

Rago v Port Auth. of N.Y. & N.J.
2023 NY Slip Op 30290(U)
January 27, 2023
Supreme Court, New York County
Docket Number: Index No. 151221/2017
Judge: Francis A. Kahn III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

-----X

INDEX NO. 151221/2017

LOCHAN RAGOO,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 006 007 008

- v -

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
JPMORGAN CHASE & CO., VERICON CONSTRUCTION
COMPANY, LLC, DURST 1 WTC LLC, WESTFIELD
CORPORATION, and WESTFIELD WTC HOLDING LLC,

DECISION + ORDER ON
MOTION

Defendants.

-----X

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
VERICON CONSTRUCTION COMPANY, LLC, DURST 1 WTC
LLC, WESTFIELD CORPORATION, and WESTFIELD WTC
HOLDING LLC,

Third-Party
Index No. 595905/2018

Third-Party Plaintiffs,

-against-

UNITY ELECTRIC CO., INC. and UNITY ELECTRIC, LLC,

Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 164, 165, 166, 167,
168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188,
189, 190, 191, 192, 193, 194, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241,
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286, 287, 288, 289, 290, 292, 293, 296, 297, 298, 299, 300, 301, 307, 308, 309

were read on this motion for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 007) 153, 154, 155, 156,
157, 158, 159, 160, 161, 162, 163, 259, 291, 294

were read on this motion for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 008) 195, 196, 197, 198,
199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219,
220, 221, 222, 223, 224, 225, 226, 260, 295, 302, 303, 304, 305, 306, 310, 311

were read on this motion for SUMMARY JUDGMENT

In this action arising out of a construction site accident, plaintiff Lochan Rago (plaintiff) moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law §§ 241 (6) and 200 and under principles of common-law negligence (motion sequence number 006).

Defendant JPMorgan Chase & Co. (Chase) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Third-party defendants Unity Electric Co., Inc. and Unity Electric, LLC (together, Unity) move, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint (motion sequence number 007).

Defendants/third-party plaintiffs Port Authority of New York and New Jersey (the Port Authority), Vericon Construction Company, LLC (Vericon), Durst 1 WTC, LLC (Durst), Westfield Corporation, and Westfield WTC Holding, LLC (together, Westfield) (collectively, the Port Authority defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint (motion sequence number 008).

This action arises out of an accident that occurred on April 8, 2016 at One World Trade Center in Manhattan. Nonparty Jones Lang LaSalle Americas, Inc. retained Vericon as the general contractor for the build-out of a Chase bank branch located at One World Trade Center (NY St Cts Elec Filing [NYSCEF] Doc No. 189). It is undisputed that One World Trade Center was owned by the Port Authority (NYSCEF Doc No. 155 ¶ 2). The Port Authority leased space in One World Trade Center to Westfield for purposes of operating a commercial mall (*id.*, ¶ 3). Westfield leased certain space within the mall to Chase (*id.*). Vericon retained subcontractors for the build-out, including nonparty Euro-Build Construction Company (Euro-Build), the concrete subcontractor, and Unity, the electrical subcontractor (*id.*, ¶ 4). Pursuant to a Master Subcontract Agreement dated May 22, 2007, Vericon retained Unity as the electrical subcontractor on the job (NYSCEF Doc No. 190). Plaintiff asserts that Durst entered into a joint venture agreement with the Port Authority (NYSCEF Doc No. 193 at 7). There is no dispute that plaintiff was employed by Euro-Build on the date of the accident (NYSCEF Doc No. 155 ¶ 5).

Plaintiff testified at his deposition that he was employed as a foreman by Euro-Build (NYSCEF Doc No. 178, plaintiff 11/28/18 tr at 33). He stated that the project entailed raising an existing floor by four inches for a Chase bank (*id.* at 38; NYSCEF Doc No. 179, plaintiff 7/26/19 tr at 24). On the first day of the job, he was supervising four workers who were laying wire laths (NYSCEF Doc No. 178, plaintiff 11/28/18 tr at 40-41).

In order to reach his work area, plaintiff used a temporary elevator to get to the basement (*id.* at 42-43). There were other trades performing work at the site, including carpenters, electricians, and plumbers (*id.* at 44). To raise the height of the floor, concrete had to be pumped into the site via metal piping (*id.* at 46-49, 53). The workers installed wire laths and the pumps for the concrete (*id.* at 48, 50).

On the second day of the job, the workers finished the wire laths and began pouring concrete (*id.* at 51-52). Plaintiff testified that the concrete was “coming but very slow because [of] the distance of the pipe” (NYSCEF Doc No. 179, plaintiff 7/26/19 tr at 47). Plaintiff was going to go outside to talk to the concrete truck driver (NYSCEF Doc No. 178, plaintiff 11/28/18 tr at 56, 59). According to plaintiff, his accident occurred while he was in the basement (*id.* at 58). Plaintiff testified that there was a security guard in the basement (*id.* at 61). The truck was outside at road level (*id.* at 60). Plaintiff stated that he

went through a doorway and was walking along a pathway/ramp that was about eight to ten feet wide, and that on one side of the pathway was the building's wall and on the other side there was a temporary lath barrier (*id.* at 63, 64, 65, 86). The pathway was not under construction (*id.* at 64). The security guard was telling the truck driver that he could not come in without a pass (*id.* at 68). Plaintiff turned around and walked back towards the doorway (*id.* at 88-89). Plaintiff testified that, while he was walking down a ramp, he "tripped on the pile of debris hanging out of the dumpster" (*id.* at 73, 100). The dumpster was green, was about five feet long, 30 inches wide, and four feet high, and had wheels (*id.* at 75, 76). He did not know who was using the dumpster and stated that his employer did not use the dumpster (*id.* at 75). Plaintiff testified that there were "probably brownish, white and blue" electrical ropes hanging from the dumpster, and scattered garbage on the floor (*id.* at 100-101). He stated that his left foot got hooked on the ropes and his right foot dragged the ropes, causing his feet to get tangled and him to trip and fall to the ground (*id.* at 102). Plaintiff fell backwards, and struck his head on the pipe that Euro-Build had laid to pour the concrete for the project (*id.* at 116-117).

David Mellett (Mellett) testified that he was Vericon's project superintendent for the Chase project (NYSCEF Doc No. 183, Mellett tr at 8-9). Vericon was the general contractor on the project (*id.* at 13). Vericon hired subcontractors, including Euro-Build (*id.* at 15). Vericon had a laborer on site "almost every day" (*id.* at 22). According to Mellett, as the general contractor, Vericon "managed the job," "coordinate[d] subcontractors, [got] people . . . to the project as they need to be there," and "ma[de] sure we hit milestones in the project schedule" (*id.* at 23-24). Gary Connor was the director of field operations for Vericon (*id.* at 24). Mellett testified that Vericon had a site safety plan for the project, but he was unsure whether the subcontractors received a copy of it (*id.* at 32-33). Mellett did only one formal inspection per week, but he walked the site daily to inspect for dangerous conditions (*id.* at 37-38). He testified that the passageways that the workers used contained "mini" dumpsters, which were small, steel rectangular dumpsters on wheels (*id.* at 64). Vericon was only obligated to clean and remove debris from the Chase bank site (*id.* at 69). Mellett testified that he showed plaintiff the way to come in, and that he "was only to be in those areas" (*id.* at 120). He testified that plaintiff "should only have been in the areas where the pipe was going to the job site," and that "[h]e should not have been anywhere else in those areas" (*id.* at 121). Mellett stated that the area where plaintiff was injured "was a passageway, but not a passageway to their work area," and that "it was outside of any work area that [he knew] of. It was not part of any sort of the build-out of the transportation hub of the World Trade Center. It was part of Tower One, which we were off limits to" (*id.* at 162-163). According to Mellett, the workers had to attend safety training at the complex and were instructed "to be in the specific area that [the] worker was assigned to," and plaintiff "did go through that class because he did have access to the building" (*id.* at 182-183, 186). When shown a photograph of the area, Mellett testified that he did not know who owned the dumpster (*id.* at 220-221).

Michael Grieco (Grieco) testified that he was a project manager for the Port Authority (NYSCEF Doc No. 181, Grieco tr at 8-9). Grieco oversaw the safety management program for each of the contractors (*id.* at 21-22). The Port Authority has a "Safety Health and Environment Plan" that sets minimum safety standards for the World Trade Center construction site (*id.* at 25-26). Grieco was tasked with ensuring that the contractors complied with the law (*id.* at 31-32). According to Grieco, trash hanging out of a dumpster and lying on the floor is a tripping hazard (*id.* at 47-49, 58). The dumpsters should not be placed in a passageway because they impede access and egress (*id.* at 55). Grieco agreed "in a general sense" that the walkway where plaintiff was injured was a passageway (*id.* at 202).

John Incandela (Incandela), an electrical foreman employed by Unity, testified that Unity was hired to install power and lighting for the Chase branch, including ATM machines, teller desks, and a small office (NYSCEF Doc No. 186, Incandela tr at 9-10, 21-22). Unity had a superintendent that visited the site but not every day (*id.* at 22). Vericon's laborers generally cleaned up the site (*id.* at 27). According to Incandela, if there was no dumpster around, Unity's workers would put debris in a corner or would put it into a little garbage can or a five-gallon bucket until Vericon's worker cleaned up the area (*id.* at 28). Unity used dumpsters supplied by Vericon (*id.* at 29). The Port Authority performed onsite inspections, and pointed out deficiencies in the quality of the work (*id.* at 37-38).

Jonathan Reyes (Reyes) testified that he was a senior manager employed by Univail-Rodail-Westfield (Westfield), a retail development and management company (NYSCEF Doc No. 185, Reyes tr at 10, 11). Westfield entered into a master lease with the Port Authority (*id.* at 20). Reyes was on site three times per week, and Westfield also had a site safety manager that was there daily (*id.* at 26). The site safety manager's responsibilities were to ensure that the contractors were abiding by the health and safety plans (*id.* at 27). Vericon was responsible for maintaining the Chase bank site in a safe condition (*id.* at 56). Westfield's site safety manager audited various projects and advised contractors if there were safety concerns (*id.* at 57-58). When shown a photograph of the site, Reyes testified that it depicted "the ramp heading from the lower level of the Tower One loading dock, or what would be the future Tower One loading dock, up to the berth level of the Tower One loading dock" (*id.* at 62). The concrete pump piping that was placed along the passageways in the loading dock was only used for the Chase project (*id.* at 70).

Leilani Glover (Glover), a construction project manager employed by Durst, testified that Durst is a real estate company (NYSCEF Doc No. 184, Glover tr at 9, 10). If Durst was performing construction work, Glover managed the contractors and their subcontractors (*id.* at 11). However, if the tenant was building the project on its own, Glover went to weekly meetings to ensure that it was adhering to building rules, regulations, and standards (*id.*). Durst entered into a joint venture agreement with the Port Authority (*id.* at 14-15).

Weston Guy (Guy) testified that he was the manager of the Chase branch (NYSCEF Doc No. 182, Guy tr at 11-12). Guy had no role in the construction of the branch (*id.* at 13). He was unaware of when the construction began or ended (*id.* at 14). Guy had no knowledge about plaintiff's accident (*id.* at 16-19).

The amended complaint asserts five causes of action seeking recovery for violations of Labor Law § 200, Labor Law § 240 (1), Labor Law § 241 (6), and Labor Law § 240 (2), and for common-law negligence (NYSCEF Doc No. 167, amended verified complaint ¶¶ 38-52).

The Port Authority, Vericon, Durst, and Westfield brought a third-party action against Unity, seeking contractual indemnification, common-law indemnification, contribution, and damages for failure to procure insurance (NYSCEF Doc No. 171, third-party complaint ¶¶ 17-52).

DISCUSSION

It is well settled that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], *rearg denied* 10 NY3d 885 [2008], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to

make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial” (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]). The court’s function on a motion for summary judgment is “issue-finding, rather than issue-determination” (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957] [internal quotation marks omitted]).

A. Labor Law § 240 (1)

Plaintiff concedes that Labor Law § 240 (1) does not apply to this case (NYSCEF Doc No. 299 at 17 n 2). Accordingly, plaintiff’s Labor Law § 240 (1) claim is dismissed.

B. Labor Law § 241 (6)

Labor Law § 241 states that:

“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, 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, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.”

To recover under Labor Law § 241 (6), the plaintiff must plead and prove the violation of a New York State Industrial Code provision “that sets forth a specific standard of conduct and [is] not simply a reiteration of common-law safety standards” (*Toussaint v Port Auth. of N.Y. & N.J.*, 38 NY3d 89, 94 [2022], quoting *St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]). In addition to establishing the violation of a specific and applicable regulation, the plaintiff must also show that the violation was a proximate cause of the accident (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012]). The purpose of Labor Law § 241 (6) is “to protect workers engaged in duties connected to the inherently hazardous work of construction, excavation or demolition . . .” (*Nagel v D & R Realty Corp.*, 99 NY2d 98, 101 [2002]).

“Section 241 (6) imposes liability . . . even in the absence of control or supervision of the worksite” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]). Moreover, “[s]ince an owner’s [or contractor’s] liability under Labor Law § 241 (6) is vicarious, it is irrelevant that defendant . . . had no notice of the hazardous condition” (*Burnett v City of New York*, 104 AD3d 437, 438 [1st Dept 2013]).

“[The] responsibility [under Labor Law § 241 (6)] extends not only to the point where the . . . work was actually being conducted, but to the entire site, including passageways

utilized in the provision and storage of tools, in order to insure the safety of [workers] going to and from the points of actual work”

(*Sergio v Benjolo N.V.*, 168 AD2d 235, 236 [1st Dept 1990]; *accord Gherardi v City of New York*, 49 AD3d 280, 280 [1st Dept 2008]; *Whalen v City of New York*, 270 AD2d 340, 342 [2d Dept 2000]).

Plaintiff moves for partial summary judgment as to liability under Labor Law § 241 (6) based upon violations of 12 NYCRR 23-1.7 (e) (1) and (e) (2). Plaintiff argues that defendants were either owners, contractors or agents of owners or contractors.

For their part, Chase and the Port Authority defendants move for summary judgment dismissing plaintiff’s section 241 (6) claim, arguing that plaintiff has failed to identify a specific or applicable Industrial Code violation.¹ In opposition to Chase’s cross motion and the Port Authority defendants’ motion, plaintiff expressly concedes that the other provisions cited in his bill of particulars do not apply (NYSCEF Doc No. 299 at 17; NYSCEF Doc No. 305 at 18 n 2). The court, therefore, only considers the alleged violations of 12 NYCRR 23-1.7 (e) (1) and (e) (2).

Industrial Code § 23-1.7 provides as follows:

“(e) Tripping and other hazards.

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

(12 NYCRR 23-1.7).

Plaintiff contends that the evidence is clear that he was injured in a passageway. In addition, plaintiff argues that he was injured in a working area since he struck his head on the pipe that brought concrete to the site, and was traversing the area while ensuring that the concrete was flowing properly. He further argues that his account as to how the accident occurred is unrefuted.

Chase and the Port Authority defendants counter that they are not liable because the accident occurred outside the site, in an area where defendants were barred from entering and for which they had no obligation to inspect, clean or maintain. They further assert that, if the court finds that there is a question of fact as to whether the accident occurred within the site, plaintiff was not injured in a passageway or a working area.

¹ Chase and the Port Authority defendants also make a conclusory argument in their moving papers that “this is a case of misidentification and plaintiff sued the wrong parties” (NYSCEF Doc No. 229 at 2; NYSCEF Doc No. 197 at 2). Accordingly, Chase and the Port Authority defendants have failed to establish prima facie entitlement to summary judgment on this ground (*see Winegrad*, 64 NY2d at 853).

The First Department has determined that sections 23-1.7 (e) (1) and (e) (2) are sufficiently concrete to serve as predicates for a Labor Law § 241 (6) claim (*Smith*, 22 AD3d at 370; *Colucci v Equitable Life Assur. Socy. of U.S.*, 218 AD2d 513, 515 [1st Dept 1995]).

“Although the regulations do not define the term ‘passageway’ . . . , courts have interpreted the term to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area” (*Quigley v Port Auth. of N.Y. & N.J.*, 168 AD3d 65, 67 [1st Dept 2018] [internal quotation marks and citation omitted]). “A ‘passageway’ is commonly defined and understood to be a typically long narrow way connecting parts of a building” and synonyms include the words corridor or hallway. . . . In other words, it pertains to an interior or internal way of passage inside a building” (*id.* [internal quotation marks and citation omitted]).

Here, there are triable issues of fact as to whether it was necessary for plaintiff to traverse the portion of the building where he was injured (*see Venezia v LTS 711 11th Avenue*, 201 AD3d 493, 495 [1st Dept 2022] [summary judgment was properly denied where superintendent testified that the area where worker was injured was not an area where concrete work was being performed and there was no reason for worker to be in that area]; *Rossi v Mount Vernon Hosp.*, 265 AD2d 542, 543 [2d Dept 1999] [(t)he evidence in the record presents a question fact as to whether it was necessary for Rossi to traverse the portion of the building where the grease pits were located in order to complete his work on the façade]). Plaintiff testified that, while he was walking on a pathway/ramp, he “tripped on the pile of debris hanging out of the dumpster” (NYSCEF Doc No. 178, plaintiff 11/28/18 tr at 72-73, 100). However, Mellett also testified that he showed plaintiff the way to come in and that he was only authorized to be in those areas, and that he did not know why plaintiff was there (NYSCEF Doc No. 183, Mellett tr at 118, 120-121, 182-183, 186-187). He testified that it was “outside of any work area that [he knew] of . . . It was part of Tower One, which we were off limits to” (*id.* at 163). He further testified that employees were required to undergo safety training at the complex and “we were told very specifically that you have to walk the areas that are shown to you” (*id.* at 182-183). He stated that on the occasions when he was in the area where plaintiff was injured, he was escorted through the area (*id.* at 194). Mellett acknowledged, however, that there were no warning signs, cones or barriers in the area (*id.* at 189-191). Incandela also stated that he walked on the passageway near where the green dumpster was located “[m]aybe two or three times a day,” and that that was how he went out to go use the bathroom and to go out for lunch (NYSCEF Doc No. 186, Incandela tr at 68-69). Reyes testified that “there was really no reason why you would go to the right [side of the pathway] unless you were just going to talk to the guard or go to the Durst area” (NYSCEF Doc No. 185, Reyes tr at 75). Additionally, plaintiff vaguely testified that his “boss told him what [he had] to do,” and that “[he] had to go through a process of being passed there” (NYSCEF Doc No. 178, plaintiff 11/28/18 tr at 45).

Notwithstanding these issues of fact, the court finds that the record is clear that plaintiff was injured in a “passageway,” as contemplated by 12 NYCRR 23-1.7 (e) (1) (NYSCEF Doc No. 178, plaintiff 11/28/18 tr at 72-73, 153; NYSCEF Doc No. 183, Mellett tr at 162-163; NYSCEF Doc No. 181, Grieco tr at 199-202). Contrary to defendants’ contention, “12 NYCRR 23-1.7 (e) (1) does not exempt any construction site ‘passageways’ from its scope; it clearly requires that “[a]ll passageways shall be kept free from . . . obstructions or conditions which could cause tripping” (*Smith v McC Corp.*, 22 AD3d 369, 370 [1st Dept 2005] [emphasis in original]). “[The] responsibility under Labor Law § 241 (6) ‘extends not only to the point where the . . . work was actually being conducted, but to the entire site’” (*id.* at 370-371, quoting *Sergio*, 168 AD2d at 236).

Moreover, given that plaintiff was injured while attempting to speak with the truck driver, and there were electrical cords hanging out of the dumpster (NYSCEF Doc No. 178, plaintiff 11/28/18 tr at 56, 101), there are issues of fact as to whether plaintiff was injured in a “working area” within the meaning of section 23-1.7 (e) (2) (see *Gallina v MTA Capital Constr. Co.*, 193 AD3d 414, 414-415 [1st Dept 2021]; *Smith v Hines GS Props., Inc.*, 29 AD3d 433, 433 [1st Dept 2006]; *Canning v Barney's N.Y.*, 289 AD2d 32, 34 [1st Dept 2001]).

In view of the above, the branch of plaintiffs’ motion for partial summary judgment as to liability on his Labor Law § 241 (6) claim is denied. Chase and the Port Authority defendants are entitled to summary judgment dismissing this claim except as to the alleged violations of sections 23-1.7 (e) (1) and 23-1.7 (e) (2).

C. Labor Law § 200 and Common-Law Negligence

Plaintiff moves for summary judgment on his Labor Law § 200 and common-law negligence claims, arguing that defendants had notice of the debris lying on the floor. Plaintiff contends that defendants cannot establish their lack of notice of the debris, and that the dumpster should not have been placed in a work area or passageway.

Chase and the Port Authority defendants argue that they did not supervise, direct or control plaintiff’s work, and did not have notice of any hazardous condition. Chase and the Port Authority defendants submit that plaintiff was injured in an area that was outside of the worksite and was off limits to plaintiff.

It is well settled that Labor Law § 200 is a “codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work” (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). “Claims under Labor Law 200 and the common law fall under two categories: ‘those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed’” (*Jackson v Hunter Roberts Constr., L.L.C.*, 205 AD3d 542, 543 [1st Dept 2022], quoting *Cappabianca*, 99 AD3d at 144).

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

(*id.*). “These two categories should be viewed in the disjunctive” (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

In this case, plaintiff’s accident stems from a dangerous premises condition, not the methods in which the work was performed. Thus, “whether they controlled or directed the manner of plaintiff’s work is irrelevant to the Labor Law § 200 and common-law negligence claims” (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

In this case, as indicated above, there are triable issues of fact as to whether the area where plaintiff was injured was part of the worksite for purposes of Labor Law § 200 and common-law

negligence (*see Zito v Occidental Chem. Corp.*, 259 AD2d 1015, 1016 [4th Dept 1999], *lv dismissed* 93 NY2d 999 [1999]).

Moreover, there are triable issues of fact as to whether defendants had constructive notice of the electrical ropes hanging out of the dumpster (*see Moss v Marymount Manhattan Coll.*, 203 AD3d 473, 473 [1st Dept 2022]; *Ladignon v Lower Manhattan Dev. Corp.*, 128 AD3d 534, 535 [1st Dept 2015]). The record is unclear as to when the area was last inspected prior to the accident (*see e.g.* NYSCEF Doc No. 183, Mellett tr at 169, 310). Even if defendants did not provide the dumpster or place the electrical ropes in the dumpster, defendants would not be absolved of their liability under section 200 and for negligence for failure to remedy a dangerous condition of which they had notice. Furthermore, it is for the jury to determine whether the debris hanging out of the dumpster was a proximate cause of plaintiff's injury (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980], *rearg denied* 52 NY2d 784 [1980]).

Accordingly, the branches of plaintiff's motion, Chase's cross motion, and the Port Authority defendants' motion for summary judgment with respect to plaintiff's Labor Law § 200 and common-law negligence claims are denied.

D. Third-Party Plaintiffs' Contractual Indemnification Claim Against Unity

Unity moves for summary judgment dismissing the third-party claim for contractual indemnification.

The Master Subcontract Agreement provides:

"To the fullest extent permitted by law, the Subcontractor hereby assumes and agrees to indemnify, defend and hold harmless the Contractor, Architect, Owner and their partners, consultants and/or subsidiaries . . . from and against any and all claims, suits, demands, damages, liabilities and professional fees arising out of or resulting from the Subcontractor's activities, operations, performance, or work under this contract, regardless of whether or not such claims . . . arose out of or was related to the active or passive negligence or other fault of the indemnities. The Subcontractor agrees . . . that the requirement to indemnify, defend and hold harmless the indemnitees from and against all claims . . . extends to and includes the indemnitees' own but not sole negligence or fault"

(NYSCEF Doc No. 162 at 10).

Unity's vice president also executed the following release and hold harmless agreement: "In consideration for access to the premises commonly known as World Trade Center (the 'Premises') the undersigned . . . hereby releases and forever discharge Westfield, LLC and all subsidiaries, as well as their respective officers, directors, shareholders . . . (collectively, the 'World Trade Center Parties') from any and all damages, losses, claims, demands, liabilities, obligations, actions and causes whatsoever, whether known or unknown, whether liability may be direct or indirect, liquidated or unliquidated, whether absolute or contingent, foreseen or unforeseen, suspected or unsuspected, disclosed or undisclosed, and whether or not heretofore asserted, upon or by reason or as a result of the use or access to the Premises from and after the date hereof regardless of how such injury, so long as

such loss or damage is not caused by the gross negligence or willful misconduct of any of the World Trade Center Parties.

The undersigned shall defend, indemnify and hold the World Trade Center Parties harmless (with counsel reasonably satisfactory to the World Trade Center Parties) from and against all claims, demands, causes of action that in any way are or are alleged to be caused by, or arise out of the use or access to the Premises from and after the date hereof. The undersigned agrees to reimburse the World Trade Center Parties for any damage caused by the undersigned's access to or operations within or around the premises"

(NYSCEF Doc No. 163 at 136).

"The right to contractual indemnification depends upon the specific language of the contract" (*Trawally v City of New York*, 137 AD3d 492, 492-493 [1st Dept 2016] [internal quotation marks and citation omitted]). Here, Unity has demonstrated that plaintiff's accident did not arise out of or result from its work (*cf. Balbuena v New York Stock Exch., Inc.*, 49 AD3d 374, 376 [1st Dept 2008], *lv denied* 14 NY3d 709 [2010]). Unity's electricians disposed of debris into containers within the space for the Chase bank (NYSCEF Doc No. 160, Mellett tr at 50-51, 64, 176). According to Mellett, Unity's electricians were "prima donnas"; "[t]hey don't like to do anything more than they have to and it's above them to throw anything in the dumpster" (*id.* at 269). He further testified that he never saw the electricians dispose of unused drag line in a dumpster (*id.* at 363). Incandela testified that Unity's workers put debris in a corner, a little garbage can or a five-gallon bucket (NYSCEF Doc No. 186, Incandela tr at 28-29). In light of this evidence and given that third-party plaintiffs did not oppose dismissal of this claim, the third-party claim for contractual indemnification is dismissed.

E. Third-Party Plaintiffs' Common-Law Indemnification and Contribution Claims Against Unity

Unity moves for summary judgment dismissing the third-party claims for common-law indemnification and contribution claims against it, arguing that it were not negligent. Unity has demonstrated that it was not negligent and did not actually-supervise the injury-producing work, and, therefore, cannot be held liable for common-law indemnification or contribution (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]; *see also Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003], *lv dismissed* 100 NY2d 714 [2003]). Given that third-party plaintiffs have not opposed dismissal of their third-party claims for common-law indemnification and contribution, these claims are dismissed (*see Goya v Longwood Hous. Dev. Fund Co., Inc.*, 192 AD3d 581, 585 [1st Dept 2021] ["because AIM and Cross did not oppose C&W's motion for summary judgment dismissing their claims against it for common-law indemnification and contribution, those claims should be dismissed"]).

F. Third-Party Plaintiffs' Breach of Contract Claim Against Unity

Finally, Unity moves for summary judgment dismissing the third-party claim for breach of contract. Unity's contract required it to procure a commercial general liability policy with limits of \$1,000,000, and was required to furnish a certificate of insurance naming the Contractor and Owner as additional insureds to Vericon (NYSCEF Doc No. 162 at 27). Unity contends that it procured the required insurance, and submits a certificate of insurance listing the third-party plaintiffs as additional insureds (*id.* at 37-38). There is no opposition to this branch of Unity's motion. Accordingly, the court dismisses the third-party claim for breach of contract as abandoned (*see Norris v Innovative Health Sys., Inc.*, 184 AD3d 471, 473 [1st Dept 2020]).

Accordingly, it is

ORDERED that the motion (sequence number 006) of plaintiff for partial summary judgment under Labor Law §§ 241 (6) and 200 and under principles of common-law negligence is denied; and it is further

ORDERED that the cross motion of defendant JPMorgan Chase & Co. for summary judgment is granted to the extent of dismissing plaintiff's Labor Law § 240 (1) claim and plaintiff's Labor Law § 241 (6) claim except as to the alleged violations of 12 NYCRR 23-1.7 (e) (1) and 12 NYCRR 23-1.7 (e) (2), and is otherwise denied; and it is further

ORDERED that the motion (sequence number 007) of third-party defendants Unity Electric Co., Inc. and Unity Electric, LLC for summary judgment is granted and the third-party complaint is dismissed; and it is further

ORDERED that the motion (sequence number 008) of defendants Port Authority of New York and New Jersey, Vericon Construction Company, LLC, Durst 1 WTC, LLC, Westfield Corporation, and Westfield WTC Holding, LLC for summary judgment is granted to the extent of dismissing plaintiff's Labor Law § 240 (1) claim and plaintiff's Labor Law § 241 (6) claim except as to the alleged violations of 12 NYCRR 23-1.7 (e) (1) and 12 NYCRR 23-1.7 (e) (2), and is otherwise denied.

1/27/2023

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE

J. A. Kahn III

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

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