SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **47**

Justice

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INDEX NO. 159466/2016

CARLOS BAYAS,

Plaintiff,

MOTION DATE 11/04/2021, 11/08/2021

- v -

MOTION SEQ. NO. 005 007

EDISON MANAGEMENT CO., L.L.C., TRIUMPH NEW YORK LLC,HOTEL EDISON, VEMA GROUP LLC,V & M DRAIN CLEANING INC.,WELL BUILT RESTAURANT'S INC.,

DECISION + ORDER ON MOTION

Defendants.

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EDISON MANAGEMENT CO., L.L.C., TRIUMPH NEW YORK LLC, HOTEL EDISON

Third-Party
Index No. 595117/2020

Plaintiffs,

-against-

WELL BUILT RESTAURANT'S INC.

Defendant.

----------X

EDISON MANAGEMENT CO., L.L.C., TRIUMPH NEW YORK LLC, HOTEL EDISON

Second Third-Party
Index No. 595505/2020

Plaintiffs,

-against-

THE RIGHT CONNECTION PLUMBING & HEATING INC., FRIEDMAN'S 47TH LLC

Defendants.

----------X

VEMA GROUP LLC

Third Third-Party
Index No. 595627/2020

Plaintiff,

-against-

WELL BUILT RESTAURANT'S INC.

Defendant.
----------X

THE RIGHT CONNECTION PLUMBING & HEATING INC. Fourth Third-Party
Index No. 595791/2021

Plaintiff,

-against-

WELL BUILT RESTAURANT'S INC, FRIEDMAN'S 47TH LLC

Defendants.
----------X

VEMA GROUP LLC Fifth Third-Party
Index No. 595792/2021

Plaintiff,

-against-

FRIEDMAN'S 47TH LLC

Defendant.
----------X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 265, 301, 330, 349, 350, 351, 352, 353, 358, 359, 360

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 354, 355, 356, 357, 362, 363, 364, 365, 366, 367, 368

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

This is an action to recover for personal injuries sustained by Plaintiff, Carlos Bayas, on July 11, 2015, when an unsecured pile of carpets fell on him while he was working at a construction site located at 227 West 47th Street, New York, NY (the "Premises").

In the main action, plaintiff alleges that Edison Management Co., LLC ("Edison"), Triumph New York LLC ("Triumph") (collectively the "Edison Defendants"), Vema Group LLC ("Vema"), and Well Built Restaurants Inc. ("Well Built') violated Labor Law §§ 200, 240 (1)

and 241 (6) and are liable under common law negligence. The main action was consolidated and joined for trial with the matter of *Bayes v Friedman's 47th LLC*, Index No. 155906/2019 (NYSCEF Doc. No. 75). In addition, there are five third-party actions.[1]

In motion sequence 005, the Edison Defendants move for summary judgment pursuant to CPLR § 3212 seeking contractual indemnification from Vema and/or the Right Connection Plumbing and Heating Inc. ("Right Connection") and dismissal of plaintiff's Labor Law §§ 200 and 241 (6) claims.

In motion sequence 007, Vema and Right Connection move for summary judgment pursuant to CPLR § 3212 (1) dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims; (2) dismissing plaintiff's Labor Law § 200 and common law negligence claims as against Vema; (3) dismissing the third party claims, cross claims and counter claims against them; and (4) on their third party claims, cross claims, and counter claims as against Well Built and Friedman's 47th LLC.[2]

Plaintiff cross-moves for permission to file a fourth supplemental bill of particulars pursuant to CPLR § 3025 (b) adding specific violations of the New York Industrial Code as the basis for his Labor Law § 241 (6) claims, and for summary judgment in his favor, pursuant to CPLR § 3212 on his Labor Law §§ 200, 240 (1), and common law negligence claims as against all defendants in the main action.[3]

Well Built cross-moves for summary judgment pursuant to CPLR § 3212 dismissing plaintiff's complaint.

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[1] The main action and all third-party actions and cross-claims have been dismissed as to V & M Drain Cleaning Inc. ("V&M") (NYSCEF Doc No 369)

[2] Vema and Right Connection share counsel and submit the same papers. Any references to Vema or Right Connection's individual arguments or submitted papers shall refer to their shared papers.

[3] Friedman's 47th LLC has not joined issue. Therefore, Plaintiff's cross motion for summary judgment will be denied as to Friedman's 47th LLC (CPLR § 3212[a]; *Jennings v Chase Home Fin., LLC*, 121 AD3d 502, 503 [2014]).

The motions are consolidated for disposition.

BACKGROUND

The accident occurred in a hallway located in the basement of the Premises (the "Hallway"). At the time of the accident, the Premises was owned by Edison and operated by the Edison Defendants as the Hotel Edison. Edison leased part of the Premises to Friedman's 47th LLC ("Friedman") for use as a restaurant space, including portions of the basement.

At the time of the accident, there were two separate construction projects in the basement of the Premises, one on behalf of Edison and one on behalf of Friedman (the "Edison Project" and the "Friedman Project" respectively).[4] The Edison Project involved a complete renovation of the basement including the installation of facilities for use by employees of the Hotel Edison. The Friedman Project was to build out retail space into a restaurant, which also included work in the basement of the Premises. Edison hired Vema as general contractor in charge of the Edison Project. Friedman hired Well Built as general contractor for the Friedman Project.

Vema subcontracted with Right Connection to do plumbing work as part of the Edison Project. Plaintiff was an employee of Right Connection.

Plaintiff's Deposition Testimony

Plaintiff appeared for depositions on January 23, 2019, January 8, 2020, December 10, 2020, and January 7, 2021. On the date of the accident, he was employed as a plumbing manager by Right Connection, which was working in the basement of the Premises as part of the Edison Project (Plaintiff January 23, 2019 tr at 14, 15, 16, 17, 30, 31). Plaintiff's responsibilities included managing his coworkers and performing manual labor (*id.* at 15, 16, 17). His

[4] In addition to the Edison and Friedman projects, there was also a project at the Premises building out retail space into another restaurant for non-party Bond 45.

supervisors were Mike Carpathios and Spiro Kouzios (Right Connection's owner) (*id.* at 22, 23, 24). Both were present at the worksite every day (*id.* at 25; Plaintiff January 8, 2020 tr at 25).

The basement area was separated into multiple rooms and hallways, and the Edison Project worksite was located to the right of the Hallway (Plaintiff January 8, 2020 tr at 80). To get to the worksite, plaintiff had to go through the Hallway, which was approximately four to five feet wide (*id.* at 64, 80-81).

Plaintiff testified that on the date of the accident, he was at the worksite to do pipe work. None of his supervisors were present (Plaintiff January 23, 2019 tr at 76).

The carpets were rolled up and stacked in an unsecured pile approximately seven feet high (Plaintiff January 23, 2019 tr at 62-63, 68 - 71). Plaintiff testified that the rolled up carpets were lying horizontally and stacked "one on top of the other" (Plaintiff December 10, 2020 tr at 29). The pile of carpets stuck out approximately one foot into the Hallway (Plaintiff January 23, 2019 tr at 62, 64). Plaintiff further testified that the pile of carpets was not in the Hallway the day before the accident (*id.* at 63, 114).

Immediately before the accident, plaintiff was going through the Hallway and passed a pile of carpets on his left side without incident (*id* .at 72, 82). Plaintiff was carrying two pipes when he first passed the pile of carpets (Plaintiff December 10, 2020 tr at 20, 25). Plaintiff placed the pipes at the end of the Hallway without incident and was not carrying them at the time of the accident (*id.* at 74 - 75).

The accident occurred as he walked back down the Hallway passing the pile of carpets again, now on his right side (Plaintiff January 23, 2019 tr at 72, 82). Plaintiff then saw a "shadow approaching [plaintiff]" immediately prior to the accident (*id.* at 74). He testified that a "wall of carpets" from the pile fell on him (Plaintiff December 10, 2020 tr at 50), striking him on

the right shoulder all the way down to his feet (*id.* at 49, 73). Approximately three or four carpets from the pile fell on plaintiff (*id.* at 28).

Plaintiff did not have any contact with the pile of carpets at any point prior to the accident (Plaintiff January 23, 2019 tr at 92). No one else was in the Hallway at the time of the accident nor witnessed the pile of carpets falling on him (Plaintiff December 10, 2020 tr at 27).

Deposition Testimony of Spiro Mutafopulos (Vema's Project Manager)

Spiro Mutafopulos appeared for deposition on January 27, 2021. At the time of the accident, he was a project manager for Vema, the general contractor on the Edison Project (Mutafopulos tr at 11, 14 - 15, 19, 21-22). His responsibilities included coordinating subcontractors, overseeing their work, and safety (*id.* at 15, 16). Mutafopulos conducted daily walkthroughs of the worksite looking for safety issues and to ensure that Vema's employees and subcontractors were working safely (*id.* at 16-19). Right Connection was one of Vema's subcontractors, responsible for plumbing and mechanical work on the Edison Project (*id.* at 59, 69-70). Right Connection oversaw its employees' work (*id.* at 34).

Mutafopulos testified that the Friedman Project did not involve Vema nor its subcontractors (*id.* at 19, 21). Well Built was the general contractor for the Friedman Project, which included doing work in the Premises' basement area in close proximity to the Edison Project's worksite (*id.* at 24-25). The Friedman Project and Edison Project's respective worksites were separated by "demising walls" with doorways to allow employees working on the Friedman Project to access their worksite through the basement (*id.* at 25).

As the Friedman Project and Edison Project were in close proximity to each other, there were "incidents where material had to be walked though each other's [Vema and Well Built's]

spaces" (*id.* at 31). Vema and Well Built would communicate with each other if either general contractor needed to move materials through the other's worksite (*id.* at 31-32).

On the date of the accident, Mutafopulos conducted a walkthrough of the worksite at approximately 7:15 a.m. and did not see the pile of carpets (*id.* at 28, 32-33, 50-51). Approximately one hour before the accident, a person from Well Built, Friedman's general contractor, contacted him asking to move the carpets, which were in the Friedman workspace (*id.* at 26, 65-66). The carpets belonged to Edison and neither Vema nor its subcontractors were using the carpets as part of their work (*id.* at 27).

Mutafopulos told Well Built not to move the carpets. He called Edison to relay the message that Well Built needed the carpets moved and Edison responded that Edison would "take care of it" (*id.* at 67). Well Built did not ask Vema for permission to place the carpets in Vema's workspace (*id.* at 31).

Mutafopulos did not witness the accident. He learned of it shortly after it happened and went to the accident location approximately thirty to forty-five minutes later (*id.* at 35, 68). He saw that the carpets had fallen and that there were no pipes or any securing devices in the area near the carpets (*id.* at 37-38, 40-41). He further testified that he spoke with plaintiff and another Right Connection employee (*id.* at 35). Plaintiff told Mutafopulos that he was walking down a corridor when the rolls of carpet shifted and rolled onto him (*id.* at 35). No one Mutafopulos spoke to indicated that plaintiff tripped on any pipes (*id.* at 41-42). After the accident, Mutafopulos also spoke to "Ryan" from Well Built, who told him that Well Built had moved the carpets (*id.* at 63-64).

Mutafopulos' Incident Report

Mutafopulos stated in his incident report that the accident occurred at the Premises in the "basement construction area" at approximately 9:30 a.m. on July 12, 2016 (Mutafopulos Report at para 2, NYSCEF Doc. No. 215). He stated that "Mr. Bayas informed [him] that a stack of carpeting in the corridor collapsed and fell on [plaintiff's] right leg as he was walking by" (*id*). He further stated:

> The carpeting belongs to the Edison Hotel and was placed in the retail basement space of Friedman's 47th LLC by hotel management and staff. Ryan of Well Built Restaurant Inc. requested the carpeting be removed from their space; I then contacted hotel management and informed them to move the carpeting out of the Friedman's space. I also informed Ryan of Well Built Restaurant Inc. not to move the carpeting that hotel staff would be down shortly to do so. They went ahead and moved the carpet out to the corridor which then caused the above accident to occur.

(*id*).

Deposition Testimony of Scott Geres (Edison's General Manager)

On January 13, 2021, Scott Geres appeared for deposition. At the time of the accident, he was Edison's "general manager" (Geres tr at 10). Geres testified that he was "in charge over all of the [construction] project[s]" at the Hotel Edison (Geres tr at 12, 13, 16). His duties included regularly meeting with the contractors involved in construction projects at the Premises (*id.* at 13). He testified that the basement of the Premises is separated into Edison's "back-of-the house" space and Friedman's back-of-the-house space (*id.* at 15).

In July of 2016, Edison hired Vema to renovate Edison's back-of-the-house space in the basement, which involved plumbing work throughout the basement and erecting walls (*id.* at 18, 22-23, 34-36). Vema hired Right Connection to do the plumbing work (*id.* at 31). At that time, Well Built was also working in the basement as part of Friedman's restaurant build-out, which did not involve Vema nor any work in Edison's back-of-the-house space (*id.* at 18, 19, 34-35).

Geres conducted daily walkthroughs through the basement with Vema to review the progress of Vema's work and to look for unsafe conditions (*id.* at 30, 110). He did not participate, nor have the responsibility to participate, in any coordination between Vema and Friedman's contractors (*id.* at 33). Any such coordination was worked out solely between Vema and Well Built (*id.* at 35, 96-97). He never discussed the storage of materials with Well Built, nor did he discuss where specific employees were working with Well Built (*id.* at 119).

Geres testified that the carpets involved in the accident belonged to Edison and were not intended for use in the basement renovation project (*id.* at 57, 59). The carpets were being stored in the basement in Friedman's workspace. He only saw them after the accident. He did not know when or how they were stored prior to being moved to the Hallway (*id.* at 72). He further testified that prior to the accident, he was not aware that the carpets needed to be moved from Friedman's worksite or that they had been moved from the worksite (*id.* at 113-114, 116).

At the time of the accident, Geres had not yet done his daily walkthrough, nor did he witness the accident (*id.* at 112). Geres learned about the accident from Edison's director of security, "Danny O'Brian," who told him that carpets fell on plaintiff, knocking him off balance, and that plaintiff tripped on pipes (*id.* at 78-79).

After speaking to O'Brian, Geres went to the location of the accident, which was "in the hallway of the Edison back of the house that was under construction" (*id.* at 54 - 55). He testified that there were both carpets and pipes on the floor of the location (*id.* at 56 - 57, 69). He further testified that the pipes he saw belonged to Right Connection (*id.* at 69). Geres did not know whether the carpets were secured prior to the accident and did not see anything that looked like securing mechanisms in the area where the accident occurred (*id.* at 68 - 69).

Geres did not have firsthand knowledge of who moved the carpets from Friedman's worksite to the Hallway, only that Edison employees were not the ones who moved the carpets (*id.* at 65-66). All of Geres' knowledge as to who moved the carpets came from reading O'Brian's incident report, Mutafopulos' written statement, and his conversations with O'Brian (*id.* at 93 - 94, 107 - 108).

Deposition Testimony of John Gaul (Owner of Well Built)

On March 11, 2021, John Gaul appeared for deposition. At the time of the accident, he was the owner of Well Built. Well Built was working on a restaurant build-out for Friedman (Gaul tr. at 15, 16, 18, 19). Well Built did not work for Edison (*id.* at 18, 19).

Well Built's work was limited to Friedman's restaurant build-out, which included working in the basement of the Premises (*id.* at 19 - 21). Gaul further testified that Vema was doing work for Edison in a "public area" of the basement "shared by [Edison] and [Friedman]," which included multiple hallways and entrance ways (*id.* at 21, 24-25).

Friedman's worksite was limited to a specific area, however, Well Built worked in both the designated Friedman worksite and in one of the hallways of the basement as part of the Friedman Project (*id.* at 26).

In response to questioning, Gaul testified that he directly controlled Well Built's work in Friedman's worksite, however, Vema directed and controlled Well Built's construction work within "certain areas of the job" (*id.* at 24 - 27). Specifically, Vema "directed [Well Built's] work" in one of the hallways of the basement (*id.* at 27). Gaul testified that Vema was "running the show" and that Well Built took directions from Vema (*id.* at 24). He further testified that "Vema gave direction to [Well Built], as a contractor in the hotel all the time" and that Well

Built went to weekly meetings with Vema, during which Vema "gave [Well Built] the direction" (*id.* at 77).

Although Well Built had a construction contract with Friedman and not Edison, Well Built took direction from the Hotel Edison as to any "coordinated work" (*id.* at 27). Gaul described this coordinated work as "work that [the Hotel Edison] perform[s] for the tenant" (*id.* at 27). He further testified that Well Built would speak to Vema as to the coordinated work (*id.* at 27). Gaul testified that Edison did not direct any of the work in the basement and that only Vema directed the work in the basement (*id.* at 82).

Gaul testified that Vema had materials in the Friedman worksite that had to be removed (*id.* at 24). All of Edison's renovation materials, including the carpets, were in the Friedman worksite and Vema, Edison's general contractor, was tasked with moving these materials from the Friedman worksite (*id.* at 81). Gaul further testified that prior to being moved to the Hallway the subject carpets were in Friedman's worksite (*id.* at 80).

He further testified that there were no procedures in place if Well Built needed to move materials from its worksite into the Hotel Edison (*id.* at 33). He stated that in these situations, Well Built would go to Vema and ask them "to either perform the task or move something" (*id.* at 33-34). He further testified that his employees did not have permission to move material from Friedman's worksite to Edison's space in the basement (*id.* at 32-33).

Gaul testified that he was not at the jobsite on the date of the accident, nor did he have any firsthand knowledge of the accident (*id.* at 27, 29). He further testified that he had no recollection of there having been an issue with carpets in Friedman's worksite, any issues involving Well Built employees moving carpets out of Friedman's worksite, and a Well Built employee moving carpets from Friedman's worksite on the date of the accident (*id.* at 32, 34).

Deposition Testimony of Spyridon Kouzios (Owner of Right Connection)

On April 28, 2021, Spyridon Kouzios appeared for deposition. At the time of the accident, he was the owner of Right Connection, a subcontractor hired by Vema to perform plumbing and HVAC work at the Premises (Kouzios tr. at 10, 12, 15-16, 18). Plaintiff was Right Connection's head mechanic at the Premises (*id.* at 18, 20-21).

Kouzios testified that he went to the worksite "a couple of times a week" and spoke to Mutafopulos three to four times a week about Right Connection's work at the Premises (*id.* at 15, 20, 40).

On the date of the accident, Right Connection was on site (*id.* at 26). Kouzios was not there. He was informed by a Right Connection employee that an accident occurred but he did not know any specifics about how it happened (*id.* at 22 - 23, 28).

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'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], 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 such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility" (*Meridian Mgt. Corp. v Cristi*

Cleaning Serv. Corp., 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined "in the light most favorable to the non-moving party" (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

Preliminary Issues

Timeliness of plaintiff's cross-motion for summary judgment and to file a fourth supplemental bill of particulars, and Well Built's cross-motion for summary judgment (motion sequence 007)

The Edison Defendants, Vema, and Right Connection argue that the court should deny plaintiff's cross-motion as it was filed beyond the time allowed by the court.

By Order dated August 31, 2021, the parties were required to move for summary judgment within sixty days of the filing of the note of issue (NYSCEF Doc No 177). Plaintiff filed the note of issue on September 8, 2021. Both plaintiff and Well Built's cross-motions for summary judgment were made more than sixty days after plaintiff filed the note of issue.

Plaintiff argues that his cross-motion should be determined on its merits as he filed it in response to Vema and Right Connection's summary judgment motion, which addressed identical issues. In addition, plaintiff argues that the delay in moving for summary judgment was due to the prior handling attorney leaving the firm and multiple office shutdowns due to the Covid-19 pandemic.

Well Built does not address this issue.

Plaintiff has established good cause for his attorney's delay in cross-moving for summary judgment and to file a fourth supplemental bill of particulars. In addition, there is no undue

prejudice as the parties have had the opportunity to respond to plaintiff's cross-motion. Further, Well Built's cross-motion addresses the same claims as Vema and Right Connections' motion for summary judgment (*see Fritz v Jlg Indus.*, 193 AD3d 641, 643 [1st Dept 2021][the Court may consider an untimely cross-motion where the movant establishes good cause for its delay or the cross-motion addresses the same claims as the motion]).

Therefore, plaintiff and Well Built's cross-motions will be determined on their merits.

Plaintiff's cross motion to file a fourth supplemental bill of particulars (motion sequence number 007)

Plaintiff cross moves for permission to file a fourth supplemental bill of particulars alleging violations of 12 NYCRR §§ 23-1.5(a-c); 23-1.7(a)(2); 23-1.33(a)(1-3), (d)(1); and 23-2.1(a)(1-2) as the basis for his Labor Law § 241 (6) claims. Plaintiff's bill of particulars and three prior supplemental bills of the particulars do not include any specific Industrial Code violations as part of his Labor Law § 241 (6) claims.

The Edison Defendants argue that allowing plaintiff to file a fourth supplemental bill of particulars would be prejudicial to the defendants as plaintiff's proposed additional allegations were not addressed during discovery. The Edison Defendants further argue that allowing plaintiff to include additional allegations after they have already moved for summary judgment would preclude the Edison Defendants from moving to dismiss the claims stemming from those allegations.

Vema, Right Connection, and Well Built also argue that allowing plaintiff to file a fourth supplemental bill of particulars would be prejudicial. Vema, Right Connection, and Well Built further argue that the Industrial Code sections alleged in the fourth supplemental bill of particulars are either insufficient to form the basis for plaintiff's Labor Law § 241 (6) claims or inapplicable to the facts of the underlying action.

> "With respect to a claim pursuant to Labor Law § 241 (6), the plaintiff must allege a violation of a specific and applicable provision of the Industrial Code. 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."

(*D'Elia v City of New York*, 81 AD3d 682, 684 [2d Dept 2011] [internal citations and quotation marks omitted]). The Court may consider the merits of the proposed pleadings but need not decide them unless they are patently insufficient on their face (*see Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 366 [1st Dept 2007]; *see also Henry v Split Rock Rehabilitation & Health Care Ctr., LLC,* 205 AD3d 540 [1st Dept 2022]). An Industrial Code violation that is insufficient to form the basis for Labor Law § 241 (6) claims or inapplicable to the underlying facts is patently insufficient on its face (*see Rodriguez v Metropolitan Transp. Auth.*, 191 AD3d 1026, 1028 [2d Dept 2021]).

Here, the fourth supplemental bill of particulars does not include any new factual allegations, allege new theories of liability, nor require additional discovery. Therefore, each of plaintiff's proposed Industrial Code violations will be considered to determine if they are sufficient to form the basis of plaintiff's Labor Law § 241 (6) claims and applicable to the underlying facts of the action.

Industrial Code 12 NYCRR § 23-1.5(a-c)

Generally, "[s]ection 23-1.5 of the Industrial Code is too general to support a cause of action for violating Labor Law § 241 (6)" (*Martinez v 342 Prop. LLC*, 128 AD3d 408, 409 [1st Dept 2015] [internal citations and quotation marks omitted]). However, subsection 1.5(c)(3) is sufficiently specific enough to support a Labor Law § 241 (6) claim (*see Becerra v Promenade*

Apts. Inc., 126 AD3d 557, 558 [1st Dept 2015] s*ee also Viruet v Purvis Holdings LLC*, 198 AD3d 587 [1st Dept 2021]).

12 NYCRR § 23-1.5(c)(3) governs the condition of equipment and safeguards:

> "(3) All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged."

The record establishes that plaintiff's accident did not involve safety devices or a failure to adequately maintain safety devices. Plaintiff testified that he did not see any safety devices on the pile of carpets prior to the accident (Plaintiff December 10, 2020 tr. at 27-28), and both Mutafopulos and Geres testified that they did not see any security devices at the location of the accident when they went there after the accident had occurred (Mutafopulos tr. at 40-41; Geres tr. at 69).

Therefore, Industrial Code 12 NYCRR § 23-1.5(a-c) is inapplicable to this action.

Industrial Code 12 NYCRR § 23-1.7(a)(2)

Industrial Code 12 NYCRR § 23-1.7(a)(2) is sufficiently specific to form the basis for a Labor Law § 241 (6) claim (*See O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 225 [1st Dept 2006], affd 7 NY3d 805 [2006]). It reads as follow:

> "(2) Where persons are lawfully frequenting areas exposed to falling material or objects but wherein employees are not required to work or pass, such exposed areas shall be provided with barricades, fencing or the equivalent in compliance with this Part (rule) to prevent inadvertent entry into such areas."

"Clearly, this section of the code requires barricades to cordon off areas for the safety of those not required to work within the sectioned-off area" (*Griffin v Clinton Green S., LLC*, 98 AD3d 41, 50 [1st Dept 2012]).Here, Plaintiff was required to walk in the Hallway as part of the work on the Edison Project.

Therefore, this provision is inapplicable to this action (*see id.* ["Since the very area where plaintiff was required to work was the area where he was injured, he was required to perform his work therein and no barricades were thus required. Accordingly, no rational view of the evidence proffered by plaintiff established a violation of Labor Law § 241 (6)."]).

Industrial Code 12 NYCRR § 23-1.33(a)(1-3) & (d)

Industrial Code 12 NYCRR § 23-1.33 cannot support a claim under Labor Law § 241 (6), "since that regulation does not mandate compliance with specifications" (*McMahon v Durst*, 224 AD2d 324, 324 [1st Dept 1996] *citing Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]).[5]

Therefore, Industrial Code12 NYCRR § 23-1.33(a)(1-3) & (d) is inapplicable to this action.

Industrial Code 12 NYCRR § 23-2.1(a)(1-2)

Industrial Code 12 NYCRR 23-2.1(a) is sufficiently specific to form a basis for a Labor Law § 241 (6) claim (*See Padilla v Touro Coll. Univ. Sys.*, 204 AD3d 415, 416 [1st Dept 2022]). It reads as follow:

"Maintenance and housekeeping

"(a) Storage of material or equipment.

> "(1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.
>
> (2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall

[5] Even assuming arguendo that 12 NYCRR § 23-1.33 was sufficiently specific to form the basis for a Labor Law § 241 (6) claim, 12 NYCRR § 23-1.33 refers to protections for non-workers passing by or though construction sites, not to workers on a construction site (*see Leighton v Chaber, LLC*, 204 AD3d 903, 904 [2d Dept 2022] citing *Turgeon v Vassar Coll.*, 172 AD3d 1134, 1135 [2d Dept 2019]). There is no dispute that plaintiff's accident occurred while he was working in the basement of the Premises.

> not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge."

The accident occurred when a pile of unsecured carpets fell on plaintiff while he was walking through the Hallway during the course of his employment.

Carpets, however, do not constitute "building materials such as wood, wallboard, aluminum siding, windows, doors and plumbing and electrical materials and components" and the like (*M & M Dev. v LS Monticello JV*, 190 AD2d 392, 394 [3rd Dept 1993]; *accord Keilitz v Light Tower Fiber NY, Inc.*, 2022 NYMisc. LEXIS 3661; 2022 NY Slip Op 31920[U] *28 [SC NY Co 2022] [holding, *inter alia*, Industrial Code 12 NYCRR § 23-2.1(a) inapplicable because a "vacuum" does not constitute "building materials"]).

Therefore, Industrial Code 12 NYCRR § 23-2.1(a) is inapplicable to this action.

Accordingly, plaintiff's cross-motion to file a fourth supplemental bill of particulars will be denied and the Edison Defendants, and Vema and Right Connection's motions for summary judgment on plaintiff's Labor Law § 241 (6) claim will be granted.

Plaintiff's Labor Law § 240 (1) claim (Vema and Right Connection's motion sequence 007, and Plaintiff and Well Built's cross-motions)

Vema and Well Built each move for summary judgment dismissing plaintiff's Labor Law § 240 (1) claims as against them and plaintiff cross-moves for summary judgment on his claims as against the Edison Defendants, Vema, and Well Built.

Plaintiff argues that he is entitled to summary judgment because the unsecured seven-foot-high pile of rolled-up carpets fell on him. Plaintiff further argues that the Edison Defendants and Vema are proper Labor Law defendants as the Edison Defendants were the owners of the Premises and hired Vema as general contractor on the Edison Project. Plaintiff posits that Well Built is a proper Labor Law defendant as a general contractor.

The Edison Defendants, Vema, and Well Built all argue that plaintiff's accident does not fall within the scope of Labor Law § 240 (1). Vema further argues that the pile of carpets was 7 feet tall and the plaintiff is 5' 4". As such, the carpets only fell 20 inches, which is a de minimis height (Vema and Right Connection's Affirmation in Opposition to plaintiff's Cross-Motion, para 53, NYSCEF Doc No 338). Vema and Right Connection also argue that plaintiff was the sole proximate cause of his injuries. The Edison Defendants and Well Built further argue that there is an issue of fact as to whether the accident was caused in part by plaintiff tripping on pipes.

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

> 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.

Labor Law § 240 [1] "imposes absolute liability on building owners and contractors whose failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011] [internal quotation marks and citation omitted]). To prevail on a Labor Law § 240 [1] cause of action, the plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of NY. City*, 1 NY3d 280, 287-289 [2003]). "[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a 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]).

The legislative intent behind the statute is to place "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 520, [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citations omitted]). Therefore, the statute should be liberally construed to achieve the purpose for which it was framed (*Rocovich v Consol. Edison Co.*, 78 NY2d 509, 513 [1991]).

Labor Law § 240 (1) applies to "[a]ll contractors and owners." The Edison Defendants were the owners of the Premises, Vema was the general contractor on the Edison Project, and Vema subcontracted work to Right Connection, who employed plaintiff. Further, the Edison Defendants and Vema do not contest that they are proper Labor Law defendants. Therefore, they are proper Labor Law defendants.

In addition, Well Built does not contest that, as a general contractor at the Premises, it is a proper Labor Law defendant. As such, Well Built concedes that there is no issue of fact on this point (*see Esponda v Ramos-Ciprian,* 179 AD3d 424, 426 [1st Dept 2020][a party's failure to oppose a factual showing in opposition to a motion for summary judgment is deemed a concession that no question of fact exists] [citations omitted]).

Turning now to the merits of this claim, the record establishes that the accident occurred when an unsecured pile of rolled-up carpets fell on plaintiff while he was walking past them in the Hallway. (Plaintiff January 23, 2019 tr at 62-63, 68-71, 74). In addition, there is nothing from the record showing that plaintiff was responsible for causing the accident.

Labor Law § 240 (1) applies to incidents when a pile of objects falls on a plaintiff, even when the pile is located on the same floor level as the plaintiff (*see Rodriguez v DRLD Dev. Corp.,* 109 AD3d 409, 409 [1st Dept 2013][Labor Law § 240 (1) is applicable to an accident where an unsecured pile of sheet rock boards, leaning against a wall and located on the same level as the plaintiff, fell on her] citing *Wilinski* , 18 NY3d at1; *see also Padilla,* 204 AD3d at 416).

Further, the record does not indicate that there is an issue of fact as to whether plaintiff tripped on pipes. Plaintiff testified that he was not carrying any pipes when the pile of carpets fell on him (Plaintiff December 10, 2020 tr at 74, 75) and there is nothing from his testimony suggesting that he tripped on pipes. Mutafopulos also testified that no one indicated to him that plaintiff's accident involved pipes (Mutafopulos tr. at 35). Other than plaintiff, none of the deposed individuals had first-hand knowledge of how the accident occurred (Mutafopulos tr at 35; Geres tr at 112; Gaul tr at 27, 29; Kouzios tr at 22, 23, 28).

The accident reports were not prepared by plaintiff or anyone with first-hand knowledge of how the accident occurred. Geres testified that O'Brian told him that plaintiff tripped on pipes and that he read O'Brian's incident report (Geres tr at 78-79, 93-94, 107-108). However, O'Brian does not indicate in his incident report that he witnessed the accident. The report is based upon unsworn statements by two purported witnesses, neither of whom indicated that they witnessed the accident. As such, it constitutes hearsay and is insufficient to create an issue of fact as to how the accident occurred (*see Acevedo v Williams Scotsman, Inc.,* 116 AD3d 416, 417 [1st Dept 2014]).

Geres' testimony that he saw pipes at the location of the accident after the fact is insufficient to create an issue of fact as to how the accident occurred (*see Singh v Hanover*

Estates, 276 AD2d 394, 394 [1st Dept 2000][plaintiff alleged that the accident occurred when a scaffolding tipped while he was descending and "[d]efendant's evidence that the scaffold was observed upright shortly after plaintiff's fall is insufficient to raise an issue of fact as to whether the accident was due solely to plaintiff's fault"])

Morever, there is no basis to conclude that the accident involved a de minimis height. Vema argues that the pile of carpets only fell 20 inches based upon the height differential between the pile of carpets and the plaintiff (*i.e.* the distance between the top of the carpet pile and plaintiff's head). However, plaintiff testified that a "wall of carpets" fell on him striking his right shoulder down to his feet (Plaintiff December 10, 2020 tr at 49, 50, 73) (*see Hoyos v NY-1095 Ave of the Ams., LLC*, 156 AD3d 491, 495 [1st Dept 2017] [an elevation of three or four feet is not considered a de minimis height]).

Accordingly, plaintiff's cross motion for summary judgment on liability on his Labor Law § 240 (1) claims as against the Edison Defendants, Vema, and Well Built will be granted and their motions for summary judgment on these same claims will be denied.

Plaintiff's Labor Law § 200 and common law negligence claims against the Edison Defendants, Vema, and Well Built (Edison's motion sequence; Vema and Right Connection's motion sequence 007, and Plaintiff and Well Built's cross-motions)

The Edison Defendants, Vema, and Well Built each move for summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims as against them and plaintiff cross-moves for summary judgment on these claims.

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.

> Under Labor Law § 200, which codifies an owner's or general contractor's common-law duties of care, there are 'two broad categories' of personal injury claims: '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.'

(*Rosa v 47 East 34th St. (NY), L.P.*, 208 AD3d 1075, 1081 [1st Dept 2022], quoting *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]).

Neither common law negligence nor Labor Law § 200 makes an owner or contractor vicariously liable for the negligence of a downstream subcontractor (*see DeMaria v RBNB 20 Owner, LLC*, 129 AD3d 623, 625 [1st Dept 2015], citing *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007]).

> 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 [means and methods] 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.

(*Cappabianca*, 99 AD3d at 144 [internal citations omitted]; *see also Toussaint v Port Auth. of N.Y. & NJ*, 38 NY3d 89, 94 [2022][to recover under Labor Law § 200 "a plaintiff must show that an owner or general contractor exercised some supervisory control over the operation]). In addition, "the mere fact that [a party] had the authority to stop unsafe work does not show that it had the requisite degree of control and actually exercised that control" (*see Galvez v Columbus 95th St. LLC*, 161 AD3d 530, 531-532 [1st Dept 2018], citing *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013]).

Here, notwithstanding plaintiff's argument to the contrary, plaintiff's accident arose from the means and methods of the work (*see Maddox v Tishman Constr. Corp.*,

138 AD3d 646, 646 [1st Dept 2016] ["[T]he double-stacking of sand and cement bags at the work site was not an inherently dangerous condition of the work site but a result of the means and methods of the injury-producing work."]).

The Edison Defendants, Vema, and/or Well Built can only be negligent if they exercised "actual supervision or control over the work" that caused plaintiff's injury (*Gonzalez v DOLP 205 Props. II, LLC*, 206 AD3d 468, 471 [1st Dept 2022][citations omitted]).

Nothing in the record creates a basis to conclude that the Edison Defendants exercised any supervisory control over the Well Built employee when he piled the carpets in the Hallway.

Accordingly, plaintiff's Labor Law § 200 and common law negligence claims will be dismissed as against the Edison Defendants.

As to Vema, it has established prima facie that it did not exercise actual supervisory control over the Well Built employee when he piled the carpets in the Hallway. Mutafopulos, Vema's project manager, testified that on the date of the accident, he told Well Built not to move the carpets and that Well Built did not ask Vema for permission to place the carpets in Vema's workspace (Mutafopulos tr at 31, 67). He further testified that he called Edison to relay the message that Well Built needed the carpets moved and that Edison responded that Edison would "take care of it" (*id.* at 67). This testimony suggests that the Well Built employee moved the carpets from the Friedman Project worksite and piled them in the Hallway without Vema's authorization, supervision, or control.

Moreover, the record is insufficient to create an issue of fact as to whether Vema exercised actual supervisory control over the Well Built employee. Gaul testified that Well Built

took direction from Vema as to materials that had to be moved from Well Built's worksite and that Vema directed and controlled Well Built's work within certain areas of Well Built's worksite (Gaul tr at 24, 25). He further testified that Vema directed the work that Well Built was doing in the basement hallways (*id.* at 25-27) and "where the carpet was going out in Friedman's space" (*id.* at 76-77). This testimony only speaks to Vema's general supervisory authority over coordination for moving materials at the worksite. It is insufficient to establish that Vema exercised actual supervision or control over the Well Built employee who piled the carpets in the Hallway (*see Herrero v 2146 Nostrand Ave. Assoc., LLC*, 193 AD3d 421, 423 [1st Dept 2021][general supervisory authority over the construction site is insufficient to demonstrate control over work for the purposes of Labor Law § 200]).

Accordingly, plaintiff's Labor Law § 200 and common law negligence claims will be dismissed as against Vema.

As to Well Built, plaintiff argues it is liable under Labor Law § 200 and common law negligence because the carpets were moved and improperly stacked by a Well Built employee.

Well Built replies that it did not have supervisory control of the space where the accident happened and the fact that a Well Built employee moved the carpets is irrelevant as the carpets were moved under Vema's direction and control.

For the reasons previously stated, the record establishes that Vema did not exercise actual supervision or control over the Well Built employee who piled the carpets in the Hallway. Indeed, it is undisputed that Well Built's employee moved the carpets and piled them in the Hallway.

Accordingly, plaintiff is entitled to summary judgment in his favor as against Well Built on his Labor Law § 200 claim.

The Edison Defendants' contractual indemnification claims against Vema and Right Connection (the Edison Defendant's motion sequence 005; Vema and Right Connection's motion sequence 007)

The Edison Defendants move for summary judgment on their cross-claim for contractual indemnification as against Vema and on their second third-party contractual indemnification claim as against Right Connection arguing that they are entitled to contractual indemnification based upon three separate agreements. First, the Edison Defendants argue that they are entitled to contractual indemnification by Vema based upon a hold harmless/indemnification/waiver of subrogation agreement that Edison entered into with Vema (the "Edison-Vema Indemnification Agreement"). Second, the Edison Defendants argue that they are entitled to contractual indemnification by Right Connection based upon a subcontractor hold harmless/indemnification/waiver of subrogation agreement between Edison and Right Connection (the "Edison-Right Connection Indemnification Agreement"). Third, the Edison Defendants argue that they are entitled to contractual indemnification by Right Connection based upon a subcontractor agreement between Vema and Right Connection (the "Vema-Right Connection Subcontractor Agreement").

Vema and Right Connection argue that they are entitled to dismissal of the Edison Defendants' claims against them for contractual indemnification. They further argue that the Edison Defendants' claims for contractual indemnification are barred by the anti-subrogation rule.

The Anti-Subrogation Rule

The anti-subrogation rule "precludes an indemnitee from bringing claims against an indemnitor when they are covered under the same policy" (*Lapinsky v Extell Dev. Co.*, 202 AD3d 478, 480 [1st Dept 2022] [internal citations omitted]).

> "[A]n insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered ... even where the insured has expressly agreed to indemnify the party from whom the insurer's rights are derived. . . . In effect, an insurer may not step into the shoes of its insured to sue a third-party tortfeasor – if that third party also qualifies as an insured under the same policy – for damages arising from the same risk covered by the policy"

(*Millennium Holdings LLC v Glidden Co.*, 27 NY3d 406, 415 [2016] [internal quotation marks and citations omitted]). However, the anti-subrogation rule only bars indemnification up to the limits of the applicable insurance policy (*see Bosquez v RXR Rlty. LLC*, 195 AD3d 536, 537 [1st Dept 2021] [holding the anti-subrogation rule only bars claims up to the limits of the applicable policies]; *New York City Dept. of Transp. v Petric & Assoc., Inc.,* 132 AD3d 614, 615 [1st Dept 2015] [applying the anti-subrogation rule only until the "limit of liability of the [] policy is exhausted"]).

The Edison Defendants tendered to Right Connection seeking defense and indemnity as to the underlying action. Non-party, National Claim Services, on behalf of State National Insurance Company, accepted the Edison Defendants' tender, thereby extending additional insured coverage to the Edison Defendants under the same insurance policy covering Vema and Right Connection. Coverage under the policy is limited to $1,000,000.00. The Edison Defendants do not dispute that National Claim Services accepted tender of their defense under the same insurance policy covering Vema and Right Connection, or that the policy limit is

$1,000,000.00. Therefore, the Edison Defendants' contractual indemnification claims against Vema and Right Connection are limited to liability in excess of the $1,000,000.00 policy.

The Edison Defendants' claim against Vema 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" (*Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82, 87-88 [1st Dept 2018] quoting *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). "'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 2011], quoting *Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d 1255, 1255 [2d Dept 2010]; *see also Ging v FJ Sciame Constr. Co., Inc.*, 193 AD3d 415, 418 [1st Dept 2021]) and indemnity contracts "must be strictly construed so as to avoid reading unintended duties into them" (*905 5th Assoc., Inc. v Weintraub*, 85 AD3d 667, 668 [1st Dept 2011]).

The Edison Defendants and Vema entered into a contractor agreement for work at the Premises (exhibit X). In connection with the contractor agreement, the Edison Defendants and Vema entered into the Edison-Vema Indemnification Agreement, which includes a "Hold harmless/indemnification Waiver of subrogation clause" (the "Edison-Vema Indemnification Provision"). The Edison-Vema Indemnification Provision is a single sentence that reads as follows:

> "To the fullest extent permitted by law, against loss(s) resulting from the contractor, the subcontractor's own negligence shall indemnify, hold harmless and provide a waiver of subrogation in favor of 228 Hotel Corp. D/B/A Hotel Edison, Edison Management Co. LLC, 47 Street, 240 West 47th Street, 240 West 47th Street, 219-231, 233 West 46th Street New York NY 10036 the landowner, operation/management company, managing agent, the owner, the mortgagee, director/officers, managers, members, partners, architect, architect's consultants, agents, and employees of any of them from and against all claims, damages,

> losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death or to injury to or destruction of tangible property, (other than the Work itself), including loss of use resulting there from, but only to the extent caused in whole or in part by any acts or omissions of the contractor, subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or reduce other rights, contracts, or obligations or indemnity with would otherwise exist"

(exhibit Z, Edison-Vema Indemnification Agreement, para C).

The Edison Defendants argue that they are entitled to contractual indemnification from Vema based upon the language of the Edison-Vema Indemnification Agreement. Specifically, the Edison-Vema Indemnification Agreement requires that Vema indemnify Edison for any injuries or damages "arising out of or resulting from" Vema's work, and the plaintiff's accident arose from the Edison project.

Vema argues that the Edison-Vema Indemnification Provision was not triggered as plaintiff's accident was not caused or created by Vema or Right Connection, nor did it arise out of their work on the Edison Project. Vema argues that plaintiff "was merely traversing down a hallway when the carpets suddenly struck him" (Vema and Right Connection's Affirmation in Support of Motion, para 95). Vema further argues that it did not exercise supervision or control over the injury producing work as Well Built piled the carpets in the Hallway causing the accident.

Here, the record establishes that the accident arose out of Vema and Right Connection's work on the Edison Project. At the time of the accident, plaintiff was employed by Right Connection, a Vema subcontractor, performing work, ultimately, on behalf of Vema and he was injured during the course of his work on the Edison Project (Plaintiff January 23, 2019 tr at 76)

[stating that he was at the worksite doing pipework]; Plaintiff December 10, 2020 tr at 20, 25 [stating he was carrying pipes down the Hallway prior to the accident]).

Therefore, the accident arose from the "acts or omissions of [Vema's] subcontractor" (Edison-Vema Indemnification Agreement, para C).

However, the Edison-Vema Indemnification Provision's language is ambiguous as to whether indemnification is contingent upon Vema's negligence, Right Connection's negligence or the negligence of both.

The first line of the Edison-Vema Indemnification Provision frames the scope of all the lines that follow: "To the fullest extent permitted by law, against loss(s) resulting from the contractor, the subcontractor's own negligence shall indemnify…" This language is unclear as to whether indemnification is contingent upon the contractor's negligence, the subcontractor's negligence, or negligence on the part of both. Specifically, the phrase "resulting from the contractor, the subcontractor's own negligence" is unclear as to whether it refers to the contractor's negligence, the subcontractor's negligence, or the negligence of both.

As such, the language of the Edison-Vema Indemnification Provision is ambiguous as to whether indemnification is contingent upon negligence on the part of Vema and/or Right Connection. This gives rise to an issue of fact because, as previously discussed, Vema was not negligent with respect to plaintiff's accident.

Accordingly, the Edison Defendants have failed to establish that they are entitled to contractual indemnification from Vema as a matter of law (*see Pepco Constr. of N.Y., Inc. v. CNA Ins. Co.,* 15 AD3d 464, 465 [2nd Dept 2005]) and since plaintiff's accident

arose from Vema and Right Connection's work, Vema is not entitled to dismissal of the Edison Defendant's cross-claims against it for contractual indemnification.

The Edison Defendants' claim against Right Connection for contractual indemnification

The Edison Defendants argue that they are entitled to contractual indemnification by Right Connection based upon two agreements. The Edison Defendants and Right Connection entered into the Edison-Right Connection Indemnification Agreement, which includes a "Hold harmless/indemnification Waiver of subrogation clause" (the "Edison-Right Connection Indemnification Provision") that mirrors the language of the Edison-Vema Indemnification Provision (exhibit AA, Edison-Right Connection Indemnification Agreement, para C).

For the same reasons as the Edison-Vema Indemnification Provision, the language of the Edison-Right Connection Indemnification Provision is ambiguous as to whether indemnification is contingent upon negligence on the part of Vema and/or Right Connection.

As to the second agreement, on or about June 10, 2015, Vema and Right Connection entered into the Vema-Right Connection Subcontractor Agreement which includes the following provision (the "Vema-Right Connection Indemnification Provision"):

> "HOLD HARMLESS: The Subcontractor agrees to the fullest extent allowable by law to indemnify and hold harmless the General Contractor, the Owner, and their agents, principals, shareholders, members, employees and independent contractors, from and against any and all claims, losses, damages, penalties or expenses, including reasonable attorneys' fees arising from:
>
> > (i) bodily injury or death to any person, and property damage, including, but not limited to, loss of use, arising out of or in any way relating to the work performed or any omission caused by the Subcontractor, or the agent(s), laborers. workers, independent contractors, sub-subcontractors or employee(s) of the Subcontractor;

> (ii) any obligation for withholding or other payroll taxes, unemployment insurance, workers' compensation insurance and an similar employer obligations with respect to Subcontractor's laborers, workers, employees, agents, independent contractors or sub-subcontractors;
> (iii) any violation of any laws, rules, regulations, governmental or quasi-governmental directives regarding employer obligations, workplace or construction site safety; and
> (iv) the use or release of hazardous substances and materials.
>
> The obligations hereunder shall remain in full force and effect whether or not arising out of the actual or alleged negligence or acts of any party indemnified hereunder."

(Vema and Right Connection subcontract, exhibit Y, para 13).

"One who seeks to recover as a third-party beneficiary of a contract must establish that a valid and binding contract exists between other parties, that the contract was intended for his or her benefit, and that the benefit was direct rather than incidental" (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 368 [1st Dept 2006] citing *State of Cal. Pub. Emples.' Ret. Sys. v Shearman & Sterling*, 95 NY2d 427, 434-435 [2000]; *Internationale Nederlanden (U.S.) Capital Corp. v Bankers Trust Co.*, 261 AD2d 117, 123 [1st Dept 1999]).

Here, the Edison Defendants were a third-party beneficiary of the Vema-Right Connection Subcontractor Agreement. The Vema-Right Connection Indemnification Provision obligates Right Connection to "indemnify and hold harmless the General Contractor, the Owner, and their agents, principals, shareholders, members, employees and independent contractors." This language directly benefits Edison as the owner of the Premises and the remaining Edison Defendants as the principals and agents of Edison. It is clear, unambiguous, and demonstrates an intention that Right Connection would indemnify the Edison Defendants (*see Pelote v Berean Apts. Hous. Dev. Fund Co., Inc.,* 188 AD3d 467, 467 [1st Dept 2020]).

The accident arose out of the work Right Connection was doing as part of the Edison Project, thereby triggering the Vema-Right Connection Indemnification Provision. Further, the

Vema-Right Connection Indemnification Provision specifically indicates that Right Connection will indemnify the Edison Defendants "from and against any and all claims, losses, damages, penalties or expenses." This language does not make indemnification contingent upon Right Connection's negligence (*see Barnes v New York Mercantile Exch.,* 7 AD3d 304, 305 [1st Dept 2004]).

Accordingly, the Edison Defendants are entitled to contractual indemnification from Right Connection as to any liability in excess of the insurance policy.

Edison and Well Built's third-party claims against Right Connection for common law indemnification and contribution (motion sequence 007)

In the second third-party action, the Edison Defendants assert contribution and common law indemnification claims against Right Connection. In the fourth third-party action, Well Built also asserts counter-claims against Right Connection for contribution and common law indemnification. Right Connection argues that the Edison Defendants and Well Built's common law indemnification and contribution claims should be dismissed as Right Connection is entitled to the protections of the Workers' Compensation Law and plaintiff did not sustain a "grave injury" as defined by the Workers' Compensation Law.

> "Where the plaintiff has not sustained a 'grave injury,' section 11 of the Workers' Compensation Law bars third-party actions against employers for indemnification or contribution unless the third-party action is for contractual indemnification pursuant to a written contract in which the employer "expressly agreed" to indemnify the claimant. Requiring the indemnification contract to be clear and express furthers the spirit of the legislation."

(*Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004])

Workers' Compensation Law § 11 defines a "grave injury" as:

> "[O]nly one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial

> disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

(Workers' Compensation Law § 11)

Here, plaintiff was employed by Right Connection at the time of the accident, and he does not allege that he sustained any grave injuries as defined by the Workers' Compensation Laws.

Accordingly, Right Connection is entitled to summary judgment dismissing the Edison Defendants and Well Built's third-party claims for contribution and common law indemnification.

Vema and Right Connection's third-party claims against Well Built for contractual and common law indemnification (motion sequence 007)

In the third third-party action, Vema asserts contractual and common law indemnification claims against Well Built. In the fourth third-party action, Right Connection also asserts contractual and common law indemnification claims against Well Built. Vema and Right Connection argue that they are entitled to "complete indemnification from Well Built" based upon "a right of implied indemnification" (Vema and Right Connection's Affirmation in Support of Motion, para 88). Specifically, Vema and Right Connection argue that Well Built moved the carpets to the Hallway, and as such, Vema is entitled to "complete indemnification" from Well Built (*id.*).

There was no contract between Well Built and Vema or between Well Built and Right Connection, and neither Vema nor Right Connection claim that either of them is entitled to indemnification as third-party beneficiaries to any contract involving Well Built. Therefore, there is no basis for Vema and Right Connection's contractual indemnification claims against Well Built (*see Karwowski*, 160 AD3d at 87 - 88; *Edge Mgt. Consulting, Inc*, 25 AD3d at 368).

"To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012], citing *McCarthy v Turner Constr., Inc.,* 17 NY3d 369, 377-378 [2011]; *Reilly v Digiacomo & Son*, 261 AD2d 318 [1st Dept 1999]).

Well Built argues that Vema was the general contractor for the work performed in the basement of the Premises and cannot "pass their liability to Well Built for their own negligent actions" (Well Built Affirmation in Support of Motion para 61, NYSCEF Doc No 267).

For the reasons previously stated, Well Built was negligent as to the plaintiff's accident. Also as previously stated, Vema was not negligent as to the plaintiff's accident. Further, there is nothing in the record to show that Right Connection actually exercised supervisory control over the Well Built employee who piled the carpets in the Hallway or that Right Connection was otherwise negligent as to the plaintiff's accident.

Accordingly, Vema and Right Connection are entitled to common law indemnification from Well Built.

All contribution claims against Vema and Right Connection (motion sequence 007)

The Edison Defendants assert a cross-claim against Vema for contribution. The Edison Defendants also assert a contribution claim against Right Connection in the second third-party action. Well-Built also asserts a cross-claim against Vema and Right Connection for contribution.

Vema and Right Connection argue that they are entitled to dismissal of any claims against them for contribution.

For the reasons previously stated, since Right Connection was plaintiff's employer at the time of the accident it is entitled to dismissal of any contribution claims against it (*see Tonking*, 3 NY3d at 490).

Also as previously stated, Vema was not negligent in the underlying action (s*ee Padron v Granite Broadway Dev. LLC*, 209 AD3d 536, 537 [1st Dept 2022] [Court correctly granted summary judgment dismissing contribution claims, as the record demonstrated that movant was free from negligence.]).

Accordingly, Vema and Right Connection are entitled to summary judgment dismissing all contribution claims against them.

The parties' remaining arguments have been considered and are unavailing.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the part of plaintiff, Carlos Bayas's cross-motion (motion sequence 007) to file a fourth supplemental bill of particulars is denied; and it is further

ORDERED that the part of defendants Edison Management Co., LLC, and Triumph New York LLC (the Edison Defendants) motion for summary judgment (motion sequence 005) and Vema Group LLC (Vema), and Well Built Restaurants Inc. (Well Built) motion for summary judgment (motion sequence 007) pursuant to CPLR § 3212 dismissing plaintiff's Labor Law § 241 (6) claim are granted and plaintiff's Labor Law § 241 (6) claim is dismissed; and it is further

ORDERED that the part of plaintiff Carlos Bayas' cross-motion (motion sequence 007) for summary judgment pursuant to CPLR § 3212 as to liability in his favor on his Labor Law § 240 (1) claims is granted as against defendants the Edison Defendants, Vema, and Well Built, and the part of plaintiff's cross-motion for summary judgment as to liability in his favor on his

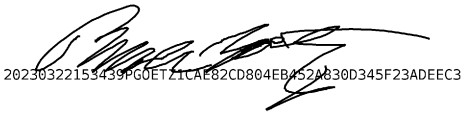
Labor Law § 200 and common-negligence claims is granted as against Well Built, only, and the remaining parts of plaintiff's cross-motion seeking summary judgment are denied; and it is further

ORDERED that the part of Vema and Right Connection Plumbing and Heating Inc.'s (Right Connection) motion (motion sequence 007) for summary judgment pursuant to CPLR § 3212 dismissing plaintiff's Labor Law § 200 and common law negligence claims as against Vema is granted, and the part of their motion for summary judgment seeking common law indemnification from Well Built is granted, and the part of their motion for summary judgment dismissing the Edison Defendants and Well Built's common law indemnification claims against Vema and Right Connection is granted, and the part of their motion for summary judgment dismissing all contribution claims against Vema and Right Connection is granted, and the remainder of their motion is denied; and it is further

ORDERED that Well Built's cross motion (motion sequence 007) for summary judgment pursuant to CPLR § 3212 is denied; and it is further

ORDERED that the Edison Defendants' motion for summary judgment pursuant to CPLR § 3212 on their contractual indemnification claims against Vema and Right Connection (motion sequence 005) is granted as to Right Connection to the extent that the Edison Defendants are entitled to contractual indemnification from Right Connection as to any liability in excess of their common insurance policy, and the part of their motion for summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims as against the Edison

Defendants is granted, and the remainder of the motion is denied.



3/22/2023
DATE

PAUL A. GOETZ, 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