**SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK: PART 18**

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OSWALDO ROPER,

Plaintiff

Index No.: 160170/2017

-against-

DECISION & ORDER

TURNER CONSTRUCTION COMPANY, HWA 1290 III LLC, HWA 1290 IV LLC, HWA 1290 V LLC, VORNADO REALTY TRUST, and MORGAN STANLEY & CO. LLC,

Motion Sequence Nos. 003 & 004

Defendant.

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TURNER CONSTRUCTION COMPANY, HWA 1290 III LLC, HWA 1290 IV LLC, HWA 1290 V LLC, VORNADO REALTY TRUST, and MORGAN STANLEY & CO. LLC,

Third-Party Index No.: 595518/2018

Third-Party Plaintiff,

-against-

ROBERT B SAMUELS, INC.

Third-Party Defendant.

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ALEXANDER M. TISCH, J.

Motion sequence numbers 003 and 004 are hereby consolidated for disposition.

PROCEDURAL BACKGROUND

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Oswaldo Roper, on November 19, 2014 when he tripped on an unsecured piece of masonite while working on the twelfth floor of a building located at 1290 6th Avenue, New York, NY (the "Premises"). HWA 1290 III LLC, HWA 1290 IV LLC and HWA 1290 V LLC (collectively "HWA") was the owner of the building located at 1290 6th Avenue at the time of the accident. Vornado Realty Trust ("Vornado") was a corporate partner with each of the HWA entities. Morgan Stanley & Co., LLC ("Morgan Stanley") was the owner of the space located on the twelfth floor of the building where the accident occurred. Morgan Stanley hired Turner Construction Company ("Turner") to act as the construction manager for a construction project (the "Project") at the Premises. Turner subcontracted

with Robert B. Samuels, Inc. ("RB Samuels") to perform electrical work at the Premises. Plaintiff was an employee of RB Samuels.

In the main action, plaintiff alleges that Turner, HWA, and Morgan Stanley violated Labor Law §§ 200 and 241 and are liable under common law negligence.

In the third-party action, Turner, HWA, and Morgan Stanley assert contractual indemnification, common law indemnification, contribution, and breach of contract claims against RB Samuels.

In motion sequence 003, Turner, HWA, and Morgan Stanley move for summary judgment pursuant to CPLR 3212 dismissing plaintiff's complaint.[1] Turner and Morgan Stanley further move for summary judgment on their third-party contractual indemnification claims against RB Samuels.

In motion sequence 004, RB Samuels moves for summary judgment pursuant to CPLR 3212 dismissing all the third-party claims and cross-claims.

Plaintiff's Deposition Testimony

Plaintiff appeared for deposition on October 1, 2019. On the date of the accident, he was employed by RB Samuels as an apprentice electrician on the Project (Plaintiff tr at 153-154, 163, NYSCEF Doc. No. 78-81). RB Samuels was subcontracted by Turner to do electrical work on the Project, which included the installation of permanent and temporary lighting (id. at 164-168, 283). There were approximately twenty RB Samuels employees working on the Project, which involved work on multiple floors of the Premises (id. at 162, 167-168).

Plaintiff received all his work directions from RB Samuels. He did not receive any direction or supervision from Turner, HWA, or Morgan Stanley (id. at 282-286). Every morning when plaintiff arrived at the worksite, he would go to a "shanty" (the "Shanty") (id. at 169-170). Plaintiff's foreman on the Project was "Richie Saruby," who would speak to the employees and give them their work assignments for the day (id. at 161-162, 169-171).

[1] Turner, HWA, Vornado, and Morgan Stanley share counsel and submit the same papers. Any references to Turner, HWA, Vornado and Morgan Stanley's individual arguments or submitted papers shall refer to their shared papers.

The accident occurred on the twelfth floor of the Premises (id. at 160, 168). On the date of the accident, plaintiff went to the morning meeting in the Shanty (id. at 171-172). The Shanty was an unfinished room, approximately thirty feet long and eighteen feet wide (id. at 177-179, 185-186). The Shanty was used to store tools, "gang boxes", and supplies for the Project (id. at 169-171, 177-179). Plaintiff testified that the Shanty had been in use for at least a month before the accident (id. at 202).

The accident occurred at approximately 7:30 am, after the morning meeting, as plaintiff and a co-worker were moving a table from an adjacent room into the Shanty (id. at 181-182, 187, 189-191). Plaintiff had been assigned "[t]o help the foreman moving with things" (id. at 189), and had been instructed by the foreman to move the table (id. at 268-269). Plaintiff was holding one end of the table and walking backwards into the Shanty, when he tripped on an unsecured piece of masonite and fell to the floor (id. at 191-193, 197-198). Plaintiff was approximately halfway into the Shanty when he tripped on the masonite (id. at 269-270). There were no other objects on the floor of the Shanty, and plaintiff did not hit any objects when he fell (id. at 218, 223-224).

Plaintiff testified that Turner was in charge of installing masonite in the Shanty (id. at 204). He did not see any unsecured masonite in the Shanty at any time prior to the accident (id. at 202-204). He only saw the unsecured piece of masonite after the accident (id. at 201). He did not know if any laborers were installing masonite flooring on the date of the accident (id. at 204-208). He did not know if anyone had complained about unsecured masonite in the Shanty at any time prior to the accident (id. at 209-210).

Plaintiff's Statement

Plaintiff wrote and signed a statement dated November 20, 2014, one day after the date of the accident (Plaintiff's Written Statement, NYSCEF Doc. No. 108). In it, he stated that the accident occurred on the twelfth floor of the Premises at approximately 7:30 am, while he was moving a table into the Shanty. He also stated that he was holding the table with "Rich Sharubbi" and walking

backwards into the Shanty when he tripped on an unsecured piece of masonite. Plaintiff further states that "Thomas Cumella" was the "supervisor on site" on the date of the accident.

Deposition Testimony of Jonathan McGuigan (Turner)

Jonathan McGuigan appeared for deposition on February 17, 2021. On the date of the accident, he was employed by Turner as an assistant engineer and assistant superintendent of the Project (McGuigan tr at 11, NYSCEF Doc. No. 104). The Project was a "patch-and-match" involving installation of new materials (id. at 11-12). He began working on the project in approximately July of 2014 (id. at 12, 32). The Project involved work on multiple floors of the Premises (id. at 32). McGuigan testified that he was at the worksite everyday (id. 31-32).

Turner oversaw the Project on behalf of Morgan Stanley and directly retained contractors and subcontractors, including RB Samuels (id. at 16-17). Turner oversaw the general safety conditions of the worksite, had the authority to stop work due to unsafe conditions, and conducted safety meetings at the worksite (id. at 19-20). The subcontractors were also responsible for overall safety and could stop work due to unsafe conditions (id. at 19). McGuigan did not recall if Turner hired an outside company to monitor the safety of the worksite (id. at 41).

RB Samuels was hired to do electrical work on the Project and had two foremen, "Rich Sarubbi" and "Tom Cumella" (id. at 18-19).

McGuigan did not recall if Turner or any other contractor placed any unsecured masonite on the floor of the worksite (id. at 48-49). Turner had a "labor foreman" who initially put masonite on the floor of the Premises and secured it down with duct tape. The labor foreman was "responsible to clean miscellaneous messes from the other subcontractors" (id. at 35-36). Turner placed and secured masonite throughout the worksite (id. at 33).

"[Turner] had a labor foreman who initially put masonite on the floor and duct taped it down to protect the carpet, but there is also additional masonite that subcontractors use to also protect the floor so

they do not damage it because if they do damage it, they're responsible, so [subcontractors] put masonite down, as well" (id. at 36). "Anyone on the Turner team" working on the project had the authority to tell a subcontractor who may have laid down masonite boards on top of secured masonite that doing so was unsafe (id. at 51-52). Turner was responsible for the masonite in the area where the accident occurred, but McGuigan did not know who placed the subject unsecured masonite (id. at 31).

McGuigan testified that masonite was duct taped to the floor to protect the carpet and the floor (id. at 31, 34, 36, 38, 45).

McGuigan did not witness the accident (*id.* at 20). He spoke to Sarubbi and Cumella after the accident and prepared an incident report based upon the information that they provided to him (id. at 23-26). McGuigan never spoke to plaintiff about the accident (id. at 22-23)

Deposition Testimony of Shakia Hill (Vornado)

Shakia Hill appeared for deposition on February 24, 2021. On the date of the accident, she was employed by Vornado Office Management as the building manager for the Premises (Hill tr at 7-8). HWA owned the Premises on the date of the accident, and Vornado has an ownership interest in the Premises through its partnership with HWA (id. at 9-13). Hill has no knowledge of plaintiff or the accident (id at 8, 11, 13). Neither HWA nor Vornado have any records of being notified of the accident (id. at 12-13).

Deposition Testimony of Richard Sarubbi (RB Samuels)

Richard Sarubbi appeared for deposition on April 30, 2021. On the date of the accident, he was employed by RB Samuels as a foreman on the Project (Sarubbi tr at 16). RB Samuels was the electrical subcontractor on the Project (id. at 17, 21-22, 27).

Sarubbi's responsibilities included conducting a daily safety meeting and providing workers with their assignments (id. at 21, 23, 31-33). The daily safety and instruction meeting was held at 7:00 am (id. at 39). He testified that "Tom Camele" was a sub-foreman working under him on the Project (id. at

66-67). Plaintiff was an apprentice electrician employed by RB Samuels on the Project (id. at 30, 36). Sarubbi was plaintiff's direct supervisor (id. at 37).

RB Samuels controlled the means and methods of its work on the Project (id. at 34). Turner, as general contractor, "could put their two cents in" but generally did not direct RB Samuels' work on the Project (id. at 33-34).

Sarubbi witnessed plaintiff's accident (id. at 41-42). He and plaintiff were moving a 6-foot-long rectangular table from one room to another to make a new shanty room (id. at 41-45). The Shanty was an empty room that RB Samuels used until work needed to be done in the room (id. at 34-35). The Shanty was twenty feet away from the old shanty (id. at 43). He and plaintiff were both holding the table on each of the shorter ends (id. at 45). Sarubbi was walking forward and plaintiff was walking backwards carrying the table (id. at 45).

The accident occurred when plaintiff tripped upon an unsecured piece of masonite laying on the floor (id. at 46-47). Sarubbi was aware that there was masonite secured to the floor prior to moving the table with plaintiff (id. at 46). Sarubbi saw the actual piece of masonite that plaintiff tripped on and confirmed that it was not secured to the floor (id. at 47). He further testified that the accident occurred four feet away from the entrance to the Shanty (id. at 48).

Sarubbi testified that it was Turner's responsibility to install masonite on the floors of the Premises for the Project (id. at 51-52). However, he did not witness Turner placing the masonite on the floor in the area of the accident (id. at 51-52). Sarubbi did not recall if there were any complaints about the masonite prior to the accident (id. at 52).

DISCUSSION

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc., 96 AD3d 551, 553 [1st Dept 2012][internal

quotation marks and citation omitted]). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment" (id.). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (Giuffrida v Citibank Corp., 100 NY2d 72, 81 [2003]).

"[F]acts must be viewed in the light most favorable to the non-moving party" (Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012][internal quotation marks and citation omitted]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiff's Labor Law § 241 (6) claims (motion sequence 003)

Turner, HWA, and Morgan Stanley move for summary judgment dismissing the Labor Law § 241(6) claim as against them. They argue that the alleged statutory violations are insufficient to form a basis for a Labor Law § 241 (6) claim and/or are inapplicable to the alleged facts. Plaintiff acknowledges that the only applicable sections of the Industrial Code are 12 NYCRR §§ 23-1.7 (e) (1) and (2) (Plaintiff's memorandum of law in opposition to defendants' motion for summary judgment p 13, NYSCEF Doc. No. 118).

As plaintiff does not oppose dismissal of his Labor Law § 241 (6) claims based upon any alleged violations, other than 12 NYCRR §§ 23-1.7 (e) (1) and (2), said claims are dismissed as abandoned (see Kempisty v. 246 Spring St., *LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section."]).

As such, the only Labor Law § 241 (6) claims before the Court are those based upon the defendants' alleged violations of 12 NYCRR §§ 23-1.7 (e) (1) and (2).

Labor Law §241 (6) reads as follows:

"Construction, excavation and demolition work
. . .

"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."

"Labor Law § 241(6) imposes a non-delegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (Toussaint v Port Auth. of N.Y. & N.J., 38 NY3d 89, 93 [2022][internal quotations marks and citations omitted]).

The non-delegable duty is absolute and "imposes liability upon a general contractor for the negligence of a subcontractor, even in the absence of control or supervision of the worksite" (Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 348-349 [1998], citing Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 503 [1993]).

"To establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision 'mandating compliance with concrete specifications'" (Ennis v Noble Constr. Group, LLC, 207 AD3d 703, 705 [2d Dept 2022], quoting Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d at 505). In addition, the rule or regulation alleged to have been breached must be a "specific, positive command" (Toussaint at 93, quoting Rizzuto at 349).

Industrial Code 12 NYCRR 23-1.7 (e) (1) and (2)

Industrial Code 12 NYCRR 23-1.7 (e) (1) and (2) are sufficiently specific to form a basis for liability pursuant to Labor Law § 241(6) (see Nicholson v Sabey Data Ctr. Props., LLC, 205 AD3d 620, 620 [1st Dept 2022]) and read as follows:

> "Protection from general hazards
>
> "(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."

Initially, plaintiff tripped upon an unsecured piece of masonite while he was in the Shanty (Plaintiff tr at 269-270) and there is nothing from the record to suggest that plaintiff's accident occurred in a passageway. As such, the defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 241(6) claim based upon an alleged violation of 12 NYCRR 23-1.7 (e) (1).

Turner, HWA, and Morgan Stanley argue that they are entitled to summary judgment dismissing the claim based upon an alleged violation of 12 NYCRR 23-1.7 (e) (2), since plaintiff did not trip over any loose or scattered materials. Specifically, they argue that the masonite was purposefully placed and was integral to the work being performed on the Project.

Under 12 NYCRR 23-1.7 (e) (2), an object that is "an integral to the work being performed" is not an accumulation of debris or scattered materials (Lenard v 1251 Ams. Assoc., 241AD2d 391, 393 [1st Dept 1997]; Tucker v Tishman Constr. Corp. of N. Y., 36 AD3d 417, 417 [1st Dept 2007] [rebar that plaintiff tripped over was "not debris, scattered tools and materials", but rather, "an integral part of the work being performed"]). Further, "[t]he integral to work defense applies to things and conditions that are an integral part of the construction, not just to the specific task a plaintiff may be performing at

the time of the accident" (Bazdaric v Almah Partners LLC, 203 AD3d 643, 644 [1st Dept 2022] [citation and internal quotation marks omitted]).

"[A]s a general rule, where Masonite is 'an integral part of the construction', a Labor Law § 241 (6) claim whether predicated on an alleged violation of Industrial Code 12 NYCRR 23-1.7 (e) (1), or (e) (2), should be dismissed" (Krzyzanowski v City of New York, 179 AD3d 479, 480-481 [1st Dept 2020], citing Conlon v Carnegie Hall Socy., Inc., 159 AD3d 655, 655 [1st Dept 2018]). However, masonite that is not an integral part of the work may be treated as debris and/or scattered material within Industrial Code 12 NYCRR 23-1.7 (e) (1) & (2) (see Krzyzanowski, 179 AD3d at 481 [Defendant's failure to establish as a matter of law that the masonite that plaintiff tripped upon was integral to the work was a sufficient basis to deny dismissal of a Labor Law §241(6) based upon 12 NYCRR 23-1.7 (e) (1) & (2)]).

Here, there is no dispute that plaintiff tripped on an unsecured piece of masonite while moving a table. Further, the defendants have failed to establish prima facie that the unsecured piece of masonite was an integral part of the construction. While McGuigan testified that masonite was secured to the floor to protect the carpet and the floor (McGuigan tr at 31, 34, 36, 38, 45), he did not know if Turner installed the subject piece of masonite, nor did not testify as to the purpose of the subject piece of masonite as to the work being performed. None of the deposition testimony spoke to the use of the subject piece of masonite nor established that it was being used as an integral part of any ongoing construction work (see generally Krzyzanowski, 179 AD3d at 481).

As such, there is an issue of fact sufficient to warrant denying defendants' motion for summary judgment as to plaintiff's Labor Law § 241 (6) claim based upon an alleged violation of 12 NYCRR 23-1.7 (e) (2).

Plaintiff's Labor Law § 200 and common law negligence claims (motion sequence 003)

Plaintiff alleges that Turner, HWA, and Morgan Stanley violated Labor Law § 200 and are liable under common law negligence. Turner, HWA, and Morgan Stanley move for summary judgment dismissing the claims as against them. They argue that there is no basis to conclude that they created or had notice of the dangerous condition. The further argue that they did not exercise actual supervision and control over the means and methods of the work that lead to the accident.

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 E. 34th Street (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. & N.J., 38 NY3d at 94 [to recover under Labor Law § 200 "a plaintiff must show that an owner or general contractor exercised some supervisory control over the operation]).

Further, "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, the accident occurred when plaintiff tripped upon an unsecured piece of masonite that had been placed in the Shanty. As such, the accident arose from the means and methods of the work, specifically, the placement of and failure to properly secure the subject piece of masonite (see e.g. Smith v EA Found. of NY, 2022 NY Slip Op 30331(U), **23 [Sup Ct, NY County] ["[T]hat plaintiff tripped over insufficiently secured plywood — implicates the means and methods of the work"]).

Plaintiff argues that the unsecured masonite constituted an inherently dangerous condition. It was not. "Where a defect is not inherent but is created by the manner in which the work is performed, the claim under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing on the premises." (Villanueva v 114 Fifth Ave. Assoc. LLC, 162 AD3d 404, 406 [1st Dept 2018] citing Cappabianca).

HWA and Morgan Stanley

Plaintiff did not receive any direction or supervision from HWA or Morgan Stanley (Plaintiff's tr at 282-286). Further, there is nothing from the record to indicate that HWA or Morgan Stanley directly supervised or controlled the placement of the subject masonite in the Shanty.

As such, defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims as against HWA and Morgan Stanley.

Turner

While plaintiff and Sarubbi both testified that Turner did not direct RB Samuels' work (id. at 282-286, Sarubbi tr at 33-34), there is an issue of fact as to whether Turner or RB Samuels placed the piece of unsecured masonite in the Shanty. McGuigan testified that both Turner and the subcontractors put down masonite on the worksite (McGuigan tr. at 33, 35-38). He further testified that he did not recall who was responsible for the placement of the subject masonite (id. at 31). Plaintiff and Sarubbi both testified that Turner was in charge of installing masonite on the floors of the worksite (Plaintiff tr. at 204, Sarubbi Tr. at 51-52), however, neither of them testified as to who supervised the placement of the subject masonite.

There is an issue of fact as to whether Turner's employees placed the subject masonite in the Shanty or were responsible for securing it. There is also an issue of fact as to who controlled the means and methods as to how the subject piece of masonite was placed in the Shanty.

As such, defendants are not entitled to summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims as against Turner.

Turner and Morgan Stanley's third-party contractual indemnification claims against RB Samuels (motion sequence 003, 004)

Turner and Morgan Stanley both assert third-party contractual indemnification claims against RB Samuels predicated upon an agreement Turner entered into with RB Samuels (the "Turner-RB Samuels Agreement").

RB Samuels argues that Turner and Morgan Stanley's contractual indemnification claims should be dismissed as the indemnification provision (the "Indemnification Provision") in the Turner-RB Samuels Agreement violates New York General Obligations Law § 5-322.1. RB Samuels further argues that the Indemnification Provision is unenforceable as Turner was negligent in causing plaintiff's accident.

New York General Obligations Law § 5-322.1

New York General Obligations Law § 5-322.1 (1) governs construction contract indemnification provisions and reads in relevant part as follows:

> "[A construction agreement] purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable... This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent."

Should a contractor be found negligent, "the indemnification provision would be unenforceable since its full enforcement would result in the contractor being indemnified for its negligence" (Padilla v Absolute Realty, Inc., 195 AD3d 422, 423 [1st Dept 2021] [internal quotation marks and citations omitted]). However, "the statute does permit a partially negligent general contractor to seek contractual indemnification from its subcontractor so long as the indemnification provision does not purport to indemnify the general contractor for its own negligence" (Brooks v Judlau Contr., Inc., 11 NY3d 204, 207 [2008]). Further, a broad indemnification provision that limits indemnification to the "fullest extent of the law" does not violate General Obligations Law § 5-322.1 as it does not seek indemnification for defendants' own negligence (see Alvarado v SC 142 W. 24 LLC, 209 AD3d 422, 424 [1st Dept 2022] citing Brooks).

On or about August 27, 2013, Turner and RB Samuels entered into the Turner-RB Samuels Agreement, which includes the Indemnification Provision:

> ARTICLE XXIII. Throughout this Agreement the "Indemnified Party (ies)" means Contractor, the Owner, any party required to be indemnified pursuant to the General Contract, and any of their respective officers. agents, servants, or employees, and affiliates, parents and subsidiaries. The Subcontractor hereby assumes the entire responsibility and liability for any and all actual or potential damage or injury of any kind or nature whatsoever (including death, business interruption or loss of use resulting therefrom) to all persons and entities, whether employees of the Subcontractor or any tier of the Subcontractor or otherwise, or to all property: or as a result of a perceived risk of such damage or injury (including actions taken to avoid or contain such actual or

> potential damage or injury. whether required or incurred by a public authority or otherwise) caused by, resulting from, arising out of or occurring in connection with the execution of the Work, or in preparation for the Work, or any extension, modification, or amendment to the Work by change order or otherwise…
>
> In furtherance to but not in limitation of the indemnity provisions in this Agreement, Subcontractor hereby expressly and specifically agrees that its obligation to indemnify, defend and save harmless as provided in this Agreement shall not in any way be affected or diminished by any statutory or constitutional immunity it enjoys from suits by its own employees or from limitations of liability or recovery under worker's compensation laws.
>
> IN THE EVENT THAT THE LAW OF THE STATE IN WHICH THE PROJECT IS LOCATED (OR OTHER APPLICABLE LAW) LIMITS THE INDEMNITY OBLIGATIONS OF THE SUBCONTRACTOR, THEN THE INDEMNITY OBLIGATIONS OF THE SUBCONTRACTOR SHALL BE ENFORCED TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, AND THIS ARTICLE SHALL BE CONSTRUED TO CONFORM TO SUCH LAW."

(Turner-RB Samuels Agreement pp 10-11, NYSCEF Doc. No. 88)

The Indemnification Provision specifically indicated that RB Samuels' obligation shall be enforced "to the fullest extent permitted by applicable law" and that the Indemnification Provision "shall be construed to conform to such law".

As such, the Turner-RB Samuels Agreement does not seek indemnification for defendants' own negligence and does not violate General Obligations Law § 5-322.1 (*see Alvarado*, 209 AD3d at 424).

Turner's claims against RB Samuels 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]). Summary judgment on a contractual indemnification claim is warranted where the intent to indemnify is clear and there is no basis to conclude that the indemnified party was negligent as to the underlying accident (see e.g. Hong-Bao Ren v Gioia St. Marks, LLC, 163 AD3d 494, 494 [1st Dept 2018]).

The Indemnification Provision clearly obligates RB Samuels to indemnify Turner "for any and all actual or potential damage or injury of any kind or nature whatsoever… caused by, resulting from, arising out of or occurring in connection with the execution of the Work." However, for the reasons previously stated, there is an issue of fact as to whether Turner is liable for plaintiff's accident.

As such, the defendants' motion for contractual indemnification is denied as to Turner; and RB Samuels' motion for summary judgment dismissing the claim is also denied.

Morgan Stanley's claims against RB Samuels for contractual indemnification

"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. Employees' Retirement 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, Morgan Stanley was a third-party beneficiary of the Turner-RB Samuels Agreement. The Indemnification Provision obligates RB Samuels to indemnify "the Owner [and] any party required to be indemnified pursuant to the General Contract." The "General Contract" refers to a construction management agreement between Turner and Morgan Stanley dated April 1, 2011 (the "General Contract", NYSCEF Doc. No. 88), wherein Morgan Stanley is identified as the Owner and an indemnified party. As such, the Turner-RB Samuels Agreement directly benefits Morgan Stanley. It is clear, unambiguous, and demonstrates the intention that RB Samuels would indemnify Morgan Stanley "for any and all actual or potential damage or injury of any kind or nature whatsoever… caused by, resulting from, arising out of or occurring in connection with the execution of the Work" (see Pelote v Berean Apts. Hous. Dev. Fund Co., Inc., 188 AD3d 467, 467 [1st Dept 2020]).

For the reasons previously stated, Morgan Stanley was not liable as to plaintiff's accident. As such, defendants' motion for summary judgment on their third-party contractual indemnification claims against RB Samuels is granted as to Morgan Stanley.

Turner, HWA, and Morgan Stanley's third-party common law indemnification, contribution claims and breach of contract claims against RB Samuels (motion sequence 004)

Turner, HWA, and Morgan Stanley assert third-party common law indemnification, contribution, and breach of contract claims against RB Samuels.

RB Samuels argues that Turner, HWA, and Morgan Stanley's common law indemnification and contribution claims should be dismissed as RB Samuels 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. It further argues that it is not in breach of contract as it obtained liability insurance in accordance with the Turner-RB Samuels Agreement.

Turner, HWA, and Morgan Stanley do not oppose the portion of RB Samuels' motion to dismiss their third-party common law indemnification, contribution, and breach of contract claims.

> "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).

Plaintiff does not allege that he sustained a grave injury.

Further, RB Samuels attaches a Wesco general liability policy, with a general aggregate limit of $4,000,000.00 and an individual occurrence limit of $2,000,000.00 (NYSCEF Doc. No. 112), and a RLI excess liability policy with a combined single limit of $3,000,000.00 (NYSCEF Doc. No. 113).

For these reasons, RB Samuels is entitled to summary judgment dismissing Turner, HWA, and Morgan Stanley's third-party common law indemnification, contribution, and breach of contract claims.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the part of defendants, Turner Construction Company, HWA 1290 III LLC, HWA 1290 IV LLC, HWA 1290 V LLC, and Morgan Stanley & Co., LLC's motion for summary judgment pursuant to CPLR 3212 (motion sequence 003) is granted to the extent that plaintiff's Labor Law § 200 and common law negligence claims are dismissed as against HWA and Morgan Stanley, and the part of said motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claims is granted to the extent that plaintiff's Labor Law § 241(6) claims are dismissed with the exception of those claims based upon alleged violations of 12 NYCRR § 23-1.7 (e) (2), and the part of said motion for summary judgment seeking contractual indemnification is granted to the extent that Morgan Stanley is entitled to contractual indemnification by RB Samuels, and the remainder of the motion is denied; and it is further

ORDERED that Robert B. Samuels, Inc.'s motion for summary judgment (motion sequence 004) dismissing the third-party complaint is granted to the extent that the third-party breach of contract, common law indemnification, and contribution claims are dismissed, and the remainder of the motion is denied.

The foregoing constitutes the Order and Decision of the Court.

3/31/2023
DATE

ALEXANDER M. TISCH, 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