SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

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KENNETH FINNEGAN,

Plaintiff,

- v -

THOR EQUITIES, LLC,GENERAL GROWTH PROPERTIES, INC.,RXR REALTY LLC,STRUCTURE TONE, LLC,530 FIFTH RETAIL, LLC, and COMMODORE CONSTRUCTION CORPORATION,

Defendant.

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INDEX NO. 155713/2018

MOTION DATE

MOTION SEQ. NO. 003 004 005 006 007

DECISION + ORDER ON MOTION

STRUCTURE TONE, LLC, GENERAL GROWTH PROPERTIES, INC., 530 FIFTH RETAIL, LLC

Plaintiff,

-against-

COMMODORE CONSTRUCTION CORPORATION, MELTO METAL PRODUCTS CO., INC.

Defendant.

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Third-Party
Index No. 595598/2019

STRUCTURE TONE, LLC, GENERAL GROWTH PROPERTIES, INC., 530 FIFTH RETAIL LLC

Plaintiff,

-against-

DAL ELECTRICAL CORPORATION

Defendant.

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Second Third-Party
Index No. 595682/2019

The following e-filed documents, listed by NYSCEF document number (Motion 003) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 141, 142, 143, 144, 145, 146, 147, 195, 196

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 261, 281, 301

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 262, 269, 270, 271, 272, 273, 274, 275, 276, 277, 299

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 263, 286, 287, 288, 289, 290, 291, 292, 293, 294, 300

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 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, 264, 282, 283, 284, 285, 295, 296

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

Upon the foregoing documents, the motions are determined as follows:

In this action, Plaintiff, Kenneth Finnegan, seeks to recover for injuries sustained on May 11, 2018, when he stepped in a hole while present at a construction project at 530 Fifth Avenue, New York, New York. At the time of his accident, Plaintiff was employed as a general foreman with Third-Party Defendant Melto Metal Products Co., Inc. ("Melto") and his duties included organizing Melto employees at the site, laying out the job, assisting the other workers when necessary, coordinating delivery and installation of the current load. Defendant 530 Fifth Retail LLC ("530") was an owner of the premises at issue and retained Defendant Structure Tone LLC ("Structure") as general contractor on the redevelopment project. Defendant Structure sub-contracted with Third-Party Defendants Melto, Commodore Construction Corp. ("Commodore") and Dal Electrical Corporation ("Dal") to provide trade services and supplies on the project.

Plaintiff commenced this action pleading causes of action for violation of Labor Law §§ 200, 240[1] and 241[6]. Plaintiff also pled a common law negligence cause of action. Defendants Structure and 530 and General Growth Properties, Inc. ("Growth") answered jointly and asserted thirty-eight [38] affirmative defenses as well as crossclaims against Defendants Thor Equities LLC[1] ("Thor") and RXR Realty LLC ("RXR") for common-law indemnification and contribution[2]. Thor answered and pled eleven [11] affirmative defenses as well as crossclaims against RXR for common-law and contractual indemnification. Defendant RXR answered and pled eleven [11] affirmative defenses as well as a crossclaim against Thor, Growth, Structure and 530 for common-law and contractual indemnification.

Thereafter, Growth, Structure and 530 commenced two third-party actions. The first was against Commodore and Melto wherein they pled causes of action for common-law and contractual indemnification as well as breach of contract for failure to procure insurance. Melto answered and pled twenty-three [23] affirmative defenses as well as a crossclaim against Commodore for common-law indemnification and contribution. Commodore answered and pled nine [5] affirmative defenses as well

[1] The Plaintiff's claims and all crossclaims against Thor were discontinued by stipulation dated January 6, 2020 (NYSCEF Doc No 63).
[2] Growth and Structure discontinued their crossclaims against one another by stipulation dated September 18, 2019 (NYSCEF Doc No 55).

as two crossclaims against Melto for common-law indemnification, contribution and contractual indemnification. The second was against Dal which pled claims of common-law and contractual indemnification as well as breach of contract for failure to procure insurance. Dal answered and pled four [4] affirmative defenses as well as a "cross complaint" against Thor, RXR, Commodore and Melto for common-law indemnification and contribution and a "counter-complaint" against Growth, Structure and 530 for common-law indemnification and contribution.

Now, Defendant Dal moves (Mot Seq No 3) pursuant to CPLR §3212 for summary judgment dismissing the second third-party complaint and to dismiss Commodore's crossclaims. Defendant Melto moves (Mot Seq No 4) pursuant to CPLR §3212 for summary judgment dismissing, as asserted against it, the first third-party complaint and all crossclaims. Plaintiff moves (Mot Seq No 5) for partial summary judgment pursuant to CPLR §3212 against Defendants on the cause of action based on Labor Law §§ 240[1]. Defendant Commodore moves (Mot Seq No 6) pursuant to CPLR §3212 for summary judgment dismissing all claims, third-party claims, and crossclaims. Defendants Growth, Structure and 530 move (Mot Seq No 7) pursuant to CPLR §3212 for summary judgment dismissing Plaintiff's complaint and on its cause of action for contractual indemnification against Melto. All the motions, in one form or another, are opposed.

"'[T]he 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'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], *citing Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Failure to make the requisite showing requires denial of the motion, regardless of the sufficiency of the opposition papers (*see id.* at 324; *see also Smalls v AJI Industries. Inc.,* 10 NY3d 733, 735 [2008]). Once a *prima facie* demonstration has been made, the burden shifts to the opponent to produce evidentiary proof that establishes the existence of a material issues of fact (*see eg Giuffrida v Citibank Corp.,* 100 NY2d 72 [2003]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Labor Law §240[1]

I. Plaintiff's and Defendants' Growth, RXR, Structure and 530 motions for summary judgment on the Labor Law §240[1] claim.

Labor Law § 240[1] imposes "upon owners, contractors, and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work' for failure to provide workers proper protection from elevation-related hazards" (*see Yaguachi v Park City 3 and 4 Apartments, Inc.*, 185 AD3d 635 [2d Dept 2020] *quoting Aslam v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 135 AD3d 790, 791 [2d Dept 2016] *quoting Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]). "The purpose of the statute is to protect workers… 'from the pronounced risks arising from construction work site elevation differentials'" (*Villa v East 85th Realty, LLC*, 189 AD3d 1661 [2d Dept 2020] *quoting Runner v New York Stock Exch., Inc.,* 13 NY3d 599, 603 [2009]; *see also Ross v Curtis–Palmer Hydro–Elec. Co.,* 81 NY2d 494, 501 [1993]; *Simmons v City of New York*, 165 AD3d 725, 726-727 [2d Dept 2018]).

"[T]he fact that a worker falls at a construction site, in itself, does not establish a violation of Labor Law § 240 (1)" (*O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33 [2017]). "To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of his injuries" (*Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 402 [1st Dept 2017]).

Thus, on a motion for summary judgment, a plaintiff must proffer evidence which demonstrates, in the first instance, that necessary protection from the gravity-related risk of his construction work was not provided and/or that the safety device in use failed to provide proper protection (*see eg Badzio v East 68th St. Tenants Corp.*, 200 AD3d 591 [1st Dept 2021]; *Carpentieri v 309 Fifth Ave., LLC,* 180 AD3d 571 [1st Dept 2020]; *Camacho v Ironclad Artists Inc.*, 174 AD3d 426 [1st Dept 2019]).

As applied to the present circumstances, it has been held that the "[t]he collapse of a floor which causes a worker to fall even partially through presents an elevation-related risk notwithstanding the purely fortuitous circumstance that [a] plaintiff . . . was spared greater injuries from a higher fall or contact with the ground below" (*Robertti v Chang*, 227 AD2d 542, 543 [2d Dept 1996]). Similarly, an uncovered hole in a concrete floor which a plaintiff does not completely fall through can present a gravity-related risk (*see Favaloro v Port Auth. of N.Y. & N.J.,* 191 AD3d 524, 525 [1st Dept 2021]; *Carpio v Tishman Constr. Corp.*, 240 AD2d 234, 235 [1st Dept 1997]["Plaintiff's partial fall through a hole at a construction site can hardly be characterized as only tangentially related to the effects of gravity"]; *see also Sunun v Klein*, 188 AD3d 507 [1st Dept 2020]; *Santos v State of New York*, 169 AD3d 1328 [3d Dept 2019]). There is also "'no bright-line minimum height differential that determines whether an elevation hazard exists'" (Brown v 44 St. Dev., LLC, 137 A.D.3d 703, 704 [1st Dept 2016], *quoting Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 9). However, where the size of an opening and/or the height differential does not present type of elevation-related hazard contemplated under the statute, liability will not exist (*see Eliassian v G.F. Constr., Inc.*, 190 AD3d 947 [2d Dept 2021]; *Sawczyszyn v New York Univ.*, 158 AD3d 510 [1st Dept 2018]; *Torkel v NYU Hosps. Ctr.*, 63 AD3d 587 [1st Dept 2009]; *Miller v Weeden*, 7 AD3d 684 [2d Dept 2004]).

In this case, Plaintiff testified at his deposition the accident occurred at about 2:15 pm as he was standing on the ground floor of the construction site, which was comprised of a concrete slab, preparing to leave work for the day. Plaintiff averred that while he was "wrapping up a welding lead" he side-stepped into a round hole in the floor, twisted his right knee and fell to the ground. He stated that his entire foot, but no other part of his lower leg, entered the hole. He also testified that his ankle was either in the hole or at the level of the hole. Plaintiff also testified that his foot stuck in the hole, pointed down, and that he did not "think" any other part of his lower leg went into the hole. Concerning the size of the hole, Plaintiff could only state that it was large enough to fit his size 13 shoe. He also averred that the hole penetrated completely through the concrete floor and the basement floor could be seen below. Plaintiff testified at his deposition that photographs marked as defense Exhibits F, G and I depicted the hole he claims cause him to fall. Michael Sansone ("Sansone"), a site superintendent for Structure, testified that the basement floor could not be seen through the hole because there was insulation therein which was placed to stop falling debris. He identified the insulation in the above photographs as being blue in color. Patrick Cotter ("Cotter"), a foreman for Commodore, testified that the hole was six inches in size.

Contrary to the arguments of Plaintiff and Defendants Growth, RXR, Structure and 530, the testimony raises issues of fact as to whether the size and depth of the defect rendered it a gravity-related hazard within the meaning of Labor Law §240[1] (*see Payne v NSH Community Servs., Inc.*, 203 AD3d 546, 547 [1st Dept 2022]; *Gallagher v Levien & Co.*, 72 AD3d 407 [1st Dept 2010]). Plaintiff testified that the hole was large enough to fit his size 13 shoe, but Cotter stated that the hole appeared to be six inches across. There is no proof to contradict Plaintiff's testimony that the hole went completely through the concrete floor, but he did not know how far below the hole the basement floor laid. Moreover, Plaintiff admitted that his foot became stuck in the hole and penetrated, at most, to his ankle. Thus, even accepting that the hole went through the floor, its size may have limited the distance a

worker could fall effectively negating its overall depth. Lastly, Plaintiff claimed the photographs of the hole revealed the basement floor. Sansone contradicted that testimony and averred that the material in the hole was insulation.

II. Defendant Commodore's motion on the Labor Law §240[1] claim.

Defendant Commodore claims that unlike Defendants Growth, RXR, Structure and 530, which do not dispute the applicability of Labor Law §240[1] to them, it cannot be liable under that section as it was a subcontractor and not an agent of the general contractor or owner. "Labor Law § [240(1)] does not automatically apply to all subcontractors on a site or in the 'chain of command'" (*Vargas v Peter Scalamandre & Sons, Inc.*, 105 AD3d 454, 455 [1st Dept 2013], *citing Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]; *see also Guevara-Ayala v. Trump Palace/Parc LLC*, 205 AD3d 450, 451 [1st Dept 2022]). "Rather, for liability under the statute to attach to a defendant, a plaintiff must show that the defendant exercised control, either over the plaintiff, the specific work area involved or the work that gave rise to the injury" (*Vargas v Peter Scalamandre & Sons, Inc.*, supra).

However, a contractor "may nonetheless become responsible if [they have] been delegated the authority and duties of a general contractor, or if [they function] as an agent of the owner of the premises" (*see Rodriguez v JMB Architecture, LLC*, 82 AD3d 949 [2d Dept 2011]; *see also Walls v Turner Constr. Co.*, 4 NY3d 861 [2005]; *Johnsen v City of New York*, 149 AD3d 822 [2d Dept 2017]). A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a Plaintiff is injured (*see* Labor Law §§ 200, 241[6]; *Russin v Picciano & Son*, 54 NY2d 311, 318 [1981]). "The determinative factor is whether the defendant had the right to exercise control over the work, not whether it actually exercised that right" (*Santos v Condo 124 LLC.*, 161 AD3d 650, 653 [1st Dept 2018]; *see also Barreto v Metro. Transp. Auth.*, 25 NY3d 426, 434 [2015]).

As the movant, it was incumbent upon Commodore to demonstrate in the first instance that it was neither a contractor nor agent within the meaning of the statute (*see Zaher v Shopwell, Inc.*, 18 AD3d 339 [1st Dept 2005]; *Garcia v Pepsico, Inc.*, 303 AD2d 227 [1st Dept 2003]; *Pest v Beeper Connection Paging, Inc.*, 302 AD2d 249 [1st Dept 2003]). In support of the motion, Commodore established it lacked the right to ensure that safety protocol was followed at the work site in general. The deposition testimony of Plaintiff, Commodore, Structure and Melto showed that Plaintiff was supervised by and took direction only from Melto personnel. As such, Commodore established *prima facie* that it was not a contractor or statutory agent of Structure or the owner on the project (*see generally Fischetto v LB 745 LLC, York*, 43 AD3d 810 [1st Dept 2007]).

In opposition, Plaintiff raised in issue of fact as to whether Commodore had been delegated the responsibility to correct the condition at issue (*see Vargas v Peter Scalamandre & Sons, Inc.*, 105 AD3d 454 [1st Dept 2013]; *Moore v URS Corp.*, 209 AD3d 438 [1st Dept 2022]). Cotter testified that it was Commodore's responsibility to cover holes, including ones as small as four inches, that existed in its work areas. Cotter acknowledged that Tenant Space B in the northeast corner of the project, the area where the incident occurred, was part of Commodore's work area and that if he had come across a hole like the one depicted in the photographs marked at the parties' depositions, he would have covered it with plywood. To the extent Cotter denied or claimed ignorance as to whether covering the subject hole was Commodore's responsibility, it does not nullify his earlier statements. That the subcontract between Structure and Commodore may fail include an express responsibility to remedy conditions like the hole at issue does not absolve Commodore as a matter of law. Indeed, there are multiple general

responsibilities listed under the scope of work that could encompass such a task (eg. Comply with all Structure Tone site safety drawings and guidelines; Adhere to building rules and regulations). Under its "Terms and Conditions", Commodore was to perform "the Work . . . in a first class manner consistent with the construction practices prevailing in the area. Further, that section states that Structure's "Corporate Safety Health and Environmental Policies" are incorporated by reference.

Labor Law §241[6]

To establish liability on a Labor Law §241[6], a claimant must demonstrate that their injuries were proximately caused by a violation of the Industrial Code applicable to the situation (*see Reyes v Astoria 31st Street Developers, LLC*, 190 AD3d 872 [2d Dept 2021]; *Ortega v Roman Catholic Diocese of Brooklyn, N.Y.*, 178 AD3d 940 [2d Dept 2019]; *Melchor v Singh*, 90 AD3d 866, 870 [2d Dept 2011]; *see also Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). Each section of the Industrial Code relied upon by a claimant must be a "concrete specification" "mandating a distinct standard of conduct" and "not merely a restatement of common-law principles" (*see Becerra v Promenade Apartments Inc.*, 126 AD3d 557, 558 [1st Dept 2015], *quoting Misicki v Caradonna, supra and Ross v Curtis-Palmer Hydro-Elec. Co.*, supra; *see also Alberto v DiSano Demolition Co., Inc.*, 194 AD3d 607 [1st Dept 2021]). Although comparative fault is a viable defense to a Labor Law §241[6] cause of action (*see Drago v TYCTA*, 227 AD2d 372 [2d Dept 1996]), a claimant is not required to demonstrate freedom from comparative fault on a motion for summary judgment (*see Ortega v Roman Catholic Diocese of Brooklyn, N.Y.*, supra; *see also Rodriguez v City of New York*, 31 NY2d 312, 313 [2018]).

To be entitled to summary judgment, Defendant is required to show that all the sections pled by Plaintiff were not concrete, inapplicable or did not cause his injuries (*see generally Spencer v Term Fulton Realty Corp.*, 183 AD3d 441, 442 [1st Dept 2020]; *Armental v 401 Park Ave. S. Assoc., LLC*, 182 AD3d 405, 407 [1st Dept 2020]).

As cited in the bill of particulars, Plaintiff relies on alleged violations of 12 NYCRR §§23-1.5, 23-1.7, 23-2.1, 23-1.30, 23-2.2, 23-2.5, and 23-2.6 and Article 26 of OSHA. However, in opposition to Defendant Commodore's motion, Plaintiff only offers arguments in support of sections 23-1.7[b][1][i] and [e][1] and [2]. Both are sufficiently specific to be actionable (*see Rizzuto v L.A. Wenger Contracting Co., Inc., supra*; *Licata v AB Green Gansevoort, LLC*, 158 AD3d 487, 489 [1st Dept 2018]). By failing to raise any argument in support of the other sections, Plaintiff abandoned reliance on same (*see Murphy v Schimenti Constr. Co., LLC*, 204 AD3d 573 [1st Dept 2022]; *Digirolomo v 160 Madison Ave LLC*, 294 AD3d 640 [1st Dept 2021]; *Kempisty v 246 Spring St., LLC*, 92 AD3d 474 [1st Dept 2012]).

Plaintiff's reliance on section 23-1.7[b][1][i] is misplaced as that section applies to "openings deep enough for a person to fall all the way through" *Favaloro v Port Auth. of N.Y. & N.J.*, supra; *Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002]).

Industrial Code section 23-1.7[e], titled "Tripping and other hazards" provides that:

> [1] Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed 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.

Section 23-1.7[e][1] is applicable only to passageways, but the Industrial Code does not contain a definition of that term (*Prevost v One City Block LLC*, 155 AD3d 531, 535 [1st Dept 2017]). Courts have "'interpreted the term to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area'" (*id., quoting Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1250 [4th Dept 2013]). The Appellate Division, First Department has further observed that "[a] 'passageway' is commonly defined and understood to be 'a typically long narrow way connecting parts of a building' and synonyms include the words corridor or hallway (*Quigley v Port Auth. of N.Y. & N.J.*, 168 A.D.3d 65, 67 [1st Dept 2018], citing Merriam-Webster Online Thesaurus, passageway [https://www.merriam-webster.com/thesaurus/passageway]). Plaintiff testified that that incident occurred in his work area which he described as "a pretty big room" that was "fairly large". As described, the incident location was an open area rather than passageway which renders this section inapplicable (*see Lenard v. 1251 Ams. Assocs.*, 241 AD2d 391, 392 [1st Dept 1997]).

Section 23-1.7[e][2] is broader and apples to "parts of floors, platforms, and similar areas where persons work or pass" and it is apparent that the area where Plaintiff qualifies as a working area. However, this section is ultimately inapplicable as there is no testimony that Plaintiff's accident was caused by "dirt and debris", "scattered tools", "materials" or "sharp projections" (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 147 [1st Dept 2012]; *Rodriguez v BCRE 230 Riverdale, LLC*, 91 AD3d 933, 935 [2d Dept 2012]; *cf. Licata v AB Green Gansevoort, LLC*, 158 AD3d 487, 489 [1st Dept 2018]).

Labor Law §200 and Common Law Negligence

Defendants also seek to dismiss Plaintiff's Labor Law §200 and common-law negligence claims. Labor Law §200 is a codification of the common-law duty of landowners and general contractors, as well as their agents, to provide a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d at 352). "A claim for common-law negligence may lie even though there is no Labor Law § 200 liability" (*Mullins v Ctr. Line Studios*, 194 AD3d 421, 422 [1st Dept 2021]). "Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Cappabianca v Skanska USA Bldg. Inc.*, supra at 143-144 [1st Dept 2012]). Although "[t]hese two categories should be viewed in the disjunctive" (*Ortega v Puccia*, 57 AD3d 54 [2d Dept 2008]), meaning that cases ordinarily fall into one category or another, this principle is not absolute as overlapping conditions frequently arise (*see eg Cackett v Gladden Props., LLC*, 183 AD3d 419, 420-421 [1st Dept 2020]; *Mitchell v Caton on the Park, LLC*, 167 AD3d 865, 867 [2d Dept 2018]). Here, the condition at issue, a hole in the concrete floor of the premises that, by most accounts, should have been covered, presents a seeming combination of the above (*see Favaloro v Port Auth. of N.Y. & N.J.*, supra; *Cackett v Gladden Props., LLC, supra*).

Where the accident is a consequence of a defective condition on a premises "'a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or

constructive notice'" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], *citing Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]). "A contractor may be liable in common-law negligence and under Labor Law § 200 in cases involving an allegedly dangerous premises condition 'only if it had control over the work site and either created the dangerous condition or had actual or constructive notice of it'" (*Doto v Astoria Energy II, LLC*, 129 AD3d 660 [2d Dept 2015], *citing Martinez v City of New York*, 73 AD3d 993, 998 [2d Dept 2010]; *see also Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]). "Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work" (*Cappabianca v Skanska USA Bldg. Inc.*, supra at 144; *see also Prevost v One City Block LLC*, supra [1st Dept 2017]). "A claim for common-law negligence may lie even though there is no Labor Law § 200 liability" (*Mullins v Ctr. Line Studios*, 194 AD3d 421, 422 [1st Dept 2021]). "'[A] subcontractor . . . may be held liable for negligence where the work it performed created the condition that caused the plaintiff's injury even if it did not possess any authority to supervise and control the plaintiff's work or work area'" (*Poracki v St. Mary's Roman Catholic Church*, 82 AD3d 1192, 1195 [2d Dept 2011], *citing Tabickman v Batchelder St. Condominiums by the Bay, LLC*, 52 AD3d 593, 594).

Here, there are issues of fact whether the accident was caused by a dangerous condition at the site (the exposed hole and Defendants' Growth, Structure and 530 notice thereof), the alleged means and methods of Commodore's work in allegedly failing to cover same, or a combination of these two, which precludes dismissal of Plaintiff's Labor Law §200 and common-law negligence causes of action (*see Favaloro v Port Auth. of N.Y. & N.J., supra; Cackett v Gladden Props., LLC, supra*).

Indemnification/Contribution and Insurance

I. Common-Law Indemnification

A claim for common-law indemnity can only be sustained by a non-negligent party whose liability is purely vicarious (*see Broyhill Furniture Indus., Inc. v Hudson Furniture Galleries, LLC,* 61 AD3d 554, 556 [1st Dept 2009]). Contribution is an apportionment of rights among wrongdoers who share responsibility for an injury (*see* CPLR §1401; *Garrett v Holiday Inns, Inc.*, 58 NY2d 253, 258 [1983]). Therefore, a *prima facie* case for dismissal of the indemnification and contribution claims requires the moving party to establish it was not negligent or that the claims are otherwise inviable as a matter of law (*see Higgins v TST 375 Hudson, L.L.C.,* 179 AD3d 508, 511 [1st Dept 2020]; *CONRAIL v Hunts Point Terminal Produce Coop. Ass'n*, 11 AD3d 341, 342 [1st Dept 2004]).

Based on the foregoing deposition testimony, the branches of the motions for dismissal of the claims for common-law indemnification against Growth, Structure, 530 and Commodore fail since they have not demonstrated they were absent negligence as a matter of law (*see eg Hammer v ACC Constr. Corp.,* 193 AD3d 455 [1st Dept 2021]).

Dal's motion for summary judgment dismissing the common-law indemnification and contribution claims of Growth, Structure and 530 was supported by the deposition testimony of Plaintiff and Sansone, an employee of Structure. Salvatore D'Alessio ("D'Alessio"), an employee of Dal Electrical, testified that Dal was retained to perform, among other things, installation of permanent and temporary lighting at the project. D'Alessio averred that was unaware who created the hole at issue nor of any complaints concerning lighting at the project, including the temporary installations. Plaintiff acknowledged that he had no trouble with the lighting conditions in the area just before his accident.

More importantly, Plaintiff averred that he was side-stepping and not looking in the direction he was moving just prior to stepping in the hole. As such, Dal demonstrated that it was not negligent, and that the adequacy of the lighting was not a proximate cause of Plaintiff's accident. The testimony also demonstrated that Dal neither had general control over the work site nor control over Plaintiff's work such that Labor Law §200 was inapplicable to Dal (*see Rodriguez v JMB Architecture, LLC*, 82 AD3d 949 [2d Dept 2011]; *Bell v Bengomo Realty, Inc.*, 36 AD3d 479, 481 [1st Dept 2007]; *Ryder v Mount Loretto Nursing Home Inc.*, 290 AD2d 892 [3rd Dept 2002]). Also absent was the existence of a common-law duty owed to Plaintiff by Dal (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]).

In opposition, Growth, Structure and 530 failed to raise an issue of fact. Plaintiff's testimony that he was "not sure" if illumination caused his fall is, at best, speculation which, in any event, is negated by his admission that he was not looking where he was going (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931 [2007]; *Knickerbocker v Ulster Performing Arts Ctr.*, 74 AD3d 1526 [3d Dept 2010]; *see also Goldberg v Village of Mount Kisco*, 125 AD3d 929 [2d Dept 2015][Plaintiff cannot resort to speculation as to the cause of a fall]). Plaintiff's other testimony that he "sometimes" had problems seeing where he was going did not specifically refer to the time and place of the accident.

Melto argues, pursuant to Workers' Compensation Law §11, that the common law indemnification and contribution claims are not viable since it was Plaintiff's employer, and he did not sustain a grave injury. Melto demonstrated that, within the narrow definition of the Workers' Compensation Law, Plaintiff did not sustain a "grave injury" (*see Castro v United Container Machinery Group*, 96 NY2d 398 [2001]; *Clarke v Empire General Contracting & Painting Corp.*, 189 AD3d 611, 612-613 [1st Dept 2020] *citing Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 417 [2004]). In opposition, no party countered this argument.

II. Contractual Indemnification

A claim for contractual indemnification claim is dependent upon the specific language of the contract (*see Ging v F.J. Sciame Constr. Co., Inc.*, 193 AD3d 415, 418 [1st Dept 2021]; *Anderson v United Parcel* Service, 194 AD3d 675, 678 [2d Dept 2021]). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]; *see also Wai Cheung v 48 Tenants' Corp.*, 192 AD3d 503 [1st Dept 2021]). Further, absent a legal duty to indemnify, an agreement containing that obligation must be strictly construed so as not to create an unintended responsibility (*see eg Tonking v Port Auth.*, 3 NY3d 486, 490 [2004]).

Section 11.2 of the terms and conditions of the three contracts between Structure and subcontractors Dal, Melto and Commodore reads, in pertinent part, as follows:

> To the fullest extent by Law, Subcontractor will Indemnity and hold harmless Structure Tone, LLC, the owner of the project, the owner of the property where the job/project is located, and all parties required to be indemnified by the prime contract entered into by Structure Tone, LLC in connection with the job/project work, and any of their trustees, officers, members, directors, agents, affiliates, parents, subsidiaries, and servants and employees form and against any and all claims, suits, liens, judgments, damages, losses and expenses including reasonable legal fees and costs arising in whole or in part and in any manner from the act, omissions, breach or default of Subcontractor, sub-subcontractors,

its officers, directors, agents, employees and Subcontractors in connection with the performance of any work by subcontractor, its employees and sub-subcontractors pursuant to this Subcontract/Purchase Order or a related Proceed Order. Subcontractor will defend and bear all costs of defending any action or proceeding brought against Structure Tone, LLC, and or Owner, their officers, directors, agents and employees, arising in whole or in part out of any such acts, omission, breach or defaults.

The above contract language obligated these subcontractors to indemnify the covered parties not simply in the case of their negligence, but far more broadly for acts "arising out of or resulting from any work and caused in whole or in part by any act or omission of Subcontractor" (*see Licata v AB Green Gansevoort, LLC*, 158 AD3d 487, 490-491 [1st Dept 2018]).

Since Dal demonstrated, based upon the findings supra, Plaintiff's accident was entirely unrelated to its actions, the claim for contractual indemnification against it fails (*see DeGidio v City of New York*, 176 AD3d 452, 454 [1st Dept 2019]).

Melto's assertion that Plaintiff's fall did not arise out of or result from his work is without merit as; "that obligation was triggered by the claim of plaintiff, an employee of [Melto], for damages for injuries he sustained while performing [Melto's] work" (*see Paulino v Bradhurst Assoc., LLC*, 144 AD3d 430, 431 [1st Dept 2016]; *see also Quiroz v New York Presbyt./Columbia Univ. Med. Ctr.*, 202 AD3d 555 [1st Dept 2022]; *Cackett v Gladden Props., LLC*, 183 AD3d 419 [1st Dept 2020]; *Rudnitsky v Macy's Real Estate, LLC*, 189 AD3d 490 [1st Dept 2020]). Nevertheless, since Growth, Structure and 530 have not demonstrated their freedom from negligence nor that any of these Defendants could not be the sole proximate cause of the accident, compete or conditional summary judgment on their claims for contractual indemnification is not appropriate (*see Pawlicki v 200 Park, L.P.*, 199 AD3d 578, 579 [1st Dept 2021; *Pardo v Bialystoker Ctr. & Bikur Cholim, Inc.*, 10 AD3d 298 [1st Dept 2007]).

Commodore, based upon the Court's findings supra, has not demonstrated Plaintiff's accident did not arise out of its failure to cover the hole at issue or that it was not obligated to perform that task. As such, the branch of its motion for summary judgment dismissing the claims against it for contractual indemnification fail. With respect to the crossclaims of Commodore against Melto for contractual indemnification, the record reveals no applicable indemnification provision and Commodore proffered no opposition to this branch of Melto's motion (*see eg Rivera v 203 Chestnut Realty Corp.*, 173 AD3d 1085, 1087 [2nd Dept 2019]).

III. Breach of Contract for Failure to Procure Insurance

To be entitled to dismissal of Growth, Structure and 530's claims for failure to procure insurance, Commodore, Melto and Dal were required to demonstrate, *prima facie*, that the requisite insurance in accordance with their contracts was obtained (*see eg Georges v Resorts World Casino New York City*, 189 AD3d 1549, 1551 [2d Dept 2020]; *Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]). Defendants Commodore and Melto demonstrated that they obtained the requisite insurance and Growth, Structure and 530 failed to address same in their opposition. Accordingly, these claims against Commodore and Melto were abandoned (*see Norris v Innovative Health Sys., Inc.*, 184 AD3d 471, 473 [1st Dept 2020]). Concerning Dal, it demonstrated its *prima facie* case with production of a certificate of insurance and copy of the insurance policy it obtained (*see Benedetto v Hyatt Corp.*, 203 AD3d 505 [1st Dept 2022]). The that the carrier declined Growth and 530's tender does not raise an issue of fact (*see Arner v RREEF Am., L.L.C.*, 121 AD3d 450 [1st Dept 2014]; *Garcia v A&P*, 231 AD2d

401 [1st Dept 1996]).

Accordingly, it is

ORDERED that the motion (MS# 5) by Plaintiff for summary judgment on his Labor Law §240[1] claim is denied, and it is

ORDERED that the branch of the motion by Defendants Growth, Structure and 530 (MS# 7) and Defendant Commodore (MS # 6) for summary judgment dismissing Plaintiff's Labor Law §240[1], §200 and common-law negligence claims are denied, and it is further

ORDERED that the Plaintiff's cause of action pursuant to Labor Law §241[6] is dismissed as against all Defendants, and it is

ORDERED that the branches of the motions for dismissal of the claims for common-law indemnification against Growth, Structure, 530 and Commodore are denied, and it is

ORDERED that the branches of the motions by Defendant Dal (MS# 3) and Defendant Melto (MS# 4) to dismiss the common-law indemnification and contribution claims against them are granted, and it is

ORDERED that that the branch of the motions by Defendants Melto and Commodore to dismiss the contractual indemnification claims of Growth, Structure and 530 are denied, and it is

ORDERED that the branch of the motion by Defendants Dal to dismiss the contractual indemnification claims of Growth, Structure and 530 is granted, and it is

ORDERED that the branch of the motions by Defendant Melto to dismiss the contractual indemnification claim of Commodore is granted, and it is

ORDERED that the branches of the motions of Defendants Commodore, Melto and Dal to dismiss the claims for breach of contract for failure to procure insurance are granted.

4/5/2023
DATE

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