

Gervasi v FSP 787 Seventh LLC

2023 NY Slip Op 31376(U)

April 24, 2023

Supreme Court, New York County

Docket Number: Index No. 161506/2019

Judge: Richard Latin

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. RICHARD LATIN PART 46V

Justice

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MICHAEL GERVASI,

Plaintiff,

- v -

FSP 787 SEVENTH LLC, FIFTH STREET PROPERTIES,
LLC, SIDLEY AUSTIN LLP, STRUCTURE TONE, LLC,

Defendant.

INDEX NO. 161506/2019

06/21/2022,
06/21/2022,
06/21/2022,

MOTION DATE 06/21/2022

MOTION SEQ. NO. 001 003 004
005

**DECISION + ORDER ON
MOTION**

-----X

FSP 787 SEVENTH LLC, FIFTH STREET PROPERTIES, LLC,
SIDLEY AUSTIN LLP, STRUCTURE TONE, LLC

Plaintiff,

-against-

NEW LAND INTERIORS CORP., EUROTECH
CONSTRUCTION CORP.

Defendant.

Third-Party
Index No. 595771/2020

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 102, 103, 104, 105, 106, 107, 108, 111, 153, 154, 155, 156, 159, 160, 164, 165, 166, 167, 171

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 98, 99, 100, 101, 110, 146, 147, 157, 158, 161, 172, 176, 177

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 112, 113, 114, 115, 116, 117, 144, 145, 148, 149, 150, 151, 152, 162, 173, 179, 180, 181, 182, 183, 184

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 163, 168, 169, 170, 174, 175, 178

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

Upon the foregoing documents, it is ordered that motion sequence numbers 001, 003, 004, and 005, have been consolidated for disposition and are determined as follows:

In motion sequence number 001, plaintiff Michael Gervasi (plaintiff) moves, pursuant to CPLR 3212, for an order granting summary judgment as to Labor Law § 241 (6) against defendants/third party plaintiffs FP 787 Seventh LLC and Structure Tone, LLC (Structure Tone). Plaintiff also moves to dismiss defendants/third-party plaintiffs' affirmative defenses alleging comparative negligence and culpable conduct.

Third-party defendant New Land Interiors (New Land) cross-moves, pursuant to CPLR 3212, for an order granting partial summary judgment as to plaintiff's claim of a violation of Labor Law § 241 (6). New Land also moves, pursuant to CPLR § 3212, for an order granting summary judgment dismissing the third-party claims for indemnification and contribution.

In motion sequence number 003, third-party defendant Eurotech Construction Corp. (Eurotech), moves, pursuant to CPLR 3212, for an order granting summary judgment against defendants/third-party plaintiffs FSP 787 Seventh LLC, Fifth Street Properties, LLC, Sidley Austin LLP, and Structure Tone, dismissing the claims against it for contractual indemnification.

In motion sequence number 004, FSP 787 Seventh LLC, Fifth Street Property i/s/h/a Fifth Street Properties LLC, Sidley Austin LLP, and Structure Tone move, pursuant to CPLR 3211 and 3212, dismissing plaintiff's complaint as to alleged violations of Labor Law §§ 200, 240 (1) and 241 (6). FSP 787 Seventh LLC, Fifth Street Property i/s/h/a Fifth Street Properties LLC, Sidley Austin LLP, and Structure Tone, also move for an order granting summary judgment against New Land and Eurotech for contractual indemnification.

In motion sequence number 005, plaintiff moves, pursuant to CPLR 3025 (b), for an order granting plaintiff leave to amend the complaint to add third-party defendant New Land as a direct

defendant. Plaintiff also moves, pursuant to CPLR 3212, for an order granting summary judgment against New Land as to Labor Law § 200 and dismissing defendant/third-party plaintiffs' affirmative defenses alleging comparative negligence and culpable conduct.

FACTUAL ALLEGATIONS

Plaintiff's deposition

Plaintiff testified that on September 10, 2019, he was injured while working for Eurotech at 787 Seventh Avenue in New York City. Plaintiff believes that the owner of the site was 787 Seventh. Structure Tone was the general contractor for an interior renovation project taking place at the premises. Plaintiff reported to a foreman named "Bernard" and his work partner was Lloyd Stevens (Stevens).

On the date of his accident, Bernard assigned plaintiff to perform sheetrock work with Stevens on the 16th floor of the premises. Plaintiff would cut boards with a razor blade and bring them to Stevens who was attaching the boards to steel framing. Plaintiff did not notice any demolition going on at the time of his accident and was unsure who was the demolition contractor. Plaintiff believes Eurotech was in charge of framing the walls.

At the time of his accident, electricians were located on the 16th floor, but plaintiff was uncertain where they were in location to where his accident took place. Plaintiff also recalls laborers who worked for the general contractor on the floor, but he was unaware of their location at the time of the accident. The room itself in which he was working was about 12 by 14 feet.

Plaintiff's accident occurred when he was walking to a dolly and tripped on a steel pin located in the center of the room with his right foot. Plaintiff maintains that the steel pin extended about a half inch above the concrete. Plaintiff testified that there were pins all over the location and that they blended in color with the ground as they were concrete in color. The pins were shot

into the concrete floor to secure a track. Plaintiff maintains that since renovations were conducted in the area, he guesses that there were existing walls and that when the demolition team removed the track, they did not remove the pins. He maintains that the floor was dirty and that it was hard to tell if the pin was from a former wall track.

Plaintiff testified that laborers were responsible for cleaning the site and sweeping. On the date of his accident plaintiff did not see any laborers cleaning. Plaintiff did not hear of any complaints about the pins prior to his accident and had not made any complaints prior to his accident.

Plaintiff testified that he did not receive any instructions from Structure Tone and that all of his instructions came from Bernard from Eurotech. He maintains that a superintendent would usually walk the site weekly. Plaintiff was not familiar with New Land. Plaintiff did not know when the demolition work was performed or completed at the site or the name of the company which performed the work.

Peter Moloney's deposition

Peter Moloney (Moloney) testified that he works as a superintendent for Structure Tone, a construction company. Moloney's duties include running job sites, meeting with foremen, and coordinating work. Moloney maintains that in 2019, a renovation project was taking place at 787 7th Avenue which involved the 16th and 17th floor of the building. Structure Tone served as the general contractor and was hired by Sidley Austin. New Land was hired by Structure Tone to serve as a subcontractor and conduct demolition work on each floor. The owner of the building at 787 7th Avenue is Commonwealth LLC, which Moloney maintains is the same entity as FSP 787 Seventh, LLC.

Moloney maintains that in August of 2019, all of the walls at the premises except for the core walls were being demolished. New Land had between 15 and 30 workers performing work and had a superintendent named Albert Sala. Moloney maintains that along with himself, Jose Gomez (Gomez) and Mike Stierle (Stierle), who both served as labor foreman, would be on-site. Moloney also testified that Tom Stanke was a project superintendent or assistant superintendent for the project, who was also onsite. Brian Gallagher (Gallagher) was the project manager present at the site on Wednesdays if demolition was being conducted, and would be at the site daily once renovation work was being conducted. Gallagher would walk around and observe work which was conducted the night before. The work would involve walking around the 16th and 17th floors.

Moloney maintains that Gomez and Stierle would clean up each night and ensure that the building's access routes were mopped, cleaned and swept. Moloney testified that they were not responsible for cleaning up all of the debris which was left behind from the demolition as that work was conducted by New Land. Moloney testified that Gomez and Stierle would be observing the work of the demolition team, but would not supervise the work, nor would they control the means and methods of New Land's work.

Moloney testified that Tom Stanke (Stanke), the assistant superintendent for Structure Tone, was onsite every day during the demolition. Stanke had the authority to stop work in the event of a hazardous condition. Moloney maintains that if there was a safety hazard at the site, it would either be stopped or handled appropriately. There was not an occasion when a safety hazard or concern was brought to the attention of New Land.

Regarding the demolition process, Moloney maintains that walls on the floor would be knocked down which were on an aluminum track. The tracks were affixed with pins, which

appeared similar to nails, and which were shot into the floor. The pins were removed with a crowbar or a machine for removing carpeting.

Structure Tone laborers at the job site were to keep the job site clean, pick up debris, throw it out and ensure that the floors were clean of obstructions. Once demolition ended on the 16th floor, someone from Structure Tone would inspect the area to ensure that no pins or tracks were left on the floor. Moloney maintains that it was the responsibility of New Land to remove both metal tracks and the pins during the course of their demolition work. There were times during the course of his walkthroughs on the 16th and 17th floors during the demolition phase when Moloney noticed that New Land failed to remove the pins from the metal track on the floor. On those occasions, he would have one of his workers pull up the pin with a crowbar.

Moloney maintains that Structure Tone hired several subcontractors including electrical, drywall, carpenters, sprinklers and ductwork. Eurotech was a drywall subcontractor, responsible for installing new tracks and pins during the renovation work. Moloney maintains that if anyone saw a pin still in the ground, it may not be from prior demolition. Moloney notes that sometimes pin guns jam and workers shoot the pins to make sure that the gun is functioning. Also, pins may be the result of a track being placed in the wrong location. Moloney did not know if anyone from Eurotech engaged in this practice during the course of renovation work on the 16th or 17th floor.

Eurotech's foreman was Bernard Sheridan (Sheridan) who was at the site every day. Moloney believes that there were about 20 to 25 carpenters onsite in September of 2019. During the course of Eurotech's renovations on the 16th and 17th floors, he was onsite every day and would observe the work to ensure that they were compliant with the design team.

Moloney learned of the subject accident from Sheridan a week after it occurred who told him that a worker had hit a pin and fell, hurting his knee. Moloney reviewed an accident report

and could not tell if the pin was left behind by New Land, or if it was installed by Eurotech. Moloney reviewed a photograph which depicted a pin that was used to hold the metal tracks in place and that looked like an existing pin from New Land's work. New Land was on the 16th floor three weeks before plaintiff's accident. After New Land workers worked on the floor, Structure Tone would walk the floors in the morning.

Jose A. Vizuettes deposition

Jose A. Vizuettes (Vizuettes) testified that he works for Allstate Interior Demolition, which was previously known as New Land. Vizuettes has worked as a foreman for Allstate for six years and with New Land for four years. His job entailed supervising interior demolition.

Vizuettes maintains that his bosses would tell him the job location at which he was to work. Vizuettes recalls a project at 787 7th Avenue and that the work was on the 19th floor. He did not go to the 16th floor for any reason. Vizuettes was the only foreman from New Land working at the subject location. The project lasted for two weeks in August of 2019. He maintains that Structure Tone was the general contractor and that a supervisor from Structure Tone was on-site every day and spoke daily about how and where the work was being conducted.

Vizuettes testified that at the premises, walls and tracks on the floor were taken down by New Land. He was aware that the floor has to be left absolutely clean. If a nail was observed to be protruding, he would have to ensure that the floor was clean and flat. Vizuettes maintains that at the time in which he was conducting demolition work on the 19th floor at 787 7th Avenue, his company was not performing work on other floors simultaneously.

Robert Sheridan's deposition

Sheridan testified that he works at Eurotech as a carpenter. Eurotech's project at 787 Seventh Avenue entailed renovation work and Sheridan served as a foreman. Eurotech would provide tools for the project and personal protective equipment.

Sheridan recalls that in September of 2019, Eurotech was performing drywall and framing work on the 16th floor of 787 Seventh Avenue. Eurotech would have had between 25 and 30 employees on-site. Sheridan was responsible for directing Eurotech employees and would tell them where to work and what tools they would need. Eurotech was performing work via a contract with Structure Tone, the general contractor. Sheridan mainly worked with the site superintendent and the project manager.

Sheridan contends that in September of 2019, the floor of the 16th floor was concrete. He recalls electricians, tin knockers, and fitters working in the same general area as Eurotech employees. Prior to September of 2019, Sheridan was not aware of any complaints regarding the floor on the 16th floor and had not made any complaints himself. He would not receive orders from anyone else before he gave out his orders to workers. Sheridan did not notice anything on the floor.

Sheridan recalls plaintiff told him that he had twisted his knee as a result of getting stuck on a nail which was protruding from the ground. He maintains that the terms "pin" and "nail" can be used interchangeably. Plaintiff told him that he was injured in the area where he and Stevens were working. After learning of the accident, Sheridan filled out an accident report.

Sheridan visited the accident site with plaintiff and a safety officer. Plaintiff told them that the nail which his boot had gotten stuck on had been pulled out. Eurotech worked with this type of nail and it was utilized for shooting down track and nails, however he maintains that the nail

was a different type than the one they utilize. Sheridan believes that the area where plaintiff tripped was an old wall line, and when they pull up old track, nails are sometimes left.

Sheridan was not sure who performed the demolition work on the 16th floor at the project. When Sheridan visited the site, he found protruding nails in other rooms near the accident location. A nail he located was a quarter inch sticking out of the floor. Sheridan recalls that plaintiff told him after the accident that there was a pre-existing piece of track and nail that was sticking out of the floor. Sheridan is not sure if New Land performed demolition work on the 16th floor.

Albert Sala's deposition

Albert Sala (Sala) testified that he is one of the owners, as well as a project manager of Allstate Interior NJ Corp. which also owns New Land. The job in which New Land was working at 787 Seventh Avenue was for interior demolition. The general contractor of the job was Structure Tone. Demolition was taking place on two floors at a time. When Sala was at the site, he would visit the 16th floor every other day.

Sala maintains that the superintendent of Structure Tone would advise New Land when it was time to work on each floor. Sala testified that he does not know when the work on the 16th floor was conducted, but that the last date in which New Land was present was August 9, 2019. On that day, the floor looked clean swept and everything was off of the floor.

When conducting demolition, New Land would remove the tracks on the floor by wedging crowbars underneath the track where it was secured and pop it up. This would remove the nails which held it in the floor. There was a requirement that the laborers were to check to ensure that all of the nails were removed. The foreman would make sure that after the laborer conducts the work, that all the nail heads were removed. After New Land conducted its work at the site, they did not return back to the floor.

Sala testified that Structure Tone did not provide any instructions on how New Land was to conduct its work. Sala maintains that there was a requirement that the floors would have to be left clear of the nails from the floor tracks. He had no recollection of seeing any of the nails left behind at the particular job site.

Sala maintains that plaintiff's accident took place after New Land had left the site. He was not aware of any accident investigation conducted by New Land. He reviewed photographs at his deposition, but was not aware if the nail was recently placed in the ground or was in the ground for a while. He believes that based upon his review of the photograph of the nail, that it was very likely the type of nail which had to be removed from the floor during the demolition of a drywall track.

Sala maintains that a carpet scraper would be utilized to remove pins or they were picked up manually. Sala did not see Eurotech at the site and no other company was allowed on the floor when New Land was conducting demolition.

Motion sequence 005

In motion sequence number 005, plaintiff argues that he should be granted leave to amend the complaint pursuant to CPLR 3025 to name New Land as a direct defendant. Plaintiff contends that New Land is a necessary party who he alleges created the dangerous condition over which plaintiff tripped and fell. Plaintiff argues that New Land has opposed plaintiff's motion for summary judgment against FSP 787 Seventh LLC and Structure Tone and has cross-moved against those defendants for dismissal of the claims for indemnification and contribution. Plaintiff contends that New Land cannot claim any prejudice as a direct defendant in this case as it has fully participated in this litigation as a third-party defendant.

In opposition, New Land contends that plaintiff has had a lengthy period of time to amend his pleadings prior to the filing the Note of Issue and dispositive motion. New Land argues that plaintiff has offered no reasonable excuse for the nearly two-year delay in moving to amend the complaint or submit an affidavit of merit. New Land also contends that it completed its work a month prior to plaintiff's accident, that an issue of fact exists as to whether the pin was pre-existing from demolition or was installed by Eurotech, and that it had no notice of the subject pin.

Here, plaintiff fails to explain the delay in naming New Land as a defendant until after the filing of the Note of Issue and dispositive motions have been made. Plaintiff also fails to submit an affidavit of merit or a proposed amended complaint which sets forth the allegations as against New Land (*see Silver v Equitable Life Assurance Socy.*, 369 [1st Dept 1990] (holding "plaintiffs failed to fulfill the basic prerequisites for leave to amend by supporting their motion with an affidavit of merit and evidentiary proof that can be considered upon a motion for summary judgment."); *Briggs v New York City Transit Auth.*, 132 AD2d 451, 451 [1st Dept 1987] (holding that while a leave is freely given, certain requirements s must be met prior to granting such leave, such as the submission of an affidavit of merit)).

Therefore, the part of plaintiff's motion seeking to amend the complaint to add New Land as a defendant must be denied without prejudice.

Furthermore, to the extent that plaintiff argues that summary judgment must be granted in its favor as against New Land for common law negligence and violations of Labor Law §§ 200 and 241 (6), as discussed above, New Land is a third-party defendant and is not a direct defendant as the motion to amend the complaint has been denied. The complaint does not allege causes of action for common law negligence or a violation of Labor Law § 200 as against New Land. Therefore, the part of plaintiff's motion seeking summary judgment as against New Land

regarding common law negligence or a violation of Labor Law § 200 must also be denied without prejudice.

Motion sequence 001

In motion sequence number 001, plaintiff argues that he is entitled to summary judgment as to his allegation that Labor Law § 241 (6) was violated.

Labor Law § 241 (6) provides, in pertinent part:

"[a]ll contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

* * *

(6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places"

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection for workers and to comply with specific safety rules which have been set forth by the Commissioner of the Department of Labor (*St. Louis v Town of N. Elba*, 16 NY3d 411, 413 [2011]). In order to demonstrate liability pursuant to Labor Law § 241 (6), it must be shown that the defendant violated a specific, applicable regulation of the Industrial Code, rather than a provision containing only generalized requirements (*Nostrom v A.W. Chesterton Co.*, 15 NY3d 502, 507 [2010]).

Plaintiff contends that's FP 787 Seventh LLC, an owner, and Structure Tone, a general contractor, violated Industrial Code section 23-1.7 (e) (2).

Industrial Code section 23-1.7 (e) (2) provides:

“(1) 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) (2) has been held to be sufficiently specific to sustain a cause of action pursuant to Labor Law § 241 (6) (*see Singh v Young Manor, Inc.*, 23 AD3d 249, 249, [1st Dept 2005] (Industrial Code § 23-1.7 [e] [2] is specific to support plaintiffs Labor Law § 241 [6] claim)).

Plaintiff argues that the metal pin on which he tripped, was a sharp projection and not a gradual change in the level of the cement floor. Plaintiff contends that it was a half inch, irregular protrusion jutting out of the ground. Plaintiff contends that the metal pin also constitutes "debris" under 23-1.7 (e) (2) and argues that the fact that the pin was the remains of prior demolition work performed and unrelated to his work is undisputed and was confirmed by witnesses who testified.

In opposition, Eurotech contends that plaintiff's motion for summary judgment pursuant to Labor Law § 241 (6) and based upon a violation of section 23-1.7 (e) (2) of the Industrial Code, must be denied. Eurotech contends that the presence of a pin on the floor was occasional and not an accumulation of dirt and debris and that plaintiff did not notice the alleged pin prior to the incident. Eurotech contends that plaintiff did not make or hear prior complaints concerning the pin, nor did his foreman. Eurotech contends that the photos produced by plaintiff show that the top of the pin was round and flat and not an object jutting out from the rest of the floor's surface.

Also in opposition, defendants/third-party plaintiffs FSP 787 Seventh LLC, Fifth Street Property i/s/h/a Fifth Street Properties LLC, Sidley, and Structure Tone, contend that Industrial Code section 1.7 (e) (2) relates to trip conditions in work areas and that the defect complained of in the instant matter cannot constitute a trip condition as a pin installed in the floor is not dirt, debris, scattered tools, materials, or a sharp projection.

Here, pursuant to the testimony, plaintiff tripped on a sharp projection. Plaintiff testified that the steel pin extended about a half inch above the concrete and that there were pins all over the location. Plaintiff testified that he noticed other pins were in the same line as the pin on which he stepped. Plaintiff specifically testified:

“Q. Did you look for other pins in the floor after your accident?

A. Yes.

Q. Okay. What did you find, then?

A. They were all over the place. They just kind of blended in because, you know, they’re basically concrete color. They’ve been in the floor for God knows how long. So I saw them more frequently then. You know, and I was looking for it at that point.”

NYCEF DOC. NO. 62.

As plaintiff’s testimony indicates, the pin was not a gradual change in the level of the floor but was a distinct object which was sticking out of the floor’s concrete surface. Furthermore, the fact that the pin blended in with the color of the floor would have made it hard to observe for those traversing the area, such as plaintiff (*see Lenard v 1251 Ams. Assoc.*, 241 AD2d 391, 394 [1st Dept 1997] (holding that the door stop being the same color as the floor “made it even more of a tripping hazard than loose dirt, which is also covered by the subject regulation, as it was both difficult to see and more likely to cause someone to trip.”); *see also Mooney v BP/CG Ctr. II, LLC*, 179 AD3d 490, 491 [1st Dept 2020] (holding that a single screw lying on the floor, which did not project from the floor, and was not sharp, was not violative of Industrial Code section 23-1.7 [e] [2])). It is also undisputed from the testimony that the accident took place in an area where workers were working or passing (*see Kaufman v Capital One Bank (USA) N.A.*, 188 AD3d 461, 462 [1st Dept 2020] (holding that pursuant to Industrial Code section 23-1.7 (e) (2), the accident occurred in an area “where persons work or pass”)).

Therefore, as plaintiff has demonstrated that section 23-1.7 (e) (2) of the Industrial Code was violated as the floor on which he was working had a sharp object, which was the proximate cause of his trip and fall, the part of plaintiff's motion seeking summary judgment as against defendants FP 787 Seventh LLC and Structure Tone, LLC pursuant to Labor Law § 241 (6) and predicated on a violation of Industrial Code 23-1.7 (e) (2) must be granted.

Plaintiff also argues that the affirmative defense alleged by defendants regarding comparative negligence and culpable conduct must also be dismissed. In order to dismiss a defendant's affirmative defense alleging comparative negligence, it must be demonstrated that the plaintiff was not at fault for the occurrence of the accident (*see Quintanilla v Mark*, 210 AD3d 713, 714 [2d Dept 2022]).

Plaintiff contends that he testified that the metal pin on which he fell "blended into" the concrete floor due to its similar color and that he did not see the metal pin at any time prior to the accident. Upon further review of the record, the submitted testimony of plaintiff establishes that plaintiff tripped and fell on a pin protruding from the ground while walking at the worksite. There is no indication from the record how, other than walking at the work site, the conduct of plaintiff contributed to his accident.

In opposition, FSP 787 Seventh LLC, Fifth Street Property i/s/h/a Fifth Street Properties LLC, Sidley Austin LLP, and Structure Tone LLC contend that whether plaintiff was comparatively negligent is a question of fact. However, other than speculating that a question of fact exists as to plaintiff's own negligence, these defendants fail to cite to any location in the record or testimony which suggests that plaintiff's personal conduct caused or contributed to his accident (*see Nord v Rice*, 2019 NY Slip Op 31711 (U) (Sup Ct, New

York County, 2019) (holding defendants have failed to present any evidence as to plaintiff's negligence and plaintiff's comparative negligence may be determined in a motion for summary judgment when plaintiff has moved to dismiss defendants' affirmative defense of comparative negligence)).

Therefore, as the defendants fail to meet their burden to demonstrate how plaintiff was negligent in causing himself to trip and fall, the part of plaintiff's motion seeking to dismiss the affirmative defense for comparative negligence and culpable conduct must be granted.

New Land's cross motion

New Land cross-moves for summary judgment. New Land first argues that the violations of the Labor Law as well as section 23-1.7 (e) (2) of the Industrial Code should be dismissed as against it. The court notes that as discussed above, plaintiff does not assert any causes of action against New Land in its complaint as it is not presently a direct defendant. Therefore, this part of New Land's cross-motion must be denied.

New Land also contends that third-party plaintiffs' claims for contractual indemnification must be dismissed because there exists no admissible evidence demonstrating that plaintiff's accident resulted from negligence attributable or arising from the demolition work of New Land. New Land contends that it completed work on the 16th floor of the subject premises on August 9, 2019, one month prior to plaintiff's alleged accident. New Land contends that because it was not negligent, Structure Tone is not entitled to contractual indemnification based upon the language of the subcontract agreement. New Land contends that the indemnification clause of the subcontract agreement between Structure Tone and New Land explicitly limits New Land's obligation

for indemnification to any claims arising from work performed pursuant to the contract and negligent conduct by it or any representative.

Section 11.2 of the subcontract entered into between New Land and Structure Tone states:

“[t]o the fullest extent by Law, Subcontractor will indemnify 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 from and against any and all claims, suits, liens, judgment, damages, losses and expenses including reasonable legal fees and costs arising in whole or in part and in any manner from the acts, omissions, breach or default of Subcontractor, sub-subcontractors, its officers, directors, agents, employees and Subcontractor 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 proceedings brought against Structure Tone, LLC. and or Owner, their offices, directors, agents and employees, arising in whole or in part out of any such acts, omission, breach or defaults.”

NYSCEF DOC. NO. 68, § 11.2.

New Land contends that while negligence is a prerequisite to trigger the indemnification clause in the agreement, there exists no evidence which demonstrates that the subject accident resulted from New Land's negligence. New Land also contends that third-party plaintiffs, cannot show they were free from negligence.

In opposition, Eurotech contends that New Land's cross-motion must be denied. Eurotech contends that New Land's witness did not have personal knowledge of the demolition work performed on the 16th floor during the relevant time period. Eurotech contends that Moloney of Structure Tone testified that New Land was the demolition contractor hired by Structure Tone and

that during walk throughs of the 16th and 17th floors by Structure Tone, Moloney noticed that New Land had failed to remove pins from the floor during demolition.

The Appellate Division, First Department, has held that an intention to indemnify should “ ‘be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances’ ” (*Masciotta v Morse Diesel Intl.*, 303 AD2d 309, 310 [1st Dept 2003], quoting *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). “In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant” (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

As discussed above, the contractual indemnification section of the agreement between Structure Tone and New Land provides that Structure Tone would be indemnified by New Land against “any and all claims, suits, liens, judgment, damages, losses and expenses including reasonable legal fees and costs arising in whole or in part and in any manner from the acts, omissions, breach or default of” New Land. Thus far, it remains unclear if New Land was negligent in conducting demolition work and possibly left the pin on the ground on which plaintiff tripped. There has been no determination whether plaintiff's injury was caused by any wrongful act or omission on the moving defendants' part (*see Pena v Intergate Manhattan LLC*, 194 AD3d 576, 578 [1st Dept 2021] (holding that as no finding has yet been made as to whether defendants/third-party plaintiffs were negligent, the motion was premature)).

As it is unclear if New Land was negligent, an award of summary judgment for contractual indemnification is premature. Therefore, the part of New Land's cross-motion seeking summary judgment dismissing claims for contractual indemnification must be denied.

Motion sequence 003

Eurotech contends that it is entitled to summary judgment regarding the claims for contractual indemnification by FSP 787 Seventh LLC, Fifth Street Properties, LLC, Sidley Austin LLP, and Structure Tone. Eurotech argues that the contract which it entered into with Structure Tone includes an indemnification clause which is not triggered because plaintiff's incident did not arise in whole or in part and in any manner from the acts, omissions, breach or default of Eurotech.

The subcontract between Structure Tone and Eurotech provides in part:

“11.2 To the fullest extent by Law, Subcontractor will indemnify 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 from 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 acts, 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 proceedings 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.”

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Eurotech contends that the testimony establishes that the subject pin was improperly left by New Land during demolition, that it had no responsibilities for demolition of the 16th floor of the premises and had no notice of the pin alleged to have been involved in the accident. Eurotech argues that it had no responsibility to supervise or inspect the work of New Land as did Structure Tone.

In opposition, FSP 787 Seventh LLC and Structure Tone argue that as the accident arose out of Eurotech's failure to observe the work site, the indemnification provisions of the contract between Eurotech and Structure Tone was triggered. FSP 787 Seventh LLC and Structure Tone contend that Eurotech agreed to provide defense and indemnification to defendants/third-party plaintiffs for all work that arose out of the agreement. They argue that there is no dispute that the contract between Eurotech and Structure Tone was in effect on the date of plaintiff's accident and that the indemnification provision of the contract between Structure Tone and Eurotech contained the requisite savings language required by section 5-322.1 of the General Obligation Law.

FSP 787 Seventh LLC and Structure Tone contend that plaintiff was on-site as an employee of Eurotech at the time of the alleged accident, that plaintiff received all supervision from Eurotech's foreman Sheridan, and that plaintiff denies observing steel pins on the subject project prior to the alleged accident. FSP 787 Seventh LLC and Structure Tone contend that neither Eurotech nor plaintiff ever made any complaints regarding the conditions of the floor at the subject project to Structure Tone.

In opposition, New Land contends that the record lacks any admissible evidence that the pin which plaintiff tripped over was left over from demolition work as it completed demolition work on the 16th floor a month prior to the alleged accident. New Land argues that plaintiff waited a week to report the alleged accident and that when his foreman, visited the accident location, plaintiff advised that he had pulled the nail from the ground. New Land contends that while a pin was found two or three rooms away from the accident location, his foreman never saw the nail which plaintiff tripped over and admitted that the type of pin depicted in the photograph is used by Eurotech for tracks to install drywall.

New Land contends that Structure Tone's superintendent Moloney testified that a pin could have been shot in ground to test a drill gun or to resolve an issue with the equipment during new installation. New Land argues that an issue of fact exists as to whether Eurotech had actual or constructive notice of the dangerous condition which caused the alleged accident.

Here, as noted above, the indemnification clause sets forth that Eurotech is to indemnify Structure Tone for its own "acts, omissions, breach or default." It remains undetermined whether Eurotech was negligent in any manner, as it is unclear who left the subject pin and whether Eurotech would have had notice of it, as plaintiff testified that he observed pins all over the area where he fell. Furthermore, Moloney testified that after reviewing an accident report, he could not tell if the pin was left behind by New Land, or if it was installed by Eurotech. Moloney testified that if anyone saw a pin still in the ground, it may not have been from prior demolition, as sometimes guns which place the pins jam and the guns would be shot to ensure that it was working. Also, Moloney testified that the pin could have been the result of being placed in the wrong place and then they would have to pull it up and place it in another location.

Sheridan's testimony is also inconclusive. He testified that Eurotech worked with the type of pin which was similar to that which allegedly caused the accident, and it was utilized for shooting down for the track and nails, however he also testified that it was a similar product, but different than the product which Eurotech utilized.

Upon review of the testimony, it remains unclear whether Eurotech's acts or omissions may have caused or contributed to plaintiff's accident and whether Eurotech could have observed the pin prior to plaintiff's accident. Therefore, Eurotech's motion for summary judgment dismissing the claims for contractual indemnification by FSP 787 Seventh LLC, Fifth Street

Properties, LLC, Sidley Austin LLP, and Structure Tone, LLC, must be denied. *See Pena v Intergate Manhattan LLC*, 194 AD3d at 578.

Motion sequence 004

Defendants/third party plaintiffs FSP 787 Seventh LLC, Fifth Street Property i/s/h/a Fifth Street Properties LLC, Sidley Austin LLP, and Structure Tone, move for an order dismissing plaintiff's claims made pursuant to Labor §§ 240, 200, and 241 (6).

FSP 787 Seventh LLC, Fifth Street Property i/s/h/a Fifth Street Properties LLC, Sidley Austin LLP, and Structure Tone contend that Labor Law § 240 (1) is not applicable as to plaintiff's accident. Labor Law § 240 (1) provides in part:

"[a]ll 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."

The Court of Appeals has held that "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *citing Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). The Appellate Division, First Department, has held that the question as to whether Labor Law § 240 (1) is applicable as to a particular accident is whether "plaintiff's injuries were the direct consequence of a failure to provide adequate protection against harm directly flowing from the application of the force of gravity to an object or person" (*Arnaud*

v 140 Edgcomb LLC, 83 AD3d 507, 508 [1st Dept 2011]; *see also Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013] (“[a]ll that plaintiff was required to establish was that defendants breached their nondelegable duty to furnish or erect, or cause to be furnished or erected, safety devices in a manner that gave him proper protection from gravity-related risks”).

Here, plaintiff’s accident did not involve a fall from a height or the failure of an enumerated safety device. Instead, it is undisputed that plaintiff fell at ground level and an elevation risk was not at issue. In opposition, plaintiff fails to demonstrate how Labor Law § 240 (1) is applicable. Therefore, FSP 787 Seventh LLC, Fifth Street Property i/s/h/a Fifth Street Properties LLC, Sidley Austin LLP, and Structure Tone’s motion dismissing the cause of action for a violation of Labor Law § 240 (1) must be granted. *See Canning v Barneys N.Y.*, 289 AD2d 32, 33 (1st Dept 2001).

FSP 787 Seventh LLC, Fifth Street Property i/s/h/a Fifth Street Properties LLC, Sidley Austin LLP, and Structure Tone contend that the part of plaintiff’s allegation of a violation of Labor Law § 241 (6) predicated on Industrial Code sections 23-1.5; 23-1.7 (d); 23-1.7 (e); 23-1.30; and 23-2.1; must be dismissed. Plaintiff fails to oppose the part of the moving defendants motion seeking to dismiss Industrial Code sections 23-1.5; 23-1.7 (d); 23-1.30; and 23-2.1 and instead, plaintiff only discusses the alleged violations of sections 23-1.7 (e). As plaintiff fails to address Industrial Code sections 23-1.5; 23-1.7 (d); 23-1.30; and 23-2.1, such sections of the Industrial Code have been deemed abandoned and must be dismissed (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] (where plaintiff did not oppose that branch of defendant’s summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned)).

With regard to Industrial Code section 1.7 (e) which discusses tripping hazards, as discussed in motion sequence 001, the court has held above that such section was violated. Therefore, the part of FSP 787 Seventh LLC, Fifth Street Property i/s/h/a Fifth Street Properties LLC, Sidley Austin LLP, and Structure Tone's motion seeking summary judgment dismissing the alleged violation of Industrial Code section 1.7 (e) must be denied.

FSP 787 Seventh LLC, Fifth Street Property i/s/h/a Fifth Street Properties LLC, Sidley Austin LLP, and Structure Tone argue that plaintiff's allegation that Labor Law § 200 was violated must be dismissed.

Labor Law § 200 (1) states, in pertinent part, as follows:

"[a]ll 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"

Structure Tone contends that plaintiff was exclusively supervised by Eurotech and that Eurotech did not advise Structure Tone of any dangerous issues on the site prior to plaintiff's accident. Structure Tone contends that it did not have notice of the presence of the pin which caused plaintiff's accident. Structure Tone maintains that it was its practice that if pins were observed, that either Structure Tone or New Land employees would remove the pins.

Plaintiff does not oppose the part of defendants' motion seeking to dismiss the alleged violation of Labor Law § 200. Therefore, because plaintiff fails to demonstrate that such section of the Labor Law is applicable, the part of plaintiff's complaint alleging that FSP 787 Seventh LLC, Fifth Street Property i/s/h/a Fifth Street Properties LLC, Sidley Austin LLP, and Structure Tone violated Labor Law § 200 is deemed abandoned and must be dismissed.

FSP 787 Seventh LLC, Fifth Street Property i/s/h/a Fifth Street Properties LLC, Sidley Austin LLP, and Structure Tone also contend that summary judgment must be granted as against New Land for contractual indemnification. As discussed above regarding New Land's cross-motion in which it sought summary judgment dismissing the third-party claims against it for contractual indemnification, there has been no conclusive determination by the court as to whether New Land was negligent. Therefore, as it is unclear if the indemnification clause between Structure Tone and New Land has been triggered, an award of summary judgment based upon the moving defendants' contractual liability claim is premature.

With regard to the moving defendants' argument that summary judgment for contractual indemnification as against Eurotech must be granted, as discussed by the court in motion sequence 003, the indemnification clause between Structure Tone and Eurotech states that Eurotech is to indemnify Structure Tone for its own "acts, omissions, breach or default." However, as discussed above, it remains undetermined from the testimony whether Eurotech was negligent. Therefore, as it remains unclear whether Eurotech's acts or omissions caused or contributed to plaintiff's accident, the part of FSP 787 Seventh LLC, Fifth Street Properties, LLC, Sidley Austin LLP, and Structure Tone, LLC's motion for summary judgment for contractual indemnification against Eurotech must be denied.

CONCLUSION and ORDER

Accordingly, it is

ORDERED that plaintiff Michael Gervasi's motion for summary judgment (sequence 001) pursuant to Labor Law § 241 (6) predicated on a violation of Industrial Code section 23-1.7 (e) (2) is granted as well as the part of plaintiff's motion seeking to dismiss defendants' affirmative


defense based upon comparative negligence and culpable conduct which is also granted; and it is further

ORDERED that New Land Interiors Corp.’s cross motion for summary judgment is denied; and it is further

ORDERED that Eurotech Construction Corp.’s motion for summary judgment (sequence 003) is denied; and it is further

ORDERED that the part of FSP 787 Seventh LLC, Fifth Street Property i/s/h/a Fifth Street Properties LLC, Sidley Austin LLP, and Structure Tone LLC motion for summary judgment (sequence 004) dismissing the claims against these defendants for violations of Labor Law §§ 240 (1) and 200, and Industrial Code sections 23-1.5; 23-1.7 (d); 23-1.30; and 23-2.1, is granted; and it is further

ORDERED that plaintiff Michael Gervasi’s motion to amend the complaint and seeking summary judgment as against New Land Interiors Corp. (sequence 005) is denied without prejudice.

<u>4/24/2023</u>					
DATE			RICHARD LATIN, J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	