SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD LATIN** **PART** **46V**

Justice

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HARNEK SINGH,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF GENERAL SERVICES, THE 253 BROADWAY CONDOMINIUM, MIDTOWN HVAC ENTERPRISES LTD, THE URBAN GROUP LTD, ROBINDRANUTH SINGH, 253 BROADWAY ASSOCIATES, MAR-SAL PLUMBING & HEATING, INC.,JLG ARCHITECTURAL PRODUCTS, LLC,GRAHAM ARCHITECTURAL PRODUCTS CORPORATION,

Defendant.

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INDEX NO. 158385/2014

MOTION DATE 08/12/2022, 08/12/2022, 08/12/2022

MOTION SEQ. NO. 010 011 012

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 010) 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 289, 292, 295, 302, 303, 304, 305, 306, 307, 323, 326, 332

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

The following e-filed documents, listed by NYSCEF document number (Motion 011) 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 290, 293, 296, 300, 301, 308, 309, 310, 311, 312, 313, 314, 324, 327, 329, 330, 331, 333, 334, 335

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

The following e-filed documents, listed by NYSCEF document number (Motion 012) 286, 287, 288, 291, 294, 297, 298, 299, 315, 316, 317, 318, 319, 320, 321, 325, 328, 336

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

Upon the foregoing documents, it is ordered that motion sequence numbers 010, 011 and 012 are consolidated for disposition and determined as follows:

This is an action to recover damages for personal injuries allegedly sustained by a construction worker on November 15, 2013, when, while working at a construction site located at 253 Broadway, New York, New York (the Premises), a window's top sash fell onto his hand.[1]

In motion sequence number 010, defendants The Urban Group Ltd (UGL) and Robindranuth Singh (together the Urban defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all crossclaims and counterclaims against them.

In motion sequence number 011, defendant Graham Architectural Products Corporation (Graham) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all crossclaims and counterclaims against it.

In motion sequence number 012, defendant JLG Architectural Products, LLC (JLG) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all crossclaims and counterclaims asserted against it.

BACKGROUND

On the day of the accident, the Premises was owned by defendant City of New York (City). City hired non-party ZHN Contracting Corporation (ZHN) as general contractor for an exterior renovation project at the Premises (the Exterior Project). City also hired UGL as general contractor

[1] By decision and order dated March 3, 2016, default judgment was granted in plaintiff's favor as against defendant The 253 Broadway Condominium.

By decision and order dated May 9, 2017, default judgment was granted in plaintiff's favor as against defendant 253 Broadway Associates.

By decision and order dated January 14, 2022, summary judgment was granted dismissing the complaint and all cross-claims and counterclaims as against defendant Midtown HVAC Enterprises Ltd.

for an interior gut renovation project on the ninth floor of the Premises (the Interior Project). As part of the Exterior Project, ZHN hired JLG to provide new windows for the Premises. JLG purchased the windows from Graham. ZHN also hired non-party Utopia Construction to install the windows as part of the Exterior Project. Plaintiff Harnek Singh was employed by ZHN.

Plaintiff's Testimony

Plaintiff testified that on the day of the accident, he was employed by ZHN. He performed cement work as well as demolition, debris removal, and cleaning as a part of the Exterior Project. At the Premises, he was assigned to clean windows and paint windowsills (plaintiff's tr at 10). His supervisor was "Johar," a ZHN employee (*id.* at 15). Johar assigned plaintiff work and told him how to do that work. He took instruction from no one else. ZHN also provided all his tools and equipment (*id.* at 22). His equipment included work gloves, a harness, and eyewear.

Plaintiff testified that on the day of the accident, he was assigned to clean the exterior portion of the windows on the ninth floor of the premises. Specifically, he would clean each window and then paint each windowsill. The windows were approximately four feet wide and eight feet tall (*id.* at 35).

Immediately before the accident, plaintiff was standing on a rising scaffold outside of the Premises, on the ninth floor. He was in front of a closed window (the Window) (*id.* at 36). The Window had been installed as a part of the Project (*id.* at 86). Both the upper sash and lower sash were fully closed (*id.* at 95).

Through the Window he was able to see into the Premises, where he saw six to seven workers from another company inside (plaintiff's tr at 33). On the day of the accident, plaintiff never saw anyone open any of the windows (plaintiff's second tr at 61). He never tried to open

any window (*id.* at 71). In addition, he was unaware of any issue with the windows (plaintiff's tr at 47).

Immediately before the accident, plaintiff started cleaning the exterior windowsill. He did not need to open the Window to do this work (plaintiff's second tr 38), and he did not try and open the Window (plaintiff's tr at 120). While cleaning the windowsill, the "top portion" – the upper sash – of the Window fell and struck plaintiff's right hand (*id.* at 38).

Plaintiff did not know why the upper sash fell. He initially testified that he did not see anyone standing near the Window when it fell (*id.* at 39), and that he did not see anyone trying to open the Window (*id.* at 38). At his second deposition, plaintiff testified that immediately before the accident, he saw workers "standing very close to the window" (plaintiff's second tr at 85), "trying to open the window" that he was working on (*id.* at 84). He then clarified that he did not actively see anyone try and open the window, he just assumed that "someone might have tried opening it" (*id.* at 85). At his third deposition, plaintiff testified that he did not observe anyone trying to open windows on any floor, except the fifteenth floor (plaintiff's third tr at 35-36). He also testified that he was unaware of whether anyone touched the Window immediately prior to the accident (*id.* at 37, 39), and that he had not looked through the Window for "[m]aybe ten to fifteen minutes" before the accident (*id.* at 38). Plaintiff then reviewed a copy of his 2014 workers compensation deposition transcript and confirmed that he had testified that he witnessed a worker on the inside of the building open the Window (*id.* at 47).

After the accident, the people working inside helped plaintiff through the Window so he could receive medical attention (plaintiff's tr at 46).

Deposition Testimony of Gabriela Bharatlall (UGL's Project Manager)

Gabriela Bharatlall testified that she was UGL's project manager for the Interior Project. UGL was hired by the City to perform the interior gut renovation of the ninth floor of the Premises. UGL was not involved with the exterior renovation of the Premises. Bharatlall's duties included reviewing design specifications and making sure UGL workers are following those specifications correctly. Defendant Robindranuth Singh, UGL's field manager, was also present at the Premises regularly.

Bharatlall testified that UGL workers were present at the premises on the day of the accident (Bharatlall tr at 37). Plaintiff was not employed by UGL or any UGL subcontractor for the Internal Project (*id*. at 58-59). UGL's scope of work did not include the exterior window installation (*id.* at 75-76). The exterior windows were installed prior to UGL beginning work at the Premises (*id.* at 76).

Bharatlall also testified that there was "no reason" for UGL workers to open any windows (*id.* at 64) and that she was informed that no UGL worker opened a window, except to let plaintiff into the building after the accident (*id.* at 64, 79). She was unfamiliar with any issues with the windows (*id.* at 67, 78). As the windows were installed prior to UGL starting work, Bharatlall did not know if they had been inspected. Such inspection would have happened prior to UGL's work (*id.* at 91).

Finally, Bharatlall testified that she did not learn of the accident until receiving notice of claim from UGL's insurance carrier.

Deposition Testimony of Jeffrey Good (JLG's Owner)

Jeffrey Good testified that on the day of the accident, he was the owner of JLG, a window design and engineering contractor. Good's responsibilities include "field measuring," estimations,

and engineering oversight (Good tr at 7). ZHN hired JLG to design and procure windows for the Exterior Project. JLG would then "coordinate with the general contractor and installer of the windows" (*id.* at 13).

JLG contracted with Graham to manufacture the windows for the Project (*id.* at 22). Graham manufactured the windows to specifications determined by JLG. Graham would then have the windows shipped to the Premises, where they would be received by ZHN. ZHN then hired a subcontractor, Utopia, to install the windows (*id.* at 37).

JLG's role at the Premises itself was limited to attending meetings and "address[ing] concerns that were brought up by the architect" (*id.* at 42). If there were any issues with the windows, he would contact William Emley, Graham's field service manager (*id.* at 45).

Good testified that, to his knowledge, Graham performed quality control inspections on the windows at its factory. It would then package them for delivery to the Project (*id.* at 68). JLG did not inspect or test the windows. Rather, the "installer typically would note any deficiencies that would be observed when they offload the window" (*id.* at 68). During window installation – which was complete at the time of the accident – JLG would perform occasional walkthroughs and review installation procedures (*id.* at 46). These walkthroughs were done with the general contractor.

After the accident, JLG was one of the entities that inspected the Window. It was determined that the "sash weight [was] broken at the top sash" and "there were bottom limit stops which were not on" and noted that the Window "could have been an access opening" (*id.* at 59). Good testified that, based on this, he "assume[d]" that "somewhere along the line, somebody removed th[e] sash . . . to gain access to the outside so you have a clear opening" (*id.* at 59). Good prepared notes on these issues. He provided the notes to Graham and ZHN (*id.* at 50).

At his deposition, Good was shown a photograph depicting the Window. He stated that, based on the photograph, which was taken well after the accident, the Window had been altered (*id.* at 75-76). Specifically, "limit stops and sash stops were both removed from this window" (*id.* at 76).

Good further explained that there were two primary issues with the Window. First, the sash weight – or balance – was damaged or disengaged. This can cause a window sash to "drift" or "drop" (*id.* at 90). Second, there would normally be a "stop at the bottom that prevents [a sash] from coming down" (*id.* at 90). Those stops were missing on the subject Window. Good also testified that the Window "wasn't shipped that way" (*id.* at 76). He did not know who altered the Window or when the alteration happened.

Good also testified that it is not uncommon for balances or sashes to have a defect. However, such defects are easy to identify by the window installer. When the installation contractor installs the window, it would be obvious if a component was defective (*id.* at 107 ["when (a window installer) engage(s) the sash . . . you would know right away if it's functional, otherwise (the sash) would drop"]; *id.* at 127).

Deposition Testimony of William Emley (Graham's Field Service Manager)

William Emley testified that on the day of the accident, he was Graham's field service manager for the Exterior Project. Graham was contracted by JLG to fabricate and supply windows for the Project. His duties included receiving contractor complaints regarding Graham windows, and scheduling engineers to travel to job sites to fix issues.

Graham fabricated the windows for the Project. They did not manufacture the balances (*id.* at 60). This fabrication process included installation of balances and stops, which were installed at Graham's factory before being shipped to the customer (*id.* at 20). At the end of

fabrication, Graham inspected the windows before shipping them out (Emley tr at 14). After the windows were shipped, Graham would not perform a further inspection (*id.* at 13).

At his deposition, Emley was shown a copy of a letter on Graham letterhead, dated January 7, 2014 (several months after the subject accident) (the Graham Letter). Emley confirmed that he wrote the Graham Letter in response to a complaint regarding the windows at the Project. He further confirmed that, over the course of approximately one year – from 2013 through 2014, JLG advised Graham of "some complaints" regarding the windows at the Project (*id.* at 22). Specifically, "issues where the sash wouldn't go up and down properly" (*id.* at 23).

When Emley received a complaint, he would send Bob Leifer, a Graham field technician, to the Premises, to inspect the problem and correct it (*id.* at 23-24). Emley believed that, between 2011 and 2014, he sent Leifer to the Premises on at least three or four occasions with respect to window issues.

Emley also testified that the issues reported to him were regularly "the same issues" (*id.* at 29). Specifically, the issues arose because "the sash [had] been removed and not reinstalled correctly or the balances hooked up correctly to the window" (*id.* at 30). These issues were "not a Graham issue" (*id.* at 30).

Emley explained that the Graham Letter noted that Graham had been to the Premises on three occasions for the same issue, often on the same windows (*id.* at 31; 46 [noting that Leifer "went back to a window that he had serviced . . . earlier" for the same issue). He further explained that these issues "would be caused by somebody messing with the windows" after they were installed (*id.* at 44). Later, he testified that he was unsure whether Leifer repaired the same windows multiple times (*id.* at 56).

Emley was unaware of a widespread issue with the windows dropping and not staying open (*id.* at 47). He testified that a situation where a window sash simply falls "could be a balance issue [or] it could be the sash not hooked up correctly to the balance" (*id.* at 51).

Deposition Testimony of Mark Forrester (the City's Project Manager)

Mark Forrester testified that he was the City's project manager and construction manager for the Exterior Project, as well as the construction manager for the Interior Project (Forrester tr at 8). The Exterior Project included the removal and replacement of windows. The Interior Project consisted of a gut renovation of the ninth floor. His responsibilities included general supervision and oversight of both projects (*id.* at 65). He was not regularly present at the Premises. He did not direct any of ZHN's work (*id.* at 86). He had the authority to stop work (*id.* at 89).

The City hired ZHN to serve as a general contractor for the Exterior Project (Forrester tr at 28). The City also hired UGL as the general contractor for the Interior Project (*id.*). The City separately hired non-party Swanke Hayden Connell Architects (Swanke) as the architect for the Exterior Project (*id.* at 38).

Swanke would occasionally perform inspections. Forrester would attend these inspections along with a representative from ZHN. These inspections could include a review of the windows "to make sure the window is installed correctly" (*id.* at 41). In addition, the window installer, Utopia, "would check the window, make sure the window works" right after installing each window (Forrester second tr at 128). Specifically, Utopia would open and close the windows as a part of their inspection (*id.* at 163), and "if the window is defective, they would replace it immediately" (*id.* at 128).

Forrester testified that ninth floor window installation was complete six months prior to the accident (*id.* at 34). Swanke's inspection would have occurred shortly after the installation was complete (*id.* at 36), typically "within a month's time, two weeks, a week" (*id.* at 87).

Forrester was not present at the Premises on the day of the accident. He learned of it shortly after it occurred. He then traveled to the Premises and inspected the Window (Forrester tr. at 104). He found that a "sash was actually loose" (Forrester second tr at 50) and would not stay in place when lifted (*id.* at 52).

Forrester then spoke with his deputy director, Jesus Coombs, and prepared two substantially identical accident reports (Forrester tr. at 105). He did not believe that Coombs witnessed the accident. Forrester "generate[d] the report based on" the information Coombs provided, including Coomb's own report (*id.* at 110), and a photograph taken after the accident (*id.* at 112). The information from Coombs listed three witnesses, each employed by Urban. He also received information from Zhoor, the principal of ZHN (*id.* at 114). The reports were not written until November 18, 2013 – several days after the accident. He confirmed that Zhoor told him that the Window "was opened from a worker on the interior side of the building" (*id.* at 135). He did not personally speak with anyone present at the time of the accident. He did not know whether anyone, in fact, opened the window (*id.* at 158, 176)

Forrester was shown a photograph of the Window taken on an unspecified day after the accident. He confirmed that the Window had a sign on it indicating that it was defective. He believed that he put the sign up (*id.* at 144).

At his first deposition, Forrester testified that he was unaware of any widespread issues with the new windows at the Premises. He was unaware of any issues where windows, including the Window, were out of balance (*id.* at170). He was also unaware of any complaints regarding

the condition of the ninth-floor windows prior to the accident (*id.* at 161). It was only after the accident that any complaint was made (*id.* at 162).

At his second deposition, Forrester testified that he became aware that "over time" there were "some deficiencies in the windows" including that some top sashes "would just drop suddenly" (Forrester second tr at 41). He was aware of these general issues prior to the accident (*id.* at 47). He did not know whether these issues were manufacturing defects, installation defects or issues that arose from improper use after installation (*id.* at 43-45).

Forrester was also shown a handwritten set of notes regarding the Window. He did not know who wrote the notes. He agreed that the note stated that the Window "needed bottom limit stops" (*id.* at 66). He testified that he understood that the bottom limit stops were removed from the Window (and all windows) because "the contractor was directed to remove the stopper, so as to keep the windows in the closed positions. The tenants did not want these windows being opened by the occupants" (*id.* at 67). He specified that the directive to remove the window stops was "from the mayor's office" (*id.* at 69). He did not know when this decision was made. He did not know who physically removed the stops. After the stops were removed, a "general notice" was given to ZHN to refrain from opening the windows (*id.* at 69). The notice "might have been verbal" (*id.* at 69).

The Incident Reports

The ZHN Incident Report

Forrester received an email dated November 17, 2013 from Zahoor Ahmed, ZHN's principal (NYSCEF Doc. No. 306). It provided, in pertinent part, as follows:

> "Two workers of ZHN Contracting were performing exterior window caulking . . . . While cleaning the windows at 9th floor, another worker from Urban Group Construction company . . . opened the wi[n]dow for reasons best known to him. However, the

> window were out of balance, upper sash fell down and struck [plaintiff's] fingers"

(*id.* at 7).

The DDC Incident Report

The DDC incident report (the DDC Report) was prepared by Forrester on November 18, 2013, several days after the accident (NYSCEF Doc. No. 306) and one day after he received ZHN's incident report. It copies the above statement in its entirety (*id.* at 4).

The DDC Report also lists three witnesses, none of whom were deposed.

The Swanke Field Report

A field report, denoted Field Report #103 (the Field Report) was prepared by Swanke on November 27, 2013, twelve days after the accident (Graham's notice of motion, exhibit N; NYSCEF Doc. No. 271). The Field Report notes that its purpose was "Phase 2 window punch-list inspections" on several floors of the Premises, including the ninth floor (*id.* at 2). It indicated that, in total, 25 windows needed some form of repair – 13 of which referenced damaged balances.

The Graham Letter

The Graham Letter, dated January 8, 2014, was prepared by Emley. It refers to a "punch list" (Graham's notice of motion, exhibit U; NYSCEF Doc. No. 278). As relevant, it states:

> "These issues are not Graham's to resolve . . . All the windows had basically the same issues. . . . All of these window sashes have been removed and not re-installed correctly by someone on site. JLG inspected all windows possibly numerous times but at least once and all were functioning properly. . . . This has been the 3rd time we have serviced windows on this job with these same issues"

(*id.*).

DISCUSSION

"[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. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Defendant Robindranauth Singh

The Urban defendants move for summary judgment dismissing the complaint and all cross claims and counterclaims as against Robindranauth Singh – an employee of UGL – in his individual capacity. Plaintiff does not address Robindranauth Singh in his opposition, or otherwise oppose dismissal of the claims as against this employee of UGL.

Accordingly, Robindrinauth Singh is entitled to summary judgment dismissing the complaint and all crossclaims and counter-claims against him.

The Labor Law § 240 (1) Claims (Motion Sequence Numbers 010 and 012)

UGL and JLG move for summary judgment dismissing the Labor Law § 240 (1) claim as against them.[2]

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

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Labor Law § 240 (1) "imposes a nondelegable duty on owners and contractors to provide devices which shall be so constructed, placed and operated as to give proper protection to those individuals performing the work" (*Quiroz v Mememorial Hosp. for Cancer & Allied Diseases*, 202 AD3d 601, 604 [1st Dept 2022] [internal quotation marks and citations omitted]). It "was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co*., 81 NY2d 494, 501 [1993]).

Not all workers who are injured in a gravity related accident at a construction site are protected under Labor Law § 240 (1). Section 240 (1) "does not cover the type of ordinary and usual peril to which a worker is commonly exposed at a construction site" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]; *see also Makarius v Port Auth. of*

[2] It is noted that, in opposition to Graham's motion (motion sequence number 011), plaintiff raises several arguments as to whether Graham is a proper Labor Law defendant. However, a review of the complaint related to Graham (NYSCEF Doc. No. 232) reveals that no Labor Law claims were alleged as against Graham.

N.Y. & N. J., 76 AD3d 805, 807 [1st Dept 2010]). Instead, the absolute liability found therein "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" (*O'Brien v. Port Auth. of N.Y. & N.J.,* 29 NY3d 27, 33 [2017] [internal quotation marks and citation omitted]). In addition, Labor Law § 240 (1) must be construed "liberally so as to accomplish its purpose of protecting workers" (*Greenfield v Macherich Queens Ltd. Partnership,* 3 AD3d 429. 430 (1st Dept 2004).

Therefore, to prevail on a section 240 (1) claim, a plaintiff must establish that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]).

As an initial matter, UGL (the general contractor for the Interior Project) and JLG (the window design and engineering company) argue that they are not proper labor law defendants, such that they may be considered statutorily liable for plaintiff's accident.

UGL's Status

Notably, while UGL is a general contractor at the Project, it was not the general contractor responsible for the installation or maintenance of the Window (Bharatlall tr at 75-76; Forrester tr at 28 [noting windows were installed prior to the interior project's start]). In addition, plaintiff does not claim that he was supervised by UGL or any of its subcontractors.

General contractors who do not control the injury producing work and who do not hire a plaintiff (or his employer) are typically improper defendants for the purposes of the Labor Law and, therefore, are free from statutory liability (*see Ferluckaj v Goldman Sachs & Co.,* 12 NY3d 316, 319 [2009] [holding that "it was Paramount, not Goldman, that hired ABM to do the project on which plaintiff was working when she fell. Plaintiff does not claim that Goldman in fact supervised her work. Goldman therefore has no liability to plaintiff under Labor Law § 240 (1)"]).

In opposition, plaintiff argues that UGL was an agent of the owner for the purposes of the Labor Law because UGL was responsible for painting the interior of the Premises, including areas near windows.

> "When the work giving rise to [the duty to conform to the requirements of Labor Law §§ 240 (1) and 241 (6)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241"

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). Accordingly, for a party to be "vicariously liable as an agent of the property owner for injuries sustained under the statute," it must have "had the ability to control the activity which brought about the injury" as "unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law (*Walls v Turner Constr. Co.,* 4 NY3d 861, 863-864 [2005]).

Here, the accident was caused because the top sash of the Window fell on plaintiff's hand. The record contains no evidence that UGL was responsible for the installation, monitoring or maintenance of the windows at the Premises. To the extent that plaintiff argues that UGL became a statutory agent because it allowed its employees to open the subject Window, such argument does not establish that UGL was given the authority to supervise or control any type of work that would give rise to the duty to conform to the requirements of the Labor Law (*Russin,* 54 NY2d at 317-318). Similarly, UGL's alleged authority to paint near windows does not impart upon it the authority to supervise or control the installation, monitoring or maintenance of those windows such

that it could be considered an agent for the purposes of the Labor Law (*id.*). Rather, plaintiff's argument merely implicates negligence.[3]

Accordingly, plaintiff has not overcome UGL's prima facie showing that it is not a proper Labor Law defendant with respect to plaintiff's accident. Thus, UGL is entitled to dismissal of the Labor Law § 240 (1) claim as against it.

JLG's Status

It is undisputed that JLG is not an owner or general contractor. JLG argues that it is not an agent for the purposes of the Labor Law because its work was limited to obtaining and providing windows for the Project (Good tr at 37-38). It argues that it completed its work six months prior to the accident and maintained only a limited presence at the Project. It further argues that it was never delegated the responsibility for installing or maintaining the windows at the Project (Good tr at 40).

In opposition, plaintiff cites to boilerplate caselaw governing whether a contractor may be considered an agent under the Labor Law. Plaintiff argues that JLG had notice of issues with the windows prior to the accident and, therefore, it was an agent. Whether JLG had notice of a defective condition is not a consideration in determining whether JLG was an agent for the purposes of the Labor Law (*see Russin,* 54 NY2d at 317-318; *Walls,* 4 NY3d at 863-864). Rather, as noted above, to become an agent under the Labor Law, a defendant must have been delegated supervisory control and authority over the injury producing work.

[3] Tellingly, the cases plaintiff appears to cite in support of this position (*Hermina v 2050 Valentine Ave LLC*, 120 AD3d 1131 [1st Dept 2014]; *Radnay v 1036 Park Corp*., 17 AD3d 106 [1st Dept 2005]) do not contain Labor Law claims. Rather, they discuss notice issues with respect to common-law premises liability claims.

Nothing in the record establishes that JLG had been delegated the authority to install, repair, or maintain the windows at the Premises. Similarly, nothing in the record establishes that JLG had any authority to control or supervise ULG's work or plaintiff's work.

Accordingly, JLG is entitled to summary judgment dismissing the Labor Law § 240 (1) claim as against it.

No other parties move for relief on the section 240 (1) claim. Therefore, the court need not address the merits of this claim.

The Labor Law § 241 (6) Claims (Motion Sequence Number 010 and 012)

UGL and JLG move for summary judgment dismissing the Labor Law § 241 (6) claim as against them. As discussed above, UGL and JLG are not proper Labor Law defendants with respect to plaintiff's accident.

Thus, UGL and JLG are entitled to summary judgment dismissing the Labor Law § 241 (6) claims against them.

No other parties move for relief on the section 241 (6) claim. Therefore, the court need not address the merits of this claim.

The Labor Law § 202 Claims (Motion Sequence Number 010)

UGL moves for summary judgment dismissing the Labor Law § 202 claim as against it. A review of the verified complaint and amended verified complaint that pertain to UGL (Graham's notice of motion, exhibits C and D; NYSCEF Doc. No. 260, 261) reveal that no claim alleging violations of Labor Law § 202 has been set forth in the complaint. That said, section 202 is alleged in the bill of particulars.

Labor Law § 202 is entitled "[p]rotection of the public and of persons engaged at window cleaning and cleaning of exterior surfaces of buildings." It provides, in pertinent part

> "The owner, lessee, agent and manager of every public building and every contractor involved shall provide such safe means for the cleaning of the windows and of exterior surfaces of such building as may be required and approved by the board of standards and appeals [now the industrial board of appeals]. The owner, lessee, agent, manager or superintendent of any such public building and every contractor involved shall not require, permit, suffer or allow any window or exterior surface of such building to be cleaned unless such means are provided to enable such work to be done in a safe manner for the prevention of accidents and for the protection of the public and of persons engaged in such work in conformity with the requirements of this chapter and the rules of the board of standards and appeals. . . ."

Section 202 governs window cleaning. It applies to "owners, lessees, agents and managers" as well as "contractors involved with the cleaning of windows and exterior surfaces" (*Williamson v 16 W 57th St. Co.*, 256 AD2d 507, 511 [2d Dept 1998]). It is designed to protect "people who clean windows and exterior surfaces of buildings" (*Bauer v Female Academy of Sacred Heart*, 97 NY2d 445, 451 [2002]), specifically those "workers engaged in high-risk, height-related occupations" (*Williamson,* 256 AD2d at 510).

UGL argues, essentially, that it was not involved with the cleaning of windows and, therefore, it cannot be liable under section 202. In opposition, plaintiff makes an unsupported, conclusory statement that UGL is a statutory agent of the City for the purposes of section 202, and therefore this section must apply to UGL.

Here, there is no evidence establishing that UGL had any form of control over the Window, such that it could be considered a contractor "involved with the cleaning of windows and exterior surfaces" (*Williamson*, 256 AD2d at 510). In addition, there is no evidence showing that UGL had any form of exclusive control over the windows at the Premises. The First Department's decision in *Domaszowec v Residential Mgt. Group LLC*, 135 AD3d 572 (1st Dept 2016) is instructive on this point. In *Domaszowec*, the First Department upheld the trial court's dismissal of the Labor

Law § 202 claims against two defendants "since it is undisputed that they did not have exclusive control of the subject window" (*id.* at 573 [internal citations omitted]).

Given the foregoing, UGL is not an entity enumerated in Labor Law § 202 and did not have any control over the windows or the cleaning thereof. Accordingly, section 202 does not apply to UGL.

Thus, UGL is entitled to dismissal of the Labor Law § 202 violations set forth in the bill of particulars.

The Common-Law Negligence and Labor Law § 200 Claims
(Motion Sequence Numbers 010 and 012)

UGL and JLG move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]).

There are two distinct categories of section 200 cases. The first applies where the accident is the result of the means and methods used by a contractor to do its work. The second applies where the accident is the result of a dangerous condition that is inherent in the premises (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]).

Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless "it actually exercised supervisory control over the injury-producing work" (*Jackson v Hunter Roberts Constr, L.L.C.*, 205 AD3d 542, 543 [1st Dept 2022] [internal quotation marks and citation omitted]; *Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012] ["liability can only be imposed against a party who exercises

actual supervision of the injury-producing work"]). Notably, "[g]eneral supervisory authority is insufficient to constitute supervisory control" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]).

Where "a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a general contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition" (*Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708 [2d Dept 2007]; *Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]). Notably, "[w]here 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]).

Here, plaintiff was injured when the top sash of the Window unexpectedly fell onto his hand. Accordingly, plaintiff's accident was caused by both of the means and methods of the work – i.e. the installation, maintenance and securing of the Window – and a hazardous condition inherent in the Premises – i.e. a broken window sash.

Means and Methods

UGL, the Interior Project general contractor, and JLG, the window design and engineering contractor, argue that they did not have actual supervision or control over the installation or maintenance of the subject Window. A review of the record supports this argument (Bharatlall tr at 75-76 [noting that UGL's scope of work did not include the exterior window installation and that the exterior windows were installed prior to UGL starting work at the Premises]; Good tr at 7 [JLG's work was limited to "field measuring," estimations and engineering oversight]; *id.* at 37

[noting that JLG did not install the windows]; Forrester tr at 128 [noting that non-party Utopia, the window installer, "would check the window, make sure the window works"]). Accordingly, UGL and JLG have established, prima facie, that they did not actually direct or supervise the window installation or maintenance at the Project (*Jackson,* 205 AD3d at 543). Plaintiff does not address the means and methods prong in his opposition papers.

Therefore, UGL and JLG have established that they were not responsible for the means and methods of the work that gave rise to plaintiff's accident.

Hazardous Condition Inherent in the Premises

UGL

UGL argues that it did not create the hazardous condition that caused plaintiff's accident (i.e. the broken sash balance in the Window that caused it to fall). This is uncontested. UGL also argues that it did not have any notice – actual or constructive – of any problems with the windows.

In support of this position, UGL notes that it was not a part of the Exterior Project and, therefore, was not responsible for the installation, inspection or maintenance of the windows. It also notes that the record is devoid of any evidence supporting that UGL had any form of notice of any condition with respect to the window.

In opposition, plaintiff argues that UGL had notice because there was "a general awareness" of window sash balance problems throughout the 15 floors of the Premises (plaintiff's affirmation in opposition, ¶ 46). That said, plaintiff fails to identify when or how UGL would have obtained notice regarding the exterior window conditions.

Specifically, while plaintiff's counsel argues that window issue were "discussed at safety meetings which were attended by [UGL]" (plaintiff's affirmation in opposition, ¶ 46), there is no evidence in the record that UGL attended any safety meetings regarding the Exterior Project or

otherwise discussed the status of the exterior windows at the Project. In addition, Forrester, the City's witness, testified that there were regular progress meetings with ZHN and JLG where issues about windows could have been raised (Forrester second tr at 138-139), but he could not remember informing UGL of any window issues (Forrester second tr at 69).[4] Further, Bharatlall – UGL's witness – testified that she was unaware of any window issues (Bharatlall tr at 67, 78).[5]

Given the foregoing, there is no evidence in the record that create a question of fact as to whether UGL had actual or constructive notice of a hazardous condition in the windows at the Premises.

Thus, as it cannot be liable under a means and methods analysis or a hazardous condition analysis, ULG is entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against it.

JLG

JLG argues that it also did not create the hazardous condition that caused plaintiff's accident. This argument is uncontested. JLG also argues that it did not have any actual or constructive notice of any hazardous condition with the windows at the Premises (*see* Good tr at 106 [stating he did not recall receiving complaints or notices regarding window deficiencies prior to the accident]).

[4] Plaintiff also argues that Forrester testified at his second deposition that warning signs about the windows were posted at the job site prior to the accident. Plaintiff refers to Forrester's second deposition transcript at page 62. Forrester's testimony does not support this assertion.

[5] It should also be noted that much of the testimony elicited in this action is based on witness reviews of a series of photographs that purport to depict the Window. These photographs were taken several days or weeks after plaintiff's accident. Accordingly, to the extent that plaintiff argues that these photographs are probative of the condition of the Window on the day of the accident, they are not.

That said, a question of fact remains as to whether JLG had notice of the window conditions at the Premises. Emley – Graham's witness – testified that in January 2014, he prepared the Graham Letter regarding window repair work at the Premises. He also testified that JLG had informed Graham of complaints "where the sash wouldn't go up or down properly" "a year prior to [Emley] writing the letter" (Emley tr at 22-23) – i.e. in early 2013, prior to the accident. Accordingly, there is conflicting testimony as to whether JLG had constructive notice of hazardous conditions with the windows at the Premises prior to the accident.

JLG further argues that, as a matter of law, it cannot be found to have had constructive notice of the Window's specific hazardous condition because a "general awareness of a recurring problem is insufficient, without more, to establish constructive notice of the particular condition that caused the accident" (*Gurley v Rochdale Vil., Inc.*, 137 AD3d 749, 750 [2d Dept 2016]; *see also Solazzo v New York City Tr. Auth.,* 6 NY3d 734, 735 [2005]). However, where there is testimony regarding specific complaints of general window problems that predate the accident, constructive notice of a window issue may, nevertheless, exist (*see Candela v New York City Sch. Constr. Auth.*, 97 Ad3d 507, 511 [1st Dept 2012]; *Butnik v Luna Park Housing Corp.,* 200 AD3d 1013, 1013 [2d Dept 2021]).

Accordingly, JLG has failed to meet its prima facie burden that it did not have constructive notice of the hazardous condition. Therefore, it is not entitled to summary judgment on this issue.

The Contractual Indemnification Crossclaims Against UGL (Motion Sequence Number 010)

UGL moves for summary judgment dismissing the contractual indemnification cross claims of the City and co-defendant New York City Department of General Services (NYCDGS).

"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'" (*Drzewinski* v *Atlantic Scaffold & Ladder Co.,* 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co*., 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J*., 3 NY3d 486, 490 [2004]).

"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" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *see also Lexington Ins. Co. v Kiska Dev. Group LLC,* 182 AD3d 462, 464 [1st Dept 2020][denying summary judgment where indemnitee "has not established that it was free from negligence"]).

Additional Facts Related to this Issue

The City and UGL entered into a contract for the Interior Project on September 25, 2013. It contains an indemnification provision that provides, in pertinent part, the following:

> "To the fullest extent permitted by law, [UGL] shall indemnify, defend and hold the City, its employees and agents harmless against any and all claims . . . allegedly arising out of or in any way related to the operations of the Contractor . . . in the performance of this Contract . . . ."

(UGL's notice of motion, exhibit BB, Art. 7.4).

UGL argues that this provision does not trigger or apply to plaintiff's accident, because the accident did not arise out of the UGL's performance of its contract with the City. The City does not oppose UGL's motion.

Accordingly, UGL is entitled to summary judgment dismissing the contractual indemnification counterclaims against it.

The Contribution and Common-Law Indemnification Claims Against UGL (Motion Sequence Number 010)

UGL moves for summary judgment dismissing the contribution and common-law indemnification claims against it.

> "To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'"

(*Perri v Gilbert Johnson Enters., Ltd.,* 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.,* 259 AD2d 60, 65 [1st Dept 1999]; *McCarthy v Turner Const., Inc.*, 17 NY3d 369, 378 [2011] ["[l]iability for indemnification may only be imposed against those parties (i.e., indemnitors) who exercise actual supervision"]).

Similarly, contribution is available only "where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003] [internal quotation marks and citations omitted]).

Here, as discussed above, UGL was not negligent with respect to plaintiff's accident. Accordingly, as it was not guilty of some negligence with respect to plaintiff's accident, UGL is entitled to summary judgment dismissing the contribution and common-law indemnification claims against it.

The Breach of Contract for the Failure to Procure Insurance Claims against UGL (Motion Sequence Number 010)

UGL moves for summary judgment dismissing the City and NYCDGS's breach of contract for the failure to procure insurance claims against it. In support it provides a copy of its policy endorsements for the Project. The City and NYCDGS do not oppose dismissal of this claim.

Accordingly, UGL is entitled to summary judgment dismissing the City and NYCDGS's breach of contract for the failure to procure insurance claims as against it.

The Cross Claims Against JLG (Motion Sequence Number 012)

While JLG seeks dismissal of all cross claims against it, it only addresses claims sounding in common-law indemnity and contribution. As discussed above, questions of fact remain regarding whether JLG may be negligent with respect to plaintiff's accident. Accordingly, questions of fact remain as to whether JLG may owe common-law indemnification and/or contribution to the co-defendants (*Perri,* 14 AD3d at 684-685).

As JLG does not address any other cross claims against it, JLG is not entitled to summary judgment dismissing the cross claims against it.

The Strict Products Liability Claim against Graham (Motion Sequence Number 011)

Graham moves for summary judgment dismissing the strict products liability claims against it.[6]

> "[A] manufacturer of a defective product is liable for injuries caused by the defect. . . . [A] product has a defect that renders the manufacturer liable for the resulting injuries if it: (1) contains a manufacturing flaw; (2) is defectively designed; or (3) is not accompanied by adequate warnings for the use of the product"

(*Matter of New York City Asbestos Litig.*, 27 NY3d 765, 786-787 [2016] [internal quotation marks and citations omitted]).

[6] Graham also argues that the City failed to properly respond to Graham's statement of material facts as required by 22 NYCRR 202.8-g and therefore those statements should be deemed admitted. However, section 202.8-g was modified, with an effective date of July 1, 2022 – the same day the City filed its opposition papers. The current version allows that a court "may" deem any purported material fact that is not properly responded to as admitted (*id.* subsection [c]). The court declines to do so as "blind adherence to the procedure set forth in 22 NYCRR 202.8-g [is] not mandated" (*On the Water Prods., LLC v Glynos,* 211 AD3d 1480, 1481 [4th Dept 2022] [internal quotation marks and citation omitted]).

Defective Design or Manufacturing

> "A defectively designed product is one that is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use. To recover for injuries caused by a defective product, the defect must have been a substantial factor in causing the injury, and the product must have been used for the purpose and in the manner normally intended or in a manner reasonably foreseeable"

(*Hartnett v Chanel, Inc.*, 97 AD3d 416, 419 [1st Dept 2012] [internal quotation marks and citations omitted).

Initially, Graham makes several arguments regarding post sale modifications. Specifically, it argues that there is evidence that the windows at the Premises were tampered with after manufacture (*see* the Graham Letter [Graham's notice of motion, exhibit U; NYSCEF Doc. No. 278] [noting that the damaged window balances were the result of window sashes being "removed and not re-installed correctly by someone on site"]; Forrester tr at 67-69 [the "mayor's office" directed contractors to "remove" window components "so as to keep the windows in the closed positions"]). It argues that such tampering, as a matter of law, would prevent any finding of liability under strict products liability or negligence.

> "'[A] manufacturer of a product may not be cast in damages, either on a strict products liability or negligence cause of action, where, after the product leaves the possession and control of the manufacturer, there is a subsequent modification which substantially alters the product and is the proximate cause of plaintiff's injuries'"

Bauerlein v Salvation Army, 74 AD3d 851, 854 [2d Dept 2010], quoting *Robinson v Reed–Prentice Div. of Package Mach. Co.,* 49 NY2d 471, 475 [1980]; *Liriano v Hobart Corp.*, 92 NY2d 232 [1998]).

That said, a defendant moving for summary judgment based on post-manufacturing modification grounds "must make the same showing required to prevail on any design defect

claim: that the product was not defective at the time it was manufactured and sold. Once this threshold showing has been made, the defendant must demonstrate that a post-sale modification rendered the otherwise safe product defective" (*Hoover v New Holland N. Am., Inc.*, 23 NY3d 41, 56 [2014] [internal quotation marks and citations omitted).

Notably, the record is devoid of any information establishing whether the windows were (or were not) defectively designed or manufactured – indeed, there is no expert testimony from any party regarding the windows design or manufacture. Graham's reliance on Emley's testimony that windows typically were inspected at the end of manufacture, prior to shipment, (Emley tr at 14) is insufficient to establish that the windows were, in fact, inspected. Emley was not present for, and had no personal knowledge of, the inspections. Good's testimony that a defect would have been noticeable by the window installer is probative, but insufficient to establish as a matter of law that there was no defect (especially considering that Good himself did not testify on behalf of the window installers). At best this creates a question for the jury.

Next, in its reply papers, Graham supplies a copy of a "Product Line Inspection Report" that purports to be for the Project's windows (the Inspection Report) (Graham's reply aff, exhibit B; NYSCEF Doc. No. 335). The Inspection Report is not accompanied by an affidavit of a person with personal knowledge of the inspections (or any affidavit) attesting to its authenticity or describing its contents, making its value on this motion extremely limited, especially considering that the Inspection Report was submitted for the first time in Graham's reply papers (*see Citimortgage, Inc. v Espinal*, 134 AD3d 876, 879 [2d Dept 2015] ["a party moving for summary judgement cannot meet its prima facie burden by submitting evidence for the first time in reply"]).

Given the foregoing, Graham has failed to come forward with sufficient evidence showing that the subject windows, as a matter of law, were not defective when they were manufactured.

Absent this threshold factor, the court cannot determine whether a subsequent modification was the proximate cause of plaintiff's injuries (*Hoover,* 23 NY3d at 56).

Accordingly, Graham has failed to establish its prima facie entitlement to summary judgment dismissing the strict product liability claims predicated upon a design or manufacturing defect against it.

Failure to Warn

"A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known" (*Liriano v Hobart Corp.*, 92 NY2d 232, 237 [1998]). However, a manufacturer "is not liable for injuries caused by substantial alterations to the product by a third party that render the product defective or unsafe. Where, however, a product is purposefully manufactured to permit its use without a safety feature, a plaintiff may recover for injuries suffered as a result of removing the safety feature" (*id.* at 238 [internal quotation marks and citations omitted]).

That said, Graham's argument is limited to pointing to plaintiff's purported failures of proof. It cannot meet its burden on summary judgment based solely on such an argument (*Vasquez v Ridge Tool Pattern Co.*, 205 AD3d 657, 661 [1st Dept 2022] ["point[ing] to gaps in plaintiff's proof" is "insufficient to meet [movant's] initial burden" on summary judgment]). Accordingly, Graham is not entitled to summary judgment dismissing this claim.

Plaintiff's Common-law Negligence Claim Against Graham (Motion Sequence Number 011)

Graham moves for summary judgment dismissing plaintiff's common-law negligence claim against it.

As an initial matter, Graham argues that the windows were not inherently dangerous. However, as discussed above, Graham has not established that the windows were not defective

when designed or manufactured. Accordingly, Graham has not established that the windows were not inherently dangerous, such that Graham could not be liable for plaintiff's injuries.

Next, Graham argues that it did not create or have actual or constructive notice of a defective condition. Again, as Graham has not established, as a matter of law, that the windows were not defective when they were designed or manufactured, then a question of fact remains as to whether Graham "created" the hazard that allegedly caused plaintiff's accident.

Graham's arguments otherwise point only to plaintiff's purported failures of proof. As discussed above, this is insufficient evidence to meet Graham's initial burden on summary judgment (*Vasquez,* 205 AD3d at 661 [1st Dept 2022].

Thus, Graham is not entitled to summary judgment dismissing plaintiff's common-law negligence claims against it.

Plaintiff's Breach of Warranty Claim Against Graham (Motion Sequence Number 011)

Graham moves for summary judgment dismissing plaintiff's breach of warranty claim against it. It argues that the warranty for the Windows lapsed in August of 2013 while the accident occurred in November of 2013 (Warranty, annexed to Graham's notice of motion, exhibit V). No party opposes this branch of Graham's motion.

Accordingly, Graham is entitled to summary judgment dismissing the breach of warranty claim as against it.

Plaintiff's Breach of Implied Warranty Claims Against Graham (Motion Sequence Number 011)

Graham moves for summary judgment dismissing the breach of implied warranty of merchantability and fitness claims as against it.

Graham argues that there is no implied warranty towards plaintiff as he was not in privity with Graham (*see Arthur Jaffee Assoc. v Bilsco Auto Serv., Inc.,* 58 NY2d 993, 995 [1983] ["there

being no privity between the purchaser and the defendant there can be no implied warranty"]). Importantly, no party raises an argument in opposition to this portion of Graham's motion. Accordingly, Graham is entitled to summary judgment dismissing the breach of implied warranty claims against it.

Plaintiff's Uniform Commercial Code Claims Against Graham (Motion Sequence Number 011)

Graham moves for summary judgment dismissing plaintiff's claims sounding in violations of Uniform Commercial Code (UCC) sections 2-313, 2-314 and 2-315.

Section 2-313 governs express warranties by affirmation or promise. It states that "any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." Graham argues that plaintiff has not identified any affirmation or promise that would apply to this action. In opposition, no party identifies any such statement that would apply under section 2-313. Accordingly, Graham is entitled to summary judgment dismissing said claim.

Section 2-314 and 2-315 are codifications of the implied warranty of merchantability and fitness. As discussed above, it does not apply to plaintiff. Further, as Graham notes, its own contract explicitly excludes "all other warranties and liabilities express or implied in law or in fact, including the warranties of merchantability and fitness" (Graham's notice of motion, exhibit X, p 3). Accordingly, Graham is entitled to summary judgment dismissing these claims.

The Cross claims and Counterclaims against Graham (Motion Sequence Number 011)

Graham moves for summary judgment dismissing all crossclaims and counterclaims against it. Graham does not specifically identify any specific claims against it, or explicitly argue in support of dismissal.

In any event, Graham would not be entitled to summary judgment dismissing any contribution or common-law indemnification claims alleged against it as questions of fact remain as to whether Graham was negligent or otherwise contributed to plaintiff's accident (*see e.g. Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]; *Spielmann v 170 Broadway NYC LP,* 187 AD3d 492, 494 [1st Dept 2020]).

The parties remaining arguments have been considered and were unavailing.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion of defendants The Urban Group Ltd and Robindranuth Singh (motion sequence number 010), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all counterclaims and cross claims against them is granted and the complaint is dismissed as against them, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion of defendant Graham Architectural Products Corporation (motion sequence number 011), pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it is granted to the extent that the causes of action sounding in Breach of Warranty, Breach of Implied Warranty and violations of the Uniform Commercial Code are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the motion of defendant JLG Architectural Products, LLC (motion sequence number 012), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all counterclaims and cross claims against it is granted to the extent that the Labor Law §§ 240 (1) and 241 (6) claims against it are dismissed, and the motion is otherwise denied; and it is further

ORDERED that defendants The Urban Group LTd and Robindranuth Singh shall serve a copy of this order, together with notice of entry, on all parties within 30 days of the date of entry of this order on NYSCEF; and it is further

ORDERED that the parties shall appear for a settlement conference via Microsoft Teams on July 18, 2023 at 11AM;

This constitutes the decision and order of the Court.

6/22/2023
DATE

RICHARD LATIN, 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