At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 9th day of June, 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

----------X

RAFAEL ACOSTA,

Plaintiff,

-against-

74 ELDERT REALTY LLC and LIBERTY ONE CONSTRUCTION LLC,

Defendants.

----------X

LIBERTY ONE CONSTRUCTION LLC,

Third-Party Plaintiff,

-against-

S.B.S. TILES, INC.,

Third-Party Defendant.

----------X

74 ELDERT REALTY LLC,

Second Third-Party Plaintiff,

-against-

S.B.S. TILES, INC. and FULL TAPING CONSTRUCTION CORP.,

Second Third-Party Defendants.

----------X

Index No.: 520803/18
Motion Seq. 7, 8

ORDER

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion/Affidavits Annexed	191-192, 204, 210-211, 223
Opposing Affidavits (Affirmations)	234, 240, 247, 250, 253
Affidavits/ Affirmations in Reply	265

Upon the foregoing papers, defendant/third-party plaintiff Liberty One Construction, LLC, (Liberty One) moves (Motion Seq. 7) for an order, pursuant to CPLR § 3212, granting it: (1) summary judgment dismissing plaintiff Rafael Acosta's common-law negligence and Labor Law § 200 causes of action as against it and dismissing all cross claims against it; and (2) summary judgment in its favor on its

third-party claims for contractual indemnification against third-party defendant S.B.S. Tiles, Inc. (SBS Tiles). Defendant/second third-party plaintiff 74 Eldert Realty LLC (74 Eldert) moves (Motion Seq. 8) for an order, pursuant to CPLR 3212, granting it: (1) summary judgment dismissing plaintiff Rafael Acosta's common-law negligence and Labor Law § 200 causes of action as against it and dismissing all cross claims and counterclaims against it; and (2) summary judgment in its favor on its first, second and third cross claims against Liberty One; and (3) summary judgment in its favor on its second and third causes of action in the second third-party action.

In this matter, Plaintiff pleads causes of action premised on common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6) based on injuries he alleges he suffered as a result of an accident that occurred on September 12, 2018, while he was applying compound to the 11 foot tall ceiling of a room in a building that was being renovated at 74 Eldert Lane Brooklyn, New York (Project Building). Plaintiff alleges that while wearing five foot tall stilts, the buckle on the left stilt broke and the stilt then slid, causing him to fall to the ground. In March 2017, 74 Eldert, the owner of the Project Building, hired Liberty One to act as the general contractor for the renovation of the Project Building and Liberty One thereafter hired SBS Tile to perform framing, drywall installation, taping and painting. In its contract with Liberty One, SBS Tile also agreed to keep the workplace clean and safe, and it agreed that it would remove all debris - except for heavy debris - throughout the construction process for the work of each of the trades. SBS Tile, in turn, hired second third-party defendant Full Taping Construction Corp. (Full Taping) to perform the drywall taping. Plaintiff was employed by Full Taping as a drywall taper.

Plaintiff testified on March 3, 2020 at his deposition that when he arrived in the room at issue on the morning of the accident, he noticed that the floor of the room was dirty, and that there were pieces of sheetrock, metal, crud, dust, plaster and other debris strewn on the floor. Prior to putting on his stilts, he cleaned the area where he was putting on his stilts. Once on his stilts, he stated that he started applying compound to the ceiling above his head and worked his way from the rear of the room to the front of the room, a distance of approximately 25 to 30 feet. Plaintiff testified that as he was working, he noticed a lot of crud, gunk, dust, and plaster was still on the floor and complained to Javier, a Full Taping supervisor, who cleaned a portion of the floor along where plaintiff was walking. Plaintiff also testified that he did not specifically ask anyone to clean the area where he fell, and he was not sure if Javier had cleared the area where the accident occurred. Just before the accident, plaintiff stated that he heard something crack, felt his left foot come loose and the left stilt slide towards his left, at which point he fell to the ground. While lying on the ground, he observed that a buckle attached to the strap that affixes the rear of his foot to the stilt platform of the left stilt was broken and that the floor was covered with damp plaster, dust, and clay. Plaintiff also stated that the clay or mud like substance resulted from some of the compound he was applying to the ceiling fell to the ground and mixed with the dust.

Plaintiff, however, testified somewhat differently with respect to the mud condition at his continued deposition on September 10, 2020. In his testimony on that date, plaintiff denied spilling any compound onto the floor. Rather, he asserted that the compound was white, the mud was like a coffee-colored brown, and that the dust and dirt on the floor had become muddy as the result of humidity. Plaintiff also stated that while Javier had cleaned a portion of the floor, he did not clean it well, and the dirt remained covering the entire floor of the room. Plaintiff also testified that in his belief, the dirt on the floor contributed to his accident and that if not for the floor being slippery and humid and also for his buckle breaking, if he would have slipped, he would have been able to return it to its normal position. Finally, plaintiff noted that the pieces of sheetrock mixed in with the debris looked like new pieces of sheetrock.

Prior to defendants' instant motions, plaintiff moved for partial summary judgment in his favor with respect to liability on his Labor Law §§ 240 (1) and 241 (6) causes of action. In an order dated July 13, 2021, this court denied the motion finding, with respect to the section 240 (1) cause of action, that there were factual issues as to whether the breaking of the buckle was a proximate cause of plaintiff's fall. With respect to the portion of the section 241 (6) cause of action premised on violations of Industrial Code (12 NYCRR) § 23-1.7 (d) and (e) (2), the court found that there were factual issues "as to whether the debris on the floor was of the statutorily prohibited variety, or a build up of substances that naturally resulted during the course of plaintiff's task of applying compound and tape to the wall" and as to whether the buckle broke because the stilt was worn or "as a consequence of the stilt slipping due to the condition of the floor on which plaintiff was walking."

"Labor Law § 200 is a codification of the common-law duty imposed on property owners, contractors, and their agents to provide construction site workers with a safe place to work" (*Sanchez v BBL Constr. Servs., LLC*, 202 AD3d 847, 849 [2d Dept 2022]; *see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]). When common-law negligence and Labor Law § 200 claims arise out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged with liability had the authority to supervise or control the performance of the work (*see Rizzuto*, 91 NY2d at 352; *Hart v Commack Hotel, LLC*, 85 AD3d 1117, 1118 [2d Dept 2011]). Where a premises condition is at issue, property owners and general contractors may be held liable under common-law negligence and for a violation of Labor Law § 200 if they had control over the worksite and they either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*see Marquez v L&M Dev. Partners, Inc.*, 141 AD3d 694, 698 [2d Dept 2016]; *Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dept 2014]; *Bauman v Town of Islip*, 120 AD3d 603, 605 [2d Dept 2014]).

Plaintiff, in his memoranda of law submitted in opposition to defendants' respective motions, concedes that 74 Eldert and Liberty One did not supervise or control plaintiff's work, and that there is thus no basis for holding 74 Eldert and Liberty One liable under a means and method theory of liability. Nevertheless, plaintiff still contends that there are factual issues with respect to whether defendants may be held liable under the dangerous property condition theory of liability that preclude granting defendants' motions in this respect. Plaintiff argues that based on the July 13, 2021 order denying his motion due to issues of fact as to whether the debris on the floor "was of the statutorily prohibited variety, or a buildup of substances that naturally resulted during the course of applying compound and tape to the wall' that this finding constitutes law of the case and may have a preclusive effect on Liberty One because they had a full and fair opportunity to litigate the issues of how the debris accumulated and the court ultimately found that there are issues of fact as to whether it was the result of the means and methods of plaintiff's work.

Contrary to plaintiff's arguments, the court does not find that the July 13, 2021 order denying plaintiff's motion due to issues of fact as to whether "debris on the floor was of the statutorily prohibited variety, or a buildup of substances that naturally resulted during the course of applying compound and tape to the wall" is the kind of finding on the merits that is binding for purposes of law of the case (*see Matter of Timperio v Bronx-Lebanon Hosp.*, 203 AD3d 179, 184 [3d Dept 2022], *lv granted* 39 NY3d 910 [2023] and ___ NY3d ___, 2023 NY Slip Op 63730 [2023]; *Zebzda v Hudson St., LLC*, 156 AD3d 851, 852 [2d Dept 2017]; *Zook v Hartford Acc. & Indem. Co.*, 64 AD2d 701, 702 [2d Dept 1978]; *see also Sunshine v Berger*, 214 AD3d 1020, 1021-1022 [2d Dept 2023]; *Delgado v City of New York*, 144 AD3d 46, 50 n1 [1st Dept 2016]). The doctrine of the law of the case seeks to prevent re-litigation of issues of law that have already been determined at an earlier stage of the proceeding (*Sunshine* at 1021; *Bank of New York Mellon v Singh,* 205 A.D.3d 866 [2d Dept. 2022]). However, a summary judgment motion presents a snapshot of the proof at a moment in time, and the denial of such a motion establishes nothing except that summary judgment is not warranted at that time and does not constitute an adjudication on the merits *(Metropolitan Steel Industries, Inc., v Perini Corp.,* 36 A.D.3d 568 [1st Dept. 2007; *Progressive Orthopedics, PLLC v Hertz Corp.,* 2017 N.Y. Slip Op. 27193 [2017]; *Fairfield Beach 9th, LLC v Shepard-Neely,* 2021 N.Y. Slip Op. 21339 [2021]). Generally, a denial of a motion for summary judgment is not necessarily the law of the case that there is an issue of fact that will be established at trial (*Zook* at 701; *Sackman-Gilliand Corp. v Senator Holding Corp.,* 43 A.D.2d 948 [2d Dept. 1974]). It merely establishes that summary judgment was not appropriate at that time. Moreover, a finding that there are factual issues that preclude a plaintiff from obtaining summary judgment in his or her favor does not necessarily encompass a finding that those same factual issues would preclude a defendant from obtaining summary judgment in his or her favor. Nevertheless, this court finds that

defendants have failed to demonstrate, prima facie, that they did not have control over the premises and that they did not have actual or constructive notice of the dust/dirt/mud condition that allegedly contributed to the accident.

In assessing defendants' liability here, an accident caused by debris or other dangers created during the course of ongoing work are generally not considered dangerous property conditions, but rather, are deemed to arise out of the means and methods of the work (*see Giglio v Turner Constr. Co.*, 190 AD3d 829, 830 [2d Dept 2021]; *Schwind v Mel Lany Constr. Mgt. Corp.*, 95 AD3d 1196, 1198 [2d Dept 2012], *lv dismissed* 19 NY3d 1020 [2012]; *Cody v State of New York*, 82 AD3d 925, 926-927 [2d Dept 2011]). However, where debris is left at a worksite after the work at issue has ceased, such debris may become a dangerous property condition (*see Slikas v Cyclone Realty, LLC*, 78 AD3d 144, 148-149 [2d Dept 2010]; *Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d 763, 764-765 [2d Dept 2009]; *see also Chuqui v Amna, LLC*, 203 AD3d 1018, 1022-1023 [2d Dept 2022]; *Toalongo v Almarwa Ctr., Inc.*, 202 AD3d 1128, 1131 [2d Dept 2022]; *cf. Cody*, 82 AD3d at 926-927).

Here, even discounting plaintiff's later testimony that no compound dripped down from the ceiling, plaintiff's initial testimony that the compound dripped down and mixed with the preexisting dust and dirt to create the mud/clay condition that he asserts contributed to his stilt slipping demonstrates factual issues as to whether the preexisting dust and dirt contributed to the accident. Neither 74 Eldert nor Liberty One has submitted any evidentiary proof that they did not have actual or constructive notice of the dirt/debris condition in the room at issue (*see Chuqui*, 203 AD3d at 1022-1023; *Toalongo*, 202 AD3d at 1131) and they cannot meet their initial burden in this respect by merely pointing to gaps in plaintiff's case (*see Maharaj v Kreidenweis*, 214 AD3d 717, 719 [2d Dept 2023]; *Kolakowski v 10839 Assoc.*, 185 AD3d 427, 427-428 [1st Dept 2020]). In addition, Liberty One makes no argument, that it, as general contractor, did not have control over the worksite (*see Guaman v 178 Ct. St., LLC*, 200 AD3d 655, 658 [2d Dept 2021]; *Mott v Tromel Constr. Corp.*, 79 AD3d 829, 830 [2d Dept 2010]). Regarding 74 Elbert, the conclusory assertion of its managing member contained in an affidavit submitted in support of its motion that "74 Eldert expected turn-key delivery of the premises upon completion of the job and had no involvement in the actual construction or the means and methods by which the work was completed" (Rabinowitz, Aff. at ¶ 3), fails to demonstrate, prima facie, that 74 Eldert did not have control over the worksite for purposes of defective premises condition liability under the common law and Labor Law § 200 (*see Bessa v Anflo Indus., Inc.*, 148 AD3d 974, 978 [2d Dept 2017]; *St. John v Westwood-Squibb Pharms., Inc.*, 138 AD3d 1501, 1503 [4th Dept 2016]; *see also Lamb v BOC Group, Inc.*, 199 AD3d 909, 911 [2d Dept 2021]). Defendants have thus failed to demonstrate their prima facie entitlement to summary judgment dismissing the common-law negligence and Labor Law § 200 causes of action, and

this portion of their respective motions must be denied regardless of the sufficiency of plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

With respect to the indemnification and insurance issues, the portion of defendants' motions seeking summary judgment in their favor on their common-law and contractual indemnification claims must be denied since in denying their respective motions with respect to plaintiff's common-law negligence and Labor Law § 200 causes of action, they have each failed to demonstrate that they are free from negligence (*see Rodriguez v Waterfront Plaza, LLC*, 207 AD3d 489, 491 [2d Dept 2022]; *Crutch v 421 Kent Dev, LLC*, 192 AD3d 977, 982 [2d Dept 2021]; *see also Zong Wang Yang v City of New York*, 207 AD3d 791, 796-797 [2d Dept 2022]; *Cando v Ajay Gen. Contr. Co. Inc.*, 200 AD3d 750, 752-753 [2d Dept 2021]).

74 Eldert's own negligence, however, is not a bar to seeking recovery under its breach of insurance procurement claims against Liberty One and SBS Tiles (*see Kinney v Lisk Co.*, 76 NY2d 215, 218-219 [1990]). Nevertheless, with respect to Liberty One, 74 Eldert's conclusory assertion that Liberty One failed to obtain the policies naming 74 Elder as an additional insured as required by the insurance procurement clause of the contract is insufficient to demonstrate its prima facie burden (*see Breland-Marrow v RXR Realty, LLC*, 208 AD3d 627, 629 [2d Dept 2022]; *Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 844 [2d Dept 2014]; *Karnikolas v Elias Taverna, LLC*, 120 AD3d 552, 556 [2d Dept 2014]; *cf. Dibuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept 2011]). In any event, Liberty One has demonstrated the existence of factual issues requiring denial of 74 Eldert's motion in this respect by submitting a copy of the policy, which contains a blanket additional insured endorsement. Such an additional insured endorsement is generally sufficient to satisfy contractual additional insured requirements (*see Langer v MTA Capital Constr. Co.*, 184 AD3d 401, 402-403 [1st Dept 2020]; *Perez v Morse Diesel Intl., Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]; *see also Kassis v Ohio Cas. Ins. Co.*, 12 NY3d 595, 599-600 [2009]; *cf. Gilbane v Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co.*, 31 NY3d 131, 135 [2018]). The fact that Liberty One's insurer has disclaimed coverage for 74 Eldert does not, in and of itself, demonstrate that the policies obtained by Liberty One failed to comply with the terms of the contract (*see Perez*, 10 AD3d at 498; *KMO-361 Realty Assoc. v Podbielski*, 254 AD2d 43, 44 [1st Dept 1998]; *Garcia v Great Atl. & Pac. Tea Co.*, 231 AD2d 401, 402 [1st Dept 1996]; *see also Dorset v 285 Madison Owner LLC*, 214 AD3d 402, 404 [1st Dept 2023]).

Assuming arguendo, that 74 Eldert has sufficiently authenticated the indemnification agreement between Liberty One and SBS Tiles containing the insurance procurement provisions requiring that SBS Tiles obtain insurance naming 74 Eldert as an additional insured, 74 Eldert's conclusory assertions that SBS Tiles failed to obtain the requisite coverage are insufficient to demonstrate, prima facie, that SBS Tiles breached its insurance procurement requirements (*see Breland-Marrow*, 208 AD3d at 629; *Ginter*,

121 AD3d at, 844; *Karnikolas*, 120 AD3d at 556; *cf. Dibuono*, 83 AD3d at 652). Thus, this portion of 74 Eldert's motion must be denied regardless of the sufficiency of SBS Tiles' opposition papers (*see Winegrad*, 64 NY2d at 853).

Accordingly, it is hereby

ORDERED, that defendant/third-party plaintiff Liberty One's motion (Motion Seq. 7) for summary judgment is denied, and it is further

ORDERED, that defendant/second third-party plaintiff 74 Eldert's motion (Motion Seq. 8) for summary judgment is denied.

This constitutes the decision and order of the court.

HON. INGRID JOSEPH J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice