At an IAS Term, Part 9 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 14th day of July, 2023.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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DWAYNE ARCHER,
Plaintiff,

-against-

RSM US LLP; STRUCTURE TONE, LLC; 4TS II LLC; THE DURST ORGANIZATION, INC.; SMART SPACE, LLC; AMC INSTALLATION SERVICES LLC; and AMC TRANSFER INC.,
Defendants.

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RSM US LLP; STRUCTURE TONE, LLC; 4TS II LLC; THE DURST ORGANIZATION, INC.,

Third-Party Plaintiffs,

-against-

SMART SPACE, LLC and TRITECH COMMUNICATIONS, INC.,

Third-Party Defendants.

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SMART SPACE, LLC,
Second Third-Party Plaintiff,

-against-

AMC TRANSFER, INC.,
Second Third-Party Defendants.

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DECISION/ORDER

Index No.: 508547/2020
MS # 2, 3, 4, 5, 6

The following e-filed papers read herein:	NYSCEF Doc. Nos.:
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	107-108, 138, 145-146, 181, 183-184, 210-212, 266-267
Opposing Affidavits (Affirmations)	179, 214-215, 217, 233-234 233-234, 236-237, 239-240, 249, 271, 274, 275, 276, 279
Affidavits/ Affirmations in Reply	230-231, 254, 255, 256, 265

Upon the foregoing papers, plaintiff Dwayne Archer moves for an order, pursuant to CPLR 3212, granting him partial summary judgment in his favor with respect to liability on his Labor Law § 240 (1) cause of action as against defendants/third-party plaintiffs 4TS II, LLC and Structure Tone, LLC, (Structure Tone) and with respect to liability on his common-law negligence cause of action as against defendant AMC Installation Services, LLC (AMC Installation) (motion sequence number 2). Defendant/second third-party defendant AMC Transfer Inc. (AMC Transfer) cross-moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint and any and all cross claims, counterclaims and third-party claims against it and granting it common-law indemnification from AMC Installation (motion sequence number 3). Defendant/third-party defendant/second third-party plaintiff Smart Space, LLC, (Smart Space) moves for an order, pursuant to CPLR 3212, dismissing the complaint and all cross claims against it (motion sequence number 4). AMC Installation moves for an order, pursuant to CPLR 3212, dismissing the complaint and all cross claims against it (motion sequence number 5). 4TS II LLC, Structure Tone, defendant/third-party plaintiff RSM US LLP (RSM US) and defendant/third-party plaintiff The Durst Organization, Inc., (Durst Org) (collectively referred to as the 4 Times Square Defendants) move for an order, pursuant to CPLR 3212,

granting them: (1) summary judgment dismissing the complaint; (2) summary judgment in their favor with respect to their claims for defense, indemnification and insurance procurement as against Smart Space, AMC Transfer and third-party defendant Tritech Communications, Inc., (Tritech); and (3) summary judgment in their favor with respect to their cross-claims against AMC Installation for common law indemnification and contribution (motion sequence number 6).

For the reasons stated herein, plaintiff's motion (motion sequence number 2) is denied. AMC Transfer's cross motion (motion sequence number 3) is granted to the extent that the complaint is dismissed as against it, that Smart Space's third-party complaint is dismissed as against it, that Tritech's cross claim is dismissed as against it, that 4 Times Square Defendants' claims for common-law indemnification and contribution are dismissed as against it, and that Structure Tone and RSM US's claims for contractual indemnification are dismissed as against it. AMC Transfer's cross motion is otherwise denied. Further, Smart Space's motion (motion sequence number 4) is granted to the extent that the complaint is dismissed as against it, the cross claims of AMC Installation and Tritech are dismissed as against it, and any and all cross claims/third-party claims for common-law indemnification are dismissed as against it. Smart Space's motion is otherwise denied. Next, AMC Installation's cross motion (motion sequence number 5) is granted to the extent that the common law indemnification claims against it asserted by the 4 Times Square Defendants is granted, and is otherwise denied. Finally, 4 Times Square Defendants' motion (motion sequence number 6) is granted to the extent that plaintiff's Labor Law § 200 and common-law negligence causes of action are dismissed as against

4TS II LLC, the Durst Org, and RSM US 4T; and granted to the extent that 4TS II LLC, the Durst Org, and RSM US 4T are entitled to contractual indemnification from Smart Space; and granted to the extent that 4TS II LLC and the Durst Org are entitled to contractual indemnification from AMC Transfer and Tritech. The 4 Times Square Defendants' motion is otherwise denied.

Background

In this action premised on common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6), plaintiff alleges that he was injured on June 14, 2018, while working on a renovation project on the 20th floor of a building known as 4 Times Square, when glass panels that were stored leaning against a wall fell on him. 4TS II LLC has admitted that it owned 4 Times Square, the Durst Org has admitted that it had an ownership interest in 4 Times Square, and RSM US has admitted that it was the tenant of the office space in 4 Times Square which included the 20th floor. 4TS II LLC hired Structure Tone to be the general contractor for the renovation project and Structure Tone hired Smart Space to install interior glass office fronts on the 20th floor of 4 Times Square. Smart Space subcontracted the glass panel installation work to AMC Transfer, which in turn, subcontracted the installation work to AMC Installation. RSM US (tenant) directly hired Tritech, plaintiff's employer, to install telecommunications infrastructure for the offices, which included the installation of cable, data ports and Wi-Fi. Plaintiff was employed by Tritech as a technician to perform the installation work.

On the date of the accident, plaintiff was testing data ports on the 20th floor of 4 Times Square. Plaintiff, in his deposition testimony, stated that he walked into the area

where he accident occurred, holding the floor plans and tester unit, which he then rested on the top of approximately 10 glass panels that were stored leaning against the wall. Each panel was four feet by eight feet, and each panel weighed approximately 140 to 170 pounds.[1] The panels were stored leaning against the wall on their long side. According to plaintiff, the panels farthest from the wall, however, were standing straight up. After noticing that the data port was hidden behind the panels, and after attempting to reach behind the panels to test the port, plaintiff stood up and started to walk away, at which time four or five of the panels fell onto plaintiff. The panels struck plaintiff on his left hip and leg, knocked him to the ground, and landed on top of him.

According to a Tritech supervisor who arrived on the scene after the accident and who prepared an accident report relating to the accident, plaintiff told him that the panels started to fall after he had "leaned against" them.[2] In his deposition testimony, Pedro Valladares, an AMC Installation supervisor, stated that, at the time of the accident, he heard plaintiff screaming and, when he walked to where plaintiff was working, he observed approximately five glass panels lying on top of plaintiff. Valladares did not hear plaintiff state how the accident happened and Valladares himself had no idea why the panels fell. Valladares also testified that the glass panels had been stored in the area because AMC Installation was waiting for the carpeting to be installed before they could install the panels,

[1] Plaintiff did not know the weight of the panels. Pedro Valladares, an AMC Installations supervisor, in his deposition testimony, estimated that the panels each weighed 140 to 170 pounds. Keith Manuel, from Smart Space, estimated that such panels would weigh approximately 175 pounds. Plaintiff's expert, in his affidavit, noted that such panels can weigh as much as 208 pounds each.

[2] At his deposition, plaintiff specifically denied that he leaned against the panels.

and that AMC Installation had placed perhaps seven panels on top of either two-by-fours, drywall pieces or scrap carpet pieces, and left them leaning against the wall at a proper angle. He further testified that the panels had been stored there for approximately two to three weeks before the plaintiff's accident, waiting to be installed. Valladares was involved in stacking many of the panels on the 20th floor, and, although he did not stack every panel himself, he asserted that he had inspected the panels stacked by other AMC Installation employees.

Discussion

Plaintiff's Causes of Action

Initially, as Plaintiff, in his opposition papers, expressly concedes that AMC Transfer and Smart Space are not proper Labor Law defendants, and that they were not negligent, and thus, that the evidence does not support a Labor Law or common-law negligence cause of action as against them (NYSCEF Doc No. 233, at ¶ 2), the court grants the portion of AMC Transfer's cross motion and Smart Space's motion seeking dismissal of the complaint as against them.

The court next turns to the issues raised by plaintiff's motion and the motions of the 4 Times Square Defendants and AMC Installation.

With respect to plaintiff's Labor Law § 240 (1) cause of action, section 240 (1)[3] imposes absolute liability on owners and contractors or their agents when they fail to

[3] As is relevant here, Labor Law § 240 (1) provides: "All 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

protect workers employed on a construction site from injuries proximately caused by risks associated with falling from a height or those associated with falling objects (*see Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). For a defendant to be held liable under Labor Law § 240 (1), a plaintiff's injuries must be both the "direct consequence of the application of the force of gravity to an object or person" and "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603-604 [2009]; *see Wilinski*, 18 NY3d at 10; *Simmons v City of New York*, 165 AD3d 725, 726-727 [2d Dept 2018]). With respect to accidents involving falling objects, the "plaintiff must show more than simply that an object fell causing injury to a worker" (*Narducci*, 96 NY2d at 268; *see also Fabrizi v 1095 Ave. of Ams., L.L.C.*, 22 NY3d 658, 663 [2014]). A plaintiff must show that, at the time the object fell, it was "being hoisted or secured" (*Narducci*, 96 NY2d at 268) or "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]; *see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758 [2008]) and that the object fell "because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268; *see Fabrizi*, 22 NY3d at 663; *Wilinski*, 18 NY3d at 10-11).

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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."

Here, the fact that the bottom of the glass panels was at the same level as plaintiff does not preclude the court from finding that Labor Law § 240 (1) is an applicable cause of action (*see Wilinski*, 18 NY3d at 9-10; *Natoli v City of New York*, 148 AD3d 489, 489 [1st Dept 2017]; *McCallister v 200 Park, L.P.*, 92 AD3d 927, 928-929 [2d Dept 2012]). Further, although the four to five panels only fell a short distance onto plaintiff, since they each weighed approximately 140 to 175 pounds,[4] the panels were capable of generating a significant amount of gravitational force in the short distance (*see Wilinski*, 18 NY3d at 10; *Runner*, 13 NY3d at 605; *Gonzalez v Madison Sixty, LLC*, 216 AD3d 1141, 1142 [2d Dept 2023]; *O'Brian v 4300 Crescent L.L.C.*, 180 AD3d 437, 438 [1st Dept 2020]; *McCallister*, 92 AD3d at 928-929; *Pritchard v Tully Constr. Co., Inc.*, 82 AD3d 730, 731 [2d Dept 2011]; *Gutman v City of New York*, 78 AD3d 886, 886-887 [2d Dept 2010]; *Mendoza v Bayridge Parkway Assoc., LLC*, 38 AD3d 505, 506 [2d Dept 2007]; *but see Parrino v Rauert*, 208 AD3d 672, 674 [2d Dept 2022]).[5]

Nevertheless, in view of the inconsistencies between the testimony of plaintiff and Valladares regarding whether the panels were stored at a proper angle, had "stopper" blocks or carpet pieces, combined with the competing opinions of the parties' experts regarding the need for a securing device, there are factual issues whether a Labor Law §

[4] As such, four panels of 140 pounds each would have weighed 560 pounds and four panels of 175 pounds each would have weighed 700 pounds. Five panels of 140 pounds each would have weighed 700 pounds and five panels of 175 pounds each would have weighed 875 pounds.

[5] Although the Appellate Division, Second Department found, in *Parrino*, that the fall of unsecured sheet rock panels that had been stored in an upright position did not involve a significant elevation differential under Labor Law § 240 (1) (*Parrino*, 208 AD3d at 674), this court finds that the weight of the glass panels here distinguishes this case from the facts before the Second Department in *Parrino*.

240 (1) securing device was required for the purpose of the undertaking, here, storage, under the circumstances (*see Wilinski*, 18 NY3d at 10-11; *Padilla v Touro Coll. Univ. Sys.*, 204 AD3d 415, 416 [1st Dept 2022]; *O'Brian*, 180 AD3d at 438; *Carlton v City of New York*, 161 AD3d 930, 932 [2d Dept 2018]; *cf. Seales v Trident Structural Corp.*, 142 AD3d 1153, 1156 [2d Dept 2016]). Additionally, in view of the Tritech supervisor's testimony that plaintiff told him that he had leaned against the panels before they fell on him, there are factual issues whether plaintiff's actions were the sole proximate cause of the panels falling onto him (*see Nalvarte v Long Is. Univ.*, 153 AD3d 712, 714 [2d Dept 2017]; *Melendez v 778 Park Ave. Bldg Corp.*, 153 AD3d 700, 701 [2d Dept 2017], *lv denied* 31 NY3d 909 [2018]; *Hernandez v Town of Hamburg*, 83 AD3d 1507, 1508 [4th Dept 2011], *lv denied* 17 NY3d 717 [2011]). In this regard, the testimony presents factual issues as to whether plaintiff, as a matter of training, experience and common sense, knew or should have known not to lean against the panels and that he nevertheless "chose for no good reason . . . to do so[ ] and that had he not made that choice he would not have been injured" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]; *see Melendez*, 153 AD3d at 701; *Hernandez*, 83 AD3d at 1508).

These disputed factual issues and differing expert's opinions require the denial of the portion of the motions by plaintiff, the 4 Times Square Defendants, and AMC Installation that relate to plaintiff's Labor Law § 240 (1) cause of action. [6]

[6] The court has not considered AMC Installation's argument that it is not a proper defendant under the Labor Law causes of action because it only raised this argument for the first time in its reply papers (*see Grassfield v JUPT, Inc.*, 208 AD3d 1219, 1220 [2d Dept 2022]; *Ditech Financial, LLC v Connors*, 206 AD3d 694, 698 [2d Dept 2022]). The court further notes that

Turning to the Labor Law § 241 (6) cause of action, plaintiff relies on Industrial Code (12 NYCRR) § 23-2.1 (a)(1), which governs the storage of material and equipment at a jobsite.[7] While there is case law holding that section 23-2.1 (a)(1) can only be violated if the material is stored in a "passageway, walkway, stairway or other thoroughfare" (*see Bianchi v New York City Tr. Auth.*, 192 AD3d 745, 748-749 [2d Dept 2021]; *Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 844 [2d Dept 2014]), the Appellate Division, Fourth Department, in *Slowe v Lecesse Constr. Servs., LLC* (192 AD3d 1645, 1646 [4th Dept 2021]) found that section 23-2.1 (a)(1) is not limited exclusively to obstructed thoroughfares. Rather, the court in *Slowe* found that section 23-2.1 (a)(1) has three distinct requirements: (1) "[a]ll building materials shall be stored in a safe and orderly manner;" (2) "[m]aterial piles shall be stable under all conditions;" and (3) "[m]aterial piles shall be . . . so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare" (*Slowe*, 192 AD3d at 1646). In its decision in *Parrino* (208 AD3d at 675), the Appellate Division, Second Department appears to have adopted the rationale of *Slowe* by finding that there were factual issues relating to the applicability of the portion of section 23-2.1 (a)(1) requiring that "[a]ll building materials" be "stored in a safe and orderly manner" relating to an accident involving the toppling of sheetrock that occurred on a porch without any mention of whether the accident occurred in a passageway, and by citing to

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plaintiff did not place this issue before the court since plaintiff only seeks summary judgment against AMC Installation based on his common-law negligence cause of action.

[7] 12 NYCRR 23-2.1 (a) (1) provides that, "All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare."

Slowe and other cases that recognize that section 23-2.1 (a)(1) can apply even if the material is not stored in a passageway or thoroughfare (*see Parrino*, 208 AD3d at 675; *Costa v City of New York*, 123 AD3d 648, 649 [2d Dept 2014]; *Rodriguez v DRLD Dev., Corp.*, 109 AD3d 409, 410 [1st Dept 2013] *Castillo v 3440 LLC*, 46 AD3d 382, 383 [1st Dept 2007]; *see also Hebbard v United Health Servs. Hosps., Inc.*, 135 AD3d 1150, 1152 [3d Dept 2016]).

Based on the evidence submitted in support of their own motions, which included plaintiff's testimony, there are factual issues as to whether the material, some seven to ten sheets of glass, was safely stored within the meaning of 12 NYCRR 23-2.1 (a)(1). As such, AMC Installation and the 4 Times Square Defendants have failed to demonstrate, *prima facie*, their entitlement to dismissal of the plaintiff's Labor Law § 241 (6) cause of action (*see Parrino*, 208 AD3d at 675; *Hebbard*, 135 AD3d at 1152; *Rodriguez*, 109 AD3d at 410; *Castillo*, 46 AD3d at 383; *see also Padilla*, 204 AD3d at 416). Accordingly, the motions with respect to Labor Law 241 (6) must thus be denied, despite plaintiff's seeming failure to oppose this branch of the motions by AMC Installation and the 4 Times Square Defendants (*see Caliber Home Loans, Inc. v Squaw*, 190 AD3d 926, 927-928 [2d Dept 2021]; *Exit Empire Realty v Zilelian*, 137 AD3d 742, 743 [2d Dept 2016]).[8]

[8] Appellate Division cases finding that plaintiffs had abandoned reliance on Industrial Code sections by failing to address them in their appellate briefs do not address the burdens at issue in a summary judgment motion (*see Debennedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021]; *Palomeque v Capital Improvement Servs., LLC*, 145 AD3d 912, 914 [2d Dept 2016]; *Harsch v City of New York*, 78 AD3d 781, 783 [2d Dept 2010]).

With respect to plaintiff's common-law negligence and Labor Law § 200 causes of action against the 4 Times Square Defendants, when such claims arise out of alleged dangers in the means, methods or materials of the work, recovery against the owner or general contractor cannot be had unless it is shown that the party defendant to be charged with liability had the authority to supervise or control the performance of the work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *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 either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*see 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]; *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Through deposition testimony in the record showing that plaintiff was exclusively supervised by his Tritech supervisors and that AMC Installation supervised and controlled the storing of the glass panels at issue, the 4 Times Square Defendants have demonstrated, prima facie, that they did not exercise more than general supervisory authority over the injury producing work, and are thus entitled to dismissal of the common-law negligence and Labor Law § 200 causes of action to the extent they are premised on the means and methods of performing the work (*see Abelleira v City of New York*, 201 AD3d 679, 680 [2d Dept 2022]; *Goldfien v County of Suffolk*, 157 AD3d 937, 938 [2d Dept 2018]; *Messina v City of New York*, 147 AD3d 748, 749-750 [2d Dept 2017]). Plaintiff, who has not

addressed the common-law negligence and section 200 claims as against the 4 Times Square Defendants in his opposition papers, has failed to raise a factual issue on this claim.

Plaintiff's claims against the 4 Times Square Defendants, however, are not limited to the means and methods of the work, as plaintiff, in his complaint and bill of particulars, has also alleged that AMC Installation's manner of storing the glass panels created a dangerous property condition. To the extent that 4TS II LLC, the Durst Org, and RSM US 4T may be deemed to have been in control of the accident location, the court finds that, as to them, the storing of the glass panels during the ongoing work at the construction site relates solely to the means, method and manner of the work and did not constitute a dangerous property condition (*see Maddox v Tishman Constr. Corp.*, 138 AD3d 646, 646 [1st Dept 2016]; *see also 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]; *cf. 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]). In this regard, the court is unwilling to impute to the owner defendants knowledge of the proper method of storing glass panels, and, absent any evidence that the storage of the material presented an obvious safety hazard - such as material blocking a passageway - any failure to properly store the material with respect to 4TS II LLC, the Durst Org, and RSM US 4T related solely to the means and methods of the work and did not constitute a dangerous property condition (*see Maddox*, 138 AD3d at 646; *see also Ortega*, 57 AD3d at 62; *cf. Chowdhury v Rodriguez*, 57 AD3d 121, 129-130 [2d Dept 2008]).

On the other hand, Structure Tone, as a general contractor responsible for general construction site safety, undoubtedly had, or should have had, knowledge regarding the proper means of storing of the glass panels at issue, and, absent any evidence that the problem with the storage of the material was a latent condition, Structure Tone was required to demonstrate, prima facie, that it did not have control of the worksite or actual or constructive knowledge regarding how the glass was being stored (*see Cantalupo v Arco Plumbing & Heating, Inc.*, 194 AD3d 686, 690 [2d Dept 2021]). One must wonder how the carpet installers were going to install carpet without someone moving these glass panels so they could do their work. The same preparation seems to have been necessary for the Tritech installation, but it was not done. Structure Tone, whose deposition witness did not work at the jobsite until after the date of the plaintiff's accident, has failed to demonstrate, *prima facie*, that it did not have control over the worksite or that it did not have actual or constructive notice of the improper or hazardous placement of the glass panels for storage until needed, and thus, it has failed to demonstrate its prime facie entitlement to summary judgment dismissing the common-law negligence and Labor Law § 200 causes of action (*see Padilla*, 204 AD3d at 416; *Cantalupo*, 194 AD3d at 690). The 4 Times Square Defendants' motion must thus be denied with regard to Structure Tone's liability in this respect, despite plaintiff's failure to address this portion of the 4 Times Square Defendants' motion (*see Caliber*, 190 AD3d at 927-928; *Exit Empire Realty*, 137 AD3d at 743).

The court turns next to the portion of plaintiff's motion seeking summary judgment against AMC Installation on his common-law negligence cause of action, and the portion of AMC Installation's motion seeking dismissal of the Labor Law § 200 cause of action as

against it. Even in the absence of the control of the worksite required for section 200 liability,[9] a subcontractor or prime contractor may be held liable for common-law negligence "where the work it performed created the condition that caused plaintiff's injury" (*Poracki v St. Mary's R.C. Church*, 82 AD3d 1192, 1195 [2d Dept 2011] [internal quotation marks omitted]; *see also Sledge v S.M.S. Gen. Contrs., Inc.*, 151 AD3d 782, 783 [2d Dept 2017]; *Lombardo v Tag Ct. Sq., LLC*, 126 AD3d 949, 950 [2d Dept 2015]).

In view of the competing deposition testimony of plaintiff and Valladares regarding whether the panels were stored at an angle, were properly stored, had "stopper" blocks of wood or carpet, combined with the competing reports of the parties' experts regarding whether the glass panels were properly stored, and the above noted factual issue as to whether plaintiff had leaned against the panels so may be found to have been the sole proximate cause of the panels' falling (*see Singh v 180 Varick, LLC*, 203 AD3d 1194, 1196 [2d Dept 2022]), there are factual issues raised whether AMC Installation created a dangerous condition that was a proximate cause of plaintiff's injuries. This requires denial of the respective motions by plaintiff and AMC Installation (*see Seales*, 142 AD3d at 1158-1159; *Lombardo*, 126 AD3d at 950; *Poracki*, 82 AD3d at 1196).

Cross Claims and Third-Party Claims

With respect to 4 Times Square Defendants' contractual indemnification claims, the right to indemnification depends on the specific language of the contract and shall not be

[9] As noted in footnote 6, this court has declined to address AMC Installation's argument that it is not a proper Labor Law defendant because AMC Installation first raised the issue in its reply papers.

found unless it can be clearly implied from the language and purpose of the entire agreement within the context of the surrounding circumstances (*see Mogrovejo v HG Hous. Dev. Fund Co., Inc.*, 207 AD3d 461, 463 [2d Dept 2022]; *Martinez v 281 Broadway Holdings, LLC*, 183 AD3d 716, 718 [2d Dept 2020]; *Gonzalez v Magestic Fine Custom Home*, 115 AD3d 796, 798 [2d Dept 2014]). In addition, a party seeking indemnification with respect to a construction contract must demonstrate that it is free from negligence (*see* General Obligations Law § 5-322.1; *Mogrovego*, 207 AD3d at 463).

The 4 Times Square Defendants' contractual indemnification claim as against Smart Space rests on an indemnification provision contained in Structure Tone's subcontract agreement with Smart Space that provides, in relevant part, that:

> "To the fullest extent permitted 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 . . . from and against any and all claims . . . and expenses including reasonable attorney's 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 purchase 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."

In opposing this portion of the 4 Times Square Defendants' motion, Smart Space's only argument is that it is not required to indemnify any of the 4 Times Square Defendants

because AMC Installation was not its direct sub-subcontractor, but rather, was hired by Smart Space's sub-subcontractor AMC Transfer.[10] Contrary to Smart Space's contention, however, the court finds that this provision's reference to "sub-subcontractors" in the plural, which reference is made in the context of this broadly worded provision, and without any limitation suggesting that the sub-subcontractors must be hired directly by Smart Space, evinces an intent that Smart Space be responsible for the "acts" or "omissions" of subcontractors hired by Smart Space's subcontractors "in connection with the performance of any work" under Smart Space's contract with Structure Tone. The court thus finds that this indemnification provision is applicable and enforceable, despite the fact that AMC Transfer subcontracted its work for Smart Space to AMC Installation (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]; *Bellreng v Sicoli & Massaro, Inc.*, 108 AD3d 1027, 1031 [4th Dept 2013]; *Scott v 122 East 42 St., LLC*, 34 Misc 3d 133 [A], 2012 NY Slip Op 50358[U], *10-11 [Sup Ct, Queens County 2012]). In view of the applicability of this provision, and this court's finding above that 4TS II LLC, the Durst Org, and RSM US were not negligent, 4TS II LLC, the Durst Org, and RSM US 4T are entitled to summary judgment in their favor on their contractual indemnification claim against Smart Space (*see Mogrovego*, 207 AD3d at 463; *De Souza v Empire Tr. Mix, Inc.*, 155 AD3d 605, 605-606 [2d Dept 2017]; *Muevecela v 117 Kent Ave., LLC*, 129 AD3d 797, 798 [2d Dept 2015]; *Tobio v Boston Props., Inc.*, 54 AD3d 1022, 1024 [2d Dept 2008];

[10] Notably, Smart Space makes no argument that any of the 4 Times Square Defendants are not parties entitled to indemnification as parties expressly identified in this provision or by this provision's reference to parties entitled to indemnification in the prime contract between 4TS II LLC and Structure Tone.

see also Olivieri v Barnes & Noble, Inc., 208 AD3d 1001, 1004-1005 [4th Dept 2022]). On the other hand, the motion must be denied with respect to Structure Tone's claim for contractual indemnification, in view of the factual issues with respect to Structure Tone's possible liability that are discussed above (*see Rodriguez v Waterfront Plaza, LLC*, 207 AD3d 489, 491 [2d Dept 2022]).

The branch of the 4 Times Square Defendants' motion for summary judgment on 4TS II LLC and the Durst Org's contractual indemnification claims against AMC Transfer and Tritech are based on identical blanket indemnification/insurance procurement agreements that provide, in relevant part that:

> "To the fullest extent permitted by law, (AMC Transfer/Tritech) ('Company') shall indemnify, defend and hold harmless the above listed entities [that include 4TS II LLC and the Durst Org] . . . (collectively, '4TS, et al.'), from and against any and all loss or damage [or] claim reason of bodily injury . . . including, without limitation, claims for reasonable attorneys' fees . . . directly or indirectly arising out of (i) any purchase or work order; (ii) any work of Company or of any of its sub-contractors, or any of Company's or such subcontractor's respective agents, servants or employees (each, an 'Company Party' and, collectively, 'Company Parties') . . .
>
> "Company agrees that the terms of this document shall apply to (a) 4TS, et al., and (b) any tenant, occupant or licensee in the building for whom work, goods or services are performed, provided, rendered or undertaken by or on behalf of any Company Party"

Initially, contrary to AMC Transfer's contention, the fact that this indemnification/insurance agreement was only signed by AMC Transfer is not a bar to its enforcement (*see Came Realty, LLC v Canadian Imperial Bank of Commerce*, 10 AD3d

348, 348-349 [2d Dept 2004]; *see also Flores v Lower E. Side Serv. Ctr. Inc.*, 4 NY3d 363, 368-369 [2005]). Likewise, the fact that 4TS II LLC and the Durst Org did not directly contract for AMC Transfer to perform the work is not a bar to their entitlement to contractual indemnification from AMC Transfer as a third-party beneficiary of the contract (*cf. Beasock v Canisius Coll.*, 126 AD3d 1403, 1404 [4th Dept 2015]). The broad language of the indemnification/insurance agreement that requires AMC Transfer to indemnify 4TS II LLC and the Durst Org for any "claim" "directly or indirectly arising out of . . . any purchase or work order"[11] or "any work" of AMC Transfer or "any of its subcontractors" for work rendered by or on behalf of AMC Transfer relating to work for the benefit of 4TS II LLC, the Durst Org, or any tenant, requires AMC Transfer to indemnify 4TS II LLC and the Durst Org under the circumstances here. As 4TS II LLC and the Durst Org have demonstrated that the indemnification provision is applicable, and that they were not negligent and thus their liability would be purely vicarious, they are entitled to summary judgment on their contractual indemnification claim against AMC Transfer (*see Mogrovego*, 207 AD3d at 463).

However, as AMC Transfer has shown that Structure Tone and RSM US are not identified as parties entitled to contractual indemnification from AMC Transfer in the indemnification/insurance agreement, and as the 4 Times Square Defendants make no assertion to the contrary in their own papers, AMC Transfer is entitled to dismissal of the

[11] By stating "any purchase or work order" the provision is not limited to work orders issued by 4TS II LLC or the Durst Org and includes the purchase order issued by Smart Space.

contractual indemnification claim asserted against it on behalf of Structure Tone and RSM US.

Contrary to Tritech's assertions, the indemnification/insurance agreement is not unclear, vague or ambiguous. Further, the indemnification/insurance agreement's broad terms require Tritech to indemnify 4TS II LLC and the Durst Org based on the fact that plaintiff, a Tritech employee, was injured at the work site, regardless of whether or not the accident is determined to have been caused by any acts or omissions on the part of Tritech (*see O'Connor v Serge El. Co.*, 58 NY2d 655, 657-658 [1982]; *Madkins v 22 Little W. 12th St., LLC*, 191 AD3d 434, 436 [1st Dept 2021]; *Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 773-774 [2d Dept 2010]; *Tkack v City of New York*, 278 AD2d 227, 229 [2d Dept 2000]).

Turning to the parties' respective common-law indemnification and contribution claims, the portion of AMC Transfer's motion seeking summary judgment on its common-law indemnification claim as against AMC Installation is denied as academic in view of the dismissal of plaintiff's complaint as against AMC Transfer (*see Hernandez v Asoli*, 171 AD3d 893, 896 [2d Dept 2019]; *Hoover v International Bus. Machs. Corp.*, 35 AD3d 371, 372 [2d Dept 2006]). Additionally, in view of the court's finding that Smart Space and AMC Transfer may not be held liable under plaintiff's common-law negligence and Labor Law § 200 causes of action, they are each entitled to dismissal of any cross claims and third-party claims against them for contribution and/or common-law indemnification (*see Debennedetto*, 190 AD3d at 938-939; *Cutler v Thomas*, 171 AD3d 860, 861-862 [2d Dept

2019]; *Kane v Peter M. Moore Constr. Co., Inc.*, 145 AD3d 864, 869 [2d Dept 2016]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]).[12]

Finally, as AMC Installation was not in privity of contract with the 4 Times Square Defendants', their summary judgment motion which seeks common-law indemnification from AMC Installation must be denied. However, due to the possible liability of AMC Installation, the court must deny the portion of AMC Installation's motion seeking dismissal of the 4 Times Square Defendants' contribution claims as against it (*see Seales*, 142 AD3d at 1160; *see also McCarthy*, 17 NY3d at 377-378; *Royland v McGovern & Co., LLC*, 203 AD3d 677, 679 [1st Dept 2022]; *Cando v Ajay Gen. Contr. Co. Inc.*, 200 AD3d 750, 752-753 [2d Dept 2021). The branch of AMC Installation's motion to dismiss the 4 Times Square Defendants' common-law indemnification claims is granted.

This constitutes the decision and order of the court.

E N T E R:

Hon. Debra Silber, J.S.C.

[12] Although AMC Transfer's motion also seeks dismissal of contractual claims against it by Tritech and Smart Space, neither Tritech nor Smart Space have pleaded contractual indemnification claims against AMC Transfer.