At an IAS Term, Part 70 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. WAVNY TOUSSAINT,
Justice.

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ANTON HAMILTON,

Plaintiff,

Index No.: 515927/2018

-against-

DECISION AND ORDER

211 SCHERMERHORN DEVELOPMENT, LLC, AND OESTREICHER CONSTRUCTION CORPORATION,

Motion Seqs. #8 and 9

Defendants.

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211 SCHERMERHORN DEVELOPMENT, LLC, AND OESTREICHER CONSTRUCTION CORPORATION,

Third-Party Plaintiffs,

-against-

LOGOZZO BROS. CONSTRUCTION CORP.,

Third-Party Defendant.

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211 SCHERMERHORN DEVELOPMENT, LLC, OESTREICHER CONSTRUCTION CORPORATION,

Second Third-Party Plaintiffs,

-against-

M & M CONTROL WIRING & ELECTRICAL, INC.,

Second Third-Party Defendant.

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The following e-filed papers read herein:	NYSCEF Doc. Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)	153-193
Opposing Affidavits (Affirmations)	198-230
Reply Affidavits (Affirmations)	232-235

1

Upon the foregoing papers, second third-party defendant M&M Control Wiring & Electrical, Inc. ("M&M") moves for an order, pursuant to CPLR 3212, granting it summary judgment on the issue of liability dismissing all claims and cross claims against it (Motion Seq. 8). Third-party defendant Logozzo Bros. Construction Corp. ("Logozzo") moves for an order, pursuant to CPLR 3211 and/or 3212, granting summary judgment on its cross claims against M&M and dismissing any and all claims, third-party claims, and cross claims asserted against it (Motion Seq. 9).

Background

On May 14, 2018, plaintiff allegedly suffered injuries when he tripped/slipped and fell while working in the subbasement of a building under construction, located at 211 Schermerhorn Street, Brooklyn, New York. Defendant/third-party plaintiff/second third-party plaintiff 211 Schermerhorn Development, LLC ("211 Schermerhorn") was the owner of the subject building; defendant/third-party plaintiff/second third-party plaintiff Oestreicher Construction Corporation ("Oestreicher") was the general contractor; third-party defendant Logozzo was a concrete superstructure subcontractor and plaintiff's employer; and second third-party defendant M&M was an electrical subcontractor.

Plaintiff was hired as a construction helper, whose duties and responsibilities included cleaning up around the construction site and taking things from floor to floor.[1] On the day of the accident, plaintiff was assigned a partner to clean the subbasement and to take down the number five jacks so they could be brought to an upper floor.[2] Plaintiff's

[1] Plaintiff's Feb. 26, 2020, EBT tr at 21, lines 2-3 ;at 23, lines 12-14 (NYSCEF Doc. No 162 and 184).
[2] Plaintiff's Feb. 26, 2020, EBT tr at 41, lines 7-8 ;at 42, lines 10-18; at 60, lines 9-11 (*id.*).

supervisor told the plaintiff and about seven other workers to follow him down a ladder to the subbasement.[3] Upon reaching the subbasement, plaintiff described it as a large, pitch-black area with no lighting, with concrete columns, no walls or windows, and accessible by a wooden stair ladder.[4] The only light came from his supervisor's small flashlight.[5] After removing a number five jack, plaintiff and the other workers were instructed to put the jack to the side so they could haul it up on the ladder.[6] Plaintiff and his partner attempted to place it onto a piece of plywood that was next to the base of the ladder. When the plaintiff placed his right foot onto what he thought was the plywood,[7] he slipped and fell backwards, landing on his left leg, which hit a rock. He also hit his face on a boulder/rock and his whole left side of the body hit the ground.[8] Thereafter, the supervisor and his co-workers helped the plaintiff get up to the top of the ladder,[9] where the plaintiff was subsequently taken to the hospital by a friend.[10]

Procedural History

On August 6, 2018, plaintiff commenced this action against defendants 211 Schermerhorn and Oestreicher asserting violations of Labor law §§ 200, 240, 241 and Rule 23 of the Industrial Code of the State of New York. On January 14, 2019, Oestreicher filed a third-party action against Logozzo asserting claims for contractual indemnification,

[3] Plaintiff's Feb. 26, 2020, EBT tr at 52, lines 3-17 (*id.*).
[4] Plaintiff's Feb. 26, 2020, EBT tr at 44, lines 22-25; at 45, lines 2-8; at 55, lines 8-16 (*id.*).
[5] Plaintiff's Feb. 26, 2020, EBT tr at 55, lines 11-16 (*id.*).
[6] Plaintiff's Feb. 26, 2020, EBT tr at 58, lines 10-19 (*id.*)
[7] Plaintiff's Feb. 26, 2020, EBT tr at 66, lines 15-20; at 91, lines 2-5 (*id.*).
[8] Plaintiff's Feb. 26, 2020, EBT tr at 91, lines 5-14; at 97, lines 10-14 (*id.*).
[9] Plaintiff's Feb. 26, 2020, EBT tr at 97, lines 18-23; at 99, lines 17 (*id.*).
[10] Plaintiff's Feb. 26, 2020, EBT tr at 100, lines 12-18 (*id.*).

breach of contract for failure to procure insurance, contribution, and common law indemnification. On January 16, 2019, issue was joined when 211 Schermerhorn filed an answer to the complaint. On March 5, 2019, 211 Schermerhorn filed a third-party action against Logozzo asserting the same claims as Oestreicher against Logozzo. Thereafter, issue was joined when Logozzo filed an answer to Oestreicher's third-party complaint on March 21, 2019 and 211 Schermerhorn's third-party complaint on March 25, 2019. On September 11, 2020, defendants 211 Schermerhorn and Oestreicher commenced a second third-party action against M&M asserting the same third-party claims. On December 29, 2020, issue was joined when M&M filed an answer to the second third-party complaint and asserted counterclaims of contractual indemnification, contribution, and common law indemnification against 211 Schermerhorn, Oestreicher and Logozzo. On March 9, 2021, Logozzo filed an answer to M&M's counterclaims and asserted crossclaims for common law contribution and indemnification against M&M. On November 1, 2022, the plaintiff filed his note of issue.

Timeliness of Logozzo's Motion and 211 Schermerhorn and Oestreicher's Opposition

M&M's motion was filed on December 29, 2022 and Logozzo's motion was not filed until January 3, 2023, which is untimely under Kings County Supreme Court Uniform Civil Term Rules, Part C, Rule 6, as it was made more than 60 days after the filing of a note of issue (*Goldin v New York & Presbyt. Hosp.*, 112 AD3d 578, 579 [2d Dept 2013]; CPLR 3212 [a]). Moreover, there has been no explanation provided for its delay. However, "[a]n untimely motion or cross motion for summary judgment may be considered by the court where a timely motion was made on nearly identical grounds" (*Sikorjak v City of*

New York, 168 AD3d 778, 780 [2d Dep't 2019]). The Court notes that Logozzo raised nearly identical issues as M&M's timely motion, including that it was not the proximate cause of the accident, did not have actual or constructive notice of a dangerous condition, and that plaintiff's Labor Law §§ 240, 241 and 200 causes of action should be dismissed, therefore, the Court accepts Logozzo's motion (*Id.*).

According to the Court's order dated February 9, 2023, opposition was due on or before March 15, 2023. While M&M and Logozzo are both correct that 211 Schermerhorn and Oestreicher's opposition was untimely filed on March 23, 2023, courts have the discretion in considering a defendant's untimely opposition papers (*Skillings v City of New York,* 173 AD3d 799, 800 [2d Dep't 2019]). Moreover, there is no prejudice to the other parties, as they all had an opportunity to respond (*Bakare v Kakouras, 110 AD3d 838, 839* [2d Dep't 2013]). Accordingly, the opposition papers are permitted.

M&M's Motion for Summary Judgment

M&M contends that plaintiff's Labor Law claims and all third-party claims should be dismissed because it did not owe a duty of care to the plaintiff, did not supervise, or control the performance of the work that allegedly brought about plaintiff's injury, and the accident did not trigger any contract indemnification. Moreover, M&M contends that it had no authority to compel the owner, the general contractor, or the plaintiff to take any safety precautions, as M&M lacked a necessary degree of control, and even if it did have a legal duty, plaintiff's employer, Logozzo's act in sending plaintiff to work in the dark subbasement constituted an intervening or superseding cause absolving M&M of any liability. M&M asserts that it did not create a dangerous condition, had no legal duty to

stand guard over the temporary lights in the subbasement once it installed them, did not turn off or disconnect the temporary lights in the subbasement prior to the accident, and that it is not M&M's responsibility if the temporary lights may have been damaged before the accident or turned off by others. Additionally, M&M contends that there is no privity of contract between it and Logozzo, and therefore any claims asserted by Logozzo against M&M should be dismissed.

In support of its motion, M&M submits, *inter alia*, a copy of Avishai Matuszewicz's ("Avi" or "Matuszewicz") affidavit of merit; and a copy of an email dated May 14, 2018 from Oestreicher supervisor Richard Hosey. The Matuszewicz affidavit states that he is a principal of M&M and has personal knowledge of the jobsite at the subject premises. It goes on to state that M&M's scope of work included installing temporary lights on all floors, including the subbasement. The temporary lighting installed in the subbasement consisted of strings of bulbs, wherein each bulb was protected by a cage. The Matuszewicz affidavit provides that "[o]n several occasions prior to the date of accident, the temporary lighting in the subbasement was damaged by workers for another subcontractor while they were removing temporary support beams," and "M&M was called upon by general contractor Oestreicher to repair the temporary lighting." The May 14, 2018 email was sent after the accident by "Rich Hosey" of Oestreicher and addressed to Avishai Matuszewicz requesting to drop off of extra bulbs and cages at the subject premises to replace the missing and broken ones.

Plaintiff's Opposition to M&M's Motion

In response, plaintiff opposes and argues that M&M failed to meet its prima facie burden by failing to establish that it did not owe plaintiff a duty of care. Plaintiff further argues that M&M was the proximate cause of his injuries, was an agent of the owner/general contractor and that the order by plaintiff's employer to work in the dark subbasement did not break the causal chain. Plaintiff notes that although he did not assert any direct Labor Law claims against M&M, he argues M&M could be liable under Labor Law §§ 241 (6) and 200 because it is an agent and had a duty to ensure there was lighting but failed to do so by placing lights in a place where they were subject to constant breaking. In support of his opposition, the plaintiff's submitted, *inter alia*, a copy of Avishai Matusziewics's deposition transcript. Avishai Matusziewics testified that M&M is responsible for bringing power to the subject building and to the subbasement, and that any person on site could access the light's temporary panel, as there was no lock or code required.

Third-Party Defendant Logozzo's Motion for Summary Judgment

Logozzo contends that plaintiff's accident did not arise out of its work nor was it negligent in causing plaintiff's accident because it did not create the alleged hazardous condition that caused plaintiff to slip, and it did not have any actual or constructive notice of the condition. As to the Labor Law claims, Logozzo contends that Labor Law § 240(1) does not apply, as plaintiff was not exposed to a gravity-related hazard, the statute does not cover a fall allegedly caused by slipping on debris on the construction site's floor, and therefore, it should be dismissed. Logozzo contends Labor Law § 241(6) premised on

Industrial Code sections 23-3.3 and 23-4.3 are both inapplicable because section 23-3.3(e) involves demolition by hand, and section 23-3.3(f) pertains to access to floors, safe access to and egress from every building or other structure during demolition and there is nothing to suggest that the plaintiff was injured pursuant to either industrial code. Section 23-4.3 pertains to access to excavations and the use of ladders, stairways, or ramps. Logozzo asserts that the plaintiff was not entering or exiting an excavation at the time of the accident, and that the plaintiff's testimony proves he did not reach the ladder, but merely approached the base of it.

Additionally, Logozzo contends that the third-party claims asserted by 211 Schermerhorn and Oestreicher and second-third party M&M's counter claims and cross claims against Logozzo must be dismissed as to the common-law claims for contribution and indemnification because the plaintiff was receiving workers compensation benefits, the plaintiff never claimed to have sustained a "grave injury" under the Workers' Compensation Law, and therefore, those claims are barred by Section 11 of the Workers' Compensation Law. Logozzo asserts that 211 Schermerhorn and Oestreicher are not entitled to contractual indemnification or for failure to procure insurance because plaintiff's accident did not arise out of the performance of Logozzo's work on the premises, but rather an alleged hazardous condition upon the premises, and its insurance carrier has accepted tender and agreed to provide for their defense. Logozzo also contends that M&M's claims for contractual indemnification must also be dismissed as there is no contract between them.

In support of its motion, Logozzo submits, *inter alia*, the deposition transcript of Rocco Logozzo and plaintiff. Rocco Logozzo testified that he was the secretary of treasury at the time of plaintiff's accident and the general foreman on the project at the subject location, that Jorge Borja was also a foreman for Logozzo, and that Logozzo was hired by Oestreicher to do excavation, foundation, and structure work at the subject location. He further testified that while his employees were in the subbasement, the light suddenly went out, but he never questioned it, as this was a regular occurrence and happened frequently. Logozzo also notes that at his deposition, plaintiff testified at his deposition that he was getting paid through workers' compensation, including his physical therapy.[11]

Plaintiff's Opposition to Logozzo's Motion

In opposition, the plaintiff does not contest that his Labor law § 240 (1) claim should be dismissed because he was not exposed to a gravity-related hazard. As to Labor Law § 241 (6), the plaintiff argues Logozzo wholly ignored sections 23-1.7 and 23-1.30. Specifically, plaintiff argues that sections 23-1.7(e)(1) and 23-1.7(e)(2), applies to slipping/tripping hazard, and that the evidence shows there was an accumulation of debris on the staircase that had been there for at least 2-3 days and caused plaintiff's fall. As to section 23-1.30, plaintiff argues the evidence shows there was no light in the subbasement where plaintiff was working, and it is immaterial that there had previously been working lights in the subbasement before the accident happened.

[11] Plaintiff's June 11, 2021, EBT tr at 32, lines 16-20 (NYSCEF Doc. No 185 and 204).

Turning to the common law indemnification and contribution claims, although the plaintiff does not dispute that he did not suffer a grave injury, he notes that the losses did arise out of or result from the performance of work under Logozzo's subcontract with Oestreicher. The plaintiff further argues that Logozzo's negligence is from the means and methods of the plaintiff's injury-producing work and involves a dangerous condition (lack of adequate lighting), which Logozzo failed to demonstrate it lacked actual or constructive notice of. Plaintiff takes no position relative to Logozzo's arguments regarding the third-party claims on failure to procure insurance or M&M's counterclaim for contractual indemnification against it.

Defendants/Third-Party Plaintiffs 211 Schermerhorn and Oestreicher's Opposition to M&M's and Logozzo's Motion

211 Schermerhorn and Oestreicher oppose both M&M's and Logozzo's motion and contends that plaintiff's injury was brought about by the work that was entirely controlled by his employer Logozzo. They assert that while they were present on the jobsite, neither had any control over the means and methods of the plaintiff's injury-producing work, and as there is no evidence that either had directed plaintiff to work in the dark subbasement without lighting; M&M's and Logozzo's motion seeking summary judgment on contractual indemnification claims of 211 Schermerhorn and Oestreicher should be denied. Turning to Labor Law § 240 (1), although there is no separate motion 211 Schermerhorn and Oestreicher contend that plaintiff's accident could not have been prevented by any protective devices enumerated in the statute, and therefore should be dismissed.

M&M's Reply to Plaintiff's, 211 Schermerhorn and Oestreicher's Opposition and Logozzo's Motion

M&M refutes plaintiff's opposition and contends it did not create the dangerous condition that caused the accident, it lacked control over the activity in question and did not have actual or constructive notice of the condition. Additionally, M&M says plaintiff's accident arose from his work under his scope of work and employment with Logozzo, and plaintiff has failed to come forward with proof to refute it had no supervisory control over where and when plaintiff was to conduct his work; thus, M&M could not be considered an agent. M&M points out that there is no affidavit from plaintiff or any of his co-workers who were allegedly present at the time and place of his accident.

M&M also argues that with respect to 211 Schermerhorn and Oestreicher, they failed to oppose the portion of M&M's motion seeking dismissal of the common law indemnification and contribution claims. Moreover, M&M contends the contractual indemnification argument is premature because there is no fact that would trigger the contractual indemnification provision. M&M further contends that 211 Schermerhorn and Oestreicher have not established their own freedom from negligence. As to Logozzo, M&M asserts because there is no privity of contract between it and Logozzo, and therefore any claims by Logozzo against it should be dismissed.

Logozzo's Reply to Plainitff's, 211 Schermerhorn and Oestreicher's, and M&M's Opposition

Logozzo notes that plaintiff has not opposed its motion regarding Labor law §§ 240 (1) and 241 (6), predicated on sections 23-3.3 and 23-4.3, and that M&M has not opposed

its motion regarding liability. Logozzo contends that plaintiff's opposition should not be considered, as the plaintiff could not have made any allegation about a grave injury since he did not sustain one. Logozzo reiterates its argument that Workers' Compensation Law bars plaintiff's direct recovery against it because plaintiff is its employee and asserts that none of the limited exceptions to the Workers Compensation bar apply. Logozzo also contends that it did not have prior notice of a dangerous condition (i.e., inadequate lighting in the subbasement) which plaintiff alleged caused the accident under Labor Law § 200.

Logozzo also contends it does not owe contractual indemnification to 211 Schermerhorn and Oestreicher because the plaintiff's work did not arise out of its work at the premises, but rather from an alleged hazardous condition upon the premises (i.e., uneven subbasement flooring), which allegedly caused plaintiff to slip and fall. Logozzo further contends 211 Schermerhorn and Oestreicher did not oppose other portions of Logozzo's motion seeking dismissal of the third-party action against it.

DISCUSSION

Labor Law § 240 (1)

The purpose of Labor Law 240 (1) is to protect against specific gravity-related accidents or elevation-related risk (*Bianchi v New York City Transit Auth.*, 192 AD3d 745, 747-748 [2d Dep't 2021]). The Court notes there are no direct Labor Law claims asserted against M&M and Logozzo, however disposition of the instant motion require a review of those claims. The submitted evidence proffered in M&M and Logozzo's motion established that the subject accident was not a result of an elevation-related hazard or gravity-related risk encompassed by Labor Law § 240 (1) (*Ortega v Fourtrax Contracting*

Corp., 214 AD3d 666, 668 [2d Dep't 2023]) and thus, the plaintiff's cause of action alleging a violation of Labor Law § 240 (1) without merit. Moreover, the plaintiff in his opposition papers to Logozzo's motion admits that his Labor Law § 240 (1) claim should be dismissed because he was not exposed to a gravity-related hazard.

Labor Law § 241 (6)

> "Labor Law § 241(6) places on owners, contractors, and their agents a nondelegable duty to keep areas in which construction work is being performed safe for those employed at such places. A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured . . . To impose such liability, the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition . . . The determinative factor is whether the defendant had "the right to exercise control over the work, not whether it actually exercised that right" (*Kavouras v Steel-More Contracting Corp.*, 192 AD3d 782, 784 [2d Dep't 2021][internal quotations and citations omitted]).

To succeed on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident (*Stewart v Brookfield Off. Properties, Inc.*, 212 AD3d 746, 746–747 [2d Dep't 2023][internal quotations and citations omitted]).

The plaintiff, in his verified bill of particulars, premises his section 241 (6) cause of action on alleged violations of 12 NYCRR sections 23-1.7(e)(1) (tripping hazard in passageways), 23-1.7(e)(2) (tripping hazard in working areas), 23-1.30 (illumination), 23-2.1(b) (disposal of debris), 23.3(e) (demolition by hand), 23.3-3(f) (safe access to and

egress), and 23-4.3 (access to excavations). However, the plaintiff only offered arguments in support of 23-1.7(e)(1), 23-1.7(e)(2), and 23-1.30. By failing to raise any argument in support of the other sections, plaintiff has abandoned reliance on sections 23-2.1(b), 23-3.3(e), 23-3.3(f) and 23-4.3 by failing to address it in his opposition papers (*Debennedetto v Chetrit*, 190 AD3d 933, 935 [2d Dep't 2021]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dep't 2017]). Therefore, the Court shall only consider sections 23-1.7(e)(1), 23-1.7(e)(2), and 23-1.30 to determine whether a plaintiff has a valid section 241 (6) claim.

Courts have interpreted passageway under section 23-1.7(e)(1) to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area (*Quigley v Port Auth. of New York,* 168 AD3d 65, 67 [1st Dep't 2018][internal quotation and citation omitted]). Conversely, the plaintiff testified that the accident occurred in the subbasement which he described as a big, open area with no subdivided room, rather than a passageway, rendering section 23-1.7(e)(1) inapplicable (*Stewart v Brookfield Off. Properties, Inc.,* 212 AD3d 746, 747 [2d Dep't 2023]).

Section 23-1.7(e)(2) requires that "[t]he parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed" (*Sanchez v BBL Constr. Servs., LLC*, 202 AD3d 847, 851 [2d Dep't 2022]). While the plaintiff notes that this section is for tripping hazards and that courts in the First Department have determined that it applies to slipping hazards as well, the Second Department continues to separate the two (*Dariusz Dyszkiewicz, appellant, v*

City of New York, et al., respondents., 2023 WL 4482173 [2d Dep't 2023][internal quotations and citations omitted]). Here, the Court finds section 23-1.7(e)(2) inapplicable. At his deposition, the plaintiff testified that he slipped and lost his balance when he attempted to step onto what he thought was plywood with his right foot.[12] When asked about if he had struck some object, the plaintiff admits that he had not struck some object, and that "[w]hatever [his] footing tried to hold its place on, it didn't hold and slipped."[13] Accordingly, M&M and Logozzo cannot be held responsible for the sections 23-1.7(e)(1), and 23-1.7(e)(2) claims.

Section 23-1.30 "provides that work sites must have [i]llumination sufficient for safe working conditions" wherever workers must work and sets a minimum standard of 10–foot candles in any work area and 5–foot candles in any passageway" (*Murphy v 80 Pine, LLC*, 208 AD3d 492, 498 [2d Dep't 2022]). It is uncontested that the lights in the subbasement were out at the time of the accident, and none of the third-party defendants demonstrated, prima facie, that this section does not apply to the accident (*id.*). Here, given that M&M is the only subcontractor hired to install temporary lighting and fix the lighting issues and Logozzo had supervisory control over the plaintiff and the job site, they both failed to make a prima facie showing that the lighting in the subbasement sufficiently complied with section 23-1.30 (*Fritz v Sports Auth.*, 91 AD3d 712, 713 [2d Dep't 2012]).

[12] Plaintiff's Feb. 26, 2020, EBT tr at 74, lines 3-13; at 90 lines 20-25; at 91, lines 2-5 (NYSCEF Doc. No 162 and 184).
[13] Plaintiff's Feb. 26, 2020, EBT tr at 91, lines 15-25; at 92, lines 2-7 (*id.*).

Accordingly, M&M and Logozzo may bear some liability premised on the section 23-1.30 claim.

Labor Law § 200/Common-Law Negligence

> "Labor Law § 200 is a codification of the common-law duty of property owners, contractors, and their agents to provide workers with a safe place to work. Where a plaintiff's injuries are alleged, as here, to arise from a dangerous condition on the premises, a defendant may be liable under Labor Law § 200 if it either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition. A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it" (*Bonkoski v Condos Bros. Constr. Corp.*, 216 AD3d 612, 616 ([2d Dep't 2023][internal quotations and citations omitted]).

Here, both M&M and Logozzo failed to establish, prima facie, that they did not have actual or constructive notice of the allegedly dangerous condition that contributed to the plaintiff's accident, namely, the unlit subbasement. Avishai Matsuzewics admits in his deposition testimony and affidavit, the subbasement's temporary lights went out on the date of the accident as had repeatedly occurred on several other occasions prior to the accident.[14] Moreover, M&M repeatedly had to repair the temporary lighting in the subbasement by replacing the stringers, bulbs, and cages prior to the date of the accident.[15]

Turning to Logozzo, the Court finds it had actual and constructive notice of the dangerous condition. At his deposition testimony, the plaintiff testified that "[t]he

[14] Avishai Matsuzewics Aff para at 7 and 8; Avishai Matsuzewics EBT tr at 21, lines 21-25; at 22 lines 1-18 (NYSCEF Doc No. 165, 200, 214 and 225).
[15] Avishai Matsuzewics EBT tr at 28, lines 1-6 (NYSCEF Doc No. 200, 214 and 225).

supervisor had a small flashlight in his hand" and described the subbasement as having "[n]o light. Pitch black. Dark",[16] which shows that the supervisor was aware of the condition in the subbasement and had actual notice. Additionally, after reaching the subbasement the plaintiff allegedly voiced his objections with: "I don't think we should be here because I slipped", "it's dark down here" and he couldn't see.[17] The alleged response from that supervisor was ". . . no. We're going to work. Don't worry about that."[18] Further, when when asked whether he inquired about the lighting condition and if he asked why the lights went out, Rocco Logozzo (a general foreman from Logozzo on the project) testified at his deposition "[n]o. It was an ongoing issue. It was very frequent, so [he] didn't ask why it went out. We still didn't know why it was going out,"[19] which supports plainitff's argument that Logozzo had constructive notice of the recurring dangerous condition.

Contractual Indemnification Claim

"[I]t is elementary that the right to contractual indemnification depends upon the specific language of the contract (*Castro v Wythe Gardens, LLC*, 2023 WL 4095957, at *3 [2d Dep't 2023][internal citations omitted]). The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*id.*) Here, both M&M and Logozzo failed to make a prima facie showing that they were not contractually obligated to indemnify 211 Schermerhorn and Oestreicher (*Selis v Town of N. Hempstead*, 213 AD3d 878, 880 [2d Dep't 2023]). The

[16] Plaintiff's Feb. 26, 2020, EBT tr at 54, lines 25-4; at 55, lines 11-16 (NYSCEF Doc No. 162 and 184).
[17] Plaintiff's Feb. 26, 2020, EBT tr at 73, lines 25; at 74, lines 2-6; at 75, lines 3-7 (*id.*).
[18] Plaintiff's Feb. 26, 2020, EBT tr at 75, lines 8-10 (*id.*).
[19] Rocco Logozzo's EBT tr at 64, lines 18-25; at 65, lines 1-9 (NYSCEF Doc No. 217 and 228).

indemnification provision under the contract between 211 Schermerhorn and Oestreicher and M&M (the "M&M contract"), and between 211 Schermerhorn and Oestreicher and Logozzo (the "Logozzo contract") both require M&M and Logozzo to indemnify 211 Schermerhorn and Oestreicher "against any and all losses, claims, NY Labor Law Sections 200, 240 and 241 et. seq. claims . . . arising out of or resulting from the performance of the Work or . . . the negligence . . . of the Subcontractor . . . ."[20] Moreover, given that the plaintiff has a viable Labor Law § 200 claim, the contractual indemnification provision was triggered (*Burgos v 14 E. 44 St., LLC*, 203 AD3d 688 [2d Dep't 2022]).

Insurance-Procurement Claim

> "A provision in a construction contract cannot be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated. In addition, contract language that merely requires the purchase of insurance will not be read as also requiring that a contracting party be named as an additional insured" (*Crutch v 421 Kent Dev., LLC*, 192 AD3d 982, 984 [2d Dep't 2021]).

"A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (*Breland-Marrow v RXR Realty, LLC*, 208 AD3d 627, 629 [2d Dep't 2022][internal quotations and citations omitted]). With respect to M&M, the M&M contract required it to name the contractor as an additional insured on its liability policy.[21] However, M&M failed to provide any evidence to establish its compliance with that obligation (*Baillargeon v*

[20] M&M Contract, page 10 (Section 4.6.1 of Indemnification) (NYSCEF Doc No. 163).
[21] M&M Contract, page 18 (Section 13.1 and 13.3 of Insurance) (*id.*).

Kings Cnty. Waterproofing Corp., 91 AD3d 686, 689 [2d Dep't 2012]). Therefore, M&M's motion for summary judgment dismissing 211 Schermerhorn and Oestreicher's second third-party claim for breach of contract for failure to procure insurance is denied.

As to Logozzo, it established that it procured the requisite insurance in a letter, dated January 15, 2019, from its insurance carrier Hiscox, who acknowledged that the Logozzo contract "obligated Logozzo to name Oesteicher as an additional insured on its commercial general liability policy . . . and that Oestreicher is specifically named as an additional insured pursuant to Endorsement 21."[22] No triable issue of fact was raised in opposition. Accordingly, Logozzo's motion for summary judgment dismissing 211 Schermerhorn and Oestreicher's third-party claim alleging breach of contract for failure to procure insurance is granted (*Meadowbrook Pointe Dev. Corp. v F&G Concrete & Brick Indus., Inc.*, 214 AD3d 965, 969).

Common Law Indemnification and Contribution Claims

> "In order to establish a claim for common-law indemnification, a party must prove not only that it was not negligent, but also that the proposed indemnitor's actual negligence contributed to the accident, or, in the absence of any negligence, that the indemnitor had the authority to direct, supervise, and control the work giving rise to the injury. Thus, a party moving for summary judgment dismissing a common-law indemnification claim can meet its prima facie burden by establishing that the plaintiff's accident was not due to its own negligence" (*Yang v City of New York*, 207 AD3d 791, 796 [2d Dep't 2022][internal quotations and citations omitted]).
>
> Moreover, Workers' Compensation Law § 11 unambiguously shields employers from liability to third parties for contribution and indemnity except in limited circumstances. "An employer

[22] NYSCEF Doc. No. 176.

> shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment" unless the employee "has sustained a 'grave injury' " or where there is a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant. In the absence of such proof, contribution and indemnification claims become extinguished by statute" (*Velazquez-Guadalupe v Ideal Builders & Constr. Servs., Inc.*, 216 AD3d 63 [2d Dep't 2023][internal quotations and citations omitted]).

Here, M&M failed to establish, prima facie, that it was not negligent (*Keller v Rippowam Cisqua Sch.*, 208 AD3d 654, 655 [2d Dep't 2022][internal citations omitted]). "Similarly, a party moving for summary judgment dismissing a claim for contribution must make a prima facie showing that it did not owe a duty of reasonable care independent of its contractual obligations, or a duty of reasonable care to the plaintiff" (*Id.* at 655). Accordingly, M&M is not entitled to dismissal of the third-party common-law indemnification and contribution claims against it, as the evidence proffered by M&M in support of its motion failed to establish, prima facie, that M&M did not, through its work, cause or contribute to the accident (*Id.* at 655-656).

Generally, as the plaintiff's employer, Logozzo would be liable for common-law contribution and indemnification if the plaintiff suffered a "grave injury" as a result of the accident (*Owens v Jea Bus Co.*, 161 AD3d 1188, 1190 [2d Dep't 2018]). However, the evidence established, prima facie, that the plaintiff did not sustain a grave injury (*id.*). As previously noted, the plaintiff does not dispute that he did not suffer a grave injury. Accordingly, the common law indemnification and contribution claims against Logozzo should be dismissed.

M&M's Counterclaim for Contractual Indemnification Against Logozzo

It is undisputed that there is no contract between M&M and Logozzo, which warrants Logozzo's entitlement to summary judgment dismissing M&M's counterclaim for contractual indemnification (*Rivera v 203 Chestnut Realty Corp.*, 173 AD3d 1085, 1087 [2d Dept 2019][internal citation omitted]).

The Court has considered the parties' remaining contentions and finds them to be without merit. All relief not specifically granted herein has been considered and is denied.

Conclusion

Accordingly, it is hereby

ORDERED that second third-party defendant M&M's motion for summary judgment seeking dismissal of the third-party claims for common law/contractual indemnification (Seq. 08) are denied; and it is further

ORDERED that third-party defendant Logozzo's motion for summary judgment (Seq. 09) is granted to the extent that (1) defendant/third-party plaintiff/second third-party plaintiff 211 and Oestreicher's common-law indemnification and contribution claims against it are dismissed; and (2) second-third party defendant M&M's counterclaim for contractual indemnification against it is dismissed.

This constitutes the decision and order of the court.

ENTER

J.S.C.

Hon. Wavny Toussaint
J.S.C.