

**Ramirez v 34-10 Dev. LLC**

2023 NY Slip Op 33161(U)

September 12, 2023

Supreme Court, New York County

Docket Number: Index No. 160428/2019

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

-----X

RAMIRO SOTO RAMIREZ,
Plaintiff,

- v -

34-10 DEVELOPMENT LLC, ATRIA BUILDERS, LLC, FSM
ELECTRICAL CORPORATION, SFK ELECTRICAL CORP.,
Defendants.

INDEX NO. 160428/2019

06/30/2023,
06/30/2023,
06/30/2023,
06/30/2023,
06/30/2023

MOTION DATE 06/30/2023

MOTION SEQ. NO. 001 002 003
004 005

DECISION + ORDER ON MOTION

-----X

34-10 DEVELOPMENT LLC, ATRIA BUILDERS, LLC
Plaintiffs,

Third-Party
Index No. 595345/2021

-against-

EXECUTIVE GROUP, INC., EXECUTIVE TRIM
CONSTRUCTION INC.
Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 48, 49, 50, 51, 52,
53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 144, 149, 162, 163, 164, 165, 166, 167, 175, 176, 177
were read on this motion to/for JUDGMENT - SUMMARY .

The following e-filed documents, listed by NYSCEF document number (Motion 002) 64, 65, 66, 67, 68,
69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 145, 150, 154, 155, 174
were read on this motion to/for JUDGMENT - SUMMARY .

The following e-filed documents, listed by NYSCEF document number (Motion 003) 82, 83, 84, 85, 86,
87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 146, 151, 160,
161, 169, 170, 171
were read on this motion to/for JUDGMENT - SUMMARY .

The following e-filed documents, listed by NYSCEF document number (Motion 004) 108, 109, 110, 111,
112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132,
133, 134, 135, 136, 147, 152, 156, 157, 172, 173
were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

The following e-filed documents, listed by NYSCEF document number (Motion 005) 137, 138, 139, 140, 141, 142, 143, 148, 153, 158, 159, 178, 179, 180

were read on this motion to/for

JUDGMENT - SUMMARY

In this Labor Law personal injury action plaintiff Ramiro Soto Ramirez, an employee of third-party defendant and millwork subcontractor Executive Trim Construction, Inc. (Executive Trim), alleges that during the course of his work installing a headboard assembly at the construction site located at 461 West 34th Street, New York, New York (the premises), he suffered an electrical shock. Defendant/third-party plaintiff 34-10 Development, LLC (34-10 Development) owned the premises and defendant/third-party plaintiff Atria Builders, LLC (Atria) was the general contractor for the project at the time of the accident. Atria retained defendant FSM Electrical Corporation (FSM) as the electrical subcontractor for the project, which assigned the physical work to defendant SKF Electrical Corp. (SKF). The parties make various motions for summary judgment, which are consolidated for disposition, as follows:

Plaintiff moves pursuant to CPLR § 3212 for summary judgment on the issue of liability on his Labor Law § 241 (6) claim and to dismiss all affirmative defenses alleging culpable conduct and/or comparative fault on the part of plaintiff (motion seq no 002).

34-10 Development and Atria move pursuant to CPLR § 3212 for summary judgment to dismiss plaintiff's Labor Law §§ 200 and 241 (6) claims (motion seq no 003).

SKF moves pursuant to CPLR § 3212 for summary judgment to dismiss all of plaintiff's claims against it and all cross-claims against it (motion seq no 004).

FSM moves pursuant to CPLR § 3212 for summary judgment to dismiss all of plaintiff's claims against it and all cross-claims against it (motion seq no 005).

34-10 Development and Atria move pursuant to CPLR § 3212 for summary judgment on their claims for contractual indemnification against third-party defendants Executive Group, Inc. (Executive Group) and Executive Trim (motion seq no 001).

### BACKGROUND

On September 4, 2019, while plaintiff was working as a carpenter for Executive Trim installing headboards in Room 1812 (the room) at the premises, he was injured in the following way: “I was walking to the ladder. And I ben[t] over to pick up a . . . wood piece, a bracket piece, from [the] floor when I got shocked” (Plaintiff’s EBT, pp 20, 29, 34, 40, NYSCEF Doc No 70). This occurred a foot and a half away from a jet pack (*i.e.*, electrical box) on the wall, which was supposed to supply power to the built-in lights and outlets in the headboard (*id.* at pp 42, 103). After its mounting on the wall, electricians would hook the headboard up with the electrical box through protruding wires that plaintiff testifies were not capped off, but rather exposed (*id.* at p 105). Plaintiff also testifies that his supervisor, Sergio Moreno, told him that the power was turned off in the room he worked in (*id.* at p 106).

Plaintiff’s co-worker, Louis Andrade, testifies that he saw the accident occur: “Ramiro was going to pick up the clip [for the headboard] that was on the floor at that time Ra[m]jiro bends down to pick up the clip that was on the floor. So he leans down and he gets close to some sort of cable or wire that was there. When Ramiro bends down to pick up the clip there was a wire that was not covered. So the wire that was not covered so Ramiro fell down to the ground and his body started trembling” (Andrade EBT, pp 18-19, NYSCEF Doc No 79). When asked whether he thought plaintiff tripped on something that caused him to fall into the wires, Andrade stated, “No, no. We thought that those cables [that] were there did not have electricity. They were not covered” (*id.* at p 19). Further, Andrade believes plaintiff was shocked when his head

touched the wires and Andrade saw a “spark” or “flash” (*id.* at pp 19, 20). This allegedly left plaintiff unconscious for approximately five minutes (*id.* at p 20).

Moreno, who was at the site and received a phone call from Andrade after the accident occurred, went to the room and observed that “the [electrical] box . . . [had] fixtures hanging out and there was an exposed wire” (Moreno EBT, pp 15, 19, NYSCEF Doc No 75).

According to Joseph Mattola, Atria’s general superintendent, the construction project was at the “punch out” stage at the time of plaintiff’s accident, which means that only small carpentry, painting, and tile jobs were left to be completed (Mattola EBT, p 12, NYSCEF Doc No 78). He further explained that exposed wiring would not protrude from electrical boxes during the “punch-out” stage, but only right before electricity goes live (*id.* at pp 12, 15, 22). Additionally, Harun Hosgoren, the project manager of FSM, testified at his deposition that the electrical wires were supposed to be taped and capped off at the time of plaintiff’s accident (Hosgoren EBT, p 45, NYSCEF Doc No 74).

Plaintiff submits Atria’s work log that shows Executive Trim had six workers on site installing headboards on floor 16 and up on the date of plaintiff’s accident (Atria Work Log, p 5, NYSCEF Doc No 73). Plaintiff also submits the incident report that states plaintiff “was working on the 18<sup>th</sup> floor room 12. Installing headboard. Working close to open outlet and got shocked. Fell down and hit his head on the furniture” (Incident Report, p 2, *id.*). The chief complaint of the ambulance report submitted by plaintiff states, “I was electrocuted” (Ambulance Report, p 11, NYSCEF Doc No 80). The report additionally notes a “[p]ositive deformity . . . to the LEFT upper extremity with discoloration and controlled bleeding possibly an exit wound from electricity. Positive deformity noted to the RIGHT lower extremity with 2 welt like deformity

that were hot to touch, possible entrance wound from electricity. Burns % 1st Degree - Electrical” (*id.*).

SKF and FSM submit an affidavit from Richard F. Regenthal, P.E., who holds a Bachelor’s Degree in Electrical Engineering and an Associate’s Degree in Engineering (Regenthal Aff, 1, NYSCEF Doc No 135). Regenthal states that the electrical box was installed by SKF at least four months prior to the accident and electrical power was turned on in each room where the furniture was being installed by plaintiff and his coworkers (*id.* at ¶¶ 13-14). He also states that the jet box does not need to be covered so long as the wires are taped and capped off inside (*id.* at ¶ 16).

After reviewing photographs taken by plaintiff’s co-worker Andrade of the electrical box, Regenthal avers that a non-electrician tampered with the electrical box after SKF installed it (*id.* at ¶ 25). He opines that photograph # 3 depicts white and black wires connected by a wire-nut (cap) constituting a short circuit thereby causing the associated circuit breaker to trip which would result in a loss of power (*id.* at ¶¶ 20, 27). Regenthal also opines that photograph # 4 depicting three straps located on the carpet with a single strap left inside the headboard demonstrates that the wires were being manipulated by the furniture installers (*id.* at ¶ 21). He notes that the wiring depicted in photograph # 2, taken later in the day after the accident, differs from the wiring photographed in photograph #’s 1, 3, 4, 5, and 6 such that photograph # 2 is not representative of the conditions which existed at the time of the accident (*id.* at ¶ 24). Regenthal suggests it is impossible that SKF left the electrical box in the condition seen in photograph #’s 2 and 3 because it would have been discovered by one of the workers, including Moreno, who cleared rooms for safety prior to his subordinates installing furniture (*id.* at ¶ 28).

Finally, Regenthal opines that since plaintiff testified that he had one foot (wearing non-conductive work boots) on a fiberglass ladder (non-conductive) while holding a piece of wood (non-conductive), even if his other hand touched an energized conductor he would not have been shocked (*id.* at ¶ 30). Instead, Regenthal suggests plaintiff may have tripped, hitting his head on the electrical box and cutting himself (*id.* at ¶ 29).

### DISCUSSION

“It is well settled that ‘the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact’” (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action” (*Cabrera v Rodriguez*, 72 AD3d 553, 553-54 [1st Dept 2010]). “The court’s function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility” (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-11 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined “in the light most favorable to the non-moving party” (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba*

*Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

*Labor Law § 241 (6)*

Plaintiff moves for summary judgment on the issue of liability on his Labor Law § 241 (6) claim and to dismiss all affirmative defenses alleging culpable conduct and/or comparative fault on the part of plaintiff (motion seq no 002). 34-10 Development and Atria also move for summary judgment to dismiss plaintiff's Labor Law § 241 (6) claim (motion seq no 003). Plaintiff argues defendants are liable under Labor Law § 241 (6) based on violations of Industrial Code 12 NYCRR (IC) § 23-1.13 (3)-(4) that require protecting employees from locations with electrical circuitry. 34-10 Development and Atria respond that they are not liable because Executive Trim was responsible for determining whether the power was off on the wall plaintiff was working on nor did they have notice that Executive Trim workers were working on the premises on the day of the accident. Plaintiff replies that the failure of plaintiff's employer flows directly to defendants who remain vicariously liable under the Labor Law and Atria's work log for the date of the accident shows that defendants had knowledge that Executive Trim workers were at the premises. The parties additionally dispute whether plaintiff had any culpability in the accident.

Labor Law § 241 (6) provides, in relevant part, as follows:

All contractors and owners and their agents, . . . when constructing or demolishing buildings to doing any excavation in connection therewith, shall comply with the following requirements:

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6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the

owners and contractors and their agents for such work, . . . shall comply therewith.

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection for workers and to comply with specific safety rules which have been set forth by the Commissioner of the Department of Labor (*St. Louis v Town of N. Elba*, 16 NY3d 411, 413 [2011]). “The duty to comply with the Commissioner’s safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable” (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). In addition, “[t]he [Industrial Code] provision relied upon by [a] plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles” (*id.*, citing *Ross v Curits-Palmer Hydro-Electric Co.*, 81 NY2d 494, 504-05 [1993]). Therefore, in order to prevail on a Labor Law § 241 (6) claim, “a plaintiff must establish a violation of an implementing regulation which sets forth a specific standard of conduct” (*Ortega v Everest Realty LLC*, 84 AD3d 542, 544 [1st Dept 2011]), and that the violation was a proximate cause of the injury (*Egan v Monadnock Constr., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

To support his motion on her Labor Law § 241(6) claim, plaintiff relies on IC § 23-1.13 (3)-(4), which provides that:

(3) Investigation and warning. Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments whether any part of an electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool or machine into physical or electrical contact therewith. The employer shall post and maintain proper warning signs where such a circuit exists. He shall advise his employees of the locations of such lines, the hazards involved and the protective measures to be taken.

(4) Protection of employees. No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work

unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means. In work areas where the exact locations of underground electric power lines are unknown, persons using jack hammers, bars or other hand tools which may contact such power lines shall be provided with insulated protective gloves, body aprons and footwear.

These provisions are “clear and sufficient” to support a claim under Labor Law § 241 (6) (*DelRosario v United Nations Fed. Credit Union*, 104 AD3d 515 [1st Dept 2013]).

Here, plaintiff has met his *prima facie* burden showing that defendants violated IC § 23-1.13 (3)-(4) by failing to warn and protect plaintiff from coming in contact with exposed electrical wires while he was engaged in construction work at the premises (*see Harris v Arnell Constr. Corp.*, 47 AD3d 768, 768 [2d Dept 2008] [plaintiff who was electrocuted at a construction site showed “that he was engaged in a covered activity when he was injured; that there were violations of the relevant Industrial Code sections . . . and that such violations were a proximate cause of his injury”]). Plaintiff’s testimony of how the accident occurred along with testimony from his co-worker Andrade support that there was exposed electrical wiring that shocked plaintiff causing him to fall and lose consciousness (*see* NYSCEF Doc Nos 70 at pp 20-40; NYSCEF Doc No 79 at pp 18-20). Additionally, plaintiff submits an ambulance report that details injuries on his extremities, including welt like deformities that were hot to the touch and presented as possible burns from an electrical shock (NYSCEF Doc No 80).

34-10 Development and Atria fail to rebut plaintiff’s *prima facie* showing because regardless of Executive Trim’s liability in this matter, it does not shield the non-delegable duty of an owner and/or general contractor under the Labor Law (*Leonard v City of New York*, 216 AD3d 51, 55-56 [1st Dept 2023] [“Section 241 (6) subjects owners and contractors to liability for failing to adhere to required safety standards whether or not they themselves are negligent.

Supervision of the work, control of the worksite, or actual or constructive notice of a violation of the Industrial Code are not necessary to impose vicarious liability against owners and general contractors, so long as some actor in the construction chain was negligent.”)]. Additionally, Mattola’s testimony that the wires should not have been live at the time of the accident because the project was in the “punch out” stage does not create a genuine issue of material fact sufficient to overcome plaintiff’s *prima facie* showing since, as plaintiff points out, the work log shows 126 Executive Trim workers were working on the premises the day of the accident (NYSCEF Doc No 78, pp 12, 15, 22; NYSCEF Doc No 73, p 6).

Plaintiff will also be entitled to dismissal of defendants’ affirmative defenses of plaintiff’s culpable conduct as “defendants do not cite to anything in the record to establish that plaintiff may have been at comparative fault in causing his accident” (*Fischer v VNO 225 W. 58th St. LLC*, 215 AD3d 486, 487 [1st Dept 2023]). Furthermore, “[t]o require that a plaintiff demonstrate that he or she is free of comparative fault would render the statute meaningless and inconsistent with direct legislative guide” (*see* 242 Siegel’s Practice Rev. [Feb 2012])” (*Capuano v Tishman Constr. Corp.*, 98 NYS 2d 517, 521 [1st Dept 2012, Acosta, J., concurring]).

Accordingly, plaintiff’s motion for summary judgment on his Labor Law § 241 (6) claim premised on IC § 23-1.13 (3)-(4) as against 34-10 Development and Atria will be granted (mot seq no 002). Additionally, plaintiff’s motion to dismiss defendants’ affirmative defenses alleging culpable conduct and/or comparative fault on the part of plaintiff will also be granted (mot seq no 002). Finally, that part of 34-10 Development and Atria’s motion for summary judgment seeking dismissal of plaintiff’s Labor Law § 241 (6) claim will be denied (mot seq no 003).

*Labor Law § 200*

34-10 Development and Atria move for summary judgment to dismiss plaintiff's Labor Law § 200 claim (motion seq no 003). Defendants argue they are not liable under Labor Law § 200 because they did not control the manner or method of plaintiff's work, their duty to provide a safe workplace was not breached because the injury arose from the negligent acts of subcontractors SKF and FSM, and they did not have notice of plaintiff working at the premises on the date of the accident nor of the dangerous condition of exposed, live wires. Plaintiff responds that defendants do not produce sufficient evidence to meet their burden in establishing lack of notice of the exposed, live wires nor does the absence of supervisory control shield defendants from liability if they knew or should have known of the existence of the dangerous condition.

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

All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see Ruisech v Structure Tone, Inc.*, 208 AD3d 412, 414 [1st Dept

2022]; *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-44 [1st Dept 2012] [“Claims for personal injury under [section 200] and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed.”]).

Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless “it actually exercised supervisory control over the injury-producing work” (*Jackson v Hunter Roberts Constr., LLC*, 205 AD3d 542, 543 [1st Dept 2022] [internal quotation marks and citation omitted]; *Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012] [“liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work”]). “General supervisory authority is insufficient to constitute supervisory control” (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]).

Where “a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a general contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition” (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]; *Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708 [2d Dept 2007];). Notably, “[w]here a defect is not inherent but is created by the manner in which the work is performed, the claim under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing on the premises” (*Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 406 [1st Dept 2018]).

Here, the means and methods test controls since plaintiff's accident arose from the electrical wiring and equipment used as materials for the construction project (*id.*). Accordingly,

34-10 Development and Atria have met their *prima facie* burden by demonstrating that they did not exercise control over or supervise plaintiff's work because SKF and FSM were specifically hired as electrical subcontractors to manage the electrical work, and plaintiff testifies that he only took direction from Executive Trim foreman Moreno and he had no contact with any non-Executive Trim employees (Subcontract, NYSCEF Doc No 94; Assignment, NYSCEF Doc No 95; NYSCEF Doc No 70, pp 31-32; NYSCEF Doc No 75, p 12). Any general responsibility 34-10 Development and Atria had for ensuring site safety does not rise to the level of supervisory control required to hold them liable for plaintiff's accident caused by the means and methods of the work (*see Haynes v Boricua Vil. Hous. Dev. Fund Co., Inc.*, 170 AD3d 509 [1st Dept 2019]).

Accordingly, 34-10 Development and Atria's motion for summary judgment on plaintiff's Labor Law § 200 and negligence claims as against them will be granted (motion seq no 003).

#### *Cross-Claims*

By stipulation of partial discontinuance dated June 20, 2023, plaintiff agreed to discontinue his common law negligence claims against SKF and FSM (Partial Stipulation of Discontinuance, NYSCEF Doc No 168); however, the cross-claims by 34-10 Development and Atria on those claims remain. Therefore, SKF and FSM's motion for summary judgment to dismiss all cross-claims against them will be considered (motion seq nos 004, 005). SKF argues that it exercised no control over the room where the accident occurred or plaintiff's work, it did not create the dangerous condition but rather someone tampered with its wiring work, and that plaintiff may not have been electrocuted but instead fell. FSM argues plaintiff's injuries could not be caused by coming in contact with an unexposed wire and the evidence shows that the

wiring that had been installed for months prior was subsequently tampered with by a non-electrician. 34-10 Development and Atria respond that questions of fact exist as to how the accident occurred and SKF and FSM fail to prove who the responsible party for the accident is if not them.

“A subcontractor may not be held liable under Labor Law § 200, and may not be held liable, as an agent of the owner or general contractor, under Labor Law §§ 240 (1) or 241 (6), where it does not have authority to supervise or control the work that caused the plaintiff’s injury” (*Tomyuk v Junefield Assoc.*, 57 AD3d 518, 521 [2d Dept 2008]; *see also Van Blerkom v Am. Painting, LLC*, 120 AD3d 660, 661 [2d Dept 2014]).

Here, SKF and FSM did not supervise plaintiff’s work as confirmed by testimony of plaintiff and Moreno (NYSCEF Doc No 70, pp 31-32; NYSCEF Doc No 75, p 12). Nor did SKF and FSM negligently exercise control over the jobsite. The electrical box was installed at least four months prior to the accident and once that work was ceded to the general contractor, the subcontractors are not responsible for dangerous conditions alleged to arise, especially when numerous other contractors work in the same area in an intervening period (*Rubino v 330 Madison Co., LLC*, 150 AD3d 603, 604 [1st Dept 2017] [“Appellants’ theory that [the subcontractor] negligently installed the wiring in the area of the accident more than one year before the accident occurred is speculative, in light of other work performed by other subcontractors in the period following the completion of (the subcontractor’s) work.”]).

Though 34-10 Development and Atria argue that since SKF and FSM were still working on the premises and needed to eventually come back to finish installation, SKF inspected its own work after it completed the electrical box installation and the dangerous condition did not exist (Martinez EBT, pp 38-39, 65, 73, 92-93, 121-22, NYSCEF Doc No 76). Additionally, various

Atria employees walked through the site after installation and did not find any dangerous condition (*see* Grunwald EBT, p 114, NYSCEF Doc No 72; NYSCEF Doc No 78, pp 78-79, 94-95).

Accordingly, SKF and FSM's motions for summary judgment on all cross-claims as against them will be granted (mot seq nos 004, 005).

### *Indemnification*

34-10 Development and Atria move for summary judgment on their claims for contractual indemnification against third-party defendants Executive Group, Inc. (Executive Group) and Executive Trim (motion seq no 001). Executive Group and Executive Trim oppose the motion by arguing there is no contract to which Executive Trim is a party, movants submit no evidence that the claim for indemnification arose from the work of Executive Group, the indemnification clause only applies to claims caused by the negligent acts or omissions of Executive Group which movants offer no evidence of, and General Obligation Law (GOL) § 5-322.1 precludes movants from obtaining indemnification for their own negligence.

Article 9 of the contract between Atria and Executive Group states:

- A. To the extent permitted by law, [Executive Group] shall indemnify, defend, save and hold the Owner [34-10 Development], the Contractor [Atria], and Design Team . . . harmless from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever which arise out of or are connected with, or are claimed to arise out of or be connected with:
  1. The performance of Work by [Executive Group], or any act or omission of [Executive Group];
  2. Any Accident or occurrence which happens, or is alleged to have happened, in or about the place where such Work is being performed or in the vicinity thereof (a) while [Executive Group] is performing the Work, either directly or indirectly through a sub-contractor or material agreement, or (b) while any of [Executive Group's] property, equipment or personnel are in or about such place or the

vicinity thereof by reason of or as a result of the performance of the Work . . .

(Atria/Executive Group Contract, Art. 9, NYSCEF Doc No 61).

Another provision in Article 9 further provides:

To the fullest extent permitted by law [Executive Group] shall indemnify and hold harmless [34-10 Development and Atria] . . . from and against all claims damages losses [and] expenses including but not limited [to] attorneys fees arising out of or resulting from performance of [Executive Group]'s work under this subcontract provided that any such claim damage loss or expense is attributable to bodily injury sickness disease or death or to injury to or destruction of tangible property (other than the work itself) but only to the extent caused by the negligent acts or omissions of [Executive Group].

(*id.*).

Since Executive Trim is not included in the indemnification contract, 34-10 Development and Atria cannot seek indemnification from it. Third-party plaintiffs fail to include legal support for their proposition that since Executive Trim is a d/b/a of Executive Group it is therefore bound by the contract entered into between Executive Group and Atria.

Accordingly, 34-10 Development and Atria's motion for summary judgment on their indemnification claims as against Executive Trim will be denied.

With respect to Executive Group, there are two competing indemnification provisions—the first requires indemnification arising out of damages related to Executive Group's work whereas the second requires indemnification arising only out of Executive Groups' negligence. In order to ensure every clause in a contract is given effect, the second provision limits the first as only to require indemnification from Executive Group upon damages arising out of its negligent acts or omissions (*see Lenart Realty Corp. v Petroleum Tank Cleaners, Ltd.*, 116 AD3d

536, 537 [1st Dept 2014]). Here, 34-10 Development and Atria fail to meet their *prima facie* burden of showing Executive Group's negligence caused plaintiff's injury.

Accordingly, 34-10 Development and Atria's motion for summary judgment on their indemnification claims as against Executive Group will be denied (motion seq no 001).

### CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment on his Labor Law § 241(6) claim premised on IC § 23-1.13 (3)-(4) as against 34-10 Development and Atria is granted (mot seq no 002); and it is further

ORDERED that plaintiff's motion to dismiss defendants' affirmative defenses alleging culpable conduct and/or comparative fault on the part of plaintiff is granted as against 34-10 Development and Atria and those affirmative defenses are dismissed (mot seq no 002); and it is further

ORDERED that part of 34-10 Development and Atria's motion for summary judgment on plaintiff's Labor Law § 241 (6) claim is denied (mot seq no 003); and it is further

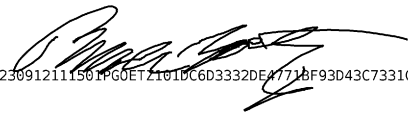
ORDERED that part of 34-10 Development and Atria's motion for summary judgment on plaintiff's Labor Law § 200 and negligence claims is granted and those claims are dismissed as against them (motion seq no 003); and it is further

ORDERED that SKF's motion for summary judgment on all cross-claims as against it is granted and those cross claims are dismissed (mot seq no 004); and it is further

ORDERED that FSM's motion for summary judgment on all cross-claims as against it is granted those cross claims are dismissed (mot seq no 005); and it is further

ORDERED that 34-10 Development and Atria’s motion for summary judgment on their indemnification claims as against Executive Trim is denied (motion seq no 001); and it is further

ORDERED that 34-10 Development and Atria’s motion for summary judgment on their indemnification claims as against Executive Group is denied (motion seq no 001).

  
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9/12/2023  
DATE

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PAUL A. GOETZ, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE