SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN **PART** 49M

Justice

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SANTIAGO, EDWIN

Plaintiff,

- v -

GENTING NEW YORK LLC, RESORTS WORLD CASINO, PLAZA CONSTRUCTION LLC and UNITED ARCHITECTURAL METALS, INC.,

Defendants.

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INDEX NO. 157665/2019

MOTION DATE 12/21/2022, 02/16/2023, 02/22/2023

MOTION SEQ. NO. 002 003 004

DECISION + ORDER ON MOTION

GENTING NEW YORK LLC, RESORTS WORLD CASINO, PLAZA CONSTRUCTION LLC

Third-Party Plaintiffs,

-against-

UNITED ARCHITECTURAL METALS, INC.

Third-Party Defendant.

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Third-Party
Index No. 595448/2020

The following e-filed documents, listed by NYSCEF document number (Motion 002) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 122, 125, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 178, 200, 201, 202

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 123, 126, 179, 180, 181, 182, 183, 184, 185, 186, 195, 196, 197

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 124, 127, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 187, 188, 189, 190, 191, 192, 193, 194, 198, 199

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

Plaintiff Edwin Santiago, an employee of non-party Utopia Construction of NY Corp., was allegedly injured on July 25, 2019, when working on a construction

project at 110-00 Rockaway Boulevard, Jamaica, New York (the Project). Defendant Genting New York LLC i/s/h/a Resorts World Casino (Genting) is the owner of the Project, and defendant Plaza Construction LLC (Plaza, together with Genting, the building defendants) is the construction manager of the Project. Plaintiff initially brought this action against the building defendants, alleging negligence and violations of Labor Law §§ 200, 240, and 241 (6). The building defendants impleaded third-party defendant United Architectural Metals, Inc. (UAM), a subcontractor that supplied window panels for the Project, asserting cross claims for contribution and indemnification to the extent of their liability to plaintiff. Plaintiff subsequently amended his complaint to add UAM as a defendant.

This Decision and Order addresses motion sequences (MS) 002, 003, and 004. In MS 002, plaintiff moves for summary judgment pursuant to CPLR 3212 on his Labor Law § 240 (1) claim against all defendants and on the negligence claim against UAM. Defendants oppose. In MS 003, the building defendants move for summary judgment dismissing plaintiff's amended complaint. Plaintiff opposed on the Labor Law § 240 (1) and § 241 (6) claims but sought to withdraw the Labor Law § 200 claim against the building defendants. In MS 004, UAM moves for summary judgment dismissing the amended complaint as well as the building defendants' cross claims against it. Plaintiff opposes on the common law negligence claim. The building defendants oppose on the cross claims and cross move for summary judgment on the contractual indemnification claim.

BACKGROUND

Plaintiff Edwin Santiago alleges that he was injured on July 25, 2019, while working on the Project. Genting, hired Plaza as the construction manager of the Project (NYSCEF # 59 – Construction Management Agreement; NYSCEF # 98 – Dorman Aff, ¶ 4), who then subcontracted non-party Massey's Plate Glass & Aluminum, Inc. (Massey) for the installation of a curtain wall to the exterior of certain buildings being constructed at the Project (NYSCEF # 98, ¶¶ 6, 7). Part of the curtain wall consisted of window panels made of glass in metal frames (*id.*, ¶ 8; NYSCEF # 68 – Ely tr at 34:9-19).

Massey purchased these glass panels from UAM (NYSCEF # 68 at 30:8-31:14; NYSCEF # 37 at 9-13 – Purchase Order). The glass panels were of different sizes (NYSCEF # 63 at 20:3-6 – Sclafani tr). An average panel weighed about 500 pounds and was about four to five feet wide and thirteen feet long (NYSCEF # 68 at 33:13-17, 34:3-4). The Purchase Order obligated UAM to not only fabricate the glass panels, but also pack them into wooden crates that UAM built inhouse, and then deliver the panels in crates to the project site (NYSCEF # 37 at 9-13; NYSCEF # 68 at 37:15-25, 39:22-40:3, 40:14-25). Under the Purchase Order, UAM shall ensure that "each crate . . . ha[s] protection so material does not get damaged during unloading & hoisting to building" (NYSCEF # 37 at 12). The Purchase Order also required UAM to indemnify Massey and Massey's customers for losses and claims that arise out of injuries "in any way arising out of or caused by the work or services performed, or articles furnished by [UAM]" (*id.* at 10 – Indemnification Clause).

Massey separately subcontracted non-party Utopia Construction of NY Corp. (Utopia) to install the glass panels to the curtain wall (NYSCEF # 98, ¶¶ 7, 10; NYSCEF # 58 at 26:22-27:22). Utopia stored the panels delivered to the site in a garage (NYSCEF # 60 – Santiago tr at 74:4-9; NYSCEF # 63 at 33:7-12). When a set of panels were to be installed, Utopia workers took them to the first floor of that building, used dollies to move the panels into a hoist elevator, and then hoisted them to a designated floor for installation (NYSCEF # 63 at 33:17-20, 34:9-35:4, 35:19-22). The dolly used by Utopia workers was a flat metal platform that had four little wheels and a beveling to place the crate (NYSCEF # 60 at 79:23-80:2, 80:16, 85:9-11). Usually, a panel-holding crate would be placed on two unconnected dollies held together by the weight of the panels and crate (*id.* at 78:4-11, 84:15-18).

Plaintiff was employed by Utopia to transfer the crated panels on dollies from the first floor of the building to another floor for installation (*id.* at 48:15-25, 61:23-62:3, 64:3-7, 74:12-19, 74:25-75:11). Plaintiff directly reported to his supervising foreman at Utopia, Michael Sclafani, who reported to Massey's general foreman, Rodney Martin (NYSCEF # 58 at 27:16-28:22; NYSCEF # 60 at 49:12-18, 50:8-51:9).

In April or May 2019, Sclafani observed issues with the placement and securing of the panels inside the crates (NYSCEF # 63 at 105:22-106:12). On July 19, 2019, days before the accident, Sclafani sent Martin photos of broken panels and crates, noting that "5 panels broke already" (NYSCEF # 64). Martin forwarded pictures of the crates to Keith Ely at UAM, informing Ely that the panels were "loose" and were moving inside the crates (NYSCEF # 68 at 59:4-61:17). Ely and Martin discussed having Massey or the workers on site re-secure the panels and potentially add some support to them (*id.* at 62:8-24). UAM left this for Massey to implement and took no part in any following remedial actions (*id.* at 63:11-64:3).

On the day of the accident, plaintiff and a few other Utopia workers were moving a crate of panels on two dollies across the first-floor deck towards a hoist elevator, so the panels could be hoisted to a designated floor for installation (NYSCEF # 60 at 99:13-15, 103:12-25). The crate at issue contained four panels, weighing about 1,200 to 1,400 pounds in total (NYSCEF # 63 at 118:17-119:10). There was a metal ramp bridging a gap between the first-floor deck and the hoist elevator (NYSCEF # 60 at 104:9-11, 105:2). The incident happened when plaintiff and his co-workers attempted to wheel the crate over the ramp. As plaintiff was "grabbing the wood [crate] from the inside," a panel inside the crate slid towards plaintiff, hit the back of plaintiff's right hand, and then broke the crate (*id.* at 108:8-12, 115:18-20, 116:16-20, 122:13-19). Immediately after the incident, Sclafani took photos of the broken crate, which depicted the crate remaining on the dollies and one side of the crate was busted open by the panels (NYSCEF # 61 – Scene Photos; NYSCEF # 63 at 64:6-14). A piece of wood at the top of the broken side of the crate hung mid-air on the right, but still attached to the body of the crate on the left (NYSCEF # 61). The photos also displayed that after the accident, the panels remained in one piece but had shifted outwards, with a little part sticking outside the crate and the main body resting in the crate (*id.*). No part of the crate or the

panels in the Scene Photos appeared to have touched the ground (*id.*). Sclafani took a picture of plaintiff's right hand as well, which showed a dent in plaintiff's right hand (NYSCEF # 88 at 167).

All eyewitnesses, including plaintiff, testified consistently with the above description of the incident. However, their testimonies differ as to the exact circumstances leading to the accident. Plaintiff asserted that the first-floor deck and the hoist elevator were on the same level and were connected by a flat metal ramp with "a little lump in the middle" (NYSCEF # 60 at 104:12-15, 105:2-6, 106:22-25). Plaintiff recalled that when the incident occurred, he was walking in the front of the crate, pulling; as the crate traversed over the ramp towards the elevator, "the ramp moved and wobbled" and then the panel flew out (*id.* at 112:6-9, 115:18-20, 118:9-14, 120:10-11). Plaintiff claimed that the panel and the crate "fell off," but when he was shown the Scene Photos, he recognized that the crate was still resting on the dollies after the accident (*id.* at 100:9-10, 118:12-14, 132:24-133:9).

Sclafani testified that he and plaintiff were both pushing the crate from the back before the accident happened (NYSCEF # 63 at 42:16-44:2, 46:2-7). Sclafani stated that the hoist elevator was about three feet higher than the first floor and a ramp went down from the elevator to the floor deck, with a one-inch lip at the bottom of the ramp (*id.* at 50:11-20, 51:5, 126:8-12, 127:10-14). When the accident occurred, Sclafani and his work crew were attempting to get the crate on the skates over the lip and onto the ramp (*id.* at 129:5-10). The skates stopped when their wheels hit the lip of the ramp, but "the momentum of the crate continued"; plaintiff was gripping the crate by his right hand and as the crate moved forward while the panels stayed still, a panel pinched plaintiff's right hand (*id.* at 54:14-56:18). Sclafani heard plaintiff moaning in pain and saw the panels partially came out of the crate (*id.* at 54:14-20, 59:24-60:5, 60:19-23, 130:25-131:16).

Antonio Murro and Travis Freeman were two other Utopia workers who moved the crate with plaintiff at the time of the incident (NYSCEF # 67 – Murro tr at 38:5-21; NYSCEF # 62 – Freeman Aff at 2). Murro testified that Sclafani was moving the dollies with him and plaintiff, although plaintiff recalled that Sclafani was not (*id.* at 38:16-21; NYSCEF # 60 at 101:10-12). Murro stated that the wheels of the dollies were stuck and stopped as soon as they hit the ramp (NYSCEF # 67 at 41:5-16). Then he saw plaintiff holding his hand, in pain (*id.* at 41:24-42:6). Freeman averred that the accident occurred when Utopia workers were "attempting to get the crate into the hoist and over the lip," at which time "the plate wobbled, causing the wooden crate to also move," and then "the crate, and the panels inside, came off the skates, collapsing and falling onto the ground, injuring [plaintiff] in the process" (NYSCEF # 62 at 2). Contradicting the Scene Photos, Freeman maintained that the "crate was literally broken after the accident with pieces all over the place, as well as the curtain wall panels on the ground" (*id.*).

The day after the accident, July 26, 2019, Ely at UAM came to the site to inspect the crates with Martin at Massey (NYSCEF # 68 at 73:22-74:9). Ely observed that the crate at issue had "come apart" (NYSCEF # 68 at 76:6-13, 77:13-

15). After the inspection, Martin directed Sclafani to better structure the crate with more stiffeners and inside dividers, as evidenced by a change order Massey issued to Utopia (NYSCEF # 63 at 74:20-75:23; NYSCEF # 51 – Change Order). On August 12, 2019, Utopia asked plaintiff and Sclafani to sign an accident report, which stated that "[UAM] should have crated the crates better" (NYSCEF # 65 – Accident Report; NYSCEF # 60 at 145:17-147:24; NYSCEF # 63 at 148:5-24).

Presently before the court is plaintiff and all defendants' summary judgment motions. In support his motion, plaintiff submits an affidavit of Nicholas Bellizzi, a registered and licensed professional engineer in New York, alleging that (i) the way the crate was placed on the skates violated Labor Law § 240 (1); and (ii) "[UAM] was also negligent in causing this accident" (NYSCEF # 69 – Bellizzi Aff, ¶¶ 21, 22). On the other hand, the building defendants provide an affidavit of Eugenia Kennedy, a certified safety professional, to explain that the injury occurred because the panels "were not securely packed within the crate" and therefore when the skates' wheels were stopped, the panels moved forward relative to the crate "due to horizontal momentum" (NYSCEF # 100 – Kennedy Aff, ¶ 14).

DISCUSSION

On a motion for summary judgment, evidence presented 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]). "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]).

If the moving party makes this initial showing, the burden shifts to the opposing party to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Labor Law § 240 (1) Claim (MS 002, 003, 004)

Plaintiff moves for summary judgment in his favor on the Labor Law § 240 (1) claim (NYSCEF # 70 – MS 002 at 2-13). All defendants move for summary judgment dismissing the same claim (NYSCEF #'s 103, 108 – MS 003, 004). Plaintiff only opposes to dismissing the claim against the building defendants NYSCEF # 179 – MS 003 Opp, ¶ 2; NYSCEF # 187 – MS 004 Opp, ¶ 2). As such, plaintiff is deemed to have abandoned this claim against UAM (NYSCEF # 187, ¶ 2) (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [a claim is deemed abandoned if plaintiff did not oppose to defendant's motion for summary judgment

dismissing the claim]). The court considers plaintiff and the building defendants' motions on the Labor Law § 240 (1) claim below.

Labor Law § 240 (1) imposes an absolute and nondelegable duty on owners and contractors to provide certain safety devices, such as "scaffolding, hoists, stays, ladders" to protect a person performing labor work "in the erection, demolition, repairing, altering . . . of a building or structure" (Labor Law § 240 [1]). This statute "was designed to prevent those types of accidents in which . . . protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001] [internal quotation and citation omitted]). Application of Labor Law § 240 (1) is limited to "specific gravity-related accidents [such] as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 500-501 [1993] [internal quotation and citation omitted]).

In MS 002, plaintiff contends that he was struck by the crate that "collapsed and fell" (NYSCEF # 56, ¶ 17). In support, plaintiff submits an expert affidavit by Belizzi, who stated that plaintiff was struck by the "panels on skates that broke apart [and] fell over" (NYSCEF # 69, ¶ 20). Plaintiff further provides the affidavit of plaintiff's co-worker, Freeman, who alleged that "the crate, and the panels inside, came off the skates, collapsing and falling onto the ground, injuring [plaintiff] in the process" (NYSCEF # 62 at 2). Plaintiff in his own testimony also mentioned that the panels and the crate "fell off," although he later recognized from the Scene Photos that the crate remained on the dollies after the accident (NYSCEF # 60 at 118:12-14, 132:24-133:9). Conversely, in MS 003, the building defendants argue that this incident is not caused by the application of the force of gravity and plaintiff was hit by the panel horizontally (NYSCEF # 151 – MS 002 MOL Opp at 11-17; NYSCEF # 103 – MS 003 MOL at 13-16). They submit Kennedy's expert affidavit in support (NYSCEF # 100, ¶ 14 ["[t]he incident was the result of the relative motion of the panels and crate due to differences in horizontal momentum"]).

"[T]he protections of Labor Law § 240 (1) do not encompass any and all perils that may be connected in some tangential way with the effects of gravity. Rather, liability [remains] contingent upon the existence of a hazard contemplated in section 240 (1)" (*Nicometi v Vineyards of Fredonia, LLC,* 25 NY3d 90, 97 [2015] [internal citation and quotation omitted]). A plaintiff is only entitled to recovery under Labor Law § 240 (1) if the injury is caused by "extraordinary elevation risks," not "the usual and ordinary dangers of a construction site" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]). In a falling object case, a plaintiff must establish that, at the time the object fell, it was being hoisted or secured, or required securing for the purposes of the undertaking (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.,* 18 NY3d 1, 7 [2011]). Labor Law § 240 (1) does not apply if plaintiff is struck by a horizontally moving object and sustains injury that "is not

attributable to the sort of elevation-related risk that Labor Law § 240 (1) was meant to address" (*Toefer v Long Is. R.R.*, 4 NY3d 399, 408 [2005]).

Applying these principles, the building defendants have established prima facie entitlement to summary judgment dismissing plaintiff's Labor Law § 240 (1) claim. As plaintiff acknowledged, the Scene Photos taken immediately after the incident show that the panels and crate remained on the skates after plaintiff was hit (NYSCEF # 61; NYSCEF # 60 at 132:24-133:9). Although plaintiff and Sclafani testified to different factual circumstances leading up to the accident, it is undisputed that in either of their narratives, plaintiff's injury was not caused by elevation or gravity-related risks (NYSCEF # 102, ¶¶ 27-29, 34). Specifically, plaintiff described that the first-floor deck, the hoist elevator, and the ramp in between were all on the same level (NYSCEF # 60 at 104:12-15). Hence, the task of moving the crate over the ramp into the elevator did not involve an elevation-related risk. Although Sclafani averred that the hoist elevator was higher than the first-floor deck, he stated that the incident happened as soon as the wheels of the skates were stopped by the one-inch lip at the bottom of the ramp, before the crate even went up onto the ramp (NYSCEF # 63 at 50:11-20, 51:5, 129:5-10). In other words, the crate was moving horizontally when the injury occurred. Further, plaintiff cannot rely on the affidavit of his expert, Bellizzi, to establish whether the panels fell over during the accident, as Bellizzi has no personal knowledge of the incident (*see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384-85 [2005] ["an affidavit by an individual without personal knowledge of the facts does not establish the proponent's prima facie burden"]).

Given the evidence, which is in line with the building defendants' expert's analysis of horizontal momentum, the building defendants have met their initial burden to prove that plaintiff was not injured by a falling object that was being hoisted or secured, but by outwards-moving panels "sliding in the crate" (NYSCEF # 60 at 120:16-20) (*see Toefer*, 4 NY3d at 408 [plaintiff's injury was not attributable to elevation-related risks as plaintiff was struck horizontally by an object that flew at him]; *see Brownell v Blue Seal Feeds, Inc.*, 89 AD3d 1425, 1427 [4th Dept 2011] [Labor Law § 240 (1) does not apply because "plaintiff's own deposition testimony establishes that the [object] that struck his leg swung outward in a horizontal direction"]).

In opposition, plaintiff has failed to raise a triable issue of facts as to whether the accident presents an elevation-related risk. Plaintiff has contradicted his own testimony that the panels and the crate "fell off" by acknowledging that the crate remained resting on the dollies after the accident (NYSCEF # 60 at 118:12-14, 132:24-133:9). Freeman vaguely stated that when the incident happened, "the crate, and the panels inside, came off the skates, collapsing and falling onto the ground, injuring [plaintiff] in the process" and the crate was "broken after the accident with pieces all over the place" (NYSCEF # 62 at 2). Importantly, however, Freeman did not explain how plaintiff was injured, by panels or crate, at which point of the process of "collapsing and falling." Freeman's recollection that the crate broke into

pieces fallen all over the floor is also inconsistent with the Scene Photos, which show that no part of the crate was on the ground after the accident (NYSCEF # 61).

In any event, even assuming some part of the crate or panels fell and injured plaintiff, according to the Scene Photos, such a fall can only be of a miniscule height, which cannot create the type of extraordinary elevation-related danger that Labor Law § 240 (1) is intended to protect against (*see Simmons v City of New York*, 165 AD3d 725, 727 [2d Dept 2018] [holding that plaintiff's injuries were not caused by the elevation-related risks encompassed by Labor Law § 240 (1) where plaintiff was moving a pallet jack and a compressor "horizontally across the floor" when a sudden stop of the pallet jack caused "the compressor to roll off the pallet jack and onto the plaintiff's ankle"]; *see Davis v Wyeth Pharm., Inc.*, 86 AD3d 907, 909 [3d Dept 2011] [Labor Law § 240 (1) does not apply to injuries caused by an object that tipped over while being moved horizontally]). As such, Labor Law § 240 (1) is not applicable to the present case.

Accordingly, the building defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 240 (1) claim and plaintiff is not entitled to summary judgment in his favor on the same claim.

Labor Law § 241 (6) Claim (MS 003, 004)

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to comply with specific safety rules which have been set forth in the Industrial Code (*see St. Louis v Town of N. Elba*, 16 NY3d 411, 413 [2011]). To demonstrate liability under Labor Law § 241 (6), "[t]he particular [Industrial Code] provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]).

In this case, all defendants move for summary judgment dismissing this claim (NYSCEF #'s 103, 108 – MS 003, 004). Plaintiff opposes only the building defendants' motion (NYSCEF # 179, ¶ 2; NYSCEF # 187, ¶ 2). Therefore, plaintiff has abandoned his Labor Law § 241 (6) claim against UAM (*see Genovese*, 309 AD2d at 833). On the remaining claim against the building defendants, plaintiff alleges violations of Industrial Code § 23-1.5 (c) (2) and § 23-1.22 (b) (1) (2) (3) (4) (NYSCEF #'s 179, 185, 192).[1] The building defendants argue that these allegations have no evidentiary basis (NYSCEF # 196 at 11-12).

As an initial matter, Industrial Code § 23-1.5 (c) (2) is not sufficiently specific for Labor Law § 241 (6) liability, as it "set[s] forth general rather than specific standards of conduct" (*McLean v Tishman Const. Corp.*, 144 AD3d 534, 535 [1st Dept 2016]; 12 NYCRR 23-1.5 [c] [titled "general responsibility of employers – condition of equipment and safeguards"]). Further, Industrial Code § 23-1.22 (b) (1) (2) (4) are not applicable to the facts of this case because they concern ramps used

[1] Plaintiff originally listed many other unspecified Industrial Code sections, which were later removed (NYSCEF #'s 81, 192); plaintiff thereby abandons his Labor Law § 241 (6) claim as to the removed sections (*Foley v Consol. Edison Co. of New York, Inc.*, 84 AD3d 476, 478 [1st Dept 2011]).

by "motor trucks or heavier vehicles" or "for the use of persons only" (12 NYCRR 23-1.22 [b]; *see Purcell v Metlife Inc.*, 108 AD3d 431, 433 [1st Dept 2013]). Thus, among the Industrial Code sections cited by plaintiff, only Industrial Code § 23-1.22 (b) (3) pertaining to ramps for the use of wheelbarrows and hand carts be "substantially supported and braced ..." (12 NYCRR 23-1.22 [b] [3]) is sufficiently specific and applicable to the present facts.

Here, the building defendants have established prima facie compliance: they argue that the ramp at issue was firmly secured, as the four corners of the ramp were screwed into the first-floor deck and hoist opening (NYSCEF # 63 at 51:18-53:2, 126:18-20). However, plaintiff in his deposition mentioned multiple times that when the incident happened, the ramp between the deck and the elevator "moved and wobbled" (NYSCEF # 60 at 113:14-20, 116:16-20, 117:12-18, 118:9-25). Freeman also recalled that the accident took place because the ramp wobbled, "causing the wooden crate to also move" (NYSCEF # 62 at 2). Viewing the evidence in the light most favorable to plaintiff, this creates a triable issue of fact as to whether the ramp was safely secured, which precludes summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on Industrial Code § 23-1.22 (b) (3) (*see Weiss v El Ad Properties NY LLC*, 62 AD3d 472, 473 [1st Dept 2009] [denying defendant's motion for summary judgment dismissing plaintiff's Labor Law § 241 [6] claim for violations of Industrial Code § 23-1.22 [b] [3] because "the injured worker's deposition testimony raised a triable issue of fact"]).

Accordingly, the building defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim (MS 003) is denied to the extent that plaintiff's claim predicated on Industrial Code § 23-1.22 (b) (3) and granted as to the rest of this claim. UAM's motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim against it (MS 004) is granted.

Labor Law § 200 Claim and Common Law Negligence (MS 002, 003, 004)

In MS 003, the building defendants move for summary judgment dismissing plaintiff's Labor Law § 200 claim; plaintiff does not oppose and therefore abandons this claim (NYSCEF # 179, ¶ 2) (*see Genovese*, 309 AD2d at 833).

In MS 002, plaintiff moves for summary judgment in his favor on the negligence claim against UAM claiming that through discovery, it was confirmed that UAM secured the panels (NYSCEF # 70 at 14). However, plaintiff's assertions are unspecified in that they are do not point to the source of the writer's conclusions. And, aside from citing to *Rodriguez v City of New York* (139 AD3d 182 [2018]) to assert the lack of comparative negligence (NYSCEF # 70 at 14), plaintiff cites no case law or other authorities on the negligence issue. Plaintiff has not presented a prima facie showing entitling him to summary judgment.

In any event, even assuming that plaintiff did present a prima facie case, UAM's opposition raises an issue of material fact to deny plaintiff's entitlement to summary judgment. UAM first argues that it does not owe a duty of care to plaintiff as it is not a Labor Law defendant (NYSCEF # 178, aff in opp). UAM then points to

testimonies by the different witnesses to show that the crates and packing were not defective, that the crates were in Masseys' or Utopia's control, and that the skate on which the crate was loaded hit a lip in the ramp which jammed the skates (*id.* ¶¶ 12-23). UAM raises issues of fact as to how plaintiff's accident occurred. As such, plaintiff's summary judgment motion on the negligence claim is denied. In turn, the court now addresses UAM's motion for summary judgment dismissing this claim (MS004).

"Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]). The question of duty is a threshold question of law for the court (*Pasternack v Lab. Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016]). Generally, a contractual obligation alone does not give rise to tort liability in favor of a third party (*Espinal*, 98 NY2d at 138). However, the Court of Appeals has identified three exceptions to this general rule, under the *Espinal* doctrine (*id.* at 140). One of the exceptions imposes a duty on a contracting party that "launche[s] a force or instrument of harm" and injures a non-contracting party (*id.*).

UAM contends, *inter alia*, that it did not launch a force of harm and thus owes no duty to plaintiff under the *Espinal* doctrine (NYSCEF # 108, ¶¶ 23-26, 44), to which plaintiff disagrees (NYSCEF # 193 – MS 004 Opp at 23-28).[2] UAM also claims that there is no breach of duty because "the crate in issue was not defective" (*id.*, ¶¶ 4, 27-34).[3]

A contractor owes a duty of care to the injured party if he "launch[es] a force or instrument of harm" or put differently, "negligently creates or exacerbates a dangerous condition" (*Espinal*, 98 NY2d at 141-142). In this context, a defendant who "creates an unreasonable risk of harm to others" while discharging a contractual obligation may be liable for the resulting injury (*Church ex rel. Smith v Callanan Indus., Inc.*, 99 NY2d 104, 111 [2002]).

Applying this standard, UAM's argument that it owes no duty to plaintiff fails. Evidence establishes that UAM crated the panels and manufactured the crates (NYSCEF # 37 at 9-13; NYSCEF # 68 at 37:15-25, 39:22-40:3, 40:14-25). UAM was contractually obligated to ensure the panels and crates are well-protected "during unloading & hoisting to building" (NYSCEF # 37 at 12). However, the panels crated by UAM were noticeably loose and moving inside the crates days before the accident (NYSCEF # 68 at 59:4-61:17). And when the crate at issue was being moved, the panels inside shifted out and busted it open (NYSCEF # 60 at

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[2] Plaintiff argues that one of the *Espinal* exceptions applies here, without specifying which one.
[3] United also disputes that its actions are the proximate cause of plaintiff's injury. The court does not address the issue of causation here (*Speller ex rel. Miller v Sears, Roebuck and Co.*, 100 NY2d 38, 44 [2003] ["[w]here causation is disputed, summary judgment is not appropriate unless only one conclusion may be drawn from the established facts"] [internal citation and quotation omitted]; *Thomas v N. Country Family Health Ctr., Inc.*, 208 AD3d 962, 964 [4th Dept 2022] ["[q]uestions concerning . . . proximate cause are generally questions for the jury"]).

108:8-12, 115:18-20, 122:13-19). These records at least raise a trial issue of fact that UAM negligently created a dangerous condition by crating the panels loosely inside easily-broken crates; as such, UAM may be liable to the resulting injury sustained by plaintiff (*see Royland v McGovern & Co., LLC*, 203 AD3d 677, 679 [1st Dept 2022] [defendant may be liable for negligence as it "failed to exercise reasonable care in assembling the ramp, thereby launching an unreasonable instrument of harm"]; *see Jackson v Conrad*, 127 AD3d 816, 818 [2d Dept 2015] [triable issues of fact exist as to whether defendant launched an instrument of harm by negligently constructing an elevated deck that fell and injured plaintiff]). UAM's motion for summary judgment dismissing plaintiff's negligence claim is denied.

Also in MS 004, UAM moves for summary judgment dismissing the building defendants' cross claims for (i) common law indemnification, (ii) contractual indemnification, and (iii) contribution (NYSCEF # 108). The building defendants oppose dismissing any of the cross claims and cross move for summary judgment on the contractual indemnification claim (NYSCEF # 176). Since claims for common law indemnification and contribution are predicated on a breach of duty by the indemnitor or contributor, UAM seeks to dismiss both claims by arguing that it owes no duty to plaintiff (NYSCEF # 108). But, as discussed above, triable issues of fact exist as to whether UAM owes a duty of care to plaintiff. Accordingly, the branch of UAM's motion for summary judgment dismissing the building defendants' cross claims for common law indemnification and contribution is denied (*Jackson*, 127 AD3d at 818).

On the remaining issue of contractual indemnification, UAM moves for a judgment dismissing this claim for lack of contract between UAM and the building defendants (NYSCEF # 108, ¶ 7). The building defendants point to the Indemnification Clause in the Purchase Order between UAM and Massey, which provides, in relevant part, that UAM shall indemnify Massey and Massey's "customers" against claims that arise out of "injuries . . . in any way arising out of or caused by the work or services performed, or articles furnished by [UAM]" (NYSCEF # 37 at 10). The building defendants argue that this contractual clause entitles them to be indemnified by UAM, because they are customers of Massey and plaintiff's injury arises out of the panels and crates UAM furnished to the Project (NYSCEF # 176 at 12-14). UAM has not responded on this issue (NYSCEF # 198).

The building defendants are entitled to summary judgment on their contractual indemnification claim against UAM. While General Obligations Law § 5–322.1 voids any contractual clauses that indemnify the owner and the manager of a premise for their own acts of negligence, an indemnification clause is enforceable to the extent that the owner is not actively negligent (*Rhodes-Evans v 111 Chelsea LLC*, 44 AD3d 430, 434 [1st Dept 2007] [even if an indemnification clause could be read as indemnifying an owner for its own negligence, such clause is enforceable to the extent that the owner is not actively negligent]). Here, the parties submit no evidence that the building defendants were actively negligent, so the clear and unambiguous terms of the Indemnification Clause are enforceable (*Bailey v Fish &*

Neave, 8 NY3d 523, 528 [2007] [a written agreement that is complete, clear and unambiguous must be enforced according to the plain meaning of its terms]). Under the Indemnification Clause, UAM has agreed to indemnify the building defendants, as Massey's customers, for claims related to any injuries arising out of the panels and crates it furnished.

Thus, the building defendants' cross motion for summary judgment on their contractual indemnification claim against UAM is granted; UAM's motion for summary judgment dismissing the same claim is denied (*see Purcell v Metlife Inc.*, 108 AD3d 431, 433 [1st Dept 2013] [granting summary judgment on the contractual indemnification claim where the indemnification clause does not violate General Obligations Law § 5–322.1]).

CONCLUSION

Based on the foregoing, it is

ORDERED that plaintiff Edwin Santiago's motion for summary judgment on the Labor Law § 240 (1) claim against all defendants and on the common law negligence claim against United Architectural Metals, Inc. (MS 002) is denied; and it is further

ORDERED that defendants/third-party plaintiffs Genting New York LLC i/s/h/a Resorts World Casino and Plaza Construction LLC's motion for summary judgment dismissing the amended complaint (MS 003) is granted in part, and denied in part as to plaintiff's Labor Law § 241 (6) claim predicated on Industrial Code § 23-1.22 (b) (3); and it is further

ORDERED that defendant/third-party defendant United Architectural Metals, Inc.' motion summary judgment dismissing all claims and cross claims against it (MS 004) is granted in part, and denied in part as to (i) plaintiff's' common law negligence claim and (ii) defendants/third-party plaintiffs' cross claims for indemnification and contribution; and it is further

ORDERED that defendants/third-party plaintiffs' cross motion for summary judgment against defendant/third-party defendant on the contractual indemnification claim (MS 004) is granted; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon the other parties and the Clerk of the Court within ten days of the date of this order.

9/27/2023
DATE

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE