At an IAS Term, Part 75 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 29th day of September, 2023.

P R E S E N T:
HON. ROBIN S. GARSON,
Justice.

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LESTER ELIZA and JANE M. EMILE ELIZA,

Plaintiffs,

-against-

Index No.: 501932/18

STB HOUSING DEVELOPMENT FUND CORPORATION, STB OWNERS LLC, L&M DEVELOPMENT PARTNERS INC., CHATSWORTH BUILDERS LLC, and DONNREILL, INC.,

**DECISON & ORDER**
CORRECTED

Defendants.

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STB HOUSING DEVELOPMENT FUND CORPORATION, STB OWNERS LLC, L&M DEVELOPMENT PARTNERS INC., and CHATSWORTH BUILDERS LLC,
Third-Party Plaintiffs,

-against-

KINGSTONE BUILDERS, INC. and DONNREILL, INC.,

Third-Party Defendants.

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DONNREILL, INC.,
Second Third-Party Plaintiff,

-against-

KINGSTONE BUILDERS, INC.,

Second Third-Party Defendants.

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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 | 298-299, 381, 329-330, 358, |

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| Affidavits (Affirmations) Annexed | 361-362, 369, 371-372, 379, 383, 384, 386, 389-390, 395, 402-403 |
| Opposing Affidavits/Answer (Affirmations) | 402-403, 404, 411, 413-414, 416, 418 |
| Affidavits/ Affirmations in Reply | 420, 422, 424, 425 |
| Other Papers: | |

Upon the foregoing papers, defendant/third-party defendant/second third-party plaintiff Donnreill, Inc., (Donnreill), moves for an order: (1) pursuant to CPLR 3212, granting it summary judgment dismissing plaintiffs' complaint, the third-party complaint and all cross-claims and counter claims; and (2), in the event its motion is denied, granting Donnreill leave to renew this motion upon obtaining additional discovery (motion sequence number 11). Defendants/third-party plaintiffs STB Housing Development Fund Corporation (STB Housing), STB Owners, LLC (STB Owners), L&M Development Partners, Inc. (L&M Development), and Chatsworth Builders, LLC (Chatsworth), (collectively referred to as STB/Chatsworth) move, pursuant to CPLR 3212, for an order: (1) granting summary judgment dismissing the complaint and Donnreill's claims against them; and (2) granting them summary judgment in their favor on their common-law indemnification, contractual indemnification and breach of contract claims against Donnreill (motion sequence number 12).[1] By way of separate cross motions, plaintiffs Lester Eliza and Jane M. Emile Eliza[2] move for partial summary judgment in their favor with respect to liability on their common-law negligence and Labor Law §§ 200 and 241 (6) causes of action as against STB/Chatsworth (motion sequence number 13) and Donnreill (motion sequence number 14).

[1] The court notes that, although STB/Chatsworth did not mention their request for summary judgment in their favor on their indemnification and breach of contract claims against Donnreill in their notice of motion, the court ignores this defect because this request was discussed in their other motion papers, because Donnreill, has not objected, and because Donnreill, which addressed STB/Chatsworth's arguments in this respect in its opposition papers, has not been prejudiced (CPLR 2001).

[2] Plaintiff Jane M. Emile Eliza's claims are derivative only. All singular references to plaintiff relate to plaintiff Lester Eliza.

Donnreill's motion (motion sequence number 11) is granted only to the extent that plaintiffs' common-law negligence and Labor Law §§ 200 and 240 causes of action are dismissed as against it, to the extent that plaintiffs' Labor Law § 241 (6) cause of action is dismissed with respect to violations of 12 NYCRR 23-1.5, and 23-1.7 (e) and (f), and to the extent that STB/Chatsworth's claims for common-law indemnification and contribution are dismissed as against it. Donnreill's motion is otherwise denied.

STB/Chatsworth's motion (motion sequence number 12) is granted to the extent that plaintiffs' Labor Law § 240 (1) cause of action is dismissed, to the extent that plaintiff's Labor Law § 241 (6) cause of action is dismissed with respect to violations of 12 NYCRR 23-1.5, and 23-1.7 (e) and (f), and to the extent that Donnreill's claims for contractual indemnification and breach of contract to obtain insurance are dismissed as against STB/Chatsworth. STB/Chatsworth's motion is otherwise denied.

Plaintiffs' motions (motion sequence numbers 13 and 14) are denied.

## Background

Plaintiff Lester Eliza alleges causes of action premised on common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6) based on injuries he allegedly suffered on March 20, 2017, when he slipped and fell on ice located on the unfinished concrete basement floor of a building being constructed as part of the St. Barnabas North Project. STB Owners owned the premises at issue,[3] and it hired Chatsworth as the general contractor for the project. Chatsworth

[3] Although STB Owners' contract with Chatsworth identifies STB Housing as a legal owner of the project, STB/Chatsworth make no arguments regarding STB Housing's liability or right to recover affirmative relief distinct from those raised on the behalf of STB Owners and Chatsworth. With regard to L&M Developers, the parties have not identified its role in the project and STB/Chatsworth have likewise made no argument regarding L&M Developers liability distinct from the arguments raised on behalf of STB Owners

thereafter hired third-party defendant/second third-party defendant Kingstone Builders, Inc. (Kingstone) as the masonry subcontractor.[4] Prior to the accident, Donnreill entered into an agreement with Kingstone, which was approved by Chatsworth, in which Kingstone assigned its contract with Chatsworth to Donnreill and Donnreill assumed Kingstone's obligations under the contract. At the same time, Donnreill hired Kingstone to actually perform the masonry work at issue.

According to his deposition testimony, plaintiff was employed by Kingstone as a mason tender and was responsible for bringing cement and concrete blocks to Kingstone's masons while they were building walls. At the time of the accident, the basement area at issue was open to the elements and Kingstone's masons were in the process of building the perimeter and interior walls of the basement. The area where plaintiff was working at the time of the accident was a long hall area with a scaffold along one side on which the masons stood in order to build one of the walls. The accident happened as plaintiff was carrying a concrete block in his arms which he intended to place on a scaffold near one of Kingstone's masons. Although plaintiff stated that he did not notice the ice on the floor prior to his fall, afterwards he saw the ice, and asserted that the patch of ice was twice the size of an eight by 11 piece of paper. Plaintiff added that, while he had walked back and forth in this hall area before the accident, he had not reached the area of his fall prior to his accident.

Initially, defendants are entitled to dismissal of plaintiff's Labor Law § 240 (1) cause of action as plaintiff's slip and fall on the basement floor did not involve an elevation differential calling for a section 240 (1) protective device (*see Melber v 6333 Main St.*, 91 NY2d 759, 762-763 [1998]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514-515 [1991]; *Schutt v Dynasty*

[4] The court notes that, in an order dated July 29, 2019, the court (Sweeney, J.) granted STB/Chatsworth and Donnreill's motions for default judgments as against Kingstone on their respective third-party and second third-party actions.

*Transp. of Ohio, Inc.*, 203 AD3d 858, 860-861 [2d Dept 2022]). Plaintiffs, in their opposition papers, concede that they have no such cause of action.

Defendants have also demonstrated their prima facie entitlement to dismissal of plaintiffs' Labor Law § 241 (6) cause of action to the extent that it is premised on violations of 12 NYCRR 23-1.5, and 23-1.7 (e) and (f). Section 23-1.5 (a), (b), (c) (1), and (2) are not specific enough to support a section 241 (6) cause of action (*see Carrillo v Circle Manor Apts.*, 131 AD3d 662, 663 [2d Dept 2015], *lv denied* 27 NY3d 906 [2016]) and section 23-1.5 (c) (3), which applies to defective equipment (*see Canty v 133 E. 79th St., LLC*, 167 AD3d 548, 549 [1st Dept 2018]), and section 23-1.7 (e) and (f), which apply to tripping hazards, not slipping hazards (*see Dyszkiewicz v City of New York*, 218 AD3d 546, 548 [2d Dept 2023]), are inapplicable to the facts herein. Since plaintiffs have abandoned reliance on these regulations by failing to address them in their opposition papers, the defendants are entitled to dismissal of the section 241 (6) claim to the extent that it is predicated on 12 NYCRR 23-1.5, and 23-1.7 (e) and (f) (*see Debennedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]).

On the other hand, both plaintiffs and defendants' motions should be denied with respect to the Labor Law § 241 (6) cause of action to the extent that it is based on 12 NYCRR 23-1.7 (d). Section 23-1.7 (d) bars employers from allowing employees to use a slippery passageway or walkway and requires that ice or snow "shall be removed, sanded, or covered to provide safe footing." Although an owner or general contractor need not possess actual or constructive notice of a slippery condition to be held liable under section 23-1.7 (d), the evidence must still demonstrate that, "someone within the chain of the construction project was negligent in not exercising reasonable care, or acting within a reasonable time, to prevent or remediate the hazard, and that [a] plaintiff's slipping, falling[,] and subsequent injury proximately resulted from such

negligence" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 351 [1998]; *see Dyszkiewicz*, 218 AD3d at 550; *Bocanegra v Chest Realty Corp.*, 169 AD3d 750, 751-752 [2d Dept 2019]). This entity in the "chain" of the project may include plaintiff's own employer (*see Lois v Flintlock Constr. Servs., LLC*, 137 AD3d 446, 447 [1st Dept 2016]),

Here, defendants exclusively rely on plaintiff's testimony that he did not see the ice patch before he slipped and the testimony of Chatsworth's project manager that he was not aware of any complaints of snow and ice to argue that plaintiff cannot establish a violation of 12 NYCRR 23-1.7 (d). Plaintiff's testimony that he did not observe the ice before he fell does not, on its own, demonstrate that the ice patch was a condition that could not have been discovered and remedied prior to the accident, particularly in view of his testimony that the accident occurred at around 9:30 a.m., more than two hours after work had started at the accident location (*see Bocanegra*, 169 AD3d at 751; *see also Santoliquido v Roman Catholic Church of Holy Name of Jesus*, 37 AD3d 815, 815-816 [2d Dept 2007]). Further, the testimony of Chatsworth's project manager, who could not recall if he was present at the worksite, fails to show when the area was last inspected or that the ice could not have been discovered and remedied as the result of a reasonable inspection (*see Booth v Seven World Trade Co., L.P.*, 82 AD3d 499, 501-502 [1st Dept 2011]; *see also Islam v City of New York*, 218 AD3d 449, 450-451 [2d Dept 2023]; *D'Esposito v Manetto Hill Auto Serv., Inc.*, 150 AD3d 817, 818 [2d Dept 2017]; *Santoliquido*, 37 AD3d at 815-816). On the other hand, in the absence of other evidence regarding how long the patch of ice was present or how visible it was, plaintiff's testimony that he only observed the patch of ice after he fell, fails to demonstrate, as a matter of law, that someone in the chain of the project would have been able to prevent or remediate the hazard presented by the ice. Accordingly, both plaintiffs and defendants have failed to demonstrate their prima facie burdens and their respective motions must be denied with respect to plaintiff's section 241 (6) claim based on 12 NYCRR 23-1.7 (d) (*compare Dyszkiewicz*, 218

AD3 at 550 [upholding jury verdict dismissing case where plaintiff had not noticed slipping hazard before his fall]; *DeStefano v Amtad N.Y.*, 269 AD2d 229, 229 [1st Dept 2000]; *with Bocanegra*, 169 AD3d at 751-752 [upholding verdict for plaintiff who did not see ice before she slipped and fell]; *Lois*, 137 AD3d at 447; *Booth*, 82 AD3d at 501-502).

The court rejects Donnreill's argument that it may not be held liable under Labor Law § 241 (6) because it was not an owner or general contractor or a statutory agent of either. Contrary to Donnreill's contentions, Donnreill, by assuming Kingstone's contractual obligations under Kingstone's contract with Chatsworth and then proceeding to rehire Kingstone to actually perform the work, had the authority to supervise Kingstone's masonry work and, regardless of whether it actually exercised that authority, Donnreill became Chatsworth's statutory agent with respect to the performance of the masonry work (*see Mogrovejo v HG Hous. Dev. Fund Co., Inc.*, 207 AD3d 457, 461 [2d Dept 2022]; *Mitchell v T. McElligott, Inc.*, 152 AD3d 928, 930-931 [3d Dept 2017]; *Gallagher v Resnick*, 107 AD3d 942, 945 [2d Dept 2013]; *Inga v EBS N. Hills, LLC*, 69 AD3d 568, 569-570 [2d Dept 2010]). Even if Donnreill's assertion that Chatsworth was solely responsible for snow and ice removal is correct, such a fact would have no impact on Donnreill's being a statutory agent since Donnreill undisputedly had a contractual responsibility for supervising the means and methods of the work and insuring worker safety (*see* Assumed Chatsworth/Kingstone Contract at §§ 6.2, 6.3, 11.1 [a], 11 [c], 11 [f], 11 [g] ) and could have stopped Kingstone's work in the area or barricaded the area around the ice until the ice was remediated by Chatsworth (*see Booth*, 82 AD3d at 501).

With respect to the common-law negligence and Labor Law § 200 causes of action, plaintiffs assert that defendants are liable under premises condition theory of liability.[5] Where a

[5] Plaintiffs make no assertion that defendants may be held liable under a means and methods of the work theory of liability, and, in any event, defendants have demonstrated through the

premises condition is at issue, property owners, general contractors and subcontractors may be liable if they have control of the work site and either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*see Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dept 2014]; *Bauman v Town of Islip*, 120 AD3d 603, 605 [2d Dept 2014]; *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]; *see also Uhl v D'Onofrio Gen. Contrs., Corp.*, 197 AD3d 770, 772-773 [2d Dept 2021] [addressing liability of subcontractor]; *Vita v New York Law Sch.*, 163 AD3d 605, 607 [2d Dept 2018] [addressing liability of a subcontractor]).

Donnreill, in moving, has demonstrated, prima facie, that it did not have control of the worksite through the deposition testimony of its president, who stated that Donnreill did no actual work at the worksite, that he was the only Donnreill employee who visited the worksite, that he only visited the work site a few times a month, and that, when he visited the worksite, he was only there to check on the progress of Kingstone's work (*see Vita*, 163 AD3d at 607). Contrary to plaintiffs contentions, the fact that Donnreill would occasionally walk the worksite to ensure compliance with contract specifications and safety requirements and the fact that it had authority to stop Kingstone's work, in and of themselves, are insufficient to demonstrate that Donnreill had more than general authority over the worksite for purposes of liability under common-law negligence and Labor Law § 200 liability (*see Abelleira v City of New York*, 201 AD3d 679, 680 [2d Dept 2022]; *Goldfien v County of Suffolk*, 157 AD3d 937, 938 [2d Dept 2018]; *Messina v City of New York*, 147 AD3d 748, 749-750 [2d Dept 2017]). The fact that Donnreill may be a statutory agent for purposes of Labor Law § 241 (6) liability does not equate with the showing necessary to

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deposition testimony in the record that they did not supervise or control the work at issue within the meaning of claims under common-law negligence and Labor Law § 200 (*see Abelleira v City of New York*, 201 AD3d 679, 680 [2d Dept 2022]; *Goldfien v County of Suffolk*, 157 AD3d 937, 938 [2d Dept 2018]).

hold it liable for purposes of common-law negligence and Labor Law § 200 (*see Aranda v Park E. Constr.*, 4 AD3d 315, 316-317 [2d Dept 2004]; *see also Abelleira*, 201 AD3d at 680).

On the other hand, STB/Chatsworth make no assertion that they did not have control of the worksite. Instead, they contend that they lacked actual or constructive notice of the ice condition. STB/Chatsworth, however, have failed to demonstrate, prima facie, the absence of such notice. Chatsworth's witness, who testified at the deposition on behalf of all the STB/Chatsworth entities, could not recall if he was present on the date of the accident, and, although he testified that Chatsworth would have had supervisors and a site safety person present on the date of the accident, Chatsworth has not provided an affidavit from any of these persons or anyone else present on the date of the accident (*see Islam*, 218 AD3d at 450-451; *D'Esposito*, 150 AD3d at 818). Additionally, plaintiff's failure to notice the ice before he fell is not enough, on its own, to demonstrate lack of constructive notice as a matter of law, particularly in view of his testimony that he had not traversed the area of his fall prior to the accident (*see Lobianco v City of Niagara Falls*, 213 AD3d 1341, 1342-1343 [4th Dept 2023]; *Santoliquido*, 37 AD3d at 815-816). In reaching the conclusion that the STB Owners and the other owner related entities have failed their prima facie burden, the court emphasizes that these entities have made no argument that their liability should be considered differently from that of Chatsworth. With respect to plaintiffs' cross motion, plaintiffs, who have presented no evidence suggesting that the ice condition was present for any significant length of time or that it was readily observable, have likewise failed to demonstrate their prima facie burden (*see McBride v City of New York*, 208 AD3d 578, 579 [2d Dept 2022]). As such, both plaintiff and STB/Chatsworth's motions must be denied with respect to plaintiffs' common-law negligence and Labor Law § 200 causes of action regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Turning to the indemnification and insurance issues, in view of the finding that Donnreill may not be held liable under plaintiff's common-law negligence and Labor Law § 200 causes of action, Donnreill is entitled to dismissal of the claims against it for contribution and common-law indemnification (*see Debennedetto*, 190 AD3d at 938-939; *Cutler v Thomas*, 171 AD3d 860, 861-862 [2d Dept 2019]; *Kane v Peter M. Moore Constr. Co., Inc.*, 145 AD3d 864, 869 [2d Dept 2016]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]).

Donnreill, however, has failed to demonstrate its prima facie entitlement to dismissal of STB/Chatsworth's contractual indemnification cause of action against it. The indemnification provision contained in Chatsworth's contract with Kingston that was assumed by Donnreill provides, as is relevant here, that Donnreill "shall indemnify, defend . . . and hold harmless" STB/Chatworth[6] "from and against all losses, claims (including, without limitation those alleging injury to third parties . . . ) . . . arising from, in connection with or relating to . . . the performance (or non-performance) of the Work" (Assumed Chatsworth/Kingstone Contract at § 12.2 [a]). Since plaintiff, a Kingstone worker, was injured while performing Donnreill's work under its contract with Chatsworth that was subcontracted to Kingstone, plaintiff's claim is one "arising from, in connection with or relating to the performance (or non-performance) of the Work" within the meaning of the indemnification provision. This "arising from" the "Work" language is read broadly and, contrary to Donnreill's assertions, encompasses plaintiff's claim despite the fact that (1) plaintiff was employed by a subcontractor of Donnreill (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]; *Bellreng v Sicoli & Massaro, Inc.*, 108 AD3d 1027, 1031 [4th Dept 2013]), and (2) Donnreill and Kingstone may not have been responsible for any of the acts that

[6] The court notes that all of the STB/Chatworth entities in this action are covered by the indemnification provision since the indemnification provision indicates that the entities entitled to indemnification include all of the additional insureds identified in Exhibit B, which section identifies each of the STB/Chatworth entities as additional insureds (Assumed Chatsworth/Kingstone Contract at § 12.2 [a] and at Exhibit B)

caused plaintiff's injury (*see O'Connor v Serge El. Co.*, 58 NY2d 655, 657-658 [1982]; *Madkins v 22 Little W. 12th St., LLC*, 191 AD3d 434, 436 [1st Dept 2021]; *Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 773-774 [2d Dept 2010]; *Tkack v City of New York*, 278 AD2d 227, 229 [2d Dept 2000]; *see also Structure Tone v Component Assembly Sys.*, 275 AD2d 603, 603 [1st Dept 2000]). That the indemnification provision was intended to apply to claims by Donnreill's subcontractors is further shown by specific reference to claims by Donnreill's subcontractors in the Assumed Chatsworth/Kingstone Contract at § 12.2 (b).

On the other hand, in view of the factual issues with respect to STB/Chatsworth's own negligence discussed above, STB/Chatworth have failed to demonstrate their prima facie entitlement to summary judgment on their contractual indemnification claim against Donnreill (*see Rodriguez v Waterfront Plaza, LLC*, 207 AD3d 489, 491 [2d Dept 2022]; *Crutch v 421 Kent Dev., LLC*, 192 AD3d 977, 982 [2d Dept 2021]; General Obligations Law § 5-322.1).

Since plaintiff's claim arose from, or in connection with, Donnreill's work under the contract, the broadly worded additional insurance requirements of Exhibit B to the Assumed Chatsworth/Kingstone Contract apply to plaintiff's accident (*see Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38-39 [2010]; *Fireman's Fund Ins. Co. v State Natl. Ins. Co.*, 180 AD3d 118, 123-127 [1st Dept 2019], *lv denied* 35 NY3d 914 [2020]; *Structure Tone*, 275 AD2d at 603; *Tibbetts v I.B.M. Corp.*, 161 AD2d 581, 582 [2d Dept 1990]; *cf. Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 415-416 [2008]). Donnreill, which, in its initial motion papers, limited its insurance procurement argument to whether or not the insurance procurement provisions of its contract apply and did not argue that the coverage it obtained satisfied the contract's insurance procurement requirements, has failed to demonstrate its prima facie entitlement to dismissal of STB/Chatsworth's breach of insurance procurement claim.

STB/Chatsworth, on their own motion, however, have failed to demonstrate, prima facie, that Donnreill did not comply with its contractual insurance procurement obligations. Namely, the conclusory assertions by plaintiff's counsel that Donnreill failed to obtain excess/umbrella coverage (*see Breland-Marrow v RXR Realty, LLC*, 208 AD3d 627, 629 [2d Dept 2022]; *Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 844 [2d Dept 2014]; *Karnikolas v Elias Taverna, LLC*, 120 AD3d 552, 556 [2d Dept 2014]) and the fact that Donnreill's insurer has disclaimed coverage on behalf of STB/Chatsworth (*see Perez v Morse Diesel Intl., Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]; *KMO-361 Realty Assoc. v Podbielski*, 254 AD2d 43, 44 [1st Dept 1998]; *Garcia v Great Atl. & Pac. Tea Co.*, 231 AD2d 401, 402 [1st Dept 1996]; *see also Dorset v 285 Madison Owner LLC*, 214 AD3d 402, 404 [1st Dept 2023]; *Binasco v Break-Away Demolition Corp.*, 256 AD2d 373, 375 [2d Dept 1998]) do not demonstrate that the policies obtained by Donnreill failed to comply with the terms of the contract. Indeed, in view of the actual language of the Donnreill policy that is appended to STB/Chatsworth's papers, it is not at all clear that the policy fails to comply with the contract terms or that Donnreill's insurer has properly disclaimed coverage.

Notably, in this respect, a blanket additional insured endorsement is generally sufficient to satisfy contractual insurance obligations (*see Langer v MTA Capital Constr. Co.*, 184 AD3d 401, 402-403 [1st Dept 2020]; *Perez*, 10 AD3d at 498; *see also Kassis v Ohio Cas. Ins. Co.*, 12 NY3d 595, 599-600 [2009]; *cf. Gilbane v Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co.*, 31 NY3d 131, 135 [2018]) and the policy's additional insured endorsement that states its coverage applies "with respect to operations performed by or on behalf of the Named Insured" appears to encompass plaintiff's accident here (*see Fireman's Fund Ins. Co.*, 180 AD3d at 124-127; *Consolidated Edison Co. of N.Y. v Harford Ins. Co.*, 203 AD3d 83, 83-84 [1st Dept 1994]; *see also William Floyd School Dist. v Maxner*, 68 AD3d 982, 985-986 [2d Dept 2009]). Nor does the insurer's additional disclaimer based on the contractual liability exclusion appear to apply here

since, in view of the indemnification requirements of Chatsworth's contract with Kingstone that was assumed by Donnreill, plaintiff's claim may fall within the "insured contract" exception to the contractual liability exclusion (*see A. Servidone, Inc. v Commercial Underwriter's Ins. Co.*, 7 AD3d 942, 944-945 [3d Dept 2004]; *Antonitti v City of Glen Cove*, 266 AD2d 487, 488 [2d Dept 1999]). Accordingly, STB/Chatsworth's own papers fail to demonstrate, prima facie, that Donnreill's policy does not comply with the terms of the assumed contract. Moreover, to the extent that STB/Chatsworth may be aggrieved by the actions of Donrnreill's insurer in denying coverage, their proper remedy would be to bring a declaratory judgment action against the insurer directly (*see Garcia v Great Atl. & Pac. Tea Co.*, 231 AD2d 401, 402 [1st Dept 1996]).

Regarding the portion of STB/Chatworth's motion that seeks dismissal of Donnreill's claims against them, STB/Chatsworth have demonstrated their entitlement to dismissal of Donnreill's contractual indemnification and breach of insurance procurement claims since the Chatsworth's contract with Kingstone assumed by Donnreill contains no contractual indemnification and insurance procurement provisions for the benefit of Kingstone/Donnreill. The above noted factual issues with respect to STB/Chatworth's own negligence, however, require denial of the portion of STB/Chatsworth's motion that seeks dismissal of Donnreill's common-law indemnification and contribution claims against them.

For the foregoing reasons, it is hereby:

ORDERED that plaintiff Lester Eliza's cross-motion (Mot. Seq. 13) for partial summary judgment on liability against STB Housing Development Fund Corporation, STB Owners, LLC, L&M Development Partners, Inc., and Chatsworth Builders, LLC is denied; it is further

ORDERED that plaintiff Lester Eliza's cross-motion (Mot. Seq. 14) for partial summary judgment on liability against Donnriell, Inc. is denied; it is further

ORDERED that plaintiff Lester Eliza's Labor Law § 240 (1) claim is dismissed as to all defendants; further it is

ORDERED that plaintiff Lester Eliza's common-law negligence and Labor Law § 200 claim is dismissed as to defendant Donnreill, Inc.; further it is

ORDERED that plaintiff Lester Eliza's Labor Law § 241(6) claim is dismissed to the extent that it relies on Industrial Code §§ 23-1.5 and 23-1.7 (e) and (f); it is further

ORDERED that Donnreill Inc.'s claims for contractual indemnification and breach of contract are dismissed as against STB Housing Development Fund Corporation, STB Owners, LLC, L&M Development Partners, Inc., and Chatsworth Builders, LLC; it is further

ORDERED that third-party plaintiffs STB Housing Development Fund Corporation, STB Owners, LLC, L&M Development Partners, Inc., and Chatsworth Builders, LLC's claims for common-law indemnification and contribution are dismissed as against third-party defendant Donnreill, Inc.

This constitutes the decision and order of the court.

ENTER

9/29/23

Hon. Robin S. Garson, A.J.S.C.

The court will enter this decision and send courtesy copies to counsel for all parties.