SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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ADAM SOMMERS,

Plaintiff,

- v -

RBNB 20 OWNER LLC and METRO LOFT MANAGEMENT, LLC,

Defendants.

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INDEX NO. 150724/2018

MOTION DATE 02/24/2022, 02/24/2022, 01/07/2022

MOTION SEQ. NO. 003 004 005

DECISION + ORDER ON MOTION

RBNB 20 OWNER LLC,

Third-Party Plaintiff,

-against-

SRS ELECTRICAL CONSULTANTS, INC.,

Third-Party Defendant.

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Third-Party
Index No. 595272/2018

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 165, 169, 176, 177, 187, 201, 204, 205, 206, 212, and 213

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document numbers (Motion 004) 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 166, 170, 173, 174, 175, 192, 193, 194, 195, 196, 197, 198, 199, 207, 208, 209, 210, and 214

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document numbera (Motion 005) 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, 105, 106, 107, 108, 109, 110, 167, 171, 188, 189, 190, 191, 200, 202, 203, and 215

were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.S.C.

Plaintiff brings this action for violations of Labor Law §§ 200, 240(1), and 241(6), as well as common law negligence, alleging that he fell from a ladder after receiving an electrical

shock while performing lighting work. Plaintiff was employed by third-party defendant SRS Electrical Consultants, Inc. ("SRS"). Defendant/third-party plaintiff RBNB 20 Owner LLC ("RBNB") is the owner of the building where the accident occurred, located at 20 Exchange Place, New York, New York ("20 Exchange"). Before the court are the parties'[1] respective motions for summary judgment. In motion sequence no. 003, RBNB moves for summary judgment on its third-party complaint against SRS for contractual and common law indemnification, as well as breach of contract for failure to procure insurance. RBNB also moves for summary judgment dismissing plaintiff's claims for common law negligence and under Labor Law § 200. In motion sequence no. 004, plaintiff moves for summary judgment on its claims pursuant to Labor Law §§ 240(1) and 241(6). In motion sequence no. 005, SRS moves for summary judgment dismissing the third-party complaint in its entirety. Motion sequences 003 through 005 are consolidated for disposition.

Background

According to plaintiff, at approximately 2:00 PM on September 14, 2017, he was working at 20 Exchange on a project to replace certain hallway lights (Sommers June EBT tr, NYSCEF Doc. No. 154 at 45-47; Friedmann EBT tr, NYSCEF Doc. No. 156 at 19-20). Specifically, plaintiff was removing old light fixtures in the ceiling and replacing them with new fixtures (Friedmann EBT tr, NYSCEF Doc. No. 156 at 22; Alexander EBT tr, NYSCEF Doc. No. 158 at 19-20, 22). Plaintiff had arrived that morning and was told by his foreman that he would be swapping lights in the hallways that day (Sommers June EBT tr, NYSCEF Doc. No. 154 at 48, 50). Before lunch, he worked on the 37th or 39th floor before proceeding to the 38th Floor after lunch (*id.* at 51, 53). On both floors on which he worked that day, he recalled that the

[1] The case has been dismissed against defendant Metro Loft Management, LLC (transcript of proceedings, NYSCEF Doc. No. 213 at 3).

power was on, as were the lights he was replacing (*id.* at 53, 56, 77). He was given a fiberglass A-frame ladder to complete his task (*id.* at 57).

At the time of the accident, plaintiff had just removed an old light fixture, and was standing on the third or fourth step of the ladder when his foreman, Paul Pope, asked plaintiff to help locate a wire in the ceiling (*id.* at 76, 80-83). Plaintiff put his right hand into the ceiling through the hole left by the removal of the old light fixture, and felt a shock running from his right hand down his right arm (*id.*at 84-89, 92). He testified that he believed he had been shocked by a live wire, after which the ladder wobbled and shook, and plaintiff fell off the ladder (*id.* at 90-98). Ashlee Friedmann, RBNB's General Manager, encapsulated the events of the accident in an email to the general contractor, nonparty DTC Capital, though she did not witness the accident herself (NYSCEF Doc. No. 157). Accompanying the email is an incident report, which Friedmann states was sent to "insurance," (*id.*), in which Friedmann's colleague recounts that plaintiff "got electrocuted on the 38th floor by 120V loose wire and he fell down the ladder. The live wire was not apart[sic] of their job" (incident report, NYSCEF Doc. No. 157). A separate report filed with the Worker's Compensation Board describes the incident similarly: "[plaintiff] grabbed a hot wire which was left exposed by the prev electrical contractor" (Report of First Injury, NYSCEF Doc. No. 161).

Notwithstanding documentary evidence to the contrary, RBNB asserts that no such loose wire existed. Defendant's expert engineer, James J. Bernitt, P.E., avers, based on his review of the accident location and the deposition testimony in this case, that there were no loose wires present at the accident location, nor were there any emergency power lines that might have remained energized had the power to the light fixture been shut off prior to plaintiff removing it (Bernitt aff., NYSCEF Doc. No. 198, ¶¶ 9-15). RBNB also observes that no witness testified to

the existence of the wire, and even plaintiff himself testified that when he was shocked he neither felt himself grab the wire nor felt the wire poke him (Sommers June EBT tr, NYSCEF Doc. No. 154 at 90).

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, "the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]). Moreover, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assocs. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Discussion

Labor Law § 200 and Common Law Negligence

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 McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

"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 had the authority to supervise or control the performance of the work" (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]). Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]). However, where an injury stems from a dangerous condition inherent in the premises, an owner or contractor may be liable in common-law negligence and under Labor Law § 200 when the owner or contractor "'created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice'" (*Mendoza v Highpoint Assocs., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

Here, the record reflects, and plaintiff does not dispute, that RBNB had no authority to control or supervise plaintiff's work, precluding liability on a theory of means and methods (*Naughton*, 94 AD3d at 11). Plaintiff instead argues that a loose and energized wire in the ceiling constitutes a dangerous condition, and that RBNB has not adequately established that it lacked notice of the wire. Assuming arguendo that such a wire was present, and that plaintiff shocked himself by coming into contact with it, the record does not support a finding of actual or constructive notice of same. Nothing in the record shows that RBNB was actually aware that there was potentially a loose energized wire in the ceiling where plaintiff was working, precluding actual knowledge. "To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Here, such a loose wire would be neither visible nor apparent to RBNB. This is especially so given the fact that, per the plaintiff's account, no meaningful length of time lapsed in between the time plaintiff removed the old light fixture and the time his foreman asked him to help locate a wire in the ceiling (Sommers tr at 76, 80-89, 92). Moreover, Bernitt, RBNB's engineer, avers that he had to use a saw to open the ceiling in a manner sufficient to inspect the accident location (Bernitt aff., NYSCEF Doc. No. 198, ¶ 11). Where, as here, a defect is "latent and not visibly apparent," constructive knowledge of the defect may not be imputed to the property owner (*Lopez v Dagan*, 98 AD3d 436, 438 [1st Dept 2012]). Accordingly, so much of RBNB's motion for summary judgment dismissing the cause of action brought pursuant to Labor Law § 200 and for common law negligence is granted.

Labor Law § 240(1)

Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

> All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

"Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other 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" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Not every worker who falls or is struck by a falling object at a construction site is afforded the protections of Labor Law § 240(1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]). Instead, liability "is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). Therefore, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]).

Here, plaintiff was provided with an A-frame ladder. There is no meaningful dispute that the task he was engaged in, namely, removing and replacing the individual light fixtures, required the use of both of his hands, meaning that only his feet remained in constant contact with the ladder. It is undisputed that the ladder was opened but not braced or otherwise secured. As the Appellate Division, First Department, has said, "[i]t is well settled that failure to properly secure a ladder to ensure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240 (1)" (*Plywacz v 85 Broad St. LLC*, 159 AD3d 543, 544 [1st Dept 2018]). However, Section 240(1) is meant to protect "against harm directly flowing from the application of the force of gravity to an object or person" (*Cutaia v Bd. of Mgrs. of 160/170 Varick St. Condominium*, 38 NY3d 1037, 1038 [2022] [internal quotation marks and citations omitted]). Plaintiff's medical records indicate that his primary injury was an electrical shock and pain in his arm (FDNY Ambulance Call Report, NYSCEF Doc. No. 208; medical records, NYSCEF Doc. No. 209 at 23 [plaintiff "relates left sided throbbing arm pain but denies other pain"]). There is no evidence in the record that plaintiff sustained any injury other than by his electrical shock, which is not an elevation related risk. The court also notes issues of fact as to the availability of other safety devices as an alternative to the ladder as Salinger, SRS' President, testifies that such devices would not have fit in the workspace (Salinger EBT tr, NYSCEF Doc. No. 141 at 84-85). Accordingly, plaintiff has not established prima facie entitlement to summary judgment on his third cause of action.

Labor Law § 241(6)

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

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

* * *

> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998). Importantly, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross*, 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

Plaintiff relies on two provisions of the Industrial Code, 12 NYCRR 23-1.13(b)(3) and (4). 12 NYCRR 23-1.13(b)(3) provides that an employer shall "post and maintain warning signs" around any circuits that an employee may come into contact with during the employee's work. 12 NYCRR 23-1.13(b)(4) provides that "[n]o employer shall suffer or permit an employee to work in such proximity to any part of an electrical power circuit that he may contact such cicuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit." Both provisions have been found sufficiently specific to support a claim under Labor Law § 241(6) (*e.g. Higgins v TST 375 Hudson, L.L.C.*, 179 AD3d 508, 510 [1st Dept 2020]). Further, the record reflects that no warning signs were placed regarding circuits plaintiff might contact, and the circuits in the ceiling where plaintiff was working were not deenergized. Salinger testifies that the power should have been shut off prior to plaintiff

working on the lights (Salinger EBT tr, NYSCEF Doc. No. 141 at 52), as does Joseph Alexander, a representative of the nonparty general contractor DTC Capital (Alexander EBT tr, NYSCEF Doc. No. 158 at 52-53). While RBNB offers different explanations as to whether a live loose wire or some other live electrical circuit shocked plaintiff, RBNB cannot deny that he was shocked, and that the power was on when it should have been off. In this regard, the court notes that Bernitt, RBNB's expert, inspected the accident site four years after the accident, and nowhere avers that the wiring in the ceiling that he inspected was in the same condition as when the accident occurred. Indeed, he notes that there was a patched hole next to the subject light fixture (Bernitt aff., NYSCEF Doc. No. 198, ¶ 9).

RBNB's argument that plaintiff is at fault for not turning off the power himself, or for continuing to work on circuits he knew to be live, impermissibly attempts to shift RBNB's nondelegable duty to provide a safe workplace onto plaintiff (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 520 [1985] [Labor Law places "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers"] [internal quotation marks and citation omitted]). Moreover, plaintiff seeks only partial summary judgment as to RBNB's liability, and any potential issues of fact as to plaintiff's comparative fault need not be conclusively resolved to grant the motion (*Rodriguez v City of New York*, 31 NY3d 312, 324-25 [2018] ["To be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault"]).

Finally, RBNB and SRS' contention that plaintiff was instructed to stop working prior to the accident is insufficient to raise a triable issue of fact. Salinger testified that he instructed plaintiff's foreman, Paul Pope, to tell plaintiff to stop working and wait in the lobby for Salinger

to meet with him prior to the accident (Salinger EBT tr, NYSCEF Doc. No. 141 at 80-81). Salinger then stated that Pope had reported to him that Pope had so instructed plaintiff, but plaintiff was continuing to work anyway (*id.* at 81-82, 180-181). Pope's conversation with plaintiff is inadmissible hearsay (*People v Goldstein*, 6 NY3d 119, 127 [2005] ["Hearsay is a statement made out of court ... offered for the truth of the fact asserted in the statement"] [internal quotation marks and citation omitted]). So, too, is Salinger's deposition testimony that Pope told him that Pope had instructed plaintiff to stop working (*Joseph v Hemlok Realty Corp.*, 6 AD3d 392, 393 [2d Dept 2004] ["In opposition, the plaintiff submitted only hearsay evidence consisting of his own deposition testimony in which he claimed that his friend told him that either his friend or his friend's roommate previously complained about the window to the building superintendent"]). Without testimony from Pope to corroborate Salinger's statement, it is inadmissible, even assuming that Pope's statement to Salinger qualifies as Pope's "present sense impression" of plaintiff's conduct (*id.*; *see also Guaman v New Sprout Presbyt. Church of New York*, 33 AD3d 758, 759 [2d Dept 2006] ("The allegation that the plaintiff was instructed prior to the accident to stop work in an unsafe and unstable manner was based on inadmissible hearsay"]).

Accordingly, so much of plaintiff's motion as seeks summary judgment on liability only on his claim under Labor Law § 241(6) is granted.

Common Law Indemnification and Contribution

RBNB's first and second third-party claims seek common law indemnification and contribution, respectively, against SRS, plaintiff's employer. Generally speaking, an employer may not be held liable for common law indemnification or contribution except where an

employee has suffered a "grave injury" (Workers' Compensation Law § 11[1]). The statute provides as follows:

> An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

(*Id.*) "The categories of grave injuries listed in section 11, providing the sole bases for a third-party action, are deliberately both narrowly and completely described; the list, both exhaustive and not illustrative, is not intended to be extended absent further legislative action" (*Fleming v Graham*, 10 NY3d 296, 300 [2008] [internal quotation marks and citations omitted]). At oral argument on the motions, counsel for RBNB withdrew the common law indemnification and contribution claims, effectively stating that no evidence in the present record showed plaintiff had suffered a grave injury (transcript of proceedings, NYSCEF Doc. No. 213 at 16). Accordingly, so much of SRS' motion for summary judgment dismissing those claims is granted.

Failure to Procure Insurance

For its fourth third-party claim, RBNB asserts that SRS is in violation of the contract's insurance procurement requirement. The contract provides that SRS shall procure various types of insurance, including workers' compensation, employer's liability, and commercial or comprehensive general liability insurance on an occurrence basis (contract, NYSCEF Doc. No. 107, § 5). The commercial general liability insurance was to be in the amount of $1,000,000.00 per project and $2,000,000.00 in the aggregate, covering, inter alia, bodily injury, personal

injury, and property damage (*id.*, Exhibit 2). RBNB was to be named as a primary and additional insured (*id.*, Exhibit 3). As set forth in further detail below, there is a dispute between the parties as to the applicability of the contract to the work plaintiff was doing at the time of the accident. Assuming arguendo that the contract applies, however, SRS did, in fact, obtain insurance. The certificate of insurance submitted by SRS shows that nonparty Harleysville Worcester Insurance Company issued SRS a general liability policy whose coverage limits exceed those required by the contract (certificate of insurance, NYSCEF Doc. No. 110). SRS has therefore established prima facie entitlement to summary judgment dismissing this claim (*Arner v RREEF Am., L.L.C.*, 121 AD3d 450, 451 [1st Dept 2014]).

RBNB, in support of its own motion and in opposition to SRS' motion, does not dispute that SRS in fact obtained the requisite insurance, but argues that such insurance was insufficient because the carrier denied coverage for plaintiff's injuries. However, nothing in the contract requires that RBNB will always be covered by SRS' insurance, just that SRS obtain insurance in the amounts and of the types specified, which SRS has done. Moreover, RBNB provides no authority that an insurer's failure to provide coverage gives rise to a claim for failure to procure insurance.

Accordingly, so much of RBNB's motion seeking summary judgment on the fourth third-party claim for failure to procure insurance is denied, and so much of SRS' motion seeking dismissal of that claim is granted.

Contractual Indemnification

The initial written contract between the parties provides that SRS was tasked with "removing existing stairwell fixtures and install new, [RBNB] supplied fixtures" (contract, NYSCEF Doc. No. 107, Exhibit 5). A written change order was required for deletions or

modifications of the contract, or any additional work (*id.*, § 3[G]). Similarly, the contract contained a merger clause (*id.*, § 10). Most relevant herein, the contract provides that SRS agreed "to defend, protect, indemnify and hold harmless [RBNB] . . . from and against each and every claim," including claims arising from personal injury incurred during the performance for SRS' work (*id.*, § 6[A]).

All parties agree that plaintiff was working on replacing lights in the hallways of 20 Exchange, which is outside the written scope of the contract. No written change orders were ever signed, with SRS instead submitting invoices for additional work to RBNB as more projects were added to SRS' work. RBNB nevertheless argues that the indemnification provision of the contract should apply, even though the stairway portion of SRS' work had been completed. RBNB points to the testimony of Robert Salinger, SRS' president, who testified at deposition that the hallway work performed by, among others, plaintiff, was covered by the original written contract (Salinger EBT tr, NYSCEF Doc. No. 141, at 69-70). Salinger also signed a lien waver regarding what is defined as "20 Exchange Place – Various Lighting Work" wherein he states that work done at 20 Exchange was done pursuant to the written agreement without differentiating items of work or referencing the original scope of the contract (Lien Waiver, NYSCEF Doc. No. 108). SRS does not meaningfully dispute these facts. Accordingly, the record indicates that SRS waived the requirement of a written amendment to the scope of work and treated the hallway work as occurring under and pursuant to the same contract (*Burhmaster v CRM Rental Mgt., Inc.*, 166 AD3d 1130, 1134 [3d Dept 2018] ["a contractual requirement for written modifications of the scope of work may be waived when the conduct of the parties demonstrates an indisputable mutual departure from the written agreement and the changes were

clearly requested by the plaintiff and executed by the defendant"] [internal quotation marks and citation omitted]).

The broad language of the indemnification clause covers all personal injury claims arising out of the performance of SRS' work, and the clause employs the phrase "to the fullest extent permitted by law," such that it does not violate the prohibition on a party seeking indemnity for its own negligence (General Obligations Law § 5-322.1; *Cerverizzo v City of New York*, 116 AD3d 469, 472 [1st Dept 2014]). Moreover, there is no issue of fact in the record as to RBNB's potential negligence, given the court's dismissal of the claims pursuant to Labor Law § 200 and for common law negligence (*Higgins*, 179 AD3d at 511 ["Moreover, because EMCOR is free from negligence, it is entitled to unconditional contractual indemnification from OMC, plaintiff's employer"]). RBNB's liability at this stage is purely vicarious based on its status as owner of the premises.

Accordingly, it is hereby

ORDERED that defendant RBNB 20 Owner LLC's motion for partial summary judgment (Mot. Seq. No. 003) is granted solely to the extent of finding third-party defendant SRS Electrical Consultants, Inc., liable to RBNB on the third third-party cause of action, with the amount of a judgment to be awarded thereon to be determined at the trial of this action, and of dismissing the first and second causes of action for common law negligence and violation of Labor Law § 200, respectively, and the motion is otherwise denied; and it is further

ORDERED that the first and second causes of action are severed and dismissed, and the action shall continue as to the balance of plaintiff's claims; and it is further

ORDERED that plaintiff's motion for partial summary judgment (Mot. Seq. No. 004) is granted to the extent of finding RBNB liable to plaintiff on the third cause of action for violation

of Labor Law § 241(6), with the amount of a judgment to be awarded thereon to be determined at the trial of this action, and the motion is otherwise denied; and it is further

ORDERED that SRS' motion for summary judgment dismissing the third-party complaint is granted as to the first, second, and fourth third-party causes of action, and otherwise denied; and it is further

ORDERED that the first, second, and fourth third-party causes of action are severed and dismissed, and the action shall continue as to the balance of defendant/third-party plaintiff RBNB's claims; and it is further

ORDERED that this matter is respectfully referred to the Clerk of the Trial Assignment Part to be scheduled for trial.

This constitutes the decision and order of the court.

ENTER:

11/9/2023
DATE

LOUIS L. NOCK, J.S.C.

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