At an IAS Term, Part 9 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 27th day of November, 2023

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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JAIME NOBOA,

Plaintiff,

- against -

AGBH PRINTING HOUSE HOLDINGS, L.L.C., THE PRINTING HOUSE CONDOMINIUM, BOARD OF MANAGERS OF THE PRINTING HOUSE, ORB MANAGEMENT, LTD., S&E BRIDGE & SCAFFOLD LLC, ROCK GROUP NY CORP., FOUNDATIONS INTERIOR DESIGN CORP., FOUNDATIONS GROUP, INC., K RESTORATION & ROOFING CORP. and TRIBUTE RESTORATION INC.,

Defendants.

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AGBH PRINTING HOUSE HOLDINGS, L.L.C.,

Third-Party Plaintiff,

- against –

J. RAPPAPORT WOOD FLOORING, LLC,

Third-Party Defendant.

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AGBH PRINTING HOUSE HOLDINGS, L.L.C., FOUNDATIONS INTERIOR DESIGN CORP., and FOUNDATIONS GROUP, INC.,

Second Third-Party Plaintiffs,

- against –

ADAM WILK, INC., PEJA GROUP CONSTRUCTION, INC., WANCO GLASS AND ALUMINUM CORP., and AGL INDUSTRIES, INC.,

Second Third-Party Defendants.

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DECISION/ORDER

Index No. 513027/2016
MOTION. SEQ. NOS. 21- 25

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	445-464, 465-479, 480-483, 484-499, 526-531
Opposing Affidavits (Affirmations)	501-505, 506-512, 513-516, 522-523, 524-525, 538-540, 544, 547-548
Reply Affidavits (Affirmations)	537, 541-543, 545-546, 560-565. 566

Upon the foregoing papers, defendant/third-party plaintiff/second third-party plaintiff, AGBH Printing House Holdings, L.L.C. (AGBH) moves (in motion sequence [mot. seq.] 21) for an order, pursuant to CPLR 3212, granting it summary judgment: 1) dismissing the causes of action based on common-law negligence, Labor Law § 200 and Labor Law § 240 (1) asserted by plaintiff Jaime Noboa (but not with regard to his claims under Labor Law §241(6)); and 2) on the issue of contractual indemnification pursuant to its cross claims, against defendant Foundations Group, Inc.

Defendants/second third-party plaintiffs, Foundations Interior Design Corp., and Foundations Group, Inc., move (in mot. seq. 22) for an order, pursuant to CPLR 3212, granting them summary judgment: 1) against Peja Group Construction Inc. (Peja) on the issues of defense, indemnity and breach of covenant to procure insurance; and 2) dismissing all cross claims asserted against them.

Defendants The Printing House Condominium and Board of Managers of The Printing House,[1] as well as defendants/second third-party plaintiffs, Foundations Interior Design

[1] Although the parties do not address this issue, it appears that The Printing House Condominium and Board of Managers of The Printing House are not proper defendants in this action. A condominium is an unincorporated association, and pursuant to General Associations Law § 13, an action purporting to be against the condominium association should properly "be maintained[] against the president or treasurer of such an association[.]" The caption should be corrected.

Corp., and Foundations Group, Inc. (collectively, Foundations)[2] move (in mot. seq. 23) for an order, pursuant to CPLR 3212, granting them summary judgment dismissing plaintiff's Labor Law § 240 (1) claims.

Second third-party defendant Peja Group Construction, Inc. (Peja) moves (in mot. seq. 24) for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the third-party claims asserted against it.

Lastly, plaintiff cross-moves (in mot. seq. 25) for an order, pursuant to CPLR 3212, granting him partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1) and § 241 (6) against defendants AGBH Printing House Holdings, L.L.C., The Printing House Condominium, Board Of Managers Of The Printing House, Foundations Interior Design Corp., and Foundations Group, Inc. These are all of the remaining defendants, as the action has been discontinued against all of the others.

Background

Plaintiff commenced the instant action by electronically filing a summons and verified complaint on July 28, 2016. As relevant to the instant motion, the record indicates that on May 6, 2016, plaintiff had an accident while descending an interior stairway in a building under construction and renovation; he lost his footing, slipped, fell and suffered injuries as a result. At all relevant times, AGBH owned the subject premises, which is known as 421 Hudson Street in Manhattan. Before the subject construction and renovation project began, the premises consisted of one eight-floor "main" building, and five townhouses; the project entailed performing a complete renovation of the main building, demolishing the five existing

[2] These parties are apparently united in interest, and, as such, the court will refer to them collectively. The court notes, however, that according to the record, only Foundations Group, Inc. has a contractual relationship with the owner with respect to the subject construction project.

townhouses and constructing two new townhouses in their place. The subject accident occurred in an interior staircase in the so-called new "Townhouse 1", then under construction.

On May 8, 2014, AGBH had hired Foundations Group, Inc.[3] as the project construction manager; a written agreement between the parties specifies their rights and responsibilities. Foundations Group, Inc. then hired several subcontractors, including, pursuant to a written agreement, Peja (whose responsibilities included interior wall/door work) and third-party defendant (and plaintiff's employer) J. Rappaport Wood Flooring LLC (Rappaport) to construct and/or install the floors.[4]

Plaintiff, while employed by Rappaport at the subject construction site, performed tasks which included finishing and sanding wooden floor materials for the new Townhouses. Prior to the accident, plaintiff ascended the subject stairway in Townhouse I from the second floor to the third floor and had lunch. After he finished lunch, and while descending the stairs to return to the second floor, plaintiff stepped on a sheet of Masonite, a material that had been used to cover and protect the finished wooden steps during the renovation and construction. The Masonite moved/slipped, causing plaintiff to lose his footing and fall. While falling, plaintiff claims that he attempted to grasp a handrail, but none was present in the stairway. Plaintiff avers that he sustained injuries as a result of the fall.

[3] The record does not specify the role of Foundations Interior Design Corp. in this action; according to the online State of New York Department of State Division of Corporation's records, both Foundations Group I, Inc. and Foundations Interior Design Corp. have the same chief executive officer and principal office address. The omission of "I" in the defendant Foundations Group, Inc.'s name seems to have been inadvertent (and is not addressed by the parties). Since the parties refer to the applicable party as Foundations Group, Inc., the court refers to this entity in the same manner.

[4] Other subcontractors/parties ostensibly involved in the project were Orb Management, Ltd., S&E Bridge & Scaffold LLC, Rock Group NY Corp., K Restoration & Roofing Corp., Tribute Restoration Inc., Adam Wilk, Inc., Wanco Glass and Aluminum Corp. and AGL Industries, Inc. This action and/or the third-party actions, as applicable, has previously been discontinued as against all of them.

The pleadings allege that defendants are owners, contractors or agents and, as such, are subject to the vicarious liability provisions of the Labor Law with respect to construction workers performing covered activities.[5] The complaint states that defendants' failure to ensure that the subject stairway was both free of slipping hazards and equipped with an adequate handrail constituted violations of Labor Law § 241 (6) as predicated upon the applicable provisions of the Industrial Code (12 NYCRR Ch 1, sub. A). Also, plaintiff claims that defendants' failure to keep and maintain a safe passageway between the floors and to guard against the risks of falling down a staircase constitutes a violation of Labor Law § 240 (1). Additionally, plaintiff asserts that the loose Masonite and missing handrail constituted premises hazards, and, consequently, defendants are also liable pursuant to Labor Law § 200 and common-law negligence principles. Lastly, plaintiff contends that defendants, as owners, contractors or agents, are vicariously liable for plaintiff's injuries without regard to fault, notice or responsibility. Plaintiff argues that since his injuries were proximately caused by defendants' negligence and violations of the Labor Law, which occurred while he was performing covered work at a construction site, defendants are vicariously liable for the damages resulting from his injuries.

Defendants interposed answers and asserted third-party claims. As relevant to the instant motions, AGBH has asserted cross claims against Foundations for contribution and indemnity. In the second third-party action, AGBH and Foundations have impleaded Peja, asserting claims sounding in contribution, indemnity and breach of the contractual covenant to procure and maintain liability insurance.

[5] Work that is encompassed by the vicarious liability provisions of the Labor Law is commonly referred to as "protected" activities, tasks or work. Workers covered by the provisions are commonly referred to as "protected" workers.

After extensive discovery and motion practice, on August 11, 2022, plaintiff filed a note of issue certifying both that discovery is complete and that this matter is ready for trial. The instant motions for summary judgment ensued. All of the motions were timely made, with the exception of plaintiff's cross-motion, motion sequence #25 filed on January 12, 2023, discussed below.

Arguments in Support of The Motions

AGBH's Motion for Summary Judgment

In support of its motion, AGBH first argues that the record establishes that Labor Law § 240 (1) does not apply to plaintiff's alleged accident. This statute, continues AGBH, does not apply to every instance of a worker falling at a construction site. AGBH notes that plaintiff allegedly fell down a flight of stairs from the third floor to the second; AGBH also characterizes the stairway as permanent. AGBH argues that the applicable appellate authority holds that a fall involving a permanent stairway does not implicate § 240 (1); indeed, counsel continues, a permanent staircase is not the type of safety device designed to protect against elevation-related risks that is enumerated in the statute.

Here, AGBH notes, the subject staircase was immobile and not a temporary structure built in connection with the subject project. Therefore, according to appellate authority, the subject stairway is not a safety device for Labor Law § 240 (1) purposes. Moreover, plaintiff was not performing any work while he descended the steps; he merely used the stairway as a passageway. For these reasons, AGBH concludes that § 240 (1) does not apply to the plaintiff's alleged accident and urges the court to dismiss plaintiff's Labor Law § 240 (1) claims accordingly.

Next, AGBH argues that plaintiff's Labor Law § 200 and common-law negligence claims are meritless as asserted against it. First, AGBH notes that § 200 is merely a

codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work. Unlike Labor Law § 240 (1) and § 241 (6), Labor Law § 200 and common-law negligence claims are not sustainable absent fault, notice or responsibility. Next, AGBH points out that in the context of construction site accidents, § 200 and common-law negligence claims are sustainable in only two situations: first, where the allegedly liable party supervised or controlled the work that produced the injury, and second, when the allegedly liable party either created or had actual or constructive notice of a dangerous premises condition that produced the injury. AGBH contends that the record in this action demonstrates that neither condition exists here.

First, AGBH points out that plaintiff's alleged accident was not a consequence of the means and methods of the work he performed; instead, the accident allegedly occurred while he descended the subject stairs after finishing his lunch. AGBH reasons that since this is not an accident that arose from the "means and methods" of his work, the only viable Labor Law § 200 and common-law negligence claims here must be based on a claim of a hazardous premises condition.

Further, AGBH argues that sustainable Labor Law § 200 and common-law negligence claims against a property owner require a showing that the owner or its agents either created the dangerous/hazardous condition that caused the accident or had actual or constructive notice of it. The record, AGBH continues, establishes that neither situation exists here. AGBH states that the record establishes that its agents did not supervise and control the work being performed by plaintiff (or, for that matter, any Rappaport employee). AGBH also points out that the record is devoid of evidence that its agents were responsible for either placing Masonite on the stairs or for installing stairway handrails. Instead, it continues, the record establishes that Foundations was responsible for performing such work or for delegating the

responsibility to its subcontractors. Therefore, AGBH concludes that the record here demonstrates that it neither created nor exacerbated a dangerous premises condition.

In addition, with regard to the issue of actual notice, AGBH claims that the record establishes that its agents never received actual notice of any relevant premises hazard. AGBH points to the deposition testimony of its principal, who averred that he had never observed any unsafe condition at the subject site. Also, counsel continues, the record contains no indication that complaints of loose Masonite boards or missing handrails on the subject staircase were ever made to AGBH's agents. Additionally, AGBH points out that plaintiff, in his deposition, admitted that he had never voiced any complaints about any relevant hazards to anyone prior to the alleged incident. Accordingly, movant concludes that the record contains no indication that actual notice of an applicable premises hazard was ever provided to the applicable parties.

Similarly, AGBH contends that the record belies any claim of constructive notice of any alleged premises hazard. AGBH points out that for constructive notice of a defect to exist, the complained-of defect must be visible and apparent for an appreciable length of time before the alleged accident occurs. This is so because, otherwise, the allegedly liable party would not have had sufficient time to both discover the hazard and to remedy it. AGBH points out that the record does not establish the length of time, prior to the plaintiff's accident, that either the missing handrail or the loose Masonite boards on the stairs was apparent. AGBH reasons that since the record does not indicate the length of time, prior to the plaintiff's alleged accident, that the alleged hazards were visible, plaintiff, as a matter of law, cannot show that AGBH (or any party) had constructive notice of the allegedly dangerous conditions. For the above reasons, AGBH argues that plaintiff's claims based on Labor Law § 200 or common-law negligence principles lack merit and must be dismissed.

AGBH further asserts that it is entitled to summary judgment on the issue of contractual indemnification against Foundations. AGBH points out that it is undisputed that, pursuant to a written agreement, it hired Foundations Group, Inc. as the construction manager for the subject project, and that the agreement contains an indemnity clause in favor of AGBH. It notes that a party is entitled to full contractual indemnification from another party if the intention to indemnify can be clearly implied from the language of the applicable written agreement. Here, the subject agreement requires Foundations Group, Inc. to indemnify AGBH for all claims resulting from the performance of the contracted-for work. AGBH also points out that the subject written indemnity provision is, by its terms, enforceable "to the fullest extent permitted by law" and is applicable to all claims not caused by the negligence of AGBH. Movant reasons that, therefore, the subject written indemnity provision does not violate either public policy or the General Obligations Law and is thus enforceable. Moreover, there is no dispute that the subject written indemnity provision was in effect at all applicable times. AGBH also contends that the installation of the Masonite and of handrails on the subject stairway was the responsibility of Foundations Group, Inc. and/or its subcontractor, Peja. If plaintiff is to be believed, AGBH continues, not only has the subject written indemnification provision been triggered, but Foundations Group, Inc. is also, whether directly or vicariously through the acts of Peja's employees, responsible for the subject accident.

Lastly, AGBH emphasizes that there is no evidence that its agents either created or had notice, actual or constructive, of either loose Masonite boards or missing handrails in the subject stairway. AGBH reasons that, accordingly, it is not liable for any negligent act or omission, and, therefore, it is not attempting to use the subject written indemnification clause to have Foundations Group, Inc. indemnify AGBH for its own negligence. In sum, AGBH

argues that, based on this record, the subject written indemnity provision contained in the agreement executed by Foundations Group, Inc. was triggered, valid, enforceable and in effect at relevant times; accordingly, AGBH maintains that, therefore, it is entitled to summary judgment on the issue of contractual indemnification against Foundations.

Foundations' Motion for Summary Judgment

In support of its motion for summary judgment, Foundations first asserts that Peja is required to defend and indemnify it in this action pursuant to a broad indemnification clause in the written construction agreement between them. Foundations characterizes the relevant provision as unambiguous and points out that the written construction agreement is a contract negotiated between sophisticated entities at arm's length. Thus, Foundations avers, any issues related to the subject provision are questions of law and must be resolved summarily.

Here, Foundations argues that the subject agreement [Doc 477] specifies that Peja was responsible for protection of the subject staircase, which included placing Masonite on the stairs and installing handrails. Accordingly, Foundations argues, the plaintiff's claims arose out of the performance of work that either was done or was supposed to have been done by Peja. Moreover, Foundations adds, the applicable indemnity provision applies to all claims arising out of Peja's work, therefore, the indemnity provision has been triggered by plaintiff's alleged accident and subsequent claims.

Foundations also points out that the indemnity provision is, by its terms, limited "to the fullest extent permitted by law" and to claims not caused by the negligence of Foundations Group, Inc. Therefore, Foundations reiterates that the written indemnity provision does not violate either public policy or the General Obligations Law, and, accordingly, is enforceable. Moreover, counsel continues, the record lacks any indication that Foundations' agents committed a negligent act or omission. In sum, Foundations concludes, based on this record,

the subject written indemnity provision contained in the agreement executed by Peja was triggered, valid, enforceable and in effect at relevant times; accordingly, Foundations maintains that it is entitled to summary judgment on the issue of contractual indemnification against Peja.

Lastly, Foundations also argues that it is entitled to summary judgment against Peja for breach of contract. Foundations points out that the subject written construction agreement [Doc 477] required Peja to obtain both commercial general liability and excess/umbrella insurance coverage in specified amounts. The agreement also obligated Peja to make certain that agreed-upon endorsements were in place, and that Foundations was named as an insured under such policies. However, Foundations claims that while the record shows that Peja obtained the required commercial general liability coverage for the specified minimum amounts, Peja failed to obtain the excess/umbrella policy for the required coverage of ten million dollars. Moreover, Peja's insurance carrier has yet to assume Foundations' defense of this action, even though Foundations Group, Inc. is an additional insured pursuant to the subject primary commercial liability policy. Foundations reasons that these two facts demonstrate that Peja breached the contractual covenant to procure and maintain insurance coverage for the agreed-upon minimums. Foundations concludes that therefore it is entitled to summary judgment against Peja with respect to its breach of contract claim as a result.

Along with AGBH, Foundations also moves for an order granting it summary judgment dismissing plaintiff's Labor Law § 240 (1) claim. Foundations echoes the arguments made by AGBH; most pertinent is the contention that plaintiff fell down a permanent interior stairway, and that appliable appellate authority holds that Labor Law § 240 (1) does not apply to such falls. For these reasons, Foundations argues that the court must award it summary judgment dismissing plaintiff's Labor Law § 240 (1) claim.

Peja's Motion for Summary Judgment

Peja moves for summary judgment dismissing all third-party claims or cross claims asserted against it. With respect to Foundations' claim for contractual indemnification, Peja notes that the applicable indemnity provision contained in the written construction contract between it and Foundations Group, Inc. applies to claims "arising out of or resulting from performance of [its] Work under this Subcontract[.]" Peja further notes that the written agreement also contains an itemized list of tasks that constitute the "Work" to be performed by Peja. Peja points out that the alleged negligent acts and omissions claimed by plaintiff—a loose piece of Masonite and a missing handrail—are neither listed nor related to the enumerated tasks. Indeed, Peja continues, none of the terms in the contract impose on Peja a duty to install, inspect, repair or replace Masonite or to install handrails in stairways. Therefore, counsel avers that the instant claims are not related to its work, and the indemnity provision has thus not been triggered.

Peja claims that plaintiff's allegations do not trigger the subject written indemnity provision even if its employees had improperly placed loose Masonite on the subject stairs. Peja argues that if its employees failed to properly secure the Masonite, its employees did so while they were being "borrowed" by Foundations. Indeed, Peja adds that, in this context, its employees were "special" employees of Foundations. Nevertheless, Peja continues, the fact that its employees performed work on the subject staircase while under Foundations' control is insufficient to qualify these tasks as the "Work" listed in the written agreement. Therefore, even if Foundations directed Peja employees to perform work that directly led to the plaintiff's alleged accident, the subject indemnity provision would nevertheless not be triggered, because any such additional work was not contracted-for work. For these reasons, Peja concludes that it is not contractually required to indemnify Foundations and urges the court to award it

summary judgment dismissing all third-party claims and any cross claims.

Plaintiff's Motion for Summary Judgment

Lastly, plaintiff moves for partial summary judgment against (the remaining) defendants on the issue of liability pursuant to both Labor Law § 240 (1) and § 241 (6) and for an order striking defendants' affirmative defenses of assumption of the risk and comparative negligence. With respect to Labor Law § 240 (1), plaintiff first points out that the statute imposes a non-delegable duty on owners and contractors—here, AGBH and Foundations Group, Inc.—to protect construction workers from elevation-related risks of harm. The statute requires that safety devices are provided and placed to prevent or at least mitigate such risks; failure to do so constitutes a violation of Labor Law § 240 (1). Plaintiff notes that owners and contractors are liable for these violations without reference to fault or responsibility. Next, plaintiff argues that he was a protected worker performing one of the activities enumerated in Labor Law § 240 (1). Specifically, he was involved in construction and renovation of the subject townhouses. Lastly, plaintiff notes that pursuant to applicable appellate authority, the statute is to be liberally construed to effectuate its purpose of protecting construction workers.

Plaintiff acknowledges defendants' contention that Labor Law § 240 (1) does not apply to a worker who falls on a permanent stairway, however, he claims that this unqualified contention is completely false. To the contrary, plaintiff argues, appellate authority holds that Labor Law § 240 (1) does in fact apply when a party slips and falls down a permanent staircase if the staircase is the sole means of access to the party's work area. In such circumstances, plaintiff avers that the subject stairway is a "safety device" and a passageway which must be properly placed and maintained to prevent or lessen the risk of a construction worker from falling.

Here, plaintiff alleges that the subject permanent staircase was the sole passageway between the third and second floors of the townhouse. Plaintiff alleges that the subject staircase was the only way he could access his assigned work area, and, therefore, the staircase was a safety device for Labor Law § 240 (1) purposes. He argues that the accident occurred as he walked down the stairs, as the Masonite was not secured and moved, causing him to slip and fall down the stairs to the second-floor landing. Plaintiff reasons that since the Masonite was loose (and likely improperly installed), the staircase—a safety device for Labor Law § 240 (1) purposes—was not properly placed and secured to prevent the risk that a worker using it would slip and fall. Therefore, plaintiff asserts that the loose Masonite on the subject staircase constituted a violation of Labor Law § 240 (1). Plaintiff adds that since the unsecured Masonite was a contributing factor to the accident, the Labor Law § 240 (1) violation was, as a matter of law, the proximate cause of his injuries. For these reasons, he concludes that he has demonstrated his prima facie entitlement to summary judgment as a matter of law with respect to defendants' liability pursuant to Labor Law § 240 (1).[6]

Next, plaintiff claims that he is entitled to partial summary judgment against defendants with respect to his Labor Law § 241 (6) cause of action. He points out that § 241 (6), just as with § 240 (1), imposes absolute vicarious liability without regard to fault, notice or responsibility against owners, contractors and their agents, for any violations of the Industrial Code that proximately caused an injury to a construction worker. Here, plaintiff argues, the applicable Industrial Code provisions[7] required defendants to provide him with

[6] Plaintiff also provides the affidavit of a site safety manager whose opinion is in accordance with plaintiff's contentions.

[7] One of plaintiff's claims is that Industrial Code § 1.7 (f) was violated; however, that provision merely states that "[s]tairways . . . shall be provided as the means of access to working levels above or below ground[.]" The record establishes that, notwithstanding plaintiff's other claims, a stairway

safe working conditions and personal protective equipment; he claims they did not do so. Plaintiff notes that Industrial Code § 23-1.7 (d) provides that: "[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform, or other elevated working surface which is in a slippery condition. . . [i]ce, snow, water, grease, and any other foreign substance which may cause slippery footing shall be removed, sanded, or covered to provide safe footing. Here, plaintiff claims, the subject stairway was a passageway on the construction site which he frequently used, and the Masonite covering the steps of the stairway was loose; he reiterates that he slipped on the loose Masonite and fell, sustaining injuries as a result. Therefore, plaintiff reasons, the record establishes that Industrial Code § 23-1.7 (d) was violated, and that the violation was a proximate cause of his injuries. Moreover, plaintiff notes that Industrial Code § 23-2.7 (e) requires safety railing surrounding "every open side" of a stairway "where enclosures or guardrails have not been erected[.]" Plaintiff claims that the record establishes that the subject stairway did not have safety rails, enclosures or guardrails around its "open side[s]" thus, defendants also violated Industrial Code § 23-2.7 (e). Plaintiff opines that a safety railing on the right side of the stairway would have either prevented or mitigated his injuries, therefore, the violation of Industrial Code § 23-2.7 (e) is a second proximate cause of his injuries.

Plaintiff argues that the provisions of the Industrial Code he cites are applicable and enforceable, and that defendants' failure to ensure compliance with these provisions constituted a violation thereof. Plaintiff maintains that these Industrial Code violations proximately caused his injuries, establishing a prima facie showing for his Labor Law § 241 (6) claim. Plaintiff asserts that any purported defense is meritless for the same reasons he

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was in fact provided, and, as such, this Industrial Code provision was not violated.

provides in support of his Labor Law § 240 (1) claim, thus, he avers that his cross motion for partial summary judgment as to liability under Labor Law § 241 (6) should be granted.

Lastly, plaintiff seeks an order dismissing defendants' affirmative defenses alleging he was comparatively negligent and had assumed the risks. Plaintiff argues that, given the above facts, defendants' violations of the Labor Law were the proximate causes of his injuries. According to appellate authority, plaintiff continues, comparative fault and assumption of risk are not viable defenses to liability pursuant to the absolute vicarious liability provisions of the Labor Law. Plaintiff also maintains that since has demonstrated his prima facie entitlement to summary judgment as a matter of law with respect to defendants' vicarious liability pursuant to the Labor Law, he bears no burden of establishing the absence of his own comparative fault or assumption of risk. Moreover, plaintiff adds, defendants' allegations of his comparative fault have no bearing on whether the aforementioned violations of the Industrial Code were a proximate cause of the plaintiff's accident; therefore, summary judgment in his favor as to liability should be granted regardless of his comparative fault, if any. Nevertheless, plaintiff contends, appellate authority has upheld the award of summary judgment dismissing defendants' affirmative defense of comparative negligence in similar situations. Indeed, plaintiff states, an injured construction worker cannot be held comparatively negligent for Industrial Code violations unless there is some evidence that plaintiff was charged with keeping a work area clean and free of hazardous conditions.

Plaintiff proffers that there is no such evidence here. To the contrary, he continues, the record shows that immediately preceding the accident, he had no choice but to use the subject stairway to access his work area. Plaintiff reiterates that as he used the stairs, he was caused to slip and fall on the loose Masonite. Also, he claims, the record establishes that he did not create the hazardous condition, which was present on the stairs before he used them.

Plaintiff argues that absent evidence of any comparative negligence on his behalf, he is entitled to summary judgment dismissing defendants' affirmative defense of comparative fault.

Lastly, plaintiff argues that he is also entitled to summary judgment dismissing defendants' affirmative defense of assumption of the risk. Plaintiff reiterates that assumption of risk is not a proper affirmative defense to liability pursuant to Labor Law § 240 (1) or § 241 (6), since these statutes impose a non-delegable duty to ensure that certain construction site safety measures are taken. Construction workers, plaintiff maintains, do not assume the risks of injury proximately caused by statutory violations. Moreover, plaintiff adds, the nature of this affirmative defense renders it inapplicable in the construction work context. Plaintiff acknowledges that when applicable, the doctrine of primary assumption of the risk applies as a complete bar to recovery of damages, based on the theory that the plaintiff consented to the risk that led to the injuries. Plaintiff points out that this doctrine has generally been applied to sporting and recreational activities but does not apply to the Labor Law claims of injured construction workers. Plaintiff rejects any suggestion that, here, there is an issue of fact with respect to primary assumption of risk; he emphasizes that when the accident occurred, he was not involved in any athletic or recreational activities. Therefore, the doctrine does not apply to this case and this court should award him summary judgment dismissing the affirmative defenses based thereon.

Arguments in Opposition

AGBH Opposition to Foundations' Motions

AGBH partially opposes Foundations' motion insofar as it seeks summary judgment dismissing its cross claims. AGBH points out that it has asserted cross claims against (among others) Foundations that sound in breach of contract (including breach of the covenant to

procure and maintain commercial general liability insurance policies), common-law contribution and indemnity, and contractual indemnification. AGBH argues that awarding Foundations summary judgment dismissing these claims would be premature; there is, presses AGBH, at least an issue of fact as to whether Foundations' negligence contributed to the alleged accident.

More specifically, AGBH points out that Foundations, in its motion, mainly emphasizes that the loose Masonite was a major contributing factor in the accident, and that Peja had installed it; AGBH also contends that Peja was responsible for installing handrails in stairways. However, the deposition testimony in this action indicates that Foundations' employees in fact installed the Masonite covering on the subject steps. AGBH avers that a trier of fact could reasonably conclude that the failure of Foundations' employees to properly install the Masonite constitutes negligent acts or omissions that proximately caused plaintiff's injuries. AGBH reasons that since it is, as the property owner, subject to vicarious liability only, and since the record suggests that Foundations' negligence led to the accident, AGBH thus has viable claims against Foundations for contribution and indemnity. In conclusion, states AGBH, the issues of fact as to Foundations' negligence precludes awarding Foundations summary judgment at this time.

AGBH's Opposition to Peja's Motion

Similarly, AGBH opposes Peja's motion insofar as it seeks summary judgment dismissing the applicable third-party claims against Peja. AGBH points out that the third-party claims allege that AGBH (and Foundations) are subject to vicarious liability pursuant to the Labor Law with regard to plaintiff's alleged fall in the stairway. AGBH reiterates that according to plaintiff, both poorly-installed Masonite step covers and the lack of a required handrail proximately caused his injuries. According to the record, witnesses observed Peja

employees placing the Masonite covers and installing temporary handrails. Therefore, an issue of fact exists regarding whether Peja is responsible for creating the alleged hazards.

Similarly, AGBH continues, the applicable written agreement between Peja and Foundations contains an indemnity clause that applies to claims that arise from Peja's work, irrespective of whether Peja's negligence contributed to the claim. AGBH notes Peja's argument that since the subject agreement did not obligate Peja to install or maintain Masonite or handrails, plaintiff's claims herein did not arise from Peja's work. Specifically, AGBH notes that Peja asserts that it was responsible only for carpentry and drywall installation. AGBH nevertheless argues that Peja's contentions are based on a strained and narrow interpretation of the contract language. AGBH emphasizes that the subject agreement explicitly states that Peja's work includes, but is not limited to, an itemized list of tasks. Indeed, another section of the agreement expressly states that the statement of the work Peja was to perform was meant to "generally define, but not in any way" limit the tasks for which Peja was responsible. Moreover, the record shows that Peja supplied Foundations with laborers. AGBH reiterates that deposition witnesses observed that agents of Foundations had supervised Peja workers installing Masonite. Thus, and notwithstanding Peja's protestations, AGBH argues that the record indicates that an issue of fact exists whether plaintiff's alleged accident arose from Peja's tasks at the construction site.

Lastly, AGBH characterizes Peja's contention that the third-party claims must be dismissed because Peja was a "special employee" of Foundations as meritless. It posits that, assuming for the sake of argument that Peja can demonstrate such a relationship, the weight of authority suggests that the issue of whether an entity is a special employee of another entity is a decision reserved for the trier of fact. Moreover, such a finding would require that the record unequivocally show that Foundations had comprehensive and exclusive control and

direction of how Peja performed its work. Also, before determining that such a special employment relationship exists, a court should consider factors such as which party directly had the right to control the employees' work, was responsible for paying employee wages, or had the power to discharge employees. AGBH maintains that although Foundations may have generally directed Peja laborers, the record contains no evidence that Foundations had the requisite complete and exclusive control over Peja's work. Similarly, the record does not show that Peja surrendered its right to control and direct the work performed by its laborers. Rather, the record demonstrates that Peja retained at least some control over its laborers. Also, while Foundations paid Peja pursuant to the written construction agreement, the record nevertheless establishes that Peja paid its laborers directly. Lastly, states AGBH, there is nothing in the record that establishes that Foundations had the ability to hire or discharge Peja laborers. For these reasons, AGBH avers that the "special employee" argument advanced by Peja is meritless.

Foundations' Opposition to Peja's Motion

Foundations argues that contrary to Peja's position, the enumerated tasks in the written construction agreement are not an exhaustive list of Peja's responsibilities. Foundations acknowledges Peja's contention that since stairway and handrail work are not itemized tasks in the written agreement, the applicable indemnity provision was thus not triggered by plaintiff's claims. However, Foundations points out that the language in the agreement that precedes the itemized list of tasks specifies that Peja's work "shall include, but is not limited to the following [….]" Moreover, the written agreement then specifies that Peja is responsible for "[a]ll carpentry work related to the Townhouse project . . . including but not limited to" enumerated tasks. Foundations maintains that this broad language expressly states that Peja's responsibilities are not limited to the itemized tasks; moreover, protecting wooden steps with

Masonite and installing stairway handrails are part and parcel of "[a]ll carpentry work" performed on the construction site. Aside from the contract, the testimony of the deposition witnesses demonstrates that Peja's work included the installation of temporary handrails and Masonite on the stairs; Foundations emphasizes that this testimony was not quoted by Peja in support of its motion for summary judgment. Foundations reasons that since plaintiff alleges that his accident was the result of both loose Masonite on the steps and the lack of a handrail in the stairway, the instant claim arose from Peja's work, notwithstanding the enumerated tasks in the agreement. Accordingly, Foundations argues that, contrary to Peja's present contentions, the subject indemnity provision applies.

Similar to the arguments made by AGBH, Foundations also rejects as meritless Peja's contention that Foundations is not entitled to contribution and indemnity from Peja because Peja workers were special employees of Foundations. First, Foundations emphasizes that according to applicable appellate authority, special employment relationships are presumed to not exist. To the contrary, Foundations continues, once a general employment relationship ensues, absent clear proof that demonstrates later surrender of control by the general employer and assumption of control by the special employer, a regular general employment relationship is presumed to continue. Furthermore, the question of whether a special employment relationship exists is usually a question of fact; Foundations notes that appellate authority holds that many factors are to be considered in the determination of whether a special employment situation exists with no one being determinative. It reasons that since Peja is seeking to have the issue of special employment improperly resolved summarily, rather than by persuading the trier of fact, the court should reject Peja's contentions solely on this ground.

Alternatively, Foundations claims that a search of this record for the factors suggesting a special employment relationship demonstrates that none exist. Foundations emphasizes that

at no point did it control the means and methods of Peja's work. Also, it claims the record contains no agreement between it and Peja to share or lease labor, and that the only written agreement between it and Peja in the record is an ordinary construction contract that does not mention employee sharing. Foundations acknowledges that its agents supervised the subject site; however, Foundations avers that such supervision is indicative of a construction manager or general contractor but is insufficient to suggest a special employment relationship. Moreover, Foundations emphasizes that Peja was a construction contractor and not a staffing agency and is a corporate entity distinct from Foundations and with different members and owners. Foundations further notes that it never paid wages directly to Peja employees. Lastly, Foundations reiterates that Peja employees installed the Masonite and that Foundation employees never directed or controlled the manner in which Peja employees worked. Accordingly, Foundations reasons that Peja has failed to show, prima facie, any of the factors that suggest the existence of a special employment relationship. For these reasons, Foundations concludes that Peja's motion must be denied.

Plaintiff's Opposition to Defendants' Motions

In opposition to defendants' motions, plaintiff first argues that defendants violated Labor Law § 240 (1) and that defendants' violation was a proximate cause of the subject accident. Plaintiff reiterates that Labor Law § 240 (1) is designed to protect construction workers from elevation-related risks and requires owners and contractors such as defendants to provide "proper protection" against such risks. Plaintiff emphasizes that the duty to provide "proper protection" against elevation-related risks is non-delegable, and both owners and contractors are strictly and vicariously liable for the failure to provide such "proper protection" without regard to control or fault. Thus, plaintiff reasons, if the record here demonstrates that the statute was violated and that the violation was a proximate cause of his

injuries, defendants are, therefore, liable pursuant to Labor Law § 240 (1) for his injuries.

Plaintiff next points out that according to appellate authority, Labor Law § 240 (1) should be liberally construed to effectuate its purpose of promoting construction site safety. Counsel for plaintiff argues that, contrary to defendants' arguments, a permanent staircase on a construction site does in fact implicate Labor Law § 240 (1) if the staircase is the sole means of access to plaintiff's work area. Plaintiff urges the court to find that appellate authority supports awarding an injured worker summary judgment with respect to liability pursuant to Labor Law § 240 (1) if the worker fell on a permanent staircase that was the only way the worker could access the relevant area. Indeed, plaintiff emphasizes, this authority suggests that summary judgment in the worker's favor is appropriate even if the worker had an alternative way to access the work area if the stairs provided the most efficient means of access.

Plaintiff notes that he was hired to perform flooring work in connection with the subject renovation project. Therefore, he was a protected worker performing a protected activity under the Labor Law when the accident occurred. Plaintiff reiterates that the loose Masonite placed to cover the subject step is what precipitated the accident. Also, it is undisputed that the staircase was the only means of access to the applicable work area (i.e., it was the sole means of access between the third and second floors of the project). Plaintiff reasons that, by the application of Labor Law § 240 (1) and the appellate authority that interprets it, the subject staircase was a "safety device" used to prevent elevation-related risks, and, as such, it had to provide "proper protection" against such risks. Plaintiff notes that, here, the subject staircase failed to function as a safety device, and thus a violation of Labor Law § 240 (1) occurred. Also, since the unsafe staircase condition contributed to the fall, the § 240 (1) violation proximately caused his injuries. Nothing in the record disputes these facts;

therefore, plaintiff claims, defendants have failed to demonstrate their prima facie entitlement to summary judgment as a matter of law with respect to Labor Law § 240 (1). For these reasons, plaintiff emphasizes that he is entitled to partial summary judgment against defendants on the issue of liability pursuant to Labor Law § 240 (1). Plaintiff argues that, if the court denies plaintiff's motion on this ground, this court must nonetheless also deny defendants' motions for summary judgment with respect to Labor Law § 240 (1).

Next, plaintiff asserts that defendants have failed to demonstrate their prima facie entitlement to summary judgment dismissing his Labor Law § 200 and common-law negligence claims as a matter of law. Specifically, plaintiff contends that defendants have not demonstrated that they did not have constructive notice of the relevant stairway hazards. Plaintiff notes that defendants state, in a conclusory fashion, that no stairway defect was apparent for any appreciable length of time. However, plaintiff argues, the court should not take defendants or their witnesses at their word. To the contrary, absent evidence of a schedule for construction site cleaning or inspection, defendants cannot demonstrate, prima facie, the lack of constructive notice. Plaintiff maintains that where, as here, an accident is alleged to involve defects in both the premises and the way the work was performed, defendants moving for summary judgment dismissing a cause of action alleging a violation of Labor Law § 200 are obligated to address the proof applicable to both liability standards. Plaintiff claims that defendants who attempt to meet their prima facie burden on the issue of constructive notice must affirmatively submit evidence establishing when the subject area was last inspected prior to the subject accident. Plaintiff further states that mere reference to general cleaning or inspection practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice. It is insufficient for defendants to merely state that their agents did not see either a missing handrail or an

unsecured Masonite board. Indeed, plaintiff states, the record suggests that the loose Masonite should have been visible for many hours if not days prior to the time of the accident. Plaintiff argues that since defendants have not submitted any evidence of any inspection practices, they are now unable to establish their lack of constructive notice as a matter of law. Plaintiff concludes that since defendants have failed to meet their prima facie burden on the issue of constructive notice, defendants' motions must be denied insofar as they seek summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims.

Defendants' Opposition to Plaintiff's Motion

In opposition to plaintiff's motion for partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1) and § 241 (6), Foundations first reiterates that, generally, a construction worker who falls down a permanent stairway does not have a viable Labor Law § 240 (1) claim for damages. Foundations also points out that there is no dispute that the subject stairway was a permanent one. Foundations acknowledges plaintiff's contention that an exception to this general rule exists where the stairway is the sole passageway to or from the relevant work area. Foundations argues that plaintiff fails to demonstrate that this stairway was the sole means of access, therefore, there are triable issues of fact with respect to this assertion. Foundations notes the deposition testimony of its senior project manager, which indicates that at relevant times, a functioning elevator was in place whereby workers could travel from floor to floor. This witness also testified that workers used this elevator while work took place on the subject stairway. Foundations emphasizes that other deposition witnesses, principals of AGBH and Adam Wilk, Inc.[8] corroborated the fact that at relevant times, the site had an active functioning elevator, which workers used

[8] This company was a woodworking subcontractor at the subject construction project and was deposed before the action was dismissed against it.

while the stairs were renovated and reconstructed. For these reasons, Foundations argues, plaintiff has not established the absence of triable issues of fact as to whether the subject stairway was the only passageway plaintiff could have used to reach his work area.

Alternatively, Foundations argues that plaintiff's contention—that Labor Law § 240 (1) applies to a worker who falls down a permanent stairway if it is the sole passageway to the relevant work area—is not universally accepted by appellate authority. Specifically, Foundation maintains that the Second Department of the Appellate Division does not recognize a "sole passageway" exception to the general rule that a fall on a permanent stairway does not implicate Labor Law § 240 (1).

In the alternative, Foundations suggests that it was plaintiff's actions which caused the alleged accident, and, therefore, plaintiff has no viable claim pursuant to Labor Law § 240 (1) or § 241 (6). Specifically, Foundations notes plaintiff's deposition testimony, which indicates that, prior to the alleged accident, he was aware of the loose Masonite on the subject stairs when he climbed up these same stairs earlier that day. Counsel adds that plaintiff testified that when he first walked up the staircase, he noticed that the Masonite was insecure; he also averred that he noticed that the Masonite "moved a little bit" as he ascended, but he did not tell anyone about the condition. Foundations reasons that since he later chose to descend the same stairs, which he knew were covered with loose Masonite, and did not use the available elevator, he should not be entitled to recover damages pursuant to Labor Law § 240 (1) or § 241 (6). Lastly, Foundations continues, the court should disregard the affidavit of the purported construction site safety expert that plaintiff offers, since the opinions therein are based on the same flaws in the plaintiff's argument which they proffer in their opposition papers.

Finally, Foundations urges the court to deny plaintiff's motion insofar as it seeks an

order striking the affirmative defenses of comparative fault and assumption of risk. Foundations reiterates that plaintiff's deposition testimony indicates that he eschewed using the elevator to descend to his work area and instead descended the stairs that he knew had "loose" Masonite covers. Foundations points out that plaintiff elected not to notify anyone about the loose covers. For these reasons, Foundations claims plaintiff's own conduct directly led to his injuries and thus plaintiff's motion must be denied.

AGBH also opposes plaintiff's motion for summary judgment. First, AGBH avers that plaintiff's motion should be denied as untimely. AGBH points out that the CPLR and local court rules require that a dispositive motion must be made within 60 days of the filing of the note of issue. Here, the note of issue was electronically filed on August 11, 2022; a timely motion for summary judgment would thus have been made on or before October 10, 2022. However, plaintiff did not move for summary judgment until January 12, 2023. AGBH contends that, pursuant to CPLR 3212 (f), plaintiff is thus required to demonstrate "good cause" for the more than three-month delay. AGBH argues that plaintiff has failed to do so, and, therefore, his motion for summary judgment should be denied.

Alternatively, AGBH joins Foundations with respect to Labor Law § 240 (1) and the significance of permanent stairways. AGBH emphasizes that prevailing Second Department authority holds that there is no liability under Labor Law § 240 (1) if an injured worker fell on a permanent stairway. Here AGBH continues, there is no dispute that the alleged accident occurred on a permanent stairway in the subject townhouse. Accordingly, AGBH concludes that plaintiff has no viable Labor Law § 240 (1) claim.

AGBH challenges plaintiff's protestations to the contrary. AGBH points out that the cases cited by plaintiff—the ones that suggest an exception to the permanent stairway rule exists—are appellate decisions of other departments that are not binding on this court. In any

event, AGBH continues, the purported "sole passageway" exception to the general rule that permanent staircases do not implicate Labor Law § 240 (1) does not apply here, because Townhouse 1 had an available elevator that workers could use to access the floors within the townhouse; this fact was confirmed by deposition testimony. Indeed, emphasizes AGBH, plaintiff chose to descend the subject stairs instead of using the elevator to reach the lower floor. AGBH also argues that the court should disregard the affidavit of plaintiff's purported site safety expert, who ignores relevant deposition testimony and controlling case law. In short, irrespective of whether the permanent staircase was plaintiff's sole means of accessing the lower floor, the subject permanent staircase was an integral part of the building and was not a "safety device" for Labor Law § 240 (1) purposes. For these reasons, AGBH concludes that the Court should deny plaintiff's motion and should instead dismiss plaintiff's Labor Law § 240 (1) cause of action as a matter of law.

Next, AGBH argues that the record does not contain any indication that the Industrial Code was violated, and, therefore, plaintiff does not have a viable Labor Law § 241 (6) claim. AGBH points out that a sustainable cause of action pursuant to Labor § 241 (6) requires a plaintiff to demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable to the circumstances preceding the accident and which sets forth a specific positive safety command instead of a mere reiteration of common-law principles. Here, plaintiff bases his Labor Law § 241 (6) claim on the alleged violations of Industrial Code § 23-1.7 (d), § 23-1.7 (f) and § 23-2.7 (e); however, AGBH protests, none of these are applicable to the relevant facts and circumstances here. AGBH notes that § 23-1.7 (d) requires that workers may not be permitted to use a "passageway . . . in a slippery condition" because of "[i]ce, snow, water, grease and any other foreign substance which may cause slippery footing [,]" and the Masonite stair covering was not the type of slipping hazard

intended and described in this Industrial Code provision. Next, AGBH points out that Industrial Code § 23-1.7 (f) requires that stairways shall be provided as a means of accessing different working levels (with exceptions that are not pertinent). AGBH cites appellate authority that states that this Industrial Code provision does not apply to permanent structures (stairway) within a building under construction or renovation. Moreover, it continues, the record demonstrates that § 23-1.7 (f) was not violated, since workers at the subject site had both a permanent stairway and an elevator as methods to access the floors in Townhouse 1. In either case, AGBH reasons that plaintiff's claim that Industrial Code § 23-1.7 (f) was violated lacks merit. Lastly, AGBH notes Industrial Code § 23-2.7 (e), requires that permanent stairways have safety railings, and the relevant deposition testimony indicates that permanent handrails had in fact been installed on the subject staircase at Townhouse 1. Alternatively, AGBH argues that the accident allegedly occurred as a consequence of plaintiff losing his footing on unsecured Masonite, and, as such, any failure to have railing in or around the subject stairway was not the proximate cause of plaintiff's injuries. Thus, Industrial Code § 23-2.7 (e) either was not violated, is not applicable or was not a proximate cause of plaintiff's alleged fall; in any event, continues AGBH, since the record does not suggest that an applicable provision of the Industrial Code was violated, plaintiff's Labor Law § 241 (6) claims lack merit. AGBH reiterates that this court should disregard the affidavit of plaintiff's purported site safety expert, who asserts unfounded legal conclusions in opining that plaintiff's motion must be denied insofar as it seeks partial summary judgment on the issue of liability pursuant to Labor Law § 241 (6).

Lastly, AGBH opposes plaintiff's motion insofar as it seeks an order striking the affirmative defenses of assumption of risk and contributory negligence. Counsel states that, even assuming arguendo that plaintiff is correct insofar as these defenses do not apply to the

vicarious liability provisions of the Labor Law, dismissing these defenses summarily would nevertheless be premature. Specifically, AGBH claims that plaintiff's contributory negligence and assumption of risk are relevant at the damages phase of trial. AGBH notes appellate authority supporting this point. Therefore, without regard to whether contributory negligence and assumption of risk are valid defenses to absolute vicarious liability under the Labor Law, these defenses should not be summarily dismissed. Accordingly, AGBH concludes that plaintiff's motion must be denied in its entirety.

Peja's Opposition to Foundations' Motion

Peja asserts that Foundations' motion, insofar as it seeks relief related to defense, indemnity and insurance procurement claims, is moot. Peja points out that its insurance carrier has tendered the defense of this action to Foundations and all additional insureds under the subject general commercial liability insurance policy. Also, and in response to Foundations' allegation that Peja failed to obtain the requisite excess/umbrella coverage, Peja claims that it is out of business and that relevant records kept by Peja's former owner were destroyed in a fire. For this reason, Peja contends that its principal cannot identify what, if any, excess insurance his company had at the time of the alleged incident. Peja concludes that, therefore, there can be no finding of breach of contract for failure to procure insurance since it is impossible to determine if any excess insurance existed at the relevant time.

As for indemnification, Peja reiterates that the indemnity provision in the written construction agreement between it and Foundations requires Peja to indemnify Foundations only for those claims that result from work assigned to Peja. This work, Peja continues, consisted of "framing, drywall, taping ready for paint and providing the doors and the baseboards and installing them." Contrary to Foundations' assertions, the scope of Peja's work is expressly itemized; work relating to stairways or protection of steps/floors is

noticeably absent from the list. Peja emphasizes that the bulk of its labor force present on the construction site were skilled carpenters who performed the tasks expressly listed in the applicable written construction agreement; also, Peja continues, Foundations would use other Peja employees—ordinary laborers—to perform other tasks. Indeed, Foundations' own deposition witness testified that these Peja laborers "would do things that the [Foundations] site super directed them to do." To the extent that Peja's laborers placed protective Masonite on stairway steps or installed stairway handrails, Peja points out that, according to Foundations' witness, Peja laborers were directed, controlled and supervised by Foundations to install temporary handrails and Masonite. Peja maintains that, according to this witness, Peja laborers were not obligated to perform this stairway work (and would not have performed it) absent these directions from the "site supers" who were agents of Foundations. In these instances, adds Peja, Foundations' employees would provide tools and materials to Peja workers. Peja notes that although its responsibility included coordination with other contractors with respect to stairway handrails, only Foundations was responsible for installing them. Moreover, Peja continues, its laborers would not have removed temporary handrails if Foundations "site supers" had not directed them to do so. Peja emphasizes that it was not at all responsible for installing Masonite covers for the subject steps. Lastly, Peja maintains that Foundations would oversee and approve the quality of the stairway work that its agents directed Peja laborers to perform; indeed, adds Peja, Foundations' deposition witness testified that Peja laborers (as opposed to the skilled carpenters) were exclusively supervised by Foundations' "site supers."[9]

Peja summarizes that, to the extent that its workers were involved in installing,

[9] This was corroborated by Peja's witness in his deposition.

maintaining or removing Masonite and/or handrails in the stairway, this work was beyond the scope of the construction contract (and, therefore, the indemnity provision) and done only because of and at the behest of Foundations workers. Moreover, Peja emphasizes that, generally, indemnification against a party is available only if that party committed a negligent act or omission. Here, there is no evidence that its workers poorly or improperly installed Masonite. In fact, Peja continues, deposition testimony indicates that Masonite had to be replaced every few days because the adhesive tape that affixed the Masonite to the steps would frequently tear. Peja suggests that the accident itself is not proof that its workers negligently installed the material; accordingly, Peja should not be required to indemnify any party. For these reasons, Foundations' motion for summary judgment against it should be denied in its entirety.

Discussion

Summary Judgment Standard

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "[T]he 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" (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]).

If a movant meets the initial burden, the court must then evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [1985], *affd* 66 NY2d 701 [1985]). Parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1991]; *see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]); *see also Akseizer*

v Kramer, 265 AD2d 356 [1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [1976]). Summary judgment "should not be granted where there is any doubt as to the existence of such issues or where the issue is 'arguable'; issue-finding, rather than issue-determination, is the key to the procedure" (*Sillman*, 3 NY2d at 404 [internal citations omitted]). "The court's function on a motion for summary judgment is 'to determine whether material factual issues exist, not resolve such issues'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010] quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2009]).

However, if there is no genuine issue of fact, a trial court should summarily decide the issues raised in a motion for summary judgment (*Andre*, 35 NY2d at 364). Conclusory assertions, even if believable, are not enough to defeat a summary judgment motion (*Seaboard Sur. Co. v Nigro Bros.*, 222 AD2d 574, 575 [1999]). More specifically, "averments merely stating conclusions, of fact or of law, are insufficient [to] defeat summary judgment" (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). With these principles in mind, the court turns to the underlying merits of the motions.[10]

[10] The court's reasoning and determinations are based on the sworn testimony and documents in the record other than the affidavits of purported experts, which are conclusory in nature; accordingly, these affidavits were disregarded (see e.g., *Wass v County of Nassau*, 166 AD3d 1052 [2018]). Also, the court disregards any submitted affidavit of a party to the extent that the affidavit deviates significantly from that party's deposition testimony and appears drafted solely to defeat summary judgment (*cf. Lipsker v 650 Crown Equities, LLC*, 81 AD3d 789 [2011]).

Timeliness of Plaintiff's Cross Motion

AGBH correctly notes that plaintiff's cross motion for summary judgment is untimely. CPLR 3212 (a) states that "[a] party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue [and] [i]f no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue." This court has set such a date; pursuant to the Uniform Civil Term Rules of Kings County Supreme Court (part C, rule 6), parties must make dispositive motions no later than 60 days after the filing of the note of issue.[11] Here, the note of issue was electronically filed on August 11, 2022; sixty days thereafter is October 10, 2022. Plaintiff's cross motion was electronically filed on January 12, 2023, which is untimely by more than three months. Under ordinary circumstances, plaintiff's cross motion would be denied on this ground (*Brill v City of New York*, 2 NY3d 648, 652-653 [2004]).

However, an exception to this general rule exists; if a timely dispositive motion is pending, an otherwise untimely cross motion in the same action will be considered if the untimely cross motion for summary judgment is made on nearly identical grounds as a timely pending motion for summary judgment (*Grande v Peteroy*, 39 AD3d 590, 591-592 [2007]). Here, and contrary to AGBH's arguments, plaintiff's cross motion, which seeks (among other things) summary judgment with respect to Labor Law § 240 (1), was made against AGBH, which had a pending timely-made motion which seeks (among other things) summary judgment with respect to Labor Law § 240 (1). In addition, The Printing House Condominium

[11] Absent good cause (CPLR 3212 [f]).

and Board of Managers of The Printing House as well as defendants/second third-party plaintiffs Foundations Interior Design Corp., and Foundations Group, Inc. (mot. seq. 23) made a timely motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) claims. For these reasons, plaintiff's cross motion raises issues "nearly identical" to those raised in defendants' timely motions (*Sheng Hai Tong v K & K 7619, Inc.*, 144 AD3d 887, 890 [2016] [trial court should have considered untimely motion implicating Labor Law § 240 (1) and § 241 (6) where timely motion related to Labor Law § 241 (6) was pending]). Further, "the court, in the course of deciding the timely motions, is, in any event, empowered to search the record and award summary judgment to a nonmoving party" (*Grande v Peteroy*, 39 AD3d 590, 592 [2007]). For these reasons, the court will consider plaintiff's cross motion and the issues raised therein even though the cross motion was untimely.

Labor Law § 200 and Common-Law Negligence

Labor Law § 200 states, in applicable part:

> "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 protections to such persons."

Labor Law § 200 codifies the common-law duty of an owner, general contractor and their agents to provide workers with a safe place to work (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 850 [2006]; *Brown v Brause Plaza, LLC*, 19 AD3d 626, 628 [2005]; *Everitt v Nozkowski*, 285 AD2d 442, 443 [2001]; *Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [1999]). This duty "applies to owners, contractors, or their agents who exercise control or

supervision over the work, or either created the allegedly dangerous condition or had actual or constructive notice of it" (*Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000], citing *Russin v Picciano & Son*, 54 NY2d 311 [1981]; *Lombardi*, 80 NY2d at 294-295; *Jehle v Adams Hotel Assocs.*, 264 AD2d 354 [1999]; *Raposo v WAM Great Neck Assn. II*, 251 AD2d 392 [1998]; *Haghighi v Bailer*, 240 AD2d 368 [1997]). "An implicit precondition to this duty 'is that the party charged with that responsibility have the authority to control the activity bringing about the injury'" (*Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [1999], quoting *Comes*, 82 NY2d at 877 and *Russin*, 54 NY2d at 317). Labor Law § 200 and common-law negligence liability "will attach when the injury sustained was a result of an actual dangerous condition, and then only if the defendant exercised supervisory control over the work performed on the premises or had notice of the dangerous condition which produced the injury" (*Sprague v Peckham Materials Corp.*, 240 AD2d 392, 394 [1997], citing *Seaman v Chance Co.*, 197 AD2d 612 [1993]).

"Cases involving Labor Law § 200 generally fall into two categories: those where workers were injured as a result of dangerous or defective conditions at a worksite and those involving the manner in which the work was performed" (*Villada v 452 Fifth Owners, LLC*, 188 AD3d 1292, 1293 [2020], citing *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2008] and *Ortega v Puccia*, 57 AD3d 54, 61 [2008]). Under the "manner of work" analysis, "[l]iability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the work" that either was performed by plaintiff or produced the injury (*Aranda v Park East Constr.*, 4 AD3d 315, 316 [2004], citing *Lombardi v Stout*, 80 NY2d 290, 295 [1992]). The second category mirrors ordinary premises liability principles with respect to hazards (*cf. Azad v 270 5th Realty Corp.*, 46 AD3d 728, 730 [2007] ["(w)here a plaintiff's injuries stem not from the manner in which

the work was being performed, but, rather, from a dangerous condition on the premises, an owner (or its agent) may be held liable in common-law negligence and under Labor Law § 200 if it had control over 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"]).

Here, plaintiff has no viable Labor Law § 200 or common-law negligence claims against AGBH. AGBH established that its agents did not supervise and control either plaintiff or the work that brought about the plaintiff's injury; indeed, plaintiff does not contest this assertion. For this reason, AGBH is not liable to plaintiff under the "means and methods" category of claims alleging common-law negligence and violations of Labor Law § 200 (*Aranda*, 4 AD3d at 316).

Additionally, AGBH is not liable to plaintiff pursuant to either Labor Law § 200 or common-law negligence principles with regard to plaintiff's claim that there were premises hazards which brought about his injury. The record establishes that agents of AGBH were not performing work at the construction site; therefore, AGBH did not create or exacerbate a premises hazard. The record also indicates that AGBH's agents were not informed about loose Masonite on stairway steps or about the lack of stairway handrails. If AGBH did not create or exacerbate a premises hazard, and lacked actual notice of the same, AGBH can be subject to Labor Law § 200 and common-law negligence liability only if it had constructive notice of the subject hazard.

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 [a] defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Here, the record belies any claim of constructive notice. There is no evidence

that either alleged hazard—loose Masonite covering the steps or the lack of a handrail—was "visible and apparent" for an appreciable length of time. Moreover, and contrary to plaintiff's contentions, for a vicarious liability claim under the Labor Law, AGBH is not required to provide evidence of the last time that the area was inspected or cleaned. Indeed, given the record and the deposition testimony—including plaintiff's—there is no issue of fact as to whether AGBH had constructive notice of the alleged premises hazards (*cf. Zukowski v Powell Cove Estates Home Owners Assn., Inc.*, 187 AD3d 1099, 1101-1102 [plaintiff's deposition testimony presented triable issues of fact as to whether defendants knew about accumulated ice that led to slip and fall]). The fact that the subject hazards existed, absent more, does not constitute constructive notice to the property owner; a general awareness of the danger of a particular condition is legally insufficient to constitute constructive notice (*see e.g., Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]). Moreover, the testimony does not establish the length of time the allegedly hazardous conditions existed before the subject accident (*see e.g., Kobiashvilli v Hill*, 34 AD3d 747, 747-748 [2006]). Nor does it suffice for plaintiff to assert that defendants were required to submit evidence of a most recent inspection or cleaning; to the contrary, evidence of notice of a hazard must be precise in order to create an issue of fact (*see e.g., Kobiashvilli*, 34 AD3d at 747-748; *Piacquadio*, 84 NY2d at 969). Absent any indication that the unsecured Masonite or a missing handrail was "visible and apparent . . . for a sufficient length of time prior to the accident" (*Gordon*, 67 NY2d at 837), AGBH cannot be found to have had constructive notice of the allegedly dangerous conditions. For these reasons, the court grants AGBH's motion insofar as it seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims asserted against it (*see e.g. Payne v 100 Motor Parkway Assoc., LLC*, 45 AD3d 550, 553 [2007]).

However, the court finds that Foundations' motion, insofar as it seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims asserted against Foundations Group, Inc., the construction manager, should be denied. Here, the record demonstrates that Foundations supervised and controlled Peja employees, and that it directed Peja workers to place Masonite on the stairs. Therefore, an issue of fact exists as to whether Foundations Group, Inc. created the alleged hazard that factored into the accident. For a general contractor or construction manager such as Foundations Group, Inc. to prevail on a motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims, it must show, among other things, that it did not create the allegedly dangerous condition (*Nankervis v Long Is. Univ.*, 78 AD3d 799, 800 [2010]). Since the record raises an issue of fact as to whether Foundations Group, Inc. created the complained-of hazard by directing Peja workers to place the Masonite, summary judgment in Foundations' favor with respect to these claims would be inappropriate (*see e.g., Erickson v Cross Ready Mix, Inc.*, 75 AD3d 519, 523 [2010]; *Marano v Commander Elec., Inc.*, 12 AD3d 571, 572-573 [2004]). Accordingly, Foundations' motion is denied insofar as it seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims.[12]

Labor Law § 240 (1)

Labor Law § 240 (1) states, in relevant part, that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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

[12] Moreover, the deposition testimony of the various parties suggests that Foundations Group, Inc. was aware that the Masonite frequently became dislodged.

> devices which shall be so constructed, placed and operated as to give proper protection to a person so employed . . ."

The purpose of Labor Law § 240 (1) is to protect workers "from the pronounced risks arising from construction work site elevation differentials" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2009], *lv dismissed* 13 NY3d 857 [2009]; *see also Ienco v RFD Second Ave., LLC*, 41 AD3d 537 [2007]; *Ortiz v Turner Constr. Co.*, 28 AD3d 627 [2006]; *Lacey v Turner Constr. Co.*, 275 AD2d 734, 735 [2000]; *Smith v Artco Indus. Laundries*, 222 AD2d 1028 [1995]). "Labor Law § 240 (1) provides special protection to those engaged in the 'erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure'" (*Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 880 [2003], quoting Labor Law § 240 [1]). Labor Law § 240 (1) applies where there is a "significant risk inherent in the particular task because of the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). The duty to provide the required "proper protection" against elevation-related risks is nondelegable; therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [holding that owner or contractor is liable under Labor Law § 240 (1) "without regard to . . . care or lack of it"]).

Although this statute "is to be construed as liberally as may be" to protect workers from injury (*Zimmer*, 65 NY2d at 520-521 [1985], quoting *Quigley v Thatcher*, 207 NY 66, 68 [1912]; *see also Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* 18 NY3d 1, 7 [2011] ["a defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability"]), "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1)" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). "[C]ourts must take into account the practical differences between the usual and ordinary dangers of a construction site, and . . . the extraordinary elevation risks envisioned by Labor Law § 240 (1)" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011] [internal quotation marks omitted]). The question of whether a particular activity falls within Labor Law § 240 (1) must be determined "on a case-by-case basis, depending on the context of the work" (*Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d at 883). Lastly, the Court of Appeals has "repeatedly held, implicitly and explicitly, that it is not enough that a plaintiff's injury flowed directly from the application of the force of gravity to an object or person, even where a device specified by the statute might have prevented the accident" (*Oakes v Wal-Mart Real Estate Bus. Trust*, 99 AD3d 31, 36 [2012]).

Here, plaintiff has no viable Labor Law § 240 (1) claim. Contrary to plaintiff's contentions, "[w]here a fall occurs from a permanent stairway, no liability pursuant to Labor Law § 240 (1) can attach" (*Sullivan v New York Athletic Club of City of N.Y.*, 162 AD3d 950, 953, quoting *Gallagher v Andron Constr. Corp.*, 21 AD3d 988, 989 [2005]; *see also Parsuram v I.T.C. Bargain Stores, Inc.*, 16 AD3d 471, 472 [2005]). Indeed, a fall involving a stairway is not considered "the result of an elevation-related or gravity-related risk" (*Castro v Wythe Gardens, LLC*, 217 AD3d 822, 825 [2023] [no § 240 (1) liability where worker "was injured

when he tripped after stepping into a gap between the top step of a staircase and the landing"], citing *Sullivan*, 162 AD3d at 953; *Lopez v Edge 11211, LLC*, 150 AD3d 1214, 1215 [2017]; *Reyes v Magnetic Constr., Inc.*, 83 AD3d 512, 513 [2011]; *Barrett v Ellenville Natl. Bank*, 255 AD2d 473, 474 [1998]). Also, since it is undisputed that plaintiff herein used the subject stairway as a passageway from the second and third floor, this too precludes his Labor Law § 240 (1) claim (*Castro*, 217 AD3d at 825, citing *Palacios v 29th St. Apts, LLC*, 110 AD3d 698, 699 [2013]; *Salcedo v Swiss Ranch Estates, Ltd.*, 79 AD3d 843, 844 [2010]; *Donohue v CJAM Assoc., LLC*, 22 AD3d 710, 712 [2005]). Accordingly, plaintiff's Labor Law § 240 (1) claim must be dismissed (*Castro*, 217 AD3d at 825).

Plaintiff's arguments to the contrary are based on appellate authority in other appellate courts, but not the Second Department, that recognizes an exception to the rule that no Labor Law § 240 (1) liability exists where a worker falls down a permanent stairway. For example, in *Rivas v Nestle Realty Holding Corp*. (188 AD3d 430 [2020]), the First Department of the Appellate Division stated that:

> "[p]laintiff met his initial burden of proof by submitting evidence that he fell to the ground when he placed his foot on the top step of a recently constructed stairway leading to the elevated deck where he was to perform his work. He testified that the stairway was the sole means of access to his work area. According to plaintiff, the stairway was unfinished and lacked handrails and supports under each step. Plaintiff testified that the top step became detached from the stairway. This testimony establishes prima facie that defendants failed to provide plaintiff with a proper elevation-related safety device, in violation of Labor Law § 240 (1), and that this violation proximately caused plaintiff's injuries (see *Conlon v Carnegie Hall Socy., Inc.*, 159 AD3d 655 [1st Dept 2018]; *Gory v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 113 AD3d 550 [1st Dept 2014])." (*Id.* at 430-431).

Plaintiff cites several other appellate decisions that have similar holdings. However, a review of the cases cited by plaintiff confirm that it is the First Department of the Appellate

Division that has recognized this exception to the general rule. In contrast, the Second Department in *Sullivan* stated unequivocally that "there is no liability arising from the plaintiff's act of descending the stairs . . . [w]here a fall occurs from a permanent stairway, no liability pursuant to Labor Law § 240 (1) can attach" (*Sullivan*, 162 AD3d at 953). The Second Department, by using the phrase "no liability" (*id.*) has clearly held that no exception exists.

In short, while the First Department may recognize the above exception,[13] this court is bound to follow the decisions of Second Department, and, as such, plaintiff's Labor Law § 240 (1) claims relating to his fall down a permanent flight of stairs must be dismissed.

Labor Law § 241 (6)

Labor Law § 241 states, in applicable part, as follows:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

[13] Also, the exception recognized by the First Department is predicated on situations where "the stairway was the sole means of access" to the area where the plaintiff had to work; however, in the instant case, as testified to by multiple witnesses, an elevator was available to access the various floors of the townhouse.

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to comply with the specific safety rules and regulations set forth in the Industrial Code in connection with construction, demolition or excavation work (*Ascencio v Briarcrest at Macy Manor, LLC*, 60 AD3d 606, 607 [2009], citing *Rizzuto*, 91 NY2d at 348; *Ross*,81 NY2d 5044, 501-502 [1993]; *Nagel v D & R Realty Corp.*, 99 NY2d 98, 102 [2002]; *Valdivia v Consolidated Resistance Co. of Am., Inc*., 54 AD3d 753, 754 [2008]). The vicarious liability provisions of Labor Law § 241 (6) apply to owners, contractors, and their agents (*Alfonso v Pacific Classon Realty, LLC*, 101 AD3d 768, 770 [2012]), which are subject to Labor Law § 241 (6) liability irrespective of fault or negligence (*Rizzuto*, 91 NY2d at 349-350 [owner or contractor is liable without regard to fault if Labor Law § 241 (6) violation is established]). "To prevail on a cause of action under section 241 (6), a plaintiff must establish a violation of a specific safety regulation promulgated by the Commissioner of the Department of Labor" (*Davies v Simon Prop. Group, Inc.*, 174 AD3d 850, 853 [2019]; *see generally Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]). If the injured worker plaintiff can establish such a violation from the record, summary judgment in plaintiff's favor on the issue of defendants' liability is properly awarded (*see e.g., Mushkudiani v Racanelli Constr. Group, Inc.*, 219 AD3d 613 [2023]).

Here, the court finds that plaintiff is entitled to partial summary judgment with respect to defendants' liability pursuant to Labor Law § 241 (6), as plaintiff has demonstrated that defendants violated an applicable and enforceable provision of the Industrial Code, and that the violation was a proximate cause of his injuries (*see e.g., Ennis v Noble Constr. Group,*

LLC, 207 AD3d 703 [2022]). The loose Masonite on the subject stairs, which caused plaintiff to fall, constituted a violation of Industrial Code § 23-1.7 (d),[14] which provides as follows:

> Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

This Industrial Code provision supports a Labor Law § 241 (6) cause of action and an award of summary judgment to a plaintiff if it is violated (*see e.g., Gancarz v Brooklyn Pier 1 Residential Owner, L.P.*, 190 AD3d 955 [2021]; *Reynoso v Bovis Lend Lease LMB, Inc.* 125 AD3d 740 [2015]). Since there is no dispute that loose Masonite caused plaintiff to lose his footing and fall, plaintiff is entitled to partial summary judgment on the issue of defendants' liability pursuant to Labor Law § 241 (6) predicated on this section of the industrial code.

Defendants' arguments to the contrary lack merit. The suggestion that loose Masonite is not the "type" of slipping hazard encompassed by Industrial Code § 23-1.7 (d) is foreclosed by the text of the provision, which explicitly states that "*any other foreign substance which may cause slippery footing* [emphasis added] shall be removed, sanded or covered to provide safe footing." Also, there is no indication that plaintiff engaged in a foolish or culpable act when he descended the same staircase he had used to ascend to the third floor only a little while earlier that day. Defendants have failed to raise a triable issue of fact to the contrary (*Cruz v 1142 Bedford Ave., LLC*, 192 AD3d 859, 862-863 [2021]; *cf. Fonck v City of New York*, 198 AD3d 874, 875 [2021]). Accordingly, plaintiff's motion, insofar as it seeks partial

[14] The court finds that plaintiff has no viable Labor Law § 241 (6) claim predicated on Industrial Code § 23-2.7 (e). The accident was caused by plaintiff's slipping on loose Masonite, and any lack of a handrail was not the proximate cause of the subject accident. The absence of a handrail may have increased his injuries, however, if he establishes at trial that there was in fact no handrail, and that if there had been one, he would have been able to grab it and stop his fall.

summary judgment against defendants with respect to liability pursuant to Labor Law § 241 (6), is granted. The court declines to dismiss the affirmative defense of comparative fault. This defense, although not a complete defense to the vicarious liability provisions of the Labor Law, is nevertheless relevant to the issue of damages (*Rodriguez v. City of New York*, 31 NY 3d 312 [2018] [plaintiff's comparative fault relevant to CPLR Article 14-A]). However, the affirmative defenses of assumption of risk are dismissed, as this defense is completely inapplicable to an injured worker at a construction site.

Cross Claims and Third-Party Claims

With respect to the various allegations relating to contractual indemnification, the court notes that "[a] party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). "'[I]t is elementary that the right to contractual indemnification depends upon the specific language of the contract'" (*Kader v City of N.Y., Hous. Preserv. & Dev.*, 16 AD3d 461, 463 [2005], quoting *Gillmore v Duke/Fluor Daniel*, 221 AD2d 938, 939 [1995]; *cf. Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989] [promise to indemnify must be clearly implied in agreement]).

Here, AGBH has demonstrated prima facie entitlement to summary judgment as a matter of law with respect to its cross claim for contractual indemnification against Foundations Group, Inc. Specifically, AGBH has submitted a copy of the May 8, 2014 written agreement between it (as Owner) and Foundations Group, Inc. (as Construction Manager); the applicable provision reads as follows:

> "§ 11.5.7 INDEMNIFICATION To the fullest extent permitted by law, the Construction Manager shall indemnify, defend, and hold harmless the Owner . . . from and against claims, damages,

> losses and expenses, including but not limited to attorneys' fees, expenses and associated costs arising out of, related to, or resulting from . . . the performance of the Work, and/or the negligence, error or omission of the Construction Manager or any of its Subcontractors[.]"

Here, there is no dispute that the subject agreement was in effect at all applicable times or that plaintiff's allegations are claims relating to the Work performed by the Construction Manager and Peja (a Subcontractor) as those terms are defined therein. Indeed, language such as "arising out of" and "resulting from" the work are broadly interpreted and trigger indemnity pursuant to such written agreements (*Giangarra v Pav–Lak Contracting*, Inc., 55 AD3d 869 [2008]; *Lesisz v. Salvation Army*, 40 AD3d 1050 [2007]). Also, since the indemnity provision is limited "[t]o the fullest extent permitted by applicable law," the provision is enforceable (*cf.* General Obligations Law § 5-322.1; *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786 [1997]). Moreover, the record establishes that any liability of AGBH in this action is purely vicarious, therefore, there is no indication that AGBH is attempting to have Foundations Group, Inc. indemnify it for its own negligence (*cf. Itri Brick & Concrete Corp.*, 89 NY2d 786 [for party to be entitled to indemnification must demonstrate that no negligent act or omission on its part contributed to accident and that its liability is therefore purely vicarious]). Indeed, Foundations offers no substantial arguments against these contractual indemnification claims. Since AGBH has demonstrated the existence of an unambiguous written indemnity provision that is enforceable against Foundations Group, Inc., in effect at relevant times and applicable to the instant action, AGBH is, therefore, entitled to summary judgment on its cross claim for contractual indemnification against Foundations Group, Inc. (*see e.g. Samaroo v Patmos Fifth Real Estate, Inc.*, 102 AD3d 944 [2013]).

Foundations, however, has not demonstrated its prima facie entitlement to summary judgment as a matter of law on its third-party claim for contractual indemnification against

Peja. Assuming arguendo that the written indemnity provision between the two parties is valid, enforceable, was in effect at relevant times and applicable, the record nevertheless establishes that Foundations was responsible for supervising and directing the Peja employees who placed the Masonite that led to the subject accident. Accordingly, Foundations has failed to show that no negligent act or omission on its part contributed to accident and that its liability is therefore purely vicarious (*Itri Brick & Concrete Corp.*, 89 NY2d 786). Accordingly, Foundations is not entitled to summary judgment with respect to its claim for contractual indemnification (*Id.*).

Similarly, Foundations has not established its prima facie entitlement to summary judgment as a matter of law with respect to its third-party claim that Peja breached its covenant to obtain and keep required insurance coverage. "A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (*Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 739 [2003], citing *McGill v Polytechnic Univ.*, 235 AD2d 400 [1997]; *DiMuro v Town of Babylon*, 210 AD2d 373 [1994]). Here, Foundations has indeed demonstrated that the written agreement between Foundations Group, Inc. and Peja required Peja to obtain both primary general commercial liability and excess/umbrella policies. However, Foundations simply argues that Peja "has failed to produce any excess insurance policies" in pre-trial disclosure and argues that this is sufficient for summary judgment purposes. The court disagrees. Foundations is simply "pointing to gaps" in discovery, which is insufficient for summary judgment (see e.g., *Peskin v New York City Tr. Auth.*, 304 AD2d 634 [2003]; *see also Pace v International Bus. Mach. Corp.*, 248 AD2d 690, 691 [1998] ["[a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its

opponent's proof but must affirmatively demonstrate the merit of its claim or defense" (internal quotations omitted)], quoting *Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614, 615 [1992]). Accordingly, Foundations' motion with respect to its third-party claims against Peja is denied.

Lastly, Peja's motion for summary judgment dismissing the third-party claims asserted by Foundations against it is likewise denied. With respect to indemnification, Peja's argument that, as a matter of law, placing Masonite on the stairs was outside the scope of the written contractor agreement is rejected by this court. The court also rejects the argument that, as a matter of law, Peja employees were "special" employees of Foundations (*see e.g. Slikas v Cyclone Realty, LLC*, 78 AD3d 144, 150 [2010] [special employment relationship is generally a question of fact and defendant failed to make prima facie showing], citing *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557-558 [1991]).[15] The record establishes neither assertion; accordingly, resolution of whether Peja is required to indemnify Foundations[16] is reserved for the trier of fact (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). Additionally, Peja's argument with respect to Foundations' claim that Peja breached the covenant to procure insurance, its claim that "Peja is out of business and the owner's records were destroyed in a fire . . . [a]s a result, he cannot identify what, if any, excess insurance his company had at the time of the alleged incident . . . [t]herefore, there can be no finding of

[15] Moreover, since the issue "special" employment is almost completely limited to facts that involve the Workers' Compensation Law or the Workers' Compensation Board, Peja has failed to show the relevance of this issue. Even if the Workers' Compensation Law bar prevented Foundations from suing Peja's workers (as "special" employees of Foundations), the bar would not prevent enforcement of the written indemnity provision triggered by claims advanced by plaintiff (who was not an employee of either Foundations or Peja).

[16] The court notes that the record indicates that Peja's insurance carrier has, albeit belatedly, tendered a defense of this action to Foundations.

breach of contract for failure to procure insurance as it is impossible to determine if any excess insurance existed at the time" is rejected by the court. In order to obtain summary judgment dismissing this claim, Peja was required to demonstrate that it *complied* with the insurance procurement provisions, and not simply point to alleged gaps in Foundations' proof of Peja's noncompliance (*see e.g. Pace*, 248 AD2d at 691). For these reasons, Peja's motion is denied in its entirety.

Conclusions

Accordingly, it is hereby

ORDERED that the branch of the motion of defendant/third-party plaintiff/second third-party plaintiff AGBH Printing House Holdings, L.L.C. (mot. seq. 21) for summary judgment is granted to the extent that the plaintiff Jaime Noboa's claims pursuant to Labor Law § 240 (1), Labor Law § 200 and common-law negligence are dismissed. The branch of its motion for summary judgment on its claim for contractual indemnification against defendant/second third-party plaintiff Foundations Group., Inc. is granted. The remainder of the relief requested is denied; and it is further

ORDERED that Foundations is directed to immediately assume AGBH's defense and reimburse their legal fees and disbursements incurred thus far; and it is further

ORDERED, that any dispute as to the amount of the attorneys' fees and disbursements which AGBH has incurred and is entitled to reimbursement for, for the period from the date the action was commenced to the date Foundations assumes its defense, shall be submitted to this Court, by motion, and the court shall schedule a hearing to determine the amount of attorneys' fees and disbursements to be awarded; and it is further

ORDERED that the motion of defendants/second third-party plaintiffs Foundations Interior Design Corp., and Foundations Group, Inc. (mot. seq. 22) for summary judgment against Peja Group Construction Inc. (Peja) on the issues of defense, indemnity and breach of the covenant to procure insurance, and dismissing all cross claims asserted against them, is denied in its entirety; and it is further

ORDERED that the motion of defendants The Printing House Condominium and Board of Managers of The Printing House as well as defendants/second third-party plaintiffs Foundations Interior Design Corp., and Foundations Group, Inc. (mot. seq. 23) for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim is granted; and it is further

ORDERED that the motion of second third-party defendant Peja Group Construction, Inc. (mot. seq. 24) for summary judgment dismissing the third-party claims asserted against it is denied in its entirety; and it is further

ORDERED that the motion of plaintiff Jaime Noboa (mot. seq. 25) for partial summary judgment is granted solely to the extent that plaintiff is awarded partial summary judgment on the issue of liability pursuant to Labor Law § 241 (6), predicated on a violation of Industrial Code § 23-1.7 (d), against defendants AGBH Printing House Holdings, L.L.C. and Foundations Group, Inc., and is otherwise denied.

The court has considered the parties' remaining contentions, if any, and finds them unavailing. All relief not expressly granted herein is denied.

This constitutes the decision, and order of the court.

E N T E R,

Hon. Debra Silber, J.S.C.