At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 1st day of December 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

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ANTWAUN BROWN,

Plaintiff,

-against-

OSIB-BCRE BOWERY STREET HOLDINGS LLC c/o BRACK CAPITAL REAL ESTATE LTD, THE RINALDI GROUP, LLC, and SCHEAR CONSTRUCTION, LLC,

Defendants.

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OSIB-BCRE BOWERY STREET HOLDINGS LLC c/o BRACK CAPITAL REAL ESTATE LTD, and THE RINALDI GROUP, LLC,

Third-Party Plaintiffs,

-against-

SCHEAR CONSTRUCTION, LLC and ANTHONY G. FERRY INC. ELECTRICAL CONTRACTORS,

Third-Party Defendants.

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SCHEAR CONSTRUCTION, LLC,

Second Third-Party Plaintiff,

-against-

DASSO INTERNATIONAL, INC., DASSO USA, DASSOXTER, and EASOON USA, LLC,

Second Third-Party Defendants.

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Index No.: 517267/19
Motion Seq. 6, 7, 8, 9, 10

ORDER

The following e-filed papers read herein:	NYSCEF Doc. Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	187-188, 190, 212-213, 224, 255, 256, 267, 280, 282, 306-307, 309, 311
Opposing Affidavits (Affirmations)	226, 237, 239, 241, 252, 254, 341, 344-345, 346, 349, 350, 351, 356
Affidavits/ Affirmations in Reply	367, 369, 371, 372, 377, 380, 382

Upon the foregoing papers, plaintiff Antwaun Brown moves for an order, pursuant to CPLR 3212, granting partial summary judgment in his favor on his Labor Law § 240 (1) cause of action (motion sequence number 6). Defendants/third-party plaintiffs OSIB-BCRE Bowery Street Holdings LLC c/o Brack Capital Real Estate Ltd. (OSIB-BCRE) and the Rinaldi Group, LLC (Rinaldi) (collectively referred

to as OSIB/Rinaldi) move for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint and any and all claims as against them and granting summary judgment in their favor on their claims for contractual indemnification, common-law indemnification and breach of contract against defendant/third-party defendant/third-party plaintiff Schear Construction, LLC (Schear) and third-party defendant Anthony G. Ferry Inc. Electrical Contractors (Ferry) (motion sequence number 7). Ferry cross-moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the third-party complaint as against it (motion sequence number 8). Schear cross-moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing plaintiff's common-law negligence and Labor Law §§ 200 and 240 (1) causes of action (motion sequence number 9). In a separate cross motion, Schear moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing OSIB/Rinaldi's claims and cross-claims as against it (motion sequence number 10).

In this action premised on common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6), plaintiff alleges that, while he was installing security cameras on the rear porch/patio of a building under construction, he sustained injuries on July 30, 2018, when his left leg broke through a plank of the porch's permanent wood deck. The building under construction was owned by OSIB-BCRE. Rinaldi was the construction manager for the project, and it hired Schear as the framing/carpentry subcontractor. It was Schear that installed the wood decking on the porch. Ferry was hired by Rinaldi to perform electrical and fire alarm work for the project, and Ferry, in turn, subcontracted some of this work, including the security camera installation work performed by plaintiff, to Giant Security, Inc. d/b/a Vertex Security (Giant).[1] Plaintiff was employed by Giant as an electrical technician for the installation of security cameras.

According to plaintiff's deposition testimony, on the day of the accident, he was directed by his Giant supervisor to install two security cameras on the rear patio of the building with the help of a coworker. After plaintiff had installed one of the cameras, he climbed down off the ladder he was using, folded the ladder with it lying on the floor and started to pick up the ladder in order to move it to another location on the porch so he could install the other camera. As plaintiff was picking up the ladder, he took a step back with his left leg and his left foot broke through a plank of the wood deck that covered the patio area.[2] Plaintiff's left leg went through the planking of the deck up to his shin, a distance plaintiff

[1] There is no real dispute that Ferry subcontracted some of its electrical work to Giant. Although Ferry's witness testified that he had never heard of Giant, he also testified that Ferry had subcontracted some of its work to Vertex. A Ferry purchase order for the security camera work identifies Vertex Security and Giant Security d/b/a Vertex Security as the contracting parties. Plaintiff, in his own testimony, identifies Vertex as a company that was related to Giant.

[2] Plaintiff testified, at his February 7, 2020 and May 11, 2020 depositions. that the accident happened when he took a step backward while grabbing the ladder. At his January 28, 2021 deposition, plaintiff did not mention that the accident occurred as he took a step back, but rather, stated that the accident happened after he had taken a few steps walking sideways while dragging the ladder. The parties make no suggestion that this minor inconsistency has any

estimated to be one and one-half feet, to the subfloor below the wood deck.[3] Plaintiff fell on top of the wood deck when his foot fell through the platform and the ladder that he was holding fell on top of him.

The wood deck was supported above a concrete slab and waterproofing membrane by pedestals and decking planks were placed over wooden joists that were 10 to 22 inches apart. Photographs taken of the accident site (NYSCEF Doc. No. 202) show that the hole that was created when the plank broke, while big enough to allow plaintiff's foot to fall through, was not of the size to allow one's entire body to fall to the level below. In his own deposition testimony, plaintiff stated that, when he put the ladder onto the floor in the area of the accident, he looked at the flooring, and did not notice any broken pieces or cracks and none of the planks in the area appeared to be bent or bowed in any manner. Rinaldi's project manager testified at his deposition that he had conducted a walk-through of the deck area at some point after it was constructed, but before the accident, and he did not observe any defects with the wood planking, nor did he ever receive any complaints from others regarding the deck's wood planking.[4]

As an initial matter, the court rejects plaintiff and OSIB/Rinaldi's assertion that Schear's cross motions may not be considered because they are untimely (Kings County Supreme Court Uniform Civil Term Rules, Part C, Rule 6; CPLR § 3212 [a]). The cross motions may be considered because the court (Freier, J.), in an order dated February 17, 2023 (NYSCEF Doc. No. 357), vacated the note of issue and restored the action to its prenote status (*see Mills v City of New York*, 144 AD3d 644, 645 [2d Dept 2016]; *see also Mayorquin v Carriage House Owner's Corp.*, 202 AD3d 541, 541 [1st Dept 2022]; *Wells Fargo Bank, NA v Apt*, 179 AD3d 1145, 1146-1147 [2d Dept 2020]).

Labor Law § 240 (1) imposes absolute liability on owners and contractors or their agents when they fail to protect workers employed on a construction site from injuries proximately caused by risks associated with falling from a height or those associated with falling objects (*see Wilinski v 334 E. 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). For a defendant to be held liable under Labor Law § 240 (1), a plaintiff's injuries must be "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see Wilinski*, 18 NY3d at 10).

The instant defendants are entitled to dismissal of the Labor Law § 240 (1) cause of action because the accident did not involve a significant elevation differential for purposes of Labor Law § 240

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bearing on the liability issues discussed below, and, in any event, this court is not aware of any legal grounds to believe that such an inconsistency would have any impact on the liability issues herein.

[3] While plaintiff did not specifically testify that his foot fell through to the subfloor below the wood deck, plaintiff's counsel conceded such was the case in the memorandum of law submitted in support of plaintiff's motion (NY St Cts Elec Filing [NYSCEF] Doc. No. 189 at 3, ¶ 12).

[4] Although Schear's president testified that he performed a walk through of the deck at some point after its installation and before the accident, he was not asked about his observations, if any, regarding the deck's condition.

(1) given that the hole that was created when the plank broke was too small to allow plaintiff's entire body to fall to the level below (*see Johnson v Lend Lease Constr. LMB, Inc.*, 164 AD3d 1222, 1222 [2d Dept 2018]; *Vitale v Astoria Energy II, LLC*, 138 AD3d 981, 983 [2d Dept 2016]; *Avila v Plaza Constr. Corp.*, 73 AD3d 670, 671 [2d Dept 2010], *lv granted* 15 NY3d 706 [2010], *appeal withdrawn* 15 NY3d 918 [2010]; *Alvia v Teman Elec. Contr.*, 287 AD3d 421, 422 [2d Dept 2001], *lv denied* 97 NY2d 749 [2002]; *see also Keavey v New York State Dormitory Auth.*, 6 NY3d 859, 860 [2006], *affirming* 24 AD3d 1193 [4th Dept 2005]; *cf. O'Conner v Lincoln Metrocenter Partners, L.P.*, 266 AD2d 60, 61 [1st Dept 1999] [hole was big enough that plaintiff could have fallen through to level below if he had not held himself up in the opening]). Even if plaintiff could have fallen to the level below, the protections of the statute were not implicated under these circumstances since the waterproofing membrane and concrete slab were only approximately one-and-one-half feet below the wood decking (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514-515 [1991]; *Balfe v Graham*, 214 AD3d 693, 694 [2d Dept 2023];[5] *Piccuillo v Bank of N.Y. Co.*, 277 AD2d 93, 94 [1st Dept 2000]; *D'Egidio v Frontier Ins. Co.*, 270 AD2d 763, 765 [3d Dept 2000]) and because the accident occurred on a fully-constructed, permanent wood decking under conditions where no section 240 (1) safety device would have been expected (*see Carrillo v Circle Manor Apts.*, 131 AD3d 662, 662-663 [2d Dept 2015], *lv denied* 27 NY3d 906 [2016]; *Romeo v Property Owner (USA) LLC*, 61 AD3d 491, 491 [1st Dept 2009]; *Geonie v OD & P NY Ltd.*, 50 AD3d 444, 445 [1st Dept 2008]; *cf. Quizhpi v South Queens Boys & Girls Club, Inc*, 166 AD3d 683, 684 [2d Dept 2018] [foreseeable that roof would collapse and cause plaintiff to fall to lower level]; *Shipkoski v Watch Case Factory Assocs.*, 292 AD2d 587, 588-589 [2d Dept 2002] [issue of fact as to whether it was foreseeable that floor would collapse and allow plaintiff to fall to floor level below]).[6]

Turning to the Labor Law § 241 (6) cause of action, plaintiff premises this cause of action on violations of Industrial Code (12 NYCRR) §§ 23-1.7, 23-1.7 (b), 23-1.7 (b) (1), 23-1.7 (d), 23-1.7 (e), 23-1.7 (e) (1), 23-1.7 (e) (2), 23-1.11, and 23-3.3 (f). In moving, OSIB/Rinaldi have demonstrated, prima facie, that all of these sections are inapplicable to the facts of this case (*see e.g. Castro v Wythe Gardens, LLC*, 217 AD3d 822, 826 [2d Dept 2023]). As plaintiff, in opposition, concedes that the facts in this case do "not present a cognizable" Labor Law § 241 (6) cause of action (NYSCEF Doc. No. 161, at ¶ 1, n1),

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[5] Although the Appellate Division, Second Department does not mention the depth of the hole at issue in *Balfe*, plaintiff, in his reply brief on appeal, states that the hole was two feet deep (*see Reply Brief*, 2021 WL 10365302, *4).

[6] The court notes that the cases plaintiff primarily relies upon are Appellate Division, First Department cases that are inconsistent with the above noted Appellate Division, Second Department cases (*see Payne v NSH Community Servs., Inc.*, 203 AD3d 546, 547 [1st Dept 2022]; *Brown v 44 St. Dev., LLC*, 137 AD3d 703, 704 [1st Dept 2016]). Morevoer, in the Second Department cases cited by plaintiff, the plaintiffs fell significantly greater distances than the distance involved herein (*see Yiming Zhou v 828 Hamilton, Inc.*, 173 AD3d 943, 944 [2d Dept 2019] [plaintiff fell 15 feet through hole]; *Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 694 [2d Dept 2006] [plaintiff fell through hole 20 feet])

OSIB/Rinaldi are entitled to dismissal of plaintiff's Labor Law § 241 (6) cause of action. Although defendant Schear did not seek dismissal of plaintiff's section 241 (6) cause of action in its cross motion, in searching the record, this court also dismisses said claim as against Schear (*see Schwartz v Town of Ramapo*, 197 AD3d 753, 756 [2d Dept 2021]; *Rivera v Port Auth. of N.Y. & N.J.*, 69 AD3d 917, 918-919 [2d Dept 2010]; CPLR 3212 [b]).

With respect to plaintiff's common-law negligence and Labor Law § 200 causes of action, when such claims arise out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged with liability had the authority to supervise or control the performance of the work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Hart v Commack Hotel, LLC*, 85 AD3d 1117, 1118 [2d Dept 2011]). Where a premises condition is at issue, property owners and general contractors may be held liable under common-law negligence and for a violation of Labor Law § 200 if they either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*see Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dept 2014]; *Bauman v Town of Islip*, 120 AD3d 603, 605 [2d Dept 2014]; *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). Similarly, liability under Labor Law § 200 and common-law negligence may be imposed upon a subcontractor where it had control over the work site and either created the allegedly dangerous condition or had actual or constructive notice of it (*see Vita v New York Law Sch.*, 163 AD3d 605, 607 [2d Dept 2018]; *Wolf v KLR Mech., Inc.*, 35 AD3d 916, 918 [3d Dept 2006]).

Through deposition testimony in the record showing that plaintiff was exclusively supervised by Giant supervisors, OSIB/Rinaldi and Schear have demonstrated, prima facie, that they did not exercise more than general supervisory authority over the injury producing work and are thus entitled to dismissal of the common-law negligence and Labor Law § 200 causes of action to the extent they are premised on the means and methods of performing the work (*see Abelleira v City of New York*, 201 AD3d 679, 680 [2d Dept 2022]; *Goldfien v County of Suffolk*, 157 AD3d 937, 938 [2d Dept 2018]; *Messina v City of New York*, 147 AD3d 748, 749-750 [2d Dept 2017]). As plaintiff concedes that OSIB/Rinaldi and Schear did not supervise or control his work, OSIB/Rinaldi and Schear are entitled to dismissal of the common-law negligence and section 200 claims to the extent premised on the means and methods of performing the work theory of liability.

Plaintiff, however, asserts that OSIB/Rinaldi and Schear have failed to demonstrate their prima facie entitlement to dismissal of the Labor Law § 200 and common-law negligence causes of action to the extent that they are premised on a defective premises condition theory of liability. In moving for summary judgment seeking dismissal of common-law negligence and section 200 causes of action, it is defendants who bear the initial burden of demonstrating, prima facie, that they did not cause or create the

defective condition or have actual or constructive notice of such condition (*see Estrella v ZRHLE Holdings, LLC*, 218 AD3d 640, 648 [2d Dept 2023]; *Karel v Pizzorusso*, 215 AD3d 738, 739 [2d Dept 2023]). "A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it" (*Hamm v Review Assoc., LLC*, 202 AD3d 934, 937-938 [2d Dept 2022]; *see Nicoletti v Iracane*, 122 AD3d 811, 812 [2d Dept 2014]).

Here, defendants primarily rely on the plaintiff's own testimony that, when he put the ladder onto the floor in the area of the accident, he looked at the flooring, and did not notice any broken pieces or cracks and none of the planks in the area appeared to be bent or bowed in any manner (Plaintiff's 2/7/20 deposition at 88, lines 16-25; at 89, lines 2-5). While this testimony constitutes some evidentiary proof regarding the condition of the flooring, the court finds that it is not dispositive with respect to whether there were any visible or apparent defects because the questioning of plaintiff at the deposition focused on the condition of the floor in the area where he placed the ladder. Defendants' attorneys did not specifically ask plaintiff if he observed the condition of the planks in the area where plaintiff's foot broke through the decking. To the extent that plaintiff's testimony suggests that the accident occurred in the same general area where he had placed the ladder, it is unclear whether he would have paid as close attention to the condition of the flooring outside the immediate area where he placed the ladder. Although defendants also note that Rinaldi's project manager testified that he observed no defects with the planking when he performed a walkthrough of the patio at some point after its construction and before the accident, this project manager could provide no further detail regarding either when he performed the walkthrough or how closely he examined the condition of the planking during the walkthrough.

Accordingly, this court finds that defendants have failed to demonstrate, prima facie, that the defect with the planking was not visible and apparent, and could not have been discovered through a reasonable inspection (*see Catalano v Tanner*, 23 NY3d 976, 977 [2014], *reversing* 112 AD3d 1299, 1299-1300 [4th Dept 2013]; *Lobianco v City of Niagara Falls*, 213 AD3d 1341, 1342-1343 [4th Dept 2023]; *Gairy v 3900 Harper Ave., LLC*, 146 AD3d 938, 939 [2d Dept 2017]; *Farrauto v Bon-Ton Dept. Stores, Inc.*, 143 AD3d 1292, 1293 [4th Dept 2016]; *Bergin v Golshani*, 130 AD3d 767, 768 [2d Dept 2015]; *Kowalczyk v Time Warner Entertainment Co.*, L.P., 121 AD3d 630, 631 [1st Dept 2014]; *see also Buffalino v XSport Fitness*, 202 AD3d 902, 903-904 [2d Dept 2022]; *but see Reed v 64 JWB, LLC*, 171 AD3d 1228, 1229 [2d Dept 2019], *lv denied* 35 NY3d 902 [2020]; *Gray v City of New York*, 87 AD3d 679, 680 [2d Dept 2011], *lv denied* 18 NY3d 803 [2012]).

In considering the parties' contentions regarding dangerous condition liability, Schear's arguments, in its motion papers, primarily address whether it had actual and constructive notice of any defect with the deck. Schear failed to address whether it, as a subcontractor, had control over the

worksite, and thus, whether it had a duty under the common-law and Labor Law § 200, to maintain the planking on the patio's wood deck (*see Vita*, 163 AD3d at 607; *Wolf*, 35 AD3d at 918). Additionally, the testimony of Schear's president, who was not directly involved in supervising or performing the work relating to the construction of the wood deck, is insufficient to demonstrate, prima facie, that Schear did not cause or create the defective condition of the deck (*see Camelio v Shady Glen Owners' Corp.*, ___ AD3d ___, 2023 NY Slip Op 04105, *2 [2d Dept 2023]; *Zong Wang Yang v City of New York*, 207 AD3d 791, 795 [2d Dept 2022]; *Jackson v Conrad*, 127 AD3d 816, 818-819 [2d Dept 2015]). Even assuming that the record is sufficient to allow an inference that the plank at issue had some latent defect that Schear would not have been able to detect at the time it constructed the deck, the present record, which is devoid of expert proof regarding the condition of the plank or first-hand knowledge regarding the actual construction, is insufficient to support such a finding as a matter of law.

OSIB/Rinaldi's motion and Schear's cross motion must thus be denied with respect to plaintiff's Labor Law § 200 and common-law negligence causes of action to the extent they are premised on the dangerous property condition theory of liability regardless of the sufficiency of plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

With respect to OSIB/Rinaldi's contractual indemnification claims as against Ferry, the indemnification provision of Rinaldi's contract with Ferry provides, as relevant here, that:

> [Ferry] shall . . . indemnify and defend [Rinaldi], the Architect, the Owner...(the "Indemnities"), and save them harmless from and against any and all claims . . . and all expenses (including attorneys fees' and disbursements) arising out of any act, error or omission or breach of Contract or infringement of any patent right by [Ferry] or any of its Sub-Subcontractors or suppliers of any tier in connection with the performance of the Work hereunder or otherwise arising out of, in connection with or as a consequence of the performance of the Work hereunder (Rinaldi-Ferry Contract § 12.2).

The language of this provision evidences a clear intent that Ferry indemnify Rinaldi and the other indemnitees, including OSIB-BCRE, regardless of who actually performed Ferry's work under its contract with Rinaldi (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]; *Mogrovejo v HG Hous. Dev. Fund Co., Inc.*, 207 AD3d 461, 463-464 [2d Dept 2022]; *Bellreng v Sicoli & Massaro, Inc.*, 108 AD3d 1027, 1031 [4th Dept 2013]; *Scott v 122 East 42 St., LLC*, 34 Misc 3d 133 [A], 2012 NY Slip Op 50358[U], *10-11 [Sup Ct, Queens County 2012]). In addition, courts read provisions using this "arising out of the work" language very broadly, and have found that in cases like this, where a plaintiff is injured and brings a claim against a party entitled to indemnification, that party may obtain

indemnification from the subcontractor even if the subcontractor, the sub-subcontractor employer of plaintiff, or the plaintiff had nothing to do with causing the injury to the plaintiff (*see Brown*, 76 NY2d at 178; *O'Connor v Serge El. Co.*, 58 NY2d 655, 657-658 [1982]; *Madkins v 22 Little W. 12th St., LLC*, 191 AD3d 434, 436 [1st Dept 2021]; *Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 773-774 [2d Dept 2010]; *Daily News, LP v OCS Sec.*, 280 AD2d 576, 577 [2d Dept 2001]; *Tkack v City of New York*, 278 AD2d 227, 229 [2d Dept 2000]). As such, since Giant, plaintiff's employer, was one of Ferry's subcontractors, and since the work plaintiff was performing at the time of the accident was part of Ferry's work under its contract with Rinaldi, Ferry is not entitled to dismissal of the OSIB/Rinaldi's contractual indemnification claim.

On the other hand, in light of the factual issues with respect to OSIB/Rinaldi's own negligence under plaintiff's Labor Law § 200 and common-law negligence claims, OSIB/Rinaldi have failed to demonstrate their prima facie entitlement to contractual indemnification as they have failed to establish that they are themselves free from any negligence with respect to this accident (*see Crutch v 421 Kent Dev., LLC*, 192 AD3d 977, 982 [2d Dept 2021]; *Tarpey v Kolanu Partners, LLC*, 68 AD3d 1099, 1100-1101 [2d Dept 2009]; General Obligations Law § 5-322.1). The court notes that, although OSIB/Rinaldi would be barred from recovering under the provision if they are found liable to plaintiff, if they are successful in defending the action, they may obtain indemnification for expenses, including attorney's fees, arising from their defense of the action (*see Alicea v Medjugorje Realty, LLC*, 210 AD3d 835, 842 [2d Dept 2022]).

Ferry is also not entitled to dismissal of the OSIB/Rinaldi's insurance procurement claims. The insurance procurement provisions of the Rinaldi's contract with Ferry required that Ferry obtain insurance for itself and OSIB-BCRE and Rinaldi, as additional insureds, covering them, as is relevant here, for "any loss or damage that may arise on account of injuries or death happening to its employees, or to any other person, or to any property caused by or in connection with the operations of [Ferry] under this contract" (Rinaldi – Ferry Contract at § 12.1 [a]). Since plaintiff's work for Giant was on the behalf of Ferry, any loss arising from plaintiff's injuries was caused "in connection" with Ferry's operations under its contract with Rinaldi (*see Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38-39 [2010]; *Fireman's Fund Ins. Co. v State Natl. Ins. Co.*, 180 AD3d 118, 123-127 [1st Dept 2019], *lv denied* 35 NY3d 914 [2020]; *Tibbetts v I.B.M. Corp.*, 161 AD2d 581, 582 [2d Dept 1990]; *cf. Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 415-416 [2008]).

Nevertheless, OSIB/Rinaldi are not entitled to summary judgment in their favor on the insurance procurement claim because their conclusory assertions that Ferry failed to obtain the policies naming them as additional insureds, as required by the insurance procurement clause of the contract, is insufficient to demonstrate their prima facie burden (*see Breland-Marrow v RXR Realty, LLC*, 208 AD3d

627, 629 [2d Dept 2022]; *Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 844 [2d Dept 2014]; *Karnikolas v Elias Taverna, LLC*, 120 AD3d 552, 556 [2d Dept 2014]; *cf. Dibuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept 2011]). The fact that Ferry's insurer may have disclaimed coverage on behalf of OSIB/Rinaldi does not, in and of itself, demonstrate that the policies obtained by Ferry failed to comply with the terms of the contract (*see Perez v Morse Diesel Intl., Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]; *KMO-361 Realty Assoc. v Podbielski*, 254 AD2d 43, 44 [1st Dept 1998]; *Garcia v Great Atl. & Pac. Tea Co.*, 231 AD2d 401, 402 [1st Dept 1996]; *see also Dorset v 285 Madison Owner LLC*, 214 AD3d 402, 404 [1st Dept 2023]).

Ferry, however, is entitled to dismissal of the common-law indemnification and contribution claims against it as Ferry has demonstrated that it did not supervise or control plaintiff's work and that it was not involved in the construction or maintenance of the wood deck at issue (*see Debennedetto v Chetrit*, 190 AD3d 933, 938-939 [2d Dept 2021]; *Cutler v Thomas*, 171 AD3d 860, 861-862 [2d Dept 2019]; *Kane v Peter M. Moore Constr. Co., Inc.*, 145 AD3d 864, 869 [2d Dept 2016]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]).

Turning to OSIB/Rinaldi's contractual indemnification claims against Schear, the indemnification provision in Rinaldi's contract with Schear contains the same language as that of the Rinaldi's contract with Ferry. In view of the factual issues with respect to Schear's liability for plaintiff's accident, Schear has failed to demonstrate, prima facie, that that plaintiff's claims did not "arise" out of its work relating to the patio deck, and thus, it is not entitled to dismissal of the contractual indemnification claims against it (*see McCullough v One Bryant Park*, 132 AD3d 491, 493 [1st Dept 2015]; *Beltran v Navillus Tile, Inc.*, 108 AD3d 414, 416 [1st Dept 2013]; *Soto v Alert No. 1 Alarm Sys.*, 272 AD2d 466, 468 [2d Dept 2000]; *see also Fireman's Fund Ins. Co.*, 180 AD3d at 123-127; *cf. Worth Constr. Co.*, 10 NY3d at 415-416). These factual issues, as well as factual issues with respect to OSIB/Rinaldi's own negligence, preclude summary judgment in OSIB/Rinaldi's favor with respect to their contractual indemnification claims against Schear (*see Crutch*, 192 AD3d at 982; *Tarpey*, 68 AD3d at 1100-1101; General Obligations Law § 5-322.1).

Neither Schear nor OSIB/Rinaldi are entitled to summary judgment in their favor with respect to OSIB/Rinaldi's breach of insurance procurement claims. There are factual issues as to whether the accident arose "in connection" with Schear's operations (*see Fireman's Fund Ins. Co.*, 180 AD3d at 123-127; *cf. Worth Constr. Co.*, 10 NY3d at 415-416), and, since neither Schear nor OSIB/Rinaldi have supplied copies of Schear's insurance policies, this court cannot determine if the policies obtained satisfy the requirements of the contract. Moreover, OSIB/Rinaldi concede that Schear's insurer has agreed to provide it with a defense, and, contrary to OSIB/Rinaldi's contention, the failure of Schear's insurer to agree to indemnify OSIB/Rinaldi, does not, in and of itself, demonstrate that the policies obtained by

Schear do not comply with the terms of the contract (*see Perez*, 10 AD3d at 498; *KMO-361 Realty Assoc.*, 254 AD2d at 44; *Garcia*, 231 AD2d at 402; *see also Dorset*, 214 AD3d at 404).

Schear, however, is entitled to summary judgment dismissing OSIB/Rinaldi's common-law indemnification claim against it. In this respect, OSIB/Rinaldi will either be found liable under plaintiff's Labor Law § 200 cause of action and/or plaintiff's common-law negligence cause of action, and thus common-law indemnification would be barred by OSIB/Rinaldi's own negligence (*see Crutch*, 192 AD3d at 981), or plaintiff's claims will be unsuccessful against OSIB/Rinaldi, rendering the common-law indemnification claim academic (*see Hernandez*, 171 AD3d at 896; *Hoover*, 35 AD3d at 372]). Factual issues with respect to the negligence of Schear, OSIB-BCRE and Rinaldi, however, require denial of Schear's motion to the extent that it seeks summary judgment dismissing OSIB/Rinaldi's claim for contribution from Schear (*see Romano v New York City Tr. Auth.*, 213 AD3d 506, 508 [1st Dept 2023]; *State of New York v Defoe Corp.*, 149 AD3d 889, 890 [2d Dept 2017]).

Turning to the cross claims and counterclaims against OSIB/Rinaldi, as OSIB/Rinaldi's contractual indemnification and breach of contract to obtain insurance claims are the only remaining claims against Ferry, Ferry's common-law indemnification and contribution claims against OSIB/Rinaldi have been rendered academic and are dismissed (*see Hernandez v Asoli*, 171 AD3d 893, 896 [2d Dept 2019]; *Hoover v International Bus. Machs. Corp.*, 35 AD3d 371, 372 [2d Dept 2006]). OSIB/Rinaldi are also entitled to summary judgment dismissing Ferry's contractual indemnification claim against them as Rinaldi's contract with Ferry does not contain an indemnification provision that requires OSIB/Rinaldi to indemnify Ferry.

With regard to Schear's contractual indemnification and breach of contract to obtain insurance claims against OSIB/Rinaldi, OSIB/Rinaldi are entitled to dismissal of those claims because Rinaldi's contract with Schear does not contain indemnification or insurance procurement provisions for the benefit of Schear. OSIB/Rinaldi are also entitled to dismissal of Schear's common-law indemnification claim as against them since Schear will either be found liable under plaintiff's Labor Law § 200 cause of action and/or plaintiff's common-law negligence cause of action, and thus common-law indemnification would be barred by Schear's own negligence (*see Crutch*, 192 AD3d at 981), or plaintiff's claims will be unsuccessful against Schear, rendering Schear's common-law indemnification claim academic (*see Hernandez*, 171 AD3d at 896; *Hoover*, 35 AD3d at 372]). Factual issues with respect to the negligence of Schear, OSIB-BCRE and Rinaldi, however, require denial of OSIB/Rinaldi's motion to the extent that it seeks summary judgment dismissing Schear's claim for contribution from them (*see Romano*, 213 AD3d at 508).

Accordingly, it is hereby, Plaintiff's motion (motion sequence number 6) is denied, and it is further,

ORDERED, that OSIB/Rinaldi's motion (motion sequence number 7) is granted to the extent that: (1) plaintiff's Labor Law §§ 240 (1) and 241 (6) causes of action are dismissed; (2) the common-law negligence and Labor Law § 200 causes of action are dismissed to the degree that they are premised on a means and methods theory of liability; (3) Ferry's counterclaims/cross-claims are dismissed as against them; and (4) Schear's cross-claims for contractual indemnification, common-law indemnification and breach of contract are dismissed as against them. OSIB/Rinaldi's motion is otherwise denied, and it is further,

ORDERED, that Ferry's cross motion (motion sequence number 8) is granted to the extent that that (1) plaintiff's Labor Law 240 (1) cause of action is dismissed, and (2) OSIB/Rinaldi's third-party claims for common-law indemnification and contribution are dismissed as against it. Ferry's cross motion is otherwise denied, and it is further,

ORDERED, that Schear's cross motion for summary judgment dismissing plaintiff's common-law negligence and Labor Law §§ 200 and 240 (1) causes of action (motion sequence number 9) is granted to the extent that (1) plaintiff's Labor Law 240 (1) cause of action is dismissed, and (2) the common-law negligence and Labor Law § 200 causes of action are dismissed to the degree that they are premised on a means and methods theory of liability. In addition, in searching the record, this court grants summary judgment in Schear's favor dismissing plaintiff's Labor Law § 241 (6) cause of action as against it. Schear's cross motion is otherwise denied, and it is further.

ORDERED, that Schear's cross motion addressed to OSIB/Rinaldi's claims (motion sequence number 10) is granted to the extent that OSIB/Rinaldi's claims for common-law indemnification against Schear are dismissed. Schear's cross motion is otherwise denied.

This constitutes the decision and order of the court.

Hon. Ingrid Joseph J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice