At an IAS Term, Part 99 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 day of , 2023.

MAY 17 2023

PRESENT:

HON. RICHARD J. MONTELIONE,
Justice.

GABOR NEMETH,

Plaintiff,

-against-

Index No.: 519284/17

MS#s 17, 18, 19, 20, 21

Cal. #s 11-15

Date Argued: 9/21/2022

PRESTIGE CONSTRUCTION NY LLC, 1241 42 DEVELOPMENT LLC, MR. DEMOLITION, INC. and ABC CORP., a fictitious name intending to be that of an unknown contractor,

Defendants.

PRESTIGE CONSTRUCTION NY LLC,

Third-Party Plaintiff,

-against-

OHR CHODOSH ELECTRICAL CONTRACTING, INC.,

Third-Party Defendant.

1241 42 DEVELOPMENT LLC,

Second Third-Party Plaintiff,

-against-

OHR CHODOSH ELECTRICAL CONTRACTING, INC., and MR. DEMOLITION, INC.,

Second Third-Party Defendants.

----------X
PRESTIGE CONSTRUCTION NY LLC,

Third Third-Party Plaintiff,

-against-

PARK LUMBAR YARD CORP., CASANOVA CONSTRUCTION GROUP, INC., CASANOVA NY, LLC and ABC CORP., a fictitious name intending to be that of an unknown contractor,

Third Third-Party Defendants.
----------X
PRESTIGE CONSTRUCTION NY LLC,

Fourth Third-Party Plaintiff,

-against-

PBS DRYWALL PECO STAJANOVSKI, T/A

Fourth Third-Party Defendant.
----------X
1241 42 DEVELOPMENT LLC,

Fifth Third-Party Plaintiff,

-against-

OHR-HUN, INC,

Fifth Third-Party Defendant.
----------X

The following e-filed papers read herein:	NYSCEF Doc. Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	448, 450, 483-484, 500, 502, 503, 532, 534, 538, 550, 552, 580, 582 622, 624, 626, 628,
Opposing Affidavits (Affirmations)	631, 635, 644, 651, 655, 676, 679, 685, 695, 697, 699, 704, 706, 708
Affidavits/ Affirmations in Reply	713, 717, 719, 721, 722, 724, 727

Relief Sought

Upon the foregoing papers, defendant/second third-party plaintiff 1241 42 Development LLC ("1241") moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint, all cross claims, and all counterclaims as against it, granting it summary judgment in its favor on its cross claims and third-party claims for contractual indemnity from defendant/second third-party defendant Mr. Demolition, Inc. ("Mr. Demolition"), and granting summary judgment in its favor on its cross claims for common-law indemnity from defendant/third-party plaintiff Prestige Construction NY LLC ("Prestige") (motion sequence number 17).

Third-party defendant/second third-party defendant Ohr Chodosh Electrical Contracting, Inc., ("Ohr Chodosh"), moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the third-party complaint, the second third-party complaint, and the cross claim against it (motion sequence number 18).

Prestige moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint and all cross claims as against it (motion sequence number 19).

Mr. Demolition moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint, second third-party complaint and all cross claims as against it (motion sequence number 20).

Plaintiff moves for an order, pursuant to CPLR 3212, granting him partial summary judgment in his favor with respect to liability on his Labor Law §§ 200, 240 (1) and 241 (6) causes of action as against defendants (motion sequence number 21).[1]

Summary of Disposition

1241's motion (motion sequence number 17) is: (1) granted to the extent that plaintiff's common-law negligence and Labor Law §§ 200 and 240 (1) causes of action are dismissed as against it; (2) granted to the extent that plaintiff's Labor Law § 241 (6) claim is dismissed with respect to Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7, 23-1.8, and 23-1.11, which are inapplicable; and (3) granted to the extent that all cross claims and counterclaims against it are dismissed. 1241's motion is otherwise denied.

Ohr Chodosh's motion (motion sequence number 18) is granted to the extent that the third-party complaint, Mr. Demolition's cross claim against it, and 1241's third-party claims against it for contractual indemnification, common-law indemnification and contribution are dismissed. Ohr Chodosh's motion is only denied with respect to 1241's second third-party claim for breach of contract to obtain insurance claim.

Prestige's motion (motion sequence number 19) is: (1) granted to the extent that plaintiff's common-law negligence and Labor Law §§ 200 and 240 (1) causes of action are dismissed as against it; (2) granted to the extent that plaintiff's Labor Law § 241 (6) claim is dismissed with respect to Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7, 23-

[1] Although plaintiff's motion was untimely, the court will consider it because it is made on grounds nearly identical to defendants' timely motions (*see Cruz v 1142 Bedford Ave., LLC*, 192 AD3d 859, 863 [2d Dept 2021]).

1.8, and 23-1.11, which are inapplicable; and (3) granted to the extent that all cross claims are dismissed as against it. Prestige's motion is otherwise denied.

Mr. Demolition's motion (motion sequence number 20) is: (1) granted to the extent that plaintiff's common-law negligence and Labor Law §§ 200 and 240 (1) causes of action are dismissed as against it; (2) granted to the extent that plaintiff's Labor Law § 241 (6) claim is dismissed with respect to Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7, 23-1.8, and 23-1.11, which are inapplicable; and (3) granted to the extent that the second third-party complaint and all cross claims are dismissed as against it. Mr. Demolition's motion is otherwise denied.

Plaintiff's motion (motion sequence number 21) is denied.

In view of the foregoing, and in view of this court's order, dated April 26, 2022, severing the third, fourth and fifth third-party actions, the clerk is directed to substitute the following caption for the above caption:

----------X
GABOR NEMETH,

Plaintiff,

-against- Index No.: 519284/17

PRESTIGE CONSTRUCTION NY LLC, 1241 42 DEVELOPMENT LLC, MR. DEMOLITION INC.,

Defendants.
----------X
1241 42 DEVELOPMENT LLC,

Third-Party Plaintiff,

-against-

OHR CHODOSH ELECTRICAL CONTRACTING, INC.,

Third-Party Defendant.
----------X

Background

Plaintiff pleads causes of action premised on common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6) based on injuries he alleges he suffered as the result of an accident that occurred on May 27, 2016 at a building under construction when 15 to 20 sheetrock panels that had been left leaning against a staircase fell onto him. The building site at issue was owned at the time by 1241, which hired Mr. Demolition to perform demolition work, rubbish removal, and site cleanup work. Meyer Meisels, a part owner of 1241, testified at his deposition that Mr. Demolition was also hired as the general contractor for the project. Mr. Demolition was also listed as the general contractor for the project on the initial building permit for the project. However, Joel Perlstein, Mr. Demolition's owner, testified at his deposition that Mr. Demolition did not hire Ohr Chodosh or other subcontractors involved in the work after demolition was complete and that Mr. Demolition's responsibility for site safety and supervision of the work ended when the demolition work was completed in November 2015.[2] As such, according to Perlstein, Mr. Demolition was not acting as the general contractor at the

[2] Although Meisels testified that Mr. Demolition hired Ohr Chodosh, he also conceded that the only basis for this testimony was his assertion that Mr. Demolition was acting as the general contractor and that Meisels obtained a certificate of insurance from Ohr Chodosh identifying Mr. Demolition as an additional insured. Meisels also conceded that he was not present at any meeting during which the process of hiring Ohr Chodosh was discussed.

time of plaintiff's accident and that, by March 2016, its role was solely limited to some rubbish removal and the placement and removal of a dumpster on the site. Perlstein asserted that Prestige, which was the framing and carpentry contractor, had assumed the role of general contractor by the time of plaintiff's accident, and had hired the subcontractors, and supervised the work and site safety for the project. In contrast, Tovia Kohen, a member of Prestige who was employed as its supervisor, testified at his deposition that, although Prestige ultimately assumed the role of general contractor, it had not assumed the role of general contractor as of the date of the accident, and that Mr. Demolition was still in charge of supervising the work and site safety on that date. Meisels, in his testimony, asserted that, as of the date of the accident, both Mr. Demolition and Prestige were in charge of supervising the work and site safety, although he concedes that Mr. Demolition was ultimately removed as general contractor after the date of the accident.

Although the record is not entirely clear as to which entity, between 1241 and Prestige, actually hired Ohr Chodosh, it is undisputed that Ohr Chodosh was hired to *perform* electrical installation work at the project. Plaintiff, an electrician's helper, testified at his deposition that, as of the date of the accident, he understood he was employed by and received paychecks from a company known as Ohr-Hun, Inc. Ohr Chodosh's secretary and part-owner, Shmuel Aizikovich ("Aizikovich"), and its supervisor, Jozsef Torok, each testified that Ohr-Hun was a company set-up by Aizikovich that employed electrician helpers such as plaintiff, who assisted Ohr Chodosh electricians and employees and worked under their supervision.

According to plaintiff's deposition testimony, shortly before the accident, he and a co-worker were directed to move their tool bags that were stored under the staircase located on the job site. The accident happened while plaintiff's co-worker was getting his bag out from under the staircase. At that time, plaintiff was standing behind the co-worker, near the staircase and a few feet from 15 to 20 sheetrock panels that had been left leaning against the staircase. Plaintiff, who asserts that he did not touch the panels before they fell, and who does not think that they would have fallen on their own, believes that his co-worker, who was under the staircase, bumped the panels in some manner and caused them to fall.

Jozsef Torok, plaintiff's supervisor, similarly testified at his deposition that he had directed plaintiff to assist his brother, Krisztian Torok, another Ohr Chodosh worker, to move Ohr Chodosh's material out from under the staircase. In contrast to plaintiff's testimony, however, Jozsef Torok asserted that, while Krisztian Torok was under the staircase, plaintiff took it upon himself to try to move four to five pieces of sheetrock out of the way, and as plaintiff was attempting to move them, they fell onto plaintiff. Jozsef Torok asserts, that immediately before plaintiff started moving the sheetrock, he had told plaintiff not to try to move it on his own, and that, if they had to move it, they would move it together, one piece at a time, but that plaintiff proceeded to attempt to move the pile of sheetrock on his own despite this instruction.

Discussion

Plaintiff's Claims

Initially, both Prestige and Mr. Demolition assert that they may not be held liable under Labor Law §§ 200, 240 (1) and 241 (6) because they did not have supervisory authority over the work as of the time of plaintiff's accident, and thus neither of them may be deemed an owner, contractor or agent thereof for purposes of liability under those statutory sections (*see* Labor Law § 240 [1]; Labor Law § 241 [6]; *Hill v Mid Is. Steel Corp.*, 164 AD3d 1425, 1426 [2d Dept 2018]; *Merino v Cont'l Towers Condo.*, 159 AD3d 471, 472 [1st Dept 2018]). "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured" (*Diaz v Trevisani*, 164 AD3d 750, 754 [2d Dept 2018 [quotations omitted]; *see Linkowski v City of New York*, 33 AD3d 971, 974-975 [2d Dept 2006]; *see also Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). Although Joel Perlstein and Tovia Kohen's deposition testimony may provide a factual basis for finding that Prestige and/or Mr. Demolition did not have such authority despite the building permits that identify them as general contractors for the project (*see Martinez v 408-410 Greenwich St., LLC*, 83 AD3d 674, 675 [2d Dept 2011]; *Kilmetis v Creative Pool & Spa, Inc.*, 74 AD3d 1289, 1291 [2d Dept 2010]), Meyer Meisels' testimony that Prestige and Mr. Demolition coordinated the work, and had supervisory control over the site safety as of the accident date is sufficient to demonstrate the existence of factual issues with respect to the supervisory authority of both Prestige and Mr. Demolition such that they

are not entitled to dismissal of the Labor Law causes of action on this ground (*see Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 434-435 [2015]; *Nucci v County of Suffolk*, 204 AD3d 817, 820 [2d Dept 2022]; *Kavouras v Steel-More Contr. Corp.*, 192 AD3d 782, 784-785 [2d Dept 2021]).

Turning to the respective motions relating to Labor Law § 240 (1) liability, that provision 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]).[3] 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). Where the accident involves a falling object, the "plaintiff must show more than simply that an object fell causing injury to a worker" (*Narducci*, 96 NY2d at 268; *see also Fabrizzi v 1095 Ave. of Ams., L.C.C.*, 22 NY3d 658, 663 [2014]). Rather, a plaintiff must show that, at the time the object fell, it was "being hoisted or

[3] As is relevant here, Labor Law § 240 (1) provides: "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 devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

secured" (*Narducci*, 96 NY2d at 268) or "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]; *see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758 [2008]) and that the object fell "because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268; *see Fabrizzi*, 22 NY3d at 663).

The Appellate Division, Second Department, has uniformly held that no significant elevation differential is implicated for purposes of Labor Law § 240 (1) liability where sheetrock/drywall panels, or other similar construction material, that fell were stored upright leaning against a wall or were sitting on a cart or dolly (*see Parrino v Rauert*, 208 AD3d 672, 673 [2d Dept 2022]; *see also Ortega v Fourtrax Contr. Corp.*, ___ AD3d ___, 2023 NY Slip Op 01096, *2 [2d Dept 2023]; *Chuqui v Amna, LLC*, 203 AD3d 1018, 1020-21 [2d Dept 2022]; *Simmons v City of New York*, 165 AD3d 725, 726-727 [2d Dept 2018]; *Grygo v 1116 Kings Highway Realty, LLC*, 96 AD3d 1002, 1003 [2d Dept 2012], *lv denied* 20 NY3d 859 [2012]; *but see Padilla v Touro Coll. Univ. Sys.*, 204 AD3d 415, 416 [1st Dept 2022]). The Second Department has similarly held that no section 240 (1) safety device would be necessary or expected to prevent such material from toppling over (*see Seales v Trident Structural Corp.*, 142 AD3d 1153, 1156 [2d Dept 2016]; *see also Gurewitz v City of New York*, 175 AD3d 658, 662-663 [2d Dept 2019]; *Ruiz v Ford*, 160 AD3d 1001, 1003 [2d Dept 2018]). In view of these cases, this court is compelled to hold that plaintiff's accident does not implicate the special protections of section 240 (1), and that defendants' respective motions relating to the section 240 (1) cause of action must be granted and plaintiff's motion must be denied.

Regarding plaintiff's Labor Law § 241 (6) cause of action, under that section, an owner, general contractor or their agent may be held vicariously liable for injuries to a plaintiff where the plaintiff establishes that the accident was proximately caused by a violation of an Industrial Code section stating a specific positive command that is applicable to the facts of the case (*see Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 349-350 [1998]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2017]). Here, defendants have demonstrated, prima facie, that Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7, 23-1.8, and 23-1.11 alleged to be violated by plaintiff, fail to state specific standards or are inapplicable to the facts of this case (*see generally Rizzuto*, 91 NY2d at 349-350; *Honeyman*, 154 AD3d at 821). As plaintiff has abandoned reliance on these regulations by failing to address them in his moving and opposition papers, defendants are entitled to dismissal of the section 241 (6) claim to the extent that it is predicated on Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7, 23-1.8, and 23-1.11 (*see Debennedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]).

On the other hand, plaintiff has addressed Industrial Code (12 NYCRR) § 23-2.1 (a) (1), which governs the storage of material and equipment at a jobsite,[4] and which has been found to state a specific standard (*see Herman v St. John's Episcopal Hosp.*, 242 AD2d 316, 317 [2d Dept 1997]). While there is case law holding that section 23-2.1 (a) (1) can only be violated if the material is stored in a "passageway, walkway, stairway or

[4] 12 NYCRR 23-2.1 (a) (1) provides that, "All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare."

other thoroughfare" (*see Bianchi v New York City Tr. Auth.*, 192 AD3d 745, 748-749 [2d Dept 2021]; *Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 844 [2d Dept 2014]), the Appellate Division, Fourth Department, in *Slowe v Lecesse Constr. Servs., LLC* (192 AD3d 1645, 1646 [4th Dept 2021]) found that section 23-2.1 (a) (1) is not limited exclusively to obstructed thoroughfares. Rather, the court in *Slowe* found that section 23-2.1 (a) (1) states three distinct requirements: (1) "[a]ll building materials shall be stored in a safe and orderly manner;" (2) "[m]aterial piles shall be stable under all conditions;" and (3) "[m]aterial piles shall be . . . so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare" (*Slowe*, 192 AD3d at 1646). In its decision in *Parrino* (208 AD3d at 675), the Appellate Division, Second Department adopted the rationale of *Slowe* by finding that there were factual issues relating to the applicability of the portion of section 23-2.1 (a) (1) requiring that "[a]ll building materials" be "stored in a safe and orderly manner" relating to an accident involving the toppling of sheetrock that occurred on a porch without any mention of whether the accident occurred in a passageway, and by citing to *Slowe* and other cases that recognize that section 23-2.1 (a) (1) can apply even if the material is not stored in a passageway or thoroughfare (*see Parrino*, 208 AD3d at 675; *Costa v City of New York*, 123 AD3d 648, 649 [2d Dept 2014]; *Rodriguez v DRLD Dev., Corp.*, 109 AD3d 409, 410 [1st Dept 2013] *Castillo v 3440 LLC*, 46 AD3d 382, 383 [1st Dept 2007]; *see also Hebbard v United Health Servs. Hosps., Inc.*, 135 AD3d 1150, 1152 [3d Dept 2016]). As such, this court concludes that section 23-2.1 (a) (1) is applicable even if the accident here did not occur in a passageway, stairway, or other thoroughfare.

Factual issues as to whether 12 NYCRR 23-2.1 (a) (1) was violated here, however, preclude the grant of defendants and plaintiff's respective motions in this regard. Through plaintiff's testimony that the panels fell because they were bumped by his co-worker, plaintiff has demonstrated that there are factual issues as to whether the panels were safely stored within the meaning of section 23-2.1 (a) (1) (*see Parrino*, 208 AD3d at 275; *Hebbard*, 135 AD3d at 1152; *Rodriguez*, 109 AD3d at 410; *Castillo*, 46 AD3d at 383; *see also Padilla*, 204 AD3d at 416). On the other hand, plaintiff's testimony fails to demonstrate, as a matter of law, that the panels were not stored in a safe manner. Moreover, Jozsef Torok's testimony is sufficient to demonstrate the existence of factual issues as to whether plaintiff's actions in attempting to move several panels at a time despite Torok's direction to stop and wait for assistance were the sole proximate cause of the accident (*see Padilla*, 204 AD3d at 416; *Luna v 4300 Crescent, LLC*, 174 AD3d 881, 883-884 [2d Dept 2019]; *Melendez v 778 Park Ave. Bldg. Corp.*, 153 AD3d 700, 701-702 [2d Dept 2017], *lv denied* 31 NY3d 909 [2018]; *see also Ochoa-Hoenes v Finkelstein*, 172 AD3d 1080, 1081 [2d Dept 2019]).

Turning to plaintiff's common-law negligence and Labor Law § 200 causes of action, defendants have each demonstrated their prima facie entitlement to summary judgment dismissing those causes of action. In this regard, the testimony of plaintiff, Meyer Meisels and the witnesses from Ohr Chodosh demonstrates that defendants did not exercise more than general supervisory authority over the injury producing work (*see Abelleira v City of New York*, 201 AD3d 679, 680 [2d Dept 2022]; *Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 670-673 [2d Dept 2018]; *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]). In addition, the record here shows that either the supplier or the entity installing the sheetrock at issue placed it near the staircase during the course of the ongoing work at the construction site and the testimony of both plaintiff and Jozsef Torok suggests that the sheetrock was not there for long and might not have even been present on the morning of the day the accident occurred. Under these circumstances, the sheetrock constitutes a transient condition arising from the method and manner of the work and did not constitute a dangerous property condition with respect to defendants (*see Giglio v Turner Constr. Co.*, 190 AD3d 829, 830 [2d Dept 2021]; *Schwind v Mel Lany Constr. Mgt. Corp.*, 95 AD3d 1196, 1198 [2d Dept 2012], *lv dismissed* 19 NY3d 1020 [2012]; *Cody v State of New York*, 82 AD3d 925, 926-927 [2d Dept 2011]; *see also Maddox v Tishman Constr. Corp.*, 138 AD3d 646, 646 [1st Dept 2016]; *cf. Edwards v State Univ. Constr. Fund*, 196 AD3d 778, 782-783 [3d Dept 2021]; *Slikas v Cyclone Realty, LLC*, 78 AD3d 144, 148-149 [2d Dept 2010]; *Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d 763, 764-765 [2d Dept 2009]). Moreover, even if the sheetrock is deemed a property condition, each of the defendants have sufficiently demonstrated they did not create or have actual or constructive notice of any dangerous property condition involving the placement of the sheetrock by the staircase (*see Seales*, 142 AD3d at 1158; *see also Hamm v Review Assoc., LLC*, 202 AD3d 934, 938-939 [2d Dept 2022]; *cf. Ventimiglia v Thatch, Ripley & Co., LLC*, 96 AD3d 1043, 1046-1047 [2d Dept 2012]).

Since plaintiff does not address the premises condition theory of liability and has not pointed to evidence demonstrating that defendants had more than general supervisory

authority over the work, plaintiff has failed to demonstrate an issue of fact warranting denial of defendants' respective motions with regard to the common-law negligence and Labor Law § 200 causes of action (*see Poulin, 166 AD3d at 673; Seales, 142 AD3d at* 1158; *see also Williams v Light*, 196 AD3d 668, 670 [2d Dept 2021]; *Debennedetto*, 190 AD3d at 936). For the same reasons, the portion of plaintiff's motion seeking summary judgment in his favor with respect to these causes of action must be denied.

Cross Claims and Third-Party Claims

Turning to Ohr Chodosh's motion, it contends that it was plaintiff's employer, that plaintiff obtained Worker's Compensation benefits, and that plaintiff did not suffer a grave injury. Thus, it argues that it is entitled to dismissal of Prestige and 1241's third-party claims and Mr. Demolition's cross claim against it for contribution and common-law indemnification based on the exclusive remedy provisions of Workers' Compensation Law §§ 11 and 29 (6).

Ohr Chodosh initially asserts that the finding of the Workers' Compensation Board ("Board") that plaintiff was Ohr Chodosh's employee is entitled to collateral estoppel effect in this proceeding. 1241, Prestige, and Mr. Demolition, however, argue that they are not bound by the determination of the Board because they were not parties to the proceedings before the Board.[5] This court rejects the contention of 1241, Prestige and Mr. Demolition in view of the Appellate Division, Second Department's recent decision in *Velazquez-Guadalupe v Ideal Bldrs. & Constr. Servs., Inc.* (___ AD3d ___,

[5] The court notes that 1241 argues that Ohr Chodosh has failed to submit copies of the Workers' Compensation determination in admissible form. *While this may be correct, the determination is nevertheless* admissible because 1241 relied upon an uncertified copy of the same determination in arguing that it was not a party before the Board (*see Guevara-Ayala v Trump Palace/Parc LLC*, 205 AD3d 450, 451 [1st Dept 2022]).

2023 NY Slip Op 02025 [2d Dept 2023]), in which the court held that the Board's determination that an entity was plaintiff's employer is binding on entities that were not parties to the proceedings before the Board (*Velazquez-Guadalupe*, 2023 NY Slip Op 02025, *4-5; *but see Liss v Trans Auto Sys.*, 68 NY2d 15, 21-23 [1986]; *Netzahuall v All Will LLC*, 145 AD3d 492, 493 [1st Dept 2016]; *Baten v Northfork Bancorporation, Inc.*, 85 AD3d 697, 698 [2d Dept 2011]). As such, 1241, Prestige, and Mr. Demolition are bound by the Board's decision that plaintiff was an employee of Ohr Chodosh.

In any event, the court further notes that Ohr Chodosh has also demonstrated that plaintiff, even though he was paid by Ohr Hun and Ohr Hun may be deemed his general employer, his employment was controlled and directed by Ohr Chodosh, and thus, that he was also special employee of Ohr Chodosh (*see Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]["A special employee is described as one who is transferred for a limited time of whatever duration to the service of another]; *Mullins v Center Line Studios, Inc.*, 194 AD3d 421, 422-423 [1st Dept 2021]; *James v Crystal Springs Water*, 164 AD3d 660, 662 [2d Dept 2018], *lv denied* 32 NY3d 911 [2018]; *Saunders v Newmark Constr.*, 94 AD3d 738, 738-739 [2d Dept 2012]; *Grilikhes v International Tile & Stone Show Expos*, 90 AD3d 480, 482-483 [1st Dept 2011]; *Gonzalez v ARI Fleet, LT*, 83 AD3d 891, 892-893 [2d Dept 2011]). In opposition, Prestige, Mr. Demolition, and 1241, have failed to demonstrate a factual issue with respect to Ohr Chodosh's special employment of plaintiff.[6]

[6] While 1241 argues that Ohr Chodosh failed to plead that it was plaintiff's "special employer" as an affirmative defense, Ohr Chodosh did affirmative plead that the action against it was barred by the Workers' Compensation Law

As it is undisputed that plaintiff obtained Workers' Compensation benefits, and as there is no real dispute that the record here (which includes plaintiff's bill of particulars and deposition testimony) shows that plaintiff did not suffer a grave injury within the meaning of Worker's Compensation Law § 11 (*see Owens v Jea Bus Co., Inc.*, 161 AD3d 1188, 1190 [2d Dept 2018]), Ohr Chodosh is entitled to dismissal of the common-law indemnification and contribution causes of action as against it.

Ohr Chodosh also asserts that it is entitled to dismissal of the contractual indemnification and breach of contract to obtain insurance claims against it because there was no express written agreement requiring Ohr Chodosh to indemnify 1241, Prestige or Mr. Demolition or requiring that Ohr Chodosh obtain insurance naming any of them additional insureds as is required by Workers' Compensation Law § 11 (*see Chong Fu Huang v 57-63 Greene Realty, LLC*, 174 AD3d 777, 778 [2d Dept 2019]; *Gikas v 42-51 Hunter St., LLC*, 134 AD3d 987, 988-989 [2d Dept 2015]; *cf. Murphy Longview Owners, Inc.*, 13 AD3d 346, 347 [2d Dept 2004]). In moving, Ohr Chodosh has demonstrated, prima facie, that there is no written agreement requiring it to indemnify any of the defendants or obtain insurance for their benefit.

In opposition, 1241 asserts that a written agreement to indemnify it is shown by an email dated January 18, 2016, sent by Meisels (1241's part owner) to Jozsef Torok, in which Meisels stated, "please do additional insured" for 1241 and for the general contractor, Mr. Demolition, and the fact that Ohr Chodosh ultimately forwarded to 1241 a

---

because plaintiff did not sustain a grave injury. The court finds any failure by Ohr Chodosh to plead that it was plaintiff's special employer was immaterial.

certificate of insurance with an issue date of June 15, 2016 indicating that 1241 and Mr. Demolition had been named as additional insureds on Ohr Chodosh's general liability policy. The existence of the email trail and a certificate of insurance from Ohr Chodosh's insurer fail to raise a triable issue of fact regarding contractual indemnification, since "[a]n agreement to procure insurance is not an agreement to indemnify or hold harmless" (*Kinney v Lisk Co.*, 76 NY2d 215, 218 [1990]; *see also Velazquez-Guadalupe*, 2023 NY Slip Op 02025, *5; *Chong Fu Huang*, 174 AD3d at 778). Ohr Chodosh is thus entitled to dismissal of 1241 and Prestige's third-party contractual indemnification claims and the entirety of Mr. Demolition's cross claim.[7]

With respect to 1241 and Prestige's breach of contract to obtain insurance claims, Workers' Compensation Law 11 (1) does not shield a party from liability for breaching an agreement to obtain insurance (*see Velazquez-Guadalupe*, 2023 NY Slip Op 02025, *5). In addition, an agreement to obtain insurance may be enforceable even if it is not in writing (*id.*). As such, this court finds that Meisels' testimony, the certificate of insurance, and the email chain are sufficient to demonstrate the existence of factual issues as to whether Ohr Chodosh orally agreed to obtain insurance naming 1241 as an additional insured (*see Wasek v New York City Health & Hosps. Corp.*, 123 AD3d 493, 494 [1st Dept 2014]; *Travelers Indem. Co. of Am. v Royal Ins. Co. of Am.*, 22 AD3d 252, 252-253 [1st Dept 2005]).[8] On the other hand, nothing in Meisels' testimony, the email

[7] Mr. Demolition's cross claim against Ohr Chodosh is limited to claims for contribution and indemnification and does not contain a breach of contract to obtain insurance claim.

[8] The court notes that the certificate of insurance in the record, which on its face states that it is "issued as a matter of information only and confers no rights upon the certificate hold," fails to demonstrate, prima facie, that Ohr

chain, or the certificate of insurance suggests that the Ohr Chodosh orally agreed to provide insurance naming Prestige as an additional insured. In the absence of a written or oral agreement requiring Ohr Chodosh to obtain insurance for the benefit of Prestige, Ohr Chodosh is entitled to dismissal of Prestige's insurance procurement claim against it.

1241, Prestige, and Mr. Demolition have each demonstrated their prima facie entitlement to dismissal of the cross claims and third-party claims against them. In view of the findings that 1241, Prestige, and Mr. Demolition may not be held liable under plaintiff's common-law negligence and Labor Law § 200 causes of action, they are each entitled to dismissal of the cross claims and third-party claims against them for contribution and common-law indemnification (*see Debennedetto*, 190 AD3d at 938-939; *Cutler v Thomas*, 171 AD3d 860, 861-862 [2d Dept 2019]; *Kane v Peter M. Moore Constr. Co., Inc.*, 145 AD3d 864, 869 [2d Dept 2016]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]).

Prestige is also entitled to dismissal of the contractual indemnification and breach of contract to obtain insurance claims against it based on its prima facie showing that there is no agreement requiring it to indemnify or to procure insurance and none of the parties in opposition have demonstrated an issue of fact in this respect (*see Carter v Nouveau Indus., Inc.*, 187 AD3d 702, 704 [2d Dept 2020]).

With respect to 1241's contractual indemnification claim against Mr. Demolition, the contract, in relevant part, requires Mr. Demolition (identified as the "Contractor" in

---

Chodosh complied with is insurance procurement obligations (*see Crutch v 421 Kent Dev., LLC*, 192 AD3d 982, 984-985 [2d Dept 2021]).

the contract) to "indemnify and hold harmless" 1241 from any claim "arising out of or resulting from performance of the contractor's work, provided that such claim" was "caused in whole or in part by negligent acts or omissions of the Contractor, Contractor's Subcontractor, a Subcontractor's sub-Subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable." Even assuming, without deciding, that the accident may be deemed to be one "arising" out of Mr. Demolition's work on the contract, Mr. Demolition's showing that it was not negligent and that it did not hire Ohr Chodosh or other contractors performing work at the time of the accident demonstrates that the claim did not arise from Mr. Demolition's negligent acts or omissions or those of a subcontractor in the chain of its subcontractors (*see Olivieri v Barnes & Noble, Inc.*, 211 AD3d 1525, 1528 [4th Dept 2022]; *Langer v MTA Capital Constr. Co.*, 184 AD3d 401, 403 [1st Dept 2020]; *Gurewitz v City of New York*, 175 AD3d 658, 664-665 [2d Dept 2019]). Meisels' speculative testimony that Mr. Demolition hired subcontractors fails to demonstrate an issue of fact as to whether Mr. Demolition hired Ohr Chodosh or any other subcontractor who was working at the time of the accident. Mr. Demolition has also demonstrated its entitlement to dismissal of the breach of the insurance procurement claim by the submission of copies of the additional insured endorsements to its insurance policy, and 1241, which has not addressed this portion of Mr. Demolition's motion in opposition, has failed to demonstrate an issue of fact in this respect (*see Zukowski v Powell Cove Estates Home Owners Assn., Inc.*, 187 AD3d 1099, 1104 [2d Dept 2020]).

Summary

In summary, the only causes of action that survive are plaintiff's Labor Law § 241 (6) claim to the extent it is premised on Industrial Code (12 NYCRR) § 23-2.1 (a) (1) and 1241's second third-party claim for breach of contract to obtain insurance as against Ohr Chodosh.

Based on the foregoing, it is

ORDERED that, defendant/second third-party plaintiff 1241 42 Development LLC's motion (motion sequence number 17) is: (1) granted to the extent that plaintiff Gabor Nemeth's common-law negligence and Labor Law §§ 200 and 240 (1) causes of action are dismissed as against it; (2) granted to the extent that plaintiff's Labor Law § 241 (6) claim is dismissed with respect to Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7, 23-1.8, and 23-1.11, which are inapplicable; and (3) granted to the extent that all cross claims and counterclaims against it are dismissed; and it is further

ORDERED that third-party/second third-party defendant Ohr Chodosh Electrical Contracting, Inc.'s motion (motion sequence number 18) *is granted to the extent that the* third-party complaint, the cross claims of defendant/second third-party defendant Mr. Demolition, and defendant/second third-party plaintiff 1241 42 Development LLC's second third-party claims for contractual indemnification, common-law indemnification and contribution are dismissed as against it; and it is further

ORDERED that defendant/third-party plaintiff Prestige Construction NY LLC's motion (motion sequence number 19) is: (1) granted to the extent that plaintiff Gabor Nemeth's common-law negligence and Labor Law §§ 200 and 240 (1) causes of action

are dismissed as against it; (2) granted to the extent that plaintiff's Labor Law § 241 (6) claim is dismissed with respect to Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7, 23-1.8, and 23-1.11, which are inapplicable; and (3) granted to the extent that all cross claims dismissed as against it are dismissed; and it is further

ORDERED that defendant/second third-party defendant Mr. Demolition Inc's motion (motion sequence number 20) is: (1) granted to the extent that plaintiff's common-law negligence *and Labor Law §§ 200 and 240 (1) causes of action* are dismissed as against it; (2) granted to the extent that plaintiff's Labor Law § 241 (6) claim is dismissed with respect to Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7, 23-1.8, and 23-1.11, which are inapplicable; and (3) granted to the extent that the second third-party complaint and all cross claims are dismissed as against it; and it is further

ORDERED that plaintiff Gabor Nemeth's motion (motion sequence number 21) is denied.

This constitutes the decision and order of the court.

ENTER

J.S.C.

Hon. Richard J. Montelione