SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

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INDEX NO. 158068/2018

ANDRZEJ SZYMCZYK,

Plaintiff,

- v -

HUDSON 36 LLC,HUDSON 37 LLC,

Defendant.

MOTION DATE 11/28/2023, 11/28/2023, 11/28/2023, 11/28/2023, 11/28/2023

MOTION SEQ. NO. 005 006 007 008 009

DECISION + ORDER ON MOTION

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HUDSON 37 LLC

Plaintiff,

-against-

FORWARD HEATING CORP., FORWARD MECHANICAL CORP.

Defendant.

Third-Party
Index No. 595878/2018

----------X

HUDSON 37 LLC

Plaintiff,

-against-

HORSEPOWER ELECTRIC AND MAINTENANCE CORP.

Defendant.

Second Third-Party
Index No. 595143/2019

----------X

HUDSON 36 LLC, HUDSON 37 LLC

Plaintiff,

-against-

QUALITY FACILITY SOLUTIONS CORP

Defendant.

Third Third-Party
Index No. 595733/2020

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HORSEPOWER ELECTRIC AND MAINTENANCE CORP.

Plaintiff,

-against-

MANHATTAN FIRE & SECURITY ELECTRICAL CO. LLC

Defendant.

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Fourth Third-Party
Index No. 596051/2020

The following e-filed documents, listed by NYSCEF document number (Motion 005) 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 314, 320

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 315, 317, 319, 327, 328, 329, 330, 331, 332, 334, 339, 340, 341, 342

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 335, 344

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 318, 321, 324, 325, 326, 338, 343

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 316, 322, 323, 333, 336, 337

were read on this motion to/for JUDGMENT - SUMMARY.

In 2018, plaintiff Andrzej Syzmczyk commenced this Labor Law action to recover damages for injuries he sustained in a fall at a high-rise construction site located at 515 West 36th Street, New York, New York. He asserts causes of action against defendants Hudson 36 LLC and Hudson 37 LLC (hereinafter, "Hudson")—respectively, the owner of the premises and its "construction manager"—under Labor Law §§ 200, 241 (1), and 241 (6). Thereafter, Hudson commenced third-party actions against subcontractors Horsepower Electric and Maintenance Corp. ("Horsepower Electric"), Forward Heating Corp. and Forward Mechanical Corp. ("Forward Heating"), and Quality Facility Solutions Corp. ("Quality Facility"). Horsepower Electric then commenced a fourth third-party action against Manhattan Fire & Security Electrical ("Manhattan Fire").

In this Decision and Order, the Court consolidates the following motions for resolution:

- Motion Sequence 005: Manhattan Fire moves for summary judgment dismissing plaintiff's complaint [1] and all crossclaims asserted by Horsepower Electric (NYSCEF doc. no. 136, notice of motion);
- Motion Sequence 006: Hudson moves for summary judgment (1) on their third-party crossclaims against Forward Heating, Horsepower Electric, and Quality Facility, and (2) dismissing plaintiff's three labor law causes of action and all third-party counterclaims (NYSCEF doc. no. 163, notice of motion);
- Motion Sequence 007: plaintiff moves for summary judgment on his Labor Law §§ 241 (1) and 241 (6) causes of action against Hudson (NYSCEF doc. no. 226, notice of motion);
- Motion Sequence 008: Quality Facility moves for summary judgment dismissing Hudson's crossclaims against it and plaintiff's complaint (NYSCEF doc. no. 227, notice of motion); and
- Motion Sequence 009: Horsepower Electric moves for summary judgment on Hudson's crossclaims (NYSCEF doc. no. 293, notice of motion).

With respect to Motion Sequence 005, only plaintiff has interposed an opposition; otherwise, Motion Sequences 006 through 009 are fully opposed.

BACKGROUND

The Parties

In September 2016, Hudson 36, as owner of the 515 West 36th Street property, entered a Construction Management Agreement with Hudson 37. Under the agreement, Hudson 37 would serve as the "Construction Manager" of a project to build an approximately 38-story mixed-use high-rise on the premises. (NYSCEF doc. no. 191, Hudson 36/37 contract.) Section 3.3, entitled "Supervision and Construction Procedures," provides:

> "The Contractor [Hudson 37] shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work … If the Contract Documents give specific instructions concerning construction means, methods [etc.] … the Contractor shall evaluate the jobsite safety thereof and … shall ensure jobsite safety. If the Contractor determines that such means, methods [etc.] … may not be safe, the Contractor shall give timely written notice to the Owner and Architect and shall not proceed with that portion of the Work." (*Id.* at 30.)

[1] As plaintiff points out, he has not asserted any direct claims against Manhattan Fire. In fact, he has asserted no direct claims against any party except Hudson 36 and Hudson 37.

On or around November 4, 2016, Hudson 37 entered into a subcontract with Forward Heating, who employed plaintiff, to provide plumbing and HVAC work for the project. (NYSCEF doc. no. 192, Forward subcontract.) The scope of Forward Heating's work (as found in Rider No. 2 to the subcontract) included, among other things, providing the project with a complete, code-compliant plumbing system in accordance with the drawing and specification and other "Contract Documents" (*id.* at ¶ 262), with hot water distribution, heat exchangers, mixing valves, circulating pumps (*id.* at ¶ 293) and with "all plumbing fixtures, carriers, drinking fountains and hookup water supply for washer machines and refrigerators" (*id.* at ¶ 298). Moreover, it was the parties' "Design Intent" that "all HVAC, Mechanical, and Plumbing fixture in this contract to be covered under this Scope of Work" (*Id.* at ¶ 312.)

Several other paragraphs of the subcontract's Rider No. 2 are important for purposes of determining whether Hudson 37 may be liable as the project's construction manager. Paragraph 114 states, "[Forward Heating] shall comply with the recommendations of the Construction Manager in addition to the rules and regulations of the NYC Department of Buildings;" paragraph 115 provides, "[Forward Heating] will cooperate with the Construction Manager's safety personnel to help maintain safe working conditions throughout;" and paragraph 154 requires "[Forward Heating] shall perform work when and as directed by Construction Manager per the approved schedule." (*Id.* at ¶¶ 114, 115, 154.) Lastly, the agreement required Forward Heating to indemnify Hudson 36 and 37, stating that:

> "[Forward Heating] shall, to the fullest extent permitted by law and at its own cost and expense, indemnify and defend the Construction Manager [and] the Owner … and save them harmless from and against any and all claims, damages, losses, liabilities, suits, judgments, actions and all expenses … arising out of any act, error, or omission or breach of contract … by [Forward Heating]." (*Id.* at 14, § 12.2.)

In January 2017, Hudson 37 began negotiations with Horsepower Electric to complete the project's electric and fire alarm work. (NYSCEF doc. no. 332 at ¶ 4, Breuer affidavit.) In support of its motion, Hudson produced an unsigned written agreement between the parties that contains the same paragraphs described above concerning Hudson 37's control over the project—114,115, and 154—and the same indemnification provision as Forward Heating's. (*See* NYSCEF doc. no. 195 at 14, § 12.2, Horsepower subcontract.) However, as will be discussed *infra*, Horsepower Electric disputes the validity and applicability of this subcontract, including the indemnification provision. In its view, the parties exchanged various proposals back and forth for the work but never reached a single agreement. (*See* NYSCEF doc. no. 332 at ¶ 7-11.) Nevertheless, Horsepower Electric does not dispute that it performed the work as outlined in the written agreement and was paid accordingly. For the fire alarm installation, Horsepower Electric entered into a subcontract with Manhattan Fire, dated June 20, 2018, to perform certain portions of the work. (NYSCEF doc. no. 159, Horsepower/Manhattan subcontract.)

Around the same time, Hudson 37 retained Quality Facility to provide the project with both skilled and non-skilled workers to perform cleaning services at the site. (*See* NYSCEF doc. no. 193, Quality Facility contract proposal.) The proposal explicitly states that the laborers were

to "clean site per direction of site supervisor." (*Id.*) Yidel Falkowitz, an employee with Quality Facility, testified that the laborers it provided to the project would receive their instructions from Hudson 37 when they arrived (NYSCEF doc. no. 241 at 31, Falkowitz EBT) and that Quality Facility did not have direct supervision over the labor at the job site (*id.* at 36). Mark Terelle, who was the Project Manager for Hudson 37 (NYSCEF doc. no. 219 at 14:16-15:7, Terelle EBT), testified that "any combination of management" had the authority to give Quality Facility workers their daily instruction, including him. (*Id.* at 52:5-12, 105:4-8.) The parties signed a separate Contractor Insurance and Indemnity Agreement, which required Quality Facility to "indemnify and hold Owner, its partners, directors [etc.] … harmless from and against any and all claims, loss (including attorneys' fees, witnesses' fees and all court costs, damages, expense and liability (including statutory liability) resulting from injury and/or death of any person or damage to or loss of any property arising out of any negligent or wrongful act, error, omission, breach of any statute… in connection with the operations of the contractor." (NYSCEF doc. no. 194, Quality Facility indemnification agreement.)

The Accident

Employed by Forward Heating since 2013, plaintiff started working on the building's plumbing and HVAC installation on the premises towards the end of 2017. (NYSCEF doc. no. 205 at 30, 32, plaintiff EBT dated 2/12/2020.) By July of 2018, when plaintiff suffered his fall, a hoist or external elevator provided workers access to the top floors of the high-rise. (*Id.* at 43; NYSCEF doc. no. 237 at 69-70, Sani EBT.) On July 17, 2018, the date of his accident, plaintiff used the hoist to get to the 29th floor to fix a problem with the plumbing in one of the kitchens, as assigned by his foreman the day before. (NYSCEF doc. no. 205 at 50-51.) Plaintiff worked on various floors between the 29th and 35th from approximately 7:00 a.m. when he arrived through 3:00 p.m. (*Id.* at 58.) After said work, plaintiff attempted to use the hoist to descend, waiting approximately 25 minutes without it coming. (*Id.* at 61.) A daily report for July 17 submitted by Aryeh Kimmel, a foreman working for Horsepower Electric, noted that "due to heavy wind & rain the hoist was shut down from 2-4 pm (workers lost time)." (NYSCEF doc. no. 216 at 62, exhibit b to Kimmel EBT.) [2]

Plaintiff testified that when the hoist was shut down, workers had to use, in his own words, "a double staircase. Well, one staircase … one stairwell." (NYSCEF doc. no. 205 at 45; *see also* NYSCEF doc. no. 207 at 37, plaintiff EBT dated 2/26/2020 ["There was just one set of stairs"].) Mark Terelle testified that the site had so-called scissor staircases, or two different but intertwining staircases. (NYSCEF doc. no. 219 at 63-64.) He explained that a wall separated the two staircases such that "you cannot access one to the other. You have to step out in the corridor to gain access [to the other] …There's no access from the A stair to the B stair without existing the stairs." (*Id.*) Kimmel similarly testified that the project contained multiple staircases for workers to use. (*Id.* at 82:21-83:11; *see also* NYSCEF doc. no. 156 at 43:15-18, Kimmel EBT

[2] There is no dispute that the hoist would not be operational at various times throughout the construction of the building. (*See* NYSCEF doc. no. 224, DOB complaint ["40 story building with only one hoist operating, electrician & other workers has to carry heave bundles of wiring & equipment up the stairs"]; NYSCEF doc. no. 219 at 36, Terelle EBT ["Q: Were there times at this jobsite when the hoist was turned off due to weather conditions? A: Yes"].)

["Two stairwells that go up the entire building and then there are two more stairwells that go up from [the ninth floor] down to the cellar"].)

Plaintiff testified that, after waiting the 25 minutes, he started walking down a set of stairs with his toolboxes, one in each hand. (NYSCEF doc. no. 205 at 61-62.) The staircase plaintiff used had hand railings, though he was not using them, and its lighting was "very weak" and "dim," but he could see where he was going and the steps in front of him. (*Id*. at 45-46; NYSCEF doc. no. 181 at 96:23-24, plaintiff EBT 4/27/2022.) As plaintiff was descending, he was aware of debris in the stairway. (NYSCEF doc. no. 205 at 103.) On the 10th floor, plaintiff tripped over a dark grey metal BX electrical cable, approximately five inches in length. (*Id*. at 63-64.) He describes being unable to see the wire because "I think that cable must have been very close under the riser, and the color of the cable is just as—like the color of the concrete." (*Id*. at 102.) In the fall, plaintiff injured his back, leg, and wrist. (*Id*. at 69.) He did not know how the BX cable came to be in the stairwell or how long it had been there before the accident. (*Id*. at 82-83.)

Joseph Milohnic, who owns and operates Forward Heating, averred that the company would not have used BX electrical cable in its plumbing and heating work at the construction site. (NYSCEF doc. no. 213 at 30-31, Milohnic EBT 6/21/2022.) As to Horsepower Electric, Kimmel explained that the BX cable can come in several colors, but the black cable would be used "almost everywhere, [in] lights, outlets, switches." (NYSCEF doc. no. 156 at 34-35.) He further acknowledged that Horsepower Electric would use BX cable throughout the building and that it was one of its most ordered items on the job. (*Id*.) In addition, he explained that while Horsepower Electric was generally not responsible for cleaning the premises, its workers "[were] responsible to clean-up our locations or put [debris or other remnants from the work] in a separate pile … We take all of our garbage and put it into one pile [in each room or apartment] to avoid it going all over the place so they can just come and sweep it up later." (*Id*. at 41:19-42:10.) Kimmel averred that if debris were created in a stairwell, Horsepower's electricians would "put it in the room next to [the staircase] …Usually it was taken off the stairwell with them because there was not much…They would not keep anything in the stairwell with them." (*Id*. at 49:22-50:21.) As to Quality Facility's role: Falkowitz testified that the company provided the project with laborers, who would receive their instructions for the day from the client's [Hudson 37's] foreman. (NYSCEF doc. no. 241 at 31.)

The Instant Action and Summary Judgment Motions

Plaintiff's Direct Action Against Hudson 36 and 37

In 2018, plaintiff commenced this action directly against Hudson 36 and Hudson 37 for alleged violations of Labor Law §§ 200, 241 (1), and 241 (6). On his summary judgment motion (MS 007), plaintiff contends that (1) he injured himself on a stairway that constitutes the sole means of access to his work area, demonstrating Hudson's liability on his § 240 (1) claim; (2) Hudson failed to comply with Industrial Code § 23-1.7 (e) (1)'s requirement that passageways be kept free from debris or other conditions that could cause tripping such that he is entitled to judgment under § 241 (6); and (3) Hudson 37 may be held liable for its supervisory control and authority over the project as a general contractor or as an agent of Hudson 36, despite using the

"Construction Manager" terminology in its contracts. (*See* NYSCEF doc. no. 200, plaintiff memo of law.) Plaintiff does *not* move for summary judgment on his § 200 claim. In opposition, Hudson argues: as to (1), several witnesses describe two staircases, meaning plaintiff's accident did not occur by way of the sole means of access to his work area; as to (2), the stairway cannot be considered a "passageway" under the code since, again, the stairwell was not the only means to access the work site; and as to (3), there are, at the very least, issues of fact as to whether Hudson 37 is a general contractor. (NYSCEF doc. no. 344, def. affidavit in opp.) Hudson 36 does not dispute that it can be held liable under New York Labor Law as owner of the premises.

On their motion for summary judgment (MS 006), Hudson 36 and 37 contend that plaintiff's medical records reveal he told his doctor that he fell from a ladder, suggesting the accident did not occur as he describes in his testimony. (NYSCEF doc. no. 166 at 12, Hudson memo of law.) They then argue summary judgment is warranted on plaintiff's § 200 claim since, in their view, there is no evidence that Hudson created the alleged dangerous condition on the staircase or had notice of it. For his § 240 (1) claim, they reiterate that Hudson 37 is not a general contractor and suggest that (1) the subject staircase does not amount to a height-related risk as contemplated by the statute, and (2) plaintiff, having failed to use the stairway's handrail, was the sole proximate cause of his injury. As to plaintiff's § 241 (6) claim, Hudson addresses several alleged Industrial Code violations and why they cannot serve as the necessary predicates for liability. While most of plaintiff's opposition amounts to similar arguments made in support of his motion, the two arguments concerning § 200 are new. First, he asserts that the alleged contradictory statements to his doctors constitute inadmissible hearsay, but even if not, they do not entitle Hudson to summary judgment; second, as a general contractor, Hudson 37 controlled the "means and methods" of subcontractor's work around the area in which plaintiff was injured, creating issues of fact as to Hudson's liability.

Hudson's Third-Party Claims and the Subcontractor's Counterclaims

In addition to the branch of mot. seq. 006 described above, Hudson contends that they are entitled to summary judgment on all counterclaims for common-law indemnification and contribution asserted against it. (NYSCEF doc. no. 163, notice of motion; *see also* NYSCEF doc. no. 172 at 7-8, Forward Heating counterclaims 1-4; NYSCEF doc. no. 174 at 7-9, Horsepower counterclaims 1-3; NYSCEF doc. no. 176 at 6-9, Quality Facility counterclaim 1.) This branch is premised on Hudson having demonstrated as a matter of law that they are not liable to plaintiff. (NYSCEF doc. no. 166 at 23 ["As such a showing (that Hudson was negligent and violated the alleged Labor Law sections) is a prerequisite to recover common-law indemnification and common law contribution, Forward, Horsepower, and Quality are all unable to successfully demonstrate their entitlement to relief on any of these grounds"].) Separately, Hudson seeks summary judgment on Horsepower Electric's counterclaim for contractual indemnification (NYSCEF doc. no. 166 at 23), which Horsepower Electric does not oppose. (NYSCEF doc. no. 331, Horsepower affidavit in opp.; *see also* NYSCEF doc. no. 312, Horsepower affidavit in support of mot. seq. 009.) [3]

[3] Horsepower Electric's opposition incorporates by reference its arguments in its motion for summary judgment. Nonetheless, neither its opposition nor its memorandum of law in support of its motion address whether Hudson is entitled to summary judgment on Horsepower Electric's counterclaim—rather, both focus exclusively on whether Hudson is entitled to contractual indemnification from it.

Lastly, Hudson moves for summary judgment on their counterclaims for contractual indemnification and contribution against Forward Heating, Horsepower Electric, and Quality Facility, and solely against Quality Facility for breaching the contractual provision requiring it to purchase insurance. Forward Heating opposes the motion on grounds that material issues of fact remain as to Hudson's liability to plaintiff (*see* NYSCEF doc. no. 334 at 5-6, affidavit in opp.); Horsepower Electric opposes on grounds that there is no evidence that it was responsible for the particular BX cable plaintiff tripped on and there was no written indemnification agreement to which the parties agreed (*see* NYSCEF doc. no. 331 at ¶ 3); Quality Facility opposes on grounds that its subcontract granted Hudson the authority to direct the project's cleaning labor, which Hudson then exercised (NYSCEF doc. no. 327 at 4-6). Quality Facility's and Horsepower Electric's respective motions for summary judgment—008 and 009—are premised on the same arguments found in their opposition to Hudson's motion.

DISCUSSION

Under CPLR 3212, summary judgment is appropriate where "the proponent makes a 'prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of material issues of fact' and the opponent fails to rebut that showing." (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v prospect Hosp.*, 68 NY2d 320, 324; see also CPLR 3212 [b].) Once the proponent has made a prima facie showing, the burden shifts to the opposing party to demonstrate, through admissible evidence, factual issues requiring a trial. "Where there is any doubt as to the existence of triable issues, summary judgment should not be granted." (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563, 565 [1st Dept 2010].)

Whether Hudson 37 is a Proper Labor Law Defendant

By their very terms, both §§ 240 (1) and 241 (6) apply to "all contractors and owners and their agents." (*See* Labor Law § 240 [1] and § 241 [6].) Although a construction *manager* is generally not responsible for injuries under these sections (*Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]), one may be vicariously liable if it has been delegated the authority and duties of a general contractor, or if it functions as an agent of the owner of the premises. (*Id.*; *Simon v Granite Bldg. 2, LLC*, 170 AD3d 1227, 1232 [2d Dept 2019].) Using "construction manager" terminology in contracts, as opposed to "general contractor," is not necessarily determinative of a party's liability. (*Walls*, 4 NY3d at 864.) Instead, "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 the plaintiff is injured." (*See Rodriguez v JMB Architecture, LLC*, 82 AD3d 949, 950-951 [2d Dept 2011].) Courts must consider four factors—laid out in *Walls v Turner Constr. Co.*—as to whether a party is considered a "typical construction manager" or, instead, a general contractor. (*Walls*, 4 NY3d at 864.) The four factors are whether (1) the contractual terms create an agency relationship, (2) there is an absence of a general contractor, (3) the defendant has a duty to oversee the construction site and the trade contractors, and (4) its representatives acknowledge the defendant's "authority to control activities at the work site and to stop any unsafe work practices." (*Id.*)

Hudson 37 contends that, in addition to describing itself as a construction manager in its contracts with Forward Heating and Horsepower Electric, the testimony from Sani confirms its position as a construction manager such that liability does not extend to it.[4] This argument is unpersuasive. Hudson 37's contracts and all relevant testimony demonstrate that it did not merely maintain a "primarily advisory role"—a defining feature of the typical construction manager (*see Walls*, 4 NY3d at 865 [Smith, J., dissenting])—but rather exercised decision-making authority on the project, including on safety decisions like closing the high-rise's hoist.

As the Court described at the outset, Hudson 36 and Hudson 37's contract that established Hudson 37 as the "construction manager" created obligations on it to oversee the project and the safety of workers on the premises. In fact, their contract stated that Hudson 37 "shall solely be responsible for, and have control over, construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the work." (NYSCEF doc. no. 191 at § 3.3.1.) [5] § 3.3.1 further states that "If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences [etc.], the Contractor [Hudson] shall evaluate the jobsite safety thereof and … shall ensure jobsite safety." (*Id.*) Elsewhere, § 10.1 provides, "the Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of this contract." (*Id.* at § 10.1.) It is in this capacity that Hudson 37 hired and paid a separate site safety contractor (non-party Safety Group, LTD) to oversee its safety obligations at the site. (NYSCEF doc. no. 237 at 46.) Further, the subcontracts with Forward Heating and Horsepower Electric also reflect Hudson 37's control and supervision over the site: Forward Heating/Horsepower Electric "shall comply with the recommendations of the Construction Manager;" "will cooperate with Construction Manager's safety personnel," and "shall perform work when and as directed by the Construction Manager." (NYSCEF doc. no. 192 at ¶ ¶ 114, 115, and 154; NYSCEF doc. no. 195 at ¶ ¶ 114, 115, and 154.) [6]

To that point, Terelle, as Hudson 37's project manager, testified that he and several others in management roles at Hudson 37 had the authority to correct unsafe conditions created by a subcontractor's employee (NYSCEF doc. no. 219 at 25-26) and the authority to shut down the hoist due to weather conditions (*Id.* at 36:10-15.) Sani confirms Hudson 37's authority, testifying that the company's employees had the authority to stop the work of subcontractors if performed in an unsafe manner. (NYSCEF doc. no. 237 at 54.) With respect to the subcontractor's daily activities, Hudson 37, or more specifically, "any combination of [its] management team," gave Quality Facility workers their daily instruction (NYSCEF doc. no. 219

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[4] While Hudson, collectively, argues that summary judgment is warranted on grounds that Hudson 37 was not the general contractor, the Court notes that Hudson 36 put forth no reason why it is entitled to the same relief. After all, Hudson 36 does not dispute that it may be held liable as an owner.

[5] Compare this language with that in *Rodriguez v JMB Architecture, LLC*, wherein the Second Department found that JMB's role was only one of general supervision (and thus not subject to liability) where the contract provided, "the Construction Manager shall *not* have control over or charge of and shall not be responsible for construction means, methods, techniques." (*JMB Architecture, LLC*, 82 AD3d at 951.)

[6] Though plaintiff does not argue the point, it would appear that Hudson 37's hiring of Forward Heating to do the HVAC and heating work satisfies the requisite authority to supervise and control plaintiff's work. (*See Weber v Baccarat, Inc.*, 70 AD3d 487, 488 [1st Dept 2010] ["King Freeze had the authority to supervise and control the work being done by plaintiff pursuant to the terms of its subcontract. Moreover, it demonstrated this authority by subcontracting a portion of the HVAC work to plaintiff's employer (internal citations omitted)"].)

at 52:5-12, 105:4-8) and would "give [Forward Heating] direction as to if they want[ed] a certain area of the job done in a certain timeline … They run the job and everyone keeps up with the schedule" (NYSCEF doc. no. 184 at 29, Milohnic EBT 8/5/2022.)

In support of its argument, Hudson 37 cites a portion of Sani's EBT wherein he explains that Hudson 37's role was to "supervise the progress on the site" and that:

> "We [Hudson] had the architectural drawings and we had the engineering scope, and the job was bid out to different trades. And they were there every day to make sure the different trades who were supposed to be working were working. They didn't supervise, control, or manage or direct any of those trades. They were there as kind of an owner's rep to make sure the job was going forward."

(NYSCEF doc. no. 237 at 25-26.)

However, Sani's admission that Hudson 37 was there as "an owner's rep to make sure the job was going forward" concedes the point that, at the very least, Hudson 37 was an agent of Hudson 36, the premises' owner. (*See Lamar v Hill Intl., Inc.*, 153 AD3d 685, 685 [2d Dept 2017].) That Hudson 37 was there every day to ensure the different trades were working as required only advances the argument that Hudson 37's control and supervision was greater than that of the "typical construction manager." Furthermore, Hudson 37's role appears to be remarkably similar to Turner Constr. Co's in *Walls*: both had broad responsibilities as coordinators and supervisors for all the work being performed and both were under contractual obligations to monitor their subcontractor's work and provide proper safety gear to their workers. (*See Walls*, 4 NY3d at 864.) In sum, Hudson 37's evidence fails to rebut the Court's findings that (1) the contractual terms between Hudson 36 and Hudson 37 created a general contractor or principal-agent relationship, (2) no other party was denominated or acted as a general contractor, (3) Hudson 37 had an active contractual duty to oversee the construction site and its trade contractors, and (4) it retained the "authority to control activities at the work site and stop any unsafe work practices." Accordingly, the Court holds that Hudson 37 is a proper Labor Law defendant.

Plaintiff's Labor Law § 200 Claim

Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. (*Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 405-406 [1st Dept 2018].) Claims for personal injury under § 200 fall into two broad categories: (1) those arising from an alleged defect or dangerous condition existing on the premises and (2) those arising from the manner in which the work was performed. (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012].) For the former category, liability attaches if the owner or general contractor created the dangerous condition or had actual or constructive notice; for the latter category, where the injury was caused by the "manner and means" (or "means and methods") of the work, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work. (*Id.*, citing *Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]; *see also Cook v Orchard Park Estates, Inc.*, 73 AD3d 1263, 1264 [3d Dept 2010] ["If an

injury is caused by the manner in which a subcontractor performs its work, an owner or general contractor will be liable only if it had the authority to control the activity bringing about the injury"].)

Here, on their summary judgment motion, Hudson 36 and Hudson 37 persuasively argue they cannot be held liable for creating a defective or dangerous condition on the premises. First, Hudson 36 did not have employees at the construction site so it could not have created the condition. That Hudson 37 did have employees at the site does not, by itself, put Hudson 36 on notice of anything that it knew or should have known. As to Hudson 37, plaintiff does not argue that it left the BX cable in the stairwell and has failed to produce evidence that Hudson 37 used BX cable at the site or was responsible for cleaning the site. Accordingly, neither Hudson 36 nor Hudson 37 can be held liable on this theory of recovery. (*See Prevost v One City Block LLC*, 155 AD3d 531, 534 [1st Dept 2017].)

Instead, plaintiff's opposition is based upon liability attaching under the "means and methods" category. More specifically, he contends that there are issues of fact as to whether Hudson exercised supervisory control over the means and methods of Quality Facility's and Horsepower Electric's workers that created the conditions for plaintiff's fall. The Court agrees. As recounted *supra* at 9, paragraphs 114, 115, and 154 of Hudson's contract with Horsepower Electric suggest that Hudson had the requisite supervisory control over the means and methods of Horsepower Electric's workers, all of whom used BX cable. Similarly, the Hudson/Quality Facility subcontract explicitly provides that the laborers supplied by Quality Facility were to "clean site per direction of site supervisor [Hudson]." (*See* NYSCEF doc. no. 193.) Falkowitz confirmed such an arrangement, testifying that their workers would receive their orders from Hudson 37 when they arrived. (NYSCEF doc. no. 241 at 31.) Since there are issues of fact as to how the BX cable came to be in the stairwell and whether Hudson exercised control over the work of the contractors responsible for using and cleaning said stairwell, neither Hudson 36 nor Hudson 37 are entitled to summary judgment on this § 200 claim.

Plaintiff's Labor Law § 240 (1) Claim

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

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

(Labor Law § 240 [1].)

Because Labor Law § 240 (1)'s aim is to protect workers by placing ultimate responsibility for safety practices on the owner and contractors instead of workers, who are scarcely in a position to protect themselves from accident (*see Rocovich v Consolidated Edison*

Co., 78 NY2d 509, 513 [1991]), the statute imposes a nondelegable duty on owners, contractors, and their agents to provide "devices which shall be so constructed, placed and operated as to give proper protection to those individuals performing the work." (*Quiroz v Memorial Hosp. for Cancer & Allied Diseases*, 202 AD3d 601, 603 [1st Dept 2022] [internal citation removed].) Section 240 (1) imposes absolute liability on these entities, but the statute is limited to a narrow class of dangers: only those "special hazards" presenting "elevation-related risks." (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 96-97 [2015].) Thus, "[absolute] liability may … be imposed under the statute only where plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation risk." (*O'Brien v Port Auth. of N.Y & N.J.*, 29 NY3d 27, 33 [2017]; *see also Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 287 [2003] ["Liability is contingent on a statutory violation and proximate causation"].)

Where a stairwell provides the only means of gaining access to an employee's elevated work site, the stairwell is considered a "device" within the meaning of Labor Law § 240 (1) and must be "constructed, placed, and operated" as to give proper protection against elevation-related risks. (*Conlon v Carnegie Hall Socy., Inc.*, 159 AD3d 655, 655 [1st Dept 2018] ["Because the stairway was an elevated surface on which plaintiff was required to work, and also the sole means of access to his work area, it constituted a safety device within the meaning of the statute"], citing *Ramirez v Shoats*, 78 AD3d 515, 517 [1st Dept 2010]; *see also Waldron v City of New York*, 203 AD3d 565, 566 [1st Dept 2022]; *Rivas v Nestle Realty Corp.*, 188 AD3d 430, 430-431 [1st Dept 2020].)

Initially, Hudson argues that these cases do not apply here since the staircase on which plaintiff injured himself had handrails and adequate, if minimal, lighting and the condition of the staircase does not amount to a height-related risk contemplated by Labor Law § 240 (1). Such arguments are unavailing. In *Conlon*, the First Department noted that the plaintiff was injured when he tripped on an extension cord and fell down the stairs. (*Conlon*, 159 AD3d at 655.) The court held that, since the stairway was an elevated surface and the sole means of access to his work area, the fact that he tripped on an extension cord was sufficient to demonstrate that his fall was the direct result of the absence of an adequate safety device. (*Id.*) The same principle applies here: the staircase constitutes an elevated surface, and the presence of the BX chord sufficiently demonstrates that his fall was a direct consequence of a failure to provide adequate protection against an elevated risk. The fact that there were handrails and proper lighting does not take the case out of the realm of § 240 (1) liability. The cases Hudson cites to suggest the staircase does not rise to an elevation-related risk are all in inapposite in one way or another. (*See Lombardo v Park Tower Mgt. Ltd.*, 76 AD3d 497 [1st Dept 2010] [a middle step of a three-step staircase, 18 inches above floor, not of sufficient height to trigger protections of § 240 (1)]; *German v Antonio Dev., LLC*, 128 AD3d 579 [1st Dept 2015] ["plaintiff's task in lifting steel grate on the ground-level just enough to slide copper wire underneath it did not present the sort of elevation-related risk envisioned by the statute"]; *DeRosa v Bovis Lend Lease LMB, Inc.*, 96 AD3d 652 [1st Dept 2012] [§ 240 (1) not applicable where plaintiff injured after getting shirt caught in cement mixer approximately three feet off the ground]; *Toefer v Long Island R.R.*, 4 NY3d 399 [2005] ["We decide in these cases that workers who fall when working on, or getting down from, the surface of a flatbed truck that is between four and five feet off the ground may not recover under § 240 (1).])

The above notwithstanding, Hudson has demonstrated an issue of fact as to whether plaintiff's injury occurred on the sole staircase providing access to his elevated work site. Just as plaintiff testified that he injured himself walking down the only staircase connecting the 31st floor to the 10th (NYSCEF doc. no. 205 at 45; *see also* NYSCEF doc. no. 207 at 37 ["There was just one set of stairs"]), both Terelle and Kimmel testified that the high-rise used scissor staircases consisting of stairwells A and B, each running from the 9th up to the top floor and would have been available to plaintiff on the date of his accident. (NYSCEF doc. no. 219 at 63-64; NYSCEF doc. no. 156 at 43 ["two stairwells that go up the entire building"].) [7]

In response, plaintiff contends that Hudson has "submit[ted] no evidence that another staircase was available on the 31st floor where plaintiff descended from, that plaintiff could and should have accessed this staircase at the time of the accident." (NYSCEF doc. no. 335 at ¶ 22.) However, in addition to his testimony that the staircases ran through the 31st floor, Terelle explained that staircases A and B would have been in "the same condition in terms of construction progression," that "they probably weren't painted just yet, but concrete poured and CMU dividing wall installed with handrails," and that both "were maintained" since "New York City code [requires] you to have your stairs poured two floors below the construction deck." (NYSCEF doc. no. 219 at 117-118.) In other words, Hudson has submitted *some* (though not conclusive) evidence of another adequate staircase available to plaintiff evidence. Accordingly, since the Court is confronted with competing summary judgment motions, and because neither party has conclusively demonstrated either the existence or absence of a second available and adequate staircase, material issues of fact remain, and neither side is entitled to summary judgment.

Lastly, Hudson's argument that plaintiff was, as a matter of law, the sole proximate cause of his injuries is unpersuassive. This argument—premised on plaintiff electing not to use the stairwell's handrail, instead carrying toolboxes in both hands—fails to appreciate the fact that he was only doing so because the hoist was inoperable when his work ended and needed to bring his tool down. "Adaptations in work that a plaintiff is forced to make at a work site cannot be used as a defense to a § 240 (1) claim where the plaintiff's actions are a consequence of the defendant's failure to provide proper safety devices in the first instance." (*Vitucci v Durst Pyramid LLC*, 205 AD3d 441, 443-444 [1st Dept 2022].) Accordingly, the Court cannot hold, as a matter of law, that plaintiff's conduct was the sole proximate cause of his injuries. Nonetheless, Hudson's showing that plaintiff observed debris on the 11th floor just before his injury—yet continued to carry heavy toolboxes in both hands—is, on its own, sufficient evidence that plaintiff's conduct may have been one of several proximate causes of his accident, and thus, sufficient to defeat summary judgment on this claim.

Plaintiff's Labor Law § 241 (6) Claim

Labor Law § 241 (6) requires owners and contractors to provide adequate safety protection for workers and to comply with the specific safety rules and regulations promulgated

[7] Even if plaintiff did have access to another staircase, Hudson would not be entitled to summary judgment. (*See Gamez v Sandy Clarkson LLC*, 221 AD3d 453, 454 [1st Dept 2023] ["Given the existence of other means of access to the worksite, there is an issue of fact as to whether the staircase that plaintiff descended constituted a safety device under Labor Law § 240 (1)"], citing *Waldron*, 203 AD3d at 565-566.)

by the Commissioner of the Department of Labor. (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009].) To support a claim under this provision, a plaintiff must establish that the defendant violated an Industrial Code provision that sets forth specific, applicable safety standards and that his or her injuries were proximately caused by said violation. (*Doxey v Freeport Union Free Sch. Dist.*, 115 AD3d 907 [2d Dept 2014]; *Licata v AB Green Gansevoort, LLC*, 158 AD3d 487, 488 [1st Dept 2018].) Here, plaintiff bases liability under §241 (6) on Hudson's alleged violation of 12 NYCRR § 23-1.7 (e) (1).[8]

12 NYCRR § 23-1.7 (e) provides, in relevant part: "(e) Tripping and other hazards. (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping." The central issue, then, is whether the staircase on which plaintiff tripped constitutes a "passageway" within the meaning of this provision. The Court finds that it does. In *Prevost v One City Block LLC*, the First Department noted that while the Industrial Code does not define passageway, "courts have interpreted the term to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area." (155 AD3d at 535, citing *Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1250 [4th Dept 2013].) As the Second Department observed in *Whalen v City of New York*, § 241 (6) extends protection "not only to the point where the…work was actually being conducted, but to the entire site, including passageways utilized in the provision and storage of tools, in order to ensure the safety of laborers going to and from the points of actual work." (*Whalen*, 270 AD2d 340, 342 [2d Dept 2000].) Here, there is little dispute that plaintiff's actions once the hoist had been shut down—that he had completed his assigned work on or near the 31st floor and was descending to the ground floor using the staircase—closely align with this understanding of passageway.

In opposition, Hudson contends that the staircase may be considered a passageway only where it is the sole available means of access to the work site or for him to leave the premises. Cases such as *Rossi v 140 W. JV Mgr. LLC* (171 AD3d 668 [1st Dept 2019]) and *Tolk v W. 42 Realty Invs. L.L.C.* (201 AD3d 491, 492 [1st Dept 2022]) offer some support for the proposition. In *Rossi*, the First Department found that the area where the plaintiff fell was "by definition, a passageway" since he tripped "along the only route he could take to return to his work area" (*Rossi*, 171 AD3d at 668); similarly, in *Tolk*, in the context of slipping hazards and 12 NYCRR §23-1.7 (d), the First Department wrote, "a staircase may constitute a passageway when that staircase is the sole access to the work site." (*Tolk*, 201 AD3d at 492.) However, it is abundantly clear that neither case *requires* plaintiff to have fallen on the only access route available to the plaintiff for the access route to be considered a passageway. (*See Milligan v 606 W. 57th LLC*, 2023 NY Slip Op 31891[U] at *8-9 [Sup. Ct. Kings County 2023].) Instead, as described *supra*, the proper analytical framework as to 12 NYCRR (e) (1)'s applicability is based on whether the plaintiff was using the area as a means of getting from one place to another or was working in that particular area (in which case, 12 NYCRR [e] [2] may be applicable). (*See Conlon*, 159 AD3d at 655.) Given that plaintiff's conduct falls into the former category, the Court finds that the staircase constitutes a passageway for purpose of the statute. Nonetheless, plaintiff is not entitled to summary judgment, since contributory and comparative negligence are valid defenses

[8] The Court notes that, in *Smith v McClier Corp.* (22 AD3d 369, 370 [1st Dept 2205]), the First Department held that the provisions of 12 NYCRR § 23-1.7 (e) were sufficiently concrete and specific in its requirements to support a Labor Law § 241 (6) claim. (*See also Danchick v Contegra Servs.*, 299 AD2d 923, 924 [4th Dept 2002].)

to a § 241 (6) claim (*Misicki*, 12 NY3d at 515) and, as described above, there remain issues of fact as to whether plaintiff was the sole proximate cause of his injuries. (*See Gamez*, 221 AD3d at 455 [finding Supreme Court properly declined to dismiss the defendants' affirmative defense of comparative negligence because the plaintiff admitted he voluntarily occupied both hands by carrying heavy material while descending the staircase.])

Lastly, Hudson contends that they are entitled to summary judgment because plaintiff's accident did not occur as he described in his EBT. This argument is based on plaintiff's medical records and the testimony of Janine Fetisov, a Physician's Assistant who treated him at Wyckoff Heights Medical Center on July 27, 2018, after his fall. According to her, when plaintiff presented for treatment, he reported that he fell off a ladder at the work site. (NYSCEF doc. no. 189 at 38, Fetisov EBT transcript.) First, the Court must highlight the fact that Hudson's memorandum of law in support of the motion does not cite any authority whatsoever that suggest summary judgment is appropriate because an EBT allegedly contradicts sworn testimony. Second, whether plaintiff's accident occurred as described in his testimony or as he allegedly indicated to his treating physician is plainly an issue of fact. (*See De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403 [1st Dept 2017] ["On a defendant's motion for summary judgment, opposed by plaintiff, we are required to accept the plaintiff's pleadings, as true, and our decision must be made on the version of facts most favorable to plaintiff" (internal quotations omitted)].) Accordingly, Hudson is not entitled to summary judgment on this ground.

Hudson's Claims against Third-Party Defendants and Third-Party Defendants' Claims against Hudson

Hudson seeks summary judgment on their common-law indemnification and common-law contribution claims against each third-party defendant. Plaintiff's only proffered argument in support of this claim is that it is free of negligence while all other defendants are not. (NYSCEF doc. no. 166 at 25.) Yet, as discussed above, there are issues of fact regarding the relative liability of Hudson and its contractors, Hudson is not entitled to such relief. Accordingly, Hudson is not entitled to summary judgment on these types of claims. Similarly, Hudson is not entitled to summary judgment on Quality Facility or Forward Heating crossclaims for common-law indemnification, contractual indemnification, or contribution. It is, however, entitled to summary judgment solely on Horsepower Electric's counterclaim for contractual indemnification (not common law indemnification or contribution): Hudson argued that Horsepower Electric did not have an indemnification provision in its favor, and Horsepower Electric failed to oppose this branch of the motion.

As to Hudson's claim against Quality Facility for breaching its contractual obligation to procure insurance naming Hudson as an additional insured, Hudson is entitled to summary judgment. Quality Facility's Contractor Insurance and Indemnity Agreement required it to purchase Commercial General Liability Insurance and to "endorse[ ] name Owner, its managing agent, General Contractor and all other entities that may be reasonably required as 'additional insured.'" (NYSCEF doc. no. 194 at ¶ 3.) The contract also required Quality Facility to purchase Umbrella Liability Insurance covering the above-described parties as additional insured parties. Yet, the insurance policy that Quality Facility attached to its opposition does not include Hudson 36 or Hudson 37 as additional insured. (NYSCEF doc. no. 329, Quality Facility insurance

policy.) In reply, Quality Facility merely states, "as demonstrated by the policy itself, [it] has fulfilled its contractual obligation to procure insurance, and any cause of action for breach of contract should be dismissed." Since Quality Facility does not address the deficiencies described above, Hudson is entitled to summary judgment on this cause of action.

Below, the Court addresses Quality Facility, Horsepower Electric, and Manhattan Fire's arguments supporting their summary judgment motions.

Quality Facility's Summary Judgment Motion on Hudson's Common Law and Contractual Indemnification Claim—MS 008

Under their indemnification agreement, Quality Facility agreed to indemnify Hudson against claims, losses, damages, and expenses for injuries "arising out of any negligent or wrongful act error, omission, breach of statute, code or rule, or breach of contract, in connection with the operations of the Contractor." (NYSCEF doc. no. 194.) Quality Facility argues—both in opposition to Hudson's motion and in support of its own summary judgment motion in MS 008—that there is no evidence of its negligence (and thus, the indemnification agreement was not triggered) since it did not have the authority to direct or supervise its workers on the job site. The Court agrees. Hudson's argument that Quality Facility "was responsible for cleaning up debris that was on the floor, such as pieces of BX cable" is factually inaccurate: the parties' contract required Quality Facility to supply the laborers—not to oversee or supervise their work. (*See* NYSCEF doc. no. 193.) There is simply no language in the subcontract in which Quality Facility, as an entity, "was hired as the cleaning contractor at the subject premises" or "that it was responsible for the removal of garbage and debris from the subject premises." To be clear, Falkowitz, Terelle, and Sani each describe Quality Facility laborers as those responsible for cleaning debris from the work site but only *at the direction of Hudson employees*, including Terelle. Accordingly, because there is no evidence that Quality Facility was in any way negligent or committed wrongful acts that caused plaintiff's injuries, its motion for summary judgment on both Hudson's common law and contractual indemnification is granted. Hudson's competing motion is, therefore, denied.

Horsepower Electric's Summary Judgment Motion on Hudson's Contractual Indemnification Claim—MS 009

Horsepower Electric advances two arguments in support of its summary judgment motion. The first is that, even though its employees used BX cable in their work, plaintiff tripped on a BX cable in an area of the construction site where Horsepower Electric's laborers had not been working for some time. As such, it argues that Hudson's indemnification claim—premised on Horsepower Electric's alleged negligence—is based on pure speculation that one of its employees created the dangerous condition on the stairway. The Court disagrees. Kimmel, Horsepower Electric's foreman, testified that BX cable was one of its workers' most ordered, most used items and that it was used "almost everywhere, lights, outlets, switches." (NYSCEF doc. no. 156 at 35-36.) In contrast, Forward Heating's Milohnic and Manhattan Fire's chief technical officer Moshe Halberstam both averred that their company's respective workers did not use BX cable to install the HVAC systems or fire alarm system. (NYSCEF doc. no.213 at 30-31; NYSCEF doc. no. 158 at 46, Halberstam EBT 9/12/2022.) Given that there is no direct testimony

as to how the BX cable ended up on the staircase, Horsepower Electric's extensive usage of BX cables in its work is sufficient to create an issue of fact as to whether it was responsible for creating the dangerous condition on the staircase. Horsepower Electric's citation to *Kimball-Malone v City of New York* (7 AD3d 675, 675 [2d Dept 2004]) is unpersuasive as there is no explanation there as to why the defendant's actions were "too speculative" to raise an issue of fact. With respect to Horsepower Electric's citation to *Santoli v 475 Ninth Ave Assoc., LLC* (2007 NY Slip Op. 32569 [U] [Sup. Ct. NY County 2007]), it is neither binding precedent nor particularly persuasive given the circumstances described above where Horsepower Electric is the only contractor to use the BX cable, at least in quantity suggested by Kimmel, in its work.

Horsepower Electric's second argument is that it did not reach a binding agreement with Hudson. According to Moshe Breuer (an Operations Executive at Horsepower Electric), Horsepower Electric returned a proposed agreement to Hudson 37 with suggested changes, Hudson 37 accepted some but not all of the changes, to which Horsepower Electric then sent a further marked-up redlined copy of the agreement. (NYSCEF doc. no. 332 at ¶ 5-6, Breuer affidavit.) Hudson 37 does not dispute that the agreement was never executed. (NYSCEF doc. no. 339 at 10.) The agreement that Hudson produced in support of its motion is this unsigned, redlined version. (NYSCEF doc. no. 195.) In addition, Rider No. 2 to the agreement provides, "[N]o binding agreement shall be deemed to have been entered into by Construction Manager unless and until a fully signed original of this Agreement and its attachments shall have been delivered to Contractor." (*Id.* at 20-21.) Despite all of this, Kimmel testified that it was his understanding that Horsepower Electric was performing work under the agreement even though it was not signed. (NYSCEF doc. 156 at 27-28.)

Horsepower Electric is not entitled to summary judgment on this ground. Contracts may be valid even where the party to be bound does not sign it. (*See Brown Bros. Elec. Contrs. V Beam Constrs. Corp.*, 41 NY2d 397, 399 [1977].) In *Brown*, the Court of Appeals found that "the course of conduct between [the owner] and Brown, including their writings … was sufficient to spell out a binding contract," notwithstanding that Brown did not sign a written contract. (*Id.*) The rule, as discerned in *Flores v Lower E. Side Serv. Ctr.*, is that an unsigned contract may be enforceable, provided there is objective evidence establishing the parties' intent to be so bound. (*Id.*; *Flores*, 4 NY3d 363, 369 [2005], citing *Matter of Municipal Consultants & Publs. v Town of Ramapo*, 47 NY2d 144 [1979].) The Court of Appeals in *Flores* confronted factual circumstances nearly identical to those presented here: the owner of a building hired a general contractor for a renovation project; the general contractor did not sign the written contract between the two; one of the general contractors' laborers brought a personal injury action against the owner; and the owner then sought to enforce an indemnification provision in the unsigned written agreement with the general contractor. (*Flores*, 4 NY3d at 365-366.) Further, as here, the record showed that the general contractor had acted in conformity with the contractual requirements, including by performing the required work as specified in the written documents and accepting payments accordingly. (*Id.* at 371.) Under those circumstances, the Court of Appeals held that the general contractor had failed to raise a question of fact as to whether it had entered into a written contract. (*Id.*) The same principles apply here. Horsepower Electric's conduct—from performing the work to accepting payment—presents uncontroverted, objective evidence of its intent to be bound by the written agreement between the parties, including the indemnification agreement. Lastly, it is important to note that Hudson is not seeking to enforce

provisions of the written agreement to which Horsepower Electric objected in their redlined proposal since none of the changes proposed by Horsepower Electric relate to the indemnification agreement itself. Accordingly, Horsepower Electric's motion for summary judgment is denied in its entirety.

Manhattan Fire's Motion for Summary Judgment on Horsepower Electric's Contractual Indemnification Crossclaim—MS 005

Manhattan Fire has made a *prima facie* showing that summary judgment is warranted on Horsepower's contractual indemnification claim by submitting the purchase order with an altogether unsigned indemnification provision (*see* NYSCEF doc. no. 159 at 8) and by proffering unrefuted testimony that its workers did not use BX cable in installing the fire alarm pursuant to the contract (*see* NYSCEF doc. no. 156 at 92-93). Since Horsepower Electric did not interpose an opposition to rebut this *prima facie* showing, Manhattan Fire is entitled to summary judgment.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that Manhattan Fire & Security Electric's motion for summary judgment pursuant to CPLR 3212 (MS 005) is granted and Horsepower Electric and Maintenance Corp.'s cause of action for contractual indemnification against it is dismissed; and it is further

ORDERED that Hudson 36 LLC and Hudson 37 LLC's motion for summary judgment pursuant to CPLR 3212 (MS 006) is denied as to plaintiff Andrzej Symczyk's causes of action under Labor Law §§ 200, 240 (1), and 241 (6); denied as to their causes of action for common law indemnification, contractual indemnification, and contribution against third-party defendants Forward Heating Corp., Forward Mechanical Corp., Quality Facility Solutions Corp., and Horsepower Electric; denied as to each cause of action asserted by Quality Facility, Forward Heating, and Forward Mechanical's against them; and denied as to Horsepower Electric's common law indemnification and contribution claims against them; and it is further

ORDERED that Hudson 36 and Hudson 37's motion for summary judgment pursuant to CPLR 3212 (MS 006) is granted as to Horsepower Electric's counterclaim for contractual indemnification and as to its claim against Quality Facility for breach of the provision to procure insure; and it is further

ORDERED that plaintiff Andrzej Symczyk's motion for summary judgment pursuant to CPLR 3212 (MS 007) on his Labor Law §§ 240 (1) and § 241 (6) causes of action is denied; and it is further

ORDERED that Quality Facility's motion for summary judgment pursuant to CPLR 3212 dismissing Hudson 36 and Hudson 37's causes of action for common law indemnification, contractual indemnification, and contribution (MS 008) is granted in its entirety; and it is further

ORDERED that Horsepower Electric's motion for summary judgment pursuant to CPLR 3212 dismissing Hudson 36 and Hudson 37's common law and contractual indemnification causes of action (MS 009) is denied in its entirety; and it is further

ORDERED that counsel for Hudson 36 and Hudson 37 shall serve a copy of this order on all parties, along with notice of entry, within twenty (20) days of entry.

This constitutes the Decision and Order of the Court.

4/24/2024
DATE

DAKOTA D. RAMSEUR, J.S.C.

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