SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD G. LATIN** **PART** **46M**

Justice

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KENNY L. RODRIGUEZ,

Plaintiff,

- v -

RXR GLEN ISLE PARTNERS LLC,RXR GARVIES P1 BUILDING H OWNER LLC,RXR GARVIES P1 BUILDING I OWNER LLC,RXR GARVIES P1 BUILDING B OWNER LLC,HUNTER ROBERTS CONSTRUCTION GROUP, LLC.,

Defendant.

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INDEX NO. 155931/2019

MOTION DATE 06/29/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

HUNTER ROBERTS CONSTRUCTION GROUP, LLC.

Plaintiff,

-against-

CUSTOM SERVICES CONTRACTING OF NY INC

Defendant.

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Third-Party
Index No. 596051/2019

RXR GLEN ISLE PARTNERS LLC, RXR GARVIES P1 BUILDING H OWNER LLC, RXR GARVIES P1 BUILDING I OWNER LLC, RXR GARVIES P1 BUILDING B OWNER LLC

Plaintiff,

-against-

CUSTOM SERVICES CONTRACTING OF NY INC.

Defendant.

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Second Third-Party
Index No. 595975/2020

The following e-filed documents, listed by NYSCEF document number (Motion 003) 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143

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

This is an action to recover damages for personal injuries allegedly sustained by a construction laborer on January 22, 2019, at a construction site located at 350 Herb Hill Road,

Glen Cove, New York (the Premises) when, while sweeping debris on the floor, he stepped into a hole that was obscured by the debris, causing him to fall.

In motion sequence number 003, defendants/second third-party plaintiffs RXR Glen Isle Partners LLC, RXR Garvies P1 Building H Owner LLC, RXR Garvies P1 Building I Owner LLC and RXR Garvies P1 Building B Owner LLC (collectively RXR) and defendant/third-party plaintiff Hunter Roberts Construction Group, LLC (Hunter) (together, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them, and for summary judgment in their favor on their contractual indemnification claims against third-party defendant/second third-party defendant Custom Services Contracting of NY Inc. (CSC).

BACKGROUND

On the day of the accident, the Premises was owned by RXR. RXR hired Hunter to provide construction management services for a project at the Premises that entailed the new construction of three residential buildings (the Project). Hunter, in turn, hired CSC to provide cleaning services at the Project. Plaintiff Kenny L. Rodriguez was employed by CSC.

Plaintiff's Deposition Testimony (NYSCEF Doc. No. 121)

Plaintiff testified that on the day of the accident, he was employed by CSC as a laborer. His duties included cleaning construction debris (plaintiff's tr at 25). His supervisor was a CSC employee named Fredy Ramirez (*id.* at 30). All of his instructions came from Ramirez (*id.* at 31).

On the day of the accident, Ramirez assigned him to "[c]lean out the rooms on the fourth and fifth floor" (*id.* at 35). To clean out a room, he would use "a broom, a shovel and the [wheel]barrow and garbage bags" (*id.* at 36). Prior to the day of the accident, he had no complaints about the condition of the job site.

On the day of the accident, plaintiff cleaned the fourth floor without issue. Then he went to the fifth floor, which was covered in "construction debris" as well as regular garbage (*id.* at 39). At the time of the accident, plaintiff walked into a room on the fifth floor that was covered with "debris and garbage" and began clearing that debris (*id.* at 43). Plaintiff described the room as "normal" with an unfinished wooden "sub floor" (*id.* at 41). He did not see any holes in the floor as he started working.

Plaintiff began cleaning the room by sweeping the construction debris to a central location to collect it for removal. He would start at the far end of the room "working [his] way backwards" (*id.* at 124). While he was sweeping and stepping backwards (*id*. at 124), he stepped into a hole that has been obscured by the debris on the floor (the Hole) (*id.* at 44). Specifically, he stepped backwards (*id.* at 136), his right foot entered the Hole, his leg fell into the Hole up to his knee (*id.* at 44), and he fell backwards to the ground.

No one witnessed the accident (*id.* at 40). Afterwards, plaintiff was able to get up. He then walked to CSC's office, where he reported the accident to his supervisor (*id.* at 46). The following day, plaintiff went back to the Premises and took a photograph of the Hole (*id.* at 63). Plaintiff was shown several photographs and confirmed that they depicted the room where he fell and the hole that caused his fall (*id.* at 67-80). He also confirmed that several of the photographs depicted the ceiling in the room below the room where he was working, showing the same hole (*id.* at 79).

Plaintiff also testified that he saw holes in other parts of the Premises, but those holes had "markings on it, like it says holes and it was patched up" (*id.* at 121). Specifically, "[t]hey were spray painted orange" with the word "holes real big, so you couldn't miss it" (*id.* at 121).

Deposition Testimony of Christopher Corwin (Hunter's Project Manager)
(NYSCEF Doc. No. 122)

Christopher Corwin testified that on the day of the accident he was Hunter's project manager for the Project. Hunter was hired by RXR as the construction manager for the Project (Corwin tr at 27). Hunter was responsible for coordinating and scheduling the trades and making sure that Project was on schedule (*id.* at 31). Hunter also hired all the subcontractors for the Project and had authority to stop work to remedy an unsafe condition *id.* at 32). Hunter hired CSC to perform "general labor . . . general cleanup labor predominantly" (*id.* at 47). Hunter "would provide direction to CSC as to areas that needed to be cleaned . . . but as far as how CSC conducted that work . . . that was up to CSC to do that" (*id.* at 97).

Hunter also hired a site safety supervisor and manager, "TSC" who was responsible for "walk[ing] the project to look for any safety concerns . . . and then either address them directly or contact [Hunter] or . . . the appropriate subcontractors to address safety issues" (*id.* at 120). TSC had authority to stop work if it saw an unsafe condition (*id.* at 125).

Corwin was on site daily. His duties included general oversite of the Project. He would walk the site occasionally, sometimes with representatives from RXR or other Hunter employees (*id.* at 36). Hunter provided CSC with equipment such as mops, brooms, and garbage containers (*id.* at 53-54).

At his deposition, Corwin was shown Hunter's accident report (the Hunter Report) and confirmed its authenticity. There were photographs attached to the Hunter Report. Corwin confirmed that photographs such as those, typically, would be taken at accident location shortly after the accident occurred (*id.* at 73-74). The photographs attached to the Hunter Report depicted an uncovered hole in a subfloor. The hole was "not a neatly prepared cut hole . . . it looks very rough" (*id.* at 101-102). He also testified that the hole was not marked with any spray paint (*id.* at

80). Corwin testified that, had he seen that uncovered hole, he would have identified it as a tripping hazard (*id.* at 74).

Corwin had no personal knowledge of how the accident happened and he never inspected the accident location (*id.* at 101).

Deposition Testimony of Joseph DiPasquale (RXR's Senior Project Manager (NYSCEF Doc. No. 123)

Joseph DiPasquale testified that he was RXR's senior project manager for the Project (DiPasquale tr at 14). RXR is a commercial real estate and multi-family residential construction company and property developer. His duties included bidding out and awarding projects to general contractors and/or construction managers and generally monitoring the schedule (*id.* at 12). Typically, he would be present daily at any project he was assigned to.

DiPasquale was not the project manager on the day of the accident, as he did not get assigned to the Project until several months after the accident (*id.* at 31). At that time, the interior work was nearly finished, and the apartments were being turned over to tenants (*id.* at 49).

Deposition Testimony of Xyroibma Nieves (CSC's President) (NYSCEF Doc. No. 124)

Xyroibma Nieves testified that at the time of the accident she was CSC's president. CSC's work includes construction cleaning (Nieves tr at 17). Hunter hired CSC to provide cleaning for the Project. Specifically, CSC's duties included cleaning debris and garbage created by the trades (*id.* at 28-29). CSC's duties did not include covering holes (*id.* at 78), or any other work besides cleaning (*id.* at 92). Hunter provided brooms, shovels, and garbage cans for CSC to use at the Premises (*id.* at 46).

Rodriguez was CSC's foreman on site. Rodriguez received his orders from Hunter's superintendent, who designated areas that CSC needed to clean (*id.* at 91). CSC would not clean anything unless Hunter directed them to do so (*id.* at 39).

Nieves had no personal knowledge of the accident. She learned of it shortly after it happened, when Rodriguez called her cellular phone and informed her that "there was a hole and then [plaintiff] slipped" but that plaintiff did not need an ambulance because he "was walking fine" (*id.* at 57). She directed Rodriguez to file an accident report and notify Hunter. She did not investigate further.

Nieves was shown several photographs but could not confirm that they depicted the accident location.

DISCUSSION

"'[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [emphasis omitted]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993] [internal quotation marks and citation omitted]). "If there is any doubt as to the existence of a triable issue, the motion [for summary judgment] should be denied" (*Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; citing *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

The Labor Law 240 (1) Claims

Defendants move for summary judgment dismissing the Labor Law § 240 (1) claims as against them.

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

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

Labor Law § 240 (1) "imposes a nondelegable duty on owners and contractors 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, 604 [1st Dept 2022] [internal quotation marks and citations omitted]). It "'was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co*., 81 NY2d 494, 501 [1993]).

The absolute liability found within section 240 "is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*O'Brien v Port Auth. of N.Y. & N.J.,* 29 NY3d 27, 33 [2017] [internal quotation marks and citation omitted]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). Therefore, section 240 (1) "does not cover the type of ordinary and usual peril to which a worker is commonly exposed at a construction site" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]). Accordingly, to prevail on a Labor Law § 240 (1) claim, a plaintiff must establish that the statute was violated, and that this violation was a

proximate cause of the plaintiff's injuries (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]).

As an initial matter, defendants do not contest that they are proper defendants under the Labor Law.

Here, testimony established that plaintiff's accident occurred when he stepped into the obscured uncovered Hole in the subfloor of the under-construction floor in the room he was clearing debris, causing him to fall to the ground with his leg in the hole.

Defendants' sole argument is that plaintiff's accident does not fall within the scope of Labor Law § 240 (1) as plaintiff did not fall from a height. This argument – which is unsupported by any caselaw,[1] aside from general boilerplate – ignores cases regarding plaintiffs who fall partway into uncovered holes (*see Carpio v Tishman Constr. Corp.,* 240 AD2d 234, 234 [1st Dept 1997] [section 240 (1) applied where the plaintiff stepped into an uncovered hole, causing his leg to fall below the surface]; *see also Favaloro v Port Auth. of N.Y. & N.J.*, 191 AD3d 524, 524 [1st Dept 2021] [section 240 (1) applied where the plaintiff's leg fell partway into an insufficiently covered concrete hole]).

Accordingly, defendants have failed to establish as a matter of law that plaintiff's fall partway into the uncovered Hole in the subfloor does not fall within the protective ambit of Labor Law § 240 (1). Therefore, defendants are not entitled to summary judgment dismissing this claim as against them.

[1] Defendants also provide an expert affidavit to support this position (NYSCEF Doc. No. 127). The court notes that the expert's affidavit, similar to defendants' motion papers, only states that section 240 (1) cannot apply because plaintiff did not fall from a height. It offers no further analysis.

The Labor Law § 241 (6) Claims

Defendants move for summary judgment dismissing the Labor Law § 241 (6) claims as against them.

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

> "All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross v Curtis-Palmer Hydro-Electric Co.,* 81 NY2d at 501–502).

To sustain a Labor Law § 241 (6) claim, it must be established that the defendant violated a specific, "concrete specification" of the Industrial Code, rather than a provision that considers only general worker safety requirements (*Messina v City of New York,* 300 AD2d 121, 122 [1st Dept 2002]; quoting *Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231 [1st Dept 2000]). Such violation must be a proximate cause of the plaintiff's injuries (*Yaucan v Hawthorne Vil., LLC*, 155 AD3d 924, 926 [2d Dept 2017] ["a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code regulation that is applicable to the circumstances of the accident"]; *see also Sutherland v Tutor Perini Bldg. Corp.*, 207 AD3d 159,

161 [1st Dept 2022]). "Whether a regulation applies to a particular condition or circumstance is a question of law for the court" (*Harrison v State of New York,* 88 AD3d 951, 953 [2d Dept 2011]).

As an initial matter, plaintiffs list multiple violations of the Industrial Code in his bills of particulars. Except for sections 23-1.7 (b) (1) (i) and (ii) and 23-1.7 (e) (c) (3), plaintiff does not oppose their dismissal. These uncontested provisions are deemed abandoned (*Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section"]).

Industrial Code 12 NYCRR 23-1.7 (b) (1) (i and ii)

Industrial Code 12 NYCRR 23-1.7 (b) (1) (i and ii) are sufficiently specific to support a Labor Law § 241 (6) claim (*Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 450 [1st Dept 2013]). Section 23-1.7 (b) (1) governs "Hazardous Openings" and provides the following, as relevant:

> "(i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).
>
> "(ii) Where free access into such an opening is required by work in progress, a barrier or safety railing constructed and installed in compliance with this Part (rule) shall guard such opening and the means of free access to the opening shall be a substantial gate."

Section 23-1.7 (b) (1) (i) "only applies to openings large enough for a person to fall completely through" (*Marte v Tishman Constr. Corp.,* 223 AD3d 527, 529 [1st Dept 2024]; *Cappabianca v Skanska USA Bldg. Inc.,* 99 AD3d 139, 147 [1st Dept 2012] [section 23-1.7 (b) (1) (i) did not apply because the hole "w[as] not large enough for a person to fit through"]). Here,

there is no testimony or photographic evidence establishing that the Hole was large enough for a person to fall through. Accordingly, this section does not apply to plaintiff's accident.

Section 23-1.7 (b) (ii) applies only to instances where access to an opening is required by work in progress. There is no testimony supporting that the subject Hole was an opening of the type set forth in this provision, or that it was being actively used in connection with the construction (*see e.g., Alonzo*, 104 AD3d at 450 ["Since the opening was being actively used in connection with the construction, section 23-1.7 (b) (1) (ii) was violated"]). Accordingly, this section does not apply to plaintiff's accident.

Thus, defendants are entitled to summary judgment dismissing that part of the Labor Law § 241 (6) claim predicated upon violations of 12 NYCRR 23-1.7 (b) (1) (i and ii).

Industrial Code 12 NYCRR 23-1.7 (e) (2)

Industrial Code 12 NYCRR 23-1.7 (e) (2) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Rossi v 140 W. JV Mgr. LLC,* 171 AD3d 668 [1st Dept 2019]). Section 23-1.7 (e) governs "Tripping and other hazards" and provides, as relevant, the following:

> "(2) *Working Areas.* The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed."

Here plaintiff argues that "the debris concealing the hole in the floor triggered the protections of § 23-1.7 (e) (2)" (plaintiff's memorandum in opposition, ¶ 21). Importantly, it is undisputed that plaintiff's explicit task at the time of the accident was removing the debris at the accident location. It is also undisputed that plaintiff was in the process of removing said debris at the time of the accident. In other words, plaintiff was injured while doing an act to eliminate the alleged cause of the injury – removal of the debris covering the hole. "It is well-settled that '[a]n

employee cannot recover for injuries received while doing an act to eliminate the cause of the injury'" (*Prevost v One City Block LLC*, 155 AD3d 531, 535 [1st Dept 2017]; quoting *Kowalsky v Conreco Co.,* 264 NY 125, 128 [1934]).

Plaintiff also argues that the hole itself should be considered a sharp projection. This argument is unavailing. The cases plaintiff cites – *Licata v AB Green Gansevoort, LLC* (158 AD3d 487 [1st Dept 2018]), *Kaufman v Capital One Bank (USA) N.A.* (188 AD3d 461, 462 [1st Dept 2020]) and *Pawlicki v 200 Park, L.P.* (199 AD3d 578, 579 [1st Dept 2021]) – do not stand for the proposition that a hole is a sharp projection. Licata and Pawlicki, which deal with holes, do not make any reference to sharp projections. Kaufman, which involved a door saddle that projected up from the floor, makes no reference to holes.

Therefore, to the extent that the debris that plaintiff was in the process of removing caused his injury, he may not recover under this Industrial Code provision, which governs the removal of dirt and debris (*Prevost,* 155 AD3d at 535). Accordingly, defendants are entitled to summary judgment dismissing that part of the section 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.7 (e) (2).

The Common-Law Negligence and Labor Law § 200 Claims

Defendants move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide

> reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

"Liability pursuant to Labor Law § 200 may be based either upon the manner in which the work is performed or actual or constructive notice of a dangerous condition inherent in the premises" (*Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 736 [2d Dept 2008]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

Here, plaintiff's accident arose both from the means and methods of the work (the cleaning of the debris, the failure to cover the Hole) and a dangerous condition inherent in the premises (the existence of the Hole itself). Accordingly, the court will address both theories.

Means and Methods

"Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]; *DaSilva v Toll First Ave., LLC,* 199 AD3d 511, 513 [1st Dept 2021]; *Andino v Wizards Studios N. Inc.*, 223 AD3d 508, 509 [1st Dept 2024]). Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]).

Here, defendants, the owner of the Premises and construction manager for the Project, did not have the authority to actually supervise or control the injury producing work – the clearing of debris, or the covering of holes (*Naughton*, 94 AD3d at 11). Plaintiff testified that he only received his work instructions from his CSC supervisor (plaintiff's tr at 31). Plaintiff also testified that his supervisor directed his work on the day of the accident (*id.* at 35).

In opposition, plaintiff's argument that Hunter gave CSC general directions as to where to clean gives rise only to a general supervisory authority. Such general authority is insufficient to establish liability under Labor Law § 200 (*see Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014] [where a contractor "may have coordinated the subcontractors at the work site or told them where to work on a given day, and had the authority to review onsite safety . . . those responsibilities do not rise to the level of supervision or control necessary to hold the [contractor] liable for plaintiff's injuries under Labor Law § 200"]; *Balcazar v Commet 380, Inc.*, 199 AD3d 403, 404-405 [1st Dept 2021]).

Accordingly, defendants cannot be liable for plaintiff's injuries under a means and methods analysis.

Dangerous or defective condition in the premises

Where an injury stems from a dangerous or defective condition inherent in the premises, an owner or contractor may be liable in common-law negligence and under Labor Law § 200 when the owner or contractor "'created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice'" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

Here, defendants argue, without elaborating, that the accident cannot be attributed to a dangerous condition inherent in the premises because the Hole was created during the construction (*see e.g. Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 406 [1st Dept 2018] ["Where a defect is not inherent but is created by the manner in which the work is performed, the claim under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing on

the premises"]; *but c.f. Balbuena v 395 Hudson New York, LLC*, 214 AD3d 586, 587 [1st Dept 2023] [holding that Masonite boards installed as a part of a project were a dangerous condition]).

Here, the construction of the subfloor was a part of the construction. That said, defendants have not established when that subfloor was installed or the last time it was worked on. Further, the record does not establish as a matter of law whether the Hole itself was an intended part of the construction (which would lend further credence to defendants' position), rather than a dangerous or defective condition inherent in the subfloor. Without this information, the court cannot say that the condition in the floor was, as a matter of law, part of the construction process such that the dangerous or defective condition analysis would not apply.

Assuming arguendo that the hole was a dangerous condition inherent in the premises, defendants fail to meet their prima facie burden. Defendants argue that they did not create and had no actual or constructive notice of the Hole, but they do not support this argument with any evidence of the last time the subject area had been inspected (*see Padilla v Touro Coll. Univ. Sys.,* 204 AD3d 415, 415-416 [1st Dept 2022] [denying the defendant's summary judgment motion on the Labor Law § 200 claim where no evidence was provided of "the last time the site was inspected"]).

Accordingly, defendants may be liable for plaintiff's injuries under the dangerous or defective condition analysis.

Given the foregoing, defendants are entitled to summary judgment dismissing that part of the common-law negligence and Labor Law § 200 claim against them under a means and methods analysis but are not entitled to summary judgment dismissing the same against them under a dangerous condition analysis.

Defendants' Contractual Indemnification Claim against CSC

Defendants move for summary judgment in their favor on their third-party contractual indemnification claim against CSC.

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82, 87-88 [1st Dept 2018], quoting *Drzewinski v Atlantic Scaffold & Ladder Co.,* 70 NY2d 774, 777 [1987]).

"In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (*Correia,* 259 AD2d at 65; *see also Lexington Ins. Co. v Kiska Dev. Group LLC,* 182 AD3d 462, 464 [1st Dept 2020][denying summary judgment where indemnitee "has not established that it was free from negligence"]).

Further, unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia,* 259 AD2d at 65).

Additional facts relevant to this claim

Hunter and CSC entered into a contract for the Project, dated May 4, 2018 (the Agreement) (notice of motion, exhibit M).[2] The Agreement contains an indemnification provision that provides, as relevant:

> "To the fullest extent permitted by law and to the extent not caused by the negligence of a party to be indemnified herein (where

[2] The court notes that there was a dispute between the parties regarding whether the Agreement applied to the Project. That said, defendants address the authenticity and applicability of the Agreement in their motion papers. In its opposition, CSC does not address or otherwise dispute the authenticity or applicability of the Agreement. Instead, it only addresses the merits of the claim. Accordingly, the Agreement is deemed to apply to the subject accident.

> required by law), [CSC] shall indemnify, defend, save and hold harmless [Hunter], the Owner . . . from and against any and all claims . . . including without limitation reasonable attorneys' fees . . . arising out of or related to any of the following: . . . (ii) the Work (including, without limitation, any extension, modification, or change to the Work, by change order or otherwise) or the preparation or performance of such Work . . . or (iii) the acts or omissions of [CSC] or any person or entity acting on its behalf"

(*id.* Art. 8, section 8.1) (the Indemnification Provision).

Here, the accident arose from plaintiff's work at the Project as an employee of CSC, pursuant to the Agreement. Therefore, the accident arose from CSC's work. Accordingly, the Indemnity Provision applies to, and covers plaintiff's accident.

CSC fails to raise any question of fact as to the applicability of the Provision, or whether it contains the requisite limiting language, pursuant to General Obligations Law § 5-322.1.

That said, as discussed above issues of fact exist as to defendants' negligence. Accordingly, defendants are entitled only to a conditional award of summary judgment on this contractual indemnification claim (*see Herrero v 2146 Nostrand Ave. Assoc., LLC,* 193 AD3d 421 [1st Dept 2021]).

The parties remaining arguments have been considered and were found unavailing.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the part of the motion of defendants/third-party plaintiffs RXR Glen Isle Partners LLC, RXR Garvies P1 Building H Owner LLC, RXR Garvies P1 Building I Owner LLC and RXR Garvies P1 Building B Owner LLC and defendant/third-party plaintiff Hunter Roberts Construction Group, LLC (together, defendants) (motion sequence number 003), pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them is granted as to the Labor Law § 241 (6) claims and that part of the common-law negligence and Labor Law § 200

claims predicated upon the means and methods analysis, and that part of the motion is otherwise denied; and it is further

ORDERED that the part of defendants' motion for summary judgment in their favor on their contractual indemnification claims against third-party defendant Custom Services Contracting of NY Inc. is conditionally granted pending an ultimate determination on the issue of defendants' negligence, and that part of the motion is otherwise denied; and it is further

ORDERED that the remainder of this action shall continue**.**

This constitutes the decision and order of the court.

8/8/2024
DATE

RICHARD G. LATIN, J.S.C.

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