SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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ALEJANDRO SANTACRUZ,

Plaintiff,

- v -

THE CITY OF NEW YORK, TURNER CONSTRUCTION COMPANY, LONG ISLAND CONCRETE INC.,SAFWAY ATLANTIC, LLC,STARR INDUSTRIES NY LLC,MAMAIS CONTRACTING CORP.,

Defendant.

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INDEX NO. 161174/2022

MOTION DATE 02/21/2024

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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THE CITY OF NEW YORK, TURNER CONSTRUCTION COMPANY

Plaintiff,

-against-

RITE-WAY INTERNAL REMOVAL INC.

Defendant.

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Third-Party
Index No. 595412/2024

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 57, 58, 59, 60, 61, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for DISMISSAL.

In December 2022, plaintiff Alejandro Santacruz commenced the instant personal injury action against defendants The City of New York (hereinafter, "the City"), Turner Construction Company ("Turner"), Long Island Concrete Inc. ("Long Island"), Safway Atlantic, LLC ("Safway"), Starr Industries NY LLC ("Starr"), and Mamais Contracting Corp. ("Mamais"). Plaintiff alleges that, on December 15, 2021, he was working as an employee of Rite-Way Internal Removal, Inc. ("Rite-Way"), now a third-party defendant, on the subject premises at 476 5th Avenue, New York, New York, when he was injured due to defendants' failure to keep the work site in a reasonably safe condition and free of dangers and other hazards. He asserts causes of action under New York Labor Law §§ 200, 240 (1), and 241(6). In this motion sequence (mot. seq. 002), Safway moves for summary judgment pursuant to CPLR 3212 as to (1) plaintiff's Labor Law claims against it and (2) its own contractual indemnification cross claims against

Rite-Way and Turner and common-law indemnification against the remaining co-defendants. [1] (NYSCEF doc. no. 39, notice of motion.) Except for Rite-Way, each branch of the motion is opposed. For the following reasons, Safway's motion is denied in its entirety.

BACKGROUND

In 2020, The City contracted with Turner to serve as the general contractor of a project to renovate The New York Public Library, which it owns and maintains, located at 476 5th Avenue, New York, New York, 10018. (NYSCEF doc. no. 17 at ¶ 4, 8, 11, City of New York's answer.) Thereafter, Turner entered into subcontracting agreements with both Rite-Way (NYSCEF doc. no. 56, Turner contract with Rite-Way) and Safway (NYSCEF doc. no. 50, Turner/Safway agreement). Under the Turner/Rite-Way agreement, Rite-Way was hired as a demolitionist to remove or take out permanent structures within the New York Public Library; under the Turner/Safway agreement, Safway agreed to provide hoisting and scaffolding for the installation of a trolley beam above a demolished staircase on the premises. (*Id*.) Under a similar though separate Safway/Rite-Way contract, Safway agreed to install the trolley beam system over the same staircase. (NYSCEF doc. no. 51, Rite-Way/Safway side agreement.)

According to the affidavit of Sean Mitchell, Safway's foreman for the project, Safway began installing the trolley beam on the night of December 12, 2024. (NYSCEF doc. no. 49 at ¶ 8.) He explained that "[Safway's] workers offloaded the truck at the site, assembled a scaffold base for the trolley, built a platform on the stairs without removing any guardrails from the staircase, and installed the trolley beam at night. Safway would disassemble the scaffold before leaving and reassemble it the following night." (*Id*.) He further avers that Safway's records—records which were not attached to its moving papers—indicate that all Safway workers left the worksite after completing the trolly beam at 4:30 a.m. on December 15, 2021, and were not on the premises when plaintiff's accident occurred at 10:00 a.m. later that same day. (*Id*. at ¶ 10.)

As the City of New York is a named defendant, plaintiff sat for a New York General Municipal Law § 50-h hearing on October 12, 2022. At this hearing, plaintiff testified that, while working to demolish the staircase, (1) he fell through a hole on the first floor and landed in the basement (NYSCEF doc. no. 48 at 10, § 50-H hearing transcript), (2) he did not know which party working on the project had created the hole or when they did so (*id*.), (3) sometime before December 15, unidentified "carpenters" had put a sheetrock/plywood covering over the hole (*id*. at 12), (4) a fire started on or around the covering, and (5) after Rite-Way workers poured water on the fire/hole covering, a Rite-Way foreman instructed him to disconnect his harness and retrieve a fire extinguisher, at which point he suffered the alleged injury (*id*. at 14-15.)

In this motion sequence, Safway has moved for summary judgment before any party depositions have been conducted. As such, its motion relies upon the parties' contracts, plaintiff's § 50-h testimony, and, principally, Mitchell's affidavit and his assertions that

[1] Safway's Notice of Motion seeks summary judgment on all co-defendant cross claims against it. With the exception of Turner's cross claim for additional insured coverage, Safway does not specifically address any of these claims in their memorandum of law. (*See* NYSCEF doc. no. 39, Safway memo of law.) However, to the extent Safway seeks summary judgment on these claims for indemnification and contribution, Safway would not be entitled to such relief as it has not shown itself to be free of negligence at this juncture.

"although the incident occurred in the same area as where we installed our trolley beam, Safway had no connection to the incident," that "No Safway employee was involved in making the hole through which plaintiff allegedly fell," and "[no] Safway employee cover[ed] that hole with sheetrock or any other substance." (NYSCEF doc. no. 49 at ¶ 11.)

DISCUSSION

Under CPLR 3212 (b), a proponent moving for a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to eliminate any material issues of fact from the case. (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010]; *Kesselman v. Lever House Rest.*, 29 A.D.3d 302 [1st Dept 2006].) The moving party, here Safway, must demonstrate entitled to judgment through admissible evidence. (*See Sears Holdings Mgt. Corp v Rockaway Realty Assoc.*, 176 AD3d 433, 433 [1st Dept 2019].) If the moving party establishes their entitlement, the burden shifts to the non-moving parties to raise a triable issue of fact. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Since summary judgment is an extreme remedy, the Court must draw all reasonable inferences in favor of the non-moving parties. (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012].) CPLR 3212 (f), however, leaves courts with the discretion to deny summary judgment motions as premature where it appears from the affidavits in opposition that facts essential to justify opposition may exist but cannot then be stated. (CPLR 3212 [f]; *Singh v Avis Rent A Car Sys., Inc.*, 119 AD3d 768, 770 [2d Dept 2014].) As such, it is incumbent on the parties opposing the motion to provide an evidentiary basis to suggest that discovery might lead to relevant evidence or that essential facts are in the exclusive knowledge or control of the moving party. (*Suero-Sosa v Cardona*, 112 AD3d 706, 708 [2d Dept 2013].)

Summary Dismissal of Plaintiff's Labor §§ 200, 240 (1), and 241 (6) Claims

Safway contends that it has submitted undisputed evidence that it did not supervise or control the manner and means of plaintiff's work and did not create or have knowledge of the defect that caused his injury. More specifically, Safway asserts that it did not pour water or instruct plaintiff to unfasten his harness and retrieve a fire extinguisher. Thus, Safway asserts, plaintiff cannot recover against it under § 200 or for common-law negligence. (*See Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012] [finding that personal injury claims 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]; *Comes v N.Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [holding that no liability attaches to the owner of a premises where it did not exercise supervisory control over the contractor's methods of work].) The Court finds Safway's argument unpersuasive since it has not established through admissible evidence that it did not create or have knowledge of the defect or dangerous condition.

First, other than plaintiff's § 50-h testimony, the only evidence Safway submitted to support its argument is Mitchell's unchallenged affidavit, wherein he avers that Safway's "location touch" files demonstrate that its workers were not on-site at the premises when the accident occurred. However, these touch files (which Safway submitted in reply and amount to time records of when its employees entered and exited the worksite) do not unequivocally

establish that it played no part in creating the hole or covering it up with sheetrock or contributing to the accident in a different manner. As Mitchell concedes, Safway only hours earlier performed work in the same area as plaintiff's accident as they had done each of the preceding three nights. (NYSCEF doc. no. 49 at ¶ 10.)

Further, through their opposing affidavits, the non-moving defendants have demonstrated the existence of an evidentiary basis upon which further discovery may lead to relevant evidence. Among other outstanding questions, plaintiff could not identify (1) whose work created the hole, (2) when it occurred, and (3) which party put the sheetrock/plywood covering over the hole that led to plaintiff's injury. As Mamais explained in its opposition, to grant summary judgment at this juncture, without Safway's deposition, the Court would necessarily be precluding the remaining parties from questioning Safway as to what assembling and disassembling the scaffolding entailed, whether it used materials in the construction of the trolly beam that were similar to those used to cover the hole, and how/where were its materials stored on the premises when not being used, i.e., were they in the vicinity of the hole and possibly contributed to the fire. Thus, finding answers to these questions requires party depositions, including from Safway, to uncover whether and to what extent Safway's work in and around the subject area contributed to plaintiff's injury. (*See Cruz v City of New York*, 183 AD3d 466, 468 [1st Dept 2020] [finding court providently exercised discretion in denying summary judgment as premature given the motion was filed while depositions and other discovery remained outstanding]; *Wilson v Yemen Realty Corp*., 74 AD3d 544, 545 [1st Dept 2010] ["The affidavit of the principal of defendant…denying any involvement in supplying the ladder from which the decedent fell…raise[s] material issues of fact warranting denial of summary judgment"]; *Reid v St. Luke 's-Roosevelt Hosp. Ctr.*, 191 AD3d 545, 547 [1st Dept 2021] [finding summary judgment on liability was premature where depositions were necessary to flesh out the circumstances of the conduct at issue but had yet to take place].)

Safway next contends that the Court must dismiss plaintiff's §240 (1) cause of action as it cannot be considered a contractor within the meaning of the Labor Law. (*See* NYSCEF doc. no. 40 at 16, Safway memo of law.) Its argument appears to be that, as a subcontractor, it did not have the authority to supervise or control the work from which plaintiff's injury arises. However, as described above, there remain issues of fact as to the specific nature of the work that caused plaintiff's injury, including whether Safway contributed to it. As such, Safway has not demonstrated that it cannot be held liable under § 240.

Lastly, as to plaintiff's § 241 (6) claim, Safway admits that plaintiff's failure to state a specific violation of the Industrial Code at this juncture, under First Department precedent, "is not necessarily fatal to a § 241 (6) claim and, in the absence of unfair surprise or prejudice, may be rectified by amendment, even where a note of issue has been filed." (*Walker v Metro-North Commuter R.R.*, 11 AD3d 339, 341 [1st Dept 2004].) Here, since discovery has not been completed, there can be no unfair surprise and/or prejudice. Accordingly, the branch of Safway's motion for summary judgment as to plaintiff's Labor Law and common-law negligence claims is denied in its entirety.

Safway's Contractual Indemnity Claim Against Turner and Rite-Way

Safway is not entitled to a conditional order of contractual indemnification against either Turner or Rite-Way. Initially, while Safway sought such an order against Turner in its original moving papers, it withdrew its claim in its reply papers. With respect to Rite-Way, Safway filed its Notice of Motion on February 21, 2024. However, Safway had not yet commenced a third-party action against Rite-Way by this time, having only served the third-party summons and complaint on April 22, 2024. (NYSCEF doc. no. 70, affidavit of service.) In addition, not only is there no evidence that Safway served the motion papers on Rite-Way but the parties stipulated to adjourn the motion's return date to May 6, 2024, with opposition papers to be served on or before April 19, 2024—or three days before Safway served Rite-Way. (NYSCEF doc. no. 53, stipulation of adjournment.) Accordingly, even though Rite-Way has not answered the third-party action or otherwise appeared in this action, Safway is not entitled to a conditional order on this motion sequence.

Safway's Common Law Indemnity and Indemnification Claims Against the Remaining Defendants

Safway contends that, even though liability has not been determined, the Court should grant it a conditional order for common law indemnity against Long Island, Starr, and Mamais. The Court finds otherwise. In each of Safway's citations—*Taddea v 15 West 72nd Street Owners Corp.* (268 AD2d 468, 469 [2d Dept]), *Guadalupe v MTA Bus Co.* (2014 WL 6991651 [Sup. Ct. Queens County 2014]), and *Public Ad'r of Bronx County v Trump Vil. Construction Corp.* (177 AD2d 258, 259 [1st Dept 1991])—the various courts granted a conditional order of indemnification only where the owner/contractor remained free from any suggestion that it had the authority to supervise or control the subject project or the work leading to the plaintiff's injuries. Put differently, these courts granted the conditional order only where there was no evidence of any negligence on the part of the owner/contractor leading to plaintiff's injury. (*See also Ruisech v Structure Tone Inc.*, 208 AD3d 412, 417 [1st Dept 2022].) Here, as discussed above, in the absence of full discovery, Safway has not made this demonstration. Accordingly, the Court denies this branch of the motion as well.

Finally, Safway seeks summary judgment on Turner's breach of contract claim for failing to purchase additional insured coverage. However, because it only attaches the certificate of insurance, it is not entitled to summary judgment. (*See Ruisech*, 208 AD3d at 417 [finding that, as to the failure-to-procure-insurance claims, "a certificate of insurance may be sufficient to raise an issue of fact, but standing alone, it does not prove coverage as a matter of law], citing *Prevost v One City Block LLC*, 155 AD3d 531, 536 [1st Dept 2017].)

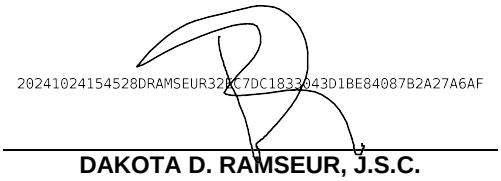
Accordingly, for the foregoing reasons, it is hereby

ORDERED that Safway Atlantic, LLC s motion for summary judgment pursuant to CPLR 3212 is denied in its entirety; and it is further

ORDERED that the parties shall appear at 60 Centre Street, Courtroom 341 on November 12, 2024 at 9:30 for a status conference with the Court; and it is further

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

This constitutes the Decision and Order of the Court.



10/18/2024
DATE

DAKOTA D. RAMSEUR, J.S.C.

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