

Plechaty v CDL W. 45th St. L.L.C.

2024 NY Slip Op 34573(U)

December 30, 2024

Supreme Court, New York County

Docket Number: Index No. 158259/2017

Judge: Alexander M. Tisch

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ALEXANDER M. TISCH PART 18

Justice

-----X

JERRY SCOTT PLECHATY and JACQUELINE F. PLECHATY,

Plaintiffs,

- v -

CDL WEST 45TH STREET L.L.C., HUDSON THEATRE, LLC, AMBASSADOR THEATRE GROUP-NY, LLC, YORKE CONSTRUCTION CORPORATION and GSI SYSTEMS, INC.,

Defendants.

-----X

GSI SYSTEMS, INC.,

Third-Party Plaintiff,

-against-

HORIZON CONTRACTING LLC

Third-Party Defendant.

-----X

YORKE CONSTRUCTION CORPORATION,

Second Third-Party Plaintiff,

-against-

LANE'S FLOORING COVERINGS AND INTERIORS, INC.,

Second Third-Party Defendant.

-----X

LANES FLOOR COVERINGS AND INTERIORS, INC.,

Third-Third Party Plaintiff,

-against-

JMC FLOOR COVERING INC.,

Third Third-Party Defendant.

-----X

INDEX NO. 158259/2017

MOTION DATE 08/16/2022,
11/03/2022,
11/22/2022

MOTION SEQ. NO. 005 006 007

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595969/2017

Second Third-Party
Index No. 595698/2019

Third Third-Party
Index No. 595325/2020

YORKE CONSTRUCTION CORPORATION,

Fourth Third-Party
Index No. 595218/2022

Fourth Third-Party Plaintiff,

-against-

GSI SYSTEMS, INC.

Fourth Third-Party Defendant.

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 005) 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 273, 279, 280, 281, 286, 287, 288, 289, 290, 291, 292, 293, 294, 320

were read on this motion to/for

SUMMARY JUDGMENT (AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 006) 282, 314, 315, 316, 318, 319, 321, 325, 326, 327, 328, 332, 333, 334, 335, 336

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 007) 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 317, 322, 323, 324, 329, 330, 331, 337, 338

were read on this motion to/for

JUDGMENT - SUMMARY

Motions Sequence Numbered 005, 006 and 007 are consolidated for disposition.

Plaintiffs Jerry Scott Plechaty (plaintiff) and Jacqueline F. Plechaty (together, plaintiffs) bring this Labor Law action to recover damages for personal injuries plaintiff allegedly sustained on September 7, 2016, when plaintiff Jeffrey Scott Plechaty fell from a ladder while working at a building under renovation.

In Motion Sequence Number 005, plaintiffs move, pursuant to CPLR 3212, for partial summary judgment on the Labor Law § 240 (1) cause of action against defendants CDL West 45th Street LLC (CDL), Hudson Theatre LLC (Hudson), Ambassador Theatre Group-NY LLC (Ambassador), Yorke Construction Corporation (Yorke) and GSI Systems, Inc. (GSI). In motion sequence no. 006, CDL, Hudson, Ambassador and GSI (together, the Owners/GSI) move, pursuant to CPLR 3212, for summary judgment on their contractual indemnification claims against Yorke

and third-party defendant Horizon Contracting LLC (Horizon). In Motion Sequence Number 007, Horizon moves, under CPLR 3212, for summary judgment dismissing all claims, third-party claims, cross-claims and counterclaims asserted against it. For the reasons set forth below, plaintiffs' motion is granted, and the motions brought by the Owners/GSI and Horizon are granted in part and denied in part.

I. FACTUAL BACKGROUND

CDL owns the theater located at 139-141 West 44th Street, New York, New York. CDL leased the theater to Hudson and Ambassador, who both operate it. Hudson hired Yorke as its general contractor to renovate the theater (the Project) (Yorke Contract, attached as Exhibit Q to Sassower affirmation, NYSCEF Doc No. 265), and Yorke subcontracted the HVAC portion of its work to GSI (GSI Subcontract, attached as Exhibit S to Sassower affirmation, NYSCEF Doc No. 267). GSI hired Horizon, plaintiff's employer, to complete the insulation portion of its HVAC work (Hudson Purchase Order, attached as Exhibit U to Sassower affirmation, NYSCEF Doc No. 269).

Plaintiff, a journeyman insulator, testified that on the day of the accident, he was tasked by Neil Jordin (Jordin), his supervisor, with wrapping fiberglass thermal insulation around HVAC ducts and steam risers and applying fire stopping at several locations on the second floor at the site (Plechaty Dep. Tr., attached as Exhibit M to Sassower affirmation, NYSCEF Docs No. 258-261 [filed in segments], at 13, 31-32, 34-37, 39 and 45). Carpenters and other trades were present (*id.* at 41), but plaintiff was the only Horizon employee working that day (*id.* at 59, 234).

Plaintiff testified that upon arriving at the site, he located several boxes of Horizon's materials in a balcony area on the second floor (Plechaty Dep. Tr. at 39 and 47-50). A folded, unfinished wood eight-foot A-frame ladder sat atop the boxes (*id.* at 45-46, 48, 287). Although

the ladder bore no markings (*id.* at 249) or anything to indicate that it belonged to Horizon, “[n]obody said anything and it looked like a good ladder to me” (*id.* at 58). Plaintiff did not notice anything wrong with the ladder when he opened it (*id.* at 68). The fittings on the ladder seemed fine (*id.* at 288), and although he did not check the spreaders, the ladder felt sturdy (*id.* at 329). No one from Yorke or GSI gave plaintiff the ladder (*id.* at 273). Before the accident, plaintiff made between 20 to 25 trips ascending and descending the ladder, opening and closing it and moving it to different locations without incident (*id.* at 74-75, 92-93). He testified that the ladder “felt sturdy and okay.” (*id.* at 80).

According to plaintiff, Jordin stopped by the site on September 7, 2016, at 9:00 a.m. to show plaintiff other areas that required work (*id.* at 37, 44). At that time, plaintiff told Jordin that the carpenters had framed a wall and covered several risers that needed insulation with four-foot by eight-foot panels of sheetrock, and that Horizon had to ask the carpenters to open the wall by removing those panels (*id.* at 83-84). The carpenters removed four to five sheetrock panels that were attached to the metal “studding of the wall” (*id.* at 88, 252) but left the wall studs in place (*id.* at 254, 296). The studs were affixed with screws to a metal track on the floor, but because there was no finished ceiling in the area, “[t]he stud slid open like an upside down [sic] A because the sheetrock is not attached to it anymore” (*id.* at 298-299). Plaintiff did not ask anyone to remove the metal track as there was no reason to do so (*id.* at 324 and 373).

The accident occurred as plaintiff worked on a horizontal duct eight and one-half to nine feet above the floor (*id.* at 255). Plaintiff testified he opened the A-frame ladder in front of the duct and placed the front edge of the ladder in front of the track (*id.* at 299-300). He explained the studs impeded his work “because I couldn’t position the ladder everywhere I wanted to” and he “would have liked to have been closer to the duct so I didn’t have to reach in” to perform his work

(*id.* at 301-302). There was no other equipment available which would have given him better access (*id.* at 257). Though plaintiff did not see any debris on the ground, the concrete floor was uneven and looked like it had been “milled or chipped” (*id.* at 99, 114, 119 and 123 and 5/23/2019 errata sheet). Plaintiff stated, “[i]t was like a rough surface, like almost kind of when they are paving like a blacktop asphalt road and how they grate the asphalt so it will stick better. I think they do the same thing with the concrete where it’s kind of a little bit chipped out. It’s not a smooth surface” (*id.* at 100). Plaintiff did not see anyone working on the concrete floor that day (*id.* at 247). Plaintiff testified that he was standing with both feet on the sixth rung of the ladder, and, while facing the duct, he reached out with his right hand to smooth out the insulation that he had just placed around the duct (*id.* at 256, 259-260 and 263-264). He stated, “I was on that last piece I was taping, reaching to tape the last piece on top ... is when I felt the ladder sort of twist and it felt like it walked a little and the next thing I know it fell and I fell” (*id.* at 104-105 and 5/23/2019 errata sheet), and “I felt like I fell straight down and the ladder fell to the side” (*id.* at 265).

Paris was employed by the Ambassador Theatre Group as the general manager at the Hudson Theatre (Eric Paris Dep. Tr., attached as Exhibit O to Sassower aff., NYSCEF Doc No. 263 at 9). Paris testified that Yorke was responsible for coordinating all trades and site safety (*id.* at 70 and 74). Neither Ambassador nor Hudson had authority to stop the work on the Project (*id.* at 100). By September 2016, the demolition phase had been completed and the framework for the theater was in place (*id.* at 49-50). Paris testified that the ground on the second floor was made of concrete, but he did not know if new concrete had been laid down and could not recall if the floor had been milled (*id.* at 77-78).

Joel Brukner, Yorke’s project manager, testified Yorke had control over the means and methods of construction, sequencing and coordination of the work, and jobsite safety (Joel Brukner

Dep. Tr., attached as Exhibit P to Sassower affirmation, NYSCEF Doc No. 264, at 11 and 23-25).
Brokner could not recall if the floors in the second-floor lounge areas were made of concrete or if the floors had been chipped out to create a smoother surface (*id.* at 38-40). Brokner stated that “[t]here’s a chance that there would have been self-leveling [concrete] put down, ... but we would not ordinarily chip or mill the concrete prior to pouring a self-leveling product on top of that” (*id.* at 40). Brokner also could not specifically recall observing “a milled floor finish of any sort” on the second floor, and testified that if he observed a tripping hazard, he would have “likely taken the methods and means to correct [it]” (*id.* at 43). Brokner also believed that a new structural slab had been poured on the second floor, “in which case the prep required would be minimal” (*id.* at 144). Yorke did not supply any ladders, scaffolds or harnesses to its subcontractors (*id.* at 175). Although the construction superintendent was tasked with looking out for safety concerns and pointing out whether someone was not working in a safe manner (*id.* at 182-183), the superintendent would not inspect a subcontractor’s equipment as each subcontractor supplies its own equipment (*id.* at 187).

Evan Avidane, GSI’s president, testified that GSI did not furnish ladders or equipment to its subcontractors, who were responsible for providing their own equipment (Evan Avidane Dep. Tr., attached as Exhibit T to Sassower Aff., NYSCEF Doc. No. 268, at 9, 46 and 85). Avidane testified GSI monitored the work performed by its subcontractors to ensure “the work was getting done ... [and] getting done correctly” (*id.* at 68). Other than confirming the work was performed correctly, GSI did not direct the means and methods of how its subcontractors performed their work or give them safety instructions, though GSI did retain stop work authority (*id.* at 70, 83-84 and 94). If a subcontractor notified GSI of an unsafe condition, GSI would notify Yorke (*id.* at 69). Avidane was not aware of any complaints about jobsite conditions (*id.* at 85).

Anthony Loverde, a construction manager at GSI, testified that GSI subcontracted most of its work to other companies, like Horizon (Anthony Loverde Dep. Tr., attached as Exhibit V to Sassower affirmation, NYSCEF Doc No. 270, at 11-13). Loverde confirmed GSI was not responsible for the safety of its subcontractors' employees (*id.* at 72) and that it did not provide Horizon with equipment (*id.* at 82). Loverde could not recall having any concerns about the physical condition of the areas where Horizon worked (*id.*). Loverde directed Jordin on scheduling, but he did not directly instruct any other Horizon employees on their work (*id.* at 69 and 78). Loverde could not recall the condition of the floor on the second floor where Horizon worked, including whether the floor was made of concrete or if it was smooth or rough (*id.* at 49-50). Yorke's superintendent contacted Loverde about plaintiff's accident and filled out a report (*id.* at 31). Loverde could not recall conducting his own investigation into the accident or if he spoke to Jordin or anyone at Horizon about it (*id.* at 54, 56, 58).

Noel Jordin testified that it was his usual procedure to contact Horizon employees the night before a job to explain the work (Noel Jordin Dep. Tr., attached as Exhibit W to Sassower affirmation, NYSCEF Doc No. 271, at 17). He testified Horizon provided its employees with safety equipment (*id.* at 99-100), and left materials for plaintiff's work, including "an eight-foot fiberglass ladder," at this jobsite (*id.* at 21). Jordin further stated that Horizon "always used fiberglass ladders" and that "it's not our normal procedure to purchase wooden ladders" (*id.* at 20). Jordin could not recall if he saw plaintiff working on a ladder on the day of the accident (*id.* at 29), what type of ladder plaintiff was using (*id.*), or if he told plaintiff to use a different ladder (*id.* at 31).

Jordin testified plaintiff had raised the issue of sheetrock blocking access to pipes that required insulation, though Jordin could not remember approaching GSI on the issue (*id.* at 40).

He also testified that if the metal studs and tracks holding the sheetrock panels remained in place, then “[i]t would impede the progress of installing the materials. It could potentially make things more unsafe” (*id.* at 51). Jordin recalled speaking to GSI about coordination issues, including instances where sheetrock had been installed before Horizon could complete its work (*id.* at 41), and housekeeping concerns, which would have included the condition of the floors (*id.* at 72 and 75). Jordin testified he saw a “[m]illed and grooved” floor (*id.* at 60) in the “mezzanine area [where Horizon had to install insulation] because they were preparing it to pour ... some kind of self-leveling concrete” (*id.* at 61). He described the milled or grooved condition of the floor as a coordination or housekeeping issue for the general contractor (*id.* at 111). Although Jordin could not recall specific details about the happening of plaintiff’s accident, Jordan testified it was “possible” plaintiff had to set up a ladder on the milled floor (*id.* at 61). Jordin testified that the floor where plaintiff worked “did not appear at the time ... to be an unsafe work area” and that “[i]t did not seem unsafe ... to my knowledge” (*id.* at 113). Jordin generally recalled seeing a milled or grooved floor but “that wasn’t the condition when I went there ... I remember it being like rough but not something that I would have said, ‘Okay, you know, Jerry, let’s not work here today’” (*id.* at 114).

An employee’s report of injury form signed by plaintiff states that the [l]adder twisted and then I was on the floor” (Accident Report, attached as Exhibit N to Sassower affirmation, NYSCEF Doc No. 262, at 2). This description of the accident also appears on a C-2 employer’s report of injury form (*id.* at 8).

II. PROCEDURAL HISTORY

Plaintiff Jerry Plechaty asserted claims under Labor Law §§ 200, 240 (1), and 241 (6) and common-law negligence against the Owners/GSI and Yorke (NYSCEF Doc No. 1). Plaintiff

Jacqueline Plechaty asserted a single claim for loss of consortium. CDL interposed a cross-claim against Yorke for indemnification (CDL Verified Answer, attached as Exhibit B to Sassower affirmation, NYSCEF Doc No. 247, ¶¶ 48-51). Hudson and Ambassador pled a cross-claim against Yorke for contractual indemnification (Hudson and Ambassador Verified Answer, attached as Exhibit C to Sassower affirmation, NYSCEF Doc No. 248, ¶¶ 27-31). GSI pled a cross-claim for common-law or contractual indemnification against Yorke (GSI Verified Answer, attached as Exhibit E to Sassower affirmation, NYSCEF Doc No. 250, ¶ 32).

GSI brought a third-party action against Horizon for common-law and contractual indemnification, contribution, and failure to procure insurance (GSI Third Party Complaint, attached as Exhibit C to Kaye affirmation, NYSCEF Doc No. 301). CDL, Hudson, and Ambassador pled cross-claims against Horizon for common-law and contractual indemnification and failure to procure insurance (CDL/Hudson/Ambassador Cross-Claims as to Horizon, attached as Exhibit F to Kaye affirmation, NYSCEF Doc No. 304). Yorke cross-claimed against Horizon for contribution, common-law and contractual indemnification, and failure to procure insurance (Yorke Cross-Claims, NYSCEF Doc No. 65).

Yorke brought third-party actions against second-third party defendants Lane's Floor Coverings and Interiors, Inc. (Lane's) and GSI for common-law and contractual indemnification, contribution, and for breach of contract for failing to procure insurance (Yorke Third Party Summons and Complaint against Lane's, and Yorke Third Party Summons and Complaint against GSI, NYSCEF Docs. No. 68 and 219). Lane's then brought a third-party action against third third-party defendant JMC Floor Covering Inc. (JMC) (Lane's Third Party Summons and Complaint against JMC, NYSCEF Doc No. 81). The actions against Lane's and JMC have been dismissed (NYSCEF Doc Nos. 191-192).

Plaintiffs now move for summary judgment against the Owners/GSI and Yorke on the issue of their liability on the Labor Law § 240 (1) claim (Motion Seq. No. 005). The Owners/GSI move for summary judgment dismissing the Labor Law § 200 and common-law negligence claims and for summary judgment on the contractual indemnification claims against Yorke and Horizon (Motion Seq. No. 006). Horizon moves for summary judgment dismissing the complaint, cross-claims and counterclaims pled against it (Motion Seq. No. 007).

III. DISCUSSION

It is well settled that “the 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” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Assuming the moving party meets its *prima facie* burden, “the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do” (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

A. Plaintiff's Motion (005) for Summary Judgment on Claim 2 (Labor Law § 240 [1])

Labor Law § 240 (1) “was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder 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” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). The statute “imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites” (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]), regardless of whether they supervised or controlled the work (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015], *rearg*

denied 25 NY3d 1211 [2015]). To prevail on a Labor Law § 240 (1) claim, the plaintiff must demonstrate both a violation of the statute and that such violation was a proximate cause of the plaintiff's accident (*id.*).

Plaintiffs have satisfied their burden on summary judgment against most of the defendants (*see DiBrino v Rockefeller Ctr. N., Inc.*, 230 AD3d 127, 130 [1st Dept 2024]). The failure “to properly secure the ladder against movement or slippage and to ensure that it remained steady and erect’ while [a] plaintiff was on it” is sufficient to satisfy the plaintiff’s burden on summary judgment (*DiBrino*, 230 AD3d at 130 [internal citation omitted]; *Castillo v TRM Contr. 626, LLC*, 211 AD3d 430, 430 [1st Dept 2022] [“a statutory violation is established if a scaffold or ladder shifts, slips, or collapses, thereby causing injury to a worker”]; *Scekic v SL Green Realty Corp.*, 132 AD3d 563, 565 [1st Dept 2015] [“[p]roof that a ladder was defective or that it slipped, tipped, was placed improperly or otherwise failed to provide support gives rise to 240 (1) liability”]). In this case, plaintiff was exposed to an elevation-related risk because his work entailed standing on an eight-foot A-frame ladder to reach HVAC ducts located eight and one-half to nine feet overhead (*see Rodas-Garcia v NYC United LLC*, 225 AD3d 556, 556 [1st Dept 2024]; *Rodriguez v Milton Boron, LLC*, 199 AD3d 537, 538 [1st Dept 2021]). Plaintiff’s testimony that the ladder on which he was standing shifted and caused him to fall establishes that the ladder failed to provide him with adequate protection (*see DiBrino*, 230 AD3d at 130). Plaintiff also testified that the floor on which he placed the ladder was uneven (*see Ross v 1510 Assoc. LLC*, 106 AD3d 471, 471 [1st Dept 2013]), and that he was unable to place the ladder closer to the duct because of the metal track (*see e.g. Castillo, LLC*, 211 AD3d at 430). Plaintiffs need not show that the ladder was defective to obtain partial summary judgment (*see Rivera v 712 Fifth Ave. Owner LP*, 229 AD3d 401, 402 [1st Dept 2024]; *Rodas-Garcia*, 225 AD3d at 556).

Because Labor Law § 240 (1) “*impos[es] absolute liability*” upon owners and general contractors for failing to furnish workers with adequate safety devices (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]; *accord Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 522 [1985], *rearg denied* 65 NY2d 1054 [1985]), plaintiffs are entitled to partial summary judgment against CDL, the owner of the premises (*see Gordon v Eastern Ry. Supply*, 82 NY2d 555, 560 [1993]), and Yorke, the general contractor (*see DiBrino*, 230 AD3d at 130).

A lessee who contracts for the construction work may be liable as an owner under the Labor Law (*Otero v 635 Owner LLC*, 210 AD3d 435, 436 [1st Dept 2022]). Hudson admitted in its verified answer and counterstatement of material facts that it leased the premises and hired Yorke (NYSCEF Doc No. 248, ¶ 2; NYSCEF Doc No. 280, Owners/GSI counterstatement, ¶¶ 2-3). These admissions are sufficient to deem Hudson an owner for purposes of liability under the Labor Law (*see Douglas v Tishman Constr. Corp.*, 205 AD3d 570, 571 [1st Dept 2022]).

A subcontractor who is a statutory agent of the owner or general contractor may also be liable under the Labor Law (*see Bacova v Paramount Leasehold, L.P.*, 223 AD3d 428, 430 [1st Dept 2024]; *see generally Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). A subcontract explicitly granting a subcontractor supervisory authority over the injury-producing work or a subcontractor exercising actual supervision is sufficient to establish that the subcontractor is a statutory agent for purposes of liability under the Labor Law (*Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 192 [1st Dept 2011]). Here, GSI was Yorke’s statutory agent because GSI subcontracted a portion of its HVAC work to Horizon (*see Badzio v East 68th St. Tenants Corp.*, 200 AD3d 591, 592 [1st Dept 2021]; *Hewitt v NY 70th St. LLC*, 187 AD3d 574, 574-575 [1st Dept 2020]; *Tuccillo v Bovis Lend Lease, Inc.*, 101 AD3d 625, 628 [1st Dept 2012]). In addition, section 4.1.2 of the GSI Subcontract states, in part, “[t]he Subcontractor

shall supervise and direct the Subcontractor's Work" (NYSCEF Doc No. 267 at 5). This language is sufficient to establish that GSI had the authority to supervise and control plaintiff's work (*see Weber v Baccarat, Inc.*, 70 AD3d 487, 488 [1st Dept 2010]).

Plaintiffs, however, have failed to meet their burden as to Ambassador's liability. First, plaintiffs and Ambassador have produced contradictory evidence as to whether Ambassador was a lessee. Ambassador denied that it leased the premises in its verified answer (NYSCEF Doc No. 248, ¶ 3), but in response to plaintiffs' motion, Ambassador admitted that it was a lessee (NYSCEF Doc No. 280, ¶ 2). Next, Hudson hired Yorke for the Project (NYSCEF Doc No. 265 at 1). While Ambassador did not contract with Yorke, "[Labor Law § 240 (1)] may also apply to a lessee, where the lessee has the right or authority to control the work site, even if the lessee did not hire the general contractor" (*Zaher v Shopwell, Inc.*, 18 AD3d 339, 339-340 [1st Dept 2005]). Plaintiffs have not furnished any evidence demonstrating that Ambassador had the right or authority to control the jobsite, as Paris testified that Ambassador had no stop work authority on the Project (NYSCEF Doc No. 263 at 100).

The Owners/GSI fail to raise a triable issue of fact in opposition. That CDL, Hudson, and GSI did not direct plaintiff's work is not relevant to the issue of their liability. As noted above, owners, general contractors and their statutory agents are liable under Labor Law § 240 (1) whether or not they supervised or controlled the work (*Barreto*, 25 NY3d at 433).

The Owners/GSI also argue that plaintiff's actions were the sole proximate cause of the accident. While contributory negligence is not a defense to a Labor Law § 240 (1) claim (*Blake v Neighborhood Hous. Servs. of City of N.Y. City*, 1 NY3d 280, 286 [2003]), a defendant cannot be held liable where the plaintiff's actions are the sole proximate cause of the accident (*id.* at 290). A defendant establishes the merits of the sole proximate cause defense by demonstrating that the

“plaintiff had adequate safety devices available; that [plaintiff] knew both that they were available and that [plaintiff] was expected to use them; that [plaintiff] chose for no good reason not to do so; and that had [plaintiff] not made that choice [plaintiff] would not have been injured” (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]). Here, the Owners/GSI submit that Plechaty’s failure to ask the carpenters to remove the wall studs and track and his decision to work on the uneven floor without alerting anyone to that condition caused the accident. Plaintiff’s actions, however, amount to no more than contributory negligence, which is not a defense to this claim (*see Vitucci v Durst Pyramid LLC*, 205 AD3d 441, 443-444 [1st Dept 2022] [“[a]daptions in work that a plaintiff is forced to make at a work site cannot be used as a defense to a section 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”]).

Yorke similarly argues that plaintiff’s failure to check or lock the spreaders on the ladder and his failure to move the ladder to a better location were the sole proximate cause of the accident. These arguments are equally unpersuasive, since the failure to secure the ladder constitutes comparative negligence (*see Rodriguez v BSREP UA Heritage LLC*, 181 AD3d 537, 538 [1st Dept 2020]). Although the accident was unwitnessed, the mere fact that it was not witnessed is no bar to granting the motion (*see Gonzalez v 1225 Ogden Deli Grocery Corp.*, 158 AD3d 582, 584 [1st Dept 2018]). Finally, plaintiff’s testimony concerning the size of the room where the accident occurred and whether he was standing 12 feet above the floor are minor inconsistencies that are insufficient to defeat summary judgment, especially where Yorke does not dispute that the accident occurred (*see Gutierrez v Turner Towers Tenants Corp.*, 202 AD3d 437, 438 [1st Dept 2022]).

B. Owners/GSI's Motion (006) for Summary Judgment on Contractual Indemnification Claim

1. Labor Law § 200 and Common-Law Negligence, Claims 1 and 4

Labor Law § 200 codifies “the common-law duty imposed upon an owner or general contractor to maintain a safe construction site” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]). Claims under Labor Law § 200 and common-law negligence can arise from a defective or dangerous premises condition, the means and methods of how the work was performed, or both (*Moore v URS Corp.*, 209 AD3d 438, 440 [1st Dept 2022]). If the injury results from a dangerous premises condition, liability may be imposed if the owner or general contractor created the condition or had actual or constructive notice of it (*Cappabianca v Skanska USA Bldg., Inc.*, 99 AD3d 139, 144 [1st Dept 2012]). If, on the other hand, the injury is caused by the means and methods of the work, liability may be imposed if the owner or general contractor exercised direct supervisory control over the plaintiff’s injury-producing work (*id.*).

Here, plaintiff’s accident arose out of the means and methods of his work but the Owners/GSI had no control over that matter. Plaintiff testified he received all his instructions from his employer, Horizon (*see Lourenco v City of New York*, 228 AD3d 577, 583 [1st Dept 2024]; *Siegel v Delta Airlines, Inc.*, 227 AD3d 516, 517 [1st Dept 2024]). There is no evidence demonstrating that the Owners/GSI directly supervised and controlled plaintiff’s HVAC insulation work.

Plaintiffs, in opposition, fail to raise a triable issue of fact as to whether the Owners/GSI directed plaintiff’s work. Their contention that the accident arose out of a dangerous premises condition is equally unpersuasive. The milled and chipped condition of the floor was not a defect inherent in the premises but was created by the means and methods of the construction work (*see Lindemann v VNO 100 W. 33rd St. LLC*, 223 AD3d 434, 434 [1st Dept 2024]; *Dalanna v City of*

New York, 308 AD2d 400, 400 [1st Dept 2003]). Plaintiffs have not presented any evidence to suggest that GSI created that condition or that it had actual or constructive notice of it such that GSI can be held liable as a statutory agent (*see DeMaria v RBNB 20 Owner, LLC*, 129 AD3d 623, 625 [1st Dept 2015]). Accordingly, the Labor Law § 200 and common-law negligence claims are dismissed as against the Owners/GSI.

2. The Owners/GSI Cross-Claims for Contractual Indemnification

“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’” (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987] [citation omitted]). A party seeking contractual indemnification “must ‘establish that it was free from any negligence and was held liable solely by virtue of the statutory liability’” (*Travalja v 135 W. 52nd St. Owner LLC*, — AD3d —, 2024 NY Slip Op 05780, *2 [1st Dept 2024], quoting *Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 65 [1st Dept 1999]).

a. Against Yorke

The General Conditions section of the Yorke Contract contains an indemnification provision, which reads as follows:

“§ 3.18.1 To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner, ... and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys’ fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity

that would otherwise exist as to a party or person described in this Section 3.18” (NYSCEF Doc No. 266 at 16).

At the outset, neither CDL¹ nor Ambassador has demonstrated their entitlement to summary judgment on the contractual indemnification cross-claims against Yorke. A contractual indemnification provision must be strictly construed (*see Shah v 20 E. 64th St., LLC*, 230 AD3d 405, 410 [1st Dept 2024]), and here, neither CDL nor Ambassador is a signatory to the Yorke Contract (*see Pitang v Beacon Broadway Co., LLC*, 231 AD3d 414, 416 [1st Dept 2024]; *Zieba v 45 Main St. Assoc.*, 171 AD3d 482, 482 [1st Dept 2019]). The Yorke Contract also defines the term “owner” to mean “the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number” (NYSCEF Doc No. 266 at 10 [article 2, section 2.1.1.]), and it identifies “Hudson Theater LLC” as the owner (NYSCEF Doc No. 265 at 1). Further, CDL and Ambassador have not furnished any evidence establishing that they were Hudson’s agents or intended third-party beneficiaries of the Yorke Contract (*see Pitang*, 231 AD3d at 416; *JDS Constr. Group LLC v US Crane & Rigging LLC*, 224 AD3d 582, 583 [1st Dept 2024]).

The part of GSI’s motion for summary judgment on its contractual indemnification cross-claim against Yorke (NYSCEF Doc No. 250, ¶ 32; NYSCEF Doc No. 314, the Owners/GSI amended notice of motion) is denied for the same reasons explained above.

As to Hudson, the counterparty to the Yorke contract, the indemnification provision in the Yorke Contract was triggered because plaintiff’s accident arose from Yorke’s work (*see Gervasi v FSP 787 Seventh LLC*, 228 AD3d 459, 461 [1st Dept 2024]). However, no determination has been made as to whether the accident was caused by Yorke’s negligent acts or omissions (*see Estevez v SLG 100 Park LLC*, 215 AD3d 566, 570-571 [1st Dept 2023]; *Madkins v 22 Little W.*

¹ CDL did not plead a cross-claim for contractual indemnification against Yorke in its verified answer to the complaint.

12th St., LLC, 191 AD3d 434, 436 [1st Dept 2021]). Accordingly, Hudson is entitled to conditional summary judgment on its cross-claim for contractual indemnification against Yorke.

b. against Horizon

The Owners/GSI move for summary judgment on their cross-claim or third-party claim for contractual indemnification against Horizon on the grounds that Horizon supplied plaintiff with the subject ladder and directed the means and methods of his work. Horizon moves for summary judgment arguing that it did not contribute to the happening of the accident.

The indemnification provision in the Hudson Purchase Order dated April 15, 2016, between GSI and Horizon, as vendor/subcontractor, reads:

“6. To indemnify, defend to the fullest extent permitted by law and hold harmless, the owner, customer and GSI Systems Inc. from all loss, damage, injury or death, or claims therefore, including attorney’s fees and court costs on the project or related thereto, from its own negligence and that of its agents or subcontractors, or from its failure to comply with the terms of this purchase order” (NYSCEF Doc No. 269 at 2).

Paragraph 14 of the Hudson Purchase Order also states “[t]hat all terms of the GSI Systems Inc. contract with its client are incorporated into this Purchase Order by reference and are binding upon the vendor as fully recited herein” (*id.*). The Hudson Purchase Order does not define “owner” or “customer.” The GSI Subcontract defines only Hudson as the “owner.” Therefore, it is ambiguous as to whether those terms include CDL or Ambassador (*see Pitang*, 231 AD3d at 416).

The provision is triggered if plaintiff’s accident was caused by Horizon’s negligence (*see Sandoval-Morales v 164-20 N. Blvd., LLC*, 231 AD3d 501, 503 [1st Dept 2024]; *Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]). Here, neither the Owners/GSI nor Horizon has demonstrated its entitlement to summary judgment.

Moreover, although the Hudson Purchase Order incorporates the terms of GSI's Subcontract (NYSCEF Doc No. 269 at 2), "incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor" (*Bussanich v 310 E. 55th St. Tenants*, 282 AD2d 243, 244 [1st Dept 2001]). Thus, the Hudson Purchase Order cannot be read to incorporate the indemnification provisions from the GSI Subcontract or Yorke Contract. In addition, triable issues of fact as to Horizon's negligence, including whether Horizon provided the subject ladder to plaintiff, preclude granting anyone summary judgment (*see McKinney v Empire State Dev. Corp.*, 217 AD3d 574, 576 [1st Dept 2023]).

B. Horizon's Motion (007) for Summary Judgment

1. Contribution and Common Law Indemnification Claims

Horizon moves for summary judgment dismissing the contribution and common-law indemnification claims and cross-claims pled against it on the ground that plaintiff did not suffer a "grave injury" of the type specified in Workers' Compensation Law § 11.

In response, the Owners/GSI withdraw their common-law claims and cross-claims against Horizon (NYSCEF Doc No. 330, Schneider affirmation, ¶ 23). Accordingly, the common-law claims and cross-claims pled by the Owners/GSI against Horizon are deemed dismissed.

Workers' Compensation Law § 11 "bars third-party lawsuits for contribution and indemnification against an injured employee's employer unless the employee suffered a 'grave injury,' limited to death and the exclusive list of disabilities defined in the statute, or the employer agreed to contribution and indemnification in a written contract entered into with the third party

prior to the accident” (*New York Hosp. Med. Ctr. of Queens v Microtech Contr. Corp.*, 22 NY3d 501, 505 [2014]). The statute defines “grave injury” to mean:

“death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability” (Workers’ Compensation Law § 11 [1]).

This list is “deliberately both narrowly and completely described. The list is exhaustive, not illustrative” (*Rubeis v Aqua Club Inc.*, 3 NY3d 408, 416 [2004]).

Horizon has demonstrated that plaintiff did not sustain a “grave injury” (*see Cooper v Bldg 7th St. LLC*, 231 AD3d 533, 534 [1st Dept 2024]; *Hernandez v Opera Owners, Inc.*, 230 AD3d 1031, 1031 [1st Dept 2024]). The verified bill of particulars alleges that plaintiff suffered internal derangement, spinal stenosis, radiculopathy, spondylolisthesis, facet arthrosis, and herniated and/or bulging discs at various levels of the cervical and lumbar spine, among other conditions (NYSCEF Doc No. 305, Kaye affirmation, exhibit G, ¶¶ 11-13). Back injuries of the type described herein do not qualify as grave injuries (*see Picchione v Sweet Constr. Corp.*, 60 AD3d 510, 511-512 [1st Dept 2009]; *Spiegler v Gerken Bldg. Corp.*, 35 AD3d 715, 717 [2d Dept 2006]).

Yorke’s argument, in opposition, that the motion must be denied for Horizon’s failure to submit a copy of the pleadings lacks merit, since the pleadings are available electronically (*see 225 ADC Realty Corp. v Popular Jewelry Corp.*, 222 AD3d 510, 510 [1st Dept 2023]). Yorke next contends that Horizon falsely states it has not asserted any claims against Horizon, and further contends that “[w]e purposefully do not annex Yorke’s cross-claims against Horizon to this motion, which are part of the NYSCEF record in this case, as doing so could be deemed a submission sufficient to overcome Horizon’s failure to submit same in support of its own motion”

(NYSCEF Doc No. 323, Ashnault affirmation, ¶ 4 and n 2). Again, the pleadings are available electronically (*see 225 ADC Realty Corp.*, 222 AD3d at 510). As to the merits, Yorke does not address whether plaintiff suffered a grave injury, and, as determined above, plaintiff did not suffer a grave injury within the meaning of Workers' Compensation Law § 11. Accordingly, Yorke's cross-claims for contribution and common-law indemnification against Horizon are dismissed.

2. Breach of Contract for Failing to Procure Insurance

Horizon contends that the failure to procure insurance claims and cross-claims must be dismissed because the entities asserting the claims have not suffered damages. The Hudson Purchase Order required Horizon to purchase and maintain specific types of coverage that "shall include Owner, Tenant and Managing Agent as additional insured" (NYSCEF Doc No. 269 at 2).

a. Yorke Cross-Claims

As against Yorke, however, Horizon repeats its contention that Yorke has not pled any cross-claims against it, and states, in reply, only that its counsel was unable to locate Yorke's cross-claims on NYSCEF (NYSCEF Doc No. 337, Kaye affirmation, ¶ 11). Horizon's counsel also asks the Court to take judicial notice of Yorke's cross-claims in the unidentified NYSCEF filing (*id.*, ¶ 12). The Court takes judicial notice of Yorke's pleading at NYSCEF Doc No. 65 (*see e.g. Campus Sq., LLC v North-Ellicott Mgt., Inc.*, 229 AD3d 1332, 1335 [1st Dept 2024] [taking judicial notice of an answer filed on NYSCEF]) and denies this branch of Horizon's motion.

As to the substance of the motion, issue of the alleged failure to purchase insurance as required by contract, "[a] party seeking summary judgment dismissing a cause of action to recover damages for breach of contract based upon the failure to procure insurance must 'submit evidence demonstrating as a matter of law that it complied with the insurance provision of the applicable contract'" (*Harrison v Consolidated Edison Co. of N.Y., Inc.*, — AD3d —, 2024 NY Slip Op

05436, *4 [2d Dept 2024]). Assuming Horizon was required to purchase insurance that covered claims against Yorke, Horizon has not furnished any evidence demonstrating its compliance with that provision (*id.*; *Madkins*, 191 AD3d at 435). Similarly, Horizon has not presented any admissible evidence that Yorke has not sustained damages from this alleged breach, since Yorke may recover its out-of-pocket costs in the event Horizon breached this provision (*see Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 114 [2001]; *Coon v WFP Tower B Co. L.P.*, 220 AD3d 407, 409 [1st Dept 2023] [denying dismissal for lack of damages where it had not yet been determined if the failure to procure insurance caused any losses]).

IV. CONCLUSION

For the reasons discussed above, it is hereby

ORDERED that the motion brought by plaintiffs Jerry Scott Plechaty and Jacqueline F. Plechaty for partial summary judgment on the issue of the liability on the Labor Law § 240 (1) cause of action (Motion Seq. No. 005) is granted as against defendants CDL West 45th Street LLC, Hudson Theatre LLC, Yorke Construction Corporation and GSI Systems, Inc., only, and the balance of the motion is otherwise denied; and it is further

ORDERED that the motion brought by defendants CDL West 45th Street LLC, Hudson Theatre LLC, Ambassador Theatre Group-NY LLC and GSI Systems, Inc. for summary judgment (Motion Seq. No. 006) is granted to the extent that plaintiffs' Labor Law § 200 and common-law negligence claims are dismissed as against these moving defendants, and defendant Hudson Theatre LLC is entitled to conditional summary judgment on its cross-claim for contractual indemnification from defendant Yorke Construction Corporation, and the balance of the motion is otherwise denied; and it is further

ORDERED that the motion brought by third-party defendant Horizon Contracting LLC for summary judgment (Motion Seq. No. 007) is granted to the extent of dismissing the contribution and common-law indemnification claims or cross-claims brought by defendants CDL West 45th Street LLC, Hudson Theatre LLC, Ambassador Theatre Group-NY LLC, Yorke Construction Corporation and GSI Systems, Inc. against it, and those claims or cross-claims are dismissed as against Horizon Contracting LLC, and the balance of the motion is otherwise denied.

This constitutes the decision and order of this Court.

12/30/2024

DATE



ALEXANDER M. TISCH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE