

Pinos v 150 Cent. Park S., Inc.

2024 NY Slip Op 34798(U)

June 28, 2024

Supreme Court, Queens County

Docket Number: Index No. 719012/2019

Judge: Timothy J. Dufficy

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

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SANDRO PINOS,
Plaintiff,
-against-

Index No.: 719012/2019
Mot. Date: 3/26/24
Mot. Seq.: 3, 4 and 5

150 CENTRAL PARK SOUTH, INC.,
HAMPSHIRE HOUSE LLC, MARSTAR LLC,
SCIAME CONSTRUCTION, LLC and NOVA
CONSTRUCTION SERVICES, LLC,

Defendants.

-----X

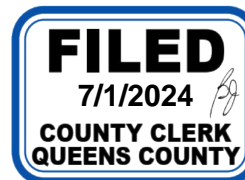
150 CENTRAL PARK SOUTH, INC., MARSTAR
LLC and SCIAME CONSTRUCTION, LLC,

Third-Party Plaintiffs,

-against-

NOVA CONSTRUCTION SERVES, LLC and
KOSTAN, INC.,

Third-Party Defendants.



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NOVA CONSTRUCTION SERVICES LLC,

Second Third-Party Plaintiff,

-against-

KOSTAN, INC.,
Second Third-Party Defendant.

-----X

150 CENTRAL PARK SOUTH, INC., MARSTAR
LLC and SCIAME CONSTRUCTION, LLC,

Third Third-Party Plaintiff,

-against-

KOSTAN, INC.,
Third Third-Party Defendant.

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The following papers were read on the motion by defendants/third-party plaintiffs/third third-party plaintiffs 150 Central Park South, Inc. (150 Central Park), Marstar LLC (Marstar) and Sciame Construction, LLC (Sciame) (collectively defendants/third-party plaintiffs) for summary judgment, pursuant to CPLR 3211 and 3212, (1) dismissing plaintiff's Labor Law §§ 240 (1), 241-a, 241 (6), 200, and common-law negligence

causes of action, (2) on its third-party claims for contractual indemnification and breach of contract for failure to procure insurance against defendant/third-party defendant/second third-party plaintiff Nova Construction LLC (Nova), or alternatively, as to Sciame for conditional contractual indemnification against Nova (Motion Sequence No. 3); the cross-motion by plaintiff for leave to amend his bill of particulars, pursuant to CPLR 3025 (b) to allege a cause of action under Industrial Code section 12 NYCRR 23-5.8 (g) (marked as Motion Sequence No. 3); the motion by third-party defendant/second third-party defendant/third third-party defendant Kostan, Inc. (Kostan), (1) for an order, pursuant to CPLR 603 and/or 1010, severing the second third-party action from the primary action, or in the alternative (2) for an order, pursuant to CPLR 2201, seeking a stay of the action until discovery is completed (Motion Sequence No. 4); and, the motion by Kostan, (1) for an order pursuant to CPLR 603 and/or 1010 severing the third¹ third-party action from the primary action, or in the alternative (2) for an order pursuant to CPLR 2201 seeking a stay of the action until discovery is completed (Motion Sequence No. 5).

PAPERS
NUMBERED

Motion Seq. No. 3

Notice of Motion – Affidavits – Exhibits.....	EF 94 – 128
Answering Affidavits – Exhibits.....	EF 145 – 146
Reply Affidavits – Exhibits.....	EF 148
Notice of Cross-Motion – Affidavits – Exhibits.....	EF 138 – 144
Answering Affidavits – Exhibits.....	EF 147

Motion Seq. No. 4

Notice of Motion – Affidavits – Exhibits.....	EF 149 – 162
Answering Affidavits – Exhibits.....	EF 186 – 187
Reply Affidavits – Exhibits.....	EF 197

Motion Seq. No. 5

Notice of Motion – Affidavits – Exhibits.....	EF 171 – 185
Answering Affidavits – Exhibits.....	EF 188 – 189
Reply Affidavits – Exhibits.....	EF 190

Upon the foregoing papers it is ordered that the motions and cross-motion are determined as follows:

¹ The Court notes that Kostan, in its notice of motion, designated as Motion Sequence No. 5), Kostan inadvertently requested the severance of the second third-party action instead of the third third-party action.

Background

In this personal injury action, the plaintiff alleges, that on September 4, 2019, he injured his finger with a hammer, while working on a hanging scaffold, and then was further injured when he tripped over debris on the floor of a residential apartment undergoing renovations on the 26th Floor (apartment), located at 150 Central Park South, New York County (premises). At the time of the accident, Marstar owned the apartment. Plaintiff's complaint alleges that 150 Central Park and defendant Hampshire House LLC (Hampshire) owned, managed, maintained, or controlled the premises. Marstar retained Sciamme as the construction manager for the renovation of the project. Sciamme subcontracted with Nova to enlarge the windows in the apartment. Nova subcontracted with Kostan to provide labor for this renovation work. Plaintiff was an employee of Kostan, although at the time of the accident, he believed that he was an employee of Nova.

Plaintiff testified that he had worked for Nova as a bricklayer and welder for four or five years before the accident. Although he received paychecks from Kostan, he understood that Nova and Kostan were the same company. He believed he was working for Nova at the premises and began working at the premises about a month before the accident. The plaintiff reported to his foreman, Carlos Rojas, and did not report to anyone outside of Nova. Plaintiff further testified that, on the morning of the accident, he was working on a hanging scaffold with another Nova employee. Before getting onto the scaffold, he spent about 5-10 minutes inspecting it, checking its functionality and safety features. He was wearing a harness, hard hat, and gloves, which he had brought with him. While on the scaffold, he was trying to connect certain lines when the scaffold moved, causing him to lose balance and hit his left index finger with his hammer, resulting in injury. Plaintiff noticed his finger was bleeding and the nail had detached, so he began to walk out of the area to seek help. While walking, he tripped on debris, including wood, bricks, pipes, and sheetrock materials, causing his knee to twist, and resulting in a fall. He claimed he did not trip on Nova/Kostan's debris because they were not using wood at the time of the accident. He then called for an ambulance and, while waiting, spoke with Alex Nunez (Nunez), whom he did not know. He informed Nunez about hitting his finger and the subsequent fall.

Nunez testified on behalf of Sciame and stated that he served as Sciame's project manager. He further testified that Nova was hired to modify and enlarge the openings for new windows throughout the apartment. Each subcontractor was responsible for its own debris. They would place the debris that was created in carts provided by Sciame. When a cart was full, Sciame would send a laborer to take the cart out of the building. The subcontractors were supposed to provide their own materials and trash bags. A Sciame laborer would walk around the site to make sure that the debris carts were not overflowing, they also had construction bags that could be used. Sciame did not instruct the subcontractors on how to perform their work. Nunez further testified that on the day of the accident, there were no other subcontractors working in the area where Nova was performing its work. Nunez was not aware that Nova had subcontracted the work to Kostan and understood that the workers on site were Nova employees. Nunez also testified that he filled out the accident report, which only mentions that the plaintiff hit himself on the left index finger with a hammer. Nunez stated that the plaintiff did not report tripping on debris or twisting his knee and falling. Nunez testified that there was no debris on the floor, no other trades working in the area, and no walls in the subject area of the apartment.

Ireneusz Janczyk (Janczyk) testified on behalf of Nova and stated, that as Nova's project manager, he managed the work, but did not employ or provide laborers. Nova was hired to enlarge window openings by removing bricks around the windows, but was not responsible for installing the new windows. This work was performed from both inside and outside the apartment. Nova subcontracted the brick removal to Kostan. Janczyk visited the site approximately every two weeks. According to the Sciame-Nova contract, Nova had to provide site safety management and supply all labor, materials, equipment, and supervision for its scope of work. Janczyk did not recall if Nova supplied any equipment or materials to Kostan. Nova provided suspended scaffolds and required Kostan to inspect them. Supervision by Nova involved Janczyk's biweekly visits. Nova inspected Kostan's work upon completion. Additionally, Janczyk testified that Nova was required to provide insurance coverage for Sciame and the additional insureds. He did not contact Nova's broker, but sent Sciame a certificate of insurance indicating coverage. Nova obtained a certificate naming Sciame as the certificate holder and Florence-Maria Tiar (a principal of Marstar) and 150 Central Park South as additional insureds. Janczyk admitted Nova was responsible for ensuring its subcontractors had the same insurance

coverage. At the time of the accident, he was unaware of Kostan's insurance exclusion for work above the 7th floor and did not verify Kostan's coverage.

Piotr Muzyk (Muzyk) testified on behalf of Kostan and stated, that as Kostan's project manager, he managed the crew on-site and coordinated work at the apartment with Sciame through Janczyk. The workers were hired by Kostan, but performed work for Nova. Safety issues with the scaffold were mainly handled by Janczyk. Nova inspected Kostan's work and had the authority to stop it if it was unsafe. Muzyk testified that Janczyk did not instruct the Kostan laborers on how to perform their work; instructions were given through Muzyk or the foreman. The work area was open, with partition walls removed. Kostan's workers collected debris in black garbage bags and brought it to the sidewalk shed outside. The Nova-Kostan contract required Kostan to keep the area free of waste materials and rubbish. If debris needed clearing, Kostan would notify Sciame. When Muzyk arrived at the accident location, the plaintiff had already been taken away by ambulance. Muzyk inspected the scaffold, but was not informed of any swaying or tripping incidents and observed no debris in front of the window where the plaintiff had been working.

A result of the accident, the plaintiff commenced the instant action asserting causes of action for violations, under Labor Law §§ 240 (1), 241 (6), 241-a, 200, and common-law negligence against the defendants/third-party plaintiffs, and Hampshire. The defendants/third-party plaintiffs commenced a third-party action against Nova and Kostan. The third-party complaint asserts claims including, contribution, common-law indemnification, contractual indemnification, and breach of contract for failure to provide insurance. Nova commenced a second third-party action against Kostan asserting identical claims. Thereafter, the defendants/third-party plaintiffs also commenced a third third-party action against Kostan asserting identical claims. Hampshire has not appeared in this action to date.

Defendants/third-party plaintiffs now move for summary judgment dismissing the plaintiff's complaint against them, and on their third-party claims for contractual indemnification and breach of contract for failure to procure insurance against Nova. Plaintiff cross-moves for leave to amend his bill of particulars to allege a cause of action, under Industrial Code section 12 NYCRR 23-5.8 (g). Kostan moves to sever the second and third third-party actions from the primary action.

Supplemental Opposition

As an initial matter, the defendants/third-party plaintiffs' letter, dated February 8, 2024, addressed to the Court, was in response to the plaintiff's letter to the Court, dated February 7, 2024. The Court finds that the letter filed by the plaintiff was an improper supplemental opposition to the defendants/third-party plaintiffs' motion (Motion Sequence No. 3). There is no indication in the record that the plaintiff obtained leave of Court to do so after he filed his cross-motion and opposition. Therefore, the Court will not consider this submission (*see* CPLR 2214; *McMullin v Walker*, 68 AD3d 943, 944 [2d Dept 2009]; *Flores v Stankiewicz*, 35 AD3d 804, 805 [2d Dept 2006]).

Labor Law §§ 240 (1) and 241-a

As to the branches of the defendants/third-party plaintiffs' motion for summary judgment dismissing the plaintiff's causes of action, alleging a violation of Labor Law §§240 (1) and 241-a, such is granted. Defendants/third-party plaintiffs argue that the plaintiff's injuries—hitting his finger with a hammer and/or tripping on alleged debris on an apartment floor—were not due to elevation-related hazards and therefore do not fall under Labor Law § 240 (1). They further contend that Labor Law § 241-a, which pertains to the protection of workers in or at elevator shaftways, hatchways, and stairwells, is inapplicable to the alleged accident and thus must be dismissed.

Labor Law § 240 (1) “is intended to protect workers from gravity-related occurrences stemming from the inadequacy or absence of enumerated safety devices” (*Ortega v Puccia*, 57 AD3d 54, 58 [2d Dept 2008]). Labor Law § 241-a pertains to individuals “working in or at elevator shaftways, hatchways, and stairwells of buildings in course of construction or demolition” (*see Desena v North Shore Hebrew Academy*, 119 AD3d 631, 635 [2d Dept 2014]).

Here, the Court finds that the facts alleged are not within the purview of Labor Law §§ 240 (1) and 241-a, as there is no allegation of a gravity-related occurrence, or that the plaintiff was working in or at elevator shaftways, hatchways, and stairwells (*see* Labor Law §§ 240 [1] and 241-a; *Desena*, 119 AD3d at 635; *Ortega*, 57 AD3d at 58). Moreover, the plaintiff and Nova do not oppose these branches of the defendants/third-party plaintiffs' motion. Therefore, the defendants/third-party plaintiffs are entitled to summary judgment dismissing these causes of action.

Plaintiff's Cross-Motion Seeking Leave To Amend Pleadings

Plaintiff cross moves for leave to amend his bill of particulars to add an allegation of Industrial Code provision 12 NYCRR 23-5.8 (g). In support of his cross-motion, the plaintiff asserts that the amendment introduces no new factual or legal theory. He contends that the defendants/third-party plaintiffs were aware of his scaffold-related accident through the complaint, accident report, bill of particulars, and his deposition testimony.

In opposition, the defendants/third-party plaintiffs argue that the plaintiff's cross-motion was filed months after the note of issue, and he did not promptly seek court permission to include the alleged violation of 12 NYCRR 23-5.8 (g). They contend they were not notified of this violation through the limited references to a scaffold in the plaintiff's bill of particulars. Defendants/third-party plaintiffs claim that they are substantially prejudiced as they did not have an opportunity to develop facts for this claim during discovery or witness testimony. They highlight the plaintiff's deposition where he testified the scaffold was anchored, refuting the claim of it being unsecured.

After the time within which to respond to a pleading has expired, a party may amend its pleading only by stipulation of all parties or with leave of court (*see* CPLR 3025 [b]). "Leave to amend the pleadings to identify a specific, applicable Industrial Code provision may properly be granted, even after the note of issue has been filed, where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant" (*Verdi v SP Irving Owner, LLC*, ___AD3d___, 2024 NY Slip Op 02721 [2d Dept May 15, 2024], quoting *Castano v Algonquin Gas Transmission, LLC*, 213 AD3d 905, 908 [2d Dept 2023]; *Przyborowski v A&M Cook, LLC*, 120 AD3d 651, 654 [2d Dept 2014]). " 'Mere lateness is not a barrier' to amendment, absent prejudice which exists where the nonmoving party 'has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position' " (*Verdi v SP Irving Owner, LLC*, ___AD3d___, 2024 NY Slip Op 02721 [2d Dept May 15, 2024], quoting *Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]).

Here, the Court finds that: the plaintiff made a showing of merit; the amendment presented no new factual allegations or new theories of liability; and, the amendment did not prejudice the defendants/third-party plaintiffs. Defendants/third-party plaintiffs were

put on sufficient notice through the complaint, the bill of particulars, the accident report, and the plaintiff's deposition testimony that the Labor Law § 241 (6) cause of action, related to the defendants/third-party plaintiffs' alleged failure to secure the scaffold, causing the plaintiff to lose his balance and hit his finger with his hammer (*see Verdi v SP Irving Owner, LLC*, ___ AD3d ___, 2024 NY Slip Op 02721 [2d Dept May 15, 2024]; *Castano*, 213 AD3d at 908; *Przyborowski*, 120 AD3d at 654).

Defendants/third-party plaintiffs' claim that they are substantially prejudiced, is conclusory and not substantiated by sufficient admissible evidence to support their contentions. Therefore, plaintiff's cross-motion seeking to amend the bill of particulars to assert a claim for violation of 12 NYCRR 23-5.8 (g) is granted.

Labor Law § 241 (6) Against Marstar

The branch of the defendants/third-party plaintiffs' motion for summary judgment dismissing the cause of action alleging a violation of Labor Law § 241 (6), as asserted against Marstar, is granted. In support of their motion, the defendants/third-party plaintiffs submit the pleadings, depositions transcripts of the plaintiff, as well as witnesses from Sciamé, Nova, and Kostan. Defendants/third-party plaintiffs contend that the homeowner's exemption applies to Marstar, because it owned the apartment, which is a single-family apartment under renovation, and it did not direct or control the plaintiff's work that caused the accident.

Owners and contractors are subject to strict liability, under Labor Law §§ 240 (1) and 241 (6), except owners of one- and two-family dwellings who contract for, but do not direct or control the work (*see Rendon v Callaghan*, 206 AD3d 945, 947 [2d Dept 2022]; *Salgado v Rubin*, 183 AD3d 617, 618 [2d Dept 2020]). "[I]n order for a defendant to receive the protection of the homeowners' exemption, the defendant must satisfy two prongs required by the statute. First, the defendant must show that the work was conducted at a dwelling that is a residence for only one or two families" (*Rendon*, 206 AD3d at 947, quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 126 [2d Dept 2008]). "The second requirement of the homeowners' exemption is that the defendants 'not direct or control the work' " (*id.*). "The expressed and unambiguous language of both statutes focuses upon whether the defendants supervised the methods and manner of the work" (*Chowdhury*, 57 AD3d at 126-127; *see* Labor Law §§ 240 [1] and 241 [6]).

As to the first prong, it is undisputed that the plaintiff's accident occurred at Marstar's apartment, which is a single-family dwelling. Regarding the second prong, the plaintiff testified that he reported to his foreman, Carlos Rojas, and did not report to anyone outside of Nova. Therefore, Marstar established, *prima facie*, that the apartment where the work was conducted is a residential dwelling, and it did not direct or control the work being performed (*see Rendon*, 206 AD3d at 947; *Salgado*, 183 AD3d at 618; *Chowdhury*, 57 AD3d at 126-127).

In opposition, the plaintiff failed to oppose this branch of the defendants/third-party plaintiffs' motion. Therefore, the Court finds that the plaintiff failed to raise any triable issues of fact that warrant denial of the summary judgment motion in this regard (*id.*). As such, Marstar is entitled to summary judgment dismissing the Labor Law § 241 (6) cause of action.

Labor Law § 241 (6) Against 150 Central Park and Sciame

The branch of the defendants/third-party plaintiffs' motion for summary judgment dismissing the cause of action alleging a violation of Labor Law § 241 (6), as asserted against 150 Central Park and Sciame, is determined as follows:

"Labor Law § 241 (6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers. To establish liability, under Labor Law § 241 (6), a plaintiff or claimant must demonstrate that his [or her] injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case" (*Cruz v 451 Lexington Realty, LLC*, 218 AD3d 733, 736-737 [2d Dept 2023], quoting *Guaman v 178 Ct. St., LLC*, 200 AD3d 655, 657-658 [2d Dept 2021]).

At the outset, in his pleadings, the plaintiff has predicated his Labor Law § 241 (6) claim upon alleged violations of sections 23-1.5, 23-1.7 (a) (2), 23-1.7 (b), 23-1.7 (d), 23-1.7 (e), 23-1.7 (f), 23-1.8 (c), 23-1.11, 23-1.15, 23-1.16, 23-1.22 (c), 23-1.28, 23-1.30, 23-2.1 (a) (1) - (2), 23-3.3 (b), 23-3.3 (c) (1); 23-5.1; 23-5.3 (d) - (e); 23-5.11 (a) - (d); and 23-6 (1) - (2) of the Industrial Code. The Court determines that the plaintiff has abandoned his reliance on provisions of the above Industrial Code, other than 12 NYCRR 23-1.7 (e) (1), 23-1.7 (e) (2), and 23-5.8 (g), by failing to address those provisions in his opposition to that branch of the defendants/third-party plaintiffs' motion for summary

judgment (*see Cruz*, 218 AD3d at 737; *Torres*, 210 AD3d at 722; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]). Although the plaintiff also alleged violations of various sections of the Occupational Health and Safety Administration (OSHA) regulations, it is well settled that liability, under Labor Law § 241 (6), cannot be based on OSHA violations (*see Wetter v Northville Indus. Corp.*, 185 AD3d 874, 876 [2d Dept 2020]; *Marl v Liro Engrs., Inc.*, 159 AD3d 688, 689 [2d Dept 2018]). Therefore, the court's determination will be limited to sections 23-1.7 (e) (1), 23-1.7 (e) (2), and 23-5.8 (g) of the Industrial Code.

12 NYCRR 23-1.7 (e) (1)

Defendants/third-party plaintiffs argue that 12 NYCRR 23-1.7 (e) (1) is inapplicable, because the alleged accident did not occur in a “passageway” that the statute contemplated protection against. 12 NYCRR 23-1.7 (e) (1) provides the following: “Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.” 12 NYCRR 23-1.7 (e) (1) is “sufficiently specific to support a claim pursuant to Labor Law § 241 (6)” (*Jara v New York Racing Assn., Inc.*, 85 AD3d 1121, 1123 [2d Dept 2011]; *Mugavero v Windows By Hart, Inc.*, 69 AD3d 694, 695 [2d Dept 2010]). “A passageway is commonly defined and understood to be a typically long narrow way connecting parts of a building and synonyms include the words corridor or hallway . . . In other words, it pertains to an interior or internal way of passage inside a building” (*Quigley v Port Auth. of NY & New Jersey*, 168 AD3d 65, 67 [1st Dept 2018]).

Defendants/third-party plaintiffs failed to establish, *prima facie*, that 12 NYCRR 23-1.7 (e) (1) is inapplicable. Here, the plaintiff testified that the area where he allegedly tripped was a “small space,” and that it was a “hallway.” This testimony contradicts Nunez's and Muzyk's testimony, as Nunez and Muzyk both testified that there were no walls in the subject area and that it was an open area. Thus, the Court finds that triable issues of fact exist as to whether the accident location was a passageway as contemplated by the statute (*see Murphy v 80 Pine, LLC*, 208 AD3d 492, 497 [2d Dept 2022]). Therefore, this branch of the defendants/third-party plaintiffs' motion for summary

judgment as asserted against 150 Central Park and Sciame, under Labor Law § 241 (6) as predicated upon 12 NYCRR 23-1.7 (e) (1) is denied.

12 NYCRR 23-1.7 (e) (2)

Defendants/third-party plaintiffs argue that 12 NYCRR 23-1.7 (e) (2) is inapplicable, and that the debris was integral to the plaintiff's work and therefore does not provide a basis for liability under this provision. 12 NYCRR 23-1.7 (e) (2) provides the following: "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." 12 NYCRR 23-1.7 (e) (2) "is sufficiently specific to support a cause of action to recover damages pursuant to Labor Law § 241 (6)" (*Lopez v New York City Dept. of Env'tl. Protection*, 123 AD3d 982, 984 [2d Dept 2014], citing *White v Village of Port Chester*, 92 AD3d 872, 877-878 [2d Dept 2012]). However, 12 NYCRR 23-1.7 (e) (1) – (2) "has no application where the object that caused the plaintiff's injury was an integral part of the work being performed" (*Lopez*, 123 AD3d at 984, citing *Castillo v Starrett City*, 4 AD3d 320, 322 [2d Dept 2004]).

Here, there are issues of fact as to whether the area where the accident allegedly occurred is a working area under this provision, as the plaintiff's testimony indicates that he and his coworkers were required to pass through the "path" or "hallway" to access the scaffold, as "that was the only entrance and exit that [they] had." As such, the defendants/third-party plaintiffs failed to demonstrate that the subject location was not a working area and that 12 NYCRR 23-1.7 (e) (2) is inapplicable.

Furthermore, the argument that the debris was integral to the plaintiff's work is without merit. Plaintiff's alleged "accident was caused by stepping on debris and did not arise from performing his work duties" (*Sternkopf v 395 Hudson NY, LLC*, ___ AD3d ___, 2024 NY Slip Op 02883 [1st Dept May 23, 2024]). Additionally, the defendants/third-party plaintiffs failed to point to evidence that it was necessary that the pieces of wood, rebar, and brick to be in the apartment or that "other protective measures would have interfered with the work" (*Murphy*, 208 AD3d at 497). Finally, the defendants/third-party plaintiffs' argument that any debris in the area could only have been generated by Kostan does not warrant denial of the motion. As owners and contractors of the renovation

project at the apartment, they have a nondelegable duty under Labor Law § 241 (6) to provide reasonable and adequate protection and safety to construction workers (*Cruz*, 218 AD3d at 736-737; *Guaman*, 200 AD3d at 657-658). Therefore, this branch of the defendants/third-party plaintiffs' motion for summary judgment as asserted against 150 Central Park and Sciame, under Labor Law § 241 (6) as predicated upon 12 NYCRR 23-1.7 (e) (2) is denied.

12 NYCRR 23-5.8 (g)

12 NYCRR 23-5.8 (g) provides the following: "Tie-ins. Every suspended scaffold shall be tied in to the building or other structure at every working level. Window cleaners' anchors shall not be used for such tie-ins and other means shall be provided."

The Court finds that this provision is applicable since the plaintiff's alleged accident resulted from the swaying of the scaffold while at a working level. Nonetheless, the plaintiff testified that he was using a hanging scaffold secured to the building's exterior by anchors (extended nails) tied to the scaffold platform to prevent movement. He stated these anchors were in place from his first day at the apartment. However, this contradicts his later testimony where he testified that there was no such anchoring device to prevent the scaffold from swinging. Based upon the plaintiff's contradictory testimony, the Court finds that issues of fact exist as to whether the scaffold was "tied in to the building" as contemplated by the statute, and whether the 150 Central Park and Sciame violated this provision which proximately caused his accident (*see* 12 NYCRR 23-5.8 [g]). Therefore, this branch of the defendants/third-party plaintiffs' motion for summary judgment as asserted against 150 Central Park and Sciame, under Labor Law § 241 (6) as predicated upon 12 NYCRR 23-5.8 (g) is denied.

Labor Law § 200 and Common-Law Negligence

The branch of the defendants/third-party plaintiffs' motion for summary judgment dismissing the plaintiff's causes of action, alleging a violation of Labor Law § 200 and common-law negligence asserted against them, is denied. In support of their motion, the defendants/third-party plaintiffs claim that they are entitled to dismissal of these causes of action, because they did not control the means and method of plaintiff's or his employer's work, and had no notice of the alleged dangerous condition. Defendants/third-party

plaintiffs claim that only Kostan was working in the accident location, and the alleged dangerous condition was created as a result of the work in which the plaintiff was engaged.

Labor Law § 200 “is a codification of the common-law duty to provide workers with a safe work environment” (*Robles v Taconic Mgt. Co., LLC*, 173 AD3d 1089, 1092 [2d Dept 2019]; *Ortega*, 57 AD3d at 60). “Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed” (*Robles*, 173 AD3d at 1092, quoting *Ortega*, 57 AD3d at 61). “To be held liable under Labor Law § 200 for injuries, arising from the manner in which work is performed, a defendant must have the authority to exercise supervision and control over the work” (*Torres v City of New York*, 127 AD3d 1163, 1165 [2d Dept 2015]; see *Cruz*, 218 AD3d at 736-737). “Where a claim is based on an alleged dangerous condition on the premises, an owner or contractor is liable where it created the dangerous condition or had actual or constructive notice of its existence” (*Gargan v Palatella Saros Bldrs. Group, Inc.*, 162 AD3d 988, 989 [2d Dept 2018], quoting *Niewojt v Nikko Constr. Corp.*, 139 AD3d 1024, 1025 [2d Dept 2016]; see *Mendez v Vardaris Tech, Inc.*, 173 AD3d 1004, 1005 [2d Dept 2019]). “A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident such that it could have been discovered and corrected” (*Mushkudiani v Racanelli Constr. Group, Inc.*, 219 AD3d 613, 617 [2d Dept 2023]). A defendant will be found to have “failed to establish that they lacked constructive notice of the dangerous condition that caused plaintiff’s injury, [if] they submitted no evidence of the cleaning schedule for the work site or when the site had last been inspected before the accident” (*Spencer v Term Fulton Realty Corp.*, 183 AD3d 441, 443 [1st Dept 2020]).

Here, the defendants/third-party plaintiffs failed to establish their *prima facie* entitlement to judgment as a matter of law dismissing the causes of action alleging a violation of Labor Law § 200 and common-law negligence as asserted against them. To the extent that the plaintiff’s claims are based on the “means and methods” liability standard, the defendants/third-party plaintiffs, based on the testimony of the plaintiff, Nunez, and Muzyk, established that they did not have the authority to supervise or control the means and methods of the plaintiff’s work (see *Samperi v City Safety Compliance Corp.*, 225 AD3d 723, 725 [2d Dept 2024]; *Rodriguez v Mendlovits*, 153 AD3d 566, 569

[2d Dept 2017]). However, with regards to the “dangerous condition” liability standard, the defendants/third-party plaintiffs failed to establish, *prima facie*, that they lacked constructive notice. Defendants/third-party plaintiffs failed to submit sufficient evidence as to the last time they inspected the subject area, or otherwise demonstrate that the alleged debris could not have been discovered upon a reasonable inspection (*see Bessa v Anflo Indus., Inc.*, 148 AD3d 974, 978 [2d Dept 2017]).

Additionally, the defendants/third-party plaintiffs’ assertion that a Sciame laborer was present for general cleaning at the end of each day or upon specific request is insufficient to meet their burden on their motion for summary judgment as “[m]ere reference to general cleaning [or inspection] practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice” (*Griffin v PMV Realty, LLC*, 181 AD3d 912, 913 [2d Dept 2020]; *see Samperi*, 225 AD3d at 725; *Spencer*, 183 AD3d at 443). Therefore, this branch of the defendants/third-party plaintiffs’ motion for summary judgment is denied.

Defendants/Third-Party Plaintiffs’ Claim For Contractual Indemnification Against Nova

The branch of defendants/third-party plaintiffs’ motion for summary judgment on their third-party claim for contractual indemnification against Nova, or in the alternative for conditional contractual indemnification against Nova, is denied in part and granted in part: as follows:

As it pertains to defendants/third-party plaintiffs 150 Central Park and Marstar, such is denied, in its entirety.

As is pertains to defendant/third-party Sciami, such is granted in part and denied, in part; in that:

- regarding the injuries arising from the plaintiff’s alleged accident on the scaffold, such is granted.

-regarding the injuries arising from the plaintiff’s alleged trip and fall on the debris, such is denied.

The alternative relief requested seeking conditional contractual indemnification against Nova, is denied.

In support of their motion, the defendants/third-party plaintiffs assert that the Sciame-Nova subcontract requires Nova to indemnify them for any claims resulting from or arising out of the work of Nova or its subcontractors. They base this argument on Article 3 of the Sciame-Nova contract, contending that the claims need only result from or arise out of any act or omission of Nova or Kostan.

A party's right to contractual indemnification is dependent on the specific language of the contract (*see O'Donnell v A.R. Fuels, Inc.*, 155 AD3d 644, 645 [2d Dept 2017]). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]; *see Shea v Bloomberg, L.P.*, 124 AD3d 621, 622 [2d Dept 2015]). "In addition, a party seeking contractual indemnification, first must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Mohan v Atlantic Ct, LLC*, 134 AD3d 1075, 1078 [2d Dept 2015], quoting *Cava Constr. Co, Inc. v. Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]). "Moreover, General Obligations Law § 5-322.1 does not bar enforcement of a contractual indemnification provision where the indemnitee was held strictly liable under Labor Law § 240 (1) or § 241 (6) and there was no evidence of its negligence" (*Grant v City of New York*, 109 AD3d 961, 964 [2d Dept 2013]).

The indemnification provision of Sciame-Nova subcontract requires Nova to indemnify the Sciame and "the Owners" against claims "resulting from or arising out of any act or omission or any negligence or carelessness on the part of" Nova or Kostan.

With Regards To 150 Central Park And Marstar

"[W]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]).

Here, the Court notes that Nova did not expressly agree to indemnify 150 Central Park and Marstar. The subcontract between Sciame and Nova neither identified 150 Central Park and Marstar as "the Owners," nor named 150 Central Park and Marstar in the indemnification provision. Thus, the subcontract did not "spell out" an obligation on

Nova's part to indemnify 150 Central Park and Marstar, and no such obligation will be read into it (*Tonking*, 3 NY3d at 490; *see Tavarez v LIC Dev. Owner, L.P.*, 205 AD3d 565, 566-567 [1st Dept 2022]; *Ruisech v Structure Tone Inc.*, 208 AD3d 412, 416-417 [1st Dept 2022]). Therefore, 150 Central Park's and Marstar's third-party claim for contractual indemnification against Nova is denied.

With Regards To Sciame As To The Plaintiff's Scaffold Accident

Sciame established its *prima facie* entitlement to summary judgment on its third-party contractual indemnification claim against Nova with regards to the plaintiff's alleged scaffold accident (*see Martinez v 281 Broadway Holdings, LLC*, 183 AD3d 716, 718 [2d Dept 2020]; *Campisi v Gambar Food Corp.*, 130 AD3d 854, 855 [2d Dept 2015]). Sciame made a *prima facie* showing that it was free from negligence by proffering evidence that it did not have the authority to supervise or control the plaintiff's work and any liability as against them is statutory (*see Fernandez v Abalene Oil Co., Inc.*, 91 AD3d 906, 910 [2d Dept 2012]). Additionally, the plaintiff's deposition testimony also establishes that the plaintiff's accident resulted from Nova's and/or Kostan's work and equipment, and triggered these indemnification provisions. Although Labor Law §§ 241 (6), 200, and common-law negligence causes of action still remains given the lack of evidence of Sciame's negligence, as to the plaintiff's alleged scaffold accident, General Obligation Law § 5-322.1 does not bar the enforcement of a contractual indemnification provision (*see Grant*, 109 AD3d at 964).

In opposition, Nova's claim that Sciame has failed to demonstrate that it is free from negligence is unavailing as to the plaintiff's alleged scaffold accident. As such, Nova failed to raise an issue of fact in this regard. Therefore, Sciame's third-party claim for contractual indemnification against Nova, as to injuries arising from the plaintiff's alleged accident on the scaffold, is granted.

With Regards To Sciame As To The Plaintiff's Trip and Fall Accident

To the extent Sciame is seeking summary judgment on its third-party claim for contractual indemnification, where the plaintiff allegedly tripped on the debris, for reasons set forth previously, it failed to "prove itself free from negligence," as such, "it cannot be indemnified therefor" (*Mohan*, 134 AD3d at 1078; *see Cava Constr. Co.*,

Inc., 58 AD3d at 662). Therefore, this branch of Scieme’s motion for summary judgment on its third-party claim for contractual indemnification against Nova, as to the injuries arising from the plaintiff’s alleged trip and fall on the debris, is denied.

In the alternative, Scieme seeks conditional contractual indemnification against Nova. Since triable issues of fact exists regarding the Scieme’s negligence, a conditional order of summary judgment for contractual indemnification is denied, as premature (*see Winter v ESRT Empire State Bldg., LLC*, 201 AD3d 844, 845 [2d Dept 2022]; *Graziano v Source Bldrs. & Consultants, LLC*, 175 AD3d 1253, 1260 [2d Dept 2019]; *Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 616-617 [2d Dept 2011]).

Defendants/Third-Party Plaintiffs’ Claim For Breach Of Contract For Failure To Procure Insurance Against Nova

The branch of the defendants/third-party plaintiffs’ motion for summary judgment on their third-party claim for breach of contract for failure to procure insurance against Nova is denied.

In support of their motion, the defendants/third-party plaintiffs submit the Scieme-Nova subcontract, the Nova-Kostan subcontract, the insurance policy, and insurer’s letters declining to defend or indemnify them in the instant action. Defendants/third-party plaintiffs contend that Nova breached its contract to procure additional insured coverage for the defendants/third-party plaintiffs, since it failed to have them added as additional insureds, and failed to require its sub-subcontractor, Kostan, to obtain additional coverage for Scieme.

“A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with” (*Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 739 [2d Dept 2003]; *see Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 701 [2d Dept 2016]; *DiBuono v Abbey, LLC*, 83 AD3d 650, 652-653 [2d Dept 2011]).

With Regards To 150 Central Park And Marstar

For reasons articulated previously, neither subcontract identified 150 Central Park and Mastar as the “Owner,” nor did the subcontracts “expressly and specifically” require

that Nova or Kostan name 150 Central Park and Marstar as additional insureds (see *Nicholson v Sabey Data Ctr. Props., LLC*, 160 AD3d 587, 587 [1st Dept 2018]). Therefore, 150 Central Park's and Marstar's third-party claim for breach of contract for failure to procure insurance against Nova is denied. (*id.*).

With Regards To Sciame

Sciame met its burden by submitting a copy of the Sciame-Nova subcontract which stated, among other things, that Nova agreed that “[i]nsurance policies shall be endorsed to name Sciame . . . as additional insureds,” and a letter from Nova’s insurer indicating that the “policy does not provide coverage for Additional Insureds unless they are specifically endorsed as the policy does not contain a blanket additional insured endorsement under which an entity may claim Additional Insured status.”

In opposition, Nova failed to raise a triable issue of fact, since it did not submit any evidence demonstrating that it procured an insurance policy naming Sciame, as an additional party (see *DiBuono*, 83 AD3d at 652). Therefore, this branch of Sciame’s motion for summary judgment on its third-party cause of action for breach of contract for failure to procure insurance against Nova pertaining to the Sciame-Nova subcontract is granted. (See *Sandoval v Trump Plaza Owners, Inc.*, 174 AD3d 830, 830 [2d Dept 2019]; *DiBuono*, 83 AD3d at 652).

Severance Of The Second and Third Third-Party Actions

Kostan’s motions to sever the second and third third-party actions from the primary action and to proceed with a separate trial of the second and third third-party actions, or alternatively, to stay the trial of the action until completion of discovery, is denied.

In support of its motions, Kostan claims prejudice because it has not had the opportunity to appear in this action, and that significant discovery remains outstanding at this stage for Kostan.

In opposition, Nova argues that all the discovery in the second third-party action can be completed before the trial. Nova contends that Kostan has neither submitted an answer to the second third-party action nor requested any discovery. Nova further argues that despite Kostan’s failure to appear, it provided Kostan’s attorney with discovery

materials, including demands, responses, deposition transcripts, and expert witness disclosures. Nova asserts that the defendants/third-party plaintiffs commenced a third-party action against Kostan on February 26, 2021, and that Kostan was aware of the instant action since then, but has failed to answer or otherwise appear.

In opposition, the defendants/third-party plaintiffs argue that Kostan is in default as it has neither filed an answer to the third-party complaint nor appeared in the instant action. They contend that Kostan's assertion of being "newly" added as a third-party defendant is unfounded, given that the third-party action commenced on February 21, 2021, and the third third-party action, on January 24, 2024. Thus, Kostan has been aware of the instant action and will not be prejudiced upon denial of its motion to sever the third third-party action. Defendants/third-party plaintiffs dispute Kostan's claim of outstanding discovery, as they claim that Kostan has not initiated any requests for discovery.

"In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue" (CPLR 603; *Mejia v Doe*, 186 AD3d 1356, 1356 [2d Dept 2020]). "Although it is within a trial court's discretion to grant a severance, this discretion should be exercised sparingly" (*Mejia*, 186 AD3d at 1356, quoting *Bennett v State Farm Fire & Cas. Co.*, 181 AD3d 774, 777 [2d Dept 2020]; see *Sumi Chuang Yeh v Leonardo*, 134 AD3d 695, 696 [2d Dept 2015]). Where common questions of law and fact exist between the two actions and a single trial would serve judicial economy and consistent verdicts, severance may be inappropriate (see *Sumi Chuang Yeh*, 134 AD3d at 696; *Herskovitz v Klein*, 91 AD3d 598, 598–99 [2d Dept 2012]).

Here, severance is inappropriate as there are common factual and legal issues involved in the primary action and the second and third third-party actions, and the promotion of judicial economy and consistency of verdicts by having a single trial outweigh any prejudice to Kostan (see *Sumi Chuang Yeh*, 134 AD3d at 696; *New York Schs. Ins. Reciprocal v Milburn Sales Co., Inc.*, 138 AD3d 940, 941 [2d Dept 2016]). Additionally, Kostan "failed to establish that a single trial would result in it suffering prejudice to a substantial right, or that any such prejudice could not be mitigated by the trial court with the appropriate jury instruction" (*Mejia*, 186 AD3d at 1357; see *Zawadzki v 903 E. 51st St., LLC*, 80 AD3d 606, 608 [2d Dept 2011]; *Quiroz v Beitia*, 68 AD3d 957, 960-961 [2d Dept 2009]). Thus, severance for the second and third third-party actions is not warranted (see *New York Schs. Ins. Reciprocal*, 138 AD3d at 941; *Sumi Chuang Yeh*,

134 AD3d at 696; *Zawadzki*, 80 AD3d at 608; *see also* CPLR 603; 1010). Therefore, Kostan's motions for severance of the second and third third-party actions from the primary action are denied.

Finally, to the extent Kostan is seeking to stay the action pending the completion of discovery, the record reflects that Kostan has failed to present grounds for the granting of a stay.

Conclusion

Accordingly, based upon the foregoing, it is

ORDERED that motion by defendants/third-party plaintiffs/third third-party plaintiffs 150 Central Park South, Inc. (150 Central Park), Marstar LLC (Marstar) and Sciam Construction, LLC (Sciam) (collectively defendants/third-party plaintiffs) for summary judgment, pursuant to CPLR 3211 and 3212, (1) dismissing plaintiff's Labor Law §§ 240 (1), 241-a, 241 (6), 200, and common-law negligence causes of action, (2) on its third-party claims for contractual indemnification and breach of contract for failure to procure insurance against defendant/third-party defendant/second third-party plaintiff Nova Construction LLC (Nova), or alternatively, as to Sciam for conditional contractual indemnification against Nova is granted in part and denied, in part (Motion Sequence No. 3), as set forth above ; in that: it is

ORDERED that the branches of the defendants/third-party plaintiffs' motion for summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241-a, as asserted against them, are granted (Motion Sequence No. 3); and it is further .

ORDERED that the branch of the defendants/third-party plaintiffs' motion for summary judgment dismissing plaintiff's Labor Law § 241 (6), as asserted against Marstar is granted (Motion Sequence No. 3); and it is further

ORDERED that the branch of the defendants/third-party plaintiffs' motion for summary judgment dismissing plaintiff's Labor Law § 241 (6), as predicated upon Industrial Code sections 23-1.5, 23-1.7 (a) (2), 23-1.7 (b), 23-1.7 (d), 23-1.7 (e), 23-1.7 (f), 23-1.8 (c), 23-1.11, 23-1.15, 23-1.16, 23-1.22 (c), 23-1.28, 23-1.30,

23-2.1 (a) (1) - (2), 23-3.3 (b), 23-3.3 (c) (1); 23-5.1; 23-5.3 (d) - (e); 23-5.11 (a) – (d); and 23-6 (1) – (2), as asserted against 150 Central Park and Sciame is granted (Motion Sequence No. 3); and it is further

ORDERED that the branch of the defendants/third-party plaintiffs’ motion for summary judgment dismissing plaintiff’s Labor Law § 241 (6), as predicated upon Industrial Code sections 12 NYCRR 23-1.7 (e) (1), 23-1.7 (e) (2), and 23-5.8 (g), as asserted against 150 Central Park and Sciame is denied (Motion Sequence No. 3); and it is further

ORDERED that the branch of the defendants/third-party plaintiffs’ motion for summary judgment dismissing plaintiff’s Labor Law § 200 and common-law negligence, as asserted against them, is denied (Motion Sequence No. 3); and it is further

ORDERED that the branch of the defendants/third-party plaintiffs’ motion for summary judgment against Nova, on 150 Central Park’s and Marstar’s third-party claim for contractual indemnification, is denied (Motion Sequence No. 3); and it is further.

ORDERED that the branch of the defendants/third-party plaintiffs’ motion for summary judgment against Nova, on Sciame’s third-party claim for contractual indemnification is granted (Motion Sequence No.3); and it is further

ORDERED that the branch of the defendants/third-party plaintiffs’ motion for summary judgment against Nova, on Sciame’s alternative request for conditional contractual indemnification against Nova is denied (Motion Sequence No. 3); and it is further

ORDERED that the branch of the defendants/third-party plaintiffs’ motion for summary judgment against Nova, on 150 Central Park’s and Marstar’s third-party claim for breach of contract for failure to procure insurance, is denied (Motion Sequence No.3); and it is further

ORDERED that the branch of the defendants/third-party plaintiffs' motion for summary judgment against Nova, on Sciame's third-party claim for breach of contract for failure to procure insurance is granted (Motion Sequence No.3) ; and it is further

ORDERED that the cross-motion by plaintiff's requesting leave to amend his bill of particulars to add an allegation of Industrial Code provision 12 NYCRR 23-5.8 (g) is granted (marked as Motion Sequence No. 3); and it is further

ORDERED that Kostan's motions for severance and/or stay of the action are denied (Motion Sequence Nos. 4 and 5)

Dated: June 28, 2024



TIMOTHY J. DUFFICY, J.S.C.

