

Calle v JRR Contr., Inc.

2024 NY Slip Op 34939(U)

July 8, 2024

Supreme Court, Bronx County

Docket Number: Index No. 21943-2020E

Judge: Myrna Socorro

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 9**

-----X
MARCO CALLE,

Plaintiff,

-against-

**Index No. 21943-2020E
Motion seq #2 and #3**

DECISION & ORDER

**JRR CONTRACTING, INC., CLARION
PARTNERS, LLC, 100 FIFTH OWNER, LLC,
BOARD OF MANAGERS OF 100 FIFTH
OWNER, LLC, KAUFMAN MANAGEMENT
COMPANY, LLC, 100-104 FIFTH AVENUE
CONDOMINIUM and BOARD OF
MANAGERS OF 100-104 FIFTH AVENUE
CONDOMINIUM,**

Defendants

Hon. Myrna Socorro, J.S.C.

-----X
JRR CONTRACTING, INC.,

Third-Party Plaintiff,

-against-

**REGALADO CONTRACTING, INC. and
RCD RESTORATIONS, INC.,
Third-Party Defendants.**

-----X
The following papers were read on the motion by the defendant/third-party plaintiff JRR Contracting, Inc. (Seq. No. 2) for **summary judgment** noticed for July 20, 2023, and submitted on March 12, 2024; on the motion by defendants Clarion Partners, LLC, 100 Fifth Owner, LLC, Kaufman Management Company, LLC, Board of Managers of 100-104 Fifth Avenue Condominium, 100-104 Fifth Avenue Condominium (Seq. No. 3) for **summary judgment** noticed for August 4, 2023, and submitted on March 12, 2024; and on the cross-motions by the plaintiff (Seq. Nos. 2 & 3) for **summary judgment** noticed for September 18, 2023, and submitted on March 12, 2024.

Document	NYSCEF Doc. No.
Motion seq #2	
Notice of Motion by Defendant/Third-Party Plaintiff JRR Contracting, Inc. – Affirmation in Support, Memorandum of Law in Support, Statement of Material Facts and Exhibits	Doc. # 46-65
Notice of Cross-Motion and Amended Cross-Motion by Plaintiff – Affirmation in Support of Cross-Motion and in Opposition to Motion, Counterstatement of Material Facts, Memorandum of Law in Support and in Opposition, Exhibits	Doc. # 109-133, 161-162
Defendants Clarion Partners, LLC's, 100 Fifth Owner, LLC's, Kaufman Management Company, LLC's, Board of Managers of 100-104 Fifth Avenue Condominium's, 100-104 Fifth Avenue Condominium's Affirmation in Opposition, Counterstatement of Material Facts and Exhibits	Doc. # 168-184, 188, 193-194
Defendant/Third-Party Plaintiff JRR Contracting, Inc.'s Reply Affirmation and Opposition to Plaintiff's Cross-Motion	Doc. #167
Motion seq #3	
Notice of Motion by Defendants Clarion Partners, LLC, 100 Fifth Owner, LLC, Kaufman Management Company, LLC, Board of Managers of 100-104 Fifth Avenue Condominium, 100-104 Fifth Avenue Condominium – Affirmation in Support, Memorandum of Law in Support, Statement of Material Facts, Exhibits	Doc. # 66-85, 186, 195-197
Notice of Cross-Motion and Amended Cross-Motion by Plaintiff – Affirmation in Support of Cross-Motion and in Opposition to Motion, Counterstatement of Material Facts, Memorandum of Law in Support and in Opposition, Exhibits	Doc. # 134-158, 160, 163-164
Defendant/Third-Party Plaintiff JRR Contracting, Inc.'s Affirmation in Partial Opposition, Counterstatement of Material Facts, Exhibits	Doc. # 86-90

Defendants Clarion Partners, LLC's, 100 Fifth Owner, LLC's, Kaufman Management Company, LLC's, Board of Managers of 100-104 Fifth Avenue Condominium's, 100-104 Fifth Avenue Condominium's Reply Affirmation to Plaintiff's Opposition and in Further Support of Motion	Doc. # 185-187
Defendants Clarion Partners, LLC's, 100 Fifth Owner, LLC's, Kaufman Management Company, LLC's, Board of Managers of 100-104 Fifth Avenue Condominium's, 100-104 Fifth Avenue Condominium's Reply Affirmation to Defendant/Third-Party Plaintiff JRR Contracting, Inc.'s Opposition	Doc. # 191-192, 198-199

Motion by the defendant/third-party plaintiff JRR Contracting, Inc. ("JRR Contracting") (Seq. No. 2), for an order pursuant to CPLR §3212 dismissing the plaintiff's complaint and all cross-claims asserted against it; the motion by defendant Clarion Partners, LLC ("Clarion"), 100 Fifth Owner, LLC, Kaufman Management Company, LLC ("Kaufman"), Board of Managers of 100-104 Fifth Avenue Condominium ("Board of Managers"), 100-104 Fifth Avenue Condominium (Seq. No. 3), for an order pursuant to CPLR §3212 dismissing the plaintiff's complaint and any and all cross-claims asserted against them, and for an order pursuant to CPLR §3212 granting judgment on their cross-claim for contractual indemnification against JRR Contracting; and the cross-motions by the plaintiff (Seq. Nos. 2 & 3), for an order pursuant to CPLR §3212 granting judgment on the Labor Law §240(1) and §241(6) claims against defendants Board of Managers, Clarion, Kaufman, and JRR Contracting, are decided as follows¹:

According to the plaintiff, on the day of the accident, he was employed by third-party defendant RCD Restorations, Inc. ("RCD Restorations") to assist on a project located at 100 Fifth Avenue, New York County. The plaintiff testified that the accident occurred on his first day on the job. He

¹ As the CPLR or Uniform Rule 202.8-b(e) do not expressly recognize the right to serve a reply on a cross-motion, and no prior leave of court was sought by Plaintiff to do so, this Court declines to review or address the contentions raised in the reply papers submitted by Plaintiff to his cross-motions (Mot. Seq. Nos. 2 & 3) (NYSCEF Doc. No. 190). [CPLR §2214].

testified that he gained access by proceeding through a door leading to a hallway to go to the basement. The plaintiff was instructed to continue the assembly of scaffolding. The plaintiff testified that his foreman provided tools akin to a crowbar and screw gun. He further testified that on the date of the accident, he wore work clothes, a hard hat, and work boots. Before the accident happened, the plaintiff was moving weighted pieces to assemble another scaffold. He testified that he would have to go to the basement to use the bathroom. The plaintiff testified that the accident occurred as he was descending the stairs to the basement to retrieve garbage bags as instructed when he slipped and fell resulting in injury. He testified that there were lights on the stairwell. The plaintiff testified that the cause of his fall was due to "the cement mix with the garbage that was there." (NYSCEF Doc No. 146, plaintiff's TR-53, L9-11). He testified that he only observed cement bags stored in the hallway, never on the subject staircase. He also testified that RCD Restorations was using cement in its work before the accident occurred but that he did not observe anyone from RCD Restorations or any other contractors using sheetrock before the accident. He recalled that he knew about the way to the basement from other workers who used it previously.

The plaintiff alleges that Board of Managers are the owners of the subject premises; that Clarion is the statutory agent of Board of Managers; that Kaufman was the managing agent; and JRR Contracting was retained as general contractor. According to JRR Director of Operations and project manager (Tomislav Pavic), JRR Contracting subcontracted façade work to Regalado Contracting, Inc.

In support of its motion for summary judgment, defendant/third-party plaintiff JRR Contracting submitted, *inter alia*, a copy of the construction contract between the owner and contractor (JRR Contracting), a copy of the subcontract between JRR Contracting and Regalado Contracting, Inc., the sworn affidavit of Joseph Caggiano (President of RCD Restorations Inc.), the sworn affidavit of Tomislav Pavic (JRR Director of Operations and project manager at the site), and the deposition testimonies of the plaintiff, Tomislav Pavic, and Carlos Martinez (building superintendent). JRR Contracting contends that the Labor Law §240(1) claim should be dismissed as against it as the staircase on which the plaintiff's accident allegedly occurred is not a safety device within the meaning of the statute and did not provide the sole means of access for the plaintiff. JRR

Contracting also contends that it is not liable under Labor Law §200 as it neither created nor possessed notice of any hazardous condition and did not possess the supervision or control over the plaintiff's work. JRR Contracting argues that the Labor Law §241(6) claim should be dismissed as none of the Industrial Codes cited by the plaintiff are applicable to the facts herein. Further, JRR Contracting argues that any cross-claim for contractual indemnification should be dismissed as the relevant indemnity provision was not triggered under these facts.

In support of their motion for summary judgment, defendants Clarion, Kaufman, 100 Fifth Owner LLC, Board of Managers, and 100-104 Fifth Avenue Condominium submitted, *inter alia*, a copy of the construction contract between the owner and contractor (JRR Contracting), the sworn affidavits of Margaret Egan ("Egan") (Senior Vice President of Real Estate Asset Management at Clarion) as it relates to 100 Fifth Owner, LLC and Clarion, and the deposition testimonies of the plaintiff, Tomislav Pavic, Carlos Martinez (building superintendent), and Seiler Garabito (freight elevator operator on the date of the accident at the premises). Egan avers that 100 Fifth Owner, LLC was a declarant of the condominium located at 100-104 Fifth Avenue and not the owner of the premises; that on the date of the accident, 100 Fifth Owner, LLC did not own, occupy, manage, maintain, control or make special use of the premises; and that said entity was inactive since year 2011. Egan separately avers that Clarion also did not own, occupy, manage, maintain, control or make special use of the premises; and is generally responsible for maintaining insurance for real estate assets purchased on behalf of its clients. The Clarion defendants therefore contend that the Labor Law claims should be dismissed against Clarion and 100 Fifth Owner, LLC as neither are proper parties under the statute. Nonetheless, the Clarion defendants argue that the Labor Law §240(1) claim should be dismissed as the accident was not an elevation-related risk and that the subject staircase was not designed as a safety device within the meaning of the statute. They also contend that the Labor Law §241(6) claim should be dismissed as the Industrial Code sections cited by the plaintiff are not applicable to the facts where the particular stairwell or staircase was not the sole means of access to a work area. Furthermore, they argue that they are entitled to contractual indemnification from JRR Contracting as the plaintiff's accident arose out of alleged cement powder on a staircase used only by workers performing façade restoration, for which JRR Contracting was retained, and materials used for this work included cement powder. The Clarion defendants further

contend that JRR Contractor bore the sole responsibility for the means and methods of the work, the safety of the work site, and the materials and equipment to complete the contracted work.

In support of his cross-motions for summary judgment, the plaintiff submitted, *inter alia*, photographs of the stairwell leading to the basement, a copy of the construction contract between the owner and contractor (JRR Contracting), a copy of the subcontract between JRR Contracting and Regalado Contracting, Inc., an incident report, copies of an email and notes authored by Tomislav Pavic, and deposition testimonies of the plaintiff, Tomislav Pavic, Carlos Martinez (building superintendent), and Seiler Garabito (freight elevator operator). The plaintiff contends that the defendants violated Labor Law 240(1) where he slipped and fell down a defective debris-covered staircase that served as the sole means of access between work areas. He further contends that the defendants violated Labor Law 241(6) as predicated on Industrial Codes 12 NYCRR §§ 23-1.7(d), 23-1.7(e)(2), and 23-2.1(b).

In opposition to the summary judgment motions by the defendants, the plaintiff argues that Clarion is a proper Labor Law defendant subject to liability under Labor Law §240(1) and §241(6). He contends that Clarion was hired by the office unit property owner of the premises and was delegated authority to supervise and control the work. In addition to arguments made in support of his cross-motion for summary judgment on his Labor Law §240(1) and §241(6) claims, the plaintiff contends that the branch of JRR Contractor's summary judgment motion seeking dismissal of the Labor Law §200 claim should be denied as it fails to demonstrate its lack of constructive notice of a hazardous condition by not proffering evidence of when the stairwell was last inspected.

Summary Judgment Standard

Summary judgment is a drastic remedy and is to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact. *See Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]. The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]. Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof,

in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See Zuckerman v City of New York*, 49 NY2d 557 [1980]; *see also Pemberton v New York City Tr. Auth.*, 304 AD2d 340 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment. *See Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY3d 381 [2004].

Proper Labor Law Defendants

Generally, a party will be held liable as an “owner” under the Labor Law where it contracted for the construction work being performed at the time of the plaintiff’s accident. *See Tropea v Tishman Constr. Corp.*, 172 AD3d 450 [1st Dept 2019]. Further, a party that is delegated the authority to supervise and control the injury-producing work renders it liable as a statutory agent. *See Otero v 635 Owner LLC*, 210 AD3d 435 [1st Dept 2022]; *see also Santos v Condo 124 LLC*, 161 AD3d 650 [1st Dept 2018].

Defendant Clarion argues that it cannot be liable for the plaintiff’s injuries under Labor Law §240(1) and §241(6) because it was not a contractor, owner, or agent for Labor Law purposes. Moreover, it argues that it is merely an investment advisor providing advisory services to its corporate clients and did not own, occupy or make special use of the subject building. The plaintiff contends that Clarion is a proper Labor Law defendant as the statutory agent of the Board of Managers of the building.

Although the plaintiff fails to provide sufficient evidence to show that Clarion supervised or controlled the work performed at the subject building, there are triable issues of fact as to whether Clarion is a proper party for purposes of the Labor Law where the building superintendent (Martinez) specifically testifies that Clarion “owns the building now” and that “[t]hey bought the building about eight years ago.” (NYSCEF Doc No. 79, exhibit J, Carlos Martinez deposition TR-15, L21-25; at TR-16 L1-7). *See Guryev v Tomchinsky*, 20 NY3d 194 [2012].

As to defendant 100 Fifth Owner, LLC, the plaintiff failed to raise a triable issue of fact or otherwise address the contentions that 100 Fifth Owner, LLC was not an owner, contractor, or agent of either

for purposes of liability under the Labor Law. Therefore, the Labor Law §240(1), §241(6), and §200 claims against 100 Fifth Owner, LLC are hereby dismissed.

Labor Law §240(1)

Labor Law §240(1) provides in part: “All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.”

“The failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident.” *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 [1st Dept 2009] [citations and quotations omitted].

The Court of Appeals has held that “[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law §240(1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein.” *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993].

To the extent that the staircase from which the plaintiff slipped and fell was a permanent structure of the building does not remove this case from the ambit of Labor Law §240(1). *See Conlon v Carnegie Hall Socy., Inc.*, 159 AD3d 655 [1st Dept 2018]. “Staircase” or “stairs” is not mentioned as an enumerated safety device in the statute, and only where a staircase is the “sole means of access” to and from a work area is a staircase deemed a safety device for the purposes of liability under Labor Law 240(1). *See Wowk v Broadway 280 Park Fee, LLC*, 94 AD3d 669 [1st Dept 2012]; *see also Ramirez v Shoats*, 78 AD3d 515 [1st Dept 2010]. The Court nonetheless finds there are

triable issues of fact as to whether the staircase on which the plaintiff fell was the sole means of access to the work site. Although the evidence in the record demonstrated that there was one staircase to the basement where materials or equipment were stored, there was insufficient evidence conclusively establishing that construction workers were prohibited from using the freight elevator, which also provides access to the basement. Garbito, the freight elevator operator, merely testified that he never used the freight elevator to transport workers on the site. Martinez, the building superintendent, testified that the freight elevator to the basement was operational on the date of the accident and never testified that said elevator was prohibited from use by construction workers.

Labor Law §241(6)

Labor Law §241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety" to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]. The standard of liability under Labor Law 241(6), requires that a plaintiff allege that an owner or general contractor breached a specific rule or regulation containing a positive command. *See Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]. In addition, Labor Law 241(6) requires that a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident. *See Gonzalez v Stern's Dep't Stores*, 211 AD2d 414 [1st Dept 1995].

In support of his Labor Law §241(6) claim, the plaintiff cites Industrial Codes 12 NYCRR §§ 23-1.7(d) (Protection from general hazards; Slipping hazards), 23-1.7(e)(2) (Protection from general hazards; Tripping and other hazards; Working areas), and 23-2.1(b) (Maintenance and housekeeping; Disposal of debris), therefore, abandoning all other predicates not raised in his legal arguments, and as such those claims are dismissed to that extent. *See Burgos v Premier Props. Inc.*, 145 AD3d 506 [1st Dept 2016]; *see also 87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540 [1st Dept 2014].

Insofar as the Labor Law §241(6) claim is predicated on a violation of 12 NYCRR § 23-1.7(d), there are triable issues of fact precluding summary judgment in favor of the plaintiff as it pertains to this

section of the Industrial Code. *See Ohadi v Magnetic Constr. Group Corp.*, 182 AD3d 474 [1st Dept 2020]; *Cf. Conklin v Triborough Bridge & Tunnel Auth.*, 49 AD3d 320 [1st Dept 2008].

Industrial Code 12 NYCRR §23-1.7(d), in relevant part, states that an employee shall not be allowed to use a floor or passageway in a slippery condition and that the substance that may be causing the “slippery footing” shall be removed. “While a staircase used to provide access to a job site is not a passageway or other working surface within the meaning of the provision unless it is the sole means of access [citations omitted], the provision is applicable if the staircase was a work area.” *Ohadi v Magnetic Constr. Group Corp.*, 182 AD3d 474 [1st Dept 2020] [citing *Wowk v Broadway 280 Park Fee, LLC*, 94 AD3d 669 [1st Dept 2012]]. The plaintiff testified that he was specifically instructed to go down to the basement to retrieve garbage bags and was caused to slip and fall on cement powder or debris on a staircase to the basement. However, there are triable issues of fact as to whether the staircase on which the plaintiff fell is a “work area, regardless of whether work was being performed there at the exact moment of his accident” as well as whether it was the sole means of access. *Ohadi v Magnetic Constr. Group Corp.*, 182 AD3d 474, 476 [1st Dept 2020]; *see Bradley v NYU Langone Hosps.*, 223 AD3d 509 [1st Dept 2024].

Under Industrial Code 12 NYCRR § 23-1.7(e)(2), “[t]he parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris...” This section of the Industrial Code applies to slipping as well as tripping hazards. *See Ohadi v Magnetic Constr. Group Corp.*, 182 AD3d 474, 476 [1st Dept 2020]. However, in this case, there are triable issues of fact as to whether the plaintiff slipped on dirt or debris that accumulated on the stairs in violation of § 23-1.7(e)(2) where the building superintendent (Martinez) testified that he never received any complaints regarding debris on the subject stairway and that the staircase was inspected on a daily basis.

Industrial Code 12 NYCRR § 23-2.1(b), in relevant part, provides that debris shall be handled and disposed in a method that will not endanger any person employed in or frequenting the area of disposal. But § 23-2.1(b) is not sufficiently specific to serve as a predicate for a Labor Law §241(6) claim. *See Armental v 401 Park Ave. S. Assoc., LLC*, 182 AD3d 405 [1st Dept 2020]; *see also*

Quinlan v City of New York, 293 AD2d 262 [1st Dept 2002]. Accordingly, the Labor Law §241(6) claim as predicated on an alleged violation of § 23-2.1(b) is dismissed.

Labor Law §200 and/or Common-Law Negligence

The branch of defendant JRR Contracting's summary judgment motion seeking to dismiss the Labor Law §200 and common-law negligence claims as against it is denied. Although the record demonstrates that JRR Contracting did not direct, supervise, or direct the means and methods of the plaintiff's work, a defendant may still be held liable if it either created the dangerous condition or failed to remedy it despite having actual or constructive notice thereof. *See Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]. JRR Contracting therefore failed to establish *prima facie* that it neither created nor had notice of a hazardous condition resulting in the plaintiff's injuries to support dismissal of the Labor Law 200 and common-law negligence claims against it. *See Padilla v Touro Coll. Univ. Sys.*, 204 AD3d 415 [1st Dept 2022]. Said defendant submitted no evidence of when the work site was last inspected or proof as to which trade stored materials related to cement or sheetrock as part of its moving papers. *See id.*; *see also Kolakowski v 10839 Assoc.*, 185 AD3d 427 [1st Dept 2020]; *Pereira v New Sch.*, 148 AD3d 410 [1st Dept 2017].

With respect to the Clarion defendants, counsel for the plaintiff, at oral argument and on the record, indicated that the plaintiff did not oppose the branch of the Clarion defendants' summary judgment motion seeking dismissal of the Labor Law §200 and/or common-law negligence claims as against them. Therefore, the branch of the Clarion defendants' summary judgment motion seeking to dismiss the Labor Law 200 and/or common-law negligence claims against them, is granted without opposition.

Clarion's Cross-Claim for Contractual Indemnity Against JRR Contracting

The Clarion defendants seek judgment on their cross-claim for contractual indemnification against JRR Contracting pursuant to the indemnification provision in the construction contract between these parties, which provides as follows:

§ 9.15 INDEMNIFICATION

§ 9.15.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants 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, [...] 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 which would otherwise exist as to a party or person described in this Section 9.15.1.

(NYSCEF Doc No. 59 at 10).

The Clarion defendants contend that JRR Contracting must indemnify them as the plaintiff's accident arose out of the negligent acts or omissions of JRR Contracting, its subcontractor(s), "anyone directly or indirectly employed by them or anyone for whose acts it may be liable. According to the Clarion defendants, the evidence in the record demonstrates that the plaintiff's accident arose out of alleged cement powder on a stairwell and said stairwell was only used by workers performing façade restoration, which includes trades retained by JRR Contracting even if JRR Contracting contends it subcontracted out the entirety of the façade restoration work. Further, the plaintiff was an employee of either RCD Restorations, Inc. and/or Regalado Contracting Inc. at the time of the accident and was performing work on behalf of either or both parties as a subcontractor hired by JRR Contracting when he attempted to retrieve garbage bags from the basement of the premises as instructed by a supervisor.

In opposition, JRR Contracting argues that the Clarion defendants failed to demonstrate the relevant indemnification provision was triggered as neither JRR Contracting nor its subcontractor(s) were utilizing sheetrock materials for its work at the location. JRR Contracting also contends that the plaintiff testified that other trades, not parties to the present lawsuit, engaged in sheetrock work.

"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., Inc.*, 70 NY2d 774, 777 [1987].

Pursuant to General Obligations Law § 5-322.1, a clause in a construction, repair or maintenance contract which purports to indemnify a party for its own negligence is void and unenforceable as against public policy. *See Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786 [1997]. However, an indemnification agreement that authorizes partial indemnification “to the fullest extent permitted by law” is enforceable. *Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]; *see Guzman v 170 W. End Ave. Assoc.*, 115 AD3d 462, 464 [1st Dept 2014]; *see also Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [1st Dept 2002].

Here, the contract between the owner of the premises and JRR Contracting, as general contractor, plainly requires JRR Contracting to indemnify the owner, its agents and employees of either for claims arising out of the performance of the contracted work, including those resulting from a negligent act or omission of a subcontractor, and the work the plaintiff was performing for his employer, a subcontractor, constituted work under said contract. The indemnification provision also sufficiently contains the appropriate savings clause to avoid violation of General Obligations Law § 5-322.1. Based upon the foregoing and inasmuch as the liability of the Clarion defendants would at best be purely vicarious and statutory, the Clarion defendants are entitled to a conditional grant of judgment on their cross-claim for contractual indemnification from JRR Contracting. *See Devlin v AECOM*, 224 AD3d 437 [1st Dept 2024]; *see also Quichimbo v Vornado 640 Fifth Ave., L.L.C.*, 30 AD3d 194 [1st Dept 2006].

Cross-Claims for Common-Law Indemnity and/or Contribution Against JRR Contracting

No party, including the Clarion defendants, submitted any opposition or otherwise addressed contentions set forth by JRR Contracting in the branch of JRR Contracting’s summary judgment motion seeking dismissal of any cross-claims for common-law indemnification and contribution as against it. Therefore, the branch of JRR Contracting’s summary judgment motion seeking to dismiss any cross-claims against it for common-law indemnification and contribution is hereby granted, without opposition.

Any Cross-Claims Asserted Against The Clarion Defendants

No party, including JRR Contracting, submitted any opposition or otherwise addressed contentions raised by the Clarion defendants in the branch of the summary judgment motion by the Clarion defendants seeking dismissal of any cross-claims asserted against them. Accordingly, the branch of the Clarion defendants' summary judgment motion seeking to dismiss any cross-claims against them is hereby granted, without opposition.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the movants was not addressed by the Court, it is hereby denied.

Accordingly, it is hereby,

ORDERED, that the summary judgment motion by defendant/third-party plaintiff JRR Contracting (Mot. Seq. No. 2) seeking dismissal of the plaintiff's complaint and any and all cross-claims asserted against it, is **GRANTED IN PART**; and it is further

ORDERED, that JRR Contracting's request for dismissal of the Labor Law §240(1) and §200 claims, is **denied**; and it is further

ORDERED, that JRR Contracting's request for dismissal of the Labor Law §241(6) claim as predicated on violations of 12 NYCRR §§ 23-1.7(d) and 23-1.7(e)(2), is **denied**; and it is further

ORDERED, that JRR Contracting's request for dismissal of the Labor Law §241(6) claim as predicated on a violation of 12 NYCRR § 23-2.1(b), is **granted**; and it is further

ORDERED, that the branch of JRR Contracting's summary judgment motion seeking dismissal of any cross-claims for common-law indemnification and/or contribution, is **granted**; and it is further

ORDERED, that the branch of JRR Contracting's summary judgment motion seeking dismissal of the cross-claim for contractual indemnification asserted against it, is **denied**; and it is further

ORDERED, that the summary judgment motion by defendants Clarion, Kaufman, 100 Fifth Owner, LLC, Board of Managers, 100-104 Fifth Avenue Condominium (Mot. Seq. No. 3) seeking dismissal of the plaintiff's complaint and any and all cross-claims asserted against them, and judgment on their cross-claim for contractual indemnification against JRR Contracting, is **GRANTED IN PART**; and it is further

ORDERED, that the Clarion defendants' request for dismissal of the Labor Law 240(1) claim asserted against defendant 100 Fifth Owner, LLC, is **granted** only; and it is further

ORDERED, that the Clarion defendants' request for dismissal of the Labor Law §200 claim as against them, is **granted**; and it is further

ORDERED, that the Clarion defendants' request for dismissal of the Labor Law §241(6) claim as predicated on violations of 12 NYCRR §§ 23-1.7(d) and 23-1.7(e)(2), is **denied**; and it is further

ORDERED, that the Clarion defendants' request for dismissal of the Labor Law §241(6) claim as predicated on a violation of 12 NYCRR § 23-2.1(b), is **granted**; and it is further

ORDERED, that the Clarion defendants are entitled to conditional summary judgment on their cross-claim for contractual indemnification against JRR Contracting; and it is further

ORDERED, that the cross-motions by the plaintiff (Mot. Seq. Nos. 2 & 3) seeking judgment on his Labor Law §240(1) and §241(6) claims, is **denied**; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment accordingly; and it is further,

ORDERED, the movants of each motion and any cross-motion shall serve a copy of this Order with

Notice of Entry upon all parties within thirty (30) days of the upload of this Order in NYSCEF.

This constitutes the Decision and Order of this Court.

Dated: July 8, 2024

HON. MYRNA SOCORRO

Hon. Myrna Socorro, J.S.C.

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- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
 - 2. DEFENDANT/THIRD-PARTY GRANTED DENIED GRANTED IN PART OTHER
 PLAINTIFF JRR CONTRACTING'S
 MOTION (SEQ NO. 2) IS.....
 - 3. MOTION BY CLARION DEFENDANTS GRANTED DENIED GRANTED IN PART OTHER
 (SEQ NO. 3) IS.....
 - 4. PLAINTIFF'S CROSS-MOTIONS FOR GRANTED DENIED GRANTED IN PART OTHER
 SUMMARY JUDGMENT (SEQ NO. 3)...
 - 5. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
 FIDUCIARY APPOINTMENT REFEREE APPOINTMENT