

Kusa v Structure Tone, Inc.
2024 NY Slip Op 35374(U)
September 25, 2024
Supreme Court, Queens County
Docket Number: Index No. 724273/2020
Judge: Frederick D.R. Sampson
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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE FREDERICK D.R. SAMPSON IAS TERM, PART 31

Justice

-----X
STEPHEN KUSA,

Plaintiff,

-against-

STRUCTURE TONE, INC., 1700 FEE, LLC,
LAWRENCE RUBEN COMPANY, INC.,
GENSLER ARCHITECTURE, DESIGN &
PLANNING, P.C., M. ARTHUR GENSLER
JR. AND ASSOCIATES, INC., MILLER
BLAKER, INC., EUROTECH CONSTRUCTION
CORP., ADCO ELECTRICAL CORP. and
1700 BROADWAY CO.,

Defendants.

-----X
STRUCTURE TONE, INC.,
Third-Party Plaintiff,

-against-

MILLER BLACKER, INC., and EUROTECH
CONSTRUCTION CORP.,

Third-Party Defendants.

-----X
STRUCTURE TONE, INC., 1700 FEE, LLC, GENSLER
ARCHITECTURE DESIGN & PLANNING, P.C. and M.
ARTHUR GENSLER JR. AND ASSOCIATES, INC.,

Second Third-Party Plaintiff,

-against-

SUPREME WOODWORK INSTALLATION, INC.,

Second Third-Party Defendant.

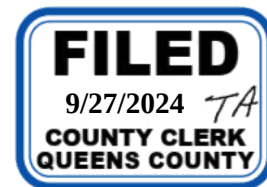
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Index No.: 724273/2020

Motion Date: 03/20/2024

Motion Cal.: Nos: 33,34,35,36

Motion Seq.: Nos:10,11,12,13



MILLER BLACKER, INC.,

Third Third-Party Plaintiff,

-against-

SUPREME WOODWORK INSTALLATION, INC.,

Third-Third Party Defendant.

-----X

STRUCTURE TONE, INC., 1700 FEE, LLC, GENSLER
ARCHITECTURE DESIGN & PLANNING, P.C. and M.
ARTHUR GENSLER JR. & ASSOCIATES, INC.,

Fourth-Party Plaintiff,

-against-

ADCO ELECTRICAL CORP.,

Fourth-Party Defendant.

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The following numbered papers read on this motion by defendant second, third and fifth third-party plaintiff Structure Tone, Inc. (Structure Tone), defendant third-party and third and fifth third-party plaintiff 1700 Fee, LLC (1700 Fee) and defendants third third-party plaintiffs Gensler Architecture, Design & Planning, P.C., and M. Arthur Gensler, Jr. & Associates (Gensler defendants) (collectively owner defendants) for summary judgment dismissing all claims against them and on their cross-claims and third-party claims; cross-motion by defendant second third-party defendant Eurotech Construction Corp. (Eurotech) for summary judgment dismissing owner defendants’ breach of contract claim against it; motion by defendant second third-party defendant Miller Blake, Inc. (Miller) and third third-party defendant Supreme Woodwork Installation, Inc. (Supreme) (collectively installation defendants) for summary judgment dismissing all claims against them; motion by defendant fifth third-party defendant ADCO Electrical Corp. (ADCO) for summary judgment dismissing all claims against it; motion by Eurotech for summary judgment dismissing all claims against it.

	<u>Papers Numbered</u>
<u>Motion Seq. No. 10</u>	
Notice of Motion – Affirmation – Exhibits.....	EF 234-261
Answering Affirmation.....	EF 349
Answering Affirmation – Exhibit.....	EF 351-354
Reply Memoranda.....	EF 405-406
Answering Affirmation.....	EF 407
Reply Affirmation.....	EF 409

Notice of Cross-Motion - Affirmation - Exhibits.....	EF 357-395
Answering Memorandum.....	EF 401

Motion Seq. No. 11

Notice of Motion – Affirmation – Exhibits.....	EF 263-293
Answering Memorandum.....	EF 403
Reply Affirmation.....	EF 420

Motion Seq. No. 12

Notice of Motion – Affirmation – Exhibits.....	EF 294-310
Answering Affirmation - Exhibits.....	EF 396-400
Answering Memorandum.....	EF 404

Motion Seq. No. 13

Notice of Motion – Affirmation – Exhibits.....	EF 312-347
Answering Memorandum.....	EF 402
Reply Affirmation.....	EF 415
Answering Affirmation.....	EF 408
Reply Affirmation.....	EF 410

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

On December 19, 2016, plaintiff commenced an action against Structure Tone, 1700 Fee, and Lawrence Ruben Company Inc. (LRC) to recover damages for personal injuries sustained on August 30, 2016, while working on a construction project. The parties do not dispute that Structure Tone was the general contractor and that 1700 Fee owned the building where plaintiff was injured. On June 5, 2017, 1700 Fee and LRC commenced a third-party action against the Gensler defendants for common law and contractual indemnification, contribution, and breach of agreement to procure insurance. On June 12, 2017, Structure Tone commenced the second third-party action against Miller and Eurotech for common law indemnification, breach of contract, contribution, contractual indemnification, and insurance coverage. In its answer, Miller asserted crossclaims against 1700 Fee, LRC, and Eurotech and a counterclaim against Structure Tone for common law and contractual indemnification, contribution, and insurance coverage. On November 13, 2017, Structure Tone commenced the third third-party action against Supreme asserting the same claims it asserted against Miller and Eurotech in the second third-party action. In its answer, Supreme asserted counterclaims against Structure Tone for common law indemnification and contribution. In an order dated July 27, 2022, the court (McDonald, J.) granted owner defendants' motion to amend the third third-party complaint to add 1700 Fee and the Gensler defendants as third third-party plaintiffs. The fourth third-party action Miller commenced against Supreme on October 17, 2017, was discontinued in a stipulation filed on May 3, 2021.

In a supplemental summons and amended complaint dated May 16, 2018, plaintiff sought recovery against only owner defendants, Miller, and Eurotech based on common law negligence and violations of Labor Law §§ 200, 240 [1], and 241 [6]. In its answer, Miller cross-claimed against 1700 Fee, LRC, and Eurotech for common law indemnification and against owner defendants and Eurotech for contribution, contractual indemnification, and insurance coverage. Owner defendants answered and cross-claimed against Eurotech and Miller for contribution, common law and contractual indemnification, and insurance coverage. In its answer, Eurotech alleged a crossclaim for contribution against owner defendants and Miller. On June 6, 2019, owner defendants commenced the fifth third-party action against ADCO for contractual and common law indemnification, contribution, attorneys' fees, and breach of contract to procure insurance. In its answer, ADCO asserted counterclaims against owner defendants for contractual and common law indemnification, breach of contract, and contribution and crossclaims against Miller, Eurotech, and Supreme for contribution and common law indemnification.

In a supplemental summons and amended complaint dated August 18, 2022, the plaintiff added ADCO, LRC, and 1700 Broadway Co. as defendants. In its answer, ADCO alleged crossclaims against owner defendants, LRC, Miller, Eurotech, 1700 Broadway Co., and Supreme for contribution and contractual and common law indemnification. Owner defendants and 1700 Broadway Co. answered and asserted crossclaims against Miller, Eurotech, ADCO, and Supreme for contribution and common law and contractual indemnification.

Owner defendants now move for summary judgment dismissing the complaint and all common law indemnification and contribution claims against them and in their favor on their claims for defense, indemnification, and breach of contract to procure insurance. Eurotech cross-moves for summary judgment dismissing owner defendants' crossclaim and third party claim for breach of contract to procure insurance against it. Installation defendants move for summary judgment dismissing all claims and third-party claims against Miller and all third-party claims against Supreme. In a separate motion, ADCO seeks summary judgment dismissing the complaint, the fifth third-party complaint and any crossclaims against it. Eurotech separately moves for summary judgment dismissing the complaint, owner defendants' contractual indemnification claim, and all claims for contribution and common law indemnification against it.

The court first addresses the branches of the summary judgment motions by owner defendants, installation defendants, ADCO, and Eurotech to dismiss the complaint. At the outset, the court need not address installation defendants' arguments that Supreme is not liable under Labor Law §§ 200 and 241 [6] as alleged in the complaint because plaintiff has asserted no claims against it.

With respect to the Labor Law § 240 [1] claim, owner defendants and ADCO contend that the claim should be dismissed because plaintiff was not exposed to an elevation-related risk. Labor Law § 240 [1] imposes on owners and general contractors a nondelegable duty to provide necessary safety devices for workers subjected to elevation-related hazards (*see Saint v Syracuse Supply Co.*, 25 NY3d 117, 124 [2015]; *Soto v J. Crew Inc.*, 21 NY3d 562, 566 [2013]). The

extraordinary protections of Labor Law § 240 [1] only apply to a narrow class of dangers related to elevation-related risks (*see Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 96–97 [2015]; *Krarunzhiy v 91 Cent. Park W. Owners Corp.*, 212 AD3d 722, 723 [2d Dept 2023]). The statute’s protections do not apply to dangers only tangentially related to gravity’s effects (*see Nicometi*, 25 NY3d at 97; *Krarunzhiy*, 212 AD3d at 723). Labor Law § 240 [1] liability depends on the existence of an elevation-related hazard and the inadequacy or failure to use a type of safety device indicated in the statute (*see Nicometi*, 25 NY3d at 97; *Chuqui v Amna, LLC*, 203 AD3d 1018, 1020 [2d Dept 2022]). Here, the undisputed evidence demonstrates that plaintiff was injured when he fell after tripping on a metal stud under garbage bags as he walked on the third floor of the construction site. Inasmuch as plaintiff did not fall from a height and was not struck by a falling object due to a safety device’s failure, his injuries do not fall under Labor Law § 240 [1] (*see Castro v Wythe Gardens, LLC*, 217 AD3d 822, 825 [2d Dept 2023]; *Krarunzhiy*, 212 AD3d at 723–24; *Sanchez v 74 Wooster Holding, LLC*, 201 AD3d 755, 756 [2d Dept 2022]; *Madero v Pizzagalli Constr. Co.*, 62 AD3d 670, 672 [2d Dept 2009]). Since plaintiff does not raise any arguments opposing dismissal of the Labor Law § 240 [1] claim, summary judgment dismissing it as against owner defendants and ADCO is warranted (*see Krarunzhiy*, 212 AD3d at 723–24; *Madero*, 62 AD3d at 672). Although Eurotech cites a different ground for dismissal of the Labor Law § 240 [1] claim and installation defendants do not address the claim at all, upon searching the record, dismissal of the claim against Eurotech and Miller is also appropriate on the same ground (*see id.*).

Regarding the Labor Law § 200 and common law negligence claims, Labor Law § 200 codifies the duty of owners and general contractors of a construction site and their agents to maintain site safety (*see Rizzuto v L.A. Wegner Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877–78 [1993]). Lessees of the premises where the injury occurs, such as the Gensler defendants, are subject to liability under Labor Law § 200 and common law negligence (*see generally Hamm v Review Assoc., LLC*, 202 AD3d 934, 939 [2d Dept 2022]; *Poalacin v Mall Props., Inc.*, 155 AD3d 900, 907–08 [2d Dept 2017]). If plaintiff’s injuries arose from the manner of the work performed, owners and general contractors are liable for a Labor Law § 200 violation and common-law negligence upon a showing that they had authority to supervise and control that work (*see Hamm*, 202 AD3d at 938; *Eliassian v G.F. Constr., Inc.*, 190 AD3d 947, 950 [2d Dept 2021]). To demonstrate entitlement to summary judgment dismissing the Labor Law § 200 and common-law negligence claims arising from an alleged defective condition, a defendant must prove “that it neither created the dangerous condition nor had actual or constructive notice of it” (*Alexandridis v Van Gogh Contr. Co.*, 180 AD3d 969, 972 [2d Dept 2020]; *see Tomlinson v Demco Props. NY, LLC*, 189 AD3d 1294, 1295 [2d Dept 2020]). Here, plaintiff’s bill of particulars dated October 26, 2017, alleged that plaintiff was injured from a dangerous condition but not the manner of work. Therefore, owner defendants’ arguments regarding manner of work do not bear on their liability. Where, as here, a premises condition caused plaintiff’s injury, subcontractors, such as Miller, ADCO, and Eurotech, are liable under Labor Law § 200 if they had control over the worksite and either created or had actual or constructive notice of the condition (*see Uhl v D’Onofrio Gen. Contrs., Corp.*, 197 AD3d 770, 772–73 [2d Dept 2021]; *Vita v New York Law Sch.*, 163 AD3d 605, 607 [2d Dept 2018]). They are liable for negligence if they created the injury-causing condition even absent their authority to

supervise and control the worksite (*see Cando v Ajay Gen. Contr. Co. Inc.*, 200 AD3d 750, 753 [2d Dept 2021]; *Poracki v St. Mary's R.C. Church*, 82 AD3d 1192, 1195 [2d Dept 2011]).

Miller, ADCO, and Eurotech do not address their lack of control over the worksite in their motion papers (*see Cando*, 200 AD3d at 753–54). However, Miller, a millwork subcontractor, presents evidence that it subcontracted installation of its millwork to Supreme and did not perform any work on the project, which establishes that no basis exists for finding that it controlled the worksite (*see generally Vita*, 163 AD3d at 607). Since owner defendants' conclusory arguments that Miller had responsibility for site safety and was liable for any negligence of its subcontractor Supreme fail to raise fact issues (*see generally Cutrona v Plaza Constr.*, 166 AD3d 941, 942 [2d Dept 2018]; *Rivera v D'Alessandro*, 248 AD2d 522, 522 [2d Dept 1998]), Miller did not control the worksite and had no obligation to demonstrate that it neither created nor had notice of the condition.

Lack of actual notice of a dangerous condition may be established by the absence of complaints regarding the condition (*see Meade v New York City Hous. Auth.*, 189 AD3d 1390, 1392 [2d Dept 2020]; *Koziar v Grand Palace Rest.*, 125 AD3d 607, 608 [2d Dept 2015]). Here, owner defendants present the deposition of plaintiff, who testified that he generally complained to a laborer of debris in the passageways, but not the passageway where he was injured. Kevin Mulvey, Structure Tone's project manager, testified that he did not receive complaints about the worksite's condition. Thomas Healy, Structure Tone's labor foreman, testified he did not receive complaints of excessive debris on the floors. According to Ernest Pitone, Miller's project manager, he did not complain or receive complaints of tripping hazards at the worksite. Robert Bowe, Eurotech's foreman, and Kevin Kussmaul, ADCO's foreman, did not complain about housekeeping at the jobsite. This evidence sufficiently demonstrates that Structure Tone lacked actual notice of the condition (*see Meade*, 189 AD3d at 1392; *Koziar*, 125 AD3d at 608). ADCO also points to Kussmaul's testimony that he never received complaints about temporary lighting, Mulvey's testimony that he did not observe problems with or receive complaints about temporary lighting, and plaintiff's testimony that he did not complain about the temporary lighting in the area where he was injured. This evidence sufficiently demonstrates that ADCO lacked actual notice of the condition (*see Meade*, 189 AD3d at 1392; *Koziar*, 125 AD3d at 608). Owner defendants fail to present proof that 1700 Fee and Gensler defendants did not have actual notice of the dangerous condition. Eurotech does not argue that it lacked actual notice of the dangerous condition.

A defendant has constructive notice of a dangerous condition when it is visible, apparent and existed for a sufficient time for defendant to discover and remedy it (*see Bonkoski v Condos Bros. Constr. Corp.*, 216 AD3d 612, 616 [2d Dept 2023]; *Mowla v Wu*, 195 AD3d 706, 707–08 [2d Dept 2021]). Although owner defendants contend that no evidence exists that they had notice of the condition, a defendant seeking summary judgment dismissing a complaint cannot meet its burden by pointing to gaps in plaintiff's evidence (*see Maharaj v Kreidenweis*, 214 AD3d 717, 719–20 [2d Dept 2023]; *Padel v Nisanov*, 203 AD3d 1058, 1058–59 [2d Dept 2022]). According to plaintiff, the garbage bags which weighed down the metal stud over which he tripped were in the passageway ten minutes before his injury. Healy testified that he supervised the laborers tasked with cleaning the jobsite and that he walked around the jobsite multiple times per day to ensure

they were keeping it clean. Although Healy testified that the laborers did not use garbage bags because mini containers were present on each floor, that testimony may only establish that the laborers did not create the condition. Absent evidence when Healy or the laborers inspected the passageway where the garbage bags and metal stud were located, Structure Tone fails to eliminate factual issues regarding its constructive notice (*see DeFelice v Seakco Constr. Co., LLC*, 150 AD3d 677, 679 [2d Dept 2017]; *Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 52–53 [2d Dept 2011]; *Mott v Tromel Constr. Corp.*, 79 AD3d 829, 830–31 [2d Dept 2010]). Owner defendants do not present depositions from 1700 Fee or Gensler defendants to establish their lack of constructive notice of the condition. Pitone’s testimony that he did not see building owner representatives walk around the project falls far short of demonstrating they lacked notice of the condition. In any event, Kussmaul’s testimony that building employees walked the site raises factual issues regarding their presence on site.

Regarding creation of the condition, ADCO contends that it did not use metal studs. However, considering that plaintiff testified that he observed one-third of the temporary lighting bulbs were inoperative earlier on the day of his injury, had difficulty seeing the area where he was walking immediately before the accident, and that there was very little light and that Kussmaul testified that no other entities were responsible for repairing temporary lighting, fact issues exist whether ADCO contributed to the condition that caused plaintiff’s injury (*see generally Martinez v 281 Broadway Holdings, LLC*, 183 AD3d 712, 715 [2d Dept 2020]; *Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 713 [2d Dept 2000]). The evidence that only Eurotech used metal studs, that plaintiff observed someone install sheetrock in the passageway the day before his injury, that metal studs were used for sheetrock installation and Bowe’s testimony that excess pieces of metal stud would be placed on the ground for the laborers to clear show that fact issues exist whether Eurotech contributed to the condition (*see generally Seales v Trident Structural Corp.*, 142 AD3d 1153, 1158–59 [2d Dept 2016]).

For the reasons set forth above, summary judgment dismissing the Labor Law § 200 and common law negligence claims against owner defendants is inappropriate because they fail eliminate fact issues regarding their actual or constructive notice of the condition (*see Vita*, 163 AD3d at 607–08; *DeFelice*, 150 AD3d at 679; *Ramirez v Metropolitan Transp. Auth.*, 106 AD3d 799, 801–02 [2d Dept 2013]). Similarly, dismissal of the Labor Law § 200 and common law negligence claims against subcontractors ADCO and Eurotech is unwarranted because they did not establish their lack of control over the worksite and fact issues exist whether they created the injury-causing condition (*see generally Pacheco v Smith*, 128 AD3d 926, 927 [2d Dept 2015]; *Poracki*, 82 AD3d at 1196) or had constructive notice of it (*see Rodriguez v HY 38 Owner, LLC*, 192 AD3d 839, 842 [2d Dept 2021]; *Garcia v Market Assoc.*, 123 AD3d 661, 665 [2d Dept 2014]). Eurotech also fails to eliminate fact issues regarding its actual notice of the condition. The issues of fact regarding ADCO’s creation also fail to demonstrate that it owed no duty to plaintiff based on its subcontract with Structure Tone under *Espinal v Melville Snow Contrs.* (98 NY2d 136, 140 [2002]) (*see generally Flood v Ahern Painting Contrs., Inc.*, 219 AD3d 1408, 1410 [2d Dept 2023]; *Cando*, 200 AD3d at 753–54).

Turning to the Labor Law § 241 [6] claim, to establish liability for violating that statute, plaintiff must show that a violation of an applicable Industrial Code proximately caused his injuries (*see Guoxing Song v CA Plaza, LLC*, 208 AD3d 760, 761 [2d Dept 2022]; *Ennis v Noble Constr. Group, LLC*, 207 AD3d 703, 704 [2d Dept 2022]). To state a Labor Law § 241 [6] claim, plaintiff must allege defendant's violation of an Industrial Code regulation requiring a specific standard of conduct (*see Toussaint v Port Auth. of N.Y. & N.J.*, 38 NY3d 89, 94-95 [2022]; *Kauffman v Turner Constr. Co.*, 195 AD3d 1003, 1005 [2d Dept 2021]). In a bill of particulars dated October 26, 2017, plaintiff alleged Industrial Code violations of 12 NYCRR §§ 23-1.7 [d], [e], [f]; 23-2.1. Since plaintiff does not address 12 NYCRR §§ 23-1.7 [d] or [f] in opposition to owner defendants' motion, he abandons reliance on them (*see Debenedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]).

Owner defendants contend that the remaining Industrial Code provisions alleged do not apply. In pertinent part, 12 NYCRR § 23-1.7 [e] [1] provides that "[a]ll passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. . ." Owner defendants argue that 12 NYCRR § 23-1.7 [e] [1] does not apply because the area where plaintiff was injured was not a passageway. However, owner defendants present a deposition dated February 26, 2019, in which plaintiff testified that the area where he sustained his injuries was a hallway or passageway, which he described as six to eight feet wide and fifteen to twenty feet long. Thus, owner defendants fail to show that 12 NYCRR § 23-1.7 [e] [1] does not apply (*see Rodriguez v 250 Park Ave., LLC*, 161 AD3d 906, 909 [2d Dept 2018]; *Aragona v State of New York*, 74 AD3d 1260, 1261 [2d Dept 2010]). Regarding 12 NYCRR § 23-1.7 [e] [2], which provides that "[t]he 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," owner defendants maintain that that regulation does not apply because the metal stud over which plaintiff tripped was integral to the work. Plaintiff, Mulvey, Bowe, Robert Mitus, a Supreme foreman, and Gzregorz Bialek, a Supreme employee, testified that Eurotech used metal studs for its work. According to plaintiff and Mitus, Supreme did not use metal studs. Bialek further testified that Miller did not provide metal studs to Supreme for its installation work. Pitone testified that the work for which Miller hired Supreme did not require the use of metal studs. In addition, plaintiff testified that the metal stud on which he tripped was shorter than stock supply length. Bowe testified that pieces of metal stud were left on the floor for laborers to clean up. Under the circumstances, owner defendants fail to eliminate fact issues whether the metal stud that caused plaintiff's injury was integral to the work or debris (*see White v Village of Port Chester*, 92 AD3d 872, 877-78 [2d Dept 2012]; *Ramsey v Leon D. DeMatteis Constr. Corp.*, 79 AD3d 720, 723 [2d Dept 2010]; *Harsch v City of New York*, 78 AD3d 781, 783 [2d Dept 2010]; *Quinn v Whitehall Props., II, LLC*, 69 AD3d 599, 600-01 [2d Dept 2010]).

As owner defendants point out, plaintiff did not specify the provision of 12 NYCRR § 23-2.1 that they allegedly violated. For the reasons addressed above, the court rejects owner defendants' argument that 12 NYCRR § 23-2.1 [a] [1] does not apply because the material piles were not stored in a passageway (*see Costa v State of New York*, 123 AD3d 648, 649 [2d Dept 2014]). To the extent that the metal stud under garbage bags was building material, owner

defendants present no evidence showing that they were stored in a manner that would not obstruct the passageway, so have not eliminated fact issues regarding the regulation's applicability (*see Parrino v Rauert*, 208 AD3d 672, 675 [2d Dept 2022]). 12 NYCRR § 23-2.1 [a] [2] does not apply because to the extent the metal stud and garbage bags were building materials, they were not stored in a manner to endanger persons beneath a floor, platform or scaffold and plaintiff raised no factual issues (*see Rodriguez v D & S Bldrs., LLC*, 98 AD3d 957, 959 [2d Dept 2012]). Finally, 12 NYCRR § 23-2.1 [b] lacks a concrete directive, so does not furnish a basis for a Labor Law § 241 [6] claim (*see Dyszkiewicz v City of New York*, 218 AD3d 546, 548–49 [2d Dept 2023]; *Longo v Long Is. R.R.*, 116 AD3d 676, 677 [2d Dept 2014]). Therefore, although summary judgment dismissing so much of the Labor Law § 241 [6] claim as is predicated on 12 NYCRR §§ 23-1.7 [d], [f] and 2.1 [a] [2], [b] is appropriate, owner defendants remain liable under Labor Law § 241 [6] to the extent it is based on 12 NYCRR §§ 23-1.7 [e] [1], [2]; 2.1 [a] [1].

With respect to the branches of the motions for summary judgment dismissing the Labor Law § 241 [6] claim by installation defendants, ADCO, and Eurotech, liability under that statute attaches to owners, contractors, and their agents (*see Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]; *Guryev v Tomchinsky*, 20 NY3d 194, 198–99 [2012]; *Albanese v City of New York*, 5 NY3d 217, 219 [2005]). Miller, ADCO, and Eurotech contend that the claim should be dismissed against them because they are not an owner, a contractor, or a statutory agent. Parties that are not owners or general contractors may be liable as a statutory agent if they “had the ability to control the activity which brought about the injury” (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863–64 [2005], *see Cando*, 200 AD3d at 754; *Jin Gak Kim v Kirchoff-Consigli Constr. Mgt., LLC*, 197 AD3d 1289, 1290–91 [2d Dept 2021]). Here, the record supports that the failure to remove the metal stud under garbage bags and repair inoperative temporary lighting were the activities that brought about plaintiff's injury. Mulvey, Healy, Mitus, and Pitone testified that Structure Tone, as general contractor, was responsible for removing debris and cleaning the worksite. Mulvey and Healy testified that Structure Tone employed laborers to perform this task. In addition, Mulvey and Kussmaul testified that ADCO installed the temporary lighting, which according to Kussmaul, was solely ADCO's responsibility to repair. Although only Eurotech used metal studs, the metal stud piece over which plaintiff tripped was debris which Eurotech bore no obligation to clear. Since Miller and Eurotech demonstrate that they did not control the injury-causing activity, dismissal of the Labor Law § 241 [6] claim against them is appropriate (*see Pereira v Hunt/Bovis Lend Lease Alliance II*, 193 AD3d 1085, 1089 [2d Dept 2021]). In contrast, ADCO's exclusive responsibility for repairing the temporary lighting shows that fact issues exist regarding its control of the injury-causing activity (*see generally Jin Gak Kim*, 197 AD3d at 1291; *cf. Navarra v Hannon*, 197 AD3d 474, 477 [2d Dept 2021]). Thus, ADCO is liable under Labor Law § 241 [6] to the same extent as owner defendants as addressed above.

Regarding the branch of owner defendants' motion for summary judgment on its contractual indemnification claims, they seek that relief against ADCO, Eurotech, and Miller through their subcontracts with Structure Tone, and against Supreme based on Miller's subcontract. Although owner defendants also contend that ADCO agreed to indemnify Structure Tone in a Blanket Insurance and Indemnity Agreement, they do not present a copy of the agreement (*see generally Murphy v 80 Pine, LLC*, 208 AD3d 492, 499 [2d Dept 2022]). Rather,

the exhibit in their motion papers to which owner defendants refer is a Master Subcontract Agreement which does not contain the indemnification provision upon which they rely. Since factual issues exist regarding owner defendants' liability under the Labor Law § 200 and common law negligence claims, they are not entitled to summary judgment on their contractual indemnification claims (*see Chuqui*, 203 AD3d at 1022-23; *Zukowski v Powell Cove Estates Home Owners Assn., Inc.*, 187 AD3d 1099, 1102 [2d Dept 2020]; *see also Fedrich v Granite Bldg. 2, LLC*, 165 AD3d 754, 757 [2d Dept 2018]) or their insurance coverage claims which also seek defense and indemnification based on the subcontracts' indemnification provisions. Although owner defendants contend that summary judgment on their contractual indemnification claims also entitles them to dismissal of the contribution and common law indemnification claims against them, they are not entitled to judgment on the contractual indemnification claim. In any event, given the factual issues regarding their liability under Labor Law § 200 and negligence, it is inappropriate at this juncture to dismiss the claims against them for contribution and common law indemnification (*see Daeira v Genting N.Y., LLC*, 173 AD3d 831, 836 [2d Dept 2019]; *Seales*, 142 AD3d at 1159–60). Since owner defendants raise no arguments that a contract required Miller, ADCO, and Eurotech to procure insurance and that they breached it and present no evidence supporting such conclusion, denial of summary judgment on the breach of contract to procure insurance claim is appropriate (*see Breland-Marrow v RXR Realty, LLC*, 208 AD3d 627, 629 [2d Dept 2022]; *Karanikolas v Elias Taverna, LLC*, 120 AD3d 552, 556 [2d Dept 2014]; *see also Rogers v Rockefeller Group Intl., Inc.*, 38 AD3d 747, 750 [2d Dept 2007]).

Turning to the cross-motion, Eurotech seeks summary judgment dismissing owner defendants' claims for breach of contract to procure insurance against it. A party seeking to dismiss such a claim must demonstrate that no contract required it to procure insurance (*see Crutch v 421 Kent Dev., LLC*, 192 AD3d 982, 984–85 [2d Dept 2021]; *Desena v North Shore Hebrew Academy*, 119 AD3d 631, 636 [2d Dept 2014]), that it complied with a contractual provision requiring procurement of insurance (*see McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1098 [2d Dept 2018]; *Castillo v Port Auth. of N.Y. & N.J.*, 159 AD3d 792, 797 [2d Dept 2018]; *Weitz v Anzek Constr. Corp.*, 65 AD3d 678, 681 [2d Dept 2009]), or that the party seeking to enforce a contract to procure insurance was not an intended beneficiary of such contractual requirement (*see Simon v Granite Bldg. 2, LLC*, 114 AD3d 749, 756 [2d Dept 2014]; *Ramcharan v Beach 20th Realty, LLC*, 94 AD3d 964, 966–67 [2d Dept 2012]). Here, since 1700 Fee and the Gensler defendants are not expressly named as beneficiaries in the subcontract between Structure Tone and Eurotech and Structure Tone may enforce the subcontract, 1700 Fee and the Gensler defendants are not third party beneficiaries of the subcontract's insurance procurement provisions (*see KTG Hospitality, LLC v Cobra Kitchen Ventilation, Inc.*, 201 AD3d 710, 711-12 [2d Dept 2022]; *see also Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 NY3d 704, 710 [2018]). Thus, dismissal of owner defendants' insurance coverage claims as to 1700 Fee and the Gensler defendants is warranted (*see KTG Hospitality, LLC*, 201 AD3d at 712; *Ramcharan*, 94 AD3d at 967). Regarding Structure Tone, although Eurotech presents evidence that it purchased a commercial general liability policy and an excess policy in the amounts required by the subcontract, the subcontract also required Eurotech to purchase insurance for Workers Compensation and Employers Liability, Business Automobile Liability, Professional Liability, Contractor's Tools and Equipment, and Contractor's Pollution Liability for specified coverage

amounts and name Structure Tone as an additional insured. Since Eurotech does not show that it complied with the subcontract's insurance purchase requirements, summary judgment dismissing owner defendants' insurance coverage claims as against Structure Tone is not warranted (*see Castillo*, 159 AD3d at 797; *Weitz*, 65 AD3d at 681).

The court next addresses the branches of the summary judgment motions of installation defendants, ADCO, and Eurotech to dismiss the crossclaims and third-party claims against them. Since installation defendants raise no arguments supporting dismissal of the second third-party and crossclaims against Miller or the third third-party claims against Supreme, dismissal of these claims is inappropriate (*see Smith v City of New York*, 288 AD2d 369, 370 [2d Dept 2001]).

Turning to the separate motions of ADCO and Eurotech, they contend that they are not liable because they did not contribute to plaintiff's injury. An owner or contractor seeking contractual indemnification must demonstrate its freedom from negligence because a party may not be indemnified for its own negligence (*see General Obligations Law* § 5-322.1; *Mogrovejo v HG Hous. Dev. Fund Co., Inc.*, 207 AD3d 461, 463 [2d Dept 2022]; *Chuqui*, 203 AD3d at 1023). A party seeking common-law indemnification must also demonstrate that it was not negligent (*see Cando*, 200 AD3d at 752; *Crutch*, 192 AD3d at 981). ADCO and Eurotech present evidence that plaintiff was injured by tripping on debris and that Structure Tone was responsible for removing debris which demonstrated that Structure Tone's negligence contributed to plaintiff's injury. Since Structure Tone raised no factual issues, dismissal of its the contractual and common-law indemnification claims against them is appropriate (*see Fedrich*, 165 AD3d at 756-57; *Dreyfus v MPCC Corp.*, 124 AD3d 830, 830-31 [2d Dept 2015]). Inasmuch as Structure Tone's attorneys' fees claim is based on the indemnification provisions in the subcontract with ADCO, dismissal of that claim is also proper.

With respect to the contribution claims against ADCO and Eurotech, to dismiss a contribution claim, the party against whom contribution is sought must show that it did not owe a duty of care independent of a contractual obligation or a duty of care to plaintiff (*see Calle v 16th Ave. Grocery, Inc.*, 219 AD3d 450, 452 [2d Dept 2023]; *Keller v Rippowam Cisca Sch.*, 208 AD3d 654, 655-56 [2d Dept 2022]). As addressed above, fact issues whether ADCO and Eurotech contributed to the condition that caused plaintiff's injury demonstrates that they may be negligent, which precludes summary judgment dismissing the contribution claims against them (*see Keller*, 208 AD3d at 655-56; *Fedrich*, 165 AD3d at 757-58; *Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 844-45 [2d Dept 2014]). Since ADCO does not raise any argument supporting dismissal of the fifth third-party claim of breach of contract to procure insurance dismissal of that claim is also inappropriate (*see Smith*, 288 AD2d at 370).

Accordingly, the branches of owner defendants' motion for summary judgment dismissing the Labor Law § 240 [1] claim and so much of the Labor Law § 241 [6] claim as is based on 12 NYCRR §§ 23-1.7 [d], [f] and 2.1 [a] [2], [b] are granted, but the remaining branches of that motion are denied. Eurotech's cross-motion for summary judgment dismissing owner defendants' claims for breach of contract to procure insurance is granted as to 1700 Fee and the Gensler defendants but is otherwise denied. The branches of the motions of Miller and Eurotech for summary judgment dismissing the Labor Law § 241 [6] claim against them is granted. The branch

of ADCO's motion for summary judgment dismissal of the Labor Law § 240 [1] claim against it is granted. Upon searching the record, the Labor Law § 240 [1] claim is dismissed against Miller and Eurotech. The branch of installation defendants' motion for summary judgment dismissing the Labor Law § 200 and common law negligence claim against Miller is granted. The branches of ADCO's and Eurotech's respective motions for summary judgment dismissal of Structure Tone's common-law and contractual indemnification claims against them and the branch of ADCO's motion seeking dismissal of Structure Tone's attorneys' fees claim against it are granted. The second third-party claims, fifth third-party claims, and crossclaims against ADCO and Eurotech for contractual and common-law indemnification, and the fifth third-party claim for attorneys' fees are dismissed. The remaining branches of the separate motions by installation defendants, ADCO, and Eurotech are denied.

Dated: September 25, 2024



Frederick D. R. Sampson, JSC

