

**Rodriguez v VBG 990 AOA LLC**

2025 NY Slip Op 30480(U)

February 6, 2025

Supreme Court, New York County

Docket Number: Index No. 159749/2020

Judge: Paul A. Goetz

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

**PRESENT: HON. PAUL A. GOETZ PART 47**

*Justice*

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PEDRO RODRIGUEZ,

Plaintiff,

-against-

VBG 990 AOA LLC, THE HOLLINGSWORTH GROUP LLC,  
HVAC CONSTRUCTION INC., VANBARTON GROUP LLC.,

Defendants.

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VBG 990 AOA LLC, VANBARTON GROUP LLC. AND  
VANBARTON GROUP, LLC

Third-Party Plaintiffs,

-against-

DK CONSTRUCTION ONE CORP.,

Third-Party Defendant.

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INDEX NO. 159749/2020

08/28/2023,

08/28/2023,

MOTION DATE 08/28/2023

MOTION SEQ. NO. 001, 002, 003

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595097/2022

The following e-filed documents, listed by NYSCEF document number (Motion 001) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 140, 141, 142, 143, 144, 145, 146, 147, 148, 152, 153, 154, 155, 156, 157, 168, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 201, 202, 203, 204, 205, 206, 207

were read on this motion to/for JUDGMENT- SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 158, 159, 160, 161, 170, 171, 172, 208, 209, 210, 211

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 162, 163, 164, 165, 166, 167, 169, 194

were read on this motion to/for JUDGMENT – SUMMARY.

In this Labor Law personal injury action, defendants/third-party plaintiffs VBG 990 AOA, LLC (“VBG 990 AOA”) and VANBARTON GROUP, LLC, (“VANBARTON GROUP” and collectively “VBG”) move, pursuant to CPLR § 3212, for summary judgment dismissing plaintiff PEDRO RODRIGUEZ’s complaint and all cross-claims as against it (motion sequence number 001). VBG also moves for summary judgment in its favor on its first and second third-party actions for common-law indemnification and contractual indemnification as against third-party defendant DK CONSTRUCTION ONE CORP. (“DK Construction”) and M.T. ELECTRIC CORP. (“MT Electric”).<sup>1</sup> Plaintiff cross-moves, pursuant to CPLR § 3126, to preclude defendants VBG 990 AOA, LLC and VANBARTON GROUP, LLC, from arguing that they lacked notice of the dangerous condition due to their failure to provide Justin Rothstein’s (Vanbarton Group’s former Assistant Project Manager) contact information.

In motion sequence number 002, plaintiff PEDRO RODRIGUEZ moves, pursuant to CPLR § 3212, for summary judgment as against defendants VBG on his Labor Law §§ 200, 241 (6) claims.

In motion sequence number 003, defendant HVAC CONSTRUCTION INC (“HVAC”), moves pursuant to CPLR § 3212 for summary judgment dismissing plaintiff’s complaint and all cross-claims as against it. HVAC also moves to strike the phrase “otherwise negligent” asserted in plaintiff’s pleadings and bill of particulars as against it.

### **BACKGROUND**

Plaintiff testified that he was an employee of DK Construction doing wall repair work in several of the apartments on the 19<sup>th</sup> floor of 990 Sixth Avenue, New York, New York (“the

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<sup>1</sup> By decision and order dated March 11, 2024, VBG’s second third-party action against MT Electric was severed (*see* NYSCEF DOC. NO. 215).

building”) on the day of his accident, October 29, 2020 (*see* NYSCEF DOC. NO. 102 at 17-18, 59-60). At around 3:45 p.m. plaintiff tripped and fell over “a piece of metal that had been in place of the compound container” (*id.* at 46, 55). Plaintiff described the piece of metal as “beams” that were “about 10 foot in length” and “heavy” (*id.* at pg. 112-113). Plaintiff testified that the piece of metal was not there all day, nor did he know when the metal was placed there (*id.* at pg. 55). He added “when I was finishing working in the bedroom and getting ready to work in the living room, there was no metal on the ground” (*id.* at pg. 59).

The building is owned by VBG 990 AOA (*see* NYSCEF DOC. NO. 118, pg. 13) and it retained Vanbarton Group to manage the “commercial portion” of the building at the time of plaintiff’s accident (*id.*).<sup>2</sup>

Vanbarton Group hired HVAC Construction to “upgrade mechanical equipment on the third floor and roof” (*see* NYSCEF DOC. NO. 120 at pg. 10-11). HVAC Construction identified their specific title as “mechanical contractor” (*id.* at pg. 11).

VBG 990 AOA hired third-party defendant, DK Construction “for general contracting for the apartments” (*see* NYSCEF DOC. NO. 118 at pg. 34; *see also* NYSCEF DOC. NO. 103 at pg. 19). VBG 990 AOA also hired second-third party defendant, MT Electric, to serve do electrical work (*id.* at pg. 21; *see also* NYSCEF DOC. NO. 98).

### DISCUSSION

“It is well settled that ‘the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact’” (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make

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<sup>2</sup> VBG 990 AOA also retained Gray Star to manage the residential portion of the building, but it is not a party in this action.

such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [internal citations omitted]).

“Once such a *prima facie* showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action” (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010], citing *Alvarez*, 68 NY2d at 342).

“The court’s function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility” (*Meridian Mgmt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined “in the light most favorable to the non-moving party” (*Schmidt v One New York Plaza Co.*, 153 AD3d 427, 428 [1st 2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

### **HVAC’s Summary Judgment Motion (MS #3)**

In support of its motion, HVAC submits an affidavit from HVAC’s president, Conor Halpin (*see* NYSCEF DOC. NO. 64 at ¶ 1). Halpin states that HVAC was contracted by VBG for two projects “as a prime mechanical contractor” (*id.* at ¶ 2). The first project involved the installation of “a garage exhaust system in the cellar and the first and second floor setback level” (*id.*). The second project involved the replacement of a cooling tower, with work performed on the first floor of 990 West 6<sup>th</sup> Street, as well as the 2<sup>nd</sup> floor, 4<sup>th</sup> floor and roof of 980 6<sup>th</sup> Avenue. (*id.*). Halpin avers that HVAC never performed work on the 19th floor of the building where

plaintiff's accident is alleged to have occurred (*id.* at ¶ 3; *see also* NYSCEF DOC. NO. 73 at pg. 13). Finally, Halpin states that HVAC's work on the premises began in 2018 and was completed by early 2020, months before plaintiff's accident occurred (*see* NYSCEF DOC. NO. 73 at pg. 12).

Plaintiff does not oppose HVAC's summary judgment motion. DK Construction also "takes no position as to HVAC's motion for summary judgment" but only takes issue with several "misstatements of fact and erroneous conclusions of law" (*see* NYSCEF DOC. NO. 162 at ¶ 3). Additionally, VBG "simply opposes the portion of HVAC's motion that argues VBG have failed to establish that they are free from negligence" (*see* NYSCEF DOC. NO. 169). VBG proffers no other opposition to HVAC's motion.

HVAC has established, *prima facie*, that it did not perform any work on the subject floor where plaintiff's accident is alleged to have occurred. Moreover, HVAC has made a *prima facie* showing that any work it performed was completed months before plaintiff's alleged accident occurred. No party submits evidence contradicting HVAC's *prima facie* showing.

Accordingly, HVAC's summary judgment motion will be granted in its entirety and any claims and crossclaims against it will be dismissed.

### **VBG's and Plaintiff's Summary Judgment Motions (MS #s 1 & 2)**

#### **Labor Law § 240(1)**

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

All contractors and owners and their agents...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.

“Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold...or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an objection or person” (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

Here, plaintiff’s accident did not involve an elevation-related hazard. Plaintiff testified that he tripped and fell on “a piece of metal” that was on the floor of the apartment he was working in (*See* NYSCEF DOC. NO. 72 at pg. 55). Moreover, plaintiff does not oppose the branch of VBG’s motion seeking dismissal of plaintiff’s Labor Law § 240 (1) claim (*see* NYSCEF DOC. NO. 182).

Accordingly, the portion of VBG’s summary judgment motion seeking dismissal of plaintiff’s Labor Law § 240 (1) claim (motion sequence 001) will be granted.

*Plaintiff’s Cross Motion to Preclude on MS #1*

Plaintiff’s cross-motion seeks to preclude defendants VBG and Vanbarton Group from arguing they lacked notice of the dangerous condition due to their willful failure to provide Justin Rothstein’s contact information.

On October 13, 2022, Malek Hajar appeared for a deposition on behalf of VBG (*see* NYSCEF DOC. NO. 103). Plaintiff argues that after the deposition of Hajar, he served a “Post-EBT Demand seeking, among other items, the last known address of ‘Justin,’ as testified to” by the VBG witness (*see* NYSCEF DOC. NO. 182 at ¶ 54). The specific Post-EBT demands call for the “[l]ast known address of Mike and Justin” (*see* NYSCEF DOC. NO. 186).

Plaintiff notes that at a status conference on December 7, 2022, “this Court Ordered that all Post-EBT Demands were to be served by December 15, 2022, and all Responses were to be served within 30 days of receipt” (*id.* at pg. 59). VBG subsequently responded to plaintiff’s demands on July 17, 2023 (See NYSCEF DOC. NO. 187) writing:

[r]esponding [d]efendants object to this demand as it is overbroad, vague and ambiguous. Subject to and without waiving the foregoing objections, [r]esponding [d]efendants are not in possession of any documentation that is responsive to said Discovery Request. Responding [d]efendants reserve the right to supplement and/or amend this response through the course of discovery (*id.*).

Plaintiff then notes that VBG submitted an affidavit from Justin Rothstein, dated August 24, 2023, in support of their motion for summary judgment (*See* NYSCEF DOC. NO. 107). Plaintiff now seeks an order precluding VBG “from challenging their lack of notice of the dangerous condition on the job site” because they “willfully withheld Rothstein’s information” (*id.* at ¶ 79).

In opposition to plaintiff’s cross-motion, VBG argues that plaintiff “made no efforts to follow up for responses to their post-EBT demands” (*See* NYSCEF DOC. NO. 205 at ¶ 10). VBG further avers that the “note of issue was filed prematurely” and that in their response VBG “reserved the right to supplement the response” (*id.*). VBG argues their “response was simply provided when the contact information was not in possession of your affirmant’s office” (*id.*). And add “[t]here is one court order that simply states post-deposition demands should be served and responded to” (*id.*). Lastly, VBG argues that Justin Rothstein’s contact information has been supplied to plaintiff. (*id.* at ¶ 14).

Pursuant to CPLR § 3126, a court may impose discovery sanctions, including striking a pleading or precluding evidence, where a party “refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed.” The

nature and degree of the penalty to be imposed under CPLR § 3126 is a matter generally left to the court's discretion (*Zakhidov v Boulevard Tenants Corp.*, 96 AD3d 737, 739 [2d Dept 2012]). To invoke the drastic remedy of preclusion, the court must determine that the offending party's lack of cooperation with disclosure was "willful, deliberate and contumacious" (*Moog v City of NY*, 30 AD3d 490, 490 [2d Dept 2012]). "The willful or contumacious character of a party's conduct can be inferred from the party's repeated failure to comply with discovery demands or orders without a reasonable excuse" (*Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 210 [2d Dept 2012]) (citations omitted).

VBG's willful or contumacious conduct can be inferred because pursuant to their own post-EBT responses they reserved the right to supplement their responses and then did not submit Rothstein's contact information until after plaintiff cross-moved to preclude. Further VBG fails to disclose when Rothstein's contact information became known, but they had the information when they were preparing their motion papers but failed to supply it to plaintiff until after submitting Rothstein's affidavit and plaintiff cross-moved to preclude. VBG's argument that plaintiff should have continued to press for Rothstein's contact information is unavailing since VBG was under a duty to disclose his contact information by reserving the right to supplement their post-EBT responses and pursuant to CPLR § 3101.

Accordingly, plaintiff's cross-motion seeking to preclude VBG from arguing a lack of notice of a dangerous condition (on motion sequence 001), will be granted to the extent that Justin Rothstein's affidavit in support of VBG's summary judgment motion will not be considered and he will be precluded from testifying at trial in this action.

Labor Law § 200 and Common Law Negligence

“Labor Law § 200(1) codifies the common-law duty [of an owner or general contractor] to maintain a safe workplace” (*Toussaint v Port Auth. of New York and New Jersey*, 38 NY3d 89, 94 [2022]). “Claims under Labor Law § 200 and the common law fall under two categories: ‘those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed’” (*Jackson v Hunter Roberts Constr., L.L.C.*, 205 AD3d 542, 543 [1<sup>st</sup> Dept 2022], quoting *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-44 [1<sup>st</sup> Dept 2012]). “Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it” (*id.*). On the other hand, “where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work” (*id.* [internal citations omitted]).

In *Armental v 401 Park Ave. S. Assoc., LLC*, 182 AD3d 405, 406-407 [1st Dept 2020], the Court examined a case where a plaintiff tripped and fell on loose pipes that had been laid on the floor directly in front of a doorway. The Court concluded “the cause of plaintiff’s accident was not the manner in which his work was performed but a dangerous condition on the premises, i.e., the loose pipes that had been laid on the floor directly in front of a doorway” (*Armental* 182 AD3d at 406-407). The Court denied defendants’ summary judgment motion on the grounds that issues of fact existed as to whether defendants “created the hazardous condition by directing the placement of the pipes and by failing to properly coordinate work on the site” (*Armental*, 183 AD3d at 407, citing *Maza v University Ave. Dev. Corp.*, 13 AD3d 65 [1st Dept 2004]; see also *Prevost v One City Block LLC*, 155 AD3d 531, 534 [1st Dept 2017]).

*VBG's Motion Seeking Summary Judgment on Plaintiff's Labor Law § 200 and Common Law Negligence Claims*

In support of its motion for summary judgment, VBG argues that “[VBG is] entitled to summary judgment dismissing the plaintiff’s common law negligence and Labor Law § 200 claims because plaintiff was not exposed to a dangerous condition” (*see* NYSCEF DOC. 83 at 25). VBG also argues that it did not direct, control or supervise plaintiff’s work. (*id.* at 28). However, VBG’s assertion that plaintiff was not exposed to a dangerous condition is unavailing.

Like in *Armental*, plaintiff’s accident occurred because of a dangerous condition on the premises, the metal piece of pipe that was placed on the floor in front of a container of compound that plaintiff was using to complete his work (*see* NYSCEF DOC. NO. 102 at 17-18). Plaintiff’s accident was not caused by the manner in which his work was being performed, but rather due to a dangerous condition on the premises (*Armental*, 183 AD3d at 407).

VBG has failed to establish, *prima facie*, that it did not negligently create the hazardous condition that caused plaintiff’s accident. In support of its motion, VBG relies on the affidavits of John Kane (*see* NYSCEF DOC. NO. 106) and Justin Rothstein (*see* NYSCEF DOC. NO. 107). As determined above Rothstein’s affidavit will not be considered. Kane attests that VBG was not responsible for directing the means and methods of plaintiff’s work to be performed. However, his affidavit does not establish that VBG was not responsible for the placement of the piece of metal that caused plaintiff’s accident.

Accordingly, the branch of VBG’s motion seeking dismissal of plaintiff’s Labor Law § 200 and common law negligence claims as against it (motion sequence 001) will be denied.

*Plaintiff's Motion for Summary Judgment on His Labor Law § 200 and Negligence Claims as Against VBG*

Plaintiff argues that defendants VBG violated Labor Law § 200 “because materials and debris were stored improperly on the 19<sup>th</sup> floor for a week, including the metal boxes with metal pipes in the apartment that [he] was working in the day he fell” (*see* NYSCEF DOC. NO. 132).

Where a premises condition is at issue, property owners may be held “liable for a violation of Labor Law § 200 if it either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*Bonkoski v Condos Bros. Constr. Corp.*, 216 AD3d 612, 616 [2<sup>nd</sup> Dept 2023] [internal quotation marks omitted]). An owner “has constructive notice of a hazardous condition on property when the condition is visible and apparent and has existed for a sufficient length of time to afford the [owner] a reasonable opportunity to discover and remedy it” (*id.*).

Here, plaintiff has failed to meet his *prima facie* burden to establish that the owner, VBG, created the dangerous condition that caused his accident. As indicated previously, plaintiff established that he “tripped on a piece of metal that had been in place of the compound container” he was using to perform his work (*see* NYSCEF DOC. NO. 102 at pg. 55). When asked about the metal piece, plaintiff testified:

Q: Was that piece of metal there all day?

A: No, no.

Q: When was the piece of metal placed there?

A: I don't know because I was working in the bedroom and before I was working in the bedroom the metal was not there, I heard someone come in. I heard the sounds but I don't know who did it.

Q: When did you start working in the living room?

A: After midday.

.....

Q: You said you heard somebody come in when you were working in a living room?

A: Yes, I heard something but I don't know who it was, I did not see.

(see NYSCEF DOC. NO. 102 at 55-56).

Based on his own testimony, plaintiff has not established that VBG created the dangerous condition by placing the metal piece where the compound container was located. He testified that although someone entered the apartment when he was working in the bedroom, he did not see who it was (*id.*). Plaintiff also testified that while he “heard steps” he did not “hear them set down any metal pipes or poles” (*id.* at pg. 58). As such, plaintiff has failed to make a *prima facie* showing to establish that VBG created the dangerous condition and thus, triable issues of fact exist as to who created the dangerous condition that caused plaintiff’s accident.

Plaintiff has also failed to make a *prima facie* showing that VBG had actual or constructive notice of the piece of metal that caused his accident.

Plaintiff testified that he previously made complaints to Anthony, an alleged employee of DK Construction (*see* NYSCEF DOC. NO. 102 at 35), about trash and debris, including “sheetrock, pieces of metal [and] insulation” located “in the hallways and in the apartments” (*id.* at 36-37). However, plaintiff testified that he was working in several apartments throughout that entire week and thus, a blanket complaint of trash and debris alone is insufficient to provide VBG with actual notice of the piece of metal, that caused plaintiff’s accident. Plaintiff has also not established that Anthony, or anyone else, forwarded any of the complaints to VBG.

Additionally, “[c]onstructive notice ordinarily means that a person should be held to have knowledge of a certain fact because he knows other facts from which it is concluded that he actually knew, or ought to have known, the fact in question. Constructive notice also exists whenever it is shown that reasonable diligence would have produced actual notice’ (42 N.Y.Jur., Notice and Notices, 3.)” *Bierzynski v N.Y.C.R.R. Co.*, 31 Ad2d 294, 297 [4th Dept 1969]; *see also Van Skyock v Burlington Northern-Santa Fe Co.*, 265 AD2d 545, 546 [2d Dept 1999]).

Here, triable issues of fact exist as to whether VBG had constructive notice of the piece of metal that caused plaintiff's accident. Plaintiff himself testified that he did not see the piece of metal when he started his work and that he only saw it after midday (*see* NYSCEF DOC. NO 102 at 55-56). The testimony is also unclear as to when plaintiff first saw the piece of metal. Plaintiff was asked "when you came out to the living room, did you see metal on the ground where the accident occurred?" he replied "no" (*id.* at 64). Thus, plaintiff has failed to make a *prima facie* showing that VBG had constructive notice of the piece of metal.

Accordingly, the branch of plaintiff's motion seeking summary judgment on his Labor Law §200 and common law negligence claims will be denied.

Labor Law § 241(6)

"Labor Law § 241(6) imposes a non-delegable duty on owners and contractors to provide reasonable and adequate protection and safety" (*Toussaint v Port Auth. of New York and New Jersey*, 38 NY3d 89, 93 [2022] [internal citations omitted]) "to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Ochoa v JEM Real Estate Co., LLC*, 223 AD3d 747, 749 [2<sup>nd</sup> Dept 2024]). "To sustain a cause of action pursuant to Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code regulation that is applicable to the circumstances of the accident" (*id.*). "[A]n owner or general contractor is vicariously liable without regard to their fault, and even in the absence of control or supervision of the worksite, where a plaintiff establishes a violation of a specific and applicable Industrial Code regulation" (*Bazdaric v Almah Partners LLC*, 41 NY3d 310, 317 [2024] [internal quotation marks and citations omitted]). "The Code regulation must constitute a specific, positive command, not one

that merely reiterated the common-law standard of negligence” (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]).

Plaintiff’s bill of particulars alleges violations of the following Industrial Code Sections: 12 NYCRR § 23-1.7 (e)(1)(2); 12 NYCRR § 23-1.7 (f); 12 NYCRR § 23-1.30; 12 NYCRR § 23-2.1 (a)(1) and (b); 12 NYCRR § 23-3.3 (e)(1), (e)(2), (e)(3), (f), (k)(1)(ii) and (L) (*see* NYSCEF DOC. NO. 69).

Plaintiff moves for summary judgment on his Labor Law § 241(6) based upon violations of 12 NYCRR § 23-1.7 (e)(2) (*see* NYSCEF DOC. NO. 132).

VBG moves for summary judgment dismissing plaintiff’s Labor Law § 241(6) claim based upon 12 NYCRR § 23-1.7 (e)(1) and (e)(2), 12 NYCRR § 23-1.7 (f); 12 NYCRR § 23-1.30; 12 NYCRR § 23-2.1 (a)(1) and (b); 12 NYCRR § 23-3.3 (e)(1), (e)(2), (e)(3), (f), (k)(1) (ii) and (L) (*see* NYSCEF DOC. NO. 83).

*12 NYCRR § 1.7 (e)*

12 NYCRR § 23-1.7 (e) provides as follows:

“(e) Tripping and other hazards.

(1) 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.

(2) 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.”

Plaintiff moves for partial summary judgment based upon VBG’s alleged violation of Industrial Code 12 NYCRR § 1.7 (e)(2). Plaintiff argues that this provision is applicable because he was engaged in a statutorily protected activity, namely “spackling work, and wall repairs”

(see NYSCEF DOC. NO. 132 at pg. 4-5). Plaintiff further argues that under this provision, “metal beams left in the apartment that [plaintiff] needed to work in-and directly in front of the tray of compound that he needed to use – violated § 23-1.7 (e)(2).”

As to 12 NYCRR § 1.7 (e)(1) and (2) VBG contends that 12 NYCRR § 1.7 (e)(1) is inapplicable because plaintiff’s accident did not occur in a passageway (see NYSCEF DOC. NO. 83 at pg. 7-8). Additionally, VBG argues that plaintiff’s claims under both 12 NYCRR § 1.7 (e)(1) and (2) should be dismissed because “evidence establishes that the pipes were integral to the work being performed and were not trash or debris” (*id.* at pg. 9-10).

12 NYCRR § 1.7 (e)(1) and (2) are sufficiently specific to support a claim under Labor Law § 241 (6) (*Smith v McClier Corp.*, 22 AD3d 369, 370 [1st Dept 2005]; *Colucci v Equitable Life Assur. Socy. of the U.S.*, 218 AD2d 513, 514-515 [1st Dept 1995]). Generally, “[a]lthough the regulations do not define the term ‘passageway’ ..., courts have interpreted the term to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area” (*Quigley v Port Auth. of N.Y. & N.J.*, 168 AD3d 65, 67 [1st Dept 2018], quoting *Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1250 [4th Dept 2013]).

Here, plaintiff tripped and fell inside the living room of an apartment. The record is unclear as to details that could allow for the area in which plaintiff fell to be defined as a walkway or pathway. Accordingly, as there are triable questions of fact, the branch of VBG’s and plaintiff’s motions seeking summary judgment on plaintiff’s Labor Law § 241 (6) claim predicated on 12 NYCRR § 1.7 (e)(1) will be denied.

With respect to 12 NYCRR § 23-1.7 (e)(2), this section does not apply where the tripping hazard was an integral part of the work being performed (*See Thomas v Goldman Sachs*

*Headquarters, LLC*, 109 AD3d 421, 422 [1st Dept 2013] [“protective covering had been purposefully installed on the floor as an integral part of the renovation project”]).

The record is clear that plaintiff was working on repairing and applying compound to walls. He was not working with any metal, including beams, nor does the record establish that any metal pipes were integral to his specific work.<sup>3</sup> When asked about metal pipes at the project, VBG testified the following:

“Q: Okay. Who would have been using metal pipes on the 19<sup>th</sup> floor, in October of 2020, if anyone?

A: If it’s – what do you – are we saying general metal pipes or are we –

Q: Correct, metal pipes.

A: Metal pipes would be the plumber or the electrician.

Q: Okay. Would anyone from the electrical company be performing sheetrock or compound on the 19<sup>th</sup> floor on October 2020?

A: No.

Q: Okay. And would anyone from MT Electric be performing sheetrock or compound, on the 19<sup>th</sup> floor, on October 2020?

A: No. Is this the same question?

Q: Sorry. The first one was the elevator company. They would not be.

A: Elevator, no, and MT no.

Q: And the same for the plumbers, they wouldn’t be using compound or sheetrock as well on the 19<sup>th</sup> floor?

A: That’s correct, no, they would not.”

(See NYSCEF DOC. NO. 103 at pg. 63-64).

Although plaintiff was not using pipes, or any pieces of metal for his work, a triable issue of fact remains as to whether any of the pieces of metal were an integral part of the construction overall project. VBG’s testimony, suggest that the pieces of metal or pipes were used at some point during the construction project, even if they were not used on the 19<sup>th</sup> floor.

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<sup>3</sup> It is noteworthy that throughout their moving papers, both plaintiff and VBG refer to the metal piece that caused plaintiff’s accident as a pipe. Plaintiff described the piece of metal as “columns” and agreed that they were “beams.” (See NYSCEF DOC. NO. 102 at pg. 112-113).

Accordingly, plaintiff's and VBG's motions for summary judgment on plaintiff's Labor Law § 241(6) will be denied as predicated on 12 NYCRR § 23-1.7 (e).

*12 NYCRR § 23-2.1(a)(1)*

VBG also moves for summary judgment on plaintiff's Labor Law § 241(6) claim predicated on violation of 12 NYCRR § 23-2.1 (a)(1).

12 NYCRR § 23-2.1 (a)(1) provides as follows:

“(a) Storage of material or equipment.

(1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.”

This section of the Industrial Code is sufficiently specific to sustain a claim under Labor Law § 241(6) (*Scannell v Mt. Sinai Med. Ctr.*, 256 AD2d 214, 215 [1st Dept 2019]).

VBG argues that 12 NYCRR § 23-2.1 (a)(1) is “inapplicable because there is no evidence that any material was being stored or that debris were being handled or disposed by methods that would have endangered persons employed at the site” (*see* NYSCEF DOC. NO. 83 at 10).

In opposition, plaintiff argues that VBG “failed to eliminate all issues of fact about whether the improperly stored pipes and boxes, did not obstruct any ‘walkway’” (*see* NYSCEF DOC. No 190 at 10).

Here, triable issues of fact exist as to whether the metal beam that caused plaintiff's accident was being stored, as well as whether it was done so in a safe and orderly manner as required by 12 NYCRR § 23-2.1 (a)(1). The record is unclear as to how or why the metal beam appeared in the apartment plaintiff was working in.

Accordingly, the branch of VBG's summary judgment motion seeking dismissal of plaintiff's Labor Law § 241(6) claim predicated on 12 NYCRR § 23-2.1(a)(1) will be denied.

Finally, plaintiff abandoned any remaining provisions of the Industrial Code cited in his bill of particulars by failing to address them in either his motion for summary judgment (*see* NYSCEF DOC. NO. 132) or in opposition to defendant VBG's motion (*see* NYSCEF DOC. 190) (*Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section."]). Accordingly, the branch of VBG's summary judgment motion seeking seeking dismissal of plaintiff's Labor Law § 241(6) claim based on 12 NYCRR § 23-1.7 (f), 12 NYCRR § 23-1.30, 12 NYCRR § 23-2.1 (b); 12 NYCRR § 23-3.3 (e)(1), (e)(2), (e)(3), (f), (k)(1)(ii) and (L) will be granted.

Contractual Indemnification

As previously discussed, the second-third party action as against MT Electric has been severed from this action (*supra*). Accordingly, the branch of VBG's motion seeking summary judgment on its contractual and common law indemnity claims as against MT Electric will be denied without prejudice to move in the separate action.

"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" (*Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82, 87-88 [1st Dept 2018], quoting *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). "The right to contractual indemnification depends upon the specific language of the contract" (*Trawally v City of New York*, 137 AD3d 492, 492-493 [1st Dept 2016] quoting *Alfaro v 65 W. 13<sup>th</sup> Acquisition, LLC*, 74 AD3d 1255, 1255 [2d Dept 2010]) and

indemnity contracts “must be strictly construed so as to avoid reading unintended duties into them” (*905 5<sup>th</sup> Assoc., Inc. v Weintraub*, 85 AD3d 667, 668 [1st Dept 2011]).

In support of its motion, VBG submits a “Standard Abbreviated Form of Agreement Between Owner and Contractor” (“Agreement”) dated August 7, 2020 (*see* NYSCEF DOC. NO. 97). The Agreement identifies DK Construction as “Contractor” (*id.*) states in relevant part:

**§9.15 Indemnification**

§9.15.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, and Owner’s agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to reasonable attorney’s fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss, or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 9.15.1. In addition, Contractor shall indemnify and hold Owner harmless from and against claims by any subcontractor or materialman relating to mechanics’ liens and claims for failure of Contractor to make payment in connection with the Project.

§9.15.2 In claims against any person or entity indemnified under this Section 9.15 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, the indemnification obligation under Section 9.15.1 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or Subcontractor under worker’s compensation acts, disability benefit acts or other employee benefit acts.

(*see* NYSCEF DOC. NO. 97 at pg. 14-15).

VBG argues that it is entitled to contractual indemnification by DK Construction based on the indemnification language in the Agreement. VBG further avers that the Agreement

requires DK Construction to “be solely responsible for and have control over construction means, methods, techniques, sequences, and procedures, and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters” (*see* NYSCEF DOC. NO. 81 at ¶ 24; *see also* NYSCEF DOC. NO. 97 at pg. 11).

In opposition, DK Construction argues that the accident was not caused by any negligence on its part and that it did not hire any subcontractors (*see* NYSCEF DOC. NO. 157 at pg. 4). DK Construction further argues that “there is no evidence that DK Construction placed in the apartment the metal materials over which plaintiff tripped” (*id.*). DK Construction adds “[p]laintiff’s injuries were not caused by any acts, or omissions by DK Construction, but by the unknown individuals who had placed the metal materials in the apartment where plaintiff was working, and by plaintiff’s failure to look where he was walking, which resulting in his tripping” (*id.*). DK Construction also argues that plaintiff was not an employee of DK Construction (*id.*).

As previously noted, plaintiff has established, *prima facie*, that he was an employee of DK Construction on the date of his accident. Plaintiff, who also goes by the name Pedro Gonzalez, testified that he was an employee of DK Construction on the date of his accident (*see* NYSCEF DOC. NO. 102 at 17-18). Moreover, the record includes documentation from the New York State Worker’s Compensation Board, including an award letter, that identifies plaintiff’s employer as DK Construction (*see* NYSCEF DOC. NO. 203).

Here, the record establishes that the accident arose out of DK Construction’s work in the building and that plaintiff was an employee of DK Construction and he was injured during the course of his work, namely repairing and renovating the walls in several apartments on the 19<sup>th</sup> floor of the building.

However, there are questions of fact as to whether plaintiff's accident was "caused by the negligent acts or omissions" of DK Construction. Specifically, there are still questions of fact as to who placed the pieces of metal that caused plaintiff's accident and when the pieces of metal were placed in the apartment where plaintiff was working. Plaintiff's own testimony is that the pieces of metal were not there all day but instead appeared "after midday" (*see* NYSCEF DOC. NO. 102 at pg. 55-56). Plaintiff's testimony raises questions as to who was responsible for transporting the pieces of metal to the apartment where plaintiff was working.

Accordingly, the branch of VBG's summary judgment motion seeking contractual indemnification as against DK Construction will be denied.

#### Common Law Indemnification

A party seeking common law indemnification must show "(1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]).

Here, as previously discussed, triable issues of fact exist as to whether VBG created the dangerous condition, namely placing the metal beam, that caused plaintiff's accident (*supra*). Accordingly, VBG's summary judgment motion seeking common-law indemnification as against DK Construction will be denied.

### CONCLUSION

Accordingly, it is

**ORDERED**, that the branch of defendants/third-party plaintiffs VBG 990 AOA, LLC and VANBARTON GROUP, LLC summary judgment motion (MS #1), seeking dismissal of

PLAINTIFF'S Labor Law § 240 (1) claim is granted and PLAINTIFF'S Labor Law § 240 (1) claim is dismissed; and it is further

**ORDERED**, that plaintiff's cross-motion (MS #1) seeking to preclude VBG 990 AOA, LLC and VANBARTON GROUP, LLC from arguing a lack of notice of a dangerous condition, is granted to the extent that Justin Rothstein's affidavit submitted in support of VBG 990 AOA, LLC and VANBARTON GROUP, LLC's summary judgment motion was not considered and he is precluded from offering testimony in this action; and it is further

**ORDERED**, that the branch of defendants/third-party plaintiffs VBG 990 AOA, LLC and VANBARTON GROUP, LLC summary judgment motion (MS #1), seeking dismissal of PLAINTIFF'S Labor Law § 200 and common law negligence claims is denied; and it is further

**ORDERED**, that the branch of plaintiff's motion (MS #2) , seeking summary judgment as against defendants/third-party plaintiffs VBG 990 AOA, LLC and VANBARTON GROUP, LLC, on his Labor Law § 200 and common law negligence claims is denied; and it is further

**ORDERED**, that the branch of plaintiff's motion (MS #3), seeking summary judgment as against defendants/third-party plaintiffs VBG 990 AOA, LLC and VANBARTON GROUP, LLC, on the issue of liability on his Labor Law § 241 (6) claim is denied; and it is further

**ORDERED**, that the branch of defendants/third-party plaintiffs VBG 990 AOA, LLC and VANBARTON GROUP, LLC summary judgment motion (MS #1), seeking dismissal of PLAINTIFF'S Labor Law § 241 (6) claim predicated on 12 NYCRR § 23-2.1 (a)(1) is denied; and it is further

**ORDERED**, that the branch of defendants/third-party plaintiffs VBG 990 AOA, LLC and VANBARTON GROUP, LLC summary judgment motion (MS #1), seeking dismissal of PLAINTIFF'S Labor Law § 241 (6) claim predicated on 12 NYCRR § 23-1.7 (f), 12 NYCRR §

23-1.30, 12 NYCRR § 23-2.1 (b); 12 NYCRR § 23-3.3 (e)(1), (e)(2), (e)(3), (f), (k)(1)(ii) and (L) is granted; and it is further


ORDERED, that defendant HVAC CONSTRUCTION INC’s summary judgment motion (MS #3), seeking is granted and all claims and cross-claims as against defendant HVAC CONSTRUCTION INC. are hereby dismissed; and it is further

ORDERED that the branch of defendants/third-party plaintiffs VBG 990 AOA, LLC and VANBARTON GROUP, LLC motion (MS #1), seeking summary judgment as against third-party defendant DK CONSTRUCTION ONE CORP. on their contractual indemnification claim is denied; and it is further

ORDERED that the branch of defendants/third-party plaintiffs VBG 990 AOA, LLC and VANBARTON GROUP, LLC motion (MS #1), seeking summary judgment as against third-party defendant DK CONSTRUCTION ONE CORP. on their common law indemnification claim is denied; and it is further

ORDERED that, that the clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of this action is severed and continued.

  
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<u>2/6/2025</u> DATE			<hr/> PAUL A. GOETZ, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE