SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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CHRIS RICHARDSON, DAWN RICHARDSON,

Plaintiffs,

- v -

ONE CITY BLOCK LLC, TACONIC MANAGEMENT CO. LLC, TALISEN CONSTRUCTION CORPORATION, STRUCTURE TONE, LLC,

Defendants.

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INDEX NO. 160760/2018

MOTION DATE 08/27/2024, 07/23/2024, 07/24/2024

MOTION SEQ. NO. 003 004 005

DECISION + ORDER ON MOTION

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STRUCTURE TONE, LLC

Plaintiff,

-against-

W&M SPRINKLER D/B/A ISLAND FIRE LIFE SAFETY CO.

Defendant.

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Third-Party
Index No. 595275/2020

The following e-filed documents, listed by NYSCEF document number (Motion 003) 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 198, 201, 204, 230, 231, 232, 233, 234, 235, 236, 237, 260, 274

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 199, 202, 205, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 261, 263, 264, 265, 266, 267, 268, 269, 270, 271, 275, 276, 277, 278, 279, 280, 281, 282, 283, 285

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 191, 192, 193, 194, 195, 196, 197, 200, 203, 206, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 262, 272, 273, 284, 286

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this Labor Law personal injury action arising from plaintiff's[1] slip and fall on the steps of a loading dock, defendant Talisen Construction Corporation (Talisen) moves (i) for plaintiff's stipulation of discontinuance of all his claims as against Talisen to be so-ordered, (ii) to dismiss defendant/third-party plaintiff Structure Tone LLC's (Structure Tone) cross-claim against it for common law indemnification; (iii) for a declaration that no other parties have claims against Talisen; and (iv) an award of Talisen's costs and attorneys' fees as against Structure Tone (MS #3). Structure Tone moves for summary judgment pursuant to CPLR § 3212 to dismiss plaintiff's claims as against it for common law negligence and violation of Labor Law §§ 200, 240(1) and 241(6), and for summary judgment on its contractual indemnification claim as against third-party defendant W&M Sprinkler d/b/a Island Fire Life Safety Co. (W&M) (MS #4). Plaintiff cross-moves for summary judgment on the issue of Structure Tone's liability on plaintiff's causes of action pursuant to Labor Law §§ 240(1) and 241(6) (MS #4). Defendants One City Block LLC (OCB) and Taconic Management Co. LLC (Taconic) move for summary judgment pursuant to CPLR § 3212 to dismiss plaintiff's Labor Law §§ 240(1) and 241(6) causes of action (MS #5). Plaintiff cross-moves for summary judgment on the issue of OCB and Taconic's liability on those causes of action (MS #5)[2].

BACKGROUND

OCB is the owner of the building located at 111 8th Avenue, New York, NY 10011, where plaintiff's accident occurred (the premises); Taconic is the managing agent of the building (NYSCEF Doc No 249); and Talisen was the construction manager hired to perform work on the building's elevators (NYSCEF Doc Nos 156-157). OCB hired Structure Tone as a general

[1] For the purposes of this decision and order, "plaintiff" shall refer to plaintiff Chris Richardson. Plaintiff Dawn Richardson is Chris Richardson's wife and seeks to recover for loss of spousal services.
[2] OCB and Taconic adopt the arguments advanced by Structure Tone in MS #4, to the extent that the motion seeks the same relief. Plaintiff's cross-motion asserts the same arguments as in his cross-motion on MS #4.

contractor to perform an interior retrofit for the Google offices on the 16th floor of the premises (NYSCEF Doc No 183). Structure Tone hired W&M, plaintiff's employer, as a sub-contractor to perform fire suppression work on the 16th floor (NYSCEF Doc No 184).

On November 6, 2018, plaintiff, a steamfitter, arrived at the premises for his 6:00 a.m. shift (NYSCEF Doc No 214, pp. 44-45). Upon arriving at the 8th Avenue-side loading dock—which employees used to load and unload materials, and where the freight elevators were located that plaintiff was to use to access the 16th floor—plaintiff walked a few steps up and across the floor to the security desk (*id.*, p. 42). There, plaintiff signed in and was given permission to bring his truck into the loading dock to unload his tools (*id.*, pp. 45-46). When plaintiff descended the steps back towards the street, however, his "left foot slipped out from under [him] and then both [his] feet slipped [] and [he] went flying forward and landed on the floor," causing injury (*id.*, pp. 49). Plaintiff then realized he had slipped on "some sort of slippery substance" on the steps which he did not notice before (*id.*, pp. 51, 96 ["It was dirty water"]).

Plaintiff's causes of action against defendants are for common law negligence and violations of Labor Law §§ 200, 240(1) and 241(6) (NYSCEF Doc No 1). Structure Tone's answer included a crossclaim against Talisen for common law indemnification (NYSCEF Doc No 2). Talisen's answer included crossclaims as against all the co-defendants for common law indemnification and contribution (NYSCEF Doc No 5). Structure Tone filed a third-party complaint against W&M with causes of action for contractual indemnification, breach of contract, contribution, and common law indemnification.

DISCUSSION

Talisen's Motion (MS #3)

First, Talisen notes that plaintiff agreed by stipulation to discontinue all his claims against it (NYSCEF Doc No 153). Accordingly, plaintiff's causes of action as against Talisen will be dismissed pursuant to the agreement.

Next, Talisen argues that Structure Tone's crossclaim against it for common law indemnification must be dismissed because Talisen had no duty to plaintiff, nor did it contribute to plaintiff's accident (NYSCEF Doc No 151). Talisen notes that it had contracts with OCB and Taconic, but neither involved work relating to the loading dock where plaintiff's accident occurred (*id.*; see also NYSCEF Doc Nos 156-157). Structure Tone opposes on the grounds that Talisen did not offer proof that it was not working on the premises on the date of plaintiff's accident (NYSCEF Doc No 230). It also asserts that "neither TALISEN nor STRUCTURE TONE had control of the loading dock[.] Therefore, if the Court were to conclude that there are no valid claims against TALISEN and STRUCTURE TONE on that basis that the area of the accident was not under their control, then they should both be dismissed" (*id.*). Structure Tone fails to allege that Talisen is at fault and that Structure Tone is being "held responsible solely by operation of law because of [its] relation to [Talisen as] the actual wrongdoer" (*Mas v Two Bridges Assocs.*, 75 NY2d 680, 690 [1990]; *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 375 [2011] ["our case law imposes [common law] indemnification obligations upon those actively at fault in bringing about the injury, [] thus reflect[ing] an inherent fairness as to which party should be held liable"]). Accordingly, the part of Talisen's motion seeking dismissal of Structure Tone's crossclaim for common law indemnification against it will be granted.

As Talisen asserts, there are no other claims asserted against it. Accordingly, upon dismissal of plaintiff's causes of action and dismissal of Structure Tone's sole cause of action, the caption will be amended to reflect that Talisen is no longer a party to this action.

Finally, Talisen has not established that Structure Tone's refusal to discontinue its claim against it was frivolous such that it is entitled recover its attorneys' fees and costs. Accordingly, the part of Talisen's motion seeking an award of attorneys' fees and costs will be denied.

Motions for Summary Judgment (MS #4 & #5)

"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 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 [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.*).

i. Timeliness of the Motions and Cross-Motions

Structure Tone asserts that plaintiff's cross-motion on its motion for summary judgment (MS #4) is untimely because it was filed more than 60 days after the filing of the note of issue without explanation for the delay (NYSCEF Doc No 263). However, a "cross motion for summary judgment made after the expiration of the [deadline for making dispositive motions] may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief nearly identical to that sought by the cross motion" (*Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 448-49 [1st Dept 2013]). Plaintiff's cross-motion was filed on September 27, 2024, the deadline for opposition papers as stipulated by the parties (NYSCEF Doc No 205), and seeks summary judgment on the same causes of action as Structure Tone. Therefore, plaintiff's cross-motion will be considered.

Plaintiff argues that OCB and Taconic's motion for summary judgment (MS #5) should not be considered because it was filed after the deadline for dispositive motions (NYSCEF Doc No 286). However, as OCB and Taconic note, their motion was filed only one day after the deadline. Additionally, there is no prejudice to plaintiff in permitting the motion to be considered, as "the relief sought by Defendants is identical to [that sought by] Structure Tone" in its motion filed the previous day and "the opposition and cross-motion filed by Plaintiff against Defendants is identical to the opposition and cross-motion filed by Plaintiff against Structure Tone" (*id.*). Therefore, OCB and Taconic's motion will be considered.

Finally, as OCB and Taconic note, plaintiff's opposition and cross-motion (MS #5) is untimely to the extent that it raises arguments regarding his Labor Law § 200 and common law negligence causes of action (NYSCEF Doc No 259), since OCB and Taconic's timely motion only seeks summary judgment dismissing plaintiff's Labor Law §§ 240(1) and 241(6) causes of action (NYSCEF Doc No 192). Therefore, the part of plaintiff's papers as it relates to OCB and Taconic's liability on plaintiff's Labor Law § 200 and common law negligence causes of action will not be considered.

ii. Application of New York's Labor Laws to the Instant Action

New York's Labor Laws cover "[a]ll areas in which construction, excavation or demolition work is being performed" (Labor Law § 241[6]). As a preliminary matter, Structure Tone asserts that it cannot be held liable under the Labor Laws because the loading dock was not a part of its controlled job area, as it was only performing work on the 16th floor (NYSCEF Doc No 189). Plaintiff opposes on the basis that the loading dock "was not a common area accessible to the public," but rather "the only way to access the 16th floor" where plaintiff was assigned to work, and that it was used by various contractors for storing, loading, and unloading materials necessary to perform his steam-fitting duties (NYSCEF Doc No 227).

"The loading dock and service entrance is within the multi-storied [] building [] in which the [] project took place . . . The building as a whole, and in particular those parts, which must be accessed by a worker to do his or her job, cannot be discounted as a job site simply because it is multi-storied and the dock is not in the immediate vicinity of the floor(s) above that plaintiff was assigned to" perform his work (*Hoyos v NY-1095 Ave. of the Ams., LLC*, 156 AD3d 491, 494 [1st Dept 2017]). According to Structure Tone superintendent Michael Esposito, Structure Tone's workers and subcontractors had to go through the loading dock to perform their work on the

construction project (NYSCEF Doc No 215 pp. 56-58). "Thus, accessing and [walking through] the loading dock for the elevator, even before working hours began, was necessary to the plaintiff's work[;] therefore[,] the loading dock from which the plaintiff fell is included" as part of plaintiff's job site, and the premises for which Structure Tone is responsible, for the purposes of the New York Labor Laws (*Crutch v 421 Kent Dev.*, 192 AD3d 977, 980 [2nd Dept 2021]; *Rivera v Squibb Corp.*, 184 AD2d 239 [1st Dept 1992] [Labor Law applied to worker injured on loading dock on ground floor, though he was performing work on the 25th through 27th floors]).

Structure Tone further asserts that plaintiff's causes of action fail because "STRUCTURE TONE was also able to confirm that the Close-Out book from the Project at the time of the incident shows no indication that Plaintiff was working on a STRUCTURE TONE Project" or that "Plaintiff's employer, ISLAND FIRE performed work at the STRUCTURE TONE project on the date of the incident" (NYSCEF Doc Nos 189, 186 ["According to the Island Fire warranty letter in the Close-Out Book, it would appear that the sprinkler systems in the Structure Tone project had already been installed and accepted before the date of incident, November 6, 2018"]). However, the "close-out book" entry Structure Tone references indicates only that the "Sprinkler System *hydrotest* [was] completed & accepted 10/8/2018"; the "[f]inal installation" of the sprinkler system was not completed until November 15, 2018, nine days after plaintiff's accident (NYSCEF Doc No 186 [emphasis added]). Therefore, Structure Tone has not established as a matter of law that plaintiff was not working on the sprinkler project on the date of his accident such that it is entitled to summary judgment, nor has Structure Tone raised an issue of fact as to plaintiff's cross-motion for summary judgment on the issue of whether he was working on November 6, 2018.

iii. Labor Law § 200 & Common Law Negligence

Structure Tone moves for summary judgment dismissing plaintiff's common law negligence and Labor Law § 200 causes of action.

"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 [1st Dept 2022], quoting *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-44 [1st 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]).

Structure Tone asserts that it did not create the slippery condition, nor did it have notice of it "because Plaintiff did not make any complaints regarding safety or hazards at this Project" (NYSCEF Doc No 189). However, this is only evidence of Structure Tone's lack of *actual* notice; Structure Tone "failed to submit any proof establishing that they lacked *constructive* notice of the condition" (*Romano v New York City Tr. Auth.*, 213 AD3d 506, 508 [1st Dept 2023] [emphasis added]). While Structure Tone notes that "there is no evidence demonstrating whether the specific alleged hazardous condition existed for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (NYSCEF Doc No 189

[internal quotation marks omitted]), it also did not "submit evidence concerning when the area was last cleaned and inspected prior to the accident" (*Sabalza v Salgado*, 85 AD3d 436, 437-38 [1st Dept 2011]).

Accordingly, the part of Structure Tone's motion for summary judgment seeking dismissal of plaintiff's Labor Law § 200 and common law negligence causes of actions will be denied.

iv. Labor Law § 240(1)

Structure Tone, OCB and Taconic move for summary judgment dismissing plaintiff's Labor Law § 240(1) cause of action, and plaintiff cross-moves for summary judgment on the issue of their liability under the statute.

Labor Law § 240(1), known as the Scaffold Law, provides as relevant:

> "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) "imposes a nondelegable duty on owners and contractors to provide devices which shall be so constructed, placed and operated as to give proper protection to those individuals performing the work" (*Quiroz v Memorial Hosp. for Cancer & Allied Diseases*, 202 AD3d 601, 604 [1st Dept 2022] [internal quotation marks and citations omitted]). It "'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 object 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]).

The absolute liability found in section 240 "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" (*O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33 [2017] [internal quotation marks and citation omitted]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). Therefore, section 240(1) "does not cover the type of ordinary and usual peril to which a worker is commonly exposed at a construction site" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]). In order to prevail on a Labor Law § 240(1) claim, a plaintiff must establish that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]).

Structure Tone, OCB and Taconic argue that plaintiff's Labor Law § 240(1) cause of action fails because his accident was not the result of an elevation related risk, but rather a fall from a permanent staircase (NYSCEF Doc Nos 189, 192), and "[w]here a fall occurs from a permanent stairway, no liability pursuant to Labor Law § 240 (1) can attach" (*Gallagher v Andron Constr. Corp.*, 21 AD3d 988, 989 [2nd Dept 2005]). Plaintiff opposes and cross-moves for summary judgment on this cause of action on the grounds that the staircase was the sole means of descent to the floor below (NYSCEF Doc Nos 227, 259).

"The permanent staircase from which the plaintiff fell was a normal appurtenance to the building and was not designed as a safety device to protect him from an elevation-related risk" (*Verdi v SP Irving Owner, LLC*, 227 AD3d 932, 936 [2nd Dept 2024]; *Sullivan v New York Athletic Club of City of N.Y.*, 162 AD3d 950, 953 [2nd Dept 2018] ["there is no liability arising from the plaintiff's act of descending the stairs"]). In the cases cited by plaintiff, "the stairway was an elevated surface on which plaintiff was required to work" (*Conlon v Carnegie Hall Socy.*,

Inc., 159 AD3d 655, 655 [1st Dept 2018]; *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 602 [2009] ["Plaintiff and several coworkers had been directed to move a large reel of wire, weighing some 800 pounds, down a set of about four stairs"]). Here, however, "plaintiff was using the [] permanent staircase as a passageway[, and an] accident arising on such a passageway does not lie within the purview of subdivision 1 of section 240" (*Ramirez v Shoats*, 78 AD3d 515, 519 [1st Dept 2010]).

Accordingly, the parts of Structure Tone's (MS #4) and OCB and Taconic's (MS #5) motions for summary judgment seeking dismissal of plaintiff's Labor Law § 240(1) cause of action will be granted; and the parts of plaintiff's respective cross-motions seeking summary judgment on this cause of action will be denied.

v. Labor Law § 241(6)

Structure Tone, OCB and Taconic move for summary judgment dismissing plaintiff's Labor Law § 241(6) cause of action, and plaintiff cross-moves for summary judgment on the issue of their liability under the statute.

"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 [2nd 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 reiterate[s] the common-law standard of negligence" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]).

On the instant motions, plaintiff only addresses Industrial Code §§ 23-1.7(d) and (f) in support of his Labor Law § 241(6) cause of action. Therefore, plaintiff abandoned any remaining provisions of the Industrial Code cited in his bill of particulars (*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."]).

Industrial Code §§ 23-1.7(d) and (f) provide:

> (d) **Slipping hazards**. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing . . .
>
> (f) **Vertical passage**. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.

"[T]he reference in 12 NYCRR 23-1.7 (d) to passageways can encompass a permanent staircase, when that staircase is the sole access to the work site" (*Wowk v Broadway 280 Park Fee, LLC*, 94 AD3d 669, 670 [1st Dept 2012]). As noted *supra*, the loading dock was the only point of access to the security desk and 16th floor where plaintiff was working. Structure Tone, OCB and Taconic argue, however, that plaintiff did not have to use the loading dock's *stairs*, as

there was a ramp available directly next to the stairs (NYSCEF Doc No 167). Plaintiff argues that "[t]he fact that there was a ramp next to the stairs does not make 241(6) nor 23- 1.7(d) inapplicable [because] it is undisputed that workers would use the loading dock stairs when going to and from the elevated loading dock to the ground level, not the ramp" (NYSCEF Doc No 285). Plaintiff testified that he never used the ramp, as it was meant "for material[s]" to be transported, nor did he see anyone else walk up or down the ramp (NYSCEF Doc No 214, p. 93). Structure Tone does not address this part of plaintiff's testimony (NYSCEF Doc No 263), and while OCB and Taconic assert that "Plaintiff was not instructed to use the stairs rather than the ramp," they provide no evidence to support that assertion, nor do they dispute that the stairs were, in practice, used as the primary means of access for construction workers unless they were transporting materials (NYSCEF Doc No 272). In any case, there remains a question of fact as to whether the stairs were left "in a slippery condition" within the meaning of Industrial Code § 23-1.7(d). Therefore, whether this section was violated cannot be determined as a matter of law.

Industrial Code § 23-1.7(f) is inapplicable to the facts of this case, as plaintiff does not allege that Structure Tone, OCB or Taconic failed to provide a stairway as the means of access to working levels (compare with *Chiarella v New York State Thruway Auth.*, 230 AD3d 463, 463 [2nd Dept 2024] ["claimant was descending from an upper walkway to a lower walkway on the work site, using a wooden pallet that had been installed between the two levels"]; *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 660 [2nd Dept 2015] ["plaintiff allegedly sustained injuries when he fell while climbing over a railing of a permanent platform"]; *Lavore v Kir Munsey Park 020, LLC*, 40 AD3d 711, 712 [2nd Dept 2007] ["plaintiff was injured when he fell while descending from the side of his utility truck"]).

Accordingly, the parts of Structure Tone's (MS #4) and OCB and Taconic's (MS #5) motions for summary judgment seeking to dismiss plaintiff's Labor Law § 241(6) cause of action will be granted as predicated on Industrial Code §§ 23-1.5, 23-1.7(e), 23-1.7(f), 23-l.11, 23-1.15, 23-1.22, 23-l .23, 23-2.1, 23-3, 23-4, 23-5, 23-6, 23- 7, 23-8, and 23-2.7, and denied as predicated on Industrial Code § 23-1.7(d); and the part of plaintiff's cross-motions seeking summary judgment on the issue of defendants' liability under that statute will be denied.

vi. Contractual Indemnification (MS #4)

Structure Tone moves for summary judgment on its contractual indemnification claim as against W&M (MS #4).

"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. 13th Acquisition, LLC*, 74 AD3d 1255, 1255 [2nd Dept 2010]) and indemnity contracts "must be strictly construed so as to avoid reading unintended duties into them" (*905 5th Assoc., Inc. v Weintraub*, 85 AD3d 667, 668 [1st Dept 2011]). In contractual indemnification, "the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (*Pena v Intergate Manhattan LLC*, 194 AD3d 576, 578 [1st Dept 2021], quoting *Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 65 [1st Dept 1999]). Unless the indemnification clause explicitly requires a finding of negligence on

behalf of the indemnitor, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia,* 259 AD2d at 65).

The "Assumption of Liability & Indemnity" clause in the subcontract entered into by Structure Tone and W&M provides:

> "To the fullest extent permitted by law, Subcontractor shall indemnify, defend and hold harmless Structure Tone . . . from and against all claims . . . arising out of, or resulting from the performance, or failure in performance, of Subcontractor's Work and obligations as provided in the Contract Documents, including [claims] . . . by any employee of Subcontractor, anyone directly or indirectly employed by Subcontractor or anyone for whose acts Subcontractor may be liable, [and] the indemnification obligation within the Contract Documents shall not be limited in any way . . .

(NYSCEF Doc No 184 § 11.2). Structure Tone argues that under this "very broad indemnification contract, [W&M must] act as indemnitor even if it was not negligent, [since] the accident arose out of . . . its work" on the construction project (NYSCEF Doc No 189). W&M argues that Structure Tone is not entitled to judgment as a matter of law on its indemnification claim because it has not established that it is free from negligence, and in any case, the provision Structure Tone relies on violates General Obligations Law § 5-322.1 because it requires W&M to indemnify Structure Tone for its own negligence (NYSCEF Doc No 271). Structure Tone asserts that Gen. Oblig. Law § 5-322.1 is not triggered "because there is no evidence of any negligence on [Structure Tone's] behalf" (NYSCEF Doc No 189).

As determined *supra*, issues of fact remain as to Structure Tone's negligence and statutory liability for plaintiff's injuries. Since Structure Tone has not "establish[ed] that it was free from any negligence and [may be] held liable solely by virtue of the statutory liability" (*Correia v Professional Data Mgmt., Inc.*, 259 AD2d 60, 65 [1st Dept 1999]), "a conditional order of summary judgment for contractual indemnification must be denied as premature"

(*Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808 [2nd Dept 2009]; *Radeljic v Certified of N.Y., Inc.*, 161 AD3d 588, 590 [1st Dept 2018] ["In light of the issues of fact that exist as to the extent of defendant's liability for causing plaintiff's injuries, summary judgment on defendant's contractual indemnification claim [] would be premature"]).

Accordingly, the part of Structure Tone's motion seeking judgment on its contractual indemnification claim as against W&M (MS #4) will be denied.

CONCLUSION

Based on the foregoing, it is

ORDERED that Talisen's motion (MS #3) is granted to the extent that all causes of action against it are dismissed; and it is therefore

ORDERED that the caption in this matter is hereby amended as follows:

CHRIS RICHARDSON, DAWN RICHARDSON,

Plaintiffs,

- v –

ONE CITY BLOCK LLC, TACONIC MANAGEMENT CO. LLC, STRUCTURE TONE, LLC,

Defendants.

----------X

STRUCTURE TONE, LLC

Plaintiff,

Third-Party
Index No. 595275/2020

-against-

W&M SPRINKLER D/B/A ISLAND FIRE LIFE SAFETY CO.

Defendant.

And it is further

ORDERED that all papers, pleadings, and proceedings in the above-entitled action be amended in accordance with this change, without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that defendant Talisen Construction Corporation shall, within 30 days of entry of this order, serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website); and it is further

ORDERED that the part of Talisen's motion seeking an award of attorneys' fees and costs as against Structure Tone (MS #3) is denied; and it is further

ORDERED that the part of Structure Tone's motion for summary judgment seeking dismissal of plaintiff's Labor Law § 200 and common law negligence causes of actions (MS #4) is denied; and it is further

ORDERED that the parts of Structure Tone's (MS #4) and OCB and Taconic's (MS #5) motions for summary judgment seeking dismissal of plaintiff's Labor Law § 240(1) cause of action are granted; and it is further

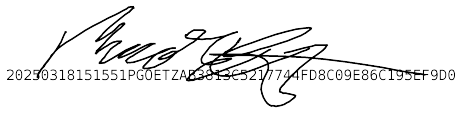
ORDERED that the parts of plaintiff's cross-motions seeking summary judgment on his Labor Law § 240(1) cause of action (MS #4 and #5) are denied; and it is further

ORDERED that the parts of Structure Tone's (MS #4) and OCB and Taconic's (MS #5) motions for summary judgment seeking to dismiss plaintiff's Labor Law § 241(6) cause of action

are granted as predicated on Industrial Code §§ 23-1.5, 23-1.7(e), 23-1.7(f), 23-l.11, 23-1.15, 23-1.22, 23-l .23, 23-2.1, 23-3, 23-4, 23-5, 23-6, 23- 7, 23-8, and 23-2.7, and denied as predicated on Industrial Code § 23-1.7(d); and it is further

ORDERED that the parts of plaintiff's cross-motions seeking summary judgment on the issue of defendants' liability on his Labor Law § 241(6) claim (MS #4 and #5) is denied; and it is further

ORDERED that the part of Structure Tone's motion seeking judgment on its contractual indemnification claim as against W&M (MS #4) is denied.



3/18/2025
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE