SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**
Justice

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EUGENE STRATIS
and MARTA STRATIS,
Plaintiffs,

- v -

345 PARK AVE L.P., STRUCTURE TONE, LLC, and BLACKSTONE ADMINISTRATIVE SERVICES PARTNERSHIP, LP,
Defendants.

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STRUCTURE TONE, LLC.,
Third-Party Plaintiff,

-against-

NATIONAL ACOUSTICS, LLC and
PAR FIRE PROTECTION/PAR PLUMBING CO., INC.,
Third-Party Defendants.

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INDEX NO. 157849/2020

MOTION SEQ. NO. 004, 006

DECISION + ORDER ON MOTION

Third-Party
Index No. 595969/2020

The following e-filed documents, listed by NYSCEF document number (Motion 004) 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 200, 238, 239, 240, 244, 245, 250, 253, 254, 255, 260, 290, 291, 292, 293

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 248, 249, 252, 258, 259, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 294, 295, 296, 297, 298, 299, 300, 301, 302

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

The underlying facts of this Labor Law case are set forth in detail in the decision and order of this court dated March 18, 2024, which denied plaintiffs' motion for partial summary judgment on claims premised on Labor Law § 241(6); Labor Law § 200 and common law negligence, and which granted that branch of their motion seeking to amend the bill of particulars to assert a claim under Labor Law § 241(6) (NYSCEF Doc. No. 164, *decision and order*). In sum, this action stems from an accident on August 27, 2020, where plaintiff Eugene Stratis ("plaintiff"),[1] allegedly tripped on a bag of plumbing pipes.

[1] Plaintiff Marta Stratis, Eugene Stratis' spouse, asserts a loss of consortium claim.

Defendants 345 PARK AVE L.P. ("345 Park"), the owner of the premises; STRUCTURE TONE, LLC ("Structure"), the general contractor; and BLACKSTONE ADMINISTRATIVE SERVICES PARTNERSHIP, LP ("Blackstone"), the entity leasing the premises at the time of plaintiff's accident, now move, pursuant to CPLR 3212, for an order dismissing plaintiff's cause of action premised on Labor Law § 240(1), arguing that plaintiff was the proximate cause of his own accident. Defendants also seek, pursuant CPLR 3212, dismissal of "[p]laintiff's cause of action for 241(6) as the Industrial Code sections on which it is premised are inapplicable to the facts of the accident, not violated, because the condition was integral to the work, and because there is no evidence anyone in the chain of the construction project was negligent." Lastly, defendants seek an order conditionally granting 345 Park and Structure summary judgment on their contractual indemnification claims against third-party defendants NATIONAL ACOUSTICS LLC ("National"), plaintiff's employer, and PAR FIRE PROTECTION/PAR FIRE PLUMBING CO., INC ("Par"), the subcontractor allegedly responsible for delivering the subject materials (NYSCEF Doc. No. 154, *notice of motion*). Plaintiff opposes the motion (NYSCEF Doc. Nos. 238-240), and National submits partial opposition (NYSCEF Doc. No. 253) (Mot. Seq. 004).

Plaintiffs also move to renew their motion for summary judgment pursuant to CPLR 3212, against defendants on their causes of action under Labor Law § 241(6), premised upon 12 NYCRR §23-1.7(e)(2) and 12 NYCRR §23-2.1(a)(1) and Labor Law §200 and common law negligence (NYSCEF Doc. No. 203, *notice of motion*).[2] Defendants oppose the motion (NYSCEF Doc. No. 287). National submits partial opposition (NYSCEF Doc. No. 289) (Mot. Seq. 006).

Motion Sequences 004 and 006 are hereby consolidated for disposition.

Addressing first Mot. Seq. 004, in support of their motion, defendants submit, *inter alia*, plaintiff's deposition testimony. Plaintiff testified that, on the day of the accident, he was instructed by Donald MacFarlane ("MacFarlane"), to work on the northwest corner of the 25th floor to redo work on columns that had been done incorrectly. According to plaintiff, there were scattered materials all over the jobsite, including white bags directly in front of a column he was directed to work on. Plaintiff moved some of the materials, despite explicit orders not to move the materials. However, plaintiff testified that the bag he tripped on was not of the materials he had moved earlier. He confirmed that materials were being delivered while he worked (NYSCEF Doc. No. 165).

MacFarlane, foreman for National, affirms via an affidavit that the evening before the accident, Structure directed National to complete construction of the column faces on the 25th floor. MacFarlane protested, complaining that various contractors had materials all over the jobsite, especially in the northwest corner of the 25th floor where plaintiff was injured. Structure allegedly disregarded his concerns. After Stratis began working on the subject columns, workers of the plumbing contractor arrived to drop off additional materials. According to MacFarlane, he made similar complaints about the condition of the workplace on prior occasions (NYSCEF Doc. No. 176, *MacFarlane affidavit*). Defendants also submit the deposition testimony of MacFarlane (NYSEF Doc. No. 175, *MacFarlane EBT*).

[2] This court denied plaintiffs' prior motion for summary judgment, in part, because discovery remained outstanding, i.e., the deposition of Marino Lovrick ("Lovrick"), which it deemed necessary to ascertain whether the pipe fittings were integral to Par's work (NYSCEF Doc. No. 138, *decision and order*).

Robert Stellato ("Stellato"), Structure's Superintendent, denies that Structure was informed about the condition of the jobsite prior to the accident. Upon being presented with a photograph of the condition of the plaintiff's jobsite, Stellato acknowledged that the condition was not one where someone should have been permitted to work, but he nevertheless stated that said condition should have been reported to a superior to clean up. Stellato also testified that the sprinkler work was underway on the 25th floor and that the steamfitting materials in the photographs were being staged for that work (NYSCEF Doc. No. 167, *Stellato EBT*).

Raymond Murray ("Murray"), Structure's project manager, testified that Structure was not involved in the actual delivery of materials. Although Structure was responsible for keeping a clean workspace, Murray affirms that each contractor was responsible for moving its own materials and subcontractors were instructed to place the materials in a neat pile, out of the path of egress. Additionally, materials were kept on wheels as much as possible for materials to be easily moved. Murry also testified that there were no complaints that good housekeeping was not being maintained at the premises, and he averred that delivery and storage of materials had not been a problem at the project. Further, according to Murray, the subject bags were "tucked away, away from paths of egress and walking paths" and "right next to the sheetrock." (NYSCEF Doc. No. 169, *Murray EBT*).

Peter Zgombic ("Zgombic"), on behalf of National, testified that National did not receive any complaints about materials, but he could not remember if MacFarlane made any complaints about the condition at the site. Zgombic testified that the subject bags seen in the photographs were materials delivered for PAR's use, which was working on the 25th floor at the time of the accident. It was Zgombic's testimony that no work was being done by the trades installing the pipe fittings for the sprinklers in the location where plaintiff was injured (NYSCEF Doc. No. 170).

On behalf of PAR, Vincent Vairo ("Vairo") testified that Par was retained by Structure to "rough in" multiple sprinkler systems on multiple floors. Vairo confirmed that Par was responsible for accepting and storing materials that were delivered. To his knowledge, no one had raised any complaints with Structure regarding the placement of Par's materials. Vairo agreed that the bags shown in the photographs were not kept in a neat, tidy fashion (NYSCEF Doc. No. 71, *Vairo's ebt*).

Lovrick, Par's foreman, testified that Par was in the process of installing main branch lines on the 25th floor and that said work required pipe fitting. He further testified that the materials in the subject bags were being used for the installation of branch lines. Lovrick claims he never made any complaints to anyone from Structure about the cleanliness of the job site or the placement or storage of materials. He testified, based on his review of a photo of the site, that it appeared to be a staging area. Lovrick further testified that the materials in the area of the accident were delivered on August 6, 2020, but he did not know when the materials were ultimately placed on the 25th floor. According to Lovrick, only two workers were present on the 25th floor on the date of the accident, but they were working on the south side of the floor (NYSCEF Doc. 173, *Lovrick EBT*).

Michael Fifelski, an eyewitness to the accident, testified that plaintiff "stepped on one of the white bags that was in his workspace, and he rolled backwards and fell." Fifelski also testified that he had seen the materials in the subject location prior to the accident, although he could not testify with certainty how long the materials had been present there (NYSCEF Doc. No. 55).

By memorandum of law, defendants argue that plaintiff's accident does not fall within the ambit of Labor Law § 240(1) because it does not concern an elevation related injury. Additionally, they insist that Labor Law § 241(6), premised on Industrial Code 12 NYCRR §§ 23-1.7(d) and (e)(1) and (2), as well as 23-2.1(a), must be dismissed because the alleged condition was integral to the work and no one within the chain of the project was negligent. To this point, defendants argue that the delivery of the subject bags were simultaneous with the accident and, thus, Structure did not have time to address the situation so as to remediate the alleged hazard. In anticipation of arguments by plaintiff that the affidavit of MacFarlane raises a question of fact as to Structure's notice of a dangerous condition, based on alleged meeting with certain Structure personnel, including Stellano and Murray, regarding a similar condition at the worksite, this, argue defendants, should be rejected because Zgombic, Stellato and Murray all denied any prior complaints regarding the placement of the materials. Moreover, inasmuch as MacFarlane also testified that he observed materials being delivered on the date of the accident, defendants represent that there is no proof that Structure was aware of the hazard, which was being created simultaneously with the incident.

Addressing 12 NYCRR § 23-2.1(a)(1), defendants argue that, contrary to plaintiff's contention, plaintiff did not encounter an unstable material pile which obstructed a passageway, but rather, a staging area which plaintiff found to obstruct his discreet work area. Since 12 NYCRR § 23-2.1(a)(1) is not concerned with this type of obstruction, defendants maintain that the claim premised on this specific industrial code must be dismissed. As to the claim based on 12 NYCRR 23-1.7(d), defendants argue that the bags of pipe fittings involved in the accident were integral to the work actively being performed by PAR in the immediate area, i.e., they were an integral part of the sprinkler system being constructed as part of the project. Similarly, defendants argue that the Labor Law § 241(6) claim based on 12 NYCRR 23-1.7(e)(1) and (2) is equally lacking in merit because plaintiff was working in an "open area" and not a "walkway or pathway" used to traverse between discreet areas. Defendants further argue that, as reflected by the testimony of Lovrick, Stellato, and Murray, the bags were not scattered, but rather were centrally staged in one area. If the bags were in fact "'scattered', that may very well have been plaintiff's doing as he testified to picking up and moving multiple bags, kicking multiple bags and he could not discern which ones he had moved from the one he had tripped on." They further contend that the bags of materials were integral to the work being performed at the premises and, thus, did not violate 12 NYCRR 1.7(e).

Additionally, defendants argue that Par and National are obligated, pursuant to the contractual agreements executed between Structure and National and Structure and Par, which contained indemnification provisions, requiring PAR and National to indemnify defendants for claims arising out of any acts, omissions, breach or default of subcontractor. As such, defendants request conditional contractual indemnification from PAR and National.

Plaintiff opposes the motion, arguing that defendants failed to establish their *prima facie* entitlement to summary judgment dismissing his cause of action under Labor Law § 241(6), since issues of fact remain as to whether the bags violated the subject industrial codes. In its memorandum of law, plaintiff addresses the following provisions: Industrial Code 12 NYCRR §23-2.1(a)(1) and Industrial Code 12 NYCRR §23-1.7(e)(1) and (e)(2).

Addressing Industrial Code 12 NYCRR §23-2.1(a)(1), plaintiff argues that he was assigned to sheetrock a column and was walking to obtain his A-frame containing his sheetrock to perform his task when he tripped over the bags on the floor. Inasmuch as the testimony of Fifelski and MacFarlane establish that the bags were scattered over the floor and obstructed the walkway which plaintiff was using to access his materials, plaintiff posits that, at the very least, issues of fact remain as to whether defendants violated Industrial Code 12 NYCRR §23-2.1(a)(1).

Plaintiff challenges defendants' argument that the materials were integral to the work being performed, arguing that Lovrick testimony reveals that no Par workers were working in the subject area at the time of the accident and that the bags had been delivered on August 6, 2020, belying the claim regarding notice. Plaintiff further argues that Lovrick also did not know whether the location in question was a staging area or whether Par was authorized to store materials there. According to plaintiff, the pipe fittings were for the sprinkler heads that were to be installed. However, any such work would be performed in other areas where National had completed the gridding for the ceiling. The materials are also required to be kept neat and tidy and, to the extent possible, should have been kept "on wheels" for easier mobility.

National submits partial opposition to defendants' motion. It contends that the subject indemnification provision lacks the requisite savings language limiting its obligation to indemnify Structure for its own negligence. Moreover, because Structure has failed to establish that it was free from negligence, National posits that that branch of the motion seeking summary judgment on the contractual indemnification claim against National must be denied (NYSCEF Doc. No. 253, *National's memo in opp*).

In reply, defendants argue that, by failing to address their arguments with respect to Labor Law § 240(1), Labor Law § 200, common law negligence, and Labor Law § 241(6), premised on a violation of 12 NYCRR 23-1.7(d), they must be dismissed as abandoned (NYSCEF Doc. No. 292 ¶ 2).[3] Furthermore, defendants maintain that plaintiff has failed to raise a question of fact sufficient to avoid dismissal of the Labor Law § 241(6) claims. Defendants argue that the bags of materials belonged to Par, who, according to Vairo and Lovrick, were performing work with those materials in the vicinity of the accident. Thus, the bags were "integral" to the work being performed, argue defendants. They also assert that no one within the chain of the construction project failed to act within a reasonable time to prevent or remediate the alleged condition. As to the issue of conditional indemnification against National and Par, defendants argue that, when read as a whole, the savings clause in the indemnification provision is understood to have been intended to limit National's obligation to indemnify Structure for Structures' own negligence to preserve enforceability. Moreover, defendants reiterate that there is no question of fact as to whether Structure was negligent.

As an initial matter, this court notes that plaintiffs do not oppose that branch of defendants' motion seeking dismissal of Labor Law § 241(6), to the extent it relies on industrial code 12 NYCRR 23-1.7(d). Thus, the Labor Law claimed premised on Industrial Code 12 NYCRR 23-1.7(d), is hereby dismissed as abandoned[4] (see *Linares v Massachussetts Mut. Life Ins. Co.*, 225

[3] It should be noted that defendants did not formally seek relief with respect to Labor Law § 200 and common law negligence.

[4] Plaintiffs concede that Labor Law § 240(1) does not apply to the facts of this case (NYSCEF Doc. No. 238 n 1).

AD3d 520, 521 [1st Dept 2024]; *Sancino v Metropolitan Transp. Auth.*, 184 AD3d 534, 535 [1st Dept 2020]). Moreover, the claim premised on Labor Law § 240(1) is withdrawn.

Addressing the remaining claims, Labor Law § 241(6) is a "'hybrid' statute, as the first sentence 'reiterates the general common-law standard of care,' while the second sentence imposes a nondelegable duty with respect to compliance with rules of the Commissioner which contain 'specific, positive command[s]'" (*Bazdaric v Almah Partners LLC*, 41 NY3d 310, 317 [2024], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 503-504 [1993]). Under said statute, "an 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], quoting *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-350 [1998]; *see Toussaint v Port Auth. of NY & NJ*, 38 NY3d 89, 94 [2022]; *Nostrom v A.W. Chesterton Co.*, 15 NY3d 502, 507 [2010]). "The Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 416 [2011]).

As relevant here, 12 NYCRR § 23-2.1(a)(1) provides, in pertinent part, that:

> "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."

12 NYCRR 23-1.7(e)(1) and (2), entitled "Tripping and other hazards" provides as follows:

> "(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."

Here, this court finds that issues of fact preclude summary judgment dismissing plaintiff's claim predicated on 12 NYCRR § 23-2.1(a)(1). Although defendants maintain that plaintiff's injuries occurred in his "work area" and, thus, falls outside the ambit of the subject Industrial Code, plaintiff testified that he was walking away from the column where he was assigned to work and was walking towards his A-frame (NYSCEF Doc. No. 165 at 37, *plaintiff's EBT*). Insofar as plaintiff's testimony raises a question of fact as to whether the bags obstructed a walkway used by plaintiff to access materials necessary to complete his task, that branch of the motion is denied. Moreover, while there is arguably some testimony suggesting that the bags of materials were centrally staged and "tucked away" from ingress and egress, defendants' own proof, including deposition testimony and photographs submitted in support of the instant motion, raise triable issues of fact as to whether the bags were scattered throughout the jobsite. Moreover, defendants' argument that plaintiff may have tripped on the bag that he himself moved is speculative at best and

similarly supports this court's determination that issues of fact remain. Therefore, that branch of defendants' motion seeking dismissal of the Labor Law § 241(6) claim, premised on 12 NYCRR § 23-2.1(a)(1), is denied.

For reasons already stated, that branch of defendants' motion seeking dismissal of the Labor Law § 241(6) claim, based on 12 NYCRR 23-1.7(e)(1) and (2), also fails. Defendants have not demonstrated, as a matter of law, that the passageways/working areas were kept free from scattered tools and materials, or from obstructions or conditions that could cause tripping. Specifically, defendants have failed to establish entitlement to dismissal of the claim based on 12 NYCRR 23-1.7(e)(1). "A 'passageway' is commonly defined and understood to be 'a typically long narrow way connecting parts of a building' and synonyms include the words corridor or hallway (*see* Merriam-Webster Online Thesaurus, passageway [https://www.merriam-webster.com/thesaurus/passageway]). In other words, it pertains to an interior or internal way of passage inside a building." (*Quigley v Port Auth. of N.Y. & N.J.*, 168 AD3d 65, 67 [1st Dept 2018]). Here, plaintiff testified, "I took my A frame and wheeled it to the hallway around the pile so I could finish that column and roll it to the next one. There w[ere] two bags that I kicked over so I could get that A frame through." Plaintiff testified that he returned to the column and completed certain tasks before he went back to the A-frame, stepping on one of the bags on the floor. Insofar as there are issues of fact as to whether plaintiff's injuries occurred in a passageway, pursuant to the statute, that branch of the motion is denied. Defendants have also failed to establish that the plaintiff's work area was free from scattered tools and materials such that 12 NYCRR 23-1.7(e)(2) is not applicable to the facts here. Therefore, that branch of the motion seeking dismissal of the Labor Law § 241(6) claim, premised on these industrial code provisions, is denied.

Additionally, this court finds that defendants fail to establish the integral to work defense. The integral to work defense "applies to things and conditions that are an integral part of the construction, not just the specific task a plaintiff may be performing at the time of the accident" (*Bazdaric v Almah Partners LLC*, 203 AD3d 643, 644 [1st Dept 2022] [internal quotation marks and citations omitted]), and may be asserted against Labor Law § 241(6) claims predicated on 12 NYCRR 23-1.7(e)(1) (see *O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805, 806 [2006]; *Conlon v Carnegie Hall Socy., Inc.*, 159 AD3d 655, 655 [1st Dept 2018]). Insofar as there are issues of fact as to how long the bags had been in the subject area and whether work was being performed in the area of the accident at the time of plaintiff's injuries, the branch of the motion is denied.

As to contractual indemnification, a party seeking full contractual indemnification must establish "that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgmt., Inc.*, 259 AD2d 60, 65, 693 [1st Dept 1999]). However, it is well-settled that a court may grant conditional indemnification, which "serves the interest of justice and judicial economy in affording the indemnitee the earliest possible determination as to the extent to which he may expect to be reimbursed" (*Hong-Baa Ren v Gioia St. Marks, LLC*, 163 AD3d 494, 496-497 [1st Dept 2018] [internal quotation marks and citation omitted]). The First Department has held that an award of conditional indemnification is warranted where the indemnification provision does not purport to indemnify an indemnitee for his or her own negligence, even where there are issues of fact as to an indemnitee's active negligence (see *Cerverizzo v City of New York*, 116 AD3d 469, 472 [1st Dept 2014]; *Hughey v RHM-88, LLC*, 77 AD3d 520, 522-523 [1st Dept 2010]). Here,

this court finds that Par and National are contractually obligated to indemnify Structure Tone, for the arguments in opposition are unavailing. However, that branch of the motion seeking relief in favor of 345 Park is denied, since there is no direct claim asserted by 345 Park against Par and National in the third-party complaint (See NYSCEF Doc. No. 6). Accordingly, that branch of the motion seeking conditional indemnification from Par and National is granted solely in favor of Structure. All remaining arguments have been considered but are nevertheless unavailing.

Turning to Mot. Seq. 005, inasmuch as issues of fact remain as to liability, this court denies plaintiffs' motion seeking leave to renew their motion pursuant to CPLR 3212 for summary judgment against defendants, on their causes of action under Labor Law §241(6) premised upon 12 NYCRR § 23-1.7(e)(2) and 12 NYCRR §23-2.1(a)(1) and Labor Law §200 and common law negligence (NYSCEF Doc. No. 203, *notice of motion*) (Mot. Seq. 006). It is hereby

ORDERED that plaintiffs' Labor Law 240(1) claim is withdrawn; and it is further

ORDERED that defendants' motion, seeking conditional contractual indemnification against third-party defendants NATIONAL ACOUSTICS, LLC and PAR FIRE PROTECTION/ PAR PLUMBING CO., INC in favor of Third-Party Plaintiff STRUCTURE TONE, LLC., is granted (Mot. Seq. 004); and it is further

ORDERED that plaintiff's Labor Law § 241(6) claim, premised on the Industrial Code 12 NYCRR §§ 23-1.7(d) is dismissed as abandoned; and it is further

ORDERED that defendants' motion, pursuant to CPLR 3212, is denied in all other respects (Mot. Seq. 004); and it is further

ORDERED that plaintiffs' motion seeking renewal of their motion for summary judgment is denied (Mot. Seq. 006); and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiffs shall serve a copy of this decision and order, with notice of entry, upon all parties, as well as the Clerk of the Court, who shall enter judgment accordingly.

This constitutes the decision and order of this court.

April 8, 2025

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:							
	CASE DISPOSED		NON-FINAL DISPOSITION				
	GRANTED		DENIED	X	GRANTED IN PART		OTHER