

Hanna v 237 First Owners LLC

2025 NY Slip Op 32473(U)

July 8, 2025

Supreme Court, Kings County

Docket Number: Index No. 507547/2020

Judge: Wavny Toussaint

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 8th day of July 2025.

P R E S E N T:

HON. WAVNY TOUSSAINT,
Justice.

-----X
SCOTT HANNA,

Plaintiff,

-against-

Index No.: 507547/2020

MS # 6#7

DECISION AND ORDER

237 FIRST OWNERS LLC, T-MOBILE NORTHEAST, LLC,
T-MOBILE NORTHEAST, LLC as successor in interest to
OMNIPOINT COMMUNICATIONS INC. and NEW
CINGULAR WIRELESS SERVICES, INC.,

Defendants.

-----X

237 FIRST OWNERS LLC,

Third- Party Plaintiff,

-against-

F&L ROOFING,

Third-Party Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____

134-160, 162-181

Opposing Affidavits (Affirmations) _____

195-202, 189-194

Affidavits/ Affirmations in Reply _____

204, 206-207

Other Papers: _____

Upon the foregoing papers, defendant New Cingular Wireless Services, Inc. (New Cingular) moves (Seq. 06) for an order, pursuant to CPLR § 3212, granting it summary judgment and dismissing the complaint and all cross-claims insofar as asserted against it. Defendants T-Mobile Northeast LLC and T-Mobile Northeast, LLC as successor in interest to Omnipoint Communications Inc. (T-Mobile) move (Seq. 07) for an order (1) pursuant to CPLR § 3212, granting them summary judgment and dismissing the complaint and all cross-claims insofar as asserted against them; and (2) pursuant to CPLR 3212, granting them summary judgment on their cross-claims against defendant 237 First Owners LLC (237 First) for common law indemnification, including reimbursement of attorneys' costs and fees.

Defendant New Cingular's motion (Seq. 06) is granted, and the plaintiff's complaint is dismissed insofar as asserted against New Cingular. Defendant T-Mobile's motion (seq. 07) is granted to the extent that the plaintiff's Labor Law §§ 240 (1) and 241 (6) causes of action are dismissed insofar as asserted against T-Mobile; and is otherwise denied.

Background

Plaintiff Scott Hanna (plaintiff) asserts causes of action premised on common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6), based on injuries suffered on April 5, 2019, when he allegedly fell through a piece of Marlite covering a hole in an elevator room floor, while upgrading telecommunications wire at 237 First Avenue, New York, New York (premises) (NYSCEF Doc No. 138; NYSCEF Doc No. 141). The premises were owned by defendant 237 First. Defendants New Cingular and T-

Mobile leased separate portions of the premises for installation and maintenance of telecommunications equipment, including antennas, equipment cables, cable trays, and equipment cabinets (NYSCEF Doc No. 159; NYSCEF Doc No 176).

According to plaintiff's deposition testimony, on the day of the accident, while employed by Verizon as a field technician (NYSCEF Doc No. 150 at 17); he was assigned to update the T-Mobile cell site on the roof of the premises, by upgrading the existing cables to fiber optic cables (*id.* at 21-22). Upon arrival at the premises, he went to the top floor and proceeded up the stairs to the roof (*id.* at 80). After observing that the conduit that he needed to work on that day was congested with existing wires, plaintiff attempted to investigate if there were any pull boxes or elbows available, in order to run fiber optic cable and complete the upgrade (*id.* at 83). While looking for a pull box, plaintiff noticed that the conduit "went through the wall of the elevator room" (*id.* at 84). As he entered the elevator room and looked at the conduit which came through the wall, he stepped on a piece of Marlite which allegedly broke, causing plaintiff's leg to fall through a hole in the floor that was two or three feet deep before hitting the cement floor below (*id.* at 100-101, 134, 136, 248).

Plaintiff testified that there were multiple antennas at the site, but he was unable to identify which antennas belonged to which company and was unaware if there were signs indicating that AT&T operated any antennas at the premises (*id.* at 275). Plaintiff further testified that the conduit he was looking at when the accident occurred was T-Mobile's, and that AT&T would have had a separate conduit at the site if it maintained equipment there (*id.* at 284).

Yeschekel Scott Berman (Berman), employed as the Director of Operations at Noam Management, the management company, testified that he was responsible for managing the premises in April 2019 (NYSCEF Doc. No. 151 at 9, 13). Berman testified that there were two antennas. He believed that one belonged to Omnipoint, later succeeded by T-Mobile Northeast, and one belonged to New Cingular Wireless (*id.* at 20, 31). He stated that if any of the communication companies needed access, they would call him and he would arrange to have someone provide access to the premises (*id.* at 33). Regarding the elevator room, Berman testified that he believed that there is a room called the elevator room located at the top of the elevator shaft, and that the roof permits access to this room (*id.* at 45). He testified that “[j]ust the elevator people enter the elevator rooms” and that they conducted monthly inspections (*id.* at 49).

With respect to repairs required at the building, Berman noted that T-Mobile and New Cingular would be responsible to repair or maintain any portions of the building where their equipment was attached, and if either T-Mobile or New Cingular damaged a portion of the roof where their equipment was located, it would be their responsibility to repair it (*id.* at 75-76). With respect to the elevator room, he testified that “either the elevator company or the building, the management company” would be responsible for maintaining and repairing the room (*id.* at 80). He did not believe there was any provision in any lease with T-Mobile or New Cingular that indicated whether or not any portion of the elevator room was leased to either T-Mobile or New Cingular (*id.* at 83). However, Berman conceded that neither New Cingular nor T-Mobile would have any responsibility

to repair or maintain the elevator room unless the damage to the room was caused by them (*id.* at 83-84).

Berman believed that the elevator room would be locked unless someone unlocked it but was not sure who had the keys to the elevator room (*id.* at 92). If either T-Mobile or New Cingular wanted access to the elevator room, they would need permission from the building owner, and neither had permission to work in the elevator room (*id.* at 122, 124). Generally, he testified, “if they need[ed] to go anywhere, the only work they [were] allowed to do without notifying the landlord, is on the antennas and in the basement. If they need[ed] to run any additional wires or if they need[ed] to tamper with the wires to remove or replace, they need[ed] to get permission” (*id.* at 133). He also confirmed that neither T-Mobile nor New Cingular obtained permission to access the elevator room on the date of the accident (*id.* at 124).

Keith Foisset (Foisset), site development manager at T-Mobile, confirmed that, generally, T-Mobile would enter into rooftop leases in order to install equipment in New York City (NYSCEF Doc No 152 at 8-9, 10). Foisset testified that T-Mobile had succeeded to leases that were originally entered into by Omnipoint (*id.* at 13). He stated that he had never visited the roof of the premises and was unaware of the full scope of the work that Verizon was doing with T-Mobile in April 2019, and was unaware of any problems pulling wire through the premises due to cable congestion (*id.* at 24, 45, 47). He testified that, in order for T-Mobile to enhance their service, T-Mobile would need to contact Verizon to contract or do an amendment for enhanced services (*id.* at 59-60). He believed that T-Mobile still maintained cabinets, antennas, and equipment at the premises

(*id.* at 86). He further noted that, to his knowledge, neither T-Mobile nor any subcontractors of T-Mobile had performed any repairs to the premises, and that T-Mobile would not repair any common areas of the building for damage that wasn't caused by their equipment" (*id.* at 96).

Foisset also confirmed that T-Mobile would not utilize the same cable tray or conduit to run wires as another company (*id.* at 34). When viewing pictures of the elevator room in which the accident occurred and the lease, Foisset confirmed that the elevator room was not part of the premises that was leased by T-Mobile (*id.* at 110). He further testified that his understanding was that none of the work being done had anything to do with AT&T or New Cingular, nor did any of the equipment belong to them (*id.* at 144)

Anthony Saraniero, an AT&T Mobility Operations manager, who had visited the premises, confirmed that AT&T had equipment at the premises, including a power plant, battery backup, 4G and 5G equipment, and antennas and radios (NYSCEF Doc No. 153 at 12, 16, 17). He testified that AT&T cables do not run through the elevator room, but rather through the stairwell to the basement, as well as to a second-level roof (*id.* at 25, 26-27). He further testified that he was not aware of AT&T Mobility, or any other company associated with AT&T, leasing the elevator room in April 2019 (*id.* at 52).

Discussion

“ ‘[S]ummary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue’ ” (*Rotuba Extruders, Inc v Ceppos*, 46 NY2d 223, 231 [1978], quoting *Moskowitz v Garlock*, 23 AD2d 943 [3rd Dept 1965]).

“[T]he 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” (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986], citing *Winegrad v New York Univ Med Center*, 64 NY2d 851 [1985]). When evaluating a motion for summary judgment, “facts must be viewed ‘in the light most favorable to the nonmoving party’” (*Vega v Restani Const Corp*, 18 NY3d 499, 503 [2012]). “It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)” (*Vega*, 18 NY3d at 505).

Motion Seq. 06

The Parties’ Contentions

New Cingular, in support of its motion for summary judgment dismissing plaintiff’s complaint insofar as asserted against it, argues primarily that New Cingular did not owe a duty of care to plaintiff; as it neither owned, leased, nor otherwise controlled or maintained the elevator room. New Cingular further argues that it did not create or have notice of any defect in the elevator room’s floor. New Cingular notes that none of its equipment runs through the elevator room, the plaintiff had no connection to New Cingular, and New Cingular had no responsibility for the maintenance or repair of the elevator room, which it did not lease. Further, New Cingular contends that it is not a proper Labor Law defendant, as it was not an owner, contractor, or agent with respect to the premises, or the work that was being performed. New Cingular further maintains that,

as it cannot be held liable to plaintiff, all cross-claims for contribution and apportionment should be dismissed.

Plaintiff does not oppose the branches of New Cingular's motion which address his causes of action sounding in violations of Labor Law §§ 200, 240 (1), and 241 (6) insofar as asserted against New Cingular. Rather, plaintiff maintains only that New Cingular has failed to establish that it did not create the defective condition in the elevator room, and therefore has failed to establish its entitlement to judgment as a matter of law with respect to the common law negligence claim.

Common Law Negligence

As plaintiff proffers no opposition to the branches of New Cingular's motion seeking dismissal of the Labor Law §§ 200, 240 (1), and 241 (6) causes of action, those branches of the motion are granted, and those claims are dismissed as asserted against New Cingular. "Common-law negligence requires proof of (1) a duty owed by the defendant to the plaintiff, (2) breach of that duty, and (3) proximate causation" (*Weiss v Vacca*, 219 AD3d 1375, 1376 [2d Dep 2023]). Moreover, "[g]enerally, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property'" (*DeCoursey v Briarcliff Congregational Church*, 104 AD3d 799, 801 [2d Dept 2013], quoting *Russo v Frankels Garden City Realty Co.*, 93 AD3d 708, 710 [2d Dept 2012]). Here, New Cingular has established its prima facie entitlement to judgment as a matter of law with respect to plaintiff's claim sounding in common law negligence, by demonstrating that it did not have any connection to the work plaintiff was performing at the time of the accident, it did not lease or otherwise use

the elevator room, it had no equipment in the elevator room, and it did not make special use of the subject area or create the alleged defect.

New Cingular submitted the testimony of a T-Mobile representative acknowledging that the conduit in the elevator room belonged to T-Mobile (and that it would not be utilized by any other telecommunication company); the testimony from 237 First indicating that maintenance and repair of the elevator room would have been the responsibility of the landlord or elevator company and that New Cingular would not have been able to access the room without permission. Additionally submitted is the testimony and affidavit from AT&T and New Cingular indicating that there was no New Cingular equipment present in the elevator room in April 2019 or thereafter, and that there were no records as to any change in AT&T or New Cingular's equipment (NYSCEF Doc No. 150 at 275, 284; NYSCEF Doc No. 151 at 48, 77, 80, 83, 92, 122, 124, 133; NYSCEF Doc No. 152 at 144; NYSCEF Doc No. 153 at 27, 38, 52; NYSCEF Doc No. 159; NYSCEF Doc No. 157 at 2, 3).

In opposition, plaintiff has not raised a triable issue of fact. Accordingly, the branch of New Cingular's motion seeking dismissal of plaintiff's cause of action sounding in common law negligence insofar as asserted against it is granted, and the complaint, insofar as alleged against New Cingular is dismissed (*Kubiczko v Westchester County Elec., Inc.*, 116 AD3d 737, 739 [2d Dept 2014]; *Russo v Frankels Garden City Realty Co.*, 93 AD3d at 710). New Cingular also seeks dismissal of all cross-claims asserted against it. As T-Mobile has conceded that it agreed to discontinue all cross-claims asserted against New Cingular (NYSCEF Doc No. 163 at 19), and, as the claims

against New Cingular asserted by the plaintiff have been dismissed, this branch of New Cingular's motion is granted, and the cross-claims asserted against New Cingular by 237 First and T-Mobile are dismissed (*Tapinekis v Rivington House Health Care Facility*, 17 AD3d 572, 574 [2d Dept 2005]).

Motion Seq. 07

The Parties' Contentions

In support of its motion for summary judgment dismissing the complaint insofar as asserted against it, T-Mobile argues that Labor Law § 240 (1) is inapplicable herein, as plaintiff was not exposed to the type of elevation-related risk which would render him subject to the protections of the statute. T-Mobile maintains that the alleged condition was located in a room that was neither leased nor maintained by T-Mobile, and therefore there was no notice of the alleged condition, and no responsibility to inspect, repair, or maintain the elevator room. Accordingly, T-Mobile contends, plaintiff's Labor Law § 200 claim should also be dismissed insofar as asserted against it. Moreover, T-Mobile argues, the provisions of the Industrial Code on which plaintiff's Labor Law § 241 (6) cause of action is premised are inapplicable to the facts of this case, thus plaintiff's Labor Law § 241 (6) cause of action should also be dismissed. Finally T-Mobile argues, it has established entitlement to judgment as a matter of law on its cross-claims for common law indemnity insofar as asserted against 237 First, who concedes that the maintenance of the elevator room was the responsibility of the building.

In opposition, plaintiff contends that his fall through an inadequately covered floor opening violates Labor Law § 240 (1) as a matter of law. Plaintiff further contends that

T-Mobile is a proper labor law defendant, as it contracted with Verizon to perform the work in question, and that such work constituted an alteration. Plaintiff also argues that the defective condition of the elevator room floor should have been discovered by a reasonable inspection, and T-Mobile failed to establish that it had no control of the area where the accident occurred or that it did not create the dangerous condition itself. Accordingly, plaintiff argues, T-Mobile's motion for summary judgment dismissing plaintiff's Labor Law §§ 200 and 240 (1) causes of action should be denied.

Labor Law § 240 (1)

“Labor Law § 240 (1) requires contractors to provide appropriate safety devices for the protection of workers engaging in labor that involves elevation related risks” (*Santiago v Hanley Group, Inc.*, 216 AD3d 833, 833-834 [2d Dept 2023]). Labor Law § 240(1) provides:

“[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building 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”

As “the purpose of the statute is to protect workers by placing ultimate responsibility for safety practices on owners and contractors instead of on workers themselves, . . . this strict liability provision ‘is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed’” (*Panek v County of Albany*, 99 NY2d 452, 457 [2003]). However, “[t]he extraordinary protections of Labor

Law § 240 (1) extend only to a narrow class of special hazards, and do not encompass any and all perils that may be connected in some tangential way with the effects of gravity” (*Aquilino v E.W. Howell Co., Inc.*, 7 AD3d 739, 740 [2d Dept 2004] [internal quotation marks omitted]). “Liability under Labor Law § 240 (1) depends on whether the injured worker’s ‘task creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against” (*Escobar v Safi*, 150 AD3d 1081, 1082-83 [2d Dept 2017], quoting *Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]).

“The single decisive question in determining whether Labor Law § 240 (1) is applicable is whether the plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential” (*Carlton v City of New York*, 161 AD3d 930, 932 [2d Dept 2018]). “Where . . . a plaintiff falls into a hole while walking at ground level, the plaintiff’s injury ‘[is] not caused by [defendants’] failure to provide or erect necessary safety devices in response to elevation-related hazards and, accordingly, the protections of Labor Law § 240 (1) do not apply” (*Wrobel v Town of Pendleton*, 120 AD3d 963, 965 [4th Dept 2014], quoting *Piccuillo v Bank of N.Y. Co.*, 277 AD2d 93, 94 [1st Dept 2000]).

Here, T-Mobile established, prima facie, that the hole into which plaintiff allegedly fell, did not present an elevation-related hazard to which the protections of Labor Law § 240 (1) was designed to apply. Plaintiff testified that he was walking on the permanent floor of the elevator room when his foot allegedly broke through the Marlite covering a hole on the floor (NYSCEF Doc No. 150 at 84-95, 97, 103); that only his leg fell through the Marlite (*id.* at 134); that the piece of Marlite was approximately two feet

by four feet in dimension (*id.* at 98); and that there was a permanent concrete floor approximately two feet below (*id.* at 134, 248). However, although plaintiff's injury was allegedly caused by a fall into this hole, a hole of these dimensions does not present an elevation-related hazard to which the protective devices enumerated in Labor Law § 240 (1) are designed to apply (*Miller v Weeden*, 7 AD3d 684, 685-686 [2d Dept 2004] ["The plaintiff stepped into an uncovered hole that was approximately two feet wide by three feet deep ... A hole of these dimensions does not present an elevation-related hazard to which the protective devices enumerated therein are designed to apply"]; also see *Rice v Board of Education of City of New York*, 302 AD2d 578, 579-580 [2d Dept 2003] [where plaintiff's leg fell into a hole approximately one-foot by one-foot in size and approximately 2 ½ or 3 feet deep, "a hole of this dimension does not present an elevation-related hazard to which the protective devices enumerated in (Labor Law § 240(1)) are designed to apply"] [internal quotation marks omitted]).

Accordingly, the branch of T-Mobile's motion seeking summary judgment with respect to plaintiff's Labor Law § 240 (1) cause of action is granted, and this cause of action is dismissed insofar as asserted against T-Mobile (*Balfe v Graham*, 214 AD3d 693, 694 [2d Dept 2023] [summary judgment dismissing Labor Law § 240 (1) cause of action where worker stepped backwards into a hole cut out of basement's floor, as accident was not the result of an elevation hazard encompassed by Labor Law § 240 (1)]; *Carey v Five Bros., Inc.*, 106 AD3d 938, 939 [2d Dept 2013]; *Spence v Island Estates at Mr. Sinai II, LLC*, 79 AD3d 936, 937 [2d Dept 2010]).

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 for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor” (*Toussaint v Port Authority of New York and New Jersey*, 38 NY3d 89, 93 [2022] [internal quotation marks omitted]). “To establish liability under Labor Law § 241 (6), a plaintiff or a claimant must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case” (*Aragona v State*, 147 AD3d 808, 809 [2d Dept 2017]). Here, T-Mobile notes that plaintiff alleges, in his bill of particulars, a violation of Labor Law § 241 (6) based on violations of Industrial Code (12 NYCRR) §§ 23-1.7 (d) and (e); 23-1.8 (c) and (d); 23-1.11; 23-1.15; 23-1.16; 23-1.22; 23-1.123; 23-1.128; and 23-2.1 (NYSCEF Doc No. 147 at 2-3).

Plaintiff fails to argue, in opposition to the branch of T-Mobile’s motion for summary judgment, that these particular provisions of the Industrial Code are applicable herein, or that the violation of any of these provisions of the Industrial Code proximately caused his injuries. Further, plaintiff has abandoned reliance on the sections of the Industrial Code referenced in their bill of particulars by failing to address them in their opposition papers (*Pita v Roosevelt Union Free Sch. Distr.*, 156 AD3d 833, 835 [2d Dept 2017]).

In any event, defendants have established that Industrial Code §§ 23-1.7 (d) and (e) [pertaining to slipping hazards or tripping hazards]; 23-1.8 (c) and (d) [pertaining to

personal protective equipment, including head protection, foot protection, waterproof clothing, protection from corrosive substances and cleanliness of personal protective equipment]; 23-1.11 [pertaining to lumber and nail fastenings] are plainly inapplicable. In addition, 23-1.15 [pertaining to safety railings]; 23-1.16 [pertaining to safety belts, harnesses, tail lines, and lifelines]; 23-1.22 [pertaining to structural runways, ramps, and platforms]; 23-1.123 [pertaining to earth ramps and runways]; 23-1.128 [pertaining to hand-propelled vehicles]; and 23-2.1 [pertaining to maintenance and housekeeping, including storage of material and disposal of debris] are similarly inapplicable to the circumstances of this action. Accordingly, the branch of T-Mobile's motion seeking summary judgment dismissing plaintiffs' Labor Law § 241 (6) cause of action insofar as asserted against it is granted.

Labor Law § 200 and Common Law Negligence

“Labor Law § 200 is a codification of the common-law duty imposed on owners, contractors and their agents to provide workers with a safe place to work” (*Mondragon-Moreno v Sporn*, 189 AD3d 1574, 1576 [2d Dept 2020], quoting *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 663 [2d Dept 2015]). “Cases involving Labor Law § 200 fall into two broad categories, namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site and those involving the manner in which the work is performed” (*Southerton v City of New York*, 203 AD3d 977, 979-980 [2d Dept 2022], quoting *Torres v City of New York*, 127 AD3d 1163, 1165 [2d Dept 2015]). “Where, as here, a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from an alleged dangerous or defective condition

on or at the subject premises, a general contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site, and either created, or had actual or constructive notice of, the dangerous condition” (*Harsch v City of New York*, 78 AD3d 781, 782-783 [2d Dept 2010]).

Here, with respect to the condition of the floor in the elevator room, T-Mobile established, *prima facie*, that it did not have actual notice of any defective condition of the elevator floor, by submission of the affidavit of Keith Foisset noting that there had been no complaints to T-Mobile regarding the floor’s condition and that T-Mobile had no record of any of T-Mobile’s employees or contractors placing Marlite on the subject floor (NYSCEF Doc No. 164 at 2). However, T-Mobile failed to establish, as a matter of law, that it lacked constructive notice of the alleged defective condition or that it did not create same. ““To provide constructive notice, the defect must be visible and apparent and exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it”” (*Vella v One Bryant Park LLC*, 90 AD3d 645, 646 [2d Dept 2011], *quoting Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Although Foisset testified that the elevator room itself was not leased to T-Mobile (NYSCEF Doc. No. 173 at 63, 97), and that T-Mobile was not generally responsible for the maintenance and repair of the room (*id.* at 63, 96, 97), it is uncontested that the conduit that ran through the elevator room belonged to T-Mobile (NYSCEF Doc No. 171 at 284). Berman testified that, to the extent that T-Mobile caused damage to the premises where its equipment was located, T-Mobile would be responsible for repairing such damage (NYSCEF Doc No. 172 at 76).

As T-Mobile failed to eliminate all questions of fact with respect to the degree of control exercised within the elevator room where its conduit was located, whether the alleged dangerous condition could have been discovered by reasonable inspection, and if or when any prior inspection or access to the elevator room containing the conduits had occurred, T-Mobile failed to establish its prima facie entitlement to judgment as matter of law with respect to plaintiff's Labor Law § 200 cause of action insofar as asserted against it (*Zholanji v 52 Wooster Holdings, LLC*, 188 AD3d 1300, 1302 [2d Dept 2020]; *Seales v Trident Structural Corp.*, 142 AD3d 1153, 1158 [2d Dept 2016]).

Accordingly, the branch of T-Mobile's motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action insofar as asserted against it is denied, without regard to the plaintiff's opposition (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Common Law Indemnification

T-Mobile also seeks summary judgment with respect to its cross-claim asserted against 237 First Avenue for common law indemnification, should the court deny its motion for summary judgment dismissing the plaintiff's complaint. However, since there remain triable issues of fact with respect to T-Mobile's own negligence, if any, summary judgment on the basis of common law indemnification is premature (*Lojano v Soiefer Bros. Realty Corp.*, 187 AD3d 1160, 1163-64 [2d Dept 2020]; *McLean v 405 Webster Ave. Associates*, 98 AD3d 1090, 1094 [2d Dept 2012]). Accordingly, the branch of T-Mobile's motion seeking summary judgment with respect to its cross-claim for common law indemnification is denied.

All arguments raised on the motion and evidence submitted by the parties in connection thereto have been considered by this Court, regardless of whether they are specifically discussed herein, and are disposed in accordance herewith.

This constitutes the decision and order of the Court.

ENTER



J.S.C.

HON. WAVNY TOUSSAINT
J. S. C.

KINGS COUNTY CLERK
FILED
2025 JUL -9 A 10:47