

Capuano v SL Green Realty Corp

2025 NY Slip Op 33283(U)

August 28, 2025

Supreme Court, New York County

Docket Number: Index No. 155675/2021

Judge: Lynn R. Kotler

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

PRESENT: HON. LYNN R. KOTLER PART 08

Justice

-----X

LENNART CAPUANO,

Plaintiff,

- v -

SL GREEN REALTY CORP, ONE VANDERBILT OWNER,
LLC, TISHMAN CONSTRUCTION CORPORATION OF
NEW YORK, L & K PARTNERS, INC., and EURO TECH
CONSTRUCTION CORP.,

Defendants.

-----X

L & K PARTNERS, INC.,

Third-Party Plaintiff,

-against-

ABCO PEERLESS SPRINKLER CORP.,

Third-Party Defendant.

-----X

INDEX NO. 155675/2021
05/09/2025,
05/09/2025,
MOTION DATE 05/09/2025
MOTION SEQ. NO. 003 004 005

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595263/2022

The following e-filed documents, listed by NYSCEF document number (Motion 003) 157, 158, 159, 160, 161, 162, 163, 164, 165, 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, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 234, 235, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 251, 255, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 288, 289, 292, 293, 294, 295, 296, 297, 298, 306, 307, 308, 309, 310, 311, 312, 313, 314, 323, 324, 330, 331, 332, 336, 337, 338, 339, 340, 341, 342, 345, 346, 347, 350

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 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, 250, 252, 256, 286, 287, 290, 291, 299, 300, 301, 302, 303, 304, 305, 315, 333, 334, 335, 348, 351

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 005) 257, 258, 259, 316, 317, 318, 319, 320, 321, 322, 325, 326, 327, 328, 329, 343, 344, 349, 352

were read on this motion to/for JUDGMENT - SUMMARY

INTRODUCTION

In this labor law action arising from personal injuries sustained at a construction site, defendant/third-party plaintiff L & K Partners, Inc. (“L&K”) moves pursuant to CPLR 3212 for summary judgment (i) dismissing plaintiff Lennart Capuano’s third amended complaint, which asserts causes of action against all defendants for negligence and under Labor Law §§ 200, 240(1), and 241(6); and (ii) granting it summary judgment on its third-party claim for contractual indemnity against third-party defendant ABCO Peerless Sprinkler Corp. (“ABCO”); or, in the alternative, if Capuano’s claims against L&K are dismissed but contractual indemnity from ABCO is denied, (iii) awarding L&K summary judgment on its common-law indemnity cross-claims against defendants Euro Tech Construction Corp. (“Eurotech”) and Tishman Construction Corporation of New York (“Tishman”) (MOT SEQ 003). Capuano opposes the motion. Eurotech and Tishman (joined by defendants SL Green Realty Corp [“SLG”] and One Vanderbilt Owner, LLC [“Vanderbilt”] [collectively with Tishman, the “Tishman Defendants”]) oppose only that part of the motion that seeks common-law indemnity from them. ABCO opposes that part of the motion that seeks contractual indemnity from it and cross-moves for summary judgment dismissing the third-party complaint and all crossclaims against it, which cross-motion is opposed by all defendants.

The Tishman Defendants separately move pursuant to CPLR 3212 for summary judgment dismissing the third amended complaint and granting them contractual indemnification as against L&K and ABCO (MOT SEQ 004). Eurotech also separately moves pursuant to CPLR 3212 for summary judgment dismissing the third amended complaint, as well as all crossclaims against it (MOT SEQ 005). Capuano, L&K, and ABCO oppose both these motions. For the reasons that follow, the motions by L&K, the Tishman Defendants, and Eurotech are granted in part, and ABCO’s cross-motion is denied.

BACKGROUND

Capuano was injured on December 10, 2020, at or about 7:30 AM, while working on the sixteenth floor of a commercial high-rise construction located at One Vanderbilt Avenue in Manhattan (the “Property”). The Property was owned by SLG and Vanderbilt (collectively, the “Owners”), who retained Tishman as the general contractor/construction manager for construction of the Property’s base building and superstructure. As part of this work, Tishman

was responsible, *inter alia*, for the erection of hoists to transport materials and equipment. As base building construction was progressively completed, floors of the Property were turned over to corporate tenants, who then retained their own general contractors to build out their office spaces. Several floors of the Property, including the sixteenth floor, were leased to non-party tenant TD Bank, which retained L&K as general contractor for the build-out of its office space, including on the sixteenth floor (the “TD Bank space”). Capuano was employed by ABCO, a subcontractor hired by L&K to install the sprinkler system in the TD Bank space.

Each floor of the Property had a hoist area separated from the tenant space by temporary weather walls, which served to protect the building’s interior from the elements. A pair of hollow, metal double doors in the weather wall allowed for the movement of materials, equipment, and workers between the hoist area and the interior tenant build-out space. Tishman subcontracted Eurotech to construct these weather walls and doors. Capuano was injured while pulling a cart of materials from the TD Bank space through the weather wall doors into the hoist area when one of the double doors came loose and fell from the doorframe, striking him on the shoulder.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of making a prima facie showing that it is entitled to summary judgment as a matter of law, providing sufficient evidence that no material issues of triable fact exist (*see Trustees of Columbia Univ. in the City of N.Y. v D’Agostino Supermarkets, Inc.*, 36 NY3d 69, 74 [2020]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once met, the burden shifts to the opposing party to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]). However, if the proponent fails to make out its prima facie case for summary judgment, its motion must be denied regardless of the sufficiency of the opposing papers (*Alvarez*, 68 NY2d at 324; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]). Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). The court’s function on these motions is limited to “issue finding,” not “issue determination” (*see id.* at 505).

I. L&K's Motion (MOT SEQ 003)

a. Labor Law § 240(1)

Labor Law § 240(1) protects workers only from the “extraordinary elevation risks” contemplated by the statute, but not from “expos[ure] to the usual and ordinary dangers of a construction site” (*Rodriguez v Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841, 843-44 [1994]). Thus, “in a section 240(1) ‘falling object’ case, the injured worker must demonstrate the existence of a hazard contemplated under that statute ‘and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein’” (*Fabrizi v 1095 Ave. of Americas, L.L.C.*, 22 NY3d 658, 663 [2014], quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *Rivas v Seward Park Hous. Corp.*, 219 AD3d 59, 63 [1st Dept. 2023]). “Essentially, the plaintiff must demonstrate that at the time the object fell, it either was being ‘hoisted or secured’” (*Fabrizi*, 22 NY3d at 662-63, quoting *Narducci*, 96 NY2d at 268), “or ‘required securing for the purposes of the undertaking’” (*id.* at 663, quoting *Outar v City of New York*, 5 NY3d 731, 732 [2005]; see *Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 759 [2008]). Section 240(1) does not, however, “automatically apply simply because an object fell and injured a worker” (*Fabrizi*, 22 NY3d at 663). Rather, “[a] plaintiff must show that the object fell . . . because of the absence or inadequacy of a *safety device* of the kind enumerated in the statute” (*id.*, quoting *Narducci*, 96 NY2d at 268).

It is undisputed that, at the time of his accident, Capuano was transporting construction materials on a cart across level ground through the weather wall door from the TD Bank space into the hoist area. This task manifestly did not present an elevation risk or hazard of the sort contemplated by Labor Law § 240(1) (*id.*; see *Kaminski v 53rd St. & Madison Tower Dev., LLC*, 70 AD3d 530, 531 [1st Dept. 2010]; *Misseritti v Mark IV Const. Co.*, 86 NY2d 487, 491 [1995]). The subject door was not being hoisted or secured when it fell and struck Capuano. Nor did it require securing to protect against an elevation-related hazard, either for the purposes of Capuano’s undertaking of transporting construction materials around the worksite or for the weather wall’s own purpose of shielding the building’s interior from the elements (*cf.* *Quattrocchi v F.J. Sciame Const. Corp.*, 11 NY3d 757, 758–59 [2008] [finding triable question of fact as to whether planks that fell and injured plaintiff “were adequately secured *in light of the*

purposes of the plank assembly” as a makeshift scaffold “to facilitate the installation of an air conditioner above a doorway”]; *Rivas*, 219 AD3d at 64-65 [earthen wall of trench, which collapsed onto plaintiff working in trench below, required securing for purposes of the undertaking to “protect[] plaintiff from the clear cave-in hazard presented by the work”]).

Further, the door did not fall “because of the absence or inadequacy of a safety device of the kind enumerated in the statute” (*Fabrizi*, 22 NY3d at 663, quoting *Narducci*, 96 NY2d at 268). Contrary to Capuano’s contention, the devices securing the door to the doorframe and the doorframe to the weather wall are not safety devices of the sort enumerated in the statute, which are specifically intended to protect against elevation-related hazards (*see Fabrizi*, 22 NY3d at 663; *Misseritti*, 86 NY2d at 491). To hold otherwise would “extend[] the reach of section 240(1) beyond its intended purpose to any component that may lend support to a structure” (*Fabrizi*, 22 NY3d at 663).

Therefore, L&K’s motion is granted to the extent it seeks summary judgment dismissing Capuano’s Labor Law § 240(1) claim.

b. Labor Law § 241(6)

L&K’s motion is likewise granted to the extent it seeks summary judgment dismissing Capuano’s Labor Law § 241(6) claim. The scope of the duty imposed by Labor Law § 241(6) is defined by the safety rules set forth in the Industrial Code (*see Garcia v 225 E. 57th Owners, Inc.*, 96 AD3d 88, 91 [1st Dept. 2012], citing *Ross*, 81 NY2d at 501-02). Thus, to establish liability under this provision, a plaintiff must “specifically plead and prove the violation of an applicable Industrial Code regulation” (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept. 2007]).

In his pleadings, Capuano alleges violations of Industrial Code §§ 23-1.5, 23-1.7, 23-1.8, 23-1.16, 23-1.21, and 23-1.22 as predicates for his Labor Law § 241(6) claim. However, his pleadings do not specify any particular subsections and subdivisions of these provisions, and his opposition papers on the present motion specify only Industrial Code § 23-1.5(c)(3) as a predicate for the claim. Indeed, except insofar as predicated on § 23-1.5(c)(3), Capuano does not contest the dismissal of his Labor Law § 241(6) claim and expressly states in his opposition that he “abandons” his reliance on all other predicates alleged in his pleadings. As such, Capuano’s

Labor Law § 241(6) claim is deemed abandoned except insofar as predicated upon an alleged violation of Industrial Code § 23-1.5(c)(3) (*see Caminiti v Extell W. 57th St. LLC*, 166 AD3d 440, 441 [1st Dept. 2018]; *McLean v Tishman Const. Corp.*, 144 AD3d 534, 535 [1st Dept. 2016]; *see also Linares v Massachusetts Mut. Life Ins. Co.*, 225 AD3d 520, 521 [1st Dept. 2024]; *Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]).

Industrial Code § 23-1.5(c)(3) governs the “Condition of equipment and safeguards” and provides that “[a]ll safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged.” Although this provision is sufficiently specific to support a Labor Law § 241(6) claim (*see Jackson v Hunter Roberts Constr. Grp., LLC*, 161 AD3d 666, 667 [1st Dept. 2018]), it is inapplicable because the subject doors “do[] not constitute a ‘safety device,’ ‘safeguard,’ or ‘equipment’ as used in the provision” (*id.* at 668).

Therefore, L&K’s motion is granted to the extent it seeks summary judgment dismissing Capuano’s Labor Law § 241(6) claim.

c. Labor Law § 200 & Negligence

Labor Law § 200 codifies the common law duty of owners and general contractors to provide construction workers with a safe workplace (*see Lapinsky v Extell Development Company*, 202 AD3d 478, 479 [1st Dept. 2022]). “Where, as here, such a claim arises from a dangerous premises condition, a defendant will not be liable unless it created the dangerous condition or had both control over the worksite and actual or constructive notice of the condition” (*id.* at 479-80, citing *Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept. 2009]; *see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-44 [1st Dept. 2012]). Applying this standard, the court denies L&K’s motion with respect to Capuano’s Labor Law § 200 and negligence claims, as there are triable issues of fact as to whether L&K created the dangerous and defective condition of the subject doors and/or whether it had constructive notice thereof.

Multiple witnesses, including L&K’s superintendents on the project, testified at their depositions that, over a period of several months prior to the accident, they observed L&K’s workers or those of its subcontractors forcefully and/or repeatedly push heavy objects such as

pallet jacks, manlifts, and carts laden with construction materials and equipment into and through the subject doors rather than opening the doors by hand. Several witnesses speculated that these impacts could have damaged the doors. L&K's contract for the build-out of the TD Bank space provides, at Section 1.3.1 of the "General Requirements" agreement, that L&K "shall supervise and direct the Work" and "shall be solely responsible for and have control over construction means, methods, techniques, sequences, and procedures[.]" Section 1.3.2 further provides that L&K "shall be responsible . . . for all acts and omissions of [its] agents, employees, consultants, and Subcontractors, and their respective agents, employees, consultants, and subcontractors, and all other persons performing portions of the Work under a contract with [L&K]." Consistent with these contractual provisions, L&K's witnesses testified that L&K was responsible for enforcing safe work practices among its workers and subcontractors and maintained authority to stop work to address unsafe conditions. There is thus a triable issue of fact as to whether L&K created the dangerous and defective condition of the subject doors by allowing its workers and/or those of its subcontractors to repeatedly "smash" heavy objects into the doors.

As to constructive notice, non-party Cyrano Polizzi, a journeyman electrician who worked on the build-out of the TD Bank space, testified that he observed damage to the subject doors prior to Capuano's accident (*see Ross v Betty G. Reader Revocable Tr.*, 86 AD3d 419, 421 [1st Dept. 2011] ["Constructive notice is generally found when the dangerous condition is visible and apparent, and exists for a sufficient period to afford a defendant an opportunity to discover and remedy the condition."]). Although Cyrano stated that he only observed this damage shortly before the accident, and did not know how long the damage was present, L&K fails to demonstrate lack of constructive notice by "producing evidence of its maintenance activities and inspection of the area prior to the accident, and specifically that the dangerous condition cited by plaintiff did not exist when the area was last cleaned or inspected before plaintiff's [accident]" (*Smith v Montefiore Med. Ctr.*, 192 AD3d 609, 610 [1st Dept. 2021]).

L&K insists the subject doors were not within its scope of work, as they were part of the hoist area enclosure built by Eurotech on behalf of Tishman, and that it therefore lacked control over the doors and was not responsible for their inspection, maintenance, and repair. However, L&K's own witnesses testified that L&K, as general contractor for the build-out of TD Bank's offices, was responsible for maintaining a safe worksite, including the means of entrance and

egress from the TD Bank space. This is consistent with L&K's contract, which provides, at Section 1.13.2 of the General Requirements agreement, that "[L&K] shall provide proper and safe access to and egress from any occupied areas in the Project at all times."

Further, Raniero Recine, one of L&K's superintendents on the project, testified that L&K conducted a daily safety inspection and would repair any unsafe condition observed to maintain the safety of its worksite, including unsafe conditions in base building elements, such as floors, installed prior to the turnover of the TD Bank space, despite these not being within its scope of work. Indeed, L&K's accident report and the testimony of its own witnesses demonstrate that L&K did just this following Capuano's accident, assigning its own workers to immediately reinstall the subject doors before even communicating with Tishman regarding the accident. While the court recognizes that evidence of subsequent remedial measures is generally inadmissible in a negligence case, such evidence may be considered where, as here, there is an issue of maintenance or control (*see Fernandez v Higdon Elevator Co.*, 220 AD2d 293, 293 [1st Dept. 1995]; *Niemann v Luca*, 214 AD2d 658, 658 [2nd Dept 1995]; *Cleland v 60-02 Woodside Corp.*, 221 AD2d 307, 308 [2nd Dept 1995]). There is thus also a triable issue as to whether L&K had constructive notice of the dangerous and defective condition of the subject doors.

d. Indemnification

L&K's Subcontractor Vendor Agreement with ABCO provides that, "[t]o the fullest extent permitted by law," ABCO will indemnify, defend, and hold harmless L&K "from any and all claims, suits, damages, liabilities, professional fees, Including attorneys' fees, costs, court costs, expenses and disbursements . . . arising out of or in connection with or as a result or consequence of the performance of the Work of the Subcontractor[.]" Contrary to ABCO's contention, this indemnity provision is not subject to a negligence trigger. Rather, the broad "arising out of" indemnity provision was triggered by Capuano's commencement of this action, in which he seeks damages for injuries sustained while performing ABCO's work on the TD Bank build-out (*see Madkins v 22 Little W. 12th St., LLC*, 191 AD3d 434, 436 [1st Dept. 2021]; *Paulino v Bradhurst Assocs., LLC*, 144 AD3d 430, 430–31 [1st Dept. 2016]; *Aramburu v Midtown W. B, LLC*, 126 AD3d 498, 500 [1st Dept. 2015]; *Fuger v Amsterdam House for Continuing Care Ret. Cmty., Inc.*, 117 AD3d 649, 650 [1st Dept. 2014]).

Nevertheless, summary judgment on L&K's third-party claim for contractual indemnity is denied as premature given the triable issues of fact discussed above as to its own negligence. Indeed, the First Department has held that even conditional summary judgment should not be granted on an owner or general contractor's contractual indemnification claim against a subcontractor where, as here, "an issue of fact exists as to whether the owner or general contractor's negligence was the sole proximate cause of the underlying claim" (*Cackett v Gladden Props., LLC*, 183 AD3d 419, 422 [1st Dept. 2020]).

Summary judgment is likewise denied with respect to L&K's common-law indemnity crossclaims against Tishman and Eurotech given the triable issues of fact as to L&K's negligence (*see Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 247 [1st Dept. 2013]).

II. ABCO's Cross-Motion (MOT SEQ 003)

Summary judgment dismissing L&K's third-party claim for contractual indemnity is denied given the court's determination that Capuano's commencement of this action triggered the indemnity provision in ABCO's contract with L&K, even if summary judgment in L&K's favor on this claim is premature.

The remainder of ABCO's motion is denied as untimely. ABCO did not file its motion until October 22, 2024, more than 120 days after the filing of the note of issue on February 20, 2024 (*see CPLR 3212[a]*). "Absent a 'satisfactory explanation for the untimeliness,' constituting good cause for the delay, an untimely summary judgment motion must be denied without consideration of the merits" (*Wittenberg v Long Island Power Auth.*, 225 AD3d 730, 732 [2nd Dept. 2024], citing *Brill v City of New York*, 2 NY3d 648, 652 [2004]). This is so even if the untimely motion is meritorious and there is no prejudice to the non-movant (*Brill*, 2 NY3d at 652). However, an untimely motion for summary judgment may be considered by the court, even in the absence of good cause, where a timely motion was made on nearly identical grounds (*see Gualpa v Leon D. DeMatteis Const. Corp.*, 121 AD3d 416, 419–20 [1st Dept. 2014]; *Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept. 2006]).

To be sure, a so-ordered stipulation set a deadline of October 22, 2024, for filing cross-motions to L&K's and the Tishman Defendants' timely-filed summary judgment motions. However, except with respect to L&K's contractual indemnity claim, ABCO's motion is an

improper cross-motion, as it seeks the dismissal of third-party claims not raised in L&K's motion and crossclaims asserted by parties other than L&K (i.e., nonmovants) (*see Orea v NH Hotels USA, Inc.*, 187 AD3d 476, 477 [1st Dept. 2020]; *Muqattash v Choice One Pharmacy Corp.*, 162 AD3d 499, 500 [1st Dept. 2018]; *Puello v Georges Units, LLC*, 146 AD3d 561, 562 [1st Dept. 2017]; *Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621, 628 [1st Dept. 2015]; *Kershaw v Hosp. for Special Surgery*, 114 AD3d 75, 87-90 [1st Dept. 2013]). Thus, except with respect to L&K's contractual indemnity claim, ABCO's motion, though labelled a "cross-motion," is in fact an untimely motion for summary judgment, and ABCO does not show good cause for its delay.

Moreover, even were the court to deem some additional portions of ABCO's motion to be sufficiently related to L&K's main motion to warrant consideration, the remainder of the motion would nonetheless be denied. ABCO's motion papers do not address contractual indemnity with respect to any party other than L&K. To the extent it seeks dismissal of the common-law indemnity and contribution claims against it on the basis of its own purported lack of fault, it fails to carry its *prima facie* burden, as it simply offers conclusory assertions that there is no evidence demonstrating its negligence. It is well established, however, that "pointing to gaps in an opponent's evidence is insufficient to demonstrate a movant's entitlement to summary judgment" (*Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept. 2016]; *see Ricci v A.O. Smith Water Prods. Co.*, 143 AD3d 516, 516 [1st Dept. 2016]; *Sabalza v Salgado*, 85 AD3d 436, 437-38 [1st Dept. 2011]). ABCO's alternative argument, that Capuano did not suffer a "grave injury," and that the common-law indemnity and contribution claims against it must therefore be dismissed pursuant to Section 11 of the Workers Compensation Law, bears entirely no relation to any issue raised in L&K's motion and will thus not be considered (*see Maggio*, 134 AD3d at 628). Finally, ABCO fails to carry its *prima facie* burden with respect to the claims against it for breach of contract for failure to procure insurance, as the policy certificate it submits in support of its motion does not identify any additional insureds.

III. Tishman Defendants' Motion (MOT SEQ 004)

a. Labor Law §§ 240(1) and 241(6)

The Tishman Defendants' motion is granted to the extent it seeks summary judgment dismissing Capuano's Labor Law §§ 240(1) and 241(6) claims, for the same reasons already discussed above.

b. Labor Law § 200 & Negligence

The Tishman Defendant's motion is denied to the extent it seeks summary judgment dismissing Capuano's Labor Law § 200 and negligence claims. The deposition testimony submitted in support of the motion demonstrates, *prima facie*, that Tishman did not create the dangerous and defective condition of the subject doors, as it did not install the doors, did no subsequent work on the doors, and did not supervise or control L&K's workers or those of L&K's subcontractors, who, as already discussed, may have caused damage to the doors. The deposition testimony further demonstrates, *prima facie*, that Tishman lacked actual notice of a dangerous and defective condition, as its witnesses uniformly denied having observed or received complaints about such a condition in the doors prior to Capuano accident. There is, however, a triable issue of fact as to whether Tishman had constructive notice of the dangerous and defective condition of the doors.

As already discussed, non-party Cyrano Polizzi testified that he observed damage to the subject doors prior to Capuano's accident (*see Ross*, 86 AD3d at 421), and, like L&K, Tishman fails to demonstrate lack of constructive notice by "producing evidence of its maintenance activities and inspection of the area prior to the accident, and specifically that the dangerous condition cited by plaintiff did not exist when the area was last cleaned or inspected before plaintiff's [accident]" (*Smith*, 192 AD3d at 610). Tishman, though, again like L&K, denies that it controlled the doors and was responsible for their inspection, maintenance, and repair. Here again, though, there is a triable issue of fact.

It is undisputed that, pursuant to its construction management agreement with the Owners, Tishman subcontracted Eurotech to construct the weather walls enclosing the hoist areas on each floor of the Property, including the weather wall and subject doors on the Property's sixteenth floor. Though Tishman denies that it had any continuing responsibility for these protective elements, Sections 4.1.2(e) and (g) of its contract with the Owners require that it both provide *and maintain* "temporary protection," "temporary closed openings," protection for "all finished and unfinished portions of the Work . . . [against] damage by the elements," and "all hoisting equipment and materials for use by . . . tenants and tenant's contractors[.]" Additionally, Section 4.6.3 provides that Tishman "shall provide proper and safe access to and egress from any occupied areas of the Project Site at all times." Section 4.6.3 also obligates Tishman to

coordinate with the “Separate Contractors” retained by the corporate tenants of the Property in connection with the delivery, unloading, staging, storage, and movement of material and equipment on the project site and provides that “[a]ny damage caused by such movement” of material and equipment “shall be repaired by [Tishman.]”

None of the contracts submitted by any party purport to shift responsibility for maintenance of the hoist area and its weather wall enclosure to TD Bank and/or L&K in connection with the turnover of the TD Bank space. Indeed, Tishman’s own witness, Edmund Delgado, testified that Tishman retained responsibility for maintenance of the hoist area. To be sure, Delgado was unsure of whether this responsibility extended to the subject doors, or whether the doors were part of the TD Bank space, for which L&K was responsible. L&K’s witnesses, however, insisted the hoist area, including the weather wall and doors, were not within L&K’s scope of work, and that maintenance thereof remained Tishman’s responsibility. Eurotech’s witness likewise testified that Tishman was responsible for the inspection and maintenance of the weather wall and doors, and that Eurotech would only repair these elements if instructed to do so by Tishman. Further, Recine, L&K’s superintendent, testified that, while he never observed Tishman and/or Eurotech personnel performing maintenance or repair work on the hoist area enclosure on the sixteenth floor of the Property, he *did* observe such personnel perform such work on hoist area enclosures elsewhere in the building.

Tishman correctly notes that, Section 5.3(c) of floor turnover agreement between the Owners, as landlord, and TD Bank, as tenant, provides that TD Bank will be responsible for “actual costs incurred by Landlord to repair any damage to the Base Building Work caused by Tenant [or] Tenant’s Work Contractor or their respective employees or agents. Tenant, within 30 days after receipt of an invoice therefor, shall reimburse Landlord for the costs of correcting such damage[.]” Based on this provision, Tishman argues that it was not responsible for repairing any damage to the subject doors because such damage was caused by L&K—TD Bank’s “Work Contractor”—or its employees or agents. However, whether the subject doors were damaged by L&K’s workers has not yet been determined and remains a triable issue of fact. Moreover, even if triggered, Section 5.3(c) of the floor turnover agreement, by its express terms, merely shifts the cost of repair to TD Bank but leaves responsibility for making necessary repairs with the Owners, and by extension Tishman, in the first instance.

In short, as to Tishman, there are triable issues of fact with respect to constructive notice beyond the relatively straightforward issue of whether the dangerous and defective condition of the subject door existed for a sufficient period to afford a reasonable opportunity for it to be discovered and remedied (*see Ross*, 86 AD3d at 421), in particular, issues as to whether or to what degree Tishman controlled the subject doors and was responsible for the inspection, maintenance, and repair thereof.

The court notes that the Tishman Defendants did not distinguish between Tishman and the Owners in their motion papers, and thus advanced no arguments for the dismissal of Capuano's negligence and Labor Law § 200 claims as against the Owners alone. They thus did not make a *prima facie* showing that the Owners, as distinct from Tishman, lacked the requisite control over the worksite to be held liable under a theory of constructive notice.

c. Contractual Indemnity

The Tishman Defendants move for summary judgment in their favor on their contractual indemnity crossclaims against L&K and ABCO. The motion is denied to the extent it seeks an award of contractual indemnity from ABCO because neither the pleadings submitted in support of the motion nor the court's own review of the docket demonstrate that the Tishman Defendants have asserted any crossclaims at all against ABCO in this action.

The Tishman Defendants demonstrate their *prima facie* entitlement to summary judgment on their contractual indemnification crossclaim against L&K via the submission, *inter alia*, of an Indemnification Agreement between Tishman and L&K and a Provider's Agreement between SLG and L&K. The Indemnification Agreement provides that, "to the fullest extent permitted by Law," L&K will indemnify, defend, and hold harmless, *inter alia*, Tishman, the "Owner" of the One Vanderbilt project and its parent, and their respective affiliates, "from and against all claims, suits, damages, losses and expenses, including but not limited to reasonable attorneys' fees . . . arising out of, [or] related to, however tangentially, the Permitted Use[,]"—defined as L&K's general contracting work on the TD Bank build-out—"or access to the Project Location." The SLG Provider's Agreement, which L&K was required to execute as a prerequisite to allow it and its subcontractors to perform any work at the Property, similarly provides, *inter alia*, that, "[t]o the fullest extent permitted by law[,]" L&K shall indemnify the Tishman Defendants for, among

other things, any and all claims, demands, suits, actions, proceedings, liabilities, judgments, awards, losses, damages, costs and expenses, including reasonable attorneys' fees and expenses "directly or indirectly arising out of or in connection with or relating to acts or omissions in connection with or pursuant to this Agreement[.]" These broad "arising out of" indemnity provisions were triggered by Capuano's commencement of this action, in which he seeks damages for injuries sustained while performing L&K's work, via ABCO, on the TD Bank build-out at the "Project Location" (*see Madkins*, 191 AD3d at 436; *Paulino*, 144 AD3d at 430–31; *Aramburu*, 126 AD3d at 500; *Fuger*, 117 AD3d at 650).

L&K fails to raise a triable issue of fact in opposition. Indeed, it does not even address the substance of the relevant indemnification agreements, but instead merely argues the Tishman Defendants are not entitled to contractual indemnity because Tishman purportedly owes common-law indemnity to L&K. To the extent L&K means to suggest the indemnity provisions in the relevant contracts are subject to a negligence trigger, and that it is free from fault for any alleged negligence (*see Aiello*, 110 AD3d at 247 [common-law indemnification requires that indemnitee be free from fault]), its argument is unavailing. As already discussed, there are triable issues of fact as to L&K's negligence. Moreover, the "arising out of" indemnification provisions in the relevant contracts are not subject to a negligence trigger. Similarly, to the extent L&K means to suggest that Tishman's own purported negligence bars its claim for contractual indemnity pursuant to General Obligations Law 5-322.1, that argument too is unavailing given the savings language in the relevant contracts, which require indemnification only "[t]o the fullest extent permitted by law" (*see Dutton v Charles Pankow Builders, Ltd.*, 296 AD2d 321, 322 [1st Dept. 2002]; *see also Herrero v 2146 Nostrand Ave. Assocs., LLC*, 193 AD3d 421, 424 [1st Dept. 2021]; *Sanchez v 404 Park Partners, LP*, 168 AD3d 491, 493 [1st Dept. 2019]).

The court notes there remains a triable issue of fact as to the Tishman Defendants' negligence. However, it does not follow that summary judgment on the Tishman Defendants' contractual indemnity claim is premature. The evidence submitted on the present motions suffices to demonstrate that the Tishman Defendants' negligence, if any, is not the *sole* proximate cause of Capuano's accident (*cf. Cackett*, 183 AD3d at 422). As already discussed, L&K had sufficient control of the subject doors to repair or remediate dangerous and defective conditions observed therein and, unlike Tishman, L&K was present at, and conducted daily

safety inspections of, the worksite, and used the subject doors regularly, if not daily. As such, logic dictates that, if Capuano is able to demonstrate at trial that a visible and apparent defect existed for a sufficient length of time to establish constructive notice with respect to the Tishman Defendants (*see Ross*, 86 AD3d at 421), liability will necessarily be shared at least with L&K.

Therefore, summary judgment on the Tishman Defendants' contractual indemnification crossclaim against L&K is granted conditionally, subject to a determination at trial as to whether Capuano's injuries were caused in part by the Tishman Defendants' negligence (*see Sanchez*, 168 AD3d at 493; *Aramburu*, 126 AD3d at 500-01; *Fuger*, 117 AD3d at 650-51).

IV. Eurotech's Motion (MOT SEQ 005)

Eurotech's summary judgment motion is untimely, as it did not file its summary judgment motion until October 18, 2024, more than 120 days after the filing of the note of issue on February 20, 2024 (*see CPLR 3212[a]*). Eurotech offers no explanation for its delay other than to point to the so-ordered stipulation that, as already discussed, set a deadline of October 22, 2024, for filing cross-motions with respect to L&K's and the Tishman Defendants' timely-filed summary judgment motions. Eurotech, however, did not designate its motion as a cross-motion, but instead filed an entirely separate, and untimely, summary judgment motion. As such, it fails to demonstrate good cause for its delay (*see*, 225 AD3d at 732). Nevertheless, the court grants Eurotech's motion to the extent it seeks summary judgment dismissing Capuano's Labor Law §§ 240(1) and 241(6) claims, for the same reasons already discussed above, as L&K's timely motion seeks dismissal of these claims on identical grounds (*see Guallpa*, 121 AD3d at 419-20; *Filannino*, 34 AD3d at 281).

The motion is denied to the extent it seeks summary judgment dismissing Capuano's Labor Law § 200 and negligence claims. It is undisputed that Eurotech installed the subject doors and weather wall pursuant to its Carpentry Agreement with Tishman, dated November 30, 2017. Further, L&K's accident report, which was completed by L&K superintendent Jonathan Mazza on December 11, 2020, the day after Capuano's accident, states, with respect to the cause of the accident, that the "[f]rame was not screwed into wall and door fell down while [Capuano] was walking through." To be sure, at his subsequent deposition, conducted over three years later in January 2024, Mazza stated that he did not know what caused the subject door to fall, and

several other deposition witnesses speculated that the doors must have been damaged by L&K's workers or those of its subcontractors repeatedly "smashing" heavy carts of construction materials into them. Nevertheless, the court's function at the summary judgment stage is limited to "issue finding," not "issue determination" (*Vega*, 18 NY3d at 505). At this juncture, L&K's accident report is sufficient, especially given the speculative nature of the testimony attributing the defective condition of the doors to another cause, to raise a triable issue as to whether Eurotech created a dangerous condition that proximately caused Capuano's accident by improperly installing the subject doors.

Additionally, regardless of whether Eurotech properly installed the doors, there is a triable issue as to whether it was negligent in failing to inspect, maintain, and repair the doors. Rider A, Section B(II) of Eurotech's Carpentry Agreement provides that "[Eurotech] shall be responsible for the furnishing, erecting, [and] maintaining . . . of all items o[f] temporary protection which is required to maintain the safety of all personnel during the course of the construction job" (emphasis added). Pursuant to Rider A, Section B(II)(35), this "temporary protection" expressly includes the weather wall and doors enclosing the hoist area on each floor of the Property. Rider A, Section B(II) further provides that "[Eurotech's] personnel must make constant inspections of the temporary protection on the project and be proactive and diligent in its maintenance and not wait to be directed to maintain protection as required." Similarly, Section 15 of the main Carpentry Agreement provides that, "while it is working on the Site in any capacity, and until the completion of the Project, [Eurotech] shall protect its Work . . . from rain, water, frost and the elements *and from all other kinds of damage which may be caused in any manner whatsoever*, and [Eurotech] shall be entirely responsible for any loss or damage done to said Work" (emphasis added).

The Carpentry Agreement thus expressly required Eurotech to inspect, maintain, and repair the weather wall and doors. It is undisputed, however, that Eurotech did not do so following the turnover of the TD Bank space to L&K for it to complete the build-out of TD Bank's offices. Indeed, Graham McHugh, a Field Supervisor for Eurotech, testified that Eurotech would only return to make repairs to the weather walls and doors if instructed to do so by Tishman. Further, while McHugh also testified that Eurotech no longer had a workforce on site at the Property by December 2020, L&K, in opposition, submits a copy of Eurotech's work

records, authenticated by McHugh at his deposition, which show that Eurotech had approximately twenty (20) carpentry laborers working at the Property through most of December 2020.

As already discussed, multiple witnesses testified that, over a period of several months prior to the accident, the subject doors suffered forceful and/or repeated impacts by heavy objects such as pallet jacks, carts, and manlifts, which workers would push into and through the doors rather than opening them by hand, and non-party Cyrano Polizzi testified that he observed damage to the subject doors prior to Capuano's accident. There are thus triable issues as to whether Eurotech had constructive notice of a dangerous and defective condition, and whether it caused or contributed to Capuano's accident by failing to perform its contractual obligation to inspect, maintain, and repair the subject doors.

Finally, Eurotech's motion is denied to the extent it seeks summary judgment dismissing the crossclaims of L&K and the Tishman Defendants for contribution, common-law and contractual indemnity, and breach of contract for failure to procure insurance. Other than L&K's claim for common-law indemnity, none of these crossclaims were addressed in L&K's and the Tishman Defendants' timely motions for summary judgment, and the court thus declines to consider Eurotech's untimely motion to the extent it seeks summary judgment dismissing those claims. In any event, and with respect to L&K's claim for common-law indemnity, Eurotech does not address any crossclaims in its moving papers, and thus fails to demonstrate its *prima facie* entitlement to summary judgment dismissing such claims.

The court has considered the parties' additional contentions and arguments, even if not specifically addressed herein, and finds them unavailing.

CONCLUSION

Accordingly, it is

ORDERED that defendant/third-party plaintiff L & K Partners, Inc.'s motion (MOT SEQ 003) is granted to the extent it seeks summary judgment dismissing plaintiff's third and fourth

causes of action for violations of Labor Law §§ 240(1) and 241(6), respectively, those causes of action are hereby dismissed, and the motion is otherwise denied; and it is further

ORDERED that third-party defendant ABCO Peerless Sprinkler Corp.’s cross-motion under MOT SEQ 003 is denied; and it is further

ORDERED that the motion of defendants Tishman Construction Corporation of New York, SL Green Realty Corp., and One Vanderbilt Owner, LLC (MOT SEQ 004) is granted to the extent it seeks summary judgment dismissing plaintiff’s third and fourth causes of action for violations of Labor Law §§ 240(1) and 241(6), respectively, which causes of action are hereby dismissed, and the motion is conditionally granted to the extent that defendant L & K Partners, Inc. shall indemnify these moving defendants subject to a determination at trial as to the issue of these moving defendants’ alleged negligence, and the motion is otherwise denied; and it is further

ORDERED that defendant Euro Tech Construction Corp.’s motion (MOT SEQ 005) is granted to the extent it seeks summary judgment dismissing plaintiff’s third and fourth causes of action for violations of Labor Law §§ 240(1) and 241(6), respectively, which causes of action are hereby dismissed, and the motion is otherwise denied; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



<u>8/28/2025</u>			<u>LYNN R. KOTLER, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE