SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART** **58**

Justice

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WILLIAM JACKSON, MARGARET JACKSON,

Plaintiffs,

- v -

NEW YORK CONVENTION CENTER OPERATING CORPORATION, NEW YORK CONVENTION CENTER DEVELOPMENT CORPORATION, JACOB K. JAVITS CONVENTION CENTER OF NEW YORK, LENDLEASE (US) CONSTRUCTION LMB INC.,TURNER CONSTRUCTION COMPANY, LENDLEASE TURNER A JOINT VENTURE, EMPIRE STATE DEVELOPMENT CORPORATION, NEW YORK STATE URBAN DEVELOPMENT CORPORATION, LENDLEASE TURNER A JOINT VENTURE BETWEEN LENDLEASE (US) CONSTRUCTION LMB, INC. AND TURNER CONSTRUCTION COMPANY, E.E. CRUZ & COMPANY, INC.,

Defendants.

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INDEX NO. 153119/2019

MOTION DATE 01/10/2025

MOTION SEQ. NO. 005 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 249, 250, 251, 252, 253, 254, 256, 259, 260, 261, 262, 263, 271, 272, 273, 274, 275, 276, 277, 278

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 248, 255, 257, 258, 264, 265, 266, 267, 268, 269, 270, 279, 280, 281, 282

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

Motion sequence numbers 005 and 006 are hereby consolidated for disposition.

PERTINENT BACKGROUND

In this Labor Law action, plaintiffs, William Jackson (plaintiff) and Margaret Jackson, seek damages for personal injuries plaintiff allegedly sustained on October 18, 2018, when, while working for third-party defendant C.B. Contracting Corp. (C.B. Contracting), he allegedly

stepped on debris and fell while working at a construction project (project) located at the Jacob K. Javits Center at 655 W. 34th Street in Manhattan (premises).

Plaintiffs assert claims against New York Convention Center Operating Corporation (NYCCOC), New York Convention Center Development Corporation (NYCCDC), Jacob K. Javits Convention Center of New York (Javits Center), Lendlease (US) Construction LMB Inc. (Lendlease), Turner Construction Company (Turner), Lendlease Turner A Joint Venture Between Lendlease (US) Construction LMB Inc. and Turner Construction Company (Lendlease Turner) (collectively, New York defendants), and E.E. Cruz & Company, Inc. (E.E Cruz) pursuant to Labor Law §§§ 240(1), 241(6), and 200, and common-law negligence.

The New York defendants assert third-party claims against EE Cruz and C.B. Contracting for contractual indemnification, common-law indemnification, contribution, and breach of contract based upon the alleged failure to procure requisite insurance.

EE Cruz asserts third-party claims against CB Contracting for breach of contract, contractual indemnification, common-law indemnification, contribution, and breach of contract based upon the alleged failure to procure requisite insurance.

In motion sequence 005, EE Cruz moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and for summary judgment on its third-party contractual indemnification claim against CB Contracting.

In motion sequence 006, the NY Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint against them and for summary judgment on their third-party contractual indemnification claims against EE Cruz and CB Contracting.

Plaintiff's Deposition Testimony (NYSCEF Doc. No. 239)

Plaintiff testified that at the time of the accident, he was working for CB Contracting as a latherer installing rebar (Plaintiff tr. at 40, 42); CB Contracting was a foundation company installing rebar on the project (*id.* at 275). Plaintiff had been working on the project for approximately six months to a year prior to the accident (*id.* at 47).

CB Contracting had a "head foreman," "Rich," on the project, who provided CB Contracting employees with daily work directions (*id.* at 46, 47-48), and Rich supervised plaintiff and provided him with directions (*id.* at 66). No one other than Rich told him how to install or carry rebar (*id.* at 269-270). There were also "other leaders" on the project, all CB Contracting employees (*id.* at 66).

Lendlease Turner was the owner of the Premises (*id.* at 64, 65), and while plaintiff saw individuals from Lendlease Turner at the premises, they did not supervise his work (*id.* at 65-66). He never heard anyone from Lendlease Turner tell a CB Contracting Employee how to do their work (*id.* at 268), instead, Lendlease Turner would "say something to the foreman and the foreman will tell us" (*id.* at 268).

Plaintiff was unfamiliar with EE Cruz (*id.* at 192-193), and never took work directions from anyone identifying themselves as being from EE Cruz (*id.* at 194-195).

On the date of the accident, plaintiff's foreman told him to carry rebar from a pile to a location where "we were building a wall" (*id.* at 71). Immediately before the accident, plaintiff was carrying approximately three rebars to the area where the wall was being built (*id.* at 75-76). Altogether, the rebars he was carrying weighed approximately 40-50 pounds (*id.* at 118) and he was carrying them on his right shoulder (*id.* at 195).

The accident occurred while plaintiff was walking on a "narrow walkway" (walkway) that "had all sorts of debris to the right where the carpenters keep their material, their plywood, their two by fours" (*id.* at 119). To the left of the walkway was "where we stored our rebar to be used" (*id.* at 119). The walkway, which was outside (*id.* at 118), was "a pathway that everybody uses to get to the stairway" and "[t]here's no other way to go" (*id.* at 119).

The accident occurred when plaintiff's left foot came in contact with debris, consisting of "cut up pieces of lumber" or "[s]plintered wood" approximately two inches by six inches long (*id.* at 87-88). Plaintiff had seen this type of debris before on the worksite and there was a pile of similar debris near where the accident occurred (*id.* at 88). "It was a two by four that was broken up, and that's what [plaintiff] tripped over. It was all sorts of debris to [his] right and [C.B. Contracting's] rebar was all to the left" (*id.* at 110).

After plaintiff tripped, he felt a pop in the back of his knee, and "once I stepped on the debris, it's when I fell" (*id.* at 91). No one witnessed the accident (*id.* at 78).

During his deposition, plaintiff was shown an "LLT – Incident Investigation Report" (the Lendlease Turner Report, NYSCEF Doc. No. 238), but he did not know who completed it nor the source of the information therein (*id.* at 123-124, 287). The report describes the incident as follows: "[Plaintiff] alleged that while he was carrying [the rebar] he felt a pop in his left knee . . . and then stopped. The walking path was concrete slab and clear . . ." (*id.*).

Plaintiff was also shown an "Incident Report" (EE Cruz Report, NYSCEF Doc. No. 237), which includes a section entitled "Employee/Injured Party - Statement" (Employee Statement Section) (*id.* at 128). The report reflects that "it was reported to [an EE Cruz safety manager] that . . . [plaintiff] was walking . . . while carrying [the rebar] when he began to experience discomfort on the backside of his left knee . . . [which plaintiff described] as a "pop" on the back

of his left knee . . . (*id.*). In the Section, the incident is described as plaintiff carrying rebar while walking when he felt a pop in his left leg (*id.*). Plaintiff acknowledged that the signature in the Employee Statement Section was his (*id.* at 131), but he did not write the written portion of the Section (*id.* at 131-132), and it did not accurately describe his accident as "[i]t doesn't say anything about me tripping on debris" (*id.* at 132).

Further, plaintiff was shown a document entitled "Employer's Report of Work-Related Injury/Illness" (C2 Report, NYSCEF Doc. No. 240), but he did not know the source of the information therein (*id.* at 134, 135). The C2 report describes the injury as occurring while plaintiff was walking and carrying rebar, and he felt discomfort in the back of his left knee (*id.*).

Finally, plaintiff was shown a portion of his medical record (CityMD Records, NYSCEF Doc. No. 241) and he did not remember telling the physician how the accident occurred, nor did he know the source of the information therein (*id.* at 126). The record reflects that plaintiff "reports he was carrying rebar and felt something behind his knee tear" (*id.*).

Deposition Testimony of Radoslaw Brzezinski, project superintendent for Lendlease Turner (NYSCEF Doc. No. 235)

Brzezinski testified that Turner employed him as Lendlease Turner's project superintendent on the project (Brzezinski tr. at 11, 17, 21, 34), and his responsibilities included "General oversight of scheduling, sequencing and safety for the project for the same thing – a section of the project" (*id.* at 18). He supervised the superintendents on the project and did daily walkthroughs of the entire worksite (*id.* at 18, 19, 49), and had the authority to stop work if he saw workers working in an unsafe manner (*id.* at 53). He was also responsible for "[g]eneral supervision and [to] monitor for contractor compliance to safety policies," which included monitoring for "general compliance with the safety manual" (*id.* at 48-49).

Lendlease Turner was the general contractor on the Project (*id.* at 26), and it retained subcontractors, construction consultants, and had its own workforce on the Project (*id.* at 27). It had site safety managers that also performed walkthroughs of the premises and it retained a third-party site safety contractor on the project (*id.* at 55).

Lendlease Turner also employed laborers who performed general housekeeping work, including cleaning debris (*id.* at 55), and these laborers would perform general housekeeping work prior to the other trades starting work on the project "if needed," and they received their directions from Lendlease Turner (*id.* at 55-56). The laborers had procedures for removing debris from the project depending upon the type of debris (*id.* at 57). If Brzezinski came across debris during one of his walkthroughs, he would "notify the contractor responsible" and if he was unable to identify the contractor, he would inform the general superintendent or laborer foreman (*id.* at 56-57). If he saw a need for a "housekeeping item," he would notify the laborer foreman (*id.* at 57).

EE Cruz was a subcontractor doing excavation and foundation work on the project (*id.* at 58-59), and it had been retained by Lendlease Turner (*id.* at 59). EE Cruz retained multiple trades including laborers, lathers, and dock builders (*id.* at 59), and had multiple subcontractors on the project (*id.* at 60). EE Cruz's role involved the entire worksite (*id.* at 80-81), and it had multiple foremen on the project, assigned to "different scopes of work" (*id.* at 61-62).

CB Contracting was one of EE Cruz's subcontractors (*id.* at 60-61, 65), and was performing "rebar installation by lathers" on the project (*id.* at 61). Brzezinski was familiar with the type of work CB Contracting was doing on the project, which included using various types of wood including two-by-fours (*id.* at 86-87). EE Cruz was responsible for directing, controlling and supervising CB Contracting's work (*id.* at 82).

Brzezinski never directed any CB Contracting workers as to how to perform their work (*id.* at 65); he only had interactions with CB Contracting's foreman (*id.* at 86).

Deposition Testimony of Volkan Yargici, senior project manager for EE Cruz (NYSCEF Doc. No. 243)

Volkan Yargici testified that at the time of the accident, he was employed by EE Cruz as a senior project manager on the project (Yargici tr. at 17, 19). He was on the worksite daily and conducted walkthroughs (*id.* at 20 and 75-76), and had authority to stop work and "have someone address the safety issue[s]" (*id.* at 77).

EE Cruz's laborers cleaned debris on the project (*id.* at 59), but "if it is in a subcontractor's work area or by a subcontractor, I would talk to the subcontractor's super or foreman. If it is E.E. Cruz, I would have one of our laborers address it immediately. If it is not E.E. Cruz or E.E. Cruz's subcontractors, then I would have our safety manager talk to Lendlease Turner's safety manager (*id.* at 78). Subcontractors were responsible for maintaining the safety of their work areas but if Yargici saw something unsafe, he would have the subcontractor address it (*id.* at 78).

EE Cruz also employed carpenters on the project (*id.* at 137), who created "formwork" to facilitate the installation of rebar for concrete placement (*id.* at 137). Forms were created using two-by-four and six-by-four sized wood (*id.* at 137-138).

Subcontractors were responsible for the means and methods of their work (*id.* at 100), and while EE Cruz coordinated the subcontractors' work, it did not tell them specifically what to do (*id.* at 100). If a subcontractor had a complaint regarding work, the subcontractor would talk to EE Cruz's superintendent (*id. at* 31).

EE Cruz subcontracted rebar work to CB Contracting (*id.* at 26, 63), and upon reviewing the contract between EE Cruz and CB Contracting, Yargici opined that if a piece of rebar was

too heavy to be carried by a CC Contracting laborer, then EE Cruz was required to provide support equipment (*id.* at 144-145).

The areas where the rebar was being moved were "under the subcontractor's supervision" and EE Cruz would direct the subcontractor's worker to take specific paths (*id.* at 125). If subcontractors wanted to store equipment on the worksite, EE Cruz would coordinate the storage locations with Lendlease Turner "[b]ut after that, the installation point, the walk paths and everything else would be by the subcontractors, how they would carry" (*id.* at 126).

Yargici was shown the EE Cruz Report (*id.* at 92), but he had not prepared any portion of it (*id.* at 92). He was also shown the Employee Statement Section of the Report (*id.* at 105), and confirmed that, based on his knowledge of EE Cruz's incident reports, that the handwritten portion of the Section was plaintiff's statement as to how the accident occurred (*id.* at 107). Yargici stated: "I think this is the employee statement. Typically the employee who is injured either writes this or, if he cannot, our safety manager helps him to write, like, if he has injured his hand. In my experience, this is the employee statement of whoever had this incident" (*id* at 107).

Deposition Testimony of Raymond Burt, superintendent for CB Contracting (NYSCEF Doc. No. 245)

Raymond Burt testified that at the time of the accident, he was a superintendent for CB Contracting (Burt tr. at 11). He was at the worksite daily and his responsibilities included making sure CB Contracting workers on the project had their materials and supplies (*id.* at 13-14).

CB Contracting worked directly with EE Cruz (*id.* at 42), and EE Cruz had daily morning meetings with CB Contractor's workers on the project (*id.* at 26). EE Cruz told CB Contractors where to work and the type of work that needed to be done, but did not tell CB Contractors how

to perform their work (*id.* at 40-41). If EE Cruz had an issue with CB Contracting's work, it would either contact him or CB Contracting's foreman (*id.* at 148).

EE Cruz and CB Contracting together determined where CB Contracting would store its materials (*id.* at 83), and they jointly decided where to place the rebar that CB Contracting was going to use (*id.* at 119). The rebar would be stored outside of the areas where the work was being done and moved to the necessary locations (*id.* at 117-118).

CB Contracting did not perform any work with wood (*id.* at 84), and did not use wood or two-by-fours as material (*id.* at 120). There were other trades on the worksite including carpenters (*id.* at 47-48), and there was lumber present in the worksite, including two-by-fours (*id.* at 120-121).

Plaintiff's Affidavit (NYSCEF 205)

The New York Defendants submit an affidavit signed by the plaintiff dated January 17, 2019, wherein he states:

> At approximately 8:30 a.m., I was carrying the rebar in a passageway leading to where the rebar would be installed. The passageway had ok lighting. As I carried the rebar down the walkway, my left foot tripped on debris making it difficult to control the rebar. The walkway was approximately two feet wide. This was the only way to go to where I was directed to bring the rebar because the area was flooded with water. Various other trades would use this same passageway, such as operating engineers, plumbers, electricians. After my foot tripped on the debris, my knee abruptly shifted and I felt excruciating pain. As I fell I dropped the rebar that I was carrying. It was at this time that I seriously injured my left knee, left ankle and left hip. I have been advised by my doctor that I have a torn ACL in my left knee.

Affirmation of Kyle Satchell (NYSCEF 217)

The New York Defendants submit an affirmation by Kyle Satchell, an associate counsel for the New York State Urban Development Corporation, who states, in pertinent part:

> NYCCOC did not contract for any work performed on the subject construction project; did not supervise or control the means and methods by which the project

> was performed (nor did it have the authority to do so); and did not possess any ownership interest in the project or in the premises on which the project occurred.
>
> Further, NYCCDC . . . did not supervise or control the means and methods by which the project was performed (nor did it have the authority to do so).
>
> In 1979, the New York Legislature specifically found that the construction of a new "convention and exhibition center [would] provide significant economic and social benefits" and, to facilitate the construction of a new convention and exhibition center, directed the creation of a subsidiary corporation, the NYCCDC . . . NYCCDC was thus created. (See the Development Corporation's Annual Subsidiary Report annexed hereto as Exhibit "1".)
>
> In 2017, the NYCCDC's Board of Directors selected [Lendlease Turner] . . . to design and build the Expansion Project. NYCCDC then executed a Design-Build Agreement for the Project (a true accurate and complete copy is annexed hereto as Exhibit "2"). The Agreement identified NYCCDC as the "Owner.
>
> . . .
>
> NYCCDC and NYCCOC was (sic) provided no notice of any actual or constructive condition involving any alleged dangerous condition on the Premises at any time [before plaintiff's accident]).

PROCEDURAL ISSUES

EE Cruz and the New York Defendants submit the Lendlease Turner Report, EE Cruz Report, and the C2 Report (collectively, Incident Reports) and the CityMD Records in support of their summary judgment motions.

Plaintiffs argue that the Court must exclude the Incident Reports in determining the motion, as the Lendlease Turner Report is unauthenticated, and the sources of the information in the EE Cruz Report and C2 Report are unknown. Plaintiffs further argue that the accident descriptions in the Reports are inadmissible hearsay.

EE Cruz argues that the Incident Reports were all prepared in the ordinary course of business, and observes that plaintiff testified at his deposition that he signed the Employee

Statement Section of the EE Cruz Report. In addition, EE Cruz refers to plaintiff's deposition testimony as to the CityMD Records and the Employee Statement Section.

Here, EE Cruz and the New York Defendants have failed to establish that any of the Incident Reports are business records pursuant to CPLR 4518. Specifically, EE Cruz and the New York Defendants have failed to submit an affidavit by someone with personal knowledge as to how any of the Incident Reports were preserved and/or maintained (*see Ging v F.J. Sciame Constr. Co., Inc.*, 193 AD3d 415, 417 [1st Dept 2021]; *JPMorgan Chase Bank, N.A. v Clancy*, 117 AD3d 472, 472 [1st dept 2014] [attorney's affirmation insufficient to establish that documents were business records and affidavit was also insufficient where "the affiant failed to state in words or substance that it was the regular business of the plaintiff to create such records"]).

Nevertheless, "hearsay entries regarding the cause of an injury contained in a medical record . . . may be admissible as an admission, but only if there is evidence that connects the party to the entry" (*Benavides v City of New York*, 115 AD3d 518, 519 [1st Dept 2014]). The same is true for party admissions contained in incident or accident reports (*Buckley v J.A. Jones/GMO*, 38 AD3d 461 [1st Dept 2007] [incident report that contained statements by plaintiff was admissible against plaintiffs as party admissions]).

Some of the reports and records submitted by defendants contain admissions by plaintiff as it is clear that he provided the information therein or the statements therein are directly attributable to him. Moreover, the statements at issue, while not necessarily contradicting plaintiff's current testimony that he fell after stepping on a piece of wood or wood debris, are at least inconsistent with that account, and are notable for the fact that all of plaintiff's statements made after the accident do not mention that he stepped on anything, only that he suddenly felt

pain in his knee while walking with the rebar (*see Pina v Arthur Clinton Hous. Dev. Fund Corp*. 188 AD3d 614, 614 [1st Dept 2021] [medical record entries containing description of accident satisfied party admissions exception because entries in records were directly attributable to plaintiff]; *Kamolov v BIA Group, LLC*, 79 AD3d 1101 [2d Dept 2010] [statement in ambulance report constituted admissions by plaintiff, as they were inconsistent with his current account of accident and were satisfactorily connected to him]).

The following Reports and statements are thus admissible as admissions by plaintiff:

(1) The Lendlease Turner Report, and the statement that "[plaintiff] alleged that while he was carrying [the rebar] he felt a pop in his left knee . . . ;

(2) The EE Cruz Report and the Employee Statement, in which plaintiff signs the statement and either writes or is quoted as saying "I was carrying rebar in zone 23 walking to the work location when I felt a pop in my left leg"; and

(3) The CityMD Records and the statement that plaintiff "reports he was carrying rebar and felt something behind his knee tear."

Plaintiff further argues that the New York Defendants' motion is procedurally defective as they have failed to attach a copy of the pleadings. However, as the New York Defendants attached a copy of the pleadings with their reply papers, the Court will determine their summary judgment motion on the merits (*see Pandian v New York Health & Hosps. Corp.,* 54 AD3d 590, 591 [1st Dept 2008]). In any event, the pleadings are electronically filed and accessible.

DISCUSSION

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (*Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553

[1st Dept 2012] [internal quotation marks and citations omitted]). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment" (*id*). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]).

"[F]acts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citations omitted]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp*., 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiffs' Labor Law § 240(1) claims against EE Cruz and the New York Defendants

EE Cruz and the New York Defendants move for summary judgment dismissing plaintiffs' Labor Law § 240(1) claims (motion seq 005 and 006). Labor Law § 240(1), also known as the Scaffold Law provides:

> Scaffolding and other devices for use of employees
>
> 1. All 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 or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

Labor Law § 240(1) "imposes upon owners, contractors and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work" (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]). Said liability applies to "injuries that

are proximately caused by the failure to provide appropriate safety devices to workers subject to gravity-related risks" (*Ladd v Thor 680 Madison Ave LLC*, 212 AD3d 107, 111 [1st Dept 2022]).

Here, given the undisputed facts that plaintiff was injured while walking on even ground, that nothing fell on him and he did not fall from a height, EE Cruz and the NY Defendants have established, prima facie, that plaintiff's accident does not fall within the scope of Labor Law § 240(1) (*see e.g. Gonzalez v G. Fazio Constr. Co., Inc.*, 176 AD3d 610, 611 [1st Dept 2019] [plaintiff tripping on debris while pushing a wheelbarrow of materials does not fall within the scope of Labor Law § 240(1)]; *Santiago v 44 Lexington Assoc., LLC*, 161 AD3d 444, 444 [1st Dept 2018] [plaintiff injured when he slipped on debris while performing work not covered accident]; *Lopez v City of New York Transit Auth.*, 21 AD3d 259, 259 [1st Dept 2005] [plaintiff injured when he slipped on debris while closing an extension ladder does not fall withing the scope of Labor Law § 240(1)]).

Plaintiffs do not address defendants' arguments as to their Labor Law § 240(1) claims, and thus fail to raise any triable issues (*see JPMorgan Chase Bank, N.A. v Jones*, 194 AD3d 483, 483 [1st Dept 2021] [as defendant did not oppose plaintiff's showing, he effectively conceded facts and evidence submitted by plaintiff]).

Accordingly, EE Cruz and the New York Defendants are entitled to summary dismissal of plaintiffs' Labor Law § 240(1) claims.

Plaintiffs' Labor Law § 241(6) claims against EE Cruz and the New York Defendants

EE Cruz and the New York Defendants move for summary judgment dismissing Plaintiff's Labor Law § 241(6) claims (motion seq 005 and 006). Labor Law §241(6) provides:

> Construction, excavation and demolition work
>
> . . .

> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

"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 Auth. of N.Y. & N.J.*, 38 NY3d 89, 93 [2022] [internal quotations marks and citations omitted]).

The non-delegable duty is absolute and "imposes liability upon a general contractor for the negligence of a subcontractor, even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502 [1993] [emphasis omitted]). "To establish liability under Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision 'mandating compliance with concrete specifications'" (*Ennis v Noble Constr. Group, LLC*, 207 AD3d 703, 705 [2d Dept 2022], quoting *Ross*, 81 NY2d at 505).

Industrial Code violations

While EE Cruz and the New York Defendants move for summary judgment dismissing plaintiffs' Labor Law § 241(6) claims based upon all of the Industrial Code violations alleged in the verified bill of particulars (NYSCEF Doc. No. 109), plaintiffs only oppose dismissal of the alleged violations of Industrial Code § 23-1.7(e)(1) & (2).

Accordingly, the only Labor Law § 241(6) claims at issue are those based upon defendants' alleged violations of Industrial Code §§ 23-1.7(e)(1) & (2) (*Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section."]).

Industrial Code § 23-1.7(e)(1) & (2) are sufficiently specific to form the basis for a Labor Law § 241(6) claim (*see Lourenco v City of New York,* 228 AD3d 577 [1st Dept 2024]) and provide:

> Protection from general hazards
>
> (e) Tripping and other hazards.
>
> > (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
> >
> > (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

EE Cruz and the New York Defendants argue that based on plaintiff's admissions in the Reports and medical records, his accident does not fall within the scope of Industrial Code § 23-1.7(e)(1) or (2).

While the admissions are sufficient to demonstrate, prima facie, that plaintiff's injury did not occur due to an Industrial Code violation, plaintiff's testimony that he fell after stepping or tripping on wood debris implicates a credibility issue that may not be resolved on summary judgment (*see Moore v Skanska USA Bldg., Inc*., 237 AD3d 566 [1st Dept 2025] [as defendants raised triable issues regarding plaintiff's version of events, conflicting accounts presented

credibility issues for jury to resolve]; *Pina v Arthur Clinton Hous. Dev. Fund Corp*., 188 AD3d 614 [1st Dept 2020] [plaintiff's own conflicting accounts as to what caused accident and injury were sufficient to raise triable issue of fact]; *McCue v Cablevision Sys. Corp*., 160 AD3d 595 [1st Dept 2018] [issues of fact existed as to how accident occurred]; *Smiegielski v Teachers Ins. and Annuity Assn. of Am*., 137 AD3d 676 [1st Dept 2016] [issue of fact may be raised where plaintiff provides inconsistent accounts of accident]).

However, as to section (e)(1), accidents that occur outdoors do not fall within that section (*see Potenzo v City of New York*, 189 AD3d 705, 707 [1st Dept 2020] ["since the area where the accident occurred was not in the interior of a building, it could not be a 'passageway" under 12 NYCRR 23-1.7(e)(1)"]). As it is undisputed that the accident occurred outdoors, defendants are entitled to summary dismissal of plaintiffs' Labor Law § 241(6) claims based upon an alleged violation of Industrial Code § 23-1.7(e)(1) (*see Quigley v Port Auth. of New York*, 168 AD3d 65 [1st Dept 2018] [passageway is "interior or internal way of passage inside a building"]).

As to 23-1.7(e)(2), defendants argue that plaintiff's accident did not occur in a work area but rather a passageway. A location is a "work area" pursuant to Industrial Code § 23-1.7(e)(2) when it is a "'physically defined area' that workers routinely crossed to access equipment and materials" (*Castaldo v F.J. Sciame Constr. Co. Inc.*, 222 AD3d 579, 579 [1st Dept 2023]), including locations that were "in constant use as a work site for the loading and unloading of construction material and debris" (*Canning v Barneys N.Y.*, 289 AD2d 32, 34 [1st Dept 2001]). Further, the accident need not occur in the plaintiff's own work area, if he or she was required to pass though the location during the course of his or her work (*id.*).

Here, defendants fail to establish, prima facie, that the accident location was not a work area, given the testimony from various witnesses that the location was where material was kept

or stored, and was used as a pathway to get to other locations at the site, and are thus not entitled to dismissal of plaintiffs' claims premised on a violation of section 23-1.7(e)(2).

There is no merit to defendants' argument that plaintiffs need to prove notice in order to hold them liable for a violation of Labor Law 241(6) (*see Zyskowski v Chelsea-Warren Corp*., 238 AD3d 498 [1st Dept 2025]).

Proper Labor Law defendants

The New York Defendants further argue that NYCCOC and NYCCDC are not proper Labor Law defendants as they were not the owners of the Premises, contractors on the Project, or statutory agents. Plaintiffs argue in opposition that NYCCDC is an owner for the purposes of the Labor Law and that NYCCOC was NYCCDC's statutory agent.

According to Satchell, NYCCDC was named as the "Owner" in the agreement between NYCCDC and Lendlease Turner relating to the Project, and the NYCCDC-Lendlease Turner Agreement indicates that "the Jacob K. Javits Convention Center [the Premises] is owned by the Owner." Defendants thus fail to establish that NYCCDC was not the owner of the premises.

As to NYCCOC,

> Although sections 240 and 241 now make nondelegable the duty of an owner or general contractor to conform to the requirement of those sections, the duties themselves may in fact be delegated. When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241.

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981] [internal citations omitted]). Accordingly, for a party to be "vicariously liable as an agent of the property owner for injuries sustained under the statute," it must have "had the ability to control the

activity which brought about the injury" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]).

Here, the NYCCDC/Lendlease Turner Agreement indicates that the premises is "operated and managed by" NYCCOC, but it does not describe NYCCOC's authority or specific responsibilities as to the Project. Moreover, there is no evidence that NYCCOC had the authority to supervise or control any of the work on the Project or that it did supervise or control the work.

Therefore, the New York Defendants have established, prima facie, that NYCCOC is not a proper Labor Law defendant, and plaintiffs have not raised a triable issue in opposition.

Plaintiffs' Labor Law § 200 and common law negligence claims against EE Cruz

EE Cruz moves for summary judgment dismissing Plaintiff's Labor Law § 200 and common law negligence claims as against it (motion seq 005). Labor Law § 200 states, in pertinent part, as follows:

> All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

Labor Law section 200 "codifie[s] the common-law duty imposed upon an owner or general contractor to provide construction site work[ers] with a safe place to work." (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981] [citation omitted]). There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises

(*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

> Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it. Where the injury was caused by the manner and means [means and methods] of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work.

(*Cappabianca v Skanska USA Bldg., Inc*., 99 AD3d 139, 144 [1st Dept 2012] [internal citations omitted]; *see also Toussaint v Port Auth. of New York and New Jersey*, 38 NY3d 89, 94 [2022] [to recover under Labor Law § 200 "a plaintiff must show that an owner or general contractor exercised some supervisory control over the operation"]).

Occasionally, however, the accident-causing condition can implicate both the dangerous condition theory as well as the "means and methods" one (*Venter v Cherkasky*, 200 AD3d 932 [2d Dept 2021]).

EE Cruz argues that it did not actually direct, supervise, or control plaintiff's work, and did not create any defective conditions nor have actual or constructive notice thereof. Plaintiffs argue in opposition that there are issues of fact as to whether EE Cruz controlled the means and methods of the injury-producing work and/or had notice of the debris.

Here, to the extent that the wood that allegedly caused the accident was part of the materials used and stored as a result of the means and methods of the contractors' work (*Maddox v Tishman Constr. Corp.*, 138 AD3d 646, 646 [1st Dept 2016] ["the double-stacking of the sand and cement bags at the work site was not an inherently dangerous condition of the work site but a result of the means and methods of the injury-producing work"]), there is no evidence that EE Cruz supervised or directed plaintiff's work, or that it had the authority to do so.

However, to the extent that the wood was debris created by workers, it may constitute a dangerous condition (*Davis v Trustees of Columbia Univ. in the City of N.Y.*, 199 AD3d 481 [1st Dept 2021] [alleged accumulation of debris may constitute dangerous condition under Labor Law 200]).

Plaintiff testified that he had seen the debris at that location before the accident, while none of defendants' witnesses testified as to whether or not they had seen the debris at issue before, nor did they submit evidence of the cleaning schedule for the site or when it had last been inspected before the accident (*Pereira v New School*, 148 AD3d 410 [1st Dept 2017]; *see also Padilla v Touro Coll. Univ. Sys*., 204 AD3d 415 [1st Dept 2022] [defendant failed to establish that it neither created nor had notice of stack of boards that fell on plaintiff, absent evidence as to who left boards against wall or last time site was inspected]).

EE Cruz thus fails to demonstrate that it is entitled to summary dismissal of plaintiff's Labor Law 200 and common-law negligence claims against it.

Plaintiffs' Labor Law § 200 and common law negligence claims against Lendlease Turner

For the same reasons stated above, Lendlease Turner is not entitled to dismissal of these claims against it.

Plaintiffs' Labor Law § 200 and common law negligence claims as against NYCCOC, NYCCDC, Javits Center, Lendlease, and Turner

Plaintiffs do not oppose dismissal of their Labor Law § 200 and common law negligence claims as against NYCCOC, NYCCDC, Javits Center, Lendlease, and Turner.

EE Cruz's contractual indemnification claim against CB Contracting

EE Cruz moves for summary judgment on its third-party contractual indemnification claim against CB Contracting (motion seq 005), arguing that it is entitled to contractual

indemnity by CB Contracting based upon the language of an indemnification provision in the contract between the two parties (EE Cruz-CB Contracting Agreement, NYSCEF Doc. No. 244).

"A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82, 87-88 [1st Dept 2018] quoting *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). Summary judgment on a contractual indemnification claim is warranted where the intent to indemnify is clear and there is no basis to conclude that the indemnified party was negligent as to the underlying accident (*see e.g. Hong-Bao Ren v Gioia St. Marks, LLC*, 163 AD3d 494, 494 [1st Dept 2018]).

The EE Cruz-CB Contracting Agreement includes an indemnification provision requiring CB Contracting "[t]o the extent permitted by law, and to the extent not caused in whole or in part by an indemnitee's own negligence" to "indemnify, defend, and hold harmless [EE Cruz]. . . from and against all liability. . . claims. . . which arise out of the Work" (EE Cruz-CB Contracting Agreement at sec. 14.1).

As there are issues of fact as to EE Cruz's liability pursuant to Labor Law § 200 and at common law (*supra*.), EE Cruz is not entitled to summary judgment on its third-party contractual indemnification claim against CB Contracting (*see Radeljic v Certified of N.Y., Inc.*, 161 AD3d 588, 590 [1st Dept 2018] [as factual issues remained as to extent of defendant's liability, summary judgment on its contractual indemnity claim would be premature]).

The New York Defendants contractual indemnification claims against EE Cruz

The New York Defendants argue that they are entitled to contractual indemnification by EE Cruz based upon the language of an indemnification provision in the contract between

Lendlease Turner and EE Cruz (Lendlease Turner-EE Cruz Agreement). EE Cruz argues in opposition that the New York Defendants failed to attach a copy of the Agreement with their moving papers.

While the New York Defendants argue that they attached a copy as exhibit M (NYSCEF Doc. No. 214), that exhibit is a copy of the EE Cruz-CB Contracting Agreement. Thus, the New York Defendants have failed meet their prima facie burden for summary judgment on their contractual indemnification claim against EE Cruz.

Further, even if defendants had attached a copy of the Agreement, they would still not be entitled to summary judgment on their third-party contractual indemnification claim against EE Cruz as to Lendlease Turner as there remain issues of fact as to Lendlease Turner's liability pursuant to Labor Law § 200 and at common law (*see Radeljic v Certified of N.Y., Inc.*, supra).

NY Defendants' indemnification claims against CB Contracting

The New York Defendants argue that they are entitled to contractual indemnification by CB Contracting based upon the language of an indemnification provision in the EE Cruz-CB Contracting Agreement.

"One who seeks to recover as a third-party beneficiary of a contract must establish that a valid and binding contract exists between other parties, that the contract was intended for his or her benefit, and that the benefit was direct rather than incidental" (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 368 [1st Dept 2006] citing *State of Cal. Pub. Empls.' Ret. Sys. v Shearman & Sterling*, 95 NY2d 427, 434-435 [2000]; *Internationale Nederlanden (U.S.) Capital Corp. v Bankers Trust Co.*, 261 AD2d 117, 123 [1st Dept 1999]).

The EE Cruz-CB Contracting agreement includes an indemnification provision that requires CB Contracting "[t]o the extent permitted by law, and to the extent not caused in whole

or in part by an indemnitee's own negligence" to indemnify the following groups: "Contractor, Design-Builder, Owner and their respective members, partners, parents, affiliates, agents, officers, employees, tenants and anyone else acting for or on behalf of any of them and any other required indemnitee under the General Contract from and against all liability" (EE Cruz-CB Contracting Agreement at sec. 14.1).

Although the New York Defendants submit a copy of the EE Cruz-CB Contracting Agreement and attachments A through C, they fail to submit attachments D(1) though D(3) which are the "General Contract," and thus, the NY Defendants fail to establish that they are "required indemnitee[s] under the General Contract."

Similarly, it is undisputed that the indemnity provision does not name the New York Defendants, nor was it signed by them. Moreover, the New York defendants do not establish that they fit in any of the named categories (*see Tonking v Port Auth. of New York and New Jersey*, 3 NY3d 486 [2004] [provision did not name defendant by name or use term "construction manager"]; *Hernandez v Port Auth. of New York and New Jersey*, 238 AD3d 408 [1st Dept 2025] [defendant was neither named nor described in indemnification clause at issue, and was not "agent" as described therein]; *Weidtman v Tremont Renaissance Hous. Dev. Fund Co., Inc*., 224 AD3d 488 [1st Dept 2024] [defendants were not third-party beneficiaries of indemnification provisions that did not mention them and of which they were not signatories]).

Further, even if the New York Defendants had established that they are entitled to contractual indemnification from CB Contracting, they would still not be entitled to summary judgment on their third-party contractual indemnification claim against CB Contracting as to Lendlease Turner. For the previouslystated reasons, there are issues of fact as to Lendlease

Turner's liability pursuant to Labor Law § 200 and at common law (*see Radeljic v Certified of N.Y., Inc.* supra).

Accordingly, the New York Defendants are not entitled to summary judgment on their third-party contractual indemnification claims against CB Contracting.

The parties' remaining arguments have been considered and found unavailing.

CONCLUSION AND ORDER

Accordingly, it is hereby

ORDERED that E.E. Cruz & Company, Inc.'s motion for summary judgment is granted to the extent of severing and dismissing plaintiffs' Labor Law 240(1) claim and their Labor Law 241(6) claim premised on any violation of the Industrial Code except for § 23-1.7(e)(2), and is otherwise denied (seq. 005); and it is further

ORDERED that the motion of defendants New York Convention Center Operating Corporation, New York Convention Center Development Corporation, Jacob K. Javits Convention Center of New York, Lendlease (US) Construction LMB Inc., Turner Construction Company, and Lendlease Turner A Joint Venture for summary judgment dismissing the complaint and for summary judgment on their third-party contractual indemnification claim against EE Cruz and CB Contracting is granted to the extent of:

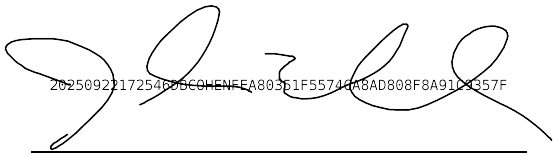
(1) severing and dismissing plaintiffs' Labor Law 240(1) claim;

(2) severing and dismissing plaintiffs' Labor Law 241(6) claim premised on any violation of the Industrial Code except for § 23-1.7(e)(2);

(3) severing and dismissing plaintiffs' Labor Law 241(6) claim against defendant NYCCOC; and

(4) severing and dismissing plaintiffs' Labor Law 200 and common-law negligence claims against NYCCOC, NYCCDC, Javits Center, Lendlease, and Turner;

And is otherwise denied (seq. 006).



9/22/2025
DATE

DAVID B. COHEN, J.S.C.

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