SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART 59**

Justice

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GIOVANN PEREZ, as Administratrix of the Estate of CARLOS PEREZ, Deceased,

Plaintiff,

- v -

UNIVERSITY MEDICAL PRACTICE ASSOCIATES, P.C.,HUNTER ROBERTS CONSTRUCTION GROUP, L.L.C., and THE INSTITUTE FOR FAMILY HEALTH,

Defendants.

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INDEX NO. 159243/2013

MOTION DATE 10/22/2024

MOTION SEQ. NO. 008 010 011 012

DECISION + ORDER ON MOTION

HUNTER ROBERTS CONSTRUCTION GROUP, L.L.C., and THE INSTITUTE FOR FAMILY HEALTH,

Third-Party Plaintiffs,

-against-

ATLANTIC DETAIL AND ERECTION CORP., and RISA MANAGEMENT CORP.

Third-Party Defendants.

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Third-Party
Index No. 595443/2015

HUNTER ROBERTS CONSTRUCTION GROUP, L.L.C., and THE INSTITUTE FOR FAMILY HEALTH

Second Third-Party Plaintiffs,

-against-

S.J. ELECTRIC, INC., J.M. BOTTO, INC., and RIVCO CONSTRUCTION, LLC,

Second Third -Party Defendants.

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Second Third-Party
Index No. 595664/2018

The following e-filed documents, listed by NYSCEF document number (Motion 008) 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 324, 325, 327, 328, 329, 330, 331, 332, 333, 341, 342, 343, 344, 345, 346, 348, 349, 350, 351, 352, 353, 354, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 464

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

The following e-filed documents, listed by NYSCEF document number (Motion 010) 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 425, 426, 429, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463

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

The following e-filed documents, listed by NYSCEF document number (Motion 011) 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 504, 508, 509, 513, 514, 515, 516, 517, 518, 526

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

The following e-filed documents, listed by NYSCEF document number (Motion 012) 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 505, 507, 510, 511, 512, 519, 520, 521, 522, 523, 524, 525

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

ORDER

ORDERED, that to the extent that it seeks summary judgment dismissing Hunter Roberts Construction Group, LLC, The Institute for Family Health, and Risa Management Corp's cross claims for common law indemnification and contribution against it, the motion of defendant Atlantic Detail and Erection Corp. (motion sequence 008) is granted; and it is further

ORDERED, that to the extent that it seeks summary judgment dismissing S.J. Electric Inc., Rivco Construction, LLC, and J.M. Botto, Inc.'s cross-claims against it, the motion of defendant Atlantic Detail and Erection Corp. (motion sequence 008) is granted; and it is further

ORDERED, to the extent that it seeks summary judgment in her favor as to liability on the Labor Law § 240 (1) claim against Hunter Roberts Construction Group, LLC and The Institute For Family

Health, the cross-motion of plaintiff Giovanna Perez, as administratrix of the Estate of Carlos Perez, Deceased (motion sequence 008) is granted; and it is further

ORDERED, to the extent that it seeks summary judgment in her favor as to the Labor Law § 241 (6) claim predicated on violations of Industrial Code regulations 23-5.18 (g) and (h) against Hunter Roberts Construction Group, LLC and The Institute For Family Health, the cross-motion of plaintiff Perez (motion sequence 008) is granted; and it is further

ORDERED, that motion and cross-motion (motion sequence number 008) are otherwise denied; and it is further

ORDERED, that to the extent that it seeks summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on other Industrial Code regulations against them, the motion of defendants Hunter Roberts Construction Group, LLC and The Institute For Family Health (motion sequence 010) is granted, without opposition of plaintiff; and it is further

ORDERED, to the extent that it seeks summary judgment on their contractual indemnification claims against third party defendants Risa Management Corp., J.M. Botto, Inc., and Rivco Construction, LLC, the motion of defendants/third party and second third-party plaintiffs Hunter Roberts Construction Group, LLC and The Institute For Family Health's motion (motion sequence 010) is granted, and such contractual indemnification is conditional,

i.e., subject to a finding that such defendants/third-party and second third-party plaintiffs were not negligent, or if negligent, that their negligence did not cause the accident; and it is further

ORDERED, to the extent that it seeks summary judgment dismissing third party defendants' Risa Management Corp. and Atlantic Detail and Erection Corp., and second third-party defendants J.M. Botto, Inc., and Rivco Construction, LLC common-law indemnification and contribution counterclaims against them, the motion of Hunter Roberts Construction Group, LLC and The Institute For Family Health (motion sequence 010) is granted; and it is further

ORDERED, to the extent that it seeks summary judgment dismissing the contractual counterclaims of the third-party defendants and second third party defendants against them, the motion of defendants/third and second third-party plaintiffs Hunter Roberts Construction Group, LLC and The Institute For Family Health (motion sequence 010) is granted; and it is further

ORDERED, to the extent it seeks summary judgment dismissing the contractual claims of second third party plaintiffs Hunter Roberts Construction Group, LLC and The Institute For Family Health against it, the cross motion of second third party defendant J.M. Botto, Inc. (motion sequence 010) is granted; and it is further

ORDERED, to the extent that it seeks summary judgment dismissing second third-party defendant Rivco Construction, LLC's

cross-claims against it, the cross motion of second third party defendant J.M. Botto, Inc. (motion sequence 010) is granted; and it is further

ORDERED, that such motion and cross motion (motion sequence 010) are otherwise denied; and it is further

ORDERED, that to the extent that it seeks summary judgment dismissing the contractual claims of second third party plaintiffs Hunter Roberts Construction Group, LLC and The Institute For Family Health against it, the motion of Rivco Construction, LLC (motion sequence 011) is granted, and such motion is otherwise denied; and it is further

ORDERED, that to the extent that it seeks summary judgment dismissing the contractual cross-claims of second third party defendants J.M. Botto, Inc, and Rivco Construction, LLC, against it, the motion of second third-party defendant S.J. Electric Inc. (motion sequence 012) is granted, and such motion is otherwise denied; and it is further

ORDERED, that the Clerk of the Court shall enter judgment with respect to the dismissed claims accordingly, and the remaining claims are severed and shall continue; and it is further

ORDERED, that within twenty (20) days of entry, any counsel shall upload on NYSCEF a copy of this decision and order with notice of entry; and it is further

ORDERED, that counsel are directed to confer with the Clerk of Trial Assignment Part (TAP) 40 to secure a mediation and/or trial date.

DECISION

In this action, Giovanna Perez, the administratrix of the estate of Carlos Perez (Perez), seeks damages for personal injuries sustained by her husband, now deceased, (Perez), in May 2012, when he fell from a scaffold while working at a construction site located at 1824 Madison Avenue in Manhattan (the premises) (NYSCEF Doc No. 299, supplemental summons and amended complaint).[1] Perez died from pneumonia during the action's pendency and Giovanna Perez was substituted as plaintiff in her capacity as administratrix of his estate (NYSCEF Doc Nos. 308, death certificate and 322, Dec. 20, 2022 Order).

In motion sequence 008, third-party defendant Atlantic Detail and Erection Corp. (Atlantic) moves for summary judgment dismissing the first-party complaint and all claims and cross-claims against it. Plaintiff cross-moves for summary judgment on her Labor Law §§ 240 (1) and 241 (6) claims against defendants/first and second third-party plaintiffs Hunter Roberts

[1] The amended complaint alleges that the accident date was May 6, 2012. The bill of particulars allege that the accident date was May 3, 2012 (NYSCEF Doc No. 400). It appears that May 3, 2012 is the correct date, based on Perez's deposition testimony (NYSCEF Doc No. 310) and other evidence submitted with the subject motions.

Construction Group, LLC (HR) and The Institute For Family Health (IFH) (collectively, the HR parties).[2]

In motion sequence 010, the HR parties move for summary judgment dismissing plaintiff's common-law negligence and Labor Law §§ 200 and 241 (6) claims and all cross-claims and counterclaims against them; and for summary judgment on most, but not all, of their third-party claims against third-party defendant Risa Management Corp. (Risa) and second third-party defendants S.J. Electric Inc. (S.J.), Rivco Construction, LLC (Rivco), and J.M. Botto, Inc. (Botto).[3] Botto cross-moves to dismiss the second third-party complaint and all cross-claims against it.

In motion sequence 011, Rivco moves for summary judgment dismissing the second third-party complaint and all cross-claims against it.[4] Finally, in motion sequence 012, S.J. moves for summary judgment dismissing the second third-party complaint and all cross-claims against it.

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[2] HR and IFH are represented by the same attorneys.

[3] The HR parties do not seek summary judgment on their contribution claims.

[4] The notice of motion states that Rivco seeks an order granting it summary judgment and dismissing the HR parties' claims against it, while the supporting memorandum of law adds that Rivco seeks to dismiss the cross-claims against it. Atlantic, S.J., and Botto treat the motion as one that seeks to dismiss the second third-party complaint and the cross-claims against Rivco. Accordingly, the court treats the motion as one brought for all such relief.

Each motion and cross-motion is opposed. For the reasons set forth below, each motion and cross-motion is granted in part and denied in part.

BACKGROUND

The parties

In June 2008, HR entered a contract with non-party New York City Economic Development Corporation (NYCEDC) to work on several projects, including a building renovation project at the premises (the 1824 Madison project) (NYSCEF Doc No. 435, NYCEDC contract). The contract identifies IFH as the premises owner and the contract's direct third-party beneficiary (id. at 354). Pursuant to the contract, HR hired various subcontractors to perform work on the project. S.J. was hired to perform electrical work; Botto was hired to perform plumbing work; Rivco was hired to perform carpentry work; and Risa was hired to perform structural steel work (NYSCEF Doc Nos. 415 and 417-419, the subcontracts). Risa, in turn, hired Atlantic as a sub-subcontractor to erect steel at the project (NYSCEF Doc No. 315 [Aug. 2018 deposition transcript [tr] of Adriana Torre, Atlantic's owner and former president] at 22, 70). At the time of the accident, Perez was employed by Atlantic as an ironworker (NYSCEF Doc No. 320, Mar. 7, 2014 Workers' Compensation Board [WCB] Notice of Decision).

The pertinent procedural history

In October 2013, Perez commenced the underlying action by summons and complaint against University Medical Practice Associates, P.C. (University Medical), which the complaint identified as the owner/lessee of the premises, and HR, the construction manager of the project (NYSCEF Doc No. 394). Perez also filed a workers' compensation claim. By Decision dated March 4, 2014, Workers' Compensation Law Judge Cohen-Miller found that Perez sustained a work-related injury and awarded him workers' compensation benefits (NYSCEF Doc No. 320). Thereafter, the parties stipulated to discontinue the action against University Medical (NYSCEF Doc No. 396, Mar. 18, 2014 stipulation).

Perez and HR then stipulated to service of a supplemental summons and amended complaint, naming IFH as an additional defendant (NYSCEF Doc No. 397, Apr. 30, 2014 stipulation). The amended complaint alleges causes of action sounding in common-law negligence and violations of Labor Law §§ 200, 240, and 241 (6) (NYSCEF Doc No. 299). The HR parties served an answer and commenced two third-party actions, one in June 2015 and the other in August 2018 (NYSCEF Doc Nos. 300, 301, and 304).

HR commenced a first third-party action against Risa and Atlantic. The third-party complaint asserts four causes of action: contribution, contractual and common-law indemnification, and breach of contract for failure to procure insurance. Risa served

an answer that asserts cross-claims against Atlantic for the same relief and a single counterclaim against the HR parties that sounds in contribution and common-law indemnification (NYSCEF Doc No. 303). Atlantic served an answer that asserts cross-claims against Risa for contribution and common-law indemnification and counterclaims for the same against the HR parties (NYSCEF Doc No. 302). In addition, the answer raises an affirmative defense that the action is barred under the Workers' Compensation Law.

HR filed a second third-party complaint against S.J., Botto, and Rivco, which asserts causes of action for contribution, contractual and common-law indemnification, and breach of contract for failure to procure insurance (NYSCEF Doc No. 304). Second third-party defendants each served an answer and second third-party defendant S.J. later served an amended answer (NYSCEF Doc No. 305). S.J.'s amended answer asserts cross-claims against all defendants for the same causes of action as those in the second third-party complaint.[5] Botto's answer asserts cross-claims against S.J., Rivco, Risa, and Atlantic and counterclaims against the HR parties for contribution, contractual and common-law indemnification, and breach of implied and express contractual obligations. Rivco's answer asserts two cross-claims against S.J.,

[5] Although S.J's answer characterizes the claims against the HR parties as cross-claims, a counterclaim is the proper term for a claim that a defendant asserts against a plaintiff.

Botto, Risa, and Atlantic and two counterclaims against the HR parties. The first cross-claim sounds in common-law indemnification and contribution, but is phrased as apportionment of liability. The second cross-claim is for defense and contractual indemnification. The first counterclaim is for common-law indemnification, and the second is for contribution and contractual indemnification. Additionally, Atlantic served answers to the cross-claims of S.J., Botto, and Rivco and served cross-claims against them (NYSCEF Doc Nos. 306 and 512). Atlantic's first cross-claim sounds in contract.[6] The second and third cross-claims are for contribution and common-law indemnification.

PERTINENT TESTIMONY

WCB hearing testimony

Perez and his co-worker, Nicholas Appice, testified at the WCB hearing. Perez described the accident as follows:

> "We had set some undercarriage. . .under the floors above to support weight and we were shimming those beams so they came in full contact with the ceiling. At one point, the shims had passed too far past the beam, so I was trying to reach around the other side. Couldn't reach them, so Nicky moved the scaffold about a foot. . .When he did so I can reach the shim and even them out, **the**

[6] In their memorandums of law, Rivco and S.J. characterize the cross-claim as seeking contractual contribution and indemnification. Botto's view is unclear since its cross-motion does not discuss any cross-claims in detail. In opposition to S.J., Rivco, and Botto's motions/cross-motion, Atlantic appears to contend that it only interposes cross-claims for contribution and common-law indemnification. As will be discussed later in this decision, the movants are entitled to summary judgment dismissing Atlantic's contractual cross-claims.

> **wheel of the scaffold went into a hole, the scaffold went over and…landed on me**" (NYSCEF Doc No. 309, WCB hearing tr at 3 [emphasis added]).

Next, Appice testified that he "worked under [Perez] and with him," and that he was working with Perez on the date of the accident (id. at 15). Appice described the accident as follows:

> "Carlos was on the Baker scaffold and we moved the scaffold and **there was a hole left either by the GC or someone that was never covered up and the wheel went into the hole and the Baker scaffold fell over** and Carlos was on the Baker scaffold, obviously, and fell down with it and landed pretty hard on the floor" (id. at 16 [emphasis added]).

Perez's deposition testimony

At his deposition, Perez testified that he was previously employed as an ironworker foreman with Atlantic (NYSCEF Doc No. 310, Nov. 2016 deposition tr at 16-18). His duties as a foreman included leading workers, keeping a job on schedule, meeting with general contractors, etc. (id. at 17). Perez testified that he also did "a little bit" of manual labor at the 1824 Madison project (id. at 50). He described the project as a building renovation and estimated that he worked there around 5 to 10 days per month (id. at 49, 51). On other days, he primarily worked at Atlantic's Brooklyn project (id. 49, 143). He described that project as his jobsite since he was the "foreman for that jobsite" and ran everything there (id. at 49). According to Perez, Appice also worked at the Brooklyn project (id. at 144). However, on days where

Perez did not need his specific skill set, Appice worked at the 1824 Madison project (id. at 144).

While Perez was an Atlantic foreman, Tommy Mott was Atlantic's foreman at the 1824 Madison project (id. at 47-49, 143, 179). Mott was the only person who provided Perez with assignments and instructions as to how to do his work at that site (id. at 48-49). On the day of the accident, Mott instructed Perez to "[p]ut the shim plates up on the beams" (id. at 47-48, 53). Perez did not remember the floor on which the accident occurred (id. at 51). Perez recalled that, prior to the accident, he and Appice assembled a Baker scaffold and attached handrails and safety-rails to it (id. at 52-54, 57). The scaffold had no defects, had the words "Atlantic Detail" written on it, and was approximately 6 feet high (*id.* at 55-56, 75-76, 147).

After assembling the scaffold, Perez and Appice locked the scaffold wheels, and Perez climbed onto it (id. at 58). Appice stayed on the ground to pass up and change out the shim plates while Perez stood on the scaffold and placed the shim plates on the beams (id. at 52, 58). Eventually, they needed to move the scaffold to continue the work (id. at 78-79, 149). Perez climbed to the ground and he and Appice unlocked the scaffold wheels, moved the scaffold, and relocked the wheels (id. at 63, 78-79, 148-150). Perez then climbed back onto the scaffold (id.).

At the time of the accident, Perez was maneuvering shim plates that had slipped past a beam's edge (id. at 60). Perez recalled that he was trying to move them into place when Appice said "Hey, hold on a second," at which point Perez fell to the ground (id.). Perez testified that after the accident, he learned that Appice had been "trying to help [him] reach more conveniently" (id. at 60-61, 69). According to Perez, Appice had unlocked the scaffold wheels and moved the scaffold, causing a wheel to go into a 5 to 6 inch diameter hole, which caused his fall off the scaffold and the scaffold to fall (id. at 60-65, 80, 152-154). Perez knew that the wheels were unlocked "because the scaffold kind of jerked" and "didn't drag" and "[i]f the wheel[s] [were] locked, [he] would have felt a jerky motion" (id. at 63). Perez testified that he did not notice the subject hole until after the accident (id. at 62-63, 79). He noted that the hole "went through the floor" and that he could see the floor below when he looked through it (id. at 61-62). He stated that the hole looked like it had been purposely drilled, but he did not know which trade drilled it (id. at 62). He later stated that "plumbers drilled a couple of holes but that didn't look like theirs" (NYSCEF Doc No. 311, Feb. 2017 deposition tr at 346).

Perez also testified that the lighting in the accident location was natural light that was neither "pitch black" or "super bright" (Nov. 2016 deposition tr at 73). He acknowledged that he

was able to see in front of him, but reiterated that the light was not bright (id. at 73-74). Perez stated that he might not have noticed the hole "because it was a little dark [and because there were] shadows" (id.). Perez further testified that he wore a hardhat and glasses, that he did not wear a safety harness as it is not required when a scaffold has handrails, and that he was not required to tie off nor was there a place for him to tie off (id. at 66, 74, 76, 155).

In addition, Perez testified that he promptly reported the accident to Mott and the HR superintendent (id. at 70-71, 145). He filled out an incident report with the superintendent, Mott prepared an incident report for Atlantic, and another individual prepared an incident report for the Local 361 Ironworkers Union (id. at 24, 70-71). Perez claimed that after completing the HR incident report, he witnessed the HR superintendent instruct the carpenter - an HR employee - to cover all holes at the site (id. at 201-202). Perez stated that after this instruction, the holes were covered with wood (id.).

Armand Aronne's deposition testimony (HR's witness)

Aronne was deposed in September 2017 and November 2022 (NYSCEF Doc Nos. 313 and 408, deposition trs). Aronne testified that on the day of the accident, he was a vice president and project executive with HR (NYSCEF Doc No. 313 at 7-8). He described the 1824 Madison project as a renovation and expansion of an existing

building (id. at 8-9). Aronne estimated that he was at the site approximately 1 day per week (NYSCEF Doc No. 408 at 9). He stated that HR was the construction manager and its duties were "[t]he overall management of construction operations" (NYSCEF Doc No. 313 at 10-11). Aronne stated that as a construction manager, HR does not typically do any physical work (id. at 29-30). Rather, it "progressed the work," hired subcontractors, and "coordinated the efforts in the field to ensure the project was constructed within the correct timeframe" (NYSCEF Doc No. 408 at 92). In response to the question, "[d]id HR supervise the work of the subcontractors," Aronne answered "[y]es, we did" (id.).

With respect to site safety, Aronne testified that each subcontractor was required to submit their own site safety manual to HR for approval (NYSCEF Doc No. 313 at 14, 16-17). Aronne testified that normally the HR superintendent and the HR project manager were responsible for reviewing these manuals (id. at 17). For this project, the HR superintendent was Augie Manzo and the HR project manager was Robert Germano (id.). Aronne confirmed that Manzo's responsibilities included daily walk-throughs of the jobsite and that he had the authority to stop the work if he saw an unsafe condition (id. at 20). Manzo was responsible for making sure that holes were properly covered during these walk-throughs (NYSCEF Doc No. 408 at 55). If he saw a hole that was uncovered, Manzo had the authority to get it covered (id.). Germano also had

the authority to stop the work if he saw an unsafe condition (NYSCEF Doc No. 313 at 20). More generally, Aronne confirmed that Germano and two assistant project managers had the authority to have safety hazards corrected (NYSCEF Doc No. 408 at 25-26, 29). As for himself, Aronne testified that if he observed a safety issue, he "would make every effort to get it corrected" (id. at 26-27).

When shown a copy of a document entitled the "HR Construction Group Corporate Safety and Health Program" (HRCG Safety and Health Program), Aronne confirmed that it was the corporate safety policy that would have been enforced by HR at the project (id. at 24-25). Aronne testified that HR did not hire its own site safety management company for the project (id. at 27). He did not believe that HR had employees at the site daily with "site safety manager" in their title (id.). When asked what HR would do if it saw an unsafe condition at the site, Aronne responded "[t]here would be a movement to correct the unsafe activity" (id. at 82-83).

When asked about which trade could have drilled holes, Aronne testified that several could have done so (NYSCEF Doc No. 313 at 36-40). He estimated that "[a] couple of hundred holes" were required to run risers, for piping, and for the placement of the conduit (id. at 38-41). He confirmed that "through and through floor openings [were] created in the concrete floors" (NYSCEF Doc No. 408 at 49). A through and through floor opening is "a hole

that goes right through the concrete completely, not just a little indentation" (id.). Aronne testified that the electrical, plumbing, and sprinkler contractors created such floor openings, and perhaps the HVAC fitter (id. at 49-50). He did not recall personally observing S.J., the electrical subcontractor, drilling holes into the concrete floor at the site nor the tools and equipment that S.J. used to perform its work (id. at 96-97). He assumed S.J. "pour drill[ed] [sic]…at some point in time to allow [for] conduit installation" (id. at 51). He further testified that he does not "recall the specifics of it but [was] sure the work that they completed on the job required that effort" (id). When asked about the purpose of a hole that is 5 or 6 inches in diameter "that goes directly from one floor and pops out in the ceiling of the other floor," Aronne replied that it would be for a plumbing, sprinkler, mechanical, or electric pipe (id. at 112-113).

Aronne testified that he was unaware of any specific complaints about safety issues related to scaffolds or holes at the site and that he did not recall any complaints related to HR and site safety (NYSCEF Doc Nos. 313 at 84, and 408 at 128). Aronne likewise testified that prior to the accident date, he did not recall receiving complaints related to S.J.'s work on the project nor did he recall receiving complaints related to Risa's safety measures (NYSCEF Doc No. 408 at 96, 128). He testified to the same with respect to Atlantic, but with the caveat that he did not

"believe [that HR] understood that Atlantic. . .even existed at that time" (id. at 128-129). Aronne also testified that he did not recall any complaints with respect to Rivco's work on the project (id. at 122). Aronne was not asked if he recalled any complaints related to Botto's work or safety measures (see NYSCEF Doc Nos. 313 and 408).

The following exchange occurred between plaintiff's counsel and Aronne regarding uncovered holes at the site:

> "Q. If someone complained to [HR] about a hole that needed to be covered, what was [HR's] procedure?
>
> A. It falls within the superintendent's responsibility to go figure out what the issue is and get it fixed.
>
> Q. Superintendent of [HR]?
>
> A. Correct.
>
> Q. So if [HR] came across a hole that needed to be covered, would the same thing apply, the superintendent would be informed and the superintendent needed to figure out a way to get it fixed?
>
> A. He would be responsible for getting it fixed, yes" (NYSCEF Doc No. 313 at 84-85).

However, Aronne maintained that if HR required any holes in the floor to be covered, Rivco, the carpentry subcontractor, was responsible for covering them (NYSCEF Doc No. 408 at 56-57). Such coverings were to protect against tripping and falling hazards (id. at 48). As for larger openings, Aronne testified that those "required cable protection" and "would have been provided by the steel contractor" (id.). Upon review of a copy of the Rivco

subcontract, Aronne confirmed that page 23, subparagraph p contained the sentence: "The carpentry contractor shall furnish and install all required temporary protection and enclosures" (id. at 114). At a different point in the depositions, Aronne characterized subparagraph p as "a standard clause within this particular project's [e]xhibit A, which talks about protection being removed and having to be replaced in a timely manner" (NYSCEF Doc No. 313 at 48). He also reviewed the S.J. subcontract and confirmed that it contained identical language (NYSCEF Doc No. 408 at 104-105). He then testified that "[b]ased on [his] understanding of [the S.J. subcontract], if S.J…were to create a hole in the floor, it would be understood that the carpentry subcontractor would then install temporary protection and enclosures for that hole" (id. at 105). Aronne testified that he was not aware of another subcontractor specifically hired to perform that function (id. at 47). He also testified that he was not sure, but did not think there were other carpenters on the project besides Rivco (NYSCEF Doc No. 313 at 36). Aronne believed that HR likely employed laborers for site cleaning and housekeeping, but stated that typically these laborers would not be told to cover any holes (NYSCEF Doc No. 408 at 55-56, 124). Aronne was asked, "[d]id the laborers cover holes if directed by [HR]," and he responded "[n]o" (id. at 56).

D. Savi Prashad's deposition testimony (Risa's witness)

Prashad testified that on the date of the accident, she was Risa's chief executive officer and president (NYSCEF Doc No. 316, Dec. 2017 deposition tr at 6-7). Prashad stated that she oversees the company's operations, and that she is currently the sole employee tasked with contract negotiations (id. at 7). She also stated that in 2011 and 2012, she sometimes worked with another Risa employee on contract negotiations (id. at 7).

Prashad confirmed that HR hired Risa pursuant to a contract to perform fabrication and installation of structural steel for the 1824 Madison project (id. at 8-9). According to Prashad, Risa subcontracted all that work to Atlantic (id. at 9). Prashad testified that she did not remember being involved in the contract negotiations with Atlantic, that she did not know if the negotiations occurred by email or some other way, and that she did not know the date that they entered into the subcontract (id. at 9, 11). Prashad stated that she could not find any emails between Atlantic and Risa nor a signed copy of a subcontract between them (id. at 10-11). Further, Prashad testified that she had not seen a signed copy of the subcontract (id. at 13). Prashad explained that Risa electronically stores its contracts, "but the copy [of the Atlantic subcontract] that was signed is not stored in the computer" (id. at 11). Prashad found an unsigned copy in Risa's office (id. at 10).

In addition, Prashad testified that Risa would not begin a project without an executed written signed contract (id.). Prashad testified that she did not remember if the Atlantic subcontract required Atlantic to "abide by the same insurance and indemnification mandates as Risa had to abide by on behalf of [HR] and the owner" (id. at 17). Prashad testified that she did not know if Atlantic was told "that it would be required to defend and indemnify [HR] and the owner" (id.). She assumed Atlantic obtained the requisite liability insurance naming HR and the owner as additional insureds (id. at 17-18). When asked whether Atlantic would have had to provide Risa with proof that the requisite insurance coverage was purchased, Prashad stated that "[t]here would've been a certificate of insurance if it was requested" (id. at 18). Prashad testified that she did not remember seeing Atlantic's certificate of insurance (id.).

As for the project itself, Prashad testified that Risa's project manager visited the site 3 to 5 times per week (id. at 13). She further testified that the project manager inspected Atlantic's work and "would generally look at the work to see if it's being done according to plans and specifications" (id. at 26). According to Prashad, the project manager had the authority under the contract to instruct Atlantic as to its work as set forth in the contract provisions addressing "the requirements of the job and scope of the job" (id. at 43-44). Lastly, Prashad testified

that she did not receive any complaints about holes in the floors and had no knowledge of Risa receiving complaints from Atlantic regarding any project conditions (id. at 28-29).

John O'Connell's deposition testimony (Atlantic's witness)

O'Connell testified that on the date of the accident, he was employed by Atlantic as a general manager (NYSCEF Doc No. 314, Oct. 2017 deposition tr at 6-8). His duties were to "[o]versee operations" (id. at 7). O'Connell stated that Risa hired Atlantic to perform structural steel replacement work in connection with the 1824 Madison project (id. at 8-9). He testified that he did not recall whether Atlantic had been hired pursuant to a contract, and he did not know if a contract was signed for the project (id. at 9, 38). He also testified that he did not recall engaging in contract negotiations related to the project, but stated that "I'm sure we did" since "Risa was our contractor" (id. at 36-37). He believed that Atlantic's former president, Adriana Torre, was responsible for signing the company's contracts, but he did not know whether she executed a contract for the project (id. at 32-33, 37-39). He similarly testified that he had "no idea" whether Atlantic started work on the project before a contract was executed, but that it had happened with other projects (id. at 39). When shown a copy of the unexecuted subcontract, O'Connell testified that he did not recall seeing that unexecuted subcontract or any contract between the two companies (id. at 41).

O'Connell testified that he did not know whether Atlantic had to indemnify Risa or procure insurance for the project (id. at 40-41). He did not know if Atlantic obtained insurance for the project (*id.* at 41-42). When shown a copy of a certificate of insurance annexed to the unexecuted subcontract and asked why Atlantic would have obtained that certificate, O'Connell replied, "[y]ou need insurance on the job" (id. at 41-42). O'Connell confirmed that the certificate names HR as an additional insured, but maintained that he had no independent "recollection as to whether insurance was provided to cover or hold [HR] harmless" (id. at 42-43). O'Connell further testified that he did not know whether, absent a signed contract, Atlantic would have procured insurance covering the project's construction manager and owner (id. at 43).

With respect to Atlantic's work and its employees at the project, O'Connell testified that if Atlantic made holes in the floors, Atlantic was responsible for covering them (id. at 65-66). Other holes were not its responsibility (id. at 65). Mott was probably Atlantic's general foreman for the project (id. at 18). Perez was an ironworker and lather - not a foreman (id. at 13-14). At some point, Perez became a working foreman (id. at 16-17). Aronne stated that a working foreman "can be a foreman performing physical work rather than more of a supervisory role" (id.).

Adriana Torre's deposition testimony (Atlantic's second witness)

Torre testified that on the day of the accident, she was Atlantic's owner and president (NYSCEF Doc No. 315, Aug. 2018 deposition tr at 7-11). Torre stated that O'Connell handled the company's contract negotiations, but she was the one who typically signed the contracts (id. at 20-21). Atlantic did not draft its own contracts (id. at 20). She did not know whether Atlantic would demand that contracts be written before work began on them (id. at 22). She acknowledged that it was possible that Atlantic could start work on a project without an executed contract if the project had to be started by a date certain (id. at 25). However, on being asked "[h]as there ever been a reason that [she] can recall that Atlantic has allowed work to begin before executing a contract," Torre replied, "I don't remember" (id. at 26).

When shown a copy of the unexecuted subcontract for the 1824 Madison project, Torre stated that she had seen it before and that she did not remember signing it (id. at 33-34). According to Torre, she did not recall there being exhibits to the subcontract, she did not recall reading the subcontract's indemnity provision, and she did not recall whether Risa wanted Atlantic to agree to indemnify any parties in connection with the subcontract (id. at 36-39, 42). Torre also did not remember Risa raising an issue about the subcontract being unsigned (id. at 71). However, she did recall that Atlantic bid for the project and that it was "a sub to Risa"

(id. at 22-23). Further, Torre averred that all of Atlantic's contracts were stored in its office and they were destroyed by Hurricane Sandy (id. at 42-44).

With respect to liability insurance, Torre testified that it is possible that Atlantic may not have been able to start work on a project without first obtaining that insurance (id. at 44-46). At the same time, Torre testified that it is possible that Atlantic obtained liability insurance for a project without a signed contract demanding such insurance (id. at 49-50).

In addition, Torre testified in general about worker complaints at worksites. She testified that such complaints would be made to the foreman (id. at 62-63). She further testified that she did not recall seeing any written complaints made to Atlantic (id.).

Anthony Rappa's deposition testimony (S.J.'s witness)

Rappa testified that on the date of the accident, he was employed as an assistant superintendent by S.J. (NYSCEF Doc No. 503, Jan. 2023 deposition tr at 10-11). Rappa stated that S.J. was responsible for all electrical work, including temporary lighting, for the 1824 Madison project (id. at 11-13, 29-30). He explained that temporary lighting work included lighting floors at the site to enable workers from the various trades to perform their respective work (id. at 29-32). Rappa testified that at a minimum, he was at the site 1 to 2 times per week (id. at 14).

According to Rappa, S.J. was not required to drill holes between floors at the project because "there was a bus duct, a riser in place that electrifies [the building] from the basement to the roof, so nothing had to go between floors because that was already in place" (id. at 37-38). Rappa noted that the bus duct was installed before S.J. commenced its work on the project (id. at 42). Rappa testified that he could not "think of any instance in [this project] which S.J.[] would have to create a hole or create an opening that would go from one floor to another" (id. at 49). He repeatedly testified that S.J. did not do any "core drilling" at the site (id. at 65-66, 82).

Nevertheless, hypothetically if S.J. had drilled any holes, Rappa testified that S.J. would not be responsible for covering them (id. at 71). He testified that the carpentry contractor is always responsible for covering any penetrations or holes in a floor (id. at 71, 90). He further testified that he did not recall seeing any holes or floor openings at the site nor did he recall seeing any carpentry contractors doing work on the floors (id. at 93-95). Rather, he saw the carpenters "[p]utting studs up" for walls (id. at 95). He did not know whether these carpenters were employed by Rivco (id. at 94-95).

James Citarella's deposition testimony (Botto's witness)

Citarella testified that on the date of the accident, he was employed as a foreman by Botto (NYSCEF Doc No. 413, Aug. 2023

deposition tr at 10). He confirmed that Botto performed the plumbing work for the 1824 Madison project (id. at 15-16). He described the project as a gut renovation of a 5 floor building (id.).

Citarella confirmed that Botto's work on the project included core drilling holes into the building's floors to run plumbing pipes through them (id. at 20-22, 39-40). As for the size of the holes, he estimated that they ranged between 3 to 5 inches (id. at 41). He specified that when Botto did not put a pipe in a hole after drilling it, Botto "would put protection over the hole" (id. at 22). He also specified that Botto was required to protect or cover a hole that it made when it did not immediately run pipes through it (id. at 41-42). The protection would be a plastic cover or a piece of wood (*id.* at 22-23). Although Citarella acknowledged that Botto was responsible for any holes that it created, he noted that "the general contractor [HR] would normally always check the job for safety conditions" (id. at 62). Citarella also noted that "if somebody saw a hole made by anybody, [HR] would cover it" (id. at 63). He continued that "it was the responsibility of whoever made that hole to cover the hole as well" (id.).

Frank Loughran's deposition testimony (Rivco's witness)

Loughran testified that on the date of the accident, he was employed as a foreman by Rivco, the carpentry subcontractor (NYSCEF Doc No. 414, Sept. 2023 deposition tr at 14-18). Loughran also

testified that he was at the premises Monday through Friday for about 7 to 8 hours a day, supervising Rivco's employees (id. at 26-27). He stated that Rivco "had the sheetrock, walls, and ceilings scope of the job," including doors and frames (id. at 19, 30). He further stated that Rivco did not perform any work on the floors nor any safety-related work, such as placing protection over holes in the floors (id. at 30).

When shown a copy of the Rivco subcontract with HR, Loughran confirmed that the scope of work section read, in part, that "Rivco will be provided with '[a] $5,000 allowance to include in base bid to repair and maintain OSHA protection installed by others' " (id. at 40). Loughran testified that Rivco did not take that allowance because it did not perform the work (id. at 69). Loughran further confirmed that the subcontract contained a sentence that read "The carpentry subcontractor shall furnish and install all required temporary protection and enclosures" (id. at 42). Loughran clarified that this provision was not in force because Rivco did not perform protection work at the project. Specifically, Loughran testified that "the end of the contract [states that] OSHA protection was excluded from Rivco's" scope of work (id. at 42-43). When further questioned about the contract language, Loughran reiterated that it contained an OSHA exclusion (id. at 64-68, 81-87). As such, Loughran maintained that Rivco was not responsible

for furnishing and installing protection over holes that were created at the project (id.).

Furthermore, Loughran testified that he observed "floor penetrations" at the site, which are "[h]oles that are drilled into the floor for pipes to penetrate through the floor for. . .electrical or water or other purposes" (id. at 44). He added that Rivco did not place protection over those floor penetrations, but he did observe the presence of floor protections (id. at 44-45). Loughran testified that he recalled placing plywood protection over pipe openings and holes in the floor on other carpenter jobs, but he maintained that Rivco was not hired to perform that type of work for the 1824 Madison project (id. at 45). In that regard, Loughran testified that Rivco was not informed when any contractor was going to create a hole in a floor, none of the contractors directed Rivco to cover a hole, and that its own work did not require the creation of any holes or floor openings (id. at 58). Loughran also testified that he did not recall or know whether the plumbing and electrical contractors created holes in the floors at the site (id. at 57). As to what he would do if he saw a hole that was not covered, he testified that he may "point it out to" HR "[s]o we can get it taken care of" (id. at 51-52). Finally, he testified that there were no complaints made to Rivco that it "was not properly providing protection" at the project (id. at 58).

DISCUSSION

Preliminary issues (motion seq. nos. 008 and 010)

Before reaching the substantive issues raised in these motions, the court must address four preliminary procedural ones. The first is that plaintiff filed a reply on her cross-motion (NYSCEF Doc Nos. 385-387). The court does not consider plaintiff's reply as a cross-movant is not entitled to a reply without leave of the court (see CPLR §§ 2214, 2215). Had plaintiff filed a separate motion, she would have had a right to reply. Indeed, in anticipation of a reply from plaintiff, the HR parties preemptively argued these points in their opposition. In addition, although the parties executed a stipulation that extended the briefing schedule for motion sequence 008, the stipulation does not permit a reply on the cross-motion (NYSCEF Doc No. 333, Apr. 25, 2023 so-ordered stipulation).

Second, Botto and Rivco filed untimely opposition to plaintiff's cross-motion (see NYSCEF Doc Nos. 354 [July 17, 2023 so-ordered stipulation where the parties agreed that opposition papers would be filed by Sept. 29, 2023], 384 [Botto's opposition filed on Oct. 6, 2023], and 388 [Rivco's opposition filed on Oct. 12, 2023]). The court nonetheless considers the untimely opposition in the interest of resolving the issues on the merits, and pursuant to CPLR §§ 2004 and 2214. In addition, there is no prejudice to plaintiff in allowing the untimely opposition.

Third, Risa filed untimely opposition to the HR parties' motion (*see* NYSCEF Doc Nos. 430 [Feb. 14, 2024 so-ordered stipulation where the parties agreed that opposition papers would be filed by Feb. 19, 2024] and 461 [Risa's opposition filed on Feb. 28, 2024]). The court considers Risa's opposition for the same reasons as discussed above and because the HR parties were able to submit a reply (Sanchez v Steele, 149 AD3d 458, 458 [1st Dept 2017] [finding that "[t]he motion court providently exercised its discretion in accepting plaintiffs' untimely opposition papers, since defendants did not demonstrate any prejudice and were able to submit reply papers"]).

Fourth, the HR parties argue that Atlantic's motion and plaintiff's cross-motion should be denied as premature since employees from Botto and Rivco still need to be deposed.[7] The HR parties contend that such testimony may uncover defenses to Atlantic and plaintiff's claims. However, this contention is "nothing more than unsubstantiated hope of discovering something relevant to [the] claims, and is an insufficient reason to deny the motion" and cross-motion (Leonard v Gateway II, LLC, 68 AD3d

[7] These depositions were ultimately held, and plaintiff submitted the deposition transcripts as exhibits to her reply. The transcripts are inadmissible under motion sequence 008 as the reply itself is improper and because "submitting evidence for the first time in reply [is] improper" (Am. Tr. Ins. Co. v Longevity Med. Supply, Inc., 131 AD3d 841, 842 [1st Dept 2015]).

408, 410 [1st Dept 2009]; Laporta v PPC Commercial, LLC, 204 AD3d 538, 539 [1st Dept 2022]).

The summary judgment standard

"[T]he proponent of summary judgment must make a prima facie showing of entitlement to judgment as matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (id.). If the proponent satisfies this evidentiary burden, a party opposing summary judgment can defeat the motion by submitting "evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (id.).

When deciding the motion, the court "must view the evidence in the light most favorable to the nonmoving part[ies], including drawing all reasonable inferences in favor of the nonmoving part[ies]" (Vega v Metropolitan Transp. Auth., 212 AD3d 587, 588 [1st Dept 2023]). The court must grant the motion "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR § 3212 [b]).

The Labor Law defendants (motion seq. nos. 008 and 010)

Proper Labor Law defendants are contractors, owners, and their agents (see Labor Law §§ 200, 240 [1], and 241 [6]). As an initial matter, IFH is a proper Labor Law defendant as the NYCEDC contract identifies it as the premises owner (Gordon v Eastern Ry. Supply, 82 NY2d 555, 559-560 [1993]). More analysis is required as to whether HR is a proper Labor Law defendant as the NYCEDC contract identifies it as the construction manager, rather than the general contractor.

A construction manager "may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury" (Walls v Turner Constr. Co., 4 NY3d 861, 863-864 [2005] [discussing Labor Law § 240 [1]). The court's "determination depends on the duties defendant was assigned and performed" (U.S. Specialty Ins. Co. v SMI Constr. Mgt., Inc., 168 AD3d 431, 431 [1st Dept 2019]). For example, in Barrios v City of New York (75 AD3d 517, 519 [2d Dept 2010]), the Second Department held that a defendant's "title of 'construction manager' does not relieve it from the duties imposed by Labor Law § 240 (1)" as defendant "was delegated supervisory authority by the NYCEDC to oversee and control the work of the various on-site contractors, particularly with respect to safety issues."

Similarly, in the instant action, HR's title of construction manager does not relieve it of the duties imposed by the Labor Law. The NYCEDC contract states that HR "shall manage and coordinate the activities of all Subcontractors" (NYSCEF Doc No. 435 at 70). Under the contract, HR had broad responsibilities including hiring subcontractors, overall coordination and supervision of the subcontractors' work, and site safety. Further, Aronne's testimony establishes that HR had the authority to stop the work if it observed an unsafe condition. The testimony also establishes that if HR observed or was informed about an uncovered hole at the site, it would be responsible for getting the hole fixed. The above, coupled with the absence of a denominated general contractor (see Walls at 864), demonstrates that HR is a proper Labor Law defendant.

The Labor Law § 240 (1) claim (motion seq. no. 008)

Plaintiff cross-moves for summary judgment on the Labor Law § 240 (1) claim against the HR parties. Atlantic seeks summary judgment dismissing plaintiff's complaint as against the HR parties, but does not make a discrete argument as to section 240 (1) of the Labor Law. Instead, it argues in general that the complaint must be dismissed as plaintiff cannot establish proximate cause.[8] Labor Law § 240 (1) states in pertinent part:

[8] Atlantic uses this blanket argument to contest all of plaintiff's Labor Law claims.

> "All contractors and owners and their agents…in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders…and other [enumerated] devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The statute's purpose is to prevent accidents where a scaffold "or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (Runner v New York Stock Exch., Inc., 13 NY3d 599, 604 [2009] quoting Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]). Simply stated, "[t]he core objective of the statute in requiring protective devices for those working at heights is to allow them to complete their work safely and prevent them from falling" (Nieves v Five Boro A.C. & Refrig. Corp., 93 NY2d 914, 916 [1999]). Thus, "the duty imposed by Labor Law § 240 (1) is nondelegable [such] that an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (Ross, 81 NY2d at 500).

Nonetheless, "the fact that a worker falls at a construction site, in itself, does not establish a violation of Labor Law § 240 (1)" (O'Brien v Port Auth. of N.Y. & N. J., 29 NY3d 27, 33 [2017]). This is because "liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or

the inadequacy of, a safety device of the kind enumerated therein" (Kebe v Greenpoint-Goldman Corp., 150 AD3d 453, 453-454 [1st Dept 2017] quoting Narducci v Manhasset Bay Assoc., 96 NY2d 259, 267 [2001]). To establish liability on this claim, plaintiff must prove that the statute was violated and that this violation was a proximate cause of the injuries that Perez sustained (Buckley v Columbia Grammar & Preparatory, 44 AD3d 263, 267 [1st Dept 2007]).

In deciding whether plaintiff is entitled to summary judgment on this claim, Wolf v Ledcor Constr. Inc. (175 AD3d 927 [4th Dept 2019]) is particularly instructive as it involves similar facts. There, a construction worker installing sheetrock fell from a scaffold that tipped over (id. at 928). A scaffold "wheel had been placed on top of a plastic curing blanket that had been applied over [a] newly installed concrete floor and was stretched over the drain hole, and the accident occurred when the wheel ripped through the plastic curing blanket and fell into the hole" (id.). The Fourth Department found that "plaintiff met his initial burden of establishing a statutory violation by submitting evidence that he was standing on a scaffold hanging sheetrock when a wheel on the scaffold fell into a floor drain and caused the scaffold to tip over" (id.). Ultimately, the Department concluded that the accident involved an elevation-related hazard covered by the statute, and the scaffold tipping in conjunction with plaintiff's fall established that the scaffold was not placed in a manner to

provide proper protection to plaintiff (id. at 929). The Fourth Department then held that summary judgment on the issue of liability was correctly granted to plaintiff with respect to his Labor Law 240 (1) claim (id. at 927-930). Further, as to defendant's arguments regarding sole proximate cause, the Department opined that if "plaintiff was negligent in failing to observe the drain hole and positioning the scaffold over it. . .his actions. . .render him [merely] contributorily negligent, a defense unavailable under [Labor Law § 240 (1)]" (id. at 929-930 [internal quotation marks and citations omitted]).

Moreover, in a recent decision, Holness v 421 Kent Dev., LLC (84 Misc 3d 1262[A], 2025 NY Slip Op 50022[U], *7-8 [Sup Ct, NY County 2025]), the court partially relied on Wolf to find that plaintiffs had established their prima facie entitlement to summary judgment on their Labor Law § 240 (1) claim.[9] So too here, plaintiff met her prima facie burden with respect to her Labor Law § 240 (1) claim. Plaintiff presents uncontroverted evidence that Perez was exposed to an elevation-related hazard contemplated by the statute, i.e. use of a scaffold to perform installation work from an elevated height. Further, Perez and his co-worker testified that Perez fell from a scaffold that collapsed, and "testimony

[9] In Holness, plaintiffs fell off a "scaffold that tipped over when one leg of the scaffold went through an opening in the roof surface" (id. at 3).

establishing that a safety device collapsed is sufficient for a prima facie showing on liability" (Garcia v 122-130 E. 23rd St. LLC, 220 AD3d 463, 464 [1st Dept 2023]; Castillo v TRM Contr. 626 LLC, 211 AD3d 430, 430 [1st Dept 2022] [holding "that a statutory violation is established if a scaffold. . . .shifts, slips, or collapses, thereby causing injury to a worker"]; see also Martinez-Gonzalez v 56 W. 75th St., LLC, 172 AD3d 616, 616-617 [1st Dept 2019] [affirming grant of summary judgment on plaintiff's Labor Law § 240 (1) claim as plaintiff fell from a scaffold, without a guardrail, that tipped after "one wheel broke through the floor on which it was standing"]).

In its motion and opposition to plaintiff's cross-motion, Atlantic argues that Appice's act of moving the scaffold (with Perez on it) into a hole is a superseding act of a third person which absolves defendants from liability.[10] Hajderlli v Wiljohn 59 LLC (71 AD3d 416 [1st Dept 2010]), the appellate decision that Atlantic relies on, is inapposite. There, the First Department found that a supervisor's act of pulling a ladder away with plaintiff still on it "was not foreseeable in the normal course of events, and was so far removed from any conceivable violation of the statute [that it was] a superseding act that broke any causal connection between any such violation of the statute and

[10] Risa also makes this argument, but provides no case law.

plaintiff's injuries" (id. at 416-417). The salient fact was that the supervisor "forgot or never realized that plaintiff was on the ladder" (id. at 416). Such circumstances are not present here.

"An independent intervening act may constitute a superseding cause, and be sufficient to relieve a defendant of liability, if it is of such an extraordinary nature or so attenuated from the defendants' conduct that responsibility for the injury should not reasonably be attributed to them" (Gordon, 82 NY2d at 562). Appice moving the scaffold to help Perez position shim plates is not an unforeseeable intervening cause of the accident. The act was not extraordinary. It is foreseeable that a worker could move a scaffold to help a co-worker to continue his work on a scaffold (see Van Guilder v Sands Hecht Constr. Corp., 199 AD2d 164, 164-165 [1st Dept 1993] ["plaintiff's rocking of the scaffold in order to move it was [not] an unforeseeable intervening cause of the [scaffold-collapse] accident"]; deSousa v Dayton T. Brown, Inc., 280 AD2d 447, 447-448 [2d Dept 2001] [co-worker "attempting to adjust a pin and brace on the scaffold" which plaintiff was standing, causing plaintiff to fall off the scaffold, not "a superseding cause sufficient to relieve the defendant of liability"]). Thus, since Appice's act was not so attenuated from defendants' conduct, the superseding cause argument fails.

Next, in opposition to the cross-motion, Atlantic argues that plaintiff is not entitled to summary judgment since Perez admitted

the scaffold was not defective. This is incorrect (see Hill v City of New York, 140 AD3d 568, 570 [1st Dept 2016] ["Defendants' argument that plaintiff was required to demonstrate that the ladder was defective in order to satisfy his burden as to the Labor Law § 240 (1) claim is without merit"]).

Further, Atlantic cites to Ortiz v Varsity Holdings, *LLC* (18 NY3d 335, 340 [2011]) for the proposition that "to prevail on summary judgment, plaintiff must establish that there is a safety device of the kind enumerated in section 240 (1) that could have prevented his fall." In reliance on Ortiz, Atlantic argues that plaintiff is not entitled to summary judgment as she did not demonstrate that a safety device could have prevented Perez's fall. That argument is unavailing. Indeed, "[t]o the extent that plaintiff was required to identify a safety device that would have prevented [Perez's] accident, plaintiff established that [Perez] was provided with a safety device, i.e., a [scaffold], but that the [scaffold] proved to be inadequate" (Lopez v 18-20 Park 84 Corp., 235 AD3d 591, 592 [1st Dept 2025] [internal quotation marks and citation omitted]).

In opposition to the cross-motion, the HR parties and S.J. contend that the sole proximate cause of Perez's accident was Perez failing to properly supervise Appice. Essentially, they contend that it was Perez's job as Appice's supervisor to ensure that Appice did not move the scaffold with him on it. However, Appice

did not testify at the WCB hearing that Perez was his supervisor on the day of the accident. Rather, Appice testified that he was working with Perez that day.[11] Perez testified that Mott was Atlantic's foreman on that job and that he received all his work instructions from Mott. In addition, O'Connell testified that Perez was an ironworker on the project, not a foreman. Even if Perez was Appice's supervisor, negligent supervision does not raise a triable issue of fact as to whether Perez's actions were the sole proximate cause of the accident. When "a statutory violation is a proximate cause of an injury, the [injured worker] cannot be solely to blame for it" (Cazho v Urban Bldrs. Group, Inc., 205 AD3d 411, 412 [1st Dept 2022] [citation omitted]).

Moreover, comparative negligence "is not a defense to a Labor Law § 240 (1) claim [as] the statute imposes absolute liability once a violation is shown" (Greene v Raynors Lane Prop. LLC, 194 AD3d 520, 522 [1st Dept 2021]; Hernandez v Bethel United Methodist Church of N.Y., 49 AD3d 251, 253 [1st Dept 2008] [holding that when an "owner or contractor has failed to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff's injury, [n]egligence, if

[11] While not raised by the parties, the court notes that Albert Ging, another former Atlantic employee, was asked at the WCB hearing if he was Perez's supervisor and he replied, "[n]o, he was actually my supervisor" (NYSCEF Doc No. 309 at 13). Regardless, as this decision proceeds to explain, the supervisor issue is not dispositive.

any, of the injured worker is of no consequence"] [internal quotation marks and citations omitted]). Assuming, for the sake of argument, that Perez had negligently moved the scaffold wheel into the subject hole, such conduct is only relevant to the issue of comparative negligence (see Wolf, 175 AD3d at 929-930). By extension, assuming for the sake of argument, that Appice's act was due to Perez's alleged negligent supervision, such supervision is only relevant to the issue of comparative negligence.

Thus, plaintiff is entitled to summary judgment on her Labor Law § 240 (1) claim against the HR parties, and the HR parties and Atlantic are not entitled to summary judgment dismissing the same.

The Labor Law § 241 (6) claim (motion seq. nos. 008 and 010)

The HR parties and Atlantic move for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim, and plaintiff cross-moves for summary judgment on this claim against the HR parties. Labor Law § 241 (6) states in pertinent part:

> "All contractors and owners and their agents…when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements….
>
> 6. All areas in which [the] 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….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…shall comply therewith."

Labor Law § 241 (6) "imposes a nondelegable duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 348 [1998]). Because of this nondelegable duty, "property owners and their agents are vicariously liable under section 241 (6) for injuries sustained by construction workers due to the negligence of a subcontractor in failing to maintain the worksite in reasonably safe condition, even when the owner exercises no direct supervisory control over the subcontractor" (Kane v Coundorous, 293 AD2d 309, 310-311 [1st Dept 2002]; see Nostrom v A.W. Chesterton Co., 15 NY3d 502, 506-507 [2010]). As such, plaintiff need not demonstrate that the HR parties supervised or controlled the construction site to establish their liability (Ross, 81 NY2d at 502).

To prevail on this claim, plaintiff must demonstrate that one or more Industrial Code provisions applied to the facts of the case; "that [defendants] violated the specific commands of these provisions; that the violations constituted negligence; and that the violations proximately caused [Perez's] injuries" (Lourenco v City of New York, 228 AD3d 577, 578-579 [1st Dept 2024]). In this framework, specific commands refer to concrete implementing

regulations, not "those that establish general safety standards" (Ross, 81 NY2d at 505).

Furthermore, "[t]he interpretation of an Industrial Code regulation and determination as to whether a particular condition is within the scope of the regulation present questions of law for the court" (McCoy v Metropolitan Transp. Auth., 53 AD3d 457, 459 [1st Dept 2008] [citation omitted]). The Court of Appeals instructs that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (St. Louis v Town of N. Elba, 16 NY3d 411, 416 [2011]).

In this action, plaintiff alleges multiple Industrial Code violations in the amended complaint and bills of particular (NYSCEF Doc Nos. 299 and 400, respectively), but with the exception of Industrial Code regulations 23-5.18 (g) and (h), plaintiff does not seek summary judgment predicated on those violations. Plaintiff likewise opposes dismissal of the claim only insofar as it is predicated upon alleged violations of Industrial Code regulations 23-5.18 (g) and (h).

Therefore, the court deems plaintiff to have abandoned the uncontested Industrial Code regulations, and the HR parties are entitled to summary judgment dismissing the parts of plaintiff's Labor Law § 241 (6) claim predicated on those regulations (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"]).

Next, the court must address the two contested Industrial Code regulations. 12 NYCRR 23-5.18 is titled "Manually-propelled mobile scaffolds" and sections (g) and (h) read as follows:

> "(g) Scaffold footing. Whenever any such scaffold is in use and is occupied by any person, such scaffold shall rest upon a stable footing, the platform shall be level and the scaffold shall stand plumb. All casters or wheels shall be locked in position.
>
> (h) Moving the scaffold. Provisions shall be made to prevent such scaffolds from tipping or falling during their movement from one location to another. Scaffolds shall be moved only on level floors or equivalent surfaces free from obstructions and openings. No person shall be suffered or permitted to ride on any manually-propelled mobile scaffold while it is being moved."

These regulations are sufficiently specific and concrete to support plaintiff's Labor Law § 241 (6) claim (Karwowski v Grolier Club of City of N.Y., 144 AD3d 865, 867 [2d Dept 2016]; see Douglas v Sherwood 48 Assoc., 162 AD3d 498, 499 [1st Dept 2018] [finding issues of fact on whether defendants' violation of Industrial Code regulation 23-5.18 (h) proximately caused plaintiff's injury]).

Here, plaintiff's evidence establishes that defendants violated Industrial Code regulations 23-5.18 (g) and (h). At some point when Perez was working on top of the scaffold, it was not on stable footing, standing plumb, and with all wheels locked as

required by Industrial Code regulation 23-5.18 (g). Rather, an unlocked scaffold wheel went into an uncovered hole, which caused Perez's fall and the scaffold's collapse. Further, because the scaffold was moved with Perez on it and because it was moved from one location to another on a floor that had an uncovered hole, Industrial Code regulation 23-5.18 (h) was violated. These violations caused the scaffold's collapse and as such, they are a proximate cause of Perez's accident. Additionally, these violations constitute negligence as defendants failed to cover a hole in an area of the construction site where workers were using a mobile scaffold to perform their work. Moreover, as Labor Law § 241 (6) imposes a nondelegable duty of reasonable care, the HR parties are liable regardless of which entity was negligent. Consequently, plaintiff establishes prima facie entitlement to summary judgment on the Labor Law § 241 (6) claim predicated on violations of Industrial Code regulations 23-5.18 (g) and (h).

In opposition to the cross-motion, Risa contends that summary judgment is precluded due to an issue of fact as to whether scaffold wheels were unlocked at the time of accident. Risa claims that Perez was not certain that this was the case. That is incorrect. Perez testified at his deposition that scaffold wheels were unlocked. There is no evidence in the record to rebut his testimony. Risa additionally claims that this is an issue of fact as Appice did not testify about whether wheels were locked or

unlocked at the WCB hearing. This is unpersuasive. The hearing transcript reflects that Appice was not asked about the scaffold's wheels during his testimony (NYSCEF Doc No. 309 at 15-17). More importantly, even if the wheels were locked, plaintiff established violations of other parts of regulations 23-5.18 (g) and (h).

In opposition to the cross-motion, Atlantic, S.J., and Risa each essentially argue that Appice's conduct was a superseding cause of Perez's accident and therefore plaintiff is not entitled to summary judgment on the claim. The court has rejected that argument (see supra, 26-27).

In opposition, the HR parties contend that even if the evidence establishes an Industrial Code violation, there are triable issues of fact as to whether defendants provided reasonable protections. This contention is based, in essence, on the false premise that Appice's conduct is a superseding cause. As discussed above, the court has rejected that argument.

For their own motion, the HR parties advance no arguments related to Industrial Code regulations 23-5.18 (g) and (h). They offer an expert's affidavit from a professional engineer that addresses most of the Industrial Code regulations cited in plaintiff's amended complaint – that is, those that were abandoned – and the affidavit is silent as to regulations 23-5.18 (g) and (h).

Accordingly, plaintiff is entitled to summary judgment on the part of the Labor Law § 241 (6) claim predicated on violations of 12 NYCRR 23-5.18 (g) and (h), and the HR parties and Atlantic are not entitled to summary judgment dismissing the Law § 241 (6) claim insofar as it is predicated on violations of those provisions.

The common-law negligence and Labor Law § 200 claims (motion seq. nos. 008 and 010)

The HR parties and Atlantic move for summary judgment dismissing plaintiff's common-law negligence and Labor § 200 claims. "Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction workers with a safe worksite" (Sakthivel v Industrious Staffing Co., LLC, 212 AD3d 419, 420 [1st Dept 2023]). It states in pertinent part:

> "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...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."

"Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (Ruisech v Structure Tone Inc., 208 AD3d 412, 414 [1st Dept 2022] quoting

Cappabianca v Skanska USA Bldg. Inc., 99 AD3d 139, 143-144 [1st Dept 2012]).

Here, the evidence establishes that Perez's accident arose, in part, from a dangerous premises condition – i.e. an uncovered hole in the floor where Perez was instructed to work (see McCullough v One Bryant Park, 132 AD3d 491, 492 [1st Dept 2015] [an uncovered drain hole constituted a dangerous condition]; see Reyes v Arco Wentworth Mgt. Corp., 83 AD3d 47, 50-52 [2d Dept 2011] [a hole in the ground constituted a dangerous condition]; see also Balbuena v 395 Hudson N.Y., LLC, 214 AD3d 586, 587 [1st Dept 2023] [Masonite boards placed on the building's floor constituted a dangerous condition]). The evidence further establishes that the accident arose, in part, from the means and methods used to perform the work – i.e. a failure to cover the subject hole in the floor (see Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc., 104 AD3d 446, 447-449 [1st Dept 2013] [means and methods analysis applied where plaintiff fell through a hole that had been covered by plywood]). Thus, this particular accident requires analysis under both categories of liability (see Favaloro v Port Auth. of N.Y. & N.J., 191 AD3d 524, 524 [1st Dept 2021] [affirming the denial of a defendant's summary judgment motion to dismiss the common-law negligence and Labor Law § 200 claims, finding that factual issues existed "as to whether plaintiff's accident was caused by a dangerous premises condition (the uncovered hole),

[defendant's] means and methods (i.e., its alleged failure to secure the plywood cover over the hole), or some combination thereof, and as to [defendant's] liability under the applicable standard governing liability" for those claims]).

Dangerous condition

"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" (Williams v McAlpine Contr. Co., 235 AD3d 521, 522-523 [1st Dept 2025] quoting Cappabianca, 99 AD3d at 144). "To constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time before the accident to permit defendant's employees to discover and remedy it" (Barrerra v New York City Tr. Auth., 61 AD3d 425, 426 [1st Dept 2009]). On defendants' motions for summary judgment, it is defendants' prima facie burden to demonstrate lack of constructive notice (McCullough, 132 AD3d at 492). "A defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell" (Ross v Betty G. Reader Revocable Trust, 86 AD3d 419, 421 [1st Dept 2011]).

Here, the HR parties argue that they are entitled to summary judgment because they did not create or have actual or constructive

notice of the uncovered hole involved in Perez's accident. They contend that Aronne's deposition testimony establishes that HR did not perform any physical construction work at the premises and therefore it could not have created the dangerous condition. They further contend that Aronne's testimony establishes that HR received no complaints of the dangerous condition before Perez's accident. They also point to deposition testimony from the various individuals who testified on the subcontractors' behalf, contending that such testimony establishes that HR was not informed as to any unprotected holes at the site.

Beyond this, the HR parties provide affidavits to support their position. The court notes that the expert's affidavit, mentioned previously in the Labor Law § 241 (6) context, states that "[t]here is no evidence that anyone associated with [HR] or IFH knew of any defects with the floor of the building or the scaffold prior to Mr. Perez's accident" (NYSCEF Doc No. 422 at 6). The expert's affidavit does not discuss constructive notice nor do the affidavits from the IFH's principal and Aronne (NYSCEF Doc Nos. 421 and 426 respectively). As to actual notice, IFH's principal avers that prior to Perez's accident, IFH was not informed of any dangerous project conditions, it received no complaints regarding the condition of the site's floors, and it received no requests to repair any dangerous project condition. Aronne also makes the same averments on behalf of HR.

In opposition, plaintiff draws the court's attention to Aronne's deposition testimony that HR's superintendent was tasked with walking the site each day. Plaintiff's position is that these walk-throughs raise a question of fact as to whether HR had notice of the condition. Additionally, plaintiff submits a copy of the HRCG Safety and Health Program, which Aronne authenticated at his deposition, and Aronne's August 2018 Jackson affidavit (NYSCEF Doc Nos. 436 and 437, respectively). Plaintiff contends that these documents raise issues of fact as to whether the HR parties had actual or constructive notice of the uncovered hole involved in Perez's accident. Central to that contention are the superintendent duties listed in the HRCG Safety and Health Program. These include performing weekly inspections and recording "all safety concerns and hazards" in the company's "daily log books [sic] for completeness and accuracy" (NYSCEF Doc No. 436 at 29-30). Plaintiff adds that each week the superintendent was required to fill out the "Jobsite Inspection Checklist" contained in the HRCG Safety and Health Program (*see id.* at 146). On this checklist, under the "Fall Protection" category is the item "[f]loor holes covered, secured, and labeled 'hole' or 'cover' " (id.). The checklist states that "[i]tems which are not in compliance should be explained. . .along with a description of abatement measures taken to correct any problems" (id.). The daily logbooks and the inspection checklists are not in the record. In his Jackson

affidavit, Aronne avers that "I have personally searched the R drive and was unable to locate any of the [records covering the date of May 3, 2012 or the month prior thereto]" (NYSCEF Doc No. 437 ¶¶ 3 and 8).

Viewing the evidence in the light most favorable to plaintiff, the court concludes that there are questions of fact as to whether the defendants had actual or constructive notice of the uncovered hole (Coon v WFP Tower B Co. L.P., 220 AD3d 407, 408-409 [1st Dept 2023] [holding that defendants did not satisfy their prima facie burden as their moving papers lacked daily logs or other evidence setting forth the cleaning schedule and the last inspection date of the accident location before plaintiff's accident occurred]; see also Jahn v SH Entertainment, LLC, 117 AD3d 473, 473 [1st Dept 2014] [holding that an owner's affidavit did not "establish a lack of constructive notice as a matter of law because [the owner] did not state how often he inspected the floor or that he or defendant's employees inspected the accident location prior to the accident"]).

Means and methods of the work

When a worker is injured due to the means and methods in which the work is performed, "the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work" (Castro v Brito, 235 AD3d 527, 529 [1st Dept 2025] quoting Prevost v One City Block LLC, 155 AD3d 531, 533-534 [1st

Dept 2017]; see also Hughes v Tishman Constr. Corp., 40 AD3d 305, 311 [1st Dept 2007] [liability under a means and methods analysis "requires actual supervisory control or input into how the work is performed"]). On the other hand, "[i]f the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercises no supervisory control over the work, no liability attaches under Labor Law § 200 or the common law" (Sullivan v New York Athletic Club of City of N.Y., 162 AD3d 955, 958 [2d Dept 2018]).

Here, the HR parties argue that they cannot be liable under a means and methods analysis as they had no authority to direct, supervise or control Perez's work on the project. They further stress that they did not have any authority to direct, supervise or control Perez's work on the date of the accident. This argument fails. The analysis under the means and methods theory is whether the HR parties exercised supervisory control over the actual injury-producing work - the failure to cover a hole on one of the project's floors - and not whether it could direct, supervise or control Perez's work at the time of the accident (see Lemache v MIP One Wall St. Acquisition, LLC, 190 AD3d 422, 423 [1st Dept 2021] [to prevail under a means and methods analysis, "plaintiff must show that the owner or agent have the authority to control the activity bringing about the injury to enable it to avoid or correct any unsafe condition"]).

The HR parties also argue that HR had only general supervisory authority to oversee the project and did not physically perform work at the site, and therefore it cannot be held liable for Perez's accident under the means and methods analysis (Balcazar v Commet 380, Inc., 199 AD3d 403, 404-405 [1st Dept 2021] ["the coordinating and scheduling of trades at work sites do not rise to the level of supervision and control necessary to impose liability under a negligence theory"]). As part of this argument, the HR parties assert that "each subcontractor testified that any subcontractors that made openings in the floor were responsible for filling them or covering them, not [HR]" (NYSCEF Doc No. 391, mem of law at 5). That said, the HR parties only cite to three transcripts, those of O'Connell, Citarella, and Loughran. Moreover, as to Loughran, the alleged statement is not on the cited transcript page. Nevertheless, the respective deposition testimony of O'Connell and Citarella is that Atlantic was responsible for covering holes created by Atlantic and Botto was responsible for holes created by Botto. In addition, Citarella testified that a subcontractor who made a hole was responsible for covering that hole.

In opposition, plaintiff represents that questions of fact preclude summary judgment under the means and methods analysis given the NYCEDC contract, the HRCG Safety and Health Program, and certain deposition testimony. The court agrees. During their

depositions, Perez and Citarella testified that HR covered holes at the site. Further, Aronne testified that if there was a complaint about an uncovered hole, the HR superintendent was responsible for looking into the issue and getting it fixed. With respect to the contract language, the court is guided by the First Department's reasoning in Pareja v Davis (138 AD3d 615 [1st Dept 2016]). There, the First Department concluded that "defendant's agent lacked the authority to direct or control the methods and means of plaintiff's work [as] [t]he agency agreement expressly excludes from the agent's duties '[d]etermining, approving or disapproving construction means and methods,' and nothing else in the agreement contradicts this express exclusion" (id. at 615). In contrast, the NYCEDC contract provides that:

> "[HR] shall be responsible for **reviewing and approving** the construction means, methods, techniques, sequences and procedures employed by [Subcontractors] in the performance of their work, and shall verify that the Subcontractors carry out work in accordance with the applicable Contract Documents. [HR] shall immediately advise [NYCEDC] if the construction means, methods, techniques, sequences and procedures employed by Subcontractors are dangerous or in [its] opinion…not in the best interests of the Project or the [NYCEDC]" (NYSCEF Doc No. 435 at 70 [emphasis added]).

With respect to the HRCG Safety and Health Program, it required the covering of floor holes "which employees may trip in or step into" or "which objects may fall," and that such covers "be capable of withstanding two times the weight of any object or employee" (NYSCEF Doc No. 436 at 278-279).

In reply, the HR parties point to other language in the NYCEDC contract and the HRCG Safety and Health Program, asserting that it eliminates all issues of fact under the means and methods analysis. From the NYCEDC contract, the language is that "[HR] shall verify that Subcontractors shall correct or modify promptly any work that is determined by [HR], [NYCEDC]. . .to not be in accordance with Contract Documents" (NYSCEF Doc No. 435 at 71). From the HRCG Safety and Health Program, the language is that "subcontractor[s] will have, and exercise, full legal responsibility for compliance to safety rules. . .with respect to [their] portion of the work," and "will promptly correct all identified potential hazards which are its responsibility" (NYSCEF Doc No. 436 at 98).

Contrary to the HR parties' argument, there are issues of fact as to whether HR is liable under the means and method analysis. For example, the NYCEDC contract raises an issue of fact as to whether HR had input as to the injury-producing work. The contradictory deposition testimony also raises a question of fact as to whether HR was responsible for covering the hole and failed to do so.

In conclusion, HR is not entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims against it as there are questions of fact under both the dangerous condition and means and methods analysis. IFH is also not entitled to summary judgment dismissing plaintiff's common-

law negligence and Labor Law § 200 claims against it as there are questions of fact under the dangerous condition analysis. The court notes that IFH cannot be liable under the means and method analysis as it had no supervisory authority and input into how the work was performed. Lastly, as a corollary, Atlantic is not entitled to summary judgment dismissing the Law § 241 (6) claim as against the HR parties.

Third-party claims and cross-claims against Atlantic (motion seq. no. 008)

Atlantic seeks summary judgment dismissing the third-party claims and cross-claims against it. S.J., Botto, and Rivco do not oppose the motion, and therefore their cross-claims against Atlantic (discussed supra at pp 10-11) must be dismissed (Jones v Vornado N.Y., RR One L.L.C., 223 AD3d 467, 468 [1st Dept 2024] [holding that "[b]ecause [defendant] Con Ed did not oppose [its co-defendants'] motion for summary judgment dismissing its cross-claim for indemnification, the cross-claim was properly dismissed"]). Likewise, the HR parties and Risa ignore Atlantic's argument for dismissal of their claims/cross-claims against them for common-law indemnification and contribution, and therefore the same must be dismissed (id.; Saidin v Negron, 136 AD3d 458, 459 [1st Dept 2016] [holding that "[p]laintiff abandoned his claim. . .by failing to oppose that part of the motion to dismiss the claim as against him"]). In any event, as plaintiff was an Atlantic

employee who received workers' compensation benefits, these claims are barred by Workers' Compensation Law § 11 (see Anton v West Manor Constr. Corp., 100 AD3d 523, 523-524 [1st Dept 2012]).

Thus, what remains are Risa and the HR parties' claims and cross-claims for contractual indemnification and breach of contract for failure to procure insurance. These contractual claims are based upon an unsigned copy of an alleged subcontract between Risa and Atlantic with respect to the 1824 Madison project (NYSCEF Doc No. 301, third-party complaint [exhibit D at 83-92]). Atlantic argues that dismissal is warranted as there is no executed subcontract between Atlantic and Risa. Atlantic relies on the testimony of Torre and Prashad, who both testified that they could not locate a signed copy of the subcontract and that they did not recall seeing one. Atlantic also relies on Prashad's testimony that she could not locate any emails between Atlantic and Risa regarding the contract negotiations. Risa, in opposition, relies on Torre's testimony that she did not know whether Atlantic would begin working without an executed contract, and that the contracts maintained by Atlantic were destroyed by Hurricane Sandy.

Without a signed subcontract in evidence, the critical inquiry is whether the unsigned subcontract is enforceable. "[A]n unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound" (Flores v Lower E. Side Serv. Ctr., Inc., 4 NY3d 363, 369 [2005]).

"In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look. . .to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds" (id. at 368 [citation omitted]). "In doing so, disproportionate emphasis is not to be put on any single act, phrase or other expression, but, instead, on the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain" (PMJ Capital Corp. v PAF Capital, LLC, 98 AD3d 429, 430 [1st Dept 2012] [citation omitted]).

Atlantic argues that unsigned subcontract is unenforceable as there is no objective evidence that the parties intended to be bound by the alleged subcontract. According to Atlantic, the unsigned subcontract cannot be used to measure the parties' course of conduct as it does not contain any exhibits referenced therein. Specifically, Atlantic focuses on exhibits C and D. Exhibit C is mentioned in section 10 of the alleged subcontract and purports to set out Atlantic's insurance requirements (NYSCEF Doc No. 301, third-party complaint [exhibit D at 89]). Exhibit D is mentioned in section 1 of the alleged subcontract and purports to set out Atlantic's scope of work (id. at 84). Sections 1 and 10 read, in pertinent part, as follows:

> "1. **Sub-Subcontractor's Work:** Subcontractor shall perform all work and furnish all labor, materials, scaffolding…tools, supplies, equipment, supervision and

> all other items necessary…for the complete performance and acceptance of the work described in **Exhibit 'D'**…in strict accordance with the terms of this Subcontract and the Contract Documents, which are fully incorporated herein and made an integral part hereof. Sub-subcontractor assumes in this Subcontract all obligations,
> risks and responsibilities which Subcontractor assumes towards Contractor in their Subcontract and in the Contract Documents.
>
> 10. **Indemnification and Insurance:**
>
> a. Sub-Subcontractor shall, to the fullest extent permitted by law, indemnify and hold harmless Subcontractor, Contractor, the Owner of the Project…from any and all liability…from any claims or causes of action…arising from the performance of Sub-Subcontractor's Work, including all claims relating to its…employees, or by reason of any claim or dispute of any person or entity for damages from any cause directly or indirectly relating to any action or failure to act by Sub-Subcontractor, its employees, subcontractors, or suppliers. Sub-Subcontractor acknowledges receiving specific consideration for this indemnification.
>
> b. For the entire period of this Subcontract…**Sub-Subcontractor shall maintain general liability and Worker's Compensation insurance as is required by Exhibit 'C'** annexed hereto, or as otherwise required by the Contract Documents. All general liability insurance shall, at minimum, name Subcontractor, Contractor and the Owner of the Project as additional insureds….**Sub-Subcontractor shall deliver original certificates of insurance to Subcontractor upon the execution of this Subcontract**" (NYSCEF Doc No. 301, third-party complaint [exhibit D at 84 and 89] [emphasis added]).

Regarding the nonproduction of exhibit C, Atlantic's insurance requirements, the court observes that section 10 of the alleged subcontract provides that "[Atlantic] shall deliver original certificates of insurance to [Risa] upon the execution of this [s]ubcontract" and that the HR parties annex copies of two

certificates to the alleged subcontract (NYSCEF Doc No. 301 [exhibit D at 89, 92-93]). Moreover, the alleged subcontract indicates a start date of March 19, 2012 and the certificates are dated April 9, 2012 and May 4, 2012. Both certificates identify Atlantic as the insured and Risa as the certificate holder. The April 2012 certificate states: "[HR] is named as additional insured as required by written contract[,] Job Location. . .1824 Madison Ave - New York" (id. at 92). The May 2012 certificates states: "[HR] is named as additional insured as required by written contract on the general liability[,] Job Location. . .1824 Madison Ave - New York" (id. at 93).

Despite the foregoing, Atlantic claims that the certificates do not evince an intent to be bound. It argues that O'Connell and Torre's deposition testimony confirms that it was Atlantic's customary business practice to provide certificates at the start of a project. Further, while Atlantic acknowledges that it purchased insurance for the project, it contends that this purchase does not prove an intent to be bound. According to Atlantic, O'Connell and Torre's deposition testimony establishes that it may have obtained insurance without an executed subcontract requiring the same. From the HR parties and Risa's perspective, however, the certificates demonstrate that Atlantic acted pursuant to the subcontract. In addition, the HR parties assert that Atlantic's

insurance purchase is further evidence that Atlantic acted pursuant to the subcontract.

The HR parties and Risa are correct. Further, although exhibit D's description of the work was not produced, the court observes that the recitals to the subcontract provide a general description of Risa's work on the project and reflect that the subcontract's purpose was for Risa to subcontract out a portion of that work to Atlantic (NYSCEF Doc No. 301, third-party complaint [exhibit D at 84]). It is undisputed that Atlantic performed work at the project site. That work alone supports a finding that the parties intended to be bound under the subcontract. Torre's testimony that Atlantic was Risa's sub-subcontractor on the project also supports that finding.

Thus, the court rejects the argument that the subcontract is unenforceable (see Flores, 4 NY3d at 368-369). While some terms of the subcontract are not provided, the missing terms are immaterial as to whether the subcontract was entered into and acted upon by the parties (see Bovis Lend Lease LMB Inc. v Garito Contr., Inc., 38 AD3d 260, 260 [1st Dept 2007] ["Although the contract was lost, [plaintiff] properly established, through extrinsic evidence, that it required [defendant] to procure insurance coverage on its behalf"]).

As the subcontract is enforceable, the court must assess whether Atlantic is entitled to summary judgement dismissing the

HR parties and Risa's contractual indemnification claims against it. "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] [internal quotation marks and citations omitted]). To obtain contractual indemnification, "a contractual indemnitee must establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (Travalja v 135 W. 52nd St. Owner LLC, 232 AD3d 503, 505 [1st Dept 2024] quoting Correia v Professional Data Mgt., Inc., 259 AD2d 60, 65 [1st Dept 1999] [internal quotation marks omitted]). Generally, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (Correia at 65). However, when an indemnification provision contains a negligence trigger, whether or not the proposed indemnitor was negligent is an issue and relevant (Agurto v One Boerum Dev. Partners LLC, 221 AD3d 442, 445 [1st Dept 2023] [owner denied summary judgment on its claim for contractual indemnification as the sub-subcontract includes a negligence trigger]).

Section 10 of the subcontract between Atlantic and Risa (*supra* at 42-43) provides for indemnification when the plaintiff's claims arise out of Atlantic's work. "[T]he phrase arising out of is

ordinarily understood to mean originating from, incident to, or having connection with" (Burlington Ins. Co. v NYC Tr. Auth., 29 NY3d 313, 324 [2017] [internal quotation marks and citations omitted]). The court holds that, because the uncontroverted evidence shows that plaintiff's claims arose from Perez's performance of Atlantic's work at the project, Atlantic is not entitled to summary judgment dismissing the HR parties and Risa's contractual indemnification claims against it.

The court now turns to Atlantic's contention that it is entitled to summary judgment dismissing the HR parties and Risa's claims against it for breach of contract for failure to procure insurance. To this end, Atlantic argues that there is no executed subcontract between it and Risa, and thus these claims cannot stand. That argument fails as the court found an enforceable subcontract. Further, while Atlantic provides a copy of its insurance policy for the project (NYSCEF Doc No. 319), factual issues remain as the subcontract does not include all particulars of Atlantic's insurance requirements, such as the required coverage amount. Thus, extrinsic evidence is necessary to resolve these claims (see Zaidi v NY Bldg. Contrs., Ltd., 99 AD3d 705, 707 [2d Dept 2012] ["Where a valid contract is incomplete, extrinsic evidence is admissible to complete the writing if it is apparent from an inspection of the writing that all the particulars of the

agreement are not present, and that evidence does not vary or contradict the writing"] [citation omitted]).

The HR parties' contractual indemnification claims (motion seq. nos. 010, 011, and 012)

The HR parties seek summary judgment on their contractual indemnification claims against Risa, S.J., Rivco, and Botto. Separately, S.J., Rivco, and Botto seek summary judgment dismissing those claims against them.

Prior to May 3, 2012, HR entered into four subcontracts in connection with the project. The subcontracts contain the same indemnification provision, which reads as follows:

> "8.1 To the extent permitted by law, and to the extent not caused in whole or in part by an Indemnitee's own negligence, the Subcontractor shall indemnify, defend, save and hold harmless [HR], [IFH]…and anyone else acting for or on behalf of any of them and any other required indemnitee under the General Contract (herein collectively called "Indemnitees") from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever **which arise out of or are connected with or are claimed to arise out of or be connected with the performance of Work by the Subcontractor, or any act or omission of the Subcontractor**" (NYSCEF Doc Nos. 415, 417-419 at 9 [emphasis added]).

This indemnification provision is akin to an indemnification provision that was analyzed in Vitucci v Durst Pyramid LLC (205 AD3d 441 [1st Dept 2022]). As a matter of fact, HR was a defendant in that action and party to the subcontract at issue in that decision. The indemnification provision in *Vitucci* required:

> "Geller to indemnify Durst/Hunter for any claims that **'arise out of or are connected with or are claimed to**

> **arise out of or be connected with the performance of Work by [Geller], or any act or omission of [Geller]** including…any work previously performed by [or] on behalf of [Geller] at the [s]ite,' to the extent the liability is 'not caused in whole or in part by an indemnitee's own negligence' " (*id.* at 445 [emphasis added]).

The plaintiff's claims in Vitucci included a Labor Law § 241 (6) claim predicated on inadequate lighting in violation of Industrial Code regulation 23-1.30, as well as common-law negligence and Labor Law § 200 claims based on an inadequate lighting condition (id. at 441-444). Pursuant to the indemnification provision, the First Department held that "the [indemnity] obligation was triggered by plaintiff's **mere allegation** that Geller's negligent installation or maintenance of lighting contributed to the accident" (id. at 445 [emphasis added]). Thus, while the Department found that "there are issues of fact as to whether defendant Geller — the electrical subcontractor — was responsible for the lighting at the time of the accident," it granted Durst/Hunter "conditional summary judgment on their contractual indemnification claim against Geller, to the extent the accident was not caused by their own negligence" (id. at 444-445; see Quiroz v Wells Reit II-222 E. 41st St., LLC, 2013 NY Slip Op 33277[U] *22-23 [Sup Ct, NY County 2013] affd as mod sub nom. Quiroz v Wells Reit-222 E. 41st St., LLC, 128 AD3d 442, 442-443 [1st Dept 2015] [holding that even though defendant "Adco was not negligent, Adco must indemnify

defendants except to the extent that defendants were themselves negligent, because defendants have claimed that the accident arose out of Adco's work"]; see also DiPerna v American Broadcasting Cos., 200 AD2d 267, 268-270 [1st Dept 1994] [despite the jury finding in the main action that the owner and the contractors were not liable for the plaintiff's injuries, the owner was granted contractual indemnification from the contractors "for the costs it incurred in defense of the main action" as the indemnification provision contains the language "loss. . .which arise[s] or [is] claimed to arise out of…any accident…which…is alleged to have happened"]). Mindful of the foregoing, the HR parties' claims for contractual indemnification against the subcontractors are examined in turn.

Risa

The HR parties argue that plaintiff's claims arose out of and are directly connected to Risa's work under its subcontract. The argument rests on the undisputed fact that the accident occurred while Perez was performing work for Atlantic - work that Risa hired Atlantic to perform.

Accordingly, the HR parties are entitled to conditional summary judgment on their contractual indemnification claim against Risa, to the extent the accident was not caused by their own negligence (see McKinney v Empire State Dev. Corp., 217 AD3d 574, 575 [1st Dept 2023]; see Ging v F.J. Sciame Constr. Co., Inc.,

193 AD3d 415, 418 [1st Dept 2021] ["Since plaintiff's accident arose out of his work for Atlantic, with which Koenig sub-subcontracted to perform, plaintiff's accident necessarily arose out of the work that Sciame subcontracted with Koenig to perform, thus triggering Koenig's contractual duty to indemnify Sciame"]).

Botto

The HR parties argue that Perez's accident and plaintiff's claims arose out of Botto's work. They rely on Citarella's testimony that Botto core drilled holes into the building's floors as part of their work and that it was required to promptly cover any holes in which it did not place a pipe. Botto argues that it is unknown which floor the accident occurred and there is no evidence linking it to the subject hole.

However, as discussed above, the subcontract's indemnification provision requires Botto to indemnify the HR parties, even if a cause of action is merely "claimed to arise out of or be connected with the performance" of Botto's work (NYSCEF Doc No. 418 at 9). Thus, applying the reasoning in Vitucci, the HR parties are entitled to conditional summary judgment on their contractual indemnification claim against Botto, to the extent the accident was not caused by their own negligence; and Botto is not entitled to summary judgment dismissing the claim.

Rivco

The HR parties argue that the indemnification provision is triggered due to Rivco's failure to perform work delineated under the subcontract. As such, the parties spend substantial time arguing whether the task of covering holes was within Rivco's responsibilities under the subcontract. However, as discussed above, the subcontract's indemnification provision requires Rivco to indemnify the HR parties even if a cause of action is merely "claimed to arise out of or be connected with the performance" of Rivco's work (NYSCEF Doc No. 419 at 9). Thus, applying the reasoning in Vitucci, the HR parties are entitled to conditional summary judgment on their contractual indemnification claim against Rivco, to the extent the accident was not caused by their own negligence; and Rivco is not entitled to summary judgment dismissing this claim.

S.J.

The HR parties argue that S.J.'s temporary lighting work at the site triggered its indemnity obligation. They rely on Perez's testimony that the lighting might have affected his ability to see the subject hole. Their argument is unavailing as plaintiff abandoned the Labor Law § 241 (6) claim predicated on a violation of Industrial Code regulation 23-1.30 which governs illumination (see Vitucci, 205 AD3d at 441-445; see also McKinney, 217 AD3d at 574-576 [1st Dept 2023] [affirming the denial of an electrical

contractor's summary judgment motion to dismiss the contractual indemnification claim against it "as it has not yet been determined whether plaintiff's accident arose out of inadequate lighting conditions"]). Moreover, the cited testimony does not establish that lighting contributed to the accident, let alone raise the possibility that lighting could have been a factor in the accident (Cruz v Metropolitan Tr. Auth., 193 AD3d 639, 640 [1st Dept 2021] [no evidence of insufficient lighting where there was testimony that "plaintiff could see where he was walking"]; see also Cahill v Triborough Bridge & Tunnel Auth., 31 AD3d 347, 349 [1st Dept 2006] [testimony "that the area was 'dark' or 'a little dark'. . .was insufficient to create an inference that the amount of lighting fell below the specific statutory standard"]).

Despite the foregoing, S.J. is not entitled to summary judgment dismissing the claim. In its motion for summary judgment, S.J. argues that the lighting conditions did not contribute to Perez's accident and that it was not responsible for creating and failing to cover the subject hole. In opposition, the HR parties persuasively argue that there is a question of fact as to whether S.J. created the subject hole and failed to cover it. While Rappa testified that S.J. did not drill any holes at the premises because there was an existing bus duct, Aronne testified that the electrical contractor needed to drill holes in the building's floor to run risers and to place the pipes and the conduit. Perez

testified that the hole involved in the accident was five to six inches in diameter and Aronne testified that a hole that size could have been created for an electrical pipe.

Common-law indemnification and contribution claims (motion seq. nos. 010, 011, and 012)

The HR parties move for summary judgment on their common-law indemnification claims against Risa, S.J., Rivco, and Botto, as well as for summary judgment dismissing all claims for common-law indemnification and contribution against them. And S.J., Rivco, and Botto move or cross-move for summary judgment dismissing the HR parties claims for common-law indemnification and contribution against them, as well as for summary judgment dismissing all cross-claims for common-law indemnification and contribution against them.

Some requested relief is unopposed. For example, in their opposition papers, Risa, Rivco, Botto, and Atlantic do not address their respective claims for common-law indemnification and contribution against the HR parties. Thus, those claims are deemed abandoned (Jones, 223 AD3d at 468). In addition, Rivco submits no opposition to Botto's cross-motion. Thus, it is deemed to have abandoned all cross-claims against Botto, including those for common-law indemnification and contribution (id.).

The court now turns to the opposed claims. "To establish a claim for common-law indemnification, the one seeking indemnity

must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (Pena v Intergate Manhattan LLC, 194 AD3d 576, 578 [1st Dept 2021] quoting Correia, 259 AD2d at 65). "Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person" (Shelton v Chelsea Piers, L.P., 214 AD3d 490, 491 [1st Dept 2023] [citation omitted]). Thus, a party can defeat a claim for contribution or common-law indemnification with a showing that it was free from negligence (*Agurto*, 221 AD3d at 444; see McCarthy v Turner Constr., Inc., 17 NY3d 369, 377-378 [2011] [duty imposed on those who actually supervised the work]).

For the reasons discussed earlier in this decision, issues of fact exist as to the HR parties' negligence beyond statutory liability. Therefore, the HR parties are not entitled to summary judgment on their claims for common-law indemnification nor are they entitled to summary judgment dismissing the common-law indemnification and contribution claims against them (except for those that were deemed abandoned).

There are also issues of fact as to the negligence of Risa, S.J., Rivco, and Botto. The conflicting deposition testimony and affidavits raise issues of fact as to which contractor created the

subject hole involved in the accident and which contractor or contractors were responsible for the failure to cover it. The conflicting accounts require credibility determinations, which cannot be resolved on the multiple motions for summary judgment before the court (Art Capital Group, LLC v Rose, 149 AD3d 447, 448 [1st Dept 2017]).

Thus, the moving parties are not entitled to summary judgment dismissing the opposed claims for common-law indemnification and contribution against them (see Mena v 5 Beekman Prop. Owner LLC, 212 AD3d 466, 467 [1st Dept 2023] [affirming the denial of a third-party defendant's motion for summary judgment to dismiss the claims for contribution and common-law indemnification against it where issues of fact remained]).

Contractual counterclaims against the HR parties (motion seq. no. 010)

The HR parties seek summary judgment dismissing the subcontractors' contractual counterclaims against them. S.J., Botto, and Rivco ignore this issue, and thus their contractual counterclaims against the HR parties are deemed abandoned. As to Risa, its answer does not plead any contractual counterclaims against the HR parties. Accordingly, the HR parties are entitled to summary judgment dismissing such counterclaims.

Contractual cross-claims against Botto (motion seq. no. 010)

Botto seeks summary judgment dismissing S.J., Atlantic, and Rivco's contractual cross-claims against it. As previously noted, Rivco submits no opposition. In their respective opposition, S.J. and Atlantic ignore this issue. Accordingly, Botto is entitled to summary judgment dismissing such cross-claims.

Contractual cross-claims against Rivco and S.J. (motion seq. nos. 011 and 012)

Rivco and S.J. separately move to dismiss the other subcontractors' contractual cross-claims against them. Rivco asserts that it has no contracts with S.J., Botto, and Atlantic, and thus there is no contract obligating it to indemnify or contribute to a judgment against these defendants. S.J. likewise argues that it has no contracts with Rivco, Botto, and Atlantic, and thus there is no contract obligating it to indemnify or contribute to a judgment against these defendants. Based on the arguments presented, the cross-claims between Rivco and S.J. warrant dismissal. As for Botto, it does not address the arguments related to the contractual cross-claims, except to assert that no cross-claim should be dismissed. As for Atlantic, it abandoned its contractual cross-claims against Rivco and S.J. as it ignores the issue. For these reasons, Rivco and S.J. are entitled to summary judgment dismissing Botto and Atlantic's contractual cross-claims against them.

The HR parties' claims for breach of contract for failure to procure insurance (motion seq. nos. 010, 011, and 012)

The HR parties seek summary judgment on these claims against Risa, S.J, Rivco, and Botto. And S.J., Rivco, and Botto seek summary judgment dismissing these claims against them.

"A party moving for summary judgment on its claim for failure to procure insurance meets its prima facie burden by establishing that a contract provision requiring the procurement of insurance was not complied with" (Benedetto v Hyatt Corp., 203 AD3d 505, 506 [1st Dept 2022]). "The burden then shifts to the opposing party, who may raise an issue of fact by tendering the procured insurance policy in opposition to the motion" (id.). Here, the insurance procurement provision is section 8.4 in each of the subcontracts between HR and the subcontractors. It provides, in relevant part, as follows:

> "[T]he Subcontractor shall procure and maintain…Comprehensive General Liability Insurance…[with a] Minimum Coverage Amount[] of [5 million and that HR and] the Owner…shall be named as additional insureds on all General Liability Insurance…and Umbrella Liability Insurance policies. . .**Any endorsements limiting coverage to ongoing operations or to losses caused wholly or in part by the Subcontractor are not acceptable…. Such policies shall be endorsed…that this insurance shall be primary for all additional insureds and that any insurance**…maintained by the additional insureds shall be excess only and shall not be called upon to contribute to this insurance" (NYSCEF Doc Nos. 415 and 417-419 at 9-10 [emphasis added]).

In their memorandum of law, the HR parties cite case law to describe their prima facie burden and quote part of the insurance procurement provision setting forth the minimum coverage amounts and that the insurance should be primary and non-contributory. They argue that summary judgment should be granted as the subcontractors did not "procure insurance coverage in accordance with the parties' respective agreements" (NYSCEF Doc No. 391 at 21). This constitutes the beginning and end of their argument. However, their affirmation refers to a pertinent motion exhibit - a copy of a tender acceptance letter from Zurich North America/Nationwide Insurance Company dated April 1, 2016. The letter establishes that Risa's insurer is providing additional insured coverage to the HR parties. Specifically, it states that Risa is the company's insured and that "the [c]ompany has determined that there is additional insured coverage available for the presently pending claims against [HR] and [IFH]" (NYSCEF Doc No. 420 at 2).

In opposition, Risa contends that HR parties are not entitled to summary judgment as the additional insured coverage has not been exhausted. In reply, the HR parties focus on the reservation of rights language in the letter, namely that the carrier "reserves its right to assert policy provisions and defenses. . .which may become applicable" (id. at 5). The HR parties contend that the reservation of rights violates the subcontract insofar as the

subcontract requires Risa to obtain primary and non-contributory additional insured coverage on the HR parties' behalf.

This argument is not properly before the court as the moving papers do not discuss the insurer's reservation of rights (Simon v FrancInvest, S.A., 192 AD3d 565, 569 [1st Dept 2021] ["An argument raised for the first time in reply—when the other party has no chance to respond—should not be considered"]). Moreover, even if the court were to determine that Risa breached the subcontract, the HR parties would not be entitled to summary judgment as they have not yet shown "a loss as a result thereof" (Gonzalez v DOLP 205 Props. II, LLC, 206 AD3d 468, 471-472 [1st Dept 2022]; Souare v Port Auth. of N.Y. & N. J., 125 AD3d 494, 495 [1st Dept 2015] [holding that even though defendant Greyhound breached the contract, "summary judgment was premature[] as it has yet to be determined that Greyhound's failure to procure the agreed-upon insurance caused the Port Authority any losses"]).

In addition, the HR parties are not entitled to summary judgment against Rivco, S.J., and Botto. The HR parties do not provide any "testimonial or documentary evidence from [the subcontractors'] insurer[s] that they were not named as insureds on any policies issued" (Lucas v City of New York, 236 AD3d 523, 526 [1st Dept 2025]). Counsel's "unsubstantiated statements that [the subcontractors] lacked the requisite insurance did not meet [the HR parties] prima facie burden" (id.).

On the other hand, the court holds that S.J., Rivco, and Botto do not establish their entitlement to summary judgment dismissing the claims against them. "[A] party moving for summary judgment dismissing a breach of contract claim for failure to procure insurance meets its prima facie burden by identifying the contract provision requiring the procurement of insurance and tendering the procured insurance policy that satisfies that requirement" (Cooper v Bldg 7th St. LLC, 231 AD3d 533, 534 [1st Dept 2024]).

Here, S.J. represents that it complied with its subcontract as it obtained an insurance policy with Harleysville Insurance Company that was effective from February 19, 2012 to February 2, 2013, naming HR as an additional insured. In support, S.J. proffers copies of a declarations page, schedules of insurance, a certificate of liability insurance, and a certificate of participation in workers' compensation group self-insurance (NYSCEF Doc No. 499). As the HR parties correctly note, these documents do not establish compliance with the subcontract. Indeed, "a certificate of insurance is merely evidence of a contract rather than conclusive proof that coverage was procured" (Shala v Park Regis Apt. Corp., 192 AD3d 607, 608 [1st Dept 2021] [citation omitted]). S.J. does not proffer the entire insurance policy nor do the declarations demonstrate strict compliance with the subcontract's insurance procurement provision. For this

reason, S.J. is not entitled to summary judgment (see Pub. Adm'r of Queens County v 124 Ridge LLC, 203 AD3d 493, 495 [1st Dept 2022] [affirming the denial of summary judgment since the movant "failed to establish, as a matter of law, that it procured the insurance it was contractually obliged to purchase, since it failed to submit the insurance policy"]).

As for Rivco, it relies on a certified copy of an insurance policy issued by Harleysville Insurance Company that was effective from July 12, 2011 to July 12, 2012 (NYSCEF Doc No. 478). Rivco highlights a policy endorsement, which confers additional insured status "to any person or organization when required in written contract" (id. at 70). The issue here is that the insurance policy contains an exclusion, which provides:

> "[The] organization is an additional insured only with respect to liability for 'bodily injury,' 'property damage' or 'personal and advertising injury' caused, in whole or in part, by. . .[Rivco's] acts or omissions; or. . .[t]he acts of omissions of those acting on [Rivco's] behalf[] in the performance of [Rivco's] ongoing operations for the additional insured" (id. at 54).

Under the exclusion, the HR parties cannot be granted additional insured status unless Rivco caused or contributed to Perez's accident. The HR parties' position is that the exclusion does not comply with the subcontract's express prohibition on such limitations. Rivco's position is that the subcontract's prohibition violates General Obligations Law (GOL) § 5-322.1 as it

requires the insurance company to provide coverage to HR for its own acts or omissions. The court disagrees with Rivco. GOL § 5-322.1 "generally renders void a clause in a construction contract purporting to indemnify a party for its own negligence" (Tingling v C.I.N.H.R., Inc., 120 AD3d 570, 571 [2d Dept 2014]; see Vasquez v Manhattan Coll., 223 AD3d 601, 602 [1st Dept 2024]). Importantly, "[a]n agreement to procure insurance is not an agreement to indemnify and hold harmless" (Kinney v Lisk Co., 76 NY2d 215, 218 [1990]), and thus GOL § 5-322.1 is not implicated here. Accordingly, Rivco is not entitled to summary judgment as it does not show that its policy comports with the subcontract.

The court reaches the same conclusion with respect to Botto. Its insurance policy contains an exclusion that resembles the exclusion in Rivco's insurance policy (see NYSCEF Doc No. 448, letter from Nationwide/Harleysville Insurance Company dated Sept. 4, 2018). Therefore, Botto is not entitled to summary judgment dismissing the claim.

To the extent not specifically addressed herein, the court

has considered the parties' remaining contentions and finds them unavailing.

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9/23/2025
DATE

DEBRA A. JAMES, 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**