SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDY H. KIM** **PART** **04**

Justice

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DANIEL MERLO,

Plaintiff,

- v -

LCOR 55 BANK STREET LLC, LCOR INCORPORATED, WP NORTH TOWER, LLC, LRC CONSTRUCTION LLC, ECKER WINDOW CORP., PARKVIEW PLUMBING & HEATING, INC., BAKER CONCRETE CONSTRUCTION, INC., and PRECISION CARPENTRY OF WESTCHESTER, INC.,

Defendants.

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INDEX NO. 152443/2017

MOTION DATE 12/07/2023, 12/06/2023, 12/07/2023, 12/08/2023

MOTION SEQ. NO. 014 015 016 017

DECISION + ORDER ON MOTION

LCOR 55 BANK STREET LLC, LCOR INCORPORATED, WP NORTH TOWER, LLC, and LRC CONSTRUCTION LLC,

Third-Party Plaintiffs,

-against-

PRECISION CARPENTRY OF WESTCHESTER, INC.,

Third-Party Defendant.

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Third-Party
Index No. 595821/2019

The following e-filed documents, listed by NYSCEF document number (Motion 014) 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 560, 564, 567, 589, 595, 598, 609, 614, 615, 616, 617, 623, 624, 634, 637, 644, 649, 650, 651, 654, 657

were read on this motion for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 015) 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 559, 563, 568, 588, 592, 593, 594, 601, 602, 653, 655, 656

were read on this motion for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 016) 555, 556, 561, 565, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 590, 596, 599, 608, 610, 613, 618, 619, 620, 621, 622, 625, 626, 627, 628, 635, 638, 640, 643, 645, 646, 647, 648, 658

were read on this motion for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 017) 557, 558, 562, 566, 569, 591, 597, 600, 611, 612, 629, 630, 631, 632, 636, 639, 641, 642, 652, 659

were read on this motion for JUDGMENT - SUMMARY.

In this action, plaintiff Daniel Merlo brings claims against all defendants for violations of Labor Law §§200, 240(1) and 241(6) as well as common-law negligence, based upon personal injuries he allegedly sustained when he tripped and fell on an uncovered floor penetration while working on the construction of a new building. The defendants' various motions for summary judgment—motion sequence numbers 014, 015, 016 and 017—are consolidated for disposition and resolved as follows:

FACTUAL BACKGROUND

WP North owned the property known as 55 Bank Street in White Plains, Westchester County, on February 27, 2017, the date of the accident.[1] Pursuant to a written agreement (the "LRC Contract"), WP North Tower LLC ("WP North"), as owner, hired LRC Construction LLC ("LRC") as its general contractor to construct a multi-story residential building on the property (the "Project"). LRC, in turn, hired Parkview Plumbing & Heating Inc. ("Parkview") to perform plumbing work and Precision Carpentry of Westchester, Inc. ("Precision") to perform carpentry installation work (NYSCEF Doc No. 428).

LRC also hired Ecker Window Corp. ("Ecker") to perform window wall, metal panel and balcony door work. Ecker, in turn, subcontracted a portion of its work to nonparty R&R Construction ("R&R"), a window installation company. R&R employed plaintiff as a journeyman

[1] While the pleadings allege that the accident occurred on February 28, 2017 (NYSCEF Doc No. 113, second amended verified complaint, ¶ 34), plaintiff testified the accident occurred on February 27 (NYSCEF Doc No. 533, plaintiff's 12/10/2019 tr at 18).

ironworker. Plaintiff received all his instructions from Joseph Amato, his supervisor and a foreman at R&R.

Plaintiff's EBT Testimony

On the date of the accident, Amato tasked plaintiff with moving windows on the seventh floor (NYSCEF Doc No. 533, Merlo tr. at 43, 45-46, 108, 122-123). Plaintiff testified that there were columns on the seventh floor but nothing else "structurally" (*id.* at 67). He further testified that he had loaded two 60-to-70-pound windows onto an A-frame dolly and that the accident occurred as he was pushing the dolly around a column (*id.* at 63, 91, 91, 161-162, 164). The dolly had a long flat rectangular base that was approximately thirteen inches wide and four feet long and sat atop four wheels (*id.* at 56-57). The windows hung over the edge of the dolly, and the windows and the dolly obstructed his view of the floor (*id.* at 161).

Plaintiff testified that "[t]here were materials all over the floor," including windows, boxes and pallets of materials for other trades, pipes, studs, gang boxes, buckets and tools (*id.* at 61, 95, 108 and 181). These materials and boxes formed a "pathway" that was approximately 3 feet wide and 30 feet long, and the accident occurred as he pushed the dolly along this pathway (*id.* at 247, 260). Specifically, plaintiff testified that he "made the turn to the right with the two windows in the A-frame, took a step or two," and his left heel caught the edge of an eight-inch diameter circular hole that passed through the floor, causing him to trip and fall (*id.* at 90, 94, 100, 103). Plaintiff never saw the hole before he tripped, as the windows leaning against the column to his right and the dolly obstructed his view of it (*id.* at 193-194). The hole was not covered, and plaintiff did not believe there was any spray paint around its perimeter (*id.* at 94-95 and 109). There was nothing inside the hole and no debris on the floor (*id.* at 100, 105).

Glen Campbell EBT Testimony

R&R's shop steward, Glen Campbell, testified that plaintiff contacted him after the accident (NYSCEF Doc No. 547, Campbell tr at 11-12, 16-17). Campbell could not recall the exact floor or location where the accident occurred (*id.* at 20, 26). He testified that when he arrived on the seventh floor, "there was just so much stuff all over the place … there are utilities all over the place, sheet rock, all that stuff … it's like a maze, like a path, like a pathway going to [plaintiff] because there was so much stuff there" (*id.* at 21-22). Campbell added, "the [window] panels and stuff was stacked on the columns. All other trades had all their materials and everything stacked up so where the hole was at … it was like in the pathway" (*id.* at 52). Campbell observed a "nice size hole … [that] was like the holes that they cut out to put like sewer pipes or plumbing pipes" (*id.* at 26). The hole was situated in the "pathway" and there were similar sized holes nearby (*id.* at 52, 58-59, 73). There was nothing inside the hole and there were no materials within two feet of it (*id.* at 27, 53, 43).

Joseph Amato EBT Testimony

Joseph Amato, the R&R foreman who directed plaintiff's work, testified that Ecker was retained to install window walls, metal panels, and balcony doors and purchased the necessary material, had it shipped to the site, offloaded, and installed there (NYSCEF Doc No. 539, Amato tr at 19-2). Neither Ecker nor R&R was responsible for plumbing, HVAC or electrical floor penetrations (*id.* at 27, 33). Most floor penetrations were covered with plywood "shot back into the concrete slab" or, for smaller floor penetrations, "a smaller, square piece of wood with a dowel penetrating into the hole not shot down, painted, maybe unpainted" (*id.* at 46). Neither Ecker nor R&R would ever remove floor protections (*id.* at 54). Amato testified that LRC was in charge of site safety and that he reported seeing multiple uncovered holes on this Project to LRC (*id.* at 34,

48). LRC never directed Amato to install temporary protection over such openings (*id.* at 54). Amato could not recall seeing the hole on which plaintiff tripped or any similar hole on the seventh floor before the accident (*id.* at 18). When Amato visited the seventh floor with Campbell the day after the accident, he saw an uncovered six- to eight-inch round floor penetration "specific for a pipe," though he did not see a pipe, conduit or other material inside it (*id.* at 71-72, 121). Later that same day, Amato noticed that someone had "cleated" this floor penetration (*id.* at 73-74, 121-122).

Marlon Lezama EBT Testimony

LRC's superintendent, Marlon Lezama, testified that LRC subcontracted the "protection trade" work on the Project to Precision, making Precision responsible for floor openings, among other things (NYSCEF Doc No. 537 at 18, 28-30). Floor protection typically involved covering floor penetrations with plywood nailed into the floor or "cleating" the opening by screwing a piece of wood vertically to the underside of the plywood cover before dropping it over the hole (*id.* at 31-32, 44). The purpose of covering floor penetrations was to prevent persons from falling through the openings or tripping over them (*id.* at 64).

Lezama testified that the electrical, HVAC and plumbing trades on the Project created floor penetrations by placing cylindrical sleeves vertically onto the plywood forms before the concrete floor is poured (*id.* at 37-39, 58, 141-142). The top of each sleeve was covered with a "lid," and the open bottom of the sleeve is nailed into the plywood form (*id.* at 141-142, 154). Stripping the plywood forms beneath the new slab created the floor-through openings (*id.* at 141). The responsibility for protecting these openings initially fell to Baker Concrete Construction, Inc., but once the floor opened to other trades, "Precision would take over the protection" (*id.* at 40, 86, 140, 144). The floor penetrations had nothing to do with window installation (*id.* at 136). Lezama testified that he inspected the Project site twice each day, during which he would look for

uncovered holes (*id.* at 72, 151). If he saw an uncovered opening, he would contact Precision to cover it unless he knew which trade had removed the cover (*id.* at 151-152).

Justin Cloidt Affidavit

LRC hired Justin Cloidt as an assistant construction superintendent on the Project (NYSCEF Doc No. 372, Cloidt aff, ¶1). Cloidt submitted an affidavit stating, in pertinent part, as follows:

> [The] [d]ay after the accident, Mr. Amato took me to the 7th floor to show where the accident occurred…
>
> Upon arriving on the 7th floor, I was shown a sleeve opening where the accident occurred that was approximately 5" to 6" in diameter and was to be used by plumbing contractor Parkview Plumbing & Heating, Inc. ("Parkview") to run its pipe. Parkview created the opening before the concrete floor was poured by Baker Concrete Construction ("Baker"). After the floor is poured, Baker installed plywood coverings over opening with a 2" x 4" attached to the bottom to prevent the plywood cover from sliding if kicked or stepped on.
>
> At the time of inspection on the date of accident, the 7th floor and the area of the accident was open with no walls or tracks in place. The accident location was not next to any column and the sleeve opening was not in any pathway or corridor created by construction material and/or pallets nor was there any such pathway or corridor on the floor.
>
> At the time of Mr. Merlo's accident, Parkview was in the process of installing cast iron pipe, approximately 3" to 4" in diameter, from the 6th floor to the 7th floor. This work is indicated in LRC's daily job report I prepared for February 27, 2017. Information under the column "Work Performed" shows Parkview installing riser pipes on the 6th floor that would run to the 7th floor. Riser pipe used in this installation is dropped down from the 7th floor to the 6th floor through sleeve openings such as the one allegedly involved in Mr. Merlo's accident. When I arrived at the accident site, the sleeve opening was uncovered and the pipe had not been completely installed. If Parkview was unable to complete the installation in a timely manner, they were responsible for placing the plywood cover back over the sleeve opening until they were able to complete the installation.

(*id.* at 5-6, 11-12 [emphasis added]).

Christpher Strnad EBT Testimony

Parkview's owner, Christopher Strnad, testified that part of Parkview's work on the Project involved laying out and installing sleeves and insert boxes for plumbing pipes (NYSCEF Doc No. 542, Heffernan affirmation, exhibit T, Strnad tr at 12, 28, 45). Parkview installed hundreds of cylindrical sleeves varying between four to twelve inches in diameter on each floor (*id.* at 30-31 and 36). Each sleeve came with a flat "cap" over one end (*id.* at 43). Strnad testified that a Parkview employee was present for each concrete pour to ensure that its sleeves were not compromised (*id.* at 53 and 195). After each pour, the protection carpenter nailed plywood covers over the sleeves, which remained embedded in the slab (*id.* at 62, 91). Strnad testified that Parkview "only removed the protection when we're dropping risers in" through to the floor below, "[o]ne hole at a time" (*id.* at 59, 61, 71, 117-118). Strnad stated that "[y]ou don't need to protect a sleeve with a pipe through it" (*id.* at 223). Strnad asserted that, according to Parkview's approved payment requisition dated February 14, 2017, Parkview was not working on the seventh floor for that month (*id.* at 82-83, 185).

Hector Figueroa EBT Testimony

Parkview foreman Hector Figueroa testified that Parkview installed roughly 400 pipe sleeves on each floor of the Project (NYSCEF Doc No. 546, Figueroa tr. at 110). Parkview employees were present when concrete pours took place to ensure that its sleeves were not damaged and to replace any damaged sleeves (*id.* at 10, 31-33). The tops to the sleeves "[v]ery rarely, almost never" became dislodged, but if that occurred, the crew observing the pour would re-affix them (*id.* at 31). Parkview removed the tops to only those sleeves they were running a pipe through at the time, and after removal someone would stand by and wait "for the pipe to be delivered" (*id.* at 57-58, 61-62). He could not recall Parkview installing any type of protection

over its sleeves (*id.* at 101), though it was responsible for covering the holes it created while performing its work (*id.* at 109). Figueroa testified that throughout the day and at the end of each day, either he or a sub-foreman walked the floors where Parkview worked, yet he never saw any unprotected floor openings related to Parkview's work and could not recall any crew complaining about unprotected floor openings (*id.* at 62-63, 89).

Figueroa testified that Parkview did not create daily logs for this Project but that he maintained a personal log in which he recorded "important things," including the areas in which personnel were working (*id.* at 35-36). Figueroa made entries in his log on January 16th and 17th and February 1st, 18th, 21st, and 27th (*id.* at 122, 145). The log entries on February 1, 2017 record that Parkview lowered a 40-foot-long pipe from the ninth floor for installation on the sixth, seventh and eighth floors (*id.* at 78). Figueroa testified that, based on his logs, Parkview did not perform any work on the seventh floor after February 1st, and he could not recall any other work on that floor taking place that month (*id.* at 78-79).

Brian Carolan EBT Testimony

Brian Carolan, Precision's general foreman on the Project from December 2016 through March 2017, testified that Precision's work included maintaining protection over open penetrations installed by other trades but that Precision only took on this responsibility once the floors were turned over to it and the other trades (NYSCEF Doc No. 544, Carolan tr at 17-18, 35, 56). Carolan stated that once a pipe was installed through an opening, Precision was not responsible for placing any protection over it (*id.* at 74-75). He also testified that "[e]very contractor is required to cover their holes if they remove the protection … [and] to cover their work after they completed their work or if they did not complete their work" (*id.* at 80). Carolan could not recall an instance where a trade failed to replace a cover that it had removed (*id.* at 96).

Precision assigned Trevor Kirwan to "do a sweep" every afternoon and ensure that openings in the floors were covered (*id.* at 40, 43, 50, 63-64). Carolan could not recall if anyone complained to him or anyone else at Precision about Parkview leaving floor openings unprotected (*id.* at 130).

PROCEDURAL HISTORY

Plaintiff now asserts claims against all defendants for violations of Labor Law §§200, 240(1) and 241(6) as well as common-law negligence. LCOR 55 Bank Street, LLC ("LCOR Bank"), LCOR Incorporated ("LCOR"), WP North and LRC (collectively, the "LCOR Defendants") answered, collectively, and interposed cross-claims against Parkview and Precision for contribution, common-law and contractual indemnification, and breach of contract for failure to procure insurance (NYSCEF Doc No. 144).

Ecker answered and asserted cross-claims for contribution and common-law and contractual indemnification against the LCOR Defendants, Parkview and Precision (NYSCEF Doc No. 153). Parkview, in its Answer, asserts cross-claims for contribution and common-law indemnification against the LCOR Defendants, Ecker, and Precision (NYSCEF Doc No. 119). Precision, in turn, asserts cross-claims for contribution and common-law and contractual indemnification against the LCOR Defendants, Ecker, and Parkview (NYSCEF Doc No. 117).

On September 8, 2022, plaintiff moved, pursuant to CPLR 3212, for partial summary judgment against the LCOR Defendants on his Labor Law §241(6) claim, against LRC on his Labor Law §200 claim and against LRC and Precision on his common law negligence claim (NYSCEF Doc No. 315). The court (Nervo, J.) denied the motion (NYSCEF Doc No. 449). The Appellate Division, First Department affirmed the denial of plaintiff's motion, concluding that "questions of fact exist as to whether plaintiff's fall occurred in a passageway so as to implicate

Industrial Code (12 NYCRR) § 23-1.7(e)(1) …"[2] and "[r]egarding plaintiff's Labor Law § 200 and common-law negligence claims, questions of fact exist as to whether defendants had notice of the condition that allegedly caused plaintiff's fall" (*Merlo v LCOR 55 Bank St. LLC*, 226 AD3d 438, 439 [1st Dept 2024] [internal citations omitted]).

The Instant Motions

In motion sequence 016, the LCOR Defendants move for summary judgment dismissing plaintiff's complaint and the cross-claim for contractual indemnification asserted against them, noting that LCOR 55 transferred ownership of the Project to WP North on July 23, 2015, and arguing that summary judgment is appropriate because neither LCOR 55 nor LCOR had any ownership interest in the Project at the time of plaintiff's accident or exercised any supervisory control over plaintiff's work. They further argue that the Labor Law §200 claim should be dismissed because there is no evidence in the record establishing the LCOR Defendants had actual or constructive notice of this condition. Finally, they argue that summary judgment dismissing the Labor Law §241(6) claim is warranted because the Industrial Code provision relied on by plaintiff in connection with that claim, Industrial Code 23-1.7(e)(1), does not apply because plaintiff's accident did not occur in a passageway.

The LCOR Defendants also move for summary judgment on their crossclaims for contractual indemnification and to dismiss the indemnification cross-claims brought against them, on the grounds that Ecker, Parkview, or Precision are obligated to indemnify the LCOR Defendants for claims that arise from their work, inasmuch as plaintiff was employed by Ecker's subcontractor, the floor penetration at issue was a Parkview opening that Precision was responsible for protecting, but that the LCOR Defendants have no such obligation.

[2] Plaintiff moved only on an alleged violation of section 23-1.7(e) (1) (NYSCEF Doc No. 315).

In motion sequences 014 and 015, Parkview and Ecker each move for summary judgment dismissing the complaint, making substantially the same arguments as the LCOR Defendants. They additionally argue, however, that no Labor Law §241(6) claim lies because the floor penetration, even if located in a passageway, was an integral part of the work being performed at that time. In motion sequence 017, Precision moves for summary judgment dismissing the complaint. However, this motion was withdrawn at oral argument (NYSCEF Doc No. 656, oral argument tr at 20).

DISCUSSION

A party moving for summary judgment bears the burden of "mak[ing] a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "facts must be viewed in the light most favorable to the non-moving party" (*Bazdaric v Almah Partners LLC*, 41 NY3d 310, 316 [2024] [internal quotation marks and citation omitted]). If the moving party meets its prima facie burden, "the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for [its] failure so to do" (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

As a threshold matter, plaintiff does not oppose the dismissal of the complaint's Labor Law §240(1) claim (NYSCEF Doc No. 656 at 4; NYSCEF Doc No. 623, Warywoda affirmation, ¶1; NYSCEF Doc No. 625, ¶1; NYSCEF Doc No. 629, Warywoda affirmation, ¶1). Accordingly, the Labor Law §240(1) claim is dismissed as abandoned (*see Linares v Massachusetts Mut. Life Ins. Co.*, 225 AD3d 520, 521 [1st Dept 2024]).

Plaintiff also does not oppose that part of the LCOR Defendants' motion seeking the dismissal of the complaint as against LCOR Bank and LCOR (NYSCEF Doc No. 625, Warywoda affirmation, ¶ 1) and the complaint against LCOR Bank and LCOR is also dismissed as abandoned (*see Linares*, 225 AD3d at 521). In light of the foregoing, the cross-claims pleaded against LCOR Bank and LCOR are dismissed (*see Digirolomo v 160 Madison Ave LLC*, 194 AD3d 640, 641 [1st Dept 2021]), leaving WP North Tower, LLC ("WP North") and LRC Construction LLC ("LRC") as defendants.

WP North and LRC's Motion for Summary Judgment Dismissing Complaint and Cross-claims

WP North and LRC's motion for summary judgment dismissing the complaint and cross-claims against them is denied. The motion is denied as to plaintiff's Labor Law §200 claims. Labor Law §200 codifies "the common-law duty imposed upon an owner or general contractor to maintain a safe construction site" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]). Labor Law §200 and common-law negligence claims can arise from a dangerous premises condition, the means and methods of how the work was performed, or both (*see Moore v URS Corp.*, 209 AD3d 438, 440 [1st Dept 2022]). Where, as here, the injury results from a dangerous premises condition, liability may be imposed if the owner or general contractor "has control over the work site and actual or constructive notice of the dangerous condition" (*Villanueva v O'Mara Org., Inc.*, 204 AD3d 557, 558 [1st Dept 2022]; *Cappabianca v Skanska USA Bldg., Inc.*, 99 AD3d 139, 144 [1st Dept 2012]). While WP North and LRC contend that summary judgment is appropriate because they lacked actual and constructive notice of the uncovered hole, they have failed to support this claim with evidence of the length of time during which the floor penetration was uncovered and the last inspection of that area prior to the accident (*see Padilla v Touro Coll.*

Univ. Sys., 204 AD3d 415, 416 [1st Dept 2022]; *DeLeo v JP Morgan Chase & Co.*, 199 AD3d 482, 483 [1st Dept 2021]).

The motion is also denied as to plaintiff's Labor Law §241(6) claim. "Labor Law §241(6) imposes on owners, general contractors, and their agents a nondelegable duty to provide 'reasonable and adequate protection' to workers engaged in construction, demolition, and excavation activities by complying with Industrial Code regulations that specify concrete safety directives, regardless whether they exercised supervision or control over the work" (*Lapinsky v Extell Dev. Co.*, 202 AD3d 478, 479 [1st Dept 2022] [internal citations omitted]; *see also Rizzuto* at 348). To establish a defendant's liability under Labor Law § 241(6), a plaintiff "must prove that defendants violated a rule or regulation of the Commissioner of Labor that sets forth a specific standard of conduct" which violation proximately caused plaintiff's injuries (*Cammon v City of New York*, 21 AD3d 196, 198 [1st Dept 2005] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-505 [1993]). Here, plaintiff relies on Industrial Code §23-1.7(e)(1), which provides that: "All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered" (Industrial Code §23-1.7[e][1]). There is no dispute that Industrial Code §23-1.7(e) is "sufficiently concrete and specific in its requirements to support" a Labor Law § 241(6) claim (*Smith v McClier Corp.*, 22 AD3d 369, 370 [1st Dept 2005]).

WP North and LRC argue that this Industrial Code provision is not implicated in plaintiff's accident because that accident did not take place in a passageway. "A passageway for purposes of this regulation 'mean[s] a defined walkway or pathway used to traverse between discrete areas as opposed to an open area'" (*Smith v Extell W. 45th LLC*, 230 AD3d 1044, 1045 [1st Dept 2024],

quoting *Quigley v Port Auth. of N.Y. & N.J.*, 168 AD3d 65, 67 [1st Dept 2018]). WP North and LRC contend that plaintiff's testimony that the seventh floor was a space with columns and no other structural elements establishes that he tripped in an open area rather than a passageway. However, plaintiff's testimony that he fell in a "pathway" created by stacked materials that he had to traverse to access his work area, when "[v]iewed in the light most favorable to plaintiff," is sufficient to "establish[] that the accident occurred in a 'passageway' within the meaning of Industrial Code §23-1.7(e)(1)" (*Lois v Flintlock Constr. Servs., LLC*, 137 AD3d 446, 448 [1st Dept 2016]). Accordingly, a question of fact remains on this point (*see Prevost v One City Block LLC*, 155 AD3d 531, 535 [1st Dept 2017] ["As the Industrial Code does not provide a formal definition of "passageway," the practical function of the area where plaintiff fell is a question to be addressed by the trier of fact"]).

However, that branch of the LCOR Defendants' motion for summary judgment dismissing the contractual indemnification cross-claims asserted against it is granted, as no party has produced a written agreement obligating the LCOR Defendants to indemnify Ecker, Parkview or Precision.

WP North and LRC's Motion for Summary Judgment on their Cross-claims

WP North and LRC's motion for summary judgment on their cross-claims for contractual indemnification against Ecker, Parkview and Precision is denied as to Ecker, as the LCOR Defendants did not plead a cross-claim against Ecker for contractual indemnification.

The motion is also denied as to Parkview and Precision. LRC's contracts with Parkview and Precision contain the same indemnification provision, which reads as follows:

> "To the fullest extent permitted by law, the Contractor and/or Vendor/Installer shall indemnify, hold harmless and defend WP North Tower, LLC (Owner) and all of its agents and employees and additional insured listed below from and against all claims, damages, losses and expenses including but not limited to attorneys' fees arising out of or resulting from the performance of the Agreement, provided that any such claims, damage, loss or expense (a) is attributable to bodily injury,

> sickness, disease or death, or to injury to or destruction of tangible property, including loss of use resulting therefore, and (b) is caused in whole or in part by any act or omission of Contractor and/or Vendor/Installer or anyone directly or indirectly employed by it or anyone for whose act it may be liable, regardless of whether it is caused in part by the negligent act or omission of Owner or any of its agents and employees. Notwithstanding the foregoing, Contractor and/or Vendor/Installer's obligation to indemnify Owner or any of its agents and employees for any judgment, decree, indication or arbitration award or settlement shall extend only to the percentage of negligence of Contractor and/or Vendor/Installer, anyone directly or indirectly employed by anyone for whose acts they may be liable in contributing to such claim, damages, loss and expenses in any and all claims against Owner or any of its agents or employees, by any employee of Contractor and/or Vendor/Installer, the indemnification obligation under this paragraph shall not be limited by any limitation on the amount or type of damages, compensation or benefits payable by or for Contractor and/or Vendor/Installer under Workers Compensation acts or other employee benefits …

(NYSCEF Doc No. 427, Parkview contract at 6; NYSCEF Doc No. 428, Precision contract at 6).

Although this provision does not violate General Obligations Law § 5-322.1 (*see Munoz v JDS Seagirt LLC*, 227 AD3d 578, 548 [1st Dept 2024]), no determination has been made that plaintiff's accident arose out of or resulted from the acts or omissions of Parkview or Precision (*see McKinney v Empire State Dev. Corp*., 217 AD3d 574, 576 [1st Dept 2023]). Accordingly, that part of the LCOR Defendants' motion for summary judgment on their cross-claim for contractual indemnification against Parkview and Precision is denied.

The motion is also denied as to WP North and LRC's cross-claims for breach of contract based upon its codefendants asserted failure to procure insurance. Once again, the LCOR Defendants' Answer did not plead such a cross-claim against Ecker. Moreover, although the LCOR Defendants furnished copies of the Parkview and Precision Contracts, they failed to submit admissible evidence that Parkview and Precision did not comply with this contractual provision (*see Dorset v 285 Madison Owner LLC*, 214 AD3d 402, 404 [1st Dept 2023] ["A party moving for summary judgment on its claim for failure to procure insurance meets its prima facie burden by … submitting, for example, copies of the contract requiring the procurement of insurance and

of correspondence from the insurer of the party against whom summary judgment is sought indicating that the moving party was not named as an insured on any policies issued"]).

Ecker's Motion for Summary Judgment

Ecker Window Corp.'s motion for summary judgment dismissing the complaint and the contribution and indemnification cross-claims asserted against it is granted. Ecker is not the owner or general contractor of the Project and has established that it not an agent of WP North or LRC under the Labor Law. A party "may be vicariously liable as an agent of the property owner [or general contractor] for injuries sustained under the statute … where the [party] had the ability to control the activity which brought about the injury" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005], citing *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]). Conversely, a party that does not function as an agent of an owner or general contractor is not a proper Labor Law defendant (*see Travalja* at 504; *DiBrino v Rockefeller Ctr. N., Inc.*, 230 AD3d 127, 131 [1st Dept 2024]). Ecker falls within the latter category. To the extent it was a materials supplier, it is not liable under the Labor Law (*see Gonzalez v Glenwood Mason Supply Co., Inc.*, 41 AD3d 338, 339 [1st Dept 2007]) and, in any event, the record reflects that it was not involved in the alleged failure to maintain or cover the floor penetration that led to plaintiff's injury (*id.*).

Contrary to Precision's argument in opposition, Ecker's contract with LRC, providing that "[Ecker] is responsible for its means and methods" and "shall provide all labor, and services of every kind necessary to complete the Work" (NYSCEF Doc No. 426, Ecker contract at 1), does not create an issue of fact on this point. Ultimately, the responsibility WP North or LRC delegated to Ecker through this contract was not related to the activity that allegedly caused plaintiff's injury (*compare Tighe v Hennegan Constr. Co., Inc.*, 48 AD3d 201, 202 [1st Dept 2008] [where electrician slipped on demolition debris, demolition subcontractor "unquestionably supervised the

work out of which the claims arose"] with *Keenan v Simon Prop. Group, Inc.*, 106 AD3d 586, 589 [1st Dept 2013] [control over plaintiff's vinyl lining installation was not delegated to Alert Glass where Alert Glass subcontracted responsibility for glass installation to a third party that hired plaintiff and Alert Glass's subcontract "did not state, or even reasonably imply, that the general contractor was delegating its responsibilities for supervising and controlling the work at the project to Alert Glass"]). Accordingly, Ecker's motion is granted and the complaint is dismissed as against it,[3] as are the cross-claims for contribution and indemnification asserted against it (*see Lucas v City of New York*, 236 AD3d 523 [1st Dept 2025]; *Vargas v 622 Third Ave. Co. LLC*, 233 AD3d 22, 27 [1st Dept 2024]).

Parkview's Motion for Summary Judgment

Parkview's motion for summary judgment dismissing the complaint is denied. Parkview has failed to establish that the Labor Law §200 and common-law negligence claims must be dismissed because it did not create or have actual or constructive notice of the uncovered floor penetration. Figueroa's personal log entry for February 27, 2017, a day before the accident, does not conclusively demonstrate that Parkview did not work on the seventh floor that day or in the days preceding the accident (*cf. Digirolomo*, 194 AD3d at 641 [granting summary judgment where Parkview could not have uncovered the floor penetration over which the plaintiff tripped because the opening was covered when Parkview last worked in the area and it did not perform any work there in the week prior to and on the day of the accident]). Moreover, while Strnad and Figueroa testified that Parkview was not working on the seventh floor on the date of the accident—but instead began dropping pipes from the seventh floor in late March 2017—and did not remove

[3] Ecker relies on a partially executed stipulation of discontinuance in support of its claim that it bears no liability to plaintiff (NYSCEF Doc No. 490, Feldman affirmation, exhibit A). The stipulation, however, is not enforceable as it has not been signed by all parties (*see* CPLR 3217 [a] [2]).

protection from a floor penetration or hole, or otherwise leave the area unattended, prior to the date of the accident, Cloidt's assertion that Parkview was lowering pipes from the seventh floor to the sixth floor at the time of the accident creates an issue of fact as to whether Parkview created the subject tripping hazard or was otherwise aware of it (*compare Fraser v Pace Plumbing*, 93 AD3d 616, 616-617 [1st Dept 2012] [issue of fact as to whether the defendant created the hole in the concrete floor and whether it removed the plywood cover] with *Digirolomo*, 194 AD3d at 641 [site safety inspector documented that the floor penetration was covered the day before and the day of the accident and Parkview established that it did not perform any work in the area in the week prior to and on the day of the accident]), the resolution of which will require credibility determinations inappropriate on this motion (*see Molina v Loft 124 Condominium*, 230 AD3d 1064, 1065 [1st Dept 2024]).

The Court does not credit Parkview's position that no claim lies under Labor Law §241(6) because a floor penetration is not a tripping hazard contemplated by 12 NYCRR 23-1.7(e)(1) (*see McCullough v One Bryant Park*, 132 AD3d 491, 492 [1st Dept 2015] [summary judgment denied where issue of fact as to, inter alia, whether uncovered drain hole in passageway constituted a tripping hazard under 12 NYCRR 23-1.7(e)(1)]).

Parkview has also failed to establish that keeping the floor penetration uncovered was integral to plaintiff's work. The "integral to the work" defense "applies only when the dangerous condition is inherent to the task at hand, and not … when a defendant or third party's negligence created a danger that was avoidable without obstructing the work or imperiling the worker" (*Bazdaric*, 41 NY3d at 320 [plastic covering placed over an escalator to protect it from damage was not deemed integral to the plaintiff's painting assignment, "particularly where a safer alternative would have accomplished the same goal"]). Here, plaintiff was tasked with moving

windows, and Parkview has not established that covering the floor penetration "would have been contrary to the objective of the work being performed" at that time (*Guzman-Saquisili v Harlem Urban Dev. Corp*., 231 AD3d 685, 686 [1st Dept 2024]; *Lourenco v City of New York*, 228 AD3d 577, 580 [1st Dept 2024] [accumulation of debris not inherent in or an integral part of the electrician's work]; *Tighe*, 48 AD3d at 202 [debris resulting from demolition was not a hazard inherent in the electrician's work]).

Given these outstanding issues of fact, Parkview is not entitled to dismissal of the contribution and indemnification cross-claims asserted against it[4] (*see McCullough*, 132 AD3d at 493).

Accordingly, it is

ORDERED that the branch of LCOR 55 Bank Street, LLC and LCOR Incorporated's motion for summary judgment dismissing the complaint and all cross-claims asserted against them is granted and the complaint and cross-claims are hereby dismissed as against them; and it is further

ORDERED that WP North Tower, LLC and LRC Construction LLC's motion for summary judgment dismissing the complaint and all cross-claims against them is granted, in part, to the extent that plaintiff's Labor Law 240(1) claim and 241(6) claim (except as predicated on 12 NYCRR 23-1.7(e)(1)) and the contractual indemnification cross-claims are dismissed as against WP North Tower, LLC and LRC Construction LLC, and is otherwise denied; and it is further

ORDERED that the branch of WP North Tower, LLC and LRC Construction LLC's motion for summary judgment on their cross-claims for contractual indemnification is denied; and it is further

[4] Contrary to plaintiff's position, the law of the case does not mandate the denial of Parkview's motion, as Parkview did not have a full and fair opportunity to litigate these issues in connection with plaintiff's prior motion for summary judgment (*see Roddy v Nederlander Producing Co. of Am., Inc.*, 15 NY3d 944, 946 [2010]).

ORDERED that Parkview Plumbing & Heating Inc.'s motion for summary judgment dismissing the complaint and all cross-claims against it is granted to the limited extent that plaintiff's Labor Law 240(1) claim and 241(6) claim (except as predicated on 12 NYCRR 23-1.7(e)(1)) are dismissed as against it, and is otherwise denied; and it is further

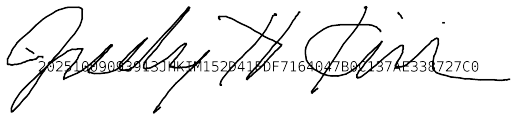
ORDERED that Ecker Window Corp.'s motion for summary judgment dismissing the complaint and all cross-claims against it is granted and the complaint and cross-claims are hereby dismissed as against it; and it is further

ORDERED that Precision Carpentry of Westchester, Inc.'s motion for summary judgment is withdrawn; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that plaintiff shall, within ten days of the date of this decision and order, serve a copy of same, with notice of entry, on all parties and the Clerk of the Court.

This constitutes the decision and order of the Court.



10/9/2025
DATE

HON. JUDY H. KIM, 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**