At an IAS Trial Term, Part 75 of the Supreme Court of the State of New York, Kings County, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 9th day of December 2025.

P R E S E N T: HON. ANNE J. SWERN, J.S.C.

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JERONE MALONE,

Plaintiff,

-against-

575 LEX PROPERTY OWNER, LLC, NORMANDY FUNDSUB MANAGEMENT CO. a/k/a COLUMBIA FUNDSUB MANAGEMENT CO., LLC and MAINSTREAM FLUID & AIR, LLC,

Defendants.

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DECISION & ORDER
Index No.: 500945/2020

Calendar No.: 23 & 24

Motion Seq.: 8 & 9

Return Date: 7/17/2025

Recitation of the following papers as required by CPLR 2219 (a):

		NYSCEF Papers Numbered
MS #8	Notice of Motion and Supporting Documentation	208-232
	Affirmations in Opposition and Supporting Documentation	232-233, 237-239
	Reply Affirmation and Affidavit	243-244
MS #9	Notice of Motion and Supporting Documentation	224-231
	Affirmations in Opposition and Supporting Documentation	240-242
	Reply Affirmation and Supporting Documentation	245-246

Upon the foregoing papers, the decision and order of the Court is as follows:

Introduction

Plaintiff Jerone Malone (plaintiff) has moved this Court for an order pursuant to CPLR § 3212 granting summary judgement pursuant to Labor Law § 240 (1) and Labor Law § 241 (6) against defendants 575 Lex Property Owner, LLC, and Normandy Fundsub Management Co. a/k/a Columbia Fundsub Management Co., LLC (575/Columbia) and Mainstream Fluid & Air, LLC (Mainstream) (MS#8).

Defendants, 575/Columbia (owners), have moved this Court for leave to file a late motion for summary judgment per CPLR 3212, and thereafter, grant summary judgment on the issue of contractual indemnification against defendant, Mainstream, the general contractor.

Facts

On November 9, 2019, plaintiff, a plumbing helper employed by subcontractor AJO Mechanical, Inc. ("AJO"), was injured on his first day at a construction site at 575 Lexington Avenue in Manhattan, New York, while assisting foreman Ante Setka (Setka) in hoisting a heavy pipe through a floor hatchway to the 36th floor of the building. The opposite end of the pipe dropped, causing plaintiff to fall 12-15 feet through the unguarded opening to the floor below, sustaining, *inter alia,* a L1-L3 transverse process fracture and lumbar spine injuries requiring laminectomy and facetectomy. The specific job on which plaintiff was working involved the demolition of old air-handling units (AHUs) and installation of new AHUs on the 36th floor.[1] Plaintiff asserts that railings, covers, harnesses, or other fall-protection equipment were not provided or available; that he had not been instructed to use fall-protection equipment; and he did not know any existed.

Setka confirmed that the site lacked any protective barriers or safety devices, and that plaintiff was never instructed to use fall protection equipment. Kenneth Stuber, representing the building owner, testified that Mainstream was the general contractor, and the property manager/agent, Normandy FundSub, did not supervise subcontractors or supply safety equipment. The hatchway, normally covered by metal doors, was uncovered at the time. Moreover, James Markham, president of Mainstream, confirmed that as the general contractor, he oversaw the project and hired the subcontractors, but was not present during the incident and gave no safety instructions. Mario Cavallone, the owner of Airside Sheet Metal, Inc. (Airside), testified that his company brought lifelines for its own workers but did not supply any to AJO's employees and was not present at the time of the accident.

Legal Arguments

a) Plaintiff's Motion for Summary Judgment on Liability (MS 8)

Plaintiff moves for summary judgment under Labor Law § 240 (1) and § 241 (6), citing defendants' failure to provide safety devices required by the statute and Industrial Code § 23-1.7 (b),

[1] AJO subcontracted to perform plumbing work, *i.e.,* cutting/capping steam lines and installing piping, and Airside, subcontracted to demolish old AHUs and transport/assemble the new units.

which mandates covers, railings, or harnesses for hazardous openings. Plaintiff argues that the unprotected floor opening was the proximate cause of the fall and injuries. Accordingly, Labor Law §§ 240 (1) and 241 (6) impose strict liability against the owner and general contractor.[2]

The owners and property manager/agent argue that plaintiff's motion should be denied because a key factual dispute exists, *i.e.,* whether the work being performed was protected "repair" work under Labor Law §§ 240 (1) and 241 (6) or merely routine maintenance, which is not covered by these statutes. They assert that the building's AHUs were part of the original 1958 structure. These units were being replaced as part of large-scale but routine upkeep, not construction or repair. They emphasize that the plaintiff has the burden to show that his work qualified as a protected activity (*Esposito v NYC Indus. Dev. Agency*, 1 NY3d 526 [2003] and *Ferrigno v Jaghab*, 152 AD3d 650 [2d Dept 2017]). They also argue that replacing worn-out components in the ordinary course of a building's operation is routine maintenance. They contend this factual dispute alone precludes summary judgment. Further, the cases relied on by plaintiff are not controlling because they all involve construction-type work, not maintenance.

Mainstream, the general contractor who had the prime contract with the building owner to supply the new AHUs, also argues that it cannot be liable under §§ 240 (1) and 241 (6) because it did not supervise, control, or direct the injury-producing work. They maintain that their role was limited to manufacturing the AHUs and providing a technical consultant onsite to answer questions during installation, which was performed by two independent subcontractors: Airside (installation) and AJO Mechanical (plaintiff's employer). The general contractor asserts it did not provide safety devices, had no authority over the means and methods of the work, and could not stop the work. Therefore, it was not an "owner, contractor, or statutory agent" for Labor Law purposes. Further, Mainstream argues that

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[2] Plaintiff relies on the following cases: *Gordon v Eastern Ry. Supply, Inc*., 82 NY2d 555 [1993] (Owners/contractors have a non-delegable duty to provide safety devices for elevation-related risks); *Guaraca v West 25th Street Housing Development Fund Corp*., 226 AD3d 568 [1st Dept 2024] (A worker fell through an unprotected floor opening.); *Mejia v 69 Mamaroneck Road Corp.,* 203 AD3d 815 [2d Dept 2022] (A worker fell through a hole in a roof while disconnected from a lifeline.); and *Poulin v Ultimate Homes, Inc*., 166 AD3d 667 [2d Dept 2018], (A worker fell through an unguarded opening).

plaintiff's evidence that it was the "general contractor" is merely conclusory testimony by interested witnesses and insufficient to establish liability.

Although all defendants admit the basic factual background,[3] they dispute (i) plaintiff's characterizations that his work was a protected activity under §§ 240 (1) and 241 (6); (ii) that they were obligated to provide safety devices, and (c) their failure to do so was the proximate cause of plaintiff's accident.[4]

b) Owners' Motion for Summary Judgment on Contractual Indemnification (MS 9)

In support of the owners' request for leave to file a late motion for summary judgment, they explain that the delay was minimal and caused by the last-minute filing of plaintiff's motion, and that the issues of liability and indemnification are closely related, justifying consideration of the late motion. They emphasize that Mainstream, as the general contractor, was responsible for demolishing and installing the AHUs, selecting and supervising subcontractors, and determining how to move the equipment, including use of the hatchway. The testimony of the owner, general contractor and Airside, establish that Mainstream acted as the general contractor. The owners provided no supervision, equipment, or direction regarding the work or use of the hatchway. As such, the owners argue that they were not negligent and any liability to be imposed is purely vicarious under Labor Law §§ 240 (1) and 241 (6). They further argue that the contract between the owners and the general contractor contains a clear indemnification

[3] Defendants admit (1) ownership of the building, (2) the date of accident, (3) plaintiff was an employee of AJO helping to hoist a pipe through an unprotected 3×6-foot floor opening, and (4) that no guardrails or fall-protection devices were in place at the time of the accident.

[4] In Reply to the above, plaintiff contends that the AHU project was a major alteration and repair, not routine maintenance, as it involved replacing failing 1958 units, shutting down the HVAC system, welding, cutting and reconnecting pipes, and coordinating multiple trades over several days at a cost of $618,000. Plaintiff cites *Panek v County of Albany*, 99 NY2d 452 [2003]; *Prats v Port Authority of New York and New Jersey*, 100 NY2d 878 [2003]; and *Mananghayav v Bronx-Lebanon Center*, 165 AD3d 117 [1st Dept 2018]) (A large-scale system replacement is protected under Labor Law § 240 [1]). Further, Mainstream as the general contractor, was hired to oversee the project, supply labor, equipment, and materials, and select and contract with the two subcontractors while requiring them to carry insurance and enforce safety rules. Plaintiff argues that this authority, even if not exercised daily, makes the general contractor liable under § 240 (1) (*see Williams v Dover Home Improvement, Inc*., 276 AD2d 626 [2d Dept 2000]; *Badzio v East 680 Street Tenants*, 200 AD3d 591 [1st Dept 2021]; *Padilla v Plaza Park Owners Corp*., 165 AD3d 1272 [2d Dept 2018]; and *Tuccillo v Bovis Lend Lease, Inc*., 101 AD3d 625 [1st Dept 2012]). Finally, defendants concede that plaintiff fell through an unguarded floor opening without safety devices, and therefore liability under § 240 (1) and § 241 (6) is established.

clause requiring Mainstream to indemnify the owners for injuries arising from Mainstream's or its subcontractors' work. Under precedents such as *Velez v Tishman Foley Partners*, 245 AD2d 155, 156 [1st Dept 1997]; *Correia v Professional Data Mgt*., 259 AD2d 60 [1st Dept 1999]; and *Cedillo v Nautilus Realty*, 219 AD3d 1300 [2023], the owners contend that they are entitled to full contractual indemnification since they exercised no supervisory control and plaintiff was injured while performing work under the contract.

Mainstream argues two grounds in opposition to the owners' motion for contractual indemnification. First, the motion was untimely, filed three days after the court-ordered deadline. Their excuse that they waited to see if plaintiff would move for summary judgment does not constitute "good cause" and is legally insufficient under *Brill v City of New York*, 2 NY3d 648 [2004] and its progeny. The opposition argues that the motion cannot be treated as a cross-motion because it is directed not at plaintiff's Labor Law claims, but at a separate claim for indemnification against a different party. Second, even if the motion were considered, the general contractor argues that contractual indemnification is barred under GOL § 5-322.1 because the owners were negligent. Expert engineer Bernard Lorenz concluded that both the 1938 and 2014 New York City Building Codes and OSHA standards required a fixed guardrail around the floor hatch, and that the lack of such protection was a proximate cause of plaintiff's fall. The owners, as long-term operators of the building, had constructive notice of this longstanding defect and installed the required guardrail only after the accident, demonstrating its feasibility. The general contractor further contends that it was not a proper Labor Law defendant; it merely manufactured the AHUs and did not supervise or control the work or provide safety devices. Since the owners cannot show that they were free from negligence and the indemnity clause in their contract lacks limiting language such as "to the fullest extent permitted by law," Mainstream argues that summary judgment for contractual indemnification is unwarranted.

In reply, the owners argue that Mainstream's objection to their late motion is unpersuasive since it caused significant delays in serving its opposition papers thereby necessitating an adjournment of both summary judgment motions. They emphasize that Mainstream, as the general contractor, was responsible

for providing labor, materials, equipment, and supervising the work, including plaintiff's employer, and thus bore responsibility for site safety. They contend that OSHA standards apply only to employers, not building owners or managers, citing *Alberto v DiSano*. They also argue that the indemnification clause is valid under *Brooks v Judlau Contracting, Inc*., 11 NY3d 204, 209 [2008], because it requires Mainstream to indemnify only for its own negligence. Further, it is argued that indemnification is appropriate since liability arises solely under Labor Law § 240 (1) and Mainstream, the general contractor, supervised the work (*citing Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660 [2d Dept 2009]). Finally, their expert, Steven Zalben, states that under the 2014 New York City Building Code, worker safety, including guardrails, was the employer's responsibility. Therefore, the owners had no duty to install a guardrail at the hatch.

Discussion

a) Plaintiff's Motion for Summary Judgment is Granted (MS 008)

It is well settled that Labor Law § 240 (1) "imposes a nondelegable duty and absolute liability upon owners and contractors for failing to provide safety devices necessary for workers subjected to elevation-related risks" who engage in activities covered by the statute and "suffered an injury as a direct consequence of a failure to provide adequate protection" against such risks (*Soto v J. Crew, Inc.,* 21 NY3d 562, 566 [2013] [internal citations omitted]). Such activities include, *inter alia,* cleaning a building or structure *(id.*). However, not all cleaning activities come within the ambit of Labor Law § 240 (1). Routine maintenance and cleaning cannot be characterized as a covered activity under the statute if the task:

> (1) is routine, in the sense that it is the type of job that occurs on a daily, weekly, or other relatively frequent and recurring basis as part of the ordinary maintenance and care of commercial premises.
>
> (2) requires neither specialized equipment or expertise nor the unusual deployment of labor.

> (3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning, and
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> (4) in light of the core purpose of Labor Law § 240 (1) to protect construction workers, [it] is unrelated to any ongoing construction, renovation, painting, alteration, or repair project. (*Soto v J. Crew, Inc.,* 21 NY3d 568).

Finally, "the presence or absence of any one [factor] is not necessarily dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the other" (*Soto v J. Crew, Inc.,* 21 NY3d 569).

Here, plaintiff has established prima facie entitlement to summary judgment under Labor Law § 240 (1) and § 241 (6) because it is undisputed that he fell 12 to 15 feet through an unguarded floor opening while performing elevation-related work with no safety devices during construction and renovation activities. The absence of fall-protection safety devices was the proximate cause of the accident, and the building owner and general contractor are strictly liable irrespective of notice or supervision. Defendants' opposition that the work being performed was routine maintenance rather than construction and/or repair is without merit. The work involved the large-scale complete demolition and replacement of large air-conditioning mechanical equipment, which constitutes covered activity as a matter of law, and no triable facts exist to avoid liability (*Soto v J. Crew, Inc.,* 21 NY3d 566-568). This was a large-scale project requiring subcontractors with specialized equipment and expertise to complete the project and can hardly be said to constitute routine maintenance or repairs "that occur on a daily, weekly, or other relatively frequent and recurring basis as part of the ordinary maintenance and care of commercial premises" since the unit was installed in 1958 (*id.*).

b) Owners' Motion for Summary Judgment is Denied (MS 009)

The owners' motion for leave to file a late summary judgment motion seeking contractual indemnification is denied as untimely and lacking "good cause" shown (*See* CPLR 3212 [a] and *Brill*

[The explanation of waiting to see whether plaintiff would move is legally insufficient.]). The owners' motion was not a cross-motion against plaintiff, the initial movant, for related relief. Mainstream's delay in serving opposition after the late service of the owners' motion is irrelevant.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment on liability on Labor Law § 240 (1), Labor Law § 241 (6) and 23 NYCRR § 23-17.7 (b) (1) (i), (ii) and (iii) is GRANTED (MS 008) and the Clerk of the Court shall enter judgment accordingly (MS 008), and it is further

ORDERED that defendants', motion for summary judgment on the issue of contractual indemnification is DENIED in its entirety (MS 009).

This constitutes the decision and order of the Court.

E N T E R:

Hon. Anne J. Swern, J.S.C.
Dated: 12/9/2025

For Clerks use only:

MG _____

MD _____

Motion seq. # _____