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

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

***Justice***

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KIRK CHASE,

Plaintiff,

- v -

RETIREMENT SYSTEMS OF ALABAMA, NEW WATER STREET CORP., SIGNATURE RELOCATION LLC,HUGO BOSS FASHIONS, INC.,HUGO BOSS USA, INC., and HUGO BOSS RETAIL, INC.,

Defendants.

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**INDEX NO.** 150246/2023

**MOTION DATE** 06/30/2025

**MOTION SEQ. NO.** 001 002 003

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 73, 84, 85, 86, 87, 88, 89, 90, 91, 92, 98, 107, 108, 109, 110, 111, 112, 113, 119, 132

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74, 82, 93, 94, 95, 96, 97, 114, 115, 116, 117, 118, 126, 127, 128, 129, 130, 131, 133

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 75, 76, 77, 78, 79, 80, 81, 83, 99, 100, 101, 102, 103, 104, 105, 106, 120, 121, 122, 123, 124, 125, 134

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

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of defendants Retirement Systems of Alabama and New Water Street Corp. for summary judgment (motion sequence no. 001) is granted to the extent that the complaint and all cross-claims against defendant Retirement Systems of Alabama are dismissed, and the balance of the motion is otherwise denied; and it is further

ORDERED that the motion of defendants Hugo Boss Fashions, Inc., Hugo Boss USA, Inc. and Hugo Boss Retail, Inc. for summary judgment (motion sequence no. 002) is granted to the extent that the complaint and all cross-claims against defendants Hugo Boss Fashions, Inc., Hugo Boss USA, Inc. and Hugo Boss Retail, Inc. are dismissed; and it is further

ORDERED that the to the extent that it seeks summary judgment on their cross-claim for contractual indemnification against defendant New Water Street Corp., with the amount of the costs, expenses and liabilities, including reasonable attorneys' fees and disbursements that defendants Hugo Boss Fashions, Inc., Hugo Boss USA, Inc. and Hugo Boss Retail, Inc. may recover from defendant New Water Street Corp. to be determined at the time of trial or other disposition of this action, the foregoing motion of defendants Hugo Boss Fashions, Inc., Hugo Boss USA, Inc. and Hugo Boss Retail, Inc. is granted, and the balance of the motion is otherwise denied; and it is further

ORDERED that upon searching the record, plaintiff Kirk Chase's Labor Law §§ 200 and 376 claims against defendants New Water Street Corp. and Signature Relocation, LLC are dismissed; and it is further

ORDERED that to the extent that it seeks partial summary judgment against defendant Signature Relocation, LLC, that determines that such defendant is liable on plaintiff's common-

law negligence claim and dismissing such defendant's fourth, eighth, tenth, eleventh, and twelfth affirmative defenses, and the fourth, eighth, tenth, eleventh and twelfth affirmative defenses, the motion, pursuant to CPLR 3212, of plaintiff is granted, and defendant is liable to plaintiff on such claim, and the foregoing affirmative defenses are hereby dismissed, and the balance of the motion is otherwise denied; and it is further

ORDERED that the claims and cross-claims against defendants Retirement Systems of Alabama, Hugo Boss Fashions, Inc., Hugo Boss USA, Inc. and Hugo Boss Retail, Inc. are severed and dismissed, and the balance of the action shall continue against the remaining defendants; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants Retirement Systems of Alabama, Hugo Boss Fashions, Inc., Hugo Boss USA, Inc. and Hugo Boss Retail, Inc. dismissing the complaint and all cross-claims made against them in this action, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that, except as exhibits to motions or for demands for bills of particulars and responses thereto (as latter constitute an amplification of the pleadings), counsel shall refrain from posting on NYSCEF discovery demands or responses thereto, as same unnecessarily and improperly clutter the

docket, and should be exchanged among counsel only; see In Re Westchester Rockland Newspapers, Inc., 66 AD2d 335, 338 (2nd Dept 1979); and are **not for public viewing** on the official public court docket, and see also, Scollo v Good Samaritan Hosp, 175 AD2d 278, 279 (2d Dept 1991)("Pretrial discovery [exchanges]" "are not 'sittings of court'", "are conducted in private as a matter of modern practice", and "[are] not a public component of a trial"); and it is further

ORDERED that counsel shall appear via Microsoft Teams in IAS Part 14 for oral argument on papers finally submitted on mot seq no 004 on March 4, 2026, or any date thereafter that the justice presiding in IAS Part 14 designates.

DECISION

Motion sequence nos. 001, 002 and 003 are consolidated for disposition herein.

Plaintiff Kirk Chase brings this action to recover damages for personal injuries allegedly sustained on November 28, 2022, when a wood pallet fell and struck him.

In motion sequence no. 001, defendants Retirement Systems of Alabama (Retirement Systems) and New Water Street Corp. (New Water) (together, the Building Defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross-claims asserted against them and for summary judgment on their cross-claims for contractual indemnification and breach of

contract for failure to procure insurance against defendants Hugo Boss Fashions, Inc. (Fashions), Hugo Boss USA, Inc. and Hugo Boss Retail, Inc. (collectively, the Hugo Boss Defendants).

In motion sequence no. 002, the Hugo Boss Defendants move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross-claims asserted against them and for summary judgment on their cross-claims for contractual and common-law indemnification, contribution and breach of contract for failure to procure insurance against New Water.

In motion sequence no. 003, plaintiff moves under CPLR 3212 for partial summary judgment against defendant Signature Relocation, LLC (Signature) on the issue of Signature's liability and to dismiss its first, fourth, eighth, tenth, eleventh, and twelfth affirmative defenses.

**BACKGROUND**

New Water owns the commercial building located at 55 Water Street in New York County (the Building) (NY St Cts Elec Filing [NYSCEF] Doc No. 40, Scott Bridgwood [Bridgwood] aff, ¶ 1; NYSCEF Doc No. 50, Doug Gingold [Gingold] affirmation, exhibit J, Bridgwood tr at 10). The Building consists of 51 above-ground floors and three below-ground floors, including a "bottom" loading dock (NYSCEF Doc No. 50 at 65-67). Fashions occupies the Building's 48th floor and part of Sublevel 2 pursuant to a written lease with New Water dated November 21, 2014 (the Lease) (NYSCEF

Doc No. 70, Lauren M. Solari [Solari] affirmation, exhibit Q, Jennifer Fern Steindler Darling [Darling] aff, exhibit 1 at 1).

Nonparty Harvard Protection Services, LLC (Harvard) employed plaintiff as a security guard and assigned him to a post at the Building's "bottom" loading dock, where his duties included recording vehicles coming into the dock and directing drivers on where to park and what floor a delivery should be made (NYSCEF Doc No. 42, Gingold affirmation, exhibit B, ¶ 11; NYSCEF Doc No. 44, Gingold affirmation, exhibit D, plaintiff tr at 22-23). The accident occurred after an employee of Signature, a company making a delivery for "Hugo Boss," left a wood pallet standing upright on the loading dock floor (id. at 25-27). Plaintiff testified that he had come from the security hut to take down information for a vehicle that had come into the loading dock (*id.* at 69-70). The pallet was "just sitting there" (id. at 73). Plaintiff did not know long the pallet had been on the floor (id. at 25 and 73) and did not notice any issues with it before it fell onto his left leg (id. at 34). The impact did not knock him to the ground (id. at 35). No one directed the Signature employee to place the pallet in an upright position (id. at 99), and plaintiff never directed anyone to move it (id. at 115). No one complained to plaintiff about the pallet before the accident nor could he recall complaining to anyone about it (id.). When asked why the pallet fell, plaintiff responded, "I know the floors are uneven" (id. at

122). Plaintiff left the pallet on the ground after it fell and walked to the security hut to contact his supervisor, Dwayne Kelly (Kelly), who wrote a report (id. at 35 and 73). Plaintiff could not recall whether he made any complaints about pain to Kelly (id. at 36). Plaintiff could not recall whether he told anyone at Signature about the accident (id. at 74). Plaintiff finished his shift but "started to feel a little pain" (id.). He returned to work two days later (id.). Plaintiff testified that he had pain in his left hip and left knee and began to feel pain in his lower back and neck "a few weeks after" (id. at 39-40).

Bridgwood, New Water's Vice President of Operations, described the Building as a self-managed commercial building owned solely by New Water (NYSCEF Doc No. 50 at 7, 10, 52, and 69). His duties involved overseeing the Building's daily operations, including security and cleaning operations (id. at 7). New Water retained vendors to furnish certain services, like Harvard to provide security (id. at 14) and nonparty Guardian Cleaning Industry to provide cleaning and maintenance services (id. at 54 and 60).

Bridgwood testified that deliveries to the Building are received and unloaded in a below-ground loading dock (id. at 10-11). Bridgwood described the loading dock as "a common area if the tenant is going down there to have a vendor come in" (id. at 72). The Harvard security guard stationed at "the bottom dock

puts the vehicles in the parking spots, make[s] sure that they don't leave garbage behind and keep[s] things in a clean working safe condition" (id. at 22). Bridgwood added that the security guard was responsible for reporting dangerous conditions, like a tripping hazard, and "address[ing] it with the vendor" (id. at 61-62).

Bridgewood testified that "diamond" metal plates topped the concrete subfloor in the loading dock; the plates had been installed prior to Bridgwood's tenure (*id.* at 39-40). Other than routine daily cleaning, such as mopping and sweeping, no work has been performed on the floor (id.). Bridgwood walked the loading dock every day to reach his office (id. at 41 and 67). He was not aware of whether the floor bounced or vibrated as items were pushed across it (id. at 42). Bridgwood was not aware of any complaints about the floor and had never heard anyone complain about an uneven floor before the accident (id. at 60 and 81). Apart from this accident, the only other accident in the loading dock involved an electrician, who was injured on a truck (id. at 60).

Oscar Castillo (Castillo), Senior Facilities Manager at Hugo Boss' corporate headquarters, testified that his duties included dealing with "in bound and out bound deliveries" (NYSCEF Doc No. 48, Gingold affirmation, exhibit H, Castillo tr at 11). Hugo Boss generally requests "inside delivery," meaning deliveries arriving at the loading dock are transported directly to the 48th floor

(*id.* at 21-22). Hugo Boss employees rarely retrieved deliveries from the loading dock and only when "they say to us only loading dock, not, quote unquote, inside delivery" (id. at 21-22). Castillo testified that Hugo Boss does not send anyone to inspect or maintain the loading dock when deliveries arrive (id. at 19 and 41). Signature delivers furniture for Hugo Boss (id. at 18). Castillo explained that he has never been present and was unaware of any Hugo Boss employee having present when Signature has made a delivery at the loading dock (id. at 18-19).

According to the bill of lading, Signature delivered three pieces and rug skids to Hugo Boss on the date of the accident (id. at 24-26). Castillo testified that he sent temporary employee David McKenzie (McKenzie) to the loading dock after he had been told that someone had left packing materials there (*id.* at 36). Castillo identified McKenzie as a person depicted in surveillance footage capturing the accident (id. at 27 and 37), and testified that after viewing the footage, he did not see the white bin McKenzie was holding come into contact with the pallet that fell onto plaintiff (id. at 37-38). Castillo never spoke to McKenzie about the accident (id. at 38).

Kimberly Beuther (Beuther) testified that she worked as an office manager at Signature, a commercial storage company (NYSCEF Doc No. 46, Gingold affirmation, exhibit F, Beuther tr at 7-8). Beuther testified that Signature had previously made deliveries to

Hugo Boss at the Building and had worked with Castillo on those deliveries (id. at 12-13). According to the bill of lading, Signature's job on the date of the accident entailed transporting fixtures to the Building and to "uncrate and place as requested" (id. at 13). Beuther testified that three Signature employees, Joseph Medina, Brandon Medina and Stephen Barth (Barth), delivered the items that day (id. at 19-20), and that Signature was responsible for removing and disposing of shipping crates and packaging materials from its deliveries (*id.* at 16 and 39). Beuther stated, "we actually were working for another company, and Hugo Boss was the end receiver," "we were actually contracted by DN Van Lines," and "we would have subcontracted with a third party … Schaeffer Trans" (id. at 48). Beuther testified that she first learned of the accident when plaintiff brought the instant action (id. at 26). When shown two videos of the incident, she could not state whether the object that fell on plaintiff was part of a pallet or a crate of if it came from part of the Hugo Boss delivery (id. at 33). She identified Barth as the person handling the pallet or crate (id. at 34-35).

According to plaintiff, the videos he was shown at his deposition accurately represented the accident (NYSCEF Doc No. 44 at 32). The surveillance footage depicted a Signature employee, later identified as Barth (NYSCEF Doc No. 47, Gingold affirmation, exhibit G, ¶¶ 3-4), moving a wood pallet off a wheeled dolly onto

the floor and placing it in an upright position (NYSCEF Doc No. 79, Straub affirmation, exhibit C). Barth walked away from the pallet, leaving it unattended, to help two other workers with a large item (id.). Plaintiff is seen walking towards the pallet before coming to a stop next to it (id.). At that time, a Hugo Boss employee, identified as McKenzie, wheeled a white bin towards the area where plaintiff is standing (id.). The footage does not show the bin coming into contact with the pallet at any time (NYSCEF Doc Nos. 77-78, Straub affirmation, exhibits A-B). The pallet then fell over and struck plaintiff below his left hip (NYSCEF Doc Nos. 77-79). Plaintiff remained standing after the impact (id.).

Plaintiff commenced this action against defendants asserting claims for negligence and for violations of Labor Law §§ 200 and 376 (NYSCEF Doc No. 54, Scolari affirmation, exhibit A). In his verified bill of particulars, plaintiff claims that defendants failed to maintain the Building in reasonably safe condition and were negligent "in causing, placing, allowing, suffering and/or permitting the subject heavy wooden pallet to be left on its side, freestanding and unsecured" and "in failing to adequately and properly secure and/or brace said heavy wooden pallet to prevent it from falling and striking plaintiff" (NYSCEF Doc No. 42, ¶ 3). Plaintiff further alleges that defendants were negligent in "failing to have stable and secure flooring on the loading dock

and loading dock area" and had allowed the loading dock floor to "bounce, move and vibrate when under pressure, stress, and when people and objects move or are moved upon it" (id.). The Building Defendants interposed cross-claims for contribution, common-law and contractual indemnification, and insurance coverage against Signature and the Hugo Boss Defendants (NYSCEF Doc No. 56, Solari affirmation, exhibit C). The Hugo Boss Defendants pleaded cross-claims for contribution, common-law and contractual indemnification, and breach of contract for failure to procure insurance against the Building Defendants and Signature (NYSCEF Doc No. 57, Solari affirmation, exhibit D). Signature asserted cross-claims for contribution, contractual indemnification, and a "*Kinney* claim" with respect to insurance against the Building Defendants and the Hugo Boss Defendants (NYSCEF Doc No. 58, Solari affirmation, exhibit E).

The Building Defendants and the Hugo Boss Defendants move separately for summary judgment, and plaintiff moves for partial summary judgment against Signature.

**DISCUSSION**

The proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). If the moving party meets its prima facie

burden, the opposing party must "'produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action'" (Carlson v Colangelo, 44 NY3d 116, 124 [2025], rearg denied 44 NY3d 986 [2025] [citation omitted]). The moving party's failure to meet its prima facie burden warrants denial of the motion, rendering it "unnecessary to review the sufficiency of the … opposition papers" (Pullman v Silverman, 28 NY3d 1060, 1063 [2016]).

I. Labor Law § 200

The Hugo Boss Defendants contend that Labor Law § 200 is inapplicable because plaintiff was neither employed in construction nor engaged in a protected activity at the time of the accident.

Labor Law § 200 "codifies the common-law duty of an owner or employer to provide employees with a safe place to work" (Jock v Fien, 80 NY2d 965, 967 [1992]). An employee "means a mechanic, workingman or laborer working for another for hire" (Labor Law § 2 [5]). The Hugo Boss Defendants have shown that plaintiff, a security guard, "does not fall within the class of workers protected by the Labor Law" (Sakthivel v Industrial Staffing Co., LLC, 212 AD3d 419, 420 [1st Dept 2023], *lv denied, appeal dismissed* 43 NY3d 958 [2025]; Kuffour v Whitestone Constr. Corp., 94 AD3d 706, 707 [2d Dept 2012] [dismissing Labor Law §§ 200, 240 (1) and 241 (6) claims because a security guard "was not a person entitled

to the protection of those statutes"]). Plaintiff failed to address this claim in his opposition, and thus, the Labor Law § 200 claim is dismissed as abandoned (see AWL Indus., Inc. v New York City Hous. Auth., 237 AD3d 596, 597 [1st Dept 2025]). Upon searching the record (*see* CPLR 3212 [b]), the court grants summary judgment dismissing the Labor Law § 200 claim against the remaining defendants.

II. Labor Law § 376

The Hugo Boss Defendants observe that Labor Law § 376 is inapplicable to the facts because the statute pertains to mercantile establishments and restaurants.

Labor Law § 376 specifies that "[e]very mercantile establishment and restaurant shall be so constructed, equipped and maintained as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein." Labor Law § 2 (11) defines a "mercantile establishment" as "a place where one or more persons are employed in which goods, wares or merchandise are offered for sale and includes a building, shed or structure, or any part thereof, occupied in connection with such establishment." A restaurant is "a business establishment where meals or refreshments may be purchased" (Merriam-Webster.com Dictionary, contaminant [https://www.merriam-webster.com/dictionary/restaurant). The Hugo Boss Defendants have demonstrated that Labor Law § 376 is inapplicable because the

loading dock and the Building are not mercantile establishments or restaurants (see Miki v 225 Madison Ave., LLC, 30 Misc 3d 1214[A], 2011 NY Slip Op 50065[U], *5 [Sup Ct, NY County 2011], affd 93 AD3d 407 [1st Dept 2012], lv denied 19 NY3d 814 [2012]; see also Senk v City Bank Farmers Trust Co., 108 F2d 630, 632 [2d Cir 1940] [Section 376 inapplicable where the health resort did not contain a mercantile establishment or a restaurant]). Plaintiff's opposition failed to address whether Labor Law § 376 applies, and thus, the claim is dismissed as abandoned (see AWL Indus., Inc., 237 AD3d at 597). Upon searching the record (see CPLR 3212 [b]), the court hereby grants summary judgment dismissing the Labor Law § 376 claim against the remaining defendants.

III. Common-Law Negligence

A cause of action for negligence requires a duty running from the defendant to the plaintiff, the defendant's breach, and damages proximately caused by the defendant's breach (Nellenback v Madison County, __NY3d__, 2025 NY Slip Op 02263, *1 [2025]). It is well settled that "[l]andowners generally owe a duty of care to maintain their property in a reasonably safe condition, and are liable for injuries caused by a breach of this duty" (Henry v Hamilton Equities, Inc., 34 NY3d 136, 142 [2019]). A defendant moving for summary judgment in an action arising out of an allegedly hazardous premises condition must demonstrate that it did not create or have actual or constructive notice of the condition (Ross v Betty G.

Reader Revocable Trust, 86 AD3d 419, 421 [1st Dept 2011]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (Gordon v American Museum of Natural History, 67 NY2d 836, 837 [1986]). The defendant establishes its lack of constructive notice by showing when the area was last cleaned or inspected prior to the accident (Ross, 86 AD3d at 421).

A. Retirement Systems

Retirement Systems, a shareholder in New Water, submits that it cannot be held liable because it did own, operate or manage the Building.

"Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises" (Gibbs v Port Auth. of N.Y., 17 AD3d 252, 254 [1st Dept 2005]). Retirement Systems has demonstrated its entitlement to summary judgment (see Lopez v Allied Amusement Shows, Inc., 83 AD3d 519, 519 [1st Dept 2011]) through Bridgwood's affidavit, in which he avers that Retirement Systems, a shareholder in New Water, does not own, manage or operate the Building (NYSCEF Doc No. 40, ¶ 1), and through Bridgwood's testimony that New Water is the Building's sole owner (NYSCEF Doc No. 50 at 69).

Plaintiff, in opposition, fails to address Retirement System's argument regarding its lack of ownership and control, and

he has not pleaded any allegations to suggest that New Water's corporate veil should be pierced so as to hold Retirement Systems accountable (see Hayden v 334 Dune Rd., 196 AD3d 634, 636 [2d Dept 2021] [granting summary judgment to an individual defendant where the "plaintiff failed to adduce evidence as to the existence of circumstances that would entitle him to pierce the corporate veil to impose personal liability on [defendant]"]; Lopez, 83 AD3d at 519 [no evidence that the defendant controlled the entity that provided and operated the slide]). Plaintiff, therefore, has failed to raise a triable issue of fact, and the complaint asserted against Retirement Systems is dismissed.

B. New Water

New Water contends that it did not create or have actual or constructive notice of a defect with the loading dock floor, and tenders affidavits from Bridgwood and mechanical engineer, Peter Chen (Chen), in support. Bridgwood avers that New Water did not instruct or supervise anyone on the placement and positioning of the pallet and had no notice that Signature would place the pallet on its side (NYSCEF Doc No. 40, ¶¶ 4-5). Bridgwood avers that the "floor. . . was solid and flat," New Water had never received a complaint about the floor, and New Water had never repaired the floor before the accident (id., ¶ 8). Chen conducted a site inspection of the loading dock on August 12, 2024 and reviewed surveillance video footage of the accident (NYSCEF Doc No. 51,

Gingold affirmation, exhibit K, Chen aff at 1 and 12). Chen opines that the "flooring on which the pallet was placed was reasonably flat and level" and "[t]here was no evidence of flooring failure or instability" (id. at 21). Chen more particularly states that the loading dock floor was "reasonably level, having slopes of 0.2, 0.2 and 0.6 degrees from east to west" (id. at 16). Chen further opines that the "sole proximate cause of the accident was placing the incident pallet on its edge" (id. at 22).

Plaintiff counters that certain of New Water's evidence is inadmissible. The Lease is not authenticated, and Chen's affidavit lacks a certificate of conformity. Next, plaintiff argues that New Water failed to submit evidence of when the loading dock floor was last cleaned or inspected before the accident. Last, plaintiff posits that there can be more than one proximate cause of accident, and plaintiff attributed the cause of the accident to the uneven floor.

As explained above, a defendant moving for summary judgment in an action involving a dangerous premises condition must show that it did not create or have actual or constructive notice of the condition (Ross, 86 AD3d at 421). In this case, New Water has failed to carry its prima facie burden. Plaintiff testified about the uneven condition of the floor, and New Water has not furnished any specific evidence of when the loading dock floor was last cleaned or inspected to show that this condition did not exist

(see Gomez v Samaritan Daytop Vil., Inc., 216 AD3d 456, 457-458 [1st Dept 2023]). In addition, Chen's affidavit, which was notarized in Connecticut, is inadmissible as it is not accompanied by a certificate of conformity, as required under CPLR 2309 (c)[1] (see De Los Santos v Carlyle House Inc., 227 AD3d 542, 542-543 [1st Dept 2024]). Generally, "the absence of a certificate of conformity 'is a mere irregularity, and not a fatal defect'" since "'authentication of the oathgiver's authority can be secured later, and given nunc pro tunc effect if necessary'" (Wager v Rao, 178 AD3d 434, 435 [1st Dept 2019], quoting Matapos Tech. Ltd. v Compania Andina de Comercio Ltda, 68 AD3d 672, 673 [1st Dept 2009]). New Water could have cured this defect in reply (*see* Khurdayan v Kassir, 223 AD3d 590, 591 [1st Dept 2024]) but failed to do so (see Attilio v Torres, 181 AD3d 460, 461 [1st Dept 2020]; *but* see Sebrow v Sebrow, 205 AD3d 563, 564 [1st Dept 2022]). Accordingly, the court is constrained to deny New Water's motion without regard to the sufficiency of the opposing papers.

C. The Hugo Boss Defendants

The Hugo Boss Defendants argue that the loading dock is a common area that New Water was responsible to maintain. They rely

[1] The court observes that Chen's affidavit does not contain the language set forth in the version of CPLR 2106 then in effect in September 2024, when the document was notarized (*see* CPLR 2106, as amended by L 2023, ch 559 § 1 [eff Jan. 1, 2024]; see Great Lakes Ins. SE v American S.S. Owners Mut. Protection & Indem. Assn. Inc., 228 AD3d 429, 429 [1st Dept 2024] [disregarding affirmation that lacked requisite language required by CPLR 2106]).

on an affidavit from Darling, Vice President, Legal Affairs and General Counsel, North America, for Hugo Boss USA, Inc. (NYSCEF Doc No. 70, ¶ 3), and the Lease. Darling avers that Hugo Boss USA, Inc. fully owns Hugo Boss Retail, Inc., and that Hugo Boss Retail, Inc. fully owns Fashions (id.). The Hugo Boss Defendants maintain their North American corporate headquarters at the Building (id., ¶ 4), where Fashions leases the 48th floor and part of Sublevel 2 from New Water (the Demised Premises) (NYSCEF Doc No. 49 at 1 [section 1.01]). According to section 4.05 (a) of the Lease, Fashions, as tenant, "shall keep the [Demised] Premises … in good condition" (*id.* at 38). The Lease obligated New Water, as landlord, to "operate, maintain, repair, and replace … all common and public service areas" (id. at 39 [Section 4.05 [b] [ii]).

Plaintiff counters that the Hugo Boss Defendants attempt to impermissibly pass the burden on summary judgment to him and maintains that triable issues of fact preclude granting the motion.

Here, the Hugo Boss Defendants have demonstrated that the loading dock does not form part of the Demised Premises and that the obligation to maintain it fell solely upon New Water (see Vivas v VNO Bruckner Plaza LLC, 113 AD3d 401, 402 [1st Dept 2014] [granting summary judgment to the defendant tenant where the location where the plaintiff fell was not part of the leased premises]). Thus, the Hugo Boss Defendants did not owe plaintiff a duty of care.

Plaintiff fails to raise a triable issue in opposition. Plaintiff maintains that the "Hugo Boss Defendants' employees' presence at the scene creates an issue of fact as to whether or not they caused and created the events that precipitated the pallet's falling over" (NYSCEF Doc No. 97, plaintiff mem of law, ¶ 12). Based on the video footage and the testimony, plaintiff concludes that it is reasonable to infer that the cart pushed by a Hugo Boss employee "hit the pallet, vibrated the floor, or otherwise caused the accident" (id., ¶ 15). These contentions are entirely speculative and are not supported by the record. When asked at his deposition whether the cart struck the pallet before it fell, plaintiff responded, "[n]o" (NYSCEF Doc No. 44 at 122). Plaintiff also fails to identify a specific excerpt from his deposition where he described the floor vibrating at any time, and on review of his testimony, plaintiff never stated that the loading floor ever vibrated at any time. The complaint as against the Hugo Boss Defendants is dismissed.

D. Signature

Plaintiff moves for partial summary judgment on the issue of Signature's liability, arguing that Signature launched an instrument of harm when its employee left the pallet unattended, and the pallet, which the employee had placed upright on the floor, fell on plaintiff. Plaintiff also moves for summary judgment

dismissing Signature's first, fourth, eighth, tenth, eleventh and twelfth affirmative defenses.

Signature opposes on the ground that plaintiff has failed to rule out his own comparative fault and New Water's and the Hugo Boss Defendants' role in contributing to the happening of the accident. Signature alleges that the security guidelines New Water developed for Harvard state that security personnel shall keep the loading dock safe and orderly and not allow deliveries to leave trash behind (NYSCEF Doc No. 102, Josephine R. Pinnock [Pinnock] affirmation, exhibit C at 4), but plaintiff's failure to maintain safety and order contributed to the happening of the accident. Signature also contends that had plaintiff stood farther away from the pallet, which he the accident would have occurred (NYSCEF Doc No. 99, Pinnock affirmation, ¶ 17). As to that part of the motion seeking dismissal of certain of its affirmative defenses, Signature argues that triable issues of fact exist. New Water and the Hugo Boss Defendants oppose and repeat that they are not liable to plaintiff.

It is well settled that a contractor does not owe a duty of care to noncontracting third parties except under three circumstances. A contractor may be held liable to a third party in tort:

> "(1) where the contracting party, in failing to exercise reasonable care in the performance of [its[ duties, 'launche[s] a force or

> instrument of harm'; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (Espinal v Melville Snow Contrs., 98 NY2d 136, 140 [2002] [citations omitted]).

Plaintiff focuses solely on the first Espinal exception. The first exception applies where a contractor, "while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk" (Church v Callanan Indus., 99 NY2d 104, 111 [2002]). Stated another way, "a contractor launches a force or instrument of harm where its affirmative act creates a dangerous condition" (Trawally v City of New York, 137 AD3d 492, 492 [1st Dept 2016]; accord Timmins v Tishman Constr. Corp., 9 AD3d 62, 69 [1st Dept 2004] [stating that the contractor must have "negligently created or exacerbated the dangerous condition that caused plaintiff's injury"]).

As applied here, plaintiff has demonstrated his entitlement to partial summary judgment as to Signature's liability. The video footage establishes that Signature's employee placed the pallet on the loading dock floor that later fell on plaintiff, thereby launching an instrument of harm (see Drummond v 450 Partners LLC, 210 AD3d 494, 494 [1st Dept 2022] [video footage captured defendant's employee placing the Masonite sheet on the floor before

the plaintiff tripped, making the floor less safe]; Tobola v 123 Washington, LLC, 195 AD3d 456, 457 [1st Dept 2021] [contractor's employee launched an instrument of harm where video footage showed that an employee negligently mopped or left a puddle of water on the floor on which the plaintiff slipped]; Jean-Francois v Port Auth. of N.Y. & N.J., 137 AD3d 450, 450 [1st Dept 2016] [television monitor the defendant had installed detached from a bracket on the wall and fell on plaintiff]).

Signature's contention that plaintiff's comparative fault precludes him from obtaining partial summary judgment is without merit (see Rodriguez City of New York, 31 NY3d 312, 315 [2018]). Likewise, any issues concerning New Water's and the Hugo Boss Defendants' actions have no bearing on Signature's liability, as those issues can be resolved by way of contribution between them (see CPLR 1401).

As for that part of plaintiff's motion seeking summary judgment dismissing Signature's first (failure to state a claim), fourth (culpable conduct), eighth (assumption of risk), tenth (lack of privity), eleventh (sole proximate cause) and twelfth (no duty owed to plaintiff), plaintiff bears the burden of demonstrating that the affirmative defenses lack merit (see Munoz v City of New York, 237 AD3d 582, 583 [1st Dept 2025]).

Regarding the first affirmative defense of failure to state a claim, "courts generally will not dismiss it unless all other

affirmative defenses are found to be legally insufficient" (Xerox Corp. v Travelers Cas. & Sur. Co. of Am., 225 AD3d 510, 515 [1st Dept 2024]). As plaintiff has not established that Signature's other defenses are not viable, the court declines to dismiss this defense.

The fourth affirmative defense alleges plaintiff's culpable conduct and the eleventh affirmative defense alleges that plaintiff was the sole proximate cause of the accident. "Because the record bears 'no indication that plaintiff … contributed in any way to the accident'" (Walcott v Wheels Inc., 235 AD3d 567, 568 [1st Dept 2025] [citation omitted]; Spielmann v 170 Broadway NYC LP, 187 AD3d 492, 494 [1st Dept 2020] [dismissing comparative negligence defense where the defendant failed to explain how the plaintiff was negligent]), the fourth and eleventh affirmative defenses are dismissed.

"The defense of assumption of risk is 'limited to cases appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic and recreative activities, or athletic and recreational pursuits that take place at designated venues'" (Munoz, 237 AD3d at 583 [citation omitted]). As plaintiff's accident did not involve a sporting or recreational activity, Signature's eighth affirmative defense is dismissed.

Signature pleads lack of privity as a tenth affirmative defense. As this action does not involve a contract or quasi-

contractual claim or any other claim where privity between the parties is an element of such claim, the tenth affirmative defense is dismissed.

As Signature owed plaintiff a duty of care, discussed earlier, its twelfth affirmative defense asserting that it did not owe plaintiff a duty of care is dismissed.

IV. Contribution

CPLR 1401 provides for contribution between "two or more persons who are subject to liability for damages for the same personal injury."

Since Retirement Systems and the Hugo Boss Defendants were not negligent, all cross-claims for contribution against them are dismissed (see Vargas v 622 Third Ave. Co. LLC, 233 AD3d 522, 526 [1st Dept 2024]; Dixon v Afternoon Delight Fifth Ave. Assoc., LLC, 233 AD3d 437, 438 [1st Dept 2024]). Retirement Systems' and the Hugo Boss Defendants' cross-claims for contribution against New Water and Signature are also dismissed (see Ghodbane v 111 John Realty Corp., 210 AD3d 498, 499 [1st Dept 2022]). As for New Water, it has failed to demonstrate its freedom from negligence (see Hangan v Edgewater Park Owners Coop., Inc., 233 AD3d 510, 511 [1st Dept 2024]). Accordingly, New Water is not entitled to dismissal of the common-law indemnification cross-claim pleaded against it by Signature, the sole remaining defendant.

V. Common-Law Indemnification

"Implied[, or common-law,] indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other" (McCarthy v Turner Constr., Inc., 17 NY3d 369, 375 [2011] [internal quotation marks and citation omitted]). A party seeking common-law indemnity must "show that it has been held vicariously liable without any proof of negligence on its part, and that the proposed indemnitor was negligent" (Dixon, 233 AD3d at 439).

As there is no basis for imposing tort liability against Retirement Systems and the Hugo Boss Defendants, all cross-claims for common-law indemnification against them are dismissed (see Vargas, 233 AD3d at 526), and Retirement Systems' and the Hugo Boss Defendants' cross-claims for common-law indemnification from New Water and Signature are dismissed (*see Ghodbane*, 210 AD3d at 499). New Water has failed to demonstrate its freedom from negligence, and therefore, it is not entitled to dismissal of the common-law indemnification cross-claim asserted by Signature against it (see Hangan, 233 AD3d at 511).

VI. Contractual Indemnification

New Water and the Hugo Boss Defendants both seek summary judgment against each other on their cross-claims for contractual indemnification.

The indemnification clauses appear in section 6.12 of the Lease. Section 6.12 (a) (i) states that New Water shall not be liable to Fashions for "any loss, injury or damage … to any other person, … irrespective of the cause of such injury, damage or loss," provided that such loss is not the result of New Water's negligence "in the operation or maintenance of the [Demised] Premises or the Building" (NYSCEF Doc No. 70 at 57). Under Section 6.12 (b), except for New Water's own negligence, Fashions shall indemnify New Water from all claims arising out of "(iii) any accident, injury or damage occurring in, at or upon the [Demised] Premises (or outside the Premises if arising from or in connection with Tenant's installations in, or use of, areas outside the [Demised] Premises)," including New Water's reasonable attorneys' fees and disbursements (id. at 57-58). Under 6.12 (c), except for Fashions' own negligence, New Water shall indemnify Fashions from all claims arising from "(i) the conduct or management of the public and common areas of the Project … or any condition created, in or about the public and common areas of the Project …, [and] (iii) any accident, injury or damage occurring in, at or upon the

public and common areas of the Project," including Fashions' reasonable attorneys' fees and disbursements[2] (id. at 58).

"'The right to contractual indemnification depends upon the specific language of the contract'" (Trawally, 137 AD3d at 492-493 [citation omitted]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (Hooper Assoc. v AGS Computers, 74 NY2d 487, 491 [1989]).

As applied here, Fashions has demonstrated its entitlement to contractual indemnification from New Water (see Welliver v T-C the Colo., *LLC*, 238 AD3d 579, 581 [1st Dept 2025]). It is not disputed that the accident occurred in the loading dock, the loading dock is a common area, and the Lease required New Water to maintain all common areas. Furthermore, Fashions has shown that it was not negligent, supra. Thus, under the plain language in section 6.12 (c), Fashions is entitled to recover from New Water all costs, expenses and liabilities it reasonably incurred in connection with plaintiff's claim, including its reasonable attorneys' fees and disbursements. New Water's motion for summary judgment dismissing the Hugo Boss Defendants' cross-claim for contractual indemnity

[2] The Lease defines "Project" to mean both the Building and the land on which it sits, including adjacent plazas, sidewalks and curbs (NYSCEF Doc No. 70 at 1).

and for summary judgment in its favor on its cross-claim for contractual indemnity against them is denied, and New Water's cross-claim for contractual indemnity against them is dismissed. The court searches the record (*see* CPLR 3212 [b]) to grant summary judgment dismissing the cross-claims for contractual indemnification asserted by the Hugo Boss Defendants and Retirement Systems against each other.

VII. Breach of Contract for Failure to Procure Insurance

New Water and the Hugo Boss Defendants both seek summary judgment against each other on their cross-claims for contractual indemnification.

Section 7.02 in the Lease requires Fashions to purchase and maintain an all risk property insurance policy and a commercial general liability insurance policy naming New Fashions as an additional insured (NYSCEF Doc No. 70 at 59). Section 7.06 requires New Water to purchase and maintain insurance "against loss or damage by fire and other casualty to the Building" and a commercial general liability insurance policy for the Project (id. at 64).

"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]). This requires the movant to furnish "testimonial

or documentary evidence" (Lucas v City of New York, 236 AD3d 523, 526 [1st Dept 2025]), like "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" (*Dorset v 285 Madison Owner LLC*, 214 AD3d 402, 404 [1st Dept 2023]). A claim for breach of contract for failure to procure insurance is not duplicative of a contractual indemnity claim (Robles v 635 Owner, LLC, 192 AD3d 604, 605-606 [1st Dept 2021], citing Kinney v Lisk Co., 76 NY2d 215, 218 [1990]).

Under these precepts, New Water has failed to meet its prima facie burden as it has not furnished any evidence demonstrating Fashions' breach of the insurance procurement provision (see Lucas, 236 AD3d at 526). The Hugo Boss Defendants, likewise, failed to furnish any evidence of New Water's noncompliance with section 7.06 or that the provision required New Water to obtain insurance for their benefit. The court, however, searches the record (*see* CPLR 3212 [b]) to grant summary judgment dismissing so much of this cross-claim asserted by Hugo Boss USA, Inc. and Hugo Boss Retail, Inc. against New Water, as the preamble to the Lease defines "Tenant" to mean Fashions (NYSCEF Doc No. 70 at 1), and neither Hugo Boss USA, Inc. nor Hugo Boss Retail, Inc. are parties to the Lease (see Simon v 4 World Trade Ctr. LLC, __AD3d__, 2025 NY Slip Op 05655, *1 [1st Dept 2025]). Based on the language in

section 7.02, the court searches the record (*see* CPLR 3212 [b]) to grant summary judgment dismissing the breach of contract cross-claims asserted by Retirement Systems and the Hugo Boss Defendants against each other.

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DEBRA A. JAMES, J.S.C.

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| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |