

Crisostomo v 30 Park Place Residential LLC
2025 NY Slip Op 35470(U)
March 3, 2025
Supreme Court, Queens County
Docket Number: Index No. 716627/18
Judge: Timothy J. Dufficy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

-----X
MIGUEL CRISOSTOMO,

Plaintiff,

-against -

Index No.: 716627/18

Mot. Date: 10/8/24

Mot. Seq.: 4 and 5

**30 PARK PLACE RESIDENTIAL LLC, 30 PARK
PLACE RETAIL LLC, 30 PARK PLACE GARAGE
LLC, 30 PARK PLACE HOTEL, LLC, SILVERSTEIN
PROPERTIES, INC., TISHMAN CONSTRUCTION
CORPORATION, TISHMAN CONSTRUCTION
CORPORATION OF NEW YORK and
ALMAR PLUMBING & HTG. CORP.,**

Defendants.

-----X
**30 PARK PLACE RESIDENTIAL LLC, 30 PARK
PLACE RETAIL LLC, 30 PARK PLACE GARAGE
LLC, 30 PARK PLACE HOTEL, LLC, SILVERSTEIN
PROPERTIES, INC., TISHMAN CONSTRUCTION
CORPORATION, TISHMAN CONSTRUCTION
CORPORATION OF NEW YORK,**



Third-Party Plaintiffs,

-against-

KSW MECHANICAL SERVICES, INC.,

Third-Party Defendant.

-----X
**30 PARK PLACE RESIDENTIAL LLC, 30 PARK
PLACE RETAIL LLC, 30 PARK PLACE GARAGE
LLC, 30 PARK PLACE HOTEL, LLC, SILVERSTEIN
PROPERTIES, INC., TISHMAN CONSTRUCTION
CORPORATION, TISHMAN CONSTRUCTION
CORPORATION OF NEW YORK,**

Second Third-Party Plaintiffs,

-against-

BABCO INCORPORATED,

Second Third-Party Defendant.

-----X
**30 PARK PLACE RESIDENTIAL LLC, 30 PARK
 PLACE RETAIL LLC, 30 PARK PLACE GARAGE
 LLC, 30 PARK PLACE HOTEL, LLC, SILVERSTEIN
 PROPERTIES, INC., TISHMAN CONSTRUCTION
 CORPORATION, TISHMAN CONSTRUCTION
 CORPORATION OF NEW YORK,**

Third Third-Party Plaintiffs,

-against-

INDUSTRIAL SOLUTIONS OF NY, INC.,

Third Third-Party Defendant.

-----X
 The following numbered papers read on the motion by plaintiff Miguel Crisostomo (plaintiff), for partial summary judgment pursuant to CPLR 3212, against defendants/third-party plaintiffs/second third-party plaintiffs/third third-party plaintiffs 30 Park Place Residential LLC, 30 Park Place Retail LLC, 30 Park Place Garage LLC, 30 Park Place Hotel, LLC, Silverstein Properties, Inc., Tishman Construction Corporation, and Tishman Construction Corporation of New York (collectively referred to as defendants), with respect to the issue of liability only on the causes of action brought under Labor Law §§ 240 (1) and 241 (6), and for summary judgment only against 30 Park Place Residential LLC, 30 Park Place Retail LLC, 30 Park Place Garage LLC, 30 Park Place Hotel, LLC, on the causes of action brought under Labor Law § 200 and common law negligence (Motion Sequence No. 4); and, by separate notice of motion by defendants along with third-party defendant KSW Mechanical Services, Inc. (KSW), for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's complaint against defendants, for relief pursuant to CPLR 3123 dismissing plaintiff's negligence claims and Labor Law § 200 claims, for summary judgment pursuant to CPLR 3212, dismissing plaintiff's cause of action brought under Labor Law § 240 (1), in its entirety, for summary judgment pursuant to CPLR 3212, dismissing plaintiff's causes of action brought under Labor Law § 241 (6), and dismissing all counterclaims and cross-claims (Motion Sequence No. 5).

**PAPERS
 NUMBERED**

Motion Seq. No. 4

Notice of Motion-Affidavits-Exhibits.....	EF 122-155
Opposition Papers (Defendants).....	EF 193-226
Affirmation in Reply.....	EF 235
Babco Inc. Opposition (Babco Inc.).....	EF 236-245
Affirmation in Reply.....	EF 250

Motion Seq. No. 5

Notice of Motion-Affidavits-Exhibits.....	EF 156-192
Opposition (Plaintiff).....	EF 232-234
Opposition Papers (Babco Inc.).....	EF 241-244
Affirmations in Reply-Exhibit.....	EF 247-249

As an initial matter, the motion by plaintiff, designated as Motion Sequence No. 4, and the motion by defendants, along with third-party defendant KSW Mechanical Services, Inc. (KSW), designated as Motion Sequence No. 5, are consolidated for purposes of disposition

Upon the foregoing papers it is ordered that both motions are denied.

This is an action to recover damages for personal injuries that the plaintiff allegedly sustained, on or about September 27, 2017, while he was working at premises located at 99 Church Street, in New York County, due to the violation of Labor Law §§ 200, 240 (1), 241 (6), and common-law negligence. Plaintiff has alleged that while he was descending an extension ladder, it moved and caused him to fall approximately ten feet to the ground below.

30 Park Place Residential LLC, 30 Park Place Retail LLC, 30 Park Place Garage LLC, and 30 Park Place Hotel, LLC were the alleged owners of the subject premises; Silverstein Properties, Inc. was allegedly the managing agent of the owners; and, Tishman Construction Corporation, and Tishman Construction Corporation of New York were allegedly the general contractors of the construction work at the premises. The action has been discontinued against defendant Almar Plumbing & Htg. Corp. (Almar).

Tishman Construction Corporation and Tishman Construction Corporation of New York allegedly hired KSW to install the HVAC system at the premises, while KSW allegedly retained second third-party defendant Babco Incorporated (Babco) to replace a motor in a cooling tower. Third third-party defendant Industrial Solutions of NY, Inc. (Industrial Solutions) was allegedly the plaintiff's employer at the time of the subject accident and an assignee of Babco. Following commencement of the action, the defendants commenced three third-party actions against KSW, Babco, and Industrial Solutions.

Plaintiff now moves for partial summary judgment against the defendants on the causes of action brought under Labor Law §§ 240 (1) and 241(6). Plaintiff has also moved for summary judgment against only 30 Park Place Residential LLC, 30 Park Place Retail LLC, 30 Park Place Garage LLC, 30 Park Place Hotel, LLC on the causes of action brought under Labor Law § 200 and common law negligence (Motion Sequence No. 4). Defendants and KSW have moved for, among other things, summary judgment

dismissing the complaint, and all counterclaims and cross-claims (Motion Sequence No. 5).

In order “ ‘[t]o grant summary judgment, it must clearly appear that no material and triable issue of fact is presented’ ” (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25 [2019], quoting *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). “ ‘Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable’ ” (*Matter of New York City Asbestos Litig.*, 33 NY3d at 25, quoting *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]).

On summary judgment, “facts must be viewed in the light most favorable to the non-moving party” (*Matter of New York City Asbestos Litig.*, 33 NY3d at 25 [internal quotes omitted]), and “the proponent of a summary judgment motion must make 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” (*Id.* at 25-26, quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

The Court will first address the defendants’ and KSW’s contention in support of their motion that 30 Park Place Retail LLC, 30 Park Place Garage LLC, 30 Park Place Hotel, LLC, Silverstein Properties, Inc., Tishman Construction Corporation, and Tishman Construction Corporation are improper labor law defendants inasmuch as these entities were not the owners or general contractors of the work at the premises.

Defendants and KSW further contend that: 30 Park Place Retail LLC, 30 Park Place Garage LLC, 30 Park Place Hotel, LLC, Silverstein Properties, Inc., and Tishman Construction Corporation did not execute any agreements for the performance of the construction work at the premises and did not have any role in the work; Tishman Construction Corporation was an unrelated entity, which was not involved in the work; and, Tishman Construction Corporation of New York was a construction manager and was not the general contractor for the work at the premises. The Court notes that the defendants and KSW have not addressed their contentions on these grounds to 30 Park Place Residential LLC.

“Labor Law §§ 240 (1) and 241 (6) impose liability for certain workplace safety violations upon owners, contractors, and their agents. ‘To hold a defendant liable as an agent of the general contractor or owner for violations of Labor Law §§ 240 (1) and

241 (6), there must be a showing that it had the authority to supervise and control the work that brought about the injury’ ” (*Woodruff v Islandwide Carpentry Contractors, Inc.*, 222 AD3d 920, 921 [2d Dept 2023], quoting *Fiore v Westerman Constr. Co., Inc.*, 186 AD3d 570 [2d Dept 2020]). “ ‘The determinative factor is whether the party had the right to exercise control over the work, not whether it actually exercised that right’ ” (*Woodruff v Islandwide Carpentry Contractors, Inc.*, 222 AD3d at 921, quoting *Navarra v Hannon*, 197 AD3d 474, 476 [2d Dept 2021]; see *Fiore v Westerman Constr. Co., Inc.*, 186 AD3d at 570). “[T]he term ‘owner’ is not limited to the titleholder of the property where the accident occurred and encompasses a person ‘who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit’ ” (*Scaparo v Village of Iliion*, 13 NY3d 864, 866 [2009], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]; see *Allan v DHL Express [USA], Inc.*, 99 AD3d 828, 830 [2d Dept 2012]).

The record contains, among other things: copies of the pleadings; the plaintiff’s deposition testimony; the deposition testimony of nonparty Brielle Gallenari (Gallenari), an employee of nonparty AECOM Tishman; the deposition testimony of nonparty Bobby Chen (Chen), an employee of Silverstein Properties, Inc.; a copy of a written “General Contractor Agreement,” dated June 2008, between nonparty 99 Church Street Investors, LLC, and Tishman Construction Corporation of New York; and, a copy of a deed, dated September 27, 2013.

The deed, dated September 27, 2013, has demonstrated that 30 Park Place Residential LLC, 30 Park Place Retail LLC, 30 Park Place Garage LLC, 30 Park Place Hotel, LLC, were owners of the subject premises at the time of the alleged accident. Chen testified that Silverstein Properties, Inc., was the developer of the project at the premises, and that, in that role, Silverstein Properties, Inc., among other things, hired the construction manager, the architect, the design team and procured financing.

Chen testified that the premises was originally owned by 99 Church Street Investors, LLC, under which the construction project at the premises began, and that ownership was eventually divided into four ownership entities, namely, 30 Park Place Residential LLC, 30 Park Place Retail LLC, 30 Park Place Garage LLC, 30 Park Place Hotel, LLC. The written “General Contractor Agreement,” dated June 2008, was between 99 Church Street Investors, LLC, as owner, and Tishman Construction

Corporation of New York, as “construction manager,” and provided that the owner retained Tishman Construction Corporation of New York, as construction manager, to act in the capacity of “constructor” in connection with the construction and/or renovation work at the subject premises.

Given a review of the evidence in the record, including but not limited to the above, the Court finds that the defendants and KSW have failed to satisfy their burden on these grounds. The evidence in the record has demonstrated that genuine issues of material fact remain, at the very least, as to what role 30 Park Place Retail LLC, 30 Park Place Garage LLC, 30 Park Place Hotel, LLC, had in relation to the work being performed at the premises, given that all three, in addition to 30 Park Place Residential LLC, are on the deed, dated September 27, 2013, as owners, while the contract for the performance of the work began under 99 Church Street Investors, LLC.

Taking that into consideration, although construction work began in 2009, the defendants and KSW have failed to point to sufficient evidence in the record to eliminate all triable issue of fact regarding whether, as owners with an interest in the premises, they did not enter into any agreement for the construction work at issue or fulfill their role as owners by having work performed for their benefit (*see Scaparo v Village of Ilion*, 13 NY3d at 866). As such, the defendants and KSW have failed to satisfy their burden as to 30 Park Place Retail LLC, 30 Park Place Garage LLC, 30 Park Place Hotel, LLC, and are not entitled to the dismissal of the plaintiff’s labor law causes of action against these three entities on this ground (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324).

The evidence above has demonstrated that 30 Park Place Residential LLC was an owner of the premises, on the date of the subject accident, which has not been contested by the defendants and KSW. Nevertheless, similar to the above findings, issues of fact also remain as to whether 30 Park Place Residential LLC, as an owner, did not enter into any agreement for the construction work at issue or fulfill its role as an owner by having work performed for its benefit (*see Scaparo v Village of Ilion*, 13 NY3d at 866).

Next, “ ‘[t]o hold a defendant liable as an agent of the ... owner for violations of Labor Law §§ 240 (1) and 241 (6), there must be a showing that it had the authority to supervise and control the work that brought about the injury’ ” (*Woodruff v Islandwide Carpentry Contractors, Inc.*, 222 AD3d 920, 921 [2d Dept 2023], quoting *Fiore v Westerman Constr. Co., Inc.*, 186 AD3d 570 [2d Dept 2020]).

Given Chen's testimony, as to the role Silverstein Properties, Inc. played in the work at the premises, as well as taking into account Chen's testimony that Silverstein Properties, Inc. hired Tishman Construction Corporation of New York to work on the premises, the defendants and KSW have failed to point to sufficient evidence in the record to eliminate all triable issues of fact as to whether Silverstein Properties, Inc. was acting as an agent of the owners (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324). Therefore, the defendants and KSW are not entitled to dismissal of plaintiff's Labor Law causes of action against Silverstein Properties, Inc. (*see id.*).

As to Tishman Construction Corporation, although the defendants and KSW contend that it is an unrelated entity, Gallenari testified that she was aware of Tishman Construction Corporation and that it was also an entity under which her employer, AECOM Tishman, did business. Taking into account her testimony, and given the defendants' and KSW's failure to otherwise point to sufficient, admissible evidence to demonstrate that Tishman Construction Corporation was not involved in the work at issue, the defendants and KSW have, thus, failed to satisfy their burden as to Tishman Construction Corporation on these grounds (*see id.*).

As to Tishman Construction Corporation of New York, "[a] construction manager of a work site is generally not responsible for injuries under Labor Law §§ 200, 240 (1), or 241 (6) unless it functions as an agent of the property owner or general contractor in circumstances where it has the ability to control the activity which brought about the injury" (*Lamar v Hill Intern., Inc.*, 153 AD3d 685, 686 [2d Dept 2017]; *see Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Barrios v City of New York*, 75 AD3d 517, 519 [2d Dept 2010]).

The written agreement, dated June, 2008, between 99 Church Street Investors, LLC and Tishman Construction Corporation of New York provided, on its face, that it was a "General Contractor Agreement."

Gallenari testified that: Tishman Construction Corporation of New York was an entity name under which AECOM Tishman did business; she was familiar with Tishman Construction Corporation of New York, as a result of her work as a project director; and, Tishman Construction Corporation of New York was retained to act as a construction manager of certain work at the premises owned by 30 Park Place Residential, LLC.

Inasmuch as Gallenari also testified that she would have the authority to stop work at the premises and the defendants and KSW have failed to otherwise point to sufficient to demonstrate that Tishman Construction Corporation of New York did not have the right to exercise control over the work, the defendants and KSW have failed to satisfy their burden as to Tishman Construction Corporation of New York. Thus, the defendants and KSW are not entitled to the dismissal of the action against Tishman Construction Corporation of New York on this ground (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324).

Therefore, based upon the above determinations, the defendants and KSW are not entitled to the dismissal of the causes of action, brought under Labor Law § 240 (1) and 241 (6), on these grounds as against 30 Park Place Retail LLC, 30 Park Place Garage LLC, 30 Park Place Hotel, LLC, Silverstein Properties, Inc., Tishman Construction Corporation, or Tishman Construction Corporation of New York.

The Court will now address the plaintiff's motion, regarding the causes of action, brought under Labor Law § 240 (1), Labor Law § 241 (6), Labor Law § 200 and for common-law negligence.

Labor Law 240 (1)

Plaintiff moves for partial summary judgment on the cause of action, brought under Labor Law § 240 (1), against the defendants, while the defendants and KSW have moved for summary judgment dismissing this cause of action against the defendants. Plaintiff has not alleged any causes of action against KSW, which is the third-party defendant. Labor Law § 240 (1) provides that:

“[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.”

Here, neither the plaintiff nor the defendants and KSW are entitled to summary relief on the cause of action, brought under Labor Law § 240 (1), as to 30 Park Place Retail LLC, 30 Park Place Garage LLC, 30 Park Place Hotel, LLC, Silverstein Properties, Inc., Tishman Construction Corporation, or Tishman Construction Corporation of New York.

As determined above, issues of fact remain in this matter regarding whether or not 30 Park Place Retail LLC, 30 Park Place Garage LLC, and 30 Park Place Hotel, LLC were owners of the premises that contracted for the work at issue or fulfilled their roles as owners who had construction work performed for their benefit, as well as issues of fact as to whether or not Silverstein Properties, Inc., acted as the agent of the owner or general contractor, and also as to whether or not Tishman Construction Corporation was involved in the project or Tishman Construction Corporation of New York acted as the general contractor. Further, based upon a review of the plaintiff's motion papers, the Court finds that the plaintiff has failed to eliminate all genuine issues of material fact as to these entities' statutory liability, under Labor Law § 240 (1), by affirmatively demonstrating through admissible evidence that these entities, in fact, were the owners, general contractors or agents of the owners or general contractors of the work at the premises, and that they, in fact, operated as such (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324). Therefore, neither the plaintiff nor the defendants and KSW, are entitled to summary relief on the cause of action brought under Labor Law § 240 (1), as to 30 Park Place Retail LLC, 30 Park Place Garage LLC, 30 Park Place Hotel, LLC, Silverstein Properties, Inc., Tishman Construction Corporation, or Tishman Construction Corporation of New York.

However, the deed, dated September 27, 2013, has demonstrated that 30 Park Place Residential LLC, was an owner of the subject premises, a fact which is undisputed in the record. Nevertheless, given the evidence in the record and, in light of the above determinations, including but not limited to, the evidence that the written agreement for the work at the premises, owned by 30 Park Place Residential LLC, was contracted for, in June, 2008, between 99 Church Street Investors, LLC and Tishman Construction Corporation of New York, but that said work was continued under the ownership of 30 Park Place Residential LLC, genuine issues of material fact also remain as to whether, under the particular circumstances in this matter, 30 Park Place Residential LLC, may or

may not be liable under labor law, as an owner who contracted for the performance of the work or had work performed for its benefit (Labor Law § 240 [1]; *see Scaparo v Village of Ilion*, 13 NY3d at 866; *Alvarez v Prospect Hosp.*, 68 NY2d at 324). Therefore, neither the plaintiff, nor the defendants and KSW, are entitled to summary relief on the Labor Law § 240 (1) cause of action asserted against 30 Park Place Residential LLC.

Labor Law § 241 (6)

Plaintiff also moves for partial summary judgment on the cause of action, brought under Labor Law § 241 (6), against the defendants, while the defendants and KSW have moved for summary judgment dismissing this cause of action against the defendants.

For the same reasons, as set forth above, in that Labor Law § 241 (6) applies to owners, general contractors and their agents, given the evidence in the record, and the above determinations, neither the plaintiff, nor the defendants and KSW are entitled to summary relief on the cause of action, brought under Labor Law § 241 (6), as to 30 Park Place Retail LLC, 30 Park Place Garage LLC, 30 Park Place Hotel, LLC, Silverstein Properties, Inc., Tishman Construction Corporation, or Tishman Construction Corporation of New York (Labor Law § 241 [6]; *see Scaparo v Village of Ilion*, 13 NY3d at 866; *Alvarez v Prospect Hosp.*, 68 NY2d at 324).

Additionally, for the same reasons, as set forth above, given the evidence in the record, as well as the genuine issues of material fact that also remain as to whether, under the particular circumstances in this matter, 30 Park Place Residential LLC, may or may not be liable under labor law, as an owner who contracted for the performance of the work or had work performed for its benefit, neither the plaintiff, nor the defendants and KSW, are entitled to summary relief on the Labor Law § 241 (6), asserted against 30 Park Place Residential LLC (Labor Law § 241 [6]; *see Alvarez v Prospect Hosp.*, 68 NY2d at 324).

Labor Law § 200 and Common-Law Negligence

Plaintiff moves for partial summary judgment on the causes of action, brought under Labor Law § 200 and for common-law negligence, only against 30 Park Place Residential LLC, 30 Park Place Retail LLC, 30 Park Place Garage LLC, 30 Park Place

Hotel, LLC. Defendants and KSW have also moved for summary judgment dismissing the causes of action, brought under Labor Law § 200 and for common-law negligence, against the defendants.

In support of this branch of his motion, the plaintiff has argued that 30 Park Place Residential LLC, 30 Park Place Retail LLC, 30 Park Place Garage LLC, 30 Park Place Hotel, LLC, exercised authority and control over the injury-producing work, and that they created the alleged dangerous condition which proximately caused the accident. In support of this branch of their motion, defendants and KSW have argued that 30 Park Place Residential LLC, 30 Park Place Retail LLC, 30 Park Place Garage LLC, 30 Park Place Hotel, LLC, did not supervise or control plaintiff's work, nor did they create the alleged condition or have actual or constructive notice of it.

“ ‘Labor Law § 200 is a codification of the common-law duty of owners, contractors, and their agents to provide workers with a safe place to work’ ” (*Mondragon-Moreno v Sporn*, 189 AD3d 1574 [2d Dept 2020], quoting *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 663, [2d Dept 2015]; see *Ortega v Puccia*, 57 AD3d 54, 60 [2d Dept 2008]). Claims brought under Labor Law § 200 are generally brought in two possible categories, those where workers were injured as a result of dangerous or defective conditions on a work site and those involving the manner in which the work was performed (see *Mondragon-Moreno v Sporn*, 189 AD3d at 1574; *LaGiudice v Sleepy's Inc.*, 67 AD3d 969, 972 [2d Dept 2009]; *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

Where a claim arises out of the methods or materials of the work, an owner or general contractor may be liable if it is shown that he or she had the authority to supervise or control the work (see *Mondragon-Moreno v Sporn*, 189 AD3d at 1574; *LaGiudice v Sleepy's Inc.*, 67 AD3d at 972; *Ortega v Puccia*, 57 AD3d at 61-63). Whereas, where a claim is brought as a result of a dangerous condition, an owner or general contractor may be liable if it is demonstrated that he or she created the dangerous condition or failed to remedy a dangerous condition of which he or she had actual or constructive notice (see *Mondragon-Moreno v Sporn*, 189 AD3d at 1574; *LaGiudice v Sleepy's Inc.*, 67 AD3d at 972; *Chowdhury v Rodriguez*, 57 AD3d at 128). In plaintiff's pleadings, his Labor Law § 200 claim has been based upon both categories.

As to the method or materials of the work, although the plaintiff testified that he

spoke to someone at an office who he believed to be an “engineer,” who told him to where to perform the work, he also testified that he did not know who the “engineer” was, who this individual worked for, or who the owner of the premises was. Additionally, contrary to the plaintiff’s testimony that someone from the “building” told him where to work and accompanied him, Chen testified that it was not the practice of the “building” to direct contract workers or to tell them where or how to perform their work. Chen also testified that no one from Silverstein Properties, Inc., ever instructed workers at the premises as to how to perform their work.

In light of this evidence, the plaintiff has failed to satisfy his burden of eliminating all triable issues of fact as to whether 30 Park Place Residential LLC, 30 Park Place Retail LLC, 30 Park Place Garage LLC, 30 Park Place Hotel, LLC, directed and controlled his work. As such, the opposition need not be considered on this issue (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324). In light of this evidence, Silverstein Properties, Inc. has sufficiently demonstrated that it did not supervise or control the plaintiff’s work. In opposition, the plaintiff has failed to raise a triable issue of fact as to this issue as to Silverstein Properties, Inc. (*see id.*).

Additionally, given a review of the evidence in the record, the defendants and KSW have failed to point to sufficient evidence to demonstrate that no one from 30 Park Place Residential LLC, 30 Park Place Retail LLC, 30 Park Place Garage LLC, 30 Park Place Hotel, LLC, Tishman Construction Corporation, and Tishman Construction Corporation of New York had the authority to supervise or control the plaintiff’s work or that no one from these entities instructed plaintiff on how to perform his work (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324). As such, the opposition papers need not be considered on this issue.

As to the alleged dangerous condition, based upon a review of the motion papers and the evidence in the record, the defendants and KSW have addressed this issue and their conclusory contentions have failed to point to sufficient, admissible evidence in the record in order to demonstrate that the defendants did not create the alleged condition. The Court notes that, despite the above showing that Silverstein Properties, Inc. did not supervise or control the plaintiff’s work, the defendants have failed to make a showing as to Silverstein Properties, Inc., on the issues related to the alleged dangerous condition. Plaintiff has not pointed to sufficient, admissible evidence in the record to eliminate all

triable issue of fact as to whether 30 Park Place Residential LLC, 30 Park Place Retail LLC, 30 Park Place Garage LLC, and/or 30 Park Place Hotel, LLC created the alleged condition.

Based upon the plaintiff's testimony that he did not make any complaints to anyone at the worksite about the alleged condition, the defendants and KSW have satisfied their burden of demonstrating that the defendants did not have actual notice of the alleged condition. In opposition, the plaintiff has failed to point to sufficient evidence to raise a triable issue of fact as to actual notice.

As to the issue of constructive notice, in order "[t]o constitute constructive notice, a condition must be visible and apparent, and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it" (*Deveau v CF Galleria at White Plains, LP*, 18 AD3d 695 [2d Dept 2005]; see *Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]; *Vargas v Lamberti*, 186 AD3d at 1573; *Chang v Marmon Enterprises, Inc.*, 172 AD3d 678, 679 [2d Dept 2019]). Based upon a review of the motion papers, neither the plaintiff, nor the defendants and KSW have sufficiently addressed the issue of the defendants' alleged constructive notice of the alleged condition. As such, neither the plaintiff, nor the defendants and KSW are entitled to summary relief on the issue of constructive notice. Therefore, in light of the above determinations, under the circumstances in this matter, the plaintiff is not entitled to partial summary judgment against 30 Park Place Residential LLC, 30 Park Place Retail LLC, 30 Park Place Garage LLC, 30 Park Place Hotel, LLC, on the causes of action, brought under Labor Law § 200 and for common-law negligence. Nor are the defendants and KSW entitled to summary judgment dismissing the causes of action, brought under Labor Law § 200 and for common-law negligence, asserted against the defendants.

Next, the Court will now address the remaining third-party causes of action.

Third-Party Causes of Action and the remaining causes of action.

As is relevant upon the instant motions, in a second third-party action, the defendants have asserted causes of action against Babco for common-law indemnification and contribution, contractual indemnification, and breach of contract for failure to

procure insurance. In a third third-party action, the defendants have asserted claims against Industrial Solutions for common-law indemnification and contribution, contractual indemnification, and breach of contract for failure to procure insurance.

In its answer to the second third-party complaint, Babco has asserted various affirmative defense and counterclaims against the defendants for common-law indemnification and contribution, contractual indemnification, and breach of contract for failure to procure insurance, and cross-claims against KSW for common-law indemnification and contribution. In its answer to the third third-party complaint, Industrial Solutions has asserted various affirmative defenses and cross-claims and counterclaims against defendants and KSW for contractual indemnification and breach of contract for failure to procure insurance.

Defendants and KSW have moved for summary judgment only on the defendants' causes of action for contractual indemnification and legal costs and fees against Babco and Industrial Solutions, and to dismiss Babco's and Industrial Solutions' counterclaims for common-law indemnification and contribution. Thus, the Court will not address the remaining third-party causes of action set forth above.

As to the branch of the motion seeking summary judgment on the defendants' second third-party causes of action for contractual indemnification and legal costs and fees against Babco, under the particular circumstances in this matter and given the above determinations, inasmuch as there has been no determination as to the liability of the parties in the action, and, based upon a thorough review of the evidence in the record, the Court finds that the defendants and KSW have failed to sufficiently demonstrate the absence of all material issues of fact on the issue of liability and any determination on the defendants' cause of action for contractual indemnification and legal costs and fees against Babco would be premature and inappropriate (*see Cava Const. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]; *Phila. Indem. Ins. Co. v AMI Dev., LLC*, 111 AD3d 689 [2d Dept 2013]; *see Gil v Manufacturers Hanover Trust Co.*, 39 AD3d 703, 705 [2d Dept 2007]).

As to the branch of the motion for summary judgment on defendants' third third-party causes of action for contractual indemnification and legal costs and fees against Industrial Solutions, likewise, for the same reasons set forth above, any determination of the defendants' cause of action for contractual indemnification against Industrial

Solutions would be premature at this juncture (*see Cava Const. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d at 662; *Phila. Indem. Ins. Co. v AMI Dev., LLC*, 111 AD3d at 689; *Gil v Manufacturers Hanover Trust Co.*, 39 AD3d at 705).

With regard to the branch of defendants' and KSW's motion for summary judgment dismissing Babco's and Industrial Solutions' counterclaims for common-law indemnification and contribution, for the reasons set forth above, dismissal of these counterclaims is also premature and inappropriate premature and inappropriate (*see Kingsbrook Jewish Med. Ctr. v Islam*, 172 AD3d 1342 [2d Dept 2019]; *Coque v Wildflower Estates Developers, Inc.*, 31 AD3d 484, 489 [2d Dept 2006]).

Lastly, to the extent that the defendants and KSW have sought, in their notice of motion, relief pursuant to CPLR 3123, inasmuch as they have failed to address this section in the motion papers, the defendants and KSW are not entitled to relief pursuant to this section.

The parties' remaining contentions have been considered and found to be unavailing. Any relief requested and not addressed herein is denied.

Accordingly, it is

ORDERED that the plaintiff's motion (Motion Sequence No. 4) is denied., in its entirety; and it is further

ORDERED that the defendants' and KSW's motion (Motion Sequence No. 5) is denied, in its entirety.

Dated: March 3, 2025



TIMOTHY J. DUFFICY, J.S.C.

