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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE J.S.C. Justice

PART 10

Index Number : 109873/2008

BELTRAN, ROBERTO

vs.

NAVILLUS TILE

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 003

tion to/for _____

No(s). _____

No(s). _____

No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

APR 05 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/2/12

HON. JUDITH J. GISCHE J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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ROBERTO BELTRAN and YAJAHIRA BELTRAN,

Plaintiffs,

-against-

NAVILLUS TILE, INC., URS CORPORATION, URS CORPORATION-NEW YORK, LIRO ENGINEERING AND CONSTRUCTION MANAGEMENT, LIRO PROGRAM AND CONSTRUCTION MANAGEMENT PE, PC and UNISYS ELECTRIC, INC.,

Defendants.

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Decision/Order
Index No.: 109873/08
Seq No.: 001, 002, 003

Present:
Hon. Judith J. Gische, JSC

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Motion Seq. No. 001	
Navillus, URS defs' n/m (3212) w/ EJF affirm (2 parts), exhs	1
Beltran opp w/MJL affirm, AA affid, exhs	2
Liro defs opp w/MTG affirm	3
Navillus, URS defs' reply to Beltran w/BJW affirm	4
Navillus, URS defs' reply to Liro w/BJW affirm	5
Beltran further opp w/MJL affirm	6
Navillus, URS defs' supp affirm in support/reply w/EJF affirm, exhs	7
Motion Seq. No. 002	
Unisys n/m (3212) w/JF affirm, exhs	8
Beltran opp w/MJL affirm, AA affid, exhs	9
Unisys reply w/JF affirm, exh	10
Beltran further opp w/MJL affirm	11
Unisys further reply w/JF affirm, exh	12
Motion Seq. No. 003	
Liro n/ (3212) w/MTG affirm, exhs	13
Navillus, URS partial opp w/BJW affirm, exh	14
Beltran opp w/MJL affirm, AA affid, exhs	15
Liro reply w/MTG affirm	16

HON. JUDITH J. GISCHE, J.S.C.:

In this personal injury/negligence action, defendants Navillus Tile, Inc. (Navillus), URS Corporation and URS Corporation-New York (URS) move for summary judgment to dismiss the complaint and all cross claims against them (motion sequence number 001), and co-defendants Liro Engineering and Construction Management and Liro Program and Construction Management PE, PC (the Liro defendants) and Unisys Electric, Inc. (Unisys) each submit separate motions for the same relief (motion sequence numbers 002 and 003, respectively). Issue was joined by each moving defendant and plaintiff filed the note of issue February 17, 2011. These timely motions are consolidated for decision herein (CPLR § 3212; *Brill v. City of New York*, 2 N.Y.3d 648 [2004]).

BACKGROUND

On July 27, 2007, plaintiff Roberto Beltran (Beltran), an elevator repairman employed by the nonparty New York City Housing Authority (NYCHA), was injured when he allegedly slipped and fell on water that had collected on the floor in a temporary ingress/egress corridor in building # 4 (the building), which is owned by NYCHA and located at 55-04 Beach Channel Drive in the Town of Oceanside, County of Nassau, State of New York. *See* Notice of Motion (motion sequence number 001), Fink Affirmation, ¶ 3. NYCHA initially hired the Liro defendants to perform certain renovation and repair work at the building, and the Liro defendants thereafter entered into a joint venture with URS to complete that work. *See* Lynch Affirmation in

Opposition, at 2 (pages not numbered). *Id.* To this end, URS and the Liro defendants worked in tandem as construction managers on the project, and URS hired Navillus as the general contractor. Later, URS also hired Unisys as an electrical contractor. *See* Notice of Motion (motion sequence number 002), Feehan Affirmation, ¶ 12.

At his deposition on March 23, 2010, Beltran testified that he had been "dispatched to repair an elevator" at the building. *See* Notice of Motion (motion sequence number 001), Exhibit C, at 58. Beltran specifically noted that his job did not include elevator "renovation, reconstruction or modernization," and consisted only of maintenance and repair work. *Id.* at 28. Beltran stated that, sometime after 3 P.M. on the day of his accident, he and his assistant, fellow NYCHA employee Michael Angarita (Angarita), entered through the back of the building via the temporary ingress/egress corridor to go to the lobby elevator that they were to repair. *Id.* at 62-64. Beltran further stated that the temporary ingress/egress corridor had a cement floor, cinder block walls and fluorescent lights on the ceiling that were turned off at that time. *Id.* at 64-65. Beltran noted, however, that a fluorescent light near the front of the elevator was turned on, and estimated that the elevator was located 10 feet to the left of the end of the darkened temporary ingress/egress corridor. *Id.* at 65-66. Regarding his accident, Beltran stated that he had proceeded about halfway down the corridor when his right foot slipped on water on the floor, and he fell backwards into Angarita. *Id.* at 67-68, 77-79. Beltran further stated that he had accessed the building through the temporary ingress/egress corridor approximately twice before his accident, but that conditions in the corridor (i.e., the lighting and the water on the floor) were not the same on those occasions. *Id.* at 72. Finally, Beltran stated that he filled out an incident report for NYCHA on July 30, 2007, on which he wrote that he "slipped on water back into my partner

injuring right Achilles." *Id.* at 83-91; Exhibit I.

Angarita was deposed on February 14, 2011, at which time he confirmed Beltran's testimony, and also stated that he had observed a leaky hose affixed to the roof of the temporary ingress/egress corridor immediately after Beltran's accident. *See* Notice of Motion (motion sequence number 001), Exhibit D, at 33-35. Angarita also stated that, on the several previous occasions that he had been in the corridor, he had not seen any water on the floor. *Id.* at 33-24.

The building's former superintendent, ex-NYCHA employee Armando Acevedo (Acevedo), was also deposed on September 15, 2011, and initially stated that NYCHA had the sole responsibility for maintenance of the temporary ingress/egress corridor, and for sweeping and mopping it each morning on a daily basis. *See* Fink Supplemental Affirmation in Support of Motion (motion sequence number 001), Exhibit B, at 29-31. Later, however, Acevedo appeared to contradict himself by stating that the construction crews working in the building were responsible for cleaning up after themselves. *Id.* at 100. Acevedo also stated that he had examined the temporary ingress/egress corridor immediately after Beltran's accident, and had observed a hose suspended from the ceiling leaking water onto the floor, which, he opined, had been run through the ceiling by Navillus from the faucet in the building's trash compactor room on the first floor. *Id.* at 38, 40. Acevedo admitted having seen such hoses used in this way on prior occasions. *Id.* at 55-58. Acevedo denied, however, that the lights were off in the temporary ingress/egress corridor, and averred instead that the lighting was sufficient. *Id.* at 103, 108-111. Beltran asserts that Acevedo's deposition testimony varied materially from the statements that he made in an affidavit, dated February 17, 2001, that:

> There were three companies working on the renovation project. [The Liro defendants and URS] were the construction managers and [Navillus] was the general contractor who was actually performing the work on the lobby renovations. This work involved tiling the walls and floors. It also involved plaster work on the ceiling. These companies used water to do their work. [Navillus] was the company doing the tiling work, and they were the company that strung the hose through the ceiling in the building. [Navillus] connected their hoses to a faucet in the trash compactor room located on the ground floor of the building. When I investigated the lobby of the building where [Beltran's] accident occurred, I saw the hose being used by [the Liro defendants, URS and Navillus]. The hose was strung through the ceiling in the hallway.... I also saw water leaking from the hose and onto the hallway floor. The leak created the puddle which caused [Beltran's] accident. It was the responsibility of the construction crew, and not the members of the NYCHA maintenance crew, to clean up after the construction crews and their work. Since the construction crew created the puddle, it was their responsibility to clean it up.

Id.; Exhibit D.

Navillus was deposed on August 24, 2010 via its project manager, Mark Kelly (Kelly), who stated that job site safety was Navillus's responsibility. *See* Notice of Motion (motion sequence number 001), Exhibit E, at 8-9. Kelly also stated that, while the work at the building was ongoing, Navillus had *not* designated different portions of the building as being the sole responsibility of either URS or the Liro defendants. *Id.* at 49-50. Kelly denied having seen a hose affixed to the ceiling of the temporary ingress/egress corridor, denied that Navillus had placed any hoses there, and averred that "there would be no reason for us to be in the egress corridor ... that work had already been completed and was signed off." *Id.* at 59-61. Regarding who was responsible for cleanup of the puddle, Kelly stated that: "I don't know. If the guy had made a mistake, he made a mistake, but I don't see - he would, obviously, have to clean up after

himself. It is the right thing to do." *Id.* at 62. However, the court notes that the March 2005 general contracting agreement between URS and Navillus (the Navillus contract) incorporates the earlier construction management agreement that NYCHA had entered into with URS and the Liro defendants (the URS/Liro contract), and that the latter contract provides, in pertinent part, as follows:

> 12.1.2 During the performance of the Work and up to the date of Final Acceptance, the Contractor [i.e., Navillus and/or Unisys] must take all reasonable precautions to protect the persons and property of the CM [Construction Manager; i.e., URS and the Liro defendants], NYCHA and of others from damage, loss or injury resulting from its or its subcontractors' operations under the Contract, or caused directly or indirectly by the acts, omissions or lack of good faith of the Contractor or its subcontractors, their officers, employees or agents, except such property as others may themselves be under legal duty to protect.

Id.; Exhibit L.

URS was also deposed on August 24, 2010 via its associate project manager, Edward Mazar (Mazar), who stated that URS was both a "construction manager" for the work at the building, and also performed masonry and electrical work there. *See* Notice of Motion (motion sequence number 001), Exhibit F, at 12-13. Mazar further averred that he himself had never observed any water in the temporary ingress/egress corridor, and that NYCHA was responsible for cleaning and maintenance of the corridor's floor. *Id.* at 33-34, 35-36. Upon questioning, Mazar clarified that cleanup was initially the contractors' responsibility, but that, after work had been completed on a given portion of the building and control thereof was ceded back to NYCHA for the use of its tenants, responsibility for cleanup reverted to NYCHA, as well. *Id.* at 35-36, 56-57. The court notes, however, that the URS/Liro contract does not appear to contain

any provision validating this assertion. *Id.*; Exhibit L.

The Liro defendants were deposed on December 2, 2010 via their project superintendent, James Karmel (Karmel), who stated that the Liro defendants were a "construction manager" for the work at the building, and also performed roof replacement, apartment renovation and lobby renovation work there. *See* Notice of Motion (motion sequence number 001), Exhibit G, at 15-17. However, Karmel also alleged that the Liro defendants were *not* responsible for any of the work that was done in the building's lobby, and asserted that URS was solely responsible for overseeing and inspecting Navillus's work in the lobby. *Id.* at 24-26. Karmel also reiterated Mazar's understanding that, once a contractor had completed its work on a portion of the building, and returned that portion to NYCHA's control, the contractor was no longer responsible for cleanup in that area. *Id.* at 62; 75-76. Karmel referred to a "substantial completion punch list" that he asserted NYCHA had signed as proof that it had accepted control over and responsibility for the temporary ingress/egress corridor. *Id.* at 34-38. However, the court notes that neither NYCHA (Beltran's employer), the Liro defendants, or any of the other co-defendants herein, has provided a copy of this purported document. Karmel further stated that he was aware that Navillus's workers occasionally ran a hose to a spigot in the temporary ingress/egress corridor in order to obtain water that they needed to mix concrete, but averred that he had never seen them doing so himself. *Id.* at 65-69.

Unisys was deposed on February 14, 2011 via its project manager, Diane Rubel (Rubel), who stated that Unisys was responsible for installing the temporary lighting in the temporary ingress/egress corridor pursuant to a 2005 contract that it executed with NYCHA, and not

pursuant to the later electrical contracting agreement that Unisys entered into with Navillus. *See* Notice of Motion (motion sequence number 001), Exhibit H, at 15-17. She stated that the lights were controlled by a switch that was not located in the corridor, and that Unisys had never received any complaints about the lights. *Id.* at 48, 55. Rubel also stated that she was unaware whether or not NYCHA was responsible for performing cleaning and maintenance work in the temporary ingress/egress corridor. *Id.* at 49-51. The court notes, however, that the electrical contracting agreement that Unisys submitted along with its moving papers was actually executed by Unisys and URS - not Navillus - and that it incorporates the entire URS/Liro contract by reference, including subparagraph 12.1.2, set forth *supra.* See Notice of Motion (motion sequence number 002), Exhibit N.

Beltran initially commenced this action on July 27, 2008, and eventually filed a third amended complaint that sets forth one cause of action for negligence on behalf of himself, and one cause of action for loss of consortium on behalf of his wife, Yajahira Beltran. *See* Notice of Motion (motion sequence number 001), Exhibit A. That complaint specifies that Beltran bases his claim on principles of common-law negligence and/or defendants' purported violations of Labor Law §§ 200 and/or 241 (6). *Id.*, ¶ 25. Navillus and URS filed a joint answer to the third amended complaint on May 24, 2010 that includes affirmative defenses and cross claims for: 1) contribution; 2) common-law indemnification; 3) contractual indemnification; and 4) breach of contract. *Id.*; Exhibit B. The Liro defendants filed their answer on April 7, 2009, and they also set forth affirmative defenses and cross claims for: 1) contractual indemnification, and 2) breach of contract. *See* Notice of Motion (motion sequence number 003), Exhibit B. Unisys claims to

have filed its answer on July 8, 2010, although it has not annexed a copy of that answer to its moving papers, and it is unclear what, if any, cross claims Unisys has raised herein. *See* Notice of Motion (motion sequence number 002), Feehan Affirmation, ¶ 7. Now before the court are defendants' three motions for summary judgment to dismiss Beltran's complaint, as well as any cross claims (motion sequence numbers 001, 002 and 003).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003). After careful consideration, the court finds that all three motions should be granted in part and denied in part. For reasons of brevity, and in order to avoid needless repetition, the court will discuss the parties' respective arguments together rather than treating each motion separately, except where individual discussion is necessary.

In their motion, Navillus and URS first argue that so much of Beltran's negligence claim as is based on a purported violation of Labor Law § 241 (6) must be dismissed, because Beltran was not engaged in activities protected by that statute at the time he was injured.[1] *See* Notice of

[1] The other two sets of defendants also join in this argument. *See* Notice of Motion (motion sequence number 002), Feehan Affirmation, ¶ 25; Notice of Motion (motion sequence

Motion (motion sequence number 001), Fink Affirmation, ¶¶ 42-46. Defendants cite the decision of the Appellate Division, First Department, in *Peluso v 69 Tiemann Owners Corp.* (301 AD2d 360 [1st Dept 2003]) to illustrate the longstanding rule that routine repair work on an elevator, as opposed to "construction, excavation or demolition" work in the building that the elevator occupies, is not a covered activity within the meaning of Labor Law § 241 (6). Here, Beltran stated in his deposition testimony that he had been "dispatched to repair an elevator" at the building, and that his job consisted only of elevator maintenance and repair work, not construction and/or installation. *See* Notice of Motion (motion sequence number 001), Exhibit C, at 28, 58. Finally, Beltran does not oppose defendants' argument anywhere in his responsive papers. Therefore, the court deems that he has conceded the argument, and finds that so much of Beltran's complaint as is based on defendants' purported violation of Labor Law § 241 (6) should be dismissed. Accordingly, the court grants so much of each of the instant motions as seeks such relief.

Navillus and URS next argue that so much of Beltran's negligence claim as is based on principles of common-law negligence and/or a purported violation of Labor Law § 200 must also be dismissed, because they neither directed nor controlled his work, and/or because they lacked actual or constructive notice of the wet condition in the temporary ingress/egress corridor that allegedly caused his injuries.[2] *See* Notice of Motion (motion sequence number 001), Fink

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number 003), Memorandum of Law, at 2-5 (pages not numbered).

[2] Unisys again joins in Navillus's and URS's dismissal arguments. *See* Notice of motion (motion sequence number 002), Feehan Affirmation, ¶¶ 21-24, 26. The Liro defendants raise separate arguments, however, which will be discussed *infra*.

Affirmation, ¶¶ 47-52. As will be discussed, this two-part argument actually involves separate legal issues that must be addressed individually.

The Appellate Division, Second Department, has observed that:

> Labor Law § 200 (1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work ...
>
> Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed. These two categories should be viewed in the disjunctive.
>
> Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident.
>
> By contrast, when the manner of work is at issue, "no liability will attach to the owner solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed." Rather, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work [internal citations omitted].

(Ortega v Puccia, 57 AD3d 54, 61 (2d Dept 2008); also Makarius v. Port Authority of New York and New Jersey, 76 A.D.3d 805 [1st Dept 2010] app wdn 15 N.Y.3d 951 [2010]). Here, Navillus and URS argue that Beltran cannot establish liability under either of the foregoing theories.

First, with respect to "manner of work," Navillus and URS argue that they did not supervise or control Beltran in the performance of his job duties, because the temporary ingress/egress corridor was under NYCHA's exclusive control at the time Beltran was injured.[3] *See* Notice of Motion (motion sequence number 001), Fink Affirmation, ¶¶ 47-48. They cite the

[3] Unisys joins in this portion of Navillus's and URS's argument, as do the Liro defendants. *See* Notice of Motion (motion sequence number 002), Feehan Affirmation, ¶ 9; Notice of Motion (motion sequence number 003), Memorandum of Law, at 5-12 (pages not numbered).

Court of Appeals decision in *Rizzuto v L.A. Wenger Contr. Co.* (91 NY2d 343, 352 [1998]) for the general rule that "an implicit precondition to [determining that a duty of care exists] is that the party to be charged with that obligation 'have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition [internal citation omitted].'" Navillus and URS then refer to the deposition testimony of Kelly, Mazer, Karmel and Rubel, which - they assert - establishes that work on the temporary ingress/egress corridor had been "completed," and/or "signed off on," and the area transferred to NYCHA's exclusive control. *See* Notice of Motion (motion sequence number 001), Fink Affirmation, ¶ 48. Beltran responds that neither the deposition testimony, nor any of the extant documentary evidence, establishes either of these points, and argues that it is actually unclear whether NYCHA had formally "signed off on" or accepted exclusive control of the temporary ingress/egress corridor, or whether work in that corridor had, in fact, been completed. *See* Lynch Affirmation in Opposition, at 13-15 (pages not numbered). Beltran also notes that the corridor still had temporary partition walls and temporary lighting at the time of his accident, which, he asserts, is evidence that work on the corridor had not been completed. *Id.* Navillus and URS reply that "all defendants ... unequivocally testified that, at the time of the incident, control over the subject ingress/egress [corridor] was turned over to NYCHA." *See* Weisburd Reply Affirmation, ¶ 7. In a second round of opposition papers, Beltran further argues that Acevedo's deposition testimony and his February 17, 2001 affidavit both establish that contractors' workers were responsible for cleaning up after themselves in the temporary ingress/egress corridor. *See* Lynch Affirmation in Further Opposition at 2-3 (pages not numbered). Navillus and URS reply that Acevedo's

deposition testimony on this point actually contradicts his February 17, 2001 affidavit, and argue that the court should reject that deposition testimony as a "feigned issue of fact." *See* Fink Supplemental Affirmation in Support, ¶¶ 16-18. However, upon review, the court finds that all of these arguments are misplaced.

As the Appellate Division , First Department, has frequently observed, where a Labor Law § 200 claim is based on alleged defects or dangers arising from a contractor's methods or materials, liability cannot be imposed unless it is shown that an owner or general contractor exercised some supervisory control over the work. *See e.g. McGarry v CVP 1 LLC*, 55 AD3d 441 (1st Dept 2008); *Hughes v Tishman Constr. Corp.*, 40 AD3d 305 (1st Dept 2007). Here, however, all of defendants' arguments are centered on the claim that they did not have any control over the *work site* (i.e., the temporary ingress/egress corridor) where Beltran was injured. Thus, all of their arguments miss the point. There is no evidence in either Beltran's or defendants' deposition testimony that any of the defendants herein possessed the right to supervise or control Beltran in the manner in which he performed his elevator repair duties. Because such evidence does not exist, the court finds that defendants' "means and method" arguments are inapposite. Instead, it is clear that defendants' potential liability to Beltran herein pursuant to Labor Law § 200 turns solely upon a "dangerous or defective premises condition" analysis, which the court will review next.

In the portion of their motion devoted to this analysis, Navillus and URS first argue that Beltran's claim should be dismissed on the ground that they had "neither actual nor constructive

notice of the alleged defects (water on the floor and lack of light)."[4] *See* Notice of Motion (motion sequence number 001), Fink Affirmation, ¶¶ 49-52. With respect to the former (i.e., actual notice), Navillus and URS note that all of the witnesses that were deposed herein specifically denied having had actual notice of either water on the floor, or broken lights on the ceiling, in the temporary ingress/egress corridor at the time of Beltran's accident. *Id.*, ¶ 50; Exhibits E at 59-61, F at 33-36, G at 65-69, H at 48. Beltran raises two arguments in opposition to this assertion.

Beltran first responds that "defendants' [actual] notice can be inferred because they created the dangerous and unsafe condition[s] in the corridor." *See* Lynch Affirmation in Opposition, at 15 (pages not numbered). The court again finds that this argument is misplaced. To reiterate, "[w]here a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either *created* the dangerous condition that caused the accident or had *actual or constructive notice* of the dangerous condition that caused the accident [emphasis added]." *Ortega v Puccia*, 57 AD3d at 61. Proof that a defendant created a dangerous or defective condition does not give rise to an inference of actual notice; it simply constitutes proof that the defendant created the dangerous or defective condition, which is itself sufficient evidence to impose liability under Labor Law § 200 pursuant to a "dangerous or defective premises condition" analysis. Here, however, Beltran's only proof that defendants created the subject conditions are his conclusory, unsupported assertions that "it is undisputed that the

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[4] Although Unisys joins in with this portion of Navillus's and URS's motion, it also presents its own arguments on the issue of notice, as do the Liro defendants. Those arguments will be discussed *infra*.

defendants were performing work in the lobby of [the] building and that this work required the use of water," and that he, Angarita and Acevedo had all observed a leaky hose in the temporary ingress/egress corridor on prior occasions and knew that Navillus, URS and/or the Liro defendants were responsible for placing it there. *See* Lynch Affirmation in Opposition, at 15 (pages not numbered). This is simply not borne out by the deposition testimony. Kelly, Mazar and Karmel all testified that they were either unaware of the use of such hoses or had not seen any hoses at the site of Beltran's accident. *See* Notice of Motion (motion sequence number 001), Exhibits E at 59-61, F at 33-36, G at 65-69. Thus, the evidence reveals a disputed issue of fact on the issue of who created the dangerous/defective water leak condition that caused Beltran's injury. With respect to the other allegedly dangerous/defective condition (i.e., inadequate lighting), Beltran raises no argument as to how Unisys might have caused the purported problem, and Unisys denies that the lights were in any way defective. *See* Notice of Motion (motion sequence number 002), Feehan Affirmation, ¶ 24. Therefore, the court rejects, as unsupported, Beltran's claims that the defendants created either of the two allegedly dangerous/defective conditions in the temporary ingress/egress corridor.

Beltran next argues for the application of the rule, enunciated by the Appellate Division, Fourth Department, in its non-Labor Law decision in *Weller v Colleges of the Senecas* (217 AD2d 280, 285 [4th Dept 1995]), that, "if the defendant has a duty to conduct reasonable inspections, the issue of actual or constructive notice is irrelevant." *See* Lynch Affirmation in Opposition, at 16-17 (pages not numbered). However, Beltran's supporting assertion, that "each of the defendants admitted that they were, at least in part, responsible for site safety," is not

helpful to his argument, because - as was previously observed - each of those defendants has also disputed that they were responsible for inspecting or cleaning the temporary ingress/egress corridor where Beltran was injured. Further, Beltran has not identified any contractual provisions that delineate each defendants' site inspection, maintenance and cleaning responsibilities. Finally, Beltran does not state how this argument applies to Unisys, which completely denied any responsibility for inspecting or maintaining the lights that it had installed. *See* Notice of Motion (motion sequence number 002), Feehan Affirmation, ¶ 24. Therefore, the court also rejects this argument as unsupported. Accordingly, the court finds that defendants have adequately demonstrated that they lacked actual notice of the subject conditions.

With respect to the issue of constructive notice, Navillus and URS argue that "there is no evidence that the water on the floor of the ingress/egress corridor existed for an amount of time sufficient to provide constructive notice." *See* Notice of Motion (motion sequence number 001), Fink Affirmation, ¶ 51. Beltran responds that his and Angarita's deposition testimony, that the leak from the hose was slow, and the puddle in the corridor was large, permit the conclusion to be drawn that "the drip must have remained undiscovered for a significant period of time." *See* Lynch Affirmation in Opposition, at 17-18 (pages not numbered). Upon consideration, the court finds for Beltran for reasons set forth below.

The law is clear that, in order to constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time prior to a plaintiff's accident to permit a defendant's employees to discover and remedy it. *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986). Further, a general awareness that a dangerous condition may

be present is legally insufficient to charge a defendant with constructive notice. *Id.* at 837. Here, as previously mentioned, there is deposition testimony from Acevedo and Karmel stating that, on previous occasions, contractors had run a hose from the trash compactor room located in the temporary ingress/egress corridor to other work sites in the building. *See* Fink Supplemental Affirmation in Support and Reply, Exhibit B (Acevedo deposition), at 55-58; Notice of Motion (motion sequence number 001), Exhibit G, at 65-69. This would tend to support Beltran's contention, that the water that leaked from the hose onto the corridor floor was an "ongoing and recurring dangerous condition." Also, although neither Navillus nor URS is the building's landlord, section 12.1.2 of the contract between NYCHA and URS/Liro (which was incorporated into the subsequent contract between URS and Navillus) imposed a duty of care on Navillus and URS "during the performance of the Work and up to the date of Final Acceptance," which duty was equivalent to that of a landlord. *See* Notice of Motion (motion sequence number 001), Exhibit L. Thus, in the absence of any cogent argument to the contrary, the court rejects Navillus's and URS's assertions and finds that Beltran's claim against them for violation of principles of common-law negligence/Labor Law § 200 may proceed on the theory of constructive notice.

In its motion, Unisys argues that Beltran has presented no evidence of either how long the lights in the temporary ingress/egress corridor were out prior to his accident, or that Unisys ever received any prior complaints about the condition of the lights. *See* Notice of Motion (motion sequence number 002), Feehan Affirmation, ¶ 24. Beltran does not respond to this argument in his opposition papers. For its part, the court notes that Rubel testified that the lights were

Liro defendants or the agreement between URS and the Liro defendants. This claim is also at odds with the deposition testimony of Kelly, who denied that different portions of the building had been assigned as the exclusive responsibility of either URS or the Liro defendants. *See* Notice of Motion (motion sequence number 003), Exhibits J, K, L (Kelly deposition transcript), at 49-50. Thus, the court rejects the Liro defendants' contentions, and finds that the evidence at hand presents an issue of fact with respect to which of the defendants - if any - was responsible for using the hose that caused the water leak in the temporary ingress/egress corridor.

As a final matter, the Liro defendants argue that Beltran's common-law negligence/Labor Law § 200 claim should be dismissed because he was not injured at a "work site," as the statute requires, but in the temporary ingress/egress corridor (adjacent to the work site) that had been turned over to NYCHA. *See* Notice of Motion (motion sequence number 003), Memorandum of Law, at 4-5 (pages not numbered). However, there are also open questions of fact as to whether work had been completed in the corridor, and whether NYCHA had accepted control over the corridor. Certainly, defendants have failed to produce the "substantial completion punch list" that Karmel referred to in his deposition testimony as proof that NYCHA had accepted the corridor prior to the "final acceptance date" of the work. Therefore, there is no factual basis for the Liro defendants' "work site" argument, and the court rejects it.

In conclusion, the court denies so much of all three of the instant motions as seeks to dismiss the portion of Beltran's common-law negligence/Labor Law § 200 claim that is based on a theory of constructive notice.

In the balance of the three instant motions, the parties seek dismissal of the various

controlled by a switch that was located outside of the corridor. *See* Notice of Motion (motion sequence number 001), Exhibit H, at 55. From this, the court concludes that it is impossible to decide with any certainty either why the lights were out, how long they were out prior to Beltran's accident or who might have turned them out. Therefore, the court cannot find that the allegedly inadequate lighting in the temporary ingress/egress corridor was an "ongoing and recurring dangerous condition." However, at this juncture, this issue of fact does not mandate dismissal of Beltran's common-law negligence/Labor Law § 200 claim against Unisys on the theory of constructive notice. That determination will be made at trial after presentation of all the evidence.

In the portion of their motion addressing the "constructive notice" issue, the Liro defendants argue that the deposition testimony shows that they never received any complaints about water in the temporary ingress/egress corridor, and that "there is no evidence of how long the water condition persisted." *See* Notice of Motion (motion sequence number 003), Memorandum of Law, at 20 (pages not numbered). The court rejects these arguments, since it has already found that the water leak was, by nature, an "ongoing and recurring dangerous condition." Therefore, the court concomitantly finds that Beltran may proceed with his common-law negligence/Labor Law § 200 claim against the Liro defendants on the theory of constructive notice. The bulk of the Liro defendants' motion is devoted to the argument that they owed Beltran no duty of care because they were not responsible for performing any work in the temporary ingress/egress corridor, and were only contracted to perform lobby renovations. This claim is not, however, supported by the terms of either the contract between NYCHA and the

Liro defendants or the agreement between URS and the Liro defendants. This claim is also at odds with the deposition testimony of Kelly, who denied that different portions of the building had been assigned as the exclusive responsibility of either URS or the Liro defendants. *See* Notice of Motion (motion sequence number 003), Exhibits J, K, L (Kelly deposition transcript), at 49-50. Thus, the court rejects the Liro defendants' contentions, and finds that the evidence at hand presents an issue of fact with respect to which of the defendants - if any - was responsible for using the hose that caused the water leak in the temporary ingress/egress corridor.

As a final matter, the Liro defendants argue that Beltran's common-law negligence/Labor Law § 200 claim should be dismissed because he was not injured at a "work site," as the statute requires, but in the temporary ingress/egress corridor (adjacent to the work site) that had been turned over to NYCHA. *See* Notice of Motion (motion sequence number 003), Memorandum of Law, at 4-5 (pages not numbered). However, there are also open questions of fact as to whether work had been completed in the corridor, and whether NYCHA had accepted control over the corridor. Certainly, defendants have failed to produce the "substantial completion punch list" that Karmel referred to in his deposition testimony as proof that NYCHA had accepted the corridor prior to the "final acceptance date" of the work. Therefore, there is no factual basis for the Liro defendants' "work site" argument, and the court rejects it.

In conclusion, the court denies so much of all three of the instant motions as seeks to dismiss the portion of Beltran's common-law negligence/Labor Law § 200 claim that is based on a theory of constructive notice.

In the balance of the three instant motions, the parties seek dismissal of the various

counterclaims and cross claims that they have asserted against each other. As previously mentioned, Navillus's and URS's joint answer sets forth cross claims for: 1) contribution; 2) common-law indemnification; 3) contractual indemnification; and 4) breach of contract; while the Liro defendants' answer includes cross claims for: 1) contractual indemnification, and 2) breach of contract. *See* Notice of Motion (motion sequence number 001), Exhibit B; Notice of Motion (motion sequence number 003), Exhibit B. As was also previously mentioned, Unisys has not submitted a copy of its answer, so it is unclear whether Unisys has asserted any cross claims herein. However, Unisys's moving papers are devoid of any argument as to why any putative cross claims should survive. Therefore, as an initial matter, the court finds that any such cross claims by Unisys should be dismissed on default.

With respect to the other co-defendants' breach of contract claims, the respective parties assert that their co-defendants committed such breaches by failing to obtain contractually required insurance policies. *Id.* In their moving papers, Navillus and URS and Unisys have each presented copies of the policies that they purportedly failed to obtain. *See* Notice of Motion (motion sequence number 001), Exhibit L; Notice of Motion (motion sequence number 002). The Liro defendants, however, have failed not. Therefore, as another initial matter, the court also finds that the Liro defendants' cross claim for breach of contract should be dismissed, and that Navillus's and URS's cross claim for the same relief should not be dismissed.

With respect to the contractual indemnification cross claims herein, all of the co-defendants seek dismissal on the ground that Beltran's work, i.e., elevator repair, did not "arise out of" or "occur in connection with" any of the activities that they agreed to indemnify against.

All co-defendants specifically refer to section 13.3.1 of the contract between URS and Navillus, entitled "Indemnification," which states in relevant part as follows:

> If the persons or property of the CM [Construction Manager, i.e., URS or the Liro defendants], NYCHA or others sustains loss, damage or injury as a result of the operations of the Contractor [i.e., Navillus] and/or its subcontractors in the performance of the contract ... the Contractor shall indemnify, defend and hold harmless the CM, NYCHA ... and their officers, agents, employees, representatives, affiliates, parents and subsidiaries, to the fullest extent permissible by law, from any and all claims, demands, causes of action, damages, costs, expenses, losses or liabilities, in law or in equity, of every kind and nature whatsoever (including, but not limited to, reasonable attorney's fees and expenses, and claims made by any employees or agents of ... NYCHA) arising out of or occurring in connection with Contractor's performance of the work ...

See Notice of Motion (motion sequence number 001), Exhibit L. Unisys notes that its contract with URS contains an identically worded provision. *See* Notice of Motion (motion sequence number 002), Exhibit N. The court notes that Article 10 of the contract between URS and the Liro defendants also contains an indemnification provision that provides that:

A. URS shall defend, indemnify and hold harmless Liro and its officers, employees, agents and representatives from and against any and all claims, demands, suits, damages, costs, expenses and fees which are or may be asserted against Liro and which arise solely out of the negligent acts or omissions of URS and its contractors (of all tiers) that perform services under this agreement. Such defense and indemnification shall not apply in any such instance and to the extent caused by the negligence or misconduct of Liro, or its officers, employees, agents or representatives.

B. Liro shall defend, indemnify and hold harmless URS and its officers, employees, agents and representatives from and against any and all claims, demands, suits, damages, costs, expenses and fees which are or may be asserted against URS and which arise solely out of the negligent acts or omissions of Liro and its contractors (of all tiers) that perform services under this agreement. Such defense and indemnification shall not apply in

a "tool or material supplied by or needed by defendant to perform its work," and the holding of *Pepe v Center for Jewish History, Inc.* would be distinguished on the facts. At this juncture, however, it is not possible to determine with finality if either Navillus or URS was making use of the hose. Therefore, an open issue of fact exists that makes it improper for the court to grant Navillus's and URS's request for summary judgment at this juncture.

Unisys adopts the legal arguments that Navillus and URS advanced in their motion. *See* Notice of Motion (motion sequence number 002), Feehan Affirmation, ¶¶ 27-28. As a factual matter, it is evident that Unisys - an electrical and lighting contractor - could not have been using the hose that dripped the water that Beltran slipped on. However, as was previously discussed, an open issue of fact exists as to the exact cause of the apparent lack of lighting in the temporary ingress/egress corridor (which Beltran alleges contributed to his injury). Because Unisys was most certainly the lighting and electrical contractor at the building, it is clear that the lights in the corridor were a "tool or material supplied by or needed by defendant to perform its work." Thus, the holding of *Pepe v Center for Jewish History, Inc.* would be distinguished on the facts in Unisys's case as well, and it could not avail itself of the "not arising out of rule" enunciated therein. Therefore, the court finds that it would be improper to dismiss the indemnification cross claims against Unisys at this juncture, also.

In their motion, the Liro defendants devote a great deal of space to the factual argument that Navillus's tile work was the only possible activity in the vicinity of Beltran's accident that required the use of water. *See* Notice of Motion (motion sequence number 003), Memorandum of Law, at 16-20 (pages not numbered). However, despite the Liro defendants' arguments to the

contrary, the deposition testimony is inconclusive. There are unresolved issues of fact about the nature and extent of the Liro defendants' work in the vicinity of the temporary ingress/egress corridor. For example, at different junctures of his testimony, Karmel both admitted and denied that the Liro defendants were performing renovation work in the building's lobby (where the elevator that Beltran was going to repair was located), and he never stated what that work consisted of. *See* Notice of Motion (motion sequence number 001), Exhibit G (Karmel transcript), at 15-26. Further, despite the Liro defendants' mischaracterization of his testimony, Beltran did not identify Navillus as the entity responsible for running the hose that leaked the water into the temporary ingress/egress corridor. Instead, Beltran stated that he did not know which contractor was responsible for the hose. *Id.*; Exhibit C (Beltran transcript), at 93. Beltran also stated that there was tile work being performed in the building's lobby which was, apparently, an area where the Liro defendants were performing work. *Id.* at 93-95. Therefore, the court rejects the Liro defendants' factual argument, and consequently finds that, at this juncture, they are also foreclosed from relying on the holding of *Pepe v Center for Jewish History, Inc.* to claim that Beltran's injuries did not "arise out of" or "in connection with" their work.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendants Navillus Tile, Inc., URS Corporation and URS Corporation-New York (motion sequence number 001) is granted solely to the extent of dismissing so much of the complaint as is based on a purported violation

of Labor Law § 241 (6), and the cross claims asserted against said defendants for breach of contract, but is otherwise denied in accordance with the findings set forth in this decision; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of defendant Unisys Electric, Inc. (motion sequence number 002) is granted solely to the extent of dismissing so much of the complaint as is based on a purported violation of Labor Law § 241 (6), and the cross claims asserted against said defendant for breach of contract, but is otherwise denied in accordance with the findings set forth in this decision; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of defendants Liro Engineering and Construction Management and Liro Program and Construction Management PE, PC (motion sequence number 003) is granted solely to the extent of dismissing so much of the complaint as is based on a purported violation of Labor Law § 241 (6), but is otherwise denied in accordance with the findings set forth in this decision; and it is further

ORDERED that this case is ready for trial after the upcoming mediation; and it is further

ORDERED that plaintiff shall serve a copy of this decision on the Mediator and on the Office of Trial Support so the case can be scheduled; and it is further

ORDERED that the balance of this action shall continue.

Dated: New York, New York
April 2, 2012

ENTER:

Hon. Judith J. Gische, JSC