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

PRESENT: HON. PAUL WOOTEN Justice PART 7

MICHAEL ESCOBAR and TAMI ESCOBAR,

Plaintiffs,

-against-

GFC FIFTH AVENUE OWNER, LLC, ST. REGIS NEW YORK OPERATING, LLC, ST. REGIS NEW YORK HOLDINGS, LLC, STARWOOD HOTELS & RESORTS WORLDWIDE, INC., d/b/a THE ST. REGIS HOTEL-NEW YORK, STARWOOD HOTELS & RESORTS MANAGEMENT COMPANY, INC., WATTS RESTORATION, INC., NORTHEAST MAST CLIMBERS, LLC, SAFETY SQUAD, INC. and DSENY BUILDING SERVICES, INC.,

Defendants.

INDEX NO. 105905/10

MOTION SEQ. NO. 003

NORTHEAST MAST CLIMBERS, LLC,

Third-Party Plaintiff,

-against-

REGIONAL SCAFFOLDING & HOISTING CO., INC.,

Third-Party Defendant.

THIRD-PARTY INDEX NO. 590419/11

WATTS RESTORATION, INC.,

Second Third-Party Plaintiff,

-against-

REGIONAL SCAFFOLDING & HOISTING CO., INC.,

Second Third-Party Defendant.

SECOND THIRD-PARTY INDEX NO 509332/12

GFC FIFTH AVENUE OWNER, LLC, ST. REGIS NEW YORK OPERATING, LLC, ST. REGIS NEW YORK HOLDINGS, LLC, STARWOOD HOTELS & RESORTS WORLDWIDE, INC., d/b/a THE ST. REGIS HOTEL-NEW YORK, STARWOOD HOTELS & RESORTS MANAGEMENT COMPANY, INC.,

THIRD THIRD-PARTY INDEX NO 590731/12

Third Third-Party Plaintiffs,

-against-

REGIONAL SCAFFOLDING & HOISTING CO., INC.,

Third Third-Party Defendant.

The following papers, were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ☐ **Yes** ■ **No**

Motion sequence numbers 003, 004, 005, 006, 007, 008, and 009 are hereby consolidated for disposition.

This is an action arising out of a construction site accident which occurred on April 19, 2010 on the premises of the St. Regis Hotel located at 2 East 55th Street, New York, New York. Plaintiff Michael Escobar, a carpenter foreman employed by Regional Scaffolding & Hoisting Co., Inc. (Regional), was allegedly injured when he climbed down the mast tower of a mast climber, while installing the mast climber on the job site.

Defendant/third-party plaintiff Northeast Mast Climbers, LLC (Northeast) moves, pursuant to CPLR 3212, for: (1) summary judgment dismissing plaintiffs' complaint and any cross-claims against it; and (2) summary judgment granting it indemnification, requiring assumption of Northeast's defense, and attorney's fees against third-party defendant Regional (motion sequence number 003).

Plaintiffs move, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law § 240(1) (motion sequence number 004). Plaintiffs also move, by order to show cause, pursuant to CPLR 3101(a)(3) through (4), for an order quashing

subpoenas served on plaintiff's nonparty treating physicians, for a protective order precluding post-note of issue nonparty depositions of plaintiff's treating physicians, and for an interim order precluding such depositions from proceeding (motion sequence number 005).

Defendants Safety Squad, Inc. (Safety Squad) and DSENY Building Services, Inc. (DSENY) move, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross-claims against them (motion sequence number 006).

Defendants/third third-party plaintiffs GFC Fifth Avenue Owner, LLC, St. Regis New York Operating, LLC, St. Regis New York Holdings, LLC, Starwood Hotels & Resorts Worldwide, Inc. d/b/a The St. Regis Hotel-New York, and Starwood Hotels & Resorts Management Company, Inc. (collectively, the St. Regis defendants) move, pursuant to CPLR 3212, for: (1) summary judgment dismissing plaintiffs' claims and all cross-claims and counterclaims as against them; and (2) summary judgment on their cross-claims for contractual and common-law indemnification over and against defendant Watts Restoration, Inc. (Watts) (motion sequence number 007).

Defendant/second third-party plaintiff Watts cross-moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint and all cross-claims against it.

Third-party defendant/second third-party defendant/third third-party defendant Regional moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint and the third-party complaints and all cross-claims and counterclaims against it (motion sequence number 008).

Regional also moves, pursuant to CPLR 3124 and 22 NYCRR 202.21 (e), for an order: (1) vacating plaintiffs' note of issue and certificate of readiness and striking this case from the trial calendar; or in the alternative, (2) directing that certain nonparty discovery may proceed post-note of issue; and (3) regardless of whether the case remains on the trial calendar,

compelling plaintiffs to provide duly executed and HIPAA-compliant authorizations to obtain plaintiff's medical records (motion sequence number 009).

The St. Regis defendants and Watts separately cross-move, pursuant to CPLR 3124 and 22 NYCRR 202.21 (e), for the same relief.

BACKGROUND

St. Regis New York Operating, LLC was the owner of the premises on the date of the accident. St. Regis New York Operating, LLC hired Watts as a general contractor to restore the facade of the hotel. Watts retained Regional to install sidewalk sheds and mast climbers on the site. Regional rented the mast climbers from Northeast. DSENY and Safety Squad provided engineering and design services for the erection of the mast climbers.

Plaintiff testified at his deposition[1] that he was employed as a carpenter foreman by Regional on the date of his accident (Plaintiff tr at 16). Regional was retained to install sidewalk protection and mast climbers, also known as Hek machines, at the St. Regis Hotel (*id.* at 38). Plaintiff described a Hek machine as an enclosed platform on three sides that ascends and descends the mast tower; it is a "machine that lifts itself with rack and pinion" (*id.* at 39-40). On the date of his accident, plaintiff arrived at the job site at approximately 6:30 a.m. (*id.* at 69). Plaintiff testified that he was going to "stack tower" on that date, which meant "[g]o[ing] up, rais[ing] the Hek machine, and mak[ing] a tie and continu[ing] on up" (*id.* at 70). The towers are made up of mast sections which are tied to the building (*id.* at 71, 72). In addition to plaintiff, there were three other Regional workers on site on the date of the accident (*id.* at 76). Prior to plaintiff's accident, Regional workers were making the second level of tie-ins on the mast towers (*id.* at 78). To complete a tie-in, the deck of the Hek machine would be raised to where the tie-in was to be placed, and Regional's workers would affix the ties while working from the

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[1] Plaintiff was deposed on November 17, 2011, November 18, 2011, and December 8, 2011. The Court cites to plaintiff's November 17, 2011 deposition transcript, unless otherwise indicated.

deck of the Hek machine (*id.* at 80). On the date of the accident, plaintiff was having a problem with the tie-in on the side that plaintiff was working on (*id.* at 80-81). Plaintiff decided to climb down the mast tower to use the bathroom and call his supervisor, Jim McMahon (*id.* at 81).

Plaintiff then notified Pete Rice, the other foreman on the job, that he was going to climb down to use the bathroom and make a call (*id.* at 84). Plaintiff informed his partner that he was going to climb down the tower, as he did not want to stop the work by lowering the deck (*id.* at 90, 99). As plaintiff started climbing down the mast tower, the deck of the Hek machine was 25 feet above a sidewalk bridge (*id.* at 85). Plaintiff had descended approximately five feet before he fell (*id.* at 88). Plaintiff testified that he "stepped off the deck of the Hek machine, held onto the scaffold mast tower and proceeded to climb down in a ladder fashion, hand under hand, and [he] missed [his] right hand and fell backwards" (*id.* at 111). Plaintiff's lanyard was not tied off as he was descending the mast tower (*id.* at 88). According to plaintiff, there were no rope drops or safety lines at the job for plaintiff to tie off to while he descended the mast tower (*id.*). Plaintiff testified that he could not have used his lanyard and harness to tie off to the mast tower while climbing down, because he would have had to go down five to six feet on his lanyard, and then would have to go up and untie it (*id.* at 88, 89).

Plaintiff and his wife, plaintiff Tami Escobar, commenced this action against the St. Regis defendants and Watts on May 5, 2010, seeking recovery pursuant to Labor Law §§ 240 (1), 241(6), and 200 and under principles of common-law negligence. Plaintiff's wife also asserts a claim for loss of services, society, and consortium. Plaintiffs filed a supplemental summons and complaint on April 7, 2011, adding Northeast and DSENY and Safety Squad as direct defendants.

On May 12, 2011, Northeast commenced a third-party action against Regional, seeking indemnification and contribution. On April 24, 2012, Watts brought a second third-party action against Regional, asserting claims for: (1) common-law indemnification; (2) contractual

indemnification; (3) contribution; and (4) breach of contract. On September 4, 2012, the St. Regis defendants commenced a third third-party action against Regional, also seeking: (1) common-law indemnification; (2) contractual indemnification; (3) contribution; and (4) breach of contract. On November 15, 2012, plaintiffs discontinued their claims pursuant to Labor Law §§ 240 and 241 (6) as against Northeast (Fullerton affirmation in support, exhibit I). Plaintiffs filed the note of issue and certificate of readiness on March 1, 2013.

DISCUSSION

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light

most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]; *Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

Labor Law § 240(1)

Plaintiffs move for partial summary judgment on the issue of liability under Labor Law § 240 (1). Plaintiffs contend that St. Regis New York Operating, LLC and Watts failed to provide lifelines when he climbed down the mast tower to take a necessary measurement.

In opposition, and in support of their own motion seeking dismissal of plaintiff's Labor Law § 240 (1) claim, the St. Regis defendants argue that there was no statutory violation and that plaintiff's actions were the sole proximate cause of his injuries. The St. Regis defendants contend that plaintiff was provided with a proper, working, and available safety device: the movable platform of the mast tower. The St. Regis defendants submit an affidavit from Brent R. Leisenring, P.E., who opines that the purpose of the mast climbing platform is to provide a safe platform for accessing work areas and to allow workers to ascend or descend from the work areas in a safe manner (Leisenring aff, ¶ 56). Leisenring concludes that plaintiff's actions in climbing down the mast tower, rather than lowering the mast tower platform, were the sole proximate cause of the accident (*id.*). The St. Regis defendants also contend that GFC Fifth Avenue Owner, LLC, St. Regis New York Holdings, LLC, and Starwood Hotels & Resorts Management Company, Inc. are not owners under the Labor Law.

Watts similarly contends that plaintiff's failure to use the mast climber platform was the sole proximate cause of his accident. Watts argues that plaintiff knew or should have known that he was expected to use the mast climber platform, since (1) the mast climber platform was

the primary, if not exclusive, method of transporting workers from the sidewalk bridge up the elevated platform; (2) lowering the platform would not have caused any significant delay; (3) the mast climber platform was routinely lowered for non-emergency reasons; (4) climbing down the platform was improper and unnecessarily dangerous; and (5) plaintiff was an experienced foreman. In addition, Watts contends that plaintiff also failed to use other readily available safety devices, including his harness, lanyard, and safety line, which could have been easily obtained.

For its part, Regional argues, in opposition to plaintiffs' motion, that plaintiff's actions were the sole proximate cause of his accident because he unilaterally decided to abandon the mast climber platform and instead climbed down the mast tower without utilizing his safety lanyard.

In reply, plaintiffs argue that the mast climber was not a safety device. As support, plaintiffs submit filings from the New York City Department of Buildings in which Watts represented that the mast climber would not be used as a personnel hoist (Laskin affirmation in opposition and reply, exhibit 1). According to plaintiffs, pursuant to 1 RCNY 3314-01 and ANSI/SIA A92.9-2011, which became effective in 2011, use of a mast climber as a personnel hoist constitutes "misuse." Plaintiffs argue that there are no documents indicating that the mast climber was the workers' safety device on the job.

Labor Law § 240(1), known as the Scaffold Law, provides, in pertinent part, that:

> "All contractors and owners and their agents, . . . 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*" (emphases added).

Labor Law § 240(1) imposes absolute liability on owners, general contractors, and their agents for any breach of the statutory duty which proximately causes an injury (*Rocovich v*

Consolidated Edison Co., 78 NY2d 509, 513 [1991]). To recover under the statute, the plaintiff must establish: (1) a violation of the statute, i.e., the owner or contractor failed to provide adequate safety devices; and (2) that the statutory violation was a proximate cause of the injuries sustained (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 [2003]). "'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

1. Proper Defendants

a. St. Regis New York Operating, LLC and Watts

Initially, the Court notes that it is undisputed that St. Regis New York Operating, LLC was the owner of the St. Regis New York Hotel on the date of the accident (Ruzi aff, ¶ 2). There is also no dispute that St. Regis New York Operating, LLC hired Watts as the general contractor on the project (Metzger affirmation in opposition, exhibit D).

b. GFC Fifth Avenue Owner, LLC

The St. Regis defendants argue that GFC Fifth Avenue Owner, LLC is not an owner under the Labor Law. Plaintiffs did not oppose this part of the St. Regis defendants' motion.

The term "owner" 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" (*Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]). Here, the St. Regis defendants submit deposition testimony indicating that: (1) GFC Fifth Avenue Owner, LLC owns the retail unit of the building located at the St. Regis Hotel; (2) GFC Fifth Avenue Owner, LLC purchased the retail unit from St. Regis New York Operating, LLC in 2009; and (3) GFC Fifth Avenue Owner, LLC had no involvement in the facade restoration work (Olenick tr at 8, 9, 14, 24; Wright tr at

36, 37). In addition, the St. Regis defendants provide an affidavit from the architect who performed the surveying, evaluation, and examination of the exterior facades of the hotel for the project, which states that the repairs to the building did not include or contemplate any work on the facades of the building adjacent to the commercial spaces (Kahane aff, ¶ 5). Therefore, the St. Regis defendants have shown that GFC Fifth Avenue Owner, LLC does not qualify as an "owner" under the Labor Law. Plaintiffs have failed to raise an issue of fact. Accordingly, GFC Fifth Avenue Owner, LLC is entitled to dismissal of plaintiff's Labor Law § 240(1) claim as against it.

c. St. Regis New York Holdings, LLC and Starwood Hotels & Resorts Management Company, Inc.

The St. Regis defendants also argue that St. Regis New York Holdings, LLC and Starwood Hotels & Resorts Management Company, Inc. are not owners. Plaintiffs did not oppose this branch of the St. Regis defendants' motion. St. Regis New York Holdings, LLC is a wholly-owned subsidiary of Starwood Hotels & Resorts Worldwide, Inc., which, for a brief period in 2006, was the owner of the St. Regis Hotel; however, in April 2010, St. Regis New York Holdings, LLC had no interest in the St. Regis Hotel (Ruzi aff, ¶ 3). Furthermore, in April 2010, Starwood Hotels & Resorts Management Company, Inc. held a .499% interest in certain personal property located at the hotel itself, but did not have an interest in any real property comprising the hotel (*id.*, ¶ 4). In light of this uncontroverted evidence, St. Regis New York Holdings, LLC and Starwood Hotels & Resorts Management Company, Inc. are entitled to dismissal of plaintiff's Labor Law § 240 (1) claim as against them.

2. Statutory Violation and Proximate Cause

Here, plaintiff was subjected to an elevation-related risk when he climbed down the mast tower. Plaintiff testified that there were no lifelines to tie off to while descending the mast tower (Plaintiff tr at 88). Plaintiff further testified that, given the nature and contours of the hotel's

facade, the mast climber could not be flush against the building; rather, each day as the towers were built, outriggers would be extended from the deck toward the building and planks were placed on top of those outriggers (Plaintiff 11/18/11 tr at 158). Greg Blinn, Regional's vice president, testified that there were no lifelines for plaintiff to tie off to on the day that he fell (Blinn tr at 287). According to Blinn, there were lifelines furnished for other parts of the job, but not at the location where plaintiff was required to work (*id.*). Blinn testified that it was feasible to have lifelines with a mast climber (*id.* at 289). Kevin Walls, a supervisor/foreman for Watts, testified after reviewing photographs of the facade restoration work, that lifelines were not in place (Walls tr at 116, 119-120). Delbert Gray, a technician employed by Northeast, testified that lifelines are not provided for mast climbers because they can get tangled in the machine (Gray tr at 90, 301-303). However, he also testified that the fall protection used is a lanyard with a double pelican hook, which plaintiff was not given (*id.* at 303). Thus, plaintiff has shown that he was not given adequate safety devices, and that his injuries are at least partially attributable to the absence of such devices (*see Hoffman v SJP TS, LLC*, 111 AD3d 467 [1st Dept 2013] [although there was no defect in scissor lift, it was an inadequate safety device in light of the configuration of the building]; *Vasquez v Cohen Bros. Realty Corp.*, 105 AD3d 595, 597-598 [1st Dept 2013] [worker working on scissor lift was not given adequate safety devices, where, besides the lift, he was not given harnesses or safety lines]).

The Court finds the St. Regis defendants', Watts', and Regional's contention that plaintiff was the sole proximate cause of his accident to be unpersuasive.

> "Liability under section 240 (1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident. In such cases, plaintiff's own negligence is the sole proximate cause of his injury" (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]).
>
> "Under Labor Law § 240 (1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same

> ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" (*Blake*, 1 NY3d at 290).

"To raise a triable issue of fact as to whether a plaintiff was the sole proximate cause of an accident, the defendant must produce evidence that adequate safety devices were available, that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained" (*Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 402-403 [1st Dept 2013], citing *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004], and *Gallagher*, 14 NY3d at 88).

Although the St. Regis defendants, Watts, and Regional argue that plaintiff was the sole proximate cause of his accident for failing to use the mast climber platform, plaintiff was not provided with an adequate safety device in the first instance (*see Hernandez v Argo Corp.*, 95 AD3d 782, 783 [1st Dept 2012] ["Given defendants' statutory violation, plaintiff's conduct cannot have been the sole proximate cause of the accident"]). Moreover, even if plaintiff knew that the mast climber or other appropriate safety devices were readily available to him, there is no evidence that he *knew* that he was expected to use these safety devices to descend from the mast climber platform (*see Gallagher*, 14 NY3d at 88). Plaintiff testified that "[w]henever we are working, we are on a time constraint. Everybody is on a schedule. We are trying to get the scaffold up and down for whatever contract and job it is. I'm not about to every time someone has to go to the bathroom or somebody does this, we all have to stop working and go downstairs, that did not make much sense" (Plaintiff tr at 91). Plaintiff testified that he could not have used his lanyard and harness to tie off to the mast tower while climbing down the mast tower; he would have had to go down five to six feet on his lanyard, and then would have to go up and untie it (*id.* at 88, 89). In addition, plaintiff's co-worker testified that he would sometimes climb down the mast tower because in order to use the mast climber platform, "you would have to take off eight or nine planks, bring in your outriggers on both sides because there were

protrusions that stick out the building," which would interrupt the work (Swerbilov tr at 38-39). Therefore, plaintiff cannot be deemed the sole proximate cause of his accident (*see Olea v Overlook Towers Corp.*, 106 AD3d 431, 432 [1st Dept 2013] [plaintiff was not sole proximate cause of his accident where workers customarily went from a balcony to a motorized scaffold by jumping onto the scaffold and climbing over the railing, the very method that plaintiff used when he was injured]; *Nechifor v RH Atl.-Pac. LLC*, 92 AD3d 514 [1st Dept 2012] [plaintiff's own acts or omissions were not the sole proximate cause of his accident; plaintiff was injured while attempting to descend from the top of a scaffold by climbing down the side frame of a scaffold]; *Torres v Our Townhouse, LLC*, 91 AD3d 549 [1st Dept 2012] [plaintiff's decision to climb down a nearby tree rather than use a ladder was not the sole proximate cause of his accident]; *Tounkara v Fernicola*, 80 AD3d 470, 471 [1st Dept 2011] [even if plaintiff knew that appropriate safety devices were "readily available," plaintiff was not the sole proximate cause of his accident because there was no evidence that he "knew he was expected to use" the safety devices for the assigned task]). Even if plaintiff was negligent in climbing down the mast tower, his negligence is not a defense to liability under Labor Law § 240(1) (*see Fernandez v BBD Developers, LLC*, 103 AD3d 554, 555 [1st Dept 2013]).

Accordingly, plaintiff is entitled to partial summary judgment on the issue of liability under Labor Law § 240(1) as against St. Regis New York Operating, LLC, the owner, and Watts, the general contractor. The branch of the St. Regis defendants' motion is granted solely as to GFC Fifth Avenue Owner, LLC, St. Regis New York Holdings, LLC, and Starwood Hotels & Resorts Management Company, Inc. The branches of Watts' motion and Regional's motion seeking dismissal of plaintiff's Labor Law § 240(1) claim are denied.

Labor Law § 241(6)

The St. Regis defendants move for summary judgment dismissing plaintiff's Labor Law § 241(6) claim, arguing that plaintiff was the sole proximate cause of his accident. In addition,

the St. Regis defendants argue that plaintiffs have failed to identify a specific or applicable violation of the Industrial Code. Watts also moves for summary judgment on this claim on the ground that plaintiff has failed to identify a specific or applicable Industrial Code provision. Regional also argues that plaintiff's Labor Law § 241(6) claim should be dismissed because there were no sufficiently specific or applicable Industrial Code violations. Plaintiff argues, in opposition to the motions, that defendants violated 12 NYCRR 23-5.1(h).

Labor Law § 241(6) provides, in relevant part, as follows:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
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> ***
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> "6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work . . . , shall comply therewith."

Labor Law § 241(6) requires owners, contractors, and their agents to "provide reasonable and adequate protection and safety" for workers performing the inherently dangerous activities of construction, excavation, and demolition work. To recover under Labor Law § 241(6), a plaintiff must plead and prove the violation of a concrete and applicable specification of the New York State Industrial Code, containing "specific, positive command[s]," rather than a provision restating common-law safety standards (*Ross*, 81 NY2d at 504). In addition, the plaintiff must also show that the violation was a proximate cause of the accident (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]). Comparative negligence is a defense to liability pursuant to Labor Law § 241 (6) (*Once v Service Ctr. of N.Y.*, 96 AD3d 483 [1st Dept 2012], *lv dismissed* 20 NY3d 1075 [2013]).

In opposition to defendants' motions, plaintiffs rely on 12 NYCRR 23-5.1(h), entitled

"Scaffold erection and removal," which states "[e]very scaffold shall be erected and removed under the supervision of a designated person." Here, plaintiff fell while climbing down from the mast climber platform. Therefore, section 23-5.1(h) does not apply here (*see Lavore v Kir Munsey Park 020, LLC*, 40 AD3d 711, 713 [2d Dept 2007], *lv denied* 10 NY3d 701 [2008] [where plaintiff fell while descending from side of utility truck, section 23-5.1 (h) did not apply because plaintiff's use of the mast climber as the "functional equivalent" of a scaffold had ceased]). Since plaintiff has failed to identify a specific and applicable Industrial Code provision, his Labor Law § 241(6) claim is dismissed (*see Owen v Commercial Sites*, 284 AD2d 315 [2d Dept 2001]).

Labor Law § 200 and Common-Law Negligence

In moving to dismiss plaintiff's Labor Law § 200 and common-law negligence claims, the St. Regis defendants argue that they did not exercise any supervision or control over plaintiff's work. Watts also contends that it did not exercise supervision and control over the means and methods of plaintiff's work installing the mast climber. Northeast moves for summary judgment dismissing these claims on the grounds that it did not supervise or control plaintiff's work and was not otherwise actively negligent. For its part, Regional contends that plaintiff was the sole proximate cause of his accident. Plaintiffs argue, in opposition to the motions, that there are issues of fact as to Watts's supervision and control over plaintiff's work.

Labor Law § 200(1) provides that:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protection to all such persons. . . ."

It is well settled that Labor Law § 200 is a codification of an owner's and general contractor's duty to provide workers with a safe place to work (*Comes v New York State Elec. &*

Gas Corp., 82 NY2d 876, 877 [1993]). "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" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). Where a worker is injured as a result of the manner in which the work is performed, the relevant standard is whether the owner or general contractor "exercise[d] supervision or control over plaintiff's work" (*Mutadir v 80-90 Maiden Lane Del LLC*, 110 AD3d 641, 643 [1st Dept 2013]; *see also Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]; *Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003]). Where a worker is injured as the result of a dangerous premises condition, "liability depends on whether the owner or general contractor created or had actual or constructive notice of the hazardous condition" (*Bayo v 626 Sutter Ave. Assoc., LLC*, 106 AD3d 648 [1st Dept 2013]; *see also Hernandez v Columbus Ctr., LLC*, 50 AD3d 597, 598 [1st Dept 2008]; *Murphy v Columbia Univ.*, 4 AD3d 200, 201-202 [1st Dept 2004]).

The parties agree that plaintiff's accident arose out of the means and methods of his work, not a dangerous condition on the premises.

1. St. Regis defendants

Plaintiff testified that the only directions that he received from anyone from the hotel was the doorman, who told the workers where to put the trucks and conveyed messages from the hotel management about litter and cleaning up the work and to be very careful with pedestrians (Plaintiff tr at 58, 68). Michael Coppola, the hotel engineer, testified that his involvement was limited to how Watts' work affected the hotel guests and clients (Coppola tr at 48). Starwood's project manager testified that he was present perhaps only once or twice during the erection of the mast climber; he spoke with Gerry Watts perhaps once a week to receive updates on the status of the work (Wright tr at 35, 41). Jim McMahon, Regional's general foreman, testified that the only meeting he had with the "house engineer" involved noise and miscellaneous things

(McMahon tr at 96). Delbert Gray, a Northeast technician, testified that his only interaction with the hotel "maintenance supervisor" involved a discussion as to the hotel's available power (Gray tr at 59, 64). In addition, article 11 of the general contract states that "Contractor shall be solely responsible for all construction means, methods, techniques or procedures and for all safety requirements, programs, measures and precautions in connection with the Work" (Metzger affirmation in support, exhibit H). Although the St. Regis defendants' representatives were either present or visited the site on occasion, they did not exercise supervision and control over plaintiff's work (*see Cappabianca*, 99 AD3d at 144). Therefore, in light of this evidence, and given that plaintiffs have not opposed this portion of the St. Regis defendants' motion, plaintiff's Labor Law § 200 and common-law negligence claims are dismissed as against them.

2. Watts

As for Watts, plaintiff testified that he "didn't deal with anyone from Watts," and that Watts did not supervise any other Regional employees (Plaintiff tr at 57, 58). "[T]he mere fact that a general contractor 'had overall responsibility for the safety of the work done by the subcontractors' is insufficient to demonstrate that it had the requisite degree of control and that it actually exercised that control" (*Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013], quoting *O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 226 [1st Dept 2006], *affd* 7 NY3d 805 [2006]). While plaintiffs rely on Watts' filings with the New York City Department of Buildings, plaintiffs have failed to raise an issue of fact as to whether Watts actually controlled plaintiff's work (*see Koerner v City of New York*, 111 AD3d 435 [1st Dept 2013]). Thus, plaintiff's Labor Law § 200 and common-law negligence claims are dismissed as against Watts.

3. Northeast

With respect to Northeast, there is no basis for imposing liability under section 200 as against this defendant. It is well settled that Labor Law § 200 applies to an owner, general

contractor, and their agents who have the authority to supervise the injury-producing work (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]; *Urbina v 26 Ct. St. Assoc., LLC*, 12 AD3d 225, 226 [1st Dept 2004]). It is undisputed that Northeast is not an owner or general contractor. There is also no evidence that it had the authority to supervise plaintiff's work. Regional rented the mast climber from Northeast. Plaintiff testified that Northeast did not instruct or direct Regional in the erection of the mast towers (Plaintiff 12/8/11 tr at 206). Plaintiff further testified that Northeast had a representative on site during the installation of the Hek machines, but that he only instructed them on a technique for picking up the tower sections and decking, both of which had been completed prior to the date of the accident (Plaintiff 11/18/11 tr at 229). Regional's vice president testified that Regional was responsible for the erection of the mast climbers (Blinn tr at 362). Nor is there any evidence that Northeast supplied a defective mast climber, which would be sufficient to sustain a claim of common-law negligence (*see Urbina*, 12 AD3d at 226; *Keohane v Littlepark House Corp.*, 290 AD2d 382, 383 [1st Dept 2002]). In view of this evidence, and since plaintiff did not oppose dismissal, the Labor Law § 200 and common-law negligence claims are dismissed as against Northeast.

The St. Regis Defendants' Request for Contractual Indemnification from Watts

The St. Regis defendants move for contractual indemnification from Watts pursuant to article 6 of the general contract.

Article 6 of the general contract provides:

> "*To the fullest extent permitted by law, the Contractor will protect, defend, indemnify and hold harmless the Owner*,[2] Starwood Hotels & Resorts Worldwide, Inc. and their respective officers, directors, shareholders, partners, Architect, Architect's consultants, Owner's consultants and agents and employees of any of them ("Indemnified Parties"), *from and against any and all claims, damages, losses or expenses, including, but not limited to attorneys fees, arising out of or resulting from the performance of the Work or Contractor's failure to comply with the terms or*

[2] The term "owner" is defined as St. Regis New York Operating, LLC in the general contract (Metzger affirmation in support, exhibit H).

> *provisions of this Agreement, to the extent caused in whole or in part by any willful or negligent acts or omissions of the Contractor or any Subcontractors*, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused by any of the Indemnified Parties. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to any of the Indemnified Parties. In claims against any of the Indemnified Parties by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this section shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts" (Metzger affirmation in support, exhibit H [emphasis supplied]).

The St. Regis defendants argue that, if there is a statutory finding of liability against any of these defendants, then said finding would have to be based upon the negligence of those parties responsible for site safety, Watts and/or its subcontractors, for failing to provide plaintiff with proper protection under the Labor Law. Alternatively, the St. Regis defendants seek a conditional judgment of indemnification against Watts.

Watts argues, in opposition, that the St. Regis defendants' motion is premature because there has been no finding of negligence against Watts or its subcontractors. In addition, Watts maintains that a conditional judgment of indemnification is also premature.

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into a duty which the parties did not intend to be assumed" (*Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 417 [2006] [internal quotation marks and citation omitted]). "In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the

statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

Here, the contractual indemnification provision requires Watts to indemnify St. Regis New York Operating, LLC "from and against any and all claims, damages, . . . including, but not limited to, attorneys fees, arising out of or resulting from the performance of the Work or Contractor's failure to comply with the terms or provisions of this Agreement, to the extent caused in whole or in part by any willful or negligent acts or omissions of the Contractor or any Subcontractors . . ." (Metzger affirmation in support, exhibit H). Although the St. Regis defendants point to article 21 of the general contract,[3] they have failed to establish that GFC Fifth Avenue Owner, LLC, St. Regis New York Holdings, LLC, Starwood Hotels & Resorts Worldwide, Inc. d/b/a The St. Regis Hotel-New York, and Starwood Hotels & Resorts Management Company, Inc. qualify as indemnitees under the indemnification provision (*see Great N. Ins. Co.*, 7 NY3d at 417).

Thus, the Court considers whether St. Regis New York Operating, LLC is entitled to contractual indemnification. As noted above, the St. Regis defendants have established that St. Regis New York Operating, LLC was not negligent. However, at this juncture, there has been no finding that Watts or any of its subcontractors committed any "willful or negligent acts or omissions," or that such acts or omissions proximately caused plaintiff's accident. Accordingly, full contractual indemnification against Watts is premature (*see Fernandez v Stockbridge Homes, LLC*, 99 AD3d 550, 551-552 [1st Dept 2012] [lower court properly denied contractual indemnification where movant did not establish that plaintiff's accident resulted from a "negligent act or omission" of general contractor or subcontractors]; *Hamill v Mutual of Am. Inv.*

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[3] Article 21 states that "[t]he Owner and the Contractor respectively bind themselves, their partners, successors, assigns, and legal representatives to the other party hereto and to the partners, successors, assigns and legal representatives of such party in respect to all covenants, agreements, and obligations contained in the Contract Documents" (Metzger affirmation in support, exhibit H).

Corp., 79 AD3d 478, 479-480 [1st Dept 2010] [contractual indemnification was premature where movant did not submit any evidence of a "wrongful act or gross negligence" on plaintiff's employer's part, which was required to trigger indemnification]; *Gomez v Sharon Baptist Bd. of Directors, Inc.*, 55 AD3d 446, 447 [1st Dept 2008] [contractual indemnification against plaintiff's employer was premature where there was no finding that employer or its agents were negligent or proximately caused the plaintiff's injuries]).

The St. Regis defendants also request a conditional judgment of indemnification against Watts. A court may render a conditional award of indemnification, pending determination of the primary action, so that the indemnitee may obtain the "earliest possible determination as to the extent to which he or she may expect to be reimbursed" (*Masciotta v Morse Diesel Intl.*, 303 AD2d 309, 310 [1st Dept 2003] [internal quotation marks and citation omitted]). "To obtain conditional relief on a claim for contractual indemnification, 'the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of . . . statutory [or vicarious] liability'" (*Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 616 [2d Dept 2011], quoting *Correia*, 259 AD2d at 65). As indicated above, St. Regis New York Operating, LLC has been found vicariously liable pursuant to Labor Law § 240(1), and there is no evidence of negligence on its part (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990] ["A violation of [Labor Law § 240(1)] is not the equivalent of negligence and does not give rise to an inference of negligence"]). Accordingly, St. Regis New York Operating, LLC is entitled to an order of conditional contractual indemnification against Watts.

The St. Regis Defendants' Request for Common-Law Defense and Indemnification from Watts

The St. Regis defendants also request common-law defense and indemnification from Watts. The St. Regis defendants again maintain that, if there is a statutory finding of liability, such finding would have to be based upon Watts' and its subcontractors' negligence. Watts argues that common-law indemnification is also premature.

"To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]; *Muriqi v Charmer Indus. Inc.*, 96 AD3d 535, 536 [1st Dept 2012]). In *McCarthy*, the Court of Appeals held that "a party's . . . authority to supervise the work and implement safety procedures is not alone a sufficient basis for requiring common-law indemnification. Liability for indemnification may only be imposed against those parties (i.e., indemnitors) who exercise actual supervision" (*McCarthy*, 17 NY3d at 378). Common-law indemnification includes the right to attorney's fees, costs, and disbursements in defending the main action (*Hernandez v Ten Ten Co.*, 102 AD3d 431, 433 [1st Dept 2013]; *Perez v Spring Cr. Assoc.*, 283 AD2d 626, 627 [2d Dept 2001]).

As discussed previously, there has no finding that Watts was negligent or actually supervised plaintiff's work on the date of the accident. To the contrary, the evidence indicates that Watts did not actually supervise the injury-producing work. Accordingly, the St. Regis defendants' request for common-law indemnification is premature and is denied (*see Pueng Fung v 20 W. 37th St. Owners, LLC*, 74 AD3d 635, 636 [1st Dept 2010] [common-law indemnification premature where there were issues of fact as to proposed indemnitor's negligence]).

Northeast's Request for Contractual Indemnification from Regional

Northeast moves for contractual indemnification over and against Regional pursuant to the rental agreement between Northeast and Regional, which provides as follows:

> "Indemnification. Lessor shall not be responsible to Lessee for, and *Lessee shall indemnify and hold Lessor*, its successors, assigns, officers, employees and agents ("Indemnified Parties") *harmless from and against any and all obligation, liability* (including liability for negligence), *claim, action, suit, loss, damage, or expense (including litigation expenses and attorneys' fees) of any kind or nature imposed on,*

> *incurred by or asserted against Lessor, consequently, directly or indirectly arising out of or in any way related to*: (i) the Equipment or the inadequacy of any items of Equipment; (ii) any deficiency or defect (patent or latent) in any items of Equipment; (iii) *the use, operation or performance of any items of Equipment*; (iv) any interruption or loss of service, use or performance of any items of Equipment; or (v) any loss of business or other consequential damages, whether or not resulting from any of the foregoing. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, LESSOR SHALL NOT BE LIABLE FOR INJURIES TO PERSONS OR DAMAGES TO THE EQUIPMENT OR ANY OTHER PROPERTY UNDER ANY THEORY OF NEGLIGENCE OR STRICT LIABILITY, AND LESSEE SHALL INDEMNIFY AND HOLD INDEMNIFIED PARTIES HARMLESS FROM ANY SUCH LIABILITY AND ALL COSTS AND EXPENSES IN DEFENDING AGAINST SUCH LIABILITY. THIS AGREEMENT IS TO BE ENFORCED TO THE FULLEST EXTENT THAT THE LAW WILL ALLOW" (Fullerton affirmation in support, exhibit Q [emphasis added]).

Northeast argues that, pursuant to the above language, Regional is obligated to not only defend and indemnify Northeast, but also to hold Northeast harmless from any claims arising out of the use of the subject equipment.

Regional contends, in opposition, and in support of its own motion, that the indemnification agreement is void and unenforceable under General Obligations Law § 5-322.1. Regional further argues that the indemnification agreement is ambiguous on its face. Alternatively, Regional argues that, since the sole basis for Northeast's liability to plaintiff is its own negligence, the indemnification provision is unenforceable.

Pursuant to General Obligations Law § 5-322.1, a clause in a construction contract which purports to indemnify a party for its own negligence is against public policy and is void and unenforceable (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997], *rearg denied* 90 NY2d 1008 [1997]). However, an indemnification agreement that authorizes indemnification "to the fullest extent permitted by law" is enforceable (*Landgraff v 1579 Bronx Riv. Ave., LLC*, 18 AD3d 385, 387 [1st Dept 2005] [internal quotation marks and citations omitted]; *Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [1st Dept 2002], *lv denied* 99 NY2d 511 [2003]). Furthermore, even if the clause does not contain this limiting language, it may nevertheless be enforced where the party to be indemnified is found to be free of any

negligence (*Brown*, 76 NY2d at 179; *Mathews v Bank of Am.*, 107 AD3d 495, 496 [1st Dept 2013]; *Collins v Switzer Constr. Group, Inc.*, 69 AD3d 407, 408 [1st Dept 2010]). Contrary to Regional's contention, the indemnification agreement is enforceable. As indicated above, Northeast has shown that it was not negligent.

"[T]he fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent . . ." (*Innophos, Inc. v Rhodia, S.A.*, 10 NY3d 25, 29 [2008] [internal quotation marks and citation omitted]). "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Whether or not an agreement is ambiguous is an issue of law for the court (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). The proper inquiry in determining whether an agreement is ambiguous is whether the agreement is reasonably susceptible to more than one interpretation (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]; *Chen v Yan*, 109 AD3d 727, 729 [1st Dept 2013]). In *Dinnocenzo v Jordache Enters.* (213 AD2d 219 [1st Dept 1995]), the First Department held that an indemnification agreement whereby a lessee agreed to indemnify a lessor from liability "arising out of User's use, operation, possession, or control" of leased equipment was unambiguous.

As in *Dinnocenzo*, the Court finds the indemnification provision requiring Regional to indemnify Northeast to be clear and unambiguous. In addition, the Court finds that the language has been triggered, since this accident qualifies as a claim asserted against Northeast "directly or indirectly arising out of or in any way related to . . . the use, operation or performance of the [mast climber]." Therefore, Regional is required to defend and indemnify Northeast.

Cross Claims for Indemnification and Contribution Against Northeast

Northeast also moves for summary judgment dismissing the cross claims against it. There is no evidence that Northeast provided a defective mast climber or was otherwise

negligent. Thus, the cross claims for common-law indemnification and contribution against Northeast are dismissed. In addition, none of the other parties has come forward with any contracts requiring Northeast to indemnify or procure insurance for them. Accordingly, the cross claims against Northeast are dismissed.

Indemnification and Contribution Claims Against Regional

1. Common-Law Indemnification and Contribution

Regional moves for summary judgment dismissing the common-law indemnification and contribution claims against it, arguing that plaintiff did not suffer a "grave injury." The St. Regis defendants and Watts argue that there is an issue of fact as to whether plaintiff suffered a "grave injury," in light of the evidence that he only has passive movement in his right arm.

> "Workers' Compensation Law § 11 prohibits third-party indemnification or contribution claims against employers, except where the employee sustained a 'grave injury,' or the claim is 'based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered'" (*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 429-430 [2005]).

The statute provides that a "grave injury" is one or more of the following:

> "[D]eath, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability" (Workers' Compensation Law § 11).

"The grave injuries listed are deliberately both *narrowly and completely described*. The list is exhaustive, not illustrative; it is not intended to be extended absent further legislative action" (*Castro v United Container Mach. Group*, 96 NY2d 398, 402 [2001] [internal quotation marks and citation omitted]). "The term 'grave injury' has been defined as a statutorily defined threshold for catastrophic injuries, and includes only those injuries which are listed in the statute and determined to be permanent" (*Ibarra v Equipment Control*, 268 AD2d 13, 17-18 [2d Dept

2000] [internal quotation marks and citations omitted]).

In *Meis v ELO Org.* (97 NY2d 714, 716 [2002]), the plaintiff suffered a complete amputation of his thumb on his dominant hand. The Court of Appeals held that "Workers' Compensation Law § 11 does not list the loss of a thumb as a 'grave injury,' and plaintiff failed to demonstrate that due to the amputation of his thumb he suffers a 'permanent and total loss of use' of the hand. Plaintiff's argument that the loss of his thumb automatically renders his hand totally useless is unavailing" (*id.* [citation omitted]).

Thus, courts have held that anything less than a "total" loss of use of an arm or hand does not qualify as a "grave injury" (*see e.g. Aguirre v Castle Am. Constr.*, 307 AD2d 901 [2d Dept 2003], *lv denied* 1 NY3d 501 [2003] ["some movement" in arm did not qualify as "permanent and total loss of use" of an arm]; *Trimble v Hawker Dayton Corp.*, 307 AD2d 452, 453 [3d Dept 2003] [plaintiff did not sustain "total loss of use" of his arm, given that he was "able to extend and close his right thumb and fingers sufficiently to grasp, hold and carry objects in his right hand"]).

However, where the plaintiff retains only "passive movement" of the hand or arm, that may be sufficient to qualify as a "total loss of use" of a hand or arm (*Balaskonis v HRH Constr. Corp.*, 1 AD3d 120 [1st Dept 2003] [finding issue of fact as to whether plaintiff permanently lost total use of his left hand and arm]; *Millard v Alliance Laundry Sys., LLC*, 28 AD3d 1145, 1147 [4th Dept 2006] [issue of fact as to whether plaintiff suffered a total loss of use of her left arm and hand, in light of affirmation by plaintiff's treating physician that she had an "inability to use her left arm and hand," and "for all intents and purposes," had "no functional use of her left extremity, including the arm, wrist and hand"]; *Sexton v Cincinnati Inc.*, 2 AD3d 1408, 1409-1410 [4th Dept 2003] [issue of fact as to whether plaintiff suffered a "grave injury" where plaintiff did not even retain minimal use of his hands; defendants' medical expert stated that plaintiff actually performed those activities with adaptive techniques of an amputee]).

Here, plaintiffs' verified bill of particulars alleges a "loss of functional use" of his left and right hands (verified bill of particulars, ¶¶ 11-12). While Regional relies on an unaffirmed and unsworn report from plaintiff's treating physician (Lourenso affirmation in support, exhibit HH), an unaffirmed and unsworn letter to counsel from the physician who conducted an independent medical examination of plaintiff (*id.*, exhibit II), and a digital surveillance recording of plaintiff, allegedly taken after the completion of various independent medical examinations, which purportedly documents his ability to pursue "robust and routine activities" utilizing his hands and arms (*id.*, exhibit JJ), these records are not in admissible form (*see National Ctr. for Crisis Mgt., Inc. v Lerner*, 91 AD3d 920, 921 [2d Dept 2012] [trial court properly declined to consider unauthenticated DVD recording submitted on summary judgment]; *Quinones v Ksieniewicz*, 80 AD3d 506 [1st Dept 2011] [unaffirmed and unsworn medical reports were not in admissible form]; *Parmisani v Grasso*, 218 AD2d 870, 872 [3d Dept 1995] ["(u)ncertified medical records and unsworn letters or reports are of no probative value"]).

As pointed out by the St. Regis defendants and Watts in opposition to Regional's motion, plaintiff testified at his deposition on November 17, 2011, that, prior to his surgery on April 13, 2011, he suffered from "extreme clawing of the right hand, lack of strength, lack of feeling, numbness on the hand" and that, after his surgery, his hand "has not improved at all" (Plaintiff 11/17/11 tr at 167, 168). According to plaintiff, he is "no longer able to use [his] hand for almost all the functions that [he has]" (*id.* at 169). Plaintiff testified that his thumb and four fingers are always bent, he has no feeling, and the fingers "don't do anything" (*id.* at 167). Therefore, the Court finds that there are issues of fact as to whether plaintiff retains only "passive movement" of his hands.

2. St. Regis Defendants', Watts', and DSENY and Safety Squad's Contractual Indemnification Claims Against Regional

As previously discussed, Workers' Compensation Law § 11 allows indemnification

based upon a "written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered" (*Rodrigues*, 5 NY3d at 430). Regional moves for summary judgment dismissing the contractual indemnification claims asserted by the St. Regis defendants, Watts, and DSENY and Safety Squad against it. Regional argues that it did not expressly agree to indemnify any of these defendants.

Regional points to Watts' president's testimony that "[they] talked about Regional was going to indemnify us and they were also going to send us the insurance certificate naming Watts as the additional insured" (Watts tr at 43). When asked whether there was any language memorializing any indemnification obligation, he stated that "[he is] aware with the language. [He knows] there was a conversation with Nancy DeLuca (DeLuca). We signed it and we wanted to get started on the project as soon as possible" (*id.*). However, he was not aware of any other agreements with Regional with respect to the St. Regis job (*id.* at 56).

DeLuca, a salesperson employed by Regional at the time, testified that she "would execute a proposal and sent it to the customer and then they would call me back and negotiate" (DeLuca tr at 23). DeLuca explained that what she sent to Watts was a "proposal," which was typically memorialized in a formal contract and recalled asking Watts a number of times for a contract, but Regional never provided a contract (*id.* at 58-59). Greg Blinn testified that DeLuca did not have the authority to agree to terms and conditions, only the scope of work and price (Blinn tr at 371-372).

In opposition, Watts argues that there are triable issues of fact as to whether Regional agreed to indemnify it. Watts submits an affidavit from Gerald Watts, its president, which states that Nancy DeLuca of Regional advised that it was well aware of the terms and conditions contained in Northeast's agreement proposal and that it would be purchasing the equipment from Northeast and utilizing Northeast as a "technical advisor" on the site (Watts aff, ¶ 8).

DeLuca also understood that during the installation of the mast climber, Watts would not be on site and that all the terms and conditions of the agreement between Watts and Starwood would be applicable to Regional insofar as protecting the sidewalk, the building, and coordination with the building for access as needed (*id.*, ¶ 9). According to Watts, it was further agreed that during installation of the mast climber, Regional would be obligated to defend, indemnify, and hold harmless Watts from any and all liability that occurred during the installation of the mast climber and hoist (*id.*, ¶ 10). Regional prepared and provided the proposal, which expressly recognizes that it was to be replaced by a formal contract, which specifically incorporated the terms and conditions of the Starwood and Watts agreement (*id.*, ¶ 11, exhibit B). Watts also provides a certificate of insurance naming Watts as an additional insured under its policy, which states "[a]s per written contract, Additional Insured status encompasses General Liability, Automobile and Excess Liability: *Watts Restoration, Inc.*, Starwood Hotels & Resorts Worldwide, Inc. and their respective (See Attached Descriptions)" (*id.*, exhibit C [emphasis added]).

In reply, Regional argues that Mr. Watts' affidavit does not contain the appropriate certificate of conformity pursuant to CPLR 2309(c), and points out that the proposal contains a merger clause, which prohibited oral modifications of the proposal.

Contrary to Regional's contention, the absence of a certificate of conformity is a "mere irregularity, and not a fatal defect" (*Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009]). Moreover, "'a contractual provision against oral modification may itself be waived'" (*Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 30 AD3d 1, 6 [1st Dept 2006], *affd* 8 NY3d 59 [2006], *rearg denied* 8 NY3d 867 [2007] [citation omitted]).

In determining whether a written contract satisfies Workers' Compensation Law § 11, courts consider a two-part test. "First, we consider whether the parties entered into a written

contract containing an indemnity provision applicable to the site or job where the injury giving rise to the indemnity claim took place. Second, if so, we examine whether the indemnity provision was sufficiently particular to meet the requirements of section 11" (*Rodrigues*, 5 NY3d at 432). In *Flores v Lower E. Side Serv. Ctr., Inc.* (4 NY3d 363, 369-370 [2005], *rearg denied* 5 NY3d 746 [2005]), the Court of Appeals held that "the common-law rule – which authorizes review of the course of conduct between the parties to determine whether there was a meeting of minds sufficient to give rise to an enforceable contract – governs the validity of a written indemnification agreement under Workers' Compensation Law § 11." "In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look . . . to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds" (*Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 399 [1977]).

In this case, the Court concludes that there are triable issues of fact as to whether Regional and Watts agreed to be bound by an indemnification agreement. Gerald Watts states in his affidavit that DeLuca understood that, during installation of the mast climber, Watts would not be on site and that all terms and conditions of the agreement between Watts and Starwood would be applicable to Regional insofar as protecting the sidewalk, the building, and coordination with the building for access as needed (Watts aff, ¶ 9). In addition, Mr. Watts states that: (1) the proposal was to be replaced by a formal contract which specifically incorporated the terms and conditions of the Starwood and Watts agreement; (2) Regional agreed to defend, indemnify, and hold Watts harmless from any and all liability that occurred during installation of the mast climber and hoist; and (3) Regional obtained, "*[a]s per written contract*," a certificate of insurance naming Watts as an additional insured (*id.*, ¶¶ 10-12; exhibit C [emphasis added]; Watts tr at 43). Thus, Regional appears to have acted in conformity with the terms of the general contract; the proposal does not contain any requirement that Regional procure insurance naming Watts or the owners as additional insureds (Watts aff, exhibit B, ¶

27), and the additional insured language appears to track the required "indemnified parties" of the general contract. "[W]here a finding of whether an intent to contract is dependent as well on other evidence from which differing inferences may be drawn, a question of fact arises" (*Brown Bros. Elec. Contrs.*, 41 NY2d at 400). Therefore, Regional's motion for summary judgment dismissing Watts' contractual indemnification claim must be denied (*see Tullino v Pyramid Cos.*, 78 AD3d 1041, 1042-1043 [2d Dept 2010]; *Auchampaugh v Syracuse Univ.*, 67 AD3d 1164, 1165-1166 [3d Dept 2009]; *Staub v William H. Lane, Inc.*, 58 AD3d 933, 935 [3d Dept 2009]). Since the St. Regis defendants and DSENY and Safety Squad have not opposed dismissal of their contractual indemnification claims, these claims are dismissed.

DSENY and Safety Squad (Motion Sequence Number 006)

DSENY and Safety Squad move for summary judgment, arguing that they cannot be liable under the Labor Law because they did not supervise or control the means or methods of plaintiff's or Regional's work. DSENY and Safety Squad point out that the plans submitted by DSENY and Safety Squad specifically exclude any responsibility for supervision and control over plaintiff or Regional's work, by stating that "DSENY has been retained for mastclimber design. Unless specifically retained separately for field verification of adherence to this design, and OSHA standards, DSENY has not been retained to perform field inspections. This submission is not a SITE SAFETY PLAN, therefore does not consider required protection for public and property" (Lourenso affirmation in opposition, exhibit C).

Plaintiffs did not oppose DSENY and Safety Squad's motion. However, Regional argues, in opposition, that DSENY and Safety Squad fail to address the common-law cross-claims against it and contractual duties of care owed to Regional. Watts joins in Regional's opposition.

As indicated above, plaintiffs did not oppose dismissal of the Labor Law and common-law negligence claims against DSENY and Safety Squad. Accordingly, those claims are

dismissed.

Nevertheless, the Court finds that DSENY and Safety Squad have not met their burden on summary judgment to dismiss the cross-claims for indemnification and contribution against them (*see Santoro v American Airlines*, 170 AD2d 206, 208 [1st Dept 1991] [issue of fact as to whether high-temperature hot water system was negligently designed precluded summary judgment on common-law claims theories and contractor's and owner's cross-claims for indemnification and contribution against professional engineer]). As pointed out by Regional, DSENY and Safety Squad did not address the cross-claims in moving for summary judgment, and only argued that they did not have the authority to supervise and control plaintiff's work (Cohen affirmation in support, ¶¶ 78-80). Even if DSENY and Safety Squad did not supervise and control plaintiff's work, it is well settled that an engineer may be liable in common-law negligence for failure to exercise due care in the performance of its services (*see Lopez v Dagan*, 98 AD3d 436, 439 [1st Dept 2012], *lv denied* 21 NY3d 855 [2013]; *Carter v Vollmer Assoc.*, 196 AD2d 754, 754-755 [1st Dept 1993]; *Davis v Lenox School*, 151 AD2d 230, 231 [1st Dept 1989]). The Labor Law was not meant to "diminish or extinguish any liability of professional engineers . . . arising under the common law or any other provision of law" (*Santoro*, 170 AD2d at 208; *see also* Labor Law §§ 240 [1], 241 [9]). Therefore, DSENY and Safety Squad's motion is denied as to the cross-claims as against them.

Plaintiffs' Motion to Quash Subpoenas Served on Plaintiff's Nonparty Treating Physicians (Motion Sequence Number 005)

Plaintiffs move, by order to show cause, for an order quashing subpoenas served on plaintiff's nonparty treating physicians by plaintiff's employer, Regional, and for a protective order precluding post-note of issue nonparty depositions of these physicians. Plaintiffs argue that Regional impermissibly seeks to depose his physicians relating to diagnosis and treatment for Lyme's disease. In addition, plaintiffs claim that Regional cannot show that "unusual or

unanticipated circumstances" developed subsequent to the filing of the note of issue.

CPLR 3101(a) provides for broad disclosure of things material and necessary in the defense or prosecution of civil cases. However, CPLR 3103 provides that the court may make a protective order "denying, limiting, conditioning or regulating the use of any disclosure device." "It is not the norm to seek the deposition of a treating physician, and it should not generally be directed unless necessary to prove a fact unrelated to diagnosis and treatment" (*Ramsey v New York Univ. Hosp. Ctr.*, 14 AD3d 349, 350 [1st Dept 2005]; *see also Matter of New York City Asbestos Litig.*, 87 AD3d 467, 468 [1st Dept 2011] [deposition of treating physician should not be compelled where information is available from another source]).

Regional argues that, at a status conference before the court, plaintiffs' counsel agreed to waive any objections to the nonparty depositions proceeding. Regional further contends that it is not merely seeking information relating to diagnosis and treatment, and this information is "material and necessary" because plaintiff's physicians have information relating to alternative causes of his injuries, such as the possibility that Lyme's disease could have caused a significant portion of his claimed injuries. The St. Regis defendants and Watts join in Regional's opposition.

Ramsey, *supra*, was an employment discrimination action based on disability and age (*Ramsey*, 14 AD3d at 350). The former employer sought to depose the plaintiff's treating psychiatrist in order to clarify the meaning of certain handwritten notes prior to plaintiff's termination (*id.*). The Court held that a protective order against this deposition was correctly granted because "plaintiff's psychiatrist's testimony [was] not the only means of discovering the tenor of the conversations constituting the subject matter of the notes" (*id.*).

However, in *Capati v Crunch Fitness Intl.* (295 AD2d 181 [1st Dept 2002]), the plaintiff's decedent was allegedly taking a dietary supplement at the time of her sudden death, which the plaintiff attributed in part to one of the supplement's ingredients. No autopsy was performed,

and the cause of death was not established by the records of decedent's medical treatment or the death certificate (*id.*). The Court permitted the depositions of the three nonparty depositions, "since the testimony of these physicians [was] 'material and necessary in the prosecution or defense' of this action, and may furnish information not available from the medical records" (*id.*).

Similarly, in *Schroder v Consolidated Edison Co. of N.Y.* (249 AD2d 69 [1st Dept 1998]), the First Department allowed the deposition of a nonparty treating psychiatrist. In *Schroder*, the plaintiff testified at her deposition that she fell on "broken, uneven pavement in the roadway" (*id.*). The psychiatrist noted in a psychiatric record that plaintiff "tripped and fell on a ConEd metal plate" (*id.*). The Court held that the deposition was "material and necessary" and, although plaintiff's statement was admissible as an admission of a party opponent, the psychiatric record itself was inadmissible because it was not relevant to diagnosis or treatment (*id.* at 70). Therefore, "the testimony of [the pyschiatrist was] necessary to bring the plaintiff's prior, inconsistent version of events before the jury" (*id.* at 71).

Here, although plaintiffs argue that the note of issue was filed on February 28, 2013, the Court's records indicate that it was, in fact, filed on March 1, 2013. Nevertheless, the Court declines to allow the depositions of plaintiff's treating physicians. While Regional contends that his physicians have information relating to whether he was treated for Lyme's disease, Regional has not shown that this information is unrelated to diagnosis or treatment, or that this information is not available from other sources (*see Ramsey*, 14 AD3d at 350). Therefore, plaintiffs' motion to quash the subpoenas served on plaintiff's treating physicians is granted.

Regional's Motion to Vacate the Note of Issue and to Compel (Motion Sequence Number 009)/St. Regis Defendants' Cross-Motion to Vacate the Note of Issue and to Compel/ Watts' Cross-Motion to Vacate the Note of Issue and to Compel

Regional moves to vacate the note of issue on the ground that the nonparty depositions of plaintiff's treating physicians are still outstanding. Alternatively, Regional seeks an order

permitting nonparty depositions of plaintiff's treating physicians post-note of issue, or an order compelling plaintiffs to provide authorizations to obtain plaintiff's medical records from newly discovered medical providers. The St. Regis defendants and Watts separately cross-move for the same relief. Plaintiffs argue, in response, that the subject of this motion is the same as plaintiffs' motion to quash the subpoenas.

The certificate of readiness filed on March 1, 2013 states that "[p]hysical examinations [have been] completed" and that "[m]edical reports [have been] exchanged" (Lourenso affirmation in support, exhibit F).

22 NYCRR 202.21(e) provides:

> "*Vacating note of issue.* Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect. . . ."

"Where a party timely moves to vacate a note of issue, it need show only that 'a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of . . . section [202.21] in some material respect" (*Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389, 390 [1st Dept 2006]; *see also Ortiz v Arias*, 285 AD2d 390 [1st Dept 2001] [a note of issue should be vacated where it is based upon erroneous facts]; *Cromer v Yellen*, 268 AD2d 381 [1st Dept 2000]).

As indicated above, the Court has granted plaintiffs' motion to quash the subpoenas for nonparty depositions of plaintiff's treating physicians. Thus, Regional has not shown that "a material fact in the certificate of readiness is incorrect" (22 NYCRR 202.21 [e]).

Nevertheless, Regional, the St. Regis defendants, and Watts seek authorizations for plaintiff's medical records from Quest Diagnostics, an internist named Dr. Strassberg of Best Care Medical Group, Inc., located at 104 E. Route 59, Nanuet, New York 10954, and a

rheumatologist named "Dr. Kurucz," who is located at 300 Middletown Road, Pearl River, New York 10965, who allegedly treated plaintiff in 2010, the same year that he was injured. Plaintiffs only note, in opposition, that "Counsel also wants HIPAA[-]compliant authorizations for doctors who Mr. Lourenso *heard* may have treated plaintiff" (Laskin affirmation in opposition at 2).

"While physician-patient communications are privileged under CPLR 4504, '[a] litigant will be deemed to have waived the privilege when, in bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue'" (*Gutierrez v Trillium USA, LLC*, 111 AD3d 669, 2013 NY Slip Op 07450, *2- *3 [2d Dept 2013], quoting *Dillenbeck v Hess*, 73 NY2d 278, 287 [1989]). "[A] party must provide duly executed and acknowledged written authorizations . . . under the liberal discovery provisions of the CLPR (see CPLR 3121, subd [a]) when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue" (*Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 456-457 [1983]). "[A] party does not waive the privilege with respect to unrelated illnesses or treatments" (*Gill v Mancino*, 8 AD3d 340, 341 [2d Dept 2004]).

Here, as pointed out by Regional, plaintiff alleges that he suffered, among other injuries, a dislocation of his left humerus and left side brachial plexopathy (verified bill of particulars, ¶¶ 11-12). Plaintiffs' only opposition to this branch of the motion and cross-motions is that Regional's counsel *heard* that they treated plaintiff. "If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered evidence material . . . in the prosecution or defense" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 407 [1968] [internal quotation marks and citation omitted]). Therefore, Regional, the St. Regis defendants, and Watts are entitled to an order compelling plaintiffs to provide authorizations for these medical providers. However, given the minimal outstanding discovery, the Court declines to vacate the note of issue.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 003) of defendant/third-party plaintiff Northeast Mast Climbers, LLC is granted and the complaint and all cross-claims are severed and dismissed as against it, and defendant/third-party plaintiff Northeast Mast Climbers, LLC is entitled to contractual defense and indemnification, including reasonable attorneys' fees, over and against third-party defendant Regional Scaffolding & Hoisting Co., Inc., and the Clerk is directed to enter judgment in favor of said defendant; and it is further,

ORDERED that the motion (sequence number 004) of plaintiffs for partial summary judgment on the issue of liability under Labor Law § 240(1) is granted as against defendants St. Regis New York Operating, LLC and Watts Restoration, Inc.; and it is further,

ORDERED that the motion (sequence number 005) of plaintiffs to quash subpoenas served on plaintiff's nonparty treating physicians and for a protective order is granted; and it is further,

ORDERED that the motion (sequence number 006) of defendants Safety Squad, Inc. and DSENY Building Services, Inc. for summary judgment is granted to the extent of dismissing the complaint as against them, and is otherwise denied; and is further,

ORDERED that the motion (sequence number 007) of defendants/third third-party plaintiffs GFC Fifth Avenue Owner, LLC, St. Regis New York Operating, LLC, St. Regis New York Holdings, LLC, Starwood Hotels & Resorts Worldwide, Inc. d/b/a The St. Regis Hotel-New York, Starwood Hotels & Resorts Management Company, Inc. is granted to the extent of (1) dismissing plaintiff's Labor Law §§ 200, 241(6), and common-law negligence claims as against St. Regis New York Operating, LLC, (2) granting St. Regis New York Operating, LLC conditional contractual indemnification over and against defendant Watts Restoration, Inc., and (3) severing and dismissing the complaint as against defendants GFC Fifth Avenue Owner, LLC, St. Regis New York Holdings, LLC, and Starwood Hotels & Resorts Management

Company, Inc., and the Clerk is directed to enter judgment in favor of said defendants, and is otherwise denied; and it is further,

ORDERED that the cross-motion of defendant/second third-party plaintiff Watts Restoration, Inc. is granted to the extent of dismissing the Labor Law §§ 200, 241(6), and common-law negligence claims against it, and is otherwise denied; and it is further,

ORDERED that the motion (sequence number 008) of third-party defendant/second third-party defendant/third third-party defendant Regional Scaffolding & Hoisting Co., Inc. is granted to the extent of dismissing the contractual indemnification claims of GFC Fifth Avenue Owner, LLC, St. Regis New York Operating, LLC, St. Regis New York Holdings, LLC, Starwood Hotels & Resorts Worldwide, Inc. d/b/a The St. Regis Hotel-New York, Starwood Hotels & Resorts Management Company, Inc. and Safety Squad, Inc. and DSENY Building Services, Inc. as against it, and is otherwise denied; and it is further,

ORDERED that the motion (sequence number 009) of third-party defendant/second third-party defendant/third third-party defendant Regional Scaffolding & Hoisting Co., Inc. to vacate the note of issue and compel discovery is granted to the extent of compelling plaintiffs to provide HIPAA-compliant authorizations for plaintiff's medical records from Quest Diagnostics, Best Care Medical Group, Dr. Strassberg, and Dr. Kurucz, and is otherwise denied; and it is further,

ORDERED that the cross-motion of defendants/third third-party plaintiffs GFC Fifth Avenue Owner, LLC, St. Regis New York Operating, LLC, St. Regis New York Holdings, LLC, Starwood Hotels & Resorts Worldwide, Inc. d/b/a The St. Regis Hotel-New York, Starwood Hotels & Resorts Management Company, Inc. to vacate the note of issue and compel discovery is granted to the extent of compelling plaintiffs to provide HIPAA-compliant authorizations for plaintiff's medical records from Quest Diagnostics, Best Care Medical Group, Dr. Strassberg, and Dr. Kurucz, and is otherwise denied; and it is further,

ORDERED that the cross-motion of defendant/second third-party plaintiff Watts Restoration, Inc. to vacate the note of issue and compel discovery is granted to the extent of compelling plaintiffs to provide HIPAA-compliant authorizations for plaintiff's medical records from Quest Diagnostics, Best Care Medical Group, Dr. Strassberg, and Dr. Kurucz, and is otherwise denied; and it is further,

ORDERED that the plaintiff is directed to serve a copy of this Order with Notice of Entry upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly.

Dated: 12/19/13

PAUL WOOTEN ***J.S.C.***

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**