**NEW YORK STATE SUPREME COURT**
**NEW YORK COUNTY: PART 7**

HARVEY STEIN AND ALICE STEIN,

Plaintiffs,

-against-

LEON D. DEMATTEIS CONSTRUCTION CORPORATION, JACOBS PROJECT MANAGEMENT CO., JACOBS ENGINEERING NEW YORK INC., THE JACOBS GROUP PLLC, JACOBS ENGINEERING GROUP INC., JACOBS ENGINEERING GROUP INC., JACOBS ENGINEERING INC., K.P. ORGANIZATION OF QUALITY PAINTING, INC., and KP ORGANIZATION, INC.,

Defendants.

Index No. 151147/12
**DECISION/ORDER**

LEON D. DEMATTEIS CONSTRUCTION CORPORATION,

Third-Party Plaintiff,

-against-

COASTAL ELECTRIC CONSTRUCTION CORP.,

Third-Party Defendant.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing the following CPLR 3212 motions: (1) defendant Jacobs Project Management Co. a/s/h/a Jacobs Engineering New York Inc., Jacobs Engineering Group Inc., The Jacobs Group PLLC, Jacobs Engineering Group Inc., and Jacobs Engineering Inc. (Jacobs): (2) defendant Leon D. DeMatteis Construction Corporation (DeMatteis); (3) defendants K.P. Organization of Quality Painting, Inc. and KP Organization, Inc. (KP).

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*The Feld Law Firm P.C.*, New York (Michael J. Lynch of counsel), for plaintiff.
*Milber Makris Plousadis & Seiden, LLP,* Woodbury (Thomas M. Fleming II of counsel), for defendant Jacobs Project Management Co., Jacobs Engineering New York Inc., Jacobs Engineering Group Inc., The Jacobs Group PLLC, and Jacobs Engineering Inc.
*Harris, King Fodera & Correia*, New York (Gregory D.V. Holmes of counsel), for defendant Leon D. DeMatteis Construction Corporation.
*Conway, Farrell, Curtin & Kelly, P.C.*, New York (Michael T. Blumenfeld of counsel) for defendant K.P. Organization of Quality Painting, Inc. and KP Organization, Inc.

Gerald Lebovits, J.S.C.:

In this Labor Law action, defendant Jacobs Project Management Co. a/s/h/a Jacobs Engineering New York Inc., Jacobs Engineering Group Inc., The Jacobs Group PLLC, Jacobs Engineering Group Inc., and Jacobs Engineering Inc. (collectively, Jacobs) move under CPLR 3212 for summary judgment dismissing all claims and cross-claims against them (motion seq. No. 003). Also, defendant Leon D. DeMatteis Construction Corporation (DeMatteis) moves for summary judgment dismissing the complaint and all cross-claims against it, and moves for summary judgment on liability on its cross-claims against defendants K.P. Organization of Quality Painting, Inc. and KP Organization, Inc. (collectively, KP) for breach of contract, contractual liability, and attorney fees (motion seq. No. 004). KP moves for summary judgment dismissing all claims and cross-claims as against it; in the alternative, KP moves for summary judgment dismissing plaintiff's claim for an alleged hip injury to plaintiff Harvey Stein (motion seq. No. 005).

The three motions are consolidated for disposition.

**BACKGROUND**

On May 8, 2009, Harvey Stein was working on a project to construct a new office space for the U.S. Mission to the United Nations. Third-party defendant, Coastal Electric Construction Corp, employed Stein as an electrician. Stein was working on the 11th floor of the building

when, according to his testimony, he slipped on a piece of cardboard that was covering paint or paint primer. DeMatteis was the general contractor on the Mission construction project, while Jacobs was the project manager and KP was DeMatteis's painting subcontractor.

On March 23, 2012, Stein filed a complaint alleging that he suffered injuries because of his fall. He asserts that defendants are liable under Labor Law § 241 (6), as well as Labor Law § 200 and common-law negligence. Stein's wife, Alice Stein, brings derivative claims against defendants for loss of her husband's services.

**DISCUSSION**

A court must grant a summary-judgment motion "if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. Sch. Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

**I. Jacobs' Motion**

Jacobs contracted with the U.S. General Services Administration (GSA) to provide construction management on the U.S. Mission to the United Nations project. Plaintiffs' complaint alleges that Jacobs is liable under Labor Law § 200 and common-law negligence, as well as under Labor Law § 241 (6).

The court will address the § 241 (6) claim first.

**A. Labor Law § 241 (6)**

Labor Law § 241 (6) provides that

> "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."

Section 241 (6) requires owners, contractors, and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). This duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]). But "comparative negligence

remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), a plaintiff must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis*, 16 NY3d at 416).

The threshold question here is whether Jacobs was an agent of either the general contractor or the owner: "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured. To impose such liability, the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition" (*Samaroo v Patmos Fifth Real Estate, Inc.*, 102 AD3d 944, 946 [2d Dept 2013] [internal quotation marks and citations omitted]). Jacobs submits its construction-management contract with GSA, which has a provision stating that Jacobs will not serve as a general contractor:

> "Nothing in this contract shall be construed to mean that the CM assumes any of the contractual responsibilities or duties of the construction contractor. The construction contractor solely is responsible for the construction means, methods, sequence and procedures used in the construction of the project and for related performance in accordance with its contract with the Government" (Jacobs-GSA contract, ¶ C.2.12.2).

Jacobs also submits plaintiff Stein's examination before trial (EBT) transcript in which he testified that while he talked at some point to a Jacobs employee — an electrical superintendent — that person never directed him where to work or how to do his job, although the Jacobs' employee provided a general overview of progress on the job (Stein tr at 186-187).

In opposition, plaintiff argues that although its role was officially cast as a construction manager, Jacobs' actual role was that of the GSA's agent. Plaintiff stresses the EBT testimony of Jacobs' project manager, William Smith, which was submitted by Jacobs with its moving papers. Smith testified that Jacobs oversaw DeMatteis's work for GSA on the project; more specifically, Smith testified that:

> "We monitor the schedule, performance of the contract, whether it's managed on schedule to complete on time. We are quality assurance as opposed to quality control. We oversee the contractor's quality organizations to make sure they build what we paid to get built. We oversee and monitor safety performance, to make sure it gets built per the contract requirements for safety, and we manage the funding on the project, the change process, the cost of the job, the payments to the contractor" (Smith tr at 15-16).

Plaintiff also points to the EBT testimony of DeMatteis' foreman, Carlos Casal. Casal, who was at the subject site every work day, testified that DeMatties was in charge of keeping the floors clean and that it was the only contractor with laborers performing housecleaning (Casal tr at 45). Plaintiff, however, seizes on another part of his testimony, in which Casal testified about his limited interaction with Jacobs employees:

"Q: Did anyone from Jacobs ever direct you to do anything on the project?
A: They would ask, sometimes would ask me.
Q: What specifically? Do you remember any specifics?
A: No.
Q: How often would that occur?
A: Not often.
Q: What types of things would they ask you to do?
A: I don't know. But they would ask, if it was something that was not an emergency, I would tell them to go see the superintendent. The way I went, Jacobs should speak to the supers and not to me.
Q: Do you know if Jacobs spoke to the laborers, directed them?
A: No, not to my knowledge" (*id.* at 35).

Plaintiff cites *Walls v Turner Constr. Co.* (4 NY3d 861 [2005]) for the proposition that "[t]he label of construction manager versus general contractor is not necessarily determinative" (*id.* at 864). In *Walls*, the Court of Appeals held that the construction manager was the owner's statutory agent. Plaintiff, however, does not cite the factors that were determinative in *Walls*:

> "(1) the specific contractual terms creating agency, (2) the absence of a general contractor, (3) [the construction manager's] duty to oversee the construction site and the trade contractors, and [4] [the construction manager's acknowledgement] that [it] had authority to control activities at the work site and to stop any unsafe work practices" (*id.*).

Here, the second factor is absent: A general contractor was present on the project site. As to the first and third factors, Jacobs' contract with the GSA provides that Jacobs was not to take on the responsibilities of the general contractor, such as the responsibility for the means and methods used by trade contractors.

In these circumstances, especially given that Jacobs did not supplant the traditional role of a general contractor, and an entity, DeMatteis, served as the general contractor, Jacobs was not a statutory agent of GSA such that it should be subject to Labor Law liability as an owner or general contractor. Because Jacobs is not subject to liability as a statutory agent, the branch of its motion seeking dismissal of plaintiff's Labor Law § 241 (6) claim against it is granted.

**B. Labor Law § 200 and Common-Law Negligence**

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

When the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007] ["General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed"]).

In contrast, when the defect arises from a dangerous condition on the work site, instead of the methods or materials the plaintiff and employer used, an owner or contractor "is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; *accord Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, "whether [a defendant] controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims. . . ." (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

As explained above, Jacobs is not an owner or general contractor. Also, none of the *Espinal* exceptions, which could confer a duty, apply to Jacobs (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). Thus, that branch of Jacobs' motion seeking dismissal of plaintiff's Labor Law § 200 and common-law negligence claims is granted. Because Jacobs was not negligent in plaintiff's accident, it is not liable for common-law negligence or contribution (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374, 375 [2011]; *Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]). The part of Jacobs' motion seeking to dismiss all cross-claims against it is granted.

**II. DeMatteis's Motion**

DeMatteis moves to dismiss plaintiffs' complaint and for summary judgment on its contractual claims against KP.

**A. Labor Law § 241 (6), Labor Law § 200, and Common-Law Negligence**

DeMatteis argues briefly, and without discussing the claims individually, that plaintiffs' Labor Law § 200 and common-law negligence claims, as well as their Labor Law § 241 (6) claim, should be dismissed because DeMatteis had no notice of the defect that caused Stein's accident — the paint or primer concealed under cardboard.

As to Labor Law § 241 (6), DeMatteis fails to make a prima facie showing of entitlement to judgment, as the question of notice is not essential to a § 241 (6) claim. Instead, the inquiry hinges on whether DeMatteis, as the general contractor, failed to provide a sufficiently safe work area to plaintiff by violating a specific provision of the Industrial Code. Because DeMatteis' moving papers do not address this issue, DeMatteis fails to make a prima facie showing as to plaintiff's Labor Law § 241 (6) claim. The branch of its motion seeking to dismiss this claim must be denied.

As to the Labor Law § 200 and common-law negligence claims, DeMatteis aptly raises the issue of notice. DeMatties implicitly characterizes the subject condition as one arising from a defect on the premises. This is an accurate characterization. The accident did not arise from the methods, materials, or manner in which plaintiff went about his work as an electrician. Plaintiff's uncontested testimony is that he slipped and fell on a hidden condition. Thus, as this is a premises-defect claim, the issue of notice is critical to the question whether DeMatteis is liable under Labor Law § 200.

But DeMatteis' conclusory denial of notice is insufficient to make a prima facie showing of entitlement to summary judgment, especially because it does not raise the issue of constructive notice: "To hold a party with a duty of care liable for a defective condition, it must have notice, actual or constructive, of the hazardous condition that caused the injury" (*Jackson v Board of Educ. of City of N.Y.*, 30 AD3d 57, 62 [1st Dept 2006]). A defendant has constructive notice "when the dangerous condition is visible and apparent, and exists for a sufficient period to afford a defendant an opportunity to discover and remedy the condition" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]).

DeMatteis failed to make any showing about constructive notice. Thus, it is not entitled to summary judgment (*see Graham v YMCA of Greater N.Y.*, 137 AD3d 546, 547 [1st Dept 2016] [denying summary judgment when the defendant made a showing about actual notice but failed to make a showing — through statements as to when the subject area was last cleaned — about constructive notice]). Accordingly, the branch of DeMatteis' motion to dismiss plaintiffs' Labor Law § 200 and common-law negligence claims is denied.

**B. Contractual Claims Against KP**

DeMatteis argues that it is entitled to summary judgment on its claims for contractual indemnification and for breach of contract for KP's failure to procure insurance.

**(1) Indemnification**

The contract between DeMatteis and KP contains an indemnification provision entitled "Damages to Persons or Property":

> "[KP] shall effectively secure and protect the Work and shall bear and be liable for, and shall repair and replace, all loss and damage of any kind which may happen to the Work, at any time prior to the final completion and acceptance thereof from any cause whatsoever and Owner shall not in any manner be responsible for any such loss or damage. [KP] shall protect, indemnify, hold harmless and defend DeMatteis, Owner and Architect, their agents and employees, from and against all liabilities, obligations, claims, demands, damages, penalties, causes of action, judgments, costs, losses and expenses (including without limitation, attorneys' fees and expenses) based upon or in any way arising out of injury or death of any person(s) or damage to or destruction of property in any manner connected with or growing out of the performance by [KP] of its obligations under this Contract, imposed upon or incurred by or asserted against DeMatties, Owner and/or Architect, as the case may be, by reason of the acts or omissions of [KP] or anyone directly or indirectly employed by [KP] in connection with the Work regardless of whether said acts or omissions are caused in part by a party or parties indemnified hereunder. Such obligation shall not be construed to negate, abridge or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party described in this Article 17" (DeMatteis-KP agreement, ¶ 17).

DeMatteis argues that plaintiff's accident arose from KP's work because KP was the only painting contractor on the job and because, since plaintiff slipped on paint or primer, the accident arose from the work of a painting contractor. Although negligence is not a requirement of the indemnification provision, DeMatteis argues that it was KP's responsibility to clean up the spilled paint. In support of its motion, DeMatteis submits a provision of its contract with KP, entitled "Clean Up," that provides:

> "[KP] shall clear and remove any dirt or debris which is caused by the execution of the Work, and [KP] shall clean up and remove or cause to be removed from the Building and the Site all trash, packing boxes, containers, etc., and any other debris caused by execution of the Work. The determination of DeMatteis as to which contractor on the Site is responsible for removal of rubbish shall be final. If DeMatteis, or its employees, are required to remove such dirt or debris by reason of [KP's] failure to remove it, DeMatteis shall charge the cost therefore to [KP]. Upon completion of the Work, [KP] shall, at its own expense, remove and clear away all unused materials and rubbish and leave the Work in a clean and proper state, ready for everyday service and use" (*id.*, ¶ 19).

In opposition, KP asserts two arguments against this branch of DeMatteis' motion: that summary judgment is inappropriate because a question of fact exists about DeMatteis' negligence and that the indemnification is not triggered because the accident did not arise from KP's work on the project. First, as to negligence, KP refers to the EBT testimony of DeMatteis' Casal — his acknowledgment that DeMatteis was responsible for housekeeping on the project (Casal tr at 45). Given this responsibility, KP contends that a material issue of fact exists about DeMatteis's negligence.

Although KP does not explain the material issue of fact, it is correct in its conclusion that an issue of fact exists. An issue of fact exists about whether the subject condition existed long enough that DeMatteis, as the general contractor, had constructive knowledge of it.

The next issue is whether DeMatteis may obtain summary judgment as to contractual indemnification while its own negligence remains a triable issue of fact.

KP states that DeMattheis may not obtain summary judgment and cites *Auriemma v Biltmore Theatre, LLC* (82 AD3d 1 [1st Dept 2011]) for the proposition that "where the contractor's negligence has not been litigated and a triable issue of fact is raised, the contractor's request for summary judgment for contractual indemnification must be denied" (*id.* at 12). The court's holding in *Auriemma* on this issue derived from its interpretation of General Obligations Law § 5-322.1, entitled "Agreements exempting owners and contractors from liability for negligence void and unenforceable; certain cases." Specifically, the *Auriemma* court noted that "General Obligations Law § 5-322.1's proscription of indemnification is only applicable if the indemnitee is found negligent to any extent" (*id.* citing *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997]).

In *Itri Brick*, the Court of Appeals held that indemnification provisions are unenforceable under § 5-322.1 if they call for complete indemnification and the general contractor/indemnitee has been found negligent (89 NY2d at 796). In *Brooks v Judlau Contr., Inc.*, the Court answered in the affirmative a question left open by *Itri Brick*, namely, whether the statute permitted a partially negligent general contractor to be indemnified by its contractor "so long as the indemnification provision does not purport to indemnify the general contractor for its own negligence" (11 NY3d 204, 207 [2008]). Given this line of cases, DeMatteis, may enforce its indemnification provision against KP, but only to the extent that it is not being indemnified for its own negligence.

Because it is possible that a factfinder would find that DeMatteis' negligence caused 100% of plaintiff's injuries, KP is correct that DeMattheis's motion is premature. For this reason, the court denies without prejudice that branch of DeMatteis's motion that seeks summary judgment on its contractual-indemnification claim against KP. The court must, however, address KP's argument that the indemnification provision was never triggered at all to determine whether this application should be denied with prejudice.

The Court of Appeals has interpreted the "arising out of" language that appears in many indemnification provisions, including the one before this court, quite broadly as "originating from, incident to, or having connection with" (*Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38 [2010] [internal quotation marks and citations omitted]). The Court of Appeals further noted that "[i]t requires only that there be some causal relationship between the injury and the risk for which coverage is provided" (*id.*). Here, coverage was ostensibly provided to protect DeMatteis against the costs associated with a workplace accident. If plaintiff slipped on KP's paint, then it would seem clear that a causal connection exists between the injury and the risk of a workplace accident.

But KP argues, citing to *Derdiarian v Felix Contr. Corp.* (51 NY2d 308 [1980]) that the placement of cardboard over the paint or primer functioned as a superseding cause. This concept of a superseding cause, however, relates to proximate causation, not to whether an injury "arises out of" a contractor's work for the purpose of determining whether an indemnification provision is enforceable (*see e.g. Derdiaran*, 51 NY2d at 314-315). Thus, if KP left paint and another entity placed a piece of cardboard over it, that act does not break the causal chain connecting KP's work to plaintiff's injury. Accordingly, that branch of DeMatteis's motion seeking summary judgment on its contractual indemnity claim against KP is denied without prejudice.

**(2) Breach of Contract**

A movant seeking summary judgment because of "an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (*DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept 2011] [internal quotation marks and citations omitted]; *accord Chunn v New York City Hous. Auth.*, 83 AD3d 416, 417 [1st Dept 2011] [dismissing claim because the subject insurance policy listed the claimant as an additional insured]).

A provision of DeMatteis-KP contract, entitled "Insurance," provides that "[KP] shall obtain and maintain, at its own expenses from the date hereof until completion of the Work and thereafter as required, such insurance as is provided in Exhibit H – page 21" (DeMatteis-KP agreement, ¶ 22). Exhibit H of the contract provides, among other things, that KP was to list DeMatteis as an additional insured and that the coverage was to be primary, while DeMatteis' own insurance was to provide excess coverage. DeMatteis argues conditionally that to the extent KP has not named it as an additional insured under its insurance, KP is in breach and liable for resultant damages to DeMatteis.

KP responds with technical arguments. Instead of providing proof of coverage — as is typical when defending against a claim of breach for failure to procure insurance — KP instead contends that DeMatteis has failed to make a prima facie showing that it did not procure insurance. KP cites *Vasquez v City of New York* (210 AD2d 156 [1st Dept 1994]), which held that a conclusory affidavit is insufficient to serve as a prima facie showing of entitlement to summary judgment dismissing a defendant from a case in which a bus shelter collapsed on the plaintiff. In *Vasquez*, the First Department was looking for admissible evidence establishing that

the defendant was not responsible for the subject bus shelter. Here, it is unclear what KP thinks the court should demand of DeMatteis to prove that KP did not procure insurance.

All that is required of parties moving for summary judgment on a breach of contract for failure to procure insurance claim is to provide the contractual provision requiring the other party to provide the insurance. DeMatteis has done that. The court declines to compel DeMatteis to prove a negative, especially when KP controls all of the relevant information. Although this court could grant this branch of DeMatteis's motion, it abstains from doing so because of the possibility that KP named DeMatteis as an additional insured on its policy. The court denies the motion without prejudice and directs KP to provide proof of insurance to DeMatteis within two weeks of the issuance of this decision. If KP fails to do so, DeMatteis may, at that time, renew its application for this relief.

## III. KP's Motion

### A. Liability

KP argues that plaintiffs' negligence claims and all cross-claims against it for contribution and common-law indemnification should be dismissed. KP argues that it is not negligent. KP contends that it last worked on the project on April 24, 2009, two weeks before plaintiff's accident on May 8, 2009. In support of this factual assertion, KP submits the affidavit of its owner and vice president, Michael Giarraputo. Giarraputo states that

> "I am advised that DeMatteis' Daily Construction Reports indicate that we last worked on the 11th Floor on April 24, 2009. There are several factors that illustrate the fact that this spill could not have been caused when KP performed work on the 11th floor. KP used a Sherwin Williams primer paint to perform work at this project. That particular primer dries in a matter of hours. If the spill had occurred when we were performing our work on the 11th Floor, it would have dried by April 25 over 2 weeks before plaintiff's accident. Furthermore, KP has specific protocols for handling paint and primer at a jobsite. Any time paint is to be transported on the job, the paint container must have a sealed top. In the event of a spill, KP workers are to scrape the spill with putty knives and wash the area down to the surface. KP workers would never place cardboard over a paint spill. This condition and attempted remedy was obviously caused by some individual that did not have the requisite training for handling paint primer products" (Giarraputo aff, ¶ 4).

Although Giarraputo's statement that KP was not working on the 11th Floor on the day of the accident is hearsay, he acknowledges that KP had workers on the jobsite on the day of the accident (*id.*, ¶ 3). KP also offers DeMatteis's Daily Construction Reports that show that it was working on the 11th Floor of the project on April 24, 2009, but DeMatteis failed to turn over the records for May 1 through May 8, 2009, during disclosure.

Plaintiff opposes KP's motion without asserting specific arguments tailored to KP. DeMatteis opposes KP's motion arguing that the proposition that KP was not working on the 11th floor on the day of the accident is speculative. DeMatteis also argues that circumstantial evidence points to a KP-spill causing the accident because it was the only paint contractor on the job and because plaintiff slipped on paint.

Even if DeMatteis is correct on both these arguments, all negligence, contribution, and common-law negligence claims as against KP must be dismissed. Similar to Jacobs, KP had no duty to plaintiff. Even if plaintiff slipped on primer that KP spilled, it did not "launch an instrument of harm," such that the first *Espinal* exception would apply (98 NY2d at 140). Moreover, while KP may have had a responsibility to DeMatteis to clean up after itself, that responsibility did not displace DeMatteis' duty to maintain the premises safely, such that the third *Espinal* exception would be applicable (*id.*). Having no duty, KP was not negligent. Without negligence, KP may not be liable for contribution or common-law negligence.

Accordingly, KP is entitled to dismissal of all claims against it, except for DeMatteis' claims for contractual indemnification and for breach of contract for failure to procure insurance. As discussed above, whether DeMatteis is entitled to contractual indemnification will hinge on whether DeMatteis is ultimately liable for anything other than its own negligence. These questions — whether DeMatteis is liable under Labor Law § 200 and common-law negligence and whether DeMatteis is liable under Labor Law § 241 (6) — remain for the factfinder.

**B. Injury/Damages**

Aside from its successful arguments regarding its liability to plaintiff, KP argues that plaintiff should be precluded from recovering for injuries to his left hip because his accident did not proximately cause his injuries. KP fails to make a prima facie showing of entitlement to judgment on this issue, as its theory — that a gap in treatment shows a lack of proximate causation — comes from cases discussing no-fault cases under New York Insurance Law § 5102 (*see e.g. Pommells v Perez*, 4 NY3d 566 [2005]). KP does not show that this theory has any relevance to Labor Law jurisprudence. Also, the doctors' reports submitted by KP do not eliminate the question of fact about whether plaintiff's accident aggravated the arthritic condition in his left hip. Accordingly, that branch of KP's motion seeking to preclude plaintiff from recovering for an injury to his left hip is denied.

Based on the foregoing, it is

ORDERED that defendants Jacobs Engineering Group Inc., The Jacobs Group PLLC, Jacobs Engineering Group Inc., and Jacobs Engineering Inc.'s motion for summary judgment dismissing all claims and cross-claims as against them is granted; and it is further

ORDERED that defendant Leon D. DeMatteis Construction Corporation's motion is resolved as follows: the branch seeking summary judgment dismissing the complaint and all cross-claims against it is denied; the branch seeking summary judgment as to liability on its

cross-claims against it is denied; the branch seeking summary judgment as to liability on its cross-claims against defendants K.P. Organization of Quality Painting Inc. and KP Organization, Inc. is denied without prejudice; defendants K.P. Organization of Quality Painting Inc. and KP Organization, Inc., within two weeks of this order, must provide to DeMatteis proof of insurance, showing that it was an additional insured under KP's insurance for the subject project; and it is further

ORDERED that the branch of defendants K.P. Organization of Quality Painting Inc. and KP Organization Inc.'s motion is resolved as follows: the branch seeking summary judgment dismissing the complaint against it is granted; the branch seeking summary judgment dismissing all cross-claims as against them is granted, except as to defendant DeMatteis's claims for contractual indemnification and for breach of contract for failure to procure insurance, which remain; and the branch of the motion seeking to limit plaintiffs' damages is denied.

Dated: January 20, 2017

J.S.C.

HON. GERALD LEBOVITS
J.S.C.