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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DORIS LING-COHAN Justice

PART 36

Index Number : 107069/2010
BIANCO, ANTHONY F.
vs.
NORTH FORK BANCORPORATION
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 6, were read on this motion ~~to/for~~ and cross-motion for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2, 3

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). 6
Cross-Motion _____ No(s). 4, 5

Upon the foregoing papers, it is ordered that this motion is consolidated for joint disposition with motion seq. nos. 003, 004 & 005, and is decided in accordance with the attached memorandum decision.

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

Dated: 7/8/13

_____, J.S.C.
DORIS LING-COHAN

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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ANTHONY F. BIANCO,

Plaintiff,

Index No.: 107069/10
DECISION/ORDER

-against-

NORTH FORK BANCORPORATION, INC., CAPITAL ONE FINANCIAL CORPORATION, CAPITAL ONE BANK (USA) N.A., CAPITAL ONE, N.A., J T MAGEN & CO., INC., J T MAGEN CONSTRUCTION COMPANY, INC., NRP 991 LLC, NRP 991 LLC 1, NRP 991 MM CORP., ALGM LEASEHOLD X, LLC, EMMES & COMPANY, LLC and EMMES CAPITAL HOLDING, LLC,

Defendants.

Motion Seq. No.: 002, 003, 004 & 005

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NORTH FORK BANCORPORATION, INC., CAPITAL ONE FINANCIAL CORPORATION, CAPITAL ONE BANK (USA) N.A., CAPITAL ONE, N.A., J T MAGEN & CO., INC., J T MAGEN CONSTRUCTION COMPANY, INC., NRP 991 LLC, NRP 991 LLC 1, NRP 991 MM CORP., ALGM LEASEHOLD X, LLC, EMMES & COMPANY, LLC and EMMES CAPITAL HOLDING, LLC,

Third-Party Plaintiffs,

Third-Party
Index No.: 590165/11

- against -

JORDAN DANIELS ELECTRICAL CONTRACTORS, INC., PIERPONT MECHANICAL CORPORATION, PREFERRED SPRINKLER, INC. and TECHNO ACOUSTICS HOLDINGS, LLC,

Third-Party Defendants.

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HON. DORIS LING-COHAN, J.S.C.:

In this personal injury/negligence action, each of the third-party defendants either moves or cross-moves separately for summary judgment to dismiss the third-party complaint (motion

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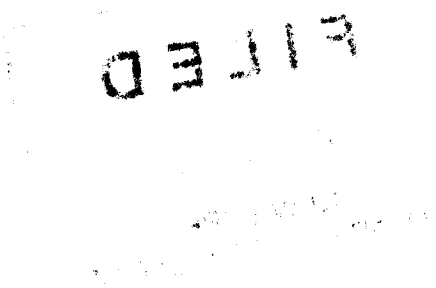

sequence numbers 002, 003, 004, 005) and the defendants/third-party plaintiffs move jointly for summary judgment to dismiss the complaint. The court disposes of all summary judgment motions as follows.

BACKGROUND

On June 7, 2007, plaintiff Anthony F. Bianco (Bianco) suffered personal injuries when he slipped and fell, part way down a staircase, during the course of his employment as an electrician with third-party defendant Jordan Daniels Electrical Contractors, Inc. (JDE) while working in a building located at 991 Third Avenue in the County, City and State of New York (the building). *See* Notice of Motion (motion sequence number 004), Spataro Affirmation, ¶ 3, 5. The building itself was in the process of being constructed at the time of Bianco's injury, and was intended for use as a bank. *Id.* at ¶28.

Defendants/third-party plaintiffs have submitted an affidavit from Emmes Asset Management Company LLC (Emmes Management) employee Seble Tareke-Williams (Williams), who avers that his company is the "asset manager" of all NRP properties, including the building, and that, at the time of Bianco's accident, the building's owner was defendant/third-party plaintiff NRP 991 LLC (NRP 991). *See* Notice of Motion (motion sequence number 004), Exhibit J, ¶¶ 1-2. Williams also states that NRP 991 MM Corp. (NRP MM) is the managing member of NRP 991, and that the building's former owner, NRP 991 LLC 1 (NRP 1), transferred ownership of the property and all rights appurtenant thereto to NRP 991 on December 14, 2006 (before Bianco's accident). *Id.*, ¶¶ 3-4. Williams further avers that his company, Emmes Management, is an "affiliate" of the building's property manager, non party Emmes Realty Services LLC (Emmes Realty). *Id.*, ¶ 5. Williams indicates that defendants/third-party plaintiffs

Emmes Management, Emmes & Company LLC (Emmes), Emmes Capital Holding LLC (Emmes Capital; collectively, the Emmes defendants) and ALGM Leasehold X LLC (ALGM), were not the building's owners at the time of the accident and are currently not the building's owners. *Id.*, ¶ 6. Defendants/third-party plaintiffs have also submitted the deposition testimony of Emmes Realty employee Christopher Plath (Plath), who confirmed that Emmes Realty is the building's managing agent, and that it is operated as a triple net lease. *See* Notice of Motion (motion sequence number 004), Exhibit I at 10-11.

Bianco alleges that defendant/third-party plaintiff North Fork Bancorporation, Inc. (North Fork) was the original tenant of the building. *See* Notice of Motion (motion sequence number 004), Spataro Affirmation, ¶ 28. He further alleges that North Fork was later purchased by defendants/third-party plaintiffs Capital One Financial Corporation (Capital One Financial) and/or Capital One, N.A. (Capital One), and that North Fork's tenancy was transferred to Capital One Bank (USA) N.A. (Capital One Bank). *Id.* Bianco further states that Capital One Bank's relationship with owner/landlord NRP 991 is as its tenant/triple net lessee. *Id.*, ¶ 24.

Defendants/third-party plaintiffs J T Magen & Company, Inc. s/h/a J T Magen & Co., Inc. and/or J T Magen Construction Company, Inc. is the construction manager/general contractor that North Fork had originally retained to oversee the erection of the building, who now works for Capital One (J T Magen). *See* Notice of Motion (motion sequence number 004), Spataro Affirmation, ¶¶ 28-32. Bianco's employer, third-party defendant JDE, was an electrical subcontractor hired by J T Magen. *Id.*, ¶¶ 58, 60, 62. J T Magen also hired the other third-party defendants as subcontractors, specifically, Pierpont Mechanical Corporation (Pierpont) was hired to install the building's HVAC system, Preferred Sprinkler, Inc. (Preferred) was hired to install

the building's fire suppression system, and Techno Acoustics Inc. i/s/h/a Techno Acoustics Holdings LLC (Techno) was hired to install ceilings and drywall. *Id.*, ¶¶ 74, 77, 85; Exhibit O, at 4.

At his deposition, Bianco testified that, on the day of his accident, he had been working on the building's second floor installing electrical system piping, when his foreman, fellow JDE employee Sal Ballone (Ballone), instructed him to go to the building's first floor to retrieve some needed material. *See* Notice of Motion (motion sequence number 004), Exhibit D, at 34-36, 40-41. Bianco stated that he then proceeded down the building's interior staircase, and slipped on debris on the fifth step from the top, injuring his left knee. *Id.* at 40-42, 46-51, 144-145. Bianco stated that the debris was comprised of nails, discarded packaging, pieces of sheetrock, cardboard and "double expansion shields," which are small metal cylinders that are placed into drilled holes to help anchor bolts that are subsequently screwed into the holes. *Id.* at 48, 52-54, 145-147, 172-174. Bianco further stated that he had complained to both Ballone and J T Magen's project manager, Mikhail Gorelik (Gorelik), "every week" about the unsafe condition of the building caused by the accumulation of debris from the work of various trades that was not regularly cleaned up or removed. *Id.* at 27-29, 156. Bianco particularly stated that he had seen the double expansion shields on the building's staircase on the morning of June 7, 2007, and had specifically complained about them to Ballone at that time, although he did not know if Ballone had passed his complaint along. *Id.* at 52, 55, 71, 164. Bianco has presented copies of an accident report and an incident report, both of which Ballone prepared and signed on June 7, 2007, and both of which state that he (i.e., Bianco) had slipped on a double expansion shield while he was walking down the stairs at the building. *See* Korman Affirmation in Opposition to

Motion (motion sequence number 004), Exhibits A, B.

J T Magen was deposed *via* its executive vice president, Sean Murray (Murray), who stated that J T Magen had initially contracted with North Fork to be the general contractor for the construction of the building, and that Capital One Bank later assumed North Fork's obligations under that contract (the J T Magen contract). *See* Notice of Motion (motion sequence number 004), Exhibit E, at 12-15. Murray also stated that J T Magen's superintendents performed daily walk-through inspections at the building, but denied that J T Magen was responsible for site safety, and stated that the individual subcontractors bore that responsibility. *Id.* at 19-21. Murray further stated that, if a J T Magen superintendent came across an unsafe condition during an inspection, he would contact the designated site safety person for the subcontractor involved in the condition and request that the subcontractor correct it. *Id.* at 32-41, 56. Murray admitted, however, that site clean up was the direct responsibility of J T Magen employees. *Id.* at 47-50, 56-57, 65-66, 76-77, 83-84, 120-121, 142-143. Murray also admitted that J T Magen had the authority to stop work at the project in the event that a dangerous condition was discovered. *Id.* at 67-68. Murray denied, however, that J T Magen had ever received any report of either Bianco's accident, or of debris on the building's stairs. *Id.* at 101-103, 130, 140-141, 158-159.

J T Magen was deposed a second time *via* its environmental health and safety manager, Paula Maunsell (Maunsell), who stated that J T Magen employed a foreman and a number of laborers who were present in the building every day during its construction, and who were responsible for "sweeping and cleaning" the job site both "at the end of each shift and periodically throughout the day." *See* Notice of Motion (motion sequence number 004), Exhibit F, at 14-16. Maunsell further stated that the various subcontractor trades were not responsible for

cleaning the job site. *Id.* at 21. Maunsell also stated that she herself performed weekly safety inspections at the building, and had the authority to stop work if she observed an unsafe condition during such inspection. *Id.* at 33-34. Maunsell denied having received any report of Bianco's accident, however, or having either observed or receiving any complaints about debris on the building's staircase. *Id.* at 44-45, 65-66.

Finally, J T Magen has presented an affidavit from Gorelik, who states that J T Magen did not have any employees at the building, and that he himself never observed any debris on the building's staircase, and never received any complaints about such debris. *See* Notice of Motion (motion sequence number 004), Exhibit G, ¶¶ 1-12.

The relevant portions of the J T Magen contract provide as follows:

> "§ 3.15 Cleaning Up
> § 3.15.1 The Contractor [i.e., J T Magen] shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove from and about the Project waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials
>
> ***
>
> § 3.18 Indemnification
> § 3.18.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner [i.e., North Fork Bank and/or Capital One Bank] ... and agents and employees ... from and against claims, damages, losses and expenses, including but not limited to attorneys fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury ... but only to the extent caused in whole or in part by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or reduce other rights or obligations of indemnity which would otherwise exists as to such party or person described in this Section 3.18."

See Korman Affirmation in Opposition to Motion (motion sequence number 004), Exhibit C.

Capital One Bank was deposed *via* its former vice president for design and construction, Nicholas Maresca (Maresca), who confirmed that that Capital One Bank was the building's tenant pursuant to a lease between NRP 991 and North Fork that Capital One Bank had assumed (the Capital One lease). *See* Notice of Motion (motion sequence number 004), Exhibit H, at 10, 13. Maresca also confirmed that Capital One Bank had assumed the J T Magen contract by which North Fork had retained J T Magen as its general contractor for the construction of the building. *Id.* at 14-17. Maresca stated that he attended weekly meetings and conducted walkthroughs, every other week, at the building while the construction was ongoing. *Id.* at 18-23. Maresca alleged that J T Magen was responsible for all site safety issues, including cleanup and coordination of the subcontractors' work. *Id.* at 35-44, 53-55. Maresca also stated that he had the authority to stop work at the building if he had noticed an unsafe condition during construction. *Id.* at 48-52. Maresca finally stated that he had never observed any debris on the building's staircase, and that he had never been notified of Bianco's accident. *Id.* at 38, 49, 57-58.

Preferred was deposed via its president, Sean Mackin (Mackin), who confirmed that Preferred had been retained as a fire protection system subcontractor by J T Magen pursuant to a "purchase order" contract dated June 23, 2006 (the Preferred contract). *See* Notice of Motion (motion sequence number 004), Exhibit N, at 10, 17. Mackin also acknowledged that Preferred occasionally used double expansion shields when installing fire protection systems, but did not recall having used them at the building. *Id.* at 36-41, 57-58, 94-95. Mackin also stated that he did not recall ever having seen any debris on the building's staircase, or having made any

complaints to J T Magen about such debris. *Id.* at 41-42. Mackin finally stated that J T Magen was responsible for cleanup and site safety at the building. *Id.* at 88. The relevant portions of the Preferred contract state as follows:

> "5. The Subcontractor [i.e., Preferred] shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of its Work. Subcontractor also shall be responsible for reviewing and complying with all safety precautions and requirements set forth in the J T Magen Safety Manual and agrees to the penalties for infraction as set forth therein.
>
> ***
>
> 17. To the fullest extent permitted by law, Subcontractor agrees to fully indemnify, defend and hold harmless J T Magen, Owner, their officers, directors, agents and employees, Building Owner, Landlord, Managing Agent, Lender and all applicable additional indemnitees, if any, their respective agents, officers, directors, employees and partners (hereinafter collectively "Indemnitees") from and against any and all claims, losses, suits, damages, liabilities, professional fees, including attorney's fees, costs, court costs, expenses and disbursements, whether arising before or after completion of the Subcontractor's Work, related to ... personal injuries ... brought or assumed against any of the Indemnitees by any person ... arising out of or in connection with or as a result of or as a consequence of (a) the performance of the Work ... whether or not caused in whole or in part by the Subcontractor or any person or entity employed, either directly or indirectly, by the Subcontractor ... or (b) any breach of this agreement. The parties expressly agree that this indemnification agreement contemplates (1) full indemnity in the event of liability imposed against the Indemnitees without negligence and solely by reason of statute, operation of law or otherwise; and (2) partial indemnity in the event of any actual negligence on the part of the Indemnitees either causing or contributing to the underlying claim in which case, indemnification will be limited to any liability imposed over and above that percentage attributable to actual fault whether by statute, operation of law or otherwise. ..."

Id.; Exhibit O, at 1-2.

Pierpont was deposed by one of its project managers, Nicholas DiGiacomo (DiGiacomo), who confirmed that J T Magen retained Pierpont as the building's HVAC subcontractor pursuant to a "purchase order" agreement (which is identical to the Preferred contract), dated June 23,

2006 (the Pierpont contract). *See* Notice of Motion (motion sequence number 004), Exhibits L, at 9-11, 13-14; O, at 9-10. DiGiacomo further stated that J T Magen was responsible for site safety and cleanup, that the stairs were always kept very clean, and that he never received any complaint about debris. *Id.* at 28, 40, 71-72. DiGiacomo also stated that Pierpont occasionally used double expansion shields when performing its work, but did not recall having used them at the building. *Id.* at 44, 88-90. DiGiacomo finally stated that Pierpont never received any notification about Bianco's accident. *Id.* at 63-64, 79.

Techno was deposed via one of its project managers, Brendan Quinn (Quinn), who acknowledged that J T Magen had retained Techno as a drywall subcontractor pursuant to a "purchase order" agreement dated June 23, 2006 (the Techno contract). *See* Notice of Motion (motion sequence number 004), Exhibits M, at 12, 26-28, 48; O, 4-5. Quinn also stated that he did not recall seeing any debris on the building's staircase, that he had not received any complaints about such debris, and that J T Magen was responsible for site safety and cleanup. *Id.* at 53, 81-82.

JDE was deposed via its president, Jordan Daniels (Daniels), who acknowledged that J T Magen had retained JDE as an electrical subcontractor pursuant to a "purchase order" contract dated January 1, 2007 (the JDE contract). *See* Notice of Motion (motion sequence number 004), Exhibits K, at 15-17; O. Daniels also acknowledged that Ballone was Bianco's supervisor, and that he had received notification of Bianco's accident from Ballone on the day it happened. *Id.* at 35-36, 55-56, 71-73. Daniels stated that JDE employees were responsible for cleaning up their own debris, but were not responsible for cleaning up the debris of the other subcontractors at the work site. *Id.* at 63-65.

Bianco originally commenced this action on May 27, 2010 by filing a summons and complaint that sets forth one cause of action for negligence that alleges violations of common-law negligence, Labor Law § 200 and Labor Law § 241 (6) (as well as Industrial Code provisions 12 NYCRR §§ 23-1.5, 23-1.7 (d) - (f), 23-1.15, 23-2.1 (a) - (b) and 23-2.7 (a) - (e)). Notice of Motion (motion sequence number 003), Exhibit A. Defendants filed a joint answer on September 23, 2010. *Id.*; Exhibit B. Thereafter, defendants commenced the third-party action on February 14, 2011 by filing a summons and complaint that sets forth causes of action against each third-party defendant for: 1) negligence; 2) contributory negligence; 3) contractual indemnification; 4) breach of contract (failure to obtain insurance); and 5) statutory negligence. *Id.*; Exhibit C.[1] Timely answers with affirmative defenses, counterclaims and cross claims were each filed by Preferred on March 31, 2011, by JDE on April 4, 2011, by Techno on April 27, 2011, and by Pierpont on May 26, 2011. *Id.* Now before the court are motions by Techno, Preferred and Pierpont, and a cross motion by JDE, each of which seeks summary judgment dismissing the third-party complaint (motion sequence numbers 002, 003 and 005), and a joint motion by the defendants/third-party plaintiffs to dismiss Bianco's complaint (motion sequence number 004).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier*

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[1] There are four sets of causes of action in the third-party complaint - i.e., five each of the foregoing claims asserted against JDE, Pierpont, Preferred and Techno, for a total of 20 claims.

& Carreras v Lacher, 299 AD2d 64, 70 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1st Dept 2003).

For reasons of clarity, this decision will deal with defendants' joint motion to dismiss the complaint first (motion sequence number 004), and then dispose of the third-party motions.

Defendants' Motion

Defendants argue that the complaint should be dismissed as against ALGM, NRP MM, Emmes, Emmes Capital and Emmes Management, because none of these entities were "the owner of the property...or had any connection to the property," and, therefore, had "no responsibilities or duties concerning the property and are not proper parties to the action." *See* Memorandum of Law in Support of Motion (motion sequence number 004), at 4 (pages not numbered). Bianco argues in opposition that dismissal is not warranted since defendants have "conceded" that NRP MM is the managing member of NRP 991 (the building's owner), and that Emmes Realty is the building's property manager. *See* Korman Affirmation in Opposition to Motion (motion sequence number 004), at 2 (pages not numbered). In their reply papers, defendants claim that Bianco has "acknowledge[d] that he has no viable causes of action against" NRP MM, ALGM or any of the named Emmes defendants. *See* Bruckner Reply Affirmation, ¶ 2. This court disagrees, as upon review of Bianco's opposition papers, no such

"acknowledgment" is contained therein. Moreover, as NRP MM is the managing member of the building's owner (NRP 991), a jury could find NRP MM liable for NRP 991's alleged negligence. Further, the moving papers fail to contain sufficient evidence to warrant a dismissal as against NRP MM, as a matter of law. The same, however, cannot be said for ALGM, however, whose identity and connection to the building, if any, has not been established. Thus, dismissal as to ALGM is warranted. As to the Emmes defendants, it also has been established that they lacked any interest in the subject building; thus, summary judgment of dismissal as to the Emmes defendants is warranted.

Defendants' reply papers also claim that Bianco has "acknowledged that he has no viable causes of action against" Capital One, Capital One Financial or JT Magen Construction, and request that the complaint be dismissed as against these defendants, too. *See* Bruckner Reply Affirmation, ¶ 2. However, Bianco's opposition papers contain no such acknowledgment. Moreover, there is in sufficient evidence in the submitted papers, to support defendants' request for dismissal, as a matter of law. Therefore, the court denies the portion of defendants' motion which seeks dismissal as to Capital One, Capital One Financial and JT Magen Construction, and turns its attention to the substance of Bianco's claims.

Bianco has asserted claims based upon principles of common-law negligence and defendants' alleged violation of Labor Law § 200. It is well settled that Labor Law § 200 is the statutory codification of the common-law duty imposed on owners and/or general contractors, to provide construction workers with a safe work site. *See e.g. Perrino v Entergy Nuclear Indian Point 3, LLC*, 48 AD3d 229, 230 (1st Dept 2008), citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 (1993). In *Ortega v Puccia* (57 AD3d 54, 60-61 [2d Dept 2008]), the

Appellate Division, Second Department, cogently summarized the law governing Labor Law § 200 as follows:

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

Here, defendants argue both that they did not create or have notice of the condition that caused Bianco's accident, and that they did not control or supervise Bianco's work. *See* Memorandum of Law in Support of Motion (motion sequence number 004), at 5-8 (pages not numbered). Bianco responds that his Labor Law § 200 claim is based on a "dangerous condition" theory, rather than a "means and manner" theory, and so all of defendants' arguments regarding supervision and control are irrelevant. *See* Korman Affirmation in Opposition, at 21-22 (pages not numbered). The court agrees and, therefore, has not considered defendants' arguments as to such issue.

With respect to the "dangerous condition" analysis, Bianco argues that the condition that caused his injury (i.e., the discarded double expansion shields) was "[a] slipping and tripping

hazard that [was] caused to be on the staircase by agents of JT Magen, and [was] permitted to remain by the failure of JT Magen to properly clean the site." *Id.* at 23. In their reply papers, defendants repeat their argument that "there is no evidence that JT Magen [had] either actual or constructive notice of any allegedly dangerous condition." *See* Bruckner Reply Affirmation, ¶ 4. After reviewing the deposition testimony, the court disagrees with defendants.

With respect to JT Magen having "caused" the dangerous condition, Bianco testified that the accumulated debris on the building's staircase had been left there by various "trades," but, Bianco does *not* allege that any JT Magen workers had dropped double expansion shields on the building's stairway. *See* Notice of Motion (motion sequence number 004), Exhibit D, at 27-29. Rather, Bianco argues that JT Magen's workers failed to clean up the debris. *See* Korman Affirmation in Opposition to Motion, at 3 (pages not numbered). Failing to remove the debris from the stairs, is different than placing the debris on the stairs, since the former is an omission, while the latter is an affirmative act. Here, an act was required to "create" the condition that caused Bianco's injury, and that act was the dropping of debris on the stairs. As previously mentioned, Bianco did not allege that JT Magen's employees dropped the subject debris. Thus, there is no evidence that JT Magen created the dangerous condition that precipitated Bianco's injury, and therefore, actual or constructive notice of the debris condition would be needed to establish liability.

With respect to "actual notice," Bianco testified that, on the day of his injury, he complained about the double expansion shields on the building's stairway to Ballone, his JDE foreman, but stated that he did not know if Ballone passed his complaint along to JT Magen. *See* Notice of Motion (motion sequence number 004), Exhibit D, at 42-43. JT Magen employees

Murray, Maunsell and Gorelik each testified that they did not receive any such complaints. *Id.*; Exhibits E, at 140-141, 158-159; F, at 65-66; G, ¶ 9. Bianco did *not* testify that he himself complained to Gorelik about the debris on the stairs, and has not presented any documentary evidence that such a complaint was made. Thus, there is no evidence that JT Magen had actual notice of the dangerous condition that precipitated Bianco's injury.

With respect to "constructive notice," New York law holds that "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." *Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526, 526-27 (1st Dept 2013), quoting *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Further, "a property owner may be charged with constructive notice of a hazardous condition if it is proven that the condition is one that recurs and about which the owner has actual notice". *Early v Hilton Hotels Corp.*, 73 AD3d 559, 561 (1st Dept 2010). Defendants argue that the deposition testimony herein does not include any statements that debris was regularly left on the building's staircase, and also note that the minutes of the periodic on-site safety meetings do not include any notations of complaints about debris on the staircase. *See* Memorandum of Law in Support of Motion (motion sequence number 004), at 7 (pages not numbered). Bianco does not raise any argument on the issue of constructive notice in his opposition papers, although, as was previously mentioned, he testified at his deposition that he made complaints "every week" about debris at the work site. *See* Notice of Motion (motion sequence number 004), Exhibit D, at 27-29, 156. This variance in the deposition testimony creates a question of fact as to whether defendants had constructive notice about recurring instances of debris being left unremoved at the worksite, and that question clearly turns on the

issue of witness credibility. It is axiomatic that issues of witness credibility are not appropriately resolved on a motion for summary judgment. *See e.g. Santos v Temco Serv. Indus.*, 295 AD2d 218 (1st Dept 2002). Therefore, there is a question of fact as to whether there was constructive notice and that portion of defendants' motion that seeks summary judgment dismissing Bianco's claim that is based on principles of common-law negligence and/or defendants' alleged violation of Labor Law § 200 is denied.

The remaining portion of Bianco's claim is based on defendants' purported violation of Labor Law § 241 (6), which imposes a nondelegable duty on "owners and contractors 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). In order to prevail on a claim under Labor Law § 241 (6), it is incumbent on a plaintiff to demonstrate that the defendant violated a regulation containing "concrete specifications" applicable to the facts of the case. *Id.* at 505. Here, defendants first argue that two of the Industrial Code provisions upon which Bianco bases his claim, are not sufficiently specific to support such a claim. *See* Memorandum of Law in Support of Motion (motion sequence number 004), at 8-10 (pages not numbered). Defendants appear to be correct. 12 NYCRR 23-1.5 and 23-2.1 (b) have each been held to be insufficiently specific. *See e.g. Meslin v New York Post*, 30 AD3d 309, 310 (1st Dept 2006) ("12 NYCRR § 23-1.5 [is] a regulation that sets only general safety standards, [and] would not constitute a basis for a claim under Labor Law § 241 [6]"); *Quinlan v City of New York*, 293 AD2d 262, 263 (1st Dept 2002) ("12 NYCRR 23-2.1 [b], which addresses "disposal of debris," ... "does not sufficiently set forth 'a specific standard of conduct as opposed to a general

reiteration of common-law principles' for its violation to qualify as a predicate for a Labor Law § 241 (6) cause of action" [citation omitted]"). Therefore, Industrial Code provisions 12 NYCRR 23-1.5 and 23-2.1 (b) may not serve as bases for Bianco's Labor Law § 241 (6) claim. The four remaining Industrial Code provisions that Bianco relies upon are as follows:

> 12 NYCRR 23-1.7 (d) - (f) provide as follows:
>
> "(d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing
>
> (e) Tripping and other hazards.
>
> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.
>
> (f) Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided."

Defendants do not contest that each of these subparagraphs has been held to be sufficiently specific to support a Labor Law § 241 (6) claim. Rather, defendants first argue that 12 NYCRR 23-1.7 (d) does not apply to the facts of this case because "the alleged debris ... was not the proximate cause of the accident; rather, it was plaintiff's continued use of the stairs." *See* Memorandum of Law in Support of Motion (motion sequence number 004), at 12 (pages not numbered). Bianco responds that this argument "completely disregards the clear purpose

underlying the Industrial Code regulations cited." *See* Korman Affirmation in Opposition, at 17 (pages not numbered). The court agrees. 12 NYCRR23-1.7(d) requires landowners to remove "foreign substances" from their premises during construction, and Bianco has alleged that defendants herein failed to do so. Thus, this Industrial Code provision clearly applies to the facts of this case. Defendants' argument improperly places the focus of the inquiry on the how the worker acted, rather than on whether the landowner complied with the law. Therefore, the court rejects defendants' argument, as 12 NYCRR 23-1.7 (d) will sufficiently support Bianco's Labor Law § 241 (6) claim.

Defendants next argue that 12 NYCRR § 23-1.7 (e) (1) does not apply to the facts of this case because the statute applies to "tripping," while Bianco alleges that he "slipped." *See* Memorandum of Law in Support of Motion (motion sequence number 004), at 11 (pages not numbered). Bianco responds that whether his "accident was a slip, a trip, or both is a question properly left for a jury." *See* Korman Affirmation in Opposition, at 18 (pages not numbered). This court agrees with Bianco, as Bianco has alleged that the condition which caused his injury (i.e. the discarded double expansion shields) was a slipping and tripping hazard. Thus, 12 NYCRR 23-1.7 (e) (1) may support Bianco's Labor Law § 241 (6) claim.

12 NYCRR 23-1.7 (e) (2) is not applicable, because it pertains to "working areas," whereas Bianco's accident took place on a staircase - which is clearly a "passageway" as defined by 12 NYCRR 23-1.7 (e) (1). Therefore, 12 NYCRR 23-1.7 (e) (2) cannot support Bianco's Labor Law § 241 (6) claim.

With respect to 12 NYCRR 23-1.7 (f), defendants argue that "as there was a staircase provided, [this] ... section is not applicable." *See* Memorandum of Law in Support of Motion

(motion sequence number 004), at 12 (pages not numbered). Bianco does not contest this point in his opposition papers. Because the deposition testimonies herein all indicate that the staircase where Bianco's accident occurred was both preexisting and the principal means of travel between the building's first and second floors, it is clear that 12 NYCRR 23-1.7 (f) does not apply to the facts of this case. Similarly, 12 NYCRR 23-2.7 (a) - (e), do not apply since such Industrial Code provisions govern temporary stairways, whereas, the stairway at issue in this action was pre-existing.

Defendants make the same argument with respect to 12 NYCRR 23-1.15, which requires landowners to install and maintain safety railings at their worksites. *See* Memorandum of Law in Support of Motion (motion sequence number 004), at 10 (pages not numbered). The court accepts that argument, and determines that Industrial Code provision 12 NYCRR 23-1.15 does not apply to the facts of this case, because the deposition testimonies all indicate that the stairway where Bianco fell had a safety railing, and there is no evidence that the lack of a safety railing was a cause of his accident.

Defendants similarly argue that 12 NYCRR 23-2.1 (a) does not apply to the facts of this case because it governs "storage of material or equipment," and the double expansion shields that Bianco fell on were not being "stored" on the staircase. *See* Memorandum of Law in Support of Motion (motion sequence number 004), at 9 (pages not numbered). Bianco responds that, because "there were double expansion shields scattered throughout the staircase," ... "there is an issue of fact as to whether ... defendants failed to comply with the storage requirements of" 12 NYCRR 23-2.1 (a). *See* Korman Affirmation in Opposition, at 20 (pages not numbered). The court disagrees, since Bianco's deposition testimony clearly stated that the double expansion shields had

been dropped on the staircase, *not* stored there. Thus, 12 NYCRR § 23-2.1 (a) does not support Bianco's Labor Law § 241 (6) claim. Based upon the above, Bianco has established that his Labor Law § 241 (6) claim may be supported by Industrial Code provision 12 NYCRR 23-1.7 (d) and 12 NYCRR § 23-1.7 (e) (1). Accordingly, the court grants defendants' motion solely to the extent of dismissing so much of Bianco's claim as is based on the other Industrial Code provisions, but denies defendants' request for summary judgment to dismiss Bianco's 241(6) claim in its entirety.

The balance of defendants' motion seeks summary judgment on their third-party claim against JDE for contractual indemnity. *See* Memorandum of Law in Support of Motion (motion sequence number 004), at 12-16 (pages not numbered). JDE responds, however, that this request has been rendered moot by virtue of a contract that its counsel executed with defendants on May 4, 2012, by which JDE agreed to assume defendants' defense in this action. *See* Morgenlender Affirmation in Partial Support, ¶ 6. The court notes that JDE's counsel prepared the reply papers that defendants submitted in response to Bianco's opposition papers. However, the Court of Appeals has observed that the duty to defend is broader than the duty to indemnify. *See e.g. Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 310-311 (1984). Thus, despite the fact that JDE's insurer has assumed defendants' defense in Bianco's primary action, it is still possible that JDE might be found liable to defendants if it is shown that JDE was in some quantum negligent itself. Therefore, defendants' request for contractual indemnification from JDE is only partially moot. However, as it has not been established that JDE *was* negligent, there are no grounds for granting defendants' request for summary judgment on their third-party indemnity claim against JDE at this juncture.

Third-party Defendant Techno's Motion/JDE's Cross-Motion

Techno seeks summary judgment to dismiss the third-party complaint as against it, and JDE cross-moves for the same relief. *See* Notice of Motion; Notice of Cross Motion (motion sequence number 002). Defendants state that they do not oppose Techno's motion. *See* Bruckner Affirmation in Opposition (motion sequence number 003), ¶ 2. Defendants are silent as to JDE's request, but have not submitted any opposition to JDE's motion. As was noted earlier, JDE's insurer has assumed defendants' defense in the main action commence by Bianco; thus partially mooting defendants' request for summary judgment on their contractual indemnity claim against JDE, and completely mooting defendants' claim that JDE failed to obtain insurance. Defendants' remaining third-party claims against JDE allege negligence, contributory negligence and the violation of certain non-specified "rules, statutes and ordinances." Leaving aside the last of these (which also appears to lack merit and, in any case, fails to state a cause of action), defendants will be required to demonstrate some quantum of negligence by JDE in order to support their claims. However, as was also previously noted, the existence of negligence (and the amount, if any, that the various parties may have contributed to that negligence) has not yet been established as a matter of law, and, thus, the resolution of that issue will be determined at trial. Under these circumstances, it would be improvident to dismiss all of defendants' third-party claims against JDE at this juncture. Accordingly, the court grants Techno's motion on consent, and grants JDE's cross motion solely to the extent of granting partial summary judgment dismissing defendants' fourth and fifth third-party claims against JDE.

Third-Party Defendant Preferred's Motion

In seeking summary judgment of dismissal of the third-party complaint, Preferred first argues that defendants' third-party Labor Law claims against it should be dismissed because "there is no evidence that Preferred controlled or supervised the injured worker." *See* Notice of Motion (motion sequence number 003), McClafferty Affirmation, ¶¶ 5-7. Defendants/third-party plaintiffs do not raise any specific objection to this argument in their opposition papers. *See* Bruckner Affirmation in Opposition, ¶¶ 6-9. The court notes that the third-party complaint does not enumerate any specific Labor Law claims against Preferred or any of the other third-party defendants. Instead, as was previously observed, the fifth cause of action therein merely alleges that Preferred violated certain non-specified "rules, statutes and ordinances." *See* Notice of Motion (motion sequence number 003), Exhibit C, ¶¶ 107-110. However, as defendants/third-party plaintiffs have not opposed dismissal of the Labor Law claims, such lack of response is deemed abandonment of this cause of action. Thus, the fifth cause of action asserted against Preferred in the third-party complaint is dismissed.

Similarly, defendants/third-party plaintiffs have not opposed the portion of Preferred's motion which seeks dismissal of the fourth third-party cause of action against Preferred, which alleges breach of contract for failure to obtain insurance. It is noted that in support of its motion, Preferred has presented a copy of the declaration page of a $132,000.00 commercial general liability policy that it purchased. *See* Notice of Motion (motion sequence number 003), Exhibit L. Therefore, defendants/third-party plaintiffs' breach of contract claim against Preferred is dismissed.

Defendants/third-party plaintiffs' remaining third-party claims against Preferred allege

negligence, contributory negligence and contractual indemnification. With respect to the negligence claims, Preferred argues for dismissal on the ground that "there is no evidence that Preferred was negligent and JT Magen was free of negligence." *See* Notice of Motion (motion sequence number 003), McClafferty Affirmation, ¶¶ 14-16. Defendants/third-party plaintiffs respond that there is an issue of fact as to whether Preffered was negligent, as evinced by Mackin's testimony that Preferred's employees may have used the double expansion shields that Bianco slipped on. *See* Bruckner Affirmation in Opposition, ¶¶ 6-9. Preferred replies that Mackin's testimony is equivocal, and notes that JT Magen, not Preferred, was responsible for cleaning the work site. *See* Goldband Reply Affirmation, ¶¶ 9-13. The court agrees that section 3.15.1 of the J T Magen contract conclusively establishes that JT Magen was solely responsible for cleaning the work site, regardless of any alleged conflicting deposition testimony. Nevertheless, as the court has also previously observed, there has yet to be a finding or apportionment of negligence in Bianco's primary action. As a result, it would be improvident to dismiss any of the third-party negligence claims at this juncture. Therefore, that branch of Preferred's motion which seeks dismissal of the negligence/contributory claims is denied.

With respect to defendants/third-party plaintiffs' contractual indemnity claim, Preferred argues for dismissal on the ground that "there is no evidence that Preferred was negligent and triggered the indemnification provision." *See* Notice of Motion (motion sequence number 003), McClafferty Affirmation, ¶¶ 8-13. The court rejects this argument for the same reason as was just discussed, and finds that this branch of Preferred's motion should also be denied. Accordingly, Preferred's motion for summary judgment of dismissal of the third-party claims is granted solely to the extent of awarding Preferred partial summary judgment dismissing defendants' fourth and

fifth third-party causes of action against it.

Pierpont's Motion

Finally, Pierpont moves for summary judgment to dismiss the third-party claim as against it (motion sequence number 005). Pierpont's motion and defendants opposition thereto are word-for-word identical to Preferred's motion and defendants' opposition papers. Accordingly, the court reaches the identical result, and finds that Pierpont's motion is granted, solely to the extent of awarding Pierpont partial summary judgment dismissing defendants' fourth[2] and fifth third-party causes of action against it, but denied with respect to the first, second and third third-party causes of action.

DECISION

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion for summary judgment pursuant to CPLR 3212 by third-party defendant Techno Acoustics Inc. i/s/h/a Techno Acoustics Holdings LLC (motion sequence number 002) is granted and the third-party complaint bearing Index No. 590165/11 is dismissed on consent with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the cross motion for summary judgment pursuant to CPLR 3212 by third-party defendant Jordan Daniels Electrical Contractors, Inc. (motion sequence number 002) is granted solely to the extent that the fourth and fifth causes of action in the third-party complaint

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[2] Pierpont has presented a copy of the declaration page of the $1 million commercial general liability insurance policy that it purchased pursuant to the terms of the Pierpont contract. *See* Notice of Motion (motion sequence number 005), Exhibit K.

bearing Index No. 590165/11 are severed and dismissed as against said third-party defendant, but is otherwise denied; and it is further

ORDERED that the motion for summary judgment pursuant to CPLR 3212 by third-party defendant Preferred Sprinkler, Inc. (motion sequence number 003) is granted solely to the extent that the fourth and fifth causes of action in the third-party complaint bearing Index No. 590165/11 are severed and dismissed as against said third-party defendant, but is otherwise denied; and it is further

ORDERED that the motion for summary judgment pursuant to CPLR 3212 by defendants/third-party plaintiffs North Fork Bancorporation, Inc., Capital One Financial Corporation, Capital One Bank (USA) N.A., Capital One, N.A., J T Magen & Company, Inc. s/h/a J T Magen & Co., Inc., JT Magen Construction Company, Inc., NRP 991 LLC, NRP 991 LLC 1, NRP 991 MM Corp., ALGM Leasehold X LLC, Emmes & Company LLC and Emmes Capital Holding LLC (motion sequence number 004) is granted *only to the extent that* this case is dismissed as to defendant ALGM Leasehold X LLC and the Emmes defendants (Emmes Management, Emmes & Company LLC, Emmes Capital Holding LLC) and to the extent that plaintiff Bianco's Labor Law 241(6) claim is deemed dismissed, *except for that portion which relies upon Industrial Code provisions 12 NYCRR 23-1.7 (d) and 12 NYCRR § 23-1.7 (e) (1)*; and it is further

ORDERED that the motion for summary judgment pursuant to CPLR 3212 by third-party defendant Pierpont Mechanical Corporation (motion sequence number 005) is granted solely to the extent that the fourth and fifth causes of action in the third-party complaint bearing Index No. 590165/11 are severed and dismissed as against said defendant, but is otherwise denied; and it is

further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the balance of these actions shall continue; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties, with notice of entry.

Dated: New York, New York
July 8, 2013

Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\biancovnorthforketal.lane.wpd