SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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YVETTE ALVAREZ,

Plaintiff,

-against-

Index No. 154276/13

PAVARINI MCGOVERN, LLC and THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,

Motion Sequence No. 1

Defendants.

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STRUCTURE TONE, INC. s/h/a PAVARINI MCGOVERN, LLC and THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,

Third-Party Plaintiffs,

-against-

Third-Party
Index No. 590617/13

ADCO ELECTRICAL CORP.,

Third-Party Defendant.

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NANCY M. BANNON, J.S.C.:

This action arises out of a construction site accident that occurred on March 5, 2012 on the campus of Columbia University located at 509 West 218th Street in Manhattan (hereinafter, the premises). Plaintiff Yvette Alvarez, an electrician, alleges that she sustained an injury when she was pushing a core machine that fell on her foot. Defendants/third-party plaintiffs Structure Tone, Inc. s/h/a Pavarini McGovern, LLC (Structure Tone) and the Trustees of Columbia University in the City of New York (Columbia) (together, defendants) move, pursuant to CPLR 3212, for an order: (1) granting them summary judgment dismissing plaintiff's complaint seeking damages for violations of Labor Law §§ 241, 241-a, and 200 and for common-law negligence

and any counterclaims against them; and (2) granting them summary judgment on their contractual indemnification claims against third-party defendant ADCO Electrical Corp. (ADCO).

Third-party defendant ADCO cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the contractual indemnification claims asserted by Structure Tone and Columbia against it.

BACKGROUND

It is undisputed that Columbia was the owner of the premises on March 5, 2012. Columbia hired Structure Tone as a construction manager for construction work on the premises. Plaintiff's employer, ADCO, was retained to perform electrical work on the job.

Plaintiff testified at her deposition[1] that, on the date of the accident, she was employed as an electrician by ADCO, and was performing coring work on the roof (Plaintiff tr at 33, 52). Her work involved using a core machine, which had two wheels, was about three feet long and 18 inches wide, and weighed about 140 pounds (*id.* at 53, 63). The machine was provided by ADCO (*id.* at 53-54). On the date of the accident, plaintiff and an ADCO apprentice carried the core machine from the fourth floor to the roof (*id.* at 62). She was then instructed by ADCO employees where to begin her core drilling work (*id.*). On the roof, plaintiff saw a raised metal framework which was about 10 inches high and a baker scaffold which blocked her access to other side of the roof where she needed to core a hole (*id.* at 63). The baker scaffold did not have wheels (*id.* at 121). In order to get to the location to drill the first hole, plaintiff climbed under

[1]Plaintiff was deposed on two occasions: on September 9, 2014 and on October 31, 2014. As the parties do not rely on the October 31, 2014 deposition transcript on the instant motion, citations to the transcript of plaintiff's deposition refer to the September 9, 2014 deposition.

the scaffolding, and dragged the machine behind her (*id.* at 100). After she finished drilling the first hole, plaintiff and an ADCO employee carried the core machine to where a second hole was going to be cored (*id.* at 68). After plaintiff finished coring the second hole, plaintiff was told by ADCO employees where she would be coring for the rest of the afternoon (*id.* at 71). Plaintiff proceeded to move the machine on her own (*id.* at 72). She tilted the core machine, pushed it under scaffolding crossbars, and stood it back under the scaffolding (*id.* at 72-73). She then went under the scaffolding (*id.* at 73). Next, she pushed the core machine in front of her and proceeded to tilt it toward her and push it under the second set of crossbars under the scaffold (*id.*).

Plaintiff described her accident as follows:

> "[she] then went under the scaffold to do so again, because that went so easy and did it again and it just like froze. It hit something, something [on] the surface of the roof. [She didn't] know . . . to this day do[es] not know what it is that [she] hit or how the machine was not able to roll and with the force of [her] giving it a push, 'cause it's heavy, went right through [her] hands and the machine went down on [her] – top of [her] left foot"

(*id.*). She stated that she "ended up hobbling over and [she] threw [herself] on the skid," and that she was lying down on the skid for "a little while" before she was able to speak and call her co-worker over (*id.* at 124, 136). Plaintiff was taken to the hospital about an hour after her accident occurred (*id.* at 140). At the time of the accident, plaintiff was wearing work boots without a reinforced steel toe (*id.* at 36). Plaintiff stated that she used her own tools, as well as tools and equipment provided by ADCO (*id.* at 131).

Michael McFadden (McFadden) testified that he was employed as a project superintendent by Pavarini McGovern, a subdivision of Structure Tone, in March 2012

(McFadden tr at 8, 9, 17). McFadden stated that his job duties included coordinating day-to-day activities on the construction site (*id.* at 7). McFadden performed walk-throughs of the site, including the roof, on a daily basis (*id.* at 114). Prior to the date of the accident, McFadden did not notice any type of condition that would be considered an obstruction (*id.* at 123-124). After the accident, McFadden looked at the entire roof and did not observe any debris on the roof (*id.* at 118). He could not recall any complaints regarding obstructions on the roof (*id.* at 77). According to McFadden, Structure Tone could not tell ADCO workers how to do the work that they were performing or how to move equipment (*id.* at 127-128). ADCO provided all of the tools necessary for core drilling (*id.* at 34).

Daniel McByrne (McByrne), ADCO's foreman, stated that, on March 5, 2012, ADCO was performing electrical work at the project for Structure Tone (McByrne tr at 7, 9, 10). According to McByrne, at the time of the accident, the roof was unfinished; it consisted of planking which was going to be covered with a pre-fit concrete slab (*id.* at 24-25). McByrne testified that a sub-foreman, Carlos Armas, directed and supervised plaintiff's work (*id.* at 27, 28, 67, 68). ADCO provided the core machine to its employees (*id.* at 67). In addition, the core drilling locations where plaintiff was coring were "pre-laid out" by ADCO (*id.* at 29-30).

McByrne testified that plaintiff told him right after the accident outside the entrance to the job site that "the core machine hit a piece of rebar that was sticking through the deck" (*id.* at 35, 36). Within an hour of the accident, McByrne went up to the roof and saw a piece of brown rebar "sticking out by the scaffold," which was straight and about three to four inches long (*id.* at 39, 40-41). McByrne recalled that the piece of rebar was "within a couple of feet of the opening of the stairwell," and that "[t]here wasn't just one piece," "[t]here were miscellaneous pieces

sticking up in various places" (*id.* at 42). However, McByrne did not know what the purpose of the rebar was or whose rebar it was (*id.* at 43). McByrne stated that the electricians made complaints about rebar on the roof during weekly safety meetings (*id.* at 43-45). McByrne also testified that he informed McFadden about the rebar on the roof; he said that "there was an unsafe condition on the roof, there's a tripping hazard" (*id.* at 45, 47).

An ADR C-2 report states that "core machine fell on left foot while moving machine on roof. Machine hit obstruction on the floor and she lost her grip. Left foot swelled and she couldn't walk on it" (Campbell affirmation in opposition, exhibit B).

On May 8, 2013, plaintiff commenced this action against defendants, seeking recovery for violations of Labor Law §§ 241, 241-a, and 200 and for common-law negligence. Plaintiff's verified bill of particulars alleges statutory violations of Labor Law §§ 200, 240, 241(6), OSHA, and the Industrial Code, including, but not limited to, 12 NYCRR 23-1.5, 12 NYCRR 23-1.7, 12 NYCRR 23-1.12, 12 NYCRR 23-1.24, 12 NYCRR 23-1.32, and 12 NYCRR 23-2.21 (verified bill of particulars, ¶ 18).

Defendants subsequently impleaded ADCO, seeking, among other things, contractual defense and indemnification (third-party complaint, first cause of action).

DISCUSSION

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (*Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012] [internal quotation marks and citation omitted]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v*

New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). "Once this showing has been made, 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" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). If there is any doubt as to the existence of a triable issue of fact, 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]).

Labor Law §§ 240(1) and 241-a

Defendants and ADCO seek dismissal of plaintiff's Labor Law §§ 240(1) and 241-a claims. Plaintiff did not oppose dismissal of those claims in her opposition to the motion.

As an initial matter, the court notes that the complaint contains no claim for violation of Labor Law § 240(1) and this claim was first raised in plaintiff's bill of particulars. The purpose of a bill of particulars is to amplify the pleadings and it may not "'add or substitute a new theory or cause of action'" (*Paterra v Arc Devel. LLC*, – AD3d –, 2016 NY Slip Op 00896 at *1 [1st Dept, Feb. 9, 2016] *quoting Melino v Tougher Heating & Plumbing Co.*, 23 AD2d 616, 617 (3rd Dept 1965]). Thus, defendants are entitled to dismissal of plaintiff's Labor Law § 240(1) claim. In any event, as the injuries sustained by plaintiff were not caused by an elevation-related hazard, she may not rely on Labor Law § 240(1) as a basis for recovery (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]).

Defendants correctly contend that Labor Law § 241-a does not apply to the circumstances of this case. Labor Law § 241-a expressly applies to workers "in or at elevator shaftways, hatchways and stairwells of buildings." Because plaintiff's accident occurred as she was traversing the roof and did not occur in an elevator shaftway, hatchway or stairwell, her Labor Law § 241-a claim is dismissed (*see Angamarca v New York City Partnership Hous. Devel. Fund Co., Inc.*, 56 AD3d 264 [1st Dept 2008]).

Labor Law § 200 and Common-Law Negligence

Defendants next argue that plaintiff's Labor Law § 200 and common-law negligence claims fail, since: (1) they did not exercise supervision or control over plaintiff's work, and (2) plaintiff cannot identify the cause of her accident.

In response, plaintiff contends that there are issues of fact as to whether defendants failed to provide a safe place to work, and that she has adequately identified what caused her accident. Plaintiff relies on McByrne's testimony that she told him immediately after the accident that it was protruding rebar that caused the accident, and that, prior to the accident, McByrne informed McFadden about the rebar on the roof. Furthermore, according to plaintiff, defendants either put the baker scaffold, which had no wheels, in its position on the roof, which blocked access to plaintiff's work area, or another trade placed the baker scaffold in that position, which defendants should have removed.

ADCO asserts that defendants had a nondelegable duty to keep the premises safe.

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 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 persons. The board may make rules to carry into effect the provisions of this section."

Initially, the court rejects defendants' contention that there is only speculation as to the cause of plaintiff's accident. To impose liability upon a defendant for violations of Labor Law § 200 or common-law negligence, the violations or negligence must constitute a proximate cause of the accident (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]; *Weininger v Hagedorn & Co.*, 91 NY2d 958, 960 [1998], *rearg denied* 92 NY2d 875 [1998]; *Weingarten v Windsor Owners Corp.*, 5 AD3d 674, 676-677 [2d Dept 2004]). Proximate cause requires that a defendant's act or failure to act "'was a substantial cause of the events which produced the injury'" (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993], quoting *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980], *rearg denied* 52 NY2d 784 [1980]). "Proximate cause may be established without direct evidence of causation, by inference from the circumstances of the accident; however, mere speculation as to the cause of an accident, when there could have been many possible causes, is fatal to a cause of action" (*Steinsvaag v City of New York*, 96 AD3d 932, 933 [2d Dept 2012] [internal quotation marks and citations omitted]).

In this case, plaintiff testified that the core machine "hit something, something [on] the surface of the roof," but she did not know what it was (Plaintiff tr at 73). However, McByrne testified that plaintiff told him after the accident outside the entrance to the site that "the core machine hit a piece of a rebar that was sticking through the deck" (McByrne tr at 35, 36). "[H]earsay evidence may be considered to defeat a motion for summary judgment as long as it is not the only evidence submitted in opposition" (*O'Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010]). McByrne also stated that he observed a piece of rebar "sticking out by the

scaffold" within an hour of the accident (McByrne tr at 39, 41). In light of the above, the court finds that there is sufficient direct and circumstantial evidence as to the cause of plaintiff's accident.

"Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). Generally, "[t]hese two categories should be viewed in the disjunctive" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Where the worker's injury results from a dangerous or defective 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, 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]).

In contrast, where a plaintiff's injury stems from the means and methods in which the work is performed, including dangerous or defective equipment provided by the plaintiff's employer, "the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work" (*Cappabianca*, 99 AD3d at 144; *see also Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]).

Therefore, the court must determine whether the obstruction or piece of rebar constitutes an inherently dangerous premises condition, or whether it was caused by the manner in which the work was performed.

In *Dalanna v City of New York* (308 AD2d 400, 400 [1st Dept 2003]), the plaintiff tripped over a protruding bolt while carrying a pipe over an outdoor concrete slab. The First Department held that the plaintiff's accident did not occur as a result of a dangerous or defective premises condition, explaining that:

> "[t]he record shows that the bolt was one of many that had been put down to temporarily anchor the tank to the concrete slab prior to its installation, and that when the tank was taken off the slab several months prior to the accident, plaintiff's employer was instructed to cut down the protruding bolts so that they would be level with the surrounding surface, but it apparently missed the one on which plaintiff tripped. Thus, the protruding bolt was not a defect inherent in the property, but was created by the manner in which plaintiff's employer performed its work. Accordingly, defendants cannot be liable under section 200 even if they had constructive notice of the protruding bolt"

(*id.*).

The record reflects that the roof was not finished at the time of the accident, and consisted of planking that was going to be covered by a pre-fit concrete slab (McByrne tr at 24-25). McByrne testified that "[t]here were miscellaneous pieces [of rebar] sticking up in various places" on the roof (*id.* at 42). Thus, plaintiff's accident arises out of the methods in which the work was performed on the roof, and not a defect inherent in the property (*see Singh v 1221 Ave. Holdings, LLC*, 127 AD3d 607, 608 [1st Dept 2015] [screw, which protruded above floor tile, was not the result of an inherently dangerous condition at the work site but was due to the methods of the contracted work]; *McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581, 1582 [4th Dept 2010] ["protruding [pin] was not a defect inherent in property, but rather was created by the manner in which plaintiff's employer performed its work"] [internal quotation marks and citation omitted]).

Defendants have established that they did not exercise supervision or control over plaintiff's work. Plaintiff testified that her work entailed coring work on the roof (Plaintiff tr at 52). She performed her work as directed by her supervisors at ADCO (*id.* at 62, 63, 71). ADCO provided tools and equipment to plaintiff, including the core machine (*id.* at 53-54, 130-131). Structure Tone could not tell ADCO how to do its work or how to move its equipment (McFadden tr at 127-128). Monitoring and oversight of the timing and quality of the work, mere presence on the job site, and a general duty to ensure compliance with safety regulations, are insufficient to impose liability under Labor Law § 200 or for common-law negligence (*see Phillip v 525 E. 80th St. Condominium*, 93 AD3d 578, 579-580 [1st Dept 2012]; *Paz v City of New York*, 85 AD3d 519, 519-520 [1st Dept 2011]). In addition, the authority to stop work for safety reasons is insufficient to raise a triable issue of fact as to a defendant's supervision and control of the work (*see Hughes*, 40 AD3d at 309).

Nevertheless, defendants have failed to demonstrate that they did not control the roofing subcontractor's work (*see Francis v Plaza Constr. Corp.*, 121 AD3d 427, 428 [1st Dept 2014] [where rebar subcontractor's employee tripped over electrical conduit, worker's injury was caused by the manner in which electrical subcontractor performed its work]). Defendants do not point to any testimony indicating that either Structure Tone or Columbia could not control how the roofing subcontractor performed its work, including the placement of the rebar on the deck. As discussed above, the roof was not finished at the time of the accident (McByrne tr at 24-25; McFadden tr at 27-30). McByrne testified that he saw a "piece of rebar sticking out by the scaffold," "[t]here wasn't just one piece," and that "[t]here were miscellaneous pieces sticking up in various places" (McByrne tr at 41, 42). As defendants failed to establish that they did not

exercise supervisory control over the injury-producing work (*see Cappabianca*, 99 AD3d at 144; *see also Foley*, 84 AD3d at 477; *Hughes*, 40 AD3d at 306), the branch of defendants' motion seeking dismissal of plaintiff's Labor Law § 200 and common-law negligence is denied, regardless of the sufficiency of plaintiff's or ADCO's opposing papers (*see Winegrad*, 64 NY2d at 853).

Labor Law § 241(6)

Labor Law § 241 requires that all contractors, owners, and their agents comply with the following requirement:

> "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, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law § 241(6) "imposes a *nondelegable* duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety'" to construction workers (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]). To recover under Labor Law § 241(6), a plaintiff must plead and prove the violation of a concrete provision of the New York State Industrial Code, containing "specific, positive commands," rather than a provision reiterating common-law safety standards (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 503 [1993]). In addition to establishing the violation of a specific and applicable Industrial Code regulation, the plaintiff must also prove that the violation was a proximate cause of the accident (*Ares v State of New York*, 80 NY2d 959, 960 [1992]). The "'plaintiff's failure to identify a

violation of any specific provision of the State Industrial Code precludes liability under Labor Law § 241(6)'" (*Kowalik v Lipschutz*, 81 AD3d 782, 783 [2d Dept 2011], quoting *Owen v Commercial Sites*, 284 AD2d 315, 315 [2d Dept 2001]).

Plaintiff's verified bill of particulars alleges violations of 12 NYCRR 23-1.5, 12 NYCRR 23-1.7, 12 NYCRR 23-1.12, 12 NYCRR 23-1.24, 12 NYCRR 23-1.32, 12 NYCRR 23-2.21, and unspecified OSHA regulations (verified bill of particulars, ¶ 18). Defendants move for summary judgment dismissing plaintiff's Labor Law § 241(6) claim, arguing that Industrial Code provisions relied upon by plaintiff are insufficiently specific, inapplicable, or were not violated in this case. ADCO also argues that plaintiff has failed to identify a specific or applicable violation of the Industrial Code. In opposition, plaintiff only relies on sections 23-1.5, 23-1.7(e)(1), and 23-1.7(e)(2). Therefore, the court only considers these Industrial Code sections in opposition to the motions (*see Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 530-531 [1st Dept 2013] ["Plaintiff abandoned the Labor Law § 241(6) claims that are predicated on violations of other Industrial Code provisions and OSHA regulations cited in his bill of particulars, since he failed to address them in his motion papers or on appeal"]).[2]

12 NYCRR 23-1.5

The First Department has held section 23-1.5 to be insufficiently specific to support a Labor Law § 241(6) claim (*see Martinez v 342 Prop. LLC*, 128 AD3d 408, 409 [1st Dept 2015]; *Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904, 906 [1st Dept 2011]; *Carty v Port Auth.*

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[2]In any case, it is well settled that OSHA regulations cannot serve as a predicate for a Labor Law § 241(6) claim (*see Khan v Bangla Motor & Body Shop, Inc.*, 27 AD3d 526, 529 [2d Dept 2006], *lv dismissed* 7 NY3d 864 [2006]).

of N.Y. & N.J., 32 AD3d 732, 733 [1st Dept 2006], *lv denied* 8 NY3d 814 [2007]).[3] As a result, plaintiff cannot rely on section 23-1.5 as a predicate for her section 241 (6) claim.

12 NYCRR 23-1.7

Section 23-1.7 provides in subdivision (e) as follows:

"(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"

(12 NYCRR 23-1.7).

Sections 23-1.7(e)(1) and (2) have been held to be sufficiently specific to support a Labor Law § 241(6) claim (*Picchione v Sweet Constr. Corp.*, 60 AD3d 510, 512 [1st Dept 2009]; *Colucci v Equitable Life Assur. Socy. of U.S.*, 218 AD2d 513, 515 [1st Dept 1995]).

Defendants argue that sections 23-1.7(e)(1) and (2) do not apply because plaintiff did not trip or slip, and that she did not see any debris in the area.

Plaintiff counters that she was entitled to a safe working area, and was also entitled to a safe passage to her working area. Specifically, plaintiff contends that the baker scaffold blocked

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[3]Although the First Department has ruled that section 23-1.5(c)(3), which governs safety devices, safeguards and equipment, is sufficiently specific (*see Becerra v Promenade Apts. Inc.*, 126 AD3d 557, 558 [1st Dept 2015]), plaintiff does not rely on this subdivision. Moreover, plaintiff does not claim that any safety devices, safeguards or equipment, including the core machine, were in poor condition or were inoperable at the time of the accident. Therefore, subdivision (c)(3) of section 23-1.5 is inapplicable.

the sole means of ingress and egress to her assigned working area, and that the raised rebar was an unsafe condition which caused her accident.

For its part, ADCO maintains that removal of any debris would have been Structure Tone's responsibility.

"Although the regulations do not define the term 'passageway' (*see* 12 NYCRR 23-1.4), courts have interpreted the term to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area" (*Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1250 [4th Dept 2013]; *see also Meslin v New York Post*, 30 AD3d 309, 310 [1st Dept 2006]).

Here, plaintiff testified that the core machine "hit something, something [on] the surface of the roof," which caused it to roll onto her left foot (Plaintiff tr at 73). There is no evidence that plaintiff tripped. Thus, the court finds section 23-1.7(e)(1) to be inapplicable here (*see Stier v One Bryant Park LLC*, 113 AD3d 551, 552 [1st Dept 2014] [section 23-1.7(e) was inapplicable where "plaintiff [did] not allege that he tripped on an accumulation of dirt or debris"]; *Purcell v Metlife Inc.*, 108 AD3d 431, 432 [1st Dept 2013] [section 23-1.7(e)(1) did not apply where worker slipped on wet plywood, and there was no evidence that he tripped]). Furthermore, plaintiff's accident did not occur in a "passageway," in light of the fact that her accident occurred under a scaffold on the roof and not in a defined walkway or pathway (*see Purcell*, 108 AD3d at 432 [open-work area on eighth-floor roof setback of work site did not constitute a "passageway"]).

Moreover, even if plaintiff was injured in a "working area," section 23-1.7(e)(2) does not apply because plaintiff was not injured as a result of tripping, or even slipping, on accumulated debris, dirt, tools or materials (*see Cappabianca*, 99 AD3d at 147 [section 23-1.7(e)(2) was

inapplicable where worker did "not allege that he tripped on an accumulation of dirt or debris"]; *Harasim v Eljin Constr. of N.Y., Inc.*, 106 AD3d 642, 643 [1st Dept 2013] [23-1.7(e)(2) did not apply where "injured plaintiff (did) not allege that he tripped over 'dirt and debris,' 'scattered tools' or 'sharp projections' in his work area"]; *Romeo v Property Owner (USA) LLC*, 61 AD3d 491, 492 [1st Dept 2009] [section 23-1.7(e)(2) did not apply because "(p)laintiff was not injured as a result of tripping over, or even slipping on, 'accumulat(ed)' debris, dirt, tools or materials"]).

Since plaintiff has failed to identify a specific or applicable Industrial Code provision, her Labor Law § 241(6) claim is dismissed (*see Kowalik*, 81 AD3d at 783).

Structure Tone and Columbia's Contractual Indemnification Claim Against ADCO

Defendants move for contractual indemnification against ADCO, plaintiff's employer, pursuant to article 9 of the trade contract between Structure Tone and ADCO.

> "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]).

> Article 9 of ADCO's contract provides, in pertinent part, as follows:
>
> "*To the greatest extent permitted by law, each Trade Contractor [ADCO] shall indemnify, defend, save and hold the Owner [Columbia] . . . the Construction Manager [Structure Tone] . . . harmless from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever which arise out of or are connected with, or are claimed to arise out of or be connected with*:
>
> 1. *The performance of work by the Trade Contractor [ADCO], or any act or omission of Trade Contractor [ADCO]*;

2. Any accident or occurrence which happens, or is alleged to have happened, in or about the place where such work is being performed or in the vicinity thereof (a) while the Trade Contractor [ADCO] is performing the work, either directly or indirectly through a second tier trade contractor or material agreement, or (b) while any of the Trade Contractor's [ADCO's] property, equipment or personnel are in or about the place or the vicinity thereof by reason of or as a result of the performance of the work; or

3. The use, misuse, erection, maintenance, operation or failure of any machinery or equipment (including, but not limited to, scaffolds, derricks, ladders, hoists, rigging supports, etc.) by Trade Contractor [ADCO] whether or not such machinery or equipment was furnished, rented or loaned by the Owner [Columbia] or the Construction Manager [Structure Tone] or their officers, employees, agents, servants or others, to the Trade Contractor [ADCO]"

(Conley affirmation in support, exhibit G [emphasis added]).

Defendants contend that indemnification is warranted because plaintiff was injured in the course of her employment with ADCO, and that her injuries arise out of ADCO's work on the site. Additionally, defendants assert that they did not supervise plaintiff's work or provide any tools to plaintiff, including the core machine.

In opposition, and in support of its cross motion, ADCO argues that any decision regarding contractual indemnification is premature as there has been no determination as to any party's liability for the accident, and that there are issues of fact as to defendants' negligence.

"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]). "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]).

An agreement to indemnify in connection with a construction contract is void and unenforceable to the extent that such agreement contemplates full indemnification of a party for its own negligence (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997], *rearg denied* 90 NY2d 1008 [1997]). However, an indemnification clause which provides for partial indemnification to the extent that the party to be indemnified was not negligent, i.e., "to the fullest extent permitted by law," does not violate the General Obligations Law (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008] [indemnification "to the fullest extent permitted by law" contemplated partial indemnification and was permissible under statute]; *Guzman v 170 W. End Ave. Assoc.*, 115 AD3d 462, 464 [1st Dept 2014] [indemnification clause was enforceable by virtue of "to the fullest extent permitted by law" savings language]). Even if the indemnification provision does not contain the savings language, it may nevertheless be enforced where the party to be indemnified is found to be free of any negligence (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]; *Collins v Switzer Constr. Group, Inc.*, 69 AD3d 407, 408 [1st Dept 2010]; *Lesisz v Salvation Army*, 40 AD3d 1050, 1051 [2d Dept 2007]).

Here, it is uncontested that the indemnification provision was in effect on the date of the accident. The indemnification provision requires ADCO, "To the greatest extent permitted by law," to defend and indemnify Columbia and Structure Tone against all claims "which arise out of or are connected with, or are claimed to arise out of or be connected with . . . [t]he performance of work by [ADCO]" (Conley affirmation in support, exhibit G). The

indemnification provision does not violate General Obligations Law § 5-322.1, in view of the fact that it provides for indemnification "To the greatest extent permitted by law" (*see Guzman*, 115 AD3d at 464). Moreover, plaintiff's claims arise out of the performance of ADCO's work,[4] given that plaintiff was ADCO's employee and was performing ADCO's contracted work at the time of the accident (*see Fuger v Amsterdam House for Continuing Care Retirement Community, Inc.*, 117 AD3d 649, 650 [1st Dept 2014] [subcontractor's indemnification provision requiring it to indemnify contractor for claims arising out of or resulting from the performance of the work and/or operations was triggered since subcontractor's employee was injured while performing subcontractor's work]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005] ["Since the work plaintiff was performing on behalf of his employer National at the time he was injured plainly constituted 'Work' required under the NYSDA-Westmont contract, the contractual indemnity provision was triggered by plaintiff's personal injury claim"]). As discussed above, since defendants have failed to establish their freedom from negligence, defendants are not entitled to full contractual indemnification from ADCO at this juncture (*see Correia*, 259 AD2d at 65).

However, the court grants defendants conditional indemnification against ADCO, given that the indemnification provision does not violate the General Obligations Law. The First Department has ruled that even where there are issues of fact as to the indemnitee's active negligence, an award of conditional indemnification is warranted where the indemnification provision at issue does not violate the General Obligations Law (*see Cuomo v 53rd & 2nd Assoc.*,

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[4]Contrary to ADCO's contention, the indemnification provision does not require negligence to trigger indemnification.

LLC, 111 AD3d 548, 548 [1st Dept 2013] ["Although, as third-party plaintiffs concede, there are issues of fact as to Plaza's active negligence, Plaza is entitled to conditional summary judgment on its claim for contractual indemnification; the extent of its indemnification depends on the extent to which any negligence on its part is found to have contributed to the accident"]; *Burton v CW Equities, LLC*, 97 AD3d 462, 463 [1st Dept 2012] ["Notwithstanding the above-discussed issues of fact as to negligence on its part, CW Equities should have been granted summary judgment on its claim for indemnification, since the indemnification provision at issue does not require T.F.N. to indemnify CW Equities for CW Equities' own negligence"]).

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of defendants/third-party plaintiffs Structure Tone, Inc. s/h/a Pavarini McGovern, LLC and the Trustees of Columbia University in the City of New York for summary judgment is granted to the extent of dismissing plaintiff's Labor Law §§ 240(1), 241 (6), and 241-a claims, and granting them conditional indemnification against third-party defendant ADCO Electrical Corp. to the extent that they are found free of any negligence in plaintiff's accident, and is otherwise denied; and it is further

ORDERED that the cross motion of third-party defendant ADCO Electrical Corp. for summary judgment is denied.

Dated: 2/11/16

ENTER:

J.S.C.

HON. NANCY M. BANNON