KELLY O'NEILL LEVY
JSC

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

----------X

PETER J. DINUZZO,

Plaintiff,

- v -

THE RUDIN FOUNDATION, INC, TURNER CONTRACTING INC, TURNER CONSTRUCTION INTERNATIONAL LLC, TURNER CONSTRUCTION COMPANY, TURNER DEVELOPMENT CORPORATION, AND TURNER RENOVATORS CORP.,

Defendants.

----------X

INDEX NO. 151311/2014

MOTION DATE 06/06/2018

MOTION SEQ. NO. 005, 006

DECISION AND ORDER

----------X

TURNER CONSTRUCTION COMPANY,

Third-Party Plaintiff,

- v -

ALL STATE INTERIOR DEMOLITION INC.,

Third-Party Defendant.

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 181, 183, 184, 185, 186, 187, 188, 189
were read on this motion to/for Summary Judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 177, 178, 179, 180, 182, 190, 191, 192, 193
were read on this motion to/for Summary Judgment.

HON. KELLY O'NEILL LEVY:

Motion sequence numbers 005 and 006 are hereby consolidated for disposition.

This is a Labor Law action involving an alleged demolition work accident.

Defendant/Third-Party Plaintiff Turner Construction Company (hereinafter, Turner) moves (mot. seq. 005) for an order, pursuant to CPLR § 3212, (1) granting summary judgment in its favor and dismissing the Complaint against it in its entirety and (2) granting summary judgment in its favor against Third-Party Defendant All State Interior Demolition Inc.

(hereinafter, All State) on all of its claims for indemnification against All State, together with costs and disbursements of this action, including reasonable attorney's fees. All State partially opposes to the extent that the motion seeks dismissal of the Labor Law § 200 and negligence claims and to the extent that it seeks indemnification from All State, including attorney's fees. Plaintiff Peter J. Dinuzzo opposes to the extent that the motion seeks dismissal of the Labor Law § 200, Labor Law § 241(6), and common law negligence claims.

All State moves (mot. seq. 006) for an order, (1) pursuant to CPLR § 3212, granting summary judgment dismissing plaintiff's claims under Labor Law § 240 and Labor Law § 241 in their entirety, (2) pursuant to CPLR § 3212, granting summary judgment in its favor, dismissing the Third-Party Complaint and any cross-claims against it in their entirety, and (3) pursuant to CPLR § 3025(b) and § 3018(a), permitting All State to amend its Verified Answer to Plaintiff's Verified Complaint and the Third-Party Complaint. Plaintiff opposes to the extent that the motion seeks dismissal of the Labor Law § 241(6) claim. Turner partially supports to the extent that the motion seeks dismissal of the Labor Law §§ 200, 240, and 241 claims and opposes to the extent that the motion seeks dismissal of the Third-Party Complaint.

BACKGROUND

On February 14, 2011, at approximately 4:00 p.m., plaintiff, a shop steward, was involved in an accident at 130 West 12th Street in Manhattan (hereinafter, the building). Plaintiff testified that at the time of his accident he worked for All State [Plaintiff tr. (ex. E to Bethmann aff.) at 15]. At the time, All State was performing interior demolition work at the building, which was undergoing renovation (*id.* at 30). All State was a demolition subcontractor [Deposition of Frank Sceri, Turner's project site safety manager (ex. F to the Bethmann aff.) at 10-11] and Turner was a general contractor at the building (Plaintiff tr. at 162). Plaintiff had a

foreman from All State who would give instructions and assign work responsibilities, but there was also a Turner foreman who would occasionally give instructions (*id.* at 24-26). All State provided most of plaintiff's tools, but if he needed something from Turner, they would provide it (*id.* at 31). At the time of the accident, plaintiff was responsible for removing debris that was being demolished (*id.*).

Plaintiff was on a loading dock platform to assist with taking debris containers off an exterior hoist located in between two existing buildings (*id.* at 22-23, 37). There was an approximately 8-10-foot ramp leading out of the building from the loading dock (*id.* at 38). Plaintiff testified that there was a gap of approximately 6 inches and less than 1 foot between the edge of the hoist and the edge of the loading dock (*id.* at 43-44). Plaintiff had mentioned to a Turner foreman that there was a wide gap between the platform and the hoist (*id.* at 46-47) and he had complained to All State's foreman at least two to three times prior to the accident about the need for a plate to cover the gap (*id.* at 49-50). Plaintiff asserts that there was a plate that Turner supplied and was occasionally used by All State employees to bridge the platform and hoist when transporting heavy piping, but it was not always available when they needed it (*id.* at 46, 170).

At the time of the accident, plaintiff was on the loading dock assisting in pulling debris off the hoist (*id.* at 56). The debris would be transported in metal containers with wheels on the bottom or in bulk on dollies with 2-3-inch wheels (*id.* at 56-57, 60). There was another worker stationed on the hoist who would assist in moving debris off the hoist and onto the platform (*id.* at 58). Prior to the accident, the hoist arrived at the platform level with an approximately 200-300-pound cast iron bathtub resting on two dollies (*id.* at 59-60). Prior to the arrival of the bathtub, plaintiff had asked Mike, Turner's foreman, about the availability of the metal plate to

bridge the gap, and Mike responded that Jimmy, the hoist operator, said that he's not sure where it is, that it may be outside, or it may be on the hoist itself (*id.* at 61-62).

When the hoist arrived at the platform level and its doors opened, another All State employee was inside the hoist and began pushing the bathtub off the hoist (*id.* at 68). Plaintiff needed to grab the front of the bathtub and pull it out, but since there was a gap, plaintiff had to lift the bathtub up so that the dolly could make it over the gap (*id.*). When plaintiff grabbed the tub and took two steps back, the two front wheels of the front dolly got jammed in the gap and the tub fell forward as plaintiff was holding it (*id.* at 71-72, 74). Plaintiff told the other worker to wait, but the worker proceeded around the tub, got down on his knees, and placed his hand in between the platform and the hoist to get the wheel out of the gap (*id.* at 72, 74). At this time, as plaintiff held all of the weight of the bathtub, his left knee buckled and his body moved to the left, but he did not fall to the ground (*id.* at 72, 76).

DISCUSSION

On a summary judgment motion, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that material factual issues exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or factual findings. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).

Labor Law § 200 and Common Law Negligence Claims

Turner moves for summary judgment in its favor on the Labor Law § 200 and common law negligence claims.

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' [citation omitted]." *Cruz v. Toscano*, 269 A.D.2d 122, 122 (1st Dep't 2000); *see also Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 316-317 (1981). Labor Law § 200(1) states, in pertinent part, as follows:

> 1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

There are two distinct standards applicable to Labor Law § 200 cases, depending on whether the accident is the result of the means and methods used by the contractor to do its work, or whether the accident is the result of a dangerous condition. *See McLeod v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 A.D.3d 796, 797-798 (2d Dep't 2007). Here, the accident was the result of a dangerous condition, as there was a 6-12-inch gap between the hoist and the loading dock. The means and methods used by Turner to do its work were not the subject of plaintiff's accident.

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" *Cappabianca v. Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 144 (1st Dep't 2012); *Murphy v. Columbia Univ.*, 4 A.D.3d 200, 202 (1st Dep't 2004) (to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's

supervision and control over plaintiff's work, because the injury arose from the condition of the work place created by or known to contractor, rather than the method of the work). To provide constructive notice, the defect must be visible and apparent and exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it. *See Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 (1986).

Turner asserts that it did not have constructive or actual notice of any alleged defective condition, nor did it have responsibility to cover the subject gap. Turner contends that All State was responsible for directing plaintiff's manner of work and that plaintiff was required to notify All State of any dangerous condition. Plaintiff asserts that the gap was a recurring condition and that Turner had notice of it, as plaintiff testified that he had complained to Turner's site safety manager about the gap on several occasions prior to the accident. Additionally, plaintiff asserts that Turner's foreman was present at the loading dock at the time of the accident.

Plaintiff's accident was the result of a dangerous condition, namely a 6-12-inch gap between the hoist and the loading dock. Plaintiff's knee buckled because he had to lift the bathtub in order for the other worker to free the dolly wheels from the gap. Plaintiff's testimony regarding prior complaints as to the gap raises a triable issue of fact as to whether Turner had actual notice of the hazardous condition caused by the presence of the gap. Moreover, Turner possessed the metal plate that would have been used to cover the gap. Thus, the branch of Turner's motion for summary judgment predicated on the Labor Law § 200 and common law negligence claims is denied.

Labor Law § 240 Claims

Turner and All State both move for summary judgment on the Labor Law § 240 claims. Plaintiff generally alleges violations of Labor Law § 240 without identifying the particular

subsections that were allegedly violated. The branches of the respective motions predicated on Labor Law § 240 are unopposed by plaintiff.

Labor Law § 240(1) provides, in relevant part:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"'Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person.'" *John v. Baharestani*, 281 A.D.2d 114, 118 (1st Dep't 2001) (quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501 [1993]).

> "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein."

Narducci v. Manhasset Bay Assoc., 96 N.Y.2d 259, 267 (2001); *See Hill v. Stahl*, 49 A.D.3d 438, 442 (1st Dep't 2008), *Buckley v. Columbia Grammar & Preparatory*, 44 A.D.3d 263, 267 (1st Dep't 2007). The statute's objective in requiring protective devices for those working at heights is to allow them to complete their work safely and prevent them from falling. *Nieves v. Fire Boro Air Conditioning & Refrigeration Corp.*, 93 N.Y.2d 914, 916 (1999). "Where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240(1) liability exists (internal citation omitted)." *Id.*

Here, plaintiff's injury did not result from an elevation-related risk and he did not fall, and thus the Labor Law § 240(1) claim is inapplicable. Moreover, this branch of the respective motions is unopposed by plaintiff. Therefore, the branches of the respective motions for summary judgment on the Labor Law § 240(1) claim are granted and the claims are dismissed.

Labor Law § 240(2) provides:

> "Scaffolding or staging more than twenty feet from the ground or floor, swung or suspended from an overhead support or erected with stationary supports, except scaffolding wholly within the interior of a building and covering the entire floor space of any room therein, shall have a safety rail of suitable material properly attached, bolted, braced or otherwise secured, rising at least thirty-four inches above the floor or main portions of such scaffolding or staging and extending along the entire length of the outside and the ends thereof, with only such openings as may be necessary for the delivery of materials. Such scaffolding or staging shall be so fastened as to prevent it from swaying from the building or structure."

Labor Law § 240(3) provides: "All scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use."

Here, there was no scaffolding or staging relating to the incident at the building. Thus, the branches of the respective motions for summary judgment on the Labor Law §§ 240(2) and 240(3) claims are also granted and dismissed as these subsections are inapplicable to the facts alleged.

Thus, the branches of Turner and All State's respective motions for summary judgment predicated on the Labor Law § 240 claims are granted and the claims are dismissed.

Labor Law § 241(6) Claims

Turner and All State move for summary judgment in their favor on the Labor Law § 241(6) claims.

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

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped ... 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 on owners and contractors to provide reasonable and adequate protection and safety to workers. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501-502. However, Labor Law § 241(6) is not self-executing, and to show a violation of this statute it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety. *Id.*

Plaintiff alleges violations of Industrial Code §§ 23-1.5, 23-1.7, 23-1.13, 23-1.15, 23-1.16, and 23-1.17 in its Verified Bill of Particulars. Plaintiff has not opposed the portion of the respective motions that seek dismissal of the Labor Law § 241(6) claims predicated on Industrial Code §§ 23-1.5, 23-1.7(a)-(d) and (f)-(h), 23-1.13, 23-1.15, 23-1.16, and 23-1.17. As such, plaintiff's claims based on violations of these provisions are dismissed as a matter of law. The only remaining portion of the respective motions that seek dismissal of the Labor Law § 241(6) claims are predicated on Industrial Code §§ 23-1.7(e)(1) and (2). The court will consider each alleged Industrial Code violation in turn.

§ 23-1.7 Protection from general hazards.

...

(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.

As a preliminary matter, Industrial Code §§ 23-1.7(e)(1) and (2) are sufficiently specific to sustain a claim under Labor Law § 241(6). *See Picchione v. Sweet Constr. Corp.*, 60 A.D.3d 510, 512 (1st Dep't 2009); *see also Licata v. AB Green Gansevoort, LLC*, 158 A.D.3d 487, 489 (1st Dep't 2018).

Turner and All State assert that these sections are not applicable to the present case. Plaintiff asserts that a triable issue of fact exists as to whether the area where plaintiff's accident occurred was a "passageway" that is subject to the protections of Industrial Code § 23-1.7(e)(1) and whether the gap created a potential tripping hazard. Plaintiff contends that the area where plaintiff fell was a "working area" within the meaning of Industrial Code § 23-1.7(e)(2) and that there is an issue of fact as to whether Turner violated this regulation by failing to keep plaintiff's work area free of "sharp projections" and whether that violation was a proximate cause of the accident. All State also asserts that there is no allegation that plaintiff tripped and thus Industrial Code § 23-1.7(e) is inapplicable.

In *Picchione v. Sweet Constr. Corp.*, the court found that where an equipment cart's wheel got stuck in a groove in an unfinished floor causing the cart to tip over and injure the plaintiff, the motion court properly denied dismissal of the section of the Labor Law § 241(6) claim predicated on Industrial Code § 23-1.7(e)(1). *Picchione*, 60 A.D.3d at 511-512. In *Urban v. No. 5 Times Sq. Dev., LLC*, the plaintiff stepped into a 10-12-inch gap between an entrance to a catwalk and the catwalk itself, and the court held that a 10-12-inch gap is not a condition that

could cause tripping, and thus Industrial Code § 23-1.7(e)(1) was inapplicable. *Urban v. No. 5 Times Sq. Dev., LLC*, 62 A.D.3d 553, 554, 556 (1st Dep't 2009). In *Trotman v. Boston Props., Inc.*, a cart's wheel struck a metal plate at the bottom of a ramp and tipped over and the court held that the defect at issue was a tripping hazard within the meaning of Industrial Code § 23-1.7(e)(1) even though the defect caused the cart, and not the plaintiff, to trip. *Trotman v. Boston Props., Inc.*, 59 Misc.3d 1230(A) (Sup. Ct., Bronx Cty. 2018).

There remains a triable material issue of fact regarding whether the 6-12-inch gap between the loading dock area and the hoist constitutes a tripping hazard within the meaning of Industrial Code § 23-1.7(e)(1). It is unclear whether the gap in the present case is more similar to the groove in the unfinished floor in *Picchione* and the metal plate at the bottom of the ramp in *Trotman*, where in both cases the court found that the conditions constituted potential tripping hazards, or more similar to the 10-12-inch gap between the entrance to a catwalk and the catwalk itself in *Urban*, where the court found that this condition was not a tripping hazard.

In *McCullough v. One Bryant Park*, the plaintiff stepped in an uncovered drain hole in a doorway and fell and the court held that the doorway constituted a passageway within the meaning of Industrial Code § 23-1.7(e)(1). *McCullough v. One Bryant Park*, 132 A.D.3d 491, 492 (1st Dep't 2015). In *Dalanna v. City of New York*, the plaintiff was injured when he tripped over a bolt on an outdoor concrete slab and the court held that the area of the plaintiff's injury did not constitute a passageway within the meaning of Industrial Code § 23-1.7(e)(1). *Dalanna v. City of New York*, 308 A.D.2d 400, 400-401 (1st Dep't 2003). In *Cabrera v. Sea Cliff Water Co.*, the plaintiff was injured in a hallway inside a loading dock and the court held that the location was not a passageway within the meaning of Industrial Code § 23-1.7(e)(1), but rather more of a work area. *Cabrera v. Sea Cliff Water Co.*, 6 A.D.3d 315, 316 (1st Dep't 2004).

There remains a triable material issue of fact regarding whether the area in which plaintiff was injured, on a loading dock area near the entrance of an exterior hoist located in between two existing buildings, constitutes a passageway within the meaning of Industrial Code § 23-1.7(e)(1). The hoist opened to a loading dock inside of the building. From the loading dock platform, there was a wooden ramp which led to the exit of the building. Plaintiff characterized the location of the accident as an "alleyway" (Plaintiff tr. at 37) but there is no further evidence of whether the location of the accident, between the hoist and the loading dock, is more of a passageway or a working area within the meaning of Industrial Code § 23-1.7(e)(1). It is also unclear whether the location of the accident is more similar to the doorway in *McCullough*, which the court considered to be a passageway, or the hallway inside a loading dock in *Cabrera* and the outdoor concrete slab in *Dalanna*, which the court did not consider to be a passageway.

Because triable material issues of fact remain regarding whether the gap constitutes a tripping hazard and whether the location of the accident is considered a passageway, the branch of Turner and All State's respective motions for summary judgment dismissing the Labor Law § 241(6) claim predicated on Industrial Code § 23-1.7(e)(1) is denied.

With respect to the branch of Turner and All State's respective motions for summary judgment dismissing the Labor Law § 241(6) claim predicated on Industrial Code § 23-1.7(e)(2), the court finds that the regulation is inapplicable to this case. In this case, no "accumulations of dirt and debris," "scattered tools and materials," or "sharp projections" were present in the area where plaintiff was working. Plaintiff's accident resulted from a gap between a hoist and the loading dock platform, which is inapplicable to Industrial Code § 23-1.7(e)(2). Thus, the branch of Turner and All State's respective motions for summary judgment dismissing the Labor Law § 241(6) claim predicated on Industrial Code § 23-1.7(e)(2) is granted and dismissed.

Indemnification, Costs, Disbursements, and Attorney's Fees Claims

Turner moves for summary judgment on its indemnification, costs, disbursements, and reasonable attorney's fees claims against All State. All State moves for summary judgment dismissing the Third-Party Complaint and all cross-claims against it.

As there remains a question of fact as to whether Turner was negligent by either causing the allegedly dangerous condition of the gap between the hoist and the loading dock platform or by having notice of it, the court denies summary judgment on the indemnification, costs, disbursements, and attorney's fees claims and denies dismissal of the Third-Party Complaint and the cross-claims against All State.

Motion to Amend Verified Answer

All State moves for an order, pursuant to CPLR § 3025(b) and § 3018(a), permitting it to amend its Verified Answer to Plaintiff's Verified Complaint and the Third-Party Complaint. All State wishes to alter the admission to a denial regarding the issue of plaintiff's employment.

CPLR § 3025(b) (Amendments and supplemental pleadings) provides:

> "(b) Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

CPLR 3018(a) (Responsive pleadings) provides:

> "(a) Denials. A party shall deny those statements known or believed by him to be untrue. He shall specify those statements as to the truth of which he lacks knowledge or information sufficient to form a belief and this shall have the effect of a denial. All other statements of a pleading are deemed admitted, except that where no responsive pleading is permitted they are deemed denied or avoided."

"Leave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay." *McCaskey, Davies and Associates, Inc. v. New York City Health and Hospitals Corp.*, 59 N.Y.2d 755, 757 (1983) (internal quotation omitted). "Mere lateness is not a barrier to granting the motion to amend. It must be lateness coupled with significant prejudice to the other side." *Edenwald Contracting Co., Inc. v. City of New York*, 60 N.Y.2d 957, 959 (1983) (internal quotation omitted). "[W]here there has been an extended delay in moving to amend, the party seeking leave to amend must establish a reasonable excuse for the delay." *Heller v. Louis Provenzano, Inc.*, 303 A.D.2d 20, 24 (1st Dep't 2003).

All State wishes to amend its Verified Answer to the Third-Party Complaint, from an admission that plaintiff was an employee of All State to a denial of said allegations. All State alleges that through the course of discovery, it uncovered that plaintiff was in fact not an employee of All State, but instead an employee of the company, General Interiors LLC [Affidavit, Plaintiff's W-2, and 2011 Payroll Records (ex. N to the Mabanta aff.)]. All State asserts that the parties cannot demonstrate prejudice with respect to these amendments because All State provided notice to all parties in the Response to Notice to Admit, which denied plaintiff's employment by All State [Response to Notice to Admit (ex. O to the Mabanta aff.)]. All State further asserts that plaintiff possessed payroll information that reflects that he was employed by General Interiors LLC in the year 2011. Turner asserts that the first time it learned of All State's assertion was from the Notice to Admit and then the instant motion. Turner contends that throughout discovery All State held itself out to be plaintiff's employer, including at depositions. Plaintiff testified that he was an employee of All State. All State produced an employee, who is purportedly also employed by General Interiors LLC, as an employee and representative of All State. Turner asserts that is will be severely prejudiced if the court were to

allow All State to amend its answer, as discovery has been completed and Turner was not given the opportunity to depose or conduct any discovery as to General Interiors LLC.

Anthony Persico, All State's Vice President, admits that he is the Vice President of All State as well as of General Interiors LLC [Anthony Persico Affidavit (ex. N to the Mabanta aff.) at ¶ 1, 4]. According to the New York State, Department of State, Division of Corporations, State Records & UCC, All State as well as General Interiors LLC both list an address of 242 Randolph Street in Brooklyn. While it is not clear what is the relationship between All State and General Interiors LLC, there is evidence that they are related. Due to the unclear relation between the two entities and the severe prejudice and significant additional discovery that an amendment would impose upon the parties, the court denies All State's motion to amend its Verified Answer to Plaintiff's Verified Complaint and the Third-Party Complaint.

The court has considered the remainder of the arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the branch of Defendant/Third-Party Plaintiff Turner Construction Company's motion (mot. seq. 005) for an order, pursuant to CPLR § 3212, for summary judgment on the Labor Law § 200 claim is denied; and it is further

ORDERED that the branch of Defendant/Third-Party Plaintiff Turner Construction Company's motion (mot. seq. 005) and Third-Party Defendant All State Interior Demolition Inc.'s motion (mot. seq. 006) for an order, pursuant to CPLR § 3212, for summary judgment on the Labor Law § 240 claims is granted and the Labor Law § 240 claims are dismissed; and it is further

ORDERED that the branch of Defendant/Third-Party Plaintiff Turner Construction Company's motion (mot. seq. 005) and Third-Party Defendant All State Interior Demolition Inc.'s motion (mot. seq. 006) for an order, pursuant to CPLR § 3212, for summary judgment on the Labor Law § 241(6) claim predicated on violation of Industrial Code §§ 23-1.5, 23-1.7(a)-(d), (e)(2), and (f)-(h), 23-1.13, 23-1.15, 23-1.16, and 23-1.17 is granted and dismissed; and it is further

ORDERED that the branch of Defendant/Third-Party Plaintiff Turner Construction Company's motion (mot. seq. 005) and Third-Party Defendant All State Interior Demolition Inc.'s motion (mot. seq. 006) for an order, pursuant to CPLR § 3212, for summary judgment on the Labor Law § 241(6) claim as to the branch predicated on violation of Industrial Code §23-1.7(e)(1) is denied; and it is further

ORDERED that the branch of Defendant/Third-Party Plaintiff Turner Construction Company's motion (mot. seq. 005) for an order, pursuant to CPLR § 3212, for summary judgment in its favor against Third-Party Defendant All State Interior Demolition Inc. on all of its claims for indemnification, together with costs and disbursements of this action, including reasonable attorney's fees is denied; and it is further

ORDERED that the branch of Third-Party Defendant All State Interior Demolition Inc.'s motion (mot. seq. 006) for an order, pursuant to CPLR § 3212, granting summary judgment in its favor, dismissing the Third-Party Complaint and any cross-claims against it in their entirety is denied; and it is further

ORDERED that the branch of Third-Party Defendant All State Interior Demolition Inc.'s motion (mot. seq. 006) for an order, pursuant to CPLR § 3025(b) and § 3018(a), permitting All

State to amend its Verified Answer to Plaintiff's Verified Complaint and the Third-Party Complaint is denied; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the decision and order of the court.

8/21/18
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

KELLY O'NEILL LEVY
JSC

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE