SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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SCOTT CACKETT,

Plaintiff,

-against-

GLADDEN PROPERTIES LLC, BOSTON PROPERTIES, INC., STRUCTURE TONE, INC., FOREST ELECTRIC CORP., INTERSTATE DRYWALL CORP., KAYE SCHOLER, LLP and KD ELECTRIC, INC.,

Defendants.

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GLADDEN PROPERTIES, LLC, BOSTON PROPERTIES, INC., and STRUCTURE TONE, INC.,

Third-party Plaintiffs

-against-

PORT MORRIS TILE & MARBLE CORPORATION and WEINSTEIN & HOLTZMAN,

Third-party Defendants.

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GLADDEN PROPERTIES, LLC, BOSTON PROPERTIES, INC. and STRUCTURE TONE, INC.,

Second Third-party Plaintiffs,

-against-

KD ELECTRIC, INC.,

Second Third-party Defendant.

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Index No. 157267/14
Motion Seq. Nos. 007, 008, 009, 010, 011

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

In a Labor Law action, defendant Interstate Drywall Corp. (Interstate Drywall) moves, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims as against

it (motion seq. No. 007). Plaintiff Scott Cackett (Cackett or Plaintiff) cross-moves for partial summary judgment as to liability on his negligence claim against Interstate Drywall. Plaintiff also moves for partial summary judgment as to liability under Labor Law § 240 (1) against defendants Gladden Properties, LLC (Gladden Properties), Boston Properties, Inc. (Boston Properties), Structure Tone, Inc. (Structure Tone) and Kaye Scholer, LLP (Kaye Scholer) (motion seq. No. 008). Third-party defendant Weinstein & Holtzman cross-moves for summary judgment dismissing all claims against it.

Defendant/second third-party defendant KD Electric moves for summary judgment dismissing all claims as against it (motion seq. No. 009). Gladden Properties, Boston Properties, Structure Tone, and Kaye Scholer move for summary judgment dismissing the complaint, as well as summary judgment as to liability on their cross claims against Interstate Drywall, their claims against co-defendant/second third-party defendant KD Electric, and their claims against third-party defendants Port Morris Tile & Marble Corporation (Port Morris) and Weinstein & Holtzman (motion seq. No. 010). Plaintiff cross-moves for partial summary judgment as to liability on its Labor Law § 200 and 241 (6) claims against Gladden Properties, Boston Properties, Structure Tone, and Kaye Scholer. Port Morris cross-moves for summary judgment dismissing the third-party complaint as against it.

Finally, to close this long circle of motions, Interstate Drywall moves again, this time to strike the answer of Weinstein & Holtzman pursuant to CPLR 3126 (3); alternatively, Interstate Drywall applies for an order, pursuant to CPLR 3124, compelling Weinstein & Holtzman to provide additional discovery (motion seq. No. 011). These five motions and five cross motions are consolidated for disposition.

BACKGROUND

On June 18, 2014, Plaintiff was working for Port Morris as a tile setter at the basement level of 250 West 55th Street in Manhattan (Plaintiff's September 30, 2015 tr at 80, NYSCEF doc No. 280). He was injured while constructing law offices. Structure Tone was the general contractor on the subject project, while Gladden Properties and Boston Properties owned the subject property, and Kaye Scholer was the tenant for whom the construction work was being done.

Prior to his accident, Plaintiff waterproofed an area in anticipation of laying tiles (*id.* at 184-185). A wood pallet was used to fashion a "bridge" in the subterranean hallway to protect the area from the foot traffic of workers from other trades (*id.* at 187). Plaintiff testified that Structure Tone, as the general contractor, should have prevented other workers from walking in the area, which would have obviated the need to take measures to protect the area (*id.* at 189-190). To protect other nearby tiles that had already been laid, but that had not fully set, Plaintiff walked into a room that did not yet have any functioning electrical light to retrieve a Masonite board which he intended to use an additional protective overlay (*id.* at 197-212).

Plaintiff knew that the Masonite board was two feet to the side of an open doorway (*id.* at 209-211). He did not know that there was an unhung metal door in the storage room (*id.* at 210). Just before his accident, he saw a piece of metal coming towards him (*id.* at 214). The door hit Plaintiff in the head as it fell and knocked him unconscious; when he came to, he and the door were lying next to each other on the floor (*id.* at 216). Although the room was dark, Plaintiff

knew the floor was concrete, as he awoke and "tasted dust in [his] mouth—concrete dust" [1] (*id.* at 217).

The door that fell on Plaintiff was left in the storage room by Michael O'Brien (O'Brien), an employee of Interstate Drywall that Plaintiff described as "a carpenter and a gentleman" (*id.* at 125). Interstate Drywall was a subcontractor on the project whose responsibilities included door installation. O'Brien testified that, after wheeling the subject door into the storage area where Plaintiff's accident took place, he did not install the subject door, as the hinges on the doorframe and the door did not match (O'Brien September 20, 2016 tr at 60, NYSCEF doc No. 302). When he realized he could not install the door, O'Brien left the door propped against the wall immediately to the left upon entering the storage room, at an approximately 70° angle, and later told Structure Tone, the general contractor, about the presence of the door in the room and the problem of the mismatched hinges (*id.* at 74-75).

As to the dimensions of the subject metal door itself, O'Brien testified that it was seven feet and that it weighed "up to 150 pounds" (*id.* at 54-55). John Weiner (Weiner), a project manager for Weinstein and Holtzman, the company that supplied the door, testified that the type of door that fell on plaintiff actually weighed between 172 and 175 pounds (Weiner tr at 71, NYSCEF doc No. 305).

Plaintiff filed his complaint on July 24, 2014, alleging that defendants are liable pursuant to Labor Law §§ 240 (1), 241 (6), and 241-a, as well as Labor Law § 200 and common-law negligence. The third-party action and the second third-party action allege liability for indemnification, contribution, and breach of contract failure to procure insurance.

[1] Plaintiff testified "[b]eing a tile setter for that long, you know what it tastes like, and smells like" (NYSCEF doc No 280).

DISCUSSION

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

I. Labor Law § 240 (1)

Plaintiff's motion for summary judgment as to liability on this issue (motion seq. No. 008) is directed against Gladden Properties, Boston Properties, Structure Tone, and Kaye Scholer. Thus, Plaintiff has effectively abandoned his Labor Law § 240 (1) claims as against the other direct defendants (*see Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014] [failure to address claims indicates an intention to abandon them as bases of liability]). Thus, the branches of Interstate Drywall and KD Electric's motions (motion seq. Nos. 007 and 009, respectively) that seek dismissal of Plaintiff's Labor Law § 240 (1) claims as against them must be granted.[2]

Thus, this motion pits the arguments presented by Plaintiff in motion seq. No. 008 against arguments posed by Gladden Properties, Structure Tone, and Kaye Scholer (the Structure Tone defendants) in motion seq. No. 010. 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,

[2] The action has been discontinued against defendant Forest Electric Corp.

> 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."

The Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with "adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Where a violation has proximately caused a plaintiff's injuries, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment" (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011]).

Plaintiff argues that the door, propped length-wise at a 70° angle, represented a gravity-related risk, as contemplated by the statute. Plaintiff argues further that Gladden Properties, Boston Properties, Structure Tone and Scholer violated the statute by failing to properly store and secure the door. In support of this conclusion, Plaintiff submits an affidavit from Anthony Dolhon (Dolhon), an engineering expert, who stated:

> "A preferred way to have stored the door ... would have been to lay it flat on the floor against a back wall of the room out of the way. Another preferred way to have stored the door would have been to have placed the door with one of its long edges on the floor and the other long edge leaning against the wall. If that had been done, should the door have toppled, rotating about an axis at, and parallel to, its long edge on the floor, the highest point would only have been thirty-six to forty-two inches (three feet to three-and-one half feet), above the floor ... Another way to have arranged the stored door would have been to surround the door with a fence or barricade which could have served the dual function of protecting the door against being inadvertently contacted and also braced the door at the bottom ..."

(NYSCEF doc No. 300, ¶ 12-13, 15).

In motion seq. No. 010, the Structure Tone defendants, who are all represented by the same counsel, do not raise any arguments about whether they are proper Labor Law Defendants, either as owners, contractors, or statutory agents. Instead, they argue that the section 240 (1) claims should be dismissed, as there is no evidence as to how the door was stored before it fell on Plaintiff. The Structure Tone defendants also suggest, without elaborating, that Plaintiff was responsible for his own accident. Moreover, the Structure Tone defendants argue that the statute does not apply, as the door was not being hoisted or secured at the time of Plaintiff's accident.

The Structure Tone defendants fail to make a *prima facie* showing of entitlement to judgment. First, it is incorrect that there is no evidence as to how the door was stored. O'Brien, Interstate Drywall's carpenter, testified that he left it propped up against the wall, lengthwise, at 70° degrees, just to the left of the door opening. Second, the Structure Tone defendants fail to make a showing that Plaintiff was somehow a recalcitrant worker who was at fault for his own accident. Third, the fact that the door was not in the process of being hoisted or secured is not dispositive of a section 240 (1) claim.

In *Quattrocchi v F.J. Sciame Constr. Corp.*, the Court of Appeals held that liability in section 240 (1) "falling-object" cases is not limited to situations where the object was in the process of being hoisted or secured (11 NY3d 757, 759 [2008]). Three years later, in *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, the Court of Appeals held that objects that fall from the same level where the injured plaintiff is working may give rise to liability under the statute (18 NY3d 1 [2011]). Under *Wilinky*, which followed the reasoning of *Runner*, the question of whether a worker faced a gravity-related risk under the statute depends on the amount of force the object generates as it falls (*id.* at 10). The Court of Appeals in *Wilinksy*

found that two ten-foot pipes, each four inches in diameter, generated sufficient force to create a gravity-related risk warranting protection under the statute (*id*).

Plaintiff is approximately the same height as the plaintiff in *Wilinsky*.[3] More importantly, the door that fell on Plaintiff was capable of generating more force as it fell, as the door was nearly as long as the pipes in *Wilinsky*, and heavier. As the door was capable of generating sufficient force as it fell, the Plaintiff was subject to a gravity-related risk warranting the protections of the statute. Plaintiff makes a *prima facie* showing that the Structure Tone defendants violated the statute by failing protect Plaintiff against these risks. Specifically, Dolhon's opinion that a protective barricade would have prevented the accident is uncontested. This contrasts the record before the Court in *Wilinsky*, which contained no showing as to whether the lack of protective device caused the plaintiff's accident (*id.* at 11 [denying summary judgment to both the plaintiff and the defendants]; *see also Rodriguez v DRLD Dev., Corp.*, 109 AD3d 409 [1st Dept 2013] [denying summary judgment to the plaintiff for the same reason as the Court in *Wilinsky*]).

As the statute was implicated here, and as Plaintiff has made an unrebutted showing that the Structure Tone defendants violated it, Plaintiff's application for partial summary judgment as to his section 240 (1) claims against the Structure Tone defendants (motion seq. No. 008) must be granted. As a corollary, the branch of motion seq. No. 010 in which the Structure Tone defendants seek dismissal of those claims must be denied.

II. Labor Law § 241-a

This provision of the Labor Law applies to "workmen in or at elevator shaftways, hatchways and stairwells." Plaintiff, in his various papers in these consolidated motions,

[3] The plaintiff in *Wilinksy*, according to the Court of Appeals' decision, "is five feet, eight inches tall" (18 NY3d at 5).

abandons reliance on this provision. Thus, Plaintiff's allegations under Labor Law § 241-a are dismissed as against all defendants.

III. Labor Law § 241 (6)

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

> "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."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

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

Here, Plaintiff relies on two Industrial Code provisions in support of his motion for summary judgment on section 241 (6) liability: 12 NYCRR 23-1.30 and 12 NYCRR 23-2.1. Defensively, Plaintiff relies on three Industrial Code provisions in opposition to defendants' application for summary judgment dismissing Plaintiffs' claims under the statute: the two listed

above, as well as 12 NYCRR 23-1.7 (e) (2).

As an initial matter, all of Plaintiff's allegations relating to Industrial Code violations, other than 12 NYCRR 23-1.30, 12 NYCRR 23-2.1, and 12 NYCRR 23-1.7 (e) (2) are dismissed as abandoned. With those allegations cleared out of the way, the court now turns to the three regulations on which Plaintiff bases his section 241 (6) claim against the Structure Tone defendants.

12 NYCRR 23-130

12 NYCRR 23-130 provides:

> "Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass"

Courts have ruled that this provision is sufficiently specific to serve as a basis for section 241 (6) liability (*see e.g. Velez v City of New York*, 134 AD3d 447 [1st Dept 2015]). Plaintiff submits ample evidence that there was no lighting in the storage room where his accident took place. In addition to his own and O'Brien's testimony to this effect, referred to above, Plaintiff submits the evidence from Joseph Cuzzi (Cuzzi), his foreman at Port Morris and John Fuller (Fuller), Structure Tone's safety coordinator. Cuzzi supported Plaintiff and O'Brien's testimony that there was no lighting in the room:

Q: Was the room dim and shadowy?
A: Yes.
Q: Was the room difficult to see clearly in?
A: Yes.
Q: Do you know if there was any lighting in the room?
A: No, there was none.

(NYSCEF doc No 334 at 59).

Similarly, Fuller confirmed that there was insufficient lighting in the room (NYSCEF doc

No. 285 at 49-50). Thus, Plaintiff makes a *prima facie* showing of a violation of 12 NYCRR 23-130. The Structure Tone defendants argue that, as some light from the hallway filtered into the windowless basement storage room, the regulation has not been violated. The Structure Tone defendants also argue that the regulation is not violated, as Plaintiff did not complain to anyone about the lack of illumination in the storage room.

In support of the first argument -- that the light from the hallway provided sufficient light -- the Structure Tone defendants submit testimony that some light filtered into the storage room from the hallway, allowing for partial vision into the room. For example, Structure Tone's Fuller testified that his inspection of the subject room revealed that "[i]t was obvious that there wasn't any permanent or temporary light" (NYSCEF doc No. 285 at 41). However, Fuller also testified that there was enough light from the hallway that he could see into the room and walk around the room without tripping (*id.* at 45).

Here, the Structure Tone defendants fail to raise an issue of fact as to whether there was sufficient lighting in the subject storage room. First, Plaintiff's testimony that the room was "pitch black" at the time of his accident (NYSCEF doc No. 280 at 167-168) has not been challenged, as Fuller's examination of the room took place later (*see Velez v City of New York*, 134 AD3d 447 [1st Dept 2015] [holding that the defendants were not entitled to summary judgment where their witnesses who testified as to adequate lighting conditions failed to "provide any evidence that any of them were present at the worksite on the evening of plaintiff's accident"]). Moreover, even if the conditions were the same at Fuller's later inspection, it is uncontroverted that there was no lighting within the windowless basement storage room. Moreover, even Fuller himself acknowledged that the lighting in the room was insufficient.

Finally, the fact that Plaintiff did not complain about the lighting is of no moment in a

241 (6) context, as the duties of owners, general contractors, and statutory agents under it are nondelegable. As the Structure Tone defendants have submitted no evidence that there was sufficient lighting in the subject area, there is a clear violation of 12 NYCRR 23-130 (*see Capuano v Tishman Constr. Corp.*, 98 AD3d 848 [1st Dept 2012] [finding a violation in similar circumstances and granting summary judgment as to the plaintiff on the issue of the defendants' liability under section 241 (6)]).

Accordingly, the branch of the Structure Tone defendants' motion (motion seq. No. 010) that seeks dismissal of Plaintiff's Labor Law § 241 (6) claims based on the inapplicability 12 NYCRR 23-130 is denied. Moreover, the branch of Plaintiff's cross motion seeking partial summary judgment as to liability on his section 241 (6) claim based on this regulation must be granted.

12 NYCRR 23-2.1 (a) (1)

12 NYCRR 23-2.1 (a) is entitled "Maintenance and housekeeping; storage of material or equipment." Its first subdivision provides: "All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare." Plaintiff argues that the regulation was violated, as the subject door was not stored in a safe and orderly manner. The Structure Tone defendants argue that this regulation is inapplicable, as Plaintiff's accident did not involve stored materials or occur in a passageway.

The subject door was clearly being stored in the storage room until it could be installed. As to the Structure Tone defendants' second point, location, they cite to *Militello v 45 W. 36th St. Realty Corp.*, in which the First Department held that 12 NYCRR 23-2.1 (a) (1) was not applicable "since the area in which plaintiff was injured was not a passageway" (15 AD3d 158,

159-160 [1st Dept 2005]).

Plaintiff cites to no caselaw that counters the passageway requirement articulated in *Militello*. As Plaintiff's accident happened inside the storage room, rather than in a passageway, Plaintiff's allegations under 12 NYCRRR 23-2.1 (a) (1) must be dismissed.

12 NYCRR 23-1.7 (e) (2)

This regulation is entitled "Working areas; Tripping and other hazards; Working areas." It provides: "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."

The Structure Tone defendants argue that this provision is not applicable, as this regulation deals with tripping hazards. Here, Plaintiff stresses that the door was left in a working area, and cites to *Canning v Barneys N.Y.* (289 AD2d 32 [1st Dept 2001]) for the proposition that an area where a worker passes is a "working area" under the regulation.

The door was plainly left in a working area. Since the working area was dark, the door was also a tripping hazard. Thus, the Structure Tone defendants violated the provision. However, Plaintiff's allegations under the regulation should still be dismissed as the violation was not a proximate cause of Plaintiff's accident. While courts typically leave this issue to factfinders, "there are instances in which proximate cause can be determined as a matter of law because only one conclusion may be drawn from the established facts" (*Hain v Jamison*, 28 NY3d 524, 529 [2016]).

Here, as Plaintiff did not trip, a tripping hazard could not have been the proximate cause of his accident. In contrast, the violation of 12 NYCRR 23-130--the failure to provide sufficient lighting--is clearly a proximate cause of Plaintiff's injury, as it led directly to the accident by

preventing Plaintiff from seeing the unsecured gravity-related risk inside the storage room. As any violation of 12 NYCRR 23-1.7 (e) (2) was not a proximate cause of Plaintiff's accident, all allegations under it must be dismissed.

IV. Labor Law § 200

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

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

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor "is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d

675, 675 [1st Dept 2010]). In the dangerous-condition context, "whether [a defendant] controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims . . ." (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

The Structure Tone defendants argue that the accident arose from the methods or materials used by Plaintiff. Thus, they argue that they are entitled to summary judgment dismissing the section 200 claims against them as they did not have supervisory control over Plaintiff's work.

However, Plaintiff is correct that this is a dangerous condition case. A large, heavy metal door leaned length-wise at a 70° angle in an insufficiently lit room is, without question, a dangerous condition. The Structure Tone defendants fail to make a showing as to constructive notice, as they fail to point to evidence as to when they last inspected (*see Jahn v. SH Entertainment, LLC*, 117 A.D.3d 473, 473 [1st Dept 2014] [holding the defendant owner's affidavit "was insufficient to establish a lack of constructive notice as a matter of law because he did not state how often he inspected the floor or that he or defendant's employees inspected the accident location prior to the accident"; *see also Velez;* 134 AD3d at 447 ["defendant failed to demonstrate that they lacked constructive notice of the alleged condition by offering evidence as to the time that the area where plaintiff fell was last inspected"]).

While the Structure Tone defendants do not cite to it, there is evidence in the record, cited by Plaintiff, that Structure Tone's project superintendent, William Murphy (Murphy), inspected the basement level on which Plaintiff's accident occurred every day that construction was ongoing:

> "Q: Is it fair to say that if the day before his accident was a workday you would have walked the C2 Level on the day before his accident.
> A: Yes.
> Q: That was something you did every day that you were on the job site, correct?

A: Yes."

(NYSCEF doc No. 287 at 141).

Whether the Structure Tone defendants should have discovered the dangerous condition through these inspections is a question of fact. Moreover, there is a question of fact as to actual notice, as Interstate Drywall's O'Brien testified that he told two Structure Tone employees, including Murphy, that he left the door in the storage room (NYSCEF doc No. 302 at 85, 90-91). As questions of fact regarding notice remain, neither the Structure Tone defendants nor Plaintiff is entitled to summary judgment on the issue of section 200 liability.

V. Interstate Drywall

Interstate Drywall moves for summary judgment dismissing all claims and cross claims as against it (motion seq. No. 007). It also makes a discovery motion against Weinstein & Holtzman (motion seq. No. 011). The court will address the discovery motion first, as discovery matters, of course, should go before applications for dispositive relief.

A. Discovery Motion Against Weinstein & Holtzman (motion seq. No. 011)

Interstate Drywall moves, pursuant to CPLR 3126 (3), to strike the answer of Weinstein & Holtzman. Alternatively, Interstate Drywall seeks additional discovery from Weinstein & Holtzman. Interstate Drywall alleges, in its moving papers, that Weinstein & Holtzman failed to respond to a demand for documents. In opposition, Weinstein & Holtzman submits its response to the demand (NYSCEF doc No. 511). Accordingly, Interstate Drywall's discovery motion (motion seq. No. 011) is denied as moot.

B. Summary Judgment

Initially, the court notes that Interstate Drywall's application for summary judgment dismissing Plaintiff's Labor Law §§ 200, 240 (1), and 241 (6) claims as against it is granted.

Plaintiff fails to rebut Interstate Drywall's *prima facie* showing that it is not a proper Labor Law defendant. That is, Interstate Drywall is not an owner, a general contractor or an agent of either.

Negligence

Interstate Drywall argues that there is evidence that the position of the door was moved after O'Brien left it at a vertical 70° angle in the storage room. The evidence it cites is O'Brien's deposition, in which he testified that he visited the storage room after Plaintiff's accident and that the door had been moved (NYSCEF doc No. 302 at 95). This is not evidence that the door was moved before Plaintiff's accident. Thus, this argument fails to raise a *prima facie* showing of entitlement to judgment dismissing Plaintiff's common-law negligence claim against Interstate Drywall.

Plaintiff takes the somewhat exceptional step of cross-moving for summary judgment as to liability on its common-law negligence claim as against Interstate Drywall. Plaintiff's argument as to Interstate Drywall's negligence hinges on Interstate Drywall's O'Brien having been the person who left the subject door in the storage room.

As Interstate Drywall is not subject to the Labor Law, regular negligence principles apply against it. To establish negligence, a plaintiff is required to prove: "the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury" (*Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006] citing, *inter alia, Palsgraf v Long Is. R.R. Co.*, 248 NY 339 [1928] [other citation omitted]).

The duty of a third-party contractor, such as Interstate Drywall, to an injured plaintiff, such as Cackett, is determined by the Court of Appeals decision in *Espinal v. Melville Snow*

Contractors, Inc., 98 NY2d 136 [2002]). Under *Espinal*, contractors do not owe a duty of care to third-parties in the absence of one of three exceptions:

> "[A] party who enters into a contract to render services may be said to have assumed a duty of care--and thus be potentially liable in tort--to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely."

(*id.* at 140 [internal quotation marks and citation omitted]).

Here, the third exception is plainly inapplicable as Structure Tone maintained responsibility for safety at the site. Similarly, the second exception is also inapplicable as there is no issue as to detrimental reliance. As to the first exception, it is true that O'Brien left the door in the storage room. However, O'Brien's uncontroverted testimony is that he informed two Structure Tone employees of the presence of the door. In these circumstances, where it is Structure Tone's contractual and statutory responsibility to keep the workplace free from dangerous conditions, it cannot be said that O'Brien launched an instrument harm at Plaintiff. His conduct was both remote in time, and mitigated by his having provided notice of the presence of the door in the storage room to Structure Tone, for this exception to be applicable. Thus, as none of the *Espinal* exceptions are applicable, Interstate Drywall did not have a duty to Plaintiff and is entitled to summary judgment dismissing the Complaint as against it.

Cross Claims

Interstate Drywall does not specifically address the cross claims against it. As such, Interstate Drywall fails to make a *prima facie* showing entitling it to dismissal of those claims.[4]

[4] However, it is now clear that common-law negligence and contribution claims will not stand against Interstate Drywall as it was not negligent.

VI. KD Electric

In motion seq. No. 009, KD Electric moves to dismiss all claims as against it. Initially, Plaintiff concedes that KD Electric is not a proper Labor Law defendant. Thus, Plaintiff's Labor Law §§ 200, 240 (1), and 241 (6) claims as against KD Electric are dismissed.

As to negligence, KD Electric argues that, under the principles of *Espinal*, it had no duty to Plaintiff. Even if that were not the case, KD Electric argues that there is no evidence that it failed to carry out any of its responsibilities under its agreement with Structure Tone.

Plaintiff, while abandoning his Labor Law claims against KD Electric, "vigorously opposes" the application for dismissal of his common-law negligence claims as against KD Electric (NYSCEF doc No. 387 at 10). As to *Espinal*, Plaintiff argues that there is a question of fact as to whether the second exception, for detrimental reliance, is applicable.

The second *Espinal* exception is appropriate "where the plaintiff detrimentally relies on the continued performance of the contracting party's duties (98 NY2d at 140). However, Plaintiff describes the KD Electric/Structure Tone contract as "virtually meaningless," since "[n]o plans, no specifications were included" (NYSCEF doc No. 387, ¶ 64 [referring to NYSCEF doc No. 336]). In other words, Plaintiff fails to identify a contractual provision on which he allegedly relied.

To make up for this deficiency, Plaintiff refers to the testimony of KD Electric's foreman, Christopher D'Allura (D'Allura). Specifically, Plaintiff refers to testimony regarding the existence of temporary lighting installed prior to KD Electric coming onto the job:

"Q: When KD started to perform work down at (the basement level), was that … temporary lighting removed?
A: It was not.
Q: Okay. For how long did that remain there?
A: Until temporary light and power was removed at the end of the project.
Q: And when you say, 'at the end of the project,' what do you mean by that –

in other words, when you say, 'end of the project' what date are you referring to?
A: No specific date in mind, but when we felt that there was enough light and power throughout the space that the trades could work safely and have enough power to actually energize their tools and work"

(D'Allura tr at 52, NYSCEF doc No. 388).

This testimony does not establish that KD Electric had a contractual duty to provide sufficient lighting in the subject storage room on the day of Cackett's accident. Even if it did, Plaintiff submits no evidence that he knew of such a duty or relied upon it. As such, the second *Espinal* exception, for detrimental reliance, is not applicable. Thus, Plaintiff's reliance on *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579 [1994]), a detrimental reliance case, is misplaced.

Plaintiff also argues that his negligence claim against KD Electric is viable under the first *Espinal* exception, as KD may have turned off the light in the storage room, thus launching an instrument of harm which caused his injuries. In support of this argument, Plaintiff turns again to the testimony of D'Allura, who stated that he did not know whether permanent lighting had been installed in the storage room at the time of Plaintiff's accident:

Q: At some point was permanent lighting installed in the storage room in question?
A: It was.
Q: Do you know when it was, using June 18th of 2014 as a reference point?
A: When it was installed, or when it was energized?
Q: When it was energized. I apologize.
A: I do not recall the date of energizing that.
Q: Can we agree it would have been sometime after June 18th of 2014, which is the date of the claimed accident?
A: We cannot agree upon that, because even if a circuit was energized, it could be de-energized and then re-energized numerous times throughout the project to add other lights to that circuit.
Q: Okay. Can we say with any certainty, yes, no, or you don't know, if it was in an energized state, as of June 18th of 2014.
A: I don't know.
Q: Is there any way of finding out?
A: No.

(NYSCEF doc No. 388 at 105-106).

When viewed in context, this testimony clearly does not provide any basis to conclude that KD Electric launched an instrument of harm justifying an exception to the general rule that contractors do no owe a duty to strangers to the contract. Plaintiff is asking the court, after years of discovery, to allow a claim to move forward on a wispy tuft of speculation. As the court cannot do that, the branch of KD Electric's motion that seeks dismissal of Plaintiff's negligent claim as against it is granted. As a corollary, Plaintiff's complaint, in its entirety, is dismissed as against KD Electric.

Moreover, all claims against KD Electric for contribution and common-law negligence must be dismissed (*see Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2nd Dept 2003] [contribution requires a showing of active negligence]; *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374, 375 [2011] [common-law negligence requires a showing of common-law negligence]). The branch of KD Electric's motion that seeks dismissal of the contractual indemnification claims against it is discussed below in section IX.

VII. Port Morris

Port Morris, Plaintiff's employer, argues that all claims for common-law indemnification and contribution should be dismissed, as against it, pursuant to Workers' Compensation Law § 11, as Plaintiff did not receive a "grave injury," as that term is interpreted by the Workers' Compensation Law. Port Morris is correct that Plaintiff did not receive a grave injury *(see generally Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 415-418). Thus, Port Morris is entitled to summary judgment dismissing all claims for common-law indemnification and contribution.

As to the issue of the Structure Tone defendants' claims for breach of contract for failure to procure insurance against Port Morris, Port Morris submits a copy of an insurance policy

satisfying its obligations under the contract (NYSCEF doc No. 278). Accordingly, the Structure Tone defendants' claims of breach of contract against Port Morris must be dismissed (*see Perez v Morse Diesel Intern, Inc.*, 10 AD3d 497 [1st Dept 2004]). The issue of contractual indemnification will be discussed below, in the context of the Structure Tone defendants' blunderbuss application for contractual indemnification against Interstate Drywall, KD Electric, Port Morris, and Weinstein & Holtzman.

VIII. Weinstein & Holtzman

Weintstein & Holtzman supplied the door that ultimately fell on Plaintiff. Weinstein & Holtzman did not perform any work at the subject location. In these circumstances, especially as there is no evidence in the record that the door was defective, Weinstein & Holtzman was not negligent in Plaintiff's accident. Accordingly, all claims for contribution and common-law negligence as against Weinstein & Holtzman must be dismissed.

As to the Structure Tone defendants' claims for breach of contract for failure to procure insurance, Weinstein & Holtzman submits a copy of an insurance policy satisfying its obligations (NYSCEF doc No. 343). Thus, all claims against Weinstein & Holtzman for breach of contract for failure to procure insurance must be dismissed. The issue of contractual indemnification will be discussed below.

IX. Contractual Indemnification

The Structure Tone defendants seek summary judgment on their contractual indemnification claims as against Interstate Drywall, KD Electric, Port Morris, and Weinstein & Holtzman. Interstate Drywall, KD Electric, Port Morris, and Weinstein & Holtzman, in turn, seek dismissal of those claims. The court will analyze this issue separately for each of these parties.

Interstate Drywall

The Structure Tone defendants submit an unsigned contract between Structure Tone and Interstate Drywall, which contains an indemnification provision at 11.2 of the Terms and Conditions section; it provides:

> "To the fullest extent permitted by Law, Subcontractor will indemnify and hold harmless Structure Tone, Inc ("STI") and Owner, their officers, directors, agents and employees from and against any and all claims, suits, liens, judgments, damages, losses and expenses including reasonable legal fees and costs arising in whole or in part and in any manner from the acts, omissions, breach or default of Subcontractor, its officers, directors, agents, employees and Subcontractors, in connection with the performance of any Work by Subcontractor pursuant to this Purchase Order and/or a related Proceed Order. Subcontractor will defend and bear all costs of defending any action or proceedings brought against STI and/or Owner, their officers, directors, agents and employees, arising in whole or in part out of any such acts, omission, breach or default"

(NYSCEF doc No. 269).

For a claim to "arise out" of a party's work, there must be a showing that "a particular act or omission in the performance of such work [was] causally related to the accident" (*Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268, 273 [1st Dept 2007] [internal quotation marks and citation omitted]). Here, the subject provision does not require a showing of negligence, as it specifies that the triggering act may be made "in any manner" (*see Wilk v Columbia Univ.*, 150 AD3d 502, 503 [1st Dept 2017] [holding that the subject indemnification provision was triggered, as it required "arising out of" indemnification even in the absence of negligence]).

Thus, the inquiry here is broader than in the negligence context. From a causal point of view, Interstate Drywall's acts on the job clearly played a role in Plaintiff's accident. More specifically, if O'Brien had not left the door inside the storage room, the accident would not have happened. Thus, the provision is triggered.

However, as discussed above, the issue of the Structure Tone defendants' own negligence is still an open question. This is particularly relevant to Structure Tone, which oversaw safety on the site and which, according to Interstate Drywall's O'Brien, was informed of the presence of the unsecured door in the storage room. Here, the Structure Tone defendants' own failure to make a *prima facie* showing as to their own negligence makes their application for summary judgment as to contractual indemnification against Interstate Drywall premature (*see Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1 [1st Dept 2011]). Thus, the Structure Tone defendants' application for summary judgment as to its claim for contractual indemnification as against Interstate Drywall must be denied as premature. Similarly, the branch of Interstate Drywall's motion seeking summary judgment dismissing the Structure Tone defendants' cross claim for indemnification must be denied, as the subject indemnification provision is applicable.

KD Electric

In its moving papers in motion seq. No. 009, KD Electric does not specifically address the Structure Tone defendants' cross claims for indemnification against it. Thus, KD Electric fails to make a *prima facie* showing that it is entitled to dismissal of this claim.

The Structure Tone defendants, in their papers in support of motion seq. No. 010, argue, in a blunderbuss fashion, that they are owed contractual indemnification from Interstate Drywall, KD Electric, Port Morris, and Weinstein & Holtzman.

The agreement between Structure Tone and KD Electric contains the same indemnification clause as the one, discussed above, in the agreement between Structure Tone and Interstate Drywall (NYSCEF doc No. 336, ¶ 11.2). The Structure Tone defendants argue that the provision is triggered, as KD Electric was hired to install lighting on the basement level of the

project, and Plaintiff alleges that insufficient lighting was one of the proximate causes of his accident.

However, the record fails to show that any act or omission of KD Electric had a causal relationship to Plaintiff's accident. For that reason, the Structure Tone defendants are not entitled to summary judgment as to its contractual indemnification claims as against KD Electric. Moreover, even if this were not the case, the Structure Tone defendants' application for summary judgment on this issue is premature for the reasons discussed in relation to Interstate Drywall.

Port Morris

Port Morris, Plaintiff's employer, does not dispute the validity of the subcontract between itself and Structure Tone, despite the copy of that agreement in the record being unsigned (NYSCEF doc No. 381). Moreover, Port Morris did sign a subsequent "Blanket Insurance/Indemnity Agreement" with Structure Tone (NYSCEF doc No. 382). Both agreements contain an indemnification agreement that is coextensive with the one reproduced above. The Structure Tone defendants argue that they are entitled to summary judgment as to contractual indemnification against Port Morris as Plaintiff's accident actually arose from the tile work he was performing for Port Morris.

Port Morris argues that the Structure Tone defendants' claims for contractual indemnification must be dismissed as against it, as Port Morris did not cause either of the defective conditions involved in Plaintiff's accident: the unsecured door or the insufficient lighting. In support of this argument, Port Morris cites to *Worth Constr. Co., Inc. v Admiral Ins. Co.* (10 NY3d 411 [2008]) and *Bovis Lend Lease LMB Inc. v Garito Contr., Inc.*, (65 AD3d 872 [1st Dept 2009]).

In *Worth Const.*, the Court of Appeals upheld the principle that, in "arise out of" indemnification provisions, such as the ones between Structure Tone and its subcontractors, "the absence of negligence, by itself, is insufficient" to absolve the putative indemnitor of the obligation to indemnify (10 NY3d at 416). The Court of Appeals held that the "focus" of such provisions is "not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained (*id.* [internal quotation marks and citation omitted]). Applying this principle, the Court found that the accident had not arisen out of work of putative indemnitor, which installed the stairwell where the subject accident occurred, but had no other connection to the accident (*id.*).

In *Bovis*, the First Department applied *Worth Const.*, and found that the subject accident had not arisen from the work of the demolition contractor which created the hole that the plaintiff ultimately fell through (65 AD3d at 873-874). In coming to this conclusion, and the corollary result that the demolition contractor was not required to indemnify the general contractor, the First Department relied on the jury's finding that the demolition contractor was negligent, but that its negligence was not a substantial factor in Plaintiff's accident. The First Department thus held that "arising out of" liability "is absent where" the putative indemnitor "is absolved of liability (*id.* at 874).

Bovis and *Wilk* (150 AD3d 502) represent a split within the First Department in interpreting "arising out of" indemnification provisions. *Wilk*, the more recent case, uses an actual causation approach to determine "arising out of" liability, while *Bovis* uses a proximate causation approach. Thus, while both cases involve an accident where a worker fell through an opening created by the putative indemnitor, the Court in *Wilk* found "arising out of" liability while the Court in *Bovis* did not.

When faced with such a schism at the Appellate Division, this court must look to the Court of Appeals for guidance. Thus, we return to the principle articulated by the Court of Appeals in *Worth Const.* and focus "not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained" (10 NY3d at 416). Applying that somewhat slippery principle, the court finds that the Plaintiff's injury did not arise from his own tile work. The injury arose, instead, from the general scheduling of trades, the unsecured door, and the insufficient lighting. To hold otherwise would be to hold that every accident "arises" out of the work of the injured worker's employer. This would, effectively, make subcontractors insurers for owners and general contractors, and circumvent the incentive structure of the Labor Law, which places the responsibility on keeping a safe workplace on owners, general contractors and their agents.

As Plaintiff's accident did not arise out of Port Morris's work, Port Morris is entitled to dismissal of the Structure Tone defendants' claims for contractual indemnification against it. Thus, the Structure Tone defendants' application for summary judgment on this issue must be denied. Moreover, as this is the last remaining claim against Port Morris, all claims as against it are dismissed.

Weinstein & Holtzman

Weinstein & Holtzman supplied the door that fell on Plaintiff. Similar to the stairwell in *Worth Const.*, there is no evidence here that the door was defective. Under *Worth Const.*, the accident could not have "arisen out of" Weinstein & Holtzman's work. Thus, Weinstein & Holtzman are entitled to dismissal of all contractual indemnification claims against them. As these are the last remaining claims against Weinstein & Holtzman, all claims are dismissed as against them. Conversely, the branch of the Structure Tone defendants' motion seeking summary

judgment on their contractual indemnification claims as against Weinstein & Holtzman must be dismissed.

CONCLUSION

Accordingly, it is

ORDERED that defendant Interstate Drywall Corp's (Interstate Drywall) motion for summary judgment (motion seq. No. 007) is granted to the extent that Plaintiff's complaint is dismissed as against it; and it further

ORDERED that Interstate Drywall's discovery motion (motion seq. No. 011) is denied; and it is further

ORDERED that Plaintiff's cross motion seeking partial summary judgment as to liability against Interstate Drywall on his negligence claims is denied; and it is further

ORDERED that Plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240 (1) against defendants Gladden Properties, LLC (Gladden Properties), Boston Properties, Inc. (Boston Properties), Structure Tone, Inc. (Structure Tone) and Kaye Scholer, LLP (Kaye Scholer) (together, the Stucture Tone defendants) (motion seq. No. 008) is granted; and it is further

ORDERED that third-party defendant Weinstein & Holtzman's cross motion for summary judgment dismissing all claims as against it is granted; and it is further

ORDERED that defendant/second third-party defendant KD Electric, Inc.'s (KD Electric's) motion for summary judgement (motion seq. No. 009) is granted to the extent that the Complaint, and all claims for common-law negligence, contribution, and breach of contract for failure to procure insurance are dismissed as against KD Electric; and it is further

ORDERED that the Structure Tone defendants' motion for summary judgment (motion

seq. No. 010) is denied except to the extent that Plaintiff's Labor Law 241-a claims, and all of Plaintiff's allegations of Industrial Code violations, except for those relating to 12 NYCRR 23-130, are dismissed; and it is further

ORDERED that Plaintiff's cross motion for partial summary judgment on its Labor Law § 241 (6) and Labor Law § 200 claims against the Structure Tone defendants is granted is granted as to the section 241 (6) claims and denied as to the section 200 claims; and it is further

ORDERED that third-party defendant Port Morris Tile & Marble Corporation's motion for summary judgment dismissing the third-complaint as against it is granted; and it is further

ORDERED that the Clerk is to enter judgment accordingly and that the action is severed with the remaining claims to proceed against the remaining parties; and it is further

ORDERED that counsel for Plaintiff is to serve a copy of this order, along with notice of entry, upon all parties within 10 days of entry.

Dated: January 7, 2018

ENTER:

HON. CAROL R. EDMEAD, J.S.C.
HON. CAROL R. EDMEAD
J.S.C.