KELLY O'NEILL LEVY
JSC

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

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DAVID RYERSON,

Plaintiff,

- v -

580 PARK AVENUE, INCORPORATED, BROWN HARRIS STEVENS RESIDENTIAL MANAGEMENT, LLC, DOUGLAS ELLIMAN PROPERTY MANAGEMENT, and FOUR STAR AIR CONDITIONING CO, LLC,

Defendants.

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580 PARK AVENUE, INCORPORATED and BROWN HARRIS STEVENS RESIDENTIAL MANAGEMENT, LLC,

Third-Party Plaintiffs,

- v -

RICHARD E. GUTMAN and ROSANN S. GUTMAN,

Third-Party Defendants.

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FOUR STAR AIR CONDITIONING CO, LLC,

Second Third-Party Plaintiff,

- v -

ECRO RESTORATION CORP.,

Second Third-Party Defendant.

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INDEX NO. 153703/2013

MOTION DATE 09/26/2018

MOTION SEQ. NO. 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 004) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 128, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158
were read on this motion to/for SUMMARY JUDGMENT.

HON. KELLY O'NEILL LEVY:

This is a Labor Law action involving an alleged tripping accident.

Defendants/third-party plaintiffs 580 Park Avenue, Incorporated (hereinafter, 580 Park) and Brown Harris Stevens Residential Management (hereinafter, BHS) (collectively, hereinafter, moving defendants) move for an order: (1) pursuant to CPLR § 3212, granting moving defendants summary judgment, dismissing the complaint and all cross-claims against them and (2) enforcing the contractual indemnification obligations of third-party defendants Richard E. Gutman and Rosann S. Gutman (collectively, hereinafter, the Gutmans) pursuant to the September 18, 2009 Alteration Agreement between moving defendants and the Gutmans (hereinafter, the Alteration Agreement) [Alteration Agreement (ex. F to the Rivera aff.)]. The Gutmans oppose. Plaintiff David Ryerson and defendant Four Star Air Conditioning Co, LLC (hereinafter, Four Star) partially oppose as to the liability portion of the motion.

BACKGROUND

On June 21, 2010, plaintiff was injured while working on an ongoing renovation of an apartment at a residential cooperative apartment building located at 580 Park Avenue in Manhattan (hereinafter, the building). 580 Park was the owner and BHS was the managing agent of the building. The Gutmans were the shareholders of the subject apartment in the building, apartment 12A. The renovation was performed pursuant to the Alteration Agreement between the Gutmans and the building. Plaintiff was employed by non-party Nawkaw Corporation (hereinafter, Nawkaw) when he was injured. Four Star was a subcontractor involved in the installation of air-conditioning units in the Gutmans' apartment. Four Star hired Nawkaw to paint the exterior bricks on the façade of the building, where there were new openings for the air-conditioning units.

On the date of the accident, plaintiff was instructed to paint the exterior bricks outside of of the Gutmans' apartment and was directed to use a catcher, which is a suspended platform,

rather than a scaffold. Plaintiff testified that the catcher was fastened with cables to the adjacent windows, rather than being supported from the roof of the building [Plaintiff tr. (ex. H to the Rivera aff.) at 50-51]. Plaintiff claimed that his work was directed by Four Star (*id.* at 39, 51-52, 54, 56). Plaintiff was instructed to climb out of several windows to paint bricks around the windows, and Four Star workers would have had to continually move and readjust the catcher for each window (*id.* at 51-54, 56). Nawkaw provided plaintiff's safety harness and rope grab (*id.* at 63). The catcher was not motorized and did not move vertically (*id.* at 66). Plaintiff approximated that the catcher was two feet wide, two feet long, and 2 feet tall (*id.* at 70). Plaintiff testified that the catcher was a confined space to work and that he had to get down on his knees and crouch to paint the bricks (*id.* at 80-81).

As plaintiff attempted to stand up to climb back into the window upon completion of his paint work for the bricks under a window, he tripped over his lanyard, which was on the floor of the catcher, and hit his right knee against the window sill (*id.* at 88-89, 95-96). Plaintiff contends that the confined space within the catcher caused him to trip over his lanyard (*id.*). Plaintiff asserts that if a scaffold is positioned correctly, he would typically be able to stand upright while working and his lanyard would be positioned above his head (*id.* at 93-94). Plaintiff testified that throughout the time of his accident, the catcher remained stable and did not move (*id.* at 81). Plaintiff filled out an Accident Report, which was created on June 28, 2010, explaining that he was working on scaffolding outside of a 12th floor window, he went to go back into the window, tripped over a lanyard, and banged his knee [Accident Report (ex. G to the Rivera aff.)].

Elizabeth Graham, Vice President and Managing Director of BHS, testified that in June 2010, there was no work done that was commissioned by the building itself, outside of several apartment alterations [Deposition of Elizabeth Graham (ex. I to the Rivera aff.) at 12-13]. She

testified that apartment shareholders would be responsible for providing equipment for their apartment alterations, including scaffolding for exterior paint work on bricks (*id.* at 30-31). She stated that the building's architect would review apartment alteration plans, as provided for in the Alteration Agreement (*id.* at 66-68).

Anastasis Miltiadou, the principal of Four Star, testified that Four Star installed the central air conditioning system and replaced the RTAC units for the Gutmans [Deposition of Anastasis Miltiadou (ex. J to the Rivera aff.) at 12]. He stated that Four Star hired Nawkaw, pursuant to a proposal by the building's engineer, to sponge and speckle the exterior bricks impacted by the Gutmans' renovation (*id.* at 57, 61, 76). He asserts that scaffolds were not needed for this work, as plaintiff had to lean over the window to touch up the bricks (*id.* at 61-62). He testified that there were no scaffolds mentioned in Four Star's contract and that no one ever asked Four Star to provide a scaffold (*id.* at 63, 72).

Richard Gutman testified that before commencing the renovation work, he had to provide the plans and specifications of the project to the building's management, get the approval of the building's architect, and sign the Alteration Agreement [Deposition of Richard Gutman (ex. K to the Rivera aff.) at 25, 29]. He stated that the Gutmans had no role in hiring any subcontractors other than Four Star (*id.* at 30, 92).

Joseph Galea, the president and owner of non-party J&J Johnson General Contracting, testified that his company was retained by the Gutmans as the general contractor for their renovation project [Deposition of Joseph Galea (ex. L to the Rivera aff.) at 8]. He confirmed that the Gutmans hired Four Star directly (*id.* at 15). He testified that his company did all the interior work and that none of that work required a scaffold (*id.* at 16). He stated that the building did

not supervise the Gutmans' renovation, although he did see the building's superintendent, Tommy Byrne, inside the apartment a few times during the renovation (*id.* at 43, 51).

Tommy Byrne, the superintendent of 580 Park, testified that the building had an extensive review process before a renovation project began, which included the building's architect's review of the renovation job and site visits [Deposition of Tommy Byrne (ex. M to the Rivera aff.) at 32-34]. He said that the subject brick painting work could not have been done from inside the apartment (*id.* at 97).

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).

Moving defendants move for summary judgment and dismissal of the complaint and all cross-claims against them. The complaint alleges violation of: (1) common law negligence, (2) Labor Law § 200, (3) Labor Law § 240(1), and (4) Labor Law § 241(6). Additionally, Four Star makes cross-claims against moving defendants in its verified answer for common law indemnification and contribution. Also, the Gutmans make cross-claims in their answer to third-

party complaint for (1) common law indemnification and contribution, (2) contractual indemnification, and (3) breach of contract for failure to procure insurance. Moving defendants also move for an order granting contractual indemnification in their favor against the Gutmans. The court will consider the claims in turn.

Common Law Negligence Claim

Moving defendants failed to specifically address plaintiff's negligence claim within their summary judgment motion, and thus they failed to meet their burden to establish a prima facie showing of entitlement to judgment as a matter of law as it relates to the common law negligence claim. *See Tobias v. DiFazio Elec.*, 288 A.D.2d 209, 209-210 (2d Dep't 2001). Nevertheless, Labor Law § 200, which is a codification of common law negligence, was addressed in moving defendants' motion, and the court will consider it in following subsection.

Labor Law § 200 Claim

Moving defendants move for summary judgment dismissing the Labor Law § 200 claim against them. 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).

Moving defendants assert that they did not and were not responsible for supervising or controlling the means and methods in which plaintiff performed his work. Plaintiff contends that his injury arose from a defective condition upon the premises, specifically that the catcher provided was not a proper scaffold and thus his lanyard could not be held up off the floor of the catcher. The accident resulted from plaintiff's use of a catcher to paint the exterior bricks of the building. Therefore, the accident was caused by the means and methods of plaintiff's work.

Plaintiff submits an affidavit as an exhibit to his further affirmation in opposition to this motion [Plaintiff's Affidavit (ex. 2 to the Cambareri aff.)]. The court will consider the same, as the motion was adjourned upon consent of all parties by a stipulation dated July 26, 2018 [July 26, 2018 Stipulation (ex. 1 to the Cambareri aff.)], which extended the deadline to file opposition papers from July 26, 2018 to August 23, 2018. Plaintiff's further affirmation in opposition to this motion was submitted on August 14, 2018, within the stipulated deadline. In his supplemental affidavit, plaintiff alleges for the first time that as he straightened his body on the catcher, he felt the movement of the catcher due to the natural shift of his body weight, he moved his foot to counter the movement of the catcher and to regain balance, and he tripped on the lanyard as a result of his repositioning of his foot (Plaintiff's Affidavit at ¶ 12). Plaintiff further asserts in his supplemental affidavit that when he testified in his deposition that the catcher did not move or was stationary, he was referring to the fact that the catcher was fixed as compared to

moving scaffolds (*id.* at ¶ 13). However, in plaintiff's deposition, he was asked several times to describe the manner of his accident, and he never alleged that the platform shifted prior to him tripping on the lanyard (Plaintiff tr. at 94-100). Plaintiff specifically testified that the platform remained stable up until the time of his accident (*id.* at 87). Plaintiff also testified that it was the lanyard that caused him to stumble and hit his knee (*id.* at 180). There is no indication in the Accident Report that the catcher had shifted or swayed (Accident Report).

Self-serving affidavits submitted in opposition to a motion for summary judgment are insufficient to defeat said motion, where the affidavits clearly contradict prior deposition testimony and have been tailored to avoid consequences of the testimony. *Phillips v. Bronx Lebanon Hosp.*, 268 A.D.2d 318, 320 (1st Dep't 2000); *Caraballo v. Kingsbridge Apt. Corp.*, 59 A.D.3d 270, 270 (1st Dep't 2009); *Amaya v. Denihan Ownership Co., LLC*, 30 A.D.3d 327, 327-328 (1st Dep't 2006); *Harty v. Lenci*, 294 A.D.2d 296, 298 (1st Dep't 2002). The court finds that plaintiff's statements in his affidavit submitted in further opposition to this motion, and submitted weeks after his opposition was originally filed, contradict his testimony during his deposition. Thus, the court will not consider the contradictory testimony contained in the affidavit. This does not create issues of fact regarding the stability of the catcher and whether that constitutes an allegedly dangerous condition for purposes of the Labor Law § 200 analysis. Therefore, the court will proceed with the Labor Law § 200 analysis based on the accident resulting from the means and methods of plaintiff's work.

To find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's method or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work. *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 352 (1998); *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877

(1999); *Ortega v. Puccia*, 57 A.D.3d 54, 61 (2d Dep't 2008). Mere presence at the job site and the ability to perform general supervisory control over a job site is insufficient to impose liability. *See Orellana v. Dutcher Ave. Bldrs., Inc.*, 58 A.D.3d 612, 614 (2d Dep't 2009).

Plaintiff testified in his deposition that Four Star's employees rigged the catcher and told him what work needed to be done (Plaintiff tr. at 51-52, 54). He also stated that there was one foreman and two other workers from Four Star moving the catcher from window to window (*id.* at 56). Plaintiff said that he was not instructed on the specific means and methods of his work (*id.* at 54). Joseph Galea, the general contractor, testified that the building did not supervise the general contractor's work with respect to the Gutmans' renovation, though he did observe Tommy Byrne, the building's superintendent, inside the Gutmans' apartment a few times while work was going on (Galea tr. at 43, 51). Mr. Byrne testified that the building conducts an extensive review process, which includes site visits by the building's architect, before a renovation project begins (Byrne tr. at 32-34). The evidence is clear that the moving defendants, as the owner and manager of the building, did not exercise control over plaintiff's method and materials, beyond potential general supervisory control by Mr. Byrne over the job site, and potentially directing Four Star to hire Nawkaw, plaintiff's employer. Moving defendants have met their burden for dismissal of the Labor Law § 200 claim. Thus, the court grants summary judgment as to the Labor Law § 200 claim, and that claim is dismissed as against moving defendants.

Labor Law § 240(1) Claim

Moving defendants move for summary judgment dismissing the Labor Law § 240(1) claim against them. Labor Law § 240(1), also known as the Scaffold Law (*Ryan v. Morse Diesel*, 98 A.D.2d 615, 615 [1st Dep't 1983]), 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); *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).

To prevail on a Labor Law § 240(1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries. *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 287 (2003); *Felker v. Corning Inc.*, 90 N.Y.2d 219, 224-225 (1997); *Torres v. Monroe Coll.*, 12 A.D.3d 261, 262 (1st Dep't 2004).

Moving defendants assert that there is no evidence to suggest that plaintiff's accident involved a height-related fall. Plaintiff contends he had to fall onto the window sill to avoid falling off the catcher twelve stories above the ground and that the height differential of eighteen inches between the floor of the catcher and the window sill was an elevation-related risk.

Labor Law § 240(1) does not apply here because plaintiff's injury was only tangentially related to gravity, and not caused by the kind of gravity-related risks that the statute was intended to cover. Therefore, while plaintiff may have been working at a height while on the catcher, his injury was not the result of him falling from a height or being struck by a falling object. Rather, he was injured because of tripping on a lanyard and hitting his knee against the window sill. *See Tolino v. Speyer*, 289 A.D.2d 4, 4 (1st Dep't 2001) (where the plaintiff alleged that "he was standing on a wobbly platform lift when his fingers became wedged between a piece of sheetrock he was installing and the ceiling," the court held that Labor Law § 240(1) did not apply because the accident was not "gravity-related"); *Kelleher v. Power Auth. of State of N.Y.*, 211 A.D.2d 918, 918 (3d Dep't 1995) (the court deemed the plaintiff's accident was not gravity-related where, while the plaintiff was standing on a ladder and operating a drill, "the ladder allegedly shifted . . . and, as plaintiff moved his left hand to steady himself, the strap on his gloved left hand was caught pulling his hand into the drill").

> "The "special hazards' [referred to in Labor Law § 240(1)] . . . do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity. Rather, the 'special hazards' referred to are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured'"

Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501 (1993) (citations omitted).

Ross v. Curtis-Palmer Hydro-Elec. Co. (*supra*) is instructive. In *Ross*, the plaintiff, a welder who was assigned to weld a seam near the top of an elevated shaft, allegedly suffered back strain because the platform that he was working on was placed over the shaft in such a way as required him to work in a contorted position. *Id.* at 498. The plaintiff in *Ross* argued that he was entitled to recover under Labor Law § 240(1), "because his injury was 'related to the effects of gravity' in that it was allegedly produced by [his] need to work in a contorted position to

avoid falling down the deep shaft on which he was working." *Id.* at 500. In finding that Labor Law § 240(1) did not apply to the facts of the case, the court in *Ross* explained that Labor Law § 240(1) "was designed to prevent those types of accidents in which a scaffold, hoist, ladder 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," and that it "[did] not extend to other types of harm, even if the harm in question was caused by an inadequate, malfunctioning or defectively designed scaffold, stay or hoist." *Id.* at 501.

In this case, "[A]lthough plaintiff was exposed to an elevation-related hazard as a result of his work [i.e., he was working on a catcher at the time the accident occurred] . . . his injuries were not proximately caused by a failure to provide safety devices necessary to protect him from that risk." *Bonaparte v. Niagara Mohawk Power Corp.*, 188 A.D.2d 853, 853 (3d Dep't 1992) (no Labor Law § 240(1) liability where "plaintiff only fell to the surface of the scaffold, and not from it, and his injuries were proximately caused by a walking surface which was cluttered"); *see also Hicks v. Montefiore Med. Ctr.*, 266 A.D.2d 14, 15 (1st Dep't 1999) (in making its determination that Labor Law § 240(1) did not apply to the facts of the case, the court noted that "[i]njuring an ankle while merely located on a scaffold is not an elevation-related risk imposing strict liability under Labor Law § 240(1)").

"Rather, plaintiff's accident arose from activities and circumstances that arise on a construction site, and are not covered by section 240 (1)'s elevation-differential protections." *DeRosa v. Bovis Lend Lease LMB, Inc.*, 96 A.D.3d 652, 654 (1st Dep't 2012); *Tuohey v. Gainsborough Studios*, 183 A.D.2d 636, 637 (1st Dep't 1992) (Labor Law § 240(1) not applicable, "[s]ince the hazard . . . electrocution, [was] unrelated to the elevation of the scaffolding").

Plaintiff's supplemental affidavit submitted with his further affirmation in opposition to this motion attempts to raise a question of fact regarding the catcher moving and causing plaintiff to lift his foot to avoid falling (Plaintiff Affidavit at ¶ 12-13). There is no testimony from plaintiff's deposition that the catcher moved prior to the accident, or that he was forced to fall into the window sill to avoid falling off the catcher. As previously stated, self-serving affidavits submitted in opposition to a motion for summary judgment are insufficient to defeat said motion, where the affidavits clearly contradict prior deposition testimony and have been tailored to avoid consequences of the testimony. *Phillips*, 268 A.D.2d at 320 (1st Dep't 2000); *Caraballo*, 59 A.D.3d at 270 (1st Dep't 2009); *Amaya*, 30 A.D.3d at 327-328 (1st Dep't 2006); *Harty*, 294 A.D.2d at 298 (1st Dep't 2002). Therefore, the court will not consider the new facts alleged in plaintiff's affidavit regarding his avoidance of a potential fall from the catcher, as plaintiff attempts to create the perception of an elevation-related hazard where none existed.

Plaintiff's affidavit submitted with his further affirmation in opposition to this motion also states that the catcher provided was inadequate because of its size and fixed height, and that a proper scaffold was not provided (Plaintiff Affidavit at ¶ 3-11). Labor Law § 240(1) was designed to prevent those types of accidents in which a scaffold proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person and that it did not extend to other types of harm, even if the harm in question was caused by an inadequate, malfunctioning or defectively designed scaffold. *Ross*, 81 N.Y.2d at 501 (1993). While the inadequacy of the catcher, namely the catcher's size and height, may have contributed to the accident, plaintiff's injury did not arise from the application of the force of gravity, as he banged his knee against the window sill allegedly due to tripping on his lanyard, and thus his accident does not fall within the scope of Labor Law § 240(1).

Therefore, the court grants the branch of moving defendants' motion predicated on a Labor Law § 240(1) claim and dismisses that claim as against all defendants.

Labor Law 241(6) Claim

Moving defendants move for dismissal of the Labor Law § 241(6) claim, as against them.

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.*

Moving defendants did not discuss the inapplicability of any specific Industrial Code, stating that none of the Industrial Code sections alleged in plaintiff's Bill of Particulars apply. As there were twenty (20) Industrial Code sections cited in plaintiff's Bill of Particulars, the court will only consider the applicability of the specific Industrial Code regulations cited in plaintiff's opposition to this motion, namely Industrial Code §§ 23-1.7(e)(1) and (2).

§ 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).

Plaintiff asserts that Industrial Code § 23-1.7(e)(1) applies because the catcher could be considered a passageway and that the lanyard on the floor of the catcher was a tripping hazard.

Although the regulations do not define the term "passageway," courts have interpreted it to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area. *Quigley v. Port Authority of New York*, 2018 WL 6537004 (1st Dep't 2018) (citation omitted). A passageway pertains to an interior or internal way of passage inside a building. *Id.* In *McCullough v. One Bryant Park*, where plaintiff's accident occurred while the plaintiff was passing through a doorway from an exterior roof to an interior room, the court found that the doorway constitutes a passageway within the meaning of the regulation. *McCullough v. One Bryant Park*, 132 A.D.3d 491, 492 (1st Dep't 2015). However, the court in *Quigley* drew a distinction with *McCullough*, stating that in *McCullough* the accident occurred in the interior of a building, whereas in *Quigley* the accident occurred directly outside of the entrance door of the work site shanty. *Quigley*, 2018 WL 6537004 (1st Dep't 2018). Here, the accident occurred

outside of the building, as plaintiff banged his knee against the exterior window sill. The facts here are similar to *Quigley* in that the accident occurred in the exterior area of the building directly outside of an entranceway, and thus the area of the accident is not a passageway within the meaning of Industrial Code § 23-1.7(e)(1). Therefore, Industrial Code § 23-1.7(e)(1) is inapplicable.

Plaintiff contends that Industrial Code § 23-1.7(e)(2) applies as the catcher could be considered a "platform or similar area" within the meaning of the subsection. Plaintiff asserts that he tripped on the lanyard in the confined catcher, which caused him to hit his knee against the window sill. He claims that the working area in which he was working was not free from "scattered tools and materials" as required by the regulation, as he tripped in his lanyard which was allegedly improperly on the floor of the catcher. In *Best v. Tishman Constr. Corp. of N.Y.*, an electrical cord, like the lanyard in this case, was considered scattered tools and materials within the meaning of the regulation. *See Best v. Tishman Constr. Corp. of N.Y.*, 120 A.D.3d 1081, 1081 (1st Dep't 2014). Moving defendants argue in their reply papers that the object that caused plaintiff to trip was his own OSHA-approved lanyard which was attached to him and moved with him each time he moved. Nevertheless, plaintiff testified that the lanyard was connected to his safety harness, but it was around four-feet long and laid on the floor of the catcher, which he alleges was improper (Plaintiff tr. at 90, 93). Plaintiff also testified that typically, if a scaffold is positioned correctly, the lanyard would hang above his head (*id.* at 93-94). It remains a question of fact whether the lanyard on the floor of the catcher constitutes a tripping hazard. Moving defendants have not met their burden in demonstrating that Industrial Code § 23-1.7(e)(2) does not apply, as they have not addressed it specifically.

Thus, the court denies the branch of moving defendants' motion for summary judgment predicated on a Labor Law § 241(6) claim.

Four Star's Cross-Claims for Common Law Indemnification and Contribution

Moving defendants move for dismissal of all cross-claims against them, which includes Four Star's cross-claim for common law indemnification and contribution. These specific cross-claims were never discussed by moving defendants in the motion. Four Star asserts that moving defendants played a role in the supervision of the work performed and that Four Star bears no responsibility for plaintiff's injuries, as it did not direct plaintiff's work, it did not provide plaintiff with safety devices or materials, and it did not erect or hire anyone to erect scaffolding. Plaintiff asserts that Four Star supervised his work. As such, there is a question of fact regarding Four Star's cross-claims. Thus, the court denies the branch of moving defendants' motion seeking to dismiss Four Star's cross-claims.

The Gutmans' Cross-Claims

The Gutmans make cross-claims for common law indemnification and contribution, contractual indemnification, and breach of contract for failure to procure insurance, but these claims were never addressed specifically in this motion. Thus, the court will not consider dismissal of these cross-claims.

The Contractual Indemnification Claim Against the Gutmans

Moving defendants move for an order enforcing the contractual indemnity obligations of the Gutmans, pursuant to the Alteration Agreement.

Paragraph 6. a. of the Alteration Agreement states:

> I agree to indemnify and hold you, your Board of Directors, your shareholders and other occupants of the Building, the Managing Agent, and your architects and engineers harmless from and against any and all losses, liabilities, costs and expenses (including and without limitation, reasonable attorneys' fees and

> disbursements) suffered by reason of any injuries or damage to persons or property as a result of or in any way connected with the Work and any fault or defect therein or created thereby, whether or not caused by negligence. This indemnification shall survive completion of the Work (Alteration Agreement).

Moving defendants assert that the above indemnity provision in the Alteration Agreement was triggered and the Gutmans are obligated to hold harmless and indemnify 580 Park. Moreover, moving defendants indicate that the insurance procurement provision in the Alteration Agreement evidenced the allocation of the risk of liability to third-parties through the employment of insurance, and thus fully protecting the Gutmans. The Gutmans contend that the indemnity provision of the Alteration Agreement was not triggered, as plaintiff's work was not within the scope of the Alteration Agreement. The Gutmans also point to General Obligations Law § 5-322.1, which states that agreements purporting to indemnify a party against liability for damage caused by that party's own negligence are void as against public policy. The Gutmans claim that there are questions of fact as to the active contributory negligence of moving defendants pertaining to their authority to oversee and supervise Nawkaw's work, which would preclude them from asserting their contractual claim for indemnity under the statute.

Plaintiff's work was within the scope of the Alteration Agreement and the accident was related to the Gutmans' renovation. Anastasis Miltiadou, the principal of Four Star, testified that Four Star hired Nawkaw to sponge and speckle the bricks (Miltiadou tr. at 57, 61). Plaintiff testified that his work was directed by Four Star (Plaintiff tr. at 52-54, 179). Joseph Galea, the general contractor, testified that the project involved installation of "through the wall" air conditioning units that would require cutting through to the exterior portion of the building, including the exterior brick façade (Galea tr. at 22-23). Mr. Galea also confirmed that the building did not supervise the Gutman renovation (*id.* at 43). Given that the renovation project

involved cutting through the exterior brick façade of the building and that Four Star hired plaintiff's employer, Nawkaw, to paint the bricks, plaintiff's work was within the scope of the Gutmans' renovation and the Alteration Agreement.

The Alteration Agreement expressly states that the Gutmans would be required to maintain any portion of the building affected by their alterations, to the standards and quality to which the building is already maintained (Alteration Agreement at ¶ 10). This language encompasses painting exterior bricks that would have been impacted by cutting through the exterior façade of the building to install through-the-wall air conditioning units. Also, the Alteration Agreement states that the Gutmans assumed responsibility for the maintenance and repair of any alterations, including those that may encroach upon common and/or exterior areas of the building (Alteration Agreement at ¶ 22). The Gutmans agreed to perform all work in accordance with any applicable laws, including Landmark laws (Alteration Agreement at ¶ 2(b)). The exterior painting of the building was done to conform with the Landmark Commission's guidelines, which required that the exterior bricks of the building appear a certain way. The Gutmans agreed in the Alteration Agreement to return the exterior portion of the building to its original state, to the extent it was affected by their work. Thus, the Alteration Agreement covered the brick work.

General Obligations Law § 5-322.1 does not prohibit indemnity where parties freely enter into an indemnification agreement whereby they use insurance to allocate between themselves the risk of liability to third parties. *Roddy v. Nederlander Producing Co. of Am., Inc.*, 44 A.D.3d 556, 556 (1st Dep't 2007). General Obligations Law § 5-322.1 is inapplicable here because the Alteration Agreement was executed between sophisticated parties and it included an insurance procurement provision for potential liability to third parties. It is thus aligned with public policy

objectives. The language of the statute specifically states that it "shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent." General Obligations Law § 5-322.1(1). This language controls because moving defendants seek indemnification for the negligence of other actors in this action. Moreover, the First Department has held similar types of indemnification clauses enforceable in matters where third parties were injured in the scope of renovation work. *See Remekie v. 740 Corp.*, 52 A.D.3d 393 (1st Dep't 2008) (the indemnification agreement that held the tenant liable for all injuries to persons arising out of the renovation work was enforceable). Thus, General Obligations Law § 5-322.1 is inapplicable in this case.

Therefore, the court grants moving defendants' motion for contractual indemnification against the Gutmans, and the Gutmans are obligated to hold harmless and indemnify 580 Park, pursuant to the Alteration Agreement.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED, that the branch of defendants 580 Park Avenue, Incorporated and Brown Harris Stevens Residential Management's motion for an order, pursuant to CPLR § 3212, granting summary judgment on the Labor Law § 200 claim is granted and the claim is dismissed as against defendants 580 Park Avenue, Incorporated and Brown Harris Stevens Residential Management; and it is further

ORDERED, that the branch of defendants 580 Park Avenue, Incorporated and Brown Harris Stevens Residential Management's motion for an order, pursuant to CPLR § 3212,

granting summary judgment on the Labor Law § 240(1) claim is granted and the claim is dismissed as against all defendants; and it is further

ORDERED, that the branch of defendants 580 Park Avenue, Incorporated and Brown Harris Stevens Residential Management's motion for an order, pursuant to CPLR § 3212, granting summary judgment on the Labor Law § 241(6) claim is denied; and it is further

ORDERED, that the branch of defendants 580 Park Avenue, Incorporated and Brown Harris Stevens Residential Management's motion for an order granting contractual indemnification against third-party defendants Richard E. Gutman and Rosann S. Gutman is granted; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the decision and order of the court.

1-7-19
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	X	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE