Langer v MTA Capital Constr. Co.
2019 NY Slip Op 30244(U)
January 31, 2019
Supreme Court, New York County
Docket Number: 159912/2014
Judge: Kelly A. O'Neill Levy
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KELLY O'NEILL LEVY
JSC

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

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CARL LANGER and TARA LANGER,

Plaintiffs,

-against-

DECISION AND ORDER

MTA CAPITAL CONSTRUCTION COMPANY, PLAZA CONSTRUCTION CORP., PLAZA CONSTRUCTION LLC and SCHIAVONE CONSTRUCTION CO. LLC.,

Defendants.

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MTA CAPITAL CONSTRUCTION COMPANY, PLAZA CONSTRUCTION CORP., PLAZA CONSTRUCTION LLC and SCHIAVONE CONSTRUCTION CO. LLC.,

Index No.: 159912/2014

Third-Party Plaintiffs,

Motion Seq. No.: 004, 005, and 006

-against-

E-J ELECTRIC INSTALLATION COMPANY and HATZEL and BUEHLER, INC.,

Third-Party Defendants.

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HON. KELLY O'NEILL LEVY:

Motion sequence numbers 004, 005 and 006 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by an electrician on April 8, 2013, when, while working at the Fulton Street Transit Center, which is located at the corner of Fulton Street and Broadway in Manhattan (the Center), water spewed out of a ceiling hole that he was drilling, causing him to lose his balance and strike the side of the lift he was working on.

In motion sequence number 004, third-party defendant Hatzel and Buehler, Inc. (Hatzel)

moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and all cross claims against it.

Third-party defendant E-J Electric Installation Company (E-J) cross-moves, pursuant to CPLR 3212, for summary judgment in its favor on its cross claim for contractual indemnification claim against Hatzel.

In motion sequence number 005, E-J moves, pursuant to CPLR 3212, for summary judgment dismissing the first four causes of action in the third-party complaint, which are directed at E-J.

Hatzel cross-moves, pursuant to CPLR 3212, for summary judgment dismissing E-J's cross claims against it for contribution, common-law and contractual indemnification and breach of contract for failure to procure insurance.

In motion sequence number 006, defendants/third-party plaintiffs Plaza Construction Corp, Plaza Construction LLC and Schiavone Construction Co. LLC. (collectively, the Plaza defendants) and MTA Capital Construction Company (MTA) (the Plaza defendants and MTA together, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims and counterclaims against them, as well as for summary judgment in their favor on their third-party claims for contractual indemnification and breach of contract for failure to procure insurance as against E-J and Hatzel.

Plaintiffs Carl Langer (plaintiff) and Tara Langer cross-move, pursuant to 22 NYCRR 130.1-1 (a), for sanctions against defendants, and, pursuant to CPLR 3212, for summary judgment in their favor as to liability on the common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6) claims against defendants.

BACKGROUND

On the day of the accident, MTA was the owner of a project underway at the Center, which consisted of the construction of the Center's entirely new facade system, all structural framing from the street level to the roof, interior walls and finishes, all mechanical, electrical and plumbing and building systems, five new escalators, new elevators, a new grand staircase, new roofing, new utilities and new sidewalks (the Project). Pursuant to a joint venture agreement, Plaza Construction Corp., Plaza Construction LLC and Schiavone served as the general contractor on the Project.

The Plaza defendants retained E-J to serve as the prime electrical contractor on the Project. As such, E-J's duties included performing electrical and communications installation work. In turn, E-J hired Hatzel to perform the communications and fiber optic work, which included the installation of a fire alarm system and the low-voltage portions of the electrical work. Plaintiff, a journeyman electrician, was an employee of Hatzel.

Plaintiff's Deposition Testimony and Affidavit Statements

Plaintiff appeared at depositions held on September 16, 2015, November 19, 2015 and December 15, 2016. Plaintiff testified that on the day of the accident, he was working as a union journeyman wireman for the Project. His duties included installing electrical pipes and racks and "laying the pipes" (Hatzel's notice of motion, exhibit K, plaintiff's tr at 69).

Plaintiff testified that his accident occurred while he was installing Kindorf racks in the second floor ceiling of the Center, specifically on the north side of the building. The Kindorf racks were to hold the pipes that were to be installed later. As he had been performing this work for over a month, plaintiff did not need any instruction for this work, nor did he receive any

instruction. In addition, neither defendants, nor E-J, directed plaintiff's work.

At the time of the accident, plaintiff was drilling a hole into the second floor ceiling while standing in the center of a lift. After drilling approximately four-inches into the hole, his drill suddenly "sink[ed] into the ceiling," as if there was no longer concrete there (*id.* at 91). At the same time, water began to pour out of the hole. Plaintiff explained the events of his accident, in pertinent part, as follows:

> "So I'm drilling in, I get about 4 inches in, all of a sudden mitral kind of sinks into the ceiling, water starts pouring and squirting out. I turn my head real fast to avoid it coming in my face. At the same time, I kind of fell off balance, so I guess I wasn't holding the drill straight, you know, from turning my head. The drill grabbed me violently, I kind of got stuck in the drill, [and] kind of like spun me around, I hit the side of the lift, bounced off of it, finally got the drill out of the ceiling. As I got more and more of the drill out of the ceiling more and more water started pouring out on me. On top of all the electrical equipment on top of the lift I back up, I drop the gun. I backed up the lift from where the water was coming out"

(*id.* at 91-92).

Plaintiff further explained that as he was attempting to avoid getting hit by the falling water, he held the drill at an angle, which caused the teeth of the drill to catch on the concrete. This caused the drill to begin spinning, which caused his hand to get stuck in the drill's handle. As a result, plaintiff's wrist twisted away from him, causing him to spin around, and his chest to get caught against the lift's safety rails. Plaintiff testified that he did not fall off the scissor lift.

After the incident, plaintiff observed water coming down from the ceiling that he believed to be the substance that fell on him. Plaintiff also maintained that prior to the accident, no one ever advised him of any water accumulations on the third floor, nor were there any warning signs. Moreover, no one ever told plaintiff that he needed to drill in any particular part of the

ceiling so as to be safe from falling water. Plaintiff noted that he was unaware that water had accumulated on the third floor prior to the time of the accident. That morning, the only thing he saw on the third floor was machinery and equipment. He did not observe any water there. He testified, "I asked the Plaza guy what it was and he said . . . and I quote 'It's rain water from when the building was open we never pumped out'" (*id.* at 103-104). Subsequently, plaintiff's foreman, Vinny Mancuso, told him that the water issue was "Plaza's problem" (*id.* at 117).

Plaintiff described the lift as having two levels of safety rails. At the time of the accident, he was wearing a "[h]ardhat, goggles, [his] vest, gloves, work boots" (*id.* at 94). His employer, Hatzel, provided him with the drill, which he had used every day on the Project. Plaintiff was also wearing safety glasses at the time of the accident.

Deposition Testimony of Vincent Mancuso (Hatzel's Foreman)

Mancuso testified he was Hatzel's foreman on the day of the accident. He explained that Hatzel entered into a subcontract with E-J, the prime electrical contractor on the Project, whereby Hatzel would perform the installation of the communications, fire alarm system and security alarm system at the Center. He noted that the Plaza defendants served as the general contractor on the Project.

At the time of the accident, Hatzel was working on the second floor of the Center. Its work that day entailed drilling racks and installing conduit. Mancuso had instructed plaintiff to continue installing racks and conduit, as part of the installation of the fire alarm system. In order to do so, it was necessary for plaintiff to drill into the ceiling, above which was the q-decking and a concrete slab located on the third floor.

After the accident, Mancuso observed water flowing out of the hole that plaintiff drilled.

He maintained that Hatzel did not know about the water condition prior to the accident, nor could it have known about it. He explained that water had collected in a recessed area of the third floor, and that it was covered by a plywood board that had been located there since September of 2012. Hatzel only discovered the presence of the water after the plywood board was later removed. Mancuso asserted that the removal of water at the site was the Plaza defendants' responsibility. He noted that plaintiff was not reprimanded for the accident because he did nothing wrong.

Deposition Testimony of William Kiecka (President of Island Foundations)

William Kiecka testified that he was president of non-party Island Foundations, the concrete contractor on the Project. He testified that Island Foundations was hired by the Plaza defendants to perform all of the cast-in-place concrete work, including the pouring of the concrete floors. His company was also in charge of cleaning the site. He asserted that the third floor slab was poured in sections in either 2011 or 2012. Due to various redesigns by MTA along the way, some of slab was recessed in places. The Plaza defendants coordinated the changes for the redesigns. He also asserted that it was their responsibility to remove any water that collected in the recessed areas.

Deposition Testimony of Vincent Amato (The Labor Foreman)

Vincent Amato testified that he was a labor foreman for the Plaza defendants on the day of the accident. As such, he was responsible for general cleanup at the Center, protection of the finished work and deliveries. He confirmed that the Plaza defendants were responsible for maintaining and cleaning up the concrete floor after each concrete pour was completed. Amato also testified that there was plywood "everywhere" on the Project (Amato tr at 18). He was not

aware of any water accumulations on the third floor prior to the date of the accident.

Deposition Testimony of Frank Gallegiante (Plaza Laborer)

Frank Gallegiante testified that he was employed by the Plaza defendants as a laborer on the day of the accident. His duties included cleaning up the construction debris left behind by the various trades. His foreman, Amato, gave him his instructions. He maintained that the Plaza defendants had various pumps and wet-vacs at the Center that were used to pump out accumulations of water, and that he only observed the laborers hired by the Plaza defendants doing this work.

Deposition Testimony of Scott Palumbo (The Site Safety Manager)

Scott Palumbo testified that he served as the site safety manager for the Plaza defendants on the day of the accident, and that he was supervised by their employee, Charlie Kramer. Palumbo began work on the Project after the concrete flooring had already been poured. He explained that he had observed some recessed areas on the second and third floors of the Center. He explained that workers, who were employed by the Plaza defendants, placed plywood over those areas, so that work could continue there, despite the uneven flooring. He explained that after big rainstorms, water would accumulate in various parts of the building, and that the Plaza defendants would send over their laborers to clean up the water accumulations. Palumbo could not state whether the electrical contractors were ever warned of the water accumulations in the recessed areas of the third floor. However, if he had noticed such an accumulation, he would have called the Project's superintendent, Kramer, to ask how to handle the situation.

Deposition Testimony of Richard Jenasku (Plaza Laborer)

Richard Jenasku was a laborer hired by the Plaza defendants. He testified that Amato

was responsible for making sure that the laborers cleared the floors of hazardous substances. He testified that it was his job to pump out any and all water accumulations before work was began. He also confirmed that there were two recessed areas on the third floor, and that they were covered with plywood.

Deposition Testimony of Charles Kramer (The Project Superintendent)

Kramer testified that he served as the superintendent on the Project, and that he worked for the Plaza defendants. Kramer maintained that the Plaza defendants were responsible for removing water from the recessed floor areas, and that they had pumps on site to do so. While he was not aware that water had accumulated on the third floor, he testified that the electricians could not have been the source of the water that caused the accident, because they installed conduit pipes to carry electrical wires, not water.

Affidavit of Charles Kramer

In his affidavit, Kramer stated that according to the job specifications, when installing anchors, Hatzel should have instructed its employees to drill into the thicker portion of the ceiling's Q decking. He explained that plaintiff's drill penetrated all the way through the third floor's concrete slab because he was drilling into the thinner underside of the Q decking.

Deposition Testimony of Nicholas Monafis (Hatzel's General Foreman)

Nicholas Monafis testified that he was Hatzel's general foreman on the Project. He explained that Hatzel's employees were instructed to install the Kindorf racks every five feet. He stated that no instruction would have been given to plaintiff to only drill in the thicker portion of the subject concrete slab. He also maintained that the Plaza defendants were responsible for cleaning up accumulated water at the Center, and that he had observed their workers pumping

water out of a recessed area on another floor.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Whether Plaintiffs' Complaint Against MTA Must Be Dismissed For Failure to Comply With A Condition Precedent and Because It Is Time Barred (motion sequence number 006)

Initially, defendants argue that plaintiffs' complaint against MTA must be dismissed for failure to comply with a condition precedent in Public Authorities Law § 1276 (1). Specifically, Public Authorities Law § 1276 (1) requires that the complaint allege that a pre-suit demand was made upon the MTA at least 30 days prior to the commencement of the suit, and that MTA "neglected or refused to make an adjustment or payment thereof." Defendants assert that plaintiff's complaint makes no mention of a demand for settlement to MTA, and, therefore, the complaint must be dismissed as to MTA (*see Wolfson v Metropolitan T ransp. Auth.*, 123 AD3d

635, 636 [1st Dept 2014]).

Defendants also argue that all causes of action against MTA are time barred, due to the fact that the applicable statute of limitations for an action against MTA, pursuant to Public Authorities Law § 1276 (2), is one year from the date of the accident, or April 8, 2013. Notably, plaintiff did not commence suit until October 9, 2014.

Plaintiffs do not oppose this branch of defendants' motion. A moving party is entitled to summary judgment where the opposing party does not put forth any proof, nor rebut the movant's prima facie showing (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]). Thus, the complaint is dismissed in its entirety as to MTA.

Therefore, in the remainder of this decision, the causes of actions in the complaint will be analyzed in regard to the Plaza defendants only.

The Labor Law § 240 (1) Claim Against the Plaza Defendants (motion sequence number 006 and plaintiffs' cross motion)

Plaintiffs cross-move for summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against the Plaza defendants. The Plaza defendants move for dismissal of said claim against them. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 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 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 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 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 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 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]). Labor Law § 240 (1) does not apply to the facts of this case 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. To that effect, while plaintiff may have been working at a height while on the lift, his injury was not the result of him falling from a height or being struck by a falling object. Rather, he was injured as a result of dirty water being spewed onto him as he drilled into

the ceiling, causing him to lose his balance, get his drill caught, spin around and then bounce off the side of the lift (*see Tolino v Speyer*, 289 AD2d 4, 4 [1st Dept 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 AD2d 918, 918 [3d Dept 1995] [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 NY2d 494, 501 [1993] [citations omitted]).

The seminal case of *Ross v Curtis-Palmer Hydro-Elec. Co.* (*supra*) is instructive. In that case, 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 in order 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 of

Appeals 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).

As noted by the Court in *Suwareh v State of New York* (24 AD3d 380, 381-382 [1st Dept 2005]):

> "In *Ross*, the injury had nothing to do with gravity-related risks such as falling from a height or being struck by a falling object. The plaintiff, while working in an elevated shaft, injured his back because of the contorted position in which he was working. There was no loss of balance nor any spilling or falling of materials."

Here, "although plaintiff was exposed to an elevation-related hazard as a result of his work [i.e., he was working on a lift 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 AD2d 853, 853 [3d Dept 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 AD2d 14, 15 [1st Dept 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 AD3d 652, 654 [1st Dept 2012]; *Tuohey v Gainsborough Studios*, 183 AD2d 636, 637 [1st Dept 1992] [Labor Law § 240 (1) not applicable, "[s]ince the hazard . . . electrocution, [was] unrelated to the elevation of the scaffolding"]).

Thus, plaintiffs are not entitled to summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against the Plaza defendants, and the Plaza defendants are entitled to dismissal of said claim against them.

The Labor Law § 241 (6) Claim Against The Plaza Defendants (motion sequence number 006 and plaintiffs' cross motion)

Plaintiffs cross-move for summary judgment in their favor as to liability on the Labor Law § 241 (6) claim against the Plaza defendants. The Plaza defendants move for dismissal of said claim 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."

Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers" (*Ross,* 81 NY2d at 501). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, 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.* at 503-505).

Initially, while plaintiffs assert multiple alleged Industrial Code violations in their bill of particulars, with the exception of sections 23-1.8 (a), which requires approved eye protection for workers engaged in certain activities, 23-1.8 (c) (3), which requires waterproof clothing when a worker is exposed to wet conditions, 23-1.7 (d), which deals with slippery conditions and 23-2.1 (b), which deals with the disposal of debris, plaintiff does not oppose their dismissal. Therefore, the unopposed Industrial Code provisions are deemed abandoned (*see Genovese v Gambino*, 309 AD2d at 833 [2d Dept 2003]).

Thus, plaintiffs are not entitled to summary judgment in their favor on the abandoned Industrial Code provisions, and the Plaza defendants are entitled to dismissal of said provisions.

Industrial Code 12 NYCRR 23-1.7 (d)

Initially, Industrial Code 12 NYCRR 23-1.7 (d) contains specific directives that are sufficient to sustain a cause of action under Labor Law § 241 (6) (*Lopez v City of N.Y. Tr. Auth.*, 21 AD3d 259, 259-260 [1st Dept 2005]).

Industrial Code 12 NYCRR 23-1.7 (d) provides:

> "(d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

Notably, as plaintiff testified that his accident was caused when water spewed on him from the hole that he was drilling, rather than from slipping, section 23-1.7 (d) does not apply to the facts of this case.

Thus, plaintiffs are not entitled to summary judgment in their favor on that part of the

Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.7 (d), and the Plaza defendants are entitled to dismissal of same.

Industrial Code 12 NYCRR 23-1.8 (a) and 23-1.8 (c) (3)

Industrial Code 12 NYCRR 23-1.8 states, as follows:

> "*Personal protective equipment.* (a) *Eye protection.* Approved eye protection equipment suitable for the hazard involved shall be provided for and shall be used by all persons while employed in welding, burning or cutting operations or in chipping, cutting or grinding any material from which particles may fly, or while engaged in any other operation which may endanger the eyes.
>
> * * *
>
> "(c) *Protective apparel . . .* (3) *Waterproof clothing.* Every employee required to work in rain, snow or similar wetting conditions shall be provided with a waterproof coat, pants and hat."

Initially, Industrial Code 12 NYCRR 23-1.8 is sufficiently specific to support a Labor Law § 241 (6) cause of action *(Buckley v Triborough Bridge & Tunnel Auth.*, 91 AD3d 508, 509 [1st Dept 2012]).

It should be noted that while plaintiff was not engaged in any of the activities enumerated in 12 NYCRR 23-1.8 (a) at the time of the accident, i.e., "welding, burning or cutting operations or in chipping, cutting or grinding," section 23-1.8 (a) also applies to "any other operation[s] which [foreseeably] may endanger the eyes."

Here, "[t]riable issues of fact exist as to whether the plaintiff's use of [a drill to make a hole in the ceiling] at the time of the accident made the possibility of injury to his eye sufficiently foreseeable so as to require eye protection" (*Montenegro v P12, LLC*, 130 AD3d 695, 697 [2d Dept 2015]). In addition, issues of fact exist as to whether section 23-1.8 (c) (3), which requires waterproof apparel be provided to workers exposed to wet conditions, is applicable for the same

reason.

Thus, plaintiffs are not entitled to summary judgment in their favor on the parts of the Labor Law § 241 (6) claim predicated on alleged violations of section 23-1.8 (a) and (c) (3) and the Plaza defendants are not entitled to dismissal of same.

Industrial Code 12 NYCRR 23-2.1 (b)

Section 12 NYCRR 23-1.2.1 (b), which addresses "[d]isposal of debris" is not sufficiently specific to support a Labor Law § 241 (6) claim (*see Quinlan v City of New York*, 293 AD2d 262, 263 [1st Dept 2002]; *Mendoza v Marche Libre Assoc.*, 256 AD2d 133, 133[1st Dept 1998]).

Thus, plaintiffs are not entitled to summary judgment in their favor on that part of the Labor Law § 241 (6) predicated on an alleged violation of section 23-2.1 (b), and the Plaza defendants are entitled to dismissal of same.

The Common-Law Negligence and Labor Law § 200 Claim Against The Plaza Defendants (motion sequence number 006 and plaintiffs' cross motion)

Plaintiff cross-moves for summary judgment in his favor on the common-law negligence and Labor Law § 200 claims against the Plaza defendants. The Plaza defendants move for dismissal of said claims against them. Labor Law § 200 (1) states, in pertinent part, as follows:

> "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 section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the

contractor to do its work, and when 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 AD3d 796, 797-798 [2d Dept 2007]).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work, "because the injury arose from the condition of the work place created by or known to the contractor, rather than the method of [the] work"]).

It is well settled that, in order to find an owner or its agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff's injury was caused by lifting a beam, and there was no evidence that the defendant exercised supervisory control or had any input into how the beam was to be moved]).

Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *see also Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009] [Court dismissed common-law negligence and Labor Law § 200 claims where the deposition testimony established that, while the defendant's "employees inspected the work and had the authority to stop it in the

event they observed dangerous conditions or procedures," they "did not otherwise exercise supervisory control over the work"]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where the defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]).

As discussed previously, the accident was caused when water, which had been allowed to accumulate in the recessed areas of the third floor, sprayed plaintiff, causing him to lose his balance, get his drill stuck and spin into the side of the lift. Therefore, as the accident was the result of the Plaza defendants' failure to properly remove the water accumulation on the third floor, the accident was caused due to the means and methods of their work. Therefore, a means and methods analysis is appropriate.

Initially, although the Plaza defendants argue that they are not liable for plaintiff's injuries under a means and methods analysis because plaintiff's work was directed and supervised exclusively by his employer, Hatzel, as noted above, the appropriate issue to be determined is whether the Plaza defendants had supervisory control over the work that caused the injury, i.e., the removal of any and all accumulated water at the site.

Here, since a review of the record overwhelming demonstrates that the Plaza defendants were in charge of the injury-producing work, i.e., water clean-up at the Center, plaintiff is entitled to summary judgment in his favor on the common-law negligence and Labor Law § 200 claims as against the Plaza defendants, and the Plaza defendants are not entitled to dismissal of said claims against them.

The court has considered the Plaza defendants remaining arguments on this issue and

finds them to be unavailing.

The Cross Claims and Counterclaims As Against Defendants

As defendants do not address, or even identify, the various cross claims and counterclaims asserted against them, they are not entitled to dismissal of said claims and cross claims as against them.

Plaintiffs' Cross Motion For Sanctions Against Defendants (Plaintiffs' Cross Motion)

Plaintiffs cross-move for sanctions against defendants on the ground that their motion for summary judgment is frivolous and misleading.

Plaintiffs' cross motion for sanctions against defendants is denied, as defendants motion, which was brought in good faith,"was neither without merit nor brought in an effort to delay or frustrate the proceedings" (*Tag 380, LLC v Ronson*, 51 AD3d 471, 471 [1st Dept 2008]).

Defendants' Third-Party Claims and E-J's Cross Claims for Contribution and Common-Law Indemnification Against Hatzel (motion sequence number 004 and Hatzel's Cross Motion To Dismiss E-J's Cross Claims)

Hatzel moves for summary judgment dismissing the third-party claims for contribution and common-law indemnification against it. Hatzel also cross-moves for dismissal of E-J's cross claims against it for same. "Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person [internal quotation marks and citations omitted]" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]). "To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d

681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]). "It is well settled that an owner who is only vicariously liable under the Labor Law may obtain full indemnification from the party wholly at fault" (*Chapel v Mitchell*, 84 NY2d 345, 347 [1994]).

Initially, as plaintiff was an employee of Hatzel, relevant to this issue is Workers' Compensation Law § 11, which prescribes, in pertinent part, as follows:

> "An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot . . . or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Therefore, "[a]n employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]).

Additional Facts Relevant To This Motion:

The Bill of Particulars

In the verified bill of particulars, plaintiffs allege that plaintiff sustained the following injuries, in pertinent part:

> "cervical disc herniations at C5-C6 and C6-C7 requiring cervical fusion with hardware . . . ; requires lifetime assistance with activities of daily living, household maintenance, care and driving, will never be able to fully take care of himself or his wife . . . extreme pain and suffering; mental anguish and distress;

difficulty sleeping; unable to attend to his usual duties and vocation; has incurred medical expenses and will incur substantial medical expenses in the future"

(Hatzel's notice of motion, exhibit J, bill of particulars).

Here, none of the alleged injuries claimed by plaintiff in his bill of particulars rises to the level of a"grave injury," as required under Workers' Compensation Law § 11.

Thus, Hatzel is entitled to dismissal of the third-party claims, as well as E-J's cross claims, against it for contribution and common-law negligence.[1]

Defendants' Third-Party Claim for Contractual Indemnification Against Hatzel (motion sequence number 004 and 006)

Defendants move for summary judgment in their favor on their third-party claim for contractual indemnification against Hatzel. Hatzel moves for dismissal of said third-party claim against it. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]).

With respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and "'[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant'" (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003]

[1]It should be noted that E-J does not put forth any opposition to Hatzel's request for dismissal of E-J's cross claims for contribution and common-law indemnification.

[citation omitted]; *Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]).

Additional Facts Relevant To This Issue:

Article 25 of the contract between E-J and Hatzel (the E-J/Hatzel Subcontract) contains an indemnification provision (the E-J/Hatzel Indemnification Provision), which sets forth, in pertinent part:

> "[Hatzel], on its own behalf, and on behalf of any and all of its subcontractors or persons or firms directly or indirectly engaged or employed by Subcontractor to perform portions of the Work under this Subcontract, hereby agrees to defend, indemnify and hold harmless Contractor and the General Contractor and Owner . . . their agents, servants and employees, from and against all claims, lawsuits, damages, losses, judgments, costs, charges . . . by reason of personal injuries . . . or breach caused by, arising out of, or occurring in connection with the Work provided for under the terms of this Subcontract . . . and due in whole or in part to negligence of or violation of any obligation imposed by this Subcontract, or by operation of law, common law, ordinance, rule, regulations or statue, including by not limited to the Labor Law, by the Subcontractor, its agents, servants, employees, subcontractors or suppliers"

(Hatzel's notice of motion, exhibit P, the E-J/Hatzel Subcontract, the E-J/Hatzel Indemnification Provision).

Here, the E-J/Hatzel Indemnification Provision provides that Hatzel indemnify defendants where the accident arises out of Hatzel's work and it is caused by Hatzel's negligence. Accordingly, the Indemnification Provision is not triggered because the accident did not arise out of any negligence on the part of Hatzel, nor any other violation of any other obligation on the part of Hatzel. At the time of the accident, plaintiff was merely drilling into the ceiling as part of his work installing Kindorf racks. Rather, the accident occurred as a result of the Plaza defendants' negligence in failing to properly carry out its duty to clean up the accumulated water in the recessed area of the third floor of the Center.

Thus, defendants are not entitled to summary judgment in their favor on the third-party claim for contractual indemnification against Hatzel, and Hatzel is entitled to dismissal of the said third-party claim against it.

Defendants' Third-Party Claim for Breach of Contract for Failure To Procure Insurance (motion sequence numbers 004 and 006)

It should be noted that while Hatzel moved to dismiss the entire third-party claim against it, which would include a third-party claim for breach of contract for failure to procure insurance, Hatzel did not put forth any argument in regard to said request in his main brief, and only addressed it for the first time in its reply papers. Thus, this part of Hatzel's motion is denied (*Shaw v Bluepers Family Billiards*, 94 AD3d 858, 860 [2d Dept 2012]).

In addition, as Hatzel did not identify or address any cross claims asserted against it in its motion, Hatzel is not entitled to dismissal of any asserted cross claims.

Defendants move for summary judgment in their favor on the breach of contract for failure to procure insurance against Hatzel. However, as defendants have conceded that they have been afforded additional insured coverage from Hatzel's insurance carrier, Zurich American Insurance Company (Zurich), they are not entitled to summary judgment in their favor on the third-party claim for breach of contract for failure to procure insurance against Hatzel.

E-J's Cross Claim for Contractual Indemnification Against Hatzel (E-J's Cross Motion and Hatzel's Cross Motion to Dismiss E-J's Cross Claims)

E-J cross-moves for summary judgment in its favor on its cross claim for contractual indemnification against Hatzel. Hatzel cross-moves for dismissal of said cross claim against it.

Additional Facts Relevant to This Cross Motion:

As set forth previously, E-J hired Hatzel pursuant to the E-J/Hatzel Subcontract, whereby

E-J would perform certain communications and fiber optic work on the Project. The E-J/Hatzel Subcontract contained the E-J/Hatzel Indemnification Provision whereby Hatzel would defend, indemnify and hold harmless E-J with respect to claims for bodily injury arising not only out of Hatzel's work, but also as a result of Hatzel's negligence on the Project.[2]

Initially, a review of the record reveals no evidence of any negligence on the part of E-J that caused or contributed to the accident. In addition, while the accident may have arisen out of Hatzel's work (as the injured worker was Hatzel's employee), there is no evidence in the record demonstrating that any negligence on the part of Hatzel caused or contributed to the accident, as required under the E-J/Hatzel Indemnification Provision. To that effect, plaintiff testified that he was merely drilling a hole into the ceiling at the time of the accident, and that he had no reason to believe that he was in danger of having water pour out of said hole. In addition, there is nothing in the record to suggest that there was anything wrong with plaintiff's drill or the means and methods that he used to perform his work.

Thus, E-J is not entitled to summary judgment in its favor on its cross claim for contractual indemnification as against Hatzel, and Hatzel is entitled to dismissal of said cross claim against it.

E-J's Cross Claim for Breach of Contract for Failure to Procure Insurance Against Hatzel (Hatzel's Cross Motion)

Hatzel cross-moves for dismissal of E-J's cross claim for breach of contract for failure to procure insurance against it. As E-J does not put forth any opposition to this part of Hatzel's

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[2]The aforementioned indemnity provision does not violate New York General Obligations Law § 5-322.1 because it does not seek to impose complete and total indemnification notwithstanding the indemnitee's negligence (*see Itri Brick & Concrete Corp. v Aetna Casualty & Surety Col.*, 89 NY2d 786, 796 [1997]).

cross motion, Hatzel is entitled to dismissal of said cross claim against it.

Defendants' Third-Party Claims for Contribution and Common-law Indemnification Against E-J (motion sequence number 005)

E-J moves for dismissal of defendants' third-party claim for contribution and common-law indemnification against it. As discussed previously, plaintiff alleges that the accident was caused due to water suddenly and unexpectedly pouring through the hole that he was drilling in the ceiling of the second floor of the Center. Here, it is undisputed that the Plaza defendants were in charge of making sure that any accumulated water was removed. Moreover, there is no evidence in the record establishing that either E-J or Hatzel's work on the Project caused or contributed to the accident in any way, nor did these entities have any reason to know that drilling in the ceiling might cause such an event to occur.

Thus, E-J is entitled to dismissal of the third-party contribution and common-law indemnification claims against it.

Defendants' Third-Party Claims for Contractual Indemnification Against E-J (motion sequence numbers 005 and 006)

Defendants move for summary judgment in their favor on their third-party claim for contractual indemnification as against E-J. E-J moves for dismissal of said third-party claim against it.

Additional Facts Relevant To This Motion:

The pertinent indemnification agreement in the contract between the Plaza defendants and E-J (the Plaza/E-J Contract) (the Plaza/E-J Indemnification Agreement) provides, in pertinent part, as follows:

"To the extent permitted by law, Subcontractor [E-J] shall indemnify, defend,

> save and hold the Owner [and] the Contractor . . . (herein collectively called 'Indemnitees') harmless from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever which arise out of or are connected with, or claimed to arise out of or be connected with:
>
> 1. The performance of Work by the Subcontractor, or any of its Sub-Subcontractors, or any act or omission of any of the foregoing;
>
> 2. Any accident or occurrence while happens . . . where such Work is being performed . . . while the Subcontractor is performing the Work . . . . or . . . while any of the Subcontractor's property, equipment or personnel are in or about such place . . . or as a result of the performance of the Work; or
>
> 3. The use, misuse, erection . . . or failure of any machinery or equipment . . . whether or not such machinery or equipment was furnished, rented or loaned by the Owner or Contractor"

(E-J's notice of motion, Abreu aff, exhibit A, Plaza/E-J Contract, the Plaza/E-J Indemnification Provision).

While E-J asserts that defendants' third-party claim for contractual indemnification against it should be dismissed against it because the Plaza/E-J Indemnification Provision requires that E-J be shown to be negligent in order for it to be triggered, in fact, a reading of said provision reveals that this is not the case. In fact, said indemnification provision provides that E-J indemnify defendants for accidents that arise out of or are connected with its work, or its sub-subcontractors' work, on the Project. Here, Hatzel was E-J's sub-subcontractor, and as plaintiff was the injured worker and an employee of Hatzel, the accident arose out of E-J's subcontractor's work.

However, as discussed previously, negligence on the part of the Plaza defendants caused and/or contributed to the accident. Therefore, E-J does not owe contractual indemnification to the Plaza defendants. That said, as no negligence on the part of MTA caused or contributed to

the accident, E-J does owe contractual indemnification to MTA.

Thus, defendants are entitled to summary judgment in their favor on that part of the third-party claim seeking indemnification from E-J as to MTA, and they are not entitled to summary judgment in their favor on that party of the third-party claim seeking indemnification from E-J as to the Plaza defendants.

In addition, E-J is not entitled to dismissal of that part of defendants' third-party claim seeking contractual indemnification from E-J as to MTA, and E-J is entitled to dismissal of that part of defendants' third-party claim seeking contractual indemnification from E-J as to the Plaza defendants.

Defendants' Third-Party Claim for Breach of Contract As Against E-J (motion sequence number 005 and 006)

Defendants move for summary judgment in their favor on the third-party breach of contract for failure to procure insurance as against E-J. E-J moves for dismissal of said third-party claim against it.

Additional Facts Relevant To This Issue:

The Plaza/E-J Contract required E-J to obtain additional insured coverage for the benefit of defendants. While E-J did obtain a primary commercial general policy for itself from Houston Casualty Company (Houston), covering the period of December 31, 2012 to December 31, 2013, said policy did not name defendants as additional insureds.

That said, pursuant to its contract with Hatzel, E-J required Hatzel to obtain insurance coverage naming both E-J and defendants as additional insureds. On May 1, 2015, the claims administrator for E-J's liability carrier, Houston, tendered defense and indemnity of defendants

and E-J to Hatzel's carrier, Zurich American Insurance Company (Zurich). Defendants have conceded that they have been afforded additional insured coverage from Zurich.

Here, despite the fact that defendants have been afforded additional insured coverage from Hatzel's carrier, E-J has not established that it obtained the proper additional insured coverage on behalf of defendants, as required by its contract with defendants.

Thus, defendants are entitled to summary judgment in their favor on the third-party claim for breach of contract for failure to procure insurance as against E-J, and E-J is not entitled to dismissal of said third-party claim against it.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the parts of third-party defendants Hatzel and Buehler, Inc.'s (Hatzel) motion (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing the third-party claims against it for contribution, common-law indemnification and contractual indemnification are granted, and these third-party claims are dismissed as against Hatzel, and the motion is otherwise denied; and it is further

ORDERED that third-party defendant E-J Electric Installation Company's (E-J) cross-motion, pursuant to CPLR 3212, for summary judgment in its favor on its cross claim for contractual indemnification claim against Hatzel is denied; and it is further

ORDERED that the parts of E-J's motion (motion sequence number 005), pursuant to CPLR 3212, for summary judgment dismissing defendants/third-party plaintiffs Plaza Construction Corp, Plaza Construction LLC, Schiavone Construction Co. LLC. (collectively, the Plaza defendants) and MTA Capital Construction Company's (MTA) (the Plaza defendants and

MTA, together, defendants) third-party claims against them for contribution and common-law indemnification are granted, and these third-party claims are dismissed as against E-J; and it is further

ORDERED that the part of E-J's motion (motion sequence number 005), pursuant to CPLR 3212, for summary judgment dismissing the third-party claim seeking contractual indemnification from E-J as to the Plaza defendants is granted, and this third-party claim is dismissed as against E-J, and the motion is otherwise denied; and it is further

ORDERED that Hatzel's cross motion, pursuant to CPLR 3212, for summary judgment dismissing E-J's cross claims against it is granted, and these cross claims are dismissed as against Hatzel; and it is further

ORDERED that the part of defendants' motion (motion sequence number 006), pursuant to CPLR 3212, for summary judgment dismissing the complaint against MTA is granted, and the complaint is dismissed as against MTA, and the Clerk is directed to enter judgment in favor of MTA, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the parts of defendants' motion (motion sequence number 006), pursuant to CPLR 3212, for summary judgment dismissing the Labor Law § 240 (1) claim, as well as those parts of the Labor Law § 241 (6) claim predicated on alleged violations of Industrial Code sections 23-1.7 (d) and 23-2.1 (b), as against the Plaza defendants are granted, and these claims are dismissed as against the Plaza defendants; and it is further

ORDERED that the part of defendants' motion (motion sequence number 006), pursuant to CPLR 3212, for summary judgment in their favor on the third-party claims for contractual indemnification and breach of contract for failure to procure insurance as against Hatzel is

denied; and it is further

ORDERED that the part of defendants' motion (motion sequence number 006), pursuant to CPLR 3212, for summary judgment in their favor on that part of the third-party claim seeking contractual indemnification from E-J as to MTA is granted; and it is further

ORDERED that the part of defendants' motion (motion sequence number 006), pursuant to CPLR 3212, for summary judgment in their favor on the third-party claim for breach of contract for failure to procure insurance as against E-J is granted, and the motion is otherwise denied; and it is further

ORDERED that the part of plaintiffs Carl Langer and Tara Langer's cross motion, pursuant to 22 NYCRR 130.1-1 (a) for sanctions against defendants is denied; and it is further

ORDERED that the part of plaintiffs' cross motion, pursuant to CPLR 3212, for summary judgment in their favor on the common-law negligence and Labor Law § 200 claims as against the Plaza defendants is granted, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: Jan 31, 2019

ENTER:

Kelley O'Neill Levy

J.S.C.

KELLY O'NEILL LEVY
JSC