SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT DAVID KALISH** **PART** **IAS MOTION 29EFM**

Justice

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JUAN SERRANO,

Plaintiff,

- v -

ALBEE DEVELOPMENT LLC, ZDG, LLC, DGC CAPITAL CONTRACTING CORP., CENTURY 21 STORES, LLC, and GMA MECHANICAL, CORP.,

Defendants.

(and two third-party actions)

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INDEX NO. 159223/2015

MOTION DATE 07/16/2019

MOTION SEQ. NO. 001–007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 300, 312, 313, 314, 315, 380, 381, 382, 390, 395, 400, 401, 402, 403, 412, 413, 414, 415, 416, 417, 428, 429, 430, 431, 432, 433, 434, 435, 447, 448, 449, 450, 451, 494

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 334, 335, 336, 337, 338, 339, 362, 363, 364, 365, 366, 436, 437, 438, 439, 440, 441, 442

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 316, 317, 318, 319, 320, 321, 340, 341, 342, 343, 393, 394, 396, 397, 398, 399, 461, 462, 463, 464

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 295, 296, 299, 303, 304, 344, 345, 346, 347, 348, 349, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 383, 384, 452, 453, 454, 455, 456, 457, 458, 459, 460, 465, 466, 467

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 305, 306, 307, 308, 309, 310, 311, 350, 351, 352, 353, 385, 386, 391, 392, 404, 405, 406, 407, 426, 427, 443, 444, 445, 446

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 322, 323, 324, 325, 326, 327, 354, 355, 356, 357, 387, 388, 418, 419, 420, 421, 475, 476, 477, 478, 479, 480, 483, 484, 485, 486, 491, 492

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 328, 329, 330, 331, 332, 333, 358, 359, 360, 361, 389, 408, 409, 410, 411, 422, 423, 424, 425, 468, 469, 470, 471, 472, 473, 474, 481, 482, 487, 488, 489, 490

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Motions decided per the annexed memorandum decision and order.

10/4/2019
DATE

HON. ROBERT DAVID KALISH, J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

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JUAN SERRANO,

Plaintiff,

-against- Index No. 159223/15

ALBEE DEVELOPMENT LLC, ZDG, LLC, DGC CAPITAL CONTRACTING CORP., CENTURY 21 STORES, LLC and GMA MECHANICAL CORP., Mot. Seq. Nos. 001-007

Defendants.

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GMA MECHANICAL CORP.,

Third-Party Plaintiff,

-against- Third-Party Index No. 595694/16

APPLE SHEET METAL, INC.,

Third-Party Defendant.

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DGC CAPITAL CONTRACTING CORP.,

Second Third-Party Plaintiff,

-against- Second Third-Party Index No. 595949/16

A&F FIRE PROTECTION CO., INC.,

Second Third-Party Defendant.

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ROBERT D. KALISH, J.:

Motion sequence numbers 001 through 007 are consolidated for disposition.

This action arises out of a construction site accident that occurred on August 5, 2015, at 1 Dekalb Avenue in Brooklyn (the premises). Plaintiff Juan Serrano, a journeyman, alleges that he slipped and fell from a greasy scissor lift on the fourth floor of the premises.

Defendant Century 21 Fulton, LLC (Century 21) moves pursuant to CPLR 3212 for an order: (1) dismissing plaintiff's Labor Law § 200 and common-law negligence claims; (2) awarding it summary judgment on its contractual indemnification claims against defendant/second third-party plaintiff DGC Capital Construction Corp. (DGC), second third-party defendant A&F Fire Protection Co., Inc. (A&F), defendant/third-party plaintiff GMA Mechanical Corp. (GMA), and third-party defendant Apple Sheet Metal, Inc. (Apple); (3) directing DGC, A&F, GMA, and Apple to reimburse Century 21 for all reasonable attorney's fees from the date of its tender; and (4) dismissing the cross claims of defendant ZDG, LLC (ZDG) as against it (motion sequence number 001).

Defendant DGC moves pursuant to CPLR 3212 for summary judgment on its common-law indemnification, common-law contribution, and contractual indemnification claims against GMA (motion sequence number 002).

Second third-party defendant A&F moves pursuant to CPLR 3212 for an order: (1) dismissing the second third-party complaint in its entirety; and (2) dismissing the cross claims asserted by defendant Albee Development, LLC (Albee), ZDG, Century 21, GMA, and Apple as against it (motion sequence number 003).

Plaintiff moves pursuant to CPLR 3212 for partial summary judgment on the issue of liability under Labor Law §§ 240 (1) and 241 (6) (motion sequence number 004).

Defendant/third-party plaintiff GMA moves pursuant to CPLR 3212 for: (1) summary judgment dismissing the complaint and all cross claims against it; and (2) summary judgment on its third-party claim for contractual indemnification against Apple (motion sequence number 005).

Defendants Albee and ZDG move pursuant to CPLR 3212 for an order: (1) directing GMA and Century 21 to defend and indemnify them; (2) granting them costs and attorney's fees incurred in the defense of the action; or, in the alternative, (3) granting them summary judgment on their contractual indemnification and defense claims against GMA and Century 21; (4) granting them summary judgment as to liability on their breach of contract claims against GMA and Century 21; (5) granting them common-law indemnification against GMA, Century 21, DGC, and A&F; or, in the alternative, (6) granting them conditional summary judgment on their common-law indemnification claims against GMA, Century 21, DGC, and A&F (motion sequence number 006).

Defendants Albee and ZDG again move pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims against them (motion sequence number 007).

BACKGROUND

Albee was the developer of the City Point Project, a multi-use project in downtown Brooklyn. Albee owned the buildings at two locations pursuant to ground leases. The City Point Project included the tenant build-out for a Century 21 store. Albee hired ZDG as a construction manager for the core and shell work. Century 21 was a tenant at the City Point Project. Century 21 retained DGC as a general contractor. Century 21 entered into a lease agreement with Albee for the space. DGC retained GMA as an HVAC subcontractor. Plaintiff was employed by Apple, the mechanical sub-subcontractor hired by GMA, on the date of his accident.

Plaintiff testified at his deposition that his accident happened right before his coffee break at about 9:15 a.m., when he was "tying in two lines of duct" on a scissor lift (NY St Cts Elec Filing [NYSCEF] Doc No. 174, plaintiff tr at 79–81, 90). There were no witnesses to his accident (*id.* at 84). He fell as he "climbed off and got hurt" when the scissor lift was in the

down position; plaintiff was "approximately three feet off the ground . . . basically on the top rail" (*id.* at 108, 109). His right foot slipped on an area of grease "and that's when I went backwards, straight down, hit the wall and hit the ground" (*id.* at 120). The grease was "clear to a little bit blacking like a dark brown blackish" (*id.* at 150, 161). Plaintiff testified that he caught the sprinkler fitters using the scissor lifts prior to his accident, and that the sprinkler fitter left grease on the subject lift (*id.* at 63, 65). Plaintiff complained to his supervisor about grease on the scissor lifts some time in the month prior to the accident (*id.* at 73-74).

DGC's superintendent, Adam Asch (Asch), testified that plaintiff told him that "his foot got caught coming down" the lift (NYSCEF Doc No. 372, Asch tr at 43). He inspected the lift after plaintiff's accident, on the day of the accident, and did not see anything slippery (*id.* at 58).

Nina Caggiano (Caggiano), GMA's project manager, inspected the lift after the accident, on the day of the accident, and did not see any grease or oil (NYSCEF Doc No. 376, Caggiano tr at 120).

A DGC incident report, dated August 5, 2015, and completed by Asch, states that:

> "Juan Serrano who is 6' 5" tall was coming off of his man lift [sic] he put his left foot down to the 2nd step off from the platform of the lift. He then lost his balance and caught his left foot on the step and fell backwards hitting his head on the concrete wall and falling on his tail bone. Hurting his tail bone, lower back, neck and groin area. The fall was 23" from the step to the ground and 69" to the concrete wall. When I got on seen [sic] I called 911. There was [sic] no witnesses he was working by himself."

(NYSCEF Doc No. 347, Rudkin affirmation in opposition to plaintiff's motion, exhibit B at 2).

In a Safety Group, Ltd. investigation report dated August 5, 2015, Elmer Ray Dawson wrote that:

> "Injured Worker stated while exiting scissor lift he tripped on the toe board of the lift. At the time of the inspection, scissor lift was fully retracted and in a parked position. Worker fell approx. 3 ft. to the ground. EMT arrived @ approx. 9:55 A.M. Worker was taken to unknown area hospital injuries unknown. Worker was conscious and talking."

(NYSCEF Doc No. 348, Rudkin affirmation in opposition to plaintiff's motion, exhibit C at 1).

An ambulance call report states that plaintiff "was climbing down construction lift when he fell backwards hitting his head on wall and fell to floor landing . . . ." (NYSCEF Doc No. 273, Gordon affirmation in support, exhibit N at 3).

DISCUSSION

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (*Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012] [internal quotation marks and citation omitted]). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment" (*id.*). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiff's Motion for Partial Summary Judgment Under Labor Law §§ 240 (1) and 241 (6) (Motion Sequence Number 004)

1. **Labor Law § 240 (1)**

Plaintiff moves for partial summary as to liability under Labor Law § 240 (1). Plaintiff argues that he was not given a proper safety device for his work. According to plaintiff,

defendants were aware that other trades were using Apple's scissor lifts and leaving them greasy and strewn with debris.

In opposition, Albee and ZDG argue that plaintiff's motion should be denied because there are issues of fact as to how his accident occurred. Albee and ZDG contend that several witnesses testified that plaintiff never mentioned the existence of grease on the scissor lift. In addition, Albee and ZDG point out that the ambulance call report, site safety report, and accident report present a version of how the accident occurred that contradicts plaintiff's account.

Century 21 argues in opposition to plaintiff's motion that plaintiff's accident was unwitnessed and joins Albee and ZDG in arguing that there is ample evidence as to how the accident happened that contradicts his account. Century 21 argues that several witnesses testified that there was no slippery substance on the lift after the accident. In addition, plaintiff told Asch that he fell when he caught his foot and lost his balance. Moreover, Century 21 points out that scissor lift did not break or collapse.

GMA argues, in opposition, that there is no evidence that the scissor lift was defective or unstable. As argued by GMA, plaintiff's accident was not foreseeable given the nature of the work being performed. Furthermore, the oil or grease was a distinct hazard unrelated to the risks of working at an elevation.

DGC also argues in opposition that plaintiff fell because his foot got caught on the step while he descended the scissor lift. Further, DGC argues that there is no evidence that any safety device could have prevented his fall.

Labor Law § 240 (1), commonly known as the Scaffold Law, provides, in relevant part:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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."

The purpose of the statute is to protect against "gravity-related accidents [such] as falling from a height" (*Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 501 [1993]). "[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

To obtain partial summary judgment on the issue of liability under Labor Law § 240 (1), the plaintiff must demonstrate, prima facie, (1) a violation of the statute, and (2) that such violation was a proximate cause of the accident (*see Robinson v East Med. Ctr. LP*, 6 NY3d 550, 554 [2006]). A worker at a construction site is entitled to judgment as a matter of law under Labor Law § 240 (1) where "the furnished protective devices fail to prevent a foreseeable external force from causing a worker to fall from an elevation" (*Cruz v Turner Constr. Co.*, 279 AD2d 322, 322 [1st Dept 2001]; *see also Spaulding v Metropolitan Life Ins. Co.*, 271 AD2d 316, 316 [1st Dept 2000] [plaintiff was knocked off a ladder when it sprang back from box and struck him; "(t)he ladder plaintiff used was manifestly inadequate to protect him from this foreseeable and inherent elevation-related risk of the work in which he was engaged"]).

In *Cruz, supra*, a case relied upon by plaintiff, an electrician fell from a ladder when he slipped on lubricating compound (*Cruz*, 279 AD2d at 322). The compound was being used to assist in pulling wires through piping and had dripped onto the rungs of the ladder (*id.*). The Appellate Division, First Department held that the plaintiff was entitled to partial summary judgment under section 240 (1), noting that "even though the ladder itself was not structurally defective, as a matter of law it became defective inasmuch as it was clearly inadequate to protect

plaintiff from the foreseeable risk of being caused to fall from while he was performing his job" (*id.* at 323).

However, in *Fernicola v Benenson Capital Co.* (252 AD2d 567, 567 [2d Dept 1998]), where the injured plaintiff slipped on grease on the rung of a scaffold as he was descending it, the Court held that the plaintiff was not entitled to summary judgment as to liability on his Labor Law § 240 (1) cause of action. The Court held that "[t]he cause of the accident was apparently a foreign substance which found its way onto the rungs of the scaffold. Accordingly, the plaintiffs did not establish as a matter of law that [the injured plaintiff] was not furnished with 'proper protection'" (*id.* at 568, quoting *Romano v Hotel Carlyle Owners Corp.*, 226 AD2d 441, 442 [2d Dept 1996]).

Here, based upon the papers submitted and the oral argument, the court finds that plaintiff has failed to demonstrate prima facie entitlement to summary judgment under Labor Law § 240 (1). According to plaintiff's testimony, the scissor lift was not defective and did not move, collapse or otherwise fail to perform its function of supporting plaintiff and his materials (NYSCEF Doc No. 174, plaintiff tr at 120). As the court ruled at oral argument, it is for the jury to determine whether the scissor lift provided proper protection to plaintiff (NYSCEF Doc No. 494, oral argument tr at 23-24). Moreover, there are questions of fact as to whether the presence of oil or grease on the lift was foreseeable given the nature of plaintiff's work. Plaintiff's supervisor testified that Apple's work did not involve oil or grease (NYSCEF Doc No. 177, Blanco tr at 79).

As such, the branch of plaintiff's motion seeking summary judgment on the issue of liability under section 240 (1) is denied (NYSCEF Doc No. 175, oral argument tr at 24).

2. Labor Law § 241 (6)

Labor Law § 241 (6) "imposes a *nondelegable* duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety'" to construction workers (*Rizzuto v L.A. Wenger Constr. Co.*, 91 NY2d 343, 348 [1998] [emphasis in original]). To recover under Labor Law § 241 (6), a plaintiff must plead and prove the violation of a concrete provision of the New York State Industrial Code, containing "specific, positive commands," rather than a provision reiterating common-law safety standards (*Ross*, 81 NY2d at 503). In addition to establishing the violation of a specific and applicable regulation, the plaintiff must also show that the violation was a proximate cause of the accident (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012]). "Contractors and owners are liable under the statute whether or not they supervise or control the work" (*Mugavero v Windows By Hart, Inc.*, 69 AD3d 694, 695 [2d Dept 2010]).

Plaintiff moves for partial summary judgment under Labor Law § 241 (6) based upon a violation of 12 NYCRR § 23-1.7 (d).[1]

Industrial Code § 23-1.7 (d) provides as follows:

> "(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"

(12 NYCRR 23-1.7 [d]).

[1] Although plaintiff withdrew the part of his motion based upon 12 NYCRR § 23-1.7 (f) at oral argument (NYSCEF Doc No. 494, oral argument tr at 10), he only moved for partial summary judgment under Labor Law § 241 (6) based upon a violation of 12 NYCRR 23-1.7 (d) (NYSCEF Doc Nos. 189, 295).

The Court of Appeals has held that section 23-1.7 (d) is sufficiently specific to result in liability pursuant to Labor Law § 241 (6) (*see Rizzuto*, 91 NY2d at 351; *see also Jennings v Lefcon Partnership*, 250 AD2d 388, 389 [1st Dept 1998], *lv denied* 92 NY2d 819 [1999]).

Here, based on the papers submitted and the oral argument, the court finds that there are questions of fact as to whether plaintiff slipped on grease on the scaffold (*cf. Velasquez v 795 Columbus LLC*, 103 AD3d 541, 541-542 [1st Dept 2013]). As the court ruled at oral argument, there are issues of fact as to whether section 23-1.7 (d) was violated and whether the violation was a proximate cause of the accident (NYSCEF Doc No. 494, oral argument tr at 24).

Therefore, the branch of plaintiff's motion seeking summary judgment as to liability under section 241 (6) is also denied (*id.*).

Albee and ZDG's Motion for Summary Judgment Dismissing the Complaint and Cross Claims for Indemnification and Contribution Against Them (Motion Sequence Number 007)

1. Labor Law § 240 (1)

Albee and ZDG argue that section 240 (1) does not apply to them, because they did not contract for the work. In addition, Albee and ZDG contend that plaintiff's accident resulted from a separate hazard unrelated to the need for the scissor lift. In reply, Albee and ZDG maintain that Albee was not an owner within the meaning of the Labor Law.

At the outset, Albee and ZDG have failed to establish that they cannot be liable under Labor Law § 240 (1) because they did not contract for the work. Albee and ZDG have not cited any cases in support of this argument. As noted above, the statutory duties apply to "[a]ll contractors and owners and their agents, *except owners of one and two-family dwellings who contract for but do not direct or control the work* . . ." (Labor Law § 240 [1] [emphasis added]).

The language relied upon by Albee and ZDG deals with the statutory exemption for one and two-family dwellings and is inapplicable to the facts of this case.

The court has not considered Albee and ZDG's argument, made for the first time in reply, that Albee was not an owner. "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]).

Moreover, as noted by GMA, in response to plaintiff's notice to admit, Albee and ZDG admitted that Albee was the owner of the premises, including the fourth floor, on the date of the accident (NYSCEF Doc No. 329, ¶¶ 1, 2). A defendant's ownership of the premises is the proper subject of a notice to admit (*see Villa v New York City Hous. Auth.*, 107 AD2d 619, 620 [1st Dept 1985] ["There is no reason why defendant should not be called upon to admit such ownership"]). "In cases imposing liability on a property owner who did not contract for the work performed on the property, [the Court of Appeals] has required 'some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest'" (*Scaparo v Village of Ilion*, 13 NY3d 864, 866 [2009], quoting *Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 51 [2004]). In this case, there is such a nexus. Albee, as landlord, entered into a lease agreement with Century 21 as tenant for the premises (NYSCEF Doc No. 330). The lease agreement contains Schedule A entitled "Century 21 – Landlord Work Letter," which delineated all the work for the build-out of the premises (*id.* at 191).

As such, the parties would be prejudiced by the court's consideration of this argument now based upon the arguments made in the original motion and that the parties have been lulled into a false sense of security as to that Albee was an owner.

Albee and ZDG have also failed to establish that ZDG cannot be held liable under the statute. A construction manager may be held liable under section 240 (1) where "it had the ability to control the activity which brought about the injury" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *see also Castellon v Reinsberg*, 82 AD3d 635, 636 [1st Dept 2011]). Albee and ZDG did not submit ZDG's contract with Albee in their moving papers. As such, Albee and ZDG have failed to show prima facie entitlement to judgment as a matter of law on this basis.

In addition, Albee and ZDG have failed to demonstrate prima facie entitlement to summary judgment dismissing plaintiff's Labor Law § 240 (1) claim on the ground that the statute does not apply. There are genuine issues of material fact as to whether the scissor lift provided proper protection to plaintiff (NYSCEF Doc No. 494, oral argument tr at 60-61). The court finds the cases cited distinguishable. Based upon the arguments presented, the court finds that movants have failed to show prima facie that plaintiff's injury did not arise from a separate hazard unrelated to an elevation-related risk (*cf. Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 99 [2015], *rearg denied* 25 NY3d 1195 [2015] [holding that section 240 did not apply where plaintiff's accident was "plainly caused by a separate hazard--ice--unrelated to any elevation risk"]; *Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 916 [1999] ["plaintiff's injury resulted from a separate hazard wholly unrelated to the danger that brought about the need for the ladder in the first instance—an unnoticed or concealed object on the floor"]; *Serrano v Consolidated Edison Co. of N.Y. Inc.*, 146 AD3d 405, 406 [1st Dept 2017], *lv dismissed* 29 NY3d 1118 [2017] [plaintiff slipped and fell on scaffold platform]). Plaintiff testified that he fell three feet to the ground while alighting from the scissor lift (NYSCEF Doc No. 260, plaintiff tr at 108, 109).

2. Labor Law § 241 (6)

Albee and ZDG move for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim, arguing that plaintiff has failed to identify a specific or applicable Industrial Code section. In addition, Albee and ZDG contend that Labor Law § 241 (6) does not apply to them, because they did not contract for the work. As the court has already found that Albee and ZDG have failed to establish that they are not proper labor law defendants on this basis, the court must now consider whether Albee and ZDG have demonstrated that the provisions relied upon by plaintiff are inapplicable.

At oral argument, plaintiff conceded that the only relevant Industrial Code sections are 12 NYCRR § 23-1.7 (d), 12 NYCRR § 23-1.7 (e) (2), and 12 § NYCRR 23-1.7 (f) (NYSCEF Doc No. 494, oral argument tr at 6). Therefore, the court shall only consider these three sections in opposition to defendants' motions (*see Cardenas v One State St., LLC*, 68 AD3d 436, 438 [1st Dept 2009] ["Plaintiff abandoned any reliance on the various provisions of the Industrial Code cited in his bill of particulars by failing to address them either in the motion court or on appeal"]).

12 NYCRR § 23-1.7 (d)

As stated previously, there are issues of fact as to whether plaintiff slipped on grease on the scissor lift or caught his foot on the scissor lift (*see* 12 NYCRR § 23-1.7 [d]). Consequently, as the court ruled at oral argument, there are questions of fact as to whether Industrial Code § 23-1.7 (d) was violated and whether the violation was a proximate cause of plaintiff's accident (NYSCEF Doc No. 494, oral argument tr at 24).

12 NYCRR 23-1.7 (e) (2)

Plaintiff concedes that he did not specifically plead a violation of 12 NYCRR 23-1.7 (e) (2) in the bills of particulars (NYSCEF Doc No. 410, plaintiff's memorandum of law in opposition at 12).[2]

As noted by the Court in *Kelleir v Supreme Indus. Park* (293 AD2d 513, 513-514 [2d Dept 2002]),

> "[a]lthough a plaintiff asserting a Labor Law § 241 (6) cause of action must allege a violation of a specific and concrete provision of the Industrial Code, a failure to identify the Code provision in the complaint or bill of particulars is not fatal to such a claim. Thus, the plaintiffs' belated allegation of a violation of 12 NYCRR 23-1.8 (a) involved no new factual allegations, raised no new theories of liability, and caused no prejudice to the defendants. The plaintiffs' failure to seek leave of court to supplement their bill of particulars is not fatal to their Labor Law § 241 (6) claim"

(citations omitted; *see also Alarcon v UCAN White Plains Hous. Dev. Fund Corp.*, 100 AD3d 431, 432 [1st Dept 2012]; *Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904, 906 [1st Dept 2011]; *Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 233 [1st Dept 2000]).

Prejudice requires "some indication that the [party] has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007] [internal quotation marks and citation omitted]).

The court shall consider plaintiff's allegation of a violation of section 23-1.7 (e) (2). This allegation does not involve any new factual allegations or new theories of liability. In addition, Albee and ZDG cannot reasonably claim any prejudice considering plaintiff's deposition testimony.

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[2] Plaintiff did not concede that section 23-1.7 (e) (2) is inapplicable at oral argument. Plaintiff's counsel stated that, "I, of course, will defer to the court" (NYSCEF Doc No. 494, oral argument tr at 11).

Industrial Code § 23-1.7 (e) governs "Tripping and other hazards." It provides in subdivision (2), titled "Working areas," that "[t]he parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed" (12 NYCRR 23-1.7 [e] [2]).

"12 NYCRR § 23–1.7 (e) (2) is sufficiently specific to sustain a claim under Labor Law § 241 (6)" (*Licata v AB Green Gansevoort, LLC*, 158 AD3d 487, 489 [1st Dept 2018]). "Whether the accident is characterized as a slip and fall or trip and fall is not dispositive as to the applicability of" section 23-1.7 (e) (2) (*Lois v Flintlock Constr. Servs., LLC*, 137 AD3d 446, 447-448 [1st Dept 2016]).

Here, based on the papers and the oral argument, the court finds that there are genuine issues of material fact as to whether section 23-1.7 (e) (2) was violated and whether the violation was a cause of plaintiff's accident (*see Beltrone v City of New York*, 299 AD2d 306, 308 [2d Dept 2002] ["defendants also failed to make a prima facie showing that the oil which accumulated on the deck of the crane was not 'debris' under section 23-1.7 (e) (2)"]). Specifically, there are issues of fact as to whether the oil constitutes "debris" within the meaning of the regulation. According to plaintiff's version of the accident, "[t]he oil was not installed, applied, or intentionally placed" on the scissor lift (*id.*). Plaintiff claims that the oil or grease was left by other trades. Moreover, the oil was not consistent with the work being performed at the time of his injury (*see id.*).

12 NYCRR § 23-1.7 (f)

Contrary to Albee and ZDG's contention, plaintiff's bills of particulars allege a violation of 12 NYCRR § 23-1.7 (f) (NYSCEF Doc No. 288 at 72).

Section 23-1.7 (f), entitled "Vertical passage," provides that "Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided" (12 NYCRR § 23-1.7 [f]).

Section 23-1.7 (f) has been held to be sufficiently specific to support a section 241 (6) claim (*Miano v Skyline New Homes Corp.*, 37 AD3d 563, 565 [2d Dept 2007]). Nevertheless, here, the court finds that section 23-1.7 (f) is inapplicable to the facts of this case because plaintiff was not attempting to access another working level within the meaning of section 23-1.7 (f) (*see Miranda v NYC Partnership Hous. Dev. Fund Co., Inc.*, 122 AD3d 445, 446 [1st Dept 2014]; *Torkel v NYU Hosps. Ctr.*, 63 AD3d 587, 590 [1st Dept 2009]; *Lavore v Kir Munsey 020 LLC*, 40 AD3d 711, 711 [2d Dept 2007], *lv denied* 10 NY3d 701 [2008]).

As such, the court finds that plaintiff has a valid Labor Law § 241 (6) claim against Albee and ZDG predicated on violations of 12 NYCRR § 23-1.7 (d) and 12 NYCRR § 23-1.7 (e) (2).

3. Labor Law § 200 and Common-Law Negligence

Plaintiff consented to the dismissal of his section 200 and common-law negligence claims as against Albee and ZDG (NYSCEF Doc No. 494, oral argument tr at 29). As such, these claims are dismissed.

4. Cross Claims for Indemnification and Contribution Against Albee and ZDG

"To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]).

"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" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003], *lv dismissed* 100 NY2d 614 [2003] [internal quotation marks and citation omitted]).

Plaintiff has withdrawn his Labor Law § 200 and common-law negligence claims against Albee and ZDG. There is no basis for the common-law indemnification and contribution claims against Albee and ZDG. First, there is no issue of fact as to Albee and ZDG's negligence. Second, there is no evidence that Albee or ZDG supervised plaintiff's or A&F's work (NYSCEF Doc No. 260, plaintiff tr at 59; NYSCEF Doc No. 268, Muth tr at 82-83). In addition, none of the defendants argue that Albee and ZDG are obligated to contractually indemnify them. As such, all cross claims against Albee and ZDG are dismissed.

GMA's Motion for Summary Judgment (Motion Sequence Number 005)

1. **Whether GMA is a Responsible Party Under the Labor Law**

GMA argues that it cannot be held liable under the Labor Law because it was not an owner, general contractor or agent. It is undisputed that GMA was not an owner or a general contractor. As such, the court must consider whether GMA qualifies as a statutory agent.

> "Although sections 240 and 241 now make nondelegable the duty of an owner or general contractor to conform to the requirement of those sections, the duties themselves may in fact be delegated. When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241"

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981] [citations omitted]; *see also Walls*, 4 NY3d at 864 ["unless a defendant has supervisory control and authority over the work

being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law"]).

To hold a subcontractor liable as a statutory agent, "the subcontractor must have been 'delegated the supervision and control either over the specific work area involved or the work which [gave] rise to the injury'" (*Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 193 [1st Dept 2011], quoting *Headen v Progressive Painting Corp.*, 160 AD2d 319, 320 [1st Dept 1990]). "[T]he determinative factor on the issue of control is not whether a subcontractor furnishes equipment but whether [it] has control of the work being done and the authority to insist that proper safety practices be followed" (*Everitt v Nozkowski*, 285 AD2d 442, 443-444 [2d Dept 2001]).

GMA contends that it did not have the authority for overall safety on the project. GMA points out that the Safety Group was hired for overall safety on the project. Additionally, GMA argues that its subcontract does not state or imply that DGC was delegating its responsibilities for supervising and controlling the work.

Here, the court finds based on the parties' submissions that GMA had contractual authority to supervise and control the HVAC work pursuant to its contract (NYSCEF Doc No. 494, oral argument tr at 26). Under its subcontract, GMA was required to provide "coordination, . . . equipment . . . and all miscellaneous appurtenances required to perform the HVAC work in accordance with the specifications, design documents, and local building code" (NYSCEF Doc No. 207 at 17). In addition, GMA's witness testified that she was required to ensure that subcontractors provided safe equipment for their employees (NYSCEF Doc No. 200, Caggiano tr at 49). GMA demonstrated this authority by subcontracting out the mechanical work to Apple (NYSCEF Doc No. 310). "[O]nce a subcontractor qualifies as a statutory agent, it may not

escape liability by . . . delegating that work to another entity" (*Nascimento*, 86 AD3d at 195). Whether GMA supervised plaintiff is immaterial. As such, GMA is a proper labor law defendant to the extent that it is a statutory agent pursuant to its subcontract (*see* oral argument tr at 26 lines 6–8).

2. Labor Law § 240 (1)

GMA contends, citing *Fernicola*, that plaintiff's section 240 (1) claim should be dismissed because the scissor lift was not defective and did not move or collapse. GMA further contends that the oil and grease were separate and distinct hazards from the risk that brought about the need for the scissor lift.

Based upon the parties' submissions, the court finds that there is a genuine issue of material fact as to whether the scissor lift provided proper protection to plaintiff (*see Romano*, 226 AD2d at 442). Moreover, GMA has failed to demonstrate that plaintiff's injury resulted, as a matter of law, from a distinct hazard unrelated to the need for the scissor lift. Plaintiff fell from a height of about three feet when getting down from the scissor lift (NYSCEF Doc No. 194, plaintiff tr at 108, 109, 120).

As such, the branch of GMA's motion seeking dismissal of plaintiff's Labor Law § 240 (1) claim is denied (NYSCEF Doc No. 494, oral argument tr at 24–25).

3. Labor Law § 241 (6)

GMA has failed to demonstrate that section 23-1.7 (d) is inapplicable, was not violated, and was not a proximate cause of plaintiff's accident. As noted above, there are issues of fact as to whether section 23-1.7 (d) was violated and whether the violation was a proximate cause of the accident (*id.*).

For the reasons set forth above, section 23-1.7 (f) is inapplicable.

GMA argues, in reply, that the court should not consider section 23-1.7 (e) (2) because plaintiff first identified this provision in opposition to its motion. However, the court finds this argument to be without merit. As noted above, there are no new factual allegations. GMA cannot reasonably claim any prejudice in light of plaintiff's deposition testimony that he slipped on an area of grease on the scissor lift (NYSCEF Doc No. 194, plaintiff tr at 120). Additionally, as indicated above, there are questions of fact as to whether section 23-1.7 (e) (2) was violated and whether the violation was a proximate cause of the accident.

4. Labor Law § 200 and Common-Law Negligence

Labor Law § 200 (1) provides 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. The board may make rules to carry into effect the provisions of this section."

It is well settled that Labor Law § 200 is a codification of the common-law duty imposed on owners and general contractors to maintain a safe work site (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). "[A]n implicit precondition to this duty is that the party to be charged with that obligation have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Rizzuto*, 91 NY2d at 352 [internal quotation marks and citation omitted]). "Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Cappabianca*, 99 AD3d at 143-144).

"Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work" (*id.* at 144 [internal quotation marks and citation omitted]).

By contrast, where the accident was caused by a dangerous or defective premises condition, "a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]). Similarly, "a general contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition" (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009] [internal quotation marks and citation omitted]).

It is well-settled that "the duty to provide a safe place to work is not breached when the injury arises out of a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work" (*Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d 136, 145 [1965], *rearg denied* 16 NY2d 883 [1965]). In *Persichilli*, the Court of Appeals reasoned that, although a subcontractor must furnish safe ladders and scaffolds to its employees, a subcontractor's failure to provide safe appliances does not render the "premises" unsafe or defective (*id.* at 146).

Here, as previously ruled on by the court at oral argument, plaintiff's accident arose out of the manner and means of the work, not a dangerous condition inherent in the premises (NYSCEF Doc No. 494, oral argument tr at 27-28).

Although GMA argued at oral argument that it did not exercise supervision over the manner and means of the work (*id.* at 27, 33), GMA did not make this argument in its motion papers, instead presenting this argument for the first time at oral argument (*see generally Dannasch*, 184 AD2d at 417). The court declines to consider this argument, as it unfairly surprises and prejudices the other parties. As such, GMA has failed to show prima facie that it did not actually exercise supervision and control over Apple's or A&F's work and is not entitled to dismissal of the section 200 and common-law negligence claims against it.

5. Cross Claims for Common-Law Indemnification and Contribution Against GMA

As GMA has failed to demonstrate entitlement to dismissal of plaintiff's Labor Law § 200 and common-law negligence claims, it follows that GMA has failed to show that it was not negligent. As such, the branch of GMA's motion seeking dismissal of all cross claims against it is denied.

6. GMA's Third-Party Claim for Contractual Indemnification Against Apple

GMA moves for summary judgment on its contractual indemnification claim against Apple, which is based upon the indemnification provision attached to Apple's purchase order, which provides as follows:

> "To the fullest extent permitted by law, Apple Sheet Metal ('Subcontractor') agrees to defend, indemnify and hold harmless GMA Mechanical Corp. and its/their officers, directors, agents and employees from and against any and all claims, suits, liens, judgments, damages, losses and expenses including reasonable legal fees and costs arising in whole or in part and in any manner from acts, omissions, breach or default of Subcontractor, its officers, directors, agents, employees and subcontractors"

(NYSCEF Doc No. 208, Donnelly affirmation in support, exhibit O at 2).

In opposition, Apple argues that the indemnification provision is invalid and ambiguous because it does not refer to any work at the jobsite.

"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]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]).

To establish entitlement to full contractual indemnification, "the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). A court may also grant conditional indemnification, which "serves the interest of justice and judicial economy in affording the indemnitee the earliest possible determination as to the extent to which he may expect to be reimbursed" (*Hong-Bao Ren v Gioia St. Marks, LLC*, 163 AD3d 494, 496-497 [1st Dept 2018] [internal quotation marks and citation omitted]). The First Department has ruled that an award of conditional indemnification is warranted where the indemnification provision does not purport to indemnify an indemnitee for his or her own negligence, even where there are issues of fact as to an indemnitee's active negligence (*see Cerverizzo v City of New York*, 116 AD3d 469, 472 [1st Dept 2014]; *Hughey v RHM-88, LLC*, 77 AD3d 520, 522-523 [1st Dept 2010]).

"[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Whether or not an agreement is ambiguous is an issue of law for the court

(*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). The proper inquiry in determining whether an agreement is ambiguous is whether the agreement is reasonably susceptible to more than one interpretation (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]; *Chiusano v Chiusano*, 55 AD3d 425, 425 [1st Dept 2008]).

Contrary to Apple's contention, the indemnification provision is not ambiguous, even though it does not refer to the site or its work. The provision has a definite and precise meaning for which there is no reasonable basis for a difference of opinion. Moreover, the intention to indemnify is clear from the language and purpose of the agreement. Apple agreed to defend, indemnify, and hold harmless GMA for claims arising in whole or in part from its acts, omissions or defaults. It is undisputed that plaintiff was Apple's employee and was injured in the course of his employment with Apple (NYSCEF Doc No. 194, plaintiff tr at 35). Therefore, the indemnification provision is triggered, since plaintiff's accident arose from Apple's acts or omissions (*see Masciotta v Morse Diesel Intl.*, 303 AD2d 309, 310 [1st Dept 2003]). Accordingly, even though there are issues of fact as to GMA's negligence, GMA is entitled to conditional summary judgment on its third-party claim for contractual indemnification against Apple.

Albee and ZDG's Motion for Summary Judgment on their Cross Claims (Motion Sequence Number 006)

1. Contractual Indemnification Against GMA

Albee and ZDG move for contractual indemnification from GMA based upon the indemnification provision contained within the hold harmless/access agreement between GMA and DGC, which provides:

> "To the fullest extent permitted by law, the Sub-Contractor [GMA] shall hold harmless, defend (at Owner's option), and indemnify the Owner, Construction Manager (ACRS II LLC) and such other entities as provided in the attached Exhibit

> 'X' ('Additional Insured'), and each of the respective agents, officers, directors, managers, partners, officials, members, shareholders, representatives, successors, employees, permitted assigns and trustees from and against claims, damages, losses and expenses, including but not limited to reasonable attorneys' fees and costs, arising out of or resulting from performance of the Sub-Contractor's Partial Work, to the extent caused by the acts or omissions of the Sub-Contractor, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expenses is caused in part by a party indemnified hereunder"

(NYSCEF Doc No. 236, Gordon affirmation in support, exhibit M at 1-2).

Albee and ZDG argue that they are entitled to contractual indemnification from GMA because Apple or A&F caused the accident. In addition, Albee and ZDG contend that ZDG is a "representative" of Albee.

In response, GMA contends that its liability has not been determined yet. GMA maintains that it did not cause or create any dangerous condition, and that it did not have actual or constructive notice that the oil or grease was on the scissor lift. Further, ZDG is not identified as the construction manager in the agreement.

Here, GMA is required to defend and indemnify "[Albee][3] . . . and each of their respective agents . . . representatives . . . from and against claims, damages, losses and expenses, arising out of resulting from performance of [GMA's] Partial Work, to the extent caused by the acts or omissions of [GMA], or anyone directly or indirectly employed by them or anyone for whose acts they may be liable" (*id.* at 1-2, 8). Plaintiff's accident arose out of GMA's contracted work. However, Albee and ZDG have not demonstrated that ZDG, the construction manager, qualifies as an indemnitee, i.e., that it is an "agent" or "representative" of Albee (*see Tonking v Port Auth. of New York & New Jersey*, 3 NY3d 486, 489-490 [2004] [construction manager did

[3] Albee is one of the entities listed in Exhibit X (NYSCEF Doc No. 236, Gordon affirmation in support, exhibit M at 8).

not qualify as owner's "agent" under indemnification clause]; *Hooper*, 74 NY2d at 491-492 ["The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances"]). As noted above, plaintiff's Labor Law § 200 and common-law negligence claims against Albee and ZDG have been dismissed. Accordingly, Albee is entitled to contractual indemnification, including reasonable attorneys' fees, from GMA.

2. Contractual Indemnification Against Century 21

Albee and ZDG also move for contractual indemnification from Century 21 based upon the lease agreement's indemnification provision, which provides:

> "Tenant's Indemnity. Tenant agrees to indemnify and hold Landlord, its officers, directors, stockholders, beneficiaries, partners, representatives, agents, investors, members, employees, Superior Landlords and Mortgagees harmless from and against any and all losses, damages, claims, suits, actions, judgments and costs (including reasonable attorneys' fees and expenses) *arising out of any injury to or death of persons or damage to property in or about the Premises directly caused by the intentional or negligent acts or omissions of Tenant or its employees, agents or contractors*, except to the extent covered by the waiver of subrogation provision or endorsement in Landlord's insurance policies for the Building. As a condition to Tenant's indemnification obligations hereunder, Landlord shall provide to Tenant reasonable prompt notice of any claim for which indemnification is sought. Tenant shall have the right to settle any such claim on any terms acceptable to Tenant, provided that such settlement does not impose any obligation on Landlord or adversely affect any rights or interests of Landlord or its business. The indemnification contained in this Section 28A shall include reasonable attorneys' fees and disbursements incurred by Landlord arising due to a breach of Tenant's duty to defend"

(NYSCEF Doc No. 239, Gordon affirmation in support, exhibit P at 83 [emphasis supplied]).

Albee and ZDG argue, in seeking indemnification from Century 21, that plaintiff slipped on oil or grease left by contractors hired by GMA or DGC. Specifically, Albee and ZDG point out that DGC was Century 21's contractor.

Century 21 maintains that it had no contract with ZDG, and there is no evidence that ZDG was an intended third-party beneficiary of the lease agreement. In addition, Century 21 argues that the indemnification provision expressly limits its indemnification obligation to Albee to incidents arising from the negligence of Century 21 or its "contractors," not subcontractors.

"Where, as here, a commercial lease negotiated between sophisticated business entities contains an insurance provision allocating the risk of liability to a third party, the indemnification clause is valid and enforceable and does not violate the General Obligations Law" (*Gary v Flair Beverage Corp.*, 60 AD3d 413, 414-415 [1st Dept 2009]).

Initially, Albee and ZDG have failed to demonstrate that ZDG qualifies as an indemnitee pursuant to the lease agreement. However, contrary to Century 21's argument, the indemnification provision makes clear that the parties intended Century 21 to indemnify Albee for claims arising out of any injury directly caused by the negligent acts or omissions of those performing work for Century 21, i.e., its contractors and subcontractors. However, there are questions of fact as to the negligence of DGC, Apple, and A&F. Therefore, Albee is entitled to conditional contractual indemnification from Century 21 (*see id.*; *see also* NYSCEF Doc No. 494, oral argument tr at 65).

3. Breach of Contract Claims Against GMA and Century 21

Albee and ZDG also move for summary judgment on their breach of contract claim against GMA.

The hold harmless/access agreement required GMA to procure the following insurance:

"**Commercial General Liability (CGL) Coverage**

A. Limits of Liability not less than:
$1,000,000 combined single limit for bodily injury, personal injury or property damage per occurrence;
$2,000,000 aggregate; and
$2,000,000 Products & Completed Operations"

(NYSCEF Doc No. 236, Gordon affirmation in support, exhibit M at 4).

Pursuant to the additional insured list annexed as Exhibit X to that agreement, GMA was required to name "Albee Development LLC ATIMA" as an additional insured (*id.* at 8). Nevertheless, the access agreement did not require GMA to procure insurance for ZDG's benefit.

In response to Albee and ZDG's motion, GMA has not submitted an insurance policy demonstrating that it complied with the above provisions (*see Crespo v Triad, Inc.*, 294 AD2d 145, 148 [1st Dept 2002] ["The Owners were properly granted partial summary judgment on their cross claim against [lessee] for breach of contract for failure to procure insurance where the lease between them required each to procure insurance naming the other as an additional insured, and, in response to the motion, [lessee] failed to tender an insurance policy"]). Accordingly, Albee is entitled to partial summary judgment on its breach of contract claim against GMA.

Albee and ZDG also move for summary judgment on their breach of contract claim against Century 21.

The lease agreement provides the following provision concerning insurance:

"F. Miscellaneous Conditions.

> (iv) During the course of Tenant's Initial Work and subsequent Alterations, Tenant (and its general contractor) will carry or cause to be carried . . . Comprehensive General Liability (including property damage coverage) and such other insurance as may be required by law to be carried by Tenant or required by Article 8 hereof in connection with such construction, and such insurance (except the Worker's Compensation Insurance) shall name Landlord, Landlord's managing agent, Superior Landlord(s), and Mortgagees and such other parties as Landlord shall designate, as additional insureds"

(NYSCEF Doc No. 239, Gordon affirmation in support, exhibit P at 42).

In addition, article 8 of the lease provides:

"8. INSURANCE.

A. Tenant's Insurance. Tenant shall obtain and thereafter maintain during the Term, the following:

(i) A policy of commercial general liability and property damage insurance on an occurrence basis, with a broad form contractual liability endorsement. The minimum limits of liability shall be a combined single limit with respect to each occurrence in an amount of not less than $5,000,000 per occurrence/$5,000,000 general aggregate for injury (or death) and damage to property, which amount may be satisfied with a primary commercial general liability policy of not less than $1,000,000 per occurrence/$2,000,000 general aggregate and an excess (or umbrella) liability policy affording coverage, at least as broad as that afforded by the primary commercial general liability policy, in an amount not less than the difference between $5,000,000 and the amount of the primary policy. Such insurance may be carried under a blanket policy covering the Premises and other locations of Tenant, provided such a policy contains an endorsement naming the Landlord, Landlord's mortgagee, Superior Landlord, managing agent, and any other party reasonably requested by Landlord, as additional insureds"

(*id.* at 53).

In opposition to Albee and ZDG's motion, Century 21 submitted an insurance policy, which contains an endorsement adding entities as additional insureds "as per written contract or agreement" (NYSCEF Doc No. 454, Rudkin affirmation in support, exhibit W, form CG 20 11 01 96). In reply, Albee and ZDG do not contend that the policy failed to comply with the above provisions. Accordingly, the branch of Albee and ZDG's motion on its breach of contract claim against Century 21 is denied.

4. Common-Law Indemnification

Albee and ZDG seek common-law indemnification from GMA, Century 21, DGC, and A&F. The motion is premature. Albee and ZDG have failed to demonstrate at this time that GMA, Century 21, DGC, and A&F were negligent or actually exercised supervision over the injury-producing work (*see Naughton*, 94 AD3d at 10; *see also Reilly v DiGiacomo & Son*, 261 AD2d 318, 318 [1st Dept 1999] [owners' motion for common-law indemnification was properly denied because their evidence did not establish, as matter of law, that the general contractor was "either negligent or exclusively supervised and controlled plaintiff's work site"]). Albee and ZDG may renew this argument at the time of trial. As such, the branch of Albee and ZDG's motion requesting common-law indemnification is denied (NYSCEF Doc No. 494, oral argument tr at 69).

Century 21's Motion for Summary Judgment (Motion Sequence Number 001)

1. Labor Law § 200 and Common-Law Negligence

Plaintiff consented to the dismissal of his Labor Law § 200 and common-law negligence claims as against Century 21 (NYSCEF Doc No. 494, oral argument tr at 29-30). As such, those claims are dismissed.

2. Century 21's Contractual Indemnification Claim Against DGC

Century 21 moves for contractual indemnification from DGC pursuant to the indemnification provision in the contract between them, which provides as follows:

> "To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner . . . form [sic] and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury . . . *but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable*"

(NYSCEF Doc No. 448, Rudkin reply affirmation, exhibit A at 38 [emphasis supplied]).

Here, as noted above, plaintiff consented to the dismissal of his section 200 and common-law negligence claims against Century 21. Thus, while there is no issue of fact as to Century 21's negligence, it has not yet been established that plaintiff's accident was caused by the negligent acts or omissions of DGC or any of its subcontractors or anyone directly or indirectly employed by them. Moreover, at oral argument, DGC agreed that Century 21 was entitled to contractual indemnification from it conditionally (NYSCEF Doc No. 494, oral argument tr at 43-44). Therefore, Century 21 is entitled to conditional contractual indemnification against DGC (*see Conrad v 105 St. Assoc., LLC*, 55 AD3d 461, 461-462 [1st Dept 2008]).

3. Century 21's Contractual Indemnification Claim Against A&F

Century 21 also moves for contractual indemnification against A&F pursuant to the indemnification provision contained within A&F's subcontract with DGC, which states:

> "To the fullest extent permitted by laws of the State of New York, the Subcontractor agrees to indemnify, defend and hold harmless DGC Capital Contracting Corp., *all applicable additional indemnitees* . . . from and against any and all claims, suits, damages, liabilities, professional fees, including attorneys' fees, costs, court costs, expenses and disbursements related to . . . personal injuries . . . or the alleged violation of any laws, statutes, rules or ordinances brought or assumed against any of the indemnities by any person . . . arising out of or in connection with or as a result of or as a consequence of the performance of the work to be undertaken by the Subcontractor. . . . The parties expressly agree that this indemnification agreement contemplates: (1) full indemnity in the event of liability imposed against the indemnities without negligence and solely by reason of statute, operation of law or otherwise"

(NYSCEF Doc No. 129, Rudkin affirmation in support, exhibit AA at 13 [emphasis supplied]).

Century 21 has failed to demonstrate entitlement to contractual indemnification (*see Sicilia v City of New York*, 127 AD3d 628, 628 [1st Dept 2015] ["The contractual provisions on which they rely are found in a subcontract to which they are not signatories and that does not enumerate them as indemnitees"]). "If the parties intended to cover [Century 21] as a potential

indemnitee, they only had to say so unambiguously" (*Tonking*, 3 NY3d at 490). Accordingly, the branch of Century 21's motion seeking contractual indemnification from A&F is denied.

4. Century 21's Contractual Indemnification Claim Against GMA

In addition, Century 21 moves for contractual indemnification against GMA. In moving for summary judgment, Century 21 relies on the following indemnification provision in the master contract agreement between DGC and GMA:

> **"Indemnification for NJ and other states**
> To the fullest extent permitted by law, the Subcontractor agrees to defend, indemnify and hold harmless the Contractor, the Owner, and any other party whom the Contractor has agreed to defend, indemnify and hold harmless, as well as each of their officers, directors, partners, agents, servants, employees, successors and assigns ('indemnitees') from and against any and all claims, damages, losses, costs and expenses of any kind, including but not limited to attorneys fees, incurred by reason of any liability for damage because of bodily injury, including death resulting from such injuries, or property damage to real and personal property of any kind whatsoever, sustained by any person or persons, whether employees of the Subcontractor or otherwise, resulting from, arising out of or occurring in connection with the performance of the work provided for in this contract, together with any change orders or additions to the work included in the contract"

(NYSCEF Doc No. 127, Rudkin affirmation in support, exhibit Y at 12).

In opposition, GMA points out that: (1) Century 21 moved for summary judgment under an incorrect indemnification provision; (2) Century 21's evidence fails to establish prima facie entitlement to summary judgment; and (3) the indemnification provisions do not identity "all applicable indemnitees."

The master contract agreement also contains the following indemnification provision:

> **"Indemnification for NY**
>
> To the fullest extent permitted by law, GMA Mechanical ('Subcontractor') agrees to indemnify, defend and hold harmless DGC Capital Contracting Corp. ('Contractor'), *all applicable additional indemnitees*, if any, their officers, directors, agents, employees and partners (hereinafter collectively 'Indemnitees') from and against any and all claims, suits, damages, liabilities, professional fees, including attorneys' fees, costs, court costs, expenses and disbursements related to

death, personal injuries, property damage (including loss of use thereof) or the alleged violation of any laws, statutes, rules or ordinances brought or assumed against any of the Indemnitees by any person, entity or firm, arising out of or in connection with or as a result of or as a consequence of the performance of the work to be undertaken by the Subcontractor (the 'Work') as well as any additional work, extra work or add-on work, whether or not caused in whole or part by the Subcontractor or any person or entity employed, either directly or indirectly, by the Subcontractor including any sub-subcontractors and subtier contractors thereof and their employees. The parties expressly agree that this indemnification agreement contemplates (1) full indemnity in the event of liability imposed against the Indemnitees without negligence and solely by reason of statute, operation of law or otherwise; and (2) partial indemnity in the event of any actual negligence on the part of the Indemnitees either causing or contributing to the underlying claim in which case, indemnification will be limited to any and all liability imposed over and above that percentage attributable to actual fault on the part of the Indemnitees whether by statute, operation of law or otherwise. Where partial indemnity is provided under this agreement, attorneys' fees, costs, court costs, expenses and disbursements incurred in defense of any underlying claim, in the enforcement of this indemnity agreement, in the prosecution of any claim for indemnification hereunder and in pursuit of any claim for insurance coverage that the Subcontractor is required to procure"

(*id.* at 10 [emphasis supplied]).

Even considering Century 21's arguments made in reply, Century 21 has failed to demonstrate that it qualifies as an indemnitee, i.e., that it is an "applicable additional indemnitee" (*see Sicilia*, 127 AD3d at 628). Accordingly, the branch of Century 21's motion seeking contractual indemnification from GMA is denied.

5. Century 21's Contractual Indemnification Claim Against Apple

Century 21 moves for contractual indemnification against Apple, pursuant to the indemnification provision in Apple's subcontract.

The indemnification and insurance provisions in Apple's subcontract provides as follows:

"**I. Indemnification and Hold Harmless**
To the fullest extent permitted by law, Apple Sheet Metal Inc. agrees to defend, indemnify and hold harmless GMA Mechanical Corp. from and against any and all claims, suits, liens, judgments, damages, losses and expenses including reasonable

legal fees and costs arising in whole or in part and in any manner from acts, omission, breach or default of Subcontractor, its officers, directors, agents, employees and subcontractors

II. Insurance

a) Subcontractor hereby agrees that it will obtain and keep in force an insurance policy/policies to cover its liability hereunder in the minimum amounts of $1,000,000 per occurrence (or other appropriate agreed upon amount) and will defend and hold harmless GMA Mechanical Corp. and owner for personal injury, bodily injury and property damage"

(NYSCEF Doc No. 128, Rudkin affirmation in support, exhibit Z at 1).

Century 21 contends that DGC and its subcontractors performed their work pursuant to AIA Document A101-2007 Standard Form of Agreement Between Owner and Contractor. Century 21 points out that it was identified as the "owner" in that agreement and DGC was identified as the "contractor."

Apple contends that the indemnification provision is unenforceable and ambiguous because it does not refer to Apple's work, a specific job site or any dates of the work.

Century 21 has failed to show prima facie entitlement to summary judgment. Even if the provision relied upon by Century 21 could be construed as an indemnification agreement and not an insurance procurement agreement, Century 21 was not a signatory to Apple's subcontract and is not identified as an indemnitee therein (*see Sicilia*, 127 AD3d at 628). Consequently, Century 21 is not entitled to contractual indemnification from Apple.

6. ZDG's Cross Claims Against Century 21

As noted previously, there is no issue of fact as to Century 21's negligence. Additionally, Century 21 did not supervise the injury-producing work. Accordingly, Century 21 is entitled to dismissal of ZDG's cross claims for common-law indemnification and contribution against it.

Century 21 seeks dismissal of ZDG's contractual indemnification claim against it. The lease agreement does not require Century 21 to defend or indemnify ZDG. Although Albee and ZDG argue that ZDG is an "agent" or "representative" of Albee, the contract language is not clear enough to enforce an obligation to indemnify ZDG (*see Tonking*, 4 NY3d at 490). Therefore, ZDG's contractual indemnification claim against Century 21 is dismissed.

DGC's Motion for Summary Judgment (Motion Sequence Number 002)

1. **DGC's Contractual Indemnification Claim Against GMA**[4]

DGC moves for contractual indemnification against GMA, based upon the indemnification provision in GMA's subcontract, which, as noted above, requires GMA, "[t]o the fullest extent permitted by the laws of the State of New York," to "indemnify, defend and hold harmless DGC Capital Contracting Corp. . . from and against all claims . . . including attorneys' fees . . . arising out of or in connection with or as a consequence of the performance of the work to be undertaken by [GMA]" (NYSCEF Doc No. 95, Sperry affirmation in support, exhibit T at 12). Pursuant to that provision, "[t]he parties expressly agree that this indemnification provision contemplates . . . (2) partial indemnity in the event of any actual negligence on the part of the indemnitees either causing or contributing to the underlying claim in which case, indemnification will be limited to any and all liability imposed over and above that percentage attributable to actual fault on the part of the indemnitees whether by statute, operation of law or otherwise" (*id.*).

[4] The court has not considered DGC's request for contractual indemnification, made for the first time in reply, against A&F. Moreover, DGC's request for common-law indemnification against GMA is denied, as it has failed to establish its freedom from negligence (*see Naughton*, 94 AD3d at 10).

Here, it is undisputed that plaintiff's accident arose out of the performance of GMA's work. However, DGC has not established its freedom from negligence. Indeed, DGC did not move for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims. While DGC argues that it lacked notice of any oily condition on the scissor lift, it has failed to show that it did not exercise supervision or control over the work or provide tools or equipment. Accordingly, as the court ruled at oral argument, DGC is entitled to conditional contractual indemnification from GMA to the extent that it is not actually negligent, which will await a determination on liability (NYSCEF Doc No. 494, oral argument tr at 52, 55).

2. Cross Claims Against DGC

DGC has not met its burden of establishing that the cross claims for common-law indemnification and contribution against it should be dismissed. DGC has failed to establish that it did not supervise the injury-producing work; DGC only argues that it did not create or have notice of a dangerous condition.

However, with respect to Albee and ZDG's contractual indemnification claim against DGC, DGC did not enter into any contracts with Albee and ZDG. Moreover, Albee and ZDG did not oppose DGC's motion. Accordingly, Albee and ZDG's cross claims for contractual indemnification against DGC are dismissed.

DGC has failed to establish entitlement to dismissal of Century 21's contractual indemnification claim, and as previously discussed, DGC conceded the merits of this claim and agreed that Century 21 is entitled to conditional contractual indemnification over it. As such, this branch of the motion is denied.

A&F's Motion for Summary Judgment Dismissing the Second Third-Party Complaint and All Cross Claims Against It (Motion Sequence Number 003)

1. **DGC's Second Third-Party Claim for Contractual Indemnification Claim Against A&F**

A&F moves for summary judgment dismissing DGC's second third-party claim for contractual indemnification. The indemnification provision requires A&F to indemnify DGC for all claims "arising out of or in connection with or as a result or consequence of the performance undertaken by [A&F]" (NYSCEF Doc No. 156, Shaw affirmation in support, exhibit R at 13). Here, there are questions of fact as to whether plaintiff's accident arose out A&F's work on the project (NYSCEF Doc No. 494, oral argument tr at 77). According to A&F, it was hired to install a fire protection system within the Century 21 store (NYSCEF Doc No. 137, Fulep aff, ¶ 6). Plaintiff testified that, before the accident, he observed the sprinkler fitters using the lift, leaving grease on the rails, platform, and on the steps (NYSCEF Doc No. 139, plaintiff tr at 54, 58, 96). Within a week before the accident, plaintiff saw the sprinkler fitters using the lift three times (*id.* at 58). Accordingly, A&F is not entitled to dismissal of DGC's second third-party claim for contractual indemnification as against it.

2. **Cross Claims for Contractual Indemnification Against A&F**

A&F moves for summary judgment dismissing the cross claims for contractual indemnification against it. Albee, ZDG, and GMA only oppose dismissal of their cross claims for common-law indemnification against A&F. Indeed, Albee and ZDG state that they did not bring contractual indemnification claims against A&F. However, the court's review of Albee and ZDG's answer indicates that they did assert a contractual indemnification claim against A&F. Moreover, Apple did not assert a cross claim for contractual indemnification against

A&F. Accordingly, the cross claims for contractual indemnification by Albee, ZDG, and GMA against A&F are dismissed.

As for Century 21, A&F has shown that Century 21 does not qualify as an indemnitee (*see Tonking*, 3 NY3d at 490). In opposition to A&F's motion, Century 21 has failed to raise an issue of fact. Accordingly, Century 21's cross claim for contractual indemnification against A&F is dismissed.

3. Breach of Contract Claims Against A&F

A&F moves for summary judgment dismissing the breach of contract claims against it. Albee, ZDG, DGC, and Century 21 did not oppose dismissal of these claims. Accordingly, the second third-party claims and cross claims for breach of contract against A&F are dismissed.

4. Common-Law Indemnification and Contribution Claims Against A&F

A&F has failed to demonstrate that it did not cause or contribute to plaintiff's accident. As noted previously, there are questions of fact as to whether A&F was negligent. Accordingly, the branch of its motion seeking dismissal of the common-law indemnification and contribution claims against it is denied.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 001) of defendant Century 21 Fulton, LLC is granted to the extent of (1) dismissing plaintiff's Labor Law § 200 and common-law negligence claims, (2) granting it conditional contractual indemnification against defendant/second third-party plaintiff DGC Capital Contracting Corp., and (3) dismissing defendant ZDG, LLC's cross claims for common-law indemnification, contractual indemnification, and contribution against it, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 002) of defendant/second third-party plaintiff DGC Capital Contracting Corp. is granted to the extent of (1) granting it conditional contractual indemnification against defendant/third-party plaintiff GMA Mechanical Corp., and (2) dismissing defendants Albee Development LLC and ZDG, LLC's contractual indemnification claim against it, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 003) of second third-party defendant A&F Fire Protection Co., Inc. is granted to the extent of dismissing the cross claims for contractual indemnification and breach of contract against it, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 004) of plaintiff Juan Serrano for partial summary judgment under Labor Law §§ 240 (1) and 241 (6) is denied; and it is further

ORDERED that the motion (sequence number 005) of defendant/third-party plaintiff GMA Mechanical Corp. is granted to the extent of (1) dismissing plaintiff's Labor Law § 241 (6) claim except as to the alleged violations of 12 NYCRR § 23-1.7 (d) and (e) (2), and (2) granting it conditional contractual indemnification against third-party defendant Apple Sheet Metal, Inc., and is otherwise denied; and it is further

ORDERED that the motion (sequence number 006) of defendants Albee Development, LLC and ZDG, LLC is granted to the extent of (1) granting Albee Development, LLC contractual indemnification against defendant/third-party plaintiff GMA Mechanical Corp., (2) granting Albee Development, LLC conditional contractual indemnification against defendant Century 21 Fulton LLC; and (3) granting defendant Albee Development, LLC summary judgment as to liability on its breach of contract claim against defendant/third-party plaintiff GMA Mechanical Corp., and is otherwise denied; and it is further

ORDERED that the motion (sequence number 007) of defendants Albee Development LLC and ZDG, LLC is granted to the extent of dismissing plaintiff's Labor Law § 241 (6) claim except as to the alleged violations of 12 NYCRR § 23-1.7 (d) and (e) (2), plaintiff's Labor Law § 200 and common-law negligence claims, and the cross claims for indemnification and contribution against them, and is otherwise denied.

Dated: Oct 4, 2019

ENTER:

J.S.C.
HON. ROBERT D. KALISH
J.S.C.