SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 35EFM

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DAVID VASQUEZ, ERICA VASQUEZ,

Plaintiff,

- v -

THE CITY OF NEW YORK, LINCOLN CENTER FOR THE PERFORMING ARTS, INC.,NEW YORK CITY BALLET, INC.,NEW YORK CITY OPERA, INC.,CITY CENTER OF MUSIC & DRAMA, INC.,RC DOLNER, INC.,ALL-SAFE LLC,LINCOLN CENTER DEVELOPMENT PROJECT, INC.,RCDOLNER LLC,

Defendant.

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INDEX NO. 159903/2015

MOTION DATE 11/05/2019, 11/06/2019, 11/06/2019

MOTION SEQ. NO. 003 004 005

DECISION + ORDER ON MOTION

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RC DOLNER, INC.

Plaintiff,

-against-

DONALDSON INTERIORS, INC.

Defendant.

Third-Party
Index No. 595223/2016

----------X

RC DOLNER, INC.

Plaintiff,

-against-

ALL-SAFE LLC

Defendant.

Second Third-Party
Index No. 595507/2016

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HON. CAROL R. EDMEAD:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 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, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 259, 260, 261, 262, 263, 279, 282

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 205, 206, 207, 208, 209, 210, 211, 212, 264, 280, 283, 284, 285, 286, 287, 288, 295, 296, 308

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 005) 213, 214, 215, 216, 217, 218, 219, 220, 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, 257, 258, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 281, 289, 290, 291, 292, 293, 294, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307

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

Upon the foregoing documents and pursuant to the following memorandum decision, it is

ORDERED defendant/second third-party defendant All-Safe LLC's (All-Safe) motion for summary judgment (motion seq. No. 003) is granted to the extent that all claims under the Labor Law are dismissed as against All-Safe; and it is further

ORDERED that defendants The City New York (the City), Lincoln Center for the Performing Arts (Lincoln Center), and City Center of Music and Drama (CCMD) (collectively, the City defendants) motion is resolved as follows:

- All claims and cross claims as against Lincoln Center are dismissed;
- Plaintiff's Labor Law § 240 (1) claims are dismissed as against all defendants;
- The remainder of the City defendants' motion is denied

and it is further

ORDERED that defendant/third-party defendant Donaldson Interiors, Inc. (Donaldson) is granted to the extent that RC Dolner's claim for indemnification as against Donaldson is dismissed; and it is further

ORDERED that counsel for Plaintiff is to serve a copy of this order, along with notice of entry, on all parties within 15 days of entry.

12/27/2019
DATE

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

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

In a Labor Law action, defendant/second third-party defendant All-Safe LLC (All-Safe) moves, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims as against it, as well as for summary judgment on its cross claims for contractual indemnification and breach of contract against defendant/third-party defendant Donaldson Interiors, Inc. (Donaldson) for contractual indemnification and breach of contract (motion seq. No. 003). All-Safe also seeks an order directing Donaldson to reimburse it for defense costs and fees already expended. Defendants The City New York (the City), Lincoln Center for the Performing Arts (Lincoln Center), and City Center of Music and Drama (CCMD) (collectively, the City defendants) move for summary judgment dismissing all claims and cross claims as against them, as well as for summary judgment on their contractual and common-law indemnification claims against defendant/third-party plaintiff/second third-party plaintiff RC Dolner, Inc. (RC Dolner) (motion seq. No. 004). Finally, Donaldson moves for summary judgment dismissing RC Dolner's third-party claim against it for indemnification, as well as for dismissal of plaintiff David Vasquez's (Plaintiff, or Vasquez) Labor Law § 240 (1) claim as against it (motion seq. No. 005). The motions are consolidated for disposition.

BACKGROUND

Plaintiff alleges that, on April 16, 2015, he tripped and fell on a jobsite, injuring himself. On that date, Plaintiff was working as a carpenter for Donaldson on a renovation project at the David H. Koch theater at Lincoln Center (Koch Theater). Donaldson was hired by RC Dolner, the general contractor, to install drywall and acoustical ceilings in certain areas, including Stairway 302.

At the time of his accident, Plaintiff was working alongside Scott Seltzer (Seltzer), another Donaldson carpenter, at the direction of his brother, William Vasquez, the Donaldson

foreman. In preparation for installation, Seltzer was cutting "rips" (wood strips 2 inches by 8 feet long) in an adjoining vestibule, and Plaintiff was walking the strips across a hallway, and then stepping onto a platform that had been installed by All-Safe above Stairway 302. Plaintiff would then place the rips on the platform.

The hallway that connected the work platform with the area where Seltzer was cutting rips was demolished by a nonparty prior to Plaintiff's accident, leaving the floor in a condition that was "not smooth," according to Douglas Weissman, a laborer for RC Dolner (NYSCEF doc No. 225 at 14). While Plaintiff managed the transition between the platform and the adjoining ground without incident several times before he fell (NYSCEF doc No. 209 at 72), his accident occurred when he stepped off the platform and "rolled his left ankle" (*id.* at 73). Plaintiff attributed his rolled ankle to "uneven ground" (*id.* at 74). After rolling his ankle, Plaintiff fell to his knees (*id.*).

Plaintiff alleges that defendants are liable pursuant to Labor Law § 240 (1) and 241 (6), as well as Labor Law § 200 and common-law negligence.

DISCUSSION

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

I. All-Safe's Motion for Summary Judgment

All-Safe was the site-logistics subcontractor on the project. In that capacity, it installed the platform that Plaintiff was stepping off at the time of his accident. It seeks dismissal of all claims and cross claims as against it.

A. Labor Law §§ 240 (1) and 241 (6)

Initially, All-Safe argues that Plaintiff's Labor Law §§ 240 (1) and 241 (6) claims as against it should be dismissed, as All-Safe is not a proper Labor Law defendant, as it was not the owner, general contractor, or an agent of either, on the subject project. Plaintiff concedes that All-Safe is not a proper Labor Law defendant and abandons his claims pursuant to Labor Law § 240 (1) and 241 (6) against All-Safe. Accordingly, the branch of All-Safe's motion seeking dismissal of Plaintiffs' Labor Law § 240 (1) and Labor Law § 241 (6) as against it is granted.

B. Labor Law § 200 and Common-Law Negligence

Plaintiff argues that All-Safe is liable pursuant to Labor Law § 200 and common-law negligence, as there is a question of fact as to whether All-Safe exacerbated a dangerous condition. RC Dolner and Donaldson also argue that there is a question of fact as to whether All-Safe was negligent.

All-Safe argues that Plaintiff's Labor Law § 200 and common-law negligence claims should be dismissed, as the platform was properly installed and functioned properly in the manner it was intended to be used at the worksite. In opposition, Plaintiff argues that All-Safe is not entitled to summary judgment, as there is a question of fact as to when the hallway adjoining the platform was demolished.

Craig Hamilton, the All-Safe employee that installed the platform, testified that the hallway floor was tile and had not yet been demolished at the time that he installed it (NYSCEF

doc No. 153). Plaintiff refers to the deposition transcript of Daniel Jimenez, RC Dolner's superintendent, which was submitted by All-Safe (NYSCEF doc No. 155). Specifically, Plaintiff refers to the following passage:

> "Q: Okay. I think you testified earlier that this particular floor that was adjacent to the platform in this stairwell had been demoed at some point before you got there and started working at the worksite; is that correct?
> A: Correct.
> Q: And you don't know who demoed the floor?
> A: No.
> Q: Do you know if anyone ever told you whether it had been demoed by a subcontractor or by RC Dolner or by anybody?
> A: No. For all I know, it could have been an existing stair that looked like that and we just put a platform on top so it would be safe to work on top of"

(*id.*).

Plaintiff submits RC Dolner's daily log from December 4, 2014, which states that that nonparty Rite Way "[w]orked in the back office space on the lower concourse. Also did the demo of the duct work in the 5th floor exercise room. Took up travertine at the first floor landing by the new stair. Stayed until 4:30pm" (NYSCEF doc No. 199).

In arguing that there is an issue of fact as to All-Safe's negligence, Plaintiff relies on *Ryder v Mount Loretto Nursing Home*, 290 AD2d 892 [3d Dept 2002]). In *Ryder*, a subcontractor defendant installed a U-shaped metal track in a bathroom. The Third Department held that the plaintiff's Labor Law § 200 claim should be dismissed against the subcontractor that installed the instrumentality that the plaintiff tripped on, as the contractor was "neither an owner nor a general contractor," and the fact that the contractor had control over the installation of the "instrumentality giving rise to plaintiff's injury" was insufficient to confer statutory agency on the contractor (290 AD2d at 894). However, the Third Department denied summary judgment as to common-law negligence, holding that there was an issue of fact as to whether the installation

of the track "without placing guards, barriers or warning notices on or around it created an unreasonable risk of harm to plaintiff and was a proximate cause of his injuries" (*id.*).

Ryder makes clear that while Plaintiff nominally opposes All-Safe's motion as to section 200 and common-law negligence, Plaintiff essentially abandoned his section 200 claims by acknowledging that All-Safe was not an owner, a general contractor, or a statutory agent. Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). As All-Safe was not an owner, a general contractor, or a statutory agent, Plaintiff's section 200 claims as against All-Safe must be dismissed.

Following *Ryder*, Plaintiff argues that there is a question of fact as to whether All-Safe created or exacerbated a defective condition that caused his accident. Three months after the Third Department decided *Ryder*, the Court of Appeals decided *Espinal v Melville Snow Contractors, Inc.* (98 NY2d 136 [2002]), which sets the standard for contractors' duty of care to noncontracting parties. The Court of Appeals held that while generally a duty does not exist in such circumstances (98 NY2d at 138), there are

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

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

Here, latter two *Espinal* exceptions are plainly inapplicable, as there are no allegations of detrimental reliance or total displacement of RC Dolner's obligation to maintain a safe jobsite.

As to the third exception, Plaintiff argues, adopting the expert opinion of Donaldson's expert, Martin Bruno (Bruno) (NYSCEF doc No. 170), and relying on the opinion of their own expert, Walter Konon (Konon) (NYSCEF doc No. 198), that there is a question of fact as to whether All-Safe created a dangerous condition by negligently installing the subject platform.

Bruno, Donaldson's expert, refers to the post-demolition hallway floor as a "mudbed," and opines that "[i]f the floor had been demolished and the mudbed was exposed when the platform was installed, All-Safe may have been obligated to install a step" (NYSCEF doc No. 170 at 4). "Especially," Bruno continues, "if certain parts of the floor had height variations of two inches or more, as the platform may have been fourteen inches in certain portions of the mudbed. This, under OSHA Standard 1926.451 (e) (8), would have required an access step, when it was installed where access to the platform was over fourteen inches" (*id.*).

OSHA 1926.451 is entitled "Scaffolds," and its subsection (e) (8) provides that "[d]irect access to or from another surface shall be used only when the scaffold is not more than 14 inches horizontally and not bore than 24 inches vertically from the other surface." All-Safe is correct that there no question of fact as to whether the platform violated this regulation. Bruno refers to a 14-inch requirement for horizontal chasms, but there is no allegation of a horizontal gap in the subject case. Instead, the subject gap was vertical and neither Bruno, nor any fact witness in this action, has alleged that the gap was 24 inches or more. Thus, OSHA 1926.451 was not violated.

As to Konon, Plaintiff's own expert, he opines that the placement of a platform over an uneven demolished floor was negligent:

> "the construction of the plywood platform with a step-off of 13 inches to a rough and uneven floor that had depressions a number of inches deep deviated from good and accepted engineering and construction site safety practices and created an unsafe condition, and exacerbated the risk of harm that was created by the removal of the floor tile … Under the circumstances that existed at the time All-Safe built the plywood platform, specifically a step-off of 13 inches onto a rough,

> uneven and dangerous surface, good and accepted practices mandated that the floor surface below the plywood platform be evened out or have something flat placed over it, such as plywood, to eliminate the risk of a worker having the type of accident that Plaintiff here had. The failure to do so was in my professional opinion a proximate cause of Plaintiff's accident and resulting injuries"

(NYSCEF doc No. 198, ¶¶ 9-10).

In reply, All-Safe argues that Konon does not argue that there was anything wrong with the platform itself, and contends that Konon "only finds a deviation of site safety practices" relating to the uneven floor adjacent to the platform, "which mandated those contractors in control of the work site to either even-out the hallway floor surface or to have 'something placed over it, such as plywood, to eliminate the risk a worker having the type of accident that plaintiff had here'" (All Safes reply brief, NYSCEF doc NO. 260, ¶ 21).

Here, the contract between RC Dolner and All-Safe provides that All-Safe was to build the platform in conformance with plans drawn by the architect and engineer on the project: "The work," the contract provides, "shall be performed in accordance with the Drawings and Specifications prepared by the Architect and/or Engineer for the Project" (NYSCEF doc No. 204). Moreover, the record reflects that RC Dolner, rather than All-Safe, scheduled the demolition, the construction of the platform, and the work performed by Donaldson.

Here, there is a question of fact as to whether the floor was in a post or pre demolition state when the platform was installed. In neither scenario, however, did *All-Safe* launch an instrument of harm triggering the first *Espinal* exception. That is, All-Safe could not have launched an instrument of harm by constructing a platform conforming to the drawings provided by RC Dolner and the platform did not collapse or malfunction.

Plaintiff relies on *Mendez v Union Theol. Seminary* (17 AD3d 271 [1st Dept 2005]) and *Urbina v 26 Court S. Assocs., LLC* (17 AD3d 271 [1st Dept 2005]), both of which involved collapsed scaffolds, and in both of which the First Department found that there was a question of fact as to whether the collapse was caused by the negligence of the company that constructed the scaffold. Neither of these cases is persuasive, as here there was no collapse of the platform. Here, the remedial steps recommended by Konon -- smoothing the uneven ground or placing plywood on the ground are both outside the ambit of the work for which All-Safe was contracted. Such measures were squarely within RC Dolner's purview, as the general contractor responsible for scheduling work and for overall safety on the site. As none of the *Espinal* exceptions apply to All-Safe's work on the site, the branch of All-Safe's motion seeking dismissal of Plaintiff's claim for common-law negligence against All-Safe must be granted.

C. Cross and Third-Party Claims

Here, the Court has held that All-Safe was not negligent in Plaintiff's accident. Accordingly, all claims against it for common-law indemnification and contribution must be dismissed (*see Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2nd Dept 2003] [contribution requires a showing of active negligence]; *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374, 375 [2011] [common-law indemnification requires a showing negligence]). However, RC Dolner has claims against All-Safe for contractual indemnification and breach of contract for failure to procure insurance.

Contractual Indemnification

The contract between All-Safe and RC Dolner contains the following indemnification provision:

> "To the fullest extent permitted by law, [All-Safe] agrees to indemnify, defend and hold harmless Owner, RC Dolner … from and against any and all losses,

> claims suits, damages ... directly or indirectly arising out of, alleged to arise out of, or in connection with or as a consequence of the performance or non-performance of the Work, excluding only Damages specifically attributable to and only to the extent caused by the negligence of the party seeking indemnification"

(NYSCEF doc No. 204).

Generally, "[a] contract that provides for indemnification will be enforced as long as the intent to assume such a role is sufficiently clear and unambiguous" (*Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 274 [2007] [internal quotation marks and citations omitted]). In support of the branch of the motion that seeks dismissal of RC Dolner's claim for contractual indemnification against it, All-Safe relies on *Brown v Two Exh. Plaza Partners* (146 AD2d 129 [1st Dept 1989]), where the Court found that an accident involving an "unexplained" collapse of a scaffold did not arise from the work of the contractor which constructed a scaffold.

The Court in *Brown* reasoned that it could not find that the accident arose out of the work of the party that constructed the scaffold "without any showing of a particular act or omission in the performance of such work causally related to the accident," as that would effectively make the party that erected the scaffold "a virtual insurer of the scaffold" and make that contractor "responsible for an unexplained collapse of the scaffold at a time when it had no control over its use or responsibility for its maintenance" (146 AD2d at 137).

RC Dolner, conversely, relies on more recent cases, such as *Regal Construction Corporation v National Union Fire Insurance Company of Pittsburgh* (15 NY3d 34 [2010] [holding that arising out of means "originating from, incident to, or having connection with") and *Urbina v 26 Court Street Associates* (46 AD3d 268 [1st Dept 2007] [distinguishing *Brown* on the basis that the general contractor inspected and approved the scaffold-constructing parties' work]), that reflect a broad of interpretation of "arising out of" language in indemnification contracts. RC Dolner relies, among others, on *Britez v Madison Park Owner, LLC* (106 AD3d

531 [1st Dept 2013]). In *Britez*, the First Department held that a drywall/carpentry subcontractor that had supervisory responsibility over the work, and which itself subcontracted the part of the job on which the plaintiff was injured, had its indemnification responsibility triggered under a broad "arising out of" provision. The Court held that the provision was triggered, as "[t]he accident arose out of the performance of [the drywall/carpentry contractor's] work and [its] failure to provide an adequate safety device," as well as the sub-subcontractor's failure to provide an adequate safety device (106 AD3d at 532).

Here, there is expert testimony that All-Safe's work caused Plaintiff's accident. While that testimony was insufficient to raise a question of fact as to negligence, the subject indemnification clause does not require a showing of negligence. Under the broad "arising under" language in the indemnification provision, it is question of fact for the jury as to whether Plaintiff's accident arose from All-Safe's work.[1] As such, the branch of All-Safe's motion that seeks dismissal of RC Dolner's contractual indemnification claims as against it is denied.

Breach of Contract for Failure to Procure Insurance

RC Dolner's third-party complaint alleges that All-Safe is liable for breach of contract for failing to procure insurance. However, All-Safe submits proof that it obtained insurance satisfying the requirements of its contract with RC Dolner (NYSCEF doc No. 162). RC Dolner does not, in its opposition, challenge that the policy satisfies the requirements under the contract. Accordingly, the branch of All-Safe's motion that seeks dismissal of RC Dolner's claim for breach of contract for failure to procure insurance must be granted.

[1] Moreover, there has not yet been any finding as to RC Dolner's negligence, and such a finding will have an impact on whether RC Dolner can seek indemnification from All-Safe.

II. The City Defendants Motion for Summary Judgement

The City defendants move for summary judgment dismissing all claims and cross claims as against them. They also move for summary judgment on their indemnification claims against RC Dolner.

A. Lincoln Center

At the outset of their moving papers, the City defendants argue that Lincoln Center should be let out of the case, as it does not own the subject property. In support, the City defendants submit the deposition testimony of David Thiele, an employee of the New York City ballet who is the managing director of the Koch Theater. Thiele testified that the City owns the theater and leases it to CCMD for $1 per year (NYSCEF doc No. 208 at 33-34). Thiele also testified that CCMD, as leaseholder, hired RC Dolner to serve as the general contractor for the subject renovation work (*id.* at 34-36). Thiele further testified that Lincoln Center has no connection with the Koch Theater, as the Koch Theater is "owned by the City of New York, unlike the other buildings on the campus, which are part of Lincoln Center" (*id.* at 35).

No party opposes the branch of the City defendants' motion that seeks dismissal of all claims and cross claims as against Lincoln Center. Accordingly, as the City defendants make an unrebutted showing that Lincoln Center was not a proper Labor Law defendant, as it was not an owner or general contractor, and had no connection with the subject work, and thus cannot be a statutory agent or liable for negligence, the branch of the motion seeking dismissal of all claims and cross claims as against Lincoln Center must be granted.

B. Labor Law § 200 and Common-law Negligence

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New*

York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

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

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials giving rise to the plaintiff's injuries, an owner or contractor "is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, "whether [a defendant] controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims . . ." (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

Here, the City defendants argue that Plaintiff's Labor Law § 200 claims against the City and CCMD should be dismissed as neither the City nor CCMD had supervisory control over Plaintiff's work. Plaintiff does not contest that the City defendants lacked supervisory control,

but instead argues that the accident arose from a defect on the premises that may have existed for months.

The border between manner-and-method cases and premises-defect cases is somewhat hazy, and ill-defined by courts, a circumstance that creates uncertainty for parties. The case of *Lopez v Dagan* (98 AD3d 436 [1st Dept 2012]) is instructive. *Lopez* involved a worker who was injured when a temporary floor collapsed. Conceptually, *Lopez* could conceivably fit into either category, as the danger was created through the general contractor's work, but it existed on the premises for an extended period.

The Court in *Lopez* initially categorized the allegations as invoking the method-and-manner category, finding that the owners made a *prima facie* showing that "plaintiff's accident was caused by the means and methods employed by the general contractor, namely, the improper installation of a temporary floor," and that the owners "had no supervisory control over the operation" (*id.* at 438).

The court in *Lopez* demurred from stating unequivocally that the facts before it solely invoked the manner-and-method category, as it stated that "[t]o the extent that plaintiff's injuries arose from a dangerous condition on the premises," the owners made a showing that they neither created the defect, nor had notice of it (*id.*). As to constructive notice, the Court found no question of fact, as the subject condition was latent (*id.*). Thus, both categories of analysis rendered the same outcome: no liability for the owners.

Our case, however, provides a situation where analyzing in the alternative produces different outcomes. That is, if this is a manner-and-method case, the City defendants do not have liability under section 200, as they did not have supervisory control over Plaintiff's work, or the scheduling of the trades, or general safety oversite over the subject project.

However, if this were a premises-defect case, the City and CCMD would not be entitled to summary judgment, as they have not made a *prima facie* showing that they lacked constructive notice of the uneven, post-demolition floor (*see Pronk v Standard Hotel,* 158 AD3d 465, 466 [1st Dept 2018] [it is a defendant moving for summary judgment's burden to make a *prima facie* showing as to constructive notice]; *see Jahn v SH Entertainment, LLC*, 117 A.D.3d 473, 473 [1st Dept 2014] [holding the defendant owner's affidavit "was insufficient to establish a lack of constructive notice as a matter of law because it did not state how often the floor was inspected prior to the accident"]).

The question before the Court is whether owners must show both that they lacked supervisory control *and* did not have notice of a condition created by a contractor or a subcontractor during a construction project. That is, whether Courts must apply both categories in these circumstances. *Lopez* instructs that owners must at least show that they lacked supervisory control over the work causing the injury. The City and CCMD clear that hurdle.

As to whether the City defendants must also show that they lacked notice, Plaintiff cites to *Murphy v Columbia University* (4 AD3d 200 [1st Dept 2004]) to support his position that this is a defective-condition case, and that the City defendants must, therefore, show a lack of notice. *Murphy*, however, does not support Plaintiff's position.

Murphy involved two temporary dangerous conditions that were created during the course of construction: a corrugated piece of cardboard covering walls in an area where the plaintiff was welding, as well as debris left in a closet where the plaintiff sought a pail of water after the corrugated cardboard caught fire. Following a trial, the First Department found that "the evidence was legally sufficient to support a finding that [the general contractor] violated" section 200, as it 'was not necessary to prove [the general contractor's] supervision and control over

plaintiff because the injury arose from the condition of the work place created by or known to the contractor, rather than the method of plaintiff's work" (4 AD3d at 202, citing *Comes*, 82 NY2d 876).

While *Murphy* may support Plaintiff's section 200 claim against RC Dolner, the owner in *Murphy* was not found liable under section 200, although it was found liable of violating its nondelegable duty under section 241 (6) of the Labor Law. *Murphy* harmonizes with *Lopez*, as in both cases a general contractor, but not an owner, was liable where the general contractor had supervisory control over the work that created a temporary[2] dangerous condition that gave rise to the plaintiffs' injuries.

Plaintiff also cites to *Luebke v MBI Group*, 122 AD3d 514 [1st Dept 2014]), where the Court found that the defendants were not entitled to summary judgment dismissing the plaintiff's section 200 claims as against them. The subject accident in *Luebke*, however, did not involve a temporary condition created during the project, but a defective hinge on a door in the building. Thus, the Court analyzed the allegations under the premises-defect framework. The present facts are readily distinguishable, as the subject condition was temporary and created during the subject project.

The caselaw discussed above, particularly *Lopez*, seems to suggest that the proper framework to analyze such allegations is manner and method. That is, they suggest that a temporary condition created during the course of construction is a manner method case, for which Labor Law defendants are liable when they have supervisory control over the creation or maintenance over such a condition. However, Plaintiff's cite another case which confounds this

[2] Temporary in this context means that it was created during the construction and is not present at the conclusion of construction.

seeming feature of section 200 jurisprudence, *DePaul v NY Brush LLC* (120 AD3d 1046 [1st Dept 2014]).

DePaul involved a temporary dangerous condition that arose during a construction project: three wet, rotten wooden planks "lined up end-to-end but unconnected" that plaintiff walked over while working on the project. The First Department analyzed Plaintiff's section 200 claim under the premises-defect framework, noting that the defendants "do not dispute that plaintiff's injury arose from a dangerous condition" (120 AD3d at 1047).

Given *Depaul*, and the fact that the Court in *Lopez* did analyze in the alternative, even though it characterized the subject temporary defect as invoking the manner-and-method analysis, the Court is left with no choice but to use both frameworks.

While under the manner-and-method framework, the City and CCMD would not have liability, as they did not have supervisory control over the creation or maintenance of the temporary condition that caused Plaintiff's accident, they are not entitled to summary judgment, as a question of fact remains, under the premises-defect analysis, as to whether they had constructive notice of the condition. Accordingly, the branch of the City defendants' motion that seeks dismissal of Plaintiff's Labor Law § 200 and common-law negligence claims as against the City and CCMD must be denied.

C. Labor Law § 240 (1)

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

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

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

In support of their application for dismissal of the Labor Law § 240 (1) claim as against it, the City defendants cite to pre-*Runner* cases, such as *Berg v Albany Ladder Co., Inc.* (10 NY3d 902 [1st Dept 2008]), for the proposition that not all accidents tangentially related to gravity are covered by the statute. While this general principle is undoubtedly true, the City defendants offer no cases showing how courts have analyzed similar facts subsequent to the sea-change of section 240 (1) analysis announced by *Runner*.

In opposition, Plaintiff cites to *Auriemma v Biltmore* (82 AD3d 1 [1st Dept 2011]), a post-*Runner* case, for the proposition that "there is no bright-line minimum height differential that determines whether an elevation hazard exists" (*id.* at 9). Plaintiffs argue that the gap between the platform and floor, in conjunction with the uneven floor, created a gravity-related risk that brings his accident with the ambit of the statute.

Although *Berg* is a pre-*Runner* case, it is still instructive here. The plaintiff's accident in *Berg* had a lot of proverbial, as well as literal, moving pieces:

> "[the plaintiff] was working on a flatbed truck unloading steel trusses with the assistance of a forklift operated by a coworker. While plaintiff was standing atop several bundles of trusses about 10 feet off the ground, another bundle became unstable and began to roll over on top of him. Rather than being crushed by the trusses, plaintiff climbed into the bundle as it toppled to the ground and he suffered physical injuries"

(10 NY3d at 903).

The Court of Appeals held that while the plaintiff alleged a gravity related risk, "he failed to adduce proof sufficient to create a question of fact regarding whether his fall resulted from the lack of a safety device." Similarly, here there is no question of fact as to whether a violation of the statute was a proximate cause of Plaintiff's injuries. That is, Plaintiff's fall was caused when his ankle rolled on uneven ground rather than a failure to protect him against an elevation risk. As the First Department stated in *Auriemma*, "the relevant inquiry is whether the hazard is one directly flowing from the application of the force of gravity to an object or person" (82 AD3d at 9). Here, there was no such direct flow from any alleged gravity-risk, as Plainiff's fall was caused by a rolled ankle rather than a gravity-risk.

As Plaintiff's accident was not caused by a violation of the duty to protect workers against gravity-related risks, the branch of the City defendants' motion that seeks dismissal of Plaintiff's Labor Law § 240 (1) claim must be denied.

D. Labor Law § 241 (6)

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

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the

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

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

Here, Plaintiff alleges violation of 12 NYCRR 23-1.7 (e) (1) and 12 NYCRR 23-1.7 (e) (2). Section 23-1.7 of the Industrial Code is entitled "Protection from general hazards" and its subsection (e), "Tripping and other hazards" provides:

> "(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed."

Both of these provisions are sufficiently specific to serve as a predicate to section 241 (6) liability (*see, e.g., Singh v Manor*, 23 AD3d 249 [1stDept 2005]; *Corbi v Avenue Woodward Corp.*, 260 AD2d 255 [1st Dept 1999]). The City defendants, however, contend that neither provision is applicable.

As to 12 NYCRR 23-1.7 (e) (1), the City defendants argue that the accident did not occur in a passageway, as that term is interpreted under section 241 (6) jurisprudence. In support, the City defendants rely on *Meslin v New York Post* (30 AD3d 309 [1st Dept 2006]). In *Meslin*, the Court held that, where the plaintiff stepped off a scaffold, and stepped on a pipe, which rolled, and caused him to fall in a hole, the accident had not happened in a "passageway or walkway covered by section 23-1.7 (e) (1)" (30 AD3d at 310).

Here, in contrast to *Meslin*, there is an issue of fact as to whether the area where Plaintiff's accident was a passageway or walkway, as it occurred in a hallway adjoining a stairwell. Douglas Weissman, of RC Dolner, described the area where Plaintiff rolled his ankle and fell:

"Q: When you stepped off the platform, would there be a wall to your left and a wall to your right?
A: Yes.
Q: And a doorway ahead of you?
A: Yes.
Q: And how far was the threshold of the doorway from the platform?
A: Like I said -- probably six feet."

Here, there is a question of fact, under *Singh v 1221 Ave Holdings, LLC* (127 AD3d 607 [1st Dept 2015] and *Thomas v Goldman Sachs Headquarters LLC*, 109 AD3d 491 [1st Dept 2013]), as to whether this area constituted a passageway or walkway. As there is a question of fact as to the applicability of 12 NYCRR 23-1.7 (e) (1), the branch of the City defendants motion seeking dismissal of Plaintiff's Labor Law § 241 (6) must be dismissed.

While this is sufficient to resolve the branch of the City defendants' motion that seeks dismissal of Plaintiff's section 241 (6) claims as against them, the Court will analyze the second Industrial Code alleged by Plaintiff, 12 NYCRR 23-1.7 (e) (2). In this context, the City

defendants argue that the area where Plaintiff tripped was not a working area. In support of this argument, the City defendants cite to *Muscarella v Herbert* (265 AD2d 264 [1st Dept 1999]).

In *Muscarella*, the Court held that both subdivisions of 12 NYCRR § 23-1.7 were inapplicable, as the plaintiff's accident occurred while he was "walking from the job site to a construction trailer" when he tripped over the ledge of a metal grate (256 AD2d at 264). The Court held that "[t]his open area did not constitute the sort of passageway, floor, platform, or similar working surface contemplated by the cited regulations" (*id.*).

The present facts are plainly distinguishable from *Muscarella*. Instead of walking from the job site, Plaintiff here alleged that he rolled his ankle on an uneven floor that he was traversing, again and again, pursuant to his job duties. As plaintiff's task, transporting rips, was carried out on the area where he fell, there is a question of fact as to whether Plaintiff's accident occurred in a working area (*see Leonard v 1251 Ams. Assoc.*, 241 AD2d 391 [1st Dept 1997]). Moreover, there is a question of fact as to whether the post-demolition "mudfloor" involved in Plaintiff's accident constitutes "dirt" and "debris" under Industrial Code 23-1.7 (e) (2).

E. The City Defendants Application for Indemnification Against RC Dolner

The City defendants do not cite to an indemnification provision entitling them to contractual indemnification. In opposition, RC Dolner cites to the relevant provision, which requires a showing of negligence to be triggered (NYSCEF doc No. 295). Here, as there as been no finding of negligence against RC Dolner, the application for contractual indemnification, under this provision, is premature (*see Bellefleur v Newark Beth Israel Medical Center,* 66 AD3d 807 [2d Dept 2009]). As an application for common-law indemnification is also premature in the absence of a finding of negligence, the City defendants application for summary judgment on their indemnification claims against RC Dolner are denied.

III. Donaldson's Motion for Summary Judgment

The branch of Donaldson's motion seeking dismissal of Plaintiff's section 240 (1) claim is moot given the discussion and dismissal of Plaintiff's section 240 (1) claim above. As to indemnification, RC Dolner holds the same broad "arising under" indemnification provision against Donaldson that it has against All-Safe. Here, as discussed exhaustively above, the accident did not arise out of Plaintiff's work, but work that occurred prior to the subject work. That is, Plaintiff alleges that his accident arose from a temporary defect caused by other contractors, the scheduling of the work, and RC Dolner's failure to remedy the defect. In these circumstances, the accident cannot be said to have arisen from Donaldson's work. Accordingly, the branch of Donaldson's motion that seeks dismissal of the RC Dolner's indemnification claim against it is granted.

CONCLUSION

Accordingly, it is

ORDERED defendant/second third-party defendant All-Safe LLC's (All-Safe) motion for summary judgment (motion seq. No. 003) is granted to the extend that all claims under the Labor Law are dismissed as against All-Safe; and it is further

ORDERED that defendants The City New York (the City), Lincoln Center for the Performing Arts (Lincoln Center), and City Center of Music and Drama (CCMD) (collectively, the City defendants) motion is resolved as follows:

· All claims and cross claims as against Lincoln Center are dismissed;

· Plaintiff's Labor Law § 240 (1) claims are dismissed as against all defendants;

· The remainder of the City defendants' motion is denied

and it is further

ORDERED that defendant/third-party defendant Donaldson Interiors, Inc. (Donaldson) is granted to the extent that RC Dolner's claim for indemnification as against Donaldson is dismissed; and it is further

ORDERED that counsel for Plaintiff is to serve a copy of this order, along with notice of entry, on all parties within 15 days of entry.

Dated: December 27, 2019

ENTER:

Hon. CAROL R. EDMEAD, JSC

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