SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** IAS MOTION 47EFM

Justice

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RINO VITUCCI, LINNE INZERILLA VITUCCI,

Plaintiffs,

- v -

DURST PYRAMID LLC, HUNTER ROBERTS CONSTRUCTION GROUP L.L.C., FRED GELLER ELECTRICAL, INC.

Defendants.

INDEX NO. 152095/2016

MOTION DATE N/A, 03/13/2020, 03/13/2020, 03/18/2020, 09/28/2020

MOTION SEQ. NO. 004 005 006 007 008

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 80, 81, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 101

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 141, 143, 205, 206, 207, 208

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 142, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 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, 191, 193, 209, 210, 211, 212, 213, 214, 216, 217, 218, 219, 220, 221, 222, 223, 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, 259, 260, 261, 265, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296

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

The following e-filed documents, listed by NYSCEF document number (Motion 008) 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY DEMAND/FROM TRIAL CALENDAR.

In this Labor Law case, plaintiffs move for partial summary judgment on their Labor Law §§ 240 (1) and 241 (6) claims against all defendants (motion seq. #004). Defendant Durst Pyramid, LLC (Durst), the sublease holder of the premises on the date of the accident, and defendant Hunter Roberts Construction Group, L.L.C. (Hunter Roberts), the general contractor for the construction project, move for summary judgment dismissing plaintiffs' Labor Law §§ 240 (1), 200, and 241 (6) claims (motion seq. #005). Durst also moves for summary judgment on its cross claim of contractual and common-law indemnification against defendant Fred Geller Electrical, Inc. (Geller) (motion seq. # 006). Geller moves for summary judgment dismissing plaintiffs' Labor Law §§ 240 (1), 200, and 241 (6) claims, and Durst and Hunter Roberts's cross claims (motion seq. #007). Durst and Hunter Roberts move to strike the note of issue on the ground that plaintiffs owe them outstanding discovery (motion seq. # 008).

Factual and Procedural Background

On January 28, 2016, plaintiff Rino Vitucci (Vitucci), was allegedly injured while working on a construction project. On March 9, 2016, plaintiffs commenced this personal injury action seeking damages pursuant to Labor Law §§ 240 (1), 200, and 241 (6) against defendants (*see* Isaac affirmation, exhibit A). Plaintiff Lianne Inzerilla Vitucci asserts a derivative claim against defendants (*id.*). In their answer Durst and Hunter Roberts asserts cross claims sounding in contribution, common- law indemnification and contractual indemnification against Geller.

Deposition Testimony of Vitucci

On January 28, 2016 (Isaac affirmation, exhibit D, 30, 42), Vitucci was working for nonparty Pace Plumbing (Pace) (Exhibit D, 57) at a construction project located on 625 West 57th Street, New York, New York (project). Defendant Hunter Roberts was the general contractor (*id.* at 97, 99-100). Just before the accident, Vitucci was installing fixtures inside newly constructed

apartments (*id*. at 57). Vitucci received all his work assignments and instructions from Ralph Gapinski, the Pace foreman at the jobsite (*id*. at 59, 103). Neither Hunter Roberts nor Durst provided plaintiff with any safety equipment or tools or materials (*id*. at 104).

At the time of the accident, Vitucci was working by himself on the fifth floor installing a bathroom fixture (*id*. at 116, 119). There were about 50 apartments on each floor (*id*.). Vitucci installed bathroom fixtures including towel bars, curtain rods, toilet paper dispensers, toilets, and vanity sinks (*id*.). At the time of the accident, Vitucci stated that there was neither electricity nor lighting in the bathroom where he was working. Vitucci testified that he had often complained about the inadequate lighting conditions to "whoever I seen, I let them know" (*id*. at 123). However, although there was an electrical subcontractor working at the site, Vitucci did not recall if he made any complaints to the electrical contractor (*id*. at 124).

When installing shower curtain rods, Vitucci would use a ladder to take measurements, mark the spot and then drill the holes for the installation plates and install the curtain rod (*id*. at 130). Vitucci would place the ladder next to the tub (*id*. at 131). The curtain rods were metal and weighed a couple of pounds and they were affixed using plates on each end that were drilled into the walls (*id*. at 137-138). Vitucci testified that the area inside each bathroom was very difficult to work in because there were materials in the way, inadequate or no lighting, and garbage all over the place (*id*. at 139). Vitucci stated that he complained about these conditions to Hunter Roberts and to Timmy, the Pace shop steward (*id*. at 139-141). During the time when plaintiff was working in the bathrooms, carpenters were working outside installing kitchen cabinetry and flooring (*id*. at 154).

According to Vitucci, the only work that required the use of a ladder was installing the shower curtain rods because he needed the leverage to do the job correctly (*id*. at 310). On the day

of the accident, Vitucci had installed fixtures in about six to eight bathrooms, three of which he could not properly place a ladder because there were refrigerators, stoves, and dishwashers stored in the bathrooms (*id*. at 149-150, 159). Whenever Vitucci encountered a bathroom that was jammed with appliances, he worked around it. He did not move the appliances to clear space for a ladder (*id*. at 155-156), because it was not his responsibility to move the appliances (*id*. at 325).

When the appliances were in the way, instead of using a ladder, Vitucci stepped on the apron or edge of the bathtub (*id*. at 160). Vitucci stated that he needed to stand on the apron to mark, drill, install the plate, and tighten the fixture (*id*. at 162, 165). The apron of the porcelain tub was about six-inches wide (*id*. at 164).

When he entered the apartment where his accident occurred, Vitucci walked in with a cart of materials and a ladder, however, there was no lighting at all in the entire apartment (*id*. at 178-179). Further, there were boxes of appliances inside the bathroom, including a refrigerator and a stove (*id*. at 180). The appliances were sitting in the middle of the bathroom and there was about three inches of space between the refrigerator and the side of the tub (*id*. at 187). Vitucci testified that although "it wasn't pitch dark," "it was dark" (*id*. at 184), and there was no artificial light inside the bathroom. Vitucci knew that there were no lights in the bathroom because he tried to turn them on and plug in his battery charger for his hand drill, but there was no power (*id*. at 190). He also tried to flip the light switch in the bathroom but "there was no power" (*id*. at 540).

Vitucci testified that at the time of the accident, he was wearing a hard hat, safety goggles, and work boots (*id*. at 189). After installing the towel rod and toilet paper holder, Vitucci proceeded to measure for the shower curtain rod with a tape measure and drilled the holes into the wall (*id*. at 191).

Vitucci testified that he had no issues standing on the apron of the tub to drill holes for the plate on the right side, then he drilled holes on the left side (*id.* at 193-94). After the drilling was finished, Vitucci inserted the plugs (screw anchors) into the holes and then he screwed the plates into the plugs (*id*. at 193- 194). Then, while standing inside the tub, Vitucci measured the length of the tub so he could cut the curtain rod to fit (id. at 195). He left the bathroom and cut the rod in the hallway (id.). After cutting the rod, Vitucci returned to the bathroom with the rod and stepped on the apron of the tub in order to install it (id. at 197-99). Vitucci testified that he needed the height of the apron in order to gain leverage and have enough force to secure the rod in place with an Allen wrench (id. at 197-99, 202, 565-66).

After inserting the rod into the plate and preparing to tighten the screws with his Allen wrench, Vitucci stepped into the tub and then stepped up on the apron, at which time he hit his head on the curtain rod (*id*. at 201). Vitucci testified that he put one foot up on the apron of the tub, and then as he was lifting his second foot on to the apron, he hit his head and fell (*id*. at 203, 204-205). Vitucci testified that he did not slip off the apron or rim of the tub, but upon hitting his head he blacked out and fell into the tub (*id*. at 207, 214).

Deposition Testimony of Vincent Teklits – Hunter Roberts

At the time of Vitucci's accident, Teklits was employed by Hunter Roberts as a senior superintendent who supervised the work of six to ten superintendents at the project (*see* Isaac affirmation, exhibit G, 9). Hunter Roberts's role at the project was to make sure that a job is done safely, on time, under budget, matching the quality in the plans and specifications (*id*. at 14). Superintendents employed by Hunter Roberts conducted walkthroughs at the jobsite daily (*id*. at 14). If a superintendent observed unsafe work activity, he had the authority to stop the work (*id*.at 16).

Prior to the accident, Teklits asked Vitucci to leave the jobsite because he was working without a hardhat and safety goggles (*id.* at 28). Teklits did not witness Vitucci's accident, but became aware of it when Ralph, the Pace foreman, told him that "the guy installing the curtain rod hit his head on a curtain rod" (*id.* at 37-38).

Teklits testified that there was a kitchen stove in the bathroom where Vitucci was working, however, he did not know who left it inside the bathroom (*id.* at 40, 78). Teklits testified that it was not unusual to see appliances stored in a bathroom, however, he was not aware that there was a stove in the bathroom that Vitucci was working in (*id.* at 41-42). Teklits stated that if a worker wanted the stove moved, then Hunter Roberts would call Pace to move it (*id.* at 43).

Teklits testified that there should have been electrical power and lighting in the apartments (*id.* at 44, 45). Prior to the accident, Teklits had received reports of inadequate lighting from workers at the worksite. Teklits stated that once he got such a report, he would call Geller and it would be addressed (*id.* at 60).

Deposition Testimony of Ronald Witteck – Geller

Ronald Witteck (Witteck) was employed by Geller as a general foreman and worked daily at the project (*see* Isaac affirmation, exhibit H at 7, 10). The scope of Geller's work included installing electrical services and lighting for all the apartments at the project (*id.* at 33, 50). Witteck was not aware if temporary electrical lighting was installed on the fifth floor as of January 28, 2016, however, referring to a photograph taken on the day of Vitucci's accident, Witteck testified that light fixtures had been installed (*id.* at 13). However, he had no personal knowledge whether there was lighting on the fifth floor on January 28, 2016 (*id.*).

Witteck testified that if there was an issue with the lighting installed by Geller, he would be notified by Hunter Roberts, Geller workers, or from laborers and journeymen from other trades

on the project (*id*. at 15). A Geller foreman would be notified to correct the issue (*id*. at 16). Witteck could not recall if anyone had reported any inadequate or malfunctioning lighting in January 2016 (*id*. at 17, 45).

Witteck testified that once the permanent lighting was installed, sheetrock, painting and tile subcontractors would come in before the bathroom fixtures were installed (*id*. at 55-56). If the permanent lighting was out, Geller would fix the lights and turn them back on (*id*. at 58). However, once the lights are installed and turned on, Geller's work was complete, and if additional lighting was needed it would be provided by Hunter Roberts (*id*. at 58).

Reviewing pictures taken of the bathroom where Vitucci fell, Witteck testified that they depicted a bathroom with permanent lighting because the lighting fixture was already installed in the ceiling (*id*. at 107). However, he could not tell if the power in the bathroom was working as the lights were off when the picture was taken (*id*. at 108-09, 113). Apart from looking at the photograph, Witteck had no personal knowledge as to whether there was lighting on the fifth floor on the day of the accident (*id*. at 13).

Discussion

Labor Law § 240 (1) – Plaintiffs' Motion (Seq # 4), Durst and Hunter Roberts' Motion (Seq # 5), and Geller's Motion (Seq #7)

Plaintiffs move for summary judgment on the issue of liability on their Labor Law § 240 (1) claim arguing that there is no question that Vitucci's injuries were caused by the application of gravity when he fell from the lip of the bathtub. Further, plaintiffs argue that Vitucci was not provided with any protection from this height-related danger. Durst and Hunter Roberts move for summary judgment dismissing this claim arguing that Vitucci was not exposed to a gravity related or elevation risk since it was not necessary for him to stand on the apron of the bathtub to perform his work. Therefore, according to Durst and Hunter Roberts, Vitucci is not afforded the protections

of Labor Law § 240 (1). Geller also moves for summary judgment dismissing this claim making similar arguments to those made by Durst and Hunter Roberts. In opposition to Geller's motion, plaintiffs concede that their Labor Law § 240 (1) claim is not applicable to Geller as the electrical contractor (*see* affirmation in opposition, NYSCEF Doc. # 193 at 2).

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

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

"Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). As such, the statute applies to incidents involving a "falling worker" or a "falling object" (*Harris v. City of New York*, 83 A.D.3d 104, 108 [1st Dep't 2011] [internal quotation marks omitted]).

The statute "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citation omitted]). However, "not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1)" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). "[T]he single decisive question is whether [a] plaintiff's injuries were the direct consequence of a failure to provide adequate protection

against a risk arising from a physically significant elevation differential" (*Runner v NY Stock Exchange*, 13 NY3d 599, 603 [2009]). Therefore, in order to prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]). Once a plaintiff establishes that a violation of the statute proximately caused his or her injury, then an owner or contractor is subject to "absolute liability" (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011], citing *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995], *rearg denied* 87 NY2d 969 [1996]).

Plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability on his Labor Law § 240(1) claim. Plaintiff testified, specifically and unequivocally, that he needed to stand on the lip of the bathtub in order to gain enough leverage and enough torque to screw in the rod with the Allen wrench into the metal plate (id. at 197-99, 202, 565-66). Indeed, plaintiff testified that he was provided with a ladder to perform this work, further supporting his testimony that he needed additional height in order to screw in the shower curtain rod (id. at 130-31, 310). However, as with some of the other bathrooms plaintiff worked in, there were appliances in the room which prevented plaintiff from using this ladder to install the curtain rod and thus he was forced to stand on the lip of the tub in order to gain the leverage he needed to screw in the curtain rod (*id*. at 149-150, 159-62, 165).

Defendants attempt to raise an issue of fact by submitting the affidavit of Robert T. Bove Jr., a biochemical engineer. In his affidavit, Mr. Bove states that he believes that plaintiff could have installed the curtain rod without standing on the lip of the tub or a ladder because his grip reach was approximately 7-9 inches above where the screws needed to be placed. However, there

is no dispute plaintiff could grip this high. Rather, the issue is whether plaintiff needed the additional height of a ladder or the lip of the tub in order to gain leverage so that he would have enough strength to tighten the screws with the Allen wrench. Mr. Bove does not address this issue in his affidavit and he ignores plaintiff's testimony that he needed the height in order to have this additional leverage. Thus, Mr. Bove's affidavit is insufficient to create an issue of fact regarding this claim.

Defendants also submit the affidavit of Ralph Gapinski, who was the foreman at the project for Pace Plumbing Corp., plaintiff's employer. In his affidavit, Mr. Gapinski states that the work of installing the curtain rods could have been performed from the ground or while standing inside the tub and that he personally observed other employees performing the work without standing on a ladder or on the lip of the tub. However, while other, unspecified employees may have been able to perform this work without the additional height, Mr. Gapinski does not address whether this specific plaintiff, given his height, weight, strength and ability, should have been able to perform this job while standing on the floor or inside the tub of the bathroom. Thus, Mr. Gapinski's generalized and vague statements about other employees is insufficient to raise an issue of fact as plaintiff's unequivocal testimony, that he could not perform this work without the use of a ladder or without standing on the lip of the tub, remains uncontroverted.

Likewise, defendants' citation to *Guerico v Metlife Inc*, (15 AD3d 153 [1st Dept 2005]), is unpersuasive. Unlike *Guerico*, where the plaintiff was installing wall tiles, Vitucci was involved in a task which required the use of force and thus the fact that he may have been able to reach this height while standing on the floor or in the tub is irrelevant. Defendants' citation to *Broggy v Rockefeller Group, Inc.*, (8 NY3d 675, 681 [2007]) is also unpersuasive as the evidence in that

case demonstrated as a matter of law that the plaintiff did not need to stand at an elevation in order to clean the windows.

Finally, defendants' contention that plaintiff could have asked someone to move the appliances so that he could fit his ladder into the bathroom is, at most, an issue of comparative negligence which is not a defense to a Labor Law 240(1) claim (*Sotarriba v. 346 West 17th Street LLC*, 179 A.D.3d 599 [1st Dep't 2020]). Accordingly, plaintiff is entitled to summary judgment on liability on his Labor Law 240 claim as against defendants Durst and Hunter Roberts. In light of this ruling, plaintiff's motion for partial summary judgment on his Labor Law 241(6) claim and the ramining aspects of defendants Durst and Hunter Roberts' motion for summary judgment seeking dismissal of all of plaintiff's claims are academic (*Squicaray v Consolidated Edison Co. of NY, Inc.*, 2017 NY Misc LEXIS 4060, 2017 NY Slip Op 32277 [U]; *affmd* 171 AD3d 416 [1st Dept 2019] [holding "[s]ince the court properly granted partial summary judgment in favor of the [plaintiff on his] Labor Law § 240 (1) claim, [third-party defendant's] remaining arguments, concerning plaintiff's Labor Law § 241 (6) claim, are academic" (*citing Fanning v Rockefeller Univ.*, 106 AD3d 484, 485 [1st Dept 2013])]).

Labor Law § 241 (6) - Geller's Motion (Seq #7)

In the bill of particulars, plaintiffs allege that defendants violated the following provisions of the industrial code: 12 NYCRR 21.9; 12 NYCRR 23-1.7; 12 NYCRR 23-1.11;12 NYCRR 23-1.13, 12 NYCRR 23-1.15; 12 NYCRR 23-1.16; 12 NYCRR 23-1.17; 12 NYCRR 23-5.1; 23-1.7; 23-1.16; 23-1.21; 12 NYCRR 23-1.2; 12 NYCRR 23-1.3; 12 NYCRR 23-1.30; 12 NYCRR 23-1.4; 12 NYCRR 23-1.5; 12 NYCRR 23-1.7; 12 NYCRR 23-1.16; 12 NYCRR 23-1 .17; 12 NYCRR 23-1.21; 12 NYCRR 23-1.22; 12 NYCRR 23-5.10; 12 NYCRR 23-5.18; 12 NYCRR 23-

9.6; 12 NYCRR 23-5.3. Plaintiffs also allege that defendants violated numerous provisions of the Occupational Safety & Health Administration (OSHA) rules.

Geller move to dismiss all of plaintiffs' Labor Law 241(6) claims based on the Industrial Code or article 1926 of OSHA. However, in opposition, plaintiffs failed to oppose the dismissal of all of the claimed violations except for Industrial Code § 23-1.30. Thus, even though plaintiffs allege multiple violations of the Industrial Code in the bill of particulars, since they do not oppose dismissal of these claims (with the exception of Industrial Code § 23-1.30), they are deemed abandoned (*see Perez v. Folio House, Inc.*, 123 AD3d 519, 520 [1st Dep't 2014]; *Rodriguez v. Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 530-31 [1st Dep't 2013]). Accordingly, Geller is entitled to dismissal of that part of the Labor Law § 241(6) claim predicated on these abandoned provisions.

Industrial Code § 23-1.30 provides that:

> Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass. 22 NYCRR § 23-1.30.

The First Department has held that this provision is concrete and specific enough to support a Labor Law 241(6) claim (*Hernandez v. Columbus Ctr.*, 50 A.D.3d 597 [1st Dep't 2008]). Here, there are issues of fact with respect to the adequacy of light in the bathroom. While Vitucci testified that the lights in the bathroom did not work, Witteck testified on behalf of defendant Geller, that there was lighting installed on the fifth floor on the date of Vitucci's accident (Isaac Affirmation, Exh. H at 13). Accordingly, neither plaintiffs nor defendant Geller is entitled to summary judgment on the Labor Law § 241 (6) claim insofar as it is predicated on a violation of Industrial Code § 23-1.30.

Labor Law § 200 - Geller's Motion (Seq #7)

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" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000] [internal quotation marks and citation omitted]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]).

Labor Law § 200 (1) states, in pertinent part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

Claims brought under this section "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 v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). In cases arising from the manner in which the work was performed, the Court of Appeals has held that the owner or general contractor may be liable only if it exercised supervision or control of the work that led to the injury (*see O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805, 806 [2006]). Here, there is no evidence that defendant Geller had any direct, supervisory control over Vitucci's work. Indeed, at this deposition, Vitucci testified that it was his employer, Pace, who supervised his work. Thus, there is no basis to support liability against defendant Geller under the means and methods category.

In his opposition, plaintiff argues that defendant Geller can be held liable under Labor Law 200 because there was a defective condition in the bathroom, namely the lights in the bathroom did not work. "Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the

condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work, "because the injury arose from the condition of the work place created by or known to the contractor, rather than the method of [the] work"]). Here, although there is an issue of fact as to whether the light fixtures in the bathroom were working on the day of the accident, there is no evidence that defendant Geller had any notice of this allegedly defective condition. Indeed, the photographs and the testimony of Geller's witness Witteck all show that permanent lighting had been installed in the bathroom, at which point Geller's work was complete (Carey Aff., Exh. K, Wittick Dep. Tr. at 13, 58). If the lights were not working, as Vitucci claims, Geller had no notice of this condition (Carey Aff., Exh. I, Plf Dep. Tr. at 527). Accordingly, plaintiffs' Labor Law 200 claim against defendant Geller must be dismissed.

Indemnification – Durst and Hunter Roberts' Motion (Seq #6)

In motion sequence #006, defendants Durst and Hunter Roberts move for summary judgment on their contractual and common-law indemnification claims against defendant Geller. With respect to the contractual indemnification claim, defendants Durst and Hunter Roberts cite to the indemnification provisions in the parties' contract, which is attached as exhibit A to the affirmation of Timothy Langan Jr. However, the contract is not authenticated as required by CPLR 4518(a) and thus is inadmissible and cannot form the basis to grant summary judgment (*Clarke v. American Truck & Trailer*, 171 A.D.3d 405, 406 [1st Dep't 2019] [holding agreement between parties, annexed to an attorney affirmation, was not authenticated and therefore was not admissible and not an appropriate basis on which to grant summary judgment]). With respect to Durst and

Hunter Roberts claim seeking common-law indemnification, Durst and Hunter Roberts have not demonstrated prima facie entitlement to summary judgment on their common-law indemnification claims, because they have failed to demonstrate, as a matter of law, that they are free from negligence (*see Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]). Accordingly, Durst and Hunter Roberts' motion for summary judgment on their contractual and common-law indemnification claims must be denied.

Durst and Hunter Roberts' Motion to Vacate the Note of Issue (Motion Seq #8)

Durst and Hunter Roberts move to vacate the note of issue and to compel plaintiffs to comply with its discovery demands arguing that pursuant to a June 13, 2019 discovery order, the parties were to exchange any in-hand medical records received from Dr. Kesselman, Dr. St. Martin, and Blue Cross Blue Shield within 20 days of receipt. However, they argue that they never received such records from plaintiffs. Further, Durst and Hunter Roberts argue that: pursuant to 22 NYCRR § 202.17, plaintiffs are required to provide them with Vitucci's treating physician's narrative report prior to any independent medical examination (IME) of Vitucci, yet no such report was provided; that they reserved their right to make a motion for the discovery of plaintiff Lianne Vituccui's social media account, and therefore, should be permitted to make such a motion; pursuant to the June 13, 2019 discovery order, they are entitled to inspect Vitucci's cell phone to copy Vitucci's cell phone health application, however, they have not been permitted access to Vitucci's cell phone; and that plaintiffs have failed to provide them with trial authorizations.

However, subsequently, on February 27, 2020, the court entered the final discovery order in this case at which time all discovery was deemed complete except one outstanding authorization. The order does not list any other outstanding discovery and expressly states "[a]bsent good cause shown, any discovery issues not raised herein will be deemed waived" (*id.*). The order also directs

plaintiffs to file the note of issue by March 15, 2020. The court notes, however, that due to COVID interruptions, plaintiffs were not able to file the note of issue until May 4, 2020.

Based upon the language of the June 13, 2019, Durst and Hunter Roberts had 45 days from that date to file a discovery motion seeking discovery of Lianne Vitucci's social media accounts, but did not do so. Likewise, they had 20 days from the date of the June 13, 2019 order to inspect Vitucci's cell phone, but did not do so. Moreover, the February 27, 2020 order indicates that there was only one outstanding item of discovery. Thus, by Durst and Hunter Roberts' own inaction and the provisions of the February 27, 2020 order, they have waived this discovery. Finally, with respect to Durst and Hunter Roberts' claim that they have not received properly signed and notarized trial authorizations, plaintiffs have provided such authorizations and thus this branch of the motion is moot. Accordingly, Durst and Hunter Roberts' motion to vacate the note of issue and to compel must be denied.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment (motion sequence #004) is GRANTED IN PART to the extent that plaintiffs are entitled to summary judgment on liability on their Labor Law 240 (1) claim against defendants Durst and Hunter Roberts, and is otherwise denied; and it is further

ORDERED that defendants Durst and Hunter Roberts' motion for summary judgment seeking dismissal of the complaint (motion sequence #005) is DENIED; and it is further

ORDERED that defendants Durst and Hunter Roberts' motion of summary judgment on the cross-claims for indemnification (motion sequence #006) is DENIED; and it is further

ORDERED that defendant Geller's motion for summary judgment seeking dismissal of all

of plaintiffs' claims and the cross-claims asserted against them (motion sequence #007) is GRANTED IN PART to the extent that the Labor Law 240 and 200 claims are dismissed as against Geller, that the Labor Law 241(6) claim is dismissed as against Geller to the extent that it is premised on violations of any provisions except for Industrial Code Section 23-1.30, and is otherwise denied; and it is further

ORDERED that defendants Durst and Hunter Roberts' motion to strike the note of issue (motion sequence #008) is DENIED.

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12/1/2020
DATE

PAUL A. GOETZ, 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