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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INDEX NO. 159007/2013

FELIPE RUISECH, MARTHA RUISECH,

Plaintiffs,

- v -

MOTION DATE 07/06/2020, 08/19/2020, 08/19/2020, 11/02/2020

MOTION SEQ. NO. 004 005 006 007

STRUCTURE TONE GLOBAL SERVICES, INC., TISHMAN SPEYER PROPERTIES, L.P., METROPOLITAN LIFE INSURANCE COMPANY, 200 PARK LP, CBRE INC,

Defendants.

DECISION + ORDER ON MOTION

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TISHMAN SPEYER PROPERTIES, L.P., 200 PARK LP,

Third-Party Plaintiffs,

-against-

CBRE, INC.,

Third-Party Defendant.

Third-Party
Index No. 590013/2014

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STRUCTURE TONE GLOBAL SERVICES, INC.,

Second Third-Party Plaintiffs,

-against-

A-VAL ARCHITECTURAL METAL III, LLC,

Second Third-Party Defendant.

Second Third-Party
Index No. 590202/2014

----------X

TISHMAN SPEYER PROPERTIES, L.P., 200 PARK LP,

Third-Party Plaintiffs,

-against-

A-VAL ARCHITECTURAL METAL III, LLC,

Third-Party Defendant.

Third Third-Party
Index No. 595439/2018

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 185, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 271, 272, 273, 274, 277, 284, 285, 286, 287, 288, 289, 292, 293, 294, 295, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 186, 205, 206, 207, 208, 209, 210, 269, 270, 278, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 184, 187, 211, 212, 213, 214, 215, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 279, 296, 297, 298, 299, 300, 301

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 188, 201, 202, 203, 204, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 275, 276, 280, 281, 282, 337

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

This action arises out of a construction site accident that occurred on June 2, 2011 at 200 Park Avenue in Manhattan (the premises). Plaintiff Felipe Ruisech (hereinafter, plaintiff), a glazier, alleges that he slipped on construction debris while attempting to install a glass partition, injuring his back.

Defendants/third-party plaintiffs/third third-party plaintiffs 200 Park, LP (200 Park) and Tishman Speyer Properties, L.P. (Tishman Speyer) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims and Labor Law § 241 (6) claim and all cross claims asserted against them. In addition, 200 Park and Tishman Speyer move for summary judgment on their common-law indemnification claims against defendant/third-party defendant CBRE, Inc. (CBRE), defendant/second third-party defendant Structure Tone, Inc. i/s/h/a Structure Tone Global Services, Inc. (Structure Tone), and

second third-party defendant/third third-party defendant A-Val Architectural Metal III, LLC (A-Val). 200 Park and Tishman Speyer also move for: (1) contractual indemnification, including defense costs/attorneys' fees, from CBRE; (2) contractual indemnification, including defense costs/attorneys' fees, from Structure Tone; and (3) contractual indemnification, including defense costs/attorneys' fees, from A-Val (motion sequence number 004).

Second third-party defendant/third third-party defendant A-Val moves, pursuant to CPLR 3212, for summary judgment dismissing Structure Tone, 200 Park, and Tishman Speyer's failure to procure insurance, common-law negligence, and common-law indemnification claims and any cross claims and counterclaims for failure to procure insurance and common-law negligence and common-law indemnification (motion sequence number 005).

Defendant/third-party defendant CBRE moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' Labor Law §§ 241 (6) and 200 claims and all cross claims and third-party claims asserted against it. CBRE also requests summary judgment on its contractual defense and indemnification claim against A-Val (motion sequence number 006).

Defendant/second third-party plaintiff Structure Tone moves for summary judgment dismissing plaintiffs' Labor Law § 241 (6), Labor Law § 200, and common-law negligence claims. Structure Tone also moves for summary judgment on its contractual defense and indemnification and failure to procure insurance claims against A-Val (motion sequence number 007).

BACKGROUND

On June 2, 2011, 200 Park and Tishman Speyer were the owner and managing agent of the building, respectively. CBRE was a tenant on the 19th floor (NY St Cts Elec Filing [NYSCEF] Doc No. 162, eighth modification of lease). CBRE hired Structure Tone as a general

contractor to build-out floors in the building (NYSCEF Doc No. 128, Structure Tone's general contract). Structure Tone, in turn, retained A-Val to perform "all labor and materials to complete the arch metal and glass work" on the project (NYSCEF Doc No. 105, purchase order, at 1). Plaintiff was employed as a glazier by A-Val on the date of the accident.

Plaintiff testified that, at about 1:00 p.m. on June 2, 2011, he had an accident on the 19th floor of 200 Park Avenue (NYSCEF Doc No. 153, plaintiff tr at 38). Structure Tone was the general contractor on the job (*id.* at 41). He reported his accident directly to Bryan Orsini (Orsini), Structure Tone's general manager (*id.* at 41-42). A-Val's glass foreman gave him instructions at the job site (*id.* at 42). Plaintiff testified that A-Val's work consisted of installing huge glass panels, and that some of them weighed as much as 500 pounds (*id.* at 46). The whole floor was under construction (*id.*). The glass was going to be used as a divider between the internal hallway and the offices (*id.* at 47). The panels were about 10 feet high and four feet wide (*id.*). Structure Tone conducted safety meetings at the site (*id.* at 49). There were at least 10 foremen on the site (*id.* at 50). Plaintiff occasionally acted as the foreman, and told the workers where to install the glass (*id.* at 50-51). He did not recall who the foreman was that day (*id.* at 53).

Plaintiff further testified that his A-Val team had to lift a piece of glass that weighed about 500 pounds, and they told A-Val that they needed at least five workers to install the glass (*id.* at 59). Plaintiff and his coworkers were going to move a piece of glass that was approximately 10 feet tall and four feet wide and weighed 500 pounds about 10 feet to the hallway (*id.* at 63-66). The piece of glass was sitting on a wall in a pile (*id.* at 65). There were eight pieces of different sizes (*id.* at 66). He testified that the piece of glass was moved with suction cups; "[y]ou would have men at the ends, one man at the end, and then men in between

the other men with other the suction cups" (*id.* at 67). According to plaintiff, the workers had to pitch it up and stand it up; "[w]hen [they] stood the glass up and [they] were just about getting ready to install it, they came and took away one man" (*id.* at 70). Plaintiff stated that "they had two men at the ends and two men at the center, and [plaintiff] was one of the men in the center of the glass" (*id.* at 71). The glass had to be fit into a track in the floor (*id.*). He testified that "[a]s [they] leaned the glass, the men at the ends and the men that were on the glass could not hold the glass" (*id.* at 77). Plaintiff explained that "[t]he glass was coming down on [plaintiff] and was going to crush [plaintiff] . . . and the man that was next to [him]. So [plaintiff] used all [his] strength in [his] body to prevent it from falling on [him]" (*id.*). Plaintiff testified that he slipped on something when installing the glass: "[w]hen [he] lifted up the glass and when [he] went to install the glass . . . it must have been pebbles, it must have been something that when [he] put [his] foot down, his foot slipped and that was when [he] felt something, something happened" (*id.* at 79). The pebbles were made out of the cement from the flooring (*id.* at 82-83).

Bryan Orsini (Orsini) testified that he was Structure Tone's construction superintendent at the 200 Park Avenue project in 2011 (NYSCEF Doc No. 155, Orsini tr at 9). He worked with Patrick Higgins, the project manager, who was responsible for "mak[ing] sure that the project was going in the right direction" (*id.* at 10). Structure Tone had laborers on the project who cleaned the job site (*id.*). The project was a build-out of CBRE's four floors (*id.* at 32). Orsini testified that, among other things, he coordinated the trades (*id.* at 9). Orsini walked the job site daily and spoke to the foreman for the different trades and asked if they "[had] any concerns about missing information, just going around making sure they're coordinated" (*id.* at 12-13).

Orsini did not recall any construction debris, plaster or any type of rocks on the 19th floor around the date of the accident (*id.* at 14-15). He did not remember the name of Structure Tone's

foreman on the date of the accident (*id.* at 19). Orsini created an accident report on June 13, 2011 (*id.* at 24-25). He believed that he received the information from the foreman on the project (*id.* at 25). He did not recall speaking to plaintiff (*id.* at 27). According to Orsini, Structure Tone was required to ensure that subcontractors were working safely (*id.* at 36). Structure Tone had a safety department, but did not have a safety coordinator on site (*id.* at 47). Orsini testified that he "can't tell [a subcontractor] what equipment to use. [He is] not trained in that . . . [He] coordinate[s] the trades. [He doesn't] tell them how to do it. [He] just [gets] them in at the right time to perform their tasks" (*id.* at 49-50). If he observed a safety issue, he spoke to the foreman (*id.* at 50).

Structure Tone's injury/accident report filled out by Orsini on June 13, 2011 states that:

> "Felipe was lifting a 4' x 8' x ¾" glass with 3 other glasiers [sic] when he pulled his lower back. Felipe didn't seek immediate care, he waited until Saturday 6/4 to go to hospital. Felipe was back on the job Friday 6/3 working. He didn't come in to claim an injury until Tuesday 6/7 around 11 am"

(NYSCEF Doc No. 159, accident report, at 4).

Michael Mucci (Mucci), a senior director of Tishman Speyer, testified that CB Richard Ellis was a tenant at 200 Park (NYSCEF Doc No. 156, Mucci tr at 9, 12). After reviewing Structure Tone's contract, Mucci stated that CB Richard Ellis hired Structure Tone to perform construction work (*id.* at 12). He believed that Structure Tone was responsible for maintaining the work area (*id.* at 15). Tishman Speyer's role with respect to the project was "minimal"; "if there was coordination needed for light safety or building shut down in terms of sprinkler systems or access to the building, we would help coordinate it" (*id.* at 22-23). Tishman Speyer was not involved with how subcontractors performed their work (*id.* at 23-24).

Sheldon Franco (Franco) testified that he was the director of facilities for CBRE, formerly known as CB Richard Ellis (NYSCEF Doc No. 157, Franco tr at 9). As the director of

facilities, Franco oversaw the various offices that his company used in the tristate area (*id.* at 9-10). The project was a build-out of new office space (*id.* at 13). Franco believed that the project started in 2010 (*id.* at 11). Franco stated that Structure Tone was responsible for keeping areas on the job site free from accumulations of debris, waste materials, and other rubbish (*id.* at 15). He recalled that "a window broke and someone was hurt" (*id.* at 17). CBRE did not supervise the work (*id.* at 21). Structure Tone informed CBRE about the progress of the work (*id.* at 22).

Plaintiffs commenced this action on October 2, 2013, seeking recovery for violations of Labor Law §§ 240 (1), 241 (6), 200 and under principles of common-law negligence (NYSCEF Doc No. 135). By stipulation dated October 15, 2019, plaintiffs withdrew their Labor Law § 240 (1) claim (NYSCEF Doc No. 145).

200 Park and Tishman Speyer brought a third-party action against CBRE, seeking contractual indemnification, common-law indemnification, contribution, and damages for breach of contract for failure to procure insurance (NYSCEF Doc No. 136).

Structure Tone commenced a second third-party action against A-Val, asserting four causes of action seeking contractual indemnification, common-law negligence, attorney's fees, and damages for failure to procure insurance (NYSCEF Doc No. 140).

200 Park and Tishman Speyer also brought a third third-party action against A-Val, seeking contractual indemnification, common-law indemnification, contribution, and damages for failure to procure insurance (NYSCEF Doc No. 143).

DISCUSSION

"It is well settled that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Pullman v Silverman*, 28 NY3d 1060,

1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). The court's function on a motion for summary judgment is "issue-finding, rather than issue-determination" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY3d 941 [1957] [internal quotation marks and citation omitted]).

A. Labor Law § 241 (6)

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241(6) imposes a duty upon owners, 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]). "The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). In addition, "[t]he [Industrial Code] provision relied upon by [a] plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law

principles" (*id.*, citing *Ross*, 81 NY2d at 504-505). Therefore, in order to prevail on a Labor Law § 241 (6) claim, "a plaintiff must establish a violation of an implementing regulation which sets forth a specific standard of conduct" (*see Ortega v Everest Realty LLC*, 84 AD3d 542, 544 [1st Dept 2011]), and that the violation was a proximate cause of the injury (*see Egan v Monadnock Constr., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

Whether CBRE and Tishman Speyer May Be Held Liable Under Labor Law § 241 (6)

In motion sequence #006, CBRE contends that it cannot be held liable under Labor Law § 241 (6) because it was a tenant and not an owner or general contractor.

Contrary to CBRE's contention, it may be held liable under Labor Law § 241 (6). "The term "owner" within the meaning of article 10 of the Labor Law encompasses a 'person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit'" (*Zaher v Shopwell, Inc.*, 18 AD3d 339, 339 [1st Dept 2005], quoting *Copertino v Ward*, 100 AD2d 565, 566 [1984]). Here, as a tenant with rights to the property, CBRE fulfilled the role of an owner by retaining Structure Tone for the renovation of the demised space (NYSCEF Doc No. 128).

200 Park and Tishman Speyer also argue that Tishman Speyer cannot be held liable under the statute because it had no supervisory authority over the project in CBRE's space.

Here, 200 Park and Tishman Speyer have demonstrated that Tishman Speyer may not be held liable under section 241 (6). It is undisputed that Tishman Speyer, the managing agent, is not an owner or contractor. Thus, Tishman Speyer may only be held liable as an agent of an owner or contractor (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981] ["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"]). There is no evidence that Tishman Speyer had the authority to supervise and control the work (*see Reyes v Bruckner Plaza Shopping Ctr. LLC*, 173 AD3d 570, 571 [1st Dept 2019]). Tishman Speyer's role on the project was "minimal," and did not direct subcontractors on how to perform their work (NYSCEF Doc No. 156, Mucci tr at 22-24). Plaintiffs have failed to raise a triable issue of fact. Therefore, Tishman Speyer is entitled to dismissal of plaintiffs' Labor Law § 241 (6) claim.

Whether Plaintiffs Have Alleged A Specific and Applicable Industrial Code Violation

Plaintiffs' bills of particulars allege the following Industrial Code violations: "12 NYCRR subpart 20-1, including but not limited to 12 NYCRR 23-1.5 (a); 12 NYCRR 23-1.5 (b); 12 NYCRR 23-1.5 (c); 12 NYCRR 23-1.5 (2); 12 NYCRR 23-1.7 (a) (b); 12 NYCRR 23-1.7 (d) (e) (1) (2); 12 NYCRR 23-6.1; and 12 CFR 1910.12 (a) and 12 CFR 1910.132 (a)" and "12 NYCRR 23-2.1 (a) and 12 NYCRR 23-2.1 (b)" (NYSCEF Doc No. 142).

200 Park and Tishman Speyer, Structure Tone, and CBRE move for summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim. In opposition to the motions, plaintiffs only rely on sections 23-1.7 (d) and 23-1.7 (e) (1) and (2) (NYSCEF Doc No. 292 at 4-10). Therefore, plaintiffs have abandoned reliance on the remaining cited provisions (*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 . . ."]). Therefore, the court will only consider whether plaintiffs have a valid Labor Law § 241 (6) claim as predicated on the alleged violations of sections 23-1.7 (d) and 23-1.7 (e) (1) and (2).

12 NYCRR 23-1.7 (d)

Section 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 or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery condition shall be removed, sanded or covered to provide safe footing"

(12 NYCRR 23-1.7 [d]).

200 Park and Tishman Speyer argue that section 23-1.7 (d) does not apply because plaintiffs do not allege any slippery condition. Structure Tone similarly contends that plaintiff's accident did not occur as a result of a slippery condition or foreign substance; rather, he testified that he was lifting a piece of glass at the time of the accident. In addition, Structure Tone maintains that plaintiff was injured on an open floor, not in a passageway. CBRE adopts Structure Tone's arguments with respect to section 23-1.7 (d).

Plaintiffs counter that the area where plaintiff was injured was located inside space under renovation. The glass panels were being erected to form passageways and walkways between cubicles and offices. Thus, the area where plaintiff was injured was a floor, passageway or walkway, rather than an open area. They further argue that plaintiff slipped on pebbles that were not integral to his work.

"12 NYCRR 23-1.7 (d) mandates a distinct standard of conduct, rather than a general reiteration of common-law principles . . ." (*Rizzuto*, 91 NY2d at 351; *see also Carty v Port Auth. of N.Y. & N.J.*, 32 AD3d 732, 733 [1st Dept 2006], *lv denied* 8 NY3d 814 [2007]). Further an open area does not constitute a "floor, passageway, walkway, scaffold, platform or other elevated working surface" within the meaning of the provision (*see e.g. Raffa v City of New York*, 100 AD3d 558, 559 [1st Dept 2012]). Moreover section 23-1.7 (d) does not apply where the worker's

accident does not result from a "foreign substance" which may cause slippery footing (12 NYCRR 23-1.7 [d]; *see also Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 530 [1st Dept 2013]; *Kowalik v Lipschutz*, 81 AD3d 782, 784 [2d Dept 2011]). As the Court of Appeals has held,

> "[a] violation of 12 NYCRR 23-1.7 (d), while not conclusive on the question of negligence, would thus constitute *some evidence of negligence* and thereby reserve, for resolution by a jury, the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances"

(*Rizzuto*, 91 NY2d at 351 [emphasis in original]).

In this case, section 23-1.7 (d) is applicable, and there are questions of fact as to whether the provision was violated and was a proximate cause of plaintiff's accident. Plaintiff testified that he slipped on pebbles from the cement flooring (NYSCEF Doc No. 153, plaintiff tr at 79, 82-83). Although defendants argue that the accident location does not constitute a "passageway," the area of the 19th floor constitutes a floor within the meaning of section 23-1.7 (d) (*see Temes v Columbus Ctr. LLC*, 48 AD3d 281, 281 [1st Dept 2008]). Moreover, the pebbles were not integral to plaintiff's work at the job site as the track for the glass plaintiff was handling had already been completed (*see Pereira New Sch.*, 148 AD3d 410, 412 [1st Dept 2017] ["the excess wet concrete discarded on the plywood on which plaintiff slipped was not integral to the work being performed by plaintiff at the accident site"]; *Ocampo v Bovis Lend Lease LMB, Inc.*, 123 AD3d 456, 457 [1st Dept 2014] [ice was not integral to the work even though there was evidence that the work required the use of a solution of water and a chemical intended to reduce its freezing point]).

12 NYCRR 23-1.7 (e)

12 NYCRR 23-1.7 (e) governs "Tripping and other hazards." It provides that:

> "(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"

(12 NYCRR 23-1.7 [e]).

Sections 23-1.7 (e) (1) and (e) (2) are sufficiently specific to support a Labor Law § 241 (6) claim (*Farina v Plaza Constr. Co.*, 238 AD2d 158, 159 [1st Dept 1997]; *Colucci v Equitable Life Assur. Socy. of U.S.*, 218 AD2d 513, 515 [1st Dept 1995]). Like section 23-1.7 (d), section 23-1.7 (e) does not apply where the instrumentality that caused the accident was an integral part of the work (*see O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805, 806 [2006]; *Krzyzanowski v City of New York*, 179 AD3d 479, 480 [1st Dept 2020]).

200 Park and Tishman Speyer and Structure Tone argue that section 23-1.7 (e) (1) does not apply because plaintiff was not injured in a passageway. Further, Structure Tone contends that plaintiff did not trip. Finally, 200 Park and Tishman Speyer and Structure Tone maintain that section 23-1.7 (e) (2) is inapplicable because the accident did not involve materials or tools scattered on the floor, and the condition was created by plaintiff's work. CBRE adopts Structure Tone's arguments with respect to section 23-1.7 (e).

Contrary to Structure Tone's contention, the fact that plaintiff slipped, rather than tripped, is not dispositive as to the applicability of section 23-1.7 (e) (*Fitzgerald v Marriott Intl., Inc.*, 156 AD3d 458, 459 [1st Dept 2017]; *but see Purcell v Metlife Inc.*, 108 AD3d 431, 432 [1st Dept 2013]).

However, section 23-1.7 (e) (1) is inapplicable because plaintiff was not using the hallway as a passageway at the time of the accident (*see Conlon v Carnegie Hall Socy. Inc.*, 159 AD3d 655, 655-656 [1st Dept 2018]).

But, section 23-1.7 (e) (2) applies because the pebbles that plaintiff allegedly slipped on were "not an integral part of the work being performed by the plaintiff at the time of the accident" (*Tighe v Hennegan Constr. Co., Inc.*, 48 AD3d 201, 202 [1st Dept 2008] [demolition debris was not integral to electrician's work]). Plaintiff testified that the pebbles were made out of the cement from the flooring, another A-Val team performed that work, and that he had never done that work (NYSCEF Doc No. 153, plaintiff tr at 82-83, 84). There are questions of fact as to whether section 23-1.7 (e) (2) was violated and was a proximate cause of plaintiff's accident.

In sum, plaintiffs have a valid Labor Law § 241 (6) claim to the extent that it is predicated on 12 NYCRR 23-1.7 (d) and 12 NYCRR 23-1.7 (e) (2). Accordingly, summary judgment should be granted to dismiss plaintiffs' Labor Law § 241 (6) to the extent it is predicated on any other alleged violation of 12 NYCRR subpart 20-1.

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" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). 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]). If the accident arises out of a dangerous premises condition, liability may be imposed if defendant created the condition or failed to remedy a condition of which it had actual or constructive notice (*see Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]). "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" (*Cappabianca*, 99 AD3d at 144). Thus, even though a defendant may possess the authority to stop the construction work for safety reasons or exercise general supervisory control over the work site, such authority is insufficient to establish the degree of supervision and control necessary to impose liability (*see Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 407 [1st Dept 2018] [finding a defendants' stop work authority insufficient to establish that the defendant actually "exercised any control over the manner and means of plaintiff's work"]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007] [concluding that overseeing job site activities and monitoring project milestones insufficient evidence of the requisite degree of supervision and control necessary to impose liability under common-law negligence or Labor Law § 200]).

200 Park and Tishman Speyer seek dismissal of plaintiffs' Labor Law § 200 and common-law negligence claims, arguing that they did not direct or control plaintiff's work, and did not have notice of any dangerous condition.

CBRE contends that it did not provide any equipment to subcontractors and did not control the means and methods of the subcontractors. Further, CBRE argues that it did not have any notice of the pebbles that plaintiff slipped on.

Structure Tone argues that it did not control the means and methods of plaintiff's work and did not create or have notice of the pebbles.

In response, plaintiffs contend that Structure Tone had a contractual duty to keep the work site free from the accumulation of construction debris "at all times." According to plaintiffs, defendants have failed to show that they lacked notice of the pebbles, as they have not submitted evidence as to their inspections of the site.

Here, the accident arose out of an alleged dangerous premises condition, not the means and methods of the work (*see DeMercurio v 605 W. 42nd Owner LLC*, 172 AD3d 467, 467 [1st Dept 2019] [green dust was a dangerous condition that existed prior to plaintiff's arrival at the job site and was not a part of the work that he was performing]; *see also Armental v 401 Park Ave. S. Assoc., LLC*, 182 AD3d 405, 407 [1st Dept 2020] [loose pipe in front of a doorway constituted a premises condition]). Plaintiff testified that he slipped on pebbles, and that the area with the pebbles was "about 10 feet" (NYSCEF Doc No. 153, plaintiff tr at 79, 82). He further testified that the pebbles were made out of the concrete flooring, that another A-Val team performed that work, that he never did that work (*id.* at 83, 84) and that Structure Tone had laborers who cleaned the job site (NYSCEF Doc No. 155, Orsini tr at 10-11).

Applying the premises condition standard, defendants have failed to show that they did not have notice of the pebbles where plaintiff fell, since they have not submitted any evidence as to when the area was last inspected (*see Quigley v Port Auth. of N.Y. & N.J.*, 168 AD3d 65, 68 [1st Dept 2018]; *Ladignon v Lower Manhattan Dev. Corp.*, 128 AD3d 534, 535 [1st Dept 2015]).

Accordingly, defendants are not entitled to dismissal of plaintiffs' Labor Law § 200 and common-law negligence claims.

C. 200 Park and Tishman Speyer's Request for Common-Law Indemnification Against CBRE, Structure Tone, and A-Val/A-Val's Request for Dismissal of Common-Law Indemnification Claims Against it

200 Park and Tishman Speyer move for common-law indemnification against CBRE, Structure Tone, and A-Val. CBRE asserts, in opposition, that there is no evidence of its negligence, nor any evidence that it exercised any supervision and control over the injury-producing work. Structure Tone argues that it did not supervise A-Val's means and methods.

"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]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011] ["a party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part"]).

> "Workers' Compensation Law § 11 prohibits third-party indemnification or contribution claims against employers, except where the employee sustained a 'grave injury,' or the claim is 'based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered'"
>
> Workers' Compensation Law § 11 provides that:
>
> "[a]n employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury.'"
>
> The statute also defines a "grave injury" as:

> "only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability"

(*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 429-430 [2005]).

However, "an employer may not benefit from section 11's protections against third-party liability unless it first complies with section 10 and secures workers' compensation for its employees" (*Boles v Dormer Giant, Inc.*, 4 NY3d 235, 239 [2005]).

A-Val argues, in support of its own motion, that the common-law indemnification claims against it should be dismissed because plaintiff did not suffer a "grave injury." According to A-Val, plaintiff alleges that he suffered a back and shoulder injury as a result of the accident (*see* NYSCEF Doc No. 172, verified bill of particulars, ¶ 20; supplemental bills of particulars, ¶ 9).

In opposition to A-Val's motion, 200 Park and Tishman Speyer argue that A-Val has failed to demonstrate entitlement to dismissal of the common-law indemnification claims. 200 Park and Tishman Speyer maintain that A-Val did not submit any medical proof that plaintiff did not suffer a "grave injury." Additionally, 200 Park and Tishman Speyer contend that A-Val did not offer any evidence that it actually procured workers' compensation insurance.

Here, 200 Park and Tishman Speyer have failed to demonstrate prima facie entitlement to summary judgment on their common-law indemnification claims against CBRE and Structure Tone because they fail to establish that CBRE or Structure Tone were negligent or exclusively supervised the injury-producing work. Plaintiff testified that his foreman gave him instructions on the site (NYSCEF Doc No. 153, plaintiff tr at 42). Even though Structure Tone employed laborers to clean the site (NYSCEF Doc No. 155, Orsini tr at 10), it cannot be determined on this record whether Structure Tone was negligent.

In addition, 200 Park and Tishman Speyer have not shown that the Workers' Compensation § 11 bar is inapplicable as to A-Val (*see McCrea v Arnlie Realty Co. LLC*, 140 AD3d 427, 429 [1st Dept 2016]; *Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 674 [2d Dept 2014]). 200 Park and Tishman Speyer do not address in their moving papers whether A-Val procured workers' compensation insurance for plaintiff (NYSCEF Doc No. 132 at 17). Moreover A-Val has not demonstrated that it procured workers' compensation insurance. A-Val has not submitted an insurance policy, and the certificate of workers' compensation insurance is insufficient to establish that it obtained coverage (*see Matter of Chmura v T&J Painting Co., Inc.*, 83 AD3d 1193, 1195 [3d Dept 2011]).[1]

In any event, there are triable issues of fact as to Structure Tone and A-Val's responsibility for the accident and "an award of summary judgment on a claim for common-law indemnification is appropriate only where there are no triable issues of fact concerning the degree of fault attributable to the parties" (*Aragundi v Tishman Realty & Constr. Co., Inc.*, 68 AD3d 1027, 1030 [2d Dept 2009]).

Accordingly, the branch of 200 Park and Tishman Speyer's motion seeking common-law indemnification must be denied. The branch of A-Val's motion seeking dismissal of the common-law indemnification claims against must be denied.

D. 200 Park and Tishman Speyer's Request for Contractual Indemnification Against CBRE

"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., Inc.*, 70

[1] Nevertheless, A-Val correctly contends that Structure Tone's claim for attorneys' fees is duplicative of its contractual indemnification claim. Accordingly, this claim must be dismissed.

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]).

"Summary relief is appropriate on a claim for contractual indemnification where, as here, the [lease] is unambiguous and clearly sets forth the parties' intention that a [tenant] indemnify the [landlord] for the injuries sustained" (*Roddy v Nederlander Producing Co. of Am., Inc.*, 44 AD3d 556, 556 [1st Dept 2007]).

200 Park and Tishman Speyer move for contractual indemnification from CBRE based upon article 34 of CBRE's lease, which provides as follows:

> "34.01 Tenant shall indemnify and save Landlord harmless from and against any (i) liability or expense arising from any breach of this Lease and (ii) damages suffered or arising from the acts or omissions of Tenant or anyone on the demised premises with Tenant's permission"

(NYSCEF Doc No. 162, lease, at 82).

In opposition, CBRE contends that this provision is vague and violates the General Obligations Law. In addition, CBRE argues that indemnification is premature because there is no evidence that it breached the lease, and there is no evidence that it was negligent.

In reply, 200 Park and Tishman Speyer notes that the eighth modification to the lease deleted article 34 and replaced it with the following provision:

> "34.01 (a) Tenant shall indemnify, defend, protect and hold harmless each of the Indemnitees (as defined in subsection (b) hereof), from and against any and all Losses (as defined in subsection (b) hereof), resulting from any claims against the Indemnitees (i) arising from any act, omission or negligence of any Tenant Parties (as defined in subsection (b) hereof, (ii) except to the extent arising from the negligence or willful misconduct of Landlord, its contractors, licensees or the Parties (as defined in Section 20.01 of this Lease), arising from any accident, injury or damage caused to any person or to the property of any person and occurring in or about the demised premises, and (iii) by a third party resulting from any breach,

> violation or nonperformance of any covenant, condition or agreement of this Lease on the part of Tenant to be fulfilled, kept or observed"
>
> ***
>
> "(b) (i) As used in this Article 34, the term 'Losses' means any and all losses, liabilities, damages, claims, judgments, fines, suits, demands, costs, interest and expenses of any kind or nature (including reasonable attorneys' fees and disbursements) incurred in connection with any claim, proceeding or judgment and the defense thereof, and including all costs of repairing any damage to the demised premises or the Building, or the appurtenances of any of the foregoing, to which a particular indemnity and hold harmless agreement applies.
>
> "(ii) As used in this Article 34, the term 'Indemnitees' means Landlord, Landlord's agents, each mortgagor and lessor, and each of their respective direct and indirect partners, officers, shareholders, managers, directors, members, trustees, beneficiaries, employees, principals, contractors, licensees, invitees, servants, agents and representatives"

(NYSCEF Doc No. 286 at 37-38).

CBRE's contention that the indemnification provision is unenforceable is without merit. "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 414, 414-415 [1st Dept 2009]). Moreover, the indemnification provision is clear and unambiguous. It requires CBRE to defend and indemnify 200 Park for any act, omission or negligence of CBRE and for any accident occurring within the demised space. Plaintiff's accident arose out of CBRE's acts, namely the renovation project, and occurred within CBRE's space. However, 200 Park and Tishman Speyer have failed to demonstrate that Tishman Speyer qualifies as an indemnitee because a managing agent is not included in the definition under 34.01(b)(ii) (*see Hooper*, 74 NY2d at 491). Therefore, even though plaintiffs have not yet prevailed in the main action, 200 Park is entitled to conditional contractual indemnification from CBRE (*see Hong-Bao Ren v Gioia St. Marks LLC*, 163 AD3d 494, 496-

497 [1st Dept 2018] ["conditional summary judgment is appropriate here even when judgment has yet to be rendered or paid in the main action, since it serves the interest of justice and judicial economy in affording the indemnitee the earliest possible determination as to the extent to which he (or she) may expect to be reimbursed"] [internal quotation marks and citation omitted]).

E. 200 Park and Tishman Speyer's Failure to Procure Insurance Claim Against CBRE

An agreement to procure insurance is distinct from an agreement to indemnify (*see Kinney v Lisk Co.*, 76 NY2d 215, 218 [1990]). Generally, where there is a breach of an agreement to procure insurance, the breaching party is responsible for all "resulting damages, including the liability [of the general contractor and the site owner] to [the] plaintiff" (*Kennelty v Darlind Constr.*, 260 AD2d 443, 445 [2d Dept 1999] [internal quotation marks and citation omitted]). However, in cases where the promisee has its own insurance coverage, recovery for breach of a contract to procure insurance is limited to the promisee's out-of-pocket expenses in obtaining and maintaining such insurance, i.e., the premiums and any additional costs incurred such as deductibles, co-payments, and increased future premiums (*Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 114 [2001]; *Cucinotta v City of New York*, 68 AD3d 682, 684 [1st Dept 2009]).

200 Park and Tishman Speyer move for summary judgment on their breach of contract for failure to procure insurance claim against CBRE. In response to 200 Park and Tishman Speyer's motion, CBRE argues that: (1) it did not breach its insurance procurement obligations, as evidenced by certificates of insurance; and (2) 200 Park and Tishman Speyer have not sustained any damages.

In *Crespo v Triad, Inc.* (294 AD2d 145, 148 [1st Dept 2002]), the First Department held that "[t]he Owners were properly granted partial summary judgment on their cross claim against

Bozell 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, Bozell failed to tender an insurance policy" (*see also Gary*, 60 AD3d at 415).

Although CBRE submits certificates of insurance to prove that it obtained the required insurance coverage, it is well settled that "[t]he certificate of insurance is evidence of the insurer's intent to provide coverage, but it is not a contract to insure appellants, nor is it conclusive proof, standing alone, that such a contract exists" (*Buccini v 1568 Broadway Assoc.*, 250 AD2d 466, 469 [1st Dept 1998]; *Horn Maint. Corp. v. Aetna Cas. & Sur. Co.*, 225 A.D.2d 443, 444 [1st Dep't 1996]).

"Because insurance procurement clauses are entirely independent of indemnification provisions, the determination with respect to liability for the contract breach need not await a final determination as to the underlying liability for personal injury" (*Spencer v B.A. Painting Co., B & F Abramowitz*, 224 AD2d 307, 307 [1st Dept 1996] [citation omitted]). The measure of damages cannot be determined on this motion, because it is unclear whether 200 Park and Tishman Speyer have their own insurance policy. Accordingly, 200 Park and Tishman Speyer are entitled to summary judgment as to liability on their breach of contract claim against CBRE.

F. Cross Claims Against 200 Park and Tishman Speyer

200 Park and Tishman Speyer also move for summary judgment dismissing the cross claims for common-law indemnification, contribution, contractual indemnification, and breach of contract against them. Specifically, 200 Park and Tishman Speyer argue that these causes of action "have no merit whatsoever and must be dismissed" (NYSCEF Doc No. 132 at 22). As argued by 200 Park and Tishman Speyer, there is no merit to the cross claims for contractual indemnification and breach of contract against them (*see Alvarez*, 68 NY2d at 324). However, as

noted above, there are questions of fact as to their negligence. Accordingly, 200 Park and Tishman Speyer are only entitled to dismissal of the contractual indemnification and breach of contract claims against them.

G. 200 Park, Tishman Speyer, and CBRE's Contractual Indemnification Claims Against Structure Tone

CBRE moves for contractual indemnification based upon the indemnification provision in Structure Tone's contract, which provides as follows:

> "General Contractor shall and does hereby indemnify and hold harmless Owner, Landlord, Architect, Engineer and Project Manager . . . and agents of each of the foregoing from and against any and all liability, claims, demands, damages, penalties, fines, losses, expenses and costs of every kind and nature, including, without limitation, costs of suit and attorneys' fees and disbursements (collectively, 'Claims and Expenses'), resulting from or in any manner arising out of, in connection with or on account of (i) any act, omission, fault or neglect of General Contractor, or any Subcontractor of, or material supplier to, General Contractor, or anyone employed by any of them in connection with the Work or anyone for General Contractor, or anyone employed by any of them in connection with the Work or anyone for whose acts any of them may be liable, (ii) claims of injury to or disease, sickness or death of persons or damage to property (including, without limitation, loss of use resulting therefrom) occurring or resulting directly or indirectly from the Work or the activities of the General Contractor, or any Subcontractor of, or material supplier to, General Contractor, or anyone employed by any of them in connection with the Work, or anyone for whose acts any of them may be liable . . ."

(NYSCEF Doc No. 128, article V, § 10).

Article XXVI provides as follows:

> "If any term or provision of this Agreement or the application thereof to any person or circumstance shall, to any extent, be held to be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term of this Agreement shall be valid and enforceable to the fullest extent permitted by law"
> (*id.*, article XXVI, § 9).

CBRE argues that Structure Tone is required to defend and indemnify CBRE for Structure Tone's acts of negligence and the acts of its subcontractors. CBRE points out that

Structure Tone's contract obligated Structure Tone to "at all times keep the Site and surrounding areas free from accumulation of debris, waste materials, and other rubbish caused by the performance of, or arising in connection with, the Work and the Coordination Items" (*id.*, article V, § 16 [a]).

200 Park and Tishman Speyer also seek contractual indemnification from Structure Tone based upon this provision.

In opposing CBRE's motion, Structure Tone contends that the indemnification provision requires indemnification for "any act, omission, fault, neglect of [Structure Tone]" (*id.*, article V, § 10). In this regard, Structure Tone asserts that it played no role in plaintiff's accident: Structure Tone did not instruct him how to do his work, and plaintiff never complained about debris to Structure Tone. Furthermore, Structure Tone contends that the provision is unenforceable until a jury determines liability.

Pursuant to General Obligations Law § 5-322.1, an indemnification provision in a construction contract which purports to indemnify a party for its own negligence is against public policy and is void and unenforceable (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997], *rearg denied* 90 NY2d 1008 [1997]). However, an indemnification agreement that authorizes partial indemnification "to the fullest extent permitted by law" is enforceable (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]; *Francis v Plaza Constr. Corp.*, 127 AD3d 427, 428 [1st Dept 2014]; *Guzman v 170 W. End Ave. Assoc.*, 115 AD3d 462, 464 [1st Dept 2014]; *Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [1st Dept 2002], *lv denied* 99 NY2d 511 [2003]). Furthermore, even if the clause does not contain this limiting language, it may nevertheless be enforced where the party to be indemnified is found to be free of any negligence (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]).

Here, plaintiff's accident arose out of Structure Tone's contracted work. There is no dispute that Structure Tone hired A-Val to perform glass work on the project, and that plaintiff was injured in the course of his employment with A-Val. As noted above, there are questions of fact as to CBRE's negligence. However, Structure Tone's contract provides that if any provision is "held to be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term of this Agreement shall be valid and enforceable to the fullest extent permitted by law" (NYSCEF Doc No. 128, article XXVI, § 9). Accordingly, CBRE is entitled to contractual indemnification from Structure Tone conditioned upon a finding by the jury that CBRE was not negligent.

200 Park and Tishman Speyer are not entitled to contractual indemnification from Structure Tone. The indemnification provision is contained in a contract to which they are not parties and does not identify them as indemnitees (*see Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004] ["If the parties intended to cover Bovis as a potential indemnitee, they had only to say so unambiguously"]; *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"]). Notably, Structure Tone's contract defines the "Owner" as CBRE, and Metropolitan Life Insurance Company is defined as the "Landlord" (NYSCEF Doc No. 128 at 1). Accordingly, 200 Park and Tishman Speyer's request for contractual indemnification from Structure Tone is denied.

H. 200 Park, Tishman Speyer, CBRE, and Structure Tone's Contractual Indemnification Claims Against A-Val

200 Park and Tishman Speyer move for summary judgment on their contractual indemnification claim against A-Val, based upon the indemnification provision contained within A-Val's purchase order, which states:

> "11.2 To the fullest extent permitted by Law, Subcontractor will indemnify and hold harmless Structure Tone, Inc. ('STI') and Owner, their officers, directors, agents and employees from and against any and all claims, suits, judgments, damages, losses and expenses, including reasonable legal fees and costs, arising in whole or in part and in any manner from the acts, omissions, breach or default of Subcontractor, its officers, directors, agents, employees and subcontractors, in connection with the performance of any work by Subcontractor pursuant to this Purchase Order and/or a related Proceed Order. Subcontractor will defend and bear all costs of defending any actions or proceedings brought against STI and/or Owner, their officers, directors, agents and employees, arising in whole or in part out of any such acts, omission, breach or default"

(NYSCEF Doc No. 164).

The blanket insurance/indemnity agreement also contains identical indemnification language (NYSCEF Doc No. 163).

In addition, Structure Tone moves for summary judgment on its contractual indemnification claim against A-Val, arguing that the indemnification provision does not violate the General Obligations Law and that A-Val acted in a manner indicating its intent to be bound by the purchase order.

CBRE also moves for summary judgment on its contractual indemnification claim against A-Val.

200 Park, Tishman Speyer, and CBRE are not entitled to contractual indemnification from A-Val. The indemnification provision is contained in a contract to which they are not parties and does not identify them as indemnitees (*see Sicilia*, 127 AD3d at 628). Contrary to 200 Park and Tishman Speyer's contention, there is no basis for a finding that 200 Park and Tishman Speyer are intended third-party beneficiaries of A-Val's contract. The terms and

conditions annexed to A-Val's purchase order do not define the term Owner, and the contract documents do not otherwise mention 200 Park and Tishman Speyer (*see Nazario v 222 Broadway, LLC*, 135 AD3d 506, 510 [1st Dept 2016], *mod on other grounds* 28 NY3d 1054 [2016]). Accordingly, the branches of these defendants' motions seeking contractual indemnification from A-Val must be denied.

However, even though there are issues of fact as to its negligence, Structure Tone is entitled to conditional contractual indemnification from A-Val. The indemnification provision is triggered because plaintiff's accident occurred while he was working for A-Val (*see Cackett v Gladden Props., LLC*, 183 AD3d 419, 422 [1st Dept 2020]). The provision does not violate the General Obligations Law. "[T]he extent of its indemnification depends on the extent to which any negligence on its part is found to have contributed to the accident" (*Cuomo*, 111 AD3d at 548). Accordingly, the branch of Structure Tone's motion seeking contractual indemnification must be granted to the extent of awarding it contractual indemnification against A-Val conditioned upon a finding by the jury that Structure Tone was not negligent.

I. Failure to Procure Insurance Claims Against A-Val

A-Val moves for summary judgment dismissing 200 Park and Tishman Speyer and Structure Tone's breach of contract for failure to procure insurance claims against it. A-Val argues that it did not breach its contract. As support, A-Val offers certificates of insurance naming 200 Park and Tishman Speyer and Structure Tone as additional insureds (NYSCEF Doc No. 181).

Structure Tone moves for summary judgment in its favor on its failure to procure insurance claim against A-Val.

The blanket indemnity/insurance agreement between Structure Tone and A-Val provides that A-Val was required to procure the following insurance:

> "3.2 Comprehensive General Liability ('CGL') with a combined single limit for Bodily Injury, Personal Injury and Property Damage of at least $4,000,000 per occurrence and aggregate. The limit may be provided through a combination of umbrella/excess liability policies. Coverage shall include the Broad From Comprehensive General Liability Endorsement. Coverage shall provide at least the following:
>
> ***
>
> (c) Blanket Written Contractual Liability covering all Indemnity Agreements.
>
> ***
>
> (e) Endorsement naming Structure Tone Inc. as an Additional Insured and endorsement of specified owners and other Additional Insureds as may be required from time to time"

(NYSCEF Doc No. 106 at 1). Thus, A-Val was required to purchase a commercial general liability policy naming Structure Tone as an additional insured.

A-Val's submission of certificates of insurance, which state that they were "issued as a matter of information only and confers no rights upon the certificate holder" (NYSCEF Doc Nos. 181, 230), is insufficient to establish that it procured the required insurance (*Horn Maintenance Corp. v Aetna Cas. & Sur. Co.*, 225 AD2d 443, 444 [1st Dept 1996]). In response to Structure Tone's motion, A-Val did not produce an insurance policy for Structure Tone's benefit.

Accordingly, the branch of A-Val's motion seeking dismissal of the breach of contract claims against it is denied. Structure Tone is entitled to summary judgment as to liability on its breach of contract claim against A-Val.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 004) of defendants/third-party plaintiffs/third third-party plaintiffs 200 Park, LP and Tishman Speyer Properties, L.P. is granted to the extent of:

(1) dismissing plaintiffs' Labor Law § 241 (6) claim as against defendant/third-party plaintiff/third third-party plaintiff Tishman Speyer Properties, L.P.,

(2) dismissing plaintiffs' Labor Law § 241 (6) claim as against defendant/third-party plaintiff/third third-party plaintiff 200 Park, LP except as to the alleged violations of 12 NYCRR 23-1.7 (d) and 12 NYCRR 23-1.7 (e) (2),

(3) granting defendant/third-party plaintiff/third third-party plaintiff 200 Park, LP conditional contractual indemnification against defendant/third-party defendant CBRE, Inc.,

(4) granting defendants/third-party plaintiffs/third third-party plaintiffs 200 Park, LP and Tishman Speyer Properties, L.P. partial summary judgment as to liability on their breach of contract claim against defendant/third-party defendant CBRE, Inc., and

(5) dismissing the cross claims for contractual indemnification and breach of contract against defendants/third-party plaintiffs/third third-party plaintiffs 200 Park, LP and Tishman Speyer Properties, L.P.; and it is further

ORDERED that the motion (sequence number 005) of second third-party defendant/third third-party defendant A-Val Architectural Metal III, LLC is granted to the extent of dismissing the third cause of action in the second third-party complaint, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 006) of defendant/third-party defendant CBRE, Inc. is granted to the extent of:

(1) dismissing plaintiffs' Labor Law § 241 (6) claim except as to the alleged violation of 12 NYCRR 23-1.7 (d) and 12 NYCRR 23-1.7 (e) (2),

(2) granting defendant/third-party defendant CBRE, Inc. conditional contractual indemnification against defendant/second third-party plaintiff Structure Tone, Inc. i/s/h/a Structure Tone Global Services, Inc., and is otherwise denied; and it is further

ORDERED that the motion (sequence number 007) of defendant/second third-party plaintiff Structure Tone, Inc. i/s/h/a Structure Tone Global Services, Inc. is granted to the extent of:

(1) dismissing plaintiffs' Labor Law § 241 (6) claim except as to the alleged violations of 12 NYCRR 23-1.7 (d) and 12 NYCRR 23-1.7 (e) (2),

(2) granting conditional contractual indemnification against second third-party defendant A-Val Architecture Metal III, LLC, and

(3) granting partial summary judgment as to liability on its breach of contract claim against second third-party defendant A-Val Architecture Metal III, LLC.

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12/14/2020
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