To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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ANTHONY PASSALACQUA and VIRGINIA PASSALACQUA,

Plaintiffs,

-against-

AVR REALTY COMPANY, LLC, SOLAL REALTY LIMITED PARTNERSHIP, SCHIMENTI CONSTRUCTION COMPANY, LLC, DICK'S SPORTING GOODS, INC. and BRANSTETTER CONSTRUCTION, INC.,

Defendants.

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SOLAL REALTY LIMITED PARTNERSHIP, and SCHIMENTI CONSTRUCTION COMPANY, LLC,

Third-Party Plaintiffs,

- against -

DAME CONTRACTING, INC.,

Third-Party Defendant.

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DECISION & ORDER
Index No.: 53984/2018

Sequence Nos.1,2,3

WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 121-258 were read in connection with:

Seq 1-motion by Third-Party Defendant, Dame Contracting, Inc. for summary judgment, dismissing the third party plaintiff's Complaint.
Seq 2- motion by defendant Branstetter Construction for summary judgment, dismissing the Labor Law §§ 240 and 241(6) claims of plaintiff, against Branstetter (ii.) dismissing plaintiff's Labor Law §200 and common law negligence claims as against Branstetter dismissing all cross-claims asserted by Solal Realty, Schimenti, Dick's and Dame.

Seq 3 -Solal Realty and Schimenti motion dismissing the plaintiffs' complaint including the Labor Law §§ 240(1), 241(6), 241-a and 200 and common-law negligence claims, as well as all cross-claims and counter-claims as against Solal Realty and Schimenti for common-law indemnification and contribution; (2) on Solal Realty's cross-claim as against defendant Dick's for contractual indemnification, defense of the plaintiff's claim and the enforcement of the indemnity agreement, or, in the alternative, a conditional order of contractual indemnification, and dismissal of Dick's cross-claims;(3) on Schimenti's third-party claim as against Dame for contractual indemnification, including expenses, incurred in the defense of the plaintiff's claim and the enforcement of the indemnity agreement, or, in the alternative, a conditional order of contractual indemnification.

Plaintiff worker, an employee of Dame, brings this action to recover damages from defendants, pursuant to common law negligence theories, and Labor Law §§§200, 240(1) and 241(6), from a trip-and-fall accident that is alleged to have occurred on July 6, 2016, during the renovation of a Dick's store and the build-out of a Field & Stream store in the adjoining retail space at the Melville Mall, a single story shopping center located at 870 Walt Whitman Road in Melville, New York (the "Project").

NOW, in light of the foregoing, the motions are decided as follows:

It is well settled that "a 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" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol, 128 AD2d 492 [2d Dept 1987]).

A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]).

Solal Realty owns the Melville Mall, and it leased the subject premises to Dick's. Dick's retained Schimenti, as the general contractor on the project. Schimenti then retained plaintiff's employer, Dame, a drywall and carpentry contractor. Dick's also retained Branstetter to install the pre-fabricated millwork in both stores.

The alleged accident happened outside of the Dick's store at the back of the shopping center, near the loading dock for the Dick's, and the asphalt parking lot. Plaintiff claims that he was performing drywall finishing work in the stockroom in the rear of the Dick's when he decided that he needed to obtain certain tools and materials being stored in the Field & Stream part of the project. He exited a rear door of Dick's and walked outside to the Field & Stream area,

walking back to the stockroom area, taking the same route he had taken to get to the Field & Steam area, he claims that he tripped and fell over plastic that was hanging off of a four-by-four wooden pallet, and onto the ground which had glass on it.

John Buonocore, an assistant superintendent of Salal Realty/Schimenti, who was involved with the Walt Whitman project, testified:

Q. Was there any other way for the workers who would go from the Dick's Sporting Goods store to the Field & Stream store and back to get to that location other than pass by the area where this pallet and this plastic wrap was?
A. There was no other way. (NYSCEF# 217, pg. 67)

Dennis Murray, store manager for Dick's, Rob Cosentino, a foreman for Dame Contracting, Timothy Branstetter, of Branstetter, each testified to conflicting accounts as to the source of the pallet and plastic that is alleged to have caused plaintiff to slip and fall. Marc Losquadro, the Schimenti supervisor, attested that Schimenti would instruct its laborers to clean up the construction debris, which could include pallets and plastic wrapping. Based upon this record, and taking into consideration the testimonies of the parties, the source of the subject pallet and plastic remain a mystery.

Turning to Labor Law §240(1), commonly known as the scaffold law, creates a duty that is nondelegable, and an owner or general contractor who breaches that duty may be held liable for damages regardless of whether they actually exercised any supervision or control over the work performed (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]). This section requires owner and contractors to provide workers with appropriate safety devices to protect against **gravity related accidents** such as falling from heights or being struck by an improperly hoisted or secured object (Novak v Del Savio,, 64 AD3d 636 [2d Dept 2009]). To demonstrate

entitlement to summary judgment on an alleged violation of Labor Law §240(1), a plaintiff must establish that there was a violation of the statute, and that it was the proximate cause of his or her injuries (Blake v Neighborhood Hous. Servs. of N. Y. City, 1 NY3d 280, 289 [2003]).

The record shows that plaintiff purported stepped on plastic wrap that was located outside on ground level, not due to the direct application of gravity – Labor Law §240(1) is not implicated because there is no elevation differential requiring a safety device (Zastenchik v Knollwood Country Club, 101 AD3d 861, 863-64 [2d Dept 2012]).

Likewise, Labor Law §241-a is also manifestly inapplicable to the facts of this case because the plaintiff was not working in an elevator, shaftway, hatchway or stairwell (Desena v North Shore Hebrew Academy, 119 AD3d 631, 635 [2d Dept 2014]). Accordingly, the plaintiff's Labor Law §241-a claim is dismissed as a matter of law.

Turning next to Labor Law §241(6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safely rules set forth in the Industrial Code ("the Code") (Ross v Curtis Palmer Hydro-Elec. Co.,81 NY2d 494 [1993]). Liability may be imposed under Labor Law §241(6) even where the owner or contractor did not supervise or control the work site. The causes of action must be based upon violations of specific codes, rules, or regulations applicable to the circumstances of the accident (Reyes v Arco Wentworth Mgt. Corp., 83 AD3d 47, 53 [2d Dept 2011]). To state a cause of action pursuant to §241(6), a plaintiff must allege that the property owners violated a regulation that sets forth a specific standard of conduct and not simply a recitation of common-law safety principles (Gonzalez v Perkan Concrete Corp., 110 AD3d 955

[2d Dept 2013]). If proven, the general contractor (or owner, as the case may be) is vicariously liable without regard to his or her fault (Monroe v City of New York, 67 A.D.2d 89, 104 [2d Dept 1979]). Therefore, this issue must go to the jury for determination as to whether any negligence of some party to, or participant in, the construction project caused plaintiffs injury, and if proven, the general contractor (or owner, as the case may be) is vicariously liable without regard to his or her fault. "Contributory and comparative negligence are valid defenses to a section §241(6) claim, moreover, breach of a duty imposed by a rule in the Code is merely some evidence for the fact finder to consider on the question of defendant's negligence" (Misicki v Caradonna 12 NY3d 511, 515[2009]).

Solal Realty argues that in the absence of any competent evidence whether the subject pallet originated from construction work as opposed to Dick's retail operations, it is impossible to prove the applicability of the cited regulation to the facts let alone that a violation of the regulation was a proximate cause of the injuries.

Plaintiff claims that the issue of the violation of NYCRR 23-1.7(e)(1) and (e)(2) precludes summary judgment being granted to Solal and Schimenti.

Initially, the court finds that Industrial Code Provision 23-1.7(b)(1) is inapplicable. This provision concerns hazardous openings, such as holes. Plaintiff does not allege that he fell down a hole; he says he tripped on a wooden pallet/shrink wrap. Additionally, except for Industrial Code Rule 23-1.7(e)(1)(2), the other Industrial Code provisions cited by plaintiff either are inapplicable to the facts, or have been abandoned.

The remaining Industrial Code Rules 23-1.7(e) (1) and (2), requires that all passageways and working areas be kept from accumulation of dirt, debris, scattered tools, and other materials.

The First Department found that "integral-to-the-work" defense, applies to Labor Law rule requiring areas in which construction is being performed to provide reasonable and adequate protection and safety to persons employed therein, applies to Industrial Code rule requiring all passageways to be kept free from obstructions which could cause tripping (Labor Law §241(6); N.Y. Comp. Codes R. & Regs. tit. 12, § 23-1.7(e)(1); Krzyzanowski v City of New York, 179 AD3d 47 [1st Dept 2020]).

Plaintiff claims that he was on his way from one portion of the work site to another to look for tools and determine if they have enough materials for the work; and to do so, he needed to navigate the subject area that was used by workers, which was fenced in, closed off by two dumpsters and a pole, in effect making it a passageway, constituting a work area covered by NYCRR 23-1.7(e)(2).

Based upon this record, moving defendants Branstetter, Solal Realty and Schimenti failed to establish their prima facie entitlement to judgment as a matter of law on the issue of liability on the cause of action alleging a violation of Labor Law § 241(6). These defendants failed to show that there was not a violation of 12 NYCRR 23–1.7(e)(2), and that such violation was a proximate cause of plaintiff's injuries. Contrary to defendants' contentions, questions of fact exists whether there was construction work being performed in the vicinity of plaintiff's alleged fall, whether the subject incident occurred at a "passageway" or defined walkway used to traverse between discrete areas indoors and, accordingly, there is question whether the subject area was truly an open and common areas, that fall within the ambit of Rule 23-1.7(e)(1) (Aragona v State of New York, 147 AD3d 808, [2d Dept 2017]).

To the extent that plaintiff alleged violations of Occupational Safety and Health

Administration ("OSHA") regulations. standards did not provide a basis for liability under Labor Law §241(6) (Cun-En Lin v Holy Family Monuments, 18 AD3d 800, 802 [2d Dept 2005]).

Addressing common law negligence and Labor Law §200, the Second Department explains that:

"Labor Law § 200 is a "codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work" (Ortega v Puccia, 57 A.D.3d 54, 60, 866 N.Y.S.2d 323). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (id. at 61, 866 N.Y.S.2d 323). When, as here, a plaintiff has alleged that his injuries arose from a dangerous condition on the premises, a defendant may be liable under common law and Labor Law § 200 if the defendant either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition (see Pacheco v Smith, 128 A.D.3d 926, 926, 9 N.Y.S.3d 377). Where the condition at issue is both "open and obvious" and "not inherently dangerous," a defendant is not liable under either a theory of common law negligence or Labor Law § 200 (Dinallo v DAL Elec., 43 A.D.3d 981, 982, 842 N.Y.S.2d 519)" (Graziano v Source Builders & Consultants, LLC, 175 AD.3d 1253, 1259, [2d Dept 2019]).

Proof that a dangerous condition is open and obvious does not preclude a finding of liability against an owner for failure to maintain property in a safe condition (Russo v Home Goods, Inc., 119 AD3d 924, 925 [2d Dept 2014]). The issue of whether a dangerous condition is open and obvious is fact-specific, and usually a question for the jury (Mazzarelli v. 54 Plus Realty Corp., 54 AD3d 1008, 1009 [2d Dept 2008]).

Given the totality of these circumstances, defendants have failed to eliminate triable issues of fact as to whether they created an unsafe condition for plaintiff (Russo v Home Goods, Inc., 119 AD3d at 926. There are triable issues of fact as to which parties share in that responsibility, and each defendant denies that the pallets and plastic was owned by them, or that the condition was created by them. Not one witness, not even plaintiff, knows or admits to whom the pallet belonged or how long it existed in that condition prior to his fall. It was a

common wooden pallet, and did not bear any markings. The record does show that prior to July 6, 2016, Solal Realty was not notified of any complaints regarding debris behind the portion of the premises leased to Dick's, including any plastic on a pallet and/or glass(NYSCEF#177). However, neither Schimenti or Dick's have established when they inspected the area, or if they inspected the area on a regular basis. This is also not a matter of plaintiff not identifying what caused the accident, because he has.

For these reasons, the branch of moving defendants' motions for summary judgment on the causes of action for common law negligence is denied.

-Common Law Indemnification-

It is well-settled that summary judgment on a claim for common-law indemnification "is appropriate only where there are no issues of material fact concerning the precise degree of fault attributable to each party involved" (Coque v Wildflower Estates Developers, Inc., 31 AD3d 484, 489 [2d Dept 2006]). Accordingly, since there are questions of fact as to degree of fault, amongst the parties, this relief is not appropriate at this juncture.

-Contractual Indemnification-

It is well-settled that "[a] party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances." (Drzewinski v Atlantic Scaffold & Ladder Co., 70 NY2d 774, 777, [1987]). "[A]n indemnification clause that purports to indemnify a party for its own negligence may be enforced where the party to be indemnified is found to be free of any negligence and its liability is merely imputed or vicarious" (Lesisz v Salvation Army, 40 AD3d 1050, 1051 [2d Dept 2007]).

-Branstetter-.

Branstetter moves to dismiss the cross-claims for contractual indemnification and breach of contract for failure to procure insurance coverage asserted by Solal Realty, Schimenti, Dick's and Dame, inasmuch as Branstetter did not agree to indemnify them or procure insurance on their behalf pursuant to any written contracts. The court agrees. As for the remaining cross claims, Branstetter contends that "[t]here is no admissible evidence or testimony offered by any party that Branstetter created the condition that plaintiff alleges caused him to fall. Nonetheless, based upon the record, and the testimonies of the parties' representatives, there is a triable issue of fact as to whether Branstetter created the condition that plaintiff alleges caused him to fall. The branch of Branstetter's motion to dismiss these remaining cross-claims of Solal Realty Schimenti, Dicks and Dame is denied.

-Solal Realty and Dick's-

The Lease between Solal Realty (as Landlord) and Dick's (as Tenant), contains the following indemnification provision (NYSCEF#223):

11.6 Indemnification
"Subject to Section 11.4, each Party (in the capacity of "Indemnitor") hereby agrees to indemnify, defend and hold the other Party (in the capacity of "Indemnitee") harmless from and against all costs, expenses, claims, suits, causes of action, liabilities, losses, fines, penalties, charges, judgments, injuries and damage, including, without limitation, reasonable attorneys' fees and costs (collectively "Indemnified Costs") relating to or resulting from bodily injuries… occurring on the Demised Premises or in other portions of the Shopping Center, the Property or on other adjoining property owned or controlled by [Solal Realty] and arising out of such Indemnitor's acts or omissions or use or control thereof, except to the extent caused by the negligent or intentional act or omission of the Indemnitee, its agents, employees or other tenants. The Indemnitor shall be promptly notified of any suits, proceedings, claims or demands for which the Indemnitee requests indemnification. The Indemnitor shall assume the entire defense thereof and the Indemnitee shall cooperate fully with the Indemnitor in such defense".

In light of the foregoing, Solal Realty fails to make a prima facie showing of entitlement to judgment as a matter of law on its claim for contractual indemnification against Dick's, as the lease requires a showing of negligence against the indemnitor before the clause is triggered, and there has been no finding of negligence against Dick's.

In any event, Dick's does not oppose the dismissal of its cross-claims for contribution, common-law indemnification and contractual indemnification as against Solal Realty. These claims are dismissed as abandoned.

-Contract between Dame and Schimenti-

Schimenti entered into Subcontract No. 1604402 ("Subcontract") with Dame to perform drywall and sheetrock work on the Project. (NYSCEF#179).

Article 8 of the contract, titled "Indemnification, Warranty, Insurance, & Bonds", and in particular, Section 81, titled "Indemnification", states as follows, in pertinent part:

> "To the fullest extent permitted by law, the Subcontractor shall indemnify, defend and hold harmless the Contractor, Owner, Architect . . . and the members, agents and employees of any of them, from and against all injuries, claims, damages, losses, liabilities, obligations, settlements, costs and expenses, whether direct or indirect or consequential . . . arising out of or in any way connected with the performance or lack of performance of the Work under the subcontract . . .and caused in whole or in part by any actual or alleged:
> 1. Act or omission or the Subcontractor or anyone directly or indirectly retained or engaged by it or anyone for whose act it may be liable.....
> 2. Violation of any statutory duty. regulation, ordinance, rule or obligation by an Indemnitee provided that the violation arises out of or is in any way connected with the Subcontractor's performance or lack of performance of the Work under the Subcontract" (NYSCEF# 179).

From these circumstances, there are triable issues of fact whether plaintiff failed to exercise due care so as to avoid tripping over the pallet that he had admittedly observed prior to his fall, and thus, whether Dame's indemnity obligations are triggered by plaintiff's claim.

Therefore, Shimenti's motion for summary judgment on the third-party cause of action for contractual indemnification is denied.

Notwithstanding the foregoing, Dame's obligation to defend Schimenti is distinct from its indemnity obligation. "An insurer's duty to defend is broader than the duty to indemnify and arises whenever the allegations of the complaint against the insured, liberally construed, potentially fall within the scope of the risks undertaken by the insurer" (McCoy v Medford Landing, L.P., 164 AD3d 1436, 1440 [2d Dept 2018]).

The express language of the subject indemnification agreement obligates Dame to defend Schimenti, which was triggered by plaintiff making a claim for his alleged injuries. If any of the claims against an insured arguably arise from covered events, the insurer is required to defend the entire action. Here, Schimenti established, prima facie, that the allegations in the complaint suggested a reasonable possibility of coverage.

Lastly, Schimenti failed to prove prima facie that Dame breached its contractual obligation to procure insurance coverage for Schimenti (Cuellar v City of New York, 139 AD3d 996, 999 [2d Dept. 2016]).

Accordingly, it is hereby

ORDERED, as from the court search of the record, dismisses plaintiff's claim for Labor Law §§ 241-a, and 240(1), and the Industrial provisions that are inapplicable and abandoned pursuant to Labor Law 241(6), as against all defendants; and it is further

ORDERED, that motion (Seq 1) by Dame Contracting, Inc. for summary judgment, dismissing the third party plaintiff's Complaint is denied; and it is further

ORDERED, that the motion by defendant Branstetter (Seq 2) is granted to the extent that contractual indemnification and breach of contract causes of action are dismissed, and to other claims denied, unless otherwise indicated in this decision; and it is further

ORDERED, that Solal Realty and Schimenti's motion (Seq 3), is denied , except as indicated herein; and it is Declared: that Dame is obligated to reimburse Schimenti for costs, disbursements, and attorneys' fees incurred in defending the main action; and it is further

ORDERED, that the parties are directed to appear in, the Settlement Conference Part in Courtroom 1600 of the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601, at a time and place so designated by that Part. The Clerk shall mark his records accordingly.

All matters not herein decided are denied. This constitutes the decision and order of the court.

Dated: **September 28, 2020**
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF