At an IAS Term, Part 90 of the Supreme Court of the State of New York, County of Kings, on the 11th day of January, 2021.

P R E S E N T:

HON. EDGAR G. WALKER,

Justice.

----------X

JOHN ANDREZZI,

Plaintiff,

- against -

Index No.503175/16

SPRINT SPECTRUM L.P., SPRINT/UNITED MANAGEMENT COMPANY, 1100 AVENUE OF THE AMERICAS ASSOCIATES and EUGENE A. HOFFMAN MANAGEMENT, INC.,

Defendants.

----------X

SPRINT SPECTRUM L.P., SPRINT/UNITED MANAGEMENT COMPANY, 1100 AVENUE OF THE AMERICAS ASSOCIATES and EUGENE A. HOFFMAN MANAGEMENT, INC.

Third-Party Plaintiffs,

- against -

CBRE, INC. CB RICHARD ELLIS, INC., D.H. PACE COMPANY, INC. and VERSATILE SERVICES, LLC,

Third-Party Defendants.

----------X

D.H. PACE COMPANY, INC.,

Second Third-Party Plaintiff,

-against

VERSATILE SERVICES, LLC,

Second Third-Party Defendant.

----------X

The following e-filed papers read herein: NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	328-350,352-382,383-404, 411-417, 419-435, 437-439, 496-507
Opposing Affidavits (Affirmations)	453,454,455-457, 458, 460, 461-469,470, 471, 472, 473, 474-476, 478,479,480,481, 482, 486, 487, 488, 508, 509
Reply Affidavits (Affirmations)	510, 511, 512, 513, 514,515, 516, 517, 518, 519, 520, 521, 522, 523-525
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, third-party defendants CBRE, Inc., and CB Richard Ellis, Inc., (collectively the CBRE defendants or CBRE) move in motion sequence no. 17, for an order, pursuant to CPLR §3212, granting summary judgment in their favor on their cross claims as against third-party defendants D.H. Pace Company, Inc. (D.H. Pace) and Versatile Services, LLC. (Versatile) seeking: common law and contractual indemnification, including attorneys' fees, expenses, costs and disbursements incurred in the defense of this action; and a conditional order declaring that the CBRE defendants are entitled to complete indemnification from D.H. Pace and Versatile, including reimbursement of all reasonable expenses, costs and disbursements incurred in the defense of this action.

Defendants/third-party plaintiffs Sprint Spectrum L.P. s/h/a as "Sprint Communications Company L.P." and Sprint/United Management Company (collectively the Sprint defendants) move in motion sequence no. 18, for an order pursuant to CPLR § 3212 (i) dismissing the complaint in its entirety against the Sprint defendants with prejudice; (ii) granting summary judgment in favor of the Sprint defendants against CBRE, on the claims for contractual indemnification and breach of contract for failure to procure insurance; (iii) granting summary

judgment in favor of the Sprint defendants against D.H. Pace pursuant to the contractual indemnification and breach of contract for failure to procure insurance causes of action; (iv) granting summary judgment in favor of the Sprint defendants against Versatile, pursuant to the contractual indemnification and breach of contract for failure to procure insurance causes of action; (v) setting this matter down for an inquest as to the attorneys fees and costs owed by CBRE, DH Pace and Versatile; and (vi) dismissing all cross-claims and counterclaims against the Sprint defendants.

Defendants/third-party plaintiffs, 1100 Avenue of the Americas Associates (1100 Avenue) and Eugene A. Hoffman Management, Inc., (Hoffman); move in motion sequence 19, for an order pursuant to CPLR § 3212 for summary judgment (1) dismissing plaintiff's negligence, Labor Law §§ 200, 240 (1) and 241 (6) causes of action, and (2) granting 1100 Avenue and Hoffman's claims for common-law, contractual indemnification and breach of contract against CBRE, DH Pace and Versatile.

CBRE cross-moves in motion sequence no. 20, for an order dismissing the Sprint defendants' third-party complaint in its entirety; (b) granting summary judgment in its favor dismissing the third-party complaint of 1100 Avenue in its entirety; (c) granting default judgment pursuant to CPLR §3215, in favor of CBRE on its counterclaims as against the Sprint defendants ; and (d) granting summary judgment in favor CBRE on its counter-claims as against the Sprint defendants for contractual indemnification and breach of contract for failure to procure insurance.

Plaintiff cross-moves in motion sequence no. 21, for partial summary judgment, establishing liability as against 1100 Avenue, Hoffman and the Sprint defendants pursuant to Labor Law § 240 (1).

D.H. Pace cross-moves in motion sequence no.22, for summary judgment dismissing all claims against it by CBRE, the Sprint defendants, 1110 Avenue and Hoffman. D.H. Pace cross-moves in motion sequence no. 23, for summary judgment as to D.H.Pace's claims against Versatile, and for an order dismissing plaintiff's complaint against the defendants, as well as any cross-claims.

Background and Procedural History

Defendant 1100 Avenue is the owner of premises located at 57 West 42nd Street in Manhattan. Hoffman manages the property on behalf of 1100 Avenue. Sprint Spectrum L.P. and Sprint/United Management Company are wholly owned subsidiaries of Sprint Communications, Inc., which is a subsidiary of Sprint Corporation. Sprint Spectrum L.P. is the entity that houses a portion of the retail operations and Sprint/United Management Company is the payroll company. Sprint Spectrum L.P. was the tenant and lessee of the premises pursuant to its lease with 1100 Avenue, which was also known as Sprint retail store no. 980 (hereinafter "the store").

Sprint/United Management Company and CBRE entered into a Managed Services Outsourcing Agreement (MSOA), dated November 24, 2008, pursuant to which CBRE managed certain work performed at the store by outside contractors and services charged to certain contracts with other vendors/contractors. D.H. Pace is a door maintenance company hired by CBRE to perform repairs to doors and gates at various Sprint store locations. At some point in September 2015, CBRE notified D.H. Pace that there was a problem with a motorized gate at the store. D.H. Pace retained Versatile to perform the actual work at the store, pursuant to a Master Subcontract Agreement (MSA) executed by D.H. Pace and Versatile.

Plaintiff was hired by Versatile in 2008 as a helper and his work primarily involved the installation of revolving and swing doors. In 2015, plaintiff usually worked with Washington Alulema (Alulema), who was responsible for working on mechanical doors. On September 24, 2015, plaintiff and Alulema were directed by Versatile to go to the Sprint store to assess a problem with a motorized security gate. However, on that date they could not determine what the problem was as the area they needed to access was located above the ceiling and a hole needed to be drilled in order to access the gate's motor. Subsequently the task of opening up the ceiling was performed by another entity and not by plaintiff or Alulema. Plaintiff and Alulema returned to the store on September 28, 2015, at which time Alulema climbed up an A-frame ladder to examine the motor located above the ceiling. He determined that part of the chain where the limit switch was located was turned around which was causing the gate to malfunction. It was determined that in order to remedy this condition they would need to replace the motor with a new one.

Plaintiff and Alulema returned to the Sprint store on October 2, 2015, to replace the motor. In order to accomplish this, they set up an eight foot A-frame ladder with rubber feet and locking hinges on both sides.[1] Plaintiff testified that they had inspected the ladder prior to using it and the rubber feet were in place and the locking mechanisms worked. He specifically testified that he inspected the ladder at least five times prior to his accident and found it to be sturdy and in proper working condition. Plaintiff stated that he held the ladder while Alulema climbed up it and went into the ceiling to perform the repair. Plaintiff then proceeded to climb the ladder several times to bring various tools up to Alulema. At some point, plaintiff climbed up several rungs on the ladder and Alulema handed him the broken

[1]Plaintiff testified that they were given the ladder to use by an employee at the Sprint store, while Alulema testified that they used the ladder supplied by Versatile.

motor which plaintiff put on his right shoulder and carried it down to the ground. Plaintiff then retrieved the new motor, which weighed approximately 100 pounds, and proceeded to carry it up the ladder to give to Alulema to install. He testified that he placed it on his right shoulder and used his right hand and arm to secure it on his shoulder, while using his left hand to hold onto the ladder as he ascended it. Plaintiff testified that he climbed up to the fifth or sixth rung and he told Alulema to grab the motor from his right shoulder while holding the ladder with his left hand. He stated that Alulema was having trouble grabbing the motor and he asked plaintiff to reposition it, so plaintiff tried to "shimmy it up my arm to get it a little higher for him" (Andrezzi 2/3/17 tr at p.102, lines 10-12). Plaintiff testified that at this point he had both of his feet on the same rung of the ladder when he felt the ladder wobble back and forth causing him to lose his balance and fall off the ladder to the ground. He testified that the ladder also fell to the ground on its side and that he was struck by the motor as he attempted to stand up. Plaintiff claims to have sustained various injuries.

Plaintiff commenced this action by filing a summons and verified complaint against the Sprint defendants, 1100 Avenue, and Hoffman on March 7, 2016. On or about March 1, 2017, the Sprint defendants, 1100 Avenue and Hoffman brought a third-party action against D.H. Pace. On or about April 7, 2017, plaintiff filed a supplemental summons and verified complaint naming D.H. Pace as a primary defendant in this action. On May 1, 2017, D.H. Pace commenced a second third-party action against Versatile. Plaintiff served several Bills of Particulars and supplements thereto. Discovery, including depositions, document exchanges and medical examinations was conducted and plaintiff filed note of issue on October 25, 2019. The following motions have ensued.

The CBRE Defendants' Motion

The CBRE defendants move for an order granting summary judgment in their favor on their cross claims as against D.H. Pace and Versatile for contractual and common law indemnification and seek a conditional order declaring that the CBRE defendants are entitled to complete indemnification from D.H. Pace and Versatile including reimbursement of all reasonable expenses, costs and disbursements incurred in the defense of this action

In support of its motion, the CBRE defendants point to testimony from representatives of the various named entities as well as the relevant contractual provisions. Robert Corbat, a Sales Operations Manager at the store on the date of plaintiff's accident, was deposed on behalf of the Sprint defendants. He testified that if there was a problem with the storefront gates, a store employee would call the "R.O.C.C." to report an issue. He identified CBRE as the company that operated R.O.C.C. and chose the vendors to perform any needed repairs. He testified that no CBRE employees were at the store to monitor the work performed.

Nathan Carrier, the Vice President of Operations for D.H. Pace was deposed on its behalf. He testified that D.H. Pace was a door company that performed work at Sprint locations and that it communicated with CBRE through a work order system which is known as the "Corrigo Platform." D.H. Pace would then retain a local subcontractor to perform the work requested. Here, D.H. Pace engaged Versatile pursuant to an MSA, which Mr. Carrier identified as an agreement that he personally executed. He further testified that he intended for both Sprint and CBRE to be "customers" as the term is contained therein. Furthermore, he stated that it was his expectation that Versatile was obligated to assure that both Sprint and CBRE were named as additional insureds under Versatile's insurance policy (Carrier tr at p. 124, lines 2-20). Carrier further testified that D.H. Pace expected that its subcontractors use their own tools and safety equipment and were responsible for selecting the appropriate

equipment needed for a specific task (Carrier tr at p.45, lines 12-19). Additionally, Carrier testified that "CBRE managed the work order flow process for Sprint" but not the work itself and that it did not have any hands-on involvement with the work requested (Carrier tr at pp.100-101, lines 14-25, 2-11).

Christopher LoPinto, a Facilities Managerm testified on behalf of CBRE. He testified that CBRE works with Corrigo, which he described as a work order system, through which Sprint could enter work orders that are then routed to the appropriate vendors. LoPinto testified that Sprint employees could also request work through R.O.C.C., a CBRE-operated call center through which CBRE would take the call, create a work order and dispatch that work order to the appropriate vendor. He stated that CBRE would never be on site for the requested repairs or maintenance and did not make store visits.

CBRE notes that it had two contracts with DH Pace relating to work performed at Sprint stores and/or technical sites, depending on the type of project. The contract applicable to the work performed by Versatile at the Store on October 2, 2015, was the Master Services Agreement (MSA), dated March 1, 2012, between Sprint/United Management Company and DH Pace ("Sprint – DH Pace Contract").

Pursuant to the MSA, D.H. Pace agreed to service, in part, security gates and doors for multiple Sprint store locations. CBRE argues that it is entitled to indemnification from DH Pace as a matter of law, based upon the specific language contained in paragraph N of agreement, pursuant to which D.H. PACE agreed, to the fullest extent permitted by law, to:

> ...defend (with counsel approved by Owner and/or CBRE), indemnify, pay, save and hold harmless the Indemnified Parties from and against any liabilities, damages (including, without limitation, direct, special and consequential damages), costs, expenses, suits, losses, claims, actions, fines and penalties (including, without limitation, court costs, reasonable attorneys' fees and any other reasonable costs of litigation) (hereinafter collectively, the "claims") that any of the Indemnified Parties

> may suffer, sustain or incur arising out of or in connection with (I) Contractor's work or presence on the Owner Facilities or other worksite, Including but not limited to any negligent or grossly negligent acts, errors or omissions, Intentional misconduct or fraud of Contractor, its employees, subcontractors or agents, whether active or passive, actual or alleged, whether in the provision of the Services, failure to provide any or all of the Services or otherwise . . . The foregoing indemnification shall apply irrespective of whether Claims are asserted by a party, by its employees, franchisees, agents or subcontractors, or by unrelated third parties. Nothing contained herein shall relieve Contractor of any responsibility for Claims regardless of whether Contractor is required to provide insurance covering such Claims or whether the matter giving rise to the Claims is the responsibility of Contractor's agents, franchisees, employees or subcontractors.

CBRE argues that wording contained in the agreement evidences that D.H. Pace intended to indemnify and save CBRE harmless from all claims arising out of the work performed by D.H. Pace or any of its subcontractors, such as Versatile. CBRE maintains that its only role with respect to the work being performed at the time of plaintiff's accident was facilitating Sprint's request, through its maintenance portal, that the malfunctioning gate be fixed. CBRE points out that it is undisputed that its employees were not present at the Sprint store at the time of plaintiff's accident, nor were they expected to be present to observe, monitor or direct the work. Moreover, there has been no evidence presented to establish that CBRE's negligence was in any way responsible for plaintiff's accident, thus CBRE argues it is entitled to summary judgment on its claim against both D.H. Pace and Versatile.

In opposition to this branch of CBRE's motion, D.H. PACE argues that although the agreement states that D.H. Pace is required to indemnify and hold harmless "the Indemnified Parties", this term is not defined anywhere within this agreement. Accordingly, D.H. Pace maintains that there is no explicit contractual indemnification provision requiring D.H. Pace to indemnify CBRE in connection with plaintiff's accident.

In reply, CBRE points out that in paragraph J of the agreement, which relates to "taxes," the term "Indemnified Party" is used for the first time, after which "as hereinafter defined" can be found in a parenthetical. The definition of "Indemnified Parties" can, thereafter, be found within Paragraph M, Insurance Requirements, sub-paragraph 7, Policy requirements, which contains the following sentence:

> [t]o the fullest extent permitted by law, all insurance policies shall contain provisions that the Insurance companies waive the rights of recovery or subrogation against Owner, CBRE, their respective affiliates, and each of their and their affiliates' respective agents, officers, directors, shareholders, invitees, nominees, employees, co-lessees, co-venturers, contractors, subcontractors, Insurers, successors and assigns (collectively, the "Indemnified Parties").

Thus, CBRE argues that D.H. Pace is mistaken in its contention that the agreement fails to define the "Indemnified Parties" and that the language within the agreement unmistakably expresses D.H. PACE's intent to indemnify and save CBRE harmless from all claims arising out of their contractual activities.

Discussion

"The right to contractual indemnification depends upon the specific language of the contract" (*Pena v 104 N. 6th St. Realty Corp.*, 157 AD3d 709, 710-711 [2d Dept 2018]; *De Souza v Empire Tr. Mix, Inc.*, 155 AD3d 605, 606 [2d Dept 2017]). Further, "[t]he intent to indemnify must be clearly implied from the language and purposes of the entire agreement and the surrounding circumstances" (*Pena,* 157 AD3d at 710-711; *De Souza*, 155 AD3d at 606). Moreover, "[a] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Martinez v 281 Broadway Holdings, LLC*, __ AD3d __ 2020 NY Slip Op 02774, *2 [2d Dept 2020] [internal quotation marks and citations omitted]).

Here, a careful reading of the entire applicable agreement reveals the clear intention that D.H. Pace would indemnify CBRE (as well as the Sprint defendants) for any claims arising from the work of its subcontractors, which would include Versatile. Moreover, as will be discussed in further detail below, there can be no finding that any negligence on the part of CBRE caused or contributed to plaintiff's accident. Accordingly, that branch of CBRE's motion seeking summary judgment on its claim for contractual indemnification as against D. H. Pace is granted.

Next, the court turns to that branch of CBRE's motion seeking summary judgment on its claims for contractual and common law indemnification as against Versatile. CBRE argues that it is entitled to contractual indemnification from Versatile based upon the language in Paragraph 8 of the Master Subcontract Agreement (MSA) between D.H. Pace and Versatile, pursuant to which Versatile agreed to:

> . . . defend, indemnify, and hold harmless Contractors Customers (as defined herein)[2], as well as Contractor and Contractors officers, directors, agents, employees. successors, and assigns (collectively referred to herein as the "Indemnitees", from and against all claims, demands, suits, losses, and damages (including attorney's fees and litigation expenses) arising out of, or related to, Subcontractors performances of the Work regardless of whether such claim, demand, suit, loss, or damage was caused or alleged to have been caused, in part by any Indemnitee; except that Subcontractor shall not be required to indemnify any indemnitee for its own negligence or intentional misconduct.

CBRE argues that wording contained in the MSA evidences that Versatile intended to indemnify and save CBRE harmless from all claims arising out of their contractual activities. Further, CBRE asserts that as there has been no evidence presented to establish that CBRE

---

[2] "Contractor's Customers" is defined in the Agreement as the owner and manager of the various properties.

was negligent in any way for plaintiff's accident, it is entitled to summary judgment on its contractual indemnification claim as against Versatile.

In opposition, Versatile argues that CBRE's motion for summary judgment on its contractual indemnity claim against Versatile must be denied as CBRE is not a signatory to the contract, is not specifically named as an indemnitee, and questions of fact exist as to whether CBRE was an intended third-party beneficiary of the contractual indemnity provision at issue. Versatile further contends that questions of fact exist as to CBRE's negligence thus precluding summary judgment on the indemnity claim.

In reply, CBRE argues that "Customers" is defined within the MSA as owners and managers of the various properties where services were contracted for, and thus CBRE was an intended indemnitee as it was responsible for managing the services charged to the contract. In support of its position that it should be considered a manager under the terms of the MSA, CBRE points to D.H. Pace's testimony that "CBRE managed the work order flow process for Sprint" (Carrier tr at p. 100, lines 23-25). CBRE further points to the affidavit submitted in support of the Sprint defendants' motion from its employee, Ginger Vigneault, in which she affirms that "the services charged to the contract were managed by CBRE" (Vigneault Aff at ¶ 10). Thus, CBRE contends that it would qualify as an intended indemnity under the MSA.

However, the court finds that the contractual provision at issue relates to property managers, such as Hoffman, and not an entity such as CBRE, who was responsible for managing the provision of services required pursuant to a contract. Accordingly, that branch of CBRE's motion seeking summary judgment on its contractual indemnification claims as against Versatile is denied.

Similarly, that branch of CBRE's motion for summary judgment on its common law indemnity claim against Versatile is denied as it has not been demonstrated that plaintiff suffered a "grave injury," thus CBRE's claim for common law indemnity cannot be maintained against plaintiff's his employer pursuant to Workers Compensation Law section 11 (*see* Workers' Compensation Law § 11; *Fleming v Graham*, 10 NY3d 296, 299 [2008] ; *Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 367 [2005]; *McIntosh v Ronit Realty, LLC*, 181 AD3d 580, 581 [2d Dept 2020]; *Cassese v SVJ Joralemon, LLC*, 168 AD3d 667, 669 [2d Dept 2019]; *Muhjaj v 77 Water St., Inc.*, 148 AD3d 1165, 1166-1167 [2d Dept 2017]).

The Sprint Defendants' Motion

The Sprint defendants move for an order: (i) dismissing plaintiff's complaint in its entirety as asserted against the Sprint defendants with prejudice, (ii) granting summary judgment in favor of the Sprint defendants against CBRE on the causes of action sounding in contractual indemnification and breach of contract for failure to procure insurance; (iii) granting summary judgment in favor of the Sprint defendants against DH Pace pursuant to the contractual indemnification and breach of contract for failure to procure insurance causes of action; (iv) granting summary judgment in favor of the Sprint defendants against Versatile, pursuant to the contractual indemnification and breach of contract for failure to procure insurance causes of action; (v) setting this matter down for an inquest as to the attorneys fees and costs owed by CBRE, DH Pace and Versatile; and (vi) dismissing all cross-claims and counterclaims against the Sprint defendants.

Plaintiff's Claims

The Sprint defendants argue that plaintiff's Labor Law and common law negligence claims should be dismissed as asserted against them. At the outset, the Sprint defendants

argue that Labor Law §§ 240 (1) and 241 (6) do not apply to this case because the work plaintiff was performing at the time of his accident was routine maintenance and therefore he was not engaged in an activity covered by the Labor Law. In support of that branch of the motion seeking to dismiss plaintiff's claims, the Sprint defendants submit the affidavit of licensed professional engineer Erick H. Knox, Ph.D., P.E. Dr. Knox affirms that he inspected the eight-foot stepladder kept at the Sprint store and reviewed all of the relevant transcripts. Based upon his inspection and review of the litigation materials, Dr. Knox opines, to a reasonable degree of engineering certainty, that the observed damage to the ladder, specifically, the left and right spreaders and damage to the side rails that was only observed post-accident was caused by the ladder tipping over and the impact of the plaintiff falling onto it. Specifically, he opines that based upon his education, training and experience, plaintiff damaged the spreader bars and side rails of the ladder and thus the damage observed to the ladder was the result of the accident and not the cause of it Dr. Knox observed that the four rubber feet were slip resistant and in good condition. He notes that plaintiff testified he weighed approximately 215 pounds at the time of the accident and that the motor was approximately 120 pounds, for a total static weight of less than 350 pounds (when including additional weight from clothing, boots, tools, etc.,) which he notes is below the strength capacity of the ladder.

Plaintiff's Labor Law § 200/Common Law Negligence Claims

The Sprint defendants argue that they are entitled to summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence clams as the Sprint defendants did not direct, supervise or control the work performed; (2) that to the extent the ladder in question was provided by Sprint, it was not defective and (3) the record is devoid of any evidence to establish notice to the extent that any dangerous condition existed. The Sprint

defendants note that there is a discrepancy regarding whether plaintiff fell from a ladder provided by Sprint, as he testified, or if the ladder was provided by his employer, Versatile, as testified to by Alulema. However, the Sprint defendants argue that regardless of which entity owned the ladder, the decision to use an 8 foot ladder was solely that of plaintiff and his co-worker. Moreover, they note that the record establishes that the ladder used was not defective or damaged prior to plaintiff's use thereof based upon plaintiff's own testimony in that regard.

In opposition, plaintiff argues that this branch of the Sprint defendants' motion should be denied as there is a question of fact as to whether they provided the faulty ladder which failed to protect him as he performed his work. He asserts that, where as here, the injuries are alleged to have been caused due to a faulty premises condition, the Sprint defendants may be held liable under Labor Law § 200 and common law negligence for providing a faulty ladder, thus arguing they created the dangerous condition that led to plaintiff's accident. Moreover, plaintiff maintains that based upon Dr. Knox's affidavit, in which he affirms that on February 4, 2019, he went to the Sprint store and examined the subject 8-foot ladder, which was the only ladder at the store, and his statement that there had not been another ladder at the store since October 2, 2015 up until the day of his inspection, it is evident that the ladder at issue was provided by Sprint and thus there is a question of fact regarding the Sprint defendants' negligence. Accordingly, plaintiff argues that, by providing the faulty ladder, the Sprint defendants created the condition that caused the accident.

Section 200 of the Labor Law statute 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 (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Haider v Davis*, 35 AD3d 363[2d Dept 2006]). "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" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]; *see Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]). "When a claim involves the manner in which the work is performed, meaning it arises out of alleged defects or dangers in the methods or materials of the work (*see Ortega*, 57 AD3d at 61), recovery against the owner or general contractor for common-law negligence or a violation of Labor Law § 200 is unavailable unless it is shown that the defendant had the authority to supervise or control the performance of the work" (*Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dept 2014]; *see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]; *Klimowicz v Powell Cove Assoc., LLC*, 111 AD3d 605, 607 [2d Dept 2013]; *Gallello v MARJ Distribs., Inc.*, 50 AD3d 734, 735 [2d Dept 2008]; *Dooley v Peerless Importers, Inc.*, 42 AD3d 199, 204-205 [2d Det 2007]). "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (*Torres v Perry St. Dev. Corp.*, 104 AD3d 672, 676 [2d Dept 2013]). "[T]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence" (*Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 698 [2d Dept 2016] quoting *Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2d Dept 2010], quoting *Gasques v State of New York*, 59 AD3d 666, 668 [2d Dept 2009], affd on other grounds 15 NY3d 869 [2010]; *see Torres*, 104 AD3d at 676; *Harrison v State of New York*, 88 AD3d 951, 954 [2d Dept 2011]).

Where "a claim arises out of an alleged dangerous premises condition, a property owner or general contractor may be held liable in common-law negligence and under Labor Law § 200 when the owner or general contractor has control over the work site and either created the dangerous condition causing an injury, or failed to remedy the dangerous or defective condition while having actual or constructive notice of it" (*Mitchell v Caton on the Park, LLC,* 167 AD3d 865, 867 [2d Dept 2018], quoting *Abelleira*, 120 AD3d at 1164; *see Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d 994, 997 [2d Dept 2017]; *Marquez*, 141 AD3d at 698; *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 663 [2d Dept 2015]; *Martinez v City of New York*, 73 AD3d 993, 998 [2d Dept 2010]).

Here, plaintiff contends that his Labor Law § 200 claim is based upon a premises condition arguing that by providing the faulty ladder, Sprint created the condition that caused the accident. "The proponent of a Labor Law § 200 claim must demonstrate that the defendant had actual or constructive notice of the allegedly unsafe condition that caused the accident. The notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken" (*Mitchell v N.Y. Univ.*, 12 AD3d 200 [1st Dept 2004]; *see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Dasilva v Nussdorf*, 146 AD3d 859, 861 [2d Dept 2017]). Here, the Sprint defendants have established their prima facie entitlement to summary judgment dismissing plaintiff's Labor Law§ 200 and common law negligence claims, through the submission of Dr. Knox's affidavit stating that the damage he observed to the ladder was caused by plaintiff's accident and not the cause of it. In addition, plaintiff's own testimony demonstrates that he checked the subject ladder at least five times prior to his accident and found it to be in good working condition with no observable defects. Plaintiff testified as follows:

> Q. Did you inspect the ladder on the date of your accident before the accident occurred?

> A. I inspected the ladder five times. I went up the ladder ten times. The ladder was nothing wrong with it until I fell.
> Q. So when was the first time you inspected that ladder on that day? You just mentioned you inspected it five times.
> A. Yes. Every time I would step on it, if it didn't wobble that means it was flat. It was stable.
> Q. Before you got on that ladder on the date of your accident, did you ever look at the ladder and check to see if everything was working properly?
> A. Yes, I did. I always do. (Andrezzi 10/22/18 tr at p.175, lines 21-25; p.176, lines 2-13).

In the instant case there is no evidence that the Sprint defendants created the alleged dangerous condition (defective ladder), or that they had any notice of it (*see Filarakos v St. John the Baptist Greek Orthodox Church*, 169 AD3d 489, 490 [1st Dept 2019]; *Chowdhury v Rodriguez*, 57 AD3d 121, 129-131 [2d Dept 2008]; *Kesselbach v Liberty Haulage*, 182 AD2d 741, 742 [2d Dept 1992]). Plaintiff has failed to raise a triable issue of fact in opposition. Additionally, the court notes that inasmuch as the plaintiff asserts that the Sprint defendants provided him with an inappropriate, insufficient, or defective ladder, it could be argued that his claim arises from the means, methods, and materials of the work, rather than from an alleged defect in the premises themselves (*see Lombardi v Stout*, 80 NY2d 290, 295 [1992]; *Ortega*, 57 AD3d at 61). However, the record is clear that the Sprint defendants lacked the authority to supervise or control the performance of the work (*Marl v Liro Engrs., Inc.*, 159 AD3d 688, 689 [2d Dept 2018];*Abelleira*, 120 AD3d at 1164). Accordingly, the Sprint defendants have demonstrated their prima facie entitlement to summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims under either theory. That branch of the Sprint defendants' motion seeking to dismiss plaintiff's Labor Law § 200 and common-law negligence claims is granted and said claims are dismissed as asserted against the Sprint defendants.

Plaintiff's Labor Law § 241 (6) Claim

The Sprint defendants argue that plaintiff's Labor Law § 241(6) cause of action must be dismissed as his accident was not covered under the statute and even if the court were to find that there was a statutory violation, he has failed to allege a violation of any applicable Industrial Code provision. Labor Law § 241 (6), provides, in pertinent part, that:

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

The statute imposes a nondelegable duty on owners, contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work, and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Misicki v Caradonna*, 12 NY3d 511 [2009]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]; *Seales v Trident Structural Corp.*, 142 AD3d 1153 [2d Dept 2016]; *Norero v 99-105 Third Ave. Realty, LLC*, 96 AD3d 727 [2d Dept 2012]). The ultimate responsibility for safety practices at building construction sites lies with the owner and general contractor (*see Allen v Cloutier Constr. Corp.*, 44 NY2d 290 [1978]). In order to prevail on a Labor Law § 241 (6) claim, it must be predicated 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]). In support of his Labor Law § 241 (6) claim, plaintiffs' verified bill of particulars alleges violations of 12 NYCRR §§ 23-1.7(b); 23-1.7(e); 23-1.15; 23-1.16; 23-1.17, 23-1.21; 23-1.30; 23-1.31; and 23-1.32. However, in plaintiff's opposition he states

that he is withdrawing the following sections of the Industrial Code: 23-1.7(b), 23-1.7(e), 23-1.15, 23-1.16, 23- 1.17, 23-1.30, 23-1.31 and 23-1.32. Accordingly, the only remaining Industrial Code section that plaintiff alleges was violated was § 23-1.21, and he specifically contends that subsections (b) (1) and (3) were violated.

However, the court finds that plaintiff's Labor Law § 241 (6) claim lacks merit and must be dismissed. The record establishes, prima facie, that the work being performed by the plaintiff at the time of the accident was not connected to construction, excavation, or demolition work, as defined in the Industrial Code (*see* 12 NYCRR 23-1.4 [b] [13], [16], [19]). Here, plaintiff was employed to fix a motorized gate at a store that was not under construction, being renovated or being demolished. It is well settled that Labor Law § 241 (6) is "inapplicable outside the construction, demolition or excavation contexts" (*Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]; *see Nagel v D&R Realty Corp.*, 99 NY2d 98,102-103 [2002]; *see also Guevera v Simon Prop. Group, Inc.*, 134 AD3d 899, 900 [2d Dept 2015][holding that the statute does not protect workers involved in maintenance or replacement of parts]; *Deoki v Abner Props. Co.*, 48 AD3d 510, 511 [2d Dept 2008]; *Irizarry v State of New York*, 35 AD3d 665, 666 [2d Dept 2006]). Since plaintiff's work was not performed in any such context, this court must dismiss plaintiff's Labor Law § 241 (6) claim. Accordingly, that branch of the Sprint defendants' motion seeking summary judgment dismissing plaintiff's Labor Law § 241 (6) claim is granted and said claim is dismissed (*see Esposito*, 1 NY3d at 526; *Garcia-Rosales v Bais Rochel Resort*, 100 AD3d 687, 688 [2d Dept 2012]; *Gallello v MARJ Distribs., Inc.*, 50 AD3d 734, 736 [2d Dept 2008]; *Wein v Amato Props., LLC*, 30 AD3d 506, 507 [2d Dept 2006]).

Plaintiff's Labor Law § 240 (1) Claim

The Sprint defendants also argue that plaintiff's Labor Law § 240 (1) claim should be dismissed as the work he was performing at the time of the accident was routine maintenance and is not covered under the Labor Law. Moreover, the Sprint defendants assert that even if the court were to determine that it was an activity subject to Labor Law § 240 (1) protection it is still entitled to dismissal of plaintiff's Labor Law§ 240 (1) claim inasmuch as there was no statutory violation that caused his accident.

In opposition, plaintiff argues that the work that he and Alulema were performing was not routine maintenance and is "covered" work under the statute. In support of this position plaintiff points to *Barrios v 19-19 246 Avenue Company LLC*, (169 AD3d 747 [2d Dept 2018]) involving a worker injured when he was struck by a differential block and chain that fell onto his head while he was replacing a broken roll-up gate on defendant's premises. The *Barrios* court found that "[t]he activity of the removal of the old roll-up gate and the installation of a new gate is a repair within the purview of Labor Law §240"]). In addition, he argues that the failure of the Sprint defendants to secure the ladder to prevent him from falling is a prima facie violation of Labor Law § 240 (1). In support of his own cross motion seeking partial summary judgment on his Labor Law§ 240 (1) claim, plaintiff has submitted an expert affidavit from Kathleen Hopkins, a Certified Safety Manager. Ms. Hopkins affirms that she reviewed all of the relevant materials related to this litigation. She notes that the defendants failed to ensure that plaintiff and Alulema were wearing hard hats and that they were not provided with any stays, hangers, blocks, braces, irons, ropes and/or other devices to secure the ladder. Further, she opines that the ladder provided was too short to perform the work in violation of OSHA Ladder Regulations and ANSI Ladder Standards, and that plaintiff should have been provided with a scaffold or hoist such as a scissor lift or boom manlift as

a safe means of access to perform this work. Accordingly, she opines that plaintiff's accident was the result of a violation of Labor Law § 240 (1).

Labor Law § 240 (1) imposes a non-delegable duty and absolute liability upon owners and contractors for failing to provide safety devices necessary for workers subjected to elevation-related risks in circumstances specified by the statute (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). To recover under the statute, a plaintiff must demonstrate that he or she was engaged in a covered activity --"the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (Labor Law § 240[1]); *see Panek v County of Albany,* 99 NY2d 452, 457 [2003]) -- and must have suffered an injury as "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

"While the reach of [Labor Law] section 240 (1) is not limited to work performed on actual construction sites, the task in which an injured employee was engaged must have been performed during 'the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure'" (*Quituizaca v Tucchiarone*, 115 AD3 d 924,926 [2d Dept 2014], quoting *Martinez v City of New York*, 93 NY2d 322, 326 [1999]; *see also Esposito*, 1 NY3d at 528; *Ferrigno v Jaghab, Jaghab & Jaghab, P.C.*, 152 AD3d650, 653 [2d Dept 2017]; *Moreira v Ponzo*, 131 AD3d 1025 [2d Dept 2015]; *Enos v Werlatone, Inc.*, 68 AD3d 713 [2d Dept 2009]; *Holler v City of New York*, 38 AD3d 606 [2d Dept 2007]), as well as acts "ancillary" to those activities (*Goodwin v Dix Hills Jewish Ctr.*, 144 AD3d 744,746 [2d Dept 2016], quoting *Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]). The issue of whether any particular task "falls within section 240 (1) must be determined on a case-by-case

basis, depending on the context of the work" (*Prats*, 100 NY2d at 883 [2003]; *see Fox v H & M Hennes & Mauritz, L.P.*, 83 AD3d 889, 890 [2d Dept 2011]).

In determining whether a particular activity constitutes "repairing," courts are careful to distinguish between repairs and routine maintenance, the latter of which falls outside the scope of section 240 (1) of the Labor Law (*see Ferrigno*, 152 AD3d at 653; *Esposito*, 1 NY3d at 528; *Joblon v Solow*, 91 NY2d457 [1998]; *Smith v Shell Oil Co.*, 85 NY2d 1000, 1002 [1995]; *Fox*, 83 AD3d at 890). An important factor in making this determination "is whether or not the job involves the replacement of a missing, malfunctioning, or worn out component. Such work is ordinarily deemed to be routine maintenance" (*Esposito*, 1 NY3d at 528). Additionally, courts will consider such factors as whether the work in question was occasioned by an isolated event as opposed to a recurring condition, whether the object being replaced was a worn-out component in something that was otherwise operable, and whether the device or component that was being fixed or replaced was intended to have a limited life span or to require periodic adjustment or replacement" (*Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc.*, 118 AD3d 524, 526-27[1st Dept 2014] [internal citations omitted]; *see Ferrigno*, 152 AD3d at 653; *Dahlia v S & K Distribution, LLC*, 171 AD3d 1127, 1128 [2d Dept 2019]; *Mammone v T.G. Nickel & Assoc., LLC*, 144 AD3d 761,761-762 [2d Dept 2016]).

At the outset, the court notes that the facts of the *Barrios* case, cited by plaintiff in support of his contention that the work he was engaged in at the time of his accident falls under the purview of Labor Law § 240 (1), are distinguishable from the facts of the instant case. In *Barrios*, the work plaintiff was performing involved the removal of an entire old roll-up gate and the installation of a new gate. Conversely, here plaintiff merely replaced a motor, a component of the gate that was malfunctioning and needed to be replaced due to

normal wear and tear. In this regard, the court notes that plaintiff testified that approximately 75 percent of the work he performed for Versatile in relation to motorized gates involved a problem with the motor and approximately 50 percent of the time it involved having to replace the motor (Andrezzi 10/22/18 tr at p. 87, lines 4-10; p. 164, lines 2-21). He further testified that a motor could last anywhere between one and ten years before needing to be replaced (Andrezzi 10/22/18 tr at 166, lines 9-18). Specifically, plaintiff testified as follows:

> Q. What was your understanding what the problem was at this store?
> A. The manager's understanding or my personal understanding?
> Q. Right, those are two different things. Because the manager doesn't have technical expertise as far as you know in roll down gates, correct?
> A. Right. So I didn't actually go up to there to look at it because it's a very tight space and this guy's like half my size. He [Alulema] went up and told me it was the motor. But the problem was it was going up and down I think, it wasn't closing and staying.
> Q Okay. So the problem was with the gate raising and lowering, it wasn't staying down?
> A. Right. And it was a little out of the traction, off balance. (Andrezzi tr at p 63 line 25, 64 64 lines 2-22)

The court finds that the work that plaintiff and Alulema were engaged in at the time of the accident was routine maintenance not covered under Labor Law § 240 (1). Here, the work being performed did not involve the installation of a new mechanical gate or the repair of the existing motor, rather they were performing routine maintenance involving replacing the existing motor which was not working properly causing the security gate to malfunction. Even the preparation of exposing the motor through the ceiling was performed by another entity. Accordingly, plaintiff's work "involved replacing components that require replacement in the course of normal wear and tear" and did not constitute "repairing" or any other enumerated activity (*see Esposito*, 1 NY3d at 528; *Dahlia v S&K Distrib.*, LLC, 171 AD3d 1127, 1129 [2d Dept] [court held that Labor Law§ 240 not applicable where plaintiff injured

during course of replacing a belt on a heating unit, court found that "plaintiff's work "involved replacing components that require replacement in the course of normal wear and tear" and did not constitute "repairing" or any other enumerated activity"]; *Gdanski v 5822 Broadway Assoc., LLC*, 116 AD3d 658, 660 [2014]; *Gonzalez v Woodbourne Arboretum, Inc.*, 100 AD3d 694, 697 [2d Dept 2012] [court held that an accident involving the replacing of a component of a water cannon which had worn thin, causing the machine, which remained operable, to leak constituted "routine maintenance" rather than "repair" or "alteration," and thus falls outside the protective scope of Labor Law § 240]; *English v City of New York*, 43 AD3d 811, 812 [2007];*Gleason v Gottlieb*, 35 AD3d 355, 356 [2d Dept 2006] [court held that replacing a worn out "water coil" in an air-conditioning unit in a nonconstruction and nonrenovation context, did not constitute a covered Labor Law § 240 (1) activity]; *Wein v Amato Properties, LLC*, 30 AD3d 506, 507 [2dDept 2006] [court held that where plaintiff was replacing a defective safety valve on a boiler it constituted "routine maintenance" and not a repair within the meaning of Labor Law § 240(1)]; *Jani v City of New York*, 284 AD2d 304, 304 [2d Dept 2001] [where an electrician was injured when he fell from a ladder while attempting to replace an electrical contactor located in an air-handling unit., court found that the involved the mere replacement of a worn-out component part in a nonconstruction, nonrenovation context, and did not constitute "erection, demolition, repairing, altering, painting, cleaning or pointing of a building" within the meaning of the statute]; *Romero v City of New York*, 46 Misc. 3d 144(A) [App Term 2015] [court held that the work performed by plaintiff when he was injured from a fall while replacing a motor on a six-foot oven, which motor was worn out due to wear and tear constituted routine maintenance]).

Accordingly that branch of the Sprint defendants' motion seeking to dismiss plaintiff's Labor Law §240 (1) claim is granted and said claim is dismissed.

The Sprint defendants' claims as against CBRE

The court now turns to that branch of the motion seeking an order granting summary judgment in favor of the Sprint defendants on their contractual indemnification and breach of contract for failure to procure insurance claims as asserted against the CBRE defendants. In this regard, the Sprint defendants point to a Managed Services Outsourcing Agreement (MSOA), dated November 24, 2008, between Sprint and CBRE, pursuant to which CBRE managed certain work performed at Sprint stores and services charged to certain contracts with other vendors/contractors. The Sprint defendants argue that they are entitled to contractual indemnification based upon the indemnification provision contained in Section 8.1 which states:

> Mutual Indemnification for Injury and Property Damage. Vendor and Sprint will defend, indemnify and hold each other and their officers, directors, employees, Affiliates and agents harmless from and against all Losses by reason of injury or death to any person or damage to any tangible property arising or resulting to the extent of the Indemnifying Party's negligence or willful misconduct.

In addition, section 15 of the MSOA states that during the term of the contract CBRE will have and maintain in force insurance, including:

> Commercial General Liability Insurance (including bodily injury, property damage, personal and advertising injury liability, and contractual liability covering operations, independent contractor and products/completed operations hazards), with limits of $2,000,000 combined single limit per occurrence and $4,000,000 annual aggregate. Vendor will name Sprint and its Affiliates, Sprint officers, directors and employees as additional insureds will provide proof of said insurance and limits as requested from time to time by Sprint;

> Umbrella/excess liability with limits of $15,000,000 combined single limit per occurrence and annual aggregate in excess of the commercial general liability, business auto liability and employer's liability, naming Sprint, its officers, directors and employees as additional insureds.
> ***
> 18.4.6. All policies required to be carried by Vendor hereunder will be primary to any insurance or self-insurance Sprint may maintain, to the extent of loss attributable to the negligent acts or omissions or willful misconduct of Vendor (and for anyone for whom Vendor is responsible if they are covered under such policies).

The Sprint defendants acknowledge that the insurance carrier for CBRE is providing a defense to the Sprint defendants, 1100 Avenue and Hoffman. However, CBRE's insurance carrier Zurich, informed Sprint by letter dated, January 11, 2018, that its tender is subject to a reservation of rights only as to the first $1 million in coverage and that no coverage will be afforded unless CBRE is found liable in whole or in part. The Sprint defendants argue this violates the terms of the contract both as to the reservation and limits required inasmuch as CBRE was required to obtain insurance "primary to any insurance or self-insurance Sprint may maintain, to the extent of loss attributable to the negligent acts or omissions or willful misconduct of Vendor." Additionally, the Sprint defendants note that the umbrella/excess carrier has not responded to the tender. Accordingly, the Sprint defendants maintain that CBRE has failed to procure the insurance required under the MSOA for the benefit of Sprint as required by the Contract.

In opposition, CBRE argues that the language contained in the MSOA indicates that Sprint and CBRE intended that each indemnify the other, but that indemnification obligation was limited to losses "arising or resulting to the extent of the Indemnifying Party's negligence or willful misconduct." CBRE contends that as there has been no evidence establishing that plaintiff's accident was due to CBRE's negligence or willful misconduct, this provision was

not triggered and thus, Sprint's claim for contractual indemnity must fail. Moreover, CBRE notes that there has been testimony indicating that the ladder on which plaintiff was working at the time of his accident had been supplied by Sprint, thus it cannot establish, prima facie, that the Sprint defendants were free from any negligence so as to establish entitlement to contractual indemnity from CBRE as a matter of law. With regard to Sprint's breach of contract/failure to procure insurance claim, CBRE asserts that it met its obligation to procure insurance as evidenced by a certified copy of its insurance policy from Zurich, which included as additional insureds "[a]ny person or organization that the insured has agreed by written contract or written agreement to name as an additional insured and executed prior to the occurrence of any loss." CBRE points out that the agreement between the parties only required that this insurance be primary to any insurance or self-insurance Sprint may maintain, to the extent of loss attributable to the negligent acts or omissions or willful misconduct of CBRE. As such the reservation of rights asserted by Zurich does not alter the fact that CBRE fulfilled its obligation to procure insurance naming Sprint as an additional insured.

Discussion

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], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see Tanking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]). "The party seeking contractual indemnification must establish that it was free from negligence and that it may be held liable solely by virtue of statutory or vicarious liability" (*Jardin v A Very Special Place,*

Inc., 138 AD3d 927, 931 [2d Dept 2016]; *see Arriola v City of New York,* 128 AD3d 747, 749 [2d Dept 2015]).

"'A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with'" (*DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept 2011], quoting *Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 739 [2d Dept 2003]; *see Marquez v L & M Dev. Partners, Inc.,* 141 AD3d at 701; *Ginter v Flushing Terr., LLC,* 121 AD3d 840, 844 [2d Dept 2014]). "If such a showing is made, the promisor is liable to the promisee for the resulting damages for the promisor's failure to obtain the required insurance coverage, including the liability of the promisee to the plaintiff and the costs incurred in defending against the plaintiffs action (*see Keelan v Sivan*, 234 AD2d 516, 517 [2d Dept 1996] [internal citations omitted]). Moreover, an insurance procurement clause is independent of the indemnification provision in a contract, and thus a final determination of liability need not await a factual determination as to whose negligence, if anyone's, caused plaintiff's injuries (*see Spector v Cushman & Wakefield, Inc.*, 100 AD3d 575, 575 [1st Dept 2012]).

Here, inasmuch as the court has determined that the Sprint defendants are entitled to summary judgment dismissing all claims alleged in plaintiff's complaint as asserted against the Sprint defendants, the third-party complaint and all cross claims asserted against CBRE, D.H. Pace and Versatile must be dismissed (*see Leicht v City of New York Dept. of Sanitation*, 131 AD3d 515, 517 [2d Dep 2015]; *Gdanski v 5822 Broadway Assoc., LLC*, 116 AD3d 658, 660 [2d Dept 2014]; *DePascale v E&A Constr. Corp.*, 74 AD3d 1128, 1131[2d Dept 2010]; *Neidhart v K.T. Brake & Spring Co.*, 55 AD3d 887, 889 [2d Dept 2008]). The court acknowledges that a party entitled to contractual indemnification is entitled to recover legal

expenses incurred in defending the main action and that a claim for costs and attorney fees survives the dismissal of the main action (*see Springstead v Ciba-Geigy Corp.*, 27 AD3d 720, 721 [2d Dept 2006]; *Perchinsky v State of New York*, 232 AD2d 34, 39 [3d Dept 1997]). In the instant case, however, it is undisputed that the insurance carrier for CBRE is providing a defense to the Sprint defendants. Accordingly, that branch of the Sprit defendants' motion seeking an order setting this matter down for an inquest as to the attorneys fees and costs owed by CBRE, DH Pace and Versatile is denied.

The Sprint defendants' claims as against D.H. Pace and Versatile

For the reasons discussed above in relation to the Sprint defendants' claims as asserted against CBRE, the Sprint defendants claims as asserted against D.H. Pace and Versatile are similarly dismissed

1100 Avenue and Hoffman's Motion

1100 Avenue and Hoffman move for an order seeking summary judgment (1) dismissing plaintiff's negligence, Labor Law §§ 200, 240 (1) and 241 (6) causes of action, and (2) granting 1100 Avenue and Hoffman's claims for common-law and contractual indemnification and breach of contract against CBRE, DH Pace and Versatile. As discussed above, 1100 Avenue is the owner of the commercial space leased by the Sprint defendants at which plaintiff's accident occurred. Hoffman manages the property on behalf of 1100 Avenue. For the reasons discussed in detail above in relation to the Sprint defendants' motion seeking the same relief, that branch of 1100 Avenue and Hoffman's motion seeking summary judgment dismissing plaintiff's claims is granted in its entirety and said claims are hereby dismissed as against 1100 Avenue and Hoffman.

The arguments raised in support of those branches of 1100 Avenue and Hoffman's motion seeking summary judgment on their claims as against CBRE, D.H. Pace and Versatile

for common law indemnification, contractual indemnification and breach of contract for failure to procure insurance, mirror those raised in the Sprint defendants' motion, and as such, will not be recited again herein. These defendants rely on the same contractual provisions in each of the relevant contracts in support of their argument that they are entitled to contractual indemnification as affiliates of the Sprint defendants. Similarly, for the reasons cited above in relation to the Sprint defendants' motion seeking summary judgment on its claims as against CBRE, D.H. Pace and Versatile, this branch of 1100 Avenue and Hoffman's motion is denied and said claims are dismissed.

The CBRE Defendants' Cross Motion

CBRE cross-moves for an order: (a) granting summary judgment dismissing the Sprint defendants' third-party complaint in its entirety; (b) granting summary judgment dismissing 1100 Avenue's third-party complaint; (c) granting default judgment pursuant to CPLR §3215 in favor of CBRE on their counterclaims as against the Sprint defendants; (d) granting summary judgment in favor of CBRE on its counter-claims as against the Sprint defendants for contractual indemnification and breach of contract for failure to procure insurance. Those branches of CBRE's cross motion seeking summary judgment dismissing the third-party complaints asserted by the Spring defendants and 1100 Avenue are granted for the reasons discussed in detail above in relation to the Sprint defendants and 1100 Avenue's motions. The remainder of CBRE's cross motion is denied as moot.

Plaintiff's Cross Motion

Plaintiff cross-moves, for partial summary judgment, establishing liability against 1100 Avenue, Hoffman and the Sprint defendants pursuant to Labor Law § 240 (1). As discussed in detail above in relation to the Sprint defendants' motion, the court has determined that plaintiff's accident was not covered under Labor Law § 240 (1) (*see Esposito*, 1 NY3d at 528;

Dahlia, 171 AD3d at 1129; *Gdanski*, 116 AD3d at 660; *Gonzalez*, 100 AD3d at 697; *English*, 43 AD3d at 812;*Gleason*, 35 AD3d at 356; *Wein*, 30 AD3d at 507; *Jani*, 284 AD2d at 304; *Romero*, 46 Misc. 3d at 144(A)). Accordingly, plaintiff's cross motion is denied in its entirety.

D.H. Pace's Cross Motions

D.H. Pace cross-moves, in motion sequence no.22 ,for summary judgment dismissing all claims asserted against it by CBRE, the Sprint defendants, 1110 Avenue and Hoffman. D.H. Pace cross-moves, in motion sequence no. 23, for summary judgment in its favor as to its' claims against Versatile, dismissing plaintiff's complaint against the defendants, as well as any cross-claims. Inasmuch as the court has dismissed all of plaintiff's claims, as well as all claims asserted by CBRE, the Sprint defendants, 1100 Avenue and Hoffman against D.H. Pace, for the reasons discussed in detail above, D.H. Pace's cross motions are denied as moot.

To the extent not specifically addressed herein, the parties' remaining contentions have been considered and have been found to be either meritless and/or moot. Accordingly, it is **ORDERED** that that branch of CBRE's motion seeking summary judgment on its claim for contractual indemnification as against D. H. Pace is granted and that branch seeking summary judgment on its contractual and common law indemnification claims as against Versatile is denied, and it is further;

ORDERED that that branch of the Sprint defendants' motion seeking summary judgment dismissing plaintiff's claims is granted in its entirety and those branches seeking summary judgment in its favor on its claims and cross claims as asserted against CBRE, D.H. Pace and Versatile is denied and said claims are dismissed , and it is further;

ORDERED that that branch of 1100 Avenue and Hoffman's motion seeking summary judgment dismissing plaintiff's claims is granted in its entirety and said claims are hereby dismissed as against 1100 Avenue and Hoffman and that branch seeking summary judgment on their claims as against CBRE, D.H. Pace and Versatile for common law indemnification, contractual indemnification and breach of contract for failure to procure insurance is denied and said claims are dismissed, and it is further;

ORDERED that plaintiff's cross motion for partial summary judgment on his Labor Law § 240 (1) claim as asserted against 1100 Avenue, Hoffman and the Sprint defendants is denied and said claim is dismissed, and it is further;

ORDERED that D.H. Pace's cross motions are denied as moot.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R,

J. S. C.