Cardona v 1717 44th St. LLC
2022 NY Slip Op 30669(U)
February 28, 2022
Supreme Court, Kings County
Docket Number: Index No. 511693/18
Judge: Ingrid Joseph
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 28th day of February, 2022.

P R E S E N T: HON. INGRID JOSEPH, JSC
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Juan Pablo Arango Cardona,

Plaintiff,

-against-

Index No. 511693/18

1717 44th Street LLC, The 1717 44th Street Condominium, Ninth Avenue Construction Group LLC and Alrose Construction, Inc.,

Defendants.

Ninth Avenue Construction Group LLC,

Third-Party Plaintiff,

-against-

PCC Cleaning Solutions, Inc.,

Third-Party Defendant.

Alrose Construction, Inc.,

Second Third-Party Plaintiff,

-against-

PCC Cleaning Solutions, Inc.,

Second Third-Party Defendant.

PCC Cleaning Solutions, Inc.,

Third Third-Party Plaintiff,

-against-

SCL Services Corp.,

Third Third-Party Defendant.

----------X

Alrose Construction, Inc.,

Fourth Third-Party Plaintiff,

-against-

SCL Services Corp.,

Fourth Third-Party Defendant.

----------X

The following e-filed papers read herein:	NYSEF Doc Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	188, 189, 206, 221, 223, 244, 245-246 264, 272-273, 296-297, 301-302
Opposing Affidavits (Affirmations)	323-324, 327, 330, 332, 335, 339, 341, 343, 345, 361,
Affidavits/ Affirmations in Reply	349-350, 352-353, 355, 356, 360, 365, 367

Upon the foregoing papers, plaintiff Juan Pablo Arango Cardona ("plaintiff") moves (Motion Seq. 8) for an order, pursuant to CPLR § 3212, granting him partial summary judgment with respect to liability on his Labor Law § 240 (1) cause of action as against defendant 1717 44th Street LLC ("1717 44th St") and defendant/third-party plaintiff Ninth Avenue Construction Group LLC ("Ninth Ave"). Defendant/second third-party plaintiff/fourth third-party plaintiff Alrose Construction, Inc. ("Alrose") moves (Motion Seq. 9) for an order, pursuant to CPLR § 3212, granting it summary judgment dismissing plaintiff's complaint and all cross claims as against it. Third-party defendant/second third-party defendant/third third-party plaintiff PCC Cleaning Solutions, Inc. ("PCC") moves (Motion Seq. 10) for an order, pursuant to CPLR § 3212, granting it summary judgment dismissing the third-party and second third-party complaints and any and all cross claims against it. 1717 44th St and Ninth Ave (collectively

referred to as the "Owner Defendants") move (Motion Seq. 11 and 12) for an order: (1) pursuant to CPLR § 3212, granting them summary judgment dismissing the complaint and any cross claims and counterclaims; (2) pursuant to CPLR § 3212, granting summary judgment in their favor on their contractual indemnification and duty to defend claims against PCC; (3) pursuant to CPLR § 3126, striking the answer of PCC and granting them relief on all causes of action as against PCC; and (4) pursuant to CPLR § 3025, granting them leave to amend the answer to assert a cross claim for contractual indemnification as against third third-party defendant/fourth third-party defendant SCL Services Corp. ("SCL").[1] Finally, Ninth Ave cross-moves (Motion Seq. 13) for an order, pursuant to CPLR § 3212, granting it summary judgment dismissing the complaint and cross claims as against it on the ground that the action as against it is barred by the Workers Compensation Law.

In this action premised on common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6), plaintiff alleges that he suffered injuries on January 8, 2018 while removing tiles from a bathroom wall when the ladder he was climbing down moved, causing him to fall to the bathroom floor. The accident occurred in a three-story building under construction that was owned by defendant 1717 44th St.[2] 1717 44th St hired defendant Ninth Ave to act as the general contractor or construction manager for the project. Alrose was hired by Ninth Ave to perform exterior roofing and stucco work. In addition, Ninth Ave, pursuant to a written contract, hired PCC to provide laborers for construction cleanup work. PCC subcontracted the actual provision of laborers to third third-party defendant SCL. Plaintiff was employed by SCL.[3]

---

[1] In mot. seq. no. 12, the Owner Defendants seek the same relief sought in mot. seq. no. 11 by way of an amended notice of motion.

[2] Although 1717 44th St did not concede its ownership of the premises in its answer, Alrose has submitted a copy of a deed showing 1717 44th St's ownership of the premises, 1717 44th St's deposition witness conceded that it owned the premises at the time of the construction project, and its contract with Ninth Ave identifies it as the owner.

[3] PCC's witness testified at its deposition that PCC subcontracted its work and the provision of laborers to SCL. Although plaintiff testified at his deposition that he believed that he was employed by PCC for the six months prior to and including the day of the accident, he conceded that his paychecks came from SCL, and that the Workers'

According to plaintiff's deposition testimony, when he arrived at the building site on the date of the accident, Ninth Ave's construction manager took him to a basement bathroom and directed him to remove tile and a layer of sheetrock that was under the tile. The construction manager gave plaintiff a crowbar to remove the tile, and a Sawzall to cut and remove the sheetrock and informed plaintiff that he could use an A-frame ladder that was in the basement to perform his work. Edgar Ramos, a coworker, who was also provided by PCC and apparently employed by SCL, was tasked with placing the tile debris in garbage bags and taking the filled bags to a trash area in the basement.

After removing much of the tile on the back wall of the bathroom located above a bathtub, plaintiff, in order to reach the tile located near the ceiling of that wall, placed the ladder in the closed position in the bathtub with the top of the ladder resting against the back wall and the feet against the inside of the bathtub. Plaintiff then climbed up the ladder until he was two to three feet above the bathroom floor and used a crowbar to remove the tile near the ceiling. When he finished removing the tile at issue, plaintiff started to climb down the ladder, and, as he was doing so, the ladder moved, causing him to fall to the floor.[4] One end of the crowbar, which he was holding in one of his hands at the time, struck plaintiff in his eye as he was falling.

In moving, Alrose submits that it is not a proper Labor Law defendant and that, since it had no connection with the work at issue at the time of the accident, it may not be held liable to plaintiff under a common-law negligence cause of action. In this regard, the deposition testimony in the record, including that of Alrose's president and Ninth Ave's construction manager Joseph Buchinger, Alrose's contract with Ninth Ave, and the other contracts in the

Compensation Board found that he was employed by SCL.

[4] In moving, plaintiff has submitted an affidavit from Ramos, who averred that he witnessed the accident, and whose assertions are consistent with plaintiff's testimony. Of note, Ramos stated that the tiles that plaintiff was removing were approximately seven feet above the floor, that plaintiff stood on the third rung from the bottom of the ladder to reach these tiles, and that the accident happened as plaintiff was stepping down one rung of the ladder (i.e., stepping down from the third to the second rung from the bottom of the ladder) (Ramas Aff. at page 2).

record, taken together, demonstrate that Alrose was only hired by Ninth Ave as a subcontractor to perform roofing, waterproofing and stucco work, that it was Ninth Ave that hired PCC, which, in turn, hired SCL, and that Alrose had no general authority over the project and/or authority over the work of PCC or SCL. In addition, according to the testimony of its president, Alrose completed its work on the project nearly a year before the accident occurred and it was off of the jobsite by early 2017. Buchinger testified that the tile work at issue was the result of a subsequent design change apparently requested relating to the sale of the condominium units.

In view of this evidence, the fact that Alrose was listed as the general contractor for the project on the work permit is, in and of itself, insufficient to render it liable as a general contractor or agent of the owner or general contractor for purposes of plaintiff's interior work that was performed a year after Alrose's last involvement with the project (*see Martinez v 408-410 Greenwich St., LLC*, 83 AD3d 674, 675 [2d Dept 2011]; *Kilmetis v Creative Pool & Spa, Inc.*, 74 AD3d 1289, 1291 [2d Dept 2010]; *Huerta v Three Star Constr. Co., Inc.*, 56 AD3d 613, 613 [2d Dept 2008], *lv denied* 12 NY3d 702 [2009]; *see also Giovanniello v E.W. Howell, Co., LLC*, 104 AD3d 812, 813-814 [2d Dept 2013]; *Kelarakos v Massapequa Water Dist.*, 38 AD3d 717, 718 [2d Dept 2007]; *cf. Utica Mut. Ins. Co. v Style Mgt. Assoc. Corp.*, 28 NY3d 1018, 1020 [2016]; *Kosovrasti v Epic (217) LLC*, 96 AD3d 695, 696 [1st Dept 2012]).[5] Alrose has thus demonstrated its prima facie entitlement to dismissal of the Labor Law and common-law negligence causes of action as against it. This same evidence demonstrates that Alrose may not be held liable on any cross claims or counterclaims for contribution or common-law

[5] The Appellate Division, First Department's decision in *Bart v Universal Picture* (277 AD2d 4, 4-5 [1st Dept 2000]), relied upon by the Owner Defendants is readily distinguishable, as the "Occupancy Permit" at issue in that case is essentially a license agreement that gave the holder a certain degree of control over the premises while the premises was being used as a film set (*see Grlilikhes v International Tile & Stone Show Expos*, 90 AD3d 480, 483 [1st Dept 2011]). Moreover, even if the New York City Building Code Requirements relied upon by the Owner Defendants meant that Alrose would have to be deemed in control of the worksite during construction, it is hard to see how those provisions would apply to Alrose for work contracted by Ninth Ave well after Alrose had finished its work at the site and after a certificate of occupancy had been issued.

indemnification (*see Debennedetto v Chetrit*, 190 AD3d 933, 939 [2d Dept 2021]; *Cutler v Thomas*, 171 AD3d 860, 861-862 [2d Dept 2019]; *Kane v Peter M. Moore Constr. Co., Inc.*, 145 AD3d 864, 869 [2d Dept 2016]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]) and that the Owner Defendants are not entitled to contractual indemnification under the terms of Ninth Ave's contract with Alrose since plaintiff's work at issue did not fall within the scope of Alrose's work under their contract (*see Lombardo v Tag Ct. Sq., LLC*, 126 AD3d 949, 950-951 [2d Dept 2015]; *see also Rizo v 165 Eileen Way, LLC*, 169 AD3d 943, 946 [2d Dept 2019]; *Smith v Hunter Roberts Constr. Corp., LLC*, 127 AD3d 647, 648 [1st Dept 2015]).

Plaintiff, who has not submitted any opposition to Alrose's motion, has failed to demonstrate an issue of fact in this regard. While the Owner Defendants oppose the motion, they have likewise failed to submit any evidentiary proof warranting denial of Alrose's motion.

Initially, Ninth Ave's cross motion, which was not made until April 16, 2021, is untimely under Kings County Supreme Court Uniform Civil Term Rules, Part C, Rule 6, because it was made more than 60 days after the filing of the note of issue on February 2, 2021 (*see Goldin v New York & Presbyt. Hosp.*, 112 AD3d 578, 579 [2d Dept 2013]; CPLR § 3212 [a]). Ninth Ave offers no excuse for its delay in moving and asserts that its cross motion may nevertheless be considered in light of plaintiff's timely motion for summary judgment. Although a court's power to search the record under CPLR § 3212 (b) allows a court to consider otherwise untimely motions even where there is no demonstration of good cause for the delay, a court's discretion to exercise this power is limited to situations where the timely motion sought relief "nearly identical" to that sought in the untimely cross motion (*see Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281-282 [1st Dept 2006], *lv dismissed* 9 NY3d 862 [2007]; *see also Sikorjak v City of New York*, 168 AD3d 778, 780 [2d Dept 2019]; *Sheng Hai Tong v K & K*

7619, Inc., 144 AD3d 887, 890 [2d Dept 2016]; *Derrick v North Star Orthopedics, PLLC*, 121 AD3d 741, 743 [2d Dept 2014]). Since plaintiff, in his motion, only requested summary judgment with respect to liability on his Labor Law § 240 (1) cause of action and did not address the Workers' Compensation and special employment issues that are the subject of Ninth Ave's cross motion, plaintiff's motion did not involve "nearly identical" issues, and thus, Ninth Ave's untimely cross motion may not be considered (*see Dojce v 1302 Realty Co., LLC*, 199 AD3d 647, 649-650 [2d Dept 2021]; *Jarama v 902 Liberty Ave. Hous. Dev. Fund Corp.*, 161 AD3d 691, 691-692 [1st Dept 2018]; *Sheng Hai Tong*, 144 AD3d at 890).

Ninth Ave's cross motion would be denied on the merits, even if it was appropriate to consider it, because Ninth Ave failed to demonstrate the absence of factual issues with respect to whether plaintiff was its special employee. The deposition testimony of plaintiff, Joseph Buchinger (the Ninth Avenue construction manager), and PCC's witnesses provided testimonial evidence that tends to support a finding that plaintiff was a special employee of Ninth Ave. The evidence encompasses their position that neither PCC nor SCL had supervisors on site and it was Buchinger who gave plaintiff his instructions regarding the work to be performed. There was also a showing that Ninth Ave provided the tools and equipment for plaintiff to perform the work, that Ninth Avenue benefitted from plaintiff's work, and had the authority to terminate plaintiff from working on the job (*see Saunders v Newmark Constr.*, 94 AD3d 738, 738-739 [2d Dept 2012]; *Grilikhes v International Tile & Stone Show Expos*, 90 AD3d 480, 482-483 [1st Dept 2011]; *Majewicz v Malecki*, 9 AD3d 860, 861 [4th Dept 2012]; *Rucci v Cooper Indus.*, 300 AD2d 1078, 1079 [4th Dept 2002]; *Brown v Bruckner Plaza Assoc.*, 295 AD2d 207, 208 [1st Dept 2002]).

There is also evidence that weighs against a finding that plaintiff was a special employee, including Ninth Ave and PCC's Master Services Agreement dated September 15, 2017. In the Agreement, PCC is identified as a subcontractor and the entity responsible for supervising and directing the work at issue (Master Services Agreement § 5.3). Additionally, plaintiff testified that he believed he was an employee of PCC but on the other hand, a witness provided by Ninth Ave stated that Ninth Ave's authority did not extend to supervision of the means and methods of PCC's work (*see Digirolomo v Goldstein*, 96 AD3d 992, 993-994 [2d Dept 2012]; *Bellamy v Columbia Univ.*, 50 AD3d 160, 164 [1st Dept 2008]; *Pato v Sweeney Steel Serv. Corp.*, 117 AD2d 984, 985 [4th Dept 1986]).[6] These factual issues would have precluded Ninth Avenue from overcoming the presumption that plaintiff's general employment with SCL continued (*see Dube v County of Rockland*, 160 AD3d 807, 808-809 [2d Dept 2018]; *cf. Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]).

Nevertheless, Ninth Ave's cross motion papers were sufficient to demonstrate the existence of factual issues as to whether plaintiff was its special employee such that plaintiff's motion must be denied. The Court of Appeals has emphasized that a worker's categorization as a special employee is usually a question of fact (*see Thompson*, 78 NY2d at 557). Further, the Court of Appeals has emphasized that many factors are considered, and that no one is decisive (*id.* at 558), including the contractual agreements amongst the parties (*id.* at 559-560). Accordingly, this court finds that the factors favoring a finding of special employment, namely

[6] Given that Ninth Ave has not yet received any affirmative relief based on its assertion, made in support of its summary judgment motion seeking dismissal of the common-law negligence and Labor Law § 200 causes of action, that it did not supervise or control plaintiffs work, Ninth Ave is not judicially estopped from asserting the inconsistent argument made in support of its cross motion (*see Ferreira v Wyckoff Heights Med. Ctr.*, 81 AD3d 587, 588 [2d Dept 2011]; *see also WestVue NPL Trust II v Gokey*, 175 AD3d 1463, 1465 [2d Dept 2019]; *cf. Lorenzo v Kahn*, 100 AD3d 1480, 1482-1483 [4th Dept 2012]). Nevertheless, counsel's competing assertions, made in Ninth Ave's motion and the cross motion may be admissible as informal judicial admissions (*see Rosales v Rivera*, 176 AD3d 753, 755 [2d Dept 2019]; *Ayers v Mohan*, 154 AD3d 411, 412 [1st Dept 2017], *lv denied* 32 NY3d 904 [2018]; *Humareda v 500A E. 87th St., LLC*, 117 AD3d 533, 534-535 [1st Dept 2014]).

the evidence showing that Ninth Ave's direction of the work, that this work was for the benefit of Ninth Ave, the absence of supervisors from either SCL or PCC at the worksite, Ninth Ave's provision of tools and equipment, and Ninth Ave's authority to discharge plaintiff from the work site are sufficient to demonstrate the existence of factual issues despite the evidence supporting factors that weigh against finding special employment (*see Saunders*, 94 AD3d at 738-739; *Majewicz*, 9 AD3d at 861; *Rucci*, 300 AD2d at 1079; *Brown*, 295 AD2d at 208). In considering these factors, it is worth noting that, despite characterizing itself as a cleaning subcontractor, PCC acted more like a staffing agency or labor supplier than a subcontractor. Additionally, plaintiff was not involved in specialized work and it cannot be said that PCC or SCL were providing the services of a specialist and thereby retained a degree of control over the work (*see Majewicz*, 9 AD3d at 861; *cf. Digirolomo*, 96 AD3d at 993-994; *Oden v Chemung County Indus. Dev. Agency*, 183 AD2d 998, 999 [3d Dept 1992]).

The Owner Defendants, in opposition to plaintiff's motion and in support of their own motion, initially assert that plaintiff is not entitled to the protection afforded to workers under Labor Law § 240 (1), because he was not engaged in any of the enumerated activities considered to constitute construction work under the statute.[7] They also argued that plaintiff's work was not part of a larger construction project, since a certificate of occupancy had already been issued (in January 2017). Labor Law § 240 (1) imposes absolute liability on owners and contractors, or their agents, when workers employed on a construction site sustain an injury that is proximately caused by the failure to provided protection against the risks associated with elevation

[7] Labor Law § 240 (1), provides, as relevant here, that, "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, *in the erection, demolition, repairing, altering, painting, cleaning or pointing* of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed" (emphasis added).

differentials (*see Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]).

The Owner Defendants' contentions might have merit if plaintiff's task only involved the removal of a few tiles. However, in this case, it is undisputed that plaintiff's task involved the removal of all of the tiles that covered the bathroom wall as well as the removal of a layer of the sheetrock. Even if plaintiff's work is not deemed part of a larger construction project, it qualifies as alteration work for purposes of Section 240(1)(*see Panek v County of Albany*, 99 NY2d 452, 458 [2003]; *Joblon v Solow*, 91 NY2d 457, 465-466 [1998]; *Alberici v Gold Medal Gymnastics*, 197 AD3d 540, 541-542 [2d Dept 2021]; *Goodwin v Dix Hills Jewish Ctr.*, 144 AD3d 744, 746-747 [2d Dept 2016]; *Velasco v Green-Wood Cemetery*, 8 AD3d 88, 89 [1st Dept 2004]) and/or demolition work (*see Hensel v Aviator FSC, Inc.*, 198 AD3d 884, 886 [2d Dept 2021]; *Kharie v South Shore Record Mgt., Inc.*, 118 AD3d 955, 956 [2d Dept 2014]).

With respect to the other statutory requirements, 1717 44th St and Ninth Ave, which are, respectively, the owner of the site and the entity that essentially acted as the general contractor for the project, may be held liable under Labor Law § 240 regardless of whether or not they actually supervised or controlled plaintiff's work (*see Gordan v Eastern Ry. Supply*, 82 NY2d 555, 559-560 [1993]; *see also McCarthy*, Inc., 17 NY3d at 374; *Barker v Union Corrugating Co.*, 187 AD3d 1544, 1546 [4th Dept 2020]; *Park City 3 & 4 Apts., Inc.*, 185 AD3d 635, 635-636 [2d Dept 2020]). Further, under the circumstances here, the two-to-three foot elevation at which plaintiff was working constitutes a significant elevation differential for purposes of Labor Law § 240 (1) (*see Swiderska v New York Univ.*, 10 NY3d 792, 793 [2008]; *Portillo v DRMBRE-85 FEE LLC*, 191 AD3d 613, 614 [1st Dept 2021]; *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 662 [2d Dept 2015]; *Gatto v Clifton Park Senior Living, LLC*, 90 AD3d 1387,

1387-1388 [3d Dept 2011]; *Abreo v URS Greiner Woodward Clyde*, 60 AD3d 878, 879-880 [2d Dept 2009]; *McGarry v CVP 1 LLC*, 55 AD3d 441, 441 [1st Dept 2008]; *Hanna v Gellman*, 29 AD3d 953, 954 [2d Dept 2006]). Plaintiff's deposition testimony that the ladder shifted as he started to climb down constitutes evidence that the ladder was inadequately secured and is sufficient to establish, prima facie, that the ladder failed to provide proper protection (*see Cioffi v Target Corp.*, 188 AD3d 788, 791 [2d Dept 2020]; *Cabrera v Arrow Steel Window Corp.*, 163 AD3d 758, 759-760 [2d Dept 2018]; *Messina v City of New York*, 148 AD3d 493, 494 [1st Dept 2017]; *Goodwin*, 144 AD3d at 747; *Florestal v City of New York*, 74 AD3d 875, 876 [2d Dept 2010]; *Ruiz v WDF Inc.*, 45 AD3d 758, 758 [2d Dept 2007]).

The Owner Defendants, however, contend that plaintiff's use of the A-frame ladder in the closed position and the failure to have his coworker hold the ladder constitute the sole proximate cause of the accident. Although, in some instances, a plaintiff's unexplained use of an A-frame ladder in the closed position has been found to constitute evidence that a plaintiff's actions were the sole proximate cause of the accident, plaintiff's usage of the ladder in such a manner here was clearly out of necessity in order for him to reach the tile that was located above the bathtub. Further, there is no evidence in the record that plaintiff was ever provided with or had available equipment that would have allowed him to reach that tile or that he disobeyed any instructions in performing his work in such a manner (*see Morales v 2400 Ryer Ave. Realty, LLC*, 190 AD3d 647, 647-648 [1st Dept 2021]; *Zholanji v 52 Wooster Holdings, LLC*, 188 AD3d 1300, 1302 [2d Dept 2020]; *Noor v City of New York*, 130 AD3d 539, 540 [1st Dept 2015]; *Sztachanski v Morse Diesel Int., Inc.*, 9 AD3d 457, 457-458 [2d Dept 2004]). Additionally, plaintiff's failure to ask his coworker to hold the ladder is not the sole proximate cause of the accident because a coworker is not a safety device (*see Rodriguez v BSREP UA Heritage LLC*, 181 AD3d 537, 538

[1st Dept 2020]; *Noor*, 130 AD3d at 541; *Grant v City of New York*, 109 AD3d 961, 962-963 [2d Dept 2013]).

Accordingly, plaintiff has demonstrated, prima facie, that Labor Law § 240 (1) was violated, and that he is entitled to summary judgment as against 1717 44th St. 1717 44th St, in opposing the motion, failed to demonstrate the existence of a factual issue warranting denial of plaintiff's motion as against it.

That branch of plaintiff's motion with respect to Ninth Ave is subject to denial. Ninth Ave has demonstrated the existence of factual issues as to whether plaintiff was acting as its special employee at the time of the accident and thus, whether the action as against it is barred by the exclusive remedy provisions of Workers Compensation Law §§ 11 and 29 (6).

With respect to Labor Law § 241 (6), the Owner Defendants have demonstrated, prima facie, that the Industrial Code sections relied upon by plaintiff do not state specific standards, are inapplicable to the facts herein, or that any violation thereof was not a proximate cause of the accident. Moreover, as counsel for plaintiff specifically represents that plaintiff does not oppose the portion of the Owner Defendants' motion requesting dismissal of plaintiff's section 241 (6) cause of action, the Owner Defendants are entitled to dismissal of the Labor Law § 241 (6) cause of action (*see Debennedetto*, 190 AD3d at 935; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]).

Regarding plaintiff's common-law negligence and Labor Law § 200 causes of action, the Owner Defendants' motion papers demonstrate that plaintiff's claims arise out of his method and manner of performing his work rather than a dangerous property condition (*see Mondragon-Moreno v Sporn*, 189 AD3d 1574, 1576 [2d Dept 2020]; *Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 671 [2d Dept 2018]; *Melendez v 778 Park Ave. Bldg. Corp.*, 153 AD3d 700, 702 [2d

Dept 2017], *lv denied* 31 NY3d 909 [2018]; *Klimowicz v Powell Cove Assoc., LLC*, 111 AD3d 605, 607-608 [2d Dept 2013]). When common-law negligence and section 200 claims arise out of alleged defects or dangers in the methods or manner of the work, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged with liability had the authority to supervise or control the performance of the work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Hart v Commack Hotel, LLC*, 85 AD3d 1117, 1118 [2d Dept 2011]; *Shaw v RPA Assoc., LLC*, 75 AD3d 634, 635-636 [2d Dept 2010]). An owner's authority to stop the work or its general supervisory authority over the injury-producing work is, in and of itself, insufficient to demonstrate supervision and control for purposes of liability under the common law and Labor Law § 200 (*see Debennedetto*, 190 AD3d at 938; *Poulin*, 166 AD3d at 670-673; *Goldfien v County of Suffolk*, 157 AD3d 937, 938 [2d Dept 2018]; *Messina v City of New York*, 147 AD3d 748, 749-750 [2d Dept 2017]).

Here, the deposition testimony of Yoel Sabel, Ninth Ave's project manager, and Joseph Buchinger, Ninth Ave's construction manager, sufficiently demonstrates that 1717 44th St did not exercise more than general supervisory control over the project, and plaintiff, in opposition, identifies no evidentiary facts that would create an issue of fact with respect to 1717 44th St's supervision and control of plaintiff's work. 1717 44th St is thus entitled to dismissal of plaintiff's common-law negligence and Labor Law § 200 causes of action.

On the other hand, the same evidence that Ninth Ave relies upon in support of its argument that plaintiff was its special employee demonstrates the existence of factual issues with respect to the extent of Ninth Ave' supervision and control of plaintiff's work for purposes of the common law and Labor Law § 200 liability such that it has failed to demonstrate its prima facie entitlement to dismissal of these claims (*see Zupan v Irwin Contr., Inc.*, 145 AD3d 715, 717-718

[2d Dept 2016]). Accordingly, the portion of the Owner Defendant's motion relating to Ninth Ave must be denied, regardless of the sufficiency of plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

PCC has demonstrated its prima facie entitlement to dismissal of the common-law indemnification and contribution claims as against it through the deposition testimony of plaintiff, PCC's supervisor, Dov Porgesz, and Ninth Ave's construction manager, Joseph Buchinger, as well as the sworn affirmation from PCC's partner and manager Yehuda Zicherman, demonstrating that PCC did not supervise or control plaintiff's work (*see Pereira v Hunt/Bovis Lend Lease Alliance II*, 193 AD3d 1085, 1090 [2d Dept 2021]; *Debennedetto*, 190 AD3d at 939; *Cutler*, 171 AD3d at 861-862; *see also McCarthy*, 17 NY3d at 377-378). The record shows that PCC did not have any supervisors at the worksite and that PCC's involvement with the work did not extend beyond informing plaintiff when and where he should show up to work. The parties' did not submit opposition that addresses this aspect of the motion, nor have the parties identified evidence that demonstrates the existence of a factual issue with respect to PCC's supervision and control. Thus, the court finds that PCC is entitled to dismissal of the contribution and common-law indemnification claims asserted against it.

PCC's motion seeking dismissal of Ninth Ave's contractual indemnification claims, and the Owner Defendants' motion for summary judgment in their favor on that claim, must be denied. The Master Services Agreement broadly requires PCC to defend and indemnify the Owner Defendants for any claim "arising out of or in connection with (i) the performance of the Services, (ii) this Agreement and/or Subcontractor's breach of any covenant, representation of warranty contained herein and (iii) any act or omission of Subcontractor or Subcontractor's employees, agents, sub-subcontractors . . . including . . . any Claim with respect to . . . personal

injury . . ." (Master Services Agreement § 6). Despite this broad language, this court finds that the language cannot be read to require PCC to indemnify Ninth Ave for work that was beyond the scope of the Master Services Agreement, which by its express terms stated that PCC "shall provide laborers to clean the construction site only after such laborers are requested by [Ninth Ave]" (Master Services Agreement § 2 and Exhibit A to Master Services Agreement) (*see Niagara Frontier Transp. Auth. v Tri-Delta constr. Corp.*, 107 AD2d 450, 452-453 [4th Dept 1985], *affd for the reasons stated below* 65 NY2d 1038 [1985]; *see also Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]; *DiGidio v City of New York*, 176 AD3d 452, 454 [1st Dept 2019], *lv dismissed in part and lv denied in part* 35 NY3d 963 [2020]; *Murphey v Longview Owners, Inc.*, 13 AD3d 346, 347 [2d Dept 2004]).

Plaintiff's work in removing tiles from the wall cannot be deemed cleaning work under any reasonable definition of cleaning. Nevertheless, factual issues exist as to whether PCC agreed to modify the agreement and provide labor for the work at issue in view of Yehuda Zicherman's statement in his sworn affirmation that PCC assigned plaintiff to work at the project upon Ninth Ave's request that it provide "a laborer to remove a couple of tiles" (*compare Saeteros v Seven Up Realty, LLC*, 187 AD3d 559, 559-560 [1st Dept 2020]; *Burhmaster v CRM Rentel Mgt. Inc.*, 166 AD3d 1130, 1133-1134 [3d Dept 2018]; *Murphy*, 13 AD3d at 347 *with Lombardo*, 126 AD3d at 950-951).[8] The existence of factual issues as to whether plaintiff's work fell within the scope of PCC's work for Ninth Ave under the Master Services Agreement requires denial of both PCC and the Owner Defendants' motion with respect to the contractual indemnification claim.

[8] While Zicherman's language minimizes how many tiles were to be removed, it nevertheless indicates his knowledge that the work involved the removal of the tiles from the wall, and not just the cleaning of construction debris.

The Owner Defendants' motion in this respect must further be denied because 1717 44th St currently has no contractual indemnification claim as against PCC, since it is not a party to the third-party action, and because there are factual issues with respect to Ninth Ave's own negligence as discussed above with respect to plaintiff's common-law negligence and Labor Law § 200 causes of action against it (*Roblero v Bais Ruchel High Sch., Inc.*, 175 AD3d 1446, 1448-1449 [2d Dept 2018]).

The portion of the Owner Defendants' motion requesting that PCC's answer to the third-party action be stricken based on its failure to produce Yehuda Zicherman for a deposition is denied because, even if the Owner Defendants are deemed to have established that PCC was required to produce an additional witness for deposition (*see Thristino v County of Suffolk*, 78 AD3d 927, 927-928 [2d Dept 2010]), absent any evidence that it obtained an order directing the additional deposition or otherwise made any effort to enforce the notice of deposition, the Owner Defendants have failed to demonstrate that PCC's failure to produce Zicherman for a deposition was willful or contumacious (*see Amos v Southampton Hosp.*, 198 AD3d 947, 948 [2d Dept 2021]). Indeed, given the absence of any evidence that it sought to enforce the notice of deposition prior to the filing of the note of issue or that it sought to vacate the note of issue on this ground, the Owner Defendants have failed to demonstrate that they are even entitled to obtain Zicherman's deposition at this point in the action (*see Breakers Motel v Sunbeach Montauk Two*, 203 AD3d 227, 227 [2d Dept 1994]; *see also Abe v New York Univ.*, 169 AD3d 445, 448 [1st Dept 2019], *lv dismissed* 34 NY3d 1089 [2020]; *Sereda v Sounds of Cuba*, 95 AD3d 651, 652 [1st Dept 2012]).

Finally, that branch of the Owner Defendants' unopposed motion seeking leave to amend their answer to add a cross claim against SCL for contractual indemnification is denied, as the

Owner Defendants have failed to submit a copy of the proposed amended pleading in support of its motion (*see* CPLR 3025 [b]; *Mulle v Lexington Ins. Co.*, 198 AD3d 908, 910 [2d Dept 2021]). This denial is made without prejudice to the Owner Defendants renewing this request upon proper papers or without prejudice to the Owner Defendants commencing a third-party action as against SCL for such relief.[9]

Based upon the foregoing, it is hereby

ORDERED, that plaintiff's motion (Motion Seq. 8) is granted to the extent that plaintiff is awarded summary judgment, with respect to liability, on his Labor Law § 240 (1) cause of action against 1717 44th St., and it is further

ORDERED, that Alrose's motion (Motion Seq. 9) is granted. The complaint and all cross claims asserted against Alrose are dismissed and the action is severed accordingly, and it is further

ORDERED, that PCC's motion (Motion Seq. 10) is granted to the extent that any and all third-party claims, cross claims, and/or counterclaims for contribution and for common-law indemnification are dismissed. That branch of PCC's motion to dismiss Ninth Ave's third-party claim for contractual indemnification is denied, and it is further

ORDERED, that the Owner Defendants' motion (Motion Seq. 11 and 12) is granted to the extent that plaintiff's Labor Law § 241 (6) cause of action is dismissed as against them and to the extent that plaintiff's Labor Law § 200 cause of action is dismissed as against 1717 44th St. The Owner Defendants' motion is otherwise denied. The denial of the portion of the motion

[9] Although the language of CPLR § 3019 (b) and (d) suggests that a person or entity may be added to an action as a defendant for purposes of a cross claim (*see Rubin v Kluger & Co.*, 86 Misc 2d 1014, 1016 [Civ Ct, New York County 1976]; *but see Lynch v Flame Oil Corp.*, 53 Misc 2d 535, 536 [Sup Ct, Kings County 1967]; *Schneiberg v Utz*, 8 Misc 2d 535, 537-538 [Sup Ct, Nassau County 1957]), this right to add such a person or entity as a defendant would appear to be limited to cases where the person or entity is a "person whom a defendant represents" or whose liability is tied to that of another defendant or defendants (i.e. "a defendant and other persons alleged to be liable" (CPLR 3019 [b]). CPLR 1007 imposes no such limitation on the Owner Defendants bringing a third-party action for contractual indemnification against SCL (*see* CPLR 1007).

seeking leave to amend their answer to add a cross claim for contractual indemnification, as against SCL, is made without prejudice to subsequent motion for such relief upon proper papers, or initiating a third-party action against SCL, and it is further

ORDERED, that Ninth Ave's cross motion (Motion Seq. 13) is denied.

This constitutes the decision and order of the court.

ENTER

HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice