Pidoto v BLDG Partnership
2022 NY Slip Op 32855(U)
August 24, 2022
Supreme Court, New York County
Docket Number: Index No. 154673/2019
Judge: Paul A. Goetz
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.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** 47

Justice

----------X

CHRISTOPHER PIDOTO,

Plaintiff,

- v -

BLDG PARTNERSHIP, 76 L.P., 23 LEXINGTON ASSOCIATES LLC, 23 LEXINGTON TENANT LLC, SYDELL HOSTELS LLC, SYDELL GROUP LLC, BLDG MANAGEMENT CO., INC. and FREEHAND NEW YORK HOTEL,

Defendants.

----------X

INDEX NO. 154673/2019

MOTION DATE 09/24/2021, 09/24/2021

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

----------X

BLDG PARTNERSHIP, 76 L.P., 23 LEXINGTON ASSOCIATES LLC, SYDELL HOSTELS LLC and BLDG MANAGEMENT CO., INC.,

Third-Party Plaintiffs,

-against-

SPRING ROC, LLC,

Third-Party Defendant.

----------X

Third-Party
Index No. 595688/2019

The following e-filed documents, listed by NYSCEF document number (Motion 002) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 79, 80, 81, 82, 83, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 164, 167, 168, 169, 170

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 165, 166, 171, 172, 173, 174

were read on this motion for SUMMARY JUDGMENT.

In this action arising out of a construction site accident, plaintiff Christopher Pidoto moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability on his claims under Labor Law §§ 240 (1), 241 (6) and 200 (motion sequence number 002). Defendants/third-party plaintiffs BLDG Partnership, 76 L.P., 23 Lexington Associates LLC, Sydell Hostels LLC, and BLDG Management Co., Inc. cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against them. Defendant 23 Lexington Tenant LLC (23 Lexington Tenant) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it. Alternatively, 23 Lexington Tenant cross-moves for summary judgment on its cross claims for contractual indemnification, common-law indemnification, and contribution claims against third-party defendant Spring Roc, LLC (Spring Roc).

Defendants/third-party plaintiffs also move, pursuant to CPLR 3212, for summary judgment on their third-party claims for contractual indemnification, common-law indemnification, breach of contract, and contribution against Spring Roc (motion sequence number 003). Spring Roc cross-moves, under CPLR 3212, for summary judgment dismissing the third-party complaint.

The motions are consolidated for disposition.

BACKGROUND

Plaintiff was injured on July 5, 2018 at 23 Lexington Avenue, New York, New York (the premises). The premises were being renovated, which became known as the Freehand New York Hotel (Freehand Hotel). It is undisputed that BLDG Partnership 76, L.P. was the fee owner on the date of the accident (NYSCEF Doc No. 74 at 3–5). Prior to the accident, BLDG Partnership 76, L.P. entered into a memorandum of lease dated June 6, 2016 with 23 Lexington

Associates LLC (*id.* at 13–19). In a subsequent memorandum of master lease agreement dated October 17, 2017, 23 Lexington Associates LLC subleased the premises to 23 Lexington Tenant (*id.* at 21–25). On August 15, 2016, 23 Lexington Associates LLC retained Spring Roc as a construction manager for all work, services, labor, and materials necessary for the partial demolition, abatement, re-development, renovation and reconstruction of the premises (NYSCEF Doc No. 125). Plaintiff alleges that BLDG Management Co., Inc. and Sydell Hostels LLC were owners and/or performed work at the premises (NYSCEF Doc No 62 ¶¶ 2 & 63).

Plaintiff's deposition

Plaintiff testified at his deposition that he became a full-time employee of Spring Roc in 2011, but until recently was paid by Spiegel Consultants (Spiegel), a related company (NYSCEF Doc No. 66, plaintiff tr at 28–29). Spring Roc ran the construction projects and Spiegel ran the management side (*id.* at 27–28). His paychecks came from Spiegel (*id.* at 29). The companies split in 2019 or early 2020 and plaintiff stayed on with Spring Roc (*id.*). Plaintiff reported to Neevon Spring (Spring), a part owner of Spring Roc and Spiegel (*id.* at 30–31). In 2018, plaintiff was working as a project manager (*id.* at 31). As a project manager, plaintiff "overs[aw] the timeliness of the project, manage[d] the subcontractors, [made] sure the performance of their work was being completed according to task and time, and produce[d] change orders for additional work services that were required as part of the contract" (*id.* at 31). He did not do any manual labor, but did manual inspections, climbed ladders to inspect things, and made sure that the work was being completed and was done correctly (*id.* at 38–39). He inspected work done by Spring Roc's workers, as well as work done by the subcontractors (*id.* at 39). On the Freehand Hotel project, Spring Roc hired the subcontractors and workers for the project (*id.* at 41–42). Plaintiff began working on the Freehand Hotel project in late June 2018 (*id.* at 44).

According to plaintiff, there were approximately 10 to 15 Spring Roc employees working at the site (*id.* at 48). Spring Roc provided its workers with tools and protective equipment, including ladders (*id.* at 50–51). In July 2018, Spring Roc was working on a restaurant on the first floor, four floors of rooms, and the rooftop bar (*id.* at 60).

According to plaintiff, he did a walkthrough on the morning of the accident, ascertaining what work was done and how it was done (*id.* at 71). At some point after lunch, when plaintiff was in the basement to use the restroom, Christopher Valenti (Valenti), one of the building's engineers, told plaintiff that there was water leaking from a ceiling (*id.* at 75–76). Valenti asked plaintiff to look at the leak and plaintiff agreed because he thought the leak might have been related to the branch piping that Spring Roc's subcontractor had installed in the basement (*id.* at 81–82). Those pipes had been installed over six months before the accident (*id.* at 82). After plaintiff asked if Valenti had a ladder that he could use, Valenti opened a closet door and pulled out a six-foot aluminum A-frame ladder (*id.* at 83). They opened the ladder under where the water was dripping, and Valenti held the ladder on one side as plaintiff began ascending it (*id.* at 83–84). The area of the basement had an open ceiling (*id.* at 86). When plaintiff reached the fourth step, the "ladder just gave out" on the left side (*id.* at 86–87). Plaintiff observed that the left leg of the ladder had "buckled" (*id.* at 87). He did not notice any defects in the ladder before he ascended it (*id.* at 88). Plaintiff fell against the elevator wall, and then down to the floor (*id.* at 88–89). Plaintiff testified that he weighed 280 pounds at the time of the accident and did not know the weight capacity of the ladder (*id.* at 89). Plaintiff was told that someone had gone to look at the ladder, but it was "gone by the time anybody went downstairs" (*id.* at 125). He testified that the fourth step of the ladder was about four feet off the ground when the ladder collapsed (*id.* at 129).

Salem Cekic's deposition

Salem Cekic (Cekic), the Freehand Hotel's director of engineering, testified that he began working at the hotel on April 30, 2018 as an engineer (NYSCEF Doc No. 67, Cekic tr at 12). He believed that Sydell Group, LLC owned the property when he first started working there (*id.* at 11). Spring Roc was the general contractor on the job (*id.* at 13). Valenti was the director of engineering and worked at several of Sydell's properties (*id.* at 16). The hotel had aluminum A-frame ladders, including four-foot, six-foot, and eight-foot ladders (*id.* at 23). According to Cekic, the ladders were usually stored in the sub-basement where the boiler room was located and were not kept in the supply closet in the basement (*id.* at 23–24). He was unaware whether any of the ladders were discarded or broken (*id.* at 27).

Adam Starkman's deposition

Alan Starkman (Starkman), testified that he is the vice president of commercial real estate of BLDG Management Co., Inc. (NYSCEF Doc No. 95, Starkman tr at 10). Starkman testified that BLDG Management Co., Inc. collects rent for the owner of the building (*id.* at 13–16).

Joshua Babbitt's deposition

Joshua Babbitt (Babbitt), a senior vice president and general counsel of Sydell Group, LLC, testified that Sydell Group is a hotel management company, among other things (NYSCEF Doc No. 68, Babbitt tr at 11–12). In July 2018, Sydell Group was renovating a building at 23 Lexington Avenue, which became known as the Freehand New York Hotel (*id.* at 14). Babbitt testified that Sydell Hostel Manager LLC was the development manager of the project, and that Sydell Hostels LLC is the owner of Sydell Hostel Manager LLC (*id.* at 15). BLDG Partnership 76, L.P. is the fee owner of the property (*id.* at 18) and according to Babbitt, 23 Lexington Associates LLC is the owner of the property pursuant to a ground lease (*id.* at 17, 19). Babbitt

believed that there was a contract between 23 Lexington Associates LLC and Sydell Hostel Manager LLC to develop the project (*id.* at 17). Babbitt testified that BLDG Partnership 76, L.P., 23 Lexington Associates LLC, and 23 Lexington Tenant were not set up to develop the hotel (*id.* at 20). Rather, 23 Lexington Associates LLC was set up to own the project, and 23 Lexington Tenant was set up to own the hotel once the renovation project was completed (*id.*). When asked whether there was a shared or collective ownership interest in all of the entities involved in the project, Babbitt stated that "[t]here is some commonality, but they are in different percentages and in different places" (*id.* at 29). By the summer of 2018, the project was substantially completed, meaning that the building had a temporary certificate of occupancy, which allowed guests to stay there (*id.* at 38–39). There was punch list work and cosmetic work that remained to be done (*id.* at 39–40). According to Babbitt, Valenti was formerly employed by NoMad Hotels, LLC, a Sydell affiliate but does not currently work for any Sydell affiliate (*id.* at 42–43). Babbitt also testified that 23 Lexington Tenant never had any employees (*id.* at 50–51).

Neevon Spring's deposition

Spring testified that he is the principal/president of Spring Roc (NYSCEF Doc No. 69, Spring tr at 7). In July 2018, plaintiff was employed by Spiegel, which was hired to perform on-site supervision on the job (*id.* at 9, 63). According to Spring, he had observed condensation coming from the pipes in the basement near the elevator prior to the accident (*id.* at 34). The pipes were not part of Spring Roc's work (*id.* at 35). However, Spring Roc wrapped the electric box as a safety precaution, even though it was not asked to do so (*id.* at 35–36). Spring further testified that plaintiff began working as a project manager and supervisor on the project towards the end of the construction project (*id.* at 58). Spring was at the site on the day of the accident

and spoke to Valenti after the accident (*id.* at 67–68). Spring learned about plaintiff's accident when someone came up to the field office to report that the accident had occurred (*id.* at 70). Spring went downstairs to see what had happened and saw a "crumbled ladder" against the wall where the elevators were located in the hallway (*id.* at 70–71). The ladder was aluminum and did not belong to Spring Roc or Spiegel (*id.* at 71, 72). When Spring learned what pipe Valenti had asked plaintiff to look at, he "instantly knew it was the same condensing pipe that we had brought up before" (*id.* at 72). After the accident, plaintiff told Spring that he had climbed the ladder after Valenti asked him to look at the pipe, that the ladder crumbled on him, and that he fell with the ladder into Valenti and that plaintiff was then pinned against the wall of the elevator in the hallway (*id.* at 79).

Documents

Plaintiff filed a Workers' Compensation Board C-3 report dated September 17, 2018, which indicates that "while climbing to 4th step of the buildings [sic] 6 ft ladder the ladder leg buckled causing me to fall toward elevator wall 3 ft away hitting left shoulder then fell to floor landing on my back" (NYSCEF Doc No. 70 at 2).

Valenti gave a witness statement about the accident, which states that "Me & Chris were looking for the cause of water leak. He ask for ladder to get above ducts. Once he climbed ladder, it twist and buckled causing him to fall. He also fell on me. And I hurt my wrist. After fall he stayed on ground for a good amount of time" (NYSCEF Doc No. 71 at 3).

DISCUSSION

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

1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp*., 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined "in the light most favorable to the non-moving party" (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

A. Labor Law § 240 (1)

Plaintiff moves for summary judgment as to liability on his Labor Law § 240 (1) claim against BLDG Partnership 76 L.P., 23 Lexington Associates LLC, Sydell Hostels, LLC, BLDG Management Co., Inc., and 23 Lexington Tenant. Plaintiff contends that these entities were all owners or agents of owners and that he is entitled to judgment as a matter of law given the evidence that the ladder suddenly shifted and collapsed causing him to fall.

Defendants/third-party plaintiffs counter that BLDG Management Co., Inc. and Sydell Hostels, LLC are not owners or agents of owners. In this regard, they argue that BLDG Management Co., Inc. only collects rents and did not have the authority to supervise and control the work. Defendants/third-party plaintiffs contend that Sydell Hostels LLC, the owner of Sydell Hostels Manager LLC, is also not an owner or an agent of an owner and did not cause or create any dangerous condition. Defendants/third-party plaintiffs assert that plaintiff was not a person employed to perform an activity enumerated under Labor Law § 240 (1); plaintiff did not do construction work, he only did inspections. Additionally, the inspection that plaintiff was performing at the time of the accident is not a covered activity. Defendants/third-party plaintiffs further argue that plaintiff was the sole proximate cause of his injuries since he was overweight and did not know the weight capacity of the ladder.

23 Lexington Tenant contends that it is not an owner or agent of the owner and it had no employees on the job site and was formed to sublease the hotel and operate it once the renovation project was completed. In addition, 23 Lexington Tenant argues that plaintiff's Labor Law § 240 (1) claim should be dismissed because plaintiff was not a person employed to perform an enumerated activity, and the inspection that he was performing at the time of his injury is not covered under the statute. Further, plaintiff's weight was the sole proximate cause of his injuries.

Plaintiff argues, in response, that there are questions of fact as to whether BLDG Management Co., Inc., Sydell Hostels LLC, and 23 Lexington Tenant LLC are owners or agents of owners. Plaintiff maintains that the court should not isolate the moment of injury and ignore the general context of the work. He asserts that Spring Roc performed façade repair work.

According to plaintiff, he inspected work that had been performed by Spring Roc employees, as well as work done by subcontractors.

Labor Law § 240 (1), also known as the Scaffold Law, provides, in relevant part:

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

Labor Law § 240 (1) "imposes absolute liability on building owners and contractors whose failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011] [internal quotation marks and citation omitted]). To prevail on a Labor Law § 240 (1) cause of action, the plaintiff must establish that the statute was violated, and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287-289 [2003]). "[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

The legislative intent behind the statute is to place "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citations omitted]). Therefore, the statute should be liberally construed to achieve the purpose for which it was framed (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]).

Whether Defendants Are Responsible Parties Under Labor Law §§ 240 (1) and 241 (6)

As a preliminary matter, it must be determined whether defendants are responsible parties under the Labor Law.

"Courts have held that the term 'owner' is not limited to the titleholder of the property where the accident occurred and encompasses a [party] 'who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for [its] benefit'" (*Scaparo v Village of Ilion*, 13 NY3d 864, 866 [2009], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]). "[The owner] is the party who, as a practical matter, has the right to hire or fire subcontractors and to insist that proper safety practices are followed'" (*Guryev v Tomchinsky*, 87 AD3d 612, 614 [2d Dept 2011], *affd* 20 NY3d 194 [2012], quoting *Sweeting v Board of Coop. Educ. Servs.*, 83 AD2d 103, 114 [4th Dept 1981], *lv denied* 56 NY2d 503 [1982]).

In addition, a party may be held liable as a statutory agent if it was delegated the authority to supervise and control the work that gave rise to the injury (*see Solano v Skanska USA Civ. Northeast Inc.*, 148 AD3d 619, 619–620 [1st Dept 2017]). As noted by the Court of Appeals,

> "Although sections 240 and 241 now make nondelegable the duty of an owner or general contractor to conform to the requirement of those sections, the duties themselves may in fact be delegated. When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241"

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981] [citations omitted]).

There is no dispute that BLDG Partnership 76, L.P. is the fee owner of the premises (NYSCEF Doc No. 74 at 3; NYSCEF Doc No. 68, Babbitt tr at 18). An owner may not escape

liability even if it had no notice or control over the work (*Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 340 [2008]).

23 Lexington Associates LLC entered into a lease with BLDG Partnership 76, L.P. for the premises (NYSCEF Doc No. 74 at 13). 23 Lexington Associates LLC also hired Spring Roc as the construction manager to renovate the hotel (NYSCEF Doc No. 125). Consequently, 23 Lexington Associates LLC qualifies as an owner (*see Kane v Coundorous*, 293 AD2d 309, 311 [1st Dept 2002] ["A lessee of property under construction is deemed to be an 'owner' for purposes of liability under article 10 of New York's Labor Law"]; *Copertino*, 100 AD2d at 566).

However, BLDG Management Co., Inc. has demonstrated that it cannot be held liable under the Labor Law. There is no evidence that BLDG Management Co., Inc. had an interest in the property or was involved int the construction work. Starkman testified that it only collects rent for the building (NYSCEF Doc No. 95, Starkman tr at 14, 16). Consequently, contrary to plaintiff's contention, BLDG Management Co., Inc. is not an agent because it did not have the "ability to control the activity which brought about the injury" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863–864 [2005]; *see also Russin*, 54 NY2d at 317–318; *Reyes v Bruckner Plaza Shopping Ctr. LLC*, 173 AD3d 570, 571 [1st Dept 2019]). Accordingly, BLDG Management Co., Inc. is entitled to dismissal of plaintiff's section 240 and 241 (6) claims.

Sydell Hostels LLC is the owner of Sydell Hostels Manager LLC, the development manager for the project (NYSCEF Doc No. 68, Babbitt tr at 15, 17). "A member of a limited liability company cannot be held liable for the company's obligations by virtue of his [or her] status as a member thereof" (*Singh v Nadlan, LLC*, 171 AD3d 1239, 1240 [2d Dept 2019] [internal quotation marks and citation omitted]; *see also* Limited Liability Company Law §§ 609, 610). However, a party may seek to hold a member of an LLC individually liable despite this

statutory proscription by application of the doctrine of piercing the corporate veil (*see Matias v Mondo Props. LLC*, 43 AD3d 367, 368 [1st Dept 2007]). Even so, "[t]he party seeking to pierce the corporate veil must establish that the owners, through their domination, abused . . . the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene" (*ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 229 [2011] [internal quotation marks and citation omitted]). Here, even if Sydell Hostels Manager LLC could be held liable for plaintiff's injury (*see Thompson v St. Charles Condominiums*, 303 AD2d 152, 155 [1st Dept 2003], *lv dismissed* 100 NY2d 556 [2003]), plaintiff has not submitted any evidence of an abuse of the LLC form to perpetrate a wrong or injustice against him. Accordingly, Sydell Hostels LLC is entitled to dismissal of plaintiff's section 240 (1) and 241 (6) claims.

Turning to 23 Lexington Tenant, the evidence indicates that 23 Lexington Tenant was set up to operate the hotel once the hotel renovation project was complete, and "to facilitate the collection and orderly usage of tax credits" (NYSCEF Doc No. 68, Babbitt tr at 19–20). 23 Lexington Tenant did not have any employees (*id.* at 50–51). There is no evidence that 23 Lexington Tenant had authority to control the work site or had the right to insist that proper safety practices be followed (*see Zaher v Shopwell, Inc.*, 18 AD3d 339, 339–340 [1st Dept 2005]; *Bart v Universal Pictures*, 277 AD2d 4, 5 [1st Dept 2000]). Thus, 23 Lexington Tenant, a subtenant that did not contract for the work, has shown that it is not an owner or an agent of an owner or contractor. Plaintiff's speculation to the contrary is insufficient to raise an issue of fact. Accordingly, 23 Lexington Tenant's is entitled to dismissal of plaintiff's section 240 (1) and 241 (6) claims.

Whether Plaintiff Was Engaged in a Protected Activity

To fall under the protection of section 240 (1), "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'" (*Martinez v City of New York*, 93 NY2d 322, 326 [1999], quoting Labor Law § 240 [1]). As a result, "[t]he question of whether inspection work falls within the purview of Labor Law 240 (1) and 241 (6) 'must be determined on a case-by-case basis, depending on the context of the work'" (*Fedrich v Granite Bldg. 2,* LLC, 165 AD3d 754, 758 [2nd Dept 2018], quoting *Nelson v Sweet Assoc., Inc.*, 15 AD3d 714, 715 [3d Dept 2005], quoting *Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 883 [2003]). The Court of Appeals instructs that, "it is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work. The intent of the statute was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts" (*Saint v Syracuse Supply Co.*, 25 NY3d 117, 124 [2015], quoting *Prats*, 100 NY2d at 882).

In considering whether plaintiff was engaged in a covered activity, it is important not consider plaintiff's activity at the time of injury too narrowly (*accord Prats,* 100 NY2d at 881). Plaintiff is covered under Labor Law § 240 (1) and § 241 (6) because the inspection he was performing when his accident occurred was "contemporaneous with and related to ongoing work" in accordance with his job duties on the premises (*see DeSimone v City of New York*, 121 AD3d 420, 421 [1st Dept 2014]). Plaintiff testified that he inspected the work of Spring Roc's workers and its subcontractors, and, on the morning of the accident, he performed a walkthrough of the site to monitor the timing and progress of the work (NYSCEF Doc No. 66, plaintiff tr at 38-39, 70–71). Thus, plaintiff "performed work that was 'part of' the construction project" and

he is within the class of persons entitled to statutory coverage (*see Campisi v Epos Contr. Corp.*, 299 AD2d 4, 7 [1st Dept 2002] [superintendent who coordinated and monitored work performance and progress of the work was entitled to protections of Labor Law § 240 (1)]; *accord Parra v Cardenas*, 183 AD3d 462, 462 [1st Dept 2020] [employee was within special class protected under section 240 (1) where he was employed as part of a "larger construction project" and a member of "a team that undertook an enumerated activity"] [internal quotation marks and citation omitted]; *England v Vacri Constr. Corp.*, 24 AD3d 1122, 1123 [3d Dept 2005] [inspector injured while inspecting building was a covered person under the Labor Law]; *Reisch v Amadori Constr. Co., Inc.*, 273 AD2d 855, 856 [4th Dept 2000] ["Plaintiff's inspection work falls within the purview of the Labor Law because it was essential to the construction of the bridge"]). Therefore, the issues of a statutory violation and proximate cause must now be addressed.

Statutory Violation and Proximate Cause

Labor Law § 240 (1) requires that ladders and other safety devices be "so constructed, placed and operated as to give proper protection" to a worker (Labor Law § 240 [1]; *see also Klein v City of New York*, 89 NY2d 833, 833–834 [1996]; *Lipari v AT Spring, LLC*, 92 AD3d 502, 503 – 504 [1st Dept 2012]). It is well established that the "failure to properly secure a ladder to insure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240 (1)" (*Plywacz v 85 Broad St. LLC*, 159 AD3d 543, 544 [1st Dept 2018] [internal quotation marks and citation omitted]). "It is sufficient for purposes of liability under section 240 (1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent" (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept

2002]). The plaintiff is not required to show that the ladder was defective (*Perez v NYC Partnership Hous. Dev. Fund Co., Inc.*, 55 AD3d 419, 420 [1st Dept 2008]).

Here, plaintiff testified that the ladder "just gave out" on the left side, and that the left leg of the ladder "buckled" (NYSCEF Doc No. 66, plaintiff tr at 86–87). In view of this testimony, plaintiff has made a prima facie showing of entitlement to summary judgment under Labor Law §240 (1) (*see Blake*, 1 NY3d at 289 n 8).

Defendants/third-party plaintiffs have failed to raise an issue of fact as to whether plaintiff's weight was the sole proximate cause of his accident. Defendants/third-party plaintiffs have not disputed that the ladder collapsed. Thus, a statutory violation occurred as a matter of law, which served as a proximate cause of the accident. "[I]f a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" (*id.* at 290; *see Mussara v Mega Funworks, Inc.*, 100 AD3d 185, 194 [2d Dept 2012]).

To the extent that defendants/third-party plaintiffs rely on the unsworn statement from Valenti (NYSCEF Doc No. 71), it is not in admissible form (*see Han Hao Huang v "John Doe,"* 169 AD3d 1014, 1016 [2d Dept 2019]). Even if the court were to consider the statement, it does not show a version of the accident for which they would not be liable, given that it states that the ladder "twisted and buckled" and caused plaintiff to fall (NYSCEF Doc No. 71 at 3). "The ladder did not prevent plaintiff from falling; thus the 'core' objective of section 240(1) was not met" (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 561 [1993]).

Finally, although defendants/third-party plaintiffs contend that plaintiff deprived the other parties of Valenti's statement, they have failed to demonstrate that summary judgment is premature (*see* CPLR 3212 [f]). "The mere hope that further disclosure might uncover evidence

likely to help [defendants'] case" does not provide a basis for postponing summary judgment (*Maysek & Moran v Warburg & Co.*, 284 AD2d 203, 204 [1st Dept 2001]).

Accordingly, plaintiff is entitled to partial summary judgment as to liability under Labor Law § 240 (1) as against BLDG Partnership 76, L.P. and 23 Lexington Associates LLC. 23 Lexington Tenant, Sydell Hostels LLC, and BLDG Management Co., Inc. are entitled to dismissal of plaintiff's section 240 (1) and 241 (6) claims.

B. Labor Law § 241 (6)

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

> All contractors and owners and their agents, . . . when constructing or demolishing buildings to doing any excavation in connection therewith, shall comply with the following requirements:
>
> ***
>
> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, . . . shall comply therewith.

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection for workers and to comply with specific safety rules which have been set forth by the Commissioner of the Department of Labor (*St. Louis v Town of N. Elba*, 16 NY3d 411, 413 [2011]). "The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). In addition, "[t]he [Industrial Code] provision relied upon by [a] plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*id.*, citing *Ross*, 81 NY2d at 504-505). Therefore, in order to prevail on a Labor Law § 241 (6) claim, "a plaintiff must establish a

violation of an implementing regulation which sets forth a specific standard of conduct" (*see Ortega v Everest Realty LLC*, 84 AD3d 542, 544 [1st Dept 2011]), and that the violation was a proximate cause of the injury (*see Egan v Monadnock Constr., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

For the reasons discussed above, plaintiff is entitled to coverage under Labor Law § 241 (6) (*see DeSimone*, 121 AD3d at 421). Plaintiff's job responsibilities as a project manager were related to ongoing work on the construction project.

In their respective motions for summary judgment, the parties only address 12 NYCRR 23-1.21, which governs ladders and ladderways and plaintiff concedes that the other Industrial Code sections he raised, 12 NYCRR 23-1.7 (f), 12 NYCRR 23-1.21 (b) (iv) (ii), and 12 NYCRR 23-1.21 (b) (4) (iv), are inapplicable (NYSCEF Doc No. 75 at 11 n 1).

Section 23-1.21 (b) (3) (iv), entitled "Maintenance and replacement," provides that "All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist: If it has any flaw or defect that may cause ladder failure" (12 NYCRR 23-1.21 [b] [3] [iv]). Section 23-1.21 (b) (3) (iv) is a specific standard of conduct that may serve as a predicate for a Labor Law § 241 (6) claim (*De Oliveira v Little John's Moving*, 289 AD2d 108, 109 [1st Dept 2001]).

Plaintiff contends that he is entitled to summary judgment as to liability under Labor Law § 241 (6) based on a violation of 12 NYCRR 23-1.21 (b) (3) (iv), as the ladder crumpled and collapsed as he was standing on it.

Defendants/third-party plaintiffs counter that there is no evidence that the ladder was not in good condition.

In this case, plaintiff's evidence that the ladder collapsed and malfunctioned for no apparent reason establishes noncompliance with 12 NYCRR 23-1.21 (b) (3) (iv) (*see Soodin v Fragakis*, 91 AD3d 535, 536 [1st Dept 2012]). Defendants/third-party plaintiffs have failed to raise an issue of fact as to BLDG Partnership 76, L.P.'s and 23 Lexington Associates LLC's liability (*cf. Campos v 68 E. 68th St. Owners Corp.*, 117 AD3d 593, 594 [1st Dept 2014] [granting dismissal of plaintiff's Labor Law § 241 (6) claim where "(t)here is no evidence that the ladder was unable to sustain plaintiff's weight, or was not in good condition, or that the floor underneath it was slippery"]).

Accordingly, plaintiff is entitled to partial summary judgment as to liability on his Labor Law § 241 (6) claim against BLDG Partnership 76, L.P. and 23 Lexington Associates LLC based on a violation of 12 NYCRR 23-1.21 (b) (3) (iv).

C. Labor Law § 200 and Common-Law Negligence

Plaintiff moves for summary judgment on his Labor Law § 200 and common-law negligence claims. Plaintiff contends that Valenti provided the ladder to plaintiff, from a supply closet under defendants' control thus creating a dangerous condition. Plaintiff further maintains that defendants must have had constructive notice that the ladder was defective.

Defendants/third-party plaintiffs assert that Valenti was an employee of NoMad Hotels, LLC, a separate and distinct entity from all named defendants. Defendants/third-party plaintiffs argue that they did not have actual or constructive notice of the defective condition of the ladder since there was no visible defect with the ladder, and no prior complaints or accidents involving the ladder. Defendants/third-party plaintiffs also argue that they did not supervise and control the injury-producing work.

Labor Law § 200, "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds* LLC, 24 AD3d 138, 139 [1st Dept 2005]; citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). It states in pertinent part, as follows:

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

(Labor Law § 200 [1]).

"Claims under the statute and common-law fall into two general categories: 'those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed'" (*Winkler v Halmar Intl., Inc.*, 206 AD3d 458, 459 [1st Dept 2022], quoting *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144, [1st Dept 2012]). The statute is governed by the "generally applicable standards of the prudent [person], the foreseeability of harm, and the rule of reason" (*Employers Mut. Liab. Ins. Co. of Wis. v Di Cesare & Monaco Concrete Constr. Corp.*, 9 AD2d 379, 382 [1st Dept 1959]).

There are two distinct standards for liability under section 200 and the common law:

> Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it. Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work.

(*Cappabianca*, 99 AD3d at 144). Generally, "[t]hese two categories should be viewed in the disjunctive" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

For the reasons discussed above, Sydell Hostels LLC, BLDG Management Co., Inc., and 23 Lexington Tenant were not responsible for providing plaintiff with a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998] ["(A)n implicit precondition to this duty is that the party to be charged with that obligation 'have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition'"] [citation omitted]). There is also no evidence that these entities committed an affirmative act of negligence. Accordingly, Sydell Hostels LLC, BLDG Management Co., Inc., and 23 Lexington Tenant are entitled to dismissal of plaintiff's section 200 and common-law negligence claims.

On the other hand, BLDG Partnership 76, L.P. and 23 Lexington Associates LLC are owners for purposes of plaintiff's section 200 and negligence claims.

A defective ladder provided by an owner implicates the premises condition standard (*see Higgins v 1790 Broadway Assoc.*, 261 AD2d 223, 225 [1st Dept 1999] ["As it was reasonably foreseeable that a worker might use the defective ladder and sustain injury, its presence in the building clearly constituted a dangerous condition"]; *Chowdhury v Rodriguez,* 57 AD3d 121, 131–132 [2d Dept 2008] ["when a defendant property owner lends allegedly dangerous or defective equipment to a worker that causes injury during its use, the defendant moving for summary judgment must establish that it neither created the alleged danger or defect in the instrumentality nor had actual or constructive notice of the dangerous or defective condition"]).

Plaintiff has failed to make a prima facie showing that defendants had constructive notice of the defective condition of the ladder. Although plaintiff speculates that defendants "must have had constructive notice of the condition," there are issues of fact as to whether a defect in the ladder was visible and apparent, and whether it existed for a sufficient length of time for

defendants to remedy the condition (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986] ["To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it"]). Accordingly, the branch of plaintiff's motion seeking summary judgment on his Labor Law § 200 and common-law negligence claims is denied.

In addition, defendants/third-party plaintiffs have failed to demonstrate that they did not provide the ladder. Even if Valenti was employed by another entity, there is no dispute that the ladder was stored in a supply closet in the hotel (NYSCEF Doc No. 66, plaintiff tr at 83). Moreover, defendants/third-party plaintiffs have failed to establish that they neither created nor had actual or constructive notice of any defective condition. In particular, defendants/third-party plaintiffs have submitted no evidence as to when the ladder was last inspected (*see Moss v Marymount Manhattan Coll.*, 203 AD3d 473, 473 [1st Dept 2022]; *see also Jaycoxe v VNO Bruckner Plaza, LLC*, 146 AD3d 411, 412 [1st Dept 2017]).

Accordingly, plaintiff and defendants BLDG Partnership 76, L.P. and 23 Lexington Associates LLC are not entitled to summary judgment on plaintiff's section 200 and common-law negligence claims. Plaintiff's Labor Law § 200 and common-law negligence claims are dismissed as against Sydell Hostels LLC, BLDG Management Co., Inc., and 23 Lexington Tenant LLC.

D. Defendants/Third-Party Plaintiffs' Contractual Indemnification Claim Against Spring Roc

Defendants/third-party plaintiffs move for contractual indemnification against Spring Roc, pursuant to the following indemnification provision contained within its construction services management agreement:

> "**12.3 Indemnification**. To the fullest extent permitted by the applicable law governing this Agreement, the Construction Manager [Spring Roc] and each of its subcontractors and sub-subcontractors (which for the purpose of this Article shall referred to as 'Indemnitor') shall defend, indemnify and hold harmless the Owner [23 Lexington Associates LLC] its affiliates and subsidiaries . . . and the Additional Insureds listed in Exhibit B, . . . from and against any claim, cost, judgment, lawsuit, damage, expense or liability, including reasonable attorneys' fees . . . to the extent *caused by, arising out of, resulting from or occurring in connection with the performance of the Work by, or any act or omission of the Construction Manager its subcontractors or its respective agents or employees* regardless of whether the indemnified party is partially negligent and excluding only liability created by the indemnified party's negligence, gross negligence, recklessness or intentional misconduct, it being the intention of the parties hereto to provide for partial indemnity"

(NYSCEF Doc No. 125 at 49 [emphasis supplied]).

"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 Company, Inc.,* 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.,* 32 NY2d 149, 153 [1973]; *see also Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82 [1st Dept 2018]; *Torres v Morse Diesel Intl., Inc*., 14 AD3d 401, 403 [1st Dept 2005]). "'The right to contractual indemnification depends upon the specific language of the contract'" (*Trawally v City of New York,* 137 AD3d 492, 492-493 [1st Dept 2011], quoting *Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d 1255, 1255 [2d Dept 2010]) and indemnity contracts "must be strictly construed so as to avoid reading unintended duties into them" (*905 5th Assoc., Inc. v Weintraub*, 85 AD3d 667, 668 [1st Dept 2011]).

Pursuant to General Obligations Law § 5-322.1, a clause in a construction contract which purports to indemnify a party for its own negligence is against public policy and is void and unenforceable (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997], *rearg denied* 90 NY2d 1008 [1997]). However, an indemnification provision that authorizes

partial indemnification "to the fullest extent permitted by law," as here, is enforceable (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]).

To establish entitlement to contractual indemnification, "the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). While a court may also grant conditional summary judgment on a contractual indemnification claim such relief must be denied as premature "where a triable issue of fact exists regarding the indemnitee's negligence" (*Spielmann v 170 Bdwy. NYC LP*, 187 AD3d 492, 494 [1st Dept 2020]). Here, there are issues of fact as to whether BLDG Partnership 76, L.P. and 23 Lexington Associates LLC provided plaintiff with a defective ladder and whether they had actual or constructive notice of any defective condition of the ladder.

Accordingly, BLDG Partnership 76, L.P. and 23 Lexington Associates LLC are not entitled to summary judgment on their contractual indemnification claim against Spring Roc; and since there is no issue of fact as to Sydell Hostels LLC's and BLDG Management Co., Inc.'s negligence, Sydell Hostels LLC and BLDG Management Co., Inc. are entitled to conditional summary judgment on their contractual indemnification claims as against Spring Roc (*Hong-Bao Ren v Gioia St. Marks, LLC*, 163 AD3d 494, 496 [1st Dept 2018] [holding conditional summary judgment is appropriate on a contractual indemnification claim where judgment has yet to be rendered in the main action because "it serves the interest of justice and judicial economy in affording the indemnitee the earliest possible determination as to the extent to which he may expect to be reimbursed" (internal quotation marks omitted)]).

E. Defendants/Third-Party Plaintiffs' Common-Law Indemnification and Contribution Claims Against Spring Roc

Defendants/third-party plaintiffs move for summary judgment on their common-law indemnification and contribution claims arguing that Spring Roc had a contractual obligation to supervise plaintiff's work. Spring Roc also seeks dismissal of these claims on the grounds that plaintiff did not suffer a "grave injury," and that it is not responsible for the defective ladder provided by Valenti.

"To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377–378 [2011]; *Muriqi v Charmer Indus. Inc.*, 96 AD3d 535, 536 [1st Dept 2012]).

"Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003], *lv dismissed* 100 NY2d 614 [2003] [internal quotation marks and citation omitted]). "The 'critical requirement' for apportionment by contribution under CPLR article 14 is that 'the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought'" (*Raquet v Braun*, 90 NY2d 177, 183 [1997], quoting *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988]).

Applying these principles there are questions of fact that preclude summary judgment as to BLDG Partnership 76, L.P.'s and 23 Lexington Associates LLC's third-party claims for common-law indemnification and contribution against Spring Roc. As discussed above, there

are issues of fact as to whether BLDG Partnership 76, L.P. and 23 Lexington Associates LLC provided plaintiff with the defective ladder and had notice of its defective condition (*see Higgins*, 261 AD2d at 225). And although Spring Roc argues that plaintiff did not suffer a "grave injury," Spring Roc offers no evidence that it procured workers' compensation insurance for plaintiff. The Court of Appeals has held that "an employer may not benefit from [Workers' Compensation Law] section 11's protections against third-party liability unless it first complies with section 10 and secures workers' compensation for its employees" (*Boles v Dormer Giant, Inc.*, 4 NY3d 235, 239 [2005]; *see also Sarmiento v Klar Realty Corp.*, 35 AD3d 834, 837 [2d Dept 2006]). There are also questions of fact as to whether Spring Roc, the constructive manager, had control over this portion of the premises and knew about the defective condition of the ladder. Furthermore, it is well settled that liability for indemnification may be imposed against only those parties who exercise actual supervision (*see McCarthy*, 17 NY3d at 378 ["if a party with contractual authority to direct and supervise the work at a job site never exercises that authority because it subcontracted its contractual duties to an entity that actually directed and supervised the work, a common-law indemnification claim will not lie against that party on the basis of its contractual authority alone"]). Thus, Spring Roc's contractual obligation, standing alone, is an insufficient basis for an award for common-law indemnification.

Accordingly, that branch of defendants/third-party plaintiffs' motion and Spring Roc's cross motion as to the third-party claims for common-law indemnification and contribution are denied, and searching the record pursuant to CPLR 3212 (b), the third-party claims of Sydell Hostels LLC and BLDG Management Co., Inc. for common-law indemnification and contribution are dismissed as moot, in light of the dismissal of the complaint as against them

(*see Nieves-Hoque v 680 Broadway, LLC*, 99 AD3d 536, 537 [1st Dept 2012]; *Hoover v International Bus. Machs. Corp.*, 35 AD3d 371, 372 [2d Dept 2006]).

F. Defendants/Third-Party Plaintiffs' Breach of Contract Claim Against Spring Roc

Defendants/third-party plaintiffs move for summary judgment on their failure to procure insurance claim against Spring Roc. Spring Roc cross-moves for summary judgment, arguing that it obtained the required insurance policies.

Spring Roc's contract provides that "[p]rior to the commencement of the Work, the Construction Manager [Spring Roc] . . . shall procure the insurance more fully set forth in Exhibit B, covering the Construction Manager, the Owners and such other persons or interests as are listed therein as Additional Insureds" (NYSCEF Doc No. 160 at 48). Exhibit B obligates Spring Roc to obtain and maintain commercial general liability insurance with a primary limit of at least $1,000,000 per occurrence and $2,000,000 in the aggregate, in addition to an umbrella or excess policy with a $50,000,000 limit (*id.* at 82–83). There is no dispute that Spring Roc was required to purchase and maintain insurance for defendants/third-party plaintiffs.

Defendants/third-party plaintiffs argue that Spring Roc denied and rejected a tender submitted on behalf of Defendants/third-party plaintiffs and that the tender denial and the denials in Spring Roc's Answer to the third-party complaint are evidence that Spring Roc failed to procure the requisite insurance. Defendants/third-party plaintiffs offer no supporting evidence in admissible form of the tender denial therefore, they have failed to meet their prima facie burden on their breach of contract claim (*accord Benedetto v Hyatt Corp.*, 203 AD3d 505, 506 [1st Dept March 15, 2022] [observing that "[a] party moving for summary judgment on its claim for failure to procure insurance meets its prima facie burden by establishing that a contract provision requiring the procurement of insurance was not complied with" by tendering evidence in

admissible form]). Likewise, in support of its cross-summary judgment seeking dismissal of defendants/third-party plaintiff's failure to procure insurance claim, Spring Roc has not tender the insurance policy (*id.; Crespo v Triad, Inc.,* 294 AD2d 145, 148 [1st Dept 2002]).

Accordingly, defendants/third-party plaintiffs and Spring Roc are not entitled to summary judgment on defendants/third-party plaintiffs' failure to procure insurance claim against Spring Roc.

G. 23 Lexington Tenant's Cross Claim for Contractual Indemnification Against Spring Roc

23 Lexington Tenant cross moves for contractual indemnification against Spring Roc based upon the indemnification provision contained within Spring Roc's contract, which requires Spring Roc to defend and indemnify 23 Lexington Associates' "affiliates" (NYSCEF Doc No. 125 at 49). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). The term "affiliate" is not defined in the agreement, and is, at best, ambiguous. The agreement does not evince an unmistakable intent to indemnify 23 Lexington Tenant, "if the parties intended to cover [it] as a potential indemnitee, they had only to say so unambiguously" (*Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). Accordingly, that branch of 23 Lexington Tenant's cross motion seeking contractual indemnification against Spring Roc is denied. Upon a search of the record pursuant to CPLR 3212 (b), 23 Lexington Tenant's cross claims for contractual indemnification and breach of contract for failure to procure insurance against Spring Roc are dismissed.

H. 23 Lexington Tenant's Cross Claims for Common-Law Indemnification and Contribution Against Spring Roc

23 Lexington Tenant only asserted cross claims for contractual indemnification and breach of contract against Spring Roc (NYSCEF Doc No. 123). In light of the dismissal of the complaint as against 23 Lexington Tenant, 23 Lexington Tenant's requests for common-law indemnification and contribution against Spring Roc are moot. Accordingly, that branch of 23 Lexington Tenant's cross motion seeking common-law indemnification and contribution against Spring Roc is denied.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion (sequence number 002) for partial summary judgment on the issue of liability is granted under Labor Law §§ 240 (1) and 241 (6), predicated upon a violation of 12 NYCRR 23-1.21 (b) (3) (iv), as against defendants BLDG Partnership 76, L.P. and 23 Lexington Associates LLC, and is otherwise denied; and it is further

ORDERED that defendants/third-party plaintiffs BLDG Partnership, 76 L.P., 23 Lexington Associates LLC, Sydell Hostels LLC, and BLDG Management Co., Inc.'s cross-motion for summary judgment is granted to the extent of severing and dismissing the complaint as against defendants BLDG Management Co., Inc. and Sydell Hostels LLC, and the Clerk is directed to enter judgment accordingly in favor of these defendants and is otherwise denied; and it is further

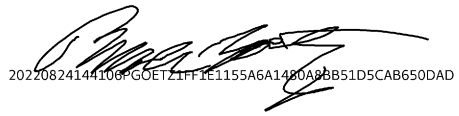
ORDERED that defendant 23 Lexington Tenant LLC's cross-motion for summary judgment is granted to the extent of dismissing the complaint as against it, and is otherwise denied; and is further

ORDERED that defendants/third-party plaintiffs BLDG Partnership, 76 L.P., 23 Lexington Associates LLC, Sydell Hostels LLC, and BLDG Management Co., Inc.'s motion (sequence number 003) for summary judgment is granted to the extent of granting Sydell Hostels LLC and BLDG Management Co., Inc. conditional contractual indemnification as against third-party defendant Spring Roc, LLC and is otherwise denied; and it is further

ORDERED that third-party defendant Spring Roc, LLC's cross-motion for summary judgment is denied; and it is further

ORDERED that defendants/third-party plaintiffs Sydell Hostels LLC and BLDG Management Co., Inc.'s third-party claims for common-law indemnification and contribution against third-party defendant Spring Roc, LLC are dismissed; and it is further

ORDERED that defendant 23 Lexington Tenant LLC's cross claims for contractual indemnification and breach of contract against third-party defendant Spring Roc, LLC are dismissed.



8/24/2022
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE