SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

Edison Loaiza

INDEX NO. 158996-2018

MOT. DATE

- v -

MOT. SEQ. NO. 3, 5 and 6

Museum of Arts and Design et al

The following papers were read on this motion to/for sj (seq 3)
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s). 75-88
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s). 111-112, 116-125
Replying Affidavits ECFS Doc. No(s). 126

The following papers were read on this motion to/for sj (seq 5)
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s). 128-143
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s). 174-185
Replying Affidavits ECFS Doc. No(s). 192

The following papers were read on this motion to/for sj (seq 6)
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s). 144-168
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s). 172-173, 187-189
Replying Affidavits ECFS Doc. No(s). 186, 193, 194

This is a personal injury action arising from a construction site accident. There are three motions for summary judgment pending which are hereby consolidated for the court's consideration and disposition in this single decision/order. In motion sequence 3, plaintiff Edison Loaiza moves for partial summary judgment on liability with respect to his Labor Law §§ 240(1) and 241(6) claims against defendants Museum of Arts and Design (the "Museum") and Amboy Rea Services Corp. d/b/a Empire Maintenance ("Empire"). Museum and Empire, together with third-party defendant Mark Prince, LLC ("Mark Prince"), oppose plaintiff's motion.

In motion sequence 5, the Museum moves for summary judgment on its third-party claims for contractual indemnification and failure to procure insurance against Mark Prince as well as for common law contribution and indemnification against Empire. Mark Prince and Empire oppose the Museum's motion.

Finally, in motion sequence 6, Empire and Mark Prince move for summary judgment dismissing the complaint and all crossclaims against Empire as well as the third-party complaint against Mark Prince. Plaintiff and the Museum oppose that motion.

Dated: 8/28/23

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☒ **OTHER**

3. Check if appropriate: ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☒ **REFERENCE**

Issue has been joined and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court will first consider the parties' motions as to plaintiff's claims. The relevant facts are as follows.

On April 14, 2018, plaintiff was injured while working for Mark Prince as a commercial window washer, cleaning the exterior windows of the Museum of Arts and Design located at 2 Columbus Circle, New York, New York (the "premises"). The premises is approximately 10-12 stories tall and is owned by the Museum, which contracted with Empire for the latter to provide routine maintenance and janitorial services, including cleaning the exterior windows twice a year.

Empire subcontracted exterior window cleaning at the premises to Mark Prince. On the date of plaintiff's accident, this was the third time Mark Prince had cleaned the windows at the building. Empire did not provide any materials, tools or equipment to Mark Prince, nor did it control or supervise Mark Prince. Empire was not present at the premises on the date of plaintiff's accident.

At his deposition, plaintiff testified that before he began his work on the date of the accident, he tied two ropes to anchor points on the roof; a main line, which he used to rappel down the side of the building, as well as a safety line. He then threw the ropes over the side of the building, although plaintiff admitted that he did not look over the side of the building to see if the ropes had hit the ground. Plaintiff explained: "When I am throwing the ropes, I feel and see the ropes going down. When I fell and I think the rope is on the ground, I make the knots."

Plaintiff explained the sequence of events after he tied the ropes to the building as follows:

> Q. After you tied it to the building structure and started to lower it, what's the next thing you did?
>
> A. After I lowered the rope, after I tied it, we organized the squeegees and the mops, water in the bucket. We put soap in the water. We made sure the suction cup was there. That's what we stick to the window.
>
> After we were sure that everything was there, I connected my cylinder to the rope and my lifeline to the other rope. Then afterwards I put up my chair. I connected it to the cylinder. I connected myself my lifeline and started to lower myself.
>
> ...
>
> Q. After both ropes were tied to the building and you were in the chair and you began lowering yourself, what did you do next?
>
> A. I started to clean the windows. I continued going down. When I finished one floor, I went to the next floor. And that's what I did one after another in succession, until the moment that I fell.

As for the accident, plaintiff testified: "[t]he only thing I remember is that I finished cleaning the window. I put my squeegee and my mop onto the chair. I squeezed the lever and I was on the ground. I don't remember anything else. ... I don't know why I fell." When asked if the ropes broke, plaintiff admitted that he did not know. Further, after the accident, plaintiff did not observe anything wrong with the equipment he was using, including the cylinder attached to the rope and his harness. Plaintiff also stated that he still had the equipment he used on the date of his accident in his possession.

Plaintiff admits that prior to the date of his accident, he had never made any complaints to anyone about the ropes or conditions at the work site. Plaintiff further testified that when he began his work on

the date of the accident, he made sure the ropes were not damaged and had no problems using the rope cylinders.

No one witnessed the accident. Mark Prince, the eponymous owner of the third-party defendant Mark Prince, appeared for a deposition. Prince testified that he spoke to plaintiff's coworkers present on the date of the accident and he learned the following:

> ... I spoke with all of them, and it was, you know, very clear to me that the main line that he used to rappel down the building was approximately five to ten feet short of touching the ground.
>
> So what was observed by everybody when they saw the accident on the scene is that his rope was close to ten feet above the ground short, which he rappelled off from. And in the process, he dropped to the ground, you know, and the reason he dropped so quickly is because his last window was cleaned on the 10th or 12th floor. He was going down the building at a steady pace without stopping.
>
> And in regard to that, I don't know if the safety line was also short, or if the safety line did not engage in time because of his consistent speed. And which would also possibly prevent it from engaging – is the location where the safety line rope grab was placed.
>
> Was that rope grab above his head like it should be to limit the fall distance? Or was it down below closer to his hip where the fall distance is greater? And then when you fall, you also have rope stretch. So the rope is gonna stretch because you have the weight going right to the other line. And that ten feet could have – it looked like it stopped his fall from a complete fall.
>
> I don't think he hit the ground without any of that safety line engaging at all. I think it slowed down the blow. But it did not engage in time to completely stop him from hitting the ground. Based on what I was told.

Mark Prince has also submitted to the court sworn affidavits from Emmanuel Noble and Wilfrido Cardenos, members of the Mark Prince crew working at the premises on the date of plaintiff's accident. According to Noble:

> It was obvious that Edison did not follow proper procedure since he failed to check that his ropes had hit the ground before he started cleaning the windows. Had he done so, he would have noticed that the main line did not reach the ground and that it was too short. He also failed to use an "8" stopper so that if he came to the end of the rope, the knot would stop him. Edison also maintained the rope grab to his chest instead of overhead which is the proper way to use to shorten the fall distance. Edison's use of the rope grab to his chest makes the stopping distance longer. These are safety practices that we have learned over the years on the job and at training courses given at Mark Prince LLC and other companies, including Tri-State Window Cleaning where Edison and I also worked. As a crew leader, I reiterate these safety practices to my crew members at the jobsite before we begin cleaning the windows, specifically to use the proper equipment, use the equipment in the manner that they should be used, and to check to our lines. I recall discussing these safety practices with my crew on April 14, 2018.

Meanwhile, Cardenas states that after plaintiff's accident, he "looked at [plaintiff's] equipment and did not see any problems with it. The lines, harness and rope grab were in good condition. The safety and main lines were still hanging from the side of the building. I noticed that the safety line dropped to

the sidewalk, however, the main line was high from the ground, approximately 15 to 20 feet. ... I also noticed that there was no figure "8" stopper at the end of the ropes like there should have been. Since there was no figure "8" stopper, the rope grab slipped. A rope grab is a device that is used to stop the rope (line) and prevents a fall. ... It is recommended that the rope grab be maintained overhead to shorten the falling distance. If the rope grab is maintained in a lower position, there is more of a slack by a few more feet, instead of 4-5 feet (if used overhead) it may be 6-7 feet, which will create a longer falling distance. I have seen [plaintiff] keep the rope grab by his chest despite being told it should be used overhead."

Cardenas further claims that he went to the roof after plaintiff's accident and "saw that [plaintiff] had connected the safety line to an anchor that was close to the wall of the roof, approximately 6 inches. The safely line reached the ground. However, the main line was connected to an anchor that was 20 feet away from the wall of the roof. [Plaintiff] tied the main line too short to the anchor points that were far away from the edge of the roof. The slack had been left on the roof. It was clear that he had either pulled too much up of the rope to make his knot or had not dropped enough rope on the side of the building. Either way, he did not check his rope to see that it was touching the ground before he started cleaning the windows."

Applicable law

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Is Empire a proper labor law defendant?

Empire argues it is not a proper labor law defendant. Plaintiff disagrees. "Where the owner or general contractor delegates to a third party the duty to conform to the requirements of the Labor Law, that third party becomes the statutory agent" (*Santos v. Condo 124 LLC,* 161 AD3d 650 [1st Dept 2018] citing *Walls v. Turner Constr. Co.,* 4 NY3d 861 [2005]). Empire claims that it is not a proper labor law defendant because the Museum only contracted with Empire to perform exterior window cleaning twice a year and the Museum did not specifically require Empire to supervise or control the injury-producing work. However, this argument fails. A contractor becomes a statutory agent of the owner when the owner delegates the work giving rise to a labor law duty to the contractor, at which point the contractor has a concomitant authority to supervise and control that work (*Mitchel v. T.McElligott, Inc.* 152 AD3d 928 [3d Dept 2017] citing *Russin v. Louis N. Picciano & Son*, 54 NY2d 311 [1981]). Since the Museum contracted with Empire to perform the injury-producing work, Empire necessarily had the right to supervise and control the work, even if it chose not to exercise that right and instead hired Mark Prince to perform the work. Therefore, Empire is a proper labor law defendant.

Section 240[1]

Labor Law § 240[1], which is known as the Scaffold Law, imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v. Eastern Railway Supply, Inc.*, 82 NY2d 555 [1993]). The statute provides in pertinent part as follows:

> All contractors and owners and their agents, ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a premises 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 protects workers from "extraordinary elevation risks" and not "the usual and ordinary dangers of a construction site" (*Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841 [1994]). "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)" (*Narducci v. Manhasset Bay Associates*, 96 NY2d 259 [2001]).

Section 240[1] was designed to prevent accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person (*Runner v. New York Stock Exchange, Inc.*, 13 NY3d 5999 [2009] quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). The protective devices enumerated in Labor Law § 240 [1] must be used to prevent injuries from either "a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991]).

Plaintiff moves for partial summary judgment on the ground that because he fell, the ropes necessarily "failed" and thus a Section 240[1] violation must have occurred. Specifically, plaintiff maintains that "[t]he record demonstrates that safety ropes failed to prevent Plaintiff from falling more than five feet, as it is undisputed that Plaintiff fell more than five feet when his safety roped (sic) failed to keep him elevated." However, Empire has established that Plaintiff was cleaning exterior windows and was provided with the necessary equipment to perform that task. Whether plaintiff used the safety rope properly is a triable issue of fact. Indeed, Empire has submitted evidence showing that the rope grab slipped because "there was no figure '8' stopper at the end of the ropes like there should have been."

Plaintiff must not only show that he was injured due to the effects of gravity, but that the injury occurred in the absence of an adequate safety device which defendants were required to furnish. Contrary to plaintiff's counsel's contention on reply, plaintiff was not forced to create his own equipment but was provided with the proper ropes system used universally by workers cleaning windows on commercial buildings. Indeed, there is no dispute that the ropes plaintiff was provided were of sufficient length given the height of the premises.

Further, plaintiff admitted at his deposition that there were no problems with the equipment he was provided, that he made no complaints about the equipment and was otherwise provided with all necessary equipment he needed to perform his work on the date of the accident. Plaintiff also testified that he did not know why he fell. The cases cited by plaintiff's counsel are inapposite. In *Batista v. Manhattanville Coll.* (2014 NYSlipOp 33801[U] [Sup Ct Bronx Co 2014)), the plaintiff was injured when a scaffold plank he was standing on broke. Here, there is no evidence that either line plaintiff was using at the time of the accident broke. In *Collins v. West 13th St. Owners Corp.* (63 AD3d 621 [1st Dept 2009]), the plaintiff was injured when the scaffold he constructed failed. Here, there is no conclusive evidence that any of the equipment plaintiff was using actually failed, nor was plaintiff required to construct a proper safety device. Rather, he was required to use the safety devices he was provided properly, and there is no proof that if properly used, the ropes, cylinders, harness and chair were insufficient for the work plaintiff was performing.

In *Spages v. Gary Null Assocs.* (14 AD3d 425 [1st Dept 2005]), the plaintiff was injured when the floorboard of a scaffold snapped. Again, none of the equipment plaintiff was using on the date of the accident broke or was otherwise defective, thereby causing him to fall. Plaintiff also cites *Scorza v.*

CBE, Inc. (231 AD2d 564 [2d Dept 1996]), but this case too involves a scaffold which broke when a plank snapped.

Here, unlike in the cases cited by plaintiff's counsel, there is evidence that plaintiff's accident occurred because he did not have enough main line hanging off the side of the building and whether or not he properly used the safety line remains a triable issue of fact. Relatedly, whether plaintiff was the sole proximate cause of his accident or a recalcitrant worker also remain triable issues of fact for a jury to determine. For all these reasons, plaintiff's motion for partial summary judgment on his Labor Law § 240[1] claim and Empire's motion to dismiss plaintiff's Labor Law § 240[1] claim are denied.

Section 241[6]

Labor Law § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

> [a]ll 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 scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57th Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). Plaintiff asserts that Industrial Code § 23-1.16[b] was violated as a matter of law.

Industrial Code § 23-1.16[b] states in pertinent part as follows:

> Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet.

Plaintiff is also not entitled to summary judgment on this claim since there is a triable issue of fact as to whether defendants failed to provide plaintiff with a safety line that could be securely anchored or whether plaintiff improperly used the safety line, thus causing him to fall more than five feet. Accordingly, plaintiff's motion as to his Labor Law § 241[6] claim is denied. Relatedly, Empire's motion for summary judgment dismissing this portion of plaintiff's Section 241[6] claim is also denied.

As for the remaining industrial code violations which plaintiff alleged in his bill of particulars, plaintiff is deemed to have conceded these claims since he has failed to oppose Empire's motion to dismiss the balance of plaintiff's Section 241[6] claim. Accordingly, all but plaintiff's Section 241[6] claim premised on Industrial Code § 23-1.16[b] is severed and dismissed. Further, the court searches the record and dismisses this portion of plaintiff's Section 241[6] claim against the Museum as well.

Section 200 and common law negligence

Labor Law § 200 codifies the common law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Comes v. New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993]). There are two categories of Labor Law § 200 and common law negligence claims: injuries arising from dangerous or defective premises conditions and injuries arising from the manner or means

in which the work was performed (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). In order to demonstrate a *prima facie* case under the former category, a plaintiff must prove that the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v. Highpoint Asoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). Where the injury was caused by the manner of the work, the owner or general contractor will be liable if it exercised supervisory control over the work performed (*Foley v. Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 [1st Dept 2011]).

The court agrees with Empire that plaintiff's accident was caused by the means and methods of plaintiff's work, not a premises condition. Therefore, since neither the Museum nor Empire actually exercised supervisory control over the work performed, plaintiff's Section 200 and common law negligence claims must be severed and dismissed. Even if the short main rope was a defective premises condition, plaintiff cannot establish that either defendant had notice of the condition, and a different result would not be reached.

Accordingly, the court grants Empire's motion to the extent of dismissing plaintiff's Section 200 and common law negligence claims against it. The court also searches the record and grants dismissal of these claims against the Museum as well.

Remaining issues

Plaintiff does not oppose dismissal of his Labor Law § 202 claim. Therefore, this claim is severed and dismissed. The court now turns to the parties' arguments regarding the Museum's crossclaims against Empire and third-party claims against Mark Prince.

The Museum seeks summary judgment on its crossclaim for common law indemnification against Empire and third-party claims against Mark Prince for contractual indemnification and breach of contract for failure to procure insurance. In turn, Empire contends that the Museum is not entitled to common law indemnification or contribution as it was not negligent, the indemnity provision in the contract between Empire and Mark Prince was not triggered and the Museum is not a beneficiary of that clause and, finally, Mark Prince did not breach the contract for failure to procure insurance. Additionally, Mark Prince asserts that the Museum's claim for common law indemnification is barred by the Workers' Compensation Law. The Museum does not respond to this final argument by Mark Prince.

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.,* 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.,* 259 AD2d 60, 65 [1st Dept 1999]). Meanwhile, "[c]ontribution 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 citations omitted]). Since there is no evidence on this record that Empire was negligent in any way and that such negligence was a proximate cause of plaintiff's accident, the Museum's crossclaim for common law indemnification and/or contribution against Empire is severed and dismissed.

Further, with respect to Mark Prince, the Museum is not entitled to common law indemnification and/or contribution because Workers' Compensation Law § 11 bars such claims against an employer when its employee was injured in a work-related accident unless the employee sustained a "grave injury." On this record, it is undisputed that plaintiff did not suffer a grave injury within the meaning of the Workers' Compensation Law. Accordingly, the Museum's third-party claim for common law indemnification and/or contribution against Mark Prince is also severed and dismissed.

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.,* 70 NY2d 774, 777 [1987], quoting *Margo-*

lin v New York Life Ins. Co., 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). However, "General Obligations Law § 5-322.1 prohibits and renders unenforceable any promise to hold harmless and indemnify a promisee which is a construction contractor or a landowner against its own negligence" (*Kilfeather v Astoria 31st St. Assoc.*, 156 AD2d 428 [2d Dept 1989]).

The indemnification clause contained in Mark Prince's contract with Empire reads as follows:

> To the fullest extent permitted by law, Sub-contractor agrees to indemnify, defend and hold harmless contractor, Empire Maintenance, property manager and 2 Columbus Circle building owner from any and all claims...related to...personal injuries... arising out of or in connection with the performance of the work of the Subcontractor, agents, servants or employees...This agreement to indemnify specifically contemplates full indemnity in the event of liability imposed against the contractor without negligence and solely by reason of statute, operation of law or otherwise and partial indemnity in the event of any actual negligence on the part of contractor either causing or contributing to the underlying claim. In the event, indemnification will be limited to any liability imposed over and above that percentage attributable to actual fault, whether by statute, by operation of law or otherwise.

Mark Prince argues that "there is no evidence that plaintiff's injuries arose out of or were connected with the performance of MARK PRINCE's work". The court disagrees. Here, no matter how plaintiff's accident occurred, it certainly arose out of or was connected with Mark Prince's work of cleaning the exterior windows. Therefore, the indemnify provision was triggered.

Mark Prince next argues that the Museum was not specifically named in the indemnity provision, but as counsel for the Museum points out, this is just semantics. The indemnity provision requires Mark Prince to indemnify Empire, property manager and "2 Columbus Circle building owner". The Museum owns the building located at 2 Columbus Circle. Therefore, Mark Prince is obligated to "indemnify, defend and hold harmless" the Museum. Accordingly, the Museum's motion is granted as to its third-party claim for contractual indemnification from Mark Prince. The issue of what amount Mark Prince is required to reimburse the Museum for defense costs incurred to date is hereby referred to a Special Referee or JHO to hear and **determine**.

The balance of the Museum's motion is denied, as Mark Prince has come forward with evidence that it did not breach the contract by failing to procure insurance. Since there are no triable issues of fact on this point, Mark Prince is also entitled to summary judgment dismissing the Museum's third-party claim for breach of contract by failure to procure insurance.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for partial summary judgment (sequence 3) is denied; and it is further

ORDERED that the Museum's motion for summary judgment (sequence 5) is granted only to the extent that the Museum is awarded summary judgment on its third-party claim for contractual indemnification from Mark Prince; and it is further

ORDERED that Empire and Mark Prince's motion for summary judgment (sequence 6) is granted to the following extent:

[1] all but plaintiff's Section 241[6] claim premised on Industrial Code § 23-1.16[b] is severed and dismissed. Further, the court searches the record and dismisses this portion of plaintiff's Section 241[6] claim against the Museum as well;

[2] plaintiff's Section 200 and common law negligence claims against Empire are severed and dismissed. The court also searches the record and grants dismissal of these claims against the Museum as well;

[3] plaintiff's Labor Law § 202 claim is severed and dismissed;

[4] the Museum's crossclaim for common law indemnification and/or contribution against Empire is severed and dismissed; and

[5] the Museum's third-party claims for common law indemnification and/or contribution as well as breach of contract for failure to procure insurance against Mark Prince are severed and dismissed.

And it is further **ORDERED** that the remainder of motion sequences 3, 5 and 6 are denied; and it is further

ORDERED that the issue of what amount third-party defendant Mark Prince should reimburse the Museum for defense costs incurred to date, with statutory interest, is referred to the Special Referee Clerk for assignment to a Special Referee or JHO to hear and **determine**; and it is further

ORDERED that counsel for the Museum shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a complete Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 8/28/23
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.