SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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RENE SANDOVAL,

Plaintiff,

- v -

4 WORLD TRADE CENTER LLC, WORLD TRADE CENTER PROPERTIES LLC, SILVERSTEIN WTC PROPERTIES LLC, SILVERSTEIN WTC LLC, SILVERSTEIN PROPERTIES, INC., SILVERSTEIN PROPERTIES, LLC,

Defendant.

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INDEX NO. 157619/2020

MOTION DATE 06/20/2023

MOTION SEQ. NO. 002 003 004 005

AMENDED[1] DECISION + ORDER ON MOTION

4 WORLD TRADE CENTER LLC, WORLD TRADE CENTER PROPERTIES LLC, SILVERSTEIN WTC PROPERTIES LLC, SILVERSTEIN WTC LLC, SILVERSTEIN PROPERTIES, INC., SILVERSTEIN PROPERTIES, LLC

Plaintiff,

-against-

ABM JANITORIAL SERVICES - NORTHEAST, INC., ABM JANITORIAL NORTHEAST, INC., ABM JANITORIAL SERVICES NEAST INC., ABM JANITORIAL SERVICES, INC., ABM ONSITE SERVICES, INC.

Defendant.

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Third-Party
Index No. 595206/2021

ABM JANITORIAL SERVICES - NORTHEAST, INC.

Plaintiff,

-against-

PALLADIUM WINDOW SOLUTIONS, LLC

Defendant.

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Second Third-Party
Index No. 595558/2021

[1] The court issues this amended order at the request of and on consent of all the parties as the original order inadvertently failed to address all of the relief requested in the pending motions.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 131, 150, 152, 153, 156, 158, 162, 165, 169, 176, 177, 178, 179, 180, 181, 182

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 132, 143, 144, 145, 146, 147, 148, 149, 154, 155, 159, 163, 166, 170, 174

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 134, 139, 140, 141, 142, 151, 157, 160, 167, 171, 175, 183

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 133, 135, 136, 137, 138, 161, 168, 172, 173

were read on this motion to/for DISMISS.

BACKGROUND

In this personal injury action, arising from a slip and fall accident involving an exterior window washing crew, the following motions are pending:

Plaintiff moves for partial summary judgment on liability on his Labor Law §241(6) claim against 4 World Trade Center LLC ("4 World"), and Silverstein Properties, Inc. ("Silverstein," and collectively, "Defendants") (Mot. Seq. 2); and

Defendants move for summary judgment dismissing Plaintiff's claims against them and seek common law and contractual indemnification against Third-Party Defendants ABM Janitorial Services-Northeast, Inc., ABM Janitorial Northeast, Inc., ABM Janitorial Services Neast Inc., ABM Janitorial Services, Inc., and ABM Onsite Services, Inc. (collectively, "ABM") (Mot. seq. 3); and

ABM moves for summary judgment dismissing Plaintiff's complaint and dismissing Defendants' third-party claims against them sounding in contractual indemnification and breach

of contract and granting them summary judgment on their contractual indemnification claim against second third-party defendant Palladium Window Solutions, Inc. ("Palladium")(Mot. seq. 4); and

Palladium moves for summary judgment dismissing the action and third-party actions. (Mot. seq. 5).

The motions are consolidated herein and determined as set forth below.

ALLEGED FACTS

Plaintiff alleges that he was injured on July 21, 2017, while working on an exterior window washing crew on the roof of a skyscraper at 4 World Trade Center in Manhattan owned by 4 World. The building is operated and managed by Silverstein and its affiliates (collectively "Silverstein Defendants").

On the date of the accident, Plaintiff was employed by Palladium, which had been subcontracted by ABM to provide exterior window washing services for the building.

Plaintiff was assigned the role of "third man" for a three-person crew tasked with lowering from the roof in a boom basket to clean the exterior windows. As the third man, Plaintiff's duties included preparing the powered scaffolding apparatus on the roof so his coworkers could wash the windows. This included laying out safety lines, getting water buckets, and plugging the machine into functioning electrical outlets on the roof.

Plaintiff alleges that while walking on the roof and pulling an electrical cable for the machine, he stepped onto a metal grate walkway cover which was wet, and his foot slipped, causing him to fall backward and sustain injuries. Plaintiff had walked over the metal grate platform with no incident prior to pulling the electric cable. Plaintiff did not see that the area was wet before he fell.

DISCUSSION

To prevail on a motion for summary judgment, a party seeking summary judgment must make a *prima facie* case of entitlement as a matter of law and sufficiently show there are no issues of material facts. *Wolfanger v Once Again Nut Butter Collective, Inc.,* 77 Misc 3d 461, 466 (Sup Ct, Monroe County 2022); *Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 (2019). It is the court's responsibility to view the evidence in the light most favorable to the opposing party and give them every benefit of "reasonable inference ascertaining whether there exists any triable issue of fact." *Esposito v Wright,* 28 AD3d 1142, 1143 (4th Dept 2006). Once a *prima facie* showing has been made, it is on the nonmoving party to raise a triable issue of fact to produce "evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Rosenblatt v St. George Health & Racquetball Assoc., LLC* 119 AD3d 45, 50 (2d Dept 2014).

Labor Law §240(1)

Labor Law §240(1) states:

> 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.

The list of required safety devices in §240(1) is specific and elicits legislative intent. *Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 500 (1993). Therefore, courts have found the legislative intent of Labor Law §240(1) is to protect workers not from routine workplace risks,

but from hazards arising from construction work site elevation differentials. *Rocovich v Consol. Edison Co.*, 78 NY2d 509, 514 (1991). 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). However, whether a plaintiff is entitled to recover under §240(1) requires determining whether the injury was gravity related. *Ibid.*

Labor Law § 240(1) does not apply to all gravity-related accidents; but is limited to such specific gravity-related accidents as being struck by a falling object that was improperly hoisted or inadequately secured or falling from a height different from where the plaintiff started. *Misseritti v Mark IV Constr. Co.,* 86 NY2d 487, 491 (1995); *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.,* 18 N.Y.3d 1, 4-5 (2011)*; Brown v VJB Constr. Corp.,* 50 AD3d 373, 374 (1st Dept 2008). For a plaintiff to recover under a §240(1) claim, the plaintiff must either fall from a height or be struck by a falling object. *Huether v NY Times Bldg., LLC,* 24 Misc 3d 634, 638 (Sup Ct, Kings County 2009). Therefore, §240(1) requires a direct connection between the worker's injury and the effects of gravity resulting from the particular elevation at which materials or loads must be positioned or secured. *Rocovich* NY2d at 514.

Here, the evidence presented reveals no such gravity-related elevation hazard necessitating any safety devices of the kind required under §240(1). Plaintiff himself testified that at the time of the accident, he was walking on the building roof at ground level when he allegedly slipped on moisture present on a metal grated platform cover. Plaintiff also stated the grated cover was at the same ground-level elevation as the roof when he claims to have fallen.

Thus, there was no height differential or change in elevation levels involved. Plaintiff's accident did not result from any materials falling from an elevated work site. He was not caused

to fall from a height by a lack of an adequate safety device. Rather, Plaintiff allegedly slipped and fell due to a supposed wet condition while mobilizing equipment from the same ground level as the roof surface. His accident arose from an ordinary slip/trip hazard, not an elevation-related risk.

Since Plaintiff cannot demonstrate that his injuries arose from the limited class of special gravity-related hazards this statute covers and because Defendants have met their *prima facie* showing, Defendants are entitled to dismissal of the §240(1) claim as a matter of law.

Labor Law §241(6)

Labor Law §241(6) protects workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections and puts the duty on owners and general contractors to comply with the safety rules. *Huether v. New York Times Bldg.*, LLC, 24 Misc. 3d 634, 635 (Sup Ct, Kings County 2009); *Esposito v NY City Indus. Dev. Agency,* 1 NY3d 526, 528 (2003). Summary judgment on a Labor Law § 241(6) claim is appropriate when there is no dispute that a violation of the Industrial Code caused the accident and the plaintiff's own negligence did not play a role in the accident. *Huether* at 634.

Routine maintenance activities that are unrelated to construction work do not trigger the statute's protections. *Esposito* at 526; *see also Smith v Shell Oil Co.,* 85 NY2d 1000, 1002 (1995).

Here, Plaintiff cites various Industrial Code provisions concerning slipping hazards, equipment maintenance, and the construction of safety devices. Plaintiff's work, however, involved routine exterior window washing services, wholly unrelated to any construction, demolition, or excavation at the premises. Based on Plaintiff's own deposition testimony, at the time of the accident, he was mobilizing equipment and preparing the powered scaffolding

apparatus on the roof so his co-workers could lower down in the basket to wash the exterior windows. Plaintiff stated he was assigned as "third man" whose job was to remain on the roof operating the machine while other crew members cleaned windows, testifying that when the accident occurred, he had been repositioning electric cable for the machine and had not yet begun washing windows. The evidence conclusively shows Plaintiff was in the process of readying the equipment when he fell and was not actively engaged in washing exterior windows himself.

Routine window washing preparation and maintenance is not a protected construction activity under the statute. *Wowk v Broadway 280 Park Fee, LLC*, 94 AD3d 669, 944 N.Y.S.2d 23 (1st Dept 2012).

Since Plaintiff was not engaged in protected work covered under §241(6), any alleged Code violations are immaterial. Defendants have met their *prima facie* burden. Accordingly, Defendants are granted summary judgment dismissing the §241(6) cause of action.

Labor Law §202

Labor Law §202 requires owners, contractors, and agents to provide adequate safety measures for workers engaged in cleaning the windows and exterior surfaces of buildings. *Soto v J. Crew Inc.*, 21 NY3d 562, 567 (2013); *Bauer v Female Academy of the Sacred Heart*, 97 NY2d 445, 451 (2002). The Court of Appeals has held that commercial exterior window washing constitutes protected "cleaning" work covered by §202. *Soto* 21 NY3d at 567. The statute aims to protect the public and the persons engaged in window cleaning and cleaning of exterior surfaces of public buildings. *Bauer* 97 NY2d at 451.

Plaintiff argues Defendants violated §202 by failing to ensure adequate safety devices were in place, given the allegedly wet and slippery condition on the roof platform cover.

However, Plaintiff was not actively engaged in window cleaning when the accident occurred. By Plaintiff's own admission, at the time of his fall, he was preparing equipment in preparation for the exterior washing, but had not yet commenced any actual cleaning work. This raises a question as to whether §202 covers Plaintiff's preparatory activities apart from direct cleaning duties.

Defendants contend §202 is inapplicable here citing *Bataraga v. Burdick*, 261 AD2d 106, 107 (1st Dep't 1999) in which the court found the plaintiff did not have a claim under §202 because the plaintiff was injured going down a fire escape after the washing had taken place. §202 requires a determination as to whether a plaintiff's equipment preparations immediately preceding the washing were necessary for the cleaning. *Wowk v Broadway 280 Park Fee*, LLC, 94 AD3d 669, 670 (1st Dept 2012).

In *Wowk*, the plaintiff was a professional window washer who was injured while carrying water up to the scaffold upon which he worked, when he fell down the fixed exterior staircase that provided the sole means of access to the scaffold. *Ibid.* The court allowed the §202 claim to proceed finding that the plaintiff's activity of exterior window washing was manifestly covered by the statute and that the reference in 12 NYCRR 23-1.7(d) to "passageway[s]" could encompass a permanent staircase, when that staircase was the sole access to the work site. *Ibid.*

Defendants are not able to meet their *prima facie* burden. Given the interconnected nature of Plaintiff's preparatory tasks to the planned window washing, there remain triable issues of fact as to whether Plaintiff was engaged in protected work under §202. Plaintiff's actions may be "manifestly" covered by the statue. *Wowk* 94 AD3d at 670. Accordingly, Defendants' motion for summary judgment dismissing this claim is denied.

Labor Law §200 and Negligence

Defendants argue Plaintiff's Labor Law §200 and negligence claims should be dismissed because Plaintiff cannot show Defendants had actual or constructive notice of the alleged wet condition on the metal roof platform.

Labor Law §200 codifies the common law duty of an owner or general contractor to provide workers with a reasonably safe workplace. *Lombardi v. Stout*, 80 N.Y.2d 290, 294; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 (1993); *Allen v Cloutier Constr. Corp.*, 44 NY2d 290, 299 (1978).

Claims under §200 generally fall into two categories: those arising from an existing defect or dangerous condition at the worksite, and those arising from the manner in which the work was performed, often involving the lack of proper safety devices. *Ortega v Puccia*, 57 AD3d 54, 61 (2d Dept 2008).

Where a premises condition causes injury, property owners and/or general contractors may be liable under §200, if they created the dangerous condition or had actual or constructive notice of it and failed to remedy the condition within a reasonable amount of time. *Ibid*; *Keating v Nanuet Bd. of Educ.,* 40 AD3d 706, 708 (2d Dept 2007); *Azad v 270 5th Realty Corp.*, 46 AD3d 728, 730, 848 NYS2d 688 (2007); *Kerins v Vassar Coll.*, 15 AD3d 623, 626, 790 NYS2d 697 (2005); *Kobeszko v Lyden Realty Invs.*, 289 AD2d 535, 536, 735 NYS2d 189 (2001). Constructive notice requires a showing that the condition was visible, apparent, and existed for sufficient time prior to the accident that it could have been discovered and corrected. *Gordon v Am. Museum of Natural History,* 67 NY2d 836, 837 (1986).

Here, Plaintiff alleges the dangerous wet condition on the metal roof platform caused his accident. He does not claim the injury arose from the manner in which his work was being performed. Thus, to hold the owner/manager Defendants liable under §200, Plaintiff must show they either created the hazardous wet condition or had actual or constructive notice of it. *Ibid:* see also *Piacquadio v Recine Realty Corp.,* 84 NY2d 967, 969 (1994).

The evidence presented does not indicate Defendants had actual notice of the purported wet roof platform. Plaintiff himself testified that he did not observe any moisture or foreign substances on the grated metal cover during his inspection minutes before his accident. Plaintiff also had walked over the metal grille without issue just moments prior to the incident.

Further, there is no proof Defendants received any complaints about or reports of dampness on the roof prior to Plaintiff's accident. Nor is there evidence Defendants performed any cleaning, maintenance, or repair work that could have created the alleged wet condition.

With no actual notice, Plaintiff relies primarily on a meteorological expert, who opines based on weather records that ambient humidity levels on the morning in question were conducive to producing condensation. Plaintiff argues this is sufficient to raise an issue of constructive notice. However, the possibility of a hazardous condition does not constitute constructive notice.

Rather, constructive notice requires a showing that the defect was visible and existed for a sufficient length of time prior to the accident to permit discovery and remediation. *Gordon*, 67 NY2d at 837. A general awareness that a dangerous condition may be present is legally insufficient to constitute constructive notice. *Piacquadio* at 696.

Here, there is no indication moisture on the walkway was visible and apparent or existed for any duration prior to Plaintiff's fall. Plaintiff himself did not observe any wet conditions

moments before the accident. Defendants have met their *prima facie* burden and Plaintiff cannot establish the existence of material issues of fact; The meteorological evidence establishing the potential for condensation is too speculative to raise a triable issue regarding constructive notice.

Accordingly, Defendants' motion regarding the §200 and common law negligence claims is granted.

Contractual Indemnification and Breach of Contract Claims

Defendants move for conditional contractual indemnification against ABM in the event Plaintiff obtains a judgment against them.

Defendants base their claim on an indemnity provision in a Janitorial Services Agreement between 4 WTC and ABM which provides ABM would indemnify against "any and all liability...arising out of or in any way relating to the performance of this Contract."

They argue this broad language reflects an unmistakable intent by ABM to indemnify them for claims connected to its contracted services, which included exterior window washing even though ABM subcontracted that portion to Palladium.

ABM opposes indemnification, and seeks dismissal of Defendants' claim, arguing the provision does not cover Palladium's negligence in performing window washing work wholly outside the scope of ABM's janitorial duties. It also argues that if Defendants' claim is not dismissed, then it is entitled to summary judgment on its contractual indemnification claim against Palladium, arguing that as it it was the party that caused Plaintiff's injuries.

A promise to indemnify must be clearly implied from the language and intent of the entire agreement under the totality of circumstances. *Hooper Assocs. v AGS Computers*, 74 NY2d 487, 491-492 (1989); *Niagara Frontier Transp. Auth. v Tri-Delta Constr. Corp.*, 107

AD2d 450, 452 (4th Dept 1985). Any ambiguities are construed against the drafter. *Sievert v Morlef Holding Co.*, 241 AD2d 445, 446 (2d Dept 1997).

Examining the provision here under these guiding principles, the broad "arising out of or relating to" language lacks specificity as to whether the parties intended to encompass liability arising solely from the negligent performance of work by Palladium that went far beyond ABM's contracted janitorial services.

While ABM did initially contract to provide window washing services that were then delegated to Palladium, ABM did not actively supervise or participate in the exterior window washing work being performed at the time of Plaintiff's accident. That work fell wholly outside the scope of the janitorial duties ABM had agreed to provide under its primary contract with defendants.

Construing ambiguities against the drafter, the indemnity clause cannot be read to clearly include indemnification for Palladium's independent negligence in conducting delegated work far exceeding ABM's own scope of contractual duties.

Therefore, defendants have failed to meet their burden of establishing ABM's unmistakable intent under the indemnity clause to indemnify for liability stemming solely from Palladium's alleged window-washing negligence, and ABM meets their burden of establishing that the indemnification provision does not apply to the work at issue. Thus, the portion of Defendants' motion seeking contractual indemnification against ABM is denied, and the claim is dismissed.

ABM additionally seeks dismissal of Defendants' breach of contract for failure to procure insurance claim, as it has produced a certificate of liability insurance in compliance with the contract. As Defendants do not oppose this portion of ABM's motion, it is granted.

Palladium's Motion

As the underlying action is not dismissed in its entirety and Palladium makes no additional arguments in support of dismissing the second third party complaint, this motion is granted, to the extent that Plaintiff's Labor Law §240(1), §241(6), §200 and common law negligence claims are dismissed against defendants, and otherwise denied.

Conclusion

Accordingly, it is hereby

ORDERED that Plaintiff's motion for partial summary judgment (Mot. Seq. 2) is denied in its entirety, and it is further

ORDERED that Defendants' motion for summary judgment (Mot. Seq. 3) seeking dismissal of the complaint is granted only to the extent of dismissing Plaintiff's Labor Law §240(1), §241(6), §200 and common law negligence causes of action; and is otherwise denied; and it is further

ORDERED that ABM's motion for summary judgment (Mot. Seq. 4) is granted, to the extent that Plaintiff's Labor Law §240(1), §241(6), §200 and common law negligence claims are dismissed against Defendants, and defendants' contractual indemnification claim is dismissed against it, and otherwise denied; and it is further

ORDERED that Palladium's motion for summary judgment (Mot. Seq. 5) is granted, to the extent that Plaintiff's Labor Law §240(1), §241(6), §200 and common law negligence claims are dismissed against Defendants, and otherwise denied; and it is further

ORDERED that, within 20 days from entry of this order, Silverstein shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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9/6/2023
DATE

SABRINA KRAUS, 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