SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART 18**

Justice

----------X

FRANK CIOPPA, LINDA CIOPPA,

Plaintiffs,

- v -

ESRT 112 WEST 34TH STREET, L.P., EMPIRE STATE REALTY TRUST, INC., AMERICON CONSTRUCTION INC., HITT CONTRACTING, INC,

Defendants.

----------X

INDEX NO. 158449/2017

MOTION DATE 03/08/2023, 03/08/2023

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

AMERICON CONSTRUCTION INC., HITT CONTRACTING, INC

Plaintiff,

-against-

ESS & VEE ACOUSTICAL CONTRACTORS INC.

Defendant.

----------X

Third-Party
Index No. 595013/2020

AMERICON CONSTRUCTION INC., HITT CONTRACTING, INC

Plaintiff,

-against-

PYRAMIID FLOOR COVERING INC., MAKLATESA PALADINO INC.

Defendants.

----------X

Second Third-Party
Index No. 595261/2020

The following e-filed documents, listed by NYSCEF document number (Motion 001) 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 115, 116, 119, 120, 121, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 141, 142, 143, 144, 145, 146, 147, 148, 149, 151, 152, 153, 154, 157, 159, 160, 161, 162

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 114, 117, 118, 122, 123, 124, 125, 140, 150, 155, 156, 158, 163

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

This is a personal injury action that stems from an alleged trip and fall accident that occurred on June 7, 2017, at the construction project located at 112 West 33rd Street, alternate address 111 West 33rd Street, New York, NY[1] ("Project").

Upon the foregoing papers, Americon Construction Inc. moves pursuant to CPLR 3212 to dismiss plaintiff's complaint entirely, for this Court to grant contractual indemnification against Ess & Vee Acoustical Contractors Inc. in favor of Americon Construction Inc., and for default judgment against second-third-party defendant Maklatesa Paladono Inc. Plaintiffs cross-move pursuant to CPLR 3212 for partial summary judgment as to liability on their Labor Law § 241(6) claim. Ess & Vee Acoustical Contractors Inc. cross-move pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint and all claims, and to dismiss plaintiffs' Labor Law §§ 240 and 241(6) claims. Defendant Empire State Realty Trust ("ESRT") moves for summary judgment for contractual indemnification, requiring Americon Construction Inc. to defend and indemnify it in this action.

FACTUAL ALLEGATIONS

Plaintiff Frank Cioppa's Deposition

Plaintiff testified that he was involved in an accident on June 7, 2017, while employed by subcontractor Ess & Vee Acoustical Contractors Inc. ("Ess & Vee") as a working foreman. Ess & Vee was hired by the general contractor Americon Construction Inc., Hitt Contracting, Inc. ("Americon")[2] to perform the drywall partitions, sheetrock ceilings, taping finishes, and any blocking for the construction project ("project") located at 112 West 33rd Street/111 West 33rd Street, New York, NY (NYSCEF Doc. No. 79, plaintiff's EBT, 15: 2-16, 20: 3-12, 31: 5-8). Plaintiff further testified that Americon held weekly safety meetings and at these meetings he would complain about the project floor conditions, specifically,

[1] There were two sides of the building.
[2] Hitt Contracting Inc. was a separate and distinct corporate entity at the time of plaintiff's accident that had no involvement with the subject project. Hitt Contracting acquired Americon Construction Inc. in August of 2016 and they now do business as Americon Hitt (NYSCEF Doc. No. 86, Americon's Aff in Supp ¶ 31).

how dangerous they were to work on (id. at 26-27: 6-8). Plaintiff testified that Americon would rip the existing floors up so they could put new floors down (id. at 27-28: 9-25). Prior to the new floors being inserted, however, concrete covered the floor of the worksite, and plaintiff complained about a temporary option so he could properly work (id. at 93-94: 19-15). In response to plaintiff's complaints, Americon put temporary plywood on the ground that, according to plaintiff, had holes all over the place (id. at 42: 15-20). After complaining about three to four times about the dangerous plywood floor conditions to the Americon supers on site, plaintiff was informed to do his best to try and finish his job (id. at 28: 12-24).

Plaintiff testified that on the date of accident, before he started working, he and a labor foreman for Americon began to clean the area in which plaintiff was going to work because there was a lot of debris and construction material throughout (id. at 34-35: 23-10). As plaintiff was cleaning, he noticed a single piece of plywood, about 4 inches wide and 8 inches long in between equipment that needed to be moved (id. at 35-36: 21-24). As plaintiff and the Americon foreman attempted to move the plywood by each holding opposite ends of it, plaintiff's right foot became caught in a hole that was located on a piece of temporary plywood. As plaintiff's right foot was trapped in the plywood, he fell into a nearby extension ladder and scaffolding as he fell to the ground (id. at 36: 10-15). Plaintiff testified that it was Americon's responsibility to cover this hole because Americon put the temporary plywood on the floor as protection (id. at 39: 9-16). Plaintiff further testified that the temporary plywood was not supported by anything underneath, nor was it fastened together in any way (id. at 42: 6-14).

DISCUSSION

Standard of Law

"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 eliminate any material issues of fact from the case" (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). The burden then shifts to the nonmoving party "[t]o produce evidentiary proof in admissible form sufficient to require

a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

Americon – Motion to Dimiss

At the outset, plaintiffs concede that the facts of this matter do not present a cognizable Labor Law § 240 (1) claim and withdraw it from their pleadings (NYSCEF Doc. No. 120, plaintiff's mem of law in opp, ¶5). Additionally, plaintiffs' bill of particulars plead that industrial codes 12 NYCRR § 23-1.2, § 23-1.5, § 23-1.7, and § 23-3.3 were violated. However, plaintiffs' opposition to Americon's motion to dismiss and plaintiffs' cross-motion for partial summary judgment only argue that 12 NYCRR § 23-1.7 (e) (2) was violated. Therefore, the Court need not determine whether industrial codes 12 NYCRR § 23-1.2, § 23-1.5, and § 23-3.3 were violated as plaintiff abandoned the claim premised upon these codes.

Labor Law § 241 (6)

Americon argues that plaintiffs' Labor Law § 241 (6) cause of action must be dismissed because the Industrial Code sections alleged are inapplicable to the facts of this case.

Labor Law § 241 (6) provides, in pertinent part:

> "[a]ll contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating 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."

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]). In order to demonstrate liability pursuant to Labor Law § 241 (6), it must be shown that the defendant

violated a specific, applicable regulation of the Industrial Code, rather than a provision containing only generalized requirements (Nostrom v A.W. Chesterton Co., 15 NY3d 502, 507 [2010]).

Industrial Code § 23-1.7 (e)(2)

Plaintiff argues that § 23-1.7 (e)(2) of the Industrial Code was violated because the sheet of plywood with a hole in it presented a tripping hazard in the worksite. Section 23-1.7 (e)(2) provides:

> "[t]he parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed."

Americon argues that plaintiffs have not sufficiently plead a violation of the industrial code in support of their Labor Law § 241 (6) claim because the facts of the case do not align with the requirements of the pleaded Industrial Code. More specifically, that plaintiff did not trip over accumulations of dirt or debris, or loose or scattered materials as the Industrial Code requires. Plaintiff argues in opposition that Americon's interpretation of the Industrial Code is inapplicable, and that said Industrial Code does apply to the facts of this case because plaintiff tripped due to a hole in a defective piece of plywood. As such, plaintiffs argue they have established a prima facie violation of this regulation that was a proximate cause of the sustained injuries.

Industrial Code § 23-1.7 (e) (2) serves to "protect against tripping hazards and sharp projections on floors and platforms 'insofar as may be consistent with the work being performed'" (Fura v Adam's Rib Ranch Corp., 15 AD3d 948, 948 [4th Dept 2005]). This Industrial Code only recognizes "dirt and debris or scattered tools and materials" as tripping hazards, rather than any item that may cause an individual to trip and fall while on a construction worksite (Verel v Ferguson Elec. Const. Co., 41 AD3d 1154, 1157 [4th Dept 2007]). Moreover, in addition to determining whether this Industrial Code is applicable concerns whether the item that caused the individual to trip and fall was consistent with the work being performed. Consistent with the work being performed does not simply refer "to the specific task a plaintiff may be performing at the time of the accident," but "applies to things and conditions that

are an integral part of the construction" project (Krzyzanowski v City of New York, 179 AD3d 479, 481 [1st Dept 2020]).

Considering the above, the Court finds that Industrial Code § 23-1.7 (e) (2) lacks evidentiary support for its application concerning plaintiff's accident because the defective piece of plywood does not qualify as a tripping hazard under the Industrial Code, and the plywood, defective or not, was consistent with the work being performed. Plaintiff testified that Americon would rip the existing floors up with the intention of putting new floors down, and that the plywood was used as a temporary floor until the new floor was provided (NYSCEF Doc. No. 79, plaintiff's EBT, 27-28: 9-16). The plywood was therefore "purposefully installed on the floor as an integral part of the renovation project," and consistent with the work being performed (Thomas v Goldman Sachs Headquarters, LLC, 109 AD3d 421, 422 [1st Dept 2013] see also Johnson v 923 Fifth Ave. Condo., 102 AD3d 592, 593 [1st Dept 2013] ["plaintiff did not trip over loose or scattered material [] [h]e tripped over a piece of plywood that had been purposefully laid over the sidewalk to protect it and that therefore constituted an integral part of the work"]; Rajkumar v Budd Contracting Corp., 77 AD3d 595, 596 [1st Dept 2010] ["plaintiff did not trip over loose or scattered material, but...over brown construction paper that was purposefully laid [to protect new floors]...[s]uch paper covering constituted an integral part of the...renovation project, and could not be construed to be a misplaced material over which one might trip"]). Accordingly, plaintiff's claim in relation to this section is dismissed as plaintiff's accident does not meet the specific requirements of Industrial Code § 23-1.7 (e) (2).

Labor Law § 200 & Common Law Claim

> "Labor Law § 200 (1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work (Ortega v Puccia, 57 AD3d 54, 60 [2d Dept 2008]). Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed. These two categories should be viewed in the disjunctive (Id. at 61). Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive

> notice of the dangerous condition that caused the accident (Id.). By contrast, when the manner of work is at issue...recovery against the owner or general contractor cannot be had...unless it is shown that the party to be charged had the authority to supervise or control the performance of the work" (Id.).
>
> "[L]iability may be imposed if the property owner created the condition or had actual or constructive notice of it, and failed to remedy the condition within a reasonable amount of time" (Bessa v Anflo Indus., Inc., 148 AD3d 974, 978 [2d Dept 2017]). "Similarly, a general contractor may be held liable in common-law negligence and under Labor Law § 200 if it had control over the work site and actual or constructive notice of the dangerous condition" (Id.).

Americon argues that plaintiff's common law negligence and Labor Law § 200 claims must be dismissed because Americon did not control or supervise plaintiff's work, nor did it have notice of a defective condition. However, the Court finds otherwise. Though Americon did not supervise or control the manner in which Ess and Vee employees performed their job, the Court finds that Americon had control of the worksite and that it had notice of the dangerous condition. Accordingly, such is sufficient to find Americon liable.

Americon's control of the worksite, specifically regarding the floor conditions, is demonstrated by its activity of ripping the existing floors up to install new floors (NYSCEF Doc. No. 79, plaintiff's EBT, 27-28: 9-25). It is further demonstrated by Americon's ability to insert a temporary floor to assist plaintiff in completing his work after he complained about the cement floor conditions (NYSCEF Doc. No. 79, plaintiff's EBT, 93-94: 19-15). Americon's notice of the dangerous condition is evidenced by the numerous complaints plaintiff made concerning the temporary floor conditions. Plaintiff testified that he complained to the Americon on-site supers about the dangerous plywood floor conditions about three to four times, and in response, was told that he should try to do his best in completing his job because Americon did not have the money to fix the floors (NYSCEF Doc. No. 79, plaintiff's EBT, 28: 12-24). Additionally, plaintiff testified about his co-worker's accident that occurred two days before his (NYSCEF Doc. No. 79, plaintiff's EBT, 125-126: 8-16). According to plaintiff's affidavit concerning his co-worker's accident, plaintiff's co-worker "stepped into a gap and hole between two pieces of makeshift plywood"

causing him to fall and sustain injuries (NYSCEF Doc. 59, Frank Cioppa Aff. ¶ 4). Plaintiff also alleges that prior to his co-worker's accident, he reported the dangerous plywood floors to Americon personnel on numerous occasions (NYSCEF Doc. 59, Frank Cioppa Aff. ¶ 5). "A plaintiff may satisfy his or her burden on notice by producing evidence that an 'ongoing and recurring dangerous condition existed in the area of the accident which was routinely left unaddressed'" (Talavera v New York City Transit Auth., 41 AD3d 135, 136 [1st Dept 2007] quoting O'Connor-Miele v Barhite & Holzinger, Inc., 234 AD2d 106, 107 [1st Dept 1996]).

Americon is unable to claim that it did not control the worksite when it was the party that installed the temporary plywood floors, or that it did not have notice of the defective condition when it fails to rebut the claims that plaintiff made numerous complaints concerning the defective plywood floors. Furthermore, a similar accident occurred two days prior to plaintiff's accident and Americon failed to remedy the situation. Therefore, the Court finds that Americon failed to establish its prima facie burden on summary judgment to dismiss plaintiff's common law negligence and Labor Law § 200 claims. For "as alleged here, plaintiff's injuries stem from a dangerous condition on the premises, [for which] a general contractor may be liable if it has control over the work site and actual or constructive notice of the dangerous condition" (Keating v Nanuet Bd. of Educ., 40 AD3d 706, 708 [2d Dept 2007]).

Indemnification

> "The right to contractual indemnification depends upon the specific language of the contract (see Sherry v Wal–Mart Stores E., L.P., 67 AD3d 992, 994 [2d Dept 2009]; Canela v TLH 140 Perry St., LLC, 47 AD3d 743, 744 [2d Dept 2008]. In the absence of a legal duty to indemnify, a contractual indemnification provision '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]; see Baginski v Queen Grand Realty, LLC, 68 AD3d 905, 907 [2d Dept 2009]. 'The promise [to indemnify] should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances' Hooper Assoc. v AGS Computers, at 491–492; see Eldoh v Astoria Generating Co., LP, 57 AD3d 603, 604 [2d Dept 2008]; Canela v TLH 140 Perry St., LLC, 47 AD3d at 744)" (Alfaro v 65 W. 13th Acquisition, LLC, 74 AD3d 1255, 1255–56 [2d Dept 2010]).

Americon and Ess & Vee

Americon argues that it is entitled to contractual indemnification from third-party defendant Ess & Vee because plaintiff's accident arose out of, and occurred in connection with, his employment with Ess & Vee. Ess & Vee argues in opposition that that plaintiff's accident did not arise out of his employment with Ess & Vee, but out of the sole negligence of Americon. Therefore, the cause of action for contractual indemnification against Ess & Vee must be dismissed.

Within the purchase order agreement between Americon and Ess & Vee, under the Insurance and Indemnification heading, the document reads that "Americon shall not be liable for any loss or casualty incurred or caused by the Subcontractor...Americon shall be named as an Additional Insured on Subcontractor's primary and excess liability policies to completely protect Americon from claims arising out of or resulting from Subcontractor's operations, attempted operations, or failure to perform operations under this Agreement" (NYSCEF Doc. No. 103, Contract between Americon and Ess & Vee, ¶ 4).

Americon argues that "arising out of" and "resulting from" are broadly construed indemnity triggers that should apply here. "The term 'arising out of' means 'originating from, incident to, or having connection with' (Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA, 15 NY3d 34, 38 [2010], quoting Maroney v New York Cent. Mut. Fire Ins. Co., 5 NY3d 467, 472 [2005]). It 'requires only that there be some causal relationship between the injury and the risk for which coverage is provided' (Maroney, 5 NY3d at 472)" (Tech. Ins. Co., Inc. v Main St. Am. Assurance Co., 202 AD3d 1506, 1508 [4th Dept 2022]). Plaintiff testified that Ess & Vee was hired to perform the drywall partitions, sheetrock ceilings, taping finishes, and any blocking. According to plaintiff, his accident occurred while he was cleaning the work area with the assistance of an Americon labor foreman, in preparation to perform the work that Ess & Vee was hired to complete (NYSCEF Doc. No. 79, plaintiff's EBT, 34-35: 14-15).

Here, the Court finds that there is a question of fact as to whether plaintiff was engaged in work that arises out of the services which Ess & Vee contracted to provide when plaintiff's accident occurred.

"The focus of a clause such as the additional insured 'is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained'" (Worth Const. Co. v Admiral Ins. Co., 10 NY3d 411, 416 [2008] quoting Impulse Enterprises/F & V Mech. Plumbing & Heating v St. Paul Fire & Marine Ins. Co., 282 AD2d 266, 267 [1st Dept 2001]). Since the Court is unable to definitively determine what type of work plaintiff was engaged in when the injury occurred, it denies Americon's plea to grant contractual indemnification against Ess & Vee.

Americon and Empire State Realty Trust

As stated above, "[t]he right to contractual indemnification depends upon the specific language of the contract" (Alfaro v 65 W. 13th Acquisition, LLC, 74 AD3d 1255, 1255–56 [2d Dept 2010]). Americon argues that ESRT's motion for summary judgment as to contractual indemnification should be denied because questions of fact exist as to whether the contractual requirements are triggered in favor of ESRT. Specifically, whether ESRT had notice of the defective condition that caused plaintiff's accident. ESRT argues in opposition that it is entitled to summary judgment indemnification because of Americon's unconditional duty to defend and indemnify.

> Americon's indemnification agreement with ESRT states that "to the fullest extent permitted by law, Construction Manager shall defend, indemnify, and hold the Owner, ESRT Management, L.L.C.,...from and against any and all losses, liabilities, claims, damages, and expenses, including, without limitation, reasonable attorneys' fees and disbursements, (collectively, the "Damages") arising out of or resulting from (a) Construction Manager's breach of this Agreement or any of the other Contract Documents; (b) any act, error, omission, negligence, or misconduct of Construction Manager, its Subcontractors, sub-Subcontractor's, "Construction Manager Parties"), and (c) all bodily injuries to or sickness, disease, or death of, any of the Construction Manager Parties or destruction of tangible property, except to the extent such Damages are caused by the gross negligence, willful misconduct or material breach of this Agreement by Owner" (NYSCEF Doc. No. 84, Agreement Doc, § 11.5.20).

Americon argues that ESRT's motion for summary judgment as to contractual indemnification should be denied because questions of fact exist as to whether the contractual requirements are triggered in favor of ESRT, such as whether ESRT had notice of the defective condition that caused plaintiff's accident. However, no such information has been presented. Moreover, even if ESRT had notice of the

defective condition, which the Court finds that it did not, such notice would not trigger ESRT's duty to indemnify Americon because simply having notice would not amount to gross negligence, willful misconduct, or a material breach of the agreement. "Gross negligence 'differs in kind, not only degree, from claims of ordinary negligence' [Colnaghi, U.S.A., Ltd. v Jewelers Prot. Servs., Ltd., 81 NY2d 821, 823 (1993)]. 'Gross negligence, when invoked to pierce an agreed-upon limitation of liability in a commercial contract, 'must smack[] of intentional wrongdoing' or 'evince[] a reckless indifference to the rights of others' (Matter of Part 60 Put-Back Litig., 36 NY3d 342, 352 [2020] quoting Sommer v Fed. Signal Corp., 79 NY2d 540, 554 [1992]). Clearly ESRT's actions do not amount to such a standard.

The parties in opposition to ESRT's motion for summary judgment argue that a question of fact regarding ESRT's notice of the defective condition is present and evidenced by the Americon Hitt meeting minutes dated May 31, 2017 (NYSCEF Doc. No. 129, Americon Hitt MM). Within said document under section 1.72.7, it states "ESRT has commented on costs for leveling at South lobby. CW rejected change order due to AH schedule delays." Americon and Ess & Vee argue that somehow the proposed leveling and rejection of such activity signals that ESRT had knowledge of the unleveled surface and chose not to act. However, such information is too speculative for this Court to impute ESRT with such knowledge, because ESRT's senior vice president director of design and construction testified that he was unfamiliar with what the document was referencing and that he was unaware of such proposed activity (NYSCEF Doc. No. 80, ESRT deposition, 57-58: 6-20). Moreover, ESRT's senior vice president director of design and construction also testified that he never noticed any problems with the temporary flooring during his walkthroughs of the construction project (NYSCEF Doc. No. 80, ESRT deposition, 28: 9-13). Nor did he receive any complaints from Ess & Vee workers regarding the conditions of the construction project floor (NYSCEF Doc. No. 80, 21: 15-19). Therefore, the Court finds that ESRT's motion for summary judgment is granted.

Ess & Vee and Empire State Realty Trust

Without a contract, there is no right to a contractual agreement. As Americon's subcontractor, Ess & Vee only had a contractual duty to Americn and not to ESRT, the owner of the building (see CDJ Builders Corp. v Hudson Grp. Const. Corp., 67 AD3d 720, 722 [2d Dept 2009]). As this Court has granted ESRT's motion for summary judgment, Ess & Vee's cross-claims against ESRT are dismissed.

Accordingly, it is hereby ORDERED that defendant AMERICON's motion (motion sequence no. 1) pursuant to CPLR 3212 to dismiss plaintiff's complaint is granted in part as plaintiff's Labor Law §§ 240 and 241(6) claims are dismissed, and denied as to plaintiffs' Labor Law § 200 & Common Law claim which shall proceed to trial; and it is further

ORDERED that the branch of the motion seeking contractual indemnification against ESS & VEE ACOUSTICAL CONTRACTORS INC. in favor of AMERICON is denied; and it is further

ORDERED that the branch of defendant AMERICON's motion (motion sequence no. 1) for leave to enter default judgment on the third-party complaint against third-party defendant MAKLATESA PALADONO INC. is granted without opposition; and it is further

ORDERED that an assessment of damages against said defendant(s) be made at the time of trial or following the disposition of the action against the other defendant(s) who has/have appeared; and it is further

ORDERED that plaintiffs' cross-motion (NYSCEF Doc. No. 104) pursuant to CPLR 3212 for partial summary judgment as to liability on their Labor Law § 241(6) is denied; and it is further

ORDERED that defendant ESS & VEE ACOUSTICAL CONTRACTORS INC. cross-motion for summary judgment, dismissing the third-party complaint, any and all crossclaims, and plaintiff's Labor Law § 240 and § 241 claims is granted in part as plaintiffs' Labor Law § 240 and § 241 claims are dismissed (NYSCEF Doc. No. 141), and otherwise denied as the third-party complaint is active against said third-party defendant regarding the indemnity provision to AMERICON; and it is further

ORDERED that defendant EMPIRE STATE REALTY TRUST, INC.'s motion for summary judgment pertaining to contractual indemnification (motion sequence no. 2) is granted.

This Constitutes the decision and order of the Court.

9/15/2023
DATE

ALEXANDER M. TISCH, 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