SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. James E. d'Auguste **PART 55**

Justice

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INDEX NO. 159676/2018

MOTION DATE

MOTION SEQ. NO. 004 005

RUSSELL BRESLOW, LAUREN BRESLOW,

Plaintiffs,

- v -

CITIGROUP TECHNOLOGY, INC., TISHMAN CONSTRUCTION CORPORATION, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, TURNER CONSTRUCTION COMPANY, SKILLMAN MECHANICAL CORP., PENGUIN AIR CONDITIONING CORP.,

Defendants.

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DECISION + ORDER ON MOTION

CITIGROUP TECHNOLOGY, INC., TISHMAN CONSTRUCTION CORPORATION, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, TURNER CONSTRUCTION COMPANY,

Third-Party Plaintiffs,

-against-

ALLRAN ELECTRIC OF NY LLC,

Third-Party Defendant.

Third-Party
Index No. 595730/2020

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ALLRAN ELECTRIC OF NY LLC,

Second Third-Party Plaintiff,

-against-

SKILLMAN MECHANICAL CORP. and PENGUIN AIR CONDITIONING CORP.,

Second Third-Party Defendants.

Second Third-Party
Index No.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 232, 234, 235, 236, 237, 238

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 233, 239, 240, 241, 242, 243, 244, 245, 246

were read on this motion to/for DISMISSAL.

In this action by plaintiffs to recover for damages allegedly sustained by Russell Breslow ("Breslow"), defendants/third-party plaintiffs Citigroup Technology Inc. ("Citigroup"), Tishman Construction Corporation, Tishman Construction Corporation of New York ("Tishman defendants"), Turner Construction Company ("Turner"), and defendants Skillman Mechanical Corp. (Skillman") and Penguin Air Conditioning Corp. ("Penguin") (collectively "defendants/third-party plaintiffs") move, pursuant to CPLR 3212, in Motion Sequence 004 ("MS004"), for summary judgment dismissing Breslow's complaint against all defendants, including the causes of action under New York State Labor Law Sections 240(1) and 241(6), and common law claims of negligence. Citigroup and Turner move, pursuant to CPLR 3212, for summary judgment against third-party defendant Allran Electric Company ("Allran"), for contractual indemnification from Allran, and for summary judgment dismissing third-party defendant/second third-party plaintiff Allran's second third-party action against Skillman and Penguin. Allran opposes Citigroup and Turner's motion for summary judgment regarding the third-party claim for contractual indemnification. Breslow opposes the motion for summary judgment of defendants/third-party plaintiffs, as well as Allran's motion for summary judgment.

Third-party defendant/second third-party plaintiff Allran, in Motion Sequence 005 ("MS005") moves, pursuant to CPLR 3212, for dismissal of Breslow's complaint as against third-party plaintiffs, thereby resulting in dismissal of the third-party complaint; alternatively,

Allran moves for summary judgment dismissing the third-party complaint, or granting it summary judgment regarding its third-party claim for common-law indemnification. Defendants/third-party plaintiffs partially oppose the portion of Allran's motion for summary judgment, specifically that which seeks common law indemnification against Skillman and Penguin and dismissal of Citigroup and Turner's claim for contractual indemnification from Allran. Breslow opposes the motion for summary judgment of defendants/third-party plaintiffs, as well as Allran's motion for summary judgment.

Motion sequence numbers 004 and 005 are hereby consolidated for disposition.

On July 12, 2018, at approximately 7:45am, Breslow was allegedly injured in a construction accident that occurred on the 16th floor of 388 Greenwich Street in Manhattan. Breslow asserts that, while carrying a ladder, he tripped on a small opening leading to a sub-floor caused by the removal of floor tiles, which caused him to fall and purportedly sustain significant personal injuries. According to photographs Breslow took of the accident scene immediately after the incident, the opening was approximately two feet wide and extended from the raised floor into the sub-floor by a depth of approximately four to six inches. NYSCEF Doc Nos. 163, 181, 182, 236, 237. The photographs showed the presence of condensate pipes. Breslow was working on the 16th floor the day before the accident and claims he did not observe work by steam fitters, only HVAC workers. NYSCEF Doc. Nos. 163, 181, 237. Photographs were also taken on the morning after Breslow's accident by Mark Nucci, an investigator from D.J. Hannon. It should be noted, however, that Nucci indicates that there may have been work performed at the incident site after Breslow's accident and prior to the time Nucci took his photographs because of the existence of "some white installation around a pipe in that column." NYSCEF Doc. Nos. 163, 190, 191, 237.

Citigroup was the owner of the building where Breslow's alleged construction accident occurred. Citigroup hired Turner and Tishman as construction managers to oversee the renovations at 388 and 390 Greenwich Street. Turner contracted with Allran, Breslow's employer, for electrical work and agreed to indemnify Citigroup and Turner for all damages and injuries arising out of work being performed by Allran under its contract with Turner regardless of there being any active negligence on Allran's part. NYSCEF Doc. No. 163. Skillman were the steam fitters that would have installed the pipes beneath the floor that Breslow observed. Turner sub-contracted HVAC work – needed for different floors at 388 Greenwich, including the 16th floor – to Penguin, who sub-contracted various aspects of the HVAC work, including hiring Skillman to have steam fitters for the HVAC work, and non-party IAR Insulation ("IAR") as insulators for the piping Skillman installed. Conversely, Tishman was not involved in interior work, which would include any work performed on the 16th floor on or before Breslow's accident as Turner oversaw this work. NYSCEF Doc. Nos. 163, 237.

MS004

As an initial matter, defendants/third-party plaintiffs assert that the work Breslow was performing at the time of the accident was at ground level. As such, they assert that the work he was performing did not fall within the ambit of the protections afforded by Labor Law Section 240(1), thereby warranting dismissal. Breslow acknowledges the validity of this argument and did not oppose that portion of defendants/third-party plaintiffs' motion regarding this claim. NYSCEF Doc. Nos. 236, 239. Thus, defendants/third-party plaintiffs are granted summary judgment dismissing Breslow's claim under Labor Law Section 240(1).

Next, defendants/third-party plaintiffs argue for dismissal of Breslow's Labor Law claim under Section 241(6). However, they contend that none of the Industrial Code sections asserted

to be violated are applicable to any of the work Breslow was performing, nor any claimed defective condition allegedly present at the time of his accident. Defendants/third-party plaintiffs assert that in the absence of an applicable provision of the Industrial Code, with concrete specifications, there can be no basis for a claim under Labor Law Section 241(6). *Ross v. Curtiss-Balmer Hydro-Electric Co.*, 81 N.Y.2d 494 (1993).

Defendants concede that Labor Law Section 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 as set forth by the Commissioner of the Department of Labor. *St. Louis*

v. Town of N. Elba, 16 N.Y.3d 411 (2011). However, defendants assert that the numerous sections of the New York State Industrial Code that Breslow claims were allegedly violated are inapplicable and/or do not contain concrete specifications that defendants violated, nor that they are applicable to the work Breslow was performing and the opening in the floor that was present, that resulted in his trip and fall.

Breslow alleges numerous violations of the Industrial Code in the bill of particulars, but concedes that any section not specifically addressed in the opposition to defendants' and third-party defendants' motions does not apply on this record. NYSCEF Doc. No. 236. As is applicable herein, Breslow alleges a violation of Industrial Code Sections 23-1.7(e)(1) and 23-1.7(e)(2) - concerning tripping and other hazards in passageways and work areas, and prohibiting dirt and debris and other obstructions in passageways, as well as dirt and debris and scattered tools and materials.

Defendants and Allran both point out, *infra*, that while there is a section of the Industrial Code dedicated to floor openings (12 NYCRR 23-1.7(b)), also referenced in Breslow's Bill of

Particulars, Breslow failed to oppose dismissal of same, and deem that section of the Industrial Code as abandoned.

Breslow asserts even Turner's Site Safety Manager, Dave Diercksen, admitted that a removed floor tile "is a tripping hazard" under 23-1.7(e)(1), arguing, as photographs show, the floor area that he traversed up to and including the area wherein the accident occurred essentially formed a passageway for purposes of the regulation. NYSCEF Doc. Nos. 194, 236. Yet, defendants maintain 23-1.7(e)(1) is inapplicable as the opening in the floor did not constitute any of the types of conditions discussed in the regulation. Breslow points to *Prevost v. One City Block LLC*, 155 A.D.3d 531 (1st Dep't 2017) in which the First Department affirmed a denial of summary judgment to defendant on the Section 241(6) Labor Law claim predicated upon 23-1.7(e)(1), holding "there is a material question of fact as to whether plaintiff fell in a "passageway" or merely in an open area. Further, Breslow claims that if not a passageway under 23-1.7(e)(1), the location where his accident occurred was within an area where workers had to work and pass, thereby invoking 23-17(e)(2) - requiring that "areas where persons work or pass shall be kept free from...materials and sharp projections..." - asserting that questions of fact exist if the floor opening and pipes therein fell within the purview of the regulation.

Further, Breslow contends that as neither he nor his employer, Allran, required access underneath the floor that required removal of the floor tile, and as it is unknown when the floor tile was removed, it is impossible to state, as a matter of law, that at the time of the accident it was integral to another trade's work. The First Department affirmed the part of a trial court's order addressed to the 23-1.7(e)(2) claim, in *Tighe v. Hennegan Construction Co. Inc.*, 48 A.D.3d 201 (1st Dep't 2008), holding that "plaintiff's Labor Law 241(6) claim predicated on 12 NYCRR 23-1.7(e)(2) was properly sustained as against Hennegan because the debris was not an

integral part of the work being performed by the plaintiff at the time of the accident." Thus, Breslow asserts that there exist questions of fact if a passageway was created by the arrangement of the materials and equipment shown in photographs, precluding summary judgment to defendants on the Labor Law Section 241(6) claim predicated on violations of the Industrial Code.

The Court agrees finding triable issues of fact exist of whether either Section 23-1.7(e)(1) or (e)(2) of the Industrial Code have been violated and/or are applicable to the subject accident. As such, summary judgment dismissing Breslow's Labor Law claim under Section 241(6) as against defendants/third-party plaintiffs is precluded.

Section 200 of the New York State Labor Law is a codification of the common law duty of a landowner to provide workers with a reasonable and safe place to work. *See Lombardi v. Stout*, 80 N.Y.2d 290 (1992). Hence, where, as here, Breslow's injuries arise not from the manner in which his work was performed, but from a dangerous condition at the work site, defendants may be liable under Labor Law Section 200 and for common-law negligence if they had control over the work site and had actual or constructive notice of the dangerous condition. *Nasuro v. PI Assoc.*, 49 A.D.3d 829 (2d Dep't 2008). Additionally, the Appellate Divisions have held that "proof of supervision and control" on the part of the owner and general contractor is not a prerequisite to recovery in a 'dangerous condition' case." *Murphy v. Columbia University*, 4 A.D.3d 200 (1st Dep't 2004). Also, plaintiff must first establish that the property owner or general contractor had constructive or actual notice of, or created, the alleged defective condition.

While defendants contend that there is no evidence to show when the alleged opening in the floor was first created, and Breslow cannot speculate as to how long any defective condition

existed before the accident occurred to establish constructive notice, Breslow asserts defendants fail to establish that they lacked actual or constructive notice by not presenting any evidence as to when the floor was last inspected before his accident. *Quigley v. Port Authority of New York*, 168 A.D.3d 65 (1st Dep't 2018). Likewise, in *Ladigon v. Lower Manhattan Dev. Corp.*, 128 A.D.3d 534 (1st Dep't 2015), the First Department affirmed the trial court's denial of a motion for summary judgment regarding the common law negligence and Labor Law Section 200 claims as "the record is unclear as to when the staircase was last inspected prior to plaintiff's fall."

Moreover, even if the Labor Law Section 200 and common law negligence claims are analyzed under a "means and methods" standard, Breslow claims that defendants are also not entitled to summary judgment as Turner, under its contract with Citigroup, was required to "supervise the performance of the work by the subcontractors" and to "review the work done by the subcontractors...to guard against defects and deficiencies in the work (NYSCEF Doc. Nos. 176, 236). Based on such contractual provisions, and witness testimony from Turner, there is a question of fact of whether Turner "had the authority to supervise or control the means and methods" of the work that resulted in the removal of the floor tile and failure to have it timely replaced or protected with a cone. *See Bulux v. Moran*, 189 A.D.3d 761 (2d Dep't 2020).

Additionally, as Breslow argues, the absence of proof as to when the accident location was last inspected prior to the accident is fatal. *See Agli v 21 E. 90 Apartments Corp.*, 195 A.D.3d 458 (1st Dep't 2021), affirming the trial court's denial of defendants' motion to dismiss the Labor Law Section 200 and common law negligence claims as "defendants submitted no evidence of their inspection and maintenance activities on the day of plaintiff's accident and no evidence that there was no dirt, gravel, or debris on the steps, as plaintiff testified, when the stairs were last inspected or cleaned." Thus, Breslow asserts that the same lack of proof exists

here, warranting the same result. Here, defendants presented only general testimony by its employees that the area was inspected daily and debris, if found, was removed.

The Court finds that there are numerous questions of fact as to whether Skillman was the subcontractor that created the dangerous opening in the floor, as well as conflicting testimonies concerning notice of the allegedly defective condition. Therefore, as triable issues remain as to Breslow's Labor Law Section 200 and common-law negligence claims, the granting of summary judgment to defendants is prohibited, and best left to the triers of fact.

Defendants argue that in the event the summary judgment motion by Citigroup and Turner is denied, defendants would be entitled to contractual indemnification from Allran per the terms of Allran's contract. Defendants assert there is no evidence either Citigroup or Turner were actually negligent, thus, entitled to contractual indemnification for all damages "caused by, resulting from, arising out of or incurring in connection with the execution of the work" for which Allran was hired. *Brown v. Two Exchange Plaza Partners*, 76 N.Y.2d 172 (1990).

Defendants/third-party plaintiffs maintained that given the broad contractual terms under which Allran is to indemnify Citigroup and Turner, without any requirement that Allran be negligent, the mere fact that Breslow was Allran's employee and working at the time of his accident, establishes that his accident "arose out" of and/or occurred in "connection with" or "execution of" Allran's work. Also, defendants assert that shortly before the accident Breslow was walking to his Gang Box on the 16th floor, with a ladder on his shoulder, to physically start work when the accident occurred, contending that per Breslow's own testimony he was already "working" at the time of the accident. Regardless, defendants maintain that just as in *O'Connor v. Serge Elevator Co.*, 58 N.Y.2d 655 (1982), defendants herein are entitled to indemnity as it did not matter that the condition causing Breslow's injury was unrelated to Breslow's work. Thus,

defendants/third-party plaintiffs contend there is no basis upon which Allran could have the contractual claims for indemnification by Citigroup and Turner summarily dismissed under the clear terms of the indemnification clause. NYSCEF Doc. Nos. 162, 164, 176, 178.

Allran opposes, contending defendants/third-party plaintiffs fail to make any showing how the incident at issue arose out of or was connected to Allran's work. Allran asserts that at the moment of Breslow's accident, the 16th floor was empty and no work was being conducted by Allran or any other contractor as the workday had yet to begin. Allran notes Breslow was merely walking across an empty floor, hence, without Allran actually conducting any work at the time of the accident, it cannot be said the incident arose out of or was in any way connected with the "execution of the work," as the contract requires. NYSCEF Doc. Nos. 178, 234. In order for a claim to "arise out" of a party's work, there must be a showing that "a particular act or omission in the performance of such work was causally related to the accident." *Allen v. City of New York*, 2012 N.Y. Misc. LEXIS 666, quoting *Urbina v. 26 Ct. St. Assoc. LLC*, 46 A.D.3d 268 (1st Dep't 2007). Also, Breslow's mere presence on the site cannot be considered an "act" sufficient to invoke indemnification under the subject contract's terms. *Lopez v. Consolidated Edison Co. Of N.Y.*, 40 N.Y.2d 605 (1976). Hence, Allran asserts that absent any claim or proof that Allran or its employees actively contributed, through a negligent or wrongful act or omission, to the cause of the injury giving rise to the litigation herein, summary judgment dismissal of the contractual indemnification claims is warranted. Furthermore, Allran argues the contract's indemnity clause does not clearly create an indemnification obligation in a situation, as here, where the injury complained of was not shown to have been caused by any culpable conduct on the part of the subcontractor-employer. *Darien Lake Theme Park & Camping Resort, Inc. v. Contour Erection & Siding Sys.*, Inc., 791 N.Y.S.2d 792 (2005).

However, the Court finds that genuine questions of fact exist concerning whether the terms contained in the parties' contract are either as broad as defendants assert, or are as narrow as third-party defendants claim, as to entitle either party to summary judgment on the contractual indemnification cause of action. As such, summary judgment granting defendants' contractual indemnification from Allran is precluded.

Defendants further seek summary judgment dismissing Allran's second-third-party action against Skillman and Penguin. As previously noted via the affidavit of Steven Straus, Director of the Construction Department for Penguin, while Penguin was hired by Turner, it did not perform any of the specific work it was hired for at the jobsite, but subcontracted the work to other subcontractors, including Skillman and non-party IAR. Straus stated Penguin had no role in supervising or controlling its subcontractors, nor control over the manner or method in which the various subcontractors performed their work. Thus, while Straus claims he would be present at the jobsite three to four times per week to oversee the status of the HVAC work taking place by the subcontractors Penguin hired for such work, Penguin was not involved in any of the physical work occurring, hence, would not have been the party that may have removed the floor tiles creating the alleged opening upon which Breslow claims to have tripped over. NYSCEF Doc. No. 186.

However, Breslow's opposition points out that Turner's daily construction reports for both July 12, and July 13, 2018, both show that IAR was not working on the 16th floor, where the accident occurred, on either of those days, and was only working on the 17th floor doing "mechanical piping." Yet, the reports do indicate that Skillman was doing "mechanical piping" on the 16th floor, and the testimony of Skillman's owner, Rocco Fonovich, shows that Skillman's work required access to underneath the floor tiles, as well as that Skillman had no records of its

own showing where precisely it worked on the day of, or the day before, the accident. NYSCEF Doc. Nos. 162, 189, 192, 236.

Additionally, Allran asserts that the project plans did not call for any power installations at, or adjacent to, the column next to which Breslow's accident happened, hence, there was no reason for Allran workers to remove any tiles adjacent to the column. NYSCEF Doc. No.234. Further, Allran employee Nezir Papraniku, currently a Senior Project Manager, testified that if Allran was to install any conduit underneath the raised flooring, such conduit would come in ten-foot pieces, and workers "would often run about 100 feet of conduit per day in any one location." However, Papraniku noted that even if workers put in the bare minimum, the size of the conduit would not be any shorter than ten feet, which would require removal of at least five of the 2' x 2' floor tiles as existed on the 16th floor, and at no time would such conduit installation be done by merely pulling up a single tile. NYSCEF Doc. No. 235.

Moreover, while Turner's daily construction reports for July 12 and July 13, 2028, show that non-party IAR was not working on the 16th floor, where Breslow's accident occurred, the reports for July 11, 2018, indicate that Skillman was doing "mechanical piping" on the 16th floor. Additionally, defendants concede that Fonovich testified that Skillman's work required access to underneath the floor tiles, yet, Skillman itself had no records of its own to show where it worked on either July 11 or July 12, 2018 – the day before or the day of Breslow's accident. NYSCEF Doc. Nos. 189, 192, 236.

The deposition testimony of Diercksen, Turner's own site safety manager, acknowledged that "if you remove the tile it is your responsibility to close it back up or put a cone or something around that area so that it would be visible for people to see the tile has been removed and we have a cone so nobody steps into it." In his deposition, Diercksen testified that "we would tell all

the trades and the trades would tell everybody to watch out for open floor tiles." NYSCEF Doc. Nos. 194, 236.

Likewise, Turner's contract with Penguin specifically stated several times that any subcontractor removing any tiles shall be responsible to reinstall all existing tiles and for all safety precautions while such tiles are removed and the underfloor is exposed. NYSCEF Doc. Nos. 179, 236. Although Penguin subcontracted its work out, including to Skillman, the subcontract acknowledged Penguin's contract with Turner and incorporated its provisions into the subcontract with Skillman agreeing to be bound and obligated to Penguin just as Penguin is bound and obligated to Turner regarding the work required under the Penguin/Turner contract. NYSCEF Doc. Nos. 180, 236. Hence, while evidence suggests that Skillman may have been the trade to remove the tile on the 16th floor on which Breslow tripped and fell, genuine questions of fact arise concerning who specifically removed the tile and who was responsible for its replacement. Therefore, summary judgment dismissing Allran's second third-party action against Skillman and Penguin is precluded and best left for a determination by the trier of fact.

Finally, summary judgment is further sought on behalf of Tishman, as defendants/third-party plaintiffs claim it did not owe Breslow any duty as it was not the construction manager for the aspect of the work taking place on the 16th floor of 388 Greenwich Street. Breslow acknowledges he is not opposing defendants' motion seeking dismissal of the claims against the Tishman defendants. NYSCEF Doc. No. 239. Thus, summary judgment is granted.

MS005

In MS005, Allran seeks dismissal of Breslow's complaint as against third-party plaintiffs, Citigroup, Turner and Tishman. As an initial matter, the Court notes that Breslow has not

opposed the aspect of defendants' motion seeking dismissal of the action against Tishman, nor the aspect of defendants' motion for dismissal of Breslow's claim under Labor Law Section 240(1). Indeed, Breslow acknowledges that the facts herein do not implicate Labor Law Section 240(1), and is not opposing that portion of defendants' and third-party defendants' motions. Additionally, Breslow is also not opposing that part of defendants' motion seeking dismissal of the claims against the Tishman defendants. NYSCEF Doc. Nos. 239, 241.

Defendants assert that Breslow failed to address defendants' claims that Industrial Code Section 23-1.7(b)(1), concerning "hazardous openings" is inapplicable, thus, conceded that such section of the code is not applicable. Defendants also point out that such section is the only sub-section of Section 23-1.7 that addresses "floor openings," as opposed to other conditions at a job site, such as dirt and debris or scattered tools and materials. Further, defendants contend that Breslow abandoned claims that other Industrial Code sections were allegedly violated, except for Sections 23-1.7(e)(1) and (e)(2). Allran agrees with defendants that while there is an entire section of Industrial Code Section 23-1.7 dedicated to floor openings (12 NYCRR 23-1.7(b)), and such section was referenced to in Breslow's Bill of Particulars, Breslow failed to oppose dismissal of same, thus, has abandoned any claim in connection with 23-1.7(b) in the opposition papers. NYSCEF Doc. Nos.241, 245.

Yet, as the Court indicated in MS004, *supra*, under the circumstances presented, genuine questions of fact exist if a passageway was created by the arrangement of materials and equipment shown in photographs, thus, implicating Section 23-1.7(e)(2) (NYSCEF Doc. No. 222). *See Delea v. JPMorgan Chase & Co.*, 199 A.D.3d 482 (1st Dep't 2021).

Further, as with the Labor Law Section 200 and common law negligence claims in MS004 being denied summary judgment as factual issues exist, so too those claims are denied

summary judgment in MS005 as triable issues of fact exist herein. Although a "property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice" *Mendoza v. Highpoint Assoc. IX, LLC*, 83 A.D.3d 1 (1st Dep't 2011) quoting *Chowdhury v. Rodriguez*, 57 A.D.3d 131 (2d Dep't 2008). Allran argues that a defendant is not required to prove lack of notice when a plaintiff is not pointing to any evidence of notice. *Wellington v. Manmall, LLC*, 70 A.D.3d 401 (1st Dep't 2010). Allran asserts there is no evidence that defendants Citigroup, Tishman or Turner created the alleged dangerous condition, instead, evidence indicates Penguin and/or Skillman were the trades involved in accessing the sub-floor space in the area where Breslow's accident occurred, thus, removing tiles to conduct their respective work. Allran additionally claims there is no evidence that Citigroup, Tishman or Turner had actual or constructive notice of the alleged dangerous condition, nor has Breslow pointed to any evidence of notice or made any claims indicating the length of time the alleged condition existed before the accident. NYSCEF Doc. No. 200.

However, as noted in MS004, *supra*, defendants are not entitled to summary judgment as Turner, under its contract with Citigroup, was required to "supervise the performance of the work by the subcontractors" and to "review the work done by the subcontractors...to guard against defects and deficiencies in the work. NYSCEF Doc. Nos. 176, 236. Based on such contractual provisions, and witness testimony from Turner, there is a question of fact of whether Turner "had the authority to supervise or control the means and methods" of the work that resulted in the removal of the floor tile and failure to have it timely replaced or protected with a cone. *See Bulux v. Moran*, 189 A.D.3d 761 (2d Dep't 2020).

Additionally, as Breslow argues, the absence of proof as to when the accident location was last inspected prior to the accident is fatal. *See Agli v 21 E. 90 Apartments Corp.*, 195 A.D.3d 458 (1st Dep't 2021), affirming the trial court's denial of defendants' motion to dismiss the Labor Law Section 200 and common law negligence claims as "defendants submitted no evidence of their inspection and maintenance activities on the day of plaintiff's accident and no evidence that there was no dirt, gravel, or debris on the steps, as plaintiff testified, when the stairs were last inspected or cleaned." Therefore, Breslow asserts that the same lack of proof exists here, warranting the same result. Here, defendants presented only general testimony by its employees that the area was inspected daily and debris, if found, was removed.

Furthermore, as there are questions of fact as to whether Skillman was the subcontractor that created the dangerous opening in the floor, triable issues remain as to Breslow's Labor Law Section 200 and common-law negligence claims prohibiting the granting of summary judgment to defendants.

The Court has considered Allran and defendants' remaining contentions and finds them unavailing. "A Court need not address, in its decision every argument raised by a party." *Ctr. For Jud. Accountability, Inc. v. Cuomo*, 167 A.D.3d 1406, 1408 (3d Dep't 2018).

This constitutes the decision of the Court. Settle order on notice.

10/28/2024
DATE

James d'Auguste, J.S.C.

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