At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 1 day of July, 2024.

P R E S E N T:

HON. RICHARD VELASQUEZ,
Justice.

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ZHIBEN SU,

Plaintiff,

-against-

Index No.: 522433/2019

MS #'s 4,5,6 +7

16 EAST 39TH STREET LLC, OMIBUILD CONSTRUCTION INC., and WWI CONTRACTING, CORP.,

Defendants.

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16 EAST 39TH STREET LLC, and OMNIBUILD CONSTRUCTION INC.,

Third-Party Plaintiffs,

-against-

ED ELECTRICAL INC.,

Third-Party Defendant.

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ED ELECTRICAL INC.,

Second Third-Party Plaintiff,

-against-

WWI CONTRACTING, CORP.,

Second Third-Party Defendant.

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16 EAST 39TH STREET LLC, and OMNIBUILD CONSTRUCTION INC.,

Third Third-Party Plaintiffs,

-against-

WWI CONTRACTING, CORP.,

Third Third-Party Defendant.
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The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	121-123, 138-140 157-159, 185-186, 189-190, 193 194-196, 203-205, 206-207, 211-212 217-218, 220, 225, 227-228, 230-231
Opposing Affidavits/Answer (Affirmations)	235-236, 241-242, 245-246, 248-249 208-209, 255, 256, 258,
Affidavits/ Affirmations in Reply	261, 266-267, 268-269, 271, 272
Other Papers:	

Upon the foregoing papers, defendants/third-party plaintiffs/third third-party plaintiffs 16 East 39th Street LLC (16 East) and Omnibuild Construction Inc. (Omnibuild) (collectively referred to as "the Owner Defendants") move for an order, pursuant to CPLR 3212: (1) granting them summary judgment dismissing plaintiff's claims under Labor Law §§ 200 and 241 (6); (2) granting them summary judgment in their favor on their common-law indemnification and contractual indemnification claims as against defendant/second third-party defendant/third third-party defendant WWI Contracting Corp. (WWI Contracting); and (3) granting them summary judgment in their favor on their contractual indemnification claim as against third-party defendant/second third-

party plaintiff ED Electrical, Inc. (ED Electrical) (motion sequence number 4). Plaintiff Zhiben Su moves for an order, pursuant to CPLR 3212, granting him partial summary judgment with respect to liability as against defendants (motion sequence number 5).[1] WWI Contracting moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint and all cross-claims against it (motion sequence number 6). ED Electrical cross-moves for an order, pursuant to CPLR 3212: (1) granting it summary judgment dismissing the Owner Defendants' contractual indemnification claim against it; and (2) granting it summary judgment in its favor on its common-law indemnification claim as against WWI Contracting (motion sequence number 7).

The Owner Defendants' motion (motion sequence number 4) is granted only to the extent that plaintiff's Labor Law § 241 (6) cause of action is dismissed to the extent that it is premised on Industrial Code (12 NYCRR) § 23-1.7 (e) (1) and (2) relating to the slip on the pebble[2] and to the extent that the portion of its motion for contractual indemnification from ED Electrical is granted for the portion of damages that are not attributable to the Owner Defendants' own negligence. The Owner Defendants' motion is otherwise denied.

Plaintiff's motion (motion sequence number 5) is denied.

WWI Contracting's motion (motion sequence number 6) is granted only to the extent that plaintiff's Labor Law § 241 (6) cause of action is dismissed as against it to the

[1] Plaintiff, in counsel's affirmation in support, only seeks summary judgment in his favor on his Labor Law § 241 (6) cause of action based on Industrial Code violations of 12 NYCRR 23-1.7 (e) (1) and (2).
[2] As discussed below, the Labor Law § 241 (6) claim premised on the portion of Industrial Code (12 NYCRR) § 23-1.7 (e) (1) and (e) (2) relating to sharp projections is not dismissed.

extent that it is premised on Industrial Code (12 NYCRR) §§ 23-1.7 (e) (1) and (2). The motion is otherwise denied.

ED Electrical's cross-motion (motion sequence number 7) is denied.

BACKGROUND

Plaintiff pleads causes of action premised on common-law negligence and violations of Labor Law §§ 200 and 241 (6) based on injuries he allegedly suffered on August 28, 2018, when he slipped and fell down a flight of stairs while walking down a staircase located in a building under construction (the Building). The Building was owned by 16 East. 16 East hired Omnibuild to act as the construction manager for the project, and Omnibuild, in turn, hired subcontractors to perform construction work on the project, including WWI Contracting, which performed carpentry work such as framing and drywall installation, and plaintiff's employer, ED Electrical, which performed electrical work that included installation of sockets, electrical boxes and wiring.

The Building at issue was an approximately 20 story building intended to serve as a hotel. At the time of the accident, the concrete superstructure, including two permanent staircases denominated as staircase A and staircase B, was complete. Various trades were then in the process of performing carpentry, masonry, electrical, mechanical, and plumbing work. According to plaintiff's deposition testimony, the accident happened as he was walking down staircase A on the way to the bathroom located on the first floor. When he was between the first and second floor of the Building, plaintiff slipped on a pebble the size of a ping pong ball and, as he was falling, he reached out with his right hand to grab something at which point his right hand hit a metal sheet, which cut his

wrist. Plaintiff asserted that there was no wooden handrail on the staircase at the time he fell,[3] and there had been no handrail at that location for the month prior to the accident. Plaintiff also asserted that he had seen rocks and pebbles on the staircase when he was climbing up the staircase to his work location earlier that morning.

In his deposition testimony, Ronald Renteria, Omnibuild's assistant site superintendent, identified the metal piece on which plaintiff cut his hand as flat stock, a metal blocking material attached to the wall of the staircase that would ultimately be used as a connection point for the permanent railing. According to Renteria, the flat stock was installed by WWI Contracting after it did the framing work, and that, after such installation, WWI Contracting was required to install a temporary wooden handrail. This temporary handrail would be removed when the drywall was installed, at which point the steel work contractor would install the permanent handrail. Although Renteria noted that the temporary handrail was missing on certain portions of the stairway approximately a month to a month and a half before the accident, he asserted this issue had been corrected well before the accident. Renteria, however, could not recall if the temporary handrail was present during his jobsite walkthroughs on the morning of the accident. Renteria also stated that, during his jobsite walkthroughs on the morning of the accident, he walked down the Building's staircases and did not see any rocks or pebbles on the steps. However, Renteria stated that he performed his inspection by going down the steps from the top floor, zig zagging between the A and B Staircases and he never specifically stated

[3] At his May 24, 2021 deposition, plaintiff testified that there were no handrails on the right and left side of the stairwell (5/24/21 plaintiff deposition at 62, lines 2-3). However, at his February 8, 2022 Deposition, plaintiff testified that he did not remember if there was a handrail on the left side of the stairwell at that location (2/8/24 plaintiff deposition at 73, lines 6-9).

that he walked down Staircase A between the first and second floor. Nevertheless, Renteria did state that shortly after the accident, he walked up Staircase A, and did not see any pebbles or other such debris.

In contrast to Renteria's testimony, Angelo Amen, a part-owner of WWI Contracting, testified at his deposition that WWI Contracting generally did not install handrails, but did maintain them. In addition, after WWI Contracting installed flat stock, if there was a delay between the installation of the flat stock and the installation of the permanent handrail, it would put up caution tape to close off access to the stairway. WWI Contracting, according to Amen, would only install a temporary railing over the flat stock if it received a specific request for such from Omnibuild. Notably, however, Amen conceded that he could not tell who installed the temporary railing shown in the photographs taken by the Department of Building's inspector after the accident, and he admitted that he only visited the project location a couple of times a month.

Mark Cicio, the site safety coordinator at the project, testified that he observed a handrail attached to the flat stock when he viewed the accident location with the Department of Building's inspector. Cicio, however, did not know if that handrail was present at the time of the accident. Cicio added that a temporary handrail was required to be attached unless work on the staircase required its removal, in which instance the practice on the jobsite required that the staircase be cordoned off.

DISCUSSION

Plaintiff's Claims

With respect to plaintiff's Labor Law § 241 (6) cause of action, under that section an owner, general contractor or their agent may be held vicariously liable for injuries to a plaintiff where the plaintiff establishes that the accident was proximately caused by a violation of an Industrial Code section stating a specific positive command that is applicable to the facts of the case (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349-350 [1998]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2017]). Here, plaintiff, in his bill of particulars, bases his section 241 (6) claim on violations of Industrial Code (12 NYCRR) § 23-1.7 (e) (1), (2), and 23-2.7 (e).

Industrial Code (12 NYCRR) § 23-1.7 (e) (1) provides that "Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered. Section 23-1.7 (e) (2) provides that "Working areas. The 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." In his bill of particulars, plaintiff asserts that sections 23-1.7 (e) (1) and (2) were violated in that the pebble which plaintiff alleges caused him to slip and fall constitutes debris within the meaning of both sections and that the flat stock on which he cut his wrist is a sharp projection within the meaning of both sections.

Given plaintiff's deposition testimony that he slipped on the pebble as he was walking down the stairs, the Owner Defendants have demonstrated prima facie that sections 23-1.7 (e) (1) and (2) are inapplicable to that aspect of his claim since those

sections only apply to tripping hazards, and do not apply to slipping hazards (*see Dyszkiewicz v City of New York*, 218 AD3d 546, 548 [2d Dept 2023]; *Keener v Cinalta Constr. Corp.*, 146 AD3d 867, 868 [2d Dept 2017]; *Stier v One Bryant Park LLC*, 113 AD3d 551, 552 [1st Dept 2014]; *Cooper v State of New York*, 72 AD3d 633, 635 [2d Dept 2010]; *but see Ohadi v Magnetic Constr. Group Corp.*, 182 AD3d 474, 476 [1st Dept 2020]; *Fitzgerald v Marriott Intl., Inc.*, 156 AD3d 458, 459 [1st Dept 2017]; *Lois v Flintlock Constr. Servs., LLC*, 137 AD3d 446, 447-448 [1st Dept 2016]). As plaintiff has failed to identify a factual issue in this respect, the Owner Defendants are entitled to dismissal of plaintiff's section 241 (6) claim under section 23-1.7 (e) (1) and (2) to the extent that it is premised on his slip on the pebble. For the same reasons, the portion of plaintiff's motion seeking summary judgment with respect to sections 23-1.7 (e) (1) and (2) based on his slipping on the pebble must be denied.[4]

On the other hand, the Owner Defendants did not address plaintiff's assertion that the flat stock constituted a sharp projection within the meaning of Industrial Code (12 NYCRR) § 23-1.7 (e) (1), (2), in their initial motion papers, and only addressed the issue in opposition to plaintiff's motion papers and in their reply papers, and as such, the court finds that the Owner Defendants have failed to demonstrate their prima facie entitlement to dismissal of that aspect of plaintiff's claim (*see Abtey v Trivigno*, 188 AD3d 629, 631

[4] If this court was bound by the Appellate Division, First Department decisions that find that the fact that a plaintiff's fall is caused by a slip does not preclude application of Industrial Code (12 NYCRR) § 23-1.7 (e) (1), (2) (*see Ohadi*, 182 AD3d at 476; *Fitzgerald*, 156 AD3d at 459; *Lois*, 137 AD3d at 447-448), this court would deny both the Owner Defendants and plaintiff's motions in this regard based on issues of fact as to whether "someone within the chain of the construction project was negligent in not exercising reasonable care, or acting within a reasonable time, to prevent or remediate the hazard, and that [a] plaintiff's slipping, falling[,] and subsequent injury proximately resulted from such negligence" (*Rizzuto*, 91 NY2d at 351; *see Dyszkiewicz*, 218 AD3d at 550; *Bocanegra v Chest Realty Corp.*, 169 AD3d 750, 751-752 [2d Dept 2019]).

[2d Dept 2020]; *see also Alvarellos v Tassinari*, 222 AD3d 815, 820 [2d Dept 2023]). Plaintiff, however, is likewise not entitled to summary on this sharp projection theory under section 23-1.7 (e) (1), (2) based on the existence of factual issues relating to whether the flat stock may be deemed a sharp projection within the meaning of section 23-1.7 (e). In this regard, the edge of the flat stock was thin, given that it was only approximately 1/16 inch thick.[5] On the other hand, it is not entirely clear that this thinness made the edge particularly sharp. Additionally, while the flat stock did not protrude far from the wall of the stairway, its placement where a handrail on a staircase would normally be present weighs in favor of finding the flat stock a sharp projection.

Aside from the issue as to whether the flat stock may be deemed a sharp projection, there are factual issues as to whether Industrial Code (12 NYCRR) § 23-1.7 (e) applies based on the "integral to the work" exception. The flat stock itself was undoubtedly integral to the work involved in the building of the stairway since it was a necessary component for the installation of the permanent handrail (*see Murphy v 80 Pine, LLC*, 208 AD3d 492, 497 [2d Dept 2022]). However, given that there was a gap in time between the installation of the flat stock and the installation of the permanent handrail, there is nothing to suggest that a temporary covering or some other protective measure could not have been provided in the time between its installation and the installation of the permanent handrail (*see Murphy*, 208 AD3d at 497; *see also Bazdaric v Almah Partners LLC*, 41 NY3d 310, 322 [2024]; *Sinai v Luna Park Hous. Corp.*, 209

[5] Aman, WWI's part owner, testified that the flat stock was a 16 gage metal sheet. Plaintiff's engineer, in his affidavit submitted in reply, averred that 16 gage metal is 1/16 of an inch thick.

AD3d 600, 601 [1st Dept 2022]).[6] Nevertheless, plaintiff has failed to demonstrate, as a matter of law, when the handrail installation work was to occur,[7] or that other work on the staircase at or near the time of the accident would have made covering the flat stock inconsistent with the ongoing work (*see Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 140 [2011]; *cf. Bazdaric*, 41 NY3d at 321).

The Owner Defendants have also failed to demonstrate, prima facie, that Industrial Code (12 NYCRR) § 23-2.7 (e), which sets requirements for safety rails and handrails on stairways,[8] was not violated.[9] Contrary to the contentions of the Owner defendants, the fact that a temporary handrail is shown in the photograph taken by the building inspector after the accident does not show, as a matter of law, that the handrail was present at the time of the accident. At the very least, plaintiff's testimony that there was no handrail at that time, and the testimony of Renteria, Omnibuild's witness, and that of Cicio, the site safety coordinator, that they did not know if the temporary handrail was present at the time of the accident, demonstrate an issue of fact regarding whether there was a handrail at the time of the accident. Additionally, plaintiff's testimony that he reached out to grab something with his right hand and struck his wrist on the flat stock presents a factual

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[6] Indeed, the temporary handrail shown in the photograph taken after the accident would appear to serve as protection against any danger presented by the exposed flat stock.

[7] While Renteria, Omnibuild's witness, did not testify what work could have been proceeding on the stairway, Omnibuild's daily report for the day of the accident submitted by plaintiff indicates that NJ Boom was installing a handrail on Stairway A. The report, however, does not indicate on which floor this work was proceeding.

[8] Industrial Code (12 NYCRR) § 23-2.7 (e) provides that, "Protective railings. The stairwells of temporary wooden stairways and of permanent stairways where enclosures or guard rails have not been erected shall be provided with a safety railing constructed and installed in compliance with this Part (rule) on every open side. Every stairway and landing shall be provided with handrails not less than 30 inches nor more than 40 inches in height, measured vertically from the nose of the tread to the top of the rail."

[9] The court notes that plaintiff did not seek summary judgment based on a violation of Industrial Code (12 NYCRR) § 23-2.7 (e).

issue as to whether the absence of a handrail was a proximate cause of his injury (*see Curto v Kahn Property Owner, LLC*, 225 AD3d 660, 661-662 [2d Dept 2024]; *Villa-Farez v 840 Fulton LLC*, 82 Misc 3d 1251[A], 2024 NY Slip Op 50591[U], *4-5 [Sup Ct, Kings Count 2024]; *Pesantez v 650 Met Partners LLC*, 2023 NY Slip Op 33637[U], *18-19 [Sup Ct, Kings County 2023]; *cf. Waldron v City of New York*, 203 AD3d 565, 566 [1st Dept 2022]).

WWI Contracting, however, argues that it may not be held liable under Labor Law § 241 (6) because it did not act as an owner, contractor or agent thereof within the meaning of the Labor Law. WWI Contracting was not an owner or general contractor, the entities primarily subject to liability under section 241 (6) of the Labor Law. Nevertheless, as a subcontractor, WWI Contracting may be held liable as an agent of the owner or general contractor upon a "showing that it had the authority to supervise and control the work that brought about the injury" (*Fiore v Westerman Constr. Co., Inc.*, 186 AD3d 570, 571 [2d Dept 2020]; *see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 293 [2003]; *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 776-777 [1987]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]; *Guevara-Ayala v Trump Palace/Parc LLC*, 205 AD3d 450, 451 [1st Dept 2022]; *Wellington v Christa Constr. LLC*, 161 AD3d 1278, 1279-1280 [3d Dept 2018]). "The determinative factor is whether the party had the right to exercise control over the work, not whether it actually exercised that right" (*Navarra v Hannon*, 197 AD3d 474, 476 [2d Dept 2021] [internal quotation marks omitted]; *see Woodruff v Islandwide Carpentry Contrs., Inc.*, 222 AD3d 920, 921 [2d Dept 2023]).

Here, WWI Contracting's contract with Omnibuild (WWI Contract), in addition to outlining its general carpentry work involving, among other things, framing and sheet rock installation, required it to install and maintain a laundry list of site protection devices (WWI Contract Exhibit A ¶¶ 60-71) and specifically required it to install and maintain handrails for all stairs and ramp areas (WWI Contract Exhibit A ¶ 71 [e]) during the course of the construction. The testimony of Renteria, an Omnibuild site superintendent, supports a broad view of WTI Contracting's obligation relating to temporary handrails. At best, the testimony of Amen, a part owner of WWI Contracting, whose testimony suggested that WWI Contracting had only limited responsibilities with respect to temporary handrails after the installation of flat stock, presents a factual issue with regard to the scope of WWI Contracting's contractual obligations. The contractual requirements and Renteria's testimony regarding WWI Contracting's obligations relating to the installation and maintenance of temporary handrails are sufficient to demonstrate a factual issues as to whether WWI Contracting may be held liable as a statutory agent under section 241 (6) as premised on a violation of the handrail requirement of Industrial Code (12 NYCRR) § 23-2.7 (e) (*see McKinney v Empire State Dev. Corp.*, 217 AD3d 574, 576 [1st Dept 2023]; *Murphy*, 208 AD3d at 498; *Vitucci v Durst Pyramid LLC*, 205 AD3d 441, 444 [1st Dept 2022]; *DeMaria v RBNB 20 Owner, LLC*, 129 AD3d 623, 626 [1st Dept 2015]; *White v Village of Port Chester*, 92 AD3d 872, 876-877 [2d Dept 2012]; *see also Drzewinski*, 70 NY2d at 776-777; *Sanchez v 404 Park Partners, LP*, 168 AD3d 491, 492 [1st Dept 2019]).

On the other hand, WWI Contracting may not be deemed a statutory agent with respect to the other alleged Industrial Code violations relied upon in support of the Labor Law § 241 (6) cause of action since it did not have authority to supervise or control other aspects of the condition on the stairway, including the presence of dirt or debris, plaintiff's work, or the work of any of the other entities responsible for other conditions at the worksite (*see Vitucci*, 205 AD3d at 444; *see also Woodruff*, 222 AD3d at 921; *Fiore*, 186 AD3d at 571-572). In addition, although the WWI Contracting installed the flat stock at issue, the contract contained no requirement suggesting that it be covered or otherwise protected after its installation.

With respect to plaintiff's common-law negligence and Labor Law § 200 causes of action, when such claims arise out of alleged defects or dangers in the methods or materials of the work, "there is no liability under the common law or Labor Law § 200 unless the owner or general contractor exercised supervision or control over the work performed" (*Carranza v JCL Homes, Inc.*, 210 AD3d 858, 860 [2d Dept 2022], quoting *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 801 [2d Dept 2005]; *see Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 435 [2015]; *Valencia v Glinski*, 219 AD3d 541, 545 [2d Dept 2023]). Where a premises condition is at issue, property owners and general contractors may be held liable under common-law negligence and for a violation of Labor Law § 200 if they either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*see Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dept 2014]; *Bauman v Town of Islip*, 120 AD3d 603, 605 [2d Dept 2014]; *Ortega v Puccia*, 57 AD3d

54, 61 [2d Dept 2008]). Similarly, liability under Labor Law § 200 and common-law negligence may be imposed upon a subcontractor where it had control over the work site and either created the allegedly dangerous condition or had actual or constructive notice of it (*see Vita v New York Law Sch.*, 163 AD3d 605, 607 [2d Dept 2018]; *Wolf v KLR Mech., Inc.*, 35 AD3d 916, 918 [3d Dept 2006]).

Here, the record, including plaintiff's deposition testimony that he received all of his instructions regarding his work from ED Electrical, demonstrates, prima facie, that the Owner Defendants did not supervise or control plaintiff's work for purposes of plaintiff's Labor Law § 200 and common-law negligence causes of action (*see Wilson v Bergon Constr. Corp.*, 219 AD3d 1380, 1383 [2d Dept 2023]; *Kefaloukis v Mayer*, 197 AD3d 470, 471 [2d Dept 2021]; *Lopez v Edge 11211, LLC*, 150 AD3d 1214, 1215-1216 [2d Dept 2017]).

On the other hand, factual issues with respect to plaintiff's dangerous premises condition theory of liability require denial of the Owner Defendants' motion with respect to the common-law negligence and Labor Law § 200 causes of action. Notably, although Renteria testified that he did not see any pebbles or rocks on the staircase during his walkthroughs on the morning of the accident, he also stated that he did such walkthroughs by going down alternating between the A Staircase and B Staircase. Renteria's testimony thus does not unequivocally show that he inspected the area of the steps where plaintiff fell and, in view of plaintiff's own testimony regarding his observation of rocks and pebbles prior to the accident that is submitted with the Owner Defendants' motion, this court finds that the Owner Defendants have failed to

demonstrate, prima facie, the absence of constructive notice of the presence of pebbles (*see Skerrett v LIC Site B2 Owner, LLC*, 199 AD3d 956, 958 [2d Dept 2021]; *Ellis v Sirico's Catering, Inc.*, 194 AD3d 692, 693-694 [2d Dept 2021]; *Rodriguez v New York City Hous. Auth.*, 169 AD3d 947, 948 [2d Dept 2019]). In addition, with respect to the handrail, as discussed above with respect to the Labor Law § 241 (6) claim, the Owner Defendants have failed to demonstrate that a handrail was not required or that their absence was not a proximate cause of plaintiff's injuries (*see Curto*, 225 AD3d at 661-662; *Adzei v Edward Bldrs., Inc.*, 221 AD3d 639, 641 [2d Dept 2023]; *Palmer v Prima Props., Inc.*, 101 AD3d 1094, 1094-1095 [2d Dept 2012]; *Asaro v Montalvo*, 26 AD3d 306, 307 [2d Dept 2006]).[10]

Although WWI Contracting had no responsibility for clearing debris from the steps of the stairways, and thus cannot be held liable for any slipping hazards on the steps, its contractual responsibility to install and maintain the temporary handrails presents factual issues as to whether it was in control of the handrails for purposes of liability for plaintiff's common-law negligence and Labor Law § 200 claims to the extent that they are premised on the absence of the handrail (*see Murphy*, 208 AD3d at 496; *Seales v Trident Structural Corp.*, 142 AD3d 1153, 1158-1159 [2d Dept 2016]; *McCullough v One Bryant Park*, 132 AD3d 491, 492-493 [1st Dept 2015]; *Miano v Battery Place Green LLC*, 117 AD3d 489, 489-490 [1st Dept 2014]; *Beltran v Navillus Tile, Inc.*, 108 AD3d 414, 415 [1st Dept 2013]; *White*, 92 AD3d at 876). WWI

[10] The court notes that since 16 East has made no argument that its liability should be considered differently from that of Omnibuild, it has provided no independent ground for dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action as against it.

Contracting has likewise failed to demonstrate, as a matter of law, that handrails were not required at the time of the accident or that their absence was not a proximate cause of plaintiff's injuries (*see Curto*, 225 AD3d at 661-662; *Adzei*, 221 AD3d at 641; *Palmer*, 101 AD3d at 194-195).

Indemnification and Insurance Issues

Turning to the Owner Defendants' contractual indemnification claim as against WWI Contracting, the indemnification provision of their contract provides, as is relevant here, that:

> "To the fullest extent permitted by law, Subcontractor [WWI Contracting] shall indemnify, defend and hold harmless Owner [16 East], . . . [and] the Construction Manager [Omnibuild]. . . from and against all losses, claims . . . causes of action, lawsuits, . . . costs, damages, and expenses arising out of the Work for any i) personal injury, sickness, disease or death, or damage or injury to, loss of or destruction of property (including tools, equipment, plant and the buildings at the Project site, but excluding the work itself), including the loss of use of property owned by third parties; ii) negligent or wrongful act or omission of Subcontractor, its employees, sub-subcontractors of any tier, representatives or other persons for whom the Subcontractor is responsible; iii) claim asserted, or lien or notice of lien filed, by any sub-subcontractor or supplier of any tier against the Project, or against any Indemnitee in connection with the Work, but only to the extent caused by the acts or omissions of Subcontractor, its employees, sub-subcontractors, representatives or other persons for whom Subcontractor is responsible on this Project. Such obligations shall arise regardless of any claimed liability on the part of an Indemnitee, provided, however, Subcontractor shall not be required to indemnify any Indemnitee to the extent attributable to Such Indemnitees negligence. Subcontractor's obligations herein shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity

> which would otherwise exist as to any Indemnitee" (WWI Contract at § 12.1).

In view of this language, the Owner Defendants have three distinct avenues for indemnification under the subheadings i, ii, and iii. As the Owner Defendants are seeking indemnification for plaintiff's personal injury claim, they can rely on subheading i, which has no restriction on indemnification other than the overarching requirement that the claim be one "arising out of the Work." Contrary to WWI Contracting's reading of this provision, the limitation providing, "but only to the extent caused by the acts or omissions of Subcontractor, its employees, sub-subcontractors, representatives or other persons for whom Subcontractor is responsible on this Project" is inapplicable to the Owner Defendants' claim here as that limitation is contained in subheading iii, and, given the structure of the provision, there is no basis to conclude that it would apply to claims made under subheading i.[11]

Contrary to the Owner Defendants' contentions, the fact that plaintiff's injury occurred when his wrist hit the flat stock that was installed by WWI Contracting does not, in and of itself, show that the claim is one "arising out" of WWI Contracting's work for Omnibuild. In the absence of any suggestion that the flat stock itself was improperly installed or that WWI Contracting was required to cover it in some manner following its installation, the flat stock itself only served as the situs of plaintiff's injury (*see Worth*

[11] While the use of an "or" before the final subheading may have constituted a better drafting practice, the intent to provide for distinct routes for indemnification is shown by the use of the subheadings, the absence of an "and" connecting any of the subheadings, and the fact that subheading iii's limitation providing "but only to the extent caused by the acts or omissions of Subcontractor, its employees, sub-subcontractors, representatives or other persons for whom Subcontractor is responsible on this Project" would be redundant if the "negligent or wrongful act or omission" requirement of subheading ii applied to all three subheadings.

Constr. Co., Inc. v Admiral Ins. Co., 10 NY3d 411, 416 [2008]; *Pereira v Hunt/Bovis Lend Lease Alliance II*, 193 AD3d 1085, 1090-1091 [2d Dept 2021]; *Stout v 1 E. 66th Corp.*, 90 AD3d 898, 903 [2d Dept 2011]; *Bovis Lend Lease LMB Inc. v Garito Contr., Inc.*, 65 AD3d 872, 874 [1st Dept 2009], *lv dismissed* 13 NY3d 878 [2009], *appeal withdrawn* 14 NY3d 884 [2010]; *Brown v Two Exch. Plaza Partners*, 146 AD2d 129, 135-136 [1st Dept 1989], *affd* 76 NY2d 172 [1990]). On the other hand, as discussed above, WWI Contracting had a contractual obligation to install and maintain the temporary handrails on the staircase, and in view of the factual issues as to whether such a handrail should have been in place at the time of plaintiff's accident, there are factual issues as to whether the claim is one "arising out" of WWI Contracting's work that require denial of both WWI Contracting's motion and the Owner Defendants' motion as they relate to the Owner Defendants' contractual indemnification claim (*see Zong Wang Yang v City of New York*, 207 AD3d 791, 796 [2d Dept 2022]; *Payne v NSH Community Servs., Inc.*, 203 AD3d 546, 548 [1st Dept 2022]; *Martinez v 281 Broadway Holdings, LLC*, 183 AD3d 716, 718 [2d Dept 2020]; *McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1097 [2d Dept 2018]).

These factual issues as to whether the accident arose out of WWI Contracting's work also require the denial of the portion of WWI Contracting's motion seeking dismissal of the Owner Defendants' breach of contract to procure insurance claim (*see Nicholson v Sabey Data Ctr. Props., LLC*, 205 AD3d 620, 622 [1st Dept 2022]; *New York City Hous. Auth. v Merchants Mut. Ins. Co.*, 44 AD3d 540, 542 [1st Dept 2007];

Belcastro v Hewlett-Woodmere Union Free School Dist. No. 14, 286 AD2d 744, 746-747 [2d Dept 2001]).

With respect to the Owner Defendants' common-law indemnification claim against WWI Contracting, the factual issues with respect to the Owner Defendants' own negligence and whether WWI Contracting was negligent, as discussed above, require denial of the portions of the Owner Defendants and WWI Contracting's respective motions addressed to the common-law indemnification claim (*see Zong Wang Yang*, 207 AD3d at 796-797; *McDonnell*, 165 AD3d at 1097-1098; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]; *Chapa v Bayles Props., Inc.*, 221 AD3d 855, 856-857 [2d Dept 2023]; *Quiroz v New York Presbyt./Columbia Univ. Med. Ctr.*, 202 AD3d 555, 557 [1st Dept 2022]). The factual issues with respect to WWI Contracting's negligence also require denial of the portion of WWI Contracting's motion seeking dismissal of the Owner Defendants' contribution claim (*see Romano v New York City Tr. Auth.*, 213 AD3d 506, 508 [1st Dept 2023]; *Randazzo v Consolidated Edison Co. of N.Y., Inc.*, 177 AD3d 796, 798 [2d Dept 2019]; *State of New York v Defoe Corp.*, 149 AD3d 889, 890 [2d Dept 2017]).

Turning to the Owner Defendants' contractual indemnification claim as against ED Electrical, the indemnification provision contained in the Owner Defendants' contract with ED Electrical (ED Electrical Contract) is the same as the provision in the WWI Contract quoted above. Contrary to ED Electrical's contention, for the reasons discussed above with respect to the contractual indemnification claim relating to WWI Contracting, the negligent act or omission language contained in subheading ii of the provision is not

applicable to claims that fall within subheading i, which are only limited by the overall requirement that the claim be one "arising out" of ED Electrical's work. Under the broad "arising out" of the work language applicable here, the indemnification provision applies to the injuries sustained by plaintiff, one of ED Electrical's employees, even though ED Electrical had nothing to do with the conditions on the staircase that caused plaintiff's injury (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]; *O'Connor v Serge El. Co.*, 58 NY2d 655, 657-658 [1982]; *Torres-Quito v 1711 LLC*, --- AD3d ---, 2024 NY Slip Op 01279, *4 [1st Dept 2024]; *Castro v Wythe Gardens, LLC*, 217 AD3d 822, 826 [2d Dept 2023]; *Madkins v 22 Little W. 12th St., LLC*, 191 AD3d 434, 436 [1st Dept 2021]; *Tkach v City of New York*, 278 AD2d 227, 229 [2d Dept 2000]).

In view of the indemnification provision's language providing that, "Such obligations shall arise regardless of any claimed liability on the part of an Indemnitee, provided, however, Subcontractor shall not be required to indemnify any Indemnitee to the extent attributable to Such Indemnitees negligence" (ED Electrical Contract at § 12.1), the provision does not purport to indemnify the Owner Defendants for their own negligence (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 207-209 [2014]; *Zong Wang Yang*, 207 AD3d at 797). As such, the factual issues with respect to the Owner Defendants' own negligence are not a bar to their obtaining indemnification from ED Electrical. Thus, the Owner defendants are entitled to conditional summary judgment on their contractual indemnification claim from ED Electrical for the portion of damages that are not attributable to the Owner Defendants' own negligence (*see Brooks*, 11 NY3d

at 207; *Zong Wang Yang*, 207 AD3d at 796-797; *DeSimone v City of New York*, 121 AD3d 420, 422-423 [1st Dept 2014]).

On the other hand, ED Electrical has demonstrated its prima facie entitlement to summary judgment dismissing the Owner Defendants' breach of contract for failing to obtain insurance claim by submitting a copy of the policy it obtained that contains a blanket additional insured endorsement that appears to facially comply with the insurance procurement requirements of the contract (*see Langer v MTA Capital Constr. Co.*, 184 AD3d 401, 402-403 [1st Dept 2020]; *Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]; *see also Kassis v Ohio Cas. Ins. Co.*, 12 NY3d 595, 599-600 [2009]). As the Owner Defendants have not addressed the insurance procurement claim in their opposition papers, this court grants the portion of ED Electrical's cross-motion seeking dismissal of the Owner Defendant's breach of contract claim against ED Electrical.

With respect to ED Electrical's second third-party claims for common-law indemnification from WWI Contracting, WWI Contracting asserts that ED Electrical cannot obtain common-law indemnification from it because ED Electrical, as plaintiff's employer, supervised and controlled his work. While this is generally the case (*cf. McCarthy*, 17 NY3d at 377-378), this court is not convinced that an employer of an injured worker may not obtain common-law indemnification from a party at fault where an accident results from a dangerous property condition unrelated to the work or negligence of plaintiff's employer and the liability of plaintiff's employer is based solely on a contractual indemnification provision that is not based on fault (*cf. McCarthy*, 17 NY3d at 377-378 [discussing the difference between authority to supervise and actual

supervision]). Nevertheless, in view of the factual issues relating to WWI Contracting's liability, both the portion of ED Electrical's cross motion for summary judgment in its favor on its common-law indemnification claim and the portion of WWI Contracting's motion for summary judgment dismissing the claim must be denied (*see McCarthy*, 17 NY3d at 377-378; *Chapa*, 221 AD3d at 856-857; *Quiroz*, 202 AD3d at 557). The portion of WWI Contracting's motion seeking dismissal of ED Electrical's contribution claim is likewise denied based on these factual issue (*see Romano*, 213 AD3d at 508; *Randazzo*, 177 AD3d at 798; *State of New York v Defoe Corp.*, 149 AD3d at 890).

This constitutes the decision and order of the court.

ENTER FORTHWITH:

7-1-2024

RICHARD VELASQUEZ, J.S.C.