At an IAS Term, Part 70 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 30th day of October, 2024.

P R E S E N T:
HON. WAVNY TOUSSAINT,
Justice.

----------X

TRISTAN GRAY,

Plaintiff,

-against-

Index No.: 504169/18

AMENDED DECISION AND ORDER

RXR 530 FIFTH OFFICE OWNER, LLC, CLUNE CONSTRUCTION COMPANY, LP, S.B.A. PLUMBING COPR., AMERIPRISE HOLDINGS, INC., KONSKER ELECTRIC CORP. and WALDORF DEMOLITION,

Defendants.

----------X

AMERIPRISE HOLDINGS, INC.,

Third-Party Plaintiff,

-against-

CUSHMAN & WAKEFIELD, INC.,

Third-Party Defendant.

----------X

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	277-279, 311-313, 315, 345-346, 348, 369, 374-378
Opposing Affidavits/Answer (Affirmations)	423-424, 426-429, 448-449, 451-452, 454, 463, 465-468, 488-491, 494, 495, 496-497, 500-501, 504-505
Affidavits/ Affirmations in Reply	508, 510, 511, 513, 515, 516, 519, 521, 523, 525, 526, 527
Other Papers:	

Upon the foregoing papers, defendant/third-party plaintiff Ameriprise Holdings, Inc., (Ameriprise) moves (Seq. 11) for an order, pursuant to CPLR § 3212, granting it summary judgement: (1) dismissing plaintiff Tristan Gray's complaint and all crossclaims and counterclaims asserted against it; (2) in its favor on its crossclaims as against defendants RXR 530 Fifth Office Owner, LLC, (RXR Office), Clune Construction Company, LP, (Clune), and Konsker Electric Corp. (Konsker); and (3) in its favor on its third-party claims against Cushman & Wakefield, Inc., (Cushman).

RXR Office moves (Seq. 12) for an order, pursuant to CPLR § 3212, granting it summary judgment: (1) dismissing plaintiff's complaint and all crossclaims and counter claims asserted against it; and (2) in its favor on its crossclaims for contractual indemnification asserted against Ameriprise and Clune and on its cross-claim for common-law indemnification against Clune and Konsker.

Cushman moves (Seq. 13) for an order, pursuant to CPLR § 3212, granting it summary judgment dismissing: (1) the complaint asserted against Ameriprise, all crossclaims asserted against it, and (2) Ameriprise's third-party complaint.

Konsker moves (Seq. 14) for an order, pursuant to CPLR § 3212, granting it summary judgment dismissing the complaint and all crossclaims asserted against it. Oppositions to all the foregoing motions have been filed, except where indicated differently herein below.

BACKGROUND

Plaintiff Tristan Gray (plaintiff) pleads causes of action premised on common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). On October 13,

2016, plaintiff alleges he sustained serious injuries when he tripped over an electric coupling while pushing a mini trash dumpster cart (mini) in a construction staging area located on the 10th floor of the building being renovated at 530 Fifth Avenue, New York, NY. The 10th floor of the building was owned by RXR Office[1] and, pursuant to a Second Amendment to Agreement of Lease dated June 20, 2016 (Second Amendment), RXR Office agreed to lease a portion of the 10th floor of its building to Ameriprise. Pursuant to the Second Amendment, after renovations on the 10th floor were completed, Ameriprise would move its operations from the 16th floor space it was then leasing in the building to the 10th floor space. RXR Office was also responsible for performing renovation work in certain common areas of the 10th floor, including in the common corridor by the elevator banks,[2] while Ameriprise was responsible for the renovation work in the area of the 10th floor demised to it. RXR Office hired non-party RXR Construction and Development (RXR Construction) as the general contractor for the work in the common areas, which in turn hired several trade contractors to perform the work. With respect to the renovation of its portion of the 10th floor, Ameriprise hired Clune as its general contractor. Clune, thereafter, hired Konsker to perform electrical work and other subcontractors to perform other trade work on the project. Cushman, a real estate management services company, acted as Ameriprise's representative in its leasing of the 10th floor space from RXR Office and in acting as project manager for Ameriprise's build-out of the leased space.

[1] The building was divided into commercial condominium units and RXR Office owned a condominium unit (or units) that included the 10th and 16th floors of the building.

[2] This area was also referred to as the "elevator lobby."

At his deposition, plaintiff testified that at the time of the accident, he was employed by non-party Construction Resources as a laborer. Construction Resources provided laborers affiliated with union Local 79 to perform construction tasks such as flagging cars, demolition, general cleaning, floor protection or wall protection. On the morning of October 16, 2013, plaintiff's supervisor phoned plaintiff, who was then working at another jobsite, and told him to fill in for a worker who had called in sick at RXR Office's building. Plaintiff's supervisor also directed plaintiff to go to the 10th floor elevator bank and cleanup for electricians who were performing work there. Plaintiff, however, did not know the name of the entity that had hired Construction Resources to perform this work.

As instructed by his Construction Resources supervisor, upon reaching the 10th floor, plaintiff obtained the mini and a broom, which were located just behind the door in a room that was being used as a staging area. He then returned to the elevator lobby area of the 10th floor and began picking up garbage and debris left by three electricians working in that area. Plaintiff observed these electricians working on ladders installing exit signs and light fixtures in the ceiling of the elevator lobby area. Other than these three electricians working in the elevator lobby, and another group of workers he assumed to be electricians working by an electrical panel, plaintiff did not see anyone else working during his time on the 10th floor. All of the work plaintiff performed on the day of his accident was in this elevator lobby area.

At around 2:30 to 3:00 p.m., after he had finished picking up debris left by the electricians and placing it in the mini, plaintiff, as instructed by his Construction

Resources supervisor, opened the door to the staging area in order to push the mini through the room towards the back wall where other minis had been left. As he was pushing the mini towards the rear of the room, plaintiff tripped and fell over an electrical coupling that he had not previously observed. Other than opening the door to this area to get the mini at the beginning of the day, plaintiff had not walked through the staging area. Plaintiff did not recall picking up a coupling while he was working in the elevator lobby area of the 10th floor, and plaintiff was not responsible for cleaning or picking up debris in the staging area. Plaintiff described the staging area as a big open area with boxes of what appeared to be electrical supplies stacked on his right side and an open area to his left.

At his deposition, Nicholas Mather (Mather), who worked as a property manager at the subject building on behalf of RXR Office, testified that RXR Office was responsible for the work in the common areas on the 10th floor which included the installation of exit signs in the elevator lobby, and that there was a vacant space next to Ameriprise's space that was used as storage for these contractors. Mather's testimony about an email exchange with an RXR Construction supervisor from early October 2016, shows that the electricians performing the common space work on the 10th floor were using this vacant space to store their materials. Based on his review of an email exchange involving Mather and an RXR Construction supervisor regarding the installation of floor protection, Mather believed that Clune's subcontractors did not get the main portion of their deliveries until after October 14, 2016. Although Mather was not sure if RXR Construction hired Construction Resources to provide laborers for cleanup work for the

10th floor common space renovations, he did recall that RXR Construction had hired Construction Resources for such work in the past. Similarly, Mather identified an invoice dated October 18, 2016, from Construction Resources to RXR Construction for work performed by Construction Resources, but he did not know if the invoice related to work on the 10th floor.

Clune's deposition witness, Enda Crowley, testified that Clune was not involved in hiring Construction Resources for any work and, based on the Kick-Off Meeting notes relating to the project, Clune's subcontractors did not begin their work until October 17, 2016. At his deposition and in his affidavit, Daniel Konsker, Konsker's president, stated that Konsker did have a contract or agreement with Construction Resources for the Ameriprise work, and that as of October 13, 2016, that Konsker had not brought any supplies or materials, including the kind of coupling described by plaintiff at his deposition, that Konsker had not performed any work other than a walk-through and that the walk-through did not involve the removal or installation of such a coupling. Anthony Corso, a Konsker supervisor, testified that he was present for a walk-through of the 10th floor space on October 13, 2016, that Konsker did not perform any work on that date, that he was the only person present from Konsker on that date, and that, although he brought some hand tools and a ladder for the walk-through,[3] he did not bring an electrical coupling. Corso added that when Konsker received its deliveries after that date, Konsker used an area in Ameriprise's space as a staging area.

[3] These hand tools and ladder were the only items that Corso brought to the 10th floor on the date of the accident and were the items referred to in an October 12, 2016 email from a Clune employee to RXR Office that stated that "Konsker will have a small tool/ladder delivery tomorrow morning."

DISCUSSION

Ameriprise, Konsker, and Cushman

Relevant to the motions by Ameriprise, Konsker, and Cushman, owners, general contractors and their agents may be held liable to plaintiff under Labor Law §§ 200, 240, and 241 (6) (*Delaluz v Walsh*, 228 AD3d 619, 621-622 [2d Dept 2024]; *Guclu v 900 Eighth Ave. Condominium, LLC*, 81 AD3d 592, 593 [2d Dept 2011]). Defendants also may be held liable as agents of the owner or general contractor upon a "showing that [they] 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]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 293 [2003]; *Russin v Picciano & Son*, 54 NY2d 311, 318 [1981]). Tenants who either contract for or control and supervise the work may be held liable as owners under sections 240 (1) and 241 (6) (*Rizo v 165 Eileen Way, LLC*, 169 AD3d 943, 946 [2d Dept 2019]; *Wendel v Pillsbury Corp., 205 AD2d 527, 528-529 [2d Dept 1994]*; *see also Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 319-320 [2009]).

Where a premises condition is at issue, a tenant's duty under Labor Law § 200 and the common law "is limited to those areas which it occupies and controls or makes a special use" (*Athenas v Simon Prop. Group, LP*, 185 AD3d 884, 885 [2d Dept 2020] *citing Knight v 177 W. 26 Realty, LLC*, 173 AD3d 846, 847 [2d Dept 2019]). Even in the absence of control of the worksite, as required for section 200 liability, a subcontractor may be held liable for common-law negligence "where the work it performed created the condition that caused plaintiff's injury" (*Poracki v St. Mary's R.C. Church*, 82 AD3d

1192, 1195 [2d Dept 2011] [internal quotation marks omitted]; *see also Sledge v S.M.S. Gen. Contrs., Inc.*, 151 AD3d 782, 783 [2d Dept 2017]).

Turning first to Ameriprise's motion (Seq. 11) and the portion of Cushman's motion (Seq. 13) addressed to Ameriprise's liability,[4] they have demonstrated, prima facie, that plaintiff's employer was not hired by Ameriprise or any of its contractors and that it did not otherwise control or supervise plaintiff's work or have authority to do so. While plaintiff himself did not know who hired Construction Resources for his cleanup work, plaintiff's own testimony demonstrates that the electricians he was cleaning up after were performing work in the elevator lobby, and Mather, RXR Office's witness, testified that this work was part of RXR Office's responsibility under the Second Amendment and was not part of the premises leased to Ameriprise. The Second Amendment and Mather's testimony on the behalf of RXR Office, as well as other testimony regarding Ameriprise's work and the evidence that Clune and its subcontractors did not start their work on the project until after the accident date, further demonstrate that plaintiff's clean-up work performed in the elevator lobby was unrelated to the work on Ameriprise's build out project.

These facts, taken together with the invoice submitted by Construction Resources dated October 18, 2016 to RXR Construction, the testimony of witnesses for Clune and Konsker that they did not hire Construction Resources, and plaintiff's own testimony that

[4] The court notes that Cushman has standing to move for summary judgment with respect to plaintiff's claims as against Ameriprise since a third-party defendant "may assert against the plaintiff ... any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant shall have the rights of a party adverse to the other parties in the action . . ." (*Abreo v URS Greiner Woodward Clyde*, 60 AD3d 878, 881 [2d Dept 2009]; *Muniz v Church of Our Lady of Mt. Carmel*, 238 AD2d 101, 102 [1st Dept 1997], *lv denied* 90 NY2d 804, [1997]; CPLR 1008).

he received his instructions regarding his work exclusively from his own supervisors, are sufficient to demonstrate, prima facie, that Ameriprise did not contract for the performance of the work at issue or otherwise have authority to supervise or control it. As plaintiff and RXR Office, in opposition, have failed to point to evidence raising an issue of fact in this respect, Ameriprise may not be held liable to plaintiff under Labor Law §§ 240 (1) and 241 (6) (*Ferluckaj*, 12 NY3d at 319-320; *Garcia v Market Assoc*, 123 AD3d 661, 665 [2d Dept 2004]).

With respect to the plaintiff's common-law negligence and Labor Law § 200 causes of action, the record demonstrates that plaintiff's trip and fall accident stemmed not from the manner of the work he performed, but rather from a dangerous property condition (*Lane v Fratello Constr. Co.*, 52 AD3d 575, 576 [2d Dept 2008]). Even if the accident may be deemed to encompass the manner the work was performed, Ameriprise has demonstrated that it did not supervise or control plaintiff's work or have the authority to do so (*Debennedetto v Chetrit*, 190 AD3d 933, 938 [2d Dept 2021]).

Regarding the dangerous premises condition theory of liability, even though plaintiff, at his deposition, could not precisely identify the location of the staging area, other evidence in the record, read together, demonstrates that this area was retained by RXR Office. There is no dispute that plaintiff's work in the elevator lobby was part of RXR Office's 10th floor common space work. Mather, RXR Office's own witness, testified that contractors involved in this common space work, including the electricians, stored material in vacant space separate from Ameriprise's space. In addition, Mather and Konsker's witnesses, each testified that Clune's subcontractors, including Konsker, did

not get deliveries until after the date of plaintiff's accident. This evidence, taken together, shows that the boxes stored in the staging area must have belonged to an electrical subcontractor working on RXR Office's common space work, and which would have been located in an area retained by RXR Office.

Ameriprise has thus demonstrated, prima facie, that the accident did not occur in space leased or controlled by it (*Athenas*, 185 AD3d at 885; *Knight*, 173 AD3d at 847; *Pouso v City of New York*, 177 AD2d 560, 561-662 [2d Dept 1991]). As plaintiff and RXR Office have failed to point to evidence demonstrating the existence of a factual issue in this respect, Ameriprise is entitled to dismissal of the Labor Law § 200 and common-law negligence causes of action asserted against it. In view of the dismissal of the Labor Law § 200 and common-law negligence causes of action against it, Ameriprise is also entitled to dismissal of the crossclaims for contribution and common-law indemnification asserted against it (*Chapa v Bayles Props., Inc.*, 221 AD3d 855, 857 [2d Dept 2023]; *Debennedetto*, 190 AD3d at 938).

Ameriprise has likewise demonstrated its entitlement to dismissal of RXR Office's crossclaim for contractual indemnification pursuant to the indemnification provision of the lease between RXR Office and Ameriprise (see the Lease at §37). Ameriprise's uncontradicted proof shows that plaintiff's claim against RXR Office did not arise from "any act, omission or negligence of [Ameriprise], its contractors, licensees, agents, servants, employees, invitees or visitors" within the meaning of subsections (i) and (iii) of Lease § 37, or "in and or about [Ameriprise's] Premises" within the meaning of subsection (ii) of Lease § 37. Although the phrase "in or about the Premises" shows that

subsection (ii) is intended to include locations outside the demised premises (*Pritchard v Suburban Carting Corp.*, 90 AD3d 729, 731 [2d Dept 2011]; *see also Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153, 159 [1977]), it cannot be construed as requiring indemnification for an accident that occurred in a separate unoccupied vacant space retained by RXR Office and used by RXR Office's own contractors (*Acadia Constr. Corp. v ZHN Contr. Corp.*, 144 AD3d 1059, 1061 [2d Dept 2016]; *Maggio v Eye Care Professionals of W. N.Y., LLP*, 118 AD3d 1317, 1318 [4th Dept 2014]).[5]

Regarding the portion of Cushman's motion (Seq. 13) addressed to Ameriprise's third-party claims, in view of the evidence showing that plaintiff was performing work as part of RXR Office's common space work and that his injury occurred in an area retained by RXR Office, Cushman, whose role was limited to representing Ameriprise in leasing its space on the 10th floor and in the build-out of Ameriprise's space, is entitled to dismissal of Ameriprise's contribution and common-law indemnification claim against it (*Chapa*, 221 AD3d at 855; *Debennedetto*, 190 AD3d at 938; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]). Here, the indemnification provisions of the contract between Ameriprise and Cushman are inapplicable and any insurance procurement requirements of the contract would not apply since the accident was unrelated to the activities covered by their agreement (*Nicholson v Sabey Data Ctr.*

[5] Although Lease § 37 contains several other grounds for indemnification, these remaining grounds are facially inapplicable to the facts here.

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]).[6]

Konsker has demonstrated its prima facie entitlement to summary judgment dismissing the action against it through the affidavits and testimony of Daniel Konsker and Corso, who stated that Konsker was not performing work at the accident location on or before the date of the accident, that it did not perform work in the elevator lobby, that it did not use or bring onto the worksite an electrical coupling on or before the date of the accident, and that it did not hire Construction Resources, or supervise or control plaintiff's work. As no party has demonstrated an issue of fact in this respect, Konsker cannot be held liable under Labor Law §§ 200, 240 (1) and 241 (6), as it was not a general contractor, owner or agent thereof (*Delaluz*, 228 AD3d at 621-622; *Fiore*, 186 AD3d at 571-572; *Uhl v D'Onofrio Gen. Contrs., Corp.*, 197 AD3d 770, 772-773 [2d Dept 2021]), and its work did not cause or create a dangerous condition for purposes of common-law liability (*Uhl*, 197 AD3d at 773).

These facts also demonstrate that Konsker may not be held liable to any entity for contribution or common-law indemnification (*see Chapa*, 221 AD3d at 856-857; *Quiroz v New York Presbyt./Columbia Univ. Med. Ctr.*, 202 AD3d 555, 557 [1st Dept 2022]; *Debennedetto*, 190 AD3d at 938; *Uddin*, 164 AD3d at 1404), contractual indemnification (which only applied to negligent acts or omissions of Konsker, or those employed by it,

[6] As counsel for Ameriprise stated in its affirmation submitted in opposition to Cushman's motion, "if summary judgment is awarded to Ameriprise, then its third-party claims against Cushman would inevitably fall away" (Kipnis Affirmation dated February 28, 2024, at ¶ 10), Ameriprise does not oppose dismissal of its claims against Cushman now that this Court has dismissed the action as against Ameriprise.

or those for whom it could be held responsible), or breach of contract for failing to obtain insurance (*Nicholson*, 205 AD3d at 622; *Belcastro v Hewlett-Woodmere Union Free School Dist. No. 14,* 286 AD2d 744, 746-747 [2d Dept 2001]).[7] Konsker is thus entitled to summary judgment dismissing the complaint and crossclaims as against it.[8]

For essentially these same reasons, the portion of Ameriprise's motion requesting summary judgment in its favor on its crossclaims as against RXR Office, Clune and Konsker, and on its third-party claims as against Cushman, are denied as it has failed to demonstrate its prima facie entitlement to such relief.[9]

RXR Office

In contrast to plaintiff's claims against Ameriprise and Konsker, RXR Office, as owner of the 10th floor space at issue, is subject to liability under Labor Law §§ 240 (1) and 241 (6) (*Chuqui v Cong. Ahavas Tzookah V'Chesed, Inc.*, 226 AD3d 960, 962 [2d Dept 2024]; *see also Gordan v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 559-560 [1993]; Given that plaintiff testified that his accident involved a trip and fall on the same level of a floor, however, RXR Office has demonstrated, prima facie, that plaintiff's accident did not involve an elevation differential required for liability under Labor Law § 240 (1) (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 99-101 [2015]; *Schutt v Dynasty*

[7] The Court notes that Konsker's Contract with Clune containing the insurance and indemnification provisions is dated October 25, 2016, a date after the accident occurred, and Konsker argues that it was not intended to apply retroactively. In granting Konsker's motion in this respect, the Court has assumed, without deciding, that it would apply retroactively. In addition, in granting Konsker's motion, the Court has not addressed Konsker's assertion that RXR Officer's crossclaims against it were not timely or properly served.

[8] As with its claims against Cushman, Ameriprise suggests that it does not oppose dismissal of its claims against Konsker in the event that this court grants Ameriprise's motion dismissing plaintiff's complaint against it.

[9] Given that Ameriprise has failed to demonstrate its prima facie burden, its motion must be denied as against Clune despite Clune's failure to submit opposition to Ameriprise's motion (*Caliber Home Loans, Inc. v Squaw*, 190 AD3d 926, 927-928 [2d Dept 2021]; *Exit Empire Realty v Zilelian*, 137 AD3d 742, 743 [2d Dept 2016]).

Transp. of Ohio, Inc., 203 AD3d 858, 860-861 [2d Dept 2022]). As plaintiff has not addressed this portion of RXR Office's motion, RXR Office is entitled to summary judgment dismissing plaintiff's section 240 (1) cause of action.

Under Labor Law § 241 (6), 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[10] stating a specific positive command that is applicable to the facts of the case (*Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2017]; *see also Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349-350 [1998]). In seeking dismissal of plaintiff's section 241 (6) cause of action, RXR Office initially contends that plaintiff's work at the time of the accident is not covered work under section 241 (6) because he was only engaged in "routine maintenance/general clean-up" work. Although, on its own, plaintiff's cleaning work may not qualify as covered work under section 241 (6), there are at least factual issues as to his work being covered here because it was performed as part of a larger construction project relating to the 10th floor common space (*White v City of Port Chester*, 92 AD3d 872, 877 [2d Dept 2012]; *Rivera v Ambassador Fuel & Oil Burner Corp.*, 45 AD3d 275, 276 [1st Dept 2007]).

Turning to the Industrial Code sections at issue, plaintiff, in his bill of particulars, premised his section 241 (6) cause of action on violations of Industrial Code §§ 23-1.7 and 23-2.1, New York City Administrative Code §§ 26-228, 27-127, 27-128, 27-2005; 2

[10] The Industrial Code sections referenced herein are found at N.Y. Comp. Codes R. & Regs. Tit. 12.

RCNY §3-02; Multiple Dwelling Law §§ 78 and 80; and Board of Standards and Appeals and OSHA rules. RXR Office has demonstrated its prima facie entitlement to dismissal of the section 241 (6) cause of action to the extent that it rests on violations of Industrial Code §§ 23-1.7 (a), (b), (c), (f), (g), (h) and 23-2.1, as these sections of the Industrial Code either fail to state a specific standard or are inapplicable to the facts here (*Dyszkiewicz v City of New York*, 218 AD3d 546, 548-549 [2d Dept 2023]). Likewise, plaintiff's reliance on OSHA, the New York City Administrative Code, Multiple Dwelling Law, and the New York City Building Code must fail, as only violations of the Industrial Code may be relied upon to state a section 241 (6) cause of action (*Alberto v DiSano Demolition Co., Inc.*, 194 AD3d 607, 608 [1st Dept 2021]; *Vernieri v Empire Realty Co.*, 219 AD2d 593, 598 [2d Dept 1995]). Finally, as plaintiff has not addressed this aspect of RXR Office's motion, RXR Office is entitled to dismissal of the section 241 (6) cause of action to the extent it is premised on Industrial Code §§ 23-1.7 (a), (b), (c), (f), (g), (h) and 23-2.1, OSHA, the New York City Administrative Code, Multiple Dwelling Law, and the New York City Building Code (*Debennedetto*, 190 AD3d at 936; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]).

Plaintiff, in his opposition papers, does address Industrial Code §§ 23-1.7 (d), (e) (1), and (e) (2),[11] which deal with tripping and slipping hazards. RXR Office is entitled to dismissal of the claim to the extent it is premised on section 23-1.7 (d) based on plaintiff's deposition testimony that he tripped and fell over the electric coupling because

[11] Under the circumstances here, the fact that plaintiff first identified these specific subsections of Industrial Code § 23-1.7 in his opposition papers is not an impediment to their consideration (*Simmons v City of New York*, 165 AD3d 725, 729 [2d Dept 2018]).

that section addresses slipping hazards not tripping hazards (*Fonck v City of New York*, 198 AD3d 874, 875-876 [2d Dept 2021]; *Nankervis v Long Is. Univ.*, 78 AD3d 799, 801 [2d Dept 2010]). In addition, RXR Office has demonstrated that section 23-1.7 (e) (1)[12] is inapplicable because the area at issue was not a passageway within the meaning of the section (*Stewart v Brookfield Off. Props., Inc.*, 212 AD3d 746, 747 [2d Dept 2023]; *Goncarz v Brooklyn Pier 1 Residential Owner, L.P.*, 190 AD3d 955, 957 [2d Dept 2021]).

With respect to Industrial Code § 23-1.7 (e) (2),[13] RXR Office contends that the staging/storage area where plaintiff fell cannot be considered a working area within the meaning of that section in light of the Appellate Division, First Department's decision in *Dacchille v Metropolitan Life Ins. Co.*, 262 AD2d 149, 149 [1st Dept 1999]), holding that a "wire mesh storage" area from which plaintiff obtained a reel of cable wire was not a working area for purposes of section 23-1.7 (e) (2) (*id.* at 149). The Court notes that the Appellate Division, Second Department similarly held that a storeroom was not a working area in *Conway v Beth Israel Med. Ctr.*, 262 AD2d 345, 346 [2d Dept 1999].

To the extent that *Dacchille* and *Conway* can be read as holding that storage areas cannot be considered working areas, this Court finds that more recent Appellate Division decisions from both the First and Second Department have essentially rejected such a holding. Rather, the more recent decisions, in determining whether an area is a working

[12] Industrial Code § 23-1.7 (e) (1), provides: "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."

[13] Industrial Code (12 NYCRR) § 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."

area, look to whether the plaintiff's job duties at issue required the plaintiff to work or pass the area in question (*Nicholson*, 205 AD3d at 621; *Gonzalez v G. Fazio Constr. Co., Inc.*, 176 AD3d 610, 611 [1st Dept 2019]; *Torres v Forest City Ratner Cos., LLC*, 89 AD3d 928, 929 [2d Dept 2011]; *Harkin v City of New York*, 69 AD3d 901, 902 [2d Dept 2010]).[14]

Under such a standard, plaintiff's deposition testimony that his supervisor directed him to place the mini in the back of the staging area next to the other minis is sufficient to demonstrate, at the very least, a factual issue as to whether the accident location was an area plaintiff was required to pass as part of his work, and thus, a working area within the meaning of Industrial Code (12 NYCRR) § 23-1.7 (e) (2). Additionally, contrary to RXR Office's contention, there is at least a factual issue as to whether the single electric coupling on which plaintiff tripped may be considered an "accumulation" of "debris" or "scattered . . . material" within the meaning of section 23-1.7 (e) (2) (*Deleo v JPMorgan Chase & Co.*, 199 AD3d 482, 482-483 [1st Dept 2021] [bottle cap]; *Rudnitsky v Macy's Real Estate, LLC*, 189 AD3d 490, 491 [1st Dept 2020] [two-by-four]; *Gonzalez v Magestic Fine Custom Home*, 115 AD3d 798, 799 [2d Dept 2014] [electrical wire]). As such, RXR Office has failed to demonstrate its prima facie entitlement to dismissal of plaintiff's Labor Law § 241 (6) claim to the extent it is premised on section 23-1.7 (e) (2). This portion of RXR Office's motion must therefore be denied regardless of the

[14] Some Appellate Division, First Department cases define a "working area" as a "physically defined area that workers routinely cross[] to access equipment and materials" (*Castaldo v F.J. Sciame Constr. Co. Inc.*, 222 AD3d 579, 579 [1st Dept 2023]; *Quigley v Port Auth. of N.Y. & N.J.*, 168 AD3d 65, 68 [1st Dept 2018]; *Smith v Hines GS Props., Inc.*, 29 AD3d 433, 433-434 [1st Dept 2006]). To the extent that the general use of the area is a factor, RXR Office has failed to submit evidence that workers did not regularly pass the accident location to access the minis kept there or the material or equipment stored in the boxes.

sufficiency of plaintiff's opposition papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

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" (*Valencia v Glinski*, 219 AD3d 541, 545 [2d Dept 2023] *quoting Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 801 [2d Dept 2005]; *Carranza v JCL Homes, Inc.*, 210 AD3d 858, 860 [2d Dept 2022]). 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 (*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]).

Here, the record, including the deposition testimony of Mather, RXR Office's witness, that RXR Office did not provide specific direction to the contractors performing the work and plaintiff's deposition testimony that he received all of his instructions regarding his work from his Construction Resources supervisor, demonstrates, prima facie, that RXR Office did not supervise or control plaintiff's work for purposes of plaintiff's Labor Law § 200 and common-law negligence causes of action (*Wilson v Bergon Constr. Corp.*, 219 AD3d 1380, 1383 [2d Dept 2023]; *Kefaloukis v Mayer*, 197 AD3d 470, 471 [2d Dept 2021]).

On the other hand, as discussed above, the record shows that the accident resulted from a dangerous property condition. With respect to this theory of liability, RXR Office has failed to submit evidence showing that it did not have control of the accident location, which, as discussed above, occurred in space retained by it (*Bessa v Anflo Indus., Inc.*, 148 AD3d 974, 978 [2d Dept 2017]; *cf. Derosas v Rosmarins Land Holdings, LLC*, 148 AD3d 988, 991 [2d Dept 2017]), or submit any evidence addressing when the staging area was last cleaned or inspected before plaintiff's fall (*Cavedo v Flushing Commons Prop. Owner, LLC*, 217 AD3d 561, 562 [1st Dept 2023]; *Bessa*, 148 AD3d at 978; *see also Skerrett v LIC Site B2 Owner, LLC*, 199 AD3d 956, 958 [2d Dept 2021]). As such, RXR Office has failed to demonstrate its prima facie entitlement to summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action and its motion in this respect must be denied, regardless of the sufficiency of plaintiff's opposition papers (*Winegrad*, 64 NY2d at 853).

The portion of RXR Office's motion seeking summary judgment on its contractual indemnification claim as against Ameriprise must be denied for the reasons discussed above in granting the portion of Ameriprise's motion dismissing RXR Office's contractual indemnification claim against it. The portion of RXR Office's motion addressed to its contractual and common-law indemnification claims against Clune must be denied despite Clune's failure to submit opposition papers (*Caliber Home Loans, Inc. v Squaw*, 190 AD3d 926, 927-928 [2d Dept 2021]; *Exit Empire Realty v Zilelian*, 137 AD3d 742, 743 [2d Dept 2016]) since RXR Office has failed to demonstrate, prima facie, that it was not itself negligent (*Bennett v DA Assoc., LLC*, 217 AD3d 650, 651 [2d Dept

2023]; *Zukowski v Powell Cove Estates Home Owners Assn., Inc.*, 187 AD3d 1099, 1102 [2d Dept 2020]), that plaintiff's injury arose out of Clune's contract with Ameriprise, or that Clune was in any way at fault for the accident (*Chapa*, 221 AD3d at 857; *Zukowski*, 187 AD3d at 1102). Finally, the portion of RXR Office's motion addressed to its common-law indemnification claim against Konsker must be denied for the reasons this court noted in granting the portion of Konsker's motion seeking dismissal of RXR Office's common-law indemnification claims.

CONCLUSION

Accordingly, it is hereby

ORDERED that Ameriprise's motion (Seq. 11) is granted only to the extent that the complaint and all crossclaims and counterclaims against it are dismissed. Ameriprise's motion is otherwise denied, and it is further

ORDERED that RXR Office's motion (Seq. 12) is granted only to the extent that plaintiff's Labor Law § 240 cause of action is dismissed and his Labor Law § 241 (6) cause of action is dismissed to the extent it is premised on Industrial Code §§ 23-1.7 (a), (b), (c), (d), (e) (1), (f), (g), (h) and 23-2.1, OSHA, the New York City Administrative Code, Multiple Dwelling Law, and the New York City Building Code. RXR Office's motion is otherwise denied, and it is further

ORDERED that Cushman's motion (Seq. 13) is granted, and the complaint is dismissed as against Ameriprise. The third-party complaint, and any crossclaims asserted against Cushman, are dismissed, and it is further

ORDERED that Konsker's motion (Seq. 14) is granted, and the complaint and all crossclaims are dismissed as against it.[15]

In view of the foregoing, and as Clune Construction Company, LP did not move for summary judgment dismissing the complaint, the action is severed, and the caption is amended to read as follows:

----------X

TRISTAN GRAY,

Plaintiff,

-against- Index No.: 504169/18

RXR 530 FIFTH OFFICE OWNER, LLC and CLUNE CONSTRUCTION COMPANY, LP,

Defendants.

----------X

All remaining arguments raised on the motions, and evidence submitted by the parties in connection thereto, have been considered by the Court, and are denied.

This constitutes the decision and order of the Court.

ENTER

J.S.C.

HON. WAVNY TOUSSAINT
J.S.C.

[15] By order dated April 18, 2024, the Court granted the unopposed motions by defendant S.B.A. Plumbing Corp (SBA Plumbing) (Seq. 09) and Waldorf Demolition (Waldorf) (Seq. 10) and dismissed the complaint and all crossclaims as against them.