SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD G. LATIN** **PART** **46M**

Justice

----------X

LUIS ROMERO CALIX,

Plaintiff,

-against-

THE UNION THEOLOGICAL SEMINARY IN THE CITY OF NEW YORK, THE TRUSTEES OF COLUMBIA UNIVERSITY, CONSIGLI & ASSOCIATES, LLC and CONSIGLI CONSTRUCTION NY LLC,

Defendants.

----------X

INDEX NO. 152806/2020

MOTION DATE 08/04/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

THE UNION THEOLOGICAL SEMINARY IN THE CITY OF NEW YORK and CONSIGLI CONSTRUCTION NY LLC i/s/h/a CONSIGLI ONSTRUCTION NY LLC,

Third-Party Plaintiffs,

-against-

ROSEMOUNT INTERIORS, INC.,

Third-Party Defendant.

----------X

Third-Party
Index No. 595982/2020

The following e-filed documents, listed by NYSCEF document number (Motion 001) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87

were read on this motion for SUMMARY JUDGMENT.

In this Labor Law action, third-party defendant Rosemount Interiors, Inc. ("Rosemount") moves, pursuant to CPLR 3212, for: (1) summary judgment dismissing plaintiff's Labor Law § 240 (1) claim; and (2) summary judgment dismissing the third-party complaint.

Plaintiff Luis Romero Calix cross-moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law § 240 (1) as against defendants The Union

Theological Seminary in the City of New York ("UTS") and Consigli Construction NY, LLC ("Consigli") and to set this matter down for an assessment of damages.

BACKGROUND

This action arises out of an accident that occurred on March 5, 2020 at 3041 Broadway in Manhattan (the premises). Plaintiff alleges that he slipped and fell down a staircase while working as a laborer at the premises (NY St Cts Elec Filing [NYSCEF] Doc No. 1, verified complaint ¶ 76; NYSCEF Doc No. 47, verified bill of particulars ¶¶ 9, 15). Plaintiff alleges that UTS owned the premises (NYSCEF Doc No. 1 ¶¶ 26, 27). UTS retained Consigli as a construction manager to renovate the premises (NYSCEF Doc No. 64). Consigli, in turn, hired plaintiff's employer, Rosemount, as a subcontractor to perform painting work (NYSCEF Doc No. 54).[1]

Plaintiff testified that he was working for Rosemount on the date of the accident (NYSCEF Doc No. 48, plaintiff tr at 32). Plaintiff was plastering, painting, and scraping (*id.*). Plaintiff was walking down a staircase at the time of his accident (*id.* at 53). It was the first time that he used that staircase (*id.*). His accident occurred between the third and fourth floors when he was going to get a tool on the second floor (*id.* at 54, 66). The staircase had a handrail on the right side (*id.* at 56). The staircase was covered with Masonite to protect it during the renovation (*id.* at 58, 59). He testified that he did not "know what it is or what material it's made of" (*id.* at 59). Plaintiff testified that he "was just going down" the staircase and the "[Masonite] moved," causing him to slip and fall (*id.* at 57-58, 71-72). He stated that he was using the staircase because the elevator was "busy," meaning that the elevator was being used (*id.* at 54). Plaintiff never performed any physical work on the staircase (NYSCEF Doc No. 49, plaintiff tr at 140).

[1] Plaintiff previously discontinued the action as against defendants The Trustees of Columbia University and Consigli Associates, LLC (NYSCEF Doc Nos. 12, 13).

Mark Placek testified that he is a senior superintendent employed by Consigli Construction (NYSCEF Doc No. 50, Placek tr at 12, 13). The project entailed renovating a wing of a building (*id.* at 19). Consigli used Masonite to protect the staircases for the project (*id.* at 24, 33, 43). The Masonite was affixed to the staircase using tape (*id.* at 24). Consigli walked the site multiple times per day and inspected site conditions (*id.* at 25). Consigli maintained the Masonite that was placed in the stairways on the project (*id.* at 52).

Consigli's superintendent's incident/accident report, completed on March 5, 2020 by Placek, states, in part, that:

> "Luis Romero was coming down north stair carrying a taping knife and tray. We believe he slipped on floor protection, he was found at the landing on the third floor. We immediately called 911 and went into our safety protocol and sent managers to gate to wait for ambulance and to hold ambulance for paramedics" (NYSCEF Doc No. 76).

Cornelius McCormack testified that he is Rosemount's president and sole shareholder (NYSCEF Doc No. 52, McCormack tr at 8-9). He testified that he did not "instruct the workers to run or walk" on the jobsite (*id.* at 29). In March 2020, Rosemount's work was about 50% completed (*id.* at 30). On March 5, 2020, McCormack gave the workers instructions to continue painting and plastering and then left the site (*id.* at 32). After McCormack left, Oscar Membreno (Membreno) was in charge of the workers (*id.* at 34). McCormack testified that he received a telephone call regarding the accident (*id.* at 37). Olimpo Babillo told him that plaintiff "was walking down the stairs and . . . there was Masonite taped to the marble stairs treads. And when he stepped on the Masonite it went out from under him and he fell down the stairs" (*id.* at 38). McCormack then returned to the jobsite (*id.* at 40). Consigli's safety representative informed McCormack that plaintiff "fell down the stairs" (*id.* at 41). Membreno went to the hospital with plaintiff (*id.* at 43). McCormack testified that the Masonite had been affixed to the staircase; some

of it was taped with blue masking tape (*id.* at 44). McCormack testified that Consigli did not issue any safety violations to Rosemount as a result of the accident (*id.* at 46, 64).

Membreno testified at his deposition that he was a worker employed by Rosemount (NYSCEF Doc No. 51, Membreno tr at 17). Membreno stated that Rosemount workers were not permitted to run on the project (*id.* at 45). When Membreno arrived at the staircase after the accident, he observed "a cardboard-like material taped onto the step and then on top of that, there was this . . . same material" (*id.* at 92). Rosemount did not perform work on the staircases (*id.* at 50).

Consigli's daily log dated March 5, 2020 states that "Worker Louis Romero was injured while running down the stairs. He slipped, fell and broke his right tibia" (NYSCEF Doc No. 53 at 10). It also states "Worker Louis Romero failed to attend safety violation [sic]. CCNY received violation from DOB" (*id.*).

A C-2 report dated March 6, 2020 states that "Employee states that he was walking down the stairs when the protection used to cover the stairs was loose and came apart causing his fall" (NYSCEF Doc No. 77 at 2).

In addition, a C-3 report dated March 5, 2020 indicates that plaintiff "slipped and fell down the stairs and got injured . . . [when he] was going to the 2nd Fl to get a handle" (NYSCEF Doc No. 78 at 1).

Plaintiff commenced this action on March 13, 2020, seeking recovery for common-law negligence and violations of Labor Law §§ 200, 240 (1), 240 (2), 240 (3), and 241 (6) (NYSCEF Doc No. 1).

DISCUSSION

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (*Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012] [internal quotation marks and citation omitted]). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment" (*id.*). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). "On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party'" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise an issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

A. Timeliness of Plaintiff's Cross-Motion for Summary Judgment

Plaintiff contends that the court may consider his cross-motion for summary judgment because it addresses the same issue as Rosemount's motion, i.e., Labor Law § 240 (1). UTS and Consigli assert that plaintiff's cross-motion is "grossly untimely" and that plaintiff offers no excuse for the belated filing. UTS and Consigli also maintain that plaintiff's cross-motion for summary judgment is procedurally improper.

"Although a court may decide an untimely cross motion, it is limited in its search of the record to those issues or causes of action 'nearly identical' to those raised by the opposing party's timely motion" (*Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 419 [1st Dept 2014], quoting *Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006], *appeal*

dismissed 9 NY3d 862 [2007]; *see also Connor v AMA Consulting Engrs. PC*, 213 AD3d 483, 484 [1st Dept 2023], *lv dismissed in part, denied in part* 40 NY3d 1088 [2024]; *Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621, 628 [1st Dept 2015]). "An otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion" (*Filannino*, 34 AD3d at 281).

Applying these principles, the court shall consider plaintiff's cross-motion for summary judgment under Labor Law § 240 (1) because it addresses the same cause of action as Rosemount's timely motion for summary judgment. Although UTS and Consigli assert that "[a] cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party" (*Mango v Long Is. Jewish-Hillside Med. Ctr.*, 123 AD2d 843, 844 [2d Dept 1986]), "[s]uch a technical defect may be disregarded where, as here, there is no prejudice, and [the opposing party] had ample opportunity to be heard on the merits of the relief sought" (*Kleeberg v City of New Yor*k, 305 AD2d 549, 550 [2d Dept 2003] [internal quotation marks and citation omitted]). UTS and Consigli have not identified any prejudice and have had an opportunity to take a position on plaintiff's cross-motion for summary judgment. The court, therefore, turns to the respective arguments with respect to plaintiff's Labor Law § 240 (1) claim.

B. Labor Law § 240 (1)

Rosemount moves for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim, arguing that a fall from permanent stairway is not covered under the statute.

For his part, plaintiff counters that the mere fact that a worker falls from a permanent stairway does not remove an accident from the protections of Labor Law § 240 (1). Plaintiff contends that he is entitled to judgment because: (1) the staircase was the sole means of access to

the second floor because the elevator was out of service; (2) the Masonite covering became unsecured and moved; and (3) the handrail was wobbly and moved and failed to protect plaintiff from falling.

To support his position, plaintiff submits an affidavit indicating that, as he stepped onto the stairwell leading from the fourth floor to the third floor, he immediately held onto the handrail on the right side (NYSCEF Doc No. 65, plaintiff aff, ¶ 11). Plaintiff avers that "[t]he handrail was wobbly, loose and not secure" (*id.*). He further states that "the elevator was not in use and out of service at the time because the elevator was being used for major deliveries," and that the elevator was out of service for up to one hour or longer (*id.*, ¶ 19). Plaintiff states that the only means of access to the second floor was the staircase, which he was not prohibited from using (*id.*, ¶ 20).

In opposition to plaintiff's cross-motion, UTS and Consigli contend that plaintiff asserts, for the first time in his cross-motion, new theories never asserted in the complaint or bill of particulars. UTS and Consigli further argue that plaintiff's affidavit only creates feigned issues of fact in response to Rosemount's motion for summary judgment. UTS and Consigli also submit an affidavit from Placek, in which he states that: (1) Consigli's daily report for March 5, 2020 does not mention that the elevator was taken out of service for any reason, including for a delivery (NYSCEF Doc No. 74, Placek aff, ¶ 7); (2) Placek and other Consigli personnel inspected the three staircases at the site daily and he never observed the handrails to be wobbly, damaged or unsecured, and Placek was unaware of any complaints about the handrails prior to the accident (*id.*, ¶ 8); and (3) "this project had three working, operational and active staircases for workers to use on the accident date" (*id.*, ¶ 9).

In opposition and reply, Rosemount contends that plaintiff's claim that the staircase was the sole means of access between the floors is self-serving and directly contradictory to his prior testimony.

Labor Law § 240 (1), commonly known as the Scaffold Law, provides, in relevant part, as follows:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect or cause, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Labor Law § 240 (1) "imposes absolute liability on building owners and contractors whose failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011] [internal quotation marks and citation omitted]). To prevail on a Labor Law § 240 (1) cause of action, the plaintiff must establish that the statute was violated, and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287-289 [2003]).

The Court of Appeals has instructed that "courts must take into account the practical differences between 'the usual and ordinary dangers of a construction site, and . . . the extraordinary elevation risks envisioned by Labor Law § 240 (1)'" (*Ortiz*, 18 NY3d at 339, quoting *Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 843 [1994]). "[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide

adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

As a preliminary matter, UTS has not disputed that it was the owner of the building. There is also no dispute that UTS retained Consigli as a construction manager to renovate a part of the building (NYSCEF Doc No. 64; NYSCEF Doc No. 50, Placek tr at 19), and that Consigli hired Rosemount (NYSCEF Doc No. 54).

Contrary to Rosemount's contention, recent First Department cases hold that "'the fact that the staircase on which plaintiff fell was constructed as a permanent structure does not remove it from the reach of Labor Law § 240 (1)'" (*DaSilva v Toll GC LLC*, 224 AD3d 540, 541 [1st Dept 2024], citing *Gory v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 113 AD3d 550, 550-551 [1st Dept 2014]). As the Court has determined, the statute applies where the stairway is an elevated surface on which the plaintiff is required to work or is the sole means of access to the work area (*see DaSilva*, 224 AD3d at 541; *Caba v 587-91 Third Owner, LLC*, 213 AD3d 520, 521 [1st Dept 2023]; *Rivas v Nestle Realty Holding Corp.*, 188 AD3d 430, 430 [1st Dept 2020]; *Conlon v Carnegie Hall Socy., Inc.*, 159 AD3d 655, 655 [1st Dept 2018]).

Rosemount, UTS, and Consigli contend that plaintiff's affidavit contradicts his prior deposition testimony. It is true that "[a] party's affidavit that contradicts [that party's own] prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment" (*Harty v Lenci*, 294 AD2d 296, 298 [1st Dept 2002]; *see also Telfeyan v City of New York*, 40 AD3d 372, 373 [1st Dept 2007]). At the same time, however, statements in a party's affidavit may be considered where they amplify rather than contradict prior deposition testimony (*see e.g. Severino v 157 Broadway Assoc., LLC*, 84 AD3d 505, 506 [1st Dept 2011]; *Bosshart v Pryce*, 276 AD2d 314, 315 [1st Dept 2000]). Here, plaintiff's

statements regarding the handrail and that the staircase was the sole means of access to the second floor in his affidavit add more detail to his testimony but do not directly contradict his prior testimony (NYSCEF Doc No. 65, plaintiff aff, ¶¶ 11-19; NYSCEF Doc No. 48, plaintiff tr at 54, 56, 69, 71). When asked why the elevator was "busy," he stated that it was being used (NYSCEF Doc No. 48, plaintiff tr at 54). Counsel never inquired at plaintiff's deposition if the handrail was defective (*id.* at 56, 71).

Furthermore, plaintiff's affidavit does not raise a new theory of liability (*cf. Kolb v Beechwood Sedgewick LLC*, 78 AD3d 481, 482 [1st Dept 2010]). The complaint and bill of particulars allege that defendants failed to provide plaintiff with proper safety devices, in violation of Labor Law § 240 (1) (NYSCEF Doc No. 1 ¶¶ 49, 130-132; NYSCEF Doc No. 47 ¶ 16).

In this case, there are questions of fact as to whether Labor Law § 240 (1) applies. As plaintiff testified that he never performed any physical work in the staircase (NYSCEF Doc No. 49, plaintiff tr at 140), the stairway was not an elevated work surface (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Moreover, there are issues of fact as to whether the stairway from which plaintiff fell was a safety device within the meaning of Labor Law § 240 (1) (*see Gamez v Sandy Clarkson LLC*, 221 AD3d 453, 454 [1st Dept 2023] ["Given the existence of other means of access to the worksite, there is an issue of fact as to whether the staircase that plaintiff descended constituted a safety device under Labor Law § 240 (1)"]; *Waldron v City of New York*, 203 AD3d 565, 565-566 [1st Dept 2022] [where electrical foreman fell down stairway in a building, "Defendant has raised a question of fact as to whether, under the circumstances here, the stairway on which defendant fell was a safety device that could give rise to the coverage of Labor Law § 240 (1)"]; *Ramirez v Shoats*, 78 AD3d 515, 517 [1st Dept 2010], *appeal withdrawn* 18 NY3d 856 [2011] [question of fact as to whether the stairway was plaintiff's sole means of

access to and from his work area and thus was a safety device within the meaning of Labor Law § 240 (1)]). Plaintiff testified that he used the staircase because the elevator was "busy," i.e., was in use (NYSCEF Doc No. 48, plaintiff tr at 54, 69). While plaintiff avers that the elevator was being used for major deliveries at the time and the only way to access the second floor was via the staircase (NYSCEF Doc No. 65, plaintiff aff, ¶¶ 19, 20), Placek refutes this assertion. Indeed, Placek states that the daily report for the date of the accident does not mention that the elevator was taken out of service for any reason, and that if the elevator had been taken out of service, it would have been noted on the daily report (NYSCEF Doc No. 74, Placek aff, ¶ 7; *see also* NYSCEF Doc No. 53). Placek further asserts that there were three available staircases on the date of the accident (NYSCEF Doc No. 74, Placek aff, ¶ 9). Given these directly contradictory accounts as to whether the staircase was the sole means of access to plaintiff's work area, summary judgment is unwarranted on plaintiff's Labor Law § 240 (1) claim (*see Griffin v New York City Tr. Auth.*, 16 AD3d 202, 203 [1st Dept 2005]).

In sum, the branch of Rosemount's motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim and plaintiff's cross-motion for partial summary judgment under Labor Law § 240 (1) are denied.

C. Third-Party Claims for Contractual Indemnification

Rosemount moves for summary judgment dismissing the third-party claim for contractual indemnification. Article 4 of Rosemount's subcontract provides as follows:

> "A. To the fullest extent permitted by law, Subcontractor shall (1) defend, indemnify, hold harmless Contractor, Contractor's surety, Owner . . . from any and all demands, claims, causes of action, liabilities, losses, damages and expenses, including but not limited to attorneys' fees . . . *arising out of Subcontractor's performance of its Work under this Subcontract caused in whole or in part by the acts or omissions of Subcontractor or any of Subcontractor's*

> *subcontractors, suppliers, or other persons or entities for whose acts Subcontractor may be liable*; (2) assume on behalf of Indemnified Parties, the defense of any such demand, claim, cause of action, liability, loss, damage or expense which may be brought against them or any of them; and (3) reimburse the Indemnified Parties for any attorneys' fees and expenses incurred by them with respect to any such claim, all regardless of whether or not such claim, liability, lien, demand, or cause of action is caused in part by an Indemnified Party" (NYSCEF Doc No. 54, article 4 [A] [emphasis supplied]).

Rosemount asserts that it was not negligent in the happening of the accident. Additionally, Rosemount contends that it was not responsible for placing and maintaining the Masonite that plaintiff slipped on, and did not perform work on the staircase.

In response, UTS and Consigli contend that the indemnification provision does not condition Rosemount's indemnification based on negligence. UTS and Consigli argue that the accident occurred as the result of plaintiff's acts and omissions while traversing down the staircase in the course of his employment with Rosemount. Furthermore, UTS and Consigli maintain that the indemnification provision does not violate General Obligations Law § 5-322.1.

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]).

Pursuant to General Obligations Law § 5-322.1, a clause in a construction contract which purports to indemnify a party for its own negligence is against public policy and is void and

unenforceable (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997], *rearg denied* 90 NY2d 1008 [1997]). Nevertheless, an indemnification agreement that authorizes partial indemnification "to the fullest extent permitted by law" is enforceable (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]; *Hernandez v Argo Corp.*, 95 AD3d 782, 783-784 [1st Dept 2012]; *Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [1st Dept 2002], *lv denied* 99 NY2d 511 [2003]). Moreover, even if the indemnification provision does not contain this savings language, the provision may still be enforced where the party to be indemnified is found to be free of any negligence (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]).

Contrary to Rosemount's contention, the indemnification provision in its subcontract does not contain a negligence trigger (*see Brown*, 76 NY2d at 177; *see also Gonzalez v DOLP 205 Props. II, LLC*, 206 AD3d 468, 471 [1st Dept 2022]; *Gomes v Vornado 640 Fifth Ave. L.L.C.*, 195 AD3d 486, 486 [1st Dept 2021]). Rather, the provision requires Rosemount to defend and indemnify UTS and Consigli for all claims "arising out of Subcontractor's performance of its Work under this Subcontract caused, in whole or in part, by the acts or omissions of Subcontractor . . ." (NYSCEF Doc No. 54, article 4 [A]). In any event, as argued by UTS and Consigli, Consigli's daily log for the date of the accident states that "Worker Louis Romero was injured while running down the stairs," "which was part of the reason he slipped, fell and broke his right tibia" (NYSCEF Doc No. 53 at 10). Plaintiff's negligence may be imputed to Rosemount under the doctrine of respondeat superior for purposes of determining liability for contractual indemnification (*see Wittenberg v Long Is. Power Auth.*, 225 AD3d 730, 734 [2d Dept 2024] [plaintiff's negligence while working on electrical lines "may be imputed to . . . his employer for purposes of determining liability for contractual indemnification"]; *Mercado v Caithness Long Is. LLC*, 104 AD3d 576, 578 [1st Dept 2013] ["plaintiff's failure to wear a hard hat can be imputed to FMP, his employer, for

purposes of contractual indemnity"]; *see also Guiga v JLS Constr. Co.*, 255 AD2d 244, 245 [1st Dept 1988]). Moreover, as the indemnification provision contains recognized savings language, "[t]o the fullest extent permitted by law," UTS and Consigli will not be indemnified for their own negligence (*see Brooks*, 11 NY3d at 210). Accordingly, Rosemount is not entitled to dismissal of the third-party claims for contractual indemnification (*see Gomes*, 195 AD3d 486).

D. Third-Party Claims for Breach of Contract

Rosemount argues that it did not breach its contract to procure insurance. Rosemount asserts that it procured insurance and named Consigli as an additional insured, as required by its contract (NYSCEF Doc No. 54; NYSCEF Doc No. 55 at 24). In addition, Rosemount maintains that UTS and Consigli cannot show any damages for any failure to obtain insurance.

In opposition, UTS and Consigli contend that they have tendered their defense to Rosemount's carrier but have not received a response.

It is well established that an agreement to procure insurance is distinct from an agreement to indemnify (*see Kinney v Lisk Co.*, 76 NY2d 215, 218 [1990]). "[A] party moving for summary judgment dismissing a breach of contract claim for failure to procure insurance meets its prima facie burden by identifying the contract provision requiring the procurement of insurance and tendering the procured insurance policy that satisfies that requirement" (*Cooper v BLDG 7th St. LLC*, -- AD3d -- , 2024 NY Slip Op 05047, *1 [1st Dept 2024]).

Rosemount's subcontract required it to purchase commercial general liability insurance and to name Contractor and Owner as additional insureds on a primary and non-contributory basis (NYSCEF Doc No. 54, article 3 [A], [B], [C]). Rosemount has demonstrated that it satisfied this requirement with respect to Consigli, with an additional insured endorsement extending coverage to "[a]ny person or organization for whom you are performing operations when you and such

person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy . . .” (NYSCEF Doc No. 55 at 24). Moreover, that Rosemount’s insurer has refused to defend and indemnify Consigli is not a basis for a breach of contract claim (*see Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]).

Nevertheless, Rosemount has failed to establish that it was not obligated to purchase insurance for UTS (*see Ryan*, 96 AD3d at 553). Rosemount’s subcontract required it to name “Owner” as an additional insured on its commercial general liability policies (NYSCEF Doc No. 54, article 3 [A], [B], [C]).

Furthermore, Rosemount has failed to demonstrate that UTS did not sustain any damages. Generally, where there is a breach of an agreement to procure insurance, the breaching party is responsible for all “resulting damages, including the liability [of the general contractor and the site owner] to [the] plaintiff” (*Kennelty v Darlind Constr.*, 260 AD2d 443, 445 [2d Dept 1999] [internal quotation marks and citation omitted]; *see also Roblee v Corning Community Coll.*, 134 AD2d 803, 805 [3d Dept 1987], *lv denied* 72 NY2d 803 [1988]). By contrast, where the promisee has its own insurance coverage, recovery for breach of a contract to procure insurance is limited to the promisee’s out-of-pocket expenses in obtaining and maintaining such insurance, i.e., the premiums and any additional costs incurred such as deductibles, co-payments, and increased future premiums (*Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 114 [2001]; *McLaughlin v Ann-Gur Realty Corp.*, 107 AD3d 469, 470 [1st Dept 2013]; *Cucinotta v City of New York*, 68 AD3d 682, 684 [1st Dept 2009]). UTS and Consigli indicate that Rosemount has its own insurance (NYSCEF Doc No. 59 ¶ 20), which Rosemount appears to concede (NYSCEF Doc No. 81 n 1). Therefore,

UTS may recover its out-of-pocket costs in obtaining and maintaining insurance (*see Cucinotta*, 68 AD3d at 684).

In light of the above, the court only dismisses Consigli's breach of contract claim.

E. Third-Party Claims for Common-Law Indemnification and Contribution

UTS and Consigli did not oppose dismissal of their common-law indemnification and contribution claims. Accordingly, these claims are dismissed as abandoned (*see Goya v Longwood Hous. Dev. Fund Co., Inc.*, 192 AD3d 581, 585 [1st Dept 2020] ["because AIM and Cross did not oppose C&W's motion for summary judgment dismissing their claims against it for common-law indemnification and contribution, those claims should be dismissed"]).

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 001) of third-party defendant Rosemount Interiors, Inc. for summary judgment is granted to the extent of dismissing the third-party claims for common-law indemnification and contribution, and the third-party claim for breach of contract for failure to procure insurance brought by Consigli Construction NY, LLC i/s/h/a Consigli Construction NY LLC, and the motion is otherwise denied; and it is further

ORDERED that the cross-motion of plaintiff Luis Romero Calix for partial summary judgment on the issue of liability under Labor Law § 240 (1) is denied.

11/1/2024
DATE

RICHARD G. LATIN, J.S.C.

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