At an IAS Term, Part 99, 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 6TH day of November 2024.

P R E S E N T:

HON. RICHARD J. MONTELIONE, J.S.C.
Justice.

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KAREN PRINGLE,

Plaintiff,

-against-

Index No.: 502915/18

MS#s 7, 8, 9, 10, 11, and 12

325 LAFAYETTE ASSOCIATES LLC, SLATE PROPERTY GROUP LLC, BRITT REALTY, LLC, URBAN PRECAST LLC, CRANES EXPRESS, INC., U.S. CRANE & RIGGING, LLC, US CRANE, LLC, and NEWBURGH IRON, LLC,

Defendants.

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BRITT REALTY, LLC,

Third-Party Plaintiff,

-against-

OZ SOLUTIONS, INC.,

Third-Party Defendant.

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BRITT REALTY, LLC,

Second Third-Party Plaintiff,

-against-

URBAN PRECAST, LLC,

Second Third-Party Defendant.

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Pringle, K. v. 325 Lafayette Associates LLC, et al., Index No. 502915/2018

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URBAN PRECAST, LLC,

Third Third-Party Plaintiffs,

-against-

NEWBURGH IRON, LLC,

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	208-210, 224-226, 241, 250-252 278-279, 353-354, 370, 371-372, 388 284, 300, 316, 396, 402, 404, 409, 411, 417, 419-420, 425-426, 430-431, 435,
Opposing Affidavits/Answer (Affirmations)	436-437, 442, 444, 446, 447, 448, 449
Affidavits/ Affirmations in Reply	450, 451, 452, 460, 461
Other Papers:	

Relief Sought

Upon the foregoing papers, defendant/second third-party defendant/third third-party plaintiff Urban Precast, LLC (Urban Precast), moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint, the second third-party complaint, and all cross-claims and, alternatively, granting it summary judgment on its common-law indemnification and contractual indemnification claims against defendant/third third-party defendant Newburgh Iron, LLC (Newburgh Iron) (motion sequence number 7). Plaintiff Karen Pringle (plaintiff) moves for an order, pursuant to CPLR 3212, granting her partial summary judgment in her favor with respect to liability on her Labor Law § 240 (1) and 241 (6) causes of action as against defendant 325 Lafayette Associates LLC (325 Lafayette), and defendant/third-party plaintiff/second third-party plaintiff Britt Realty, LLC (Britt Realty) (motion sequence

number 8). Defendants 325 Lafayette, Slate Property Group, LLC (Slate Property) and Britt Realty (collectively referred to as the Owner Defendants) move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint, all counterclaims, and cross-claims as against them and granting Britt Realty summary judgment in its favor on its contractual indemnification claims against Urban Precast and against third-party defendant Oz Solutions, Inc. (Oz Solutions) (motion sequence number 9). Newburgh Iron moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint, the third third-party complaint and any cross-claims and/or counterclaims as against it (motion sequence number 10). By way of separate cross-motions, Oz Solutions cross-moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint, the third-party complaint, and any cross claims as against it (motion sequence numbers 11 and 12).

Summary of Disposition

Urban Precast's motion (motion sequence number 7) is granted to the extent that plaintiff's Labor Law §§ 200, 240 (1) and 241 (6) causes of action are dismissed as against it. The motion is otherwise denied.

Plaintiff's motion (motion sequence number 8) is denied.

The Owner Defendants' motion (motion sequence number 9) is granted to the extent that: (1) the complaint and any and all counterclaims and cross-claims are dismissed as against Slate Property; (2) with respect to 325 Lafayette and Britt Realty, plaintiff's Labor Law § 241 (6) cause of action is dismissed to the extent that it is premised on Industrial Code (12 NYCRR) §§

23-1.5, 23-1.7 (b), (c), (d), (e), (f), (g), and (h), 23-1.16 and 23-1.33. The Owner Defendants' motion is otherwise denied.[1]

Newburgh Iron's motion (motion sequence number 10) is granted to the extent that plaintiff's causes of action premised on Labor Law §§ 200, 240 (1) and 241 (6) are dismissed as against it. The motion is otherwise denied.

Oz Solutions' cross-motion for an order dismissing plaintiff's complaint pursuant to CPLR 3212 (motion sequence number 11) is granted only to the extent that plaintiff's Labor Law § 241 (6) cause of action, premised on Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7 (b), (c), (d), (e), (f), (g), and (h), 23-1.16 and 23-1.33, is dismissed and granted to the extent that plaintiff's Labor Law §§ 200, 240 (1) and 241 (6) causes of action are dismissed as against Urban Precast and Newburgh Iron and the remainder of the motion is otherwise denied. Oz Solutions' cross-motion for an order dismissing the third-party complaint and all other claims against third-party defendant Oz Solution pursuant to CPLR 3212 (motion sequence number 12) is denied.

The court additionally notes that stipulations of discontinuance, each dated December 9, 2022 (NYSCEF Doc Nos. 180 and 181), demonstrate that the action has been discontinued as against defendants Crane Express Inc. and US Crane and Rigging LLC.[2]

Background

[1] The Owner Defendants, in their memorandums of law in reply, contend that this court should decline to consider the affirmations in opposition to the Owner Defendants' motion on the ground that those affirmations improperly included legal arguments in the affirmations rather than in separate briefs in violation of Uniform Rules for Trial Courts (22 NYCRR) § 202. 8 (c). This court, however, choses to ignore such defect as any violation of the requirements of section 202. 8 (c) has not caused any confusion or hindered the Owner Defendants' ability to respond to the factual and legal arguments of the other parties in this action (*see Lagattuta-Spataro v Sciarrino*, 191 AD3d 1355, 1356 [4th Dept 2021]; *Matter of County of Essex (Golden Ring Intl. , Inc.)*, 195 AD3d 1187, 1187-1188 [3d Dept 2021], *lv denied* 38 NY3d 904 [2022]; CPLR 2001).

[2] The court notes that defendant US Crane LLC has not moved for summary judgment and no party has addressed its role in the project. At its deposition, however, US Crane LLC's witness testified that it was not in operation in New York City at the time of plaintiff's accident and that it was not involved with the project at issue.

Plaintiff pleads causes of action premised on common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6) based on injuries she alleges she suffered on July 31, 2017, while she was on a staircase between the fifth and sixth floor of a building under construction when she was struck on her head and the back of her neck by a piece of a two-by-four that fell from above. The building site at issue was owned by 325 Lafayette, which hired Britt Realty to act as the general contractor for the construction of an eight-story residential and commercial building (the Building). Britt Realty hired Urban Precast to manufacture and install precast concrete planks, and Urban Precast asserts that it hired defendant U.S. Crane & Rigging, LLC, (US Crane) to provide a crane to lift the planks and related materials, and also hired Newburgh Iron to perform the work related to the actual installation of the planks.[3] Britt Realty also hired Oz Solutions to provide laborers for cleaning, debris pickup and flagging duties.

According to plaintiff's deposition testimony, she was employed by Oz Solutions, and spent the morning of July 17, 2017, flagging cars on the street in front of the Building. After lunch, "Stefan", who plaintiff believed worked for 325 Lafayette, told plaintiff to sweep the stairs. At around 1:00 p.m., while plaintiff was sweeping a staircase located between the fifth and sixth floor of the Building, a large object fell from above and hit plaintiff on her head, neck, and back, causing plaintiff to fall into the staircase wall. After she hit the wall, plaintiff looked down and observed that the object that struck her was a large two-by-four. Plaintiff asserted that at the time of the accident, the staircase above the sixth floor was open to the sky, and that, although she did not see them at the time of the accident, there were people working on the roof. Following the accident, plaintiff went down the stairway and spoke with Stefan, who she asserts, thereafter went up the stairs to investigate what occurred. After Stefan returned, a worker

[3] According to Thomas Auringer, Urban Precast and Newburgh Iron are distinct entities that are owned by him and that Urban Precast would generally use Newburgh Iron for the installation work on its various projects.

plaintiff believed to be a supervisor who was wearing a tee shirt with "Uban" or "Urban" written on it, apologized to plaintiff, stating that he was sorry for what happened and asked if plaintiff was "all-right".

James Campbell, one of plaintiff's coworkers with Oz Solutions, testified at his deposition that he was sweeping steps near plaintiff at the time of the accident. Although he could not see plaintiff from where he was working, he heard a loud bang and heard plaintiff scream, and when he arrived at plaintiff's location, he observed plaintiff holding her head and noticed a two-by-four which plaintiff asserted was what struck her. Campbell likewise stated that the stairway was open at the top, and that, while he could not see anyone working above them, he could hear work being performed. After walking downstairs with plaintiff, Campbell observed her speak with the supervisor for the general contractor after which Campbell drove plaintiff home.

Oren Ziv, an owner of Oz Solutions and a consultant for Britt Realty, testified at each of his depositions that plaintiff, in fact, was fired from Oz Solutions a few days before the date of the accident and that she was not at the jobsite on that date.

Similarly, Stefano Cafiso, who was Britt Realty's project manager, testified that, contrary to plaintiff's testimony, no one ever informed him of an accident at the jobsite on the date of the alleged accident, and he did not recall plaintiff coming up to him and mentioning an accident. If plaintiff had informed him of such an accident, Cafiso asserts that he would have noted it in the daily report or, if an ambulance was called to the jobsite, he would have prepared an accident report. While Cafiso noted that several trades, including millworkers, plumbers, and electricians,

used two-by-fours in their work, he asserted that there was no reason for Urban Precast to use two-by-fours in its installation of the precast planks.[4]

With respect to Urban Precast's role on the project, Joseph Dunham testified at his deposition that it played no role in the actual installation of the precast concrete planks, which he believed may have been installed by Newburgh Iron. Dunham asserted that, to his knowledge, two-by-fours were not needed for the installation of concrete planks.

Thomas Auringer, the owner of Urban Precast, Newburgh Iron, and U.S. Crane & Rigging, testified at his deposition that Urban Precast manufactured the concrete planks for the project and subcontracted their installation to Newburgh Iron. Although Newburgh Iron's workers might have used a piece of plywood when they were filling in the spaces between the planks with grout, Auringer asserted that none of their work involved the use of two-by-fours.

Ibrahima Adamou testified at his deposition that he worked as a laborer on the installation of the precast concrete planks. Adamou was not entirely sure who employed him at the time of the accident since, at one point, he was employed by Urban Precast but, at a later point in time, he started receiving checks from Newburgh Iron. Adamou denied that he and his coworkers used two-by-fours in the precast concrete plank installation work, denied that he or his coworkers dropped a two-by-four on plaintiff, and denied having a conversation with anyone regarding a falling two-by-four.

Discussion

Labor Law Defendants

In moving for summary judgment, Urban Precast and Newburgh Iron each assert that they are not proper defendants within the meaning of Labor Law §§ 240 (1) and 241 (6). In this

[4] Cafiso did not know that Urban Precast had subcontracted the plank installation work to Newburgh Iron.

respect, Urban Precast and Newburgh Iron were not owners or general contractors, the entities primarily subject to liability under sections 240 (1) and 241 (6). As subcontractors, however, Urban Precast and Newburgh Iron 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]; *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]).

Urban Precast and Newburgh Iron have each demonstrated, *prima facie*, that they were not statutory agents of 325 Lafayette or Britt Realty. Namely, neither Urban Precast nor Newburgh Iron were in contractual privity with Oz Solutions, plaintiff's employer (*see Russin*, 54 NY2d at 318; *cf. Mogrovejo v. HG Hous. Dev. Fund Co., Inc.*, 207 AD3d 457, 461 [2d Dept 2022]). Additionally, Urban Precast's contract with Britt Realty (Urban-Britt Realty Contract, Exhibit A, General Scope of Work, NY St Cts Elec Filing [NYSCEF] Doc No. 222) contains no language suggesting that Britt Realty delegated any of its site safety obligations to Urban Precast and, indeed, language that would have required Urban Precast to provide edge protection and safety planking to protect openings below its work was crossed out and initialed (Urban-Britt Contract, Exhibit A, General Scope of Work § II [37], [44], NYSCEF Doc No. 222) (*see*

Giannas v. 100 3rd Ave. Corp., 166 AD3d 853, 856 [2d Dept 2018]; *cf. Walls v. Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Drzewinski*, 70 NY2d at 776-777; *Rooney v. D.P. Consulting Corp.*, 204 AD3d 428, 429 [1st Dept 2022]). Even though, as discussed below, there are factual issues as to whether Newburgh Iron was responsible for the two-by-four falling onto plaintiff, in the absence of control over the stairway where plaintiff was working, control over plaintiff's work, or responsibility for safety devices or the safety of the area where plaintiff was working, Newburgh Iron and Urban Precast cannot be held liable as statutory agents for purposes of sections 240 (1) and 241 (6) (*see Burns v. Lecesse Constr. Servs. LLC*, 130 AD3d 1429, 1432 [4th Dept 2015]; *Coque v. Wildflower Estates Devs., Inc.*, 31 AD3d 484, 488 [2d Dept 2006]; *Kwoksze Wong v. New York Times Co.*, 297 AD2d 544, 548-549 [1st Dept 2002]; *see also Giovanniello v. E.W. Howell, Co., LLC*, 104 AD3d 812, 813 [2d Dept 2013]; *but see Wellington*, 161 AD3d at 1279-1280). For the same reasons, Newburgh Iron and Urban Precast are also entitled to dismissal of the Labor Law § 200 cause of action as against them (*see Russin*, 54 NY2d at 316-317; *Delaluz v. Walsh*, 228 AD3d 619, 620 [2d Dept 2024]; *Sledge v. S.M.S. Gen. Contrs., Inc.*, 151 AD3d 782, 83 [2d Dept 2017]; *Lopes v. Interstate Concrete*, 293 AD2d 579, 580 [2d Dept 2002]).

There is no dispute, however, that 325 Lafayette and Britt Realty may be held liable under Labor Law §§ 240 (1) and 241 (6). In this regard, 325 Lafayette may be held liable as an owner in view of its concession it owned the subject premises (*see Gordon v. Eastern Ry. Supply*, 82 NY2d 555, 559-560 [1993]; *Jara v. Costco Wholesale Corp.*, 178 AD3d 687, 690 [2d Dept 2019]) and Britt Realty, which acted as the general contractor, may be held liable in view of its potential control of the project (*see McCarthy v. Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]; *Guaman v. 178 Ct. St., LLC*, 200 AD3d 655, 657 [2d Dept 2021]).

On the other hand, the Owner Defendants have demonstrated, *prima facie*, that Slate Property, a developer of the project, was not an owner, general contractor, or subcontractor on the project, and that it may not otherwise be held liable for the accident involving plaintiff. As plaintiff has not opposed this aspect of the Owner Defendants' motion, the Owner Defendants are entitled to summary judgment dismissing the action as against Slate Property.

Staged Accident

Based on Oren Ziv's testimony that Oz Solutions fired plaintiff on July 28, 2017, and that she was not working on the date of the accident, the Owner Defendants argue that the action against them should be dismissed because plaintiff staged her accident. Plaintiff, however, asserts that defendants are collaterally estopped from raising this issue based on the determination of the Workers' Compensation Board (Board) finding that plaintiff had a work-related injury on July 31, 2017, while employed by Oz Solutions. Contrary to plaintiff's contentions, the determination of the Board that plaintiff suffered a work related injury on July 31, 2017 does not collaterally estop the Owner Defendants from arguing that plaintiff was not employed at the time of the accident since they were not parties or in privity with parties to the Board's proceedings (*see Liss v. Trans Auto Sys.*, 68 NY2d 15, 21-23 [1986]; *Netzahuall v. All Will LLC*, 145 AD3d 492, 493 [1st Dept 2016]; *see also Cullen v. Moschetta*, 207 AD3d 699, 700 [2d Dept 2022]).[5]

[5] To the extent that the decision in *Velazquez-Guadalupe v. Ideal Bldrs. & Constr. Servs., Inc.* (216 AD3d 63 [2d Dept 2023]) modified this general principle regarding the collateral estoppel effect of a determination on parties who did not participate in Board proceedings, nothing in the decision in *Velazquez-Guadalupe* suggests that the modification applies to circumstances other than a party's indemnification and contribution claims against the entity found to be the employer by the Board (*id.* at 72-73). In other words, nothing in the court's decision in *Velazquez-Guadalupe* suggests that non-party before the Board would be precluded from arguing that a plaintiff was not employed at the jobsite on the date of the accident as a defense to a plaintiff's causes of action premised on negligence and the Labor Law (*id.*).

In considering the merits of this argument, the court finds that Oren Ziv's testimony is sufficient to demonstrate the existence of factual issues as to whether plaintiff was employed at the time of the accident, and whether the accident. As there are issues of fact, plaintiff's summary judgment motion must be denied. Conversely, plaintiff's deposition testimony and Campbell's deposition testimony and affidavit demonstrate factual issues as to whether plaintiff was employed and working for Oz Solutions on the date of the accident such that the Owner Defendants are not entitled to summary judgment in their favor based on this argument.

Labor Law § 240 (1)

Regarding plaintiff's Labor Law § 240 (1) cause of action, section 240 (1) imposes absolute liability on owners and contractors or their agents when they fail to protect workers employed on a construction site from injuries proximately caused by risks associated with falling from a height or those associated with falling objects (*see Wilinski v. 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 7 [2011]; *Narducci v. Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]; *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). For accidents involving falling objects, the "plaintiff must show more than simply that an object fell causing injury to a worker" (*Narducci*, 96 NY2d at 268; *see also Fabrizzi v. 1095 Ave. of Ams., LLC*, 22 NY3d 658, 663 [2014]). A plaintiff must show that, at the time the object fell, it was "being hoisted or secured" (*Narducci*, 96 NY2d at 268) or "required securing for the purposes of the undertaking" (*Outar v. City of New York*, 5 NY3d 731, 732 [2005]; *see Quattrocchi v. F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758 [2008]) and that the object fell "because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268; *see Fabrizzi*, 22 NY3d at 663; *Wilinski*, 18 NY3d at 10-11).

Given these requirements, and in view of plaintiff's testimony that she did not see the two-by-four before it hit her, did not know where it came from or what it was being used for, plaintiff has failed to demonstrate, *prima facie*, that the object was being hoisted or secured or required securing for the undertaking, and thus failed to show that the fall of the two-by-four was proximately caused by a violation of Labor Law § 240 (1) (*see Maisuradze v. Nows the Time, Inc.*, 219 AD3d 722, 724 [2d Dept 2023]; *Henriquez v. Clarence P. Grant Hous. Dev. Fund Co., Inc.*, 186 AD3d 577, 577-578 [2d Dept 2020]; *Pazmino v. 41-50 78th St. Corp.*, 139 AD3d 1029, 1030 [2d Dept 2016]; *Podobedov v. East Coast Constr. Group, Inc.*, 133 AD3d 733, 735-736 [2d Dept 2015]). On the other hand, the Owner Defendants' "submissions failed to eliminate all triable issues of fact as to whether the [two-by-four] that struck [plaintiff] w[as] part of a load that required securing . . . or fell due to the absence or inadequacy of an enumerated safety device" (*Rzepka v. City of New York*, 227 AD3d 922, 923 [2d Dept 2024] [internal citations and quotation marks omitted]; *see Podobedov*, 133 AD3d at 735-736; *Floyd v. New York State Thruway Auth.*, 125 AD3d 1456, 1457 [4th Dept 2015]; *Ginter v. Flushing Terrace, LLC*, 121 AD3d 840, 843 [2d Dept 2014]; *Gonzalez v. TJM Constr. Corp.*, 87 AD3d 610, 611 [2d Dept 2011]). Although the Owner Defendants have submitted evidence that Newburgh Iron would not have used two-by-fours in its work, plaintiff's testimony that a Newburgh Iron supervisor apologized to her is sufficient to demonstrate a factual issue as to whether it was responsible for the two-by-four at issue. Moreover, Cafiso, in his deposition testimony, noted that there were several trades that used two-by-fours in their work, and his testimony did not exclude such entities as a possible source of the two-by-four that allegedly struck plaintiff or demonstrate that any such two-by-four was not part of a load that required securing or was not improperly secured. In finding that the Owner Defendants have failed to meet their *prima facie* burden in

this respect, the court emphasizes that defendants cannot satisfy their initial burden by merely showing gaps in a plaintiff's case (*see Incorporated Vil. of Freeport v Albrecht, Viggiano, Zurich & Co., P.C.*, 226 AD3d 658, 660 [2d Dept 2024]; *Bourne v. Martin Dev. & Mgt., LLC*, 219 AD3d 684, 685 [2d Dept 2023]; *Cruz v. 1142 Bedford Ave., LLC*, 192 AD3d 859, 863 [2d Dept 2021]).

Labor Law § 241 (6)

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 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 her bill of particulars, premises her section 241 (6) cause of action on violations of Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7 (a) (1), 23-1.7 (a) (2); 23-1.7, 23-1.16 and 23-1.33. In moving, defendants have demonstrated, *prima facie*, that Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7 (b), (c), (d), (e), (f), (g), and (h), 23-1.16 and 23-1.33 either do not state specific standards or are inapplicable to the facts herein. As plaintiff has abandoned reliance on those sections by failing to address them in her motion and opposition papers, defendants are entitled to dismissal of the section 241 (6) cause of action to the extent that it is premised on those sections (*see Debennedetto v. Chetrit*, 190 AD3d 933, 936 [2d Dept 2021]; *Pita v. Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]).

On the other hand, plaintiff does address Industrial Code (12 NYCRR) § 23-1.7 (a) (1)[6] and (a) (2),[7] which requires protections against overhead hazards, in her moving and opposition papers. Section 23-1.7 (a), which states a specific standard (*see Roosa v. Cornell Real Prop. Servicing, Inc.*, 38 AD3d 1352, 1354 [4th Dept 2007]; *Portillo v. Roby Anne Dev., LLC*, 32 AD3d 421, 422 [2d Dept 2006]), requires that the area at issue be one that is normally exposed to falling objects (*see Flores v. Fort Green Homes, LLC*, 227 AD3d 672, 674 [2d Dept 2024]; *Vatavuk v Genting N.Y., LLC*, 142 AD3d 989, 990 [2d Dept 2016]). Plaintiff, in moving and in opposing the Owner Defendants' motion, has failed to point to any evidence in the record suggesting that the area of the staircase at issue was normally exposed to falling objects. While the Owner Defendants note that neither plaintiff nor Campbell provided testimony that the staircase was normally subject to falling objects, their transcripts also show that they were not asked if the area was one where objects regularly fell. In addition, Ciafiso's testimony that there were no instances of workers getting struck by two-by-fours or of workers getting injured does not address the issue of whether the staircase was an area subject to falling objects (*see Salcedo v. Sustainable Energy Options LLC*, 190 AD3d 439, 440 [1st Dept 2021]; *Ginter*, 121 AD3d at 843; *Gonzalez*, 87 AD3d at 611). Under these circumstances, neither plaintiff nor the Owner Defendants are entitled to summary judgment with respect to plaintiff's Labor Law § 241 (6) cause of action to the extent that it is premised on section 23-1.7 (a) (1) and (a) (2).

Common-Law Negligence and Labor Law § 200

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[6] Industrial Code (12 NYCRR) § 23-1.7 (a) (1) provides that, "Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot."

[7] Industrial Code (12 NYCRR) § 23-1.7 (a) (2) provides that, "Where persons are lawfully frequenting areas exposed to falling material or objects but wherein employees are not required to work or pass, such exposed areas shall be provided with barricades, fencing or the equivalent in compliance with this Part (rule) to prevent inadvertent entry into such areas."

With respect to plaintiff's common-law negligence and Labor Law § 200 causes of action, the exact cause of the accident, if it occurred, is unclear, and it is unknown whether it occurred as the result of a failure to brace or secure the two-by-four or otherwise insure adequate overhead protection for plaintiff. Accordingly, plaintiff's claim arises out of the means and methods of performing the work relating to the two-by-four rather than as the result of a dangerous property condition (*see Turgeon v. Vassar College*, 172 AD3d 1134, 1136 [2d Dept 2019], *lv denied* 34 NY3d 902 [2019]; *Poulin v. Ultimate Homes, Inc.*, 166 AD3d 667, 671-673 [2d Dept 2018]; *Melendez v. 778 Park Ave. Bldg. Corp.*, 153 AD3d 700, 702 [2d Dept 2017], *lv denied* 31 NY3d 909 [2018]). When a plaintiff's 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]).

Here, 325 Lafayette has demonstrated its *prima facie* entitlement to summary judgment on the common-law negligence and Labor Law § 200 causes of action through the deposition testimony in the record showing that it had no direct employees, that its representatives had only a limited presence at the project location, and that it did not exercise any direct supervision or control over the subcontractors performing the actual work on the project (*see Miano v. Skyline New Homes Corp.*, 37 AD3d 563, 567 [2d Dept 2007]). Plaintiff, in opposing the Owner Defendant's motion, does not separately address the contentions relating to 325 Lafayette and has failed to identify evidence demonstrating an issue of fact with respect to its liability. The

court therefore grants the portion of the Owner Defendant's motion seeking dismissal of plaintiff's common-law negligence and section 200 causes of action as against 325 Lafayette.

On the other hand, this court finds that the Owner Defendant's motion papers fail to demonstrate the absence of factual issues with respect to Britt Realty's liability for plaintiff's common-law negligence and Labor Law § 200 claims. Notably, in this respect, plaintiff's own testimony presents factual issues as to whether Stefano Cafiso, Britt Realty's project manager, was the person who directed plaintiff to sweep the stairway at issue. Moreover, since Britt Realty had overall responsibility for sight safety and coordination of the work, its direction that plaintiff perform work on the open stairway while work was proceeding above her presents factual issues regarding to its negligence in coordinating the work (*see Rizzuto*, 91 NY2d at 352-353; *Dejesus v. Downtown Re Holdings LLC*, 217 AD3d 524, 526 [1st Dept 2023]; *Gardner v. Tishman Constr. Corp.*, 138 AD3d 415, 416-417 [1st Dept 2016]; *Matthews v. 400 Fifth Realty LLC*, 111 AD3d 405, 406 [1st Dept 2013]; *Miano*, 37 AD3d at 567).

As noted above, this court found that both Urban Precast and Newburgh Iron did not have authority to supervise and control plaintiff's work or the worksite and thus cannot be held liable under Labor Law § 200. Nevertheless, they may still be held liable for common-law negligence if their work caused the injury or created the condition that caused the injury (*see Delaluz*, 228 AD3d at 620; *Zong Wang Yang v. City of New York*, 207 AD3d 791, 795 [2d Dept 2022]; *Hewitt v. NY 70th St. LLC*, 187 AD3d 574, 575 [1st Dept 2020]; *Van Nostrand v. Race & Rally Constr. Co., Inc.*, 114 AD3 664, 666 [2d Dept 2014]).

In view of this standard, Newburgh Iron has failed to demonstrate its *prima facie* entitlement to dismissal of the common-law negligence cause of action. Concededly, the deposition testimony of Adamu, a laborer who installed concrete planks, Dunham, an Urban

Precast employee, Auringer, the owner of Urban Precast and Newburgh Iron, and Cafiso, Britt Realty's project manager, that two-by-fours were not used in the planking installation and related work at the jobsite supports finding that Newburgh Iron did not cause a two-by-four to fall onto plaintiff. Additionally, this court agrees that Auringer's testimony that Newburgh Iron may have used plywood pieces as part of its grout work does not demonstrate an issue of fact since plywood pieces were readily distinguishable from the two-by-four that plaintiff testified struck her. Nevertheless, the court finds that plaintiff's deposition testimony, which Newburgh Iron submitted in support of its motion,[8] to the effect that a worker wearing an Urban Precast tee shirt apologized to her is sufficient to demonstrate the existence of a factual issues as to whether the apology served as an admission of fault for the accident (*see Borowski v. Ptak*, 107 AD3d 1498, 1499 [4th Dept 2013]).[9]

With respect to Urban Precast, Auringer, the owner of Urban Precast and Newburgh Iron, and Dunham, an Urban Precast employee, testified at their depositions that Urban Precast's role in the project was essentially limited to measuring and manufacturing the concrete planks. Additionally, Auringer testified that Urban Precast subcontracted the actual installation of the planks to Newburgh Iron. Although such testimony would support a finding that Urban Precast may not be held liable for the accident, Adamu, a Newburgh Iron laborer, testified at his deposition that he had worked for both Urban Precast and Newburgh Iron doing planking installation work, and that he could not recall which of those entities employed him at the time of the accident. Additionally, plaintiff testified that the worker who apologized to her wore an Urban Precast tee shirt, and Ciafiso, Britt Realty's onsite project manager, believed that it was

[8] Newburgh Iron, while it did not include plaintiff's deposition transcript as an exhibit to its motion, it relied upon the transcript that was appended to Urban Precast's motion papers (NYSCEF Doc No. 215).
[9] As discussed below, Urban Precast asserts that the plank installation work was actually performed by Newburgh Iron.

Urban Precast that performed the installation work. In view of this record, the court finds that there are factual issues as to whether it was Urban Precast, rather than Newburgh Iron, that performed the installation work (*see Brown v. Window King LLC*, 224 AD3d 533, 534-535 [1st Dept 2024]; *Affenito v. PJC 90th St.*, 5 AD3d 243, 245 [1st Dept 2004]). In view of the factual issue presented by the worker apology noted above, Urban Precast has failed to demonstrate, *prima facie*, the absence of factual issues with respect to its own liability.

Indemnification and Insurance Issues

As is relevant to Britt Realty's contractual indemnification claims against Urban Precast, Britt Realty's contract with Urban Precast provides, as is relevant here, that:

> "In consideration for the Subcontract, and to the fullest extent permitted by law, the Subcontractor shall defend and shall indemnify, and hold harmless, at Subcontractor's sole cost and expense, the Contractor, all entities the Contractor is required to indemnify and hold harmless, the Owner, the Owner's lender and all other entities the Owner is required to indemnify and hold harmless, and the officers, directors, agents, members, partners, shareholders, employees, successors and assigns of each of them (the "Indemnified Parties") from and against (i) all liabilities or claimed liabilities for bodily injury or death to any person(s), and for any and all liabilities or claimed liabilities for property damage and/or economic damage, including, without limitation, all attorney fees, expert fees, disbursements and related costs, arising out of or resulting from the Work as defined in this Subcontract to the extent such Work was performed by or contracted through the Subcontractor or by anyone else for whose acts the Subcontractor may be held liable, excluding only liability created by the sole and exclusive negligence of the Indemnified Parties" (Britt Realty-Urban Precast Contract § 4.6.1).[10]

[10] In addition to the above quoted provision from the Britt Realty-Urban Precast contract, the Insurance Requirements Rider that is appended as exhibit C to that contract contains an indemnification provision that likewise requires Urban Precast to indemnify Britt Realty for claims "arising out of or resulting from the Work covered by this Subcontract to the extent such Work was performed by or contracted through the Subcontractor or by anyone for whose acts the Subcontractor may be held liable, excluding liability only created by the sole and exclusive negligence of the Indemnified Parties."

Urban Precast has failed to demonstrate its *prima facie* entitlement to summary judgment dismissing Britt Realty's contractual indemnification claim as against it. In this respect, given the above noted factual issues as to whether Urban Precast, or its subcontractor Newburgh Iron, caused or was otherwise responsible for the two-by-four falling and hitting plaintiff, there are factual issues as to whether the accident was one "arising out of or resulting from the Work" under the indemnification provision (*see Zong Wang Yang*, 207 AD3d at 796; *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]). In view of the above noted factual issues with respect to Britt Realty's own negligence and with respect to whether the injury arose out of Urban Precast's work, the portion of the Owner Defendants' motion seeking summary judgment in favor of Britt Realty on the contractual indemnification claim as against Urban Precast must be denied (*see Graziano v. Source Bldrs. & Consultants, LLC*, 175 AD3d 1253, 1260 [2d Dept 2019]; *McDonnell*, 165 AD3d at 1096-1097).

In view of the factual issues with respect to Urban Precast's own fault, the portion of Urban Precast's motion seeking dismissal of the contribution and common-law indemnification claims against it brought by the other parties must be denied (*see Romano v. New York City Tr. Auth.*, 213 AD3d 506, 508 [1st Dept 2023]; *Zong Wang Yang*, 207 AD3d at 796; *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]).

The factual issues as to whether the accident arose out of Urban Precast's work on the project also preclude dismissal of Britt Realty's breach of contract claim for failing to obtain insurance (*see Hogan v. 590 Madison Ave., LLC*, 194 AD3d 570, 571-572 [1st Dept 2021];

Belcastro v. Hewlett-Woodmere Union Free School Dist. No. 14, 286 AD2d 744, 746-747 [2d Dept 2001]; *cf. 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]). The court further notes that Urban Precast, in moving, has not addressed whether it obtained the insurance required by the Insurance Requirements Rider to Britt Realty-Urban Precast's contract.

The above noted factual issues regarding whether Urban Precast and/or Newburgh Iron may be held liable for plaintiff's injuries and, also, whether the accident arose out of Newburgh Iron's work likewise require denial of the portion of Urban Precast's and Newburgh Iron's respective motions as they relate to Urban Precast's contribution, common-law indemnification and contractual indemnification claims against Newburgh Iron (*see Romano*, 213 AD3d at 508; *Zong Wang Yang*, 207 AD3d at 796; *Payne*, 203 AD3d at 548; *Martinez*, 183 AD3d at 718; *McDonnell*, 165 AD3d at 1097). In view of these factual issues with respect to its own fault, Newburgh Iron is also not entitled to dismissal of Oz Solutions' claims against it for contribution and common-law indemnification (*see McCarthy*, 17 NY3d at 377-378; *Chapa v. Bayles Props., Inc.*, 221 AD3d 855, 856-857 [2d Dept 2023]; *Romano*, 213 AD3d at 508; *Randazzo*, 177 AD3d at 798).

Turning to Britt Realty's contractual indemnification claim against Oz Solutions, the indemnification provision contained in Britt Realty's contract with Oz Solutions is the same as the provision in the Britt Realty-Urban Precast Contract quoted above (Britt Realty-Oz Solutions Contract § 4.6.1). Oz Solutions is not entitled to dismissal of Britt Realty's contractual indemnification claim against it since, if plaintiff is found to have been employed by Oz Solution, the injury to plaintiff would be covered under the broad "arising out" of the work language even if Oz Solutions did not have any responsibility for 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*, 227 AD3d 113, 119 [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]). Given these factual issues and the above noted issues with respect to Britt Realty's own liability, however, Britt Realty is also not entitled to summary judgment in its favor with respect to its contractual indemnification claim as against Oz Solutions (*see Graziano*, 175 AD3d at 1260; *McDonnell*, 165 AD3d at 1096-1097).

Oz Solutions, which did not separately address Britt Realty's breach of contract to procure insurance claim, has also failed to demonstrate its *prima facie* entitlement to dismissal of that claim (*see Hogan*, 194 AD3d at 571-572; *Belcastro*, 286 AD2d at 746-747; *cf. Nicholson*, 205 AD3d at 622; *New York City Hous. Auth. v. Merchants Mut. Ins. Co.*, 44 AD3d at 542).

Summary

Based on the foregoing, it is

ORDERED that Urban Precast's motion (motion sequence number 7) is granted to the extent that plaintiff's Labor Law §§ 200, 240 (1) and 241 (6) causes of action are dismissed as against it. The motion is otherwise denied; and it is further

ORDERED that plaintiff's motion (motion sequence number 8) is denied; and it is further

ORDERED that the 325 LAFAYETTE ASSOCIATES, LLC and SLATE PROPERTY GROUP, LLC, and BRITT REALTY, LLC's motion (motion sequence number 9) is granted to the extent that: (1) the complaint and any and all counterclaims and cross-claims are dismissed as against Slate Property; (2) with respect to 325 Lafayette and Britt Realty, plaintiff's Labor Law §

241 (6) cause of action is dismissed to the extent that it is premised on Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7 (b), (c), (d), (e), (f), (g), and (h), 23-1.16 and 23-1.33. The Owner Defendants' motion is otherwise denied; and it is further

ORDERED that Newburgh Iron's motion (motion sequence number 10) is granted to the extent that plaintiff's causes of action premised on Labor Law §§ 200, 240 (1) and 241 (6) are dismissed as against it. The motion is otherwise denied; and it is further

ORDERED that Oz Solutions' cross-motion for an order dismissing plaintiff's complaint pursuant to CPLR 3212 (motion sequence number 11) 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) §§ 23-1.5, 23-1.7 (b), (c), (d), (e), (f), (g), and (h), 23-1.16 and 23-1.33 and granted to the extent that plaintiff's Labor Law §§ 200, 240 (1) and 241 (6) causes of action are dismissed as against Urban Precast and Newburgh Iron and the remainder of the motion is otherwise denied; and it is further

ORDERED that Oz Solutions' cross-motion for an order dismissing the third-party complaint and all other claims against third-party defendant Oz Solution pursuant to CPLR 3212 (motion sequence number 12) is denied.

This constitutes the decision and order of the court.

ENTER

HON. RICHARD J. MONTELIONE, J.S.C.