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SHORT FORM ORDER

INDEX No. 06-35205
CAL No. 12-00066OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 5-9-12 (#006)
MOTION DATE 5-23-12 (#007)
MOTION DATE 6-26-12 (#008)
MOTION DATE 6-1-12 (#009)
MOTION DATE 9-25-12 (#010)
ADJ. DATE 10-23-12
Mot. Seq. # 006 - MotD # 009 - MG
007 - MotD # 010 - XMD
008 - XMotD

ERIC BALDWIN,

Plaintiff,

- against -

WINDCREST RIVERHEAD, LLC, GREENVIEW PROPERTIES, INC., WINDCREST EAST CONDOMINIUM II and WINDCREST ASSOCIATES, LLC,

Defendants.

FERRO, KUBA, MANGANO, SKYLAR, P.C.
Attorney for Plaintiff
825 Veterans Highway
Hauppauge, New York 11788

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP
Attorney for Defendants Windcrest Riverhead and Greenview Properties
3 Gannett Drive
White Plains, New York 10604

WINDCREST RIVERHEAD, LLC, GREENVIEW PROPERTIES, INC.,

Third-Party Plaintiffs,

- against -

WEATHER WISE CONTRACTING, INC.,

Third-Party Defendant.

CASCONE & KLUEPFEL, LLP
Attorney for Third-Party Defendant
1399 Franklin Avenue, Suite 302
Garden City, New York 11530

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WINDCREST RIVERHEAD, LLC, GREENVIEW :
PROPERTIES, INC.,

Second Third-Party Plaintiff,

- against -

AFG CONTRACTING INC.,

Second Third-Party Defendant.
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Upon the following papers numbered 1 to 130 read on these motions and cross motions for summary judgment, to vacate the note of issue, and to serve a late jury demand ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22; 28 - 51; 105 - 112 ; Notice of Cross Motion and supporting papers 65 - 92; 115 - 124 ; Answering Affidavits and supporting papers 23 - 25; 52 - 58; 59 -62; 93 - 97; 98 - 99; 113 - 114; 125 - 126 ; Replying Affidavits and supporting papers 26 - 27; 63 - 64; 100 - 102; 103 - 104; 127 - 128; 129 - 130 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (006) by third-party defendant, Weather Wise Contracting, for summary judgment, the motion (007) by defendants/third-party plaintiffs Windcrest Riverhead, LLC and Greenview Properties, Inc. to vacate the note of issue and the motion (009) by defendants/third-party plaintiffs Windcrest Riverhead, LLC and Greenview Properties, Inc. for leave to serve a jury demand nunc pro tunc are consolidated for the purposes of this determination and are decided together with the cross motion (008) by defendants/third-party plaintiffs Windcrest Riverhead, LLC and Greenview Properties, Inc. for summary judgment and the cross motion (010) by plaintiff for partial summary judgment; and it is further

ORDERED that the motion (006) by third-party defendant, Weather Wise Contracting, Inc., for an order pursuant to CPLR 3212 granting summary judgment to defendants/third-party plaintiffs Windcrest Riverhead, LLC and Greenview Properties, Inc. dismissing the complaint as against them and for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the third-party complaint is determined herein; and it is further

ORDERED that the motion (007) by defendants/third-party plaintiffs Windcrest Riverhead, LLC and Greenview Properties, Inc. for an order vacating the note of issue or, in the alternative, directing plaintiff to produce authorizations for records concerning his motor vehicle accident and to appear for a further examination before trial and additional independent medical examinations, and striking plaintiff's bills of particulars served after his first amended/supplemental bill of particulars or precluding plaintiff from arguing at trial that defendants violated Industrial Code § 23-2.7 (e) is determined herein; and it is further

ORDERED that the cross motion (008) by defendants/third-party plaintiffs Windcrest Riverhead, LLC and Greenview Properties, Inc. for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing plaintiff's complaint or, in the alternative, granting Windcrest Riverhead summary

judgment against third-party defendant, Weather Wise Contracting, Inc., for contractual indemnification is determined herein; and it is further

ORDERED that the motion (009) by defendants/third-party plaintiffs Windcrest Riverhead, LLC and Greenview Properties, Inc. for an order pursuant to CPLR 4102 (e) granting them leave to serve a jury demand nunc pro tunc is granted; and it is further

ORDERED that the cross motion (010) by plaintiff for an order pursuant to CPLR 3212 (e) granting partial summary judgment on his Labor Law § 241 (6) cause of action as against defendant Windcrest Riverhead, LLC is denied; and it is further

ORDERED that inasmuch as all claims have been dismissed against defendants/third-party plaintiff Greenview Properties, Inc. as indicated herein, the action is severed and continued against the remaining defendant Windcrest Riverhead, LLC and third-party defendant, Weather Wise Contracting, Inc.

This is an action to recover damages for injuries allegedly sustained by plaintiff on December 20, 2004 when he slipped and fell on snow and ice while descending an interior staircase leading from the second floor to the first floor of a condominium unit under construction. Said unit, Lot No. 70, was situated in a condominium complex known as Windcrest East Condo II, located in Riverhead, New York. At the time of the accident, plaintiff was employed by non-party Master Cooling Plumbing and Heating.

Plaintiff subsequently commenced this action on August 10, 2006. Plaintiff alleges that the source of the snow and ice was an open second floor soffit. By his complaint, plaintiff alleges a first cause of action for negligence, a second cause of action for violation of Labor Law § 200, a third cause of action for violation of Labor Law § 240, a fourth cause of action for violation of Labor Law § 241 (6), and a fifth cause of action for violation of certain sections of the Industrial Code. Defendants Windcrest Riverhead, LLC (Windcrest Riverhead) and Greenview Properties, Inc. (Greenview) answered.[1]

Plaintiff's supplemental bill of particulars dated April 1, 2008 alleged that defendants violated certain Industrial Code (12 NYCRR § 23) sections and his further supplemental bill of particulars dated June 18, 2008 added 12 NYCRR §§ 23-2.1 and 23-2.7. By a second further supplemental bill of particulars dated December 9, 2011, plaintiff alleged that defendants violated certain sections of the Federal Occupational Safety and Health Act (OSHA). By a third further supplemental bill of particulars dated December 22, 2011, plaintiff alleged that defendants violated 12 NYCRR §§ 23-1.7 (d) and 23-1.7 (f).

Defendants Windcrest Riverhead and Greenview commenced a third-party action against Weather Wise Contracting Inc. (Weather Wise), the installer of the roofs, windows, soffit material, and gutters for this project. The third-party complaint contains a first cause of action for contractual indemnification, a second cause of action for reimbursement pursuant to a contract provision requiring them to be named as

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[1] By order of this court dated February 6, 2012 (Martin, J.), Windcrest Riverhead and Greenview obtained an order of default against AFG Contracting, Inc. (AFG). The Court's computerized records indicate that defendant Windcrest Associates, LLC never answered and that the action has been discontinued as against defendant Windcrest East Condominium II pursuant to a stipulation of discontinuance dated April 26, 2010.

additional insureds under a liability insurance policy, and a third cause of action for common-law contribution and indemnification. The Court's computerized records indicate that the note of issue in this action was filed on January 12, 2012.

Windcrest Riverhead and Greenview move (007) to vacate the note of issue or, in the alternative, to direct plaintiff to produce authorizations for records concerning his July 8, 2011 motor vehicle accident and to appear for a further examination before trial and additional independent medical examinations. They assert that they first learned of plaintiff's motor vehicle accident after the filing of the note of issue, that plaintiff is claiming cervical spine injuries in said accident, and that they require further discovery to determine whether plaintiff's current cervical complaints are the result of the subject accident or the motor vehicle accident. They argue that to date, plaintiff has ignored their good faith efforts to obtain additional discovery regarding said motor vehicle accident. In response, plaintiff provides HIPAA authorizations for defendants and third-party defendant to obtain plaintiff's July 8, 2011 emergency room records from Brookhaven Memorial Hospital, records of any visits to Dr. Krieff after said date, and plaintiff's no-fault records from Redland Insurance Company.

A motion to vacate the note of issue and certificate of readiness made more than 20 days after their service will be granted only where "a material fact in the certificate of readiness is incorrect" or upon "good cause shown" (Uniform Rules for the Trial Courts [22 NYCRR] § 202.21 [e]; *see* ***Torres v Saint Vincents Catholic Med. Ctrs.***, 71 AD3d 873, 895 NYS2d 861 [2d Dept 2010]; ***Ferraro v North Babylon Union Free School Dist.***, 69 AD3d 559, 892 NYS2d 507 [2d Dept 2010]). To satisfy the requirement of "good cause," the party seeking vacatur must "demonstrate that unusual or unanticipated circumstances developed subsequent to the filing of the note of issue and certificate of readiness requiring additional pretrial proceedings to prevent substantial prejudice" (***Utica Mut. Ins. Co. v P.M.A. Corp.***, 34 AD3d 793, 794, 826 NYS2d 138 [2d Dept 2006]; *see* ***Torres v Saint Vincents Catholic Med. Ctrs.***, 71 AD3d 873, 895 NYS2d 861; ***Ferraro v North Babylon Union Free School Dist.***, 69 AD3d 559, 892 NYS2d 507; ***White v Mazella-White***, 60 AD3d 1047, 877 NYS2d 106 [2d Dept 2009]; ***Audiovox Corp. v Benyamini***, 265 AD2d 135, 707 NYS2d 137 [2d Dept 2000]).

Here, under the circumstances of this case, the Court exercises its discretion in declining to vacate the note of issue and instead directs plaintiff to produce all outstanding discovery and to submit to a further deposition and a further independent medical examination limited in scope to the July 8, 2011 motor vehicle accident, all of which is to be completed within thirty (30) days of the entry date of this order (*see* ***Encarnacion v Monier***, 81 AD3d 875, 917 NYS2d 875 [2d Dept 2011]; ***Rampersant v Nationwide Mut. Fire Ins. Co.***, 71 AD3d 972, 898 NYS2d 567 [2d Dept 2010]).

Windcrest Riverhead and Greenview also seek to strike plaintiff's bills of particulars served after his first amended/supplemental bill of particulars or to preclude plaintiff from arguing at trial that defendants violated 12 NYCRR § 23-2.7 (e), relating to handrails on stairways, an allegation they assert was first raised in an expert exchange dated January 3, 2012. They argue that they never had notice of such a claim prior to the filing of the note of issue as plaintiff did not testify at his deposition that he attempted to stop himself from falling or fell over the side of the stairway and did not include said claim in any of his bills of particulars. They further argue that to allow plaintiff to allege new theories and statutory violations six years after the action's commencement would cause them severe prejudice.

In opposition, plaintiff contends that his further supplemental bill of particulars dated June 18, 2008 alleged violation of 12 NYCRR § 23-2.7 and that plaintiff testified at both of his depositions that the stairway did not contain a permanent or temporary handrail rendering defendants' arguments unavailing.

The submissions reveal that four years ago plaintiff served his "further supplemental" bill of particulars dated June 18, 2008 which alleged that defendants violated Industrial Code § 23-2.7. This is actually a second amended bill of particulars[2]. Plaintiff was required to obtain leave of Court to serve this second amended bill of particulars. Plaintiff did not do so and now requests said relief in his opposition papers. In addition, plaintiff mentioned the lack of handrails at his first deposition on June 24, 2008, after plaintiff served his "further supplemental" bill of particulars dated June 18, 2008. He was questioned at his next deposition on July 30, 2009 by the attorney for Weatherwise, with the attorney for Windcrest Riverhead and Greenview present, about the existence of handrails. Thus, Windcrest Riverhead and Greenview failed to demonstrate that the allegation of 12 NYCRR § 23-2.7 constituted a new theory of liability, or that they would be prejudiced if the plaintiff were allowed to amend his bill of particulars to add this allegation (*see* ***Roman v 233 Broadway Owners, LLC***, 99 AD3d 882, 2012 NY Slip Op 06936 [2d Dept 2012]; ***Sanders v St. Vincent Hosp.***, 95 AD3d 1195, 945 NYS2d 343 [2d Dept 2012]). Plaintiff's "further supplemental" bill of particulars dated June 18, 2008 is deemed his second amended bill of particulars served upon defendants. Based on the foregoing, the request by Windcrest Riverhead and Greenview to strike or to preclude plaintiff is denied.

Weather Wise moves (006) for summary judgment dismissing the complaint. Weather Wise asserts that plaintiff's fall on a permanent fixed staircase does not constitute a violation of Labor Law § 240 (1), that the alleged Industrial Code provisions are either too general or inapplicable to establish a violation of Labor Law § 241 (6), that plaintiff's Labor Law § 200 and common-law negligence claims must be dismissed as there is no proof that Windcrest Riverhead and Greenview had actual or constructive notice of the snow and ice; and that the action must be dismissed as against Greenview based on the testimony of its president that it had no affiliation with this project. Its submissions include the pleadings, the deposition transcripts of plaintiff, Larry Gargano on behalf of Windcrest Riverhead and Greenview, and Dennis Breslin on behalf of Weather Wise, the Hold Harmless Agreement, and the affidavit of Richard Arcuri, vice president of Arcuri & Sons, Inc., a licensed general contractor.

Plaintiff contends in opposition that Weather Wise lacks standing to move for summary judgment dismissing the complaint inasmuch as Weather Wise is not a party to the main action. In addition, plaintiff concedes that a fall from a permanent staircase does not fall within the purview of Labor Law § 240 (1) and withdraws said claim, concedes that Labor Law § 200 is inapplicable to the subject circumstances, and concedes that with respect to plaintiff's Labor Law § 241 (6) claims, 12 NYCRR § 23-1.5 is insufficiently specific and that 12 NYCRR §§ 23-1.7 (a), 23-1.7 (f), 23-1.19, 23-1.33, and 23-2.1 are inapplicable to the

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[2] Plaintiff's supplemental bill of particulars dated April 1, 2008 is deemed an amended bill of particulars as it was served prior to the filing of the note of issue, and a party may amend his or her bill of particulars once as of course prior to the filing of the note of issue (*see* CPLR 3042 [b]; ***Vargas v Villa Josefa Realty Corp.***, 28 AD3d 389, 815 NYS2d 30 [1st Dept 2006]; ***Geller v Port Jefferson Obstetrics and Gynecology, P.C.***, 294 AD2d 537, 742 NYS2d 872 [2d Dept 2002]).

subject circumstances. Plaintiff insists that 12 NYCRR §§ 23-1.7 (d) and 23-2.7 are sufficiently specific and applicable herein and notes that Weatherwise did not mention said sections. Plaintiff does not address the argument that the claims against Greenview should be dismissed. In reply, Weather Wise concedes that it did not seek dismissal of 12 NYCRR §§ 23-1.7 (d) and 23-2.7 inasmuch as there remain questions of fact relative thereto.

Here, Weather Wise has standing to seek summary judgment dismissing the complaint (*see* CPLR 1008; ***Abreo v URS Greiner Woodward Clyde***, 60 AD3d 878, 875 NYS2d 577 [2d Dept 2009]; ***Stamboulis v Stefatos***, 256 AD2d 328, 681 NYS2d 342 [2d Dept 1998]). The Court notes that where a fall occurs from a permanent stairway, no liability pursuant to Labor Law § 240 (1) can attach (*see* ***Gallagher v Andron Constr. Corp.***, 21 AD3d 988, 801 NYS2d 373 [2d Dept 2005]; ***Barrett v. Ellenville Natl. Bank***, 255 AD2d 473, 680 NYS2d 634 [2d Dept 1998]). Based on the foregoing and plaintiff's aforementioned concessions, his Labor Law §§ 200 and 240 (1) claims are dismissed and his allegations that Industrial Code sections 23-1.5, 23-1.7 (a), 23-1.7 (f), 23-1.19, 23-1.33, and 23-2.1 are applicable to establish liability under Labor Law § 241 (6) are dismissed. Inasmuch as Labor Law § 200 codifies the common-law duty of an owner or contractor to provide employees with a safe place to work (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 877, 609 NYS2d 168 [1993]; ***Aguilera v Pistilli Constr. & Dev. Corp.***, 63 AD3d 763, 882 NYS2d 148 [2d Dept 2009]; ***Peay v New York City School Constr. Auth.***, 35 AD3d 566, 567, 827 NYS2d 189 [2d Dept 2006]), plaintiff's common-law negligence claims are also dismissed. Thus, plaintiff's sole remaining claim is his fourth cause of action for damages under Labor Law 241 (6) based on violations of sections 23-1.7 (d) and 23-2.7 of the Industrial Code. Inasmuch as there is no evidence of any involvement of Greenview in this construction project, the action is dismissed as against it.

Windcrest Riverhead and Greenview cross-move (008) for summary judgment dismissing the remaining fourth cause of action alleging violation of Labor Law § 241 (6). They argue that 12 NYCRR § 23-1.7 (d) does not apply to permanent stairways which are not elevated working surfaces, scaffolds or a passageway and that plaintiff cannot rely upon 12 NYCRR §§ 23-2.7 (e) as it was first alleged in the second supplemental bill of particulars served without leave of court and the lack of a handrail was not the proximate cause of his accident. Their submissions include the affidavit of Bernard P. Lorenz, a professional engineer. Plaintiff cross-moves (010) for summary judgment on his remaining claim against Windcrest Riverhead under Labor Law § 241 (6) based on violations of 12 NYCRR §§ 23-1.7 (d) and 2.7 (e). Weatherwise opposes the granting of summary judgment to plaintiff as premature at this juncture as there remain issues of fact concerning plaintiff's comparative negligence.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals, Inc. v Associated Fur Mfrs., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of

the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, citing to ***Zuckerman v City of New York***, 49 NY2d 557, 562, 427 NYS2d 595).

Labor Law § 241 (6) provides: "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places." Labor Law § 241(6) "imposes a nondelegable duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 348, 670 NYS2d 816 [1998], quoting Labor Law § 241[6]; *see* ***Harrison v State***, 88 AD3d 951, 931 NYS2d 662 [2d Dept 2011]). Inasmuch as the statute is not self-executing, a plaintiff must allege a violation of a specific and applicable provision of the Industrial Code (*see* ***Wilinski v 334 East 92nd Housing Dev. Fund Corp.***, 18 NY3d 1, 935 NYS2d 551 [2011]; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 530, 601 NYS2d 49 [1993]; ***Jara v New York Racing Assn., Inc.***, 85 AD3d 1121, 1123, 927 NYS2d 87 [2d Dept 2011]; ***D'Elia v City of New York***, 81 AD3d 682, 684, 916 NYS2d 196 [2d Dept 2011]). The interpretation of an Industrial Code regulation and the determination as to whether a particular condition comes within the scope of the regulation generally present questions of law for the court (*see* ***Spence v Island Estates at Mt. Sinai II, LLC***, 79 AD3d 936, 914 NYS2d 203 [2d Dept 2010]; ***Messina v City of New York***, 300 AD2d 121, 752 NYS2d 608 [1st Dept 2002]; ***Penta v Related Cos.***, 286 AD2d 674, 730 NYS2d 140 [2d Dept 2001]).

Initially the Court notes that plaintiff's reliance on alleged violations of OSHA regulations is misplaced as it is well settled that said regulations do not provide a basis for liability under Labor Law § 241 (6) (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 351, 670 NYS2d 816; ***Shaw v RPA Assoc.***, 75 AD3d 634, 906 NYS2d 574 [2d Dept 2010]; ***Cun-En Lin v Holy Family Monuments***, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]).

Plaintiff's deposition testimony on June 24, 2008 reveals that on the date of the accident that he and two other employees of non-party Master Cooling and Heating, Alex and Freddy Benitez, were working inside Lot No. 70 and he had received work orders from Windcrest East to "load the house up with all the materials that we would need to install central air." Plaintiff testified that the roof, windows and exterior walls had already been installed and the rooms consisted of two-by-fours. Plaintiff explained that the accident occurred as he was descending the staircase empty-handed and was talking to Freddie Benitez, who remained on the second floor. Plaintiff had gone up and down the same staircase two or three times while carrying materials from the truck located in the garage into the house and up to the second floor. The staircase had approximately 20 steps, no handrails and was next to a wall. Plaintiff was at the middle of the staircase when his right foot slipped "on something wet," his body twisted to the left, away from the wall, and he fell to the bottom of the staircase. After his fall, plaintiff observed ice and water on the step(s) near the middle of the staircase. It was not snowing at the time of the accident. Plaintiff believed that it had been snowing prior to the accident. Plaintiff also believed that the snow, ice and water came from the soffit at the peaks of the second floor windows because he saw snow sitting in the soffit when he took photographs a few days after his accident. Plaintiff stated that the snow and ice was still on the staircase the day that he took the photographs. He did not observe any precipitation falling onto the stairs on the day of his fall or when he took photographs. Plaintiff's deposition testimony of July 30, 2009 reveals that prior to his fall he

did not notice any snow or ice on the second floor and after his fall he did not see any snow or ice on the first floor leading to the garage. Plaintiff was asked about his previous testimony concerning the lack of handrails and testified as to the lack of temporary handrails that he believed were supposed to be there for safety reasons.

Larry Gargano testified on April 1, 2011that he is the managing member of Windcrest Riverhead whose purpose was to develop the subject condominium complex known as Windcrest East comprised of 126 single-family detached residences. The complex was divided into Windcrest East One and Windcrest East Two and the subject unit was located in Windcrest East Two. He informed that the job superintendent for Windcrest Riverhead was Frank DeNicola who oversaw the project. Mr. Gargano testified that he was responsible for hiring contractors to perform work at the site and that he hired Master Cooling and Heating as the heating and cooling contractor, the framing and window contractor AFG, and the roofing and siding contractor Weatherwise. In addition, he testified that he visited the site probably once a week. Mr. Gargano also testified that there were no safety managers or employees employed by Windcrest Riverhead or outside safety contractors employed at the site. He added that he is also president of Greenview, which had no relationship to said project. Mr. Gargano further testified that there was no one employed by Windcrest Riverhead who would check that the work by the subcontractors was performed correctly. He described a soffit as the flat portion of the end of the roof that overhangs each dormer of the home. Mr. Gargano explained that Weatherwise would install a vented material designed for air flow and that if not installed, there would be an opening of approximately four feet in length and six inches wide. He stated that he did not receive any complaints concerning missing soffits and that he was unaware of any repairs to soffits at the subject unit. Mr. Gargano also stated that AFG installed the stairs in the units.

The deposition testimony of Dennis Breslin on September 9, 2011 reveals that he is the president of Weatherwise, that Weatherwise contracted with "Windcrest East," for the installation of the roofing and siding at the subject development. He identified the "hold harmless' agreement that he signed and testified that he did not read its contents. He described a soffit as the area where the rafter overhangs the siding leaving a gap. Mr. Breslin testified that his employees installed some of the siding and none of the roofing. He explained that after the soffit is built by the framer there remains an eight inch gap between the exterior wall and the end of the roof tail which gap was to be covered with vinyl soffit material, which is interlocking 12-inch wide pieces of vinyl divided into three sections, each four inches. The middle section is ventilated and the two outer sections are solid. According to Mr. Breslin, the vinyl soffit material could have been installed by either Weatherwise or by a subcontractor, such as Vinlin. He also explained that the soffit material would be installed at the same time as the siding after the windows and doors were installed and that the gutters and leaders would be installed by Weather Wise at the end of the job. Mr. Breslin believed that Vinlin installed the soffit material at Lot 70 because it was mentioned in Lot 70's work order. There was no written contract between Weather Wise and Vinlin, Weatherwise supplied the materials to Vinlin. Mr. Breslin stated that he visited the site at least once a day for approximately an hour and inspected the work of Weatherwise workers and its subcontractors. He also stated that after the installation of the soffit material, the structure should be watertight.

Mr. Arcuri opines in his affidavit submitted by Weather Wise that based on the layout of the house and the small size of the soffits, it is nearly impossible for snow to have entered the soffit, moved in excess of 10 feet across the second floor and landed in the center of the subject staircase 10 feet below. Mr. Lorenz

opines in his affidavit submitted by Windcrest Riverhead and Greenview that if one or more of the dormer soffits, particularly the center dormer located directly over the interior stairway, were uncovered and snow had accumulated therein, the wind could have blown said snow to the middle of the subject stairway.

12 NYCRR § 23-1.7 (d) provides "Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing." Here, a triable issue of fact exist as to whether Windcrest Riverhead violated that regulation by allegedly permitting a slippery condition to exist on the stairway (*see* ***Linkowski v City of New York***, 33 AD3d 971, 824 NYS2d 109 [2d Dept 2006]; ***Brown v Brause Plaza, LLC***, 19 AD3d 626, 798 NYS2d 501[2d Dept 2005]).

12 NYCRR § 23-2.7 (e) provides "Protective railings. The stairwells of temporary wooden stairways and of permanent stairways where enclosures or guard rails have not been erected shall be provided with a safety railing constructed and installed in compliance with this Part (rule) on every open side. Every stairway and landing shall be provided with handrails not less than 30 inches nor more than 40 inches in height, measured vertically from the nose of the tread to the top of the rail." Here a further issue of fact exists as to whether the absence of guardrails was a proximate cause of plaintiff's injury (*see* ***Kanarvogel v Tops Appliance City, Inc.***, 271 AD2d 409, 705 NYS2d 644 [2d Dept 2000], *lv to appeal dismissed* 95 NY2d 902, 716 NYS2d 642 [2000]; *see also* ***Smith v McClier Corp.***, 38 AD3d 322, 831 NYS2d 413 [1st Dept 2007]). Therefore, the portion of the motion by Weather Wise for summary judgment dismissing the complaint and the portion of the cross motion by Windcrest Riverhead and Greenview for summary judgment dismissing the complaint are denied.

Although plaintiff submitted evidence sufficient to establish that 12 NYCRR § 23-2.7 (e) was violated, there remain issues of fact as to whether a violation of said provision was the proximate cause of his injury (*see* ***Riffo-Velozo v Village of Scarsdale***, 68 AD3d 839, 891 NYS2d 418 [2d Dept 2009]). Therefore, plaintiff's cross motion for summary judgment on his remaining claim against Windcrest Riverhead under Labor Law § 241 (6) is denied.

Weather Wise also seeks summary judgment dismissing the third-party complaint. Weather Wise asserts that the second cause of action for breach of contract must be dismissed inasmuch as the only contract between the parties is the Hold Harmless Agreement which has no insurance procurement requirement or requirement that defendants be named as additional insureds on Weatherwise's general liability policy and thus could not be breached. In addition, Weather Wise asserts that the first cause of action for contractual indemnification and the third cause of action for common-law indemnification must be dismissed inasmuch as only pure speculation links its work to the alleged existence of snow on the subject staircase and there is no proof that the work of Weatherwise was defective. Windcrest Riverhead and Greenview seek, in the alternative, summary judgment on their claims for indemnification.

The Hold Harmless Agreement provides "To the fullest extent permitted by law, Weather Wise Contracting Inc. Subcontractor, and Sub-subcontractor, shall defend, indemnify and save harmless Greenview Realty Service, Inc., Greenview Properties, Inc., and Windcrest Riverhead LLC, and their respective successors, assigns, officers, directors, trustees, employees, agents and corporate affiliates

("Indemnities") from any and all liability, claims, judgments, demands, damages, losses, costs, attorney's fees and charges of every kind connected with or arising directly or indirectly out of the activities, performance or non-performance of the Work hereunder or any negligent act or omission or arising as a result of faulty workmanship or performance including both patent or latent defects by Subcontractor or Sub-subcontractor, or by any lower -tier subcontractors or suppliers or anyone directly or indirectly employed by or working for them, or anyone for whose acts they may be liable."

The differences of opinion expressed by the experts retained by Weather Wise and Windcrest Riverhead raise issues of credibility which preclude summary judgment (*see* ***Apple v State***, 268 AD2d 398, 701 NYS2d 634 [2d Dept 2000]). However, a court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed (*see* ***George v Marshalls of MA, Inc.***, 61 AD3d 931, 878 NYS2d 164 [2d Dept 2009]; ***O'Brien v Key Bank***, 223 AD2d 830, 636 NYS2d 182 [3d Dept 1996]). To obtain conditional relief on a claim for contractual indemnification, "the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of ... statutory [or vicarious] liability" (***Correia v Professional Data Mgt.***, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]; *see* ***Tranchina v Sisters of Charity Health Care Sys. Nursing Home***, 294 AD2d 491, 493, 742 NYS2d 655 [2d Dept 2002]). Here, Windcrest Riverhead met its initial burden of demonstrating its prima facie entitlement to judgment as a matter of law on its contractual indemnification claim against Weather Wise by establishing that it can only be held liable based on statutory liability and, in response, Weather Wise failed to raise a triable issue of fact (*see* ***Jamindar v Uniondale Union Free School Dist.***, 90 AD3d 612, 616, 934 NYS2d 437 [2d Dept 2011]). Therefore, Windcrest Riverhead is granted conditional summary judgment on its contractual indemnification claim against Weather Wise. For the same reason, Windcrest Riverhead is granted conditional summary judgment on its common-law contribution and indemnification claim against Weatherwise (*see id.*).

Inasmuch as there is no evidence of a written agreement between Windcrest Riverhead and Weather Wise requiring Weather Wise to name Windcrest Riverhead as an additional insured under a liability insurance policy, the second cause of action of the third-party complaint for breach of contractual obligation to procure liability insurance is dismissed.

Weather Wise is not entitled to summary judgment dismissing the remaining first and third causes of action of the third-party complaint as it failed to establish, as a matter of law, that any alleged negligence on its part did not contribute to plaintiff's alleged accident (*see* ***Perez v 347 Lorimer, LLC***, 84 AD3d 911, 923 NYS2d 138 [2d Dept 2011]; ***Poracki v St. Mary's R.C. Church***, 82 AD3d 1192, 1196, 920 NYS2d 233 [2d Dept 2011]).

Finally, Windcrest Riverhead and Greenview move (009) pursuant to CPLR 4102 (e) for leave to serve a jury demand nunc pro tunc asserting that the failure to timely serve a jury demand was inadvertent, that plaintiff will not be prejudiced, and that denial of the request will prejudice the defendants. They explain that although the Court's records indicated that plaintiff had made a jury demand, they discovered upon review of the note of issue served upon them that no jury demand had been made, and when they subsequently attempted to file a jury demand with the Court, it was rejected as untimely and for a discrepancy as to who was representing the defendants. The Court's computerized records do indicate that

plaintiff made a jury demand on January 12, 2012 and that Windcrest Riverhead and Greenview attempted to file a jury demand on April 19, 2012, which was rejected due to discrepancy concerning the identity of their counsel. The attorneys for Windcrest Riverhead and Greenview include in their papers their notice of appearance filed on August 4, 2010. Plaintiff submits an affirmation in support of this request. Based on the absence of prejudice to plaintiff and the demonstration by Windcrest Riverhead and Greenview that their waiver of the right to a jury trial was inadvertent and unintentional, their request for leave to serve a jury demand nunc pro tunc is granted (*see* CPLR 4102 [e]; ***Breezy Point Co-Op, Inc. v Young***, 234 AD2d 410, 651 NYS2d 896 [2d Dept 1996]; ***Ossory Trading v Geldermann, Inc.***, 200 AD2d 423, 606 NYS2d 221[1st Dept 1994]; ***Lane v Marshall***, 89 AD2d 579, 452 NYS2d 238 [2d Dept 1982]).

Windcrest Riverhead and Greenview are directed to serve a copy of this order upon the Clerk of the Calendar Department.

Dated: JANUARY 10, 2013.

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**