To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM

----------X
DHANESH BOODRAM and SAMANTHA BOODRAM,

Plaintiffs,

-against -

PUTNAM COUNTY DEPARTMENT OF HIGHWAYS AND FACILITIES, WORTH CONSTRUCTION COMPANY, INC., CLEAN AIR QUALITY SERVICES, INC., HILL INTERNATIONAL, INC. and EXECUTECH CONSTRUCTION CORP.,

Defendants.
----------X
WORTH CONSTRUCTION COMPANY, INC.,

Third-Party Plaintiff,

-against-

CARMODY BUILDING CORP.,

Third-Party Defendant.
----------X
WORTH CONSTRUCTION COMPANY, INC.,

Second Third-Party Plaintiff,

-against-

EXECUTECH CONSTRUCTION CORP.,

Second Third-Party Defendant.
----------X
PUTNAM COUNTY DEPARTMENT OF HIGHWAYS AND FACILITIES and WORTH CONSTRUCTION COMPANY,

Third Third-Party Plaintiffs,

-against-

HILL INTERNATIONAL, INC.,

Third Third-Party Defendant.
----------X

DECISION & ORDER

Index No. 3194-2009

Sequence Nos. 5-9

LUBELL, J.

The following papers were considered in connection with the following motions:

Motion Sequence 5 by third-party defendant, Carmody Building Corp., for an Order, pursuant to CPLR §3212, granting summary judgment in favor of third-party defendant, Carmody Building Corp., thereby dismissing the Third-Party Complaint and all cross-claims asserted against Carmody Building Corp., and as and for such other and further relief as this Court may deem just and proper;

Motion Sequence 6 by plaintiffs, Dhanesh Boodram and Samantha Boodram, for an Order granting summary judgment on liability in favor of plaintiffs, against defendants, Putnam County Department of Highways and Facilities, Worth Construction Company, Inc., Clean Air Quality Services, Inc. and Hill International, and for such other and further relief as the Court deems proper and just;

Motion Sequence 7 by defendant, Clean Air Quality Services, Inc., for an Order pursuant to CPLR §3212 dismissing plaintiff's complaint in its entirety with prejudice along with any and all cross-claims and for such other and further relief as is deemed just and proper;

Motion Sequence 8 by defendant, Hill International, Inc. ("Hill"), for an Order (1) dismissing plaintiffs' complaint as a matter of law on the ground that there is no evidence that Hill violated any statute or breached any common law duty owed to plaintiffs which caused or contributed to the alleged incident; (2) dismissing Putnam County Department of Highways and Facilities and Worth Construction Company, Inc.'s third-party complaint against Hill as a matter of law on the ground that there is no evidence that Hill breached any common law duty or contractual obligation owed to Putnam or Worth with respect to the alleged incident; (3) dismissing all cross-claims against Hill as a matter of law on the ground that there is no evidence that Hill owed any common law duty or contractual obligation to any other party with respect to the alleged incident; (4) granting Hill judgment on its cross-claim against Putnam for breach of contract arising out of Putnam's failure to defend and indemnify Hill in this action; (5) granting Hill judgment on its cross-claim against Putnam for breach of contract arising out of Putnam's failure to require that Hill be named as an additional insured on the prime contractor's liability policies; and (6) for such other and further relief as the Court deems just and proper; and

Motion Sequence 9 by defendants/third party plaintiff, second third-party plaintiff and third third-party plaintiffs, Putnam County Department of Highways and Facilities and Worth Construction

Company, Inc. for an Order granting summary judgment pursuant to CPLR §3212 to (A) defendants Putnam County Department of Highways and Facilities and Worth Construction Company, Inc., dismissing plaintiff's first cause of action and the portions of plaintiff's second cause of action based on Labor Law §241-a and §200; (B) defendant Worth Construction Company, Inc. on its third-party action against third-party defendant Carmody Building Corp.; (C) defendant Putnam County Department of Highways and Facilities on its cross-claims against defendant Clean Air Quality Services, Inc.; (D) defendants Putnam County Department of Highways and Facilities and Worth Construction Company, Inc. on the third-party action against defendant Hill International, Inc.; and (E) granting such other, further, and different relief as to this Court may seem just, proper and equitable:

PAPERS[1]	**NUMBERED**
Motion Sequence 5	
Motion/Affirmation/Exhibits A-R	1A
Memorandum of Law	1B
Affirmation in Opposition/Exhibits A-B (Putnam & Worth)	2
Reply Affirmation	3
Motion Sequence 6	
Motion/Affirmation/Exhibits A-S	1
Final Corrective Affirmation in Support	2
Plaintiffs' Further Affirmation in Support	3
Affirmation in Opposition/Exhibits A-H (Worth & Putnam)	4
Reply Affirmation in Opposition/Exhibit A	5
Plaintiffs' Reply Affirmation in Support	6
Motion Sequence 7	
Motion/Affirmation/Exhibits A-Z	1A
Memorandum of Law In Support	1B
Affirmation in Opposition/Exhibits A (Worth & Putnam)	2
Affirmation in Opposition (Putnam & Worth)	3
Reply Affirmation (Clean Air)	
Motion Sequence 8	
Motion/Affirmation/Exhibits A-V	1A
Memorandum of Law In Support	1B
Affirmation in Opposition/Exhibits A-E (Worth & Putnam)	2
Affirmation in Opposition (Putnam & Worth)	3
Reply Affirmation in Support	4

[1] The Court notes that some papers were submitted in connection with multiple motion sequences and were duly considered by the Court in connection with same.

Motion Sequence 9

Motion/Affirmation/Exhibits A-II	1
Affirmation in Opposition/Exhibit A (Hill)	2A
Memorandum of Law In Opposition (Hill)	2B
Affirmation in Opposition/Exhibits A-C (Carmody)	3
Affirmation in Opposition (Clean Air)	4
Reply Affirmation to Plaintiff's Affirmation	5

Plaintiff, Dhanesh Boodram, brings this action to recover for personal injuries sustained on November 4, 2006, while working on the construction of the new Putnam County Courthouse located at 20 County Center, Carmel, New York (the "Premises"). More particularly, plaintiff was injured when he fell five stories through a ventilation shaft/duct (the "HVAC Shaft") located on the top floor machine room or "penthouse" of the Premises after allegedly stumbling upon and breaking through a piece of Dens Fiberglass, a type of weatherproof exterior sheetrock, covering the HVAC Shaft opening of the then under construction Premises.

The Premises is owned by defendant/third party plaintiff, Putnam County Department of Highways and Facilities ("Putnam") County") which, in connection with its construction, entered into "prime contracts" with: defendant Clean Air Quality Services, Inc. ("Clean Air") to perform HVAC work; defendant/third-party plaintiff /second-third-party plaintiff/ third-party plaintiff, Worth Construction Company, Inc. ("Worth"), to perform general construction work; and defendant/third-party defendant, Hill International, Inc. ("Hill"), the construction manager. In turn, Worth entered into various subcontracts including, but not limited to, a subcontract with Carmody Building Corp. ("Carmody Building") to provide concrete and masonry work, and Executech Construction Corp. ("Executech") to perform exterior/interior metal framing and various carpentry/dry-wall services.[2] Carmody Building also subcontracted with Carmody Masonry Corporation ("Carmody Masonry"). At very least in his motion papers, plaintiff alleges that he was working for Carmody Building at the time of the accident. (See, Attorney Affirmation in Support dated February 22, 2012, par. 15[a].)

Through his amended verified complaint, as amplified by his amended verified bill of particulars, plaintiff advances multiple causes of action sounding in common law negligence and violations of sections 200, 240 and 241 of the Labor Law against Putnam, Worth, Clean Air and Hill. In turn, Worth commenced a third-party action against Carmody and Putnam based on causes of action sounding in breach of contract, common law indemnification and

[2] All claims against Executech have since been discontinued.

contractual indemnification. Various other claims, counterclaims and cross-claims and actions are also advanced, some of which are hereinbelow more particularly set forth.

Pursuant to plaintiff's deposition testimony, immediately before the accident, plaintiff was laying block at the penthouse work site.[3] Plaintiff placed a block onto the mortar and went to get another one. Upon proceeding to lay this block at the bottom of what would become a wall, plaintiff allegedly stepped backwards and caught his heel on something which caused him to jump up and backwards over the edge or lip of the HVAC Shaft which has been variously described in these papers as extending anywhere from 6" to 18" inches above the penthouse floor. In the end, plaintiff fell approximately sixty feet down the 26 inch by 26 inch HVAC Shaft, landing upright. After having been cut out of the shaft by fellow workers, plaintiff sought medical attention for injuries allegedly sustained to his shoulders, back and neck.

These actions follow.

Motion Sequence 6[4] - Plaintiff

The principal and dispositive issue to be addressed in connection with plaintiff's motion for partial summary judgment on his Labor Law §240(1) cause of action against defendants Putnam, Worth, Clean Air and Hill is whether plaintiff is a "protected worker" within the meaning of the Labor Law §240(1).

Labor Law § 240(1) reads, in pertinent part:

> All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, 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 [emphasis added].

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[3] Each block measures 8" by 16" and weighs approximately 50 pounds.

[4] This motion is intentionally taken out of sequence given the legal issues raised.

A "protected worker" within the meaning of section 240 is one whose "task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against" (Broggy v. Rockefeller Group, Inc., 8 N.Y.3d 675 [2007]).

While the great majority of the cases addressing section 240(1) liability deal with the safety devices therein enumerated (see e.g. Pineda v. Kechek Realty Corp., 285 A.D.2d 496 [2d Dept 2001] [plaintiff made a prima facie showing of entitlement to summary judgment when the scaffold upon which he was working failed to provide proper protection and was the proximate cause of his injuries]), other cases address circumstances not obviously falling within its ambit(see e.g., Richardson v. Matarese, 206 A.D.2d 353 [2d Dept 1994] [although issue of fact existed as to whether a violation of section 240(1) was a proximate cause of plaintiffs' injuries, Labor Law §240(1) is implicated where plaintiff was injured as the result of the collapse of a permanent floor, not intended to be temporary structure]).

More pertinent to the case before this Court are those cases which deal with injuries sustained by a worker who steps into a hole in the workplace floor.

For example, in the First Department case of Carpio v. Tishman Construction Corporation (240 AD2d 234 [1st Dept 1997]), a construction worker was injured when, while painting the ceiling of the third floor of a building, he stepped into an uncovered riser or sleeve (a piping shaft) and fell three feet below the work surface. Upon reversing the lower Court and finding that plaintiff was a "protected worker" within the meaning of section §240(1), the Court reasoned that "the risk of injury existed because of the 'difference between the elevation level of the required work' (the third floor), and 'a lower level' (the bottom of the piping shaft into which he fell), and common sense alone tells us that this accident was gravity-related [parentheticals as in original]" (id. at 235). The Court also emphasized that plaintiff "fell into a hole with a 3 foot elevation differential, and such a risk would fall within the statute even if it existed at ground level" (id. at 236).

In similar circumstances, however, the Appellate Division, Third Department, reached a different conclusion. In D'Egidio v. Frontier Insurance Company (270 A.D.2d 763 [3d Dept 2000]), the Court found that the plaintiff, who misstepped into a hole while placing wire into a ceiling, did not qualify as a worker under §240(1).

> [W]e cannot conclude that the floor on which plaintiff was required to stand constituted an

> elevated work site requiring the use of the protective devices enumerated in Labor Law §240(1). . . [A] work site is "elevated" within the meaning of the statute where the required work itself must be performed at an elevation. . . such that one of the devices enumerated in the statute will safely allow the worker to perform the task . . . Here, plaintiff's work site was the nonelevated permanent floor and there is no evidence in the record indicating that plaintiff's work in proximity to the floor openings warranted the use of the type of safety devices contemplated by Labor Law §240(1).

(D'Egidio v. Frontier Ins. Co., supra at 765-766).

There is much support for the position that "mere proximity to an elevation differential, alone, is insufficient to trigger the protection of Labor Law § 240(1) . . . " (D'Egidio v. Frontier Ins. Co., supra at 763 citing Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509, 514 [1991] and its progeny Barrett v. Ellenville Natl. Bank, 255 AD2d 473 [2d Dept 1998]; Bradshaw v. National Structures, 249 A.D.2d 921 [4th Dept 1998]; Duke v. Eastman Kodak Co., 248 A.D.2d 990, 991 [4th Dept 1998]; cf., Somerville v. Usdan, 255 A.D.2d 500 [2d Dept 1998]; Ozzimo v. H.E.S. Inc., 249 A.D.2d 912, 914 [4th Dept 1998]).

In Rocovich v. Consolidated Edison Co., supra, for example, the Court of Appeals denied a worker the protection of section 240(1) where the worker failed to establish that the use of one of the enumerated devices would have prevented his injuries. Therein, plaintiff slipped and fell backwards causing his foot and ankle to be immersed in hot oil running through a trough 18 to 36 inches wide and 12 inches deep. Plaintiff argued "that there was some elevation-related risk inherent in having to work near the 12-inch trough and that a 'slip and fall, be it only a matter of inches, into a highly caustic substance such as heated industrial oil should . . . be deemed within section 240(1)'s embrace.'" (Rocovich v. Consolidated Edison Co., supra, at 514).

Upon concluding that the circumstance was not 240(1) worthy, the Court stated:

> While the extent of the elevation differential may not necessarily determine the existence of an elevation-related risk, it is difficult to imagine how plaintiff's proximity to the 12-inch trough could have entailed an elevation-related risk which called for the protective devices of the types listed in

section 240(1).

(Id.).

Similarly, in Broggy v. Rockefeller Group, Inc. (8 NY3d 675 [2007], supra), the Court of Appeals found section 240(1) inapplicable to a worker who fell from a desk while washing the interior windows of an office building. The record demonstrated "as a matter of law plaintiff did not need protection from the effects of gravity" (id. at 681). More particularly, plaintiff therein failed to prove that he needed a ladder or other protective device to complete required tasks.

Here, plaintiff argues that defendants are statutorily liable for having failed to have provided an adequate cover to the HVAC Shaft or other safety devices which would have prevented his fall.

At the threshold, the Court rejects any assertion that plaintiff should have been provided with any of the specifically enumerated safety devices found in section 240(1).

> The types of devices which [Labor Law §240(1)] prescribes "shall be so constructed, placed and operated" . . . as to avoid the contemplated hazards are: "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices" (id.). Some of the enumerated devices (e.g., "scaffolding" and "ladders"), it is evident, are for the use or protection of persons in gaining access to or working at sites where elevation poses a risk. Other listed devices (e.g., "hoists", "blocks", "braces", "irons", and "stays") are used as well for lifting or securing loads and materials employed in the work.

(Rocovich v. Consol. Edison Co., supra at 513-14 [1991])

The only aspects of plaintiff's 240(1) cause of action worthy of close scrutiny is whether the proposed "adequate cover" to the HVAC Shaft into which plaintiff fell constitutes an "other device" within the meaning of the statue and, if so, whether a hole of the magnitude in question constitutes an elevation-related hazard within the meaning of section 240(1).

In the recent Court of Appeals case of Salazar v. Novalex Contr. Corp. (18 NY3d 134 [2011]), the Court reversed the Appellate Division, First Department, and held section 240(1) inapplicable to an accident which occurred when, while walking backwards across the floor and pulling concrete with a rake held in front of him,

plaintiff was injured when he stepped into an approximately two-foot-wide and three-to-four-foot-deep trench which had been partially filled with concrete (Salazar v. Novalex Contracting Corp., supra at 138). Plaintiff's argument that the trench should have been covered or barricaded in such a way as to have prevented his fall was rejected by the Court as "contrary to the objectives of the work plan" which included filling with concrete the very hole into which he fell (id. at 140). Upon ruling as it did, the Court expressly assumed for purposes of its decision, without so finding, that the installation of the protective device posited by plaintiff constituted an "other device" within the meaning of Labor Law §240(1).

Impracticality of the installation of the device here posited by plaintiff is not at issue. There is no viable argument that the HVAC Shaft could not have been adequately covered without compromising the objectives of the work plan, i.e., the erection of a wall. As such, now squarely before this Court is whether a cover or other barrier placed over an opening or hole large enough for a worker to fall through constitutes an "other device" within the meaning of section 240(1) of the Labor Law where the task at hand neither entails nor requires anything other than a worker's close proximity to the opening or hole. The Court answers the question in the negative.

It is well settled that "[t]he extraordinary protections of Labor Law §240(1) extend only to a narrow class of special hazards, and do 'not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity'" (Nieves v. Five Boro Air Conditioning & Refrig. Corp., 93 NY2d 914, 915-916, quoting Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [emphasis in original]). As earlier stated, " . . . mere proximity to an elevation differential, alone, is insufficient to trigger the protection of Labor Law §240(1) . . ." (D'Egidio v. Frontier Ins. Co., supra, at 766), and plaintiff has failed to come forward with any legal authority or factual circumstance which would warrant a different result. Plaintiff's position is not that he was caused to use or step upon the HVAC Shaft to effectuate the work plan. He assertion, as is more fully set forth above, is that he tripped backwards and fell into the HVAC Shaft as he was performing assigned tasks.

Upon construing Labor Law §240(1) with a "commonsense approach to the realities of the workplace at issue" (Salazar v. Novalex Contr. Corp., supra at 140), the Court holds that plaintiff has failed to establish that he was engaged in a task that created an elevation-related risk and that an "other device" within the meaning of section 240(1) of the Labor Law should have been "so constructed, placed and operated as to [have given him] proper protection . . . " (Labor Law §240[1], supra). As a matter of law, the Court concludes that the accident is not the result of an

elevation-related hazard within the meaning of Labor Law §240(1) and plaintiff is not a "protected worker" thereunder.

Having ruled as such, the Court need not determine whether a hole of the magnitude in question constitutes an elevation-related hazard within the meaning of section 240(1). (See, Alvia v. Teman Elec. Contr., Inc., 287 AD2d 421, 422 [2d Dept 2001][a hole measuring 12" by 16" and of unspecified dept does not present an elevation-related hazard to which 240(1) protective devices apply]; Miller v. Weeden, 7 AD3d 684, 685-86 [2d Dept 2004][uncovered hole approximately two feet wide by three feet deep not within ambit of section 240).

Accordingly, plaintiff's motion for summary judgment in its favor is denied and the Court hereby grants summary judgment in favor of all defendants against which said claim has been advanced.

Motion Sequence 5 - Carmody Building

Third-party defendant Carmody Building' motion for summary judgment in its favor dismissing the third-party complaint and all cross-claims asserted against it is granted.

Third-parties, such as Worth, are barred from bringing an action for contribution or indemnification against an employer where its employee is injured in a work-related accident unless the employee has sustained a statutorily defined "grave injury" or the claim for contribution or indemnification is based upon a written contract in which the employer expressly agreed to contribution or indemnification of the claimant for the loss suffered (Bovis v. Crab Meadow Enterprises, LTD., 67 AD3d 846 [1st Dept. 2009]; Fischer v. Waldbaum's, Inc., 7 AD3d 756 [2nd Dept. 2004]); Majewski v. Broadalbin Perth Cent. School Dist., 91 NY2d 577 [1998]).

Upon responding to the merits of that aspect of Carmody Building's motion to dismiss on the grounds that "grave injury" is neither alleged nor proved, Putnam and Worth argue that such is so because plaintiff was in fact employed by non-party Carmody Masonry, not defendant Carmody Building.

Either way, in the absence of an allegation and showing of "grave injury" for whatever reason, the Court now turns to the contractual indemnification clause found in Article XXI of the December 22, 2005, Subcontract Agreement between the parties. It reads:

> To the fullest extent permitted by law, Subcontractor [Carmody Building] will indemnify and hold harmless Worth Construction Co., and the Owner, their officer's, directors, partners, representatives, agents

> and employees from and against any and all claims, suits, liens, judgment, damages, loses and expenses, including legal fees and all court costs and liability (including statutory liability) arising in whole or in part and in any manner from injury and/or death of person of damage to or loss of any property **resulting from the acts, omissions, breach or default of Subcontractor**, its officers, directors; agents; employees and subcontractors, in connection with the performance of any work by or for Subcontractor pursuant to any contract Purchase Order and/or related Proceed Order, except to the proportionate extent that these claims, suits, liens, judgments, damages, losses and expenses are caused by the negligence of Worth Construction Co., Inc.

The Court finds that Carmody Building has come forward in the first instance with a sufficient showing that plaintiff's injuries did not "result[] from [its] acts, omissions, breach or default . . . ", nor were plaintiff's injuries caused by or arise out of the negligence of Carmody Building. In response, Worth has not come forward with any admissible documentary evidence or testimony establishing a question of fact to the contrary.

There is no genuine challenge to the fact that it was the responsibility of the HVAC prime contractor, Clean Air, to have secured the shaft opening (see, Pepe v. The Center for Jewish History, 59 AD3d 277 [1st Dept. 2009]["In short, plaintiff was injured not because the ramp had been removed (allegedly by third-party defendant mason), but because someone had removed the secure covering over the hole . . . and replaced it with a flimsy, unsecured piece of plywood"]).

Having found that Worth has failed in its burden, the Court concludes the above referenced indemnity provision between Carmody Building and Worth has not been triggered as a matter of law (Kader v. City of New York, 16 AD3d 461 [2nd Dept. 2005]).

Motion Sequence 7 - Clean Air

Defendant Clean Air's motion for summary judgment in its favor dismissing plaintiff's complaint in its entirety with prejudice along with any and all cross-claims is granted to the extent herein indicated and, to any further extent, is denied.

As set forth in its moving papers, the thrust of Clean Air's motion is that (a) it was a prime contractor on the project with no authority to supervise, direct or implement safety standards over plaintiff's work and (b) it was not negligent in the happening of

plaintiff's accident.

Upon review and consideration of the papers submitted in connection with issue "(a)", the Court finds that Clean Air has come forward in the first instance with a sufficient and proper showing of entitlement to summary judgment and, in response, plaintiff has failed to raise any material questions of fact regarding same. As such, plaintiff's Labor Law §§240(1), 241(6) and 241-a claims as against Clean Air are dismissed (see, Passananti v. City of New York, 268 AD2d 512 [2d Dept 2000]; Milanese v. Kellerman, 41 AD3d 1058 [3d Dept 2007]; Blake v. Neighborhood Hous. Services of New York City, Inc., 1 NY3d 280 [2003]).

As to "(b)", however, the Court finds that there are questions of fact as to whether Clean Air was negligent in the manner in which it secured or otherwise safeguarded the HVAC Shaft. Also, since plaintiff's injuries allegedly stem not from the manner in which the work was being performed, but, rather, from an alleged dangerous condition at the work site over which Clean Air had control and which it allegedly either created or had actual or constructive notice of, Clean Air may be liable in common-law negligence *and* under Labor Law §200 (see, Martinez v. City of New York, 73 AD3d 993, 998 [2d Dept 2010]). As such, the Court denies that aspect of Clean Air's motion seeking to dismiss the common law negligence and Labor Law §200 claims (see, Ortiz v. I.B.K. Enterprises, Inc., 85 AD3d 1139, 1140 [2d Dept 2011]).

Correspondingly, the unresolved questions of fact as to Clean Air's negligence warrants the denial of that aspect of Clean Air's motion seeking the dismissal of Putnam's and Carmody Building's claims for indemnification at this juncture.

Motion Sequence 8 - Hill

Notwithstanding the terms of the contract between Hill (a prime contractor and the construction manager), and Putnam (the

property owner) [5] [6], the Court finds that Putnam has come forward with sufficient proof in admissible form in response to Hill's prima facie showing of entitlement to judgment in its favor as a matter of law, sufficient to raise a triable issue of fact as to, among other things, whether Hill functioned as an agent of the property owner, Putnam, such that liability may be imposed against Hill under the Labor Law.

> Although a construction manager is generally not considered a "contractor" or "owner" within the meaning of Labor Law §240 (1) or § 241, it may nonetheless become responsible for the safety of the workers at a construction site if it has been delegated the authority and duties of a general contractor, *or if it functions as an agent of the owner of the premises* (see Walls v. Turner Constr. Co., 4 NY3d 861, 863-864 [2005]; Russin v. Louis N. Picciano & Son, 54 NY2d 311, 318 [1981]; Lodato v. Greyhawk N. Am., LLC, 39 AD3d 491, 493 [2007]; Kenny v. Fuller Co., 87 AD2d 183, 190 [1982]) [Emphasis added] . . .

(Pino v. Irvington Union Free School Dist., 43 AD3d 1130, 1131 [2d Dept 2007]). Although Hill may not have been contractually delegated the right to control the work of others (most noteworthy, Clean Air), there are questions raised as to whether it in fact did (see Nowak v. Smith & Mahoney, P.C., 110 AD2d 288, 290-91 [3d Dept 1985][although not found under the circumstances of the case, court recognized the possibility that, despite the terms of the underlying written contract, a prime contractor's activities at the work site may transform its role from that of a prime contractor to

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[5] [HILL] shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work of each of the Contractors, but shall promptly advise the Owner as to each Contractor's responsibility under the Construction Contract(s) and as to whether in (HILL's) judgment, revisions or changes to such contracts are required and whether the terms of such contracts are otherwise being met by the parties thereto. (HILL) shall not be responsible for a Contractor's failure to carry out the work in accordance with the respective Contract Documents.

[6] [HILL] shall review and advise the Owner as to the efficacy of the safety programs developed by each of the Contractors and shall assist in coordinating the safety programs with those of the other Contractor. (HILL's) responsibilities for coordination of safety programs shall not extend to direct control over or charge of the acts or omissions of the Contractors, subcontractors, agents or employees of the Contractors or subcontractors, or any other person performing portions of the Work and not directly employed by (HILL). (See Exhibit "L.")

that of a de facto general contractor; thus exposing itself to Labor Law liability]). Such a potential application of the Labor Law is not inconsistent with its legislative history nor does it effectuate the imposition of an otherwise nondelegable duty upon Hill if, in the end, it is shown that Hill actually functioned as an agent of the owner, Putnam, with respect to the job site injury herein under consideration to the extent related to the scope of supervision and/or control actually performed (see Russin v. Louis N. Picciano & Son, 54 NY2d 311, 317-18 [1981]).

Based upon the foregoing, Hill's motion for summary judgment in its favor dismissing the plaintiff's complaint and all cross-claims against it, and Putnam's and Worth's third-party complaint is denied, except to the extent otherwise expressly granted herein.

That aspect of Hill's motion seeking summary judgment on its cross-claim against Putnam for breach of contract arising out of Putnam's failure to defend and indemnify Hill in this action is denied, there being outstanding material questions of fact regarding Hill's liability as is more fully set forth above (see Kielty v. AJS Const. of L.I., Inc., 83 AD3d 1004, 1005 [2d Dept 2011]).

Finally, Hill's motion for summary judgment on its cross-claim against Putnam for breach of contract arising out of Putnam's alleged failure to require that Hill be named as an additional insured on the prime contractor's liability policies is denied for want of proof in admissible form establishing entitlement to same as a matter of law. Among other things, although Hill has established the absence of any such *contractual* requirement between Putnam and the prime contractors, it has failed to establish that, in fact, no such policies were procured on its behalf.

Motion Sequence 9 - Putnam and Worth

That aspect of Putnam's and Worth's motion for summary judgment in its favor dismissing plaintiff's first cause of action and the portions of plaintiff's second cause of action based on Labor Law §241-a and §200 is granted, the Court being satisfied that movants have come forward in the first instance with sufficient proof in admissible form establishing their entitlement to same and that, in response, plaintiff has failed to raise any material question of fact regarding same.

Worth's motion for summary judgment in its favor in the third-party action against third-party defendant Carmody Building upon Worth's breach of contract claim for Carmody Building's alleged failure to name Worth "as an additional insured on a primary basis" in its insurance policies is granted, the Court being satisfied that Worth has come forward with sufficient proof in admissible form establishing such breach and Carmody Building

has failed to raise a material question of fact regarding same.

That aspect of Worth's motion seeking summary judgment in its favor and against Carmody Building for indemnification is denied for the reasons set forth in the Court's determination with respect to Motion Sequence 5, supra, wherein, among other things, the Court granted Carmody Building's motion for summary judgment as against Worth.

Putnam's motion for summary judgment on its cross-claims against Clean Air for indemnification is denied as premature. The indemnification clause provides for indemnification where "any claims, damages, losses and expenses, including reasonable attorneys fee, . . . aris[e] out of or result[] from any errors or omissions of the contractor in the performance and furnishing of its services under [the] agreement." As earlier indicated, there are material questions of fact as to whether Clean Air is at fault for plaintiff's injuries.

The summary judgment motion by Putnam and Worth in the third-party action against defendant Hill for contractual indemnification is denied, there being material questions of fact raised as to Hill's liability, if any. (See Motion Sequence 8, supra.)

That aspect of Putnam's summary judgment motion seeking judgment in its favor and against Hill upon Hill's alleged failure to have procured General and Professional Liability insurance with limits of $2,000,000 per occurrence is denied. Although Putnam's reference to such a contractual provision is sufficient to make out a prima facie case upon the claim, the Court finds that Hill has come forward with sufficient proof in admissible form raising material questions of fact regarding same.

The parties are directed to appear before the Court at 9:30 A.M. on July 30, 2012, for a Status Conference. [7]

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
June 28, 2012

S/ _____
HON. LEWIS J. LUBELL, J.S.C.

[7] In the event of appellate review, the Court has intentionally ruled on all aspects of the various motions and cross-motions notwithstanding the fact that some aspects of the applications may have been rendered moot by virtue of earlier rulings.

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