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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MADDEN Justice

PART 11

LANTOW, B

- v -

CITY OF NY

INDEX NO. 115210/07

MOTION DATE

MOTION SEQ. NO. 2

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance Memorandum Decision + Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

JUL 30 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: July 24, 2012

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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BRIAN LACHOW,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, AND NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, AMERICAN SAFETY CONSULTANTS, LLC., EARTH TECH AMERICAN SAFETY CONSULTANT, joint venture, AECOM TECHNOLOGY CORPORATION, joint venture, and JENNY URS ENGINEERING, joint venture,

Index No. 115261/07

Defendants.

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JOAN A. MADDEN, J.:

In this action arising out of a construction site accident, defendant TAMS/Earth Tech and Allied North America/Joint Venture d/b/a Earth Tech American Safety Consultant (Allied) moves, by order to show cause, pursuant to CPLR 3212, for summary judgment dismissing the amended complaint and all cross claims against it. Plaintiff Brian Lachow opposes the motion only on his Labor Law § 200 and common-law negligence causes of action and cross-moves, pursuant to CPLR 3025, for leave to amend the bill of particulars. Defendant Jenny URS Engineering, joint venture (Jenny) opposes Allied's motion in part and also opposes plaintiff's cross motion. Defendants City of New York, New York City Department of Environmental Protection (DEP), and New York City Economic Development Corporation (collectively, the City) also oppose plaintiff's cross motion.

BACKGROUND

Plaintiff was injured on August 3, 2007 while working as a maintenance mechanic for nonparty Schiavone/Shea/Frontire-Kemper Joint Venture (SSFK JV) at the capital project known as Water Tunnel #3 located at 10th Avenue and 31st Street in Manhattan. Water Tunnel #3 is owned by the City, and is operated by DEP. The City hired Jenny to provide construction management and resident engineering services at the project. The City hired Allied to provide construction safety and health management services in connection with various DEP projects, including the capital project at Water Tunnel #3.

Pursuant to its contract with DEP, Allied was required to "verify and enforce contractors' compliance with health, safety and related provisions contained in contract documents," "[e]valuate means, methods and materials for construction for potential hazards to the work or to persons or property," "[e]nforce such compliance by the contractors for action by the DEP in accordance with the terms of the Construction Contract Agreement," "perform inspections of all areas, operations and equipment as frequently and comprehensively as is necessary to verify and enforce, in accordance with the terms of the Construction Contract Agreement, that contractors are fulfilling their obligations to provide a safe environment," and "make the contractor aware of any safety deficiencies and direct immediate corrective action" (Ficarra Affirm. in Support, Exh. M, Attachment No. 1, Arts. I, II, §§ 2.3, 2.5).

Plaintiff testified at his deposition[1] that, on August 3, 2007, he was employed by SSFK JV as a maintenance mechanic at the capital project known as Water Tunnel #3 (Plaintiff EBT, at

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[1]Plaintiff was deposed on two occasions: on August 3, 2009 and on January 20, 2011. The court cites to plaintiff's August 3, 2009 deposition, unless otherwise indicated.

20, 21). Plaintiff's job was to maintain rock drilling, mining, and concrete equipment at the project (*id.* at 35). Plaintiff had been employed by SSFK JV and had been performing this task at the tunnel's north heading since January 2007 (*id.* at 21). Plaintiff's supervisor was Bob Washington, Schiavone's operating engineer foreman (*id.* at 33-34). Plaintiff worked two shifts and began to work at 3 P.M. on August 2, 2007 (*id.* at 32-34).

During his shift, plaintiff determined that he could not fabricate a part needed for the work after the welder malfunctioned (*id.* at 36-37). Plaintiff's supervisor instructed plaintiff to take the pieces needed to fabricate the part to the main shaft and use the welder there (*id.* at 37). Plaintiff gathered the parts that he needed and got on a diesel-powered locomotive which is operated by an operator and a brakeman (*id.* at 40). The purpose of the locomotive was to tow and/or push flat cars or passenger cars through the tunnel on rails (*id.*). While riding on the locomotive, plaintiff was standing on a foot platform on the front of the locomotive (*id.* at 55). Plaintiff explained that his accident occurred after the locomotive passed over a California switch (*id.* at 67). The locomotive veered to the left side of the track, which contained slick lines to move concrete into the tunnel (*id.* at 67-68). As the locomotive was traveling at about 15 to 20 miles per hour, one of the slick line pins that was sticking out about a foot from the wall struck plaintiff's right boot (*id.* at 68, 96). Plaintiff screamed, and the locomotive stopped almost immediately (*id.* at 77). Although the pin did not penetrate plaintiff's boot, plaintiff broke his right calcaneous as a result of the impact (*id.* at 102; Plaintiff 50-H Hearing Tr., at 31).

In an affidavit submitted in opposition, plaintiff states that, on the date of his accident, he was instructed by his supervisor to go to weld the pieces of equipment on the locomotive (Plaintiff Aff., ¶ 12). Plaintiff states that he rode on the front of the locomotive where small

platforms had been installed to permit two workers to stand (*id.*, ¶ 15). The platforms were small and his feet hung over the edge of the platform (*id.*, ¶ 16). Plaintiff was standing on the left platform as the train moved towards the main shaft (*id.*, ¶ 17). Plaintiff believes that the locomotive was not manufactured with two platforms, and that the platforms were fabricated after they were received by Schiavone (*id.*, ¶ 20). Plaintiff states that he was never told not to ride on the platforms in front of the locomotive; rather, he was encouraged to ride on the platforms because it was often the only means of riding on the locomotive (*id.*, ¶ 26).

Peter Reynolds testified that he was employed as a safety engineer for SSFK JV at Water Tunnel #3 (Reynolds EBT, at 6, 8, 11). Reynolds issued safety equipment, including earplugs, respirators, safety glasses, and hard hats, and conducted safety meetings every other week (*id.* at 18). According to Reynolds, the workers were transported through the tunnels on "man trips" – two train cars that are pulled by a locomotive (*id.* at 34). Prior to the accident, Reynolds held a safety meeting and instructed workers not to ride on the locomotive itself but to ride only on the "man trip" attached to the locomotive (*id.* at 75-78).

Mohammed Abbaszadeh testified that he was employed as a resident engineer for DEP (Abbaszadeh EBT, at 6). DEP hired Allied to provide safety engineers and inspectors to monitor safety at various capital projects, including Water Tunnel #3 (*id.* at 40). Allied reported any safety issue to SSFK JV and DEP, which would then take necessary action to remedy safety concerns (Abbaszadeh Continued EBT, at 185). DEP or Jenny issued stop work orders (*id.*).

Mitch Calderon avers that, in August 2007, he was employed as a field auditor by Allied (Calderon Aff., ¶ 1). Calderon states that his job duties consisted of performing periodic field safety inspections, recording the results of his inspections in a database, and occasionally

reporting the results of his inspections to the resident engineer (*id.*, ¶ 2). Calderon asserts that he did not direct the means or methods of the work of any contractor (*id.*, ¶ 3). Jenny and SSFK JV had their own safety personnel on site, as required by their contracts with DEP, who inspected the work for compliance with safety standards (*id.*, ¶ 5). Prior to August 3, 2007, Calderon was last at the project site on July 12, 2007 to perform a random safety audit, and did not record any non-compliant practices (*id.*, ¶ 7).

Jack LaMantia states in an affidavit that he was employed as a deputy project manager for Allied (LaMantia Aff., ¶ 1). Allied randomly visited sites, including Water Tunnel #3, to audit for compliance with federal, state, local, and DEP occupational safety regulations (*id.*, ¶ 3). If Allied observed unsafe work practices or conditions, it recorded them in a database known as DB02 and discussed any such issues with appropriate DEP staff, resident engineering staff, and the contractor's site safety representative to take immediate corrective action (*id.*). Allied did not supply equipment or devices, and did not approve or disapprove of the materials or methods used on the job site (*id.*).

Steven Wakefield testified that he was employed as a safety inspector for Allied (Wakefield EBT, at 9). Wakefield performed safety inspections of the water tunnel project (*id.* at 12). During an inspection, Wakefield noted that he observed an employee riding on the rear coupling of a locomotive (*id.* at 41). According to Wakefield, the locomotives were used to move trains (*id.* at 46). Wakefield believed that riding on the outside of a locomotive was dangerous and a violation of OSHA regulations (*id.* at 80, 81). Wakefield never complained about the existence of the platforms (*id.* at 85).

Plaintiff commenced this action against the City on November 14, 2007, seeking recovery

for violations of Labor Law §§ 240 (1), 241 (6), and 200 and for common-law negligence. On February 11, 2010, plaintiff served a supplemental summons and amended complaint adding defendants Allied, American Safety Consultants, LLC, Aecom Technology Corporation, and Jenny as additional defendants, seeking recovery against all defendants on the same theories. In its answer, the City asserts cross claims for contractual and common-law indemnification, contribution, and breach of contract for failure to procure insurance against Allied. Jenny also asserts cross claims for contractual and common-law indemnification, contribution, and failure to procure insurance against Allied.

DISCUSSION

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to "present evidentiary facts in admissible form sufficient to create a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). "On a motion for summary judgment, issue-finding, rather than issue-determination, is key" (*Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 475 [1st Dept 2010], citing *Insurance Corp. of N.Y. v Central Mut. Ins. Co.*, 47 AD3d 469, 472 [1st Dept 2008]).

I. Allied's Motion for Summary Judgment Dismissing Plaintiff's Claims

Allied moves for summary judgment, arguing that plaintiff's Labor Law claims must be dismissed, because it is not an "owner," "contractor" or "agent" of the owner or contractor. In addition, Allied argues that it cannot be liable under Labor Law § 200 because it did not

supervise, direct, or control the means or methods of plaintiff's work. As for plaintiff's common-law negligence claim, Allied contends that it did not owe plaintiff a duty of care because: (1) it did not create or exacerbate the alleged dangerous slick line pin condition or have actual or constructive notice of it; (2) plaintiff did not detrimentally rely on Allied's contract because he had never heard of Allied; and (3) it did not have a "comprehensive and exclusive" duty to maintain the water tunnel, since its contract did not require it to maintain the premises at all. Allied further contends that plaintiff's Labor Law § 240 (1) claim fails because plaintiff was not subjected to an elevation-related hazard. Additionally, Allied asserts that plaintiff's Labor Law § 241 (6) claim is insufficient because plaintiff has failed to identify a specific or applicable violation of the Industrial Code. Finally, Allied argues that plaintiff's alleged violations of OSHA and the Building Code do not form a predicate for liability against it.

In opposition, plaintiff concedes that Allied is not liable under Labor Law §§ 240 (1) and 241 (6) (Kerner Affirm. in Support of Cross Motion and in Opposition, ¶ 158). With respect to Labor Law § 200 and common-law negligence, plaintiff also concedes that Allied did not supervise or control the means or methods of plaintiff's work (*id.*, ¶ 144).

Plaintiff, however, argues that Allied failed to meet its burden on summary judgment and may be liable under Labor Law § 200 and in common-law negligence because it assumed full responsibility for safety on the job site pursuant to its contract with the City, and either knew or should have known of the dangerous platform of the locomotive, and failed to take any remedial measures. Plaintiff points out that Allied's own witness, Steven Wakefield, testified that riding on the outside of a locomotive was very dangerous and in violation of OSHA rules, and that the only purpose of the platform was for workers to stand on them while being transported by the

locomotive. Plaintiff argues that Allied stood in the shoes of the City regarding job site safety. Relying upon *Freitas v New York City Tr. Auth.* (249 AD2d 184 [1st Dept 1998]) and *Gawel v Consolidated Edison Co. of N.Y.* (237 AD2d 138 [1st Dept 1997]), plaintiff contends that where a site safety coordinator has an all exclusive contract, the issue of its liability is for a jury to determine.

In reply, Allied responds that it is not an owner or a contractor as it did not have supervisory control over the work site. Allied also argues that neither the platform of the locomotive on which plaintiff was standing nor the slick line pin can be deemed a condition inherent in the premises. Allied points out that the platform was part of the diesel-powered locomotive used by plaintiff's employer to transport workers and materials throughout the water tunnel project. In addition, Allied claims that the slick line pins, including the one that struck plaintiff's foot, were installed by SSFK JV. Allied further asserts that plaintiff's injuries were a result of the manner in which the slick line pins were installed by SSFK JV, or the manner in which workers were transported through the tunnel. Furthermore, Allied submits that it did not displace DEP's duty to safely maintain the water tunnel because it was not required to maintain the premises at all.

As noted above, plaintiff has conceded that Allied cannot be liable under Labor Law §§ 240 (1) and 241 (6). Thus, the court must only determine whether Allied may be liable under Labor Law § 200 and in common-law negligence.

Labor Law § 200 provides, in relevant part, that:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places.

> All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. . . ."

Labor Law § 200 is a codification of the common-law duty imposed on property owners, general contractors, and employers to provide workers with a safe work site (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; NY PJI 2:216). "[A]n implicit precondition to this duty is that the party to be charged with that obligation 'have the *authority to control the activity bringing about the injury to enable it to avoid* or correct an unsafe condition'" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998], quoting *Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]).

Generally, Labor Law § 200 claims fall into two disjunctive categories: those involving the manner in which the work is performed, and those where a worker is injured as a result of dangerous or defective premises conditions at the work site (*Schultz v Hi-Tech Constr. & Mgt. Servs., Inc.*, 69 AD3d 701 [2d Dept 2010]). Plaintiff argues that the platform on the locomotive on which plaintiff was standing constitutes a dangerous premises condition, of which Allied had notice, while Allied argues that the platform implicates the means and methods of the work, and therefore it cannot be held liable to plaintiff absent evidence that it supervised or controlled the activity giving rise to the injury (*Thompson v BFP 300 Madison II, LP*, 95 AD3d 543 [1st Dept 2012]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]; *Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347, 350 [1st Dept 2006]).

The duty to provide a safe place to work is not breached when the injury arises out of a defect in the contractor's own plant, tools, and methods, or through negligent acts of the contractor occurring as a detail of the work (*Persichilli v Triborough Bridge & Tunnel Auth.*, 16

NY2d 136, 145 [1965], *rearg denied* 16 NY2d 883 [1965]). In *Persichilli*, the Court of Appeals reasoned that, although a subcontractor must furnish safe ladders and scaffolds to its employees, a subcontractor's failure to provide safe appliances does not render the "premises" unsafe or defective (*id.* at 146).

However, in some instances, tools or equipment may constitute dangerous premises conditions. For instance, in *Higgins v 1790 Broadway Assoc.* (261 AD2d 223 [1st Dept 1999]), a case relied upon by plaintiff, the plaintiff was injured while attempting to repair a malfunctioning freight elevator and using a defective ladder, which had been stored in the building, to gain access to the roof of the elevator. A rung of the ladder broke under him as he was descending the ladder. The First Department held that "[i]t is generally accepted that a ladder falls within the protection afforded by Labor Law § 200" (*id.* at 224). According to the Court, "[a]s it was reasonably foreseeable that a worker might use the defective ladder and sustain injury, its presence in the building clearly constituted a dangerous condition" (*id.* at 225).

In *Slikas v Cyclone Realty, LLC* (78 AD3d 144 [2d Dept 2010]), the plaintiff tripped on a crowbar that painters had left in an office doorway. In determining that the mislaid crowbar was a premises condition, the Second Department held that:

> "[t]he mislaid crowbar was not, at the time of the accident, being used by the painters. Instead, by leaving the crowbar in an office doorway, the painters created a tripping hazard. The plaintiff's accident occurred at a time of day when the painters had already ceased their work and were no longer using their tools, including the crowbar at issue. Therefore, the crowbar was not part of the painters' work at the time of the accident, but was a mere consequence of it after the day's work had been completed. The end of the painters' work day transformed the mislaid crowbar into a premises condition"

(*id.* at 148).

However, in *Cody v State of New York* (82 AD3d 925, 927 [2d Dept 2011]), the Second Department clarified its holding in *Slikas*, noting that "the *Slikas* case would have fallen into the 'means and methods of the work' category if the object on which plaintiff stumbled had been a product of ongoing construction work, which is precisely the situation presented in the instant case."

Contrary to plaintiff's contention, the record suggests that his accident was a product of dangerous equipment provided by his employer, SSFK JV, which was used during ongoing construction work, and not a dangerous condition inherent in the premises. Plaintiff was injured while riding on the allegedly dangerous platform of the locomotive to use the welder at the north heading of the tunnel (Plaintiff EBT, at 68, 96). Here, plaintiff testified that Allied never gave him any instructions regarding his work (Plaintiff 1/20/11 EBT, at 97-98). Allied monitored safety at the project and reported any safety issues to SSFK JV and DEP, which would take corrective action; Allied never directed the means or methods of any work performed by any contractor (Abbaszadeh Continued EBT, at 185; Calderon Aff., ¶¶ 2, 3; LaMantia Aff., ¶ 3).[2]

"General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (*Hughes*, 40 AD3d at 306). Thus, Allied's retention of the right to generally supervise the work, to stop a contractor's work if a safety violation was noted, or to ensure compliance with safety regulations, is insufficient to impose liability under the common law or section 200 (*see Griffin v Clinton Green S., LLC*, –

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[2]In fact, it appears that plaintiff has conceded that such supervision and control does not exist (Kerner Affirm. in Support of Cross Motion and in Opposition, ¶ 144). However, since plaintiff also cites cases to support the contrary position, the court has examined the issue.

AD3d –, 2012 NY Slip Op 04841 [1st Dept 2012]; *Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [1st Dept 2005]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]; *Buccini v 1568 Broadway Assoc.*, 250 AD2d 466, 468 [1st Dept 1998]). Even if Allied was aware that SSFK JV's employees were riding on the outside of a locomotive (Wakefield EBT, at 80, 85), "[m]ere notice of unsafe methods of performance is not enough to hold the [defendant] vicariously liable under this section [or in common-law negligence]" (*Colon v Lehrer, McGovern & Bovis*, 259 AD2d 417, 419 [1st Dept 1999]; *see also Dennis v City of New York*, 304 AD2d 611, 612 [2d Dept 2003] ["no liability will attach to the owner solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed"]).

Plaintiff argues that Allied supervised safety on the job site, relying upon *Freitas* (249 AD2d 184, *supra*), and *Gawel* (237 AD2d 138, *supra*). In *Freitas*, the First Department held that a general contractor's authority to stop work for safety reasons was sufficient to raise a triable issue of fact as to its supervision and control over the work (*Freitas*, 249 AD2d at 186). Similarly, in *Gawel*, citing *Freitas*, the First Department held that the testimony of defendant's chief construction inspector that he was stationed at the work site, inspected the work on a daily basis, kept a daily log, and had the authority to stop the work to correct unsafe work practices was sufficient to raise a triable issue of fact as to whether it supervised the work (*Gawel*, 237 AD2d at 138-139). However, in *Hughes* (40 AD3d 305, *supra*), the First Department overruled the *Gawel* line of cases, noting that:

> "That Tishman, Site Safety, or both, may have had the authority to stop work for safety reasons is insufficient to raise a triable issue of fact with respect to whether Tishman exercised the requisite degree of supervision and control over the work being performed to sustain a claim under Labor Law § 200 or for common-law negligence . . . The *Buccini* line of cases, however, comports with the overarching

> principle that liability under Labor Law § 200 or for common-law negligence may only be imposed on a general contractor or construction manager who controls the manner in which the plaintiff performed his or her work. The *Gawel* line of cases, upon which the dissent relies, deviate from that well-settled principle"

(*id.* at 309).

Furthermore, even assuming *arguendo* that the locomotive constituted an unsafe condition of the premises as advocated by the plaintiff, there is no basis for imposing liability against Allied under Labor Law § 200. Notably, the statutory duty to provide a safe place to work, which is based on the common law, is imposed on owners, general contractors and employers only (*Comes v. New York State Elec. and Gas Corp.*, 82 NY2d at 877]). Thus, owners, general contractors and employers are subject to liability for a defect in the premises if they created or had actual or constructive notice of the dangerous condition (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]; *Hernandez v Columbus Ctr., LLC*, 50 AD3d 597, 598 [1st Dept 2008]; *Murphy v Columbia Univ.*, 4 AD3d 200, 201-202 [1st Dept 2004]).

In contrast, Allied, as an engineer hired by DEP to make safety inspections at the work site, cannot be held liable to injured worker unless it "commits an affirmative act of negligence or such liability is imposed by a clear contractual provision"(*Hernandez v. Yonkers Contr. Co., Inc.*, 306 AD2d 379, 380 [2d Dept 2003]; *see also*, *Domenach v. Associated Engineers*, 257 AD2d 403 [1st Dept 1999][holding that engineer was not liable to injured worker where its function was to report to DEP, and that contract specifically said that it was an agent of DEP]; *Becker v. Tallamy, Van Kuren, Gertis & Assocs*, 221 AD2d 1014 [1st Dept 1995]). Here, there is no evidence that Allied committed an affirmative act of negligence or that any contractual

provision imposed liability on Allied for injuries to workers like the plaintiff.[3] Thus, even if Allied had notice of the defect with the locomotive and did not report it to DEP, it cannot be liable to plaintiff for any resulting injuries *(see Suriano v. City of New* York, 240 AD2d 486 [2d Dept 1997]; *Hamill v. Foster-Lipkins Corp.*, 41 AD2d 361 [3d Dept 1973]).

In this connection, the court notes that, in general, a contractor, such as Allied, does not owe a duty of care to noncontracting third parties, such as plaintiff (*Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]; *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]; *Timmins v Tishman Constr. Corp.*, 9 AD3d 62, 66 [1st Dept 2004], *lv dismissed* 4 NY3d 739 [2004], *rearg denied* 4 NY3d 795 [2005]). However, there are three exceptions to this general rule: (1) "where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk" (*Church*, 99 NY2d at 111); (2) "where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation" (*id.*); and (3) "'where the contracting party has entirely displaced the other party's duty to maintain the premises safely'" (*id.* at 112, quoting *Espinal*, 98 NY2d at 140).

Plaintiff relies on the third exception,[4] arguing that Allied entirely displaced the City's

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[3]For the same reason, it cannot be said that plaintiff is a third-party beneficiary of the contract between Allied and DEP (*see generally*, *Alicea v. City of New York*, 145 AD2d 315 (1st Dept 1988).

[4]There is also no evidence that the first or second exceptions apply. First, there is no evidence that Allied created the allegedly dangerous platform condition. Second, plaintiff did not know whether Allied was on site (Plaintiff Continued EBT, at 97-98). Thus, he could not have detrimentally relied on Allied's contract (*see e.g. Castro v Maple Run Condominium Assn.*, 41 AD3d 412, 413 [2d Dept 2007] [detrimental reliance exception did not apply because plaintiff testified that she had no knowledge of snow removal contract]).

duty to maintain the water tunnel. Under this exception, a defendant may owe a duty of care where it has a "comprehensive and exclusive" contractual obligation to inspect and maintain the premises safely (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 588 [1994]). In order for this exception to apply, the contractor must have entirely displaced the landowner's duty to maintain the premises safely (*see Espinal*, 98 NY2d at 141; *Timmins*, 9 AD3d at 68).

In *Palka*, the plaintiff, a nurse, was injured when a defectively maintained fan fell on her while she was caring for a patient in a hospital (*Palka*, 83 NY2d at 582). The Court of Appeals imposed a duty of care on the hospital's maintenance contractor, since its contract was "comprehensive and exclusive" as to preventative maintenance, inspection, and repair, thus making the contractor the "sole privatized provider for a safe and clean hospital premises" (*id.* at 588, 589). In *Espinal*, the plaintiff slipped and fell in an icy parking lot, and sued the owner's snow removal contractor (*Espinal*, 98 NY2d at 138). The Court held that this exception did not apply, because, under the terms of its contract, the owner "at all times retained its landowner's duty to inspect and safely maintain the premises" (*id.* at 141).

Here, Allied did not displace the City's duty to maintain the water tunnel safely. Allied was only required to perform inspections to determine whether contractors' safety and health plans conformed with contract documents, and was required to report those results to the City, Jenny, and SSFK JV. Therefore, the third exception does not apply (*see Parra v Allright Parking Mgt., Inc.*, 59 AD3d 346, 347 [1st Dept 2009] [parking garage manager's contract with garage owner was not so comprehensive and exclusive so as to displace owner's duty to maintain premises in a safe condition; manager was only required to cooperate with TBTA's contractors and subcontractors]; *cf. Hopper v Regional Scaffolding & Hoisting Co., Inc.*, 21 AD3d 262, 263

[1st Dept 2005], *lv dismissed* 6 NY3d 806 [2006] [although subcontractor was not in privity of contract with the injured worker, it was contractually responsible for maintenance and repair of the material hoist he was hired to operate, and thus owed him a duty of care]).

Accordingly, Allied is entitled to summary judgment dismissing the complaint as against it.

II. Allied's Motion for Summary Judgment Dismissing the Cross Claims Against it

The City and Jenny have not opposed Allied's motion for summary judgment dismissing their cross claims for contractual indemnification and failure to procure insurance against Allied. Accordingly, these claims are dismissed. In addition, since Allied has shown that it was not negligent, defendants' cross claims for common-law indemnification and contribution against Allied are also dismissed.

III. Plaintiff's Cross Motion for Leave to Amend the Bill of Particulars

Plantiff cross-moves, pursuant to CPLR 3025, for leave to amend the bill of particulars to allege the following two violations of OSHA regulations: 29 CFR 1926.601 (b) (8) and 29 CFR 1926.800 (r) (6).[5]

In opposition, the City argues that OSHA regulations do not provide a predicate for liability under Labor Law § 241 (6). In addition, Jenny takes the position that it will be prejudiced by adding new theories of liability. According to Jenny, plaintiff had previously only alleged that the slick line pin was the dangerous condition that caused his accident. Jenny also

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[5]29 CFR 1926.601 (b) (8) provides that "Vehicles used to transport employees shall have seats firmly secured and adequate for the number of employees to be carried." 29 CFR 1926.800 (r) (6) (ii) states that "No employee shall ride haulage equipment unless it is equipped with seating for each passenger and protects passengers from being struck, crushed, or caught between other equipment or surfaces."

argues that the locomotives were fully compliant with 29 CFR 1926.601 (b) (8) and 29 CFR 1926.800 (r) (6) because "man trips" were connected to the locomotives, and were equipped to carry as many as 25 men at a time through the tunnels. Finally, Jenny points out that OSHA rules do not create independent causes of action or a predicate for liability under Labor Law § 241 (6).

In reply, plaintiff points out that CPLR 3042 (b) applies because the note of issue has not yet been filed.

CPLR 3042 (b) provides that "[i]n any action . . . in which a note of issue is required to be filed, a party may amend the bill of particulars once as of course prior to the filing of the note of issue." Such an amendment "'can [make] any change at all in the bill,' and enables a party to include whatever could have been included in the original bill of particulars" (*Geller v Port Jefferson Obstetrics & Gynecology, P.C.*, 294 AD2d 537 [2d Dept 2002], quoting *Martinovics v New York City Health and Hosps. Corp.*, 285 AD2d 532, 535 [2d Dept 2001]; *see also* Siegel, NY Prac § 240 [5th ed]).

In *Dubose v New York City Health & Hosps. Corp.* (229 AD2d 312 [1st Dept 1996]), the First Department held that "[u]nder CPLR 3042 (b) (CPLR 3042 former (g)]), a party is entitled to amend the bill of particulars once as of right, regardless of the timing, so long as the note of issue has not been filed. Here, since plaintiff sought to amend his bill of particulars before the note of issue was filed, his amendment should have been allowed."

Here, as pointed out by plaintiff in reply, the bill of particulars has not been amended and the note of issue has not yet been filed in this action. Accordingly, plaintiff is permitted to amend the bill of particulars to allege violations of 29 CFR 1926.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 002) of defendant TAMS/Earth Tech and Allied North America/Joint Venture d/b/a Earth Tech American Safety Consultant for summary judgment is granted and the complaint and all cross claims are severed and dismissed as against said defendant with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the cross motion of plaintiff Brian Lachow for leave to amend the bill of particulars is granted; and it is further

ORDERED that the remaining parties shall appear on August 16, 2012 at 9:30 am in Part 11, room 351 for a status conference.

Dated: July 24 2012

J.S.C.