SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

PART C-2

THOMAS RODRIGUEZ and NORINA RODRIGUEZ,

HON. THOMAS P. ALIOTTA

Plaintiff(s),

-against-

DECISION AND ORDER

TRADES CONSTRUCTION SERVICES CORP., LEEWOOD REAL ESTATE GROUP/NY LLC, LEEWOOD REAL ESTATE GROUP, LLC, AMERICAN HERITAGE PROPERTIES, LLC, MONOGRAM PROPERTIES, INC., OWN-A-HOME REALTY CORP., THE ESTATES AT OPAL RIDGE, and THE CITY OF NEW YORK,

Index No. 101131/06

Motion Nos. 4505 - 014
003 - 015
106 - 016
180 - 017

Defendant(s).

x

THE CITY OF NEW YORK,

Third-Party Plaintiff(s),

Index No. 101131A/06

-against-

DESIGN PLUMBING AND HEATING SERVICE, INC., OPAL BUILDERS, LLC, OPAL LAND HOMEOWNERS ASSOCIATION, a/k/a OPAL LANE HOMEOWNERS ASSOCIATION, INC., PHILIP CULOTTA, "JOHN DOE and "JANE DOE" 1 THROUGH 15, fictitious names, true names unknown, the parties intended being any and all persons and/or entities with title or control; in the real property on which the subject accident occurred or exercising control; over the means, methods and machinery which caused the accident.

Third-Party Defendant(s).

x

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The following papers numbered 1 to 12 were marked fully submitted on the 11th day of April, 2012.

Papers Numbered

Notice of Motion for Summary Judgment by Defendants LEEWOOD REAL ESTATE GROUP/NY and LLC, LEEWOOD REAL ESTATE GROUP, LLC and OPAL BUILDERS, LLC s/h/a THE ESTATES AT OPAL RIDGE and Third-Party Defendant OPAL BUILDERS, LLC, with Supporting Papers and Exhibits (dated December 27, 2011) 1

Notice of Cross Motion for Summary Judgment of Third-Party Defendant DESIGN PLUMBING AND HEATING SERVICE, INC. and PHILIP CULOTTA, with Supporting Papers, and Exhibits (dated December 27, 2011) 2

Notice of Cross Motion for Summary Judgment of Defendants/Third-Party Plaintiffs THE CITY OF NEW YORK , with Supporting Papers and Exhibits (dated January 3, 2012) 3

Notice of Cross Motion for Summary Judgment of Third-Party Defendant TRADES CONSTRUCTION SERVICES CORP., with Supporting Papers and Exhibits (dated January 3, 2012) 4

Affirmation in Partial Opposition by Defendants LEEWOOD REAL ESTATE GROUP/NY, LLC, LEEWOOD REAL ESTATE GROUP, LLC, s/h/a THE ESTATES AT OPAL RIDGE and OPAL BUILDERS, LLC to the Cross Motion of Defendant TRADES CONSTRUCTION SERVICES, INC. (dated January 10, 2012) 5

Affirmation in Opposition by Plaintiffs to the Motions of Defendants TRADES CONSTRUCTION SERVICES CORP., LEEWOOD REAL ESTATE GROUP/NY LLC, LEEWOOD REAL ESTATE GROUP, LLC, THE ESTATES AT OPAL RIDGE, and THE CITY OF NEW YORK (dated February 7, 2012) 6

Affirmation in Partial Opposition by Defendant TRADES CONSTRUCTION SERVICES CORP. to the Cross Motion of Defendant/Third-Party Plaintiff THE CITY OF NEW YORK (dated March 7, 2012) 7

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Affirmation in Partial Opposition by Defendant DESIGN PLUMBING AND HEATING SERVICE, INC. to the Cross Motion for Summary Judgment of Defendant/Third-Party Plaintiff THE CITY OF NEW YORK, with Exhibits (dated March 7, 2012) 8

Reply Affirmation of Defendant TRADES CONSTRUCTION SERVICES CORP. (dated March 8, 2012) 9

Reply Affirmation by Defendant/Third-Party Plaintiff THE CITY OF NEW YORK to the Affirmation in Opposition of Plaintiffs, Defendant TRADES CONSTRUCTION SERVICES CORP. , Defendant DESIGN PLUMBING AND HEATING SERVICE, INC., and PHILIP CULOTTA, and in Partial Opposition to the Motion of Defendants LEEWOOD REAL ESTATE GROUP/NY LLC and OPAL BUILDER, LLC, and Cross Motion of Defendants TRADES CONSTRUCTION SERVICES CORP. and DESIGN PLUMBING AND HEATING SERVICE CORP., with Exhibit (dated April 9, 2012) 10

Reply Affirmation of Defendants LEEWOOD REAL ESTATE GROUP/NY, LEEWOOD REAL ESTATE GROUP LLC, and Third-Party Defendant OPAL BUILDERS, LLC s/h/a THE ESTATES AT OPAL RIDGE (dated April 10, 2012) 11

Reply Affirmation of Third-Party Defendant DESIGN PLUMBING AND HEATING SERVICE, INC. to the Affirmation in Opposition of Defendant/Third-Party Plaintiff THE CITY OF NEW YORK (dated April 22, 2012) 12

Upon the foregoing papers, the motion and cross motions for summary judgment are decided as follows.

Plaintiffs THOMAS RODRIGUEZ and NORINA RODRIGUEZ commenced this action to recover damages for injuries allegedly sustained by the former (hereinafter "plaintiff") on March 14, 2006, while working as a plumbing laborer at a construction site on Bloomingdale Road in Staten Island, New York. Insofar as it appears from the papers submitted to the Court, defendant/third-party defendant OPAL BUILDERS, LLC (s/h/a "THE ESTATES AT OPAL

RIDGE" but hereinafter referred to as "OPAL"), was the owner of property, and had contracted with defendant TRADES CONSTRUCTION SERVICES CORP. (hereinafter "TRADES") to develop 22 two-family homes to be called Opal Ridge Estates. It is undisputed that TRADES was to act as general contractor for all activities occurring at the site, and was responsible for the hiring of all subcontractors.

Third-party defendant DESIGN PLUMBING & HEATING SERVICE INC. (hereinafter "DESIGN") was the plumbing subcontractor hired by TRADES to install subterranean water and sewer lines at the site, and to connect those lines to the houses in the development. For its part, it appears that third-party plaintiff THE CITY OF NEW YORK (hereinafter "THE CITY") was required to inspect the connection to its water main after DESIGN had excavated the roadway and installed the necessary piping. It further appears that DESIGN was to arrange with THE CITY to make the connections and obtain the necessary permits, including (1) a permit from the Department of Transportation (hereinafter DOT) to open the street, and (2) a permit from the Department of Environmental Protection (hereinafter DEP) to make the connection to THE CITY's mains. To the extent relevant, it appears that the DEP was required to have an inspector "on site" for the process of making the "wet connection" to THE CITY's lines, a presence which was also to be arranged by DESIGN. So, too, for the digging of the trench into which the pipe was to be laid, and the making of the physical connection to THE CITY's mains. As regards the trench, it appears that both the Department of Buildings and OSHA require shoring for trenches that are five or more feet in depth. No shoring is required if the trench is of a lesser depth. In this case, it is claimed that no shoring was used for the trench accommodating the connection to the

City's mains which were located at a depth of approximately three feet. Plaintiff, an employee of DESIGN, was laboring in the trench when its side collapsed.

As a result of said collapse, plaintiff claims to have sustained, *inter alia*, multiple pelvic fractures, a ruptured bladder, a grade 3-4 spleen laceration, and internal bleeding. The required medical intervention included a splenic artery embolization, foley catheter, vena cava filter and several blood transfusions. According to the bill of particulars, plaintiff continues to be unable to bear weight on his left lower extremity; is unable to walk without assistance; continues to experience pain and suffering, both mental and physical; has lost his enjoyment of life; and is unable to conduct his normal daily activities. It is further alleged that plaintiff has remained incapacitated from his employment as a plumber since the subject accident, and that his injuries are permanent in nature.

As a result of these injuries, plaintiff and his wife, NORINA, commenced the present action against OPAL, TRADES, THE CITY, *et al.*, alleging violations of Labor Law §§ 240(1), 241(6) , 200 and common law negligence. In response, THE CITY commenced a third-party action for indemnification against OPAL and DESIGN, including its supervisor, the individual third-party defendant PHILIP CULOTTA, to whatever extent their roles in the subject construction project constituted a source of liability imposed upon THE CITY. On August 16, 2011, a Stipulation of Discontinuance was executed by the parties against defendant OWN-A-HOME REALTY CORP. In addition, the derivative claims asserted on behalf of NORINA RODRIGUEZ have been discontinued.

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In their current application (Motion No. 4505-014), defendant LEEWOOD REAL ESTATE GROUP/NY and LLC, LEEWOOD REAL ESTATE CORP, LLC (hereinafter collectively LEEWOOD), and defendant/third party defendant OPAL move for summary judgment dismissing plaintiffs' causes of action for common-law negligence and violations of the Labor Law, as well as any cross claims against them, and for judgment in their favor on their cross- claims for contractual and/or common-law indemnification against codefendant TRADES. According to these defendants, all claims asserted against LEEWOOD should be dismissed, since it had nothing to do with either the subject property or the construction project.

With regard to plaintiffs' claims under Labor Law §200 and common-law negligence, LEEWOOD and the owner, OPAL, contend that they are entitled to summary judgment and the dismissal of any claims against them since they did not exercise any supervisory control over plaintiff, his work or the manner in which he performed his job. These defendants also argue that although Labor Law §200 imposes a non-delegable duty upon owners and contractors to furnish workers with a safe workplace, they may only be subjected to such liability for the failure to exercise reasonable care and prudence in securing the safety of the work area, and then only if the owner or contractor (1) exercises supervisory control over the contractor's means and methods, *and* (2) possesses actual or constructive notice of any unsafe work methods. In addition, these parties contend that the mere exercise of general supervisory powers is insufficient to impose liability under this section of the Labor Law. Likewise, it is also argued that the imposition of liability under a common-law negligence theory requires proof of the exercise of control over the injured plaintiff's work.

Relying on the EBT testimony of OPAL's principal, Randy Lee, these defendants argue that OPAL did not participate in the hiring of any subcontractors; that Lee, personally, did not visit the work site on a regular basis; that he did not attend any project meetings; and that he did not provide any instructions to either the general or subcontractors or any of their employees regarding the work in which they were engaged. In fact, LEEWOOD and OPAL argue that plaintiff testified at his own EBT that no one other than DESIGN personnel ever gave him instruction, and that he performed his work solely under the direction and control of his employer, DESIGN. In addition, these defendants argue that there has been absolutely no proof of any negligence on their part with regard to their roles in the subject construction project.

Insofar as plaintiffs assert claims against LEEWOOD and OPAL based on the purported violation of Labor Law §240(1), these defendants contend that in order to recover under this section of the Labor Law, a plaintiff must show that his work involved risks related to height differentials requiring the furnishing or erection of elevation-related safety devices, and that not every hazard, danger or peril encountered in a construction zone that is somehow connected to the effects of gravity falls within its scope. Rather, they contend that the statute addresses only those risks posed by elevation differentials which expose a worker to exceptional danger. Ultimately, it is argued that a worker injured in the collapse of a trench is not covered by the statute.

As for plaintiff's claim under Labor Law §241(6), LEEWOOD and OPAL argue that this section requires owners and contractors to provide reasonable and adequate protection for the safety of workers by requiring them to comply with *specific* safety rules and regulations

promulgated in the Industrial Code by the Commissioner of the Department of Labor. Here, it is argued that plaintiff has failed to site any code violations that are sufficiently specific to form a basis for liability in the instant case. In particular, plaintiff has alleged that his injury was causally related to violations of Industrial Code §§23-1.5 (general responsibilities of employers); 23-1.7 (protection from general hazards); 23-1.8 (personal protective equipment); 23-1.16 (safety belts, harnesses, tail lines and lifelines); 23-1.17(life nets); 23-4.2 (trench and area type excavations); 23-4.3 (access to excavations) ; and 23.4-4 (sheeting, shoring and bracing).

In support of dismissal, LEEWOOD and OPAL argue, *inter alia*, that §23-1.5, which is entitled "General Responsibility of Employers", contains generic directives that are insufficient as predicates for Labor Law liability; that §23-1.8, entitled "Personal Protective Equipment", is inapplicable since there is no evidence that a failure to provide any sort of protective equipment was the proximate cause of plaintiff's injuries, that §23-1.16 regarding safety belts, harnesses, tail lines and lifelines, is inapplicable since there is no proof that plaintiff's accident was, in any way, caused by the absence of any of these devices, and that §23-1.17, entitled "Life Nets", is inapplicable since the presence or absence of life nets is irrelevant to the subject accident. These defendants further argue that Industrial Code §23-4.2 is irrelevant since this section requires sheeting and shoring along the walls of trenches which are *five feet* or more in depth, while documentary or other proof in this case establishes that the trench in which plaintiff was working was only three feet deep. In fact, while plaintiff disputes the fact, defendants note that the depth of the trench as measured by DEP employee Ramses Sidhom confirms that the trench was less than five feet deep, and that the report prepared by a DEP site inspector following a "site visit",

indicates that the project's internal water main was connected to a 12-inch City water main at a depth of three feet below the elevation of the existing roadway. Section 23-4.3 is also claimed to be irrelevant since it applies only to the provision of ladders, stairways or ramps in order to provide access to excavations which are more than three feet deep. According to these defendants, any violation of this regulation bears no causal connection to plaintiff's injuries. In addition, they maintain that §23-4.4, entitled "Sheeting, Shoring and Bracing" is per se inapplicable since this section only applies to trenches with sloped sides, which this trench lacked. Finally, these defendants contend that the OSHA violations cited by plaintiff do not provide any basis for liability under Labor Law §241(6). Hence, any claims predicated upon the alleged violation of the above section of the Labor Law must be dismissed.

LEEWOOD and OPAL further contend that THE CITY's claim against it based on common-law and/or contractual indemnification should be dismissed. Insofar as a claim of contractual indemnification is asserted, THE CITY contends that there is an implied provision for indemnification in every permit issued by it to general and sub-contractors pertaining to the work performed thereunder. LEEWOOD and OPAL argue that there is no basis in law or fact for any such theory of liability. According to these defendants, there is no language in the permits themselves providing for any kind of indemnification, nor can any such covenant be implied. Contractors and subcontractors may be required by law to acquire these permits, but the terms and conditions appearing thereon cannot be deemed to be agreed upon or accepted by the permitees. Nevertheless, should this Court conclude that an implied covenant to indemnify exists by virtue of these permits, defendants argue that THE CITY is not entitled to summary judgment

on its indemnification claim since THE CITY has not established as a matter of law that it was free from negligence in causing or contributing in any way to plaintiff's accident. Nor is there any proof of negligence on OPAL's part as the owner of the property. Instead, it was plaintiff's employer, DESIGN, which undertook to excavate the trench in conformity with its contractual obligations, and any liability arising out of the failure to properly shore-up it's walls lies solely with it.

With regard to THE CITY's claim of common-law indemnification, defendants argue that none of the parties have submitted any proof of negligence on the part of any of these defendants. In addition, THE CITY has failed to demonstrate its freedom from negligence in its alleged supervision of DESIGN's work in preparing for the plumbing connection to THE CITY's water main. Therefore, THE CITY is not entitled to summary judgment on its claim for common-law indemnification, as well.

Finally, OPAL maintains that it is entitled to contractual indemnification from codefendant TRADES arising from the contract between them, which is alleged to contain a detailed indemnification clause under which TRADES agreed to hold OPAL harmless with regard to any injuries sustained at the job site. According to LEEWOOD and OPAL, TRADES was in full control of the subject project and supervised all of the work being performed at the site, including plaintiff's. Furthermore, since there is no proof of any negligence on the movants' part, they are entitled to summary judgment on their cross claim for contractual indemnification against TRADES.

In the alternative, should this Court decline to grant summary judgment on their claim for contractual indemnification, these defendants argue that they are entitled to common-law indemnification from TRADES. In this regard, they allege that notwithstanding OPAL's absolute liability as the owner under Labor Law §240(1), if it did not direct, control, or supervise the work, it would be entitled to common-law indemnification for plaintiff's injuries. Here, OPAL argues that the proof establishes that it did not direct, control or supervise any of the work at this construction site. Thus, notwithstanding its status as owner, it is entitled to common-law indemnification from the parties actually in control of the work being performed.

In their cross motion for summary judgment (No. 003-015), third-party defendants DESIGN and its supervisor PHILIP CULOTTA (hereinafter "CULOTTA"), seek dismissal of the third-party complaint and any cross claims against them on the ground that plaintiff did not sustain a "grave injury" as defined in the Omnibus Workers' Compensation Reform Act of 1996 (Workers' Compensation Law §11). According to these defendants, a third party cannot maintain a cause of action for common-law contribution and/or indemnification against a plaintiff's employer without proof of a "grave injury", which is lacking in this case. In support, DESIGN and CULOTTA rely on plaintiff's bill of particulars as well as the results of two medical examinations of plaintiff, both of which indicate that plaintiff has not sustained a "grave injury" as defined in the law. To the contrary, when examined by orthopedic surgeon, Dr. Mark Sherman, plaintiff's prognosis was indicated to be good; no further medical treatment was recommended; and it was opined that plaintiff could perform the duties of his profession without restriction. In addition, a neurological examination performed by Dr. Robert April indicated that plaintiff is

neurologically intact; needs no neurological intervention, and is not disabled from the activities of daily living.

For his part, CULOTTA contends that co-employees under the Workers' Compensation Law are granted the same protection as an employer against claims asserted by third parties for contributory negligence and common-law indemnification. Since it is undisputed that CULOTTA was plaintiff's supervisor at DESIGN, he argues that he cannot be subjected to third-party liability.

Furthermore, DESIGN and CULOTTA contend that since there was no valid agreement for indemnification and/or contribution between DESIGN and THE CITY, there can be no claim against them for contractual indemnification and/or contribution. Contrary to THE CITY's claim that an implied contract of, *e.g.*, indemnification, was created when DESIGN applied for and was granted various permits regarding the excavation, DESIGN contends that unless an intention to indemnify *can be clearly implied* from the language and purposes of the agreement and the surrounding facts and circumstances, no obligation to indemnify can be read into an agreement. Here, it is claimed that the permits in question contain no such language obligating these third-party defendants to indemnify THE CITY.

As for CULOTTA, it is alleged that he cannot be held individually liable on any alleged contract between DESIGN and THE CITY in the absence of proof of his intention to bind himself, individually. Here, the documentary proof indicates that CULOTTA signed the subject permit applications on behalf of, and in his capacity as the authorized representative of DESIGN, and not as an individual. Accordingly, no proof of any intention to bind himself, personally, has

been adduced. Furthermore, the subject permits were issued to DESIGN and not to CULOTTA, individually. Accordingly, CULOTTA cannot be held individually liable on any of THE CITY's claims for indemnification and/or contribution.

In a second cross motion (No. 106-016), defendant/third-party plaintiff THE CITY seeks summary judgment dismissing plaintiff's complaint and all cross claims against it, as well as summary judgment on its third-party claims for contribution and/or indemnification against DESIGN, OPAL and TRADES. According to THE CITY, plaintiff's claims under Labor Law §240(1) must be dismissed, since trench collapses do not come within the purview of this section of the Labor Law. With regard to Labor Law §§200 and 241(6), THE CITY contends that these sections are not applicable to it, because each of these sections impose liability on owners and contractors for failing to provide adequate workplace safety. Here, THE CITY argues that since plaintiff's accident occurred on private property, the statutes do not apply to THE CITY.

More particularly, THE CITY claims that it neither owned the property where the accident occurred, nor was it a contractor on the construction project. In addition,it contends that while the trench in which plaintiff was working extended from Bloomingdale Road, a public street, onto private property, the injury occurred in a portion of the trench located exclusively on private property. According to THE CITY, it is clear in this case that the gate valve which plaintiff was installing was on private property, as was the manhole which now covers access to that valve. In addition, it has been firmly established that TRADES was the contractor on the job, while THE CITY was neither an owner of the property where the injury occurred, nor a contractor on the

subject project. Accordingly, it is argued that all of plaintiff's Labor Law claims against THE CITY must be dismissed.

Finally, THE CITY claims that since it had no supervisory control over the activity which brought about plaintiff's injury, it had no authority either to avoid or correct any safety hazard. Additionally, it is claimed that it never gave plaintiff any instruction as to how to perform his job. Accordingly, in the absence of any proof that it owed plaintiff a duty, any claims of common-law negligence against THE CITY must be dismissed.

With regard to so much of THE CITY's cross motion as seeks summary judgment on its claim for contractual indemnification, it is argued that a contractual right to indemnification arises under the permits issued by it for the excavation and installation of water and sewer lines on the property being developed. According to this defendant/third-party plaintiff, the subject permits actually provide for a right of indemnification in favor of THE CITY by the permitee, here, third-party defendant DESIGN, and that by applying for and obtaining these permits, the latter agreed to indemnify and hold THE CITY harmless for any damages arising out of activities performed under the permits. This argument is premised on section 2–02(a)(3)(ix) of the Rules of the City of New York. Alternatively, the CITY argues that it is entitled to common-law indemnification, and that since any negligence on its part was clearly passive and secondary compared to that of DESIGN, the permit holder, it is entitled to summary judgment.

In opposition to THE CITY's cross motion for common-law indemnity, TRADES contends that in light of THE CITY's acknowledgment that only the employees of DESIGN had the authority to supervise and control the means and methods of plaintiff's work, its motion as

against TRADES is unsustainable. In addition, TRADES contends that THE CITY has failed to submit any proof that TRADES was actively negligent, or that any negligence on its part was proximately related to plaintiff's accident.

In this regard, TRADES notes that its contract with OPAL specifically excluded water, sewer and water main work. Thus, it had no contractual obligation to supervise DESIGN's work. In addition, TRADES argues that a party seeking indemnification must first prove that it was entirely free from negligence. Here, however, TRADES claims that THE CITY was actively involved in the work being performed in the subject trench at the time of the injury, and thus had an obligation to act upon any violations, *i.e.*, inadequate shoring, which would have immediately shut down the work site. As a result, TRADES argues that THE CITY could be held actively negligent for its failure to report an unsafe condition at the job site., thereby precluding its claim to be free from any negligence. Accordingly, TRADES claims that the CITY's motion for summary judgment on its claim for indemnification against it must be denied.

DESIGN and CULOTTA also oppose THE CITY's cross motion seeking contribution and/or indemnification, contending that (1) THE CITY's cross motion fails to name CULOTTA, and (2) contrary to THE CITY's contention, the permits issued by DOT are devoid of any language obligating it to indemnify THE CITY. Moreover, CULOTTA, who signed the applications and permits on behalf of DESIGN has stated under oath that it was never his or DESIGN's intention to obligate the latter to indemnify THE CITY for damages arising out of the work to be performed under the permits. In addition, these defendants argue that in order to hold a party liable under an indemnification agreement, it must include language specifically

addressing the issue. Here, THE CITY has failed to establish that either the application or the permits included any agreement to indemnify. In partial support, these defendants note that even though THE CITY issues thousands of street-opening permits affecting hundreds of sites where people have sustained injuries, THE CITY has failed to cite a single case in which it was found entitled to contractual indemnification based solely on the acquisition of such a permit.

In any event, DESIGN and CULOTTA note that THE CITY has failed to make a prima facie showing of its freedom from negligence as a matter of law. In this regard, movants note that THE CITY was required in accordance with its rules and regulations to assure that the connections to its water and sewer systems were properly made, and that if its inspector had observed a safety violation pertaining to the excavation, he or she was authorized, if not duty-bound, to bring that violation to his or her superiors' attention and cause the work to be halted. Instead, in the case at bar, THE CITY's own inspector, James Luke, testified at his EBT that he walked the entire length of the trench and did not notice any irregularities or find any dangerous or unsafe conditions that would impugn its integrity, *i.e.*, that it was improperly dug or shored.

Finally, these defendants argue that in the absence of any proof that plaintiff suffered a "grave injury", THE CITY is not subject to any liability to which indemnification can attach. Hence, THE CITY's third-party complaint as against DESIGN and CULOTTA should be dismissed.

In the last of the cross motions (No. 180 - 017), defendant TRADES seeks summary judgment dismissing plaintiff's claims against it, contending that its liability under Labor Law

§241(6) is dependent upon proof that it failed to take reasonable and adequate safety measures in violation of some concrete and specific Industrial Code safety provision, as opposed to a failure to comply with a "general" safety standard incorporated therein. Here, TRADES contends that the violations alleged by plaintiff are not specific enough to support his claims under Labor Law §241(6), nor are they applicable to the facts at bar.

With regard to the alleged violation of Industrial Code §§23-4.2, 23-4.3 and 23-4.4, TRADES argues that is has been unequivocally established that THE CITY's water main on Bloomingdale Road was no more than three feet deep. In support, TRADES cites, *e.g.*, the EBT testimony of more than one CITY inspector indicating that the depth of the trench housing the connections was required to be deep enough to keep the piping between the water main and the gate valve horizontal and in contact with the dirt at the base of the trench, *i.e.*, a distance of three feet. According to the deposition testimony, when a CITY inspector first arrived to approve the plumbing connections, he was unable to do so because the trench was too shallow. Moreover, in a subsequent report, he stated that since the piping was lying only three feet below the surface, *i.e*., above the frost line, the pipe was required to insulated. Only once DESIGN had installed insulation was the inspection completed and the connection approved. TRADES contends that this proof conclusively establishes that the depth of the trench could not have been greater than three feet. This being so, the Industrial Code regulations requiring the shoring of the trench walls of five feet or more in depth are wholly inapplicable. Although plaintiff testified that the trench was deeper, TRADES argues that his testimony concerning the depth of the trench must be disregarded as inconsistent with his admission that the pipe he was fitting was required to be

horizontal with the CITY's water main, which has conclusively been shown to be at a depth of three feet.

In addition, with regard to the Code provision concerning ladders, stairways or ramps, TRADES notes that plaintiff was neither entering nor exiting the trench when it collapsed and that none of these safety devices would have prevented the walls from giving way. Hence, any such violation was not a cause of plaintiff's injuries.

As for plaintiff's claim of OSHA violations, TRADES argues that the violation of these regulations cannot serve as a predicate for §241(6) liability. TRADES further argues that trench collapses are not within the class of hazards to which Labor Law §240(1) was intended to apply.

Finally, TRADES maintains that it cannot be held liable under Labor Law §200 or common-law negligence, since plaintiff's accident did not result from any dangerous condition which existed on the premises. Moreover, even if it did, TRADES neither created nor was aware of the purported dangerous condition. Neither did it exercise any authority over the work plaintiff was performing when his injuries were sustained. In particular, TRADES argues that the proof conclusively establishes that it lacked the authority to control the manner of plaintiff's work when the accident occurred. Plaintiff, in fact, acknowledged during his EBT that no one supervised or directed his work other than his fellow employees at DESIGN. Accordingly, while TRADES' president may have had the right to stop the work in the event that he became aware of some hazard, he did not have the right to direct DESIGN in the manner in which it chose to accomplish its excavation and plumbing work.

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In partial opposition to TRADES' cross motion, co-defendants LEEWOOD and OPAL merely request that this Court take notice of the fact that TRADES has not sought dismissal of their cross claims. Thus, they argue that any order issued with respect to TRADES' cross motion should not include any adjudication thereof.

The motion and cross motions are decided as follows.

The well-settled rule for summary judgment motions requires the proponent of the motion to make a prima facie showing of its entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see* Alvarez v. Prospect Hosp., 68 NY2d 320). Once this has been accomplished, the burden then shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see* Zuckerman v. City of New York, 49 NY2d 557).

Here, it is the opinion of this Court that the moving and cross-moving parties have satisfied their initial burden insofar as they seek dismissal of plaintiff's claims under Labor Law §240(1). In opposition, plaintiff has failed to raise an issue of fact.

Labor Law §240(1) "evinces a clear legislative intent to provide 'exceptional protection' for workers against the 'special hazards' that arise when the work site either is itself elevated, or is positioned below the level where 'material or loads' [are] hoisted or secured" (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500-501 [citations omitted]; *see* Narducci v. Manhasset Bay Assoc., 96 NY2d 259, 267-268; Rocovich v. Consolidated Edison Co., 78 NY2 509, 514). Also known as the "Scaffold Law" , this section was specifically designed for the protection of

construction workers against the exceptional risk of injury from the unique hazards posed by the effects of gravity upon laborers working at elevated work sites (*see* Misseritti v. Mark IV Constr. Co., 86 NY2d 487, 491). Nevertheless, it is well settled that "[t]hese special hazards do not encompass any and all perils that may be connected in some tangential way with the effects of gravity. Rather, they are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (Gonzalez v. Turner Constr. Co., 29 AD3d 630, 631). As a result, it is not enough to support plaintiff's claim that the force of gravity was "involved" in his injury (*see* Zdunczyk v. Ginther, 15 AD3d 574, 575). For example, in order to establish liability under Labor Law §240(1), a plaintiff must show more than simply that an object fell, thereby causing injury to [the] worker (*see* Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 288-289). A plaintiff must show that 'the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute' " (Turczynski v. City of New York, 17 AD3d 450, 451, quoting Narducci v. Manhasset Bay Assoc., 96 NY2d at 268).

In this case, the admissible evidence establishes as a matter of law that plaintiff was not injured as a result of a gravity-related accident as contemplated by the above statute, nor was he injured during the hoisting or securing of any object. Rather, the unequivocal proof indicates that plaintiff was injured when the sides of the trench in which he was working collapsed. It is well established that these types of injuries are not within the class of hazards to which Labor Law §240(1) is directed (*see* O'Connell v. Consolidated Edison Co. of N.Y., 276 AD2d 608, 610; Vitaliotis v. Village of Saltaire, 229 AD2d 575; *see also* Natale v. City of New York, 33 AD3d

772, 774). Hence, plaintiff's claims under Labor Law §240(1) must be dismissed in their entirety.

Insofar as plaintiff has asserted causes of action under Labor Law §241(6), it is well established that owners and general contractors are subject to absolute liability for any injury proximately caused by the breach of a specific safety provision set forth in the Industrial Code (12 NYCRR §§23-1.1 *et seq*) without reference to their ability to control or supervise the work site (*see* Rizzuto v. Wenger Contr. Co., 91 NY2d 343, 348-349). Thus, in order to state a viable cause of action under Labor Law §241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by the violation of a specific Industrial Code provision articulating a concrete standard of conduct applicable to the circumstances of the accident rather than a mere reiteration of common-law principles (*see* Ross v. Curtis-Palmer Hydro-Elec Co., 81 NY2d at 501-502).

Here, it is uncontested that OPAL was the owner of the property under development and that TRADES was the general contractor for the project, as evidenced by the admission of OPALS's principal, Randy Lee, and by a copy of the construction contract between these two parties. Therefore, both OPAL and TRADES are potentially liable to plaintiff for any injuries proximately caused by a violation of specific safety provisions in the Industrial Code regardless of their supervision or control (or lack of same) over the work being performed. While there is no proof that anyone from OPAL was ever present at the site or was involved in any phase of the construction project, it still remains ultimately responsible for any statutory breach arising under Labor Law §241(6), as the duty of care imposed thereby is non-delegable. The same is true for the general contractor, TRADES.

In this case, it is the opinion of the Court that the moving and cross-moving parties have sustained their burden of demonstrating prima facie that the following alleged violations of the Industrial Code (12 NYCRR §§23-1.5, 23-1.7, 23-1.8, 23-1.16, 23-1.17, 23-4.3 and 23-4.4) are either too general to support a claim under Labor Law §241(6), or are simply inapplicable to the case at bar. More particularly, §23-1.5 merely sets forth a general standard of care and, thus, cannot serve as a predicate for liability pursuant to Labor Law §241(6) (*see* Greenwood v. Shearson, Lehman & Hutton, 238 AD2d 311, 312). Moreover, Industrial Code §23-1.7 is plainly inapplicable as it calls for the installation of planking or other forms of protection for persons working in an area or at a task that would normally expose a laborer to falling material or objects. Similarly, Industrial Code §23-1.16 is inapplicable, since it requires the use of safety belts, harnesses, tail lines and lifelines, none of which bear any relevance to the happening of this accident (*see* Avendano v. Sazerac, Inc., 248 AD2d 340). Neither does Industrial Code §23-1.8, which relates to the provision of safety equipment such as eye protection, respirators, head and/or foot protection and waterproof clothing. In addition, plaintiff has completely failed to address the applicability of any of these sections or their role in bringing about his injuries in his opposing papers, thereby failing to raise any triable issue of fact with regard to their viability. Accordingly, any Labor Law §241(6) causes of action predicated on these violations must be dismissed (*cf* Harsch v. City of New York, 78 AD3d 781).

A closer question is presented as to plaintiff's claim of a violation of Industrial Code §23-4.2, since there is conflicting proof regarding the depth of the trench. As applicable herein, the foregoing section only mandates the use of shoring to stabilize trenches and excavations of five

feet or more in depth (*cf.* Magnuson v. Syosset Community Hosp. 283 AD2d 404, 405). Clearly, the evidence presented by the CITY's inspectors is more than sufficient to demonstrate prima facie, that the subject trench was less than five feet deep. Moreover, the only contrary evidence is plaintiff's conclusory and self-serving claim to the contrary, the basis for which is not clearly evident. While the opponent of a motion for summary judgment is entitled to the benefit of every favorable inference that can be drawn from the evidence (*see* Maritn v. Briggs, 235 AD2d 192), once a prima facie case for dismissal has been made out, it is incumbent upon the opposing party to lay bare its proofs and present admissible evidence sufficient to require a trial of material questions of fact on which its claim rests (*see e.g.* Zuckerman v City of New York, 49 N2d 557, 562). Mere conclusions and unsupported allegations are insufficient to defeat the motion (*id.*). Even on a motion to dismiss pursuant to CPLR 3211(a)(7), our courts have recognized that a dismissal is warranted where the movant can demonstrate "that a material fact ... claimed by the pleader is not a fact at all and that no significant dispute exists regarding it" (Guggenheimer v Ginzburg, 43 NY2d 268, 275; *see* Sta-Brite Servs., Inc. v Sutton, 17 AD3d 570, 571). Here, plaintiff has failed to raise a triable issue of fact pertaining to trench depth sufficient to defeat the motion and cross motions for summary judgment. A court cannot practically limit its consideration to the pleader's facts where substantiated additional and varying facts have been placed before the court by disinterested witnesses and unimpeached documentary evidence (*see* Tobin v Grossman, 24 NY2d 609, 612). Finally, it is familiar law that OSHA's violations are insufficient to support of a cause of action under Labor Law §241(6). OSHA regulations speak only to the duties owed by employers to their employees, and impose no independent liability

upon an owner or general contractor under the Labor Law (*see* Herman v. Lancaster Homes, 145 AD2d 926), *lv denied* 74 NY2d 601). Accordingly, any cause of action predicated upon the violation of section 241(6) of the Labor Law is dismissed.

Turning to plaintiff's claims under Labor Law §200 and common-law negligence, it is well-settled that the former represents a statutory codification of the common-law negligence standard, and that together they impose a duty upon an owner or general contractor to provide laborers with a safe place to work (*see* Comes v. New York State Elec. & Gas Corp., 82 NY2d 876, 877). "An implicit precondition to this duty ... is that the party [to be] charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (Russin v. Louis N. Picciiano & Son, 54 NY2d 311, 317). Thus, where an alleged defect or dangerous condition arises from a subcontractor's methods over which a defendant exercises no supervisory control, liability will not attach under either the common law or Labor Law §200 (Lombardi v. Stout, 80 NY2d 290, 295)). It is only owners and contractors who actually exercise control or supervision over the work site and either created or had actual or constructive notice of the purported dangerous condition to which this liability applies (*see* Hargh v. City of New York, 78 AD3d at 783; Singh v. Black Diamonds LLC, 24 AD3d 138).

Here, it is the opinion of this Court that there is no proof sufficient to establish that defendants/third-party defendants LEEWOOD, OPAL or TRADES supervised, directed or controlled the work performed by plaintiff at the time of the accident. To the contrary, the only evidence before this Court indicates that it was DESIGN which was solely responsible for

supervising and controlling the means and methods of plaintiff's work. The fact that TRADES may have had general supervisory powers to coordinate the progress of the work and to correct any unsafe conditions which its representatives may have observed is insufficient to establish liability under either theory (*see* Singh v. Black Diamonds LLC, 24 AD3d at 140). Accordingly, any claims made by plaintiff pursuant to Labor Law §200 and/or common-law negligence as against defendants/third-party defendants LEEWOOD, OPAL and TRADES must be dismissed.

Likewise, any of plaintiff's claims against THE CITY under Labor Law §200 and/or common-law negligence must also be dismissed. In this case, THE CITY was neither the owner of the property on which the accident occurred, nor the contractor charged with the responsibility of supervising plaintiff's work. Instead, THE CITY'S involvement stems solely from its necessity to connect the development's water and sewer lines to THE CITY's system. Of course, it was THE CITY that issued the permits, but were this relationship alone sufficient to confer "ownership" status upon THE CITY for purposes of the Labor Law, every similar permit issued by THE CITY would render it potentially liable to every laborer standing in plaintiff's stead. Clearly, this would impose an unintended and potentially disastrous financial burden upon the City. In any event, there is an abundance of proof in this case establishing that plaintiff's work was supervised, directed and controlled solely by DESIGN employees. Thus, any claims against THE CITY under Labor Law §200 or common-law negligence must be dismissed. For similar reasons, plaintiff's Labor Law claims under §§240(1) and 241(6) also must be dismissed as against THE CITY.

The dismissal of plaintiff's claims against OPAL under Labor Law §200 and common-law negligence is also warranted, as there has been no showing of negligence on the part of that owner for failing to provide plaintiff with a safe place to work. Neither is there any proof that OPAL (1) exercised any supervision and control over the work being performed on the premises which brought about plaintiff's injury (*cf.* Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d at 505, 506), or (2) either created or had knowledge of the purported dangerous condition which allegedly resulted in plaintiff's injury. Here, it is undisputed that no one from OPAL was present at the work site that day, nor is there any evidence of complaints made to OPAL regarding any hazard or dangerous conditions existing thereat. Therefore, any claims under Labor Law §200 and/or common-law negligence against OPAL must be dismissed.

The same is true with regard to so much of OPAL and LEEWOOD's motion as seeks the dismissal of all claims against LEEWOOD. None of the parties have submitted any opposition to this request, nor is the Court aware of any proof suggesting that it was involved in any phase of this project. Accordingly, the complaint as against LEEWOOD must be dismissed, as well.

As for plaintiff's claims against PHILIP CULOTTA, it is the opinion of this Court that all of the Labor Law and common-law negligence claims against him must also be dismissed. Although a vice-president of DESIGN, there has been no proof which would warrant the piercing of DESIGN's corporate veil, nor has any such relief been requested. In addition, all of the acts performed at the job site were clearly undertaken within the scope of his employment as DESIGN's work site supervisor.

Accordingly, it is

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ORDERED that the motion and cross motions for summary judgment are granted; and it is further

ORDERED that the complaint as against the moving and cross moving defendants is severed and dismissed; and it is further

ORDERED that the Clerk enter judgment accordingly.

E N T E R,

/s/
Hon. Thomas P. Aliotta
J.S.C.

Dated: August 8, 2012