Scrudato v AJS Constr. & Renovation, Inc.
2015 NY Slip Op 32098(U)
January 15, 2015
Supreme Court, New York County
Docket Number: 114550/10
Judge: Doris Ling-Cohan
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FA 1/14/15 E

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DORIS LING-COHAN Justice

PART 36

Index Number : 114550/2010
SCRUDATO, STEVEN
vs.
AJS CONSTRUCTION
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits (+ memo) | No(s). 1, 2

Answering Affidavits — Exhibits | No(s). 3

Replying Affidavits | No(s). 4

Upon the foregoing papers, it is ordered that this motion is for summary judgment by third-party defendant River Pile + Foundation Co., Inc is granted in accordance with the attached memorandum decision. (consolidated for disposition with motion Seq. No 003 + 001).

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

Dated: 1/15/15

_____, J.S.C.
HON. DORIS LING-COHAN

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

----------X

STEVEN SCRUDATO,

Plaintiff,

Index No.: 114550/10
DECISION/ORDER

-against-

AJS CONSTRUCTION & RENOVATION, INC., AJS PROJECT MANAGEMENT, INC., 160 FRONT STREET ASSOCIATES, LLC, JP MORGAN CHASE & CO., JP MORGAN CHASE BANK, NA, MUESER RUTLEDGE CONSULTING ENGINEERS, TPG ARCHITECTURE, LLP and ATLAS COPCO CONSTRUCTION MINING TECHNIQUE USA, LLC,

Defendants.

Motion Seq. No.: 001, 002 & 003

----------X

AJS PROJECT MANAGEMENT, INC., 160 FRONT STREET ASSOCIATES, LLC and JP MORGAN CHASE BANK, NA,

Third-Party Plaintiffs,

-against-

Third Party Index No. 590586/11

RIVER PILE & FOUNDATION CO., INC., MUESER RUTLEDGE CONSULTING ENGINEERS, TPG ARCHITECTURE, LLP and ATLAS COPCO CONSTRUCTION MINING TECHNIQUE USA, LLC,

Third-Party Defendants.

HON. DORIS LING-COHAN, J.S.C.:

In this Labor Law action and the third-party indemnification action that followed, defendant/third-party defendant Atlas Copco Construction Mining Technique USA, LLC (Atlas Copco) (motion sequence number 001), third-party defendant River Pile (motion sequence number 002) and defendant/third-party defendant Mueser Rutledge Consulting Engineers (Mueser Rutledge) (motion sequence number 003), each move for summary judgment to dismiss

the complaint and/or portions of the third-party complaint as against it. The court disposes of these motions as follows.

BACKGROUND

On March 10, 2009, plaintiff Steven Scrudato (Scrudato) was injured while performing pile drilling work for his employer, third-party defendant River Pile & Foundation Co., Inc. (River Pile), at a property located at 155 Water Street (the property) in the County, City and State of New York. *See* Notice of Motion (motion sequence number 001), Chavez Affirmation, ¶ 21. Defendants 160 Front Street Associates, LLC (160 Front Street), JP Morgan Chase & Co. (JP Morgan) and JP Morgan Chase Bank, NA (JP Morgan Bank) are the co-owners of the property. Defendants AJS Construction & Renovation, Inc. and AJS Project Management, Inc., apparently the same company (together, AJS Construction), was the general contractor that the owners hired to construct a building on the property (which was to be used as a bank by JP Morgan Bank). *Id.*, ¶ 5. Defendant/third-party defendant TPG Architecture, LLP (TPG Architecture) was the architect for the work, and defendant/third-party defendant Mueser Rutledge Consulting Engineers (Mueser Rutledge) was the engineering firm that TPG Architecture hired to review the shop drawing submissions regarding the installation of piles at the site. *Id.*, ¶ 7. As was previously indicated, plaintiff's employer River Pile actually performed the pile work. *Id.*, ¶ 6. Defendant/third-party defendant Atlas Copco Construction Mining Technique USA, LLC (Atlas Copco) was the equipment leasing company from which River Pile rented a drill rig and a grout plant with which to perform the pile installation. *Id.*, ¶ 12. Atlas Copco was not a subcontractor on the work. *Id.*, ¶ 23.

Plaintiff Scrudato is the son of River Pile's vice-president, Steven Scrudato, Sr. (Scrudato

Sr.), and the brother of one of its operating engineers, Dale Scrudato (Dale). *See* Notice of Motion (motion sequence number 001), Exhibit 8, at 21-24-32-33. At his deposition, Scrudato confirmed that River Pile was a subcontractor to AJS Construction for the work at the property, that Mueser Rutledge was the resident engineer that "watched" River Pile's work, that TPG Architecture was the resident architect (although they had no employees at the work site), and that Atlas Copco was the company from which River Pile had rented drilling equipment. *Id.* at 39-42, 50. Scrudato also testified that he mainly interacted with AJS Construction's superintendent, Anthony Viola (Viola) and that, on the day of his accident, he met Atlas Copco's sales specialist, Kenneth McLanahan (McLanahan), who demonstrated the use of the grout plant, and an Atlas Copco mechanic named "Joe," who demonstrated the use of the drill rig. *Id.*, at 50-51. Scrudato explained that the process of installing piles required the use of a drill to physically force the pile into the ground, and a grout plant, which simultaneously injected a mixture of water and cement into the ground around the pile. *Id.* at 52-55, 59-60, 102-103. Scrudato further explained that this process had caused water to leak into the basement of the building adjacent to the property, so an excavator was brought in to build up a dirt "berm" near the area where he was installing piles so as to prevent any such leakage. *Id.* at 57-58. Scrudato stated that he had complained to Viola, AJS Construction's Superintendent, that this berm had caused all of the water (which he referred to as "drill spoils") to pool up in his working area and turn into mud, and that the water was not being removed as it should have been. *Id.* at 82-85. Scrudato also stated that Viola did nothing. *Id.*

Regarding his accident, Scrudato stated that he was standing on a pallet and grabbed the bottom end of a 110 pound pile segment while his brother, Dale, grabbed the top. *Id.*, at 104-

105, 118-122. Scrudato next stated that, when he went to place the pile segment into the hole to attach it to another pile segment that had been previously drilled down, he could not see where he was placing his feet because they were covered with mud and water, so he slipped. *Id.* Scrudato thereafter stated that the weight of the pile segment that he was holding drove him to his left and caused an injury to his left knee. *Id.* At his second deposition, Scrudato stated that there was no "dewatering system" at the work site to remove the water, mud, grout and/or spoils from the ground, and that he had complained about this to Viola. *Id.*; Exhibit 9, at 159-161. Scrudato also stated that Atlas Copco employees McClahahan and Joe were present on the day of his accident, but that they had no authority to stop the work, and were only there to demonstrate the use of the drill rig and the grout plant to River Pile's employees. *Id.* at 150-153. Scrudato also denied that either McClanahan, Joe, the drill rig or the grout station caused his accident. *Id.* at 157-158.

Scrudato Sr. was deposed at testified that there was no dewatering system in place at the job site. *See* Notice of Motion (motion sequence number 003), Exhibit E, at 30-33. Scrudato Sr. also acknowledged that River Pile had rented the drilling rig and grout plant from Atlas Copco. *Id.* at 43. Scrudato Sr. further stated that Mueser Rutledge employee, engineer Rich Driscoll (Driscoll), instructed River Pile's employees on how deep to drill the piles, and how much grout to use in the drilling process. *Id.* at 54-58. Scrudato Sr. opined that Driscoll, Mueser Rutledge's engineer, instructed River Pile's employees to use an excessive amount of grout in the drilling, with the result that there was a correspondingly large amount of drill spoils. *Id.* at 51-62. Scrudato Sr. noted that both he and McClanahan, Atlas Copco's employee, had argued with Driscoll over this point on several occasions. *Id.* at 59-60, 73. However, Scrudato Sr. denied that McClanahan had any role in supervising River Pile's employees, and stated that Driscoll was

overseeing the injection of the grout at the time of Scrudato Jr.'s accident. *Id.* at 68-71. Scrudato Sr. also noted that he had complained to Viola, AJS Construction's superintendent, on many occasions about the lack of a dewatering system at the job site. *Id.* at 76-78. Scrudato Sr. also claimed that River Pile's employees had had no role in the construction of the dirt berm. *Id.* at 79-80. Finally, Scrudato Sr. stated that, on several occasions, he had seen his on stacking wooden pallets at the work site in order to have something firm to stand on while he was feeding pile segments into the drilling hole, but also stated that he was not there at the time of his son's accident. *Id.* at 89-92.

On September 9, 2005, JP Morgan Bank and TPG Architecture executed a "master architectural agreement" (the TPG Architecture contract), the pertinent parts of which state as follows:

> 1. Engagement: Design Services:
>
> ***
>
> (b) Basic Services. The design services rendered by the Architect [i.e., TPG Architecture] under this Agreement shall include: (i) all services described in, contemplated by, or reasonably inferable from the "basic Architectural Design and Services" described in Exhibit B to this Agreement ...
>
> (c) Additional Services. Additional services ("Additional Services") are those serv ices which are outside the scope of the Basic Services and which are expressly designated in this Agreement as "Additional Services." Additional Services will be provided by [TPG Architecture] only if and to the extent authorized and confirmed in advance in writing by Owner [i.e., JP Morgan Bank] ...
>
> ***
>
> 5. Indemnification:
>
> (a) Indemnification. [TPG Architecture] will indemnify and hold harmless Owner [JP Morgan Bank], Owner's Project Manager [AJS Construction] and its and their respective officers, directors, shareholders, employees, partners, joint ventures, affiliates, successors and assigns from and against any and all liabilities, obligations, claims, demands, causes of action,

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losses, expenses, damages, fines, judgments, settlements, and penalties (including, without limitation, costs, expenses and reasonable attorney's fees thereto) arising out of, connected with or related to:

(i) A violation of any laws or any negligence, reckless or willful misconduct by [TPG Architecture] ... during the performance of its Design Services under this Agreement; and/or

(ii) A breach of this Agreement by [TPG Architecture] ...;

***

Exhibit B - Basic Architectural and Design Services

***

2. Detailed Description of Services:

***

(h) Construction/Final Completion and Punch List.

***

(iii) Acceptance and Testing of Work. [TPG Architecture] shall cause the engineers [Muesler Rutledge] to undertake a controlled inspection of the structural, electrical, mechanical (including elevations), site work and other work requiring such inspections by engineers during the course of construction and, upon completion of the Project, to ascertain the compliance of the same with the Construction Documents, applicable codes and the rules and regulations of all governmental and quasi-governmental authorities, and cause mechanical engineers to furnish to [JP Morgan Bank] operating instructions for the mechanical components of the Project. ... These activities are for the benefit of [JP Morgan Bank] and do not create a duty or responsibility to the Contractor [AJS Construction], Subcontractors [i.e., River Pile], material and equipment suppliers [i.e., Atlas Copco], their agents, or employees or other persons performing or supplying services or work to the Project(s).

(iv) No Control Over Means and Methods. [TPG Architecture] shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, schedules, sequences or procedures, fabrication, procurement, shipment, delivery, receipt or installation, or for safety

> precautions and programs in connection with the Work, since these are solely [AJS Construction's] responsibility under the Contract for Construction. [TPG Architecture] shall not be responsible for [AJS Construction's], Subcontractors' [i.e., River Pile's], suppliers' [i.e., Atlas Copco's] or any other person's schedules, or failure to carry out the Work in accordance with the Contract Documents. [TPG Architecture] shall not have control over or charge of acts or omissions of [AJS Construction], [River Pile], or their agents or employees, or of any other persons or entities performing or supplying portions of the Work. [TPG Architecture] shall endeavor to guard against defects in the Work and will report to [JP Morgan Bank] all defects observed.

See Notice of Motion (motion sequence number 003), Exhibit I. TPG Architecture was not deposed in connection with this action.

On November 5, 2008, JP Morgan Bank and AJS Construction executed a general contracting agreement (the AJS Construction contract), the pertinent parts of which state as follows:

> Article 9 Enumeration of Contract Documents
>
> ***
>
> § 9.14 The Specifications
>
> ***
>
> Division 2 - Site Work
>
> ***
>
> 02240 Dewatering
>
> ***
>
> General Conditions of the Contract for Construction
>
> ***
>
> Article 3 Contractor
>
> ***
>
> § 3.3 Supervision and Construction Procedures
>
> § 3.3.1 The Contractor [AJS Construction] shall supervise and direct the work, using the Contractor's best skill and attention. [AJS Construction] shall be solely responsible for, and have control over, construction means,

methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, [AJS Construction] shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures. If [AJS Construction] determines that such means, methods, techniques, sequences or procedures may not be safe, [AJS Construction] shall give timely written notice to the Owner [i.e., JP Morgan Bank], the Architect [TPG Architecture] and shall not proceed with that portion of the Work without further written instructions from [TPG Architecture]. If [AJS Construction] is then instructed to proceed with the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by [AJS Construction], [JP Morgan Bank] shall be solely responsible for any loss or damage arising solely from those Owner-required means, methods, techniques, sequences or procedures.

***

§ 3.18 Indemnification

§ 3.18.1 To the fullest extent permitted by law, [AJS Construction] shall indemnify and hold harmless [JP Morgan Bank], [TPG Architecture], [TPG Architecture]'s consultants, and agents and employees of any of them from and against claims, damages, losses or expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss and expense is attributable to bodily injury ... but only to the extent caused by the negligent acts or omissions of [AJS Construction], a Subcontractor [River Pile], anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this section.

***

Article 10 Protection of Persons and Property

***

§ 10.2 Safety of Persons and Property

§ 10.2.1 [AJS Construction] shall take reasonable precautions for the safety of, and shall provide reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:
1. Employees on the Work and other persons who may be affected thereby.

See Notice of Motion (motion sequence number 003), Exhibit J.

AJS Construction was first deposed by Viola, its superintendent, who stated that he was responsible for site safety inspections at the property. *See* Notice of Motion (motion sequence number 003), Exhibit F, at 24-25. Viola also opined that the manner in which River Pile was driving the piles at the property was "inherently dangerous." *Id.* at 82-84. Viola stated had he had observed the drilling operations, including Scrudato's accident, and had observed the liquid spoils accumulating around the drill site where Scrudato was working. *Id.* at 167-169. However, Viola admitted that River Pile was not responsible for de-watering. *Id.* at 45. Viola also stated that Mueser Rutledge was responsible for insuring that the piles were installed correctly, and to report to AJS Construction if they were not. *Id.* at 118-119. Finally, Viola stated that, apart from Atlas Copco's initial demonstration of how to use the machinery, no one from Atlas Copco, AJS Construction or Mueser Rutledge ever directed the work of River Pile's employees. *Id.* at 156-157, 162-164. AJS Construction was deposed a second time, again by Viola, who stated then that, pursuant to the contract between AJS Construction and River Pile, "de-watering" (i.e., removal of) the drill spoils was AJS Construction's responsibility, not River Piles's, and that AJS Construction did not perform this responsibility, nor did it construct a de-watering system. *See* Notice of Motion (motion sequence number 001); Exhibit 14, at 213-218. Viola also stated that, rather than creating a de-watering system, AJS Construction obliged both its own and River

Pile's employees to dig the dirt berm with hand shovels as an attempt to divert some of the drill spoils liquid. *Id.* at 218-220. Finally, Viola reiterated that he observed Scrudato become injured when he was lifting a pile segment while standing with his feet "partially [in] drill spoils, [and] partially [in] some muddy water". *Id.* at 224.

On November 7, 2008, AJS Construction and River Pile executed a contract (the River Pile contract), which provides, in pertinent part, as follows:

Scope of Work:	22 drilled in 60 ton piles consisting of a 60' long hollow core bar, Titian 73/53 or equal with a 5" drill bit and 5000 psi grout as per the attached sketch.
	***
Exclusions:	Excavation, dewatering, site preparation, removing obstructions, working off pontoons, site, structure and utility protection and restoration, drilling through overburdens, obstructions or contaminated material, maintenance of traffic, barricades, vibration, deflection or heave monitoring, responsibility for damage to underground utilities, spoil removal, "Call Before You Dig," layout, surveying.

See Notice of Motion (motion sequence number 001), Exhibit 5. A rider to the River Pile contract, that the parties executed on March 18, 2009, provides, in pertinent part, as follows:

> 6. Indemnification.
>
> 6A. To the fullest extent permitted by law, the Subcontractor [i.e., River Pile] shall indemnify and hold harmless [AJS Construction], its Principal, the Owner [i.e., JP Morgan Bank], Architect [i.e., TPG Architecture], Architect's consultants and agents and employees or any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Work, provide that such claim, damage, loss or expense is attributable to bodily injury ... caused in whole or in part by negligent acts or omissions of the Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or reduce other rights or obligations of indemnity, which could otherwise exist as to a party or person

described in this Paragraph 6A.

See Packer Affirmation in Opposition to Motion (motion sequence number 002), Exhibit B. An earlier submission to AJS Construction (that AJS Construction evidently executed on or about February 10, 2009) detailed the manner in which River Pile planned to do the work; in particular:

Procedure

1. Utilize Atlas Copco MAI System, ECM 590 Hydraulic Crawler Drill, M400NT Grout Plant; brochure attached.

2. Installation:
   - A. Attach drill bit to 10' hollow core bar.
   - B. Set in drill, attach swivel to drill and bar and connect hose to grout plant.
   - C. Start drilling and pumping grout. Install 10' bar plus bit into the ground.
   - D. Attach coupler and second 10' bar, continue drilling until 4 sections of 40' of bar are in the ground.
   - E. For the last 25', slide a 3" diameter pvc pipe over the bar to isolate the unbonded zone.
   - F. Pile is 65' long, 40' bond zone and 25' unbonded zone as per design of Heller & Johnsen, Geotechnical Engineers.

See Notice of Motion (motion sequence number 001), Exhibit 6.

Mueser Rutledge was deposed by one of its partners, geotechnical engineer James Kaufman (Kaufman), who stated that Mueser Rutledge was responsible only for reviewing the architect's (TPG Architecture's) plans regarding the method by which piles would be installed at the premises, and observing the subcontractor (River Pile) to make sure that it was following those procedures. *See* Notice of Motion (motion sequence number 001), Exhibit 10, at 10, 57-59. Kaufman specifically stated that site safety was not Mueser Rutledge's responsibility, nor was Mueser Rutledge capable of overriding the contractor's (AJS Construction's) decision as to what methods would ultimately be used to do the work. *Id.* at 10-11, 59-61. Kaufman opined

that the pile drilling method that River Pile had proposed and that AJS Construction had approved was "relatively common." *Id.* at 12. The agreement between TPG Architecture and Mueser Rutledge (the Mueser Rutledge contract) consisted of three separate work proposals that Mueser Rutledge submitted, and that TPG Architecture approved and executed on October 10, 2005, June 7, 2006 and January 9, 2009, respectively. Each of the proposals contains an indemnification clause, as follows:

> [Mueser Rutledge] shall indemnify and hold harmless [TPG Architecture], its officers, directors, partners and employees, from and against any and all claims, suits, losses and damages (including but not limited to all fees and charges of attorneys and all court or arbitration or other dispute resolution costs and claims[']expenses) caused solely by the negligent acts or omissions of [Mueser Rutledge], its partners, agents, employees and consultants in the performance and furnishing of the services under this Proposal/Agreement.
>
> To the full extent permitted by law, [Mueser Rutledge] agrees to indemnify and hold [TPG Architecture] harmless from and against any liabilities, claims, damages and costs (including reasonable attorney's fees) to the extent caused by the sole negligence of [Mueser Rutledge], its partners, employees, and consultants in performance of services under this Proposal/Agreement. In no event shall the indemnification agreement extend beyond the date when the institution of legal or equitable proceedings for professional negligence would be barred by an applicable statute of repose or statute of limitations.[1]

See Notice of Motion (motion sequence number 003), Exhibits H-1, H-2, H-3. Kaufman also submitted an affidavit, wherein he states that Mueser Rutledge "had no responsibility for determining the contractor's means and methods of completing the pile drilling and grout work," "had no responsibility for specifying, inspecting or overseeing any safety aspects of this Project in general," and "did not undertake any extra-contractual efforts related to contractor's means and methods of construction ... [or] site safety or worker safety." *See* Notice of Motion (motion

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[1] The second and third proposals' indemnity clauses are identically worded.

sequence number 003), Exhibit H, ¶¶ 9-11.

Atlas Copco was deposed by McClanahan, who stated that Atlas Copco's employees did no work at the premises other than to demonstrate the use of the drill rig and the grout plant to River Pile's employees for "a few hours" on the day of Scrudato's accident. *See* Notice of Motion (motion sequence number 001), Exhibit 12, at 59. The equipment lease between River Pile and Atlas Copco (the Atlas Copco lease) states, in pertinent part, as follows:

> Terms and Conditions - Equipment Rental
> ***
>
> 10. Lessee [River Pile] understands that Lessor [Atlas Copco] makes no representation or warranty of any kind, express or implied, with respect to the equipment, including warranties of merchantability or fitness for a particular purpose. There is no warranty or representation that the equipment is free of latent defects and lessee hereby waives any and all claims for damages for breach of warranty including, but not limited to claims for injury or death, property damage, parts, labor, delay or business interruption by Lessee or third parties. Under no conditions will Lessor be responsible for special, indirect, incidental, punitive or consequential damages.
>
> 11. Lessor shall not be liable for any direct, indirect, special or consequential damages or loss: (i) arising out of the non-delivery, delivery, manufacture, installation, use or operation of the Equipment, or from any defects in features, malfunctions, repairs, replacements or alterations thereof; or (ii) without limitation, any other liability of any nature with respect to the Equipment, or this Agreement, or any breach thereof arising out of negligence. Furthermore, Lessee shall indemnify and hold harmless Lessor, its directors, officers, employees, agents and representatives, from any and all claims, actions, suits, proceedings, costs, expenses, damages and liabilities, including attorney's fees, arising out of, connected with, or resulting from, this Agreement or the breach thereof.

Id.; Exhibit 7. McClanahan also stated that he disagreed with the amount and type of grout that was being pumped during the drilling process, that he had stated this to Driscoll, that he did not believe that Driscoll had sufficient experience with grouting, and that he also believed that Driscoll had overstepped his bounds by insisting on overpumping the grout rather than switching

to a system that "made sense." *See* Notice of Motion (motion sequence number 001), Exhibit 12, at 109-110.

Scrudato initially commenced his action against AJS Construction, 160 Front Street, JP Morgan and JP Morgan Bank, after which AJS Construction commenced the instant third-party action against River Pile, Mueser Rutledge, TPG Architecture and Atlas Copco. Thereafter, on August 1, 2011, Scrudato filed an amended complaint that names all of the defendants herein except River Pile (his employer), and that sets forth causes of action for: 1) common-law negligence; 2) violation of Labor Law § 200; and 3) violation of Labor Law § 241 (6) (as well as NYCRR 23-1.5, 23-1.7, 23-1.7[b], [d] and [e], 23-1.8 and 23-4.2). *See* Notice of Motion (motion sequence number 001), Exhibit 1. Defendants all filed timely answers. *Id.*; Exhibit 3; Notice of Motion (motion sequence number 002), Exhibit C. AJS Construction's third-party complaint sets forth causes of action for: 1) contractual indemnification (against River Pile); 2) breach of contract - failure to obtain insurance (against River Pile); 3) contributory negligence (against River Pile); 4) common-law indemnification (against River Pile); 5) contractual indemnification (against Mueser Rutledge); 6) breach of contract - failure to obtain insurance (against Mueser Rutledge); 7) contributory negligence (against Mueser Rutledge); 8) common-law indemnification (against Mueser Rutledge); 9) contractual indemnification (against TPG Architecture); 10) breach of contract - failure to obtain insurance (against TPG Architecture); 11) contributory negligence (against TPG Architecture); 12) common-law indemnification (against TPG Architecture); 13) contractual indemnification (against Atlas Copco); 14) breach of contract - failure to obtain insurance (against Atlas Copco); 15) contributory negligence (against Atlas Copco); and 16) common-law indemnification (against Atlas Copco). *See* Notice of Motion

(motion sequence number 002), Exhibit D. The third-party defendants also all filed timely answers to that complaint, each of which included cross claims for common-law indemnification and/or contribution from AJS Construction and the other third-party defendants. *Id.*; Exhibits E, F, G. Now before the court are, respectively, motions by Atlas Copco (motion sequence number 001), River Pile (motion sequence number 002) and Mueser Rutledge (motion sequence number 003), each of which seeks summary judgment to dismiss the complaint and/or portions of the third-party complaint as against it.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (1st Dept 2002). Once this showing has been made, the burden 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 e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1st Dept 2003). The court will dispose of each motion in turn.

Atlas Copco's Motion

In its motion, Atlas Copco argues that "plaintiff's injuries occurred as a result of a dangerous condition that was not within Atlas Copco's responsibilities." *See* Atlas Copco Memorandum of Law, at 10-12. This argument appears to be aimed at both Scrudato's first and second causes of action, which allege common-law negligence and a violation of Labor Law § 200, respectively. Labor Law § 200 is the statutory codification of the common-law duty that is

imposed on owners and/or general contractors to provide construction workers with a safe work site. *See e.g. Perrino v Entergy Nuclear Indian Point 3, LLC*, 48 AD3d 229, 230 (1st Dept 2008), citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 (1993). Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed. *See Lopez v. Dagan*, 98 AD3d 436 (1st Dept 2012. Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident. *Id.* at 441. When the manner of work is at issue, no liability will attach to the owner or general contractor, unless it is shown that the party to be charged had the authority to supervise or control the performance of the work. *Id.* At 442.

Here, Atlas Copco specifically argues that it cannot be found liable under either of the foregoing theories. *See* Atlas Copco Memorandum of Law, at 10-12. With respect to the "dangerous premises condition" analysis, Atlas Copco argues that it had no role in either the construction of the dirt berm or the removal of the drill spoils, and that the evidence discloses that those activities were entirely AJS Construction's responsibility. *Id.* at 11. With respect to the "means and manner" analysis, Atlas Copco argues that it had no role in supervising Scrudato's work, which was River Pile's and AJS Construction's responsibility, and that the evidence demonstrates that its only role was to demonstrate the manner in which the drill rig and grout plant were operated, and not to actually operate them. *Id.* at 11-12. AJS Construction responds that there are issues of fact as to whether Atlas Copco exercised direction and control

over River Pile's operation of the drill rig and grout plant. *See* Packer Affirmation in Opposition, ¶¶ 4-14. AJS Construction also argues that there are issues of fact as to whether Atlas Copco's employees' drilling of the first piles as part of their demonstration of the equipment may have been part of the cause of the condition that led to Scrudato's accident. *Id.*, ¶ 15. Scrudato joins in with AJS Construction's arguments. *See* McCrorie Affirmation in Opposition, ¶ 5. As will be discussed below, AJS Construction's arguments are unsupported by the evidence and such are without merit with respect to common-law negligence/Labor Law § 200 claims .

Under either the "dangerous premises condition" analysis or the "means and manner" analysis, liability for an employee's injury will only attach to a property owner, a general contractor or an agent thereof. Here, it is clear that Atlas Copco was none of these, but merely an equipment rental company. Neither AJS Construction nor Scrudato has presented any evidence or argument to support a claim that Atlas Copco was an "agent" of either JP Morgan Bank or of AJS Construction itself. Further, Atlas Copco's lease with River Pile contained a waiver of all claims for personal injury. As such, it is clear that Atlas Copco cannot be held liable to Scrudato under a theory of common-law negligence and/or violation of Labor Law § 200 because it owed no duty to Scrudato as either an owner of or a party responsible for the property where the injury occurred. Therefore, Scrudato's first and second causes of action against Atlas Copco are dismissed.

Additionally, an analysis of the facts under either the "dangerous premises condition" or the "means and manner" theories also supports dismissal of the instant claims. As was previously noted, Scrudato denied that any of the Atlas Copco employees were either involved in, or the cause of, his accident, and testified that he had made repeated unanswered complaints

to Viola, AJS Construction's superintendent, about the accumulation of drill spoils that interfered with his work, and about the lack of a de-watering system. *See* Notice of Motion (motion sequence number 001), Exhibit 9, at 150-161. Further, Viola testified that the dirt berm was dug by AJS Construction and River Pile employees only, and that installing a "de-watering" system in the work area that would continuously remove the accumulating liquid "drill spoils" was AJS Construction's contractually mandated responsibility, but that AJS Construction did *not* install one (and instead merely constructed the dirt berm). *Id.*; Exhibit 14, at 213-220. The text of the River Pile contract lists de-watering as an "exclusion" from River Pile's duties. *See* Notice of Motion (motion sequence number 001), Exhibit 5. The text of the AJS Construction contract also lists "de-watering" as an element of "Site Work" for which AJS Construction was responsible. *See* Notice of Motion (motion sequence number 003), Exhibit J. The proof before this court, simply fails to indicate that Atlas Copco's employees were in any way engaged in the activity that gave rise to Scrudato's accident, but only that they were present at the time it occurred. Such presence, without more, does *not* create an issue of fact, as AJS Construction and Scrudato suggest. *See e.g.*, *Lombardi v Stout*, 178 AD2d 208, 211-212 (1st Dept 1991), *affd as mod* 80 NY2d 290 (1992) ("the mere presence of [defendant] at the scene does not impose liability on him, in the absence of the exercise of supervision or control over the work performed at the site, since pursuant to Labor Law § 200, the owner is not responsible for the negligent acts of others over whom he had no direction or control"). Moreover, AJS Construction's contention that Atlas Copco's employees may have contributed to the conditions that caused Scrudato's injuries by using their company's equipment to drill some sample piles and inject some sample grout is a mere "red herring", as Scrudato's and Viola's deposition testimony indicate that the

accumulation of liquid drill spoils was an ongoing problem, and not a one-time event (as the sample work was). Therefore, the court rejects AJS Construction's and Scrudato's fact-based arguments as unsupported by the evidence, and that there are no triable issues of fact as to Atlas Copco's liability to Scrudato under principles of common-law negligence and/or alleged violation of Labor Law § 200. Accordingly, summary judgment dismissing Scrudato's first and second causes of action as against Atlas Copco is granted.

Scrudato's third cause of action alleges violation of Labor Law § 241 (6), as well as supporting violations of 12 NYCRR 23-1.5, 23-1.6, 23-1.7, 23-1.7 (d), (e) (1) and (e) (2), 23-1.8, 23-1.8 (c) (2), (3) and (4), 23-1.22 and 23-1.23.[2] Atlas Copco seeks summary judgment to dismiss this cause of action on the ground that the cited Administrative Code provisions are inapplicable to it. *See* Memorandum of Law in Support of Motion (motion sequence number 001), at 12-13. Neither AJS Construction, nor Scrudato, offers any response to this argument in their respective opposition papers, and Atlas Copco does not revisit the issue in its reply papers. The court notes that the first two cited Administrative Code provisions have been held to be insufficiently specific to support a Labor Law § 241 (6) claim. *See Meslin v New York Post*, 30 AD3d 309 (1st Dept 2006) (12 NYCRR 23-1.5 not sufficiently specific); *Balladares v Southgate Owners Corp.*, 40 AD3d 667 (2d Dept 2007) (12 NYCRR 23-1.6 not sufficiently specific). Although the other Administrative Code provisions are sufficiently specific to support a Labor Law § 241 (6) claim, the court agrees with Atlas Copco that they are factually inapposite to the case at bar, since they are all inapplicable to Atlas Copco, in its capacity as a lessor of

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[2] The Administrative Code provisions set forth in Scrudato's bills of particulars differ from those that he listed in his complaint.

construction equipment. Nevertheless, neither Scrudato, nor AJS Construction, has contested the argument. Therefore, Scrudato's third cause of action is dismissed as against Atlas Copco..

The balance of Atlas Copco's motion seeks summary judgement dismissing AJS Construction's thirteenth third-party claim against it for contractual indemnification on the ground that there never was any contract between AJS Construction and Atlas Copco. *See* Memorandum of Law in Support of Motion (motion sequence number 001), at 14-15. AJS Construction does not address this argument in its opposition papers. Further, the court's review of the documentary proof herein does not disclose the existence of any such contract. Therefore, Atlas Copco is entitled to summary judgment dismissing AJS Construction's thirteenth third-party cause of action against it. Accordingly, the court grants Atlas Copco's motion in its entirety.

River Pile's Motion

In its motion, River Pile seeks summary judgment to dismiss the first through fourth causes of action set forth in AJS Construction's third-party complaint, which respectively allege contractual indemnification, breach of contract (for failure to obtain insurance), contributory negligence and common-law indemnification. River Pile argues that the contributory negligence and indemnity claims are barred by Workers' Compensation Law § 11. *See* Memorandum of Law in Support of Motion (motion sequence number 002), at 12-15 (pages not numbered). That statute provides, in pertinent part, that:

> An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and

> total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

River Park argues that Scrudato did not suffer a "grave injury" within the statute's meaning. *Id.* at 12-13 (pages not numbered). AJS Construction does not offer any response to this argument in its opposition papers. However, River Pile does not offer any medical evidence to support its argument either, and the court cannot determine whether or not a plaintiff suffered a "grave injury," as a matter of law, unless the plaintiff supports his or her claim with "competent medical evidence." *See e.g. McCoy v Queens Hydraulic Co.*, 286 AD2d 425, 425 (2d Dept 2001). Therefore, the court rejects this argument. Moreover, Workers' Compensation Law § 11 also provides, in pertinent part, that:

> The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee ... to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury..., except that if an employer fails to secure the payment of compensation for his or her injured employees and their dependents as provided in section fifty of this chapter, an injured employee ... may, at his or her option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his or her employment, nor that the injury was due to the contributory negligence of the employee.
>
> ***
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> For purposes of this section the terms "indemnity" and "contribution" shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered.

River Pile further argues that there was no "indemnification clause" in effect at the time of Scrudato's accident, because it and AJS Construction did not execute the rider to the River Pile contract (which contains the indemnity clause) until March 18, 2009 - eight days *after* Scrudato's accident. *See* Memorandum of Law in Support of Motion (motion sequence number 002), at 14-15 (pages not numbered); Notice of Motion (motion sequence number 002), Exhibit M. AJS Construction responds by citing the decision of the Appellate Division, First Department, in *Podhaskie v Seventh Chelsea Assoc.* (3 AD3d 361, 362 [1st Dept 2004]), which held that an indemnification "clause in a contract executed *after* a plaintiff's accident may nevertheless be applied retroactively where evidence establishes as a matter of law that the agreement pertaining to the contractor's work 'was made "as of" [a pre-accident date], and that the parties intended that it apply as of that date'." *See* Packer Affirmation in Opposition to Motion (motion sequence number 002), ¶ 11. Scrudato joins in all of AJS Construction's arguments. *See* McCrorie Affirmation in Opposition, ¶ 7. River Pile replies that, because this argument was advanced by counsel for AJS Construction and is unsupported by any testimonial or documentary evidence to support the existence of such intent, it should be disregarded as insufficient to overcome a motion for summary judgment. *See* Schneider Reply Affirmation, ¶¶ 6-15. It is true that "an attorney's affirmation ... is of no probative value in opposition to a motion for summary judgment." *Ramnarine v Memorial Ctr. for Cancer & Allied Diseases*, 281 AD2d 218, 219 (1st Dept 2001). However, more to the point, the decision of the Appellate Division, First Department, in *Temmel v 1515 Broadway Assoc., LLP* (18 AD3d 364, 365 [1st Dept 2005]), which reviewed the *Podhaskie* decision, held that, where a "subsequent purchase order ... does contain such [an indemnification] provision, [and] it is dated ... after plaintiff's accident and is

devoid of any language demonstrating an intention by the parties that it be retroactively applied," it will not be given retroactive effect. Here, the court's review of the March 18, 2009 rider to the River Pile contract discloses that it contains no such retroactive language. Therefore, in accordance with the *Temmel* holding, it cannot be given retroactive effect. As a result, Workers' Compensation Law § 11 does not permit AJS Construction to maintain its third-party claims against River Pile for contributory negligence, contractual or common-law indemnification, and that the branch of River Pile's motion that seeks summary judgment dismissing these claims, as a matter of law, is therefore granted.

The balance of River Pile's motion seeks summary judgment dismissing AJS Construction's claim for breach of contract for failure to obtain insurance on the ground that it did, in fact, obtain such insurance. *See* Memorandum of Law in Support of Motion (motion sequence number 002), at 16-17 (pages not numbered). River Pile has presented copies of the comprehensive general liability policy that it obtained that named AJS Construction as an additional insured. *See* Notice of Motion (motion sequence number 002), Exhibit N. AJS Construction does not contest this evidence in its opposition papers, and, thus, such argument is deemed conceded. Therefore, that branch of River Pile's motion that seeks summary judgment to dismiss AJS Construction's claim for breach of contract for failure to obtain insurance is granted. Accordingly, the court grants River Pile's motion in its entirety.

Mueser Rutledge's Motion

In its motion, Mueser Rutledge seeks summary judgment dismissing Scrudato's complaint as against it. Mueser Rutledge raises separate arguments against Scrudato's first and second causes of action, which respectively allege common-law negligence and a violation of

Labor Law § 200. With respect to Scrudato's common-law negligence claim, Mueser Rutledge argues that it "owed no duty to the plaintiff to control the work site or to maintain a safe work site." *See* Memorandum of Law in Support of Motion (motion sequence number 003), at 5-6. With respect to Scrudato's Labor Law § 200 claim,[3] Mueser Rutledge argues that it is "inapplicable" because Mueser Rutledge was neither the owner of the property nor the general contractor in charge of the work there. *Id.* at 9. With respect to the former argument, JP Morgan Bank and AJS Construction submit opposition papers, with which Scrudato joins in, that feature an expert's affidavit from engineer Vincent Tirolo (Tirolo), who opines that the grouting method chosen by Mueser Rutledge's on-site engineer, Driscoll, was not the standard one used in the industry, but an irregular one with which he had insufficient experience to implement effectively, with the result that too much grout was used and an overly large amount of drill spoils were generated. *See* Packer Affirmation in Opposition to Motion (motion sequence number 003), Exhibit A; McCrorie Affirmation in Opposition, ¶ 9. Tirolo concludes that this excess amount of drill spoils was a proximate cause of Scrudato's accident. *Id.* Mueser Rutledge replies that McClanahan's deposition testimony demonstrates that Mueser Rutledge was merely there to inspect the drilling and grouting, and not to direct its implementation. *See* Cardenas Reply Affirmation, ¶¶ 15-19. Nevertheless, such arguments are of no significance as they are directed at the "proximate cause" element of Scrudato's negligence claim, but do not bear on Mueser Rutledge's original argument - i.e., that it did not owe Scrudato a "duty of care." Therefore, the court rejects these arguments. That does not end the inquiry, however. Mueser Rutledge's

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[3] Mueser Rutledge also raises this argument against Scrudato's third cause of action, which alleges a violation of Section 241 (6). *See* Memorandum of Law in Support of Motion (motion sequence number 003), at 6-9.

original argument claimed that it owed no duty of care to Scrudato because it was neither an owner nor a general contractor. *See* Memorandum of Law in Support of Motion (motion sequence number 003), at 9. Mueser Rutledge notes that Exhibit B to the TPG Architecture contract plainly states that, as the engineer at the premises, its sole responsibility was:

> "to undertake a controlled inspection of the structural, electrical, mechanical (including elevations) site work and other work requiring such inspections by engineers during the course of construction"

and that

> "[t]hese activities are for the benefit of the Owner [i.e., JP Morgan Bank] and do not create a duty or responsibility to the Contractor [i.e., AJS Construction], Subcontractors [i.e., River Pile], material and equipment suppliers [i.e., Atlas Copco], their agents, or employees or other persons performing or supplying services or work to the Project(s)."

See Notice of Motion (motion sequence number 003), Exhibit I. Neither Scrudato, nor any of the other defendants, has presented any evidence to support an argument in opposition to Mueser Rutledge's assertion. Instead, they raise the argument, discussed below, that Mueser Rutledge was liable as an "agent" of the general contractor (AJS Construction). The court, however, rejects this argument. Leaving aside the fact that Mueser Rutledge's contract was with the architect, TPG Architecture, and not with AJS Construction, the "agency" argument that Scrudato and the co-defendants seek to raise applies only to claims for violations of Labor Law §§ 240 and 241. Because such argument is inapplicable to Labor Law § 200 claims, Scrudato's and the other defendants' reliance on it in connection with the first and second causes of action herein is misplaced. Further, as will be discussed below, there is no issues of fact as to whether Mueser Rutledge had the authority to control Scrudato's work, so as to render it liable in common-law negligence and under Labor Law § 200. Accordingly, Mueser Rutledge's motion is

granted with respect to Scrudato's first and second causes of action.

Scrudato's final cause of action alleges a violation of Labor Law § 241 (6). As was previously noted, Mueser Rutledge contends that it cannot be held liable under this statute because it did not meet the legal definition of "agent." *See* Memorandum of Law in Support of Motion (motion sequence number 003), at 6-9. As correctly argued by Mueser Rutledge, the Court of Appeals has held in *Russin v Louis N. Picciano & Son* (54 NY2d 311 [1981]) that:

> Although sections 240 and 241 now make nondelegable the duty of an owner or general contractor to conform to the requirement of those sections, the duties themselves may in fact be delegated. When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an "agent" under sections 240 and 241. To hold otherwise and impose a nondelegable duty upon each contractor for all injuries occurring on a job site and thereby make each contractor an insurer for all workers regardless of the ability to direct, supervise and control those workers would lead to improbable and unjust results and would directly contravene the express legislative history accompanying the 1969 amendments to these provisions.

Id., 317-318 (internal citations omitted); *see also Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 (2003) . Mueser Rutledge is also correct in stating that New York courts have held that "where no evidence shows that [an engineer] had the authority to supervise or control how the work was done, [the engineer] was not a statutory agent of either the owner or [general] contractor." *See* Memorandum of Law in Support of Motion (motion sequence number 003), at 8. This was the finding in *Hutchinson v City of New York* (18 AD3d 370, 371 [1st Dept 2005]), a case cited by Mueser Rutledge, in which the Appellate Division, First Department, granted summary judgment dismissing the Labor Law §§ 240 and 241 claims against the defendant/consulting engineer, on the grounds that there were "no contractual terms creating a

statutory agency; there was ... [an] engineer–in–charge to whom [defendant] reported; [defendant] had no duty to oversee the construction site and the trade contractors; and there was no evidence that [defendant]'s representative had authority to control activities at the work site or to stop any unsafe work practices." However, in *Barraco v First Lenox Terrace Assoc.* (25 AD3d 427, 428 [1st Dept 2006]), the Appellate Division, First Department, reversed the trial court's grant of summary judgment dismissing a Labor Law § 240 claim against a consulting engineer, finding that the engineer "was obligated to oversee the construction site, had a resident engineer on site, and [that] there was deposition testimony that it had authority to control activities and stop unsafe work practices." More recently, in *Nenadovic v P.T. Tenants Corp.* (94 AD3d 534, 535 [1st Dept 2012]), the Appellate Court found that the defendant rigging company "was properly found by the [trial] court to be a statutory agent for purposes of Labor Law § 240 (1), inasmuch as [it] was the lone licensed authority on the project which, pursuant to applicable regulations, was under an obligation to supervise and control the conduct of the workers that manned the scaffolds." Here, Scrudato and the co-defendants all join in the argument that there is an issue of fact with respect to whether Mueser Rutledge had the authority to supervise and control the work at the property. *See* Schneider Affirmation in Opposition, ¶¶ 11-20. In addition to Tirolo's affidavit, they specifically refer to McClanahan's deposition testimony that Driscoll had stepped beyond his role as a consulting engineer's work inspector, and instead had taken up the power to supervise and control the work, by insisting that River Pile's employees pump too much grout during the drilling process, despite the resulting overflow of drill spoils. *See* Schneider Affirmation in Opposition, ¶¶ 12-18. However, the court's review of the deposition testimony discloses that this was merely McClanahan's opinion being taken out of context.

When he was asked whether Driscoll had ever given River Pile's employees an order to stop working, McClanahan replied "not that I remember." *Id.*; Exhibit A, at 56. Further, Scrudato Sr. and Viola both testified that Driscoll did *not* have any authority to direct River Pile's employees, and that Mueser Rutledge's functions were only to observe that the piles were being installed in accordance with the architect's plans, and to report to AJS Construction if they were not. *See* Notice of Motion (motion sequence number 003), Exhibit E, at 69-71; Exhibit F, at 118-119, 156-157. Inasmuch as Scrudato and the co-defendants can point to no deposition testimony or other evidence that demonstrates that Mueser Rutledge had the authority to supervise or control River Pile's work, while Mueser Rutledge has identified multiple statements in the deposition testimony that it did *not* have such authority, as well as documentary evidence - in the form of the TPG Architecture and AJS Construction contracts - that states that only AJS Construction possessed such authority, Mueser Rutledge cannot be considered an "agent" of AJS Construction for purposes of Labor Law § 241 (6) analysis. As a result, Mueser Rutledge cannot be held liable to Scrudato under that statute, as a matter of law. Therefore, that portion of Mueser Rutledge's motion that seeks summary judgment to dismiss Scrudato's third cause of action for an alleged violation of Labor Law § 241 (6) is granted. Accordingly, the court grants Mueser Rutledge's motion in its entirety.

DECISION

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion for summary judgment of defendant/third-party defendant Atlas Copco Construction Mining Technique USA, LLC is granted and the complaint bearing Index No. 114550/10 is severed and dismissed with costs and disbursements to said defendant as

taxed by the Clerk upon the submission of an appropriate bill of costs, and the thirteenth cause of action in the third party complaint bearing Index No. 590586/11 is also severed and dismissed as against said defendant; and it is further

ORDERED that the motion for summary judgment of third-party defendant River Pile & Foundation Co., Inc. is granted and the third party complaint bearing Index No. 590586/11 is severed and dismissed with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of defendant/third-party defendant Mueser Rutledge Consulting Engineers is granted and the complaint bearing Index No. 114550/10 is severed and dismissed with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the balance of these actions shall continue; and it is further

ORDERED that defendant/third-party defendant Atlas Copco shall serve a copy of this decision upon all parties, with notice of entry.

Dated: New York, New York
January 15, 2015

Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\scrudatovajsetal.f lane.wpd