Mananghaya v Bronx-Lebanon Hosp. Ctr.
2017 NY Slip Op 32915(U)
May 3, 2017
Supreme Court, Bronx County
Docket Number: 20191/2013
Judge: Lucindo Suarez
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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MALOU MANANGHAYA, as Administratrix of THE ESTATE OF TRISTAN MICHAEL MANANGHAYA, MALOU MANANGHAYA, Individually, ANICA JILL MANANGHAYA, infant child of TRISTAN MICHAEL MANANGHAYA, ANGELICA NINA MANANGHAYA, infant child of TRISTAN MICHAEL MANANGHAYA, SHANEN MANANGHAYA, infant child of TRISTAN MICHAEL MANANGHAYA, PATRICK MANANGHAYA, infant child of TRISTAN MICHAEL MANANGHAYA, MICHAEL MANANGHAYA, infant child of TRISTAN MICHAEL MANANGHAYA and FRANCIS MIGUEL MANANGHAYA, infant child of TRISTAN MICHAEL MANANGHAYA,

Plaintiffs,

- against -

BRONX-LEBANON HOSPITAL CENTER and NAPOLI TRANSPORTATION SERVICES d/b/a C&L TOWING SERVICES, INC.,

Defendants.

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NAPOLI TRANSPORTATION, INC. d/b/a C&L TOWING SERVICES, INC.,

Third-Party Plaintiff,

- against -

AGGREKO, LLC.,

Third-Party Defendant.

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THE BRONX-LEBANON HOSPITAL CENTER,

Second Third-Party Plaintiff,

- against -

AGGREKO, LLC.,

Second Third-Party Defendant.

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DECISION AND ORDER

Index No. 20191/2013

Third-Party Index No. 83819/2013

Second Third-Party Index No. 83953/2013

PRESENT: Hon. Lucindo Suarez

Upon plaintiffs' notice of motion dated November 23, 2016 and the affirmation and exhibits submitted in support thereof (Motion Sequence #10); the affirmation in opposition dated January 27, 2017 of third-party defendant/second third-party defendant Aggreko, LLC. and the exhibits submitted therewith; the affirmation in opposition dated January 30, 2017 defendant/second third-party plaintiff The Bronx-Lebanon Hospital Center and the exhibits submitted therewith; plaintiffs' reply affirmation dated April 3, 2017 and the exhibits submitted therewith; the notice of motion dated January 26, 2017 of defendant/second third-party plaintiff The Bronx-Lebanon Hospital Center and the affirmation and exhibits submitted in support thereof (Motion Sequence #11); the affirmation in opposition dated March 8, 2017 of third-party defendant/second third-party defendant Aggreko, LLC. and the exhibits submitted therewith; the affirmation in opposition dated March 17, 2017 of defendant/third-party plaintiff Napoli Transportation, Inc. d/b/a C&L Towing Services, Inc. and the exhibits submitted therewith; plaintiffs' affirmation in opposition dated March 17, 2017 and the exhibits submitted therewith; the reply affirmation dated April 5, 2017 of defendant/second third-party plaintiff The Bronx-Lebanon Hospital Center and the exhibit submitted therewith; the reply affirmation dated April 5, 2017 of defendant/second third-party plaintiff The Bronx-Lebanon Hospital Center and the exhibit submitted therewith; the reply affirmation dated April 5, 2017 of defendant/second third-party plaintiff The Bronx-Lebanon Hospital Center; the notice of motion dated January 30, 2017 of third-party defendant/second third-party defendant Aggreko, LLC. and the affirmation and exhibits submitted in support thereof (Motion Sequence #12); the affirmation in opposition dated March 17, 2017 of defendant/second third-party plaintiff The Bronx-Lebanon Hospital Center the affidavits and exhibits submitted therewith; the reply affirmation dated April 4, 2017 of third-party defendant/second third-party defendant Aggreko, LLC. and the exhibits submitted therewith; the notice of motion dated January 20, 2017 of third-party defendant/second third-party defendant Aggreko, LLC. and the affirmation, affidavit, and exhibits

submitted in support thereof (Motion Sequence #13); the affirmation in opposition dated March 17, 2017 of defendant/third-party plaintiff Napoli Transportation, Inc. d/b/a C&L Towing Services, Inc. and the exhibits submitted therewith; the reply affirmation dated April 5, 2017 of third-party defendant/second third-party defendant Aggreko, LLC. and the affidavit and exhibits submitted therewith; the notice of motion dated January 27, 2017 of third-party defendant/second third-party defendant Aggreko, LLC. and the affirmation and exhibits submitted in support thereof (Motion Sequence #14); the reply affirmation dated April 5, 2017 of third-party defendant/second third-party defendant Aggreko, LLC. and the exhibits submitted therewith; the notice of motion dated January 31, 2017 defendant/third-party plaintiff Napoli Transportation, Inc. d/b/a C&L Towing Services, Inc. and the affirmation and exhibits submitted in support thereof (Motion Sequence #15); the reply affirmation dated April 5, 2017 of defendant/third-party plaintiff Napoli Transportation, Inc. d/b/a C&L Towing Services, Inc.; and due deliberation; the court finds:

This matter arises out of an incident that occurred on December 4, 2012 when a 400-ton capacity industrial chiller or cooling unit fell off a flatbed trailer onto decedent Tristan Michael Mananghaya. The incident occurred on East 173 Street near Grand Concourse. Defendant/second third-party defendant The Bronx-Lebanon Hospital Center ("BXL") rented the chiller from decedent's employer third-party defendant/second third-party defendant Aggreko, LLC. ("Aggreko"). Aggreko retained defendant/third-party plaintiff Napoli Transportation Services d/b/a C&L Towing Services, Inc. ("C&L") to transport the chiller to a facility in New Jersey.

Plaintiffs move pursuant to CPLR 3212 for summary judgment on liability on their Labor Law § 240(1) claim against BXL (Motion Sequence #10). BXL moves for summary judgment dismissing plaintiffs' negligence and Labor Law §§ 200, 240(1) and 241(6) claims and for summary judgment on its cross-claim for common-law indemnification against C&L and on its third-party claim for common-law indemnification against Aggreko (Motion Sequence #11). Aggreko moves for summary judgment

dismissing BXL's third-party complaint on the ground that Texas law requires dismissal (Motion Sequence #12). Aggreko moves for summary judgment on its counterclaims for contractual and common-law indemnification against C&L (Motion Sequence #13). Aggreko moves for summary judgment dismissing plaintiffs' Labor Law §§ 200, 240(1) and 241(6) claims against BXL and C&L and for summary judgment dismissing both third-party complaints (Motion Sequence #14). C&L moves for summary judgment dismissing plaintiffs' Labor Law §§ 200, 240(1) and 241(6) claims (Motion Sequence #15). The motions are consolidated for decision herein as they involve common questions of law and fact.

Background

For three months in 2009, BXL rented an 80-ton chiller and a diesel generator from Aggreko. The chiller was placed on a trailer on East 173 Street and the generator was placed on Grand Concourse. Because East 173 Street sloped downward towards Selwyn Avenue, one end of the trailer was propped up on wood blocks to level it.[1] Two hoses connected the chiller's input and output ports to T-valves fitted onto the chilled water supply and return risers in the hospital's second floor mechanical room. The hoses ran out an open door to the second floor roof and over a scaffold next to the chiller. The rental period passed without incident. In 2012, BXL rented a 400-ton chiller and a diesel generator from Aggreko for four months. The equipment was set up in the same locations as in 2009, and the hoses connected to the same valves and risers. Aggreko stacked wood blocks beneath the landing gear of the trailer to level it. A fence was placed on the street around the trailer. Aggreko hired non-party Miller Mechanical Systems ("Miller") to perform part of the work.

For the 2012 rental, Aggreko presented a proposal to Kuriakose Fernandez ("Fernandez"), BXL's Senior Director of Engineering. The proposal contained a short list of Aggreko's terms and conditions and referred BXL to its website to view the complete document. The last paragraph above

[1] Witnesses identified the system as cribbing, blocking, chocking and a chimney block.

the signature line states that "[b]y signing this Acceptance, I certify that I am authorized to enter into this agreement . . . [and] acceptance or delivery of Aggreko's rental equipment shall be deemed an acceptance of Aggreko's North American Rental Agreement Terms & Conditions." The full terms and conditions state the "contract is governed by the laws of the requisite country and state . . . where the contract is performed" and that the parties shall submit to jurisdiction in Harris County, Texas. It does not appear that anyone from BXL signed the proposal.

BXL's engineering department prepared a purchase requisition, and once the requisition was approved, the purchasing department issued a purchase order for the rental. Aggreko and BXL have submitted two different copies of the May 2012 purchase order. Stamped and handwritten text on Aggreko's copy reads "[s]ubject to the terms of Aggreko Proposal No. 12006-7593, dated 5-30-2012, of which the customer acknowledges receipt, including all terms and conditions expressly referenced therein which are incorporated herein by reference, customer agrees to be bound by all such terms upon delivery of the equipment ordered hereunder." BXL's copy omits that language.

C&L had worked as an approved transport vendor for Aggreko for several years. Aggreko directed C&L to deliver its equipment to BXL in June and to return the equipment in December. C&L driver Richie Ramirez ("Ramirez") and Aggreko technician Talesh Jagdeo ("Jagdeo") were present for the delivery and the pick-up of Aggreko's equipment at BXL.

Deposition Testimony

Fernandez testified that he managed the hospital's daily plant operations. When he received Aggreko's proposal, he "glanced" at the terms and conditions section but did not read it. It was his job to "address the proposal, the numbers and that's the end of that." He believed it was the responsibility of the purchasing department to read the fine print. Fernandez did not recognize the additional stamped language on the purchase order. He denied receiving a faxed copy of it from Aggreko.

Regarding the 2009 rental, Fernandez testified that BXL's consultant recommended placing the

chiller on the fifth floor roof but this was costly and inconvenient. An Aggreko engineer suggested placing the chiller on East 173 Street and using a generator to provide power. BXL chose to proceed with Aggreko's recommendation. For the 2012 rental, Aggreko chose where to set up its equipment. Aggreko was responsible for delivering, connecting, and removing its equipment. BXL's employees showed Aggreko to the mechanical room but took no part in the installation. Apart from the connections to the chilled water supply, Aggreko made no connections to any other hospital systems. No systems were shut down to facilitate the work.

Lead engineer John Minton ("Minton") testified that BXL installed valves on the risers in the second floor mechanical room in 2009 "because it wasn't designed to have a connection there." The hospital "basically put a T in the line with a valve on it so we could connect at that point." By closing the valve, BXL could isolate and remove Aggreko's equipment without affecting the hospital's cooling system. The hardware was permanent. The connections in 2012 were made to the same valves. The only work needed to disconnect the hoses from the risers was to drain them and then unscrew them. Minton was not involved in removing Aggreko's equipment. The bill of lading he signed accepting delivery of the chiller showed its gross weight was 28,450 pounds. The net weight was 27,450 pounds. BXL asked Aggreko to remove its equipment in October but Aggreko did not do so until December.

Vice President of Operations Hiram Torres ("Torres") testified that he signed off on the purchase requisition for the chiller. He was not involved in obtaining Aggreko's proposal and he did not negotiate the price. The materials management department under Seif Rehim ("Rehim") generated the purchase order.

Purchasing agent Ravindranath Casuba ("Casuba") testified that he generated the purchase order. He obtained the information on the purchase order from a requisition he received from the engineering department. Once Rehim approved the purchase order, Casuba signed it and sent the document to the vendor by fax. Casuba was not involved in any negotiations.

C&L driver Bruce Brighton ("Brighton") delivered the chiller in 2012. The bill of lading listed the weight of the chiller but not the weight of the trailer. He used chains and a rachet binder to secure the chiller to the trailer during transport but he could not recall removing them upon delivery. He parked the trailer on East 173 Street with the front end of the trailer facing downhill. Ramirez used the knuckle boom on his truck to lift the front end of the trailer while Aggreko employees built a chimney block under the landing gear. Ricky Rambally ("Rambally") from Aggreko was also present.

Ramirez testified that Truck 100 was equipped with a knuckle boom or small crane affixed to the frame of the trailer. A chart on the side of the truck listed the lift capacity of the boom at different angles and with the jib extended. The maximum lift capacity without the jib extended was 29,700 pounds. The maximum with the jib was 23,000 or 24,000 pounds. Outriggers stabilized the truck when the boom was in use. The truck was equipped with chains, chain binders, nylon slings, and shackles. A C&L employee trained him on how to rig equipment and operate the knuckle boom. He was familiar with Aggreko's equipment and had used the boom to lift chillers and generators. The heaviest piece of Aggreko equipment he lifted before the accident was a 23,000 pound generator. C&L owned rotators with a greater lift capacity but Ramirez was not certified to operate them.

Ramirez was present when Aggreko installed the chiller. He was told to "boom" hoses onto the roof but when he arrived, Rambally told him to lift the chiller as well. He testified "it was almost like a normal thing" that Aggreko's field instructions differed from what the C&L dispatcher told him. He had never used the boom to lift a chiller of this size before. No one told him what the chiller weighed. He estimated the chiller weighed 16,000 pounds because he had transported smaller chillers in the past. He assumed it weighed less than 23,000 pounds. Ramirez used a chain, a shackle and two slings hooked to the front end of the trailer. He wrapped the chain around the bottom of the trailer and threaded it through the railings to hold the chain in place before he lifted the front end of the trailer with the chiller loaded on top. Ramirez had never lifted a chiller in this fashion before.

The night before the accident, dispatch told Ramirez he would be booming hoses at BXL. He was not given any paperwork such as a bill of lading. The bill of lading usually, but not always, listed the address for pick up or delivery and the weight of each item. He met decedent and Jagdeo at the hospital. Jagdeo told Ramirez to lift the chiller so that Jagdeo could remove the blocks. Ramirez could not recall discussing a lift plan with them and could not recall if anyone from BXL was present. Jagdeo did not know the weight of the chiller, and Ramirez did not look at the label on the chiller to determine its weight. He never felt his equipment was inadequate for the job.

Ramirez rigged the trailer the same way he had rigged it in May except he used two shackles. The chain, which was newer, was not marked. It was rated to tie down equipment up to 10,000 pounds. He had not used the chain to lift anything before. He was not aware of the difference between tie down and hoisting chains. He did not secure the chiller to the trailer. Ramirez raised the trailer two inches and signaled for Jagdeo to remove the blocks. Decedent, who had been told to divert pedestrian traffic away from the sidewalk, "just started helping." Ramirez heard a loud bang and the "trailer started coming straight down." The chiller slid off the trailer onto the sidewalk. Charles Napoli ("Charles") told Ramirez the chain broke.

Charles testified that he owned Napoli Transportation, Inc. which operated as C&L, and C&L hauled equipment for Aggreko and others. Aggreko may request specific equipment but C&L decided what equipment to send. Aggreko did not always provide dispatch with the size and weight of its equipment. For the job at BXL in December, Aggreko asked for a "[l]arge boom truck to lift [the] chiller." According to the rating chart, the boom on Truck 100 could lift 15,683 pounds at its highest point without the jib and 6,493 pounds at its lowest point. Charles did not dispatch Ramirez but Ramirez knew he would be lifting the trailer. An Aggreko employee usually acted as a flagman. It was Ramirez's decision to use a tie down chain to lift the chiller. Tie down chains were not meant to lift heavy loads. Charles believed the chain, not the boom, failed because the boom was capable of lifting

the back part of the trailer several inches off the ground. Ramirez was not required to possess a rigging license. C&L paid $32,000 in fines to OSHA and DOB.

Charles believed there was an unwritten performance agreement between C&L and Aggreko. He recognized his signature stamp imprinted on Aggreko's Freight Supplier Requirements but he never saw the document before. He believed his brother Angelo Napoli ("Angelo") stamped it. Angelo, who served as an operations or dispatch manager, was authorized to make decisions for C&L.

Angelo testified that his duties included dispatching drivers. Aggreko would send dispatch an e-mail with the job details and dispatch would telephone to confirm. C&L gave its drivers Aggreko's bill of lading if Aggreko sent one. Aggreko often requested specific equipment, and Aggreko asked for a boom truck for the BXL job. He did not know who dispatched Ramirez or if the dispatcher considered Ramirez's qualifications. He never saw the Freight Supplier Requirements before.

Aggreko technician Jack Fadena ("Fadena") helped set up the chiller with Rambally and Jagdeo. The trailer was parked on the street when he arrived, and chains and binders tied the chiller to the trailer. The chiller had to be level to work efficiently, and East 173 Street was at an incline. He and Rambally decided to use wood shims to level it. Ramirez used the boom to lift the trailer and Fadena and Jagdeo slid wood blocks underneath the landing gear. Once the chains and binders were removed, nothing but "gravity" kept the chiller on the trailer. The chiller weighed 28,000 pounds and the trailer weighed 12,000 pounds. Two 6-inch diameter hoses connected the chiller to T-fittings or flanges attached to risers in the hospital's mechanical room. Miller used a standard wrench to bolt the hoses together. Fadena testified that Aggreko provided no training on how to remove cribbing.

Jagdeo testified that he was the lead technician on the decommission. A tech one, or entry level technician, could decommission a chiller without supervision if the equipment had been shut down. Because "everything was already decommissioned," Jagdeo's job was to make sure that "everything gets put on the truck." Rambally told Jagdeo that decedent would accompany him. Jagdeo could direct

decedent's work but "there was really nothing for him to do." Rambally also told him that Ramirez "is going to be rigging the trailer so we could get the cribbing off." Jagdeo was not given any long poles or tools to remove the blocks, and he had no tools in his truck to remove them. The blocks stacked beneath the landing gear were not secured to each other, and the chiller was not secured to the trailer.

Jagdeo testified that no one at BXL was present for the decommission. Miller had detached the hoses from the hospital's pipes and the scaffold had been removed. Jagdeo could not recall discussing a lift plan with Ramirez and decedent, and Ramirez did not ask what the chiller weighed. Decedent wanted to help remove the cribbing but Jagdeo told him to work as a flagman. Ramirez lifted the trailer a couple of inches, and Jagdeo kicked the blocks to knock them down. At some point, decedent came to help when a block caught on the landing gear. Jagdeo testified "we both got the block off . . . [and] that's when the chain snapped." Jagdeo was alongside the trailer and decedent was "right next to me." Jagdeo did not ask decedent to leave his post and he did not ask for decedent's assistance. Jagdeo testified that he had received no training on the use of cribbing and Rambally gave him no instructions on how to remove it.

Marlin Mowery ("Mowery") testified that he served as the operations manager at Aggreko's Bridgeport location. Rambally ran Aggreko's Linden facility where Jagdeo and decedent worked. Mowery provided technical support for the rental in 2009 but had no further involvement. When Mowery arrived at BXL after the accident, the chiller was on its side on the sidewalk. Chillers could be loaded on a trailer in either direction so long as there was safe access to the control panel.[2] The ports on the chiller at BXL faced the sidewalk, and the control panel was located at the rear toward Grand Concourse. Charles from C&L told him the wrong type of chain had been used.

Aggreko relied exclusively on trucking and rigging companies like C&L to transport its

[2] Fernandez, Torres and Charles testified they were told the chiller had been loaded backwards on the trailer with the ports facing the street.

equipment. Mowery understood rigging to include lifting and cribbing, and the trucking company should set up cribbing if needed. He was not aware that Aggreko employees assembled the cribbing at BXL, and it was not an Aggreko technician's job to remove cribbing. Prospective vendors had to complete a vendor qualification package before Aggreko's corporate office approved them. It was Aggreko's policy to send each vendor a bill of lading listing the weight and dimensions of the equipment. Aggreko did not tell its vendors what type of equipment to use on a job.

Huey Louis Bourque, II ("Bourque") worked as the manager for Environmental Health and Safety for Aggreko's North America operations. His duties included overseeing compliance with safety issues and developing training manuals and safety protocols including Aggreko's Best Operating Practices ("BOPs"). BOPs covered topics such as transporting equipment, cranes, and rigging. Every Aggreko employee had access to the BOPs on the intranet. The BOPs were internal protocols that applied only within Aggreko's facilities. Aggreko technicians had the authority to issue stop work orders.

Bourque arrived at BXL the day after the accident. Aggreko did not tie down its equipment during a rental period unless a client requested it, and the chiller at BXL was not secured to the trailer. It was customary to crib a chiller to level it, and East 173 Street was not level. Aggreko, the transport company, or the client could install cribbing. Aggreko's engineering department confirmed the chiller weighed 28,450 pounds when full. Bourque examined the chain used to lift the trailer and found a broken link 6 feet 13 inches from the hook. He learned the chain was not rated for lifting. He provided his investigative report to OSHA. OSHA levied a fine against Aggreko for allowing its personnel to come within the fall radius of a suspended load. BXL played no role in demobilizing the chiller.

Logistics coordinator Gabriel Katz ("Katz") described his general procedures for sending a job to C&L. He would discuss what the job entailed with a dispatcher and they would either come to an agreement on what equipment was needed or the dispatcher would decide. Katz could request a specific

truck but C&L had the ability to dispatch a different one. For the job in December, Katz requested a "[l]arge boom truck to lift [the] chiller." He did not know the difference in lift capacities between a small boom and a large boom.

Jacklyn McDade ("McDade") worked as a rental coordinator, and her duties included supporting Aggreko's sales team. She created the proposal for the 2012 rental. She did not include a copy of Aggreko's terms and conditions because it would be "too large and nobody's reading them." The proposal referred the customer to Aggreko's website for a complete copy. In order to create an agreement in Aggreko's system, she needed a signed proposal, and McDade endeavored to obtain a customer's signature. By signing the proposal, the customer accepted Aggreko's terms. If a customer sent Aggreko a purchase order instead of a signed proposal, McDade checked that the amounts matched those in the proposal. She would stamp the purchase order with language stating that Aggreko's terms applied and send the stamped order to the customer by fax. She understood the stamp was a counterproposal rejecting the customer's terms. If the customer did not agree, she referred them to the legal department. McDade could not recall receiving a signed copy of the proposal from BXL. She sent a stamped copy of the purchase order to BXL by fax.

Plaintiffs submitted records related to Aggreko they obtained from a Freedom of Information Act request to OSHA. A signed stipulation of settlement prohibits its use or submission in any court proceeding. Aggreko, BXL and C&L also submitted records pertaining to OSHA's notices of violation issued to C&L. BXL included a decision dated December 27, 2013 from the New York City Environmental Control Board ("ECB") dismissing all municipal notices of violation issued to Aggreko. The notices related to alleged violations of New York City Building Code regulations for crane, hoisting and rigging operations. The administrative law judge found that the "operations performed at the time of the accident did not occur during the construction or demolition of a building." No party contests the admissibility of the OSHA records or the ECB decision.

Plaintiffs' Labor Law § 240(1) Claim

Labor Law § 240(1) imposes a nondelegable duty upon owners and contractors to provide safety devices to protect workers engaged in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" from the risks inherent in elevated work sites. *Barreto v. Metropolitan Transp. Auth.*, 25 N.Y.3d 426, 433, 34 N.E.3d 815, 519, 13 N.Y.S.3d 305, 309 (2015). Plaintiff must show there was a violation of the statute and that the violation was a proximate cause of the injury. *See Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 803 N.E.2d 757, 771 N.Y.S.2d 484 (2003). Plaintiffs contend the chiller project constituted an "alteration" under Labor Law § 240(1) and that the chain used to hoist the trailer was inadequate. BXL, C&L and Aggreko argue that decedent's work was not a covered activity. He was assigned to work as a flagman, *see Mananghaya v. Bronx-Lebanon Hosp. Ctr.*, 147 A.D.3d 487, 47 N.Y.S.3d 282 (1st Dep't 2017), and Aggreko argues that such work did not expose him to an elevation-related risk.

"'Altering' within the meaning of N.Y. Lab. Law § 240(1) requires making a significant physical change to the configuration or composition of the building or structure." *Joblon v. Solow*, 91 N.Y.2d 457, 466, 695 N.E.2d 237, 241, 672 N.Y.S.2d 286, 290 (1998). "Whether a physical change is significant depends on its effect on the physical structure." *Saint v. Syracuse Supply Co.*, 25 N.Y.3d 117, 125, 30 N.E.3d 872, 877, 8 N.Y.S.3d 229, 234 (2015). The work must affect the structural integrity of a building. *See Kretzschmar v. New York State Urban Dev. Corp.*, 13 A.D.3d 270, 785 N.Y.S.2d 923 (1st Dep't 2004), *lv denied*, 5 N.Y.3d 703, 833 N.E.2d 708, 800 N.Y.S.2d 373 (2005). Cosmetic or decorative changes are not considered alterations. *See Munoz v. DJZ Realty, LLC*, 5 N.Y.3d 747, 834 N.E.2d 776, 800 N.Y.S.2d 866 (2005).

None of the evidence demonstrates that the chiller rental involved an alteration or a significant physical change to the configuration or composition of the hospital. The chiller connected to two existing valves permanently affixed to the chilled water supply and return risers. The hoses, which were

bolted or screwed into place, ran from the mechanical room through an open door to the roof. The chiller and the generator were freestanding units parked outside the hospital.

The cases cited by plaintiffs in support are factually dissimilar and unpersuasive. The majority of them involved objects affixed in such a way that they became part of the building. *See Franco v. Jemal*, 280 A.D.2d 409, 721 N.Y.S.2d 51 (1st Dep't 2001) (rooftop central air conditioner part of building); *Sprague v. Peckham Materials Corp.*, 240 A.D.2d 392, 658 N.Y.S.2d 97 (2d Dep't 1997) (air conditioning unit built into the wall). Other cases involved extensive work that caused significant physical changes. *See Sanatass v. Consolidated Inv. Co., Inc.*, 10 N.Y.3d 333, 887 N.E.2d 1125, 858 N.Y.S.2d 67 (2008) (installation of a commercial air conditioning unit involved drilling holes, affixing metal rods and installing ducts). Unlike the plaintiff in *Panek*, who spent two days "cutting pipes and plumbing, removing electrical distribution lines and studs and detaching the bolts" that affixed two air handler units to an I-beam in the ceiling, *Panek v. County of Albany*, 286 A.D.2d 86, 87, 731 N.Y.S.2d 803, 804 (3d Dep't 2001), *affirmed*, 99 N.Y.2d 452, 788 N.E.2d 616, 758 N.Y.S.2d 267 (2003), decedent's work did not result in a substantial modification to the building. The chiller was located outside the hospital. It was powered by a separate generator. No pipes or plumbing lines were cut.

The evidence also fails to support plaintiffs' contention that the work was ancillary to a larger project. *See Prats v. Port Auth. of N.Y. & N.J.*, 100 N.Y.2d 878, 800 N.E.2d 351, 768 N.Y.S.2d 178 (2003). Plaintiffs submit that *Mora v. Sky Lift Distrib. Corp.*, 126 A.D.3d 593, 4 N.Y.S.3d 211 (1st Dep't 2015) and *Destefano v. City of New York*, 39 A.D.3d 581, 835 N.Y.S.2d 275 (2d Dep't 2007) are factually analogous but the projects in those cases involved significant physical changes to a building. In *Mora*, a fan cowl cover from a cooling tower fell off a flatbed truck and struck plaintiff. The cooling tower had been removed as part of larger project that called for the installation of a new rooftop cooling tower and electrical service, the replacement of existing lines and condensers, and the modification of existing steel supports. In *Destefano*, plaintiff fell from a ladder propped against a mobile unit housing

a temporary boiler for defendant's building. The unit was parked on the street, and plaintiff helped connect the boiler to the premises. He used a sledgehammer to enlarge a hole in a cinder block wall through which he routed three industrial hoses and an electrical cable. *See Destefano v. City of New York*, 10 Misc.3d 508, 809 N.Y.S.2d 395 (Sup. Ct. Kings County 2005). The hoses connected the boiler to the building's pipes and the electrical cable connected the boiler to an electrical panel. Welders had cut holes in the pipes and welded flanges onto them. There was no ongoing construction or demolition work at BXL nor was such work pending. The temporary chiller was housed on a mobile unit on the street but installation did not require any substantial structural work on the building.

Plaintiffs' motion for summary judgment on the Labor Law § 240(1) claim is denied, and the motions by BXL, C&L and Aggreko seeking dismissal of that claim is granted.

Plaintiffs' Labor Law § 241(6) Claim

Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection to their employees and to comply with specific rules promulgated by the Commissioner of the Department of Labor. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993). The injury must have occurred "in an area 'in which construction, excavation or demolition work is being performed.'" *Rhodes-Evans v. 111 Chelsea LLC*, 44 A.D.3d 430, 433, 843 N.Y.S.2d 237, 242 (1st Dep't 2007). Plaintiff must show there was a violation of a regulation which set forth a specific standard of conduct, *see Ortega v. Everest Realty LLC*, 84 A.D.3d 542, 923 N.Y.S.2d 74 (1st Dep't 2011), and that the violation was a proximate cause of the injury. *See Egan v. Monadnock Constr., Inc.*, 43 A.D.3d 692, 841 N.Y.S.2d 547 (1st Dep't 2007), *lv denied*, 10 N.Y.3d 706, 886 N.E.2d 804, 857 N.Y.S.2d 39 (2008). Plaintiffs cite OSHA 29 CFR 1910 and 29 CFR 1926 and 12 NYCRR §§ 23-1.5, 23-1.7 and 23-1.17 as predicates in the bill of particulars.

Construction work for purposes of Labor Law § 241(6) includes alteration. *See Saint v. Syracuse Supply Co.*, *supra*. The rental did not involve alteration work. *See Anderson v. Schwartz*, 24 A.D.3d

234, 808 N.Y.S.2d 26 (1st Dep't 2005), *lv denied*, 7 N.Y.3d 707, 854 N.E.2d 1276, 821 N.Y.S.2d 812 (2006). The OSHA and Industrial Code regulations are also inapplicable. OSHA standards may not serve as a basis for liability. *See Schiulaz v. Arnell Constr. Corp.*, 261 A.D.2d 247, 690 N.Y.S.2d 226 (1st Dep't 1990). Section 23-1.5 (general responsibility of employers) is too general. *See Kochman v. City of New York*, 110 A.D.3d 477, 973 N.Y.S.2d 114 (1st Dep't 2013). Section 23-1.17 (life nets) is inapplicable because decedent was not given a life net, *see Dzieran v. 1800 Boston Rd., LLC*, 25 A.D.3d 336, 808 N.Y.S.2d 36 (1st Dep't 2006), and the incident did not involve a fall. Plaintiffs did not identify a subsection of Section 23-1.7 (protection from general hazards), but it is evident that none of them apply. The incident did not involve a hazardous opening or a drowning, slipping or tripping hazard. Decedent was not exposed to contaminated or oxygen-deficient air or to a corrosive substance. Section 23-1.7(a)(1) calls for the installation of planks capable of supporting 100 pounds per square foot but there was no evidence showing the area was normally exposed to falling material or objects. Section 23-1.7(b) calls for barricades except in areas where an employee is required to work. *See Griffin v. Clinton Green S., LLC*, 98 A.D.3d 41, 948 N.Y.S.2d 8 (1st Dep't 2012). Other than Section 23-1.5(c)(2), plaintiffs have abandoned their reliance on these sections. *See Burgos v. Premiere Props., Inc.*, 145 A.D.3d 506, 42 N.Y.S.3d 161 (1st Dep't 2016). Section 23-1.5(c)(2), though, describes a general standard of care. *See Dann v. City of Syracuse*, 231 A.D.2d 855, 647 N.Y.S.2d 617 (4th Dep't 1996); *Vernieri v. Empire Realty Co.*, 219 A.D.2d 593, 631 N.Y.S.2d 378 (2d Dep't 1995).

Plaintiffs in opposition allege for the first time a violation of 12 NYCRR §§ 23-8.1 (mobile cranes, tower cranes and derricks), more specifically Sections 23-8.1(a), 23-8.1(e), 23-8.1(f)(6), and request leave to amend their bill of particulars. Absent unfair prejudice or surprise, plaintiffs' belated identification of a code provision is not fatal. *See Noetzell v. Park Ave. Hall Hous. Dev. Fund Corp.*, 271 A.D.2d 231, 705 N.Y.S.2d 577 (1st Dep't 2000). The request, though, is procedurally defective. *See Scott v. Westmore Fuel Co., Inc.*, 96 A.D.3d 520, 947 N.Y.S.2d 15 (1st Dep't 2012). Plaintiffs, who

filed their note of issue in June 2016, failed to offer an affidavit of merit or a reasonable excuse for the delay. *See Jennings v. 1704 Realty,* L.L.C., 39 A.D.3d 392, 834 N.Y.S.2d 160 (1st Dep't 2007); *Reilly v. Newireen Assoc.*, 303 A.D.2d 214, 756 N.Y.S.2d 192 (1st Dep't), *lv denied*, 100 N.Y.2d 508, 795 N.E.2d 1244, 764 N.Y.S.2d 235 (2003); *Kassis v. Teachers Ins. & Annuity Assn.*, 258 A.D.2d 271, 685 N.Y.S.2d 44 (1st Dep't 1999). Moreover, defendants have shown they would be prejudiced by the amendment. In their moving papers, plaintiffs identified the inadequacy of the chain as a proximate cause of the injury. Discovery, which is complete, proceeded on that theory. Defendants have had no opportunity to conduct any discovery related to the boom. Defendants have also shown that Section 23-8.1(a) is a general safety standard. *See Goss v. State Univ. Constr. Fund*, 261 A.D.2d 860, 690 N.Y.S.2d 811 (4th Dep't), *lv dismissed in part and denied in part*, 94 N.Y.2d 847, 724 N.E.2d 766, 703 N.Y.S.2d 70 (1999).

Plaintiffs also failed to establish that decedent was engaged in demolition work which is defined in 12 NYCRR § 23-1.4(b)(16) as "work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment." Demolition must involve changes to the structural integrity of a building or structure. *See Garcia v. 225 E. 57th St. Owners, Inc.*, 96 A.D.3d 88, 942 N.Y.S.2d 533 (1st Dep't 2012). The rental was not part of a larger project and the removal of Aggreko's equipment had no impact on the structural integrity of the hospital building. *See Lavigne v. Glens Falls Cement Co.*, 92 A.D.3d 1182, 939 N.Y.S.2d 172 (3d Dep't), *lv denied*, 19 N.Y.3d 813, 976 N.E.2d 252, 951 N.Y.S.2d 723 (2012). Plaintiffs' reliance on *Pino v. Robert Martin Co.*, 22 A.D.3d 549, 802 N.Y.S.2d 501 (2d Dep't 2005) and *Phillips v. Powercrat Corp.*, 126 A.D.3d 590, 6 N.Y.S.3d 50 (1st Dep't 2015) is misplaced. In *Garcia*, the Appellate Division, First Department refused to follow *Pino* and apply the definition of a "structure" in Labor Law § 240 cases to Labor Law § 241(6) cases. In *Phillips,* the work required to dismantle shelves bolted to the floors and walls on the second floor of a warehouse was significantly

more extensive than the work required at BXL. Numerous witnesses testified the hoses were bolted into existing fittings and ran out an open door to the chiller. The branch of the motions by BXL, C&L and Aggreko seeking dismissal of plaintiffs' Labor Law § 241(6) claim is granted.

Plaintiffs' Labor Law § 200 and Common-Law Negligence Claims

Labor Law § 200 codifies the common-law duty that an owner or general contractor provide construction workers with a safe work site. *See Comes v. N.Y. State Elec. & Gas Corp.*, 82 N.Y.2d 876, 631 N.E.2d 110, 609 N.Y.S.2d 168 (1993). Liability may be imposed where defendant controlled the means and methods of the injury-producing work or where defendant had actual or constructive notice of the specific defect or hazardous condition that caused the accident. *See Dasilva v. Nussdorf*, 146 A.D.3d 859, 45 N.Y.S.3d 531 (2d Dep't 2017). BXL has demonstrated that it did not supervise or control the work. *See Williams v. River Place II, LLC*, 145 A.D.3d 589, 43 N.Y.S.3d 347 (1st Dep't 2016). Because it did not own or provide the chain used to lift the trailer, BXL also lacked notice of a dangerous condition. *See Dasilva v. Nussdorf, supra.*

Plaintiffs do not oppose dismissal of their Labor Law § 200 and direct negligence claims against BXL or dismissal of their Labor Law § 200 claim against C&L. Accordingly, the motions seeking dismissal of those claims is granted. C&L has not moved to dismiss the negligence claim against it.

BXL's Cross Claim and the Second Third-Party Complaint

BXL moves for summary judgment on its cross claim for common-law indemnification against C&L and on its third-party claim for common-law indemnification against Aggreko. C&L opposes BXL's motion as premature. Aggreko opposes the motion and moves for dismissal of BXL's third-party complaint based in part on BXL's acceptance of Aggreko's terms and conditions. Aggreko contends that controlling Texas law mandates dismissal. BXL argues that it never accepted Aggreko's terms, that the forum selection clause states New York law applies, and that Aggreko has not established its freedom from negligence. Given the dismissal of plaintiffs' complaint against BXL, this branch of

BXL's motion is denied as moot and Aggreko's motions seeking dismissal of the second third-party complaint are denied as moot. *See Turchioe v. AT&T Communications*, 256 A.D.2d 245, 682 N.Y.S.2d 378 (1st Dep't 1998). BXL's cross claim against C&L is also dismissed. *Id.*

Aggreko's Counterclaims and the Third-Party Complaint

Aggreko moves for summary judgment dismissing C&L's third-party complaint and for summary judgment on its counterclaims seeking contractual and common-indemnification against C&L. C&L opposes both motions. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances.'" *Drzewinski v. Atlantic Scaffold & Ladder Co.*, 70 N.Y.2d 774, 777, 515 N.E.2d 902, 904, 521 N.Y.S.2d 216, 217 (1987) (internal citations omitted). A party seeking common-law indemnification claim must show "(1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work." *Naughton v. City of New York*, 94 A.D.3d 1, 10, 940 N.Y.S.2d 21, 28 (1st Dep't 2012) (internal citation omitted). Summary judgment on a common-law indemnification may be granted only "where there are no issues of material fact concerning the precise degree of fault attributable to each party." *Tzic v. Kasampas*, 93 A.D.3d 438, 440, 940 N.Y.S.2d 218, 221 (1st Dep't 2012) (internal citation omitted).

Aggreko tenders an affidavit from National Purchasing Manager Jude Eserman ("Eserman") whose duties include overseeing maintenance of all records and contracts between Aggreko and its vendors. He submits a certified copy of the agreement between Aggreko and C&L dated October 15, 2009 that he maintains in Aggreko's ordinary course of business. The agreement consists of the Freight Supplier Requirements, Supplier Terms and Conditions, and a Small Business Concern Declaration.

C&L argues there is no enforceable agreement. Charles did not recognize the Freight Supplier Requirements and he did not sign it. There are irregularities in dates and page numbering, and the

indemnification clause in the Supplier Terms and Conditions violates General Obligations Law §§ 5.322.1 and 5.323. The contentions lack merit. Eserman's affidavit is sufficient to authenticate the documents. *See Ramade v. C.B. Contr. Corp.*, 127 A.D.3d 596, 8 N.Y.S.3d 284 (1st Dep't 2015). His reply affidavit shows the indemnification provision in the Freight Supplier Requirements remained unchanged from 2008 to 2009. The 2009 terms were in effect at the time of the accident. Although Charles did not sign the Freight Supplier Requirements, the last page bears his signature stamp. Charles denied personally stamping the document but he did not deny that someone at C&L received it and applied his stamp. His testimony is sufficient to establish that C&L entered into the agreement. *See Kokirtsev v. Wells Fargo N.A.*, 2014 U.S. Dist. LEXIS 109443 (E.D.N.Y. Feb. 3, 2014), *citing Landeker v. Co-operative Bldg. Bank*, 71 Misc. 517, 130 N.Y.S. 780 (Sup. Ct. Queens County 1911); *see also Continental Coffee Prods. Co. v. Banque Lavoro S.A.*, 852 F. Supp. 1235 n 8 (S.D.N.Y. 1994). The court agrees that application of the Supplier Terms and Conditions is limited to instances where Aggreko purchases or leases equipment. C&L has not argued that the indemnification provision in the Freight Supplier Requirements violates the General Obligations Law.

Section D of the Freight Supplier Requirements, entitled Motor Carrier Terms and Conditions, identifies Aggreko as the "shipper" and the freight supplier as the "carrier." Section 7 states:

> Indemnification. Carrier agrees, at its own expense, to defend and indemnify shipper, and hold shipper harmless, from and against any and all liability, loss, cost, expense, damage, claims or demands, including reasonable attorneys' fees, directly or indirectly arising out of, or resulting in any manner from, or occurring in connection with, the performance of the services, except to the extent caused by the negligence of the shipper.

The provision expressly provides that C&L shall indemnify Aggreko from liability for claims arising out of C&L's work except to the extent it is caused by Aggreko's negligence. Aggreko has shown the incident occurred during the performance of C&L's work. However, judgment dismissing C&L's third-party complaint and judgment in Aggreko's favor on its counterclaims is premature. There

has been no finding as to C&L's negligence. *See Brockman v. Cipriani Wall St.*, 96 A.D.3d 576, 947 N.Y.S.2d 34 (1st Dep't 2012). Moreover, C&L has raised a triable issue of fact whether Aggreko was negligent in failing to provide the proper training and tools to remove the cribbing. Fadena testified that Aggreko provided no such training, and Jagdeo testified that he was not given any tools or instructions. To the extent the OSHA records are admissible, the records indicate the cribbing could have been removed using a long bar or stick. A question of fact also exists whether Aggreko was negligent in supervising or training its employees. Although Bourque testified the BOPs applied only to Aggreko's internal facilities, Mowery testified the BOPs applied to all work areas. Two BOPs, specifically BOP 45 (Transport of Equipment) and BOP 47 (Delivery Operations and Siting of Equipment) discussed safety practices at outside locations such as a customer's facility. Fadena and Mowery testified that Aggreko prohibited its employees from working near suspended loads. Jagdeo, who had never worked in or around a raised load, testified that he could not recall receiving any training on the subject. Jagdeo also testified that decedent had not yet completed his training. Jagdeo had the authority to direct decedent's work, but when decedent began to assist him, Jagdeo did not tell him to return to his post.

Accordingly, it is

ORDERED, that plaintiffs' motion for partial summary judgment on their Labor Law § 240(1) claim against defendant/second third-party plaintiff The Bronx-Lebanon Hospital Center (Motion Sequence #10) is denied; and it is further

ORDERED, that the motion of defendant/second third-party plaintiff The Bronx-Lebanon Hospital Center for summary judgment (Motion Sequence #11) is granted as to plaintiffs' complaint and is denied as moot as to its cross-claim for common-law indemnification against defendant/third-party plaintiff Napoli Transportation, Inc. d/b/a C&L Towing Services, Inc. and its second third-party complaint against third-party/second third-party defendant Aggreko, LLC.; and it is further

ORDERED, that the motion of third-party/second third-party defendant Aggreko, LLC. for

summary judgment dismissing the second third-party complaint (Motion Sequence #12) is denied as moot; and it is further

ORDERED, that the motion of third-party/second third-party defendant Aggreko, LLC. for summary judgment on its counterclaims for contractual and common-law indemnification against defendant/third-party plaintiff Napoli Transportation, Inc. d/b/a C&L Towing Services, Inc. (Motion Sequence #13) is denied; and it is further

ORDERED, that the branch of third-party/second third-party defendant Aggreko, LLC.'s motion for summary judgment dismissing plaintiffs' Labor Law §§ 200, 240(1) and 241(6) claims against defendant/second third-party plaintiff The Bronx-Lebanon Hospital Center and defendant/third-party plaintiff Napoli Transportation, Inc. d/b/a C&L Towing Services, Inc. (Motion Sequence #14) is granted; and it is further

ORDERED, that the branch of third-party/second third-party defendant Aggreko, LLC.'s motion for summary judgment dismissing the third-party actions against it (Motion Sequence # 14) is denied as to the third-party complaint of defendant/third-party plaintiff Napoli Transportation, Inc. d/b/a C&L Towing Services, Inc. and denied as moot as to the second third-party complaint of defendant/second third-party plaintiff The Bronx-Lebanon Hospital Center; and it is further

ORDERED, that the motion of defendant/third-party plaintiff Napoli Transportation, Inc. d/b/a C&L Towing Services, Inc. for summary judgment dismissing plaintiffs' Labor Law §§ 200, 240 and 241(6) claims (Motion Sequence #15) is granted; and it is further

ORDERED, that the clerk of the court is directed to enter judgment in favor of defendant/second third party plaintiff The Bronx-Lebanon Hospital Center dismissing plaintiffs' complaint and all cross claims asserted against it; and it is further

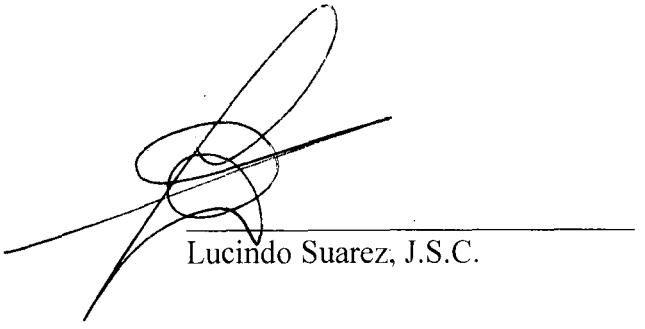
ORDERED, that the clerk of the court is directed to enter judgment in favor of defendant/third-party plaintiff Napoli Transportation, Inc. d/b/a C&L Towing Services, Inc. dismissing plaintiffs' Labor

Law §§ 200, 240 and 241(6) claims and the cross-claim of defendant/second third party plaintiff The Bronx-Lebanon Hospital Center against it; and it is further

ORDERED, that the clerk of the court is directed to enter judgment in favor of third-party/second third-party defendant Aggreko, LLC. dismissing the second third-party complaint against it.

This constitutes the decision and order of the court.

Dated: May 3, 2017



Lucindo Suarez, J.S.C.