SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

MASSIMO DEMETRIO,

Plaintiff,

-against-

CLUNE CONSTRUCTION COMPANY, L.P., NORDIC CONTRACTING COMPANY, INC., TIME WARNER CABLE NEW YORK CITY LLC, E&N CONSTRUCTION INCORPORATED, and TIME WARNER CABLE ENTERPRISES, LLC,

Defendants.

----------X

Index No. 653686/2016
Motion Seq. Nos. 003 and 004

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

In a Labor Law action, defendants Clune Construction Company L.P. (Clune) and Time Warner Cable New York City LLC (Time Warner) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Massimo Demetrio's (Plaintiff or Demetrio) claims pursuant to Labor Law §§ 240 (1), 200 and 241 (6); Clune and Time Warner also seek summary dismissal of all cross claims as against them, and Clune seeks summary judgment on its cross claims against defendant E&N Construction Incorporated (E&N) for contractual indemnification and breach of contract for failure to procure insurance (motion seq. No. 003). Defendant Nordic Contracting Company cross-moves for summary judgment dismissing all claims and cross claims as against it. Plaintiff cross-moves for summary judgment as to liability on his Labor Law §§ 240 (1) and 241 (6) claims against Clune, Time Warner, Nordic and E&N. E&N moves separately for summary judgment dismissing all claims and cross claims as against it (motion seq. No. 004). The motions are consolidated for disposition.

BACKGROUND

This action arises from an accident, on October 22, 2014, on a construction project at 100 Cable Way in Staten Island. The property was owned at the time by Time Warner, although it is now owned by Charter Communications, which acquired Time Warner in 2016. Ryan Capone, who worked for Time Warner at the time of the accident as a "Director of Critical Infrastructure" stated that Charter Communication maintains a "multifunction facility" on the property that includes "a hub site," for infrastructure, as well as a payment center, a warehouse, and general offices (Capone tr at 10, NYSCEF doc No. 164).

The construction work on the property in 2014 involved an upgrade of the infrastructure and repairing of equipment that was damaged during Hurricane Sandy. More specifically, Time Warner was expanding what Capone refers to as its "hub site" to "accommodate new hardware required to launch new higher tier services" (*id.* at 9). This infrastructure is related to the provision of internet access and consists of indoor and outdoor electrical components (*id.* at 11). The renovation project involved demolition, a 1,200 square foot expansion of the indoor space, including the construction of a new electrical room, and replacement of the outdoor electrical generator set (*id.* at 11-12). Time Warner hired Clune as the general contractor on the project (*id.* at 12-13; *see also* Time Warner/Clune agreement at 98).

Clune contracted with Nordic to do concrete work on the project, but the contract was cancelled before Nordic began work (NYSCEF doc No. 94 at 14-15). Klune then contracted with E&N, by an agreement dated September 25, 2014, but signed on January 22, 2015, to do the concrete work (NYSCEF doc No. 99). E&A's work also involved excavation and the installation of a generator pad.

On the day of his accident, Plaintiff, who was employed as a laborer by nonparty Construction Resources, walked outside with an intention to tell other workers to move a generator to a certain spot (plaintiff's tr at 104, NYSCEF doc No. 130). As he moved from the indoor to the outdoor areas of the project, Plaintiff stepped on a crate placed on top of mud, and then onto a muddy pathway (*id.* at 78-81). On either side of the pathway were deep trenches, dug for the installation of pipes, and the trenches were covered only by orange netting, held up by wooden posts driven into the ground (*id.* at 81-88). Plaintiff slipped on the muddy path and fell into the trench which he estimated as being 10 to 15 feet deep with 2 to 3 feet of water at the bottom (*id.* at 88). When he slipped, Plaintiff

> "tried to catch myself from falling, and leaned to the right. I grabbed the netting. And when I grabbed the netting, the whole thing caved in, and I did a flip into the hole … [t]he posts, the netting, everything came – fell into the hole with me. Everything just collapsed … I landed [with my] face in the mud. I slammed my leg against the pipe"

(*id.*).

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a *prima facie* showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. Labor Law § 240 (1)

Here, Plaintiff seeks summary judgment as to liability on his section 240 (1) claims against Time Warner, Clune, Nordic, and E&A.

Labor Law § 240 (1) provides, in relevant part:

> "All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with "adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Where a violation has proximately caused a plaintiff's injuries, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment" (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011]).

Time Warner and Clune

The court will analyze the section 240 (1) claims against Time Warner and Clune first, as these two defendants, as the owner and general contractor, are unambiguously proper Labor Law defendants. Another layer of analysis is required for Plaintiff's claims that Nordic and E&N are subject to section 240 (1) liability as statutory agents.

Time Warner and Clune argue that the statute is not applicable, as Plaintiff was not subject to a gravity-related risk. In support, Time Warner and Clune cite *to Caradori v Med Inn Ctrs. of Am.*, in which the Fourth Department held that a 3 foot trench did not pose a gravity-related risk under the statute (5 AD3d 1063 [4th Dept 2004]). *Caradori*, however, is distinguishable, as Plaintiff testified that the trench here was 10 to 15 feet deep. Time Warner and Clune cite to no cases in which a court has held that a trench of this depth is not a gravity related risk.

Time Warner and Clune cite to *Salazar v Novalex Contr. Corp.*, which also involved a trench that was approximately 3 feet deep (18 NY3d 134, 138 [2011] [the plaintiff testified that the subject trench was "between 3 and 4 feet deep"]). The Court of Appeals in *Salazar,* however, did not make any ruling as to gravity-related risk. Instead, it held that the statute was inapplicable as the use of any protective device "would have been contrary to the objectives of the work," as the trench was being filled with concrete at the time of the plaintiff's accident (*id.* at 140). "Put simply," the Court of Appeals held, "it would be illogical to require an owner or general contractor to place a protective cover over, or otherwise barricade, a three- or four-foot-deep hole when the very goal of the work is to fill that hole with concrete" (*id.*).

Salazar is plainly inapplicable here, as the trench was not being filled at the time of Plaintiff's accident. Moreover, there was a protective device guarding the trench (*i.e.*, the orange netting), but it was insufficient to protect him from the gravity-related risk created by the trench. Thus, Time Warner and Clune have violated section 240 (1) and the violation was a proximate cause of Plaintiff's injuries (*see Gjeka v Iron Horse Transp., Inc.*, 151 AD3d 463, 464 [1st Dept 2017] [holding that a 5 to 8 foot trench constituted a gravity-related risk under the statute and

that the defendants violated the statute by failing to provide any safety device, such as a barrier or a railing]).

Accordingly, the branch of Plaintiff's motion that seeks partial summary judgment as to liability under Labor Law § 240 (1) against Time Warner and Clune must be granted. As a corollary, the branch of Time Warner and Clune's motion that seeks dismissal of Plaintiff's section 240 (1) claims as against them must be denied.

Nordic and E&N

Whether a subcontractor may be considered a statutory agent hinges on the question of control:

> "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured. To impose such liability, the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition. Thus, a defendant's potential liability is based on whether it had the right to exercise control over the work, not whether it actually exercised that right"

(*Samaroo v Patmos Fifth Real Estate, Inc.*, 102 AD3d 944, 946 [2d Dept 2013] [internal quotation marks and citation omitted]).

Plaintiff fails to make a showing that Nordic was a statutory agent under the Labor Law, as he fails to make a showing that it had supervisory authority over the jobsite. Accordingly, the branch of Plaintiff's motion that seeks partial summary judgment as to Nordic's liability under section 240 (1) must be denied. Conversely, Nordic is entitled to dismissal of the section 240 (1) claim, as its subcontract was cancelled before it did any work on this project.

E&N seek summary judgment dismissing the section 240 (1) claim, arguing that it was not a proper statutory defendant. Plaintiff, as well as Time Warner and Clune, oppose this application, arguing that E&N was a statutory agent.

E&N's argument as to statutory agency is two-fold. First, it argues that it was Clune, rather than itself, that had supervisory control over Plaintiff's work. Second, it argues that Clune retained the authority and responsibility to keep the worksite safe.

As to supervisory control over Plaintiff's work, E&N cites to the deposition testimony of Steven Giordano, Clune's superintendent. Giordano testified that Clune both provided Plaintiff with all of the tools he needed to perform his job, and that he personally gave direction to Plaintiff every day (NYSCEF doc No. 162 at 91).

As to overall responsibility for the safety of the jobsite, E&N relies on its agreement with Clune, which contains no clause providing that E&N has responsibility for overall site safety (NYSCEF doc No. 99). E&N also returns to the testimony of Giordano, who testified that Klune, was in charge of safety on the site, and that he had the authority to stop work if he saw a dangerous condition (NYSCEF doc No. 162 at 141). Giordano also testified that he spoke with E&N daily about the safety precautions to be used around the subject trench and that the precautions that were actually used, which Giordano referred to as "wood rails, fencing, netting" roughly matched specifications in Clune's "site safety book" (*id.* at 144-145).

In these circumstances, E&N was not a statutory agent under the Labor Law, as it did not displace or assume Clune's supervisory control over the work that caused Plaintiff's accident. While E&N installed the insufficient safety protections, it was Clune that ultimately controlled the means by which workers would be protected or not from the dangers posed by the trench. Accordingly, the branch of E&N's motion that seeks dismissal of Plaintiff's Labor Law § 240 (1) claim as against it must be granted, while the branch of Plaintiff's motion that seeks partial summary judgment against E&N on its section 240 (1) claims must be denied.

Plaintiff, as well as Time Warner and Clune, each argue that E&N had authority to control the activity that brought about Plaintiff's accident, i.e., the excavation work and the provision of safety devices along the trenches caused by that excavation work. In support, both Plaintiff and Time Warner cite to the deposition testimony of Shawn Roney, E&N's project manager, who testified that E&N did the excavation and put up the orange safety netting "[A]t the end of the workday every day" when excavation was not actively ongoing (*id.* at 29).

While this protective device proved insufficient, it is unclear from the record whether E&N had authority to build a proper safety device. Plaintiff argues that, instead of the makeshift crate-step, defendants should have constructed a stairwell with a railing.

II. Labor Law § 241 (6)

Labor Law § 241 (6) provides, in relevant part:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

Initially, the applications of Nordic and E&N to dismiss the section 241 (6) claims as against them are granted. For the reasons discussed above, Nordic and E&N are not proper Labor Law defendants, as they were not owners or general contractors or agents of either. Thus, the analysis below relates only to Plaintiff's claims as against Time Warner and Clune.

Plaintiff predicates his section 241 (6) claims on three Industrial Code Regulations: 12 NYCRR 23-1.7 (d), 12 NYCRR 23-1.7 (b) (1), and 12 NYCRR 23-4.2 (h).

12 NYCRR 23-1.7 (d)

This is entitled "Protection from general hazards" and subsection (d) is entitled "Slipping hazards." It provides:

> "Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing"

Courts have held that this regulation is sufficiently specific to serve as a predicate for section 241 (6) liability (*see e.g. Luciano v New York City Hous. Auth.*, 157 AD3d 617 [1st Dept 2018]). Here, the uncontested testimony is that Plaintiff slipped on a muddy path. This is plainly a slipping hazard and the violation was also a proximate cause of Plaintiff's accident, as he slipped and fell into the trench after slipping on the hazard. Accordingly, Plaintiff is entitled to summary judgment against Time Warner and Clune on his section 241 (6) claims as against Time Warner and Clune. For the sake of completeness, the Court will analyze the other two relied upon regulations.

12 NYCRR 23-1.7 (b) (1) (i)

This regulation involves falling hazards that arise from hazardous openings. It provides that "[e]very hazardous opening into which a person may step or fall shall be guarded by a

substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)." Courts have ruled that this provision is sufficiently specific to serve as a predicate for section 241 (6) liability (*Gjeka v Iron Horse Transp., Inc.*, 151 AD3d 463 [1st Dept 2017]).

Time Warner and Clune argue that the regulation is not applicable, as plaintiff fell less than 15 feet. In support of this argument, defendants cite to *Dzerian v 1800 Boston Road, LLC*, 25 AD3d 336 [1st Dept 2006]), which held that 12 NYCRR 23-1.7 (b) (1) (iii) (a) was subject to a 15-foot requirement. As that is not the provision relied upon here, it is irrelevant to the analysis (*see Gjeka*, 151 AD3d at 465 [applying 12 NYCRR 23.1.7 (b) (1) (i) to a hazardous opening that was 5 to 8 feet deep]).

Here, 12 NYCRR 23.1.7 (b) (1) (i) is plainly applicable, as Time Warner and Clune failed to guard the hazardous opening with either a substantial covering or a safety railing. This regulation, thus, provides another sufficient basis for granting summary judgment to Plaintiff on his section 241 (6) claims against Time Warner and Clune.

12 NYCRR 23-4.2 (h)

12 NYCRR 23-4.2 is entitled "Trench and area type excavations" and its subdivision (h) provides:

> Any open excavation adjacent to a sidewalk, street, highway or other area lawfully frequented by any person shall be effectively guarded. Such guarding shall consist of a substantial fence or barricade. As an alternative, such guarding may consist of an extension of the sheeting above the ground surface adjacent to the excavation to a height of at least 42 inches above such adjacent street, highway or other area lawfully frequented by any person. In lieu of such guarding, protection may be afforded by a substantial covering installed over such excavation. Such covering shall consist of planking at least two inches thick full size, properly supported exterior grade plywood at least three-quarters inch thick or material of equivalent strength. Where it is possible that the movement of vehicles or other heavy equipment will take place over such covering, the

> covering shall be of sufficient strength to withstand such loading without structural failure of the covering or of the support system.

This regulation is sufficiently specific to serve as predicate for section 241 (6) liability (*see Ventimiglia v Thatch, Ripley & Co., LLC*, 96 AD3d 1043 [2nd Dept 2012]). Time Warner and Clune again argue that the depth of the trench is disqualifying. However, in *Gjeka*, the First Department held that this regulation was applicable for a trench that was less deep than the one involved in Plaintiff's accident (151 AD3d at 465). Time Warner and Clune also argue that this regulation is inapplicable, as Plaintiff's accident did not happen in excavation adjacent to a sidewalk, street, or highway. Defendants, however, ignore, the catchall for an "other area lawfully frequented by any person." While this regulation clearly is concerned about the safety of members of the public, it would go against the purpose of the Labor Law to hold that a jobsite is not an "other area" and that a worker on that jobsite is not lawfully frequenting it. As Plaintiff and the subject trench are covered, this regulation may also serve as a predicate to Time Warner and Clune's liability under section 241 (6).

III. Common-law Negligence and Labor Law § 200

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving an injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr.*

Corp., 40 AD3d 305, 306 [1st Dept 2007]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (*id.*).

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor "is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, "whether [a defendant] controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims . . ." (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

Time Warner and Clune

Here, Time Warner and Clune argue that they did not have supervisory control over Plaintiff's work. Initially, the court notes that Giordano's testimony at least raises a question of fact as to whether Clune had supervisory control over Plaintiff's work. More importantly, Plaintiff's accident clearly arose from a dangerous condition on the jobsite. Thus, the touchstone of the section 200 analysis here is notice. While Time Warner and Clune argue that the accident arose from the means and methods of Plaintiff's work, they state in passing that they "lacked notice" (NYSCEF doc No. 140 at 23). However, as Time Warner and Clune fail to cite any evidence that shows when they last inspected the jobsite, they fail to make a showing as to constructive notice (*see Jahn v. SH Entertainment, LLC*, 117 A.D.3d 473, 473 [1st Dept 2014]).

Accordingly, the branch of Time Warner and Clune's motion that seeks dismissal of the section 200 claims as against them must be denied. Moreover, the branch Time Warner and Clune's motion seeking dismissal of all cross claims for contribution and common-law negligence as against them must be denied (*see generally Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2nd Dept 2003] [contribution requires a showing of active negligence]; *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374, 375 [2011] [common-law indemnification requires a showing negligence]).

Nordic

As to Nordic, it cannot be liable under Labor section 200 or common-law negligence as it was not an owner or general contractor, and it was not present on the jobsite, as discussed above. As a corollary, all cross claims for contribution and common-law negligence must be dismissed as against Nordic.

E&N

As discussed above, E&N was not a general contractor, an owner, or an agent of either for the subject project. Thus, Plaintiff's section 200 claim must be dismissed as against E&N. As to common law negligence, a contractor only has a duty to third-parties in three exceptional circumstances:

> "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely"

(*Espinal v Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 138 [2002]).

Here, none of the three *Espinal* exceptions are applicable. First, E&N did not launch an instrument of harm where it created an insufficient protection over the trench, as that protection

was created under Clune's supervisory control and within Clune's own safety specifications. Second, there is no allegation here of detrimental reliance. Third, the record shows, as discussed above, that E&N did not displace Clune's duty to maintain safety on site. Thus, as none of the *Espinal* exceptions are applicable, E&N cannot be liable in negligence. As a corollary, all cross claims against E&N for common-law negligence and contribution must be dismissed.

IV. Contractual Indemnification

Time Warner and Clune seek summary judgment against E&N. As there is no indemnification provision so broad that it could apply to a contractor that was never on the jobsite, all contractual indemnification claims as against Nordic must be dismissed. Thus, Nordic's motion for dismissal of all claims and cross-claims as against it must be granted.

As to E&N, Time Warner and Clune submits the indemnification clause between Clune and E&N. The clause provides:

> "To the fullest extent permitted by Law, [E&N] shall indemnify, defend and hold harmless [Clune] and all other Indemnified Parties ... from and against any and all liabilities, injuries, claims, demands, damages, loss, costs and expenses, including but not limited to reasonable attorney's fees, provided that such liability, injury, claim, demand, loss, cost or expense is attributable to bodily injury ... but only to the extent caused or alleged to be caused in whole or in part by the negligent acts or omissions of [E&N] ... regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder"

(NYSCEF doc No. 99).

"A contract that provides for indemnification will be enforced as long as the intent to assume such a role is sufficiently clear and unambiguous" (*Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 274 [2007] [internal quotation marks and citations omitted]). Crucially, this indemnification clause requires a showing of negligence.

Under a broader "arising out of" clause, E&N would owe indemnification, as Plaintiff's accident arose out of E&N's work on the subject trench (*see Hurley v Best Buy Stores, L.P.*, 57 AD3d 239 [1st Dept 2008]). However, narrower indemnification provisions that require a showing of negligence are regularly encountered by courts and these provisions are not found to be triggered unless a showing of negligence has been made against the putative indemnitor (*see e.g. Matter of 91st St. Crane Collapse Litig.*, 133 AD3d 478, 480-481 [1st Dept 2015]).

Here, the court has found that E&N cannot, as a matter of law, be found negligent in Plaintiff's accident. Accordingly, the branch of E&N's motion that seeks dismissal of Time Warner and Clune's contractual indemnification claims as against E&N must be dismissed. Further, as this is the last claim remaining against E&N, the court must grant E&N's motion for dismissal of all claims and cross claims as against it.

CONCLUSION

Accordingly, it is

ORDERED that defendants Clune Construction Company L.P. (Clune) and Time Warner Cable New York City LLC's (Time Warner) motion for summary judgment (motion seq. No. 003) is denied; and it is further

ORDERED that defendant Nordic Contracting Company's cross motion for summary judgment dismissing all claims and cross claims as against it is granted; and it further

ORDERED that plaintiff Massimo Demetrio's cross motion for partial summary judgment as to defendants' liability under Labor Law §§ 240 (1) and 241 (6) is granted as against Clune and Time Warner; and it is further

ORDERED that the remainder of plaintiff's cross motion is denied; and it is further

ORDERED that defendant E&N Construction Incorporated's (E&N) motion for summary judgment dismissing all claims and cross claims as against it (motion seq. No. 004) is granted; and it is further

ORDERED that the Clerk is to enter judgment accordingly and the action is severed with the remaining claims to proceed against the remaining parties; and it is further

ORDERED that counsel for E&N is to serve a copy of this order, with notice of entry, on all parties, within 10 days of entry.

Dated: March 6, 2019

ENTER: