At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2nd day of June 2020

HONORABLE FRANCOIS A. RIVERA

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PAUL A. LEDWELL, SR. and DEBRA LEE LEDWELL,

Plaintiffs,

- against -

DECISION & ORDER
Index No. 500607/2016

NATIONAL GRID USA SERVICE COMPANY INC., a/k/a NATIONAL GRID USA, DANELLA CONSTRUCTION OF NY, INC., FERRARA BROS. BUILDING MATERIALS, CORP. and VICHAR, INC. GEI CONSULTANTS, INC. and PARADIGM SAFETY SERVICES LLC.,

Defendants.

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Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion of Danella Construction of NY, Inc. (hereinafter Danella), filed on March 20, 2019, under motion sequence number thirteen, for an order pursuant to CPLR 3212 granting summary judgment in its favor and dismissing the complaint and all cross claims asserted against it.

-Notice of Motion
-Affirmation in Support
-Exhibits A to Z
-Memorandum of Law
-Affirmation in Partial Opposition by defendant Ferrara Bros. Building Materials, Corp.
-Affirmation in Opposition by defendant National Grid USA
-Exhibits A to C
-Memorandum of Law in Opposition by National Grid USA
-Plaintiffs' Affirmation in Opposition

-Exhibit A
-Reply to National Grid USA
-Reply to Plaintiffs
-Reply to Ferrara Bros. Building Materials, Corp.

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion of defendant Ferrara Bros. Building Materials, Corp. (hereinafter Ferrara), filed on May 9, 2019, under motion sequence fifteen, for an order pursuant to CPLR 3212 granting summary judgment in its favor and dismissing the complaint and all cross-claims asserted against it.

-Notice of Motion
-Affirmation in Support
-Exhibit A to T
-Memorandum of Law in Support
-Plaintiffs' Affirmation in Opposition
-Exhibit A
-Reply
-Exhibit A

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion of defendant National Grid USA Service Company, Inc. a.k.a. National Grid USA (hereinafter National Grid), filed on May 10, 2019, under motion sequence sixteen, for an order pursuant to CPLR 3212 granting summary judgment in its favor and dismissing the complaint and all cross-claims asserted against it.

-Notice of Motion
-Affirmation in Support
-Exhibit A to M
-Memorandum of Law in Support
-Plaintiffs' Affirmation in Opposition
-Exhibit A
-Memorandum of Law in Reply

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion of plaintiff Paul A. Ledwell, Sr. and Debra Lee Ledwell, filed on May 10, 2019, under motion sequence seventeen, for an order pursuant to CPLR 3212 granting partial summary judgment in their favor on the issue of liability on their claims under Labor Law 240 (1) and 241 (6) as against defendants National Grid, Danella, Ferrara, Vichar, Inc. and GEI Consultants, Inc. On May 16, 2019, the plaintiffs amended motion sequence seventeen by withdrawing those branches of the motion seeking summary judgment against GEI Consultants, Inc.

-Notice of Motion
-Affirmation in Support
-Exhibits A to S
-Affirmation in Opposition by Vichar, Inc.
-Affirmation in Opposition by Danella
-Exhibit AA to II
-Memorandum of Law in Opposition by National Grid
-Affirmation in Opposition by National Grid
-Exhibit A to E
-Reply

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion of Vichar, Inc. (hereinafter Vichar), filed on June 4, 2019, under motion sequence eighteen, for an order granting leave to file a late summary judgment motion; and upon the granting of leave, for an order pursuant to CPLR 3212 granting summary judgment in its favor and dismissing the complaint and all cross-claims asserted against it.

-Notice of Motion
-Affirmation in Support
-Memorandum of Law
-Exhibit A to M
-Plaintiffs' Affirmation in Opposition
-Exhibit A
-Reply

BACKGROUND

On January 15, 2016, Paul A. Ledwell, Sr. (hereinafter the injured plaintiff) and Debra Lee Ledwell, suing derivatively, (collectively the plaintiffs) commenced the instant action (hereinafter the 2016 action) to recover damages for personal injuries by electronically filing a summons and verified complaint with the Kings County Clerk's Office (hereinafter KCCO).

On April 8, 2016, defendant National Grid interposed a verified answer with cross claims for common law indemnification and contribution against co-defendants Danella and Ferrara.

On April 14, 2016, defendant Danella interposed a verified answer with cross claims for common law indemnification and contribution against co-defendants Ferrara, National Grid and Vichar.

On April 22, 2016, defendant Vichar interposed a verified answer with cross claims for common law indemnification and contribution against co-defendants Danella and Ferrara.

On April 29, 2016, defendant Ferrara interposed a verified answer with cross claims for contractual indemnification, common law indemnification, contribution and failure to procure insurance against co-defendants National Grid, Danella, and Vichar.

On March 18, 2017, the plaintiffs commenced an action (hereinafter the 2017 action) to recover damages for personal injury against defendants GEI Consultants, Inc. (hereinafter GEI) and Paradigm Safety Services, LLC (hereinafter Paradigm).

On June 29, 2017, GEI interposed a verified answer. Paradigm has neither appeared nor interposed an answer.

By an Order of the Court dated November 3, 2017, the 2016 action and 2017 action were consolidated. On July 9, 2018, the plaintiffs filed a note of issue. By Order dated October 5, 2018, the Court extended the parties' time to make dispositive motions to May 10, 2019.

The consolidated complaints, verified bills of particulars, and the injured plaintiff's deposition transcript allege the following salient facts. On March 18, 2014, at around 8:50 am, the injured plaintiff was working on a construction site known as the Former Citizens Gas Works MGP Remedial Design Pilot Test located near the Gowanus Canal in Brooklyn, New

York (hereinafter the subject site) as a field superintendent for Cashman, Dredging & Marine Contractors (hereinafter Cashman). The project involved excavation at designated pit sites for the assessment and testing of the soil for the purpose of designing an appropriate remedial measure to address environmental contaminants. As a field superintendent, the injured plaintiff played no role in the hiring of subcontractors. It was his understanding that National Grid owned the site and that it hired Cashman, Paradigm and GEI. He understood that Paradigm was hired to oversee site safety, that GEI was hired as an engineering consultant and that Ferrara owned a concrete plant located on the site.

On the date and time of the accident, the injured plaintiff was standing on a flat concrete surface above and near an excavated testing pit. From his position, he was able to observe a Caterpillar excavator (hereinafter a CAT 320) tilted at a angle on a slope on the side of a testing pit. He heard the CAT 320 sputtering out. He also overheard the operator, Mark Dolan, a Danella employee, tell his foreman that the CAT 320 was running out of fuel.

The injured plaintiff was concerned about the danger of the sloped angle of the CAT 320 and the fact that the operator had insufficient fuel to take it out of its dangerous position. He also was made aware that a fuel truck was not expected to arrive to refuel the CAT 320 before noon. The injured plaintiff had a conversation with the foreman of Danella and with Jamie Morneau, a junior project manager for Cashman. Together, they jointly decided to obtain the fuel from a local gas station and not wait for the fuel truck. They went to a gas station, filled nine fuel cans with gasoline and returned to site. The injured plaintiff approached the CAT 320 with two Danella employees. He then climbed to a surface near the

fuel tank. He and the two other Danella employees formed a chain passing the fuel cans up, one at a time, to the injured plaintiff who poured the fuel through a funnel into the CAT 320. When the task was completed, the Danella foreman stepped down first. The injured plaintiff then began his descent. While holding a rail with his right hand, the injured plaintiff slipped and fell onto the track of the CAT 320 and then onto the ground (the subject accident). He attributed his fall to the tilted angle of the CAT 320 which caused him to lose his balance, fall and sustain serious injuries.

The injured plaintiff alleged that the defendants were negligent and that they had violated New York State Labor Law §§ 240 (1), 241 (6) and 200. He further alleged that the violations and their negligence caused the subject accident and his personal injuries.

On June 10, 2019, the plaintiffs and GEI filed a stipulation discontinuing all causes of action asserted against GEI.

LAW AND APPLICATION

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material facts (*Guiffirda v Citibank*, 100 NY2d 72 [2003]). A moving party must address the specific factual allegations set forth in the complaint and the bill of particulars (*Parrilla v Saphire*, 149 AD3d 856 [2nd Dept 2017] citing, *Terranova v Finklea*, 45 AD3d 572 [2nd Dept 2007]).

A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324).

Pursuant to CPLR 3212 (b), a court will grant a motion for summary judgment upon a determination that the movant's papers justify holding, as a matter of law, that there is no defense to the cause of action or that the cause of action or defense has no merit. Furthermore, all of the evidence must be viewed in the light most favorable to the opponent of the motion (*Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2nd Dept 1990]).

Danella's Motion Regarding Labor Law §§ 240 (1) and 241 (6)

The plaintiffs have asserted claims under Labor Law §§ 240 (1), 241 (6) and 200 and common law negligence against Danella. Danella has moved under motion sequence thirteen for an order pursuant to CPLR 3212 granting summary judgment in its favor on liability and dismissing the complaint and all cross claims asserted against it.

The plaintiffs only opposed those branches seeking dismissal of the Labor Law § 200 and common law negligence claims. Accordingly, the Labor Law §§ 240 (1) and 241 (6) claims asserted against Danella are abandoned by the plaintiffs' failure to oppose Danella's motion to dismiss them (*see Elam v Ryder Sys., Inc.*, 176 AD3d 675, 676 [2nd Dept 2019] citing, *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2nd Dept 2017]; *see also*

Kronick v L.P. Thebault Co., 70 AD3d 648, 649 [2nd Dept 2010] citing, *Genovese v Gambino*, 309 AD2d 832, 833 [2nd Dept 2003]).

Danella's Motion Regarding Labor Law § 200 and Common Law Negligence

Labor Law § 200 (1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work (*Graziano v Source Builders & Consultants, LLC*, 175 AD3d 1253, 1259 [2nd Dept 2019] citing, *Ortega v Puccia*, 57 AD3d 54, 60 [2nd Dept 2008]). It applies to owners, contractors, or their agents who exercise control or supervision over the work, or either created the allegedly dangerous condition or had actual or constructive notice of it (*Yong Ju Kim v Herbert Const. Co.*, 275 AD2d 709, 712 [2nd Dept 2000]).

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 (*Lamar v Hill Int'l, Inc.*, 153 AD3d 685, 686 [2nd Dept 2017]).

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 (*Graziano v Source Builders & Consultants, LLC*, 175 AD3d 1253, 1259 [2nd Dept 2019]). These two categories should be viewed in the disjunctive (*Ortega v Puccia*, 57 AD3d 54, 61 [2nd Dept 2008]).

When the manner and method of work is at issue in a Labor Law § 200 analysis the issue is whether the defendant had the authority to supervise or control the work (*Ortega*, 57 AD3d at 62 n 2). A defendant has the authority to supervise or control the work for purposes

of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed (*id*.).

Where a premises condition is at issue, property owners or their agents may be held liable for a violation of Labor Law § 200 if the owner or agent either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*Ortega*, 57 AD3d at 61). Where an accident is alleged to involve both a dangerous condition on the premises and the means and methods of the work, a defendant moving for summary judgment with respect to causes of action alleging a violation of Labor Law § 200 is obligated to address the proof applicable to both liability standards (*Banscher v Actus Lend Lease, LLC*, 132 AD3d 707, 709–710 [2nd Dept 2015]).

In support of this branch of its motion Danella submitted, inter alia, the deposition transcript of the injured plaintiff and of Joseph Mauro, its general foreman (hereinafter Mauro). Mauro testified to the following facts. On the date and time of the subject accident, Cashman had hired Danella to dig test pits using excavators such as the CAT 320. Danella employed Mauro as regular foreman. Jamie Morneau, a junior project manager for Cashman would let Mauro know the locations where they wanted Danella to dig the test pits. Mauro testified that no one from Cashman controlled the manner, method or means that he and the other Danella employees would do their job. Mauro directed Mark Dolan, a Danella employee, to operate the subject CAT 320 and saw him actually operating it. Mauro did not witness the accident but did come to the site afterward and observed the subject CAT 320 set at an angle on a slope by the pit.

The deposition testimony of the injured plaintiff and Mauro raises triable issues of fact, regarding Danella's status as an agent and whether it had supervisory control of the method or means of the injury producing work. It also raises triable issues of fact regarding whether the tilted angle of the CAT 320 on a slope was dangerous, whether Danella had notice of the condition and whether it caused the dangerous condition. As a result, Danella did not eliminate all material issues of fact regarding it status as an agent. Nor did it eliminate all material issues of fact as to whether it had supervisory control over the method or means of the injury producing work and whether it had notice of or created a dangerous condition (*Poalacin v Mall Properties, Inc.*, 155 AD3d 900, 907–08 [2nd Dept 2017] citing, *Lam v Sky Realty, Inc.*, 142 AD3d 1137, 1139 [2nd Dept 2016]).

Danella has also claimed that the injured plaintiff's conduct was the sole proximate cause of the subject accident. There can be more than one proximate cause of an accident, and generally, it is for the trier of fact to determine the issue of proximate cause (*M.M. T. v Relyea*, 177 AD3d 1013, 1013 [2nd Dept 2019]). Since there can be more than one proximate cause of an accident, a defendant moving for summary judgment has the burden of establishing freedom from comparative negligence as a matter of law (*Ballentine v Perrone*, 179 AD3d 993, 994 [2nd Dept 2020]). Contrary to Danella's contention, the Court did not find as a matter of law that the angled slope of the CAT 320 was not a dangerous condition or that, although dangerous, it played no role in causing the subject accident.

In light of the foregoing, Danella did not make a prima facie showing of entitlement to dismissal of the Labor Law § 200 or common law negligence claims

asserted against it without regard to the sufficiency of the opposition papers (*Alexandridis v Van Gogh Contracting Co.*, 180 AD3d 969, 973 [2nd Dept 2020] citing, *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Danella's Motion to Dismiss the Cross Claims of Ferrera and Vichar

Danella also sought dismissal of the cross claims asserted against it by co-defendants National Grid, Ferrera and Vichar. The cross claims of Ferrara and Vichar asserted against Danella are abandoned by their failure to oppose Danella's motion to dismiss them (*see Elam*, 176 AD3d at 676).

Danella's Motion to Dismiss the Cross Claims of National Grid

On April 8, 2016, defendant National Grid's verified answer asserted cross claims against Danella for common law indemnification and contribution. National Grid was the only defendant that opposed the branch of Danella's motion seeking dismissal of all cross claims asserted against it.

The principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party (*Board of Mgrs. of the 125 N. 10th Condominium v 125 North10, LLC*, 150 AD3d 1063, 1064 [2nd Dept 2017], quoting *Curreri v Heritage Prop. Inv. Trust, Inc.*, 48 AD3d 505, 507 [2nd Dept 2008]). The party seeking indemnification must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought, and must not have committed actual wrongdoing itself (*Tiffany at Westbury Condominium v Marelli Dev. Corp.*, 40

AD3d 1073, 1077 [2nd Dept 2007], quoting *17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80 [1st Dept 1999]). Common-law indemnification is warranted where a defendant's role in causing the plaintiff's injury is solely passive, and thus its liability is purely vicarious (*Balladares v Southgate Owners Corp.*, 40 AD3d 667, 671 [2nd Dept 2007]; *see also Dreyfus v MPCC Corp.*, 124 AD3d 830, 830 [2nd Dept 2015]).

A cause of action for contribution requires that the culpable parties must be subject to liability for damages for the same personal injury (*Nassau Roofing & Sheet Metal v Facilities Development Corporation*, 71 NY2d 599 [1988]). The parties need not be liable under the same theories or whether the party whom contribution is sought is allegedly responsible for the injury as a "concurrent, successive, independent, alternative or even intentional tort-feasor" (*id.*). Contribution is not founded upon, nor does it necessarily arise from contract and only a ratable or proportional reimbursement is sought (*McDermott v City of New York*, 50 NY2d 211 [1980]; *McFall v Compagnie Maritime Belge S.A.*, 304 NY 314 [1952]). Where a party is held liable at least partially because of its own negligence, contribution against other culpable tort-feasors is the only available remedy (*Fox v County of Nassau*, 183 AD2d 746, 746 [2nd Dept 1992]). To sustain a cause of action for contribution, the party seeking contribution is required to show that ... a duty was owed to the plaintiff as an injured party and that a breach of that duty contributed to the alleged injuries (*Eisman v Vil. Of E. Hills*, 149 AD3d 806, 808-809 [2nd Dept 2017] quoting, *Guerra v St Catherine of Sienna*, 79 AD3d 808 [2nd Dept

2010]). Thus, contribution is not available where the co-defendant owed no duty or breached no duty to either the party seeking contribution or to the plaintiff (*see Rodriguez v Suffolk*, 305 AD2d 574 [2nd Dept 2003]).

As previously indicated, Danella failed to make a prima facie showing that it was free of liability under Labor Law § 200 or under common law negligence. Consequently, Danella did not establish its entitlement to judgment dismissing National Grid's claims against it for contribution and common law indemnity.

Ferrara's Motion to Dismiss Plaintiffs' Labor Law § 200 and Negligence Claims

On May 9, 2019, Ferrara moved under motion sequence number fifteen, for an order pursuant to CPLR 3212 granting summary judgment in its favor and dismissing the plaintiffs' complaint and all cross claims asserted against it.

The plaintiffs only opposed that branch of Ferrara's motion which sought dismissal of plaintiff's claims under Labor Law §§ 240 (1) and 241 (6). Accordingly, the plaintiff's claims under Labor Law § 200 and common law negligence asserted against Ferrara are abandoned by the plaintiffs' failure to oppose Ferrara's motion to dismiss it (*see Elam*, 176 AD3d at 676).

Ferrara's Motion to Dismiss Plaintiffs' Labor Law §§ 240 (1) and 241 (6) Claim

Under Labor Law § 240 (1), contractors and owners engaged in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure must provide 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 (*O'Brien v Port Auth. of New York & New Jersey*, 29 NY3d 27, 33 [2017]). The statute imposes upon owners, contractors and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]). Where an accident is caused by a violation of the statute, the plaintiff's own negligence does not furnish a defense; however, where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability (*id.*). Thus, in order to recover under Labor Law § 240 (1), the plaintiff must establish that the statute was violated and that such violation was a proximate cause of his injury (*Barreto v Metro. Transp. Auth.*, 25 NY3d 426, 433 [2015] citing, *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524 [1985]).

As a general rule, a separate prime contractor is not liable under Labor Law §§ 240 or 241 for injuries caused to the employees of other contractors with whom they are not in privity of contract, so long as the contractor has not been delegated the authority to oversee and control the activities of the injured worker (*Barrios v City of New York*, 75 AD3d 517, 518 [2nd Dept 2010]). However, where a separate prime contractor has been delegated the authority to supervise and control the plaintiff's work, the contractor becomes a statutory agent of the owner or general contractor (*id.*)

Ferrara claims that the plaintiffs' Labor Law §§ 240 (1) and 241 (6) claims should be dismissed because it is not a proper defendant and because the plaintiff was not involved in the type of protected activities or gravity related risk contemplated by the

statute. In support of its contention, Ferrara has submitted, inter alia, the deposition testimony of the injured plaintiff; Katherine Vater (hereinafter Vater), a project engineer and in house consultant to National Grid; Mauro, a general foreman of Danella; and Joseph Ferrara (hereinafter Joseph F.), the vice-president of Ferara.

Joseph F. testified that in 2014, Ferrara owned a concrete plant at Hoyt and 5th Street in Brooklyn, New York and that it leased the land that the plant was on from the City of New York. The sworn testimony of the injured plaintiff, Vater, Mauro and Joseph F. established that Ferrara had absolutely no involvement with the subject site. It established that Ferrara had no authority and exercised no authority to hire, manage, supervise or control any entity or person involved with the subject site. Consequently, Ferrara's evidentiary submission demonstrated that it was neither an owner, general contractor or agent within the intendment of Labor Law § 240 (1).

Labor Law § 241 (6) imposes a nondelegable duty upon building owners, general contractors, and their agents to provide reasonable and adequate protection and safety to construction workers. An implicit precondition to this duty is that the party to be charged with that obligation have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition (*In re New York Asbestos Litig.*, 146 AD3d 461, 461 [2nd Dept 2017] citing, *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]).

Ferrara's evidentiary submissions have demonstrated that it was neither an owner, general contractor or agent within the intendment of Labor Law § 241 (6). Accordingly,

Ferrara has met its prima facie burden establishing its entitlement to dismissal of the Labor Law §§ 240 (1) and 241 (6) claim asserted against it. In opposition the plaintiff has failed to raise a triable issue of fact.

Ferrara's Motion to Dismiss all Cross Claims

Ferrara has also moved under motion sequence fifteen for an order pursuant to CPLR 3212 granting summary judgment in its favor and dismissing all cross-claims asserted against it. No co-defendant has opposed this branch of Ferrara's motion. Accordingly, all cross claims asserted against Ferrara are abandoned by the failure to oppose Ferrara's motion to dismiss them (*see Elam,* 176 AD3d at 676).

National Grid's Motion on Labor Law § 200 and Common Law Negligence

The plaintiffs have asserted Labor Law §§ 240 (1), 241 (6) and 200 and common law negligence claims against National Grid. National Grid has moved, under motion sequence sixteen, for an order granting summary judgment in its favor and dismissing plaintiffs' complaint and all cross-claims as asserted against it.

The plaintiffs did not oppose those branches of National Grid's motion which sought dismissal of the Labor Law § 200 and common law negligence claims asserted against it. Therefore, the plaintiffs' Labor Law § 200 and common law negligence claims asserted against National Grid are deemed abandoned (*see Elam, 176* AD3d at 676).

National Grid's Motion on Labor Law § 240 (1)

National Grid contends that the injured plaintiff's testimony and evidentiary submissions establishes that the subject accident falls outside of the statutory protection

of Labor Law § 240 (1). In support of this contention, National Grid has submitted the deposition testimony of the injured plaintiff, Vater, Mauro, and Joseph F.

The injured plaintiff testified that the subject accident occurred after he finished fueling the CAT 320 and while he was stepping down from the machine. He was facing outward and away from the machine as he stepped down and he was holding a handrail in his right hand. As he moved from one step to another, he lost his footing and fell onto the CAT 320's tracks and then off the machine. He attributed his fall to the angle at which the CAT 320 was parked. The CAT 320 did not move when he fell. He estimated the gap between the CAT 320 excavator and the concrete slab he ultimately landed on was about two and a half to three feet.

National Grid contends that the risk of falling while alighting from the CAT 320 construction vehicle is not an elevation-related risk which calls for any of the protective devices listed in Labor Law § 240 (1). In support of its contention, National Grid has cited the Court of Appeals holding in the matter of *Bond v York Hunter Construction, Inc.* (95 NY 2d 883 [2000]) and the Appellate Division Second Department holding in the matter of *Lavore v Kir Munsey Park 020, LLC* (40 AD3d 711, 712 [2nd Dept 2007]).

In the *Bond* case, the plaintiff laborer sued to recover for injuries sustained when he stepped from the cab of his demolition vehicle. The laborer placed his foot onto the vehicle's track system, using it like a step, and allegedly slipped off the track because grease had previously leaked onto the surface. He fell approximately three feet to the ground. The Court of Appeals in the *Bond* decision held that the risk of alighting from

the construction vehicle was not an elevation-related risk which called for any of the protective devices of the types listed in Labor Law § 240 (1) (*Bond*, 95 NY2d at 884).

In *Lavore*, the plaintiff was injured when he fell while descending from the side of his utility truck. The truck had a flatbed with utility bins and ladder racks installed along the length of each side, and a tailgate at the back. After successfully descending from the platform into the back of the truck and putting away his tools, the plaintiff fell about five feet as he was alighting from the side of the truck to the ground. The Appellate Division Second Department, in *Lavore*, held that the approximately five-foot elevation between the top of the truck's utility bin and the ground did not present an elevation-related risk for purposes of Labor Law § 240 (1).

Similar to the *Bond* and the *Lavore* cases, in the instant matter, the injured plaintiff's fall from the CAT 320 onto its tracks does not present an elevation-related risk for purposes of Labor Law § 240 (1) (*see Toefer v Long Island R.R.*, 4 NY3d 399, 409 [2005]). National Grid's contention that the subject accident falls outside of the statutory protection of Labor Law § 240 (1) is correct. Therefore, National Grid has made a prima facie showing of entitlement to dismissal of the Labor Law § 240 (1) claim asserted against it. The plaintiffs have not raised a triable issue of fact.

National Grid's Motion on Labor Law § 241 (6)

With regard to plaintiff's claim under Labor Law § 241 (6), the plaintiff only opposed that part of National Grid's motion which alleged that Industrial Code sections 12 NYCRR 23-1.7 (b)(1)(i), 12 NYCRR 23-1.7 (d), 12 NYCRR 23-4.2 (h) and 12

NYCRR 23-4.3 were inapplicable to the subject accident. Accordingly, only these sections of the Industrial Codes need to be addressed and all other industrial code sections asserted by the plaintiff are deemed abandoned (*see Elam, 176* AD3d at 676).

Industrial Code Rule 12 N.Y.C.R.R. 23-1.7 (b) deals with falling hazards, and more specifically, hazardous openings into which a person may step or fall. National Grid contends that according to the injured plaintiff's testimony, the subject accident occurred as he was alighting from a CAT 320 and did not involve a fall through an opening.

Industrial Code Rule 12 NYCRR 23-1.7 (d), among other things, imposes a duty on employers to not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface in a slippery condition. National Grid argues that it neither employed the plaintiff nor required the plaintiff to either use or refuel the CAT 320. National Grid also argues that, according to the injured plaintiff's testimony, the steps of the CAT 320 were free of any substance or debris. National Grid concludes that the subject accident was not due to a slippery condition on the steps of the CAT 320.

Industrial Code Rule 23-4.2 (h) requires that any open excavation adjacent to a ... street ... or other area lawfully frequented by any person shall be effectively guarded. National Grid contends that this industrial code provision did not apply to the work site where the subject accident occurred. According to the injured plaintiff's testimony, the subject accident was caused by the dangerous angle that the CAT 320 was situated on the

slope of the test pit. The angle caused the injured plaintiff to lose his balance while he was alighting the CAT 320.

Industrial Code Rule 23-4.3 requires, among other things, that ladders, stairways or ramps be provided in every excavation more than three feet in depth for safe access and egress. The injured plaintiffs testimony of how the subject accident occurred establishes as a matter of law that any alleged violation of Industrial Code Rule 23-4.2 (h) or 23-4.3 has no causal connection to the subject accident. National Grid has made a prima facie showing that the aforementioned industrial codes section were either inapplicable, or if applicable, did not proximately cause the subject accident. Consequently, National Grid has met its prima facie burden establishing its entitlement to dismissal of the plaintiff's Labor Law § 241 (6) claim asserted against it. In opposition the plaintiff has failed to raise a triable issue of fact.

National Grid's Motion to Dismiss all Cross Claims

National Grid has also moved under motion sequence sixteen for an order pursuant to CPLR 3212 granting summary judgment in its favor and dismissing all cross-claims asserted against it. Only co-defendants Danella and Ferrara have asserted cross claims against National Grid. Neither Danella nor Ferrara has opposed this branch of National Grid's motion. Accordingly, their cross claims against National Grid are abandoned by the failure to oppose National Grid's motion to dismiss them (*see Elam,* 176 AD3D at 676).

Plaintiffs' Motion for Summary Judgment under Labor Law §§ 240 (1) and 241 (6)

The plaintiffs have moved under motion sequence seventeen for an order pursuant to CPLR 3212 granting summary judgment in their favor on the issue of liability on their causes of action under Labor Law §§ 240 (1) and 241 (6) as asserted against National Grid, Ferrara and Vichar. As previously addressed in National Grid and Ferrara's respective motions for summary judgment, the subject accident is not within the statutory protections of either Labor Law §§ 240 (1) or 241 (6). Therefore, plaintiffs' motion for summary judgment in their favor on the issue of liability under Labor Law §§ 240 (1) and 241 (6) is denied.

Vichar's Motion for Leave to Make A Late Summary Judgment Motion

By order dated October 5, 2018, the parties were granted an extension to May 10, 2019, to file summary judgment motions. On June 4, 2019, Vichar filed the instant motion, seeking leave to file a late summary judgment motion, and upon the granting of leave, for an order pursuant to CPLR 3212 granting summary judgment in its favor and dismissing the complaint and all cross-claims asserted against it.

A movant seeking leave to make a late summary judgment motion must demonstrate good cause for the delay (*see* CPLR 3212 [a]; *Ade v City of New York*, 164 AD3d 1198, 1200-01 [2nd Dept 2018], citing *Courtview Owners Corp. v Courtview Holding B.V.*, 113 AD3d 722, 723 [2nd Dept 2014]). In the absence of a showing of good cause for the delay in filing a motion for summary judgment, the court has no discretion to entertain even a meritorious, non-prejudicial motion for summary judgment

(*Bargil Assoc., LLC v Crites*, 173 AD3d 958, 958 [2nd Dept 2019] quoting *Bivona v Bob's Discount Furniture of NY, LLC*, 90 AD3d 796 [2nd Dept 2011]).

Vichar's counsel affirmed that the delay in filing the instant motion was due to the delay in holding the deposition of Henry Abadi, its president and owner. Due to alleged scheduling issues, he was not deposed until May 14, 2019, four days after the deadline. Vichar offered no explanation of the scheduling issues to show that they were not caused by Vichar. Vichar stated that the deposition testimony was needed to support the motion. There is no dispute that Danella, Ferrara, National Grid and the injured plaintiff were all deposed early enough before May 10, 2019 such that each one was able to file a timely summary judgment motion. Vichar's decision to wait for the deposition transcript of its president was a strategic choice. Vichar could have timely submitted an affidavit of its president instead of waiting until after the filing deadline to use a deposition transcript. Vichar's explanation for the delay does not constitute good cause (*Brill v City of New York*, 2 NY3d 648 [2004]).

Vichar's Motion for Summary Judgment of the Labor Law Claims

An untimely motion or cross motion for summary judgment may be considered by the court where a timely motion for summary judgment was made on nearly identical grounds (*Munoz v Salcedo*, 170 AD3d 735 [2nd Dept 2019]). The branch of Vichar's motion seeking an order granting summary judgment in its favor and dismissing the Labor Law §§ 200, 240 (1), and 241 (6) claims are mirror images of the timely summary judgment motions of the plaintiffs, National Grid and Ferrara. Therefore, these branches

of Vichar's motion may be considered.

As previously indicated in addressing National Grid, Ferrara and the plaintiffs' respective summary judgment motions, the subject accident is not within the statutory protections of either Labor Law §§ 240 (1) or 241 (6). Although the plaintiffs objected to the untimeliness of the motion, they did not address or oppose the merits of Vichar's motion to dismissal of plaintiffs' Labor Law § 200. Accordingly, the plaintiffs Labor Law § 200 claims asserted against Vichar are abandoned by the failure to oppose Vichar's motion to dismiss it (*see Elam, 176* AD3d at 676).

Vichar's Motion to Dismiss all Cross Claims

The branch of Vichar's motion seeking an order granting summary judgment in its favor and dismissing all cross claims asserted against it are mirror images of the timely summary judgment motions of National Grid and Ferrara. Therefore, this branch of Vichar's motion may be considered (*Munoz v Salcedo*, 170 AD3d 735 [2nd Dept 2019]).

CPLR 2214 (a) provides that a notice of motion shall specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefor (*Abizadeh v Abizadeh*, 159 AD3d 856, 857 [2nd Dept 2018]). Vichar did not explain why the cross claims asserted against it should be dismissed. However, no co-defendant has raised this defect or otherwise opposed the motion. Therefore, the motion is granted as unopposed and all cross claims asserted against Vichar are deemed abandoned by the failure to oppose Vichar's motion to dismiss it (*see Elam, 176* AD3d at 676).

CONCLUSION

Danella Construction of NY, Inc.'s motion to dismiss plaintiffs' claims under Labor Law §§ 240 (1) and 241 (6) is granted as those claims were abandoned.

Danella Construction of NY, Inc.'s motion to dismissing the plaintiffs' claims under Labor Law § 200 and common law negligence is denied.

Danella Construction of NY, Inc.'s motion to dismiss the cross claims of Ferrara Bros. Building Materials Corp. and Vichar, Inc. is granted as those claims were abandoned.

Danella Construction of NY, Inc.'s motion to dismiss the cross claims of National Grid USA is denied.

Ferrara Bros. Building Materials, Corp.'s motion to dismiss plaintiffs' claims under Labor Law § 200 and common law negligence is granted as those claims were abandoned.

Ferrara Bros. Building Materials, Corp.'s motion to dismissing plaintiffs' claims under Labor Law §§ 240 (1) and 241 (6) is granted.

Ferrara Bros. Building Materials, Corp.'s motion to dismiss all cross claims asserted against it is granted as those claims were abandoned.

National Grid USA Service Company, Inc's motion to dismiss plaintiffs' claims under Labor Law § 200 and common law negligence is granted as those claims were abandoned.

National Grid USA Service Company, Inc's motion dismissing plaintiffs' claim

under Labor Law §§ 240 (1) and 241 (6) is granted.

National Grid USA Service Company, Inc's motion to dismiss all cross claims asserted against it is granted as those claims were abandoned.

Paul A. Ledwell, Sr. and Debra Lee Ledwell's motion for an order granting partial summary judgment in their favor on the issue of liability on their claims under Labor Law §§ 240 (1) and 241 (6) is denied.

Vichar, Inc.'s motion to dismiss the complaint and all cross-claims asserted against it is granted.

The foregoing constitutes the decision and order of this Court.

ENTER:

Francois A. Rivera

J.S.C.