SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 47

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NELSON REYES,

Plaintiff,

-against-

BRK GARAGE CO., LLC, 15TH STREET LESSEE, LLC, RCDOLNER, LLC, BAROCO CONTRACTING CORPORATION, and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendants.

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Third-Party Plaintiff,

-against-

MECC CONTRACTING INC.,

Third Party Defendant.

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Index No. 154309/2016

MOTION SEQUENCE #005

DECISION AND ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 117-179 were read on this motion to/for SUMMARY JUDGMENT.

Goetz, J.

This is an action to recover damages for personal injuries allegedly sustained by a construction worker on August 27, 2015 when, while working at a construction site located at 430 West 15th Street, New York, New York (the Premises), he struck a live wire buried in the ground with a pickaxe, causing an explosion and injuring him.

In motion sequence number 005, plaintiff Nelson Reyes moves, pursuant to CPLR 3212, for summary judgment as to liability on his common-law negligence and Labor Law §§ 200 and

241 (6) claims as against defendants BRK Garage Co., LLC (BRK), 15th Street Lessee LLC (15th Street), RCDolner, LLC (RCDolner) and Baroco Contracting Corporation (Baroco) (collectively, defendants).

RCDolner cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against it, and for summary judgment in its favor on its cross claim for contractual indemnification against Baroco.

Third-Party Defendant MECC Contracting Inc. (MECC) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the defendant/third-party plaintiff Consolidated Edison of New York's (Con Ed) third-party complaint as against it.

BACKGROUND

On the day of the accident BRK was the owner of the Premises and 15th Street was the lessee of the Premises. 15th Street hired RCDolner to provide construction management services for a project at the Premises that involved the conversion of a garage into an office building (the Project). RCDolner, in turn, hired Baroco to perform sidewalk excavation and installation at the Project. Baroco subcontracted part of its work to non-party Fine Line Carpentry & Renovations, Inc. (Fine Line), plaintiff's employer.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was employed by Fine Line as a carpentry laborer. His work included building "platforms" (plaintiff's tr at 25). His supervisor was a man he checked in with in the morning, but he did not know the supervisor's name or who he worked for. He took his general directions from his coworker "Wilfredo" (*id.* at 38). Plaintiff was not provided with any safety equipment. He brought his own hard hat.

Plaintiff and Wilfredo were directed to begin work on the sidewalk outside the Premises. At that time, the sidewalk had been excavated to a depth of approximately 15 inches. All the concrete had been removed and the surface was packed dirt. He did not notice any pipes, wires, or conduits in the dirt. In addition, there were no warning markings spray painted on the dirt and no one warned him that there might be live wires underground in his work area. He was familiar with warning markings – painted "red triangle[s]" – but he did not see any (*id.* at 97).

Plaintiff's work primarily consisted of measuring and cutting wooden stakes and installing wooden platform frames in the excavated portion of the sidewalk. To do this, he would take the stakes and hammer them into place in the sidewalk depression. His coworkers would then lay planks and nail them into place in advance of pouring concrete. To install the stakes, plaintiff had to dig down approximately eight inches into the dirt. Plaintiff testified that, on the day of the accident, the stakes were not "going in the floor" easily (*id.* at 47). Wilfredo told plaintiff to get a pickaxe to dig open holes in the dirt.

At the time of the accident, plaintiff swung the pickaxe into the dirt, where it struck a buried cable (the Cable). The contact instantly created a "ball of fire and an explosion" (*id.* at 63). He and Wilfredo were thrown several feet by the force of the explosion. Plaintiff briefly lost consciousness then remembered being taken by ambulance to the hospital.

Deposition Testimony of Stephen Nuckel (15th Street's Representative)

Stephen Nuckel testified that he is an "independent owner's rep and construction consultant for real estate projects" (Nuckel tr at 9). At the time of the accident, he was employed by non-party Atlas Capital, the development group for the Project. 15th Street was the "owner's entity for [the Project]" (*id.* at 10). The Project consisted of the retrofitting of an old six-story garage into an eight-story office building. RCDolner was the construction manager. Nuckel also

testified that RCDolner selected and directed the subcontractors at the Project, including Baroco. Baroco has been selected by RCDolner to perform the sidewalk demolition and reinstallation work at the Project.

Nuckel was present at the time of the accident. At that time, he was speaking to RCDolner's project manager, Brian Klodaski, with his back turned to plaintiff. He heard a loud noise and saw a flash of electricity and ran directly into the building for shelter in case the electrical arc continued. He later learned that a worker with a pickaxe struck a "live conductor" (*id.* at 22) – i.e., the Cable.

Nuckel testified that when work included tearing up the street or sidewalk, a contractor would make a "One Call" to arrange a "mark-outs for utilities" for the street (*id.* at 50). Con Ed would then arrange for the mark-out, which would identify and mark – with chalk or paint – the underground utilities (power lines, gas lines, water lines) in the specified area. According to Nuckel, an owner would not make the One Call or otherwise arrange for a mark-out. That would be the responsibility of the contractors. Nuckel did not know whether RCDolner or Baroco made the One Call.

Deposition Testimony of Timothy O'Connell (Baroco's Vice President)

Timothy O'Connell testified that on the day of the accident he was the vice president of Baroco, in charge of procurement and job oversite. According to O'Connell, Baroco's work entailed excavation and concrete installation work. Specifically, Baroco "had to remove and replace the sidewalk and curb in front of the property" (O'Connell tr at 12).

Baroco used Fine Line to supply its labor. There was no written contract between them, but all Fine Line employees at the Project were directed and supervised by Baroco's supervisor. Fine Line's laborers were used in all aspects of Baroco's work. They used "a compressor and a

small excavator to take out the bulk of the concrete then they follow-up with hand tools" to build a trench to lay new curbing and sidewalks (*id.* at 18). Generally, they would work two feet below the top of the sidewalk.

O'Connell did not witness the accident. He learned of it from Baroco's project manager, Peter Majewski, shortly after the accident happened. According to O'Connell, someone contacted Con Ed to review the site after the accident. O'Connell testified that he learned from Majewski that a Con Ed "representative" told him that the Cable "wasn't shown on his drawings" (*id.* at 27).

After the accident, OSHA issued Baroco a violation for the failure to make a One Call for a mark-out. O'Connell acknowledged that Baroco should have made a One Call for a second mark-out, but it did not do so (*id.* at 69).

Deposition Testimony of Peter Majewski (Baroco's Project Manager)

Peter Majewski testified that he was Baroco's project manager for the Project. Baroco was hired by RCDolner to perform concrete and masonry installation. His duties included overseeing Baroco's work at the Project, ordering materials and filling out paperwork. He visited the Property two to three times per week.

Majewski testified that prior to demolition of the sidewalk, another contractor, MECC, had made a One-Call for a mark-out of the street outside of the Premises (the MECC Mark-Out). According to Majewski, the sidewalk was included within the scope of the MECC Mark-Out.

Majewski did not make a One Call for a mark-out on behalf of Baroco prior to the start of its work. Majewski explained that, in his opinion, a mark-out was not necessary in the first place. He did obtain photographs of the Mark-Out from RCDolner in order to have an idea of where underground utility equipment, if any, was located.

Majewski also testified that making a One Call and scheduling a mark-out was "never in [Baroco's] scope of work" because "the GC is doing that" (*id.* at 35). Further, Majewski testified, "utilities usually are required to be three feet down from the street level" and Baroco's work was "only nine inches down" (*id.* at 36). Majewski then testified that, in his opinion, a mark-out was not necessary in the first place.

Deposition Testimony of Anthony Dolce (RCDolner's Managing Partner)

Anthony Dolce testified that on the day of the accident, he was the managing partner of RCDolner. RCDolner was hired by 15th Street to be the construction manager for all phases of the Project at the Premises. RCDolner, in turn, hired Baroco. Dolce testified that RCDolner was the sole company in charge of scheduling the trades, overseeing job performance and the "delivery of goods and services" related to the Project (Dolce tr at 25-26).

Dolce knew of the accident but was not present at the Premises on the day of the accident. He did not know any specifics about the accident.

Deposition Testimony of Roger Paul (Con Ed's Construction Representative)

Roger Paul testified that on the date of the accident he was an inspector and construction representative for Con Ed. His duties included confirming that contractors complied with Con Ed's specifications and completed their work accordingly. Part of his job included reviewing mark-outs for accuracy.

Paul was assigned as Con-Ed's representative for the MECC Mark-Out – which involved the removal of the asphalt on the street adjacent to the Premises on or about August 12, 2015 – over two weeks prior to the accident. This excavation work – which primarily included the excavation of a portion of the parking lane, not the sidewalk, was performed by MECC. Paul did not work at the Project during Baroco's work.

Before it began its excavation work, MECC made a One Call, which resulted in Con Ed sending Paul along with a mark-out crew to perform the MECC Mark-Out. Paul oversaw the mark-out process.

Generally, prior to allowing excavation work to commence at any project, Paul would review the underground utility schematics, known as "service plates" (the Plates) and compare them with the mark-outs the mark-out crew placed on the street. He would then review both the Plates and the mark-outs with the excavation contractor's foremen to explain the markings and warnings (Paul tr at 20). The contractors would then perform their work. He followed this procedure with MECC. MECC's work was completed without incident on or about August 14, 2015 (13 days prior to the accident).

At his deposition, Paul reviewed several documents, including the One Call for the MECC Mark-Out request, dated August 12, 2015. He noted that it called for a mark-out of "[b]oth sides of the street and sidewalk for the width of the block" (*id.* at 35). He testified that he did not recall any discrepancy between the Plates and the mark-outs placed on the street outside the Premises.

Paul did not work at the Project during Baroco's work.

Deposition Testimony of James McCutchen (Con Ed's First Responder)

James McCutchen testified that he was the Con Ed emergency department first responder who reported to the Premises after plaintiff's accident. McCutchen did not actually inspect the accident site, his coworker did.

At the deposition, McCutchen was provided several photographs of the accident location. According to McCutchen, based on the photographs, plaintiff "hit the seven-wire main" power line, also known as a "secondary main" (McCutchen tr at 10). This secondary main was encased

in a lead and rubber sheathing and had been further encased in either a fiber or concrete duct. McCutchen testified that the wire likely had been in the ground "at least 50" years prior to the accident, based on how it looked and the materials surrounding it (*id.* at 27-28).

McCutchen also testified that the Plates he reviewed indicated that there were power lines near the area where work was performed, including a "seven wire main" – the type of wire that plaintiff struck. (*id.*at 36). He was unable to state with certainty the exact location of that seven wire main, or whether the seven wire main he saw in the Plates was, in fact, the Cable that plaintiff struck.

DISCUSSION

"[T]he proponent of a summary judgment motion must make 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. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]; *see also Pullman v Silverman*, 28 NY3d 160, 1062 [2016]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*O'Brien v. Port Auth. of N.Y. and N.J.*, 29 NY3d 27, 37 [2017], citing *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Procedural Issues

The Timeliness of the Cross Motions

Plaintiff's motion seeks summary judgment in his favor on his Labor Law §§ 200 and 241 (6) claims against defendants. RCDolner's cross motion seeks summary judgment dismissing the claims addressed in plaintiff's motion, as well as summary judgment in its favor on its cross claim for contractual indemnification against Baroco. MECC's cross motion seeks summary judgment dismissing Con Ed's third-party complaint as against it.

MECC's cross motion and the part of RCDolner's cross motion seeking summary judgment in its favor on its contractual indemnification claim against Baroco, are untimely. This part's rules require all motions for summary judgment to be filed within 60 days of the filing of the note of issue.[1]

The note of issue in this action was filed on August 8, 2019 (NYSCEF Doc. No. 117). Therefore, the deadline for filing a timely motion was October 7, 2019. RCDolner's cross motion was filed on October 18, 2019. MECC's cross motion was filed on October 23, 2019.[2]

A cross motion is "merely a motion by any party against the party who made the original motion, made returnable at the same time as the original motion" (*Kershaw v Hosp. for Special Surgery*, 114 AD3d 75, 87 [1st Dept 2013] [internal quotation marks and citation omitted]). Furthermore:

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[1] Explicitly this part's rules require that: "All summary judgment motions must be made no later than 60 days after filing the Note of Issue – there are no exceptions without leave of Court. . . . Absent good cause for late filing, a late motion will be denied, even if your adversary does not object."

[2] While the parties stipulated to extend the time to file opposition and reply papers to October 24, 2019 with respect to plaintiff's timely motion (filed on August 27, 2019), the parties did not seek to extend the time to file motions or cross motions.

> "[A] cross motion is an improper vehicle for seeking relief from a nonmoving party . . . . Allowing movants to file untimely, mislabeled "cross motions" without good cause shown for the delay, affords them an unfair and improper advantage. Were the motions properly labeled they would not be judicially considered without an explanation for the delay"

(*id.* at 88).

In short, an untimely cross motion for summary judgment made after the expiration of the motion filing deadline may be considered only (1) where there is "a satisfactory explanation for the untimeliness" (*Brill v City of New York*, 2 NY3d 648, 652 [2004]), or (2) where a timely motion for summary judgment was made seeking relief nearly identical to that sought by the cross motion (*see Altschuler v Gramatan Mgt., Inc.*, 27 AD3d 304 [1st Dept 2006]).

Here, the part of RCDolner's cross motion seeking dismissal of plaintiff's Labor Law claims is timely, because it seeks nearly identical relief to plaintiff's motion. However, the part of its cross motion seeking summary judgment in its favor on its cross claim for contractual indemnification against non-movant Baroco does not seek nearly identical relief to plaintiff's motion, and RCDolner does not explain the delay in filing its motion as against Baroco. Accordingly, that part of RCDolner's cross motion must be denied.

Likewise, MECC's cross motion does not seek relief that is nearly identical to the relief sought in plaintiff's motion. Rather, it seeks to dismiss non-movant Con Ed's third-party action against it, and MECC does not give a reason for its late filing. Accordingly, MECC's cross motion must also be denied.

The Labor Law § 241 (6) Claim

Plaintiff moves for summary judgment in his favor as to liability on the Labor Law § 241 (6) claim.

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
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> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241(6) imposes a duty upon owners, 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]). "The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). In addition, "[t]he [Industrial Code] provision relied upon by [a] plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*id.*, citing *Ross*, 81 NY2d at 504-505). Therefore, in order to prevail on a Labor Law § 241 (6) claim, "a plaintiff must establish a violation of an implementing regulation which sets forth a specific standard of conduct" (*see Ortega v Everest Realty LLC*, 84 AD3d 542, 544 [1st Dept 2011]), and that the violation was a proximate cause of the injury (*see Egan v Monadnock Constr., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

Initially, BRK, as the owner of the Premises may be liable to plaintiff under Labor Law § 241 (6). However, it must be determined whether 15th Street (the self-described lessee of the Premises) was, effectively, an owner for the purposes of Labor Law Labor Law § 241 (6), and therefore, liable for plaintiff's injuries.

Notably, the definition of "owner" under Labor Law §§ 240 and 241 "has not been limited to the titleholder. The term has been held to encompass a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit" (*Kane v Coundorous*, 293 AD2d 309, 311 [1st Dept 2002]; *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]).

Here, while plaintiff asserts that 15th Street is an owner of the Premises, he provides no evidence supporting this claim that as a matter of law 15th Street (a) had an interest in the Premises and (b) contracted to have work performed for its own benefit. Therefore, plaintiff has failed to establish his prima facie entitlement to summary judgment because he has not established that 15th Street is an owner for purposes of the Labor Law.

Accordingly, plaintiff is not entitled to summary judgment in his favor on his Labor Law § 241 (6) claim as against 15th Street.

Next, it must be determined whether RCDolner (the construction manager) and Baroco (the sidewalk subcontractor), may be vicariously liable for plaintiff's injuries under Labor Law § 241 (6) as agents of the owner.

> Although sections 240 and 241 now make nondelegable the duty of an owner or general contractor to conform to the requirement of those sections, the duties themselves may in fact be delegated. When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241.

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981] [internal citations omitted]). To hold a subcontractor liable as a statutory agent, "the subcontractor must have been 'delegated the supervision and control either over the specific work area involved or the work which [gave]

rise to the injury'" (*Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 193 (1st Dept 2011), quoting *Headen v Progressive Painting Corp.*, 160 AD2d 319, 320 [1st Dept 1990]).

RCDolner argues that it was a construction manager, and not a general contractor. However, there remains a question of fact as to RCDolner's status on the Project, as no party provides a copy of RCDolner's contract with 15th Street. Such contract would set out RCDolner's specific duties and responsibilities. Therefore, whether RCDolner's responsibilities encompassed those of a general contractor or whether it had the authority to act as an agent of the owner is unclear.

Accordingly, plaintiff is not entitled to summary judgment in his favor on his Labor Law § 241 (6) claim as against RCDolner.

Next, it is undisputed that Baroco was the contractor directly responsible for plaintiff's work and had the authority to direct and control the injury producing work – i.e. confirming and ensuring that the area where plaintiff was digging did not contain an underground electrical cable. Therefore, Baroco was an agent for purposes of Labor Law § 241 (6).

Plaintiff moves for summary judgment in his favor as to liability with respect to a violation of Industrial Code section 23-1.13 (b) (4). 12 NYCRR 23-1.13 (b) (4) provides the following:

> "Protection of employees. No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding such circuit by effective insulation or other means. In work areas where the exact locations of underground electric power lines are unknown, persons using jack hammers, bars or other hand tools which may contact such power lines shall be provided with insulated protective gloves, body aprons and footwear."

Section 23-1.13 (b) (4) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Snowden v New York City Tr. Auth.*, 248 AD2d 235, 236 [1st Dept 1998] ["Plaintiff has a viable claim under Labor Law § 241 (6) based on a violation of 12 NYCRR 23-1.13 (b) (4)"]).

Here, it is undisputed that plaintiff was using a hand tool to dig in the ground when he struck a live underground electric power line. It is also uncontested that Baroco did not ascertain whether there was an underground electric power line in plaintiff's work area. Therefore, the exact location of any such power lines was unknown. Pursuant to section 23-1.13 (b) (4), plaintiff should have been provided with protective wear to mitigate the risk of injury in exactly this situation (*see Addonisio v City of New York*, 112 AD3d 554, 556 [1st Dept 2013]).

The record establishes that plaintiff was not provided any insulated protective wear while performing his work. Therefore, Industrial Code section 23-1.13 (b) (4) was violated. Such violation – i.e. the failure to provide insulated protective gear to mitigate the risk of unknown electrical hazards – was a proximate cause of plaintiff's electrical-discharge related injuries.

That plaintiff suffered burns by the resulting explosion caused by striking the buried live Cable – rather than (or in addition to) being electrocuted – is not a defense to a violation of this section (*Snowden*, 248 AD2d at 236 ["We reject . . . [the] argument that section 23-1.13 (b) (4) is inapplicable because plaintiff suffered burns and not an electric shock"]). BRK's argument that a question of fact remains as to proximate causation is unpersuasive as BRK offers no specifics or analysis to support its position. Baroco's argument that its violation was, essentially, a de minimis technical violation that could not amount to a proximate cause of plaintiff's accident misconstrues its obligations pursuant to section 23-1.13 (b) (4) and is also unsupported by any specific references to the record.

Accordingly, plaintiff is entitled to summary judgment on his Labor Law § 241 (6) claim, based on a violation of Industrial Code section 23-1.13 (b) (4) as against BRK and Baroco only, and RCDolner is not entitled to summary judgment dismissing this claim as against it.

The Common-Law Negligence and Labor Law § 200 Claims

Plaintiff moves for summary judgment in his favor as to liability on the common-law negligence and Labor Law § 200 claims as against Baroco and RC Dolner. RCDolner cross-moves for summary judgment dismissing this claim.

Initially, while plaintiff requests relief on the common-law negligence and Labor Law § 200 claims against BRK and 15th Street, he raises no arguments and provides no rationale for liability as to those defendants. Accordingly, plaintiff is not entitled to summary judgment in his favor as to BRK or 15th Street.

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" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

Claims brought under this section "fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). If the accident arises out of a dangerous premises condition, liability may

be imposed if defendant created the condition or failed to remedy a condition of which it had actual or constructive notice (*see Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]). "Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury producing work" (*Cappabianca*, 99 AD3d at 144). Thus, even though a defendant may possess the authority to stop the construction work for safety reasons or exercise general supervisory control over the work site, such authority is insufficient to establish the degree of supervision and control necessary to impose liability (*see Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 407 [1st Dept 2018] [finding a defendants' stop work authority insufficient to establish that the defendant actually "exercised any control over the manner and means of plaintiff's work"]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007] [concluding that overseeing job site activities and monitoring project milestones insufficient evidence of the requisite degree of supervision and control necessary to impose liability under common-law negligence or Labor Law § 200]).

Here, plaintiff alleges that he was injured when his pickaxe struck the buried live Cable. Therefore, his accident was caused by a dangerous condition on the Premises (the buried live electrical wire). The next question that must be resolved is whether RCDolner and/or Baroco created or had actual or constructive notice of the Cable.

With respect to RCDolner, there is no evidence that it created the hazardous condition (i.e. that it installed the Cable). Because no party provided RCDolner's contract with 15th Street the question of whether RCDolner had or should have had notice of the Cable cannot be resolved. As noted above, the scope of RCDolner's responsibilities at the Project, and whether it encompassed such specific duties as obtaining mark-outs or otherwise identifying underground

hazards such that it would be liable for plaintiff's injuries under the common law or Labor Law § 200 is unknown on this record. Plaintiff's argument that RCDolner was, in fact, a statutory excavator (pursuant to 16 NYCRR 753-1.2)[3] and, therefore, required to obtain a mark-out (which might have provided notice of the Cable) itself, is conclusory, unsupported by evidence and, therefore, unpersuasive. Accordingly, neither plaintiff nor RCDolner are entitled to summary judgment with respect to plaintiff's Labor Law § 200 claim.

As to Baroco, there is no evidence that it created the hazardous condition (i.e. installed the subject Cable). There is also no evidence that it had actual notice of the Cable, as the Cable was entirely buried beneath the ground. Therefore, the question remains whether Baroco had, or should have had, constructive notice of the Cable's existence.

Plaintiff argues that Baroco, as an excavator, was required to obtain a mark-out for the work area in advance of plaintiff starting his work.[4] According to plaintiff, such a mark-out would have shown the existence of the Cable – thus making plaintiff aware of the hazard and

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[3] 16 NYCRR 753-1.2 which governs the "protection of underground facilities" sets forth the definition of an "excavator" as follows:

> "Any person who is engaged in a trade or business which includes the carrying out of excavation or demolition; provided, however, that an individual employed by an excavator and having no supervisory authority other than the routine direction of employees over an excavation or demolition, shall not be deemed an excavator for the purpose of this Part. The act of any employee or agent of any excavator acting within the scope of his or her official duties or employment shall be deemed to be the act of such excavator."

Plaintiff fails to establish, through testimony or evidence that RCDolner was, in fact, engaged in a trade or business that included excavation. It is undisputed, however, that Baroco was an excavator.

[4] 16 NYCRR 753-3.3 provides, in sum, that an excavation may commence only after a one-call is made and any utilities are marked-out.

allowing him to avoid it – and Baroco's failure to obtain the mark-out was negligent. In support of this argument, plaintiff relies on McCutchen's testimony that relevant Con Ed's Plates for the Project depicted a "secondary main" cable that was identical to the type of Cable that plaintiff struck (McCutchen tr at 36). Therefore, plaintiff has submitted sufficient evidence to establish that Baroco should have known of the Cable, had it made a One Call for a mark-out, as it was required to do. Notably, Baroco received an OSHA violation for failing to obtain a mark-out prior to its work (O'Connell tr at 55).

In opposition, Baroco argues that its failure to make a One Call and obtain its own mark-out cannot be a proximate cause of plaintiff's injuries because the MECC Mark-Out – which Baroco had photographs of – purportedly did not show the existence of the Cable. The failure to identify the Cable in the MECC Mark-Out, Baroco claims, means that any subsequent request for a mark-out would have also failed to identify the Cable's existence in plaintiff's work area. Therefore, it argues, even if it had made a One Call for a mark-out, it would not have had notice of the Cable.

However, Baroco does not establish that the mark-out that it was required to obtain would not have shown the Cable. Baroco provides no testimony or expert analysis of the Plates that would establish, as a matter of law, that the Cable was not denoted on the Plates. Rather, to establish the purported non-existence of the Cable on the Plates, Baroco relies solely on O'Connell's hearsay testimony that he "was told by [Majewski] that" a Con Ed representative "told [Majewski] that he had no knowledge of the [Cable]" (O'Connell tr at 27). Such testimony, without more, is insufficient to raise a question of fact as to whether the Cable would have appeared in a mark-out, had Baroco requested one (*Narvaez v NYRAC*, 290 AD2d 400, 400-401 [1st Dept 2002] ["While hearsay evidence may be utilized in opposition to a motion for

summary judgment, such evidence is insufficient to warrant denial of summary judgment where it is the only evidence upon which the opposition to summary judgment is predicated"]). Further, Majewski's testimony that he did not believe that a mark-out was necessary is belied by the facts of the case and the pertinent requirements governing the obtaining of mark-outs.

Accordingly, plaintiff is entitled to summary judgment in his favor on his Labor Law § 200 claim as against Baroco.

Common-Law Claim for Negligence Per Se

Plaintiff argues that he is entitled to summary judgment on his common-law claims against RCDolner and Baroco based on a negligence per se theory for violating various "relevant provisions of the NYS Industrial Code" (plaintiff's affirmation in support, ¶ 56). Plaintiff supplies no case law where a violation of the Industrial Code was found to establish negligence per se. In fact, it has been held that a violation of the Industrial Code does "not impos[e] per se liability . . . [but] may be considered in evaluating negligence" (*Keegan v Swissotel N.Y.*, 262 AD2d 111, 113 [1st Dept 1999], *lv. dismissed* 94 NY2d 858 [1999]).

Finally, the court declines plaintiff's request to issue a finding, pursuant to CPLR 3212 (g), that plaintiff, in fact, was not negligent in any way with respect to his accident. Such an issue goes to a comparative weighing of the evidence and is properly within the purview of the jury.

The parties remaining arguments have been considered and they are unpersuasive.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the part of plaintiff Nelson Reyes's motion, pursuant to CPLR 3212, for summary judgment as to liability in his favor on the Labor Law § 241 (6) claim is granted as

against defendants BRK Garage Co, LLC and Baroco Contracting Corporation (Baroco); and the part of his motion for summary judgment as to liability in his favor on the common-law negligence and Labor Law § 200 is granted as against Baroco, only; and the remainder of the motion is denied; and it is further

ORDERED that the part of defendant RCDolner LLC's cross motion for summary judgment dismissing the common-law negligence and Labor Law § 200 claim as against it is denied; and the remainder of the cross-motion seeking contractual indemnification from Baroco is denied as untimely; and it is further

ORDERED that third-party defendant MECC Contracting Inc.'s cross motion for summary judgment dismissing the third-party complaint is denied as untimely.

7/31/20
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE