Harris v City of New York
2020 NY Slip Op 32989(U)
September 11, 2020
Supreme Court, New York County
Docket Number: 159346/2014
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL R. EDMEAD** **PART** **IAS MOTION 35EFM**

Justice

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GARY HARRIS,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, SAFETY AND QUALITY PLUS, INC.,

Defendant.

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INDEX NO. 159346/2014

MOTION DATE 9/16/2020

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

THE CITY OF NEW YORK

Plaintiff,

-against-

SAFETY AND QUALITY PLUS, INC.

Defendant.

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Third-Party
Index No. 595628/2014

The following e-filed documents, listed by NYSCEF document number (Motion 004) 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 176, 177, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 216, 217, 219, 226, 227

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 193, 194, 195, 196, 197, 198, 212, 213, 214, 215, 218, 221, 222, 223, 224, 225, 228, 229

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, it is

ORDERED that the branch of Defendant New York City's (the City's) motion (Motion Seq. 004), pursuant to CPLR 3211, for summary judgment dismissing Plaintiff's Labor Law claims is granted to the extent that Plaintiff's Labor Law § 200 claims, Labor Law § 241 (6) claims pursuant to Industrial Code Sections 23-1.7(e)(1) and (e)(2) and Labor Law § 240 (1) claims abandoned by Plaintiff are all dismissed, and Plaintiff's remaining Labor Law § 241 (6) is severed and shall continue against the City; and it is further

ORDERED that the branch of the City's motion (Motion Seq. 004), pursuant to CPLR 3211, for summary judgment on its Third-Party Complaint and crossclaims against Safety and Quality, Plus Inc. (SQP) for contractual indemnification is denied; and it is further

ORDERED that the branch of SQP's motion (Motion Seq. 005), pursuant to CPLR 3211, seeking summary judgment dismissing Plaintiff's complaint Labor Law claims against it is granted; and it is further

ORDERED that the branch of SQP's motion (Motion Seq. 005), pursuant to CPLR 3211, seeking summary judgment dismissing the City's Third-Party Complaint and crossclaims is granted to the extent that the City's claims for contribution and common-law indemnification are dismissed, and the City's contractual indemnification claim against SPQ is severed and shall continue; and it is further

ORDERED that the cross-motion of the City (Motion Seq. 005), pursuant to CPLR 3211, seeking summary judgment on its Third-Party Complaint and crossclaims against SQP for common law indemnification and contribution is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the counsel for third-party defendant Safety and Quality, Plus Inc. shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all parties.

NON FINAL DISPOSITION

MEMORANDUM DECISION

In this Labor Law action, the following motions are consolidated for disposition.

In Motion Seq. 004, defendant New York City ("the City")[1] moves, pursuant to CPLR 3212, for summary judgment dismissing Plaintiff Gary Harris' complaint against it, and summary judgment granting its third-party claims against defendant Safety and Quality Plus, Inc. (SQP) for contractual indemnification and defense, together with dismissal of all of SQP's crossclaims and counterclaims against the City.

In Motion Seq. 005, SQP moves, pursuant to CPLR 3211, for summary judgment dismissing Plaintiff's complaint against it and for summary judgment dismissing the City's third-party complaint and crossclaims. City cross-moves, pursuant to CPLR 3211, for summary judgment granting its crossclaims for common law indemnification and contribution from SQP.

BACKGROUND FACTS

Defendant New York City Department of Design and Construction (NYCDDC) owns Project Contract MED-609 (Project) which involves the installation of trunk water mains throughout Manhattan, including at 9th Avenue and 48th Street (Site) where the accident here occurred. NYCDDC engaged Waterworks JV (Waterworks) as the General Contractor for the Project. Through a separate subcontract agreement (Subcontract Agreement), Waterworks engaged SQP as safety consultant (NYSCEF doc No. 157).

Plaintiff is a timberman employed by Waterworks. On December 3, 2013, after breaking for lunch, Plaintiff alleges that he was instructed to begin work on a manhole located at the northwest corner of the Site (NYSCEF doc No. 150, p. 66:2-5). To get to the manhole, Plaintiff

[1] The City claims that it was incorrectly sued herein as the New York City Department of Design Construction and New York City Department of Environmental Protection. These defendants will collectively be referred to as the "City Defendants".

testified that he had to travel along a 10x30 feet trench (*Id.*, p. 67:1-8) by walking on 12x12 beams called walers (*Id.*, p. 68:3-4). These walers form part of the trench system and were located below street level (*Id.*, p. 78:10). After reaching the manhole and starting to work on it, Plaintiff alleges that he was later instructed to retrieve a chainsaw across the street so he had to climb up the manhole again and walk back across the same walers (*Id.*, p. 77:2-12). Upon reaching the end of the walers to exit the trench, Plaintiff claims that his right foot tripped on a 2x4 piece of lumber which served as a top rail (*Id.*, p. 81:17) and which was affixed to the trench's railing four feet above the ground on one side and resting on the ground on the other side (*Id.*, p. 82:7-13). As a result, Plaintiff fell to the ground and sustained injuries (*Id.*, p. 83:4).

Plaintiff commenced this action on September 23, 2014 against the City Defendants asserting claims for negligence and seeking damages under New York Labor Law §§ 200 and 241 (6).[2] On December 15, 2014, the City brought a third-party complaint against SQP for contractual defense, indemnification and contribution. Plaintiff later filed an amended complaint to join SQP as an additional defendant.

The City now moves, by way of summary judgment, to dismiss Plaintiff's complaint against it and grant its third-party claims for contractual indemnification and defense against SQP, together with dismissal of SQP's crossclaims and counterclaims against it (Motion Seq. 004). Both Plaintiff and SQP oppose.

Separately, SQP seeks an order granting summary judgment dismissing both Plaintiff's complaint and the City's third-party complaint and crossclaims against it (Motion Seq. 005). Plaintiff and the City oppose. The City cross-moves for summary judgment against SQP for common-law indemnification and contribution, a relief that the City did not seek in its own motion

[2] Initially, Plaintiff also sought damages pursuant to Labor Law § 240(1), but later withdrew this claim (*see* NYSCEF doc No. 209 where plaintiff "acknowledge[d] that the facts here do not implicate Labor Law § 240(1)").

for summary judgment. SQP opposes the cross-motion on the ground that it was filed late and raises arguments that the City should have raised in its own motion for summary judgment. In reply, the City argues that its cross-motion is timely as it previously filed a motion for summary judgment seeking relief that is "nearly identical" to that sought in the cross-motion (NYSCEF doc No. 228).

DISCUSSION

Applicable Standards

Summary Judgment

Summary judgment is granted when "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, [Ct App 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [Ct App 1986]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [Ct App 1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [Ct App 1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). When the proponent 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 [Ct App 2008] quoting *Alvarez*, 68 NY2d at 324).

Here, both the City and SQP bear the burden of making a prima facie showing of entitlement to a judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Bellinson Law, LLC v Iannucci*, 35 Misc 3d 1217[A], 951 N.Y.S.2d 84, 2012 NY Slip Op 50729[U] [Sup. Ct., N.Y. County 2012], aff d, 102 AD3d 563 [1st Dept 2013], *citing Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (*Alvarez, supra, Zuckerman v City of New York*, 49 N.Y.2d 557 [1980] and *Santiago v Filstein*, 35 AD3d 184 [1st Dept 2006]).

The function of a court in reviewing a motion for summary judgment "is issue finding, not issue determination, and if any genuine issue of material fact is found to exist, summary judgment must be denied" (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474 [1st Dept 2012]). Where "credibility determinations are required, summary judgment must be denied" (*Id.*). Thus, on a motion for summary judgment, the court is not to determine which party presents the more credible argument, but whether there exists a factual issue, or if arguably there is a genuine issue of fact (*DeSario v SL Green Management LLC*, 105 AD3d 421, [1st Dept 2013] [holding given the conflicting deposition testimony as to what was said and to whom, issues of credibility should be resolved at trial]).

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 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 [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 [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 [1st Dept 2010]).

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]).

To maintain a viable claim under Labor Law § 241 (6), plaintiffs must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis*, 16 NY3d at 416).

The City's Motion for Summary Judgement (Motion Seq. 004)

A. *Labor Law § 200 and Common-law negligence*

In support of its motion for summary judgment dismissing Plaintiff's Labor Law § 200 and common-law negligence claim, the City argues that the accident was caused by means and methods by which Plaintiff's work was being performed. Therefore, liability cannot be imposed as the City had no supervisory control over Plaintiff, who was supervised exclusively by Waterworks (NYCSEF doc No. 135, ¶¶ 42, 55-66). The City further claims that even if the accident arose because of a dangerous condition, the City neither created such condition nor had prior actual or constructive notice thereof (*Id.*, ¶¶ 43-54). Plaintiff maintains that the defense of lack of supervisory control is irrelevant as the accident arose from a dangerous condition at the Site and the City failed to meet its burden to show it lacked constructive notice, as it failed to show when it last inspected the Site (NYSCEF doc No 209, ¶¶ 18-27).

The Court finds that whether analyzed under the premises-defect or manner-and-method framework, the outcome is the same, *i.e.*, the City is not liable for Plaintiff's Labor Law § 200 claim. Indeed, as this Court previously opined, the border between manner-and-method cases and premises-defect cases is somewhat hazy, and ill-defined by courts, a circumstance that creates uncertainty for parties (*Vasquez v City of New York*, NY Slip Op 337758 (U) [Sup Ct 2019]). In *Vasquez,* this Court concluded that when an injury or accident arises from "a temporary condition created during the course of construction," the proper framework to analyze the case is manner-and-method, for which Labor Law defendants are liable only when they have supervisory control over the creation or maintenance of such a condition (*Id.*). The cases cited by Plaintiff even support this conclusion. *First*, the case of *Luebke v MBI Group* (122 AD3d 514 [1st Dept 2014]) involved an accident by reason of a defective hinge on a door in the building. This is not a temporary condition created during the project and, thus, the Court analyzed the allegations under the premises-defect framework. *Second*, the case of *Edwards v. W.K. Nursing Home Corp.*, (107 A.D.3d 639 [1st Dept 2013]) was analyzed under the premises-defect framework as the accident in that case involved a "defective portion of curb and sidewalk in front of defendants' premises" which is clearly not a temporary condition that was created for a specific work.

The two other cases cited by Plaintiff are inapposite as they involve the liability of a general contractor. In *Murphy v Columbia University* (4 AD3d 200, 773 N.Y.S.2d 10 [1st Dept 2004]), it was the general contractor, and not the owner who was found liable as the general contractor had supervisory control over the work that created a temporary dangerous condition. In *Ford v Luigi Caliendo & Sons, Inc.* (305 AD2d 368 [2d Dept 2003]), while the trial court dismissed plaintiff's Labor Law § 200 claims against both the owner and the general contractor, the appellate court reinstated the claims only as asserted against the general contractor finding that "issues of fact

exist as to whether [the general contractor] knew or should have known of the alleged dangerous condition on the property which caused the plaintiff's injuries." Here, Plaintiff testified that the 2x4 lumber that he tripped over was a top rail (NYSCEF doc No. 150, p. 81:17) affixed to the trench's railing system (*Id.*, p. 82:7-13). It is therefore a temporary condition created during the course of the construction and, thus, the allegations here should be analyzed under a manner-and-method framework. Based on Plaintiff's own testimony, he received instructions from Waterworks to perform his work (NYSCEF doc No. 151, p. 207:9-12) and had never communicated with any individuals acting on behalf of the City (*Id.*, at 206:20-23). Since the City did not have supervisory control over Plaintiff's work, the City cannot be held liable for Plaintiff's Labor Law § 200 claim.

An analysis under the premises-defect framework renders the same outcome. Here, Plaintiff concedes that the City did not create the alleged dangerous condition and there is no proof that the City otherwise had actual notice thereof (NYSCEF doc No. 209, ¶ 25). The remaining issue is whether the City may have had constructive notice of the dangerous condition. The Court notes the "dangerous condition" in this case was not the 2x4 lumber itself, but how this lumber was positioned on the day and time of the incident, *i.e.*, its position of having its one side nailed to the railing system 4 feet above the ground with the other side lying on the ground. As the 2x4 lumber was used as a "top rail", under ordinary circumstances, it would have been: (i) nailed on both sides at the same height above the ground (NYSCEF doc No. 151, p. 236:15-18); or (ii) completely removed, put on the side before workers enter the trench (*Id.*, p.237: 13-17; *see also* NYSCEF doc No. 150, pp. 103:9-10 and 104:3-9) and generally put back after the work was finished (NYSCEF doc No. 151, pp. 205: 12-16 and 237:9-12).

Here, the 2x4 lumber was not completely removed and remained nailed on one side causing the alleged dangerous condition. The City, however, has made a *prima facie* showing that it lacked

constructive notice of this dangerous condition. A defendant is charged with constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the happening of an accident to permit the defendant to discover and remedy it (*Lopez v Dagan, 98 AD3d 436* [1st Dept 2012] citing *Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]). Here, the record is bereft of evidence that the alleged defective placement of the 2x4 lumber existed for a sufficient length of time prior to the accident. Plaintiff himself did not even notice the 2x4 lumber when he first entered the trench to reach the manhole (NYSCEF doc No. 151, pp. 203-204). Moreover, he testified that the top rail is regularly put off and on (NYSCEF doc No. 150, p. 104:3-9). The inability of the plaintiff to make the required showing of when the alleged defect existed "creates the possibility that the condition may have emanated only moments before the accident, through no fault or with no knowledge of the defendant, any other conclusion being pure speculation" (*Deegan v 336 E. 50th St. Tenants Corp*., 216 AD2d 59 [1st Dept 1995] *citing Grier v Macy & Co*., 173 AD2d 238 [1st Dept 1991]).

The Court rejects Plaintiff's argument that the City's motion should be denied as the City failed to show when it last inspected the Site. The City submitted the deposition of SQP's safety representative, Mr. Raul Del Toro, who testified that he walked the Site on a daily basis (NYSCEF doc No. 154, 62:18-24 and 64:12) and confirmed that he saw nothing dangerous at the time of his visit on the day of the accident (see NYSCEF doc No. 158, p. 6).

B. *Labor Law § 241(6)*

While Plaintiff initially alleged violation of a number of Industrial Code sections, his Opposition was limited to 12 NYCRR §§ 23-1.5(c)(3), 23-1.7(e)(1) and (e)(2). Therefore, all of Plaintiff's claims relating to Industrial Code violations, other than those discussed in his

Opposition, are dismissed as abandoned (*see Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014] [failure to address claims indicates an intention to abandon them as bases of liability]).

In support of its motion, the City contends that Plaintiff's remaining claims should be dismissed as the accident did not involve violation of the three Industrial Codes invoked. The Court finds that the City is correct to the extent that 12 NYCRR §§23-1.7(e)(1) and (e)(2) are inapplicable to this case.

Industrial Code Section 23-1.7(e)(1)

Section 23-1.7(e)(1) provides that "[a]ll passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered."

Following First Department precedent, "passageway" under 12 NYCRR §23-1.7(e)(1) should be construed as referring to an "interior or internal way of passage inside a building" or an "internal hallway or interior side of a doorway" but does not contemplate "outdoor areas" [*see Quigley v Port Authority*, 168 AD3d 65 [1st 2018] [dismissal of § 23-1.7(e)(1) was upheld as plaintiff slipped on a pile of snow-covered pipes outside the entrance door of employer's work shanty]; *Jones v 30 Park Place Hotel LLC*, 178 AD3d 604 [1st Dept 2019][the area where plaintiff tripped and fell, "over a piece of plywood nailed to the floor of construction site…to cover a hole" is an "open area" not within the meaning of § 23-1.7(e)(1)]). As Plaintiff's accident here occurred in an open outdoor area which is not a "passageway," his Labor Law § 241(6) claims predicated on 12 NYCRR §23-1.7(e)(1) are dismissed.

Industrial Code Section 23-1.7(e)(1)

Section 23-1.7(e)(1) provides that "[t]he parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered

tools and materials and from sharp projections insofar as may be consistent with the work being performed".

Plaintiff alleges that the 2x4 that Plaintiff tripped over is a "sharp projection" within the meaning of the 12 NYCRR § 23-1.7(e)(2), citing *Lenard v 1251 Americas Associates* (241 AD2d 391 [1st Dept 1997]) where the First Department found a door stop as a sharp projection. The Court in *Lenard*, however, defined "sharp" as "clearly defined and distinct" such that "a distinct object jutting out from the rest of the floor's surface" falls within the definition. Thus, the door-stop which was firmly fixed to the floor is within its contemplation. However, the 2x4 lumber in this case is not a sharp projection as it does not "project from the floor," but was merely lying on the ground on one end (*see also Mooney v BP/CG Ctr. II, LL*, 117 NYS3d 206 [1st Dept 2020] [the Court found that the screw lying on the floor was not a sharp project as it was not "project[ing] from the floor"]). Thus, Plaintiff's claim under 12 NYCRR § 23-1.7(e)(2) should likewise be dismissed.

The Court, however, denies the remaining branch of the City's motion seeking dismissal of Plaintiff's Labor Law § 241(6) claims based on a violation of 12 NYCRR §23-1.5(c)(3) which requires that "[a]ll safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged." The Court agrees with Plaintiff that there is a question of fact as to whether the 2x4 lumber - which was a functional equivalent of a safety device preventing anyone from falling into the trench - was in a sound condition at the time of the accident. There remains a question of fact regarding whether the device should have been restored to its proper place by either nailing the 2x4 lumber on both sides or by removing it completely and put aside until the work was done. While the City relies on the testimony of its construction health and safety expert that "temporarily

removing part of a top rail in order to gain access to an excavation does not render the top rail damaged, inoperable or unsound" (NYSCEF doc No. 135, ¶ 73), the expert fails to address the fact that the 2x4 lumber here was removed only on one side and remained nailed to the railing system on the other side. Therefore, dismissal of the branch of Plaintiff's § 241(6) claim predicated on a violation of 12 NYCRR §23-1.5(c)(3) is denied at this juncture.

C. *Contractual Indemnification and Defense against SQP*

In its motion for summary judgment, the City argues that it is entitled to contractual indemnification from SQP in view of the "hold harmless" clause under the Subcontract Agreement (NYSCEF doc No. 135, ¶¶ 119-128) which reads, in relevant part, as follows:

> ...The Subcontractor shall, to the fullest extent permitted by law, hold the Contractor and the Owner, their agents, employees and representatives harmless from any and all liability, costs, damages, attorneys' fee, and expenses from any claims or causes of action of whatever nature arising from the Subcontractor's work, including all claims relating to its subcontractors, or suppliers or employees, or by reason of any claim or dispute of any person or entity for damages from any cause directly or indirectly relating to any action or failure to act by the Subcontractor, its representatives, employees, subcontractors or suppliers… (NYSCEF doc No. 157, ¶ 12)

SQP opposes on the grounds that the "Owner" under the Subcontract Agreement is NYCDDC and that Plaintiff's accident did not arise out of SQP's work (NYSCEF doc No. 199, ¶¶ 43-72). In its reply, the City insists that it is an intended beneficiary of the Subcontract Agreement as NYCDDC is a department maintained by the City and the same contract required SQP to name the City as an additional insured (NYSCEF doc No. 202, ¶¶5-11).

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.,* 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.,* 32 NY2d 149, 153 [1973]; *see*

also Tonking *v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). Here, the Court finds that the City's claim for contractual indemnification should not be summarily granted at this juncture as there are issues of fact regarding whether the parties intended the City to benefit from the Subcontract Agreement. While the City was not the "Owner" under the Subcontract Agreement, the City submitted a copy of a "Certificate of Liability Insurance" showing that the City was made an additional insured under the Subcontract Agreement (NYSCEF doc No. 203). In the case of *Mantovani v. Whiting-Turner Contr. Co.*, 55 AD3d 799 [2d Dept 2008]), the Court held that the Certificate of Liability Insurance was sufficient evidence of a written contract of indemnification. The certificate, when read together with the provisions on "Additional Insured" under the "Commercial General Liability" contract (NYSCEF doc No. 201, pp. 24-25), raises factual issues as to the City's contractual entitlement to indemnity under the Subcontract Agreement.

The Court rejects SQP's argument that the indemnification clause was not triggered by claims "arising from" SQP's work. Under the Subcontract Agreement, SQP had the duty to "identify deficiencies and report said deficiency notices as required" (NYSCEF doc No. 181, p.8). However, as discussed, summary judgment cannot be granted at this time as there remains a factual issue of whether the City was an intended beneficiary of the Subcontract Agreement

In view of the above, the Court denies the branch of the City's motion for summary judgment predicated on its claim for contractual indemnification and defense against SQP.

III. SQP's Motion for Summary Judgement

A. *Labor Law § 200 and Common-law negligence*

In support of its motion to dismiss Plaintiff's complaint against it, SQP argues that: (i) it is not a proper Labor Law defendant as it merely provided safety consultant services to Waterworks and is not an owner, contractor or agent under the Labor Law (NYSCEF doc No. 164, ¶¶ 40-59);

(ii) it cannot be held liable for Plaintiff's negligence claims as it did not supervise, direct or control Plaintiff or the injury-producing work and did not otherwise owe Plaintiff any duty of care (*Id.*, ¶¶ 60-76); and (iii) the Industrial Code sections cited by Plaintiff are either insufficient to support a Labor Law § 241(6) claim or inapplicable to the facts of this case (*Id.*, ¶¶ 121-125). Plaintiff opposes SQP's motion and disagrees that SQP owes him no duty as, according to him, SQP undertook the responsibility for safety inspection of the Construction Site pursuant to its Subcontract Agreement with Waterworks (NYSCEF doc No. 212, ¶ 29).

A review of the Subcontract Agreement shows that Waterworks retained SQP to provide site safety management services (NYSCEF doc No. 181, p. 7). In particular, SQP was engaged to, among others, "conduct inspections for items required by NYC Building Code…", "identify deficiencies and report said deficiency notices as required", "conduct schedule safety meetings", "investigate accidents" and "analyze accidents on periodic basis and make abatement and prevention recommendations for accident patterns" (*Id*. p. 7).

On the basis of the provisions of the Subcontract Agreement, and the evidence submitted, this Court finds that there is no evidence that SQP exercised supervision and control over Plaintiff's work sufficient to hold SQP liable under Labor Law § 200 or common-law negligence. In its opposition to SQP's motion, Plaintiff draws the attention of the Court to cases which suggest that control is evidenced by the authority to stop work in case of dangerous conditions. These cases are inapposite. *First*, in *Keller v Kruger* (39 Misc. 3d 720 [Kings Sup Ct 2013]), the consultant engineer admitted that it represented the owner at the construction site with the authority to shut down work if safety practices were not being followed. Here, there is no evidence that SQP was providing safety services in a similar capacity as it never acted as the City's agent at the Site. In fact, even if SQP had the authority to stop unsafe work practices, the First Department has held

that this authority alone is insufficient to show control necessary to impose liability under Labor Law § 200 or common-law negligence (*see Francis v Plaza Constr. Corp.*, 121 AD3d 427 [1st Dept 2014] ["That Plaza had a representative who would walk the site on a daily basis and had the authority to stop work for safety reasons is insufficient to raise a triable issue of fact with respect to whether Plaza exercised the requisite degree of supervision and control to sustain a Labor Law § 200 or common-law negligence claim"]).

Second, the continuing validity of the other cases cited by Plaintiff, *i.e.*, *Freitas v New York City* (249 AD2d 184 [1st Dept 1998]) and *Bush v Gregory / Madison Avenue* (308 AD2d 360 [1st Dept 2003], are in question. These cases stand for the proposition that a party's authority to stop work for safety reasons raises a triable issue of fact as to whether that party exercised supervision and control to sustain a claim under Labor Law § 200 or for common-law negligence. However, in the case of *Hughes v Tishman Constr. Corp*, 40 AD3d 305 [1st Dept 2007]), the First Department held that these cases "deviate from th[e] well-settled principle" that "liability under Labor Law § 200 or for common-law negligence may only be imposed on a general contractor or construction manager who controls the manner in which the plaintiff performed his or her work". Thus, the Court is not persuaded that *Freitas* or *Bush* are instructive as they have been effectively overruled by subsequent First Department caselaw.

Finally, the Court rejects Plaintiff's argument that SQP's motion should be dismissed for SQP's failure to show when it last inspected the Site. As discussed above, the testimony of Mr. Del Toro sufficiently shows that the Site was inspected on a daily basis, including the day before and of the incident.

B. *Labor Law § 241(6)*

As discussed above, the Court finds that 12 NYCRR §§23-1.7(e)(1) and (e)(2) are inapplicable to this case. Thus, Plaintiff's claims against SQP on the basis of these provisions are dismissed. While the Court finds 12 NYCRR §23-1.5(c)(3) applicable to the facts of this case, the Court holds that SQP is not subject to liability under this provision as it was not an "owner" or a "general contractor" and the record establishes that SQP did not have sufficient authority to supervise and control the injury-producing work to support imposition of liability on it as a statutory agent (*see e.g. Williams v River Place II, LLC*, 145 AD3d 589 [1st Dept 2016]; *Cappabianca v Skanska USA Bldg., Inc.*, 99 AD3d 139 [1st Dept 2012]; *Smith v McClier Corp.*, 22 AD3d 369 [1st Dept 2005]). SQP's Chief Executive Officer testified that the scope of SQP's services did not include any physical work on the site, nor any supervision or control of Plaintiff's work or installation or maintenance of the trench, including its top rail (NYSCEF doc No. 163, § 15). Plaintiff failed to raise a triable issue of fact in this regard. The Court therefore dismisses Plaintiff's Labor Law § 241(6) claims against SQP.

C. *The City's Claim for Indemnification, Contribution and Defense*

In light of this Court's determination that Plaintiff's complaint insofar as asserted against SQP must be dismissed, SQP is accordingly entitled to summary judgment dismissing the City's claims for contribution and common-law indemnity which are both premised on SQP's alleged common-law negligence and violation of Labor Law § 200 (*see Martinez v 342 Prop. LLC*, 89 AD3d 468 [1st Dept 2011]). The Court therefore finds no need to address the parties' arguments on the timeliness of the City's cross-motion seeking judgement for contribution and common-law indemnification.

The Court, however, denies the branch of SQP's motion seeking dismissal of the City's cause of action for contractual indemnification. As discussed above, the Subcontract Agreement imposed on SQP the duty to "identify deficiencies and report said deficiency notices as required." SQP failed to make a *prima facie* demonstration that it did not breach such contractual duty by showing that the 2x4 wood was not deficient as a safety top rail (*see Marquez v L&M Dev. Partners, Inc.*, 141 AD3d 694 [2d Dept 2016][denying dismissal of a consultant's contractual indemnification claim after finding that it failed to establish, *prima facie*, that it did not breach such contractual duty with respect to safety obligations pursuant to its duties under the consultant agreement]). Therefore, dismissal of the City's claims for contractual indemnification against SQP is not warranted at this juncture.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the branch of Defendant New York City's (the City's) motion (Motion Seq. 004), pursuant to CPLR 3211, for summary judgment dismissing Plaintiff's Labor Law claims is granted to the extent that Plaintiff's Labor Law § 200 claims, Labor Law § 241 (6) claims pursuant to Industrial Code Sections 23-1.7(e)(1) and (e)(2) and Labor Law § 240 (1) claims abandoned by Plaintiff are all dismissed, and Plaintiff's remaining Labor Law § 241 (6) is severed and shall continue against the City; and it is further

ORDERED that the branch of the City's motion (Motion Seq. 004), pursuant to CPLR 3211, for summary judgment on its Third-Party Complaint and crossclaims against Safety and Quality, Plus Inc. (SQP) for contractual indemnification is denied; and it is further

ORDERED that the branch of SQP's motion (Motion Seq. 005), pursuant to CPLR 3211, seeking summary judgment dismissing Plaintiff's complaint Labor Law claims against it is granted; and it is further

ORDERED that the branch of SQP's motion (Motion Seq. 005), pursuant to CPLR 3211, seeking summary judgment dismissing the City's Third-Party Complaint and crossclaims is granted to the extent that the City's claims for contribution and common-law indemnification are dismissed, and the City's contractual indemnification claim against SPQ is severed and shall continue; and it is further

ORDERED that the cross-motion of the City (Motion Seq. 005), pursuant to CPLR 3211, seeking summary judgment on its Third-Party Complaint and crossclaims against SQP for common law indemnification and contribution is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the counsel for third-party defendant Safety and Quality, Plus Inc. shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all parties.

9/11/2020
DATE

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