Gerardi v Hudson Yards
2020 NY Slip Op 34155(U)
December 16, 2020
Supreme Court, New York County
Docket Number: 150629/2016
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12

Justice

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INDEX NO. 150629/2016

JOHN GERARDI,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 004

- v -

HUDSON YARDS, THE RELATED COMPANIES, INC., OXFORD PROPERTIES GROUP, TUDOR PERINI BUILDING CORP., LINE DRAGON, LLC, METROPOLITAN TRANSPORTATION AUTHORITY,

DECISION + ORDER ON MOTION

Defendants.

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LINE DRAGON, LLC,

Third-Party
Index No. 595390/2018

Third-party Plaintiff,

-against-

NEW YORK CONCRETE CORP.,

Third-party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 174-181, 202, 203, 217-221

were read on this motion to dismiss.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on September 3, 2015 when, while working at a construction site located at the Hudson Yards Retail Facility in Manhattan (the premises), a large concrete line hose filled with wet concrete pinned his foot against a piece of rebar, causing him to fall.

In motion sequence 003, defendant/third-party plaintiff Line Dragon, LLC moves

pursuant to CPLR 3212 for an order granting it summary judgment and dismissing the complaint, and for summary judgment in its favor on its third-party claim for contractual indemnification against third-party defendant New York Concrete Corp (NYCC). Defendants Hudson Yards, The Related Companies, Inc., Oxford Properties Group, Tutor Perini Building Corp., and Metropolitan Transportation Authority (MTA) (collectively, defendants) cross-move for summary judgment on their common law indemnification claims against Line Dragon.

In motion sequence 004, NYCC and defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint as against them and dismissing the third-party complaint as against NYCC. NYCC cross-moves for summary judgment dismissing the third-party complaint.

The motions are consolidated for disposition.

I. BACKGROUND

On the day of plaintiff's accident, Related was the premises owner, and Tutor was the general contractor for a project at the premises that entailed the construction of the retail facility; Tutor hired NYCC, plaintiff's employer, to install concrete for the project.

A. Depositions

1. Plaintiff's testimony (NYSCEF 130)

Plaintiff testified that on the day of the accident, he worked as a laborer for NYCC, which poured concrete for the project. Plaintiff's supervisor and foreperson, both of NYCC, solely directed plaintiff's work.

In laying concrete, laborers usually maneuver by hand the concrete hose line around a work site when laying concrete. Not long before the period in question, NYCC had obtained machines from Line Dragon that moved the concrete hose lines from location to location during

the pour. There were two machines used in tandem to pour the concrete. One connected the front and middle of the concrete hose line, and the other connected the back of the hose line to a concrete pump. Concrete was poured from the machine at the front (placer), and the one towards the middle moved the hose (dragger). The rubber hose measured between eight and ten inches in diameter.

The machines were operated by NYCC engineers. Plaintiff had never been trained in the use of the Line Dragon machines, and he was not responsible for their operation. Rather, plaintiff's foreperson assigned plaintiff as "the laborer in between the machines assisting the hose if it got snagged or kinked." (*Id.* at 22). Plaintiff also received direction and instruction from "[t]he people from Line Dragon." (*Id.* at 28).

According to plaintiff, the Line Dragon machines were used many times without incident, during the laying of concrete on the first four floors of the premises. Line Dragon representatives were present at the premises during each of the pours and they personally ran the machines during the pour on the first two floors.

At the time of plaintiff's accident, NYCC was preparing to pour concrete for the fifth floor. NYCC's engineers were operating the machines in the presence of Line Dragon representatives. The floor on which the concrete was to be applied was composed of steel Q-decking, wire mesh, and rebar. (*Id.* at 38). The pour began at approximately 6:30 am, and plaintiff was directed to monitor the line between the placer and the dragger.

Plaintiff stood closer to the placer, watching the line for snagging or kinking. Immediately before the accident, plaintiff and two NYCC forepersons stood near the hose line and the placer was moving forward and to the right when the hose line shifted and hit plaintiff's left foot, causing it to become "pinned between [a] steel pin and the concrete hose." (*Id.* at 55).

Plaintiff neither tripped nor slipped, but was pushed to the ground by the force of the line as it "climbed up [his] leg and knocked [him] to the ground." (*Id.* at 158).

Plaintiff explained that the steel pin and/or rebar pinning his foot was attached to the floor and was used to fasten the Q-deck to the steel I-beams. (*Id.* at 56). Immediately after the accident, plaintiff and others yelled at the engineer to stop the machine, but it continued for a little longer causing the hose to move further up plaintiff's body, stopping on his hip and lower back.

2. Testimony of NYCC's operating engineer (NYSCEF 131)

The operating engineer for NYCC for the project received direction from NYCC. His responsibilities at the project included operating the placer, although he had never before used it. He received some on-the-job training in operating the placer from two Line Dragon employees before being allowed to operate it himself, but he considered the training to have been insufficient. The engineer could not recall whether he had ever personally used the placer before the day of the accident, but remembered that a Line Dragon employee was there that day, observing him as he used it.

The engineer was operating the placer that day by slowly walking it backward across the floor, pouring concrete along the way. Plaintiff's job was to ensure that the hose did not kink or snag as the placer backed up.

Before moving the placer backward, the engineer would look behind him to ensure that the path was clear. Immediately before the accident, he looked behind him and saw plaintiff near the hose line, facing him, which was typical for the worker responsible for tending the hose. Three or four seconds after the engineer began moving the placer backward, as concrete was being poured, he heard a scream and was told to stop. He turned around and saw plaintiff on the

floor, covered by the hose.

3. Testimony NYCC's mason foreperson (NYSCEF 132)

On the day of the accident, the mason foreperson was employed by NYCC at the project and was responsible for monitoring the pour and overseeing the leveling and finishing of the concrete on each floor. He worked closely with the NYCC laborers responsible for the actual pour, but did not supervise them.

At the time of the accident, the foreperson was facing plaintiff, speaking to him about the pour when he "[s]aw the line dragon machine move and back up and basically take [plaintiff] down. The line rode over his left leg and took him down." (*Id.* at 42).

When shown a witness' written statement about the accident, the foreperson confirmed that he had filled it out and had written that:

> during concrete pumping operations, [plaintiff] was directing the concrete (pump and hose). During movement of pump and hose, [plaintiff] was distracted by cement masons asking for direction. When he turned to answer, the hose rolled over his ankle taking him to the ground with the hose on top of his leg.

(*Id.* at 63).

4. Testimony of NYCC's laborer foreperson (NYSCEF 132)

The laborer foreperson was employed by NYCC for the concrete pour and to operate the dragger. Line Dragon's owner had trained him on the use of the Line Dragon machines, and the owner was present on the day of the accident, observing the machines' operation during the concrete pour.

At the time of the accident, the laborer foreperson was operating the dragger and described the accident as follows: "We were pouring and [the mason foreperson] actually called – called [plaintiff] and he wind up looking at the guy and I believe the hose came riding up his

leg and he either fell back or forward." (*Id.* at 23). He did not witness the accident itself, although he saw plaintiff standing up moments before it happened, and then on the ground moments after he heard the mason foreperson call out to plaintiff.

According to the laborer foreperson, under normal operation, it was possible for the hoses between the machines to move around due to the pressurized concrete being pushed through them. The movement of the hoses was typical and the machines also moved during operation.

5. Testimony of NYCC's concrete safety manager (NYSCEF 134)

The duties of NYCC's concrete safety manager for the project included walking the project to ensure that NYCC's employees were following all safety rules and regulations and filling out daily safety reports. NYCC's safety coordinator held weekly toolbox talks for its employees at the project.

The safety manager was at the premises at the time of the accident but did not see it happen.

6. Testimony of NYCC's safety director (NYSCEF 135)

NYCC's safety director at the project was responsible for overseeing the overall safety of concrete-related work at several projects and had the authority to stop work if he saw an unsafe condition. He testified that plaintiff not only monitored the hose for kinks and snags, but also coordinated the movement of the Line Dragon machines with the operating engineer and his foreperson. (*Id.* at 79).

The safety director did not witness the accident, but discussed it with the mason foreperson who told him that he had "distract[ed]" plaintiff while the machine was moving and that then, the hose struck him. (*Id.* at 31).

7. Testimony of Tutor's general superintendent (NYSCEF 136)

Tutor's general superintendent for the project scheduled and organized field activities, supervised and managed Tutor employees and subcontractors, and prepared reports concerning, among other things, scope of work matters. He was at the project a few times a week and held weekly meetings with every subcontractor, including NYCC.

Tutor requires its subcontractors to prepare safety plans for their work, including the use of equipment such as the Line Dragon machines; he knew that NYCC had prepared a safety plan.

The general superintendent was not at the premises at the time of the accident, nor did he know any details about it. His assistant supervisors, who were present each day, would have been given manuals and general information about the Line Dragon machines; Line Dragon provided on-site training on the use of its machines.

8. Testimony of Line Dragon's president (NYSCEF 140)

The president of Line Dragon testified that Line Dragon developed and manufactured its machinery to assist concrete laborers in laying concrete in large buildings. The machinery consists of two parts, the placer and the dragger, each of which are remote-controlled. The placer pours the concrete, and the dragger, attached approximately 20 feet behind the placer, picks up the hose and moves it around. The remote control for each machine consists of two joysticks, toggle switches, and an emergency stop button which shuts down the machines.

Days before the accident, the president had showed NYCC's engineer how to operate the machines. On the day of the accident he was observing the NYCC engineer operate the machines. Although he did not witness the accident, he had heard plaintiff yell out.

The president was shown several Line Dragon invoices issued to NYCC for the sale of the machines and "two consecutive day-on-job training" which, according to the president,

means that he would be present on the job for two days to demonstrate the machines, which is a standard clause in all Line Dragon sales contracts.

Whenever he was present on a job site, the president would assist the operating engineer and answer questions, and would also take over for the operating engineer in his absence or if he needed assistance.

II. ANALYSIS

"[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]). 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. (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

A. Procedural Issues

1. Timeliness of defendants' motion (seq 004)

This court's part rules, available on the New York State Supreme Court website, direct that summary judgment motions be filed within 60 days of the filing of the note of issue. (https://www.nycourts.gov/legacypdfs/courts/1jd/supctmanh/Rules/part12-rules.pdf).

Plaintiff filed his note of issue on August 2, 2019 (NYSCEF 113), and defendants filed this motion on July 23, 2020, nearly a year later.

In *Brill v City of New* York, the Court of Appeals determined that courts should not consider late summary judgment motions absent a demonstration of good cause for the delay, even if questionable claims or defenses continue to trial. (2 NY3d 648 [2004]).

Defendants offer no good cause for their delay. Rather, they rely mainly on CPLR 3212(b) and claim that having joined Line Dragon's motion for summary judgment, their motion should be considered as a matter of fairness and equity.

As it is undisputed that defendants' motion is untimely, and absent good cause shown for the delay, defendants' motion is not considered.

The court, however, has authority to search the record and grant summary judgment even to a non-moving party, if expedient, necessary, and in the interests of justice (CPLR 3212[b]), but only "with respect to a cause of action or issue that is the subject of the motions before the court." (*Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430 [1996]).

Therefore, to the extent that any arguments raised by Line Dragon in its motion for summary judgment also establish that certain claims against defendants cannot, as a matter of law, survive, such claims may be dismissed even in the absence of a timely motion.

2. Timeliness of cross motions

Line Dragon seeks summary dismissal of plaintiff's Labor Law §§ 200 and 241(6) claims as against it, as well as summary judgment in its favor on its third-party contractual indemnification claim as against NYCC. Defendants' cross motion seeks summary judgment in their favor on their common-law indemnification claims as against Line Dragon. NYCC's cross motion seeks summary dismissal of Line Dragon's third-party complaint against NYCC.

As noted above, plaintiff filed his note of issue on August 2, 2019, and Line Dragon's motion for summary judgment was timely filed on September 27, 2019. Defendants' cross motion was untimely filed on October 25, 2019, 85 days after the filing of the note of issue. Defendants' motion for summary judgment was filed untimely, as was NYCC's cross motion, filed on August 25, 2020, 370 days post-note of issue.

A cross motion is "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:

> [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).

An untimely cross motion for summary judgment made after the expiration of a deadline may be considered only: (1) where there is "a satisfactory explanation for the untimeliness" (*Brill,* 2 NY3d at 652), 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, both cross motions are untimely, and movants offer no explanation for the delay. Moreover, in their cross motion, defendants do not seek relief that is "nearly identical" to the relief sought by Line Dragon, as Line Dragon seeks dismissal of plaintiff's complaint and for judgment against NYCC on its third-party contractual indemnification claim, whereas defendants move for common-law indemnification against Line Dragon.

NYCC's cross motion was filed in response to defendants' untimely summary judgment

motion and does not seek relief against defendants-movants but rather against Line Dragon. Consequently, it too is an improper cross motion.

In view of the foregoing, neither cross motion is addressed.

B. Substantive issues

1. 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:
>
> * * *
>
> (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.

(*See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998] [Labor Law § 241(6) imposes nondelegable duty]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 501–502 [1993] [same]).

In order to sustain a Labor Law § 241(6) claim, the plaintiff must establish that the defendant violated a specific and "concrete" implementing regulation of the Industrial Code (*Ross,* 81 NY2d at 505, and that such violation is a proximate cause of the plaintiff's injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

a. Delegation of authority

In *Russin v Louis N. Picciano & Son*, the Court held that

> [a]lthough 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.

(54 NY2d 311, 317-318 [1981] [internal citations omitted]). Thus, 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]).

Line Dragon argues that it is not a proper defendant as it is neither an owner nor contractor or agent of either, such that it may be held vicariously liable for plaintiff's injuries under Labor Law § 241(6) as an agent of the owner.

As it is undisputed that Line Dragon representatives were present during and observing the work leading to the accident, that they operated the equipment on several occasions, trained NYCC personnel on the use and operation of the machines, and supervised and/or advised NYCC's personnel while they used the Line Dragon system, including on the day of the accident, Line Dragon thus fails to establish, *prima facie*, that it was not delegated supervision and control over plaintiff's work that day.

b. Industrial Code violations

Although plaintiff lists multiple violations of the Industrial Code in his bill of particulars, he does not oppose their dismissal except for those addressed below, and thus, they are deemed abandoned. (*See Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that

particular Industrial Code section."]).

c. Industrial Code § 23-1.5

For the performance of work required by this Part (rule) to be done by or under the supervision of a designated person, an employer shall designate such a person only such an employee as reasonable and prudent man experienced in construction . . . would consider competent to perform such work.

While plaintiff does not identify the subsection of rule 23-1.5 allegedly violated, it appears from his arguments that he relies on subsections 23-1.5(b) and (c)(1).

Section 23-1.5(b) is insufficient to support a claim under the Labor Law. (*Martinez v 342 Prop. LLC*, 128 AD3d 408 [1st Dept 2015]).

Subsection 23-1.5(c)(1) provides, as relevant, that "[n]o employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition." This subsection is also insufficient. (*See Sajid v Tribeca N. Assoc. L.P.*, 20 AD3d 301, 302 [1st Dept 2005]; *Hawkins v City of New York,* 275 AD2d 634, 635 [1st Dept 2000] [12 NYCRR § 23-1.5(c)(1) requirement that "machinery be in 'good repair' and 'safe'" too generic to serve as predicate for liability under Labor Law § 241(6)]). If plaintiff relies on section 23-1.5(a), it is likewise fatally generic and unspecific. (*Hawkins,* 275 AD2d at 635).

Accordingly, Line Dragon establishes that Industrial Code § 23-1.5 is inapplicable to this action, and plaintiff raises no triable issue in opposition.

d. Industrial Code § 23-1.7(e): Tripping and other hazards.

(1) Passageways. All Passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. . . .
(2) Working Areas. The 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 . . . insofar as may be consistent with the work being performed.

Sections 23-1.7(e)(1) and (2) are sufficiently specific to support a Labor Law § 241(6)

claim. (*Boss v Integral Constr. Corp.*, 249 AD2d 214, 215 [1st Dept 1998]). Here, however, plaintiff does not allege that he tripped over accumulations of dirt and debris, or scattered tools and materials, or any other condition which could cause tripping. Rather, he alleges that he was struck by the concrete line, which caused him to fall.

Even assuming that plaintiff had tripped, subsection (1) is inapplicable as it is undisputed that the accident did not occur in a passageway. Moreover, the objects involved in his accident were integral to the work being performed, i.e. the pouring of a concrete floor. (*See Tucker v Tishman Constr. Corp. of N.Y.*, 36 AD3d 417, 417 [1st Dept 2007] [no liability where rebar over which plaintiff tripped was integral part of work being performed, not debris]).

Consequently, Line Dragon demonstrates that it cannot be held liable for a violation of Labor Law § 241(6) based on an alleged violation of Industrial Code § 23-1.7(e), and plaintiff raises no factual issue related thereto.

e. Industrial Code § 23-9.2(b): Operation

(1) All power-operated equipment used in construction . . . shall be operated only by trained, designated persons and all such equipment shall be operated in a safe manner at all times.

(2) Operators of power-operated material handling equipment shall remain at the controls while any load is being handled.

Subsection 23-9.2(b)(1) has been held insufficiently specific to sustain a Labor Law § 241(6) claim. (*See Abelleira v City of New York*, 120 AD3d 1163, 1165 [2d Dept 2014] [internal quotation mark and citation omitted] [12 NYCRR § 23–9.2(b)(1) is a general safety standard that does not give rise to nondelegable duty under Labor Law § 241(6)]; *Gonzalez v Glenwood Mason Supply Co., Inc.*, 41 AD3d 338, 339 [1st Dept 2007] [Section 9.2 is not sufficiently specific to support statutory violation "under the circumstances"]).

Subsection 23-9.2(b)(2) is inapplicable here as plaintiff did not operate power-operated

equipment. Rather, he was monitoring the hose while the machine was being operated by another, and it is undisputed that the machine operator remained at the controls while the machine was being operated.

Thus, Line Dragon shows that plaintiff's Labor Law § 241(6) claim is not properly premised on a violation of Code 23-9.2(b) and plaintiff raises no issue of fact.

f. OSHA violations

The federal Occupational Safety and Health Administration (OSHA) governs employer/employee relationships. (*Delaney v City of New York*, 78 AD3d 540, 540 [1st Dept 2010]). The regulations promulgated pursuant to OSHA provide no specific statutory duty for which a Labor Law defendant may be held liable. (*Kocurek v Home Depot, U.S.A.P.*, 286 AD2d 577, 580 [1st Dept 2001] [OSHA inapplicable as limited safety practices of employers and defendants were not plaintiff's employer]).

g. ANSI violations

To the extent that plaintiff relies upon alleged violations of the American National Standards Institute's (ANSI) regulations, they too are not appropriate predicates for asserting a violation of Labor Law § 241(6). (*See Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d at 501-505; *Campuzano v Board of Educ. of City of N.Y.*, 54 AD3d 268, 269 [1st Dept 2008]; *Rosado v Briarwoods Farm, Inc.*, 19 AD3d 396, 399 [2d Dept 2005] [plaintiff asserting cause of action for violation of Labor Law § 241(6) must allege violation of specific and concrete provision of Industrial Code]; *see also Bradley v HWA 1290 III LLC*, 157 AD3d 627 [1st Dept 2018] [ANSI standards not statutes, ordinances, or regulations], *affd on other grounds* 32 NY3d 1010 [2018]).

Thus, Line Dragon demonstrates that plaintiff's Labor Law § 241(6) claim cannot be supported by an alleged violation of an ANSI regulation, and plaintiff raises no factual issue.

2. Common-law negligence and Labor Law § 200 claims

Labor Law § 200 provides that:

> 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.

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]).

There are two standards applicable to section 200 cases, depending on the kind of accident at issue: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when it results from a dangerous condition that is inherent in the premises. (*See McLeod v Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Saints,* 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

Here, plaintiff's accident was caused by a concrete line hose that pinned plaintiff's foot and caused him to fall. As plaintiff was in the process of monitoring the hose, which was required during the concrete pour, the accident arose from the means and methods of plaintiff's work at the project, rather than a dangerous condition inherent to the premises.

If a plaintiff's claims implicate the means and methods of the work, no liability may be imposed on an owner or a contractor under Labor Law § 200 unless the owner or contractor had the authority to supervise or control the performance of the work. (*Sotarriba v 346 W. 17th St.*

LLC, 179 AD3d 599 [1st Dept 2020]). Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]; *see also Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007] [liability under a means and methods analysis "requires actual supervisory control or input into how the work is performed."]).

Line Dragon denies having had or exercised actual supervisory control over the work at the time of the accident. While it did not control the concrete pour itself, there is evidence that its president supervised, or at least observed and assisted, NYCC's operating engineer and that he had the authority to take over operation of the machines if the engineer was unable to operate them. Line Dragon thus fails to establish, *prima facie*, that it did not exercise actual supervisory control over the use of the Line Dragon machines at the time of the accident,

Line Dragon also argues that plaintiff was the sole proximate cause of his accident as he had stopped watching the concrete line to speak with his foreperson and that, therefore, even if Line Dragon supervised the work, it cannot be held liable for plaintiff's accident.

Plaintiff not only monitored the concrete line to check for kinks and snags but he also strategized with coworkers about future moves of the pour using the Line Dragon. Moreover, the operator/engineer should have been aware of where people were in relation to the concrete hose line and the Line Dragon machines. Line Dragon was at the scene, observing the pour and offering its expertise and assistance with the use of its proprietary system. As noted above, questions of fact remain with respect to whether it acted negligently with respect to plaintiff's accident.

Given the foregoing, Line Dragon does not establish, *prima facie*, that plaintiff's conduct in speaking with his foreperson about the work being performed at the time of the accident was

the sole proximate cause of the accident. Moreover, whether plaintiff was negligent by failing to monitor the movement of the line while performing his work is an issue of comparative fault and does not itself bar a finding of liability under section 200. (*See Hill v Stahl,* 49 AD3d 438, 442-443 [1st Dept 2008] [denying defendants summary judgment motion because "issues of fact exist as to whether plaintiff's injury was proximately caused by any negligence on the part of [a defendant]" and that plaintiff's actions "at most go to the issue of contributory negligence"]).

3. Line Dragon's third-party contractual indemnification claim

Line Dragon moves for summary judgment in its favor on its third-party contractual indemnification claim as against NYCC.

"In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability." (*Correia v Professional Data Mgt.,* 259 AD2d 60, 65 [1st Dept 1999]; *see also Murphy v WFP 245 Park Co., L.P.*, 8 AD3d 161, 162 [1st Dept 2004]). Unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant." (*Correia,* 259 AD2d at 65).

"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]).

While it is undisputed that there is no direct indemnification agreement between Line Dragon and NYCC, Line Dragon argues that it is entitled to contractual indemnification from NYCC based on an indemnification provision in a contract between Related and NYCC

(Agreement). NYCC contends that absent any identification of Line Dragon within the indemnification provision in the Agreement, Line Dragon is not entitled to indemnity.

NYCC also argues that it served a post-note of issue notice to admit on Line Dragon, seeking its admission that it was not a third-party beneficiary under the Agreement, and that having failed to respond to the notice, Line Dragon admits it.

To the extent that such post-note of issue discovery would be permitted, the notice to admit is improper, as it seeks an admission on a material issue and ultimate fact related to the contractual indemnification provision. (*Fetahu v New Jersey Tr. Corp.*, 167 AD3d 514, 515 [1st Dept 2018], quoting *Taylor v Blair*, 116 AD2d 204, 206 [1st Dept 1986] ["'[A] notice to admit may not be utilized to request admission of material issues or ultimate or conclusory facts'"]; *Kimmel v Paul, Weiss, Rifkind, Wharton & Garrison*, 214 AD2d 453, 453 [1st Dept 1995]). Therefore, the notice to admit and Line Dragon's alleged failure to respond to it are not considered.

However, as Line Dragon does not submit a copy of the Agreement, it does not establish, *prima facie*, that it is entitled to contractual indemnity from NYCC.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant/third-party plaintiff Line Dragon, LLC's motion for summary judgment dismissing the complaint as against it (mot. seq. 003) is granted to the extent of severing and dismissing the Labor Law § 241(6) claims and is otherwise denied; it is further

ORDERED, that the branch of Line Dragon's motion for summary judgment in its favor on its third-party claims against third-party defendant New York Concrete Corp. is denied; it is further

ORDERED, that defendants Hudson Yards, The Related Companies, Inc., Oxford Properties Group, Tutor Perini Building Corp. and Metropolitan Transportation Authority cross motion for summary judgment on their common-law indemnification claims against Line Dragon is denied; it is further

ORDERED, that defendants' motion for summary judgment (mot. seq. 004) is denied; it is further

ORDERED, that upon searching the record, plaintiff's Labor Law § 241(6) claim is severed and dismissed as against defendants Hudson Yards, The Related Companies, Inc., Oxford Properties Group, Tutor Perini Building Corp. and Metropolitan Transportation Authority; it is further

ORDERED, that third-party defendant New York Concrete Corp.'s cross motion for summary judgment dismissing the third-party complaint against it is denied; and it is further

ORDERED, that the parties contact the court jointly by email to cpaszko@nycourts.gov to schedule a settlement conference with Justice Jaffe.

12/16/2020
DATE

BARBARA JAFFE, J.S.C.

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