# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. DAVID BENJAMIN COHEN** **PART** **IAS MOTION 58EFM**

***Justice***

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BRANDON PERRONE, REBECCA PERRONE, and RUFUS STANCIL,

Plaintiff,

- v -

METROPOLITAN TRANSPORTATION AUTHORITY, MTA METRO-NORTH RAILROAD, KRATOS DEFENSE & SECURITY SOLUTIONS, INC., HENRY BROS. ELECTRONICS, INC., DIVERSIFIED SECURITY SOLUTIONS, INC., CRC ELECTRICAL INC., RECCHIA ELECTRICAL CONTRACTING CORP., and TNT EQUIPMENT SALES & RENTALS, INC.,

Defendants.

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CRC ELECTRICAL INC., and RECCHIA ELECTRICAL CONTRACTING CORP.,

Third-Party Defendants.

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**INDEX NO.** 109488/2011

**MOTION SEQ. NO.** 008, 009, 010

METROPOLITAN TRANSPORTATION AUTHORITY, MTA METRO-NORTH RAILROAD, KRATOS DEFENSE & SECURITY SOLUTIONS, INC., HENRY BROS. ELECTRONICS, INC., AND DIVERSIFIED SECURITY SOLUTIONS, INC.,

Third-Party Plaintiffs,

- v -

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 008) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 48, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 130, 131, 137, 158, 159, 160, 161, 162, 163, 164, 165, 166, 168, 177, 178, 179, 180, 181, 182, 189, 198, 199, 200, 201, 202, 203, 204, 205, 220, 221, 222, 223, 232, 233, 235, 246 were read on this motion to/for PARTIAL SUMMARY JUDGMENT .

The following e-filed documents, listed by NYSCEF document number (Motion 009) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 133, 138, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 169, 183, 184, 197, 214, 215, 216, 217, 218, 219, 224, 230, 231, 236
were read on this motion to/for SUMMARY JUDGMENT .

The following e-filed documents, listed by NYSCEF document number (Motion 010) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 134, 139, 170, 185, 186, 187, 188, 206, 207, 208, 209, 210, 211, 212, 213, 237, 238, 239

were read on this motion to/for SUMMARY JUDGMENT .

Motion Sequences 008, 009, and 010 are hereby consolidated for disposition.

In this Labor Law action, plaintiffs Brandon Perrone ("Perrone"), Rufus D. Stancil ("Stancil"), and Rebecca Perrone ("Ms. Perrone") (collectively "Plaintiffs") move, pursuant to CPLR 3212, for partial summary judgment (Seq. 008), on the issue of liability under Labor Law § 240(1) against defendants Metropolitan Transportation Authority ("MTA"), MTA Metro-North Railroad ("Metro-North"), Kratos Defense and Security Solutions, Inc. ("Kratos"), Diversified Security Solutions, Inc. ("Diversified"), and Henry Bros. Electronics, Inc. ("Henry Bros."), which motion is opposed by MTA, Metro-North, and Henry Bros. MTA and Metro-North crossmove for partial summary judgment, seeking an order dismissing Plaintiffs' causes of action under Labor Law §§ 240 and 241 as against them and dismissing the complaint as against their

"affiliates," co-defendants Kratos and Diversified, which motion is opposed by TNT Equipment Sales & Rentals, Inc. ("TNT").[1] Recchia Electrical Contracting Corp. ("Recchia") and CRC Electrical, Inc. ("CRC") also cross-move, pursuant to CPLR 3212(b), for summary judgment dismissing the third-party complaint in its entirety as against them, which application is opposed by MTA, Metro-North and TNT (Doc 185). MTA and Metro-North also cross move against

Recchia and CRC for defense and indemnification. This cross motion by MTA and Metro-North is opposed in full by Recchia and CRC, and is opposed in part by Henry Bros.

[1] Plaintiffs withdraw any Labor Law claims against TNT (Doc 197 at 2, n. 1), rendering TNT's opposition to Plaintiffs' motion (Seq. 008) academic.

TNT moves for an order (Seq. 009) seeking, inter alia, leave to renew its motion for summary judgment and, upon such renewal, granting it summary judgment dismissing the complaint and all cross claims asserted against it. MTA and Metro-North, inter alia, oppose TNT's motion. Plaintiffs oppose TNT's motion to the extent TNT seeks summary judgment in its favor but, as noted in footnote 1, voluntarily withdrew their Labor Law claims against TNT. Henry Bros. opposes TNT's motion in full.

Henry Bros. likewise moves for summary judgment (Seq. 010), dismissing the complaint in its entirety, (2) dismissing all cross-claims against it, and (3) denying Plaintiffs' motion for summary judgment. TNT and Plaintiffs oppose Henry Bros.'s motion in full.

After oral argument of the motions (Doc 250), and a review of the motion papers, as well as a review of the relevant statutes and case law, the motions are decided as follows.

## I. BACKGROUND

On May 6, 2011, Perrone and Stancil, electrical workers, were being driven from one work site to another on the back of a hi-rail vehicle (the "hi-rail" or the "vehicle"),[1] which was operating on train wheels on track 130 beneath Grand Central Terminal ("GCT") in New York, New York, when the vehicle derailed, injuring them (*see* Verified Second Amended Complaint ["Complaint"] at 45-46, Doc 26; affs of Plaintiffs, Docs 27, 28).

The MTA owns GCT and the train tracks below it, including track 130. Metro-North maintains the tracks and operates a rail service on them. MTA and Metro-North hired Kratos, Henry Bros., Diversified and TNT as contractors to work on the tracks below GCT as part of a project led by the United States Department of Homeland Security ("DHS") (Complaint at 1-43; *see also Perrone v Metro. Transp Auth.*, 2016 WL 11268764, *1 [Sup Ct, New York County 2016, Mills, J.]). TNT, an equipment leasing company, owned the hi-rail and leased it to Henry Bros. (Complaint at 39-40; *see also Perrone*, 2016 WL 11268764, *1). Plaintiffs were employed by Recchia (Affs of Plaintiffs, Docs 27, 28), a subcontractor hired by CRC to perform electrical work at the project (EBT of Chetan Patel [owner of Recchia and CRC] dated June 19, 2018 at 09:21-10:11, Doc 37).

[1] A hi-rail vehicle is a hybrid vehicle built to operate either on roads with rubber tires or on railroad tracks with metal road wheels that raise the vehicle up and off its tires and onto the train tracks (49 CFR 214.7; *see also* affs of Plaintiffs, Docs 27, 28; Perrone's EBT at 17:18-23, Doc 29; Perrone's Second EBT dated June 14, 2018 at 20:24-21:25; Stancil's Second EBT dated June 15, 2018 at 19:15-19, Doc 32; Doc. 250; Hoffman's EBT dated Dec 17, 2018 at 35:04-07, Doc 33).

At the time of the subject incident, the driver was accelerating and braking from a cab at the front of the hi-rail since the vehicle could not be steered on train tracks (EBT of John Bermingham [assistant director of construction management for the MTA] dated May 24, 2017 at 48:18-24, Doc 36). Attached to the cab, at the back of the vehicle, and where the bed of a normal truck would be, was a scissor lift platform, which was designed to be raised and lowered to allow Plaintiffs access to different heights to perform their work (Affs of Plaintiffs, Docs 27, 28; Perrone's Second EBT dated June 14, 2018 at 20:19-21:25, Doc 30; photos of the vehicle, Docs 43 & 48; EBT of Philip Hoffman [driver]) dated Dec 17, 2018 at 13:13-21; *see also* Plaintiffs' Memo in Supp [Seq 008] at 25, Doc 25 ["The back part of the vehicle was actually a scissor lift used to raise workers to the elevations where they needed to perform their work, including near the ceilings where they were installing conduit overhead"] [internal citations omitted]). The scissor lift had guardrails around it for Plaintiffs' safety (Perrone's Second EBT at 21:13-17). The "three to four" steps at the back of the vehicle allowed Plaintiffs to climb onto the vehicle (*id.* at 28:09-15).

When the vehicle derailed, Plaintiffs, along with an MTA flagman, were standing on the scissor lift platform, which was at its lowest position and around "6 feet high from the … railroad tracks," and were thrown across the scissor lift platform (Perrone's Second EBT at 29:05-08). There were some work materials on the platform as well (*id.* at 29:09-13). Plaintiffs commenced this action on March 20, 2014 by filing a Complaint, alleging negligence and violations of Labor Law sections 200, 240(1), and 241(6). Ms. Perrone asserts a claim for loss of consortium (Complaint at 44-52; BOP ¶ 7, Doc 26; *see also Perrone*, 2016 WL

11268764, *1).

**A. Affidavits, EBTs, Contracts, & Accident Reports**

**1. Perrone**

According to Perrone, Plaintiffs "were directed [by the MTA] to ride on the scissor lift while [the vehicle] moved from one work area to another along the tracks" (Perrone's aff dated May 5, 2020, Doc 27). The MTA flagman was also on the scissor lift when the accident occured *(id.)*. According to Perrone, when Plaintiffs "were directed to board and ride on the scissor lift by the MTA flagman, all [they] could do was to do [their] best to stand and hold on to whatever [they] could. [Perrone] was holding on to a side rail of the scissor lift when the high rail derailed and fell. … [Perrone and Stancil] were not provided with any safety harnesses, seats, seatbelts or any other safety devices." (*id.*)

Perrone testified that he, Stancil, and the MTA flagman were all standing on the scissor lift when the accident occurred (Perrone's EBT dated Apr. 22, 2015 at 21:8-17, Doc. 29), and that he was "holding on to the guardrail … to [his] right" with one hand (*id.* at 21:18-22:03). Perrone added that he did not recall seeing the MTA flagman fall (*id.* at 166:13-167:24). Perrone added that "up until [he] heard the loud noise and the accident happened, … there [was nothing] different about the way the [hi-rail] was proceeding from other days [that he] had been on it" at that location (Perrone's EBT at 169:03-15; *see also* Perrone's Second EBT dated June 14, 2018 at 18:25-20:06). Perrone added that, at the time of the accident, the vehicle was going "slowly" (*id.* at 22:22-24).

Perrone explained that, when the accident happened, he heard "a loud bang and [he] was thrown down" "facedown" on the scissor lift platform (*id.* at 23:23-24:23). He "ended up totally on the truck, like totally on the platform" (*see* Perrone's Second EBT dated June 14, 2018 at 29:05-08).

Additionally, Perrone filled out a foreman's 24-hour incident report on the date of the accident, stating: "[The vehicle] jumped [the] track and I fell on [a] bundle of [one-inch] galvanized pipe directly on my right knee" (Doc 69).

**2. Stancil**

According to Stancil, the "accident occurred between 8:30 and 9:00 PM. There were four persons in [the] crew. Besides [he] and [Perrone], there was a driver and the MTA/Metro-North flagman assigned to the [vehicle]. They were instructed by the MTA during [their] orientation for this job that [they] were to strictly follow all instructions by the MTA flagman" (Stancil's aff dated May 5, 2020, Doc. 28). "[They] were directed to stand on the platform by the MTA flagman because the vehicle ... did not have enough seats for [them] all. … There were no seats on the platform. [They] held onto the rails as best [they] could" (*id.*).

Stancil stated that, on the date of the accident, or, any other day, "[they] were not provided with any harnesses, seats, or any other safety equipment" (*id.*). "When the accident happened, [Stancil] heard a loud bang and the [hi-rail] derailed and fell off the tracks, causing the scissor lift to tip and fall [and] [he] was thrown down" (*id.*). He also stated that he "was thrown across [the] flatbed" toward the back of the hi-rail (Stancil's EBT dated Apr 29, 2015 at 14:1622, Doc. 31; *see also id.* at 15:25-16:04; Stancil's Second EBT dated June 15, 2018 at

24:08-24, Doc 32). Stancil was holding the left guardrail of the vehicle, which was the opposite railing from that which Perrone was holding, with either both hands or his left hand (*id.* at 15:07-14,

25:14-16; Stancil's EBT dated Apr 29, 2015 at 17:23-25).

Unlike Perrone, Stancil had not been on a hi-rail at GCT before the incident (Stancil's Second EBT dated June 15, 2018 at 17:02-05, Doc 32). Neither Perrone nor Stancil noticed any problems with the vehicle immediately before the accident (*id.* at 19:11-14). When Stancil rode on a hi-rail before, he was not given any safety equipment (*id.* at 22:06-10). He stated that he had never seen "any type of harnesses or safety belts or lines being used for workers working on hi-rail[s]" (*id.* at 22:11-14).

**3. Philip Hoffman (Operator of the Vehicle)**

Philip Hoffman ("Hoffman"), the driver of the vehicle, stated that he "was driving the [vehicle] at about 3 miles per hour when [he] heard a loud bang[,]" the vehicle "thump[ed][,]" and it dropped off the rails "5 [or] 6 inches" (Hoffman's EBT dated Dec 17, 2018 at 08:1409:05; 17:18-24; 57:03-17; 70:02-13, Doc 33).

According to Hoffman, the platform of the vehicle was "about 10 [feet] long" and "maybe 7 [feet]" wide and could be raised up to "maybe 15 feet in the air" (*id.* at 13:13-21).

He recalled that "[Plaintiffs] had to sit in the back while [the vehicle] was moving" (*id.* at 56:09-13) and that "the entire Recchia crew was laid off [the day] after the accident" (*id.* at 84:07-18).

**4. Dominick Caciopoli, Jr. (MTA mechanic)**

Dominick Caciopoli ("Caciopoli"), an MTA mechanic, inspected the vehicle four days after the incident, prepared a report in which he commented that there were problems with a "lock pin" and "engine RPM" of the vehicle but that the vehicle otherwise passed the inspection, and further testified that an MTA rule provided that "people aren't allow[ed] to stand on a moving high track vehicle" and that this written rule was explained to all MTA employees (Caciopoli's EBT dated Nov 11, 2019 at 44:08-45:15, Docs 35 & 71).

**5. James Devito (Henry Bros.' Project Manager)**

James Devito ("Devito"), who was employed by Henry Bros. as a project manager at the time of the accident, recalled that the vehicle derailed while "going over a switchgear, which is a portion of the tracks that cross each other" (Devito EBT dated Dec 10, 2018 at 27:22-24, Doc 38). He further stated that, if a hi-rail derailed, it would not be unusual for it to happen over a switchgear (*id.* at 29:14-21). In an accident report that he prepared, Devito reiterated that "[t]he possibility of the hi-rail derailment can only be minimized, not eliminated, primarily due to the fact that the wheels of a hi-rail are significantly smaller than the wheels the rail system is designed to use. This happens most commonly when going over a switch, as in this case" (*id.* at 29:18-22; Doc 39; Doc 68).

**6. Henry Bros.-MTA Contract**

On June 2, 2010, MTA contracted with Henry Bros. (Doc 60). This contract provided, in relevant part, as follows:

**Article 44. Insurance.** … [MTA] is to be added to the insurance certificate as a

> Certificate Holder and as [an] additional[] insured. **…**
>
> [Henry Bros.] is to provide a current insurance certificate with all MTA approved and contractually required covered amounts in that certificate.

**(Doc 60).**

**7. Henry Bros.-CRC SubContract**

On June 21, 2010, Henry Bros. subcontracted with CRC for CRC to "furnish all labor, material, equipment, services and perform … work" (Doc 62). This subcontract provided, in relevant part, as follows:

> **Article 5. Insurance and Bonding.** [CRC] agrees to obtain and pay for the following insurance coverage: Worker's Compensation and Employer's Liability in the amount of no less than $1,000,000 or the State Statutory Limit. Commercial General Liability in the amount of not less than $1,000,000 each occurrence on a combined single limit basis for injuries to persons (including death) and damage to property, Automobile and Truck liability insurance in the amount of not less than $ 1,000,000, and any other insurance coverage which may be necessary as required by [Henry Bros.], [MTA], or State Law. [CRC] will supply proof of insurance in the form of Certificates of Insurance. This certificate shall include a clause which names the Contractor ([Henry Bros.] and its subsidiaries and affiliates) as additional insureds. This insurance must remain in effect throughout the term of this Agreement. Any material change or termination by carrier must include an automatic 30 day pre-notification of [Henry Bros. and MTA]. [MTA] may provide insurance coverage under an Owner Controlled Insurance Program. The [CRC] will cooperate in all requests for information involving this Program. If specified in Attachment A [to this sub-contract], [CRC] shall secure and provide to [Henry Bros.], for the benefit of the itself and [MTA]. Performance and Payment Bonds in an amount equal to the value of the Sub-Contract, as it may be modified from time to time.
>
> **Article 10. Compliance with Laws and Regulations.** [CRC] is bound by all applicable terms and conditions of the Contract between [MTA] and [Henry Bros.] … [CRC's] attention is specifically directed to those portions of that Contract referring to payments

> to laborers and workmen and its obligation to comply with prevailing wage regulations (if applicable) and applicable [L]abor [L]aws.
>
> **Article 18. Hold Harmless.** [CRC] agrees to indemnify and hold harmless [Henry Bros.], from and against any and all claims, damages, losses, and expenses suffered or incurred, including reasonable attorneys' fees, arising out of [CRC's] performance hereunder or any delay in performance on the part of [CRC] or caused by the commission or omission of some act on the part of [Henry Bros.] that caused or contributed to any delay in the performance on the part of [CRC].

(Doc 62; *see also* Doc 72).

**8. Henry Bros.-TNT Rental Agreement**

On May 16, 2011, Henry Bros. and TNT entered into a written agreement (the "Equipment Lease," Doc 64) for the lease of the vehicle, including the scissor lift (the "Equipment"). In this agreement, Henry Bros. was identified as the "customer" (Doc 64). An unnumbered page attached to the Equipment Lease, titled "Damage to Equipment," referred to a "customer." Based on the Equipment Lease identifying Henry Bros. as the customer, it is evident that the customer that was referred to on the unnumbered attachment referred to Henry Bros. That attachment provided, in relevant part, as follows:

> **Damage to Equipment:**
>
> 1) [Henry Bros.] shall return the equipment to [TNT] in the same condition as it was when rented to [Henry Bros.]. The Equipment Inspection Report executed by [Henry Bros.] upon its receipt of the equipment shall be conclusive evidence binding upon [Henry Bros.] of the condition of the Equipment at the time same was received by [Henry Bros.]. In the event the Equipment is returned to [TNT] in a condition other than that which is set forth on the Equipment inspection report or in a damaged condition, [Henry Bros.] shall be solely responsible and liable to [TNT] for the following, all of which shall be paid to TNT.
>
> a) The cost of all repairs to the Equipment, Copies (or the originals) of the bills and statements of any repairmen (including [TNT's] own repairmen) who repair or

> work on the Equipment shall be conclusive evidence of the fair, reasonable and proper cost of such repairs and the necessity and need therefor.

(Doc 64).

## II. The Summary Judgment Standard

"The 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 eliminate any material issues of fact from the case" (*Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). "The proponent must do so by tender of evidentiary proof in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Hearsay alone cannot support a motion for summary judgment unless accompanied by other direct evidence (*AIU Ins. Co. v Am. Motorists Ins. Co.*, 8 AD3d 83, 85 [1st Dept 2004]). "This burden is a heavy one," requiring that the "facts . . . be viewed in the light most favorable to the non-moving party" (*Jacobsen v NY City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014] [internal quotation marks and citation omitted]). "Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853).

Once met, the burden shifts to the opposing party, who must establish the existence of a triable issue of fact to defeat the summary judgment motion (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "[I]f the opponent is to succeed in defeating a summary judgment motion he, too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable

excuse for his failure to meet the strict requirement of tender in admissible form" (*Zuckerman*, 49 NY2d at 562).

## III. The Parties' Contentions and Legal Conclusions

### A. Motion Sequence No. 008

#### 1. The Parties' Contentions

Plaintiffs move for partial summary judgment on the issue of liability under Labor Law § 240(1) against all defendants and third-party defendants, arguing, inter alia, that Defendants violated Labor Law § 240(1) when the scissor lift failed, causing Perrone and Stancil to be thrown across the scissor lift platform. Plaintiffs further argue that Defendants violated Labor Law § 240(1) by failing to provide them with safety devices necessary to prevent their alleged falls.

MTA and Metro-North oppose Plaintiffs' motion and cross move for an order, pursuant to CPLR 3212, dismissing Plaintiff's causes of action under Labor Law sections 240(1) and 241(6); granting summary judgment in favor of Kratos and Diversified; and granting such other and further relief as this Court deems just and proper (Docs 158 & 159).

Henry Bros. also opposes Plaintiffs' motion, arguing that Labor Law § 240(1) is inapplicable since the alleged fall was not elevation-related and, further, that Plaintiffs were on their way to install fiber optic conduit, which activity, it maintains, is not covered by Labor Law § 240(1) (Doc 130).

TNT opposes Plaintiffs' motion and the cross motion by MTA and Metro-North, arguing, inter alia, that it "did not direct, supervise or control [P]laintiff's work and, in fact, TNT did not

have any employees or representatives at the work site at any time" (Docs 177 & 189). Henry Bros. partially opposes MTA and Metro North's cross motion disputing, inter alia, "the authenticity and accuracy of the purported contract between Henry Bros. and MTA" (Doc. 220).

In reply to the opposition of Henry Bros., Plaintiffs argue, inter alia, that "a scissor lift is … not a flatbed truck[,] … a fall from a safety device is not a requirement on a Labor Law 240(1) claim[,].. [Plaintiffs] are entitled to summary judgment under Labor Law 240(1) because their injuries were the direct result of the application of the force of gravity[,] … the safety of the workers requires that [] Defendants provide a properly constructed platform under Industrial Code 23-9.7(e), not just any platform[,].. [and] Henry Bros. is liable under Labor Law 200 and common law negligence for failing to provide [Perrone] and [Stancil] with a safe place to work" (Doc 246). Further, Plaintiffs make an application for the Court to search the record and grant them summary judgment under Labor Law § 241(6), alleging a violation of Industrial Code section 23-9.7(e), and Labor Law § 200 (*id.*).

**2. The Relevant Law**

**i. Labor Law § 240(1)**

> Labor Law § 240(1), also known as the Scaffold Law, provides, in relevant part, that:
> All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

(Labor Law § 240[1]).

"The legislative purpose behind this enactment is to protect workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident" (*Rocovich v Consol. Edison Co.*, 78 NY2d 509, 513 [1991], citing 1969 NY Legis Ann at 407; *see also Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 284-90 [2003]). The statute protects workers against "those types of accidents in which the scaffold ... or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*John v Baharestani*, 281 AD3d 114, 118 [1st Dept 2001] [internal citations omitted]). Additionally, the statute "is designed to protect workers from gravity related hazards ... and must be liberally construed to accomplish the purpose for which it was framed" (*Valensini v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

However, "[n]ot every worker who falls at a construction site … [is shielded by] the extraordinary protections of Labor Law § 240(1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]). "In other words, liability may ... be imposed under the statute only where the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*O'Brien v Port Auth. of New York and New Jersey*, 29 NY3d 27, 33

[2017] [internal citations and quotations marks omitted]).

There is no bright-line test that exists for determining whether a worker was exposed to an elevation-related risk within the meaning of the statute (*Jones v 414 Equities LLC*, 57 AD3d 65, 73 [1st Dept 2008]). "Nevertheless, … a plaintiff in a § 240(1) action who was injured because he or she fell must establish that (1) the task required the plaintiff to work at an elevation, (2) the plaintiff was exposed to the effects of gravity at that elevation and fell *as a direct result* of the force of gravity, and (3) the protective devices envisioned by the statute, e.g., ladders, scaffolds and similar devices, were designed to prevent the hazard that caused the fall" (*id.* at 73 [emphasis added]). A plaintiff must further demonstrate that "the risk of injury from an elevated-related hazard was foreseeable, and that an absent or defective protective device of the type enumerated in the statute was a proximate cause of the injuries alleged" (*id.* at 75 [internal citations omitted]; *see also Ortega v City of New York*, 95 AD3d 125, 128 [1st Dept 2012] ["[A] plaintiff need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable; it is sufficient that he demonstrate that the risk of some injury from defendants' conduct was foreseeable"]).

The risk to which the worker is exposed must be in the first instance height related. "[T]he question is whether the harm flows directly from the application of the force of gravity to the object" (*DeRosa v Bovis Lend Lease LMB, Inc.*, 96 AD3d 652, 653 [1st Dept 2012] [internal citations and quotations omitted]). "Stated differently, the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*id.* at 653-54). For instance,

the Appellate Division, First Department has held that the plaintiff workers were not faced with the type of elevation-related hazard envisioned by Labor Law § 240(1) where their "fall was not caused by an elevation-related risk, but by the motion of the truck after the boom struck the overhead road sign and gantry" (*James v Alpha Painting & Const. Co., Inc.*, 152 AD3d 447, 450 [1st Dept 2017]).

Similarly, in *Dilluvio*, the Appellate Division, First Department, held that the plaintiff worker was not exposed to an elevation-related risk because Labor Law § 240(1) was not intended to protect incidents such as the one in that case where a worker fell three feet from the tailgate of a pickup truck when he was being driven to the location on the roadway where he would place cones as part of lane closure process (*Dilluvio v City of New York*, 264 AD2d 115, 118, 121 [1st Dept 2000], *affd*, 95 NY2d 928 [2000]. The First Department reasoned that the worker was "not exposed to any particular danger referable to height but rather to motion [and that] [d]anger presented itself only when the pickup began moving" (*id.* at 119). "Hence, the 'significant risk' in [*Dilluvio*] did not arise from a height-related danger *per se*, but a danger related to forward motion irrespective of height" (*id.*). The *Dilluvio* Court further held that "[d]angers that are premised on height invoke section 240(1), while those that are normally attendant to riding in a moving vehicle do not" (*id.*).

**3. The Application of the Relevant Law**

As a threshold matter, this Court finds that Plaintiffs, whose scope of work included installing a security system and all of its power lines, fiber optic cable lines, conduits, control panels, distribution panels, cameras, and monitoring systems in compliance with the DHS

upgrades spanning twenty-three acres of the train shed under GCT, and who fell while installing fiber optic conduit (Doc 206 at 9-10), were engaged in "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" within the meaning of Labor Law § 240(1) and, thus, protected by the statute (*see Tuccillo v Bovis Lend Lease, Inc.*, 101 AD3d 625, 626 [1st Dept 2012]; *Leconte v 80 E. End Owners Corp.*, 80 AD3d 669, 670 [2d Dept 2011]; *Joblon v Solow*, 91 NY2d 457, 461 [1998]; *Weininger v Hagedorn & Co.*, 91 NY2d 958, 959 [1998]; *see also St. v Syracuse Supply Co.*, 25 NY3d 117, 124 [2015]).

However, this Court finds that Labor Law § 240(1) is inapplicable to the specific facts of this case since Plaintiffs, who fell across the scissor lift platform when the vehicle, moving at three to five miles per hour, dropped off the rails five or six inches, and suddenly stopped, were not exposed to an elevation-related risk within the meaning of the statute (*see Jones*, 57 AD3d at 73). It is undisputed that the platform of the scissor lift, on which Plaintiffs were standing at the time of the incident, was at its lowest position, and was the only platform at the back of the vehicle, and, therefore, was equivalent to the platform of any other flatbed or pickup truck (*see* Affs of Plaintiffs, Docs 27, 28; Perrone's Second EBT dated June 14, 2018 at 20:19-21:25, Doc 30; photos of the vehicle, Docs 43 & 48 & 239; EBT of Philip Hoffman [driver]) dated Dec 17, 2018 at 13:13-21; *see also* Plaintiffs' Memo in Supp [Seq 008] at 25, Doc 25; tr. at 19:02-09, Doc 250).

Further, contrary to Plaintiffs' argument that the scissor lift platform was elevated even in its lowest position, the record is clear in that Plaintiffs did not fall from a height, but rather fell

on the same platform on which they had been standing. Therefore, any "significant risk" in this case did not arise from a height-related danger, but rather arose from the danger arising from the forward motion of the vehicle, irrespective of height (*Dilluvio*, 264 AD2d at 118, 121, *affd*, 95 NY2d 928 [2000]; *Simon v City of New York*, 265 AD2d 318, 319 [2d Dept 1999] [holding that Labor Law § 2401(1) was inapplicable to the facts of the case when the muck car derailed from railroad track and fell five and a half inches]). Thus, this "is not a situation that calls for the use of a device like those listed in section 240(1) to prevent a worker from falling" from a height (*Toefer v. Long Is. R.R.*, 4 NY3d 399, 405, 408 [2005] [holding that the plaintiff worker was not exposed to an elevation-related risk where he "was working on a large and stable surface only four feet from the ground"]).

Additionally, the subject accident did not occur because a "safety device that was provided did not operate so as to give 'proper protection'" (*compare Lind v Tishman Const. Corp. of New York*, 2019 N.Y. Slip Op. 30623[U], 2, 11 [Sup Ct, New York County 2019, Jaffe, J.] [internal citations omitted], *aff'd as modified*, 180 AD3d 505, 505 [1st Dept 2020]). In *Lind*, while the worker plaintiff was "suspended in the basket of [an articulating lift] some 10 to 11 feet in the air and as he drove 10 feet down [a] ramp to his next work station, the lift began to pick up speed [and] [i]n an attempt to stop the lift, he released the joystick which engaged the automatic brakes[,] [which] "failed" (*Lind v Tishman Const. Corp. of New York*, 2019 N.Y. Slip Op. 30623[U], 2, 12 [N.Y. Sup Ct, New York County 2019]). The *Lind* Court held that the articulating lift was a safety device since its "braking system was designed to prevent the lift from succumbing to the effects of gravity" (*Lind v Tishman Const. Corp. of New York*, 2019

N.Y. Slip Op. 30623[U], 12 [N.Y. Sup Ct, New York County 2019]). Here, however, the scissor lift is not a safety device within the meaning of the statute since it was at its lowest position when Plaintiffs fell across it moving at three to five miles an hour. Thus, even assuming, arguendo, that the scissor lift can be considered a safety device under these circumstances, there is no indication that it "failed." Although Caciopoli reported some issues regarding the lock pin, wheel gauge/size, and/or the hydraulic system (Doc 143 at 4, citing Ex Q), none of these issues were linked to the scissor lift and/or the accident.

Accordingly, this Court denies Plaintiffs' motion for partial summary judgment on the issue of liability under Labor Law § 240(1), and grants the cross motion by MTA and Metro North and dismisses Plaintiffs' causes of action under 240(1) as against all defendants and thirdparty defendants.

Plaintiffs' application for partial summary judgment under Labor Law § 241(6) as predicated on Industrial Code section 23-9.7(e), as well as under Labor Law § 200 will be analyzed as part of Motion Sequence No. 010 (*id.*).

**B. The Cross-Motion by CRC and Recchia[2]**

**1. The Parties' Contentions**

Third-party plaintiffs MTA, Metro-North, Kratos, and Diversified commenced a thirdparty action against CRC and Recchia, alleging that they were negligent in their supervision

[2] The cross motion by Recchia and CRC against third-party plaintiffs, the cross motion by MTA and Metro-North against CRC and Recchia, and the cross motion by MTA and Metro-North against TNT are incorrectly labeled as cross motions (*see* CPLR 2215); however, these motions will be addressed since there is no prejudice to opposing parties, who responded to these motions in writing and also had the opportunity to argue the motions (*see Daramboukas v Samlidis*, 84 AD3d 719, 721 [2d Dept 2011]).

and control of Plaintiffs, and that they breached their subcontract with the third-party plaintiffs by failing to maintain an insurance policy providing general liability insurance for the third-party plaintiffs covering work that Plaintiffs were performing at the time of their alleged accident, and and by failing to "to indemnify, hold harmless and defend [the third-party plaintiffs]." (Doc 76).

Recchia and CRC cross move for summary judgment, pursuant to CPLR 3212(b), dismissing the third-party complaint in its entirety as against them, arguing that (1) Recchia was Plaintiffs' employer at the time of the accident and, therefore, any third-party claims for common law indemnification or contribution are barred by the Workers' Compensation Law since plaintiffs did not sustain a "grave injury;" (2) Recchia did not enter into any written contract in

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which it agreed to indemnify any party; (3) CRC did not enter into any written contract or agreement with any of the third-party plaintiffs; and (4) third-party plaintiffs' claims for common law indemnification fail since third-party plaintiffs negligently caused or contributed to the accident and CRC did not (Docs 51, 52, & 79).

Specifically, Recchia and CRC argue that they "only subcontracted with Henry [Bros.] and only agreed to defend, indemnify and hold harmless Henry [Bros.] [and]" and that they "did not enter into any written agreement requiring CRC to [defend, indemnify, hold harmless, or procure insurance to benefit] third-party plaintiffs[,]" which they maintain, are not the contractors, agents, or employees of Henry Bros. (Doc 79). They further argue that "any claims for common law negligence fail as (1) CRC employees did not operate the hi-rail when it

derailed causing plaintiffs' alleged injuries, [that] a Recchia employee was operating the hi-rail and MTA employees were controlling the switches directing where the hi-rail went; (2) CRC employees did not supervise, direct or control the operation of the hi-rail at the time of the accident [and that] MTA flagmen were responsible for directing the operation of the hi-rail; (3) CRC did not own, lease, maintain or repair the hi-rail at any time [and that] the evidence demonstrates that TNT owned the hi-rail and leased it to Henry Brothers; and (4) CRC was not responsible for site safety for the hi-rail at the time of the accident" (*id.*).

MTA and Metro-North oppose the cross-motion by CRC and Recchia and cross-move for an order granting summary judgment against CRC for defense and indemnification or, in the alternative, declaring that MTA and Metro-North are entitled to judgment against CRC and Recchia for common law contribution based upon the findings of negligence against CRC and Recchia (Docs 150 & 151). MTA and Metro-North argue that CRC and Recchia were actively negligent in failing to supervise, manage, and instruct Plaintiffs. They specifically argue that the MTA rule that Plaintiffs were not to ride on the back of the vehicle was communicated to CRC's supervisor (Doc 151 at 2-3). MTA and Metro-North further argue that CRC leased the vehicle and assumed all responsibilities for it, that CRC and Recchia were responsible for their employees' safety and activity on the vehicle, that there is no mention of any fault or any involvement by the MTA flagman in the Henry Bros. Vehicle Accident Report Form, that the MTA flagman was "solely responsible to tell the driver where to stop … and to prevent the vehicle from going into areas where there was train traffic[,]" that "CRC agreed to be bound by

all terms and conditions of the MTA/Henry Bros. Contract, and thus CRC is required to indemnify MTA and Metro North[,]" and that "as the agent of [Henry Bros.], CRC was statutorily responsible for any violation of the [L]abor [L]aw" (Doc 68).

Henry Bros. opposes the cross-motion by MTA and Metro-North against Recchia and CRC in part, disputing the authenticity and accuracy of the purported contract between Henry Bros. and MTA annexed as Exhibit C of MTA's Motion (Doc 154) and specifically denying that Article 41 was included or incorporated into any contract between MTA and Henry Bros. pertaining to the subject project (Doc 220).

In further support of their motion for summary judgment, CRC and Recchia argue, inter alia, that they have "provided prima facie evidence of their entitlement to summary judgment dismissing the third-party complaint against them as a matter of law [and that] MTA's opposition thereto is riddled with misstatements of fact and fails to raise any triable issues of fact" (Doc 232).

**2. The Relevant Law & Its Application**

In order to establish their claim for common-law indemnification, MTA and Metro-North are required to prove not only that they were free of negligence, but also that the proposed indemnitor, Recchia and/or CRC, was negligent and that its acts and/or omissions contributed to the accident or, in the absence of any negligence, that it had the authority to direct, supervise, and control the work giving rise to the injury (*McCarthy v Turner Const., Inc.*, 17 NY3d 369, 378 [2011]; *Poalacin v Mall Properties, Inc.*, 155 AD3d 900, 909 [2d Dept 2017]).

Furthermore, in order for Recchia to be held liable in common-law indemnification, where it is undisputed that Plaintiffs have received workers' compensation benefits for the injuries sustained in this accident, it must be shown that Plaintiffs suffered from a "grave injury" (*id.* at 910).

Here, since there are triable questions of fact concerning the degree of fault attributable to MTA, Metro-North, Recchia, and CRC, the granting of summary judgment on the basis of common-law indemnification is premature and is not warranted for either side (*Lojano v Soiefer Bros. Realty Corp.*, 187 AD3d 1160 [2d Dept 2020]; *Robles v Taconic Mgt. Co., LLC*, 173 AD3d 1089, 1093 [2d Dept 2019]).

Relatedly, there are triable issues of fact as to whether there was an MTA flagman on the scissor lift and whether his instructions (or lack thereof) caused and/or contributed to Plaintiffs' injuries and, therefore, the branch of the motion by MTA and Metro-North seeking summary judgment dismissing the common-law negligence claims is denied.

Further, since Recchia did not enter into a written contract with any of the third-party plaintiffs, its motion for summary judgment is granted to the extent the third-party plaintiffs seek contractual indemnification against it.

Moreover, CRC establishes prima facie that it did not enter into a contract to indemnify or insure MTA, and MTA and Metro-North fail to raise an issue of fact in this regard. The lease for the hi-rail reflects that the hi-rail was leased to Henry Bros. rather than to CRC (Doc 64). The MTA-Henry Bros. contract (Doc 60), which provides, in relevant part, that "[MTA] is to be added to the insurance certificate as a Certificate Holder and as [an] additional[] insured **…** [and]

[Henry Bros.] is to provide a current insurance certificate with all MTA approved and contractually required covered amounts in that certificate" does not require CRC to indemnify or insure any of the third-party plaintiffs. Further, there is no indication that either the subcontract cited by MTA and Metro-North (Doc 62 [Article 5]) was in effect at the time of the accident or that there was mutual assent for it to be in effect (*Curreri v Heritage Prop. Inv. Tr., Inc.*, 48 AD3d 505, 506, 507 [2d Dept 2008]).

Similarly, Henry Bros.'s subcontract with CRC, wherein CRC agreed to "furnish all labor, material, equipment, services and perform … work[,]"and to be "bound by all applicable terms and conditions of the [MTA-Henry Bros. contract] … [CRC's] attention is specifically directed to those portions of [the MTA-Henry Bros. contract] referring to payments to laborers and workmen and its obligation to comply with prevailing wage regulations (if applicable) and applicable [L]abor [L]aws" (Doc 62) does not expressly state that CRC will indemnify, hold harmless, or procure insurance to benefit the third-party plaintiffs but only that it will "indemnify and hold harmless [Henry Bros.], its agents and employees" (*Campisi v. Gambar Food Corp.*, 130 A.D.3d 854, 13 N.Y.S.3d 567 (2d. Dept. 2015). The term "agent" is not defined in the contract and the language of the contract is not clear enough to enforce an obligation to indemnify the third-party plaintiffs (*see Tonking v Port Auth. of New York and New Jersey*, 2 AD3d 213, 216 [1st Dept 2003], *affd*, 3 NY3d 486 [2004]). Moreover, NYSCEF Documents 154 and 244, as cited by MTA and Metro-North, fail to raise triable issues of fact. Accordingly, the branch of the motion by Recchia and CRC to dismiss the contractual indemnification claims against them is granted.

Further, to the extent MTA and Metro-North argue that CRC is statutorily responsible under Labor Law §§ 240(1) and 241(6), this argument is moot since any claims and/or cross claims under these Labor Law sections have been dismissed pursuant to this decision.

The unopposed branch of the motion by MTA and Metro-North seeking to dismiss the claims against co-defendants Kratos and Diversified, arguing that said defendants had no involvement in the subject project at GCT and had no role in the incident, is granted and all claims against Kratos and Diversified are dismissed.

**C. Motion Sequence No. 010**

**1. The Parties' Contentions**

In Motion Sequence No. 010, Henry Bros. moves for summary judgment (1) dismissing the complaint in its entirety, (2) dismissing all cross claims against it, and (3) denying Plaintiffs' motion for summary judgment (Docs 112, 113).

Henry Bros. argues, inter alia, that Plaintiffs' Labor Law § 200 claims against it should be dismissed and Ms. Perrone's claims for loss of services and loss of consortium are derivative and should be dismissed.

TNT opposes the motion (Doc 185) arguing, inter alia, that Henry Bros. acted as a general contractor for the subject project and that, as such, it was liable under Labor Law sections 240(1) and 241(6) "regardless of [its] actual direction and supervision of Plaintiffs or [its] knowledge or notice of the manner in which Recchia was performing its work" (Doc 185). Plaintiffs also oppose Henry Bros.'s motion arguing, inter alia, that there are issues of material fact warranting the denial of the motion (Doc 206). Plaintiffs further argue that they should be

granted summary judgment under Labor Law § 241(6) and that their injuries were proximately caused by a violation of subdivision (e) of section 23-9.7.

In further support of its motion, Henry Bros. argues, inter alia, that Plaintiffs' Labor Law § 241(6) claim should be dismissed since they have not alleged a violation of any applicable section of the Industrial Code. Henry Bros. specifically argues that Industrial Code § 23-9.7(e), which Plaintiffs claim was violated, does not require workers to wear seat belts where, as here, workers are riding a work vehicle to their worksite, but that it merely requires a properly constructed seat or platform. Henry Bros. further argues Plaintiffs' work does not fall under Labor Law § 240(1) (Doc 238).

**2. The Relevant Law**

**i. Labor Law § 241(6)**

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.

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors " 'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross*, 81

NY2d at 501--502). Importantly, to sustain a Labor Law § 241(6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross*, 81 NY2d at 505). Such violation must also be a proximate cause of the plaintiff's injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

**ii. Common-Law Negligence and Labor Law § 200**

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005] [internal citations omitted]). 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.

There are two distinct standards applicable to Section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see e.g. Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

"'Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise

or control the performance of the work'" (*Soller v Dahan*, 173 AD3d 803, 805 [2d Dept 2019]. That is, "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"]).

However, where an injury stems from a dangerous condition inherent in the premises, an owner may be liable in common-law negligence and under Labor Law § 200 "'when the owner [or contractor] created the dangerous condition [causing an injury] or when the owner [or contractor] failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice'" (*Bradley v HWA 1290 III LLC*, 157 AD3d 627, 630 [1st Dept 2018], quoting *Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]).

**3. The Application of the Relevant Law**

Henry Bros. moves for summary judgment dismissing the Labor Law § 241(6) cause of action, arguing that the platform of a pickup truck is a properly constructed and installed platform within the meaning of the Industrial Code. Plaintiffs likewise seek summary judgment in their favor under Labor Law § 241(6), as predicated on an alleged violation of section 239.7(e) of the Industrial Code (12 NYCRR 23-9.7[e]), which reads as follows: "Riding. No person shall be suffered or permitted to ride on running boards, fenders or elsewhere on a truck or similar vehicle except where a properly constructed and installed seat or platform is provided." In *Pruszko*, where the plaintiff was "injured while riding on the platform of a pickup

truck … [w]hen … the truck came to a sudden stop, and [he] hit his left knee and fell to the bed of the truck[,]" the Appellate Division, Second Department reversed the IAS court's decision and held that there was no Industrial Code § 23-9.7(e) violation (*Pruszko v Pine Hollow Country Club, Inc.*, 149 AD3d 986, 987 [2d Dept 2017]). The Second Department reasoned as follows:

> "[T]he word 'platform' as used in subdivision (e) of section 23-9.7 must reasonably be read to include the platform of a pickup truck. While such a platform is normally intended for transporting cargo, the Vehicle and Traffic Law contemplates that it may also be used, without restriction, to carry people over distances of less than five miles (*see* Vehicle and Traffic Law § 1222). Thus, it is reasonable to interpret section 23-9.7 (e) as excluding from its scope an activity that is not prohibited by Vehicle and Traffic Law § 1222"

(*Pruszko v Pine Hollow Country Club, Inc.*, 149 AD3d 986, 988 [2d Dept 2017]).

Here, the accident happened less than a half hour after the vehicle left the GCT (Perrone's EBT at 20:16-21). Since the vehicle was traveling at three to five miles per hour when the incident occurred, it is evident that the accident took place less than five miles from the GCT (Hoffman's EBT at 72:23-25, 101:08-09). Applying the reasoning in *Pruszko* to the facts herein, Henry Bros. established its prima facie entitlement to summary judgment dismissing Plaintiffs' claim pursuant to Labor Law § 241(6) as predicated on section 23-9.7(e) of the Industrial Code. In opposition, Plaintiffs fail to raise a triable issue of fact (*see Zuckerman*, 49 NY2d at 562).

Accordingly, the branch of Henry Bros.'s motion (Seq. 010) seeking summary judgment under Labor Law § 241(6) is granted, and Plaintiffs' claims under Labor Law § 241(6) against all defendants and third-party defendants are dismissed, and Plaintiff's motion for summary judgment on liability pursuant to 241(6) is denied.

Nevertheless, the branch of the motion by Henry Bros. seeking the dismissal of Plaintiffs' Labor Law § 200 claims is denied as there are issues of fact as to whether Henry Bros., as the general contractor, with authority through its project manager to direct or supervise the performance of the work, provided a safe place to work in terms of the means and methods used.

Additionally, Plaintiffs' motion for summary judgment under Labor Law 200 as to the remaining defendants is denied. There are material issues of fact for a trial as to whether MTA and Metro-North, which had the authority, through their flagman, to direct or supervise the performance of the work, were negligent, and whether Henry Bros., MTA, and MetroNorth failed to remedy a dangerous or defective condition of which they had actual or constructive notice since Henry Bros's project manager testified that before the incident took place, he was aware of the possibility of the hi-rail derailment when going over a switch.

Further, Plaintiffs' motion for summary judgment is denied as against CRC and Recchia since Plaintiffs fail to establish that either CRC or Recchia was an owner or general contractor with authority to supervise or control the work, or created the dangerous condition or failed to remedy a dangerous or defective condition of which they had actual or constructive notice.

**D. Motion Sequence No. 009**

**1. The Parties' Contentions**

In Motion Sequence No. 009, TNT seeks leave to renew its motion for summary judgment and, upon such renewal, moves for an order granting it summary judgment dismissing Plaintiffs' complaint and all cross claims against it. Specifically, TNT argues that:

> The depositions of Henry [Bros.], MTA/Metro North and Recchia…revealed that all [hirail] vehicles provided by contractors are inspected by Metro North before such vehicles are permitted to travel on Metro North's tracks, that the [hi-rail] involved in this incident was inspected by Metro North after the accident and that Metro North's machinist found nothing in his inspection that would have caused or contributed to a derailment; that the accident reports completed by Henry [Bros.] attribute the derailment to the [hi-rail] passing over a rail switch and not to any mechanical defect in the [hi-rail], that all [hirails] operated by conductors should have a Metro North employee assigned to it, called a pilot who is responsible for the vehicle's safe operation, and that Metro North's safety rules prohibit passengers from riding on the outside of the vehicle. …

(Doc 82 at 18, 19).

TNT further moves for an order striking the MTA and Metro North's Answer "due to their repeated and continuing failure to comply with this [C]ourt's compliance conference orders" (Doc 106).

In opposition to TNT's motion (Seq No. 009), Plaintiffs argue that there is an issue of fact as to whether TNT inspected, maintained, and repaired the vehicle leased to Henry Bros. Plaintiffs "voluntarily withdr[e]w any Labor Law claims against TNT, to the extent they were asserted, as TNT is neither an owner, agent, or general contractor for this project" (Doc 197 at 2, n. 1).

MTA and Metro-North oppose TNT's motion (Seq No. 009) and cross-move for an order, inter alia, denying TNT's motion for summary judgment. MTA and Metro-North argue that "[t]he only reason the vehicle derailed was because of defective equipment that was supplied, maintained and repaired by TNT" (Doc 143). In support, they submit the deposition testimony of Caciopoli in which he referred to some potential problems with a lock pin and the engine of the vehicle (*id.* at 4, citing Ex Q).

MTA/Metro-North opposes TNT's motion (Doc 183). Henry Bros. also opposes TNT's motion, arguing that "[t]he pleadings and evidence elicited in discovery indicate that TNT may have been … negligent in [its] maintenance, and inspection of the hi-rail, and that it may have negligently provided an improper hi-rail vehicle with wheels that were too small, negligently installed the hi-rail equipment, and/or negligently instructed the MTA on how to operate the hirail" (Doc 215).

MTA and Metro North also cross-move for an order (1) denying CRC and Recchia's motion for summary judgment; (2) granting them summary judgment against CRC for "defense and indemnification," or in the alternative (3) declaring that they shall have judgment against CRC and Recchia for contribution (Docs 150, 151).

TNT opposes MTA and Metro-North's Cross-Motion as against it (Doc 183).

Plaintiff opposes TNT's motion (Seq. 009) arguing, inter alia, that there is an issue of fact as to whether TNT properly inspected, maintained, and repaired the hi-rail vehicle it leased to the general contractor, Henry Bros., on this project (Docs 197, 214, 215).

CRC and Recchia oppose MTA and Metro-North's cross-motion for summary judgment against them, arguing that MTA and Metro-North failed to meet their prima facie burden and that their motion is "based on expired contracts for unrelated vehicles, [a] self-serving rendition of events not based on the deposition testimony or documentary evidence, and is riddled with questions of fact" (Doc 224).

In further support of its motion, TNT argues that "TNT has eliminated all questions of fact as to whether it improperly maintained or repaired the [hi-rail] involved in the accident"

(Doc 230).

**2. The Relevant Law & Its Application**

The Graves Amendment, 49 U.S.C. § 30106, exempts an owner of a motor vehicle who leases or rents it from claims for vicarious liability for harm to persons or property that arise from the operation of that vehicle. However, "the statute does not absolve leasing companies of their own negligence" (*Collazo v MTA-New York City Tr.*, 74 AD3d 642, 643 [1st Dept 2010]).

Thus, this Court grants TNT's motion to renew based on testimony that had not been previously submitted[4] and, upon renewal, denies[5] the branch of its motion for summary judgment seeking to dismiss common law negligence causes of action either in the way of cross claims or direct claims by Plaintiffs; given that there are material issues of fact regarding whether TNT was negligent in its inspection and maintenance of the hi-rail, in its installation the hi-rail equipment, in providing a hi-rail with wheels that were too small, and/or in negligently instructing the MTA regarding the proper operation of the hi-rail. Each of these are material issues of fact concerning TNT's negligence in causing or contributing to the accident.

[4] In or around April 2016, TNT moved for summary judgment. Having reviewed the affidavit of TNT's controller, Liam Gibbons, this Court (Mills, J.) denied said motion, reasoning as follows:

> "Certainly, that [the issue of TNT's negligence] is ultimately the case in this action; however at this juncture, it is TNT's burden to prove that it was free of negligence if it wishes to invoke the protection of the Graves Amendment. TNT has failed to do so. ...Whether or not it did ["negligently maintain" the vehicle] is an issue to be resolved later by the trier of fact."

(Doc 147 at 5). Justice Mills also held that TNT's motion was premature partly because Defendants' depositions had not yet taken place (*id.*).

[5] Plaintiffs voluntarily withdraw any Labor Law claims against TNT.

The parties' remaining contentions are either without merit or need not be addressed in light of the conclusions reached above.

## IV. CONCLUSION

Accordingly, it is hereby:

ORDERED that the motion (Seq. 008) by Plaintiffs seeking summary judgment in their favor under Labor Law §§ 200, 240(1), and 241(6) is denied in its entirety; and it is further,

ORDERED that the branch of the motion (Seq. 009) by TNT seeking leave to renew its motion for summary judgment is granted and, upon renewal, the application for summary judgment is denied; and it is further,

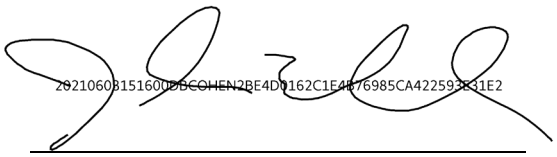
ORDERED that the branches of the motion (Seq. 010) by Henry Bros. seeking summary judgment dismissing Plaintiffs' claims under Labor Law 240(1) and 241(6) are granted and the motion (Seq. 010) is otherwise denied; and it is further,

ORDERED that the action is dismissed against Kratos Defense & Security Solutions, Inc. and Diversified Security Solutions, Inc.; and it is further,

ORDERED that counsel for the movants shall serve a copy of this order, with notice of entry, upon the Clerk of the Court (60 Centre Street, Room 14B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the dismissals and enter judgment accordingly; and it is further,

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on *Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-

Filing" page on the court's website at the address www.nycourts.gov/supctmanh).




06/02/2021

DATE

CHECK ONE: CASE DISPOSED [ ] NON-FINAL DISPOSITION [X]
GRANTED DENIED GRANTED IN PART OTHER
APPLICATION: SETTLE ORDER [ ] [X] SUBMIT ORDER

CHECK IF APPROPRIATE: [ ] INCLUDES TRANSFER/REASSIGN [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE