SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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INDEX NO. 158469/2018

GRACE GRABOWSKI,

Plaintiff,

- v -

PPF OFF TWO PARK AVENUE OWNER, LLC, CUSHMAN & WAKEFIELD, INC., PRATT CONSTRUCTION & RENOVATION INC., GROUP PMX, LLC, EXCEL INTERIOR CONSTRUCTION CORP., ALLSTATE ELECTRIC CORP., NY ELECTRIC MAINTENANCE & DATA CORP, and GUNZER, INC.,

Defendants.

MOTION DATE 02/19/2021, 03/22/2021, 03/30/2021, 03/31/2021, 03/31/2021, 03/31/2021, 03/31/2021, 05/24/2021

MOTION SEQ. NO. 003 004 005 006 007 008 009 010

DECISION + ORDER ON MOTION

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PPF OFF TWO PARK AVENUE OWNER, LLC, GROUP PMX, LLC, CUSHMAN & WAKEFIELD, INC., PRATT CONSTRUCTION & RENOVATION INC., EXCEL INTERIOR CONSTRUCTION CORP., ALLSTATE ELECTRIC CORP., NY ELECTRIC MAINTENANCE & DATA CORP, and GUNZER, INC.,

Third-Party Plaintiffs,

-against-

CAPITAL RESTORATION & CONSULTING CORP.,

Third-Party Defendant.

Third-Party
Index No. 595680/2019

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ALLSTATE ELECTRIC CORP.,

Second Third-Party Plaintiff,

-against-

CAPITAL RESTORATION & CONSULTING CORP.,

Second Third-Party Defendant.

Second Third-Party
Index No. 596068/2019

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NY ELECTRIC MAINTENANCE & DATA CORP.,

Third Third-Party

Index No. 595203/2020

Third Third-Party Plaintiff,

-against-

CAPITAL RESTORATION & CONSULTING CORP., PRATT CONSTRUCTION INC., and PRATT CONSTRUCTION & RESTORATION INC.,

Third Third-Party Defendants.
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The following e-filed documents, listed by NYSCEF document number (Motion 003) 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 368, 369, 538, 539, 540, 541, 542, 555, 556, 598, 605, 619, 620, 621, and 622

were read on this motion for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 543, 544, 545, 546, 559, 560, 561, 581, 582, 583, 584, 585, 586, 599, 606, 623, 624, 627, 628, and 641

were read on this motion for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 519, 520, 521, 522, 523, 524, 525, 554, 557, 558, 578, 579, 580, 587, 600, 607, 625, 631, 632, 633, 634, and 635

were read on this motion for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 601, and 608

were read on this motion for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 514, 515, 516, 526, 527, 528, 529, 530, 531, 551, 552, 553, 562, 563, 564, 565, 566, 567, 576, 577, 602, 609, 626, 636, 637, 638, 639, and 640

were read on this motion for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 603, and 610

were read on this motion for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 517, 518, 532, 533, 534, 535, 536, 537, 547, 548, 549, 550, 568, 569, 570, 571, 572, 573, 574, 575, 604, 611, 629, and 630

were read on this motion for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 612, 613, 614, 615, 616, 617, 618, and 642

were read on this motion to STRIKE PLEADINGS.

LOUIS L. NOCK, J.

Upon the foregoing documents, and after due deliberation hereon, it is ordered that the referenced motions are consolidated herein for disposition and determined as follows

FACTUAL BACKGROUND AND PROCEDURAL POSTURE

The Complaint:

This personal injury action was commenced by the widow, and administratrix of the Estate, of Andrzej B. Osuch, decedent, arising out of his fatal electrocution while working at a construction site at 2 Park Avenue in Manhattan on July 18, 2017. Mr. Osuch was 61 years old at that time. The complaint alleges that Mr. Osuch was an employee of third-party defendant Capital Restoration & Consulting Corp. ("Capital") which, according to papers submitted by Capital, was contracted solely to perform waterproofing work on the roof of the subject building, and having nothing whatsoever to do with electrical work.

Plaintiff has sued the following companies which were either the owner, the property manager, the general contractor for the project, or subcontractors working on the project:

- PPF Off Two Park Avenue Owner LLC ("PPF"), as owner of the subject building;
- Cushman & Wakefield, Inc. ("Cushman"), as managing agent for the subject building;
- Pratt Construction & Renovation, Inc. ("Pratt"), as a contractor on the project;
- Group PMX, LLC ("Group"), as a contractor on the project;
- Excel Interior Construction Corp. ("Excel"), as the general contractor on the project;
- Allstate Electric Corp. ("Allstate"), as an electrical contractor on the project;
- NY Electric Maintenance & Data Corp. ("NY Electric"), as an electrical contractor on the project; and
- R. Gunzer, Inc. ("Gunzer"), as an electrical contractor on the project.

The complaint asserts causes of action against all defendants under Labor Law sections 200, 240, 241, and 241 (6) (first cause of action); common law negligence and gross negligence (second

cause of action); breach of express and implied warranty (third cause of action); and loss of consortium (fourth cause of action). Substantial discovery practice has gone forward in this matter.

Answers and Cross-Claims of the Defendants:

NY Electric answered the complaint and asserted cross-claims against all co-defendants for contribution and common law and contractual indemnification and for failure to procure insurance (NYSCEF Doc. No. 34); Gunzer answered the complaint and asserted cross-claims against all co-defendants for contribution and common law and contractual indemnification (NYSCEF Doc. No. 36); Allstate answered the complaint and asserted cross-claims against all co-defendants for contribution and common law and contractual indemnification (NYSCEF Doc. No. 41); Group answered the complaint and asserted cross-claims against all co-defendants for contribution and common law and contractual indemnification (NYSCEF Doc. No. 45); PPF answered the complaint and asserted cross-claims against all co-defendants for contribution and common law and contractual indemnification and for failure to procure insurance (NYSCEF Doc. No. 68); Pratt answered the complaint and asserted cross-claims against all co-defendants for contribution and common law and contractual indemnification (NYSCEF Doc. No. 76); and Excel answered the complaint and asserted cross-claims against all co-defendants for contribution and common law and contractual indemnification (NYSCEF Doc. No. 80).

The Third-Party Action:

By third-party complaint (NYSCEF Doc. No. 225), the defendants sued Capital for common law indemnification and contribution in respect of the causes of action alleged in the complaint. Capital answered the third-party complaint (NYSCEF Doc. No. 182).

The Second Third-Party Action:

By second third-party complaint (NYSCEF Doc. No. 187), Allstate sued Capital for common law indemnification and contribution in respect of the causes of action alleged in the complaint. Capital answered the second third-party complaint (NYSCEF Doc. No. 231).

The Third Third-Party Action:

By third third-party complaint (NYSCEF Doc. No. 491), NY Electric sued Capital, CR Consulting & Management Corp. ("CR"), Pratt Construction Inc. ("Pratt Construction"), and Pratt for common law indemnification and contribution in respect of the causes of action alleged in the complaint. The third third-party defendants answered the third third-party complaint and asserted cross-claims for common law indemnification and contribution in respect of the causes of action alleged in the complaint.

RELEVANT FACTS ADDUCED DURING DEPOSITION PRACTICE

Neil Vanderteems was employed by Cushman, the management company for the subject building. He had been working at the subject building since 2005 and was chief engineer since 2009, and remained in charge of running the air conditioning, heating, and all of the systems in the subject building. Mr. Vanderteems was present on the day of the accident. The construction project took place on the roof of the subject building, concerning adding an elevator bulk house. The general contractor for this project was Excel. Pratt had brickwork personnel working on the bulk house as well as roofers; but none of them performed any electrical work. There were three electrical contractors for the five phases of the project – NY Electric, Gunzer, and Allstate. As part of Phase 3 – ventilation – bathroom exhaust fans were being replaced. The "north fan" had to be relocated. New fans had been installed, and the new south and old north exhaust fans were running at the time of the accident. The old north exhaust fan electrical conduit had to be moved

because of the creation of the new bulk house. Several electrical cut-off switches existed to terminate the electric charge going to the roof powering the old north exhaust fan at the time of the accident.

Mr. Vanderteems, his supervisor – Jose Toro, NY Electric, and Excel were aware that the conduit energizing the old north exhaust fan had to be relocated. Photographs taken by Mr. Vanderteems before the accident occurred depicted a power box and conduits being moved back and forth with broken and taped wires and a screw visible at times. Immediately after the accident, there was black electrical tape on either end of the broken conduit. Mr. Vanderteems observed the conduit on the roof before the accident more than once a week and knew that if the wires were not enclosed, it was dangerous. Mr. Vanderteems made a complaint before the accident that the power box was not secure and was hanging from different locations. Nothing was done to make the power box more secure before the accident. The wires were exposed and the conduit was not intact when Mr. Vanderteems arrived immediately after the accident. While Allstate, NY Electric, and Gunzer were each electrical contractors responsible for various phases of the job, none of them admitted having moved the conduit for the old north exhaust fan.

When Mr. Vanderteems arrived at the roof in response to an emergency call regarding the electrocution, Mr. Osuch was surrounded by Pratt's foreman – Jacek Dziduch, some Pratt employees, and the Excel superintendent – Peter Bryja. Mr. Dziduch said that Mr. Osuch had been found beneath the old north exhaust fan, and when he and the Pratt workers pulled him out, they felt the tingle of electricity, after which, significantly, Mr. Vanderteems shut off all the electricity so the power could not be turned back on. Either immediately after the accident or the next morning, Mr. Vanderteems inspected the area near the old north exhaust fan and took thirteen photographs which showed the energizing broken electrical conduit housing with fraying

and exposed electrical wires. Mr. Vanderteems did not know of Pratt or Capital having responsibility for relocating any electrical components or rerouting any electrical power.

THE MOTION PRACTICE

Motion Sequence No. 003:

Capital moves for summary judgment dismissing all claims and cross-claims asserted against it for common law indemnification and contribution in respect of the causes of action alleged in the complaint, noting, as a primary observation, that "Capital Was Never Delegated Authority Over Electrical Work" (NYSCEF Doc. No. 365 [Memorandum of Law] at 3 of 19). There is no dispute in this action that Mr. Osuch was an employee of Capital, and that Capital's sole responsibility vis-à-vis this construction project – via a contract it had with Pratt – was limited to waterproofing work to be performed on the roof of the subject building, having nothing whatsoever to do with electrical work. There is also no dispute in this action that the cause of Mr. Osuch's death was electrocution.

Capital's counsel cites the court to the case of *Russin v Louis N. Picciano & Son* (54 NY2d 311 [1981]), in which the Court of Appeals laid down the following limitations as concerns causes of action asserted under the Labor Law:

> Section 200 of the Labor Law merely codified the common-law duty imposed upon an owner or general contractor to provide construction site workmen with a safe place to work. An implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition. . . . Without this authority to control the activity producing the injury, defendants could not be liable to plaintiff under section 200 for failure to provide a safe place to work.
>
> Similarly, sections 240 and 241 impose no liability on defendants for plaintiff's injury. Although the statutes appear to impose liability unequivocally on "[a]ll contractors and owners *and their agents*" (Labor Law, § 240, subd 1; § 241 [emphasis added]), this language must be interpreted in light of the historical development of these provisions.

> . . . 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. To hold otherwise and impose a nondelegable duty upon each contractor for all injuries occurring on a job site and thereby make each contractor an insurer for all workers regardless of the ability to direct, supervise and control those workers would lead to improbable and unjust results and would directly contravene the express legislative history accompanying the 1969 amendments to these provisions.
>
> **Our interpretation of the statutory "agent" language appropriately limits the liability of a contractor as agent for a general contractor or owner for job site injuries to those areas and activities within the scope of the work delegated or, in other words, to the particular agency created.**

(*Id.*, at 316-18 [boldface and underscore added] [citations omitted].)

With that legal backdrop, Capital's counsel argues that the mere fact that Mr. Osuch was employed by Capital does not render Capital liable in any way for indemnification or contribution in connection with Mr. Osuch's electrocution at the job site, seeing as Capital – a waterproofing contractor – had no supervisory control over the electrical condition that was the cause of the electrocution (*see, Jehle v Adams Hotel Assocs.*, 264 AD2d 354 [1st Dept 1999] [plaintiff's employer was not responsible for contribution or indemnification when it had no control over the condition that caused the injury]).

Viewed in a vacuum, Capital's counsel's reference to the foregoing principles seems sound. The problem here, though, impacting summary judgment analysis, is the factual issue whether the area where the electrocution took place might, in fact, have been an area regarding which Capital ought to have been responsible, even though its responsibilities did not relate to electrical work. It is undisputed that the accident occurred on the roof, and that Mr. Osuch's job entailed waterproofing work on that roof. At the very least, issues of fact exist as to whether Capital failed to properly supervise Mr. Osuch and ensure that he had a safe working

environment at or proximate to the waterproofing site on the roof. As discovery had borne out during this case, Capital's supervisory employee at the project – Jorge Molina – sent Mr. Osuch to work at the project pursuant to a contract that Capital had entered into with Pratt. Aside from one site visit made before the agreement was even executed, Mr. Molina had no knowledge regarding working conditions on the roof and made no efforts to ascertain the existence of any possible hazards, such as the one that actually caused Mr. Osuch's death. Mr. Molina had no communications with anyone from Pratt or with Mr. Osuch himself during the time that Mr. Osuch worked on the job.

Due to the existence of such issues of fact concerning the extent to which Mr. Molina or any other supervisory Capital employee was responsible for examining the rooftop for hazards, this court cannot grant summary dismissal of any claims or cross-claims against Capital merely on the basis of the assertion that it was not Capital's job to perform electrical work *per se*. Even though Capital, through Pratt, was hired to do waterproofing work; the proximate area for that work – i.e., the roof – contained an electrical hazard as to which a factfinder might reasonably find was Capital's responsibility to anticipate, investigate, and take measures to abate, for the sake of its employee – Mr. Osuch – or to prevent Mr. Osuch from going onto the roof absent such abatement.

Motion Sequence No. 004:

NY Electric moves for summary judgment dismissing all claims and cross-claims asserted against it for common law indemnification and contribution in respect of the causes of action alleged in the complaint.[1] NY Electric argues that it is entitled to dismissal of the Labor

[1] NY Electric alternatively asks for a sanction against Cushman for spoliation. This request is similar to plaintiff's motion to strike the answers of PPF and Cushman (motion seq. no. 010). For the reasons stated at the end of this decision in disposition of that motion, the alternative request is denied.

Law claims because it was neither the owner of the subject building or the general contractor for the project, pointing to Excel as the general contractor. Although NY Electric is, undoubtedly, an electrical contractor that was hired in connection with the project, it makes the remarkable statement that it "was never delegated any authority or control any work that allegedly gave rise to any claimed dangerous or hazardous condition" (NYSCEF Doc. No. 372 [Affidavit in Support] ¶ 45) – the condition here being, of course, faulty and dangerous electrical conditions on the rooftop where Mr. Osuch worked and with which he came into contact, causing his death by electrocution.

There are, at a minimum, questions of fact precluding summary judgment. Although NY Electric contends that relocation of the injury-producing conduit was outside of its scope of work, the record contains ample evidence that supports a reasonable inference that if the conduit was indeed relocated, it was done by NY Electric, as the relocation was related to the bulk house and NY Electric was the subcontractor responsible for electrical work pertaining to the bulk house, and there are documents and testimony in the record identifying NY Electric as the contractor who performed this work (*see*, NYSCEF Doc. No. 391 [Subcontract between Excel, as Contractor, with NY Electric, as Subcontractor]).

> To establish a prima facie case of negligence based wholly on circumstantial evidence, "[i]t is enough that [plaintiff] shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred." The law does not require that plaintiff's proof "positively exclude every other possible cause" of the accident but defendant's negligence. Rather, her proof must render those other causes sufficiently "remote" or "technical" to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence.

(*Schneider v Kings Highway Hosp. Ctr., Inc.*, 67 NY2d 743, 744 [1986] [citations omitted]; *see also, Carboy v Cauldwell-Wingate Co., Inc.*, 43 AD3d 261 [1st Dept 2007] [reasonable

inferences derived from the record regarding the role played by a defendant in creating a dangerous condition precludes summary judgment].)

NY Electric was an electrical subcontractor performing electrical work on the roof from March 2017 to July 2017 and an electrical subcontractor under Excel (*see*, Bryja Transcript [NYSCEF Doc. No. 475] at 74; Rojas Transcript [NYSCEF Doc. No. 443] at 70-71, 145, 173). Excel's superintendent testified that any electrical work performed for Excel, would have been performed by NY Electric (*see*, Bryja Transcript [NYSCEF Doc. No. 476] at 415, 416, 438, 439; *see also*, Bryja Transcript [NYSCEF Doc. No. 478] at 929, 931). Cushman's chief engineer testified that he knows NY Electric relocated the conduit because he personally coordinated with NY Electric and Excel to shut off the power to the conduit during the relocation (*see*, Vanderteems Transcript [NYSCEF Doc. No. 470] at 2, 61, 68, 69, 72, 73, 75). Moreover, in its moving papers, NY Electric has acknowledged that there is, at a minimum, a possibility that NY Electric relocated the conduit (based on progress notes and meeting minutes) that it "temped out power to an exhibit exhaust fan" in January 2017 (*see*, Rojas Transcript [NYSCEF Doc. No. 443] at 153, 155, 159).

NY Electric was an electrical subcontractor performing electrical work on the roof from March 2017 to July 2017. Cushman's chief engineer testified that he knew that NY Electric relocated the conduit because he personally coordinated with NY Electric and Excel to shut off the power to the conduit during the relocation. Because there are indications in the record that any relocation of the conduit would have been performed by NY Electric, NY Electric cannot make a prima facie showing that it is free from negligence and therefore, its motion for summary judgment must be denied as a matter of law.

Motion Sequence No. 005:

Excel – the general contractor for the project – moves for summary judgment dismissing all claims and cross-claims asserted against it for common law indemnification and contribution in respect of the causes of action alleged in the complaint. Plaintiff contends that the conduit constituted a hazardous condition at a workplace. The claims against Excel are premised on Excel's status as a general contractor of the bulkhead construction project. Excel did not itself perform any actual physical labor in connection with construction of the elevator bulkhead (Statement of Material Facts [NYSCEF Doc. No. 401] ¶ 8). The electrical work, specifically, was subcontracted to NY Electric, pursuant to a valid and enforceable written agreement, containing an express indemnity provision (*id.*, ¶ 9). (Other electrical contractors were also involved, such as Allstate and Gunzer.)

Excel argues that Mr. Osuch was not exposed to any elevation differential and, therefore, the accident was outside the scope of Labor Law § 240. Excel further argues that there is no basis for a liability finding under Labor Law §§ 241 and 241 (6) alleged as a specific Industrial Code violation which proximately caused the decedent's death. Excel also argues that there is no factual basis to support plaintiff's breach of express and implied warranties claim, since the instrumentality involved in the incident – an electrical conduit – was not subject to any warranties, nor are any of the defendants manufacturers or distributors of the conduit.

It is settled Law that Labor Law §241 (6) places upon owners and general contractors the non-delegable duty of providing reasonable and adequate protection and safety to persons working in construction, excavation or demolition, irrespective of their control or supervision of the work site (*Allen v Cloutier Construction Corp.*, 44 NY2d 290, *rearg denied* 45 NY2d 776 [1978]); *Celestine v City of N.Y.*, 86 AD2d 592 [2d Dept 1982], *affd* 59 NY2d 938 [1983]; *Rapp*

v Zandri Construction Corp., 165 AD2d 639 [3d Dept 1991]; *Schlueter v Health Care Plan, Inc.*, 168 AD2d 985 (4th Dept 1990]). Here, plaintiff has asserted that Excel violated at least one provision of the New York State Industrial Code, which would, at a bare minimum, warrant a denial of summary judgment regarding plaintiff's Labor Law §241 (6) cause of action. The New York State Industrial Code includes the following five relevant sections: (i) Section 23-1.13, governing Electrical Hazards; (ii) Section 23-1.31, requiring Approval of Materials and Devices; (iii) Section 23-1.32, regarding Notice, Warning, and Avoidance of Imminent Danger; (iv) Section 23-1.33, requiring Protection of Persons; and (v) Section 23-13.2, regarding Requirements and Precautions. The possibility of even one Industrial Code violation would preclude summary judgment dismissing the Labor Law § 241 (6) claim against Excel (*see, Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1 [1st Dept 2011]).

Mr. Vanderteems testified that the electrical apparati on the roof of the building where Mr. Osuch was working were gravely defective, and that the conduit should have been – but was not – solidly mounted with a tightly secured seal so as to prevent vibration so that it would not come apart and give rise to a hazard of electrocution (*see*, NYSCEF Doc. Nos. 415, 416).

In addition to the foregoing New York State Industrial Code sections, the New York City Department of Buildings Regulations require the following:

3301.2 Safety measures and standards. Contractors, construction managers, and subcontractors engaged construction or demolition operations shall institute and maintain all safety measures required by this chapter and provide all equipment or temporary construction necessary to safeguard the public and property affected by such contractor's operations.

3301.3 Site safety managers, coordinators and superintendent of construction. A site safety manager or site safety coordinator must be designated and present at the construction or demolition of a major building in accordance with Section 3310. A superintendent of construction is required for the construction or demolition of such other buildings as identified in Section 3301.

No evidence exists in the record of this case to find that any such safety measures were in place at the work site until after the accident occurred. Moreover, Jacek Dziduch – Pratt's foreman – in answer to the question whether Excel's superintendent, Peter Bryja, told him "that the Pratt workers should not work in any particular areas of the roof," responded "No. I don't remember anything like that." (NYSCEF Doc. No. 420 at 119.) Similarly, Mr. Vanderteems testified that there were no restricted areas on the roof and that no area on the roof was cordoned off with safety tape (*see*, NYSCEF Doc. Nos. 415 at 198, 416 at 216).

It is simply impossible, therefore, to grant summary judgment of dismissal in respect of the claims against Excel, except for the claim asserted under Labor Law § 240, which governs injuries caused by falls from heights. There is no evidence that such conditions are relevant to Mr. Osuch's electrocution. Moreover, no basis for a claim sounding in breach of warranty exists here, where Excel was not a distributor or manufacturer of the conduit.

Excel also moves for leave to serve cross-claims against Pratt. Insofar as Excel seeks an order granting it summary judgment on its proposed cross-claims submitted to the court on this motion practice, which the court accepts as its cross-claims in this action, such application is denied at this time in view of issues of fact related to Excel's own negligence, considering the poor condition of the conduit observed by Mr. Vanderteems.

Motion Sequence No. 006:

Allstate, one of the electrical contractors on the job, moves for summary judgment dismissing plaintiff's claims. Allstate asserts that, as a mere subcontractor, is not a proper Labor Law defendant as it was not an owner or general contractor, nor did it have any authority to supervise, direct or control Mr. Osuch's work. Allstate asserts that it owed no duty of care to Mr. Osuch and thus, cannot be held to be liable in negligence. Allstate asserts that the accident

did not arise out of any work performed by it. Rather, Allstate asserts that its limited scope of work in the entire project included the installation of transformers in the basement of the building and running electricity up to the 28th floor of the building (*see*, Vanderteems Transcript [NYSCEF Doc. No. 496] at 25-26). Prior to the accident, Allstate installed new 480-volt power to the 28th Floor (*id.*, at 49). This work was part of Phase 2 of the project. Mr. Vanderteems explicitly testified as follows:

> Q Who was in charge of or what company was performing this work on the bathroom vents and the exhaust fans for the bathrooms?
>
> A The 480-volt power coming up was Allstate. That was Allstate's scope of work. The work on the roof for the bulk house was New York Electrical's work.
>
> * * *
>
> Q But at the actual time of this accident, you're saying the 480 line stopped?
>
> A On 28.
>
> Q Two floors below?
>
> A Yes, sir.

(*Id.*, at 49-50.)

Allstate had no involvement in phase 3 of the project. It was not responsible for de-energizing the old North fan (*see*, NYSCEF Doc. No. 496 at 66, 152). Rather, it was within NY Electric's scope of work to de-energize the old North fan (*see, id.*, at 66). Mr. Vanderteems specifically testified that had this accident not occurred, the old North fan would have been removed under Excel's contract, which was Phase 3 and beyond (*see*, Vanderteems Transcript [NYSCEF Doc. No. 497] at 135). Allstate had nothing at all to do with the North fan work prior to the accident. As Mr. Vanderteems testified:

> Q. You're familiar with Allstate Electric, correct?

A. Yes.

Q. When was the last time that Allstate Electric was at this job site prior to the accident day?

A. I am not exactly sure, days prior, not that day.

Q. They were not at all involved in the phase three work, correct?

A. No, not at all.

Q. They were not at all involved in the temporary relocation of the conduit and box that has been shown in these photographs, correct?

A. Correct.

Q. They were not at all involved in turning off the power for the old fan, correct?

A. Correct.

Q. They were not at all involved in any of the work that was with regard to the old fan in place as of the day of the accident, correct?

A. Correct.

(*Id.*, at 137-38.)

If a subcontractor, such as Allstate, has no supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability upon that party under the Labor Law (*see, Blake v Neighborhood Housing Servs.*, l NY3d 280 [2003]; *Martinez v 342 Property LLC*, 89 AD3d 468 [1st Dept 2011]). Based on the evidence adduced in this case, this court can find no reasonable possibility that Allstate was involved in Mr. Osuch's phase of work operations, or in the particular electrical apparati relevant to Mr. Osuch's rooftop activities, given the fact that Allstate's electrical work stopped two floors below the rooftop where the accident took place. Accordingly, the motion by Allstate to dismiss all claims against should be, and is, granted.

Motion Sequence No. 007:

PPF – the owner of the subject building – and its managing agent, Cushman, move for summary judgment dismissing plaintiff's claims. PPF and Cushman are statutory Labor Law defendants and, therefore, vulnerable to responsibility for the injuries causing Mr. Osuch's death by electrocution.

As discussed above in connection with General Contractor Excel's motion, it is settled law that Labor Law §241(6) places upon owners and general contractors the non-delegable duty of providing reasonable and adequate protection and safety to persons working in construction, excavation or demolition, irrespective of their control or supervision of the work site (*Allen v Cloutier Construction Corp.*, *supra*; *Celestine v City of N.Y.*, *supra*; *Rapp v Zandri Construction Corp.*, *supra*; *Schlueter v Health Care Plan, Inc.*, *supra*). Here, plaintiff has asserted that PPF and its managing agent, Cushman, violated at least one provision of the New York State Industrial Code, which would, at a bare minimum, warrant a denial of summary judgment regarding plaintiff's Labor Law §241 (6) cause of action. The New York State Industrial Code includes the following five relevant sections: (i) Section 23-1.13, governing Electrical Hazards; (ii) Section 23-1.31, requiring Approval of Materials and Devices; (iii) Section 23-1.32, regarding Notice, Warning, and Avoidance of Imminent Danger; (iv) Section 23-1.33, requiring Protection of Persons; and (v) Section 23-13.2, regarding Requirements and Precautions. The possibility of even one Industrial Code violation would preclude summary judgment dismissing the Labor Law § 241 (6) claim against PPF and Cushman (*see, Auriemma v Biltmore Theatre, LLC*, *supra*).

Mr. Vanderteems testified that the electrical apparati on the roof of the building where Mr. Osuch was working were gravely defective, and that the conduit should have been – but was

not – solidly mounted with a tightly secured seal so as to prevent vibration so that it would not come apart and give rise to a hazard of electrocution (*see*, NYSCEF Doc. Nos. 415, 416).

In addition to the foregoing New York State Industrial Code sections, the New York City Department of Buildings Regulations require the following:

3301.2 Safety measures and standards. Contractors, construction managers, and subcontractors engaged construction or demolition operations shall institute and maintain all safety measures required by this chapter and provide all equipment or temporary construction necessary to safeguard the public and property affected by such contractor's operations.

3301.3 Site safety managers, coordinators and superintendent of construction. A site safety manager or site safety coordinator must be designated and present at the construction or demolition of a major building in accordance with Section 3310. A superintendent of construction is required for the construction or demolition of such other buildings as identified in Section 3301.

No evidence exists in the record of this case to find that any such safety measures were in place at the work site until after the accident occurred. Mr. Vanderteems himself – Cushman's employee – testified that there were no restricted areas on the roof and that no area on the roof was cordoned off with safety tape (*see*, NYSCEF Doc. Nos. 415 at 198, 416 at 216).

It is simply impossible, therefore, to grant summary judgment of dismissal in respect of the claims against PPF and Cushman.

PPF and Cushman have requested summary judgment on their claims for contractual indemnity. However, issues of fact exist as to their own negligence, precluding such a grant of summary judgment (*see, e.g., Mannino v J.A. Home Construction Group, LLC*, 16 AD3d 235, 236 [1st Dept 2005] [even where indemnity provision contemplates partial indemnity, motion for summary judgment should be denied "in light of outstanding issues of whether [indemnitee] was actively negligent and contributed to plaintiff's accident"]). Mr. Vanderteems testified that he visited the roof on a daily basis in the several weeks preceding the accident, including on the morning thereof, to observe the work and to coordinate as necessary. As part of this work, the

subject conduit and panel box were repeatedly moved. To the extent any of this work may be found to have caused, or constituted, a dangerous condition which resulted in the accident, Cushman and PPF were on notice of it yet did not abate the hazard. This would constitute the requisite notice of a dangerous condition for liability under Labor Law §200 and common law negligence. Thus, summary judgment on the cross-claims cannot be granted at this time.

Motion Sequence No. 008:

Gunzer moves to dismiss plaintiff's claims. Gunzer is an electrical contracting company. Gunzer had no contract with Excel for any work performed on the roof. It is further undisputed that Gunzer performed no work on the roof related to the subject project up to and including the date of Mr. Osuch's death. Gunzer was not involved in any work on the bulkhead up to and including the date of the accident, nor was Gunzer involved in any way with the subject conduit in that same time frame.

Gunzer was not a contractor on the subject project up to and including the date of the subject incident and played no part in the installation or repositioning of the subject conduit, nor any work on the subject bulkhead. Gunzer is entitled to summary judgment and the dismissal of the Labor Law causes of action as it was neither the owner of the property nor the general contractor for the project. Additionally, Gunzer was not an agent under the Labor Law as it did not have any authority over Mr. Osuch's work activities, nor did it supervise, direct, or control such activities and was never delegated authority over any work that caused or contributed to the accident. As Gunzer played no role in the work on the roof, up to and including the date of accident, plaintiff cannot establish any negligence on the part of Gunzer that caused or created any condition that led to the accident. Any work Gunzer performed at the subject building prior to the accident was limited to voltage risers solely situated within the 29th floor of the building –

not anywhere on the roof (*see*, NYSCEF Doc. No. 443 at 192). Accordingly, the motion by Gunzer for summary judgment dismissing the claims against it should be, and is, granted.

Motion Sequence No. 009:

Pratt moves for summary judgment dismissing plaintiff's claims. Pratt's counsel asserts that summary judgment is appropriate since, as he puts it, "Osuch was not performing his work on the roof as part of the Pratt crew" (NYSCEF Doc. No. 452 ¶ 20). But there are several contrary indications from the record.

On the day of the accident, Jacek Dziduch served as the foreman for Pratt at the building and he supervised the Pratt workers (*see*, NYSCEF Doc. No. 453 [Transcript] at 15, 23, 28, 53-54). Mr. Dziduch acknowledged that Pratt acted as a subcontractor to Excel on the roof project taking place at the building (*see, id.*, 26-27, 325-26). Mr. Dziduch testified that part of Pratt's work was to perform waterproofing on the roof, as well as masonry and brickwork (*see, id.*, at 39-40). Mr. Dziduch stated that Mr. Osuch was hired by Pratt because Pratt needed extra help (*see, id.*, at 34). Thus, Pratt entered into a subcontract with Capital, Mr. Osuch's employer, to secure such help (*see*, NYSCEF Doc. No. 569). Mr. Dziduch testified that both he and Mr. Bryja of Excel directed the work of Mr. Osuch (*see, id.*, at 54). Moreover, Mr. Dziduch acknowledged that Mr. Osuch's said work took place in the vicinity of the bulkhead being constructed on the roof (*see, id.*, at 116; NYSCEF Doc. No. 454 at 229-31).

In light of such evidence, bearing on the question of Pratt's control and supervision of the location of the accident and the work being performed by Mr. Osuch at that location, it is simply impossible to grant Pratt summary judgment dismissing the claims against it (*e.g., Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 ["To grant summary judgment it must clearly appear that no material and triable issue of fact is presented"], *rearg denied* 3 NY2d 941 [1957]).

Pratt's request for summary judgment on its cross-claims for contractual indemnification is denied at present in light of the issues of fact regarding its own possible negligence, considering that Mr. Dziduch was in direct supervisory contact with Mr. Osuch's work.

Motion Sequence No. 010:

Plaintiff moves to strike the answers of defendants PPF and Cushman on the ground of "spoliation of critical evidence, the electrical components that electrocuted plaintiff's decedent" (Notice of Motion [NYSCEF Doc. No. 588] at 1). No evidence of any intent by said defendants to spoliate has been presented. The motion is circumstantial – the actual physical components no longer exist.

As alleged in this case and discussed above in detail, during Mr. Osuch's work on the roof of the subject building (owned by PPF and managed by Cushman), Mr. Osuch touched a broken, electrified, conduit pipe, resulting in his electrocution. Immediately after the accident, numerous contemporaneous photographs of the conduit were taken by Cushman employee Neil Vanderteems. Those photographs were produced in this action and show the actual condition of the conduit on the day the accident occurred. At the February 24, 2020, deposition of Mr. Vanderteems taken more than two years after the accident, Mr. Vanderteems testified that after the accident he had secured the conduit and placed it in the basement of the building. He was asked at his deposition to search for the conduit and noted at his deposition that he would check for the conduit but that the basement in the building recently had been through some "cleanups." Subsequently, Cushman advised the parties through its then-counsel that the conduit was missing.

Plaintiff's counsel has not pointed to any discovery demand seeking production or inspection of the conduit. Nor does the note of issue in this action report that discovery

regarding inspection of the conduit was outstanding. More importantly, neither plaintiff or any other party disputes the fact of the subject conduit within the context of this action; nor does plaintiff or any other party dispute that Mr. Osuch was electrocuted when he came into contact with the conduit. Plaintiff is not prejudiced or disadvantaged in any way in proceeding to trial in this action due to an inability to present the actual conduit to a jury. Nor does plaintiff make that assertion.

"[S]triking a pleading is usually not warranted unless the evidence is crucial and the spoliator's conduct evinces some higher degree of culpability" (*Russo v BMW of North America, LLC*, 82 AD3d 643, 644 [1st Dept 2011]). Because no indications exist to warrant the drastic measure of striking the answers of PPF and Cushman, the motion to strike is denied.

Accordingly, it is

ORDERED that Capital's motion for summary judgment (seq. no. 003) is denied; and it is further

ORDERED that NY Electric's motion for summary judgment (seq. no. 004) is denied; and it is further

ORDERED that Excel's motion for summary judgment (seq. no. 005) is denied, except with regard to the claims asserted against it under Labor Law § 240 and under a theory of breach of warranty, which are dismissed; and it is further

ORDERED that Excel's application for leave to serve cross-claims against Pratt (included in seq. no. 005) is granted, and its proposed cross-claims filed in this action are deemed its cross-claims in this action; and it is further

ORDERED that Allstate's motion for summary judgment (seq. no. 006) is granted, and the claims and cross-claims asserted against it herein are dismissed; and it is further

ORDERED that Cushman's motion for summary judgment (seq. no. 007) is denied; and it is further

ORDERED that Gunzer's motion for summary judgment (seq. no. 008) is granted, and the claims and cross-claims asserted against it herein are dismissed; and it is further

ORDERED that Pratt's motion for summary judgment (seq. no. 009) is denied; and it is further

ORDERED that plaintiff's motion to strike the answers of PPF and Cushman (seq. no. 010) is denied; and it is further

ORDERED that a pre-trial conference in this matter shall be convened on January 12, 2022, at 10:30 a.m., via remote conferencing to be arranged by the court.

This will constitute the decision and order of the court.

ENTER:

12/28/2021				LOUIS L. NOCK, J.S.C.			
DATE							
CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE