SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DENISE M DOMINGUEZ** **PART** **21**

Justice

----------X

HEANEY, THOMAS and HEATHER HENEY,

Plaintiffs

- v -

METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, YONKERS CONTRACTING COMPANY, INC. NY LIMO EXPRESS, INC., and MOHAAMMAD SHAHID

Defendant

----------X

METROPOLITIAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRASIT AUTHORITIES and YONKERS CONTRACTING COMPANY, INC.

Third-Party Plaintiffs

-v-

FMB, INC

Third-Party Defendant

----------X

INDEX NO. 155291/2013

MOTION DATE

MOTION SEQ. NO. 007

DECISION AND ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 246, 251, 253, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 292, 294, 301

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

For the reasons that follow, the motion for summary judgment by Defendant and Third-Party Plaintiff, Yonkers Contracting Co., Inc. (Yonkers) is denied.

Background

In this action for negligence and labor law violations, Plaintiff, Thomas Heaney, alleges sustaining serious injuries on December 11, 2012. [1] At the time of the alleged accident, Plaintiff was working at a construction project of Defendants, Metropolitan Transportation Authority,

[1] Plaintiff, Heather Heaney, spouse to Thomas Heaney, asserts claims for loss of consortium and services stemming from Thomas Heaney's injuries. Heather Heaney's claims are not raised in these motions. Any and all references to "Plaintiff" only refer to Thomas Heaney.

New York City Transit (collectively Transit). The worksite was located at or near the No. 7 subway line, at or near 11th Avenue and 10th Avenue, between 33rd and 34th Street, New York, NY. For the project, Transit hired Yonkers as their general contractor and Yonkers hired FMB, Inc. (FMB) as their subcontractor.

Plaintiff alleges that while working for FMB as a project foreman, he was in the basket of a construction type lift, referred to as a boom-lift, when a vehicle owned by Defendant, NY Limo Express Inc. (NY Limo Express), and driven by its employee, Defendant, Mohamed Shahid (Shahid), bypassed the protections around the worksite and struck the boom-lift.

Plaintiff alleges that Yonkers and Transit were negligent and violated § 200, 240 (1), and 241 (6) of the NYS Labor Law. Plaintiff also asserts negligence claims against NY Limo and Shahid. NY Limo and Shahid assert cross-claims against Yonkers and Transit for contribution and indemnification.

Thereafter, Defendants and Third-Party Plaintiffs, Transit and Yonkers, filed a summons and complaint against Third- Party Defendant, FMB, for common law indemnification, contribution, contractual indemnification, and breach of contract claims. On or about December 22, 2021, by order (Adams, J), granted Third-Party Defendant, FMB's motion for summary judgment against the claims of indemnification and contribution, finding that such claims were barred by Workers Compensation Law. Accordingly, only contractual indemnification and breach of contract claims remain against Third-Party Defendant, FMB.

In this instant motion, Yonkers moves post-note of issue for summary judgment pursuant to CPLR 3212 against Plaintiff and Third-Party Defendant. Yonkers specifically alleges that Plaintiff's negligence and labor law claims should be dismissed because a) Yonkers did not supervise or control and because b) Yonkers didn't cause the alleged condition and did not have actual or constructive notice of it. Yonkers further alleges that it is entitled to contractual indemnification against FMB based on the terms of the contract agreement. Plaintiff opposes.

Relevant Testimony

Plaintiff's 50-h Hearing

According to Plaintiff, Transit nor Yonkers directed his work (NYSCEF Doc. No. 158). (*id.* at 34-35, 39). However, Yonkers conducted weekly toolbox meetings addressing safety issues including the operation of the boom-lift (*id.* at 19-21, 39, 42). Plaintiff further testified

that Yonkers had a permit for closing traffic lanes and that FMB "had nothing to do with" closing down lanes (*id.* at 64).

On the day of the accident, Plaintiff alleges that Yonkers had partially closed off a traffic lane on 33rd street, between 10th and 11th avenue (*id.* at 69-70, 73). Plaintiff alleges he was alone in the basket of the boom-lift and that the boom-lift was inside the part of the traffic lane that was closed off with traffic cones (*id.* at 24-27, 99). Plaintiff's "flagman" was FMB employee, Keven McMurry. His job was to stop traffic while Plaintiff "reloaded" and moved the boom-lift (*id.* at 92). The accident happened when the vehicle drove into the closed lane and struck the boom-lift (*id.* at 83, 87-99, 101-102). Plaintiff alleges that he was thrown from the basket and "jerked back" into the basket by his safety cable referred to as a lanyard (*id.* at 107-108).

Plaintiff's Deposition Testimony

Plaintiff appeared for depositions on July 31 and November 15 of 2017 (NYSCEF Doc. No. 159, 287). He testified that FMB did not have a "lane closure permit" (Plaintiff tr. at 126) and that Yonkers was in charge of closing lanes, which included putting out traffic cones and moving jersey barriers (*id.* at 322, 338-339). He also stated that at the beginning of the job, the traffic lane had been completely closed off with jersey barriers, but that the jersey barriers had been removed and replaced with traffic cones at least one month before the accident (*id.* at 124-125, 338).

Deposition Testimony of Michael Lloyd, Yonkers' general superintendent

Michael Lloyd appeared for deposition on May 7, 2018 (NYSCEF Doc. No. 161). He testified that on a daily basis there were three (3) Yonkers' "safety professionals" at the site responsible for the worksite safety (*id.* at 20-21, 40-41, 48-49).

He further testified that it was Yonkers who had the permits to use jersey barriers and to close traffic lanes (*id.* at 117-118, 132). Yonkers also decided what kind of barriers to use at the worksite (*id*, at 50, 83). In determining which types of barriers to use in different situations, he testified that Yonkers referred to the "NYS DOT Uniform Traffic Control Manual" and the "DOT MUTCD manual" (*id.* at 60-65, 73-74).

Lloyd testified that jersey barriers were used to protect the "walking public" but could also protect workers by creating "a safe work zone" (*id.* at 57). He also stated that "people

drove passed flaggers all the time" (*id.* at 197), however, flaggers are still the most effective way to control traffic (*id.* at 201-202).

Deposition Testimony of Gary Paolella, vice president of operations for FMB

Gary Paolella appeared for deposition on October 23, 2019 (NYSCEF Doc. No. 157). At the time of the accident, he was the vice president of operations for FMB (*Paolella* tr at 6-7). He He stated that Yonkers was "running the show" when it came to closing traffic lanes and held the permit to closing lanes (*id.* at 57-58).

Deposition Testimony of Kevin McMurray, employee of FMB

Kevin McMurray appeared for deposition on February 8, 2021 (NYSCEF Doc. No. 162). At the time of the accident he was employed by FMB and working as Plaintiff's "flagman" (McMurray tr at 17, 45-46). He testified that on the date of the accident, West 33rd Street was partially closed from 10th to 11th Avenue only with "orange traffic cones" (*id.* at 31-32, 38, 116-117).

He stated that as a flagman, he would "hold up traffic", while the workers were moving the boom-lift from one area to another (*id.* at 42-44). Plaintiff had instructed him to keep the lane closed until Plaintiff moved the boom-lift "inside the cones" (id. at 50). The boom-lift and basket were both inside the closed off area at the time of the accident (*id.* at 61, 160). McMurray then allowed traffic to proceed on 33rd Street, when a vehicle sped past him (*id.* at 65-66). He attempted to stop it, but it went past him and hit the bottom of the basket (*id.* at 60-6, 141, 152). McMurray testified that he saw the vehicle disengage from the bottom of the basket and that the lift went "straight up in the air" (*id.* at 71). McMurray then saw Plaintiff "go up in the air" and leave the basket before Plaintiff's harness "yanked him back in the basket (*id.* at 72).

McMurray Witness Statement

> McMurray signed a witness statement dated December 18, 2012, wherein he states: "I was stopping traffic for about 5 minutes so the lift could park, I let a sports car pass when lift was inside cones. Try to stop bus to make sure lift so clear for bus to pass, bus didn't stop. I jump on curb and bus hit lift & safety cones with FMB foreman on lift."

(Incident/Witness Statement, NYSCEF Doc. No. 189)

Discussion

It is well established that in a summary judgment motion, the moving party has the high burden of establishing entitlement to judgment as a matter of law with admissible evidence that dispels questions of fact (see CPLR §3212; *Andre* v. *Pomeroy,* 35 NY2d 361 [1974]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551 [1st Dept 2012]).

Regarding Labor Law § 200, it provides employees with a safe work environment and states that: "all places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons" *(NY Labor Law* § 200*; see also, Choudhury v Rodriguez*, 57 AD3d 121 [2008]).

Thus, Labor law § 200, codifies an owner or general contractor's common law duties of care, into two categories of personal injury claims (*Rosa v 47 East 34th Street (NY), L.P.*, 208 AD3d 1075 [1st Dept 2022], quoting *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]).

One category is based on claims arising from a defect or dangerous condition existing on the premises (*id*). An owner or contractor is liable under this theory if they created the condition or had actual or constructive notice of it (*Cappabianca*, 99 AD3d 139).

The other category is based on claims arising from the manner in which the work was performed, including the equipment used *(id; Cappabianca,* 99 AD3d 139). An owner or general contractor is liable if they exercised supervisory control over the injury-producing work (*id*; see *also, Toussaint v Port Auth. of N.Y. & NY*, 38 NY3d 89 [2022]. A determinative factor to consider is whether the party had the right to exercise control over the work, not whether it actually exercised that right (*Johnsen v City of New York*, 149 AD3d 822,[2017], quoting *Williams v Dover Home Improvement*, 276 AD2d 626 [2000]).

Upon review, the facts in this case give rise to the latter theory of liability. Plaintiff's injuries allegedly arise from the means and methods of the work being performed – specifically, the selection of appropriate protections around the worksite rather than from a defective or dangerous condition on the premises.

Here, Yonkers argues that it did not supervise nor control the means and methods of the work that lead to the Plaintiff's injuries and that it did not train Plaintiff or direct his work. Yonkers further argues that jersey barriers were not required to close off the instant traffic lane and that the combination of a flagger and traffic cones were sufficient.

In support of this argument, Yonkers submits testimonial evidence and an affidavit by Kristopher Seluga P.E., who states that Yonkers retained him as an engineering, accident reconstruction, and traffic safety expert. Seluga concludes that the use of traffic cones and a flagger for the temporary closure of the subject traffic lane was appropriate and in compliance with the Manual on Uniform Traffic Control Devices ("MUTCD"), New York State, and New York City Department of Transportation standards. He further concludes that jersey barriers were not required nor recommended for short-term stationary work.

Yet, Seluga's conclusions are based upon the use of cones for the "temporary closure" of the traffic lane, which he argues fell within the MUTCD category of "short duration stationary work" (Seluga affidavit at 12, para 21, NYSCEF Doc. No. 165). However, Plaintiff testified that the cones were in place for at least one month before the accident (*id.* at 124-125, 338) and that the cones were already set up on the date of the accident (*id.* at 322).

Upon review, at this time, Yonkers' submitted evidence is insufficient to establish entitlement to judgment as a matter of law since questions of fact exist. For instance, why did Yonkers decide to replace the jersey barriers in the worksite with cones? Whether Yonkers' decision was in compliance with the NYS Dot Uniform Control Manuel and the DOT MOTCD Manuel? Whether the work on the day of the accident constituted a long term closure or a temporary one?

In addition, the testimonial evidence undisputedly alleges that Yonkers was solely responsible for deciding what kind of barriers to use at the worksite and held the worksite permits to use jersey barrier. Yonkers' own superintendent stated that it was Yonkers' responsibility to close traffic lanes and decide what kind of barriers to use (Lloyd tr. at 50, 83). He also testified that jersey barriers were used to protect the "walking public" and also for creating a "safe work zone." In addition, Plaintiff and McMurry both testified that FMB did not place barricades and that it was Yonkers' responsibility to decide closing off traffic lanes at the

worksite. Further raising a question of fact as to why Yonkers chose to use cones rather than jersey barriers to close off a traffic lane on the day of the accident.

Accordingly, Yonkers has not established it prima facia case warranting summary judgment against Plaintiff's claims for negligence and labor law violations (see *Johnsen,* 149 AD3d 822).

Yonkers also moves for summary judgment based on contractual indemnification against FMB. Summary judgment on a contractual indemnification claim is warranted when the intent to indemnify is clear and there is no basis to conclude that the indemnified party was negligent as to the underlying accident (*see e.g. Hong-Bao Ren v Gioia St. Marks, LLC,* 163 AD3d 494 [1st Dept 2018]). Since issues of fact exist as whether Yonkers's decision to replace jersey barrier with cones, was a proximate cause to Plaintiff's accident, summary judgment against FMB is also denied.

Accordingly, it is hereby

ORDERED that Defendant, Yonkers Contracting Company's ("Yonkers") motion for summary judgment against Plaintiff and Third Party Defendant is denied.

HON. DENISE M. DOMINGUEZ
J.S.C.

5/11/2023
DATE

DENISE M DOMINGUEZ, J.S.C.

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