Shelton v. Chelsea Piers, L.P.

2021 N.Y. Slip Op. 30522
Decided Feb 23, 2021

INDEX NO. 150506/2016 Third-Party Index No. 595211/2016 Second Third-Party Index No. 595446/2017 Third Third-Party Index No. 595464/2018

02-23-2021

MICHAEL SHELTON, Plaintiff, v. CHELSEA PIERS, L.P., CHELSEA PIERS MANAGEMENT, INC.,HUDSON RIVER PARK TRUST, Defendant. CHELSEA PIERS, L.P., CHELSEA PIERS MANAGEMENT, INC. Third-Party Plaintiff, v. TREVCON CONSTRUCTION COMPANY, INC. Third-Party Defendant. CHELSEA PIERS, L.P., CHELSEA PIERS MANAGEMENT, INC. Second Third-Party Plaintiff, v. THE CEACON GROUP, INC., VACHRIS ENGINEERING, P.C. Second Third-Party Defendant. HUDSON RIVER PARK TRUST Third Third-Party Plaintiff, v. TREVCON CONSTRUCTION COMPANY, INC. Third Third-Party Defendant.

HON. FRANCIS A. KAHN, III Justice

NYSCEF DOC. NO. 246 **PRESENT: HON. FRANCIS A. KAHN , III *Justice* MOTION DATE _____ MOTION SEQ. NO.** 003 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 107, 108, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 155 *2 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 212, 213, 218, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236 were read on this motion to/for JUDGMENT - SUMMARY. The following e-filed documents, listed by NYSCEF document number (Motion 004) 157, 158, 159, 160, 161, 162, 176, 177, 178, 179, 180, 215, 216, 219, 220, 221, 222, 223, 224, 225, 226 were read on this motion to/for PRECLUDE. The following e-filed documents, listed by NYSCEF document number (Motion 005) 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 214, 237, 238, 239, 240, 241, 242, 243, 244, 245 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents the motions are determined as follows:

In this action, plaintiff Michael Shelton (plaintiff) alleges that he was injured on August 26, 2015 while performing work at Chelsea Piers in Manhattan when a beam which weighed over 2,000 pounds fell on top of his arm.

Motion sequence numbers 003, 004, and 005, have been consolidated for disposition. In motion sequence 003, plaintiff moves, pursuant to CPLR 3212, for an order granting partial summary judgment as to his claims of violations pursuant to Labor Law §§ 240 and 241 (6). Defendant/third third-party plaintiff Hudson River Park Trust (HRPT) cross-moves, pursuant to CPLR 3212, for

an order granting summary judgment and dismissing plaintiff's complaint, cross claims, and counter claims. HRPT also moves for summary judgment as to its own claims for contractual indemnification as against Chelsea Piers, L.P. and Chelsea Piers Management, Inc. (collectively known hereafter as the Chelsea defendants).

The Chelsea defendants cross move, pursuant to CPLR 3212, for an order granting summary judgment and dismissing the claims of violations of Labor Law §§ 200, 240 and 241 (6).

In motion sequence 004, plaintiff moves to strike and exclude from consideration the affidavit of Gordon Aaker, an expert retained by the Chelsea defendants.

In motion sequence 005, second third-party defendant Vachris Engineering, P.C. (Vachris), moves, pursuant to CPLR 3212, for an order granting it summary judgment and dismissing the second third-party complaint and all cross claims.

FACTUAL ALLEGATIONS

Plaintiff's factual allegations

Plaintiff testified at a deposition and submits an affidavit regarding his subject accident. On August 26, 2015, plaintiff was working as a professional dock builder for Trevcon Construction (Trevcon) at Chelsea Piers in Manhattan, New York. Trevcon was contractually required to maintain the integrity of the pier structures at Chelsea Piers. Plaintiff's work included demolition of pilings and pile-jacketing of pilings, as well as installation of pile caps and other refurbishments. In late August of 2015, the work had progressed to underneath the pier. It was
3 determined that the pilings within the *3 middle portion of the pier needed to be replaced. On the parking deck above were numerous steel columns supporting the roof. These columns carried the weight of the load and onto the piling structures below. Plaintiff maintains that Trevcon installed a jack system in order replace the pilings because the weight of the column had to be lifted off of the deck and pilings below so that the they could be replaced. Plaintiff recalls that two temporary columns, called "props," were erected underneath portions of the roofs supports. On top of the props were hydraulic jacks to lift the roof beams in order to take the weight off of the pilings below. The bottom of each prop was affixed to a grillage, which is a lattice of interconnected and welded steel beams, which held the weight of the roof.

Plaintiff maintains that Tim Luyster (Luyster), his supervisor from Trevcon, operated a "JCB" forklift on the site. However, Luyster did not have a forklift operator's license or certificate. Plaintiff testified that the prop system had to be disassembled which included disassembling the load off the jacks by lowering the weight of the roof onto the column to the deck, removing the prop, and disassembling the grillage. Before the beams could be lifted, all welds between the beams, had to be ground out utilizing a grinder.

Plaintiff testified that in the afternoon on the date of his accident, plaintiff, Tyler Lupoli (Lupoli) and Ted McGrath (McGrath), were utilizing grinders to remove the welds between the southernmost beam and the cross-pieces. Plaintiff recalls that Luyster operated the JCB and that the first beam was removed and placed in front of the grillage. In order to remove the second beam, plaintiff, Lupoli, and McGrath ground the welds between that beam and the cross-beam. When Luyster attempted to lift the second beam by extending the forks of the JCB machine under the beam, the forks did not fit due to the grillage and the first beam.

Plaintiff maintains that Luyster attempted to hoist the beam on the forks of the JCB rather than using a sling to lift the beam. Plaintiff states that McGrath directed Luyster to move the JCB towards the beam and where to locate the forks. He recalls that Luyster placed the forks of the JCB under the beam and tried to lift it but was unsuccessful because of the welding connecting the beam to the cross beams below. Luyster, who

was sitting in the JCB machine, directed plaintiff, Lupoli, and McGrath to grind the weld connections between the beam and the cross-beams.

McGrath proceeded to utilize a grinder on the west side of the beam where it connected to the cross-beam. Plaintiff recalls waiting on the east side of the beam with a different grinder and was waiting for McGrath to finish. Once McGrath finished, plaintiff bent down to work on the welds on the east side of the beam.

Plaintiff states that just prior to his accident, he knelt on one knee and put his right shoulder against the beam. He recalls that at that time, the forks of the JCB were not touching the beam. As plaintiff approached the remaining weld between the beam and the cross beam, he heard a bang and saw the forks of the JCB shaking. Plaintiff maintains that Luyster had moved the JCB forks to lift the beam but struck the beam without providing a warning that he was going to move the second beam. Plaintiff states that after he heard a bang, he saw the beam fall towards him. Although he tried to get out of the way, the flange of the beam, which weighed 2,000 pounds, rolled over and pinned his left arm against the cross- beam below. Plaintiff recalls hearing McGrath yell at Luyster to pick the beam up and plaintiff proceeded to yell at Luyster to lift the beam. He recalls that after Luyster picked the beam with the JCB, he apologized. [*4] Plaintiff maintains that Luyster did not install a sling to the load so that it could have been safely lifted and did not look to see that the workers were clear of the beam when he attempted to move the beam.

Plaintiff testified that at the Chelsea Piers project, Vachris oversaw Reicon which was another contractor performing work similar to Trevcon. Plaintiff testified that a worker from Vachris and Luyster had told him that they were going to set up shoring. Plaintiff recalls that Vachris was observing the work of Trevcon for integrity. He recalls observing Vachris workers drawing up plans, inspecting the work of Trevcon, and being on-site on the day of his accident. Plaintiff recalls seeing a worker from Chelsea Piers at the site providing the workers their designated work region. Plaintiff had heard of HRPT but did not recall interacting with any of its workers. Plaintiff was not aware of what Ceacon did at the site.

David Braito's deposition

David Braito (Braito) testified that he works for Chelsea Piers Management and oversees the tenants, staff, and capital improvements. He maintains that Chelsea Piers Management is the general partner of the limited partnership and HRPT is the owner of the property. Braito testified that Trevcon was to perform work at the premises which included foundation repairs. Braito maintains that on a day to day basis, Chelsea Piers Management did not have any supervision over the work of Trevcon and did not monitor Trevcon's work. Braito testified that pursuant to a contract, Trevcon's work was to be performed pursuant to specified plans.

Braito testified that Vachris is Chelsea Piers' consultant and engineer that performs inspection work and administers and oversees the contractor's work. Vachris was retained by Chelsea Piers Management to answer questions of the contractor. Braito testified that Vachris came up with how the grillage at the location was to be assembled. Vachris also hired a subcontractor to work at the pier and Braito maintains that Vachris was periodically on-site. Braito testified that he would not know if Vachris employees instructed Trevcon employees as to how to perform work. He testified that Vachris conducted a final inspection to ensure that the work was completed to conform with the contract. Braito maintains that in 2015, Vachris told him that two clusters had to be repaired with shoring. He recalls being told about the area which was needed for the work. Braito would not visit the area on a daily basis.

Braito testified that on the date of plaintiff's accident, a manager called his office to tell him that a worker was injured. Upon arriving at the site, he saw the worker in pain sitting on a beam. He recalls hearing that a beam had rolled over on the worker's arm or hand and recalls another worker stating that the accident was not his fault. Upon leaving, it was Braito's understanding that the cause of the accident was due to a forklift knocking over a beam.

Fred Price's deposition

Fred Price (Price) testified that in August of 2015, he worked for Trevcon as a superintendent at Chelsea Piers. At that time, he was supervising work to take apart a grillage system. When disassembling the grillage, Price maintains that anything which was welded had to be ground off so that one beam could sit on top of another. Price testified that one of the beams was removed prior to the accident by a machine known as JCB and a backhoe. Price recalls Luyster, Trevcon's foreman, stating that he was on the forklift at the far end of the beam when a beam flipped and struck plaintiff. Price recalls speaking to Luyster who told him
5 that the JCB *5 had the forks under the beam and that his sleeve must have caught on one of the levers and flipped it, causing the beam to flip. He believes that Luyster and McGrath were not being honest about how the accident occurred. Price maintains that Luyster did not have a forklift operator's license.

Price testified that no one from HRPT told him how to perform the job. Price testified that it was possible that outside of Trevcon, a Vachris worker gave direction for the project and would pass on information, however, he also testified that the employees of Trevcon did not perform their work pursuant to any direction from Vachris.

David Fitzgerald's deposition

David Fitzgerald (Fitzgerald) testified that he is employed by Trevcon as an operating engineer. He has a license to operate a JCB machine. He recalls that in August of 2015, Trevcon had to install two jacks at Chelsea Piers. He recalls that there were four beams, with two beams going one direction, and two other beams in another direction. He recalls being told where the beams were going by Luyster.

Fitzgerald testified that when moving steels beam from a secure pile to the location where they were being placed, workers would use a strap or forks. He testified that straps may have to be used to move the beam closer to where they were being set up and that the forks of the JCB would have been utilized to place the beams. He estimated that the beams were about 4,000 pounds each. He recalls that the first beam removed was a clean cut. The second beam was tack welded to the crossbeams underneath and the tacks had to be ground. Fitzgerald recalls that plaintiff and McGrath were grinding just prior to the accident. While they were grinding, Fitzgerald was moving materials with a forklift.

Just prior to plaintiff's accident, Fitzgerald noticed Luyster attempting to pick up the second beam with the JCB so he approached the machine. He testified that he told Luyster to let him operate the JCB. However, Fitzgerald returned to finish his initial work with the forklift when he heard a bang from the impact of a falling beam. Firtzgerald then saw Luyster move the forks of the JCB to pick a beam which had fallen on plaintiff. Fitzgerald recalls speaking with plaintiff who said that he saw Luyster in the seat of the JCB and that he saw the JCB's forks hitting the subject beam.

Fitzgerald did not take any direction from anyone at HRPT, Vachris or Ceacon. He testified that the manager of Chelsea Piers would supervise for short periods of time, but would not supervise on a regular basis.

Tyler Lupoli's deposition

Tyler Lupoli (Lupoli), a dockbuilder that worked for Trevcon, testified that he was working at a job at Chelsea Piers during plaintiff's accident. Lupoli recalls that on the day of the accident, beams at

the premises were welded and needed to be cut. Plaintiff, Fitzgerald, and Lupoli were cutting the welds with grinders.

Lupoli testified that when the crossbeams were free and the welds had been cut, Luyster utilized a JCB and picked up the beams with the forks. The first beam they removed was moved with the JCB, and then transported by Fitzgerald with a forklift. Lupoli testified that, with regard to the second beam, the JCB could not pick it up as it was stuck on welds. Lupoli proceeded to grind the welds. He maintains that plaintiff was on the east side and that he was not sure if he was grinding or getting in a position to grind. Lupoli recalls that Luyster was in the JCB and that the forks were underneath
6 the *6 crossbeam. When the crossbeam could not be lifted by the forks, the forks were lowered, and were located underneath the beam.

Lupoli recalls hearing steel hitting steel. He believes that the JCB struck the beam, causing the beam to roll onto plaintiff. Lupoli observed plaintiff falling and saw the beam fall on his hand. Lupoli did not see Luyster remove the beam off plaintiff. Lupoli spoke with Luyster following the accident who said that he may have hit a lever prior to the beam rolling. He did not recall seeing Luyster leave the seat of the JCB. Lupoli testified that only Trevcon instructed him and no one from HRPT told him how to perform his work. He testified that the worker in charge from Chelsea Piers did not provide him with instructions.

Timothy Luyster's deposition

Luyster testified that he works for Trevcon as a dock builder foreman. Luyster supervised the assembly of grillage and the installation of props at Chelsea Piers. He maintains that in August of 2015, the project at Chelsea Piers involved shoring up a column and replacing piles underneath the foundation. Luyster maintains that the piles under the column were deteriorated and columns were going to be repaired in a method to shore up columns with the use of steel beams and a grillage system.

Luyster maintains that a JCB was brought on-site, but he was not aware by which company. He testified that a JCB is a forklift with an extended boom which extends and retracts. Luyster did not have a license to operate a forklift or JCB. In order to lift beams at the subject location, forks would go underneath the beam. Luyster testified that workers lifted the first beam and cut its welds because the welds were holding the beams and had to be removed by grinding them off.

After the first beam was lifted with the assistance of the JCB, the beam was removed by Fitzgerald with a forklift. A second beam was going to be removed which was lying flat across two cross beams. Luyster recalls that while Fitzgerald was moving the forklift, he used the JCB to try to lift the second beam. As the beam would not lift, the welds on the beam had to be ground. Luyster was not aware if following his attempt at lifting the beam, if he stayed in the JCB or was standing next to it. Shortly thereafter, Luyster recalled hearing a pop and a beam falling over onto plaintiff. At that moment Luyster was not operating the JCB and the forks of the machine had been cleared.

Luyster testified that after the beam rolled onto plaintiff, he operated the JCB and removed the beam which had struck plaintiff. He was not sure how the beam rolled over and maintains that the beam could have rolled over on its own. Luyster testified that there was nothing unbalanced about the beam as it was welded and that the subject beams weighed about 6,000 pounds.

Luyster testified that no one from HRPT gave him directions. However, he recalls a worker from Chelsea Piers provided him with instructions about cleaning and housekeeping. Luyster testified that other than himself, the only other worker who provided directions to plaintiff was Fred Price from Trevcon.

Luyster testified that Vachris was monitoring the column and inspecting the work underneath the pier. Vachris did not direct anyone from Trevcon

regarding how to take apart temporary shoring. He was not aware of a company named Ceacon. *7

Anthony DePasquale's deposition

Anthony DePasquale (DePasquale) testified that he is the president of Vachris and previously worked as an engineer. He maintains that Vachris inspects the work of Trevcon at Chelsea Piers to ensure that it meets the contract drawings which Vachris prepared for the project. In addition to inspecting the work, Vachris prepared the drawings for the work for the underside of the pier. Vachris reviewed the contractor's requisitions and recommended payment. Vachris would get called to the site if a pile needed to be replaced. DePasquale testified that an engineer retained by Trevcon designed the grillage system at Chelsea Piers. DePasquale's maintains that his main role was to ensure that the load was properly transferred away from the area Vachris had to work on below the deck. He never had any discussions with any workers from HRPT or Ceacon. He did not recall if there was anything which defined the scope of Vachris's work at the subject premises.

DePasquale recalls that Vachris had previously reviewed plans for temporary shoring. He maintains that he had a verbal agreement with Chelsea Piers which included inspecting the work of Trevcon to ensure that it meets the contract drawings prepared for Chelsea Piers. DePasquale did not recall if anyone from Vachris gave direction to Trevcon regarding the grillage system.

John A. Geary's deposition

John A. Geary (Geary) testified that he is the president of The Ceacon Group (Ceacon). He maintains that there was agreement between Ceacon and Trevcon for work at Chelsea Piers. Geary never visited the site. He recalls having interactions with someone from Vachris regarding the scope of the work for a prop design. He did not interface with anyone from Chelsea Piers.

For the subject premises, Geary recalls being asked to develop a method of supporting an existing floor girder with the Chelsea Piers structure while repairs were being made to an existing column and timbers. He also was involved with the design of the welding connections for the grillage. Geary did not provide instruction to anyone from Trevcon or Chelsea Piers regarding the dismantling of the grillage.

Eric Paulson's deposition

Eric Paulson (Paulson) testified that he works for Vachris as an engineer. Paulson recalls a system of posts which was utilized for a shoring system at Chelsea Piers. He did not know if anyone from Vachris reviewed plains to assemble or dissemble the grillage. He believes that David Kampa from Vachris was at the site frequently and would inspect the substructure below deck.

Paulson reviewed a document which included an instruction for removing the prop and grillage. He was not aware of anyone being present from Vachris at the time in which the grillage was assembled or disassembled.

Daniel Kurtz's deposition

Daniel Kurtz (Kurtz) testified that he has worked for HRPT since October of 2010 and supervises the finance department at HRPT and management. He testified that HRPT was formed by the legislature for the planning development, construction and operation of Hudson River Park. He *8 maintains that the property is owned by New York State, acting through the Department of Parks and Department of Environmental Conservation. Kurtz testified that HRPT is a successor-in-interest to New York State with regard to the Chelsea Piers lease.

DISCUSSION

MOTION SEQUENCE 003

"'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.'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], *quoting Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]).

Labor Law § 240 (1)

Plaintiff contends that defendants violated Labor Law § 240 (1) and seeks summary judgment as to this section of the Labor Law. Labor Law § 240 (1) provides in part: "[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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."

The Court of Appeals has held that "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to 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], *citing Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

The Court of Appeals has held that with regard to falling object cases brought pursuant to Labor Law § 240 (1):

> "the applicability of the statute in a falling object case . . . does not under this essential formulation depend upon whether the object has hit the worker. The relevant inquiry-one which may be answered in the affirmative even in situations where the object does not fall on the worker-is rather whether the harm flows directly from the application of the force of gravity to the object."

Runner v New York Stock Exch., Inc., 13 NY3d 599, 604 (2009).

The Court of Appeals has emphasized that a height differential cannot be held to be de minimus when a large amount of force can be generated (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 10 [2011][holding that plaintiff is not precluded from recovery under
9 Labor Law § 240 (1) *9 because plaintiff and the pipes which struck him were located on the same level and the falling pipes were able to generate a force]). Furthermore, it is well-settled, that pursuant to Labor Law § 240 (1), it is enough that the subject object needed securing for the purposes of the undertaking. (*see Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 964 [2d Dept 2013]).

Plaintiff argues that during the attempted hoisting of the beam from the stacked grillage, the beam which plaintiff was attempting to free, fell over due to the force of gravity. Plaintiff contends that the forks of the JCB, knocked the beam over onto plaintiff. Plaintiff argues that the expert affidavit of Jesse Paszkewicz demonstrates that the equipment utilized was improper and that the beam should have been hoisted from above the load by using a forklift with an attachment to hold and hoist the load with a sling. Plaintiff contends that the height of the beam of about four feet above the ground, in conjunction with its large weight of thousands of pounds and the force that weight could impart due to gravity, violate the protections of Labor Law § 240 (1).

In opposition, and in support of its own cross motion, HRPT argues that the claims pursuant to Labor Law 240 § (1) must be dismissed. HRPT contends that liability under § 240 (1) does not exist when the equipment was operated as intended, but that the worker was injured due to a human error. HRPT contends that there was nothing wrong with the hoisting equipment. HRPT argues that Luyster confirmed that the JCB did not come into contact with the subject beam and it was not being hoisted.

The Chelsea defendants argue in opposition and in support of their own cross motion, that the beam which tipped over and crushed plaintiff's hand was caused to travel only two feet and the court must take into account the practical differences between the usual and ordinary dangers of a construction site and the elevation risk envisioned by Labor Law § 240. The Chelsea defendants contend that the beam being worked on by plaintiff was not being hoisted, nor did it require securing for the purpose of the undertaking at the time of his injury.

The Chelsea defendants argue that there is a question as to why the beam was caused to tip and whether it was because of the JCB operator.

Here, the Court finds that plaintiff has established his *prima facie* entitlement to summary judgment in his favor on the Labor Law § 240 (1) claim because the object which caused his injury, specifically the beam which weighed 2,000 pounds, was a load which required securing for the purposes of the undertaking at the time which it fell. The testimony explains that a heavy beam at the location was being removed, lifted, and transported from one area of the site to another. However, based upon the testimony, there were no devices or braces attached to the beam to prevent it from rolling, shifting, or falling during the removal process (*see Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005][holding that for section 240 (1) to apply, a plaintiff must demonstrate that the object fell, while being hoisted or secured, due to the absence or inadequacy of a safety device which is enumerated in the statute]).

Although the testimony and experts disagree as to whether the beam fell from being pushed over by the JCB, was loosened during the grinding process, or shifted because of stored energy, no safety devices were being utilized to prevent the beam, which was extremely heavy, from falling, moving, shifting, rolling or from being impacted by gravity. In fact, the beam was so heavy that the testimony from the witnesses' state that it had to be lifted off of by plaintiff by using the JCB's lifting device. Even if the beam was impacted by the grinding process and removal of the welds, there is no indication that any safety device was utilized to prevent the beam from tipping onto plaintiff. *10

The Appellate Division, First Department, has held that "[t]he failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident" (*Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 [1st Dept 2009]). (internal quotation marks and citations omitted). Despite defendants' argument that there was not a large elevation differential when the beam struck plaintiff, a minor elevation differential "'[could not] be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating even over the course of a relatively short descent.'" (*Wilinski*, 18 NY3d at 10 [2011]), *quoting Runner*, 13 NY3d at 605 [2009]). Here, the unsecured beam weighed 2,000 pounds and could generate a significant force during its short fall.

Therefore, because plaintiff meets his burden and demonstrates that there was a failure to provide a safety device and that the subject beam, which was very heavy and elevated, was not strapped to prevent it from shifting, rolling or falling, the part

of plaintiff's motion seeking summary judgment pursuant to Labor Law 240 (1) must be granted. Labor Law § 241 (6)

Plaintiff contends that summary judgment must be granted as to his allegations that Labor Law § 241 (6) was violated. Labor Law § 241 (6) states, as follows:

> "6. All areas in which construction, excavation or demolition work is a being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owner and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection for workers and to comply with specific safety rules which have been set forth by the Commissioner of the Department of Labor (*St. Louis v. Town of N. Elba*, 16 NY3d 411, 413 [2011]). In order to demonstrate liability pursuant to Labor Law § 241 (6), plaintiff must demonstrate that the defendants violated a specific, applicable regulation of the Industrial Code and that the injuries were proximately caused by such violation (*see Nostrom v A.W. Chesterton Co.*, 15 NY3d 502, 507 [2010]; *Aragona v State of New York*, 147 AD3d 808, 809 [2d Dept 2017]).

Plaintiff contends that summary judgment must be granted as to Industrial Code sections 23-3.3 (c), 23-3.3 (h), 8.1 (f) (iv), 8.1 (1) (2) (i), 8.1 (f) (5), 8.2 (c) (3), and 23-8.2 (i). Plaintiff indicates that he has abandoned his claim of violations of Industrial Code sections 23-1.7 (e) (2), 23-2.1 (a) (1), 23-2.3(1), and 23-6.1 (h).

Industrial Code section 23-3.3 (c)

Plaintiff alleges that Industrial Code section 23-3.3 (c) was violated. Section 23-3.3 (c) provides:

11 *11

> "Inspection. During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means,"

The Appellate Division, First Department, had held that a violation of Industrial Code section 23-3.3 (c) has been held to be sufficiently specific to warrant the imposition of liability pursuant to Labor Law § 241 (6) (*see Gawel v Consolidated Edison Co. of N.Y.*, 237 AD2d 138 [1st Dept 1997]).

Plaintiff argues that this section of the Industrial Code was violated as he was permitted to work in an area where the hazard of a falling beam existed, and proper shoring, bracing or other effective means to keep it from falling were not provided. Plaintiff contends that no supervisor or designated person inspected or insured that the beam which the workers loosened by grinding out the welds was safely secured.

The Chelsea defendants contend that plaintiff has not demonstrated that section 23-3.3 (c) is applicable. They argue that the subject beam was stable and not loose prior to plaintiff's grinding and that plaintiff was deliberately loosening the beam that caused his alleged accident. The Chelsea defendants also argue that there is an issue of fact as to whether section 23-3.3 (c) of the

Industrial Code was violated because the beam and overall grillage system were inspected prior to the accident. The Chelsea defendants contend that the Trevcon workers tried to lift the beam to see if it was loose and therefore posed a hazard. They also contend that Lupoli testified that he visually inspected the beam after the first attempt to move it, at which time he noticed that there were welds holding the beams together.

In opposition, HRPT contends that while the statute discusses demolition by hand, the work being performed was dismantling the grillage system and did not incorporate demolition. "Demolition work is defined in the Industrial Code as [t]he work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment." *Baranello v Rudin Mgt. Co.*, 13 AD3d 245, 245-246 [1st Dept 2004][internal quotations omitted]).

Here, the deliberate dissembling of a beam within the grillage system could be defined as demolition work. However, it remains unclear why the subject beam fell including whether it was due to being loosened or if it was struck by the JCB. Therefore, as there is a question of fact as to why the beam was caused to fall, the court cannot determine if inspections of loosened material could have prevented the beam from falling and if plaintiff's injuries were proximately caused by such violation. Therefore, as an issue of fact exists as to the cause of the accident, the court denies the part of plaintiff's motion seeking summary judgment as to the alleged violation of Industrial Code section 23-3.3 (c).

Industrial Code section 23-3.3 (h)

Plaintiff alleges that Industrial Code section 23-3.3 (h) was violated. This section discuses demolition of structural steel by hand.

12 Section 23-3.3 (h) provides: *12

> "[d]emolition of structural steel by hand. Steel construction shall be demolished column length by column length and floor by floor. Every structural member which is being dismembered shall not be under any stress other than its own weight and such member shall be chained or lashed in place to prevent its uncontrolled swinging or dropping. Large structural members shall not be thrown or dropped from the building or other structure, but shall be carefully lowered . . . ."

A violation of Industrial Code section 23-3.3 (h) has been held to be sufficiently specific to warrant the imposition of liability pursuant to Labor Law § 241 (6). See Sweeney v Yonkers Contr. Co., 269 AD2d 590, 591 (2d Dept 2000).

Plaintiff argues that the subject steel beam was placed under stress due to the JCB forklift which caused the beam to roll over onto his arm. Plaintiff contends that the beam was not secured from dropping which this section of the Industrial Code requires.

In opposition, the Chelsea defendants contend that there is a genuine issue of material fact as to whether section 23-3.3 (h) is applicable. The Chelsea defendants contend that plaintiff has not sufficiently met his burden to demonstrate that the beam was under stress other than its own weight and that an issues of fact exists as to whether other factors caused the beam to fall. The Chelsea defendants contend that the stored energy theory which is presented by expert Gordon Aaker demonstrates that there is a genuine issue of material fact as to how the accident occurred.

HRPT contends that plaintiff's accident did not occur because of stress other than the subject beams own weight, nor is it alleged that the beam was thrown from the building.

Here, because the testimony conflicts as to whether the beam fell due to stress other than from its own weight and whether the beam was being

hoisted at the time of the accident, the court cannot determine at this time if plaintiff's injuries were proximately caused by such violation. Therefore, the court denies the part of plaintiff's motion which seeks to grant summary judgment as to a violation pursuant to Industrial Code section 23-3.3 (h).

Industrial Code section 23-8.1 (f) (1) (iv)

Plaintiff alleges that summary judgment must be granted as to his claim of a violation of section 23-8.1 (f) (1) (iv) of the Industrial Code. Section 8.1 (f) (1) (iv) provides:

> "(1) Before starting to hoist with a mobile crane, tower crane or derrick the following inspection for unsafe conditions shall be made:
> (iv) The load is well secured and properly balanced in the sling or lifting device before it is lifted more than a few inches."

Claims made pursuant to a violation of Industrial Code 23-8.1 (f) have been held to be sufficiently specific to warrant the imposition of liability pursuant to Labor Law § 241 (6). (see *Cammon v City of New York*, 21 AD3d 196, 199 [1st Dept 2005]).

Plaintiff contends that the load was not well secured, that the load was not balanced, and that a sling was not utilized. Plaintiff argues that securing of the load was not completed before the load was lifted and that this provision of the Industrial Code was violated. *13

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The Chelsea defendants contend that the JCB used on the date of the accident is a forklift and not a mobile crane, tower crane, or a derrick, and that the statute would not apply. The Chelsea defendants also argue that there is a genuine issue of material fact as to whether any of the provisions pertaining to mobile cranes are applicable as there are two theories as to how the accident occurred and whether the beam was even being lifted or hoisted at the time of the accident.

HRPT contends that there is no allegation that the accident occurred due to improper balance in a sling, nor is there an allegation that it was lifted more than a few inches. HRPT also contends that plaintiff himself alleges that the JCB forks hit the beam and knocked it over. The Appellate Division, First Department, has held that whether an Industrial Code regulation pertaining to a mobile crane is applicable to other machinery depends on how and for what purpose equipment is utilized, and not based upon its label or name. In McCoy v Metropolitan Transp. Auth., 75 AD3d 428, 429 (1st Dept 2010) the Court held that:

> "to interpret the Industrial Code provisions governing mobile cranes as applicable to the Gradall at issue here is entirely consistent with the statutory and regulatory purposes behind Labor Law § 241 (6) and the Industrial Code--to protect construction workers against hazards in the work place--and whether a regulation applies will depend on how and for what purpose the equipment is used, not on its label or name (see Copp v City of Elmira, 31 AD3d 899, 900 [2006]; see e.g. Borowicz v International Paper Co., 245 AD2d 682, 683-84 [1997]; Smith v Hovnanian Co., 218 AD2d 68, 71-72 [1995])."

Id. at 429.

While plaintiff alleges that the JCB was being utilized to hoist the beam in order to move it to another location in a method similar to that of a crane, Luyster testified that at the time of the accident, he was not hoisting the beam and that he had to enter the JCB following the accident in order to remove the beam off of plaintiff. Luyster testified that he recalled hearing a pop and the beam falling over. Luyster testified that the forks of the machine were cleared and the beam would not have been in the lift portion of the JCB at the time of the accident.

Therefore, because it is disputed whether the JCB was being operated at the time of plaintiff's accident in order to hoist the beam similar to that of a crane, or if the beam was caused to fall due to another cause, the part of plaintiff's motion seeking summary judgment as to section 8.1 (f) of the Industrial Code must be denied. Industrial Code section 23-8.1 (f) (2) (i)

Plaintiff alleges that summary judgment must be granted as to its claim that Industrial Code section 23-8.1 (i) (2) (i) was violated. Section 23-8.1 (f) (2) (i) states: "(i) There shall be no sudden acceleration or deceleration of the moving load unless required by emergency conditions."

Claims made pursuant to a violation of Industrial Code 23-8.1 (f) (2) have been held to be sufficiently specific to warrant the imposition of liability pursuant to Labor Law § 241 (6) (*McCoy v Metropolitan Transp. Auth.*, 38 AD3d 308, 309 [1st Dept 2007]). Plaintiff contends that there was
14 a *14 sudden acceleration by the JCB which caused the load to lift and fall on plaintiff, thus violating this section of the Industrial Code.

In opposition, the Chelsea defendants contend that there is issue of fact as to whether this section of the Industrial Code is applicable as there are two theories as to how the accident occurred. HRPT argues that there is no allegation that the load was moving when a sudden acceleration or deceleration occurred.

Here, based upon the conflicting witness testimony, it remains disputed whether the JCB was or was not lifting or hoisting the beam at the time of plaintiff's accident. Luyster's account of the accident in which he testified that the beam was not being hoisted, conflicts with that of plaintiff's testimony which suggests that the JCB was in operation at the time of his accident and in the process of hoisting.

Therefore, because the testimony raises a question of fact as to whether the beam was being hoisted by the JCB at the time of the accident, the part of plaintiff's motion seeking summary judgment as to section 23-8.1 (f) (2) (i) must be denied.

Industrial Code section 23-8.1 (f) (5)

Plaintiff contends that summary judgment must be granted as its claim of a violation of section 23-8.1 (f) (5) of the Industrial Code. Section 23-8.1 (f) (5) states:

> "[m]obile cranes, tower cranes and derricks shall not hoist, lower, swing or travel while any person is located on the load or hook."

Claims made pursuant to a violation of Industrial Code 23-8.1 (f) (5) have been held to be sufficiently specific to warrant the imposition of liability pursuant to Labor Law § 241 (6) (*see Catarino v The State of New York*, 55 AD3d 467, 467 [1st Dept 2008]).

Plaintiff contends that when Luyster commenced hoisting, he was leaning on the load to brace himself as he ground out the welds. Plaintiff argues that Luyster made no effort to insure that he and the other workers were completely clear of the load.

In opposition, the Chelsea defendants argue that there is an issue of fact as to whether plaintiff was even located on the load at the time of the accident and whether Luyster hoisted the beam at the time of plaintiff's accident.

Here, based upon the testimony of the witnesses, it remains disputed whether the JCB was hoisting the subject beam at the time of plaintiff's accident. Therefore, as an issue of fact exist as to whether section 23-8.1 (f) (5) of the Industrial Code was violated, the part of plaintiff's motion seeking summary judgment as to this section, must be denied. Industrial Code section 23-8.2 (c) (3)

Plaintiff contends that Industrial Code section 23-8.2 (c) (3) was violated. Section 8.2 (c) (3) provides:

> "(3) Loads lifted by mobile cranes shall be raised vertically so as to avoid swinging during hoisting except when such operations are permitted by the capacity chart. A tag or
>
> 15 *15
>
> restraint line shall be used when rotation or swinging of any load being hoisted by a mobile crane may create a hazard."

A claim of a violation of Industrial Code section 8.2 (c) (3) is specific enough to serve as predicate for a violation pursuant to Labor Law § 241 (6). See Cammon v City of New York, 21 AD3d at 201.

Plaintiff argues that because the hoist's load moved horizontally and was partially lifted by the forks of the JCB, this provision of the Industrial Code was violated. In opposition, the Chelsea defendants contend that the JCB has a fixed arm that does not swing and that therefore, the Code's language regarding rotation and swinging does not apply. HRPT contends that there is no allegation that the accident occurred due to swinging of the load.

As a question of fact exists as to how the load was being lifted with plaintiff contending that it was raised horizontally and Luyster testifying that it was not lifted, the court denies the part of plaintiff's motion seeking summary judgment as to section 23-8.2 of the Industrial Code. Industrial Code section 23-8.2 (i)

Plaintiff maintains that section 23-8.2 (i) of the Industrial Code was violated. Section 23-8.2 (i) states:

> "[t]he operator's cab of every mobile crane shall be kept locked whenever the operator is not present. No unauthorized person shall enter the cab of or remain immediately adjacent to any mobile crane in operation. Ignition locks, locking bars or other equivalent devices shall be provided to prevent unauthorized operation of mobile cranes."

Plaintiff contends that Luyster was an unauthorized operator of the JCB as he did not have a forklift operator's license. Plaintiff argues that if Luyster had been prevented from using the JCB as a mobile crane, plaintiff's injury would not have occurred. The Chelsea defendants contend that plaintiff correctly states that there is no applicable case law supporting a violation of § 23-8.2 (i) when it involves a forklift. HRPT contends that even if this section were somehow applicable, Luyster denies that he was operating the JCB or that it contacted the beam.

Here, it is unclear if this section of the Industrial Code is applicable to plaintiff's accident. Luyster's testimony is inconclusive as to whether he was located in the cab of the JCB as Lusyter maintains that he was not operating the device at the time of the accident. Therefore, as a question exists as to whether a violation of this statute was the proximate cause of plaintiff's injury, the court denies the part of plaintiff's motion seeking summary judgment as to the violation of Industrial Code 23-8.2 (i).

Finally, to the extent that OSHA and New York City Building Code violations are alleged by plaintiff, these alleged violations cannot serve as a predicate for a cause of action pursuant to Labor Law § 241 (6) (*see Schiulaz v Arnell Constr. Corp.*, 261 AD2d 247, 248 [1st Dept 1999] [holding "[t]he alleged violations of OSHA standards cited by plaintiffs do not provide a basis for liability under Labor Law § 241 [6]"]); *Franks v Si-Hous. Partnership Dev. Fund Co., Inc.*,
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[holding "violations of OSHA regulations or the New York City Building Code do not support a cause of action under Labor Law § 241[6]"]).

HRPT's Cross Motion

HRPT cross moves for summary judgment and contends that any claims for common law indemnification and contribution must be dismissed. To establish a claim for common-law indemnification, "the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident." (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], *quoting Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

Here, plaintiff has already withdrawn claims as against HRPT pursuant to Labor Law § 200 and claims of negligence (*see* NYSCEF DOC. NO. 174, at 47). Furthermore, in order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's method or manner, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]). Pursuant to the testimony of plaintiff as well as the other witnesses, there is no evidence which demonstrates that HRPT exercised any supervisory control over the injury producing work or was negligent in causing the accident.

In opposition, as defendants fail to meet their burden to demonstrates that HRPT was negligent and caused or contributed to the injury producing work or had control or authority over the subject work plaintiff was performing, claims for common law indemnification and contribution as against HRPT must be dismissed.

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HRPT also contends that it is entitled to summary judgment on its claims of contractual indemnification and breach of contract as against Chelsea Piers. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances.'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], *quoting Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." (*Hooper Assoc., v AGS Computers*, 74 NY2d 487, 491 [1989]).

HRPT contends that based upon its agreement with Chelsea Piers, it would be entitled to full contractual indemnification for plaintiff's accident. HRPT maintains that the original lease entered into on June 24, 1994, was in full force and effect, that HRPT was the successor in interest as the "lessor," and that Chelsea Piers L.P. was the "lessee." The lease provides in part:

> "Lessee shall indemnify and save Lessor. . . and subsidiaries thereof and other subsdiaries of the State and their respective agents, directors/officers and employees (collectively, the "indemnitees"), harmless from and against all liabilities, suits ... including without limitation, reasonable ... attorneys' fees and disbursements (collectively, "Liabilities"), that may be imposed upon or incurred by or asserted against any of the Indemnitees by reason of, in connection with or arising out of any of the following occurring during the Term, except, with regard to any Indemnitee, to the extent

*17

that the same is caused by the gross negligence or willful misconduct of any indemnitee or by any past or Existing Tenant at the Premises prior to July 1, 1993:

. . .

(e) any accident, injury (including death at any time resulting therefrom), or damage to any Person or property occurring in or on the Premises or any part thereof or in, or about any adjacent sidewalk, alley, curb, space or vault or waterway provided such indemnity with regard to streets, alleys, sidewalks, curbs, vaults, waterways, passageways and other space net comprising a part of the Premises is limited to an alteration, repair, condition or maintenance of any street, alley, sidewalks, curbs, vaults, waterways, passageways and other space done or performed by Lessee or any Sublessee or any agent or employee of Lessee or any Sublessee or which Lessee or any Sublessee is obligated to do or perform by law.

. . .

Section 17.3. (a) The obligations of Lessee under this Article 17 shall not be affected in any way by the absence in any case of insurance coverage or by the failure or refusal of any insurance carrier to perform any obligations on its part under insurance policies affecting the Premises.

(b) if any claim, action or proceeding is made or brought against any of the Indemnitees by reason of any event for which Lessee has agreed to indemnify the Indemnitees in Section. 17.1, then, upon prior written notice to Lessee of such claim, action or proceeding, and a simultaneous or subsequent demand by Lessor and/or the State, Lessee shall resist or defend such claim, action or proceeding (in such Indemnitees name, if necessary) by the attorneys for Lessee's insurance carrier (if such claim action or proceeding is covered by insurance maintained by Lessee) or (in all other instances) by such attorneys as Lessee may select and Lessor and/or the State may approve, which approval shall not be unreasonably withheld or delayed. Nothing in this Section 17.3 shall preclude Lessor and/or the State from engaging its own attorneys, in any action, suit or proceeding, the defense of which is assumed by Lessee hereunder, Lessee shall have the sole right to settle or compromise such action, suit or proceeding provided that such settlement calls for the payment of money damages only the entire amount of which is paid, discharged or bonded by Lessee at the time of such settlement is entered into."

NYSCEF DOC. NO. 132.

Upon reviewing the terms of the lease, the court finds that HRPT is entitled to contractual indemnification by Chelsea Piers. The indemnification clause of the lease between HRPT and the Chelsea defendants covers all liabilities including any accident at the subject premises, includes repairs performed by the lessee or any agent, and would hold HRPT harmless from and against all liabilities and suits, pursuant to the terms of the agreement. The Chelsea defendants fail to demonstrate that the terms of the lease would not be applicable to plaintiff's accident as plaintiff was injured at the premises.

While HRPT also alleges that it is entitled to summary judgement on its claim for breach of contract against the Chelsea defendants related to the lease, in HRPT's Verified Answer to the Verified Complaint which is dated April 12, 2016, HRPT alleges only three cross claims against the
18 Chelsea *18 defendants which include

contribution, common law indemnification and contractual indemnification, but does not include a separate cross claim for breach of contract.

HRPT next contends that all cross and counter-claims against it requiring HRPT to contractually indemnify any other party in this action and alleging that HRPT breached a contract are not applicable as it did not have any contracts with other parties in which it had to provide indemnification. As no opposition is provided as to this argument to demonstrate that contracts existed for HRPT to indemnify other parties, all claims for contractual indemnification and breach of contract as against HRPT must be dismissed.

Finally, HRPT contends that plaintiff's expert affidavit of Jesse Paskewicz (Paskewicz) must be disregarded. HRPT argues that the documents reviewed by Paskewicz demonstrate that he did not conduct an inspection of the premises and relies on facts not personally known to him. HRPT contends that although Paskewicz' claims that Luyster's belief that the beam rolled onto plaintiff's arm is physically impossible, he provides no explanation for his claim. HRPT contends that the affidavit consists of speculative assertions and conclusions.

The court denies HRPT's application to disregard the affidavit of Paskewicz. In support of his sworn affidavit, Paskewicz submits his educational and professional background. He submits a comprehensive list of documents and transcripts which he reviewed prior to reaching his conclusions. Although he does not represent that he performed a personal inspection of the subject premises, Paskewicz submits a series of photographs of the subject location which he reviewed to make his determination. Therefore, as Paskewicz's opinion explains what documents he has reviewed in order to reach his conclusions, the court denies the application of HRPT to disregard the opinion.

The Chelsea Defendants' Cross Motion

The Chelsea defendants contend that plaintiff's allegation that they violated Labor Law § 200 must be dismissed.

Liability pursuant to Labor Law § 200 may be based either upon the manner in which the work is performed or actual or constructive notice of a dangerous condition inherent in the premises. In order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's method or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d at 352). When the accident arises from a dangerous condition on the property, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident (*see Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004]).

The Chelsea defendants contend that Luyster negligently operated a forklift, causing plaintiff's injury. They contend that there is no evidence that the Chelsea defendants controlled the means and methods associated with Luyster's alleged operation of the forklift, that there is no evidence that Chelsea Piers management was meaningfully present at the site, or that they acted with supervisory control over Trevcon's work. The Chelsea defendants also contend that there is no evidence that Chelsea Piers was placed on notice of any improper or negligent act or defect alleged by Plaintiff. *19

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Here, plaintiff testified that Luyster directed himself and Trevcon workers to free the second beam from the cross-beams. Although there is testimony from Fitzgerald which suggests that for short periods of time, a worker from the Chelsea defendants provided some supervision at the site over Trevcon's work by looking around, the testimony does not demonstrate that the Chelsea defendants controlled the manner of work which

injured plaintiff (*see Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007][holding "[g]eneral supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed"] [emphasis omitted]).

Therefore, because the Chelsea defendants met their burden that they did not exercise supervisory control over the manner of plaintiff's injury producing work and plaintiff failed to raise an issue of fact, the part of the Chelsea defendants motion seeking to dismiss plaintiff's claim of a violation of Labor Law § 200 must be granted.

MOTION SEQUENCE 004

In motion sequence 004, plaintiff moves to strike the affidavit of expert Gordon Aaker (Aaker). Plaintiff contends that in his affidavit, Aaker provides no description of any experience working as a welder, engineer, designer or calculator of proper engineering of steel structures, or welded jacking/loading systems. Plaintiff contends that Aaker's testimony relating to how the beam fell as a result of the release of stored energy is speculative and not supported by any generally accepted engineering principles.

Plaintiff argues that Aaker also does not provide any bases to conclude that the welds resulted from poor welding techniques or that the welds were old. Plaintiff also contends that Aaker's affidavit fails to state the professional or industry standard, rule, code, regulation, testing, or data upon which he reaches his assertions and opinions.

In opposition, the Chelsea defendants submit Aaker's supplemental affidavit dated June 5, 2020, which explains the scientific principle of stored energy and how it could have impacted the alleged cause of plaintiff's accident. In this sworn affidavit, Aaker refers the court to ten specific guidelines, articles, and treatises. Aaker states that the articles support the scientific theory that residual stress is an important consideration in the welding process and that the concept of residual stress and stored energy is a scientific principle or phenomenon that requires consideration.

Aaker states that the effects of residual stress buildup in welded materials must be managed or mitigated and that residual stress developed within the beam was most likely the cause of this incident. He maintains that stored energy was the result of a poor welding technique that caused the subject beam to shift.

Aaker also elaborates as to how his prior work and experience guided his conclusions. He states that his past work included serving as president of Engineering Services, L.P., a company which provides root cause failure analysis that requires metallurgical and mechanical engineering expertise. He also states that he has over forty years of engineering experience in conducting root cause failure analysis in connection with mechanical engineering failures, including identification of failures that are the result of poor mechanical design, or fabrication and misuse of materials. Aaker also states that he has a Bachelor of Science in Metallurgical Engineering, and attained a Registered Professional Engineer *20 License with extensive experience in engineering design and fabrication of onshore/offshore projects for the oil, gas and petrochemical industries.

As the sworn Supplemental Affidavit of Aaker offers support for his conclusions and clarifies how Aaker's professional experience assisted in reaching his findings, the court denies plaintiff's motion to strike the affidavit. While the parties acknowledge that the expert opinions differ with one another, they "present a battle of the experts for the jury to resolve." (*Shillingford v New York City Tr. Auth.*, 147 AD3d 465, 465 [1st Dept 2017]).

MOTION SEQUENCE 005

Vachris contends that summary judgement must be granted as to the cross claims and third-party claims filed against it for common law

indemnification and contribution. As discussed above, "[t]o be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work." (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]["a party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part"]).

Vachris argues that it was not actively negligent in causing plaintiff' s accident, and as such, cannot be liable for a claim of common law indemnification. Vachris contends that it neither supervised nor controlled the method or manner of the work which plaintiff was performing, owed no duty to plaintiff, and did not commit any affirmative acts of negligence. Vachris argues that it was not at the site at the time of the subject accident, did not have any control over the temporary shoring demolition work, was performing design and inspection services for pier work, and was not in control of any safety measures at the Chelsea Pier's facility.

The Chelsea defendants oppose Vachris's motion and contend that Vachris was hired as its engineer to review and approve the work being done by Trevcon, plaintiff's employer, and to ensure that Trevcon's work was completed properly and to specification. They contend that Vachris also reviewed and oversaw the work performed by Ceacon, which involved the shoring systems and grillage above the pier. The Chelsea defendants contend that although Trevcon retained Ceacon to engineer the plans for the grillage, Vachris initially provided Ceacon with suggested designs for the task and reviewed, provided comments and directions, and approved the plans ultimately drawn up by Ceacon.

The Chelsea defendants contend that because there is a genuine issue of material fact as to the scope of Vachris' involvement and whether the design of the grillage may have caused or contributed to plaintiff's accident, summary judgment for common law indemnification and contribution in favor of Vachris must be denied at this time. They argue that while Vachris generalizes that it had no involvement with the portion of the project above the pier, an examination of the role that Vachris played and the testimony of its own employees question the assertion that Vachris was a hands-off participant.

The Chelsea defendants argue that Chelsea Piers hired Vachris as its engineer to review and approve the work being done by Trevcon, ensuring that the work was completed properly and to specification, and that Vachris also reviewed and oversaw the work done by Ceacon, which involved the 21 *21 shoring systems and grillage above the pier. The Chelsea defendants contend that because there is a genuine issue of material fact as to whether the design of the grillage caused or contributed to plaintiff's accident, which Vachris was involved with, summary judgment in favor of Vachris must be denied.

The Chelsea defendants argue that in the alternative, Vachris' motion should be denied as it is premature. They argue that discovery is not yet complete and that liability experts have not been retained. The Chelsea defendants argue that Chelsea Piers should be afforded the opportunity to seek a liability expert opinion as to how Vachris work may have caused or contributed to plaintiff's accident and possibly violated its professional duty to Chelsea Piers.

Here, the testimony of several witnesses raises a question as to whether Vachris may be held negligent for the accident. First, there is a dispute of fact regarding Vachris' presence at the subject site. While Paulson from Vachris testified that Vachris was not present at the site on the date of

plaintiff's accident and that he was not aware that anyone was present while the grillage was disassembled, plaintiff testified that Vachris was at the site on the date of his accident. Plaintiff also testified that Vachris was often at the site and was overseeing the work of Trevcon. He recalls that Vachris workers had previously drawn up plans for work at the site. He also recalls that Vachris was around when welds were being cut at the site and may have been present to take a reading on the column hourly or every three hours.

Plaintiff further testified that a worker named Dave from Vachris would inspect his work, review everything, and had the final say. Plaintiff testified that on the day of his accident, Dave from Vachris checked in to make sure a column did not drop. He also recalls seeing him take a couple of shots on the column to make sure nothing moved.

The testimony of DePasquale, president of Vachris, also raises questions of fact as to Vachris' scope of involvement at the site. DePasquale testified that Vachris reviewed plans for the temporary shoring. He maintains that Vachris's role was to ensure that the load was properly transferred away from the area where work was taking place below the deck. DePasquale could not confirm or deny if anyone from Vachris had given directions to Trevcon.

Braito's testimony also raises a question of fact as to Vachris' involvement at the site. While Braito testified that Vachris did not create a plan for disassembly, Braito also testified that repairs had to be complete before Vachris removed the grillage. Braito testified that Vachris would not let the grillage be taken down unless repairs were complete. He also testified that Vachris was to ensure that the engineer or Trevcon understood spreading the load and the value of the load which has to be picked up.

The testimony from the various witnesses raises a question of fact as to whether Vachris had an active role at the site, whether it oversaw the work of Trevcon, and whether Vachris was at the site on a regular basis including on the date of plaintiff's accident. Therefore, it remains unclear to the court whether Vachris had the ability to intervene in how the subject beam was being removed during the process of disassembling the grillage.

As the testimony of the witnesses and expert affidavits conflict as to what caused the accident and Vachris' role regarding the work at the site which allegedly caused plaintiff's injury, the part of Vachris's motion seeking summary judgment dismissing the claims of common law indemnification and contribution, must be denied.

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Finally, with regards to Varchris' argument that the claims against it for contractual indemnification must be dismissed, the parties fail to demonstrate that Vachris had an obligation, pursuant to a contract, to indemnify. Therefore, the part of Vachris' motion seeking summary judgment as to claims that it must contractually indemnify the other parties, must be granted.

CONCLUSION and ORDER

Accordingly, it is

ORDERED that plaintiff Michael Shelton's motion for partial summary judgment (motion sequence no. 003) is granted in part, and summary judgment is granted as to plaintiff's claim of a violation of Labor Law § 240 (1). Plaintiff's allegations that Industrial Code sections 23-1.7 (e) (2), 23-2.1 (a) (1), 23-2.3(1), and 23-6.1 (h) were violated, are dismissed; and it is further

ORDERED that defendant/third third-party plaintiff Hudson River Park Trust's cross motion is granted in part, and the claims for common law indemnification, contribution, contractual indemnification and breach of contract are dismissed as against it; and summary judgment is granted as to Hudson River Park Trust's claim of contractual indemnification as against Chelsea Piers, L.P. and Chelsea Piers Management, Inc.; and it is further

ORDERED that Chelsea Piers, L.P. and Chelsea Piers Management, Inc.'s cross motion for summary judgment is granted as to the part of the motion dismissing the claim of a violation of Labor Law § 200; and it is further

ORDERED that plaintiff's motion to strike the affidavit of Gordon Aaker (motion sequence no. 004) is denied; and it is further

ORDERED that third-party defendant Vachris Engineering, P.C.'s motion for summary judgment (motion sequence no. 005) is denied in part, with the exception of the part of the motion which seeks to dismiss claims of contractual indemnification and breach of contract as against Vachris which are dismissed. **2/23/2021**

DATE

/s/ _____

FRANCIS A. KAHN, **III**, **A.J.S.C.**