[* 1]

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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Index Number : 403369/2006
COLLADO, AUSTRALIA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO.

this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits
Replying Affidavits

FILED
JAN 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion sequence 004 is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion (sequence number 004) of defendant/third-party plaintiff Parsons Brinckerhoff Construction Services, Inc. is granted to the extent that the Labor Law §§ 240 (1) and 241 (6) claims and the cross claim by the City for failure to procure insurance are dismissed as against it, and is otherwise denied; and it is further

ORDERED that the cross motion of plaintiffs is denied; and it is further

ORDERED that the cross motion of defendants City of New York and New York City Department of Transportation is denied; and it is further

ORDERED that third-party defendant Kiska shall serve a copy of this order with notice of entry within twenty days of entry on counsel for all parties.

Dated: 1/15/09

HON. CAROL EDMEAD J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

----------X

AUSTRALIA COLLADO AS ADMINISTRATRIX OF THE ESTATE OF KERVIN F. COLLADO, AND AUSTRALIA COLLADO, INDIVIDUALLY,

Plaintiffs,

Index No. 403369/06

-against-

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, and PARSONS BRINKERHOFF CONSTRUCTION SERVICES, INC.,

Defendants.

----------X

PARSONS BRINKERHOFF CONSTRUCTION SERVICES, INC.,

Third-Party Plaintiff,

Third-Party
Index No. 590874/06

-against-

KISKA CONSTRUCTION CORP., USA,

Third-Party Defendant.

----------X

HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

Motion sequence numbers 002, 003, and 004 are consolidated for disposition.

This action arises out of a fatal construction site accident that occurred on October 4, 2005 on a project at the Third Avenue Bridge over the Harlem River. On that date, Kervin F. Collado (Collado), a dock builder employed by third-party defendant Kiska Construction Corp., USA, fell 10 feet off the bridge's fender system into the river, where he drowned. Collado's estate and his wife, Australia Collado, now seek to recover monetary damages from the City of

New York, the owner of the bridge, and Parsons Brinckerhoff Construction Services, Inc., the project's engineering consultant, pursuant to New York State Labor Law §§ 200, 240 (1), 241 (6), and common-law negligence.

Third-party defendant Kiska Construction Corp., USA (Kiska) moves (motion sequence number 002), pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint. Plaintiffs also move (motion sequence number 003) for partial summary judgment on the issue of liability on their causes of action pursuant to Labor Law §§ 240 (1) and 241 (6) as against defendants City of New York and New York City Department of Transportation. Defendants City of New York and New York City Department of Transportation (together hereinafter, the City) cross-move for: (1) summary judgment dismissing the complaint; or alternatively, (2) an order striking plaintiffs' pleadings or precluding them from offering evidence at trial based upon their spoliation of evidence. Defendant/third-party plaintiff Parsons Brinckerhoff Construction Services, Inc. (PBCS) moves (motion sequence number 004) for summary judgment dismissing the complaint and all cross claims asserted against it. Plaintiffs cross-move for summary judgment against PBCS. The City cross-moves for summary judgment on its cross claims for indemnification as against PBCS.

BACKGROUND

On May 17, 2001, Kiska entered into a contract with the New York City Department of Transportation, Division of Bridges, pursuant to which Kiska was retained as a general contractor[1] on a construction project known as the Reconstruction of the Third Avenue Bridge

[1]Plaintiffs appear to dispute that Kiska was the general contractor on the project, but analyze PBCS's liability as an "agent" under Labor Law §§ 240 (1) and 241 (6). Therefore, the court analyzes PBCS's liability as such, as discussed *infra*.

over the Harlem River -- Boroughs of Manhattan and Bronx, Contract No. HBX663. Among other things, Kiska was required to repair and replace the fender system of the bridge. On July 2, 2001, PBCS entered into a written consultant agreement with the City, to provide resident engineering and inspection services for the project.

On the date of the accident, Collado was working for Kiska as part of a gang of dock builders, assigned to installing panels on a fender system located on an abutment of the Third Avenue Bridge (Johansson Dep., at 14-15, 18, 44; Wirick Dep., at 18; Ostrander Dep., at 10-11). The fender system provides protection against damage caused by shipping colliding with the bridge (Grafton Aff., at 5; Johansson Dep., at 14, 17). The fenders are essentially a wooden bumper system, which consists of wooden braces known as "whalers," which are attached to piles that are driven into the river bed (Johansson Dep., at 14, 17, 18, 73). In order to install the fenders, the workers were required to work from a barge, where they kept the materials and equipment for their work (Wirick Dep., at 21).

The only eyewitness to Collado's accident was Roger Johansson, a crane operator. Johansson testified that, at about 7:00 A.M., he entered his crane, which was located on the same work barge where Collado started work that day (Johansson Dep., at 19-20). After making "small talk" with Collado, Johansson observed Collado standing on top of the fender system, retrieving an air hose lying on the fenders to power the workers' pneumatic tools (*id.* at 44). The air hose was connected to a manifold located on the abutment, which was being fed by a bull hose connected to an air compressor located shoreside (Ostrander Dep., at 104). According to Johansson, Collado was walking backwards on the fenders, when he lost his footing, causing him to fall backwards and into the river (Johansson Dep., at 44, 53, 61-62, 66, 121, 165-166).

Johansson estimated that Collado fell a distance of approximately 10 feet (*id.* at 92). Johansson next saw Collado in the river with his head still above the water, and called to Jerry Wirick, a dock builder diver, who went into the water in order to rescue Collado (*id.* at 78, 79-80). Thereafter, other Kiska employees went into the water to rescue Collado (*id.* at 95-96; Burke Dep., at 18-19; Wirick Dep., at 45-47). However, the attempts to rescue Collado were unsuccessful. When Collado was eventually pulled from the water, he was not wearing a life vest or other flotation vest (Johansson Dep., at 106; Ostrander Dep., at 46-47). The autopsy report indicates that Collado died as a result of "[d]rowning" (Schwarz Affirm. in Support, Exh. P).

Kiska supplied eight barges at the Third Avenue Bridge project (Scozzari Dep., at 119). When necessary, the barges were moved by tugs supplied by Kiska (Wirick Dep., at 67). On the date of the accident, the barges were moored around the site and were acting as staging/work platforms (*id.*). None of the barges was self-propelled (Scozzari Dep., at 119). Of the eight barges utilized at the job site, the barge that Collado's crew was working on that day was Barge #7, which was approximately 60 feet wide by 160 feet long (Karpousis Affirm. in Support, Exhs. F, G).

An investigation by the Occupational Health and Safety Administration (OSHA) resulted in the issuance and citation of a "serious" penalty to Kiska (Sharp Affirm. in Support, Exh. D, at 6).[2] Kiska has been paying benefits pursuant to the Longshore and Harbor Workers'

---

[2]Specifically, the OSHA citation states that "[a] dock builder walking at the edge of a bridge pier with unprotected sides that was approximately 12 feet above the surface of the water that was approximately 15 feet deep was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems. On or about 10/4/05" (Sharp Affirm. in Support, Exh. D, at 6).

Compensation Act (LHWCA), 33 USC § 901 *et seq.*, to the Collado family since the date of the accident.

By summons and complaint dated March 31, 2006, plaintiffs brought the instant action, asserting causes of action under Labor Law §§ 240 (1), 241 (6), 200 (1), and for common-law negligence. The bill of particulars alleges that defendants violated "Administrative Code & Charter of the New York City Title 27, Article 7 [C26-70.0] § 26-228; New York State Labor Law 200 (1); 240 (1); 240 (2); 240 (3); 241 (6); New York Code Rules and Regulations, 12 NYCRR Part 23, Subpart 23-1.1, 23-1.5 (a) (b) (c) (2) (3); 23-1.7 (b) (1) (i) (ii) (iii) (a) (b) (c); 23-5.1 (b) (c) (1) (2) (f) (h) (j) (i); 23[-]5.3 (e) (g) (1); Public Law 91-596 Congress; US Department of Labor Occupational Safety and Health Administrative 5 (a); 1926.20 (a); 1926.21 (2); 1926.451 (a) (1) (2) (3) (4)" (Verified Bill of Particulars, ¶ 3). Plaintiffs seek to recover damages for conscious pain and suffering and pre-impact terror. Mrs. Collado also asserts causes of action for loss of society, services, and consortium. In its answer, PBCS asserted cross claims for contribution and indemnification against the City. The City cross-claimed against PBCS for contribution, indemnification, and failure to procure insurance. Thereafter, PBCS commenced a third-party action against Kiska, seeking indemnification and contribution.

DISCUSSION

The standards for summary judgment are well settled.

> "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact

which require a trial of the action"

(*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted]). "'[I]ssue-finding, rather than issue-determination, is the key to (reviewing a motion for summary judgment)'" (*Bautista v David Frankel Realty, Inc.*, 54 AD3d 549, 556 [1st Dept 2008], quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, *rearg denied* 3 NY2d 941 [1957]).

Labor Law § 240 (1)

Plaintiffs contend that they are entitled to summary judgment on their Scaffold Law claim, since Collado fell from an elevated work station, which constituted an ad hoc scaffold. They maintain that the work station did not contain even the bare minimum of safety devices, such as a floor, guardrails, tie-offs, or a static line for personal fall protection.

The City argues, in opposition, that Collado was the sole proximate cause of his death because he was not wearing a life vest. In any event, the Scaffold Law does not apply, because Collado was not using a scaffold or work platform at the time of his accident.

PBCS contends that it cannot be considered a statutory agent of either the City or Kiska. It was Kiska, not PBCS, that had an obligation to provide Collado with appropriate safety equipment and a safe place to work. According to PBCS, it only had an obligation to inspect Kiska's work for compliance with the project's plans and specifications. Collado had not even begun working on the date of the accident; he was merely setting up. Although PBCS had the authority to stop the performance of Kiska's work, such authority only constituted general supervisory authority. PBCS also contends, like the City, that Collado's failure to wear a life vest was the sole proximate cause of his injuries as a matter of law.

Labor Law § 240 (1), commonly known as the Scaffold Law, provides, in relevant part, that:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed"

The Scaffold Law imposes absolute liability on contractors and owners irrespective of their negligence and whether they supervised or controlled the work (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). In addition, the plaintiff's comparative negligence is not a defense to liability (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 [2003]). The statute applies to "risks related to elevation differentials," including "those related to the effects of gravity where protective devices are called for . . . because of a difference between the elevation level of the required work and a lower level" (*Rocovich*, 78 NY2d at 514). The purpose behind the Scaffold Law is to protect workers "by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520, *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citations omitted]).

As noted above, section 240 only applies to contractors, owners, and their agents. There is no dispute that PBCS is not an owner or contractor, and thus may only be liable as an agent of either the City or Kiska. "When the work giving rise to [the nondelegable duties of the owner or general contractor] 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 [the work] does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]; *see also Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005] ["unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law"]).

In support of its motion, PBCS relies upon section 7.2 of the contract between Kiska and the City, which provides as follows:

> "During the performance of the **Work** and up to the date of **Final Acceptance**, the **Contractor** shall take all reasonable precautions to protect the persons and property of the City and of others from damage, loss or injury resulting from the **Contractor's**, and or its **Subcontractors'** operations under this **Contract**. The **Contractor's** obligation to protect shall include the duty to provide, place or replace and adequately maintain at or about the **Site** suitable and sufficient protection such as lights, barricades and enclosures"

(Schwartz Affirm. in Support, Exh. A [emphasis in original]). PBCS also points to the following provision of the contract between PBCS and the City:

> "II. **RESIDENT ENGINEERING AND INSPECTION**
>
> A. The Consultant shall be the representative of the Department at the site and, subject to review by the Commissioner or his duly authorized representative, shall have the power, in the first instance, to inspect the performance of the work, as delineated in Article 30, 'The Resident Engineer', of the Agreement section of the Standard Specifications of the Bureau of Highway Operations, dated June, 1986, as currently amended.
>
> B. The Consultant agrees that he will endeavor to safeguard the City against defects and deficiencies in the work and that he will use reasonable care and reasonable powers of observation and detection in determining that the work conforms to the Construction Contract documents.

> C. It is the responsibility of the Construction Contractor(s), and not the responsibility of the Consultant, to determine the 'Means and Methods of Construction', as defined by Article 2, Paragraph 17 of the Agreement section of the Standard Specifications of the Bureau of Highway Operations, dated June, 1986, as currently amended. However, if the Consultant reasonably believes that the means and methods of construction proposed by the Construction Contractor(s) will constitute or create a hazard to the work, or to the persons or property, or will not produce finished work in accordance with the terms of the Construction Contract, such means and methods must be reported to the Commissioner, or to his duly authorized representative"

(*id.*, Exh. L, § II). Pursuant to that term of the contract, the City's Engineer-in-Charge was the "senior authority in the field" to review the performance of PBCS (*id.*, Exh. L, § II [D]).

Furthermore, PBCS points to the following deposition testimony to show that Kiska, not PBCS, was responsible for safety issues: James Klim and his assistant, both Kiska employees, were in charge of safety on the project (Johansson Dep., at 108; Ayverdi Dep., at 53-54). Kiska instructed and supervised its own employees regarding the work to be performed (Ostrander Dep., at 9-11; Marriott Dep., at 24; Burke Dep., at 9). Klim held safety meetings for laborers twice monthly, as well as safety meetings for Kiska management (Ayverdi Dep., at 54-60). Klim performed daily safety walkthroughs and brought safety issues to the attention of Kiska's management (*id.* at 62-65). Additionally, Kiska was solely responsible for providing its employees with safety equipment, including life vests (*id.* at 68; Wirick Dep., at 27-28). In fact, on April 23, 2003, Collado signed a Kiska receipt establishing that he had been given a flotation device and other safety equipment (Schwarz Affirm. in Support, Exh. F). PBCS's responsibility on the project was to "double-check" the work performed by Kiska's workers and to inspect the "quantity and quality" of the work (Marriott Dep., at 27-29). In view of the contractual terms and evidence showing that it did not supervise or control how the work was performed, PBCS

has made a prima facie showing that it was not a statutory agent of either the City or Kiska (*see Wray v Morse Diesel Intl. Inc.*, 23 AD3d 260, 262 [1st Dept 2005] [general supervision and control over quality and timing of work is insufficient to establish direct supervision and control over how the work is performed]; *Hutchinson v City of New York*, 18 AD3d 370, 371 [1st Dept 2005] [engineering firm's obligation to inspect work did not create an issue of fact as to its statutory agency]; *Kocurek v Home Depot, U.S.A.P.*, 286 AD2d 577, 580 [1st Dept 2001] [contractor could not be liable under Labor Law because plaintiff's employer had sole authority to supervise and control plaintiff's injury-producing activity]).

In opposition to PBCS's motion, plaintiffs and the City extensively refer to contractual provisions and deposition testimony showing that PBCS was required to inspect the construction work in order to determine if it complied with the plans and specifications, ensure compliance with the law and regulations, and had the authority to stop work if it noticed an unsafe condition. However, none of this evidence shows that PBCS had the authority to supervise how the work was performed (*see Russin*, 54 NY2d at 318). To be sure, when asked whether PBCS would approve how the bridge would be removed, the City's Engineer-in-Charge stated that "[PBCS] doesn't approve in this particular case. But they do concur and it's up to the contractor. It's the contractor Kiska's means and method to build the bridge including safety" (Chionchio Affirm. in Opp., Exh. H, Hom Dep., at 54). Accordingly, PBCS is entitled to summary judgment on the Labor Law claims.

The court, thus, turns to the issue of liability under the Scaffold Law as against the City. To impose liability under the statute, a plaintiff need only prove: (1) a violation of the statute (i.e., the owner or contractor failed to provide adequate safety devices); and (2) that the statutory

violation proximately caused his or her injuries (*Gallagher v New York Post*, 55 AD3d 488, 489 [1st Dept 2008]). Where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under the statute (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]; *Blake*, 1 NY3d at 290 ["if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation"]). Such actions may include the failure to use or the misuse of an otherwise available safety device (*Robinson*, 6 NY3d at 554; *Miro v Plaza Constr. Corp.*, 38 AD3d 454, 455 [1st Dept], *affd as mod* 9 NY3d 948 [2007]). However, "[t]he mere presence of [safety devices] somewhere at the worksite" is insufficient to defeat liability (*Zimmer*, 65 NY2d at 524).

In *Cahill* (4 NY3d 35, *supra*), the plaintiff was injured while greasing rods at an elevation, but did not use safety lines, as he had been instructed to do several weeks earlier. Rather, he used another device that was not designed for his task. The Court of Appeals acknowledged that plaintiff fit the definition of "recalcitrant" in that he was given specific instructions to use a safety line while climbing, which he disregarded, but explained that "[t]he controlling question . . . [was] not whether the plaintiff was 'recalcitrant,' but whether a jury could have found that his own conduct . . . was the sole proximate cause of his accident" (*Cahill*, 4 NY3d at 39-40). The Court in *Cahill*, reversing the Appellate Division, found issues of fact as to whether the plaintiff was the sole cause of his injuries:

> "Here, a jury could have found that plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he

> would not have been injured. Those factual findings would lead to the conclusion that defendant has no liability under Labor Law § 240 (1), and therefore summary judgment should not have been granted in plaintiff's favor"

(*id.* at 40).

Similarly, in *Robinson* (6 NY3d 550, *supra*), the plaintiff was injured when he used a six-foot ladder for a task that he knew required an eight-foot ladder. It was uncontested that there were eight-foot ladders available at the job site. The Court of Appeals held that "[p]laintiff's own negligent actions – choosing to use a six-foot ladder that he was knew was too short for the work to be accomplished and then standing on the ladder's top cap in order to reach the work – were, as a matter of law, the sole proximate cause of his injuries" (*Robinson*, 6 NY3d at 555). In making this determination, the Court noted that "plaintiff also conceded that his foreman had not directed him to finish the piping in the office suite before undertaking other tasks, and testified that there was sufficient other work to occupy him for the rest of the workday" (*id.*).

In the instant case, plaintiffs have established that Collado was not provided with any safety devices and that such failure was a proximate cause of his injuries. Contrary to the City's position, the statute is applicable to Collado's accident; even though he was not working on a scaffold or work platform, Collado was subject to the risk of falling off the fenders into the water (*see Rocovich*, 78 NY2d at 514).[3] It is undisputed that Collado fell a distance of approximately 10 feet from the top of the fender system to the river below. Although the City claims that Collado was the sole cause of his accident because he did not wear a life vest, this contention is without merit. Even if Collado was not wearing a life vest, his failure to do so would constitute

---

[3]Although the City argues that workers were not required to work on the fender system, the record, in fact, reflects that workers did climb on the fenders to perform their work (Johansson Dep., at 52).

at most comparative negligence, which is not a defense to liability under the Scaffold Law (*see Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 619 [2d Dept 2008] ["any comparative negligence on the plaintiff's behalf is not a defense to a claim under Labor Law § 240 (1)"]). It also cannot be seriously disputed that a life vest cannot be considered fall protection. At most, the life vest would have prevented Collado from drowning, not falling. Given that the statute was violated since there were no safety devices to prevent Collado's fall, Collado could not have been solely responsible for his injuries (*see Blake*, 1 NY3d at 290).

Accordingly, plaintiffs' motion for summary judgment as to liability under Labor Law § 240 (1) is granted as against the City.

Labor Law § 241 (6)

Plaintiffs argue that they are entitled to summary judgment on four sections of the Industrial Code: 12 NYCRR 5.1 (e), (j), 12 NYCRR 23-1.7 (b) (1) (iii) (c), and 12 NYCRR 23-1.7 (c). Defendants contend that plaintiffs have failed to identify a specific or applicable provision of the Code.[4]

Labor Law § 241 (6) requires owners, contractors, and their agents to "provide reasonable and adequate protection and safety" for workers performing the inherently dangerous activities of construction, excavation and demolition work. Pursuant to Labor Law § 241 (6), a plaintiff must identify a concrete specification of the New York State Industrial Code, containing "specific,

---

[4]The court disregards the City's contention made, for the first time in the reply, that the failure to provide a safety boat was not a proximate cause of Collado's death (*see Matter of Allstate Ins. Co. v Dawkins*, 52 AD3d 826, 827 [2d Dept 2008] ["[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant, not to permit the movant to introduce new arguments or new grounds for the requested relief"]).

positive commands," rather than a provision reiterating common-law safety standards (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349 [1998]). Violation of an Industrial Code provision provides "some evidence of negligence," which is to be considered along with all other evidence on the issue (*Ramputi v Ryder Constr. Co.*, 12 AD3d 260, 261 [1st Dept 2004]). Comparative negligence is a defense to liability (*Spages v Gary Null Assoc., Inc.*, 14 AD3d 425, 426 [1st Dept 2005]).

Here, plaintiffs allege in the complaint and bill of particulars that the following sections of the Industrial Code were violated: 23-1.1; 23-1.5 (a), (b), (c) (2), and (3); 23-1.7 (b) (1) (i), (ii), and (iii) (a) (b) and (c); 23-1.16; 23-1.21; 23-5.1 (b), (c) (1), and (2), (f) (h), (j), and (i); and 23-5.3 (e) (g) (1). Additionally, plaintiffs allege that defendants violated the following OSHA regulations: 29 CFR 1926.20 (a), 29 CFR 1926.21 (2), 29 CFR 1926.451 (a) (1), (2), (3), and (4).

In support of their motion for summary judgment, plaintiffs only rely upon four Industrial Code sections: 23-5.1 (e) and (j) and 23-1.7 (b) (1) (iii) (c) and 23-1.7 (c). Plaintiffs have not opposed defendants' motions for summary judgment dismissing the remaining sections. Accordingly, the court shall only consider the disputed Code provisions, and the remaining sections are dismissed.

As noted above, PBCS has established that it was not a statutory agent of either the City or Kiska, and thus, cannot be liable under Labor Law § 241 (6) (*see Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 46-47 [1st Dept 2005]).

12 NYCRR 23-1.7 (c)

Section 23-1.7 (c) provides as follows:

"Drowning hazards. Where any person is exposed to the hazard of falling into water

> beneath his work location in which he might drown, equipment for the prompt rescue of such person from the water shall be provided. Such equipment shall consist of a manned boat of a size suitable for the existing water conditions and area. Such boat shall be equipped with oars, with United States Coast Guard approved life preservers, with a life ring fastened to a line not less than 50 feet in length and with a boat hook. *Such boat shall continuously patrol the area beneath the work location at all times when any person is exposed to the falling and drowning hazard*"

(emphasis supplied).

While there appear to be no reported cases interpreting this provision of the Industrial Code, the court finds that this provision is sufficiently specific and applicable to the facts at hand. Collado was clearly exposed to the hazard of falling into the water from the barge and fender system. Plaintiffs, however, are not entitled to summary judgment on this Code provision. First, there are issues of fact as to whether there was a safety boat patrolling beneath the work location. Kiska's project manager, Mehmet Ayverdi, testified at his deposition that there was a small safety boat at the project site (Ayverdi Dep., at 32). Second, even if the boat was not patrolling beneath the work site, the violation of an Industrial Code provision is only "some evidence of negligence," which is to be considered with all other evidence on the issue (*see Ramputi*, 12 AD3d at 261). Indeed, unlike under the Scaffold Law, comparative negligence is a defense (*see Spages*, 14 AD3d at 426). Thus, in evaluating defendants' liability, the jury may consider whether or not Collado was wearing a life vest.

12 NYCRR 23-1.7 (b)

Section 23-1.7 (b), entitled "Falling hazards," states, in relevant part, that:

> "(1) (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

***

(iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows:

***

([c]) An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage"

This provision has been held to be sufficiently concrete to support this claim (*Olsen v James Miller Mar. Serv., Inc.*, 16 AD3d 169, 171 [1st Dept 2005]). The regulation does not define a "hazardous opening." Case law reveals, however, that the regulation is meant to protect workers against "'falls from an elevated area to a lower area through openings large enough for a person to fit'" (*Bell v Bengomo Realty, Inc.*, 36 AD3d 479, 480 [1st Dept 2007], quoting *Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002]; *see also Alvia v Teman Elec. Contr.*, 287 AD2d 421, 423 [2d Dept 2001], *lv dismissed* 97 NY2d 749 [2002]). The regulation does not apply where the hole is too small for a worker to fall through (*Alvia*, 287 AD2d at 423). Here, Collado did not fall into a hole or opening; rather, he fell off the fender system into the river. Therefore, this regulation does not apply.

12 NYCRR 23-5.1 (e), (j)

Finally, section 23-5.1 is not applicable to these facts, because Collado was not working on a scaffold at the time of the accident (*see Riccio v NHT Owners, LLC*, 13 Misc 3d 1209[A], *9, 2006 NY Slip Op 51752[U] [Sup Ct, Kings County 2006], *affd* 51 AD3d 897 [2d Dept 2008]).

In sum, plaintiffs' Labor Law § 241 (6) claim is dismissed, except to the extent that it is based upon a violation of the safety boat provision (12 NYCRR 23-1.7 [c]).

Labor Law § 200 and Common-Law Negligence

Labor Law § 200 is a codification of the common-law duty imposed upon owners and general contractors to maintain a safe workplace (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Where liability arises from the means and methods employed, the plaintiff must establish that the owner or contractor had "'the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition'" (*Carty v Port Auth. of N Y. & N.J.*, 32 AD3d 732, 733 [1st Dept 2006], *lv denied* 8 NY3d 814 [2007], quoting *Rizzuto*, 91 NY2d at 352).

As noted above, PBCS has established that it did not supervise or control Collado's work. In addition, the City has submitted uncontroverted evidence that Kiska's superintendent, Fernando Marriott, was responsible for overseeing Collado's crew, and that Kiska's foreman would assign Collado's work assignments (Wirick Dep., at 12, 19, 24). Accordingly, the City has demonstrated that it did not supervise or control the injury-producing work.

Plaintiffs also allege that the unsecured fender system constituted a hazardous condition. Where the injuries arise out of a defective or dangerous condition of the worksite, the plaintiff must prove that the defendant had actual or constructive notice of the condition (*Zaher v Shopwell, Inc.*, 18 AD3d 339, 340 [1st Dept 2005], citing *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [supervision and control over plaintiff's work is unnecessary where injury arose from defective or dangerous condition at a work site, rather than from method of plaintiff's work]). "The notice must call attention to the specific defect or hazardous condition, and its specific location" (*Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d at 351, citing *Mitchell v New York Univ.*, 12 AD3d 200, 201 [1st Dept 2004]).

In their replies, the City and PBCS argue that the duty to provide a safe place to work does not extend to hazards that may be readily observed by reasonable use of the senses. However, defendants did not make this argument in their moving papers, and may not do so in their replies (*see Matter of Allstate Ins. Co.*, 52 AD3d at 827). While PBCS and the City argue that they had no actual or constructive notice of a hazardous condition, the court concludes that there are issues of fact as to whether defendants had notice of the unsecured condition of the fender system. Plaintiffs submit accident reports from the New York City Department of Transportation, Bureau of Bridges, indicating that there were four prior accidents involving inadequate fall protection on the fender system and barges of the project, where Collado's accident occurred (Sharp Affirm. in Opp., Exh. K). Indeed, one report dated February 10, 2004 states that "[PBCS] directed Kiska earlier in the day to bring all walkways up to standard" (*id.*). In addition, one witness testified that there was one prior accident in which a worker fell into the river from a pier[5] (Marriott Dep., at 34).

Conscious Pain and Suffering

The City contends that plaintiffs' cause of action for pain and suffering should be dismissed, since Collado did not suffer any conscious pain and suffering during the accident.

To recover for pain and suffering damages under New York law, a plaintiff must prove that the decedent experienced conscious pain and suffering for a sufficiently identifiable period of time (*Cummins v County of Onondaga*, 84 NY2d 322, 324 [1994]; *Ramos v Shah*, 293 AD2d 459, 460 [2d Dept 2002]). In *Cummins*, *supra*, the Court of Appeals stated, in the context of a

---

[5]The court notes that the OSHA citation referred to the location where Collado fell from as a "pier" (Sharp Affirm. in Support, Exh. D, at 6).

motion to set aside a jury's award of conscious pain and suffering damages:

> "Plaintiffs have the threshold burden of proving consciousness for at least some period of time following an accident in order to justify an award of damages for pain and suffering. The burden can be satisfied by direct or circumstantial evidence. However, '[m]ere conjecture, surmise or speculation is not enough to sustain a claim for [pain and suffering] damages'. Without legally sufficient proof of consciousness following an accident, a claim for conscious pain and suffering must be dismissed"

(*Cummins*, 84 NY2d at 324-325 [citations omitted]). When the interval between injury and death is relatively short, "'the degree of consciousness, severity of pain, apprehension of impending death, along with duration, are all elements to be considered'" (*Ramos*, 293 AD2d at 460, quoting *Regan v Long Is. R.R. Co.*, 128 AD2d 511, 512 [2d Dept 1987]). The courts have also recognized the decedent's "pre-impact terror" as an element of conscious pain and suffering (*Lubecki v City of New York*, 304 AD2d 224, 238 [1st Dept 2003], *lv denied* 2 NY3d 701 [2004]; *Torelli v City of New York*, 176 AD2d 119, 123 [1st Dept 1991], *lv denied* 79 NY2d 754 [1992] [pain and suffering award must "tak[e] into account the [decedent's] pre-impact fear and terror"]).

The City submits, in support of its motion, an affirmation by Michael M. Baden, M.D., a former chief medical examiner for New York City, who reviewed photographs of Collado being pulled from the water and the record (Baden Affirm., ¶ 7). Dr. Baden concludes that Collado was not conscious when he entered the water, based upon the autopsy report and the project manager's testimony that he hit his head and lost consciousness when he fell (*id.*, ¶¶ 8, 9). Collado remained unconscious because he did not scream, yell, or make any defensive movements (*id.*, ¶ 10). However, in opposition, plaintiffs submit an affirmation from Charles Welti, M.D., the former Chief Medical Examiner for Suffolk County, in which he states, based

upon his review of the photographs of Collado, that he had no skull fracture or skull lacerations and only had linear abrasions of less than one inch in the frontotemporal region, and that these injuries could not have rendered Collado unconscious (Welti Affirm., ¶ 10). In light of these issues of fact, the claim for conscious pain and suffering must be resolved by the jury (*see Phiri v Joseph*, 32 AD3d 922, 922-923 [2d Dept 2006]; *Cushing v Seemann*, 247 AD2d 891 [4th Dept 1998]).

Spoliation of Evidence

The City also seeks an order striking plaintiffs' pleadings or precluding them from offering evidence at trial based upon their spoliation of Collado's life vest.

Spoliation sanctions may be imposed where a party, either negligently or intentionally, loses, destroys or disposes of evidence (*Standard Fire Ins. Co. v Federal Pac. Elec. Co.*, 14 AD3d 213, 218 [1st Dept 2004]; *Squitieri v City of New York*, 248 AD2d 201, 202-203 [1st Dept 1998]; *Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]). If it is shown that the defendant was responsible for the spoliation of evidence, the court may strike the pleadings if required as a matter of fundamental fairness, or may impose a lesser sanction, such as a fine or negative inference (*Diaz v Rose*, 40 AD3d 429 [1st Dept 2007]; *Deveau v CF Galleria at White Plains, LP*, 18 AD3d 695, 696 [2d Dept 2005]). An "obligation to preserve evidence even arises prior to the filing of a complaint where a party is on notice that litigation is likely" (*Turner v Hudson Transit Lines, Inc.*, 142 FRD 68, 73 [SD NY 1991]).

The City has failed to show any spoliation of evidence. As pointed out by the City, there is no evidence that Collado was wearing a life vest on the date of the accident – indeed, all of the

eyewitnesses testified that they did not recall whether Collado was wearing a life vest (Ostrander Dep., at 46; Wirick Dep., at 35; Burke Dep., at 20; Johansson Dep., at 38, 50). And, a photograph of Collado being taken out of the water shows that he was not wearing a life vest (Chionchio Affirm. in Support, Exh. H). Therefore, this application must be denied at this juncture.

The City's Cross Claims for Contractual Defense and Indemnification

As an initial matter, PBCS moves for summary judgment dismissing the City's cross claim for failure to procure insurance naming the City as an additional insured, and submits a certificate of insurance showing that it, in fact, procured the requisite insurance (Schwarz Affirm. in Support, Exh. N). Given that a certificate of insurance is some evidence that an insurance contract was procured (*see Buccini v 1568 Broadway Assoc.*, 250 AD2d 466, 469-470 [1st Dept 1998]), and that the City has not opposed dismissal, this cross claim is dismissed.

PBCS also argues that it is entitled to dismissal of the City's cross claims for contractual indemnification, since it did not supervise or control Collado's work and was not responsible for providing Collado with safety equipment on the job site. According to the City, PBCS is required to defend and indemnify the City upon any claims of injury caused by PBCS's negligence. Additionally, the City seeks common-law indemnification from PBCS.

"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'" (*Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005], quoting *Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777

[1987] [internal quotation marks omitted]). The contract between PBCS and the City provides, in relevant part, that:

> "The contractor shall be solely responsible for all physical injuries or death to its agents, servants, or employees or to any other person or damage to any property sustained during its operations and work on the project under this contract *resulting from any negligent or wrongful act of omission or commission or error in judgment* of any of its officers, trustees, employees, agents, servants, or independent contractors, and shall hold harmless and indemnify the City from liability from any and all claims for damages on account of such injuries or death to any such person or damages to property on account of any neglect, fault or default of the contractor, its officers, trustees, employees, agents, servants or independent contractors"

(Schwarz Affirm. in Support, Exh. L, Art. 4.1[B] [emphasis supplied]). In the instant case, the contract does not require PBCS to defend the City, but only to indemnify and hold it harmless for any claims for death to any person.[6] The City is not entitled to contractual indemnification from PBCS at this juncture, inasmuch as it has not established its freedom from negligence (General Obligations Law § 5-322.1; *Cuevas v City of New York*, 32 AD3d 372, 374 [1st Dept 2006]). In view of the issues of fact as to whether PBCS had notice of a dangerous condition on the fender system, PBCS's motion for summary judgment dismissing the City's cross claim for contractual indemnification must also be denied, because it has not established that it was not negligent. Finally, the factual issues as to the City's negligence also preclude summary judgment on its cross claims for common-law indemnification over and against PBCS (*see Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

PBCS's Third-Party Claims for Indemnification and Contribution

Kiska, Collado's employer and the barge owner, also moves for summary judgment

---

[6]PBCS acknowledges that the duty to defend may arise under the insurance contracts. However, neither party has provided these contracts.

dismissing the third-party complaint, arguing that PBCS's indemnification and contribution claims are foreclosed by the LHWCA. PBCS maintains that it may recover implied contractual indemnity from Kiska because, pursuant to Kiska's contract with the City, it was ultimately responsible for project safety.

The LHWCA was enacted in 1927 to provide compensation to workers injured on navigable waters in the course of employment by a statutory employer (*Lockheed Martin Corp. v Morganti*, 412 F3d 407, 411 [2d Cir 2005], *cert denied* 547 US 1175 [2006]). The LHWCA "establishes a comprehensive federal workers' compensation program that provides longshoreman and their families with medical, disability, and survivor benefits for work-related injuries and death" (*Howlett v Birkdale Shipping Co., S.A.*, 512 US 92, 96 [1994]). Where an employer has paid workers' compensation benefits to its injured employee, the LHWCA "shall be exclusive and in place of all other liability of such employer to the employee . . . and anyone otherwise entitled to recover damages from [it] at law or in admiralty on account of such injury" (33 USC § 905 [a]). However, under section 905 (b), a cause of action may be maintained against a vessel[7] owner for its negligence (33 USC § 905 [b]).

The LHWCA covers an injured worker engaged in maritime employment, provided that he or she meets a two-fold inquiry: (1) the injury must have occurred within an area adjoining navigable waters of the United States, known as the "situs" test; and (2) the nature of the work performed by the worker must be maritime in nature, i.e., the "status" test (*Northeast Marine Terminal Co., Inc. v Caputo*, 432 US 249, 279-280 [1977]).

---

[7]A "vessel" has been defined as "any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment" (*Stewart v Dutra Constr. Co.*, 543 US 481, 497 [2005]).

Kiska contends, and PBCS does not dispute, that Collado suffered an injury in navigable waters. It is uncontested that the fenders are designed to prevent boats from hitting the bridge, and are an aid to navigation. Therefore, the "situs" test has been met, since the fenders qualify as an area adjoining navigable waters (*see Fleischmann v Director, Office of Workers' Compensation Programs*, 137 F3d 131, 138-139 [2d Cir], *cert denied* 525 US 981 [1998]). The "status" test has also been satisfied because Collado was engaged in maritime employment (*LeMelle v B. F. Diamond Constr. Co.*, 674 F2d 296, 298 [4th Cir 1982], *cert denied* 459 US 1177 [1983] [building bridge over navigable water constituted "maritime employment" as defined in the LHWCA, even though bridge construction is not classically maritime work "under ancient traditions of the sea"; it has long been merged with such work by exigencies of modern coastal land and sea traffic]; *see also Duncanson-Harrelson Co. v Director, Office of Workers' Compensation Programs*, 644 F2d 827, 830 [9th Cir 1981]).

The LHWCA does not foreclose actions for indemnity as long they are based on an express contractual right to indemnification or an implied right of indemnification (*Olsen*, 16 AD3d at 172). There is no dispute that there is no express agreement by Kiska to indemnify PBCS. Thus, Kiska may only recover indemnification based upon an implied contractual right. Implied contractual indemnity arises when there are "unique special factors [] demonstrating that the parties intended that the 'would-be indemnitor bear the ultimate responsibility for the plaintiff's safety' or when there is a generally recognized special relationship between the parties" (*Pennisi v Standard Fruit & S.S. Co.*, 206 AD2d 290, 293 [1st Dept 1994] [citation omitted]; *see also Maritime Overseas Corp. v Northeast Petroleum Indus., Inc.*, 706 F2d 349, 353 [1st Cir 1983]). The party alleging this claim has a heavy burden of showing an implied

agreement by the potential indemnitor to indemnify it (*Triguero v Consolidated Rail Corp.*, 932 F2d 95, 101 [2d Cir 1991]). "Relationships that support implied indemnification include employer/negligent employee, building owner/independent contractor, and motor vehicle owner/negligent driver" (*Pro Bono Invs., Inc. v Gerry*, 2005 WL 2429787, *17, 2005 US Dist LEXIS 22348, *58 [SD NY 2005] [internal quotation marks and citations omitted]).

Although PBCS contends that Kiska was solely responsible for site safety, there is no express or implied contractual relationship between PBCS and Kiska. Thus, there are no "unique special factors" which would demonstrate that Kiska ever considered, let alone intended to indemnify PBCS. Nor is there a generally recognized special relationship between Kiska and PBCS. Furthermore, assuming *arguendo* that the barge is a vessel, it cannot be said that Kiska was negligent in its capacity as vessel owner. Collado was not on the barge when he fell. Moreover, the barge was not in transit when he fell, and the air hose was not part of the barge's equipment. Therefore, Kiska is entitled to summary judgment dismissing the third-party complaint (*see Pennisi*, 206 AD2d at 291 ["once [plaintiff's employer] fulfilled its obligation under the LHWCA by paying out benefits to the plaintiff, further tort-based contribution from the employer was foreclosed"]).

CONCLUSION AND ORDER

Based upon the foregoing, it is hereby

ORDERED that the motion (sequence number 002) of third-party defendant Kiska Construction Corp., USA, for summary judgment is granted and the third-party complaint is dismissed with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion (sequence number 003) of plaintiffs Australia Collado as Administratrix of the Estate of Kervin F. Collado, and Australia Collado, Individually, for partial summary judgment is granted on their Labor Law § 240 (1) cause of action on the issue of liability as against defendants City of New York and New York City Department of Transportation, and is otherwise denied; and it is further

ORDERED that the cross motion of defendants City of New York and New York City Department of Transportation is granted to the extent that the Labor Law § 241 (6) claim is dismissed except to the extent that it is based on 12 NYCRR 23-1.7 (c); and it is further

ORDERED that the motion (sequence number 004) of defendant/third-party plaintiff Parsons Brinckerhoff Construction Services, Inc. is granted to the extent that the Labor Law §§ 240 (1) and 241 (6) claims and the cross claim by the City for failure to procure insurance are dismissed as against it, and is otherwise denied; and it is further

ORDERED that the cross motion of plaintiffs is denied; and it is further

ORDERED that the cross motion of defendants City of New York and New York City Department of Transportation is denied.

Dated: January 15, 2009

ENTER:

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD