| **Malnick v NAB Constr. Corp.** |
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| 2009 NY Slip Op 30392(U) |
| February 20, 2009 |
| Supreme Court, New York County |
| Docket Number: 111205/2004 |
| Judge: Paul G. Feinman |
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SCANNED ON 2/24/2009
[* 1]

C COMM 001

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

PRESENT: HON. PAUL GEORGE FEINMAN PART 12

*Justice*

MALNICK

INDEX NO. 111205/04

MOTION DATE

- v -

MOTION SEQ. NO. 007

NAB CONSTRUCTION CORP.

MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on this motion to/for ______.

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/Petition — Affidavits — Exhibits | see attached |
| Answering Affidavits — Exhibits (Memo) | |
| Notice of Cross-Motion — Affidavits — Exhibits | |
| Replying Affidavits (Reply Memo) | |

Cross-Motion: X Yes (2) No

Upon the foregoing papers, it is ORDERED that this motion and cross motion are decided in accordance with the annexed decision + order

FILED
FEB 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/20/09

J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
DO NOT POST REFERENCE
Preliminary Conference
X Compliance Conference 3/11/09 11AM

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

[* 2 ]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

---------------------------------------------------------------X

CHRISTOPHER MALNICK and KAREN HUTSEBAUT,
Plaintiffs,

against

NAB CONSTRUCTION CORPORATION and PARSONS TRANSPORTATION GROUP, INC.,
Defendants.

---------------------------------------------------------------X

PARSONS TRANSPORTATION GROUP, INC.,
Third-Party Plaintiff,

against

HAKS ENGINEERS AND LAND SURVEYORS, P.C. a/k/a and f/k/a HAKS ENGINEERS, P.C.,
Third-Party Defendant.

---------------------------------------------------------------X

NAB CONSTRUCTION CORPORATION,
Second Third-Party Plaintiff,

against

PARSONS TRANSPORTATION GROUP-OF NEW YORK, INC.,
Second Third-Party Defendant.

---------------------------------------------------------------X

PARSON TRANSPORTATION GROUP OF NEW YORK, INC.,
Fourth-Party Plaintiff,

against

HAKS ENGINEERS, ARCHITECTS AND LAND SURVEYORS, P.C. a/k/a HAKS ENGINEERS AND LAND SURVEYORS, P.C., a/k/a and f/k/a HAKS ENGINEERS, P.C.,
Fourth-Party Defendant.

---------------------------------------------------------------X

Index Number 111205/2004

Mot. Seq. No. 007

**DECISION AND ORDER**

Third-Party Index No. 590894/2005

Second Third-Party Index No. 590507/2007

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Fourth-Party Index No. 590918/2007

[* 3 ]

Papers considered in review of these cross-motion for summary judgment and dismissal, and to amend:

| Papers | Numbered |
|---|---|
| Notice of Motion and Affidavits Annexed | 1 |
| Cross-Motion, Affidavit in Supp., Exhibits, Memo of Law | 2, 3, 4 |
| Cross-Motion | 5 |
| Affirmation in Opp. | 6 |
| Reply Aff. In Further Support | 7 |
| Affirmation in Opposition | 8 |
| Reply Affirmation and Affirmation in Opposition | 9 |
| Reply Memo of Law | 10 |

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**PAUL G. FEINMAN, J.:**

By decision and order dated November 12, 2008, the motion brought by fourth-party defendant Haks Engineers to dismiss the cause of action in the fourth-party complaint sounding in common law indemnification and contribution, was granted for the reasons stated on the record at oral argument (Ct. Reporter Nina Koss). That motion by Haks is not further addressed in this decision and order.

Remaining to be decided are the cross-motions by third-party defendant Parsons Transportation Group which is defending against claims for indemnification and contribution asserted by NAB Construction Corporation,[1] and by defendant/second third-party plaintiff NAB.

NAB Construction seeks partial summary judgment and dismissal of the Labor Law causes of action, and Parsons Transportation seeks summary judgment and dismissal of the complaint *in toto*, both moving pursuant to CPLR 3212, and 3211 (a) (1) and (7). Parsons in the alternative seeks leave to amend its answer to add defenses and counterclaims of contractual indemnification and contribution as against NAB. For the reasons which follow, both cross-

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[1]NAB seeks contribution and indemnification from Parsons based on each of the grounds asserted by plaintiffs in their complaint, namely violations of Labor Law §§ 200, 240, and 241 (6), and common law negligence (see, NAB Cross-Mot. Ex. G [NAB Verified Second Third-Party Complaint]).

motions are granted in part and otherwise denied.

*Background*

This is an action based on alleged violations of Labor Law §§ 240 (1), 241(6) and 200 and on common law negligence. Plaintiffs seek to recover damages for personal injuries sustained by Christopher Malnick on January 7, 2003, while working as an inspector on the Bronx-Whitestone Bridge. Malnick alleges he was injured when he was blown by a wind gust from his position on the bridge cable, causing him to fall to a platform positioned a few feet below.

The bridge is owned and operated by the Triborough Bridge and Tunnel Authority (TBTA). The TBTA contracted with NAB Construction Corporation, the remaining defendant in the main action, to perform as the general contractor for the project described as Contract PSC-00-2589, "Construction Inspection and Support Services for Project BW-82A, Truss Removal and Installation of Aerodynamic Fairing at the Bronx-Whitestone Bridge." As described by NAB's project manager, Thomas Riso, the project involved "several structural repairs and modifications to the bridge" (NAB Cross-Mot., Ex. C Riso Aff. ¶ 2). One portion of the overall project involved testing the bridge's main cables to assess their condition after 60 years of exposure to salt and moisture (NAB Cross-Mot., Ex. C Riso Aff. ¶ 2). According to Project Manager Riso, the TBTA "specifically contracted with NAB to open the main cables for inspection by TBTA engineers and remove samples of deteriorated wire from the main cables of the bridge" for laboratory analysis (NAB Cross-Mot., Ex. C Riso Aff. ¶ 2). Also according to Riso, the TBTA would determine, based on what it learned after the testing, if future maintenance or repair of the cables was needed and would put it out for bid for a later separate

contract (NAB Cross-Mot., Ex. C Riso Aff. ¶ 2).

The TBTA separately contracted with Parsons Transportation Group to perform as a consultant on the project. Parsons subcontracted with Haks Engineers for "construction inspection and support services" "for the duration of the project," as described in Attachment A of the contract. Plaintiff Malnick was specifically named in the contract as one of two Haks inspectors on the project. The project manager for Haks Engineers was Alberto Villaman (Mot. Exs. I, J, Villamon EBT 10). Villaman testified that in general, a construction inspector such as Malnick would be assigned to a particular construction operation, would have knowledge of the work to be done by virtue of having read the specifications and the contract drawings and shop drawings, and would be on-site to witness the work proceeding and ensure that the work was performed pursuant to the contract requirements (Mot. Ex. J, Villamon EBT 11-12).

Malnick testified during his examination before trial, that on January 7, 2003, he was assigned to inspect the work of NAB employees as they performed cable sampling (NAB Cross-Mot. Ex. D, Malnick EBT 74-76). In order to perform inspection of the work, he had to climb up to the main cable and the platform underneath it, called the high-line platform. He testified that to reach the workers, he would attach to the bridge "handrail" the two lanyards that were attached to his harness, and move along the main cable until he needed to unhook one of the lanyards, re-hook it, and then unhook and re-hook the second one, and so on (NAB Cross-Mot. Ex. F Malnick EBT 140; 143-144; 164-165). The first time he ascended to the high-line platform, he did not know how to get down from the bridge cable and had complained to one of two Parsons workers about the need for a ladder (Haks [South] Reply Aff. ¶¶ 7-8, citing Malnick EBT 417-420; see also NAB Cross-Mot. Ex. K, Malnick EBT 418; Weiser Aff. in Opp. p. 13, citing Malnick EBT

at 342). On the day in question, when he reached the high-line platform, he was attached by the two lanyards to the handrail, and he sat on the cable in order to disconnect himself from the handrail so that he could descend to the platform. After he sat down and disconnected both lanyards but before he could get safely down, he was caught by a gust of wind and knocked forward (NAB Cross-Mot. Ex. F, Malnick EBT 165-167).

Both NAB and Parsons seek to dismiss the complaint on the grounds that Malnick does not fall under the protections of the Scaffold Law (Labor Law § 240) or Labor Law § 241, concerning construction, excavation, and demolition work. They also both argue that plaintiff was a "recalcitrant worker" because he admitted he purposefully unhooked both lanyards, which were provided to him for his safety. Parsons also seeks to dismiss the loss of consortium claim by co-plaintiff, Karen Hutsebaut.

*Legal Analysis*

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor (*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]). A party opposing summary judgment must lay bare its proofs so that the matters raised in the pleadings are shown to be real and capable of being established upon trial (*W.W. Norton & Co. v Roslyn Targ Literary Agency, Inc.*, 81 AD2d 798 [1st Dept. 1981]). Summary judgment is appropriate when there is no genuine issue as to any material fact and the disposition of the causes of action may be decided as a matter of law (*Security Pacific Bus. Credit, Inc. v Peat

*Marwick Main & Co.*, 79 NY2d 695, *rearg denied* 80 NY2d 918 [1992]).

Labor Law § 200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site (*Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352 [1998]). It will hold an owner or general contractor liable if it is shown that the owner and/or general contractors exercised a certain degree of supervisory control over the worker's activities (*Lombardi v Stout*, 80 NY2d 290, 295 [1992]). Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, then no liability will attach to the owner under either the common law or under Labor Law § 200 (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). It is well settled that Labor Law 200 will only be imposed on an engineer engaged to ensure compliance with construction plans and specifications where there is active malfeasance or liability is imposed by a clear contractual provision creating an obligation running to, and for the benefit of, the workers to ensure their safety (*Conti v Pettibone Cos., Inc.*, 111 Misc. 2d 772, 774-775 [Sup. Ct., New York County 1981], *affd* 90 AD2d 708 [1st Dept.1982]; *Domenech v Associated En'grs*, 257 AD2d 403 [1st Dept. 1999]).

Labor Law § 240(1) states that all "contractors and owners and their agents. . . , in the erection, demolition, repairing, altering, painting, cleaning or pointing of a . . . structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, . . . ladders, . . . and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." The purpose of this statute is to "protect workers by placing the 'ultimate responsibility' for worksite safety on the owner and general contractor, instead of the workers themselves" (*Gordon v Eastern Railway Supply, Inc.*, 82 NY2d 555, 559

[1993], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). The section imposes "absolute liability" on owners, contractors, and their agents for any breach of the statutory duty which has proximately caused injury, and is to be interpreted liberally (*Gordon*, at 559). Once it is determined that the owner or contractor failed to provide the necessary safety devices required to give a worker "proper protection," absolute liability is "unavoidable" under Labor Law § 240 (1), even if the injured worker contributed to the accident *(Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521-522 [1985]). An owner or contractor who breaches that duty may be held liable in damages regardless of whether it actually exercised supervision or control over the work (*Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra*, 81 NY2d at 500).

Labor Law § 241(6) concerns safety conditions in "areas in which construction, excavation or demolition work is being performed." Allegation of a violation of an Industrial Code regulation is a prerequisite to an action under this section of the statute (*Ross v Curtis-Palmer*, 81 NY2d at 505).[2] Absent direction or supervision of the construction work, it has been held that engineers cannot be held liable for injuries under Labor Law § 241(6) (*Conti v Pettibone Cos.*, *supra*, at 779; *Harvey v Sear-Brown Group*, 262 AD2d 1006 [4th Dept. 1999]).

To establish a prima facie case of negligence, a plaintiff must demonstrate (1) that the defendant owed him a duty of reasonable care, (2) a breach of that duty, and (3) a resulting injury

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[2]Plaintiff alleges violations of Title 12, Section 23 of the Industrial Code (12 NYCRR 23): 23-1.5(a) and (b) (concerning "General responsibility of employers"); 23-1.7 (b) (1) and (b) (2) (requiring protection from falls from hazardous openings, and safety belts for bridge work); 23-1.16 (a)-(f) (requiring safety belts, harnesses, tail lines, and lifelines); 23-1.17 (requiring life nets); 23-1.19 (requiring catch platforms) (Haks Mot. Ex. C, Bill of Partic. ¶ 10).

proximately caused by the breach (*see, Boltax v Joy Day Camp*, 67 NY2d 617 [1986]). The threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 (2002). It is the court's responsibility to determine whether there is a duty, and "involves a very delicate balancing of such considerations as logic, common sense, science, and public policy" (*Blye v Manhattan & Bronx Surface Transit Oper. Auth.*, 124 AD2d 106, 108 [1st Dept. 1987], *aff'd* 72 NY2d 888 [1988], citing *Bovsun v Sanperi*, 61 NY2d 219, 228 [1984]; *De Angelis v Lutheran Med. Center*, 58 NY2d 1053, 1055 [1983]). There must be proof of supervision or control of the work in order for an engineer to be held liable, and absent such supervision, there is no negligence for the failure to provide a safe place to work as a matter of law (*Becker v Tallamy, Van Kuren, Gertis & Assocs.*, 221 AD2d 1014, 1014-1015 [4th Dept. 1995]).

Here, NAB Construction, as the general contractor, has a non-delegable duty to the workers on the bridge project for injuries that arise during the course of work. NAB argues, as does Parsons, that as an inspector of the work done by NAB's cable samplers, plaintiff was not involved in Labor Law § 240 (1)'s "erection, demolition, repairing, altering, painting, cleaning or pointing" activities, nor was his work in an area where "construction, excavation or demolition" was being performed as required by Labor Law § 241 (6). NAB relies on the holding and reasoning of *Martinez v City of N.Y.*, 93 NY2d 322, 326 (1999), which held that a worker who fell from a height in a school while performing asbestos inspection, where the inspection was phase one of a project and after its completion, phase two of the project to actually clean and remove asbestos would be performed by another supervisor, was not covered under the Labor Law statute. NAB argues that similarly, plaintiff was hired solely to inspect the discrete project

of cable sampling, and that any work to repair the cables would be done by a different company, after the inspection.

Plaintiffs argue that the more analogous case and reasoning is *Prats v Port Auth. of N.Y. and N.J.*, 100 NY2d 878 (2003), which involved a plaintiff injured after falling while inspecting an air conditioner fan who was held to be covered under the statute. According to *Prats*, "[t]he question whether a particular inspection falls within section 240 (1) must be determined on a case-by-case basis, depending on the context of the work" (100 NY2d at 883). The plaintiff in *Prats* was a mechanic who "routinely undertook an enumerated activity," he was employed with a company "engaged under a contract to carry out an enumerated activity," and he "participat[ed] in an enumerated activity during the specific project and at the same site where the injury occurred." (100 NY2d at 883). This "confluence of factors" was found to bring his activity at the time of his accident, within the statute. Plaintiffs argue that Malnick's work also entailed a variety of functions in addition to inspection, [3] and that the work on the bridge's cables was only a part of a much larger repair and renovation project, of which the cable testing was an integral and crucial component. He thus points to *Prats*' holding that the "intent of the statute was to protect workers employed in the enumerated acts, even while performing duties ancillary to those

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[3] Plaintiff offers a description of work duties in a recent affidavit that greatly elaborates on what he described during his deposition testimony, and is less than compelling evidence (Pl. Aff. in Opp. to Cross-Mot. Ex. B). Even so, the physical labor described by plaintiff, including closing lanes on the bridge, replacing rubber cones that were knocked down, adjusting arrow boards to direct traffic, moving heavy scaffolding so as to inspect, installing metal clips to keep the platform safe, assisting in calibration of the torque wrench, and, during his inspection, tagging the removed sections and lower them to the roadway for later analysis (Pl. Aff. in Opp.to Cross-Mot., Ex. B, Malnick Aff. ¶¶ 10-22), are not rightfully seen as construction, excavation, or demolition, nor repairing, altering, painting, cleaning, or pointing as defined under the statute.

acts." (*Prats*, at 882).

The question of whether inspection work falls within the purview of Labor Law § 240 (1) and § 241 (6) is determined on a case-by-case basis and depends on the context of the work (*Nelson v Sweet Assocs.*, 15 AD3d 714, 715-716 [3d Dept. 2005] [citation omitted]). "An employee will be deemed covered by the statute when the employee performs, for example, inspections that are on-going and contemporaneous with other work on a construction project pursuant to a single contract, other tasks that are enumerated by the statute, *and* work for a contractor engaged to provide services enumerated by the statute" (*Nelson*, 15 AD3d at 707, citing *Prats v Port Auth. of N.Y. & N.J., supra* [emphasis added]). "The critical inquiry in determining coverage under the statute is 'what type of work the plaintiff was performing at the time of injury.'" (*Panek v County of* Albany, 99 NY2d 452, 457 [2003], quoting *Joblon v Solow*, 91 NY2d 457, 465 [1998]). Here, although the contract itself involved structural repairs and modifications to the bridge, plaintiff's employer was not hired by the general contractor, NAB, but by the project consultant, Parsons, to assist in inspection, and specifically of the cable sampling work. Despite plaintiff's arguments otherwise, his work as described in the Parsons-Haks Engineering contract, cannot be said to involve the enumerated categories of work under the statute (*see, Bosse v City of Hornell*, 197 AD2d 893 [4th Dept. 1993] [dismissing complaint because plaintiff's employer was hired solely to perform inspection work on a bridge, not construction or repair work, and thus plaintiff was not a person "employed" to carry out work within the scope of Labor Law 240 (2) and 241 (6)]; *cf., Crowther v City of N.Y.*, 262 AD2d 519 [2d Dept. 1999] [holding that plaintiff injured at construction site while inspecting the steel columns for rust and dirt, as directed by his employer who was hired to inspect by the

construction manager, was covered by Labor Law §§ 200 and 241 (6)]). Moreover, although plaintiff argues that his work, and that of the cable sampling, was an integral part of the overall project, the Court in *Martinez* explicitly rejected the analysis employed by the lower court which "focused on whether plaintiff's work was an 'integral and necessary part' of a larger project." (93 NY2d at 326) (*cf. Coombs v Izzo Gen. Contr., Inc.*, 49 AD3d 468, 469 [1st Dept. 2008] [holding that "an individual need not actually be engaged in physical labor to be entitled to coverage under the Labor Law," but it must be found that the person "perform[ed] work integral or necessary to the completion of the construction project" or was "'a member of a team that undertook an enumerated activity under a construction contract."]).

Because plaintiff's work does not fall under the parameters of the Scaffold Law or Labor Law § 241 (6), the causes of action in the complaint alleging these claims must be dismissed as against NAB, and are dismissed in the second third-party complaint against Parsons as well. Accordingly, there is no need to address the "recalcitrant worker" doctrine which, in any event, would be unpersuasive given plaintiff's testimony that the only way to reach the platform from the cable was to unhook the lanyards.

Remaining are the Labor Law § 200 claim and the claim sounding in negligence against NAB, and NAB's claims against Parsons seeking indemnification and contribution. Parsons moves to dismiss both causes of action, arguing that it did not exercise supervisory control over Malnick and had no duty of care to provide him a safe work environment. Parsons' motion to dismiss both claims is denied, as there are questions of fact as to its duty of care and supervisory role. Notably, the Parsons contract with the TBTA include provisions that it would provide all protective gear for its subcontractors' employees, ensure that the methods of performing the

services do not involve "undue danger" to the employees, and comply with all safety regulations (NAB Cross-Mot. Ex. I [Contract, p. 17, Art. XXXVI; pp. TR-19, TR-22]). The Parsons contract with Haks Engineering indicates that the scope of services to be performed by Haks includes performing inspection and support services in accordance with the project contract and "as directed by Consultant [Parsons]" (Contract Attachment A) [4] Parsons also retained the ability to inspect the performance of Haks' workers and to obtain removal of any worker (Contract Attachment E). Thus, the statute's provisions may be imposed based on the contractual provision running explicitly to the workers (*Conti v Pettibone Cos., supra*, 111 Misc. 2d at 775). Additionally, Malnick testified that he complained to a Parsons employee about the need for a ladder, at the very least calling into question whether Parsons retained a direct supervisory role in the work.

Parsons also seeks leave to amend its second-third party answer to add the defenses of contractual indemnity and contribution against NAP Construction, and to add counterclaims for contractual indemnification and contribution as against NAB. It includes a proposed amended answer as Exhibit T of its cross-motion.

Pursuant to CPLR 3025(b), "leave to amend the pleadings shall be freely given, absent prejudice or surprise resulting from the delay" (*see, McCaskey, Davies & Assoc., Inc. v New York City Health & Hosp. Corp.*, 59 NY2d 755, 757 [1983]). Parsons points to the existence of the clause in the contract between NAB and TBTA stating that the indemnified parties include the "consultant," i.e., Parsons (NAB Cross- Mot. Ex. J, p. 6-1). NAB opposes, and points to a

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[4]The agreement is attached to an earlier motion made by Parsons, in Sequence 003, as Exhibits V-Y.

conflicting clause in the same contract, entitled "No Third-Party Beneficiaries," which states that the agreement is "solely for the benefit of the authority, the MTA and the contractor. No other person or entity is intended to receive any benefit under this agreement" (NAB Cross-Mot. Ex. J, art. 10.16, p. 10-9).

It is basic law that the contract as a whole should not be interpreted in a way that would leave one of its provisions without force and effect (*350 East 30th Parking, Ltd. v Board of Managers of the 350 Condominium*, 280 AD2d 284, 287 [1st Dept. 2001]). Moreover, if two clauses of a contract conflict and are irreconcilable, it is the rule that the first clause is accepted and the subsequent one is rejected (*see, Spectrum Standards Inc. v Telnetex Ltd.*, 150 Misc. 2d 515, 516 [App. Term 2d Dept. 1991], citing 22 NY Jur 2d, Contracts, § 222]). With no discussion from the parties about the intent of the contract provision prohibiting third-party beneficiaries, the court makes no ruling as to the seemingly conflicting clauses, but grants Parsons' motion to amend its complaint to add the additional defenses and counterclaims of indemnification and contribution.

The branch of the cross-motion to dismiss Kutsebaut's loss of consortium claim is denied.

It is

ORDERED that in accordance with this court's prior decision on the record on November 12, 2008 (Ct. Reporter Nina Koss) which is incorporated as part of this decision on the cross-motions, and in accordance with this court's prior written order of that date, the motion by Fourth Third-Party Defendant Haks Engineers is granted to the extent of directing the Clerk of Court to dismiss the causes of action in the fourth third-party complaint premised on common law

indemnification and contribution; and it is further

ORDERED that the cross-motions by NAB Construction and Parsons Transportation are granted only to the extent that the causes of action of the complaint sounding in Labor Law §§ 240 (1), and 241 (6) are dismissed; it is further

ORDERED that the cross-motions by NAB Construction and Parsons Transportation to dismiss the causes of action in the complaint sounding in Labor Law § 200 and common law negligence are denied and those causes of action are severed and continued under this index number; and it is further

ORDERED that cross-movants shall serve a copy of this order upon the Clerk of the Court who is to enter judgment in accordance with this decision and order; and it is further

ORDERED that the cross-movants shall serve a copy of this order with notice of entry upon all parties and third-parties within seven days of entry of this order;

ORDERED that the branch of Parsons' cross-motion to amend its second third-party answer is granted, and the document attached as Exhibit "T" to the cross-motion shall be deemed filed and served upon the entry of this decision and order, and NAB shall file and serve any reply to the counterclaims within 20 days of entry of this decision and order; and it is further

ORDERED that the parties in the main action and all the related third-party actions shall, by March 9, 2009 submit a joint compliance conference stipulation scheduling all outstanding depositions and resolving all outstanding disputes to be so ordered by the court, with **all** discovery to be completed by May15, 2009; it is further

ORDERED if the parties and third-parties fail to comply with the order to submit a joint compliance conference stipulation referenced in the foregoing paragraph, then **all** parties and

third-parties must appear at a compliance conference on March 11, 2009 at 11:00 a.m. THIS COMPLIANCE CONFERENCE MAY NOT BE ADJOURNED and any party or third-party failing to appear by counsel fully prepared to address all issues of discovery shall be deemed in default.

This constitutes the decision and order of the court.

Dated: February 20, 2009
New York, New York

Paul G Feinman
J.S.C.

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