Ferreira v City of New York
2010 NY Slip Op 31037(U)
April 16, 2010
Supreme Court, Kings County
Docket Number: 12488/06
Judge: Mark I. Partnow
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At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 16th day of April, 2010.

PRESENT:

HON. MARK I. PARTNOW,
Justice.
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MARIA H. FERREIRA AND KATHLEEN FERREIRA, AS ADMINISTRATORS OF THE ESTATE OF CARLOS A. FERREIRA, ET AL.,
Plaintiffs,

- against -

Index No. 12488/06

THE CITY OF NEW YORK, ET AL.,

Defendants.
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THE CITY OF NEW YORK, ET. AL.,

Third-Party Plaintiffs,

- against -

Index No. 75636/07

CHELMSFORD CONTRACTING CORP.,

Third-Party Defendant.
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AMMANN & WHITNEY, INC.A/K/A AMMANN& WHITNEY CONSULTING ENGINEERS, P.C.,

Third-Party Plaintiffs,

- against -

Index No. 75723/07

CHELMSFORD CONTRACTING CORP.,

Third-Party Defendant.
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The following papers numbered 1 to 17 read on these motions:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2 4-5 7-11 13-15
Opposing Affidavits (Affirmations)	16
Reply Affidavits (Affirmations)	3 6 12 17
______ Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, in this action by plaintiffs Maria H. Ferreira and Kathleen Ferreira, as the administrators of the estate of Carlos A. Ferreira, and Maria H. Ferreira, Antonio H. Ferreira, and Maria Luisa Trinida Marquis, individually (collectively, plaintiffs), alleging claims of common-law negligence, negligent hiring, and violations of Labor Law § 200 (1) and § 241 (6), defendants the City of New York (the City), the New York City Department of Transportation (the DOT), the New York City Department of Design and Construction (DDC), and Housing Preservation & Development (HPD) (collectively, the City defendants), and AAH Construction Corp. (AAH) move for summary judgment dismissing plaintiffs' complaint and all cross claims as against them. Defendant Ammann & Whitney, Inc. a/k/a Ammann & Whitney Consulting Engineers, P.C. (A&W) cross-moves for summary judgment dismissing all claims, cross claims, and counterclaims as against it. Plaintiffs cross-move for summary judgment in their favor on the issue of the liability of the City defendants, AAH, and A&W (collectively, defendants) pursuant to Labor Law § 200 (1) and § 241 (6).

Third-party defendant Chelmsford Contracting Corp. (Chelmsford) cross-moves for summary judgment dismissing third-party plaintiff A&W's contractual claims as against it, and for summary judgment dismissing the City defendants and AAH's third-party complaint as against it based upon the anti-subrogation rule.

On June 2, 2004, DDC awarded a contract to AAH, a contractor, to furnish all labor and materials necessary and required to install pedestrian ramps at designated locations within the borough of Brooklyn in order to modify sidewalk corners to facilitate access to people with disabilities. The DOT was the agency which identified the locations for which this work was needed. DDC also entered into a separate contract with A&W, under which A&W was to provide resident engineering inspection services for this construction project. The services provided consisted of monitoring the work of the construction contractors, reporting on these activities, and ensuring that the contract specifications were being met, as well as authorizing and processing payment requests.

AAH kept some of the sidewalk corners on which the sidewalk cutout work was to be performed and subcontracted out some of the other sidewalk corners, pursuant to a March 10, 2005 subcontract, to Chelmsford, a company which specializes in sidewalk and curb work.

On September 22, 2005, Chelmsford, in furtherance of its subcontract with AAH, was performing excavation work at the location of Herzl Street and Hegeman Avenue, in Brooklyn, New York. At approximately 2:50 P.M., Nelson Apuango (Apuango), who was employed by Chelmsford as a machine operator and was a member of the excavation crew

working at that location, was preparing to lift and remove a catch basin with a backhoe. Carlos Ferreira (Ferreira) was employed by Chelmsford as a form setter and was at the construction site to set up for cement work to be performed the next day. Ferreira was unloading a flatbed truck parked near the backhoe, when Apuango, who was unaware of Ferreira's presence, began to lower the backhoe's stabilizing outriggers. As the backhoe moved, the left outrigger struck Ferreira, who became pinned and trapped between the backhoe's outrigger and the flatbed truck. Apuango immediately raised the outriggers and Ferreira was removed and taken to the hospital, but he died a few hours later from the injuries he sustained in the accident.

Consequently, on April 25, 2006, plaintiffs commenced this action against the City defendants, AAH, and A&W, alleging claims of common-law negligence, violations of Labor Law § 200 (1) and § 241 (6), and negligent hiring of Chelmsford, as well as claims of wrongful death by Ferreira's wife, father, and mother. On June 25, 2007, the City defendants and AAH interposed a third-party complaint against Chelmsford, and on July 25, 2007, A&W interposed a third-party complaint against Chelmsford. Both of these third-party complaints allege claims of common-law indemnification and/or contribution, contractual indemnification, and breach of the contract to procure insurance.

Initially, the court notes that plaintiffs' wrongful death claims are wholly statutory in nature, and can only be sustained insofar as Ferreira, if he had survived, had a cause of action against defendants (*see* EPTL 5-4.1; *Prink v Rockefeller Ctr.*, 48 NY2d 309, 315 [1979]; *Allen*

v County of Westchester, 172 AD2d 471, 471 [1991]). Thus, plaintiffs' wrongful death claims may only be sustained insofar as their Labor Law and negligence claims are viable.

Labor Law § 200 (1) is a codification of the common-law duty imposed on owners and contractors to provide workers with a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]). Labor Law § 200 (1) applies to owners, contractors, and their agents (*see Romang v Welsbach Elec. Corp.*, 47 AD3d 789, 789 [2008]). Plaintiffs assert that defendants failed to provide Ferreira with a safe place to work and were negligent in allowing Ferreira to be crushed with a backhoe.

"To establish liability under a theory of common-law negligence and for a violation of Labor Law § 200, an injured worker must establish that the party charged with the duty to maintain a reasonably safe construction site had the authority to control the activity bringing about the injury, to enable it to avoid or correct an unsafe condition" (*O'Leary v Clean Cut Carpentry, Inc.*, 31 AD3d 514, 514 [2006]; *see also Russin v Louis Picciano & Son*, 54 NY2d 311, 317 [1981]; *Locicero v Princeton Restoration, Inc.*, 25 AD3d 664, 666 [2006]). Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the methods that the plaintiff employs in his or her work, or to those who have actual or constructive notice of, or are otherwise responsible for an unsafe condition that causes an accident (*see LaGuidice v Sleepy's Inc.*, 67 AD3d 969, 972 [2009]; *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2008];

Ortega v Puccia, 57 AD3d 54, 61 [2008]; *Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [2005]; *Vaneer v 993 Intervale Ave. Hous. Dev. Fund Corp.*, 5 AD3d 161, 162 [2004]; *Aranda v Park E. Constr.*, 4 AD3d 315, 316-317 [2004]; *Akins v Baker*, 247 AD2d 562, 563 [1998]).

It is well established that an owner or general contractor's "'[g]eneral supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under common-law negligence and under Labor Law § 200'" (*Natale v City of New York*, 33 AD3d 772, 773 [2006], quoting *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 683 [2005]; *see also Riccio v Shaker Pine*, 262 AD2d 746, 748 [1999]). The mere retention of inspection privileges and the fact that a defendant inspects the work site and was authorized to stop the work in the event that it observed any unsafe condition is insufficient to establish liability (*see Carolino v Judlau Contr. Inc.*, 46 AD3d 733, 735 [2007]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [2007]).

The City defendants, AAH, and A&W assert that they did not exercise control or supervision over the work of Apuango or Ferreira, nor did they have the authority to control the activity which brought about Ferreira's injuries and resulting death. In support of this assertion, defendants point to the deposition testimony of the City's engineer in charge, Marie Brandao (Brandao), who testified that the DDC did not have inspectors on this project (Brandao's Dep. Transcript at 23), and that A&W supplied the inspectors (*Id.* at 24).

Defendants also point to the deposition testimony of Charles Leute (Leute), A&W's senior vice-president, who stated that A&W's duties were limited to observing construction activities, preparing daily reports as to what these activities were, keeping track of and recording the quantities of the construction material that were utilized, and reporting these activities and quantities to DDC (Leute's Dep. Transcript at 10). Leute further testified that A&W did not have the authority to supervise and control the means and methods of Chelmsford's work (*Id.* at 49).

Defendants also point out that AAH's president Jack Brucculeri (Brucculeri) testified, at his deposition, that AAH would only inspect to see if the work was done properly (Brucculeri's Dep. Transcript at 58). Moreover, Apuango testified, at his deposition, that his supervisor, who worked for Chelmsford, and Chelmsford's foreman were the only people who gave him instructions on how to do his job (Apuango's Dep. Transcript at 38). Apuango further testified that he never heard of AAH (*Id.* at 39).

Thus, defendants have established their prima facie entitlement to judgment as a matter of law on their common-law negligence and Labor Law § 200 (1) claims by producing evidence that they did not have supervisory control over the activity that brought about Ferreira's injuries and death (*see O'Leary*, 31 AD3d at 514; *Damiani v Federated Dept. Stores, Inc.*, 23 AD3d 329, 332 [2005]). In opposition, plaintiffs argue that DDC, AAH, and A&W had complete control of the means and methods of the work at the project. Specifically, plaintiffs rely upon the fact that DDC and A&W ordered AAH to stop work and

redo several sidewalk cutouts, which Chelmsford had already completed using a stamped concrete method, and required that Chelmsford install a special tile instead.

Plaintiffs' argument must be rejected. The special tile which defendants required Chelmsford to install related to the end product of the work rather than the manner in which the work was performed. Brandao testified, at her deposition, that Chelmsford had to redo this work because it had not been installing the special tiles, as was required by the contract (Brandao's Dep. Transcript at 45). Thus, defendants' general supervisory authority in demanding that the work product conform with the contract does not constitute the control or supervision of the work that is necessary in order to predicate liability under Labor Law § 200 (1) (*see McFadden v Lee*, 62 AD3d 966, 967; *Farnsworth v Brookside Constr. Co., Inc.*, 31 AD3d 1149, 1150 [2006]; *Pensabene v San Francisco Constr. Mgt., Inc.*, 27 AD3d 709, 711 [2006]; *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 683 [2005]). The dangerous condition resulting in this accident arose out of Chelmsford's own means and methods, for which the City defendants, AAH, and A&W are not responsible (*see Lombardi v Stout*, 80 NY2d 290, 295 [1992]).

Plaintiffs further argue, however, the A&W, should nevertheless be held liable for common-law negligence and for violating Labor Law § 200 (1) because, as the resident engineer on the project, it acted as an agent to the City and DDC on this project, and had the duty to inspect the job site and ensure that the specifications of the contract were followed. Plaintiffs rely upon 31.1 of the contract between DDC and AAH, which stated that the

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resident engineer "shall have the power to inspect, supervise and control the performance of the work, subject to review by [DDC]."

This argument is unavailing since, as noted above, neither inspection privileges nor the general power to supervise constitute sufficient control to render A&W liable for injuries sustained by the employee of a subcontractor (*see Farnsworth*, 31 AD3d at 1150; *Perri*,14 AD3d at 683). As discussed above, A&W did not supervise or control the injury-producing activity, and its performance of on-site inspections does not constitute the requisite supervision and control for the imposition of liability (*see Harvey v Sear-Brown Group*, 262 AD2d 1006, 1006 [1999]).

Plaintiffs also assert that A&W was on the job site at the time of the accident and that a simple inspection would have indicated that no signal spotter was used near the backhoe. Contrary to this assertion, however, Apuango testified, at his deposition, that he could not recall whether anyone other than Chelmsford's employees were present at the moment of the accident (Apuango's Dep. Transcript at 37-38). Thus, there is no sufficient evidence that A&W was present at the time of the accident (*see Hutchinson v City of New York*, 18 AD3d 370, 371 [2005]). Moreover (as discussed above), there is no evidence that A&W exercised any actual supervision or control over the work that the workers were performing (*see id.*; *Torres v CTE Engrs., Inc.*, 13 AD3d 359, 359 [2004]).

Plaintiffs also point to paragraph 2 of A&W's safety plan for its own workers, which warned:

> "Do not stand or walk behind any operating trucks or vehicles without assurance that the operator is aware you are there. Follow all directions issued by flag persons or spotters. Be aware of moving parts on equipment and avoid pinch points or crush zones."

This paragraph, however, only pertained to A&W's own employees, and did not impose any duty upon A&W to Chelmsford's workers.

Plaintiffs also contend that defendants had actual notice of the unsafe condition because Chelmsford had a similar incident where a worker was crushed by a backhoe in June 2005, several months prior to the accident. Such contention is devoid of merit. The mere fact that there was a prior accident involving a backhoe on an unrelated job did not put defendants on notice that Chelmsford would have another backhoe accident on this job.

Thus, inasmuch as there is no showing that defendants exercised supervisory control over Apuango or Ferreira's work or that they had created or had actual or constructive knowledge of any allegedly dangerous condition, defendants cannot be held liable pursuant to Labor Law § 200 (1) or under a theory of common-law negligence (*see Balladares v Southgate Owners Corp.*, 40 AD3d 667, 670 [2007]; *Gonzalez v Pon Lin Realty Corp.*, 34 AD3d 638, 639 [2006]; *Brown v Brause Plaza, LLC*, 19 AD3d 626, 628 [2005]). Consequently, summary judgment dismissing plaintiffs' Labor Law § 200 (1) and common-law negligence claims against defendants must be granted (*see* CPLR 3212 [b]).

Plaintiffs also argue that they have a viable claim as against defendants for negligent hiring. However, "a necessary element of a cause of action for negligent hiring is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" (*Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 161 [1997]).

In support of their negligent hiring claim, plaintiffs assert that AAH hired Chelmsford, whose employees were not adequately trained and prepared to perform the work. Plaintiffs argue that prior to the accident, defendants knew or should have known that Chelmsford's operators were not adequately trained in the use of heavy equipment and that Chelmsford unreasonably exposed workers to crush injuries. In support of this argument, plaintiffs assert that Apuango received his training when he worked as a busboy in a nightclub.

Plaintiffs' argument must be rejected. Apuango, at his deposition, explained that he had used a backhoe while working at the nightclub, and that after his work at the nightclub, he worked at P&T Contracting for four or five years (Apuango's Dep. Transcript at 10). Additionally, Chelmsford's president, Horacio Alfonso (Alfonso), testified that Apuango had operated a backhoe when he worked for another company (Alfonso's Dep. Transcript at 44), and that before Chelmsford hired Apuango, it determined that he was an experienced backhoe operator (*Id.* at 80). Thus, plaintiffs have shown no basis upon which to predicate a claim of negligent hiring, and summary judgment dismissing this claim against defendants must be granted (*see* CPLR 3212 [b]).

With respect to plaintiffs' claim pursuant to Labor Law § 241 (6), inasmuch as the work at issue constitutes excavation and construction work, it is a covered activity under Labor Law § 241 (6). The duty imposed by Labor Law § 241 (6) to provide reasonable and adequate protection and safety to construction workers is nondelegable (*see Comes*, 82 NY2d at 878). Control of the work site or notice of a condition is not a precondition to liability under Labor Law § 241 (6) (*see Rizzuto v L.A. Wenger Constr. Co., Inc.*, 91 NY2d 343, 351-352 [1998]; *Locicero v Princeton Restoration, Inc.*, 25 AD3d 664, 666 [2006]; *Gonzalez v United Parcel Serv.*, 249 AD2d 210, 211 [1998]). Instead, in order to state a claim under Labor Law § 241 (6), a plaintiff must identify a specific Industrial Code provision mandating compliance with concrete specifications (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]; *Rosado v Briarwoods Farm, Inc.*, 19 AD3d 396, 399 [2005]).

Plaintiffs rely upon 12 NYCRR 23-9.2 (b) (1), which provides that "[a]ll power-operated equipment used in excavation operations shall be operated only by trained, designated persons and all such equipment shall be operated in a safe manner at all times." This regulation, however, is merely a general safety standard that is insufficient to establish a nondelegable duty under Labor Law § 241 (6) (*see Hricus v Aurora Contrs., Inc.*, 63 AD3d 1004, 1005 [2009]; *Berg v Albany Ladder Co., Inc.*, 40 AD3d 1282, 1285 [2007], *affd* 10 NY3d 902 [2008]).

Plaintiffs also rely upon 12 NYCRR 23-4.2 (k), which provides that "[p]ersons shall not be suffered or permitted to work in any area where they may be struck or endangered by

any excavation equipment." This regulation, however, is also insufficiently specific to support a Labor Law § 241 (6) claim (*see Sparendam v Lehr Constr. Corp.*, 24 AD3d 388, 389 [2005]; *Friot v Wal-Mart Stores*, 240 AD2d 890, 891 [1997]).

12 NYCRR 23-1.2 (a), cited by plaintiffs, is inapplicable to this case since this regulation applies to hazards from public vehicular traffic, not from a backhoe. 12 NYCRR 23-9.4 (c), cited by plaintiffs, is also inapplicable to this case since it applies to an excavating machine that is not in use, and, here, the backhoe was in use (*see Woroniecki v Tzitzikalakis*, 304 AD2d 571, 572 [2003]).[1]

Plaintiffs additionally rely upon 12 NYCRR 23-9.4 (h) (4), which provides that "[u]nauthorized persons shall not be permitted in the . . . [area] immediately adjacent to . . . [a backhoe] in operation." Plaintiffs' reliance upon this regulation is misplaced. Since Ferreira was a member of the work crew on the site, he cannot be deemed to be an unauthorized person within the meaning of this regulation (*see Carroll v County of Erie*, 48 AD3d 1076, 1077-1078 [2008]; *Copp v City of Elmira*, 31 AD3d 899, 900 [2006]; *Mingle v Barone Dev. Corp.*, 283 AD2d 1028, 1029 [2001]).

Plaintiffs, however, also rely upon 12 NYCRR 23-9.5 (c), which provides that "[n]o person other than the pitman and excavating crew shall be permitted to stand within range of the back of a power shovel or within range of the swing of the dipper bucket while the shovel is in operation." Contrary to the City defendants and AAH's argument, this regulation applies

[1]The other Industrial Code provisions cited by plaintiffs are also either inapplicable to this case or merely provide general safety standards.

to backhoes (*see Mingle v Barone Dev. Corp.*, 283 AD2d 1028, 1029 [2001]; *Webber v City of Dunkirk*, 226 AD2d 1050, 1051 [1996]). Plaintiffs contend that Ferreira was a form setter and was loading materials for the next day's work so that he could pour concrete when the excavation was completed. Thus, there is, at the very least, an issue of fact as to whether Ferreira was part of the excavating crew and whether the work he was doing could be considered to be an integral part of the excavation operation (*compare Mingle*, 283 AD2d at 1029). Consequently, summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim as against the City defendants and AAH must be denied.

A violation of the Industrial Code, however, does not establish these defendants' negligence as a matter of law, but is merely some evidence to be considered (*see Rizzuto*, 91 NY2d at 349-350; *Riffo-Velozo v Village of Scarsdale*, 68 AD3d 839, 842 [2009]; *Amirr v Calcagno Constr. Co.*, 257 AD2d 585, 586 [1989]). A showing of "a violation of a regulation does not necessarily establish a right to summary judgment on a Labor Law § 241 (6) cause of action" (*Copp*, 31 AD3d at 900). Thus, since there are factual issues as to some of the relevant circumstances surrounding the accident, summary judgment in plaintiffs' favor with respect to their Labor Law § 241 (6) claim cannot be granted (*see Rizzuto*, 91 NY2d at 349-350; *Riffo-Velozo*, 68 AD3d at 842; *Amirr*, 257 AD2d at 586).

As to A&W, a professional engineer can be held liable under Labor Law § 241 (6) only if it is established that it had the authority to supervise and control the activity that brought about the injury (*see* Labor Law § 241 (9); *Torres*, 13 AD3d at 359; *Harvey*, 262 AD2d at

1006; *Becker v Tallamy, Van Kuren, Gertis & Assoc.*, 221 AD2d 1014, 1014 [1995]; *Carter v Vollmer Assoc.*, 196 AD2d 754, 754 [1993]; *Hamby v High Steel Structures*, 134 AD2d 884, 884 [1987]). An inspecting engineer does not acquire the status of an "agent" of the construction site owner and become chargeable with the owner's nondelegable duty to provide for safety at a work site where it was not involved in the actual construction, but merely had the contractual duty of performing inspection functions for the owner to assure the owner that the contractor complied with approved plans and specifications (*see Conti v Pettibone Cos., Inc.*, 111 Misc 2d 772, 776 [1981]; *Wetteland v Reyna Const.*, 42 Misc 2d 991, 1000 [1963], *affd* 23 AD2d 822 [1965]). The authority to stop work if the contractor failed to correct conditions unsafe for workers is also insufficient to create a duty running from an engineer to the workers (*see Fox v Jenny Eng'g Corp.*, 122 AD2d 532, 533 [1986], *affd* 70 NY2d 761 [1987]).

Here, A&W did not exercise supervision, control, or have any input into how the backhoe was to be operated (*see Sparendam*, 24 AD3d at 389). Thus, A&W cannot be held liable under Labor Law § 241 (6) and is entitled to summary judgment dismissing this claim as against it (*see* CPLR 3212 [b]).

With respect to Chelmsford's cross motion, it is entitled to summary judgment as to A&W's contractual claims as against it since it has shown that it had no contract with A&W. Furthermore, insofar as A&W's third-party complaint seeks recovery for contribution and/or

common-law indemnification for any monies recovered by plaintiffs as against it, such claims are now moot in view of the dismissal of plaintiffs' complaint as against A&W.

In support of its cross motion, Chelmsford has submitted the sworn affidavit of Alfonso, who, as noted above, is its president, in which he attests that the blanket additional insured-contractor's endorsement contained in a primary insurance policy issued by Graphic Arts Mutual Insurance Company (Graphic) to it, as the named insured, confers additional insured coverage to the City defendants and AAH in the amount of $1 million. Alfonso further attests that an excess insurance policy issued by National Surety Corporation/Fireman's Fund Insurance Company (National) to it, as the named insured, "follows form" and provides excess liability coverage to the City defendants and AAH in the amount of $10 million per occurrence.

Chelmsford asserts that the Graphic policy affords contractual indemnification coverage to it. Chelmsford has submitted an October 10, 2007 letter from Graphic, in which Graphic disclaims liability for contribution and/or common-law indemnification, breach of contractual obligations, and breach of an alleged agreement to procure insurance, but does not disclaim coverage for the City defendants and AAH's third-party claim of contractual indemnification.

The City defendants and AAH, in response, do not deny that they are additional insureds on the Graphic policy or the National policy and that their contractual indemnification claim has not been excluded from coverage. Chelmsford also asserts, and the City defendants and AAH do not deny, that Chelmsford's primary and excess general liability

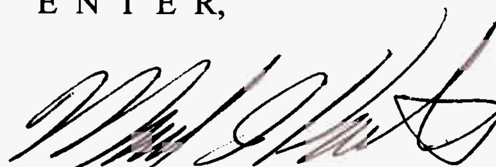
carriers are providing them with a defense and will indemnify them for any amounts recovered by plaintiffs in this action up to the policy limits.

Pursuant to the anti-subrogation rule, "[a]n insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered" (*Pennsylvania Gen. Ins. Co. v Austin Powder Co.*, 68 NY2d 465, 468 [1986]). Thus, the City defendants and AAH's third-party claims against Chelmsford are barred by the anti-subrogation rule up to the policies' limits of $11 million (*see Leyden v Square Arch Realty Corp.*, 164 Misc 2d 769, 771 [1995]).

Accordingly, the City defendants and AAH's motion is granted insofar as it seeks summary judgment dismissing plaintiffs' Labor Law § 200, common-law negligence, and negligent hiring claims, and is denied insofar as it seeks dismissal of plaintiffs' Labor Law § 241 (6) claim. A&W's cross motion for summary judgment dismissing all claims, cross claims, and counterclaims as against it is granted. Plaintiffs' cross motion for summary judgment in their favor on the issue of the liability of defendants pursuant to Labor Law § 200 (1) and § 241 (6) is denied. Chelmsford's cross motion for summary judgment is granted insofar as A&W's third-party contractual claims as against it are dismissed and the City defendants and AAH's third-party complaint as against it is dismissed up to the policies' limits of $11 million.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. MARK I. PARTNOW J.S.C.