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SCANNED ON 9/24/2010

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

PRESENT: SALIANN SCARPULLA PART 19

Index Number : 102507/2004
MESSINA, ALEXANDER
VS.
TRANSIT AUTHORITY
SEQUENCE NUMBER : 010
SUMMARY JUDGMENT

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

on this motion to/for _____

PAPERS NUMBERED

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

FILED
SEP 24 2010
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: X **Yes** ☐ **No**

Upon the foregoing papers, It is ordered that this motion

and cross motions are decided per the Memorandum decision dated Sept 16, 2010 which disposes of Motion Sequences nos. 10 - 13.

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

Dated: Sept 16, 2010

Saliann Scarpulla J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

ALEXANDER MESSINA & LORI MESSINA,
Plaintiffs,

-against-

NEW YORK CITY TRANSIT AUTHORITY, E.A. TECHNOLOGIES and E.A. TECHNOLOGIES/ PETROCELLI, J.V., L.L.C., STEVENS APPLIANCE TRUCK CO. and NEW HAVEN MOVING EQUIPMENT CORPORATION,
Defendants.

INDEX NUMBER 102507/2004
Mot. Seq. 010, 011, 012 & 013
DECISION & ORDER

For Plaintiff:
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600 Old Country Road
Garden City, New York 11530

For Defendant New York City Transit Authority:
Jeffrey Samel & Partners
150 Broadway, 20th Floor
New York, New York 10038

For Defendant E.A. Technologies:
Morris, Duffy, Alonso & Faley
Two Rector Street, 22nd Floor
New York, New York 10006

For Defendant E.A. Technologies/Petrocelli, J.V., LLC:
Law Offices of Edward Garfinkel
120 Metrotech Center, 28th Floor
Brooklyn, NY 11201

For Defendant Stevens Appliance Truck Co.:
Garbarini & Scher, P.C.
432 Park Avenue South
New York, New York 10016

For Defendant New Haven Moving Equipment Corporation:
Furey, Kerley, Walsh, Matera & Cinquemani, P.C.
2174 Jackson Avenue
Seaford, New York 1178

HON. SALIANN SCARPULLA, J.:

This action for personal injuries stems from an incident on November 23, 2002 (the "accident") in which plaintiff Alexander Messina ("Messina") was injured while delivering telecommunications equipment to a subway station. Motions with the sequence numbers 010, 011, 012 and 013 are hereby consolidated for decision. First, in motion sequence 010, plaintiffs Messina and Lori Messina (collectively "plaintiffs") move for summary judgment against defendants New York City Transit Authority

("NYCTA") and E.A. Technologies ("E.A. Tech") on (I) their Labor Law § 241(6) claim; (ii) to deem that a Labor Law § 240 (1) cause of action is implied in the complaint, or for leave to amend the complaint to assert a Labor Law § 240 (1) cause of action; and (iii) for summary judgment on the resulting Labor Law § 240 (1) cause of action against NYCTA and E.A. Tech. E.A. Tech cross-moves for summary judgment dismissing the complaint against it. NYCTA also cross-moves for summary judgment in its favor on its cross claims against E.A. Technologies/Petrocelli, J.V., L.L.C. ("JV") for contractual defense and indemnification and its cross claims against E.A. Tech for common-law indemnification.

In motion sequence 011, JV moves for summary judgment dismissing the complaint and all cross claims against it.

Next, in motion sequence 012, Stevens Appliance Truck Co. ("Stevens") moves for summary judgment dismissing the complaint and all cross claims against it. Plaintiffs cross-move for summary judgment against Stevens and New Haven Moving Equipment Corporation ("New Haven"). JV cross-moves for leave to amend its answer to assert cross claims, and for summary judgment on those cross claims against Stevens and New Haven adopting plaintiffs' position in their cross-motion. NYCTA also cross-moves for summary judgment against Stevens and New Haven, also adopting the position of plaintiffs in their cross-motion.

Last, in motion sequence 013, New Haven moves for summary judgment dismissing the complaint and all cross claims against it. As stated above, the cross-

motions by plaintiffs, JV and NYCTA for summary judgment against Stevens are also addressed to New Haven.

Factual Background

Messina, a member of the International Brotherhood of Electrical Workers, Local # 3, was hired as an electrician by non-party Petrocelli Electric Co., Inc. ("Petrocelli") in or around May 2002. In 1995, Petrocelli and E.A. Tech formed a joint venture ("JV"). The joint venture was subsequently reformed as a limited liability company in 1999. On November 23, 2002, Messina was part of a crew delivering a 1,000-pound piece of telecommunications equipment, known as a BDA cabinet, at the subway station at 66th Street and Broadway, New York, NY. The BDA cabinet, to be installed in a communications room at the platform level of the subway station, was a component of a police radio system project (the "project"), awarded to JV by NYCTA on or about December 23, 1999.

Messina worked solely on the project from September 2002 until the accident. The night of the accident, Messina was in a crew of about seven Petrocelli employees. Earlier that night the crew made three other deliveries of BDA cabinets to other subway stations. Charles Proffit ("Proffit"), a Petrocelli foreman, supervised the crew.

The three other BDA cabinets were delivered that night by use of a "robot," which lowered the BDA cabinet down a staircase. When the crew arrived at 66th Street and Broadway, it was raining. Proffit testified at his deposition that he decided to use the passenger elevator from street level to the platform as a safer alternative to the robot.

Proffit also testified at his deposition that he received permission from Rony Crevecoeur ("Crevecoeur"), an engineer employed by the NYCTA, to use the elevator.[1] The BDA cabinet was strapped onto a hand truck,[2] manufactured by Stevens and distributed by New Haven, and rolled to the elevator by four crew members, not including Messina. Messina testified at his deposition that his job the night of the accident was to place cones and caution tape around the work area.

When the hand truck rolled onto the elevator, something prevented the elevator doors from closing. The crew tried to roll the hand truck off the elevator, but two small rear wheels stuck in a one-inch gap between the elevator floor and street level. When the crew members could not dislodge the hand truck, Messina stepped forward to aid them by pulling the hand truck, while at least one other crew member pushed it from behind inside the elevator. Messina testified at his deposition that "[a]s I pulled it out, the whole thing came out at me," resulting in injury to Messina.

Discussion

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 (1st Dept 2007), citing *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853 (1985). Upon proffer of evidence

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[1] Crevecoeur testified at his deposition, however, that no one requested use of the elevator to move the BDA equipment, and that he would need the permission of his supervisors to allow use of the elevator to transport equipment.

[2] The hand truck is sometimes referred to by the parties as a dolly.

establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People ex rel. Spitzer v. Grasso*, 50 A.D.3d 535, 545 (1st Dept 2008), quoting *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 231 (1978); *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224 (1st Dept 2002).

Motion Sequence 010

Plaintiffs' Motion for Summary Judgment

"Labor Law §241(6), by its very terms, imposes a *nondelegable* duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed." *Rizuto v. L.A. Wenger Contracting, Co., Inc.*, 91 N.Y.2d 343, 348 (1998) (quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501-502 (1993)) (emphasis in original). To find liability under Labor Law §241(6), there must be a specific violation of the New York State Industrial Code. *See Betemit v. Spring*, 306 A.D.2d 177, 178 (1st Dep't 2003) (plaintiff's complaint dismissed where she could not "identify any pertinent provisions of the Industrial Code that were violated as would support a claim under Labor Law §241(6)"). Plaintiffs move for summary judgment against NYCTA, E.A. Tech, and JV under Labor Law §241(6), for their failure to comply with Industrial Code regulation 12 NYCRR 23-1.7(f), and that

"this failure to comply be considered as some evidence of negligence by each of these defendants at trial."

12 NYCRR 23-1.7(f) states: "Vertical Passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature of the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided." Plaintiffs claim that this provision was violated because an adequate vertical passage was not provided as the means of access to the subway platform below ground, forcing the crew to try to use the elevator.

It is undisputed that a proper stairway – the stairway into the subway station – was *available* at the accident site, but Proffit, the crew leader deemed it unsafe and chose to use the elevator instead. Proffit testified at his deposition that he had used stairways and a robot for deliveries of other BDA cabinets, but had deemed the staircase at 66th Street and Broadway unusable for the robot because of the rain In light of the fact that a stairway – a vertical passage – was provided, but which the crew leader found to be an unsafe alternative, there is a question of fact as to whether a safe means of access was provided, and whether there was a violation of 12 NYCRR 23-1.7 (f) and, thus, a violation of Labor Law § 241 (6). *See Sponholz v. Benderson Property Develop., Inc.*, 273 A.D.2d 791, 792 (4th Dep't 2000) (denying plaintiffs' motion for summary judgement where "[t]here is a triable issue of fact whether defendants provided a safe stairway for

plaintiff to use."). Accordingly, plaintiff's motion for summary judgment on the Labor Law § 241(6) claim against E.A. Tech is denied.

There are also questions of fact regarding plaintiffs' allegations against NYCTA. There is a dispute as to whether NYCTA approved the use of the elevator to deliver the BDA cabinet once Proffit determined that the rain made use of the robot unsafe. Rony Crevecoeur, an engineer employed by NYCTA, testified at his deposition that he accompanied the crew as it delivered BDA cabinets on the night of the accident, but that he was in the communications room on the station platform level when the accident occurred. He testified that he had not seen the subject elevator ever used to transport equipment previously, he was not aware of any problems with the elevator, no one requested use of the elevator to move the BDA equipment, and he would need the permission of his superiors to allow use of the elevator to transport equipment.

In contrast, Proffit testified at his deposition that he decided to deliver the BDA cabinet by elevator as "the safest way," that Crevecoeur gave him permission to use the elevator, and that he did not witness the accident. Because of the conflicting evidence concerning the NYCTA's supervision and control over the delivery of the BDA cabinet, plaintiffs' motion for summary judgment on the Labor Law § 241(6) claim against NYCTA is also denied.

Plaintiffs also request that their complaint, describing the toppling of the BDA cabinet when the small wheels of the hand truck stuck in a one-inch gap between the elevator floor and street level, be found to plead a cause of action against NYCTA, E.A.

Tech and JV for violation of Labor Law § 240 (1), or in the alternative be allowed to amend their complaint to plead such a cause of action, and then for summary judgment on a Labor Law §240(1) cause of action. Labor Law §240(1), known as the scaffold law, has been broadened beyond scaffolds and ladders to include "the protection against risks due in some way to relative differences in elevation." *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 515 (1991). While the statute is designed to protect workers against "special hazards" which arise "when the work site either is itself elevated or is positioned below the level where 'materials or load [are] hoisted or secured" the special hazards "do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity." *Ross v. Curtis-Palmer Hydro-Eclectic Company*, 81 N.Y.2d 494, 501 (1993) (emphasis in original) (quoting *Rocovich v. Consol. Ed. Co.*, 78 N.Y.2d 509, 514 (1991).

In support of this part of their motion, plaintiffs cite *Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 605 (2009), where a worker was injured moving an 800-lb. cable reel down a staircase. The Court there noted that "[t]he relevant inquiry – one which may be answered in the affirmative even in situations where the object does not fall on the worker – is rather whether the harm flows directly from the application of the force of gravity to the object." *Runner*, 13 N.Y.3d at 604. The Court then held that the "elevation differential here involved cannot be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent."

In this action, however, plaintiff has not shown that the harm to Messina flowed "directly from the force of gravity" to the BDA cabinet. Messina testified that the BDA cabinet and hand truck collapsed onto him after he attempted to pull it out of the elevator, not while he was raising or lowering from one height to another. Moreover, the elevation differential was one inch, many times less than the height of even one step of the four-step staircase in *Runner*. Also, the work crew in *Runner* encountered a permanent elevation differential in the staircase that was part of the structure they were working within. Here, there was no permanent elevation differential and it appear that Messina's co-workers may have created the temporary elevation differential by loading the heavy piece of equipment onto a passenger elevator.

The mere "'fact that gravity worked upon this object which caused plaintiff's injury is insufficient to support a section 240(1) claim.'" *Betemit*, 306 A.D.2d at 178 (quoting *Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 270 (2001)). Similarly, Labor Law §240(1) is not triggered merely because the top of the BDA cabinet was above Messina's head at the time of the accident. "The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of. *Rocovich*, 78 N.Y.2d at 514 (1991). Upon this authority and for the reasons stated, plaintiffs' application to deem that a Labor Law § 240 (1) cause of action is implied in the complaint, or for leave to amend the complaint to assert a Labor Law § 240 (1) cause of

action, is denied. Plaintiffs' request for summary judgment on a Labor Law § 240 (1) cause of action is denied, therefore, as moot.[3]

E.A. Tech's Cross-motion for Summary Judgment

E.A. Tech cross-moves for summary judgment on the ground that it has no possible individual liability for Messina's injuries. E.A. Tech formed JV with Petrocelli and they remain the only two members. In 1999, the members converted the joint venture into a limited liability company ("LLC"). Plaintiffs assert that E.A. Tech is an independent party in this action, because of the extensive involvement of key E.A. Tech personnel in JV, notably Edward Willner ("Willner") as Chief Executive Officer of both E.A. Tech and JV, Charles Boyce in charge of JV's day-to-day operations, William Dayton as project safety engineer, William Share as project manager for scheduling delivery of the BDA cabinets, and Anthony Carr as safety inspector. Plaintiffs also raise questions about ownership of the hand truck and the storage facility for purported JV equipment.

The crew on the night of Messina's accident consisted of Petrocelli employees only and was supervised by Proffit, a Petrocelli employee. This division of labor was embedded in the original Joint Venture Agreement, executed by E.A. Tech and Petrocelli

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[3] In their reply papers on this motion, (which are also in opposition to E.A. Tech.'s and NYCTA's cross-motions for summary judgment) plaintiffs argue they should also be granted summary judgement on their common law negligence and Labor Law §200 causes of action. As these arguments were not raised in the plaintiffs' notice of motion or moving papers, they are not properly before this Court now. *Clearwater Realty Co. v. Hernandez*, 256 A.D.2d 100, 102 (1st Dep't 1998).

on September 28, 1995. According to section 4 of the Joint Venture Agreement, and as incorporated into the LLC Operating Agreement, "Petrocelli shall provide to the Joint Venture the services of workers with membership in the International Brotherhood of Electrical Workers, Local # 3, . . . [and E.A. Tech] shall provide the services of management, engineering, computer programming and technical electronic employees to the Joint Venture, as shall be necessary and sufficient for the Joint Venture." JV was responsible for transferring sufficient funds to the respective members to pay its own workers for their JV work.

The joint venture was converted to an LLC by execution of the LLC Operating Agreement, which provides in part that "all of the terms, conditions and covenants" of the Joint Venture Agreement were incorporated into the Operating Agreement and "apply, where applicable, to the operation of the LLC and the activities, rights and limitations of the" members.

The LLC operating agreement also provides at paragraph 9 that the "Members shall not have any liability for the obligations or liabilities of the Company except to the extent provided in the LLCL [New York's Limited Liability Company Law]." LLCL § 609 (a) provides that no member of an LLC "is liable for any . . . liabilities of the limited liability company . . . , whether arising in tort, contract or otherwise, solely by reason of being such member, manager or agent . . . or participating (as an employee, consultant, contractor or otherwise) in the conduct of the business of the limited liability company."

Under LLCL § 609 (b), the members may accept individual liability by the terms of the LLC's articles of incorporation. There is no indication from the LLC Operating Agreement that E.A. Tech and Petrocelli allowed for this. Under these circumstances, E.A. Tech cannot be held individually liable for the events causing Messina's accident on November 23, 2002. *See Landa v. Herman*, 9 Misc. 3d 1125A (Sup. Ct. N.Y. Co. 2005) (member of LLC cannot be found liable for actions of other member unless it agreed to such liability pursuant to LLCL §609(b)). Accordingly, E.A. Tech.'s cross-motion for summary judgment dismissing the complaint and cross claims against it is granted.

NYCTA's Cross-motion for Summary Judgment

NYCTA cross moves for summary judgment in its favor on its cross claims against JV for contractual defense and indemnification and its cross claims against E.A. Tech for common law indemnification. Because E.A. Tech has been dismissed as a defendant in this action, there is no basis to assert cross claims against it, and NYCTA's request for summary judgement against E.A. Tech for common law indemnification is denied as moot.

In support of its motion, NYCTA submitted the contract for the project. At his deposition Willner, CEO and COO of both E.A. Tech and JV, stated that JV entered into the contract with NYCTA, which Willner negotiated as General Contractor for the project. The JV project contract addresses indemnification at Art. 6.03:

> (a) The Contractor [JV] shall indemnify and save harmless the Indemnified Parties, to the fullest extent permitted by law, from loss and liability upon any and all claims and expenses, including but not limited to attorneys' fees

[* 14].

> . . . irrespective of the actual cause of the accident, irrespective of whether it shall have been due in part to negligence of the Contractor or its subcontractors or negligence of the Indemnified Parties, or of any other persons, but excepting bodily injuries and property damage to the extent caused by the negligence of the Contracting Party or the Authority. . . . (c) Except as otherwise provided in (a) above, the liability of the Contractor under this Article is absolute and is not dependent upon any question of negligence on its part or on the part of agents, officers or employees. The approval of the Authority of the methods of doing the Work or the failure of the Authority to call attention to improper or inadequate methods or to require a change in the methods or to direct the Contractor to take any particular precautions or to refrain from doing any particular thing shall not excuse the Contractor in case of any such injury to person or damage to property.

Under Article 6.01 of the project contract, the indemnified parties are identified as the City, the Authority [NYCTA], the State and the MTA, and their officers, employees and agents.

Article 6.02(a) of the project contact provides in part that the Contractor will be "solely responsible" for "all injuries (including death) to persons, including but not limited to employees of the Contractor and Subcontractors and Indemnified parties . . . . The liability hereunder shall be limited to such injuries or damage occurring on account of, or in connection with, the performance of the Work . . . but shall exclude injuries to such persons . . . to the extent caused by the negligence of the Contracting Party or the Authority."

NYCTA argues that under the terms of this agreement, JV is obligated to indemnify and defend NYCTA in this action. NYCTA also argues that even assuming "the incident occurred without any active fault by" JV, because Messina's accident arose out of work performed under the project contract, JV is still obligated to defend NYCTA.

In opposition, JV argues that the motion should be denied because Messina was JV's special employee. For the reasons stated below, the Court finds JV fails to meet its burden of establishing that Messina was a special employee. In the alternative, JV argues that Article 6.03(a) violated General Obligations Law ("Gen. Oblig.") §5-322.1, and is therefore unenforceable. JV also argues that NYCTA's motion for indemnification is premature as there has not yet been a determination regarding NYCTA's negligence.

Turning first to NYCTA's argument regarding JV's obligation to defend, it is well settled that the duty to defend is broader than the duty to indemnify. *Automobile Insur. Co. of Hartford v. Cook*, 7 N.Y.3d 131, 137 (2006). The Court must look to the allegations of the complaint to determine if the defense of the action is covered, even if facts outside the pleading indicate that the action may lack merit. *Cook*, 7 N.Y.3d at 137.

The allegations of the complaint clearly indicate that this action stems for an accident which arose out of Messina's work on the project. Article 6.03(a) states that the Contractor is obligated to pay attorneys' fees to an indemnified party (including NYCTA) for claims for damages "irrespective of the cause of the accident." Where, as here, the parties have drafted an agreement in clear and concise terms, that writing it to be enforced according to those terms. *See TAG 380, LLC v. ComMet 380, Inc.*, 10 N.Y.3d 507, 512-4513 (2008). NYCTA has, therefore, established that JV owes it a duty to defend.

JV's arguments in opposition fail to refute this showing. JV's argument that this provision of the contract violates Gen. Oblig §5-322.1 is without merit. Article 6.03(a) states that JV shall indemnify "to the fullest extent permitted by law." This limiting

language would prevent JV from having to indemnify NYCTA for its own negligence, which would be a violation of Gen. Oblig. §5-322.1. *Brooks v. Judlau Contracting, Inc.*, 11 N.Y.3d 204 (2008); *Murphy v. Columbia University*, 4 A.D.3d 200, 202-203 (1st Dep't 2004) (finding the indemnification provision "did not violate General Obligations Law §5-322.1, in that the obligation was 'to the fullest extent permitted by law,' and should be read to give the provision effect, rather than in a manner that would render it void") (internal citations omitted); *Dutton v. Charles Pankow Builders, Ltd.*,. 296 A.D.2d 321, 322 (1st Dep't 2002).

NYCTA also moves for summary judgment on its claim for contractual indemnification against JV. Where, as here, there are "triable issues of fact as to whose negligence, if any, caused the plaintiff's accident" it is premature to address claims of contractual indemnification. *Bellefleur v. Newark Beth Israel Med. Ctr.*, 66 A.D.3d 807, 808-809 (2d Dep't 2009). *See also Francesco v. Gucci Amer., Inc.*, 71 A.D.3d 528, 529 (1st Dep't 2010) (where liability under Labor Law §241(6) was yet to be determined, "summary judgment in defendants' favor on their contractual indemnification claims" was premature); *Erickson v. Cross Ready Mix, Inc.*. 2010 NY Slip Op 6073, at 4 (2d Dep't July 13, 2010) (affirming denial of summary judgment where it was "premature for the Supreme Court to reach the issue of contractual indemnification, in light of the outstanding Lar Law §241(6) cause of action asserted against [movant]").

As discussed above, there are issues of fact regarding liability by any of the defendants for Messina's injuries. Accordingly, NYCTA' motion for summary judgment on its contractual indemnification claim against JV is denied as premature.

Motion Sequence 011

JV's Motion for Summary Judgment

JV moves for summary judgment dismissing the complaint and all cross claims against it, arguing that it was Messina's special employer, or, alternatively, that the accident arose as an integral part of his work.

"[A]n employee, although generally employed by one employer, may be specially employed by another employer, and [] a special employer may avail itself of the Workers' Compensation Law to bar negligence claims against it for injuries sustained by a special employee in the course of special employment. General employment is, however, presumed to continue, and special employment will not be found absent a 'clear demonstration of surrender of control by the general employer and assumption of control by the special employer.' Whether such a complete transfer of control has occurred is ordinarily a fact-sensitive inquiry not amendable to resolution on summary judgment. Only where the defendant is able to demonstrate conclusively that it has assumed exclusive control over the 'manner, details and ultimate result of the employee's work' is summary adjudication of special employment status and consequent dismissal of an action proper." *Bellamy v. Columbia University*, 50 A.D.3d 160, 161-162 (1st Dep't 2008) (quoting *Thomas v. Grumman Aerospace Corp.*, 78 N.Ny2d 553, 557-558 (1991)).

Here, JV fails to meet its burden of showing that there is no question of fact as to whether it was Messina's special employer. Messina testified that he worked solely on the project for at least two months prior to the accident. He also testified that he was hired by Petrocelli, and was paid by Petrocelli. Messina was supervised by Proffit, a

Petrocelli foreman, throughout that period. JV's argument that Proffit was a JV employee is contradicted by Proffit's own testimony that he was employed by Petrocelli, not JV, except for one year while he left to work for Dennison Electric.

JV asserts that it had no general employees, and that all of its employees were special employees. For support, JV points to the deposition of Willner, Chief Executive Office and Chief Financial Officer of both JV and E.A. Tech. However, Willner testified at his deposition (on behalf of E.A. Tech.) that JV was the general contractor at the project, and that it hired E.A. Tech. and Petrocelli as subcontractors to perform the actual work. JV asserts, without pointing to any support, that Petrocelli surrendered direction and control over Messina to JV to do work for it on the project.

Special employee status cannot be forced upon Messina without his consent and understanding. "'[E]mployment, like any other contract, presupposes understanding. The new relation cannot be thrust upon the servant without knowledge or consent. He must understand that he is submitting himself to the control of a new master . . . . Understanding may be inferred from circumstances, but understanding there must be. . . . There can be no unwitting transfer from one service to another.'" *Bellamy*, 50 A.D.3d at 166-167 (quoting *Murray v. Union Ry. Co. of N.Y. City*, 229 N.Y. 110, 113 (1920)). JV fails to establish as a matter of law that Messina was aware of any transfer JV.

"[T]he existence of a special employment relationship turns on the resolution of factual issues properly left for trial. . . . Defendant's proof of its assumption of control over 'the manner, details and ultimate result' of plaintiff's work, simply [is] not sufficient

to permit a legally conclusive inference that plaintiff was aware of an consented to the alleged change in his employment status." *Bellamy*, 50 A.D.3d at 169.

In the alternative, JV argues that it should be awarded summary judgment on plaintiff's claims under Labor Law §241(6) because "the way the accident happened was an integral part of the plaintiff's work."

In support of this claim, JV relies solely on the decision in *Sharrow v. Dick Corporation*, 233 A.D.2d 858 (4th Dep't 1996), in which the Court found, in part, that plaintiff cannot establish a prima facie case under Labor Law §241(6) for a violation of Industrial Code section 23-1.7(e)(2). Section 23-1.7(e)(2) provides that floors, platforms and similar working areas "shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed." The Court in *Sharrow* concluded that this regulation did not apply to the Genie hoist on which plaintiff tripped because it was "an integral part of the work he was performing." *Sharrow*, 233 A.D.3d at 860.

JV asserts that whether Messina's accident was caused by the dolly or the elevator, "all aspects of the mechanisms claimed by Messina were an integral part of his work in delivering the BDA cabinet." As Messina testified, however, his job the night of the accident was to set up cones and warning flags. Moreover, the "integral part" test of section 23-1.7(e)(2), as applied in *Sharrow*, applies to keeping a work area free of debris. As Messina does not allege his injury was the result of debris at the work site, this argument is unavailing.

For the foregoing reasons, JV's motion for summary judgement dismissing the claims and cross claims as against it are denied.

Motion Sequence 012

Stevens's Motion for Summary Judgment, Plaintiffs' Cross-motion for Summary Judgment, NYCTA's Cross-motion for Summary Judgment

Stevens moves for summary judgment dismissing the complaint against it, arguing that the hand truck had no design or manufacturing defect, and that the accident must be attributed to misuse of the hand truck. Messina testified that the hand truck "pancaked," that is, that the rear (caster) wheel assembly folded back into its storage position, but he only deduced this from the events. "I did not actually see them [fold in], but the cabinet came down on me." He testified, though, that, when he was lying on the ground, "I seen the dolly with the wheels collapsed in, folded back in and lying on the ground." No one else who testified – Proffit, Crevecoeur and Dayton – saw the accident. They all said they came upon the scene after the BDA cabinet fell on Messina.

The rear wheel assembly is released for use by pulling on a rod on the right-hand side of the hand truck. When the rear wheels are deployed, the hand truck stands at a 55-degree angle to the ground and can rest otherwise unsupported on its four wheels. Using only its larger front wheels, the hand truck can only stand upright at 90 degrees without additional support. Photographs of the hand truck, submitted in support of this motion, show a metal pipe that is part of the rear wheel assembly to be bent.

Stevens submits an affidavit from Paul R. Stephens ("Stephens") a licensed engineer, with a background in industry and forensic engineering, who opines that the

bent pipe is consistent with a "rearward tipover of the heavily loaded hand truck without caster frame collapse." Further, he states that the mechanism locking the caster wheels into position "is not defective." He concluded that attempting to push the hand truck over the gap with the caster wheels against the obstruction "was not proper hand truck operating practice."

Plaintiffs, in their opposition to Stevens' motion and in their cross-motion for summary judgment against Stevens, submit the affidavits of Alden P. Gadreau ("Gadreau"), a professional engineer, experienced in accident reconstruction and mechanical failure analysis. Gadreau inspected the hand truck, as had Stephens, and opines that, while the hand truck's large front wheels lifted off the ground 20 degrees or less, because of the efforts to dislodge it, this generated sufficient force to bend the pipe frame and allow the rear wheel locking mechanism to disengage, resulting in the folding of the rear wheel assembly. Further, Gadreau claims that the hand truck lacks a "positive lock" to keep the rear wheel assembly properly deployed under a heavy load. A positive lock could be fitted to the hand truck, he states, with an "easy modification" that would be "inexpensive."

Stevens relies on *Walk v. J. I. Case Co.*, 36 A.D.2d 60, 62 (3d Dept 1971) ("Appellant's operation of the machine in a manner contrary to the instructions given for its use, was clearly both an assumption of the risk and a misuse of the product, and bars his recovery as a matter of law"), arguing that Messina's admitted pulling and yanking was the proximate cause of the accident. However, as another court later observed: "The age of the case gives away its fault. *Walk* precedes New York's adoption of comparative

fault principles." *Tripolone v. Genova Prods.*, 1997 WL 583120, *6, US Dist LEXIS 13800, *17 (N.D. N.Y. 1997). With no one able to describe what happened when the hand truck fell on Messina, and the experts disagreeing on the safety of its design, a jury must decide Stevens's liability, pursuant to the doctrine of comparative fault. *See Cregan v. Sachs*, 65, A.D.3d 101, 109 (1st Dep't 2009) ("in view of the conflicting expert affidavits, issues of fact and credibility are raised that cannot be resolved on a motion for summary judgment"). Stevens's motion for summary judgment dismissing the complaint and all cross claims against it is, accordingly, denied. For the same reasons, the cross-motions for summary judgment by plaintiffs and NYCTA against Stevens are denied.

JV's Cross-motion for Leave to Amend its Answer

JV's cross-motion for leave to amend its answer to assert cross claims against Stevens, and for summary judgment on those cross claims, is made without opposition. Accordingly, JV's cross-motion to amend its answer to assert cross claims against Stevens is granted. Arguing for summary judgment against Stevens on these cross claims, JV "adopts the argument and case law cited therein and the motion for summary judgment by the plaintiff dated January 6, 2010." As the plaintiffs' January 6, 2010 cross-motion for summary judgment was denied for the reasons stated above, JV's motion for summary judgment on its cross claims against Stevens is also denied.

MOT. SEQ. 013

New Haven's Motion for Summary Judgment, Plaintiffs' Cross-motion for Summary Judgment, NYCTA's Cross-motion for Summary Judgment

New Haven did not design or manufacture the hand truck at issue, but served as a distributor for Stevens. Messina has proceeded against it based on the theory of strict products liability because New Haven allegedly placed a defective product into the stream of commerce. *Gebo v. Black Clawson Co.*, 92 N.Y.2d 387, 392 (1998) ("Where a defective product is sold by a seller, dealer or distributor engaged in its normal course of business, the burden of strict liability has been imposed").

As discussed above, whether the hand truck was defectively designed is a triable issue of fact. Accordingly, the issue of New Haven's liability under New York law must be determined at trial. Its motion for summary judgment dismissing the complaint and all cross claims against it is denied. For the same reasons, the cross-motions for summary judgment by plaintiffs and NYCTA against New Haven are denied.

JV's Cross-motion for Leave to Amend its Answer

JV's cross-motion for leave to amend its answer to assert cross claims against New Haven is made without opposition. Accordingly, JV's motion to amend its answer to assert cross claims against New Haven is granted. For its motion for summary judgment against New Haven on these cross claims, JV "adopts the argument and case law cited therein and the motion for summary judgment by the plaintiff dated January 6, 2010." As the plaintiffs' January 6, 2010 cross-motion for summary judgment was denied for the

reasons stated above, JV's motion for summary judgment on its cross claims against New Haven is also denied.

Accordingly, it is

ORDERED that motion by plaintiffs Alexander Messina and Lori Messina for summary judgment is denied (mot. seq. 010); and it is further

ORDERED that cross-motion by defendant E.A. Technologies for summary judgment is granted and the complaint and any cross claims against it are dismissed (mot. seq. 010); and it is further

ORDERED that the cross-motion by New York City Transit Authority for summary judgment on its cross claims for common-law indemnification against E.A. Technologies is denied as moot (mot. seq. 010); and it is further

ORDERED that cross-motion by New York City Transit Authority for summary judgment in its favor on its cross claims for contractual defense against E.A. Technologies/Petrocelli, J.V., L.L.C. only is granted, and the cross-motion is denied to the extent that is seeks summary judgment against E.A. Technologies/Petrocelli, J.V., LLC for contractual indemnification (mot. seq. 010); and it is further

ORDERED that motion by E.A. Technologies/Petrocelli, J.V., L.L.C. for summary judgment dismissing the complaint and all cross claims against it is denied (mot. seq. 011); and it is further

ORDERED that the motion by Stevens Appliance Truck Co. for summary judgment in its favor dismissing the complaint and all cross claims against it is denied (mot. seq. 012); and it is further

ORDERED that the cross-motion by E.A. Technologies/Petrocelli, J.V., L.L.C. for leave to amend its answer is granted (mot. seq. 012); and it is further

ORDERED that the cross-motion by Alexander Messina and Lori Messina for summary judgment in their favor dismissing the complaint against Stevens Appliance Truck Co. is denied (mot. seq. 012); and it is further

ORDERED that the cross-motion by New York City Transit Authority for summary judgment in its favor on its cross claims against Stevens Appliance Truck Co. is denied (mot. seq. 012); and it is further

ORDERED that the motion by New Haven Moving Equipment Corporation for summary judgment on the complaint and all cross claims against it is denied (mot. seq. 013); and it is further

ORDERED that the cross-motion by E.A. Technologies/Petrocelli, J.V., L.L.C. for leave to amend its answer is granted (mot. seq. 013); and it is further

ORDERED that the cross-motion by Alexander Messina and Lori Messina for summary judgment in their favor on the complaint against New Haven Moving Equipment Corporation is denied (mot. seq. 013); and it is further

ORDERED that the cross-motion by New York City Transit Authority for summary judgment in its favor on its cross claims against New Haven Moving Equipment Corporation is denied (mot. seq. 013); and it is further

ORDERED that upon proof of service of a copy of this order with notice of entry upon all parties, the Clerk of Court is directed to enter judgment dismissing the complaint and all cross-claims as against E.A. Technologies only; and it is further

ORDERED that the remainder of the action with respect to the remaining defendants is severed and shall continue to trial under this index number.

This constitutes the decision and order of the Court.

DATED: New York, NY
September 16, 2010

ENTER:

Saliann Scarpulla, J.S.C.