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SCANNED ON 11/10/2010

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

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

Index Number : 113952/2006

KITTELSTAD, ROBERT

VS.

LOSCO GROUP INC

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. 113952/06

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

this motion to/for

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

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

The parties agree that motions are consolidated for consideration + determination 8/26/10

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

FILED

NOV 10 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: Nov 8, 2010

HON. JUDITH J. GISCHE J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Robert Kittelstad and Arlene Kittelstad,

Plaintiff (s),

-against-

The Losco Group, Inc., Clean Air Quality, Services, Inc., and Jacobs Facilities, Inc.,

Defendant (s).

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Clean Air Quality Service, Inc.,

3rd Party Plaintiff.

-against-

Campbell Insulation Corp.,

3rd Party Defendant.

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DECISION/ ORDER
Index No.: 113952/06
Seq. No.: 002, 003

PRESENT:
Hon. Judith J. Gische
J.S.C.

T.P. Index No.:
113952/06

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Clean Air n/m (3212) w/RPF, exhs	1
Campbell n/m (3212) w/KAW affirm, exhs	2
Campbell partial support/partial opp to Clean Air w/KAW affirm, exhs	3
Jacobs x/m (3212) w/LSS affirm, exhs	4
Kittelstad x/m (3212) w/TAC affirm, exhs (2 sep vols)	5,6,7
Campbell opp and reply w/KAW	8
Clean Air partial opp to Campbell w/ RPF affirm	9
Clean Air opp to Kittelstad, partial opp Jacobs, Reply to Clean w/RPF affirm,exhs	10
Campbell reply to Clean Air w/KAW affirm	11
Kittelstad opp to Jacobs w/ TAC affirm	12
Kittelstad reply to Clean Air w/TAC affirm	13
Kittelstad reply to Campbell w/TAC affirm	14

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

Plaintiff Robert Kittlestad alleges the defendants violated the New York State Labor Laws (sections 240 [1], 241 [6], 200) and that his injuries are causally related to those violations. Issue has been joined by defendants Clean Air Quality Service, Inc. ("Clean Air") and Jacobs Facilities, Inc. ("Jacobs"), and Clean Air has commenced a third party action against Campbell Insulation Corp. ("Campbell") who has answered the third party complaint.

The court has before it two motions and two cross motions for summary judgment. All the motions are timely and will be decided on the merits (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]). The motions are consolidated for decision in this single decision/order.

Arguments

Plaintiff contends he was injured on February 25, 2004 ("date of accident"), while working on a construction project owned by the State of New York ("owner"). On the date of his accident, plaintiff was employed by Campbell. Plaintiff was instructed by his foreman to insulate certain piping and duct work in an air handler room. According to plaintiff, the only way he could get to the area he had to work on was by climbing onto the HVAC unit itself and walking across it to get to a far corner. The air duct handler had not yet been installed, but there was a hole for it. Someone had placed wooden planks over the opening and when plaintiff stepped onto one of the planks, it broke and he fell 5-6 feet into the unit. Plaintiff is the sole witness of his accident.

The owner is not a party to this action and the case against the State of New York was dismissed by the Court of Claims[1]. Defendant, The Losco Group, Inc. ("Losco") has not answered the complaint or appeared in this action. More than one year has passed since Losco's default. Losco is allegedly the general contractor ("GC") for this project.

A principal issue in this case is whether Jacobs, the construction manager, was the owner's statutory agent, such that Jacobs can be held vicariously liable for plaintiff's injuries pursuant to Labor Law §§ 240 [1] and 241 [6][2]. According to plaintiff, Jacobs was the *de facto* general contractor ("GC") for the project because there was no GC. Furthermore, plaintiff claims that Clean Air, as a prime contractor on this project, was a statutory agent of the owner and, therefore, it cannot escape liability by delegating its work to Campbell, a subcontractor.

The owner and Jacobs entered into a "Construction Manager Agreement" for construction management services for the project ("construction management agreement"). The owner also entered into a separate contract with Clean Air for the installation of HVAC at the project ("prime contract"). In turn, Clean Air entered into its own agreement with Campbell ("subcontract"), for HVAC insulation work. The subcontract identifies the State as the "owner," Clean Air as the "contractor," and Campbell as the "subcontractor." It also incorporates by reference the prime contract.

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[1]Plaintiff commenced an action against the owner in the Court of Claims. That action (Claim No. 112004) was dismissed by Judge Terry Ann Ruderman for untimely service (order, Ruderman, J., 2/1/07).

[2]The Labor Law § 200 and common law negligence claims are addressed separately.

The written agreement - if any - between Losco and the owner or any other party named in this action has not been provided to the court.

Clean Air and Campbell have each moved for summary judgment, dismissing the complaint. Jacobs has cross moved for summary judgment dismissing the complaint as well. To some extent, all three defendants present arguments supportive of each other's motions. Thus, all three movants agree that none of them are the owner or GC of the project.

Jacobs separately argues that under its construction management agreement, it was merely a consultant, charged with the overall administration of the project and, although it coordinated the work of the various contractors, controlled the schedule and monitored costs, its construction management agreement did not authorize Jacobs to control the means and methods employed by the prime contractors or sub-contractors. Jacobs contends Clean Air and Campbell were each responsible for the safety of their own workers.

Clean Air denies it had any contractual relationship with Losco or that is the statutory agent of the owner. Clean Air also claims it is Jacobs who was the owner's agent because it was responsible for overseeing all matters related to construction activities on the project. Clean Air denies it had, or assumed, any responsibility for the management, supervision or control of the work site or any of the other prime contractor's employees, except its own employees. Thus, Clean Air contends that it had none of the statutory duties imposed on owners, contractors, or their agents. In the alternative, Clean Air asks that it be granted summary judgment on its indemnification claims against Campbell, if Clean Air is not granted summary judgment on plaintiff's

complaint against it.

Campbell agrees that Jacobs and Clean Air are entitled to summary judgment dismissing the complaint, but opposes Clean Air's motion for summary judgment on the 3rd party complaint for contractual indemnification because there is a question of fact whether Clean Air attached an air duct to the air handler unit. Campbell argues that there is no proof the duct was attached before the day of the accident or, if it was, and then removed, who removed it.

Plaintiff was deposed and each defendant (except for Losco) produced a witness to be deposed. At his deposition ("EBT"), plaintiff testified he was supervised by and received directions and instructions only from his foreman, John Barden ("Barden" or "foreman"), also a Campbell employee. Plaintiff testified he used a ladder to get up onto the air handler and the ladder was provided to him by his employer. After his accident, he reported what had happened to his foreman. Plaintiff argues that there no genuine material issue of fact that the duct on the air handler had been removed. He reasons that had it not been originally installed, he would not have been sent to insulate it, but had it still been in place when the accident happened, he would not have been able to access the piping beyond the duct work.

In his Bill of Particulars, plaintiff alleges the failure to properly cover the opening in the air handler is a violation of the Industrial Code section 23-1.17, as well as other code sections (§§ 23-1.5, 23-1.7, 23-1.15 and 23-1.30). In support of his Labor Law § 240 [1] claim, he contends he was not provided with an efficient ladder or scaffold to safely do his job. He claims the defendants were negligent by failing to provide him with a well constructed, well lit area to work in.

All three defendants rely on the construction management agreement, Clean Air's prime contract and Campbell's subcontract, as well as the deposition testimony of the various defendant witnesses and plaintiff himself.

The construction management agreement provides, in relevant part as follows:

> "ARTICLE I. The Construction Team and Extent of Agreement: The construction manager accepts the relationship of trust and confidence established between it and the Owner by this Agreement. It covenants to furnish its best skill, judgment and cooperation in furthering the interests of the Owner. It agrees to furnish efficient business administration and superintendence and to use its best efforts to complete the Project n the best and soundest way and in the most expeditious and economical manner consistent with the interest of the owner. The Construction Manager represents and agrees that its officers, employees, agents, servants [etc.] shall possess the experience, knowledge and character necessary to qualify them individually for the particular duties they perform hereunder."

The construction management agreement defines the "construction team" as the construction manager, the owner and various design consultants, contractors, subcontractors and supplier. As to this team, the construction manager is to provide "leadership . . .on all matters relating to construction." A "Trade Contractor" is defined in the agreement as an "individual construction contractor having a contract with the State. . ." Schedule "B" sets forth the scope of services to be proved by Jacobs. Such services include: initial project review, project estimates, consultation during project development, coordination of contract documents, bidding, project administration, contractor coordination, schedule, cost and quality control and problem resolution. Jacobs was also responsible for closing out the project by assisting and training Department of Transit operating staff. The insurance provisions require that Jacobs

obtain comprehensive general liability for personal injuries in the amount of $1 million per occurrence.

Article 12.4 states that the agreement "shall not" be construed "to create any relationship between the Construction Manger and any trade contractor" and Article 4 states that trade contracts, including contracts for general construction, are at the owner's discretion.

The construction management agreement between the owner and Jacobs is for $1,524,095.

Clean Air's prime contract with the owner only specifies "design and construction and that Clean Air would "physically complete the work within the time stated in Section 01110 of the specifications." The prime contract between the owner and Clean Air is for $2,906,000.

The subcontract between Clean Air and Campbell requires that Campbell furnish "all labor, supervision, materials, tools, equipment, machinery, scaffolding, hoisting, rigging, appliances [etc.] and all other things necessary for the complete, safe, workmanlike and expeditious performance of . . . the HVAC Insulation work."

At his deposition, Robert Bauco ("Bauco"), Jacobs' facilities manager, was asked about his duties. He stated he "represented Jacobs on the project [and] Jacobs represented the the State of New York as their agent to manage the overall construction process and actually pre-construction as well." According to Bauco, the owner had staff on site but Jacobs "supplemented their staff." He stated that any accidents were reported to the owner and Jacobs. Jacobs had weekly "progress meetings," where safety was among the topics discussed but it was the prime

contractors who held "tool box safety meetings" where the topic of safety was front and center.

Bauco did daily inspections of the worksite as did Robert Raspanti, Jacobs' superintendent. Rapasanti coordinated the prime contractors and maintained quality control. If he saw a safety violation and it was an "imminently dangerous situation," Rapasanti could stop the worker from doing his work. In fact anyone on Jacobs' staff could stop an activity if it "appeared to be imminently dangerous . . . to insure that nobody gets hurt." According to Bauco, Campbell did not have to, nor did it, report to Jacobs about their work and Bauco first learned about the accident, months after it happened, from Clean Air.

Clean Air's Vice President, Pasquale Ruperto ("Ruperto) testified at his deposition that Clean Air installed, inspected and approved the air handling unit. According to Ruperto, the duct was installed prior to the accident and he personally inspected the work once completed. He specifically inspected that air handler in particular on a continual basis. He held weekly job meetings and kept minutes of them. Ruperto stated that Losco, not Jacobs, was the GC and Clean Air did not have any agreement (neither written nor oral) with Losco. Ruperto stated that on prior occasions, Campbell had erected a ladder or scaffold over the air handler to do the necessary insulation work.

Defendants claim that plaintiff was a recalcitrant worker because he decided to step onto and walk on top of the air handler, instead of using the ladder he had or walking around the unit to reach the area to be insulated. Furthermore, aside from claiming he was not provided with adequate safety equipment, plaintiff has not provided

anything to show that the only way to reach the area where he had to work was by walking on the air handler or that, as he claims, he should have been provided with a scaffold which is why he walked on the unit. William Campbell, Campbell's principal, testified at his EBT that his employees were provided with A-frame ladders to do their jobs and no one, not even the plaintiff, complained they needed scaffolding or other safety equipment to safely do their job. Thus, defendants each claim plaintiff's decision to forego the proper use of a ladder, relieves Jacobs from any statutory liability.

Defendants deny that any sections of the Industrial Code cited by plaintiff are applicable or specific enough to support his Labor Law § 241 [6] claim. Thus, they contend there is no testimony or other evidence by him that the area was improperly illuminated (section 23-1.30 - illumination) or that safety rails were necessary (section 23-1.14 - safety rails).

Clean Air and Jacobs deny any negligence on their part and Clean Air separately argues that it did not remove the air duct, if in fact it was removed. Jacobs contends that plaintiff's testimony about the absent air duct and covered hole is simply "incredible."

Law Applicable to Motions for Summary Judgment

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case " (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate

the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing (*See:* Hindes v. Weisz, 303 A.D.2d 459 [2nd Dept 2003]).

Discussion

Labor Law § 240 [1] imposes a non-delegable duty upon owners, contractors and their agents to supply necessary security devices for workers at an elevation, to protect them from falling (Bland v. Manocherian, 66 N.Y.2d 452, 458-459 [1985]). An owner, contractor or agent who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500 [1993]). Therefore, a violation of this duty results in absolute liability where the violation was the proximate cause of the accident (Meade v. Rock-McGraw, Inc., 307 A.D.2d 156 [1st Dept. 2003]).

Similarly, Labor Law § 241 [6] also imposes a non-delegable duty upon owners, contractors and their agents to provide reasonable and adequate protection and safety to construction workers (Comes v. New York State Electric & Gas Co., 82 NY2d 876 [1993]; Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 348 [1998]; Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993]).

The first issue to be decided is whether, as plaintiff claims (and denied by defendants), Jacobs and/or Clean Air are the owner's agent and, therefore, vicariously liable for plaintiff's injuries, even though neither of these defendants are, themselves,

an "owner" or "contractor."

A "general contractor" is not the same thing as a "construction manager." Furthermore, just because a GC is not doing its job (for whatever reason), this does not mean liability moves up to the construction manager, if there is one on the project. It is also of no moment, based upon the arguments raised on these motions, that plaintiff failed to timely enter judgment against Losco or even whether Losco was, in fact, the GC or another prime contractor.

Labels do not control whether an entity is an agent of the owner and, therefore, statutorily (and vicariously) liable for a plaintiff's injuries (Walls v. Turner Construction Company 4 NY3d 861 [2005]). Instead, the court is required to examine what the construction manager's responsibilities both pursuant to the contract and on the particular project. Thus, the court must decide whether the construction manager had the authority to supervise, direct or control the injury producing work or whether there are issues of fact that must be resolved before that determination can be made (Russin v. Picciano & Son, 54 NY2d 311 [1981]; Balthazar v. Full Circle Const. Corp., 268 A.D.2d 96 [1st Dep 2000]; Olney v. Ciminelli-Cowper, Co., Inc., 248 AD2d 1019 [4th Dept 1998]).

As a general matter, a construction manager is not statutorily liable for injuries under Labor Law §§ 240 [1] and 241 [6], unless the manager is an agent of the property owner and had the ability to control the activity which brought about the injury (Walls v. Turner Construction, Co., Inc., 4 NY3d 861 [2005]; Russin v. Picciano & Son., *supra;* Tomyuk v. June field Assoc., 57 AD3d 518 [2nd Dept 2008]). Here, the specific terms of Jacob's contract with the owner did not create an agency and, therefore, Jacob was not

the agent of the owner, as that term is used in the Labor Law. There is language in the construction management agreement that the terms of the agreement "shall not" be construed "to create any relationship between the Construction Manger and any trade contractor . . ." Furthermore, although Jacobs had broad responsibilities for the project, Jacobs was not required to (nor did it) control the work done by the prime and sub-contractors that the owner contracted to do work on the project. Jacobs was hired to provide "efficient business administration and superintendence" and to "use its best efforts to complete the Project in the best and soundest way and in the most expeditious and economical manner consistent with the interest of the owner." Thus, Jacobs may have been the brain of the operation, but not its brawn (i.e. a contractor). Jacobs was not paid to act as the owner's agent and Jacobs did not do any of the tasks traditionally handled by a GC.

Jacobs did have a general ability to stop any work it thought was "imminently dangerous," if one of its inspectors actually observed such work being done during one of their walk-throughs. Jacobs, however, was not authorized to control, supervise or direct the work being done by any of the prime contractors or subs. Only upon obtaining authority to supervise and control work does a third party fall within the class of those having nondelegable liability as an "agent" under sections of the Labor Law requiring owners and contractors to provide workers with certain protections (Voultepsis v. Gumley-Haft-Klierer, Inc., 60 A.D.3d 524 [1st Dept 2009]). A general contractual obligation to ensure compliance with safety regulations is insufficient to support liability on an agency theory, or pursuant to Labor Law § 200 and its common law counterpart (Smith v. McClier Corp., 22 AD3d 369 [1st Dept 2005]; Blake v. Neighborhood Hous

Services of New York, 1 NY3d 280 [2003]). Although safety issues were discussed at meetings held by Jacobs, the primary focus of those meetings was on the progress of the project and meeting deadlines. Workers (including plaintiff) received their safety equipment from the contractors, not Jacobs and it was at the tool box meetings with the contractors that safety issues were the primary topic of concern.

Plaintiff has not proved that Jacobs is a statutory agent and therefore, plaintiff's cross motion for summary judgment must be denied. Jacobs' cross motion for summary judgment is granted. Thus, the Labor Law 240 [1] and 241 [6] claims against Jacobs are hereby severed and dismissed.

Plaintiff's motion for summary judgment against Clean Air, based upon it being the statutory agent of the owner, must also be denied for many of the same reasons. The owner did not delegate to Clean Air the authority to supervise and control the work on the project. Therefore, Clean Air was not the statutory agent of the owner, but a prime contractor who had a contract with the owner. Clean Air subcontracted some its work to plaintiff's employer (Campbell). Under its contract, however, Campbell was obligated to insure the safety of its employees. Clean Air did not retain the authority to control or supervise the work performed by Campbell employees (Domino v. Professional Consultation, Inc., 57 AD3d 713 [2nd Dept 2008]). There is no basis for the imposition of vicarious (statutory) liability on Clean Air, and therefore, Clean Air's motion for summary judgment dismissing the Labor Law §§ 240 [1] and 241 [6] claims against it is granted.

Although defendants have raised other arguments about why they are entitled to summary judgment dismissing the complaint, such as that plaintiff was a recalcitrant

worker and his account of the accident is "incredible," these arguments have no impact on the court's decision, that neither Clean Air nor Jacobs are statutory agents.

The court also considers whether, as defendants claim, there is no predicate basis for plaintiff's Labor Law § 241 [6] claim. The interpretation of an Industrial Code regulation and determination as to whether a particular condition is within the scope of the regulation present questions of law for the court (Messina v. City of New York, 300 A.D.2d 121 [1st Dept 2002]). Plaintiff principally relies on Industrial Code 23-1.7 and appears to have abandoned the other sections set forth in his Bill of Particulars. Section 23-1.7 [d] sets forth the requirements owner, contractors, and their agents must follows in dealing with hazardous openings:

> b) Falling hazards.
>
> 1. (1) Hazardous openings.
>
> (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).
>
> (ii) Where free access into such an opening is required by work in progress, a barrier or safety railing constructed and installed in compliance with this Part (rule) shall guard such opening and the means of free access to the opening shall be a substantial gate. Such gate shall swing in a direction away from the opening and shall be kept latched except for entry and exit.
>
> (iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows . . .

The regulation does not define "hazardous opening." Based upon the unique facts of this case, the court decides that the rule was not intended to apply to this type

of opening (an air duct on top of air handler) because it was not an area or surface where a worker might be expected to walk on or step into (Messina v. City of New York, supra). Thus, this is another reason to deny plaintiff's Labor Law § 241 [6] claims against the defendants. The other Industrial Code provisions cited in the Bill of Particular are either general (23-1.5), inapplicable (23-1.15 - safety railings), or not supported by any facts (23-1.30 - illumination) and, therefore, are not a predicate basis for plaintiff's Labor Law § 241 [6] claim.

Labor Law § 200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site and unlike Labor Law §§ 240 [1] and 241 [6], liability can only be imposed if the defendant has actually been negligent. The elements of a prima facie Labor Law § 200 claim are that the defendants: 1) exercised supervision and control over the work performed or 2) had actual or constructive notice of the dangerous condition alleged, or 3) created the condition (Sheridan v. Beaver Tower Inc., 229 AD2d 302 [1st Dept. 1996] *lv den* 89 NY2d 860 [1996]; O'Sullivan v. IDI Construction Co., Inc., 7 NY3d 805 [2006]; Gonzalez v. United Parcel Serv., 249 AD2d 210 [1st Dept. 1998]). Plaintiff's testimony is that he received all his instructions, directions and equipment from his foreman, a Campbell employee.

There is, however, a material issue of fact whether the air duct was installed and then removed and if removed, then by who. Clean Air contends the air duct was installed, but then removed and someone put down planks. Although there are no facts tending to show that any Jacobs employee removed it and covered the whole with planks, plaintiff contends it was removed by Clean Air. This factual dispute must be

decided at trial. Therefore, Jacobs' cross motion for summary judgment dismissing the Labor Law § 200 claims against it is granted. Clean Air's motion for summary judgment dismissing the Labor Law § 200 claims against it is denied.

Contractual Indemnification

The subcontract between Clean Air and Campbell requires that Campbell provide "indemnify and hold harmless" the owner an contractor (i.e. Clean Air) "to the fullest extent permitted by law" for injuries to all persons, "whether employees of the Subcontractor or otherwise . . . resulting from, arising out of or occurring in connection with the execution of the Work . . ." Furthermore, the obligation to defend, indemnify and hold harmless exists whether the injuries "are due, or are claimed to be due, to the negligence of the Contractor or the Owner, or the agents and employees of the Contractor and Owner or other subcontractors, excepting from the foregoing the sole and complete negligence of the Contractor..." (Division 23.1)

Clean Air contends, without any elaboration, that since Campbell was required to indemnify, hold harmless and defend Clean Air, it is entitled to summary judgment on its third party complaint. Neither of the cases cited by Clean Air support the relief sought (one case involves common law indemnification) and there are factual issues about whether the air duct was removed and if so, who removed it. Therefore, Clean Air's motion for summary judgment on its third party claims against Campbell for contractual indemnification is denied.

Conclusion

The Labor Law §§ 240 [1] and 241 [6] claims against Jacobs and Clean Air are

dismissed because neither defendant is the owner or contractor of this project nor the agents of the owner. Therefore, plaintiff's summary judgment is denied and the motions by Jacobs, Clean Air and Campbell for summary judgment dismissing the Labor Law §§ 240 [1] and 241 [6] claims is granted. The Labor Law § 241 [6] claim is also dismissed as there is no predicate basis.

Jacobs' motion for summary judgment dismissing the Labor Law § 200 (common law negligence) claims against it is granted and those claims are hereby severed and dismissed. Clean Air's motion for summary judgment dismissing the Labor Law § 200 (common law negligence) claims against it is, however, denied as is Clean Air's motion for summary judgment on its contractual indemnification claims against Campbell. Thus, the Labor Law § 200 claim against Clean Air and Clean Air's third party claims against Campbell will be tried. Plaintiff shall serve a copy of this decision and order on the Office of Trial Support so the trial can be scheduled.

In accordance with the foregoing,

It is hereby

ORDERED that the Clerk shall enter judgment in favor of defendants Clean Air Quality Service, Inc. and Jacobs Facilities, Inc., against plaintiffs Robert Kittelstad and Arlene Kittelstad, on the Labor Law § 240 [1] and 241 [6] claims; and it is further

ORDERED that the Clerk shall enter judgment in favor of defendant Jacobs Facilities, Inc., against plaintiffs Robert Kittelstad and Arlene Kittelstad, on the Labor Law § 200 and common law negligence claims; and it is further

ORDERED that plaintiff's Labor Law § 200 (common law neglignce) claim against Clean Air and Clean Air's third party claims against Campbell will be tried; plaintiff shall serve a copy of this decision and order on the Office of Trial Support so the trial can be scheduled; and it is further

ORDERED that any relief requested not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
November 8, 2010

So Ordered:

Hon. Judith J. Gische, JSC