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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

ELIZABETH FRANCES KERRIGAN, as Executrix of the Estate of THOMAS CONNELLY, deceased,

Plaintiff,

-against-

TDX CONSTRUCTION CORP., JEM ERECTORS, INC., BAY CRANE SERVICE, INC., BAY CRANE SERVICE OF LONG ISLAND, INC., KOENIG IRON WORKS, INC. and THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,

Defendants.

INDEX NUMBER 109042/04
Motion Sequence 015, ~~016 & 017~~
DECISION & ORDER

JEM ERECTORS, INC.,

Third-Party Plaintiff,

-against-

ERIN ERECTORS, INC.,

Third-Party Defendant.

Third-Party Index No. 591138/04

TDX CONSTRUCTION CORPORATION and THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,

Fourth-Party Plaintiffs,

-against-

BETON PREFABRIQUES duLac, INC. and ERIN ERECTORS, INC.,

Fourth-Party Defendants.

Fourth-Party Index No. 590316/05

TDX CONSTRUCTION CORPORATION and
THE TRUSTEES OF COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK,
Fifth-Party Plaintiffs,

-against- Fifth-Party Index No. 590317/05

ELIZABETH FRANCES KERRIGAN, as
Executrix of the Estate of THOMAS CONNELLY,
deceased,
Fifth-Party Defendant.

JEM ERECTORS, INC.,
Sixth-Party Plaintiff,

-against- Sixth-Party Index No.
590170/06

ERIN INTERIORS, INC.,
Sixth-Party Defendant.

ELIZABETH FRANCES KERRIGAN, as
Executrix of the Estate of THOMAS CONNELLY,
deceased,
Seventh-Party Plaintiff,

-against- Seventh-Party Index No.
590112/06

GENIE INDUSTRIES, UNITED RENTALS and
TOTAL SAFETY CONSULTING, LLC,
Seventh-Party Defendants.

Motion sequences 015, 016 and 017 are hereby consolidated for decision. Three summary judgment motions and nine summary judgment cross motions are presented here, involving in one way or another all plaintiffs and all defendants. The attendant complexity does not permit the decision to proceed simply through each motion and cross motion in order.

The original action is a wrongful death suit brought by the estate of a construction worker who died from injuries suffered in a construction accident.[1] Seventh-party defendant United Rentals (North America), Inc., sued here as United Rentals (United), moves for partial summary judgment dismissing the third and fourth causes of action as against it in the seventh-party complaint by Elizabeth Frances Kerrigan, as Executrix of the Estate of Thomas Connelly, Deceased (the Estate)[2] (Mot. Seq. 015). Defendants, fourth-party plaintiffs, and fifth-party plaintiffs TDX Construction Corporation (TDX) and the Trustees of Columbia University in the City of New York (Columbia) (together as TDX/Columbia) cross-move for summary judgment dismissing the complaint and all cross claims and counterclaims as against them, for conditional contractual indemnification against the Estate, Erin Erectors, Inc., and Koenig Iron Works, Inc. (Koenig), and to compel the Estate to serve its fifth-party answer, for leave for TDX to amend its answer, and for leave for Columbia to further amend its amended answer. Fourth-party Beton Prefabriques duLac, Inc. (Beton), with its insurers Commerce & Industry Insurance Company and Commerce & Industry Insurance Company of Canada, moves for summary judgment dismissing the fourth-party complaint and all cross claims and counterclaims as against it.[3] There is no opposition to Beton's cross motion, as the court observed at the oral argument held on March 10, 2011 (*see* Transcript of Oral Argument, March 10, 2011, at 11), and it will be granted. The Estate cross-moves for partial summary judgment dismissing the fifth-party complaint as against it, and in its favor on the

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[1]Some other actions were originally interleaved with the actions in the caption above. They were severed or resolved in some fashion. This results in some inconsistency in identifying the various actions at hand.

[2]The Estate as fifth-party defendant and seventh-party plaintiff is represented by a different law firm than the one representing it as plaintiff. *See* p 6 *infra*. Kerrigan, Connelly's widow, is also president of the two Erin companies, which shared office space with decedent. Kerrigan II at 189. She testified that she received no compensation, in any form, for holding either position while her husband was alive. *Id.* at 260-262. Both companies were subcontractors to Connelly on the Columbia project. *Id.* at 259. Erin Erectors, Inc., was a union shop, Erin Interiors, Inc., a non-union shop. *Id.* at 214. Unless the distinction between the two Erin entities is needed, Erin will be used to refer to Kerrigan's companies generally, or Erin Erectors, Inc. specifically.

[3]Beton also cross-moves, as fifth-party defendant, to have the fifth-party complaint dismissed as against it. However, it is not involved in the fifth-party action here, but in another set of actions arising from Connelly's accident, which are in front of another court. *See* n 1 *supra*.

complaint's Labor Law §§ 240 (1) and 241 (6) claims.

Defendant, third-party plaintiff, and sixth-party plaintiff JEM Erectors, Inc. (JEM) moves for summary judgment dismissing the complaint and all cross claims and counterclaims as against it (Mot. Seq. 016). Erin, defendant, third-party defendant, fourth-party defendant, and sixth-party defendant (sued here as Erin Interiors, Inc.) cross-moves for summary judgment dismissing the complaint in its entirety and all cross claims and counterclaims as against it. Seventh-party defendant Total Safety Consulting, LLC (Total Safety) cross-moves for summary judgment dismissing the seventh-party complaint and all cross claims and counterclaims as against it. United cross-moves for summary judgment dismissing the seventh-party complaint and all cross claims and counterclaims as against it, or, in the alternative, dismissing all cross claims as against it by Erin.

The Estate moves for summary judgment dismissing the fifth-party complaint and all cross claims and counterclaims as against it in the fifth-party action and the seventh-party action, and in its favor on the seventh-party complaint as against seventh-party defendant Genie Industries (Genie) and United (Mot. Seq. 017). Genie cross-moves for summary judgment dismissing the seventh-party complaint and all cross claims and counterclaims as against it. Koenig cross-moves for summary judgment dismissing all cross claims and counterclaims as against it. It has been discontinued as a direct defendant. Transcript of Oral Argument, March 10, 2011, at 9. Defendant Bay Crane Service, Inc. (Bay) cross-moves to dismiss all cross claims as against it. The action by the Estate against Bay has already been discontinued with prejudice, and Bay Crane Service of Long Island, Inc. has been discontinued from the case by all parties. *Id.* at 7-8.

FACTUAL BACKGROUND

Decedent Connelly died on July 2, 2002 at a job site at 1130 St. Nicholas Avenue, New York County, owned by Columbia. TDX was the general contractor on the project, which involved, as subcontractors, among others, Beton and Koenig. Beton was hired to furnish and install precast

concrete panels. In turn, it hired JEM to install the panels on the building, which required hoisting them into place. Consequently, JEM contracted with Bay for the rental of a Manitowoc 88 crane to hoist the materials it was to install. The crane had a 200-foot boom and a 130-foot retractable boom. Koenig was engaged by TDX to supply structural steel. It hired Connelly, a sole proprietor, to install the structural steel. Connelly hired and supervised union ironworkers from Erin Erectors, Inc. and non-union laborers from Erin Interiors, Inc. to assist him. Connelly had once worked for Erin as an ironworker, but, upon retiring from the ironworkers' union, he became an independent construction manager in order to preserve his substantial union retirement benefits.

In order to help get the structural steel installed, Connelly arranged for Erin to rent a manlift (also called a boom lift, a man basket or a high-reach) from United, manufactured by Genie, weighing over 11,000 pounds. When the manlift was being lifted off the building, to be lowered to the ground after it had served its purpose, it swung, crushing Connelly against a wall. The underlying complaint seeks to recover for personal injuries and wrongful death allegedly due to violations of Labor Law §§ 200, 240 (1) and 241 (6), and negligence.

It is undisputed that TDX worked for Columbia pursuant to a written contract (Ex. A attached to Mot. Seq. 015); TDX had a written contract with Beton (Ex. E attached to Beton cross motion); Beton had a written contract with JEM (Ex. F, *id.*); Jem had a written contract with Bay (Ex. 121 attached to Mot. Seq. 016); TDX had a written contract with Koenig (Ex. B attached to Mot. Seq. 015); Koenig had a written contract with Connelly (Ex. C, *id.*); Erin had a written contract with United (Ex. 126 attached to Mot. Seq. 016); and, there was no written agreement between Erin and Connelly specific to the Columbia project. Erin and Connelly had an "Indemnity Agreement," dated January 1, 2002, for any and all work performed by Erin for Connelly. Ex. 112 attached to Mot. Seq. 016.

There are other related, but severed, actions involving insurers and insurance brokers to various parties to the events. In one action, the Estate sought a declaratory judgment that it was covered by an excess insurance policy issued to Erin. Although decedent was unnamed in the

excess insurance policy, the Appellate Division, First Department, held that Connelly was an additional insured, because he was named as an additional insured in Erin's underlying commercial general liability insurance policy, effective January 13, 2002 to January 13, 2003. *Kerrigan v RM Associates, Inc.*, 68 AD3d 659 (1st Dept 2009). The insurer then selected a different law firm to represent the Estate in the instant fifth-party action and seventh-party action than the law firm representing the Estate in the original action. This issue was explored in the court's decision on motion sequence 018, decided on September 21, 2010.

LEGAL STANDARD FOR SUMMARY JUDGMENT

"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 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence 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 v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 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 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224 (1st Dept 2002).

DISCUSSION OF COMMON-LAW AND STATUTORY LIABILITY

In the combined motion sequences, all parties request summary judgment in their favor, either as to liability for the underlying incident and/or indemnification by another party. The 12 applications are detailed and carefully reasoned, expressing a multiplicity of interests. At bottom, however, are the circumstances of Connelly's fatal accident. After examining the wealth of material submitted by the parties proposing and opposing relief, with special attention to the depositions of

16 witnesses, some appearing more than once or for sessions extending over days,[4] the court

[4]Unless noted otherwise, the deposition transcripts are exhibits attached to JEM motion (Mot. Seq. 016).

Stephen Callaghan, JEM field operations manager and safety director
May 16, 2007, Ex. 100 - cited as Callaghan I
March 28, 2007, Ex. 101 - Callaghan II

John Iaroli, operating engineer
July 13, 2007, Ex. 103 - Iaroli

Matthew Mozitis, JEM vice president of operations
January 18, 2007, Ex. 97 - Mozitis I
January 22, 2007, Ex. 98 - Mozitis II

Carl Egan, Erin ironworker
May 21, 2007, Ex. 104 - Egan I
May 23, 2007, Ex. L attached to United cross motion - Egan II
October 10, 2007, Ex. F attached to United cross motion - Egan III

Leonard McTier, Total Safety site safety manager
March 7, 2008, Ex. 105 - McTier I
January 20, 2009, Ex. 106 - McTier II

Jeff Connelly, Erin ironworker
July 9, 2008, Ex. 107 - Jeff Connelly

Robert Young, Erin ironworker
February 12, 2007, Ex. 99 - Young

John Brennan, Erin foreman
July 9, 2008, Ex. N attached to United cross motion - Brennan

Prakash Shah, TDX project manager
April 3, 2007, Ex. N attached to TDX/Columbia cross motion - Shah I
April 4, 2007, Ex. O attached to TDX/Columbia cross motion - Shah II

Rick Curtin, Genie product safety engineering manager
April 1, 2009, Ex. D attached to Estate's motion (Mot. Seq. 017) - Curtin

Elizabeth Frances Kerrigan, plaintiff, Erin owner
July 17, 2006, Ex. 1 attached to Koenig cross motion - Kerrigan I
November 28, 2006, Ex. 94 - Kerrigan II
November 29, 2006, Ex. R attached to TDX/Columbia cross motion - Kerrigan III
November 30, 2006, Ex. 2 attached to Koenig cross motion - Kerrigan IV
December 4, 2006, Ex. U attached to TDX/Columbia cross motion - Kerrigan V
December 5, 2006, Ex. 95 - Kerrigan VI

Joseph Bernardo, Sr., Bay secretary-treasurer
January 12, 2007, Ex. 96 - Bernardo

Sylvain Lapointe, Beton supervisor
May 23, 2007, Ex. G attached to Beton cross motion - Lapointe

Alan Guthertz, Koenig chief financial officer
April 23, 2007, Ex. H attached to Beton cross motion - Guthertz

James Morley, TDX superintendent
June 7, 2007, Ex. 102 - Morley

Patrick James Burke, III, Columbia Medical Center, Director of Design and Construction

concludes that the sole proximate cause of the accident on July 2, 2002 was decedent Connelly's conduct. He alone defined the task at hand, chose the methods and means to be used, and made two critical decisions, one resulting from the other, that determined his fate. Nothing that any other party or nonparty did or failed to do made any difference once he exercised his authority in performing the work he had been contracted for.

Connelly, born October 6, 1943, had been an ironworker almost all his adult life. Kerrigan founded Erin in 1996, moving in with Connelly, whom she met in 1992, about the same time. Erin operated out of their apartment, and she was its only officer. Connelly retired from the ironworkers' union in 2000, the same year he married Kerrigan. For the two years prior, he was employed by Erin in order to qualify for union benefits. Kerrigan II at 331-333.[5] Even while employed by Erin, Connelly found the work, signed a contract and subcontracted the work to Erin without a writing memorializing their agreement. "The agreement was an oral agreement." Kerrigan VI at 847; *see also id.* at 938; Kerrigan I at 51; Kerrigan II at 188, 192. In her more than 1,000 pages of testimony, Kerrigan displayed essentially no knowledge of Erin's operations, aside from its bookkeeping.

She frequently acknowledged Connelly's leadership in performing field work. "'He would supervise the workers of Erin Erectors.' 'Was he doing that at the time this accident occurred?' 'Yes, he was.'" Kerrigan I at 81. "On that particular day [of the accident], I believe he was the supervisor . . . telling them how to get the job done." *Id.* at 142-143. "I mean it was his contract, so I understand him to be supervising." Kerrigan II at 238. "I believe Mr. Connelly directed the men to go to that [Columbia] job site." Kerrigan III at 416. She testified that Connelly told her that a manlift was needed for the project (Kerrigan I at 148); that he arranged for the delivery of the forklift and manlift from United (*id.* at 203); "told me that they were going to rent the crane again from Jem

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July 9, 2007, Ex. M attached to TDX/Columbia cross motion - Burke

[5]At one deposition, Kerrigan denied that Connelly was ever employed by Erin. Kerrigan I at 44-45.

Erectors to remove the equipment" (*id.* at 226); answered the telephone on behalf of Erin Erectors (Kerrigan IV at 553); had authority to tell an Erin employee to do work a certain way, to stop work that Erin employees were doing if he saw that the work they were doing was improper, to make sure site safety plans were implemented, to conduct site safety meetings and to take equipment from the warehouse (*id.* at 604-606); "had the authority to order items that he thought were needed" (Kerrigan V at 754); and "may have" hired or fired Erin employees (Kerrigan VI at 945). In recollecting that she first worked for Connelly in 1995, doing his bookkeeping, she concluded that "I worked for him, I guess you could say, until he died." Kerrigan I at 37.

Others who came in contact with Erin often drew the same conclusion. Stephen Callaghan, JEM's field operations manager, testified that Connelly told him that he owned Erin. Callaghan I at 351. Matthew Mozitis, JEM's vice president of operations, never met Connelly, but agreed to rent him the daily use of the crane JEM was using in its own work, because "we, you know, knew that he was the owner of Erin Steel and he has a very good reputation in the industry as doing a good job." Mozitis I at 79. JEM's internal report of the accident named Connelly as the owner of Erin Ironworks or Erin Erectors four times. Ex. 115 attached to Mot. Seq. 016. According to Alan Guthertz, Koenig's chief financial officer, "Erin Erectors, Inc. and Tom Connelly are at Koenig Iron Works considered the same company." Guthertz at 51-52.

All four of Erin's workers who testified shared a similar viewpoint. Jeff Connelly, decedent's adult son, an ironworker who worked for Erin on June 14, 2002, when the forklift and manlift were hoisted onto the roof, said that his father "worked for Erin Erectors as far as I know." Jeff Connelly at 47. He continued: "He was my boss. That's all I needed to know." *Id.* John Brennan, an Erin ironworker and foreman, whose sister was married to Kerrigan's brother, said that, in 2001, Tom Connelly was "the boss." Brennan at 33. Carl Egan, the senior Erin employee at the job site and the only eyewitness to the accident, said that Connelly "acted like he was the super." Egan I at 142. Although he knew that Connelly was not employed by Erin, "I believe he used to call himself

an outside super. Whatever that meant." *Id.* at 168. "He would dictate a lot of things to do, policies or whatever or what to do." *Id.* at 143. Robert Young, another Erin ironworker who was on the roof with Connelly and Egan at the time of the accident, testified that he "assumed" that Connelly was "[j]ust owner of the company." Young at 19. At various Erin jobs, Connelly "would just be there . . . telling people what to do." *Id.* at 31.

Regardless of title or ownership interest, Connelly was totally in charge of getting the manlift up to the roof on June 14, 2002 and down on July 2, 2002.[6] Connelly spoke to Mozitis about renting the crane on the job site to hoist the forklift and manlift rented by Erin onto the roof, after Bay told Connelly to deal directly with JEM, which had rented the crane from Bay. Bernardo at 31. Mozitis asked Connelly for a certificate of insurance for JEM and received it from Erin. Mozitis II at 345; Ex. 117 attached to Mot. Seq. 016. JEM provided the crane to Connelly as a bare rental, the same terms it had from Bay, that is, the operator and "anything [else] required to accomplish the job from the hook down would be the responsibility of the contractor." Bernardo at 78. John Iaroli, the operator of the crane, was told by JEM to make his own deal with Erin.[7] Iaroli at 37-38. Connelly paid Iaroli $1,000 cash for each hoist on June 14, 2002 and July 2, 2002, which Iaroli reported on his 2002 personal income tax return.[8] Ex. 118 attached to Mot. Seq. 016.

Iaroli recalled that the rigging method used to hoist the manlift on June 14, 2002 differed from what he had seen at other job sites where such equipment was hoisted. "I asked him [Connelly], you know, is this the way you want to pick it and he said that that was the way he picked it all the time so." *Id.* at 33. Jeff Connelly was one of several Erin workers who rigged the manlift

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[6]The manlift was placed on an eleventh-story setback of the building, which rose higher.

[7]Iaroli, licensed as a long boom operator since 1971, was assigned by his union to operate the crane rented by JEM. Iaroli at 13-15. He was on JEM's payroll from mid-March 2002 until early July 2002. He had been employed by JEM previously as a crane operator. Mozitis I at 36.

[8]Mozitis asked Connelly for $1,500 for each day's use of the crane. Mozitis II at 433. Connelly allegedly gave $1,500 cash to Dale Kron, a JEM foreman, for the June 14, 2002 hoist, which Kron kept. *Id.* As a result, Mozitis fired Kron. *Id.* Connelly gave JEM a check from Erin, signed by Kerrigan, on July 1, 2002 for the next hoist. Ex. 116 attached to Mot. Seq. 016.

on June 14, 2002. He was uncertain what his father was doing at the time, but he said that Connelly was present on the ground during the rigging and hoist. Jeff Connelly at 33-34, 97. Brennan testified that Connelly "was on-site supervising," when he, Jeff Connelly and Young rigged the manlift on June 14, 2002.[9] Brennan at 73-74, 15-16. Connelly did not "physically" do the rigging, but he told them "[h]ow to actually put the cables on it." *Id.* at 20-21. He also told them to "[p]ut tag lines, tag lines and balance it." *Id.* at 21.

While Young testified that both Egan and Connelly were in charge of the hoist to remove the manlift on July 2, 2002 (Young at 101), he also said that "Tom was in charge as far as I knew" (*id.* at 229). When Young offered to help rig the manlift for the hoist, as he had done when it was raised to the roof on June 14, 2002, he was waved off. "I was walking over to give him a hand. He said no, go over here to do this. I walked away to do what I had to do." *Id.* at 61. Whether it was Egan or Connelly waving off Young is not clarified, but he said that Egan did the rigging and hooked the manlift to the crane's cable. *Id.* at 58, 62-63. Young walked about 40 feet away from the manlift to do welding with his back to the scene. *Id.* at 102-103. He saw and heard nothing more until the sound of the crash. Iaroli observed that "the man lift had been rigged to the load block by Mr. Connelly and his employee, Carl Egan" on July 2, 2002. Iaroli Aff., ¶ 5. Egan testified that he and Zacarias Mencia, an Erin laborer, connected the shackles and chokers holding the manlift to the crane.[10] Egan I at 82. The chokers and shackles "would have been provided by Erin." *Id.* at 13. He did not recall Erin ever lifting a manlift by crane, since 1996 when he began working for them (*id.* at 27), and he personally had never rigged a manlift for hoisting (Egan III at

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[9]Brennan, throughout his deposition, attributed a large supervisory role on June 14, 2002 to Tom McKenna, an Erin superintendent, since deceased. However, Egan, in his three depositions, only notes McKenna's presence on June 14, 2002 once, without identifying his role. Egan I at 189. Young only testified to seeing McKenna in Erin's warehouse. Young at 211. Jeff Connelly said that McKenna was present on June 14, 2002 (Jeff Connelly at 16), but virtually every mention of McKenna also includes his father. For instance, who told him to get to the job site at around 5:00 A.M. on June 14, 2002: "It was either my father or Tom McKenna" (*id.* at 32); was Connelly in charge of the hoist on June 14, 2002: "It was him or Tom McKenna" (*id.* at 46); who was Erin's "super" at the time: "My father was the super, Tom McKenna, Jimmy Keane" (*id.* at 80). McKenna never appears in Iaroli's testimony. No one claims that McKenna was at the job site on July 2, 2002 in any capacity.

[10]Mencia has never been deposed.

197-198). On this occasion, Egan, who had been on the roof when the manlift landed on June 14, 2002, "rigged the manlift the way it came up onto the roof and as far as I am concerned, it was okay." *Id.* at 506. "I helped to rig the manlift up the same way it was taken onto the roof and because it is the only manlift I ever lifted in that fashion, I can't comment – I can't make any decision as to whether she was or was not right." *Id.* at 509.

Even if Connelly did not do the rigging, he was specific in directing the hoist. He took the role of signalman on July 2, 2002 (Egan I at 35, 44-45; Egan II at 427; Egan III at 518-519; Young at 91; Iaroli at 47-48), although he did not on June 14, 2002 (Jeff Connelly at 20-21; Brennan at 43). He told Egan, who drove the manlift, where to position it for the removal. Egan I at 70. "He told me that's where – that was the corner where the manlift was going to be taken down to the street." *Id.* Egan moved the manlift from a location "probably 100 feet from the east of the northwest corner [of the roof]. Not 100 feet, 50 feet." *Id.* at 71.

While tag lines to steady the load were attached to the manlift when it was hoisted to the roof on June 14, 2002 (Brennan at 19-20, 103; Iaroli at 160-161), they were not used on July 2, 2002, although they were available (Egan I at 90). The manner that Connelly directed the hoist precluded the use of the tag lines. Egan was the only person available to hold a tag line; Young had been sent off to weld and no other Erin workers were reported in the vicinity. While Egan said that Mencia helped with the rigging, Egan, who was "six, eight feet" from the manlift as the hoisting began (*id.* at 17), never mentioned Mencia's presence again once the hoisting began. No one else's workers were on the roof at the time. Mozitis I at 113; Egan I at 56; Egan III at 501; Egan OSHA statement, Ex. 124 attached to Mot. Seq. 016. Young, who was 40 feet or so away, testified that he was the first one to reach Connelly after the impact. Young at 141. Connelly himself could not hold onto a tag line, because he chose to use hand signals to direct the hoist.

The decision to use hand signals, solely Connelly's, led inexorably to the fatal accident. The crane was equipped with a squawk box, a speaker in the crane's cab wired directly to a

microphone. Iaroli at 21-22; Mozitis I at 112; Mozitis II at 363; Callaghan II at 88-89; Morley at 54. It had been used when the manlift was hoisted to the roof on June 14, 2002. Iaroli at 30; Jeff Connelly at 20-21; Brennan at 43. Erin had a squawk box available for use (Jeff Connelly at 91), but the squawk box in the crane belonged to JEM (Mozitis I at 68, 112; Mozitis II at 363). Iaroli testified that Connelly refused his offer of a squawk box to communicate during the lift of the manlift and forklift off the roof and down to the street. "Mr. Connelly refused the offer of the squawk box because he considered it two simple picks, and stated he was going to use standard hand signals instead. Mr. Connelly directed and controlled me to follow his hand signals." Iaroli Aff., ¶ 4. This chain of command comported with industry practice. "The signalman is the person who directs the crane operator to lift." Mozitis II at 319. "Crane operators don't generally tell ironworkers how to pick something." Jeff Connelly at 119. The crane, with Iaroli in the cab, sat at street level, 11 stories below. In order for his hand signals to be seen by Iaroli, Connelly had to stand at or very near the low wall, placing him "eight or ten feet from the corner of the west – northwest corner" of the roof, according to Egan. Egan I at 16. "The only place that you could see the [crane] operator to give him signals was in one particular area on the north wall." Egan July 22, 2002 Workers' Compensation Board statement, Ex. 123 attached to Mot. Seq. 016.

Iaroli described what happened next:

> "He signaled me to pick up the cable to the roof. I picked it up to the roof and Mr. Connelly stopped me. Mr. Connelly was giving me hand signals. Mr. Connelly swung me left and stopped. He boomed up and stopped and lowered the load and stopped again. Mr. Connelly disappeared. A minute or two later he reappeared again. He signaled me to pick up the load which I did slowly. Mr. Connelly disappeared and I stopped the operation."

Iaroli Aff., ¶ 6. He gave a similar description of events at his deposition, but added one sad image. As Connelly disappeared from view for the last time, his hard hat flew by. Iaroli at 57. Egan was at eye level with the events as the manlift "started to drift or it started – it may have started to drift when it came off the ground or it may have stopped." Egan I at 16. He saw "the manlift sway or drift towards the parapet wall." Egan III at 505-506. Connelly "tried to get away from the manlift,

but he wasn't fast enough to get out, so it pinned him against the wall." Egan I at 18. Egan repeated his account in several unsworn written statements. "As the manlift started to come off the ground it drifted towards the corner. Tom Connelly went to get out of its way he didn't make it." Ex. 122, Egan July 2, 2002 JEM statement, attached to Mot. Seq. 016. After the load "may have lifted a bit . . . [Connelly] went to the corner to see the position the man lift was in, [and] it started to drift in the northwesterly direction. . . . Tom tried to run south, but the man lift pinned him against the west before he got free." Egan July 22, 2002 Workers' Compensation Board statement, Ex. 123, *id.*

> "As the man lift started to come off the ground it started to drift westerly toward the west wall and then northerly. . . . I did see Tom walk westerly toward the west wall and northwest corner, when the man lift was suspended in the air and drifting toward the wall. Tom was walking fast and I saw him turn to his left to walk southerly and away from the man lift that was starting to swing. The[n] Tom got pinned between the west parapet wall and the chassis of the man lift. The tires were off the ground less than 12 inches when Tom [was] pinned."

Egan July 9, 2002 OSHA statement, Ex. 124, *id.*

Others who later observed the accident scene gave similar estimates of the height of the manlift above the roof. "If it was a foot, it was a lot." Iaroli at 241. "My guess I would say it was like two feet." Young at 156. Morley, TDX's superintendent, recalled that the manlift was four feet off the ground. Morley at 42. Color photographs taken soon after the accident,[11] examined by several witnesses for authenticity, show the manlift resting in a corner formed by the parapet walls, with its tires about one foot above the ground. Ex. A attached to TDX/Columbia cross motion. The manlift's chassis sat about one-and-a-half feet above the bottom of the tires. In other words, the lowest part of the manlift, the tires, were about one foot above the ground, while the bulk of the manlift was at least three or four feet above the ground.

Connelly, an experienced ironworker, arranged to remove the manlift from a setback portion of the building 11 stories above the street, when it was no longer needed to assist in the installation

[11]The first photograph shows Connelly on the ground being attended by emergency workers, not many yards from the manlift.

of structural steel. He rented the crane located on site from JEM for use after the end of the normal work day; he paid Iaroli directly to operate the crane. Connelly directed Egan where to park the manlift to be hoisted. He supervised the rigging of the manlift by Egan and one or more Erin employees, his subcontracted employees. He rejected use of the squawk box and chose to use hand signals to communicate with the crane operator. In order to be seen by the crane operator, he had to stand in a small section of the roof, near a low parapet. He signaled the operator to lift the manlift at least one foot, when it started to drift. He could not avoid being pushed against the parapet by the manlift as he was cornered by the path it took. He died within hours from the injuries he suffered.

Even if Connelly's conduct was not the sole proximate cause of his injuries, the strict liability provisions of Labor Law § 240 (1) would not apply to his accident. It resulted from lateral motion of the manlift suspended from the crane. This is not the sort of elevation-related risk addressed by Labor Law § 240 (1). *Smith v New York State Elec. & Gas Corp.*, 82 NY2d 781 (1993) (where a cable, attached to a crane located at ground level, which was being used to drag heavy machinery across the floor of a subterranean concrete vault, snapped and propelled a 200-pound metal tension ball against plaintiff, his injury did not result from an elevation-related hazard); *Biafora v City of New York*, 27 AD3d 506, 508 (2d Dept 2006) (where a crane operator was dragging a bucket approximately 20 to 25 feet along the ground and the cable jerked the bucket suddenly off the ground, injuring plaintiff, this "operation did not constitute the type of elevation-related hazard contemplated by Labor Law § 240 [1])"; *Dilluvio v City of New York*, 264 AD2d 115, 119 (1st Dept), *affd* 95 NY2d 928 (2000) ("while [plaintiff] was seated on the back of the pickup, he was not exposed to any particular danger referable to height but rather to motion. Danger presented itself only when the pickup began moving. Hence, the 'significant risk' in this case did not arise from a height-related danger per se, but a danger related to forward motion irrespective of height").

Even if Connelly faced an elevation-related risk when supervising the hoisting of the manlift,

the application of strict liability to the property owner and the general contractor would not be appropriate, because of Connelly's conduct.

> "Under Labor Law § 240 (1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation."

Blake v Neighborhood Hous. Servs. of N.Y. City, Inc., 1 NY3d 280, 290 (2003).

Labor Law § 241 (6) provides that "the owners and contractors and their agents for such [construction, demolition or excavation] work . . . shall comply" with the New York State Industrial Code (Industrial Code). However, holding an owner liable for work site injuries requires a specific applicable violation of the Industrial Code. *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 (1993) ("we hold that, for purposes of the nondelegable duty imposed by Labor Law § 241 [6] and the regulations promulgated thereunder, a distinction must be drawn between provisions of the Industrial Code mandating compliance with concrete specifications and those that establish general safety standards"). 12 NYCRR 23-8.1 *et seq.* define the safety requirements for mobile cranes, tower cranes and derricks, the sort of equipment rented by Bay to JEM, and used on June 14, 2002 and July 2, 2002 by Erin. However, Connelly's conduct overrode the possible liability of the property owner, its general contractor and other subcontractors on the construction project. No other party was positioned, literally or figuratively, to interfere with Connelly's supervision and direction on July 2, 2002. No other party violated a relevant Industrial Code provision regarding crane operations. "Even assuming, arguendo, that defendant[s] violated those regulations, we nevertheless conclude that any such violations were not a proximate cause of plaintiff's injuries as a matter of law." *Trippi v Main-Huron, LLC*, 28 AD3d 1069, 1070 (4th Dept 2006).

> "To support a finding of liability under Labor Law § 200, which codifies the common-law duty of an owner or general contractor to provide a safe work site, a plaintiff must show that the defendant supervised and controlled the plaintiff's work, or had actual or constructive knowledge of the alleged unsafe condition in an area over which it had supervision or control, or created the unsafe condition."

Torkel v NYU Hosps. Ctr., 63 AD3d 587, 591 (1st Dept 2009) (citation omitted). The fatal accident resulted from circumstances exclusively under Connelly's control. Egan was an employee subcontracted to Connelly. Egan worked from his recollection of the rigging that he had observed more than two weeks earlier when the manlift was hoisted onto the roof, and had no other experience with rigging a manlift. He positioned and rigged the manlift under Connelly's supervision. No tag lines were attached to the load, although they were available. Only Egan was allowed to stand by when the hoisting began. Connelly, most critically, chose to use hand signals even when offered a squawk box, the means used to communicate with the crane operator when the manlift was hoisted onto the roof on June 14, 2002. In order to be seen by the crane operator 11 floors below, Connelly had to position himself along the edge of the roof, near a corner, where he was trapped once the manlift started to drift when the hoisting began. He sought no guidance or assistance from anyone else, and ignored or rejected tangible aids to a safe lift, that is, tag lines and the squawk box.

No direct defendant in the underlying action was liable for Connelly's death in light of his conduct, which was the sole proximate cause of the accident. No party exercised supervision or control of the work site after hours, when he scheduled the hoist. No one but Connelly and his Erin employees created the conditions surrounding the hoist. While other parties were aware that the manlift would be hoisted off the roof, none had reason to believe that there was anything unsafe about the prospective procedure, because it mirrored to a substantial degree the raising of the manlift to the roof on June 14, 2002.[12]

To summarize, the complaint shall be dismissed against all remaining direct defendants,

[12]Iaroli recalled that getting the manlift onto the roof took longer than expected, "they couldn't get it balanced properly[,] . . . when I went to pick the man basket up, it wouldn't balance." Iaroli at 26. The work crew, which he thought consisted of JEM and Erin employees, changed positions of the load "maybe four or five, six times." *Id.* at 27. Jeff Connelly, in contrast, testified that the hoist in June did not take very long, "probably less than five minutes." Jeff Connelly at 121-122. Erin's use of the JEM's crane on June 14, 2002, on the whole, took hours longer than expected, because Koenig's structural steel, which Connelly had been hired to install, fell out of the sling and scattered onto the street after the manlift and fork lift had been raised to the roof. Iaroli at 27-29, 35; Mozitis I at 91.

because decedent's conduct was the sole proximate cause of his injuries, obviating any findings of negligence or violation of Labor Law §§ 200, 240 (1) and 241 (6) as against them.

DISCUSSION OF CONTRACTUAL OBLIGATIONS

Any third-party actions and cross claims for indemnification asserted by any party herein are dismissed "as a necessary consequence of dismissing the complaint in its entirety." *Turchioe v AT&T Communications*, 256 AD2d 245, 246 (1st Dept 1998). However, some contracts among the parties extend beyond indemnification for losses and deal with the responsibility for defense of claims and associated legal fees.

Columbia's contract with TDX as its general contractor addresses this issue in Article VIII. It requires that TDX, the contractor, procure commercial general liability insurance, workers' compensation and employer's liability insurance that provide that the insurer pay the cost of defense, including attorneys' fees, in any proceeding against Columbia "alleging any omission or act relating to the Project covered by such policy, . . . even if such suit is groundless, false or fraudulent." Ex. A attached to Mot. Seq. 015. This is distinct from Article 5.12 where Columbia is indemnified and held harmless against any claims, damages, losses and expenses resulting from "any negligent act or omission or willful misconduct of the Contractor, any Subcontractor, [or] anyone directly or indirectly employed by any of them."

TDX's contract with Koenig to supply structural steel consists of the American Institute of Architect's industry-standard document A401 - 1997 (the AIA Contract), and "General Conditions of the Contract" created by Columbia. Ex. B attached to Mot. Seq. 015. The industry-standard document requires, at Article 4.6.1, that Koenig, as subcontractor, hold harmless Columbia, as owner, and TDX, as contractor, "against claims, damages, losses and expenses, including but not limited to attorney's fees" arising from "negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, [or] anyone directly or indirectly employed by them."

Koenig's contract with Connelly to install structural steel is in simple letter form. Ex. C

attached to Mot. Seq. 015. It requires him to provide all workers' compensation, employee and public liability insurance in amounts set by Koenig's contract with TDX. Additionally, as subcontractor, he "shall be bound by all Contract Documents to the same extent and with the same effect as if the subcontractor were the contractor." An indemnity agreement is attached to the letter contract, requiring, at paragraph 3, Connelly as subcontractor to "indemnify, defend, and hold harmless the Owner, [and] Contractor . . . from and against all claims, damages, losses and expenses, including but not limited to attorneys' fees arising out of or resulting from any act or omission of the Subcontractor" or anyone directly or indirectly employed by it. Ex. D, *id.* However, the subcontractor is obliged to indemnify the owner and contractor "only to the percentage of negligence of Subcontractor or anyone directly or indirectly employed by it." *Id.*

TDX's contract with Beton is the same standard form used by TDX with Koenig, the AIA Contract, without the Columbia General Conditions of the Contract. Ex. E attached to Beton cross motion. Article 4.6.1 is repeated as above.

Beton's contract with JEM is very brief, primarily because the contract states that the "present sub-contractor [JEM] is here-in bound by the same rights, obligations terms and conditions that bind BPDL [Beton] to the General Contractor [TDX] as if writtened here-in in full" (*sic*). Ex. F attached to Beton cross motion.

Bay's contract with JEM for rental of the crane is in the form of Bay's "Standard Rental Agreement." Ex. 121 attached to Mot. Seq. 016. It states that

> "YOU agree to defend and indemnify us against all loss, damage, expense and penalty arising from any action on account of personal injury . . . occasioned by the operation, handling or transportation of ths equipment during the rental period. . . . It is understood and agreed that we shall be saved harmless from all court actions and all claims for injuries to persons or property occasioned through the use of this equipment while in your possession."

United's contract with Erin for rental of the manlift is contained on a page of "Rental Contract Terms and Conditions" printed on the reverse side of United's 4 Weekly Billing Invoice. Ex. 126 attached to Mot. Seq. 016, reproduced on a separate page. Of the 22 paragraphs of terms

and conditions, only two are printed all in bold capital letters, Disclaimer of Warranties, paragraph 3, and Indemnity/Hold Harmless/Damages, paragraph 4. The latter states:

> "Customer acknowledges and assumes all risks inherent in the operation and use of the equipment by customer, and will take all necessary precautions to protect persons and property from injury or damage from the equipment. United shall not be responsible to customer or to any other party for, and customer agrees to defend, indemnify and hold United harmless from and against, any liability, claim, loss, damage or injury (including any attorney's fees . . .) caused by, or in any way connected with the use, maintenance, instruction, operation, possession, ownership or rental of the equipment, however caused."

The Indemnity Agreement between Erin and Connelly provides that Erin hold harmless and defend Connelly, "Owner and agents and employees of any of them" against all claims, including expenses, arising out of "any act or omission" by Erin. However, Erin's obligation to Connelly only extends to the percentage of negligence found against Erin or anyone directly or indirectly employed by it.

The Columbia contract with TDX, the Bay contract with JEM and the United contract with Erin do not qualify the obligation to defend and/or hold harmless from expenses Columbia, Bay and United, respectively. Therefore, in this regard, TDX is contractually obligated to Columbia, JEM is contractually obligated to Bay, and Erin is contractually obligated to United.

Columbia's contract with TDX also contains a provision (Article 5.12) that ties responsibility for expenses to negligence by a subcontractor or anyone employed by a subcontractor. The AIA Contract, used by TDX/Koenig and TDX/Beton, requires the respective subcontractor, Koenig and Beton, to hold harmless Columbia and TDX against expenses arising from the negligence of "Sub-subcontractors." Koenig's contract with Connelly requires Connelly to hold harmless Koenig from expenses "only to the percentage of negligence of Subcontractor [Connelly]." Beton's contract with JEM incorporates by reference the terms and conditions of the TDX/Beton contract, thus including the obligation of JEM to hold harmless Columbia and TDX against expenses arising from the negligence of sub-subcontractors. Of all the contracts here, the Beton/JEM contract does not oblige the sub-subcontractor (JEM) to hold harmless the subcontractor (Beton) against expenses.

Rather, it makes JEM potentially responsible for Columbia and TDX's expenses.

Because Connelly's negligence was the sole proximate cause of his injuries (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 555 [2006]; *Montgomery v Federal Express Corp.*, 4 NY3d 805, 806 [2005]; *Blake*, 1 NY3d at 290), TDX is contractually obligated to Columbia for its expenses incurred as a party, as is Koenig to Columbia and TDX, Connelly to Koenig, and JEM to Columbia and TDX. Although they had no written contract, Erin provided JEM with a certificate of insurance naming JEM as an additional insured under Erin's commercial general liability policy. However, no party produced a copy of that policy, so there can be no finding about Erin's possible obligation to JEM for defense or expense relief pursuant to the policy's terms. Because there is no finding of negligence against Erin, it is not responsible to any other party under the Indemnity Agreement. Finally, because Beton's cross motion to be dismissed as a defendant in the fourth-party action brought against it by Columbia and TDX was unopposed, Beton has no obligation to indemnify Columbia and TDX in any respect.

CONCLUSION

All applications for the dismissal of claims, counterclaims and cross claims concerning common-law and statutory liability shall be granted. All applications for the imposition of contractual liability, expressed as claims, counterclaims and cross claims, shall be granted to the extent that they comport with the findings of fact above.

Accordingly, it is

ORDERED that summary judgment dismissing all claims, counterclaims and cross claims seeking to impose common-law and/or statutory liability for decedent's injuries is granted; and it is further

ORDERED that summary judgment dismissing all claims, counterclaims and cross claims for contractual indemnification against the various parties is granted, except to the extent that the subject contracts oblige particular parties to pay expenses, not limited to attorneys' fees;

and it is further

ORDERED that TDX and Columbia shall serve upon all relevant parties a copy of this order with notice of entry within 20 days of the date of this order; and it is further

ORDERED that the affected parties shall settle an order, comporting with the findings of fact above, setting forth the amounts owed by each party within 20 days of receipt of a copy of this order with notice of entry.

DATED: August 18, 2011

ENTER:

Paul Wooten J.S.C.