

Capparo v City of New York

2011 NY Slip Op 32808(U)

October 13, 2011

Sup Ct, NY County

Docket Number: 104458/2008

Judge: Doris Ling-Cohan

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

PRESENT: *Hon. Doris Ling-Cohan*

PART 30

Index Number : 104458/2008

CAPPARO, JOHN

INDEX NO. _____

vs
CITY OF NEW YORK

MOTION DATE _____

Sequence Number : 006

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for *Summary judgment*

PAPERS NUMBERED

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

1, 2

Answering Affidavits — Exhibits _____

3, 4, 5

Replying Affidavits _____

6, 7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *for Summary judgment*
by defendant Environmental Energy Assoc., Inc. is
granted *in accordance with the attached*
memorandum decision.

(Consolidated for disposition with motion
Sequence No. 004 + 005)

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/18/08

[Signature]
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: TAS PART 36

-----X
JOHN CAPPARO and THERESA WISSLER,

Plaintiffs,

Index No.:
104458/2008

-against-

Motion Seq.
No.: 004
005 & 006

CITY OF NEW YORK and METCALF & EDDY OF
NEW YORK, INC.,

Defendants.

-----X
METCALF & EDDY OF NEW YORK, INC.,

Third-Party Plaintiff,

Third Party
Index No.:
590372/2009

-against-

ENVIRONMENTAL ENERGY ASSOCIATES, INC.,

Third-Party Defendant.

-----X

DORIS LING-COHAN, J.:

This personal injury and Labor Law action arises out of plaintiff John Capparo's fall as a result of allegedly being provided with improper safety equipment as he was working on a construction site owned by defendant City of New York (City of New York). Plaintiff's spouse, Theresa Wissler, claims that defendants' negligence resulted in her loss of consortium. In March 2008, plaintiff filed a complaint against the City of New York and defendant Metcalf & Eddy of New York, Inc. (M & E). Thereafter, M & E commenced a third-party action against defendant Environmental Energy Associates (EEA). On May 26,

2010, plaintiffs amended their complaint to add EEA as a direct defendant. Plaintiffs' causes of action include claims for violations of Labor Law §§ 200, 240 (1), 241 (6), and several provisions of the Industrial Code. Motions with sequence numbers 004, 005 and 006 are hereby consolidated for disposition.

In motion sequence number 004, the City of New York moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiffs' causes of action for common-law negligence and for violation of Labor Law § 200. It also moves, pursuant to CPLR 3212, for an order granting summary judgment on its cross claim against M & E for contractual indemnification.

In motion sequence number 005, M & E moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing all of plaintiffs' claims, as well as any cross claims as asserted against M & E. In motion sequence number 006, EEA moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiffs' claims, as well as any cross claims alleged as against EEA. Plaintiffs cross-move, pursuant to CPLR 3212, for an order granting summary judgment as against M & E and EEA.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff alleges that, at approximately 9:15 A.M. on December 31, 2007, he sustained personal injuries when he fell from a height of approximately 25 feet as he was performing work at a waste water treatment plant construction site located on

Wards Island. The City of New York owned the buildings, land and structures located at Wards Island. The City of New York employed Silverite Construction Company (Silverite) to construct a concrete water treatment tank at the Sharon Facility on Wards Island. Plaintiff was employed as a carpenter with Silverite. M & E, a corporation which provides professional engineering services, was retained by the City of New York as the construction manager. EEA was the subcontractor hired by Silverite to prepare the Health and Safety Plan and also to provide limited safety consulting services. The Health and Safety Plan was submitted to the New York City Department of Environmental Protection (DEP), which ultimately approved the Health and Safety Plan for the waste water treatment plant, including the type of fall protection which was to be used by the workers.

At the time of his accident, plaintiff was attempting to "strip" the concrete form from a portion of a cured concrete wall. Plaintiff intended to hook cables from a crane to the top of the form to remove the form. He was wearing a body harness and positioning device that was supplied to him by Silverite. The body harness and positioning device had a clip which needed to be hooked into the holes of the steel braces on the form so that he could work hands-free. At some point while he was performing his job, plaintiff fell backwards and landed on the ground.

In his deposition, plaintiff testified that he hooked into the holes of the form before he fell. EEA's Exhibit H, Capparo TR, at 64-65. Plaintiff testified that he had used the same harness for the entire time he was performing work at Wards Island. *Id.* at 40. Plaintiff's counsel noted that since only one lanyard or safety line/clip was provided, if plaintiff wanted to move more than two feet, he was "forced to unbuckle and unsecure his safety line and then rehook himself back after moving positions." Ayers Affirmation, ¶ 11.

The City of New York and M & E set forth the same set of facts regarding the events leading up to and including the accident. According to both parties, workers were always instructed to "tie off," or hook, the large hook on the positioning device to the hole in the form, whenever they were working on forms or using aerial lifts. There were hand grips on the steel braces that were intended for climbing and tying off. The City of New York maintains that the workers were supposed to move up and down and also laterally on the form. The workers were not to hook the positioning device while they were moving up and down or laterally, just when they were ready to start working at a specific place; when a worker positions himself, he is hooked up to the form, but while moving on the form, he is not hooked up. Plaintiff was stationary at the time of the accident, attempting to remove one of the forms.

According to the City of New York, the safety equipment

provided to plaintiff was the only equipment that could have been used to perform the job, due to the eight-inch bolts that protruded from the forms. Slattery Affirmation, ¶ 13. Neither lanyards nor life lines were used in stripping procedures. *Id.*

Ronald Kellner, a Silverite Site Safety Director, testified that, although Silverite purchased different variations of fall protection devices, such as yo-yos and nets, none would have been as safe as what plaintiff was given. City of New York's Notice of Motion, Exh. E, Kellner Transcript at 40-41. Belts were also not safe. *Id.* at 41. Bocina, Silverite's site safety representative, concurred that, in connection with the positioning device and harness which plaintiff was using, no other fall arrest device would have been appropriate, as it may have done more harm than good. City of New York's Exhibit F, Bocina TR, at 12. After plaintiff's accident, the safety device used by plaintiff was determined to be in good condition and was reissued to someone else shortly thereafter. Slattery Affirmation, ¶ 16-17. After the accident occurred, it was Silverite's responsibility to fill out an accident report for OSHA.

The representative from DEP, Keith Beckmann (Beckmann), the Section Chief Project manager, testified that he would visit the work site one to three times a week to see if there were any issues with construction problems and the project's progress. City of New York's Exhibit K, Beckmann TR, at 17. Employees from

the City of New York were never present during the Silverite employce safety meetings. Beckmann stated that Silverite was the primary contractor for the job. *Id.* He also testified that both Silverite and M & E were to provide the DEP with a Health and Safety Plan prior to the start of the construction project. He advised that it was M & E's responsibility, pursuant to its contract with DEP, to assess whether the Health and Safety Plan complied with applicable rules and whether the plan would provide 100% fall protection. *Id.* at 24-25. Beckmann continued that he did have the authority to stop work at the site if he observed an unsafe work condition.

The contract between the City of New York and M & E provides that M & E was responsible for the review of the contractor's Health and Safety Plan, for conformance with OSHA requirements for each prime contractor. City of New York's Exhibit O, at SR 22. The contract also reiterates that M & E's review of the Health and Safety Plan does not diminish each contractor's responsibilities to its employees in terms of safety. *Id.*

Donald Gibbs, Jr. (Gibbs), who was M & E's health and safety officer, testified that his duties were to "audit and review the contractor's performance. They have their own site safety rep on site. And I review their process and progress of work." City of New York's Exhibit 1, Gibbs TR, at 9-10. He was at the construction site on a daily basis. Although Gibbs testified that no one from M & E had any input into the creation of the

Health and Safety Plan, as previously mentioned, the contract between the City of New York and M & E states that M & E was to review the Health and Safety Plan for conformance with OSHA regulations. Gibbs provides clarification, stating that the review of the Health and Safety Plan was for informational purposes only and that the DEP had the authority for approving or disapproving the plans. *Id.* at 15-16.

Under its contract with the City of New York, M & E had the authority to stop work if it noticed an unsafe condition. Gibbs testified that if Silverite had a question regarding safety, they would "come to me." *Id.* at 38.

As previously mentioned, Silverite hired EEA to perform safety consulting services for the project, including the preparation of the Health and Safety Plan. According to the contract between Silverite and the City of New York, Silverite was to have a Health and Safety Plan prepared by a safety professional. The contract states the following, in pertinent part:

B. [Silverite] shall be responsible for the safety of Silverite's employees, the public and all other persons at or about the site of the work. [Silverite] shall be solely responsible for the adequacy and safety of all construction methods, materials, equipment and the safe prosecution of the work.

C. [Silverite] shall employ a properly qualified safety professional familiar with all work under this contract whose duties shall be to initiate, review and cause implementation of measures for the protection of health and prevention of accidents. [Silverite] shall also employ a full-time safety representative(s) whose duties shall be to work under the direct supervision of the safety professional, to implement the safety

program for the work under this Contract.

G. [Silverite] shall stop work whenever a work procedure or a condition at a work site is deemed unsafe by the safety staff.

EEA's Exhibit E, at 2-3.

Mark Waznys (Waznys), a Vice President at EEA, states that EEA was hired by Silverite to provide certain safety consulting services, such as providing a certified safety professional on site and developing the Health and Safety Plan. Hitchcock Reply Affirmation, Waznys Affidavit, ¶ 2. Waznys continues that EEA supplied a certified safety professional, Allen Tanzer, to visit the site once a week. *Id.* at ¶ 3. Purchase Order 195, between EEA and Silverite, states that EEA was to provide a certified safety professional on site (Tanzer) and a safety rep on site at a rate of \$48.00 an hour. EEA's Exhibit U, at 1. The purchase order also states that "the work will be performed under the direction and scheduling of Silverite Construction Co." *Id.* at 2. EEA maintains that this hourly safety rep was only provided in the situations where Silverite's rep, Bocina, was not at the work site. Hitchcock Affirmation in Opposition, ¶ 47. Regardless, on the day of plaintiff's accident, Bocina was present and EEA did not have to provide an hourly safety rep.

According to Waznys, while at the site, Tanzer would relay any safety concerns he had to Silverite's site safety representative, who was Bocina. Bocina would "then make the ultimate decisions with respect to the work being performed at

the job site." Hitchcock Reply Affirmation, Waznys Affidavit, ¶ 9. EEA was only present, according to Waznys, for purposes of conducting a site safety evaluation. Waznys indicates that EEA did not direct or control the work of any of the Silverite employees. He claims that EEA was a consultant to Silverite, and had no authority to stop the work at the job site. *Id.*

Plaintiff testified that he only took direction from his foreman, a Silverite employee, and that he did not know what EEA was. EEA's Exhibit H, Capparo TR, at 110. Kellner, a Silverite employee, testified that EEA did not have the authority to direct the methods by which the Silverite employees performed their work. EEA's Exhibit K, Kellner TR, Kellner TR at 87. Kellner testified that, with respect to safety, "you pretty much have to do what Tanzer tells you to do." EEA's Exhibit K, at 85. However, Tanzer would only relay those safety concerns to either Kellner or Bocina and would never communicate directly with a Silverite employee. And, as previously mentioned, Gibbs testified that if Silverite had a question regarding safety, they would "come to me." City of New York's Exhibit I, Gibbs TR, at 38.

Silverite purchased the equipment for plaintiff to use during his employment. Silverite also supplied the safety videos and training in fall protection for its employees. The City of New York had to approve all of the safety protection obtained by Silverite. Plaintiff attended the requisite safety meetings.

Bocina, Silverite's site safety representative, was on site at all times.

When plaintiff arrived at the hospital, according to Bocina (Silverite's site and safety representative), and Kellner (Silverite's site safety director), plaintiff told them that he "forgot to clip his positioning device to the form, leaned back to grab the crane's hook in order to hook the cable to the form, and fell from the form to the ground." Slattery Affirmation, ¶ 5; New York City Notice of Motion, Exh. F, at 24, 27.

There were three accident reports prepared after plaintiff's accident. The Workers' Compensation report prepared by Bocina indicated that "employee unclipped lanyard to relocate and lost his footing and fell to the ground." City of New York's Exhibit G. Bocina later testified that he should have written more accurately that when plaintiff reached his goal, he forgot to tie off. City of New York's Exhibit F, Bocina TR, at 24. Gibbs wrote an accident report on behalf of M & E which did not have the cause of the accident listed. After the accident occurred, M & E instructed Silverite to use aerial lifts instead, to stop climbing the form walls, and to review the Health and Safety Plan. City of New York's Exhibit H, at 2. Gibbs testified that M & E concluded at a meeting held subsequent to plaintiff's accident that "human error on the worker's part" was the root cause of the fall. City of New York's Exhibit I, Gibbs TR, at 22-24. The report prepared by EEA states that when plaintiff

"reached the top of the form, he did not attach the positioning lanyard to the form. He didn't realize that he was not secured; and fell when he let go of the form and reached for the lifting hook." City of New York's Exhibit J, at 1.

Plaintiff testified that he was given the positioning device by Silverite and that it only had one large hook to attach to the work surface. Despite the previously referred-to testimony from Kellner and Bocina suggesting the contrary, plaintiff alleges that, along with the rebar positioning device given to him, he should have been given some type of fall arrest system, such as a lanyard. Plaintiff claims that he should have been provided with a fall arrest device and nets when erecting tanks. Plaintiff's counsel contends that plaintiff never should have been working at such elevated heights with only one safety line.

Plaintiff's counsel claims that Bocina and Kellner's testimony about plaintiff's statements to them about the cause of his accident are hearsay and should be disregarded. Plaintiff maintains that he always testified that he "hooked back in." EEA, Exh H, Capparo TR, at 64-65. Plaintiff's counsel adds that the positioning device that plaintiff used was not preserved for inspection after the investigation was complete and, since some of the accident reports differ, they should be disregarded.

Plaintiff's expert, Kathleen Hopkins (Hopkins), prepared a report discussing the causes of plaintiff's accident. Hopkins contends, among other things, that plaintiff was not provided

with the "proper or correct fall protection positioning device with two independent lanyards with locking snaphooks that would have provided the Plaintiff with one-hundred percent (100%) fall protection ..." Hopkins Affidavit, ¶ 15.

Plaintiffs filed a summons and complaint against the City of New York and M & E, alleging six causes of action. Specifically, plaintiff's first cause of action is one for common-law negligence against all defendants. His second cause of action claims violations of Labor Law § 200. Since Labor Law § 200 is the codification of common-law negligence, the first and second causes of action will be dealt with in the same discussion. The third cause of action alleges that the defendants violated Labor Law § 240 (1). The fourth cause of action alleges that the defendants violated Labor Law § 241. The fifth cause of action alleges that defendants violated multiple sections of Rule 23 of the Industrial Code of the State of New York. The sixth cause of action is a derivative claim by plaintiff's spouse.

In his complaint, plaintiff alleges that the defendants failed to provide him with the proper safety equipment, failed to provide him with a safe place to work and failed to have a safety plan for the job site, among other allegations. Plaintiff's second supplemental bill of particulars alleges that the Health and Safety Plan was defective in that the Health and Safety Plan did not set forth that he should have been provided with safety nets when erecting a tank "so there is no room for discretion"

and that the Health and Safety Plan was improper and defective since it did not require that he be provided with a "full-body harness equipped with both positioning devices and a double lanyard" EEA's Exhibit O, at 4d-e.

DISCUSSION

I. Summary Judgment:

As noted above, summary judgment motions have been made by all parties. "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. Ctr.*, 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). In considering a summary judgment motion, evidence should be viewed in the "light most favorable to the opponent of the motion." *Id.* at 544, citing *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). The function of the court is one of issue finding, not issue determination. *Ferrante v American Lung Assn.*, 90 NY2d 623, 630 (1997).

II. Labor Law § 200 (City of New York, M & E, and EEA's motions):

Labor Law § 200 provides the following:

1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section.

Labor Law § 200 is the "codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site." *Rizzuto v L.A. Wenger Contracting Co.*, 91 NY2d 343, 352 (1998); see also *Buckley v Columbia Grammar & Preparatory* (44 AD3d 263, 272 [1st Dept 2007]) ("Labor Law § 200, the codification of the common-law negligence standard, imposes a duty upon an owner or general contractor to provide construction site workers with a safe place to work").

Claims brought pursuant to Labor Law § 200 either involve situations in which a worker was injured as a result of a defective or dangerous condition at a work site, or involve the "manner in which the work is performed." *Ortega v Puccia*, 57 AD3d 54, 61 (2d Dept 2008). In the present case, the "manner in which the work [was] performed" is being challenged. *Id.*

A. Labor Law § 200 Claims As Against the City of New York

Plaintiff advises that "[s]ection 200 specifically states

that owners are responsible for seeing that all workers are properly equipped, which plaintiff was not." Dobkin Affirmation, ¶ 26. Plaintiff's counsel also asserts, "the only question is whether adequate safety devices were supplied, which is a question of law." *Id.*, ¶ 10. Plaintiff's expert concludes that the fall protection positioning device lanyard which was provided to plaintiff did not provide reasonable and adequate fall protection. Hopkins Affidavit, ¶ 25. There is contradictory testimony in the record as to whether or not the plaintiff properly used his positioning device. However, even assuming, *arguendo*, that plaintiff did hook up his positioning device, the plaintiff maintains that the City of New York failed to provide plaintiff with proper safety equipment.

Also implicit in plaintiff's argument is that plaintiff was not provided with a safe place to work when the City of New York allegedly approved an improper Health and Safety Plan, as the plaintiff was given safety equipment which was purportedly not adequate or safe for his job specifications. According to plaintiff, he was not provided with the proper type of equipment for the specific job that he was doing at the time of the accident. Plaintiff continues that it was the City of New York's responsibility to ensure that the equipment provided to plaintiff met all the applicable regulations.¹

¹ Although these arguments may seem to be relevant to a dangerous condition analysis, as stated above, a contractor's

Regarding the Health and Safety Plan, the record indicates that Silverite, along with EEA (with an additional level of review by M & E), prepared the initial Health and Safety Plan which set forth the equipment plaintiff would be using for the specific job. There is no indication that the City of New York was involved in devising the Health and Safety Plan, nor was it involved in any decisions regarding the type of equipment which would be used for the job. No employee from the City of New York gave plaintiff any direction regarding his job duties or the application of the Health and Safety Plan as it applied to plaintiff.

Nor can the plaintiff argue that the City of New York did not provide a safe place to work. The record indicates that a representative from the City of New York visited the site to check on the project's progress and to see if there were any problems with the construction, and the representative had the authority to stop work if he noticed any safety violations. However, this limited role does not rise to the level of direct supervisory control as to create liability under Labor Law § 200. The Appellate Division, First Department, has held that "[g]eneral supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor

failure to provide safe appliances does not render a premises unsafe or defective', but rather is viewed as relating to the manner in which the work was performed. See *Otega v. Puccia*, 57 AD3d at 62-63.

controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed [emphasis in original]." *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 (1st Dept 2007) (primarily inspections was held to be insufficient to raise a triable issue of fact as to the owner's liability under Labor Law §200). Silverite provided the safety meetings, the body positioning device and harness, safety videos and training in fall protection, safety meetings, a site safety representative on site, and also provided safety directives to plaintiff as he was working. There is insufficient evidence to establish that the City of New York controlled the manner in which plaintiff performed his work.

Further, although the City of New York may have had the ability to stop work for safety reasons, this has been held to be "insufficient to raise a triable issue of fact" as whether the City of New York retained the requisite degree of supervision and control as required for liability under Labor Law § 200. *Id.* at 309; see also *Singh v Black Diamonds LLC*, 24 AD3d 138, 140 (1st Dept 2005) (holding that the contractor's supervision was insufficient to trigger liability under Labor Law § 200 when the contractor conducted regular walk-throughs and if he observed an unsafe condition, had the ability to stop the work).

Accordingly, since the record does not indicate that the City of New York devised the method by which plaintiff would perform his job, nor did it exert sufficient supervisory control

over the operation, the City of New York is not liable under Labor Law § 200, and therefore for common-law negligence, for any of plaintiff's alleged injuries; as such, the part of the City of New York's motion for summary judgment is granted with respect to these claims which include plaintiff's first and second causes of action.

B. Labor Law § 200 Claims As Against M & E

As explained above, M & E was retained by the City of New York to provide construction management and engineering services. With respect to the Health and Safety Plan, M & E's duties were to review it for conformance with OSHA regulations.

Plaintiffs argue that M & E was retained by the City of New York to audit and review Silverite's performance, including inspecting the final work of Silverite. Plaintiffs also claim that M & E would have the ability to stop work at the site if Gibbs noticed an unsafe work practice. However, plaintiffs' arguments are unpersuasive.

Plaintiffs' claims under Labor Law § 200 against M & E fail for many of the same reasons that they fail against the City of New York. First, as with the City of New York, M & E did not provide the equipment to plaintiff, nor did it provide plaintiff with any safety training. Additionally, M & E did not direct or control the work, and, as with the City of New York, although M & E was able to stop the work if an unsafe condition was noticed, this limited role does not rise to the level of direct

supervisory control as to create liability under Labor Law § 200.

M & E's limited role in reviewing the Health and Safety Plan after it was created for compliance with OSHA regulations does not create a role of supervision, direction or control on M & E's part. See *c.g. Buckley v Columbia Grammar & Preparatory* (44 AD3d at 272-273) (holding that plaintiff could not sustain a Labor Law § 200 claim against defendant where defendant did not supervise, direct or control the work, and stating "[t]hat [the fact that defendant] may have had general supervisory powers to coordinate the progress of the work and correct any unsafe conditions that came to its attention is insufficient to establish its liability"). Moreover, M & E's contract with Silverite specifically exempted it from any responsibility for the means and methods of the work performed by Silverite and its employees. Accordingly, M & E is granted summary judgment dismissing plaintiff's first and second causes of action for violation of Labor Law §200 and common-law negligence.

C. Labor Law § 200 Claims As Against EEA

EEA was the safety consultant hired by Silverite to develop the Health and Safety Plan and also to supply a safety professional on site. Plaintiff claims that EEA created a deficient Health and Safety Plan and also that EEA's safety professional was routinely on site for project safety management.

Similar to the other parties, however, EEA did not exercise control over the means and methods of the work being conducted by

plaintiff. EEA did not supply the equipment to plaintiff nor provide him with safety training. Plaintiff, a Silverite employee, was directed and supervised by Silverite. Accordingly, plaintiff has not raised a triable issue of fact with respect to whether EEA exercised supervision and control over the work he performed, and EEA's motion for summary judgment dismissing plaintiff's first and second causes of action for violation of Labor Law §200 and common-law negligence is granted.

III. Labor Law § 240 (1) and § 241 (6) Claims (M & E and EEA's motions):

A. M & E's Liability:

M & E argues that an agency relationship should not attach to it to create liability under plaintiff's Labor Law §§ 240 (1) and 241 (6) claims. Labor Law §§ 240 (1) and 241 (6) impose requirements on owners, contractors, and their agents in certain situations. Labor Law § 240 (1) states the following:

1. All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

Similarly, Labor Law § 241 (6) imposes a nondelegable duty on owners, contractors and their agents to "provide reasonable

and adequate protection and safety' for workers [involved in construction, excavation or demolition] and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494, 501-502 (1993), quoting Labor Law § 241 (6).

Plaintiff alleges that liability should attach to M & E pursuant to Labor Law §§ 240 (1) and 241 (6) since, although M & E was not an owner or a contractor, M & E was a statutory agent of the City of New York. The Court of Appeals has held that, for purposes of Labor Law § 240 (1), an agency relationship arises "only when work is delegated to a third party who obtains the authority to supervise and control the job. Where responsibility for the activity surrounding an injury was not delegated to the third party, there is no agency liability under the statute." *Blake v Neighborhood Housing Services of N.Y. City, Inc.*, 1 NY3d 280, 293 (2003). M & E claims that it was not a statutory agent of the City of New York since it did not supervise or control plaintiff's work. The City of New York also asserts that M & E is not an agent of the city.

Despite M & E's contentions, due to the language in the contract between M & E and the City of New York and the within facts, it cannot be said as a matter of law, that M & E was an agent of the City of New York. As set forth by the plaintiffs, the contract between the City of New York and M & E, appears to

demonstrate that M & E was acting as an agent of the City of New York for the job plaintiff was working on. For example, the contract states that "the CM [M & E] shall be the representative of the Department at the site" M & E's Exhibit F, at SR-16. The Department referenced in the contract is the City of New York Department of Environmental Protection. The contract continues in the next paragraph with, "[t]he CM agrees that it will endeavor to safeguard the City against defects and deficiencies in the work" *Id.* Moreover, Beckmann, who was the representative from DEP, agreed in his testimony that M & E was the "voice" of the City of New York at the job site. The City of New York's Exhibit K, Beckmann TR, at 31.

The court notes that M & E, in its opposition to the City of New York's motion, highlights the portion of the contract between Silverite and the City of New York which describes M & E as the City of New York's agent. In pertinent part, M & E references this part of the contract: "[t]he contractor [Silverite] shall indemnify and hold the City, its employees and agents harmless against any and all claims ... [emphasis in original]." Gangel Affirmation, ¶ 17. Although now disputed by M & E, evidently at one point M & E had considered itself a potential agent of the City of New York, at least in response to the City of New York's motion for summary judgment.

Due to the discrepancy between the contract language between M & E and the City of New York, and the actual duties of M & E,

plaintiff has raised a triable issue of fact with respect to M & E's liability as a statutory agent, and, therefore, M & E's motion for summary judgment with respect to dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims is denied.

B. EEA's Liability:

The parties do not dispute that EEA was neither the owner, nor the contractor at the job site. Plaintiff argues that Silverite hired EEA to have "control over all of the safety aspects of this job." Ayers Reply Affirmation, ¶ 27. Plaintiff refers to the testimony of Tanzer, an EEA employee, in which he states that EEA was "in control over safety." *Id.*, ¶ 30.

It is not disputed that EEA developed the Health and Safety Plan and had a site safety professional on site once a week. Plaintiff's counsel avers that EEA was supposed to provide a separate safety representative as per its contract. However, the record indicates that this separate safety representative was provided by Silverite, as per the contract between EEA and Silverite.

EEA's professional safety representative, who was Tanzer, did not have the authority to stop work, nor did he direct Silverite's employees. Plaintiff even testified that plaintiff only took direction from the Silverite foreman and the Silverite superintendent. EEA's, Exhibit H, Capparo TR, at 39, 110.

Plaintiff argues that EEA, in devising the Health and Safety

Plan, failed to provide an adequate equipment recommendation to plaintiff to protect him from falls. Therefore, according to plaintiff, since the Health and Safety Plan is deficient, EEA is liable as an agent for supervising and controlling plaintiff's work. However, as demonstrated below, the act of preparing the Health and Safety Plan, without any more responsibility, does not create liability for EEA under Labor Law §§ 240 (1) and/or 241 (6). As set forth below, EEA has sufficiently proven that it was not an agent for liability purposes under Labor Law §§ 240 (1) and/or 241 (6), and none of the parties has presented triable issues of fact to refute such.

As set forth by EEA, case law does not suggest that a safety consultant who devises a Health and Safety Plan would have the requisite "control" necessary to qualify as an agent. For instance, the Court in *Borbeck v Hercules Construction Corporation* (48 AD3d 498, 498 [2d Dept 2008]) held that the construction manager of the project "did not have the authority to control and supervise the work to become the owner's statutory agent" because the construction manager did not have "the authority to enforce the provisions of the contracts entered into by the owner with the project's prime contractors" or the "authority to stop the work in the event that an unsafe condition came to light." See also *Walls v Turner Construction Company*, 4 NY3d 861, 864 (2005) ("unless a defendant has supervisory control and authority over the work being done when the plaintiff is

injured, there is no statutory agency conferring liability under the Labor Law").

In the present situation, although EEA developed the Health and Safety Plan, the record indicates that it was actually "enforced" by Bocina, Silverite's site safety representative. Despite plaintiff's allegations, the contract between EEA and Silverite, and the record, support this contention. EEA states that it was also Silverite's responsibility to determine whether equipment other than a positioning device was feasible. If EEA noticed an unsafe condition, including conditions with respect to the equipment set forth in the Health and Safety Plan, it would report it to Silverite, which would then make the ultimate decision in directing the employees. As such, EEA's creation of the Health and Safety Plan would not create an agency relationship for EEA under Labor Law §§ 240 (1) and/or 241 (6).

Similarly, this court recently held in *Gaspar v LC Main, LLC* (27 Misc 3d 1212[A], 2010 NY Slip Op 50691[U][Sup Ct, NY County], *affd* 79 AD3d 428 [1st Dept 2010]), that the site safety consultant, who was charged with the development and implementation of the site safety plan, did not qualify to be an agent under the Labor Law. In *Gaspar v LC Main, LLC*, the contract between the general contractor and the project safety's consultant provided the following requirements of the project safety's consultant: "[d]evelopment and implementation of a site specific safety plan. Daily monitoring of the site to identify

hazards and/or potential hazards to prevent and reduce injuries and incidents." *Id.* at *1. The court held that the owner's and general contractor's claims against the project safety's consultant for common-law indemnification must fail since the project safety's consultant did not supervise and control the plaintiff's work.

Likewise, here, EEA, having similar responsibilities to the project safety's consultant in *Gasper*, did not supervise and control plaintiff's work for purposes of statutory liability. Accordingly, EEA's motion for summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims as against it, which are plaintiff's third and fourth causes of action, is granted.

IV. Industrial Code Violations (M & E and EEA motions):

A. EEA

Plaintiff's fifth cause of action includes allegations that defendants violated Part 23 of the New York State Industrial Code (12 NYCRR Part 23). EEA's Exhibit S, at 10. In actuality, violations of the Industrial Code provisions form the basis for Labor Law § 241 (6) liability and do not constitute a cause of action themselves. As plaintiff's cause of action pursuant to Labor Law § 241 (6) has been dismissed as against EEA, summary judgment dismissing any claim pursuant to Industrial Code sections is also granted.

B. M & E

Although M & E moved for summary judgment dismissing all of plaintiff's claims, it did not address whether it is subject to liability for any alleged OSHA or Industrial Code violations.² In addition, as indicated above, as an issue of fact remains as to whether M & E is an agent under Labor Law § 241 (6), and as M & E did not meet its burden to address the relevant alleged violations, summary judgment is denied with respect to plaintiff's claims under the Industrial Code as against M & E.

V. Indemnification:A. Cross Claims Against EEA

Both M & E and the City of New York have brought cross claims against EEA for indemnification. The City of New York argues that, if it is subject to liability for the selection of the fall protection used by plaintiff, it is entitled to common-law indemnification from EEA for drafting the Health and Safety Plan by which EEA selected the fall protection equipment. M & E also alleges that EEA should be subject to liability for common-law and/or contractual indemnification if the Health and Safety Plan is found to be deficient. Significantly, neither the City of New York, nor M & E, contends that the Health and Safety Plan was indeed deficient.

²Violations of OSHA do not provide a basis for Labor Law § 241 (6) liability. See *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 802 (2d Dept 2005).

B. The Health and Safety Plan Was Not Deficient

Hopkins, plaintiffs' expert, opines, among other things, that EEA is liable for creating a defective Health and Safety Plan. However, Hopkins's and plaintiffs' arguments are unpersuasive. The evidence submitted herein is sufficient to show that EEA's preparation of the Health and Safety Plan was in compliance with OSHA regulations; thus, the Health and Safety Plan set forth appropriate procedures for plaintiff's job.

The OSHA regulation with respect to formwork, the type of work completed by plaintiff, provides the following:

1926.501 Duty to have fall protection
(b) (1) (5) Formwork and reinforcing steel. Each employee on the face of formwork or reinforcing steel shall be protected from falling 6 feet (1.8 m) or more to lower levels by personal fall arrest systems, safety net systems, or positioning device systems.

Plaintiffs' Cross Motion, Exhibit A, Hopkins Affidavit, ¶ 14.

The Health and Safety Plan recommends that aerial lifts of properly constructed scaffolding be used when installing forms above six feet. However, the Health and Safety Plan states that other positioning devices or other personal fall protection may be used if those means are not feasible. EEA's Exhibit Y, at 1. Nowhere in the Health and Safety Plan, nor in OSHA, is 100% fall protection required.

Silverite was given many options for fall protection, including a guardrail system, safety net or a body belt/full body harness. EEA's expert, Steven Kane (Kane), explains that the

positioning devices contained in Table 2A of the Health and Safety Plan are approved safety belts with attached lifelines, one of which was the single lanyard which was given to plaintiff. Thus, a positioning system lanyard was given to plaintiff, which, if properly secured, would have prevented plaintiff from falling more than two feet. Plaintiff allegedly did not anchor his positioning device.

Without adequate supporting evidence, plaintiffs' expert Hopkins alleges that the single lanyard was not the proper device for climbing the form. As previously mentioned, there are different types of personal fall arrest systems or positioning devices that plaintiff could have used on this job. The one given to plaintiff was a single lanyard, which is a positioning device. The Health and Safety Plan also provides for other methods such as ladders or aerial lifts. OSHA regulations for a positioning device system require that "positioning devices shall be rigged such that an employee cannot free fall more than two feet." Hitchcock Reply Affirmation, Exhibit C, Kane Affidavit, ¶ 16. As set forth by Kane, plaintiff somehow failed to connect his positioning device to the form. This is not the result of a Health and Safety Plan deficiency, as such plan complied with OSHA regulations.

Moreover, as Kane contends, although OSHA requires the protection of workers, there is no OSHA regulation stating that 100% fall protection is required for workers. *Id.*, ¶ 17. OSHA

also does not mandate that only a double lanyard can be used.

As EEA maintains, plaintiff was given a positioning device which, if hooked into properly, would have prevented the plaintiff from falling more than two feet. As such, EEA did not violate any statutory provisions by suggesting the use of a single lanyard for plaintiff's job.

As stated, neither M & E, nor the City of New York, actually allege that the Health and Safety Plan was in fact defective. It is evident from the within submissions that, the Health and Safety Plan, as written, was appropriate for the job and it has not been shown that it violated any OSHA regulations. Plaintiff's assertions, including any mention of the HASP including language of 100% fall protection, are unfounded. It is well settled, "[a] shadowy semblance of an issue or bald conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment [internal quotation marks and citation omitted]." *Costello v Saidmehr*, 236 AD2d 437, 438 (2d Dept 1997). Accordingly, any cross claims against EEA for any alleged Health and Safety Plan deficiency must fail. EEA's motion for summary judgment dismissing any cross claims as against it, is granted.

VI. The City of New York's Cross Claim against M & E for Indemnification:

The City of New York seeks to have the indemnification provision enforced if M & E is found negligent. The City of New

York argues that the indemnity provision in the contract between the City of New York and M & E is valid and enforceable.

M & E entered into a contract with the City of New York to work on the construction site at Wards Island. The contract included an indemnification provision, which provides as follows:

ARTICLE 15-INDEMNITY

The Engineer [M & E] shall be liable to and hereby agrees to indemnify and hold harmless the Commissioner and the City and each officer, agent, and employee of the City from any and all claims and judgments against any of them, for damages and from costs and expenses to which the City and its respective officers, agents, and employees may be subjected, or which they may suffer or incur by reason of any loss, property damage, bodily injury, or wrongful death, resulting from the negligence, carelessness or other act of the Engineer or anyone employed by the Engineer, in the performance of this Agreement, or from negligent failure to comply with any of the provisions of this Agreement, or of law.

City of New York's Exhibit O, Appendix A at 39.

Not only does the City of New York claim that it is entitled to indemnification from M & E for any negligence on M & E's part, but it maintains that it is also entitled to indemnification even if M & E is not found to be negligent. The City of New York continues that, if the Health and Safety Plan is determined to be deficient, then M & E should also be liable since it was M & E's responsibility, pursuant to the contract with the City of New York, to review the Health and Safety Plan for conformance with OSHA regulations. This act of review would be the "other act" that is referenced in the indemnity provision, according to the City of New York. Likewise, the City of New York contends that M

& E was required to report unsafe work practices to the City of New York, and, if plaintiff's injury is attributable to any of the City of New York's violations, M & E would also be held liable.

M & E does not deny that the contract contained the indemnity provision. However, it argues that "the indemnity clause in the City and M & E's contract cannot be enforced since plaintiff's injury cannot be attributable to any negligence, carelessness or any other act by M & E, as [construction manager]." Gangel Affirmation, ¶ 27. M & E also contends that, if it is found to be the City of New York's agent, Silverite would be required to indemnify M & E.

The indemnification clause in the contract, provides a right to indemnification to the City of New York, *only if M & E is found negligent*. Here, as indicated above, plaintiffs' negligence claims against M & E have been dismissed. Thus, the indemnification clause is not enforceable under the within circumstances. The City of New York's attempt to define "other act" as referenced in the contract clause, as the review of the Health and Safety Plan is not persuasive, as there has been no showing that the Health and Safety Plan was not deficient. Despite the City of New York's other contentions, based upon the language of the contract, the City of New York does not have limitless possibilities for indemnification. Accordingly, the City of New York's motion for partial summary judgment enforcing

the contractual indemnification clause in the contract between M & E and the City of New York, is denied and M & E's motion for summary judgment dismissing the City of New York's cross claim for indemnification is granted.

VII. The City of New York's Cross Claim Against M & E For Failing To Add The City As An Additional Insured:

One of the City of New York's cross claims against M & E alleges that M & E failed to name the City of New York as an additional insured on an insurance policy. The City of New York contends that M & E was required to add the City of New York onto one of its various insurance policies, pursuant to the contract between M & E and the City of New York. M & E's Exhibit F, Appendix A, at 7. M & E did not address this cross claim in its motion for summary judgment in which it seeks to dismiss all cross claims. Accordingly, M & E is denied summary judgment with respect to this cross claim.

VIII. Plaintiff's Cross Motion for Summary Judgment:

This court issued an order dated May 21, 2010 which directed the parties to file any motions for summary judgment within 60 days after the completion of plaintiff's further deposition. Plaintiff's further deposition was conducted on June 24, 2010. Plaintiffs served their cross motion against EEA and M & E for summary judgment on October 13, 2010. Plaintiffs did not request additional time to file their late cross motion; nor do plaintiffs proffer any excuse for their delay in timely moving or

cross moving for summary judgment.

This matter comes squarely within the principles announced by the Court of Appeals in *Brill v City of New York* (2 NY3d 648 [2004]), to prevent the filing of "eleventh-hour summary judgment motions", a practice that "ignores statutory law, disrupts trial calendars, and undermines the goals of orderliness and efficiency in state court practice" (*id.* at 650-651). In *Brill*, the Court of Appeals concluded that the Supreme Court should not have considered the merits of a summary judgment motion brought by the City of New York almost one year after the filing of the note of issue, as the City gave no explanation for filing the motion after the 120-day limit specified in CPLR 3212 (a). The Court of Appeals stated, "We conclude that 'good cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion - a satisfactory explanation for the untimeliness - rather than simply permitting meritorious, nonprejudicial filings, however tardy ... No excuse at all, or a perfunctory excuse, cannot be 'good cause'" (*Brill v City of New York*, 2 NY3d at 652; see also *Miceli v State Farm Mut. Auto Ins. Co.*, 3 NY3d 725, 726 [2004]; *Perini Corp. v City of New York*, 16 AD3d 37 [1st Dept. 2005]). It has been held that motion courts have no discretion to entertain non-prejudicial meritorious post-note of issue motions made after a court-imposed deadline, even if made within the statutory maximum 120-day period, unless there is a showing of good cause. *Glasser v. Abromovitz*, 37 AD3d 194

8(1st Dept 2007) (emphasis supplied). Moreover, these principles with respect to late motions for summary judgment have also been applied to late cross-motions for summary judgment (see *Colon v City of New York*, 15 AD3d 173 [1st Dept 2005]; *Thompson v Leben Home For Adults*, 17 AD3d 347 [2nd Dept 2005]). Accordingly, the Court is constrained to deny the cross motion as the requisite "good cause" showing has not been established.

Nevertheless, even if this court were to consider the merits of plaintiffs' untimely cross-motion for summary judgment, the court would deny the requested relief as detailed below.

A. Cross Motion for Summary Judgment As Against EEA

As a result of this decision, EEA has been granted summary judgment dismissing plaintiffs' complaint. This would also include a dismissal of Wissler's derivative cause of action. Accordingly, plaintiffs' cross motion for summary judgment against EEA is denied.

B. Cross Motion for Summary Judgment As Against M & E

As a result of this decision, M & E has been granted summary judgment dismissing plaintiffs' first and second causes of action. The court has determined that an issue of fact remains as to whether M & E is a statutory agent. As such, plaintiffs' additional Labor Law and Industrial Code violation claims cannot be decided at this time. Accordingly, plaintiffs' cross motion for summary judgment against M & E is denied.

CONCLUSION

Accordingly, it is

ORDERED that the part of the motion of defendant City of New York for summary judgment dismissing plaintiffs' causes of action for common-law negligence and for a violation of Labor Law § 200 is granted and these claims are dismissed as against it; and it is further

ORDERED that the part of the motion of defendant City of New York for summary judgment on its cross claim against defendant Metcalf & Eddy of New York, Inc. for contractual indemnification is denied; and it is further

ORDERED that the part of defendant Metcalf & Eddy of New York, Inc.'s motion for summary judgment dismissing the complaint is granted with respect to plaintiffs' first and second causes of action, and granted with respect to the City of New York's cross claim for contractual indemnification, and is otherwise denied for plaintiffs' third, fourth, fifth and sixth causes of action; and it is further

ORDERED that the part of Metcalf & Eddy of New York, Inc.'s motion for summary judgment dismissing cross claims asserted as against it is denied with respect to the City of New York's cross claim for Metcalf & Eddy of New York, Inc.'s failure to add it as an additional insured, and is denied with respect to its cross claims against Environmental Energy Associates for common-law and contractual indemnification; and it is further

ORDERED that Environmental Energy Associates' motion for summary judgment dismissing plaintiffs' complaint and any cross claims as against Environmental Energy Associates herein is granted and the complaint is hereby severed and dismissed in its entirety as against Environmental Energy Associates, with costs and disbursements to Environmental Energy Associates as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of Environmental Energy Associates; and it is further

ORDERED that plaintiffs' cross motion for summary judgment is denied; and it is

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that within 30 days of entry of this order, Environmental Energy Associates' shall serve a copy upon all parties, with notice of entry.

Dated: _____

10/18/12

FILED

10/18/2012

Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Capparo v City of New

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