SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ANTHONY CORRADO,

Plaintiff,

-against-

METROPOLITAN TRANSIT AUTHORITY, METRO NORTH COMMUTER RAILROAD, SAVAGE SERVICES CORPORATION, CANAC RAILWAY SERVICES, INC., and CANAC INC.,

Defendants.

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Index No.: 102002/2010

Motion Seq. Nos. 003-004

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

This action for personal injuries arises from an incident that occurred on April 23, 2009, during a railroad tie replacement project at Metro North Commuter Railroad's ("Metro North") Hudson Line (the "Project") in which a wheel of a gantry crane severed the second through fourth fingers of plaintiff's left hand (the "Incident").

Defendants Savage Services Corporation ("Savage"), CANAC, Inc. ("CANAC, Inc."), and CANAC Railway Services, Inc. ("Railway") (collectively, the "Railway Defendants")[1] now move pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint and all cross-claims asserted against them (sequence 003).

Defendants Metropolitan Transit Authority (the "MTA") and Metro North also move pursuant to CPLR 3211 and 3212 for dismissal of the complaint and all cross-claims, and for contractual and/or common law indemnification from Railway and CANAC, Inc. (sequence 004).

Plaintiff opposes both motions and cross-moves for summary judgment against Metro

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[1] In 2004, Savage, which specializes in rail-related services, purchased CANAC, Inc., which, in 2006, became "CANAC Railway Services, Inc." (the entity referred to as "Railway" in this decision).

North as to his claims for common law negligence and violations of Labor Law 200 and 241(6), and against Metro North and MTA as to his Federal Employer Liability Act ("FELA") claim.[2]

Factual Background

In 2007, Metro North, a subsidiary of the MTA, entered into a contract with Railway for the provision of labor and equipment necessary to replace concrete ties on the Hudson Line (the "Contract").[3] Under the Contract, Railway provided a Track Laying Machine ("TLM") called the "P-811," and all equipment, tie cars, handling equipment, and all necessary "maintenance and installation services" (MN, exh. S, p. 158). "Installation services" included labor for all positions in and around the TLM required for its successful operation. Additionally, as per the "Scope of Work" section, Railway was to submit detailed work plans describing the proposed sequence of operations and proposed methods for accomplishing work.

The "Laborer's Duties" section of the Contract provided that "tie space handlers" were responsible for ensuring that spacers were removed prior to the pick-up of ties by the gantry, and that "tie handling platform attendants" were to "control and correct problems with the ties being removed at the old tie gathering platform" (MN, exh. S, p. 167). "Quality control and clip-up attendants" were responsible for applying clips to new ties; ensuring that newly installed ties

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[2] Motion sequence numbers 003 and 004 are consolidated for joint disposition herein.

[3] Metro North submitted a Request for Proposal ("RFP") for the performance of work including labor and necessary equipment. In response, Railway submitted a Proposal for Work (the "Proposal") for the tie installation, which Metro North accepted by Notice of Award dated June 15, 2007. Railway's Proposal indicated that its supervisors and employees were responsible for "ensuring that equipment used is maintained in such a condition that is suitable for the work intended, and will not in any way compromise the health and safety of the workers." (Metro North motion, hereinafter, "MN," exh.. S, p. 158). Annexed to Railway's Proposal was its "P-811 Tie Program Safety Procedures," which included a provision stating that "the gantry running rail is not a hand hold. Keep clear of the running rail. A good habit to have is to not hold onto or lean on any part of the P-811 consist" (MN, exh.. S p 234).

were not missing hardware and/or were not skewed; and replacing components that may have been damaged during the lining operation." (*Id.*)

The Contract included various provisions which set forth the parties' responsibilities.[4] Also, Metro North used a "Roadway Worker Safety Manual" (the "Safety Manual") mandated by the federal government (Plaintiff motion, exh. D). The Manual provided that it applied to all "roadway workers," which included employees or employees of a contractor to Metro North. The Manual further provided that the "Employee-in-Charge," (who was Ronald Ploss ["Ploss"] of Metro North) was responsible for the "safety, instruction, performance, and on-track protection of all employees" under its jurisdiction. It also provided that the Employee-in-Charge was to "personally and continuously supervise any work involving hazards and discuss specific procedures to protect against such hazards." (*Id.*, exh. D, p 10).

With respect to indemnification, article 5.01 of the RFP provided that Railway "shall be solely responsible for . . . all injuries (including death) to all persons, including, but not limited to, employees of [Railway], its Subcontractors, and the Indemnified Parties . . ." for injuries that occurred during the Project, and that Railway:

> "shall indemnify and save harmless [Metro North and the MTA], to the fullest extent permitted by law, from loss and liability upon any and all claims and expenses . . . on account of loss and liability for bodily injuries . . .to the extent such loss and liability is caused by the negligence or intentional act of [Railway] or, its employees, agents, Subcontractors, or any person under the direct supervision of [Railway] and for whom [Railway] is responsible for the performance of [the Project]." (MN, exh. S p 51).
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> Metro North and the MTA are listed as "Indemnified Parties" (MN, exh. S p 42-43).
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> According to Gary Plant ("Plant"), a Savage senior vice-president, Metro North leased the

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[4] Because the import of these provisions is at issue, the court discusses same in detail in its "Discussion" section, *infra*.

subject tie cars from Railway before the 2009 production season. The lease commenced when Metro North took control of the tie cars for initial movement from the cars' rest station to the tie manufacturer which supplied ties for the Project.

The Project and Equipment

The Project involved the replacement of old concrete railroad ties with new concrete ties.[5] Under Metro North's direction, the tie manufacturer would ship tie cars loaded vertically with five rows of ties. Once transported to New York, Metro North unloaded, stacked and stored the ties at its facilities. Upon arrival, Metro North would either unload the entire car (and ship it back to the manufacturer to be reloaded), or it would remove the top layer of ties from the car. When Metro North removed the top layer of ties, this was so that the gantry, a mobile, crane-like device used to lift and move ties, could function properly, as it could not do so if all five rows of ties remained in place. None of the pre-production, transport, unloading or storage of the ties was performed by Railway or Savage; this work was performed under the sole supervision and control of Metro North. (MN, exh. N, p 47-51, 54-60).

To complete the Project, the crew used a "consist," *i.e.*, interconnected railroad equipment, which, in this case, included a locomotive, tie cars, gantry and the P-811. The consist usually included approximately eight tie cars which were loaded with new ties (which weigh approximately 800 pounds apiece) at the start of a day's production.

The P-811 tie replacement machine was the actual piece of equipment that replaced old

[5] By way of background, a railroad track is comprised of metal rails, affixed to concrete ties (placed perpendicularly to the rails) by clips. To replace ties, the rails must be un-clipped from the ties and spread out. Old ties are then dug out by a plow and replaced with new ties.

ties, and was located at the back end of the consist. New ties were moved from the tie cars to the P-811 by the gantry, which traveled over the ties by riding on separate rails (not the actual rails on which the consist ran) located on the sides of the tie cars (the "running rails").

The gantry was operated by a worker seated in a cab situated at its top, which was positioned in such a way that the operator's view of activity below was obstructed. On the date of the Incident, the gantry was operated by Mitchell Kerman ("Kerman") of Railway. The gantry was positioned so it could ride over up to four rows of stacked ties. The gantry would place new ties onto a conveyor of the P-811, which would carry new ties through the P-811 machinery to an area near the consist's plow. The gantry moved ties to and from the P-811 several times a day. *via* a crane mounted to its underside, which could be hoisted up and down by the gantry operator. The gantry had a clamping/closing mechanism designed to close on ties and lift them up. Once the ties were lifted, the gantry operator would transport them by holding the mechanism closed and maneuvering the gantry on the running rails.

For the gantry to lift ties, its clamping mechanism was required to physically get "under" the ties. To foster this action, each row of ties was separated by pieces of scrap wood, called "dunnage" or "spacers." Dunnage/spacers would be removed once a row of ties was lifted away.

When the tie cars were brought to the Project site in the morning, the tie rows were separated with dunnage/spacers, with the exception of the bottom/lowest row. This row of ties did not rest on spacers, but rather on wooden "timbers" which were actually part of, and affixed to, the tie car. The timbers' purpose was to keep the ties sufficiently raised off the tie car so the gantry's clamping mechanism could get underneath and lift the bottom row of ties.

Frank Hardman ("Hardman"), a Railway supervisor, testified that in 2008, before the tie

cars were transferred to Metro North, he had made specific recommendations for the repair of the actual tie car involved in the Incident.[6] He believed that the timbers needed to be replaced because the tie car was decayed and had been ineffectively repaired at some point prior. Also, Hardman believed that the timbers themselves were problematic in that, among other things, they consisted of the wrong material, were too short and missing planks, and had wear and rot on them. Moreover, a portion of the timbers had a small piece of plywood on top of it to bring it up to the height of another timber to which it was connected. This plywood was secured by a "spike"; an approximately 10 inch long nail.[7]

Hardman also testified that this use of plywood, combined with the use of a spike, alarmed him before the 2009 production season. This type of repair, in Hardman's view, was not customary, but that with this repair, he "tried to secure it as best as he could."[8] In this vein, Hardman and Adrian Versluis ("Versluis"), another Railway supervisor, testified that this section would normally be held down with a bolt and nut (which would better secure the ties), and not by a spike.[9]

Hardman voiced his disapproval with the setup, and claimed he could have properly secured the problematic timber; however, time constraints imposed upon him prevented him from doing so. Additionally, Hardman believed that this portion of the tie car could be dangerous because it could become dislodged and/or "skewed." After the incident, Hardman

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[6] Hardman Dep., pp. 60-61.

[7] Hardman Dep., pp. 64-69.

[8] Hardman Dep., p. 69.

[9] Hardman Dep., pp. 68-69; Versluis Dep., pp. 132-133.

learned that the load had in fact skewed, possibly due to the condition of the timbers.[10]

The Incident

On April 5, 2009, plaintiff entered into an employment contract with non-party Savage Transportation Management, Inc. ("STM"), whose parent company is Savage, in order to work on the Project (the "Employment Contract"). As per the Employment Contract, plaintiff was to "report to [Versluis], Program Supervisor . . ."[11] (Railway motion, exh. N). Thus, at the time of the Incident, plaintiff was a laborer "on the books" of STM.

On the date of the Incident, from 7:00 a.m. until 10:30 a.m., plaintiff was working with a fellow crew member, Roman Mlynaryk ("Mlynaryk") removing tie clips to permit access to the ties. When plaintiff finished, Hardman told him to go to the back of the consist to see if any help was necessary[12]. Plaintiff then walked over to help crew members Andy Yerks and J.P. Barrios, who were performing "dunnage work," which involves the removal of the dunnage/spacers between the rows of ties. This was plaintiff's first time performing dunnage work.[13]

At approximately 10:35 to 10:40 a.m., the gantry arrived and attempted to lift the bottom row of ties. However, it could not maneuver itself under and pick up this row, due to an apparent problem with the timber on one side of the tie car that rendered approximately six ties (of the 20

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[10] Hardman Dep., pp. 72-76.

[11] The Employment Contract also provided "for the duration of your employment with STM, it is agreed that you [plaintiff] will not undertake work for any outside party that could be in direct competition with the business activities of STM."

[12] Corrado Aff., ¶ 28.

[13] Corrado Aff., ¶ 29.

total ties in that row) "dipped down."[14]

Versluis (of Railway), standing near the men, radioed Kerman to hold and not bring the gantry into the area. He then told Barrios to obtain pry bars so the crew could attempt to manually lift the ties up. Barrios and Yerks then began to try and lift the ties with pry bars. Besides Versluis and the aforementioned other crew members, Plant and Benson Lewis, a Savage corporate representative, were nearby[15]. And, at this time, Ploss, Metro North's on-site Employee in Charge/track foreman, was standing approximately 200 yards away.[16]

Because it was difficult to get adequate leverage to lift the heavy ties; Versluis told plaintiff to find pieces of wood to stick underneath the ties.[17] Plaintiff then obtained a long piece of dunnage scrap, which he began to break on a step of the tie car (the "stirrup") by sticking the wood in and snapping it. Plaintiff was on the ground near the tie car, pulled the piece of scrap wood straight out and snapped it into smaller pieces. He then handed two pieces of wood off to Barrios, who, with Yerks, wedged the broken-off wood under the ties. As plaintiff was doing this, no co-worker, supervisor or anyone else told plaintiff to stop or do anything differently.[18]

Plaintiff then tried to break off a third piece. He put approximately a foot-and-a-half of the wood into the stirrup and began to pull back. When plaintiff tried to snap the wood, it did not break. He then moved the piece of wood further into the stirrup and again pulled at the wood,

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[14] Corrado Aff., ¶ 30.

[15] Versluis Dep., p. 350; Corrado Aff., ¶¶ 30-31.

[16] The parties dispute whether a Metro North employee was present in the immediate vicinity of the Incident.

[17] Corrado Aff., ¶ 32.

[18] Corrado Aff., ¶¶ 33-35.

trying to snap it. As plaintiff pulled the wood away from the tie car, it did not snap and instead pulled him toward the running rail. As his momentum pulled him towards the running rail, plaintiff instinctively put his hands out in front of him to avoid hitting his face on the rail. When this happened, plaintiff's hands came into contact with the running rail. Although he tried to quickly remove both of his hands from the rail, the gantry, which had been moving from plaintiff's right to left, passed by and severed off a large portion of his left hand.[19]

Versluis testified that at some point before the Incident, Versluis directed all nearby crew members to move away from the tie car, so he could direct the gantry to come through the area and drop off the load of old ties it was holding. Everyone nearby moved away from the tie car, and, according to his recollection of the Incident, Versluis then asked if everyone was "clear." According to Versluis, everyone, including plaintiff, told him that they were clear. Thereafter, Kerman, following Versluis's command, came through and dropped off the load of old ties, without incident. Once the gantry had passed, Versluis again told Kerman to hold his position.[20]

According to Versluis, he subsequently told everyone, including plaintiff, that he was going to let the gantry come through the area again. Once more, Versluis asked if everyone was clear, and everyone told him that they were in the clear. Versluis then turned toward plaintiff, who was a few feet to his right, and said "clear"; plaintiff then said "clear" back to him. At this time, plaintiff was standing still on the ground approximately four to five feet away from the running rail. Versluis then told Kerman that it was clear to proceed, and Kerman began to move the gantry. At some point after he told Kerman that it was clear to proceed, Versluis, who did

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[19] Corrado Aff., ¶¶ 36-37.

[20] Versluis Dep., pp. 357-360, 364, 372.

not witness the actual Incident (or see plaintiff move after he had given Kerman the "ok" to proceed) heard the plaintiff scream.[21]

However, plaintiff attests that he had no idea the gantry was moving toward him immediately before the Incident. Plaintiff claims he did not yell "clear" back to Versluis, because Versluis did not yell "clear" to him in the first place. Plaintiff stated that had he heard Versluis yell "clear," he would have stopped.[22] Mlynaryk testified that no one stopped work while plaintiff was breaking the dunnage, and the gantry was moving back and forth at this time. He also was unsure whether Versluis yelled "clear" immediately before the Incident.[23]

Arguments

The Railway Defendants' Motion

The Railway Defendants argue that the common law and Labor Law claims against them are preempted by plaintiff's FELA claims alleged against MTA and Metro North.[24]

Also, because plaintiff is receiving workers' compensation benefits from STM, his general employer, Workers' Compensation Law §11's exclusivity provision extends to bar his common law and Labor Law claims against plaintiff's special employer, Railway and/or CANAC, Inc., which supervised and controlled plaintiff's work. Additionally, CANAC, Inc. no longer existed on the date of the Incident, as it became Railway in 2006.

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[21] Versluis Dep., pp. 360, 373-375, 386-388, 392.

[22] Corrado Aff., ¶¶ 38-40.

[23] Mlynaryk Dep., p. 111.

[24] Plaintiff does not address the Railway Defendants' contention that no FELA claims lie against them given that none of them is a railroad engaged in interstate commerce, and, there is no specific FELA claim asserted against them. As such, the branch of the motion dismissing the FELA claims against the Railway Defendants is granted.

Savage also argues for dismissal on the specific ground that as Railway's parent, it cannot be liable for Railway's torts. Savage did not supervise or control plaintiff's work. Similarly, common law and Labor Law claims must be dismissed against Savage because it is not an owner or general contractor of the Project.[25]

And, plaintiff's Labor Law 241(6) claim must be dismissed against the Railway Defendants because plaintiff does not allege the violation of an applicable Industrial Code. In any event, plaintiff was the sole proximate cause of the Incident, as he knew beforehand the dangers of the running rail.

MTA/Metro North's Motion

The MTA and Metro North move to dismiss plaintiff's claims against them based on: (a) FELA; (b) Labor Law 200; (c) Labor Law 241(6); and (d) common law negligence. They also move for summary judgment against Railway and CANAC, Inc. for contractual and/or common law indemnification.[26]

Metro North argues that under FELA, railroads are liable only to their employees for injuries sustained in the course of employment, and that the FELA claim should be dismissed as plaintiff was not its "employee" under the statute. Plaintiff was employed under a written contract with STM, and performed the Project under Railway's direction, supervision and control. Metro North's role in the Project was limited to general oversight and coordinating

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[25] Likewise, as plaintiff does not address these arguments, and because Metro North's claims regarding Savage are speculative and/or do not address Savage's contentions (*e.g.*, Plant's testimony cited by Metro North pertained to CANAC, Inc., not Railway) all claims and cross-claims against Savage are dismissed.

[26] MTA and Metro North also sought dismissal of plaintiff's claims against MTA on the ground that MTA may not be held liable for the torts committed by its subsidiary. And, all defendants (including the Railway Defendants) moved to dismiss plaintiff's strict products liability and Labor Law 240 claims. Plaintiff did not oppose the dismissal of these claims. As such, these branches of the specific defendants' motions are granted, as unopposed.

Railway's work with its own public transportation operation to ensure that the Project was being performed safely and without interfering with live trains on adjacent tracks.

Moreover, plaintiff does not fall within the three common law exceptions which establish "employment" for FELA purposes when the individual is technically employed by another entity (the "borrowed servant"/"special employee"; "dual servant"; and "sub-servant" theories). Plaintiff cannot show that the railroad (Metro North) exercised supervision and control over the physical conduct of plaintiff's work operations.

Here, all witnesses testified that Railway directed, supervised and controlled the operation of the P-811, gantry and tie installation operation. All witnesses further testified that Railway and/or Savage owned, inspected and maintained the tie cars, gantry and timbers during pre-production time in 2008. And, the record shows that Railway did not perform necessary repairs regarding missing planks, rotting, and other problems with the timbers.

Versluis testified that he had the duty and discretion to address the issue of the inability to pick up the bottom row of ties, which is the event that led to the Incident. Versluis was responsible for clearing workers in the area of the gantry and running rail. Versluis further testified that Metro North did not concern itself with individual laborers and what work they were specifically doing on any particular day; rather, this was simply a Railway function. He further did not recall results of pre-production inspections being shared with Metro North, and did not believe that anyone from Metro North asked about what, if anything, Railway observed and/or if it had any recommendations for maintenance. Moreover, Versluis stated that he believed problems with the timbers occurred due to a hidden, unobservable defect.[27]

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[27] Versluis Dep., pp. 261, 317, 411, 436-438

Additionally, Versluis testified that at the end of each workday, he would contact P.J. Cunningham ("Cunningham") (of Metro North) to advise how many ties were needed for the next day and to discuss safety issues. Versluis further testified that he did not know if Cunningham could remove a worker without first asking permission from Railway.[28]

Metro North supervisors were not actually present at the subject tie car when the Incident occurred or when the activity that gave rise to the Incident was underway. Despite the fact that Ploss mentioned using a boom truck in the past to assist in moving the bottom row of ties, he testified there was nothing he could do, since he was 200 yards away when the Incident occurred.[29]

Cunningham attests that Metro North did not supervise or control plaintiff's work, and that the gantry (and its operation) was "[Railway's] problem." Railway employees never testified that Metro North could have them fired, and most agreed that if a Metro North supervisor gave them instruction, they would run it by Versluis or Hardman first. Notwithstanding, Cunningham confirmed that Metro North lacked the authority to fire Railway workers; more important, every witness agreed that no one from Metro North ever directed or supervised the means and methods of plaintiff's work.[30]

Similar to the *Smith v. Metropolitan Transportation Authority* (226 AD2d 168, 641 NYS2d 8 [1st Dept 1996]) case, STM, Railway's corporate owner, employed plaintiff pursuant to the Employment Contract; Railway was an independent contractor under the Contract with Metro

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[28] Versluis Dep., pp. 151-153

[29] Ploss Dep., pp. 90, 93.

[30] Cunningham Aff., ¶¶ 5-6.

North (which identified Railway as the entity with the sole authority to supervise and control its employees' activities); Versluis and Hardman supervised and directed plaintiff on a daily basis; Railway/STM hired plaintiff and had the right to fire him; Railway furnished the equipment needed to perform the Project; STM paid plaintiff's wages; plaintiff's work on the Project was seasonal and not continuous; and Railway specialized in utilizing the subject equipment (the P-811 and gantry).

Also, all of plaintiff's Labor Law claims should be dismissed because Congress has made clear that allegations of FELA violations preempt Labor Law claims.

Moreover, even if the court evaluates plaintiff's Labor Law 200 claim, it should be dismissed because neither the MTA, nor Metro North, supervised or controlled plaintiff's work. Further, Metro North did not cause or create, or have notice of any defective condition on its property that proximately caused the Incident. The Incident was caused by Railway's work operations and/or equipment, and under caselaw, a subcontractor's failure to provide safe appliances does not render premises unsafe or defective.

The Labor Law 241(6) claim should be dismissed because plaintiff failed to allege an applicable violation of the Industrial Code. Sections 23-8.1(i) and 23-9.2[31] concern inspecting and maintaining equipment including mobile boom cranes and derricks. Section 23-8.1 also involves those particular cranes and not the gantry at issue herein. In any event, the Incident occurred because plaintiff slipped and placed his hand on the running rail, something he knew was extremely dangerous and something that was an ordinary peril associated with railroad work.

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[31] The MTA and Metro North (as well as the Railway Defendants) sought dismissal of the claim if based on additional Industrial Code sections alleged by plaintiff, which plaintiff did not oppose. Therefore, such additional Industrial Code sections are not addressed herein, and cannot form the basis for a Labor Law 241(6) claim.

And, the Incident was not proximately caused by defective equipment: although plaintiff alleges that the gantry was not properly "guarded" and explored the absence of "pipe sweepers" at depositions, Railway employees who operate and use the gantry testified that a "pipe sweeper" functions to sweep debris out of the way, not to knock someone's hand out of the way.

Further, plaintiff's common law negligence claims should be dismissed because the MTA and Metro North did not owe any common law duty with respect to Railway's methods and equipment. Metro North's duty in this regard was only as a landowner to provide safe premises and a safe place to work. As noted above, a subcontractor's failure to provide safe equipment does not entail that the landowner provided unsafe premises.

Moreover, all witnesses testified that Railway owned, inspected, maintained and repaired the tie cars and gantry. And, Metro North was unaware of any relevant issues with the tie car and gantry in accordance with the Contract. Further, even under the lower burden of proof required by FELA, the Incident arose solely because of Railway's operation and not due to Metro North's conduct. Lastly, Metro North argues that a violation of 49 CFR(c) 229.41 (which provides, *inter alia*, that exposed moving parts of mechanisms shall be in non-hazardous locations or equipped with guards to prevent personal injury) does not create a private right of action for negligence.

The MTA and Metro North further argue that they are entitled to contractual indemnification from Railway and/or CANAC, Inc. under the Contract, given that Metro North was not actively negligent. Common law indemnification is also proper because of the lack of active negligence, the Incident occurred during Railway's operation and under its supervision and control, and due to Railway's maintenance and repair of the subject equipment. Railway was

plaintiff's "special employer,"[32] And, Workers' Compensation Law § 11 does not bar the indemnification claims against Railway, as plaintiff sustained a "grave injury" due to his loss of multiple fingers.

Plaintiff's Opposition/Cross Motion for Summary Judgment

Plaintiff contends that Metro North was his employer under FELA because Metro North directed, controlled and supervised him in the performance of his work. Plaintiff was a "borrowed servant/special employee"; "dual servant" and "sub-servant" of Metro North in light of the facts, Contract provisions, and Restatement. And, defendants' case law is inapposite.

Metro North had on-site employees (Ploss and Cunningham) who controlled the entire Project crew. Moreover, Metro North inspected, loaded and positioned the tie cars and their loads. Also, plaintiff's crew reported on-site every day; the assignment was permanent, and the crew never went to Railway's and/or Savage's corporate offices.

Ploss (of Metro North), who was present on the job site every day, testified that he could stop work on the Project at any time. Also, he and Cunningham could directly reprimand and remove any worker from the job site if they believed they were breaking Metro North's rules. Ploss also participated in daily safety meetings held before the start of a day's production, and referred to the Safety Manual while in charge of the Project (MN, exh. O, pp 20-21). Also, the witnesses' testimony establish that Metro North could determine the start time for a day's production, and halt all work directly at its discretion.

Metro North's supervision of the Project also extended to quality control. At the end of each day's production, Metro North would inspect the work that was done and direct the Railway

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[32] Metro North and the Railway Defendants agree that Railway was plaintiff's "special employer."

crew as to changes and/or repairs that were necessary to be performed. Metro North would review the tie-laying, and would direct changes to adjust, raise or straighten ties as it deemed necessary.

Additionally, Ploss testified that he would have stopped the subject dunnage work that plaintiff engaged in before the Incident, had he been closer to the Incident site. Ploss admitted that he never would have allowed the gantry to operate in the vicinity of workers, had he been present. Ploss also admitted that when ties were skewed (as was the case here) he became actively involved in adjusting and removing such ties by calling for and using a dump truck with a telescoping boom. He did so under his own discretion, and did not require approval from any Railway employee or anyone else.[33]

Moreover, by Hardman's testimony, it is undisputed that the subject tie car was in Metro North's exclusive control for five months before the 2009 production season. And, it was Metro North which loaded and unloaded the tie cars on a daily basis during the production season.[34]

Additionally, Metro North and Railway/Savage were in the same business of railroads, and were all experienced in laying and replacing tracks and ties. In fact, Metro North admitted to having a crew of approximately 40 workers who performed this type of work year round.

The mere assertion of FELA claims does not preempt Labor Law or common law negligence claims. If plaintiff's cross motion as to his FELA claims is granted against Metro North, then all other claims fall away. Otherwise, plaintiff is allowed to plead in the alternative and should be allowed to maintain other claims until it is determined that a FELA violation does

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[33] Plaintiff's Cross-Motion, pp. 43-47.

[34] Plaintiff's Cross-Motion, pp. 66-70.

or does not lie against Metro North.

In any event, Metro North, the subject landowner, is liable to plaintiff under Labor Law 200 and for common law negligence, as it failed to provide plaintiff with a safe work place. It is undisputed that, according to Hardman, the subject tie car was defective when Metro North took exclusive control of it in 2008, up until the date of the Incident. And, it is undisputed that Metro North did not inspect the timbers, as per the testimony of Cunningham and Angelo Augello ("Augello") (of Metro North). Plaintiff's expert engineer, Thomas E. Johnson ("Johnson") opined that the Federal Railroad Administration ("FRA") and Association of American Railroads ("AAR") regulate the transfer of possession of railroad equipment. As a result, the transfer, or "interchange" or railroad equipment requires an inspection of the equipment by the common carrier (Metro North) accepting control of the equipment. Here, Metro North accepted 80 tie cars from Railway at interchange. And, the tie car in question had a floor defect of a missing timber replaced by a railroad tie, and plywood covering attached by a spike, which should have been discovered by Metro North during inspection.

Pursuant to 49 CFR 229.7(a), Metro North's inspection must have ensured that the equipment is "in proper condition and safe to operate in the service to which it is put, without unnecessary peril to life or limb." Moreover, the Contract provided that Metro North was to comply with this statutory requirement, as the tie cars were to meet all minimum requirements set forth by the FRA and AAR and meet interchange regulations, and Metro North agreed to inspect all tie cars at interchange. On this note, case law provides that a violation of a statute, combined with proximate cause, warrants a finding of liability.

Also, as per Augello's and Cunningham's testimony, Metro North loaded and moved ties

to the job site daily. Thus, every morning before production commenced, Metro North had an opportunity to discover the defects in the tie cars and with the timbers.

Moreover, Metro North's use of the gantry without guards violated 49 CFR(c) 229.41, which requires exposed moving parts of mechanisms to be equipped with guards to prevent personal injury. Johnson opined that had the gantry been equipped with guards, plaintiff's hand would have been knocked off the running rail and would have prevented his injury. And, 49 CFR(c) 229.45 provides that the CFR applies to all workers, including plaintiff, because this section provides that all systems and components on a locomotive shall be free of conditions that endanger the safety of the crew.

Additionally, Metro North negligently controlled the job site. Ploss, as the "Employee in Charge," failed to give his "personal and continuous" supervision as required by the Manual, and admitted that he would have stopped plaintiff's activity had he been closer to the Incident site or aware of what was occurring. And, Ploss knew of, and had used (during the Project), a safer alternative to fix skewed ties.

Also, Versluis, Hardman and Kerman testified that Metro North was in charge of the Project. And, it is undisputed that the Manual applied to all workers on the job site, and that Ploss was obligated to enforce it. Additionally, Metro North was experienced in tie replacement work, performed quality control work daily, and would have Railway redo work Metro North deemed deficient. Moreover, under the common law and Labor Law 200, Metro North is liable for Railway's negligence, as well as its own negligence.

Furthermore, had the subject tie car been inspected by Metro North and properly repaired, the ties therein would not have been skewed; thus, the Incident would never have occurred.

Ploss's distance from the Incident and Metro North's failure to provide a radio to its personnel were also contributing factors to the Incident. Additionally, the dangerous activity plaintiff engaged in had been occurring for 20 minutes before the Incident, during which time, Metro North should have appreciated the situation and intervened.

Plaintiff further argues that Metro North is liable under Labor Law 241(6) by violating Industrial Code § 23-9.2(a) in failing to conduct necessary inspections of the tie car and remove all defects therein. Here, notice of defects existed, based on the period in which the tie cars were in Metro North's exclusive control. And, as noted above, 49 CFR(c) 229.41 was violated in that the gantry wheels lacked guards.

As to Railway's motion for summary judgment (discussed, *infra*), plaintiff states that his submission shall act as opposition thereto only if the court finds an issue of fact as to plaintiff's FELA claims against Metro North. In any event, Railway had actual notice of defects on the tie car, constructive notice in that the gantry lacked statutorily required wheel guards, and Railway was negligent in moving the gantry and directing the dunnage work as it did herein.

The Railway Defendants' Reply

The Railway Defendants maintain that no evidence has been submitted addressing their arguments for dismissal as against Savage. The opposition is hearsay based in counsel's affirmation. And, Plant's and Lewis's presence alone is insufficient to demonstrate "control" over Railway, Savage's subsidiary.

Plaintiff can be an employee under the Workers' Compensation Law of both STM and Railway, as Railway supplied the subject equipment, directed and supervised plaintiff, and the Employment Contract required plaintiff to submit to Railway's command.

Lastly, Metro North's cross-claims for indemnification should be dismissed because the evidence shows that Metro North itself was negligent.

The Railway Defendants' Opposition

As to plaintiff's cross-motion, the Railway Defendants challenge plaintiff's Labor Law 241(6) claim, contending that Industrial Code violations are not "catchalls," and by pointing out that plaintiff abandoned all but one of its alleged Industrial Code violations by failing to discuss same in his cross-motion/opposition. Notwithstanding, an Industrial Code violation is only some evidence of negligence, and cannot form the basis for summary judgment in plaintiff's favor. And, Section 23-9.2 is inapplicable, as it does not refer to railroads, and other regulations in its subpart refer to non-railroad equipment. Moreover, the evidence shows that plaintiff was comparatively negligent, which here, creates an issue of fact as to liability.

With respect to Metro North's motion, the Railway Defendants also support plaintiff's arguments regarding his FELA claim against Metro North. Plaintiff testified that Cunningham was one of his supervisors; he took instruction from Metro North; complained directly to Cunningham; Metro North performed quality control work; and Metro North previously performed pre-Project maintenance on the P-811 in a related project. Additionally, before the Project, plaintiff was once terminated by Railway; yet, Cunningham modified this action and deemed plaintiff merely as "suspended." Also, prior to the Project, Metro North directly supervised plaintiff on a number of occasions.

And, during the Project, Metro North directed where new tie clips were to be placed. Also, Cunningham would override Versluis regarding plaintiff's position on the job site. Railway further noted Cunningham's testimony in which he stated that he controlled Railway workers to

the degree the work "affected Metro North operations."

Augello testified that when Metro North would load the tie cars, it was required to ensure that the ties were stacked so that they could have been picked up by the gantry, and that if problems were noted, Metro North employees were required to advise either himself or Cunningham.

As to indemnification, Railway and CANAC, Inc. argue that a party cannot obtain indemnification for its own negligence. And, there has been no finding that Railway or CANAC, Inc. were negligent or that same was a proximate cause of the Incident. Additionally, there is an issue as to whether plaintiff's action was the sole proximate cause thereof. Likewise, common law indemnification is unwarranted due to issues regarding Metro North's own negligence.

Metro North's Reply/Opposition to Plaintiff's Cross-Motion

As to FELA, plaintiff fails to demonstrate that Metro North was anything but a landowner with safety interests in the Project, and fails to make a demonstration as to Metro North's purported control and supervision of him. Plaintiff testified that Versluis and Hardman were his supervisors, and did not testify that Metro North gave him specific, daily instructions. Mlynaryk likewise testified that Cunningham did not give such daily orders. Kerman testified that Metro North did not "control" the work on the Project. Ploss and Cunningham testified that Metro North only had "general oversight" over the Project, and Versluis testified that he was unsure that Metro North could stop work without his permission. Metro North's role did not involve the operation of the P-811 or gantry, and how to lay ties.[35]

As to plaintiff's common law and Labor Law 200 claims, Metro North contends that it

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[35] Metro North Reply/Opposition, pp. 3-6.

owed no duty to plaintiff to inspect the tie cars, as plaintiff is a third party to the Contract. And, there is no showing that Metro North launched a force of harm, displaced any obligation of Railway to inspect or repair the tie cars, or that plaintiff detrimentally relied on the Contract.

Even assuming Metro North owed such a duty, it did not breach any duty to plaintiff. The Contract does not define "interchange," and Metro North's inspections were limited to whether tie cars could travel safety on tracks regarding clearance issues and issues regarding the third rail. Also, Cunningham, and Metro North representatives Lambregtse and Rodrigues, attest that the interchange is the point where and when Metro North is delivered equipment. Lambregtse, who drafted the Contract, stated that Metro North and Railway understood that inspections under Article 6.5 therein were limited to the issue of safe travel. It was further understood that inspections were governed by Metro North's own operating equipment instructions. Rodrigues further states that the only time Metro North would inspect or address timbers if they extended from the side (*i.e.*, a "shifted load"), which was not the case here. The tie car problems here were unrelated to transportation; that the ties were too far down does not equate to a finding that they stuck out from the side of the tie car and affected transportation.[36]

Also, plaintiff cites no authority for his claim that a violation of the AAR Rules of Interchange (88-95) constitutes negligence. Thus, under the case law, plaintiff's expert's conclusion that such a violation equals negligence is speculative.

In any event, the alleged defective tie car was not the proximate cause of the Incident. The Incident was caused by plaintiff's failure to pay attention and/or by Railway's negligence, not by Metro North's alleged failure to inspect and/or remedy the timbers. On this note, a landowner

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[36] Metro North Reply/Opposition, pp. 37-41.

is not the insurer of everyone's safety, and at most, Metro North may have furnished the occasion for the Incident. Moreover, plaintiff's and Railway's actions were intervening causes that remove any possible liability from Metro North.

Furthermore, Metro North had no duty to inspect the gantry. The Contract required Railway to inspect and repair the gantry, not Metro North. Also, the gantry is not a "locomotive" under the authority cited by plaintiff. Thus, all of Johnson's claims based on section 229.41 of the CFR are speculative. Moreover, guards that would have been placed on the gantry wheels are to remove and clear debris, and not for worker safety. Plaintiff cites to no reliable evidence that a guard was meant to protect against an injury, or that it would have prevented the Incident.

Metro North has no duty to plaintiff to have radios, and Johnson's opinion that radios would have prevented the Incident is speculative.

Metro North's Opposition/Reply to the Railway Defendants' Motion

Metro North contends that Railway and CANAC, Inc. fail to meet its burden for dismissal of Metro North's cross-claims. The indemnification provisions in the Contract are undisputed, and Railway makes no arguments regarding common law indemnification. Plaintiff indisputably sustained a "grave injury"; thus, Railway's arguments regarding the Workers' Compensation law must fail. Railway also admits that it supervised plaintiff.

Moreover, Railway is subject to plaintiff's Labor Law claims if the FELA claims are dismissed, as the Bill of Particulars alleges FELA violations against all defendants. Additionally, there are issues of fact whether plaintiff was Railway's special employee, as he was actually employed by STM.

Plaintiff's Reply in Support of Its Cross-Motion

As to FELA, case law provides that railroads have a duty to inspect property and equipment, and can thus be liable for resulting injury. Metro North was concerned with other issues beyond safety, in that it exercised the requisite control and supervision over plaintiff, as it reviewed Railway's work twice daily, and ordered modifications to ties (regarding spacing/measuring and tie placement, generally).

Metro North misrepresents the witnesses' testimony. Mlynaryk did testify that Cunningham controlled the job site and had authority. The Contract demonstrates that Metro North also had authority over actual work methods employed by Railway. Ploss confirmed these facts at his deposition, which negates his other testimony that he was only there to look out for safety issues and problems involving other tracks. Further, Article 7.01 of the Contract, although it delegated supervisory responsibilities to Railway, did not actually preclude Metro North from also assuming such duties (as it did). And, Metro North's cited case law is entirely distinguishable from the facts at hand.

As to Labor Law 241(6), Section 23-8.1 of the Industrial Code applies to cranes and should be applicable herein. Metro North's motion only stated that this section was inapplicable because it "applies to boom cranes and derricks"; however, the section clearly states that it applies to "mobile cranes" as well. Also, Metro North had a non-delegable duty under this section of the Labor Law to provide a safe work place for plaintiff; the facts clearly show this did not occur.

As to common law negligence, the ties were negligently loaded by Metro North, as they were skewed and could not be picked up by the gantry. Augello admitted that Metro North should have apprised someone in authority of this unsafe situation. Moreover, Metro North

confuses the applicable standard, as plaintiff need not show that Metro North's negligence in this regard was *the* proximate cause of the Incident, but only *a* proximate cause.

Metro North's failure to intervene, was due to a lack of knowledge, and not due to a lack of authority. And, significantly, Metro North fails to submit an expert affidavit to refute Johnson's opinions.

Metro North fails to overcome plaintiff's arguments regarding inspection at interchange. The Contract itself requires such an inspection that conforms to the FRA and AAR. Additionally, this duty has roots in the common law. In the cases cited by Metro North, the land owner did not exercise such dominion or control over the property or equipment. And, Metro North's argument regarding the lack of duty to plaintiff under the Contract fails because plaintiff was effectively an employee of Railway, a party to the Contract.

Here, Metro North created or caused the defective condition, as it increased plaintiff's risk of harm. The plywood was ineffectively spiked to the timbers by Hardman before Metro North took control of the tie cars, which it did nothing to remedy. And, the defect that caused the skew (improper loading) occurred when the subject tie car was in Metro North's exclusive possession. Moreover, plaintiff relied on the Contract's performance because he relied on Metro North to inspect and maintain the consist and all parts thereto.

The new affidavits submitted by Metro North do not show when or how an inspection took place, and, some of the affiants (*e.g.*, Rodrigues) lack personal knowledge of the facts. Due to the lack of proof regarding an inspection, it is clear that Metro North breached Article 6.5 of the Contract. And, not only do Johnson's claims regarding apparent defects remain unchallenged, Metro North submits no evidence indicating that it ever inspected the gantry.

The evidence overwhelmingly indicates that Metro North had control over plaintiff's work. Examples include the following: testimony that Metro North had track men clearing debris and ties; Ploss was generally situated at the "point of production"; Cunningham did not deny stating to plaintiff that "your a*s is mine"; Railway worked only on the Project in 2009 and on no other projects; and plaintiff was paid on Metro North property.

Discussion

As to motions for summary judgment, it is well established that the "proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" *(Winegrad v New York University Medical Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). However, the moving party must demonstrate entitlement to judgment as a matter of law (*id.*), and the failure to make such a showing will result in the denial of the motion, regardless of the sufficiency of the opposing papers (*Johnson v CAC Business Ventures, Inc.*, 52 AD3d 327, 859 NYS2d 646 [1st Dept 2008]; *Murray v City of New York*, 74 AD3d 550, 903 NYS2d 34 [1st Dept 2010]).

FELA (45 USC § 51, et seq.) was enacted in 1908 to provide a federal remedy for railroad workers who suffer personal injuries as a result of negligence of their employer or their fellow employees (*see Atchison, Topeka and Santa Fe Railroad Co. v Buell*, 480 US 557 [1987]). As such, under FELA, railroads are liable only to their employees, and only for injuries sustained in the course of employment.

There are "three methods by which a plaintiff can establish his 'employment'" with a

railroad under FELA even while he is technically employed by another; by showing that (1) plaintiff was a "borrowed servant" or "special employee" of the railroad at the time of his injury; (2) the "dual servant" theory where he is acting "for two masters simultaneously; or (3) the plaintiff was a "sub-servant" of the company that was in turn a servant of the railroad (*Kelley v Southern Pac. Co.*, 419 US 318 [1974]).

Restatement, Agency 2d, Section 220 defines a "servant" as one who is "employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." It further illustrates factors relevant to "control," which include: (1) the extent of control which by agreement the railroad may exercise over the details of the work; (2) whether or not the one employed is engaged in a distinct occupation or business; (3) the kind of occupation with reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer supplies the tools and the place of work; (6) the length of time for which the person is employed; (7) the method of payment; (8) whether or not the work is a part of the regular business of the employer; (9) whether or not the parties believe they are creating the relation of master and servant; and (10) whether or not the principal is or is not in business.

Notwithstanding, no one factor is decisive because each case revolves around its peculiar facts (*see Missouri-Kansas-Texas Ry. Co. v Hearson*, 422 F2d 1037 [10th Cir 1970] (despite fact that plaintiff was paid by an independent contractor to the railroad, and that the contractor supplied the tools plaintiff used for his work, the record was "replete" with testimony that railroad controlled the significant parts of the subject car-cleaning operation, including the fact

that the railroad's yardmaster determined which cars plaintiff should clean and told him where they were; it was further unimportant that the railroad was not "looking over [plaintiff's] shoulder" when he was working)). In *Missouri-Kansas-Texas Ry. Co.*, in which the court determined plaintiff was a railroad employee, the evidence established that if the railroad's yardmaster gave plaintiff instructions, plaintiff should have, and would have, complied.

The central factor establishing employment under *all* three theories is whether the railroad exercised control over the physical conduct of the purported employee's work operations (*id.* at 325-326) (emphasis added). Notably, the "extent of the actual supervision exercised" by the employer over the "means and manner" of the worker's performance is the most important element to control (*see North American Van Lines, Inc. v National Labor Relations Board*, 869 F2d 596, 599 [DC Cir 1989]). Thus, full supervisory control is not necessary; rather, the railroad must play a "significant supervisory" role as to the individual's work (*see Ancelet v National R.R. Passenger Corp.*, 913 F Supp 968 [ED La. 1995]). And, the requisite "control" is different than the "passing of information and the accommodation that is obviously required in a large and necessarily coordinated operation" (*Ancelet, supra at* 973).

Beyond formal factors of control, other relevant factors to determine whether an individual is an "employee" of the railroad include the following: (1) whose work is being performed; (2) was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer; (3) did the employee acquiesce in the work situation; (4) did the original employer terminate his relationship with the employee; (5) was the employment over a considerable length of time; and (6) who had the right to discharge the employee (*see Smith v MTA*, 226 AD2d 168, 641 NYS2d 8 [1st Dept 1996], *citing Melancon v Amoco*

Production Co., 834 F2d 1238 [5th Cir 1988] (regarding "borrowed employee" test, (although oil company could not terminate plaintiff's employment with his direct employer, it had the right to terminate the subcontractor's services by asking that he be replaced by another welder at the worksite[37])).

Kelley (*supra*), although factually distinct, is instructive to illustrate the complex concept of "control" under FELA. In *Kelley*, the defendant trucking company was primarily engaged in operations in conjunction with the defendant railroad, which was its parent company. The trucking company was responsible for unloading automobiles from defendant's three-level flatcars. Although the subsidiary maintained the operation on the railroad's yard on a permanent basis, the railroad inspected the cars for safety, railroad supervisors would from time-to-time advise or consult with the subsidiary's employees, and there were various other contacts between the railroad's employees and plaintiff about matters such as how long plaintiff's work would take. Thus, the United States Supreme Court found that plaintiff was not the railroad's borrowed employee.

Vinyard v Missouri Pac. R.R. (632 SW2d 272 [Mo Ct App 1982]), is instructive. Therein, plaintiff sustained injuries while unloading a railroad car. In finding that there was sufficient evidence of plaintiff's employment under the dual servant theory, the Court noted plaintiff's testimony that, *inter alia*, a railroad official directed, supervised, and controlled "the details" of how plaintiff performed his work, and directed the crew to adjust or reload the cars as

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[37] *Melancon* (*supra*), although not decided under FELA, considered the factor of who has control over the employee and his/her work under the "borrowed employee" standard for purposes of determining whether a federal workers' compensation statute barred the injured employee's action against an oil company as his "employer."

it saw fit.[38]

Buccieri v Illinois Central Gulf Railroad (235 Ill App3d 191, *lv denied*, 148 Ill 2d 640 [1993]), is similarly illuminating. The contract between the railroad and subcontractor "TLI" (which employed plaintiff) provided that the subcontractor's employees remained "exclusively" its employees. It also provided, *inter alia*, that the railroad could remove any crew member from the job site, while the subcontractor was responsible for conducting safety/operational meetings and disciplining its employees. Additionally, the railroad was responsible for advising the subcontractor of its expected rail volume; in turn, the subcontractor supplied the appropriate number of workers. And, the railroad was "in charge" of inspection of trains. All workers reported to the railroad's job site daily and not to the subcontractor's office.

The court found issues of fact as to whether the plaintiff was an employee of the railroad. The Court noted that no one from TLI supervised the daily activities of the plaintiff (or of the TLI crew), thereby enabling a jury to potentially infer that the railroad performed that function. The Court also noted that the railroad's employees inspected the TLI crew members' work, and directed TLI crew members to correct mistakes that were made. Therefore, the record raised an issue as to whether the railroad controlled or had the right to control plaintiff's activities to render him a employee for FELA purposes (235 Ill App3d at 200).[39]

Smith, relied upon by Metro North, like *Kelley*, is inapposite. In *Smith*, plaintiff was

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[38] In *Vineyard*, the defendant railroad also inspected the subject railroad cars, and supplied the car on which he was working at the time of the incident.

[39] The *Buccieri* court distinguished its facts from *Kelley (supra)*, noting that even though the railroad's employees consulted with the subcontractor's employees about the unloading process, it was the subcontractor's supervisors that "controlled and directed the day-to-day operations [in the yard]" whereas in *Buccieri*, "no TLI supervisor presided over the daily activities as of plaintiff . . . ." *(Buccieri*, 235 Ill App3d at 199-200).

technically employed by an independent contractor (retained by Metro North) to perform weed-killing services on Metro North property. The independent contractor's employees supervised and directed its employees, including plaintiff; hired plaintiff and had the right to fire or discipline him; furnished all the equipment and supplies used by plaintiff; and trained and paid plaintiff; and plaintiff's work on Metro-North property was seasonal and non-continuous and he only worked there briefly. Metro North merely coordinated the independent contractor's work with its own ongoing operations. Therefore, the Court found "as a matter of law, that in all material respects, plaintiff's employer," was "Asplundh," and not Metro North.

Further, *Ancelet* (*supra*), cited by Metro North, although useful for its summary of the relevant case law, is factually inapposite. The court therein found that "supervisory control" was absent because plaintiff was not permanently assigned to the railroad's premises, was not performing traditional railroad work at the time of his injury (plaintiff performed pest control work; not the work of defendant railroad), and was not supervised by railroad personnel in performing his specialized services; rather, plaintiff's interaction with railroad personnel was in the nature of cooperation and consultation. Notably, the *Ancelet* court distinguished its facts with those of *Lindsey v Louisville & Nashville Railroad* (775 F2d 1322 [5th Cir 1985]), in which there was evidence that railroad employees gave directions as to the cars to be unloaded and occasionally issued specific orders and instructions to the contractor's personnel. Also, in *Lindsey*, a railroad employee was the "boss" of the contractor's crew and inspected their work. The contractor's employees were permanently assigned to the railroad yard and never reported to the contractor's place of business even to collect their pay. And, the *Lindsey* plaintiff was performing traditional railroad work (loading and unloading flatcars) when his incident occurred.

Since the "focus here is not on who controls the result of the work but who controls the detailed performance of the work . . . and it is the right or power of control that is important, not necessarily the exercise of that right or power" (*Vinyard*, 632 S.W.2d at 275, *citing Byrne v. Pennsylvania R. Co.*, 262 F.2d 906, 913 [3d Cir. 1959[), a discussion of the relevant Contract provisions is appropriate.

Article 7.01 of the RFP provided that Railway "shall operate as, and have the status of, an independent contractor and shall not act as, or be, an employee or agent of Metro North. [Railway] shall employ, pay from its own funds, and discharge all persons engaged in the performance of [the Project], and such persons shall be under [Railway's] supervision, direction and control, subject to general oversight and guidance of [Metro North]." (MN, exh. S, p. 67).

The Contract further provided that Railway's personnel "will be required to comply with Metro North system-wide safety rules," and that Metro North "has the authority to require that any employee of [Railway] who fails to observe these rules be removed from the property." (MN, exh. S p 138).

The Contract's "Project Staffing Chart" listed Metro North above Railway and at the top of the Project's hierarchy (MN, exh. S p 162). The RFP and Scope of Work contained therein further provided the following:

> •[Railway] will assign sufficient personnel with demonstrated competence in the [Project] set forth in the Work Scope. The credentials of such personnel will be submitted to Metro North for review and approval if requested by Metro North. (MN, exh. S p 48)
>
> •[Railway] may not substitute any employee specifically identified in the Proposal as providing services in connection with the Contract without Metro North's written approval of the substitution and of the replacement employee. Such approval will be at the sole discretion of Metro North. Substitution will be allowed in cases of termination of employment subject to Metro North's review and written approval of the replacement.

(MN, exh. S p 48)

• Metro North's "Quality System" shall be used in conjunction with the above technical specifications (MN, exh. S p 135)

• Work may be performed during daylight or night shifts. Metro North reserves the right to work in excess of forty hours per week, more than eight hours per day, more than five days per week, or more than one shift per day . . . It is the responsibility of the Metro North Project Manager to determine and direct the sequence of work. (MN, exh. S p 136)

• The work schedule will be determined by the production rate of the concrete tie installation. [Metro North's] Project Managers will generate the schedule for the installation of concrete ties which [Railway] is required to follow (MN, exh. S p 137)

• Tie rack cars to be supplied by [Railway] shall meet all minimum requirements set forth by the FRA and AAR and meet interchange regulations. Tie cars will be inspected by Metro North at time of interchange (Scope of Work, Article 6.5; MN,, exh. S p 137)

•[Metro North] reserves the right to change the schedule, the locations of work and the quantities of ties to be installed (MN, exh. S p 138).

The record contains facts which support both Metro North's and plaintiff's respective positions, therefore creating triable issues of fact as to whether plaintiff was an "employee" of Metro North for purposes of FELA (*see Kobe v. Canadian Nat. Ry. Co.*, 2007 WL 2746640 [D Minn 2007], *citing Baker*, *supra* (the issue of whether a person is an employee of a railroad under FELA is a question for the jury to decide when reasonable minds could not reach differing conclusions)). Here, the record shows that reasonable minds could reach differing conclusions as to whether plaintiff was a Metro North "employee." As such, both Metro North's and plaintiff's motions as to this issue must be denied.

Metro North fails to meet its *prima facie* burden on summary judgment. Its argument that Article 7.01 mandates dismissal of the FELA claim is unavailing. The reality of a work site and the parties' actions in carrying out a contract can impliedly modify, alter, or waive express

contract provisions (*see Melancon*, 834 F2d at 1245 ("In the case at bar, [defendant subcontractor] clearly understood that [plaintiff] would be taking his instructions from [defendant railroad], notwithstanding Provision 6 of the contract")). The parties' actions indicate that Metro North may have controlled and supervised the Project and its crew, including plaintiff, despite Article 7.01.

Further, its own submissions demonstrate that the record supports both plaintiff's and Metro North's positions. Facts which support Metro North include the following: (1) testimony that Railway owned/inspected/maintained the tie cars in 2008; (2) testimony that Versluis had discretion to address the issue of the inability to pick up the bottom row of ties; (3) Versluis was the supervisor who directed plaintiff to perform the subject dunnage task leading up to the Incident; (4) Railway technically owned the subject equipment; (5) STM paid plaintiff; plaintiff's work was seasonal; and (6) Railway specialized in using the P-811 and gantry.

The following facts support plaintiff's position: (1) Metro North and Railway were in the same business of railroad work (all parties were experienced in laying and replacing tracks and ties, and Metro North had a year-round crew of 40 who performed such work); (2) Metro North had the authority to remove any on site worker at any time; (3) Ploss was on site daily at the point of production; (4) Cunningham stated to plaintiff that "your a*s is mine"; (5) Ploss had authority to halt all production at any time; (6) Ploss had authority to reprimand workers directly; (7) Ploss's presence at daily safety meetings; (8) Ploss's admission that if he saw the subject dunnage work combined with gantry operations, he would have stopped work himself; (9) Ploss would tell the crew not to work a certain way if he saw something he did not like the previous day; (10) Metro North's role in loading and moving ties to the job site; (11) Metro North's

installation of ties (as per Augello's testimony); (12) testimony that Metro North had the "final word" and would address issues without consulting with Railway beforehand (*e.g.*, Kerman admitting that he would stop the gantry if Metro North supervisors told him to); and (13) Ploss's familiarity on the Project with the scenario of skewed ties, and how if he encountered same, he would call a boom truck, and a Metro North worker would perform necessary work.

Significantly, Metro North performed quality control work twice per day, and would order modifications and repairs regarding tie work related to spacing, measuring, and "dipped-down" ties. And, as is plainly evident above, various Contract provisions suggest Metro North had authority over the entire crew's work (including those related to quality control, time of work, replacement of rail, work schedules, and the locations of work and the quantities of ties to be installed).

In light of the above, plaintiff also fails to meet its *prima facie* burden on summary judgment. In addition to the rule of *Baker*, *supra*, plaintiff cites no case law in which a court granted summary judgment in favor of a plaintiff as to this issue; rather, plaintiff's cases involved jury trials or concerned the denial of a summary judgment motion made by the defendant.

Accordingly, questions of fact exist as to whether Metro North exercised sufficient "control" over plaintiff's work, and thus, whether plaintiff is a Metro North "employee" under FELA so as to render this statute applicable.[40] As such, both Metro North's and plaintiff's motions as to FELA are denied.

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[40] And, as noted above, since the court cannot determine whether FELA is applicable, it cannot address the issue of Metro North's purported negligence under that statute.

Further, Metro North fails to establish that plaintiff's FELA cause of action preempts his Labor Law claims against Metro North as a matter of law. *Longo v Metro-North Commuter R.R.* (275 AD2d 238, 712 NYS2d 531 [1st Dept 2000]), cited by Metro North, is factually inapposite, as it was undisputed that the plaintiff therein was a Metro North employee. Here, it cannot be determined, as a matter of law, whether plaintiff was an "employee" of Metro North under FELA. Thus, although *Longo* stands for the proposition that when FELA is applicable, State claims are preempted, at this juncture, it is unclear if FELA is applicable. As such, plaintiff, who is permitted to plead in the alternative (*see* CPLR 3014, 3017(a); *Lemle v Lemle*, 92 AD3d 494, 939 NYS2d 15 [1st Dept 2012]), may maintain his non-FELA claims.[41]

Notwithstanding, because the issue of federal preemption of state law claims is a threshold issue which cannot be determined on this motion, the court cannot address plaintiff's non-FELA claims at this juncture (*see In re Joy Global, Inc.*, 346 BR 659, 662 [D Del 2006] (threshold issue of preemption should have been resolved prior to resolution of state law issue); *Roemen v Federated Mut. Ins. Co.*, 2010 WL 2228349, *4 [D South Dakota 2010] ("whether or not . . . preemption applies in a case is a mixed question of law and fact, and a threshold issue which determines how the case will proceed"); *Wealleans v Provident Life and Acc. Ins. Co.*, 1997 WL 382042, * 2 [CD Cal 1997] ("It is true that almost all federal courts address preemption

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[41] *See also Stevens v Trona Ry. Co.*, 2009 WL 362114, * 2 [CD Cal 2009] ("[Plaintiff may plead both his FELA claims and his state law claims, *although they are inconsistent legal theories*") (emphasis added); *Aguirre v Union Pacific R. Co.*, 20 Neb App 597, 600 [2013] (in permitting a laborer to file a second action based on common law negligence after his initial action based on FELA was dismissed on the grounds that he was not a railroad employee, the court ruled that *res judicata* did not apply, and stated, "if the plaintiff is not an employee of the defendant railroad, the FELA does not apply . . ."); *Krentkowski v Norfolk Southern Ry. Co.*, 1997 WL 159517 [ND Illinois 1997] (in a complaint alleging both FELA and common law claims, the Court denied the railroad's motion for summary dismissal of the FELA claim denied due to issue of fact as to whether plaintiff was employee of railroad).

as a threshold matter, and properly so. For example, it would be improper to adjudicate a state law claim before addressing the issue of preemption where the federal law provides some remedy in place of the state law claim"); *Rivera v Philip Morris, Inc.*, 395 F3d 1142, 1145 [9th Cir 2005] ("As a threshold issue, we first determine whether any of [plaintiff's] state law claims are preempted by federal law")). Here, the issue of whether FELA is applicable so as to preempt the state law claims remains undetermined on this motion, thereby precluding the Court from further inquiry as to plaintiff's non-FELA claims.

Moreover, the branch of the MTA and Metro North's motion regarding contractual and/or common law indemnification from Railway and/or CANAC, Inc. must be denied, as it is well-settled that a party seeking indemnification must prove that it was free of negligence (*see Lewis-Moore v Cloverleaf Tower Housing Development Fund Corp.*, 26 AD3d 292 [1st Dept 2006]; *Edenwald Contracting Co., Inc. v Northern Ins. Co. of New York*, 289 AD2d 370 [2d Dept 2001] (common law indemnification claim dismissed because defendant seeking indemnification was negligent); *Keller v Kruger*, 39 Misc 3d 720 [Sup Ct Kings Cty 2013] (motion for summary judgment as to contractual indemnification denied when defendant failed to establish that it was free of negligence)). Given that the issue of whether Metro North was negligent (and whether such negligence was a proximate cause of plaintiff's injuries) cannot be determined on this motion, the issue of Metro North's purported negligence under all theories of liability remains open. Likewise, the branch of the Railway Defendants' motion seeking to dismiss Metro North's claims for indemnification against Railway must be denied.[42] [43]

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[42] The court also notes that it is undisputed that plaintiff sustained a "grave injury"; namely, the loss of multiple fingers. Thus, although the court cannot yet resolve Metro North's claims for indemnification, the claims are not subject to dismissal for lack of a grave injury (*see* Workers Compensation Law § 11; *Manganello v*

Regarding plaintiff's common law negligence and Labor Law claims against Railway, such claims cannot be dismissed based solely on the existence of the FELA claim against Metro North. It is undisputed that Railway is not a "railroad" subject to FELA. Further, in *Longo*, the First Department reinstated the Labor Law claims against the non-railroad defendant in the action, even though it dismissed those same claims against the defendant railroad based on FELA preemption (*Longo*, 275 AD2d at 238-240). Thus, dismissal of plaintiff's non-FELA claims against the Railway Defendants on the ground that plaintiff asserts a FELA claim against Metro North is unwarranted.

Further, the branch of the Railway Defendants' motion to dismiss plaintiff's non-FELA claims against Railway and CANAC, Inc. based on Worker's Compensation Law § 11's exclusivity provisions is denied, as these defendants fail to meet their burden. Section 11 provides that an employee may not sue his or her employer for injuries arising out of and in the course of the employment (*see Banegas v Farrell Bldg. Co., Inc.*, 2014 WL 3615885 [Sup Ct New York Cty 2014]; *Burke v Torres*, 120 AD2d 283, 509 NYS2d 11 [1st Dept 1986]). Moreover, the section applies to a "special employer" which, although it does not technically employ the plaintiff, is considered as such due to the entity's daily supervision, direction and

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Hamilton, 12 Misc3d 1178(A), 824 NYS2d 763 [Sup Ct Queens Cty 2006]).

[43] Notwithstanding, the branch of the Railway Defendants' motion to dismiss the MTA and Metro North's indemnification claims against Savage and CANAC, Inc. is granted. As noted above, Savage has no legal connection to, or responsibility, regarding the Incident. And, inasmuch as it is undisputed by the parties that CANAC, Inc. changed its name to [Railway] before the essential events leading up to the Incident, that the Contract was between Metro North and Railway, and MTA and Metro North do not expressly argue that CANAC, Inc. is independently liable under any theory of indemnification, the only party against which indemnification may potentially hold is Railway. The cross-claims for indemnification are not compromised by the dismissal of CANAC, Inc. from this action, as the claims against Railway in this regard remain open. And, because the Contract was between Metro North and Railway, the branch of the Railway Defendants' motion to dismiss the MTA's indemnification claim against Railway is granted.

control over the plaintiff (*see Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 578 NYS2d 106 [1991]; *Maldonado v Canac Int'l, Inc.*, 258 AD2d 415, 685 NYS2d 715 [1st Dept 1999]; *Brooks v Chemical Leaman Tank Lines*, 71 AD2d 405, 422 NYS2d 695 [1st Dept 1976]). This is the case even when the formal employer pays wages, and is responsible for maintaining workers' compensation and other benefits (*see Maldonado*, *supra*; *Thompson*, *supra*).

However, a finding of "special employment" in the context of Section 11 is justified only where the purported special employer exerts "complete and exclusive" control over the purported employee (*see Bellamy v Columbia Univ.*, 50 AD3d 160, 851 NYS2d 406 [1st Dept 2008] ("special employment will not be found absent a 'clear demonstration of surrender of control by the general employer and assumption of control by the special employer'"); *Sanfilippo v City of New York*, 239 AD2d 296, 657 NYS2d 423 [1st Dept 1997]). Although the evidence suggests that Railway supervised and controlled plaintiff's work, the court has noted in great detail above that the record contains evidence that Metro North also supervised and controlled plaintiff's work. Railway does not address such evidence in its moving papers, and thus fails to meet its burden on summary judgment, as it fails to establish its "complete and exclusive" control.

Nevertheless, the court grants the branch of the Railway Defendants' motion to dismiss plaintiff's Labor Law 241(6) claim against them. Section 241(6) requires owners and contractors to provide reasonable and adequate protection and safety for workers, and to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 [1993]).

To establish liability under section 241(6), the plaintiff must specifically plead and prove the violation of an applicable Industrial Code regulation which contains concrete specifications,

as regulations which establish only general safety standards are not legally sufficient predicates for an action under the statute (*Ross*, 81 NY2d at 502-504). Such regulations are not "catch-all provisions," and do not apply to equipment not specifically listed in the regulation (*see Conforti v Bovis Lend Lease LMB, Inc.*, 37 AD3d 235, 829 NYS2d 498 [1st Dept 2007]).

Because, as the Railway Defendants contend, the two remaining Industrial Code provisions at issue -- sections 23-9.2(a) and 23-8.1.(i) -- are inapplicable to railroads, the replacement of railroad ties, gantries, or to track replacement machines, the Railway Defendants are entitled to dismissal of plaintiff Section 241(6) claim.

Industrial Code § 23-9.2 provides, in pertinent part, that:

> "all power-operated equipment shall be maintained in good repair and in proper operating condition at all times. Sufficient inspections of adequate frequency shall be made of such equipment to insure such maintenance. Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement."

Yet, the section contains no mention of any of the equipment involved in this action. Moreover, plaintiff, in reply, fails to address defendants' arguments as to this section and essentially concedes the section's inapplicability, and thus is deemed to have abandoned its claim (*see Patmos Fifth Real Estate Inc. v Mazl Bldg. LLC*, 40 Misc3d 1220(A), 975 NYS2d 711 [Sup Ct New York Cty 2013], *citing Kronick v L.P. Thebault Co., Inc.*, 70 AD3d 648, 892 NYS2d 895 [2d Dept 2010]).

On this note, plaintiff, in reply, attempts to argue that instead, Industrial Code § 23-8.1(i) is applicable. This section provides, in pertinent part, that "exposed moving components or parts of mobile cranes, tower cranes and derricks such as gears, set screws, projection keys, chains, chain sprockets and reciprocating parts which might constitute a hazard under normal operating

conditions shall be guarded and such guards shall be securely fastened in place." Again, however, there is no mention of the specific railroad-related equipment at issue herein. And, plaintiff cites no authority for its assertion that the section applies to gantries. Thus, because the Industrial Code sections are not "catch-all" provisions in the context of Labor Law 241(6) liability, section 23-8.1(i) cannot support plaintiff's cause of action.[44]

Lastly, the Railway Defendants' motion to dismiss plaintiff's Labor Law and common law negligence claims on the ground that plaintiff was the sole proximate cause of his injuries is unwarranted.

Where a plaintiff's actions are the sole proximate cause of his injuries, no liability under the Labor Law or under a common law negligence theory may attach (*see Kerrigan v. TDX Const. Corp.*, 108 AD3d 468, 970 NYS2d 13 [1st Dept 2013]). Here, although Versluis testified that he received confirmation from plaintiff that he was "clear" for the gantry to proceed, plaintiff attests that Versluis (or anyone else) did not in fact give such a warning, and that he was unaware that the gantry was passing at the time of the Incident. Moreover, there is substantial evidence in the record which calls into question of, *inter alia*, the nature of the subject tie car, Metro North's role in the Incident, and the propriety of Versluis's decision to direct plaintiff in prying ties with dunnage. Accordingly, as the Railway Defendants fail to establish entitlement to dismissal on this theory, summary judgment on this ground is not warranted due to these issues of fact.

Conclusion

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[44] Notwithstanding the court's discussion of FELA preemption as a threshold issue, plaintiff's Labor Law 241(6) claims against the MTA and Metro North are dismissed on this ground, as the record demonstrates that no applicable Industrial Code provision has been pleaded by plaintiff to support a Labor Law 241(6) against any defendant.

Based on the foregoing, it is hereby

ORDERED that CANAC Railway Services, Inc./Savage Services Corporation/CANAC Inc.'s motion for summary judgment (motion sequence 003) is resolved as follows: (a) the branch of the motion seeking dismissal of plaintiff's complaint and all cross-claims against Savage Services Corporation is granted, and the complaint against Savage Services Corporation are severed and dismissed with prejudice; (b) the branch of the motion seeking dismissal of plaintiff's complaint and all cross-claims against CANAC, Inc. is granted, and the complaint against CANAC, Inc. are severed and dismissed with prejudice; (c) the branch of the motion seeking dismissal of plaintiff's complaint against CANAC Railway Services, Inc. is granted to the extent that plaintiff's claims against CANAC Railway Services, Inc. based on FELA, Labor Law 240(1), Labor Law 241(6) and strict products liability are severed and dismissed with prejudice; (d) the branch of the motion to dismiss plaintiff's Labor Law 200 and common law negligence claims is denied as against CANAC Railway Services, Inc.; and (e) the branch of the motion to dismiss MTA's and Metro North's cross-claims for indemnification is (i) denied as to Metro North's indemnification cross-claims against CANAC Railway Services, Inc.; (ii) granted as to MTA's indemnification cross-claims against CANAC Railway Services, Inc.; and (iii) granted as to the MTA's and Metro North's cross-claims against Savage and CANAC Inc., and the MTA's indemnification cross-claims against CANAC Railway Services, Inc., and the MTA's and Metro North's indemnification cross-claims against Savage Services Corporation and CANAC, Inc. are hereby severed and dismissed. It is further

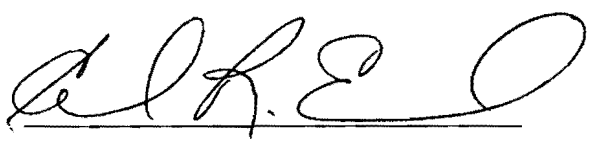
ORDERED that the MTA and Metro North's motion for summary judgment (motion sequence 004) is resolved as follows: (a) the branch of the motion seeking dismissal of plaintiff's

complaint and all cross-claims against the MTA is granted, and thus the complaint and all cross-claims asserted against the MTA are severed and dismissed with prejudice; (b) the branch of the motion seeking dismissal of plaintiff's complaint and all cross-claims against Metro North is granted to the extent that plaintiff's Labor Law 240(1), Labor Law 241(6), and strict products liability claims are severed and dismissed with prejudice; (c) the branch of the motion seeking dismissal of plaintiff's FELA, Labor Law 200, and common law negligence claims is denied; and (d) the branch of MTA's and Metro North's motion for summary judgment on their contractual and common law indemnification claims against CANAC Railway Services, Inc. and/or CANAC, Inc. is denied. It is further

ORDERED that plaintiff's cross-motion for summary judgment against Metro North on his claims for common law negligence and violations of Labor Law 200 and 241(6), and against Metro North and MTA on his claims under FELA, is denied in its entirety; and it is further ORDERED that plaintiff shall serve a copy of this order with notice of entry on all parties within 30 days of entry.

This constitutes the decision and order of the Court.

Dated: September 26, 2014



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD