Larkin v City of New York
2015 NY Slip Op 32094(U)
July 24, 2015
Supreme Court, New York County
Docket Number: 113998/09
Judge: Joan A. Madden
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

8/17/15

PRESENT: Hon Joan A. Madden PART 11
Justice

Index Number : 113998/2009
LARKIN, PETER
vs.
DEPT. OF ENVIRONMENTAL
SEQUENCE NUMBER : 006
PARTIAL SUMMARY JUDGMENT

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

The following papers, numbered 1 to ____, were read on this motion to/for Summary Judgmt

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision and Order

FILED
AUG 12 2015
COUNTY CLERK'S OFFICE
NEW YORK

GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL
RECEIVED
AUG 11 2015

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

Dated: July 24, 2015

_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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PETER LARKIN and LAURA LARKIN,

Plaintiffs,

-against-

Index No. 113998/09

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, WDF INC.,and METCALF & EDDY OF NEW YORK, INC.,

Defendants.

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WDF INC.,

Third-Party Plaintiff,

-against-

Third-Party Index No. 590012/10

S & M MECHANICAL CORP.,

Third-Party Defendant.

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THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION and WDF INC.,

Second Third-Party Plaintiffs,

Second Third-Party Index No. 590987/11

-against-

METCALF & EDDY OF NEW YORK, INC.,

Second Third-Party Defendant.

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S & M MECHANICAL CORP.,

Third Third-Party Plaintiff,

-against-

PRO SAFETY SERVICES, LLC,

Third Third-Party Defendant.

Third Third-Party
Index No. 590323/12

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Joan A. Madden, J.:

In this action arising out of injuries sustained by plaintiff Peter Larkin (Larkin) during a construction accident at a sewage treatment plant, third party defendant/third-third party plaintiff S&M Mechanical Corp. (S&M Mechanical) moves for partial summary judgment dismissing the third party claims asserted against asserted against it by WDF Inc. (WDF) for contribution, common-law indemnity, and breach of contract for failure to procure insurance. WDF opposes the motion (motion seq. no 006).

Second third-party defendant Metcalf & Eddy of New York, Inc. (Metcalf & Eddy) moves for summary judgment dismissing the complaint and second third-party complaint, and defendants' cross claims asserted against it.[1] Plaintiffs and the second

[1]As defendants' second third-party causes of action and their cross claims against Metcalf & Eddy are identical, they will be considered only once.

third-party plaintiffs oppose the motion (motion seq. no. 007).

Defendants and third third-party defendant Pro Safety Services LLC (Pro Safety) move for partial summary judgment dismissing the amended complaint and any cross claims or counterclaims asserted against them and the third third-party complaint against Pro Safety. Plaintiffs oppose the motion, and cross moves for partial summary judgment in their favor on the issue of defendants' liability under common-law negligence and Labor Law §§ 200 and 240 (1)(motion seq. no. 008).[2]

BACKGROUND

Larkin was injured on January 7, 2009, while working as a foreman and senior steamfitter for S & M Mechanical at a sewage treatment plant on Wards Island which was being upgraded ("the project"). The project entailed the erection of a new building, the blower building, and the refurbishment of an existing building, the Return Sludge Pump Station (RSPS).

At the time of the accident, Larkin was attempting to remove an end cap from a large pipe in order to connect that pipe to a second pipe. There was pressurized air in the pipe behind the end cap, and when Larkin loosened the studs connecting the end cap to the pipe, the 400-pound end cap burst and Larkin was knocked off the second step of the ladder on which he was

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[2]Motion sequence numbers 006, 007 and 008 are consolidated for disposition.

standing, causing him to fall and suffer injuries.

The City of New York (the City), acting through the City of New York Department of Environmental Protection (DEP), holds a long term lease for the site. DEP maintains and operates all 14 of the City's sewage treatment facilities, including the Wards Island waste water treatment facility at issue here. The City/DEP hired Metcalf & Eddy as both the construction manager and the resident engineer for the project. The City/DEP retained WDF, to perform rehabilitation/renovation of the RSPS and the new building. WDF retained S & M Mechanical, plaintiff's employer, as the steamfitter subcontractor. Pro Safety was engaged by WDF as a safety consultant.[3]

S & M Mechanical was responsible for installing and connecting the pipes for the two buildings, which were approximately 15 feet from each other, and tying in RSPS's old pipeline with the blower building's new one. The pipes were 36 inches in diameter. The pipe located in the RSPS was 30 feet long, and was "live," meaning it was pressurized. A butterfly /isolation valve had been installed to isolate the old pipe system from a new 12-foot pipe. The purpose of a butterfly valve

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[3]Although other parties maintain that Pro Safety was the safety "manager," the WDF/Pro Safety Consultant Agreement (WDF/Pro Safety Contract) specifically states that Pro Safety provides "safety consulting services" (WDF/Pro Safety Contract, first page). Managerial services are nowhere mentioned in the WDF/Pro Safety Contract.

is to connect new piping to old piping, and to stop the flow of air from the live side to the piping in the blower building had not yet been pressurized.

There was a "lock out/tag out" procedure at the project which is designed to inform workers as to whether a pipe was de-energized and safe to work on. The main purpose of locking out a valve is to prevent residual or trapped air behind the valve from releasing once the end cap is removed. To lock out a valve, a chain is placed through the valve handle tied around the pipe so that the valve cannot be opened. When a valve is tagged out, a big red WDF tag is supposed to be placed on the valve, which warns workers not to open the valve for any reason, and tells them who secured the valve.

Larkin installed the isolation valve between the new and old pipe approximately six months before the accident. S & M Mechanical performed a so-called soap and water test on the valve, and there was no seepage of air at that time, and then turned the system over to WDF.

On the day of the accident, Larkin contacted his boss, S & M Mechanical's president, Stanley Moore (Moore), and told him he was finished with the work in the blower building and asked what he should do next. According to Moore, he instructed Larkin "to go into the old building [i.e. RSPS] to prepare the line" to receive a fabrication system to tie into the blower building,

which involved removing the end cap and setting up blocks to receive the fabrication (Moore Dep., at 101, 121). However, Moore told Larkin that he had to first get permission of WDF's project manager, Peter Napoli (Napoli), and his superintendent Dan Zang (Zang) (Id, at 101-103). Moore testified that he wanted Larkin to contact Napoli and Zang to put a "lockout on (the valve) because you're going to start to work on another system that anyone could have come and open that valve while your working on it" (Id, at 123). Moore saw a lockout on the valve when he arrived at the site after the accident but he did not know who or when it was put on. (Id, 124). Moore also did not know if Larkin followed his instructions to get the work approved by Napoli and/or Zang (Id, at 103-104). Moore answered "no" when asked if there is any possibility of getting leakage from the live side to the de-energized side through an isolation valve despite proper installation and testing of the valve. (Id, at 205).

Larkin testified that when he told Moore about the work he planned to do in the RSPS and that he planned on removing the end cap, that Moore instructed him to "get the okay from everybody" (Larkin Dep, at 172). According to Larkin, he then went to Napoli, and told him that he wanted to remove the end cap on the pipe in the RSPS, and he and Napoli discussed the need to lock out the valve before Larkin could work on the pipe (Id, at 176).

Larkin testified, "I told [Napoli] to 'lock it out,' and I will see you before I do anything" (Id, at 177). Later that morning, Larkin saw two WDF laborers, one of whom was WDF's laborer foreman, Gaetano Gambino (Gambino), walking into the RSPS with chains and locks. (Id, at 178). When they did not come out right away, Larkin went in and asked them what they were doing, and they told Larkin that they were trying to close a valve (Id, at 178). Larkin testified that he asked them four times if they had opened the valve, and four times they answered that they had not, so "I told them to put the chain on and lock it" (Id., at 178-179). Larkin went back to Napoli to tell him that he was going to remove the end cap, and Napoli told him, "OK" (Id, at 180); however he did not tell Napoli that he saw workers locked out the valve (Id). Larkin subsequently testified that he could not remember if he spoke to Napoli again (Id, at 242).

Larkin testified that the only way to tell if a valve had been opened by another worker, was to physically observe it being opened (Id, at 181). He also denied that he received any instructions or training about lock out or tag-out procedures (Id.). Larkin testified that before he removed the end cap he was working under the assumption that the valve was closed, but there was no way to check (Id, at 190). He testified, however, there was no chain on the on the pipe valve on the date of the accident (Id, at 245).

According to Larkin, before the accident happened his crew had started to remove the end cap with a hydraulic claw and removed the studs from the end cap but then he had "second thoughts" about removing it since he had not observed whether the pipe had been properly locked out and instructed the crew to lock it back up (Id, at 194-195). Larkin testified that before it was locked back up "the end pipe burst" and he was knocked off the second step of the ladder by the air pressure created when the end cap came off and after he was hit in the head by a coupling from the end cap (Id, at 199). According to Larkin, the ladder he was standing at the time the accident was six-foot A-frame fiberglass step ladder, and that he was on the second step although he had climbed up to the third and fourth step before the accident (Id, at 397). A member of his crew was standing on a Baker scaffold, and did not fall off after the end cap came off (Id, at 198-199). Larkin was not tied off onto anything while on the ladder and was not given a safety harness (Id, at 198). When asked whether there was any reason to be tied off, Larkin testified "I wasn't that high off the ground" (Id).

Napoli testified that when Larkin spoke with him about working in the RSPS, he told Larkin not to "touch the end cap" until he was finished in the blower building, and then to return to him to discuss how to remove it (Napoli Dep, at 44, 47). He also testified that he knew it was a "possibility" that the there

was pressurized air in the 12 foot section of pipe and that it why he told Larkin not to touch it (Id, at 46). According to Napoli, he did not want to discuss how to remove the end cap with Larkin until he had spoken with Billy Politis (Politis), Pro Safety's site safety consultant, and they were able to prepare a task analysis plan that Larkin could follow in order to remove the end cap safely (Id, at 44). According to Napoli, after a lock out procedure is done the pipe "should be safe to work on," but there was "always the possibility of [the] valve leaking" and that there was no pressure valve to test for that (Id, at 58). Larkin never returned to him before going to the RSPS to remove the end cap.

Napoli testified that aside from making sure the pipe was locked out, he would have "put a little pinhole in the pipe until the air came out..but that the job of the super with ...S&M." (Id, at 61). He later testified that he had never seen this method performed and had not done it himself. (Id., at 111). Napoli denied telling Gambino, or any other WDF laborer, to lock out the butterfly valve before the accident (Id, at 49, 104). Napoli also testified that the last time work had been done in RSPS was six months before the accident, and the valve had been locked and tagged at that time (Id, at 100-102).

Gambino testified that he had observed situations at the project where air had seeped or leaked out of a closed butterfly

valve (Gabino Dep, at 80). According to Gambino, on the morning of accident, Napoli told him that he had gotten an email from DEP, asking WDF to take all the valves in the RSPS out of service, and that DEP wanted all the valves to be chained up (Id., at 118-119). Gambino also testified that after Napoli discussed with him that he should shut down the valves, Larkin came in to the speak with Napoli about doing work in the RSPS, and that Napoli told Larkin to hold off on working there (Id, at 134-135).

According to Gambino, based on Napoli's instructions, on the morning of the accident, he took eight valves out of service (Id, at 123). He testified that the reasons for taking the valves out were for mechanical, and not safety reasons, since the pipes were being blown apart by too much air being blown into them (Id, at 289-290) With respect to the particular valve involved in Larkin's accident, Gambino testified that "we opened it all the way up and closed it back down to try to make sure we closed it" (Id.). He testified that he had some "trouble with it," as it was showing that it was open one percent" (Id, at 145-146). He also testified that Larkin walked into the RSPS when he was trying to close the valve, and proceeded to help him try to take the valve out of service (Id, at 151). According to Gambino, with Larkin's help they opened the valve 100 percent, and then closed it back down (Id, at 153). Larkin was also present when

they checked the gauge showing that it was all the way closed, and when they put a lock and chain on the valve (Id, at 154). Larkin then went back to the blower building (Id, at 177).

Pro Safety's site safety consultant, Billy Politis (Politis) worked at the Ward Island project where Pro Safety's responsibilities were to "look over working conditions and observe unsafe conditions and make recommendations based on the observations" (Politis, Dep., at 37). According to Politis, it was the responsibility of WDF to provide safety equipment, and it was Pro Safety's job to make sure they were using proper equipment (Id, at 50). When he arrived at accident scene, the valve had an "out of service" tag and a lock, but he did know when these were place on the valve (Id, at 71). Pro Safety was responsible for reporting whether the valves were locked and tagged, but not for placing locks and tags, which was the responsibility of WDF (Id, at 74-81). Politis testified that according to a Site Safety Representative Checklist he prepared for the month prior to the accident, there had been no locked out or tagged out valves for over a month prior to and including the day of Larkin's accident (Id, 105-107). He also testified that the documentation did not show that the valve at issue had been locked out six months before the accident. In an accident report prepared by Politis, he determined that the cause of the accident was "air pressure left inside the air line after being locked out

and tagged out."

In the amended complaint, plaintiffs assert causes of action for common-law negligence, violation of Labor Law §§ 200, 240 (1) and 241 (6), and loss of consortium[4] against City, DEP, WDF and Metcalf & Eddy. The City, DEP and WDF, in their answers to the amended complaint, assert three cross claims against Metcalf & Eddy, sounding in common-law indemnity or contribution, breach of contract by failure to procure insurance, and contractual indemnification. Metcalf & Eddy answered the amended complaint, and asserts cross claims for contribution or common-law indemnification, and contractual indemnification against defendants and S & M Mechanical.[5]

WDF asserts third-party causes of action against S & M Mechanical for contribution, common-law and contractual indemnification, and breach of contract by failure to procure insurance. In its amended third-party answer, S & M Mechanical asserts counterclaims against WDF, sounding in common-law

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[4]The court notes that a cause of action for loss of services or consortium "does not exist independent of the injured spouse's right to maintain an action for injuries sustained" (*Klein v Metropolitan Child Servs., Inc.*, 100 AD3d 708, 711 [2d Dept 2012]). Thus, if the amended complaint's Labor Law and common-law negligence claims are dismissed, Larkin's wife's cause of action will also be dismissed.

[5]Although defendants aver that Metcalf & Eddy's cross claims are asserted against Pro Safety, not S & M Mechanical, Metcalf & Eddy's cross claims are asserted against defendants, and "third-party defendants," i.e., S & M Mechanical.

indemnification and contribution.

Defendants bring a second third-party action against Metcalf & Eddy, asserting causes of action for contribution, common-law and contractual indemnity, and breach of contract by failure to procure insurance. In its second third-party answer, Metcalf & Eddy asserts cross claims against defendants and S & M Mechanical for contribution or common-law indemnification, contractual indemnification, and breach of contract for failure to procure insurance.

S & M Mechanical brings a third third-party complaint against Pro Safety, alleging claims for common-law indemnity and contribution. Pro Safety, in its third third-party answer, asserts cross claims against defendants, S & M Mechanical and Metcalf & Eddy for contribution and common-law indemnification, and against WDF alone for contractual indemnification.

DISCUSSION

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to "present evidentiary facts in admissible form sufficient to create a genuine, triable issue of fact"

(*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). "On a motion for summary judgment, issue-finding, rather than issue-determination, is key" (*Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 475 [1st Dept 2010], citing *Insurance Corp. of N.Y. v Central Mut. Ins. Co.*, 47 AD3d 469, 472 [1st Dept 2008]).

Summary Judgment Motions Regarding the Main Action

Defendants DEP, the City, WDF and Pro Safety move for summary judgment dismissing the amended complaint and Metcalf & Eddy's cross claims against them.[6] Metcalf & Eddy also moves for summary judgment dismissing the amended complaint against it.

Plaintiffs oppose the motions, and cross move for partial summary judgment in their favor on the issue of defendants' liability under common law negligence and Labor Law §§ 200 and 240 (1).

As a preliminary matter, third third-party defendant Pro Safety's motion to dismiss claims asserted against it in the amended complaint is moot as in its decision and order dated July 9, 2013, this court denied plaintiffs' motion to amend its complaint to assert direct claims against Pro Safety, finding that the proposed claims were time-barred.

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[6]The, DEP, the City, WDF and Pro Safety are now represented by the same counsel. The court assumes that their interests are now aligned, and will not consider the City's, DEP's, WDF's and Pro Safety's cross claims as against each other.

Next, defendants' argument that Larkin's cross motion should be denied as untimely is unavailing. The preliminary conference order required that summary judgment motion be made within 60 days after the filing of the note of issue. The note of issue was filed on June 5, 2014, so the summary judgment motions had to be made on or before August 4, 2014. Plaintiffs' cross motion is dated October 10, 2014.

> "'A cross motion for summary judgment made after the expiration of the [deadline for making dispositive motions] may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief "nearly identical" to that sought by the cross motion'"

(*Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 448-449 [1st Dept 2013], quoting *Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006]; *see also Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 419 [1st Dept 2014] [in deciding untimely cross motion, court "is limited in its search of the record to those issues or causes of action 'nearly identical' to those raised by the opposing party's timely motion"]).

There is no dispute that the defendants' motion for summary judgment which seeks dismissal of the Labor Law §§ 200, 240 (1) and common-law negligence claims, was timely filed. Moreover, plaintiffs' cross motion seeks the opposite relief, summary judgment in his favor on those same claims. As set forth

in the Appellate Division, First Department's decision in *Brill & Meisel v Brown* (113 AD3d 435, 435 [1st Dept 2014]), an untimely cross motion may be properly considered "because [defendants] sought dismissal of the same claims on which plaintiff timely sought summary judgment." Therefore, the court will consider plaintiffs' cross motion.

Next, all claims asserted against DEP must be dismissed since DEP, in this action, acted only as an arm of the City, and is not a suable entity.

> "In New York, agencies of a municipality are not suable entities. The only proper defendant in a lawsuit against an agency of a municipality is the municipality itself, not the agency through which the municipality acted. This is so because, [u]nder New York law, departments that are merely administrative arms of a municipality have no separate legal identity apart from the municipality and therefore cannot be sued [internal quotation marks and citation omitted]"

(*Omnipoint Communications, Inc. v Town of LaGrange*, 658 F Supp 2d 539, 552 [SD NY 2009]; *see also, Siino v. Department of Education of City of New York,* 44 AD3d 568 (1st Dept 2007]; *Lee v. The City of New York,* 2014 WL 5364094 [Sup Ct NY Co. 2014]). Thus, the part of defendants' motion which seeks summary judgment dismissing all claims as against DEP is granted.

Metcalf & Eddy contends the amended complaint must be dismissed as against it as untimely as the claims were not asserted until July 22, 2013, beyond the running of three-year

statute of limitations. This argument is without merit. As found by the court's decision and order dated July 9, 2013, plaintiffs' claims against Metcalf & Eddy were timely asserted since the second-third party action against Metcalf & Eddy was commenced in December 2011, which is within three years of the January 2009 accident (*see Duffy v. Horton Mem Hosp.*, 66 NY2d 473 [1985]).

The court will next address the merits of plaintiffs' claims.

Labor Law § 240 (1)

Defendants move for summary judgment dismissing plaintiffs' Labor Law § 240 (1) claim, arguing that Larkin's conduct in failing to ensure the pipe was de-energized before working on it was the sole proximate cause of his injuries, and that the recalcitrant worker defense applies based on Larkin's failure to use a Baker's scaffold, like the one his co-worker used at the time of the accident. They also argue that Larkin's injuries were not caused by an elevation-related hazard but the pressurized air from the pipe, and that there is no evidence that the ladder was defective, slipped or collapsed, or that other safety devices were required.

Metcalf & Eddy separately argues that it is not a "statutory agent" under the Labor Law and therefore cannot be held liable under § 240(1).

Plaintiffs counter that section 240 (1) was violated and such violation was a proximate cause of his injuries as the ladder was defective since there should have been a "tie in" or harness to prevent him from falling from the ladder. Plaintiffs also argue that as there was a violation of section 240(1), any negligence by Larkin in connection with allegedly failing to ensure the pipe was de-energized cannot be said to be the sole proximate cause of his injuries. Larkin also argues that Metcalf & Eaddy had sufficient control over the activity causing injury to qualify as a statutory agent of the City and WDF.

Labor Law § 240 (1) provides, in pertinent part:

> "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."

"Labor Law § 240 (1) . . . evinces a clear legislative intent to provide 'exceptional protection' for workers against the 'special hazards' that arise when the work site either is itself elevated or is positioned below the level where 'materials or load [are] hoisted or secured' [internal quotation marks omitted]" (*Harris v City of New York*, 83 AD3d 104, 108, [1st Dept 2011], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494,

500-501 [1993]). "[T]he extraordinary protections of the statute . . . apply only to a narrow class of dangers . . . [and] do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity [internal quotation marks and citations omitted]" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 96-97 [2015]). Rather, the statute "imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks" (*Saint v Syracuse Supply Co.*, 25 NY3d 117, 124 [2015]). This liability may be imposed "regardless of the absence of control, supervision, or direction of the work" (*Romero v J & S Simcha, Inc.*, 39 AD3d 838, 839 [2d Dept 2007]).

To impose liability under Labor Law § 240 (1), the plaintiff need only prove: (1) a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices); and (2) that the statutory violation proximately caused his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]). Proximate cause is demonstrated based upon a showing that a defendant's act or failure to act was a "substantial cause of the events which produced the injury" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784 [1980]). Even if it is found

that a plaintiff's negligence contributed to his injuries, "contributory negligence will not exonerate a defendant who has violated the statute and proximately caused a plaintiff's injury" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]; *see also Dias v City of New York*, 110 AD3d 577, 578 [1st Dept 2013] ["comparative negligence . . . is not a defense under § 240 (1)"]).

In ladder cases, "'[i]t is sufficient for purposes of liability under section 240 (1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 252-253 [1st Dept 2008], quoting *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]). As noted by the First Department in *Montalvo v J. Petrocelli Constr., Inc.* (8 AD3d 173, 174 [1st Dept 2004]), "[w]here a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection" and the "failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1)" (internal quotation marks and citation omitted). The plaintiff is not required to show that the ladder is somehow defective (*McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 333-334 [1st Dept 2008]; *Orellano*, 292 AD2d at 290-291).

Nonetheless, where a plaintiff is the sole proximate cause

of the injury, a defendant cannot be liable under the statute (*Blake*, 1 NY3d at 290). To show that a plaintiff was the sole proximate cause of his injuries under the statute, the defendant must establish that the plaintiff "'had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he made that choice he would not have been injured'" (*Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008], quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]). However, "[t]he mere presence of ladders or safety belts somewhere at the work site does not establish 'proper protection'" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524, *rearg denied* 65 NY2d 1054 [1985]). The controlling question ... is not whether plaintiff was "recalcitrant," but whether a jury could have found that [plaintiff's] own conduct, rather than any violation of Labor Law § 240 (1), was the sole proximate cause of his accident" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d at 39-40; see *also* Gallagher *v New York Post*, 14 NY3d 83, 88 [2010]).

Under these principles, the court finds that there are triable issues of fact precluding a grant of summary judgment in favor of the City and WDF, or plaintiffs with respect to the Labor Law § 240(1) claim. Specifically, as the record shows that the ladder was not defective, material issues of fact exist as to

whether it was a proper safety device and whether Larkin should have been provided with additional protection, particularly in light of evidence that injury producing work posed a risk in that the pipe might not have been fully depressurized (*See e.g. Kumar v. Stahlunt Associates, LLC*, 3 AD3d 330 [1st Dept 2004][record raised issues of fact as to whether the safety device afforded provided proper protection]; *Camprise v. Cohen*, 302 AD2d 332 [1st Dept 2003][summary judgment was properly denied when evidence submitted raised triable issues of fact as to whether "plaintiff's fall and injury were attributable in some measure to the inadequacy of the ladder as a safety device for his work"]; *Weber v. 1111 Park. Ave. Realty*, 253 AD2d 376 [1st Dept 1998][holding that where plaintiff fell from a ladder that was not defective due to electric shock, triable issues of fact existed as to whether ladder failed to provide proper protection and whether he should have been provided with additional safety devices]). In addition, issues of fact exist as to whether Larkin's failure to make sure the pipe was depressurized before opening the end cap was the sole proximate cause of his injuries[7] (*Kumar v. Stahlunt Associates, LLC*, 3 AD3d at 330).

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[7]On the other hand, it cannot be said that Larkin's failure to use a Baker's scaffold was the sole proximate cause of his injuries, particularly as he was not instructed to use the scaffold, which was in use in any event(*Rice v. West 37th Group, LLC*, 78 AD3d 492 [1st Dept 2010])

At the same time, however, Metcalf & Eddy is entitled to summary judgment based on uncontroverted evidence that it is not a statutory agent for the purposes of the Labor Law 240(1). Agency in the context of sections 240 (and 241) "arises only when work is delegated to a third party who obtains the authority to supervise and control the job" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 293 [2003] [internal citation omitted]). This authority, and an agency relationship, may arise from a contract which requires regular inspection and maintenance (*Medina v MSDW 140 Broadway Prop., L.L.C.*, 13 AD3d 67 [1st Dept 2004] [an agency relationship existed between owner and rigging company where the rigging company agreed to regularly inspect and maintain a defective window washing rig which caused injury to plaintiff]). However, an agency relationship does not arise where a contract obligates a party to make certain that the project is built in accordance with plans and specifications, but there is no evidence that the alleged agent "had the authority to supervise, direct, or control the injury-producing work" (*Sikorski v Springbrook Fire Dist. of Town of Elma*, 225 AD2d 1041, 1041 [4th Dept 1996]).

Here, Metcalf & Eddy in support of its position that it is not a statutory agent, and submits its contract with the City with respect to the project (hereinafter "the Contract"), which provides that:

> "[i]t is the responsibility of the Construction Contractors (i.e. the prime contractors, including WDF) and not the responsibility of the CM (i.e Metcalf & Eddy) to determine the means and methods of construction... However, if it becomes apparent that the means and methods of construction proposed by the Construction Contractors will constitute or create a hazard to the work, or to persons or property, or will not produced finished work in accordance with the terms of the Contract, such means and methods must be reported to the Commissioner (of DEP), or to the Commissioner's duly appointed representative."

Metcalf & Eddy also relies on the deposition testimony of Matt Regan ("Regan"), an engineer for Metcalf & Eddy. Regan testified that under the Contract, Metcalf & Eddy "was to observe any issues with compliance with the contract with shop drawings and specifications...if we were to witness any of that we were to report back to the City." (Regan Dep, at 148-149) He also testified that Metcalf & Eddy's "primary role was to see that the equipment was installed as per the contact" (150). As for the pipeline in the RSPS, he testified that an inspector from Metcalf & Eddy would inspect and prepare a report regarding installation of the pipeline "for adherence to shop drawings" (Id, 152). This inspection would include making sure the butterfly/isolation valve was properly installed and testing any seepage of air flow through the valve from the live side to the depressurized side (Id, at 153). He also testified that its role was to report hazards to the prime contractors and to DEP but this role did not include remedying hazards. The evidence submitted by Metcalf &

Eddy is sufficient to make a prima facie showing that it is not a statutory agent for the purposes of the Labor Law since it had no authority to supervise or control the Larkin's work or that of S&M Mechanical, or of any of the other contractors.

In opposition, plaintiffs and Metcalf & Eddy's co-defendants fail to rebut Metcalf & Eddy's prima facie showing entitling it to summary judgment. Specifically, the opposing parties' reliance on the deposition testimony from representatives of the City, WDF and S&M that Metcalf & Eddy was responsible for inspecting the work performed including the installation and testing of the butterfly/isolation valve and ensuring that the workers used proper safety equipment is insufficient to raise a triable issue of fact. Notably absent from this testimony is any evidence that Metcalf & Eddy had been delegated authority "to supervise and control the [injury producing] work" or "to coordinate and supervise the work of ... prime contractors" (*Johnson v. City of New York*, 120 AD3d 405, 406 [1st Dept 2014]; *see also Smith v McClier Corp.*, 22 AD3d 369, 371 [1st Dept 2005][Labor Law claim dismissed as against defendant subcontractor because defendant was not owner or general contractor, and did not have authority to supervise and control injury-producing work]). Accordingly, the Labor Law § 240(1) claim against Metcalf & Eddy must be dismissed.

Labor Law § 200 and Common-Law Negligence

Labor Law § 200 (1) provides, in relevant part:

> "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."

"Section 200 (1) of the Labor Law codifies an owner's or general contractor's common-law duty of care to provide construction site workers with a safe place to work" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143 [1st Dept 2012]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed [internal quotation marks and citation omitted]" (*Makarius v Port Auth. of N.Y. and N.J.*, 76 AD3d 805, 817 [1st Dept 2010]). The facts of this case fall within the manner in which the work was performed.

When the accident results from the means and methods of an injured party's work, "the determination to be made is whether defendants exercised supervision and control over a plaintiff's work" (*Singh v 1221 Ave. Holdings, LLC*, 127 AD3d 607, 608 [1st

Dept 2015]). "Regular inspection of the site to ensure that work is progressing according to schedule or the authority to stop any work perceived to be unsafe constitutes a general level of supervision that is not sufficient to warrant holding defendants liable under Labor Law § 200" (*ibid.*). In fact, "general oversight duties, work coordination, and safety reviews do not constitute supervision and control under Labor Law § 200" (*Quiroz v Wells Reit-222 E. 41st St., LLC*, 128 AD3d 442, 442 [1st Dept 2015]). Instead, it must be shown that the owner or contractor "'had authority to control the activity bringing about the injury to enable it to avoid or correct the unsafe condition.'" (*Hughes v. Tishman Construction Corp.*, 40 AD3d 305 [1st Dept 2007], quoting, *Ruzzuto v. Wenger Construct. Co.*, 91 NY2d 343, 352 [1998]).

Under this standard, evidence in the record that WDF supervised and instructed Larkin on the date of the accident and was in charge of the lock out and tagging procedures for valves raises a triable issue of fact as to WDF's liability under Labor Law § 200 (*see Matthews v. 400 Fifth Realty, LLC*, 111 AD3d 405 [1st Dept 2013][holding that the trial court erred in dismissing plaintiff's Labor Law § 200 and common law negligence claims against construction manager where there was evidence that this defendant "managed day-to-day activities at the job site and exercised at least some control over the coordination of [the

injury producing work] enabling it to avoid or correct the unsafe condition"][internal citation and quotation omitted]; *Vukovich v. 1345 Fee, LLC,* 61 AD3d 533 [1st Dept 2009][summary judgment properly denied with respect to section 200 claim where there existed factual issues as to defendant's control over the activity at question]).

Furthermore, while Larkin testified that he worked only for S & M Mechanical, and that the he received instructions solely from S & M Mechanical's president, Moore, and that he did not remember having any contact with WDF other than two times when he needed change orders to correct problems, other evidence differs, including Larkin's own testimony that he received direction from Napoli, and worked with Gambino on the valve on the day of the accident. "'It is not the court's function on a motion for summary judgment to assess credibility' [citation omitted]" (*Ocean v Hossain*, 127 AD3d 402, 403 [1st Dept 2015]), but issues of fact raised by Larkin's own testimony preclude summary judgment in his favor on his Labor Law § 200 and common law negligence claims.

In contrast, the Labor Law § 200 and common law negligence claims against the City must be dismissed, as there is no evidence that it was negligent or involved in any way in supervising and controlling Larkin's work. As such, no liability under Labor Law § 200 or common law negligence can be imposed.

[* 30]

Likewise, for the reasons indicated in connection with the court's determination that Metcalf & Eddy did not exercise sufficient control over Larkin's work to qualify as a statutory agent, including the absence of any evidence that Metcalf & Eddy had been delegated the responsibility to supervise or control Larkin's work, plaintiffs' Labor Law § 200 and common law negligence claims against Metcalf & Eddy must be dismissed.

Labor Law § 241 (6)

Labor Law § 241 (6) provides:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> "6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

"Labor Law § 241 (6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas

in which construction, excavation, or demolition work is being performed" (*Capuano v Tishman Constr. Corp.*, 98 AD3d 848, 850 [1st Dept 2012]). "To establish a claim under the statute, a Larkin must show that a specific, applicable Industrial Code regulation was violated and that the violation caused the complained-of injury" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 at 146).

In his complaint, it is alleged that defendants violated Industrial Code §§ 23-1.7, 23-1.7 (a), 23-1.21, and 23-3.2 (a). While his first two bills of particulars allege the same Industrial Code sections, in his third bill of particulars, dated September 11, 2012, Larkin also alleges violations of sections 23-1.7 (b), 23-1.7 (b) (1), 23-1.7 (f), 23-1.8 (a), 23-1.8 (c), 23-1.21 (b) (4), 23-1.21 (b) (ii), 23-1.21 (e) (3), and 23-3.3 (g).

However, in opposition to defendants' motion, plaintiffs do not argue that any of the Industrial Code provisions alleged in the amended complaint or their bill of particulars provide a basis for liability. Moreover, to the extent plaintiffs rely on an affidavit of Emanuel A. Troise, Jr., a licensed professional plumber and fire suppression piping contractor, who opines that unspecified provisions of the Industrial Code and OSHA were violated at the project, such affidavit is insufficient to raise a triable issue of fact (*see*

Ramos v. Howard Industries, Inc., 10 NY3d 218, 224 [2008]). In addition, it is well established that OSHA violations do not provide a basis for liability under Labor Law § 241(6) (see *Schiulaz v. Arnell Constr. Corp.*, 261 AD2d 247,248 [1st Dept 1999]).

Accordingly, in the absence of any applicable Industrial Code sections in support of plaintiffs' Labor Law § 241 (6) claim, the claim must be dismissed.

Summary Judgment Motions Regarding Third Party Claims)

Metcalf & Eddy

Metcalf & Eddy moves to dismiss the second third-party complaint in which the City, DEP and WDF assert causes of action for contribution, common-law and contractual indemnification, and breach of contract for failure to procure insurance.

To state a viable claim for common law contribution or indemnity, it must be shown that the defendant or third-party defendant is negligent or otherwise at fault (*Burgos v 213 W. 23rd St. Group LLC*, 48 AD3d 283, 284 [1st Dept 2008]; *Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]; *Siegl v New Plan Excel Realty Trust, Inc.*, 84 AD3d 1702, 1703 [4th Dept 2011]). Moreover, "a party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part. . . . Liability for indemnification may only be imposed

against those parties (i.e., indemnitors) who exercise actual supervision" *(McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]).

Metcalf & Eddy argues since it was never delegated authority over the work site or Larkin's work, there is no basis for finding that it was negligent or otherwise at fault. Moreover, with respect to the claim for contractual indemnification, it argues the relevant provision is triggered only if there is a finding of its negligence or fault.[8] While the City and WDF oppose the motion, arguing that there are issues of fact as to Metcalf & Eddy's negligence or fault, this argument is without merit since, as indicated in connection with the court's dismissal of the Labor Law § 200 and common law

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[8]The claim against Metcalf & Eddy for contractual indemnification is based Article 15 of Appendix A, the General Provisions Governing Contracts for Engineering Services, which provides, in relevant part:

> "The Engineer [Metcalf & Eddy] shall be liable to and hereby agrees to indemnify and hold harmless [the City] . . . from any and all claims and judgments against [the City] for damages and from costs and expenses to which the City . . . may be subjected, or which they may suffer or incur by reason of any . . . bodily injury . . . resulting from the negligence, carelessness or other act of the Engineer or anyone employed by the Engineer, in the performance of this Agreement . . ."

(DEP/Metcalf & Eddy Contract, Article 15 of Appendix A, the General Provisions Governing Contracts for Engineering Services, at 9).

negligence claim, there are no factual issues in this regard. As for the alleged failure of Metcalf & Eddy to procure insurance, as the City and WDF do not argue in support of this claim, it must also be dismissed. Accordingly, Metcalf & Eddy's motion to dismiss the second third party complaint is granted.

S&M Mechanical

S & M Mechanical moves to dismiss WDF's third-party claims for common law contribution, indemnification and breach of contract for failure to procure additional insurance coverage. S&M Mechanical does not seek to dismiss the claim for contractual indemnification. Moreover, WDF does not deny that as Larkin's employer, S&M Mechanical cannot be held liable for common law indemnification or contribution since Larkin did not sustain a "grave injury" as set forth in Workers' Compensation Law § 11 (*see e.g. Keita v City of New York*, 129 AD3d 409 [1st Dept 2015]).

Thus, the only remaining claim concerns S & M Mechanical's alleged breach of contract for failure to procure additional insurance coverage.

The S&M Mechanical's obligation to obtain insurance set forth in Article 12 of S&M Mechanical's subcontract with WDF (hereinafter "the WDF Contract"), which states, in relevant part:

> Before commencement of Work, and any payment of Work and until final completion and final acceptance by the Owner, the Subcontractor (i.e. S&M Mechanical) shall obtain and maintain, at its expense, at least

> the insurance coverage specified in Exhibit C....As a condition to commencement of the Work and to any payment for the Work, Subcontractor shall furnish a certificate....The certificate shall name the Contractor (i.e. WDF), GC, Owner and any other parties required by the Contract Documents as additional insureds under the policies as required by Exhibit C and under the Contract Documents. The terms and conditions on insurance to be provided by Subcontractor as described in Exhibit C.

(emphasis supplied).

Exhibit C, while stating that WDF and its affiliates are to be named as additional insured on "all general liability policies" is completely crossed out, and refers to Schedule A. Schedule A includes General Conditions Relating to Article 22 (Insurance), and refers to Commercial Liability Insurance with minimum limits of $3,000,000 per occurrence and $6,000,000 in aggregate, and lists as additional insureds,"the City of New York, including its officials and employees."

S & M Mechanical argues that the claim for breach of the obligation to procure insurance must be dismissed since, "to the extent there is a requirement" under the subcontract with WDF to obtained insurance, it complied with such requirement by obtaining a policy from Aspen Insurance UK Limited ("Aspen") under policy number CRA4MMF08 for the policy period October 1, 2008 and October 1, 2009 (hereinafter "the Aspen Policy"). S&M Mechanical further argues that since it obtained the required coverage, Aspen's refusal to defend and indemnify WDF and the

City does not give rise to a claim for breach of contract to procure insurance (*see Perez v. Morse Diesel Intl., Inc.*, 10 AD3d 497 [2004][third-party defendant should have been granted summary judgment dismissing claim based on alleged failure to procure insurance, where record showed that third-party defendant purchased agreed upon insurance coverage, and insurer's refusal to indemnify third-party plaintiff was insufficient to raise a triable issue of fact]).

The Aspen Policy, provides for insurance of $1,000,000 per occurrence, and includes an additional insured endorsement which provides:

> Who is An Insured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured to your policy. Such person or organization is only your additional insured only with respect to liability for 'bodily injury,' 'property damage,' or 'personal and advertising injury' caused in whole or in part, by:
>
> 1. Your (i.e. S&M Mechanical's) acts or omissions; or
>
> 2. The acts or omissions of those acting on your behalf;
>
> in the performance of your ongoing operations for the additional insured.

Alternatively, S&M argues that since WDF is fully insured for its loss, its only measure of damages would be the out-of-pocket expenses resulting from any breach.

In support of the motion, S& M Mechanical submits its subcontract with WDF, an affidavit of its President, Stanley M. Moore, who states that "S&M was insured by Aspen during the period from October 1, 2008 and October 1, 2009 " and a copy of the Aspen Policy.

WDF opposes the motion, arguing that Aspen's denial of coverage to it, the City, and DEP, raises an issue of fact as to whether S&M Mechanical complied with its obligation to obtain additional insurance coverage.[9] Furthermore, it argues that as the additional insurance coverage endorsement is limited to bodily injuries caused by the acts and omissions of S&M Mechanical and those acting on S&M Mechanical's behalf, the coverage obtained is insufficient to meet S&M Mechanical's obligation to provide insurance. In addition, WDF argues that S& M Mechanical submits no evidence or documentary proof that the insurance covers the defendants.[10]

Although there is no dispute that S& M Mechanical obtained

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[9]WDF, the City and DEP have commenced a declaratory judgment action (Index No. 150388/14) against Aspen and S&M Mechanical seeking, inter alia, a declaration that Aspen is obligated to defend, indemnify and hold harmless WDF, the City and DEP in this action.

[10]In support of its position, WDF points out that a schedule of additional insureds annexed to the Aspen policy is blank. However, the additional insured endorsement covers WDF and City since S&M Mechanical was performing operations for them and the claim is based on the assumption that there was a written agreement under which they were to be named as additional insureds.

additional insurance coverage under the Aspen Policy "a breach may [nonetheless] occur... if the insurance coverage procured does not match the coverage promised in the insurance procurement agreement" *(Roffi v. Metro North Commuter R.R.*, 2001 WL 1568319 [SDNY 2001] (applying New York law); *see also Nrecaj v. Fisher Liberty Co.*, 282 AD2d 213, 214 [1st Dept 2001]; *Clapper v. County of Albany*, 188 AD2d 774, 775 [3d Dept 1992]).

Moreover, New York courts have held that when there is a provision in the contract requiring the promisor to name the promisee as an additional insured to their general liability insurance policy, such promise inherently includes an obligation to procure coverage for all acts arising out of the work performed, regardless of who was at fault, or whether such broad coverage is expressly provided for in the contract (*see Bachrow v. Turner Const. Corp.*, 46 AD3d 388 (1st Dept 2007) [holding that a subcontractor agreement with a general contractor and owner requiring subcontractor to name them as additional insured required "(subcontractor) to procure insurance covering (general contractor) for all liabilities arising out of (subcontractor's) work, including liabilities caused by (general contractor's) own acts of negligence]; *Lenze v. Lehrer McGovern & Bovis, Inc.*, 245 AD2d 209 [1st Dept 1997][contractor was required to obtain additional insurance coverage for plaintiffs' injuries regardless of who was culpable]; *Cf. Nuzzo v. Griffin Technology Inc.*, 212 AD2d 980 [4th Dept 1995][holding that an insurance policy only covering acts caused by the promisor's negligence was sufficient to satisfy an insurance-procurement contractual obligation that

did not specify scope of coverage]).

At the same time, however,

> "A provision in a construction contract cannot be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated. In addition, contract language that merely requires the purchase of insurance will not be read as also requiring that a contracting party be named as an additional insured [internal quotation marks and citation omitted]"

(*Ramcharan v Beach 20th Realty, LLC,* 94 AD3d 964, 966-967 [2d Dept 2012]). Furthermore, the denial of coverage by an insurer, is insufficient in and of itself to give rise to a claim of breach of contract to procure insurance (*Perez v. Morse Diesel Intl., Inc.*, 10 AD3d at 497).

Under these principles, S&M Mechanical is not entitled to summary judgment dismissing the breach of contract claim. First, the court finds that Article 12 of S&M Mechanical's subcontract with WDF required S&M Mechanical to provide additional insurance coverage to WDF. In addition, while the Aspen policy provided coverage to WDF (and the City), as required by the WDF Contract, as noted by WDF, the additional insurance endorsement only covered injuries arising out S&M Mechanical's acts or omissions, and not for acts of WDF (*see Bachrow v. Turner Const. Corp.*, 46 AD3d 388). Furthermore, although not raised by WDF, the limits of the Aspen policy are less than that required under the WDF Contract. At the same time, however, it cannot be said on this on this record whether the type coverage provided was sufficient under the circumstances here with respect to Larkin's claims.

Next, as argued by S& M Mechanical, assuming WDF has its own insurance which covered Larkin's claims, the proper measure of damages for breach is "the full cost of insurance, i.e., the premiums it paid for its own insurance, any out-of-pocket costs that may have been incurred incidental to the policy and any increase in future insurance premiums resulting from the present liability claim" *(Wong v. New York Times Co.*, 297 AD2d 544, 548 [1st Dept 2002]).

Accordingly, S&M's motion is granted only to the extent of dismissing the third-party claims against it for common law contribution and indemnification.

Pro Safety

In the third-third party complaint, S&M Mechanical asserts claims for common law indemnification and contribution against Pro Safety. Pro Safety moves to dismiss these claims and S&M Mechanical opposes the motion based on Pro Safety's role with respect to the lock out and tag out procedure relating to the valves.

As indicated above, in order assert a successful claim for common law indemnification and/or contribution a party must show that the defendant or third-party defendant is negligent or otherwise at fault (*Burgos v 213 W. 23rd St. Group LLC*, 48 AD3d at 284). In addition, "a party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part. . . . Liability for indemnification may only be imposed against those parties (i.e., indemnitors) who exercise actual

supervision" *(McCarthy v Turner Constr., Inc.*, 17 NY3d at 377-378).

Here, the record shows that Pro Safety's role as a safety consultant was limited to observing and reporting safety violations, and that it had no direct authority over the work at the site, including the work causing Larkin's injuries. Therefore, the third-party claims asserted against it for common law contribution and indemnification must be dismissed (*see O'Sullivan v. IDI Constr. Co., Inc.*, 7 NY3d 806 [2006][holding that "plaintiff cannot recover in negligence or pursuant to Labor Law § 200 because no triable issue of fact exists that on-site safety manager "control [led] the activity bringing about the injury to enable it to avoid or correct an unsafe condition"]; *Pope v. Safety and Quality Plus, Inc.*, 111 AD3d 911 [2d Dept 2013], *lv denied* 23 NY3d 905 [2014][trial court properly dismissed claim for common law contribution against safety consultant where no rational jury could have found that it was responsible for providing a safe place to work, or had authority to supervise or control the performance of work giving rise to plaintiff's injuries]; *compare Silva v. FC Beekman Associates*, 92 AD3d 754 [2d Dept 2012][issues of fact existed precluding summary judgment dismissing third party claims for common law indemnification and contribution against safety consultant, where the record showed that consultant had "the ability to stop imminently dangerous work from continuing, and the evidence that a .... representative [of the defendant safety consultant] observed the plaintiff working on the scaffold prior to the

accident, without taking any action]).

CONCLUSION

In view of the above, it is

ORDERED that S & M Mechanical Corp.'s motion (motion sequence number 006) is granted to the extent of dismissing WDF Inc.'s third-party claims for contribution and common-law indemnification; and it is further

ORDERED that defendant Metcalf & Eddy of New York, Inc.'s motion (motion sequence number 007) for summary judgment is granted and the amended complaint and the second third-party complaint are dismissed against it, and the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that all cross claims and/or counterclaims asserted by Metcalf & Eddy of New York, Inc.'s are dismissed as moot; and it is further

ORDERED that the part of The City of New York, WDF Inc. and Pro Safety Services, LLC's motion (motion sequence number 008) that seeks summary judgment dismissing all claims, cross claims and counterclaims as against The New York City Department of Environmental Protection is granted, and the Clerk of the Court, is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the part of The City of New York, WDF Inc. and Pro Safety Services, LLC's motion which seeks summary judgment dismissing the amended complaint is granted to the extent of dismissing the common law negligence and Labor Law §

200 claim as against the City of New York only, and the Labor Law § 241 (6) in its entirety, and is otherwise denied; and it is further

ORDERED that the motion by third-third party defendant Pro Safety Services LLC to dismiss the third-third party complaint is granted and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that all cross claims and/or counterclaims asserted by Pro Safety Services LLC are dismissed as moot; and it is further

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

ORDERED that the amended complaint is dismissed as against Metcalf & Eddy of New York, Inc., The New York City Department of Environmental Protection and The City of New York, and the action is severed and continued against the remaining defendants.

Dated: July 14, 2015

J.S.C.