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

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MICHAEL McCUE,

Plaintiff,

-against-

Index No. 156805/12

CABLEVISION SYSTEMS CORPORATION, CONSOLIDATED EDISON CO. OF NEW YORK, INC., VERIZON COMMUNICATIONS, INC., and VERIZON NEW YORK, INC.,

Motion Sequence Nos. 003, 004, 005 & 006

Defendants.

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JOAN A. MADDEN, J.:

In this action arising out of a construction site accident, plaintiff Michael McCue moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law § 240 (1) and Labor Law § 241 (6) based upon a violation of 12 NYCRR 23-1.16 against defendants Cablevision Systems Corporation (Cablevision), Consolidated Edison Co. of New York, Inc. (Con Ed), Verizon Communications, Inc., and Verizon New York, Inc. (together, the Verizon defendants) (motion sequence no. 003).

The Verizon defendants move, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims against them and for summary judgment on their cross claims for full indemnification and attorneys' fees from Cablevision (motion sequence no. 004).

Defendant Con Ed moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it[1] and for summary judgment on its cross claims for full

[1]Con Ed makes no arguments as to why the complaint or any cross claims against it should be dismissed.

indemnification and attorneys' fees from Cablevision (motion sequence no. 005).[2]

Defendant CSC Holdings, Inc. s/h/a Cablevision moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims and/or counterclaims against it (motion sequence no. 006).

BACKGROUND

Plaintiff alleges that he was injured on September 8, 2010 when he fell from a utility pole in the vicinity of 5 Welwyn Lane in Valhalla, New York. Plaintiff was working for nonparty H2O Landscape Design, Inc. (H2O), a cable installer that had subcontracted with CSC Holdings, Inc. to install a "cable plant extension" to increase the signal strength running to 5 Welwyn Lane. Con Ed and the Verizon defendants allegedly owned the utility pole from which he allegedly fell. It appears that CSC Holdings, Inc. is the parent company of Cablevision (Robinson tr at 36).

Con Ed and the New York Telephone Company entered into a joint use agreement effective January 1, 1982, which "provided for the Joint Use of [Con Ed's and New York Telephone Company's] respective wood poles when and where such Joint Use will be of mutual advantage and where such Joint Use will be consistent with the service requirements of both parties" (Abramson affirmation in support, exhibit G). The joint use agreement states that it "is applicable in the common service area in which Con Edison and N.Y. Telephone operate during the term hereof" (*id.*).

A pole attachment agreement between Con Ed, as licensor, and CSC Holdings, Inc., as licensee, which was notarized on May 5, 2000, states that Con Ed was "willing to license attachments by LICENSEE to Edison-owned poles according to the terms of the agreement" (*id.*,

[2]Motion sequence numbers 003, 004, 005, and 006 are consolidated for disposition.

exhibit H). The pole attachment contains the following provisions:

> "201. Specific License Required. No general permission is granted hereunder. LICENSEE may not make an attachment to any pole until Edison grants a license for that specific attachment.
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> ***
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> "601. Ten Year Term. Unless previously terminated pursuant to its terms, this Agreement shall continue in effect for a term of ten years and shall remain in effect thereafter unless it shall have been terminated on 90 days' written notice"

(*id.*). In addition, the pole attachment agreement contains indemnification and insurance procurement clauses (*id.*).

Plaintiff testified that when Desmond Shepherd (Shepherd) of H2O hired him as a manager, Shepherd wanted plaintiff to teach H2O employees, do "ride-out work" and "keep them happy at Cablevision" (Plaintiff tr at 140-141). Plaintiff testified that he frequently brought Cablevision sushi and pizza (*id.* at 141). He was also responsible for going to "town halls and get[ting] permits" (*id.*).

Plaintiff further testified that the "ride-out work" consisted of going to a jobsite to "make sure it can be built to the way that they're gonna hand you a print, as-built" (*id.* at 142). This involved "looking up" if the work was "an aerial job" – i.e., installation of cable equipment on utility poles (*id.* at 143-144). Plaintiff stated that "almost all of [his] work" consisted of walking on the ground (*id.* at 144).

In the early afternoon of September 8, 2010, plaintiff drove to 5 Welwyn Lane to meet Kevin Dickinson (Dickinson) from Cablevision to "turn the job on" (*id.* at 189-190). Specifically, on this date, Dickinson had to plug in the amplifier that feeds pole SPO54 (*id.* at

189). Plaintiff testified that "[b]asically [his] job was to be there. [His] men did the work. [He] was there to make sure everything turned on smoothly where he could turn in that job complete" (*id.* at 192-193). Plaintiff was "there to make sure everything went smoothly but [plaintiff was] not Kevin's supervisor" (*id.* at 194). If the activation was not done adequately, plaintiff was responsible for taking the steps necessary to get it to work properly (*id.* at 195). Plaintiff testified that he "would have to go out and look at it, weigh it out and, you know, get back to Desmond Shepherd, who was [his] boss" (*id.* at 220).

According to plaintiff, after Dickinson installed the amplifier, plaintiff observed Dickinson take a meter reading that showed the plant extension "didn't work," and plaintiff "turned cherry red" (*id.* at 196). Plaintiff testified that he "had to jump into gear and get this thing fixed" (*id.*). Plaintiff had a list of troubleshooting items such as "loose seizure screw" which was located on pole SPO54 (*id.* at 198). Plaintiff went up the pole to make sure that the seizure screws were tight (*id.* at 199-200). Plaintiff testified that gaffing a pole "means going up the pole with hooks on your boots" (*id.* at 233-234). He used his co-worker's gaffing equipment (*id.* at 297, 318, 341-343). Gaffing equipment consists of gaffs, which are strapped onto the worker's boots, and a "two piece belt" (*id.* at 235, 236). The belt consists of a six-inch wide strap that goes around the worker and two large buckles "where your secondary strap goes" (*id.* at 236, 237). The secondary strap, which is about four feet long, "goes around the telephone pole" and connects to the large buckles (*id.* at 237-238). When deciding whether to gaff a pole, "[he]'d look for any other way but to gaff the pole" because he "always thought [gaffing] was dangerous" (*id.* at 247, 248). Plaintiff climbed up the pole by putting on gaffs; he tightened all of the straps around his ankle and his shins and put his safety belt on (*id.* at 201). Plaintiff already had his

hardhat on and he grabbed the tool that tightens the seizure screws (*id.*).

To get down, plaintiff "put everything in [his] little ditty bag where [his] tools go, held the cable, moved down a little bit, moved down. Then [he] unhooked the belt and re-hooked the belt. And that's when [he] proceeded down the pole" (*id.* at 328). As plaintiff was gaffing down the pole, "[his] right leg slid down and [he] was just in an awkward position" (*id.*). He was about 18 to 20 feet off the ground when his right foot slipped (*id.* at 333). Plaintiff claims that, when he reset his right gaff into the pole, he inadvertently placed his right gaff into a crack in the pole, and that was why he fell (*id.* at 335). He stated that "[he] kicked the right foot in. And then when [he] put the weight on the right foot, you know, to go down with the left foot, the right foot just gave out. . . . And the left foot wasn't in too good" (*id.* at 334). After his right foot slipped, his body went down to the ground (*id.* at 336).

Kevin Dickinson, a Cablevision technician, testified that he "activated" the Welwyn Lane project (Dickinson tr at 57). When he installed the amplifier on the project, no one from H2O was present (*id.* at 66). Dickinson activated the line and verified the signal continuity point of the work done by H2O (*id.* at 67). He used a field strength meter to access the new tap (*id.* at 68). Dickinson did not recall there being any problems with the signal strength (*id.* at 67). Dickinson stated that he was not aware that anyone had fallen off any of the utility poles in the vicinity (*id.* at 71-72). He stated that plaintiff was not present at the site when he was there; "He wasn't there. He wasn't there when I was there" (*id.* at 100).

Plaintiff commenced this action on September 28, 2012, asserting claims for violations of Labor Law §§ 240 (1), 241 (6) and 200 and seeking recovery under principles of common-law negligence. In their answers, Con Ed and the Verizon defendants assert cross claims for

contractual indemnification and damages for failure to procure insurance against Cablevision.

DISCUSSION

"[T]he 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" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). "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]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Labor Law § 240 (1)

Plaintiff moves for partial summary judgment under Labor Law § 240 (1) against Cablevision, Con Ed, and the Verizon defendants. Plaintiff argues that as the owner of the decayed/damaged pole, Con Ed failed to provide adequate safety devices to climb the pole, since it was riddled with holes and inadequate for gaffing. Moreover, plaintiff contends that since Cablevision fulfilled the role of owner by contracting to have work performed for its benefit, it can also be held liable under the Labor Law.

In addition, plaintiff asserts that, at the time of the accident, plaintiff was "altering" a "structure." In this regard, plaintiff contends that his work of installing aerial cables and rerouting wires constituted a significant change to the utility pole, a "structure." Plaintiff also

submits an affidavit from Pedrito Alberto (Alberto), an employee of H2O on September 8, 2010, who states that, around noon on that date, someone in the crew received a telephone call from plaintiff indicating that he had fallen off a utility pole and was injured (Alberto aff, ¶ 2). Alberto and a few H2O workers arrived at the accident site to find plaintiff in the woods behind 5 and 9 Welwyn Lane (*id.*). Plaintiff was unable to complete his work after he fell (*id.*). Plaintiff also relies on the C-2 form filled out by Shepherd, which states that "[t]he employee slipped and fell from the pole he was climbing" (Rosen affirmation in support, exhibit N).[3]

In support of its motion for summary judgment, and in opposition to plaintiff's motion, Cablevision argues that climbing utility poles was outside the scope of his employment, and that plaintiff was not engaged in a covered activity, since he was not "altering" a building or structure. Cablevision submits an affidavit from Shepherd, a part owner of H2O, who states that:

> "[he] specifically conditioned Mr. McCue's employment on his not ever climbing a utility pole in any manner, including by using gaffing equipment. [He] told Mr. McCue he was not allowed to climb or gaff any utility poles. Mr. McCue indicated that he understood that his not gaffing or climbing any utility poles was a condition of his employment with H2O. Climbing utility poles, including with gaffing equipment, was outside of the scope of Mr. McCue's work duties"

(Shepherd aff, ¶ 8). Additionally, in opposition to plaintiff's motion, Cablevision further contends that: (1) plaintiff failed to show that Cablevision is a proper Labor Law defendant; (2) there are issues of fact as to whether plaintiff was a recalcitrant worker and the sole proximate cause of his injuries, because he disregarded specific instructions not to climb any utility poles for any reason; and (3) there are inconsistent versions of the accident, and issues of plaintiff's credibility, in view of Dickinson's testimony that plaintiff was not present at 5 Welwyn Lane

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[3]The C-2 report also states that "[t]he employee was climbing a pole for unknown cause" (Rosen affirmation in support, exhibit N).

when he was there and plaintiff's prior criminal convictions (Lamboley affirmation in opposition, exhibit D).

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

> "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) imposes absolute liability on owners, contractors, and their agents for failing to provide proper protection to workers on a construction site which proximately causes an injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]; *D'Amico v Manufacturers Hanover Trust Co.*, 177 AD2d 441, 442 [1st Dept 1991]). To establish liability under Labor Law § 240 (1), the plaintiff must prove a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices), and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]). "[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

The legislative intent behind the statute is to place ultimate responsibility for safety practices on owners and general contractors, rather on workers, who "are scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citation omitted]).

Thus, the negligence of the injured worker is not a defense to liability (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]).

1. Proper Defendants

a. Con Ed

Con Ed concedes it was the owner of the utility pole (Aviles affirmation in support, ¶ 5). "Liability under section 240 (1) rests on the fact of ownership, and whether the owner has contracted for the work or benefitted from it is legally irrelevant" (*Spagnuolo v Port Auth. of N.Y. & N.J.*, 8 AD3d 64, 64 [1st Dept 2004]). Therefore, the court finds that Con Ed may be found liable under Labor Law § 240 (1).

b. Cablevision

Plaintiff argues that Cablevision may also be held liable as an "owner," since it contracted with H2O to perform various construction services for Cablevision. Plaintiff also contends that Cablevision acted as a general contractor. In opposition to plaintiff's motion, Cablevision contends that CSC Holdings, Inc., not Cablevision, entered into a contract with H2O Landscape Designs, Inc.

"The meaning of 'owners' under Labor Law § 240 (1) and § 241 (6) has not been limited to titleholders but has 'been held to encompass a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit'" (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 618 [2d Dept 2008], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]; *see e.g. Girty v Niagara Mohawk Power Corp.*, 262 AD2d 1012, 1013 [4th Dept 1999] [cable television company was "owner" of the television cable line which lineman was installing at the time of his fall, where it was permitted to use the

utility pole pursuant to license agreements with owners, and hired plaintiff's employer to install lines]; *Wilcox v Paragon Cable T.V.*, 241 AD2d 914, 914-915 [4th Dept 1997] [cable company, a successor in interest to the holder of a license permitting the installation of a cable line and attachments to utility pole that hired plaintiff's employer to install cable line and attachments, was an "owner" under Labor Law § 240 (1); company contracted to have the installation work performed for its benefit and had the power to enforce safety standards and to choose responsible contractors]). The key criterion is the "right to insist that proper safety practices were followed and it is the right to control the work that is significant, not the actual exercise or nonexercise of control" (*Sarigul v New York Tel. Co.*, 4 AD3d 168, 170 [1st Dept 2004], *lv denied* 3 NY3d 606 [2004] [internal quotation marks and citation omitted]).

In addition, an entity is a "contractor" within the meaning of Labor Law §§ 240 (1) and 241 (6) where it "'had the power to enforce safety standards and choose responsible contractors'" (*Rauls v DirecTV, Inc.*, 113 AD3d 1097, 1098 [4th Dept 2014], quoting *Mulcaire v Buffalo Structural Steel Constr. Corp.*, 45 AD3d 1426, 1428 [4th Dept 2007]). It is well established that an entity's "right to exercise control over the work denotes its status as a contractor, regardless of whether it actually exercised that right" (*Milanese v Kellerman*, 41 AD3d 1058, 1061 [3d Dept 2007]).

In this case, CSC Holdings, Inc., not Cablevision, hired H2O to "construct, install and maintain all aerial, underground or building attachment plant necessary to complete the Work designated by [CSC Holdings, Inc.]" (Rosen affirmation in support, exhibit K).[4] CSC Holdings,

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[4]CSC Holdings, Inc. is thereafter referred to in H2O's subcontract as "Cablevision" (Rosen affirmation in support, exhibit K).

Inc. was obligated to "furnish cable, electronic equipment, fittings, hardware and associated materials required for the Work" (*id.*). H2O's use of "equipment, tools, vehicles and Contractor supplied materials available for the work was subject to the approval of [CSC Holdings, Inc.]" (*id.*). CSC Holdings, Inc. reserved the right to inspect, test, and approve all work performed by H2O (*id.*). According to Cablevision's witness, CSC Holdings, Inc. is the parent company of Cablevision (Robinson tr at 36).

In reply, plaintiff argues that the court should allow the summons to be amended pursuant to CPLR 305 © to name CSC Holdings, Inc. as a defendant. However, "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]). Therefore, plaintiff has not shown that Cablevision was either an owner or a contractor under the Labor Law.

c. Verizon Defendants

James K. O'Neill, claims counsel in Verizon Risk Management, who was an attorney in the legal department of New York Telephone Company, states based upon his work experience and his review of books and records that he is familiar with the corporate history of Verizon New York, Inc. and Verizon Communications, Inc. (O'Neill affirmation, ¶¶ 2-4). Verizon Communications, Inc. is a holding company that does not own offer goods or services to the public and does not own any real property; it does not and did not own, maintain or repair any utility poles (*id.*, ¶ 13). In addition, Albert Lee, an outside plant manager for Verizon, testified that a search was conducted to determine if Verizon owned poles in the area of 5 Welwyn Lane (Lee tr at 8, 26). The search revealed that Verizon did not own any poles in the area (*id.*).

In opposition, plaintiff argues that the Verizon defendants did not address plaintiff's Labor Law § 240 (1) and § 241 (6) claims. However, the Verizon defendants have demonstrated that they were not "owners" within the meaning of the Labor Law, and plaintiff makes no argument as to how the Verizon defendants are responsible parties under the Labor Law. Accordingly, the Verizon defendants are entitled to dismissal of plaintiff's Labor Law §§ 240 (1) and 241 (6) claims.

2. Statutory Violation and Proximate Cause

Labor Law § 240 (1) imposes the duty to protect workers engaged in "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." Under Labor Law § 240 (1), a "structure" is "any production or piece of work artificially built up or composed of parts joined together in some definite manner" (*Lewis-Moors v Contel of N.Y.*, 78 NY2d 942, 943 [1991] [internal quotation marks and citation omitted]). Courts have held that utility poles constitute a "structure" under the statute (*see id.*; *Campbell v City of New York*, 32 AD3d 703, 705 [1st Dept 2006]; *Sarigul*, 4 AD3d at 169; *Dedario v New York Tel. Co.*, 162 AD2d 1001, 1002 [4th Dept 1990]).

The Court of Appeals has held that "'altering' within the meaning of Labor Law § 240 (1) requires making a *significant* physical change to the configuration or composition of the building or structure" (*Joblon v Solow*, 91 NY2d 457, 465 [1998]). Simple, routine activities such as maintenance and decorative modifications are not within the activities protected by Labor Law § 240 (1) (*see Saint v Syracuse Supply Co.*, 25 NY3d 117, 125 [2015]). In determining whether the plaintiff's work constituted "alteration" of a structure, courts should not "isolate the moment of injury and ignore the general context of the work" (*Prats v Port Auth. of N.Y. & N.J.*, 100

NY2d 878, 882 [2003]). "The intent of the statute was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts" (*id.*).

In *Sarigul*, *supra*, the First Department held that stripping insulation on cable lines which were connected to utility poles constituted alterations to a structure under Labor Law § 240 (1) (*Sarigul*, 4 AD3d at 169). In *Dedario*, *supra*, the Court held that the work required to install a cable movie channel constituted an alteration (*Dedario*, 162 AD2d at 1002). Similarly, in *Tauriello v New York Tel. Co.* (199 AD2d 377, 378 [2d Dept 1993]), the Court held that the "transfer of cable television service as performed here by plaintiff constituted an alteration to the structure."

In the days before the accident, H2O had extended a "cable plant" to increase or upgrade the signal to the house at 5 Welwyn Lane (Robinson tr at 156-157). Plaintiff and "Frank" determined that they needed a "strand" cable on the pole from which he fell, in order to complete the job of installing cable service (Plaintiff tr at 179-181). They also determined that they needed to "cut a tap" on the pole (*id.* at 182-183). Plaintiff's men "put strand, hung 650 MC square cable and lashed it and then spliced it" (*id.* at 185-186). Plaintiff testified, on the date of the accident, that "Kevin wanted me there. He called and said he's the only one that can touch the amplifiers at – in this system" (*id.* at 302). "So we wanted to activate that. And I was there to make sure everything went smoothly" (*id.*). When he was injured, plaintiff was checking a seizure screw to make sure that it was properly tightened (*id.* at 198, 200). Kevin Dickinson used a truck to work on a pole and installed an amplifier and activated the line (Dickinson tr at 66-69, 82).

Based on this evidence, a "confluence of factors" may bring plaintiff's activity within the

coverage of the statute (*Prats*, 100 NY2d at 883). Plaintiff was employed by a company that was engaged in alteration. In addition, plaintiff was a member of a team that undertook an enumerated activity. There is no evidence that all enumerated activity had been completed at the time of the accident (*see Randall v Time Warner Cable, Inc.*, 81 AD3d 1149, 1151 [3d Dept 2011] [upgrade to cable subscriber's service was not complete until final step – replacing the cable filter was accomplished, and replacement of the filter was part of and not separate from the work that constituted alteration under the statute]).

However, Shepherd, plaintiff's supervisor,[5] states that plaintiff was required to activate a job only when the system could be activated from a plant at ground level or in a customer's home, and that climbing poles was outside the scope of plaintiff's employment; plaintiff's duties were purely administrative (Shepherd aff, ¶¶ 8-9). Shepherd states that H2O did not send plaintiff to the job on the day of the accident and does not know why or even whether he went to that location that day (*id.*, ¶ 13).

Under these specific circumstances, the court finds that there are issues of fact as to whether plaintiff is entitled to recover under Labor Law § 240 (1)[6] (*see Vega v Renaissance 632 Broadway, LLC*, 103 AD3d 883, 885 [2d Dept 2013] [issue of fact as to whether worker was acting outside of scope of his employment when he ascended ladder and began removing pipes, where plaintiff's employer's principal testified at his deposition that he had only authorized other

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[5]Shepherd was not deposed in this action.

[6]The court rejects Cablevision's contention that plaintiff was not an "employee" or "employed" within the meaning of the Labor Law (*see Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 576-577 [1990]). There is no genuine dispute that plaintiff was working for H2O at the time of the accident, and had been hired by H2O's principal (Shepherd aff, ¶ 8).

employees to do this work, and that he had only instructed the plaintiff to do clean-up work]; *see also Higgins v 1790 Broadway Assoc.*, 261 AD2d 223, 224 [1st Dept 1999] [Labor Law § 240 (1) claim was correctly dismissed where porter, "whose duties included mopping and waxing floors, was plainly acting outside the scope of his employment in attempting to repair the elevator"]; *cf. DePalma v Metropolitan Tr. Auth.*, 304 AD2d 461, 462 [1st Dept 2003] ["Decedent worked as part of a rigging crew and cutting a tag line was within the scope of the crew's task"]; *Andino v BFC Partners*, 303 AD2d 338, 339-340 [2d Dept 2003] [plaintiff's use of scaffolding was clearly foreseeable and fell within the scope of his employment where he was sent to premises in connection with installation of window guards]; *Calaway v Metro Roofing & Sheet Metal Works*, 284 AD2d 285, 286 [1st Dept 2001] [where ice removal was a top priority and plaintiff had been engaged in ice removal for four to five hours prior to the accident, "even if on the particular occasion of the accident plaintiff had been sent to the roof with instructions only to check it for leaks and to speak to the day laborers plaintiff's employer had hired, it does not follow that plaintiff was acting outside the scope of his employment simply because he threw chunks of ice off the roof that he observed while carrying out these instructions"]; *O'Connor v Lincoln Metrocenter Partners, L.P.*, 266 AD2d 60, 61 [1st Dept 1999] [plaintiff was actually engaged in work involving a gravity-related risk when he fell into opening of floor while crossing floor to floor where he was assigned to perform his task]).

Moreover, issues as to whether plaintiff was acting within the scope of his employment should be considered together with differing accounts by plaintiff and Dickinson of the circumstances leading up to the accident. Here, plaintiff testified that he had to climb the pole after Dickinson tested the line and "[i]t didn't work"; however, Dickinson did not recall any

problems with the signal strength and stated that plaintiff "wasn't there when [Dickinson] was there" (Plaintiff tr at 190, 196, 303; Dickinson tr at 66, 67, 71-72, 100). Under these circumstances, the issues as to scope of work and how the accident occurred are interrelated, and Cablevision "should have the opportunity to subject the plaintiff's testimonial account to cross-examination and have his credibility determined by the trier of fact" (*see Manna v New York City Hous. Auth.* 215 AD2d 335, 335-336 [1st Dept 1995][holding that an issue of fact as to liability was presented where the worker presented evidence that he was struck by a cinder block thrown from a third-floor window by a co-worker named "Brian," the fact that the worker was cut on the head, that there were no safety nets or safety devices in place, and where the employer offered evidence that it never employed anyone named "Brian," and that no cinder blocks were ever found]).

Therefore, plaintiff's motion for partial summary judgment under Labor Law § 240 (1), and Cablevision's motion for summary judgment dismissing this claim, are denied.

Labor Law § 241 (6)

Plaintiff also moves for partial summary judgment under Labor Law 241 (6) against Cablevision, Con Ed, and the Verizon defendants based upon a violation of 12 NYCRR 23-1.16 © and (f).[7]

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[7]12 NYCRR 23-1.16, entitled "Safety belts, harnesses, tail lines and lifelines," provides in subdivisions (c) and (f) as follows:

> "(c) Instruction in use. Every employee who is provided with an approved safety belt or harness shall be instructed prior to use in the proper method of wearing, using and attaching such safety belt or harness to the lifeline.
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Cablevision moves for summary judgment dismissing this claim, arguing that plaintiff's work did not involve demolition or excavation, and that his work did not affect the structural integrity of a building or structure.

Labor Law § 241 (6) provides as follows:

> "All contractors and owners and their agents, . . . , when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
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> ***
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> "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."

The Industrial Code defines "construction work" as follows:

> "All work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures, whether or not such

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> "(f) Inspection and maintenance.
>
> (1) Every safety belt, harness, tail line and lifeline shall be inspected by a designated person prior to each use. Employers shall not suffer or permit any employee to use any such equipment which shows any indication of mildew, broken fibre or fabric, excessive wear or any other damage or deterioration which could materially affect the strength of such safety belts, harnesses, tail lines or lifelines. Any such equipment found to be unsafe shall be removed from the job site.
>
> (2) When not in use, safety belts, harnesses, tail lines and lifelines shall be stored in such areas and in such a manner as to prevent their deterioration and to protect them from being damaged"

(12 NYCRR 23-1.16).

> work is performed in proximate relation to a specific building or other structure and includes, by way of illustration but not by way of limitation, the way of hoisting, land clearing, earth moving, grading, excavating, trenching, pipe and conduit laying, road and bridge construction, concreting, cleaning of the exterior surfaces including windows of any building or other structure under construction, equipment installation and the structural installation of wood, metal, glass, plastic, masonry and other building materials in any form or for any other purpose"

(12 NYCRR 23-1.4 [b] [13]).

In *Nagel v D & R Realty Corp.* (99 NY2d 98, 101 [2002]), the Court of Appeals held that Labor Law 241 (6) is "meant to protect workers engaged in duties connected to the inherently hazardous work of construction, excavation or demolition." In that case, the plaintiff was injured while performing a two-year safety inspection on an elevator (*id.* at 99). The Court held that the plaintiff's claim had to be dismissed because the "protections of Labor Law § 241 (6) do not apply to claims arising out of maintenance of a building or structure outside of the construction context" (*id.*). "The Industrial Code definition of 'construction work,' which includes maintenance, must be construed consistently with this Court's understanding that section 241 (6) covers industrial accidents that occur in the context of construction, demolition and excavation" (*id.* at 103).

The First Department has ruled that section 241 (6) does not apply, even where the plaintiff was altering a structure, under circumstances where the plaintiff's work did not involve the construction, demolition or excavation of the structure (*see Rhodes-Evans v 111 Chelsea LLC*, 44 AD3d 430, 433 [1st Dept 2007]; *Campbell*, 32 AD3d at 705; *Sarigul*, 4 AD3d at 170).

Here, plaintiff did not construct, demolish or excavate the utility pole. Moreover, it cannot be said that plaintiff's work of checking a seizure screw on the date of the accident "affected the structural integrity of the building or structure or was an integral part of the

construction of a building or structure" (*Rhodes-Evans*, 44 AD3d at 434 [internal quotation marks and citation omitted]). In light of this authority, plaintiff's section 241 (6) claim must be dismissed.

Labor Law § 200 and Common-Law Negligence

Labor Law § 200 (1) provides as follows:

> "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."

"Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). Generally, "[t]hese two categories should be viewed in the disjunctive" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Where the plaintiff's injury arises from a dangerous or defective premises condition, "a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]).

In contrast, where a plaintiff's injury stems from the means and methods in which the work is performed, including dangerous or defective equipment provided by the plaintiff's employer, "the owner or general contractor is liable if it actually exercised supervisory control

over the injury-producing work" (*Cappabianca*, 99 AD3d at 144; *see also Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]).

The plaintiff's comparative negligence is a defense to liability under Labor Law § 200 (*Drago v New York City Tr. Auth.*, 227 AD2d 372, 373 [2d Dept 1996]).

1. Verizon Defendants

The Verizon defendants have established that they were not "owners" within the meaning of the Labor Law. Plaintiff has not offered any basis to hold the Verizon defendants liable under section 200 (1) (*see Lopez v Strobe King Bldg. Supply Ctrs.*, 307 AD2d 681, 681 [3d Dept 2003] [Labor Law § 200 applies to owners, general contractors and their agents]). There is also no evidence that the Verizon defendants committed an affirmative act of negligence that caused plaintiff's accident. Therefore, plaintiff's Labor Law § 200 and common-law negligence claims against the Verizon defendants are dismissed.

2. Cablevision

Cablevision argues that there was no dangerous or defective premises condition, since plaintiff and his co-worker climbed the pole without any problems. In addition, Cablevision contends that it did not exercise any supervision, direction or control over plaintiff's work.

In response, plaintiff argues that Cablevision cannot establish that it lacked notice of the defective pole because it contracted for work to be performed in the immediate area, and that there are issues of fact as to its supervision over H2O's work.

To the extent that plaintiff's section 200 and common-law negligence claims are predicated on the means and methods in which plaintiff performed his work, Cablevision has

established that it did not exercise supervision over his work. While plaintiff stated that he took directions from "Frank" at Cablevision, plaintiff clarified that Frank did not instruct him as to how to carry out the aerial installation; "He just said put up – we need a span of cable. No, he did not give me directions, no" (Plaintiff tr at 223, 225). Plaintiff also testified that Dickinson did not tell plaintiff how to climb the pole and did not give him any instructions as to what equipment to use; "The guy from Cablevision told me to get up there and get it fixed, I want to go to lunch, you know" (*id.* at 347-348). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (*Hughes*, 40 AD3d at 306). As a result, monitoring and oversight of the timing and quality of the work, mere presence on the job site, and a general duty to ensure compliance with safety regulations, are insufficient to impose liability under section 200 or in common-law negligence (*see Phillip v 525 E. 80th St. Condominium*, 93 AD3d 578, 579-580 [1st Dept 2012]; *Paz v City of New York*, 85 AD3d 519, 519-520 [1st Dept 2011]).

Plaintiff also alleges that his accident occurred as the result of a dangerous or defective condition.

"To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). On a motion for summary judgment, the defendant bears the initial burden of establishing that it lacked notice of the allegedly dangerous condition (*see McCullough v One Bryant Park*, 132 AD3d 491, 492 [1st Dept 2015] ["defendants failed to make a prima facie showing that they

lacked constructive notice of the uncovered drain hole"]; *Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008] [a defendant who moves for summary judgment bears the "initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice" of it]).

Here, Cablevision has failed to meet its burden that it lacked notice of the defective condition of the utility pole. First, there is evidence that Cablevision was at the job site a week before plaintiff's fall (Robinson tr at 95-106). Moreover, to the extent Cablevision argues that there was no defective or dangerous condition, such argument is unavailing based on plaintiff's testimony. While plaintiff testified that he thought that the pole looked "worked" but was "gaffable" (Plaintiff tr at 321, 323, 326, 352), plaintiff also testified that while he was at the top of the pole, he saw "some bad cracks, and [he] was concerned" (*id.* at 323-324, 353). As plaintiff descended the pole, plaintiff's right gaff did not go into the pole; his right foot went into a crack in the pole and he lost his footing (*id.* at 333, 334, 351-352). The photographs of the pole show that it is riddled with holes (exhibit D to plaintiff tr). Accordingly, issues of fact exist as to whether Cablevision had notice of the allegedly defective condition. In reaching this conclusion, the court notes that in its brief Cablevision states "[a]ssuming *arguendo*, but not conceding that Cablevision is a Labor Law 200 defendant" (Cablevision's aff in support, at 45). Thus, Cablevision does not specifically argue it is not a proper defendant with respect to Labor Law § 200, and the court makes no determination as to this issue.[8]

In light of the above, the branch of Cablevision's motion seeking dismissal of plaintiff's

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[8]Cablevision asserts, however, that it "did not owe the plaintiff a duty of care pursuant to the contract between H2O and Cablevision because plaintiff was working outside the scope of his employment." (Cablevision's aff in support, at 45).

Labor Law § 200 and common-law negligence claims is denied.

Con Ed's Contractual Indemnification Claim Against Cablevision

Con Ed moves for summary judgment in its favor on its contractual indemnification claim against Cablevision. Cablevision also moves for summary judgment dismissing Con Ed's contractual indemnification claims against it.

Sections 701 and 702 of the pole attachment agreement provide as follows:

> "701. Indemnity. LICENSEE hereby indemnifies, protects and saves harmless Edison and BAC [identified as Bell Atlantic Corporation] from and against any and all loss, liability, damages and expense arising out of any demand, claim, suit or judgment for damages to property or injury to or death of persons, including the officers, agents and employees of either party hereto and of BAC, including payment under the Workers' Compensation Law or under any plan for employees' disability and death benefits, which arises out of this agreement, LICENSEE'S use of the pole, the right of way and related equipment or arises out of the erection, maintenance, transfer, presence, use or removal of LICENSEE'S attachments or out of the proximity of the cables, wires, apparatus and appliances of the LICENSEE to those of Edison or BAC, or arises out of any act or omission of the LICENSEE, Edison or BAC including any claims and depends of customers of LICENSEE OR others, and irrespective of any fault, failure, negligence or alleged negligence on the part of Edison or BAC.
>
> "702. (a) Insurance: Named Insureds. LICENSEE shall carry general liability insurance at its sole cost and expense to protect the parties hereto and BAC, by naming each as an additional insured, in respect of LICENSEE'S liability for indemnification under Sections 506, 509 and 709 and to protect the parties hereto and BAC in respect to any other claim for bodily injury or property damage . . . which arises out of this agreement, LICENSEE'S use of the pole, the right of way and related equipment or arises out of the erection, maintenance, presence, use or removal of LICENSEE'S attachments or out of the proximity of the cables, wires, apparatus and appliances of LICENSEE to those of Edison or of BAC, or arises out of any act or omission of LICENSEE, Edison or BAC including any claims and demands of customers of LICENSEE of others and irrespective of fault, failure, negligence or alleged negligence on the part of Edison or of BAC"

(Abramson affirmation in support, exhibit H).[9]

In moving for contractual indemnification against Cablevision, Con Ed argues that it is undisputed that: (1) Con Ed owned the utility pole; (2) Cablevision's cables were attachments to the utility pole; (3) plaintiff was performing work for H2O at the time of the accident; (4) plaintiff's work was under H2O's subcontract with Cablevision; and (5) at the time of the accident, plaintiff was performing work on Cablevision's attachment to the utility pole.

Cablevision contends that: (1) the pole attachment agreement was not in effect at the time of the accident; (2) the pole attachment agreement does not apply to the pole and/or against Cablevision because Con Ed did not issue a license pursuant to the pole attachment agreement; (3) the pole attachment agreement does not apply because Con Ed did not own the pole from which plaintiff allegedly fell; and (4) the pole attachment agreement violates General Obligations Law § 5-322.1.[10]

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[9]While Con Ed quotes section 702 of the pole attachment agreement, Con Ed only requests "full indemnification and attorneys' fees from Cablevision" and an order "requiring Cablevision to defend and indemnify Con Edison in the instant action including attorneys' fees and costs in defending this action" (Aviles affirmation in support, ¶¶ 1, 9). Cablevision also only seeks summary judgment dismissing Con Ed's contractual indemnification, and does not otherwise address Con Ed's breach of contract claim against it.

[10]In opposition to Con Ed's motion, Cablevision argues that Con Ed's notice of motion is defective because it violates CPLR 2214 (a). CPLR 2214 (a) states that "[a] notice of motion shall specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefor." Con Ed's notice of motion requests "an Order pursuant to CPLR 3212, granting summary judgment to Con Edison, dismissing plaintiff's complaint and all cross-claims against Con Edison" (Con Ed's notice of motion at 1). While Con Ed's notice of motion does not indicate that it sought summary judgment on its cross claims against Cablevision, Con Ed's attorney's affirmation indicates that it sought summary judgment on its cross claims, and Cablevision has not established any prejudice (*see Holy Spirit Assn. for the Unification of World Christianity v Harper & Roe, Publs.*, 101 Misc 2d 30, 33 [Sup Ct, NY County 1979] [procedural defect of failing to specify in notice of motion grounds on which dismissal was sought may be disregarded where there was no

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]). "In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

Although Cablevision argues that there is no evidence that the pole attachment agreement was in effect on the date of the accident, since the agreement produced by Con Ed was not signed by Con Ed, and that Con Ed did not issue a specific license to Cablevision, Cablevision has not disputed that its attachments were on utility poles in the area, and that Cablevision's subcontractor was performing a cable plant extension (*see Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 369 [2005] [an unsigned contract may be enforceable where there is objective evidence that the parties intended to be bound]). There is also no evidence that the agreement was terminated in writing. In any event, even if a license was not issued to Cablevision, the pole attachment agreement requires Cablevision to indemnify Con Ed and BAC for claims arising out of "any act or omission of [Cablevision]" (Abramson affirmation in support, exhibit H).

Cablevision has not demonstrated that the pole attachment agreement is unenforceable as a matter of law.

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prejudice and grounds for motion were apparent]). Additionally, in a so-ordered stipulation dated March 24, 2016, Cablevision withdrew an argument that it was not identified as a licensee/indemnitor in the pole attachment agreement (NYSCEF Doc. No. 209).

An agreement to indemnify in connection with the construction, alteration, repair or maintenance of a building or structure is void and unenforceable to the extent that such agreement contemplates full indemnification of a party for its own negligence (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997], *rearg denied* 90 NY2d 1008 [1997]). However, an indemnification clause which provides for partial indemnification to the extent that the party to be indemnified was not negligent, i.e., "to the fullest extent permitted by law," does not violate the General Obligations Law (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008] [indemnification "to the fullest extent permitted by law" contemplated partial indemnification and was permissible under the statute]). Even if the indemnification provision does not contain the savings language, it may nevertheless be enforced where the party to be indemnified is found to be free of any negligence (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]; *Collins v Switzer Constr. Group, Inc.*, 69 AD3d 407, 408 [1st Dept 2010]; *Lesisz v Salvation Army*, 40 AD3d 1050, 1051 [2d Dept 2007]). In this case, even though the pole attachment agreement does not contain the savings language "to the fullest extent permitted by law," the pole attachment agreement may be enforceable if the jury finds that Con Ed was not negligent.

However, Con Ed has failed to demonstrate that it lacked notice of the defective condition of the utility pole (*see Correia*, 259 AD2d at 65). Moreover, Con Ed has failed to demonstrate that the pole attachment agreement has been triggered, i.e., that plaintiff's accident "arises out of [Cablevision's] use of the pole" or "the erection, maintenance, presence, use or removal of [Cablevision's] attachments" (*id.*). The record is unclear as to whether plaintiff fell from a pole owned by Con Ed. Plaintiff testified that the pole from which he fell was "in the

middle," and was designed "SPO54" on a Google sketch map, and plaintiff testified that the pole was in a wooded area between houses and not in a street (Plaintiff tr at 179, 180, 181; exhibit E to plaintiff tr).[11] A pre-survey map shows a pole near 5 and 7 Welwyn Lane designated 748577 (Robinson tr at 130-131, 133). East of pole 748577 is another pole with a numeral "4" circled underneath it to indicate the tap value of the cable plant on the pole (*id.* at 133, 136). To the east of pole 4 is a pole designated W2 (*id.* at 138). Con Ed's witness, Donald Miller, testified that pole 3P was a "private property pole," and that the two other poles near pole 3P are designated "FR," meaning "foreign poles" or not owned by Con Ed (Miller tr at 48, 49-50).[12] For the same reasons, Cablevision has failed to show that the provision has not been triggered as a matter of law. Therefore, the branch of Con Ed's motion for summary judgment seeking full indemnification and attorneys' fees from Cablevision, and the branch of Cablevision's motion seeking dismissal of this claim, must be denied (*see D'Angelo v Builders Group*, 45 AD3d 522, 525 [2d Dept 2007] [since it had not been determined that plaintiff's accident was caused by any act or omission of a subcontractor, contractual indemnification was premature]).

Verizon Defendants' Contractual Indemnification and Breach of Contract Claims Against Cablevision

The Verizon defendants seek summary judgment on their contractual indemnification and breach of contract claims against Cablevision pursuant to sections 701 and 702 of the pole attachment agreement, arguing that since the pole attachment agreement identifies "BAC" as an

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[11]Plaintiff relies on exhibit 4 to the deposition transcript of Christopher Shannon, another Con Ed witness, which describes pole 3P (Rosen affirmation in support at 37, 47).

[12]Although Con Ed failed to respond to a notice to admit as to ownership of the subject pole, the court notes that Con Ed's admission is not binding on Cablevision (*see Mack v Arnold Gregory Mem. Hosp.*, 90 AD2d 969, 969 [4th Dept 1982]).

indemnitee and requires Cablevision to purchase insurance naming "BAC" as an additional insured, the agreement was intended to benefit them. As support, the Verizon defendants rely on an affirmation indicating that "[b]etween 1997 and September 22, 2000, Verizon New York, Inc. and its predecessor, The New York Telephone Company, did business under the name Bell Atlantic" (O'Neill affirmation, ¶ 6). On May 5, 2000 (the date that the pole attachment agreement was notarized), NewYork Telephone Company was doing business as "Bell Atlantic" (*id.*, ¶ 11).

In moving for summary judgment dismissing the Verizon defendants' contractual indemnification and breach of contract claims, Cablevision contends that: (1) the Verizon defendants are not identified as indemnitees or additional insureds under the pole attachment agreement; (2) the pole attachment agreement does not apply because it was not signed by Con Ed; (3) the pole attachment agreement does not apply because Con Ed did not issue a license to Cablevision; (4) the pole attachment agreement does not apply because Con Ed did not own the pole; and (5) the pole attachment agreement violates the General Obligations Law.

Initially, the court notes that "a contract assuming [the duty to indemnify] must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]).

A party asserting third-party beneficiary rights under a contract must establish:

> "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [its] benefit, and (3) that the benefit to [it] is sufficiently immediate, [rather than incidental,] to indicate the assumption by the contracting parties of a duty to compensate [it] if the benefit is lost"

(*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and

citation omitted]). "[A] party claiming to be a third-party beneficiary has the burden of demonstrating an enforceable right" (*Alicea v City of New York*, 145 AD2d 315, 317 [1st Dept 1988]). An intended beneficiary is

> "one whose right to performance is appropriate to effectuate the intention of the parties to the contract *and* either the performance will satisfy a money debt obligation of the promisee to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance"

(*id.* [internal quotation marks and citation omitted]). "Thus, where the performance is rendered directly to a third party, that party is generally considered an intended beneficiary of the contract" (*id.* at 318).

> "'The best evidence . . . of whether the contracting parties intended a benefit to accrue to a third party can be ascertained from the words of the contract itself. An intent to benefit a third party can also be found when no one other than the third party can recover if the promisor breaches the contract . . . or . . . the language of the contract otherwise clearly evidences an intent to permit enforcement by the third party'"

(*id.*, quoting *Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 45 [1985]).

Here, the Verizon defendants are not identified as indemnitees in the pole attachment agreement. Although the Verizon defendants point out that the pole attachment agreement states that Cablevision agreed to indemnify BAC, the Verizon defendants have not established that the agreement was intended to benefit either Verizon Communications, Inc. or Verizon New York, Inc. (*cf. Matter of White Plains Plaza Realty, LLC v Cappelli Enters., Inc.*, 108 AD3d 634, 637 [2d Dept 2013] [intent to benefit judgment creditor was apparent from face of indemnification agreement]; *Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 369 [1st Dept 2006], *lv dismissed* 7 NY3d 864 [2006] [lessor of a condominium unit was a third-party beneficiary of an indemnification provision in an alteration agreement, which expressly stated that the

indemnification provision applied "to all persons, including, without limitation, the owners of other units in the Building"]). As noted above, "[t]he best evidence . . . of whether the contracting parties intended a benefit to accrue to a third party can be ascertained from the words of the contract itself" (*Alicea*, 145 AD2d at 318).

Moreover, the pole attachment agreement did not require Cablevision to procure insurance naming either Verizon Communications, Inc. or Verizon New York, Inc. as additional insureds. Thus, the Verizon defendants have failed to establish that they were intended third-party beneficiaries of the insurance procurement provision (*see Clapper v County of Albany*, 188 AD2d 774, 777 [3d Dept 1992] [subcontract required that general contractor be named as additional insured on subcontractor's policy and therefore, general contractor was third-party beneficiary of insurance procurement provision]). Therefore, the Verizon defendants' contractual indemnification and breach of contract claims against Cablevision are dismissed.

Cross Claims Against the Verizon Defendants

The Verizon defendants seek an order dismissing "all cross claims against the Verizon defendants" (Verizon defendants' notice of motion at 1). In opposition, Cablevision points out that the Verizon defendants did not address Cablevision's cross claims for negligence and contribution (Lamboley affirmation in opposition at 31). However, since the Verizon defendants have demonstrated that they were not negligent, there is no basis for these cross claims. Therefore, Cablevision's cross claims against the Verizon defendants are dismissed.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion (sequence number 003) for partial summary judgment

on the issue of liability under Labor Law § 240 (1) and Labor Law § 241 (6) is denied; and it is further

ORDERED that the motion (sequence number 004) of defendants Verizon Communications, Inc. and Verizon New York, Inc. for summary judgment is granted to the extent of dismissing plaintiff's complaint and all cross claims against said defendants, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 005) of defendant Consolidated Edison Co. of New York, Inc. for summary judgment is denied; and it is further

ORDERED that the motion (sequence number 006) of defendant CSC Holdings, Inc. s/h/a Cablevision Systems Corporation for summary judgment is granted to the extent of dismissing plaintiff's Labor Law § 241 (6) claim, and the cross claims for contractual indemnification and breach of contract of defendants Verizon Communications, Inc. and Verizon New York, Inc. against it, and is otherwise denied.

Dated: October 25, 2016

ENTER:

J.S.C.
HON. JOAN A. MADDEN
J.S.C.