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

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THEODORE COOLBAUGH,

Plaintiff,

-against-

SHULMAN INDUSTRIES INC., DESMAN, INC., TAYLOR CLARK ARCHITECTS INC., THORNTON ENGINEERING, P.C., J.F. O'HEALY CONSTRUCTION CONSTRUCTION CORP., ROGER V. HEALY and NORTH SHORE UNIVERSITY HOSPITAL,

Defendants.

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SHULMAN INDUSTRIES, INC.,

Third-party Plaintiff,

-against-

SHARED SYSTEMS TECHNOLOGY,

Third-party Defendant.

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SHULMAN INDUSTRIES, INC.

Second Third-party Plaintiff,

-against-

BAE SYSTEMS SHARED SERVICES, INC., PULLMAN POWER, LLC, PULLMAN SST, STRUCTURAL GROUP, INC. a/k/a STRUCTURAL GROUP OF MARYLAND, STRUCTURAL TECHNOLOGIES, LLC, THE PULLMAN COMPANY, VSTRUCTURAL, LLC,

Second Third-party Defendants.

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Index Nº.: 151225/14
Motion Seq. Nos. 005, 006, 007, and 008

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

In a Labor Law action, defendants Roger V. Healy (Healy) and J.F. O'Healy Construction Corp. (O'Healy Construction) move, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims against Healy (motion seq. No. 005). Third-party defendant Shared Systems Technology, Inc. (Shared Systems) moves for summary judgment dismissing all claims for common-law indemnification and contribution as against it (motion seq. No. 006). Defendant/third-party plaintiff Shulman Industries (Shulman) moves for summary judgment dismissing the complaint, as well as for summary judgment on its claim for contractual indemnification against Shared Systems; defendant Desmond, Inc. cross-moves on Shulman's motion for summary judgment dismissing the complaint (motion seq. No. 007). Defendant North Shore University Hospital (North Shore) moves for summary judgment dismissing the complaint; in the alternative, North Shore moves for summary judgment on its contractual indemnification claim against Desman (motion seq. No. 008).

BACKGROUND

On the date of his accident, September 8, 2012, plaintiff Theodore Coolbaugh (Coolbaugh) was working for Shared Systems, a subcontractor on a project to renovate the parking garage at North Shore Hospital in Manhasset, New York. The garage, an above-ground, post-tensioned concrete structure[1] with four levels, was originally built in the early 1980s. J.F. O'Healy Construction Corp. (O'Healy Construction), an entity that dissolved seven years before the subject renovations, was the general contractor on the original construction of the building.

[1] A post-tensioned concrete structure is one in which steel cables (known as tendons) are pulled taut and anchored after concrete has been poured over them.

North Shore owned the garage and it hired Desman and Shulman to perform the subject renovations. Shulman, the construction manager, hired Shared Systems to perform repairs on the garage's concrete and post-tension repairs.

Prior to his accident, plaintiff was operating a chipping hammer while performing a partial-depth repair to a curb on the roof level of the garage. He was not aware that he was chipping near post-tensioned steel beams that were shallowly nestled beneath the top layer of concrete. Shulman's construction supervisor for the project, Charles Scott (Scott), testified that the tensioned cables in the area where plaintiff was working were installed improperly, as there were "no bursting bars . . . No Hold Down Bars . . . and they weren't buried deep enough" (Scott tr at 56-57). Moreover, Scott testified that no ground penetrating radar was used to detect the tendons before plaintiff began working in the area where his accident took place, despite such equipment being used to search for metal tendons before work began in other areas of the garage (*id.* at 57-58).

The post-tensioning failed, producing an explosive effect; plaintiff appeared to struggle when asked to describe the moment of impact at his deposition:

> Q: What happened?
> A: To tell you the truth, did you ever hear in a car when an airbag goes off? It was just an explosion. That's all I remember.
> Q: It sounded like an explosion?
> A: Yes.

(Coolbaugh tr at 91).

Shulman's Scott testified that the explosion "took football-size pieces of concrete and threw [them] 30 to 40 feet" (Scott tr at 53). Shared Systems' construction manager, Joseph Munch (Munch), testified that, typically, when you are aware of the location of post-tensioned

steel cable, or a tendon, "if it's a big major repair we would go out to the middle of the tendon, not at the end anchor, and expose it and actually cut it with a grinder and then both sides would go back into the concrete" (Munch tr at 81). Plaintiff testified that he was thrown 10 to 15 by the explosion and that it caused various injuries, including a fractured tibia (Coolbaugh tr 94, 134).

Plaintiff filed his complaint on February 11, 2014 alleging that defendants are liable to him for his injuries in negligence, and under Labor Law § 200, 240, and 241 (6). As O'Healy Construction was dissolved long before the action was filed, plaintiff brought the action directly against O'Healy Construction principal, Roger Healy.

DISCUSSION

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212

[b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi,* 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

Healy's Motion (motion seq. No. 005)

Healy argues, citing *James v Loran Realty V Corp.* (20 NY3d 918 [2012]), that a party seeking to pierce the corporate veil has the burden to show that an individual defendant abused the privilege of doing business in the corporate form. In *James*, the Court of Appeals held that the plaintiffs "did not meet this burden, inasmuch as they failed to produce evidence that the individual defendants took steps to render the corporate defendant insolvent in order to avoid to plaintiffs' claim for damages or otherwise defraud plaintiffs" (*id.* at 919).

Similarly, here there is no evidence in the record that Healy abused the privilege of doing business in the corporate form. As such, and as plaintiff does not oppose Healy's motion, all claims and cross claims against Roger Healy must be dismissed.

Shared Systems' Motion (motion seq. No. 006)

The second cause of action in Shulman's third-party complaint contends that Shared Systems are liable to Shulman for common-law negligence and contribution. Shared Systems

argues that these claims must be dismissed, as plaintiff did not suffer a "grave injury" under Workers Compensation Law (WCL) § 11. The WCL § 11 defines a grave injury as:

> "[D]eath, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total or permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

The Court of Appeals has held that these categories, "providing the sole bases for a third-party action, 'are deliberately both narrowly and completely described'; the list, both 'exhaustive' and 'not illustrative,' is 'not intended to be extended absent further legislative action' (*Fleming v Graham*, 10 NY3d 296 quoting Governor's Approval Mem at 55). Shulman does not oppose Shared Systems' motion. For that reason, and because plaintiff's injuries do not fall within the ambit of WCL § 11, Shulman's claims for contribution and common-law indemnification against Shared Systems must be dismissed.

Shulman's Motion (motion seq. No. 007)

Labor Law 240 § (1)

Shulman argues that plaintiff's Labor Law § 240 (1) claim should be dismissed, as his accident was not gravity-related, in the sense required by that statute. This is the case, as plaintiff alleges that his accident resulted from the force released by the post-tensioned tendons, rather than the ordinary force of gravity. As such, plaintiff's Labor Law § 240 (1) claims must be dismissed, as against all defendants.

Labor Law § 200 and Common-law Negligence

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). "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" (*id.*) (emphasis omitted).

Shulman argues that it should be granted summary judgment on plaintiff's Labor Law § 200 claim because it did not have notice of the tendons that were involved with plaintiff's accident. However, Shulman's approach suggests, focusing only on notice and not addressing supervisory control ignores plaintiff's allegations, which suggest that his accident arose both from a defect in the premises and the means and methods of his work.

Plaintiff argues, correctly, that when Labor Law § 200 and common-law negligence claims involve both premises, as well as means and methods issues, any *prima facie* showing of entitlement to judgment dismissing such claims must address both claims. In *Garcia v Market*

Assoc., the Appellate Division held that when a plaintiff alleges both types of claims, "a defendant moving for summary judgment with respect to causes of action alleging a violation of Labor Law § 200 is obligated to address the proof applicable to both liability standards" (123 AD3d 661, 663 [2d Dept 2014] [internal quotation mark and citation omitted]). Thus, to make a *prima facie* showing of entitlement to summary judgment in such circumstances, defendants are "obligated to address the proof applicable to both liability standards" (*id.* at 664).

Here, as Shulman has failed to address plaintiff's means and methods allegations and has failed to address the issue of supervisory control, it has failed to make a *prima facie* showing as to summary judgment on plaintiff's Labor Law § 200 and common-law negligence claims. In any event, plaintiff raises an issue of fact as to notice on the premises defect half of the claim by submitting testimony from Tom Isaac (Isaac), Desman's project manager, who testified that Shulman was provided with structural drawings which identified the metal tendons involved with plaintiff's accident (Isaac tr at 210-211). Accordingly, as Shulman has failed to make a *prima facie* showing, and as, in any event, issues of fact remain, the branch of Shulman's motion seeking dismissal of plaintiff's Labor Law § 200 and common-law negligence claims must be denied.

Labor Law 241 (6)

Labor Law § 241 (6) provides, in relevant part:

> "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."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiffs must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis*, 16 NY3d at 416).

Plaintiff alleges that defendants violated 12 NYCRR 23-3.3 (c),[2] which is entitled "Demolition by hand; inspection" and provides:

> "During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorating floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means."

[2] Plaintiff abandons any allegations relating to other Industrial Code provisions by only defending 12 NYCRR 23-3.3 (c) in its opposition (*see Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014] [failure to address claims indicates an intention to abandon them as bases of liability]). Accordingly, allegations relating to other Industrial Code provisions must be dismissed.

Shulman does not challenge the specificity of this regulation, and, indeed, courts have found that it is sufficiently specific to serve as a Labor Law § 241 (6) predicate (*see e.g. Ortega v Everest Realty LLC* (84 AD3d 542 [1st Dept 2011]); *Perillo v Lehigh Constr. Group, Inc.*, 17 AD3d 1136, 1138 [4th Dept 2005]). Shulman instead maintains that the regulation is inapplicable, arguing initially that the subject project did not involve the demolition of building or structure.

Even if the concrete chipping work that plaintiff was performing at the time of his accident were considered demolition, Shulman argues that the regulation is still not applicable because the accident was not related to structural instability caused by the progress of the demolition. In support, Shulman cites to *Campoverde v Bruckner Plaza Assoc., L.P.* (50 AD3d 836 [2d Dept 2008]), which held that 12 NYCRR 23-3.3 "requires 'continuing inspections against hazards which are created by the progress of the demolition work itself' rather than inspections of how demolition would be performed" (*id.* at 837, quoting *Monroe v City of New York*, 67 AD2d 89, 100 [1979]). In *Monroe*, the Court of Appeals held that 12 NYCRR 23-3.3 was not applicable, as "the danger," an insufficiently secured fire escape, "was present before the demolition work began," and reasoned that "[t]he thrust of this subdivision is to fashion a safeguard, in the form of 'continuing inspections, against hazards which are created by the progress of the demolition work itself" (67 AD2d at 100).

Shulman cites not only to *Campaoverdre*, but to several other cases from the Second Department analyzing 12 NYCRR 23-3.3, such as *Vega v Renaissance 632 Broadway, LLC* (103 AD3d 883, 885 [2d Dept 2013] [dismissing claims based on the regulation, as "the hazard," a falling pipe, "arose from the plaintiff's actual performance of the demolition work itself, rather

than from structural instability caused by the progress of the demolition"] [internal quotation marks and citation omitted]), *Smith v New York City Hous. Auth.* (71 AD3d 985 [2d Dept 2010] [dismissing claims under the regulation where plaintiff tripped over cinder block debris during a demolition]), and *Mercado v TPT Brooklyn Assoc., LLC* (38 AD3d 732, 734 [2d Dept 2007] [holding, in a case where a piece of ceiling fell on a demolition worker's head, that claims under this regulation must be dismissed, as they were "based on mere speculation"]). However, Shulman does not cite the most recent Court of Appeals case analyzing 12 NYCRR 23-3.3 (c), *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp* (18 NY3d 1 [2011]).

The plaintiff in *Wilinsky* was injured while demolishing a wall, when debris fell from a nearby wall fell and knocked two unsecured pipes into him (*id.* at 5). In analyzing the subject provision, the Court of Appeals quoted *Monroe* for the proposition that its purpose was to provide a safeguard, "in the form of continuing inspections, against hazards which are created by the progress of the demolition work" (*id.* at 13 [internal quotation marks and citation omitted]). The Court of Appeals did not follow the Second Department's line of cases which require that the hazard created by the demolition work must be one that involves structural instability, as unsecured pipes clearly do not reflect structural instability. Even without a showing of structural instability caused by the demolition work, the Court of Appeals held that, as the "defendants failed to meet their burden of showing either that they complied with the regulation or that their noncompliance did not cause plaintiff's accident," denial of a motion to dismiss the plaintiff's Labor Law § 241 (6) claim was proper.

In opposition, plaintiff argues that his accident fits neatly within the parameters of the 12 NYCRR 23-3.3 (c). First, plaintiff maintains he was engaged in demolition, as he was

demolishing concrete with a chipping hammer when his accident happened. Moreover, plaintiff argues that the demolition work created, and the lack of ongoing inspections, caused plaintiff's accident. Plainiff cites to the North Shore's project manager, Jeff Scott (J. Scott), who testified that, in his view, the action of the chipping hammer caused the metal tendons to snap: "I—it's my belief that it was the chipping action … further weakened an anchor and the anchor let loose" (J. Scott tr at 77).

Here, the crucial question is the threshold one: was plaintiff engaged in demolition at the time of his accident? That is, similar to the defendants in *Wilinsky*, Shulman has failed to show that it conducted continuing inspections, or that the failure to do so did not cause plaintiff's accident. But these requirements of the regulation only apply to Shulman if plaintiff was engaged in demolition operations.

In *Solis v 32 Sixth Ave. Co. LLC* (38 AD3d 389 [1st Dept 2007]), the First Department considered the question of what qualifies as demolition under 12 NYCRR 23-3.3. In *Solis*, the subject work involved exterior facade repairs, and the plaintiff was injured while using an electric hammer to remove bricks, when he tripped while standing on debris caused by the work (*id.* at 389). The First Department held that 12 NYCRR 23-3.3 was not implicated, as "[t]he project did not call for the dismantling or razing of a building or structure, in whole or part, and there were no contemplated changes to the structural integrity of the building" (*id.* at 390).

Here, Shulman's own Charles Scott testified that the scope of the job was to "repair and replace tension cables" (C. Scott tr at 11). This work is distinguishable from the work in *Solis* because it involved a change to the structural integrity of the garage -- replacing post-tensioned cables, which are a stabilizing agent with concrete structures, such as the roof/ceiling concrete

slab where plaintiff's accident took place. As plaintiff had to partially demolish the roof/ceiling in order for the repairs to take place, he was engaged in demolition, such that his work is within the ambit of 12 NYCRR 23-3.3. Thus, as plaintiff's work is covered demolition work, and as Shulman has failed to make a *prima facie* showing that it did not violate the regulation, or that any such violation was not the cause of plaintiff's accident, the branch of Shulman's motion seeking denial plaintiff's Labor Law § 241 (6) claims must be denied.

Contractual Indemnity Against Shared Systems

Shulman argues that it is entitled contractual indemnification from Shared Systems. The indemnification clause in the work order between these two parties provided:

> To the fullest extent permitted by the law, [Shared Systems] hereby assumes and agrees to indemnify, defend, and hold harmless SST, its partners, consultants and/or subsidiaries, and their respective agents, officers and employees from and against any and all claims, suits, demands, damages, liabilities, and professional fees (including but not limited to attorneys' fees, costs, court costs, litigation expenses, and disbursements), arising out of or resulting from any negligent act or omission of Offeree, its employees and/or agents, related to SST's performance of the work required by this Proposal, or any extra work arising out of this proposal

(Shulman/Shared Systems Work Order, ¶ 6).

"A contract that provides for indemnification will be enforced as long as the intent to assume such a role is sufficiently clear and unambiguous" (*Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 274 [2007] [internal quotation marks and citations omitted]). Here, Shulman fails to make a *prima facie* showing of entitlement to judgment as a matter of law on its claim for contractual indemnification against Shared Systems, as the the clause plainly requires a showing of negligence against the indemnitor before the clause is triggered, and there has been no finding of negligence against Shared Systems in this matter at this juncture (*see e.g. Matter of 91st St.*

Crane Collapse Litig., 133 AD3d 478, 480-481 [1st Dept 2015]; *Fernandez v Stockbridge Homes, LLC*, 99 AD3d 550, 551-552 [1st Dept 2012]; *Gentile v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2005 NY Slip Op 25426 [1st Dept 2005]). Accordingly, the branch of Shulman's motions seeking summary judgment on its claim for contractual indemnification against Shared Systems must be denied.

Desman's "Cross Motion"

Desman cross moves for summary judgment dismissing the complaint. Initially, plaintiff, Shulman, and North Shore each argue that Desman's motion should be denied on procedural grounds. That is, this court's order of April 18, 2017 provided, based on contingencies outlined in the order, that the deadline for dispositive motions was July 17, 2017. Desman filed its application on July 19, 2017. While it is denominated as a cross motion, it seeks relief against a plaintiff, a nonmoving party.

It is well established that a late cross motion for dispositive relief may be entertained when the issues raised are "nearly identical" to those raised by a timely a motion (*Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 419 [1st Dept 2014] [internal quotation marks and citation omitted]). This rule does not apply to improperly labeled cross motions (*see Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 88 [a cross motion is an improper vehicle for seeking relief from a nonmoving party]). *Kershaw* held that "[a]llowing movants to file untimely, mislabeled 'cross motions' without good cause shown for the delay affords them an unfair and improper advantage" (*id.*).

Plaintiff, Shulman, and North Shore each argue that if Desman's "cross motion" were properly labeled, it would come up against the rule of *Brill v City of New York* (2 NY3d 648

[2004]), which states that a court may not accept a summary judgment motion filed more than 120 days after the filing of the note of issue absent a showing of good cause for the delay (*id.* at 651-653). Here, Desman's motion was filed more than 120 days after the filing of the note of issue.[3] Thus, under *Brill*, the court cannot accept the application unless Desman can show good cause for the delay.

Desman does not offer good cause for the delay, but instead argues that the other parties will not be prejudiced by the court overlooking its technical deficiencies. However, *Brill* is clear that, in the circumstances that present themselves here, the absence of prejudice is not enough and the party that has made the untimely motion must show good cause for the delay. As Desman has failed to do so, the court must deny its motion for summary judgment.

North Shore's Motion (motion seq. No. 008)

Labor Law § 200 and Common-law Negligence

Unlike Shulman, North Shore, which owns the subject property, makes arguments touching both the premises, as well as the means and methods allegations made by plaintiff. As to the allegations of premises defect, North Shore argues that it neither created nor had notice of any defect related to the post-tensioned tendons involved with plaintiff's accident.

Plaintiff does not allege that North Shore caused the defect. As to notice, North Shore argues that it operated the garage for 30 years, and no one ever reported the subject condition to it. North Shore refers to the testimony of its project manager, Jeff Scott, who testified as follows with respect to the subject cables:

Q: Did you personally know that there were post-tension cables in the area of

[3] Plaintiff filed the Note of Issue on November 29, 2016.

-- in the curb area of plaintiff's accident prior to his accident?

...

A: No.

Q: Earlier we looked at design drawings from the original construction and you said that it was difficult to read, correct?

A: Yes.

Q: What about it was difficult to read or makes it difficult to read?

...

A: I didn't understand what that one heading said. You referred to it saying 150 kips and it was shown in an area. I don't understand what that's referring to

(J. Scott tr at 145).

As to constructive notice, North Shore cites *Barrerra v New York City Tr. Auth.* (61 AD3d 425 [1st Dept 2009]), which recites the well-established requirement that, "[t]o constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time before the accident to permit defendant's employees to discover and remedy it" (*id.* at 426 [internal quotation marks and citation omitted]). *Barrerra* also held that a corollary of this principle is that "[c]onstructive notice will not be imputed where the defect is latent (*id.*). North Shore argues that it cannot have had constructive notice of the subject defect, as, laying beneath cement, it was latent.

As to the supervisory control required for a means and methods claim, North Shore argues, without citing to any specific transcript pages, that plaintiff and all defendants testified that North Shore had no control over plaintiff's work.

In opposition, plaintiff challenges North Shore's position as to both notice and supervisory control. As to notice, plaintiff does not challenge North Shore's position as to constructive notice, but contends that it had actual notice of the subject defect. Like North Shore, plaintiff turns to the testimony of Jeff Scott, North Shore's project manager. Scott

testified both that he was capable of reading structural engineering drawings, and that North Shore was in possession of structural drawings from the original construction of the parking garage (J. Scott tr at 12, 55). Plaintiff submits the original structural drawings, and contends that the drawings plainly show the placement of the subject post-tensioned cables.

In support of their interpretation of the drawings, plaintiff submits testimony from Ajay Kumar, Desman's structural engineer, who was shown the structural drawings at his deposition:

> Q: Can you show me on the structural drawing from the original construction that we looked at earlier?
>
> ...
>
> A: 150 kips, that's the tendon. It says that six tendons are there.
> Q: Okay. Where does it say that six tendons are there?
> A: Says 150 kips, standard practice, we use 25 kips each tendon.
> Q: So 150 kips indicates to you that there are six tendons in that location?
> A: Yes.
>
> ...
>
> Q: ...Looking at this document, does it indicate that there were post-tension cables in the curb where plaintiff was injured?
>
> ...
>
> A: They are saying 150 kips, so there, yes, there is cables in that area.

(Kumar tr at 54-55).

Kumar's testimony makes clear that there is, at least, an issue of fact as to whether North Shore had actual notice of the post-tensioned cables. However, the mere existence of such cables does not constitute a premises defect. Plaintiff maintains that the defect consisted of the cables having been shallowly placed two inches below the surface of the concrete curb where plaintiff was working. Plaintiff submits an affidavit from John Flynn (Flynn), a forensic engineer, who stated the structural drawing of the subject area "plainly shows that the cables were embedded only 2 inches below the surface of the concrete" (Flynn tr at 6). As North Shore had possession of the drawing, there is a question of fact of whether it had actual notice of the alleged defect.

Accordingly, the branch of North Shore's motion that seeks dismissal of plaintiff's Labor Law § 200 claim as against it must be denied.

As to supervisory control, plaintiff also raises an issue of fact as to whether North Shore had supervisory control over his work. Plaintiff argues that his accident was caused, among other things, by the failure of North Shore to use ground penetrating radar as a preparatory safety measure before concrete-chipping began. Plaintiff submits the testimony of North Shore's Jeff Scott, who testified that he could have ordered such ground penetrating radar (J. Scott tr at 45). Accordingly, as North Shore had control over this allegedly decisive part of the work, there is a question of fact as to whether North Shore had supervisory control over plaintiff. North Shore, as a result is not entitled to dismissal of the means and methods branch of its Labor Law § 200 claim against it.

Labor Law §§ 240 (1) and 241 (6)

For the reasons discussed in the context of Shulman's motion, North Shore's application to dismiss plaintiff's Labor § 240 (1) claim as against it is granted, while its application to dismiss plaintiff's Labor Law § 241 (6) claim as against it is denied.

As to section 241 (6), while North Shore's arguments are largely overlapping with Shulman's, the court notes that North Shore cites to a recent First Department case not discussed above, *Quishpi v 80 WEA Owner, LLC* (145 AD3d 521 [1st Dept 2016]). In *Quishpi*, plaintiff, while demolishing an elevator shaft, was injured in a complicated way:

> "when he tried to take down two 12-foot vertical steel beams topped by a horizontal steel beam approximately two feet long. He cut into the two vertical beams until they fell over in a "V" shape, and the horizontal beam, still attached to them, hit the floor. When plaintiff bent over to sever the horizontal beam from the left vertical beam, the beam sprang up and hit him in the face"

(id. at 522).

The First Department dismissed 12 NYCRR 23-3.3 (c) as a predicate to Labor Law § 241 (6) in these circumstances, as the plaintiff's accident did not involve the dangers that the regulation requires inspections to detect, that is "'weakened or deteriorated floors or walls or from loosened material,' which refers to structural instability caused by the progress of demolition" (*id.*, quoting 12 NYCRR 23-3.3 [c] [other quotations marks and citation omitted]). While there appears to be some tension between the analysis in *Quishpi* and the Court of Appeals' decision in *Wilinsky*, that does not affect the outcome here, as plaintiff's partial demolition of the curb and roof slab caused structural instability in the form of exploding post-tensioned beams. Accordingly, and for the reasons articulated at greater length above, North Shore is not entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claims as against it.

Contractual Indemnification Against Desman

The agreement between North Shore and Desman contains an indemnification clause, which provides in relevant part:

> . . . [Desman] agrees to defend, indemnify and hold [North Shore], and its directors, officers, employees and agents harmless against and for all losses, causes of action, liability, costs, expenses, claims and damages, including all expenses of litigation, reasonable attorney's fees and court costs, that [North Shore] suffers or sustains or becomes liable for, due to (i) injury or death of a person, or for damage to any property, arising out of, or in connection with the Service(s) delivered by [Desman] caused in whole, or in part, by the negligence or willful misconduct of [Desman] . . .

(North Shore/Desman Agreement, ¶ 7).

As with the indemnity clause in the work Shulman/Shared Systems work order, this

clause clearly requires a showing negligence before the obligation to indemnify is triggered. Thus, as no finding of negligence has been made against Desman in this matter, North Shore's application for summary judgment on this claim cannot be granted at this stage.

CONCLUSION

Accordingly, it is

ORDERED that defendant Roger V. Healy's motion for summary judgment dismissing all claims and cross claims as against him is granted (motion seq. No. 005); and it is further

ORDERED that the Clerk is to enter judgment accordingly, and the matter is severed and continued against remaining defendants; and it is further

ORDERED that third-party defendant Shared Systems Technology, Inc.'s motion for summary judgment dismissing all claims for common-law indemnification and contribution as against it is granted (motion seq. No. 006); and it is further

ORDERED that Defendant/third-party plaintiff Shulman Industries' (Shulman) motion for summary judgment (motion seq. No. 007) is granted only to the extent that plaintiff's Labor Law § 240 (1) claim is dismissed and all allegations of Industrial Code violations, except for 12 NYCRR 23-3.3 (c), are dismissed; and it is further

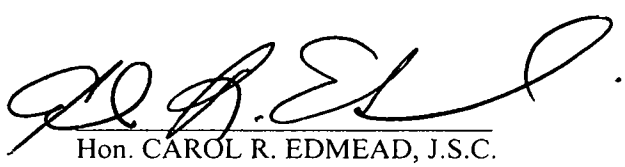
ORDERED defendant Desmond, Inc.'s cross-motion to Shulman's motion is denied; and it is further

ORDERED defendant North Shore University Hospital's motion for summary judgment (motion seq. No. 008) is granted only to the extent that plaintiff's Labor Law § 240 (1) claim is dismissed and all allegations of Industrial Code violations, except for 12 NYCRR 23-3.3 (c), are dismissed.

This constitutes the decision and order of the of the court.

Date: December 11, 2017

ENTER:



Hon. CAROL R. EDMEAD, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.