NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

DENNY GERONIMO,

Plaintiff,

- against-

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSIT AUTHORITY, MTA CAPITAL CONSTRUCTION COMPANY, CRICKET ENTERPRISES LLC, TNT EQUIPMENT SALES & RENTALS, J-TRACK LLC, NORFOLK SOUTHERN RAILWAY CO., and INDUSTRY SAFETY CONSULTANTS, LLC,

Defendants.

Index No. 701067/14

Motion Date July 18, 2017

Motion Cal. No. 45, 46 & 47

Motion Seq. No. 4, 5 & 6

The following papers read on this motion by plaintiff for an order granting partial summary judgment against the defendants on the issue of liability on his claims for a violation of Labor Law §§ 241(6) and 200. Defendant Industry Safety Consultants, LLC (Industry) separately moves for an order granting summary judgment dismissing all claims and cross claims against it. Defendants New York City Transit Authority (NYCTA), Metropolitan Transit Authority (MTA), MTA Capital Construction Company (MTACC), TNT Equipment Sales & Rentals (TNT) and J-Track, LLC (J-Track) separately move for an order granting summary judgment dismissing the plaintiff's complaint in its entirety, and granting summary judgment on defendants' cross claims against Industry for breach of contract and for failure to name them as additional insureds on a commercial general liability policy and professional services policy.

| | Papers Numbered |
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| Notice of Motion-Affirmation-Exhibits..... | EF103-119 |
| Opposing Affirmation-Exhibits..... | EF 183-191 |
| Opposing Affirmation-Exhibits..... | EF 198-203 |
| Reply Affirmation-Exhibit ..... | EF 210-212 |
| | |
| Notice of Motion-Affirmation-Exhibits..... | EF120-136 |

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| Opposing Affirmation-Exhibit..... | EF 180-182 |
| Opposing Affirmation-Exhibits..... | EF 192-197 |
| Reply Affirmation..... | EF 208-209 |
| Notice of Motion-Affirmation-Exhibits..... | EF142-178 |
| Opposing Affirmation-Exhibits..... | EF 204-206 |
| Reply Affirmation..... | EF 207 |

Upon the foregoing papers these motions are consolidated for the purpose of a single decision and order and are determined as follows:

**Background**

Plaintiff, Denny Geronimo, commenced the within action on February 17, 2014, and alleges that he sustained serious personal injuries on May 8, 2013, when during the course of his employment as a mechanic and electrician employed by non-party TC Electric LLC, he was struck by a hi-rail pickup truck operated by Peter Matthews, an employee of J-Track. At the time of the accident, Matthews was driving said vehicle in reverse and was transporting four other workers to another area of the work site. The accident is alleged to have occurred on the "A" line train subway track located at or around Hamilton Beach Station and Broad Channel Station, at the Rockaway Flats Location 618 on Track 3 South Bound, in Far Rockaway, New York.

Plaintiff in his complaint alleges causes of action for common law negligence; to recover damages for serious injuries as defined by Insurance Law §5102(d);and for violations of Labor Law §§ 200 and 241(6).

Defendants NYCTA, MTA, MTACC and J-Track served an answer and interposed 14 affirmative defenses, and cross claims against defendants Cricket Enterprises LLC (Cricket), TNT, Norfolk Southern Railway, Co. (Norfolk) and Industry for common law contribution and indemnification, as well as cross claims against Industry for contractual indemnification and for breach of contract arising out of the alleged failure to procure insurance naming defendants NYCTA, MTA, MTACC and J-Track as additional insureds.

Defendant Industry interposed four affirmative defenses in its answer and a cross claim against defendants NYCTA, MTA, MTACC, Cricket, TNT, J-Track and Norfolk for common law indemnification and contribution.

This court, in a prior order dated October 30, 2014, granted Norfolk's pre-answer motion to dismiss the complaint and all cross claims against it, and Cricket's pre-answer cross motion to dismiss the complaint, and determined that at the time of plaintiff's alleged accident, the subject hi-rail pickup truck was owned by defendant TNT.

All cross claims between TNT and NYCTA, MTA, MTACC and J-Track were discontinued pursuant to a stipulation dated December 10, 2014.

The "A" line train subway tracks and related areas located at or around Hamilton Beach Station and Broad Channel Station sustained severe damage during Hurricane Sandy. The documentary evidence submitted herein establishes that the NYCTA assigning the subject project to J-Track pursuant to "Contract C-31673-Work Order #50 for Emergency Clean Up and Track Rebuild on Broad Channel, Rockaway Line "B" Division (IND) in the Borough of Queens." J-Track, the general contractor, subcontracted the electrical work to plaintiff's employer TC Electric LLC (TC Electric).

**Deposition Testimony**

Plaintiff testified at his deposition that he and his brother Francisco Geronimo were both employed by TC Electric as mechanics and engineers and that they were working together on the morning of May 8, 2013; that there were no trains running and that the track had been de-electrified, and was being repaired; that he was positioned inside the closed off track; that his brother was on the other side of the third rail, helping him to pull the cable; that he had not placed cones on the track, and had not been instructed to do so at any time, and that there were no flag men or signal men present; that he was standing bent over pulling cable when his brother said "be careful"; that when he looked to his left, the truck was upon him; and that he was struck by the rear bumper of the truck which was traveling in reverse. Plaintiff further testified that after the truck struck him, he fell on his right side and lost consciousness, and that the next thing he remembered was being in Jamaica Hospital. It is undisputed that plaintiff was removed from the work site by ambulance and taken to Jamaica Hospital. Plaintiff asserts that he sustained injuries to his back, right shoulder and right hand as a result of the accident; that he had several surgical procedures; that he is disabled; and has not returned to work since the accident.

Plaintiff testified that on the morning of the accident, it was rainy and foggy, and that he was wearing a yellow reflective rain jacket with the hood over his head, a hard hat, an orange reflective vest, and goggles, and that he did not hear a beeping sound or any other sound warning him of the truck's approach.

Matthews, an employee of J-Track testified at his deposition, that on the morning of May 8, 2013, he was instructed by his foreman Steve Borsellino to take the high-rail pickup truck, which was already on the rails, and drive to another location. Matthews testified that he and four other co-workers got into the vehicle; that one man sat in the front seat passenger, and that the other three sat in the rear area; that no one was in the bay or bed of the pickup truck; that each of the three men in the rear seat were at least six feet tall; that his visibility using the rear view mirror was periodically obstructed by these passengers; and that the truck did not have a backup camera. Matthews further testified that he was mainly using the left side (driver's side) mirror

which gave him a view of the "left rear area of the truck and an angled view behind the truck maybe 50 to 75 feet behind"; that "you can't see anything" approximately 10 to 15 feet behind the truck and that he could get a clear view of the whole track, about "50 to 75 feet back" (Tr 50); that the truck was moving backwards, "at a crawl" (Tr 64); and that it was a bit foggy, with light rain on and off, and that visibility due to the weather was moderate.

Matthews testified that he knew that there were going to be people on the track that day, but was under the impression that nobody was out there yet; that from the time he began operating the truck in reverse, until the time he became aware of an accident, he did not see any flag men; that in total he drove approximately 400 feet prior to the accident; that after driving approximately 300 feet, he saw one man in his left side view mirror, prior to the impact, who was "in the gauge in the track"(Tr 67), which Matthews also described as the middle of the track (Tr 69). Matthews testified that said person was at least 75 to 100 feet away from him; that the man was upright and wearing a vest, and that he saw the man step over the third rail and exit the track, which was to Matthews' right; that he didn't see anyone else directly behind him; that at no point did he see a second worker crouching down or bending over in the middle of the track; that he could hear the truck's backup alarm inside the truck as he was driving in reverse; that at the time of the accident, his "attention left the mirror and was on the man at the right of the fender"; that he continued to move the truck back; and that he became aware of the accident when he "looked to the left and saw a man on the ground" (Tr 83).

Matthews further testified that prior to the accident, he did not see the man who was on the ground, and did not hear anything; that when he stopped the truck, the man who standing on the right side of the track had his hands up in the air, and was looking down; that he put the truck in park and saw the man's "brother on the floor off to my left"; that he recognized the man on the right side of the tracks as "Cisco"; that the man on the ground was Cisco's brother, plaintiff; that he went over to plaintiff, who was partially conscious; that he smacked plaintiff to keep plaintiff awake; that plaintiff's eyes began rolling back in his head; and that other individuals arrived at the accident site, prior to the arrival of the police or an ambulance.

Wilfredo Pesante, the site safety engineer employed by Industry, testified at his deposition that he was responsible for checking the workers for proper protective equipment and proper procedures; that vehicles were not speeding along the road on the side of the tracks or on the tracks; and that the men working on the tracks were using the cones he suggested that they use to keep from being struck by any vehicles. Pesante testified that Industry commenced working after the project had started and that he was permanently assigned to work in the Howard Beach area. Pesante further testified that if he observed workers at the job site not wearing proper protection, he had the authority to stop the work, and to stop the worker from working until the issue was addressed (Tr 43); that he and the foremen would conduct safety meetings; that he had the authority to shut the job down if he saw an unsafe construction practice; and that he reported

to the construction manager for the MTA, John Willis, or Carmen DeCosmo.

Pesante next testified that in connection with the subject job, prior to the accident he provided J-Track with written protocols for the use of high rail equipment on the project, which would then be turned over to the MTA for review ( Tr 58-59); that the speed limit for high rail vehicles was 10 mph; that he had posted speed limit signs along the entire roadway, but could not post them on the tracks; and that he had witnessed high rail vehicles speeding at the subject project before May 2013, but that he never saw Matthews speeding.

Pesante also testified that he did not witness the accident and had no knowledge of the actual visibility at the time and site of the accident, as he was working in a different area, approximately two miles away; that when he arrived at the accident site it was raining heavily; and that it was noisy due to the rain, wind, and that the backup alarm of a front loader which was moving gravel back and forth; that the front loader's backup alarm was louder than the back alarm on the high-rail pickup truck (Tr 67); that he saw plaintiff lying on the side of the track; that he was unable to speak to plaintiff; that as Matthews was trying to wake up plaintiff, plaintiff's eyes started to roll to the back; and that he called "CPM", which he identified as the Transit Authority, and informed them of the accident.

Pesante testified that prior to the accident he was not aware that the Geronimo brothers would be working at the subject location; that the Geronimo brothers were removing a damaged third rail heater, and would be required to put out orange cones if they were working on the tracks; and that no cones were used at the time of the accident. Pesante further testified that he had given a verbal warning about the use of safety cones to a group of TC Electric workers, including the Geronimo brothers, but that he did not speak to the Geronimo brothers directly and did not recall when he gave said warning; that J-Track was supposed to use spotters to escort the high-rail equipment; that J-Track's laborers and foremen had been so informed prior to the date of the accident (Tr 40); and that no spotters were used at the time of the accident.

Pesante testified that the accident was witnessed by Francisco Geronimo, and by another person who he identified as the operator of the front loader that was on the side of the road near the site of the accident. Pesante testified that he believed that the front loader was operated by Doug Costa, and that Costa essentially told him that he "saw Mr. Geronimo standing between two boxes and he stepped out" (Tr 30) and that he was not sure if he ever obtained a statement from Costa (Tr 49). Pesante's accident report did not list the names of any witnesses and did not include statements from any witnesses.

James C. Merritts testified at his deposition that he is employed by the MTA New York City Capital Management Programs; that the MTA "has other sister companies with Long Island Railroad, Metro North, MTA Bus, MTA New York City Transit"; and that he works for "New

York City Transit...in a subdepartment which is the Capital Programs Management" (Tr 19). In May 2013, Merritts was an assistant chief and was responsible for directing the contractors' compliance and safety management divisions (Tr 31).

Merritts testified that New York City Transit flaggers were not required at the subject work site, as there was no train service; that he had no first hand knowledge of the May 8, 2013 incident; that he inspected the subject site some three hours after the accident; and that he did not interview any of the witness. Merritts testified that the area, tracks and heating equipment where the accident occurred was either NYCTA's or MTA's property (Tr 36); that the NYCTA and the MTA did not have anyone onsite regarding safety protocols; that it was the responsibility of the NYCTA construction manager's office (CMO) to "ensure that the safety is being abided by through the contract" (Tr 41); and that the CMO could shut down a project if it found an unsafe work condition.

Merritts further testified that with respect to a report prepared by a co-worker, he had input as to the root cause of the incident which he stated "has been determined to be the failure of J-Track management to apply adequate safeguards to protect roadway workers from approaching high rail vehicles and ensure that the operator or operators of a high rail vehicle were aware of any wayside work being performed"; that based upon the information provided, Matthews was operating the vehicle in reverse, using his rear view mirrors for visibility, and was not adequately watching the roadway behind him; and that in this particular situation, with people on or near the right of way, Matthews needed to operate the vehicle in the direction of his view and not in reverse, and to "provide some type of spotter or person to walk along side the car or the track to ensure that they either clear the people or set up derailers in front of the work area so that if a failure such as this occurs it would derail the vehicle versus possibly or allegedly striking someone" (Tr 68).

Fernando Paulino, an employee of the NYCTA, in their Capital Program Management office, testified at his deposition that he learned about the accident from Merritts and had no independent knowledge of the May 8, 2013 occurrence involving plaintiff; that he, along with Merritts, spoke with Matthews and Pesante, but that he did not recall the specifics of these conversations; that his investigation revealed that there were no spotters or flaggers walking adjacent to the high rail vehicle at the time it was involved in the accident; and that there were other noise factors that may have contributed to this incident(Tr 61).

Steven Borsellino, a general foreman employed by J-Track, testified at his deposition that J-Track was the general contractor for the subject emergency clean up and repair project, and had subcontracted the signal work to TC Electric; that he and Pesante both had the authority to shut down any particular part of the project for safety reasons; that he did not supervise or inspect the work performed by the trades or subcontractors; that upon completion of a particular

task or job, the subcontractor would schedule an inspection to be performed by the NYCTA; and that the final approval of the work performed came from the Transit Authority and not J-Track.

Borsellino testified that J-Track rented equipment from TNT, pursuant to a purchase order; that he personally ordered the subject high-rail pickup truck, which was leased from TNT for the duration of the job; and that J-Track was required to insure the equipment it rented from TNT.

Borsellino did not witness the accident. Borsellino testified that he left his office in a trailer about 300-400 feet away from the site of the accident and that it was raining at the time; that when he got to the accident site, plaintiff was lying in the middle between two tracks, on the driver's side of the high-rail truck; that Matthews was slapping plaintiff to keep him awake; and that Matthews told him he didn't see plaintiff. Borsellino did not conduct an investigation of the accident.

Borsellino further testified that prior to May 8, 2013, J-Track provided cones that were put out in the center of the track to alert the high-rail equipment driver that someone was working there (Tr 71), and that the high-rail equipment was only supposed to be driven between 10-15 mph on the tracks, whether going forward or in reverse; that as the subway tracks were out of service, the Transit Authority did not have to be notified that J-Track was using the high-rail vehicles on the track and that the Transit Authority had a switchman at Broad Channel to manually switch the high-rail equipment from one side to the other; that on the morning of the accident, Matthews was directed to operate the high-rail equipment and transport workers to a specific spot, which required him to drive the pickup truck in reverse approximately 2,500 to 3,000 feet; that he knew that electricians from TC Electric working on the track; and that Matthews also knew that there were people working on the track.

**Discussion of plaintiff's motion and motion of defendants J-Track, NYCTA, MTA, and MTACC**

On a motion for summary judgment, the movant bears the initial burden of establishing, *prima facie*, entitlement to judgment as a matter of law, offering sufficient evidence, in admissible form, to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324[1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus. Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d at 557; CPLR 3212[b]).

When deciding a summary judgment motion, the court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626[1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231[1978]).

The MTA and its subsidiaries "must be sued separately and are not responsible for each other's torts" (*Mayayev v Metropolitan Transp. Auth. Bus*, 74 AD3d 910, 911[2d Dep't 2010]; N.Y. Pub. Auth. Law § 1266[5]). It is noted that counsel for plaintiff, in deposing various defendants, failed to distinguish between the MTA and the NYCTA, and referred to these defendants as a single entity. However, "[i]t is well settled, as a matter of law, that the functions of the MTA with respect to public transportation are limited to financing and planning, and do not include the operation, maintenance, and control of any facility" (*Cusick v Lutheran Med. Ctr.*, 105 AD2d 681 [2d Dept 1984]; *see also* (*Puzhayeva v City of NY*, 151 AD3d 988 [2nd Dept 2017]; *Delacruz v Metro. Transp. Auth.*, 45 AD3d 482, 483 [1st Dept 2007]; *Soto v NY City Tr. Auth.*, 19 AD3d 579 [2nd Dept 2005] ).

Plaintiff's claims against defendants MTA, MTACC and NYCTA for negligence and to recover damages for serious injury as defined by Insurance Law §5102 are based upon an allegation that these defendants own the subject high-rail pickup truck. This court previously determined that the subject high-rail pickup truck is owned by defendant TNT, and the evidence submitted herein establishes that said vehicle was leased to J-Track and operated by Matthews, an employee of J-Track, during the course of his employment. Defendants in support of their motion submit an affidavit from Utilda Ramsay, a senior claims specialist for the MTA, who states that the MTA and MTACC neither owned, leased or operated the subject vehicle. In addition, there is no evidence that the NYCTA owned, leased or operated the subject high-rail pickup truck. Therefore, that branch of these defendants' motion which seeks to dismiss plaintiff's claims for negligence as it pertains to the ownership and operation of the subject high-rail pickup truck, based upon violations of VTL sections 388, 1101,1156, 1121,1212, 1213, 1226, and New York City Traffic Rules, Title 34, sections 4-02(c), 4-02(d), 4-04(d), 4-07(d), and Insurance Law §5102(2), is granted as to defendants MTA, MTACC and NYCTA.

The documentary evidence submitted herein, as well as an affidavit of Liam Gibbons, submitted by defendants, establish that TNT leased the subject high-rail pickup truck to J-Track for a period of 28 days, on November 3, 2012, and that said lease was extended for successive periods of 28 days, up to and including May 8, 2013, the date of the accident. The lease agreement and an invoice attached to Gibbons' affidavit, establishes that the subject vehicle was leased to J-Track for the period of April 20, 2013 through May 17, 2013. Thus, as J-Track

leased the subject vehicle for a period of less than 30 days, it cannot be considered an "owner" as defined by VTL § 128 and cannot be found vicariously liable for any negligence on the part of the operator of said vehicle, pursuant to VTL §388. Therefore, that branch of defendants' motion which seeks to dismiss plaintiff's claims for negligence as it pertains to the ownership and operation of the subject high-rail pickup truck, based upon violations of VTL sections 388, 1101,1156, 1121,1212, 1213, 1226, and New York City Traffic Rules, Title 34, sections 4-02(c), 4-02(d), 4-04(d), 4-07(d), and Insurance Law §5102(2), is granted as to defendant J-Track.

Defendants assert that plaintiff's cause of action against TNT for negligence and to recover damages for serious injury as defined by Insurance Law §5102(d) is barred by the Graves Amendment (49 USC § 30106). The Graves Amendment provides, generally, that the owner of a leased or rented motor vehicle cannot be held liable for personal injuries resulting from the use of such vehicle by reason of being the owner of the vehicle for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease if: (1) the owner is engaged in the trade or business of renting or leasing motor vehicles, and (2) "there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner)" (49 USC § 30106 [a]; see *Cioffi v S.M. Foods, Inc.*, 129 AD3d 888, 892 [2nd Dept 2015]; *Bravo v Vargas*, 113 AD3d 579, 580 [2 Dept 2014]; *Ballatore v HUB Truck Rental Corp.*, 83 AD3d 978, 979 [2d Dept 2011]]). Here, defendant TNT has established that it is in the business of leasing vehicles; that it leased the subject vehicle to J-Track during the period that the accident occurred; and that there is no negligence or criminal wrongdoing on its part. Plaintiff has failed to oppose that branch of defendants' motion which seeks dismissal of his negligence claim against TNT. Accordingly, as said claim against TNT is barred by the Graves Amendment, and as plaintiff has apparently abandoned said claim, that branch of the defendants' motion which seeks to dismiss plaintiff's claim against TNT, is granted.

Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877[1993]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). Labor Law § 200 has two standards for determining a property owner's or general contractor's liability. The first is the authority to supervise the work when a plaintiff's injury arises out of defects or dangers in the methods or materials of the work and the second standard is applicable to worker injuries arising out of the condition of the premises rather than the methods or manner of the work. *(Schultz v Hi-Tech Const. & Management Services, Inc.*, 69 AD3d 701, 701 [2nd Dept 2010]; *see also, Bridges v Wyandanch Community Development Corp.*, 66 AD3d 938 [2nd Dept 2009]).

Where, as here, "a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery ... cannot be had under Labor Law § 200 [and for common-law

negligence] unless it is shown that the party to be charged had the authority to supervise or control the performance of the work" (*Fernandez v Abalene Oil Co., Inc*., 91 AD3d 906, 909 [2nd Dept 2012], quoting *Ortega v Puccia*, 57 AD3d 54, 61 [2nd Dept 2008]). "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed." (*Id*. at 62). "[T]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law 200 or for common-law negligence" (*Austin v Consolidated Edison, Inc*., 79 AD3d 682, 684[ 2d Dept 2010] [internal quotation marks omitted]; *see Kandatyan v 400 Fifth Realty, LLC*, ___AD3d___, 2017 NY Slip Op 07984, 2017 N.Y. App. Div. LEXIS 8064 [2d Dept 2017]; *Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 698 [2nd Dept 2016]).

To grant a motion of summary judgment, the movant must eliminate all issues of fact (*New v Stachowiak,* 84 AD3d 1326 [2nd Dept 2011]). Plaintiff, in support of his motion for summary judgment on his common law negligence and Labor Law §200 causes of action against defendants MTA and MTACC has failed to submit any evidence which establishes that these defendants were involved in the subject project in any manner, or that they owned the real property, equipment, structures or facilities at the subject premises. In addition, there is no evidence that defendants MTA or MTACC had any authority to supervise or control the plaintiff's work, or that they actually supervised, directed or controlled any work performed at the subject premises, including the work performed by TC Electric or plaintiff.

Defendants MTA and MTACC, in support of defendants' motion for summary judgment also rely upon the affidavit of Utilda Ramsay, a senior claims specialist for the MTA, which establishes the MTA and MTACC were not involved in the subject project in any manner, and did not own the land, or any equipment, facility or structures located on the subject real property or at the project at the time of the accident. Plaintiff, in opposition, has failed to raise any triable issue of fact with respect to said defendants.

Plaintiff has also failed to establish, *prima facie*, entitlement to summary judgment on his Labor Law § 200 and common law negligence claims against defendants NYCTA and J-Track. Plaintiff has not submitted any evidence which establishes, as a matter of law, that either J-Track or the NYCTA owns the subject real property. Furthermore, even if plaintiff is able to establish such ownership, he has not submitted sufficient evidence which establishes, *prima facie*, that the NYCTA, or its general contractor, J-Track, exercised supervisory authority or control over the means and methods of the plaintiff's work.

Defendants NYCTA and J-Track, in support of their motion for summary judgment have demonstrated their *prima facie* entitlement to judgment as a matter of law dismissing plaintiff's

causes of action alleging a violation of Labor Law § 200 and common-law negligence, "as they established that they neither possessed nor exercised any supervisory authority or control over the means and method of the plaintiff's work..." (*McCallister v 200 Park, L.P.*, 92 AD3d 927, 930 [2nd Dept 2012]). To the extent that plaintiff asserts that said defendants had the authority to shut down the project if a safety violation was noted, such general supervisory authority is insufficient to impose liability (*see Marquez v L & M Dev. Partners, Inc.*, 141 AD3d at 698; *Austin v Consolidated Edison, Inc*., 79 AD3d at 684).

Therefore, that branch of plaintiff's motion which seeks summary judgment against defendants MTA, MTACC, NYCTA and J-Track on his Labor Law §200 and common law negligence causes of action, is denied, and that branch of the defendants' motion which seeks to dismiss plaintiff's Labor Law §200 and common law negligence causes of action against defendants MTA, MTACC, NYCTA and J-Track, is granted.

Labor Law § 241(6) imposes a nondelegable duty on owners, 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 (*White v Village of Port Chester*, 84 AD3d 946 [2nd Dept 2011]). "'[T]o establish liability under Labor Law § 241(6), a plaintiff must demonstrate that the defendant's violation of a specific rule or regulation was a proximate cause of the accident'"(*Creese v Long Is. Light. Co.*, 98 AD3d 708, 710 [2d Dept 2012], quoting *Seaman v Bellmore Fire Dist*., 59 AD3d 515, 516 [2d Dept 2009]; *see also Eddy v John Hummel Custom Bldrs., Inc.*, 147 AD3d 16, 24 [2nd Dept 2016]). Here, plaintiff alleges violations of 12 NYCRR 23-9.2, 12 NYCRR 23-9.7, 29 CFR 1926.601(b)(4), 29 CFR 1910.269(p)(1)(ii), 29 CFR 1926.952(a)(3), and 49 CFR 659 et seq.

"The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable" (*Misicki v Caradonna*, 12 NY3d 511, 515[2009]). However, "[c]ontributory and comparative negligence are valid defenses to a section 241 (6) claim; moreover, breach of a duty imposed by a rule in the Code is merely some evidence for the factfinder to consider on the question of a defendant's negligence" (*Misicki v Caradonna*, 12 NY3d at 515; *see also Riffo-Velozo v Vil. of Scarsdale*, 68 AD3d 839, 842 [2nd Dept 2009]).

Although plaintiff has not specified the subdivision of 12 NYCRR 23-9.2 relied upon to establish a violation of Labor Law §241(6), it is noted that Section 23-9.2 (1) (b) is merely a general safety standard that does not give rise to a nondelegable duty under Labor Law § 241(6) (*see Guallpa v Canarsie Plaza, LLC*, 144 AD3d 1088, 1091 [2nd Dept 2016]; *Abelleira v City of New York*, 120 AD3d 1163, 1165 [2d Dept 2014]). Plaintiff has not demonstrated that the defendants violated any other provision of Section 23-9.2.

To the extent that plaintiff alleges OSHA violations, such violations are insufficient to support of a cause of action under Labor Law §241(6). OSHA regulations speak only to the duties owed by employers to their employees, and impose no independent liability upon an owner or general contractor under the Labor Law (*see* 29 CFR § 1910.12[a]; *Kocurek v Home Depot, USAP, Inc*, 286 AD2d 577, 580 [1st Dept 2001]; *Abreo v URS Greiner Woodward Clyde*, 25 Misc 3d 1228[A], 2007 NY Slip Op 52662[U], [Sup Ct, Queens County 2007]).

As plaintiff has failed to oppose those branches of defendants' motion seeking dismissal of his Labor Law claims predicated on violations of 12 NYCRR 23-9.2, 29 CFR 1910.269(p)(1)(ii) 29 CFR 1926.601(b)(4), 29 CFR 1926.952(a)(3) and 49 CFR 659 et seq., these claims are deemed abandoned and are dismissed (*see Kronick v L.P. Thebault Co., Inc*., 70 AD3d 648[2d Dept 2010]).

Plaintiff seeks summary judgment on its Labor Law §241(6) claim against defendants NYCTA, MTA, MTACC, and J-Track predicated upon an alleged violation of 12 NYCRR 23-9.7 (d). It is undisputed that NYCTA engaged J-Track as the general contractor for the subject project. However, as neither plaintiff nor defendants have established, *prima facie*, that the NYCTA is the owner of the subject real property where the accident occurred, this court makes no determination at this juncture as to whether the NYCTA is an owner within the meaning of Labor Law §241(6). Accordingly, that branch of plaintiff's motion which seeks summary judgment on its claim for a violation of Labor Law §241(6) against NYCTA is denied, and that branch of defendants' motion which seeks summary judgment dismissing said claim as to NYCTA, is denied.

As to defendants MTA and MTACC, the evidence submitted herein is insufficient to establish that these defendants are the owners of the subject real property within the meaning of Labor Law §241(6). It is noted that even if plaintiff could establish that either of these defendants is the deed owner of the real property, there is no evidence that either entity contracted for the work performed. Thus, there is no evidence of a nexus or connection between the alleged owner and the plaintiff (*see Morton v State of New York*, 15 NY3d 50 [2010]). Accordingly, that branch of plaintiff's motion which seeks summary judgment on its claim for against the MTA and MTACC for a violation of Labor Law §241(6) is denied, and that branch of the defendants' motion which seeks summary judgment dismissing said claim against said defendants, is granted.

Defendants' assertion that 12 NYCRR 23-9.7(d) is inapplicable here, or if applicable has not been violated, is rejected for the reasons stated below.

12 NYCRR 23-9.7 " Motor Trucks" provides:

"d) Backing. Trucks shall not be backed or dumped in places where persons are working nor backed into hazardous locations unless guided by a person so stationed that he sees the truck drivers and the spaces in back of the vehicles."

A high-rail pickup truck is a standard pickup truck equipped with steel wheels attached to its front and rear that can be lowered, enabling it travel on railroad tracks (*see* (*Gadsden v Port Auth. Trans-Hudson Corp.*, 140 F3d 207, 208 [2d Cir 1998]). Matthews testified at his deposition that the high-rail pickup truck's rubber tires act to propel the vehicle; that the railroad tracks were not electrified at that time; and that the subject high-rail pickup truck can also be driven on ordinary roads.

Defendants acknowledge that the Industrial Code does not define the term "motor truck". In *Eddy v John Hummel Custom Bldrs., Inc.*, (147 AD3d 16 [2nd Dept 2016]), the injured plaintiff was riding on top of unsecured heavy pieces of construction materials, including a cast iron gate, that had been loaded onto the back a pickup truck in order to transport the materials from one location at a construction site to another. As the co-worker began to drive the truck, the plaintiff fell to the ground and the cast iron gate, weighing approximately 100 pounds fell onto the plaintiff, causing him to sustain injuries. Plaintiff alleged violations of 12 NYCRR 23-9.7(c) and (e). Notably, the Appellate Division did not find that the pickup truck was not a "motor truck" under the provisions of the Industrial Code. Rather, the court therein found that"under the circumstances of this case, the sole proximate cause of the accident was the plaintiff's decision to forgo riding in the front passenger seat of the truck in favor of riding on top of the cast iron grate that was lying on the truck's open tailgate. Thus, any violation of Labor Law § 241(6) was not a proximate cause of the accident (citations omitted)" (*id*. at 24-25)

In *Erickson v Cross Ready Mix* (75 AD3d 524, 526-527 [2nd Dept 2010]), the court without defining the term "motor truck" stated that "[e]vidence that the cement truck which struck the plaintiff at the construction site backed into the area where he was working, without being guided by another person who was properly positioned, is sufficient to raise a triable issue of fact as to whether Turner's violation of 12 NYCRR 23-9.7 (d) was a proximate cause of the plaintiff's injuries (*see generally Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 351[1998])".

In view of the foregoing, defendants' attempt to restrict the term "motor truck" to vehicles that pull or carry things such as airplanes or semi-trailers, is rejected. Defendants' claim that 12 NYCRR 23-9.7 is not applicable, based upon Matthews's testimony regarding Francisco Geromino is also rejected. It is undisputed that both Francisco and plaintiff were electricians

employed by TC Electric LLC, and defendants' claim that Francisco was acting as a person guiding the vehicle while it was backing up on the tracks, is not supported by the evidence.

It is well settled that hearsay evidence is insufficient to defeat a motion for summary judgment if it is the only evidence submitted (*see Silva v FC Beekman Assoc., LLC*, 92 AD3d 754, 756 [2nd Dept 2012]; *Roche v Bryant*, 81 AD3d 707, 708[ 2d Dept 2011]; *Roldan v New York Univ.*, 81 AD3d 625, 627 [2d Dept 2011]). Defendants contend that there was no accident at all. In support of said claim, defendants submit two unsworn statements from Costa, a truck driver who claimed to have witnessed the accident. Defendants further assert that Costa's statements are supported by the sworn testimony of Matthews and Pesante. Contrary to defendants' assertions, neither Matthews nor Pesante deposition testimony support a claim that plaintiff was not struck by the pickup truck or that he did not sustain injuries as a result of said accident. Matthews' testimony regarding Francisco Geronimo is irrelevant in this regard, as he affirmatively testified that he did not see plaintiff prior to the accident. Pesante did not witness the accident, and the statements made by Costa to Pesante regarding a "Mr. Geronimo," did not distinguish between plaintiff and his brother Francisco Geronimo.

Moreover, Costa's unsworn statements constitute inadmissible hearsay. The court notes that Costa's two statements contain contradictory information as to the direction the subject truck was traveling, and the writing dated June 14, 2016 states that the incident occurred at about 12:00 p.m. However, the overwhelming admissible evidence submitted herein by the parties establishes that the high-rail pickup truck was driven by Matthews, in reverse, and struck plaintiff, and that said accident occurred at approximately 7:15 a.m.

Defendants' claim that plaintiff did not have visible injuries at the time he was removed from the scene by ambulance, as well as the characterization of plaintiff's injuries in an accident investigation report, is insufficient to establish that plaintiff did not sustain the injuries claimed herein. Defendants' attempts to manufacture an issue of fact as to whether plaintiff was struck by the high-rail pickup truck, and whether he sustained physical injuries as a result of said accident, are rejected.

The court finds that the evidence presented that the high-rail pickup truck which struck plaintiff was driven in reverse (backing up) in the area where plaintiff was working, without being guided by a spotter who was properly positioned, is sufficient to raise a triable issue of fact as to whether J-Track's violation of 12 NYCRR 23-9.7(d) was a proximate cause of plaintiff's injuries. In addition, defendants have established that a triable issue of fact exists as to whether plaintiff was negligent, in view of plaintiff's deposition testimony that he had not closed off the tracks with cones and had not been instructed to do so, and Pesante's testimony that he had instructed a group of TC Electric's employees, including plaintiff, to use cones to block off areas of the track where they were working. Therefore, that branch of plaintiff's motion which seeks

summary judgment against J-Track on its claim for a violation of Labor Law § 241(6), is denied, and that branch of the defendants' motion which seeks to dismiss said claim against J-Track, is denied.

To the extent that the complaint alleges that TNT violated Labor Law §§200 and 241(6), there is no evidence that this defendant is an owner or contractor within the meaning of Labor Law §§200 or 241(6). Therefore, that branch of defendants' motion which seeks summary judgment dismissing the Labor Law causes of action against TNT, is granted.

Defendants NYCTA, MTA MTACC and J-Track have cross claimed against Industry for breach of contract, based upon an alleged failure to procure insurance. J-Track entered into a professional services agreement with Industry as a "sub-consultant", dated January 22, 2013, which required, among other things, that Industry maintain professional liability insurance, and general commercial liability insurance. The contract's "Amendment B Insurance Rider" required Industry to provide professional and general commercial liability insurance, naming as additional insureds, ten entities, including J-Track, NYCTA, MTA and MTACC.

The documentary evidence submitted by defendants establishes that Industry failed to procure professional liability insurance and general commercial liability insurance naming J-Track, NYCTA, MTA and MTACC as additional insureds. Industry's counsel in a response to a so-ordered stipulation dated June 2, 2016, stated that Industry did not maintain professional liability insurance that was in effect on the date of the subject occurrence. The certificate of liability insurance dated February 1, 2013, named Industry as the insured, Kinsale Insurance Company as the insurer, and J-Track as the certificate holder. Said certificate of insurance identifies the policy number as 010002795-1, and does not name any additional insureds. Kinsale Insurance Company, in a letter dated February 5, 2014, informed Industry's claims administrator that policy number 010002795-1 corresponds to a different named insured and does not mention Industry as a named or additional insured, and that no policy was ever issued by Kinsale to Industry. Industry's counsel, in response to a preliminary conference order dated December 15, 2014, stated that Western Heritage Insurance Company issued a commercial general liability policy to Industry, with effective dates of March 28, 2013 to March 28, 2014, and that Western Heritage issued a reservation of rights letter dated July 16, 2014.

Industry, in opposition, asserts that it delivered a certificate of insurance to J-Track, pursuant to the terms of the contract, and claims that said certificate "was apparently deemed satisfactory." The certificate of insurance relied upon by Industry listed Kinsdale as the insurer. As there is no evidence that Kinsdale insured Industry, as well as the required additional insureds, said certificate of insurance did not comply with the terms of the subject contract, and cannot be "deemed satisfactory." In addition, Industry does not claim to have provided J-Track with an endorsement from an insurer along with a certificate of insurance, as required by the

policy.

Industry has also failed to establish that it provided J-Track with a certificate of insurance from Werstern Heritage Insurance Company, along with an endorsement naming the additional insureds. There is no evidence that the policy issued by Western Heritage Insurance Company named J-Track, NYCTA, MTA and MTACC as additional insureds, or otherwise provided insurance coverage to said entities.

To the extent that Industry argues that it was only obligated to indemnify the contractor and owner for liability caused by its own negligence, it has confused the contractual obligation to indemnify with the separate contractual obligation to procure insurance. Contrary to Industry's assertions, the contract's dispute resolution clause, is inapplicable here. The dispute resolution clause, by its terms only applies to J-Track and Industry, and is not applicable to NYCTA, MTA and MTACC. Furthermore, there is no dispute between Industry and J-Track regarding Industry's obligation under the contract to procure professional liability insurance and general commercial liability insurance naming J-Track, NYCTA, MTA and MTACC as additional insureds, and Industry's failure to do so.

Finally, the contract's "No Consequential Damages" clause provides as follows: "The parties hereto agree that they shall not seek, nor shall they be entitled to recover any lost revenues, lost profits, or other indirect or consequential damages as a result of a breach of any of the provisions of this Agreement by the other party. This waiver does not apply, however, to direct project costs and overhead which may be incurred as a result of project delays *or damages caused in whole or part by the negligence or breach of contract of either party*" (emphasis added). As said clause explicitly exempts claims for damages based upon breach of contract, defendants' cross claim for breach of contract based upon plaintiff's failure to procure insurance is not barred by the agreement's no consequential damages clause.

Accordingly defendants NYCTA, MTA, MTACC and J-Track are entitled to summary judgment as to the issue of liability on their third cross claim to recover damages for breach of contract for failure to procure insurance naming them as additional insureds (*see generally Baillargeon v Kings County Waterproofing Corp.*, 91 AD3d 686, 689 [2nd Dept 2012]; *see also Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 114 [2001]).

**Discussion of Industry's motion for summary judgment dismissing the complaint and all cross claims**

The complaint's twelfth cause of action against Industry incorporates all of the prior allegations, including the claims for common law negligence and a violation of Labor Law §§200 and 241(6). Is alleged that Industry negligently provided safety services for the project at the subject location, and that the subject accident and plaintiff's resulting injuries were "due

solely and wholly as a result of the carelessness and negligence" of Industry; that plaintiff's injuries and damages "were caused or contributed to by the negligence, statutory violations, wilfulness, wantonness and lack of care" of Industry, including the failure to provide plaintiff with a safe place to work, and the failure to provide necessary safety devices in which to do the same.

Industry was retained by J-Track pursuant to the professional services agreement dated January 22, 2013, as a "sub-consultant" and agreed to provide a site safety engineer who was responsible for daily field reports; pre task activity safety; preparing safe work plans and ensuring that they are implemented; ensuring all field personnel, J-Track or a J-Track subcontractor are compliant with OSHA and NYCT safety requirements; daily site safety inspections; daily tool box safety talks and handouts; safety orientation for new employees and subcontractor employees; and attending safety meetings.

To the extent the complaint alleges, by incorporating all prior allegations, a claim against Industry for negligence and to recover damages for serious injuries as defined by Insurance Law §5102(d), it is undisputed that Industry did not own, lease or operate the subject high-rail pickup truck. Therefore, that branch of Industry's motion which seeks to dismiss plaintiff's claims for negligence as it pertains to the ownership and operation of the subject high-rail pickup truck, based upon violations of VTL sections 388, 1101,1156, 1121,1212, 1213, 1226, and New York City Traffic Rules, Title 34, sections 4-02(c), 4-02(d), 4-04(d), 4-07(d), and Insurance Law §5102(2), is granted.

To hold Industry liable for a violation of Labor Law § 241 (6) as an agent of the owner or the general contractor, there must be a showing that Industry had the authority to supervise and control the work (*see Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 696-699 [2nd Dept 2016]; *Van Blerkom v America Painting, LLC*, 120 AD3d 660, 661 [2d Dept 2014]). The determinative factor is whether the party had "the right to exercise control over the work, not whether it actually exercised that right" (*Williams v Dover Home Improvement*, 276 AD2d 626, 626 [2000]; *see Samaroo v Patmos Fifth Real Estate, Inc.*, 102 AD3d 944, 946 [2d Dept 2013]). Where the owner or general contractor delegates to a third party the duty to conform to the requirements of the Labor Law, that third party becomes the statutory agent of the owner or general contractor (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]; *Marquez v L & M Dev. Partners, Inc.*, 141 AD3d at 696-699; *Bakhtadze v Riddle*, 56 AD3d at 590).

Defendant, Industry has made a *prima facie* showing of its entitlement to judgment as a matter of law dismissing the Labor Law § 241 (6) claim insofar as asserted against it. Section 2.3 of Industry's professional services agreement with J-Track provides that the "Sub-

Consultant" [Industry] shall not have control or charge of construction activities and shall not be responsible for construction means, methods, techniques, sequences, procedures or for safety precautions or programs, or the acts or omissions of Contractor [J-Track] and/or its Sub-Consultants, or for the failure of any of them to carry out the work in accordance with the Contract Documents or the Sub-Consultant's final design." The deposition testimony submitted also demonstrates that Industry did not assume responsibility for plaintiff's work, and did not engage in conduct that rose to the level of supervision or control necessary to hold it liable for plaintiff's injuries (*see Marquez v L & M Dev. Partners, Inc.*, 141 AD3d at 696-699; *Linkowski v City of New York*, 33 AD3d 971, 975 [2d Dept 2006]). In opposition, plaintiff and defendants J-Track, NYCTA, MTA, MTACC and TNT have failed to raise a triable issue of fact as to whether Industry was a statutory agent for the purposes of the Labor Law.

Defendant Industry has demonstrated its *prima facie* entitlement to judgment as a matter of law dismissing plaintiff's causes of action for common-law negligence and a violation of Labor Law § 200, as it has established that it neither possessed nor exercised any supervisory authority or control over the means and method of plaintiff's work (*McCallister v 200 Park, L.P.*, 92 AD3d at 930). To the extent that plaintiff asserts that Industry failed to conduct a safety meeting on the morning of the accident due to inclement weather and failed to enforce the requirement that J-Track use spotters when operating the high-rail vehicle in reverse, "the right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications, is insufficient to impose liability under Labor Law 200 or for common-law negligence" (*Austin v Consolidated Edison, Inc.*, 79 AD3d at 684 [internal quotes omitted]; *see also Marquez v L & M Dev. Partners, Inc.*, 141 AD3d at 696-699). Nor may Industry be held liable as an "agent" of J-Track, based upon the contract's general obligation to ensure compliance with safety regulations at the work site *(see Kandatyan v 400 Fifth Realty, LLC*, ___AD3d___, [2d Dept 2017], 63 NYS 3d 681 [2017], 2017 NY Slip Op 07984, [2017]).

In view of the forgoing, that branch of Industry's motion which seeks summary judgment dismissing plaintiff's claims against Industry, is granted.

That branch of Industry's motion which seeks summary judgment dismissing defendants' NYCTA, MTA, MTACC J-Track and TNT's cross claims for common law contribution and indemnification, is granted, as Industry has established that it lacked the necessary control over plaintiff's work to impose liability upon it under Labor Law §200 or common law negligence, and as it is not a statutory agent for the purposes of Labor Law §241(6) (*see Martinez v 342 Property LLC*, 89 AD3d 468, 469 [1st Dept 2011]; *see also Doherty v City of New York*, 16 AD3d 124, 125 [1st Dept 2005]).

Similarly, Industry is also entitled to summary judgment dismissing defendants' NYCTA, MTA, MTACC J-Track and TNT's cross claims for contractual indemnification. The professional services agreement between Industry and J-Track unambiguously limited the site safety manager's indemnity duty to instances of the site safety's negligence, and while Industry may have been responsibility for the safety of the work performed by the subcontractors, such duty to supervise and enforce general safety standards at the work site is insufficient to raise a question of fact as to its negligence (*see Doherty v City of New York*, 16 AD3d at 125).

That branch of Industry's motion which seeks to dismiss defendants NYCTA, MTA, MTACC and J-Track's cross claim for breach of contract based upon the failure to procure insurance, is denied, as this court has determined that Industry failed to procure professional liability and general commercial liability insurance, naming said entities as additional insureds.

That branch of Industry's motion which seeks to dismiss TNT's cross claims for breach of contract is granted, as there is no evidence that defendant TNT entered into any contractual agreement with Industry, nor was TNT a third party beneficiary of the professional services agreement between J-Track and Industry.

That branch of Industry's motion which seeks to dismiss TNT's cross claim for negligence is granted, as this claim is repetitive of the cross claim for common law contribution.

That branch of Industry's motion which seeks to dismiss TNT's cross claim to provide a defense and indemnify TNT is granted, as there is no evidence that Industry entered into any such agreement with TNT.

**Conclusion**

Plaintiff's motion for an order granting partial summary judgment against defendants on the issue of liability as to his claims for a violation of Labor Law §§ 241(6) and 200, is denied.

Defendant Industry's motion for an order granting summary judgment dismissing all claims and cross claims is granted to the extent that plaintiff's complaint is dismissed as to this defendant in its entirety; that defendant TNT's cross claims against Industry are dismissed; and that defendants NYCTA, MTA, MTACC and J-Track's cross claims for common law indemnification and contribution and contractual indemnification are dismissed. That branch of Industry's motion which seeks to dismiss defendants NYCTA, MTA, MTACC and J-Track's cross claims for breach of contract based upon the failure to procure insurance, is denied.

Defendants NYCTA, MTA, MTACC, J-Track and TNT's motion for an order granting summary judgment dismissing plaintiff's complaint is granted to the extent that plaintiff's claims against TNT are dismissed in their entirety; that plaintiff's claims against defendants MTA and MTACC are dismissed in their entirety; that plaintiff's claims against NYCTA and J-Track for common law negligence and for a violation of Labor Law §200 are dismissed; that plaintiff's claims against NYCTA and J-Track for negligence and to recover damages based upon Insurance Law §5102(d) are dismissed. That branch of defendants' motion which seeks to dismiss plaintiff's claims against defendants NYCTA and J-Track for a violation of Labor Law §241(6), is denied.

That branch of the motion of defendants NYCTA, MTA, MTACC and J-Track which seeks partial summary judgment in their favor on the issue of liability on their third cross claim against Industry for breach of contract and for the failure to procure insurance is granted , and the amount of damages shall be determined at trial.

Dated: December 11, 2017

DARRELL L. GAVRIN, J.S.C.