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

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JOHN DZIENIUS,

Plaintiff,

-against-

PJ MECHANICAL SERVICE & MAINTENANCE CORP., TISHMAN CONSTRUCTION CORP. OF NEW YORK, DELTA SHEET METAL CORP., and FRESH MEADOW MECHANICAL CORP.,

Defendants.

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TISHMAN CONSTRUCTION CORP. OF NEW YORK,

Third-party Plaintiff,

-against-

MBC INSULATION, INC.,

Third-party Defendant

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Index No. 150741/15
Motion Seq. No. 002

DECISION AND ORDER

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

In a Labor Law action, defendant Fresh Meadow Mechanical Corp. (Fresh Meadow) moves, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims as against it (motion seq. No. 003). Defendants PJ Mechanical Service & Maintenance Corp. (PJ Mechanical) and Delta Sheet Metal Corp. (Delta) also move for summary judgment dismissing all claims and cross claims as against them; additionally, Delta moves for summary judgment as to liability on its contractual indemnification claim against third-party defendant MBC Insulation (MBC) (motion seq. No. 004). Plaintiff John Dzienius cross-moves for partial summary judgment as to liability on his Labor Law § 240 (1) claim against Delta. Plaintiff's cross motion

also seeks an order, pursuant to CPLR 602 (a), consolidating the present action with another action in New York County entitled *John Dzienius v Weill Medical College of Cornell University*, index No. 158801/2017, for all purposes including joint trial.

BACKGROUND

On October 14, 2014, plaintiff John Dzienius was working for third-party defendant MBC Insulation, Inc. (MBC) on a construction project at Weill Cornell College on East 69th in Manhattan. Specifically, defendant/third-party plaintiff Tishman Construction Corp. (Tishman) was the construction manager on the construction project. Tishman hired Fresh Meadow to install the wet portion of an HVAC system and it hired Delta for the air side of the HVAC system. Delta subcontracted with MBC to do insulation on the ductwork it installed throughout the building. Plaintiff was injured while engaged in this insulation work.

Plaintiff, prior to his accident, was provided a punchlist by Tishman employees that indicated that insulation work had to be performed on the B3 mezzanine level. To reach the duct referred to on the punchlist, plaintiff walked along a metal grated catwalk. When he found the duct, plaintiff noticed that it was beyond the catwalk, and, to work on it, he reached through the rails of the catwalk and pressed his abdomen on an insulated hot water pipe:

> "I was trying to -- my work was far enough where I couldn't reach the back. When I insulate the duct, you have to slide the piece of insulation in, and it was so tight in the area where we were working that we were cutting strips. So there was only a small strip that I had, and I had to slide it over, and I was reaching to pull the piece under, and I just fell. I just heard a ping and then dropped down"

(Plaintiff's June 6, 2016 tr at 64).

The ping was the sound of the hot water pipe rupturing. As it did, plaintiff fell "headfirst" beyond the railing (*id.* at 77):

Q: How far did you fall beyond the railing?
A: Maybe five feet.

Q: What did you land on?
A: My hard hat flew off from gravity, and then I think my head banged against a rib.
Q: Rib of what?
A: Of ductwork, [it's] angled. It's the connection that connects ducts together.

(*id.*).

Plaintiff required three staples in his head to close the cut caused by this fall (*id.* at 80). Directly after his fall, however, that was not his only problem. Boiling water from the ruptured pipe was spraying onto him, and he put up his left arm to block it (*id.*). Plaintiff's alleges that he sustained burns to his left arm, right foot, as well as his scalp. Plaintiffs injuries were exacerbated by the difficulty he had moving away from the ruptured pipe:

> "When I was crouched in the spot, and I was blocking the rushing water with my left arm, I dove about two feet away to get away, and then realized my right foot was trapped in between one of the HVAC ducts … and a piece of the broken pipe which was leaning against my boot and pressing – it was boiling hot. It was boiling hot, the pipe. It was burning my foot, and it trapped me.

(*id.* at 84).

Around this time, plaintiff, whose apprentice tried unsuccessfully to free him, "screamed" at the apprentice, telling him "to call 911" (*id.* at 86). The apprentice ran off and plaintiff eventually pulled his right leg free and then struggled to find a way back to the catwalk:

> "I crawled forward and realized it was a – it was getting more confined as I crawled forward, the duct blocking me. I heard the water rushing behind me. I looked left, and left of me was the metal grating, the opposite way. I looked, there was about ten inches of space for me to go under the metal grating and come up, and I climbed back onto the grating"

(*id.* at 85-86).

When he got back to the catwalk, plaintiff could not find his apprentice. He found two laborers near the elevator. The laborers had not heard the commotion and had continued with their own task through the accident. Plaintiff pulled his sleeve up and some of his skin peeled off with the shirt (*id.* at 90). Plaintiff asked the laborers whether

his "face was burned, because," he explained, "there was blood running all down my face, and I thought my face melted" (*id.*). The laborers "kind of nodded and shook their head" and plaintiff went to the elevator to get more help for himself (*id.*). Plaintiff then went to the hospital and spent five to six days in a burn unit (*id.* at 104).

Plaintiff filed his complaint on January 26, 2015. He filed an amended complaint on April 10, 2010, alleging that defendants are liable under Labor Law §§ 240 (1) and 241 (6), as well as Labor Law § 200 and common-law negligence. On August 13, 2015, Tishman filed its third-party complaint against MBC, which alleges that MBC is liable to it for contribution, contractual and common-law indemnification, and breach of contract for failure to procure insurance.

DISCUSSION

It is well settled that the proponent of a motion for summary judgment 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]).

I. Fresh Meadow's Motion

A. Plaintiff's Claims

The amended complaint alleges that Fresh Meadow is liable to plaintiff under Labor Law §§ 240 (1) and 241 (6), as well Labor Law § 200 and common-law negligence. Fresh Meadow argues that it cannot be liable under Labor Law §§ 240 (1) and 241 (6), as it not a proper Labor Law defendant, as it was not an owner, a general contractor, or an agent of either. As to the Labor Law § 200 and common-law negligence claims, Fresh Meadow argues that plaintiff's claims should be dismissed, as it had no supervisory control over plaintiff's operations. Plaintiff does not oppose Fresh Meadow's application for summary judgment. As plaintiff has thus abandoned his claims against Fresh Meadow (*see Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014]), the application for dismissal of these claims must be granted.

B. Cross Claims

MBC and Tishman have cross claims against Fresh Meadow for common-law negligence and contribution, while Tishman has an additional cross claim against Fresh Meadow for contractual indemnification.

Fresh Meadow argues that all cross claim for common-law negligence and contribution should be dismissed, as there is no evidence that could serve as a basis for finding it negligent. Fresh Meadow submits the results of a Hydrostatic Pressure Test Report, which indicates that the system, which the subject pipe was a part of, was "tested prior to application of insulation, by hydrostatic pressure at least 1-1/2 times the maximum operating pressure for a minimum of four hours to detect all leaks and defects." The report indicates that the pipes passed the test, which was conducted on May 17, 2012. Fresh Meadow contends that this is the only evidence before the court as to whether its pipe was installed correctly and it indicates that it was.

In opposition, MBC and Tishman each argue that Fresh Meadow is a statutory agent of Tishman. Both MBC and Tishman rely on *Schaefer v Tishman Construction Corp.*, 153 AD3d 1169 [1st Dept 2017]). *Schaefer*, which involved Tishman and the same hospital construction project that gave rise to the subject accident, held that an electrical contractor was a statutory agent under Labor Law § 241 (6) "to the extent" that it "remained on the job site and the dangerous condition arose from work delegated to it, which it was in a position to control" (153 AD3d at 1170).

Schaefer, despite arising from the same construction project as the present action, is nonetheless distinguishable. Here, Fresh Meadow was not in a position to control MBC's work (*see Samaroo v Patmos Fifth Real Estate, Inc.*, 102 AD3d 944, 946 [2d Dept 2013] [holding that "[a] party is deemed to be an agent of an owner or general contractor under the Labor Law when

it has supervisory control and authority over the work being done where a plaintiff is injured"] [internal quotation marks and citation omitted]). As Fresh Meadow did not have supervisory control over MBC's work, it was not a statutory agent for either Tishman or the owner under the Labor Law.

In any event, the statutory agency argument is one for the plaintiff to make, as MBC and Tishman have no Labor Law claims against Fresh Meadow. Plaintiff has declined to make such an argument. The court rejects MBC and Tishman's efforts to make this flawed argument on plaintiff's behalf.

As to common-law negligence and contribution, MBC and Tishman argue that there is an issue of fact as to whether Fresh Meadow created the subject defect. Fresh Meadow made a *prima facie* showing that it did not create any defect in the pipe involved in plaintiff's accident by providing the Hydrostatic Pressure Test Report that was conducted after the pipe was installed.

To raise an issue of fact on this issue, MBC and Tishman refer to plaintiff's testimony as to the moments before the pipe ruptured. Plaintiff testified that his abdomen "was lightly resting" on the pipe prior to accident (plaintiff's tr at 61). Plaintiff also testified that he did not know what caused the pipe to rupture:

> Q: Do you have any idea today as to what caused that pipe to become broken?
> A: I don't know.
> Q: Did you physically come in contact with that pipe before it came unattached?
> A: I was lightly resting on it to reach the insulation.
> Q: And what part of your body was lightly resting on it?
> A: My abdomen.
> Q: Lower part of your abdomen?
> A: Yes.

(*id.* at 60-61).

MBC and Tishman each argue that such light pressure would not be enough to rupture the pipe if had been installed properly. Thus, MBC and Tishman, without calling the doctrine by its name, are making an argument that is akin to *res ipsa loquitur*, which allows parties to prove negligence without providing any direct evidence of it. For the doctrine to apply, a plaintiff must establish that: "(1) the accident [is] of a kind that ordinarily does not occur in the absence of negligence; (2) the instrumentality or agency causing the accident [is] in the exclusive control of the defendants; and (3) the accident must not be due to any voluntary action or contribution by plaintiff" (*Smith v Consolidated Edison Co. of N.Y., Inc.*, 104 AD3d 428, 429 [1st Dept 2013]).

Here, the pipe was plainly not in Fresh Meadow's exclusive control in the two-year period between installation and plaintiff's accident. Thus, the doctrine may not be invoked. Without access to *res ipsa loquitur*, MBC and Tishman try to raise a question of fact as to Fresh Meadow's negligence through circumstantial evidence.

Initially, the court notes that a question of negligence may go to a jury based on circumstantial evidence. Plaintiffs "may establish a prima facie case of negligence based wholly on circumstantial evidence as long as [they demonstrate] the existence of facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred" (*Affenito v PJC 90th St.*, 5 AD3d 243, 245 [1st Dept 2004] [internal citation and quotation marks omitted]). While plaintiffs do not need to exclude every other possible cause of the accident, they "must render those other causes sufficiently 'remote' or 'technical' to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" (*Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744 [1986]). Put differently, plaintiffs must prove "that it was more likely or more reasonable that the alleged injury was caused by the defendant's negligence than by some other agency"

(*Gayle v City of New York*, 92 NY2d 936, 937 [1998] [internal citation and quotation marks omitted]).

MBC and Tishman argue that there is a question of fact as to whether Fresh Meadow failed to properly install the subject pipe. The only direct evidence that goes to this issue is the Hydrostatic Pressure Test Report, which tends to show that the pipe was installed properly. MBC and Tishman argue that an issue of fact arises, circumstantially, from the mere fact of plaintiff's accident. This is speculation that cannot support a claim of negligence. MBC, for its part, supplements the fact of the pipe rupture with reference to testimony of Christopher Milone (Milone), Fresh Meadow's project manager.

Milone, asked how much pressure the subject pipe could withstand before rupturing, answered that "[p]iping is not designed to take external force" (Milone tr at 61). Pressed again about the amount of force required to break a joint in copper piping, Milone answered that "[i]t would take a lot of force to break a joint like that" (*id.* at 61). Milone later speculated as to the force required to rupture the joint:

"Q: Was there any testing performed to ascertain the external pressure capacity of these pipes near the area of the accident?
A: No, there is no test that's performed on external pressure.
Q: Are you aware of any standards concerning external pressure on the piping?
A: No.
Q: You have indicated before that it would take a lot of force to break the joint or the pipe, correct?
A: Yes.
Q: When you say 'a lot,' what do you mean?
A: I believe if I took my hands and [tried] to rip that apart, there is no way it would come apart.
Q: If somebody stepped on it with their weight, might that do it?
A: I believe so, yes"

(*id.* at 72).

None of this testimony creates an issue of fact as to whether Fresh Meadow negligently installed the subject pipe. MBC and Tishman's argument as to Fresh Meadow's negligence rests on pure speculation. As a negligence claim based on pure speculation is not viable, all claims for common-law negligence and contribution must be dismissed (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374, 375 [2011]; (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2nd Dept 2003]). Thus, the branch of Fresh Meadow's motion seeking dismissal of all claims for common-law negligence and contribution must be granted.

As to contractual indemnification, the contract between Tishman and Fresh Meadow contains the following provision:

> "To the fullest extent permitted by law, the Contractor shall indemnify, defend and hold harmless the owner, [Tishman] . . . from and against all claims or causes of action, damages, losses and expenses, including but not limited to attorneys' fees and legal and settlement costs and expenses (collectively "Claims"), arising out of or resulting from the acts or omissions of Contractor, or anyone for whose acts Contractor may be liable, in connection with the Contract Documents, the performance of, or failure to perform, the Work, or the Contractor's operations, including the performance of the obligations set forth in this clause. To the fullest extent permitted by law, Contractor's duty to indemnify . . . shall arise whether caused in part by the active or passive negligence or other fault of any of the Indemnitees, provided, however, that Contractor's duty hereunder shall not arise to the extent that any such claim, damages, loss or expense was caused by the sole negligence of the Indemnitees or an Indemnittee."

(Tishman/Fresh Meadow agreement, ¶ 7).

Tishman, in motion seq. No. 002, applied for, among other things, summary judgment on its contractual indemnification claims against Fresh Meadow. The court denied Tishman's application by a memorandum decision dated November 17, 2017 (the November decision). After a lengthy discussion, the court found that the subject provision is not triggered absent a showing that plaintiff's accident arose from Fresh Meadow's negligence (the November decision, 4-6). As the court has found that

Tishman cannot make a showing of negligence by Fresh Meadow, Tishman cannot, of course, make a showing that plaintiff's accident arose from Fresh Meadow's negligence. Accordingly, the branch of Fresh Meadow's motion that seeks dismissal of Tishman's contractual indemnification claim against it must be granted.

II. PJ Mechanical and Delta's Motion

PJ Mechanical and Delta argue that all claims as against them should be dismissed as PJ Mechanical was not involved with the subject construction project and as Delta was not negligent and is not liable under Labor Law §§ 200, 240 (1), 241 (6). Delta also seeks summary judgment on its cross claim for contractual indemnification against MBC.

P.J. Mechanical, which owns Delta, submits deposition testimony from Greg Ronzo, its project manager. Ronzo testified that PJ Mechanical was not involved with the subject project (Ronzo tr at 11). As no party opposes the application from P.J. Mechanical or raises any questions of fact as to its *prima facie* showing of entitlement to judgment, it application for summary judgment dismissing all claims as against it must be granted.

The branch of the motion seeking summary judgment for Delta is opposed by plaintiff, MBC, and Tishman.

A. **Statutory Agency**

As discussed above, in relation to Fresh Meadow, "[a] party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured" (*see Samaroo v Patmos Fifth Real Estate, Inc.*, 102 AD3d 944, 946 [2d Dept 2013] [internal quotation marks and citation omitted]). In this context, supervisory control is defined as "the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition" (*id.* [internal

quotation marks and citation omitted]). Thus, "a defendant's potential liability is based on whether it had the right to exercise control over the work, not whether it actually exercised that right" (*id.* [internal quotation marks and citation omitted]).

Delta argues that it is not a statutory agent, citing to the testimony of Ronzo, P.J. Mechanical's project manager. Ronzo testified that although he works for P.J. Mechanical, he is sometimes sent to work as a project manager for Delta (Ronzo tr at 9-10). Ronzo testified that Delta did not supervise the work performed by "MBC, at the B3 mezzanine level" (*id.* at 24). Delta also cites to plaintiff's testimony that he never spoke with anyone from Delta during his work on the project (plaintiff's tr at 37).

Thus, while Delta makes a showing that Delta did not exercise control over plaintiff's work, it does not make a showing that it did not have authority to control plaintiff's work. In the context of agency under the Labor Law, the latter is dispositive. Tishman, MBC and plaintiff all argue that the contract between Tishman and Delta and the subcontract between Delta and MBC give Delta authority to control MBC's work.

Indeed, the contract between Tishman and Delta provides that Delta is responsible for supervising and controlling any subcontractors working under Delta (Tishman/Delta agreement, Duties of Contractor, ¶ 2). Moreover, the Delta/MBC agreement provides that Delta has the authority to "judge" which processes to use when not specified by the contract (Delta/MBC agreement, ¶ 8) and that Delta has the right to inspect and correct any work done by MBC (*id.*, ¶¶ 13, 14). Thus, under the operative agreements, Delta had concurrent authority, along with Tishman, to control MBC's work.

Accordingly, Delta's argument that it is not a statutory agent is unpersuasive (*see Weber v Baccarat, Inc.*, 70 A.D.3d 487 [1st Dept 2010] [holding that a subcontractor was a statutory

agent based on the contractual authority to supervise and control]). *Weber* is especially instructive because the Court held that the subcontractor was a statutory agent, despite the fact that the general contractor had "concomitant or overlapping authority to supervise" and held that whether the subcontractor "actually supervised plaintiff is irrelevant" (*id.*at 488).

B. **Labor Law § 241 (6)**

As plaintiff does not oppose Delta's application for dismissal of the Labor Law § 241 (6) as against it, that claim must be dismissed as abandoned.

C. **Labor Law § 240 (1)**

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

> "All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with "adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Where a violation has proximately caused plaintiff's injuries, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment" (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011] [citation omitted]).

Delta argues that plaintiff's Labor Law § 240 (1) should be dismissed as plaintiff's accident arose from a ruptured pipe, rather than a significant elevation differential. Delta argues that plaintiff dove away from the hot water and ended up on a duct that was approximately 10 to 18 inches below the catwalk from which he was working. Plaintiff testified that from the bottom of the catwalk to the top of the ducts was "probably 10 to 18 inches" (plaintiff's November 10, 2016 tr at 9).

In opposition, plaintiff submits an affidavit from Herbert Heller (Heller), an engineer, who opined that:

> "Defendant Delta and Defendant Tishman failed to provide plaintiff adequate safety devices for the work assigned. Because the plaintiff's work area had already been enclosed, plaintiff should have, at minimum, been provided a harness with a self-retracting lifeline affixed to the ceiling. This would allow plaintiff to stretch to reach for a duct beyond the mezzanine catwalk while protecting plaintiff from a fall through the ceilings to the B3 floor below. In the event of a fall, the retractable lifeline would tighten and minimize the fall. The retractable lifeline would also provide the plaintiff sufficient freedom to navigate around hot water piping and other obstacles within a tight area, allowing plaintiff's access to the punchlist work area"

(Heller aff, ¶ 17).

Thus, plaintiff argues that he faced the elevation-related risk of falling between the ducts and crashing through the floor of the level below. Moreover, plaintiff underlines that he testified that he fell five feet down, not to the top of the duct, but to the rib connecting the ducts.

The Court of Appeals has recently reiterated that liability may "be imposed under the statute only where the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90 [2015] [intenral quotation marks omitted]). At first glance, plaintiff's accident would appear to not trigger the protections of the

statute, as plaintiff's injuries seem to have been caused primarily by a burst pipe, rather than a gravity related risk.

However, Heller's expert affidavit states that a retractable lifeline was necessary because of a gravity related risk that plaintiff faced -- specifically, that he would crash through the "B3 floor below." Indeed, plaintiff testified that this floor was not load bearing. Thus, there is a question of fact as to whether there was a statutory violation. As to the question of whether such a violation led directly to plaintiff's injuries, Heller states that lifeline would have provided plaintiff freedom to work around the pipe. If Heller's testimony is given the benefit of every inference, as it must be at this procedural posture, then there is a question of fact as to whether the lifeline would have prevented plaintiff from leaning on the pipe while insulating the duct. As there is a question of fact as to whether a lifeline would have prevented the pipe rupture, there is a question of fact as to whether a statutory violation directly caused plaintiff's injuries. Accordingly, the branch of the motion that seeks dismissal of plaintiff's Labor Law § 240 (1) claim as against Delta must be denied.

D. **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, as here, 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]). A 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.*).

The court notes, initially, that this case highlights an idiosyncratic detail of Labor Law jurisprudence: the term supervisory control means something different in the context of section 200 than it does in the context of statutory agency. That is, as discussed above, the term refers to the authority to control in the agency context. In the section 200 context, in contrast, it refers to control that is exercised.

Delta argues that it did not supervise plaintiff's work. In support, Delta refers to plaintiff's testimony that no one from Delta ever gave him any instruction as to how to do his work (plaintiff's June 2016 tr at 42). Delta's project manager, Ronzo, also testified that Delta did not supervise plaintiff's work (Ronzo tr at 24).

Plaintiff argues that Delta, in conjunction with Tishman, controlled plaintiff's work through their coordination of plaintiff's access to the work area. Specifically, plaintiff refers to a portion of Ronzo's testimony in which he testifies that, at performance meetings, all of the trades and Tishman would discuss progress and timing of work on the project:

> "We would discuss areas that had to be insulated, as they were tested. Obviously, through the course of a construction project, you can't just go. There would be performance meetings between all the trades to determine who would go when and where and what work was to come up next. In that regard, we all collaboratively came up with direction on where to go. He would ask me, hey is that duct on 8 tested or etcetera. You know, in that regard, yeah. We would say, yeah, that's done, you can go ahead and get to that area now"

(Ronzo tr at 25).

Plaintiff argues that an error was made in scheduling: the installation of ceilings at the B3 level. More specifically, the erection of the ceiling for the floor below the B3 level removed the safest means of insulating the ducts on the B3 level. Plaintiff refers to the testimony of Timor Nasseri, MBC's principal, who testified that MBC's preference is to perform insulation work "before the ceiling goes up" (Nasseri tr at 29). Moreover, plaintiff's expert, Heller, opines that:

> "Coordination of the work and inspection of the system would be the responsibility of Delta (as the installer of the air side HVAC system) and Tishman (as the general contractor/construction manager) jointly. This coordination of the order of the work is necessary for worksite safety because the best and safest method of performing insulation work on the air side ducts at the B3 Mezzanine level would be to access the ducts from the B3 level below via a ladder or scaffold...Defendant Tishman and Defendant Delta coordinated the installation of sheetrock ceilings at the B3 level, closing off access to the ducts at the B3 Mezzanine level from below, before ensuring all ductwork insulation work was completed"

(Heller aff, ¶¶ 8-9).

Heller concludes that "[a]llowing sheetrock ceilings to be installed before completion of all insulation work is contrary to standards within the construction industry and construction safety practices, because further duct insulation work would have to be completed by more hazardous methods as a result" (*id.*, ¶ 10). Heller also opines that Delta and Tishman should have coordinated "to shut down hot water pipes in the area of the punchlist work" (*id.*, ¶ 11).

Here, the relevant inquiry is whether Delta "exercised actual supervision or control over the work that brought about plaintiff's injury" (*Aarons v 401 Hotel, L.P.*, 12 AD3d 293 [1st 2004]). The work that brought about plaintiff's injury was not only the work itself, but the coordination and timing of the work. Thus, Delta is not entitled to summary judgment simply because it did not supervise plaintiff's insulation work. As there is a question of fact as to whether Delta had control over the coordination and

timing of plaintiff's work, Delta's application for dismissal of plaintiff's Labor Law § 200 and common-law negligence must be denied.

Cross Claims for Contribution and Common-law Indemnification

As there is still a question of fact as to whether Delta is liable under Labor Law § 200 and common-law negligence, Delta's application for dismissal of all cross claims for contribution and common-law indemnification must be denied.[1]

Contractual Indemnification Against MBC

Without referring in its affirmation in support to any specific provision entitling it to contractual indemnification from MBC, Delta argues that it is entitled to summary judgment as to the issue of its contractual indemnification claim against MBC, as the accident arose from MBC's acts and omissions. Although the affirmation did not refer to it, Delta submits its agreement with MBC as an exhibit to its motion. The agreement contains the following indemnification provision:

> "To the fullest extent permitted by law, Subcontractor shall indemnify and hold harmless [Delta], [Tishman], and Owner, and their directors, officers, employees, agents and representatives from and against all claims, damages, losses and expense, including, but not limited to, attorney's fees, arising out of or resulting from performance of the Work, including but not limited to, any such claims, damages, losses and expenses attributable to bodily injury, sickness, disease or death, or injury to or destruction of tangible property, including the loss of use of resulting therefrom provided such claim, damage, loss, or expense is caused in whole or in part by any act or omission by [MBC]"

(Delta/MBC agreement, ¶ 4.1).

MBC initially opposed Delta's motion without specifically refering to Delta's application for contractual indemnification as against it. Instead, MBC argues that Delta is a statutory agent

[1] Tishman opposes this branch of Delta's motion, as it relates to itself, arguing that there is a question of fact as to whether Delta negligently coordinated installation and insulation, and whether Delta negligently failed to request hot water be shut off before plaintiff's work began.

under the Labor Law and that plaintiff was injured by a dangerous condition created by Delta. Specifically, MBC argues that Delta created the dangerous condition by failing to schedule plaintiff's insulation before the sheetrock ceiling was installed below the subject ducts, and by failing to ask for the hot water to be turned off before plaintiff began his insulation work.

In reply to MBC's opposition, Delta notes that MBC failed to oppose its application for summary judgment as to the issue of contractual indemnification as against it. It also, in reply, attaches a copy of its answer with cross claims for the first time, which contains its claim for contractual indemnification against MBC.

In a sur-reply, MBC argues that Delta's application is defective because it failed to annex the cross claims against MBC. MBC also argues that its bases for opposing the application summary judgment are set forth in its application – namely, the argument that MBC was negligent in plaintiff's accident.[2] In response to the sur-reply, Delta argues that it would be greatly prejudiced if the court accepted the sur-reply.

The court need not reach this issue, as Delta, without reference to the technical defects referred to in MBC's sur-reply, failed to make a *prima facie* showing of entitlement to judgment on its application for summary judgment on this issue. Here, as discussed above, there remains a question of fact as to whether plaintiff's accident is attributable to Delta's negligence. Thus, its application for contractual indemnification must be denied (*see Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 12 [1st Dept 2011] [holding that a motion for contractual indemnification must be denied where the indemnitee's "negligence has not been litigated and a triable issue of fact is raises"]).

[2] For good measure, MBC also points out that Delta violated this court's part rules by failing to hyperlink their e-filed motions.

III. Plaintiff's Cross Motion

A. Labor Law § 240 (1)

Plaintiff seeks summary judgment as to liability on its Labor Law § 240 (1) as against Delta. Delta argues that the application should be denied as it was submitted after the court's 60-day deadline for submission of dispositive motions. Plaintiff is correct that the court has discretion to consider the merits of the cross motion, despite its lateness, as Delta's liability under section 240 (1) was a subject of Delta's motion *(see Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006], appeal dismissed 9 N.Y.3d 862, 872 [2007]).

However, as discussed, questions of fact remain as to whether plaintiff faced a gravity related risk and whether defendants' failure to provide plaintiff with a safety device to protect against that risk led directly to his injuries. As these questions of fact remain, plaintiff's application for summary judgment on its Labor Law § 240 (1) must be denied.

B. Consolidation

Plaintiff cross motion also seeks an order of consolidating the present action with another action in New York county entitled *John Dzienius v Weill Medical College of Cornell University*, index No. 158801/2017. The other action involves the subject accident, but is brought against the owners of the subject building. Plaintiff argues that consolidation upholds efficiency and avoids holding two trials for the same accident. No party opposes this branch of plaintiff's cross motion.

CPLR 602 (a) provides that "[w]hen actions involving a common question of law or fact are pending," courts, "upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein

as may tend to avoid unnecessary costs or delay." Here, as the two actions clearly involve common questions of law and fact, plaintiff's application for consolidation must be granted.

CONCLUSION

Accordingly, it is

ORDERED that defendant Fresh Meadow Mechanical Corp.'s motion for summary judgment dismissing all claims and cross claims as against it (motion seq. No. 003) is granted; and it is further

ORDERED that defendants PJ Mechanical Service & Maintenance Corp. (PJ Mechanical) and Delta Sheet Metal Corp.'s (Delta) motion for summary judgment (motion sequence No. 004) is resolved as follows:

- The branch seeking dismissal of all claims and cross claims as against PJ Mechanical is granted;
- The branch seeking dismissal of plaintiff's Labor Law § 241 (6) as against Delta is granted;
- The remainder of the motion is denied;

and it is further

ORDERED that the Clerk is to enter judgment accordingly; the case is severed and will proceed against remaining defendants; and it is further

ORDERED that the branch of plaintiff's cross motion seeking summary judgment on its Labor Law § 240 (1) claim as against Delta is denied; and it is further

ORDERED that the branch of plaintiff's cross motion that seeks consolidation for all purposes is granted; and it is further

ORDERED that the above-captioned action is consolidated in this Court with *John Dzienius v Weill Medical College of Cornell University*, index No. 158801/2017, under the instant index No. 150741/2015 and the consolidated action shall bear the following caption:

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JOHN DZIENIUS, Index No. 150741/15

Plaintiff,

-against-

PJ MECHANICAL SERVICE & MAINTENANCE CORP., TISHMAN CONSTRUCTION CORP. OF NEW YORK, DELTA SHEET METAL CORP., and FRESH MEADOW MECHANICAL CORP., WEILL MEDICAL COLLEGE OF CORNELL UNIVERSITY,

Defendants.

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TISHMAN CONSTRUCTION CORP. OF NEW YORK,

Third-party Plaintiff,

-against-

MBC INSULATION, INC.,

Third-party Defendant.

----------X

and it is further

ORDERED that counsel for plaintiff, within 10 days of entry, shall serve a copy of this order with notice upon all parties, the Trial Support Office (Room 158), and the County Clerk, who shall consolidate the papers in the actions hereby consolidated and shall mark the records to reflect the consolidation.

This constitutes the decision and order of the court.

Dated: June 5, 2018

ENTER:

Hon. CAROL R. EDMEAD, JSC

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