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

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VINCENT BENTIVEGNA,

Plaintiff

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF DESIGN & CONSTRUCTION, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, ANTHONY RIVARA CONTRACTING LLC and CH2M HILL NEW YORK, INC. and CH2M HILL, INC.,

Defendants.

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CH2M HILL NEW YORK, INC.,

Third-party Plaintiff,

-against-

MFM CONTRACTING CORP.,

Third-party Defendant.

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Index No. 154285/16
Motion Seq. No. 005, 006, and 007

DECISION AND ORDER

In a Labor Law action, defendant/third-party plaintiff CH2 Hill New York, Inc. and defendant CH2M Hill (collectively, CH2M Hill) move, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims as against them (motion seq. No. 005). Alternatively, CH2M Hill moves for summary judgment on its third-party claim for contractual indemnification against third-party defendant MFM Contracting Corp. (MFM). MFM nominally moves for summary judgment, but its notice of motion does not specify on what issue MFM seeks summary judgment; MFM's motion papers clarify that it seeks dismissal of both Plaintiff's complaint and the third-party complaint brought against it by CH2M Hill (motion seq. No. 006).

Finally, defendants The City of New York, The City of New York i/s/h/a New York City Department of Design & Construction, The City of New York, i/s/h/a New York City Department of Environmental Protection (collectively, the City) moves for summary judgement dismissing Plaintiff Vincent Bentivegna's complaint, as well as summary judgment on the City's cross claims for contractual indemnification and breach of contract against CH2M Hill.[1]

BACKGROUND

On January 3, 2012, CH2M Hill entered into a contract with the City's Department of Design and Construction (DDC) "Resident Engineering Inspection Services" (NYSCEF doc No. 55). One of the projects that CH2M Hill provided such services was "East 34th Street Select Bus Service," Contract No. HWMBRT5A, which involved construction work, including the installation of new bus bulbs, bus pad, curb, sidewalk, replacement of sewer and water mains, as well as street lighting and traffic signal work from FDR Drive to Lexington Avenue. DDC hired MFM to perform this work.

Plaintiff was injured on September 4, 2015 while he was working as a journeyman dockbuilder for MFM on a portion of the project that involved the installation of a new sewer main along that required driving piles below street level to support the sewer main. The accident happened on Plaintiff's second day on the job.

Despite his nominal position as a journeyman dockbuilder on the project, Plaintiff did not have extensive experience as dockbuilder. Plaintiff testified that, on his first day on the job, he told his foreman at MFM, Guy Iavorone (Iavorone):

> "I want to remind you that this is my first day. I don't know really what I 'm doing. I don't what you to think if I'm standing around that I'm being lazy. It's just that I don't really know what to do. So if you could please help me, I would really appreciate it."

[1] The City has two breach of contract claims against CH2M Hill: one related to the performance of the work and one for failure to procure insurance.

(NYSCEF doc No. 176 at 62).

The following day, the day of Plaintiff's accident, Plaintiff testified that Anthony Rivara Sr. (Rivara Sr.), whose company, nonparty Pile Foundation, owned the subject pile driving crane, was angry that the job was behind schedule (*id.* at 70). Anthony Rivara Jr. (Rivara Jr.), principle of Anthony Rivara Contracting, was also present on the jobsite on the day of the accident, apparently as an employee of MFM. Plaintiff testified as to Rivara Sr.'s comportment that morning:

> "he kept screaming and cursing. He threw a hot coffee on the floor, he had a clipboard he broke in half and something happened where they had to stop working with the crane and he called a couple of us over, we were all kind of nervous because he was going crazy. And at the top of the crane, there's a cable that held like a hook or an anchor and it was kind of swaying around a little bit. He said, 'somebody get up there and wrap it around.' I was right next to him, he grabbed me and pushed me and said, 'get the fuck up there right now or go the fuck home.' I said, 'what do you want me to do?' He said, 'climb up the arm and wrap it around.' I said, 'Well, am I supposed to do something, like have a harness or wear anything?" … And he said, "no, no. Get the fuck up there and stop being a bitch now or go home'"

(*id.* at 71-72).

Plaintiff climbed up a ladder on the side of the pile driving crane (*id.* at 80). Plaintiff testified that the anchor he was directed to tie around the arm of the crane was 25 higher than the raised platform to which he climbed (*id.* at 87). Plaintiff testified that he slipped on grease on the platform as he approached the arm of the crane which he had been directed to climb: "I walked close to the arm. I grabbed onto the arm and then I tried to -- I started to climb and there was a slippery grease underneath my foot that made my feet slip out from underneath me and that's when I fell off to the street" (*id.* at 90). Plaintiff estimated that he fell "10, 15 feet" to the street below (*id.* at 95).

Plaintiff testified that he ripped his pants during his fall (*id.* at 100). Plaintiff testified that he lost consciousness after his fall (*id.* at 97), and that, after he was helped out of the street, he became aware that his genitals were exposed[2]: "after I was pulled off to the side of the street," he testified, "everyone was trying to see if I was okay and comfort me. some guy said something like, hey, your junk is hanging out" (*id.* at 101).

The testimony of other witnesses, submitted by defendants, offers a wildly different view of events, also involving exposed genitalia. MFM's foreman, Iavorone, testified that Rivara Jr., rather than Rivara Sr., gave Plaintiff instructions prior to his accident (NYSCEF doc No. 180 at 108). Moreover, Iavorone described the work being a matter of unhooking a pile from the crane, rather than Plaintiff's account, which involved tying an anchor around the arm of the crane (*id.* at 109-110). Iavorone also testified that Plaintiff ripped his pants prior to exiting the platform and that, instead of falling, Plaintiff jumped off the platform:

> "When he got to the top I was watching him. He unhooked the pile and went down in a crouch-like position … He crouched, covering his midsection and pants. At that point he leaped off. He jumped and rolled to one side. I was maybe 20 feet away from him. I ran up to him. He was on the ground trying cover himself because his pants ripped and his private parts were exposed and he was very concerned about somebody seeing him. He was also in a lot of pain. He told me his left ankle hurt. I said, 'don't worry about your pants. I'm going to help you … At that point he was in the middle of the street, so myself and another guy, we grabbed him and lifted him and put him out of harm's way out on the sidewalk"

(*id.* at 110-111).

Rivara Sr. also testified that Plaintiff reported for work in "church clothes," rather than appropriate work attire (NYSCEF doc No. 179 at 77). According to Rivara Sr., Plaintiff was standing on the crane's platform with his back to Rivara Sr. when Plaintiff in his direction (*id.* at 75-76). That, Rivara Sr. testified, "is when I seen [Plaintiff's genitals]" (*id.* at 76). Rivara Sr.

[2] The Court only includes this in the factual recitation, as the City's motion rests on Plaintiff's exposure taking place before his fall.

testified that his view was unobstructed, as Plaintiff "had no underwear on" (*id.* at 78). "The problem," as Rivara Sr. identified it, "was right behind me was two lady police officers, traffic police in uniform" (*id.* at 79). Plaintiff, according to Rivara Sr., "turned around and jumped off [the platform] covering himself" (*id.*).

Rivera Jr. provides an account similar to the ones provided by his father and Iavorone. That is, he testified that he directed Plaintiff to unhook materials from the crane, that Plaintiff subsequently ripped his pants and injured himself while jumping down to avoid embarrassment (NYSCEF doc No. 215 at 145-155). Defendants also submit the testimony of nonparty Robert Joule (Joule), a representative of nonparty New York City District Council of Carpenters. Joule testified that he called Plaintiff while he was in the hospital after the accident and that Plaintiff told him he injured himself while jumping to flee embarrassment related to his ripped pants (NYSCEF doc No. 182 at 39-40).

Plaintiff, at his deposition, specifically denied that he that he jumped from the platform (NYSCEF doc No. 176 at 102) or that his pants were ripped before doing so (*id.* at 80). He also stated that he was wearing underwear on the day of accident (*id.* at 89-90). Plaintiff filed his complaint on May 20, 2016 alleging that defendants are liable pursuant to Labor Law § 200 and common-law negligence, as well as Labor Law §§ 240 (1) and 241 (6).

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d

320, 324 [1986]). However, if the moving party fails to make a *prima facie* showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. The City's Motion

A. 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 a 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]).

Here, the City argues that Plaintiff's Labor Law § 240 (1) claim should be dismissed, as Plaintiff was the sole proximate cause of his own accident, as his decision to jump off the pile-driving crane was the cause of his accident. As this argument relies on a factual predicate about

which there is a question of fact -- i.e., whether Plaintiff fell or jumped -- the branch of the City's motion that seeks to dismiss Plaintiff's Labor Law § 240 (1) claim must be denied.

B. Labor Law § 241 (6)

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

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

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

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

Here, Plaintiff alleges that defendants violated the following Industrial Code violations: 22 NYCRR 23-1.7 (d), 12 NYCRR 23-1.7 (e), 12 NYCRR 1.15, 12 NYCRR 23-1.16, 12 NYCRR 23-5.1 (f) (j), and 12 NYCRR 23-5.3 (e).

12 NYCRR 1.7 (d)

12 NYCRR 23-1.7 (d) is entitled "Protection from general hazards; Slipping hazards. It provides:

> "Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing"

This regulation is sufficiently specific to serve as a predicate to liability under the statute (*see e.g. Hageman v Home Depot U.S.A., Inc.*, 45 AD3d 730 [2d Dept 2007]). Here, Plaintiff has clearly raised an issue of fact as to its applicability through his testimony that he slipped on grease on the pile-driving crane's platform. As there remains a material issue of fact regarding 12 NYCRR 1.7 (d), the branch of the City's motion seeking dismissal of Plaintiff's Labor Law § 241 (6) claim must be denied.

C. Labor Law § 200

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

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

constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (*id.*).

Plaintiff presents allegations that form a hybrid, as he alleges that his accident was caused both by a dangerous condition and the methods and materials of his work. As to the methods and materials claim, the City argues that it did not have supervisory control over Plaintiff's work. Plaintiff's own testimony indicates that Plaintiff was directed in his work by Rivara Sr., who is not a City employee (NYSCEF doc 176 at 70). Accordingly, Plaintiff cannot sustain a Labor Law § 200 methods and material claim against the City.

However, Plaintiff also alleges that the crane platform had a dangerous condition, grease, on it.[3] Here, the City offers no evidence as to when the subject platform was last inspected. Thus, it fails to make a *prima facie* showing as to constructive notice (*see Jahn v. SH Entertainment, LLC*, 117 A.D.3d 473, 473 [1st Dept 2014]). Accordingly, the branch of the City's motion seeking dismissal of Plaintiff's Labor Law § 200 claims must be denied.

The City's argument that, as an out-of-possession owner, it is not liable for injuries that occur on the premises unless it is contractually obligated to repair or maintain the premises is unpersuasive. In support of this proposition, the City cites to *Eckers v Suede* (294 AD2d 533 [2d Dept 2002]), but that case, which involves only common-law negligence rather than section 200, is inapposite the City, which commissioned the subject work, is not an out-of-possession landlord. Moreover, the Court of Appeals recently held, in *Xiang Fu He v Troon Management* (2019 WL5429374) that property owner's have a nondelegable duty to maintain abutting sidewalks notwithstanding transfer of possession to a lessee.

[3] Plaintiff also alleges that the platform on the pile-driving crane was defective, as it lacked safety rails.

D. Indemnification

The City seeks summary judgment on its contractual indemnification claim against CH2M Hill. The City's contract with CH2M is entitled "Requirements Contract for Resident Engineering Inspection Services" (NYSCEF doc No. 186). The agreement contains an indemnification provision which provides:

> "[CH2M] shall defend, indemnify, and hold the City, its officers and employees harmless from any and all claims (even if the allegations of the lawsuit are without merit) or judgments for damages on account of any injuries … to any person … and from costs and expenses to which the City … may be subjected or which it may suffer or incur allegedly arising out of or in connection with any operations of the Contractor and/or subcontractors to the extent resulting from any negligent act or commission or omission, any intentional tortious act, or failure to comply with the provisions of this Agreement or of the Laws. Insofar as the facts or Law relating to any claim would preclude the City from being completely indemnified by the Contractor, the City shall be partially indemnified by the Contractor to the fullest extent permitted by Law"

(*id.* at Appendix A, ¶ 8.03).

The City argues that, per the contract, CH2M was the City's representative on the job, and ultimately responsible for site safety. (*see* NYSCEF doc No. 186, § 6.1.1, stating that CH2M is responsible for inspection, management, coordination and administration of work subsumed by the contract). Moreover, the City argues that CH2M was responsible for enforcing safety standards on the subject project. Thus, the City argues, to the extent that Plaintiff's accident arose from a dangerous condition of the jobsite, such a condition must have arisen through CH2M negligent failure to prevent such a condition.

CH2M argues that the City's application for summary judgment on its contractual indemnification claim against it is premature, as there is an open question as to the City's own negligence. Per the Court's analysis, above, of Plaintiff's Labor Law § 200 claims as against the City, there remains a question of fact as to the City's negligence. Thus, a determination as to the

City's contractual indemnification claims as against CH2M would be premature (*see Radeljic v Certified of N.Y., Inc.* [1st Dept 2018] [holding that "(i)n light of the issues of fact that exist as to the extent of defendant's liability for causing plaintiff's injuries, summary judgment on defendant's contractual indemnification claim ... would be premature"]).

The City also moves for summary judgment on its common-law negligence claims against CH2M Hill, which are also premature, as there has been no finding that the City is vicariously liable for the active negligence of CH2M Hill (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374, 375 [2011] [common-law indemnification requires a showing negligence]).

E. Breach of Contract

The City seeks summary judgment on its claim of breach contract against CH2M for failure to procure insurance. The agreement between the City and CH2M provides that CH2M "shall maintain Commercial General Liability Insurance covering the Contractor as named insured and the City as an additional insured in the amount of at least one million dollars ($1,000,000).

In opposition, CH2M submits an insurance policy endorsement for additional insureds which provides that CH2M's commercial general liability coverage covers "[a]ny entity, person or organization you are required or have agreed in a written insured contract, permit access agreement, and any other written agreement" (NYSCEF doc No. 252). However, the endorsement does not specify how much the liability coverage is for. Thus, there is a question of fact as to whether the CH2M Hill satisfied the requirement in its contract with the City to procure insurance in the amount of $1,000,000 on the City's behalf. Accordingly, the branch of the City's motion that seeks summary judgment on its claim for breach of contract against CH2M Hill is denied.

The City also moves for breach of contract with respect to various provisions of § 6, "Engineering Services," which provide that CH2M Hill has oversite responsibilities over the subject project. The City's argument is that, if a dangerous condition was present on the jobsite, then such condition must have been caused by a failure of CH2M Hill to properly oversee the subject project. In the absence of any direct proof that CH2M breached its contract with the City, the Court cannot find a breach based on a dangerous condition the existence of which remains a question of fact. Accordingly, the branch of the City's motion seeking summary judgment on its breach of contract claim against the CH2M Hill related to alleged violations of § 6 of the subject contract must be denied.

II. CH2M Hill's Motion

A. Agency Under the Labor Law

CH2M Hill's argues that it is not a proper Labor Law defendant, as it was not an owner or general contractor, or an agent of either with respect to the subject work. The City and Plaintiff each argue that CH2M was agent under the Labor Law.

Whether or not party is agent under the Labor Law hinges on the issue of supervisory control, which, in this context, equates to *authority*[4] to control the subject work:

> "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. To impose such liability, the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition. 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"

[4] "Supervisory control" appears to have slightly different meaning in the section 200 context, where the supervisory control must be exercised. In Labor Law agency context, it merely possessing the authority is sufficient.

(*Samaroo v Patmos Fifth Real Estate, Inc.*, 102 AD3d 944, 946 [2d Dept 2013] [internal quotation marks and citation omitted]).

Here, the contract between CH2M Hill and the City provided that CH2M was the "representative" of the City on the site (NYSCEF doc No. 186). Generally, the agreement provides that CH2M Hill "shall provide all services necessary and required for inspection, management, coordination and administration of the Project, so that the required construction is properly executed, completed in a timely fashion and conforms to the requirements contract and to good construction practices" (*id.* at § 6.1.1).

As to safety oversite, the agreement provides, among other things, that CH2M Hill shall

> "Monitor contractor compliance with (1) Safety Program, (2) Site Safety Plan, (3) DDC Safety Requirements, and (4) all applicable regulations that pertain to construction safety. [CH2M Hill] shall perform a daily inspection of the Project site[s] at the beginning and end of each day ('Dawn and Dusk Patrol') and shall issue directives to the contractor(s) to correct any deficiencies which may be identified"

(*id.* at 6.3.6 [b]).

Moreover, section 6.38 of the agreement provides that CH2M Hill will monitor contractors' compliance with various statutes, including the Labor Law. As to the equipment used by contractors on the project, the agreement provides that CH2M shall "[r]eview the adequacy of the personnel and equipment of the contractor[s]" (*id.*, § 6.3.4 [e]). Moreover, during the construction phase of the project, CH2M Hill was to "[c]heck and approve … the contractor's pile layout, condition of piles, treatment of piles, pile driving equipment and method of pile driving; certify pile records locations and lengths. (*id.*, § 6.3.33)."

Plaintiff submits the deposition testimony of Calvin Woolson (Woolson), CH2M Hill's engineer.[5] Woolson testified that CH2M Hill created a site safety plan for the subject project,

[5] Woolson now works for Jacobs, which acquired CH2M Hill in 2018 (NYSCEF doc No. 240 at 13-14).

although he stated that the plan was only for CH2M employees (NYSEF doc No. 240 at 29). Plaintiff, in his opposition to CH2M Hill's motion, states that Woolfson testified that CH2M Hill was a contractor on the job, not just the resident engineer. This is a mischaracterization of Woolfson's testimony. At the deposition, Plaintiff's counsel referred to the definition section of the contract, which, at section 1.10, states: "'Contractor' or 'Engineer' shall mean the entity entering into this agreement with the Department." Woolfson responded that that "I never viewed ourselves as a contractor" (NYSCEF doc No. 240 at 66). Here, the contract and the record generally, make clear that CH2M Hill was the resident engineer on the project. Engineers and architects are generally not proper Labor Law defendants.

CH2M Hill's relies on *Conti v Pettibone Cos* (111 Misc 2d 772 [Sup Ct, NY County 1981]) and *Walker v Metro-North Commuter R.R.* (*Walker v Pettibone Cos.*, 111 Misc2d 772 [1stDept 2004] [holding that the defendant architect had]) in which an engineer and architect, respectively, were found, as a matter of law, to not be agents under the Labor Law. Neither case is dispositive here, as neither the engineer in *Conti* or the architect in *Walker* agreed to take on the type of safety responsibilities apportioned to CH2M Hill in its contract with the City.

In *Conti*, the contractual clause relied upon by the Plaintiff referred "only to a duty of general inspection" and this was insufficient to establish agency related to the defendant engineer (111 Misc 2d at 776). In *Walker*, the First Department held that the defendant architect was not an agent under the Labor Law, as the Plaintiff made no showing that the architect controlled or supervised the work, or had "the authority to direct the construction procedures or safety measures employed at the site" (11 AD3d at 341).

Here, Plaintiff alleges that the platform on the pile-driving crane was in a dangerous condition, as it presented a slipping hazard where he performed work and it lacked guardrails.

The agreement between CH2M Hill and the City makes clear that CH2M had the authority to control the condition of the crane. Thus, the contract raises a question of fact as to whether CH2M was an agent of the City under the Labor Law. Accordingly, the branch of CH2M Hill's motion that seeks dismissal of all Labor Law claims as against, as it is not a proper Labor Law defendant, must be denied.

B. Common-Law Negligence

CH2M Hill also argues that it is entitled to dismissal of Plaintiff's common-law negligence claims as against it, as had no duty to Plaintiff as a third-party engineer. Plaintiff does not specifically address his common-law negligence claim, as a separate claim from his Labor Law § 200 claim. As such, Plaintiff has effectively abandoned this claim, and the Court must grant the branch of CH2M Hill's motion that seeks dismissal of Plaintiff's common-law negligence claim as against it.

C. The City's Cross Claims

As discussed above, questions of fact remain as to the City's cross claims as against CH2M Hill. Accordingly, the branch of CH2M Hill's motion that seeks dismissal of the City's cross claims as against it must be denied.[6]

D. Contractual Indemnification

In the alternative, CH2M Hill seeks summary judgment on its third-party claim that it is entitled to contractual indemnification. This claim is premised on the theory that CH2M Hill is a third-party beneficiary of the contract between the City and MFM. The indemnification clause in that agreement provides that MFM will provide indemnification to the City's "agents"

[6] As to contribution, which was not discussed above, there remains a question of fact as to whether CH2M Hill was actively at fault under the precepts of Labor Law § 200 – e.g.., there is a question of fact as to whether CH2M Hill had constructive notice of the alleged dangerous conditions on the pile-driving crane.

Here, the Court has determined that there is a question of fact as to whether CH3M Hill was an agent of the City's. As a question remains on this issue, CH2M Hill cannot obtain summary judgment on its claim for contractual indemnification as against MFM and the branch of its motion that seeks such relief must be denied.

III. MFM's Motion

MFM only specifically argues for dismissal of the third-party complaint. As discussed above, there remains a question of fact as to whether CH2M Hill was the City's agent. Thus, the question of whether CH2M Hill is entitled indemnification under the City's agreement with MFM, which cover's the City's "agents" cannot be resolved at this time. Accordingly, MFM's motion must be denied.

CONCLUSION

Accordingly, it is

ORDERED that defendant/third party plaintiff CH2M Hill New York, Inc. and defendant CH2M Hill's (collectively CH2M Hill) motion for summary judgment (motion seq. No. 005) is granted only to the extent that Plaintiff's common-law negligence claims as against them is dismissed; and it is further

ORDERED that the remainder of CH2M Hill's motion is denied; and it is

ORDERED that third-party defendant MFM Contracting Corp.'s motion for summary judgment is denied; and it is further

ORDERED that defendants The City of New York, The City of New York i/s/h/a New York City Department of Design & Construction, The City of New York, i/s/h/a New York City

Department of Environmental Protection (collectively, the City) motion for summary judgment is denied.

ORDERED that counsel for CH2M Hill is to serve a copy of this order, along with notice of entry, on all parties within 10 days of entry.

Dated: November 4, 2019

ENTER:

Hon. CAROL R. EDMEAD, JSC

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