

**Winkler v Halmar Intl., LLC**

2019 NY Slip Op 34689(U)

October 1, 2019

Supreme Court, New York County

Docket Number: Index No. 150694/2014

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

-----X

WINKLER, DOREEN ELLEN

Plaintiff,

- v -

HALMAR INTERNATIONAL, LLC; HALMAR CONSTRUCTION CORP.; HALMAR INTERNATIONAL CONSTRUCTION, LLC; HAKS GROUP, INC.; HAKS ENGINEERS, ARCHITECTS AND LAND SURVEYORS, P.C.; THE CITY OF NEW YORK; THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION; JA UNDERGROUND PROFESSIONAL CORPORATION d/b/a JACOBS ASSOCIATES

Defendants.

-----X

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Plaintiff,

-against-

PRECISION CONCRETE PUMPING, INC.

Defendant.

-----X

HAKS GROUP, INC., HAKS ENGINEERS, ARCHITECTS AND LAND SURVEYORS, P.C.

Plaintiff,

-against-

JA UNDERGROUND PROFESSIONAL CORPORATION D/B/A JACOBS ASSOCIATES

Defendant.

-----X

DECISION + ORDER ON MOTION

Third-Party Index No. 595096/2015

Second Third-Party Index No. 595523/2015

The following e-filed documents, listed by NYSCEF document number (Motion 007) 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328,

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were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 008) 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 400, 415

were read on this motion to/for

JUDGMENT - SUMMARY

Scott Winkler, a concrete pump truck operator, sustained fatal injuries in this Labor Law matter. His estate, by plaintiff administratrix Doreen Winkler, moves in motion sequence 007 for summary judgment pursuant to CPLR 3212 on her claims under Labor Law §240(1), §241(6), and §200 (NYSCEF #283 – Notice of Motion). Opposing the motion are defendants Halmar International, LLC, Halmar Construction Corp., Halmar International Contruction, LLC (collectively, “Halmar”), Haks Group, Inc., Haks Engineering, Architects, Land Surveyors, P.C. (collectively, “Haks”), The City of New York, The New York City Department of Environmental Protection (collectively, the “DEP” or “the City”), and JA Underground Professional Corporation d/b/a/ Jacobs Associates (“JA”). For its part, Halmar cross-moves for summary judgment to dismiss the complaint and all cross-claims against it (NYSCEF #351 – Notice of Cross-Motion). Plaintiff, Haks, the DEP, and JA all oppose the cross-motion.

Additionally, third-party defendant Precision Concrete Pumping, Inc. (“Precision”) moves in motion sequence 008 for summary judgment pursuant to CPLR 3212 to sever and dismiss all claims against it (NYSCEF #334 – Notice of Motion). Precision’s motion is unopposed. The Decision and Order is as follows:

## FACTS

This action arises from a construction site accident that occurred at 918 Homestead Avenue in Maybrook, New York on December 2, 2013. The following is undisputed:

Plaintiff’s decedent, Scott Winkler, was a concrete pump truck operator. Winkler operated a pump that transferred concrete from a hopper through a hose into a reinforced concrete-form in the process of erecting a mockup of a water tunnel for the Delaware and Catskill Aqueduct (“the Aqueduct Project”). The Aqueduct is the conduit that brings water from upstate New York reservoirs to New York City.

Winkler worked for third-party defendant Precision. Precision rented the pump truck with a driver, Winkler, to Halmar, the general contractor retained by the DEP to build an interconnection shaft for the Aqueduct Project in Gardiner,

New York. Haks was hired by the DEP as a Construction Manager, tasked with inspection and ensuring that the construction conformed to the plans and specification of the project (NYSCEF #310). JA was hired as a Construction Management subcontractor, subject to all the obligations of Haks under its DEP contract (NYSCEF #311).

As part of its arrangement with the DEP, Halmar built a mockup of a section of the aqueduct tunnel on land it owned in Maybrook. The mockup was to be built out of concrete. As such, Halmar employees created a form for the concrete to be poured into it.

The procedure for pouring concrete started with concrete trucks arriving at the Maybrook property and emptying the concrete into a hopper. A pump truck would then pump the concrete from the hopper through a hose which would feed the concrete up into the form which was thirteen to fourteen feet high. Winkler was the operator of the pump truck that transferred the wet concrete from the hopper up into the form.

On the lengthwise side of the form, Halmar's employees built a wooden scaffold. The scaffold was used by workers to stand on to feed the pump truck hose into the form and to operate a vibrating device to assure that the concrete was settled without any air pockets or gaps.

However, at approximately 12:30 PM on the date of the accident, Scott Winkler was on the scaffold guiding the pump truck hose that delivered the concrete into the form. While he was standing on the scaffold, the walls of the concrete-form gave way, causing him to be thrown approximately twelve feet to the ground and crushed under the scaffold and the collapsed form.

Winkler was pulled out of the wreckage alive and conscious. He was then transported to Westchester Medical Center. Winkler suffered a massive crush injury to his entire trunk which included multiple rib fractures, a collapsed lung, massive intracranial hemorrhages and herniations, and multiple crush fractures of his pelvis and his thoracic and lumbar spine. Winkler died of his injuries eight days later on December 10, 2013.

Following the accident, Halmar enlisted McLaren Forensic Engineering Analysis to produce a report regarding the accident. The McLaren Report found a discrepancy in the number of concrete-form anchors specified in the drawings for the forms and the actual number of anchors installed (NYSCEF #305 – McLaren Report at 6). The drawings specified a total of fifty-two (52) five-eighth-inch diameter anchors be installed, however only twenty-four (24) smaller half-inch diameter anchors were installed (*id.*). The McLaren Report concluded that: (1) the concrete-form anchors may not have been installed fully or properly; (2) the number

and type of anchors actually installed did not have adequate capacity to resist the applied forces from the wet concrete; (3) even if the anchors had been properly installed, the twenty-four anchors did not provide enough anchor capacity to resist the applied wet concrete loads; (4) the failure method would start at the bottom row of anchors which would cause progressive anchor and formwork failure; and (5) the findings and conclusions were consistent with the 'pullout' condition of the anchors actually observed by the investigating engineers at the site on December 4, 2013 (*id.* at 7).

The Occupation Safety and Health Administration (OSHA) also produced a report regarding the accident (NYSCEF #306 – OSHA Report). The OSHA report concluded that: (1) the formwork was not erected, supported, braced, and maintained so that it would be capable of supporting all anticipated loads without failure; (2) three steel braces specified in the drawings for the formwork were omitted; (3) a competent person was not on site to provide frequent and regular inspections; (4) drawings or plans for the formwork, working decks, and scaffolding were not available on the work site; and (5) shoring equipment was not inspected prior to the formwork erection to determine installation according to designed specifications.

Plaintiff filed this lawsuit on January 24, 2014 (NYSCEF #1). In addition to Winkler, Halmar employee Timothy Lang was killed, and Rafael Zakota was seriously injured in the same accident. Those related matters are filed under separate index numbers<sup>1</sup>, but the three actions were joined for joint discovery (NYSCEF #78 – July 23, 2015 Order).

## DISCUSSION

This Decision and Order resolves the respective motions for summary judgment by plaintiff and third-party defendant Precision, and defendant Halmar's cross-motion for the same. The motions/cross-motion will be addressed out of sequence. First, the prematurity argument leveled against the motions and cross-motion will be addressed, followed by Halmar's cross-motion regarding the Workers Compensation Bar to recovery. Finally, plaintiff's and Precision's respective motions will be addressed in turn.

A party moving for summary judgment must make a *prima facie* showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary

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<sup>1</sup> *Robert Lang v City of New York, et. al.*, index no. 160974/2014; *Rafael Zakota v City of New York, et. al.*, index no. 157284/2014.

judgment, facts must be viewed in the light most favorable to the non-moving party (see *Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (see *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). “A motion for summary judgment, irrespective of by whom it was made, empowers a court to search the record and award judgment where appropriate” (*GHR Energy Corp. v Stinnes Interoil Inc.*, 165 AD2d 707, 708 [1st Dept 1990]).

*DEP, Haks, and JA Incomplete Discovery Argument*

Haks, JA, and the DEP argue that discovery in this matter is incomplete and that summary judgment motions of plaintiff, Halmar, and Precision are premature. As way of background, plaintiff filed her Note of Issue on July 25, 2018 (NYSCEF #242). The defendants responded by filing two motions to vacate the note of issue, arguing that discovery was incomplete. By order dated October 25, 2018, this court vacated plaintiff's note of issue, finding that there were unresolved discovery issues (NYSCEF #345 – October 25, 2018 Decision and Order). Plaintiff filed the instant motion for summary judgment on September 18, 2018, while the vacate note of issue motions were still in submissions.

Haks, JA, and the DEP point the court to the October 17, 2018, Compliance Conference Order which scheduled numerous additional depositions in this matter (NYSCEF #346 – October 17, 2018 Compliance Conference Order). The additional depositions were to be of: (1) former Halmar employee William Loftus, P.E.; (2) Haks witness Michael Hadley; (3) former Halmar employee Lawrence Franzese; (4) Ed Sturm of JA (a continuing deposition); (5) former Haks employee Craig Morgan (continuing deposition); (6) former Halmar employee Leo Dragone; (7) former Halmar employee Jason Roy; and (8) reservation of right to subpoena former Haks employee Charles Bunyaviroch (*id.*).

Defendants claim these depositions are necessary for their defense. The DEP argues that “[m]any of the witnesses yet to be deposed in this action have personal knowledge of the facts and circumstances relating to the subject incident; the work performed at the construction project and accident location; the duties and responsibilities of the defendants with regard to the project and accident location, all of which may lead to relevant evidence and facts in determining the potential liability of the defendants” (NYSCEF #373 – DEP Aff in Opp at ¶10).

Plaintiff counters that there has been ample discovery in this matter and that defendants fail to proffer an evidentiary basis for the need for additional discovery (NYSCEF #408 – Pl's Reply at ¶28).

Plaintiff, for the most part, is correct. Even though there was outstanding discovery at the time she filed this motion, defendants have “failed to show that facts essential to justify opposition to the motion may emerge upon further discovery” (*Bailey v New York City Transit Authority*, 270 AD2d 156, 157 [1st Dept 2000]). However, defendants are also correct to a limited extent – plaintiff’s Labor Law §241(6) claim predicated on Industrial Code §23-2.2(b) is premature due to the lack of William Loftus’s testimony, as will be more fully elaborated below.

*Halmar’s Cross-Motion on Special Employee Status*

Halmar argues in its cross-motion that the complaint and all cross-claims should be dismissed against it because of the Workers’ Compensation Bar as outlined in Workers Compensation Law (WCL) §§ 11 and 29(6). The WCL provides that an employee who is entitled to receive compensation benefits for injuries sustained in the course of his or her employment may not sue the employer in an action for those injuries. “When an employee elects to receive Workers’ Compensation benefits from his general employer, a special employer is shielded from any action at law commenced by the employee” (*Villanueva v Southeast Grand St. Guild Hous. Dev. Fund Co., Inc.*, 37 AD3d 155, 156 [1st Dept 2007]). Halmar argues that Winkler constituted a “special employee” and that it is protected from liability by the Workers’ Compensation Bar.

“A special employee is ‘one who is transferred for a limited time of whatever duration to the service of another,’ and limited liability inures to the benefit of both the general and special employee” (*Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 359 [2007] [internal citations omitted]). “Although no one factor is determinative, a ‘significant’ and ‘weighty feature’ in deciding whether a special employment relationship exists is ‘who controls and directs the manner, details and ultimate result of the employee’s work’ – in other words, who determines ‘all essential, locational and commonly recognizable components of the [employee’s] work relationship’” (*id.* at 359). Factors in determining whether a special employment relationship exists include control, direction and supervision, payment of wages, and furnishing of equipment, hiring and discharging, among others (*see id.* citing *Ugijanin v 2 West 45<sup>th</sup> Street Joint Venture*, 43 AD3d 911, 913 [2d Dept 2007]). “Only where the defendant is able to demonstrate conclusively that it has assumed exclusive control over ‘the manner, details and ultimate result of the employee’s work’... is summary adjudication of special employment status and consequent dismissal of an action proper” (*Bellamy v Columbia Univ.*, 50 AD3d 160, 162 [1st Dept 2008] [internal citations omitted]). “General employment is... presumed to continue, and special employment will not be found absent a ‘clear demonstration of surrender of control by the general employer and assumption of control by the special employer’” (*id.* at 161).

Halmar argues that Precision leased the pump to Halmar, and that Halmar directed the manner, details, and ultimate result of Winkler's work. Halmar points to the testimony of Jason Pino, the operations manager of Precision, who oversaw daily operations at Precision (NYSCEF #364 – EBT of Pino). Pino testified that Halmar contracted for a “daily rental” of Precision's pump truck and a pump operator (*id.* at 30-31). Pino testified that when a pump operator appears at a job site, he or she checks in with a foreman or superintendent (*id.* at 39). Pino further stated that at the pour, the pump operator's responsibility is “to put the boom in wherever they say. Whoever is in charge of the pour for that day, it could be the concrete foreman, it could be the superintendent... wherever they tell him to put the boom and place concrete, that's what they do” (*id.* at 43). However, Pino also testified that if an operator had safety concerns at a particular site, he would call Pino at Precision and apprise him of the situation (*id.* at 44).

Pino testified that Precision provided its employees with safety gear, such as a vest, gloves, and hard hat (*id.* at 39). Additionally, the pump truck was owned by Precision and operated in compliance with Precision's contractual obligation to Halmar (*id.* at 23-25).

Rafael Zakota, plaintiff in the related matter, and the foreman at the time of the accident, testified that he did not direct or supervise Winkler in any way, nor did he give him any instructions on how to perform the pumping job (NYSCEF #298 – Zakota EBT at 132).

Plaintiff argues that the facts of this matter militate against declaring Winkler as a special employee. Plaintiff points out that Halmar did not exercise exclusive control over Winkler or provide the equipment for Winkler, and that Winkler did not have knowledge of the special employment arrangement.

Plaintiff is correct; Halmar's cross-motion is denied. Pino's and Zakota's testimonies establish that Halmar did not exercise exclusive and complete control over Winkler's activities at the work site. Pino's testimony establish that if Winkler had issues on the job site, Winkler would contact Pino to resolve the safety issue. This conclusively establishes that Halmar did not have exclusive control over Winkler. Additionally, “being told what job to do does not suffice to demonstrate the existence of a special employment relation; independent contractors and their employees are routinely instructed as to what they should do by those purchasing their services, but do not therefore become the purchasers' employees” (*Bellamy*, 50 AD3d at 164). Other than being told where to pour the concrete, Winkler retained control over all other aspects of his function at the construction site. Furthermore, Precision provided Winkler with the pump truck and safety equipment, further indicating that he was not a special employee. The presumption of Winkler's general employment with Precision holds here.

Halmar points to *Costa v Piermont Plaza Realty, Inc.* (10 AD3d 442 [2d Dept 2004]) as a factually similar situation also involving a concrete pump operator where the plaintiff was declared a special employee. In that case “A & J leased the concrete pump to Piermont Plaza and an employee to operate it to perform a task that was Piermont Plaza's sole responsibility. Piermont Plaza paid the pump operator's salary, and directed the manner, details, and ultimate result of his work on the day of the accident. Thus, as a matter of law, the plaintiff was a special employee of Piermont Plaza at that time” (*id.* at 444). However, in that case, the pump operator could not see where he was pouring, and he relied exclusively on the foreman to direct his work (*id.*). Here, Winkler retained control over how he poured the concrete.

There is no dispute as to the facts of Winkler's employment relationship with Precision and Halmar. As such, there is no question of fact, and thus, based on the record it is clear that Winkler remained a general employee of Precision and did not enter into a special employment relationship with Halmar. As such, Halmar's cross-motion is denied.

### Plaintiff's Motion for Summary Judgment

#### *DEP Ownership and Off-Site Mockup Arguments*

The DEP argues that plaintiff's motion for summary judgment should be denied as to the municipal defendants because neither the DEP nor the City were owners of the Maybrook site nor have an “interest” in the site. The DEP cites a variety of Second and Fourth Department cases for the proposition that an “owner” for Labor Law purposes must have an “interest in the property” and that the project is fulfilled for the owner's benefit (*Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]; *see also Walp v ACTS Testing Labs, Inc./Div. of Bur. Veritas*, 28 AD3d 1104 [4th Dept 2006]; *Reisch v Amadori Construction Co.*, 273 AD2d 855, 856 [4th Dept 2000]). The First Department incorporated the *Copertino* analysis, stating that “the term ‘owners’ within the meaning of § 241 of the Labor Laws is not ‘limited to the titleholder ... [it] encompass[es] a person who has an interest in the property and who fulfill[s] the role of owner by contracting to have work performed for his benefit” (*Kane v Coundorous*, 293 AD2d 309, 311 [1st Dept 2002], citing *Copertino*, 100 AD2d at 566).

JA also makes a similar argument, claiming that since plaintiff was injured working on a mockup, and was not performing “significant structural alteration” or “construction” as required by Labor Law §§ 240(1) and 241(6), plaintiff's claims must be denied. JA cites to *Adams v Pfizer, Inc.* (293 AD2d 291 [1st Dept 2002]), *Flores v ERC Holding LLC* (87 AD3d 419 [1st Dept 2011]), and *Martinez v City of New York* (93 NY2d 322 [1999]) for this proposition. The *Flores* court found that a worker's engagement in the fabrication and loading of steel beams onto a truck for

transport twelve miles away at a facility that was independently owned and operated, and leased by the worker's employer for the storage of its equipment and materials, did not constitute construction work under the scaffold law (*Flores*, 87 AD3d at 420). The *Adams* court found that the worker was not involved in construction when he fell from a motorized scaffold where his activities were not directed at producing a significant structural alteration and that his activities were incidental to a mock-up being constructed by his employer in connection with the site owner's premises (*Adams*, 293 AD2d at 292). And the *Martinez* court found that an inspector who fell off a desk while inspecting for asbestos in a school did not fall within the ambit of the Labor Law (*Martinez*, 93 NY2d at 324).

Plaintiff counters that the recently decided *Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82 [1st Dept 2018] should control this matter. *Karwowski* found that an office building lessee who had contracted for work could be held liable for a plaintiff's table-saw injury that occurred in a staging area that was in the same office building, but on a different floor in which defendant lessee did not have a property interest (*id.* at 86). "Indeed, '[g]enerally, the scope of a work site must be reviewed as 'a flexible concept, defined not only by the place but by the circumstances of the work to be done' (*id.* [citations omitted]).

Plaintiff is correct. The DEP specifically contracted for a "full size mock-up of a cast-in-place wall [that] shall be erected on the site where directed. Mock-up shall conform to requirements..." (NYSCEF #309 – Halmar-DEP Contract at 29). The DEP did not object to the construction of the mockup on Halmar's property and had the authority to inspect and control the work within the meaning of Labor Law § 240(1). The mockup was done specifically for the DEP's benefit. The mockup was cordoned off from the rest of the Maybrook site and the DEP rules governed safety inspections. As the scope of a work site must be viewed as a "flexible concept", Labor Law ownership liability must extend to this circumstance. The recently decided *Karwowski* decision saw past the interest in the property requirement as enunciated in *Copertino* and *Kane*. The Labor Law is designed to hold owners liable where they can exercise control and supervision of the work; this is such a case.

Additionally, *Lacey v Long Island Lighting Co.* (293 AD2d 718 [2d Dept 2002]), which states that "[a]n 'owner' within the meaning of the Labor Law is not limited to the titleholder of the property but also includes one who 'has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit'. The key in determining whether a non-titleholder is an 'owner' is the 'right to insist that proper safety practices were followed and it is the right to control the work that is significant, not the actual exercise or nonexercise of control'" (*id.* at 718-719 [2d Dept 2002]). The DEP had the right to control construction of the mockup by contract and in practice. The DEP and the City cannot escape liability on the grounds that it was not an owner for purposes of the Labor Law.

JA's arguments are also rejected. First, *Martinez* explicitly states that "[w]hile the reach of section 240(1) is not limited to work performed on actual construction sites... the task in which an injured employee was engaged must have been performed during 'the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure'" (*Martinez*, 93 NY2d at 326). Here, Winkler was involved in the erection of a structure, unlike the *Martinez* plaintiff. Next, both *Adams* and *Flores* were decided simply on the basis that their workers were not engaged in construction; that the work was in an off-site mockup location was ultimately inapposite to the Courts' respective findings. As such, both are readily distinguishable from the facts in the instant matter. Winkler was involved in the construction of a concrete-form and Labor Law protection must extend to such a worker. As such, plaintiff's claims survive the DEP's and JA's objections.

### *Plaintiff's 240(1) Claim*

Plaintiff is entitled to judgment on her Labor Law §240(1) claim. Labor Law §240(1) provides that: "[a]ll contractors and owners and their agents... in the... altering... of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding,... ladders, slings,... ropes, and other devises which shall be so constructed, placed and operated as to give proper protection to a person so employed." "The statute imposes absolute liability on... owners and contractors whose failure to 'provide proper protection to workers employed on a construction site' proximately causes injury to a worker. Whether a plaintiff is entitled to recovery under Labor Law § 240(1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011] [internal citations omitted]). The "core premise [of the statute is]... that a defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability" (*id.*).

Plaintiff need not demonstrate that a scaffold or ladder was defective or failed to comply with applicable safety regulations (*see Ocana v Quasar Realty Partners, L.P.*, 137 AD3d 566, 567 [1st Dept 2016]). Instead, the decisive question is whether plaintiff's injuries were a direct consequence of a failure to provide adequate protection against a risk arising from a physically significant height differential (*see Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 603 [2009]). As such, it is well settled that where an elevated work surface fails to remain stable or erect and results in the injury of a worker, there is prima facie liability under §240(1) (*see Aburto v City of New York*, 94 AD3d 640 [1st Dept 2012]; *Nenadovic v P.T. Tenants Corp.*, 94 AD3d 534, 534-535 [1st Dept 2012]).

The facts here are clear and undisputed. The formwork failed and collapsed on the scaffold upon which Winkler was standing. The scaffold was unable to

withstand the force of the collapse. The failure of a scaffold due to collapsing material constitutes a prima facie violation of Labor Law §240(1) (*see Jarama v 902 Liberty Ave. Hous. Dev. Fund Corp.*, 161 AD3d 691, 692 [1st Dept 2018] [finding that the collapse of scaffold when large masonry stone fell onto it was proximate cause of worker's injuries]). As such, plaintiff has demonstrated her entitlement to summary judgment on her Labor Law §240(1) claim as against Halmar and the DEP.

Haks and JA both argue that as construction managers, they did not have supervisory control and authority over the work being done, and thus cannot be held liable as agents under Labor Law §240(1). "An agency relationship for purposes of section 240(1) arises only when work is delegated to a third party who obtains the authority to supervise and control the job. Where responsibility for the activity surrounding an injury was not delegated to the third party, there is no agency liability under the statute" (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 293 [2003]). Although a construction manager of a work site is generally not responsible for injuries under Labor Law § 240(1), one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury" (*Walls v Turner Const. Co.*, 4 NY3d 861, 863-64 [2005]). "The determinative factor is whether the defendant had the right to exercise control over the work, not whether it actually exercised that right" (*Santos v Condo 124 LLC*, 161 AD3d 650, 653 [1st Dept 2018]; *see also Bart v Universal Pictures*, 277 AD2d 4, 5 [1st Dept 2000]).

Here, it remains a question of fact whether Haks and JA exercised control over the work, and thus it cannot be conclusively determined whether agency liability attaches to them. Haks' construction management contract with the DEP explicitly states that "[t]he CM [construction manager] will not supervise, direct, control or have authority over or be responsible for each contractor's means, methods, techniques, sequences or procedures of construction or the safety precautions and programs incident thereto or, for any failure of a contractor to comply with laws or regulations applicable to a contractor's performance of work" (NYSCEF #372 – Abbreviated Haks-DEP Contract at 3).

While plaintiff is right that Haks, and JA by its contract with Haks, were required to perform inspections of the work, plaintiff does not adduce evidence, contractual or testimonial, indicating that Haks and JA had the ability to control the work done on the mockup. While there is evidence that Haks and JA did not properly inspect the mockup, plaintiff does not point to any testimony or evidence that indicates that even with a proper inspection that they would have been able, on their own, to have stopped the mockup project and prevented the accident. As such, plaintiff fails to show that it is entitled to judgment on Haks' and JA's liability.

*Plaintiff's 241(6) Claim*

The branch of plaintiff's motion regarding her Labor Law §241(6) claims is granted in part and denied in part. Labor Law §241(6) creates a non-delegable duty on owners and contractors mandating compliance with the Industrial Code (IC) of the State of New York (*see Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501 [1993]). Liability under the statute is established by showing that there was a violation of a provision of the Industrial Code which provides a specific, positive command (*see Rizzo v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 349 [1998]).

First, to establish her §241(6) claim, plaintiff turns to IC §23-2.2[a], which reads as follows: "Concrete work. (a) *General Requirements*. Forms, shores and reshores shall be structurally safe and shall be properly braced or tied together so as to maintain position and shape." (12 NYCRR §23-2.2[a]).

The evidence conclusively establishes a violation of this provision. As testified to by Robert Power, Halmar's Executive Vice President, the form was not braced so that it maintained position and shape (NYSCEF #299 – Power EBT at 144-146). He additionally testified that the form was not properly tied together by loop ties which came apart causing the collapse (*id.* at 146-150). Craig Morgans, Haks' inspector, also testified that external braces were missing (NYSCEF #302 – Morgans EBT at 451-453). As such, plaintiff has demonstrated its entitlement to summary judgment on its IC §23-2.2[a] claim.

Next, plaintiff turns to IC §23-2.2[b], which reads as follows: "(b) *Inspection*. Designated persons shall continuously inspect the stability of all forms, shores and reshores including all braces and other supports during the placing of concrete. Any unsafe condition shall be remedied immediately." (12 NYCRR §23-2.2[b]).

Plaintiff's motion for summary judgment on this claim premised on IC § 23-2.2[b] is denied. Plaintiff is unable to establish a prima facie entitlement to summary judgment as she has not shown that inspections were not performed continuously. Plaintiff has not conclusively demonstrated that inspections of the concrete were not happening continuously. While Hak's inspector Craig Morgans testified that he did not inspect the concrete-form on the date of the accident, he also testified that the primary inspector assigned to the mockup project was Bill Loftus, P.E. who has yet to testify in this matter (NYSCEF #302 – Morgans EBT at 94-96). As Loftus has not testified, it is unclear if the mockup concrete-form was continuously monitored or not. As such, plaintiff's motion for summary judgment on its Labor Law §241(6) claim predicated on IC §23-2.2[b] must be denied at this time.

Finally, plaintiff points to IC §23-5.1[c][2], which reads as follows: "(2) Every scaffold shall be provided with adequate horizontal and diagonal bracing to prevent lateral movement." (12 NYCRR §23-5.1[c][2]). Plaintiff's motion is denied as to this

claim. It remains a question of fact for a jury to determine if the scaffolding was adequate. Additionally, plaintiff seems to conflate the concrete-formwork with scaffolding, stating in her brief that “[a]s is clear from the deposition testimony on the inadequacy of the formwork bracing, there can be no question that this Industrial Code subsection [23-5.1] was violated” (NYSCEF #284 at 63). As such, while it is clear that the formwork was improperly designed, it is unclear whether the scaffold that Winkler used was improperly designed. As such, plaintiff’s IC §23-5.1[c][2] must be denied.

### *Plaintiff’s Labor Law §200 Claim*

Labor Law §200 “codified landowners’ and general contractors’ common-law duty to maintain a safe workplace” (*Ross v Curtis-Palmer-Hydro-Electric Co.*, 81 NY2d 494, 505 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

“All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.”

(Labor Law § 200[1]). There are two distinct standards applicable to Labor Law §200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

“Where a plaintiff’s claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work” (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]). Specifically, “liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work” (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]; *see also Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007] [liability under a means and methods analysis “requires actual supervisory control or input into how the work is performed”]).

However, where an injury stems from a dangerous condition on the premises, an owner may be liable in common-law negligence and under Labor Law § 200

“when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice” (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]; see also *Jaycox v VNO Bruckner Plaza, LLC*, 146 AD3d 411, 412 [1st Dept 2017]).

Here, the evidence indicates that the accident was caused by the improper construction of the concrete-formwork. Therefore, plaintiff's claim implicates the means and methods of the work being performed, i.e. the manner in which the formwork was constructed. As indicated in the McLaren and OSHA reports, there were serious defects in the concrete-formwork that were unable to support the concrete pour, leading to the formwork collapse and Winkler's injuries.

As the general contractor, Halmar is liable under Labor Law §200. Halmar had actual supervisory authority over the project and the construction choices it made led to the collapse of the concrete-formwork, causing Winkler's demise.

The evidence indicates that the DEP had general supervisory control over the project, not actual supervisory control. Even where a defendant “may have coordinated the subcontractors at the work site or told them where to work on a given day, and had the authority to review onsite safety... those responsibilities do not rise to the level of supervision or control necessary to hold the [defendant] liable for plaintiff's injuries under Labor Law §200” (*Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014]).

As such, plaintiff has failed to show that she is entitled to summary judgment as against the DEP. Additionally, plaintiff fails to show that Haks and JA are liable under Labor Law §200. Again, it remains a question of fact regarding their actual supervisory roles at the Maybrook site.

#### Precision's Summary Judgment Motion

Precision's motion for summary judgment is granted; all claims against it are dismissed. The DEP and the City initiated a third-party action against Precision on three causes of action: (1) for breach of contract for failure to obtain insurance for the benefit of the DEP and the City; (2) for contractual indemnification; and (3) for common law indemnification (NYSCEF #40 – Third Party Complaint). Halmar agreed to rent concrete pumping equipment from Precision on behalf of the City and the DEP.

As to the contract claims, the “Equipment Rental Rates” contract stands as the only agreement between Precision and Halmar (NYSCEF #337 – Equipment Rental Rates). As sworn by Precision employee, Jason Pino, the Equipment Rental Rates agreement is the only document which pertains to Precision's leasing of the

pump truck to Halmar (NYSCEF #338 – Aff of Pino). There is no language in the Equipment Rental Rates agreement requiring indemnification or the acquisition of insurance for the benefit of the DEP and the City. The parties must evidence clear intent to establish indemnity, and none can be found here (*see Hooper Associates, Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 492 [1989]). There is also no breach as the alleged contract provision does not exist. As such, third-party plaintiffs' first and second causes of action must be dismissed.

The common law indemnification claim is also dismissed. To establish common law indemnification and contribution in Labor Law matters, the claims must be based on either negligence or supervision and control of the jobsite or of the injury-causing work on the part of the proposed indemnitor (*see McCarthy v Turner Construction, Inc.*, 17 NY3d 369, 377-378 ["liability for indemnification may only be imposed against those parties... who exercise actual supervision"]). It is undisputed that Precision did not exercise supervision of the worksite or of the injury-causing work. There is also no allegation or evidence regarding Precision's negligence. As such, the common law indemnity claim must also be dismissed.

## CONCLUSION

The branch of plaintiff's motion for summary judgment regarding Labor Law §240(1) is granted as to defendants Halmar, the DEP and the City. The branch of plaintiff's motion for summary judgment is granted with respect to her §241(6) claim predicated on IC §23-2.2(a) as to defendants Halmar, the City and the DEP. The branches of plaintiff's motion for summary judgment is denied with respect to her §241(6) claims predicated on IC §23-2.2(b) and IC §23-5.1(c)(2). Plaintiff's motion is denied in total with respect to defendants Haks and JA. The branch of plaintiff's motion for summary judgment regarding Labor Law §200 is granted as to defendant Halmar and denied as to defendants the DEP and the City.

Halmar's cross-motion for summary judgment is denied.

Precision's motion for summary judgment to dismiss all claims against it is granted.

Accordingly, it is ORDERED that the branch of plaintiff's motion for summary judgment regarding Labor Law §240(1) claims as against defendants Halmar, the City of New York, and the New York City Department of Environmental Protection is granted; it is further

ORDERED that the branch of plaintiff's motion for summary judgment regarding Labor Law §241(6) and Industrial Code §23-2.2(a) is granted with respect to defendants Halmar, the City of New York, and the New York City Department of Environmental Protection; it is further

ORDERED that the branches of plaintiff's motion for summary judgment regarding Labor Law §241(6) and Industrial Code §§23-2.2(b) and 23-5.1(c)(2) are denied; it is further

ORDERED that the branch of plaintiff's motion for summary judgment regarding Labor Law §200 is granted with respect to defendant Halmar and denied with respect to defendants City of New York and the New York City Department of Environmental Protection; it is further

ORDERED that plaintiff's motion for summary judgment is denied with respect to defendants Haks Group, Inc. and JA Underground Professional Corporation on all claims; it is further

ORDERED that Halmar's cross-motion for summary judgment is denied; it is further


ORDERED that Precision Concrete Pumping, Inc.'s motion for summary judgment is granted, and the City of New York's and New York City Department of Environmental Protection's third-party complaint and all claims against it are dismissed; it is further

ORDERED that the Clerk of the Court enter judgment as written; and it is further

ORDERED that the parties appear for a status conference in Part 33 at 71 Thomas St., New York, NY 10013 on October 16, 2019 at 10:30 AM.

This constitutes the Decision and Order of the court.

10/01/2019  
DATE

  
MARGARET A. CHAN, J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE