

<b>Wodz v City of New York</b>
2020 NY Slip Op 33615(U)
October 30, 2020
Supreme Court, New York County
Docket Number: 160924/2015
Judge: Francis A. Kahn III
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The City and DDC commenced a third-party action against Mega and Perfetto for contractual indemnification, breach of contract for failure to procure insurance, common-law indemnification and contribution.

Plaintiff now moves for summary judgment on its Labor Law §241[6] cause of action against City and Mega and on its Labor Law §200 cause of action against Mega. Plaintiff further moves to dismiss Defendants' affirmative defenses of culpable conduct and comparative fault. Defendant Mega cross-moves for summary judgment dismissing Plaintiff's complaint and all crossclaims against Mega. In the alternative, Mega cross-moves for summary judgment on its contractual indemnification claim against Perfetto. Defendants City and DDC also cross-move for summary judgment dismissing Plaintiff's causes of action upon common law negligence, Labor Law §200 and Labor Law §240[1] and all crossclaims against City and DDC. They further seek summary judgment on their contractual indemnification claims against Mega and Perfetto.

As to the branch of Plaintiff's motion for summary judgment on his claim under Labor Law §241[6], Plaintiff was required to establish *prima facie* proof of each element of this claim (*see Ortega v Roman Catholic Diocese of Brooklyn, N.Y.*, 178 AD3d 940, 941 [2d Dept 2019]; *see also Davis v Commack Hotel*, 174 AD3d 501, 502 [2d Dept 2019], *citing Andre v Pomeroy*, 35 NY2d 361, 364-65 [1974]).

Section 241[6] of the Labor Law provides that areas in which construction is being performed shall be "guarded, arranged, operated, and conducted" in a manner which provides "reasonable and adequate protection and safety to the persons employed therein," that the Commissioner of Labor may make rules to implement the statute, and that owners, contractors, and their agents shall comply with them (*see Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). The duty imposed under Labor Law §241[6] upon owners and contractors is also nondelegable and exists regardless of their control and supervision of the job site (*see Rizzuto v L.A. Wenger Contracting Co., Inc., supra*).

Here, it is undisputed that the Defendant City was the owner of the property where the accident occurred. Furthermore, it appears DDC hired all the subcontractors and coordinated the work among them. Mega was neither the owner of the premises nor a construction contractor on the project, but rather was retained by DDC to serve as its manager of the day-to-day operations at the project.

Construction managers and site engineers, like Mega, are "generally not considered a contractor responsible for the safety of the workers at a construction site pursuant to Labor Law §§ 200 and 241 (6), [but they] may nonetheless become responsible if [they have] been delegated the authority and duties of a general contractor, or if [they function] as an agent of the owner of the premises" (*see Rodriguez v JMB Architecture, LLC*, 82 AD3d 949 [2d Dept 2011]; *see also Walls v Turner Constr. Co.*, 4 NY3d 861 [2005]; *Johnsen v City of New York*, 149 AD3d 822 [2d Dept 2017]). 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 Labor Law §§ 200, 241[6]*; *Russin v Picciano & Son*, 54 NY2d 311, 318 [1981]). "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 [1<sup>st</sup> Dept 2018]; *see also Barreto v Metro. Transp. Auth.*, 25 NY3d 426, 434 [2015]).

As to the applicability of Labor Law §241[6] to Mega, as it was neither the owner nor explicitly engaged as the general contractor on the premises, Plaintiff was required to establish in the first instance that Mega was the agent of the City for this project. As stated in section 6.1.1 of the contract between Mega and DDC, Mega was retained to “[p]rovide all services necessary and required for the inspection, management, coordination and administration of the project, so that work is properly executed . . . and conforms to the requirements of the construction contract and to good construction practice”. Further, Mega was designated to “serve as the representative of the [DDC] at the site and, subject to the review by the Commissioner [of DDC], shall be responsible for the inspection, management, and administration of the performance of the work” (*see Mega/City Contract section 6.1.1[b]*). Mega was also required to “[r]eview and evaluate the means and methods of construction proposed by the contractors[s]” (*see Mega/City Contract section 6.3.5*). As to site safety, the contract tasked Mega with monitoring compliance with “all applicable regulations that pertain to construction safety” and stated that Mega “shall issue directives to the contractor[s] to correct any deficiencies which may be identified” (*see Contract section 6.3.6[b]*). With respect to the specific work at issue, Mega was required to “[c]heck performance of excavation, and compliance with safety standards for sheeting” (*see Mega/City Contract section 6.3.31*). The contract between Perfetto and the City clearly acknowledged Mega’s “right to reject the Means and Methods of construction proposed by [Perfetto] which in the opinion of [Mega]: . . . Will constitute or create a hazard to the Work, or to persons or property” (Perfetto/City Contract section 4.1 and 4.1.1).

Plaintiff also proffered the deposition testimony of Sasan Sareh (“Sareh”), the engineer in charge of the project employed by DDC, who testified that Mega was contracted by the City to run “the show from A to Z” and that Mega was responsible for site safety. Sareh further averred at his deposition that due to a City manpower shortage, the City hired Mega and empowered it to oversee this project and Mega oversaw all teams on this project. Sareh also averred that if Michel Michael (“Michael”), Mega’s resident engineer and onsite engineer for the project, observed unsafe work practices or an unsafe condition, he had the authority to take action, which included stopping the work. Plaintiff also proffered the testimony of Michael who averred that Mega was responsible for inspecting Perfetto’s work and ensuring that it was done safely and properly which included confirming that any necessary shoring and bracing of excavated areas was in place. Michael also averred that if he observed something unsafe, he would bring it to Perfetto’s attention. Although he testified that he personally could not authorize work stopped, he acknowledged that Mega could stop work at the site through the City and, in that context, Mega was the agent of the City.

Mega’s claimed lack of authority to direct and control the work is belied by two writings created by Michael which were proffered by Plaintiff in support of his motion. In an e-mail dated May 12, 2015, nine days prior to the accident, Michael told Perfetto to provide *inter alia* “sheeting and shoring” before the subject work commenced. Further evidence of control is derived from a field order issued by Michael to Perfetto directing them to “install adequate sheeting system to support the sides of the 20 inch WM trench when the excavation exceeds 5.0-ft deep per section 4.05 in the water main specification and per section 9 of the approved site

specific safety plan.” Michael testified at his deposition that this field order was issued as a direct result of the accident. Accordingly, Plaintiff established *prima facie* that Mega was the statutory agent for City (see *Lind v Tishman Construction Corp.*, 180 AD3d 505 [1<sup>st</sup> Dept 2020]; see also *Walls v Turner Constr. Co.*, *supra*; *Vohra v Mount Sinai Hospital*, 180 AD3d 503 [1<sup>st</sup> Dept 2020]).

In its opposition, Mega failed to establish the existence of an issue of fact. That DDC had “concomitant or overlapping authority” to oversee the entire project did not absolve Mega’s supervisory control and authority over the work being done (see *Weber v Baccarat, Inc.*, 70 AD3d 487, 488 [1<sup>st</sup> Dept 2010]). Likewise, the fact that Michael may not have actually exercised his control authority is irrelevant (see *Tuccillo v Bovis Lend Lease, Inc.*, 101 AD3d 625, 628 [1<sup>st</sup> Dept 2012]; *Williams v Dover Home Improvement, Inc.*, 276 AD2d 626 [2d Dept 2000]).

As to whether Mega and City are liable under Labor Law §241[6], a plaintiff establishes a *prima facie* case of a violation of this section with proof that relevant Industrial Code sections were violated and were a proximate cause of his injuries (see *Ortega v Roman Catholic Diocese of Brooklyn, N.Y.*, *supra*; *Melchor v Singh*, 90 AD3d 866, 870 [2d Dept 2011]; see also *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]; *Ross v Curtis-Palmer Hydro-Elec Co.*, 81 NY2d 494, 501-505 [1993]). Each section of the Industrial Code relied upon by Plaintiff must be a “concrete specification” “mandating a distinct standard of conduct” and “not merely a restatement of common-law principles” (see *Becerra v Promenade Apartments Inc.*, 126 AD3d 557, 558 [1<sup>st</sup> Dept 2015] quoting *Misicki, supra* and *Ross, supra*). Although comparative fault is a viable defense to a Labor Law §241[6] cause of action (see *Drago v TYCTA*, 227 AD2d 372 [2d Dept 1996]), a plaintiff is not required to demonstrate his freedom from comparative fault on a motion for summary judgment (*Ortega v Roman Catholic Diocese of Brooklyn, N.Y.*, *supra*; see also *Rodriguez v City of New York*, 31 NY2d 312, 313 [2018]).

Plaintiff relies on violations of two sections of the Industrial Code: 12 NYCRR §23-4.1[b] and 12 NYCRR §23-4.2[a]. 12 NYCRR §23-4.1[b] is not sufficiently specific and cannot serve as a predicate for Labor Law §241 [6] liability (see *Smith v Robert Marini Builder, Inc.*, 83 AD3d 1188, 1189 [3d Dept 2011]).

However, a violation of 12 NYCRR §23-4.2[a] can sustain a Labor Law §241[6] claim (see *Smith v Robert Marini Builder, Inc.*, *supra*; *Bell v Bengomo Realty, Inc.*, 36 AD3d 479 [1<sup>st</sup> Dept 2007]; *Fischer v State*, 291 AD2d 815 [4<sup>th</sup> Dept 2002]). That section requires sheeting and shoring to be in contact with sides or banks of trench five feet or more in depth. It further requires for “any trench or excavation in clay, sand, silt, loam or non-homogenous soil which has sides or banks more than three feet but less than five feet in depth shall be provided with side or bank protection in compliance with this Part (rule).” This section also requires that “a designated person carefully inspect such sheeting and shoring at least once each day and more frequently in the event of rain, the presence of additional surface or ground water from any source, excessive ground vibrations or whenever additional loads of any kind have been imposed near or adjacent to such excavation. Additional protection against slides and cave-ins shall be provided whenever necessary.”

In the present case, since there is no dispute that there was no shoring of any kind in the trench when it collapsed, a violation of 12 NYCRR §23-4.2[a] would exist if: [1] the trench was more than five feet in depth, [2] the trench was dug in “clay, sand, silt, loam or nonhomogeneous soil” and was between three and five feet in depth or [3] careful inspections were not performed based upon the prevailing circumstances.

Here, Plaintiff established, by his own testimony, that at the time of its collapse, the trench he was working in was over 5 feet in depth. Plaintiff testified at his deposition that just before the collapse he was standing on bottom of the trench with his back 10 feet from the end of the trench at the end of the new water main affixing a temporary cap to it. Plaintiff averred that the trench at his location was six feet deep based upon his observation and comparison to his own height. Plaintiff also demonstrated the depth of the trench based upon a sketch of the trench created by Mega. The drawing contained measurements taken by Mega personnel, and was relied on to determine the amount of back fill need by Perfetto after the pipe was installed, demonstrated that the distance from the top of the newly installed water main to the street surface to be 3.83 feet, or 46 inches. It was also established with the deposition testimony of Sareh that the pipe installed in the trench had a 21-inch interior diameter and that 6 inches was dug beneath the pipe prior to its installation. Adding these distances together establishes the trench was 73 inches or 6.08 feet in depth.

Plaintiff also demonstrated that the trench was situated in non-homogenous soil and sandy clay which would have required shoring since the trench was indisputably more than three feet in depth. With the affidavit of his expert engineer, Michael J. Tuttmann, P.E., Plaintiff demonstrated the trench was dug in non-homogenous soil<sup>1</sup>. Further, both Michel Michael, Mega’s Resident Engineer, and James Miranda, Perfetto’s Project Manager, testified to the presence of non-homogenous soil. Moreover, Miranda identified in his accident report that “a pocket of ash” existed at the point of collapse and Michael’s accident report described the surrounding soil as “sandy clay.”

As such, Plaintiff established *prima facie* entitlement judgment as a matter of law on his Labor Law §241[6] cause of action against Defendants City and Mega.

In opposition, the City’s argument that questions of fact exist as to the trench depth since Plaintiff failed to identify where he was in the trench when the accident occurred and because he was standing on sandbags is without merit. Plaintiff precisely testified at his deposition that he was 10 feet from the end of the trench standing on the bottom of the trench, installing a temporary cap to the end of the new water main. Since sandbags were placed under the water main, there would not be sandbags at Plaintiff’s location at the end of water main. At their depositions, representatives of both Mega and Perfetto were examined about Mega’s trench sketch which revealed the trench was in excess of 5 feet in depth, and neither witness contradicted that measurement. Even if the trench was only 4.75 feet deep as the City now propounds, the lack of shoring still violates 12 NYCRR §23-4.2[a] given the presence of non-homogenous soil as confirmed by Mega and Perfetto.

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<sup>1</sup> Expert opinion is admissible to establish the composition of the soil (*see Monsegur v Modern Comfort Tech.*, 289 AD2d 307 [2d Dept 2001]).

As to the branch of Plaintiff motion for summary judgment against Mega on his Labor Law §200 claim, “plaintiff may be awarded summary judgment on the issue of a defendant's negligence where ‘there is no conflict at all in the evidence’ and ‘the defendant's conduct fell far below any permissible standard of due care’” (*Davis v Commack Hotel*, 174 AD3d 501 [2d Dept 2019], citing *Andre v Pomeroy*, 35 NY2d 361, 364-65 [1974]). Plaintiff was required to establish *prima facie* proof of each element of this claim (*see generally Tatom v Andrews Intl., Inc.*, 178 AD3d 981 [2d Dept 2019]). An award of summary judgment to a plaintiff on a Labor Law §200 cause of action is a “rare case” (*Langer v MTA Capital Constr. Co.*, 184 AD3d 401, 402 [1<sup>st</sup> Dept 2020]).

Labor Law §200 is a codification of the common-law duty of landowners and general contractors to provide a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d at 352). “Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed” (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). “These two categories should be viewed in the disjunctive” (*Ortega v Puccia*, 57 AD3d 54 [2d Dept 2008]), meaning that cases ordinarily fall into one category or another.

Where a plaintiff's injuries arise out a dangerous condition at the premises “‘a property owner is liable 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 [1<sup>st</sup> Dept 2011], citing *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]). “A contractor may be liable in common-law negligence and under Labor Law § 200 in cases involving an allegedly dangerous premises condition ‘only if it had control over the work site and either created the dangerous condition or had actual or constructive notice of it’” (*Doto v Astoria Energy II, LLC*, 129 AD3d 660 [2d Dept 2015], citing *Martinez v City of New York*, 73 AD3d 993, 998 [2d Dept 2010]; *see also Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1<sup>st</sup> Dept 2009]). “Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work” (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d at 144; *see also Prevost v One City Block LLC*, 155 AD3d 531 [1<sup>st</sup> Dept 2017]).

In this case, as statutory agent of owner, Mega may be found liable for both an unsafe condition in the workplace and for a dangerous manner in which the work was performed (*see Hewitt v NY 70th Street LLC*, 2020 NY Slip Op 05853 [1<sup>st</sup> Dept 2020]; *Moscoti v Consolidated Edison*, 168 AD3d 717 719-720 [2d Dept 2019]; *see also Langer v MTA Capital Constr. Co.*, *supra*; *Ortega v Puccia*, *supra* at 62-63). However, contrary to Plaintiff's assertion there are issues of fact as to whether Mega failed to fulfill its duties under the circumstances (*see Gardner v Tishman Constr. Corp.*, 138 AD3d 415 [1<sup>st</sup> Dept 2016]; *Douglas v Sherwood 48 Assoc.*, 162 AD3d 498 [1<sup>st</sup> Dept 2018]). Unlike other cases where a Plaintiff has been awarded summary judgment on Labor Law §200 and common-law negligence claims based upon an affirmative act (*see Hewitt v NY 70th Street LLC*, *supra*; *Langer v MTA Capital Constr. Co.*, *supra*; *Gardner v Tishman Constr. Corp.*, *supra*), here it is undisputed that Perfetto created the condition which

was a cause of the accident, to wit digging the trench without installing shoring, and Mega's potential liability is based upon an alleged omission to act. In advance of the excavation work, Mega sent an e-mail to Perfetto ordering it to provide *inter alia* "sheeting and shoring" before the subject work commenced. Whether this satisfied Mega's duty, as owner's agent, to use reasonable care to provide a safe workplace or safe means and methods of work remains a triable issue of fact.

As for Plaintiff's motion to dismiss Defendants' affirmative defenses of culpable conduct and comparative fault, Plaintiff demonstrated an absence of fault on his part with his testimony that that he was at the end of the new water main, affixing a temporary cap to it when the trench partially collapsed (*see Rubino v 330 Madison Co., LLC*, 150 AD3d 603 [1<sup>st</sup> Dept 2017]). In opposition, Defendants offered no evidence to establish that Plaintiff was also negligent. Accordingly, the branch of Plaintiff's motion to dismiss Defendants' affirmative defense of culpable conduct is granted (*see Hayden v 845 UN Ltd. Ptnrsp.*, 304 AD2d 499, 500 [1<sup>st</sup> Dept 2003]).

Turning to Mega's cross-motion, the branch of the motion for summary judgment dismissing Plaintiff's negligence, Labor Law §200 and Labor Law §241 [6] claims is denied based upon the determinations above. However, the branch of the motion to dismiss Plaintiff's Labor Law §240 [1] claim is granted since Plaintiff concedes in his affirmation in opposition to Mega's cross-motion that this claim is not viable (*see Hamann v City of New York*, 219 AD2d 583, 584 [2d Dept 1995]).

As to that branch of Mega's cross-motion for summary judgment on its contractual indemnification claim against Perfetto, it is undisputed Mega and Perfetto were not in contractual privity with each other and no express indemnity agreement exists between the parties. Instead, Mega relies on the indemnification language contained in Perfetto's contract with the City, wherein it reads that Perfetto "shall indemnify . . . the City, its employees and *agents*..." (*see Perfetto/City Contract section 7.4 [emphasis added]*).

"When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). In other words, "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]; *Hooper Associates, Ltd. v. AGS Computers, Inc.*, *supra* at 491-492).

Here, while Mega has been held to be a statutory agent of the City under Labor Law §241[6], there is no indication in the agreement between Perfetto and the City that Mega was an intended third-party beneficiary of the indemnity provision. The agreement expressly acknowledges the existence of an engineer or project manager on the venture (*see eg Perfetto/City Contract Sections 2.1.14, 4.1 and Article 32*), but does not incorporate the City's agreement with Mega into the Perfetto contract nor does it specifically designate the engineer or project manager as an indemnitee. Also, section 7.6 of the contract states that the indemnification provisions "shall not be deemed to create any new rights of action in favor of

third-parties against [Perfetto] or the City”. Lastly, cases cited by Mega in support of this application are inapposite as they all involve contracts made between the indemnitee and indemnitor, wherein contractual indemnification was agreed upon by the parties.

In any event, even if the contractual indemnification provision in the contract between the City and Perfetto were applicable, Mega has not demonstrated that it is free from negligence as required to be entitled to contractual indemnification (*see eg Rainer v Gray-Line Dev. Co., LLC.*, 117 AD3d 634 [1<sup>st</sup> Dept 2014]). Based on the foregoing, the branch of Mega’s cross-motion for summary judgment on its claim for contractual indemnification is denied.

As for the cross-motion by City and DDC for summary judgment dismissing Plaintiff’s causes of action upon common law negligence, Labor Law §200 and Labor Law §240 [1], the Plaintiff conceded that the facts do not support a Labor Law §240 [1] claim and that cause of action is dismissed (*see Hamann v City of New York, supra*). Furthermore, as Plaintiff submits in his affirmation in opposition that his Labor Law §200 and negligence claims are not viable against the City and DDC, these claims are also dismissed. All cross-claims asserted against the City and DDC are dismissed as no party opposed this branch of the motion (*see Ledwell v National Grid USA Service Company Inc.*, 67 Misc3d 1230[A] [Sup Ct. Kings County 2020] citing *Elam v Ryder Systems, Inc.*, 176 AD3d 675, 676 [2d Dept 2019]).

The branch of City and DDC motion for summary judgment on its third-party claim for contractual indemnification against Mega and Perfetto is dependent upon the specific language contained in each contract (*see Trawally v City of New York*, 137 AD3d 492, 493 [1<sup>st</sup> Dept 2016]). Generally, “a party seeking full contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor” (*Cava Constr. Co., Inc., v Gealtec Remodeling Corp.*, 58 A.D3d 660, 662 [2d Dept 2009]; *see General Obligations Law § 5–322.1*). However, if contemplated by the indemnity provision, partial indemnification may be available (*see Frank v 1100 Avenue of Americas Associates*, 159 AD3d 537, 538 [1<sup>st</sup> Dept 2018]).

In their contract with Mega, the City and DDC seek to enforce the indemnification provision that reads:

“Section 8.03 Indemnification

The Contractor shall defendant, indemnify and hold the City, its officers and employees harmless from any and all claims (even if the allegations of the lawsuits are without merit) or judgments for damages on account of any injuries or death to any person or demand from costs and expenses to which the City, its officers and employees 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 its subcontractors to the extent resulting from any negligent act of 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 of 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.”

In their contract with Perfetto, the City and DDC seek to enforce the indemnification provision that reads:

“7.4 To the fullest extent permitted by law, the contractor shall indemnify, defend and hold the City, its employees and agents (the “Indemnitees”) harmless against any and all claims (including but not limited to claims asserted by any employee of the Contractor and/or its Subcontractors) and costs and expenses of whatever kind (including but not limited to payment or reimbursement of attorneys’ fees and disbursements) allegedly arising out of or in any way related to the operations of the Contractor and/or its Subcontractors in the performance of this Contract or from the Contractor’s and/or its Subcontractors’ failure to comply with any of the provisions of this Contract or of the Law. Such cost and expenses shall include all those incurred in defending the underlying claim and those incurred in connection with the enforcement of this Article 7.4 by way of cross-claim, third-party claim, declaratory action or otherwise. The parties expressly agree that the indemnification obligation hereunder contemplates (1) full indemnity in the event of liability imposed against the Indemnitees without negligence and solely by reason of statute, operation of law or otherwise; and (2) partial indemnity in the event of any actual negligence on the part of the Indemnitees either causing or contributing to the underlying claim (in which case, indemnification will be limited to any liability imposed over and above that percentage attributable to actual fault whether by statute, by operation of law, or otherwise). Where partial indemnity is provided hereunder, all cost and expense shall be indemnified on a pro rata basis.”

Here, with the dismissal of the Labor Law §200 and common-law negligence claims, the City and DDC’s liability is entirely vicarious as an owner under Labor Law §241[6]. The moving papers also demonstrated that Plaintiff’s accident “arose out of” and/or was “related to the operations of [Perfetto]” such that the City and DDC are entitled to contractual indemnification from Perfetto (*see eg Martinez-Gonzalez v 56 W. 75th St., LLC*, 172 AD3d 616 [1<sup>st</sup> Dept 2019]).

With respect to Mega, however, the indemnification provision is narrower than that contained in the Perfetto contract and limits Mega’s liability to “any negligent act of commission or omission.” In as much as it has been determined there are issues of fact as to whether Mega is negligent, the within motion is denied (*see also Licata v AB Green Gansevoort, LLC*, 158 AD3d 487, 409-91 [1<sup>st</sup> Dept 2018]).

Accordingly, it is

ORDERED that Plaintiff’s motion for summary judgment on its Labor Law §241[6] cause of action against Defendants City of New York and Mega Engineering and Land Surveying, P.C., is granted, and it is further

ORDERED that the affirmative defenses of Defendants City of New York, New York City Department of Design and Construction and Mega Engineering and Land Surveying, P.C. alleging culpable conduct/comparative fault by Plaintiff are dismissed, and it is further

ORDERED that the branch of the cross-motion by Mega Engineering and Land Surveying, P.C., for summary judgment dismissing Plaintiff's complaint is denied except that Plaintiff's Labor Law §240[1] is dismissed, and it is further

ORDERED that the branch of the cross-motion Mega Engineering and Land Surveying, P.C. for summary judgment on its contractual indemnification claim against Perfetto Contracting Co, Inc., is denied, and it is further

ORDERED that the cross-motion by the City of New York and New York City Department of Design and Construction for summary judgment dismissing Plaintiff's complaint is granted insofar that the claims for common law negligence, Labor Law §200 and Labor Law §240 [1] are dismissed. In addition, all cross-claims against the City of New York and New York City Department of Design and Construction are dismissed, and it is further

ORDERED that the branch of the cross-motion the City of New York and New York City Department of Design and Construction for contractual indemnification is granted against Perfetto Contracting Co. Inc., but denied as against Mega Engineering and Land Surveying, P.C.

10/30/2020

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE

*Francis A. Kahn III*

FRANCIS A. KAHN, III, A.J.S.C.

**HON. FRANCIS A. KAHN III  
J.S.C.**