Plumer v Turner Constr. Co.
2021 NY Slip Op 30733(U)
March 9, 2021
Supreme Court, New York County
Docket Number: 156691/2015
Judge: David Benjamin Cohen

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** IAS MOTION 58EFM

Justice

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INDEX NO. 156691/2015

DARRYL PLUMER and KATHLEEN PLUMER,

Plaintiffs,

- v -

MOTION SEQ. NO. 003, 004, 005, and 006

TURNER CONSTRUCTION COMPANY, GLOBAL FOUNDRIES US INC., THE PIKE COMPANY, INC., M PLUS W U.S., INC, SCHNEIDER ELECTRIC USA, INC, BIG TOP PORTABLE TOILETS, INC, and JOHN W. DANFORTH COMPANY,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 114, 115, 116, 219, 220, 221, 227, 228, 234, 239, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 259, 267, 268, 271, 272, 275, 276, 277, 285, 288, 290, 291

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 222, 223, 229, 232, 240, 253, 254, 273, 274, 289

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 224, 226, 230, 233, 241, 255, 256, 260, 261, 262, 263, 264, 265, 266, 286

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 225, 231, 235, 236, 242, 257, 258, 269, 270, 278, 279, 280, 281, 282, 283, 284, 287

were read on this motion to/for DISMISS.

Motion sequence numbers 003, 004, 005, and 006 are consolidated for disposition.

This action arises out of a construction site accident that occurred on June 11, 2014 at the corporate campus of defendant GlobalFoundries U.S., Inc. (GlobalFoundries) at 400 Stone Break

Road Extension in Malta, New York (the premises). Plaintiff Darryl Plumer (hereinafter, plaintiff) was allegedly injured while exiting a portable toilet when it was struck by a van operated by an employee of defendant Schneider Electric U.S.A., Inc. (Schneider).

Defendant M+W U.S., Inc. (M+W) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it with prejudice (motion sequence number 003).

Plaintiffs cross-move, pursuant to CPLR 3212, for partial summary judgment on the issue of liability, and for an order setting this action down for a trial on damages.

Defendant GlobalFoundries moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it (motion sequence number 004).

Defendant The Pike Company, Inc. (Pike) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint (motion sequence number 005).

Defendant Schneider moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint on the ground that plaintiff has failed to satisfy the "serious injury" threshold in Insurance Law § 5102 (motion sequence number 006).

FACTUAL AND PROCEDURAL BACKGROUND

GlobalFoundries hired M+W as a general contractor to construct the Technology Development Center (TDC) Building at GlobalFoundries' campus. M+W retained defendant John W. Danforth Companies (Danforth) as a mechanical subcontractor. By agreement dated October 28, 2013, GlobalFoundries hired Pike to perform site logistics construction services in connection with construction work on GlobalFoundries' campus. Plaintiff was an employee of BC Flynn, one of Danforth's subcontractors.

Plaintiff testified that he was employed as a mechanical insulator by BC Flynn on the date of his accident (NY St Cts Elec Filing [NYSCEF] Doc No. 103, plaintiff tr at 22). Plaintiff testified that the portable toilets were located in a small parking field, in the vicinity of a building called the Central Utilities Building (CUB) (*id.* at 37). Kawasaki golf carts were parked there, in addition to Schneider's vehicles (*id.*). Plaintiff testified that he had used the portable toilet and, as he was preparing to exit, opened the door (*id.* at 42). At that moment, he heard his partner calling for the van to stop (*id.* at 47). The van struck the portable toilet's door, which caused it to tip to the exterior wall of the adjacent building and "stood back up, and twisted" (*id.* at 41, 58). Plaintiff fell and struck his left shoulder, neck, and right elbow against the toilet (*id.* at 47-48). When plaintiff emerged from the portable toilet, he saw the Schneider van and yelled at the driver (*id.* at 51, 182-183).

Justin Ryan (Ryan), Schneider's employee, testified that "[he] was coming back from somewhere, [he doesn't] remember where, but [he was] looking for a spot to park. [He] saw a spot along the wall of the building. [He] made [his] turn to back into the spot that [he] saw and while backing up [he] hit the porta-potty" (NYSCEF Doc No. 106, Schneider tr at 50). He knew that he was not permitted to park there but parked there anyway (*id.* at 53). Although there was a passenger in the van, he did not use him as a spotter (*id.* at 67-68, 116). Ryan testified that the van's back-up alarm was operational at the time of the accident (*id.* at 69). According to Ryan, only Schneider's employees supervised his work (*id.* at 135).

Werner Gerling (Gerling), M+W's project director, testified that M+W did not place the portable toilets in the location of the accident (NYSCEF Doc No. 107, Gerling tr at 28-29); that M+W did not control the area where the accident occurred (*id.* at 34, 106); and that M+W did not have a contract with Schneider (*id.* at 35-36).

James Mulligan (Mulligan) testified that, in 2014, he was GlobalFoundries' senior manager for health and safety (NYSCEF Doc No. 108, Mulligan tr at 7). In June 2014, GlobalFoundries had two ongoing construction projects: the Phase II extension project and the TDC Building project (*id.* at 15). Turner Construction Company (Turner) was the general contractor for the Phase II extension project, and M+W was the general contractor for the TDC project (*id.* at 18). Pike was required to provide site logistics, including safety, traffic control, and portable restrooms (*id.* at 36-37).

GlobalFoundries' security manager, Richard Belokopitsky (Belokopitsky), testified that Pike "coordinated things like blocking roads, identifying locations for construction workers to walk, parking, [and] the day-to-day activities on the site" (NYSCEF Doc No. 151, Belokopitsky tr at 21). He testified that Pike employed a safety representative who reported directed to GlobalFoundries, and that Pike was responsible for enforcing parking regulations and other aspects of site construction (*id.* at 21-22, 100-101).

Paul Moyer (Moyer), Pike's executive vice president, testified that M+W had a lump sum contract to provide dumpsters, portable toilets, and temporary facilities to GlobalFoundries (NYSCEF Doc No. 104, Moyer tr at 27). Moyer testified that the area of the northwest spine of the TDC building was "under M+W's jurisdiction" (*id.* at 28). M+W did not control "what was going on in that area" but had to cooperate with whoever was working in that area (*id.*). GlobalFoundries' site logistics plan specified the locations for necessary traffic signs and signage, as well as the location of storage of materials, dumpsters, and portable toilets (*id.* at 35). Pike was required to make sure that the portable toilets were in the proper location and were cleaned and maintained (*id.* at 36). Big Top delivered the portable toilets and placed them in a location that was determined by GlobalFoundries (*id.* at 67).

> An accident report prepared on the date of the accident states that:
>
> "Worker from Schneider Electric was backing up and inadvertently bumped the porta-john while a worker from BC Flynn was in the porta-john. Porta-John was not knocked over, both the driver and the individual in the Porta-John were taken to the nurse for evaluation"

(NYSCEF Doc No. 246).

> The accident report includes the following statement signed by Ryan:
>
> "After returning from lunch I proceeded to park my van alongside the building. I began to reverse my van alongside the building. I began to reverse my van and while doing so I hit the portajohn. After the portajohn was hit and [I] saw that someone was in there I stopped to check if the guy was OK. I then called my site foreman. When he arrived he checked my van to make sure my alarm was working and my strobe light was functioning and they were"

(*id.*).

> A statement by a witness, plaintiff's partner, Timothy Hart, indicates:
>
> "The van pulled up and starting to backing [sic] up nobody got out to back up and no beeper went off. My partner had just opened the door on the portajohn and was stepping out and the van backed into it and pinched him and turned his portajohn sideways. I yelled for the driver of the van to stop but he had both windows up and couldn't hear me. Finally he heard me or felt the hit and stopped and the passenger rolled down the window"

(*id.*).

Plaintiffs commenced this action on July 2, 2015, seeking recovery for common-law negligence and for violations of Labor Law §§ 200, 240 (1), and 241 (6) (NYSCEF Doc No. 1). By stipulation of discontinuance dated December 16, 2015, plaintiffs discontinued the action against Turner (NYSCEF Doc No. 105). By stipulation of discontinuance dated August 10, 2016, plaintiffs also discontinued the action without prejudice against Danforth (*id.*). In their answers, Schneider and Pike asserted cross claims for indemnification, contribution, and failure to procure insurance against GlobalFoundries (NYSCEF Doc Nos. 5, 10).

GlobalFoundries and M+W asserted cross claims for indemnification and contribution against Pike (NYSCEF Doc No. 174).

LEGAL CONCLUSIONS

"'On a motion for summary judgment, the movant bears the burden of adducing affirmative evidence of its entitlement to summary judgment'" (*Scafe v Schindler El. Corp.*, 111 AD3d 556, 556 [1st Dept 2013], quoting *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]).

The Branch of Plaintiffs' Motion for Partial Summary Judgment Against Schneider

Plaintiffs move for partial summary judgment as to liability against Schneider. They argue that there is no dispute that Schneider's driver, Ryan, injured plaintiff by backing into the portable toilet. Thus, plaintiffs argue that Scheider is vicariously liable for Ryan's actions under Vehicle and Traffic Law § 388 and under the doctrine of respondeat superior.

In opposition, Schneider does not dispute that Ryan caused the accident. Schneider only argues that plaintiff's injuries do not meet the serious injury threshold.[1]

Here, it is undisputed that Ryan backed his van into the portable toilet that plaintiff was using (NYSCEF Doc No. 143, plaintiff tr at 41-43; NYSCEF Doc No. 145, Ryan tr at 50). Therefore, plaintiffs have demonstrated that Schneider's driver was negligent as a matter of

law in backing up the van without taking adequate precautions (*see* Vehicle and Traffic Law § 1211 [a]; *see also Rodriguez v City of New York*, 161 AD3d 575, 575-577 [1st Dept 2018]; *Ortiz v Lynch*, 105 AD3d 584, 585 [1st Dept 2013]; *Garcia v Verizon N.Y., Inc.*, 10 AD3d 339, 340 [1st Dept 2004]). Vehicle and Traffic Law § 388 (1) provides that:

> "[e]very owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner."

Therefore, as the owner of the van, Schneider is responsible for its employee's negligence pursuant to statute and under the doctrine of respondeat superior.

Given that Schneider has not disputed Ryan's negligence in the use or operation of its van, or that he caused the accident, Schneider has failed to raise an issue of fact as to its liability.

Accordingly, plaintiffs are entitled to partial summary judgment on the issue of liability on their common-law negligence claim against Schneider.

Whether M+W May Be Held Liable As a Contractor or Agent Under the Labor Law

M+W argues that it cannot be held liable under the Labor Law because it was not an owner or general contractor at the site where the accident occurred – it was the general contractor hired to construct the TDC building. Specifically, M+W maintains that it did not place the portable toilets in the location and that it did not supervise Schneider's work.

Plaintiffs contend that M+W, as the general contractor, had the ultimate authority to supervise and control plaintiff's work. According to plaintiffs, M+W hired Danforth, which in turn hired plaintiff's employer.

"An entity is a contractor within the meaning of Labor Law § 240 (1) and § 241 (6) if it had the power to enforce safety standards and choose responsible subcontractors" (*Mulcaire v Buffalo Structural Steel Constr. Corp.,* 45 AD3d 1426, 1428 [4th Dept 2007] [internal quotation marks and citation omitted]; *accord Futo v Brescia Bldg. Co.*, 302 AD2d 813, 814 [3d Dept 2003]). Moreover, "[t]he entity's right to exercise control over the work denotes its status as a contractor, regardless of whether it actually exercised that right" (*Milanese v Kellerman*, 41 AD3d 1058, 1061 [3d Dept 2007]).

In addition, an entity may be liable as an agent of the owner or contractor where it "has the ability to control the activity which brought about the injury" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]).

> "When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241"

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

Here, M+W has failed to demonstrate that it is not a responsible party under the Labor Law. M+W has not provided its contract with GlobalFoundries, and has, therefore, failed to demonstrate that it did not have contractual authority to supervise the work or work area (*cf. Ortiz v Igby Huntlaw LLC*, 146 AD3d 682, 683 [1st Dept 2017], *lv denied* 29 NY3d 919 [2017] [general contractor did not have the right to control the work where its contract specifically excluded painting apartment]; *see also Butts v Bovis Lend Lease LMB, Inc.*, 47 AD3d 338, 340-341 [1st Dept 2007]). In any event, it is undisputed that M+W hired Danforth, which, in turn, hired BC Flynn. Moreover, M+W's own Site Specific Safety Environment and Health Safety Plan for the project required it to "manage the number of vehicles per

subcontractor, based on limited space and phase of the construction project," and stated that vehicles were required to park in designated parking spaces only (NYSCEF Doc No. 193 at 79).

Accordingly, M+W is not entitled to dismissal of the complaint on the ground that it was not a contractor or agent for purposes of the Labor Law.

Whether Pike May Be Held Liable Under Labor Law §§ 240 (1) and 241 (6)

Pike moves for summary judgment dismissing plaintiffs' Labor Law §§ 240 (1) and 241 (6) claims. Plaintiffs, in response, do not contest that Pike is not a responsible party under these statutes (NYSCEF Doc No. 260 at 1-2). Therefore, Pike is entitled to dismissal of plaintiffs' section 240 (1) and 241 (6) claims (*see Russin*, 54 NY2d at 318).

Labor Law § 240 (1)

M+W, GlobalFoundries, and Pike move for summary judgment dismissing plaintiffs' Labor Law § 240 (1) claim, arguing that plaintiff's accident did not involve an elevation-related hazard.

Plaintiffs did not oppose dismissal of their section 240 (1) claim.

Labor Law § 240 (1), commonly known as the Scaffold Law, provides, in relevant part, as follows:

> "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."

As the Court of Appeals has held:

> "[t]he contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured. It is because of the special hazards in having to work in these circumstances . . . that the Legislature has seen fit to give the worker the exceptional protection that section 240 (1) provides"

(*Toefer v Long Is. R.R.*, 4 NY3d 399, 407 [2005] [internal quotation marks and citation omitted]). "[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

Since there is no dispute that plaintiff's accident did not involve a physically significant elevation differential, plaintiffs' Labor Law § 240 (1) claim is dismissed.

Labor Law § 241 (6)

Labor Law § 241 (6) provides:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
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> ***
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> "6. 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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work . . . , shall comply therewith."

Labor Law § 241 (6) requires owners, contractors, and their agents to "provide reasonable and adequate protection and safety" for workers performing the inherently dangerous activities of construction, excavation and demolition work. To recover under Labor Law § 241

(6), a plaintiff must plead and prove the violation of a concrete specification of the New York State Industrial Code, containing a "specific standard of conduct" rather than a provision reiterating common-law safety standards (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]). In addition, the plaintiff must also show that the violation was a proximate cause of the accident (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]). "The legislative intent of section 241 (6) is to ensure the safety of workers at construction sites" (*Morris v Pavarini Constr.*, 22 NY3d 668, 673 [2014]).

1. *Whether Labor Law § 241 (6) Applies Even Though the Accident Occurred Outside Plaintiff's Immediate Work Area*

GlobalFoundries and Schneider contend that section 241 (6) does not apply because there was no construction, excavation or demolition in the area. The court finds this argument to be unpersuasive.

Courts have held that "responsibility under Labor Law § 241(6) extends not only to the point where the . . . work was actually being conducted, but to the entire site, including passageways utilized in the provision and storage of tools, in order to insure the safety of laborers going to and from the points of actual work" (*Smith v McClier Corp.*, 22 AD3d 369, 370 [1st Dept 2005] [internal quotation marks and citation omitted]). Given that plaintiff was using a portable toilet that was available for the workers' use, plaintiff was sufficiently within the work site when his accident occurred (*see McGuinness v Hertz Corp.*, 15 AD3d 160, 161 [1st Dept 2005]; *Shields v General Elec. Co.*, 3 AD3d 715, 717 [3d Dept 2004]).

2. *Whether Plaintiff was Engaged in a Protected Activity Under Labor Law § 241 (6)*

GlobalFoundries next argues that plaintiff is not entitled to the protections of Labor Law § 241 (6) because he was not injured while performing construction, demolition or excavation.

Plaintiffs contend that, considering the context of the work, the accident falls within the ambit of the statute.

Section 241 (6) is "inapplicable outside the construction, demolition or excavation contexts" (*Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]). The Court of Appeals has held that "[t]he Industrial Code definition of 'construction work' [12 NYCRR 23–1.4 (b) (13)], which includes maintenance [and repair], must be construed consistently with this Court's understanding that section 241 (6) covers industrial accidents that occur in the context of construction, demolition and excavation" (*Nagel v D & R Realty Corp.*, 99 NY2d 98, 103 [2002]).

Cases interpreting section 240 (1) are instructive. In *Prats v Port Auth. of N.Y. & N.J.* (100 NY2d 878, 880 [2003]), an assistant mechanic, whose job typically entailed cleaning, repairing and rehabilitating air handling units, was injured while ascending a ladder in order to hand a wrench to a coworker who was inspecting an air handling unit. The Court of Appeals held that the plaintiff was engaged in a protected activity under section 240 (1), reasoning that:

> "Although at the instant of the injury he was inspecting and putting the finishing touches on what he had altered, he had done heavier alteration work on other days at the same job site on the same project. He was a member of a team that undertook an enumerated activity under a construction contract, and it is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work. The intent of the statute was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts"

(*id.* at 882).

Moreover, courts have held that section 240 (1) applies to lunch break accidents (*see e.g. Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 45 [1st Dept 2005] [section 240 applied to worker's fall from scaffold even though he was on his lunch break]).

In this case, even though plaintiff was using a portable toilet at the time of his injury, the court must not "isolate the moment of injury and ignore the general context of the work" (*Prats*, 100 NY2d at 882). Plaintiff was employed by BC Flynn, a subcontractor that was hired to construct the TDC Building. Thus, plaintiff's accident occurred within the scope of a construction project and his activity falls within the purview of section 241 (6) (*see Emery v Steinway, Inc.*, 178 AD3d 613, 615 [1st Dept 2019] [finding issue of fact as to whether plaintiff was engaged in alteration of a building under section 241 (6)]).

Therefore, the branch of GlobalFoundries' motion seeking dismissal of plaintiffs' Labor Law § 241 (6) claim on the ground that plaintiff was not engaged in a protected activity is denied.

3. *Whether Plaintiffs and Defendants Are Entitled to Summary Judgment Under Labor Law § 241 (6) Based Upon the Alleged Industrial Code Violations*

Plaintiffs' bills of particulars allege violations of 12 NYCRR 23-1.5; 12 NYCRR 23-1.7; 12 NYCRR 23-1.8; 12 NYCRR 23-1.9; 12 NYCRR 23-9.7; 12 NYCRR 23-1.23; 12 NYCRR 23-2.1; 12 NYCRR 23-3; 12 NYCRR 23-4; 12 NYCRR 23-5; 12 NYCRR 23-6; 12 NYCRR 23-7; and 12 NYCRR 23-8 (NYSCEF Doc No. 102).[2]

Defendants move for summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim, arguing that they have failed to identify a specific or applicable violation of the Industrial Code.

In opposition to defendants' motions, and in support of their cross motion, plaintiffs only rely on 12 NYCRR 23-1.9 (c) (3) and (e) and 12 NYCRR 23-9.7 (d). Accordingly, the court shall only consider the alleged violations of sections 23-1.9 (c) (3) and (e) and 23-9.7 (d) (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]).

12 NYCRR 23-1.9 (c) (3) and (e)

Section 23-1.9 governs drinking water and facilities. Subdivisions (c) and (e) provide as follows:

> "(c) Toilet facilities.
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> ***
>
> "(3) Accessibility of toilet facilities. Toilet facilities shall be readily available to all employees. In the construction of buildings or other structures such facilities shall be located no more than four stories or 60 feet above or below, nor more than 500 feet travel on the same level, from the work location of any person. In no case shall toilet facilities be located more than 1,000 feet from any work location except in the cases of highway construction and maintenance or the installation and repair of utility facilities in remote locations where transportation to sanitary facilities shall be provided by employers. Such toilet facilities shall be in compliance with paragraphs (1) and (2) of this subdivision.
>
> ***
>
> "(e) Sheltered facilities. All toilet and washing facilities on construction, demolition and excavation job sites shall be sheltered and so enclosed as to provide privacy for the users and protection from insects, vermin and the elements. Such facilities shall be protected from any hazard from machinery, equipment and falling objects and materials"

(12 NYCRR 23-1.9 [c] [3], [e]).

M+W argues that section 23-1.9 does not apply because plaintiff was provided with appropriate toilet facilities. GlobalFoundries contends, relying on *Fox v Hydro Dev. Group* (222 AD2d 1124 [4th Dept 1995], *lv denied* 88 NY2d 801 [1996]), that section 23-1.9 (c) (3) is insufficiently specific.

Plaintiffs contend that the undisputed evidence demonstrates a violation of section 23-1.9 (e), since the toilet facility that plaintiff was using was not "protected from any hazard from machinery, equipment [or] falling objects and materials." Furthermore, plaintiffs assert that defendants have failed to offer any proof that the facility was located in conformance with section 23-1.9 (c) (3).

"The interpretation of an Industrial Code regulation and determination as to whether a particular condition is within the scope of the regulation present questions of law for the court" (*Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002]).

Contrary to plaintiffs' argument, section 23-1.9 (c) (3) is insufficiently specific to support a section 241 (6) claim. In *Fox, supra*, the Fourth Department held that this provision is not a safety regulation, but rather, is a health provision (*Fox*, 222 AD2d at 1125). The court's research has not revealed any other reported cases interpreting section 23-1.9 (c) (3). Although plaintiffs argue that *Fox* was implicitly overruled in *Lee v Lewiston Constr. Corp.* (23 AD3d 1002 [4th Dept 2005], *appeal withdrawn* 6 NY3d 772 [2006]), that case concerned an alleged violation of section 23-1.9 (d), which regulates washing facilities.

Nevertheless, the court finds that section 23-1.9 (e) is specific and applicable, and there are questions of fact as to whether a violation of this rule proximately caused plaintiff's injuries. Section 23-1.9 (e) mandates a specific standard of conduct – it mandates that toilet facilities "shall be protected from any hazard from machinery, equipment and falling objects and materials" (12 NYCRR 23-1.9 [e]). "Machinery" is defined as "machines in general or as a functioning unit" (https://www.merriam-webster.com/dictionary/machinery [accessed March 4, 2021]), and a "machine" is defined as "a mechanically, electrically . . . operated device for performing a task" and a "conveyance, a vehicle"

(https://www.merriamwebster.com/dictionary/machines [accessed March 4, 2021]). "Equipment" is defined as "the implements used in an operation or activity" (https://www.merriam-webster.com/dictionary/equipment [accessed March 4, 2021]). Thus, the van qualifies as a machine or equipment. However, the record does not support an undisputed violation of this provision. There is evidence that vehicles were not permitted to park on the perimeter of the CUB (NYSCEF Doc No. 107, Greyling tr at 167-168; NYSCEF Doc No. 108, Mulligan tr at 38-39, 45-47). There were also "no parking" markings on the outside of the CUB (NYSCEF Doc No. 108, Mulligan tr at 40-41). In light of this evidence, as well as the proof that the portable toilet that plaintiff was using was struck by the van, there are triable issues of fact as to whether a violation of section 23-1.9 (e) was a proximate cause of plaintiff's injuries (*see Lee*, 23 AD3d at 1002-1003; *see also Sdregas v City of New York*, 309 AD2d 612, 612 [1st Dept 2003]).

12 NYCRR 23-9.7 (d)

Subpart 23-9 is entitled "Power-Operated Equipment". Rule 12 NYCRR 23-9.1 provides that "[t]he provisions of this Subpart shall apply to power-operated heavy equipment or machinery used in construction, demolition and excavation operations."

Section 23-9.7, "Motor trucks," provides in subsection (d) that "Trucks shall not be backed or dumped in places where persons are working nor backed into hazardous locations unless guided by a person so stationed that he sees the truck drivers and the spaces in back of the vehicles" (12 NYCRR 23-9.7 [d]).

M+W contends that this section is inapplicable because Ryan was not driving a truck. In addition, M+W argues that Ryan was not backing into an area where persons were working nor into a hazardous location. Finally, M+W maintains that it did not own, operate or direct

Schneider and/or its vans. GlobalFoundries argues that this provision does not apply because Schneider's van does not constitute power-operated heavy equipment or a piece of machinery used in construction.

Plaintiffs argue that the undisputed evidence demonstrates a flagrant violation of section 23-9.7 (d). According to plaintiffs, Ryan backed up the van without using a spotter. Furthermore, plaintiffs argue that the van was being used as a motor truck to transport Schneider's equipment and materials.

Considering 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), there are issues of fact as to whether the van was a motor truck within the meaning of section 23-9.7 (*see Borowicz v International Paper Co.*, 245 AD2d 682, 684 [3d Dept 1997] [allowing amendment of bill of particulars to assert a violation of section 23-9.7 (c), where the parties "utilized analogies likening the scissor lift to a truck being used in a lateral direction to move a load of channel iron piping from one location to another"]). Indeed, there are questions of fact as to whether Schneider's employees were using the van to transport materials and equipment. Ryan testified that, on the date of the accident, he was assigned to make "cable connections inside of an H.V.L. which is a disconnect switch" and "to make holes for IR windows for transformers" (NYSCEF Doc No. 145, Ryan tr at 56). In addition, Ryan testified that he "was coming back from somewhere," and backed up the van into the portable toilet without using a spotter (*id.* at 50). Moreover, plaintiff stated that the area was "very crowded right there," and that "golf carts, they all park in the grass, so it was very congested. A lot of people walk in there" (NYSCEF Doc No. 103, plaintiff tr at 120). Therefore, there are triable issues of fact as to whether section 23-9.7 (d) was violated, and was a proximate cause of

plaintiff's accident (*see Erickson v Cross Ready Mix, Inc.*, 75 AD3d 524, 526-527 [2d Dept 2010]).

Finally, M+W argues that it is not liable because it did not own or operate the truck. However, this argument is incorrect. "Labor Law § 241 (6) 'creates a cause of action against owners and contractors, making them vicariously liable for the negligence of others whom they did not supervise, where . . . a specific, positive command[ ] or a concrete specification of a regulation promulgated by the Commissioner . . . has been violated" (*Erickson*, 75 AD3d at 526, quoting *Toefer*, 4 NY3d at 499).

In light of the above, plaintiffs have a valid Labor Law § 241 (6) claim to the extent it is based on alleged violations of 12 NYCRR 23-1.9 (e) and 12 NYCRR 23-9.7 (d).

Labor Law § 200 and Common-Law Negligence

M+W argues that plaintiffs' Labor Law § 200 and common-law negligence claims should be dismissed because it did not supervise Schneider's work and did not have notice of any dangerous condition.

Similarly, GlobalFoundries contends that it did not supervise Schneider's employees. In addition, GlobalFoundries maintains that plaintiff's accident did not result from a dangerous premises condition, and that even if one existed, Pike was responsible for correcting the condition.

For its part, Pike argues that it did not supervise plaintiff's or Schneider's work. Pike further asserts that it did not have actual or constructive notice of an unsafe condition.

Plaintiffs argue, in opposition and in support of their cross motion, that the accident resulted from a dangerous condition. Plaintiffs contend that portable toilets were unbarricaded and located in an area used by vehicular traffic. Plaintiffs maintain that M+W and

GlobalFoundries cannot claim that they lacked notice of these conditions, given that they were in plain sight on GlobalFoundries' campus. According to plaintiffs, Pike, as the site logistics manager, was also negligent in the control of vehicular traffic and the placement of the portable toilets since there were no signs or other warning system preventing vehicles from parking in that location.

Labor Law § 200 (1), "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]), provides 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. The board may make rules to carry into effect the provisions of this section."

"An implicit precondition to [the] duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin*, 54 NY2d at 317).

Liability under Labor Law § 200 "generally falls into two broad categories: instances involving the manner in which the work is performed, and instances in which workers are injured as a result of dangerous or defective premises conditions at a work site" (*Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dept 2014]). "These two categories should be viewed in the disjunctive" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). Moreover, the distinction between the two categories "may be nuanced" (PJI 2:216).

Where the worker is injured as a result of the manner in which the work is performed, 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 139, 144 [1st Dept 2012]; *see also Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]).

By contrast, "[w]here . . . the accident arises not from the methods or manner of the work, but from a dangerous premises condition, '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 [1st Dept 2011], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2008]). Similarly, a general contractor may be liable under section 200 and the common law if it had "control over the work site and knew or should have known of the unsafe condition that allegedly brought about plaintiff's injury" (*Gallagher v Levien & Co.*, 72 AD3d 407, 409 [1st Dept 2010]).

M+W and GlobalFoundries

Here, plaintiff's accident arose out of the means and methods of the work, not a dangerous premises condition (*see Cappabianca*, 99 AD3d at 144). There is no dispute that Ryan backed the van into the portable toilet that plaintiff was using, causing his injuries (NYSCEF Doc No. 143, plaintiff tr at 43; NYSCEF Doc No. 145, Ryan tr at 50). Additionally, plaintiff testified that the portable toilets were "flat on the ground" and were "very stable," and that he did not have any problems using the toilets prior to the accident (NYSCEF Doc No. 103, plaintiff tr at 119, 131). Thus, all of the contributing causes of the accident arose directly from the manner in which Schneider performed its work.

The cases cited by plaintiffs, *Eversfield v Brush Hollow Realty, LLC* (91 AD3d 814 [2d Dept 2012]) and *Steiger v LPCiminelli, Inc.* (104 AD3d 1246 [4th Dept 2013]) are

distinguishable, since in those cases the workers' injuries directly resulted from the portable toilet's placement on unstable ground or in close proximity to a curb.

In this case, M+W and GlobalFoundries have demonstrated that they did not exercise supervision over the injury-producing work. Ryan testified that Schneider's employees supervised his work (NYSCEF Doc No. 106, Ryan tr at 135). Even if the accident arguably arose out of plaintiff's work, plaintiff testified that his foreman supervised his work (NYSCEF Doc No. 103, plaintiff tr at 116).

Plaintiffs have failed to raise an issue of fact. Accordingly, plaintiffs' Labor Law § 200 and common-law negligence claims are dismissed against M+W and GlobalFoundries.

Pike

Pike, the site logistics manager, has demonstrated that it did not "have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin*, 54 NY2d at 317). Pike did not have the authority to supervise plaintiff's or Schneider's work (NYSCEF Doc No. 106, Ryan tr at 135; NYSCEF Doc No. 103, plaintiff tr at 116). Moreover, Pike did not have the authority to insist that safe practices be followed (NYSCEF Doc No. 183, Rainsberg tr at 26-27). Accordingly, plaintiffs' section 200 claim is dismissed against Pike.

However, there are questions of fact regarding whether Pike was negligent (*see Williams v 7–31 Ltd. Partnership*, 54 AD3d 586, 586–587 [1st Dept 2008]). Mulligan testified that Pike was responsible for "site logistics," including placement of the portable toilets (NYSCEF Doc No. 147, Mulligan tr at 24-25). GlobalFoundries' security manager testified that Pike "coordinated things like blocking roads, identifying locations for construction workers to walk,

parking [and] the day-to-day activities on the site" (NYSCEF Doc No. 151, Belokopitsky tr at 21). Pike also employed a safety representative who reported directly to GlobalFoundries; Pike was responsible for enforcing parking regulations (*id.* at 21-22; 100-101). Additionally, Moyer testified that the portable toilets were "in the middle of the road," although vehicles would not normally park there (NYSCEF Doc No. 144, Moyer tr at 86).

Moreover, there are questions of fact as to whether Pike's negligence proximately caused the accident. In a negligence case, "'the plaintiff must generally show that the defendant's negligence was a substantial cause of the events which produced the injury'" (*Maniscalco v New York City Tr. Auth.*, 95 AD3d 510, 512 [1st Dept 2012], quoting *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980], *rearg denied* 52 NY2d 784 [1980]). "There may be one, or more than one, substantial factor" in causing a plaintiff's injury (*Ohdan v City of New York*, 268 AD2d 86, 89 [1st Dept 2000], *lv denied* 95 NY2d 769 [2000]). "As a general rule, the question of proximate cause is to be decided by the finder of fact . . ." (*Derdiarian*, 51 NY2d at 312). "There are certain instances, [however], where only one conclusion may be drawn from the established facts and the question of legal cause may be decided as a matter of law" (*id.* at 315). It is for the jury to determine whether Pike's placement of the portable toilet in the area and failure to enforce parking rules in the area were proximate causes of the accident.

Therefore, Pike is not entitled to dismissal of plaintiffs' common-law negligence claim asserted against it. For the same reasons, plaintiffs are not entitled to summary judgment as to liability on their common-law negligence claim against Pike.

Serious Injury

Schneider moves for summary judgment dismissing the complaint on the ground that plaintiff fails to meet the "serious injury" threshold in Insurance Law § 5102. Schneider argues

that plaintiff's claims fail under the 90/180 test. In addition, Schneider maintains that plaintiff's injuries are unrelated to the accident or fail to meet the serious injury threshold.

According to the bill of particulars, plaintiff allegedly suffered, among other injuries, injuries to his cervical spine, lumbar spine, left shoulder, right elbow, and knees (NYSCEF Doc No. 205). He further claims that he was required to undergo two spinal (neck and lower back) surgeries, and a shoulder surgery (*id.*). In addition, plaintiff claims psychological and neuropsychological injuries (*id.*). Plaintiff alleges that he is unable to work as a result of his disabilities (*id.*).

A defendant seeking summary judgment bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 352 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956 [1992]). Once a defendant has made a prima facie showing, "the burden shifts to the plaintiff to submit evidence in admissible form sufficient to create a material issue of fact necessitating a trial" (*Franchini v Palmireri*, 1 NY3d 536, 537 [2003]).

Moreover, a defendant can establish entitlement to summary judgment by negating causation, i.e., by establishing that the injuries alleged are not related to the accident at issue (*see Pommells v Perez*, 4 NY3d 566, 577-578 [2005]; *Marsh v City of New York*, 61 AD3d 552, 552 [1st Dept 2009]). Once the defendant meets that burden, the burden shifts to plaintiff "to come forward with evidence addressing defendants' claimed lack of causation" (*Pommells*, 4 NY3d at 580).

Schneider submits an affirmed report from Dr. Jonathan Garay, a doctor of osteopathic medicine, who opines, based upon his examination of plaintiff, the record, MRI reports and X-rays, that "[t]he left knee, left shoulder, cervical spine and lumbar spine surgeries for preexisting

degenerative conditions were not causally related. There is no causally related shoulder, knee, cervical spine or lumbar spine impairment" (NYSCEF Doc No. 208 at 25).

In addition, Schneider provides an affirmed report from Dr. Andrew Bazos, an orthopedist, who examined plaintiff, which states that:

> "[a]ny proposed injury the claimant may have sustained to the cervical and lumbar spine, left shoulder, right elbow, and bilateral knees is based solely on his history and subjective complaints. Due to the lack of any accident-related objective findings, the claimant sustained nothing more than minor, self-limited, soft tissue injuries to the cervical and lumbar spine, left shoulder, right elbow, and bilateral knees as a result of the work-related accident on June 11, 2014"

(NYSCEF Doc No. 210 at 17-18).

Schneider also relies on an affirmed report from Dr. Yong Kim, a spine surgeon, who opines, based upon his examination of plaintiff and his review of plaintiff's MRI reports, that "the findings on the MRI of the cervical spine are consistent with what appears to be age-related, age-appropriate, degenerative changes of the cervical spine," "the findings noted on the MRI of the lumbar spine obtained more than two years after the subject accident [show] age-related, degenerative changes of the lumbar spine," and that plaintiff's complaints of severe neck and lower back pain were not causally related to the accident (NYSCEF Doc No. 209 at 7-10).

Schneider submits an affirmed report from Dr. Craig Sherman, a radiologist, who reviewed plaintiff's MRI reports, and opines that they show chronic degenerative changes in plaintiff's left shoulder, cervical spine, thoracic spine, lumbar spine, right and left knees that are not causally related to the accident on June 11, 2014 (NYSCEF Doc No. 207 at 14-15).

Further, Dr. Roger Bonomo, a neurologist, opines, based upon his examination of plaintiff and his review of plaintiff's medical records, that "[t]his history and his objectively normal neurologic exam are consistent with resolved muscle contusions and muscle strains.

There is no objective evidence of injury to any part of the nervous system or spine" (NYSCEF Doc No. 206 at 13).

Dr. David Yamins, a psychiatrist, opines, based upon his examination of plaintiff and review of available medical records, that plaintiff "does not exhibit any psychiatric disorder, including no major depression, posttraumatic stress disorder or an anxiety disorder," "[t]here is no expectation that [plaintiff] will develop any future adverse psychological reaction in connection with this incident," and that there is no psychological reason why plaintiff cannot work (NYSCEF Doc No. 211 at 11-12).

Finally, Schneider provides an affidavit from Dr. Robert Cargill, a biomechanical engineer, who reviewed the record and considered the forces in the accident, and concludes that none of the claimed injuries are consistent with the injury potential of the accident (NYSCEF Doc No. 212 at 7).

In response to Schneider's motion, plaintiffs provide an affirmed report from Dr. Gabriel L. Dassa, D.O. F.A.A.O.S., who performed arthroscopic surgery on plaintiff's left shoulder on May 13, 2015 and arthroscopic surgery on plaintiff's left knee on July 15, 2014 (NYSCEF Doc No. 279 ¶¶ 10, 12). Dr. Dassa states that "[t]he patient was examined intraoperatively and found to have extensive internal derangement of the left shoulder and left knee that were documented in the intra-operative report" (*id.* ¶ 19). Dr. Dassa further indicates that:

> "[a]s the patient was asymptomatic before the accident in regards to bilateral knees and left shoulder on June 11, 2014, [he] can conclude the patient's injuries and symptomology are based upon a traumatic event of June 11, 2014 accident and not degeneration. Trauma sustained in June 11, 2014 accident increased the rate of arthritis, rendering Darryl symptomatic where he had previously been asymptomatic. If Darryl had any pre-existing conditions in his bilateral knees and left shoulder, they were certainly asymptomatic prior to accident on June 11, 2014 and were aggravated by subject accident"

(NYSCEF Doc No. 279 ¶ 25).

Dr. Steven Touliopoulos, an orthopedist, also states, based upon his examination of plaintiff using a hand-held goniometer and a tape measure and review of his medical records, that plaintiff has pain, discomfort, and dysfunction in his left shoulder and left knee, that plaintiff has bilateral meniscus tears and chondral injuries, and that he has chronic permanent residual range of motion loss in the left shoulder and bilateral knees (NYSCEF Doc No. 283 ¶¶ 25, 30). Dr. Touliopoulos states that plaintiff was asymptomatic before the accident and concludes that plaintiff's injuries and symptomology are based upon a traumatic event and not degeneration (*id.* ¶ 27).

Dr. Andrew Merola states, based upon his examination of plaintiff and objective range of motion tests, that plaintiff was asymptomatic for at least eight years prior to the accident, and that he has chronic permanent residual deficits as a result of an accident on June 11, 2014 (NYSCEF Doc No. 284 ¶ 20). Dr. Merola performed a cervical spinal fusion at C5-C6 on plaintiff on March 8, 2016, and also performed decompressive lumbar laminectomy surgery on plaintiff on April 25, 2017 (*id.* ¶¶ 24, 28). Dr. Merola states that plaintiff has chronic permanent residual deficits in the neck and back areas as a result of his traumatic injury (*id.* ¶ 29).

Here, Schneider has met its prima facie burden of establishing that plaintiff did not suffer a serious injury causally related to the accident, based upon the evidence that plaintiff's injuries are pre-existing degenerative conditions (*see Marsh*, 61 AD3d at 552).

In light of plaintiffs' affirmations, plaintiffs have sufficiently raised material issues of fact as to whether plaintiff sustained a "permanent consequential limitation of use" and "significant limitation of use of a body function or system" as to plaintiff's left shoulder and knees. The affirmations of plaintiffs' physicians indicate more than "a mild, minor or slight limitation of use" (*Booker v Miller*, 258 AD2d 783, 784 [3d Dept 1999] [internal quotation

marks and citation omitted]). Moreover, plaintiffs have raised triable issues of fact as to whether the injuries are causally related to the accident (*see Bonilla v Vargas-Nunez*, 147 AD3d 461, 462 [1st Dept 2017]; *Kone v Rodriguez*, 107 AD3d 537, 538 [1st Dept 2013]). Plaintiffs are not required to present proof of contemporaneous range of motion findings as a prerequisite to establishing serious injury (*see Perl v Meher*, 18 NY3d 208, 218 [2011]).

Having raised triable issues of fact as to whether plaintiff sustained a serious injury to his left shoulder and knees, the court need not address whether the other injuries claimed by plaintiff are sufficient to meet the no-fault threshold (*see Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]). "Should a jury determine that plaintiff has met the threshold for serious injury, it may award damages for any other injuries causally related to the accident, even those not meeting the serious injury threshold" (*Arias v Martinez*, 176 AD3d 548, 549 [1st Dept 2019] [internal quotation marks and citation omitted]).

However, Schneider has made a prima facie showing that plaintiff did not suffer a 90/180 injury (*see Morales v Cabral*, 177 AD3d 556, 558 [1st Dept 2019] [defendant established prima facie that plaintiff did not suffer a 90/180 injury based upon her testimony that she returned to work the day after the accident for one month]; *see also Anderson v Pena*, 122 AD3d 484, 485 [1st Dept 2014]). Here, plaintiff testified that he worked for seven months after the accident, and worked 10-hour days and 58-hour weeks (NYSCEF Doc No. 202, plaintiff tr at 33, 50-51, 53-54). Plaintiffs have failed to raise a triable issue of fact as to whether he was prevented from performing substantially all of his usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (*see Toure*, 98 NY2d at 357; *Blake v Portexit Corp.*, 69 AD3d 426, 426 [1st Dept 2010]).

Therefore, Schneider's motion for summary judgment is granted except as to the "permanent consequential limitation of use" and "significant limitation of use of a body function or system" categories.

Cross Claims Against GlobalFoundries

GlobalFoundries moves for summary judgment dismissing the cross claims asserted against it.

It is undisputed that there are no contracts requiring GlobalFoundries to indemnify any other party or purchase insurance coverage for the benefit of any other party. Accordingly, the cross claims for contractual indemnification and failure to procure insurance against GlobalFoundries are dismissed.

"To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011] ["a party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part"]). Given that Pike and Schneider are sued for their own negligence and not on a theory of vicarious liability, GlobalFoundries is entitled to dismissal of the cross claims for common-law indemnification against it.

"Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003], *lv dismissed* 100 NY2d 614 [2003] [internal quotation marks and citation omitted]). "The 'critical requirement' for apportionment

by contribution under CPLR article 14 is that 'the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought'" (*Raquet v Braun*, 90 NY2d 177, 183 [1997], quoting *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988]). As noted above, GlobalFoundries has demonstrated that it was not negligent, and its only remaining liability would be vicarious pursuant to Labor Law § 241 (6). Accordingly, GlobalFoundries is entitled to dismissal of the contribution claims against it.

Therefore, the branch of GlobalFoundries' motion seeking dismissal of the cross claims is granted.

Cross Claims Against Pike

Pike also moves for summary judgment dismissing the cross claims against it, arguing that it is free of any fault. As discussed above, there are questions of fact as to Pike's negligence. Accordingly, Pike is not entitled to dismissal of the cross claims against it.

Accordingly, it is hereby:

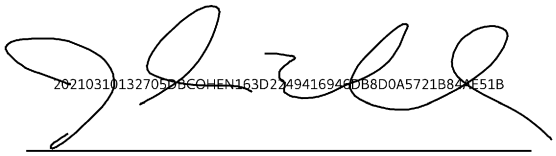
ORDERED that the motion (sequence number 003) of defendant M+W U.S., Inc. for summary judgment is granted to the extent of dismissing plaintiffs' Labor Law § 240 (1) claim, Labor Law § 200 and common-law negligence claims, and Labor Law § 241 (6) claim except as to the alleged violations of 12 NYCRR 23-1.9 (e) and 12 NYCRR 23-9.7 (d), and is otherwise denied; and it is further

ORDERED that the cross motion of plaintiffs for partial summary judgment is granted as against defendant Schneider Electric U.S.A., Inc. on the issue of liability on their common-law negligence claim, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 004) of defendant GlobalFoundries U.S., Inc. for summary judgment is granted to the extent of dismissing plaintiffs' Labor Law § 240 (1) claim, Labor Law § 200 and common-law negligence claims, and Labor Law § 241 (6) claim except as to the alleged violations of 12 NYCRR 23-1.9 (e) and 12 NYCRR 23-9.7 (d), and the cross claims asserted against it, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 005) of defendant The Pike Company, Inc. for summary judgment is granted to the extent of dismissing plaintiffs' claims against it except as to the common-law negligence claim; and it is further

ORDERED that the motion (sequence number 006) of defendant Schneider Electric U.S.A., Inc. for summary judgment is granted to the extent of dismissing the complaint except in the categories of permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system.



3/9/2021
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE