SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

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RONY ANDRADE and ALBA VANEGAS,

Plaintiffs,

Index No.: 512446/2018
Motion Seq. Nos.: 07, 08, 09, 10 & 11

-against-

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, SKANSKA KOCH, INC., KIEWIT INFRASTRUCTURE CO., and SKANSKA KOCH/KIEWIT, Joint Venture,

Defendants.

DECISION AND ORDER

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THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, SKANSKA KOCH, INC., KIEWIT INFRASTRUCTURE CO., and SKANSKA KOCH/KIEWIT, Joint Venture,

Third-Party Plaintiffs,

-against-

ATLANTIC COAST DISMANTLING, LLC, ENVIRONMENTAL AND INFRASTRUCTURE GROUP, LLC, ATLANTIC COAST DISMANTLING ENVIRONMENTAL AND INFRASTRUCTURE GROUP JV, and AMS SAFETY LLC,

Third-Party Defendants.

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ATLANTIC COAST DISMANTLING, LLC, ENVIRONMENTAL AND INFRASTRUCTURE GROUP, LLC, ATLANTIC COAST DISMANTLING ENVIRONMENTAL AND INFRASTRUCTURE GROUP JV, and AMS SAFETY LLC,

Second Third-Party Plaintiffs,

-against-

CATERPILLAR, INC.,

Second Third-Party Defendant

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The following e-filed documents, listed by NYSCEF document number (Motion 07) 121-140, 175-191, 193; (Motion 08) 159-174, 194, 263-276; (Motion 09) 195-215, 294-317, 320-328;

(Motion 10) 279-293, 331, 332; and (Motion 11) 249-262, 278, and 330 were read on these motions for summary judgment.

The plaintiffs move for partial summary judgment (Motion 07) on liability based on Labor Law §§ §240(1) and 241(6). The defendants, The Port Authority of New York and New Jersey (hereinafter PA), Skanska Koch, Inc. (hereinafter Skanska), Kiewit Infrastructure Co. (hereinafter Kiewit) and Skanska Koch/Kiewit, Joint Venture (hereinafter SKK), cross-move for summary judgment (Motion 08) based on plaintiffs' Labor Law §§ 200, 240(1) and 241(6) claims, and seek summary judgment against third-party defendants Atlantic Coast Dismantling, LLC (hereinafter ACD), Environmental and Infrastructure Group, LLC (hereinafter EIG) and Atlantic Coast Dismantling Environmental and Infrastructure Group JV (hereinafter ACD/EIG) for common-law indemnification and contribution, or alternatively, for a conditional judgment for common-law indemnification and contribution, and for an order that ACD, EIG and ACD/EIG are obligated to defend the direct defendants and for reimbursement of attorneys' fees, or alternatively, for a conditional judgment for defense costs and reimbursement of attorneys' fees, and for dismissal of the cross-claims of second third-party defendant Caterpillar Inc. (hereinafter Caterpillar) for common-law indemnification and contribution. Caterpillar moves for summary judgment (Motion 09) and dismissal of ACD, EIG and ACD/EIG's second third-party complaint and all cross-claims, and ACD, EIG and ACD/EIG cross-moves for summary judgment (Motion 10) on their negligent design and strict liability claims against Caterpillar, and seek partial summary judgment (Motion 11) on the plaintiffs' Labor Law § 240(1) claims. After oral argument and upon careful consideration of the parties' submissions, the motions are decided as set forth below.

This action arises from an accident which occurred on November 28, 2017, while the plaintiff was working on the Bayonne Bridge demolition project when his left leg was crushed between a jersey barrier and the parapet wall of the bridge, necessitating a below-the-knee amputation of the leg. The PA is the owner of the Bayonne Bridge, and SKK was retained by PA as the general contractor. PA subcontracted with EIG, the plaintiff's employer, to conduct demolition and excavation work. EIG then formed a joint venture with ACD.

According to the plaintiff's testimony, at the time of the accident he was working with another EIG employee, Jao Rodriguez, as well as John Wade, the operator of the Caterpillar excavator. The scope of the work involved demolition of the bridge, and the plaintiff's role was a signal person to the excavator operator. Michael Cadugan, the superintendent for ACD/EIG, supervised the plaintiff's work.

According to the plaintiff's testimony, at the time of the accident Wade was operating the excavator to cut iron from the sidewalk of the bridge, and the plaintiff was acting as a signal person, using hand signals to communicate with Wade. Just prior to the accident the plaintiff signaled to Wade to stop the machine so he could move to a different position. The plaintiff was

standing approximately four to five feet in front of the cab of the excavator and to the right, in between the barrier and the parapet wall, where he could visually signal to Wade. Wade stopped cutting and then moved the excavator in reverse. As the track of the excavator moved off the barrier it moved up and tipped back toward the plaintiff, trapping his leg between the barrier and the parapet wall. The plaintiff testified that he worked with Wade for approximately four months prior to the accident and had never experienced any problems communicating with him while assisting as a signal person. Wade had never instructed the plaintiff where to stand when acting as a signal person, and he had never been asked to move to a different location because Wade was unable to see him while operating the excavator.

The plaintiff testified that the excavator operator is trained not to move the machine unless the signal person is in his line of vision. He further testified that he was never given instructions as to where he should stand to perform his work, and that there was no designated distance from the excavator that he was expected to be standing when assisting the operator. However, as a signal person, he was trained to always stand somewhere visible to the operator. The plaintiff also testified that "there is no blind spot between the operator and the signal man," and that in any event, he was never given instructions by his supervisor, Cadugan, that he should not stand in the excavator's blind spot.

Cadugan testified that he was unaware that the plaintiff was "signaling or spotting" for Wade, and that the plaintiff's role was "to make sure John [Wade] did not back into anything or let anybody else walk into the work area." He further testified that he never had a conversation with the plaintiff instructing him not to stand where he was prior to the accident. Cadugan testified that the plaintiff received instructions at a toolbox meeting in the mornings about crush points and about not getting close to an excavator. He stated that operators of excavation machines were instructed and trained not to move the machine if someone is within the swing radius or pinch pint or near a crush hazard. Cadugan testified that other than the tool box meetings which likely occurred months prior to the accident, no formal training was provided to the plaintiff on spotting or signaling. He also testified that the barriers were originally secured to the roadbed with steel pins, but the pins were removed by EIG and never replaced after the barriers were moved.

According to the deposition testimony of Wade, he worked with the plaintiff for two months prior to the accident. He described the plaintiff as a general laborer, who helped "core drill the deck, saw cut, move stuff around as we needed it." He testified that during the demolition phase, which included using a hydraulic hammer to remove the concrete and cut the rebar, the plaintiff used hand signals to direct Wade where to chop and cut, when to stop, and to indicate whether debris was hanging or hitting the safety net below. Generally, no instructions were given to the plaintiff as to where he should stand in relation to the excavator, and Wade never instructed the plaintiff not to stand on the right side of the excavator. During the time that he was using the excavator for "snipping and dropping the parapet" he was able to see the

plaintiff, however from the time that he stopped cutting to when he backed up the excavator and struck the barrier, a three-to-four-minute period, he did not see him. Wade testified that he believed that a part of the excavator track slipped underneath the barrier, and when he backed up, the barrier tipped over. He testified that although he saw the plaintiff standing behind the barrier, which was approximately two feet from the excavator track just prior to the accident, he never instructed him to relocate to another position. He was unaware that the accident had occurred until he saw the expression on the face of the plaintiff's co-worker, Jao Rodriguez, which caused Wade to stop and exit the excavator, at which time he observed the plaintiff bleeding heavily. Wade could not recall if Cadugan ever instructed the plaintiff not to stand on the right side of the excavator or whether he told the plaintiff to move to the left side of it.

Wade also testified that he was responsible for deciding where to place the barrier during the course of the workday. Wade placed the barrier at its location prior to the plaintiff's arrival at the worksite that morning. The barrier stood four feet high and was generally secured to the roadway with pins to prevent movement and to keep it from tipping over. Wade was aware that the barrier was not secured to the bridge deck at the time of the accident.

Ronald Knott, the Environmental Health & Safety area manager for Skanska USA Civil Northeast, confirmed at his deposition that no communication protocol, either hand and/or verbal signals or radio communication had been established between the plaintiff and Wade, and that it was an important safety issue to prevent the machine from coming into contact with workers or adjacent structures. He also testified that based on the position of the boom and dipper on the excavator the operator had clear sight of the signal person, and that the initial belief that the plaintiff was in a blind spot was inaccurate. Based on his observations at the scene after the accident, Knott believed that the track of the excavator came into contact with the barrier causing it to tip and fall onto the plaintiff.

According to the deposition testimony of Leonard Iacoviello, who was employed by PA as a Resident Engineer, a barrier was used to either regulate traffic or protect the leading edge, and could be secured to the roadway with a pin to prevent it from sliding or tipping over. He did not witness the accident, however he acknowledged that when the accident occurred the pins were not installed to secure the barrier, and that installation of the pins was relatively easy and could be done in 15 to 20 minutes. Iacoviello testified that the barrier weighed two to two-and-a-half tons and was about two feet wide at its base. Based on photographs and his personal observations of the scene after the accident, he estimated that the barrier fell two to three feet after it was tipped. Viewing video stills depicting just before and at the time of the accident, Iacoviello opined that there were no glaring issues with respect to the manner in which the work was being done or where the plaintiff was standing, although he opined that the area was "a little tight." He noted that it would have been difficult for the operator to have seen the plaintiff across the boom if he were standing on the left side rather than the right side of the excavator where the work was being performed.

Brad Minkovitz, the Project Manager who was employed by ACD/EIG, testified that the plaintiff was not a signal person or spotter, and that there was no need for one because "the operator knew what he needed to do." Minkovitz, who did not witness the accident, testified that he would not have allowed a worker to stand in the position where the plaintiff was located just prior to the accident because it was "a bad spot for him to be as far as visual communication with the operator." Minkovitz testified that the plaintiff was a laborer who assisted Rodriguez with the water hose for dust control, and that when not needed the plaintiff was standing out of the way and was expected to stand by in the event that his co-worker needed assistance. Minkovitz testified that he never instructed the plaintiff not to stand on the right side of the excavator while it was in operation, and he claimed that Cadugan informed him that he instructed the plaintiff not to stand in that area, but Cadugan did not know when the conversation had occurred. He acknowledged that his report did not mention that the plaintiff was standing in an unsafe area at the time of the accident.

Labor Law Motions – (Motions 07, 08 and 11)

The plaintiffs argue that they are entitled to summary judgment (Motion 07) pursuant to Labor Law § 240(1), based on the defendants' failure to pin the two-ton barrier to prevent it from falling or tipping onto the plaintiff. Plaintiffs argue that unrefuted witness testimony establishes that the barrier was not secured to the roadway with pins, which would have prevented the barrier from moving or tipping, and is sufficient to establish a prima facie Labor Law §240(1) violation.

In support of the motion, the plaintiffs submit the pleadings, the deposition transcripts of the plaintiff, Iacoviello, Knott, Minkovitz, Cadugan, and Wade, and a number of reports that were generated after the accident. These reports include a partially redacted Skanska Incident Report prepared by Ron Knott; the Skanska interview of John Wade by Knott and two other Skanska employees, from which a written report was made; a PA police report dated November 28, 2017 based on an interview with John Wade; a Workers' Compensation First Report of Injury; and the OSHA Investigation Report. The plaintiffs also submit numerous photographs depicting the plaintiff's accident before and after it occurred; the PA-Skanska Kiewit contract; and the Skanska-ACD/EIG subcontract; and the note of issue.

The plaintiffs contend that the "same-level" rule is inapplicable to the instant case, and that Labor Law § 240(1) was designed to prevent the types of accidents in which the protective device was inadequate to shield the worker from a falling object, even in circumstances where it falls only a short distance. The plaintiffs also seek summary judgment based on Labor Law § 241(6), which is predicated on a violation of the Industrial Code 12 NYCRR § 23-4.2(k), which states that "[p]ersons shall not be suffered or permitted to work in any area where they may be struck or endangered by any excavation equipment or by any material being dislodged by or falling from such equipment." They contend that the statute was violated based on the

undisputed witness testimony that the plaintiff's injuries occurred when the excavator struck the unsecured barrier that tipped over and fell on his leg.

In opposition, defendants PA, Skanska, Kiewit and SKK, argue that the barrier was in good working order and served its intended safety purpose as a temporary, free-standing concrete construction barrier used "as a delineation for a fall hazard." They further argue that expert evidence refutes the plaintiffs' allegation that the barrier should have been pinned because it would have been impracticable and infeasible to pin and unpin the barrier every time it was moved. Defendants contend that a pinned barrier usually results in damage to the bridge deck and would compromise the structural integrity of the work area, leading to unsafe working conditions.

In support of their arguments, the defendants, PA, Skanska, Kiewit and SKK, submit the unsworn report of LPI, Inc., Consulting Engineers, dated September 21, 2020, which concludes, inter alia, that a barrier such as the one in the instant case, that is used in a free-standing configuration "to provide a conspicuous means of demarcating the road deck trailing edge," is not required to have holes cast within its base. They further contend that the plaintiff's actions in standing in the excavator's blind spot on the right side of the machine where the operator could not see him was the sole proximate cause of his injury, and that he was aware of the tipping hazard of the barrier when struck by an excavator. They maintain that there are no safety devices that were necessary or expected to be utilized to keep the barrier from tipping over and falling.

Additionally, the defendants oppose the plaintiffs' Labor Law § 241(6) claim, arguing that the evidence shows that the plaintiff's actions were the sole proximate cause of the accident, and not any alleged Industrial Code violation, and that 12 NYCRR § 23-4.2(k) is not sufficiently specific, and inapplicable to the facts of this case.

The defendants, PA, Skanska, Kiewit and SKK cross-move for summary judgment (Motion 08) based on plaintiffs' claims under Labor Law §§ 200, 240(1) and 241(6). Further, they seek summary judgment against third-party defendants ACD, EIG, ACD/EIG and AMS Safety LLC for common law indemnification and contribution; or a conditional judgment for common-law indemnification and contribution; and for an order that third-party defendants are obligated to defend them and for reimbursement of attorneys' fees, or alternatively for conditional judgment for defense costs and reimbursement of attorneys' fees. PA, Skanska, Kiewit and SKK also seek dismissal of Caterpillar's cross-claims for common-law indemnification and contribution.

In their opposition papers the plaintiffs concede that the facts of this case do not support a cognizable Labor Law § 200 or common law negligence claim. At oral argument, plaintiffs' counsel withdrew those claims.

In support of their motion for dismissal of the plaintiffs' Labor Law § 240(1) claim, the defendants PA, Skanska, Kiewit and SKK repeat the arguments asserted in their opposition to the

plaintiffs' motion, i.e. that the plaintiff was the sole proximate cause of his injuries because he placed himself in a pinch point position between the barrier and the bridge parapet wall, and in the excavator operator's blind spot while the operator was in the process of demolishing a portion of the bridge deck. The defendants also contend that the barrier served its intended safety purpose; the barrier was in good working order at the time of the accident; and that expert evidence contained in the unsworn LPI report purportedly shows that it would be impracticable and infeasible to pin and unpin the barrier every time it was moved, and would result in damage to the bridge deck. As to that prong of their motion seeking dismissal of the plaintiffs' Labor Law § 241(6) claim, they assert the same arguments as presented in their opposition papers, i.e., that 12 NYCRR § 23-4.2(k) is too general and inapplicable to the facts of this case.

Defendants PA, Skanska, Kiewit and SKK contend that they are entitled to common-law indemnification and contribution from third-party defendants ACD, EIG and ACD/EIG because they have demonstrated their freedom from fault. They further argue that in cases involving a grave injury, under implied indemnity principles one held vicariously liable solely on account of the negligence of another is permitted to shift the entire burden of the loss to an actual wrongdoer. They maintain that at most, they are exposed to statutory liability based upon the actions of ACD/EIG, who exclusively controlled, directed, and supervised the plaintiff's work and its equipment operators. In the alternative, the defendants seek a conditional order of implied indemnity pending determination of the primary action. The defendants argue that second third-party defendant Caterpillar's cross claims for indemnity and contribution should be dismissed because the defendants were not actively negligent, and because any liability would be purely vicarious.

ACD, EIG and ACD/EIG oppose that prong of the defendants' motion seeking common-law indemnification and contribution arguing that there are issues of fact as to the defendants' negligence in the happening of the accident. They argue that in the event that the Court denies the defendants' motion for summary judgment on the plaintiffs' Labor Law claims there is an issue of fact as to the negligence of PA Skanska, Kiewit and SKK in failing to secure the barrier with metal pins. ACD, EIG and ACD/EIG maintain that defendant PA knew that the barrier involved in the plaintiff's accident was being used to protect the "leading edge" of the bridge and was not secured to the roadway with the metal pins, and the PA officials conducted three walkthroughs each week of the plaintiff's work area. ACD, EIG and ACD/EIG also assert that they are not obligated to defend Caterpillar in this action, as such a claim has no basis in law, was not pled in the third-party complaint, and no arguments in support of this contention were included in the moving papers.

Third-party defendants ACD, EIG and ACD/EIG cross-move and seek dismissal of the plaintiffs' § 240(1) Labor Law claims (Motion 11), arguing that the injury was not caused by an elevation-related risk because the barrier was not a falling object, as it was situated on the roadway. The defendants rely on an Appellate Division, Third Department case, *Oakes v Wal-Mart Real Estate Bus. Trust*., 99 AD3d 31 (3d Dept 2012), to support their argument that the

statute was not violated because the barrier was situated at the same level as the plaintiff when it tipped over.

ACD, EIG and ACD/EIG, also assert that Labor Law § 240(1) does not apply because the barrier was not an object being hoisted or moved as part of the work that the plaintiff was doing at the time of the accident. The defendants contend that the safety devices, the metal pins used to secure the barrier to the roadway, are not similar to the safety devices enumerated in the statute.

The plaintiffs oppose the motion, arguing that the third-party defendants' reliance on *Oakes* is misplaced. They contend that this Court is required to follow binding precedent from the Appellate Division, Second Department, which holds that a height differential may not be considered de minimis, in light of a falling object's weight and the force it is able to generate over its short descent. The plaintiffs cite to well-settled Appellate Division, Second Department case law involving falling objects from the same level or slightly higher in which the height differential was not considered to be de minimis, including *McCallister v 200 Park, L.P.*, 92 AD3d 927 (2d Dept 2012); *Gutman v City of New York*, 78 AD3d 886 (2d Dept 2010) and *Kandatyan v 400 Fifth Realty, LLC*, 155 AD3d 848 (2d Dept 2017). The plaintiffs also contend that undisputed deposition testimony establishes that the barrier was an object that should have and could have been secured to the roadway with pins to prevent it from tipping and falling onto the plaintiff. According to the plaintiffs, the LPI Report is inadmissible, as it is unsworn, and should not be considered by the Court.

Summary judgment is a drastic remedy and may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). The moving party is required to make a prima facie showing of entitlement to judgment as a matter of law, and evidence must be tendered in admissible form to demonstrate the absence of any material issues of fact. *Alvarez v Prospect Hosp.*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 (1980). The papers submitted in the context of the summary judgment application are always viewed in the light most favorable to the party opposing the motion. *Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). If the prima facie burden has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. CPLR § 3212(b); *see also Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d at 562.

In the context of summary judgment motions based on Labor Law, the Court of Appeals has repeatedly held that Labor Law § 240(1) must be construed liberally. *See Rocovich v Consolidated Edison Co.*, 78 NY2d 509 (1991); *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 (1993). In order to impose absolute liability under Labor Law § 240(1) the plaintiff must show that the owner or general contractor's failure to provide proper protection to workers employed on a construction site proximately caused injury to a worker. *See Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1 (2011). "Whether a plaintiff is entitled to recovery

under the statute requires a determination of whether the injury is the type of elevation-related risk to which the statute applies." *Id*. at 3. Significantly, the single decisive question in determining whether Labor Law § 240(1) applies is "whether plaintiff's injuries were the direct consequence of a failure to provide protection against a risk arising from a physically significant elevation differential." *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 (2009); *see also Wilinski*, 18 NY3d at 6.

Labor Law § 240(1) applies to both "falling worker" and "falling object" cases. *See Wilinski*, 18 NY3d at 8. Liability under the statute for falling objects is not limited to cases in which the falling object is in the process of being hoisted or secured. *See Escobar v Safi*, 150 AD3d 1081, 1083 (2d Dept 2017) (where unsecured sheet of plywood fell from roof 20 feet high and struck plaintiff, falling object liability was established under Labor Law § 240(1) where the plaintiff demonstrated that the falling object "required securing for the purposes of the undertaking"); *Andresky v Wenger Constr. Co., Inc.*, 95 AD3d 1247 (2d Dept 2012) (finding liability under Labor Law § 240(1) even though the falling object did not strike the worker because the object required securing for the purposes of the undertaking); *Outar v City of New York*, 286 AD2d 671 (2d Dept 2001), *affd* 5 NY3d 731 (2005) (falling object liability established where the plaintiff was injured when an unsecured dolly fell on him from a bench wall 5½ feet above him as he was lifting pieces of track).

Further, a short elevation differential between a worker and a falling object is not considered de minimis if the weight of the object and the force it is capable of generating on its descent is significant. *See Wilinski*, 18 NY3d at 6. In *Wilinski*, the Court of Appeals articulated that its "jurisprudence defining the category of injuries that warrant the special protection of Labor Law § 240(1) has evolved over the last two decades," and enunciated the core premise that "a defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability." *Id*. at 4. *Wilinski* involved an injury that occurred as a result of the fall of two unsecured metal vertical pipes which were 10 feet tall and were located on the same level as the plaintiff. The pipes fell four feet and landed on the plaintiff, who was five feet eight inches tall, striking him on his head, shoulder and arm. The Appellate Division, First Department, partially granted the defendants' summary judgment motion, dismissing the plaintiff's Labor Law § 240(1) claim, finding that since both the pipes and the plaintiff were at the same level at the time of the collapse the elevation differential was not sufficient to impose liability. The Court of Appeals rejected the reasoning of the Appellate Division in *Wilinski*, as well as other intermediate appellate courts that had previously found that no liability can attach where the plaintiff and the base of the falling object stood on the same level. The Court concluded that the height differential between the unsecured pipes was not de minimis given the amount of force the pipes were able to generate as they fell.

In soundly rejecting the same-level rule, the Court adopted the reasoning set forth in *Runner v New York Stock Exch., Inc*., 13 NY3d 599. *Runner* involved a novel set of circumstances that did not involve a falling worker or a falling object. The plaintiff was injured

while moving an 800-pound reel of wire down a flight of four stairs using a 10-foot length of rope wrapped around a metal bar. As the reel descended, the plaintiff was pulled into the metal bar, injuring his hands as they jammed against it. The Court of Appeals held that "the relevant inquiry … is whether the harm flows directly from the application of the force of gravity to the object." *Id*. at 604. The Court found that the "elevation differential… [could not] be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent." *Id*. at 605.

Turning to the instant matter, the plaintiffs have demonstrated their prima facie entitlement to summary judgment on their Labor Law § 240(1) claim. The plaintiffs have established that the plaintiff is a worker covered under the Labor Law statute. The defendant, PA, was the owner of the Bayonne Bridge, and Skanska was the general contractor of the project. According to the testimony of Wade and Iacoviello, the barrier weighed approximately two tons and stood four feet high, falling two to three feet onto the plaintiff's leg after it tipped. There is ample evidence on this record that the barriers used were routinely secured to the roadway with metal pins to ensure that they would not tip over and injure a worker on the construction site, and that the barrier that struck the plaintiff had not been pinned before the demolition work began. Clearly, this was a risk that was well-known in the construction industry, as evidenced by the deposition testimony of the plaintiff and the defendants' witnesses.

In opposition, the defendants have failed to raise a triable issue of fact that the plaintiffs' claim is not covered by § 240(1) of the statute. The LPI Report, relied upon heavily by defendants PA, Skanska, Kiewit and SKK in opposing the plaintiffs' motion and in support of their summary judgment motion, is unsworn and constitutes inadmissible hearsay. *See Utica First Ins. Co. v Gristmill Earth Realty Corp*., 145 AD3d 1059 (2d Dept 2016); *Guanopatin v Flushing Acquisition Holdings, LLC*, 127 AD3d 812 (2d Dept 2015); *1212 Ocean Ave. Hous. Dev. Corp. v Brunatti*, 50 AD3d 1110 (2d Dept 2008).

Further, this Court declines to adopt the holding in *Oakes*, as urged by ACD, EIG and ACD/EIG. As the plaintiffs point out, the Court is required to follow precedent from the Appellate Division, Second Department and the New York Court of Appeals. *See Mountain View Coach Lines v Storms*, 102 AD2d 663 (2d Dept 1984). Moreover, the facts in *Oakes* are clearly distinguishable from those presented here. The Appellate Division, Second Department, has repeatedly found liability under Labor Law § 240(1) in circumstances where either the plaintiff and the falling object were on the same level or the object traveled only a short distance before striking the worker. *See McCallister v 200 Park, L.P.*, 92 AD3d at 928-929 ("although the base of the scaffold was at the same level as the plaintiff and the scaffold only fell a short distance, given the combined weight of the device and its load, and the force it was able to generate over its descent, this difference was not de minimis"); *Pritchard v Tully Constr. Co., Inc*., 82 AD3d 730 (2d Dept 2011) (finding liability under Labor Law § 240(1) when an unsecured motor weighing 300 to 350 pounds fell two to three feet onto the plaintiff who was standing beneath it); *Gutman v City of New York*, 78 AD3d at 887 (the rail that fell on the

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plaintiff traveled only 12 to 16 inches before striking him, however the elevation differential was not de minimis given the weight of the object and the amount of force it was capable of generating "even over the course of a relatively short descent"). The Court of Appeals has rejected the same-level rule in cases involving facts similar to those presented here, as demonstrated in *Runner* and *Wilinski*, and the defendants have failed to show that those cases are not controlling in the case at bar.

Additionally, the argument of third-party defendants ACD, EIG and ACD/EIG, that liability under Labor Law § 240(1) based on falling objects is limited to cases in which the object is in the process of being hoisted or secured is without merit. *See Escobar v Safi*, 150 AD3d at 1083 (falling object liability was established under Labor Law § 240(1) where the plaintiff demonstrated that the falling object "required securing for the purposes of the undertaking" where unsecured sheet of plywood fell from roof 20 feet high and struck plaintiff); *Andresky v Wenger Constr. Co., Inc*., 95 AD3d 1247 (finding liability under Labor Law § 240(1) even though the falling object did not strike the worker because the object required securing for the purposes of the undertaking).

Likewise, the contentions of defendants PA, Skanska, Kiewit and SKK, that the plaintiff was the sole proximate cause of the accident is unavailing. Their assertion that the plaintiff improperly placed himself in the operator's blind spot and in a pinch point position between the barrier and the bridge parapet wall at best rises to the level of comparative negligence, which is not a defense to a claim under Labor Law § 240(1). *See Garzon v Viola*, 124 AD3d 715 (2d Dept 2015); *see also Smith v Yonkers Contr. Co*., 238 AD2d 501 (2d Dept 1997). Once it has been established that the defendants' failure to provide proper protection was causally related to the accident, in this case the failure to secure the barrier to the roadway, a plaintiff has demonstrated prima facie entitlement to judgment as a matter of law. *See Roblero v Bais Ruchel High Sch., Inc*., 175 AD3d 1446 (2d Dept 2019). Based on the facts presented here, and prevailing Appellate Division, Second Department and Court of Appeals case law, the plaintiffs are entitled to summary judgment on their Labor Law § 240(1) claim.

Those prongs of the motion of PA, Skanska, Kiewit and SKK seeking common-law indemnification and contribution against ACD, EIG and ACD/EIG, and dismissal of Caterpillar's cross-claims for common-law indemnification and contribution are denied. The Court of Appeals has held that "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." *See McCarthy v Turner Const., Inc*., 17 NY3d 369, 377-378 (2011). In *McCarthy*, the Court found that an obligation to indemnify may only be imposed on "parties who were actively at fault in bringing about the injury." *Id* at 377. In opposition, third-party defendants and Caterpillar have raised triable issues of fact as to whether defendants PA, Skanska, Kiewit and SKK were actively at fault in bringing about the injury. Specifically, PA, Skanska, Kiewit and SKK had general supervisory authority with respect to site safety, and should have ensured that the concrete barrier at issue was pinned, based on the close proximity of the workers to the

barrier and the active excavator. *See Roblero v Bais Ruchel High Sch., Inc.*, 175 AD3d 1446 (upholding the trial court's denial of summary judgment to the owner defendant on its common-law contribution and indemnification claims because the owner failed to show there were no triable issues of fact regarding its negligence); *Mendelsohn v Goodman*, 67 AD3d 753, 754 (2d Dept 2009) ("an award of summary judgment on a claim for common-law indemnification is appropriate only where there are no triable issues of fact concerning the degree of fault attributable to the parties"); *see also Tarpey v Kolanu Partners, LLC*, 68 AD3d 1099 (2d Dept 2009). That branch of the motion seeking a conditional order of implied indemnity is also denied as premature. *See Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807 (2d Dept 2009).

The plaintiff also seeks summary judgment based on Labor Law § 241(6), predicated on a violation of the Industrial Code, 12 NYCRR § 23-4.2k, which is entitled "Trench and area type excavations," and states:

> (k) Persons shall not be suffered or permitted to work in any area where they may be struck or endangered by any excavation equipment or by any material being dislodged by or falling from such equipment.

In opposition, the defendants PA, Skanska, Kiewit and SKK contend that 12 NYCRR § 23-4.2k is too general to support a Labor Law § 241(6) claim, and is inapplicable to the facts of this case. They further argue that the plaintiff's broad definition of "construction work" used to apply Industrial Code § 23-4.2k conflicts with the plain meaning of excavations that the Industrial Code specifically covers.

Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to "provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed." *See Lopez v New York City Dept. of Envtl. Protection*, 123 AD3d 982, 983 (2d Dept 2014); *see also Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 (2d Dept 2015). To prevail on a Labor Law § 241(6) cause of action, a plaintiff must allege and prove a violation of a concrete specification promulgated by the Commissioner of the Department of Labor in the Industrial Code. *See Misicki v Caradonna*, 12 NY3d 511 (2009); *Ross v Curtis-Palmer Hydro-Elec*. Co., 81 NY2d 494. However, even if a plaintiff establishes as a matter of law that the defendant violated a concrete specification of the Industrial Code, granting summary judgment on that claim is not appropriate. In *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 351 (1998), the Court of Appeals held that a violation of the Industrial Code is not conclusive with respect to defendant's liability, and merely constitutes "some evidence of negligence and thereby reserve[s], for resolution by a jury, the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances." *See also Seaman v Bellmore Fire Dist.*, 59 AD3d 515 (2d Dept 2009); *Chrisman v Syracuse SOMA Project, LLC*, 192 AD3d 1594

(4th Dept 2021). Accordingly, the branch of the plaintiff's summary judgment motion based on a violation of Labor Law § 241(6) must be denied.

In sum, the plaintiffs' motion (Motion 07) seeking summary judgment on their Labor Law § 240(1) claim is granted, and that branch of the motion seeking summary judgment on their Labor Law § 241(6) claim is denied. The prong of the cross-motion of defendants PA, Skanska, Kiewit and SKK (Motion 08) seeking summary judgment and dismissal of the plaintiffs' Labor Law §§ 240(1) and 241(6) claims is denied, and the branch seeking dismissal of the plaintiffs' Labor Law § 200 claim is granted as unopposed. Those prongs of the motion seeking common-law indemnification and contribution, and/or a conditional judgment for common law indemnification and contribution against ACD, EIG and ACD/EIG, for an order directing ACD, EIG and ACD/EIG to defend PA, Skanska, Kiewit and SKK and/or for a conditional judgment for defense costs and reimbursement of attorneys' fees, and for dismissal of the cross-claims of Caterpillar are denied. The cross-motion of defendants ACD, EIG and ACD/EIG (Motion 11) seeking partial summary judgment on the plaintiffs' Labor Law § 240(1) claim is denied.

Products Liability Motions – (Motions 09 & 10)

Caterpillar seeks summary judgment (Motion 09) and dismissal of all claims of ACD, EIG and ACD/EIG, and related cross-claims. The claims against Caterpillar include defective design, failure to warn, negligence, breach of express warranty and breach of the implied warranty of merchantability, and for contribution and common-law indemnification.

The excavator involved in this accident is the Caterpillar 349F L, designed and manufactured by Caterpillar. It is a hydraulic excavator that weighs more than 49 tons, and is used for different applications, including demolition. It was manufactured on July 5, 2016 and built at a Caterpillar factory in Texas. The machine was subsequently sold to a Caterpillar dealer, Southworth-Milton, Inc., on September 29, 2016. On October 31, 2016, ACD rented the excavator from Southworth-Milton, Inc. to be used principally for demolition.

Caterpillar's main argument is that a lack of visibility of the right excavator track was not the cause of the accident, and that even if the machine had a right-side camera the accident would have still occurred. It maintains that the machine has a mirror on the right side, and the excavator operator was aware that the excavator track was two feet from the barrier and capable of causing it to tip over; that Wade could see the plaintiff and he was aware of the plaintiff's position in relation to the barrier; and that before Wade moved the excavator in reverse he looked in the right-side mirror and saw the back of the machine and the right track.

Caterpillar also points to the plaintiff's testimony that he and the operator were able to see each other clearly at the time of the accident. It asserts that the accident was not caused by the design of the excavator but by operator error in failing to pay attention to the available clearance of the excavator tracks from the barrier before moving in reverse, and the plaintiff's

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carelessness in standing in an obvious pinch point between the barrier and the parapet wall. It asserts that a right-side camera on the excavator would not have necessarily made it safer in these circumstances, and would not have prevented the accident. As to the nature of the product and the likelihood that it will cause injury, Caterpillar contends that it is a safe machine when used properly. Caterpillar maintains that the accident would not have occurred if the plaintiff and Wade had followed the instructions in the Operation and Maintenance Manual (OMM) and the "AEM Safety Manual" that was shipped with the machine.

Caterpillar presents the affidavit of Joseph B. Sala, Ph.D., its human factors expert witness, who inspected the subject excavator. Mr. Sala concluded that it contained features that enhance operator visibility, such as a rearview camera, left and right-side mirrors, and the ability of the cab to rotate 360 degrees. According to Mr. Sala, the excavator cab is designed to maximize operator visibility, having clear glass on all sides, with narrow pillars. The rearview camera has a vertical and horizontal field of vision, which provides additional visibility to the sides of the machine. When the boom is raised, as it was in the subject accident, the operator has direct visibility to the front right of the machine and full access to the right side of the mirror. Mr. Sala sat in the cab of the excavator and observed the right excavator track using the right-side mirror, and noted that the front portion of the barrier would have been visible to the operator from inside the cab.

Caterpillar also relies on the deposition testimony of Dennis O'Rourke, its New Product Introduction Program Manager for Large Excavators (including the subject 349 excavator), who testified that the model was designed to meet the visibility requirements set forth in the international industry standard. He further testified that in order to comply with the visibility requirements the subject excavator included a rearview camera, right and left side mirrors and the ability to rotate the cab 360 degrees. The cab of the excavator was also designed to maximize operator visibility by surrounding the cab with clear glass on all sides and narrowing the pillars. Mr. O'Rourke testified that when the subject excavator was designed, manufactured, and sold, right-side cameras were not required by prevailing industry standard, but additional camera kits which were dealer-installed were available before 2016, and could be placed anywhere on the machine to enhance visibility.

Relying on the United States District Court's decision in *Marshall v Sheldahl, Inc*., 150 F Supp 2d 400 (NDNY 2001), Caterpillar further argues that the potential danger to the plaintiff by standing in a one-and-a-half-foot crevice between a concrete barrier and the parapet siding of the bridge with the active excavator two feet away, is an open and obvious condition as a matter of law. It also asserts that Wade admitted that he was aware of the potential hazard associated with standing behind the barrier.

ACD, EIG and ACD/EIG oppose the motion, and cite to the Caterpillar operation manual that indicated that the model 349F L excavator had blind spots, and they refer to Mr. O'Rourke's deposition testimony in which he conceded that it had blind spots. They also cite to a contract

Caterpillar made with the Center for Disease Control and Prevention prior to the subject accident, to study and create "Construction Vehicle and Equipment Blind Area Diagrams." According to the study, new technology was needed to address the visibility limitations around equipment to prevent "significant risk of fatal and serious nonfatal injuries while working in and around a street/highway construction jobsite." They argue that in 2007 Caterpillar informed its dealers about the availability of an external vehicle camera system which would allow the operator to view outside of the vehicle with external mountable cameras. ACD, EIG and ACD/EIG note that Caterpillar sells a virtually identical excavator in Europe with a standard right-side camera, which according to Mr. O'Rourke, is mandatory there.

In opposing the motion, ACD, EIG and ACD/EIG present the affidavit of their expert, Robert Crandall, who studied the visibility from the operator cab of an exemplar 349F L, and concluded that relying only on eyesight and the standard features of the excavator, an operator in Wade's position could not accurately determine how far the barrier was from the excavator's 17-foot-long track. As to the viability of equipping the excavator with a right-side camera, Mr. Crandall opined that unlike the mirror, "a well-positioned right-side view camera would have allowed an operator in Mr. Wade's position to accurately determine how the position and angle of the Jersey barrier relative to the escalator track." The defendants argue that it was feasible to add the camera, as it was easy to install, and the cost of a single surround camera, i.e., the WAVS camera, was affordable at approximately $710.00. Mr. Crandall concluded, with a reasonable degree of technical certainty, that the subject excavator was defective and unreasonably dangerous as designed, manufactured, and sold because of the hazardous blind spot to the right of the excavator, and that the excavator should have been equipped with at least one right-side view camera to render it reasonably safe.

Caterpillar seeks dismissal of ACD, EIG and ACD/EIG's failure to warn claim, which is based on Caterpillar's alleged failure to provide adequate warnings about the excavator's blind spot. Caterpillar argues that the open and obvious hazard created by the plaintiff positioning himself in a pinch point, coupled with Wade's testimony that he was aware of the hazard and of plaintiff's proximity to the jersey barrier, establish that visibility was not a causal factor in this incident. According to Caterpillar, additional warnings would not have provided any information that the plaintiff and Wade did not already have available to them. Caterpillar further contends that neither the plaintiff nor Wade read any of the warnings that were posted on labels which were affixed to the body of the excavator, or contained in the OMM and "AEM Safety Manual."

In opposition, ACD, EIG and ACD/EIG, argue that questions of fact preclude summary judgment on this issue, including Caterpillar's failure to demonstrate that it provided adequate warnings, and whether the blind spot hazard was open and obvious. They contend that Caterpillar has not submitted proof that the warning labels were affixed to the excavator or that they contained a warning about the blind spot. The third-party defendants further maintain that

the instructions contained in the OMM and "AEM Safety Manual" are vague, general, and irrelevant as the accident occurred because the excavator's defects prevented Wade from appreciating the hazard. ACD, EIG and ACD/EIG concede that the OMM manual states that there are areas of "significant restricted visibility" to the right side of the excavator, however they contend that the determination of whether these warnings were sufficient is within the province of a jury. Finally, ACD, EIG and ACD/EIG argue that based on the deposition testimony of the plaintiff and Wade, Caterpillar has not established that additional or different warnings would not have been heeded by them.

Caterpillar further seeks dismissal of ACD, EIG and ACD/EIG's claim that it was negligent in failing to recall or retrofit the subject excavator with a right-side camera because New York law is well-settled that manufacturers have no duty to do so after the product is sold, citing to *Adams v Genie Indus., Inc.*, 14 NY3d 535 (2010). In *Adams* the Court of Appeals held that "[w]e have never imposed a post-sale duty to recall or retrofit a product, and the facts of this case provide no justification for creating one." *Id*. at 545.

In opposition, third-party defendants ACD, EIG and ACD/EIG distinguish the holding in *Adams*, and assert that the Court of Appeals confined it to the particular set of facts presented in that case. They note that the Court held that the trial court erred in submitting the cause of action to the jury because there was no evidence of any facts that came to the manufacturer's attention after the sale that might have triggered a new duty. *See Adams*, 14 NY3d at 543. They argue that Caterpillar introduced the right-side camera as a standard feature on excavators it sold in the European Union in mid-2016, before the subject excavator was built, and therefore Caterpillar had a post-sale duty to warn or should have recalled or retrofitted the excavator to include the camera. ACD, EIG and ACD/EIG cite to *Adams* in support of its argument that "the seller of a product who discovers, after the sale, risks that were not known beforehand" generally has a duty to warn. *Id*. at 544-545.

Lastly, ACD, EIG and ACD/EIG seek summary judgment (Motion 10) on their negligent design claim against Caterpillar. In support of the motion they submit, inter alia, the expert affidavit of Robert Crandall. Caterpillar opposes the motion, and submits the expert affidavit Joseph B. Sala, Ph.D.

The standard for determining the existence of a design defect is whether the product, as designed, was not reasonably safe. *See Voss v Black & Decker Mfg. Co.*, 59 NY2d 102 (1983). The proper standard to be applied to determine whether a product was not reasonably safe is "whether it is a product which, if the design defect were known at the time of manufacture, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner." *Id.* at 108. *See also Scarangella v Thomas Built Buses*, 93 NY2d 655 (1999); *Denny v Ford Motor Co*., 87 NY2d 248 (1995).

In *Voss*, the Court noted seven nonexclusive factors to be considered in balancing the risks created by a product's design:

1) the utility of the product to the public as a whole and to the individual user;
2) the nature of the product—that is, the likelihood that it will cause injury;
3) the availability of a safer design;
4) the potential for designing and manufacturing the product so that it is safer but remains functional and reasonably priced;
5) the ability of the plaintiff to have avoided injury by careful use of the product;
6) the degree of awareness of the potential danger of the product which reasonably can be attributed to the plaintiff; and
7) the manufacturer's ability to spread any cost related to improving the safety of the design.

See Voss, 59 NY2d at 109.

It is well-settled that a manufacturer "has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known." *Liriano v Hobart* Corp., 92 NY2d 232, 237 (1998). "Whether warnings are sufficient to alert the product user to potential hazards is usually, but not always, a question of fact." *Johnson v Johnson Chem. Co*., 183 AD2d 64, 69 (2d Dept 1992); *see also Reed v Niagara Mach. & Tool Works,*166 AD2d 567, 568 (2d Dept 1990) ("the question of what, if any, warning is reasonable is generally a question of fact"). Moreover, there is "a limited class of hazards that need not be warned of as a matter of law because they are patently dangerous or pose open and obvious risks." *Liriano v Hobart Corp.*, 92 NY2d at 241. When "a warning would have added nothing to the user's appreciation of the danger, no duty to warn exists as no benefit would be gained by requiring a warning." *Id.* at 242. Further, a manufacturer's failure to warn is not considered a proximate cause of a plaintiff's injuries if the warning that the plaintiff contends should have been given would not have prevented the incident. *See Rinaldo v McGovern*, 78 NY2d 729, 731-32 (1991).

Caterpillar has demonstrated its prima facie entitlement to summary judgment on those prongs of its motion seeking summary judgment on ACD, EIG and ACD/EIG's defective design and failure to warn claims. However, in opposition, the defendants have raised triable issues of fact through the deposition testimony of the witnesses, including the plaintiff, as well as the conflicting expert opinions, concerning whether a right-side camera should have been installed based on the *Voss* considerations, and whether even if it was installed, it would have prevented the accident. Further, Caterpillar's reliance on *Marshall* in arguing that the hazard was open and obvious is misplaced, as *Marshall* involved a products liability case where the plaintiff reached his hand into a "bubble out bag machine" while it was turned on, which the court found no reasonable person would have attempted to do without first shutting it off. *See Marshall v Sheldahl, Inc*., 150 F Supp 2d at 401. The facts of *Marshall* are distinguishable from those

presented here, as an alleged blind spot on the right side of an excavator is not the equivalent of placing one's hand in a dangerous machine that had not first been turned off.

ACD, EIG and ACD/EIG have also raised triable issues of fact that preclude a grant of summary judgment in favor of Caterpillar on the third-party defendants' failure to warn claim, including whether the blind spot was open and obvious; whether the OMM and "AEM Safety Manual" instructions were vague and general; and whether the plaintiff and Ward would have heeded those instructions and/or warnings or additional or different warnings concerning the hazard. Likewise, issues of fact exist on ACD, EIG and ACD/EIG's claims for contribution and common-law indemnification, and therefore Caterpillar is not entitled to summary judgment on those claims.

As to that branch of Caterpillar's motion seeking summary judgment on the claim by ACD, EIG and ACD/EIG based on Caterpillar's failure to recall or retrofit the subject excavator with a right-side camera, issues of fact exist as to whether the facts in the instant case triggered a post-sale duty to warn or to recall or retrofit the excavator with such a device.

Defendants ACD, EIG and ACD/EIG do not oppose that branch of Caterpillar's motion seeking summary judgment on their breach of express warranty and breach of the implied warranty of merchantability claims, and therefore that branch of Caterpillar's motion seeking summary judgment is granted.

The motion of third-party defendants ACD, EIG and ACD/EIG (Motion 10) seeking summary judgment on its negligent design and strict products liability claims against Caterpillar is denied. The conflicting opinions of Joseph B. Sala, Ph.D., Caterpillar's expert, and ACD, EIG and ACD/EIG's expert, Robert Crandall, create triable issues of fact which should be resolved by a jury.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the prong of the plaintiffs' motion (Motion 07) seeking summary judgment on their Labor Law § 240(1) claim is granted; and that prong of the motion seeking summary judgment on their Labor Law § 241(6) is denied; and it is further

ORDERED, that those prongs of the summary judgment motion of PA, Skanska, Kiewit and SKK (Motion 08) seeking dismissal of the plaintiffs' Labor Law §§ 240(1) and 241(6) claims; seeking common-law contribution and indemnification from ACD, EIG and ACD/EIG; seeking an order directing ACD, EIG and ACD/EIG to defend the direct defendants; seeking reimbursement of attorneys' fees; and seeking dismissal of Caterpillar's cross-claims are denied; and it is further

ORDERED, that the branch of the summary judgment motion of PA, Skanska, Kiewit and SKK (Motion 08) seeking dismissal of the plaintiffs' Labor Law § 200 claim is granted as unopposed; and it is further

ORDERED, that those prongs of the summary judgment motion of Caterpillar (Motion 09) seeking dismissal of ACD, EIG and ACD/EIG's claims based on design defect, failure to warn, negligence, contribution and common-law indemnification are denied; and it is further

ORDERED, that those prongs of Caterpillar's motion (Motion 09) seeking dismissal of the claims of ACD, EIG and ACD/EIG for breach of express warranty and breach of the implied warranty of merchantability are granted as unopposed; and it is further

ORDERED, that the summary judgment motion of ACD, EIG and ACD/EIG (Motion 10) seeking dismissal of Caterpillar's negligent design and strict liability claims is denied; and it is further

ORDERED, that the summary judgment motion of ACD, EIG and ACD/EIG (Motion 11) seeking dismissal of the plaintiffs' Labor Law § 240(1) claim is denied.

This constitutes the decision and order of the Court.

Dated: December 20, 2021

Lillian Wan

HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.