SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, J.S.C.

SUPREME COURT : ORANGE COUNTY
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RAYMOND VAZQUEZ,
Plaintiff,
-against--

J. MULLEN & SONS, INC. and CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Defendants.
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J. MULLEN & SONS, INC.,
Third-Party Plaintiff,
-against--

ETHAN ALLEN STAFFING CORPORATION; ETHAN ALLEN PERSONNEL GROUP, INC.; ETHAN ALLEN STAFFING; ETHAN ALLEN PERSONNEL; ETHAN ALLEN STAFFING CORPORATION a/k/a ETHAN ALLEN STAFFING and/or ETHAN ALLEN PERSONNEL; and ETHAN ALLEN PERSONNEL GROUP, INC. a/k/a ETHAN ALLEN PERSONNEL and/or ETHAN ALLEN STAFFING,
Third-Party Defendants.
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF004431-2017

DECISION AND ORDER

Motion Dates: June 23, 2021

The following papers numbered 1 to 29 were read and considered on (1) a motion by the Plaintiff, pursuant to CPLR §3212, for summary judgment on the issue of liability as against the Defendants J. Mullen & Sons, Inc. and Central Hudson Gas & Electric Corporation; (2) a motion by the Third-Party Defendants Ethan Allen Staffing Corporation, Ethan Allen Personnel Group, Inc., Ethan Allen Staffing, Ethan Allen personnel, Ethan Allen Staffing Corporation a/k/a Ethan Allen Staffing and/or Ethan Allen Personnel, and Ethan Allen Personnel Group, Inc. a/k/a Ethan Allen Personnel, and/or Ethan Allen Staffing, pursuant to CPLR § 3212, for summary judgment dismissing the third-party complaint and all claims as against them; (3) a cross motion by the Defendant Central Hudson Gas & Electric Corporation, pursuant to CPLR §3212, for summary judgment dismissing the complaint and all cross claims insofar as asserted against it; (4) a cross motion by the Defendant/Third Party Plaintiff J. Mullen & Sons, Inc., pursuant to CPLR §3212, for summary judgment as to liability on its third-party complaint; and (5) a cross motion by the

Defendant/Third Party Plaintiff J. Mullen & Sons, Inc., pursuant to CPLR §3212, for summary judgment dismissing the complaint and all cross claims insofar a asserted against it.

Upon the foregoing papers, it is hereby,

ORDERED, that the motions and cross motions are decided as set forth herein.

Introduction

The Plaintiff Raymond Vazquez was seriously injured while performing his duties as a flagger at a construction site when an excavator rolled backwards and crushed his foot and ankle, ultimately resulting in amputation. He commenced the main action to recover damages for personal injuries.

All parties move for summary judgment.

Factual/Procedural Background

The following background facts do not appear to be in dispute.

The Defendant/Third-Party Plaintiff J. Mullen & Sons, Inc. (hereinafter "J. Mullen") is in the business of construction.

On the date of the accident at issue, May 13, 2016, J. Mullen was performing construction work in Kingston, New York, pursuant to a contract with the Defendant Central Hudson Gas & Electric Corporation (hereinafter "Central Hudson") to replace gas mains and other services under the road way.

J. Mullen hired additional flaggers for projects from the Third-Party Defendants (hereinafter referred to collectively as "Ethan Allen"), who provided temporary workers.

At the time at accident, the Plaintiff was working at the site as a flagger. The Plaintiff was employed by Ethan Allen. Ethan Allen trained him as a flagger and provided him with equipment, including a helmet, radio, vest, paddle and flag. He passed a test and was issued a flagger certificate on April 13, 2016, one month before the accident.

J. Mullen did not provide the Plaintiff with any training. If J. Mullen was dissatisfied with his work, it would call Ethan Allen and Ethan Allen would replace him.

The Plaintiff commenced the main action against J. Mullen and Central Hudson alleging causes of action sounding in negligence and violations of the Labor Law.

J. Mullen commenced the Third-Party Action against Ethan Allen seeking, *inter alia*, common law and contractual indemnity and contribution.

The Plaintiff's Motion

The Plaintiff moves for summary judgment on the issue of liability as against J. Mullen and Central Hudson on his cause of action alleging violations of Labor Law 241(6), and as against J. Mullen on his cause of action alleging common law negligence.

In support of the motion, The Plaintiff submits an affirmation from counsel, Andrew Spitz.

Spitz avers as follows.

At the time of the accident on May 13, 2016, the Plaintiff was a flagger employed by Ethan Allen who had been assigned to work at the subject jobsite operated by J. Mullen.

Central Hudson had hired J. Mullen to replace certain gas main lines and other lines beneath portions of Broadway, Prince Street, and Pine Grove Avenue in the City of Kingston.

At the time of the accident, the Plaintiff was working as a flagger on Broadway, and was directing vehicular traffic away from an area where an excavator, operated by an employee of J. Mullen, was replacing and adjusting steel plates over an excavated opening. While the Plaintiff was facing oncoming traffic with his back to the excavator, that vehicle backed up and struck him from behind. As the result of that accident, he sustained severe personal injuries.

In his complaint, The Plaintiff alleges that Central Hudson, as the owner, and J. Mullen, as the contractor, on the project, were negligent and violated sections 200 and 241(6) of the Labor Law.

However, Spitz notes, the motion at bar was confined to his cause of action against J. Mullen sounding in common law negligence, and to his cause of action against both the Defendants for violations of section 241(6) of the Labor Law based on the breach of sections 23-1.29(b) and 23-4.2(k) of the Industrial Code.

Section 23-1.29(b) provides: "Every designated person authorized to control public vehicular traffic shall be provided with a flag or paddle measuring not less than 18 inches in length and width. Such flag or paddle shall be colored fluorescent red or orange and shall be mounted on a suitable hand staff. Such designated person shall be stationed at a proper and reasonable distance from the work area and shall face approaching traffic. Such person shall be

instructed to stop traffic, whenever necessary, by extending the traffic flag or paddle horizontally while facing the traffic. When traffic is to resume, such designated person shall lower the flag or paddle and signal with his free hand."

Section 23-4.2(k) provides: "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."

Concerning the relevant facts, Spitz asserts that the following relevant testimony was adduced at examinations before trial.

The Plaintiff testified that he was directing traffic in both directions on Broadway when the accident occurred. (P. 67-70). Traffic cones blocked off the entire work area (P. 75-76). The excavator had been situated within the area blocked off by the cones, and he was inside the area, to the right of the cones. He was not holding a "stop" paddle or a flag at the time of his accident, but was directing traffic with his hands (P. 76-81). He was not trying to stop traffic at the time of the accident, and traffic was moving past him (P. 159).

When he last saw the excavator before the contact, it was 2 to 3 car lengths from him. The excavator was stopped and facing forward toward Prince Street. The boom and bucket were both in a forward position. He did not see it move before he was struck by it. He did not think the excavator would proceed toward him from the location where the digging was being performed (P. 172-176).

He was standing still when he was struck by the excavator. The first contact that he felt was to his head and back while he was facing oncoming traffic in a straight position. Upon contact, he fell onto his right side in a crouched position. He then felt pain in his lower

extremities. He lost consciousness, and was not told that the excavator had crushed his foot until after his surgery at Albany Medical Center.

He was not supervised at the site by any representative of Central Hudson (P. 138).

He was not using his paddle or flag because J. Mullen's foreman had instructed the flaggers not to use such devices, but instead to direct traffic with their hands. That foreman had issued him a set of earplugs to protect him from the loud sounds of the machinery. (P. 141-142). No one at this jobsite had told him that he was not performing his job properly.

On the date of the accident, he was instructed by J. Mullen's foreman where to provide services, and to use his hands, not a paddle or flag, to direct traffic (P. 150-153; P. 156).

Peter Parola, a heavy equipment operator for J. Mullen, testified that he was operating the excavator at issue, which was owned by J. Mullen. (P. 10-11; P. 14). He had operated an excavator for seven years. There was a bucket and a blade on the front of the excavator. The cab and engine compartment can rotate. The excavator is equipped with an automatic backup alarm, which was in working order on the day of the accident. (P. 16-20).

On the day of the accident, Parola was involved in excavation as follows– he was removing steel plates covering an opening in the road so that workers could climb down into the opening. He also replaced the plates. At the time of the accident, he was backing up so that he could adjust the steel plate closest to him (P. 21-26).

He testified that Jason Legg was the foreman that day. This was the first day the J. Mullen crew worked on Broadway. (P. 28-29).

The excavator was on tracks, not wheels.

The area where Parola was working was cordoned off by traffic cones. The traffic cones

were placed alongside the excavator, to separate that vehicle from traffic, and past the excavator, tapering in toward the sidewalk.

The hole in the road being covered, which had been excavated by a J. Mullen crew, was within the road against the curb.

Parola did not see the Plaintiff while he was working on Broadway before the occurrence. The Plaintiff was further down Broadway from where he was operating the excavator. He backed the excavator while he was facing toward Prince Street. He learned that the excavator had struck the Plaintiff only when he heard a shout and saw another laborer, Peter Petramale, waving at him to move forward (P. 50-53).

Just prior to the contact, he had been operating the excavator in reverse for 4 to 6 feet at "crawling" speed. While backing up, he was looking in his left side view mirror. Also, the front window of the excavator was open so that he could communicate with his spotter. The excavator had a rear camera, but it was situated in such manner that he could not see someone standing close to the excavator (P. 54-60). He did not see the Plaintiff in his side view mirror. At the time, he believed that the Plaintiff was situated at the end of the cone pattern, further away from the back of the excavator.

Jason Legg (a foreman for J. Mullen) was his spotter, and was to guide him as to whether he could back up the excavator safely. Legg communicated with him both verbally and with hand signals. Legg signaled Parola to back the excavator. He backed the excavator for a few seconds before contact. Legg never gave any indication that the Plaintiff was in danger of being struck.

Parola did not feel the impact between the excavator and the Plaintiff. He had moved the

excavator forward a few feet when he saw Petramale waving at him. He exited the excavator and saw the Plaintiff laying on the ground behind the machine within the driving lane close to the curb (P. 66-69).

When Legg initially signaled him to back the excavator, Legg was standing toward the left front of the excavator (P. 73-74). The accident occurred while Parola was backing the excavator to be in position to replace the steel plate (P. 76-78).

Jason Legg, the job foreman of J. Mullen's excavation crew at the time of the accident, testified that the job at issue was the Pine Street main replacement, and that the Plaintiff was a flagger at the job (P. 14). J. Mullen provided the Plaintiff with a "Stop"/"Slow" paddle, and made earplugs available to him (P. 23-24).

When the accident happened, the crew was replacing a steel plate over an opening in the road. Flaggers were positioned based on lane closures. The traffic cones around the work site were tapered from the intersection to the delineated parallel parking lane. Legg directed the Plaintiff to stand outside the taper of cones toward the parking spots, and to face oncoming traffic with his back to the excavator. If he had seen the Plaintiff standing inside the cones, he would have directed him to stand outside the cones. He made no request to the Plaintiff that day to reposition himself. When he last saw the Plaintiff, he was standing outside the cones (P. 33-38).

Legg knew of the potential hazard that workers might be struck by heavy equipment. He was also aware of the need for a spotter to assist the operator of heavy equipment, and acted as the spotter for Parola. Prior to the accident, he directed Parola to back up so that the steel plate could be replaced on the hole. He was in front of the excavator while the steel plate was being set back on the hole. The excavator, with the steel plate hanging from the chain, was between

him and the area behind the excavator (P. 41-45). The Plaintiff's accident occurred during the process of setting the plate upon the hole. Legg was able to communicate verbally with Parola while standing 5 to 7 yards from the excavator. He was not using hand signals because his hands were on the plate.

After the steel plate was attached by chain to the excavator, Parola backed it into position. The excavator struck the Plaintiff while it was backing up. Legg knew that the excavator needed to back up so that the plate could be replaced. He did not see the Plaintiff immediately before telling Parola to move the excavator back. When he had last saw the Plaintiff, he was standing at the taper of the cone pattern and was directing traffic with his back to Legg and the excavator. (P. 46-51).

While the excavator was stopped, just prior to moving backward, Legg's view behind the excavator was obstructed because of his position in front of that excavator. He did not consider having someone else be the spotter while he was assisting with the replacement of the plate (P. 52-54). He had previously acted as a spotter while simultaneously maneuvering a road plate back over a hole, and did not expect a flagger to be in the area behind the excavator, even though the setup of cones at this site was smaller than on some other projects (P. 55- 58).

He learned that an accident had occurred when he heard another worker, Peter Petramale, yell from the other side of the street. At that time, Legg was bent over working while still in front of the excavator by the bucket and the plate. Petramale gestured toward the rear of the excavator. When Legg ran around the excavator, he saw the Plaintiff on the ground screaming with his foot under the excavator track.

The excavator speed was very slow while backing up. Legg did not remember the

distance that the excavator backed up before the contact, but it was a short distance. (P. 65-66).

Legg, as the Plaintiff's foreman, supervised him on the jobsite (P.70).

Peter Petramale Sr., a laborer for J. Mullen, testified that he was present when the Plaintiff was injured. (P.10). At the time, he was across the street preparing another piece of pipe. He saw the Plaintiff close to the rear of the excavator, which was backing up. He yelled when the machine came into contact with the Plaintiff and he fell down. (P.12-17).

Earlier that day, he had seen the Plaintiff working outside the area of the cones. He did not know how close the Plaintiff was to the excavator. He did not see him working inside the area of the cones before the accident (P. 18; P. 20).

Petramale observed Legg assisting with the placement and maneuvering of the steel plate that was being held by the excavator. He yelled to Parola to stop when he saw the excavator roll over the Plaintiff's body.

In general, Patramle testified, a spotter was posted whenever the excavator was moved. On previous occasions, another worker had assisted in placing a plate while Legg acted as the spotter for the excavator. On the day of the accident, Legg was both the spotter for the excavator and the person maneuvering the plate. (P. 28; P. 30-31).

Spitz argues that, based on the testimony *supra*, the Plaintiff should be awarded summary judgment on the issue of liability.

In further support of the motion, the Plaintiff submits an affidavit of Joseph McHugh, P.E.

McHugh avers that it was his opinion, to a reasonable degree of engineering certainty, that Central Hudson, as owner, and J. Mullen, as contractor, violated section 23-4.2(k) of the

Industrial Code, and that this caused or contributed to the accident.

McHugh opines that Legg, a foreman for J. Mullen, was fully aware of the danger that a worker could be struck by an excavator, particularly when the equipment was moving in reverse. Further, that Legg understood the need for a spotter to direct and guide an excavator traveling backward. However, he notes, Legg did not designate someone (other than himself) to act as a spotter for the excavator at the time of the accident. Rather, Legg endeavored to perform the dual functions of replacing and adjusting a steel plate in front of the excavator while, at the same time directing the excavator operator that the vehicle could be safely moved in reverse.

This is true, McHugh asserts, even though Legg conceded that his view of conditions behind the excavator was obstructed at the time he signaled the operator to proceed backwards. Indeed, he asserts, Legg, by his own admission, was still bent over in front of that excavator, replacing and adjusting the steel plate, when the machine was backing up. McHugh opines that Legg should not have signaled the excavator operator to begin moving in reverse until he could ascertain that the path behind the excavator was safe and clear. That is, Legg should have positioned himself so that he could see the area behind the excavator, or assigned another worker to do so.

McHugh opines that the accident would not have occurred had a spotter been properly positioned.

In addition, McHugh asserts, both Defendants violated section 23-1.29(b) of the Industrial Code, which provides in relevant part that a flagger shall be "stationed at a proper and reasonable distance from the work area."

Here, he argues, Legg, as spotter, failed to determine and assure that The Plaintiff was

stationed a proper and reasonable distance from the machine before directing the machine in reverse.

Ethan Allen's Motion

Ethan Allen moves for summary judgment dismissing the third-party complaint.

In support of their motion, they submit an affirmation from counsel, Matthew Cramer.

Initially, Cramer notes, the Plaintiff did not assert any direct causes of action as against Ethan Allen.

Cramer notes that J. Mullen's third-party action seeks to recover as against Ethan Allen based on theories sounding in breach of contract, contractual indemnification, and common law indemnification and contribution. J. Mullen alleges that the Plaintiff's accident occurred or was caused in part by Ethan Allen's negligence, namely the alleged negligent supply of traffic control and traffic flagging manpower for the subject project.

However, Cramer argues, Ethan Allen's sole involvement in the project is that it supplied the Plaintiff, who was a trained and qualified traffic flagger. Otherwise, he notes, Ethan Allen was not on the job site at the time of the accident, and did not supervise or control the site, or the Plaintiff's work at the site. Further, he asserts, Ethan Allen did not receive any complaints about the Plaintiff's work.

Consequently, he argues, J. Mullen's claims for common law contribution and indemnity must be dismissed.

In addition, he asserts, the contract between Ethan Allen and J. Mullen does not contain any insurance procurement or indemnification language, and contractual indemnity cannot be awarded in the absence of the same. Thus, he argues, J. Mullen's claims for contractual

contribution, indemnity and failure to procure insurance must be dismissed.

Indeed, Cramer notes, by the plain terms of the agreement between the parties, "The client [J. Mullen] supervises the employees [the Plaintiff] and it is the client's responsibility to ensure the quality of the work done by the employees. The client assumes all liability for all acts or omissions of the temporary employees within the scope of assignment to the client."

Given all of the above, he argues, the third-party action should be dismissed in its entirety.

In opposition to Ethan Allen's motion, the Plaintiff submits an affirmation from counsel, Lawrence Lissauer.

Lissauer notes that the Plaintiff did not assert any causes of action as against Ethan Allen because of the exclusivity provisions of the Worker's Compensation law.

However, he notes, an exception to the exclusivity rules is when a worker suffers a "grave injury."

Here, Lissauer asserts, Ethan Allen failed to meet its initial burden of proof to dismiss the third-party complaint, as it fails to address whether there was a "grave injury."

Indeed, Lissauer argues, granting Ethan Allen's motion would be, in effect, to find that Ethan Allen was not negligent in the happening of the accident as a matter of law. The effect of the same, he notes, is that there could be no "pass through" on the Plaintiff's La bor Law 241(6) claim.

Further, he argues, "[t]he effect of this would be to determine as a matter of law, that J. Mullen was actively negligent. Without making such a determination, a pass-through might exist, and this would be a question for the jury." Indeed, he asserts, if the Court were to grant Ethan

Allen's motion, it would have to determine, as a matter of law, that J. Mullen was actively negligent, as any other result would be inconsistent. Thus, he notes, if the Court grants Ethan Allen's motion, the Plaintiff asks that an affirmative finding be made that J. Mullen was actively negligent pursuant to the Plaintiff's original motion, and dismiss all affirmative defenses that the Plaintiff's culpable conduct was the sole proximate cause of this accident."

Moreover, Lissauer argues, there is an issue of fact concerning Ethan Allen's affirmative negligence, to wit: Ethan Allen did not ensure that the Plaintiff was properly trained or acting in conformity with his training. Thus, he asserts, there is a question of fact as to whether Ethan Allen is vicariously liable for the Plaintiff's actions, which would require the denial of Ethan Allen's motion.

Also, he argues, Ethan Allen's motion is defective for its failure to address whether there was "a grave injury".

Central Hudson's Cross Motion

Central Hudson moves for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

In support of its motion, Central Hudson submits an affirmation from counsel, Eric Kurtz.

Kurtz argues that the Plaintiff's motion for summary judgment "rests upon inapplicable case law, industrial codes which do not support the causes of action alleged, and a conclusory expert report."

Regardless, he asserts, from the facts alleged, it is clear that Central Hudson did not exercise control over the worksite, and that it was not an "owner" of the site within the meaning

of the Labor Law.

Kurtz argues that the following additional relevant testimony was adduced at examinations before trial.

Rebecca Fournier testified that she was employed as a project engineer with J. Mullen since February of 2015. As project manager, she provided support to Edwin Cooper (a general manager), including scheduling drug tests, training, and other duties related to the day-to-day operation of the company.

The safety plan utilized during the project at issue was developed by Fournier based upon templates she had taken from National Grid.

If the project had gone smoothly, Fournier planned to offer the health and safety plan to Central Hudson for their use in future projects.

Thomas Palmer testified that he had been employed as the superintendent for the distribution of gas transmission at Central Hudson for approximately six months prior to the occurrence of the accident in May of 2016.

Palmer first learned of the Plaintiff's accident when he received a telephone call from a Central Hudson's foreman, Gary Dachenhausen. He did not know if Dachensausen was present when the Plaintiff sustained his injuries.

He noted that he or Dachenhausen was present at the site approximately once per week, for the purpose of ensuring that the work being performed by J. Mullen complied with Central Hudson's specifications. Such specifications related to the nature of the work being performed, rather than any safety protocols.

He noted that Central Hudson did not direct or control any of the flaggers or traffic

control which was performed at the worksite.

Further, he was not aware of any safety notices being sent to Central Hudson in the thirty days preceding the accident.

Finally, he testified, Central Hudson did not provide any payment or compensation to the Plaintiff for the work he performed at the site.

Amy Van Tassel testified that she was the industrial staffing division manager for Ethan Allen Staffing, and assigned temporary employees to various employers at the time of the Plaintiff's injury.

Ethan Allen arranged for the Plaintiff to receive the appropriate training through "Ethan Allen Personnel Group" and thereafter arranged for his employment as a flagger with J. Mullen.

Finally, she testified, the work zones at the site were set up by employees of J. Mullen, and it was the responsibility of J. Mullen to manage and supervise the Ethan Allen employees that they hired.

Kurtz notes that the Plaintiff argues that he entitled to summary judgment under section 241(6) of the Labor Law based upon a claim Central Hudson violated sections 23-4.2(k) and 23-1.29(b) of the Industrial Code.

However, he argues, it is well settled that, in order to sustain a cause of action pursuant to §241(6) of the Labor Law, a plaintiff must identify specific safety rules and regulations which were violated.

Further, evidence of comparative fault will preclude a grant of summary judgment.

Here, Kurtz asserts, the Plaintiff was struck by a vehicle operated by his own employer, which was outside the flow of "public vehicular traffic." Thus, he argues, the Plaintiff cannot

recover pursuant to 12 NYCRR § 23-1.29.

Similarly, he asserts, the Plaintiff cannot recover pursuant to NYCRR § 23-4.2(k), because that provision is "not sufficiently specific" to support a cause of action under the Labor Law.

In any event, he argues, the Plaintiff was specifically directed not to stand in the area which had been blocked by cones, but did so anyway. Thus, Kurtz asserts, not only is there an issue of comparative fault, but also, a jury could determine that the Plaintiff was not "permitted or suffered" to work in the area where the accident occurred, and/or that his negligence was the sole proximate cause of the accident.

In addition, Kurtz argues, the case law relied upon by the Plaintiff is easily distinguished, and is contrary to case law from other departments.

Kurtz notes that the Plaintiff also proffered an affidavit from an expert, Joseph McHugh.

However, he argues, McHugh's testimony is merely conclusory and speculative, and he ignores the testimony of Legg that the Plaintiff was specifically instructed to position himself outside of the construction zone to direct traffic. "Very simply," Kurtz asserts, the Plaintiff "positioned himself in an area where he was not supposed to be nor would anyone have anticipated him to be."

In sum, he argues, the Court should disregard McHugh's affidavit.

In any event, he asserts, Central Hudson was not an "owner" within the meaning of Labor Law §241(6), as it exercised no control or supervision over the area where the accident is alleged to have occurred, or over the manner in which work was performed. General supervisory authority to oversee the work , he argues, is insufficient.

Further, he asserts, the cases relied upon by the Plaintiff to the contrary, involved unique facts that apply to utility companies.

In addition, he notes, the excavator and other equipment involved in the accident were wholly owned by J. Mullen, as were the earbuds which allegedly prevented the Plaintiff from hearing the excavator as it was backing up.

Accordingly, he argues, the Court should grant Central Hudson summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

In opposition to Central Hudson's motion, the Plaintiff submits an affirmation from counsel, Andrew Spitz.

Spitz notes that the Plaintiff's motion as against Central Hudson is limited to a violation of Labor Law 241(6), and that the Plaintiff withdraws his causes of action alleging common law negligence or violations of section 200 as against Central Hudson.

Spitz argues that Central Hudson, in its capacity as "owner" of the project, may be held liable for a violations of Labor Law 241(6) even if it did not control or supervise the Plaintiff's work. Thus, he asserts, Central Hudson's "lengthy argument" concerning the same is irrelevant.

Further, he notes, Central Hudson argues that the Plaintiff may not be awarded summary judgment because there is an issue of comparative fault, to wit: there is evidence that he was standing inside the cones, too close to the excavator.

However, Spitz asserts, in *Rodriguez v. City of New York* (31 NY3d 312), the Court of Appeals held that a plaintiff can be awarded summary judgment even if there is an open question concerning comparative fault. Thus, he argues, the Court can still grant the Plaintiff summary judgment, and leave the issue of comparative negligence to the damages phase of the trial.

In addition, Spitz asserts, Central Hudson incorrectly argues that it is not an "owner" of the project for purposes of Labor Law 241(6) because it was not a titleholder of the property where the construction and excavation was being performed, and because it did not exercise control over the work.

Indeed, Spitz argues, the written contract between Central Hudson, as owner, and J. Mullen, as contractor, for the work at issue confirms Central Hudson's status as "owner" of the project, to wit: the introductory paragraph of that contract, which Central Hudson prepared, expressly designates Central Hudson as the "owner" and Mullen as the "contractor".

Further, Spitz notes, Central Hudson, which was excavating to replace its items beneath the ground surface, could do so legally only if it obtained permission from the titled property owner. Here, counsel for Central Hudson confirms that Central Hudson did, in fact, obtain the necessary permits from the municipal owner of the street to undertake the work.

Thus, he argues, in addition to owning the pipes and other inputs involved in the project, which by itself qualifies Central Hudson as an "owner" under the statute, Central Hudson also possessed an interest in the land because it was entitled to excavate and install new pipes and inputs beneath the ground.

Finally, Spitz notes, pursuant to case law from the Second Department, both Industrial Code provisions cited by the Plaintiff are sufficiently specific to sustain a Labor Law 241(6) cause of action.

In reply, Central Hudson submits an affirmation from counsel, Eric Kurtz.

Kurtz notes that, in claiming that Central Hudson is an "owner" as defined by Labor Law 241(6), the Plaintiff relies upon the contract between Central Hudson and J. Mullen. However,

he argues, nothing about the contract itself made Central Hudson an "owner" of the property.

Further, he asserts, the Plaintiff ignored specific instructions about where to stand, and positioned himself within the construction zone, away from the traffic he was supposed to be directing. Thus, Kurtz argues, the Plaintiff was not "permitted or suffered to work" in the area where the accident occurred, as required by the cited Industrial Code provision.

Indeed, he asserts, a jury could reasonably conclude that the Plaintiff's conduct was the sole cause of the accident, which goes beyond the mere "comparative fault."

J. Mullen's Cross Motion

J. Mullen cross moves for summary judgment on its claims against Ethan Allen.

In support of the cross motion, J. Mullen submits an affirmation from counsel, Kimberly Lee.

Lee argues that J. Mullen is entitled to summary judgment against Ethan Allen because the Plaintiff was an employee of the Ethan Allen, and suffered a "grave injury" as defined by Worker's Compensation Law §11. Thus, she asserts, Ethan Allen may be held liable for contribution and/or indemnification.

She notes that J. Mullen concedes that its written agreement with Ethan Allen contains no provisions relating to indemnification or contribution. Thus, she asserts, J. Mullen's claims arising from contract are not viable.

However, she argues, evidence that Ethan Allen was in some way negligent as to the accident is not necessary under the Worker's Compensation statute. Rather, Ethan Allen's liability is statutory.

She notes that J. Mullen has proffered an affidavit from an expert, Angela Levitan *(infra)*,

who opines, *inter alia*, that the Plaintiff' own actions, *i.e.*, the manner in which he performed his job, which contradicted the training he allegedly received, was a causative factor in the subject incident. Thus, she opines, had Ethan Allen performed on-site evaluations and follow-up inspections, "it is likely that [the Plaintiff] would have been more aware of his surroundings and not moved into a location that would put him the vicinity of a working excavator."

Accordingly, she argues, it was Ethan Allen that did not take steps to ensure that the Plaintiff was properly trained and acting in accordance with his training.

Thus, she contends, under general principles of common law, J. Mullen is entitled to indemnification from Ethan Allen.

At a minimum, she asserts, there is a question of fact as to the Plaintiff' negligence and whether Ethan Allen may be held vicariously liable for the same.

In sum, she argues, because the Plaintiff was employed by Ethan Allen, was acting within the scope of his employment, and sustained a grave injury as a result of the accident, J. Mullen is entitled to summary judgment on its third-party complaint as against Ethan Allen.

In further support of the cross motion, J. Mullen submits an affirmation from Angela Levitan, Ph.D., CPE.

Levitan asserts that she is, *inter alia,* a Senior Biomechanist and Certified Professional Ergonomist specializing in the study of human factors, biomechanics, human movement, and workplace/construction safety.

After review of all relevant materials concerning the accident, and the pleadings, etc., she opines as follows.

The Plaintiff was employed by Ethan Allen and was working as a flagger at the work

zone located on Broadway in Kingston, New York. The work zone was adjacent to the curb and included a driving lane of traffic. In the area, Broadway had a lane for traffic intending to continue on Broadway, and one for a left turn. The work zone was within the through lane, and was coned off, requiring traffic on Broadway to use the left turn lane to continue straight on Broadway.

The work zone began at the intersection of Broadway and Pine Grove/Prince Street. The outer perimeter of the work zone, which tapered past the area in which the work was being performed, was identified by cones placed by J. Mullen. The J. Mullen foreman identified positions outside of the work zone in which the flaggers should stand.

The Plaintiff's work position was outside of the work zone and near the end of the taper on Broadway, further from the intersection with Pine Grove, and closer to the Dallas Weiner storefront.

An excavator was being used within the work zone to move steel plates that were used to cover holes within the work zone.

The Plaintiff attended morning safety meetings in which the J. Mullen foreman described what work was being performed for the day. The Plaintiff was working for an hour prior to the subject incident, with J. Mullen employees working in or near the subject hole. The work being done included using the excavator to move a steel plate used to cover a hole in the roadway. The excavator had been used several times prior to move steel plates in the roadway during the period the Plaintiff was working at the work site, which was approximately 3 weeks.

Levitan opines that, if the Plaintiff had been reasonably attentive to his surroundings, he would have been familiar with the work being performed with the excavator and the space

necessary to perform this work.

The Plaintiff was certified to be a flagger after attending an in-person training session provided by Ethan Allen Staffing.

According to the Ethan Allen Staffing Traffic Control (Flagger) Job Description, the primary duty of a flagger was traffic control, and a flagger must exhibit mental alertness. Thus, the Plaintiff was required to be aware of the pedestrians, traffic, and the equipment/workers inside of the work zone.

In addition, she notes, the training provides that flaggers shall not position themselves close to the work space.

If the Plaintiff had been reasonably cautious and attentive while he was working, she opines, including while he was in the safety meeting and, while he was working for an hour prior to the subject incident, he would have been aware that the excavator was being used to perform work and he would have been aware of the general area in which the excavator was being used.

The Plaintiff testified that he was aware that the excavator was being used, but that he was wearing hearing protection so he could not hear the excavator, including the automatic backup alarm that sounded when the excavator was placed in reverse. She notes that it is not clear from the training materials whether this was contrary to his training.

Regardless, she asserts, the Plaintiff moved from his assigned position outside of the work zone at the end of the taper to within the work zone, which placed him in the vicinity of the moving excavator.

The Plaintiff testified that he was aware that the excavator was being used just prior to his accident, but that, even though he could not hear the excavator, he did not visually confirm the

location of the excavator during the time it took for the excavator to creep along the roadway and reverse towards him.

Thus, she opines, the Plaintiff was not reasonably cautious or sufficiently mentally alert regarding his location in relation to the perimeter of the work zone and the location of the excavator.

In sum, she opines, the Plaintiff's own actions, or lack thereof, were causative factors in the subject incident.

She notes that Ethan Allen Staffing provides approximately 4 hours of in-person training to train flaggers. Ethan Allen Staffing determined that individuals were qualified to work as flaggers after completing the in-person training and a pass/fail examination. According to the Plaintiff, no written training materials were provided for him to reference, if needed, after the completion of the training.

Ethan Allen Staffing did not provide any on-the-job training, and Ethan Allen Staffing did not conduct any follow-up evaluations in the field to confirm that the Plaintiff, a newly certified flagger, was applying the training properly at the work site.

Thus, she opines, the Plaintiff' actions, which contradicted the training that he allegedly received, were a causative factor in the subject incident.

Moreover, she opines, had Ethan Allen Staffing performed on-site evaluations and follow-up inspections, "it is likely that [the Plaintiff] would have been more aware of his surroundings and not moved into a location that would put him in the vicinity of a working excavator."

She notes that the Plaintiff also claims a violation of Labor Law § 241(6) and alleges that

there was a violation of the New York State Industrial Code:

However, she notes, the Plaintiff testified that Ethan Allen provided him with traffic control devices, including a flag and paddle, which he left in his personal vehicle while he was working. Thus, she asserts, because the Plaintiff left his traffic control devices in his personal vehicle while he was working at the subject site, the characteristics of the traffic control devices or the manner in which the Plaintiff would have used them were not causative factors.

She notes that the Plaintiff's initial work position, as dictated by the J. Mullen foreman, was outside of the cones at one end of the work area. The Plaintiff testified that he was aware that the cones were used to establish the perimeter of the work area. Thus, she opines, the Plaintiff was caused to be in the work area, where he was struck by the excavator, due to his own choices and volitional movements. Thus, she argues, J. Mullen did not violate section 12 NYCRR § 23-1.29(b) of the Industrial Code.

Further, she asserts, as to section 23-4.2(k), the Plaintiff's work position, as identified by the J. Mullen foreman, was outside of the work zone, and there is no evidence that the Plaintiff was redirected to a different position prior to the subject incident. Thus, she contends, the Plaintiff was "caused" to stand in the work area due to his own choices and volitional movements.

In sum, she asserts, there is no credible evidence that supports violations of the Industrial Codes cited by the Plaintiff.

Thus, she opines, it was her professional opinion, to a reasonable degree of scientific certainty, that there is no credible evidence that a violation of Labor Law 241(6) was a proximate cause of the Plaintiff's injuries.

J. Mullen's Cross Motion

J. Mullen cross moves for summary judgment dismissing the complaint and all cross-claims insofar as asserted against it.

In support of the cross motion, J. Mullen submits an affirmation from counsel, Kimberly Lee.

Lee notes that Labor Law §241(6) imposes a non-delegable duty on owners and contractors to comply with specific safety rules and regulations set forth in the Industrial Code in connection with construction, demolition or excavation work.

To support a cause of action under Labor Law §241(6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident. This requires an allegation that defendants violated a provision of the Industrial Code that contains "concrete specifications." The Industrial Code provision must mandate a distinct standard of conduct, rather than a general reiteration of common law principles.

Here, she argues, the Plaintiff's Labor Law §241(6) claim lacks merit because, at a minimum, questions of fact exist as to the Industrial Code sections cited apply to the facts.

Lee notes that J. Mullen adopts all of the arguments made by Central Hudson (*supra*) on this point.

In addition, she argues, as to the Plaintiff's common law negligence claims, the record establishes that his own negligence was, as a matter of law, the sole proximate cause of his injuries.

Indeed, she asserts, although the Plaintiff argues that J. Mullen's employees were

negligent, and that such negligence was the cause of the accident, "[a]ny fair view of the evidence - including the Levitan affidavit shows it was actually plaintiff who was at fault for this accident."

At a minimum, she asserts, there are questions of fact.

In opposition to J. Mullen's cross motion, the Plaintiff submits an affirmation from counsel, Andrew Spitz.

In general, Spitz argues, J. Mullen admits the facts necessary to find that it may be held liable for a violation of Labor Law 200 and 241(6), even if the Plaintiff did negligently enter the work area inside the taper of the cones. Thus, he asserts, the Plaintiff may be awarded summary judgment on liability in a negligence case even if there is an open question as to comparative fault. This is because comparative negligence is considered in diminishment of damages recoverable, and does not prevent summary judgment on liability.

Here, he asserts, J. Mullen was negligent for striking the Plaintiff with the excavator because J. Mullen, as general contractor, permitted the Plaintiff to work in an area where he could be so struck.

Finally, he argues, even if the Plaintiff's conduct was negligent, it could not possibly be the sole proximate cause of the occurrence. Rather, he asserts, at a minimum, J. Mullen's negligence and violation of Sections 200 and 241(6) of the Labor Law were contributing causes of the accident.

In reply, J. Mullen submits an affirmation from counsel, Kimberly Lee.

Lee notes that the Plaintiff admits that, at the time the accident occurred, he was standing within the work zone, which is the very area he was directing others to avoid. Thus, she asserts,

this accident did not occur because excavation work was being performed. Nor did it occur because the Plaintiff was stopping or directing pedestrian or vehicular traffic, or because the work zone was not adequately marked, or there was an open excavation pit. Rather, she argues, the accident occurred because, contrary to his training, the Plaintiff placed himself in a position of peril and, despite knowing that an excavator was being operated in the work zone, walked backwards into a moving excavator.

Thus, she argues, J. Mullen was not negligent in the happening of the accident, and did not violate any provision of the Labor Law. Rather, she asserts, the Plaintiff's actions were the sole proximate cause of the accident.

In opposition/reply, and in further support of its motion, Ethan Allen submits an affirmation from counsel, Matthew Cramer.

Initially, Cramer asserts, those branches of Ethan Allen's motion which are for summary judgment dismissing J. Mullen's claims for contractual contribution and indemnification, breach of contract and failure to procure insurance, should be granted because J. Mullen concedes that there were no provisions in the contract between J. Mullen and Ethan Allen relating to the same.

Thus, he contends, the sole issue before the Court is common law indemnification and contribution.

Here, he notes, J. Mullen's basis for seeking common law indemnification and contribution from Ethan Allen is that the Plaintiff sustained a "grave injury" within the meaning of Workers' Compensation Law §11, which is not disputed.

However, he argues, Workers' Compensation Law §11 is not a "strict liability" statute once a grave injury is established. Rather, common law principles of indemnification and

contribution must still be applied.

Thus, he asserts, for J. Mullen to prevail on its claim for common law indemnification and contribution, it must show three things: (1) that the Plaintiff sustained a "grave injury", (2) that J. Mullen was free of negligence, and (3) that Ethan Allen was negligent in causing or contributing to the accident.

However, he argues, J. Mullen did not, and cannot, show that it was free of negligence, or that Ethan Allen was negligent or that such negligence was a proximate cause of the accident. Nor did it show that Ethan Allen may be held vicariously liable for the Plaintiff's alleged negligence.

Indeed, he asserts, although Ethan Allen was technically the Plaintiff's employer, J. Mullen was the Plaintiff's "special employer," as J. Mullen directed and controlled his activities on the job site.

Therefore, he argues, it is J. Mullen – not Ethan Allen – who is vicariously liable for the Plaintiff's alleged negligent actions.

Here, he notes, it is not disputed that the Plaintiff received Workers' Compensation benefits from Ethan Allen.

Otherwise, he argues, there is no evidence in the record demonstrating that Ethan Allen was negligent in furnishing flagging services to J. Mullen and/or that it supervised or controlled the work that caused the Plaintiff's accident.

In reply, J. Mullen submits an affirmation of counsel, Kimberly Lee.

Lee notes that it is conceded that Ethan Allen was the Plaintiff's employer, and that he suffered a grave injury as a result of the accident.

Thus, she argues, Worker's Compensation Law §11 applies, and Ethan Allen is liable for contribution or indemnification to J. Mullen. That is, she asserts, J. Mullen has demonstrated that the Plaintiff's own actions were the sole proximate cause of the accident, thereby making his employer, Ethan Allen, vicariously liable for his injuries.

Moreover, she argues, there are clear indicators of Ethan Allen's negligence, to wit: its negligent training and supervision of its employee, as highlighted by Levitan; and its failure to ensure that the Plaintiff was properly trained.

Lee asserts that, concerning Ethan Allen's "newest argument"-- that the Plaintiff was a "special employee" of J. Mullen- the Court should determine whether the Plaintiff was in fact a "special employee" of J. Mullen. If so, then his exclusive remedy as against J. Mullen would be Worker's Compensation benefits, and this action would be barred against J. Mullen. She notes that the categorization of a worker as a special employee is usually a question of fact. Here, she argues, there is insufficient evidence submitted on these motions to make the determination as a matter of law. Thus, she asserts, the Court should hold an evidentiary hearing, given the implications of such a determination.

Discussion/Legal Analysis

The Court begins its analysis with the motions and cross motion which relate to the main action.

In relevant part, Labor Law § 241 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:
>
> * * *

> 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, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

Labor Law § 241(6) requires owners and contractors to provide reasonable and adequate protection and safety for workers, and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. *Misicki v. Caradonna*, 12 N.Y.3d 511 (2009); *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494 (1993); *Moscati v. Consolidated Edison Company of New York, Inc.*, 168 A.D.3d 717 [2nd Dept. 2019]. The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable. *Misicki v. Caradonna*, 12 N.Y.3d 511 (2009).

In order to support a claim under section 241(6) based upon a code violation, the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications, and not simply declare general safety standards or reiterate common-law principles. *St. Louis v. Town of North Elba*, 16 N.Y.3d 411 (2011); *Misicki v. Caradonna*, 12 N.Y.3d 511 (2009); *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494 (1993); *Moscati v. Consolidated Edison Company of New York, Inc.*, 168 A.D.3d 717 [2nd Dept. 2019].

Because section 241(6) imposes a nondelegable duty on contractors and owners, supervision of the work, control of the work site or actual or constructive notice of a violation of the Industrial Code is not necessary to impose vicarious liability against owners and general contractors, so long as someone in the construction chain was negligent. *Rizzuto v L.A. Wenger*

Contracting Co., Inc., 91 NY2d 343 (1998); *Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d 290 (1978); *PJI 2:216A.*

Further, because an owner or general contractor's vicarious liability under section 241(6) is not dependent on its personal capability to prevent or cure a dangerous condition, the absence of actual or constructive notice sufficient to prevent or cure is irrelevant to the imposition of Labor Law § 241(6) liability. *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 (1998); *Reynoso v Bovis Lend Lease LMB, Inc.*, 125 A.D.3d 740 [2nd Dept. 2015].

An owner or contractor may defend against such a claim by demonstrating that the code provision cited is inapplicable to the facts. *Zaino v. Rogers*, 153 A.D.3d 763 [2nd Dept. 2017].

Further, a breach of a duty imposed by a rule in the Code is merely some evidence for the factfinder to consider on the question of a defendant's negligence. *Misicki v. Caradonna*, 12 N.Y.3d 511 (2009).

However, the Second Department has permitted summary judgment upon such a showing. *Reynoso v. Bovis Lend Lease LMB, Inc.*, 125 A.D.3d 740 [2nd Dept. 2015].

An owner or general contractor may raise any valid defense to the imposition of vicarious liability under section 241(6), including contributory and comparative negligence. *Misicki v. Caradonna*, 12 N.Y.3d 511 (2009); *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 (1998); *Long v. Forest–Fehlhaber*, 55 N.Y.2d 154, 160–161 (1982); *PJI 2:216A.*

Finally, although the introductory language to Labor Law § 241(6) appears to limit the application of the ensuing subdivisions to "building sites," the actual application of the statute, due to its legislative history, is broader. *Joblon v Solow*, 91 NY2d 457 (1998); *PJI 2:216A.* The protection afforded workers by Labor Law § 241(6) is not limited to construction involving

buildings, but extends to workers involved in, among other things, road construction projects. *Gonnerman v. Huddleston*, 78 A.D.3d 993 [2nd Dept. 2010]. Further, its protections are not limited to the actual site of the construction. *Gonnerman v. Huddleston*, 78 A.D.3d 993 [2nd Dept. 2010]. Rather, in general, the scope of a work site must be reviewed as a flexible concept, defined not only by the place but by the circumstances of the work to be done. *Gonnerman v. Huddleston*, 78 A.D.3d 993 [2nd Dept. 2010].

Here, applying the statutes, codes and case law *supra*, the work site at issue, and the work being performed by the Plaintiff at the time of the accident, was clearly within the scope of Labor Law 241(6).

Further, it is not disputed, and it cannot be reasonably disputed, that J. Mullen was a general contractor within the meaning of statute.

In addition, although a closer question, Central Hudson was an "owner" of the work site within the meaning of Labor Law 241(6).

Initially, it is noted, although not expressly stated, or demonstrated by proof, the motion papers clearly presume that the road where the accident occurred was owned by the municipality.

Stated conversely, there is no evidence or allegation that Central Hudson was the actual "owner" of the road itself.

However, the term "owner" as used in the statute is not limited to the titleholder of the property where the accident occurred, but encompasses a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his or her benefit. *Scaparo v. Village of Ilion*, 13 N.Y.3d 864; *Cruz v. 1142 Bedford Avenue, LLC*, 192 A.D.3d 859 [2nd Dept. 2021]. The critical factor in determining whether a party is an 'owner' is

whether it possessed the right to insist that proper safety practices were followed; that is, the right to control the work. *Cruz v. 1142 Bedford Avenue, LLC*, 192 A.D.3d 859 [2nd Dept. 2021].

In that regard, the case of *Copertino v. Ward* (100 A.D.2d 565 [2nd Dept.1984]) is particularly instructive.

In *Copertino*, the defendant was the owner of a single-family residence. To remedy a sewer backup problem, he contracted with A–1 Sewer Company to replace a section of collapsed pipe located in his feeder line which connected the house to the municipality's sewer main. The municipality's sewer main had been laid beneath the middle of Birchwood Avenue, a town highway. After the contractor obtained the requisite permit from the Town of New Windsor, workers from A–1 Sewer Company, including the plaintiff, began to excavate a trench in order to dig up and replace the collapsed pipe. The trench began on defendant's lawn, a short distance from the curb, and extended to the center of Birchwood Avenue. The defendant did not supervise, control, or assist, in any manner, regarding the excavation work. While plaintiff was standing in the portion of the trench located on Birchwood Drive, approximately four to five feet from defendant's property line, the trench caved in and buried plaintiff up to his chest. The plaintiff sought to recover damages for personal injuries sustained in the accident based on violations of section 200 and subdivision 6 of section 241 of the Labor Law. The defendant moved to dismiss the complaint on the ground he was not an "owner" within the purview of either section because the accident occurred in an excavation on a public street and not on his property.

In rejecting the argument, the Second Department noted that Labor Law 241(6) did not define the term "owners. However, it held:

> An examination of the legislative history indicates that "[t]he 'owners' contemplated by the Legislature are those parties with a property interest who hire the general contractor to undertake the construction work for their behalf *(see N.Y.Legis.Ann., 1969, pp. 407–408)*". On the rare occasions when courts have been called upon to consider the meaning of "owners" under section 241 of the Labor Law the definition has not been limited to the titleholder. The term has been held to encompass a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit.
>
> Pursuant to section 36–2 (par. [D]) of the Code of the Town of New Windsor, pertaining to sewer regulations, the abutting property owner must incur the entire expense of building and connecting the sewer line from his house to the sewer main in the public street and of removing any obstruction causing stoppage of sewer flow in said line that originates from or is caused by the property owner. Under these circumstances, the abutting property owner has an easement running through and under the street for his sewer connection. An easement is an interest in land created by grant or agreement, express or implied, which confers a right upon the holder thereof to some profit, benefit, dominion, enjoyment or lawful use out of or over the estate of another. Consequently, the holder of an easement falls within the scope of the generic term "owner."
>
> Defendant, as an easement holder, had a property interest in the excavation site where plaintiff was injured. Furthermore, defendant contracted with plaintiff's employer, A–1 Sewer Company, to remove the obstruction causing the stoppage of sewer flow in his feeder line. He had the primary interest in completing the work since his property alone would receive the benefit. As a practical matter, defendant had the right to insist that proper safety practices were followed and it is the right to control the work that is significant, not the actual exercise or nonexercise of control. Based on these facts, defendant is an owner within the contemplation of section 241 of the Labor Law. Said conclusion is in accord with our decision in *Celestine v. City of New York*, 86 A.D.2d 592, 446 N.Y.S.2d 131. In *Celestine* we held that the titleholder was an "owner" under subdivision 6 of section 241 of the Labor Law even though the property upon which the injury occurred was subject to easements. In other words, both the owner of the fee and the grantees of the easement could be found liable, pursuant to section 241 of the Labor Law, as "owners" of the construction site.

Copertino v. Ward, 100 A.D.2d 565 [2nd Dept.1984][internal citations omitted]; *see also, Ampolini v. Long Island Lighting Co.*, 186 A.D.2d 772 [2nd Dept. 1992]["While LILCO did not own the food-service trailer, it did derive a benefit from its presence on the [its] premises, and it should be considered an "owner" for purposes of Labor Law § 240"]; *Da Silva v. Chemical Bldg.*

Supplies, Inc., 151 A.D.2d 717 [2nd Dept 1989]["It is apparent that the City had an easement over that part of North Broadway [owned by the County] that would allow it to maintain its water main. An easement is a property interest, and the holder of it can be regarded as an owner for the purposes of Labor Law § 241(6). Since the City had a property interest in the worksite, and since it contracted with Micelli to replace the water main, it had the right to insist that proper safety practices were followed, which right forms the basis for its potential liability"];

Here, applying this case law, Central Hudson is properly deemed an "owner" of the work site within the meaning of Labor Law 241(6).

The Plaintiff alleges violations of two Industrial Code provisions as a basis for his Labor Law 241(6) cause of action against both J. Mullen and Central Hudson.

First, 12 NYCRR 23-1.29, which provides:

(a) Whenever any construction, demolition or excavation work is being performed over, on or in close proximity to a street, road, highway or any other location where public vehicular traffic may be hazardous to the persons performing such work, such work area shall be so fenced or barricaded as to direct such public vehicular traffic away from such area, or such traffic shall be controlled by designated persons.

(b) Every designated person authorized to control public vehicular traffic shall be provided with a flag or paddle measuring not less than 18 inches in length and width. Such flag or paddle shall be colored fluorescent red or orange and shall be mounted on a suitable hand staff. Such designated person shall be stationed at a proper and reasonable distance from the work area and shall face approaching traffic. Such person shall be instructed to stop traffic, whenever necessary, by extending the traffic flag or paddle horizontally while facing the traffic. When traffic is to resume, such designated person shall lower the flag or paddle and signal with his free hand.

However, the Court agrees that this provision has no application to the facts of this case. The clear focus of the code provision is the protection of workers on a work site from

nearby traffic by requiring fencing and barricading around the work areas, and the posting flaggers; not the safety of workers within the work area from machinery being used on the work site.

Further, although the provision requires a flagger to be stationed at "a proper and reasonable distance from the work area, and to face approaching traffic," such a requirement does not mandate compliance with concrete specifications for the safety of the flaggers, but is simply a general safety standard, and reiterates common-law principles.

In sum, on the facts presented, the Court does not find that 12 NYCRR 23-1.29 provides a basis upon which to impose liability on J. Mullen or Central Hudson under Labor Law 241(6).

By contrast, the second provision cited, 12 NYCRR 23–4.2(k), is applicable to the facts, and has been held sufficiently specific to support a Labor Law § 241(6) cause of action. *Zaino v. Rogers*, 153 A.D.3d 763 [2nd Dept. 2017]; *Cunha v. Crossroads II*, 131 A.D.3d 440 [2nd Dept. 2015]; *Ferreira v. City of New York*, 85 A.D.3d 1103 [2nd Dept. 2011].

Section 23–4.2(k) provides: "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."

Here, the Plaintiff demonstrated, *prima facie*, that both J. Mullen and Central Hudson violated this provision, and that such a violation was a proximate cause of his injuries.

Indeed, the spotter for J. Mullen at the time of the accident, Legg, admitted that he directed the excavator to back up even though he was unable to see behind the excavator. This, in effect, was an admission that he failed in his primary function as spotter, to wit: to assure that the excavator was not moved unless safe to do so. Stated otherwise, Legg failed to assure that no

worker was suffered or permitted to work in any area where they may be struck or endangered by any excavation equipment.

This negligence in the "construction chain" is enough to impose liability as against both J. Mullen and Central Hudson under Labor Law § 241(6).

However, as noted *supra*, comparative and contributory negligence is applicable to a Labor Law § 241(6) cause of action.

Here, in opposition to the Plaintiff's *prima facie* demonstration, both J. Mullen and Central Hudson raised triable issues of fact as to whether the Plaintiff's own conduct was the sole or a contributing factor to the happening of the accident.

Contrary to the contentions of both J. Mullen and Central Hudson, neither demonstrated, *prima facie*, that the Plaintiff's own conduct was the sole proximate cause of the accident. Indeed, the Court notes, in general, cases arising under the Labor Law that have found the same have required significantly unreasonable behavior by a worker. *See e.g.*, *Montgomery v. Federal Express Corp.*, 4 N.Y.3d 805 (2005))[the plaintiff, rather than go and get a readily available ladder, climbed into a motor room by standing on an inverted bucket, and then later jumped down to the roof, injuring his knee in the process]; *Weingarten v. Windsor Owners Corp.*, 5 A.D.3d 674 [2nd Dept. 2004][the plaintiff's unforeseeable act of standing on a folding chair while trying to climb into an unoccupied freight elevator, when repairing elevators was not one of his duties, no one had requested that he climb into the elevator, and he had never previously attempted to do so, was the sole and superseding cause of his injuries].

In sum, the respective branches of the motion and cross motions of the Plaintiff, J. Mullen and Central Hudson which are for summary judgment on the issue of liability on the

Labor Law 261(6) cause of action insofar as it alleges a violation of Section 23–4.2(k) are denied.

The respective branches of the cross motions of J. Mullen and Central Hudson which are for summary judgment on the issue of liability on the Labor Law 241(6) cause of action insofar as it alleges a violation of Section 23-1.29 are granted.

Further, the same allegations are sufficient to demonstrate, *prima facie*, that J. Mullen was negligent in the happening of the accident under common law principles.

However, again, J. Mullen raised triable issues of fact as to whether the Plaintiff's own conduct was the sole or a contributing factor to the happening of the accident.

Thus, the respective branches of the motion and cross motion of the Plaintiff and J. Mullen which seek summary judgment on the issue of liability on the common law negligence cause of action are denied.

As to the third-party complaint.

Initially, it is noted, Central Hudson is not a party to the third-party complaint, and has not interposed any causes of action as against Ethan Allen. Rather, the third-party complaint concerns only J. Mullen and Ethan Allen.

In general, under the Workers' Compensation Law, an employee's recovery of workers' compensation benefits is his or her exclusive remedy against his or her employer or coworkers for injuries sustained in the course of his or her employment. *Caputo v. Brown*, – AD3d – [2nd Dept July 7, 2021].

In relevant part, Workers' Compensation Law § 11 states:

The liability of an employer prescribed by the last preceding section shall be exclusive

> and in place of any other liability whatsoever, to such employee, his or her personal representatives, spouse, parents, dependents, distributees, or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom, except that if an employer fails to secure the payment of compensation for his or her injured employees and their dependents as provided in section fifty of this chapter * * *.
>
> For purposes of this section the terms "indemnity" and "contribution" shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered.
>
> An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

Here, it is not disputed, and it has been previously found, that Ethan Allen was the Plaintiff's employer at the time of the accident. Further, Ethan Allen contends without contradiction that it provided the Plaintiff with Workers' Compensation benefits.

In addition, it is not disputed that there was no written provision in the contract between J. Mullen and Ethan Allen which provided for indemnity or contribution.

Thus, under the basic provisions of the law, Ethan Allen may not be held liable directly to the Plaintiff for his injuries, and may not be held liable by J. Mullen for contribution or indemnity. *Naula v. Utokilen, LLC*, 180 A.D.3d 1058 [2nd Dept. 2020].

However, the Court notes, it is not disputed that the Plaintiff suffered a "grave injury" (an amputation) within the meaning of the statute. *Caputo v. Brown*, – AD3d – [2nd Dept. July 7,

2021].

Thus, J. Mullen may seek contribution and indemnification from Ethan Allen under the third paragraph *supra* of Workers' Compensation Law § 11.

Common law principles of contribution and indemnity apply. *Fleming v. Graham*, 10 N.Y.3d 296 (2008).

Pursuant to the same, to be entitled to indemnification, J. Mullen must demonstrate that no negligent act or omission on its part contributed to the Plaintiff's injuries, and that its liability is therefore purely vicarious. *General Obligations Law § 5–322.1[1]; Coque v. Wildflower Estates Developers, Inc.*, 31 A.D.3d 484 [2nd Dept. 2006].

Indemnification arises from the principle that every one is responsible for the consequences of his or her own negligence, and that, if another person has been compelled to pay the damages which ought to have been paid by the wrongdoer, such damages may be recovered from the wrongdoer. *Raquet v. Braun*, 90 N.Y.2d 177 (1997).

Thus, summary judgment on a claim for common-law indemnification is appropriate only where there are no issues of material fact concerning the precise degree of fault attributable to each party involved. *Coque v. Wildflower Estates Developers, Inc.*, 31 A.D.3d 484 [2nd Dept. 2006].

A defendant may seek common contribution from a third party, even if the injured plaintiff has no direct right of recovery against such party, either because of a procedural bar or because of a substantive legal rule, when such third-party has contributed to the happening of the accident, even if the third party owed no duty to the injured plaintiff. *Raquet v. Braun*, 90 N.Y.2d 177 (1997).

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 N.Y.2d 177 (1997). Thus, contribution is available whether or not the culpable parties are allegedly liable for the injury under the same or different theories, and the remedy may be invoked against concurrent, successive, independent, alternative and even intentional tortfeasors. *Raquet v. Braun*, 90 N.Y.2d 177 (1997); *Nassau Roofing & Sheet Metal Co., Inc. v. Facilities Development Corp.*, 71 N.Y.2d 599 (1988).

Here, J. Mullen did not demonstrate, *prima facie*, that a proximate cause, or the sole proximate cause, of the Plaintiff's injuries was negligence by Ethan Allen (*e.g.*, the failure to properly train him).

Rather, there are questions of fact whether J. Mullen and/or Ethan Allen were negligent in the happening of the accident and, if so, whether such negligence caused or contributed to the damages.

Thus, J. Mullen's motion for summary judgment as to liability on the third-party complaint is denied.

Similarly, those branches of the cross motion of Ethan Allen which are to dismiss the third-party action insofar as it concerns common law indemnity and contribution are denied.

However, those branches of the cross motion which seek to dismiss the causes of action seeking contractual contribution or indemnity are granted, as is that branch which alleges breach of contract for failure to procure insurance.

On a matter related to the application of the Workers' Compensation Law, the Court finds

that J. Mullen has raised a triable issue of fact whether the Plaintiff was a "special employee" at the time of the accident, and whether, therefore, it is entitled to the protections of the Workers' Compensation Law.

In general, a general employee of one employer may also be in the special employ of another, notwithstanding the general employer's responsibility for payment of wages and for maintaining workers' compensation and other employee benefits. A special employee is described as one who is transferred for a limited time, of whatever duration, to the service of another. General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer. *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553 (1991).

In general, a person's categorization as a special employee is usually a question of fact. *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553 (1991). These cases usually involve arrangements under which a general employer performed work and provided services for another business and, in the course of doing so, an employee and equipment of the general employer were necessarily used and temporarily assigned to work for that business. *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553 (1991). These lent employee cases rest on their particular facts. They do not create a per se rule that a question of fact always exists. They do not require that the question of special employment inevitably go to a jury. *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553 (1991). Rather, although recognized as an exception to the general approach and analysis, the determination of special employment status may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact. *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553 (1991). Thus,

the issue of special employment need not always be submitted to a fact finder where the undisputed facts establish that the general employer was performing no work for the special employer and did not retain control over the special employee. This, when combined with other factors, allows a determination of special employment status as a matter of law. *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553 (1991)

Many factors are weighed in deciding whether a special employment relationship exists, and generally no one factor is decisive. While not determinative, a significant and weighty feature has emerged that focuses on who controls and directs the manner, details and ultimate result of the employee's work. *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553 (1991); *Owens v. Jea Bus Co., Inc.*, 161 A.D.3d 1188 [2nd Dept. 2018]; *Schramm v. Cold Spring Harbor Laboratory*, 17 A.D.3d 661 [2nd Dept. 2005].

Receipt of workers' compensation benefits from the general employer is the exclusive remedy, and the worker is barred from bringing a negligence action against the special employer. *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553 (1991).

Here, the Court finds that there is a question of fact as to whether the Plaintiff was a "special employee" of J. Mullen. However, the Court does not direct an immediate hearing on the matter, but rather refers the issue to trial, for the following reason.

Under general principles, if the Plaintiff was found to be a special employee of J. Mullen, J. Mullen would be entitled to the protections of the Workers' Compensation law.

This would suggest a need for an immediate resolution of the Plaintiff's status as a special employee of J. Mullen.

However, as noted *supra*, it is not disputed that the Plaintiff suffered a "grave injury"

within the meaning of the Workers' Compensation law. Thus, even if the Plaintiff is found to be a special employee of J. Mullen, J. Mullen may still be held liable for contribution and indemnification under common law principles.

Consequently, an immediate hearing on the issue of whether the Plaintiff was a special employee of J. Mullen would be of no practical value. Rather, determinations as to fault, and apportionment of fault, must still be made.

In sum, J. Mullen, Central Hudson and Ethan Allen each remain potentially liable for some or all of any damages awarded the Plaintiff.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, that the motions and cross motions are decided as set forth herein; and it is further,

ORDERED, that the parties, through respective counsel, are directed to, and shall, appear for a status conference on Wednesday, October 6, 2021, at 9:30 a.m., at the Orange County Supreme Court, Court room #3, 285 Main Street, Goshen, New York, if Courts are in session and open to the public. If the Courts are not open the public at that time, a virtual conference will be held on that date at a time designated by the Court at which time a date a trial date shall be established.

The foregoing constitutes the Decision and Order of the Court.

Dated: August 23, 2021
Goshen, New York

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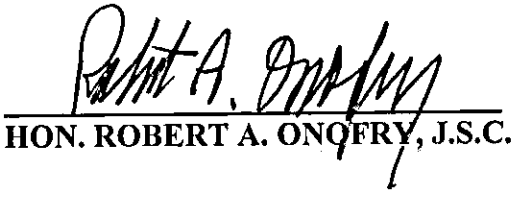

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