SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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INDEX NO. 156724/2016

MOTION DATE 2/8/2022

MOTION SEQ. NO. 008 009 010 011

CHRISTOPHER CABRAL, JAIME CABRAL,

Plaintiff,

- v -

THE ROCKEFELLER UNIVERSITY, TURNER CONSTRUCTION COMPANY,

Defendant.

DECISION + ORDER ON MOTION

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THE ROCKEFELLER UNIVERSITY, TURNER CONSTRUCTION COMPANY

Plaintiff,

-against-

THE PRINCE MANUFACTURING COMPANY

Defendant.

Third-Party
Index No. 595221/2017

----------X

THE ROCKEFELLER UNIVERSITY, TURNER CONSTRUCTION COMPANY

Plaintiff,

-against-

NORTHERN TOOL & EQUIPMENT CATALOG COMPANY, LLC, NORTHERN TOOL & EQUIPMENT CATALOG HOLDINGS, INC., NORTHERN TOOL & EQUIPMENT COMPANY, INC., NORTHERN TOOL & EQUIPMENT PARTS, LLC.

Defendant.

Second Third-Party
Index No. 595627/2021

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 288, 289, 301, 302, 303, 304, 305, 306, 307, 308, 312, 313, 358, 362, 364, 368, 372, 376, 380, 416, 417, 418, 419, 452, 458

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 292, 293, 294, 295, 296, 297, 298, 299, 309, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 359, 363, 365, 369, 373, 377, 381, 384, 453, 459

were read on this motion to/for SEVER ACTION.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 310, 311, 357, 360, 366, 370, 374, 378, 382, 386, 415, 454, 460

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 361, 367, 371, 375, 379, 383, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 420, 421, 455, 461

were read on this motion to/for JUDGMENT - SUMMARY.

BACKGROUND

On August 8, 2016, at 10:30 a.m., Plaintiff, Christopher Cabral (Cabral) was struck in the face when a hydraulic piston, being used as part of a large mechanism to pull a mooring arm and whaler beam in a northerly direction up the East River alongside the FDR Parkway, broke or malfunctioned. Cabral was an Ironworker who was part of a gang for steel subcontractor New York City Constructors (NYCC).

The accident occurred at the Rockefeller University (RU) extension project located at 1228-1230 York Avenue at 63rd through 66th Streets, between York Avenue and FDR Drive in Manhattan. RU is the owner of the construction site. RU retained Turner Construction Company (Turner) as the general contractor, who then subcontracted with various trades to construct a modular building above the FDR on the Upper East Side. To move the modules, Turner subcontracted with Banker Steel, who subcontracted with NYCC. NYCC used a barge crane that they pulled up the East River through the use of tugboats. The barge was connected by a mooring arm to a whaler beam that sat on the land east of the FDR roadway. NYCC then used a hydraulic piston, a Prince F500, to move the whaler beam laterally north and south to reposition the crane

to set the modules. On each end of the hydraulic piston were clevis ears, that contained clevis pins.

The Prince Manufacturing Company (Prince) manufactured the hydraulic piston.

RU and Turner allege that the Prince F500 hydraulic piston was defectively designed, and that Prince breached the implied warranty of merchantability by producing a product that was not fit for its intended use and reasonably foreseeable purpose. Further, they allege that Prince failed to warn users of the inherent and unobservable dangers of the product. Northern Tool is the distributor of this Prince F500 hydraulic piston, and RU and Turner brought a second Third-Party action against Northern Tool.

PENDING MOTIONS

There are four[1] pending motions before the court.

On July 23, 2021, Defendants Rockefeller University (RU) and Turner Construction Company (Turner) moved for partial summary judgment as to liability against Prince Manufacturing Company (Prince).

On September 21, 2021, plaintiffs moved for an order pursuant to CPLR §603 and CPLR §1010 severing the Second Third-Party Action from the plaintiffs underlying negligence and labor law action or alternatively dissing the Second Third-Party action without prejudice.

On October 18, 2021, Northern Tool & Equipment Catalog Company, LLC Northern Tool & Equipment Catalog Holdings, Inc., Northern Tool & Equipment Company, Inc., Northern Tool & Equipment Parts, LLC (collectively "Northern Tool") moved for dismissal of the Second Third Party Complaint.

On October 25, 2021, plaintiffs moved for partial summary judgment as to liability as

[1] There is an additional motion Seq No 12, which has not yet been fully submitted and thus will not be addressed herein.

against defendants under Labor Law §§ 240(1), 241(6), and 200.

On February 8, 2022, the court heard oral argument on the four motions and reserved decision. The motions are consolidated herein for determination and are granted or denied to the extent set forth below.

NORTHERN TOOL'S MOTION TO DISMISS (MO SEQ 10)

Northern Tool seeks to dismiss the Second Third-Party Complaint in its entirety. RU and Turner asserted the following causes of action against Northern Tool: (i) contribution; (ii) common law indemnity; (iii) strict liability; (iv) breach of implied warranty of merchantability; (v) contractual indemnity; and (vi) failure to procure insurance.

In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR §3211(a)(7), the sole criterion is whether the pleading states a cause of action. [*Cooper v. 620 Prop. Assoc.*, 242 A.D.2d 359 (2d Dep't 1997)]. The court will look to the four corners of the complaint and if able to identify any cause of action cognizable at law, a motion to dismiss will fail. (*511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152). The court is to accept the allegations as true and accord them every favorable inference forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts.'" Id. (*citing 219 Broadway Corp. v. Alexander's, Inc.*, 46 N.Y.2d 506, 509 (N.Y. 1979)). "Although on a motion to dismiss plaintiffs' allegations are presumed to be true and, conclusory allegations…are insufficient to survive a motion to dismiss."

The Motion to Dismiss the Cause of Action for Common Law Contribution Is Granted

Northern Tool moves to dismiss the first cause of action for common law contribution based on their argument that there is no right of contribution between themselves and RU and

Turner, because they allege as distributors they were not negligent, and any liability is only by imputation of law. Northern Tool relies primarily on *Godoy v Abamaster of Miami, Inc* (302 AD2d 57) as authority for its argument.

The issue presented in *Godoy* was whether one distributor could obtain common law indemnification from an upstream distributor. However, the Second Department also discussed cross-claims for common-law contribution. The Court specifically noted that "the proof presented at trial did not support the conclusion that either defendant was anything more than an innocent conduit in the sale of the defective product," and "[t]here was no proof to support a finding that either (distributor) was actively negligent in designing the meat grinder, or that they committed any independent tort which caused or contributed to the plaintiff's injury." Id. 61. As such, both defendants were liable to the plaintiff only by imputation of law, not because they were negligent, and therefore the appropriate concept was indemnification, rather than contribution. Id. 62.

RU and Turner argue that in contrast, here, there no been determination as to Northern Tool's culpability, and that the Second-Third Party Complaint alleges negligence on the part of Northern Tool.

The Second-Third Party complaint alleges that Northern Tool manufactures and distributes the pistons. However, the record is clear that Prince manufactured the piston at issue and Northern Tool is only a distributor.

Additionally, while RU & Turner, do allege negligence on the part of Northern Tool it is a completely conclusory manner and insufficient to warrant denial of the motion. It is well settled that

> .... the "favorable treatment" accorded to a plaintiff's complaint is not "limitless" (*Tenney v. Hodgson Russ, LLP,* 97 A.D.3d 1089, 1090, 949 N.Y.S.2d 535 [2012]) and, as such,

> "conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss" (*Godfrey v. Spano,* 13 N.Y.3d 358, 373, 892 N.Y.S.2d 272, 920 N.E.2d 328 [2009]; *accord Barnes v. Hodge,* 118 A.D.3d 633, 633, 989 N.Y.S.2d 467, 989 N.Y.S.2d 467 [2014]; *see Wiggins & Kopko, LLP v. Masson,* 116 A.D.3d 1130, 1131–1132, 983 N.Y.S.2d 665 [2014]).

Rodriguez v. Jacoby & Meyers, LLP, 126 A.D.3d 1183, 1185 (2015). There are no specific allegations of negligence on the part of Northern Tool as pertains to this cause of action.

Based on the foregoing, the motion to dismiss the cause of action for contribution as against Northern Tool is granted.

The Cause of Action for Common Law Indemnification is Dismissed

> 'The principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party' " (*Board of Mgrs. of the 125 N. 10th Condominium v 125North10, LLC*, 150 AD3d 1063, 1064 [2017], quoting *Curreri v Heritage Prop. Inv. Trust, Inc.*, 48 AD3d 505, 507 [2008]). "The party seeking indemnification 'must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought,' and must not have committed actual wrongdoing itself" (*Tiffany at Westbury Condominium v Marelli Dev. Corp.*, 40 AD3d 1073, 1077 [2007], quoting *17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80 [1999]). "Common-law indemnification is warranted where a defendant's role in causing the plaintiff's injury is solely passive, and thus its liability is purely vicarious" (*Balladares v Southgate Owners Corp.*, 40 AD3d 667, 671 [2007]; *see Dreyfus v MPCC Corp.*, 124 AD3d 830, 830 [2015]). "Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine"

Bd. of Managers of Olive Park Condo. v. Maspeth Properties, LLC, 170 A.D.3d 645, 647, (2019).

Here, RU and Turner are alleged to have committed wrongdoing through their own negligence. Moreover, as noted above there are only conclusory allegations in the complaint as to Northern Tool's negligence. Additionally, there is no allegation anywhere that RU & Turner delegated exclusive responsibility for the duties giving rise to plaintiff's injuries to Northern Tool.

Additionally, the potential liability as against RU & Turner is not purely vicarious. They are alleged to have been negligent by plaintiffs. When the liability of a third-party plaintiff is wholly vicarious, there may be recovery from the third-party defendant whose negligence was imputed to the party liable. On the other hand, where the liability of the third-party plaintiff is not solely derivative and the third-party plaintiff is alleged to have directly breached a duty owed to the prime plaintiff, common law indemnification is not available. *Marrero v. Thomas*, 63 Misc. 3d 1220(A), (N.Y. Sup. Ct. 2019)(citing *Baron v. Grant*, 48 AD3d 608 [2nd Dept 2008]; (*Eisman v. Vil. Of E. Hills*, 149 AD3d 806, 808-809 [2nd Dept 2017]).

Based on the foregoing the motion to dismiss the cause of action for common law indemnification is granted.

The Third and Fourth Causes of Action for Strict Liability and Breach of Implied Warranty are Time Barred

"Pursuant to CPLR 214(5), a personal injury action must be commenced within three years of its accrual, and "[a] cause of action accrues for purposes of CPLR 214 'when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court.'" *Torres v. Greyhound Bus Lines, Inc.*, 48 A.D.3d 1264, 1265 (4th Dep't 2008) "As a rule, the date of injury is the benchmark for determining the accrual of a cause of action." Id.

Plaintiff's injuries occurred on August 8, 2016. RU and Turner filed their Second Third-Party Complaint on July 9, 2021. A personal injury action against Northern Tool cannot be commenced now, more than three years later. Considering the foregoing, the cause of action for strict liability is time-barred as a matter of law.

"Under UCC § 2–725, an action for breach of implied warranty must be commenced within four years from the date that the defendant tenders delivery of the product." *Vanata v.*

Delta Int'l Mach. Corp., 269 A.D.2d 175, 176 (1st Dep't 2000). "The cause of action accrues upon tender of delivery despite the aggrieved party's lack of knowledge of the breach (UCC § 2–725 [2])." *Id.* "This rule is equally applicable to suits by a party not in privity with the manufacturer, such as the plaintiffs in the case at bar ." *Id.*

Here, Northern Tool necessarily tendered delivery of the product at issue to NYCC prior to the accident on August 8, 2016. RU and Turner filed their Second Third-Party Complaint on July 9, 2021. Tender of delivery occurred more than four years ago, thus the fourth cause of action for breach of implied warranty of merchantability fails.

RU and Turner's arguments that this "misconstrues" what is intended by the third and fourth causes of action and that said causes of action are for indemnity and contribution rather than strict liability and breach of implied warranty of merchantability are belied by a plain reading of the complaint.

Based on the foregoing the third and fourth causes of action are dismissed.

The Motion to dismiss the Fifth and Sixth Causes of Action for Contractual Indemnity and Failure to Procure Insurance are Denied

Northern Tool does not refute that a contract exists between Northern Tool and NYCC. Northern Tool does not attach any evidence or affidavit to that effect. Instead, Northern Tool only argues that RU and Turner did not attach the contract to the complaint. RU and Turner point out that there has not yet been any discovery on this point.

The pleading must be afforded every reasonable inference, and the key inquiry is simply whether the four corners of the Second Third-Party Complaint states a cause of action for contractual indemnification against Northern Tool. Here, defendants have properly plead causes of action for contractual indemnification and failure to procure insurance, alleging that Northern Tool and subcontractor NYCC entered into an agreement whereby Northern Tool would defend,

indemnify, and hold harmless defendants, from any and all claims or liabilities arising out of the products purchased pursuant to the agreement. They further allege Northern Tool and subcontractor NYCC entered into an agreement whereby Northern Tool was obligated to purchase and maintain liability insurance naming defendants as additional insureds pursuant to the agreement, and that Northern Tool breached that agreement.

Northern Tool has neither denied that such a contract exists nor produced the contract to show that it does not provide for the indemnification and insurance requirement alleged. Based on the foregoing, the motion to dismiss the fifth and sixth causes of action is denied.

RU AND TURNER'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST PRINCE (MO SEQ 8)

The purpose of summary judgment is to expedite civil cases by eliminating those claims that can properly be resolved as a matter of law. A party seeking summary judgment must make a *prima facie* showing that it is entitled to judgment as a matter of law, tendering sufficient evidence to eliminate issues of material fact from the case. *Pirrelli v. Long Island Railroad*, 226 A.D.2d 166 (1st Dep't 1996). Once the moving party has made a *prima facie* showing of entitlement to summary judgment, the burden shifts to the opposing party to produce admissible evidence sufficient to establish the existence of material issues of fact that require a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

In the context of summary judgment in products liability, the movant must submit direct evidence that a defect existed. *McArdle v. Navistar Int'l Corp*, 293 A.D.2d 931, 932–33 (3d Dept. 2002). A party must not only present evidence that a defect existed, but also that the said defect proximately caused the accident. *Vitello v. Gen. Motors Corp. (Chevrolet Motors Div.)*, 49 A.D.3d 448, 448 (1st Dept. 2008).

In moving for summary judgment RU and Turner rely on the expert opinion of Martin E Gordon PE who opines that the Prince cylinder was designed and manufactured such that it would eventually fail without warning under normal use. He opines that the Prince cylinder was an inherently dangerous product because it was not designed using accepted standards of mechanical engineering design.

Specifically, he argues the subject Prince cylinder should have been designed to have a safety factor of at least 3.0 to 5.0 based upon accepted design practice. That is, the weakest link in the cylinder should have been three to five times stronger than the maximum load expected. Mr. Gordon points out that Prince's catalog claimed that its cylinders are designed to a safety factor of 2:1 (safety factor of 2.0), proving that Prince's cylinders were not designed to generally accepted design practice, as the cylinders were far short of the requisite 3.0 to 5.0 safety factor.

Mr. Gordon further opines that Prince's advertised safety factors are also false and misleading, as the subject Prince cylinder actually had a safety factor for static loading that was only about half as much as advertised, namely a safety factor of just 1.1. Id. 110. Prince sold the subject cylinder as one rated for a maximum of 3,000 PSI.

Mr. Gordon states the Finite Element Analysis revealed that at 3,000 PSI the rod-end clevis of the cylinder was under a stress of 49,500 PSI. If the cylinder was built to a safety factor of three, that area of the cylinder would have to withstand 148,500 PSI. If built to a safety factor of five, it would have to withstand 247,500 PSI.

Prince claimed to have built the cylinder to a safety factor of two, which would require the rod-end clevis of the cylinder to withstand 99,000 PSI. But because Prince manufactured this cylinder design with ductile iron, which has a material strength of just 55,000 PSI, the cylinder's safety factor was just 1.1. Mr. Gordon opines that as a result, the cylinder experienced a

catastrophic failure and broke apart at a stress level that was only a fraction of what Prince advertised its cylinder as being able to withstand and was required by generally accepted principles of engineering to design its cylinder to withstand if sold as one with a maximum rated pressure of 3,000 PSI.

Prince presents the rebuttal opinion of its own expert Thomas Cocchiola, PE. Mr. Cocchiola opines that the reason the clevis ear failed is because the clevis pin was only inserted into one of two ears, so that ear was subjected to the total amount of force generated by the Prince F500 piston. Mr. Cocchiola further opines that the clevis pin was not inserted in the remaining intact clevis ear and secured with a cotter pin or nail, so it never carried the load in the first place, which is why the load was carried entirely on the other ear and caused that ear to fail, which failure is what caused the clevis to break.

Per Mr. Cocchiola, the clevis ear that was missing a cotter pin or nail was intact, and the hole where the missing pin or nail would have gone was likewise not deformed, which establishes that the clevis ear was intact because it was never subjected to the load on August 8, 2016; in contrast, the clevis ear which failed was engaged but was visibly bent and deformed, meaning that was the ear subjected to the load.

The court finds that these competing opinions and theories of liability create questions of fact which must be determined at trial. While movants did make a *prima facie* showing sufficient to show entitlement to judgment, Prince has sufficiently rebutted that showing to the extent of raising triable issues of fact. The conflicting affidavits of the parties' experts present issues of credibility that cannot be resolved on a motion for summary judgment [*see Riley v ISS Intl. Serv. Sys.*, 5 AD3d 754, 756 [2004]; *Slomin v Skaarland Constr. Corp.*, 207 AD2d 639, 641

[1994]; *see generally Haas v F.F. Thompson Hosp., Inc.*, 86 AD3d 913, 914 [2011]); *Swormville Fire Co., Inc. v. K2M Architects P.C.*, 147 A.D.3d 1310, 1311 (2017)].

Based on the foregoing RU and Turner's motion for summary judgment is denied.

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT UNDER LABOR LAW §§ 240(1), 241(6), AND 200 (MO SEQ 11)

Labor Law §241(6)

Plaintiffs move for summary judgment under Labor Law §241(6).

Labor Law §241(6) provides, in relevant part:

> 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.

It is well settled that this statute requires owners and contractors and their agents "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" (*Ross v. Curtis-Palmer Hydro-Elec. Co*., 81 NY2d 494, 501-502 [1993], quoting Labor Law 241[6]).

To maintain a viable claim under Labor Law §241(6), plaintiffs must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v. Caradonna*, 12 NY3d 511, 515 [2009]).

Plaintiffs allege that in this case, 12 NYCRR §§ 23-1.5(c) (3) and 23-9.29(a) are applicable, sufficiently specific, and violated.

12 NYCRR § 23-1.5(c) (3) provides in pertinent part:

> (c) Condition of equipment and safeguard. (1) No employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition.

(2) All load-carrying equipment shall be designed, constructed and maintained throughout to safely support the loads intended to be imposed thereon.

(3) All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the jobsite if damaged.

Similarly, § 23-9.29(a)provides in pertinent part:

(a) Maintenance. All power operated equipment shall be maintained in good repair and in proper operating condition at all times. Sufficient inspections of adequate frequency shall be made of such equipment to insure such maintenance. Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement.

The First Department in *Becerra v. Promenade Apartments, Inc*., 126 A.D.3d 557 (1st Dep't 2015) held that § 23-9.29(a) and § 23-1.5(c) (3) were sufficiently specific to support the plaintiff's 241(6) claim.

The testimony of Robert Wargo, and Glenn Dickerson show that the defendants violated these provisions related to inspecting, maintaining, and safeguarding load-bearing and power-operated equipment. No one inspected the machinery prior to use, and no one denied, after the fact, that the machine as operated was not in good and safe working condition.

Defendants argue that *Becerra* is distinguishable because in that case the defect was known prior to the accident. However, the First Department has recently reinforced the holding in *Becerra* holding that a failure to inspect, as acknowledged in the case at bar, is a sufficient predicate for the statute to apply. The Court held "… the 'upon discovery' language in § 23–1–5(c)(3) placed an affirmative duty on defendant to conduct all necessary inspections to ensure compliance with safety regulations and remove the grinder from the worksite." *Viruet v. Purvis Holdings LLC*, 198 A.D.3d 587 (2021).

Based on the foregoing, plaintiffs' motion for partial summary judgment as to liability based on Labor Law § 241(6) is granted.

Labor Law §240(1)

Plaintiffs also move for summary judgment on liability pursuant to Labor Law §240(1).

> Labor Law § 240 (1) provides, in pertinent part, that: All contractors and owners and their agents, ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.
>
> N.Y. Lab. Law § 240 (McKinney).

"Whether a plaintiff is entitled to recovery under Labor Law 240(1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies." *Wilinski v. 334 E. 92nd Hous. Dev. Fund. Corp.*, 18 N.Y.3d 1, 7-8 (2011).

The court finds that this provision is not applicable to the facts in the case at bar and agrees with defendants that plaintiffs' reliance on *Runner v. New York Stock Exchange, Inc.*, 13 N.Y.3d 599 (2009) and its progeny is misplaced, as those cases all involved risks arising from a physically significant elevation differential, a factor not present in this accident.

Based on the foregoing, plaintiff's motion for summary judgment pursuant to Labor Law §240(1) is denied.

Labor Law §200

Labor Law § 200 is a codification of the common law duty imposed upon owners or general contractors to provide construction site workers with a safe place to work. *See Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d, 876, 877 (1993); *Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d 290 (1978).

The court agrees with defendants that plaintiffs' sole, one sentence, conclusory argument that Turner's duties as to means and methods were concomitant with NYCC's duties, and

therefore Turner breached its duties of care as to the plaintiff, which is supported by neither evidence nor case law, is insufficient to meet their burden for summary judgment on this issue.

Based on the foregoing this prong of plaintiffs' motion is denied.

PLAINTIFFS' MOTION TO SEVER THE SECOND-THIRD PARTY ACTION (MO SEQ 9)

CPLR §1010 provides "The court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof, or make such other order as may be just. In exercising its discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party."

This action has been pending since 2016. Cabral's injuries are severe, and he has been waiting years for his day in court. The Second-Third Party Action is still at the pre-answer stage. Moreover, the court has dismissed most of the claims in said action, and the remaining claims are dependent on a contract which may or may not exist and provisions that said contract may or may not contain.

The court finds plaintiffs would be substantially prejudiced by the extensive delay that would result from having to await the completion of discovery in the second third-party action. *Blechman v. I.J. Peiser*, 186 A.D.2d 50 (1st Dep't 1992).

In the case at bar, the Second Third-Party Action was commenced over four years after the First Third-Party action and five years after the commencement of the main action. Moreover, the Second Third-Party action was commenced almost two years after the last deposition taken of Prince. Turner and RU have failed to offer a reasonable excuse for the very late commencement of their new third-party action against Northern Tool. Defendants assert that they only learned that Northern Tool is the Prince F500 distributor at the end of May, 2021.

Defendants fail to offer any specific explanation as to how they only belatedly came to learn that Northern Tool was the distributor of the Prince F500 hydraulic piston, or why it took them such an inordinate amount of time to discover this information when depositions were completed more than two years ago.

Furthermore, the claims brought by the Turner and RU against Northern Tool are not sufficiently intertwined with the liability and damages issues in the plaintiffs' negligence and Labor Law causes of action to make severance a waste of judicial resources and these claims need not be tried together.

Based on the foregoing, plaintiffs' motion for a severance is granted.

CONCLUSION

Wherefore it is hereby:

ORDERED that the Northern Tool's motion to dismiss is granted and the first, second, third and fourth causes of action of the complaint are dismissed; and it is further

ORDERED that Northern Tool is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED motion Sequence Number 8 is denied in its entirety; and it is further

ORDERED that plaintiff's motion for partial summary judgment is granted to the extent of finding liability against defendants based on Labor Law §241(6); and it is further

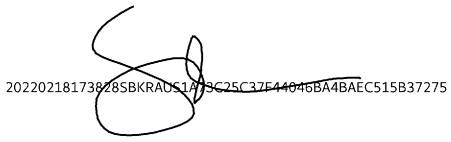
ORDERED that plaintiffs' motion to sever the Second-Third Party Action is granted; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.



2/18/2022
DATE

SABRINA KRAUS, J.S.C.

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