SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. WILLIAM PERRY** **PART** **23**

Justice

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CHRISTOPHER KEILITZ,

Plaintiff,

- v -

LIGHT TOWER FIBER NEW YORK, INC, VERIZON NEW YORK, INC., VERIZON COMMUNICATIONS, INC., EMPIRE CITY SUBWAY,

Defendant.

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INDEX NO. 158494/2017

MOTION DATE 05/14/2021

MOTION SEQ. NO. 007 008 009 010 011

DECISION + ORDER ON MOTION

LIGHT TOWER FIBER NEW YORK, INC

Plaintiff,

-against-

HELLMAN ELECTRIC CORP

Defendant.

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Third-Party
Index No. 595032/2019

VERIZON NEW YORK, INC., VERIZON COMMUNICATIONS, INC., EMPIRE CITY SUBWAY

Plaintiff,

-against-

HELLMAN ELECTRIC CORP.

Defendant.

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Second Third-Party
Index No. 595375/2020

The following e-filed documents, listed by NYSCEF document number (Motion 007) 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 176, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 218, 220, 221, 223, 224, 225, 226, 227, 228, 262, 263, 264, 265, 266, 269, 285, 286, 290, 291, 292, 297, 298, 299, 300, 301, 302, 303

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

The following e-filed documents, listed by NYSCEF document number (Motion 008) 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 219, 222, 229, 267, 270, 287

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

The following e-filed documents, listed by NYSCEF document number (Motion 009) 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 273, 274, 275, 276, 277, 278, 279, 280, 282, 283, 288, 336

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

The following e-filed documents, listed by NYSCEF document number (Motion 010) 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 268, 271, 272, 281, 284, 289

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

The following e-filed documents, listed by NYSCEF document number (Motion 011) 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY.

Motion Sequence Numbers 007, 008, 009 010 and 011 are hereby consolidated for disposition.

This is an action to recover damages for personal injury allegedly sustained by a union electrician on March 30, 2017, when, while working inside the vault space beneath an open manhole cover, six feet below street level at 163rd street and Union Avenue in the Bronx (the Accident Location), he was struck by a wet/dry vacuum that fell through the open manhole (the Manhole).

In motion sequence number 007, plaintiff Christopher J. Keilitz (plaintiff) moves, pursuant to CPLR 3212, for summary judgment in his favor as to liability on his Labor Law §§ 200, 240 (1) and 241 (6) claims against defendant/third-party plaintiff Light Tower Fiber New York, Inc. (Light Tower) and defendants/second third-party plaintiffs Verizon New York Inc. (VZNY), Verizon Communications, Inc. (VCI) (together, the Verizon defendants) and Empire City Subway Company (ECS) (collectively, defendants).

In motion sequence number 008, third-party defendant/second third-party defendant Hellman Electric Corp. (Hellman) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against defendants.

In motion sequence number 009, the Verizon defendants and ECS move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against them, and for summary judgment in their favor on their cross claims for contractual and common-law indemnification, and breach of contract for the failure to procure insurance as against Light Tower.

In motion sequence number 010, Hellman moves, pursuant to CPLR 3212, for summary judgment dismissing the Verizon defendants and ECS's second third-party complaint.

In connection with motion sequence number 007, Light Tower cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it, and for summary judgment in its favor on its third-party contractual indemnification claim against Hellman.

In motion sequence number 011, the Verizon defendants and ECS move, pursuant to CPLR 3402, to vacate plaintiff's Note of Issue and Certificate of Readiness and compel plaintiff to respond to all outstanding discovery demands. Defendant/third party plaintiff Light Tower supports the motion and plaintiff opposes the motion.

BACKGROUND

On the day of the accident, VZNY and VCI were telecom agencies operating in New York. ECS, a wholly owned subsidiary of VCI, was the owner certain telecommunication manholes throughout New York City. ECS leased space within its conduit system (accessible through the manholes) to several telecommunications companies, including Light Tower. Light Tower hired Hellman to install fiber optic cable in a manhole (the Manhole) located at the Accident Location as a part of Light Tower's own contract with non-party New York City Department of Education (DOE).

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was an electrician employed by Hellman. Hellman was performing work for Light Tower that entailed installing fiberoptic cables between several telecommunication manholes in the Bronx. Ultimately, these fiberoptic cables would be connected to schools throughout the Bronx. Light Tower would schedule the installation work at various locations and Hellman would perform that work.

Plaintiff was part of a four-man crew that worked during the night. Plaintiff's foreman was Ed Fonda, a Hellman employee. Fonda would generally direct plaintiff and his coworkers. Light Tower's project manager would also be present on occasion. When there, Light Tower's manager would "show[] us what pipes he wanted us to use; where he wanted the racks; where he wanted us to pull the pipe; and how he wanted us to pull the wire" (*id.* at 94).

Hellman provided plaintiff's tools and safety equipment, including his hard-hat. According to plaintiff, Light Tower was supposed to have a safety representative on site every day, but he was only present "once in a while" (plaintiff's tr at 71) and not on the day of the accident.

On the day of the accident, plaintiff and his coworkers were "dragging pipes" (*id.* at 16). This entailed pulling rope through conduits between two manholes that were about "[a] block" apart from each other, in advance of pulling fiberoptic cable (*id.* at 100). Plaintiff described the Manhole as approximately four-feet by eight-feet and six- to eight-feet deep (*id.* at 97).

Pulling cable requires two teams of two electricians (one at each manhole) to enter each manhole and snake rope through pre-existing pre-installed conduits to find a functional path between the two (*id.* at 70). At each manhole, one worker would enter the manhole while the other remained on the surface. The workers in the manholes would then run rope along the

conduit path, to connect them. Ultimately, fiberoptic cables would be attached to the ropes and guided along the conduit path to connect the manholes. In addition to feeding rope and wire through the conduits, plaintiff's work included "[i]nstalling racks with arms . . . like a shelf" in the manholes (*id.* at 70).

Plaintiff testified that he believed "Verizon" was the owner of the Manhole he was in at the time of the accident (*id.* at 87). This was his belief because he was told that Verizon had cables in the Manhole. Also, he saw Verizon workers and trucks, on occasion, though he never interacted with them (*id.* at 306-307). The Verizon workers did not direct his work.

Plaintiff testified that when he first arrived at 163rd Street, he parked the Hellman vehicle next to the Manhole. His coworker placed cones and safety pipe around the side of the van and into the street while plaintiff put on his safety gear (including a hard hat). Plaintiff also testified that "[t]here is supposed to be a gate" – a manhole cage – set up around the Manhole (*id.* at 136). He described it as a three-sided portable fence with two "chains across the opened side" (*id.* at 136). The fence portion consisted of three horizontal metal bars, spaced about one foot apart, reaching a height of three or four feet. Its purpose was to prevent people from inadvertently falling into the Manhole and "for safety so nothing falls in" (*id.* at 141).

The manhole cage was supplied by Hellman. According to plaintiff, his coworker set the manhole cage up before plaintiff entered the Manhole and, to his knowledge, it was not removed while he was inside. Closing the cage's gate was his coworker's responsibility (*id.* at 137).

Plaintiff also testified that, sometimes, he would need to use a vacuum as a part of his job, using it to suck water or debris that may have infiltrated into the conduit over time. He was unaware if any of Hellman's vacuums had been removed from the Hellman truck on the night of the accident.

At the time of the accident, plaintiff was in the Manhole. He was crouching directly underneath the manhole opening, in the process of snaking a pipe when he was suddenly "hit on the head with [a] vacuum" – described as a 15-gallon capacity Shop-Vac on wheels (*id.* at 148-149). He had not heard anyone using the vacuum prior to the accident and did not know why it was near the Manhole (*id.* at 150). Plaintiff's coworker was able to remove the vacuum from the Manhole and plaintiff was able to climb out. After plaintiff climbed out, he emptied the vacuum, pouring out some "rocks and water" (*id.* at 157). He did not know why the vacuum fell into the Manhole.

Finally, plaintiff testified that an object falling through a manhole is not a common occurrence.

Deposition Testimony of Michael Masiello (Hellman's Worker)

Michael Masiello testified that on the day of the accident, he was employed by Hellman as an "electrical worker" (Masiello tr at 11). He works on telecommunication manholes. Hellman's work includes installing and maintaining electrical data communication systems "on roadways and in buildings" (*id.* at 15). Light Tower hired Hellman to install its cables. Light Tower employees were "very rarely" present at the job site (*id.* at 35).

On the day of the accident, Masiello, along with plaintiff, was a part of a four-man crew assigned to "rodding and roping" – i.e., finding a path between two manholes for fiberoptic wires (*id.* at 47). The four-man crew was split into two teams, each team worked on one of the two manholes. He and plaintiff were not working at the same manhole at the time of the accident. The regular foreman for the crew was on vacation and plaintiff had assumed the unofficial role as "leadman" (*id.* at 28).

Masiello testified that rodding and roping did not involve constructing or demolishing anything inside the manhole and did not involve making any changes to the manhole (aside from inserting fiberoptic cables in the conduits) or the conduits themselves (*id.* at 56).

One way to perform rodding and roping would be to use a shop-vac style wet-vacuum. Each Hellman truck had one of these shop-vacs. They could be used to push or pull an object down a conduit, guiding a wire which would then connect the two manholes. Masiello testified that plaintiff's team used a vacuum on the night of the accident to try to pull a rope through the conduit (*id.* at 58).

Immediately before the accident, Masiello was above ground, approximately fifteen feet from the manhole where plaintiff was working. He "saw the vacuum roll towards the manhole and fall in it" and heard plaintiff "yell when it hit him" (*id.* at 66). Masiello did not know why the vacuum started rolling. He believed the vacuum rolled four to five feet before it fell into the manhole. Later, Masiello testified that he did not actually see the vacuum roll, but that he saw the vacuum four or five feet from the manhole and then looked elsewhere before hearing plaintiff yell (*id.* at 69-70). He helped remove the vacuum from the Manhole.

Masiello further testified that he saw a manhole cage erected around the Manhole, but that "it was not in the closed position" – i.e., that the chain side was not closed (*id.* at 99).

Finally, Masiello testified that, ultimately, once Hellman was finished working in a manhole, except for new cable running through the conduits, there would be nothing changed or installed in the manhole.

Deposition Testimony of Anthony Barone (Light Tower's Vice President of Operations)

Anthony Barone testified that at the time of the accident, he was the vice president of operations for Light Tower. His responsibilities included overseeing "all operational duties"

regarding Light Tower's "construction related activities" related to fiberoptic cable for New York City (Barone tr at 10). DOE contracted with Light Tower to provide internet access "to all 1,381 New York City public schools" (*id.* at 21).

Barone had several employees working for him, including several construction managers. One of those managers was assigned to manage the DOE project. That manager contracted with Hellman to perform the subject work (*id.* at 16) via a purchase order dated April 14, 2017 (*id.* at 25). In addition to the purchase order, Light Tower has a standing contract agreement with Hellman, which was dated March 17, 2016 (*id.* at 40).

Neither Barone nor his managers were ever present at any of Hellman's jobsites. In addition, Light Tower did not hire an outside safety company, or oversee any issues on sight. Specifically, Light Tower's contact with Hellman was generally limited to telephone conversations regarding progress (*id.* at 51).

Barone testified that he believed Verizon "owns the manhole systems" (*id.* at 22). He also testified Light Tower was able to access the manhole systems via an "occupancy contract" with ECS (*id.* at 22). This contract gave Light Tower "permission to place cable in the manholes" (*id.* at 22) and then "lease space in that manhole" from ECS (*id.* at 30). Barone provided a copy of the occupancy contract to counsel at the deposition (*id.* at 24).

Barone further testified that, pursuant to the agreement with ECS, Light Tower needed to "apply for an opening number" – a permit to access the manhole. According to Barone, Hellman was the entity that would call ECS and obtain the opening number, not Light Tower (*id.* at 58).

Deposition Testimony of Daniel Tergesen (ECS's Construction Manager)

Daniel Tergesen testified that on the day of the accident, he was ECS's construction manager. His duties include overseeing contractors who build out "subsidiary conduit in Manhattan" (Tergesen tr at 10).

He testified that ECS is a wholly owned subsidiary of Verizon. According to Tergesen, "ECS owns telecommunication manholes and mainline conduit in Manhattan and the Bronx, and they lease that conduit to communication companies" (*id.* at 13). ECS does not own any telecommunication equipment. The Manhole was an ECS manhole. Verizon does not own any manholes in the Bronx (*id.* at 79).

Tergesen indicated that ECS uses a form "conduit occupancy agreement" with all its contractors that gives them the ability to access ECS manholes to run wires on the mainline conduit (*id.* at 56). "Mainline conduit" is conduit leading from manhole to manhole, while "[s]ubsidiary conduit" leads from a manhole to a private building or structure (*id.*at 79).

Tergesen testified that he directed a search for authorized work at the subject Manhole and there were no such records, meaning that no one requested an opening number – as required under the occupancy agreement – to gain access to the Manhole. Therefore, ECS had no knowledge that any work was being done in the Manhole. According to Tergesen, while this is improper, it is not uncommon (*id.* at 22).

Tergesen further testified that any work done in a manhole did not alter or change the manhole itself. Contractors would run fiberoptic wire through conduit and then tie the wire to already installed racks in the manhole, to keep them out of the way (*id.* at 51). He had never heard of a contractor having to install anything in a manhole to run cable (*id.* at 52).

Deposition Testimony of Kalani Pfannschmidt (Verizon's Project Manager)

Kalani Pfannschmidt testified that she is an engineer and project manager for Verizon (she did not specify which Verizon entity she specifically worked for). She was not employed at Verizon at the time of the accident. Her duties include assisting in connecting buildings to the Verizon fiberoptic network.

Pfannschmidt testified that Verizon does not own any of the manholes in New York City, but ECS does (Pfannschmidt tr at 17). She performed a search of Verizon's records regarding the subject Manhole and found no evidence that Verizon had ever accessed the Manhole (*id.* at 18) or performed work in the Manhole. If Verizon needs something done in a Manhole, it refers that work to ECS.

Affidavit of Veronica Glennon (VCI's Assistant Secretary)

Veronica Glennon avers that she is the assistant secretary for VCI. Her responsibilities include being familiar with the corporate structure of VCI and its subsidiaries. She states that VCI is a holding company. It is the parent holding company to VZNY and ECS, each of which are separate legal entities (Glennon Aff., ¶12).

According to Glennon, VCI has never owned, leased, controlled, maintained, operated, or accessed any manholes in New York (*id.* at ¶ 9). VCI also never contracted with Light Tower or Hellman (*id.* at ¶ 10).

DISCUSSION

"[T]he proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v*

Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, "the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). Finally, evidence must be "construed in the light most favorable to the one moved against" (*Kershaw*, 114 AD3d at 82). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

The Labor Law § 240 (1) Claim (Motion Sequence Numbers 007, 008, 009 and Light Tower's Cross Motion)

Plaintiff moves for summary judgment in his favor as to liability on the Labor Law §240 (1) claim against defendants. The Verizon defendants, ECS and Hellman move for summary judgment dismissing the complaint as against defendants. Light Tower cross-moves for summary judgment dismissing the complaint as against itself.

Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

> "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."

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec.*

Co., 81 NY2d 494, 501 [1993]). Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC,* 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Not every worker who falls or is struck by a falling object at a construction site is afforded the protections of Labor Law § 240 (1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]). Instead, liability "is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

Therefore, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]).

As an initial matter, the Verizon defendants and ECS argue that they are not proper Labor Law defendants, such that they cannot be liable to plaintiff under sections 240 (1) or 241 (6).

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

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981] [internal citations omitted]). Accordingly, for a party to be "vicariously liable as an agent of the property owner for injuries

sustained under the statute," it must have "had the ability to control the activity which brought about the injury" (*Walls v Turner Constr. Co.,* 4 NY3d 861, 863-864 [2005]).

The Verizon Defendants

The Verizon defendants argue that they are not the owner of the subject Manhole, nor a general contractor for any work performed there. They further argue that, because they did not have the authority to control any of the work performed at the Manhole, they cannot be considered an agent of either for the purposes of the Labor Law.

Here, the record reflects that the Verizon defendants are not the owners of the subject Manhole (Glennon Aff., ¶ 9-12, Pfannschmidt tr at 17, Tergesen tr at 13 ["ECS owns telecommunication manholes and mainline conduit in Manhattan and the Bronx"]). In addition, there is no evidence that the Verizon defendants acted as a general contractor. Finally, there is no evidence that the Verizon defendants had the authority to control the subject work at the Manhole (*see Villalta v Consolidated Edison Co. of N.Y., Inc.,* 197 AD3d 1078 [1st Dept 2021] [dismissing a § 240 (1) claim as to Verizon because it did not contract for, direct or control the subject work]). Accordingly, the Verizon defendants are not proper Labor Law defendants in this action.

Plaintiff's argument that VCI, as the parent company of ECS, should be considered an owner because of ECS's status as a wholly owned subsidiary of VCI is unpersuasive as plaintiff does not seek to pierce VCI's corporate veil.

Thus, the Verizon defendants are entitled to summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) claims against them.

ECS

ECS also argues that it is not an owner, general contractor or agent of either such that Labor Law §§ 240 (1) and 241 (6) cannot apply to them. However, ECS's own representative testified that ECS "owns" manholes in the Bronx, including the Manhole (Tergesen tr. at 13). Nonetheless, ECS argues that it should be considered merely an out of possession landlord, and not an owner.

As to Labor Law § 240 (1), this argument is unpersuasive in light of ECS's own testimony that it owned the Manhole. Liability under section 240 (1) "rests upon the fact of ownership and whether [the owner] had contracted for the work or benefitted from it are legally irrelevant" (*Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 560 [1993]; *see also Siguencia v City of New York,* 138 AD3d 605 [1st Dept 2016]). Accordingly, ECS has failed to establish as a matter of law that it is not a proper Labor Law defendant with respect to the Labor Law § 240 (1) claim.

However, "ownership of the premises where the accident occurred – standing alone – is not enough to impose liability under Labor Law § 241 (6) where the property owner did not contract for the work" (*Morton v State of New York*, 15 NY3d 50, 56 [2010]). In addition to ownership, there must be "some nexus between the owner and the worker, whether by a lease agreement or grant of an easement or other property interest" (*id.*). Here, ECS did not contract for, benefit from, or direct plaintiff's work. Accordingly, there is no nexus between ECS and plaintiff's employer, Hellman, sufficient to impose Labor Law § 241 (6) liability on ECS in this matter. Thus, ECS is entitled to summary judgment dismissing the Labor Law § 241 (6) claims against it.

Next, defendants argue that the section 240 (1) claim should be dismissed because plaintiff's accident did not arise from one of the enumerated activities to which section 240 (1) applies. Specifically, Labor Law § 240 (1) provides protection from elevation-related risks for workers engaged in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (Labor Law § 240 [1]).

Plaintiff argues that he was involved in either demolition or altering work. As an initial matter, the record is devoid of any evidence that plaintiff was involved in demolition work. Plaintiff's work involved installing fiberoptic cable the conduit between two manholes. While this work sometimes involved the removal of debris that had accumulated in the conduits over time, such removal is not demolition.[1]

"'[A]ltering' within the meaning of Labor Law § 240 (1) requires making a significant physical change to the configuration or composition of the building or structure" (*Joblon v Solow*, 91 NY2d 457, 465 [1998] [emphasis omitted]).

Feeding cable through a pre-existing hole does not constitute alteration for the purposes of the Labor Law (*see Pantovic v YL Realty, Inc.*, 117 AD3d 538, 538 [1st Dept 2014] [a plaintiff who was injured "while feeding a portable AC exhaust tube into a pre-existing duct hole" was not performing an "'alteration' pursuant to the statute"]; *see also Rhodes-Evans v 111 Chelsea LLC*, 44 AD3d 430, 432 [1st Dept 2007] ["Nothing in the record suggests that in splicing fiber optic cable located in a box plaintiff was making a significant physical change" to a structure]). Accordingly, plaintiff was not performing an alteration at the time of his accident.

[1] "Demolition work," as defined in the Industrial Code includes "work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment" (12 NYCRR 23-1.4 [16]).

The cases plaintiff relies upon to establish that installing fiberoptic cable should constitute alteration are inapposite. The cases plaintiff relied upon involved significant alterations to a building (*see e.g. Kochman v City of New York*, 110 AD3d 477, 478 [1st Dept 2013] [installing wires through a roof and down walls, into a room "where a new circuit would be installed"]; *Schick v 200 Blydenburgh, LLC*, 88 AD3d 684 [2d Dept 2011] [pulling wire at a height of 20 feet above the floor and installing hardware in an office building]). The facts here – where plaintiff's work consisted of pulling rope through a conduit – are more analogous to *Pantovic* and *Rhodes-Evans* than to *Kochman* and *Schick*.

To the extent plaintiff argues that, ultimately, at some point in the future, the fiberoptic cables were going to be routed into buildings (via work performed by separate Hellman crews at separate locations, pursuant to separate agreements) and that such work may have involved altering those buildings, such argument is unavailing. This argument conflates the scope of Light Tower's contract with the Department of Education with the subject action, which ultimately arises from Light Tower's agreements with ECS. That Hellman was working for Light Tower at a separate location, performing different work, pursuant to a separate contract is immaterial to the subject action.

In any event, even had plaintiff's work constituted protected alteration, this claim would still be dismissed. Plaintiff was struck by a falling object. To prevail in a "falling object" case, a plaintiff must show the existence of a hazard contemplated under section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein. "Essentially, the plaintiff must demonstrate that at the time the object fell, it either was being 'hoisted or secured,' or 'required securing for the purposes of the undertaking'" *Fabrizi v 1095 Ave. of Americas, L.L.C.*, 22 NY3d 658, 662-63 [2014] [internal quotation marks and citation omitted]).

The object that struck plaintiff was a vacuum located on the street level. The record is devoid of any evidence that the vacuum was being hoisted or secured at the time of the accident. Further, the record does not indicate that the vacuum needed to be secured while at ground level for the purposes of the undertaking – i.e., for plaintiff's use. Plaintiff's expert's conclusory assertion that the vacuum needed to be secured because it fell is conclusory and insufficient to establish a question of fact as to whether the vacuum was statutorily required to be secured in the first instance (Bellizzi aff., ¶ 15).

Thus, Labor Law § 240 (1) is inapplicable to this accident and defendants are entitled to summary judgment dismissing this claim as against them. Plaintiff is not entitled to summary judgment in his favor on the same claims.

The Labor Law § 241 (6) Claim (Motion Sequence Numbers 007, 008, 009 and Light Tower's Cross Motion)

Plaintiff moves for summary judgment in his favor as to liability on the Labor Law § 241 (6) claim against defendants. The Verizon defendants, ECS and Hellman move for summary judgment dismissing the complaint as against defendants. Light Tower cross-moves for summary judgment dismissing the complaint as against itself.

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "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, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "'to provide reasonable and adequate protection and safety' to persons employed in,

or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501–502 [1993]). Importantly, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross*, 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

As discussed above, the Verizon defendants and ECS are not proper Labor Law defendants. Accordingly, they are entitled to summary judgment dismissing the Labor Law § 241 (6) claims against them. The court must still address this claim as against Light Tower.

Here, plaintiff lists multiple violations of the Industrial Code in the bill of particulars. Except for sections 23-1.7 (a) (1), 23-2.1 (a) (1), 23-3.3 (g) and 23-9.2 (b) (1), plaintiff does not affirmatively seek relief or oppose their dismissal. These uncontested provisions are deemed abandoned (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section"]).

Accordingly, defendants are entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on the abandoned provisions.

Industrial Code 12 NYCRR 23-1.7 (a) (1)

Industrial Code 12 NYCRR 23-1.7 (a) (1) governs "[o]verhead hazards." It is

sufficiently specific to support a Labor Law § 241 (6) claim (*Amato v State of New York*, 241 AD2d 400, 402 [1st Dept 1997]). It provides, in pertinent part, the following:

> "Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength."

Here, plaintiff alleges that he was in the Manhole when the vacuum rolled from the street, into the Manhole, and struck him on the head. That said, the record is devoid of any evidence showing that there was work ongoing above plaintiff that would normally expose him to falling material or objects such that overhead protection of the kind described in section 1.7 (a) (1) was warranted (*see Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007] ["where an object unexpectedly falls on a worker in an area not normally exposed to such hazards, the regulation does not apply"]).

Plaintiff's expert testimony that "an uncovered manhole [is] normally exposed to falling objects from above" (Bellizzi aff., ¶ 34) is conclusory and does not give rise to a question of fact as to whether such protections were needed (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002] ["Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to withstand summary judgment"]). Moreover, it goes against plaintiff's own testimony that it is uncommon for an object to fall into a manhole.

Here, there is no testimony or evidence showing that the Manhole had been normally subject to falling object risks.

Plaintiff relies on *Amerson v Melito Constr. Corp.*, 45 AD3d 708 (2d Dept 2007) for the proposition that any worker who is struck from above by an object should fall within the scope

of section 1.7 (a) (1). This is incorrect (*see Buckley*, 44 AD3d at 271). In *Amerson*, the plaintiff was working in an area where there was ongoing masonry work performed 12 to 20 feet above him, when he was struck in the head by falling masonry. The fact that there was ongoing construction work directly above the plaintiff's work area is what created the exposure to falling hazards. Here, to the contrary, there was no such work being performed above plaintiff.

In the absence of any ongoing activities that could regularly expose plaintiff's work area to an overhead falling hazard, there is nothing establishing that the Manhole was normally exposed to falling objects. Accordingly, section 1.7 (a) (1) does not apply to the subject accident.

Thus, defendants are entitled to summary judgment dismissing that part of the Labor Law § 241 (6) claim predicated upon a violation of Industrial Code 12 NYCRR 23-1.7 (a) (1). Plaintiff is not entitled to summary judgment in his favor on the same.

Industrial Code 12 NYCRR 23-2.1 (a) (1)

Industrial Code 12 NYCRR 23-2.1 (a) governs "[s]torage of material or equipment." Section 23-2.1 (a) (1) is sufficiently specific to support a Labor Law § 241 (6) claim (*Tucker v Tishman Constr. Corp. of N.Y.*, 36 AD3d 417, 417 [1st Dept 2007]). Subsection (1) provides the following:

> "All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare."

Here, plaintiff was injured when a vacuum fell on his head. The vacuum is not building materials nor a material pile. Accordingly, section 2.1 (a) (1) is inapplicable to this accident.

Thus, defendants are entitled to summary judgment dismissing that part of the Labor Law § 241 (6) claim predicated upon a violation of Industrial Code 12 NYCRR 2.1 (a) (1). Plaintiff is not entitled to summary judgment in his favor on the same.

Industrial Code 23-.3.3 (g)

Industrial Code 23-3.3 governs "[d]emolition by hand." Subsection (g) governs "[p]rotection in other areas." Section 23-3.3 (g) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Zuluaga v P.P.C. Constr., LLC*, 45 AD3d 479, 480 [1st Dept 2007]).

Notably, section 3.3 applies only to demolition by hand. There is no allegation that plaintiff or anyone at the accident location on the day of the accident was performing demolition by hand.

Plaintiff's argument that removing debris from the conduits while rodding and roping should constitute demolition is unavailing. Demolition is defined in the Industrial Code (12 NYCRR 23-1.4 (b) (16) as "work incidental to or associated with the total or partial dismantling or razing of a building or other structure . . . ." Neither plaintiff, nor any worker at the accident location, were performing such work on the day of the accident.

In a similar vein, plaintiff's argument that his work should be considered demolition because other Hellman workers, at a work location separate from the two subject manholes at issue in this action, may have been performing demolition inside a building at some point prior to the accident – and that such debris somehow found its way into the Manhole's conduit – is tenuous and unpersuasive.

Accordingly, section 23-3.3 (g) is inapplicable to the subject accident. Thus, defendants are entitled to summary judgment dismissing that part of the Labor Law § 241 (6) claim

predicated upon a violation of Industrial Code 12 NYCRR 23-3.3 (g). Plaintiff is not entitled to summary judgment in his favor on the same.

Industrial Code 12 NYCRR 23-9.2 (b) (1)

Industrial Code 12 NYCRR 23-9.2 (b) governs the operation of power operated equipment. Subsection (b) (1) provides the following

> "All power-operated equipment used in construction, demolition or excavation operations shall be operated only by trained, designated persons and all such equipment shall be operated in a safe manner at all times"

Section 23-9.2 (b) (1) is insufficient to support a Labor Law § 241 (6) claim (*Scott v Westmore Fuel Co., Inc.*, 96 AD3d 520, 521 [1st Dept 2012] ["12 NYCRR 23-9.2 (b) (1) is a mere general safety standard that is insufficiently specific to give rise to a nondelegable duty under the statute"]).

Plaintiff's argument that the phrase "designated person" should transform this provision from a general standard to a specific command is unavailing considering the recent Court of Appeals decision in *Toussaint v Port Authority of N.Y. & N.J.*, ___ NY3d ___ (2022) (2022 NY Slip Op 01955). In *Toussaint*, the court determined whether a different (but nearly identically worded) Industrial Code provision was sufficiently specific for the purposes of the Labor Law. The Court of Appeals ultimately found the provision to be a general standard. In doing so it explained that "the additional direction that 'trained and competent' individuals must also be 'designated'" does not "transform[] the provision from a general standard of conduct to a specific positive command" (*id.* at *2).

Accordingly, section 23-9.2 (b) (1) is insufficient to support a Labor Law § 241 (6) claim and defendants are entitled to summary judgment dismissing said claim as against them. Plaintiff is not entitled to summary judgment in his favor on the same.

Given the foregoing, defendants are entitled to summary judgment dismissing the entirety of the Labor Law § 241 (6) claim as against them.

The Common-Law Negligence and Labor Law § 200 Claims (Motion Sequence Numbers 007, 008, 009 and Light Tower's Cross Motion)

Plaintiff moves for summary judgment in his favor on his common-law negligence and Labor Law § 200 claims against defendants. Defendants move for summary judgment dismissing the same as against them.

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

"Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d

905, 909 [2d Dept 2011]). Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012])

However, where an injury stems from a dangerous condition inherent in the premises, an owner or contractor may be liable in common-law negligence and under Labor Law § 200 when the owner or contractor "'created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice'" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

Here, plaintiff alleges that he was struck in the head by an improperly secured vacuum that fell through the Manhole. Accordingly, plaintiff's accident was caused by the means and methods of the work.

As to the Verizon defendants and ECS, the record contains no evidence that they exercised actual supervision or control over the injury producing work – i.e., the securing of the Manhole and the vacuum.

As to Light Tower, the record establishes that it did not control or supervise plaintiff or his coworkers or provide them with any tools or equipment. The record contains no evidence supporting that any Light Tower employee specifically directed or instructed plaintiff or his coworkers on how to secure the Manhole or the vacuum.

That Light Tower generally directed Hellman as to where and when to perform its work, such facts, without more, only establishes that Light Tower had general supervisory control over Hellman. Such general supervisory control is insufficient to impute liability under section 200 or the common-law (*see Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014];

Hughes v Tishman Constr. Corp., 40 AD3d 305, 309 [1st Dept 2007]; *Reilly v Newireen Assoc.*, 303 AD2d 214, 221 [1st Dept 2003]).

Accordingly, defendants are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them and plaintiff is not entitled to summary judgment in his favor on the same.

It is noted that all defendants seek dismissal of all cross claims as against them. However, with a few exceptions, discussed *infra*, the parties do not identify or address these claims. Accordingly, the parts of their motions that seek relief to these unidentified and unaddressed cross claims are denied.

It is also noted that Hellman seeks dismissal of the Labor Law § 200 claim as against defendants, but he does not actually address this claim. Nevertheless, in light of the above determinations in favor of dismissing such claim as against defendants, by operation of law, Hellman's motion (while ministerial) is, likewise, granted.

The Verizon Defendants and ECS's Contractual Indemnification Cross Claims against Light Tower (Motion Sequence Number 009)

The Verizon defendants and ECS move for summary judgment in their favor on their contractual indemnification claims against Light Tower.

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]).

"In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (*Correia v*

Professional Data Mgt., 259 AD2d 60, 65 [1st Dept 1999]; *see also Murphy v WFP 245 Park Co., L.P.*, 8 AD3d 161, 162 [1st Dept 2004]). Unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia*, 259 AD2d at 65).

Additional Facts Relevant to this Claim

The indemnification provision relied upon by the Verizon defendants and ECS is found within an unsigned "occupancy agreement" between ECS and non-party RCN Telecom Services of NYC (RCN) (the Occupancy Agreement) (Verizon defendants and ECS notice of motion, exhibit P; NYSCEF Doc. No. 247). RCN is the predecessor in interest to Light Tower. The Occupancy Agreement's indemnification provision provides as follows:

> "To the extent permitted by law, Tenant shall indemnify and hold harmless ECS and Verizon (solely in its capacity as ECS's parent corporation), their officers, directors, affiliates and employees from and against all claims, costs, losses and damages . . . caused by, arising out of or resulting from the performance or nonperformance of this Agreement or the work activities of Tenant, provided that any such claim . . . is caused in whole or in part by any negligent or willful act or omission of Tenant or anyone employed by Tenant for whose acts it may be liable"

(*id.*, Article VI).

As an initial matter, the Verizon defendants and ECS argue that Light Tower, as RCN's successor, is a party to the unsigned Operation Agreement (i.e., Light Tower is the "Tenant") and the Operation Agreement's indemnification provision.

The court notes that, while RCN is the named Tenant on the Occupancy Agreement, Barone, Light Tower's vice president of operations, produced and reviewed the Occupancy Agreement at his deposition and testified that it applied to Light Tower and was the controlling

document that gave Light Tower the ability to access ECS's manholes and place cable therein (Barone tr at 22-24).

With respect to the unsigned nature of the Occupancy Agreement, "[a]n unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound" (*Flores v. Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 369 [2005]). Here, the Occupancy Agreement is unsigned. That said, based on Barone's testimony that the Occupancy Agreement applied to Light Tower and provided Light Tower with the authority to access the Manhole, Light Tower clearly operated pursuant to, and intended to be bound by the Occupancy Agreement's terms.[2] Accordingly, Light Tower is, effectively, a "Tenant" as referred to in the indemnification provision.

The Occupancy Agreement's indemnification provision requires a finding of negligence against an indemnitor before it activates. Specifically, it requires Light Tower to indemnify where an injury arises out of the performance of the Occupancy Agreement "provided that any such claim . . . is caused in whole or in part by any negligent or willful act or omission of Tenant or anyone employed by Tenant" (Verizon defendants and ECS notice of motion, exhibit P, Article VI; NYSCEF Doc. No. 247). Here, as discussed above, the Labor Law § 200 and common-law negligence claims against Light Tower were dismissed. Accordingly, Light Tower was not negligent with respect to plaintiff's accident.

The indemnification provision also governs any entity employed by Light Tower. Hellman was employed by Light Tower, so Light Tower would need to provide indemnification

[2] Light Tower argues that it obtained the right to access the Manhole not pursuant to the Operation Agreement, but through ECS's website. Notably, this argument directly contravenes its own vice president's testimony. Moreover, the ECS website itself also contains an indemnification provision (NYSCEF Doc. No. 276).

if Hellman is found to be liable for the subject accident. However, no such determination has been made at this time.

Accordingly, the Verizon defendants and ECS have not established their entitlement to summary judgment in their favor on their contractual indemnification claims against Light Tower at this time.

Notably, while the Verizon defendants and ECS also seek summary judgment on their common-law indemnity and breach of contract for the failure to procure insurance claims against Light Tower, they do not raise any arguments in support of these claims. Accordingly, that part of their motion seeking relief on these claims is also denied.

Light Tower's Third-Party Contractual Indemnification Claim against Hellman (Light Tower's Cross Motion)

Light Tower cross-moves for summary judgment in its favor on its contractual indemnification claim against Hellman. Notably, Hellman's primary insurer has accepted Light Tower's tender of defense and indemnification. According to Light Tower, Hellman's excess insurer has not accepted tender of excess coverage. Therefore, Light Tower only seeks a determination as to indemnification to the extent that plaintiff's damages might exceed Hellman's primary insurance coverage.

Given the above determination dismissing plaintiff's claims, this part of Light Tower's motion is denied as moot.

The Verizon Defendants and ECS's Second Third-Party Contractual Indemnification Claims against Hellman (Motion Sequence Number 010)

Hellman moves for summary judgment dismissing the Verizon defendants and ECS's contractual indemnification claim as against it.

The second third-party contractual indemnification claims against Hellman stem from two contractual agreements. First, the Verizon defendants and ECS allege that Hellman owes contractual indemnification to them through the Occupancy Agreement's indemnification provision, discussed above. Separately, they allege that Hellman owes contractual indemnification to them through Hellman's contract with Light Tower. Accordingly, the court must address both indemnification provisions.

Initially, it is noted that the term "Tenant" in the Occupancy Agreement is defined as "all employees, agents or contractors of Tenant" (Verizon defendants and ECS notice of motion, exhibit P; Article II, ¶ 45; NYSCEF Doc. No. 247). As discussed above, Light Tower, by its actions and acknowledgement of the Occupancy Agreement, is a Tenant. Therefore, Light Tower's own contractors – i.e., Hellman – would also be a Tenant. However, Hellman is merely a third-party non-signatory to the Occupancy Agreement. Therefore, absent a direct reference to an indemnification provision referencing ECS and the Verizon defendants in Hellman's own contract with Light Tower, the court will not consider the Occupancy Agreement's indemnification provision as against Hellman (*see Adams v Boston Properties Ltd.,* 2006 NY Slip Op. 30622[U] [Sup Ct, New York County 2006], *affd* 41 AD3d 112 [1st Dept 2007] [noting that provisions "other than scope, quality, character and manner of the work must be specifically incorporated [into a subcontract] to be effective against the subcontractor"]; *see also Naupari v Murray*, 163 AD3d 401, 402 [1st Dept 2018] ["the claims for contractual indemnification against Shearman were based on the main agreement between the Murrays and the Board, to which Shearman was not a signatory"]).

Accordingly, the court turns to the agreement between Hellman and Light Tower.

Additional Facts Relevant to this Claim

Light Tower and Hellman entered into a "Contractor Agreement" dated March 17, 2016 (the Contractor Agreement), which is an overarching agreement connected to all of Hellman's work for Light Tower (typically performed via individual purchase order). It is uncontested that the Contractor Agreement governs the subject work at issue in this matter.

The Contractor Agreement includes a section entitled "Prime Contracts" which includes the following:

> "A Purchase Order may also include the contract . . . between [Light Tower] and a higher tiered contractor(s) and/or customer and/or owner (collectively a "Customer) . . . . [Hellman] agrees to be bound by and comply with all of the terms of the Prime Contract and to assume towards [Light Tower] all the obligations and responsibilities that [Light Tower] assumes towards the Customer, insofar as they are applicable to the Purchase Order"

(Hellman's notice of motion, exhibit F, ¶ 5; NYSCEF Doc. No. 259). This paragraph is nothing more than an incorporation clause. Incorporation clauses that seek to "incorporate[] prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor" (*Bussanich v 310 E. 55th St. Tenants*, 282 AD2d 243, 244 [1st Dept 2001]). In any event, there is no evidence in the record that the Occupancy Agreement was attached to any purchase order related to the subject work, as required by this provision.

Notwithstanding the above, the Contractor Agreement includes its own indemnification provision. It provides the following:

> "To the fullest extent permitted by law, [Hellman] shall indemnify, defend and hold harmless [Light Tower] and its parent, subsidiaries, Affiliates . . . partners, directors, officers, employees, representatives, agents, successors and assigns . . . from and against any and all liabilities . . . arising out of or related to the Receivables or [Hellman's] obligations, liabilities, performance,

> breach or failure to perform under this Agreement whether directly or through [Hellman's] subcontractors"

(Hellman's notice of motion, exhibit F, ¶ 18; NYSCEF Doc. No. 259). The Verizon defendants and ECS are not Light Tower's parent, subsidiary, affiliate, partner, director, officer, employee, representative, agent, successor or assign. Accordingly, the Contractor Agreement's indemnification provision does not require Hellman to directly indemnify the Verizon defendants or ECS.

Thus, Hellman is entitled to summary judgment dismissing the Verizon defendants and ECS's second third-party contractual indemnification claim as against it.

The Verizon Defendants and ECS's Second Third-Party Contribution and Common-law Indemnification Claims against Hellman (Motion Sequence Number 010)

Hellman moves for summary judgment dismissing the second third-party contribution and common-law indemnification claims against it because plaintiff was Hellman's employee.

Workers' Compensation Law § 11 bars claims against it for contribution or indemnification where the injured person receives workers compensation.[3] This is so, except in the case of a grave injury (*Rubeis v Aqua Club, Inc*., 3 NY3d 408, 412-413 [2004] ["An employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution"]). No grave injury is alleged here.

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[3] Workers' Compensation Law § 11 sets forth, in pertinent part, as follows:

> "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, . . . or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Accordingly, Hellman is entitled to summary judgment dismissing these claims.

Motion Sequence Number 011

The Verizon Defendants and ECS's motion to vacate plaintiff's note of issue and compel discovery is denied as moot, in light of the court's determination herein, granting summary judgment and dismissing the complaint as against them.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the motion of plaintiff Christopher J. Keilitz (motion sequence number 007), pursuant to CPLR 3212, for summary judgment in his favor on his Labor Law §§ 240 (1), 241 (6) and 200 claims against defendant/third-party plaintiff Light Tower Fiber New York, Inc. (Light Tower), defendants/second third-party plaintiffs Verizon New York Inc. (VZNY), Verizon Communications, Inc. (VCI) (together, the Verizon defendants) and Empire City Subway Company (ECS) (collectively, defendants) is denied; and it is further

ORDERED that the motion of third-party defendant/second third-party defendant Hellman Electric Corp. (Hellman) (motion sequence number 008), pursuant to CPLR 3212, for summary judgment dismissing the complaint as against defendants, is granted; and it is further

ORDERED that the part of the Verizon defendants and ECS's motion (motion sequence number 009), pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them is granted, and the complaint is hereby dismissed as against them with costs and disbursements as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and the motion is otherwise denied; and it is further

ORDERED that Hellman's motion (motion sequence number 010), pursuant to CPLR 3212, for summary judgment dismissing the second third-party complaint is granted; and the second third-party complaint is dismissed; and it is further

ORDERED that the part of Light Tower's cross-motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it is granted, and the complaint is hereby dismissed as against it with costs and disbursements as taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and the motion is otherwise denied; and it is further

ORDERED that the Verizon defendants and ECS's motion (motion sequence number 011), pursuant to CPLR 3402, that seeks an order vacating plaintiff's note of issue and certificate of readiness, is denied as moot.

6/17/2022
DATE

WILLIAM PERRY, J.S.C.

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