Rivas v Seward Park Hous. Corp.
2022 NY Slip Op 33794(U)
November 7, 2022
Supreme Court, New York County
Docket Number: Index No. 151607/2016
Judge: Richard Latin

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD LATIN** **PART** **46V**

Justice

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WILLIAM RIVAS,

Plaintiff,

- v -

SEWARD PARK HOUSING CORPORATION, FRED SMITH PLUMBING & HEATING COMPANY, INC.,SEWARD PARK CONSUMERS COOPERATIVE, INC.,ONSITE CONSTRUCTION ENTERPRISES, INC.

Defendant.

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INDEX NO. 151607/2016

MOTION DATE N/A, N/A

MOTION SEQ. NO. 002 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 98, 115, 116, 117, 118, 119, 120, 122, 144, 149, 151, 154, 155, 156, 157, 158, 159, 160, 161, 162, 166, 168, 171

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 145, 146, 150, 152, 163, 164, 165, 167, 169, 170, 172, 173, 174, 175

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

Upon the foregoing documents, it is ordered that motion sequence numbers 002 and 004 are hereby consolidated for disposition and determined as follows:

This action is to recover damages for personal injuries allegedly sustained by plaintiff, William Rivas, on January 21, 2015 when the wall of a trench (the "Excavation") collapsed on him while he was working at the premises located at 413 Grand Street New York, NY (the "Premises"). The Premises was owned by Seward Park Housing Corporation ("Seward"), which contracted with Onsite Construction Enterprise, Inc. ("Onsite") to conduct an excavation to locate an underground pipe (the "Project"). Onsite subcontracted with non-party, Cisney Site Works Inc. ("Cisney"), to conduct the excavation work. Plaintiff was employed by Cisney.

Seward and Onsite crossclaim against Fred Smith Plumbing & Heating Company Inc. ("Fred Smith") for breach of contract, contractual indemnification, contribution, and common law indemnification.

In motion sequence 002 plaintiff moves for summary judgment pursuant to CPLR 3212 on his Labor Law §§ 240 (1) and 241 (6) claims against all defendants.

Seward and Onsite cross-move for summary judgment dismissing the action as against them.

In motion sequence 004, Fred Smith moves for summary judgment dismissing the complaint and Seward and Onsite's crossclaims as against it.

Plaintiff's Deposition Testimony

Plaintiff appeared for deposition on January 10 and 17, 2019. He testified that on the date of the accident, he was employed by Cisney as a laborer. Plaintiff's work included digging the Excavation to reach a subsurface pipe (Rivas January 10, 2019 tr at 10, 14-15, NYSCEF Doc. No. 81). There were four other Cisney employees, three other laborers and a supervisor, present at the worksite (*id.* at 37-38). The supervisor was employed by Cisney and responsible for safety at the site. No one else supervised plaintiff's work (*id.* at 38-39, 46). Plaintiff testified that he worked at the location for three days (*id.* at 28-29).

Plaintiff testified that there were no safety protections on the sides of the Excavation during the first or second day that he worked on the site (*id.* at 47-48). Plaintiff also testified that dirt removed from the Excavation was piled on the left side of the Excavation. The dirt pile was approximately four feet tall and eight-by-eight feet wide (*id.* at 50-51).

Plaintiff testified that on the date of the accident, the workers were enlarging and deepening the Excavation (*id.* at 52, 55). That day, the Excavation was more than twelve feet deep with approximately two feet of water coming from the subsurface pipe (*id.* at 56 - 58, 61-63, 70).

Immediately before the accident, plaintiff was inside the Excavation, kneeling down, shoveling on the right side of the Excavation (*id.* at 28, 81-82). Plaintiff could not recall if he saw movement in any of the walls of the Excavation at the time of the accident (*id.* at 85-86). He testified that he felt "everything fall on top of [him]" and that the accident happened very quickly (*id.* at 85-86).

Plaintiff testified that he had never heard of Fred Smith (Rivas January 17, 2019 deposition tr at 166). Plaintiff was unaware of anyone other than Cisney that had control over the means and methods of the work at the Excavation site (*id.* at 171-172).

Deposition Testimony of Kevin Erdman (Cisney's supervisor)

Kevin Erdman appeared for deposition on June 4, 2019. In January of 2015, he was employed by Cisney to supervise Cisney's work on the Project (Erdman tr at 10, 62, NYSCEF Doc. No. 79).[1] Cisney was hired to locate a leak on a pipe, which included excavation work (*id.* at 11-13, 21). There were no engineering or architectural plans prepared for the Project. The excavation work was conducted based upon Erdman's previous job experiences (*id.* at 30-31). Plaintiff was one of Cisney's laborers working on the Project (*id.* at 17).

Erdman testified that he had contact with Onsite at the worksite (*id.* at 96). An Onsite employee would check on the progress of the Excavation. Erdman understood that this employee was "overseeing" the work (*id.* at 96-98). Erdman testified that he was not familiar with Fred Smith and that only Cisney was responsible for shoring the sides of the Excavation (*id.* at 102-

[1] Erdman testified that he is currently employed as a foreman with Onsite, and that Onsite does trenching and concrete work (*id.*at 5, 7).

103). Erdman did not know if the Onsite employee was authorized to instruct Erdman's crew in the performance of their work or if the Onsite employee had the authority to stop work on the Project (*id.* at 110). No one other than Erdman instructed his crew (*id.* at 110).

Erdman testified that on the second day of work, the asphalt had been removed and workers began digging the Excavation (*id.* at 46, 50-51). The dirt under the asphalt was hard "compacted soil" (*id.* at 47-48). Erdman checked the security of the Excavation walls and confirmed that there was shoring on the deeper area of the Excavation (*id.* at 57-60, 70). The shoring was made using 3/4 -inch plywood sheets and eight-to-ten-foot long four-by-four lumber (*id.* at 57-58). Erdman testified that on the second day of work there was "moisture in the soil" in an area of the Excavation and that the workers continued digging in that area (*id.* at 53, 54-55).

On the date of the accident, the workers continued digging in the area of the Excavation with the wet soil (*id.* at 72). Specifically, the workers dug in the area of the Excavation that was already four feet deep and continued digging straight approximately another eight feet (*id.* at 70). Erdman testified that by 4:30, the Excavation was approximately six and a half feet deep (*id.* at 73).

Erdman supervised the shoring in the Excavation and made sure that it was shored properly (*id.* at 77). He testified that on the date of the accident, from 4:30 p.m. to the approximate time of the accident, there were plywood and lumbar structures preventing the walls of the Excavation from collapsing (*id.* at 73, 75-77). As soil was moved from the Excavation, the plywood and lumber structures were moved "forward" (*id.* at 73-74). As the digging went forward it would expose un-shored areas of the Excavation walls, and additional shoring would be used to cover these exposed areas (*id.* at 83-85). The dirt wall in front of the Excavation was sloped and there

were no structures to prevent dirt falling on the workers from the front of the Excavation (*id.* at 74-76).

Erdman testified that on the date of the accident, at approximately 4:45 p.m., he had a conversation with the workers "as a group" about "moving lumber forward, putting dirt back" (*id.* at 79-81). At that time, Erdman was standing next to the Excavation and saw plaintiff getting into it (*id.* at 81-82).

Erdman learned of the accident when one of his employees informed him that the shoring had collapsed, and that plaintiff was "under the dirt" (*id.* at 82-83). He testified that the right-hand wall of the Excavation had collapsed on plaintiff (*id.* at 83). Erdman never went into the Excavation to determine why the shoring failed (*id.* at 93).

Kevin Erdman's Affidavit

Kevin Erdman stated in his affidavit that on January 20, 2015, the right and left walls of the Excavation were shored with plywood and lumber (Erdman aff para 3, NYSCEF Doc. No. 157). He further stated that on January 31, 2015, two plywood/lumber sheets were installed on the left wall of the Excavation, two on the right wall, and that there were no gaps between the sheets (*id.* at para 5). There was no shoring on the front wall of the Excavation as the front wall was sloped (*id.* at para 7). The back wall of the Excavation was also sloped from the bottom of the Excavation to ground level to allow the workers to enter and exit (*id.* at para 7). The loose dirt was shoveled and placed either on the slope at the rear of the Excavation or piled on the left side of the Excavation at least two feet away (*id.* at para 8). Erdman "last inspected" the Excavation and shoring at approximately 4:30 p.m. on January 21, 2015 (*id.* at para 5)

Erdman stated that when plaintiff entered the Excavation, Erdman "instructed [plaintiff] and his co-workers who were present that two additional sheets of plywood were to be installed in

the excavation once plaintiff extended the trench another four feet" (*id.* at para 10). Erdman stated that he did not see the accident occur but was advised that plaintiff did not install the additional sheets of plywood as he had been instructed to do (*id.* at para 11).

Deposition Testimony of Gelson Durant (general manager and vice president of Seward)

Gelson Durant appeared for deposition on December 19, 2019. At the time of the accident, he was the general manager and a vice president of Seward (Gelson Durant deposition tr at 5, NYSCEF Doc. No. 76).

Durant testified that there was a standpipe leak on the Premises, and that Fred Smith was called to "take a look at the leak" (Durant tr at 13-15). John Shannon, a supervisor for Fred Smith, "would have looked at the conditions and reported back to [Durant] what he thought . . . and he would have dispatched a crew to come out and inspect or check" (*id.* at 14-15). Fred Smith performed the initial evaluation and inspection prior to the accident, and any repair work Fred Smith would have performed on the standpipe would have been done after the excavation work was complete (*id.* at 56).

Durant testified that the leaking pipe was buried under the driveway and walkway of the Premises (*id.* at 19-20). Shannon informed him that Fred Smith would have to test to determine if there was an actual leak" (*id.* at 20-21). Durant testified that it was an "emergency situation" and there was no written plan as to how the test would be conducted (*id.* at 21-22). Fred Smith "recommended" that there was an underground leak from the standpipe, and Onsite conducted the excavation work (*id.* at 29).

Durant testified that Onsite would be handling all the matters regarding safety, the Excavation, and shoring at the jobsite (*id.* at 55-56). There was no project manager. Fred Smith

handled the plumbing and Onsite handled the excavation work (*id.* at 47). Other than Fred Smith and Onsite, Durant was not aware of any contractors performing work at the jobsite (*id.* at 38).

Durant testified that he came to the jobsite after the accident had occurred and plaintiff had already been removed from the collapsed Excavation (*id.* at 45-46). He did not learn the cause of the accident, nor did he enter the Excavation (*id.* at 49-50). He further testified that Fred Smith would not have been at the worksite on the date of the accident as there was no plumbing work to be done (*id.* at 56-57).

Deposition Testimony of John Shannon (Fred Smith's Supervisor)

John Shannon, appeared for deposition on March 11, 2020.

He testified that Fred Smith was the plumber for the Premises, and in that role had worked on approximately fifty different projects (Shannon tr at 10-11, NYSCEF Doc. No. 77). The management of the Premises would call Fred Smith to address interior leaks and discuss projects (*id.* at 16). The management of Premises has never called Fred Smith to ask about excavation work (*id.* at 16-17).

In January of 2015, Durant spoke to him about a "small stream of water" at the Premises and wanted Shannon to "take a look at it" (*id.* at 24-25). Shannon went to the Premise and spoke with Durant, who showed him the stream of water (*id.* at 25). He testified that after this discussion, Seward hired Onsite to start the excavation work. Fred Smith did not do the excavation work (*id.* at 29-30).

Shannon testified that he never spoke to any of Onsite's employees (*id.* at 31-33). -He affirmed in response to questioning that when he visited the worksite, he would do so for roughly an hour each time. During these visits, he would meet with building management, walk outside, and look at the Excavation (*id.* at 69-70).

Raymond Cestaro's Affidavit (Onsite's President)

Raymond Cestaro stated in his affidavit that he is the President of Onsite (NYSCEF Doc. No. 118). He also stated that Onsite was retained by Seward to perform work at the Premises pursuant to a contractor agreement dated January 15, 2015. Cestaro further stated that Onsite retained Cisney to provide the labor required by the contractor agreement, and that there was no written agreement between Onsite and Cisney.

Affidavit of Jed Staszyn (Cisney Employee)

Jed Staszyn stated in his affidavit that he was working for Cisney at the Premises on the date of the accident (Staszyn aff para 2, NYSCEF Doc. No. 156). He further stated that Kevin Erdman was the foreman and that plaintiff, Bonifacio Soto, and Milton Cartagena were also all working at the site (*id.* at para 2). On the date of the accident, the workers were increasing the size of the Excavation in order to locate the leak in the standpipe (*id.* at para 7).

Staszyn stated that when the Excavation had reached a point where the part closest to the building was approximately eight feet deep, he told plaintiff that more shoring was needed and tried to pass plaintiff wood for shoring (*id.* at para 8). He stated that Soto also tried to get plaintiff to add more shoring, but that plaintiff refused (*id.* at para 8).

DISCUSSION

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" *(Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012][internal quotation marks and citation omitted]). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment" (*id.*). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible

form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]).

"[F]acts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012][internal quotation marks and citation omitted]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Preliminary Issues

Seward and Onsite argue that plaintiff and Fred Smith's motions for summary judgment are premature. By Order dated March 8, 2021 (the "Order"), Seward and Onsite were allowed to conduct depositions of Jed Staszyn, Milton Cartagana, and Bonofacio Soto on or before June 25, 2021. Seward and Onsite argue that plaintiff and Fred Smith both moved for summary judgment prior to June 25, 2021, forcing Seward and Onsite to respond prior to conducing the depositions.

"A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*Bailey v New York City Transit Auth.*, 270 AD2d 156, 157 [1st Dept 2000], citing *Auerbach v. Bennett,* 47 NY2d 619 [1979]; *Ruttura & Sons Constr. Co. v Petrocelli Constr.*, 257 AD2d 614, 615 [2d Dept 1999] *lv dismissed* 93 NY2d 956). "The mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion" (*Flores v City of New York*, 66 AD3d 599, 600 [1st Dept 2009]). In addition, the fact that depositions have not been completed does not render a summary judgment motion premature, unless the opposing party can show that discovery might lead to facts that would support their

opposition to the motion (*See Laporta v. PPC Commercial, LLC,* 204 AD3d 538, 539 [1st Dept 2022], citing *Kremer v Sinopia LLC,* 104 AD3d 479 [1st Dept 2013]).

Here, Seward and Onsite have not shown that additional depositions may lead to relevant evidence necessary to oppose plaintiff and Fred Smith's summary judgment motions. Further, Seward and Onsite did not conduct the additional depositions on or before June 25, 2021, as required by the Order (*See Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C. (Habiterra Assocs.)*, 5 NY3d 514, 521 [2005] ["Litigation cannot be conducted efficiently if deadlines are not taken seriously . . . that disregard of deadlines should not and will not be tolerated."]).

As such, the motions and cross-motions are not premature and shall be determined on their merits.

Plaintiff's Labor Law § 240 (1) claim (Motion Sequence Number 002 and 004)

Labor Law § 240 (1), also known as the Scaffold Law (*See Ryan v. Morse Diesel, Inc.*, 98 AD2d 615 [1st Dept 1983]) reads as follows:

> "Scaffolding and other devices for use of employees
>
> "1. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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."

To prevail on a Labor Law § 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*See Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 287 [2003]).

Plaintiff argues that he is entitled to summary judgment as defendants failed to provide proper safety devices for the Excavation and that said failure was the proximate cause of plaintiff's injuries.

Seward and Onsite argue that plaintiff's Labor Law § 240 (1) should be dismissed as the accident involved a collapsed Excavation wall, which does not fall within the scope of Labor Law § 240 (1).

Fred Smith argues that plaintiff's Labor Law § 240 (1) claims should be dismissed as against it as Fred Smith was not a contractual nor statutory agent of Seward or Onsite.

By its express terms, liability under Labor Law § 240 (1) only apply to "contractors and owners and their agents." Here, it is undisputed that Fred Smith is not an owner, contractor, nor did Fred Smith have any contractual relationship with Onsite or Cisney. As such, the only basis for Fred Smith to be potentially liable under Labor Law § 240 (1) is as a statutory agent of Seward or Onsite.

> "To hold a defendant liable under the Labor Law as a statutory agent of either the owner or the general contractor, it must be shown that the defendant had the authority to supervise and control the injury-producing work. The determinative factor is whether the defendant had the right to exercise control over the work, not whether it actually exercised that right. Where the owner or general contractor delegates to a third party the duty to conform to the requirements of the Labor Law, that third party becomes the statutory agent"

(*Santos v Condo 124 LLC*, 161 AD3d 650, 653 [1st Dept 2018][internal citations and quotations marks omitted]).

Fred Smith has established, prima facie, that it did not have the authority to supervise nor control the injury producing work. Shannon testified that Fred Smith did not perform excavation work and did not have any role in the Project (Shannon tr at 16-17, 29-30). This was consistent with Durant's testimony that Onsite did excavation work and that Onsite handled all of the matters

with regards to safety, excavation, and shoring at the jobsite (Durant tr at 29, 39-40, 55-56). In addition, Erdman testified that he had no familiarity with Fred Smith and that only Cisney was responsible for the erection of the shoring along the sides of the Excavation (Erdman tr at 102-103). The deposition testimonies are sufficient to establish that Fred Smith did not have any authority to supervise nor control over the injury producing work.

In opposition, Plaintiff has failed raise an issue of fact as to whether Fred Smith was a statutory agent of Seward or Onsite. As such, Fred Smith is entitled to summary judgment dismissing plaintiff's Labor Law § 240 (1) claim as against it.

Turning to Plaintiff's Labor Law § 240 (1) claim as against Seward and Onsite,

> "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, 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 Assocs.,* 96 NY2d 259, 267 [2001]). "Labor Law § 240 (1) was aimed only at elevation-related hazards and that, accordingly, injuries resulting from other types of hazards are not compensable under that statute even if proximately caused by the absence of … [a] required safety device" (*Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995]).

Multiple Appellate Courts have determined that accidents involving collapsing excavation walls do not fall within the scope of Labor Law § 240 (1) (*See e.g. O'Connell v Consolidated Edison Co. of N.Y.*, 276 AD2d 608 [2d Dept 2000] [Plaintiff's injury from a collapsed excavation wall while doing plumbing work in a trench does not fall within the scope of Labor Law § 240 (1)]; *Hamann v City of New York*, 219 AD2d 583 [2d Dept 1997] [Plaintiff's injury as the result of excavation work he was performing in a trench does not fall within the scope of Labor Law §

240 (1)]; *Pinheiro v Montrose Improvement Dist.*, 224 AD2d 777 [3rd Dept 1996] [Plaintiff's injuries from earth fallen from a collapsed excavation does not fall within the scope of Labor Law § 240 (1)]; *Rogers v County of Niagara*, 209 AD2d 1034, 1034 [4th Dept 1994] ["Labor Law § 240 (1) does not impose liability in favor of a worker injured in the collapse of an excavation trench."]).

Based upon the record before the Court, the accident occurred when the right wall of the Excavation collapsed upon plaintiff (*See* Erdman tr at 83). In addition, plaintiff testified that immediately before the accident he was working closest to the right side of the Excavation (Rivas January 10, 2019 tr at 81).

Plaintiff has failed to create an issue of fact as to whether the accident occurred due to dirt or debris sliding from the dirt pile into the Excavation. Plaintiff testified that the dirt removed from the Excavation was piled on the left side of the Excavation (*id.* at 50-51). That said, there was nothing in plaintiff's nor any of the witnesses' testimonies to contradict Erdman's testimony that the right side of the Excavation collapsed on plaintiff. Further, the fact that neither plaintiff nor the deposed individuals specifically observed the wall collapsing does not preclude a determination on summary judgment as to how the accident occurred (*See generally Casabianca v. Port Auth.,* 237 AD2d 112, 113 [1st Dept 1997] ["That the accident was unwitnessed does not preclude summary judgment."]).

In the instant action, the accident occurred when the right wall of the Excavation collapsed upon the Plaintiff, which does not fall within the scope of Labor Law § 240 (1). As such, Seward and Onsite are entitled to summary judgment dismissing plaintiff's Labor Law § 240 (1) claim as against them.

Plaintiff's Labor Law § 241 (6) claims

Labor Law §241 (6) reads as follows:

"Construction, excavation and demolition work

. . .

"6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

"To establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision 'mandating compliance with concrete specifications'" (*Ennis v. Noble Constr. Group, LLC,* 207 AD3d 703, 705 [2d Dept 2022], citing *Ross v. Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494 [1993]). In addition, the rule or regulation alleged to have been breached must be a "specific, positive command" (*Toussaint* at 93, quoting *Rizzuto v L.A. Wenger Contr. Co.* at 349).

"Labor Law § 241(6) imposes a non-delegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (*Toussaint v. Port Auth. of N.Y.,* 38 NY3d 89, 93 [2022][internal quotations marks and citations omitted]). The non-delegable duty is absolute and "imposes liability upon a general contractor for the negligence of a subcontractor, even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998], citing *Ross v. Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494 [1993]).

For the reasons previously stated, Fred Smith has established that it is not a proper Labor Law defendant in this action. As such, Fred Smith is entitled to dismissal of plaintiff's Labor Law § 241 (6) claims as against it (*See Ahern v NYU Langone Med. Ctr.,* 147 AD3d 537, 538 [1st Dept 2017], citing *Lopez v Dagan,* 98 AD3d 436, 437 [1st Dept 2012] *lv denied* 21 NY3d 855 [2013]).

Plaintiff argues that he is entitled to summary judgment on his Labor Law § 241 (6) claim premised upon defendants' alleged violations of New York Industrial Code Rules 12 NYCRR §§ 23-4.2(a), 23-4.2(f), 23-4.2(g), 23-4.3, 23-4.4, and 23-4.5.

Seward and Onsite argue that they did not violate any of the sections of the New York Industrial Code, and that any alleged violations of the New York Industrial Code were not the proximate cause of the alleged incident.

Initially, Seward and Onsite argue that plaintiff was a "recalcitrant worker" and that he was the sole proximate case of his injuries.

"[A]n owner who has provided safety devices is not liable for failing to insist that a recalcitrant worker use the devices" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]). The "recalcitrant worker" defense "requires a showing that the injured worker refused to use the safety devices that were provided by the owner or employer" (*Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993]). More specifically, it "requires a showing that the safety device in question was both available and visibly in place at the immediate worksite of the injured employee who deliberately refused to use it." (*Powers v Lino Del Zotto & Son Builders, Inc.*, 266 AD2d 668, 669 [3rd Dept 1999] [internal quotation marks and citations omitted].

Recalcitrance "is not established merely by showing that the worker failed to comply with an employer's instruction to avoid using unsafe equipment or engaging in unsafe practices, or to use a particular safety device" (*Powers* at 669). Rather, the defendant must show that plaintiff

deliberately refused to obey a direct and immediate instruction to use an available safety device (*see Vitucci v. Durst Pyramid LLC*, 205 AD3d 441, 444 [1st Dept 2022], citing *Saavedra v 89 Park Ave. LLC*, 143 AD3d 615 [1st Dept 2016]; *see also Santo v Scro*, 43 AD3d 897, 898-899 [2d Dept 2007]).

Seward and Onsite's recalcitrance argument is based entirely upon Erdman and Staszyn's affidavits. Plaintiff argues that the Court should not consider these affidavits. Specifically, plaintiff argues that Erdman's affidavit contradicts his deposition testimony as to a conversation he had with one of plaintiff's co-workers, Milton Cartagena, and that the affidavit was specifically tailored to avoid the consequence of said testimony. Plaintiff further argues that Staszyn was not plaintiff's supervisor and did not have any authority or control over plaintiff's work.

When a question is not directly asked in deposition, the court may properly consider a subsequent affidavit that provides greater specificity without directly contradicting the deposition testimony (*see Macgregor v. Mrmd Ny Corp.,* 194 AD3d 550, 551 [1st Dept 2021], citing *Red Zone LLC v Cadwalader, Wickersham & Taft LLP,* 27 NY3d 1048, 1049 [2016]; *McLaughlin v Arch Ins. Co.*, 168 AD3d 627 [1st Dept 2019]).

Upon review of the record, Erdman's affidavit does not contradict his deposition testimony. Erdman testified that on the date of the accident at approximately 4:45 p.m., he had a conversation with the workers "as a group," including Milton Cartagena, about "moving lumber forward,putting dirt back" (Erdman tr at 79-81). This testimony is not contradicted by his statement in his affidavit that he gave specific safety instructions to plaintiff and his co-workers when plaintiff entered the Excavation. In addition, Erdman was never questioned as to whether he directly told plaintiff to take any safety precautions immediately prior to the accident. As such, the Court will consider Erdman's affidavit.

The Court will also consider Staszyn's affidavit, as it was duly signed and sworn before a notary (*see Sirico v F.G.G. Prods., Inc.,* 71 AD3d 429, 434 [1st Dept 2010]), and he has personal knowledge of his interaction with plaintiff on the date of the accident.

Read together, Erdman and Staszyn's affidavits are insufficient to establish that plaintiff was recalcitrant. Erdman states that he "instructed [plaintiff] and his co-workers who were present that two additional sheets of plywood were to be installed in the excavation once plaintiff extended the trench another four feet" (Erdman aff para 10). As such, Erdman's instruction to install additional plywood was conditional upon plaintiff extending the Excavation an additional four feet. However, Seward and Onsite failed to show that the accident occurred when or after plaintiff had extended the Excavation an additional four feet. As such, they have failed to establish that plaintiff refused to obey Erdman's directions or that said alleged refusal was the sole proximate cause of the accident.

In addition, Staszyn's statement that he told plaintiff that more shoring needed to be added to the Excavation is insufficient to establish that plaintiff was recalcitrant (*see Somereve v Plaza Constr. Corp.*, – AD3d –, 2019 NY Slip Op 33728(U) [Sup Ct, NY County], citing *Morin v. Machnick Builders, Inc.*, 4 AD3d 668 [3rd Dept 2004] ["Merely failing to follow a coworkers' advice does not render a plaintiff 'recalcitrant'"]).

As such, Seward and Onsite failed to establish prima facie that plaintiff was a recalcitrant worker.

Industrial Code 12 NYCRR 23-4.2 (a)

Industrial Code 12 NYCRR 23-4.2 (a) is sufficiently specific to form a basis for liability pursuant to Labor Law § 241(6) (*see Moscati v Consolidated Edison Co. of N.Y., Inc.,* 168 AD3d 717 [2d Dept 2019]) and reads in relevant part as follows:

"Trench and area type excavations

"(a) Whenever any person is required to work in or is lawfully frequenting any trench or excavation five feet or more in depth which has sides or banks with slopes steeper than those permitted in Table I of this Subpart, such sides or banks shall be provided with sheeting and shoring in compliance with this Part (rule). Such sheeting and shoring system shall be in contact with the sides or banks of such trench or excavation. A designated person shall carefully inspect such sheeting and shoring at least once each day and more frequently in the event of rain, the presence of additional surface or ground water from any source, excessive ground vibrations or whenever additional loads of any kind have been imposed near or adjacent to such excavation. Additional protection against slides and cave-ins shall be provided whenever necessary. Any trench or excavation in clay, sand, silt, loam or nonhomogeneous soil which has sides or banks more than three feet but less than five feet in depth shall be provided with side or bank protection in compliance with this Part (rule)…"

Plaintiff argues that the Excavation was not properly shored or inspected as required by 12 NYCRR 23-4.2 (a). He argues there was water in the Excavation and as such, defendants were required to inspect the shoring more than once a day. He further argues that the Excavation was in nonhomogeneous soil and that defendants did not provide any additional side or bank protection.

Seward and Onsite argue that there is no basis to conclude that plaintiff's injuries were proximately caused by a violation of 12 NYCRR 23-4.2 (a).

Here, there are issues of fact as to whether the accident was proximately caused by a violation of 12 NYCRR 23-4.2(a). Specifically, there are issues of fact as to whether any shoring was provided for the walls of the Excavation and as to how often Erdman inspected the shoring.

12 NYCRR 23-4.2 (a) requires that the walls an excavation be provided with adequate shoring. Plaintiff testified that there was no protection on the walls of the Excavation on the first and second days of work (Rivas January 10, 2019 tr at 47-48). Said statement is inconsistent with Erdman's testimony that there was shoring on the walls of the deeper area of the Excavation (Erdman tr at 57-60). As such, there is an issue of fact as to whether there was any shoring on the walls of the Excavation.

12 NYCRR 23-4.2 (a) also requires that a designated person inspect shoring more than once a day in the presence of ground water. Plaintiff and Erdman both testified that there was water in the Excavation on the date of the accident (Rivas January 10, 2019 tr at 56 - 58, 61-63; Erdman tr at 72). However, Erdman was never questioned as to how often he inspected the shoring on the date of the accident. Erdman's statement in his affidavit that he "last inspected" the Excavation and shoring at approximately 4:30 p.m. on January 21, 2015 (Erdman aff at para 5), does not necessarily imply that this was the only time he inspected the shoring on the date of the accident. As such, there is an issue of fact as to whether Erdman inspected the shoring more than once on the date of the accident.

Plaintiff's remaining argument that defendants were required to provide any additional side bank protection in compliance with 12 NYCRR 23-4.2 (a) is without merit.

12 NYCRR 23-4.2 (a) requires that side bank protection must be provided for an "excavation in … nonhomogeneous soil which has sides or banks more than three feet but less than five feet in depth". There is nothing in the record to show that the Excavation was in "nonhomogeneous soil". Erdman testified that the dirt under the asphalt was hard "compacted soil" (*id.* at 47-48). In addition, both Erdman and plaintiff testified that the walls of the Excavation were more than five feet high on the date of the accident (Rivas January 10, 2019 tr at 70; Erdman tr at 73).

As such, plaintiff's motion and Seward and Onsite's cross-motion for summary judgment are both denied as to plaintiff's Labor Law § 241(6) based upon an alleged violation of Industrial Code 12 NYCRR 23-4.2 (a).

Industrial Code 12 NYCRR 23-4.2 (f)

Industrial Codes 12 NYCRR 23-4.2 (f) is sufficiently specific to form a basis for liability pursuant to Labor Law § 241(6) (*see e.g. McCombs v. Cimato Enters.,* 20 AD3d 883 [4th Dept 2005]) and reads as follows:

"Trench and area type excavations

> "(f) Excavated material and other superimposed loads shall be placed at least 24 inches back from the edges of any open excavation and shall be so placed or piled that no part thereof can slide, fall or roll into the excavation. Such 24-inch required clearance may be reduced if the employer installs a barrier or similar retaining device which is designed and constructed to prevent excavated material from falling into the excavation."

Plaintiff argues that the pile of excavated dirt was placed too close to the Excavation in violation of 12 NYCRR 23-4.2 (f) and was a proximate cause of the accident.

Seward and Onsite argue that there is no basis to conclude that 12 NYCRR 23-4.2(f) was violated as there was no evidence that any of the dirt that had been piled outside of the trench fell into the Excavation.

Here, there is no basis to conclude that the accident occurred as a result of a violation of NYCRR 23-4.2(f). As previously stated, the record establishes that the accident occurred as the result of the right wall of the Excavation collapsing upon plaintiff. Plaintiff testified that the loose dirt was piled on the left side of the trench (Rivas January 10, 2019 tr at 50-51). There is nothing in the record to suggest that the accident involved the left side wall of the Excavation or the pile of loose dirt.

As such, Seward and Onsite are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim based upon an alleged violation of Industrial Code 12 NYCRR 23-4.2 (f).

Industrial Code 12 NYCRR 23-4.2 (g)

Industrial Code 12 NYCRR § 23-4.2 (g) is sufficiently specific to form a basis for liability pursuant to Labor Law § 241(6) (*see e.g. Daniels v Potsdam Cent. Sch. Dist.,* 256 AD2d 897, 898 [3rd Dept 1998]) and reads as follows:

> "Trench and area type excavations
>
> "(g) All sides or banks, slopes and areas in and adjacent to any excavation shall be stripped and cleared of loose rock or any other material which may slide, fall, roll or be pushed upon any person located in such excavation."

Plaintiff argues that the pile of excavated dirt next to the Excavation falls within the scope of 12 NYCRR 23-4.2 (g), and that defendants' failure to properly clear the pile was a proximate cause of the accident.

Seward and Onsite argue that 12 NYCRR 23-4.2 (g) is inapplicable as there is no basis to conclude that the accident occurred as the result of a failure to strip or clear loose rock or any other material from the side of the Excavation.

Here there is no basis to conclude that the accident occurred as a result of a violation of NYCRR 23-4.2 (g). As previously stated, the record establishes that the underlying accident occurred as the result of the right wall of the Excavation collapsing upon plaintiff. There is nothing in the record to suggest that the accident occurred as the result of loose rock or other material sliding, falling, or rolling upon plaintiff from the pile of excavated material or due to a failure to adequately strip the walls of the Excavation.

As such, Seward and Onsite, are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim based upon an alleged violation of Industrial Code 12 NYCRR 23-4.2 (g).

Industrial Code 12 NYCRR 23-4.3

Industrial Code 12 NYCRR 23-4.3 is sufficiently specific to form a basis for liability pursuant to Labor Law 241 (6) (*see e.g. Finkle v. A.J. Eckert Co.,* 11 AD3d 794, 794[3rd Dept 2004]) and reads as follows:

> "Access to excavations
>
> Ladders, stairways or ramps constructed in compliance with this Part (rule) shall be provided in every excavation more than three feet in depth for safe access and egress. Such ladders, stairways or ramps shall be installed in sufficient number and in such locations as to be readily accessible to any person wishing to enter or leave such excavation without more than 25 feet of lateral travel."

Plaintiff argues that defendants' failure to provide a ladder or other means of exit, caused him to become trapped inside the Excavation as it collapsed on him.

Seward and Onsite argue that the back of the Excavation was sloped, allowing plaintiff to enter and exit, and there is no basis to conclude that the lack of a ladder was the proximate cause of the accident.

Here, there is no basis to conclude that the lack of ladders proximately caused the accident. Plaintiff testified that the accident occurred while he was kneeling down, shoveling (Rivas January 10, 2019 tr at 28, 81-82), and that the accident happened very quickly (*id.* at 85-86). His testimony does not suggest that the presence of a ladder would have prevented the accident.

As such, Seward and Onsite are entitled to summary judgment dismissing plaintiff's Labor Law § 241(6) claim based upon an alleged violation of Industrial Code 12 NYCRR 23-4.3.

Industrial Code 12 NYCRR 23-4.4 & 4.5

Industrial Codes 12 NYCRR 23-4.4 is sufficiently specific to form a basis for liability pursuant to Labor Law § 241 (6) (*see Ferreira v Village of Kings Point,* 68 A.D3d 1048 [2d Dept 2009]) and reads as follows[2]:

> "Sheeting, shoring and bracing
>
> "(a) Where any excavation is not protected by sloped sides or banks in compliance with Table I of this Subpart, any person in such excavation shall be protected by sheeting, shoring and bracing in compliance with Tables II, III and IV of this Subpart. Sizes of materials listed in the tables are nominal or trade dimensions.
> Table II
> …
>
> (b) Shores, struts and braces, whether horizontal or inclined, shall be of adequate size to provide stiffness and adequately braced to withstand the loads intended to be imposed thereon. The ends of all braces shall be individually anchored and fastened to fully resist all imposed forces and to prevent such braces from shifting or slipping. The placing of any inclined shores, struts or braces at any angle exceeding 30 degrees from the horizontal is prohibited.
>
> (c) Each earth-supported shore, strut or brace shall bear against a footing of sufficient area and stability to prevent any subsidence, yield or shifting of such shore, strut or brace."
>
> Table III
> …"

Plaintiff argues that defendants' failure to meet the requirements of 12 NYCRR 23-4.4 & 4.5 as to the shoring was the proximate cause of the accident. Plaintiff's argument is based upon an expert affidavit by William Marletta, Ph.D., CSP, who investigated the accident and concludes that the shoring on the walls of the Excavation did not meet the requirements of 12 NYCRR 23-4.5.

[2] 12 NYCRR 23-4.5 Use of Table III and IV addresses the use of Tables III and IV of 12 NYCRR 23-4.4.

Seward and Onsite argue that the there is no basis to establish that defendants violated 12 NYCRR 23-4.4 & 4.5. Their argument is based upon their own expert affidavit by Joseph M. Danatzko, P.E., who examined the depositions, affidavits, and concludes that there were no violations of 12 NYCRR 23-4.4 & 4.5.

For the reasons indicated in the Court's analysis of plaintiff's Labor Law § 241 (6) claim for alleged violations of Industrial Code 12 NYCRR 23-4.2 (a), the Court finds that there are also issues of fact as to whether plaintiff's injuries were proximately caused by a violation of 12 NYCRR 23-4.4 & 4.5. Specifically, there is an issue of fact as to whether there was any shoring on the walls of the Excavation prior to the accident.

Even assuming, arguendo, that there was shoring on the walls of the Excavation, there is also an issue of fact as to whether the shoring met the specific requirements of 12 NYCRR 23-4.4 & 4.5. There was no testimony as to the specific dimensions of the shoring in relation to the walls of the Excavation, or how the shoring was braced or anchored. Erdman testified as to the thickness of the plywood sheets and approximate length of the lumber used to construct the shoring (*id.* at 57-58), but he did not testify as to how high or how wide the shoring was in relation to the walls of the Excavation. He only testified that the shoring was created using plywood sheets and four-by-four lumber, which was nailed to the sheets (*id.* at 84-85).

As such, plaintiff's motion and Seward and Onsite's cross-motion for summary judgment are both denied as to plaintiff's Labor Law § 241(6) based upon alleged violations of Industrial Code 12 NYCRR 23-4.4 & 4.5.

Plaintiff's remaining Labor Law § 241(6) claims and claims pursuant to Labor Law 240 (2), 240(3) and 241-a

As plaintiff does not affirmatively seek relief nor oppose dismissal of its remaining Labor Law § 241 (6) claims, said claims are dismissed as 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."]).

Similarly, as plaintiff does not oppose defendants' motion to dismiss its claims pursuant to Labor Law §§ 240 (2); 240 (3) and 241-a, plaintiff implicitly concedes to the dismissal of said claims (*See JP Morgan Chase Bank, N.A. v Jones*, 194 AD3d 483, 483[1st Dept 2021], citing *Esponda v Ramos-Ciprian*, 179 AD3d 424, 426 [1st Dept 2020]).

As such, plaintiff's remaining Labor Law § 241(6) claims and claims pursuant to Labor Law §§ 240(2), 240(3) and 241-a are hereby dismissed.

Plaintiff's Labor Law § 200 and common law negligence claims

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."

Labor Law § 200 "codifies an owner's or general contractor's common-law duties of care, there are 'two broad categories' of personal injury claims: 'those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed'" (*Ana Rosa, as Administrator of the Estate of Danny Rosa, v 47 East 34th Street (NY), L.P., et al*., 208 AD3d 1075, 2022 NY Slip Op 05144 [1st Dept 2022], quoting *Cappabianca*

v Skanska USA Bldg. Inc., 99 AD3d 139, 144 [1st Dept 2012]). Neither common law negligence nor Labor Law § 200 makes an owner, a general contractor or their statutory agent vicariously liable for the negligence of a downstream subcontractor (*see DeMaria v RBNB 20 Owner, LLC*, 129 AD3d 623, 625 [1st Dept 2015], citing *Burkoski v. Structure Tone, Inc.,* 40 AD3d 378 [1st Dept 2007]).

> "Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it. Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work."

(*Cappabianca* at 144 [internal citations omitted]; *see also Toussaint v Port Auth. of N.Y. & NY*, 38 NY3d at 94)

Further, "the mere fact that a party had the authority to stop unsafe work does not show that it had the requisite degree of control and actually exercised that control" (*see Galvez v Columbus 95th St. LLC*, 161 AD3d 530, 531-532 [1st Dept 2018], citing *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.,* 104 .D3d 446, 449 [1st Dept 2013]).

Here, plaintiff's Labor Law § 200 and common law negligence claims arise from the means and methods of the excavation work, specifically defendants' alleged failure to provide proper shoring in the Excavation. As such, to find defendants liable, plaintiff must establish that defendants exercised "actual supervision or control over the work" that allegedly caused plaintiff's injury (*Gonzalez v DOLP 205 Props. II, LLC*, 206 AD3d 468, 471 [1st Dept 2022]).

To that end, Seward and Onsite have established prima facie that they did not actually supervise or control the injury producing work i.e. the shoring of the Excavation.

Both plaintiff and Erdman testified that Cisney supervised the Project, which included shoring the walls (Rivas January 10, 2019 tr at 38-39, 46; Erdman tr at 77, 102-103).

Similarly, Fred Smith established prima facie that it did not actually supervise or control the Project.

In opposition, plaintiff does not point to any evidence to raise an issue of fact. Erdman's testimony that an Onsite employee would check on the progress of the Excavation and was "overseeing" the work (Erdman tr at 96-98) is insufficient to raise an issue of fact as to whether Onsite actually supervised or controlled the injury-producing work (*See Hughes v. Tishman Constr. Corp.,* 40 A.D.3d 305, 311 [1st Dept 2007] ["A contractor's general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed."]).

As such, Fred Smith, Seward, and Onsite, are entitled to summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims.

Seward and Onsite's crossclaims for breach of contract and contractual indemnification against Fred Smith (motion sequence 004)

Seward and Onsite allege in their crossclaims that Fred Smith was contractually obligated to obtain insurance for their benefit and failed to do so. They further claim that they are entitled to contractual indemnification by Fred Smith as to the main action.

Fred Smith argues that there was no contract between Fred Smith with Seward or Onsite, and as such, no basis for their breach of contract and contractual indemnification claims.

Here, it is undisputed that Fred Smith did not have any contract with Seward or Onsite as to the subject excavation work. As such, there is no basis for Seward and Onsite'

crossclaim that Fred Smith was contractually bound to obtain liability insurance for their benefit. Similarly, there is no basis for Seward and Onsite's contractual indemnification claim (*see Trawally v City of New York*, 137 AD3d 492, 492-493 [1st Dept 2016], quoting *Alfaro v 65 W. 13th Acquisition, LLC,* 74 AD3d 1255, 1255 [2d Dept 2016] ["The right to contractual indemnification depends upon the specific language of the contract"]).

As such, Fred Smith is entitled to summary judgment dismissing Seward and Onsite's crossclaim for breach of contract and contractual indemnification.

Seward and Onsite's crossclaims for contribution and common law indemnification against Fred Smith (motion sequence 004)

Seward and Onsite further claim that the underlying accident was the result of Fred Smith's negligence and that they are entitled to contribution and common law indemnification by Fred Smith as to the main action.

"To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012], citing *McCarthy v Turner Constr., Inc.,* 17 NY3d 369, 377-378 [2011]; *Reilly v S. Digiacomo & Son, Inc.*, 261 AD2d 318 [1st Dept 1999])

For the reasons previously stated, Fred Smith has established its freedom from negligence.

In opposition, Seward and Onsite have failed to raise an issue of fact.

As such, Fred Smith is entitled to summary judgment dismissing Seward and Onsite's crossclaims for contribution and common law indemnification.

The parties' remaining arguments have been considered and found unavailing.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion (motion sequence 002) pursuant to CPLR 3212, for summary judgment in his favor as to liability on his Labor Law 240 (1) and 241 (6) claims against Seward, Onsite and Fred Smith is hereby denied; and it is further

ORDERED that Seward and Onsite's cross-motion pursuant to CPLR 3212, for summary judgment is granted to the extent that the complaint is dismissed, except for plaintiff's Labor Law 241 (6) claim for alleged violations of Industrial Code 12 NYCRR 23-4.2(a), 23-4.4, and 23-4.5 as against Seward and Onsite; and it is further

ORDERED that Fred Smith's motion (motion sequence 004) pursuant to CPLR 3212 for summary judgment dismissing plaintiff's action and Seward and Onsite's crossclaims is granted, and the complaint and crossclaims are dismissed in their entirety as against Fred Smith, with costs and disbursements to Fred Smith as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of Fred Smith; and it is further

ORDERED that the action is severed and continued against the remaining defendants as to plaintiff's remaining claims; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that the remaining parties appear for a conference in Part 46 via Microsoft Teams on December 16, 2022 at 11AM.

The foregoing constitutes the Order and Decision of the Court.

Index #151607-16

11/7/2022
DATE

RICHARD LATIN, 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