SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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CHRISTOPHER HAVISON, MICHELLE HAVISON,

Plaintiff,

- v -

PORT AUTHORITY OF NEW YORK & NEW JERSEY, PORT AUTHORITY TRANS HUDSON CORPORATION, SIEMENS INDUSTRY, INC., ALDRIDGE ELECTRIC, INC.,CH2M HILL NEW YORK, INC.,TUV RHEINLAND MOBILITY, INC.,D/A BUILDERS, LLC

Defendant.

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INDEX NO. 158983/2015

MOTION DATE 11/22/2022

MOTION SEQ. NO. 008 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 263, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 299, 301, 303, 306, 307, 308, 309, 310, 311

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 262, 265, 266, 267, 300, 302, 304, 305

were read on this motion to/for SUMMARY JUDGMENT.

BACKGROUND

Plaintiffs commenced this action seeking damages for personal injuries sustained by plaintiff Christopher Havison (Christopher), which they allege incurred when he was struck by cables that fell from a hoisting device on September 23, 2014, in the course of his employment while working on a construction project at a PATH station in Jersey City, New Jersey. Plaintiffs assert causes of action for negligence, violations of the Federal Employers' Liability Act, violations of New York Labor Law §§ 200, 240, and 241(6), Strict Liability, and for loss of consortium on behalf of Christopher's spouse, plaintiff Michelle Havison.

By stipulation dated June 27, 2019, plaintiffs signed a stipulation voluntarily discontinuing their claims against defendant TUV Rheinland Mobility, Inc. (TUV).

PENDING MOTIONS

On March 4, 2022, defendant CH2M Hill New York, Inc. (CH2M) moved for an order awarding it Summary Judgment dismissing the amended complaint and all claims and cross claims as to it. (Mot. Seq. 8)

On April 27, 2022, plaintiffs cross moved for an order granting them partial summary judgment on liability against CH2M on their claims pursuant to Labor Law §240(1) and §241(6).

On March 3, 2022, TUV moved for an order pursuant to CPLR 3212 granting it summary judgment dismissing all cross claims against it. (Mot. Seq. 9).

On November 22, 2022, the court heard oral argument and reserved decision.

The motions are consolidated herein for determination as set forth below.

FACTS

Undisputed Facts

Pursuant to the parties' statements of material fact, and responses thereto, the following facts are undisputed:

1. At the time of his accident, Christopher was employed by Daidone Electric, Inc. (Daidone) as an electrician; in that capacity he was performing work at the Journal Square Path station in New Jersey on the Port Authority Trans-Hudson (PATH) Automatic Train Control Project (the project).
2. Christopher was working the night shift, when on September 23, 2014, at approximately 2:30 a.m., he was injured in the course of his employment when a cable that he helped load onto an aerial lift fell while being lifted and struck him.

3. By contract dated December 11, 2009, defendant Port Authority of New York & New Jersey (PANYNJ) retained defendant Siemens Industry Inc., Safetran Systems Corporation, and defendant D/A Builders (collectively, Siemens Team) to complete the project, which was a "complete system for controlling train movements, enforcing train safety, and directing train operation, utilizing Communications Based Train Control technology."
4. A portion of the Project involved the installation of cables on poles ten feet in the air.
5. By contract dated November 13, 2009, PANYNJ retained Booz Allen Hamilton, Inc. (Booz Allen) to provide all management and engineering services as required to oversee and manage the work of the ATC Contractor and to aid PATH in placing the ATC System service (Booz Allen Contract).
6. The Booz Allen Contract was later assumed by and assigned to CH2M pursuant to an Asset Purchase Agreement dated May 3, 2011; CH2M's role and responsibilities on the project are set forth in the Booz Allen Contract.

Booz Allen Contract

The following provisions of the Booz Allen Contract are at issue:

21. The Consultant assumes the following distinct and several risks to the extent arising from the negligent or willful intentional acts or omissions of the Consultant or its sub consultants in the performance of services hereunder:
D. The risk of claims, just or unjust, by third persons, made against the Consultant or its sub consultants or the Authority on account of injuries (including wrongful death), loss or damage of any kind whatsoever including claims against the Consultant or its subconsultants or the Authority for the payment of workers' compensation, whether such claims are made and whether such injuries, damages and loss are sustained at any time both before and after the completion of services hereunder.

The Consultant shall indemnify the authority against all claims described in Paragraphs A through D above and for all expense incurred by it in the defense, settlement, or satisfaction thereof, including expenses of attorneys. If so directed, the Consultant shall defend against any claim described in subparagraphs B. C. and D above...

No third party rights are created by the Agreement, except to the extent that the Agreement specifically provides otherwise by use of the words "benefit" or "direct right of action".

The tasks to be performed by the Consultant may include but shall not be limited to the following:

TASK I. INSPECTION SERVICES

1. Provide system inspection services by trained signal system inspectors, subject to PATH approval, qualified in FRA installation and testing regulations, during the Signal System installation, testing, commissioning, demolition and removal of the old Signal System, and punch list cycles. Inspectors shall not be reassigned unless specifically approved in writing by PATH.

2. Except where PATH has designated a Consultant representative to direct such inspection activities, inspectors shall report to and receive instructions and daily assignments directly from PATH. The number of inspectors assigned shall be sufficient to provide full-time coverage of all of the Contractor's active work shifts and locations on each work day (including weekends when used) during all on-site work and testing, plus support as needed for factory inspections.

12. The inspection services shall ensure that only first (new) material is used, good workmanship is performed, and work is in accordance with all approved plans and Contract documents. Inspection services shall include, but not be limited to:

a. Inspecting:
    1) Components in process and after fabrication;
    2) Production tooling, test equipment, and quality of workforce;
    3) Signal system assembly and integration;

b. Routinely monitor and critique;
    1) Contractor and subcontractor inspection and QA/QC programs;
    2) Progress of Contractors production program;
    3) Configuration management;
    4) Contractor revisions and configuration control documentation;
    5) Schedule compliance;

c. Monitor and inspect any PATH-authorized extra work performed by the Contractor;

d. Monitor the removal of existing / retired signal equipment from PATH;

e. Provide follow-up technical review and monitoring of corrective actions, changes, and deviations by the Contractor; and,

f. Provide written certification signal equipment is ready for shipment to PATH.

RSC Contract

On November 17, 2009, PANYNJ entered into a contract with nonparty Rail Safety Consulting LLC (RSC), which was assigned to TUV after it acquired RSC, the following provisions of which are at issue:

II. SCOPE OF WORK
The services of [RSC] shall generally consist of serving as the Independent Safety Assessor ("ISA") for the PATH Railcar and Signal Program…

Services shall include independent reviews during the design, development, manufacture, integration, factory testing, installation, testing, and commissioning of a Communications-Based Train Control ("CBTC") based ATC system for PATH rail network. These reviews shall provide verification that all safety related requirements have been met…

VII. LIABILITY INSURANCE AND WORKERS' COMPENSATION INSURANCE
21. [RSC] assumes the following distinct and several risks to the extent arising from the negligent or willful intentional acts or omissions of [RSC] or its subconsultants in the performance of services hereunder:

D. The risk of claims, just or unjust, by third persons made against [RSC] or its subconsultants or [PANYNJ] on account of injuries (including wrongful death), loss or damage of any kind whatsoever arising in connection with the performance of services hereunder . . . whether such claims are made and whether such injuries, damage and loss are sustained at any time both before and after the completion of services hereunder.

[RSC] shall indemnify [PANYNJ] against all claims described in subparagraphs A through D and for all expense incurred by it in the defense, settlement or satisfaction thereof, including expenses of attorneys.

Relevant Deposition Testimony

Christopher testified that prior to his shift on the night of the accident, when discussing the work to be performed that night, he expressed disagreement to his supervisors, including the Port Authority employee in charge and the foreman from Daidone, about the proposed method of installing the wire on the messenger cable using an aerial lift. Christopher believed that a piece of equipment called a "choo"[1] should have been used instead as it was more safe, but his concerns were dismissed. He stated that he believed CH2M had multiple employees present at the planning meeting on the night of the accident, although he wasn't sure whether any of them were present when he voiced his concerns about the aerial manlift or whether they were present during his accident. Christopher testified that CH2M employees would frequently be at the

[1] In plaintiffs EBT transcripts it is spelled "cho" but elsewhere is spelled "choo."

jobsite, although the exact frequency varied, that he was sure that he raised safety concerns with them at some point in the project, and that he believed their role on the project was "on site safety."

Robert Chin, project manager for Daidone, testified that CH2M had no responsibility for the safety of Daidone employees. He testified that CH2M's role on the project was as a consultant to PATH, that would "[i]nterface between the contractor and the customer." He testified that when track access or Path equipment were needed, CH2M and Path would confer and tell them which requests could be fulfilled and which could not, but that other than whether or not resources could be obtained from PATH, CH2M had no say over means, method, or use of equipment. However, he also testified that CH2M inspectors would stop work if they felt that the means and methods being used were unsafe, although he did not believe that CH2M inspectors were present at every work shift. He testified that the choo was owned by defendant Aldridge Electric, Inc., who was part of a joint venture with Daidone. He stated that while he did not recall the conversation about whether or not to use the choo prior to the accident, the decision would usually be "a discussion with the foreman, [Christopher], general foreman, myself, other project managers involved", and that in this case, it was obvious the choo would not have been used because there were too many obstructions and not enough clearance, so there would not be any real discussion. However, he agreed in hindsight that an using aerial lift was improper, stating that the task should have been accomplished either by using a come-along to lift the cable and climbing a ladder to secure it, or by using pulleys.

William DeTore, railroad consultant for CH2M's successor company who was initially hired by CH2M after the accident, testified that CH2M provided three roles on the project, including "construction management… evaluation of the design from Siemens… and finally the

[car-borne train control] … which was also design and implementation" and that it provided no role on the project with respect to site safety other than ensuring resources were in place. At a later deposition, he clarified that CH2M inspectors would ensure that equipment was installed safely, but that they did not give direction to workers or foremen with respect to ensuring the means and methods followed were safe.

Anthony LaPolla, a rail safety engineer employed by RSC who was a deputy project manager on the project, testified that RSC's role on the project was as an "Independent Safety Assessor," and their duties were to assist PATH in complying with federal regulations, assess supplier or contractor products and systems for safe use, and make a safety recommendation on the safety readiness of deploying the system on PATH property. He stated that RSC's installation work was limited to what was mounted on trains, and that it was not involved in construction safety or civil work safety. He also stated that RSC had no responsibility with regard to means, methods, or scheduling work on the project, and it had no employees present at the accident site.

Plaintiffs' Expert Affidavit

Plaintiffs attach the expert affidavit of professional engineer Walter Konon (Konon), who concludes from his review the relevant testimony and documents related to the accident that the aerial lift that was used at the time of the accident was designed only to lift workers, not heavy cable per the manufacturer's safety instructions, that using it for that purpose was unsafe, and that the lift's maximum lift capacity of 500 pounds was exceeded by over 100 pounds. He opines that had a proper hazard analysis been performed beforehand, these issues should have been identified and alternative means to lift the cable, and that all parties at the worksite had a safety obligation with respect to OSHA and identifies violations of OSHA regulations 1926.501(c)(3) and 1926.453(b)(2)(vi) by all employers at the worksite.

DISCUSSION

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. CPLR 3212(b); *Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 (2019). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." *Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 (2016), quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 (1988). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." *O'Brien v Port Auth. of New York and New Jersey*, 29 NY3d 27, 37 (2017).

Konon's affidavit is admissible for the purposes of this motion

CH2M contends that as plaintiffs fail to attach Konon's CV to their motion, the expert affidavit cannot be considered, and that even if the court were to overlook that defect, the affidavit should be disregarded as Konon makes broad, unsubstantiated conclusions. Plaintiffs attach the CV in reply and argue that the failure to attach the CV to the motion was a clerical error, that was ultimately harmless as they disclosed Konon's CV along with his expert report to CH2M over a year prior to the motion, and thus their omission should not bar consideration of the expert affidavit by the court. They argue that his credentials are sufficient to opine on the issues at hand, and that his opinions are properly substantiated.

As CH2M possessed Konon's CV prior to the motion, and as plaintiffs attached it in reply, the affidavit is considered.

CH2M's Motion for Summary Judgment Dismissing Plaintiffs' Labor Law Claims Is Granted and Plaintiffs' Cross Motion For Summary Judgment Is Denied

Under New York's choice-of-law principles, the court applies interest analysis to determine which of two competing jurisdictions has the greater interest in having its law applied in the litigation. *Padula v Lilarn Props. Corp.* 84 NY2d 519 (1994). "Two separate inquiries are thereby required to determine the greater interest: (1) what are the significant contacts and in which jurisdiction are they located; and (2) whether the purpose of the law is to regulate conduct or allocate loss." *Id.* at 521. Where laws are conduct regulating in nature, the law of the place of the tort applies. *Id.*; *Rose v Arthur J. Gallagher & Co.*, 87 AD3d 733 (2d Dept 2011).

It is well settled that New York Labor Law provisions, including §§ 200, 240(1), and 241(6), are conduct regulating in nature and thus do not apply to accidents that occur outside of New York State even where, as here, all parties are New York domicilliaries. *Osborn v 56 Leonard LLC*, 138 AD3d 624 (1st Dept 2016); *see also Padula v Lilarn Props. Corp.*, 84 NY2d 519 (1994); *Salvador-Pajaro v Port Auth. Of New York and New Jersey*, 52 AD3d 303 (1st Dept 2008) (*finding Labor Law provisions inapplicable to accident in New Jersey despite Port Authority's status as an Interstate Compact agency*). As it is undisputed that the underlying accident occurred in New Jersey, it is New Jersey law rather than New York law that governs. Thus, CH2M's motion to dismiss plaintiffs' Labor Law claims is granted, and plaintiffs' cross motion for summary judgment on their Labor Law claims is denied.

As plaintiffs fail to oppose the portion of CH2M's motion seeking to dismiss its claim for strict liability, that claim is also dismissed.

CH2M's Motion for Summary Judgment Dismissing Plaintiffs' Negligence And Loss of Consortium Claims Against It Is Granted

The elements of a negligence claim under New Jersey law are the same as they are under New York law, "a duty of care owed by the defendant to the plaintiff, a breach of that duty by the defendant, injury to the plaintiff proximately caused by the breach, and damages." *J.H. v R&M Tagliareni*, 239 NJ 198, 218 (2019). A major consideration in the determination of the existence of a duty of reasonable care under "general negligence principles" is the foreseeability of the risk of injury. *Alloway v Bradlees, Inc.*, 157 NJ 221, 230 (1999). The determination of such a duty "involves identifying, weighing, and balancing several factors—the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." *Id.*, quoting *Hopkins v Fox & Lazo Realtors*, 132 NJ 426, 439 (1993).

While New Jersey has no direct analogue to New York Labor Law, both general contractors and subcontractors have a non-delegable duty to maintain a safe workplace. *Kane v Hartz Mountain Industries*, 278 NJSuper 129 (App Div 1994), *aff'd* 143 NJ 141 (1996). "[S]uch duty does not exist apart from the… contractor's supervision or control over the work with respect to which it is asserted *Coyne v 101 Hudson Street Urban Renewal Associates*, 256 AD2d 48 (1st Dept 1998), *lv denied* 93 NY2d 810 (1999) (*interpreting New Jersey law*). While relevant OSHA regulations may be considered under this analysis, compliance with an OSHA regulation does not in and of itself preclude a finding of negligence, nor does the finding of an OSHA violation constitute negligence *per se*. *Alloway*, 157 NJ at 233-234; *Kane*, 278 NJSuper at 142-144.

CH2M contends that they were not the general contractor for this project, were not Christopher's employer, and had no safety or other responsibilities on this project that would

create a duty to Christopher. They point out that the Booz Allen contract explicitly disclaims third-party rights and argue that they were only obligated to inspect completed work, having no say over means and methods. Plaintiffs argue that CH2M, while not the general contractor, was a construction manager, and was actively involved in planning and coordination, including regarding safety, and thus owed Christopher a duty to maintain a safe workplace.

There is uncontroverted testimony that CH2M did not directly supervise or direct Christopher's work, and there is no evidence other than speculation that they were present at the accident location or that they were involved in the decision making or direction of work that contributed to the accident. Thus, CH2M meets its *prima facie* burden of demonstrating that it owed no duty to plaintiff.

Plaintiffs fail to raise a triable issue of fact in opposition. CH2M's presence at the planning meeting, absent any ability or obligation to affect the means and methods of construction, is insufficient to establish a duty to Christopher, and there is no evidence that it had any additional involvement in the decision beyond speculation. While they had a role in determining requested PATH equipment was available, there is no evidence that alternative equipment was requested here. And while there is testimony that CH2M inspectors had authority to stop to stop work that was being performed in an unsafe manager, that is insufficient to establish control necessary to impose liability. *Martinez v 342 Property LLC*, 89 AD3d 468, 469 (1st Dept 2011). Konnon's affidavit is also insufficient to defeat summary judgment, as its conclusions as to CH2M's control at the jobsite are unsubstantiated and contradicted by the record. Thus, absent the existence of a duty, there is no basis to hold CH2M liable to plaintiffs, and their negligence claim against it is dismissed.

Additionally, as loss of consortium is a derivative cause of action, plaintiffs' cause of action for loss of consortium is dismissed against CH2M. *Many v Lossef*, 190 AD3d 721 (2d Dept 2021).

CH2M's motion for Summary Judgment dismissing all cross claims against it is granted

Absent triable issues of fact as to CH2M's negligence, or that it exercised actual supervision or control over the injury producing work, the cross claims for common law indemnity and contribution are dismissed as against it. *Quiroz v New York Presbyterian/Columbia University Medical Center*, 202 AD3d 555, 557 (1st Dept 2022).

It is undisputed that the Booz Allen contract requires CH2M to indemnify PANYNJ as to claims "arising from the negligent or willful intentional acts or omissions" of itself or its subconsultants. As CH2M was not negligent, and as PATH and PANYNJ fail to identify any "willful intentional acts and omissions" by CH2M that contributed to the accident, the cross claims for contractual indemnification are dismissed as against it. *See Martinez*, 89 AD3d 469-70 (*contractual indemnification provision not triggered where site safety manager allegedly failed to correct unsafe work practices*); *Wilk v Columbia University*, 2016 WL 9308096 (Sup Ct, New York County 2016) (*applying Martinez rule to indemnification provision with "negligent or willful acts" language*).

TUV's motion for summary judgment is granted

TUV seeks dismissal of all cross claims against it for indemnity and contribution, arguing that the stipulation of discontinuance signed by plaintiffs constitutes a release under General Obligations Law §15-108, even though it was not signed by its co-defendants. It alternatively argues that as it had no duties, involvement, or control over the work that resulted in Christopher's injuries. PATH and PANYNJ argue that the discontinuance does not release TUV

from its contractual indemnification claims, and that they are not entitled to dismissal of those claims as the indemnification provision of the RSC contract does not require negligence by TUV to be triggered.

Absent opposition to the portion of TUV's motion seeking to dismiss the common law indemnification and contribution cross claims against it, those claims are dismissed. Additionally, absent any contention that TUV either controlled the injury producing work, created the hazardous condition, or of any other "willful intentional acts and omissions" that contributed to the accident, the claims against it for contractual indemnification are dismissed. *Martinez*, 89 AD3d 469-70.

CONCLUSION

ORDERED that the motion for summary judgment of defendant CH2M Hill New York, Inc. is granted, and the complaint is dismissed against it; and it is further

ORDERED that all cross claims against CH2M Hill New York, Inc. are severed and dismissed; and it is further

ORDERED that plaintiffs' cross motion for partial summary judgment of is denied; and it is further

ORDERED that the motion for summary judgment of defendant TUV Rheinland Mobility, Inc. is granted and all cross claims against it are severed and dismissed; and it is further

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

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for*

Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that the caption shall be amended and that the action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------X
CHRISTOPHER HAVISON and MICHELLE HAVISON,

Plaintiff,

-against-

PORT AUTHORITY OF NEW YORK & NEW JERSEY; PORT AUTHORITY TRANS HUDSON CORPORATION; SIEMENS INDUSTRY, INC.; ALDRIDGE ELECTRIC, INC.; and DIA BUILDERS, LLC,

Defendants.
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And it is further

ORDERED that, within 30 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office, who is hereby directed to reflect the amendment by appropriately marking the court's records; and it is further

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

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

1/10/2023
DATE

HON. SABRINA B. KRAUS
J.S.C.

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