SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **07**

Justice

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INDEX NO. 156963/2017

MOTION SEQ. NO. 003 004

TYREL HEMPSTEAD,

Plaintiff,

- v -

HAMMER & STEEL, INC., STS-SCHELTZKE GMBH & CO. KG, 9501 DITMARS BOULEVARD, LLC, ICS BUILDERS, INC., and ENTERPRISE HOLDINGS, INC.,

DECISION + ORDER ON MOTION

Defendants.

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ICS BUILDERS, INC.,

Third-Party
Index No. 595699/2017

Plaintiff,

-against-

PETERSON GEOTECHNICAL CONSTRUCTION LLC,

Defendant.

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HAMMER & STEEL, INC.,

Second Third-Party
Index No. 595927/2017

Plaintiff,

-against-

PETERSON GEOTECHNICAL CONSTRUCTION, LLC,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 188, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 290, 291, 292, 295

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 189, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250,

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were read on this motion for SUMMARY JUDGMENT.

Kahn Gordon Timko & Rodriques, P.C., New York, NY (Nicholas I. Timko of counsel), for plaintiff.
Ahumuty, Demers & McManus, New York, NY (Rachael E. Nole of counsel), for defendants Hammer & Steel, Inc. and STS-Scheltzke GmbH & Co. KG.
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, White Plains, NY (Christopher R. Post and Eian S. Weiner of counsel), for defendants 9501 Ditmars Boulevard, LLC, ICS Builders, Inc., and Enterprise Holdings, LLC, and for third-party defendant Peterson Geotechnical Construction, LLC.

Gerald Lebovits, J.:

In this action, plaintiff Tyrel Hempstead alleges that he suffered personal injuries on May 11, 2015, while working at a construction site located at 95-10 Ditmars Boulevard in Queens, New York.

In motion sequence 003, defendant/third-party plaintiff Hammer & Steel, Inc., and defendant STS-Scheltzke GMBH & Co. KG (STS), move, under CPLR 3212, for an order granting summary judgment and dismissing plaintiff's complaint.

In motion sequence 004, defendants 9501 Ditmars Boulevard, LLC (9501), ICS Builders, Inc. (ICS), Enterprise Holdings, LLC (Enterprise), and third-party defendant Peterson Geotechnical Construction, LLC (Peterson), move, under CPLR 3212, for an order granting summary judgment and dismissing plaintiff's claims of common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). The moving defendants also seek summary judgment dismissing the third-party claims asserted by Hammer & Steel for contribution, common law indemnification, and contractual indemnification.

Motion sequences 003 and 004 are consolidated for disposition.

Hammer & Steel and STS's motion for summary judgment dismissing plaintiff's claims against them (mot seq 003) is granted only with respect to plaintiff's manufacturing-defect claim, and otherwise denied.

9501, ICS, Enterprise, and Peterson's motion for summary judgment dismissing plaintiff's claims against them (mot seq 004) is denied with respect to plaintiff's Labor Law § 240 (1) claims; granted with respect to plaintiff's Labor Law § 241 (6) claims; granted with respect to plaintiff's Labor Law § 200 and common-law negligence claims as asserted against 9501, ICS, and Enterprise; and denied with respect to plaintiff's Labor Law § 200 and common-law negligence claims as asserted against Peterson.

9501, ICS, Enterprise, and Peterson's motion for summary judgment dismissing Hammer & Steel's third-party claims against Peterson (mot seq 004) is granted with respect to the claims

for common-law indemnification and contribution, and denied with respect to the claim for contractual-indemnification. 9501, ICS, Enterprise, and Peterson's motion for summary judgment dismissing Hammer & Steel's cross-claims against 9501, ICS, and Enterprise (mot seq 004) is granted.

BACKGROUND

Plaintiff's deposition

Plaintiff testified that he was involved in an accident that took place on May 11, 2015, at a jobsite at an Enterprise Rental Car Company location on Ditmars Boulevard in Queens, New York. His employer was Peterson. At the subject location, the work he was conducting involved installing "micropiles" for foundational support. The micropiles required the use of cement. At the time of his accident, he was the senior person for Peterson and was a superintendent. The senior contact for Peterson was part-owner Patrick Doherty and Andrew Peterson was the owner. Plaintiff recalls both Doherty and Andrew Peterson visiting the site; however, neither individual was on-site at the time of his accident. ICS was the general contractor for the project. Plaintiff believes that Hammer & Steel was a company that sold equipment to Peterson and STS manufacturers grout plants.

On the date of his accident, plaintiff received a call from Doherty to go to the Enterprise location because a mixing unit had to be moved from the location to a site at Queens Boulevard. Plaintiff does not recall seeing the manual for the mixing unit prior to his accident but does recall talking to Doherty about the use of this piece of equipment. Plaintiff did not recall whether any training he received from Doherty for the mixing unit addressed the issue of safe and proper transportation of the unit from one location to another.

Just before his accident, plaintiff testified, a worker from Peterson named Brandon Bogle moved the mixing unit and equipment onto a trailer by utilizing a skid steer. Plaintiff testified that he was helping to load the equipment but did not recall details about how, where, and why the equipment was loaded. The mixing unit was going to be secured utilizing straps.

Plaintiff testified that he does not remember how the accident occurred. He does not recall with certainty whether he was located on the trailer of the truck. He reviewed a document completed by Peterson that states that a grout mixer fell, which weighed 661 pounds, and crushed a person against the sidewalk. Plaintiff testified that he cannot recall whether his is an accurate description of what occurred.

Plaintiff maintains that Bogle visited plaintiff in the hospital and told him that on the date of his accident, after he came around a corner while putting equipment away, he observed that plaintiff was located underneath the mixing unit. Plaintiff was unsure how close to the edge of the trailer the mixing unit was located. He did not previously complain to anyone about the mixing unit and recalls no prior incidents. As the mixing unit landed on top of him, plaintiff believes that he must have been relatively close to its location for it to fall on him. Plaintiff testified that he does not recall telling anyone that his accident occurred as a result of jumping off the trailer and getting his shirt or vest caught.

Plaintiff testified that he visited the Hammer & Steel facility in Sparta, New Jersey, and spoke with Ryan Ayers about the instability and awkwardness of the machine. He recalls Ayers referencing a unit that fell over during shipping. Plaintiff maintains that the machine was awkward in design as it did not have a way to support itself on its backside with the wheels. He recalls that when one held the mixing unit, there was nothing to catch it; it was heavy and impacted by gravity. Plaintiff was made aware that at a time after his conversation with Ayers, the mixing unit was modified and that the wheels were replaced to make a stable platform.

Plaintiff did not know anyone who worked at 9501 and did not have any interaction with anyone at Enterprise. While ICS directed scheduling at the premises, ICS did not direct his actual work. He maintains that a worker from ICS was overseeing the work, however plaintiff does not recall anyone supervising him when the mixing unit was loaded onto the trailer.

Brandon Bogle's deposition

Bogle testified that he worked for Peterson in May of 2015. On the day of plaintiff's accident, Bogle was with plaintiff loading equipment on the trailer with the skid steer at an Enterprise site. He drove to the site with plaintiff in a truck with a trailer to place equipment.

Before plaintiff's accident, Bogle picked up six different sets of equipment or supplies with the skid steer and made trips to the trailer. He recalls leaving the "grout plant piece" upright on the trailer. Bogle moved the skid steer, adjusting its forks, when a man alerted him of plaintiff's accident. Thereafter, Bogle observed plaintiff laying on the sidewalk next to the trailer with the grout plant nearby.

Bogle recalls manually moving the grout plant on a concrete floor at a shop on a previous occasion, and that it was very difficult as it was a heavy piece of equipment. Bogle testified that when he lifted the grout plant piece, it would not stay put; nothing held it perfectly straight. He intended to strap the pieces of the grout plant to the trailer and maintains that it was plaintiff's decision about how to strap the equipment.

Bogle does not recall plaintiff's being located on the trailer and believes he was directing traffic when the equipment was being loaded. Bogle did not have problems loading the mixer and did not complain to anyone about the means and methods of transporting the mixer onto the trailer. He recalls hearing a rumor that plaintiff's vest got caught on a handle of the equipment while plaintiff was located on the trailer.

Trina Lally's deposition

Trina Lally testified that she was engaged to plaintiff and that they have a child together. On May 11, 2015, the NYPD called Lally to inform her that plaintiff was involved in an accident at work in Queens and that her presence was requested at Booth Hospital. Lally testified that while he was in the hospital, plaintiff told Lally that he was injured when he was with his co-worker loading a grout plant onto Peterson's truck. Plaintiff told Tally that while his co-worker

walked away, he jumped off of the truck, and the handle of the grout plant caught his clothes and it fell on top of him into the street.

Lally maintains that several people know the machine got caught on plaintiff's shirt, including his father as they talked about this. Lally testified that plaintiff maintained the same story regarding how the accident took place for several months.

Edward O'Rourke's deposition

Edward O'Rourke testified that he is the principal of ICS, a general contractor. In 2015, O'Rourke was the Vice President of Operations. He testified that the company had project managers, field superintendents, laborers, and project administrators. The site superintendent would monitor subcontractors and site safety compliance. O'Rourke required all the site superintendents or field supervisors to have safety training. He maintains that ICS maintains a comprehensive safety plan covering generally known hazards.

O'Rourke testified that when a subcontractor was scheduled and ICS was aware of their presence on the site, a superintendent or other representative would be on site. O'Rourke maintains that when ICS or its subcontractors went to a property, ICS brought materials, supplies, and equipment to the property. Before ICS or any subcontractor could bring in materials, equipment, or supplies or remove them, O'Rourke communicated with the facilities manager.

O'Rourke testified that ICS contracted to undertake a multiphase project at a National/Enterprise rental car facility site adjacent to LaGuardia Airport. At least 12 subcontractors were involved with the project. A subcontract was in place with Peterson.

Peterson was a subcontractor at the site and was installing structural piles. The site superintendent had authority to direct and control what the subcontractor did, but they were subject to Enterprise's authority in terms of when they would be permitted to do certain things so that they did not disrupt the business flow.

On May 11, 2015, O'Rourke learned via telephone from David Nielsen, ICS's site supervisor, that plaintiff was injured while loading equipment from the site onto a trailer. Nielsen was not aware of the incident or the fact that Peterson was on-site until after the accident. ICS was aware that Peterson utilized specialized equipment which would need to be removed from the site.

O'Rourke maintains that responsibilities to control the means and methods of techniques of the work site were transferred to the subcontractor implicitly by the subcontractor agreement. Regarding safety, ICS had a safety plan that covered general industry hazards, and that routine safety meetings and toolbox discussions would have been conducted by Nielsen with on-site personnel.

Patrick Doherty's deposition

Patrick Doherty testified that he is the vice president of Peterson, a foundation drilling business. In 2015, Peterson did not have a dedicated safety officer, but the responsibilities were assumed by himself, project managers Nolan Keeley and John Weiss. Project managers would estimate the work, procure materials, prepare safety binders, and cover day-to-day staffing.

In 2015, plaintiff and Darryl Green served as superintendents. Tool box talks would take place in which a topic would be selected to discuss how to perform the task safely. A safety plan included safety protocol for transporting equipment. In 2015, Peterson had trucks used to transport equipment. Peterson regularly bought equipment from Hammer & Steel. Peterson purchased a model 200 EFB grout mixing unit from STS. He does not recall having conversations about how to safely transport the equipment to job sites.

In 2015, Peterson engaged on a project for ICS at a car rental location at 95-10 Ditmars Boulevard in Queens, New York, to drill piles. Doherty visited the site about 10 times to check on the progress. The mixing unit was used on various projects. He believes that it would be utilized on this project.

Doherty was informed that plaintiff was injured at the site. He recalls that there were no witnesses but that the mixing unit was on top of him and found by employees from ICS as well as Bogle. Doherty spoke with Bogle, who indicated that he loaded the mixing unit on the trailer of a truck and that plaintiff was going to strap it down. Bogle told Doherty that when he went to the site with a forklift which he was operating, he returned to find the mixing unit laying on top of plaintiff in the street.

Doherty spoke with plaintiff about the accident, but plaintiff did not recall how it occurred. Doherty did not receive any complaints that the mixing unit was top heavy. He does not recall instructing plaintiff to review the manual for the mixing unit. Peterson did not have any safety rules or guidelines or regulations requiring wheel shocks to be used on the mixing device when it was being transported.

Doherty recalls speaking with Frank Pasierbski or Jason Newbold following plaintiff's accident, inquiring why the mixing unit did not have wheels as it seemed dangerous. Doherty was told that they would get a retrofit kit to take the wheels off. He recalls speaking with Newbold about the lack of stopping on the wheels and that there was no brake to stop their rotation. Doherty was not given any instructions on how to transport the mixing unit. Peterson instructed employees to use two straps placed over the unit for transportation.

Hans-Georg Scheltzke's deposition

Hans-Georg Scheltzke testified that he is the founder of STS. Since 2010, STS has made a mixing unit known as an "MS-200-E-FB." Scheltzke maintains that the safety of the mixing unit as well as its testing were his responsibility. As part of the design of the machine, testing was conducted, and STS created an operating instruction manual. The mixing unit weighs 300 kilograms.

Sheltzke reviewed a manual created in January 2014 by STS that included original operating instructions for the mixing unit. He maintains that when the mixing unit was to be transported on a vehicle, the transport support was lowered so that the machine is stable and does not tip over. He testified that the machine is stable when it is positioned on a level surface.

Scheltzke testified that the manual states that the mixing unit was supposed to be positioned close to a wall. Scheltzke testified that mixing units were sold to Hammer & Steel with wheels but no transportation support bracket. He maintains that transport brackets were added to the units after 2015 and that if an individual installed something to the machine without STS's authorization, then the risk would be higher that the weight could not be displaced. When it stands, the center of gravity is exactly in the middle of the mixing unit. If the trailer on which the mixing unit is positioned is slightly inclined, it would stay in position.

Scheltzke testified that STS received a telephone call in mid-May of 2016 from Peterson regarding plaintiff's accident. In November of 2016, STS received pictures of the accident. After the accident, STS determined that it would place a transportation support device on the mixing unit as an added safety measure.

Frank Pasierbski's EBT

Frank Pasierbski testified that he works for STS, a mechanical engineering company, as a customer-service representative. STS manufactures cement mixing machines.

In 2010, STS made a mixing unit known as an "MS-200-E-FB." Pasierbski was not involved in any aspect of the design of the mixing unit, but he believes that Scheltzke was involved. Before the mixing unit was built and sold, the machine's stability was tested, as it was the first one built on wheels. Pasierbski believes that Scheltzke conducted testing to determine where on the mixing unit the center of gravity was located.

Pasierbski maintains that if someone had a problem with a unit, mechanics could be sent to construction sites. He reviewed a photograph of how the company recommends the machine should be secured for transportation which includes an orange strap.

Hammer & Steel was a dealer and distributor for the mixing unit. Hammer & Steel would buy the machines from STS, bring them to the United States, and lease or sell them. Peterson had bought machines from Hammer & Steel, including the subject mixing unit. Pasierbski had discussions with Peterson to address the mixing unit and provide training. He maintains that the type of mixing unit Hammer & Steel sold to Peterson did not have a transportation support bracket placed on it until after an accident took place.

Pasierbski first learned of plaintiff's accident in 2015 after Doherty informed STS via telephone that during the loading process, the machine fell onto a co-worker from a trailer. Doherty told Pasierbski that the wheels were being removed from under the machine in order to make it more stable so that another incident did not occur. Doherty did not provide Pasierbski any additional information regarding who was going to make these modifications.

Pasierbski told representatives from Hammer & Steel and Peterson, including Doherty and Newbold, that the mixing unit should be loaded as indicated in the manual for the product. He maintains that the position of the mixing unit should be pointed in the direction of travel and that the wheels are not to be at an angle to the edge of the vehicle.

Pasierbski did not receive any complaints about the mixing unit prior to plaintiff's accident. Hammer & Steel did not advise Pasierbski of any issues with the stability of the mixing unit. He did not know whether Hammer & Steel made repairs to the mixing unit from the time in which it was sold until the time of the accident. Pasierbski maintains that other than this event involving plaintiff, he was not aware of any other occasions in which it is claimed that the mixing unit tipped over. Pasierbski had not heard of an entity known as ICS or Enterprise.

Ryan Ayers's deposition

Ayers testified that he works for Hammer & Steel as a salesman. Hammer & Steel sells, rents, and services foundation drilling and pile driving equipment. When Ayers was hired at Hammer & Steel, Peterson was a customer.

In 2014 and 2015, Hammer & Steel was a distributor for STS. Ayers recalls meeting Pasierbski, STS's head trainer and technician, and the "MS 200-E-FB" machine that Hammer & Steel sold a unit to Peterson. Ayers was not aware whether Scheltzke began to produce an MS 200 version that had an additional moveable bracket to lower and support the device. Ayers recalls that during the shipping process of various machines, MS 200's tipped over.

Ayers testified that he spoke to plaintiff regarding the renting of equipment. He had learned about plaintiff's accident from Jason Newbold, who told him that a MS 200 unit had fallen off of a truck and onto plaintiff.

Ayers testified that after plaintiff's incident, he assumes that there were communications between Hammer & Steel and Peterson or Scheltzke regarding modifying the MS 200 unit because Hammer & Steel removed the wheels and placed the units on skids to make it easier to move. He testified that the units were difficult to move on wheels because of the amount of force needed. Ayers maintains that the units were modified to prevent any further incident like that of plaintiff's and to make them easier to move with a forklift.

Ayers does not believe he provided any training, instructions or information to Peterson employees regarding the use, operation, or transport of the units. He was not aware of any complaints received by Hammer & Steel regarding the use of the mixing unit.

Robert Laurence's deposition

Robert Laurence testified that he is vice president of Hammer & Steel, a business that sells and rents deep foundation equipment. He maintains that Ayers is a salesperson who sells and rents equipment. STS is a manufacturer of grout plant equipment that would be used in

aspects of the deep foundation industry. Hammer & Steel reached an agreement with STS to sell or distribute equipment in North America.

Laurence maintains that during the business relationship between Hammer & Steel and STS, he learned that STS had a mixing unit known as Model 200 E-FB.

Laurence did not have any discussions with anyone at STS before or during the course of his business relationship regarding safety issues involving equipment. When personnel from Hammer & Steel sold equipment to a customer, such as Peterson, it was not a topic of conversation whether the equipment they were selling from STS was safe for its intended use. It would be common that when Hammer & Steel sold or rented a piece of equipment to a customer, that it provided a manufacturer's operations manual. Laurence did not know whether anyone from Hammer & Steel provided any verbal instruction to anyone at Peterson about the use and operation of the Model 200- E-FB mixing unit. Laurence was not aware that Peterson modified any equipment from STS.

Laurence was contacted by Ayers about plaintiff's accident a day or two after its occurrence. Laurence did not know whether Pasierbski was provided with an operation manual for the mixing unit. Laurence was not aware of any complaints or stability issues with the mixing unit prior to plaintiff's accident.

Jason Newbold's deposition

Jason Newbold testified that he works for Hammer & Steel as Regional Manager for Sales. The Sparta, New Jersey, location of Hammer & Steel was conducting sales and rentals of drilling and pile driving equipment. STS was a supplier of grouting equipment to the business. Ayers was a salesman for Hammer & Steel.

If customers wanted to buy equipment from STS in the United States, the customer would have to go through Hammer & Steel. Newbold recalls possibly selling two "MS 200-E-FB" machines to Peterson. When discussing with potential customers about certain equipment such as the "MS 200-E-FB," Newbold did not have any written materials from the company to show customers, but did have a one or two page catalog from STS.

Newbold did not recall the subject mixer being received from STS at the Sparta location of Hammer & Steel. After the equipment was sold to Peterson, a worker from Hammer & Steel went to Peterson's facilities in New York to assist with putting it together and showing how it works with instructions and training.

In 2014 or 2015, Pasierbski from STS visited the United States for presentations, to discuss equipment, and to answer questions. Newbold was introduced to plaintiff by Dougherty, who worked for Peterson. He did not have any conversations with plaintiff about the accident. Newbold recalls hearing about plaintiff's accident and visiting him in the hospital but testified that no one knows how the accident occurred. He recalls something about the machine involved in the accident being modified by taking off the wheels.

Chelsea Barbot's deposition

Chelsea Barbot works at Elrac, LLC, as its regional risk supervisor. Elrac employs and rents under the tradename Enterprise Rental Car to the public. Enterprise Holdings, Inc., is the parent company. Barbot did not know about the facilities of the Enterprise location at 9510 Ditmars Boulevard in May 2015 and was not aware about security present in May 2015. Barbot maintains that Elrac received a claim from Peterson regarding an incident of an employee which took place on the premises in May of 2015, however Barbot did not have any knowledge of an investigation conducted regarding the claim.

Jason Mattice's affidavit

Jason Mattice submits an affidavit dated March 24, 2022. Mattice states that he is a mechanical engineer and works for SEA, Ltd., as a Senior Project Engineer. He reviewed documents and the testimony of plaintiff, Pasierbski, Scheltzke, and Bogle and conducted an in-person inspection of the mixing unit on July 8, 2019.

Mattice states that the mixing unit is a stable product with no evidence of defective design and will not tip over on its own when resting on a level surface. Mattice maintains that his analysis demonstrates that the mixing unit would be stable when both the stanchion and the wheel assembly are resting on the subject trailer and that the design of the mixing unit is such that even when one leg of the wheel assembly is unsupported, it is still stable and would need an external force to tip over.

Mattice states that a mixing unit resting on a level surface would require at least 174 pounds of force applied tangentially to the handlebar in order to tip the mixer. He concludes that the design, construction, and manufacture of the machine was not a cause of plaintiff's incident.

Bartley Eckhardt's affidavit

Bartley Eckhardt is a licensed professional engineer. Eckhardt states that the mixing unit was defectively designed as it was top heavy and prone to tip by the application of an unacceptably low amount of horizontal force. He states that the unstable and top-heavy nature of the mixing unit together with its substantial mass of approximately 600 pounds rendered the machine dangerous, unsafe, and the foreseeable cause of potentially catastrophic personal injury as a tipping risk.

Eckhardt states that the mixing unit was not fit for its intended use and purpose, was ill-suited for applications involving any degree of surface slope or camber, and failed to conform to expressed and implied warranties. Eckhardt maintains that the mixing unit lacked adequate and proper warnings and that there were reasonable alternative designs including the placement of a "transportation support" bracket, which was implemented by the manufacturer, and/or the removal of wheels and use of solid skid mounts.

Eckhardt states, within a reasonable degree of engineering and safety certainty, that the defective design, unfitness for its reasonable and intended use, and breach of expressed and

implied warranties, and failure to warn, were individually and collectively a substantial factor in causing the mixing unit to be unstable and tip over onto plaintiff.

Based upon the evidence in this case, the testimony, a review and analysis of the data, and his education, training, and experience, Eckhardt concludes that the mixing unit was defectively designed.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact . . . ." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Ryan v Trustees of Columbia Univ. in the City of N.Y, Inc.,* 96 AD3d 551, 553 (1st Dept 2012); *Brandy B. v Eden Cent. School Dist*., 15 NY3d 297, 302 (2010). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *accord Ostrov v Rozbruch*, 91 AD3d 147, 152 (1st Dept 2012).

Motion sequence 003

In motion sequence 003, Hammer & Steel and STS contend that this court should grant summary judgment in their favor because these defendants cannot be held strictly liable under a products liability theory as there was no manufacturing flaw, design defect, or lack of warning. The moving defendants contend that while no injury resulted from the actual use of the mixer, the placement of the mixer and its improper securing caused the accident.

The Court of Appeals has held that "[m]anufacturers of defective products may be held strictly liable for injury caused by their products--meaning that they may be liable regardless of privity, foreseeability or reasonable care. A product may be defective because of a mistake in the manufacturing process, because of defective design or because of inadequate warnings regarding use of the product." *Sprung v MTR Ravensburg*, 99 NY2d 468, 472 (2003) (internal citations omitted); *accord Voss v Black & Decker Mfg. Co*., 59 NY2d 102, 106-107 (1983) ("[A]s the law of strict products liability has developed in New York, a plaintiff may assert that the product is defective because of a mistake in the manufacturing process or because of an improper design or because the manufacturer failed to provide adequate warnings regarding the use of the product" [internal citations omitted]).

Design defect

With regard to plaintiff's cause of action alleging a design defect, Hammer & Steel and STS contend that summary judgment must be granted dismissing this cause of action because no design defect exists and because the mixing unit was reasonably safe for its intended use.

"In order to establish a prima facie case in strict products liability for design defects, the plaintiff must show that the manufacturer breached its duty to market safe products when it

marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiff's injury." *Voss,* 59 NY2d at 107.

"A defectively designed product is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use. If the utility of a product does not outweigh the danger inherent in its introduction into the stream of commerce, then the product is defectively designed." *Yun Tung Chow v Reckitt & Colman, Inc*. 17 NY3d 29, 33 (2011) (internal quotation marks and citations omitted).

Furthermore, "[w]hen a product is manufactured in accordance with plans and specifications provided by the purchaser, the manufacturer is not liable for an injury caused by an alleged design defect in the product, unless the specifications are so patently defective that a manufacturer of ordinary prudence would be placed on notice that the product is dangerous and likely to cause injury." *Houlihan v Morrison Knudsen Corp.*, 2 AD3d 493, 494 (2d Dept 2003).

Hammer & Steel and STS argue that plaintiff testified that the mixing unit never tipped over while he was using it, that he had never observed it tip over, and that the mixer functioned properly. Hammer & Steel and STS contend that the testimony of Bogle establishes that the mixer was not loaded on to the trailer in accordance with the safety instructions in the operating manual and was placed on the edge of the trailer and was off-center. Hammer & Steel and STS argue that when loading the mixer onto a transport vehicle it should be lifted from the highest point of the machine and placed onto a trailer in the position recommended by the user manual. The moving defendants contend that licensed mechanical engineer Mattice examined the mixer and opined that there was no design defect.

In opposition, plaintiff contends that defendants' expert affidavit from Mattice is conclusory with no analysis or support. Plaintiff contends that Mattice's conclusions regarding the stability and tipping threshold of the mixing unit assumes that that the mixing unit is always resting on a level surface. Plaintiff argues that mixing unit is a portable unit, intended to be transported to and from and used at various construction sites.

In further opposition, plaintiff contends that as described in the affidavit of Eckhardt, the mixing unit had a tipping point of 7°, and that the machine only had to tip an additional 3° to fall over. Plaintiff contends that it was foreseeable that the mixer would be used in applications involving a slope of at least 9°, such as in a parking garage. Plaintiff contends that Mattice's finding that a mixing unit resting on a level surface would require at least 174 pounds of force applied to the handlebar to cause it to tip is irrelevant due to the surface slope the mixing unit would have been exposed to through its foreseeable use. Plaintiff argues that Mattice does not explain the analysis performed or provide supporting documentation.

Plaintiff contends that while defendants also blame plaintiff's accident on the manner in which the mixer was loaded onto the truck, the vehicle was not moving at the time of the accident. Plaintiff argues that the testimony is clear that Bogle and plaintiff intended to complete the strapping process of the mixing unit prior to moving the vehicle.

Plaintiff contends that Eckhardt's affidavit includes a discussion of the standards applicable in the design and production of the mixing unit as well as the evidence that STS failed to observe basic principles of machine design and flouted applicable standards and regulations. Plaintiff contends that there is no evidence that STS performed a proper hazard analysis with respect to the subject mixing unit, and therefore, any assertion that they complied with European Machine Directive standards was misguided. Plaintiff contends that Eckhardt states that two alternative designs were available in the marketplace and that these designs do not possess the same instability as the subject machine.

This court concludes that questions of fact exist about whether a design defect may have contributed to plaintiff's accident. Specifically, the expert affidavit of Eckhardt raises an inquiry as to whether the design of the mixing unit contributed to it its fall from the truck. Eckhardt states that the mixing unit was unstable and top-heavy, and that its substantial mass of approximately 600 pounds rendered the machine dangerous and unsafe with a tipping risk. He states that there is no evidence that STS conducted a proper hazard analysis in accordance with minimum accepted design principles and requirements of the European and International communities. He also states that when moving the mixing unit as described in the operation manual, the user is instructed to push down on the "transport bracket" in which the load to the user rapidly switches from pushing down to lifting or holding the machine up. He maintains that if the user is unable to support the weight by holding up the transportation bracket once the machine tilts, it will tip over. He states that the lifting force necessary to manually transport the subject machine far exceeds United States standards.

Furthermore, it remains unclear based upon the testimony how and why the subject accident occurred and whether plaintiff may have gotten caught on the mixing unit, causing it to fall over. Therefore, as issues of fact exist about whether the mixing unit was defective, the part of defendants Hammer & Steel and STS's motion seeking to dismiss the claim for a design defect must be denied.

Manufacturing defect

With regard to plaintiff's allegation that a manufacturing defect existed, Hammer & Steel and STS contend that this claim must be dismissed because plaintiff has not alleged a specific manufacturing defect. Hammer & Steel and STS contend that Mattice examined the mixing unit along with the design drawings and found that there was no manufacturing defect. They argue that plaintiff had been utilizing the mixing unit for 18 months prior to the accident, that it had never tipped over while he was using it, and that he had never observed it tip over.

"A manufacturing defect claim is premised on the relevant product being defective because it was not manufactured as designed." *Goldin v Smith & Nephew Inc*., 2013 WL 1759575, at *2 (SD NY Apr. 24, 2013) (internal quotation marks omitted). To "plead and prove a manufacturing flaw under either negligence or strict liability, the plaintiff must show that a specific product unit was defective as a result of some mishap in the manufacturing process itself, improper workmanship, or because defective materials were used in construction, and that the defect was the cause of plaintiff's injury." (*Id.*)

Here, plaintiff fails to demonstrate that the subject mixing unit had a mishap during the manufacturing process itself, was constructed with improper workmanship, or had defective materials utilized in its construction. Instead, plaintiff argues in opposition that the mixing unit had a design defect. Therefore, the part of STS and Hammer & Steel's motion seeking summary judgment dismissing the claim for manufacturing defect is granted.

Failure to warn

Hammer & Steel and STS contend that plaintiff's claim of a failure to warn must be dismissed. "A failure to warn claimant must show (1) that a manufacturer has a duty to warn; (2) against dangers resulting from foreseeable uses about which it knew or should have known; and (3) that failure to do so was the proximate cause of harm. Failure to warn claims are identical under strict liability and negligence theories of recovery." *Colon ex rel. Molina v. BIC USA, Inc*., 199 F Supp 2d 53, 84 (SD NY 2001). "Generally, whether a warning is adequate is an issue of fact to be determined at trial." *Figueroa v Boston Scientific Corp*., 254 F Supp 2d 361, 370 (SD NY 2003) (citations omitted).

Hammer & Steel and STS argue that plaintiff determined how the machinery was loaded, strapped, and transported. They argue that plaintiff was given specific training about the safe operation and transportation of the mixing unit and failed to follow the instructions. Hammer & Steel and STS contend that plaintiff could not recall whether he had reviewed the operating manual for the mixer.

In opposition, plaintiff contends that the subject machine was not equipped with a warning sign regarding "tilt safety," which was affixed to later produced models. Plaintiff contends that Eckhardt opined that the mixing unit failed to contain adequate and proper warnings of the risks and dangers inherent in the machine. Plaintiff argues that defendants' assertion that plaintiff failed to abide by instructions relating to the transport of the machine is misleading because the machine was not yet in transport at the time of the incident.

This court concludes that Eckhardt's affidavit raises an issue of fact about whether the mixing unit had a foreseeable defect of which defendants should have warned users, specifically the potential for the mixing unit to tip. Although Hammer & Steel and STS contend that plaintiff was trained in the safe use of the mixing unit, it is unclear whether a warning sticker regarding the alleged tipping propensities should have been placed on the machine and whether the operating instruction manual was adequate in alerting users. Therefore, the part of STS and Hammer & Steel's motion for summary judgment seeking to dismiss the claim of failure to warn must be denied.

Breach of implied warranty

Hammer & Steel and STS contend that plaintiff's cause of action alleging a violation of the implied warranty of merchantability must be dismissed.

"The implied warranty of merchantability is a guarantee by the seller that its goods are fit for the intended purpose for which they are used and that they will pass in the trade without

objection." *Wojcik v Empire Forklift, Inc*., 14 AD3d 63, 66 (3d Dept 2004) (internal quotation marks and citations omitted). Furthermore, a plaintiff makes out a prima facie case for breach of implied warranty of merchantability, as well as for breach of implied warranty of fitness for particular purpose, by raising questions as to the product's design defects. *See Bimini Boat Sales, Inc. v Luhrs Corp*., 69 AD3d 782, 783 (2d Dept 2010).

Hammer & Steel and STS argue that the mixing unit was reasonably fit for its intended purpose, that the mixer functioned properly and that there are no facts in the record that could establish that this accident was caused by anything other than plaintiff and Bogle's improper loading of the mixing unit on the trailer. In opposition, plaintiff contends that the mixing unit was defectively unstable and not reasonably fit for the ordinary purposes for which it was intended to be used. Plaintiff maintains that it failed to conform to expressed and implied warranties of merchantability and fitness for its intended purposes.

Here, plaintiff's expert raises a question of fact about the cause of the accident and whether a defect caused the mixing unit to tip over. Therefore, it remains unclear if the mixing unit was defectively designed. *See Bailey v Disney Worldwide Shared Servs.,* 35 Misc 3d 1201 (A), 2012 NY Slip Op 50524 (U), *8 (Sup Ct, NY County 2012) (holding "plaintiff raises a question of fact as to whether the bridge was defectively designed. As such, the branch of Showman's motion that seeks dismissal of plaintiff's second and third causes of action, for breach of the implied warranties of merchantability and fitness for a particular purpose, are denied").

Therefore, as it remains unclear whether the subject mixing unit had a design defect, the part of STS and Hammer & Steel's motion for summary judgment seeking to dismiss the claim for breach of the implied warranty of merchantability is also denied.

Motion Sequence 004

On motion sequence 004, 9501, ICS, Enterprise, and Peterson move, pursuant to CPLR 3212, for an order granting summary judgment.

Labor Law § 241 (6)

9501, ICS, Enterprise, and Peterson contend that the part of plaintiff's complaint alleging a violation of Labor Law § 241 (6) must be dismissed.

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

> "All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> . . . .

> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places . . . ."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection for workers and to comply with specific safety rules which have been set forth by the Commissioner of the Department of Labor. *St. Louis v. Town of N. Elba*, 16 NY3d 411, 413 (2011). To demonstrate liability pursuant to Labor Law § 241 (6), it must be shown that the defendant violated a specific, applicable regulation of the Industrial Code, rather than a provision containing only generalized requirements. *Nostrom v A.W. Chesterton Co*., 15 NY3d 502, 507 (2010).

The Court of Appeals has held that "[l]iability under Labor Law § 241 (6) is not limited to accidents on a building construction site" and looks "to the regulations contained in the Industrial Code (12 NYCRR 23-1.4 [b] [13]) to define what constitutes construction work within the meaning of the statute." *Joblon v Solow,* 91 NY2d 457, 466 (1998). 12 NYCRR § 23-1.4 defines construction work as:

> "All work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures, ..., includes, by way of illustration but not by way of limitation, the work of hoisting, land clearing, earth moving, grading, excavating, trenching, pipe and conduit laying, road and bridge construction, concreting, cleaning of the exterior surfaces including windows of any building or other structure under construction, equipment installation and the structural installation of wood, metal, glass, plastic, masonry and other building materials in any form or for any purpose."

Here, plaintiff was in the process of moving equipment to a construction site when his accident occurred. Delivery of equipment has been previously held to be a covered activity by the Labor Law if the equipment is being delivered to an active construction site or being prepared for use. *See Shaw v Scepter, Inc*., 187 AD3d 1662, 1663-1665 (4th Dept 2020); *Serrano v TED Gen. Contr*., 157 AD3d 474, 475 (1st Dept 2018).

Plaintiff alleges violations of Industrial Code sections 23-1.5, 23-1.7, 23-1.8, 23-1.12, 23-1.15, 23-1.16, 23-1.17, 23-1.22, 23-1.28, 23-1.33, 23-6.1, and 23-9.11. The moving defendants contend that these sections of the Industrial Code are not applicable to plaintiff's accident. In opposition, plaintiff fails to address these sections of the Code and instead argues that sections 23-2.1 (a) (2), 23-9.2 (a), and 23-9.2 (b) are applicable.

Given the limited scope of plaintiff's opposition, the part of plaintiff's complaint alleging a violation of Labor Law § 241 (6) predicated on Industrial Code sections 23-1.5, 23-1.7, 23-1.8, 23-1.12, 23-1.15, 23-1.16, 23-1.17, 23-1.22, 23-1.28, 23-1.33, 23-6.1, and 23-9.11, is deemed abandoned and is dismissed. *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."); *see also Genovese v Gambino*, 309 AD2d 832, 833 (2d Dept 2003).

Industrial Code § 23-9.2 (b) (1)

In opposition to 9501, ICS, Enterprise, and Peterson's motion for summary judgment, plaintiff asserts a violation of Industrial Code section 23-9.2 (b) (1). Section 23-9.2 (b) (1) provides:

> "(1) 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."

This Industrial Code provision "is a mere general safety standard that is insufficiently specific to give rise to a nondelegable duty under the statute." *Scott v Westmore Fuel Co., Inc.*, 96 AD3d 520, 521 (1st Dept 2012) (citations omitted); *Guallpa v Canarsie Plaza, LLC,* 144 AD3d 1088, 1091 (2d Dept 2016) (holding "12 NYCRR 23-9.2 (b) (1) is merely a general safety standard that does not give rise to a nondelegable duty under Labor Law § 241 (6)." [citations omitted]); *Keilitz v Light Tower Fiber N.Y., Inc.*, 2022 NY Slip Op 31920 (U)**22 (Sup Ct, NY County, 2022). Plaintiff may not rely on this Industrial Code provision to support a § 241 (6) claim.

Industrial Code section 23-2.1 (a) (2)

Plaintiff also asserts a violation of Industrial Code section 23-2.1 (a) (2). This section provides:

> "(a) Storage of material or equipment.
>
> (2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge."

Section 23-2.1 (a) (2) of the Industrial Code contains specifications that will support a claim under Labor Law § 241 (6). *See Flihan v Cornell Univ.*, 280 AD2d 994, 994 (4th Dept 2001).

Defendants contend that the facts of this case demonstrate that plaintiff was not injured as a result of the mixing unit being placed close to an edge of a surface as to endanger those below. They maintain that Lally testified that she was told by plaintiff that he had jumped off of the trailer and the handle of the mixing unit caught his shirt causing it to fall on top of him into the street besides the trailer. Defendants also contend that there has been no allegation that the weight of the subject mixer exceeds the safe carrying capacity of the floor.

Section 23-2.1 (a) (2) applies when material is being stored. *See Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272 [1st Dept 2007]) (holding that "although there is a paucity of precedent interpreting this regulation, it does not apply to material and equipment that is not being stored. The few cases that have considered the issue have so held [*see McLaughlin v Malone & Tate Bldrs., Inc*., 13 AD3d 859, 861, (2004); *Castillo v Starrett City*, 4 AD3d 320, 321 (2004)]." Here, as the testimony demonstrates, the mixing unit was not in storage, but was being moved from a location. Plaintiff testified that on the date of his accident, he had received a call from Doherty to go to the Enterprise location as a mixing unit had to be moved from the to a site at Queens Boulevard.

As the subject mixing unit was loaded on to the truck just prior to the accident, the mixing unit was in the process of transport, and not in storage. Therefore, section 23-2.1 (a) (2) of the Industrial Code is not applicable.

Industrial Code section 23-9.2 (a)

Plaintiff asserts a violation of Industrial Code section 23-9.2 (a). Section 23-9.2 (a) provides:

> "(a) Maintenance. All power-operated equipment shall be maintained in good repair and in proper operating condition at all times. Sufficient inspections of adequate frequency shall be made of such equipment to insure such maintenance. Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement. The servicing and repair of such equipment shall be performed by or under the supervision of designated persons. Any servicing or repairing of such equipment shall be performed only while such equipment is at rest."

Parts of section 23-9.2 (a) have been held to be specific enough to impose an affirmative duty on the employer pursuant to Labor Law § 241 (6). *See Misicki v Caradonna*, 12 NY3d 511, 520-521 (2009) (holding that "the first two sentences of section 23-9.2 (a)--which employ only such general phrases as 'good repair,' 'proper operating condition,' '[s]ufficient inspections,' and 'adequate frequency'--are not specific enough to permit recovery under section 241 (6) against a nonsupervising owner or general contractor. We reach the opposite conclusion about the third sentence, however.").

Defendants contend that plaintiff testified that he participated in the moving of the mixing unit on several occasions, and that he could not recall anyone complaining about the mixing unit or its condition. They argue that the record establishes that the defendants did not have actual or constructive knowledge of any dangerous or defective condition regarding the mixing unit that caused plaintiff's accident.

Plaintiff contends that there is evidence that the subject mixing unit was defectively unsafe, unstable, and posed a significant tipping hazard, and that defendants knew or in the exercise of reasonable care such as conducting inspections should have discovered. Plaintiff

contends that Petersen admitted that after the subject incident, the mixing unit was modified to make it safer.

Here, plaintiff is not alleging a maintenance issue of the mixing unit which section 23-9.2 (a) of the Industrial Code discusses, but instead alleges that a manufacturing or design defect caused the mixing unit to fall. The testimony does not suggest that the mixing unit was known to need servicing or repair, that it had an alleged maintenance defect which was previously identified and left unremedied, or that there was any notice provided to the defendants of an alleged maintenance defect. *See Misicki,* 12 NY3d at 521 (holding that "an employee who claims to have suffered injuries proximately caused by a previously identified and unremedied structural defect or unsafe condition affecting an item of power-operated heavy equipment or machinery has stated a cause of action under Labor Law § 241 [6] based on an alleged violation of 12 NYCRR 23-9.2 [a])." Plaintiff's reliance on section 23-9.2 (a) is misplaced.

The branch of 9501, ICS, Enterprise, and Peterson's motion seeking to dismiss plaintiff's claim under Labor Law § 241 (6) is granted.

Labor Law § 240 (1)

The moving defendants contend that they are entitled to summary judgment as to plaintiff's claim of a violation of Labor Law § 240 (1).

Labor Law § 240 (1) provides, in part:

> "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).

> "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 Assoc., 96 NY2d 259, 267 (2001); *accord Hill v Stahl*, 49 AD3d 438, 442 (1st Dept 2008).

To prevail on a Labor Law § 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. *See Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 (2003); *see also Torres v Monroe Coll.*, 12 AD3d 261, 262 (1st Dept 2004).

Defendants argue that plaintiff's accident occurred, not as direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential, but rather as a result of a stable piece of equipment caused to fall from a trailer and onto the plaintiff. They argue that after the subject mixing unit was set down on the trailer, plaintiff made the decision to jump off the flatbed, causing his clothing to become stuck on the mixing unit and causing it to fall.

In opposition, plaintiff contends that he was not injured when he jumped or fell from an elevated truck bed, but rather was injured when the mixing unit, being subjected to the application of the forces of gravity, tipped over and fell.

Here, questions of fact exist about how the accident occurred, and whether the mixing unit fell on its own volition or whether plaintiff knocked it over causing it to proceed to fall. Furthermore, it is unclear whether the mixing unit, which weighed over 600 pounds, could have been secured in a way that would have prevented it from tipping during its initial placement on the truck prior to it being strapped down. Therefore, as questions of fact exist about how the accident occurred and whether a safety device could have been used to prevent the accident, the branch of defendants' motion seeking to dismiss plaintiff's § 240 (1) claim is denied.

Labor Law § 200

Defendants contend that the part of plaintiff's complaint alleging a violation of Labor Law § 200 must be dismissed. 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) (citations omitted).

Labor Law § 200 (1) provides in part:

> "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. . . ."

Liability under Labor Law § 200 may be based either upon the means and method by which the work is performed or actual or constructive notice of a dangerous condition inherent in the premises. When the accident arises from a dangerous condition on the property, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual

or constructive notice of the allegedly unsafe condition that caused the accident. *See Murphy v Columbia Univ*., 4 AD3d 200, 202 (1st Dept 2004).

To find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's method or manner, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work. *See Rizzuto v L.A. Wenger Contr. Co*., 91 NY2d 343, 352 (1998); *Jackson v Hunter Roberts Constr., L.L.C.,* 205 AD3d 542, 543 (1st Dept 2022).

"General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed." *Hughes v Tishman Constr. Corp*., 40 AD3d 305, 306 (1st Dept 2007) (emphasis in original); *Suconota v Knickerbocker Props*., LLC, 116 AD3d 508, 508 (1st Dept 2014); *Mutadir v 80-90 Maiden Lane Del LLC*, 110 AD3d 641, 643 (1st Dept 2013).

Defendants argue that they did not control plaintiff's work and did not have any notice of a hazardous condition. They argue that they did not supervise or control the retrieval, loading, or transportation of the mixing unit. Defendants contend that no one directed the plaintiff on how to load the mixing unit onto the trailer, how to secure the mixing unit, or where to park the trailer.

In opposition, plaintiff contends that the ICS defendants possessed the authority to supervise and control the means and methods of his work on the date of the incident. Plaintiff argues that ICS controlled the Enterprise job site, that the site was active at the time of the incident, and that an ICS supervisor was physically present at the Enterprise site on the date of the incident. Plaintiff maintains that delivery and pickup of equipment at the site was coordinated between Peterson and ICS. Plaintiff contends that pursuant to the written contract between ICS and Enterprise, ICS was responsible for and had control over, construction means, methods, techniques, sequences, and procedures.

Plaintiff testified that on the day of the accident, he received a phone call from Dougherty of Peterson. As the testimony suggests, Peterson maintained a level of supervision over the injury producing work. However, with regards to 9501, ICS and Enterprise, plaintiff fails to demonstrate that 9501, ICS, or Enterprise provided him with actual supervision of the injury-producing work. *See Foley v Consolidated Edison Co. of N.Y., Inc,* 84 AD3d 476, 478 (1st Dept 2011) ("The contractual terms relied on by John Deere merely establish that Con Edison had general supervisory authority and do not establish that Con Edison controlled how plaintiff performed the injury-producing work.").

Plaintiff's testimony demonstrates that he did not have any interaction with Enterprise and did not know anyone who worked with 9501. Plaintiff testified that while ICS had a worker occasionally around overseeing what they were doing, ICS "didn't direct the actual work," that ICS directed scheduling, and that plaintiff did not recall anyone from ICS supervising while the mixing unit was being loaded onto the trailer. (Plaintiff's EBT, at 155, 165).

Therefore, because 9501, ICS and Enterprise have demonstrated that they did not control the injury producing work, and because plaintiff fails to demonstrate otherwise, the part of defendants' motion seeking summary judgment dismissing plaintiff's Labor Law § 200 claim is granted with respect to 9501, ICS and Enterprise.

Common law indemnification, contribution, and contractual indemnification

9501, ICS, Enterprise, and Peterson contend that Peterson is entitled to summary judgment as to Hammer & Steel's claims for common-law indemnification and contribution.

"To establish a claim for common-law indemnification the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident." *Pena v Intergate Manhattan LLC,* 194 AD3d 576, 578 (1st Dept 2021) (citations and internal quotations omitted). Furthermore, "[c]ontribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person." *Godoy v Abamaster of Miami*, 302 AD2d 57, 61 (2d Dept 2003), *lv dismissed* 100 NY2d 614 (2003) (internal quotation marks and citation omitted).

9501, ICS, Enterprise, and Peterson contend that Hammer & Steel is barred from asserting any claims for common-law indemnification and contribution. 9501, ICS, and Enterprise contend that with regard to Peterson, "Workers' Compensation Law § 11 prohibits third-party claims for indemnification against an employer unless the employee has sustained a "grave injury," or when there is a "written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant." Workers' Compensation Law § 11; *Flores v Lower E. Side Serv. Ctr., Inc*., 4 NY3d 363, 367 (2005).

Hammer & Steel fail to oppose this part of the motion and fail to demonstrate that plaintiff sustained a grave injury. Furthermore, Hammer & Steel fail to offer any opposition to 9501, ICS, and Enterprise about why any cross-claim for contribution and common-law indemnification as against these defendants should survive. *See Genovese,* 309 AD2d at 833 (holding that plaintiff failed to oppose that branch of the motion and abandoned his claim that he was wrongfully terminated).

9501, ICS, Enterprise, and Peterson also argue that Hammer & Steel's claim for contractual indemnification as against Peterson must be dismissed. The indemnification provision of the "Sales Agreement" between Peterson and Hammer & Steel provides, in part:

> "[L]essee shall indemnify and hold harmless Hammer & Steel, Inc., and its agents and employees from and against all claims, damages, losses, and expenses . . . arising out of or resulting from the use or handling of the material and/or equipment sold or rented hereunder, provided that any such claims, damage, loss or expense (1) is attributable to bodily injury, sickness, disease or death, or to injury or to destruction of tangible property, including the loss of use resulting there from and 2) is caused in whole or in part by any negligent act or omission of the Lessee or

anyone for whose acts that the Lessee may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder." NYSCEF No. 184.

Due to the conflicting testimony, it remains unclear how the accident took place. Plaintiff, an employee of Peterson, does not recall how the accident occurred, and it is disputed whether an article of clothing caused the accident or if the mixing unit fell as its placement may have been unsteady.

While Doherty testified on behalf of Peterson that the mixing unit was secured with straps, he also testified that there were no braces, blocks, or other supports utilized for the wheels. Doherty maintains that Peterson did not have any safety rules or guidelines requiring wheel shocks be used when the mixer was transported. Doherty testified that he did not recall reviewing the instruction manual for the mixing unit with plaintiff, nor was he aware whether anyone from Peterson reviewed the information.

Doherty testified that plaintiff knew how to utilize the mixing unit. He testified that the mixing unit was placed on the back end of the trailer, which has a slope that is not level and that he was not aware if the Peterson safety plan has any specific guidelines or rules that state to make sure that the equipment is level.

As the testimony is inconclusive about whether Peterson may have been negligent, and as the contractual indemnification provision between Peterson and Hammer & Steel requires that the injury be caused by a negligent act or omission of Peterson, the part of 9501, ICS, Enterprise, and Peterson's motion seeking summary judgment dismissing Hammer & Steel's claims for contractual indemnification as against Peterson must be denied.

Accordingly, it is

ORDERED that Hammer & Steel and STS's motion for summary judgment (mot seq 003) is granted only with respect to plaintiff's manufacturing-defect claim, and otherwise denied; and it is further

ORDERED that the branches of 9501, ICS, Enterprise, and Peterson's motion seeking summary judgment dismissing plaintiff's claims against them (mot seq 004) is denied with respect to plaintiff's Labor Law § 240 (1) claims; granted in full with respect to plaintiff's Labor Law § 241 (6) claims; granted as against 9501, ICS, and Enterprise with respect to plaintiff's Labor Law § 200 and common-law negligence claims; and denied as against Peterson with respect to plaintiff's Labor Law § 200 and common-law negligence claims; and it is further

ORDERED that the branch of 9501, ICS, Enterprise, and Peterson's motion seeking summary judgment dismissing Hammer & Steel's third-party claims against Peterson (mot seq 004) is granted with respect to the claims for common-law indemnification and contribution and denied with respect to the claim for contractual indemnification; and it is further

ORDERED that the branch of 9501, ICS, Enterprise, and Peterson's motion seeking summary judgment dismissing Hammer & Steel's cross-claims against 9501, ICS, and Enterprise (mot seq 004) is granted.

6/30/2023
DATE

HON. GERALD LEBOVITS
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