

**Haskins v Metropolitan Transp. Auth.**

2024 NY Slip Op 32916(U)

August 19, 2024

Supreme Court, New York County

Docket Number: Index No. 151643/2020

Judge: David B. Cohen

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DAVID B. COHEN PART 58**

*Justice*

-----X

DARREN T. HASKINS,

Plaintiff,

- v -

METROPOLITAN TRANSPORTATION AUTHORITY,  
TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,  
ENTECH ENGINEERING, P.C.,

Defendants.

-----X

INDEX NO. 151643/2020

MOTION DATE 04/02/2024

MOTION SEQ. NO. 007 008 009

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 369, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 435, 436

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 008) 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, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 370, 387, 388, 389, 395, 396, 404, 405, 406, 407, 408, 409, 410, 411, 433, 437, 438

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

The following e-filed documents, listed by NYSCEF document number (Motion 009) 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 371, 390, 391, 392, 397, 398, 399, 400, 401, 402, 403, 434, 439, 440, 441, 442, 443, 444

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

In this Labor Law action, defendant/third-party defendant/second third-party plaintiff Entech Engineering, P.C. moves (seq. 007) pursuant to CPLR 3212 for summary judgment dismissing plaintiff's Labor Law claims, third-party claims and cross-claims brought against it, and for summary judgment on its indemnity claims against second third-party defendant Restani Construction Corp.

Restani moves (seq. 008) for summary dismissal of plaintiff's claims against it and defendants Metropolitan Transportation Authority (MTA) and Triborough Bridge and Tunnel Authority (TBTA) (collectively, MTA/TBTA), and dismissal of Entech's third-party complaint against it.

Defendants MTA/TBTA move (seq. 009) for summary judgment dismissing plaintiff's Labor Law §§ 200, 241(6) and 241-a claims, and granting them summary judgment against Entech on their indemnification claim. They also move for leave to renew the decision on plaintiff's previous motion for summary judgment seeking recovery under Labor Law § 240(1), which has now been decided and denied (NYSCEF 443).

### I. BACKGROUND

Plaintiff alleges he was injured on October 15, 2019 while performing construction for Restani on the Henry Hudson Bridge (HHB). Restani, plaintiff's employer, was a construction contractor on the project, while Entech furnished certain engineering and construction supervision services. MTA/TBTA were the owners and general contractors on the project.

On the accident date, plaintiff alleges he was carrying plywood for use on construction of a pedestrian walkway. It was late at night and dark out, partly because some of the overhead lights were not working. While plaintiff was walking, he fell into a two-and-half feet deep hole in the ground, which had been created to secure a load-bearing wall and was concealed by a black plastic tarp sheeting operating as a moisture barrier. The hole was not covered with plywood or any other kind of covering and was not protected by cones, barriers or any other warning signs.

On January 26, 2023, another justice of this court ruled on plaintiff's motion for partial summary judgment on his Labor Law §§ 240(1) and 241(6) claims, finding that "TBTA's failure

to provide protective devices, such as a cover or a barricade around the hole at the HHB site, constitutes a violation of Labor Law Section § 240(1) and was the proximate cause of [plaintiff's] injuries." The Court determined that the accident resulted from a "gravity-related risk," placing the accident within the "ambit" of section 240(1), and thus granted plaintiff summary judgment on that claim. Having ruled in his favor, the Court did not decide plaintiff's Labor Law § 241(6) claim (NYSCEF 207).

The instant motions were filed in January 2024. As motion sequence nine was partially a motion seeking leave to renew the prior decision, that portion of it was referred to the prior judge for determination, and it was denied by decision and order dated April 25, 2024 (NYSCEF 443).

By decision and order dated May 2, 2024, the Appellate Division, First Department, affirmed the grant of partial summary judgment in plaintiff's favor as against MTA/TBTA (NYSCEF 446).

## II. ANALYSIS

Pursuant to CPLR 3212, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of material issues of fact (*Alvarez v Prospect Hosp.* 68 NY2d 320 [1986]). If this prima facie showing is made, the burden shifts to the opposing party to produce evidence in admissible form that there is in fact a triable issue of fact (*id.*; see also *Gammons v City of New York*, 24 NY3d 562 [2014]).

Because summary judgment deprives a litigant of her day in court, "evidence should be analyzed in the light most favorable to the party opposing the motion" (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). However, bare or conclusory allegations or assertions are

insufficient to create genuine issues of material fact sufficient to defeat a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

A. Entech's motion (seq. 007)

1. Labor Law §§ 240(1) and 241(6)

Entech contends that it is a professional engineer and thus may not be held liable pursuant to Labor Law § 240(1), which provides that "[n]o liability pursuant to this subdivision for the failure to provide protection to a person so employed shall be imposed on professional engineers . . . who do not direct or control the work or activities other than planning and design" although "[t]his exception shall not diminish or extinguish any liability of professional engineers...arising under the common law or any other provision of law." Labor Law § 241(6) and (9) contain similar language.

Entech also observes that as it was neither an owner, nor general contractor, it may only be held liable as a statutory agent of the owner or general contractor if it had the ability to control Restani's, and therefore plaintiff's, work (*Walls v Turner Constr. Co.*, 4 NY3d 861 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311 [1981]; *Barraco v First Lenox Terrace Assoc.*, 25 AD3d 427 [1st Dept 2006]).

Entech argues that its role was strictly that of a professional engineer, with the sole duty to inspect and report, and it denies that it directed or controlled plaintiff's work, relying on the description of its role set forth in the pertinent contract and plaintiff's testimony that he was only supervised and directed by Restani employees. It cites in support, among others, *Domenech v Assoc. Engrs.*, 257 AD2d 403 (1st Dept 1999), in which the Appellate Division, First Department, held that the plaintiff's Labor Law claims should have been dismissed against the

defendant engineering firm as its duty to inspect and report was insufficient by itself to result in liability.

Here, even assuming that Entech had the authority to stop unsafe work, it demonstrated that it did not have the ability to direct or control Restani's or plaintiff's work, and no party raises a triable issue in opposition. Entech may thus not be held liable under Labor Law §§ 240(1) or 241(6) for plaintiff's accident (*see Lopez v Dagan*, 98 AD3d 436 [1st Dept 2012], *lv denied* 21 NY3d 855 [2013] [as engineer did not have authority to direct, supervise or control injury-producing work, it could not be liable as statutory agent of owners under Labor Law §§ 240(1) or 241(6)]; *Hernandez v Yonkers Contr. Co.*, 306 AD2d 379 [2d Dept 2003] [claims dismissed against engineer as it did not exercise supervision and control over activity resulting in plaintiff's injury and death]).

## 2. Labor Law § 200 and common-law negligence

Labor Law § 200 provides that:

1. 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. The board may make rules to carry into effect the provisions of this section.

“Section 200 of the Labor Law 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 (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [internal quotation marks and citations omitted]). Claims under the statute and the common-law arise in two ways, “those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed. Where an existing defect or dangerous condition caused

the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it. Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work” (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012] [internal quotation marks and citations omitted]).

The parties agree that the accident arose out of the means and methods of plaintiff’s work. As discussed above, absent any evidence that Entech supervised or controlled plaintiff’s work at issue, this claim is also dismissed against Entech.

### 3. Indemnity

#### a. MTA/TBTA

Entech further seeks summary judgment dismissing MTA/TBTA's claim for indemnification against it. Pursuant to its engagement agreement, Article VII provides:

Except for claims, suits, actions, damages and costs, otherwise provided for in the Article hereof entitled “Ownership of Plans; Patents and Copyrights”, the Consultant shall assume the defense of, and protect, indemnify and hold the Authority, its affiliates and subsidiaries harmless from and against claims suits, actions, damages and costs of every type and description brought or recovered against it or them and arising out of or in connection with the performance of Services by the Consultant, its subcontractors and their respective officers, agents and employees, to the extent that they are attributable to the willful or negligent acts, errors or omissions of the Consultant, its subcontractors or their respective officers, agents or employees. Such indemnity shall not be deemed limited by any insurance taken out pursuant to the provisions of this Agreement.

As Entech observes, MTA/TBTA's "right of indemnification is triggered by the willful or negligent acts of Entech, its subconsultants or agents." As Entech has shown that it cannot be held liable for any negligent conduct (*see, supra*), it is also entitled to dismissal of any indemnity claims against it.

b. Restani

Entech also seeks summary judgment against Restani for indemnification, relying on Article 6.03 of Restani's contract with the MTA/TBTA, which provides:

(a) The Contractor [i.e., Restani] shall indemnify and save harmless the Indemnified Parties, to the fullest extent permissible by law, from loss and liability upon any and all claims and expenses, including but not limited to attorneys' fees, on account of such injuries to persons or such damage to property, irrespective of the actual cause of the accident, irrespective of whether it shall have been due in part to negligence of the Contractor or its subcontractors or negligence of the Indemnified Parties, or of any other persons, but excepting bodily injuries and property damage to the extent caused by the negligence of the Authority.

Entech argues that it is entitled to the benefits of this language as it is a "Consultant" which falls within the definition of "Indemnified Parties."

Restani maintains that its contract with MTA/TBTA does not directly refer to Entech, but rather only to defined terms, and the definition of indemnified parties is "1) The Authority 2) The State 3) The MTA 4) The Consultant, to the extent permitted by General Obligations Law § 5.324." The term Consultant is defined "to mean the consulting engineer or other person or firm hired by the Authority to act on behalf of the Engineer to perform certain services, including but not limited to design, study, or inspection relating to the project..." Restani contends that this description of an indemnified "Consultant's" services does not completely "match up" to the services Entech was providing and that the Consultant at issue here was "likely" another engineering entity on the project, such as RAD Engineers or some "other person or firm hired by the Authority to act on behalf of the Engineer." (Doc. No. 381, at 12).

Contractual indemnity provisions should be strictly construed and "should not be judicially rewritten to create obligations that were not 'unambiguously' stated therein"

(*Weidman v Tremont Renaissance Hous. Dev. Fund Co., Inc.*, 224 AD3d 488, 491 [1st Dept 2024]).

As it is not unambiguously clear that the pertinent language pertains to Entech, it does not establish, prima facie, that it is entitled to indemnity from Restani (*see Bradley v NYU Langone Hosps.*, 223 AD3d 509 [1st Dept 2024] [contractor not entitled to summary judgment on contractual indemnity claim as it did not submit evidence showing intent to indemnify it]; *Ruisech v Structure Tone, Inc.*, 208 AD3d 412 [1st Dept 2024] [where parties disputed whether contract identified party as one to be indemnified, summary judgment on contractual indemnification claim properly denied as pertinent language not clear enough to enforce obligation to indemnify; Court “unwilling to rewrite the contract and supply a specific obligation the parties themselves did not spell out”]).

#### B. Restani’s motion (seq. 008)

Restani seeks summary judgment (1) dismissing plaintiff’s Labor Law § 200 claims against MTA/TBTA; (2) dismissing plaintiff’s Labor Law § 241(6) claims "in their entirety;" and (3) dismissing Entech’s second third-party complaint against Restani.

##### 1. Labor Law §§ 200 and 241(6) claims

As plaintiff has not asserted a Labor Law § 200 claim against Restani, it has no standing to move to dismiss those claims as against other defendants.

Restani argues that plaintiff’s Labor Law § 241(6) claims should be dismissed. (Doc. No. 317, at p. 10). Based on plaintiff’s opposition to the motion, it appears that only Industrial Code sections 12 NYCRR 23-1.7(b)(1) and 23-1.30 remain as predicates for plaintiff’s section 241(6) claim (NYSCEF 405).

Labor Law § 241(6) imposes a nondelegable duty on premises owners and contractors at construction sites to provide reasonable and adequate safety to workers. To establish a claim under the statute, a plaintiff must show that a specific, applicable Industrial Code regulation was violated, and that the violation caused the complained-of injury (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146, 950 N.Y.S.2d 35 [1st Dept 2012] [internal citations omitted]).

a. 12 NYCRR 23-1.7(b)(1)

Section 23-1.7(b)(1) provides that “[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part” (*Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 140 [2011]). However, the regulation “only applies to openings large enough for a person to fall completely through” (*Marte v Tishman Constr. Corp.*, 223 AD3d 527, 529 [1st Dept 2024]; see *Favaloro v Port Auth. of N.Y. & N.J.*, 191 AD3d 524, 525 [1st Dept 2021]).

Here, plaintiff stepped into a hole that was 2 ½ feet deep, composed of dirt and topsoil, with more dirt and rock beneath; there was no possibility that plaintiff could have fallen all the way through the hole. Therefore, Restani demonstrates that this alleged violation is inapplicable to plaintiff’s accident (*Farrell v Dick Enter., Inc.*, 227 AD2d 956 [4th Dept 1996] [as plaintiff stepped into hole in ground that had been dug during installation of fence, section 23-1.7(b) held inapplicable]; see also *Vitale v Astoria Energy II, LLC*, 138 AD3d 981, 983 [1st Dept 2016] [finding no Industrial Code violation because “openings of the grid were not of a dimension that would have permitted the plaintiff’s body to completely fall through”]; *Favaloro*, 191 AD3d at 525 [dismissing violation as plaintiff did not fall all the way through hole and “no measurement in the record supports an inference that plaintiff could have fallen all the way through the hole.”]; *Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002] [“the safety measures required

(in 23-1.7[b][1])– planking installed below the opening, safety nets, harnesses and guard rails – all bespeak of protections against falls from an elevated area to a lower area through openings large enough for a person to fit”).

b. 12 NYCRR 23-1.30

This Industrial Code section provides that:

Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass.

Restani argues that plaintiff’s testimony that the lighting was “horrible” is insufficient to establish a violation of this section, especially as plaintiff testified that there was a dome light under the bridge which provided “some light” and plaintiff’s foreman testified that there was no unsafe condition related to the lighting.

In opposition, plaintiff observes that his accident occurred at night, that the dome light was the only light that was working, and that plaintiff’s foreman testified that a nearby light pole contained a light that could not be lit, either because it was out of fuel or the generator was not working. The foreman also testified that they were working in very dark conditions, and that there should have been two lights posts with two lights on each post, instead of having only one working light approximately 50 feet away from them (NYSCEF 405).

Based on the conflicting testimony of the lighting conditions on the date of plaintiff’s accident, Restani does not meet its burden of showing that a violation of 12 NYCRR 23-1.30 did not occur (*see McKinney v Empire State Dev. Corp.*, 217 AD3d 574 [1st Dept 2023] [defendant not entitled to dismissal of claim predicated on 12 NYCRR 23-1.30 as plaintiff testified it was dark in accident area with no lights and others testified area was well-lit, raising issues of

credibility that could not be resolved on summary judgment]; *Hernandez v Columbus Centre, LLC*, 50 AD3d 597 [1st Dept 2008] [plaintiff's testimony that lighting conditions were poor, consisting only of street light 150 to 20 feet away created triable issue as to adequate lighting]).

Restani thus demonstrates that dismissal of plaintiff's Labor Law § 241(6) claim is appropriate only as to 12 NYCRR 23-1.7(b)(1).

## 2. Indemnity

Restani also seeks dismissal of Entech's claim against it for indemnification. As discussed previously (*supra*, II.A.3.b.), triable issues remain as to Entech's third-party claim against Restani for contractual indemnity.

## 3. Workers' Compensation Law

Finally, Restani argues that Entech's common-law indemnity and contribution claims against it fail under Section 11 of the Workers Compensation Law, which generally limits an employer's liability to third parties for injuries to their employees.

As Retani's arguments are meritorious and Entech does not oppose dismissal of these claims, they are dismissed.

## C. MTA/TBTA's motion (seq. 009)

MTA/TBTA seek summary dismissal of plaintiff's claims under sections 200, 241(6) and 241-a of the New York Labor Law and granting summary judgment against Entech on their indemnity claim.

MTA/TBTA argue that they cannot be held liable to plaintiff as they did not supervise or control his injury-inducing work. As the pertinent deposition testimony reflects that only Restani employees supervised plaintiff's work, MTA/TBTA is entitled to dismissal of plaintiff's Labor Law § 200 claim.

For the same reason discussed on Entech's motion related to Labor Law § 241(6), a triable issue remain as to whether there was adequate lighting at the site, thereby precluding dismissal of plaintiff's claim predicated on 12 NYCRR 23-1.30.

MTA/TBTA also seeks summary judgment on what it describes as plaintiff's Labor Law Section 241-a claim, which plaintiff does not oppose, and it is therefore dismissed.

As to MTA/TBTA's claim for indemnity against Entech, as the contractual indemnity claim depends on a finding that Entech was negligent and that its negligence caused or contributed to plaintiff's accident, summary judgment is premature, as is the claim for common-law indemnity.

### III. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion for summary judgment filed by defendant/third-party defendant/second third-party plaintiff Entech Engineering, P.C. (seq. 007) is granted to the extent of:

(1) dismissing plaintiff's claims against it pursuant to Labor Law §§ 240(1), 241(6), and 200; and

(2) dismissing defendants/third-party plaintiffs Metropolitan Transportation Authority and Triborough Bridge and Tunnel Authority's contractual indemnification claim asserted against it; and is otherwise denied; it is further

ORDERED, that the motion for summary judgment filed by second third-party defendant Restani Construction Corp. (seq. 008) is granted to the extent of:

(1) dismissing plaintiff's Labor Law § 241(6) claim predicated on a violation of 12 NYCRR 23-1.7(b)(1); and

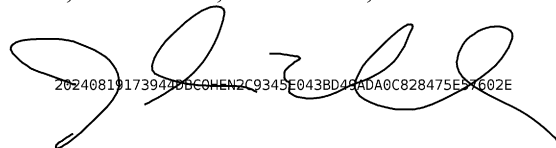
(2) dismissing defendant/third-party defendant/second third-party plaintiff Entech Engineering, P.C.'s claims against it for common-law indemnification and contribution; and is otherwise denied; it is further

ORDERED, that defendants/third-party plaintiffs Metropolitan Transportation Authority and Triborough Bridge and Tunnel Authority's motion for summary judgment is granted to the extent of:

(1) dismissing plaintiff's claims against them pursuant to Labor Law §§ 200 and 241-a; and

(2) dismissing plaintiff's Labor Law § 241(6) claim predicated on a violation of 12 NYCRR 23-1.7(b)(1); and is otherwise denied; and it is further

ORDERED, that the parties appear for the previously-scheduled settlement conference on November 13, 2024 at 9:30 a.m. in Part 40, 60 Centre Street, Room 422, New York, New York.

  
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8/19/2024  
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: