SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

MICHAEL NOWELL and SYLVIA NOWELL,

Plaintiffs,

-against-

HAVERSTRAW HUDSON LLC, ADMIRALS COVE HOLDINGS LLC INC., ORANGE AND ROCKLAND UTILITIES, INC., ALTICE USA, INC., and VERIZON NEW YORK, INC.,

Defendants.

ORANGE AND ROCKLAND UTILITIES, INC.,

Third-Party Plaintiff,

-against-

GINSBURG DEVELOPMENT COMPANIES, LLC,

Third-Party Defendant.

DECISION & ORDER

Index No.: 031636/2022

(Motions # 3, 5, 6)

Keith J. Cornell, A.J.S.C.

Before the Court is the motion (Motion #3) made pursuant to CPLR § 3212 by Admirals Cove Holdings LLC Inc. (ACH) seeking summary judgment dismissing all claims and cross claims against it. This motion is opposed by Plaintiff Michael Nowell and Defendant/Third-Party Plaintiff Orange and Rockland Utilities (O&R).

Also before the Court is the motion (Motion # 5) made pursuant to CPLR § 3212 by Plaintiff Michael Nowell for summary judgment on the issue of liability under Labor Law §200, § 240(1), and § 241(6) against Defendant ACH and on liability under Labor Law § 240(1) and § 241(6) against Defendant O&R. Defendants ACH, O&R, and Third-Party Defendant Ginsburg

Development Companies, LLC, (GDC) oppose the motion. Plaintiff also moves to strike seven affirmative defenses asserted by ACH.[1]

Also before the Court is the motion (Motion # 6) made pursuant to CPLR § 3212 by O&R seeking summary judgment dismissing all claims and cross claims against it. Defendants ACH, Verizon, and Plaintiff oppose the motion.[2]

The Court considered the following papers electronically filed on NYSCEF:

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Affirmation of Luis Ortega, dated May 6, 2024 (expert opinion)	310
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Affirmation in Opposition by Matthew W. Cramer, Esq. for Ginsburg Development Companies, LLC	286
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[1] In Motion #5, Plaintiff also moves for a unified trial. That request will also be addressed in a separate opinion.
[2] In Motion #6, O&R also moves for summary judgment on its claim that Cablevision must defend and indemnify O&R. This argument and Cablevision's opposition will be addressed in a separate decision.

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Background

Plaintiff Michael Nowell was injured in an accident that took place on November 15, 2021 at approximately 10:45am at a construction site in Haverstraw, New York for a project known as Admirals Cove. Third-Party Defendant Ginsburg Development Companies, LLC (GDC), the General Contractor, employed Plaintiff as a Site Superintendent. The site was owned by Admirals Cove Holdings, LLC (ACH).

A few months prior to the accident, on April 24, 2021 and June 9, 2021, five utility poles were removed because they were in the footprint of the construction project. The poles were owned by O&R and held overhead cables and electrical equipment that was owned, operated and/or maintained by O&R, Cablevision of Wappingers Falls, Inc. i/s/h/a Altice USA, Inc. (Altice), and Verizon New York, Inc. (Verizon) (together, the Utility Defendants). O&R coordinated the removal of the five poles. Following the removal, two utility poles carrying live wires remained standing within the worksite. The area around the two poles was not barricaded or blocked off. The new end pole, #60270/43429, was not braced with a guy-wire or in-ground anchor. There had allegedly been a plan to replace the overhead wiring with underground lines, but that plan had not yet been approved or carried out by the date of the accident. Plaintiff alleges that after removal of the five poles, the remaining two poles had begun to lean to the west and the cables had sagged due to the tensile stresses from the wires. The Utility Defendants deny that the poles had any significant lean or that any of the wires were below the regulated minimum height of 15.5 feet from the ground.

Javis Construction ("Javis") had been hired by GDC to perform excavation work. It is not disputed that Javis drove its excavator between the poles, below the wires, on multiple occasions. On November 9, 2021, Javis walked off the job after a disagreement with GDC and left an excavator at the site.

On November 15, 2021, a truck arrived at the site with a delivery of precast concrete. The truck was located on the northside of the jobsite. The Javis excavator was located on the southside of the jobsite. Architect Jens Versland, who was employed by GDC as the project director, operated the Javis excavator to meet the delivery truck and unload the concrete. Plaintiff was walking in front of the excavator toward the delivery truck, possibly as the spotter. Versland drove

the excavator under the utility and electrical wires to reach the delivery truck. The boom of the excavator hit the telecommunication cables. The two utility poles then snapped and fell with transformers and live wires onto Plaintiff, and he sustained serious personal injuries, including electrocution.

Procedural Posture

Plaintiff commenced this action by filing a summons and complaint on April 14, 2022 against Defendants Haverstraw Hudson LLC,[3] ACH, O&R, Altice, and Verizon. On April 20, 2022, Plaintiff filed and served a Supplemental Summons and Amended Complaint against the same Defendants. Plaintiff asserted causes of action under Labor Law §§ 200, 240(1), and 241(6), as well as a common-law negligence cause of action. The Defendants each answered the Amended Verified Complaint and asserted cross claims against one another. In August 2022, O&R brought a third-party action against GDC for contribution. Discovery was conducted and a note of issue and certificate of readiness were filed on December 22, 2023. A schedule for dispositive motions was set. Six motions for summary judgment were simultaneously filed on or about April 3, 2024. Opposition and one cross motion were filed by May 9, 2024. Replies were filed on or about May 30, 2024.

In this decision, the Court will address the motion by ACH for summary judgment dismissing all claims against it, the motion by Plaintiff for summary judgment on the issue of liability in his favor on all of the Labor Law claims against ACH and the Labor Law § 240(1) and § 241(6) claims against O&R, and O&R's motion for summary judgment dismissing all claims against it.

[3] Upon proof that Haverstraw Hudson LLC is not an owner of the project or in any way associated with the site or the construction, all parties signed a stipulation of discontinuance as to Haverstraw Hudson LLC on April 4, 2024.

ARGUMENTS AND EVIDENCE

Arguments by ACH in favor of summary judgment dismissing the complaint

ACH argues as a matter of law that it has no liability under the Labor Law or common law to Plaintiff for the injuries he sustained. (Doc. 135). ACH argues that the Labor Law § 200 and common law claims against it must be dismissed because it had no role in the construction project other than as owner of the site and as the party that hired the general contractor, GDC. ACH argues it did not exercise any control over the work being performed at the time of Plaintiff's accident. ACH argues that it had no involvement with the Javis excavator. ACH argues that it did not create and had no notice of the alleged defective condition of the unsecured utility poles and sagging wires.

ACH argues that as a matter of law Labor Law § 240(1) does not apply in this situation. ACH argues that §240(1) liability is contingent upon the accident being a type in which a scaffold, hoist, stay, ladder, or other protective device proved inadequate to shield an injured worker from harm directly flowing from the application of the force of gravity to an object or person. ACH argues that the utility poles and wires were not being hoisted or secured and Plaintiff was not working on an elevated work site. ACH argues that the "required safety devices" listed in § 240(1) are not applicable to Plaintiff's accident. ACH argues that there was no relevant safety device that could have been used to protect Plaintiff from this accident. Finally, as to Labor Law § 241(6), ACH argues that Plaintiff has failed to establish that any of the Industrial Code regulations identified in his Bill of Particulars were violated or that such violations, if any exist, were a proximate cause of the accident. ACH argues that no issues of material fact exist that would prevent granting summary judgment in its favor and dismissing the complaint.

Arguments by O&R in favor of summary judgment dismissing the complaint and all cross-claims

In the Affirmation in Support of Motion #6 (Doc. 200), Affirmation in Opposition to Motion # 3 (Doc. 341), and Affirmation in Opposition to Motion #5 (Doc. 343), O&R argues that reckless operation of the excavator by Versland was the only proximate cause of the accident. In support of the motion, O&R submitted the affidavit and expert report of J. Edward Horne (Doc. 227). Horne concluded that the lowest wires, which belonged to Verizon, were never below the minimum NESC ground clearance of 15.5 feet. (Doc. 227 p. 8-11). Horne concluded that the poles did not have any significant lean. (Doc. 227 p. 7, 13-14). He also concluded that neither pole required a guy-wire per the NESC guidelines. (Doc. 227 p. 12).

O&R argues that on the day of the accident, Versland operated the excavator without permission, with Plaintiff acting as his spotter. O&R argues that the boom on the excavator was 19 feet tall. In support of this claim, O&R submitted the expert report of Joseph Neal, P.E. (Doc. 228). O&R argues that the boom would have hit the wires whether they sagged or not, because the Verizon wires were attached 17 feet above ground level.

O&R argues that the Labor Law claims are all legally insufficient because O&R is neither an owner of the property or a contractor on the construction site. O&R argues that the many Labor Law cases that assign liability to electrical utilities after accidents involving their utility poles are inapposite because work was not being done on these poles when the accident occurred. O&R argues that its poles are not supposed to be built to withstand any and all forces, including the reckless operation of an excavator.

Arguments by Plaintiff for finding of liability as to ACH & O&R

In the Affirmation in Support of Motion # 5 (Doc. 164), Memorandum of Law in support of Motion #5 (Doc. 165), Affirmation in Opposition to Motion #3 (Doc. 308), Memorandum of

Law in Opposition to Motion #3 (Doc. 312), Affirmation in Opposition to Motion #6 (Doc. 321), Memorandum of Law in Opposition to Motion #6 (Doc. 325) Plaintiff argues that ACH's and O&R's motions for summary judgment dismissing the complaint should be denied and his own motion for summary judgment should be granted. In the alternative, Plaintiff argues that substantial issues of fact exist that prevent granting either ACH's or O&R's motions for summary judgment.

A. Labor Law § 200

Plaintiff argues that as an owner, ACH has a nondelegable common-law duty, codified at Labor Law § 200, to provide reasonable and adequate protection and safety for workers. Plaintiff argues that he has established liability under both § 200 categories, the condition of the premises and the method or manner of work. He argues a dangerous condition at the jobsite was created by the two remaining utility poles in the active jobsite, as the poles were not barricaded, the wires were live, and the utility end pole was not properly stabilized, causing it to lean allowing the overhead wires to sag. Plaintiff alleges that Martin Ginsburg, who was both a manager for ACH and an employee of GDC, was aware of the dangerous condition at the jobsite. Plaintiff points to emails between Martin Ginsburg, Versland, and Jason Davis, the owner of Javis, in which the overhead wires are discussed and identified as a problem. (Doc. 176). Plaintiff argues that Javis had notified ACH of the hazard of working near the wires prior to the accident. Plaintiff argues that through Martin Ginsburg, ACH had actual and constructive notice of the dangerous condition. Further, Plaintiff argues that operation of the excavator under the live wires was a violation of the "method or manner of work" category of Labor Law §200. Plaintiff argues that ACH was aware that the excavator was operated below the live wires, which was an inherently dangerous activity. Plaintiff argues that allowing this unsafe practice was a *prima facie* violation of Labor Law § 200.

B. Labor Law § 240(1)

Plaintiff next argues that ACH and O&R are strictly liable pursuant to Labor Law § 240(1) because there was a failure to use a safety device to protect him from harm directly flowing from the application of the force of gravity to an object. Plaintiff argues that after the five-pole demolition, Pole #60270/43429 became an end pole, which needed a guy-wire to stabilize it. Plaintiff argues that the failure to brace the new end pole with a guy-wire and in-ground anchor caused the two remaining poles in the jobsite to tilt and allowed the cables between them to sag. Plaintiff argues by the day of the accident, the lowest cables were less than the minimum of 15 ½ feet above the ground. Plaintiff argues that the failure to use a guy-wire to secure the utility pole is a proximate cause of his injury, as it allowed the wires to sag dangerously low and failed to keep the poles upright when the excavator hit the wires.

Plaintiff offers the expert testimony of Luis Ortega, a technical expert in the electrical utility field, see Doc. 166 (aff. dated 2/26/24) and Doc. 362 (aff. dated 5/6/24, and also uploaded as Docs. 310 & 323), Nicholas Bellizzi, P.E., a professional engineer, see Doc. 167 (aff. dated 2/26/24) and Doc. 363 (aff. dated 5/1/24, and also uploaded as Docs. 311 & 324), and Leo J. DeBobes, a Certified Safety Professional, see Doc. 168 (aff. dated 2/27/24) and Doc. 361 (aff. dated 5/1/24 also uploaded as Docs. 309 & 322) in support of his claims. Ortega concluded that after the demolition of the five utility poles, "the remaining wires and cables running from poles #60266/43422 and 60270/43429 to West Street should have been grounded or de-energized given the ongoing construction." (Doc. 166 at ¶ 25). This conclusion was echoed by Plaintiff's expert engineer, Nicholas Bellizzi, P.E. (Doc. 167 at ¶ 23). Ortega and Bellizzi also concluded that the failure to brace end pole #60270/43429 with a guy-wire and in-ground anchor caused the poles to tilt and the telecom wires to sag. (Doc. 166 at ¶ 27; Doc. 167 ¶ 24). Finally, both experts concluded

that "the telecom cables sagged creating an inherently dangerous condition on an active construction site involving frequent use of heavy machinery." (Doc. 166 at ¶ 27; Doc. 167 ¶ 24). Bellizzi concluded that, pursuant to the Pole Attachment agreements between O&R and Verizon and O&R and Altice, all three of the Utility Defendants were responsible for ensuring that the utility poles were stable and secure, and for ensuring that the cables would not sag. (Doc. 363 ¶ 59-63).

Plaintiff's Certified Safety Professional, Leo J. DeBobes, concluded that permitting work around the poles and underneath the live wires without any change in safety protocol was a clear violation of NYS Industrial Code, National Electrical Safety Code (NESC) and OSHA construction standards. (Docs. 168 & 361 at ¶15). DeBobes found that the leaning poles and sagging wires were distinctly visible for several months prior to the incident, but despite the obvious dangerous condition, "absolutely nothing was done to protect the workers on this site from the inherent and foreseeable danger of the poles falling." (Docs. 168 & 361 at ¶ 27).

DeBobes further concluded that an excavator should not have been operated in around the utility poles:

> [T]he use of heavy machinery should never have been permitted around the poles by the pump station (poles #60266/43422 and 60270/43429) and certainly not underneath live electrical wires and sagging telecom cables. The wires and cables should have been de-energized or grounded. The area should have been blocked off or barricaded. Another route for the excavator to travel should have been created and designated. Michael Nowell and other workers should never have been permitted within the zone of danger of an unsecured utility pole, collectively weighing over 3,000 pounds, running live electrical wires with 13,200 volts.

(Doc. 168 & 361 at ¶ 44).

Professional Engineer Bellizzi explained that the excavator had the ability to move at between 2.1 and 3.5 mph. (Doc. 167 at ¶ 42; Doc. 363 at ¶ 43.) He concluded that

> A force was generated by the folded arm of the excavator when it snagged the telecom cable(s) which ran from pole #60266/43422 and was connected to pole #60270/43429. The excavator arm pulled on the telecom cable(s) at the wire's reduced height of less than 15½ feet above the ground surface. The telecom cable(s) was pulled in a Northern direction perpendicular to West Street resulting in tensile forces (pulling apart forces) in the telecom wire(s) as the slack in the wire was eliminated. This tension on the telecom cable(s) then began to pull upon the wood poles where the cable(s) was connected to the poles approximately 18 feet above the ground elevation below. As the cable(s) pulled away from the poles, the tensile forces at the cable connection to the poles approximately 18 feet in height, were transferred down to the base of the poles at the ground level. The approximate 18 feet height distance was the moment arm, with zero moment at the base of the poles. The tensile force line of action at the approximate 18 feet height and the axis of rotation at the base of the poles at the ground level acted as a lever arm. The axis of rotation was at the base of each pole. The moment was the tensile force at the top, 18 feet from the base. As the cable(s) was pulled upon by the excavator's arm, the two poles, ultimately snapped at their bases. However, the cable(s) that was being pulled upon by the excavator arm which was attached to the pole, did not break due to the tensile (horizontal) forces acting upon it to pull it apart. These tensile forces were not sufficiently great enough to exceed the ultimate strength of the lowest telecom wire, but were great enough to shear the two poles at their bases and topple the two poles.

(Doc. 167 at ¶ 44; Doc. 363 at ¶ 45).

Ortega further concluded that a properly installed guy-wire would have prevented the poles from falling even if the excavator had crashed into the wires:

> The lowest telecom cable belonging to VERIZON had a breaking (ultimate) strength of no more than 6,600 pounds. This cable did not fail upon contact from the excavator arm. It did not snap. Therefore, the tensile load placed on the cable by the excavator's arm was less than 6,600 pounds. The strength of a galvanized steel strand guy-wire with a 3/8 inch diameter has a breaking tensile strength (ultimate strength) of 15,500 pounds. If the guy-wire and in-ground anchor had been properly installed on pole #60270/43429, the guy-wire would have provided sufficient strength to prevent the poles from breaking by counteracting the tensile forces placed at the top of the pole due to the pulling on the telecom cable by the excavator arm.

(Doc. 166 at ¶ 43). In summary, Plaintiff argues that a properly installed safety device (the guy-wire) would have prevented the poles from falling and injuring him, even if the excavator had been improperly operated under the lines.

Plaintiff argues as an alternate theory that ACH is strictly liable pursuant to Labor Law § 240(1) because the excavator that caused the accident was going to be used as a hoist to lift the precast concrete on the delivery truck. Plaintiff argues that an accident involving equipment that is going to be used as a hoist, even if it is not in the act of hoisting at the time of the accident, may still be a ground for liability under §240(1) because a hoist is itself an enumerated safety device. In support of this claim, Plaintiff cites to the deposition of Jason Davis, in which he stated that the excavator was used to hoist the precast concrete. (Doc. 180 at 99:16-25). Safety expert DeBobes also concluded that the excavator was being used as a hoist. (Docs. 168 & 361 at ¶ 59-60.). Plaintiff argues that the excavator was not properly operated near electrical lines to afford proper protection to Plaintiff.

Plaintiff argues that O&R is liable as an "owner" under § 240(1) because O&R owned the subject utility poles, transformers, and electrical wires that were left standing in the middle of the Admirals Cove construction site. Plaintiff also argues that O&R is liable as a contractor or agent that performed demolition work because O&R removed the five utility poles upon request from GDC. Plaintiff argues that O&R improperly focuses on the height of the cables, rather than the lack of a brace. Plaintiff argues that at a minimum, there is an issue of fact as to the height of the cables on the date of the incident.

Plaintiff argues that O&R's experts misinterpret NESC Rule 264 by arguing that it only requires guying in situations when overloading is possible. Plaintiff points out the NESC Rule 264 also requires guying and bracing to limit sagging and to provide strength at dead ends. Plaintiff argues that the software used by O&R's expert did not properly take into account all the factors that affect utility poles.

C. Labor Law § 241(6)

Lastly, Plaintiff argues that ACH and O&R are each vicariously liable under Labor Law § 241(6) because work was permitted around the poles and underneath the wires without any change in safety protocol and in clear violation of the NY State Industrial Code, 12 NYCRR § 23-1.1 *et seq.* and the National Electrical Safety Code.

Plaintiff's experts all concluded that ACH violated Section 23-1.13 "Electrical Hazards", subsections (b) "General" & (d) "High-voltage power circuits", because an excavator was operated under live power lines, the area surrounding the poles and live wires was not barricaded, warning signs were not posted in the area, and the three Utility Defendants were not properly notified that work would done under the wires. (Doc. 166 at ¶ 73-74; Doc. 167 at ¶ 55-56; Doc. 168 at ¶ 79-80).

Based on the testimony of Steve Diaz of GDC and Jason Davis of Javis, Plaintiff's safety expert DeBobes concluded that Versland was not a designated person to operate the Javis excavator. (Doc. 168 at ¶ 45). DeBobes concluded that Versland was not properly trained. (Id. 50). Therefore, he concluded that ACH violated Section 23-9.4 "Power shovels", subsection (h)(4)&(6) and Section 23-9.5 "Excavating Machines", subsections (c)-(d), because the excavator was operated by an unauthorized person/ non-designated person near power lines. (Doc. 168 at ¶ 81-82). DeBobes and Bellizzi also opined that Section 23-4.2(k) "Excavating Operations-Trench and area type excavations" was violated because it prohibits working in an area where a person could be struck by any material dislodged by excavation equipment. (Doc. 168 at ¶ 83-84; Doc. 167 at ¶ 59-60).

Plaintiff's experts all concluded that ACH and O&R violated Section 23-4.1 "Excavating Operations" because bracing was not used to stabilize the utility poles near the excavation for the storm drainage system. (Doc. 166 at ¶ 75-76; Doc. 167 at ¶ 57-58; Doc. 168 at ¶ 85-86).

Plaintiff's experts concluded that Section 23-3.2 "Demolition Operations" subsection (a)(3) was violated by ACH and O&R when the five utility poles were removed and the remaining power lines were not protected with substantial coverings, (Doc. 166 at ¶ 78; Doc. 167 at ¶ 61-62; Doc. 168 at ¶ 87) and Section 23-3.2 "Demolition Operations" subsection (b) was violated when Pole # 60270/43429 was not properly braced after it became the end pole. (Doc. 167 at ¶ 61).[4]

Plaintiff points out that OSHA determined that federal regulations 29 CFR § 1926.600(a)(6) and 29 CFR § 1926.600(a)(6)(iv) were violated because an excavator was operated in the vicinity of energized power lines and because a person was not designated to observe clearance and give warning. (Doc. 193). Plaintiff argues that these Industrial Code violations by ACH and O&R establishes his *prima facie* entitlement to summary judgment on liability in his favor on his Labor Law § 241(6) claims.

Finally, Plaintiff argues that even if he has not established his entitlement to summary judgment, ACH and O&R have also failed to meet their initial burden for a grant of summary judgment because issues of fact remain.[5]

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[4] In the Memorandum of Law filed by ACH on April 3, 2024 in support of its motion for summary judgment, ACH argued that Plaintiff could not establish violations of Industrial Code Sections 23-1.5, 23-1.7, 23-1.8, 23-1.12, 23-1.31, 23-1.32, 23-9.2(a). Plaintiff did not argue that those sections were violated either in his opposition to the ACH motion for summary judgment or in support of his own motion for summary judgment. Therefore, the motion for summary judgment by ACH dismissing those claims is granted.

[5] O&R also argues against dismissal of Plaintiff's claims against ACH (Doc. 341). O&R argues that ACH is not entitled to dismissal of Plaintiff's Labor Law § 200 claim because ACH had notice of the excavator being operated under the electric and telecommunication wires. O&R also argues that there are issues of fact as to whether ACH exercised control over the work being performed at the time of the accident. Additionally, O&R argues that ACH cannot prove that the Industrial Code section prohibiting work within 10 feet of electrical wires, 12 § NYCRR 23-1.13(d)(1), was not violated. Thus, ACH has failed to meet its burden that it is not liable under Labor Law §241(6).

Arguments of ACH in reply

In reply and further support of its motion to dismiss all claims (Doc. 333), ACH argues that Plaintiff has not raised a triable issue of fact that could defeat ACH's motion for summary judgment. ACH argues that Verizon's and Altice's failure to oppose ACH's motion means that any cross-claims asserted by those Defendants should be dismissed. In opposition to Plaintiff's motion for summary judgment (Doc. 302), ACH argues that none of Plaintiff's claims are viable.[6]

ACH argues that it does not have liability under §200 "condition of premises" because ACH did not have actual or constructive notice of any allegedly dangerous condition. ACH argues that Plaintiff and O&R misconstrue the relationship between ACH and Martin Ginsburg. ACH argues that Martin Ginsburg's role as a manager at ACH was strictly limited to design of the project, not construction. ACH argues that in all the emails between Martin Ginsburg, Versland, and Davis, Martin Ginsburg was acting only in his capacity as an employee of GDC. ACH points out that Plaintiff has not argued that ACH and GDC are not separate entities and Plaintiff has not attempted to pierce the corporate veil.

ACH argues that there is no factual or legal basis for Plaintiff's Labor Law § 200 "means and methods" claims. ACH argues that it did not have the authority to supervise or control the performance of the work. ACH argues that GDC was the general contractor and only party with authority to supervise or control work. ACH argues that the evidence establishes that none of the GDC employees reported to ACH. ACH argues that it did not own, lease, rent, control or have any involvement with the excavator that crashed into the overhead wires.

[6] GDC also submitted an affirmation in opposition to Plaintiff's motion for summary judgment. GDC argues that triable issues of fact exist as to Plaintiff's § 240(1) and § 241(6) claims. GDC argues that ACH's involvement with the project is not sufficient for §200 liability to attach.

ACH argues that Labor Law § 240(1) does not apply to this situation because the worksite was not positioned below the level where materials are hoisted. ACH argues that the utility poles and wires were not items that required securing for the purposes of the undertaking. ACH argues that Plaintiff has not demonstrated that a guy-wire was required for Pole #60270/43429 or that a guy-wire constitutes a "brace" or any other enumerated safety device per § 240(1). ACH argues that the excavator was not hoisting anything at the time of the accident. ACH argues that Plaintiff was not working on a building or a structure when he was injured. ACH points out that Plaintiff was just walking to a truck to unload items when the poles and wires fell on him. ACH argues that Plaintiff never complained about the utility poles and wires before they fell and injured him.

ACH argues that a failure to provide an enumerated safety device was not the proximate cause of the accident. ACH suggests that the failure to provide a spotter for Versland when he drove the excavator was the proximate cause of the accident. ACH argues that a spotter is not the type of safety device contemplated by Section §240(1). ACH suggests that Plaintiff was supposed to be Versland's spotter, and Plaintiff's failure to warn Versland about the wires was the proximate cause of the accident. ACH argues that it was not foreseeable that the utility poles would fall. ACH argues that the utility poles are not "structures" per the Labor Law. ACH argues that the fact that Plaintiff was not working on the utility poles that fell on him prevents summary judgment in his favor.

ACH argues that no Industrial Codes were violated, thereby making Labor Law § 241(6) inapplicable. ACH argues in the alternative that a violation of a specific Industrial Code is merely some evidence of negligence that may be presented to a jury.

ACH offers the affirmation of their expert, Michael J. Tuttman, Professional Engineer, in support of the claim that certain Industrial Codes were not violated. (Doc. 301). Tuttman opined

that Section 23-1.13 "Electrical Hazards", subsections (b) "General" and (d) "High-voltage power circuits", are not applicable because Plaintiff was not working within 10 feet of a power line. (Doc. 301 ¶ 9). Tuttman opined that the pulling down of the power lines was an "unforeseeable event." Id. Tuttman concluded that there was no indication that ACH violated Section 23-4.2(k) "Excavating Operations-Trench and area type excavations" because

> there was "no evidence that the Plaintiff MICHAEL NOWELL was working in an area where it was foreseeable that he would be struck or endangered by any excavation equipment. In addition, MICHAEL NOWELL allowed himself to be in an area where the wires fell.

Doc. 301 at ¶ 10.

Tuttman further concluded that ACH did not violate Section 23-4.1 "Excavating Operations" because no excavation was taking place at the time of the accident. (Doc. 301 at ¶ 13). Similarly, Tuttman concluded that Section 23-3.2 "Demolition Operations" subsection (a)(3) was not violated by ACH because nothing was being demolished on the day of the accident. (Doc. 301 ¶ 15).

ACH argues Section 23-9.4 "Power shovels", subsection (h)(4)&(6) and Section 23-9.5 "Excavating Machines", subsections (c)-(d), were not violated because Versland was a designated person to operate the excavator or he was at least not an "unauthorized person." ACH argues that Versland was a designated person because he was the Project Director and was OSHA-10 certified. ACH suggest that Plaintiff may have given Versland authority to operate the excavator, or at least implicitly acknowledged Versland's authority. ACH argues that, at a minimum, whether Versland was a "designated person" or an "unauthorized person" is an issue of fact. ACH argues that there is no connection between the removal of the utility poles in April and June of 2021 and Plaintiff's accident in November 2021. ACH argues that Section 23-1.4(b)(16) was not violated because the movement of the excavator that day was not incidental to or associated with the dismantling of a

structure. However, ACH offered no expert opinion or affidavit of a person with knowledge in support of these arguments regarding Sections 23-1.4, 23-9.4, or 23-9.5.

Finally, as a matter of law, ACH argues that it had no duty to protect Plaintiff from conditions that are readily observable. ACH argues that Plaintiff's decision to walk in front of the excavator was the sole proximate cause of the accident.

Arguments by O&R in reply

In further support of its motion for summary judgment, O&R argues that the pole and wire configurations were not the cause-in-fact of the accident. O&R argues that it has established through competent evidence that height of the wires was irrelevant because the 19 foot height of the boom was well above the 15.5 feet of minimum ground clearance. O&R points to the expert affirmations of J. Edward Horne submitted in reply to Plaintiff's experts (Docs. 344, 370) in which he concludes that the end pole #60270/43429 did not require a guywire per the NESC guidelines because the strength of the two poles was sufficient to prevent sagging of the wires. O&R also points out that Horne concluded that the presence of a guy-wire would not have prevented the incident because guys are not designed to support extreme outside loads, such as falling trees or moving vehicles. (Doc. 227 p.12, Doc. 344 ¶ 7). In his affirmation in reply to Plaintiff's experts, Horne explains why he disagrees with Plaintiff's experts' calculations.

Finally, O&R argues that all of Plaintiff's Labor Law claims must fail. As to § 240(1), O&R argues that it is not an owner or agent because it was not engaged in work at the construction site. O&R joins in ACH's argument that a guy-wire is not a "brace" as that term is used in § 240(1). As to § 241(6), O&R argues that the two cited Industrial Codes are inapplicable to this case.

Arguments by Plaintiff in reply

In reply to ACH's opposition to Plaintiff's motion for summary judgment (Doc. 358), Plaintiff argues that the ownership of the excavator is irrelevant for Section § 200 liability because ACH owned the land. Plaintiff points out that no affirmation or affidavit was submitted by Martin Ginsburg to support the claim that Mr. Ginsburg acted only on behalf of GDC when he communicated with Davis and Versland about the construction site.

Plaintiff argues that he is a person covered under § 2401(1) because he was working on a site where demolition and construction were performed. Plaintiff argues that excavator was being used as a hoist on the day of the accident, and therefore was an enumerated safety device under § 240(1). Plaintiff argues that a guy-wire is a "brace" and a utility pole is a "structure" as those terms are used in § 240(1). Plaintiff points out that his expert, Ortega, specifically opined that a properly attached guy-wire would have counteracted and withstood the force of the excavator crashing into the telecom wires and prevented this incident. (Doc. 166 ¶ 43).

Plaintiff argues that he cannot be found to be the proximate cause of the accident, as he was not involved in the demolition of the poles, did not refuse any safety device, and was not operating the excavator. Plaintiff argues that he did not discuss the use of the excavator with Versland that morning and was not aware that Versland was going to operate the excavator. Plaintiff argues that even if Versland's claim that Plaintiff was acting as the spotter is given credit, this would not establish comparative negligence and/or would not preclude an award of summary judgment to him because ACH is strictly liable under §240(1) and §241(6).

Plaintiff argues that the expert affirmation of Michael J. Tuttman submitted by ACH (Doc. 301) raises no legitimate issues of fact as to these violations. Plaintiff argues that Tuttman's interpretations of the Industrial Code are incorrect. Plaintiff argues that Section 23-1.13 applies

to people and equipment used within 10 feet of power lines. Plaintiff argues that whether he was within 10 feet of the power lines is immaterial, since the excavator was well within 10 feet of the lines when it crashed into them. Plaintiff argues that ACH has no valid challenge to his entitlement to summary judgment based on the violations of Sections 23-1.13, 23-9.5(d) and 23-9.4(h)(6).

Plaintiff reiterates his argument that Versland was not authorized or a designated person to use or operate the excavator, establishing the violations of Sections 23-9.5(c) and 23-9.4(h)(4). Plaintiff argues that Section 23-4.2(k) applies even if excavation work was not underway at the time of the accident and that Section 23-3.2(b) applies even if demolition work was not occurring that day.

Plaintiff's arguments in reply to O&R

Plaintiff argues that O&R is a proper labor law defendant first, because it is the "owner" of a "structure" that ultimately fell on Plaintiff, and second because it was the contractor/agent that performed the demolition work to remove the other five poles. Plaintiff argues that it is of no matter that O&R was not present at the time of the accident or that the poles were not being worked on that day. Plaintiff argues that O&R failed to take appropriate measures to ensure that the poles and cables could withstand the foreseeable contact from a vehicle.

Plaintiff argues that the operation of the excavator by Versland was not the sole proximate cause of the accident. Plaintiff argues that O&R's expert never was on the site and his opinions are based on distorted photos. Plaintiff points to the testimony of Jason Davis for support of Plaintiff's claims that the lowest wires were below 15.5 feet. (Doc. 180 p. 117). Plaintiff argues that O&R had an obligation to recognize the significant danger of leaving two unsecured utility poles running live electrical wires standing in the middle of a construction site and, therefore, to take reasonable and necessary step of securing the pole with a guy-wire to prevent injury.

Arguments about Dismissing Affirmative Defenses

Plaintiff dedicates one paragraph in his Memorandum of Law in support of his argument to dismiss ACH's affirmative defenses per CPLR § 3211(b). Plaintiff argues these defenses should be stricken because there are no issues as to liability and the defenses lack merit. In response, ACH argues that the defenses should not be dismissed because numerous issues of material fact remain. ACH also points out that Plaintiff failed to actually explain why the affirmative defense should be dismissed.

DISCUSSION

Summary Judgment Standard

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient admissible evidence to eliminate any material issues of fact from the case. See Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 (1957). The movant bears the burden of proving entitlement to summary judgment, and the failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985). Once sufficient proof has been offered, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form that raises a triable issue of fact. See Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A court must carefully scrutinize the motion papers in the light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference. See Negri v. Stop & Shop, 65 N.Y.2d 625 (1985). However, conclusions or allegations unsupported by competent evidence are

insufficient to raise a triable issue. See id.; see also Stonehill Capital Mgt. LLC v Bank of the W., 28 N.Y.3d 439 (2016).

Labor Law § 200 and Common Law Claims

Labor Law §200 is a codification of the common law duty imposed on owners and general contractors to maintain a safe construction site. See Rizzuto v. L.A. Wenger, 91 N.Y.2d 343 (1998).

Labor Law § 200 cases can be divided into two broad categories: "those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed." Ortega v. Puccia, 57 A.D.3d 54, 61 (2d Dept. 2008). Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created or had actual or constructive notice of the dangerous condition that caused the accident. See Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837 (1986) ("To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it."). However, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor under Labor Law § 200 requires a showing that the defendant had the authority to supervise or control the performance of the work. See Rizzuto, 91 N.Y.2d at 352; Russin v. Picciano, 54 N.Y.2d 311, 317 (1981) (defendant must "have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition."). This precondition is an outgrowth of the basic common-law principle that an owner or general contractor should not be held responsible for the negligent acts of others, such as a subcontractor, over whom the owner or general contractor had no direction or control. See Ross v Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 505 (1993).

Plaintiff argues first that a dangerous condition existed at the worksite because of presence the two utility poles with live wires that had no guy-wire to secure them or prevent the sagging of the wires, and that also lacked any barrier around them or protective coating on the wires. Plaintiff provided the sworn statement of Luis Ortega, a technical expert in the electrical utility field, who stated that after the demolition of the five utility poles, "the remaining wires and cables running from poles #60266/43422 and 60270/43429 to West Street should have been grounded or de-energized given the ongoing construction." (Doc. 166/362 at ¶ 25). This conclusion was echoed by Plaintiff's expert engineer, Nicholas Bellizzi, P.E., (Doc. 167/363 at ¶ 23). Ortega and Bellizzi also concluded that the failure to brace end pole #60270/43429 with a guy-wire and in-ground anchor caused the poles to tilt and the telecom wires to sag. (Doc 166/362 at ¶ 27; Doc 167/363 ¶ 24). Finally, both experts concluded that "the telecom cables sagged creating an inherently dangerous condition on an active construction site involving frequent use of heavy machinery." (Id.).

ACH does not deny that the live, sagging wires that were not coated or grounded, or separated from the active construction area by a barrier, was a dangerous condition. Although O&R presents evidence to raise an issue of fact as to the whether the poles were leaning or the wires sagged, none of the expert evidence presented by O&R denies that the presence of the two utility poles in the construction area, without any type of barricade or change in safety protocol, presented a potentially dangerous condition.

Plaintiff next argues that ACH had either actual or constructive notice of the dangerous condition because Martin Ginsburg had actual notice. Plaintiff points to the email from Jason Davis to Martin Ginsburg dated November 13, 2021, in which Davis writes "You still have live Gas main and electric going through the site that I complained about the 1st week of the job."

(Doc. 176). All parties concede that Martin Ginsburg is employed by GDC. Plaintiff offered evidence that Martin Ginsburg is also affiliated with ACH. See Doc. 169 (Contract between Admirals Cover Holdings LLC (Owner) and Ginsburg Development Companies LLC (Contractor), which Ginsburg signed as the "Owner's representative"). Although ACH argued that the relationship between ACH and Ginsburg had been "misconstrued," ACH failed to offer any admissible evidence to raise an issue of fact as to Ginsburg's connection to ACH. No affidavit from Ginsburg was submitted in support of ACH's motion or in opposition to Plaintiff's motion. It does not appear that Ginsburg was deposed.

The Court finds that Plaintiff established that a dangerous condition existed at the jobsite and that ACH had actual or constructive notice of the condition. No admissible evidence was offered to create an issue of fact as to the existence of a dangerous condition or ACH's notice of the dangerous condition. Therefore, Plaintiff is entitled to summary judgment on his Labor Law § 200 claim as to liability against ACH based on a dangerous condition.

Plaintiff also established that allowing construction activity around and under the sagging wires was a violation of Labor Law § 200 under the "means or methods" basis. Plaintiff's expert engineer, Nicholas Bellizzi, P.E. found that "[i]t is indisputable that operating the excavator underneath these wires was inherently dangerous." (Doc. 167 ¶ 79). This conclusion was echoed by Plaintiff's technical expert Luis Ortega. (Doc 166 ¶ 83). OSHA also identified the operation of the excavator in the vicinity of energized power lines as a serious violation of federal regulations. (Doc. 193 at p. 9). ACH does not dispute that operation of the excavator under the power lines was dangerous, though it does point out that other employees at the site testified that there were no problems on prior days when the excavator was operated under the wires.

However, to make out a *prima facie* "means or methods" case, a plaintiff must also establish that the defendant has the "authority to supervise or control the performance of the work." Ortega v. Puccia, 57 A.D.3d 54, 61 (2d Dept. 2008). "[M]ere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200." Id. at 62. Plaintiff's claim that ACH had authority to control the work is based only on Ginsburg's communications by email with Versland and Davis in November 2021. (Doc. 177).

ACH claims that it did not direct or control the work on the jobsite or possess the authority to do so. In support of this claim, ACH offers the deposition of Doug Ramsey, the Chief Financial Officer of GDC (Doc. 124). Ramsey testified that he is also a trustee of the Martin Ginsburg 1997 Trust, which is the sole member of ACH (14:21-23) and a member of GDC (41:4-7). Ramsey testified that he does not have any duties that are specific to ACH. (16:11). He testified that ACH hires the general contractor, GDC, to construct the project, so ACH remains in a passive position. (16:12-16). He testified that ACH is the borrower for the purpose of the construction loans. (50:5-8). He testified that Martin Ginsburg is the manager of ACH. (20:6). Ramsey testified that ACH had no other employees or people with positions other than himself and Martin Ginsburg. (24:9-13). He testified that GDC did not provide ACH with any type of periodic reports about the construction project. (31:14-18). ACH did not offer the testimony of Martin Ginsburg.

On this record, neither party is entitled to summary judgment on the Labor Law § 200 "means and methods" claim, as a material issue of fact remains, that is, whether ACH directed or controlled work on the jobsite. Therefore, both the motion to dismiss the claim by ACH and the motion for summary judgment on liability by Plaintiff are denied.

Labor Law §240(1)

Labor Law §240(1) states, in relevant part, that:

> All contractors and owners and their agents . . . in the erection, demolition, repairing, [or] altering . . . 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 . . .

The purpose of Labor Law §240(1) is to protect construction workers "from the pronounced risks arising from construction work site elevation differentials." Runner v. New York Stock Exch., Inc., 13 N.Y.3d 599, 603 (2009). The statute is to be construed liberally to accomplish its stated purpose. See Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501 (1993). The duty to provide "proper protection" against elevation-related risks is nondelegable; therefore, owners, contractors and their agents are liable for violations even if they have not exercised supervision and control over either the subject work or the injured worker. See Zimmer v. Chemung County Performing Arts, Inc., 65 N.Y.2d 513, 521, (1985) (owner or contractor liable for Labor Law §240(1) violation "without regard to . . . care or lack of it"). The statute "embodies the Legislature's intent to 'protect[ ] workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident.'" O'Brien v. Port Auth. of NY & New Jersey, 29 N.Y.3d 27, 35 (2017) (Rivera, J., dissenting) (quoting Zimmer, 65 N.Y.2d at 520).

Labor Law § 240(1) cases are broadly divided between falling worker cases and falling object cases. In a "falling object" case, the injured worker must demonstrate that "the proper 'erection', 'construction', 'placement' or 'operation' of one or more devices of the sort listed in section 240 (1) would allegedly have prevented the injury." Rocovich v. Consolidated Edison Co.,

78 N.Y.2d 509, 514 (1991); see Sung Kyu-To v Triangle Equities, LLC, 84 A.D.3d 1058, 1059-1060 (2d Dept. 2011) ("Given the nature and purpose of the work that was being performed at the time of his injury, such material presented a significant risk of injury such that the defendants were obligated under Labor Law § 240 (1) to use appropriate safety devices to secure the material that fell.").

The falling object need not be in the process of being hoisted or secured when the incident occurred. See Quattrocchi v. F.J. Sciame Constr. Corp., 11 N.Y.3d 757, 758-759 (2008). Rather, liability may be imposed where the object that fell itself "required securing for the purposes of the undertaking at the time it fell." Narducci v. Manhasset Bay Assoc., 96 N.Y.2d 259, 268 (2d Dept. 2001). Conversely, liability may be imposed when a piece of equipment that is used to hoist things generally, but is not actually in the process of hoisting at the time of the accident, causes an accident because it was not placed or operated as to give proper protections to employees. See Region v. W.J. Woodward Constr., Inc., 140 A.D.2d 758 (3d Dept. 1988) (affirming Labor Law § 240(1) applicable when crane, a type of hoist, was operated under electric lines, even though crane had not yet begun to actually hoist stack of steel building materials).

"Labor Law §240(1) should be construed with a commonsense approach to the realities of the workplace at issue." Salazar v. Novalex Contr. Corp., 18 N.Y.3d 134, 140 (2011) (no liability when use of the safety device proposed "would be impractical or contrary to the very work at hand"). Labor Law §240(1) does not apply to "any and all perils that may be connected in some tangential way with the effects of gravity." Ross, 81 N.Y.2d 494 at 501. 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, 96 N.Y.2d at 267.

The question of whether a particular incident falls within § 240(1) must be determined on a case-by-case basis. See Prats v. Port Auth., 100 N.Y.2d 878, 883 (2003).

Finally, a plaintiff alleging that the provided safety devices were inadequate must show that it was that inadequacy which proximately caused the alleged injuries. See Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp., 18 N.Y.3d 1, 9 (2011) (plaintiff must establish "causal nexus between the worker's injury and a lack or failure of a device prescribed by section 240(1)"); Skalko v. Marshall's Inc., 229 A.D.2d 569, 570 (2d Dept 1996); Zimmer, 65 N.Y.2d 513 at 524. Given the unique nature of the inquiry in each accident, it is generally for the trier of fact to determine the legal or proximate cause of the incident. See Derdiarian v. Felix Contractor Corp., 51 N.Y.2d 308 (1980). The issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the facts. See Howard v. Poseidon Pools, Inc., 72 N.Y.2d 972 (1988); Zimmer, 65 N.Y.2d 524. Additionally, there may be more than one proximate cause of an accident. See Kalland v. Hungry Harbor Assoc., LLC, 84 A.D.3d 889 (2d Dept. 2011).

Unlike some other construction injury theories of recovery, strict liability under § 240(1) generally does not contemplate an injured worker's contributory negligence. See Zimmer, 65 N.Y.2d 524. When a plaintiff can establish a violation of the statute and that the violation was a proximate cause of his injury, the plaintiff's comparative negligence, if any, is not a defense. See Mejia v. 69 Mamaroneck Road Corp., 203 A.D.3d 815 (2d Dept. 2022) (reversing denial of summary judgment to plaintiff on liability on § 420(1) claim). Conversely, only where a plaintiff's culpable conduct is the sole proximate cause of an accident will an owner or contractor have an affirmative and absolute defense to strict Labor Law liability. See Narducci, 96 N.Y.2d at 267; Ross, 81 N.Y.2d at 501.

Here, Plaintiff presents two arguments that his injury is the result of "the type of elevation-related hazard to which the statute applies." Wilinski, 18 N.Y.3d at 7. First, he argues that the failure to install a guy-wire or anchors on pole #60270/43429 after it became an end pole was a proximate cause of the injury, because the lack of the guy-wire allowed the poles to lean, caused the wires to sag below the proper elevation, and ultimately failed to prevent the poles from falling down and injuring Plaintiff. In the alternative, Plaintiff argues that the improper operation of the excavator, which was in the process of being moved to hoist a load, also qualifies this accident for the enhanced protections of Labor Law § 240(1) because the improper operation of the hoist itself caused the injury.

ACH's argument that Labor Law § 240(1) is inapplicable because Plaintiff was not actually engaging in construction or demolition at the time he was injured, but was just walking toward the delivery truck when the poles and power lines fell on him, borders on the absurd. Plaintiff, as a person working at a construction site, is clearly within the protected class of employees. Further, it is irrelevant for purposes of Labor Law § 240(1) whether the object that should have been secured related directly to Plaintiff's own work. See Grigoryan v. 108 Chambers St. Owner, LLC, 204 A.D.3d 534 (1st Dept. 2022) (reversing denial of summary judgment to plaintiff and finding that failure to secure heavy fire pump to prevent it falling on plaintiff was a violation of § 240(1) as a matter of law).

ACH is also incorrect in its claim that Labor Law § 240(1) does not apply in this case because nothing was being secured or hoisted at the moment of injury. In Quattrocchi v. F.J. Sciame Constr. Corp., 11 N.Y.3d 757 (2008), the Court of Appeals specifically held that §240(1) liability is not limited to cases in which the falling object was in process of being hoisted or secured. Further, the fact that Plaintiff was not elevated when he was injured does not absolve

ACH of potential § 420(1) liability. See Wilinski, 18 N.Y.3d at 10 (plaintiff not precluded from recovery when pipes that hit him were on same level as plaintiff).

ACH's claim that a guy-wire is not one of the enumerated safety devices must also fail, as a guy-wire is literally a type of brace. See Merriam-Webster Dictionary (guyline: a "wire attached to something as a brace."). In a similar vein, ACH argues that the utility pole was not something that required securing for the purpose of the undertaking. Plaintiff argues that an object requires securing for the purposes of the undertaking, where "the nature of the work performed at the time of the accident posed a significant risk that the object would fall." McLean v. 405 Webster Ave Assocs., 98 A.D.3d 1090 (2d Dept. 2012). All three of Plaintiff's experts concluded that the pole should have been secured by a guy-wire. (Doc. 166 at 27; Doc. 167 at ¶ 24; Doc. 168 ¶ 18). ACH offers no admissible evidence to the contrary. However, O&R offered expert testimony from J. Edward Horne that a guy-wire was not necessary in this situation (Docs. 344, 370). Horne also concluded that the presence of a guy-wire would not have prevented the incident because guy-wires are not designed to support extreme outside loads, such as moving vehicles. (Doc. 227 p.12, Doc. 344 ¶ 7).

ACH argues that §240(1) is not applicable because the particular chain of events that led to Plaintiff's injury was not foreseeable. ACH's expert, Tuttman, baldly concluded that the power lines being pulled down was a "sudden and unforeseeable event" (Doc. 301 ¶ 9.). Plaintiff's experts came to the opposite conclusion, all finding after extensive analysis that the danger of the poles falling was totally foreseeable, (Doc. 166 at ¶ 40; Doc 167 ¶ 27, 36; Doc. 168 ¶ 20, 27) as was the danger that the poles or cable would be contacted by a piece of machinery (Doc. 166 at ¶ 31, 59; Doc. 167 ¶ 51; Doc. 168 ¶65).

As a matter of law, the foreseeability of the cause of a particular accident is not dispositive for determining liability under § 420(1). See Campbell v. City of NY, 32 A.D.3d 703, 705 (1st Dept. 2006) (a truck rolling down the hill and striking a utility pole's guy-wire was not an unforeseeable, superseding event, as a matter of law); Girty v. Niagara Mohawk Power Corp., 262 A.D.2d 1012, 1014 (4th Dept. 1999) (affirming partial summary judgment to plaintiff on § 420(1) claim based on injury after truck struck guy-wire, causing plaintiff's gaffs to be jarred out of utility pole, and plaintiff to dangle from pole and slam into the pole several times); see also Alomia v. New York City Transit Authority, 292 A.D.2d 403 (2d Dept. 2002) (act of striking scaffolding support cable was not of such an "extraordinary nature" as to relieve defendant, as a matter of law, from liability for a violation of Labor Law § 240(1)). Therefore, even if the Court was to find that Tuttman's affidavit raised an issue of fact as to foreseeability, this would not require the Court to determine that the lack of guy-wire was not a proximate cause of the accident.

Finally, ACH suggest that Plaintiff was the proximate cause of his own injury. ACH points out that Plaintiff was the Site Superintendent. ACH offers the affidavit of their expert civil engineer, Michael J. Tuttman, P.E., who opined that Plaintiff "allowed himself to be in an area where the wires fell." (Doc. 301 ¶ 10). Tuttman also noted that Plaintiff "likely" heard the motor of the excavator. (Id. ¶ 14). ACH argues that Plaintiff had not complained about the utility poles or sagging wires in the past. ACH suggests that Plaintiff may have given Versland permission to use the excavator. ACH's attempt to blame the victim is not persuasive.

O&R argues that Versland's improper and reckless operation of the excavator was the only proximate cause. O&R denies that the guy-wire or lack thereof was a proximate cause.

Plaintiff has made out a *prima facie* case under § 420(1) that he was injured because there was a failure to use a protective device (a guy-wire) to shield him from the risk of harm directly

flowing from the application of gravity to an object (the utility poles and wires). ACH has failed to prove as a matter of law that being crushed and electrocuted by falling utility poles is outside the scope of a statute meant to protect workers from falling objects on jobsites. Plaintiff has also made out *prima facie* case that a proximate cause of the accident was the failure to properly secure the utility poles. ACH provides no expert reports to the contrary. Instead, ACH simply argues that Plaintiff failed to establish proximate cause.

However, O&R raised an issue of fact as to proximate cause by offering evidence that a guy-wire was not necessary. O&R also raise an issue of fact as to proximate cause by offering evidence that even if a guy-wire had been installed, it would not have prevented the poles from falling down. Therefore, all parties' motions for summary judgment on liability on § 240(1) based on the lack of a guy-wire must be denied.

As to Plaintiff's alternate theory for liability under § 240(1), which only applies to ACH, Plaintiff offered the testimony of Jason Davis and Plaintiff's expert DeBobes to establish that the excavator was being operated as a hoist on the day of the accident. ACH argues that as a matter of law, § 240(1) does not apply to this accident because that excavator was not yet being used as a hoist on the day of the accident. However, ACH fails to offer any case law in support of this argument.

An analogous case is found in Region v. W. J. Woodward Constr., Inc., 140 A.D.2d 758 (3d Dept. 1988). In Region, a mobile crane had been placed below high tension electric lines so that it could move stacks of steel building materials (known as purlins). An ironworker was attempting to attach a stack of purlins to a hook that was suspended from a cable attached to the mobile crane. Unfortunately, the cable came into contact with the electric lines, and the plaintiff

was electrocuted and killed. His estate argued that the matter was covered by § 240(1) because the defendants failed to take appropriate measures to ensure safe operation of the mobile crane.

The Supreme Court, Ulster County, granted partial summary judgment to plaintiff on liability and the Third Department affirmed. The Third Department pointed out that

> The statute specifically requires that hoists be so 'placed and operated as to give proper protection' to employees (Labor Law § 240 [1]). The placement and operation of the crane under the electric lines without proper safety precautions clearly violated this provision.

140 A.D.2d at 760.

Here, Plaintiff established that the excavator was going to be used to hoist precast concrete. Plaintiff also offered expert evidence that the excavator was operated under the electric lines without proper safety precautions. See Doc. 166 at ¶ 73-74; Doc. 167 at ¶ 55-56; Doc. 168 at ¶ 79-80). ACH fails to raise any issue of fact in opposition to Plaintiff's claims. ACH also failed to offer any caselaw to establish that this scenario falls outside of the purview of § 240(1). Therefore, Plaintiff is entitled to summary judgment as to liability on this claim.

Labor Law Section 241(6)

Labor Law § 241(6) imposes a non-delegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation, or demolition. See Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494 (1993). Since an owner or general contractor's vicarious liability under § 241(6) is not dependent on its personal capability to prevent or cure a dangerous condition, the absence of actual or constructive notice sufficient to prevent or cure it is also irrelevant to the imposition of Labor Law § 241(6) liability. See Rizzuto v. L.A. Wenger Contracting Co., 91 N.Y.2d 343 (1998). The worker must allege and prove that the owner or contractor violated a rule or regulation of the

Commissioner of the Department of Labor which sets forth a specific standard of conduct, as opposed to a general reiteration of the common law. See Ross, 81 N.Y.2d at 502-504.

Section 23-1.13: Electrical Hazards, (b) General and (d) High-Voltage Power Circuits

Section 23-1.13(d) provides regulation for operating equipment on a construction site within 10 feet of an overhead energized electric power line. Through the expert testimony, Plaintiff established *prima facie* that this section was violated by the operation of the excavator under the power lines, the lack of a barricade around the poles, the lack of warning signs, and the failure to notify the Utility Defendants. (Doc. 166 at ¶ 73-74; Doc. 167 at ¶ 55-56; Doc. 168 at ¶ 79-80). In response, ACH argues only that Plaintiff himself was not working within 10 feet of overhead powerlines. This is not relevant, as the excavator was clearly within 10 feet of the powerlines. ACH has failed to raise an issue of fact as to this claim. Therefore, Plaintiff is entitled to summary judgment as to liability under § 241(6) based on violation of 12 NYCRR § 23-1.13.

Section 23-3.2: Demolition Operations, (a) Preparation & (b) Protection of adjacent structures

Section 23-3.2 (b) states:

> Protection of adjacent structures. During the demolition of any building or other structure, the employer performing such demolition shall examine the walls of all buildings or other structures adjacent to the one which is to be demolished. Such examination shall include a determination of the thickness and method of support of any wall of such adjacent buildings or other structures. Where there is any reason to believe that an adjacent building or other structure or any part thereof is unsafe or may become unsafe because of the demolition operations, such operations shall not be performed until means have been provided to insure [sic] the stability and to prevent the collapse of such adjacent buildings or other structures. Such means shall consist of sheet piling, shoring, bracing or the equivalent.

Plaintiff made out a *prima facie* case that this section was violated through the expert opinions that found that when the five utility poles were removed (demolished), the remaining adjacent utility poles were not properly braced to ensure their stability. (Doc. 166 at ¶ 78; Doc. 167 at ¶ 61-62; Doc. 168 at ¶ 87). In response, ACH argued only that this section does not apply because the poles

were removed many months earlier. However, O&R raised an issue of fact by offering expert opinion that a guy-wire was not necessary. Therefore, no party is entitled to summary judgment as to liability under § 241(6) based on violation of 12 NYCRR § 23-3.2 (b).

Plaintiff also argues that Section 23-3.2(a)(3) was violated because the power lines were not protected with substantial coverings or relocated during the demolition operation. Plaintiff's injury did not occur while the five poles were being removed, so this violation, if it occurred, is not a proximate cause of Plaintiff's injury. Therefore, this claim is dismissed.

Section 23-4.1: Excavation Operations

Section 23-4.1 (a) states:

> Stability of structures. Except in hard rock, whenever any excavation is to be performed in the vicinity of buildings, structures or utilities, the integrity, stability and structural adequacy of such buildings, structures or utilities shall be maintained at all times by the use of underpinning, sheet piling, bracing or other equivalent means to prevent damage to or failure of foundations, walls, supports or utility facilities and to prevent injury to any person. Such underpinning, sheet piling, bracing or equivalent means shall be inspected at least once each day or more often if conditions warrant.

Plaintiff made out a *prima facie* case that this section was violated by introducing expert testimony that the poles were not properly braced to ensure their stability and that excavation for the storm drainage system was occurring in the area adjacent to the utility poles. (Doc. 166 at ¶ 75-76; Doc. 167 at ¶ 57-58; Doc. 168 at ¶ 85-86). In response, ACH argues that this section does not apply because the excavation work was not taking place when the accident occurred. ACH has failed to raise an issue of fact. However, O&R raised an issue of fact by offering expert opinion that a guy-wire was not necessary. Therefore, no party is entitled to summary judgment as to liability under § 241(6) based on violation of 12 NYCRR § 23-4.1(a).

Section 23-4.2(k): Trench and area type excavations

Section 23-4.2(k) states that "persons shall not be suffered or permitted to work in any area where they may be struck or endangered by any excavation equipment or by any material being dislodged by or falling from such equipment." The Second Department has held that Section 23-4.2(k) provides a sufficient predicate for the imposition of liability pursuant to Labor Law § 241 (6). See Garcia v. Silver Oak USA, 298 A.D.2d 555 (2d Dept. 2002); but see Mann v. Mezuyon, LLC, 225 A.D.3d 569 (1st Dept. 2024) (First, Third and Fourth Departments do not find Section 23-4.2(k) sufficiently specific to support § 241(6) claim). Plaintiff points out that he was hit by utility poles and wires that were dislodged by an excavator. While this is factually accurate, this Court finds as a matter of law that based on the rest of Section 23-4.2, this section refers to material that is being dislodged by an excavator when it is being used for excavation. Here, the excavator was being moved to hoist material from a truck. Therefore, as a matter of law, the Court finds that this section was not violated. ACH's motion to dismiss this claim is granted.

Section 23-9.4: Power shovels and backhoes used for material handling

Section 23-9.4(h)(4) states that "[u]nauthorized persons shall not be permitted in the cab or immediately adjacent to any such equipment in operation." Plaintiff alleges that this regulation was violated because Versland was an "unauthorized person" as such term is defined in this section because he was not part of the excavation work crew. ACH argues that Versland was not "unauthorized" or that there is an issue of fact as to whether he was authorized. It is undisputed that the excavator belonged to Javis and that Versland was employed by GDC as the project director. Here, an issue of fact as to Versland's authorization to use the equipment has been raised, preventing a grant of summary judgment to Plaintiff or ACH.

Section 23-9.4(h)(6) states that "[o]peration near power lines or power facilities shall be in compliance with this Part (rule)." Plaintiff argues that operation of the excavator in violation of 12 NYCRR § 23-1.13 establishes that this section was violated as well. ACH does not argue specifically that this regulation was not violated. However, as matter of law, the Court finds that this section fails to set forth a specific standard of conduct such that it constitutes its own violation under § 241(6). Therefore, ACH's motion to dismiss this claim is granted.

Section 23-9.5: Excavating machines

Section 23-9.5(c) Operation states that "[e]xcavating machines shall be operated only by designated persons. A "designated person" is an employee who was "selected and directed' by his employer to operate the equipment. Cunha v. Crossroads II, 131 A.D.3d 440, 442 (2nd Dept. 2015). Plaintiff alleges that Versland was not selected and directed by GDC to operate the excavator. In his deposition, Versland said that he was given permission to operate the excavator by Joe Dziegelewski, another employee of GDC, prior to November 15, 2021. (Doc. 133 at 88:10-16). Here, an issue of fact as to Versland's authorization to use the equipment has been raised, preventing a grant of summary judgment to Plaintiff or ACH.

Section 23-9.5(d) Operation near power lines or power facilities states that "[t]he operation of excavating machines near power lines or power facilities shall be in compliance with this Part (rule)." Plaintiff argues that operation of the excavator in violation of 12 NYCRR § 23-1.13 establishes that this section was violated as well. ACH does not argue specifically that this regulation was not violated. However, as matter of law, the Court finds that this section also fails to set forth a specific standard of conduct such that it constitutes its own violation under § 241(6). Therefore, this claim is dismissed. As such it is

ORDERED that the Motion for Summary Judgment by ACH is DENIED IN PART and Plaintiff's Motion for Summary Judgment is GRANTED IN PART in that Plaintiff is granted summary judgment on liability as to his claims against ACH per Labor Law § 200 (dangerous condition) and Labor Law § 240(1) (excavator used as a hoist); and it is further

ORDERED that the Motion for Summary Judgment by ACH is GRANTED IN PART and Plaintiff's Motion for Summary Judgment is DENIED IN PART in that Plaintiff's claims pursuant to Labor Law § 241(6) pursuant to Sections 23-4.2(k), 23-9.4(h)(6), 23-9.5(d) are DISMISSED; and it is further

ORDERED that the Motion for Summary Judgment by ACH and Plaintiff's Motion for Summary Judgment are DENIED IN PART as to Plaintiff's Labor Law § 200 claim (means and methods) and Plaintiff's Labor Law § 241(6) claims pursuant to Sections 23-9.4(h)(4) and 23-9.5(c) because material issues of fact remain; and it is further

ORDERED that the Motion for Summary Judgment by ACH, the Motion for Summary Judgment by O&R, and Plaintiff's Motion for Summary Judgment are all DENIED IN PART as Plaintiff's Labor Law § 240(1) claim (failure to secure poles) and Labor Law § 241(6) claims pursuant to Sections 23-1.13, 23-3.2(b) and 23-4.1(a) because material issues of fact remain.

The foregoing constitutes the Decision and Order of this Court ~~on Motion~~ # 3, Motion #5 addressed to the liability of ACH and O&R, and Motion #6 as to liability of O&R.

Dated: October 23, 2024

HON. KEITH J. CORNELL
Acting Justice of the Supreme Court

To: All parties via NYSCEF