

De Oliveira v Ahern Painting Contrs., Inc.

2025 NY Slip Op 33193(U)

August 25, 2025

Supreme Court, New York County

Docket Number: Index No. 150574/2021

Judge: Richard Tsai

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

PRESENT: HON. RICHARD TSAI PART 21

Justice

-----X

JEFERSON DE OLIVEIRA,

Plaintiff,

- v -

AHERN PAINTING CONTRACTORS, INC., TRIBOROUGH
BRIDGE AND TUNNEL AUTHORITY, and METROPOLITAN
TRANSPORTATION AUTHORITY,

Defendants.

-----X

AHERN PAINTING CONTRACTORS, INC., TRIBOROUGH
BRIDGE AND TUNNEL AUTHORITY, and METROPOLITAN
TRANSPORTATION AUTHORITY,

Third-Party Plaintiffs,

-against-

CHAMPION PAINTING SPECIALTY SERVICES CORP.

Third-Party Defendant.

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INDEX NO. 150574/2021
MOTION DATE 08/23/2024,
08/23/2024
MOTION SEQ. NO. 004 005

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595039/2022

The following e-filed documents, listed by NYSCEF document numbers (Motion 004) 8, 105, 133, 156, 159, 169-179, 195, 198, 201-212, 214-215

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

The following e-filed documents, listed by NYSCEF document numbers (Motion 005) 8, 156, 159, 169, 180-194, 196, 199-200, 213

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

In this action alleging violations of Labor Law §§ 200, 241 (6), and common-law negligence, plaintiff Jeferson De Oliveira, an employee of third-party defendant Champion Painting Specialty Services Corp. (Champion), was allegedly injured while he was engaged in construction work. According to plaintiff, he was operating an industrial vacuum hose that was attached to a truck mounted equipment unit (the Vacuum Hose). The segments of the Vacuum Hose, which were held together by duct tape, allegedly detached and separated, which threw plaintiff forward and caused him to fall and sustain injury.

Defendants now move for summary judgment dismissing the complaint, and for summary judgment in their favor on their third-party claim for contractual indemnification claim against Champion (Seq. No. 004). Plaintiff opposes defendants' motion. Champion supports dismissal of plaintiff's complaint but opposes summary judgment on the third-party claim for contractual indemnification.

Plaintiff also separately moves for summary judgment in his favor as to liability on his Labor Law § 241 (6) claims against defendants (Seq. No. 005). Defendants and Champion oppose plaintiff's motion.

This decision addresses both motions.

According to defendants Triborough Bridge and Tunnel Authority (TBTA) and Metropolitan Transportation Authority (MTA), the TBTA operates and maintains the Verrazano Narrows Bridge (the Verrazano) (see plaintiff's exhibit 2 in support of mot, TBTA and MTA's answer ¶¶ 2, 3 [NYSCEF Doc. No. 183]).¹

The TBTA hired defendant Ahern Painting Contractors (Ahern) to perform steel repairs, painting, and sandblasting at the Verrazano, and vacuuming of the steel grit that was used during the sandblasting process (the Project) (see plaintiff's exhibit 6 in support of mot, Youseff EBT, at 29, lines 12-17; at 41, lines 4-13 [NYSCEF Doc. No. 187];² see also plaintiff's Exhibit 9 in support of mot, Lighty EBT, at 48, lines 15-20 [NYSCEF Doc. No. 190];³ see also plaintiff's exhibit 4 in opposition to mot [NYSCEF Doc. No. 206]). Ahern was the general contractor on the Project (see Lighty EBT, at 38, line 24 through 39, line 10; affirmation of defendants' counsel in support of mot ¶¶ 12-13 [NYSCEF Doc. No. 171]).

It is undisputed that Champion was a subcontractor of Ahern, pursuant to a subcontract agreement dated April 15, 2020 between Ahern and Champion (affirmation of defendants' counsel in support of mot ¶ 13; see also plaintiff's exhibit 4 in opposition to mot, subcontract agreement [NYSCEF Doc. No. 207]).⁴ Champion did structural steel painting, interiors and commercial painting work (see plaintiff's Exhibit 7 in opposition, Farrington EBT, at 8, 10 [NYSCEF Doc. No. 209]). On the date of the accident, Champion was doing "surface preparation" work at the Verrazano Bridge (*id.* at 14, lines 19-22).

On the date of the accident, plaintiff was a Champion employee working as an apprentice on the Project (see plaintiff's exhibit 4 in support of motion, plaintiff's EBT, at

¹ According to defendants, the owner of the Verrazano is nonparty Triborough Bridge and Tunnel Authority Bond Holders (TBTA and MTA's answer ¶¶ 2, 3).

² Youseff's deposition was also submitted as plaintiff's exhibit 3 opposition to defendants' motion (see NYSCEF Doc. No. 205).

³ Lighty's deposition was also submitted as plaintiff's exhibit 6 in opposition to defendants' motion (see NYSCEF Doc. No. 208).

⁴ The subcontract was also submitted on a prior motion as NYSCEF Doc. No. 105, which defendants incorporated by reference on their motion.

19, lines 7-16; at 21, lines 17-19; at 77, lines 20-21).⁵ Plaintiff's work consisted of vacuuming paint chips and debris from paint scraping at the Verrazano (*id.* at 26, line 24 through 27, line 8), as part of Champion's surface preparation crew (Farrington EBT, at 20, line 20 through 21, line 2; at 22, lines 18-23).

Vacuuming Work

According to Aiman Youseff, the TBTA's program manager for the Project, vacuuming work was done using hoses (Youssef EBT, at 42, lines 8-13). According to plaintiff and Declan Farrington (Champion's senior project manager on the Project), vacuuming work did not involve any tools other than a vacuum hose (see plaintiff's EBT, at 28, lines 17-20; Farrington EBT, at 25, lines 8-13).

The work involved using a 3-inch diameter vacuum hose to vacuum up the blast media that had landed from the sandblasting operation (Farrington EBT, at 25, lines 14-17). The grit would be sucked through the vacuum hose to a recycling unit "a couple of hundred feet away and below the bridge structure" (*id.* at 25, lines 17-21). The vacuum hose goes to a "recycling abrasive blast unit" which consists of three different units: an abrasive blast unit, a recycling unit, and a vacuum unit (*id.* at 26, lines 8-19).

According to plaintiff, when performing vacuuming, "You have to have a really firm grip with both hands because there was a lot of pressure" (plaintiff's EBT, at 29, lines 4-6).

The Accident

Plaintiff stated that, when he began his work, the Vacuum Hose was already connected "to a big machine" that provided the suction for the Vacuum Hose (plaintiff's EBT, at 25, line 20-22; at 35, line 24 through 36, line 4; at 79, lines 4-8). At his deposition, plaintiff was shown a photograph marked as Defendants' Exhibit B, which he identified as the ground-level vacuum machinery:

(continued on next page)

⁵ Plaintiff's deposition was also submitted as plaintiff's exhibit 1 opposition to defendants' motion (see NYSCEF Doc. No. 203).



(see plaintiff's EBT, at 26, lines 3-23; see *also* plaintiff's exhibit 5 in support of mot, photograph [NYSCEF Doc. No. 186]). Plaintiff did not know how many hoses were connected to the machine but testified that there were "several because they are connected to each other" (plaintiff's EBT, at 29, lines 10-12).

Plaintiff testified that he arrived at the worksite before 7:00 a.m. and went straight to his work area (*id.* at 21, lines 9-16; at 32, lines 19-23). According to plaintiff, the chief of apprentices informed him there would be vacuuming work (*id.* at 23, lines 18-21; at 27, lines 13-16). Plaintiff testified that he was the only worker vacuuming on the bridge on the date of the accident (*id.* at 31, line 25 through 32, line 4).

Plaintiff stated that, as he was vacuuming, "I was hunched up to perform my duties. That's when the hose got disconnected. With the pressure, it threw my body forward three to four feet and I landed on my knees and my spine got twisted" (*id.* at 34, lines 8-13). When asked if the suction pressure stopped right at the time he fell, plaintiff answered, "I don't know what happened. I just went to the ground" (*id.* at 79, lines 19-22).

According to plaintiff, on the fall, the pressure from the vacuum hose when it disconnected "bounced my head forward and back," like whiplash (*id.* at 44, line 18 through 45, line 6). He did not know which of the several parts of the Vacuum Hose had disconnected, only that the section he was holding had disconnected (*id.* at 34, line 24 through 35, line 6).

When asked if anything besides the disconnected hose caused plaintiff to be injured, he answered, "No" (*id.* at 38, lines 20-23). Plaintiff testified that the Vacuum Hose had never disconnected before the accident (*id.* at 37, line 24 through 38, line 4). Plaintiff testified that Champion provided him with the Vacuum Hose, and that this was

the same vacuum hose that he had used the day before the accident (*id.* at 28, lines 21-24; at 31, lines 12-15).

Plaintiff stated that, on the date of the accident, he did not tell anyone on the job site about his accident; he spoke to no one and went home (*id.* at 46, lines 4-16).

Linton Felder, an on-site safety officer at the Project, stated that he completed an incident report after speaking with plaintiff about his alleged injuries, on September 29, 2020 (NYSCEF Doc. No. 133, Felder aff ¶ 6). According to Felder, plaintiff stated that he pulled his lower back muscle while trying to reach a spot and did not advise Felder that he fell or was injured due to a vacuum hose disconnecting (*id.* ¶¶ 7, 9). Plaintiff denied that he told Felder that he had pulled a lower back muscle (plaintiff's EBT, at 82, lines 13-18). According to plaintiff, "I told him that the hose was disconnected. With that impact, it threw my body and I fell on my knees and I twisted my back" (*id.* at 82, lines 19-24).

Vacuum Hoses at the work site

According to Farrington, the vacuum hoses which ran off the truck were 6 inches in diameter (Farrington EBT, at 31, line 25 through 32, line 5; at 76, line 25 through 77, line 7). They would use as many 6-inch diameter hoses as possible "to maintain a good amount of vacuum before you reduce it" to a 3-inch hose "close to where you're actually working" "for easy management by the operator" (*id.* at 33, lines 2-7).

According to Farrington, "industry standard would be to connect two 6-inch hoses with a 6-inch hose connector" "made up of some kind of metal material . . . a little bit smaller diameter than the actual 6-inch hose" (*id.* at 78, lines 12-14). Farrington also referred to the metal connector as a "6-inch plenum" (*id.* at 34, lines 3-6, 20-24).

When asked what holds the entire connector in place, Farrington initially answered, "We usually duct tape it, but that's more for production value. As soon as you engage the vacuum, you cannot separate the things" (*id.* at 79, lines 15-20). Farrington repeated, "The duct tape is to make it more – create more of a vacuum, to make it airtight"; "to stop any leaks"; "to increase the proficiency of the vacuum" (*id.* at 79, line 25 through 80, line 5; at 105, lines 21-23). When asked if there was any other device that keeps the connector in place other than the suction itself and the duct tape, Farrington replied, "No, that's it" (*id.* at 80, lines 17-20).

Farrington further testified that Champion employees applied the duct tape (*id.* at 101, lines 17-21). He stated that he did not inspect any of the vacuum hose connections (Farrington EBT, at 59, lines 12-15).

Kevin Lighty, Ahern's environmental health and safety manager, testified that 4-inch and 2-inch hoses were used for vacuuming (see Lighty EBT, at 36, lines 17-22; at 61, lines 13-16). According to Lighty, these hoses did not require couplings to be secured (*id.* at 61, lines 17-22). Duct tape was used to connect the vacuum hoses (*id.* at

61, line 23 through 62, line 4). When asked if the duct tape performed any safety function, Lighty replied, “No. It’s just connecting two pieces of hose together” (*id.* at 101, lines 15-20).

Lighty stated that he saw vacuumers at the site applying duct tape to vacuum hoses (*id.* at 65, lines 12-16). He further testified that the duct tape used to connect the vacuum hoses was replaced when it wore out (*id.* at 80, line 24 through 81 line 8). However, he did not generally check the security of the duct tape that was being used to connect the vacuum hoses (*id.* at 63, lines 14-19). He further testified that he did not check the duct tape before vacuuming commenced on the worksite (*id.* at 67, lines 4-16).

Lighty testified that he was familiar with “whip check[s]” (*id.* at 31, lines 13-17). He described a “whip check” as a safety device that consists of a length of cable that connects two hoses together (*id.* at 31, lines 18-25). “In case the two hoses break off from each other, it will prevent the hose that is under pressure from whipping and causing damage to the structure or a person” (*id.* at 32, lines 4-8).

According to Lighty, the vacuum hoses did not require whip checks because “[v]acuum hoses, once are connected, will not whip like a hose that has pressure inside of it” “[b]ecause vacuums suck, and all the other hoses force air” (*id.* at 62, lines 15-20). Loosening duct tape was a “production issue,” rather than a safety issue (*id.* at 98, line 23 through 99, line 4), in that “[i]f there is a leak in the hose, the hose won’t suck properly” (*id.* at 100, line 21 through 101, line 14).

Lighty further explained:

“If a vacuumer is using the vacuum hose where the hoses are not connected tightly, they wouldn’t get any suction. So they would be the first ones to notice that the connection... is not tight... the vacuumer that’s doing the actual work would be the first one to notice that there is a disconnect somewhere” (*id.* at 64, lines 5-14).

When Farrington was asked if he was familiar with “whip checks,” he answered that these were not used on vacuum hoses (Farrington EBT, at 39, line 25 through 40, line 3).

Complaints about vacuum hoses

In an affidavit dated May 26, 2023, Olvy Marte states that was employed by Champion as a laborer on the Project, and that his work “involved sandblasting and vacuuming with large equipment and hoses” (see plaintiff’s Exhibit 9 in opposition, Marte aff ¶ 1 [NYSCEF Doc. No. 210]).⁶

⁶ Marte’s affidavit was also submitted as exhibit B in support of defendants’ motion (see NYSCEF Doc. No. 173).

According to Marte,

“3. The vacuum hoses at the job were always a problem, because they were frequently disconnecting. They were connected with duct tape, so they were always coming loose and apart. This was dangerous, because the force of the vacuum would impact against your body.

4. I complained about this several times but nothing was done about it. In fact, this work was so dangerous that, after my complaints were ignored, I actually quit the job.

* * *

6. Mr. De Oliveira told me he was vacuuming when the hose he was using disconnected. This was the same problem we had at the project for weeks before his accident and about which I had complained” (Marte aff ¶¶ 3, 4, 6).

According to Farrington, prior to plaintiff’s accident, he was not aware of any complaints from plaintiff or other Champion employees regarding vacuum hoses disconnecting (Farrington EBT, at 38, line 21 through 39, line 7). Farrington stated that no one on the Project had brought to his attention or to Champion’s attention that vacuum hoses might have disconnected before plaintiff’s accident (*id.* at 41, line 19 through 42, line 4). According to Farrington, if a vacuum hose disconnected between the operator and the truck, then the operator would have no suction (*id.* at 41, lines 6-10).

Supervision of Plaintiff’s Work

Plaintiff stated that he received his work instructions from the chief of apprentices, and plaintiff did not receive work directions from anyone other than the chief of apprentices (plaintiff’s EBT at 23, lines 18-25; at 24, lines 16-19). Plaintiff testified that he had no knowledge of Ahern (*id.* at 43, lines 5-7). He stated that he did not have any contact with the MTA on the Project (plaintiff’s EBT, at 43, lines 8-11).

Youseff, the TBTA’s program manager, testified that he would make weekly on-site visits during the construction phase of the Project (Youseff EBT, at 28, lines 9-12). During these visits, he would conduct walkthroughs to check on the progress and quality of the work (*id.* at 52, lines 7-18). Youseff further testified that if he saw anything unsafe (during these walkthroughs), he would point it out to Ahern’s site safety manager and GPI’s resident engineer (*id.* at 46, lines 2-11).

Youseff never tested any of the connections on any of the vacuum hoses during his weekly visits (*id.* at 53, lines 3-7). He further testified that he did not ever go inside the containment area when blasting or vacuuming was not in progress (*id.* at 65, lines 12-16). Youseff could not recall if he had ever seen vacuuming work done at the Project outside of the containment tarps (*id.* at 67, line 18 through 68, line 4).

Lighty testified that Ahern had a field office on the Project and that a project manager that was onsite daily (Lighty EBT, at 44, lines 18 through 45, line 11; at 48, lines 21-23). He further testified that Champion had its own health and safety officer on the Project, who was employed by an outside safety company (*id.* at 42, line 21 through 43, line 17). Champion also had a field office on the premises, a superintendent, and an overall foreman (*id.* at 45, lines 9-11; at 50, line 22 through 51, line 18). Lighty testified that Champion's foreman was on the worksite daily (*id.* at 52, lines 2-4).

Lighty testified that he was on the worksite daily and had the authority to stop unsafe practices and the use of unsafe equipment if he saw them (*id.* at 48, line 24 through 49, line 2; at 54, lines 2-6; at 55, lines 2-7). He further testified that he conducted several daily walkthroughs of the worksite, which included "[v]isual inspection of... whip checks [and] periodic inspection of hoses" (*id.* at 75, line 16 through 76, line 2; at 78-79). Lighty further testified that he made daily inspections of the couplings between the hoses (*id.* at 58, line 7 through 59, line 7).

Lighty testified that if workers were using hoses that did not have proper whip checks, he could direct workers to put them on (*id.* at 56, lines 6-10). He further testified that workers had used hoses without whip checks during the Project (*id.* at 56, lines 11-23). In response to questioning, Lighty testified that on those occasions when he saw hoses being used without whip checks he directed workers to use whip-checks (*id.* at 57, lines 18-24). He further testified that "[p]utting a whip check wouldn't be a suggestion, it would be a directive" (*id.* at 57, lines 21-22).

PROCEDURAL HISTORY

On April 5, 2016, plaintiff commenced this action by filing a summons with notice (see NYSCEF Doc. No. 1). Plaintiff alleges violations of Labor Law §§ 200 and 241 (6), and common-law negligence against Ahern, TBTA, and the MTA. Defendants assert a third-party contractual indemnification claim against Champion.

On or about June 16, 2023, defendants moved for summary judgment dismissing the complaint, and plaintiff had cross-moved for partial summary judgment as to liability in his favor on his claims for violations of Labor Law § 241 (6) (Seq. No. 003). By a decision and order dated September 19, 2023, the Supreme Court Justice previously assigned to this matter denied the motion "without prejudice and with leave to re-file upon the completion of the outstanding discovery" (see NYSCEF Doc. No. 159).

On May 31, 2023, plaintiff filed the note of issue (see NYSCEF Doc. No. 66). However, by decision and order dated September 18, 2023, the note of issue was stricken (see NYSCEF Doc. No. 156). On February 28, 2024, plaintiff re-filed the note of issue (see NYSCEF Doc. No. 169).

DISCUSSION

“To prevail on a motion for summary judgment, the movant must make a prima facie showing by submitting evidence that demonstrates the absence of any material issues of fact. Once that initial showing has been made, the burden shifts to the opposing party to show there are disputed facts requiring a trial. All facts are viewed in the light most favorable to the non-moving party” (*Nellenback v Madison County*, —NY3d—2025 NY Slip Op 02263 [2025] [internal citations omitted]).

I. Plaintiff’s Labor Law § 241 (6) claims

Defendants move for summary judgment dismissing plaintiff’s Labor Law §241 (6) claims. Plaintiff opposes the motion and moves for summary judgment in his favor as to liability on his Labor Law § 241 (6) claims against defendants.

“Labor Law § 241 (6) imposes a non-delegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor” (*Toussaint v Port Auth. of N.Y. & N.J.*, 38 NY3d 89, 93 [NY 2022] [internal quotations marks and citations omitted]). The non-delegable duty is absolute and “imposes liability upon a general contractor for the negligence of a subcontractor, even in the absence of control or supervision of the worksite” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [NY 1998], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502 [NY 1993] [emphasis omitted]).

“To establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision ‘mandating compliance with concrete specifications’” (*Ennis v Noble Constr. Group, LLC*, 207 AD3d 703, 705 [2d Dept 2022], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505).

Here, in response to defendants’ motion for summary judgment dismissing plaintiff’s Labor Law § 241 (6) claims, plaintiff focuses only on violations of Industrial Code §§ 23-1.5 (c) (3) and 23-9.2 (a). Thus, so much of plaintiff’s Labor Law § 241 (6) claims that are premised on the Industrial Code provisions other than 12 NYCRR 23-1.5 (c) (3) and 12 NYCRR 23-9.2 (a) are deemed abandoned (*Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]).

A. 12 NYCRR 23-1.5 (c) (3)

As a threshold matter, the court notes that Industrial Code [12 NYCRR] § 23-1.5 (c) (3) is sufficiently specific to form a basis for liability pursuant to Labor Law § 241 (6) (*See Desprez v United Prime Broadway, LLC*, 225 AD3d 518, 518 [1st Dept 2024]; *Becerra v Promenade Apts. Inc.*, 126 AD3d 557, 558-559 [1st Dept 2015]). 12 NYCRR 23-1.5 (c) (3) reads as follows:

“General responsibility of employers

* * *

(c) Condition of equipment and safeguards.

* * *

(3) All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged.

Plaintiff argues that the Vacuum Hose constituted “equipment in use,” and that the hose connectors, which served a safety function, were not sound and operable and should have been replaced with other fittings (see plaintiff’s memo of law in support of motion at 9-10 [NYSCEF Doc. No. 194]).

1. Prior Notice of the defect

It is well settled that a violation of Industrial Code § 23-1.5 (c) (3) requires prior notice of a defect (see *Desprez*, 225 AD3d at 518; *Cabral v Rockefeller Univ.*, 222 AD3d 474, 475 [1st Dept 2023]; *Lopez v City of New York*, 203 AD3d 405, 406 [1st Dept 2022]; *Viruet v Purvis Holdings LLC*, 198 AD3d 587, 588 [1st Dept 2021]).

Plaintiff contends that Champion and Ahern had actual notice that the hose sections were connected with duct tape. Lighty, Ahern’s environmental health and safety manager, testified that he saw vacuumers at the site applying duct tape to vacuum hoses (Lighty EBT, at 65, lines 12-16). Farrington testified that a metal connector joined the hose sections, but he also stated that the suction itself and the duct tape kept the connector in place (see Farrington EBT, at 78, lines 11-14; at 80, lines 17-20).

Defendants argue that they did not have actual notice that the vacuum hose had disconnected (see affirmation of defendants’ counsel in support of mot ¶ 68 [NYSCEF Doc. No. 171]; see also affirmation of defendants’ counsel in opp to plaintiff’s mot ¶ 22 [NYSCEF Doc. No. 199]). Additionally, they assert that there is no evidence that the Vacuum Hose was defective or not in good repair (see affirmation of defendants’ counsel in support of mot ¶ 68; affirmation of defendants’ counsel in opp to plaintiff’s mot ¶ 29).

For defendants to meet their prima facie burden of summary judgment dismissing a claim premised on a violation of 12 NYCRR 23-1.5 (c) (3) based on lack of notice, they must submit evidence that they had conducted a safety inspection of the equipment before the accident (see *Lopez*, 203 AD3d at 406 [defendants submitted no evidence that they conducted a safety inspection of the whip check before the accident]). Here, defendants did not submit evidence as to when the vacuum hose was last inspected. Thus, summary judgment dismissing plaintiff’s Labor Law § 241 (6) claim based on a violation of 12 NYCRR 23-1.5 (c) (3) is denied.

The court agrees with plaintiff that Lighty's and Farrington's deposition testimony established that Champion and Ahern had actual notice that the only thing holding the Vacuum Hose sections together was suction and duct tape, which is the defect asserted. Although defendants cleverly characterize the defect as detachment of the hoses, this would focus actual notice on the effects of the defect, rather than the defect itself.

In light of the court's ruling that defendants had actual notice, the court need not address plaintiff's alternative argument that prior notice may be based on constructive notice, and that defendants had constructive notice based on Marte's alleged complaints.

2. Whether the Vacuum Hose was "sound and operable"

Plaintiff argues that the Vacuum Hose was not "sound and operable," in that an improper hose connection was used, i.e., duct tape. Plaintiff submits an expert affidavit by Richard W. Paul, who has a Bachelor of Science degree in Mechanical Engineering and Fluid Power Technology and approximately 38 years of experience in the abrasive blast cleaning industry (see plaintiff's exhibit 12 in support of mot, Paul aff. at ¶ 1 [NYSCEF Doc. No. 193]). Paul states:

"[I]t is my opinion, with a reasonable degree of mechanical engineering certainty, that the vacuum hoses at this project were improperly and inadequately connected, and that the connection method that was used constituted a departure from good and accepted industry practice. It further is my opinion, with a reasonable degree of mechanical engineering certainty, that such departure was a substantial factor in causing the accident and injuries described by the Plaintiff."

... The use of proper 'cam locks' or other secure industrial connection techniques are essential for worker safety and stability when such hoses must be joined together. If the hoses are not connected properly, it is foreseeable that they may suddenly separate, as occurred at the time of the accident Plaintiff described. As a result of that separation, the force that Plaintiff was exerting on the hose was released when the coupling failed, causing him to be pulled forward and lose his footing, much like occurs in a game of 'tug of war' when one side succeeds in overcoming the other.

Instead of the duct tape used to connect the vacuum hoses here, a secure cam lock connection should have been used... Had a cam lock connector been used here, the accident described by the Plaintiff could not have occurred" (*id.* ¶¶ 9-11).

However, the court agrees with defendants and Champion that the assertion of plaintiffs' expert that "good and accepted industry practice" required cam locks is conclusory, "as it was not supported by reference to specific, applicable safety standards or practices" (*Hernandez v Callen*, 134 AD3d 654 [1st Dept 2015]; see *Peranzo v WFP Tower D Co. L.P.*, 201 AD3d 486, 488 [1st Dept 2022] [expert's affidavit failed to set forth violations of industry-wide standards or supporting data for his conclusory opinions]). "An expert's opinion should be disregarded where no authority, treatise, standard, building code, article or other corroborating evidence is cited to support the assertion concerning an alleged deviation from good and accepted industry custom and practice" (*Cassidy v Highrise Hoisting & Scaffolding, Inc.*, 89 AD3d 510, 511 [1st Dept 2011], citing *Buchholz v Trump 767 Fifth Ave., LLC*, 5 NY3d 1, 2 [2005]).

In any event, both Ahern and Champion's witnesses directly contradict Paul's conclusion that the Vacuum Hose was inadequately connected.

Lighty, Ahern's environmental health and safety manager, was familiar with multiple types of coupling devices, i.e., whip checks, slings, and Chicago couplings (see Lighty EBT, at 31, line 13 through 34, line 8), and he testified that the vacuum hoses did not require couplings to be secured (*id.* at 61, lines 17-22). He further testified that, "to [his] understanding" the vacuum's suction did not place the vacuum hoses under any pressure (*id.* at 63, lines 2-13).

Farrington, Champion's senior project manager at the time of the accident, testified that the vacuum hose sections were attached using "6-inch plenum(s)" (Farrington EBT, at 34, lines 3-4, 20-24). He further testified that when the vacuum was engaged, the vacuum's suction held the vacuum hose sections together (*id.* at 80, lines 17-20), while duct tape was only used to make the connections airtight (*id.* at 79, line 25 through 80, line 5; at 105, lines 21-23).

Given the conflicting testimony as to whether sections of the Vacuum Hose needed to be secured, there are disputed issues of fact as to whether the Vacuum Hose was "sound and operable" as required under 12 NYCRR 23-1.5 (c) (3).

In light of the court's determination, the court need not address defendants' and Champion's alternative argument that there is an issue of fact as to whether the Vacuum Hose had disconnected at all, because plaintiff purportedly did not inform a site safety officer that he was injured due to a vacuum hose disconnecting but instead purportedly told him that he pulled a back muscle (see affirmation of defendants' counsel in opposition to mot ¶¶ 46-49; affirmation of Champion's counsel in opposition to mot ¶ 9 [NYSCEF Doc. No. 200]).

In sum, summary judgment in plaintiff's favor as to liability on his Labor Law § 241 [6]) claim based upon an alleged violation of Section 23-1.5 (c) (3) is denied.⁷

⁷ In light of the denial of plaintiff's motion, this court need not reach the issue of whether the TBTA was an "owner" under Labor Law § 241 (6). Although plaintiff asserted that the

B. Industrial Code § 23-9.2 (a)

Industrial Code [12 NYCRR] § 23-9.2 (a) states:

“General requirements

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

Plaintiff’s expert contends that the vacuum hoses and their connectors were “not in good repair and in proper operating condition” because they should have been repaired or replaced with secure and proper fittings (see Paull aff ¶¶ 13-14).

Defendants argue that Section 23-9.2 (a) is inapplicable, in that there was no evidence that they had prior actual notice of the Vacuum Hose disconnecting.

As a threshold matter, to the extent that plaintiff’s expert opines that defendants violated the first sentence of 12 NYCRR 23-9.2 (a), that “All power-operated equipment shall be maintained in good repair and in proper operating condition at all times,” the Court of Appeals has held that the first sentence is too general to permit recovery under Labor Law § 241 (6) (*Misicki v Caradonna*, 12 NY3d 511, 521 [2009]).

To the extent that plaintiff argues that defendants violated the third sentence of Section 23-9.2 (a), defendants correctly point out that such a violation requires “discovery” or actual notice of a structural defect or unsafe condition affecting power-operated equipment (*Misicki*, 12 NY3d at 521). Notice given to the injured plaintiff’s employer is sufficient to satisfy the requirement of actual notice, even if the owner or general contractor who is liable under Labor Law § 241 (6) lacks actual notice (see *Misicki*, 12 NY3d at 521 [“he complained to his supervisor about the missing handle— i.e., his employer had actual notice”]; see also *Nicholson v Sabey Data Ctr. Properties, LLC*, 205 AD3d 620, 621 [1st Dept 2022] [“That Sabey defendants did not have actual notice of the defect does not absolve them of liability, where plaintiff testified that he had given his employer actual notice”]).

“MTA/TBTA” owned the Verrazano (see plaintiff’s memo of law at 1), defendants stated in their answer that nonparty Triborough Bridge and Tunnel Authority Bond Holders owns the Verrazano (see TBTA and MTA’s answer ¶¶ 2, 3).

Here, the court rejects defendants' argument of lack of actual notice.

First, defendants characterize the unsafe condition of the equipment as detachment of the hoses, whereas plaintiff characterizes the unsafe condition as the fact that the hoses sections were attached to each other only with duct tape. The court agrees with plaintiff. As discussed above in the context of 12 NYCRR 23-1.5 (c) (3), following defendants' logic would focus actual notice on the effects of the unsafe condition, rather the unsafe condition itself.

Champion, plaintiff's employer, clearly had actual notice that the vacuum hose sections were attached to each together with a 6-inch plenum and held together by suction (see Farrington EBT, at 34, lines 3-4, 20-24; at 80, lines 17-20). Lighty, Ahern's environmental health and safety manager, testified that he saw vacuumers at the site applying duct tape to vacuum hoses (Lighty EBT, at 65, lines 12-16). Lighty stated that the vacuum hoses did not require couplings to be secured (*id.* at 61, lines 17-22).

To the extent that defendants argue that there is no evidence that the vacuum hose was defective (see affirmation of defendants' counsel ¶ 68), "[m]erely pointing to gaps in an opponent's evidence is insufficient to satisfy the movant's burden" (*Hairston v Liberty Behavioral Mgt. Corp.*, 157 AD3d 404, 405 [1st Dept 2018]).

As to summary judgment in plaintiff's favor, the affidavit of plaintiff's expert was conclusory, for the same reasons discussed above with respect to 12 NYCRR 23-1.5 (c). In any event, an issue of fact arises as to whether the Vacuum Hose should have been connected by cam locks, and thus whether there was an unsafe condition in the Vacuum Hose that ought to have been repaired or replaced under 12 NYCRR 9.23 (a).

Defendants' motion for summary judgment dismissing so much of plaintiff's Labor Law § 241 (6) claim based on a violation a violation of 12 NYCRR 23-9.2 (a) is denied. Plaintiff's motion for summary judgment in his favor on that violation is also denied.

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

Labor Law § 200 (1) states, in pertinent part, as follows:

"All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to

work” (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v N.Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]).

“[T]here are ‘two broad categories’ of personal injury claims [under Labor Law § 200]: ‘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’” (*Rosa v 47 E. 34th St. (NY), L.P.*, 208 AD3d 1075, 1081 [1st Dept 2022], quoting *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]).

“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 [means and methods] of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work” (*Cappabianca* at 144 [internal citations omitted]; see also *Toussaint*, 38 NY3d at 94 [to recover under Labor Law § 200 “a plaintiff must show that an owner or general contractor exercised some supervisory control over the operation”]).

Here, the accident arose from the means and methods of the work, rather than a premises condition at the work site. Specifically, the accident occurred because Vacuum Hose segments were attached to each other using duct tape instead of couplings.

Defendants established prima facie that MTA and TBTA did not have the requisite supervision or control over plaintiff’s work to be held liable under Labor Law § 200 or at common law. Plaintiff testified that he received his work instructions from Champion’s chief of apprentices and that no one else directed his work (plaintiff’s EBT, at 23-24). He further testified that Champion provided him with the Vacuum Hose (*id.* at 28) and that he did not have any contact with MTA on the Project (*id.* at 43).

In opposition, plaintiff argues that the court should reject defendants’ contention that they did not supervise the plaintiff’s work, because Youssef (the TBTA’s program manager) testified that he visited the site weekly, and because Lighty (Ahern’s health and safety manger) testified that he and Ahern’s project manager were on site daily (see plaintiff’s memo in opp to mot at 16-17). Plaintiff further argues that defendants had notice of the deficiency in the vacuum hose connections (*id.* at 17).

These arguments are unavailing. There is nothing from the record to suggest that the MTA and TBTA exercised more than general supervisory authority over the worksite (see *Maddox v Tishman Constr. Corp.*, 138 AD3d 646, 646 [1st Dept 2016] [“regular general inspection of a site to ensure that work is progressing according to schedule and the authority to stop any work perceived to be unsafe are not enough to warrant imposing liability”]). Defendants have further established that Ahern did not exercise the requisite control and/or supervision over plaintiff’s work to be held liable

under Labor Law § 200 or at common law. As previously stated, plaintiff testified that he received work instructions only from Champion.

Lighty's testimony that he conducted daily walkthroughs and was responsible for safety is insufficient to create an issue of fact as to whether Ahern exercised the requisite degree of supervision and control over the work being performed to sustain a claim under Labor Law § 200 or for common-law negligence (see *Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 406 [1st Dept 2018]).

Without the requisite supervisory authority, any notice that defendants may have had of the unsafe condition of the Vacuum Hose is insufficient to give rise to liability under Labor Law § 200 (*DaSilva v Toll First Ave., LLC*, 199 AD3d 511 [1st Dept 2021]; see *Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 878 [1993] [Court of Appeals has not imposed liability under Labor Law § 200 solely because the owner had notice of the allegedly unsafe manner in which the work was performed, where the owner did not exercise supervisory control]).

Accordingly, the branch of defendants' motion for summary judgment dismissing plaintiff Labor Law § 200 and common law negligence claims is granted

III. Defendants' third-party claim against Champion for contractual indemnification

Defendants argue that they are entitled to contractual indemnification and attorneys' fees from Champion based upon the language of the subcontract agreement between Ahern and Champion dated May 22, 2020 (The "Subcontractor Agreement").

In opposition, Champion argues that contractual indemnification is contingent upon a finding of Champion's negligence, and that there are issues of fact as to whether Champion was negligent.

"A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82, 87-88 [1st Dept 2018] quoting *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). Summary judgment on a contractual indemnification claim is warranted where the intent to indemnify is clear and there is no basis to conclude that the indemnified party was negligent as to the underlying accident (see e.g. *Hong-Bao Ren v Gioia St. Marks, LLC*, 163 AD3d 494, 494 [1st Dept 2018]).

The Subcontract Agreement includes an indemnification provision that reads in relevant part as follows:

10.1 Indemnification Agreement To the fullest extent permitted by applicable law, the Subcontractor shall assume entire responsibility and

liability for all damages (including purely economic loss) and injury or illness of any nature (including death) to persons and property, including intangible property, caused in whole or in part by the acts or omissions of the Subcontractor or of anyone for whose acts or omissions the Subcontractor is responsible, in connection with the execution of the Work, and the Subcontractor agrees, at its own expose, to defend (if requested by Contractor), indemnify and hold harmless Contractor, the Owner, the Additional Insured and/or any other party that the Contractor is required to indemnify under the terms of the Prime Contract...(collectively, the Indemnitees), from all demands, claims, causes of action (even though they may be groundless, false, or fraudulently asserted), losses, costs and expenses, including reasonable counsel fees, asserted against any of the Indemnitees, caused in whole or in part by the acts or omissions of the Subcontractor or of anyone for whose acts or omissions the Subcontractor is responsible, in connection with the execution of the Work, and whether or not the claim is predicated on the violation of a statutory duty, regulation, ordinance, rule or obligation (provided that the violation arises out of or is in any way connection with the Subcontractor's performance or lack of performance of the Work under this Subcontract)" (see NYSCEF Doc. No. 105, Subcontract Agreement at 9).⁸

The Subcontract Agreement identifies Ahern as the "Contractor" and Champion as the "Subcontractor," and the TBTA as the "Owner" (*id.* at 1). Thus, pursuant to Article 10.1 of the Subcontract Agreement, Champion agreed to indemnify Ahern and the TBTA from "all demands, claims, causes of action" "asserted against any of the Indemnitees, caused in whole or in part by the acts or omissions of [Champion]."

Article 10.1 also requires Champion to indemnify the MTA. As mentioned above, Champion is required to indemnify "any other party that [Ahern] is required to indemnify under the terms of the Prime Contract." Article 1.1 of Subcontract Agreement defines the "Prime Contract" as the contract between the "Owner" and the "Contractor," i.e., between the TBTA and Ahern.

Under Ahern's own contract with the TBTA, Ahern is required to indemnify the MTA. Article 6.03 of the contract between the TBTA and Ahern requires Ahern to

"indemnify and save harmless the Indemnified Parties, to the fullest extent permitted 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

⁸ The Subcontract Agreement was also submitted as plaintiff's exhibit 5 in opposition to defendants' motion [NYSCEF doc. No. 207]).

injuries and property damage to the extent caused by the negligence of the Authority” (see NYSCEF Doc. No. 102 at 6-1).⁹

As per Article 6.01, the MTA is included among the “Indemnified Parties” (*id.*).

As defendants correctly point out, Article 10.1 does not require a showing of Champion’s negligence, but only that the injuries were caused, in whole or in part, by Champions “acts or omissions.” Such language does not incorporate a negligence requirement (see *Gomes v Vornado 640 Fifth Ave. L.L.C.*, 195 AD3d 486 [1st Dept 2021] [general contractor was not required to show that the accident was proximately caused by the employer’s negligence or other fault], citing *Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 324 [2017]). Here, plaintiff testified that Champion provided him with the Vacuum Hose, and that this was the same vacuum hose that he had used the day before the accident (plaintiff’s EBT, at 28, lines 21-24; at 31, lines 12-15). Farrington testified that Champion employees applied the duct tape (Farrington EBT, at 101, lines 17-21).

However, as defendants contend, there is a question of fact as to whether the vacuum hose segments had detached, or whether plaintiff’s injuries were instead caused by plaintiff reaching too far, as Linton Felder, a site safety officer, had averred in his affidavit. Thus, defendants are entitled to conditional summary judgment on their third-party contractual indemnification claim against Champion, which would include counsel fees and expenses (see *Santos v BRE/Swiss, LLC*, 9 AD3d 303, 304 [1st Dept 2004]; see e.g. *Moelis & Co. LLC v Ocwen Fin. Corp.*, 203 AD3d 469, 472 [1st Dept 2022]). That is, defendants are entitled to contractual indemnification against Champion on condition that defendants are held liable for plaintiff’s claims under Labor Law § 241 (6) (see e.g. *Vitucci v Durst Pyramid LLC*, 205 AD3d 441, 445 [1st Dept 2022]). For in that scenario, the jury would necessarily find that the vacuum hose segments had detached and were inadequately secured, and were a substantial factor in causing plaintiff’s injuries.

CONCLUSION AND ORDER

Accordingly, it is hereby

ORDERED that defendants/third-party plaintiffs’ motion for summary judgment (Seq. No. 004) is **GRANTED IN PART TO THE EXTENT** as follows:

- (1) plaintiff’s Labor Law § 241 (6) claims are dismissed as abandoned, except for violations premised on 12 NYCRR 23-1.5 (c) (3) and 12 NYCRR 23-9.2 (a);
- (2) plaintiff’s Labor Law § 200 and common-law negligence claims are hereby dismissed;

⁹ Ahern’s contract with the TBTA was also submitted as plaintiff’s exhibit 4 in opposition to defendants’ motion (NYSCEF Doc. No. 206).

(3) defendants/third-party plaintiffs are granted conditional summary judgment as to liability on their third-party claim against third-party defendant Champion Painting Specialty Services for contractual indemnification, on condition that defendants are held liable for plaintiff's claims under Labor Law § 241 (6) based on either a violation of NYCRR 23-1.5 (c) (3) or 12 NYCRR 23-9.2 (a);

and the motion is otherwise denied; and it is further

ORDERED that plaintiff's motion for summary judgment in his favor as to liability against defendants on so much of his Labor Law § 241 (6) claims premised on 12 NYCRR 23-1.5 (c) (3) and 12 NYCRR 23-9.2 (a) (Seq. No. 005) is **DENIED**; and it is further

ORDERED that the remainder of the action shall continue.



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<u>8/25/2025</u> DATE		<u>RICHARD TSAI, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
SEQ NO. 004	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
SEQ NO. 005	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE