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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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KENNETH SENESE and DEBORAH SENESE,

Index No.: 5709/10

Plaintiff(s),

Motion Date: 9/25/12

- against - **Motion Cal. No.:** 21, 22, 23, 24, 25

Motion Seq. No: 2,3,4,5,6

J. KOKOLAKIS CONTRACTING, INC., ELDOR CONTRACTING CORP., HELLMAN ELECTRIC CORP., and DORMITORY AUTHORITY OF THE STATE OF NEW YORK,

Defendant(s).

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DORMITORY AUTHORITY OF THE STATE OF NEW YORK,

Third-Party Index No.:350403/10

Third-Party Plaintiff(s),

- against -

PABCO CONSTRUCTION CORP. and LAWS CONSTRUCTION CORP.,

Third-Party Defendant(s).

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J. KOKOLAKIS CONTRACTING, INC.,

Second Third-Party Index No.:350295/11

Second Third-Party Plaintiff(s),

- against -

PABCO CONSTRUCTION CORP. and LAWS CONSTRUCTION CORP.,

Second Third-Party Defendant(s).

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The following papers numbered 1 to 118 read on this (1) motion by Laws Construction Corp. ("Laws"), for summary judgment in its favor dismissing all claims and cross-claims against it; and, alternatively, to sever the claims of the Dormitory Authority of the State of New York ("DASNY") and J. Kokolakis Contracting, Inc. ("Kokolakis") for breach of contract; and, alternatively for summary judgment on Laws' cross-claims against Hellman Electric

Corp., ("Hellman"), for breach of contract and indemnification or contribution; (2) motion by Pabco Construction Corp. ("Pabco"), for summary judgment dismissing plaintiff's claims predicated upon Labor Law §§ 240 (1) and 241(6), and to dismiss the third-party claim and all cross-claims against Pabco, predicated upon Pabco's alleged breach of contract for failure to procure insurance as required under its contract with Kokolakis; (3) motion by DASNY to dismiss the complaint and all cross-claims against DASNY, and to direct that DASNY is entitled to defense costs and contractual indemnification from Pabco, Laws, Eldor Contracting Corp. ("Eldor"), Hellman and Kokolakis; (4) motion by Eldor for summary judgment in its favor dismissing all claims and cross-claims against it; (5) motion by Hellman, to renew its prior motion for summary judgment, and upon renewal, for summary judgment in its favor; (6) cross-motion by plaintiffs for summary judgment in their favor on their claim pursuant to Labor Law §241(6); and (7) cross-motion by Kokolakis for summary judgment in its favor pursuant to CPLR 3212.

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Upon the foregoing papers it is ordered that the motions and cross-motions are considered together and decided as follows:

Plaintiffs in this negligence/labor law case seek damages for personal injuries sustained by plaintiff Kenneth Senese on July 28, 2008, while employed as a union carpenter with Pabco. It is alleged that plaintiff Kenneth Senese fell off a baker's scaffold while performing construction work at premises located at 80-45 Winchester Blvd., Queens, New York. The facility is known as Creedmoor Psychiatric Facility. The construction project was known as the Bernard Fineson Project.

The project entailed the construction of nine buildings identified as buildings numbered "1" through "8", and the "Program Building" or "Administration Building". At the time of the accident, plaintiff was working on a scaffold in the basement of building "4", installing sheetrock on the ceiling. As plaintiff Kenneth Senese stepped down from the scaffold, the temporary lights went out inside the building. As a result, plaintiffs alleges that plaintiff Kenneth Senese mis-stepped from the scaffold and sustained injuries to his knee.

DASNY owns the premises. DASNY entered into a prime contract with Kokolakis to act as contractor for general construction of the project. DASNY also entered into a prime

contract with Laws for Laws to perform site work and utilities work. This contract required Laws, as it relates to electric work, to install temporary power around the perimeter of the site, which terminated approximately fifteen (15) feet away from each structure to be built. Laws then entered into a sub-contract agreement with Hellman to install this temporary electric power. This temporary power has been referred to as the "temporary power loop".

Hellman also maintained the temporary power loop, which included poles with electrical panels that went around the campus. The temporary power loop was installed so that the contractors could have power for the individual buildings. The power source for the temporary power loop came from an on-site power plant that distributed the power throughout the entire facility.

Eldor provided and distributed both the permanent and temporary electricity to buildings "1" through "8" The temporary power came from the temporary power loop.

The parties each move, or cross-move, for summary judgment dismissing all claims and cross-claims against it on the ground that it did not cause, or contribute to, the temporary lighting failure which caused or contributed to the subject accident.

Facts

Paul Goncalves testified in July 2008, as follows: he was employed as the Project Manager for DASNY at the Creedmoor project. DASNY performs design and construction as well as financing of public benefits projects. Goncalves explained that the duties of a Project Manager include managing the job in terms of completion of the scope of the work and time parameters, gathering information, receiving day-to-day reports from the Construction Manager and his physical presence at the site on a daily basis. The Creedmoor project entailed the replacement of a campus facility consisting of nine (9) buildings on the Creedmoor campus in Queens Village.

Hellman was an electrical subcontractor that performed the site work that pertained to the temporary electric and permanent electric installations. Hellman installed the temporary power loop that provided temporary power to the buildings under construction. Specifically, Hellman installed poles with transformers along the perimeter of the site to support the construction activities, and had a daily presence following the installation of the power loop. The power loop was the responsibility of Hellman to install and maintain.

Goncalves further testified that Eldor was responsible for the distribution of the temporary power within each building; and that Kokolakis was responsible for the general construction of Buildings 1 - 6. Although Goncalves testified that he did not

know the cause of the outage, he stated that based upon the facts as relayed by certain incident reports, the power outage was caused either by an interruption of service from the temporary power loop or an interruption of service from the source of the power. Goncalves testified that Creedmoor was the owner of the power plant, not DASNY.

Ken Jeffries testified on behalf of Pabco as follows: at the time of the accident, he was employed by Pabco as a carpenter foreman, and Pabco is in the business of carpentry which includes performing finishing work, sheetrock framing and installation. As a foreman, Jeffries would be assigned to a construction project and remain on the site all day. Jeffries further testified that there were two accepted methods by which a worker dismounts from a Baker's scaffold and they are either by climbing down the bars at either end of the scaffold, or by using a ladder and not by stepping off the middle without holding on to the supports. If a Pabco worker required a ladder to dismount from a Baker's scaffold, ladders are "absolutely" available at the site; they were maintained in building #4 on either the first floor or the basement where plaintiff had been working.

Joseph Russo testified on behalf of Eldor as follows: in July 2008, he was employed by Eldor as a journeyman electrician and worked as a "sub foreman" on the Creedmoor project. The scope of work for Eldor was to supply the temporary power and lighting to buildings #1 - 8, during the construction project. Hellman, the site electrician, installed poles around the perimeter of the project to carry the temporary power from the existing main feed of the site. Hellman also installed poles that attached temporary breaker panels that provided the power for the residential buildings. Eldor used the panels to carry the power by underground conduit to the individual buildings, which had a temporary panel box in each building; the Hellman panel on the poles was five feet off the ground. Russo further testified that he believes the outage occurred on the entire project site. Thus, the outage was not related to Eldor's equipment since it had to do with the entire power loop installed by Hellman. Additionally, Russo testified that, with regard to the July 28, 2008 incident, the power was out for about one hour and then, Russo testified, he and his crew left at 2:30 p.m. The power was restored when he returned with his crew the next morning.

Daniel Bindus testified on behalf of Hellman. He stated that he was the Project Manager for Hellman on the Creedmoor project. Bindus testified that Hellman was responsible for the installation and maintenance of the temporary power system, and that there was a system in place for the provision of temporary power, which provided lighting and power for the workers to perform construction. Bindus identified Eldor as the company which installed its own breakers and feeders within the ones supplied by Hellman, to supply the power to individual buildings. Finally, Bindus testified that Hellman's power supply "stops at

the pole" (outside), which houses Hellman's electric breaker boxes; Eldor then brings the power into the buildings.

William Gray (a non-party) testified that he is employed as a plant utilities engineer III at Creedmoor. His job responsibilities include overseeing the electric, plumbing and carpentry shops, their supervisors at the facility and assisting the "power plant" as needed. Gray testified that the power to the power plant originated from the street from Con Edison facilities. Gray identified a plant logbook, which was the power plant operator's logbook for Creedmoor, documenting events of significance associated with the daily operations of the power plant. Gray specifically reviewed the logbook for the date of the accident and found that there was no indication of a power outage anywhere in the logbook for July 28, 2008. As such, Gray testified, the power outage could not have been a total outage at Creedmoor, but rather the power outage [had to be] confined to the temporary power supply installed by Hellman.

Non-party Consolidated Edison submitted an affidavit by Gale D. Dakers, dated January 12, 2012, stating that a search was made and Consolidated Edison has no record of any electric power outages or electrical service interruptions which occurred on July 28, 2008 for Creedmoor.

Motion by Laws

The motion by Laws for summary judgment dismissing all claims and cross-claims against it is granted in its entirety.

In the third-party action against Laws, DASNY seeks contribution, common-law and contractual indemnification from Laws, together with attorneys' fees, costs and disbursements incurred in the defense of this action. The branch of the motion by Laws which is to dismiss the third-party complaint is granted. Pursuant to the contract, Laws only assumed responsibility and liability for damage or injury "resulting from, arising out of, or occurring in connection with [Laws'] work." By its plain terms, the indemnification provision at issue would be triggered only in the event of a finding that the plaintiff's injuries arose out of, or resulted from, the performance of Laws' work under the subcontract (*see* *Loikv 1133 v 5th Avenue Corp.*, 46 AD3d 766 [2007]). However, the record shows that the plaintiff's injuries did not arise out of, or result from, the performance of Laws' work under the subcontract (*cf. Moss v McDonald's Corp.*, 34 AD3d 656 [2006]).

The branch of the motion which seeks to dismiss DASNY's claim for breach of contract against Laws based upon an alleged failure to procure insurance, is granted as the record reveals that Laws did in fact procure the said general liability or commercial liability insurance coverage naming DASNY as an insured against any and all claims arising out of or resulting from the performance of the work provided in the contract.

In the second third-party action, Kokolakis also seeks contribution, common-law and contractual indemnification from Laws, together with attorneys' fees, costs and disbursements incurred in the defense of this action. The branch of the motion which seeks to dismiss the second third-party complaint is also granted. There was no contract between Kokolakis and Laws which required Laws to defend or indemnify Kokolakis.

Motion by Pabco

The branch of the motion by Pabco which is to dismiss plaintiffs' claim under Labor Law §240(1), is granted as unopposed, and otherwise on the merits. "To recover under Labor Law § 240 (1), a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident" (*Marin v Levin Props., LP*, 28 AD3d 525 [2006], citing *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]). "The extraordinary protections of Labor Law § 240 (1) extend only to a narrow class of special hazards, and do 'not encompass any and all perils that may be connected in some tangential way with the effects of gravity' " (*Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 915-916 [1999], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). "Where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240 (1) liability exists" (*Nieves v Five Boro A.C. & Refrig. Corp.*, *supra* at 915, citing *Melber v 6333 Main St.*, 91 NY2d 759, 763-764 [1998]). Here, the undisputed evidence indicates that the fall resulted from a separate hazard wholly unrelated to the danger that brought about the need for the scaffold in the first instance (*see Nieves v Five Boro A.C. & Refrig. Corp.*, *supra* at 916; *see also Melber v 6333 Main St.*, *supra*; *Aquilino v E.W. Howell Co., Inc.*, 7 AD3d 739 [2004]; *Masullo v City of New York*, 253 AD2d 541 [1998]).

The branches of Pabco's motion which are to dismiss some of plaintiffs' claims under Labor Law 241 (6), based upon violations of certain Industrial Code Provisions, are granted. In order to recover under Labor Law § 241 (6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 503-505 [1993]; *Weingarten v Windsor Owners Corp.*, 5 AD3d 674, 677 [2004]). The Industrial Code provisions cited by the plaintiffs in their Bill of Particulars are inapplicable to the facts of this case. Specifically, 12 NYCRR 23-1.7(d) and (e) relate, respectively, to slipping and tripping hazards. However, the injured plaintiff in this case has not alleged that he either slipped or tripped nor does he assert that there was a foreign object or condition on the floor in the area where he mis-stepped from the scaffold. 12 NYCRR 23-1.21 provides certain requirements for "ladders and ladder ways". There are no allegations in this case pertaining to ladders and ladder ways. Finally, 12 NYCRR 23-2.1 contains certain requirements for the storage of materials and the disposal of debris. Here, there is no evidence even suggesting that the

injured plaintiff's accident was connected to or proximately caused by the improper storage of materials or any wayward debris. Thus, the branches of Pabco's motion which is to dismiss the Labor Law § 241 (6) causes of action based upon the violations of these sections, are properly granted (*see* *Weingarten v Windsor Owners Corp.*, *supra*).

The branch of the motion by Pabco which is to dismiss the causes of action by DASNY and Kokolakis for breach of contract for allegedly failing to procure insurance naming those parties as additional insureds, is granted. Pabco fulfilled its contractual obligation to procure liability insurance to protect Kokolakis and DASNY from negligence claims arising out of the activities covered by the subcontract (*see*, *Ceron v Rector*, *Church Wardens & Vestry Members of Trinity Church*, 224 AD2d 475 [1996]; *Martinez v Tishman Constr. Corp.*, 227 AD2d 298 [1996]).

The branches of the motion by Pabco which are to dismiss the claims of DASNY and Kokolakis for contractual indemnification and defense costs, are granted. " '[T]he right to contractual indemnification depends upon the specific language of the contract' " (*Kader v City of N.Y., Hous. Preserv. & Dev.*, 16 AD3d 461, 463 [2005], quoting *Gillmore v Duke/Fluor Daniel*, 221 AD2d 938, 939 [1995]). The indemnification provision at issue here requires Pabco to indemnify Kokolakis and DASNY for "all claims, damages, losses and expenses . . . arising out of or resulting from the performance of the Work . . ." Specifically, Article 9 of the contract between Pabco and Kokolakis entitled "Indemnity", states, in relevant part, as follows:

> "To the fullest extent permitted by law, Subcontractor (Pabco) shall defend, indemnify, and hold harmless the Owner (DASNY) . . . from and against all claims, damages. . . losses . . . including but not limited to attorneys' fees, arising out of or in any way connected with the performance of the work . . ."

Routine performance of plaintiff Kenneth Senese's duties on the job, or his mere presence on the site, cannot be considered an "act" sufficient to invoke indemnification under the governing contractual terms. Strictly construed, as it must be (*see* *Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]; *Dunham v Weissman*, 281 AD2d 220, 222 [2001], *lv denied in part and dismissed in part* 96 NY2d 851 [2001]), the contract's indemnity clause does not clearly create an indemnification obligation in a situation where, as here, the injury complained of was not shown to have been caused by any culpable conduct—either malfeasance or nonfeasance—on the part of Pabco (*see* *Lopez v Consolidated Edison Co. of N.Y.*, 40 NY2d 605 [1976]; *Darien Lake Theme Park & Camping Resort, Inc. v Contour Erection & Siding Sys., Inc.*, 16 AD3d 1055

[2005]). Had the parties intended Pabco to indemnify DASNY and Kokolakis for all claims arising from any work-related activity irrespective of negligence, they had only to say so unambiguously, as was done in such cases as *Brown v Two Exch. Plaza Partners* (76 NY2d 172 [1990]), and *Torres v Morse Diesel Intl., Inc.* (14 AD3d 401 [2005]), where the indemnity provisions were expressly made applicable to claims arising out of the indemnitor's "performance of the [contract] Work." Such an intention is not "unmistakably clear from the language of the promise[s]" made here (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 492 [1989]), and it is not for the court "to rewrite the contract and supply a specific obligation the parties themselves did not spell out." (*Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d at 490). In the absence of any claim or proof that Pabco or its employees actively contributed, through a negligent or wrongful "act[ ] or omission [ ]," to the cause of the injury giving rise to the litigation, summary judgment dismissal of the contractual indemnification claims by Kokolakis and DASNY is warranted (*cf. Murphy v Columbia Univ.*, 4 AD3d 200, 203 [2004]).

Motion by DASNY

The branch of the motion by DASNY which is to dismiss plaintiff's claim under Labor Law §241(6), based upon a violation of section 23-1.30, is denied. DASNY argues that section 23-1.30 is inapplicable to the facts of this case. To establish a violation of 12 NYCRR 23-1.30, a plaintiff must proffer evidence that conclusively establishes an absence of light in the subject area. The evidence must be more than just "vague" recitations that the lighting was "dark, poor" or that area as "a little dark" (*Carty v Part Authority of NY, NJ*, 32 AD3d 732 [2006]). For example, evidence that the subject area was dark enough so that the plaintiff could not read a newspaper was held to be sufficient to establish violation of 12 NYCRR § 23-1.30 (*Vedrel v Ferguson Elec. Const.*, 41 AD3d 1154 [2007]). In *Murphy*, evidence that the area where the accident occurred was pitch black and that light was nonexistent was sufficient to establish a violation of 12 NYCRR § 23-1.30 (*Murphy v Columbia University*, 4 AD3d 200 [2004]). Thus, under the circumstances presented, evidence that there was a power outage which resulted in the area where the injured plaintiff was working being in complete darkness, with no natural light is sufficient to establish an issue of fact as to a violation of 12 NYCRR § 23-1.30.

The branch of the motion by DASNY which is to dismiss plaintiffs' Labor Law §200 and common law negligence claims against it is denied. Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work (*see Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876 [1993]; *Ross v Curtis-Palmer Hydro-Electric Co.*, *supra*; *Lombardi v Stout*, 80 NY2d 290 [1992]; *Rojas v Schwartz*, 74 AD3d 1046 [2010]). Where a dangerous condition of premises is at issue, property owners may be held liable for a violation of Labor Law § 200 or based on common-law negligence if the owner either created the dangerous

condition that caused the accident or had actual or constructive notice of the condition (*see*, *Ortega v Puccia*, 57 AD3d 54 [2008]). Here, there is evidence in the record of a history of power outages at the project. Michael Lupo, Kokolakis' project manager, testified that there were sporadic power outages throughout the week for all buildings on site; and that these outages lasted about three or four days and were discussed at job meetings. Daniel Bindus, Hellman's project manager, testified that Eldor experienced power losses on several occasions during heavy rain. Also, Joseph Russo, Eldor's electric foreman, testified that he knew or one or more power failures other than on the date of plaintiff's accident, although he was unsure if they occurred before the date of the accident. Paul Goncalves, DASNY's project manager, testified that he believed there were prior power outages before the incident at issue. Thus, there are questions of fact as to whether DASNY had at least constructive notice of the condition at issue.

The branch of the motion by DASNY which seeks a conditional judgment on the issue of contractual indemnification from Laws is denied for the reasons noted above.

The branches of the motion by DASNY which seek a conditional judgment on the issue of contractual indemnification from Hellman, Eldor and Kokolakis are denied . A court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed (*see* *George v Marshalls of MA, Inc.*, 61 AD3d 931 [2009]; *O'Brien v Key Bank*, 223 AD2d 830, 831 [1996]). To obtain conditional relief on a claim for contractual indemnification, "the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of . . . statutory [or vicarious] liability" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1999]; *see* *Tranchina v Sisters of Charity Health Care Sys. Nursing Home*, 294 AD2d 491, 493 [2002]). However, where a triable issue of fact exists regarding the indemnitee's negligence, a conditional order of summary judgment for contractual indemnification must be denied as premature (*see* *Pardo v Bialystoker Ctr. & Bikur Cholim, Inc.*, 10 AD3d 298, 301 [2004]; *State of New York v Travelers Prop. Cas. Ins. Co.*, 280 AD2d 756, 757-758 [2001]). Here, DASNY met its initial burden of demonstrating its prima facie entitlement to judgment as a matter of law on its contractual indemnification claims against Hellman, Eldor and Kokolakis by submitting evidence establishing that it was free from any negligence and can only be held liable based on statutory or vicarious liability as the owner of the subject property where the accident occurred. In opposition, however, Hellman, Eldor and Kokolakis raised the issue of whether DASNY had constructive notice of a lighting outage problem prior to the accident at issue. Thus, in the situation present here where the indemnitee's negligence remains unresolved, summary judgment in favor of the indemnitee on a claim for contractual indemnification is inappropriate (*see* *Crespo v Triad, Inc.*, 294 AD2d 145, 147 [2002]; *Correia v Professional Data Mgt., Inc.*, 259

AD2d 60, 65 [1999]). Accordingly, the Court denies, as premature, those branches of DASNY's motion which are for conditional summary judgment on its contractual indemnification claims against Hellman, Eldor and Kokolakis.

The branch of the motion which seek contractual indemnification and defense costs from Pabco is denied for reasons provided above.

The branches of the motion which seek contractual indemnification for defense costs from Eldor, Hellman and Kokolakis, are granted. The contracts between these parties and DASNY provides that,

> "if any person shall make said claim for any damage or injury. . . the contractor shall assume the defense and pay on behalf of the Owner (DASNY) . . . any and all loss, expense . . . that the Owner (DASNY) may sustain as the result of the claim . . ."

DASNY established its *prima facie* entitlement to contractual indemnification for defense costs from Eldor, Hellman and Kokolakis by showing that this action arose out of their performance of the contract and the acts or omissions of persons and entities directly and indirectly employed by them (*cf. Langner v Primary Home Care Servs., Inc.*, 83 AD3d 1007, 1010 [2011]; *D'Angelo v Builders Group*, 45 AD3d 522 [2007]). The plain and unambiguous terms of the contracts do not condition their obligation for attorneys' fees and costs upon a finding of fault (*see Diudone v City of New York*, 87 AD3d 608 [2011]; *Sand v City of New York*, 83 AD3d 923, 926 [2011]). Since the contracts do not require as a condition for contractual indemnification that the acts or omissions be negligent or wrongful, whether those acts or omissions constituted negligent conduct is not relevant to Eldor, Hellman and Kokolakis' liability for contractual indemnification with respect to attorneys' fees and costs (*cf. Martinez v City of New York*, 73 AD3d 993, 999 [2010]; *Quiroz v Beitia*, 68 AD3d 957, 961 [2009]; *Bryde v CVS Pharmacy*, 61 AD3d 907, 908 [2009]). In opposition, these entities (Eldor, Hellman and Kokolakis) failed to raise a triable issue of fact.

Motion by Eldor

The motion by Eldor for summary judgment in its favor dismissing all claims and cross claims against it is denied.

It is undisputed that DASNY delegated the work of providing temporary lighting to Building #4 (where the accident occurred), to Eldor, [[and delegated to Laws, the work of providing temporary power to the job site. Laws, in turn, subcontracted that work to Hellman.]] According to Joe Russo of Eldor, the cause of the light failure in the basement of Building #4 did not result from a failure of its temporary lighting but rather would have arisen from a problem with the Hellman power loop or the DASNY/Creedmoor Power Plant. According to Bindus of Hellman, there was no failure and no breaker trips to its power loop and

he attributes the failure to either the DASNY/Creedmoor Power Plant from which Hellman drew its power for the power loop, or to Eldor's use of the temporary power loop.

William Gray, an engineer employed at the Power Plan was deposed as a non-party. Gray testified that there was no record of a power failure or outage at the Power Plant and opined that such outage must have been confined to the temporary power system. In short, none of the defendants charged with providing illumination on the subject project can explain or admit why the system devised to provide illumination failed on July 28, 2008. Indeed each blames the other.

It is well settled that 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 evidence in admissible form to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegard v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]), and in this regard "the evidence is to be viewed in a light most favorable to the party opposing the motion, giving him the benefit of every favorable inference" (*Cortale v Educational Testing Serv.*, 251 AD2d 528, 531 [1998]). Here, Eldor has failed to establish its entitlement to judgment as a matter of law. Eldor argues, indeed speculatively, that since power was lost in all buildings at the time of plaintiff's injury, there was a problem with the source of the temporary power lighting and thus Eldor's actions could not have caused the power loss. However, there is no *proof* that the power went out in all of the buildings under construction, and no proof that the power and lighting went out in all the buildings or that there was a problem with the source of the temporary power lighting. All of the witnesses that testified stated that they did not know what caused the outage. Specifically, Russo (on behalf of Eldor), Lupo (on behalf of Kokolakis), Goncalves (on behalf of DASNY), Bindus (on behalf of Hellman), Stabiner (on behalf of Laws), and Jeffries (on behalf of Pabco), all testified that they did not know what caused the outage. Some testified that they *believed* that the outage occurred in all of the buildings but did not know that for a fact. Therefore, Eldor's assertion that the witnesses affirmatively testified that the outage occurred in all of the buildings and therefore, Eldor could not have caused the outage at issue, is either conclusory and based upon impermissible speculation *(see Estate of Aviles v New York City Health & Hosps. Corp.*, 5 AD3d 432 [2004]), or is contradicted by the other evidence which is before the court (*see, Wallenquest v Brookhaven Mem. Hosp. Med. Ctr.*, 28 AD3d 538 [2006]; *DeSimone v Lutheran Med. Ctr.*, 34 AD2d 660 [1970]; *cf. Texter v Middletown Dialysis Ctr.*, 22 AD3d 831 [2005]; *Velez v Policastro*, 1 AD3d 429, 431 [2003]). Furthermore, Eldor cannot obtain summary judgment by pointing to gaps in plaintiffs' proof (*Coastal Sheet Metal Corp. v. Martin Associates, Inc.*, 63 AD3d 617 [2009]). Rather, Eldor must adduce affirmative evidence that it was not responsible, in whole or in part, for the electrical outage in question (*see Torres v Industrial Container*, 305 AD2d 136 [2003]). This it failed to do. Accordingly, the motion is denied regardless of the sufficiency of the parties' opposing papers

(*see id*).

Motion by Hellman

The motion by Hellman to renew its prior motion for summary judgment is granted. Upon renewal, the motion by Hellman for summary judgment dismissing all claims and cross claims against it is denied. Hellman submitted evidence indicating that the work which Hellman was responsible for, namely the installation of the temporary power loop, could not have caused or contributed to the power failure since Hellman's work on the power loop did not include any aspect of the *interior* electrical work within the buildings. Rather, Hellman contends, the work which it performed terminated outside of the buildings at the poles spaced around the perimeter of the site, approximately 15 feet from the buildings. In opposition, however, defendants submitted the transcript of the testimony of Daniel Bindus , the project manager for Hellman, wherein he acknowledged that Hellman was responsible for the "installation and maintenance" of the *entire* temporary power system, which provided lighting and power for the workers to perform the construction. Also, Hellman's scope of work delineated in the Subcontract between Laws and Hellman clearly indicates that Hellman was responsible for the entire temporary power loop. Moreover, although not conclusive, there is evidence suggesting that the power outage was confined to the temporary loop. The affidavit of Consolidated Edison by Gale D. Dakers, dated January 12, 2012, states that Consolidated Edison had no record of any electric power outages or electric service interruptions occurring on July 28, 2008, for the Creedmoor campus project. In addition, William Grey, the engineer employed by the State of New York at the Creedmoor campus, testified that there was no outage with respect to the service that supplied power to the temporary loop. Thus, there is an issue of fact as to whether Hellman's work contributed to the power outage that caused/contributed to plaintiff's accident.

Cross-Motion by Plaintiffs

The cross-motion by plaintiffs for summary judgment in their favor on their claim pursuant to Labor Law §241(6), predicated upon a violation of 23-1.30, is denied.

It is noted in the first instance that plaintiffs' cross-motion is untimely, made almost a month after the April 16, 2012 deadline. A cross-motion for summary judgment made more than 120 days after the filing of a note of issue may be considered on its merits if there is a timely pending motion for summary judgment made by another party on nearly identical grounds (*see Grande v Peteroy,* 39 AD3d 590, 591-592 [2007]; *Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 497 [2005]; *Boehme v A.P.P.L.E., A Program Planned for Life Enrichment,* 298 AD2d 540 [2002]). "Notably, the court, in the course of deciding the timely motion, is, in any event, empowered to search the record and award summary judgment to [the] nonmoving party" (*Lennard v Khan*, 69 AD3d at 814 [some internal quotations marks omitted]; *see* CPLR 3212[b]). Since DASNY's motion is properly before the court, the court may providently exercise its discretion and consider plaintiffs' cross-motion, made on nearly

identical grounds (*see* *Lennard v Khan*, 69 AD3d at 814; *Ianello v O'Connor*, 58 AD3d at 686).

"Labor Law § 241(6) imposes a non-delegable duty of reasonable care upon an owner or general contractor to provide reasonable and adequate protection to workers, and a violation of an explicit and concrete provision of the Industrial Code by a participant in the construction project constitutes some evidence of negligence for which the owner or general contractor may be held vicariously liable" (*Edwards v C & D Unlimited*, 295 AD2d 310, 311 [2002]; *see* *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 [1998]). "An owner or general contractor may, of course, raise any valid defense to the imposition of vicarious liability under section 241(6), including contributory and comparative negligence" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d at 350). Here, the injured plaintiff's decision to step off of the scaffold without using the "ladder" portion which constituted the side rails, raises questions of fact as to whether the injured plaintiff's own negligence contributed to the happening of the subject accident.

Furthermore, in support of their cross-motion for summary judgment with respect to so much of the complaint as alleged a violation of Labor Law § 241(6), the plaintiffs failed to establish their prima facie entitlement to judgment as a matter of law (*see* *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The affidavit of plaintiffs' expert is rejected by the court because the plaintiffs did not comply with the disclosure requirements of CPLR 3101 (d) (1) (I), and only first identified their expert witness in opposition to the defendants' summary judgment motions, after the plaintiff filed the note of issue and certificate of readiness (*see* *King v Gregruss Mgt. Corp.*, 57 AD3d 851, 852-853 [2008]). Also, the expert's opinion which is speculative and conclusory, and not based on accepted industry standards, is insufficient to establish prima facie entitlement to judgment as a matter of law (*see* *Rabon-Willimack v Robert Mondavi Corp.*, 73 AD3d 1007, 1009 [2010]; *Pappas v Cherry Cr., Inc.*, 66 AD3d 658 [2009]; *Rivas-Chirino v Wildlife Conservation Socy.*, 64 AD3d 556 [2009]).

Cross-Motion by J. Kokolakis

The cross-motion by Kokolakis for summary judgment in its favor on its third-party claims for defense costs and contractual indemnification from Pabco, is denied as untimely and otherwise on the merits as provided above.

As previously stated, a cross-motion for summary judgment made more than 120 days after the filing of a note of issue may be considered on its merits only if there is a timely pending motion for summary judgment made by another party on nearly identical grounds (*see* *Grande v Peteroy*, supra; *Bressingham v Jamaica Hosp. Med. Ctr.*, *supra*; *Boehme v A.P.P.L.E., A Program Planned for Life Enrichment*, *supra*). Here, however, Kokolakis' cross-motion for summary judgment, served more than four (4) months after the last day to properly do so, is not responsive to a timely, pending motion for summary judgment and, therefore, the

court is without authority to consider it on its merits (*see* *Brill v City of New York*, 2 NY3d 648, 650-651).

Conclusion

Defendant/third-party defendant/second third-party defendant Laws' motion for summary judgment is granted. The complaint and all cross-claims are hereby dismissed as against this defendant.

The branch of the motion by Pabco which is to dismiss plaintiff's claim under Labor Law §240(1), is granted. The branches of Pabco's motion which are to dismiss certain aspects of plaintiff's claim under Labor Law 241 (6), based upon violations of sections 12 NYCRR 23-1.7(d) and (e), 23-1.21 and 23-2.1, are granted. The branch of the motion by Pabco which is to dismiss the causes of action by DASNY and Kokolakis for breach of contract for allegedly failing to procure insurance naming those parties as additional insureds, is granted. The branch of the motion by Pabco which is to dismiss DASNY's claims for contractual indemnification and defense costs, is granted.

The branch of the motion by defendant/third-party plaintiff DASNY which is to dismiss plaintiff's claim under Labor Law §241(6), based upon a violation of section 23-1.30, is denied. The branches of the motion which seek contractual indemnification for defense costs from Eldor, Hellman and Kokolakis, are granted. The branch of the motion by DASNY which is to dismiss plaintiff Labor Law §200 and common law negligence claim against it is denied. The branches of the motion by DASNY which seek a conditional judgment on the issue of contractual indemnification from Eldor and Kokolakis are granted. The branches of the motion by DASNY which seek contractual indemnification and defense costs from Pabco and Laws are denied. The branches of the motion by DASNY which seek contractual indemnification for defense costs from Eldor, Hellman and Kokolakis, are granted.

Defendant Eldor's motion for summary judgment is denied.

Defendant Hellman's motion to renew its prior motion for summary judgment is granted. Upon renewal, defendant Hellman's motion for summary judgment is denied.

Plaintiffs' cross-motion for summary judgment on the issue of liability on their claim pursuant to Labor Law §241(6), predicated upon a violation of 23-1.30, is denied.

Defendant/third-party plaintiff Kokolakis' motion for defense costs and contractual indemnification from Pabco is denied.

Dated: January 16, 2013

JANICE A. TAYLOR, J.S.C.

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