Rivera v East Broadway Real Estate Holding LLC

2024 NY Slip Op 33977(U)

November 4, 2024

Supreme Court, Kings County

Docket Number: Index No. 502156/16

Judge: Heela D. Capell

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At an IAS Term, Part 19 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 4th day of November, 2024.

PRESENT:

HON. HEELA D. CAPELL,
Justice.

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ARIEL RIVERA,

Plaintiff,

-against-

Index No.: 502156/16

EAST BROADWAY REAL ESTATE HOLDING LLC, R&S CONSTRUCTION OF NY LLC, NY DRILLING INC., CHUAN SHU WANG, A&T ENGINEERING P.C., ROBERT LIN P.E., SIR JAMES ROBINSON, and ROBINSON ARCHITECTS P.C.,

Defendants.

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EAST BROADWAY REAL ESTATE HOLDING LLC,

Third-Party Plaintiff,

-against-

A&T ENGINEERING P.C., ROBERT LIN P.E., SIR JAMES ROBINSON, ROBINSON ARCHITECTS P.C., and SHENG SHENG CONSTRUCTION, INC.,

Third-Party Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	358-359, 369, 379, 382, 388-389, 427-430, 436-437, 458-459, 463-465, 467, 474, 496, 503-504, 538-540, 563-565
Opposing Affidavits/Answer (Affirmations)	544, 550, 561, 562, 568, 570, 572, 577, 581-582, 601, 606, 607, 608, 609, 610-613,617, 625, 640
Affidavits/ Affirmations in Reply	641, 642, 643, 644, 646, 647, 648, 651, 653, 654-655,

Upon the foregoing papers, defendants A & T Engineering, P.C., (A&T Engineering) and Robert Lin, P.E. (collectively referred to as the A&T Defendants) move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint, third-party complaint and all cross-claims as against them and granting them reasonable attorney's fees (motion sequence number 16).

Defendant/third-party plaintiff East Broadway Real Estate Holding LLC (East Broadway) moves for an order: (1) pursuant to CPLR 3212, granting it summary judgment dismissing plaintiff's causes of action premised on common-law negligence and Labor Law §§ 200 and 240 (1) and all counterclaims and cross-claims as against it; (2) pursuant to CPLR 3212, granting it conditional summary judgment in its favor on its common-law indemnification claim against third-party defendant Sheng Sheng Construction, Inc. (Sheng Sheng); and (3) pursuant to CPLR 3025 (b) and (c), granting it leave to amend its third-party complaint to allege that plaintiff suffered a grave injury within the meaning of Workers' Compensation Law § 11 (motion sequence number 17).

Defendant R&S Construction of NY LLC (R&S Construction) moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint and all cross-claims as against it (motion sequence number 18).

Defendant/third-party defendants Sir James Robinson and Robinson Architects P.C. (Robinson Architects) (collectively referred to as the Robinson Defendants) move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint, all cross-claims, and the third-party complaint as against them (motion sequence number 19).

Plaintiff Ariel Rivera, by way of a motion and a cross-motion, moves for an order, pursuant to CPLR 3212: (1) granting him partial summary judgment in his favor with respect to his Labor Law § 241 (6) cause of action as against East Broadway and R&S Construction and dismissing the affirmative defenses of all defendants sounding in comparative negligence, sole proximate cause, and assumption of risk (motion sequence number 20); and (2) moves for an order, pursuant to CPLR 3212, granting him summary judgment in his favor on his Labor Law § 240 (1) cause of action as against East Broadway (motion sequence number 22).

Sheng Sheng moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the third-party complaint and any cross-claims (motion sequence number 21).

Background

Plaintiff Ariel Rivera pleads causes of action premised on common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6) based on injuries he allegedly suffered on December 31, 2015, when the dirt walls of a trench caved in on him while he was installing rebar as part of foundation work for a building under construction. The construction site was owned by East Broadway, which intended to construct a seven-story mixed use building on the site. East Broadway hired Sheng Sheng to do the excavation and foundation work and hired R&S Construction to act as the general contractor on the project once the foundation work was completed. R&S also applied for, and obtained the permits for, the foundation construction work and Sir James L. Robinson of Robinson Architects signed a portion of the permit application indicating that he would be the construction

superintendent for the project. In addition, East Broadway hired A&T Engineering to conduct TR1 and TR8 inspections, required by the New York City Department of Buildings (Department of Buildings), to ensure that the work performed was done in compliance with the construction plans.

At his own deposition, plaintiff testified that he was employed by Sheng Sheng as an assistant. Plaintiff, who had no recollection of what he was doing at the time of the accident, could only testify to the work he performed at the jobsite on the day before the accident and the manner Sheng Sheng performed its work in general. In describing this work, plaintiff stated that, after a Sheng Sheng worker excavated a pit using an excavator, plaintiff's job involved assisting a coworker install rebar and then wood forms into the pit that would thereafter be filled with concrete. These pits were approximately 9 to 11 feet-deep but Sheng Sheng did not provide plaintiff with a ladder to climb into the pit and Sheng Sheng never installed any shoring to protect its workers while they were inside the pits.

Mario Lopez, one of plaintiff's coworkers with Sheng Sheng, testified at his non-party deposition, that the pits excavated on the date of the accident were approximately 8 to 10 feet deep and around 4 feet long and 3 feet wide. Just before the accident, Sheng Sheng's workers had completed three trenches. Plaintiff was working inside the fourth trench setting up the rebar, and another Sheng Sheng worker was using an excavator to dig a trench next to the one in which plaintiff was working. Plaintiff had no ladder to climb in or out of the trench, and, as Lopez also stated in an affidavit, the walls and floor of the trench consisted of dirt with no shoring to support any of the trenches on the jobsite - - including the one in which plaintiff was working. At the time of the accident, the excavator

being used to dig the next trench, touched the wall of the trench in which plaintiff was working, causing the dirt walls to cave in on plaintiff, burying him over his head with dirt.

At his deposition, Chuan Shu Wang, a shareholder and manager of East Broadway,[1] testified that he arrived at the job site around 11:00 a.m. and observed workers installing rebar in the holes that had been excavated. At 2:00 p.m. he saw an excavator in use near one of the holes and thought it might have triggered something because he saw the dirt cave into the hole and bury one of the workers who was working in the hole. On the date of the accident, but at some point before the trench collapse, Wang took a couple of pictures of Sheng Sheng's workers and, at his deposition, Wang identified one of these photographs[2] as showing plaintiff working in the trench where the accident happened (Wang, April 25, 2021 deposition at pages 80, 83-84, 86, 99; Wang, August 27, 2021 deposition at page 77). When Fu Heng Ye, Sheng Sheng's owner and "boss," was shown this same photograph at his deposition, he testified that the photograph showed one of his employees tying up rebar in a trench located at the job site. Fu Heng Ye also stated that if he had observed a worker doing this work in such a deep pit he would have stopped the work because the soil walls in the middle area of the pit were vertical and not angled at 45 degrees and there was no shoring on these side walls (Fu Heng Ye deposition, October 7, 2022 at pages 35-39).

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[1] Wang, at his deposition, described East Broadway as a real estate development company. Although Wang stated that East Broadway did not have a person identified as a president, vice-president, or treasurer, he did state that he was the person who handled matters for the company.
[2] The photo was the first of the two photos identified as exhibit 15 at Wang's August 27, 2021, deposition and one of the photos contained in exhibit 5 at Wang's April 26, 2021 deposition. This photo is the first photo in the photos provided by plaintiff in NYSCEF Doc. No. 566.

Discussion

Plaintiff, East Broadway, and Sheng Sheng

Labor Law § 240 (1)

Labor Law § 240 (1) imposes absolute liability on owners and contractors or their agents when they fail to protect workers employed on a construction site from injuries proximately caused by risks associated with falling from a height or those associated with falling objects (*see Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 7 [2011]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). For accidents involving falling objects, the "plaintiff must show more than simply that an object fell causing injury to a worker" (*Narducci*, 96 NY2d at 268; *see also Fabrizi v 1095 Ave. of Ams., L.L.C.*, 22 NY3d 658, 663 [2014]). A plaintiff must show that, at the time the object fell, it was "being hoisted or secured" (*Narducci*, 96 NY2d at 268) or "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]; *see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758 [2008]) and that the object fell "because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268; *see Fabrizi*, 22 NY3d at 663; *Wilinski*, 18 NY3d at 10-11).

East Broadway contends that it is entitled to dismissal of plaintiff's Labor Law § 240 (1) cause of action because a trench collapse does not fall within the ambit of the class of hazards against which section 240 (1) was intended to guard against. Indeed, the Appellate Division, Second Department, has expressly held as such in multiple decisions (*see Ferreira v Village of Kings Point*, 68 AD3d 1048, 1050-1051 [2d Dept 2009]; *Natale*

v City of New York, 33 AD3d 772, 774 [2d Dept 2006]; *O'Connell v Consolidated Edison Co. of N.Y.*, 276 AD2d 608, 610 [2d Dept 2000]; *Vitaliotis v Village of Saltaire*, 229 AD2d 575, 575 [2d Dept 1996]; *Hamann v City of New York*, 219 AD2d 583, 583 [2d Dept 1995]). Plaintiff, in opposing East Broadway's motion, and in support of his own cross-motion,[3] asserts that these Second Department cases have been effectively overruled by subsequent Court of Appeals decisions and that the court should follow the lead of the Appellate Division, First Department in *Rivas v Seward Park Hous. Corp.* (219 AD3d 59 [1st Dept 2023]) and find a section 240 (1) violation under the circumstances here.

In *Rivas*, the court found that a trench collapse that buried the plaintiff involved an elevation differential within the meaning of Labor Law § 240 (1) that required protection by way of an adequate section 240 (1) protective device such as a brace or shoring (*Rivas*, 219 AD3d at 64-65). In so finding, the court expressly declined to follow the contrary decisions from the other departments of the Appellate Division, including the Second Department, because it found them to be inconsistent with the Court of Appeals more recent decisions in *Runner v New York Stock Exch., Inc.* (13 NY3d 599 [2009]) and *Wilinski* (18 NY2d 1) (*see Rivas*, 219 AD3d at 65 n3; *see Garcia v SAF LI LLC*, 2023 NY Slip Op 34373[U], *2-4 [Sup Ct, Kings County 2023]). Although *Runner* and *Wilinski* undoubtedly

[3] Although plaintiff's cross-motion is untimely since it was made more than 60 days after the filing of the note of issue in violation of this court's time requirements for summary judgment motions (*see* Kings County Supreme Court Uniform Civil Term Rules, part C, rule 6; CPLR 3212 [a]; *Souffrant v M&K Real Estate Assoc., LLC*, 225 AD3d 914, 915 [2d Dept 2024]), the court may consider it because it is made on grounds that are nearly identical to East Broadway's timely motion seeking summary judgment dismissing plaintiff's Labor Law § 240 (1) cause of action (*see Sheng Hai Tong v K&K 7619, Inc.*, 144 AD3d 887, 890 [2d Dept 2016]).

altered section 240 (1) analysis and their rationale may require the Second Department to reappraise its holdings in this area in line with the First Department's holding in *Rivas*, neither *Runner* nor *Wilinski* involved a trench collapse or an accident sufficiently analogous to a trench collapse for this court to find that they effectively overruled the prior decisions from the Second Department. Indeed, in reversing the determination of the Supreme Court in deciding the motion below, the First Department in *Rivas* recognized that the Supreme Court was bound to follow the on-point precedent from the other departments of the Appellate Division despite the holdings in *Runner* and *Wilinski* (*see Rivas*, 219 AD3d at 65 n3). As such, this court finds it is bound by the above noted Second Department cases holding that a trench collapse is not covered by section 240(1) (*see Duffy v Horton Mem. Hosp.*, 66 NY2d 473, 475-476 [1985]; *Mountain View Coach Lines v Storms*, 102 AD2d 663, 664-665 [2d Dept 1984]). Accordingly, East Broadway is entitled to dismissal of the Labor Law § 240 (1) cause of action. For the same reasons, plaintiff's cross-motion for summary judgment on that cause of action must be denied.

Labor Law § 241 (6)

Turning to plaintiff's motion seeking summary judgment in his favor on his Labor Law § 241 (6) cause of action, East Broadway initially contends that the motion may not be considered because it was made more than 60 days after the filing of the note of issue in violation of Kings County Supreme Court Uniform Civil Term Rules, part C, rule 6 (*Souffrant v M&K Real Estate Assoc., LLC*, 225 AD3d 914, 915 [2d Dept 2024]; CPLR 3212 [a]). Given that Kings County Supreme Court Uniform Civil Term Rules, part C, rule 6 sets no requirements for how the 60 days are counted, the computation is governed

by General Construction Law § 20, which provides, as is relevant here, that "[t]he day from which any specified period of time is reckoned shall be excluded in making the reckoning" (*see People v Stiles*, 70 NY2d 765, 767 [1987]; *Gutierrez v New York City Hous. Auth.*, 42 Misc 2d 1236[A], 2014 NY Slip Op 50373[U], *2 [Sup Ct, Kings County 2014]). In view of this rule of computation, since the note of issue was filed on December 2, 2022, and the plaintiff's motion was served on January 31, 2023, plaintiff's motion was made on the 60th day (*see Gutierrez*, 2014 NY Slip Op 50373, *2-3) and is thus timely.

On the merits, under Labor Law § 241 (6), an owner, general contractor or their agent may be held vicariously liable for injuries to a plaintiff where the plaintiff establishes that the accident was proximately caused by a violation of an Industrial Code section stating a specific positive command that is applicable to the facts of the case (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349-350 [1998]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2017]). Here, East Broadway may be held liable as a section 241 (6) defendant since it is indisputably the owner of the project site (*see Gordan v Eastern Ry. Supply*, 82 NY2d 555, 559-560 [1993]; *Chuqui v Cong. Ahavas Tzookah V'Chesed, Inc.*, 226 AD3d 960, 962 [2d Dept 2024]). In order to meet his summary judgment burden, plaintiff must show: (1) that the Industrial Code section relied upon applied under the circumstances; (2) that defendants or plaintiff's employer Sheng Sheng violated that section's specific commands; (3) that this violation alone, or considered with other undisputed factual evidence, constitutes negligence; and (4) that the violation caused plaintiffs' injuries (*see Bazdaric v Almah Partners LLC*, 41 NY3d 310, 318 [2024]; *Lourenco v City of New York*, 228 AD3d 577, 578-579 [1st Dept 2024]). Plaintiff, in

moving, relies upon Industrial Code (12 NYCRR) §§ 23-1.7 (f), 23-4.1 (a), 23-4.2 (a) and (k), 23-4.3, 23-4.4 (a), 23-4.4 (e).

Plaintiff has demonstrated his prima facie entitlement to summary judgment with respect to Industrial Code (12 NYCRR) §§ 23-4.2 (a), 23-4.4 (a), and 23-4.4 (e) (*see Leonard v City of New York*, 216 AD3d 51, 56 [1st Dept 2023] [addressing sections 23-4.2 (a) and 23-4.4 (a)]; *Smith v Robert Marini Bldr., Inc.*, 83 AD3d 1188, 1189 [3d Dept 2011] [addressing section 23-4.2 (a)]; *Ferreira*, 68 AD3d at 1051 [addressing sections 23-4.2 and 23-4.4]). Section 23-4.2 (a) provides that, "[w]henever any person is required to work in or is lawfully frequenting any trench or excavation five feet or more in depth which has sides or banks with slopes steeper than those permitted in Table I of this Subpart, such sides or banks shall be provided with sheeting and shoring in compliance with this Part (rule)." Section 23-4.4 (a) similarly provides that, "[w]here any excavation is not protected by sloped sides or banks in compliance with Table I of this Subpart, any person in such excavation shall be protected by sheeting, shoring and bracing in compliance with Tables II, III and IV of this Subpart. Sizes of materials listed in the tables are nominal or trade dimensions." Section 23-4.4 (e) provides that a movable shield meeting certain requirements could be used in lieu of the shoring required by the other subsections of 23-4.4.

Plaintiff has demonstrated that Industrial Code (12 NYCRR) §§ 23-4.2 (a), 23-4.4 (a), and 23-4.4 (e) are applicable in view of Chuan Shu Wang's deposition testimony that the excavation pit was approximately 10 feet deep, and Lopez's deposition testimony that it was approximately 8 to 10 feet deep. Additionally, the testimony of Chuan Shu Wang

that one of the photographs[4] he took showed plaintiff working in the pit at issue and Fu Heng Ye's testimony that this photograph showed a Sheng Sheng employee working in a pit that had no shoring on two walls and that the walls were vertical and not angled demonstrates that the sections 23-4.2 (a), 23-4.4 (a) and 23-4.4 (e) were violated.[5] The failure to shore the vertical dirt walls of an 8 to 10 foot deep trench presents an obvious risk that the walls of such a trench may collapse and therefore constitutes negligence. Plaintiff's engineering expert states as such in her supporting affidavit, and Fu Heng Ye, Sheng Sheng's owner as much as conceded the danger presented by testifying at his deposition that he would have stopped the work if had seen an employee working in a trench as shown in the photograph of plaintiff. The undisputed fact that the walls of excavation pit here collapsed onto plaintiff and buried him establishes that the violation of the statute was a proximate cause of plaintiff's injuries (*see Bazdaric*, 41 NY3d at 318; *Lourenco*, 228 AD3d at 578-579).

Plaintiff has demonstrated that Industrial Code (12 NYCRR) § 23-4.2 (k) was violated. The provisions states, "[p]ersons 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

[4] Given this detailed testimony regarding what is shown in the photograph, plaintiff's failure to submit the photograph until he made his subsequent cross-motion relating to his Labor Law § 240 (1) cause of action is not an impediment to plaintiff's prima facie showing (NYSCEF Doc. No. 566). Moreover, the photograph is consistent with the testimony, and shows that the earthen walls of the deep excavation in which plaintiff was working were nearly vertical and were not shored.

[5] Although Lopez did not testify as to whether the walls of the excavation pit were angled or sloped, as noted above, he did testify that there was no shoring on the walls of the pit. Contrary to East Broadway's contention, the portion of Lopez's testimony and affidavit addressing shoring are not called into question by any lack of familiarity with the word shoring as his testimony demonstrates that he generally understood its purpose as it relates to plaintiff's accident.

material being dislodged by or falling from such equipment." Contrary to East Broadway's assertion, the Appellate Division, Second Department has found that section 23-4.2 (k) states a specific standard to support a cause of action under labor law § 241 (6) (*see Zaino v Rogers*, 153 AD3d 763, 765 [2d Dept 2017]; *Cunha v Crossroads II*, 131 AD3d 440, 441 [2d Dept 2015]; *Ferreira v City of New York*, 85 AD3d 1103, 1105 [2d Dept 2011]; *Garcia v Silver Oak USA*, 298 AD2d 555, 555 [2d Dept 2002]).[6] Lopez testified that the wall collapsed when the excavator digging the trench next to the one in which plaintiff was working touched the wall of the trench where plaintiff was working. Established that the operation of the excavator in close proximity to the un-shored trench in which plaintiff was working was negligent (*see Bazdaric*, 41 NY3d at 318; *Lourenco*, 228 AD3d at 578-579).

In opposing the motion, East Broadway contends that plaintiff has failed to eliminate factual issues regarding the presence of shoring in the excavation pit. Although East Broadway cites Fu Heng Ye's deposition testimony where he states that Sheng Sheng used shoring at the project, Fu Heng Ye also testified that he was not at the jobsite at the time of the accident and that the pit at issue had not been dug before he left the jobsite. As such, his testimony that shoring was generally used fails to raise an issue of fact. Similarly, Yunkai Zheng's affidavit, a supervisor for Sheng Sheng, does not address the conditions

[6] The court notes that the First, Third and Fourth Departments of the Appellate Division have all held that Industrial Code § 23-4.2 (k) is not sufficiently specific to support a cause of action under Labor Law § 241 (6) (*see Malvestuto v Town of Lancaster*, 201 AD3d 1339, 1341 [4th Dept 2022]; *Kropp v Town of Shandaken*, 91 AD3d 1087, 1091 [3rd Dept 2012]; *Mann v Mezuyon, LLC*, 225 AD3d 569, 570 [1st Dept 2024]). This court, however, must follow the controlling authority of the Appellate Division, Second Department (*see Duffy*, 66 NY2d at 475-476; *Mountain View Coach Lines*, 102 AD2d at 664).

in the pit in which plaintiff was working at the time of the accident. Moreover, even if there was an issue of fact regarding whether there was shoring, none of East Broadway's evidence suggests that the shoring complied with the requirements of the Industrial Code. Indeed, the collapse here suggests that, even if there was shoring, it was inadequate and that Industrial Code (12 NYCRR) §§ 23-4.2 (a), 23-4.4 (a), and 23-4.4 (e) were still violated. With respect to Industrial Code (12 NYCRR) § 23-4.2 (k), East Broadway does not provide evidence to challenge Lopez and Chuan Shu Wang's eyewitness accounts showing that the movement or action of the excavator precipitated the wall collapse.

Plaintiff, however, is not entitled to summary judgment pursuant to Industrial Code (12 NYCRR) §§ 23-1.7 (f), 23-4.1 (a), and 23-4.3. Section 23-1.7 (f) requires that workers be provided with safe means to access work areas above or below ground, and section 23-4.3 requires that ladders, stairways, or ramps be provided to access every excavation more than three feet in depth. While Lopez asserts, in his affidavit and deposition, that Sheng Sheng did not provide any ladders, stairways or ramps to access the excavation pits, plaintiff did not establish that absence of such devices was a proximate cause of plaintiff's injuries. Plaintiff has also failed to show that section 23-4.1 (a) is applicable here, since that section applies to the collapse of structures in an excavation, which is not the case here (*see Scarso v M.G. Gen. Constr. Corp.*, 16 AD3d 660, 661 [2d Dept 2005], *lv dismissed* 5 NY3d 849 [2005]).

However, plaintiff has established that the defendants' affirmative defenses of primary assumption of the risk, sole proximate cause and comparative fault should be dismissed. First, the doctrine of assumption of risk is generally limited to voluntary athletic

and recreational activities and does not apply to plaintiff's work-related injury at issue here (*see Depass v Mercer Sq., LLC*, 219 AD3d 801, 803 [2d Dept 2023]; *Thompson v 1241 PVR, LLC*, 104 AD3d 1298, 1299 [4th Dept 2013]; *see also Trupia v Lake George Cent. School Dist.*, 14 NY3d 392, 395-396 [2010]).[7] In addition, the facts here show that plaintiff did not operate the excavator, did not supervise the work, and was working under the direction of the supervisor in working in the un-shored excavation pit. Further, there is no suggestion that plaintiff's work in installing the rebar in the excavation pit contributed to the collapse of the pit's walls. Accordingly, plaintiff's actions could not have been the sole proximate cause of the accident (*see Zholanji v 52 Wooster Holdings, LLC*, 188 AD3d 1300, 1302 [2d Dept 2020]; *Rico-Castro v Do & Co N.Y. Catering, Inc.*, 60 AD3d 749, 750 [2d Dept 2009]; *Pichardo v Aurora Contrs., Inc.*, 29 AD3d 879, 880-881 [2d Dept 2006]; *see also Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1168 [2020]) and there is no merit to defendants' comparative fault defense (*see Bradley v NYU Langone Hosps.*, 223 AD3d 509, 511 [1st Dept 2024]; *Fischer v VNO 225 W. 58th St. LLC*, 215 AD3d 486, 487 [1st Dept 2023]; *Ellerin-Diefenbach v Autumn Sky Dev. Co., Inc.*, 208

[7] To the extent that East Broadway's first defense may be read as a defense premised on an open and obvious nature of the condition rather than as a primary assumption of the risk defense, such a reading does not alter plaintiff's entitlement to summary judgment dismissing the defense. An open and obvious condition defense only applies if the open and obvious condition is not inherently dangerous (*see Farrugia v 1440 Broadway Assoc.*, 163 AD3d 452, 454-455 [1st Dept 2018]; *Baumann v Town of Islip*, 120 AD3d 603, 605 [2d Dept 2014]) or inherent in the nature of the work of a construction worker (*see Zarnoch v Luckina*, 112 AD3d 1336, 1338 [4th Dept 2013]), and here the record demonstrates that the hazard of un-shored walls of the trench were inherently dangerous and that the danger was not one inherent in plaintiff's work as a construction worker (*see Zarnoch*, 112 AD3d at 1338).

AD3d 456, 457-458 [2d Dept 2022]). Defendants' affirmative defenses of primary assumption of the risk, sole proximate cause and comparative fault are therefore dismissed.

However, East Broadway has established that plaintiff's Labor Law § 200 and common-law negligence causes of action should be dismissed. East Broadway has demonstrated that the accident was caused by Sheng Sheng's methods and manner of performing its excavation work without shoring and that East Broadway did not supervise or control this work (*see Turgeon v Vassar College*, 172 AD3d 1134, 1136 [2d Dept 2019], *lv denied* 34 NY3d 902 [2019]; *Peck v Szwarcberg*, 122 AD3d 1216, 1220 [3d Dept 2014]; *Ortega v Everest Realty LLC*, 84 AD3d 542, 543-544 [1st Dept 2011]). Under a methods and manner of work theory of liability, "no liability will attach to the owner [or general contractor] solely because it may have had notice of the allegedly unsafe manner in which work was performed" (*Dennis v City of New York*, 304 AD2d 611, 612 [2d Dept 2003]; *see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]; *Cody v State of New York*, 82 AD3d 925, 927 [2d Dept 2011]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 851 [2d Dept 2006], *lv dismissed* 8 NY3d 841 [2007]).

East Broadway established that it did not supervise or control plaintiff's work through the deposition testimony of Chuan Shu Wang that he gave no direction regarding the means and methods of the excavation work; the testimony of Fu Heng Ye, Sheng Sheng's owner, that he did not take instructions from anyone on how to perform the work; the affidavit from Yunkai Zheng, a Sheng Sheng supervisor who stated that he did not take direction from the property owner; and the testimony of both plaintiff's coworker Lopez and plaintiff that Sheng Sheng's workers received instructions regarding the work

exclusively from their Sheng Sheng supervisors (*see Pchelka v Southcroft, LLC*, 178 AD3d 836, 838 [2d Dept 2019]).

Plaintiff failed to raise issues of fact in opposition sufficient to defeat this branch of East Broadway's motion. Testimony in the record that Chuan Shu Wang told Sheng Sheng to hurry up its work, without more, does not establish supervision or control (*see Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD 476, 477 [1st Dept 2011]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 307 [1st Dept 2007]; *Haider v Davis*, 35 AD3d 363, 364 [2d Dept 2006]). It also does not raise an issue of fact that Chuan Shu Wang was present and observing the work (*see Debennedetto v Chetrit*, 190 AD3d 933, 937-938 [2d Dept 2021]; *McDonald v UICC Holding, LLC*, 79 AD3d 1220, 1222 [3d Dept 2010]; *Hughes*, 40 AD3d at 307). As plaintiff has failed to submit evidence demonstrating a factual issue as to whether the accident arose out of Sheng Sheng's means and methods of performing its work or East Broadway's supervision and control of its work, East Broadway is entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 causes of action.

Since East Broadway has demonstrated it was not negligent and did not supervise or control the injury producing work, East Broadway is also entitled to dismissal of the cross-claims against it for contribution and common-law indemnification (*see Chapa v Bayles Props., Inc.*, 221 AD3d 855, 857 [2d Dept 2023]; *Quiroz v New York Presbyt./Columbia Univ. Med. Ctr.*, 202 AD3d 555, 557 [1st Dept 2022]; *Uddin v A.T.A. Constr. Corp.*, 164 AD3d 1402, 1404 [2d Dept 2018]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]).

East Broadway is also entitled to amend its common-law indemnification claim against plaintiff's employer, Sheng Sheng, to allege that plaintiff suffered a grave injury within the meaning of Workers Compensation Law § 11 (1). Although East Broadway seeks this relief after the filing of the note of issue, it has demonstrated the potential merit of its grave injury claim through the medical reports submitted in support of its motion. The amendment does not prejudice Sheng Sheng as the claim is based upon plaintiff's supplemental bill of particulars (*see Cioffi v S.M. Foods, Inc.*, 178 AD3d 1015, 1016 [2d Dept 2019]; *Vidal v Claremont 99 Wall, LLC*, 124 AD3d 767, 768-769 [2d Dept 2015]).

East Broadway, however, is not entitled to summary judgment on its common-law indemnification claim against Sheng Sheng. East Broadway showed it was not actively negligent and Sheng Sheng directed, supervised and controlled plaintiff's work, and provided doctors affirmations and reports to support that plaintiff may have suffered a grave injury within the meaning of Workers' Compensation Law § 11 (*see Golec v Dock St. Constr., LLC*, 186 AD3d 463, 466 [2d Dept 2020]).[8] However, Sheng Sheng's opposition raises a triable issue of fact as to whether plaintiff sustained a grave injury (*see Golec*, 186 AD3d at 466). Even without considering the unsworn report of rehabilitation specialist submitted by Sheng Sheng, the affirmed report of the neurologist submitted by Sheng Sheng is sufficient to demonstrate a factual issue as to whether plaintiff suffered a

[8] Workers' Compensation Law § 11 provides that an employer is not liable for contribution or indemnity to a third party for an employee's injuries sustained within the scope of employment unless a third party shows through competent medical evidence that such employee has sustained a grave injury, as defined in that section. There does not appear to be any dispute here that Sheng Sheng had Workers' Compensation coverage and that plaintiff obtained Workers' Compensation benefits.

traumatic brain injury, let alone one with lasting neurological consequences (*see Purcell v Visiting Nurses Found. Inc.*, 127 AD3d 572, 574 [1st Dept 2015]; *see also Cioffi v S.M. Foods, Inc.*, 178 AD3d 1006, 1013 [2d Dept 2019]; *Grech v HRC Corp.*, 150 AD3d 829, 830-831 [2d Dept 2017]). Similarly, Sheng Sheng's cross-motion to dismiss must be denied since factual issues exist as to whether plaintiff suffered a grave injury.

Remaining Defendants

The A&T Defendants, R&S Construction and the Robinson defendants each contend in their separate motions that they cannot be held liable for plaintiff's accident. Generally, only owners, general contractors and their agents may be held liable under Labor Law §§ 200, 240, and 241 (6) (*see Guclu v 900 Eighth Ave. Condominium, LLC*, 81 AD3d 592, 593 [2d Dept 2011]; *see also Russin*, 54 NY2d at 317-318; *Delaluz*, 228 AD3d at 621-622). Defendants may be held liable as agents of the owner or general contractor upon a "showing that [they] had the authority to supervise and control the work that brought about the injury" (*Fiore v Westerman Constr. Co., Inc.*, 186 AD3d 570, 571 [2d Dept 2020]; *see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 293 [2003]; *Russin*, 54 NY2d at 318). Even in the absence of authority to supervise or control the work required for liability as an agent under Labor Law §§ 200, 240 (1) and 241 (6), an entity, such as a subcontractor, may be held liable for common-law negligence "where the work it performed created the condition that caused plaintiff's injury" (*Poracki v St. Mary's R.C. Church*, 82 AD3d 1192, 1195 [2d Dept 2011] [internal quotation marks omitted]; *see also Sledge v S.M.S. Gen. Contrs., Inc.*, 151 AD3d 782, 783 [2d Dept 2017]; *Lombardo v Tag Ct. Sq., LLC*, 126 AD3d 949, 950 [2d Dept 2015]).

A&T Defendants

The A&T Defendants submitted a copy of A&T Engineering's contract with East Broadway which states that A&T Engineering was to provide shop drawings for construction use,[9] prepare, sign and file TR1 and TR8 forms with the Department of Buildings and conduct on-sight inspections relating to these requirements. The contract does not explicitly state that A&T Engineering had any authority to supervise or control the workers. The contract also provided that A&T Engineering was only required to perform inspections by appointment, and that A&T Engineering's work did not include "[a]ny other services not included in the scope of work[] listed above." In an affidavit, Robert Lin, who is an engineer and A&T Engineering's president, asserted that A&T Engineering's only responsibility with respect to the inspections was to see whether the work performed by East Broadway's contractors complied with the construction plans filed with the Department of Buildings. Lin stated that A&T Engineering was not hired as a construction superintendent or site safety manager and did not have authority to direct or control the work of the contractors.

Lin stated that on the day of the accident Sheng Sheng had arranged for A&T Engineering to conduct an inspection at 3:00 p.m. on that date. According to Lin, the purpose of that inspection was to observe whether the rebar had been installed in compliance with plans, not to supervise the workers performing that work. Lin also

[9] At his deposition, Lin said that A&T Engineering did not end up performing shop drawing services. Both East Broadway's manager, Chuan Shu Wang, and Lin testified at their depositions that A&T Engineering and East Broadway ended their relationship in early 2016.

maintained that the accident happened before 3:00 p.m. and that no worker from A&T Engineering was present at the time of the accident.[10]

In opposition, East Broadway asserts that A&T Engineering's authority to supervise the work is suggested by notations in its inspection report relating to a December 28, 2015 inspection performed by an engineer employed by A&T Engineering. In the report, the engineer noted, with respect to an excavation at the north corner of the site, that the timber and rebar were in place, but that no timber "approach box" or "pit box" had been used. Additionally, the inspector noted that, "[d]ue to safety concern, we allow contractor to proceed this day only," and that a "notice has [been] sent to contractor to use approach timber box for all other pins." Lin, in his deposition testimony, explained that such a timber box was required by the construction plans.

Further, in arguing that the A&T Defendants' obligations extended to worker safety, plaintiff points to the February 3, 2021 deposition of Chuan Shu Wang, East Broadway's owner, where he stated that he hired Lin "as the competent site safety person or engineer for this project to make sure that the project was run safely so workers would not be killed and/or injured on the job" (Wang, February 3, 2021 deposition, at 100, lns 14-19). This testimony, combined with the contract provision that includes 45 on-site inspections by A&T, the December 28, 2015 inspection report citing safety concerns, and Lin's testimony that A&T was responsible for ensuring that contractors complied with construction plans,

[10] At his deposition, Chuan Shu Wang testified that the only persons present at the time of the accident aside from him were workers from Sheng Sheng.

raises a sufficient issue of fact with respect to A&T Engineering's supervision and control pursuant to Labor Law §§ 200, 240 (1) and 241 (6).

However, Robert Lin has demonstrated that he may not be held individually liable under the circumstances here. "A shareholder, employee, or officer of a limited liability company is liable only for negligent or wrongful acts 'committed by him or her or by any person under his or her direct supervision and control while rendering professional services in his or her capacity as a member, manager, employee or agent of such professional service limited liability company'" (*Oviedo v Weinstein*, 102 AD3d 844, 847 [2d Dept 2013], quoting Limited Liability Company Law § 1205 [b]; *see Moller v Taliuaga*, 255 AD2d 563, 564 [2d Dept 1998]; *Ecker v Zwaik & Bernstein*, 240 AD2d 360, 361-362 [2d Dept 1997]; Business Corporation Law § 1505 [a]). The proof here shows that Lin did not commit any individual acts of negligence or directly supervise anyone who committed such acts (*see Oviedo*, 102 AD3d at 847; *Moller*, 255 AD2d at 564; *Ecker*, 240 AD2d at 361-362).

Accordingly, the A&T Defendants' motion for summary judgment dismissing the complaint and all cross-claims against them is denied as against A & T Engineering, P.C. and granted as against Lin, individually.

R&S Construction

Plaintiff's motion against R&S Construction based on Labor Law § 241(6) must be denied as plaintiff has failed to demonstrate that R&S Construction was an owner, general contractor or agent thereof within the meaning of Labor Law § 241 (6) (*see Russin v Louis*

N. Picciano & Son, 54 NY2d 311, 318 [1981]; *Delaluz v Walsh*, 228 AD3d 619, 621-622 [2d Dept 2024]).

R&S Construction contends that it is entitled to dismissal of the complaint and cross-claims against it because, although it obtained the permits relating to the foundation work performed by Sheng Sheng, it was not responsible for the foundation work and its duties as general contractor for the project did not begin until long after the accident. In support of these assertions, R&S Construction submits its contract with East Broadway, which provides, the "[d]ate of commencement shall be after the completion of foundation for subject project. Foundation is not included in this contract. The Foundation Contractor 'Sheng Sheng Construction' is under contract with the Owner. General Contractor is not responsible or liable for the completed foundation work for subject project" (East Broadway/R&S Construction Contract § 3.1).

At his deposition, Kenneth Wong, R&S Construction's principal, testified that R&S Construction obtained the permits for the foundation work and sent the required notices to the owners of neighboring buildings as a favor to East Broadway knowing that R&S Construction would obtain the contract for the work once the foundation was completed. Wong stated that R&S Construction had no authority over Sheng Sheng since it did not have a contract with Sheng Sheng. Wong added that R&S Construction had nothing to do with Sheng Sheng's foundation work, that R&S Construction never went to the jobsite to oversee Shen Sheng's excavation work, that R&S Construction did not have any employees present at the jobsite during Sheng Sheng's work, and that it did not provide safety equipment to Sheng Sheng's employees. Wong stated that he was called to the jobsite on

the date of the accident by the Department of Buildings only because R&S Construction was the permit holder for the work. R&S Construction only received the violations from the Department of Buildings because of the accident and submitted correction notices because it was the permit holder. East Broadway paid all the fines that were incurred before R&S Construction took over the project in March 2017.[11] Chuan Shu Wang's deposition testimony on behalf of East Broadway largely confirms Wong's testimony. In particular, Chuan Shu Wang stated that Sheng Sheng was the only contractor on site during the underpinning/foundation work and the only contractor in control of such work and in charge of the jobsite.

Contrary to plaintiff and East Broadway's arguments, the contracts and this deposition testimony are sufficient to demonstrate that R&S Construction was not the general contractor or the owner's agent with respect to the Shen Sheng's work and that it did not have control over the worksite or the authority to exercise supervision and control over that work (*see Maisuradze v Nows the Time, Inc.*, 219 AD3d 722, 723-724 [2d Dept 2023]; *Oseguera v Lincoln Props. LLC*, 147 AD3d 704, 704 [2d Dept 2017]).[12] The record

[11] As testified to by Chuan Shu Wang and stated in its contract with Sheng Sheng, Sheng Sheng was obligated to pay any fines relating to its work. Chuan Shu Wang, however, stated that East Broadway ended up paying for the fines in order to expedite the work.

[12] The court rejects East Broadway's assertion that R&S Construction has failed to submit evidence in admissible form because the deposition transcripts relied upon by it were unsigned. Although unsigned, all of the transcripts at issue were certified as accurate by the court reporter and their accuracy has not been challenged (*see Gironza v Macedonio*, 230 AD3d 742, 743 [2d Dept 2024]; *Farquharson v United Parcel Serv.*, 202 AD3d 923, 924 [2d Dept 2022]; *Celestin 40 Empire Blvd., Inc.*, 168 AD3d 805, 808 [2d Dept 2019]). Further, R&S Construction, by submitting the Keven Wong transcripts in support of its motion, has adopted them as accurate (*see Gironz*, 230 AD3d at 743; *E.W. v City of New York*, 179 AD3d 747, 747-748 [2d Dept 2020]). In addition, most of the transcripts were relied upon by East Broadway in support of its own motion (*see Guevara-Ayala*

shows that R&S Construction and Sheng Sheng were separate prime contractors with respect to the work East Broadway hired them to perform and that, absent control over the worksite or authority to supervise and control plaintiff's work, R&S Construction cannot be held liable under Labor Law §§ 200, 240 (1) and 241 (6) (*see Russin*, 54 NY2d at 315-318; *Delaluz*, 228 AD3d at 621-622; *Salcedo v Sustainable Energy Options, LLC*, 190 AD3d 439, 439 [1st Dept 2021]; *Knab v Robertson*, 155 AD3d 1565, 1566 [4th Dept 2017]). Similarly, the fact that R&S Construction filed for the work permit and was listed as the general contractor on the permit application is not, in and of itself, sufficient to demonstrate a factual issue (*see Maisuradze*, 219 AD3d at 723-724; *Martinez v 408-410 Greenwich St., LLC*, 83 AD3d 674, 675 [2d Dept 2011]; *Kilmetis v Creative Pool & Spa, Inc.*, 74 AD3d 1289, 1291 [2d Dept 2010]; *Huerta v Three Star Constr. Co., Inc.*, 56 AD3d 613, 613 [2d Dept 2008], *lv denied* 12 NY3d 702 [2009]; *cf. Utica Mut. Ins. Co. v Style Mgt. Assoc. Corp.*, 28 NY3d 1018, 1020 [2016]; *Kosovrasti v Epic (217) LLC*, 96 AD3d 695, 696 [1st Dept 2012]).

The court does not find that an issue of fact exists because East Broadway's contract with R&S Construction does not specifically identify excavation and underpinning as work excluded from R&S Construction's contractual obligations. Excavation and underpinning work was a necessary precursor to the Sheng Sheng's foundation work and the contract, by stating that R&S Construction's obligations did not commence until after the foundation

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v Trump Palace/Parc LLC, 205 AD3d 450, 451 [1st Dept 2022]). East Broadway raises this same argument in opposition to the Robinson Defendants' motion, plaintiff's motions, and the court rejects it for the same reasons.

work was completed, therefore excluded the excavation and underpinning work from its coverage. Accordingly, R&S Construction's motion to dismiss the complaint and all cross-claims against it is granted.

The Robinson Defendants

At his deposition, Sir James Robinson, the principal of Robinson Architects, testified that he was only hired to sign-off on the initial work permits as a construction superintendent. Robinson asserted that he was not actually hired to supervise the work relevant to the accident, that he did not visit the jobsite until after the accident, and that this visit only occurred because his name was on the permit application as superintendent for the "New Building" permit.[13] Indeed, Kevin Wong of R&S Construction and Chuan Shu Wang of East Broadway, each assert that they did not hire the Robinson Defendants with respect to the project.

This evidence is sufficient to demonstrate the Robinson Defendant's entitlement to summary judgment dismissing the complaint. As stated above, a party's obtaining or signing off on work permits is not, on its own, sufficient to demonstrate that the Robinson Defendants had authority over the jobsite or authority to supervise and control the work (*see Maisuradze*, 219 AD3d at 723-724; *Martinez*, 83 AD3d at 675; *Kilmetis*, 74 AD3d at 1291). In opposition, East Broadway, the only party submitting opposition papers to the Robinson Defendants' motion, has failed to demonstrate a factual issue with respect to their liability. For the same reason, the Robinson Defendants are entitled to dismissal of the

[13] Robinson did not sign-off on portion of the permit application relating to for the foundation/earthwork.

cross-claims for contribution and common-law indemnification (*Chapa*, 221 AD3d at 857; *Quiroz*, 202 AD3d at 557; *Uddin*, 164 AD3d at 1404).

Conclusion

To the extent not specifically addressed herein, the parties' remaining contentions and arguments were considered and found to be without merit and/or moot.

Accordingly, it is

ORDERED that the A&T Defendants' motion (motion sequence number 16) is granted only to the extent that the complaint, third-party complaint and cross-claims are dismissed as against Robert Lin, individually. The motion is otherwise denied; and it is further

ORDERED that East Broadway's motion (motion sequence number 17) is granted to the extent that: (1) plaintiff's causes of action premised on common-law negligence and Labor Law §§ 200 and 240 (1) are dismissed; (2) all counterclaims and cross-claims are dismissed as against it; and (3) East Broadway is granted leave to amend the third-party complaint to allege that plaintiff suffered a grave injury as alleged in the proposed amended third-party complaint (NY St Cts Elec Filing [NYSCEF] Doc. No. 434). East Broadway is directed to file and serve the amended third-party complaint within 30 days of entry of this order. East Broadway's motion is otherwise denied; and it is further

ORDERED that R&S Construction's motion (motion sequence number 18) is granted and the complaint and cross-claims as against it are dismissed; and it is further

ORDERED that the Robinson Defendants' motion (motion sequence number 19) is granted and the complaint, third-party complaint, and cross-claims as against it are dismissed; and it is further

ORDERED that Plaintiff's motion (motion sequence number 20) is granted to the extent he is (1) granted partial summary judgment in his favor on his Labor Law § 241 (6) cause of action as against East Broadway to the extent that such cause of action is premised on Industrial Code (12 NYCRR) §§ 23-4.2 (a), 23-4.2 (k), 23-4.4 (a), and 23-4.4 (e); and (2) granted summary judgment dismissing the affirmative defenses sounding in comparative negligence, sole proximate cause and assumption of risk. Plaintiff's motion is otherwise denied; and it is further

ORDERED that Plaintiff's cross-motion (motion sequence number 22) is denied; and Sheng Sheng's motion (motion sequence number 21) is denied; and it is further

ORDERED that in view of the foregoing, the action is severed accordingly, and the caption is amended to read as follows:

----------X
ARIEL RIVERA,

Plaintiff,

-against-

EAST BROADWAY REAL ESTATE HOLDING LLC and A&T ENGINEERING P.C.,

Defendant(s).
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EAST BROADWAY REAL ESTATE HOLDING LLC,

Third-Party Plaintiff,

-against-

A&T ENGINEERING P.C. and SHENG SHENG CONSTRUCTION, INC.,

Third-Party Defendant(s).
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This constitutes the decision and order of the court.

ENTER

J.S.C.

HON. HEELA D. CAPELL, J.S.C.