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The following papers numbered 1 to 34 read on this motion by defendants in Action No. 2, New York Telephone Company and NYNEX Corporation, for summary judgment in their favor, dismissing plaintiff's complaint; upon the motion by defendants in Action No. 2, Concord Construction Co. and Concord Pipe Jacking Company, Inc. for summary judgment in their favor, dismissing plaintiff's complaint; upon the cross motion by plaintiff for: (1) partial summary judgment in his favor as against defendants on his cause of action under Labor Law § 240[1]; and (2) leave to amend his bill of particulars to plead violations of the Industrial Code; upon the cross motion by defendant/third-party plaintiff Rogers Brothers Corp. for summary judgment in its favor, dismissing plaintiff's complaint; and upon the cross motion by third-party defendant, A & J Antorino Company, Inc. for partial summary judgment in its favor dismissing plaintiff's causes of action under Labor Law §§ 240[1] and 241[6]..

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

This is an action to recover monetary damages for personal injuries alleged sustained by plaintiff on May 11, 1993 when he was injured in an accident on a construction site. Defendants New York Telephone Company and NYNEX Corporation [hereinafter collectively referred to as "NYNEX"] hired defendants Concord Construction Co. and Concord Pipe Jacking Company, Inc. [hereinafter collectively referred to as "Concord"] as the general contractor on a large-scale construction project to install telephone conduit and manholes. Concord, in turn, hired several subcontractors, including plaintiff's employer, A & J Antorino Company, Inc. [hereinafter "A & J"], where plaintiff was employed as a "flagman" whose job duties included watching for and redirecting traffic around the construction workers and the site itself. Plaintiff was injured when, while standing on the back of a "lowboy" trailer manufactured by defendant/third-party plaintiff Rogers Brothers Corp. [hereinafter "Rogers"], plaintiff fell into the left rear wheel well, causing several injuries.

Action No. 1 was commenced against Rogers by filing of a summons and complaint on November 3, 1993 and asserts claims of negligence, breach of express and implied warranties, strict products liability and negligent failure to warn in connection with the design, manufacture and sale of the trailer in question.

Action No. 2 was commenced on May 13, 1996 and asserts claims for violations of Labor Law §§ 200, 240[1] and 241[6].

Initially, this court must address the issue of the Statute of Limitations in regard to Action No. 2 as both NYNEX and Concord raise this defense in support of their respective motions herein. As noted earlier, plaintiff's accident occurred on May 11, 1993 and the action was commenced by the filing of a summons and complaint on May 13, 1996. Since the Statute of Limitations period within which plaintiff's action had to be commenced expired on a Saturday, May 11, 1996, plaintiff had until Monday, May 13, 1996, to commence his action (see, General Construction Law § 25-a; Delcrete Corp. v Kling, 67 AD2d 1099; Cyens v Town of Roxbury, 40 AD2d 915). Thus, plaintiff's action is timely.

NYNEX's motion for summary judgment in its favor is granted in part. NYNEX claims that it is entitled to said relief as to plaintiff's cause of action under Labor Law § 200 on the grounds that it did not direct, control, oversee or supervise the work performance of plaintiff, Concord or A & J. A party will be liable for violation of Labor Law § 200 and common-law negligence when the injuries complained of only if the owner exercised supervision and control over the work performed at the site or had actual or constructive notice of a dangerous condition (see, Cuartas v Kourkoumelis, 265 AD2d 293; Giambalvo v Chemical Bank, 260 AD2d 432; Rosemin v Oved, 254 AD2d 343; Akins v Baker, 247 AD2d 562). Additionally, for liability to be imposed, the party must direct and control the manner in which the work is performed, not merely possess general supervisory authority (see, Cuartas v Kourkoumelis, supra; Haghighi v Bailer, 240 AD2d 368; Greenwood v Shearson, Lehman & Hutton, 238 AD2d 311; Merkle v Weibrecht, 234 AD2d 696). In the instant matter, Thomas Anthony Antorino, partner/owner of A & J, Michael Shershenovich, plaintiff's co-worker and driver of the "lowboy" and Salvatore Sommeso, vice-president of Concord, all testified at their depositions that Concord and A & J were the only companies to provide supervisors and foremen for the project and that plaintiff only received instructions from them. Thus, it is clear that NYNEX did not direct and control the manner in which plaintiff's work was performed

Similarly, with regard to plaintiff's cause of action under Labor Law § 240[1], NYNEX claims that it cannot be held liable because, at the time of the plaintiff's accident, he was not engaged in covered activity. It is plaintiff's contention that the work he was performing was within the scope of the statute because he was working on an "elevated platform," i.e., the back of a "lowboy" trailer, and that defendant failed to provide him with any safety devices to protect him from falling from that platform. As an initial matter, this finds that NYNEX qualifies as an "owner" subject to the nondelegable duty imposed by this absolute liability statute based upon defendant's ownership of the property on which plaintiff was injured, notwithstanding A & J's ownership of the

truck itself (see, Gordon v Eastern Ry. Supply, 82 NY2d 555; Ampolini v Long Is. Light. Co., 186 AD2d 772). Likewise, the definition of "structure" is sufficiently broad to encompass the truck herein (see, Gordon v Eastern Ry. Supply, supra; Lewis-Moors v Contel of N.Y., 78 NY2d 942).

Labor Law § 240[1] was enacted "in recognition of the exceptionally dangerous conditions posed by elevation differentials at work sites for workers laboring under unique gravity-related hazards" (Misseritti v Mark IV Constr. Co., 86 NY2d 487). "The extraordinary protections of [the statute] 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 Air Conditioning & Refrig. Corp., 93 NY2d 914, quoting Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494). In determining whether the statute applies in the instant matter, the question is whether there is "a significant risk inherent in the particular task because of the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured" (see, Rocovich v Consolidated Edison Co., 78 NY2d 509). Here, it can hardly be debated that there was an "exceptionally dangerous condition" or "significant risk" posed by the mere elevation differential between the platform of the "lowboy" upon which plaintiff was riding and the ground, which, as plaintiff concedes, was not even three feet (cf., Tillman v Triou's Custom Homes, 253 AD2d 254; DePuy v Sibley, Lindsay, & Curr Co., 225 AD2d 1069; Gaul v Motorola, Inc., 216 AD2d 879; Colopy v William C. McCombs, Inc., 203 AD2d 920). In regard to whether the elevation posed a significant risk, Tillman v. Triou's Custom Homes (supra) is particularly instructive. In Tillman, the plaintiff was unloading cement blocks from the back of a flatbed truck. As he was lowering a unit of blocks with a boom, the truck tipped, and the plaintiff fell 4 ½ feet from the truck to the ground. The court held that there was no exceptionally dangerous condition posed by the elevation differential between the flatbed portion of the truck and the ground, and there was no significant risk inherent in the particular task plaintiff was performing because of the relative elevation at which he was performing that task. When the facts of the instant case, which involved an elevation of less than three feet, are contrasted with Tillman, an even more compelling basis is presented for concluding that plaintiff was not exposed to any exceptionally dangerous condition by virtue of height (see also, DePuy v Sibley, Lindsay, & Curr Co., supra [plaintiff fell approximately three feet from bed of truck while unloading cabinet]; Gaul v Motorola, Inc., supra [plaintiff tripped and fell from back of trailer]; Colopy v. William C. McCombs, Inc., supra [plaintiff fell from truck when struck by boom]).

Further analysis of the risk plaintiff faced shows that he was not exposed to any particular danger referable to height but rather to motion. Danger presented itself only when the "lowboy" began moving. Thus, the "significant risk" in this case did not arise

from a height-related danger per se, but a danger related to forward motion irrespective of height. This dichotomy in the source of the danger is of pivotal importance in evaluating a case of this type. Dangers that are premised on height invoke section 240[1], while those that are normally attendant to riding on a moving vehicle do not (cf., Dankulich v Felchar Mfg. Corp., 247 AD2d 660; Salzler v New York Tel. Co., 192 AD2d 1104). The distinction is particularly telling here since plaintiff was simply being transported the short distance to the area where they would begin installing the conduit. Hence, at the time of the accident, the "lowboy" was not even being used as an elevated work platform, but merely as a mode of transportation.

With regard to plaintiff's claim under Labor Law § 241[6], this section imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to construction workers (see, Narrow v Crane-Hogan Structural Sys., 202 AD2d 841). In order to support a claim under this section, plaintiff must allege a violation of a specific "concrete" provision of the industrial code and not merely those that establish "general safety standards" (Ross v Curtis-Palmer Hydro-Elec. Co., supra; Greenwood v Shearson, Lehman & Hutton, 238 AD2d 311; Vernieri v Empire Realty Co., 219 AD2d 593; Biszick v Ninne Constr. Corp., 209 AD2d 661). In the instant matter, plaintiff, as part of his cross motion, seeks leave to amend his bill of particulars so as to allege violations of the Industrial Code. For reasons that this court will address more fully below, that branch of NYNEX's motion to dismiss plaintiff's cause of action under Labor Law § 241[6] is denied.

In sum, NYNEX's motion is granted to the extent that plaintiff's causes of action under Labor Law §§ 200 and 240[1] are dismissed as against NYNEX.

Concord's motion for summary judgment in its favor is also granted in part. For the reasons explained above, that branch of Concord's motion to dismiss plaintiff's cause of action under Labor Law § 240[1] is granted and that branch of Concord's motion to dismiss plaintiff's cause of action under Labor Law § 241[6] is denied. The branch of Concord's motion to dismiss plaintiff's cause of action under Labor Law § 200 is also denied because there are numerous issues of fact regarding who was responsible for the supervision and control of the work performed by plaintiff (Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343; Ross v Curtis-Palmer Hydro-Elec. Co., supra; Lombardi v Stout, 80 NY2d 290; Russin v Picciano & Son, 54 NY2d 311; Zuckerman v City of New York, 49 NY2d 557; Fair v 431 Fifth Ave. Associates, 249 AD2d 262; Paone v Westwood Vil., 178 AD2d 518).

With regard to plaintiff's cross motion, in light of the foregoing, that branch seeking summary judgment in his favor on the Labor Law § 240[1] cause of action is denied as moot. That branch of the cross motion seeking leave to amend plaintiff's bill of

particulars is, however, granted in part. Plaintiff moves for leave to amend the bill of particulars to include alleged violations of the Industrial Code (12 NYCRR 23-9.2[i] and 12 NYCRR 23-9.7) in support of his cause of action predicated on Labor Law § 241[6] (see, Gusmerotti v Martocci, 169 AD2d 813; cf., Ross v Curtis-Palmer Hydro-Elec. Co., supra). When no prejudice or unfair surprise exists, leave to amend pleadings, or to supplement a bill of particulars, should be liberally granted (see, Edenwald Contr. Co. v City of New York, 60 NY2d 957). The defendants herein will sustain no actual prejudice by the proposed amendment to include an alleged violation of 12 NYCRR 23-9.7 of the Industrial Code since it contains no new factual allegations. However, that portion of the cross motion which is to amend the bill of particulars to include alleged violations of 12 NYCRR 23-9.2[i] is denied inasmuch as this alleged violation does not provide a basis for liability under Labor Law § 241[6] (see, Vernieri v Empire Realty Co., supra).

The cross motion by defendant/third-party plaintiff Rogers Brothers Corp. for summary judgment in its favor, dismissing plaintiff's complaint is denied. As was stated in this court's prior order dated June 30, 1996 (Milano, J.), plaintiff has raised issues of fact with regard to, inter alia, negligent manufacture and design and failure to warn

Finally, the cross motion by third-party defendant, A & J Antorino Company, Inc. for partial summary judgment in its favor dismissing plaintiff's cause of action under Labor Law §§ 240[1] and 241[6] is denied as no such causes of action have been interposed against this defendant.

Dated: _____

Justice John A. Milano