SUPREME COURT OF THE STATE OF NEW YORK **Calendar No.: 3960-002**
COUNTY OF RICHMOND DCM PART 3 **Index No.:100488/05**

NORBERTO HURTADO,

Petitioner(s)/Plaintiff(s)

against

DECISION
HON. JOSEPH J. MALTESE

INTERSTATE MATERIALS CORPORATION AND ABC CORPORATION (fictitious name, true name being unknown to the undersigned),

Respondent(s)/Defendant(s)

The following papers numbered 1 to 3 were used on this motion the 20th day of April 2007.

Notice of Motion, Affirmations
and Exhibits in support
(dated December 22, 2006)..... 1

Affirmation and Exhibits in Opposition
(dated March 26, 2007)..... 2

Affirmation in Reply
(dated April 12, 2007) 3

Upon the foregoing papers, the motion for summary judgment by defendant Interstate Materials Corporation (hereinafter "Interstate") is decided as follows.

On or about July 2, 2003, plaintiff was employed as a truck driver for DonJon Marine Company Inc. (hereinafter "DonJon"). DonJon, a scrap metal company, entered into a contract with defendant Interstate to pick up and deliver scrap metal containers to their yard on Johnson Street in Staten Island, New York. On the day of the accident, plaintiff arrived at Interstate to deliver one empty container and pick up one full container. While preparing to load the full container onto his truck, plaintiff noticed several pieces of metal protruding therefrom. As a result, plaintiff, who had previously been ticketed

for driving a truck with metal protruding from the load area, asked Interstate's employees to assist him in compressing the metal. While the request itself was not unusual, it appears that on this day none of defendant's employees was available to assist. At this point, plaintiff attempted to compress the debris by hand. It was during this process that a shard of metal "jumped out" and struck him in the eye, causing his injuries. Plaintiff subsequently brought this action against defendants based on allegations of common-law negligence and violations of Labor Law §§ 200, 240(1) and 241(6). Interstate is currently moving for summary judgment in its favor on the ground that the Labor Law sections pleaded by plaintiff do not apply.

At the outset, the Court must note that plaintiff has not opposed the dismissal of those claims based on Labor Law § 240(1); therefore said cause(s) of action will be severed and dismissed. Plaintiff has also failed to oppose the dismissal of those claims based on Labor Law § 241(6). However, since he *does* oppose the dismissal of his allegations of violating §§ 23-1.5 and 23-1.8 of the Industrial Code, as well as the Occupational Safety and Health Administration regulations (hereinafter "OSHA") and defendant's own safety manual, the Court is inclined to treat plaintiff's papers as opposing the dismissal of those claims under Labor Law § 241(6) which are based upon these purported violations. All other Industrial Code violations alleged to support plaintiff's cause(s) of action under Labor Law § 241(6) are deemed dismissed.

Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of triable issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Herrin v Airborne Freight Corp.*, 301 AD2d 500, 500-501 [2d Dept 2003]). The party seeking summary judgment bears the initial burden of establishing its right to judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In the course of so-doing, " the evidence is to

be viewed in a light most favorable to the party opposing the motion, giving [it] the benefit of every favorable inference" (*Cortale v Educational Testing Serv.*, 251 AD2d 528, 531 [2d Dept 1998]). Nevertheless, upon a prima facie showing by the moving party, any party opposing the motion bears the burden of producing "evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Labor Law § 200

Labor Law § 200(1) provides, in relevant part, as follows

> All [work sites] . . . shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

It is well settled that this statute represents "a codification of the common-law duty imposed upon an owner or general contractor to provide . . . workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *see Jack v Fein*, 80 NY2d 965,967 [1992]). However, to impose liability "it must be established that the owner or general contractor exercised supervision and control over the work [being] performed at the [time of injury], *or* had actual or constructive notice of the allegedly unsafe condition" (*Stafford v Viacom, Inc.*, 32 AD3d 388, 390 [2d Dept 2006] quoting *Dennis v City of New York*, 304 AD2d 611, 612 [2d Dept 2003][internal quotations marks omitted and emphasis supplied]; *see Carty v Port Auth of N.Y. & N.J.*, 32 AD3d 732, 732-733 [1st Dept 2006] citing *Rizzo v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348).

Here, defendant has presented sufficient evidence to establish prima facie (1) that it exercised no supervisory control over plaintiff's work at the time of the injury, and (2) that it did not have actual or constructive notice of any allegedly unsafe condition arising, e.g., out of plaintiff's attempt to compact the metal without assistance. Nevertheless, plaintiff has successfully raised triable issues of fact regarding, *inter alia*, the extent of defendant's supervisory control over the loading operation as a whole and specifically, so much thereof as may have left metal protruding from the container. In this regard, plaintiff has successfully demonstrated that defendant dictated where he was to park, which containers were to be removed and when the loading process could begin. Hence, it was within defendant's apparent power to insure that only properly compacted loads were designated for shipment and/or that its employees were available to assist in making insufficiently compacted containers fit for the road. Whether these or any other elements of control are sufficient to give rise to cause of action under Labor Law § 200 presents a factual issue for a jury to determine (*see Ramos v Schoonmaker Homes-John Steinburg, Inc.*, 213 AD2d 534, 535 [2d Dept 1995]).

Labor Law § 241(6)

Addressing plaintiff's remaining claims under Labor Law § 241(6)[1], the statute requires that

> [a]ll areas in which construction, excavation or demolition work is being performed [to] be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.[2]

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[1]As previously indicated, the purported violations of sections *other than* 23-1.5 and 23-1.8 of the Industrial Code have been deemed dismissed.

[2]The applicability of Labor Law § 241(6) to the nature of the work being conducted on Interstate's premises is not disputed.

This statute "imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v. L.A. Wenger Contr Co.*, 91 NY2d at 348 [emphasis and internal quotation marks omitted]). Thus, "the statute [makes] . . . owners and contractors . . . vicariously liable for the [neglect] of others whom they [do] not supervise, [but] only where, a specific, positive command or a concrete . . . [safety] regulation promulgated by the [Industrial] Commissioner . . . has been violated" (*Toefer v Long Is. R.R.*, 4 NY3d 399, 409 [2005][internal quotation marks omitted]).

Here, plaintiff's surviving allegations rely upon the purported violation of sections 23-1.5 and 23-1.8 of the Industrial Code, OSHA regulations and defendant's own safety procedures. Pertinent to the foregoing, it is long settled that section 23-1.5 of the Industrial Code (12 NYCRR 23-1.5) contains only "general safety standards, [and] would not [support] a claim under Labor Law § 241(6)" (*Meslin v New York Post*, 30 AD3d 309, 310 [1st Dept 2006]). Furthermore, it is well established that neither OSHA violations nor the violation of private safety manuals will provide a suitable predicate for liability under Labor Law § 241(6) (*see Rizzuto v L.A. Wenger Constr. Co.*, 91 NY2d at 351, n [1998]).

However, § 23-1.8 of the Industrial Code has been held to contain "concrete [safety] specifications" that are sufficient to sustain a cause of action under Labor Law § 241 (6) (*Donovan v S&L Concrete Constr. Corp.*, 234 AD2d 336, 337 [2d Dept 1996]). Addressed to "personal protective equipment" and more precisely, eye protection, § 23-1.8(a) of requires that

> [a]pproved eye protection equipment suitable for the hazard involved shall be provided for and shall be used by all persons while employed in welding, burning or cutting operations or in chipping, cutting or grinding any material from which particles may fly, *or while engaged in any other operation which may endanger the eyes* (12 NYCRR

23-1.8 [a][emphasis supplied]).

In this case, it is undisputed that plaintiff was neither wearing nor required to wear any eye protection before attempting to compress the protruding metal shards into the container. Whether the alleged violation contributed to plaintiff's injury presents a question of fact for a jury to determine (*Penta v Related Cos.*, 286 AD2d 674, 675, *lv denied* 100 NY2d 515; *Gawel v Consolidated Edison Co. of N.Y.*, 237 AD2d 138 [1st Dept 1997]).

Accordingly it is,

ORDERED, that the motion for summary judgment is granted to the extent of severing and dismissing those causes of action based on the alleged violation of Labor Law §§ 240(1) and 241(6), with the sole exception of that claim pleaded under Labor Law § 241(6) which is predicated on the alleged violation of Industrial Code section 23-1.8(a) (12 NYCRR 23-1.8[a]); and it is further

ORDERED that the balance of the motion for summary judgment is denied; and it is further;

ORDERED, that the Clerk of the Court enter judgment in accordance herewith.

All parties shall appear for a pre-trial conference in DCM Part 3 on **June 25, 2007** at 9:30 a.m.

ENTER,

DATED: May 31, 2007

Joseph J. Maltese
Justice of the Supreme Court

[* 7]