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

PRESENT: Marilyn Shafer Justice PART 8

Vosburgh

INDEX NO. 110332/07

MOTION DATE

- v -

MOTION SEQ. NO. 01

PMV Acquisition

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided in accord with the annexed Memorandum.

FILED
MAY 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/15/09

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

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JONATHAN VOSBURGH,

Plaintiff,

Index No. 110332/07

-against-

PWV ACQUISITION, LLC, 808 COLUMBUS, LLC, GOTHAM ORGANIZATION, INC., GOTHAM DEVELOPERS, LLC, and GOTHAM CONSTRUCTION COMPANY, LLC,

Defendants.

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MARILYN SHAFER, J.:

Plaintiff moves, pursuant to CPLR 3212 and Labor Law § 240 (1), for an order granting summary judgment against defendants PWV Acquisition, LLC (PWV), 808 Columbus, LLC (Columbus), Gotham Organization, Inc., Gotham Developers, LLC, and Gotham Construction Company, LLC (collectively referred to as Gotham).

Defendants cross-move, pursuant to CPLR 3212, for an order dismissing the complaint.

This is an action for personal injuries sustained by plaintiff while he was working at a construction site. Plaintiff brings this action pursuant to Labor Law §§ 240 (1), 241 (6), 200, and common law negligence. The subject incident occurred at a construction site described as "an excavation of 45 feet down ... [three] city blocks long from West 97th Street to West 100th

Street" in Manhattan, where work was being performed at premises known as 808 Columbus Avenue, New York (the job site).

The complaint alleges that, on or about February 28, 2007, plaintiff, an employee of non-party Mayrich Construction Corp. (Mayrich), was caused to sustain serious injuries while working as a "drill runner" at the job site. Plaintiff claims that, at the time of the incident, he was working on an air track drilling machine,[1] when he was struck on the left shoulder, neck and head by a falling elevated heavy steel jib weighing over 1,000 pounds The jib was being hoisted over the work site, and had fallen from an "excavator" known as a Hitachi 850.[2]

At the relevant time, Columbus was the owner of the job site. Pursuant to a "Construction Management Agreement" (the Agreement), dated June 1, 2006, Columbus retained Gotham as "Construction Manager" to, among other things, "act as its agent

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[1]The air track machine is described as a large, heavy piece of hydraulic drilling equipment used to drill holes for the placement of explosives at excavation sites.

[2]The Hitachi 850 is described as a hydraulic excavator which is used to move dirt, material, and construction equipment on the job site. The excavator is a large piece of construction equipment which is used for both digging and as a crane for lifting and moving construction material over the job site. It is comprised of three moving parts, to wit, a bucket that attaches with a pin and is used for digging; a jib, which has a chain at the end, and is attached to the excavator when it is being used to move equipment like the air track over the job site; and a boom, which is a large arm that comes out from the main unit where the operator's control cab area is.

to plan, coordinate and manage the construction" at the job site.[3] Gotham was also in charge of hiring the subcontractors, and for safety at the job site. On September 7, 2006, Gotham and Mayrich entered into a "Trade Subcontract," pursuant to which Mayrich was to supply, inter alia, labor and equipment to complete and perform the work at the job site. Mayrich supplied all the equipment at the job site.

In his deposition testimony, dated January 24, 2008, plaintiff explained that his job duty was to drill holes in the ground, six inches apart, with an air track. He described the air track as approximately 13 feet long, with a 27-foot-high boom. He noted that, on the day of the accident, the ground was muddy, so the air track was being moved around the job site by an excavator, instead of on its own power.

Plaintiff described the procedure of lifting the air track as follows: the excavator operator would take off the bucket of the excavator and put on a jib which had a chain on the end[4] to lift the air track. This was done on the ground. Once that was completed, the jib would be raised off the ground via the excavator. The chain attached to the jib would be used to lift the air track once the chain was placed through an "eyelet" on

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[3]There was no entity designated as "General Contractor" on the job site.

[4]The chain was attached to the jib by a "clevis" or "shackle."

the top of the air track. Plaintiff testified that normally the air track would be raised two-three feet above the ground on the first move, and that the highest point it would be raised off the ground would be approximately 20 feet.

Plaintiff related that on the day of the accident, he stood on the air track in order to hook the chain into the eyelet, since he could not reach the chain standing on the ground. He testified that an excavator had been brought over, the bucket had been removed, and the jib had been placed on the end of the dipper and raised off the ground. However, he could not reach the chain to affix it to the eyelet on top of the air track because the jib was too far out. He stated that, before he could reach the chain, he heard the jingle of the chain above his head, noticed the jib break loose from the elevated boom of the excavator, heard a loud crash, tried to move away by diving underneath the boom, and then was struck by the falling jib. He guessed that the crane was approximately 29 feet above the ground and the jib was at least eight or nine feet above the ground.

Plaintiff moves for partial summary judgment as against defendants as owner and general contractor, on the ground that Labor Law § 240 (1) imposes absolute liability against the defendants. Plaintiff asserts that his accident and injuries were proximately caused by defendants' violations of Labor Law § 240 (1), in that defendants permitted a defective or improperly

secured jib at the job site and/or failed to provide him with a safe method of working under the elevated jib, chain, and hook. Defendants argue in opposition that plaintiff's motion should be denied because there are issues of fact as to whether plaintiff was struck by a falling object, and because plaintiff's fall was not the result of an elevation related risk.

Section 240 (1) of the Labor Law was enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Owners and general contractors are required to furnish workers with devices such as hoists, pulleys and other devices "which shall be so constructed, placed and operated as to give proper protection to a person so employed" (*Bland v Manocherian*, 66 NY2d 452, 459 n 1 [1985], quoting Labor Law § 240 [1]).

The statute affords a worker statutory protection of absolute liability in situations in which a worker is exposed to the elevation-related risk of falling from an elevated work site or being struck by an elevated object, regardless of the degree of control over the work (*Haimes v New York Tel. Co.*, 46 NY2d 132 *[1978]; Outar v City of New York*, 286 AD2d 671, 672 [2d Dept 2001], *affd* 5 NY3d 731 [2005];; see also, *Rocovich v Consolidated*

Edison Co., 167 AD2d 524, 526 [2d Dept 1990], *affd* 78 NY2d 509 [1991]), and despite the worker's own negligence (*Zimmer v Performing Arts*, 65 NY2d 513 [1985]).

Plaintiff contends that Gotham was a "general contractor" within the meaning of Labor Law § 240, since there was no general contractor hired on the job site; it had the duties and obligations of a general contractor such as supervision, co-ordination, and control of the various trades, including the hiring of subcontractors, and enforcing safety rules and regulations (*Kenny v George A. Fuller Co.*, 87 AD2d 183 [2d Dept 1982]). This court notes that the designation of Gotham as "Construction Manager" instead of "General Contractor" is not relevant since Gotham may still be subject to Labor Law liability as an agent of the owner based upon its supervisory control of the activity which resulted in the injury (*see e.g., Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Chimborazo v WCL Assocs., Inc.*, 37 AD3d 394, 396 [2d Dept 2007]).

It is undisputed that Columbus hired Gotham and that Gotham, in turn, hired Mayrich to perform construction at the job site. A review of the construction management agreement between Columbus and Gotham shows that Gotham agreed to perform all the services required to complete the construction project, including, inter alia, arranging for the labor, equipment and

materials for the project and hiring, monitoring and coordinating the subcontractors.

Gotham issued its own "Site Specific Safety, Health, & Environmental (SH&E) Plan" for the work site to be used by Gotham and its subcontractors. Its stated goal was the "prevention of incidents, injuries, and illnesses to the site employees." It established "the duties and responsibilities of the field supervisory staff, as well as the basic procedures to be followed by every project employee ... to help assure the safety and health of each site employee." The safety plan further stated that "Gotham requires all subcontractors, and their material suppliers to monitor, comply, and enforce the safety rules and regulations set forth in this plan and the Federal, State, and Local safety regulations."

Michael Sommers (Sommers), Gotham's "Senior Safety Health and Environmental Officer," testified at his deposition, dated February 6, 2008, that, other than himself, Gotham had a number of supervisory personnel at the job site, including a Project Manager, an Assistant Project Manager, a Superintendent,[5] and a Safety Director. Both Sommers and the Superintendent had the authority to immediately stop all work at the job site if they saw anyone engaging in unsafe practices. Given Gotham's

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[5]The Superintendent was the licensed site-safety manager for the construction project.

authority to hire subcontractors, and to exercise control over the work performed at the job site, and the imposition of its own safety plan, Gotham is a "contractor" within the meaning of the Labor Law.

Defendants argue that plaintiff's motion should be denied because various witnesses offer conflicting evidence, which raises issues of fact regarding exactly how plaintiff's injury occurred, e.g., whether plaintiff was struck by the falling jib, or whether he was injured by jumping off the air track to avoid being struck by the falling jib. Defendants also argue that the affidavits of plaintiff's two eyewitnesses to the accident should not be considered by this court because of plaintiff's failure to disclose the identity of the witnesses during discovery.

This court notes that defendants do not claim that they were unaware of the witnesses to the alleged accident (they secured their own witness statements), nor that the witnesses were unavailable to them. CPLR 3212 (b) permits the court to search the record where there is a pending motion for summary judgment. There is no basis for the court to disregard the affidavits by plaintiff's eyewitnesses to the accident.

"[T]o trigger Labor Law § 240 in a falling object accident, the work site must be elevated above or positioned below the area where the object was being hoisted or secured" (*Brown v VJB Construction Corp.*, 50 AD3d 373, 375 [1st Dept 2008]). Here,

plaintiff was injured while working at a site that was positioned below the area where the jib was being hoisted, without any safety device. Contrary to defendants position, the evidence demonstrates that plaintiff's construction work and accident involved an elevation-related risk within the meaning of Labor Law § 240 (1) (see e.g., *Thompson v St. Charles Condominiums*, 303 AD2d 152 [1st Dept 2003]; *Bland v Manocherian*, 66 NY2d 452 [1985]; *Carpio v Tishman Const. Corp. of New York*, 240 AD2d 234 [1st Dept 1997]). However, it is not enough that a plaintiff show that an object fell resulting in his or her injury; there must be a showing that "the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]).

The evidence demonstrates that plaintiff was either struck by the falling jib which was being hoisted over the job site, or was injured when he fell off the air track to avoid being hit by the falling construction equipment, and that there was no safety device present. Plaintiff submits an affidavit, dated June 8, 2007, by Thomas Vivian (Vivian), a co-worker and eyewitness to the accident. Vivian states that plaintiff was on the air track waiting for the jib and chain to be lowered when the jib fell off and hit plaintiff and injured him. When Vivian approached

plaintiff, he saw that plaintiff was conscious, but partially buried in the mud.

In a separate signed statement given to defendants' investigator, Walter Cruz, dated May 1, 2008, Vivian recounts, in relevant part, that, while he was working, he "heard something fall and upon looking up, he saw an excavator with a boom and air track. [He] did not see [plaintiff] whom moments prior was standing near to said equipment." He then saw plaintiff lying on the ground face down near the air track.

Plaintiff further attaches an affidavit by Diodoro B. Torres (Torres), dated October 1, 2007. At the time of the accident, Torres was a drill runner, employed by Mayrich, who was working with plaintiff at the job site. In his affidavit, he states that, at the time of the accident, he saw plaintiff "on the air track machine waiting for the jib and chain to be lowered, but after the boom was over the air-track, the jib attachment-extension fell off and hit [plaintiff] and injured him." Torres further states that prior to falling off, the jib was approximately 25 feet above where plaintiff was standing.

Plaintiff has established prima facie entitlement to judgment as a matter of law with respect to Labor Law § 240 (1), by noting that he was struck and injured by an inadequately secured object that was being lowered by a crane (*Baker v Barron's Educ. Serv. Corp.*, 248 AD2d 655 [2d Dept 1998]). Defendants offer testimony

by Joseph T. Scott (Scott), the operator of the subject excavator at the time of the accident. He testified that he observed the "lifting attachment"[6] become separated from the boom, strike the air track, and fall to the ground. He states that he did not see the jib strike plaintiff, but that when the jib struck the air track, he observed plaintiff either jump or fall off the air track.

Defendants also offer the deposition testimony of Michael Sommers, Gotham's Senior Safety Health and Environmental Officer, who was not an eyewitness to the accident, and does not offer any testimony that contradicts plaintiff's account of the accident.

This court notes that, even assuming, arguendo, that plaintiff was injured solely as a result of jumping out of the way to avoid being struck by the falling jib, defendants would still be liable under Labor Law § 240 (1) (*Lopez v Boston Properties, Inc.*, 41 AD3d 259 [1st Dept 2007]; *Suwareh v State of New York, 24 AD3d 380* [1st Dept 2005]; *Van Eken v Consolidated Edison Co. of N.Y.*, 294 AD2d 352 [2d Dept 2002]).

Defendants have failed to meet their burden of demonstrating an issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]. The evidence shows that defendants permitted a dangerous and unsafe condition to exist at the job site which

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[6]Defendants note that Scott uses the term "lifting attachment" for jib, and that the terms are used interchangeably.

violated Labor Law § 240 (1) and Gotham's own Safety Plan, and that defendants' breach of their duty to provide adequate safety devices under Labor Law § 240 (1) was the proximate cause of plaintiff's injuries (*see e.g. Van Eken v Consolidated Edison Co. of N.Y.*, 294 AD2d 352, *supra*).

The accounts given by plaintiff and his two eyewitnesses are not disputed by sworn testimony of someone with personal knowledge of the circumstances (*see e.g., MacNair v Salamon*, 199 AD2d 170 [1st Dept 1993]; *Baly v Chrysler Credit Corp.*, 94 AD2d 781 [2d Dept 1983]). This court has considered defendants' remaining arguments and found them to be without merit. For the above reasons, plaintiff is entitled to partial summary judgment on the issue of Labor Law § 240 (1) liability against defendants. Defendants' application insofar as it seeks dismissal of plaintiff's Labor Law § 240 (1) claim is denied.

Defendants argue that plaintiff's Labor Law § 241 (6) claim must be dismissed because none of the Industrial Code sections alleged by plaintiff applies and because the alleged violations did not proximately cause plaintiff's injuries. Labor Law § 241 (6) provides:

> All areas in which construction, excavation or demolition work is being performed shall 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. The commissioner may make rules to carry into effect the provisions

> of this subdivision, and the owners and contractors and their agents for such work ... shall comply therewith.

In order to establish a Labor Law § 241 (6) claim, plaintiff must show that defendants violated a provision of the Industrial Code which contains concrete specifications with which the defendant must comply (*Donovan v S & L Concrete Constr. Corp.*, Inc., 234 AD2d 336 [2d Dept 1996]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, *supra*). A violation of a provision of the Industrial Code that "mandates a distinct standard of conduct" will establish liability of an owner under this statute (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 351 [1998]). The alleged violation of a provision of the Industrial Code must contain a specific positive command and not general regulatory criteria such as "adequate," "effective" and "proper" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501-504).

Defendants argue that every section alleged by plaintiff either does not set forth a specific safety standard, or does not factually apply. Although plaintiff lists multiple violations of the Industrial Code in his bill of particulars, plaintiff does not address these Industrial Code violations in his opposition papers, and thus, they are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was

wrongfully terminated was deemed abandoned). As such, defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on these provisions.

Finally, plaintiff does not address that branch of defendants' cross motion for summary judgment which seeks to dismiss the Labor Law § 200 and common-law negligence causes of action. Thus, defendants' motion for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims is likewise granted.

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment on the issue of defendants' liability pursuant to Labor Law § 240 (1) is granted, with an assessment of damages to be determined at trial; and it is further

ORDERED that defendants' cross motion for summary judgment dismissing the complaint is granted as to the claims based upon Labor Law §§ 241 (6), 200, and common-law negligence.

DATED:

5/15/09

ENTER:

MARILYN SHAFER J.S.C.

FILED

MAY 26 2009

COUNTY CLERK'S OFFICE NEW YORK