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

PRESENT: Hon Joan A. Madden PART 11
Justice

Latchuk

- v -

Port Authority

INDEX NO. 105908/05

MOTION DATE

MOTION SEQ. NO. 002

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 is decided in accordance with the annexed Memorandum Decision + Order.

FILED
JUN 17 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: June 15, 2009

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS Part 1

908/05

DAVI LATCHUK,

Plaintiff,

-against-

THE PORT AUTHORITY OF NEW YO
NEW JERSEY,

Defe

JOAN MADDEN, J.:

In this action to recover damages fo Davi Latchuk ("Latchuk") while performing sandblasting work on the George Washington Bridge, defendant the Port Authority of New York and New Jersey ("the Port Authority") moves for an order granting summary judgment dismissing the complaint (motion seq. no. 002). Latchuk opposes the motion and separately moves for an order (1) granting summary judgment as to liability under Labor Law §§ 240(1), 240(2) and 241(6), and (2) granting leave to amend his Bill of Particulars to include violations of Industrial Code §§ 23-5.1(j)(1),23-1.22, 23-5.3, 23-1.16(b), (f) and 23-1.10. (motion seq. no. 003).[1]

BACKGROUND

Latchuk was injured on October 2, 2003, when he fell from an elevation while performing sandblasting work on the New York Tower of the George Washington Bridge ("the Bridge"). At the time of the accident, Latchuk was employed by non-party L&L Painting ("L&L), which in March 2001, had entered into a contract with the Port Authority, the owner of the Bridge, to perform lead paint removal work on the New York and New Jersey Towers of the Bridge ("the

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[1]Motion seq. nos. 002 and 003 are consolidated for disposition.

Contract"). Pursuant to the Contract, a containment structure was built around the Bridge to wrap the area and to provide an enclosed space to prevent the spread of lead paint. All sandblasting work was performed within this structure. At her deposition, Andrea Bocker ("Bocker"), the senior resident engineer from the Port Authority assigned the Bridge project, testified that "there are two types of scaffolding being used on the job. One is the scaffold structure that is erected around the towers to support the containment, and a second set of scaffolding or rigging was internal to the containment for L&L's work." (Bocker EBT, at 85).

The record indicates that for the workers to perform their work, they were provided with a helmet, earplugs, safety glasses, protective suits, and a harness. They were also provided with sandblasting equipment, including sandblast hoses, a whip, nozzle and dead man's switch. The whip is the portion of the sandblast hose which is handled by the sandblaster and the dead man's switch is the on and off switch which is behind the nozzle at the end of the hose. John Lawson ("Lawson") who was one of the foremen employed by L&L on the Bridge project, described the switch as a "toggle" or "momentary" switch. "If you press it, it goes on, if you let it go, it turns off." (Lawson EBT at 26-27).

The workers were also provided with motorized spider baskets which they used to reach different elevations of the containment structure and they were also required to wear a full body harness, which had a ring in the back equipped with a double lanyard and hooks, which could be tied to safety cables, safety lines on various points on the structure. (Id., at 37-38). Lawson testified that he trained Latchuk in how to use the spider basket (Id. at 43-44). While the motorized spider baskets were the usual method used to reach different parts of the Bridge, Lawson testified that workers could also access various points on the Bridge by climbing, but

that they were not usually instructed to climb because "it is not safe." (Lawson EBT at 44). However, he also testified that if a worker could not sandblast a location where he was standing, he might use the spider basket or climb to a new location (Id at 46-47). Lawson testified that if the worker did not go too far, for example two feet, it would be proper procedure to climb the structure using the "pipe scaffold around the tower" that held the containment structure in place and acknowledged that workers actually climbed the structure (Id at 47-48).

Latchuk testified that on the date of the accident he was "reblasting" parts that had already been sandblasted but had turned yellow due to humidity. To reach the area he went up in a spider basket to the sixth pipe threw the rope, pulled the basket close to the corner and tied it there. He then exited the basket and stood on the sixth pipe. According to Latchuk, while sandblasting he would "walk on iron pipes...a metallic structure which is connected to the bridge and we walk on top of it" (Latchuk EBT 30-31). Latchuk testified that "the people that work there, also the bosses" referred to the various elevation levels of pipes numerically, saying "we're on the sixth pipe." (Id., at 57).

Latchuk testified that when he arrived at the sixth pipe he could not reach the surface that he needed to reblast so he climbed up the structure to the next level. He started doing the reblasting when he reached the seventh pipe level. He described the area where he was doing the work as about four and a half feet wide. He also explained that as he did the work he was tethered to a safety line which was located on the seventh level and testified that his safety harness had a clip which he tied to a rope attached to the structure behind him.

According to Latchuk a few minutes after he reached to seventh pipe, his hose stopped working "it was clogged." (Id., at 59-60). He explained that he know it was clogged because the

"hose got hard," which he testified happened "more than six times ...the day before" and that afterwards he spoke to Lawson and told him that if the hose was not fixed he would go home because "I couldn't work like that...He said go back up there, that I will get it fixed for you" (Id., at 59-61).

Latchuk testified that the accident occurred "when I tried to move to a safer position, the hose got unclogged, and it threw me backwards. It exploded" (Id., at 59). He later explained that after he turned the hose off, he decided to move to a different place since where he was "was uncomfortable...one of my feet was standing on one side of the bridge, and the other was backward...it was the only way I could stand because there was no scaffold...one foot [was] on the tower the another foot on the pipes...[m]y legs were open but that was the "only position" from which he could sandblast. (Id. at 64).

According to Latchuk after the hose exploded, he lost consciousness and when he regained consciousness he was hanging from his harness below the sixth level. He further testified that "he believed that it was more than six feet" between seventh level from which he fell and the sixth level. (Id. at 76). Latchuk testified that he injured his right shoulder and left arm and was bleeding but was easily able to get to the sixth level since it was at the level of his waist (Id at 80). He later testified that the harness was too big for him and that it could not be adjusted since it had dried paint on it, and that since it was too loose, it contributed to his injuries. (Id at 209-210). Once Latchuk reached the sixth level he let go of the hose and "walked to where the clip was. I unclipped and tried to untie the basket. I wasn't able to untie the basket, and I didn't know why. I thought the knot was just too difficult to untie. So I had no other option but to climb down using my hands" (Id. at 80).

Latchuk also testified that he did not see anyone after his fall and although there were about eight other workers some were working higher, others had already gone down and others were behind boxes and that he did not yell for anyone since he had on a mask and that since the workers wore earplugs no one would hear him (Id at 78-79). The workers were not supplied with radios or other devices that would enable them to call for help if they were injured. According to Latchuk, after he was injured, he said to himself "I got to go down 'cause no one with find me here" Id at 182). Latchuk later testified that "I was trying to go down but there was something holding me which was the belt, so I... unhooked the belt, and I tried to clip on the basket or something like that or to untie the basket so I could go down. But I don't remember if I clipped onto something or not, all I remember is that I could not untie the basket" (Id. at 182). When asked why he unhooked his safety harness he testified that "there was no other way I could go down." (Id at 183) Latchuk further testified that at the time he felt "very dizzy" and "anxious" and that he was "bleeding a lot" and thought that "if I didn't go down on my own, I would faint." (Id., at 80).

Latchuk then proceeded to climb down manually. He testified that he had "no grip on his [left] hand, [s]o I fell. Because there was a lot of blood, I kinda slipped."[and that] "I just remember there was a lot of blood, and I couldn't hold anything, and I remember that I fell (Id. at 82-83). According to Latchuk, he slipped and fell to the platform at the bottom of the container from about the sixth pipe which Latchuk estimated was "about thirty to forty feet" (Id at 182).

When Lawson went to inspect the area, he saw that Latchuk's spider basket was about five feet above platform level and there was "blood on the steel approximately...21 feet from the

platform area" (Lawson EBT, at 56). He also inspected the spider basket and testified that it was working properly and was not tied off (Id., at 102). When asked how he reached the spider basket, Lawson testified that "there is an I beam the runs along the platform. It is approximately two feet up, so if you are standing on that I beam, you can climb into the spider basket." (Id. at 101).

On April 28, 2005, Latchuk filed a verified complaint against Port Authority seeking damages for its alleged violation of Labor Law §§ 240(1), 241(6), 200 and for its purported negligence in failing to provide a safe place to work. Port Authority subsequently answered. Following completion of discovery, Latchuk filed a note of issue and certificate of readiness on July 15, 2008. These summary judgment motions were made in October 2008. Latchuk's motion included an amended bill of particulars which, for the first time, alleged violations of Labor Law § 240 (2) and included additional violations of the New York State Industrial Code which provide the predicate for Latchuk's claims under Labor Law § 241(6).

The Motions

Port Authority moves for summary judgment dismissing Latchuk's Labor Law § 240(1) claim on the grounds that the record does not show that a violation of the statute was a proximate cause of Latchuk's injuries. Specifically, Port Authority argues that Latchuk's injuries were not caused by the lack of appropriate safety devices, since the record reveals that he was provided with such devices, including a safety harness, lanyards and spider basket, and that the harness and lanyard prevented Latchuk's from being further injured. Moreover, Port Authority argues that even if the safety devices provided were inadequate Latchuk's own conduct and the sandblasting hose were the sole proximate cause of his injuries.

Latchuk counters that he is entitled to summary judgment as to liability on Labor Law § 240(1) claim, since that the record shows that his injuries were proximately caused by the lack of safety devices since the scaffold he was working on was not equipped with safety or guard rails or other devices to prevent him from falling, and that the safety devices provided, including the harness and spider basket, did not prevent him from being injured. In particular, Latchuk asserts that his harness did not fit him properly and when he fell it injured his arm and shoulder. In addition, Latchuk seeks summary judgment based on a violation of Labor Law § 240(2), which requires that scaffolding more than twenty feet off the ground be provided with guardrails.

In response, Port Authority submits the affidavit of Bocker, its senior resident engineer on Bridge project, who states that there were two types of scaffold used on the Bridge project. According to Bocker, the first type of scaffolding was that erected around the towers to exclusively support the containment structure and "was not a working scaffold and was not used to support workers, materials, or equipment [and that] [w]orkers did not use the structure support to maneuver about the work area" (Booker Aff. ¶ 6). In contrast, states Bocker, the second type of scaffold used on the project were rigged by L&L for use in maneuvering around the work area was internal to the containment area, known as a "swing" or "pick" scaffold and was intended for such use and it was equipped with safety rails and toeboards (a board placed around a platform to prevent personnel or materials from failing off), and were in compliance with OSHA standards and those of the New York State Industrial Code (Id. ¶ ¶ 7-9). Bocker states that "L&L were required to work from spider baskets, or from swing scaffolds, if needed. L&L employees were required to employ 100% tie off when working from baskets, scaffolds or directly on the bridge steel structure" (Id. ¶ 10).

Port Authority also asserts that it is too late for Latchuk to assert a claim based on a violation of Labor Law § 240(2), which is not included in his complaint.

In reply, Latchuk argues that Bocker's affidavit is without probative value as she does not state that she observed the conditions at the specific area where Latchuk was working on the date of the accident, and points out that Bocker did not state that Latchuk was working on a swing scaffold at the time of the accident. In his affidavit, Latchuk states that at the time of his accident he was not working on a swing scaffold and that "[i]n order to do my job, I was not suppose to work on a swing scaffold and was never instructed to work on a swing scaffold."(Latchuk Aff. ¶¶ 3, 4). Instead, Latchuk states that he was working on pipes where "there were no guardrails or rails of any kind [and that] if there had been a rail I would not have fallen at all." (Id. ¶ 6). With respect to the Labor Law § 240(2) claim, Latchuk asserts that the complaint which alleged violations of Labor Law § 240 provided adequately notice of this claim.

The Port Authority also seeks summary judgment on the Labor Law § 241 (6) claim, arguing that Latchuk has failed to sufficiently allege a violation of the New York State Industrial Code. Latchuk counters that he is entitled to summary judgment based on violations of Industrial Code §§ 23-5.1(j)(1)(safety railings for scaffold platforms),23-1.22 (safety railings for platforms), 23-5.3 (safety railings for metal scaffolds), 23-1.16(b), (f) (safety lines for harnesses) and 23-1.10 (cut off switch for hand tools). As none of the Industrial Code sections now relied on by Latchuk are specified in his original or Supplemental Bill of Particulars, Latchuk moves for leave to amend to include them asserting that their addition provides a meritorious ground for recovery and will not prejudice Port Authority since they do not raise any new theory of liability. In response, Port Authority asserts that it is too late to seek this relief.

The Port Authority also moves for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action, contending that it did supervise or control Latchuk's work, that his injuries were not caused by any dangerous condition at the site, and that it did not create or know about any dangerous condition or defect at the site. In opposition, Latchuk argues that his Labor Law § 200 and negligence claims are meritorious as the record shows that Port Authority sufficient authority and control over Latchuk's work and that the Port Authority had actual or constructive notice of the lack of guardrails on the piping scaffold, which constituted a dangerous condition which resulted in Latchuk's injuries.

DISCUSSION

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

Labor Law § 240 Claims

Labor Law § 240 (1), commonly known as the Scaffold Law, provides as follows:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The purpose of the statute is "to protect workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident." Rocovich v Consolidated Edison Co., 78 NY2d 509, 513 (1991) (internal quotation marks and citations omitted). The statute imposes a nondelegable duty and absolute liability on owners and contractors for failing to provide adequate safety devices to workers who sustain gravity-related injuries. Jock v Fien, 80 NY2d 965, 967 (1992); Rocovich, 78 NY2d at 513. Labor Law § 240 (1) applies to "risks related to elevation differentials," including "those related to the effects of gravity where protective devices are called for . . . because of a difference between the elevation level of the required work and a lower level" Rocovich, 78 NY2d at 514.

To impose liability under Labor Law § 240 (1), the plaintiff need only prove: (1) a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices); and (2) that the statutory violation proximately caused his or her injuries. Blake v Neighborhood Hous. Servs. of New York City, 1 NY3d 280, 290 (2003); Ramos v. Port Authority of New York and New Jersey , 306 AD2d 147, 148 (1st Dept 2003). Proximate cause is demonstrated based on a showing that a "defendant's act or failure to act as the statute requires 'was a substantial cause of the events which produced the injury.'" Gordon v. Eastern Railway Supply, Inc., 82 NY2d 555, 562 (1993)(citation omitted). It is not necessary for plaintiff to demonstrate that the precise manner in which the accident occurred, or the extent of the injuries, was foreseeable. Rodriguez v. Forest City Jay Street Associates, 234 AD2d 68 (1st Dept. 1996), citing Public Administrator of Bronx County v. Trump Village Construction Corp., 177

AD2d 258 (1st Dept 1991). Comparative negligence is not a defense. See Blake v. Neighborhood Housing Services of New York City, Inc., 1 NY3d 280, 289-290 (2003). However, "a defendant is not liable under Labor Law § 240 (1) [when a] plaintiff's own negligence was the sole proximate cause of the accident." Id. at 290.

To show that a plaintiff's negligence was the sole proximate cause of an injury allegedly based violations of the Labor Law, a defendant must establish that the plaintiff "had adequate safety devices available: that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured." Cahill v. Triborough Bridge & Tunnel Auth., 4 NY3d 35, 40 (2004); see also, Kosavick v. Tishman Construction Corp. of New York, 50 AD3d 287 (1st Dept 2008).

Under the foregoing standards, Latchuk is entitled to summary judgment as to liability under Labor Law § 240(1). First, although Latchuk was provided with safety devices, including a harness and lanyard which was tied to a rope on the structure, which prevented him from suffering more serious injuries or death when he was propelled off the bridge after the sandblaster exploded, these devices were inadequate to protect him from injury and thus do not preclude recovery under Labor Law § 240(1). See e.g., Lopez v. Boston Properties, Inc., 41 AD3d 259, 260 (1st Dept 2007)(noting that "the fact that the safety line and harness may have spared plaintiff from death by arresting his fall before he struck the ground does not preclude recover under Labor Law § 240"); Kyle v. City of New York, 268 AD2d 192 (1st Dept 2000), lv denied, 97 NY2d 608 (2002)(holding that where safety devices of harness, lanyards and retractable safety lines known as "yo-yos" did not protect plaintiff from injuries after falling 30

feet, the trial court erred in denying plaintiff summary judgment as to liability under Labor Law § 240(1)).

Specifically, Latchuk was not provided with a swing scaffold or other safety devices, such as guard rails, which would have prevented his fall. This is so notwithstanding the general affidavit of Bocker that swing scaffolds equipped with safety railings were available for maneuvering around the work area, as nothing in the record shows that this type of scaffold was available for use in the area where Latchuk was working at the time of the accident, or that he was ever instructed to use such a scaffold. See Ramos v. Port Authority of New York and New Jersey, 306 AD2d 147, 148 (1st Dept 2003)(plaintiff entitled to summary judgment on § 240 claim where record did not show, inter alia, that plaintiff was ever advised of the use of various safety devices including a swing scaffold). Significantly, Latchuk stated in his affidavit that he was never instructed to work on a swing scaffold and his foreman, Lawson, did not testify that Latchuk was instructed to use a swing scaffold.

While the Port Authority argues that the spider basket was another available safety device, Lawson testified that at times, workers left the basket, and stood at locations to sandblast areas that could not be reached from the basket. Significantly, although Lawson testified that the area that Latchuk was sandblasting on the date of the accident could have been reached from the spider basket, he did not testify that he instructed Latchuk to work from the spider basket on the date of the accident. Although not specifically argued by the Port Authority, absent such instruction, and in view of Latchuk's testimony that the area could not be reached from the spider basket, the spider basket did not constitute an adequate safety device to protect Latchuk from the injuries received when sandblasting from the bridge. See Hagins v. State, 81 NY2d 921, 923

(1993)(plaintiff, who fell from an unfinished abutment wall while returning from retrieving lumber was entitled to summary judgment as to liability under Labor Law § 240 (1) even though the record showed that plaintiff took the more dangerous route since plaintiff's supervisor did not specifically instruct him on which route to take when retrieving the lumber).

In reaching this conclusion, for the reasons below, this court rejects the Port Authority's arguments that the malfunction of the sandblaster or Latchuk's conduct were the sole proximate or supervening cause of his injuries. First, since Latchuk's injuries were a foreseeable result of his use of a sandblaster at an elevated area without adequate safety devices, the malfunctioning of the sandblaster cannot be said to be the sole proximate cause of his injuries. See Gordon v. Eastern Railway Supply, Inc., 82 NY2d at 562 (holding that defendants were liable under Labor Law § 240(1) for plaintiff's fall and injury occasioned by an allegedly defective sandblaster where such injuries were the foreseeable result of the failure to provide plaintiff with a safe scaffold or ladder while sandblasted a railway car from a ladder); Madalinski v. Structure Tone, Inc., 47 AD3d 687 (2d Dept 2008)(defendant liable under Labor Law § 240(1) when plaintiff was injured when he turned on a high-pressured hose and the water pressure caused him to fall off a scaffold that had no siderails).

Nor has the Port Authority established that Latchuk's conduct after he climbed onto the sixth level of the piping scaffold following his initial injuries was the sole proximate cause or supervening cause of his injuries. As indicated above, the injuries Latchuk suffered in the initial fall, which left him bleeding, dizzy and disoriented, were caused by the failure to provide adequate safety devices. Moreover, the record shows that these injuries lead Latchuk to attempt to climb down the piping scaffold, and resulted in his further injuries when he slipped on his own

blood and fell about thirty feet to a platform below. Furthermore, the record shows that Latchuk had no way to call for help since he was not provided with a radio or similar device, and there were no workers close enough to see or to hear him.

Under these circumstances, particularly in light Latchuk's isolation from other workers or supervisors and the lack of means of communicating with them, the Port Authority's failure to provide adequate safety devices set into motion a chain of events which resulted in Latchuk's injuries, so that such failure was a proximate cause of Latchuk's injuries. Gordon v. Eastern Railway Supply, Inc., 82 NY2d 555.

Port Authority's position that Latchuk's conduct after his fall was a supervening cause of his injuries is unpersuasive since it is foreseeable that a worker injured as the result of an elevation hazard would be further injured when attempting to climb down to safety. See e.g., Lopez v. Boston Properties, Inc., 41 AD3d at 260 (holding that plaintiff's action of reaching for a bucket in order to save a co-worker which resulted in him falling off a beam was not the sole proximate cause of the accident since such action was not unforeseeable);.Hagins v. State of New York, 81 NY2d at 923. In other words, Latchuk's conduct was not of "such an extraordinary nature or so attenuated from the [Port Authority's] conduct [in failing to provided adequate safety devices] that responsibility for injury should not reasonably be attributed to [it]." Gordon v. Eastern Railway Supply, Inc., 82 NY2d at 561.

Since the failure to provide adequate safety devices was a proximate cause of Latchuk's second fall and its resulting injuries, it also cannot be said that Latchuk's conduct was the "sole proximate cause" of his injuries. Blake v. Neighborhood Housing Services of New York City, Inc., 1 NY3d at 290 ("if a statutory violation is a proximate cause of an injury, the plaintiff

cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation"). Furthermore, although the spider basket was provided as a safety device to assist Latchuk in reaching the platform below, he was unable to access it, so that the facts here do not warrant a finding that Latchuk "chose for no good reason" not to use it. Cahill v. Triborough Bridge & Tunnel Auth., 4 NY3d at 40.

In addition, while Latchuk testified that he could not untie the spider basket whereas Lawson testified that the basket was untied when he went to inspect it, this conflicting testimony is insufficient to raise an issue of fact as to whether Latchuk "chose not to use" as an available safety device, given Latchuk's injuries and Lawson's testimony that the spider basket was five feet above the platform and could only be reached by climbing onto an I-beam[2]. Kosavick v. Tishman Construction Corp. of New York, 50 AD3d at 289; compare Cahill v. Triborough Bridge & Tunnel Auth., 4 NY3d at 40 (record raises issues of fact as to whether plaintiff's conduct was the sole proximate cause of his injuries when employer instructed the plaintiff to use a safety line when climbing and at the time of the accident plaintiff did not use an available safety line but instead used a position hook not designed for climbing); Plass v. Solotoff, 5 AD3d 365, 367 (2d Dept), lv denied, 2 NY3d 705 (2004)(plaintiff's unilateral decision to use

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[2]Although Port Authority asserts that Lawson's testified that the spider basket was five feet above the platform as opposed to the sixth pipe the level where Latchuk was located after the accident, it is unclear if the sixth pipe and the platform are at different levels on the piping scaffold. In any event, the record does not indicate that the spider basket would have been any more accessible from the sixth pipe than from the platform. Specifically, Lawson did not testify that he would have been closer to the basket if he climbed on the sixth pipe, and instead testified that he had to climb onto an I-beam to reach it. Furthermore, if the spider basket had been moved at the time of Lawson's inspection, then his testimony that it was untied would not be probative as to the accessibility of the basket at the time the accident.

only one plank on the scaffold he owned despite having three planks available for him was the sole proximate cause). Finally, even if it is assumed that Latchuk's conduct was negligent,such contributory negligence does not constitute a defense to a Labor Law § 240(1) claim. Stolt v. General Foods Corp., 81 NY2d 918, 920 (1993). Likewise, since the record shows that Latchuk unhooked his harness so that he could try to access the spider basket and when he could not do so, in order to climb manually down the piping structure, it cannot be said that this conduct, which arose out of the injuries caused by the lack of safety devices in the first instance, was the sole proximate cause of his injuries sustained in the second fall.[3]

Accordingly, Latchuk is entitled to summary judgment as to liability on his claim under Labor Law § 240(1).

Latchuk also moves for summary judgment based on Labor Law § 240(2), which requires that scaffolds over twenty feet high be equipped with safety rails on three sides and be properly fastened. However, the complaint which seeks recovery under section 240 refers only to the requirements of 240(1) and makes no mention guardrails on scaffolds, and the First Department has held that under these circumstances, a plaintiff cannot seek relief under this section for the first time in connection with a summary judgment motion. See Dominguez v. Lafayette-Boynton, 240 AD2d 310, 312-313 (1st Dept 1997)(plaintiff not entitled to relief under Labor Law § 240(2) when complaint alleged violation of the requirements of § 240(1) and contained no allegations of the requirements of subdivision (2) of § 240); Smizaski v. 784 Park Avenue Realty, Inc., 264 AD2d at 366 (same). Therefore, Latchuk's request for summary judgment

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[3]Notably, the record indicates that to use his safety line while climbing down, Latchuk would have needed to reattach himself at each level of the six levels before reaching the platform at the bottom of the containment structure.

under § 240(2) is denied without prejudice to seeking leave to amend the complaint to include a claim based on this section.

Labor Law § 241(6) Claim

Labor Law § 241 (6) provides that "[a]ll 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 section requires owners and contractors at a construction site to "provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494, 502 (1993).

The duty under Labor Law § 241(6) is nondelegable. Thus, "to the extent that a plaintiff has asserted a viable claim under Labor Law § 241(6), he need not show that defendants exercised supervision or control over the worksite in order to establish a right to recovery." Id. At the same time, however, a violation of 241(6) does not result in "absolute liability *irrespective of the absence of a negligent act* which caused the injury [but rather] imposes a nondelegable duty upon an owner or general contractor to respond in damages from injuries sustained *due to another party's negligence* ..." Ruzzuto v. Wenger Construct. Co., 91 NY2d 343, 349-350 (1998)(emphasis in original). In addition, only a violation of the State Industrial Code and regulations promulgated by the State Commissioner of Labor may serve as a basis for liability under that statutory section" Heller v 83rd Street Investors Ltd. Partnership, 228 AD2d 371, 372 (1st Dept), lv denied 88 NY2d 815 (1996); see also Messina v City of New York, 300 AD2d 121

(1st Dept 2002). Furthermore, a violation of a section of the Industrial Code is only "some evidence of negligence." Ruzzuto v. Wenger Construct. Co., 91 NY2d at 351.

In support of his section 241(6) claim, Latchuk alleges that the Port Authority violated Industrial Code §§ 23-5.1(j)(1)(safety railings for scaffold platforms),23-1.22 (safety railings for platforms), 23-5.3 (safety railings for metal scaffolds), 23-1.16(b), (f) (safety lines for harnesses) and 23-1.10 (cut off switch for hand tools).[4] These violations were not alleged in Latchuk's complaint or in his original or Supplemental Bill of Particulars, but are alleged in an Amended Bill of Particulars dated October 12, 2008, which is included as an exhibit to Latchuk's summary judgment motion..

The First Department has held that "in the absence of prejudice or unfair surprise, requests for leave to amend should be granted freely. ... [I]t is improper for a court to dismiss a Labor Law § 241(6) claim merely because the Code violation was not set forth in the initial pleadings." Noetzell v Park Avenue Hall Housing Development Fund Corp., 271 AD2d 231, 232 (1st Dept 2000) (internal citations omitted). Moreover, such amendments have been permitted even after note of issue has been filed when such amendment "entitled no cognizable prejudice." Walker v. Metro-North Commuter Railroad, 11 AD3d 339, 341 (1st Dept 2004). However, any such additional Code violations must merely amplify the pleadings and not raise new theories of liability. See Adams v Santa Fe Construction Corp., 288 AD2d 11 (1st Dept 2001).

Here, the additional code violations, which concern the safety of scaffolds, safety belts,

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[4]It appears that Latchuk has abandoned the sections of the Industrial Code (23-4.2(k), 23-9.2(b), 23-9.5(c) and (g)) alleged in his original and Supplemental Bill of Particulars.

and power tools, do not raise new theories of liability but merely amplify the theories of liability alleged in the previously served Bill of Particulars which allege, inter alia, that the Port Authority "its agents, contractors, and employees were further negligent, reckless in careless in violating section 241(6) of the Labor Law and Industrial Code provisions pertaining to scaffolding, safety belts and construction site safety."

Moreover, there is no dispute that the proposed additional Industrial Code violations are sufficiently specific to support claims under Labor Law § 241(6). See, Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494; see also, Hawkins v City of New York, 275 AD2d 634 (1st Dept 2000). The remaining issue, then, is whether the violations are applicable to the facts of the case. Mendoza v. Marche Libre Associates, 256 AD2d 133 (1st Dept 1998); Cafarella v Harrison Radiator Div. of General Motors, 237 AD2d 936 (4th Dept 1997).

Three of the newly alleged Industrial Code violations, §§ 23-5.1(j)(1), 23-1.22(c)(2), 23-5.3(e), concern requirements that scaffolds and platforms be equipped with safety railings. Section 23-5.1(j)(1), entitled safety railings, provides that "[t]he open sides of all scaffold platforms, except those platforms listed below[5], shall be provided with safety railings constructed and installed in compliance with this Part (rule)." Section 23-1.22 (c)(2) provides that "[e]very platform more than seven feet above the ground...shall be provided with a safety railing constructed and installed in compliance with this Part (rule)." Section 23-5.3(e) provides that "safety railings constructed and installed in compliance with this Part shall be provided for every metal scaffold." Here, the record shows that the piping scaffold on which Latchuk was working at the time of the accident did not have any safety railings. Furthermore, while Port Authority

[5]There is no dispute that the exceptions listed in the provision do not apply.

argues that this section is inapplicable since the swing scaffolding described by Bocker in her affidavit was equipped with safety railings, there is no dispute that Latchuk was not using a swing scaffold at the time of his injuries. Accordingly, this section of the Industrial Code is sufficiently applicable to this case to provide a basis for a section 241(6) claim.

Section 23-1.16, concerns safety belts, harnesses, tail lines and lifelines. Subdivisions (b) and (f) of this section, on which Latchuk relies, provide that:

> (b)Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging life line. Such attachments shall be so arranged that if the user shall fall such fall shall not exceed five feet.
>
> (f) Inspection and Maintenance. (1) Every safety belt, harness, tail line and lifeline shall be inspected by a designated person prior to each use. Employers shall not suffer or permit any employee to use any equipment which shows any indication of ...excessive wear or any other damage or deterioration which could materially affect the strength, of such safety belts, harnesses, tail lines or lifelines. Any such equipment found to be unsafe shall be removed from the job site.

(emphasis supplied).

Here, based on Latchuk's testimony that, while wearing his harness and safety line, he fell more than six feet from the pipe scaffolding after the sandblaster hose exploded, there is a basis for finding this subdivision (b) of this section applicable to the facts of this case. And, while the Port Authority argues that based on Latchuk's loss of consciousness on the time he fell, his testimony is mere speculation, there is sufficient evidence in the record to support the

applicability of 23-1.16 (b).

In contrast, subdivision (f) is not applicable to this case. While Latchuk testified that the harness did not fit him properly and that it was covered with dried paint which prevented him from adjusting the harness, these asserted defects did not "materially affect the strength" of such harness and therefore subdivision (f) cannot be used as a predicate to liability under section 241(6).

Latchuk also relies on Industrial Code § 23-1.10(b)(1), which concerns electrical and pneumatic hand tools, and provides, in relevant part, that "[e]very electric and pneumatic hand tool shall be equipped with a cut-off switch within easy reach of the operator." An alleged violation of this section does not provide a basis for liability since the record shows that the sandblaster used by Latchuk at the time of the accident was equipped with a "dead man's switch" that turned off when it was released, and that the sandblaster exploded after it was turned off. Thus, while the sandblaster appears to have malfunctioned, such malfunction cannot be attributed to a violation of § 23-1.10(b)(1).[6]

Accordingly, Latchuk shall be permitted to amend its Bill of Particulars to allege that the violation of Industrial Code §§ 23-5.1(j)(1), 23-1.22(c)(2), 23-5.3(c) and 23-1.16 (b) provide a predicate to liability under Labor Law § 241(6). That being said, however, Latchuk is not entitled to summary judgment on his Labor Law § 241(6) claim since a violation of the Industrial Code is only some evidence of negligence, and the fact finder must resolve "the issue of whether the equipment, operation, or conduct of the worksite was reasonable and adequate

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[6]To the extent Latchuk relies on § 23-1.10(2), which provides that electric hose lines shall be guarded to prevent severe abrasion, such reliance is misplaced as the section is inapplicable to the facts of this case.

under the circumstances." Ruzzuto v. Wenger Construct. Co., 91 NY2d at 351.

Therefore, Latchuk's motion for summary judgment on his Labor Law § 241(6) claim is denied, as is the request by Port Authority to dismiss the claim.

Labor Law § 200 and Negligence Claim

To establish a prima facie case of common-law negligence, a plaintiff is required to show that a defendant either created or had actual notice of the alleged dangerous or defective condition, and that the alleged dangerous condition was the proximate cause of the injury. See, Pouso v City of New York, 177 AD2d 560 (2d Dept 1991). An owner's or general contractor's common-law duty to maintain a safe workplace is codified in Labor Law § 200. See, Gasper v Ford Motor Co., 13 NY2d 104 (1963).

"Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to owner under the common law or under Labor Law § 200." Comes v New York State Elec. and Gas Corp., 82 NY2d 876, 877 (1993). Moreover, liability will not be found under 200 "solely because the owner had notice of the unsafe manner in which work is performed." Id., at 878. To be charged with liability under Labor Law § 200, an owner or general contractor must perform more than their "general duty to supervise the work and ensure compliance with safety regulations." De La Rosa v Philip Morris Management Corp., 303 AD2d 190, 192 (1st Dept 2003); see also Vasiliades v Lehrer McGovern & Bovis, Inc., 3 AD3d 400 (1st Dept 2004); Reilly v Newireen Associates, 303 AD2d 214 (1st Dept), lv denied, 100 NY2d 508 (2003)."[M]onitoring and oversight of the timing and quality of the work is not enough to impose liability under section 200, [n]or is a general duty to ensure compliance with safety regulations or

the authority to stop work for safety reasons." Dalanna v City of New York, 308 AD2d 400, 400 (1st Dept 2003). Instead, it must be shown that the owner "'*had authority to control the activity bringing about the injury to enable it to avoid or correct the unsafe condition*'." Hughes v. Tishman Construction Corp., 40 AD3d 305 (1st Dept 2007)(emphasis in the original), quoting, Ruzzuto v. Wenger Construct. Co., 91 NY2d at 352.

Latchuk argues that such control was present in this case based on evidence that the Port Authority, through its resident engineer, Bocker was regularly at the work site and instructed L&L's foreman " what to do on any given day" and would have daily meetings with L&L, and was nearby at the Bridge on the date of the accident. (Lawson EBT at 31; Bocker EBT at 48, 66). Furthermore, Latchuk points out that Bocker had the authority to stop the work if she witnessed and safety violation or in the case of an emergency situation. (Bocker EBT at 20). She also received daily narratives prepared by inspectors as the progress of work and events at the worksite, and attended monthly progress meetings (Id. at 38, 52-54)).

In addition, Latchuk relies on evidence that the Port Authority had a risk management employee, Linda Cortland who, according to Lawson's deposition testimony, would visit the site regularly and discuss various matters with him or other L&L employees including "railings at platforms and entrances or tripping hazards." (Lawson EBT at 63). According to Bocker, Ms. Cortland was typically at the worksite about once a week. (Bocker EBT at 26-27).

Notably, however, Lawson testified that Cortland never talked to him about the safety of the equipment such as scaffolding and harnesses (Lawson EBT at 63), and the record indicates that all safety equipment was provided by L&L. Moreover, Lawson testified that the workers were instructed by L&L and that the Port Authority would only supervise the work "[i]f there

was some cleanup issue or something they had an issue with, someone would come and watch and make sure it was done to their satisfaction" (Id 31-32). Furthermore, while L&L received its instructions from the Port Authority regarding the work to be done each day, there is no evidence in the record that such instructions concerned that methods used by the individual workers. Notably, Latchuk testified that he only received instructions from the two foremen from L&L.

Based on this record, the court finds that the Port Authority's level of supervision over Latchuk's work was insufficient to give raise to liability under Labor Law section 200, since Port Authority did not have supervisory authority over the work causing injury to plaintiff. O'Sullivan v. IDI Construction Co., Inc., 28 AD3d 225 (1st Dept), aff'd, 7 NY2d 805 (2006)(trial court properly dismissed Labor Law § 200 claim against general contractor where the record was "devoid of evidence that [the general contractor] supervised, controlled or directed the performance of plaintiff's job" and plaintiff admitted that he only took instructions from the subcontractor's supervisors); Singh v. Black Diamonds LLC, 24 AD3d 138 (1st Dept 2005)(dismissal of Labor Law § 200 claim against construction manager was warranted despite evidence that construction manager's project superintendent "conducted regularly walk-throughs and if he observed an unsafe condition had authority to find whoever was responsible for the condition and have them correct it" and "discussed the covering of the ..hole (in which plaintiff fell) with [plaintiff's employer]..and inspected the plywood [covering the hole])."

When an injury is caused not by a contractor's methods but by a defect in the premises, it is not necessary to show that an owner or general contractor exercised control or supervision over the work causing injury if the owner or general contractor had actual or constructive notice of the defect causing the injury or was responsible for creating the condition. Bonura v. KWK Associates, Inc., 2 AD3d 207 (1st Dept 2003). Here, however, since it cannot be said that the

lack of guardrails constituted a defect in the work site, as opposed to a danger caused by the methods employed by Latchuk's employer for performance of the work, Port Authority cannot be held liable under § 200 even if it had constructive notice of the absence of guardrails on the piping scaffolding. See Dalanna v City of New York, 308 AD2d 400 (protruding bolt was not a defect in the premises itself, but rather was created by the manner in which the worker's employer performed his work).

Accordingly, Port Authority is entitled to summary judgment dismissing Latchuk's claims under Labor Law § 200 and for common law negligence.

CONCLUSION

In view of the above, it is

ORDERED that the motion by defendant Port Authority of New York and New Jersey for summary judgment (motion seq 002) is granted to the extent of dismissing the Labor Law § 200 and common law negligence claims and is otherwise denied; and is further

ORDERED that the motion by plaintiff Davi Latchuk (motion seq 003) to amend its supplemental bill of particulars is granted to the extent of permitting him to allege the violation of Industrial Code §§ 23-5.1(j)(1), 23-1.22(c)(2), 23-5.3(c) and 23-1.16 (b) provide a predicate to liability under Labor Law § 241(6); and it is further

ORDERED that the motion by plaintiff Davi Latchuk (motion seq 003) for summary judgment is granted only as to liability on his Labor Law § 240(1) claim and is otherwise denied.

DATED: June 15,2009

J.S.C.