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

PRESENT: Hon Joan A. Madden PART 11

Index Number : 100081/2007
SCOTT, JAMES
VS.
MORIARTY, T.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE 10/22/09
MOTION SEQ. NO.
MOTION CAL. NO.

n 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
APR 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: April 19, 2010

HON. JOAN A. MADDEN J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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JAMES SCOTT,

Plaintiff,

-against-

Index No. 100081/07

T. MORIARTY & SON, INC.,
THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY and UNITED RENTALS, INC.,

Defendants.

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JOAN A. MADDEN, J.:

In this action arising out of a construction site accident, defendants T. Moriarty & Son, Inc. (Moriarty) and the Port Authority of New York and New Jersey (the Port Authority) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against them by defendant United Rentals, Inc. (United Rentals). Plaintiff opposes the motion.

BACKGROUND

The Port Authority is the fee owner of the site. The Port Authority hired Moriarty as a general contractor on a construction project to build a parking garage, helix, and elevator bank at John F. Kennedy International Airport (JFK) in Queens, New York. The project was known as the "Red Garage" project. Moriarty, in turn, subcontracted various portions of the work. Non-party Stonebridge Erectors, Inc. (Stonebridge) was hired to install structural steel and precast double T concrete planks on the project.

Plaintiff, an ironworker employed by Stonebridge, testified at his deposition that, on January 30, 2006, he was working on the first floor of the parking garage across from the

American Airlines terminal at JFK (Plaintiff Dep., at 32, 34). He was directed by his foreman, Ed Burbus, to continue installing shim packs as part of the precast double T plank installation phase, as he had done the day before (*id.* at 33-35). In order to perform the work, plaintiff was required to use a manlift, also known as a boom lift, and a hydraulic jack to lift the concrete planks (*id.* at 33, 39, 47, 61). Plaintiff retrieved the boom lift that he was using the day before, and positioned it where he needed to install shim packs (*id.* at 60). Plaintiff and his co-worker, Russell Henry, then entered the manlift (*id.*). Plaintiff was wearing a hard hat and safety harness while in the manlift (*id.* at 57, 61). Plaintiff began to scope out the boom to a position that was suitable for him to install the shims (*id.* at 130-132). When he reached that position, he took his foot off the boom's safety pedal and released the boom's control (*id.* at 63). The boom "jumped" and pinned plaintiff between the boom's controls and a structural steel beam (*id.*).[1] After plaintiff hit the emergency stop button, the lift stopped moving (*id.* at 137). Henry later told plaintiff that he had to descend from the boom in order to lower the basket (*id.* at 64). Plaintiff stated that he did not notice anything wrong with the boom lift when he got into it, and did not know what caused the boom to move and pin him against the steel beam (*id.* at 67, 68).

According to plaintiff, he had used the manlift at least four times that month (*id.* at 44, 114). Plaintiff attended safety meetings held by Stonebridge's foreman, when he was instructed to wear a safety harness when in a manlift (*id.* at 36). Plaintiff testified that he did not receive any instructions from Moriarty or the Port Authority (*id.* at 48, 49).

Alexander Margolin, a senior engineer employed by the Port Authority, testified that

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[1]An accident report dated January 30, 2006 states that the "boom lift continued to boom up after the [control] was released. J. Scott pinched between basket of lift + underside of beam on 2nd floor" (Warycha Affirm., Exh. G).

Stonebridge used its own means and methods to level off the double T planks (Margolin Dep., at 52). Margolin did not have the authority to direct Stonebridge to use particular manlifts (*id.* at 82).

Salvatore DeAngelis, a field service technician for United Rentals, stated that his employer is in the business of renting construction equipment to companies (DeAngelis Dep., at 10). DeAngelis testified that, on November 11, 2005, United Rentals entered into a contract with Stonebridge for the rental of a 60-foot JLG boom model number 600S which was delivered to JFK (*id.* at 19). DeAngelis testified that the foot switch of the 600S has to be pressed in order for the other controls to work because it controls all operations of the 600S boom lift (*id.* at 25). On January 30, 2006, DeAngelis received a dispatch call regarding the boom involved in plaintiff's accident (*id.* at 29). When he inspected the boom lift the same day, he checked all of the controls by operating them extensively, including the emergency stop switch (*id.* at 37). DeAngelis testified that all functions stopped when he hit the stop switch (*id.* at 38). After performing his tests, DeAngelis concluded that the boom lift was operating properly (*id.* at 39). DeAngelis tightened a cap on the lift controller that was loose, and replaced the emergency stop switch, because it looked worn (*id.* at 40). The lift controller controls the boom's vertical movements (*id.*). According to DeAngelis, a worn emergency stop switch could cause the engine to stop operating (*id.* at 47). DeAngelis testified that it was unlikely for a boom lift to lift uncontrollably, as reported in the customer complaint, because the flip switch, safety switch, and dump valve would have to malfunction simultaneously (*id.* at 56). DeAngelis did not find any of those problems when he inspected the unit (*id.* at 57).

Joseph DiMarco testified that he was employed as a project superintendent for Moriarty

on the Red Garage project in January 2006 (DiMarco Dep., at 11). As part of his job duties, DiMarco coordinated the work among the trades (*id.* at 21). DiMarco only discussed the location of the leveling of the double Ts with Stonebridge's superintendent (*id.* at 30). Moriarty did not provide any boom lifts on the project to ironworkers (*id.* at 37).

The complaint alleges that defendants were negligent and violated Labor Law §§ 200 and 241 (6), Rule 23 of the Industrial Code of the State of New York, and the Rules and Regulations of the Occupational Safety and Health Administration (OSHA) (Complaint, ¶ 34). In the verified bill of particulars, plaintiff also alleges that defendants violated Labor Law § 240, 12 NYCRR 23-9.6 (a), 12 NYCRR 23-9.6 (b), 12 NYCRR 23-9.6 (e), 29 CFR 1910, and 29 CFR 1926 (Verified Bill of Particulars, ¶ 10).

DISCUSSION

Labor Law § 240 (1)

In support of their motion, the Port Authority and Moriarty point out that plaintiff did not assert a Labor Law § 240 cause of action in the verified complaint; rather, he only asserted this cause of action in the verified bill of particulars. The Port Authority and Moriarty further contend that the statute does not apply because plaintiff was not subjected to an elevation-related hazard. Additionally, the Port Authority and Moriarty maintain that plaintiff was a recalcitrant worker and the sole proximate cause of his injuries as a matter of law. They assert that plaintiff used the boom lift without inspecting it for any problems. Plaintiff only inspected the boom lift one week prior to the accident. Further, there is no evidence of a defect with the boom lift.

In opposition, plaintiff contends that the manlift was being used as a functional scaffold at the time of his accident, and that there is a question of fact as to whether the scaffold provided

proper protection to him. Plaintiff points out that he was directly injured by the malfunction of the manlift.

The Port Authority and Moriarty note, in their reply, that plaintiff did not testify that he fell off the boom lift, was struck by a falling object, or that elevation had anything to do with his accident.

"'The bill of particulars, the purpose of which is to amplify the pleadings, limits the proof, and prevents surprise at the trial . . ., may add specific statements of fact to a general allegation in the pleading but cannot add or substitute a new theory or cause of action'" (*Castleton v Broadway Mall Props., Inc.*, 41 AD3d 410, 411 [2d Dept 2007], quoting *B. & F. Leasing Co. v Ashton Cos.*, 42 AD2d 652, 653 [3d Dept 1973]; *see also DeJesus v New York City Hous. Auth.*, 46 AD3d 474, 475 [1st Dept 2007] [plaintiff's claim that NYCHA failed to hire sufficient and efficient employees was new theory of liability first raised in the bill of particulars, and should have been stricken]; *Sebring v Wheatfield Props. Co.*, 255 AD2d 927, 928 [4th Dept 1998] [bill of particulars generally may not supply an allegation that is missing from the complaint, and it may not add or substitute a new theory or cause of action or defense]).

In the complaint, plaintiff alleges that defendants were negligent in, among other things, failing to provide a safe place to work, and also alleges violations Labor Law §§ 200 and 241 (6). Since plaintiff alleges a violation of Labor Law § 240 (1) only in the bill of particulars, and not in the complaint, plaintiff has failed to assert a viable cause of action pursuant to this statute (*see e.g. Castleton*, 41 AD3d at 411 [where plaintiff alleged a violation of Labor Law § 376 in the bill of particulars and not in the complaint, he did not assert a viable cause of action to recover damages under that statute]). The court notes that Labor Law § 240 (1) and negligence claims

are distinct. Pursuant to Labor Law § 240 (1), an owner or general contractor may be held liable even if they did not exercise supervision and control over the work, i.e., irrespective of their actual wrongdoing (*see Haimes v New York Tel. Co.*, 46 NY2d 132, 136 [1978]).

Even assuming that plaintiff had properly pleaded this cause of action in the complaint, plaintiff's accident would not be covered by the statute. Labor Law § 240 (1) states, in pertinent part, that:

> "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" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520, *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citations omitted]). To impose liability under Labor Law § 240 (1), the plaintiff need only prove a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices), and that the statutory violation proximately caused his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]).

Generally, the statute only applies to elevation hazards, and not the ordinary risks of a construction site. In *Rocovich v Consolidated Edison Co.* (78 NY2d 509, 514-515 [1991]), the Court of Appeals explained that "[t]he contemplated hazards are those related to the effects of

gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." In *Ross v Curtis-Palmer Hydro-Elec. Co.* (81 NY2d 494, 500-501 [1993]), the Court, in discussing the risks covered by the statute, stated that section 240:

> "evinces a clear legislative intent to provide 'exceptional protection' for workers against the 'special hazards' that arise when the work site is itself elevated or is positioned below the level where 'materials or load [are] hoisted or secured.' The 'special hazards' to which we referred in *Rocovich*, however, do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity. Rather, the 'special hazards' referred to are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. In other words, Labor Law § 240 (1) was designed 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*"

(citations omitted; *see also Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001] ["Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein"]).

Recently, in *Runner v New York Stock Exch., Inc.* (13 NY3d 599, 603 [2009]), the Court determined that liability under section 240 (1) may attach even if a worker does not fall and is not struck by a falling object. There, the Court stated that "we think the dispositive inquiry framed by our cases does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker.

Rather, *the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential*" (emphasis supplied). The Court continued, stating that "the governing rule is to be found in the language from *Ross* . . . where we elaborated more generally that 'Labor Law § 240 (1) was designed 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*'" (*id.* at 604, quoting *Ross*, 81 NY2d at 501 [emphasis in original]).

Here, it cannot be said that the manlift "proved inadequate to shield the [plaintiff] from harm directly flowing from the application of the force of gravity to an object or person" (*id.* [emphasis omitted]). The "right of recovery afforded by the statute does not extend to other types of harm, even if the harm in question was caused by an inadequate, malfunctioning or defectively designed [safety device]" (*Ross*, 81 NY2d at 501). Plaintiff did not fall off the manlift. Moreover, plaintiff's injury did not flow directly from the application of the *force of gravity* to the manlift. Plaintiff testified that he was pinned against a structural steel beam after the manlift "jumped" (i.e., malfunctioned) (Plaintiff Dep., at 63). Thus, plaintiff was not exposed to any risk that any of the safety devices enumerated in Labor Law § 240 (1) would have protected against (*see Tolino v.* Speyer, 289 AD2d 4 [1st Dept 2001] [plaintiff who was standing on a wobbly platform lift when his fingers became wedged between a piece of sheetrock he was installing and the ceiling did not have a section 240(1) claim since the accident was not gravity related); Moutray *v Baron*, 244 AD2d 618, 619 [3d Dept 1997], *lv denied* 91 NY2d 808 [1998] [plaintiff injured when he lowered platform of scaffold onto his right foot; accident was not

gravity-related, but rather due to malfunction in scaffold's mechanism]; *Elezaj v Carlin Constr. Co.*, 225 AD2d 441, 442 [1st Dept 1996], *affd* 89 NY2d 992 [1997] [excavator's hand was crushed not because of gravity but because of negligent operation of co-worker]).

In view of the above, the court need not consider whether plaintiff was a recalcitrant worker or the sole proximate cause of his injuries.

Labor Law § 241 (6)

The Port Authority and Moriarty contend that plaintiff cannot establish a cause of action under Labor Law § 241 (6), because none of the Industrial Code regulations upon which he relies apply to these facts. Furthermore, the Port Authority and Moriarty argue that plaintiff's reliance on OSHA regulations cannot serve as a predicate for liability against them. Additionally, as noted above, they content that plaintiff was the sole proximate cause of his injuries.

In opposing this portion of defendants' motion, plaintiff contends that defendants' motion erroneously asserts that 12 NYCRR 23-9.6 (a) does not apply here. Plaintiff argues that the record in this case is utterly devoid of any evidence that plaintiff was ever instructed to perform daily inspections of aerial baskets, which are mandated by the Industrial Code.

Labor Law § 241 (6) requires owners, contractors, and their agents to "provide reasonable and adequate protection and safety" for workers performing the inherently dangerous activities of construction, excavation and demolition work. To recover under Labor Law § 241 (6), a plaintiff must plead and prove the violation of a concrete specification of the New York State Industrial Code, containing "specific, positive command[s]," rather than a provision reiterating common-law safety standards (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349 [1998] [internal quotation marks and citation omitted]). The violation of an Industrial Code rule or regulation

provides "some evidence of negligence," which is to be considered along with all other evidence on the issue (*Long v Forest-Fehlhaber*, 55 NY2d 154, 159, *rearg denied* 56 NY2d 805 [1982]). Comparative negligence is a defense to liability (*Spages v Gary Null Assoc., Inc.*, 14 AD3d 425, 426 [1st Dept 2005]).

In the verified bill of particulars, plaintiff alleges that defendants violated subsections (a), (b), and (e) of 12 NYCRR 23-9.6, in addition to 29 CFR 1910 and 29 CFR 1926. In his opposition papers, plaintiff only argues that defendants violated 12 NYCRR 23-9.6 (a). Plaintiff has apparently abandoned reliance on subsections (b) and (e), and therefore, this claim is dismissed to the extent that it is based upon these two subsections (*Cardenas v One State St., LLC*, 68 AD3d 436, 438 [1st Dept 2009] ["Plaintiff abandoned any reliance on the various provisions of the Industrial Code cited in his bill of particulars by failing to address them either in the motion court or on appeal . . ."]). In any event, the cited OSHA regulations, 29 CFR 1910 and 29 CFR 1926, do not provide a specific statutory duty which could result in defendants' liability under Labor Law § 241 (6) (*see Khan v Bangla Motor & Body Shop, Inc.*, 27 AD3d 526, 529 [2d Dept], *lv dismissed* 7 NY3d 864 [2006]). Therefore, the court only considers the disputed section 23-9.6 (a).

Subpart 23-9, entitled "POWER-OPERATED EQUIPMENT," applies to "power-operated heavy equipment or machinery used in construction, demolition and excavation operations." Section 23-9.6 (a) (Equipment inspection) provides, in relevant part, that:

"Prior to the use of an aerial basket[2] the operator shall make a daily inspection of the

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[2]"Aerial basket" is defined in the Industrial Code as "[a] vehicle-mounted, power-operated device with an articulating or telescoping work platform designed for use at elevated working positions" (12 NYCRR 23-1.4 [b] [2]).

equipment.

(1) Such daily inspection shall include the following:

(i) All attachment welds between the actuating cylinders and the boom or pedestal.

(ii) All pivot pins for security of their locking devices.

(iii) All exposed ropes, sheaves and leveling devices for both excessive wear and security of attachment.

(iv) Hydraulic systems for leaks and excessive wear.

(v) Boom and basket for cracks and abrasions.

(vi) The lubrication and fluid levels.

(2) A test operation of the boom from the ground controls through one complete cycle shall be performed by the operator. The basket controls shall be tested to make sure that they are in proper working order. The truck driver shall test the truck brakes and other automative operating accessories.

(3) A record of such inspection and testing shall be made by the operator. Such record shall be kept on the job site available for examination by the commissioner"

(12 NYCRR 23-9.6 [a]).

The parties dispute whether this Industrial Code regulation applies and was violated in this case. The Port Authority and Moriarty point out that plaintiff was the "operator" of the manlift in question. In addition, they argue that the record shows that any failure to inspect the manlift was not the proximate cause of plaintiff's injuries. In particular, they point to plaintiff's testimony that he used the boom lift for a period of time without incident prior to his accident, and did not notice any problem with it before the accident. Plaintiff counters that there is no evidence that he did anything wrong and that, at the very least, there is a question of fact whether

the failure to perform inspections was a substantial factor in causing the accident.

"The interpretation of [an Industrial Code] regulation presents a question of law, but the meaning of specialized terms in such a regulation is a question on which a court must sometimes hear evidence before making its determination" (*Morris v Pavarini Constr.*, 9 NY3d 47, 51 [2007]; *see also Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002]).

Although there do not appear to be any reported cases discussing 12 NYCRR 23-9.6 (a), the court finds that the regulation is sufficiently specific to result in liability pursuant to the statute. The regulation not only specifies the frequency with which inspections must be made (daily), but also specifies the component parts which must be inspected and the conditions for which the inspector should be looking (leaks, excessive wear, cracks, and abrasions) (*compare Misicki v Caradonna*, 12 NY3d 511, 521 [2009] [section 23-9.2 (a)'s specific requirement that employers "correct() by necessary repairs or replacement" "any structural defect or unsafe condition" in equipment or machinery "(u)pon discovery" or actual notice of the structural defect or unsafe condition]). Additionally, the court concludes that there are issues of fact as to whether this regulation was violated, and caused plaintiff's accident. There is no evidence that the manlift was inspected on the date of plaintiff's accident. Further, plaintiff's deposition testimony that the manlift "jumped" after he released the boom's controls (Plaintiff Dep., at 63), is sufficient to raise a question of fact as to whether the basket controls were "in proper working order" (12 NYCRR 23-9.6 [a] [2]). Moreover, it cannot be said that plaintiff was the sole "operator" of the manlift. Plaintiff testified that he was operating the manlift with his co-worker, and that no one inspected it that day (Plaintiff Dep., at 60).

Contrary to defendants' contention, plaintiff was not the sole proximate cause of his

accident by failing to inspect the manlift prior to using it. Plaintiff did not act in such an extraordinary, irrational, or unforeseeable manner such that defendants would be absolved of all liability under Labor Law § 241 (6) (*see Capellan v King Wire Co.*, 19 AD3d 530, 532 [2d Dept 2005] [plaintiff's unforeseeable act of forcing open secured door was the sole proximate cause of his injuries]; *Misirlakis v East Coast Entertainment Props.*, 297 AD2d 312, 313 [2d Dept 2002], *lv denied* 100 NY2d 637 [2003] [plaintiff's unforeseeable and unnecessary act of climbing on dumpster and ascending fire escape was the sole and superseding proximate cause of his injuries]). In addition, plaintiff's comparative negligence, if any, presents issues of fact for the jury (*see Spages*, 14 AD3d at 426 [noting that evidence that plaintiff himself equipped the scaffold with the type of floorboard that snapped under his weight raised a triable issue of fact as to his comparitive negligence]).

Therefore, summary judgment is denied as to plaintiff's Labor Law § 241 (6), only to the extent it is based on a violation of 12 NYCRR 23-9.6 (a).

Labor Law § 200 and Common-law Negligence

The Port Authority and Moriarty argue that they did not have the authority to (and in fact did not) supervise or control plaintiff's work. They point out that plaintiff testified that he received all of his safety training and job instructions from Stonebridge's foreman. The Port Authority and Moriarty further contend that they did not create or have notice of any dangerous condition with the boom lift. As noted above, the Port Authority and Moriarty argue that plaintiff was the sole proximate cause of his injuries as a matter of law.

In opposition, plaintiff contends that defendants have failed to meet their burden on

summary judgment. According to plaintiff, the Port Authority had the authority to stop work if it observed unsafe methods, malfunctioning equipment, or the misuse of equipment. Plaintiff further states that "[t]here is evidence that the equipment used on the project was not subjected to the inspections mandated by law and that defendants knew or should have known of this failure" (Plaintiff's Mem. of Law in Opp., at 5).

Labor Law § 200[3] is merely a codification of the common-law duty imposed on owners and general contractors to maintain a safe work site (*Rizzuto*, 91 NY2d at 352), and therefore, the same standards apply to both Labor Law § 200 and common-law negligence theories of recovery. To prevail on a claim under Labor Law § 200 and common-law negligence, where the injury arises out of the means or methods of the construction work, the plaintiff must establish that the defendant supervised or controlled the activity giving rise to the injury (*Geonie v OD & P NY Ltd.*, 50 AD3d 444, 445 [1st Dept 2008]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]; *Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347, 350 [1st Dept 2006]). Nonetheless, general supervision over the work, including coordination of the trades and inspection of quality of the work, is insufficient to impose liability under either theory (*Geonie*, 50 AD3d at 445; *Hughes*, 40 AD3d at 306).

Here, there is no evidence that either the Port Authority or Moriarty exercised supervision or control over plaintiff's work. Plaintiff testified that the Port Authority and Moriarty did not

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[3]Labor Law § 200 (1) provides that "All places to which this chapter applies 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. The board may make rules to carry into effect the provisions of this section."

supervise or control his work (Plaintiff Dep., at 48, 49). According to the Port Authority's senior engineer, Stonebridge used its own means and methods to install the concrete planks (Margolin Dep., at 54). The Port Authority's senior engineer did not have the authority to direct Stonebridge to use particular manlifts (*id.* at 82). Further, Moriarty's project superintendent, Joseph DiMarco, testified that Moriarty only coordinated the work among the trades, and did not provide any boom lifts on the project (DiMarco Dep., at 21, 37). While plaintiff argues that the Port Authority had the authority to stop work for unsafe methods, "the authority to stop work for safety reasons is insufficient to raise a triable issue of fact with respect to whether [a defendant] exercised the requisite degree of supervision and control over the work being performed to sustain a claim under Labor Law § 200 or for common-law negligence" (*Hughes*, 40 AD3d at 309; *see also Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [1st Dept 2005]; *Reilly v Newireen Assoc.*, 303 AD2d 214, 220-221 [1st Dept], *lv denied* 100 NY2d 508 [2003]).

To prevail on a Labor Law § 200 or common-law negligence claim arising from a defective or dangerous condition, the plaintiff must show that the defendant either created or had actual or constructive notice of the condition (*see Temes v Columbus Ctr. LLC*, 48 AD3d 281 [1st Dept 2008]; *Zaher v Shopwell, Inc.*, 18 AD3d 339, 340 [1st Dept 2005] [supervision and control over plaintiff's work is unnecessary where injury arose from defective or dangerous condition at a work site, rather than from method of plaintiff's work]). "The notice must call attention to the specific defect or hazardous condition, and its specific location" (*Cahill*, 31 AD3d at 351). In the instant case, there is no evidence that either the Port Authority or Moriarty created or had notice of any defect with the manlift. Plaintiff only had problems starting the manlift before the accident (Plaintiff Dep., at 114). However, he never complained to either the

Port Authority or Moriarty about any problems with the manlift (*id.* at 44). Stonebridge provided the manlift (DeAngelis Dep., at 19, 20).

Therefore, plaintiff's Labor Law § 200 and common-law negligence claims are dismissed. Additionally, because the Port Authority and Moriarty were not negligent, United Rentals' cross claims for common-law indemnification and contribution against these defendants are also dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion (sequence number 001) of defendants T. Moriarty & Son, Inc. and the Port Authority of New York and New Jersey for summary judgment is granted as to (1) plaintiff's Labor Law § 200, common-law negligence, and Labor Law § 241 (6) causes of action, to the extent it is based on 12 NYCRR 23-9.6 (b) and (e), 29 CFR 1910, and 29 CFR 1926, and (2) defendant United Rentals, Inc.'s cross claims for common-law contribution and indemnification asserted against T. Moriarty & Son, Inc. and the Port Authority of New York and New Jersey, and is otherwise denied; and it is further

ORDERED that a pre-trial conference shall be held on May 6, 2010 at 3:30 pm in Part 11, room 351, 60 Centre Street, New York, NY.

Dated: April 19, 2010

J.S.C.

HON. JOAN A. MADDEN
J.S.C.