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

PRESENT: HON. PAUL WOOTEN Justice PART 7

JAMES NAVIN and NOREEN NAVIN,

Plaintiffs,

- against -

SJP TS, LLC and PLAZA CONSTRUCTION CORP.,

Defendants.

INDEX NO. 109087/2008

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to 4, were read on this motion by defendants for summary judgment, and cross-motion by plaintiffs for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1, 2
Answering Affidavits — Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4

Cross-Motion: ■ Yes ☐ No

This is a personal injury action by plaintiff James Navin ("plaintiff") and his wife Noreen Navin (collectively "plaintiffs") to recover damages for injuries allegedly sustained while plaintiff was working on the 6th floor of a construction site. The accident occurred when a 40-foot steel beam that was being lifted by crane unexpectedly dislodged two stacks of steel beams positioned on the 6th floor deck, causing one or more of the beams to fall upon plaintiff's legs. Defendants SJP TS, LLC ("SJP") and Plaza Construction Corp. ("Plaza") (collectively "defendants") are the owner and construction manager of the construction site. Plaintiffs commenced this action against defendants asserting claims under Labor Law §§ 200, 240(1) and 241(6), Article 1926 of the Occupational Safety and Health Agency ("OSHA") standards, and for common law negligence.[1] The parties completed discovery and a Note of Issue was

[1]Plaintiff's wife brings a derivative claim for loss of services.

filed on August 19, 2009. Defendants now move for summary judgment, pursuant to CPLR 3212, dismissing the Labor Law §§ 200, 240(1) and 241(6), OSHA and common law negligence claims as a matter of law. Plaintiff cross-moves for summary judgment on the issue of liability with respect to the Labor Law §§ 240(1) and 241(6) claims.

BACKGROUND

In support of their summary judgment motion, defendants submit, *inter alia*, plaintiff's deposition and an affidavit and deposition of Plaza superintendent Robert Gillies. In opposition to the motion and in support of his cross-motion for summary judgment, plaintiff submits his own affidavit and an affidavit of his co-worker Joe Emerson. The following facts are undisputed.

On June 14, 2008, plaintiff was employed as a journeyman ironworker by Cornell & Company, Inc. ("Cornell") at the construction site of 11 Times Square, New York, New York. The property under construction was a new 40-story commercial building that was owned by SJP. Plaza was the project's construction manager and was responsible for coordinating and reviewing the work of various subcontractors. Plaza retained Cives Steel Corporation ("Cives") to perform structural steel and metal work at the site. Cives, in turn, subcontracted the steel and metal work to Cornell.

Cornell's responsibilities at the site included crane operation, steel beam and load maneuvering, "shaking out" and other associated structural ironwork.[2] Plaintiff worked under the supervision of a Cornell foreman, Sean Donahue, who provided his work instructions. Cornell was solely responsible for the work of its own employees, and plaintiff had no daily interactions with defendants. Plaza had no prior notice of any hazardous conditions or unsafe work practices by Cornell.

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[2]"Shaking out" was a process by which particular steel beams were organized into specific loads for future use.

Plaintiff was assigned to work as the "hooker-on" in the raising gang of ironworkers. His job involved preparing steel beams and columns to be lifted by crane to the location on the site where they would be erected. He would attach a piece of steel cable known as a "choker" to each steel beam or column to be lifted and connect it to the tower crane apparatus. He would then direct the "signal" man to slowly raise the load several inches in order to assure that it was properly balanced. The load would then be hoisted to the "connector" men who would erect it.

Plaintiff was working on the 6th floor that day, which was a floor still under Cornell's control. Upon returning from lunch, plaintiff and Emerson observed that a 40-foot steel beam had already been lifted above the 6th floor by tower crane. Plaintiff did not know who had "choked" the beam, but it was positioned upside down. Donahue directed them to lower the beam, which weighed more than a ton, onto two separate stacks of steel beams that were positioned on the 6th floor deck. The stacks were approximately 4 to 5 feet in height and more than 40 feet in length, and reached the level of plaintiff's chest. The raising gang had created the stacks during the shaking out process, and tried to make them as safe as possible by staggering the beams to insure that they did not roll off.

As the crane operator proceeded to lower the beam onto the two stacks, Donahue instructed them to rotate it right-side up. Plaintiff and his co-workers slacked the choker and rotated the beam. After the rotation was complete, plaintiff tightened the choker, securing the beam to the hoisting apparatus. Although the choker was located close to the center of the beam, plaintiff was unable to determine whether the beam was properly balanced at that point.

Next, plaintiff directed the signal man, Teddy Barnard, to lift the load so that plaintiff could determine the beam's center of gravity and whether it was balanced. While plaintiff was standing next to the beam holding onto the choker, the crane began lifting the beam and plaintiff expected it to come up slowly and only a few inches. For an unknown reason, the beam rose faster than expected and was suddenly three or four feet directly above plaintiff's

head. It came up at an angle rather than horizontally as it was supposed to.

Plaintiff saw that the beam was heavy on one side and unbalanced. When he realized that it was not level, he ran from the load to get out of the way as it started to descend. As he was running, he tripped on some pieces of wooden debris on the floor and fell to the ground. The hoisted beam struck the two stacks of beams and one or more of the beams from the stacks weighing a couple of tons landed on plaintiffs legs injuring him. Although there was a "tag line" responsible for guiding the placement of the hoisted beam, the tag line man was unable to guide it properly because the beam came up too rapidly and was top heavy. Plaintiff did not know where the debris that he tripped on came from or how long it had been there prior to the accident. He had previously seen debris on the 6th floor but never complained about it.

Plaintiff and Emerson believed that the procedure followed at the time of the accident, as directed by Donahue, was different from the normal procedure used in raising steel from the decking floor. They explained in their affidavits that, normally, a hoisted steel beam was placed on wooden skids known as "dunnage" on the decking floor, which was less than a foot in height. The beam could then be raised slowly and only a few inches so that the hooker-on could determine if it was properly balanced before it was raised. The hooker-on could keep his hand on the choker during this process, and the load was never lifted above a worker's head. After the hooker-on determined that the beam was properly balanced, the signal man would direct the crane operator to lift the load. Emerson also believed that either the wrong signal was given to the crane operator by the signal man, or the operator lifted the load too quickly.

Gillies, who did not witness the accident, testified at his deposition that he had also previously observed steel being erected in accordance with a procedure whereby the steel would initially come up several feet or inches for testing to find the center of gravity before it was sent up to the connectors. This was done to ensure that it was properly balanced so the erectors could grab hold of it safely and set the steel.

DISCUSSION

Defendants move for summary judgment dismissing plaintiff's claims under Labor Law §§ 200, 240(1) and 241(6), OSHA and for common law negligence, as lacking merit as a matter of law. Plaintiff opposes defendants' motion and cross-moves for summary judgment on the issue of liability as to the Labor Law §§ 240(1) and 241(6) claims. The motion and cross-motion are decided as follows.

A. Summary Judgment Standards

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary

judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

B. Labor Law § 200 and Common Law Negligence

Defendants argue that they are entitled to summary judgment dismissing the Labor Law § 200 and common-law negligence claims because they did not supervise, direct or control plaintiff's work, nor have notice of any hazardous conditions on the 6th floor. Plaintiff consents to dismissal of the section 200 claim (*see* Notice of Cross-Mot., Singer Aff. ¶ 29).

Labor Law § 200 is essentially a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*see Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]). Liability is limited to parties who exercise supervision or control over the work out of which the injury arises, or who create or have actual or constructive notice of an unsafe condition which causes the injury (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Colon v Lehrer, McGovern & Bovis, Inc.*, 259 AD2d 417, 419 [1st Dept 1999]). Since the undisputed evidence demonstrates that defendants did not exercise the requisite supervision or control over plaintiff's work nor have notice of hazardous conditions on the 6th floor, and in view of plaintiff's consent to dismissal, summary judgment dismissing the Labor Law § 200 and common-law negligence claims is granted (*see Cardenas v One State St., LLC*, 68 AD3d 436, 437 [1st Dept 2009]; *Romeo v Property Owner (USA) LLC*, 61 AD3d 491, 491 [1st Dept 2009]).

C. Labor Law § 240(1)

Labor Law § 240(1), known as the "scaffold" law, imposes non-delegable, strict liability upon property owners and general contractors for certain types of elevation-related injuries that occur during construction (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]).[3] The statute provides in

[3]Defendants do not challenge the applicability of the Labor Law to Plaza on the basis that Plaza was not a "contractor." In any event, the record establishes Plaza's contractor status for Labor Law purposes, and Plaza would still be subject to the statute as SJP's agent (*see e.g. Williams v Dover Home Improvement, Inc.*, 276 AD2d 626, 626 [2d Dept 2000]).

pertinent part:

> "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."

To establish liability under Labor Law § 240(1), the injured plaintiff must demonstrate (1) a violation of the statute, and (2) that such violation was the proximate cause of his or her injuries (*see Blake v Neighborhood Hous. Serv.*, 1 NY3d 280, 287 [2003]; *Cherry v Time Warner, Inc.*, 66 AD3d 233, 236 [1st Dept 2009]). The statute can be violated either when no protective device is provided, or when the device provided fails to furnish proper protection. Once a plaintiff proves the two elements, the defendants are subject to absolute liability even if they did not supervise or exercise control over the construction site (*see Ross*, 81 NY2d at 500), and comparative negligence may not be asserted as a defense (*see Sharp v Scandic Wall Ltd. Partnership*, 306 AD2d 39, 40 [1st Dept 2003]). Notwithstanding that section 240(1) is an absolute liability statute, if a plaintiff's actions were the sole proximate cause of the accident, there is no liability (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Kosavick v Tishman Constr. Corp.*, 50 AD3d 287, 288 [1st Dept 2008]).

Traditionally, Labor Law § 240(1) has been construed to apply to elevation-related risks involving "falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross*, 81 NY2d at 501). In *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], however, the Court of Appeals clarified that the dispositive inquiry does not depend upon whether the injury resulted from a "falling worker" or "falling object." According to *Runner*, "the governing rule is . . . 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.* [quoting *Ross*, 81 NY2d at 501] [emphasis in original]). Moreover, in a falling object case, the applicability of the statute does not "depend upon whether the object has hit the worker. The relevant inquiry - one which may be answered in the affirmative even in situations where the object does not fall on the worker - is rather whether the harm flows directly from the application of the force of gravity to the object" (*id.*).

Defendants move for summary judgment dismissing plaintiff's section 240(1) claim on the basis that the statute is inapplicable. They argue that plaintiff was not struck by a falling object that was "improperly hoisted" because the hoisted beam did not hit plaintiff. They also contend that there was an inadequate "elevation differential" since the two stacks of beams containing the beam that did hit plaintiff were only chest-high in height. They further argue that they are not liable under the statute because plaintiff himself repositioned the choker on the hoisted beam, and the raising gang secured the two stacks prior to the accident.

In his cross-motion, plaintiff argues that he is entitled to summary judgment on the issue of liability because the undisputed evidence establishes, as a matter of law, that he was struck by a beam that was improperly hoisted. He maintains that the proper procedure for lifting a steel beam was not followed here since the beam was already several feet above the floor before the hoisting process was begun, and it was abruptly lifted above his head before he could determine if it was properly balanced. As a separate basis for liability, plaintiff claims that the two stacks of beams were inadequately secured.

Defendants' motion for summary judgment as to the Labor Law § 240(1) claim is denied. The Court is unpersuaded by defendants' argument that section 240(1) is inapplicable because plaintiff was not struck by the hoisted beam. *Runner* plainly establishes that the statute's applicability does not depend upon whether a falling object actually *hits* an injured plaintiff (*see Runner*, 13 NY3d at 604). Thus, the relevant inquiry is whether plaintiff's injuries were a direct consequence of the application of the force of gravity to the hoisted beam, which in this

instance, can clearly be answered affirmatively (*see id.*; *see also Runner v New York Stock Exch., Inc.*, 590 F3d 904, 905 [2d Cir. 2010] [defendants found liable under section 240(1), as a matter of law, "because the application of the force of gravity to an 800 pound reel of wires caused plaintiff's hands to be severely injured while he was using a makeshift pulley system to lower the reel down four stairs"]).

Nor is the Court convinced that there was an insufficient elevation differential to support a violation of section 240(1). Without regard to the height of the stacked beams, it is uncontroverted that the hoisted beam was lifted three or four feet directly above plaintiff's head, which was a sufficient elevation differential to fall within the ambit of section 240(1) (*see Cardenas*, 68 AD3d at 437 [plaintiff who was injured while removing electrical panel positioned six or seven feet above ground was engaged in an activity covered by section 240(1)]; *Fontaine v Juniper Assoc.*, 26 Misc 3d 493, 497 [Bronx Co. 2009] ["Plaintiff's injury from a bundle of wood that fell from above, even if only one and a half feet above plaintiff, thus constitutes a special elevation related hazard . . . which is covered by Labor Law § 240(1)."], *aff'd* 67 AD3d 608 [1stDept 2009]; *see also Brown v VJB Const. Corp.*, 50 AD3d 373, 377 [1st Dept 2008] [citation omitted] [rejecting requirement of a "substantial" elevation differential]).

As to the issue of liability, the Court finds that plaintiff has established prima facie entitlement to judgment as a matter of law. The undisputed evidence establishes that plaintiff was injured when the hoisted beam abruptly rose above his head in an unbalanced manner and, due to the force of gravity, dislodged the two stacks of beams causing one or more beams to fall on plaintiff's legs as he was attempting to run to safety. Although there was a tag line, it failed to provide proper protection because the tag line man could not guide it properly since the beam came up so rapidly and was top heavy. There was also undisputed evidence that the proper procedure for lifting steel beams may not have been followed since the beam was lifted before plaintiff could determine if it was properly balanced. Plaintiff, therefore, has established a prima

facie case that the crane was not operated in a manner as to afford him proper protection, in violation of section 240(1) *(see Moller v City of New York*, 43 AD3d 371, 371 [1st Dept 2007] [section 240(1) was violated where hoisting mechanism failed while plaintiff was in the process of hoisting a two-ton structural piece from an elevated height to a platform]; *Osowski v Forrest City Ratner*, Sup. Ct., N.Y. County, Jan. 9, 2008, Solomon, J., index No. 107097/2005 [although plaintiff was not struck directly by the original falling object, section 240(1) liability was found where the proximate cause of his injuries was second beam falling and striking first beam which then struck plaintiff]).

Defendants have failed to raise an issue of fact sufficient to defeat plaintiff's cross-motion regarding liability. There has been no showing that plaintiff's conduct was the sole proximate cause of the accident (*see Kosavick*, 50 AD3d at 288; *Moller*, 43 AD3d at 372). Furthermore, defendants' attempt to shift responsibility for the accident by arguing that plaintiff himself repositioned the choker and that the raising gang secured the two stacks prior to the accident does not raise a triable issue, as a worker's contributory negligence is not a defense to a section 240(1) claim (*see Sharp*, 306 AD2d at 40 ["[t]hat the hoist was removed by plaintiff himself is irrelevant as comparative negligence is not a defense to a claim under the Labor Law]).

Accordingly, plaintiff's cross-motion for summary judgment under Labor Law § 240(1) on the issue of liability is granted (*see Ray v City of New York*, 62 AD3d 591 [1st Dept 2009] [plaintiff granted summary judgment on section 240(1) claim as to liability where steel beam that was being lowered atop steel towers came toward him at an angle, jumped around and could not be controlled by tag line men]; *Brown*, 50 AD3d at 377 [plaintiff granted summary judgment on section 240(1) claim where, due to effects of gravity and defective stone clamp, a slab of granite being hoisted three feet above grade fell and injured plaintiff]; *Gonzalez v Glenwood Mason Supply Co., Inc.*, 41 AD3d 338 [1st Dept 2007]; *Moller*, 43 AD3d at 371).

D. Labor Law § 241(6)

Defendants also move for summary judgment dismissing plaintiff's Labor Law § 241(6) claim as a matter of law. Plaintiff cross-moves for summary judgment in his favor as to liability.

Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation or demolition (*see Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 348 [1998]). Liability may be imposed under section 241(6) even where the owner or contractor did not supervise or control the worksite (*see id.*).

To support a cause of action under section 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of a rule or regulation of the Commissioner of the Department of Labor ("Industrial Code") that is applicable given the circumstances of the accident, and that sets forth a concrete standard of conduct rather than a mere reiteration of common law principals (*see Ross*, 81 NY2d at 502-04; *Ares v State*, 80 NY2d 959, 960 [1992]; *Cammon v City of New* York, 21 AD3d 196, 198 [1st Dept 2005]).

A violation of the Industrial Code, once proven, does not establish negligence as a matter of law, but rather is some evidence of negligence to be considered with other relevant proof (*see Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982]). "Thus, once it has been alleged that a concrete specification of the [Industrial] Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused [the] plaintiff's injury" (*Rizzuto*, 91 NY2d at 350). If proven, the owner or contractor is vicariously liable without regard to his or her fault (*see id.*). The owner or contractor "may, of course, raise any valid defense to the imposition of vicarious liability under section 241(6), including contributory and comparative negligence" (*id.; see also Ramputi v Ryder Constr. Co.*, 12 AD3d 260, 261 [1st Dept 2004]).

Plaintiff's Labor Law § 241(6) claim is predicated upon alleged violations of 12 NYCRR

23-1.7(e)(2) and 12 NYCRR 23-8.1(f)(1)(iii) and (iv), 23-8.1(f)(2)(i) and (ii), and 23.8-1(f)(6), as well as OSHA.[4] The Court will consider the alleged violations of the Industrial Code in turn.

1. 12 NYCRR 23-1.7(e)(2)

12 NYCRR 23-1.7(e)(2), which pertains to "tripping and other hazards," provides:

> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Defendants argue that section 23-1.7(e)(2) is inapplicable because the proximate cause of the accident was a falling beam, not debris. They also assert that the 6th floor was under Cornell's control, and that plaintiff had not complained about debris at the site. Plaintiff argues that section 23-1.7(e)(2) is specific and that there was unrefuted proof that he tripped over broken-up wooden debris while he was attempting to escape the falling beam, and that whether he complained about debris is irrelevant.

Although section 23-1.7(e)(2) is sufficiently specific to support a Labor Law § 241(6) claim (*see Vieira v Tishman Constr. Corp.*, 255 AD2d 235, 235 [1st Dept 1998]), the Court finds this provision inapplicable to this action as the undisputed evidence establishes that plaintiff's injuries were proximately caused by the falling of the hoisted beam, not by the debris (*see Romeo*, 61 AD3d at 492 [section 23-1.7(e)(2) was inapplicable because plaintiff who stepped on floor tile that unexpectedly dislodged "was not injured as a result of tripping over, or even slipping on, 'accumulat[ed]' debris, dirt, tools or materials"]; *Kulis v Xerox Corp.*, 231 AD2d 922, 923 [4th Dept 1996] [no violation of section 23-1.7(e)(2) where accident was caused by temporary protective flooring itself]). Therefore, the portion of defendants' motion that seeks dismissal of plaintiff's Labor Law § 241(6) claim predicated on 12 NYCRR 23-1.7(e)(2) is

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[4]In the bill of particulars, plaintiff also alleges violations of the following provisions of the Industrial Code: 12 NYCRR 23-1.5, 23-2.1, 23-2.3, 23-6, 23-7 and 23-9. His opposition and cross-motion do not address these sections, and the Court finds any claims premised upon them either abandoned or inapplicable.

granted, and plaintiff's cross-motion as to 12 NYCRR 23-1.7(e)(2) is denied as moot.

2. 12 NYCRR 23-8.1(f)

Plaintiff also alleges violations of several sections of 12 NYCRR 23-8.1(f), which pertains to the hoisting of "tower cranes" and provides in pertinent part:

> (f) Hoisting the load.
> (1) Before starting to hoist with a mobile crane, tower crane or derrick the following inspection for unsafe conditions shall be made:
> * * *
> (iii) The hook shall be brought over the load in such manner and location as to prevent the load from swinging when hoisting is started.
> (iv) The load is well secured and properly balanced in the sling or lifting device before it is lifted more than a few inches.
> * * *
> (2) During the hoisting operation the following conditions shall be met:
> (i) There shall be no sudden acceleration or deceleration of the moving load unless required by emergency conditions.
> (ii) The load shall not contact any obstruction.
> * * *
> (6) Mobile cranes, tower cranes and derricks shall not hoist or carry any load over and above any person except as otherwise provided in this Part (rule).

Defendants argue that section 23-8.1(f) is inapplicable because the accident was caused by plaintiff's own actions, since he failed to properly position the choker onto the beam and to alert the crane operator that the beam required readjusting.

Plaintiff argues that all of the cited provisions are specific and apply to establish a predicate for liability. With respect to section 23-8.1(f)(1)(iii) and (iv), plaintiff argues that, due to the actions of the signal man and/or the crane operator, the load was lifted abruptly and above his head before he could inspect it. As to section 23-8.1(f)(2)(i) and (ii), plaintiff submits that the load was accelerated suddenly, then descended suddenly, striking the stack of beams leading directly to his injuries. Plaintiff alleges a violation of section 23-8.1(f)(6) since the load was lifted directly above his head.

The Court denies defendants' motion for summary judgment under Labor Law § 241(6)

predicated upon 12 NYCRR 23-8.1(f). Defendants have failed to establish prima facie entitlement to summary judgment (*see Smalls*, 10 NY3d at 735) .

With regard to plaintiff's cross-motion, the Court finds that all of the cited provisions of 12 NYCRR 23-8.1(f) set forth specific safety standards for Labor Law § 241(6) purposes (*see Cammon*, 21 AD3d at 199; *Locicero v Princeton Restoration, Inc.*, 25 AD3d 664, 667 [2d Dept 2006]; *Marin v City of New York*, 2004 WL 2300442, *3 [Kings Co. 2004]). Furthermore, there is uncontroverted evidence that the hoisted beam was lifted at an angle in an unbalanced manner and abruptly rose three or four feet above plaintiff's head before striking the stacked beams. Thus, plaintiff has submitted sufficient evidence to establish a viable claim based on 12 NYCRR 23-8.1(f)(1)(iii) and (iv), 23-8.1(f)(2)(i) and (ii), and 23.8-1(f)(6) (*see Locicero*, 25 AD3d at 667; *Marin*, 2004 WL 2300442, *3).

As noted, where a violation of the Industrial Code is established, it does not conclusively establish a defendant's liability as a matter of law, but constitutes some evidence of negligence and thereby reserves, "for resolution by a jury, the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances" (*Rizzuto*, 91 NY2d at 351). Accordingly, plaintiff's cross-motion under Labor Law § 241(6) is denied as to liability, but granted to the extent that plaintiff has established a viable claim under section 241(6) predicated upon violations of 12 NYCRR 23-8.1(f)(1)(iii) and (iv), 23-8.1(f)(2)(i) and (ii), and 23.8-1(f)(6).

3. OSHA

Defendants also request dismissal of plaintiff's OSHA claim on the ground that an OSHA violation may not be used to support a violation of Labor Law § 241(6). Plaintiff raises no arguments in opposition to this portion of defendants' motion. Therefore, dismissal of the Labor Law § 241(6) claim to the extent that it is predicated upon OSHA is granted (*see Schiulaz v Arnell Constr. Corp.*, 261 AD2d 247, 248 [1st Dept 1999] [alleged violations of OSHA standards do not provide a basis for liability under section 241(6)]).

For these reasons and upon the foregoing papers, it is,

ORDERED that defendants' motion for summary judgment is: (1) granted as to the Labor Law § 200 and common law negligence claims; (2) denied as to the Labor Law § 240(1) claim; (3) granted as to the Labor Law § 241(6) claim predicated on 12 NYCRR 23-1.7(e) and OSHA; and (4) denied as to the Labor Law § 241(6) claim predicated on 12 NYCRR 23-8.1(f)(1)(iii) and (iv), 23-8.1(f)(2)(i) and (ii), and 23.8-1(f)(6); and it is further,

ORDERED that plaintiff's cross-motion for motion for summary judgment is: (1) granted on the issue of liability under Labor Law § 240(1); and (2) granted to the extent that plaintiff has established a viable claim under Labor Law § 241(6) predicated upon violations of 12 NYCRR 23-8.1(f)(1)(iii) and (iv), 23-8.1(f)(2)(i) and (ii), and 23.8-1(f)(6), but denied as to liability; and it is further,

ORDERED that the remainder of the action shall continue; and it is further,

ORDERED that defendants shall serve a copy of this order, with notice of entry, upon plaintiffs.

This constitutes the Decision and Order of the Court.

Dated: ~~March~~ Apr. 19, 2010

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**