Kearney v Bay Hills Prop. Owners, Inc.
2012 NY Slip Op 31574(U)
June 11, 2012
Supreme Court, Suffolk County
Docket Number: 09-39024
Judge: Daniel Martin
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SHORT FORM ORDER

INDEX No. 09-39024

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 8-25-11
ADJ. DATE 11-22-11
Mot. Seq. # 001 - MotD

CHAD KEARNEY,

Plaintiff,

- against -

BAY HILLS PROPERTY OWNERS, INC. and BAY HILLS PROPERTY OWNERS ASSOCIATION,

Defendants.

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Upon the following papers numbered 1 to 23 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 11 - 21 ; Replying Affidavits and supporting papers 22 - 23 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants is granted to the extent that (1) it seeks summary judgment dismissing so much of the plaintiff's complaint as alleges a cause of action pursuant to Labor Law § 240 (1); (2) it seeks summary judgment dismissing so much of the plaintiff's complaint as alleges a cause of action pursuant to Labor Law § 241 (6) premised on violations of 12 NYCRR §§ 23-1.35, 23-1.5, 23-1.6 (i), 23-6.1, 23-6.1 (i), 23 -9.1, 23-9.4 (h), 23-9.7 (e), 23-9.2 (a-h), 23-9.5 (a), (b), (d), (e), (f) and (g); and (3) it seeks summary judgment dismissing so much of the plaintiff's complaint as alleges causes of action pursuant to Labor Law § 200 and common law negligence; and is otherwise denied.

In this action, the plaintiff seeks to recover damages for personal injuries which he sustained on October 21, 2008 during an accident which occurred while he was performing work on a roadway, located in the Town of Huntington, New York, which is owned, operated, and/or maintained by the defendants. The defendants entered into a contract with the plaintiff's employer, non-party Roger Ambrosio Paving (hereinafter Ambrosio), to perform certain repairs and repaving of the subject

roadway. The plaintiff was purportedly injured when he fell off of a piece of equipment which was utilized to perform the work, a skid steer with an attached milling machine. At the time of the accident, the plaintiff was riding on the machine, which was in transit to the next location of the roadway which required work. In his complaint, the plaintiff alleges that the defendants are liable for his injuries based on their violations of Labor Law §§ 240 (1), 241 (6) and 200, as well as, common law negligence. Specifically, he alleges that the defendants were negligent in, *inter alia*, allowing him to be propelled off of the equipment, allowing him to fall from and then be struck by the equipment, failing to provide him with safety devices for his proper protection, causing slippery substances to be at the construction site including upon the skid steer, and allowing a defective and dangerous condition to exist at the construction site.

The defendants now move for summary judgment dismissing the complaint on the grounds that they did not violate §§ 200, 240 (1) and 241 (6) of the Labor Law and were not negligent. Specifically, they contend (1) the cause of action pursuant to Labor Law § 241 (6) should be dismissed because the Industrial Code provisions relied on are not specific enough to support liability, do not exist, or are inapplicable to the facts of this case, (2) the cause of action pursuant to Labor Law § 240 (1) should be dismissed because the plaintiff's fall from the skid loader is not the kind of elevation related hazard which supports such a claim; (3) the causes of action pursuant to Labor Law §§ 240 (1) and 241 (6) should be dismissed because the plaintiff was not engaged in a protected activity set forth in such provisions but was engaged in routine maintenance; and (4) the causes of action based on violation of Labor Law § 200 and common law negligence should be dismissed where the defendants did not direct, control or supervise the plaintiff's work.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

In support of the motion for summary judgment, the defendants submit, *inter alia*, the deposition testimony of the plaintiff, a photograph depicting the machine the plaintiff was standing on at the time of his accident, and the deposition testimony and affidavit of Richard Bonitz on behalf of the defendants. As is relevant to this motion, the plaintiff testified that he started with Ambrosio in 2004 and worked with them through the time of his accident. On the date of his accident, Ambrosio was performing a large project involving maintenance work on a roadway. They had been performing work on the subject roadway for three days prior to the date of the incident. On the first day at the job site, they marked the location of the pot holes which needed to be repaired in the roadway. On the following two days, as well as on the date of the accident, they were "squaring the holes." Squaring the holes is a process by which larger holes are made, and cleaned out, so that the potholes can be effectively filled and the roadway

repaved. A piece of equipment, known as a skid steer or skid loader was being utilized with an attached planer or milling machine in order to dig out the pot holes. The final paving would be performed after this process was complete. On the morning of the incident, the owner of Ambrosio provided them with a map with the potholes that needed to be repaired. The plaintiff's function on the date of the incident was to direct the skid steer where to stop, and where to put down and pick up the milling machine. The milling machine sits very close to the ground but raises up slightly to travel. Ambrosio workers were following behind the machine to clean the debris out of the holes. The plaintiff's supervisor, John Walters, was operating the machine. Shortly before the accident, Walters instructed the plaintiff to get onto the machine in order to travel down the roadway to the next marked pothole, which was further down the roadway. The other workers would take a truck to meet them after they completed clearing out the holes. The plaintiff got onto the machine, placing his feet at two different heights and locations on the planer, and held onto a handle that was present on the skid steer. The plaintiff marked the location on which he was standing in a photograph which he testified accurately depicted the equipment. His right foot was located approximately one foot off of the ground and his left foot slightly higher. The plaintiff testified that he had ridden on this type of equipment in a similar manner in the past. He testified that although a seat within a cage like structure was part of the skid steer, that this was where the operator of the skid steer sat. He admitted that there was no other seat or position on the equipment that was designed to carry a passenger.

The plaintiff testified that he was riding on the machine for approximately thirty seconds to one minute prior to the accident. The machine, which was traveling approximately 7 to 10 m.p.h., traveled approximately one hundred yards during this time. Then it suddenly bucked or jerked, causing the plaintiff to fall forward off of the machine. The wheel of the machine rolled up part of his left leg prior to the time the operator stopped the machine and backed off. According to the plaintiff, no action on the part of Walters in operating the machine contributed to his accident. The plaintiff was unsure of why the machine jerked. He believed the machine might have come into contact with something, such as a pothole or debris or may have gone off the edge of the roadway, which was breaking up. He admitted that, at the time of the incident, his company was working to correct any defects in the condition of the roadway's pavement. The plaintiff testified that there was no foreign substance on any part of the equipment which contributed to his accident.

The plaintiff testified that, to his knowledge, a representative of the defendants was not present at the job site in order to instruct Ambrosio what to do. The plaintiff did not take direction from anyone with respect to the work to be performed at the location except his supervisor and the owner of the company. According to the plaintiff, the owner of Ambrosio was present on the job site to observe the work on the date of his accident.

Richard Bonitz, a member of the Board of Directors of the Bay Hills Property Association, testified that Bay Hills is a private community, which is less than one square mile in size, consisting of approximately 200 households and thirty streets. The location of the plaintiffs accident, the intersection of Soundview and Shore Road, was owned by Bay Hills. According to Bonitz, Bay Hills does not have a maintenance department to maintain or perform work on the several asphalt roadways that are present in the community. Bay Hills also does not own any of the equipment necessary to maintain or repair the roadways. When work is required to the roadway, it is contracted out. According to Bonitz, potholes

were routinely repaired on the Bay Hills roadways. At the time of the incident, Ambrosio had a contract to perform such pothole repairs and to perform road work on certain roadways within the private community. A volunteer on the Board of Directors, Roger Fay, was in charge of overseeing the roadways and acted as a liaison with Ambrosio. However, Fay was generally not present when Ambrosio was performing the work and, to Bonitz' knowledge, Fay did not give any instruction to anyone affiliated with Ambrosio. Bonitz testified that, to his knowledge, no one from Bay Hills provided any type of direction or control over the work performed by Ambrosio.

In his affidavit, Bonitz avers that, as a member of the Board of Directors for the Bay Hills Property Owners Association, he has personal knowledge that, on the date of the accident, Ambrosio had a contract with the Bay Hills Property Owners Association for routine maintenance of the roadways within the Bay Hills private community. As part of such contract, Ambrosio was in complete control as to the manner and method by which any maintenance was to be done to the roadways. He averred that, on the date of the accident, neither he, nor any other member of Bay Hills Property Owners, Inc. or Bay Hills Property Owners Association, directed, supervised or controlled the manner in which the plaintiff was to perform his work.

The evidence submitted by the defendants establishes their *prima facie* entitlement to summary judgment dismissing so much of the plaintiff's complaint as seeks recovery pursuant to Labor Law § 240 (1) on the grounds that the plaintiff's fall from the skid loader is not the kind of elevation related hazard protected by such statute. Labor Law § 240 (1) provides in 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." In ***Rocovich v Consolidated Edison Co*** (78 NY2d 509, 577 NYS2d 219 [1991]), the Court of Appeals noted that the hazards contemplated and leading to the enactment of Labor Law § 240 (1) 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 ***Narducci v Manhasset Bay Assocs***, (96 NY2d 259, 267, 727 NYS2d 37 [2001]), describing cases involving these risks as "falling worker" and "falling object" cases respectively, the Court of Appeals noted that "[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)." In ***Toefer v Long Island R.R.*** (4 NY3d 399, 795 NYS2d 511 [2005]) the Court of Appeals reiterated this finding and further noted that, in some cases involving falls of workers and objects, the Court had held that where a plaintiff was exposed to the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law § 240 (1), the plaintiff cannot recover under the statute (*see also* ***Rodriguez v Margaret Tietz Ctr. for Nursing Care, Inc.***, 84 NY2d 841, 843, 616 NYS2d 900 [1994]).

In the instant matter, the evidence submitted establishes that the plaintiff's fall from the skid steer with attached milling equipment did not entail the kind of elevation-related hazard contemplated by Labor Law § 240 (1) (*see* ***Toefer v Long Island R.R.***, *supra*; ***Modeste v Mega Contr., Inc.***, 40 AD3d

255, 835 NYS2d 156 [1st Dept 2007]). It is undisputed that, at the time of the incident, the plaintiff was riding on equipment, which was no more than a few feet off of the ground (*see* ***Dilluvio v City of New York***, 95 NY2d 928, 721 NYS2d 603 [2000]; ***Bond v York Hunter Constr.***, 95 NY2d 883, 715 NYS2d 209 [2000]; ***Lavore v Kir Munsey Park 020, LLC***, 40 AD3d 711, 835 NYS2d 708 [2d Dept 2007]; ***Vargas v State***, 273 AD2d 460, 710 NYS2d 609 [2d Dept 2000]). Moreover, the equipment upon which the plaintiff was riding was not used to facilitate access to a different elevation level for the plaintiff or his materials, and at the time of the incident was being utilized to transport the plaintiff from one work location to another (*see* ***Modeste v Mega Contr., Inc.***, *supra*). The plaintiff's opposition does not address this branch of the defendants' motion. Accordingly, the branch of the defendants' motion seeking summary judgment dismissing so much of the plaintiff's complaint as seeks recovery pursuant to Labor Law § 240 (1) is granted.

With respect to the branch of the defendants' motion which seeks summary judgment dismissing so much of the plaintiff's complaint as seeks recovery pursuant to Labor Law § 241 (6), such provision imposes a nondelegable duty of reasonable care upon an owner, general contractor, or agent to provide reasonable and adequate protection to workers. Pursuant to this provision, a violation of an explicit and concrete provision of the Industrial Code by a participant in the construction project constitutes some evidence of negligence for which the owner or general contractor may be held vicariously liable (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 348, 670 NYS2d 816 [1998]; ***Melchor v Singh***, 90 AD3d 866, 935 NYS2d 106 [2d Dept 2011]; ***Fusca v A & S Constr., LLC***, 84 AD3d 1155, 924 NYS2d 463 [2d Dept 2011]; ***Forschner v Jucca Co.***, 63 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; ***Cun-En Lin v Holy Family Monuments***, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]; *see also* ***Mosher v State***, 80 NY2d 286, 590 NYS2d 53 [1992]). In order to recover damages on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the defendant's violation of an Industrial Code provision which sets forth specific safety standards and that such violation was a proximate cause of the accident (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Ramos v Patchogue-Medford School Dist.***, 73 AD3d 1010, 906 NYS2d 45 [2d Dept 2010]; ***Hricus v Aurora Contrs.***, 63 AD3d 1004, 883 NYS2d 61 [2d Dept 2009]; ***Seaman v Bellmore Fire Dist.***, 59 AD3d 515, 873 NYS2d 181 [2d Dept 2009]; ***Fitzgerald v New York City School Constr. Auth.***, 18 AD3d 807, 796 NYS2d 694 [2d Dept 2005]). The rule or regulation alleged to have been breached must be a specific, positive command and must be applicable to the facts of the case (*see* ***Forschner v Jucca Co.***, *supra*; ***Cun-En Lin v Holy Family Monuments***, *supra*).

At the outset, and contrary to the defendants' contention, the evidence submitted fails to establish their *prima facie* entitlement to summary judgment dismissing so much of the plaintiff's complaint as seeks recovery pursuant to Labor Law § 241 (6) on the grounds that the work being performed at the time of the incident was not a protected activity under these statutes, but constituted "routine maintenance." Liability under Labor Law § 241 (6) is limited to accidents where the work being performed involves "construction, excavation or demolition work" (*see* ***Toefer v Long Island R.R.***, 4 NY3d 399, 795 NYS2d 511 [2005]; ***Peluso v 69 Tiemann Owners Corp.***, 301 AD2d 360, 755 NYS2d 17 [1st Dept 2003]). Construction work is further defined by regulation as "all work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures, whether or not such work is performed in proximate relation to a specific building or other structure" (12 NYCRR 23-1.4 [b] [13]; *see* ***Mosher v State***, 80 NY2d 286, 590 NYS2d 53 [1992];

Peluso v 69 Tiemann Owners Corp., *supra*). Tasks comprising "routine maintenance" are not protected under Labor Law § 241 (6) (*see* ***Radoncic v Independence Garden Owners Corp.***, 67 AD3d 981, 890 NYS2d 555 [2d Dept 2009]; ***LaGiudice v Sleepy's Inc.***, *supra*; *see e.g.* ***Azad v 270 5th Realty Corp***, 46 AD3d 728, 848 NYS2d 688 [2d Dept 2007]; ***Wolfe v KLR Mech., Inc.***, 35 AD3d 916, 826 NYS2d 458 [3d Dept 2006]; *see also* ***Esposito v N.Y. City Indus. Dev. Agency***, 1 NY3d 526, 770 NYS2d 682 [2003]). "The question of whether a particular activity constitutes a "repair" or "routine maintenance" must be determined on a case-by-case basis (*see* ***Riccio v NHT Owners, LLC***, 51 AD3d 897, 858 NYS2d 363 [2d Dept 2008]; *see also* ***Davidson v Ambrozewicz***, 12 AD3d 902, 785 NYS2d 149 [3d Dept 2004]).

Here, the evidence submitted fails to demonstrate, as a matter of law, that the work in which the plaintiff was engaged at the time of his accident constituted "routine maintenance." Rather, there exists a triable issue of fact as to whether the work should properly be characterized as "routine maintenance" or as either "repair work" or some other task that is protected by these statutes (*see* ***Reyes v Arco Wentworth Mgt. Corp.***, 83 AD3d 47, 919 NYS2d 44 [2d Dept 2011]; ***Weisman v Duane Reade, Inc.***, 64 AD3d 643, 883 NYS2d 137 [2d Dept 2009]; *cf.* ***Herrera v Union Mech. of NY Corp.***, 80 AD3d 564, 914 NYS2d 295 [2d Dept 2011]; ***LaGiudice v Sleepy's Inc.***, *supra*; ***Davidson v Ambrozewicz***, *supra*; *compare* ***English v City of New York***, 43 AD3d 811, 844 NYS2d 320 [2d Dept 2007]; ***Peluso v 69 Tiemann Owners Corp.***, *supra*). Although it is unnecessary to consider the opposing papers on this issue, the Court further notes that evidence submitted in opposition to the motion, including the plaintiff's affidavit and the copy of the agreement between the defendants and Ambrosio for the subject paving work, further raises a triable issue of fact as to whether the plaintiff was engaged in routine maintenance at the time of his accident. Accordingly, the defendants are not entitled to summary judgment dismissing the plaintiff's cause of action based on Labor Law § 241 (6) on the grounds that the work being performed at the time of the incident was "routine maintenance."

In his complaint, the plaintiff alleges that the defendants are liable pursuant to Labor Law § 241 (6) based on their purported violations of the regulations found at 12 NYCRR §§ 23-1.35, 23-1.5, 23-6.1, 23-6.1(i), 23-9.1, 23-9.2; 23-9.7 (e), 23-9.2 (i), 23-9.4 (h) or 23-9.5 (c). In his bill of particulars, he further alleges that the defendants have violated the regulations found at 12 NYCRR §§ 23-1.6 (i) and 23-9.5. The evidence submitted on this motion demonstrates the defendants' *prima facie* entitlement to summary judgment dismissing the plaintiff's Labor Law § 241 (6) claim to the extent that it is premised on violations of 12 NYCRR §§ 23-1.35, 23-1.5, 23-1.6 (i), 23-6.1, 23-6.1 (i), 23-9.1, 23-9.4 (h), 23-9.7 (e), 23-9.2 (a-h), 23-9.5 (a), (b), (d), (e), (f) and (g). In this regard, § 12 NYCRR 23-1.5 does not set forth a specific standard of conduct, but sets forth a general standard of care for employers, and thus cannot serve as a predicate for liability for a Labor Law § 241 (6) claim (*see* ***Gasques v State of New York***, 15 NY3d 869, 910 NYS2d 415 [2010]; ***Ulrich v Motor Parkway Props., LLC***, 84 AD3d 1221, 924 NYS2d 493 [2d Dept 2011]; ***Spence v Island Estates at Mt. Sinai II, LLC***, 79 AD3d 936, 914 NYS2d 203 [2d Dept 2010]; ***Sparkes v Berger***, 11 AD3d 601, 783 NYS2d 390 [2d Dept 2004]). Likewise, 12 NYCRR § 23-9.1, does not itself support a Labor Law § 241 (6) claim as such provision does not set forth a safety standard, but merely provides a definition of power-operated equipment for purposes of the applicability of subpart 23-9 (*see also* ***St. Louis v Town of N. Elba,*** 16 NY3d 411, 923 NYS2d 391 [2011]).

The defendants purported reliance on 12 NYCRR §§ 23-1.35 and 23-1.6 (i) is misplaced as no such regulations exist within the Industrial Code. Moreover, to the extent that the plaintiff, purports to rely on 12 NYCRR § 23-1.6, such regulation fails to support a Labor Law 241 (6) violation as it requires that an "employee" observe the Industrial Code regulations and utilize the safety equipment provided (*see* ***Balladares v Southgate Owners Corp.***, 40 AD3d 667, 835 NYS2d 693 [2d Dept 2007]; ***Lawyer v Rotterdam Ventures***, 204 AD2d 878, 612 NYS2d 682 [3d Dept 1994]; *cf.* ***Sdregas v City of New York***, 309 AD2d 612, 765 NYS2d 610 [1st Dept 2003]).

The evidence submitted establishes that the regulations found at 12 NYCRR § 23-6.1, including § 23-6.1 (i), are not applicable to the facts of this case (*see* ***Georgakopoulos v Shifrin***, 83 AD3d 659, 920 NYS2d 383 [2d Dept 2011]). These provisions apply to "material hoisting equipment" and, here, the plaintiff's accident did not involve a hoist or crane (*see* ***Balladares v Southgate Owners Corp.***, *supra*; ***Aloi v Structure-Tone, Inc.***, 2 AD3d 375, 767 NYS2d 832 [2d Dept 2003]; *see also* ***Toefer v Long Island R.R.***, *supra*; ***Locicero v Princeton Restoration, Inc.***, 25 AD3d 664, 811 NYS2d 673 [2d Dept 2006]).

12 NYCRR § 23-9.4 (h) is inapplicable to the facts of this case as such provision provides requirements for power shovels and back hoes that are used for "material handling" (***Robinson v County of Nassau***, 84 AD3d 919, 923 NYS2d 135 [2d Dept 2011]) and the equipment at issue in the instant matter, the skid steer and attached milling machine, was not so utilized (*see* ***St. Louis v Town of N. Elba***, *supra*; *cf.* ***Vicari v Triangle Plaza II, LLC***, 16 AD3d 672, 793 NYS2d 430 [2d Dept 2005]). In addition, to the extent that the plaintiff relies on 12 NYCRR § 23-9.4 (h) (4), which requires that unauthorized persons shall not be permitted in the cab of equipment used for material handling or in the area immediately adjacent to such equipment, such regulation is also inapplicable to the facts of this case as the evidence submitted establishes that the defendant, as a member of the work crew, was not an "unauthorized person" (*see* ***Ferreira v City of New York***, 85 AD3d 1103, 927 NYS2d 100 [2d Dept 2011]; ***Carroll v County of Erie***, 48 AD3d 1076, 850 NYS2d 738 [4th Dept 2008]).

Similarly, 12 NYCRR § 12-9.7 (e), which prescribes required safety practices for "motor trucks," is inapplicable to the facts of this case where the equipment being utilized by the defendant at the time of his accident was not a truck or similar vehicle (*see* ***Modeste v Mega Contr., Inc.***, *supra*; ***Vargas v State***, *supra*; *but see* ***Borowicz v International Paper Co.***, 245 AD2d 682, 664 NYS2d 893 [3d Dept 1997]; *see also* ***Fitzgerald v N.Y. City Sch. Constr. Auth.***, *supra*; ***Bailey v Irish Dev. Corp.***, 274 AD2d 917, 711 NYS2d 241 [3d Dept 2000]).

Although the equipment involved in the instant matter is "power-operated heavy equipment or machinery" as defined by 12 NYCRR § 23-9.1 (*see generally* ***Misicki v Caradonna***, 12 NY3d 511, 882 NYS2d 375 [2009]; ***Cabrera v Revere Condominium***, 91 AD3d 695, 937 NYS2d 98 [2d Dept 2012]) the evidence submitted establishes the inapplicability of all of the subdivisions of 12 NYCRR § 23-9.2 with the exception of 12 NYCRR § 23-9.2 (i) (*see* ***McKee v Great Atl. & Pac. Tea Co.***, 73 AD3d 872, 905 NYS2d 601 [2d Dept 2010]; ***Vicari v Triangle Plaza II, LLC***, *supra*). In this regard, the plaintiff's accident did not result from the failure to maintain the skid steer and attached milling device in good repair (§ 23-9.2 [a]), from the operation of such equipment by someone who was not trained and designated or from the operator's failure to remain at the controls while handling a load (§ 23-9.2 [b]),

from an improper load on such equipment (§ 23-9.2 [c]), from the failure to protect the moving parts of such equipment (§ 23-9.2 [d]), from failures during refueling of the equipment (§ 23-9.2 [e]), from an improper engine exhaust discharge (§ 23-9.2 [f]), from a load which was suspended while the equipment was at rest (§ 23-9.2 [g]) or from the absence of adequate rollover protection or seat belts (§ 23-9.2 [h]).

In a similar vein, although the equipment involved in the instant matter may be considered an "excavating machine," the evidence submitted establishes the inapplicability of all of the subdivisions of 12 NYCRR § 23-9.5 with the exception of § 23-9.5 (c). In this regard, the plaintiff's accident did not result from improper or unstable footing on the subject equipment (§ 23-9.5 [a]), the operator of such machine being exposed to an overhead hazard requiring a cab or cover (§ 23-9.5 [b]), the machine's operation near a power line or facility (§ 23-9.5 [d]), or material being pushed manually into the path of the machine (§ 23-9.5 [e]). Nor was the machine stopped or parked (§ 23-9.5 [f]) or backing up at the time of the incident (§ 23-9.5 [g]).

In opposition to the defendants' *prima facie* showing of entitlement to summary judgment dismissing the plaintiff's Labor Law § 241 (6) claim to the extent that it is premised on the aforementioned violations, the plaintiff failed to submit sufficient evidence to raise a triable issue of fact. The conclusory and unsupported conclusions contained in the affidavit of the plaintiff's expert were insufficient for this purpose. Accordingly, the branch of the defendants' motion for summary judgment which seeks dismissal of the plaintiff's Labor Law § 241 (6) claim is granted to the extent that such claim is premised on violations of 12 NYCRR §§ 23-1.35, 23-1.5, 23-1.6 (i), 23-6.1, 23-6.1 (i), 23-9.1, 23-9.4 (h), 23-9.7 (e), 23-9.2 (a-h), 23-9.5 (a), (b), (d), (e), (f) and (g).

However, the branch of the defendants' motion for summary judgment which seeks dismissal of the plaintiff's Labor Law § 241 (6) claim is denied to the extent that such claim is premised on violations of 12 NYCRR §§ 23-9.2 (i) and 23-9.5 (c). The evidence presented is insufficient to demonstrate, as a matter of law, the defendants' *prima facie* entitlement to summary judgment dismissing the plaintiff's Labor Law § 241 (6) claim to the extent that it is premised on such violations. 12 NYCRR § 23-9.2 (i) provides, in pertinent part, that "persons shall not ride on the loads, buckets, blades, slings, balls, hooks, or similar parts of power-operated equipment or machines." Here, the evidence submitted raises a triable issue of fact as to whether this provision was violated when the plaintiff was instructed to ride on the milling machine which was attached to the skid steer (*compare* ***Carroll v County of Erie***, *supra*). Likewise, the evidence presented demonstrates the existence of a triable issue of fact as to the applicability of 12 NYCRR § 23-9.5 (c). Such provision provides, in pertinent part, that "no person except the operating crew shall be permitted on an excavating machine while it is in motion or operation" (*cf.* ***Ferreira v City of New York***, *supra*). The evidence here fails to demonstrate that the plaintiff was not on an excavating machine while it was in motion. The evidence also fails to establish, as a matter of law, that his presence was based on his role as part of the "operating crew" (*but see* ***Mingle v Barone Dev. Corp.***, 283 AD2d 1028, 723 NYS2d 803 [4th Dept 2001]). In light of the defendants' failure to meet their *prima facie* burden with respect to these claims, the branch of their motion seeking summary judgment dismissing the Labor Law § 241 (6) cause of action must be denied to the extent that it seeks dismissal of such claims without regard to the sufficiency of the opposition papers.

Lastly, turning to the branch of the defendants' motion which seeks summary judgment dismissing so much of the plaintiff's complaint as seeks recovery pursuant to Labor Law § 200 and common law negligence. Labor Law § 200 merely codifies the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra* at 352; ***Gasques v State of New York***, *supra*; ***Dooley v Peerless Importers***, 42 AD3d 199, 837 NYS2d 720 [2d Dept 2007]). When a worker's injuries result from an unsafe or dangerous condition existing at a work site, the liability of a party will depend upon whether the party had control of the place where the injury occurred, and whether it either created, or had actual or constructive notice of, the dangerous condition (*see* ***Cook v Orchard Park Estates, Inc.***, 73 AD3d 1263, 902 NYS2d 674 [3d Dept 2010]; ***Harsch v City of New York***, 78 AD3d 781, 910 NYS2d 540 [2d Dept 2010]; ***Martinez v City of New York***, 73 AD3d 993, 901 NYS2d 339 [2d Dept 2010]). When a worker's injuries result from the use of dangerous or defective equipment at the job site, or the method and manner of the work at issue, it must be shown that "the party to be charged had the authority to supervise or control the performance of the work" (***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323[2d Dept 2008]; *see* ***Reyes v Arco Wentworth Mgt. Corp.***, *supra*; ***La Veglia v St. Francis Hosp.***, 78 AD3d 1123, 912 NYS2d 611 [2d Dept 2010]; ***Chowdhury v Rodriguez***, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]; ***Gasques v State of New York***, *supra*; ***Orellana v Dutcher Ave. Bldrs.***, 58 AD3d 612, 871 NYS2d 352 [2d Dept 2009]; ***Dooley v Peerless Importers***, *supra*). General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under the statute (*see* ***La Veglia v St. Francis Hosp.***, *supra*; ***Orellana v Dutcher Ave. Bldrs.***, *supra*; ***Perri v Gilbert Johnson Enters.***, 14 AD3d 681, 790 NYS2d 25 [2d Dept 2005]). The authority to review safety at the site, ensure compliance with safety regulations and contract specifications, and to stop work for observed safety violations is also insufficient to impose liability (*see* ***Austin v Consolidated Edison***, 79 AD3d 682, 913 NYS2d 684 [2d Dept 2010]; ***Capolino v Judlau Contr.***, 46 AD3d 733, 848 NYS2d 346 [2d Dept 2007]; ***McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.***, 41 AD3d 796, 839 NYS2d 164 [2d Dept 2007]; ***Garlow v Chappaqua Cent. School Dist.***, 38 AD3d 712, 832 NYS2d 627 [2d Dept 2007]; ***Perri v Gilbert Johnson Enters.***, *supra*). Rather, it must be demonstrated that the defendant controlled the manner in which the work was performed (*see* ***La Veglia v St. Francis Hosp.***, *supra*; *cf.* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Dooley v Peerless Importers***, *supra*; ***Hughes v Tishman Constr. Corp.***, 40 AD3d 305, 836 NYS2d 86 [1st Dept 2007]).

The evidence submitted on the instant motion, demonstrates, as a matter of law, that the plaintiff's accident was not caused by the defendants' negligence in allowing a defective condition to exist on their premises. In this regard, the plaintiff expressly testified that there was no foreign substance which contributed to his accident. Although he testified that the machine may have come in contact with a pothole or gone off the edge of the roadway, he admitted that Ambrosio was specifically hired to repair any defects in the pavement of the roadway. Moreover, the plaintiff admitted that he was, in fact, unsure of why the machine jerked. The evidence submitted also demonstrates, as a matter of law, that the defendants cannot be held liable for the use of dangerous or defective equipment at the job site as they did not supervise or control the plaintiff's work (*see* ***Reyes v Arco Wentworth Mgt. Corp.***, *supra*). Indeed, the plaintiff testified that he did not take direction from anyone with respect to the work to be performed at the location except for from his supervisor and the owner of Ambrosio.

The plaintiff's opposition does not address this branch of the defendants' motion. Accordingly, the branch of the defendants' motion which seeks summary judgment dismissing so much of the plaintiff's complaint as seeks recovery pursuant to Labor Law § 200 and common law negligence is granted.

Dated: JUNE 11, 2012

J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**