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

PRESENT: FREED HON. KATHRYN FREED Justice JUSTICE OF SUPREME COURT

PART 5

BARROS, JOSE

INDEX NO. 109338/07

MOTION DATE

-V-

ARTHUR KILL POWER, LLC, ET AL.

MOTION SEQ. NO. 008

MOTION CAL. NO.

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

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

NOV 15 2013

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 11-8-13 NOV 08 2013

HON. KATHRYN FREED J.S.C.
JUSTICE OF SUPREME COURT

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

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JOSE BARROS,

Plaintiff,

-against-

ARTHUR KILL POWER, LLC, NRG ARTHUR KILL OPERATIONS and CONSOLIDATED EDISON OF NEW YORK,

Defendants.

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ARTHUR KILL POWER, LLC,

Plaintiff,

-against-

WING ENVIRONMENTAL, INC.,

Third-Party Defendant.

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DECISION/ORDER
Index No. 109338/2007
Seq. No. 008

KATHRYN E. FREED, JSC:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....1-2 (Exhs. B-D)
ANSWERING AFFIDAVITS.....	.....3 (Exhs. A-B)
REPLYING AFFIDAVITS.....	.....
EXHIBITS.....	.....
OTHER.....	.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendant Consolidated Edison Company of New York, ("Con Ed"), moves for an Order for leave to amend the Complaint and Bill of Particulars to add claims sounding in violation of Labor Law§ 240 and§ 241(6) pursuant to CPLR§ 3025(b); and a new trial pursuant to CPLR§ 4113(b).

Defendant Arthur Kill Power, LLC NRG Arthur Kill Operations opposeS.

After a review of the papers presented, all relevant statutes and case law, the Court **denies** the Order To Show Cause.

Factual and procedural background:

Plaintiff seeks monetary damages for injuries he sustained in an accident occurring on February 26, 2006, when as he was unloading materials from his employer's van on a construction site, he alleged that he slipped on grease and fell three feet through a gap between the van and the loading dock. Plaintiff's boss had backed up his van to the end of the loading dock to unload some materials. However, he did not back up the van completely against the loading dock because the back door of the van opened outwards. At trial, there was testimony that there was a 12 ½ to 24 inch gap between the van and loading dock.

Consequently, plaintiff commenced the instant action via the filing of a Summons and Complaint on July 6, 2007. Issue was joined on or about July 30, 2007 by the service of the Answer of defendants' Arthur Kill Power, LLC NRG Arthur Kill Operations and Consolidated Edison of New York. A Third-Party action was subsequently commenced on or about September 25, 2008 when plaintiff's counsel received Third-Party defendant Wing Environment, Inc.'s Answer.

On June 6, 2013, the instant case was tried before a jury with this Court presiding. On June 13, 2013, the jury rendered a verdict. However, since five sixths of the jurors were unable to agree on the issue of liability, this Court had no alternative but to declare a mistrial. Thereafter, as a result of the testimony adduced at trial, plaintiff discovered that defendants had violated Labor Law§§200, 240 and 241(6). At the time of trial, plaintiff orally argued and later submitted a memorandum of law seeking to amend his Complaint to add Labor Law§ 200, which this Court granted.

Positions of the parties:

Plaintiff asserts that the Court's previous ruling is now considered the law of the case, and as such, he seeks leave to amend his Complaint and Bill of Particulars to conform to the proof presented at trial and include a specification of defendants' violations of their statutory duties pursuant to Labor Law§§ 200, 240(1) and 241(6). Plaintiff also asserts that any claim of surprise or prejudice by defendants is vitiated because he merely seeks to amend his Complaint and Bill of Particulars on a theory of law based on facts formerly alleged.

Plaintiff argues he must be permitted to amend the complaint and bill of particulars ("pleadings"), to add claims sounding in violation of Labor Law§§ 240(1) and 241(6). He argues that "Labor Law 240 covers injuries flowing directly from the force of gravity determined by whether an enumerated safety device would have prevented the injury, not whether the device would have prevented the fall. Specifically, this law protects workers exposed to an elevated differential either because of heights, or when exposed to the danger of materials falling on the worker." (OSC, exh. I., ¶ 7). Plaintiff argues that since he fell three feet, his injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential, wherein such negligence is the type codified in Labor Law§§ 200, 240 and 241(6).

Plaintiff also argues that the fact that common law negligence alleged in his pleadings is based on the same facts as the proposed amendment, defendants cannot legitimately claim surprise and/or prejudice. Lastly, plaintiff argues that he is entitled to a new trial pursuant to CPLR § 4113(b).

Defendants argue that plaintiff should be precluded from amending his complaint to assert a cause of action predicated on Labor Law§§ 240 and 241(6) because such claims would be palpably

improper where the new claims being asserted are time barred and cannot be saved by the relation-back doctrine. They argue that the new claims asserted under Labor Law§§ 240 and 241(6), although still personal injury claims, are time-barred and are claims that require specific elements of proof that "are different from the run-of-the-mill personal injury claims." (Aff. in Opp., p.3, ¶ 6). Defendants also argue that in order to prove a claim predicated on Labor Law §241(6), plaintiff must allege and prove a violation of one or more Industrial Code violations and that said violation was a proximate cause of his injuries.

Defendants point out that it is undisputed that plaintiff did not plead a violation of any sections of the Labor Law or any industrial code for seven years since the commencement of this action. "Therefore, because Labor Law claims are technical in nature, in that, an industrial code violation need be pleaded and proved, Plaintiff's original Pleadings 'did not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved' with respect to Labor Law§ 241(6) claim. Accordingly, the relation-back doctrine would not save a new claim predicated on Labor Law§ 241(6) because there was no notice." (Aff. in Opp., p. 3, ¶ 7). Defendants also argue that in order to assert a new cause of action, there must have been notice and here, the original pleadings did not provide notice of any Labor Law claims.

Defendants also argue that plaintiff should not be permitted to amend to include a claim predicated on Labor Law§ 240 because this section is inapplicable to the facts of this case and is also not saved by the relation-back doctrine. They argue that Labor Law §240 applies only to work-site injuries that occur as a result of falling from an elevated-height or being struck by a falling object that was improperly raised or inadequately secured above the ground. Thus, the instant case falls outside of the purview of Labor Law§ 240. Furthermore, defendants argue that plaintiff's potential

new claim based on Labor Law§ 240 is not saved by the relation-back doctrine because there was no notice that such a claim could be asserted given the technical nature of a claim under this section. Defendants claim that Labor Law§ 240 is not like common law negligence, because it does not require a showing of control or notice on the part of the building owner and gives rise to absolute liability.

Defendants further argue that to permit plaintiff to now assert a claim predicated on Labor Law§ 240 after discovery has been completed and a subsequent mistrial has occurred, would cause extreme prejudice to them as they have discontinued their third-party claim against plaintiff's employer, who could have faced liability for plaintiff's injuries on a Labor Law§240 claim. Moreover, the new claims would require defendants to retain an expert and depose other non-parties, a time consuming and expensive venture.

Defendants further argue that plaintiff should be precluded from asserting a claim based on Labor Law§ 241(6) because this section is inapplicable to the instant case because plaintiff had not been engaged in building, construction, demolition or excavation work incidental thereto. There was also no construction, neither the loading dock nor the van were a construction site, nor could they be classified as a passageway, thoroughfare or walkway to any construction site or actual construction.

Conclusions of law:

"Applications for leave to amend pleadings under CPLR 3025(b) should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit" (*Maldonado v. Newport Gardens, Inc.*, 91 A.D.3d 731, 732 [2d Dept. 2012]; see also *Briarpatch Ltd., L.P. v. Briarpatch Film Corp.*, 60

A.D.3d 585, 585 [1st Dept. 2009];*Thompson v. Cooper*, 24 A.D.3d 203, 205 [1st Dept. 2005]).

The decision of whether to grant leave to amend a pleading is generally left to the sound discretion of the trial court (see *Peach Parking Corp. v. 346 W. 40th Street, LLC*, 42 A.D.3d 82 [1st Dept. 2007]; *Mayers v. D'Agostino*, 58 N.Y.2d 696 [1982]; *Lanpont v. Savvas Cab Corp., Inc.*, 244 A.D.2d 208 [1st Dept. 1997]). However, where "an application for leave to amend is sought after a long delay and the case has been certified as ready for trial, judicial discretion in allowing such amendments should be discrete, circumspect, prudent, and cautious" (*Velez v. South Nine Realty Corp.*, 57 A.D.3d 889, 892 [2d Dept. 2008]). Therefore, "[i]n exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom" (*Sampson v. Contillo*, 55 A.D.3d 591, 592 [2d Dept. 2008]).

It is important to note at the outset that the Court finds that its previous ruling permitting amendment of the pleadings to include Labor Law§ 200 shall remain in place pursuant to the doctrine of the law of the case, which "applies only to legal determinations that were necessarily resolved on the merits in the prior decision" (*Baldasano v. Bank of N.Y.*, 199 A.D.2d 184, 185, [1st Dept. 1993], citing *Locilento v. Coleman Catholic High School*, 134 A.D.2d 39, 43 [3d Dept. 1987]).

Labor Law§ 240(1) provides 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.

Establishing liability pursuant to Labor Law§ 240(1) is fact specific in that plaintiff must show more than that an object fell causing the injury sustained on the job (see *Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 268 [2001]). For section§ 240(1) to apply, a plaintiff must show that the harm flowed directly from the application of the force of gravity to the object; and that the injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential (*DeRosa v. Bovis Lend Lease LMB, Inc.*, 96 A.D.3d 652 [1st Dept. 2012]). Moreover, not every object that falls on a worker gives rise to the specific protections promulgated by 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 (see *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501 [1993]). Clearly, it requires more than that an object fell while being hoisted or secure, because of the absence or inadequacy of a safety device of the kind enumerated in the statute

In the case at bar, the Court finds that the facts do not fall under the purview of Labor Law §240(1), in that plaintiff failed to present any facts that sufficiently establish that the work he was performing was dangerous, out of the ordinary or that the use of safety equipment was necessary. Plaintiff slipped on grease which was on the ground. Thus, there was no indication that his work placed him in a position wherein he could fall from a height, where an unsecured item could fall on him or that his accident occurred because a piece of machinery had fallen due to a lack of or the inadequacy of a safety device (see *Mendez v. Jackson Dev. Group, Ltd.* 99 A.D.3d 677 [2d Dept. 2010], citing, among other cases, *Narducci*, supra, *Ross*, supra, *Ouattrocci v. F.J. Sciame Constr. Corp.*, 11 N.Y.3d 757 [2008]). The fact that plaintiff fell into the gap is of no consequence when contemplating Labor Law§ 240(1).

Labor Law§ 241(6) provides in pertinent part that:

> All contractors and owners and their agents....when constructing, or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements: 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

It is well settled that to bring a claim pursuant to Labor Law§241(6), a plaintiff must establish that, at the time of his injury, he was engaged in the type of work contemplated by the statute, specifically, building construction, building demolition and/or excavation incidental to building construction or building demolition (*Esposito v. N.Y.C. Indus. Dev. Agency*, 1 N.Y.3d 526 [2003; *Nagel v. D&R Realty Corp.*, 99 N.Y.2d 98 [2002]).

Moreover, a Labor Law §241(6) claim is proper where plaintiff asserts a provision of the Industrial Code containing concrete specifications that the defendant allegedly violated (*Donovan v. S&L Concrete Constr. Corp., Inc.*, 234 A.D.2d 336, 337; see also *Ross v. Curtis Palmer Hydro* Elec. Co., supra. Where same is established, there exists vicarious liability on behalf of an owner (*Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 351 [1998]). Additionally, the cited Industrial Code provisions must contain specific positive commands, not general regulatory criteria such as "adequate," "effective" and "proper" (*Ross*, 81 N.Y.2d at 501-504).

In the case at bar, it is clear that at the time of his accident, plaintiff was no engaging in the type of work contemplated by this statute. Indeed, unloading materials off a truck would not be

characterized as engaging in building construction, demolition or excavation. Furthermore, plaintiff was a part of a group of workers who were engaged in the removal of asbestos from the premises at a later date (see Aff. in Opp, work contract, Exh. B).

Therefore, since the Court finds that the proposed amendments are devoid of merit and are both inapplicable to the instant case, the motion for leave to amend must be denied.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff's Order To Show Cause for leave to amend the complaint to add Labor Law§ 200 is granted; and it is further

ORDERED that plaintiff's Order To Show Cause for leave to amend the complaint to add Labor Law§§ 240(1) and 241(6) is denied; and it is further

ORDERED that the case should be scheduled for re-trial; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: November 8, 2013

ENTER:

NOV 0 8 2013

FILED

NOV 15 2013

NEW YORK
COUNTY CLERK'S OFFICE

Hon. Kathryn E. Freed
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT