Borges v CCA Civil/Halmar Intl. LLC
2014 NY Slip Op 30654(U)
March 11, 2014
Sup Ct, New York County
Docket Number: 107571/10
Judge: Shlomo S. Hagler
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SCANNED ON 3/18/2014

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

Present: Hon. Shlomo S. Hagler *Justice* **IAS Part:** 17

VALMIR BORGES and ELIZA BORGES,

Plaintiffs,

- against -

CCA CIVIL/HALMAR INTERNATIONAL LLC - JOINT VENTURE,

Defendant.

INDEX NO.: 107571/2010

Motion Sequence No.: 003

DECISION and ORDER

Motion by defendant for summary judgment pursuant to CPLR § 3212 dismissing plaintiffs' Labor Law § 240(1), § 241(6), § 200 and common law negligence claims.

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Defendant's Notice of Motion for Summary Judgment Dismissing the Complaint	1
Affirmation of Defendant's Counsel Carolyn Comparato, Esq., in Support of the Motion, with Exhibits "A" through "S"	2
Defendant's Memorandum of Law in Support of the Motion	3
Plaintiffs' Amended Notice of Cross-Motion for Partial Summary Judgment on Plaintiffs' Labor Law § 240(1) Claim	4
Affirmation of Plaintiffs' Counsel Lawrence P. Biondi, Esq., in Opposition to Defendant's Motion and in Support of Plaintiffs' Cross-Motion, with Exhibits "1" through "3"	5
Reply Affirmation of Defendant's Counsel Carolyn Comparato, Esq., in Further Support of Defendant's Motion and in Opposition to Plaintiffs' Cross-Motion, with Exhibit "A"	6
Reply Affirmation of Plaintiffs' Counsel Lawrence P. Biondi, Esq., in Reply to Defendant's Opposition to Plaintiffs' Cross-Motion and in Further Support of Plaintiffs' Cross-Motion, with Exhibit 1	7
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Cross-Motion: ❑ **No** ❑ **Yes** **Number of Cross-Motions:** 1

Cross-Motion by Plaintiffs for partial summary judgment on their Labor Law § 240(1) claim.

Upon the foregoing papers, it is hereby ordered that Plaintiffs' cross-motion for partial summary judgment is denied and Defendant's motion for summary judgment is granted in part and denied in part to the extent set forth in the attached separate written Decision and Order.

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MAR 18 2014
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ENTER:

Dated: March 11, 2014
New York, New York

Hon. Shlomo S. Hagler, J.S.C.

Check one:	❑ **Final Disposition**		☒ **Non-Final Disposition**	
Motion is:	❑ Granted	❑ Denied	❑ Granted in Part	❑ Other
Cross-Motion is:	❑ Granted	❑ Denied	❑ Granted in Part	❑ Other
Check if Appropriate:	❑ SETTLE ORDER		❑ SUBMIT ORDER	
	❑ DO NOT POST		❑ REFERENCE	

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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Defendant.

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Index No.: 107571/10

Motion Sequence No. 003

DECISION and ORDER

SHLOMO S. HAGLER, J.:

Plaintiff Valmir Borges ("Borges" or "plaintiff") seeks compensation for personal injuries that he sustained, while working on the Alexander Hamilton Bridge ("the Bridge"), from falling from a beam onto a platform located approximately four feet below the beam. Plaintiff Eliza Borges asserts a derivative claim. Defendant CCA Civil/Halmar International LLC - Joint Venture ("CCA" or "defendant") was the general contractor for the project. Borges was the employee of nonparty subcontractor L&L Painting ("L&L").

Defendant moves for an order granting summary judgment dismissing plaintiff's Labor Law §§ 240(1) and 241(6) claims.[1] Plaintiff opposes defendant's motion and cross-moves for an order granting him partial summary judgment on the issue of liability under Labor Law § 240(1). Both the motion and cross-motion are consolidated herein for disposition.

FILED

MAR 18 2014

COUNTY CLERK'S OFFICE
NEW YORK

1. Defendant also moved for summary judgment dismissing the common law negligence and Labor Law § 200 claims, which was unopposed by plaintiff, and dismissed by this Court at oral argument on this motion on July 15, 2013.

Background

It is undisputed that plaintiff was a painter/sandblaster employed by L&L, working on the Bridge on April 24, 2010, and wearing a safety harness to which was attached a lanyard that was approximately three to four feet long (Examination before trial of plaintiff Valmir Borges, taken on January17, 2012, May 4, 2012, and May 17, 2012 and consecutively numbered ["Borges EBT"], at 89, attached as Exhibit "D" to the Affirmation of Carolyn Comparato, Esq., in support of defendant's motion ["Comparato Aff."]). The area in which plaintiff fell included horizontal beams ("the lower beams") located approximately four feet above a corrugated-metal platform that spanned the width of the Bridge ("the platform"). The platform is angled, or curved, as it follows arches of the structure of the Bridge (*id.* at 77). Approximately four feet above the lower beams, and seven to eight feet above the platform, are other horizontal beams ("the upper beams").

Plaintiff testified that his supervisor, Alex Quinones ("Quinones"), asked him to search for a saw disk to cut cables and that, after searching one area of the Bridge, he began heading to a second area which Quinones asked him to search when he initially instructed plaintiff to look for a disk. Plaintiff stated that he walked on a platform and used a ladder to get to the first area,[2] and, after searching, used the lower beams to attempt to get to the second area. However, after Quinones called him back from his search, while walking on a lower beam to return to his work area, plaintiff lost his balance, falling onto and rolling down the platform (*id.* at 75-76, 192, 194-196, 241, 243). Plaintiff testified that he is five feet, ten inches tall (*id.* at 58) and did not clip on, or tie off, onto a safety line or cable while walking on the beam because none was available. Plaintiff stated that he

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2. Alexander Placito, who worked at the site as defendant's field engineer, testified at his deposition that there was a ladder approximately 50 feet from the beam from which plaintiff fell (Placito EBT at 50, attached as Exhibit I to Comparato Aff.).

was not instructed to walk on the beams in order to retrieve the disk, but did so in order to follow Quinones's instructions to go through a work containment area to get to the second area, because he believed there was no other way to get from the first area he searched to the second area (*id.* at 233-235).

At his deposition, taken on January 21, 2013, Quinones testified that on the morning of the accident and the day before, he told plaintiff not to walk on the beams, and that he did not ask plaintiff to retrieve a saw disk or blade, but instructed him to take down cables from the lower beams, which did not require him to walk on a beam (Quinones EBT at 36, 57-59, 76, 79, attached as Exhibit "M" to Comparato Aff.). Quinones testified that there were safety lines or cables that plaintiff could have clipped onto, and that he saw the lines on the day plaintiff fell, that plaintiff also could have tied off to the upper beams and that he instructed the workers to tie off on the day of the accident (*id.* at 49-50, 76, 78-79, 88). Quinones testified that workplace policy required that workers tie off 100% of the time on the work site, and that workers were instructed to do so (*id.* at 82). However, plaintiff testified that did not have a meeting with Quinones prior to going to the worksite on the day of the accident (Borges EBT at 81).

Discussion

To succeed on a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If this showing is made, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which requires a trial (*id.*).

A. The Labor Law § 240(1) Claim

As noted above, plaintiff moves for summary judgment on the Labor Law § 240(1) claim and defendant moves to dismiss that claim. Labor Law § 240(1) provides that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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 statute "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" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]) and places the responsibility for safety devices and practices on owners and general contractors and their agents who are "best situated to bear that responsibility" (*id.* at 500). (*See also generally Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 [2003]). Labor Law § 240(1) is to be construed as liberally as may be possible in order to effectuate its protective goals (*see Blake*, 1 NY3d at 284-285).

To prevail on this claim, plaintiff must show: (1) a violation of defendant's duty under Labor Law § 240(1) to cause to be furnished or constructed safety devices in such a manner that plaintiff was provided proper protection from gravity-related risks; and (2) that the statutory violation was a contributing cause of the injuries sustained (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Blake*, 1 NY3d at 287, 289). To demonstrate that the claim should be dismissed, or to raise a fact issue, a defendant must "establish that 'there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident'" (*Kosavick v Tishman*

Constr. Corp. of N.Y., 50 AD3d 287, 288 [1st Dept 2008], quoting *Blake*, 1 NY3d at 289 n 8). "If defendant's assertions in response fail to raise a fact question as to these issues, the plaintiff must be accorded summary judgment" (*Blake*, 1 NY3d at 289 n 8). Comparative negligence is not a defense to absolute liability under the statute (*id.* at 289); *Jamison v GSL Enters.*, 274 AD2d 356, 361 [1st Dept 2000]).

Defendant argues that plaintiff was the sole proximate cause of his own injuries. The "sole proximate cause" defense may be raised in a Labor Law § 240(1) action only when the owner or contractor establishes that "plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 10 [1st Dept 2011] [citation and internal quotation marks omitted]).

Defendant argues that plaintiff's testimony that he walked on the beams after being instructed by Quinones to make use of the platform/ladder to search for the disk, and did not use the platform, or walk toward the outer sides of the Bridge where safety devices were available, or to use a permanent ladder that was approximately 50 feet away, demonstrates that he was the sole cause of his accident. Defendant also contends that, due to plaintiff's recent training and his supervisor's instruction, plaintiff was aware that he was required to tie off, but failed to do so despite available safety cables and beams. Defendant argues that plaintiff chose not to avail himself of these options, which would have prevented his fall and injury, instead taking a foolhardy risk in walking on the beams and not using the available devices and thus is solely responsible for his accident.

In opposition, and in support of his cross-motion, plaintiff argues that due to the absence of protective devices, or inadequate devices, plaintiff was not the sole proximate cause of the accident.

In support thereof, plaintiff submits the affidavit of a licensed engineer, Daniel S. Burdett ("Burdett Aff." attached as Exhibit 2 to affirmation of Plaintiffs' Counsel Lawrence P. Biondi, Esq., in opposition to defendant's motion and in support of plaintiffs' cross-motion [Biondi Aff."]). Burdett avers that the equipment provided was not adequate to prevent plaintiff's fall because, with a safety line at six feet above the platform, as testified to by Quinones, and a three-foot lanyard, plaintiff, who is five feet, ten inches tall, would not have been prevented from hitting the ground (*id.* at ¶¶ 7-8). Burdett also avers that it was impossible to properly tie off to the upper beams, due to their position above the lower beam, their perimeter, and their rectangular shape (*id.*). Burdett states that because the lanyard would not slide along the overhead beam, due to the beam's shape and configuration, it was not effective for walking or moving around (*id.* at ¶ 8). In offering his opinion, Burdett states that he reviewed the accident with the plaintiff at the Bridge and on a prior occasion, and that he reviewed the photographs provided by defendant.

Plaintiff also submits an affidavit from his co-worker, Juscelino Andrade ("Andrade Aff." attached as Exhibit 1 to Biondi Aff.").[3] Andrade avers that the workers walked on beams to perform work, without instruction not to do so, and did not tie off to work. Andrade states that there were no safety lines available to plaintiff where he was working, and that it was dangerous and difficult to walk on the platform below the beams because of a steep curve in the platform, due to the arch of the Bridge, which is why workers walked on lower beams. Andrade also states that "we" were

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3. Defendant challenges Andrade's affidavit as inadmissible, stating, through an attorney's affirmation, that Andrade does not speak English and that consequently the submission does not meet the requirements of CPLR § 2101(b), as plaintiff has not provided a translator's affidavit. As no concrete factual basis is provided from which may be drawn a conclusion that Andrade does not speak English, defendant's conclusory assertion is unpersuasive. Furthermore, as discussed later in this decision, there were several other persons who testified at their deposition to similar conditions as those described by Andrade.

never instructed by Quinones or anyone else to tie off to overhead beams (Andrade affidavit at 1-2), and that it was difficult to tie off to those beams.

Tartso Mendez Silva ("Silva"), also employed by L&L as a painter and sandblaster and who worked with plaintiff on the day of the accident, testified at his deposition taken on January 21, 2013, that on the day of plaintiff's accident, L&L had finished sandblasting the upper portion of the Bridge so they were taking down the containment there in order to start working on the lower area, where sandblasting had not yet been done, and which included the location of plaintiff's accident (Silva EBT at 38-39, attached as Exhibit "L" to Comparato Aff.). Silva stated that he and other workers would walk on the beams in April 2010 (*id.* at 25, 27, 73-74). Silva also testified that when he walked on the beams in the area where plaintiff's accident occurred, he sometimes tied off to overhead safety lines and sometimes did not have to tie off (*id.* at 74). However, in response to a question regarding if he was ever told not to walk on the beams in the area of plaintiff's accident during the time period of the accident, Silva responded that "I always walked on the beams if there was a safety line. If there was no safety line, I would not walk on them" (*id.* at 29-30). Silva did not remember if there were safety lines up on the date of plaintiff's accident (*id.* at 26, 29).

Leonides Schemin, Jr. ("Schemin"), who was employed as a machine operator for L&L, testified at his deposition, taken on January 21, 2013, that he and his partner were performing setup for the containment on the Manhattan side of the Bridge on the date of the accident, although he did not see plaintiff's accident and was informed about it after it occurred (Schemin EBT at 6-10, attached as Exhibit "N" to Comparato Aff.). Schemin testified that the day of plaintiff's accident was the first day they were working in that area (*id.* at 17), that the beams were plaintiff had his accident had not yet been sandblasted and painted (*id.* at 15-16), and that no tarps had yet been put

up at the time of plaintiff's accident (*id.* at 11). Schemin also testified that he too had walked on the beams in other parts of the Bridge and had never been told by anyone from L&L to not walk on the beams in the area where plaintiff fell (*id.* at 16, 26). Schemin did not recall if there were any safety cables on the day of plaintiff's accident in the accident area (*id.* at 21).

Defendant CCA's field engineer, Alexander Placito, who also worked on the Bridge, testified at his deposition on December 5, 2012, that he had seen various workers, including L&L workers and defendant's own employees walking on the beams (Placito EBT at 62, 65). Placito also testified that if a worker were tied off at the box located at one of the beams, their lanyard and tie off cable would not allow them to walk more than 6 feet from that box or beam (*id.* at 67).

Plaintiff argues that any argument that the platform below the lower beams provided sufficient safety protection is unpersuasive because of testimony that workers walked on beams, demonstrating that this was both standard conduct and reasonable in the area where plaintiff fell, due to the extreme slope of the corrugated-metal platform. Plaintiff contends that a Labor Law § 240(1) claim is not barred for conduct that was standard at the job site, or that seemed reasonable at the time and that, at most, these actions are comparative negligence. Plaintiff further contends that all of the evidence, except for Quinones' testimony, demonstrates that required safety lines were not in place and that defendant did not provide adequate safety devices to prevent the fall because any lines that existed, or any beams that defendant claims that plaintiff could have used, would not have prevented plaintiff's fall.

While defendant, in moving, correctly adopted plaintiff's version of events concerning the activities in which plaintiff was engaged at the time of the incident, the parties' recollections as to these events differ. Furthermore, there is a conflict in the evidence concerning the availability of

safety lines for plaintiff to tie off, as Quinones testified that there were safety lines available where plaintiff fell (Quinones EBT at 76), which contradicts the testimony of plaintiff and Andrade which alleged that there were no available safety lines. Furthermore, Silva and Schemin, two other L&L employees, did not recall if there were safety lines available on the day of plaintiff's accident, which is also when L&L was first beginning to set up the containment in the accident area. Therefore, there is a question of fact about whether or not there were safety lines were available for tie off at the time of plaintiff's accident.

Plaintiff also contends that, even assuming the safety lines had been provided, they would have been inadequate to protect plaintiff from falling and that, despite defendant's assertion otherwise, plaintiff could not successfully tie off to the upper beam to prevent his fall while doing his work. In support, plaintiff relies on the affidavit of his expert, Burdett, who contends that the safety lines allegedly provided would have been ineffective due to many factors, including plaintiff's height, the length of the lanyard and the height of the safety lines. However, in his calculations, Burdett adopted Quinones testimony that the safety lines were approximately six feet high (Burdett aff., ¶ 8), but Quinones also testified that the safety lines were eight feet high (Quinones EBT at 75, 97). This raises a fact issue as to the height of the safety lines. Since plaintiff has not demonstrated that a safety line located eight feet above the platform would not have prevented his accident, had such a line had been available and used by plaintiff, there remains a fact issue as to the availability of adequate safety devices.[4]

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4. In addition, Burdett did not adequately address plaintiff's back or torso measurements in relation to where the lanyard attached to the safety harness on his back, and the impact of this on his calculations.

As discussed above, Burdett also opines that tying off to an upper beam would not have been a viable option for plaintiff. Burdett's opinion is based on the length of the lanyard in relation to the circumference of the upper beams, and, presumably, the height of the beam.[5] However, Burdett's assertion in his initial affidavit as to his measurements of the circumference of the beams must be disregarded because, while Burdett averred that he took this measurement at the Bridge, his reply affirmation and the opposition papers, clearly demonstrate that he did not do so. Therefore, plaintiff did not demonstrate that the upper beams could not be used for tying off because of their circumference. Even if plaintiff could be said to have remedied this defect with his reply submissions, such submissions would not cure moving paper defects (*Ford v Weishaus*, 86 AD3d 421, 422 [1st Dept 2011] [defect in moving papers may not be cured with reply submission]).

Burdett also asserts that even if the lanyard could have reached around the upper beam, that typing off to such beams would be ineffective since the lanyard would not slide along the beam due to the beam's shape and configuration. However, Burdett did not adequately explain why or how the configuration of the beam would have prevented its use, or specifically identify the photograph(s) that he states would support his conclusion about the configuration. Therefore, his assertion that the lanyard would not slide along or otherwise be effective for work because of the beam's configuration is at best conclusory.[6]

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5. Burdett's affidavit does not state the height of the upper beam that he employed in his calculations; thus his opinion is conclusory and does not demonstrate that the overhead beam was not high enough to provide proper protection from a fall.

6. It also appears that Burdett adopted plaintiff's version of events, that he was walking back on the beams after being sent to retrieve a disk, while Quinones's testimony as to what plaintiff was assigned to do differs. On plaintiff's motion, Quinones's testimony must be credited *(Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 [1st Dept 2013]).

It is also not clear from Burdett's affidavit whether or not the "configuration" he discusses includes the relative position of the upper and lower beams to each other, which is disputed by defendant (Placito affidavit, sworn to on June 5, 2013, at ¶ 4 ["Placito reply aff."], attached as Exhibit "A" to reply affirmation of Carolyn Comparato, dated June 12, 2013 ["Comparato reply aff."]). These fact issues preclude a finding of summary judgment in plaintiff's favor.

The fact issues discussed above, including whether or not plaintiff was furnished with adequate safety devices to prevent his fall, also preclude summary judgment in defendant's favor. Crediting plaintiff's version of how the accident occurred, as required on defendant's motion (*Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 [1st Dept 2013] [in reviewing moving party's motion for summary judgment, non-moving party's facts must be accepted as true, and all reasonable favorable inferences accorded the non-moving party]), plaintiff testified that he used the beams to come back from his search for a disk, instead of returning on the staircase, because that was the only way he knew to go, and there were no available safety lines where he walked.[7] There is no testimony that, after plaintiff spent time searching for the disk, Quinones instructed plaintiff to use the same ladder to return. In light of the conflicting evidence presented on this record, that part of defendant's motion seeking summary judgment on plaintiff's Labor Law § 240(1) claim must be denied, as issues

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7. On its motion, defendant relied on plaintiff's testimony that Quinones instructed him to search two specific areas for a saw blade or disk, that he was told to use the platform and a permanent ladder to get to the first location and to go to a second location if he did not find the disk at the first. Plaintiff testified that he used the platform and ladder to get to the first location, searched there, and walked on the beam to get to the second location, which was the only way that he knew to get there (Borges EBT at 233-235). Plaintiff did not testify that he also was instructed to use the platform and ladder to get to the second location or to return. Under such circumstances, any negligence on plaintiff's part in walking on the beam to get to the second location, instead of using the ladder and platform, as defendant alleges plaintiff had been instructed to do, would be comparative negligence, which does not defeat a Labor Law § 240(1) claim.

of fact exist as to whether plaintiff was the sole proximate cause of his accident for having failed to use available safety lines.

Defendant's argument that the platform was a safety device, in that it prevented falls from the Bridge and also fulfilled OSHA regulations that applied to plaintiff's employer, does not warrant dismissal of plaintiff's claim. While the platform may have aided in preventing falls from or off of the Bridge, plaintiff's fall was from a beam onto the sloped, corrugated-metal platform. The platform did nothing to shield him from this gravity-related fall of four feet or more (*Auriemma,* 82 AD3d at 9 [height of approximately four to six feet constituted elevation-related risk]; *Arrasti v HRH Constr. LLC*, 60 AD3d 582, 583 [1st Dept 2009] [fall of 18 inches from a ramp was a covered risk]; *McGarry v CVP 1 LLC*, 55 AD3D 441, 441 [1st Dept 2008] [fact that plaintiff only fell a short distance of 3 feet when first block on unsecured cinder block staircase skidded from under his foot does not remove the protection afforded by Labor Law § 240(1)]; *Vurchio v Kalikow Lincoln Dev. Co.*, 187 AD2d 280, 280 [1st Dept 1992] [fall of 2½ feet after sawhorse collapse was a covered risk]). Furthermore, Labor Law § 240(1) contains its own safety requirements, and compliance with OSHA regulations alone is not sufficient to demonstrate entitlement to dismissal of a Labor Law § 240(1) claim (*see Dalaba v City Schenectady*, 61 AD3d 1151, 1153 [3d Dept 2009]; *Miranda v Norstar Bldg. Corp.*, 79 AD3d 42, 47 [3d Dept 2010]).

B. <u>The Labor Law § 241(6) Claim</u>

Labor Law § 241(6) provides, in relevant part:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or

> doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> "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."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross,* 81 NY2d at 501-502, quoting Labor Law § 241[6]). This duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]).

To maintain a viable claim under Labor Law § 241(6), a plaintiff must allege a violation of an Industrial Code provision that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). "The Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 416 [2011]).

Industrial Code (12 NYCRR) § 23-1.16 provides:

> "(b) Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet."

As the only code violation addressed in plaintiff's opposition concerns section 23-1.16, any assertion of other alleged Industrial Code violations is deemed abandoned (*Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] [where a defendant moves for summary judgment, "it is appropriate to find that a plaintiff who fails to respond to allegations that a certain [Industrial Code] section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section"]).

On its motion, defendant's only arguments are that general, nonspecific safety standards cannot serve as a basis for statutory liability and that section 23-1.16 of the Industrial Code is insufficient by itself to allege a claim under Labor Law § 241(6), but must be used in conjunction with section 23-1.7(b)(1). Expanding on this argument, defendant maintains that because section 23-1.7(b)(1) does not apply to the facts of this case, plaintiff's claim under section 23-1.16 must be dismissed. Defendant's argument is unpersuasive as the First Department has determined that section 23-1.16 alone is sufficiently specific as to serve as a predicate for a Labor Law § 241(6) claim (*see Latchuk v Port Auth. of N.Y. & N.J.*, 71 AD3d 560, 560 [1st Dept 2010]). Therefore, defendant has not demonstrated entitlement to summary judgment on this ground.

Defendant's additional argument about the Industrial Code's application, in light of the height of the lower beam, is improperly raised for the first time in reply (*see Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 [1st Dept 1993] ["the court should never even have considered arguments making their initial appearance in reply papers"]; *Ford v Weishaus*, 86 AD3d at 421).

Conclusion

In light of the foregoing, it is hereby

ORDERED that the portion of defendant's motion for summary judgment dismissing plaintiffs' Labor Law § 200 and common law negligence claims, which were unopposed by plaintiff was granted on the record at the hearing on July 15, 2013, and it is further

ORDERED that the portion of defendant's motion to dismiss plaintiffs' Labor Law § 240(1) claims is denied, and it is further

ORDERED the portion of defendant's motion to dismiss plaintiffs' Labor Law § 241(6) claims is granted to the extent of dismissing plaintiff's Labor Law § 241(6) claim, except to the extent that it is predicated on Industrial Code (23 NYCRR) 23-1.16, and is otherwise denied; and it is further

ORDERED that the plaintiff Valmir Borges' cross-motion for partial summary judgment in his favor on the issue of liability under Labor Law § 240(1) is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:

Dated: March 11, 2014
New York, New York

Hon. Shlomo S. Hagler, J.S.C.

FILED
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