Nokaj v Trimph Constr. Corp.
2014 NY Slip Op 32681(U)
September 3, 2014
Supreme Court, Bronx County
Docket Number: 305823/2011
Judge: Alison Y. Tuitt
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NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

SKENDER NOKAJ,

Plaintiff,

-against-

TRIUMPH CONSTRUCTION CORP.,

Defendant.

INDEX NUMBER: **305823/2011**

Present:
HON. **ALISON Y. TUITT**
Justice

TRIUMPH CONSTRUCTION CORP.,

Third-Party Plaintiff,

-against-

A-1 UNITED ENTERPRISES, INC.,

Third-Party Defendant.

INDEX NUMBER: **84193/2011**

The following papers numbered 1 to 5,

Read on this Defendant's Motion and Plaintiff's Motion for Summary Judgment

On Calendar of 2/24/14

Notices of Motion/Cross-Motion-Exhibits, Affirmations	1, 2
Affirmation in Opposition	3
Reply Affirmations	4, 5

Upon the foregoing papers, defendant's motion for summary judgment and plaintiff's motion for summary judgment are consolidated for purposes of this decision. For the reasons set forth herein, defendant's motion is granted in part and denied in part and plaintiff's motion is denied.

This is a personal injury action arising out of an alleged accident on November 11, 2009 when plaintiff was allegedly injured while in the course of his employment with A-1 United Enterprises, Inc. (hereinafter "A-1") at a work site adjacent to the building located at 209-21 Jamaica Avenue in Queens, New York. Plaintiff alleges that he was a laborer employed by A-1 and was standing on metal casting which was being lifted from the bed of a dump truck when he was caused to fall approximately ten feet to the sidewalk after being struck by the bucket of a backhoe that was being utilized to raise the casting. Defendant moves for summary judgment of plaintiff's Labor Law §240(1) claim on the grounds that plaintiff was not injured while working on a building or structure at the time of the accident as he testified that he was working on the bed of a dump truck when he was allegedly struck by the bucket of a backhoe. Defendant also argues that plaintiff was the sole proximate cause of his accident. Defendants further seek dismissal of plaintiff's Labor Law §241(6) claim on the grounds that the Industrial Codes alleged by plaintiff to have been violated are inapplicable to the instant matter. The branch of defendant's motion seeking dismissal of plaintiff's Labor Law §200 and common law claims are is not opposed by plaintiff. Therefore, those claims are dismissed.

Plaintiff testified at his deposition that he was working on the bed of a dump truck when he was struck by the bucket of a backhoe. Plaintiff was working on repairing manholes which included excavating heavy old castings, the metal frames that sit on top of manholes, and regrades, the metal doors that fit in the castings and close of the manholes, in the street and replacing them with new casting and regrades. The work was being performed at the corner of Jamaica Avenue and 210th Street as part of an ongoing Con Edison project. The project was done pursuant to a contract between Con Edison and defendant Triumph Construction Corp., the general contractor, who subcontracted the work to A-1, the subcontractor. At the time of the accident, plaintiff was not working in a manhole, but was actually on a dump truck. His supervisor, Albie Firestone, was operating a backhoe, a truck with a front-loader bucket and a backhoe for excavating in the back. Mr. Firestone had already removed and lifted the old casting in the street using the front-loader bucket and then disposed of it in a dump truck. While Mr. Firestone did this, plaintiff was standing to the side waiting for direction from Mr. Firestone, and his co-workers were using jackhammers to break up the roadway surrounding the place where the new casting would be placed. Plaintiff testified that after Mr. Firestone had disposed of the old casting, he directed plaintiff to get into position in the dump truck with the new castings in order to attach a new casting to the front bucket of the backhoe. Plaintiff had to climb three metal footholds built into the driver's side of the

dump truck behind the cab. The top of the truck was still another four to five feet above the third foothold, so then he put his foot on a small steel bar attached to the truck, reached up to the top of the truck with his arms and pulled his body up to the top of the truck. From there, he climbed into the back of the dump truck which held the new castings. The depth of the dump truck was stacked "just about full" to the top with castings, approximately 10 feet above the ground.

Plaintiff testified that the entire width and length of the dump truck was full of new castings, there was no ladder or scaffold, and there was no other place on the truck to stand or move, so plaintiff stood on top of a stack of approximately three or four new castings, ten feet off the ground, waiting for Mr. Firestone to approach with the backhoe. Mr. Firestone drove the backhoe up to plaintiff on the driver's side of the dump truck, raised the front bucket and tilted it down, causing a four-way chain to hang down from the bucket. Plaintiff's job was to reach up to the bucket, manually unhook the four chains and then attache each chain to a hook in each of the four corners of the new casting he was standing on. Once all four chains were hooked, plaintiff would move off the new casting and onto the roof of the truck or down to the ground and then Mr. Firestone could lift the new casting without hitting plaintiff with the casting, which would swing upon being hoisted. Plaintiff testified that other than a hardhat, he was provided no safety devices, such as a ladder, scaffold, harness or lanyard to protect him from the swinging materials being hoisted or from a fall off the truck. Immediately prior to the accident, plaintiff had hooked three of the four chains to the new casting, made eye contact with Mr. Firestone and gave him a hand gesture of three fingers indicating that three chains were hooked. Mr. Firestone would wait until plaintiff gave him the "thumb's up" sign, but on this date, as plaintiff bent down to hook the fourth chain, Mr. Firestone unexpectedly tilted the bucket of the backhoe, lifting the new casting out of the truck and plaintiff was instantly struck by the moving bucket and then thrown in the air as the new casting, with plaintiff still standing on it, was lifted above the dump truck.

Mr. Firestone testified at a deposition that he was not aware of plaintiff's accident and was still seated in the backhoe when he saw plaintiff limping and plaintiff told him he slipped off the truck. He testified that plaintiff went into the bed of the dump truck and attached the hooks of the casting to the chain of the backhoe. Three to five minutes elapsed between the time that plaintiff fixed the chain to the eyehooks until the time that he limped toward the backhoe to tell Mr. Firestone that he had been injured. When he lifted the new casting out of the dump truck, Mr. Firestone was able to see the dump truck and when he lifted the new casting,

plaintiff was not in the dump truck. Plaintiff was standing outside of the truck, on a ledge over the rear passenger side wheels and observed plaintiff give him a thumb's up signal to indicate it was safe to lift the casting and plaintiff got out of the dump truck by stepping out. Mr. Firestone was 100% certain that the plaintiff was outside of the truck at the time he observed plaintiff's thumb's up sign. Mr. Firestone testified that at no time did the casting come into contact with plaintiff. All four eyehooks were fastened to the chain when he lifted the casting with the bucket of the backhoe. Plaintiff had given a thumb's up signal like that on many occasions before the day of the accident. There were multiple hand signals used by the laborer to signal to the operator of the backhoe, including a thumb's up which means that it is okay to lift the casting. It was common for a laborer to stand on that particular ledge and then give hand signals to the operator of the backhoe after the eyehooks of the casting had been secured to the clamps. This is what happened on the date of the accident.

Mr. Firestone also testified that to the best of his recollection there were three new castings on the dump trunk and the truck was little more than five feet wide, fourteen feet long and five feet high. When the new castings were loaded into the bed of the dump truck, there would have been room for a worker who was standing on the bed of the truck to move around the castings. The three rectangular castings stacked on top of each other would have been approximately 21 inches above the bed of the dump truck. If the dump truck bed would have been completely empty and someone was standing on it, the bed would be three feet above ground level. Defendant argues that assuming that at the time of the accident, plaintiff was standing on top of the three castings which were 21 inches high, that would place the plaintiff approximately four to five feet above ground level. Defendant contends that plaintiff gave Mr. Firestone the thumb's up sign while he was standing approximately four to five feet above ground level. Plaintiff marked an "X" on a photograph the area where he was standing immediately before the accident. Plaintiff testified that the bed of the dump truck was approximately four or five feet above ground level, assuming there were no castings on the dump truck. But he stated that he was standing on castings that were stacked on top of each other, taking him up to approximately 10 feet above the ground.

Sabbato "Sam" Perna, owner/partner of A-1 with Albie Firestone, testified that he was not a witness to the accident. He came to the job site to check on the progress of the work and saw plaintiff flying in the truck and plaintiff told him he slipped and fell off the truck and that plaintiff told him he had been on the sidewalk side of the truck. Mr. Perna prepared a report regarding the accident wherein he provided that the

accident occurred when plaintiff "slipped off of the truck" and that he obtained that information from "Sammy" (plaintiff). He testified that the information he obtained that he provided in the report came from plaintiff and Mr. Firestone. Caesar Santos and Tome Nokaj, plaintiff's cousin, never indicated to Mr. Perna that they had witnessed the accident.

Tome Nokaj submits an affidavit wherein he states that he was working with plaintiff at A-1 at the subject project on the date of the accident. He states that he did not see a ladder or scaffold at the construction site and no safety devices other than hard hats were provided to them. Mr. Nokaj states that he saw the front bucket of the backhoe begin to be lifted near where plaintiff was working in the back of the dump truck and saw the bucket hit plaintiff and lift the casting that plaintiff was standing on. Plaintiff and the casting were hoisted in the air and plaintiff was thrown off the dump truck and landed approximately 15 feet below on the street. Cesar Santos also submits an affidavit wherein he states that he worked with plaintiff at A-1 and was at the accident site on the date of the accident. Mr. Santos states that he was working on the street and plaintiff was standing on top of a dump truck when he saw the front bucket of a backhoe being lifted where plaintiff was working and observed the backhoe strike plaintiff, lifting him up while the casting was being hoisted. He further states that plaintiff was then thrown off the dump truck and fell about 15 to 20 feet down to the street below.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra.*

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion)

shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

Labor Law §240(1) provides in pertinent part as follows: "[a]ll 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... 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." Strict liability under §240(1) is limited only to risks associated with elevation differentials. Daley v. City of New York , 716 N.Y.S.2d 50 (1st Dept 2000). Not every gravity-related hazard falls within the statute. Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487, 490-491. Moreover, once it is determined that the owner or contractor failed to provide the necessary safety devices required to give the worker proper protection, absolute liability is unavoidable under §240(1). See, Bland v. Mamocherian, 66 N.Y.2d 452 (1985).

An owner of a premises has a non-delegable duty under the Labor Law to provide a safe work environment to workers. However, an implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition. Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311 (1981) citing Reynolds v Brady & Co., 329 N.Y.S.2d 624 (2d Dept. 1972). Moreover, the work giving rise to these duties may be delegated to a third person or party. Russin 54 at 317. (Although §240 makes these duties non-delegable, the duties themselves may in fact be delegated. When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor.) Thus, the authority to supervise and control the work operates to transform the subcontractor into a statutory agent of the owner or construction manager. See, Kelly v. Diesel Construction Division of Karl A. Morse, Inc., 35 N.Y.2d 1 (1974).

Whether a plaintiff is entitled to recovery under the Labor Law requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies. Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509, 513 (1991). Here, defendant argues that it is not. Defendant argues

that plaintiff was not working on a building or structure as contemplated in Labor Law §240(1) as he was working on a truck. "The extraordinary protections of [the statute] extend only to a narrow class of special hazards, and do 'not encompass any and all perils that may be connected in some tangential way with the effects of gravity'". Nieves v. Five Boro Air Conditioning & Refrig. Corp., 93 N.Y.2d 914, 915–916 (1999) quoting Ross v. Curtis–Palmer Hydro–Elec. Co., 81 N.Y.2d 494, 501 (1993). The task of unloading a truck is not an elevation-related risk simply because there is a difference between the ground and the truck bed. See, Jacome v. State, 698 N.Y.S.2d 320 (2d Dept. 1999)(State was not liable under scaffolding law for injuries sustained by road construction foreman when steel plate slipped sideways as it was being unloaded from flatbed truck level with foreman's chest and struck foreman's hand; task of unloading a truck is not an elevation-related risk simply because there is a difference in elevation between the ground and the truck bed. Even if plate which slipped and injured road construction foreman as it was unloaded from truck was elevated several inches above truck bed at time of accident, foreman was not entitled to recover under scaffolding law; injury was not elevation-related risk, but resulted from type of ordinary and usual peril worker is commonly exposed to at construction site). Defendant contends that since the bed of the dump truck where plaintiff was standing was four to five feet from the ground, he is not entitled to the protections of the Labor Law. See, Toefer v. Long Island Railroad, 4 N.Y.3d 399 (2005)(Surface of trailer of flatbed truck, four to five feet above ground, did not present elevation-related risk within the meaning of the scaffold law, and did not call for any of the protective devices of types listed in scaffolding law to prevent a worker from falling).

In Phelan v. State of New York, 661 N.Y.S.2d 109 (4th Dept. 1997), the Court held that plaintiff's claims should have been dismissed where plaintiff was injured during a renovation project on the New York State Throughway Bridge where guardrails had to be removed from the bridge and plaintiff was loading them onto flatbed trucks. Plaintiff was injured when while standing on the bed of the truck, guiding a load of guardrails that was being lowered onto cribbing set up by plaintiff and a co-worker. The load was positioned and plaintiff was removing the sling from the load when he felt the load shift. As the load began to move toward plaintiff, he either fell or jumped approximately seven feet to the ground, and the guardrails fell from the truck bed, striking and injuring him. The Court held that plaintiff's claim should have been dismissed because an incident involving objects falling from the bed of a flatbed truck is not the type of special, elevation related hazard contemplated by Labor Law § 240(1). In DeRosa v. Bovis Lend Lease LMB, Inc., 947 N.Y.S.2d

472 (1st Dept. 2012), the First Department reversed this Court's denial of defendant's motion for summary judgment, holding that the cement-mixing truck driver's accident, which occurred while the plaintiff-driver was on the truck's rear fender, which was approximately three feet off the ground, when the back of the driver's shirt became caught in the mixer's rotating hatch handle, causing the driver to be propelled upward and over to the other side of the truck, was not covered by scaffold law as the driver was not exposed to an elevation-related risk and his injury did not directly flow from the application of gravity's force. The Court concluded that side-by-side pouring of concrete, although apparently not a routine method of delivery, was not unknown to either plaintiff or defendants. Plaintiff testified that he made such deliveries on a "handful" of other occasions and made no complaints about such practice prior to his injury, despite the fact that he never received any training on how to make such deliveries. Under these circumstances, the "realities of the workplace at issue" do not implicate the protections of the statute.

Plaintiff argues that he is entitled to summary judgment and defendant's motion for summary judgment must be denied because he was engaged in a construction project involving the excavation and "repair" of manholes which are considered "structures" for purposes of Labor Law §240(1). Plaintiff cites Dos Santos v. Consolidated Edison of New York, 963 N.Y.S.2d 12 (1st Dept. 2013). In Dos Santos, plaintiff and a co-worker were dispatched to respond to a heavy vapor condition caused by a nor'easter. Plaintiff was injured after a gust of wind caused him to stumble and fall into a steam manhole that he and his co-worker had uncovered in order to pump out the subterranean water. Defendant acknowledged that severe weather conditions led to a loss of hazard protection around the exposed manhole consisting of a railing. The First Department noted that a manhole meets the definition of a "structure" as that term is used in the statute and held that plaintiff's injury resulted from an elevation-related hazard that Labor Law 240(1) is intended to obviate. In the instant matter, the construction project that plaintiff was involved in related to manholes; repairing manholes by excavating old castings and regrades and replacing them with new castings and regrades. Therefore, although plaintiff was physically on the dump truck at the time of the accident, the construction project involved the repair of manholes.

Plaintiff also cites Naughton v. City of New York, 940 N.Y.S.2d 21 (1st Dept. 2012). In Naughton, plaintiff was allegedly injured when he fell 15 feet to the ground while unloading bundles of curtain wall panels off of a flatbed truck. Plaintiff's employer was hired as sub-subcontractor to unload and install

curtain wall panels. There were six bundles of curtain wall panels on a flatbed truck and each bundle was approximately 10 feet long, 4 feet wide and 10 feet tall. Plaintiff was instructed by his supervisor to climb on top of the bundles, attach each bundle to a crane and make sure the bundles stayed apart while they were hoisted to a sidewalk bridge above. When plaintiff asked his supervisor for a ladder, he was told that a ladder was not needed, and that instead he should climb up the side of the bundles. Plaintiff then climbed to the top of one of the bundles, which was 10–11 feet above the flatbed surface and 15–16 feet above the ground. Plaintiff explained that it was necessary to work on top of the bundles so that he could attach the chokers to the corners and ensure that the bundles did not interfere with each other while being hoisted. Two of plaintiff's coworkers were standing on the street below holding tag lines attached to the bottom of the bundles to control their movement. While standing on an adjacent bundle, plaintiff rigged one of the bundles, and the crane operator began to lift the load. After the load had been lifted several feet, one of the tag lines "got slack," and the bundle began to swing toward plaintiff. According to plaintiff, he retreated as far as he could looking for an escape route, but the bundle hit him and knocked him down 15 feet to the street below. The First Department held that the absence of a ladder was proximate cause of accident establishing contractor's liability pursuant to Labor Law §240(1). The Court noted that plaintiff asked his supervisor for a ladder but was told that one was not needed. He specifically explained to the supervisor that he did not like being on top of the bundles without a ladder because there was no way to get down. Plaintiff testified that when the bundle started swinging toward him, he retreated. Since there was no ladder, he had no way to get off the bundles. Thus, plaintiff has established that the absence of a ladder was a proximate cause of the accident. The Court also held that the contractor failed to provide secure method of hoisting bundles of curtain wall panels in violation of scaffold law. The Court noted that the undisputed testimony established that after the bundle began its ascent, one of the tag lines "got slack," causing the load to swing toward plaintiff. Thus, plaintiff showed that the hoist proved inadequate to shield him from harm. See also, Intelisano v. Sam Greco Const., Inc., 890 N.Y.S.2d 683 (3rd Dept. 2009) (Property owner's and general contractor's failure to provide ladder or scaffold to worker attempting to unload bundles of insulation stacked on flatbed trailer violated Labor Law where worker was hanging from 10 foot high stack of insulation bundles, with his hands 14 feet above ground, as he tried to swing his body to that height when he fell); Ford v. HRH Const. Corp., 838 N.Y.S.2d 636 (2d Dept. 2007)(Defendants liable under the Labor Law where plaintiff was injured when he fell from the top of wooden cross braces which secured 10 foot high stacks

of curtain wall panels located on the platform of a flatbed truck. The truck's platform was approximately 4 ½ feet above the ground. Plaintiff had not been given a ladder or other safety device to reach the top of the stack. In order to reach the top of the stack, he pulled himself up onto the flatbed and climbed the wooden cross braces located at the ends of each stack. As plaintiff reached the top of the panel stack and was lifting his leg onto the upper-most panel, he slipped and fell to the ground, sustaining injuries).

In the instant action, there are questions of fact as to how high off the ground plaintiff was working at the time of his accident which warrant denial of both motions for summary judgment with respect to plaintiff's Labor Law §240(1) claim. Plaintiff testified that he was approximately 10 feet off the ground when he was struck. Mr. Santos and Mr. Nokaj, plaintiff's co-workers, who attest that they witnessed the accident and state that plaintiff was thrown off the dump truck and landed approximately 15 to 20 feet below on the street. Defendant contends that plaintiff was only four to five feet off the ground at the time of the accident. If a jury believes that plaintiff was between 10 to 20 feet off the ground at the time of his accident, defendant may be held liable under Labor Law §240(1) as plaintiff's injury could have been caused by his falling from a height while performing an activity covered by Labor Law § 240(1) as a result of defendant failing to provide plaintiff with a safety device to prevent this type of fall. The contradicting testimony and statements raise an issue of fact precluding summary judgment on the Labor Law §240(1) claim. It should be noted that even where there is no appreciable height differential between plaintiff and the object being hoisted, a defendant can still be held liable. See, Kempisty v. 246 Spring Street, LLC, 938 N.Y.S.2d 288 (1st Dept. 2012)(Under scaffolding law, an elevation differential cannot be considered de-minimis when the weight of the object being hoisted is capable of generating an extreme amount of force, even though it only traveled a short distance; Runner v. New York Stock Exchange, Inc., 13 N.Y.3d 599 (2009)(The elevation differential involved could not be viewed as de-minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent. Plaintiff's injuries were a direct consequence of the failure to provide adequate protection against the risk arising from the physically significant elevation differential even though occurrence did not involve traversal of elevation differential either by plaintiff or by the object that hit him; the harm to plaintiff was a direct consequence of application of force of gravity).

The parties also move for summary judgment with respect to plaintiff's Labor Law §241(6) claim. Labor Law §241(6) concerns reasonable and adequate protection and safety through the worksite. This

Section provides that contractors and owners must assure that: "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 shall comply therewith." Thus, Labor Law §241(6) imposes a nondelegable duty upon an owner or general contractor who does not control, supervise or direct the worksite to comply with the regulations promulgated by the Commissioner of the Department of Labor that mandate compliance with concrete specifications in the Industrial Code. Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494 (1993). In order to plead a violation of Labor Law §241(6), plaintiff must allege a specific violation of the New York State Industrial Code. Isola v. JWP Forest Elec Corp., 691 N.Y.S.2d 492 (1st Dept. 1999). Neither actual or constructive notice is a prerequisite to recovery under Section 241(6). Touhey v. Gainsborough Studios, Inc., 586 N.Y.S.2d 103, 106 (1st Dept. 1992).

The branch of defendant's motion that seeks dismissal of plaintiff's Labor Law §241(6) claims based on purported violations of Industrial Code Sections 23-1.7, 23-1.8, 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-3, 23-6, 23-8, 23-9, 23-9.4(h)(1), 23-9.4(h)(4), 23-9.5(c) and 23-9.5(f) is granted without opposition. With respect to Section 23-9.4(h)(5), both plaintiff and defendant seek summary judgment. Section 23-9.4(h)(5) pertains to power shovels and backhoes used for material lifting, and provides that "[c]arrying or swinging suspended loads over areas where persons are working or passing is prohibited." The standards set forth in Industrial Code § 23–9.4 have been held to be sufficiently specific to serve as the basis of a claim where one has been injured by an accident caused by a backhoe, or analogous equipment, in the process of "lifting or hoisting" a load. See, St. Louis v. Town of North Elba, 16 N.Y.3d 411 (2011); Leszczynski v. Town of Neversink, 968 N.Y.S.2d 204 (3rd Dept. 2013). Defendant correctly argues that there is no evidence that Mr. Firestone was carrying or swinging the metal casting over the area where plaintiff was working on the date of the accident. Rather, plaintiff's testimony was that he was standing on the casting when it was suddenly lifted while he was attempting to fasten the fourth hook to the chain. Thus, plaintiff's Labor Law §241(6) claim based on Section 23-9.4(h)(5) is dismissed. Additionally, since plaintiff has offered no opposition to defendant's branch of the

motion to dismiss plaintiff's Labor Law §200 and common law negligence, those claims are also dismissed.

This constitutes the decision and order of this Court.

Dated: 9/3/14

Hon. Alison Y. Tuitt