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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

DANIEL VITALE, et ano.,
Plaintiffs,

- against -

ASTORIA ENERGY II LLC, et ano.,
Defendants.

Index
No. 8372 2012

Motion
Date March 25, 2014

Motion
Cal. No. 188

Motion
Seq. No. 1

The following papers numbered 1 to 18 read on this motion by plaintiffs for an order granting them summary judgment in their favor on their causes of action pursuant to Labor Law §§ 240 (1) and 241 (6); and on this cross motion by defendants for an order granting them summary judgment dismissing the complaint.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-4
Notice of Cross Motion - Affirmation - Exhibits.....	5-8
Answering Affirmation - Exhibits.....	9-10
Reply.....	11-18

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiffs commenced this action to recover damages for personal injuries alleged to have been sustained by plaintiff Daniel Vitale during the course of his employment on December 11, 2009, at a construction site located at 17-10 Steinway Street, Astoria, New York. Defendant Astoria Energy II LLC, owns the site, and defendant SNC-Lavalin

Constructors, Inc., was the construction manager for the project. Plaintiff was working as a survey engineer, confirming the accuracy of the location of certain anchor bolts (i.e., to ensure that they were positioned according to the contract survey). In order to do so, plaintiff was positioned atop a multi-layer "rebar mat," approximately 50' x 100' in dimension, and 5' above grade level. Plaintiff was required to walk across the surface of the rebar mat from anchor point to anchor point; plaintiff testified that it was "common practice" to do so and that planking or plywood was never used for traversing across same. The rebar mat was constructed in such a way that the mat had square openings of either 9" x 9" or 12" x 12". The accident occurred when plaintiff lost his balance, causing his leg to fall through one of the square openings, up to his groin, thereby sustaining injuries to his left hip, knee, and shoulder.

As a preliminary matter, plaintiffs argue that defendants' cross motion should not be considered in its entirety, as it is untimely. To the extent the cross motion seeks dismissal of plaintiffs' claims under, *inter alia*, Labor Law § 200 and common-law negligence, same will not be considered for that reason (CPLR 3212 [a]; *Brill v City of New York*, 2 NY3d 648 [2004]), inasmuch as the aforementioned causes of action are not "nearly identical" to the issues raised in the timely motion, to wit, Labor Law §§ 240 (1) and 241 (6) (*see Podlaski v Long Is. Paneling Ctr. of Centereach, Inc.*, 58 AD3d 825 [2009]; *Bickelman v Herrill Bowling Corp.*, 49 AD3d 578 [2008]; *Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280 [2006]). That having been said, however, to the extent the cross motion seeks summary judgment dismissing plaintiffs' causes of action based upon Labor Law §§ 240 (1) and 241 (6), the court, pursuant to its power to search the record before it, may consider same (*see Whitehead v City of New York*, 79 AD3d 858 [2010]; *Grande v Peteroy*, 39 AD3d 590 [2007]).

That having been said, as to plaintiffs' Labor Law § 240 (1) cause of action, this section requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Gasques v State of New York*, 59 AD3d 666 [2009]; *Rau v Bagels N Brunch, Inc.*, 57 AD3d 866 [2008]). The duty to provide scaffolding, ladders, and similar safety devices is non-delegable, as the purpose of the section is to protect workers by placing the ultimate responsibility on the owners and contractors (*see Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 559 [1993]; *Ortega v Puccia*, 57 AD3d 54 [2008]; *Riccio v NHT Owners, LLC*, 51 AD3d 897 [2008]). In order to prevail on a cause of action pursuant to Labor Law § 240 (1), the plaintiff must establish that the statute was violated and that said violation was the proximate cause of his or her

injuries (*see Chlebowski v Esber*, 58 AD3d 662 [2009]; *Rakowicz v Fashion Inst. of Tech.*, 56 AD3d 747 [2008]; *Rudnik v Brogor Realty Corp.*, 45 AD3d 828 [2007]).

In support, plaintiff relies exclusively on the Fourth Department case of *Gottstine v Dunlop Tire Corp.* (272 AD2d 863 [2000]). In that case, the plaintiff, as part of his work, was required to walk over a rebar mat. While carrying a metal leveling plate, his foot slipped and his leg went through a 12" x 12" opening in the mats, thereby causing him injury. The Fourth Department, with one Justice dissenting, held that the rebar mat, which was suspended over the opening, constituted an elevated work site within the meaning of Labor Law § 240 (1), such that a safety device – such as planking – could have prevented the fall. The Court did not grant summary judgment to plaintiff, however, noting that issues of fact existed as to whether any safety devices were practical or whether any were "customarily used for such work." Defendants aver that *Gottstine* is the only case on the issue and, as such, should "cause a red flag to this Court in considering the severe application of Labor Law 240(1)." Notwithstanding, defendants argue that the facts in *Gottstine* are inapposite to those presented here. Finally, defendants note that, at the very least, if constrained to *Gottstine's* holding, there is an issue of fact as to whether this case falls within the protections of Labor Law § 240 (1).

Though not mentioned by either of the parties, research reveals that there is a fairly recent Second Department case which is analogous to the case at bar, to wit, *Avila v Plaza Constr. Corp.* (73 AD3d 670 [2013]). In that case, a rebar grid,[1] similar to the one in the instant action, was suspended over a dirt floor. The rebar was laid in such a way which created numerous openings, each measuring approximately one square foot, such as those described in this case. Plaintiff lost his balance and his right leg fell approximately three feet down into one of the openings, causing him to fracture his leg. The Court held, when determining the applicability of Labor Law § 240 (1), the following, in pertinent part:

> "On their motion for summary judgment, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 240 (1). Specifically, they established, prima facie, that the openings of the grid, which were clearly not of a dimension that would have permitted the plaintiff's body to fall through and land on the dirt floor below, did not present an elevation-related hazard to which the protective devices enumerated in Labor Law § 240 (1) are designed to apply" (*id.* at 671 [internal citations and quotation marks omitted]).

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1. It is noted that plaintiff's witness, Brian Donnellan, referred to the area upon which plaintiff was walking as a "rebar grid." It would, thus, appear that "rebar mat" and "rebar grid" are interchangeable terms for the structure.

As this court is bound by Second Department, and not Fourth Department, precedent, Labor Law § 240 (1) does not apply to the facts of this case pursuant to *Avila*, and defendants are entitled to dismissal of this cause of action.

Turning to plaintiffs' Labor Law § 241 (6) claim, same imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers without regard to direction and control (*see Romero v J&S Simcha, Inc.*, 39 AD3d 838 [2007]). In order to prevail under this section of the Labor Law, a plaintiff must establish that specific safety rules and regulations of the Industrial Code promulgated by the Commissioner of the Department of Labor were violated (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]); *Ares v State of New York*, 80 NY2d 959 [1992]). The rule or regulation alleged to have been breached must be a specific, positive command and be applicable to the facts of the case (*see Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 619 [2008]; *Jicheng Liu v Sanford Tower Condominium, Inc.*, 35 AD3d 378, 379 [2006]). Though there are several Industrial Code violations asserted in plaintiff's bill of particulars, the one relied upon in plaintiff's motion is 12 NYCRR 23-1.7 (b) (1) (i), entitled "Hazardous openings." The code provides that "Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)."

For similar reasons noted above, plaintiffs' Labor Law § 241 (6) claim cannot be predicated on a violation of section 23-1.7 (b) (1) since, "based upon a review of the regulation as a whole—particularly the safety measures delineated therein—it is apparent that the regulation is 'inapplicable where the hole is too small for a worker to fall through' " *(Rice v Board of Education of City of New York*, 302 AD2d 578 [2003] quoting *Alvia v Teman Electr. Contr.*, Inc., 287 AD2d 421 [2001]).

While it is noted that defendants move to dismiss the entirety of plaintiffs' Labor Law § 241 (6) action, defendants only specifically addressed the aforementioned Industrial Code section, notwithstanding the fact that several other sections were alleged in plaintiffs' complaint and bill of particulars. As defendants failed to specifically address the inapplicability of those other sections, they are not entitled to the dismissal of same. In any event, it is noted that a discussion beyond the scope of section 23-1.7 (b) (1) would be beyond the scope of plaintiffs' timely motion for summary judgment.

In light of the above findings, this court need not address – as academic – the parties' remaining contentions regarding, inter alia, the adequacy of expert affidavits.

Accordingly, plaintiffs' motion is denied. Defendants' cross motion is granted to the extent that plaintiffs' cause of action under Labor Law § 240 (1) is dismissed, and the alleged violation of 12 NYCRR 23-1.7 (b) is dismissed.

Dated: April 22, 2014

J.S.C.