

Joseph v City of New York

2015 NY Slip Op 30752(U)

May 6, 2015

Sup Ct, New York County

Docket Number: 153735/12

Judge: Michael D. Stallman

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 21**

-----X
LINDY JOSEPH and AMANDA JOSEPH,

Plaintiffs,

Index No.:
153735/12

-against-

THE CITY OF NEW YORK and METROPOLITAN
TRANSPORTATION AUTHORITY,

DECISION and
ORDER

Defendants.

-----X
HON. MICHAEL D. STALLMAN, J.:

This is an action to recover damages for personal injuries sustained by a worker for the Number 7 subway line extension, when he was struck by an unsecured pressurized pipe (the pipe), while working in a tunnel located at West 26th Street and 11th Avenue in Manhattan, New York on October 26, 2011.

Defendants City of New York (the City) and the Metropolitan Transportation Authority (the MTA) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety.

Plaintiffs Lindy (plaintiff) and Amanda Joseph cross-move, pursuant to CPLR 3212, for partial summary judgment in their favor as to liability on

the Labor Law § 240 (1) claim, as well as for leave to amend their bill of particulars to add an alleged violation of New York State Industrial Code § 23-9.2 (a) to the Labor Law § 241 (6) claim.

In this action, plaintiffs allege violations of common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6).

BACKGROUND

On the day of the accident, plaintiff, an employee of nonparty S3II Tunnel Construction Company (S3II), was working at the job site as part of the Number 7 subway line extension project, which included extending the existing Number 7 subway line west to 11th Avenue and south to West 25th Street, with a station at West 34th Street and 11th Avenue. The MTA, on behalf of the New York City Transit Authority (the NYCTA), hired S3II to serve as general contractor on a project which entailed designing and building a shaft at the job site (the project).¹

Plaintiff's Deposition and 50-H Testimony

Plaintiff testified that, on the day of the accident, he was employed as a tunnel laborer by S3II. When he arrived at the job site that afternoon,

¹ Ownership of the accident area is unclear from the record in this case; however, none of the parties put forth any argument that defendants are not proper Labor Law defendants, in that they are not owners, general contractors or agents.

one of the S311 foremen, Jerome Date, instructed plaintiff to “[g]o downstairs and clean up some concrete into a basket” (defendants’ notice of motion, exhibit D, plaintiff’s 50-H testimony, plaintiff’s tr at 25). Once plaintiff arrived at the job site, he began to shovel concrete into a muck bucket. At this time, he was working approximately three to four feet to the left of the pipe, which is sometimes known as a “slick line” (*id.* at 37).

Plaintiff testified that, after he had been working for approximately 10 to 15 minutes, he “got blasted with [the] pipe, a pressurized pipe,” when the pipe “let loose and [spun] around into [him],” making contact with his “left hip . . . left rib, abdominal area” (*id.* at 28, 30). Plaintiff described the part of the pipe that struck him as “[t]he elbow” of the pipe (*id.* at 38). Plaintiff could not remember in which direction the pipe moved, or how it moved, before it struck him. The last thing he remembered was his face being “thrown into a wall” (*id.* at 36). Plaintiff noted that the pipe “moved, it didn’t break” (*id.* at 33).

Plaintiff explained that the pipe, which was made of metal, was comprised of pieces, which were about four feet in length and approximately three inches wide. The pipe ran vertically from three or four hundred feet above ground to below ground. He explained that, one time

per working shift, the pipe was cleared of excess concrete by shooting air and water and an eight inch rubber "rabbit" through the pipe (defendants' notice of motion, exhibit E, plaintiff's deposition, plaintiff's tr at 29). Plaintiff described the rabbit as "something that fits inside the pipe that push[es] concrete or anything inside the pipe to clear it out" (*id.*).

Plaintiff opined that approximately 400,000 pounds of pressure and water is used to flush the excess concrete from the pipe. Importantly, he explained that, when the pipe flushing process is underway,

"[t]he pipe is secured with come-a-long on both sides. The come-a-long, you hook it on one side, hook it on the other side and you brace it with two pipes in [the] middle and you tighten it so they will not move. Whatever pressure is coming through it, [it's] secure on both sides, it will not move, [it's] just steady. . . . The pipes are secured like the way it runs from upstairs to downstairs, everything is secured. But the ones that we pull apart, like we take apart for the pouring of concrete, that [has] to be fastened. So when the pressure comes down it doesn't move. It's section pipes, so they must be fastened at the end when the pressure comes out"

(*id.* at 37-38). Plaintiff testified that the accident occurred when "the pipe came loose and started swinging around," because "[i]t was unsecured. It was just loose, dangling all over the place" (*id.* at 37).

Plaintiff further explained that, typically, workers were given a verbal warning when the pipe flushing process was about to occur, so that they

move out of the way.² Plaintiff maintained that there were no cones or barricades in place around the accident area at the time of the accident. Plaintiff also testified that neither the City nor the MTA ever gave him instructions as to how to perform his work.

Deposition Testimony of Paul Matthews (Construction Manager for the NYCTA)

Paul Matthews testified that, on the date of the accident, he was working on the “Number 7 line extension,” which involved “extending the existing Number 7 [subway] line . . . extending the tunnels west under 41st Street to Eleventh Avenue and then south down to 25th Street, with a station at 34th Street and Eleventh Avenue” (defendants’ notice of motion, exhibit F, Matthews’ tr at 8). Matthews testified that, as construction manager for the NYCTA, his duties on the project were “to administer the contract and make sure that the contractors [were] following their contract” (*id.* at 7). In addition, he “handle[d] changes to the contract, payments, all the administrative work associated with the contract” (*id.*). Matthews explained that there were six contracts making up the project. Pursuant to contract between the MTA, acting on behalf of the NYCTA, and S3II, in

²It should be noted that plaintiff gives differing testimony regarding whether or not he was given a warning that the flushing process was about to occur.

effect from November of 2007 to April of 2012, S3II served as a general contractor on a project to build and design a shaft to be located at the job site.

Matthews testified that he did not know exactly who owned the land upon which the subway was being extended. He explained that “[i]t is a combination. Part of it is under the street and part of it is under private property” (*id.* at 10). Matthews speculated that the City likely had an easement agreement with the owner of the private property to put the subway in place.

Matthews also maintained that the MTA had only a minor presence at the job site. MTA inspectors were present at the north end of the job, because the project entailed tying into existing subway lines. In addition, MTA inspectors were present at 41st Street and 11th Avenue and under the Port Authority Bus Terminal.

Matthews testified that, in order to get the concrete for the project from above ground to below ground, it was pumped through the pipe, which was supplied by S3II. The pipe was several hundred feet long and comprised of steel sections connected together by 10 to 15-foot-long “coupling[s]” (*id.* at 30). Matthews explained that the section of the pipe,

“where the [pipe] makes a turn,” is called the elbow of the pipe (*id.* at 70). The elbow of the pipe is also connected to the rest of the pipe via couplings.

Matthews testified that “normally” the pipe is secured from movement in different ways (*id.* at 31). He explained,

“I have seen it secured in several different ways. It is either tied to something permanent, something stationary that would not move. I have also seen just a huge concrete block placed on top of it so it wouldn’t move”

(*id.*). Matthews was not aware of how the pipe at issue in this case was secured. He noted that how the pipe is secured, as well as any testing done on the couplings to make sure that they are secure, is “up to the contractor”

(*id.* at 32). Matthews maintained that no one from the City, the MTA or the NYCTA ever directed or supervised anyone from S3II as to how to perform their work.

The MTA’s Accident Investigation Report

In the MTA’s accident investigation report, dated November 27, 2011, the accident is described, as follows:

“*Witnesses indicate that while the clearing of the slick lines two rubber projectiles were pushed through the lines as usual.

*However, the injured worker is not typically involved at the end of the concrete placements and was not aware that two rubber projectiles were used to clear the slick line.

*At the time the second projectile exited the end of the line, the injured worker was shoveling waste concrete from the floor and apparently did not hear the warning that the second projectile had been sent.

*When the projectile cleared the end, the elbow jerked and struck the worker in the abdomen.

*He fell to the ground due to the force of the blow and in the process three teeth were broken”

(defendants' notice of motion, exhibit H, MTA's accident investigation report).

DISCUSSION

“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 eliminate any material issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to

the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiff's Labor Law § 240 (1) Claim Against Defendants

Plaintiffs move for summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against defendants. Defendants move for summary judgment dismissing the Labor Law § 240 (1) claim against them. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant 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.”

“Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . 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” (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-*

Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]).

“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). 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”

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Preliminarily, in opposition to plaintiffs' cross motion, and in support of their own motion, defendants do not put forth any argument that they are not proper Labor Law defendants, in that they are not owners, general contractors or agents. Therefore, the court need not address this issue.

Here, the pipe extended downward from three or four hundred feet above ground to below ground. At the time of the accident, excess

concrete was being flushed from the pipe using highly pressurized air, water and a rubber rabbit (the objects). As the objects reached the bottom of the pipe and exited, the elbow section of the pipe, which was not secured against movement in any way, as was normally the case, was caused to swing around and strike plaintiff. Testimony in this case establishes that safety devices, specifically come-a-longs, or large bricks placed on top of the pipe, were usually used to secure the pipe against movement when the pipe flushing process was underway.

Defendants argue that Labor Law § 240 (1) does not apply to the facts of this case, because plaintiff was not injured as a result of any gravity-related risk. Defendants argue that plaintiff neither fell from a height, nor did the pipe fall on him from a height. Rather, defendants urge, plaintiff was injured when the pipe swung around laterally into him. Defendants conclude that plaintiff's injuries did not result from an elevation-related hazard protected by Labor Law § 240 (1), but "rather from the usual and ordinary dangers which exist on a construction site" (*Wells v British Am. Dev. Corp.*, 2 AD3d 1141, 1143 [3d Dept 2003]; *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 491 [1995]).

However, as argued by plaintiffs in their opposition to defendants'

motion, and in support of their cross motion, Labor Law § 240 (1) applies to the facts of this case, because plaintiff's injuries were the result of a gravity-related risk, in that the force of gravity on the objects, as they moved downward through and out of the pipe, caused the unsecured pipe to whip around and strike plaintiff. In addition, defendants violated Labor Law § 240 (1) by failing to provide a proper safety device necessary to keep the pipe secured against movement while the pipe flushing process was underway.

As the Court of Appeals has held in the case of *Runner v New York Stock Exch., Inc.* (13 NY3d 599, 604 [2009]), plaintiffs are not deprived of the protection of section 240 (1) merely because they were not struck by the falling objects themselves. Rather, "[t]he relevant inquiry - one which may be answered in the affirmative even in situations where the object does not fall on the worker - is rather whether the harm flows directly from the application of the force of gravity to the object" (*id.*).

In *Runner*, the plaintiff and several of his co-workers were instructed to move a large reel of wire, which weighed approximately 800 pounds, down a set of about four stairs. To prevent the reel from rolling freely down the stairs, the workers tied one end of a 10-foot length of rope to the reel

and then wrapped the rope around a horizontally-placed metal bar which was positioned horizontally across a door jamb at the same level of the reel. The plaintiff and his co-workers held the loose end of the rope while two other workers began to push the reel down the stairs. As the reel began to descend, it pulled the plaintiff and his co-workers, who were acting as counterweights, toward the metal bar. The plaintiff injured both his hands when they were jammed into the bar (*id.* at 602).

In finding that the plaintiff was entitled to recovery under Labor Law § 240 (1), the Court of Appeals reasoned:

“Here, as the District Court correctly found, the harm to plaintiff was the direct consequence of the application of the force of gravity to the reel. Indeed, the injury to plaintiff was every bit as direct a consequence of the descent of the reel as would have been an injury to a worker positioned in the descending reel’s path. The latter worker would certainly be entitled to recover under section 240 (1) and there appears no sensible basis to deny plaintiff the same legal recourse”

(*id.* at 604; *see also Strangio v Severson Env'tl. Servs., Inc.*, 15 NY3d 914, 915 [2010]; *Apel v City of New York*, 73 AD3d 406, 407 [1st Dept 2010] [Labor Law § 240 (1) applied where, after a crane hoisted up a spud, and as plaintiff was attempting to secure it by inserting a pin into the spud, the crane dropped the spud, which caused the pin to “[come] up ‘like a seesaw,’ ‘snapping’ plaintiff’s left arm”]).

Here, like the plaintiff in *Runner*, while the objects themselves did not strike the plaintiff, the application of the force of gravity on them as they descended, like the application of the force of gravity to the reel as it descended, caused the end of the pipe to swing around and strike plaintiff. Therefore, as in *Runner*, “the injury to plaintiff was every bit as direct a consequence of the descent of the [objects] as would have been an injury to a worker positioned in the descending [object's] path” (*Runner*, 13 NY3d at 604). As such, Labor Law § 240 (1) applies to the facts of this case.

This case is distinguishable from those cases where Labor Law § 240 (1) did not apply, because the safety device which struck the plaintiff did not fall from a height, but rather, it swung laterally into the plaintiff (see *Desharnais v Jefferson Concrete Co., Inc.*, 35 AD3d 1059, 1060 [3d Dept 2006] [no Labor Law § 240 (1) liability where the plaintiff was injured when he was struck by a spreader bar that “did not actually fall, but shifted and swung around,” and where “[t]he bar was not construction material being hoisted or secured at the time, but was a safety device being maneuvered in preparation for hoisting a piece of the septic tank”]; *Tsatsakos v Citicorp*, 295 AD2d 500, 501 [2d Dept 2002] [no Labor Law § 240 (1) liability where a scaffold swung back laterally and struck the plaintiff, because, the

plaintiff, though standing on the 48th floor, was not threatened with or injured by any gravity-related peril]). Here, although plaintiff was injured when the pipe moved laterally into him, unlike the above-mentioned cases, and as discussed previously, gravity played a factor in the ultimate causation of the accident.

Defendants also argue that Labor Law § 240 (1) does not apply, because it cannot be shown “that, at the time the object fell, it was ‘being hoisted or secured’ [*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259 at 268], or ‘required securing for the purposes of the undertaking’” (*Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 964 [2d Dept 2013], quoting *Outar v City of New York*, 5 NY3d 731, 732 [2005] [Labor Law § 240 (1) applicable where plaintiff was struck by an unsecured dolly, which was being stored on top of a bench wall, and not in the process of being hoisted or secured, at the time that it fell on the plaintiff]; see also *Fabrizi v 1095 Ave. of the Ams., LLC*, 22 NY3d 658, 663 [2014]; *Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 759 [2008] [Labor Law § 240 (1) applicable where “[the plaintiff] was struck by falling planks that had been placed over open doors as a makeshift shelf”]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501; *Floyd v New York State Thruway Auth.*,

125 AD3d 1456, 1457 [4th Dept 2015]; *Vargas v City of New York*, 59 AD3d 261, 261 [1st Dept 2009]).

Although it is undisputed that the pipe did not fall while in the process of being hoisted or secured, in fact, the pipe needed securing for the purpose of the undertaking. A review of the testimony in this case reveals that safety devices, such as come-a-longs placed on either side of the pipe, or large bricks placed on top of the pipe, were normally utilized, as well as necessary, to keep the pipe secure from movement during the pipe flushing process. As no such devices were in place at the time of the accident, the pipe was caused to swing loose and strike plaintiff.

Defendants also argue that they are entitled to dismissal of the Labor Law § 240 (1) claim against them, because the pipe did not “[fall] . . . because of the absence or inadequacy of a safety device of the kind enumerated in the statute” (*Fabrizi v 1095 Ave. of the Ams., LLC*, 22 NY3d 658, 663 [2014], quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d at 268). In other words, they argue that the accident was not caused due to the lack of or failure of a safety device whose function was intended to protect plaintiff from a gravity-related hazard (*Miles v Buffalo State Alumni Assn., Inc.*, 121 AD3d 1573, 1574 [4th Dept 2014]; *Mueller v PSEG Power*

N.Y., Inc., 83 AD3d 1274, 1275 [3d Dept 2011]).

In support of this argument, defendants put forth the case of *Gualpa v Leon D. DeMatteis Constr. Corp.* (121 AD3d 416, 418 [1st Dept 2014]). In *Gualpa*, the plaintiff was injured when a stone block, which was resting on top of a plastic tarp, fell and struck him on the knee. The plaintiff argued that Labor Law § 240 (1) was applicable, because his injuries were caused by defendants' failure to provide an adequate safety device to hold the plastic tarp in place. However, the Court in *Gualpa* held that Labor Law § 240 (1) did not apply to the facts of that case, because "[t]he purpose of the tarp was to keep possible rain off the object, not to protect workers from an elevated risk."

Similarly, in *Fabrizi (supra)*, the plaintiff, an electrician, was injured when he was struck by a piece of falling conduit pipe, which was left dangling by a compression coupling connecting it to a similar conduit. At the time of the accident, the plaintiff was "relocating a pencil box" (*id.* at 661). When he removed the pencil box, he left "the top conduit dangling by the compression coupling near the ceiling" (*id.*). About 15 minutes later, while drilling, "the top conduit fell, striking plaintiff on the hand" (*id.*). The Court in *Fabrizi* held that the defendants were entitled to dismissal of the

Labor Law § 240 (1) claim against them, because, contrary to the plaintiff's assertion, the inadequate compression coupling, which allegedly failed to prevent the conduit from falling, was not a safety device "constructed, placed and operated as to give proper protection' from the falling conduit" (*id.* at 663). In making its determination, the Court noted that the compression coupling's

"only function was to keep the conduit together as part of the conduit/pencil box assembly . . . It cannot be said that the coupling was meant to function as a safety device in the same manner as those devices enumerated in section 240 (1).

It follows that defendants' failure to use a set screw coupling is not a violation of section 240 (1)'s proper protection directive. A set screw coupling, utilized in the manner proposed by plaintiff, is not a safety device within the meaning of the statute. Plaintiff concedes that compression and set screw couplings are 'basic couplings' that serve identical purposes, namely, to function as support for the conduit/pencil box assembly, not to provide worker protection"

(*id.*).

Significantly, the devices at issue in *Gualpa* and *Fabrizi* were not in place to protect the plaintiff from a elevation or gravity-related risk, they served other purposes. In contrast, in the case at bar, safety devices, such a come-a-longs fastened to the pipe on either side, or a large brick placed on top of the pipe, were clearly intended and used for the purpose

of protecting workers from the risks associated with an unsecured pipe during the pipe flushing process. In fact, had one of these safety devices been in place at the time of the accident, the accident would not have occurred (see *Henningham v Highbridge Community Hous. Dev. Fund Corp.*, 91 AD3d 521, 521-522 [1st Dept 2012] [Labor Law § 240 (1) applicable where workers were dropping construction debris from the roof of a building into a hard plastic chute, which was not functioning properly at the time of the accident, and where the plaintiff, who was attempting to unclog the chute from below, was struck on the back of the head by a cinder block shortly after telling the workers that the chute was clear).

Furthermore, it cannot be said that the accident was only “tangentially” related to gravity, because the objects were being forced through the pipe by applied pressure at the time of the accident. Basic principles of science dictate that, with or without the added pressure, the force of gravity alone would have moved the objects downward through the pipe at an ever increasing speed, likely causing the unsecured pipe to swing loose. As plaintiff was subjected to a gravity-related risk, a safety device should have been in place to protect him.

This case can be distinguished from the case of *Ross v Curtis-*

Palmer Hydro-Elec. Co. (supra). In *Ross*, the plaintiff, a welder, who was assigned to weld a seam near the top of an elevated shaft, allegedly suffered back strain, because the platform that he was working on was placed over the shaft in such a way as required him to work in a contorted position (*id.* at 498). The plaintiff in *Ross* argued that he was entitled to recover under Labor Law § 240 (1), “because his injury was ‘related to the effects of gravity’ in that it was allegedly produced by [his] need to work in a contorted position in order to avoid falling down the deep shaft on which he was working” (*id.* at 500).

In finding that Labor Law § 240 (1) did not apply to the facts of the case, the Court of Appeals in *Ross* noted that

“[t]he problem with plaintiff’s argument is that it misconstrues the import of our analysis in *Rocovich* The ‘special hazards’ to which we referred in *Rocovich* . . . do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity. Rather, the ‘special hazards’ referred to are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured”

(*id.* at 500-501 [citations omitted]; see also *Suwareh v State of New York*, 24 AD3d 380, 381 [1st Dept 2005]).

The *Ross* court further explained that Labor Law § 240 (1) “was designed to prevent those types of accidents in which a scaffold, hoist,

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,” and that it “[did] not extend to other types of harm, even if the harm in question was caused by an inadequate, malfunctioning or defectively designed scaffold, stay or hoist” (*id.* at 501). Therefore, “however unsafe the makeshift ‘scaffold’ may have been . . . it cannot be said that the device did not serve the core objective of Labor Law § 240 (1) – preventing plaintiff from falling down the shaft. In that regard, the device did not malfunction and was not defective in its design” (*id.*).

As noted by the Court in *Suwareh v State of New York* (24 AD3d at 381-382):

“In *Ross*, the injury had nothing to do with gravity-related risks such as falling from a height or being struck by a falling object. The plaintiff, while working in an elevated shaft, injured his back because of the contorted position in which he was working. There was no loss of balance nor any spilling or falling of materials”

In contrast to the *Ross* case, here, at the time of the accident, plaintiff was subjected to harm directly flowing from the application of the force of gravity on the objects, as they moved down and through the pipe, the force of their exit causing the pipe to swing loose and strike plaintiff. Unlike the scaffold in *Ross*, a securing device, such as a come-a-long or a

brick, would have served the core objective of Labor Law § 240 (1), in that it would have prevented the pipe from swinging loose and injuring plaintiff. Thus, it cannot be said that the accident was only tangentially connected to the effects of gravity (*compare also Fenty v City of New York*, (71 AD3d 459, 460 [1st Dept 2010] [where the plaintiff was injured when, while working inside a bucket lift, a steam pipe next to the lift ruptured, causing hot steam to emanate from the pipe and onto the plaintiff, the First Department held that the “plaintiff’s injury-producing accident was not attributable to the risk arising from the elevation differentials at his work site that brought about the need for the safety device in the first place, but rather was caused by the separate, unforeseeable hazard of hot steam emanating from a ruptured pipe, leading to plaintiff’s decision to jump from the bucket lift”]; *Delmar v TerraStruct Corp.*, 249 AD2d 259, 260 [2d Dept 1998] [no Labor Law § 240 (1) liability where the plaintiff, while standing on a scaffold, was injured when the saw he was using kicked back and cut him, because his injury was not the result of a fall or an elevation-related risk]; *Kelleher v Power Auth. of State of N.Y.*, 211 AD2d 918, 918 [3d Dept 1995] [where the plaintiff sustained injury when his hand became caught in a rotary drill after the ladder on which he was standing shifted, and he

instinctively moved his hand to steady himself, the Court held that Labor Law § was inapplicable, because plaintiff injuries were not caused from a fall from an elevated height, and thus, they were not gravity-related]; *Becker v Royce*, 170 AD2d 974, 975 [4th Dept 1991] [no Labor Law § 240 (1) liability where the plaintiff's injuries were solely caused from the kick back of the saw he was using at the time of the accident, and not from his fall from the three-foot high crate he was standing on]).

Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed [internal citation omitted]" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]). "As has been often stated, the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, 'those best suited to bear that responsibility' instead of on the workers, who are not in a position to protect themselves" (*John v Baharestani*, 281 AD2d at 117, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500).

Thus, plaintiffs are entitled to summary judgment in their favor as to liability on the Labor Law § 240 (1) claim, and defendants are not entitled

to dismissal of that claim.

Plaintiff's Common-Law Negligence and Labor Law §§ 200 and 241 (6) Claims

Plaintiffs do not oppose the parts of defendants' motion seeking dismissal of the common-law negligence and Labor Law § 200 claims, or the Labor Law § 241 (6) claim, alleging violations of Industrial Code 12 NYCRR 23-1.5, 1.7, 1.17 (h), 1.8 and 1.30. Accordingly, these claims are deemed abandoned (see *Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]; *Musillo v Marist Coll.*, 306 AD2d 782, 784 n [3d Dept 2003]). Thus, defendants are entitled to summary judgment dismissing said abandoned provisions.

Plaintiffs' Cross Motion For Leave To Amend Their Bill of Particulars To Add An Alleged Violation of 12 NYCRR 23-9.2 (a)

Plaintiffs cross-move for leave to amend their bill of particulars to add an alleged violation of Industrial Code 12 NYCRR 23-9.2 (a).

“Leave to amend pleadings under CPLR 3025 (b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law. A party

opposing leave to amend must overcome a heavy presumption of validity in favor of permitting amendment. Prejudice to warrant denial of leave to amend requires some indication that the defendant[] ha[s] been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position [internal quotation marks and citations omitted]”

(*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]).

“A failure to identify the Industrial Code provision in the complaint or bill of particulars is not fatal to such a claim” (*Jara v New York Racing Assn., Inc.*, 85 AD3d 1121, 1123 [2d Dept 2011], quoting *D’Elia v City of New York*, 81 AD3d 682, 684 [2d Dept 2011]). “Rather, leave to amend the pleadings to identify a specific, applicable Industrial Code provision “may properly be granted, even after the note of issue has been filed, where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant”” (*id.*). In seeking amendment, a plaintiff need not establish the merits of the proposed allegations, but rather, he must “show that the proffered amendment is not palpably insufficient or clearly devoid of merit” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]).

Here, plaintiffs’ belated identification of Industrial Code 12 NYCRR

23-9.2 (a), which applies to power-operated equipment, results in no prejudice to defendants. As to whether the claim is meritorious, it should be noted that Labor Law § 241 (6) provides, in pertinent part, as follows:

“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, [and] equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.”

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501-502). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant’s motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Initially, “the first two sentences of section 23-9.2 (a) - which employ

only such general phrases as 'good repair,' 'proper operating condition,' . . . are not specific enough to permit recovery under section 241 (6)" (*Misicki v Caradonna*, 12 NY3d 511, 520 [2009]). However, that portion of section 23-9.2 (a) which "imposes an affirmative duty on employers to 'correct[] by necessary repairs or replacement' 'any structural defect or unsafe condition' in equipment or machinery '[u]pon discovery' or actual notice of the structural defect or unsafe condition" is sufficiently specific to support a Labor Law § 241 (6) claim (*id.* at 521; *Becerra v Promenade Apts., Inc.*, 126 AD3d 557 [1st Dept 2015]; *Hricus v Aurora Contrs., Inc.*, 63 AD3d 1004, 1005-1006 [2d Dept 2009]).

In their cross motion, plaintiffs assert only that the first sentence of section 23-9.2 (a), which provides that "[a]ll power-operated equipment shall be maintained in good repair and in proper operating condition at all times," was violated. As noted above, this portion of section 23-9.2 (a) is not sufficiently specific to support a Labor Law § 241 (6) claim. Thus, plaintiffs have not demonstrated that "the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d at 500). Accordingly, plaintiffs are not entitled to leave to amend the bill of particulars to add a claim that

defendants violated New York State Industrial Code § 23-9.2 (a).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby


ORDERED that the parts of defendants the City of New York and Metropolitan Transportation Authority's (together, defendants') motion, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims is granted, and these claims are dismissed as against these defendants, and the motion is otherwise denied; and it is further

ORDERED that plaintiffs Lindy and Amanda Joseph's cross motion, pursuant to CPLR 3212, for partial summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against defendants is granted, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

DATED: May 6, 2015
New York, New York

ENTER:



J.S.C.

HON⁸: MICHAEL D. STALLMAN