[* 1]

FA 2/5/15 JE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES Justice

PART 59

Index Number : 107682/2011
KEELER, BAYARD
vs.
MSG HOLDING
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

denied in accordance with the Memorandum Decision and Order dated ~~January 3~~ 2/3, 2015.

FEB 03 2015

FILED
FEB 05 2015
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
FEB 05 2015
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

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

Dated: FEB 03 2015

DEBRA A. JAMES, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

----------x

BAYARD KEELER and BONNIE KEELER,

Plaintiffs,

-against-

Index No.
107682/2011

MSG HOLDINGS, L.P. and TURNER CONSTRUCTION COMPANY,

Defendants.

----------x

DEBRA A. JAMES, J.:

Motion sequence numbers 002 and 003 are consolidated for disposition.

Plaintiff Bayard Keeler brings this action to recover for injuries that he sustained on April 18, 2011, while working as an ironworker/foreman on a construction project at the facility known as Madison Square Garden, located on 7th Avenue between 31st and 33rd Streets in Manhattan (the Premises).

In motion sequence number 002, plaintiff moves, pursuant to CPLR 3212, for an order granting him summary judgment as to liability with respect to his Labor Law § 240 (1) claim.

In motion sequence number 003, defendants MSG Holdings L.P. (MSG) and Turner Construction Company (Turner) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6) claims.

Plaintiff cross-moves for an order granting him summary judgment as to liability on his Labor Law § 241 (6) claim, or alternatively that this court search the record and grant plaintiff summary judgment as to this claim.

The following facts are undisputed. At the time of the occurrence, the Premises were undergoing a full scale renovation/transformation project. Defendant MSG is the owner of the facility. By agreement dated July 8, 2010, Turner contracted to be the general contractor on the project. Turner thereafter subcontracted with various trade companies to perform work on the project. Nonparty Falcon Steel Company, Inc. (Falcon), plaintiff's employer, was hired by a Turner subcontractor to perform steel installation and erection on the project.

According to plaintiff's deposition testimony, at the time of the occurrence, he was working at the Premises as an ironworker/ foreman, and was in charge of a five-person crew responsible for unloading steel deliveries from trucks and delivering/hoisting the steel to particular floors. He had become a foreman approximately two weeks prior to the accident. Prior to becoming a foreman, plaintiff had worked for several months as a journeyman ironworker on a crew that had unloaded and delivered the steel.

On the day of the occurrence, plaintiff's crew was engaged in unloading steel plates from delivery trucks that had driven up to the fifth floor of the Premises, placing the steel plates onto A-frame drywall carts, wheeling the carts to a rigging area, also located on the fifth floor, and hoisting the steel plates to the sixth floor through a narrow hole or opening between the floors. At the rigging area, Falcon had installed an electric chain fall that the crew was using to hoist the steel plates through the opening. The electric chain fall, which was physically positioned on the seventh floor, was being operated by another Falcon employee located on the sixth floor. According to plaintiff, the opening through which the steel plates were being hoisted measured only about 30 inches wide.

Plaintiff testified that the accident occurred when, while walking down from the sixth to the fifth floor to check on a delivery, plaintiff noticed that Dan Thorman/Vega (Thorman), one of plaintiff's crew members, was getting ready to hoist a load of steel plates from an A-frame cart. Plaintiff noticed that no other crew member was present to assist Thorman, and testified that either Thorman had asked plaintiff to help guide the load as Thorman signaled the rig, or plaintiff had seen that Thorman needed a hand and automatically went over to help. Plaintiff

testified that he had not been present when the steel plates had been loaded onto the A-frame cart, but believed that there were between six to eight plates on the cart at that time. According to plaintiff, the steel plates were between 15 and 20 feet long, 8 to 10 inches wide, and about one and one-half inches thick. Plaintiff testified that the plates were not secured to the A-frame cart, as there was nothing to which the plates could be attached; however, the frame of the cart was on an angle, so the load could lean against the A-frame.

In order to hoist the steel plates through the narrow opening, the crew would wrap a steel cable choker around the steel and connect the choker to a hook on the chain fall. Plaintiff testified that, by the time he had reached the cart, a steel cable choker already had been connected to the steel plates, and the choker had been connected to the chain fall. The steel plates were resting on the base of the A-frame cart, on top of four by four inch wooden chocks. Plaintiff observed that the choker had been double wrapped around the plates, which was the proper way to attach the load to the choker, and that the connection looked fine to him. Plaintiff did not know who exactly had connected the steel plates to the choker or the chain fall. Plaintiff testified that the chain fall did not appear to

be damaged in any way. Plaintiff further testified that the A-frame cart also did not appear to be damaged or defective.

According to plaintiff, the accident happened as the plates were being raised off of the A-frame cart using a method known as "suitcasing". Briefly, "suitcasing," as described by various witnesses, is the process of hoisting the plates up on the short rather than flat side of the plate, much like when you hold up a suitcase: one side is brought up before the full load is hoisted up off the surface.

Plaintiff testified that he was standing by the side of the load near the choker in order to guide or steady the load. As the load started to rise, the plates became unbalanced, shifted on the cart, and simultaneously flipped off of the cart and onto plaintiff's foot. The cart fell over with the load. Plaintiff testified that he does not know exactly why the load became unbalanced and came off of the cart. Just prior to the accident, the bottoms of the steel plates, which were still resting on the wooden chocks on the base of the cart, were at a height of approximately 10 to 14 inches from ground; the tops of the steel plates were at a height of approximately two and one-half feet from the ground.

Plaintiff testified that the A-frame drywall cart that his

crew was using most likely had been provided by Falcon. The A-frame drywall carts were the only carts that plaintiff's crew had been given to use, and were the only carts available to use. Plaintiff testified that there were no wheel locks on the A-frame carts, and that the wheels of the A-frame carts spin 360 degrees. In addition, plaintiff testified that no chocks were placed around the wheels to prevent the A-frame cart involved in the accident from rolling, as such wheels really could not be chocked. Although there were some larger and heavier duty steel carts at the site, plaintiff testified that they belonged to another contractor and/or were not available to him to use. At one time, plaintiff testified that he had told someone that the crew needed heavier, stronger carts, because he thought the A-frame carts were at their limit. While plaintiff did not know the specifications of the A-frame carts, and did not know if the steel plates were too heavy for the cart, plaintiff testified that he thought that it was "borderline".

According to the testimony of Thorman, who was employed by by Falcon as a journeyman ironworker on plaintiff's crew, the crew had been unloading and delivering steel plates to the floors on which they were to be used throughout the day, and that, prior to plaintiff's accident, the crew had hoisted maybe 10 other

loads to the sixth floor using the same method each time. Thorman did not know whether plaintiff had been present each time that they had hoisted a load.

Thorman testified that, at the time of the occurrence, the crew was in the process of raising four steel plates that were around 15 feet long, 8 to 10 inches wide, and about one inch thick. The plates together weighed between 1000 to 2000 pounds (*id.* at 50). The crew was using the method known as "suitcasing" to get the plates through the opening between the fifth and sixth floors, which measured about five feet wide, and between 10 and 15 feet long.

The steel plates were resting on four by four inch wooden chocks or cribbing on the bottom of the A-frame cart. In order to hoist the load, a steel choker had been wrapped twice around the plates and then connected to the chain fall. Thorman was not sure who had wrapped or connected the plates with the choker, but believed it could have been him or the crew member with whom he had been working. Thorman did not believe that it was plaintiff that had connected the load, as plaintiff was the foreman and not really "hands on".

Thorman testified that, after he had given the signal to hoist the load, the operator started to raise the load, and the

minute the operator had "got into the weight of the load" and had taken some of the weight off of the cart, the cart shifted and fell or tipped over, dumping or flipping the load onto plaintiff's foot. The load did not come off of the cart until the cart fell over. Thorman testified that the plates rolled off the cart because the weight shifted from one end of the cart to the other when the plates started coming up, which rolled the cart over.

Thorman testified that they were using A-frame carts because that is what they were given to do the job, and it was not his job to question it. There was nothing defective about the A-frame cart that they were using. Thorman did not know the weight rating of the A-frame cart involved in the accident, and did not know if the weight of the steel plates had exceeded the cart's weight rating. Thorman testified that other, heavier duty steel carts or dollies were not available for use on the site at that time.

Thorman testified that there was no way to lock the wheels of the A-frame cart, as the wheels do not lock on that type of cart. While they possibly could have choked the wheels, Thorman testified that they had never choked the wheels on other occasions.

Lawrence Walther, Falcon's general foreman/superintendent on the project, testified that he did not witness the accident but had arrived at the accident site shortly thereafter. Walther believed that plaintiff was using an A-frame cart at the time of the accident, but did not know the particular capacity or weight rating of the cart. He testified that, whether the A-frame cart that plaintiff was using was proper for the task would depend on the weight he was moving. Walther did not know the weight of the particular load involved in the accident. Walther testified that other steel-framed carts should have been available at the site, but was not sure who owned the steel carts, or whether other carts were available on the job site on the date of the accident.

Greg Murray, plaintiff's immediate supervisor, Walther's assistant, and the "walking boss" on the project stated that he did not witness the accident, but had arrived shortly thereafter and observed that the chain fall was in working order, and that plaintiff had not been using a broken cart. He believed that Falcon had provided the cart that plaintiff's crew was using. He testified that, until the day of the accident, Falcon had used A-frame carts on the project, as well as some bigger carts. Murray did not know the weight rating of the A-frame cart that plaintiff was using, did not know the size of the load that

plaintiff had put on the cart, and did not know if the steel plates weighed more than the rating of the cart. Murray also did not know which carts were available to plaintiff at the site that day. Murray was not certain, but thought that there might have been six bars on the cart, measuring four inches wide, six plus feet long, and one to two inches thick. He testified that the opening through which the bars were to be hoisted measured approximately four feet wide and at least 15 feet long. He testified that he, personally, would not have used only one choker to pick up the load off of the A-frame cart, because it would have been difficult to chock the cart's wheels since they spin 360 degrees. Murray testified that he first would have hoisted the load to the ground with two chokers, and then re-choked the load for hoisting. However, he stated that plaintiff essentially was hoisting the plates in the same manner, and following the same protocol, that Falcon had been using to hoist steel beams during the previous six weeks. Murray testified that the steel beams would become uneven every time they were hoisted, because the hole basically was smaller than the beams.

Rodrigo Caro, Turner's site safety manager for the project, testified that he also did not witness the accident but arrived shortly after. Caro testified that each of the ironworker

companies brought their own equipment onto the job site, and that Turner did not supply any equipment to the ironworker companies. Turner did not have their own carts at the site. At the accident site, Caro remembered seeing an A-frame cart with a Falcon name, four steel plates attached to a sling, and the sling attached to the hook of a chain fall or hoist. Caro also observed pieces of four by four inch wood on the floor, that appeared to have been used as cribbing. Caro testified that the steel plates varied in length, with some over 10 feet long, 10 inches wide, and maybe three-quarters of an inch thick. Caro estimated that the four plates together weighed a bit over 1500 pounds. Caro did not recall the exact size of the opening, but believed that it was between 24 to 36 inches wide and more than 15 feet long.

Caro observed different types of dollies and carts being used by the ironworker companies to transport the steel from the trucks, but did not have any idea of which dollies and carts belonged to which contractor. While Caro had observed heavier duty steel dollies on the Premises, he did not know to whom the heavier duty steel dollies belonged, or if they were available to plaintiff's crew.

Corey Hayes, who was working at the site that day as the superintendent of another steel contractor, Titan Erectors, and

witnessed portions of the events leading up to plaintiff's accident, recalled that, on the day of the accident, Falcon was hoisting a bunch of steel, beams or structural T beams, from the fifth to the sixth floor. He remembered that the Falcon crew was using various dollies and carts, but mostly A-frame carts, and was hoisting the steel directly off of the carts or dollies. He did not know whether Falcon had other carts available to transport the steel. In Hayes's opinion, the A-frame carts were not the right type of cart to use for the transportation of steel because the carts were overloaded.

Just prior to plaintiff's accident, Hayes witnessed plaintiff on one side of an A-frame cart, and two of his men on the other, pushing the A-frame cart towards the chain fall. Hayes testified that the crew was having difficulty moving the A-frame cart towards the hole, so plaintiff, or someone on the crew, had taken the choker and wrapped it around the A-frame cart and the steel, attaching it to the chain on a diagonal and not a vertical pull. Hayes believed that the crew was trying to use the chain fall as a mechanism to pull and help get the cart to the hole where they were hoisting the steel; Hayes testified that, as the cart started moving forward, it flipped or rolled over with the steel, landing on top of plaintiff's foot. Hayes

testified that plaintiff's crew was about 15 feet away from the hole, and not directly under it, when they wrapped the choker around the steel and the A-frame cart.

Hayes testified that, immediately after the accident, he went over to help plaintiff get out from under the load; it was Hayes's recollection that the choker was still wrapped around the steel and the A-frame cart at that time.

With respect to experts, The parties each have submitted an affidavit. Briefly, plaintiff's expert opines, inter alia, that the opening through which the materials were to be hoisted was inadequate to permit proper and balanced hoisting; that the method of hoisting was not appropriate for 1500 pounds of steel; and that the A-frame cart on wheels was an improper piece of equipment from which to hoist the steel.

Defendants' expert opines, inter alia, that the plaintiff was provided with all proper safety equipment, and that it is industry standard to lift steel directly from carts with wheels just like the one plaintiff was using, and that it is industry standard to "suitcase" a load. Defendants' expert further states that it is a known consequence of lifting steel in this manner that the load will rotate or "break" in a predictable fashion. He

opines that there was no violation of Labor Law § 240 (1), and that, in any event, plaintiff was the sole proximate cause of the accident by standing in an improper position, and by failing to fulfill his responsibility, as foreman, to ensure that the load was choked in a way that would cause the load to "break" away from, rather than towards, plaintiff when it tipped.

Plaintiff now seeks summary judgment with respect to liability on his Labor Law §§ 240 (1) and 241 (6) claims. Defendants seek summary judgment dismissing all of plaintiff's causes of action.

It is well settled that "[t]he 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" (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]; see also Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment will be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]).

Labor Law § 240 (1) imposes absolute liability upon owners and general contractors who fail to fulfill their statutory obligation to furnish or erect safety devices adequate to give proper protection to a worker who sustains gravity-related injuries proximately caused by such failure (Rocovich v Consolidated Edison Co., 78 NY2d 509, 513 [1991]; Bland v Manocherian, 66 NY2d 452, 459 [1985]). Specifically, Labor Law § 240 (1), also known as the Scaffold Law, 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"

(*id.*). In order to accomplish its goal, the statute places responsibility for safety practices and safety devices on owners, contractors, and their agents, who are "best situated to bear that responsibility" (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500 [1993]). The statute is to be liberally construed to achieve this purpose (*see* Lombardi v Stout, 80 NY2d 290, 296 [1992]).

. . . .

"'Labor Law § 240 (1) 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*'" (Runner v New York Stock Exch., Inc., 13 NY3d 599, 604 [2009], quoting Ross, 81 NY2d at 501). For liability to attach under this statute, "'the owner or contractor must breach the statutory duty . . . to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries'" (Kerrigan v TDX Constr. Corp., 108 AD3d 468, 471 [1st Dept 2013], quoting Robinson v East Med. Ctr., LP, 6 NY3d 550, 554 [2006]). The inquiry cannot "focus simply on whether the provided safety devices malfunctioned, but must also examine whether the safety devices that were provided 'operated [so] as to give *proper* protection'" (Harris v City of New York, 83 AD3d 104, 111 [1st Dept 2011], quoting Labor Law § 240 [1] [emphasis added]).

To prevail on his Labor Law § 240 claim, plaintiff must show (1) a violation of the statute (i.e., that defendants breached their nondelegable duty to furnish or erect, or cause to be furnished or erected, safety devices in a manner that gave him proper protection from gravity-related risks); and (2) that the

statutory violation was a contributing or proximate cause of his injuries (*see* Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35, 39 [2004]; Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 287-289 [2003]). Plaintiff argues that the statute was violated because the evidence establishes that the hoisting protocol, which Falcon had developed and was using to hoist the steel through the narrow opening between the floors, caused the load to become uneven and unbalanced; and, that Falcon's provision of a four-wheel A-frame drywall cart to transport the steel, and to use as a platform for hoisting the steel, was inadequate to handle the shifting weight of the load caused by the uneven hoisting.

In order to recover damages for a violation of Labor Law § 240 (1), plaintiff must demonstrate that, "at the time the object fell, it was being hoisted or secured or required securing for the purposes of the undertaking" (Gabrus v New York City Hous. Auth., 105 AD3d 699, 699 [2d Dept 2013] [internal citations and quotations omitted]). Here, plaintiff has met his initial burden of establishing prima facie entitlement to summary judgment as to liability on his Labor Law § 240 (1) claim. Plaintiff has proffered evidence to establish that the accident occurred while plaintiff and his crew were in the process of hoisting the load

of steel plates. Plaintiff also has proffered evidence that the A-frame cart, from which the load was being hoisted, was inadequate to secure the load, and thus failed to provide proper protection from the foreseeable risks associated with the plates becoming unbalanced and shifting during hoisting. The evidence establishes that, as a result of the inadequately secured load becoming unbalanced and shifting, the cart was caused to tip, fall, or roll over, dropping the plates onto plaintiff's foot (see Marrero v 2075 Holding Co. LLC, 106 AD3d 408, 409 [2d Dept 2013] [injuries within ambit of section 240 (1) where plywood planks, on which plaintiff was walking, buckled and shifted; as a result, an A-frame cart containing Sheetrock and two 500-pound beams tipped over towards plaintiff, causing the steel beams to fall and land on plaintiff's calf and ankle]).

In opposition to plaintiff's motion, and in support of their motion for summary judgment to dismiss this cause of action, defendants argue that Labor Law § 240 (1) is not applicable because the evidence establishes that there was at most only a de minimis height differential between plaintiff and the bottom of the A-frame cart.

In determining whether Labor Law § 240 (1) has been violated, our courts have held that the "single decisive question

is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a *physically significant elevation differential*" (Runner, 13 NY3d at 603 [emphasis added]). In determining whether an elevation differential is "physically significant," the court must consider, among other things, "the weight of the object and the amount of force" the object is "capable of generating, even over the course of a relatively short descent" (id. at 605; see also Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., 18 NY3d 1, 10 [2011]). Here, there is evidence that the steel plates weighed between 1500 and 2000 pounds. Given the force that such a load would be capable of generating over a distance of 12-14 inches, the height differential between plaintiff's foot and the base of the cart cannot be said to be de minimis (see Marrero, 106 AD3d at 409 [although the steel beams fell only short distance from the A-frame cart, the height differential was not de minimis given the weight of the beams and the force that they were able to generate during their descent]; McCallister v 200 Park, L.P., 92 AD3d 927, 928-929 [2nd Dept 2012] [although the base of the scaffold was at the same level as the plaintiff and the scaffold fell only a short distance, height differential was not de minimis given the combined weight of the device and its load, and

the force it was able to generate over its descent]).

Defendants additionally argue that plaintiff's motion must be denied, and that their motion for summary judgment dismissing this claim must be granted, because there is evidence that the accident did not result from the absence or inadequacy of any safety device, and because plaintiff was the sole proximate cause of his accident. In support of their contention that plaintiff was provided with all necessary and proper safety equipment, defendants point to the deposition testimony of various witnesses that the chain fall and rigging set up were not defective and did not fail in any way, and that the A-frame cart also was not damaged or defective. To establish that the A-frame cart was an adequate device on which to secure and hoist the steel plates, defendants cite to plaintiff's deposition testimony, that he did not think that it was unsafe to lift steel plates off the cart. Defendants also cite to their expert's opinion that lifting steel loads from carts with wheels just like the one plaintiff was using is "industry standard".

Defendants contend that plaintiff was the sole proximate cause of his injury, because there is evidence that it was plaintiff's responsibility, as a foreman, to ensure that the steel plates were choked in a manner to cause the load "break" so

as to fall away from, and not towards, plaintiff. Defendants contend that the load landed on plaintiff's foot only because plaintiff either improperly choked the load, or failed to ensure that the plates were properly choked so that the load would break away from, instead of towards him. In support of their contention, defendants cite to their expert's affidavit, wherein he states:

> Plaintiff decided to have the load secured so that the choker line was between the load and the back of the A-frame. This is referred to as "breaking" the load on the inside. This forced the load to shift towards Plaintiff. Plaintiff could have and should have instead "broken" the load on the outside so the line ran from the front of the load, forcing any rotation and/or shift of balance to cause the load to move away from Plaintiff and towards the back support of the A-frame.

Defendants' motion for summary judgment to dismiss plaintiff's Labor Law § 240 (1) claim is denied. Where, as here, plaintiff has made a prima facie showing that there was a violation of Labor Law § 240 (1), the burden shifts to the defendants to 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).

To the extent that the accident occurred while plaintiff's

team was in the process of hoisting the steel plates off of the A-frame cart, defendants have failed to establish that there was no violation of the statute. Defendants' evidence, that neither the steel chain fall nor the A-frame cart were defective or damaged, is insufficient to establish that A-frame cart provided proper protection when used as a platform for hoisting steel. Additionally, plaintiff's testimony, that he did not think it was unsafe to lift steel plates off the cart, does not establish that the A-frame cart involved in the occurrence was adequate to provide proper protection during the hoisting of such heavy loads. Defendants' expert's assertion, that "it is industry standard to lift steel from carts with wheels just like the one Plaintiff was using at the time of the accident," also is insufficient to raise a triable issue of fact that the statute was not violated. There is no indication that the expert examined the A-frame cart involved in the accident, nor has any evidence been offered to establish the particular specifications or weight rating of the A-frame cart involved in the accident. Accordingly, there appears to be no basis in the record for the expert's conclusion, that the A-frame cart being used by plaintiff to lift heavy steel loads complied with a recognized industry standard (see Simo v New York City Tr. Auth., 13 AD3d

609, 611 [2d Dept 2004] ["[I]t is settled and unquestioned law that opinion evidence must be based on facts in the record or personally known to the witness" (citations and internal quotations omitted)].

Having failed to raise a triable issue of fact with respect to whether there was a violation of the statute in using a four-wheel A-frame drywall cart as a platform to secure and hoist heavy steel loads, it follows that any negligence on the part of plaintiff in either choking or hoisting the load could only have been a contributory, and not the sole proximate cause of his injuries (see Vail v 1333 Broadway Assoc., L.L.C., 105 AD3d 636, 637 [1st Dept 2013]).[1] It is well settled that contributory or comparative negligence is not a defense to absolute liability under Labor Law § 240 (1) (see Romanczuk v Metropolitan Ins. & Annuity Co., 72 AD3d 592 [1st Dept 2010]). Thus, where "the

---

[1]In any event, this court notes that defendants' expert's assertion that plaintiff improperly choked the load on the inside, also is not based on any facts in the record. As the basis for his assertion, the expert apparently relies on the deposition testimony of plaintiff's supervisor Murray, who did not witness the accident. Moreover, Murray testified only that he "imagine[d the choker] had to be broken away from [plaintiff]," because the cart went away from plaintiff instead of coming into him. On the other hand, plaintiff, a witness with personal knowledge as to how the load actually was choked, testified that the loop came around and was choked facing him on his side, i.e., that the load was choked on the outside.

owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence" (Tavarez v Weissman, 297 AD2d 245, 247 [1st Dept 2002] [internal quotation marks and citations omitted]).

Nevertheless, plaintiff's motion for summary judgment on his Labor Law § 240 (1) claim must be denied. Although plaintiff may have made out a prima facie showing of a violation of the statute in the use of the A-frame cart as a platform for hoisting heavy steel loads, defendants have proffered evidence, i.e., the deposition testimony of nonparty Hayes, that is sufficient to raise issues of fact as to whether the accident occurred during the process of hoisting the steel, and thus whether the accident resulted from a violation of the statute. Specifically, Hayes testified that the accident occurred, not as plaintiff and his crew were attempting to hoist the load, but as they were attempting to pull the cart toward the opening between the floors with the chain fall, after wrapping the cable choker around both the A-frame cart and the steel load. Where, as here, there appears to be credible, eye-witness testimony that reveals a differing version of the accident, "one under which defendants

would be liable and another under which they would not, questions of fact exist making summary judgment inappropriate" (Ellerbe v Port Auth. of N.Y. & N.J., 91 AD3d 441, 442 [1st Dept 2012]).

Labor Law § 241 provides, in pertinent part:

> All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places

(*id.*)

Labor Law § 241 (6) "imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers" (Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 878 [1993]), 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).

To sustain a cause of action under section 241 (6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision

that is applicable given the circumstances of the accident, and that sets forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*id.*) In order to establish their entitlement to summary judgment as a matter of law dismissing the Labor Law § 241 (6) cause of action, defendants must establish "the absence of any triable issues of fact as to whether the Industrial Code provision[s] cited by the plaintiffs [are] applicable" (Mott v Tromel Constr. Corp., 79 AD3d 829, 831 [2d Dept 2010]).

As the bases for his Labor Law § 241 (6) claim, plaintiff has asserted, generally, violations of Industrial Code §§ 12 NYCRR 23-1.5 (General responsibility of employers), 23-1.7 (Protection from general hazards), 23-1.8 (Personal protective equipment), 23-1.10 (Hand tools), 23-1.12 (Guarding of power-driven machinery), 23-6 (Material Hoisting), 23-8 (Mobile Cranes, Tower Cranes and Derricks), and 23-9 (Power-Operated Equipment).

Defendants argue that plaintiff's Labor Law § 241 (6) claim should be dismissed because the Industrial Code provisions cited by plaintiff provide no basis for liability under this statute, and/or, did not proximately cause plaintiff's accident. Specifically, defendants argue that Industrial Code §§ 12 NYCRR

23-1.5 and 23-6.1 (a) (b) © and (h) are not sufficiently specific to sustain this cause of action, and that all of the remaining provisions are inapplicable to the facts of this case.

Plaintiff opposes defendants' motion solely with respect to the asserted violation of Industrial Code provision 12 NYCRR 23-6.1 (d), and argues that his cross motion for summary judgment should be granted as to liability with respect to that provision.

To the extent that plaintiff's Labor Law § 241 (6) claim is premised on the violation of any Industrial Code provision other than 12 NYCRR 23-6.1 (d), the defendants' motion for summary judgment dismissing the cause of action is granted. Our courts have held that where, as here, a defendant moves for summary judgment, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated is deemed to have abandoned reliance on that particular Industrial Code section (Rodriguez v Dormitory Auth. of the State of N.Y., 104 AD3d 529, 530-531 [1st Dept 2013]).

Industrial Code § 12 NYCRR 23-6.1 (d) provides, in pertinent part, that "[s]uspended loads shall be securely slung and properly balanced before they are set in motion" (*id.*) Our courts have held that the provisions of 12 NYCRR 23-6.1 (d) are sufficiently concrete in their specifications to support a Labor

Law § 241 (6) claim (see Hayden v 845 UN Ltd. Partnership, 304 AD2d 499, 500 [1st Dept 2003]).

Defendants argue that their motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim should be granted with respect to this provision, because there is evidence that the bottom edges of the steel plates were still resting on the A-frame cart when the imbalance caused the load to shift, thus the load was not a "suspended load" within the meaning of this provision when the accident occurred.

Defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action, insofar as it is based on an alleged violation of 12 NYCRR 23-6.1 (d), is denied. The "interpretation of an Industrial Code regulation and determination as to whether a particular condition is within the scope of the regulation present questions of law for the court" (Messina v City of New York, 300 AD2d 121, 123 [1st Dept 2002] [citations omitted]). Our courts have held that "[t]he 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]).

Although 12 NYCRR 23-6.1 (d) refers to a "suspended load,"

the purpose of the regulation is to prevent improperly secured or unbalanced loads from being set in motion. Here, plaintiff has submitted evidence that the steel plates at issue were not securely slung and properly balanced before the load was set in motion, and that the resulting shift of the partially suspended plates proximately caused plaintiff's accident. To find that this statute is not applicable because the load, which plaintiff testified was in the process of being hoisted, was not yet fully suspended off the platform would be inconsistent with the purpose of the regulation (see e.g., Duffina v County of Essex, 111 AD3d 1035, 1039 [3d Dept 2013] [Industrial Code provision that required brakes to be maintained so that a fully loaded stopped truck could be "securely held on any grade" applicable where the accident resulted from the inability of the brakes to bring a moving truck to a stop]).

Nevertheless, plaintiff's cross motion for summary judgment on this claim also must be denied, as issues of fact remain as to whether plaintiff's accident occurred while the load was being hoisted or while the load was being pulled. Summary judgment also would not be warranted, in any event, because unlike Labor Law § 240 (1), comparative or contributory negligence is a defense to liability under Labor Law § 241 (6) (Misicki v

Caradonna, 12 NY3d 511, 515 [2009]), and plaintiff has failed to make the requisite prima facie showing that he was otherwise free any from contributory or comparative negligence.

Labor Law § 200 is a codification of the common-law duty of an owner or general contractor to maintain a safe worksite (*Comes*, 82 NY2d at 877). Claims involving Labor Law § 200 generally fall into two broad categories: "those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (Cappabianca v Skanska USA Bldg. Inc., 99 AD3d 139, 144 [1st Dept 2012]).

Where a workplace is rendered unsafe by a dangerous or defective condition on the premises, an owner or contractor can be held liable if it either created the dangerous condition, or failed to remedy a dangerous or defective condition of which it had actual or constructive notice (id. at 144; Mendoza v Highpoint Assoc., IX, LLC, 83 AD3d 1, 9 [1st Dept 2011]). Supervision and control need not be proven where the injury arose from a dangerous premises condition (see Murphy v Columbia Univ., 4 AD3d 200, 202 [1st Dept 2004]).

Where a workplace is rendered unsafe by the methods or manner in which the work is performed, including the equipment

used, an owner or contractor can be held liable only if it actually exercised supervision or control over the injury-producing work (Coppabianca, 99 AD3d at 144). For purposes of Labor Law § 200, a defendant has the authority to supervise or control the work "when that defendant bears the responsibility for the manner in which the work is performed" (Ortega v Puccia, 57 AD3d 54, 62 [2d Dept 2008]). Generally, monitoring or oversight of the timing and quality of the work, as well as a general duty to supervise the work and ensure compliance with safety regulations, are insufficient to trigger liability under Labor Law § 200 (see Paz v City of New York, 85 AD3d 519, 519-520 [1st Dept 2011]; Dalanna v City of New York, 308 AD2d 400 [1st Dept 2003]).

Defendants argue that their motion for summary judgment dismissing this cause of action should be granted, because plaintiff's injury resulted from the means and methods employed by Falcon to hoist the steel, and defendants did not direct, control, or supervise that work. In support of their contention, defendants proffer evidence that it was Falcon employees that determined the method by which the steel plates were to be rigged and hoisted, and that no one other than Falcon employees supervised, directed or controlled the manner in which plaintiff

performed his work. Defendants also proffer evidence to establish that neither Turner nor MSG supplied Falcon with any of the equipment that Falcon was using to perform this work.

Plaintiff argues that defendants' summary judgment motion must be denied, because supervision and control are not required when an accident results from a dangerous condition at the work site. Plaintiff notes that it was Turner that had determined where Falcon was to hoist the steel, i.e., through the narrow opening between the 5th and 6th floors. Thus, plaintiff argues, it is evident that Turner had "directed the means and methods of where the hoisting operation should take place". Plaintiff argues that, as a result of the narrow opening, Falcon employed a hoisting protocol that caused the loads to be hoisted in an uneven and unbalanced manner, resulting in injury to plaintiff when the load became unbalanced and shifted, flipping off of the A-frame cart.

Defendants' motion for summary judgment dismissing plaintiff's Labor Law § 200 claim is granted. Defendants have produced evidence sufficient to establish that plaintiff's injury arose out of the means and methods employed by Falcon to perform its work, and that defendants did not exercise the requisite supervision or control over that work to impose liability.

Although Turner may have designated the opening through which Falcon could perform its work, our courts have held that the authority to direct contractors where to work on a given day does not rise to the level of supervision or control necessary to hold such a defendant liable for a plaintiff's injuries (see Reilly v Newireen Assoc., 303 AD2d 214, 221 [1st Dept 2003], lv denied 100 NY2d 508 [2003]). To the extent that plaintiff is claiming that the defendants were negligent by failing to provide Falcon with a large enough opening through which it could hoist the steel in a safer manner, plaintiff has produced no evidence that might establish that either he or Falcon ever notified or complained to Turner or MSG that the opening in the floor designated for their work was too small or narrow, and thus constituted a dangerous condition (see Mitchell v New York Univ., 12 AD3d 200, 201 [1st Dept 2004] [to establish negligence, it must be shown that defendants had actual or constructive notice of the allegedly unsafe condition, and such notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken]).

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment as to liability on his Labor Law § 240 (1) claim (motion sequence

number 002), as well as plaintiff's cross motion for summary judgment as to liability on his Labor Law § 241 (6) claim, are denied; and it is further

ORDERED that defendants' motion for summary judgment to dismiss plaintiff's common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6) claims (motion sequence number 003) is granted solely to the extent of (1) dismissing plaintiff's common-law negligence and Labor Law § 200 claim, and (2) dismissing those portions of plaintiff's Labor § 241 (6) claim based on violations of New York State Industrial Code 12 NYCRR 23-1.5; 23-1.7; 23-1.8; 23-1.10; 23-1.12; 23-6.1 (a), (b), (c), (e), (f), (g), (h) (I) (j) (k); 23-6.2; 23-6.3; 23-8; and 23-9, and the motion otherwise is denied; and it is further

ORDERED that this action shall continue as to the remaining causes of action.

Dated: February 3, 2015 ENTER:

DEBRA A. JAMES J.S.C.