| **Calle v Cornell Tech** |
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| 2018 NY Slip Op 33040(U) |
| October 5, 2018 |
| Supreme Court, Queens County |
| Docket Number: 713265/2015 |
| Judge: Cheree A. Buggs |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CHEREÉ A. BUGGS IA Part 30
Justice

LUIS CALLE and ROSA OJEDA, x

PLAINTIFFS,

-against-

CORNELL TECH, TISHMAN CONSTRUCTION CORP., PAL ENVIRONMENT SERVICES, BARR & BARR, INC., W5 GROUP, LLC, WELLIVER MCGUIRE, INC., CORNELL UNIVERSITY, AND TECHNION-ISRAEL INSTITUTE OF TECHNOLOGY,

DEFENDANTS. x

Index Numbers 713265/ 2015

Motion Date August 22, 2018

Mot. Seq. No. 4

The following efile papers numbered 56-92 submitted and considered on this motion by plaintiff seeking summary judgment on liability, based upon Labor Law §§ 240 (1), 241 (6), 200 and common-law negligence; and the cross motion by defendants, Cornell Tech, Tishman Construction Corp., PAL Environmental Services, and Cornell University (moving defendants), seeking summary judgment dismissing the causes of action of the complaint as against them and defendant ,W5 Group, LLC (W5).

| | Papers Numbered |
|---|---|
| Notices of Motion and Cross Motion - Affirmations - Exhibits ..... | E56-E89 |
| Answering Affirmations and Reply Affirmation ..... | E90-E92 |

Upon the foregoing papers, it is ordered that the instant motion and cross motion, both for summary judgment, pursuant to CPLR 3212, are determined as follows:

Plaintiff, Luis Calle, a construction worker employed by nonparty Waldorf Demolition (Waldorf), a subsidiary of W5, allegedly sustained serious personal injuries while performing demolition work at a building located at 1 Main Street, Roosevelt Island, New York, on July 18, 2014. It is agreed that the premises were owned by defendants, Cornell Tech and Cornell University (collectively Cornell), and that Tishman Construction Corp. (Tishman), acted as agent and representative for the owners for the subject project. PAL Environmental Services (PAL), the prime/general contractor on the job, subcontracted with W5, d/b/a Waldorf, to perform demolition work at said premises.

Plaintiff alleges that on the date of his accident, he was using an electric chipping gun on some windows, standing on the fifth step of an eight-foot tall metal A-frame ladder, when his ladder was struck, from behind, by a Bobcat machine/vehicle being operated by a co-worker, knocking plaintiff off the ladder, onto the back of the Bobcat, and onto the cement floor, causing him serious injuries to, among other things, his right shoulder and knee. Plaintiff commenced this action against defendants in December 2015, alleging common law negligence and violations of Labor Law §§ 200, 240 and 241. During the period from May to September 2016, the parties stipulated to discontinue the case against Technion-Israel Institute of Technology, Barr & Barr, Inc., and Welliver McGuire, Inc. Plaintiff moves against defendants, Cornell, PAL, and Tishman, and moving defendants cross-move, for summary judgment.

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable'" [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *see also Rotuba Extruders v.Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; *see Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).

"[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 demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *see Schmitt v Medford Kidney Center,* 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

The court will first address the branch of plaintiff's motion seeking summary judgment on liability against defendant on the Labor Law § 240 (1) claim. Labor Law § 240 (1) protects a worker from "specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured," and, to be applicable, the harm must flow "directly ... from the application of the force of gravity to an object or person" *(Ross v Curtis Palmer Hydro-Electric Company,* 81 NY2d 494, 501 [1993]). Such statute should be construed as liberally as possible for the accomplishment of the purpose of imposing absolute liability for a breach which proximately causes an injury (*see Nicometi v Vineyards of Fredonia, LLC,* 25 NY3d 90 [2015]; *Fabrizi v 1095 Ave. of the Ams., LLC,* 22 NY3d 658 [2014]; *Misseritti v Mark IV Construction Co, Inc.*, 86 NY2d 487 [1995]; *Zamora v 42 Carmine St. Associates, LLC,* 131 AD3d 531 [2d Dept 2015]), and the duty imposed upon owners and contractors that control the work being performed pursuant to it is nondelegable (*see McCarthy v Turner Constr., Inc., 17 NY3d 369 [2011];Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]; *Scofield v Avante Contracting Corp,* 135 AD3d 929 [2d Dept 2016]). Liability is imposed where there exists a hazard contemplated under the statute; a failure to utilize a safety device enumerated therein, or the use of an inadequate safety device; and "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 v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see Wilinski v 334 East 92nd Housing Development Fund Corp.*, 18 NY3d 1 [2011]).

"To recover on a cause of action pursuant to Labor Law §240 (1), a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident" (*Przyborowski v A & M Cook, LLC*, 120 AD3d 651, 653 [2d Dept 2014]). Where there is no statutory violation, or where a hoisting or securing device of the type enumerated in the statute

would not be necessary (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509; *Garcia v Market Assoc.*, 123 AD3d 661 [2d Dept 2014]; *Moncayo v Curtis Partition Corp.*, 106 AD3d 963 [2d Dept 2013]), or where the plaintiff's actions are the sole proximate cause of his or her own injuries (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 [2003]; *Bonaerge v Leighton House Condominium*, 134 AD3d 648 [1st Dept 2015]), Labor Law §240 (1) will not apply. Such statute is not applicable unless plaintiff's injuries result from an elevation-related risk and the inadequacy of the safety device (*see Fabrizi v 1095 Ave. of the Ams., LLC*, 22 NY3d 658). "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)" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). "The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, at 514; *see Eddy v John Hummel Custom Builders, Inc.*, 147 AD 16 [2d Dept 2016]). A fall from a ladder, in and of itself, does not establish that proper and adequate protection was not provided (*see Carrion v City of New York*, 111 AD3d 872 [2013]; *Melchor v Singh*, 90 AD3d 866 [2011]).

In the case at bar, based upon the evidence presented, plaintiff has failed to satisfy his prima facie burden of demonstrating that defendants violated Labor Law § 240 (1). First, plaintiff has failed to show that his injuries resulted "from the type of elevation related hazard to which the statute applies" (*Parker v 205-209 East 57th Street Associates, LLC*, 100 AD3d 607, 609 [2012]). Said vehicle's actions were not, themselves, "elevation-related" (*see Fabrizi v 1095 Ave. of the Ams., LLC*, 22 NY3d 658). Further, although plaintiff was expected to, and did, use a ladder to perform his duties at the work site, and such ladder, therefore, functioned as a safety device under Labor Law § 240 (1) (*see Ramirez v Metropolitan Transp. Authority*, 106 AD3d 799 [2013]; *De Jara v 44-14 Newton Rd. Apt. Corp.*, 307 AD2d 948 [2003]), plaintiff has failed to establish that such safety device was "inadequate" to prevent his fall, as the proximate cause of plaintiff's accident was the independent action of the Bobcat vehicle backing into the ladder plaintiff was standing on, and not any defect in the ladder itself. (*see Estevez-Rivas v W2001Z/15 CPW Realty, LLC*, 104 AD3d 802 [2013]; *Jimenez v RC Church of Epiphany*, 85 AD3d 974 [2011]; *Ricciardi v Bernard Janowitz Constr. Corp.*, 49 AD3d 624 [2008]). Thus, plaintiff failed to demonstrate that a violation of the statute was a contributing cause of his fall (see Blake v *Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280).

Liability under Labor Law § 240 (1) is a question of fact, except when the device, the ladder herein, collapses, moves, falls or otherwise fails to support the plaintiffs (*see Ramirez v Metropolitan Transp. Auth.*, 106 AD3d 799; *Godoy v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 104 AD3d 646 [2013]; *Melchor v Singh*, 90 AD3d 866). Plaintiff did not testify that the ladder moved, fell or "broke," without the intervention of the Bobcat vehicle, which

would have been necessary to establish that such safety device was inadequate (*see Estevez-Rivas v W2001Z/15 CPW Realty, LLC*, 104 AD3d 802; *Jimenez v RC Church of Epiphany*, 85 AD3d 974; *Ricciardi v Bernard Janowitz Constr. Corp.*, 49 AD3d 624). As to plaintiff's argument that an additional safety device was required, plaintiff must, again, be able to demonstrate that he fell due to the absence or inadequacy of another safety device of the kind enumerated in the statute (*see Garbett v Wappingers Central School District*, 160 AD3d 812 [2d Dept 2018]; *Sarata v Metropolitan Transp. Auth.*, 134 AD3d 1089 [2d Dept 2015]), and while plaintiff does not have to specify which safety device would have prevented his injuries, the risk requiring the safety device must be one both foreseeable and inherent in the work being performed (*see Carlton v City of New York*, 161 AD3d 930 [2d Dept 2018]). In the case at bar, "the risk to plaintiff was not the type of extraordinary peril section 240(1) was designed to prevent ... because no true elevation-related risk was involved here" (*Nieves v Five Boro Air Conditioning & Refrigeration Corp.*, 93 NY2d 914, 916 [1999]; *see Jock v Fein*, 80 NY2d 965 [1992]; *Baugh v New York City Sch. Constr. Auth.*, 140 AD3d 1104 [2d Dept 2016]; *Carey v Five Bros., Inc.*, 106 AD3d 938).

Here, plaintiff's evidence has failed to demonstrate that the ladder was, itself, inadequate, or that it "required securing for the purposes of the undertaking at the time it fell" (*Fried v Always Green, LLC*, 77 AD3d 788, 789 [2d Dept 2010]; *see Roberts v General Elec. Co.*, 97 NY2d 737 [2002]), and, thus, plaintiff failed to eliminate all issues of fact with regard to whether a violation of the statute, i.e., the absence of a required safety device of the kind specified therein, was a contributing cause of the accident and the proximate cause of plaintiff's injury (*see Blake v Neighborhood Hous. Servs. of N. Y. City*, 1 NY3d 280; *Weininger v Hagedorn & Co*, 91 NY2d 958 [1998]; *Cacanoski v 35 Cedar Place Assoc., LLC*, 147 AD3d 810 [2d Dept 2017]). Further, even if demonstrated by the evidence, a violation of a provision of the Industrial Code is merely "some evidence of negligence," and it is left for the trier of fact to determine the proximate cause of plaintiff's injury (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d at 351; *see Eddy v John Hummel Custom Builders, Inc.*, 147 AD3d 16 [2016]; *Seaman v Bellmore Fire Dist.*, 59 AD3d 515 [2009]). As plaintiff has failed to substantiate his prima facie burden in the first instance, this branch of plaintiff's motion, seeking summary judgment on liability, pursuant to Labor Law 240 (1), is denied.

Labor Law § 241 (6), imposes a nondelegable duty on owners, contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work, and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Misicki v Caradonna,* 12 NY3d 511 [2009]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]; *King v Villette,* 155 AD3d 619 [2d Dept 2017]; *Seales v Trident Structural Corp.*, 142 AD3d 1153 [2d Dept 2016]). The ultimate responsibility for safety practices at building construction sites lies with the owner, general contractor and agents (*see Allen v Cloutier Constr. Corp.*, 44 NY2d 290 [1978]).

To succeed in being granted summary judgment under this section, moving defendants must establish either that the Industrial Code sections allegedly violated cannot serve as a predicate for liability pursuant to Labor Law § 241 (6), because they merely set forth a general standard of care for employers, and did not involve a violation of a provision of the Industrial Code that set forth specific applicable safety requirements or standards, which was a proximate cause of plaintiff's accident (*see St. Louis v Town of N. Elba*, 16 NY3d 411 [2011]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]; *Kosinski v Brendan Moran Custom Carpentry, Inc.*, 138 AD3d 935 [2d Dept 2016]; *Torres v City of New York,* 127 AD3d 1163 [2d Dept 2015]); *Carey v Five Bros., Inc.,* 106 AD3d 938 [2d Dept 2013]), or that such sections did not apply in this case or were not violated (*see Zaino v Rogers*, 153 AD3d 763 [2d Dept. 2017]; *Cruz v Cablevision Systems Corp.*, 120 AD3d 744 [2d Dept 2014]; *Ulrich v Motor Parkway Props., LLC*, 84 AD3d 1221 [2d Dept 2011]).

Plaintiff's pleadings assert that defendants violated a multitude of Industrial Code Regulations. Plaintiff, and his expert, have argued this branch of plaintiff's motion solely with regard to Regulations 12 NYCRR 23-3.4 (c) (4) and (5), thereby effectively abandoning those remaining violations by failing to support them in this motion to dismiss. Consequently, plaintiff's motion will be decided with regard to only these stated Code Regulations.

While these provisions may serve as predicates for liability under Labor Law § 241 (6), as they involve an alleged violation of a "specific, positive command" or "concrete specification" of the Industrial Code (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505; *Rizzuto v L.A. Wenger Contr. Co.,* 91 NY2d at 350; *see Przyborowski v A&M Cook, LLC*, 120 AD3d 651; *Torres v Perry Street Development Corp.*, 104 AD3d 672 [2d Dept 2013]) *Carey v Five Bros., Inc.,* 106 AD3d 938; *Forschner v Jucca Co.,* 63 AD3d 996 [2d Dept 2009]), in the case at bar, defendants contend that said specific Code Rules either did not apply to the facts herein, and/or that they were not violated.

Rules 23-3.4 (c) (4) and (5) refer to a "zone of demolition," and the necessity of keeping non-essential individuals out of said "zone of demolition," by erecting "barricades ... wherever there is a likelihood of any person entering" such an area. Plaintiff was, admittedly, outside the red-tape-demarcated "zone of demolition," when his ladder was struck by the Bobcat vehicle. As a result, plaintiff's conclusion, that the subject Rules apply to the facts in the case at bar because they were enacted with the intent of confining the Bobcat vehicle within the "zone," is erroneous.

Consequently, Plaintiff is not entitled to summary judgment on such 241 (6) claim (*see generally, Parrales v Wonder Works Const. Corp.*, 55 AD3d 579 [2d Dept 2008]), as he has failed to demonstrate the applicability of such sections of the law, and this branch of plaintiff's motion is denied (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494; *Hartnagel v FTW*

*Contracting*, 147 AD3d 819 [2d Dept 2017]; *Cortes v Jing Jeng Hang*, 143 AD3d 854 [2d Dept 2016]; *Lopez v New York City Dep't. of Environmental Protection*, 123 AD3d 982 [2d Dept 2014]).

Additionally, plaintiff moves for summary judgement based on Labor Law § 200 and common-law negligence. Labor Law § 200 is a codification of the common-law duty imposed upon an owner and general contractor or agent to provide construction site workers with a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343; *Allen v Cloutier Constr. Corp.*, 44 NY2d 290; *DeMilo v Weinberg Bros., LLC*, 122 AD3d 895 [2d Dept 2014]; *Nicoletti v Iracane*, 122 AD3d 811 [2d Dept 2014]; *Carey v Five Bros., Inc.*, 106 AD3d 938 [2d Dept 2013]). Plaintiff contends that he was injured as the result of a dangerous and defective condition at the job site, *i.e.*, the use of the Bobcat vehicle without sufficient "barrier of the zone of demolition" to protect plaintiff from harm. To be entitled to summary judgment based on Labor Law § 200, plaintiff must demonstrate either that defendants created the alleged condition or that they had actual or constructive notice of the alleged dangerous condition in time to correct it, and failed to do so (*see Martin v I Bldg. Co., Inc.*, 126 AD3d 861 [2d Dept 2015]; *Guilfoyle v Parkash*, 123 AD3d 1088 [2d Dept 2014]; *DiMaggio v Cataletto*, 117 AD3d 974 [2d Dept 2014]; *Quituizaca v Tucchiarone*, 115 AD3d 924 [2d Dept 2014]). A defendant has constructive notice of a dangerous or defective condition when such condition "is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected" (*Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc.*, 61 AD3d 629, 629 [2d Dept 2009]; *Gordon v American Museum of Natural Hist.*, 67 NY2d 836 [1986]).

In the case at bar, while plaintiff has adequately demonstrated that defendants created the "zone of demolition" at the job site, he failed to show that the "red taped" boundary thereat created a risk of injury that was foreseeable given the nature of the work being performed (*see Gordon v Eastern Ry. Supply Co.*, 82 NY2d 555 [1993]). While it is well-settled that defendants are liable for all normal and foreseeable consequences of their acts, it is also well-settled that an independent intervening act may constitute a superseding cause sufficient to relieve a defendant of liability if it is "not foreseeable in the normal course of events, or independent of, or far removed from the defendant's conduct" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]; *see Kush v City of Buffalo*, 59 NY2d 26 [1983]; *Weiss v Hager*, 151 AD3d 906 [2d Dept 2017]). Summary judgment is appropriate "where only one conclusion may be drawn from the established facts" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d at 315; *see Niewojt v Nikko Const. Corp.*, 139 AD3d 1024 [2d Dept 2016]), which is not the case here. The issue of whether an act is foreseeable is generally for the trier of fact (*see Lynch v Bay Ridge Obstetrical & Gynecological Assoc.*, 72 NY2d 632 [1988]; *Manzella v County of Suffolk*, 163 AD3d 796 [2d Dept 2018]). Here, plaintiff has failed to eliminate all triable issues of fact as to whether the collision of the Bobcat with plaintiff's ladder was a

natural and foreseeable consequence of the defendants' alleged negligence or not, resulting in a question as to whether there was a violation of Labor Law § 200. Consequently, the branch of plaintiff's motion seeking summary judgment on the basis of such statutory provision and/or common-law negligence is denied.

Defendants cross-move for summary judgment dismissing plaintiff's complaint as against them, stating, in essence, the same arguments they propounded in opposition to plaintiff's motion for summary judgment. With regard to the causes of action based upon Labor Law § 241 (6), movants have, prima facie, demonstrated that Industrial Code sections 23-3.4 (c)(4) and (5) do not apply to the facts herein. In opposition, plaintiff has failed to rebut defendants prima facie demonstration with regard to these two sections of the Industrial Code, and, thus, defendants are entitled to summary judgment dismissing said two Code sections. However, defendants have failed to address the many other sections of the Industrial Code alleged by plaintiff to have been violated, and so, with respect to those other Code sections, summary judgment pursuant to Labor Law § 241 (6), is denied.

The branch of defendants' cross motion seeking summary judgment dismissing plaintiff's cause of action made pursuant to Labor Law § 240 (1), is granted. Defendants have shown, prima facie, that the subject accident did not involve the type of elevation-related risk with safety device inadequacy (*see Fabrizi v 1095 Ave. of the Ams., LLC,* 22 NY3d 658), or contemplated hazard related to the effects of gravity (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509), necessary for a judgment under such statute. Again, plaintiff's opposition failed to raise a triable issue of fact sufficient to deprive defendants of entitlement to summary judgment on this ground.

Additionally, defendants cross-move for summary judgment dismissing plaintiff's causes of action for violation of Labor Law § 200, and for common law negligence. Employing the same arguments as raised by the parties in support and opposition to plaintiff's motion for summary judgment on these causes of action, the same result ensues. Viewing the evidence in a light most favorable to the non-moving plaintiff (*see Rivera v Town of Wappinger*, 164 AD3d 932 [2d Dept 2018]), defendants have failed to demonstrate that the intervening act of the Bobcat vehicle striking plaintiff's ladder was not "a natural and foreseeable (outcome) to a condition allegedly created by the defendant's negligence" (*Niewojt v Nikko Const. Corp.*, 139 AD3d at 1026), sufficient to relieve defendants of liability herein. Consequently, a triable issue of fact remains, necessitating denial of this branch of defendants' motion.

The final branch of defendants' motion seeks summary judgment dismissing the complaint against W5, plaintiff's employer, pursuant to Workers Compensation Law § 11, which prohibits, with limited exceptions not applicable in the case at bar, employees injured on the job from making claims for damages against employers, if said injured employee has opted for, and has collected, Workers Compensation benefits - his exclusive remedy (*see Weiner v City of New York*, 19

NY3d 852 [2012]; *Owens v Jea Bus Co., Inc.,*, 161 AD3d 1188 [2d Dept 2018]). In the case at bar, defendants have demonstrated that plaintiff was W5's employee; that he was injured inn the course of his employment; and that he chose to proceed, and was found eligible for, benefits under the Workers Compensation Law (*see Dumervil v Port Auth. of N.Y. & N.J.* 163 AD3d 628 [2d Dept 2018]*)*. Consequently, defendants have demonstrated prima facie entitlement to judgment as a matter of law dismissing the complaint against W5 herein.

Contrary to plaintiff's opposition, defendants' cross motion must not be procedurally denied. While it is true that the court may search the record and grant summary judgment to any nonmoving party solely with respect to a cause of action that is the subject of the motion before it (*see Dunham v Hilco Constr. Co.*, 89 NY2d 425 [1996]; *Philogene v Dockett*, 163 AD3d 1015 [2d Dept 2018]), in this matter defendants have served a proper cross motion, pursuant to CPLR 2215, which statute states, in relevant part, that "relief need not be responsive to that demanded by the moving party." As plaintiff has proffered no other opposition to this branch of defendants' motion, this branch is granted, and the complaint, as against W5, is dismissed.

The parties' remaining contentions and arguments either are without merit, or need not be addressed in light of the foregoing determinations.

Accordingly, plaintiff's motion, seeking summary judgment based on Labor Law §§ 240 (1), 241 (6), 200 and common law negligence, is denied. The branch of the cross motion by defendants, seeking summary judgment dismissing the causes of action based on Labor Law § 240 (1), is granted. The branch of the cross motion seeking summary judgment dismissing the claims based on Labor Law § 241 (6) is granted solely with regard to Industrial Code Rules 23-3.4 (c) (4) and (5). The branch of the cross motion seeking summary judgment dismissing the complaint as against W5 is granted. The branch of the cross motion seeking summary judgment dismissing the claims based on Labor Law § 200 and common law negligence is denied.

Dated: October 5, 2018

**HON. CHEREÉ A. BUGGS, J.S.C.**

FILED
OCT 17 2018
COUNTY CLERK
QUEENS COUNTY