

Lind v Tishman Constr. Corp. of N.Y.

2019 NY Slip Op 30623(U)

March 13, 2019

Supreme Court, New York County

Docket Number: 154781/2016

Judge: Barbara Jaffe

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

-----X

EARL LIND JR. and DOROTHY LIND,

Plaintiffs,

- v -

INDEX NO. 154781/2016

MOTION DATE _____

MOTION SEQ. NO. 006

TISHMAN CONSTRUCTION CORPORATION OF
NEW YORK and TISHMAN CONSTRUCTION
CORPORATION,

DECISION AND ORDER

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 006) 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322

were read on this motion for summary judgment.

By notice of motion, plaintiffs move pursuant to CPLR 3212 for an order granting them summary judgment as to liability, for an order setting this matter for trial on the issue of damages, and for an order striking defendants' answers. Defendants oppose.

I. MOTION FOR SUMMARY JUDGMENT

A. Background

On November 9, 2009, the Port Authority of New York and New Jersey entered into an agreement with defendant Tishman Construction Corporation (Tishman), pursuant to which the latter was to serve as construction manager for the Vehicular Security Center and Tour Bus Facility at the World Trade Center. The agreement is signed by the President and Chief Operating Officer of Tishman. The agreement refers interchangeably to Tishman and defendant Tishman Construction Corporation of New York (Tishman of NY) as construction manager. By

letter dated December 8, 2009, the Port Authority confirmed to Tishman of NY that it had accepted its proposal to serve as construction manager. That letter is “concurrent in and confirmed” by the President and Chief Operating Officer of Tishman of NY. In relevant part, the agreement provides that the “Construction Manager shall manage the workers, materials, and Project in such a manner that the Project can be safely and successfully completed within the Project Schedule and the Project budget,” and that the “Construction Manager shall oversee and manage Project Site visits and provide or arrange for responses to Contractor inquiries.” (NYSCEF 262).

On August 16, 2011, Tishman of NY, as construction manager, entered into a contract with non-party Zwicker Electric Co., Inc., as contractor for the provision of electrician services. (NYSCEF 47).

Plaintiff Earl Lind Jr. (Earl) worked as an electrician for Zwicker. In his affidavit dated July 6, 2018, he states the following: On March 27, 2015, he performed a routine safety check on an articulating lift he was to operate and found no problems with it. He wore safety glasses, hard hat, vest, harness, retractable lanyard, and safety boots as he operated the articulating lift on a spiral-shaped ramp within the vehicular center. While suspended in the basket of the lift some 10 to 11 feet in the air and as he drove 10 feet down the ramp to his next work station, the lift began to pick up speed. In an attempt to stop the lift, he released the joystick which engaged the automatic brakes. Due to “slippery sludge” on the ramp, the lift skidded and crashed into a curb. As a result, he ricocheted within the lift from side to side and was injured. He reported his injury to his Zwicker supervisor. (NYSCEF 276).

Earl also states in his affidavit that throughout his time at the site, slippery sludge was present on the ramp and that on several prior occasions the lift had slid down the ramp due to the

sludge. He, along with 50 to 60 other workers, had complained numerous times about that condition at Zwicker safety meetings. Also discussed at the safety meetings were complaints about “debris everywhere,” “metal protruding from the walls,” and “carbon monoxide.” Although Earl saw workers wearing “Tishman”-labeled vests sweeping parts of the ramp, they did nothing to remedy the hazardous conditions. (NYSCEF 276).

On June 7, 2016, plaintiffs commenced this action by filing a summons with notice. (NYSCEF 1). On July 21, 2016, they filed their complaint asserting causes of action for negligence and violations of the Labor Law. (NYSCEF 2).

At his deposition, Earl testified that he had always checked in at the site with the Zwicker sub-foreman who had given him all of his assignments, that he had only reported to Zwicker, that defendants had never assigned him work or directed him on how to perform it, and that immediately after the accident, Earl spoke with the sub-foreman and then reported the accident to a Zwicker foreman. Despite feeling pain and limping, Earl completed his shift that day. (NYSCEF 295).

In an affidavit dated August 17, 2018, Zwicker’s now former sub-foreman, states that he was Earl’s immediate supervisor, that Earl had not reported his accident, and that after the alleged time of the accident, he saw Earl working without a limp or noticeable injury. He saw no slippery substance on the roadway on which Earl operated the lift, nor did he know of any malfunctions with any of the lifts at the site. (NYSCEF 297).

In an affidavit dated August 17, 2018, Tishman of NY’s site safety director denies having seen any slippery substances on the roadway where Earl operated the lift. (NYSCEF 298).

In an affidavit dated August 17, 2018, the Port Authority’s senior engineer for the site states that he took photographs of the site, and that based thereon, there was no slippery

substance on the roadway. (NYSCEF 299).

By order dated October 19, 2018, defendants' motion to dismiss was granted to the extent that they had sought dismissal of all of the alleged violations of Labor Law § 241(6) premised on Industrial Code §§ 23-1.5, 1.7(a)(2), 1.16, 1.17, 2.3, 2.4, and 6.1. (NYSCEF 323).

B. Contentions

1. Plaintiffs (NYSCEF 273-282)

Plaintiffs argue that defendants are construction managers of the site, as they “give the appearance of operating their job site and conducting themselves” as would a general contractor, and that therefore, they are liable under Labor Law § 240(1) as the owner/general contractor of the work site, regardless of whether they controlled, supervised, or directed the work being performed. Moreover, Earl's injury falls within the Labor Law because it was due to the failure of two safety devices, the articulating lift and the ramp on which he worked.

Plaintiffs also maintain that defendants violated Labor Law § 241(6), as it places a non-delegable duty on owners and general contractors to provide reasonable and adequate protection to workers, and as they violated numerous safety codes, only one of which is necessary to have a cause of action under that statute. (NYSCEF 282).

2. Defendants (NYSCEF 291-304)

Defendants assert that pursuant to Labor Law § 240(1), they may be held liable only if they were delegated the authority to oversee and control the work being performed when Earl was injured, and that plaintiffs offer no evidence that defendants had sufficient control of the work for liability to attach. They also fail to specify which defendant is liable under the statute.

The November 2009 agreement between Tishman of NY and the Port Authority requires that Tishman of NY coordinate with on-site contractors and contains no requirement that

Tishman of NY take control or responsibility over the “construction means, methods, techniques, or procedures.” Moreover, Earl received no job tasks or oversight from defendants, and he did not complain to defendants about the sludge. To the extent that plaintiffs argue that exercising supervision or control over the work site is not necessary, defendants maintain that as they are not owners, they must be shown to have supervision or control before liability may attach.

Defendants also contend that the motion must be denied as plaintiffs do not establish that a safety device failed Earl, proximately causing his injury, and that they fail to provide any support for their contention that the lift and ramp constitute safety devices within the meaning of the statute. Rather, it is undisputed that Earl wore safety devices when he was injured.

In addition, defendants argue plaintiffs have no claim under Labor Law § 240(1) because the accident was not due to gravity. Rather, they observe, plaintiffs allege that the accident was due to slippery sludge and the motion of a motorized vehicle, neither of which is related to gravity, and that Earl neither fell from the lift nor was struck by a falling object. Rather, he alleges that he was tossed about within the lift basket.

To the extent that plaintiffs establish a *prima facie* case, defendants contend that issues of fact preclude summary judgment. They observe that plaintiffs offer no witnesses to the accident and that Earl’s direct supervisor refutes Earl’s recollection of events; that Earl claims to have reported the accident to the Zwicker sub-foreman within 15 minutes thereof and that the sub-foreman denies such report; that Earl claims to have been in pain and limping and that the sub-foreman states that Earl appeared completely normal and did not complain of any injuries; that Earl alleges that sludge covered the roadway and that the sub-foreman denies it and asserts that Earl had never complained about it. They also cite a Zwicker accident report dated three days after the accident which reflects no mention of the lift skidding or that its brakes malfunctioned.

Rather, it reflects only that Earl had felt a “pop” in his right leg when the platform moved to the right. (NYSCEF 302).

In addition, according to defendants, the accident occurred on Earl’s last day of employment at the site, his account of the accident is contradicted by the site’s safety director who saw no sludge, and the photographs provided by the Port Authority’s senior engineer for the site show no sludge on the roadway. They observe that Earl claims to have inspected the lift and found nothing wrong with it before operating it. When asked what had caused the lift to slide, Earl only references sludge, mentioning nothing of the lift’s brakes.

Defendants also argue that plaintiffs do not establish that they have a claim under Industrial Code § 241(6), absent any explanation as to how defendants violated the various cited provisions of the industrial code. They specifically argue that section 23-1.7(d) is inapplicable as the lift skidded, not Earl, and absent any claim that Earl had tripped on dirt or debris, the section is inapplicable. As Earl was not working on a vertical passage, defendants assert that section 23-1.7(f) is inapplicable, and that his injury was not due to a failure to provide a stairway, ramp or runway. Section 23-1.7(g) is inapplicable as Earl does not claim a pulmonary injury, and section 23-2.1(a), which requires work in a passageway, walkway or stairway, is inapplicable, absent any allegation that the roadway could not support the weight of “unspecified materials and equipment” or that such materials and equipment were stored near an edge of a floor, platform, or scaffold. Defendants argue that section 23-2.1(b) is not a proper basis for a claim under Labor Law § 241(6), and that Industrial Code § 23-8.1 is inapplicable as the accident did not involve a crane or derrick, but an articulating boom lift.

Defendants deny having violated section 23-9.6 given Earl’s admission that he had inspected the lift before the accident and found it operable, and he does not allege that the lift

had improper ground or grade level controls. Whereas subdivision (d) of that provision concerns aerial baskets attached to a motor vehicle like a truck. ~~By contrast~~, the lift Earl operated was not attached to a truck, and he was driving the lift at the time of the accident, not operating the aerial basket.

Although defendants do not cross-move for summary judgment, they seek judgment in their favor, and ask that plaintiffs be prohibited from filing successive summary judgment motions, absent good cause.

3. Reply (NYSCEF 306-322)

Plaintiffs contend that defendants fail to raise triable issues of fact, observing that the photographs submitted by Port Authority's senior engineer are not date stamped, are out of sequence, are possibly incomplete, and that three of the photographs appear to have been altered or edited when compared with those produced earlier. Moreover, none of them depicts the exact location where Earl was working. They also deny that the affidavit of Zwicker's former sub-foreman raises a triable issue of fact given Zwicker's motive to avoid having to indemnify defendants, and to the extent that the sub-foreman saw no sludge or debris on the roadway or that the lifts were properly maintained, they observe that he provides no documentation.

Plaintiffs maintain that Zwicker's general foreman confirms Earl's injury, offering in support thereof exhibits from Earl's workers' compensation board proceeding (NYSCEF 308), and that contrary to Zwicker's former sub-foreman, Earl often complained about the job site. He also testified to hearing others complain during Zwicker's on-site safety meetings. Moreover, as the lift was in proper working condition, plaintiffs argue that "[i]f [it] was unfit and unsafe, [Earl] would not have operated it." Rather, he was injured because the "ramp" was slick and covered in sludge, causing the lift to slide.

Plaintiffs also assert that Tishman of NY's safety director does not support defendants' position, as he fails in his affidavit to provide documentation supporting his statement that there was no sludge on the roadway. In support of their contention that Tishman is the "construction managers acting as agent to the Port Authority," they submit the transcript of the safety director's deposition in another matter (NYSCEF 306), subcontracts for the site to show that Tishman of NY was an agent of the Port Authority (NYSCEF 313), and a deposition transcript from a different action in which someone purporting to be defendants' safety manager states that "Tishman" ensured that construction at the site was compliant with safety protocols (NYSCEF 307).

C. Analysis

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposition. (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

Evidence submitted for the first on reply may not be relied on for the movant's *prima facie* showing. (*Anderson & Anderson LLP-Guangzhou v N. Am. Foreign Trading Corp.*, 165 AD3d 511, 514 [1st Dept 2018], citing *L'Aquila Realty, LLC v Jalyng Food Corp.*, 103 AD3d

692, 692 [2d Dept 2013]).

1. Labor Law § 240(1)

Pursuant to Labor Law § 240(1):

All contractors and owners and their agents, . . . in the erection, demolition, repair, 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, hangars, 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.

The statute imposes absolute liability on building owners and their agents for workplace injuries. (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]; *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513 [1985]). Its purpose “is to impose a ‘flat and unvarying’ duty upon the owner and contractor despite any contributing culpability on the part of the worker.” (*Bland v Manocherian*, 66 NY2d 452, 461 [1985]). It is liberally construed. (*Koenig v Patrick Constr. Corp.*, 298 NY 313, 319 [1948]; *Quigley v Thatcher*, 207 NY 66, 68 [1912]).

a. Contractor, owner, or agent

Pursuant to Labor Law § 240(1), a contractor or owner may be held liable, even if it exercised no supervision or control over the work performed. (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 287 [2003]). Being an agent of the owner, however, in and of itself, is insufficient for liability to attach absent “circumstances where [the agent] has the ability to control the activity that brought about plaintiff’s injury.” (*Maurisaca v Bowery at Spring Partners, L.P.*, 168 AD3d 711 [2d Dept 2019]; *see Blake*, 1 NY3d at 293 [“[a]n agency relationship for purposes of section 240(1) arises only when work is delegated to a third party who obtains the authority to supervise and control the job”]). Thus, a “construction manager” of a work site is not responsible under the statute unless it exercised control of the activity which brought about the plaintiff’s injury. (*Walls v Turner Const. Co.*, 4 NY3d 861, 863–864 [2005]).

Specifically, it must be shown that the defendant exercised supervision over the plaintiff's day-to-day work and assumed responsibility over the manner in which the work was conducted. (*See Lamar v Hill Int'l, Inc.*, 153 AD3d 685, 686 [2d Dept 2017] [construction manager not liable as it did not supervise plaintiff's day-to-day work and had no authority to control methods used by contractors]).

Here, Earl admitted having received no job tasks from defendants, did not report to them, and that defendants never directed the manner in which he performed his work. That the Construction Management Agreement provides that the construction manager oversee the work at the site to ensure that it is completed timely and within budget is insufficient for liability to attach. (*See Armentano v Broadway Mall Properties, Inc.*, 30 AD3d 450, 451 [2d Dept 2006] [coordination with subcontractors, creating work schedules, and preparing progress reports does not rise to supervision or control]). Moreover, as the Construction Management Agreement references both defendants interchangeably as construction manager, and absent any argument or evidence as to which defendant may be held liable under the agreement, plaintiffs fail to demonstrate, *prima facie*, that defendants may be held liable as agents.

To the extent plaintiffs offer new evidence with their reply to meet their *prima facie* burden of proof on supervision and control, it is not considered. Thus, the transcripts of depositions in a different action, which plaintiffs offer to show that defendants exercised supervision and control over Earl's work, are not considered.

b. Safety device

Even if plaintiffs establish that defendants had exercised supervision and control over Earl's activities for liability to attach, plaintiffs must also establish that the injuries proximately resulted from a violation of the statute. (*Blake*, 1 NY3d at 287; *Rocovich v Consol. Edison Co.*,

78 NY2d 509 [1991]). Such a violation occurs not only when a safety device malfunctions, but when the safety device provided does not operate so as to give “proper protection.” (*Harris v City of New York*, 83 AD3d 104, 111 [1st Dept 2011]).

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.” (*Hoyos v NY-1095 Ave. of the Americas, LLC*, 156 AD3d 491, 500 [1st Dept 2017], quoting *Ross*, 81 NY2d at 501; *Naughton v City of New York*, 94 AD3d 1, 8 [1st Dept 2012]). There is no minimum height differential for a violation to occur. (*Wilinski v 334 E. 92 Hous.*, 18 NY3d 1 [2011]; *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 9 [1st Dept 2011]; *Thompson v St. Charles Condominium*, 303 AD2d 152, 154 [1st Dept 2003], *lv dismissed* 100 NY2d 556 [2003]).

To determine whether a device falls within the definition of a safety device, courts consider whether the device allowed the plaintiff to complete the work performed at a given height in a safe manner. (*Melber v 6333 Main St., Inc.*, 91 NY2d 759, 763 [1998]). In *Melber*, the plaintiff was working on 42-inch stilts while installing studs into drywall. (*Id.* at 761). When going to retrieve a tool, still on the stilts, the plaintiff tripped on something protruding from the floor and fell. (*Id.*). The Court found that the stilts were not a failed safety device, as the plaintiff’s injuries resulted not from the stilts, but from the object protruding from the ground. (*Id.* at 764-765). By contrast, in *Landi v SDS William St., LLC*, the Court found that a pallet jack which had rolled over the plaintiff’s foot when it slid on a slippery ramp, was a safety device. (146 AD3d 33, 38 [1st Dept 2016]). There, the jack had an automatic braking system to prevent it from rolling downhill. (*Id.* at 35). Although the ramp’s slippery condition contributed to the

injury, the jack's braking system was designed to prevent gravity from allowing the jack to slide down the ramp, and thus, the jack was held to be a safety device. (*Id.* at 38).

Here, the articulating lift's braking system was designed to prevent the lift from succumbing to the effects of gravity. It failed and Earl was allegedly injured as a result. As in *Landi*, although the ramp is alleged to have been slippery, the wet condition alone could not have caused Earl's accident, absent the ramp's incline and the failure of the braking system. Thus, the lift is a safety device within the meaning of the statute. However, plaintiffs do not demonstrate that the ramp itself is a safety device. In none of the cases cited by plaintiffs, including *Landi*, was it held that the ramp which precipitated a gravity-related injury was itself a safety device.

Although plaintiffs demonstrate, *prima facie*, that a safety device had failed, proximately causing Earl's injuries, there remain triable issues of fact, as they admit that the lift was in proper working condition, and in light of the statements of Zwicker's sub-foreman, Tishman of NY's safety director, and the Port Authority's senior engineer that the roadway was not slippery the day of Earl's accident.

All three of the aforementioned sworn statements are based on the affiants' personal knowledge, and although the photographs are not date-stamped and are allegedly out of sequence, incomplete, altered, and not reflective of the location where Earl was injured, plaintiffs offer no support for their conclusory allegations concerning the photographs. Moreover, the Port Authority's senior engineer states that he took them on the morning of and at the location of Earl's accident, thereby providing evidence of their reliability. Zwicker's alleged ulterior motive, to the extent that it evidences a lack of credibility of its employees, is not pertinent to this motion. (*See Morales v 320 E. 176th St., LLC*, AD3d , 2019 NY Slip Op 01711 [1st Dept 2019] [credibility issues not to be resolved on summary judgment]; *Latif v Eugene Smilovic Hous. Dev.*

Fund Co., 147 AD3d 507, 508 [1st Dept 2017] [same]).

2. Labor Law § 241(6)

Pursuant to Labor Law § 241(6), owners and contractors bear a non-delegable duty to provide workers with reasonable and adequate protection and safety. To establish a violation of this section, a plaintiff must show that the defendants violated a regulation setting forth a specific standard of conduct. Given the non-delegable duty imposed on an owner and general contractor, or their agents, a plaintiff need not establish that they had notice of the alleged violation or caused or created it by exercising supervision and control over the injury-producing work. (*See Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998] [general contractor may be held liable despite absence of control over worksite or notice of violation]; *Rubino v 330 Madison Co., LLC*, 150 AD3d 603 [1st Dept 2017] [owner and/or general contractor's lack of notice irrelevant to liability]; *Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955 [2d Dept 2013] [plaintiff need not show that defendants exercised supervision and control over work or worksite]). Even when violation of a regulation is established, the plaintiff must show that the alleged injuries were proximately caused by that violation. (*Ulrich v Motor Parkway Properties, LLC*, 84 AD3d 1221, 1223 [2d Dept 2011]; *Egan v Monadnock Const., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

a. Industrial Code § 23-1.7(a)(1) (overhead hazards)

Work areas and passageways “normally exposed to falling material or objects shall be provided with suitable overhead protection”

Plaintiffs fail to show that this section applies under the circumstances. (*See e.g. Daly v City of New York*, 254 AD2d 214, 214–215 [1st Dept 1998] [plaintiff presented no evidence that work he was engaged in was normally exposed to falling material or objects]).

b. Industrial Code § 23-1.7(d) (“Slipping hazards”)

“Employers shall not suffer or permit any employee to use a . . . passageway, walkway, . . . or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.”

Plaintiffs do not allege that Earl slipped on something that caused him to lose his footing. Rather, they allege that he was injured while in the basket atop the articulating lift when it skidded. Even if the statute applies to skidding vehicles, a material issue of fact exists as to whether the road was slippery.

c. Industrial Code § 23-1.7(e) (“Tripping and other hazards”)

“All passageways shall be kept free from accumulations of dirt and debris . . .”

Plaintiffs do not allege that Earl tripped on an accumulation of dirt or debris. Rather, they allege that the lift he operated skidded on sludge. Thus, this provision is inapplicable. (*See Velasquez v 795 Columbus LLC*, 103 AD3d 541, 541 [1st Dept 2013] [distinguishing tripping from slipping hazards]). Additionally, as Industrial Code § 23-1.7(d) pertains to slipping hazards on *inter alia*, foreign substances, and as mud has been found to constitute a foreign substance (*see Fassett v Wegmans Food Markets, Inc.*, 66 AD3d 1274, 1278 [3d Dept 2009] [mud is “foreign substance” within meaning of section 1.7(d)]; *Conklin v Triborough Bridge & Tunnel Auth.*, 49 AD3d 320 [1st Dept 2008] [mud constitutes slippery substance within meaning of section 23-1.7(d)]), and given the similarity between sludge and mud, the accident in issue here is not governed by section 23-1.7(e). In any event, a triable issue of fact remains as to the condition of the roadway.

d. Industrial Code § 23-1.7(f) (“Vertical passage”)

“Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground . . .”

Plaintiffs do not allege that defendants did not provide Earl with a vertical passage to access his work.

e. Industrial Code § 23-1.7(g) (“Air-contaminated or oxygen deficient work areas”)

Plaintiffs neither allege nor offer evidence that Earl suffered an injury related to carbon monoxide.

f. Industrial Code § 23-2.1(a) and (b)
“(a) Storage of material or equipment”

Plaintiffs do not allege or offer facts demonstrating that Earl’s injury was related to the improper storage of materials.

“(b) Disposal of debris”

Subdivision (b) of this section lacks the specificity required to sustain a claim under Labor Law § 241(6). (*Canning v Barney’s New York*, 289 AD2d 32, 33–34 [1st Dept 2001]).

g. Industrial Code § 23-2.2(d)
“After stripping, forms shall be promptly stockpiled or removed from area in which persons are required to work or pass.”

Plaintiffs do not allege or offer facts demonstrating that Earl’s injury was related to a possible violation of this section.

h. Industrial Code § 23-8.1 (“Mobile cranes, tower cranes, and derricks”)

Plaintiffs offer no argument or support for contending that the lift at issue here is covered by this section. Moreover, the statute pertains to machinery that handles and hoists loads, as opposed to the lift here, which is used to carry people.

i. Industrial Code § 23-9.6 (“Aerial baskets”)

Subdivision (a) of this section requires that the operator of an aerial basket inspect the equipment daily, which Earl concededly did. Subdivision (b) requires that basket controls be protected and that lower controls be capable of overriding controls in the basket. Plaintiffs do not allege that the controls were unprotected or that ground controls of the lift were incapable of overriding those in the basket. Subdivision (d) covers aerial baskets operated by a “truck.”

Plaintiffs offer no argument or evidence as to this section's applicability. Accordingly, this provision may not serve as a predicate for plaintiffs' Labor Law § 241(6) claim.

II. OTHER APPLICATIONS

A. Non-movant summary judgment

A court may search the record and grant summary judgment to a non-moving party even in the absence of a cross motion. (*Kershaw v Hosp. for Special Surgery*, 114 AD3d 75, 87 [1st Dept 2013]). As defendants assert that discovery is not complete, the record will not be searched.

B. Successive summary judgment motions

A party is barred from successively seeking summary judgment predicated on grounds which could have been raised in an earlier motion, absent sufficient justification. (*Jones ex rel. Cline v 636 Holding Corp.*, 73 AD3d 409, 409 [1st Dept 2010]). Consequently, an order precluding plaintiffs from again seeking summary judgment is unnecessary.

C. Motion to strike

Plaintiffs' motion to strike defendants' answers is identical to an earlier motion they brought for the same relief which was denied by order dated September 7, 2018. (NYSCEF 177, 305). Thus, their motion is not revisited.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for an order striking defendants' answers and for summary judgment is denied in its entirety; it is further

ORDERED, that to the extent discovery is ongoing, the parties are directed to complete discovery within 60 days of this order; and it is further

ORDERED, that plaintiffs are to file their note of issue within 90 days of this order.


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BARBARA JAFFE, J.S.C.

3/13/2019

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE