Janczewski v 388 Realty Owner LLC
2019 NY Slip Op 30852(U)
March 29, 2019
Supreme Court, New York County
Docket Number: 155614/16
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58
---X
JOHN JANCZEWSKI,

Plaintiff,

-against-

Index No. 155614/16

388 REALTY OWNER LLC, CITIGROUP TECHNOLOGY, INC., SL GREEN REALTY CORP. and TISHMAN CONSTRUCTION CORPORATION,

Defendants.

Mot. Seq. Nos. 002 & 003
---X

DAVID B. COHEN, J.:

Motion sequence numbers 002 and 003 are consolidated for disposition.

This action arises out of a construction site accident that occurred on July 5, 2016 at 388 Greenwich Street in Manhattan (hereinafter, the premises). Plaintiff John Janczewski moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law § 240 (1) as against defendants 388 Realty Owner LLC (388 Realty Owner), Citigroup Technology, Inc. (Citigroup), and Tishman Construction Corporation (Tishman) (motion sequence number 002).

Defendants 388 Realty Owner, Citigroup, SL Green Realty Corp. (SL Green Realty), and Tishman move, pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety (motion sequence number 003).

BACKGROUND

It is undisputed that 388 Realty Owner was the owner of the premises. On December 18, 2007, 388 Realty Owner leased the subject premises to Citigroup Global Markets Inc. (Norton affirmation in support, exhibit K). The lease indicates that 388 Realty Owner had an office "c/o SL Green Realty . . . , 420 Lexington Avenue, New York, New York 10170" (*id.* at 1). By

construction management agreement dated December 23, 2014, Citigroup hired Tishman to act as a construction manager/general contractor on a renovation project at the premises (Mayer affirmation in support, exhibit 3). Plaintiff was employed by nonparty Gabriel Steel Erectors on the date of his accident.

Plaintiff testified at his deposition that he was employed by Gabriel Steel Erectors as a journeyman ironworker on July 5, 2016 (plaintiff deposition tr at 12-14). His foreman on the project was Chris Mayer (Mayer) (*id.* at 16). He arrived at the site before 7:00 a.m., and put his tools and safety equipment by the tool box on the first floor (*id.* at 34). Plaintiff was working with a coworker, Nick Dimuzio (Dimuzio) (*id.* at 36, 46). Mayer directed plaintiff to hoist a 5,000 pound scale box up to the second floor via a lull machine (*id.* at 37, 39, 43). Plaintiff described the scale box as a "big steel box" about 10 feet long, 10 feet wide, and three feet high that was filled with various miscellaneous steel items (*id.* at 38). According to plaintiff, a lull is a forklift-type machine that is used as a crane with an extended boom or arm to hoist items (*id.* at 43-44). A lull has outriggers, which are used to stabilize the machine (*id.* at 44).

At the time of the accident, Dimuzio was on the first floor, and plaintiff's foreman was on the second floor with plaintiff (*id.* at 46). The operator was going to "put [the scale box] on the forks and extend it up to the second floor" (*id.* at 45). Dimuzio moved the forks while on the first floor (*id.* at 46). The lull lifted the scale box about eight feet above the second floor (*id.* at 50). Plaintiff was about six to eight feet away from the scale box when it was being lowered (*id.* at 51, 53-54). Plaintiff was told after the accident that the lull machine became top heavy, and that the scale box slid off the forks of the machine, projecting towards plaintiff (*id.* at 50-52). He testified that "[t]he machine collapsed, the lull . . . came down," although he also stated that

nothing broke off the lull (*id.* at 51-52). The scale box landed on plaintiff's right hip, pinning him from the waist down (*id.* at 53).

Dimuzio avers that the lull operator set up the lull on an uneven surface, half on concrete, and half on dirt (Dimuzio aff, ¶ 1). As the operator began to lift the scale box, he did not deploy the lull's outriggers (*id.*). Dimuzio told the operator, "What the hell are you doing? Why are the outriggers not placed?," to which the operator responded that they did not need outriggers (*id.*). Dimuzio states that the lull hoisted the box to the second floor, and as the piece was coming over to the workers, the lull "suddenly collapsed and tipped over," causing the box to fall off the lift and slam down onto plaintiff, about six to eight feet below (*id.*, ¶ 2). There was nothing securing the scale box to the forks of the lull at the time of the accident (*id.*). The box weighed approximately 5,000 pounds (*id.*). Plaintiff "was seriously injured when he was crushed by the box" (*id.*). An ambulance came and took plaintiff away (*id.*).

Joseph Casey (Casey) testified that he was employed by Tishman as a senior safety manager (Casey tr at 7). Casey described a lull as a "four-wheel[ed] vehicle with a long, articulating forward boom with two forks on it and . . . has the ability to deploy forward outriggers on the left or right side of the vehicle" (*id.* at 23). Lulls are commonly used to hoist items (*id.*). The outriggers provide stability when lifting heavy loads (*id.* at 25). Casey did not witness the accident, but learned about it within five minutes after the accident and immediately went to the scene (*id.* at 45, 47). Casey performed an investigation, and determined that the "skip box"[1] fell off the lull because the outriggers had not been used (*id.* at 54). Casey estimated that the skip box weighed about 1,800 pounds (*id.* at 55). He testified that the outriggers could have been used, and believed that if they had been properly placed, the lull would not have

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[1] Casey referred to the scale box as a skip box (Casey tr at 54).

tipped over (*id.* at 67-68). When asked if anything was being used to secure the skip box to the forks of the lull, Casey stated that he "did not see any in the course of his investigation" (*id.* at 69). Casey filled out an accident report (*id.* at 66). The lull operator never came back to the jobsite after the accident; "He was definitely a ghost after the accident" (*id.* at 62-63).

Tishman's accident report dated July 7, 2016 states that "[plaintiff] was assisting in landing of a skip box from a Lull machine. The Lull machine was on the ground floor and [plaintiff] was on the second floor. Chris Maher was signaling the Lull machine operator and [plaintiff] was receiving the skip box containing steel plates and bolts" (Maher affirmation in support, exhibit 6 at 1). "The Lull machine did not deploy the outriggers before moving the skip box. Thus, the Lull machine over extended (sic) its weight carrying capacity and caused the skip box to slide off the forks of the Lull machine and strike [plaintiff's] leg" (*id.*). Plaintiff broke his right femur (*id.*).

Plaintiff commenced this action on July 6, 2016, asserting causes of action for violations of Labor Law §§ 200, 240 (1), 241 (6) and for common-law negligence.

DISCUSSION

"'On a motion for summary judgment, the movant bears the burden of adducing affirmative evidence of its entitlement to summary judgment'" (*Scafe v Schindler El. Corp.*, 111 AD3d 556, 556 [1st Dept 2013], quoting *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Ostrov v Rozbruch*,

91 AD3d 147, 152 [1st Dept 2012]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a genuine triable issue of fact (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988] [internal quotation marks and citation omitted]).

A. Labor Law § 200 and Common-Law Negligence

Plaintiff did not oppose dismissal of his Labor Law § 200 and common-law negligence claims (Mayer affirmation in opposition, ¶ 2). Accordingly, these claims are dismissed.

B. Labor Law § 240 (1)

Plaintiff argues that he is entitled to partial summary judgment under Labor Law § 240 (1), because the lull, a rigging device covered by the statute, collapsed and caused his injuries. In addition, plaintiff contends that he was undisputedly struck by an unsecured falling load – the scale box – that was being hoisted at the time of his accident.

Defendants contend, in support of their cross motion, that SL Green Realty cannot be held liable under Labor Law §§ 240 (1) or 241 (6) because it was not an owner, general contractor or statutory agent. Defendants also argue that section 240 (1) does not apply, since plaintiff was not exposed to an elevation-related hazard. Additionally, defendants assert, in opposition to plaintiff's motion, that plaintiff's allegation that the skip box slid off the forklift is insufficient to establish a Labor Law § 240 (1) claim.

To support their argument, defendants submit an affidavit from an engineer, Ernest J. Gailor, P.E. (Gailor), who opines, based upon his review of the record, that section 240 (1) is inapplicable, because "there is no indication that the skip box involved in plaintiff's accident slid because of any absence or inadequacies of a safety device of the kind enumerated in the statute" (Gailor aff, ¶ 31). According to Gailor, even if the lull machine operator failed to deploy the

outriggers, this was not the cause of the skip box coming off the forklifts (*id.*). He further states that the lull machine was on a level, newly poured concrete surface at the time of the accident (*id.*). Gailor states that the lull machine properly used its forklifts to lift the skip box to the second floor, and no other devices were needed to secure the skip box to the forklifts (*id.*).

Labor Law § 240 (1), commonly referred to as the Scaffold Law, provides, in relevant part, as follows:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"Labor Law § 240 (1) imposes a nondelegable duty and absolute liability upon owners or contractors for failing to provide safety devices necessary for protection to workers subject to the risks inherent in elevated work sites who sustain injuries proximately caused by that failure" (*Jock v Fien*, 80 NY2d 965, 967-968 [1992]; *see also Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 512 [1991]). "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*" (*Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 501 [1993] [emphasis in original]). To impose liability under Labor Law § 240 (1), the plaintiff must prove a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices), and that the statutory violation proximately caused his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]).

"[T]he 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 v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). The purpose of the statute is to "protect[] workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citations omitted]).

"In order to prevail on summary judgment in a section 240 (1) 'falling object' case, the injured worker must demonstrate the existence of a hazard contemplated under that statute 'and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein'" (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662 [2014], quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). "Essentially, the plaintiff must demonstrate that at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking" (*Fabrizi*, 22 NY3d at 662-663 [internal quotation marks and citations omitted]). "[F]or section 240 (1) to apply, a plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell . . . *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268).

1. Proper Defendants

At the outset, the court must determine whether defendants may be held liable under Labor Law §§ 240 (1) and 241 (6).

a. SL Green Realty

It is undisputed that 388 Realty Owner, not SL Green Realty, was the owner of the premises (Norton affirmation in support, exhibit K). There is also no dispute that Tishman was retained as a construction manager/general contractor. In addition, defendants submit

uncontroverted evidence that SL Green Realty did not enter into any contracts for work on the project, and that SL Green Realty did not have any personnel performing any work (Majkowski aff, ¶¶ 7-8). Thus, defendants have demonstrated that SL Green Realty cannot be held liable as agents under either section 240 (1) or 241 (6) (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]). Plaintiff does not address SL Green Realty in his opposition papers, and has therefore failed to raise an issue of fact. Therefore, SL Green Realty is entitled to dismissal of plaintiff's Labor Law §§ 240 (1) and 241 (6) claims.

b. 388 Realty Owner

There is no dispute that 388 Realty Owner was the owner of the premises. "Liability rests upon the fact of ownership and whether [the owner] had contracted for the work or benefitted from it are legally irrelevant" (*Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 560 [1993]). Therefore, 388 Realty Owner may be held liable under sections 240 (1) and 241 (6).

c. Citigroup

Plaintiff notes that Citigroup was an owner, and that it subsequently hired Tishman on the project. As argued by plaintiff, "[t]he term 'owner' within the meaning of article 10 of the Labor Law encompasses a 'person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit'" (*Zaher v Shopwell, Inc.*, 18 AD3d 339, 339 [1st Dept 2005], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]). Here, the lease identifies Citigroup Global Markets Inc. as the tenant, but also states that the term "Tenant" shall mean "any assignee or other successor in interest . . . of the Tenant herein named, which at the time in question is the owner of the Tenant's estate and interest granted by this lease . . ." (Norton affirmation in support, exhibit K at 1, 86). Defendants have not disputed plaintiff's assertion that Citigroup was an "owner." Additionally, Citigroup clearly

contracted for the work (Mayer affirmation in support, exhibit 3). Therefore, Citigroup may be held liable under sections 240 (1) and 241 (6).

d. Tishman

Plaintiff also argues that Tishman may be held liable under sections 240 (1) and 241 (6) as a construction manager/general contractor. "[A] construction manager . . . may be vicariously liable [under Labor Law §§ 240 (1) and 241 (6)] as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]). In response to plaintiff's motion, defendants have not contested that Tishman, the construction manager (*see* Mayer affirmation in support, exhibit 3), is a responsible party pursuant to Labor Law §§ 240 (1) and 241 (6). Therefore, Tishman may be held liable under both statutes.

2. Statutory Violation and Proximate Cause

Here, the lull machine was being used to hoist the 1,800 to 5,000 pound scale box to the second floor (plaintiff tr at 37, 38; Dimuzio aff, ¶ 2; Casey tr at 23, 55). Dimuzio, an eyewitness to the accident, avers that, "as the piece was coming over to the workers, the lull suddenly collapsed and tipped over, causing the box to fall of the lift and slam down onto [plaintiff], about 6-8 feet below" (Dimuzio aff, ¶ 2). Thus, the "harm [to plaintiff] flow[ed] directly from the application of the force of gravity" to the scale box that was being lifted by the lull (*Runner*, 13 NY3d at 604). Moreover, plaintiff has demonstrated that the load "fell, while being hoisted . . ., *because of* the absence or inadequacy of a safety device of the kind enumerated in [section 240 (1)]" (*Narducci*, 96 NY2d at 268). Dimuzio states that the lull operator had not set up the outriggers to stabilize the lull, and that there was nothing securing the scale box to the forks of the lull (Dimuzio aff, ¶¶ 1, 2; *see also* Casey tr at 54, 69).

Defendants have failed to demonstrate that plaintiff was exposed to the usual and ordinary dangers of a construction site (*see Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 843-844 [1994]). In light of the weight of the scale box and the significant force it was capable of generating over the course of its six- to eight-foot fall (plaintiff tr at 37, 38; Dimuzio aff, ¶ 2), the height differential is not de minimis (*see Runner*, 13 NY3d at 605). In addition, Gailor's opinion that "there is no indication that the skip box involved in plaintiff's incident slid because of any absence or inadequacies of a safety device of the kind enumerated in the statute" (Gailor aff, ¶ 31), is speculative, conclusory, and not supported by the record (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]). Even if the lull cannot be considered a safety device, defendants have not refuted the evidence that the heavy scale box was not secured while it was being lifted by the lull (*see Gould v E.E. Austin & Son, Inc.*, 114 AD3d 1208, 1208 [4th Dept 2014]; *Williams v Town of Pittstown*, 100 AD3d 1250, 1251 [3d Dept 2012]; *Minchala v Port Auth. of N.Y. & N.J.*, 67 AD3d 978, 978 [2d Dept 2009]). Gailor merely concludes that "[n]o additional devices were needed to secure the skip box to the forklifts" (Gailor aff, ¶ 31).

In view of the above, plaintiff's motion for partial summary judgment as to liability under Labor Law § 240 (1) is granted as against 388 Realty Owner, Citigroup, and Tishman. Defendants are not entitled to dismissal of this claim, with the exception of SL Green Realty.

C. Labor Law § 241 (6)

Labor Law § 241 (6) provides, in pertinent part, that:

> "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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work . . . shall comply therewith."

"Labor Law § 241 (6) . . . 'requires owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor'" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 413 [2011], quoting *Ross*, 81 NY2d at 501-502). Labor Law § 241 (6) is not self-executing because it depends upon an outside source, the Industrial Code (*Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982], *rearg denied* 56 NY2d 805 [1982]). The Court of Appeals has held that,

> "for purposes of the nondelegable duty imposed by Labor Law § 241 (6) and the regulations promulgated thereunder, a distinction must be drawn between the provisions of the Industrial Code mandating compliance with concrete specifications and those that establish general safety standards by invoking the '[g]eneral descriptive terms' set forth and defined in 12 NYCRR 23-1.4 (a). The former give rise to a nondelegable duty, while the latter do not"

(*Ross*, 81 NY2d at 505). Therefore, to recover under Labor Law § 241 (6), "the plaintiff must demonstrate that his or her injuries were proximately caused by a violation of a specific and applicable provision of the New York State Industrial Code" (*Licata v AB Green Gansevoort, LLC*, 158 AD3d 487, 488 [1st Dept 2018]).

Plaintiff's complaint and bill of particulars allege violations of 12 NYCRR 23-1.5; 12 NYCRR 23-1.7; 12 NYCRR 23-1.8; 12 NYCRR 23-2.1; 12 NYCRR 23 subpart 6; 12 NYCRR 23 subpart 8; and 12 NYCRR 23 subpart 9, including 12 NYCRR 23-9.1, 12 NYCRR 23-9.2, 12 NYCRR 23-9.3, 12 NYCRR 23-9.4, 12 NYCRR 23-9.5, 12 NYCRR 23-9.6, 12 NYCRR 23-9.7, 12 NYCRR 23-9.8, and 12 NYCRR 23-9.9 (verified complaint, ¶ fifteenth; verified bill of particulars, ¶¶ 6, 7, 8, 9; second supplemental verified bill of particulars, ¶ 8).

Defendants move for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim, arguing that the Industrial Code provisions relied upon by plaintiff are either too general or are inapplicable. In opposition to defendants' motion, plaintiff only relies on sections 23-1.5 (c) (1) and (2), 23-6.1 (c) (1), 23-6.1 (d), and 23-9.8 (e). Accordingly, plaintiff has abandoned reliance on the remaining Industrial Code provisions cited in the complaint and bill of particulars (*see Cardenas v One State St., LLC*, 68 AD3d 436, 438 [1st Dept 2009] ["Plaintiff abandoned any reliance on the various provisions of the Industrial Code cited in his bill of particulars by failing to address them . . . in the motion court . . ."]). Therefore, the court shall only consider the alleged violations of sections 23-1.5 (c) (1) and (2), 23-6.1 (c) (1), 23-6.1 (d), and 23-9.8 (e).[2]

12 NYCRR 23-1.5 (c) (1) and (2)

Section 23-1.5 (c) provides as follows:

"(c) Condition of equipment and safeguards.

> "(1) No employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition.
>
> "(2) All load carrying equipment shall be designed, constructed and maintained throughout to safely support the loads intended to be imposed thereon.
>
> "(3) All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged"

(12 NYCRR 23-1.5 [c]).

Defendants argue that section 23-1.5 (c) (1) and (2) have been held to be general. In opposition, plaintiff argues that these sections have recently been held to be specific sections of

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[2] Since plaintiff is entitled to partial summary judgment under Labor Law § 240 (1), defendants' arguments concerning his Labor Law § 241 (6) claim are academic (*see Fanning v Rockefeller Univ.*, 106 AD3d 484, 485 [1st Dept 2013]). However, the court addresses these points for the sake of completeness.

the Code. However, as very recently noted by the First Department, "[a]lthough 12 NYCRR § 23-1.5 (c) (1) and (2) are too general to serve as Labor Law § 241 (6) predicates, 12 NYCRR 23-1.5 (c) (3) is sufficiently specific to support a claim" (*Jackson v Hunter Roberts Constr. Group, LLC*, 161 AD3d 666, 667-668 [1st Dept 2018], citing *Becerra v Promenade Apts., Inc.*, 126 AD3d 557, 558 [1st Dept 2015]). Plaintiff only relies on sections 23-1.5 (c) (1) and (2), and not 23-1.5 (c) (3). In light of this authority, section 23-1.5 (c) (1) and (2) cannot support plaintiff's Labor Law § 241 (6) claim.

12 NYCRR 23-6.1 (c) and (d)

Subpart 23-6 of the Industrial Code governs material hoisting. Section 23-6.1 provides as follows:

> "(a) Application of Subpart. The general requirements of this Subpart shall apply to all material hoisting equipment except cranes, derricks, aerial baskets, excavating machines used for material hoisting and fork lift trucks.
>
> ***
>
> "(c) Operation.
>
> > "(1) Only trained, designated persons shall operate hoisting equipment and such equipment shall be operated in a safe manner at all times.
> >
> > "(2) Operators of material hoisting equipment shall remain at the controls while any load is suspended.
>
> "(d) Loading. Material hoisting equipment shall not be loaded in excess of the live load for which it was designed as specified by the manufacturer. Where there is any hazard to persons, all loads shall be properly trimmed to prevent dislodgment of any portions of such loads during transit. Suspended loads shall be securely slung and properly balanced before they are set in motion"

(12 NYCRR 23-6.1 [a], [c], [d]).

Defendants argue that subpart 23-6 does not apply because a forklift was being used to hoist the skip box, and a hoist was not in use at the time of the accident. In addition, defendants

contend, citing *Sharrow v Dick Corp.* (233 AD2d 858 [4th Dept 1996], *lv denied* 89 NY2d 810 [1997], *rearg denied* 89 NY2d 1087 [1997]), that Industrial Code § 23-6.1 (c) is insufficiently specific to support a section 241 (6) claim. Defendants further maintain that section 23-6.1 (d) is inapplicable, since there is no evidence that the skip box exceeded the load of the lull machine, and the skip box was not a suspended load secured by slings.

Plaintiff counters that defendants violated both sections 23-6.1 (c) and (d). According to plaintiff, the lull was not operated in a safe manner, and there is no proof whatsoever as to the training of the lull operator. Moreover, plaintiff asserts that the First Department has been silent as to whether section 23-6.1 (c) is a specific provision. Furthermore, plaintiff maintains that the scale box was not secured in any manner to the lull.

"[T]he preferred rule as a matter of statutory interpretation and as a reinforcement of the objectives of the Industrial Code is to take into consideration the function of a piece of equipment, and not merely the name, when determining the applicability of a regulation" (*St. Louis*, 16 NY3d at 416). The Industrial Code defines an "excavating machine" as "[a] power-driven vehicle equipped to excavate, push, grade or *elevate* earth, rock or *other material*" (12 NYCRR 23-1.4 [b] [18] [emphasis supplied]). Plaintiff testified that a lull machine is a "forklift type machine with an extended boom" and outriggers (plaintiff tr at 43-45). The record reveals that the scale box was placed on the boom of the lull, and that the operator then lifted the boom to the second floor (*id.* at 47; Dimuzio aff, ¶¶ 1, 2). Thus, the lull, a power-driven vehicle, was being used to hoist the scale box. In light of this evidence, the exception in section 23-6.1 (a) for "excavating machines used for material hoisting" precludes application of sections 23-6.1 (c) and (d) (*see Scott v Westmore Fuel Co., Inc.*, 96 AD3d 520, 521 [1st Dept 2012]; *see also St. Louis*, 70 AD3d 1250, 1251 [3d Dept 2010], *affd* 16 NY3d 411 [2011]).

12 NYCRR 23-9.8 (e)

Subpart 23-9 of the Industrial Code governs power-operated equipment. Section 23-9.8 (e) provides in subsection (e), which concerns "[o]perating surfaces," that "No lift or fork truck shall be used on any surface that is so uneven as to make upsetting likely" (12 NYCRR 23-9.8 [e]).

Defendants argue that this section was not violated, because Casey testified that the area where the lull was positioned was newly-poured, level concrete. Plaintiff argues, however, that there is significant proof that the regulation was violated. More specifically, the eyewitness to the accident, Dimuzio, confirmed that the lull's operating surface was uneven.

Section 23-9.8 (e) "'mandates a distinct standard of conduct, rather than a general reiteration of common-law principles, and is [therefore] the type of 'concrete specification' that [is] require[d]'" (*Oakes v Wal-Mart Real Estate Bus. Trust*, 99 AD3d 31, 40 [3d Dept 2012], quoting *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 351 [1998]).

Here, it is undisputed that the lull constitutes "power-operated heavy equipment or machinery used in construction, demolition and excavation operations" (12 NYCRR 23-9.1; *see also St. Louis*, 16 NY3d at 416). Moreover, defendants do not dispute that the lull was serving the same function as a lift or fork truck (*see St. Louis*, 16 NY3d at 416). However, there are triable issues of fact as to whether the lull's operating surface complied with the requirements of section 23-9.8 (e). Casey testified that he did not know whether the lull was placed on any "dunnage,"[3] but also stated that the lull was on level poured concrete (Casey tr at 59-60). Nevertheless, as pointed out by plaintiff, Dimuzio states that the operator set up the lull half on

[3] It appears that "dunnage" refers to wooden skids (*see e.g. Myiow v City of New York*, 143 AD3d 433, 434 [1st Dept 2016]).

concrete and half on dirt, and that it was an uneven surface for the lull (Dimuzio aff, ¶ 1). Thus, it is for the jury to determine whether the lull's operating surface was "so uneven as to make upsetting likely" (12 NYCRR 23-9.8 [e]; *see also Oakes*, 99 AD3d at 40; *Fritz v Sports Auth.*, 91 AD3d 712, 713 [2d Dept 2012]).

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 002) of plaintiff John Janczewski for partial summary judgment on the issue of liability under Labor Law § 240 (1) as against defendants 388 Realty Owner LLC, Citigroup Technology, Inc., and Tishman Construction Corporation is granted, with the issue of plaintiff's damages to be determined at the trial of this action; and it is further

ORDERED that the motion (sequence number 003) of defendants 388 Realty Owner LLC, Citigroup Technology, Inc., SL Green Realty Corp., and Tishman Construction Corp. is granted to the extent of:

(1) severing and dismissing the complaint as against defendant SL Green Realty Corp., and the Clerk is directed to enter judgment accordingly;

(2) dismissing plaintiff's Labor Law § 200 and common-law negligence claims; and

(3) dismissing plaintiff's Labor Law § 241 (6) claim, except as to the alleged violation of 12 NYCRR 23-9.8 (e).

Dated: 3-29-2019

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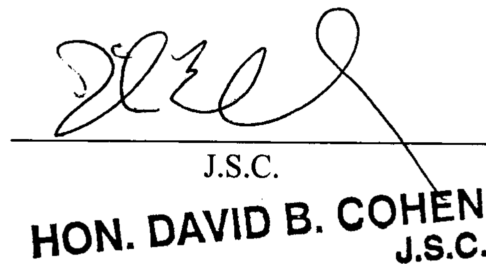

J.S.C.

HON. DAVID B. COHEN
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