SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY **PART** IAS MOTION 23EFM

Justice

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OLGA MIKESHINA,

Plaintiff,

- v -

TISHMAN CONSTRUCTION CORPORATION, ATLANTIC HOISTING & SCAFFOLDING, LLC, NEW YORK CONVENTION CENTER DEVELOPMENT CORPORATION, NEW YORK CONVENTION CENTER OPERATING CORPORATION, THE JACOB K. JAVITS CONVENTION CENTER, NEW YORK STATE ECONOMIC DEVELOPMENT CORPORATION, NEW YORK STATE URBAN DEVELOPMENT CORPORATION, EMPIRE STATE DEVELOPMENT CORPORATION, NEWPORT PAINTING & DECORATING. CO., INC (3RD PARTY DEFT.)

Defendant.

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INDEX NO. 155373/2012

MOTION DATE N/A, N/A

MOTION SEQ. NO. 002 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 94, 165

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 004) 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 166

were read on this motion to/for EXTEND - TIME

Motion sequence numbers 002 and 004 have been consolidated for disposition.

In motion sequence 002, defendants Tishman Construction Corporation (Tishman), New York Convention Center Development Corporation, New York Convention Operating Corporation, The Jacob K. Javitz Convention Center, New York State Economic Development Corporation, and New York State Urban Development Corporation d/b/a Empire State Development Corporation (hereinafter collectively known as "the Convention Center defendants"), move, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff Olga Mikeshina's (plaintiff) complaint and all cross claims. Alternatively, if this motion is not granted, these defendants move for summary judgment granting their cross

claims for contractual and common law indemnification against co-defendant Atlantic Hoisting & Scaffolding LLC (Atlantic).

In motion sequence 004, Atlantic moves, pursuant to CPLR 2004, for leave to file a late motion for summary judgment. Upon the granting of such leave, Atlantic moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's complaint.

BACKGROUND

Plaintiff testified that she was injured in an accident which occurred on March 23, 2012, while she was working to paint the interior of the Jacob Javitz Center. At the time of her accident, plaintiff was working for Newport Construction (Newport) as a second year apprentice bridge painter. Newport provided plaintiff with a helmet, safety belt, and harness which included two lanyards.

At the site, plaintiff was instructed by her forewoman as to which scaffold she was to work on in order to reach her painting assignment. Plaintiff proceeded to take a 75 pound can of paint, a brush, and a roll to an elevator to the second level platform where she was working. After connecting the paint to her belt, plaintiff walked to the metal scaffold. While on the scaffold, plaintiff attached her harness and began to paint the interior metal frame of the building. Plaintiff estimates that at that time, she was located on the second or third floor. Plaintiff testified that when she moved on the scaffold, she would switch her lanyards.

Plaintiff testified that when she ran out of paint, she placed the lanyards and hooked them on the ring of her belt. Plaintiff maintains that she was carrying a scraper with her right hand and proceeded to the stairwell to walk up a metal staircase to another platform. After taking five steps up, she proceeded to fall backwards. Plaintiff maintains that when she started walking up the staircase, she had felt as though something was forcing her backwards. When plaintiff

grabbed the metal handrail to support herself, she realized that one of her lanyards had gotten stuck on the end of the left handrail. Plaintiff's left knee came in contact with the steps and she fell onto her left side. Plaintiff unhooked herself and realized that she was bleeding from her leg.

Plaintiff did not know who placed or owned the staircase. She did not observe any liquid or debris on the stairs before her accident. Plaintiff maintains that neither the harness nor the lanyard ripped or tore. She filed an accident report and continued to attend work until she visited a physician on March 29, 2012. Plaintiff later found out that she had torn meniscus, cartilage, and ligaments in her right shoulder.

Alan Tan (Tan), a superintendent for Tishman Construction, testified that he oversaw the field construction process and logistics. In March of 2012, Tan was working as a project superintendent at the Javitz Center. He maintains that Tishman was the general contractor and that New York Convention Center Development Corporation was the owner of the Javitz Center. Tan testified that Roger Cettina (Cettina) was the general superintendent. Tan maintains that Cettina would oversee the superintendents and deal with the owner. At the site, there was a site safety supervisor from Total Safety Consulting who had the authority to stop work at the site.

Tan believes that Tishman hired subcontractors including Atlantic who constructed the scaffolding. He did not know if anyone from Tishman was responsible for checking the scaffolding placed by Atlantic. Tan did not inspect the scaffolding, but if he saw something unsafe, he would talk to Atlantic. Tan recalls telling Atlantic's foreman about problems with the scaffolding including plywood which had warped in certain areas.

Tan did not know when Newport commenced work at the Javitz Center, but recalls that the company was at the site in March of 2011. Tan would conduct daily walk throughs and

speak with the foreman to see if there were any issues. If Tan saw a worker or a condition which was unsafe, he had the authority to correct the condition or stop the work.

At his deposition, Tan reviewed photos of the scaffolding and noted that the handrail projects past the station pole about six inches and that this was the same for all of the scaffold stairs at the site. Tan maintains that this was not something which he reported to Atlantic as being a safety problem. He maintains that generally workers from Newport were wearing harnesses.

Tan did not recall particular concerns brought to his attention regarding the scaffold stairs and did not remember any workers or foremen discussing problems with the edges of the stairs. He maintains that there were discussions with employees regarding the required use of harnesses. Tan testified that Tishman did not provide Newport employees with any personal protective equipment and did not instruct Newport employees how to conduct their work.

Paul Perdek (Perdek), testified that he is employed by Safeway Atlantic, which was previously known as Atlantic Scaffolding & Hoisting. At Safeway, Perdek's job title is engineer in charge of structural design. He did not conduct work on the scaffold design at the Javitz Center, although he did draw plans for scaffolding projects. Perdek testified that he had no knowledge regarding plaintiff's accident.

Benjamin Rivera (Rivera) testified that he is employed by Safeway Atlantic. Rivera works as a field foreman and maintains that Atlantic erects scaffolding. Rivera maintains that he received OSHA training for scaffolding erection, but recalls that there was no specific training regarding when handrails extended beyond a certain length or about items getting caught in handrails.

Rivera recalls working as a foreman at the Javitz Center project. He maintains that Atlantic was hired to install scaffolding in the "crystal palace" section of the Javitz Center. Rivera testified that the type of scaffolding utilized in that area was "walk-through frame" and "regular frame" scaffolding. The scaffolding was erected by carpenters and laborers who were employees of Atlantic. Rivera did not know whose decision it was to install the types of scaffolding, but he was involved in supervising his workers to erect the scaffolding. He did not have any job duties with respect to the safety or maintenance of the scaffolding and did not know if Atlantic had to obtain permission or consent from Tishman.

Rivera reviewed pictures of the site and testified that the scaffolding in the picture was erected by Atlantic, but that he did not know who manufactured the staircase. He testified that at the bottom of the handrail on the staircase was an "upright" and recalls that there were no safety issues or concerns with using the specific type of handrail. Rivera maintains that prior to the date of plaintiff's accident, he was not aware of any incidents in which anyone working on this project got their clothing or lanyards caught on any portion of handrail. Rivera maintains that it was not part of Atlantic's responsibility to inspect the scaffolding as once Atlantic set up the scaffolding, it was turned over to Tishman.

Rivera submits an affidavit dated February 5, 2018. Rivera states that on March 23, 2012, he was employed by Atlantic as a foreman at the Jacob Javitz project where Atlantic was hired to erect scaffolding. He states that he has never heard of anyone getting their lanyards or safety harnesses caught on a scaffold stairway rail. He states that he is not aware of any regulations that handrails extend beyond the horizontal upright or column it attaches to. He maintains that the handrail system is pre-fabricated and complies with OSHA regulations and the New York City Building Code.

Rivera states that he was unaware of any requirements whereby handrails are to be turned instead of straight and has never been on any projects in which handrails are turned. Rivera states that neither Tishman, nor any other party asked for repairs, alterations, or modifications to be made to the scaffold stairs or handrails prior to the accident, and that no one expressed any concerns regarding the stairs or handrails. Rivera states that he has not received complaints, and was not aware of complaints received by Atlantic from anyone regarding the handrails at the Javits Center from the time of installation to the time of the subject accident. He states that Atlantic did not receive any violations from the Fire Department of the City of New York, OSHA, or the Department of Buildings.

David H. Glabe (Glabe) submits an affidavit dated January 30, 2018. Glabe is a professional engineer and president of Glabe Consulting Services, Inc., a company founded in 1985 as an engineering firm that provided engineering design and analysis for the temporary structure industry. Glabe states that he reviewed the accident report, the depositions of Rivera and Tan, photographs, and the supplemental bill of particulars.

Glabe concluded that the stairwell used on the scaffold erected by Atlantic complied with all applicable federal and New York regulations. He states that the stairwell did not constitute a projection hazard. Glabe maintains that the design has been successfully utilized for decades and that the design is customary in the industry. He states that the stairway was in good repair.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact . . .." *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 Metro. Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006).

First, Atlantic moves, pursuant to CPLR 2004, for leave to file a late motion for summary judgment. Atlantic contends that Tishman filed a motion to strike plaintiff's note of issue and Atlantic filed a cross motion seeking the same relief. Counsel for Atlantic, Scott J. Laird, Esq., affirms that these motions, which at the time were in front of Hon. Gerald Lebovitz, were resolved after a brief off the record discussion between counsel and the Court and that the parties agreed to conduct further discovery as plaintiff recently underwent a total knee replacement in April of 2018.

Mr. Laird maintains that the order drafted on May 16, 2018, and handwritten by Hon. Gerald Lebovitz, provided that the respective motions to vacate the note of issue were granted on consent. It appeared from counsel's review of the handwritten order, that the note of issue was vacated to allow discovery to proceed. Counsel maintains that after the order was uploaded to the e-filing system on May 22, 2018, and was reviewed, the order granting the subject motions did not vacate the note of issue as the final sentence states "Note of Issue not vacated."

Mr. Laird affirms that as he reasonably believed that the note of issue was vacated on May 16, 2018, upon the discovery that the language did not vacate the note of issue, he promptly filed the motion for summary judgment nine days later. He maintains that the time period in which to move for summary judgment, based upon the filing of the note of issue, was May 15, 2018 and that on May 15, 2018, Atlantic had a cross motion to vacate which was pending and which had yet to appear on the court's calendar. Atlantic maintains that there is no prejudice to plaintiff or Tishman as Tishman's motion was not argued and that the oral argument was not scheduled until August 22, 2018.

In opposition, plaintiff argues that Atlantic has failed to demonstrate good cause for the delay. Plaintiff maintains that the note of issue was filed on March 14, 2018, and sixty days from that date would be Sunday, May 13, 2018. As the date fell on a Sunday, the last date in which the summary judgment was to be filed was May 14, 2018. Plaintiff maintains that the motion was not filed until May 23, 2018, and was the result of law office failure.

The Appellate Division, First Department, has held that "[s]ince the Court of Appeals decision in *Brill v City of New York*, a party moving for summary judgment outside the statutory (CPLR 3212 [a]) or court-imposed time limit must show good cause for the delay. A motion court's exercise of discretion in determining that the moving party has established good cause for the delay will be overturned only if there has been an improvident exercise of discretion." *Pena v Women's Outreach Network, Inc.*, 35 AD3d 104, 108 (1st Dept 2006) (citations omitted).

Here, the court does not have knowledge as to what occurred off the record during the referred to conversation as such conversation took place while the parties were in front of a different Part. Furthermore, the court notes that the ordered language resolving the motion to vacate the note of issue is hard to read on the e-filing system. As counsel for plaintiff has provided an affirmation describing the delay and explains that such delay was solely caused by his belief that the contents of the conversation which he had with the court was different than what was reflected by the ordered language, the court will consider such motion on its merits.

Tishman, the Convention Center defendants, and Atlantic argue that plaintiff's claim that they violated Labor Law § 200 must be dismissed. Labor Law § 200 (1) states, in pertinent part, as follows:

> [a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places

> shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. . .

"Liability pursuant to Labor Law § 200 may be based either upon the manner in which the work is performed or actual or constructive notice of a dangerous condition inherent in the premises." *Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 736 (2d Dept 2008). In order for an owner or general contractor to be liable for common-law negligence or a violation of Labor Law § 200 for claims involving the manner in which the work is performed, it must be shown that the defendant had the authority to supervise or control the performance of the work. For claims which arise out of an alleged dangerous premises condition, it must be demonstrated that an owner or general contractor had control over the work site and either created the dangerous condition causing an injury, or did not remedy the dangerous or defective condition, while having actual or constructive notice of it. *See Abelleira v City of New York*, 120 AD3d 1163, 1164-1165 (2d Dept 2014).

Tishman and the Convention Center defendants contend that they did not have any notice of defective or hazardous conditions, nor did they have any control over the injury producing work. These defendants maintain that Tan testified that no issues were brought to his attention regarding the handrails being defective or dangerous. They also argue that neither Tishman nor the Convention Center defendants created or designed the scaffold structure, but that the structure was designed, installed, and maintained by Atlantic. These defendants contend that they did not direct plaintiff's work and that plaintiff testified that she received instructions from Newport's forewoman.

Atlantic contends that plaintiff's claims made pursuant to Labor Law § 200 must be dismissed because plaintiff failed to establish that it supervised, controlled, or assumed authority for the activity which gave rise to her injury. Atlantic maintains that it was neither the owner,

nor general contractor at the site, and was retained by Tishman to perform hoist and scaffold work at the site. Atlantic argues that Newport controlled the activities which gave rise to plaintiff's accident and that while it erected the scaffolding, there has been no evidence that erecting a pre-fabricated scaffold, which was compliant with all codes and regulations, and for which Atlantic never received any complaints, was an act or omission which gave rise to plaintiff's accident. Atlantic maintains that it submitted an expert report from Glabe who states that the subject scaffold complied with all applicable codes, rules, regulations and standards.

In opposition, plaintiff argues that defendants owed plaintiff a non-delegable duty to provide her with a safe place to work. Plaintiff contends that since Tishman arranged for, and paid for the scaffold, it had control of the scaffold and of the dangerous condition which caused plaintiff's injury. Plaintiff argues that according to an OSHA standard, the ends of top rails and mid rails shall not overhang the terminal posts except where such overhang does not constitute a projection hazard for employees. Plaintiff argues that not only did the handrails project beyond their termination points in violation of OSHA regulations, but that they posed a particular hazard to workers walking up and down the stairs.

The defendants have met their burden and have demonstrated that they did not have actual or constructive notice of the condition of the handrails or that the stairwell was a dangerous condition. Tan, who testified on behalf of Tishman, testified that he never received any complaints about the construction of the staircase, and was not provided notice that anything got caught in the handrails. Rivera, who testified on behalf of Atlantic, states that he never received any complaints regarding the handrails at the Javits Center from the time of installation to the time of the subject accident. Rivera also testified that Atlantic did not receive any

violations from the Fire Department of the City of New York, OSHA, or the Department of Buildings.

Furthermore, Atlantic submits an affidavit from Glabe which states that the stairwell used on the scaffold erected by Atlantic complied with all applicable federal and New York regulations and that it did not constitute a projection hazard.

In opposition, plaintiff fails to meet her burden and does not submit her own expert affidavit which refutes Glabe's findings that the staircase was not dangerous or which demonstrates that the defendants had notice of the alleged condition. Therefore, because plaintiff fails to meet her burden and present evidentiary facts in admissible form which demonstrates that Tishman, the Convention Center defendants, or Atlantic, created a dangerous condition or had constructive or actual notice of such condition, the part of plaintiff's complaint alleging a violation of Labor Law § 200 must be dismissed.

Tishman, the Convention Center defendants, and Atlantic argue that plaintiff's allegation that Labor Law § 240 (1) was violated must also be dismissed.

Labor Law § 240 (1) provides in part:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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.

Tishman and the Convention Center defendants contend that plaintiff was provided with a safety belt harness and lanyards for use at work. They argue that even though the harness got caught on a handrail, this does not negate the fact that an adequate safety device was provided to prevent a gravity related injury. Tishman and the Convention Center defendants argue that

plaintiff's accident was the result of a separate hazard, unrelated to the risk which brought about the need for the safety device.

Atlantic argues that it was neither the owner or the general contractor on site and had no authority to direct plaintiff's work or the work which she was performing at the time of the incident. Atlantic also contends that plaintiff was provided with a safety belt harness and lanyards which satisfy the objectives set forth by Labor Law § 240 (1). Atlantic maintains that it is clear that plaintiff's fall was not caused by an elevation differential as she did not fall down from the scaffolding.

Plaintiff argues that a person painting a building or structure is entitled to protection of Labor Law § 240 (1). Plaintiff contends that she was furnished with a lanyard and harness, however, she was not provided with a secure anchorage point or a rope grabber which would provide fall protection.

The Appellate Division, First Department, has held that "[t]he failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident." *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 (1st Dept 2009) (citations and quotations omitted).

However, the Court of Appeals has held that "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 (2001) *citing Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 (1993); *see also Nieves v Five Boro*

Air Conditioning & Refrigeration Corp., 93 NY2d 914, 916 (1999) (holding "[t]he core objective of the statute in requiring protective devices for those working at heights is to allow them to complete their work safely and prevent them from falling. Where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240 (1) liability exists.").

Here, plaintiff was provided with safety devices which included scaffolding, a helmet, safety belt, and harness. Despite plaintiff's fall on the stairs, there is no indication from Glabe, Atlantic's expert, that the scaffold or stairwell connecting the scaffold was inadequate, hazardous, or defective. Plaintiff fails to submit an affidavit from an expert which refutes the findings of Glabe regarding the adequacy of the scaffold or which supports her assertion that there was a need for an anchorage point for a line.

Therefore, because plaintiff fails to meet her burden to demonstrate that the stairwell failed to provide her with proper protection, the part of plaintiff's complaint, alleging a violation of Labor Law § 240 (1), must be dismissed.

Tishman, the Convention Center defendants, and Atlantic, contend that plaintiff's claims made pursuant to Labor Law 241 (6) must be dismissed.

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

> [a]ll 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 . . . .

Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant

violated a specific, applicable regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety. *See Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 (1st Dept 2007).

Defendants first argue that plaintiff's claims under Labor Law § 241 (6) which are premised upon OSHA regulations must be dismissed. It has been held that "violations of OSHA standards do not provide a basis for liability under Labor Law § 241 (6)." *Greenwood v Shearson, Lehman & Hutton*, 238 AD2d 311, 313 (2d Dept 1997); *see also Schiulaz v Arnell Constr. Corp.*, 261 AD2d 247, 248 (1st Dept 1999) (holding "[t]he alleged violations of OSHA standards cited by plaintiffs do not provide a basis for liability under Labor Law § 241 [6]"). Therefore, the OSHA violations alleged by plaintiff cannot serve as a predicate for a finding that a violation of Labor Law § 241 (6) took place.

Plaintiff alleges a violation of section 23-1.5 of the Industrial Code. Section 23-1.5 is entitled "General responsibility of employers" and discusses health and safety protection that is required, the condition of equipment and safeguards, and the general requirement of competency. Tishman and the Convention Center defendants contend that section 23-1.5 is not specific enough for plaintiff to have a viable claim pursuant to Labor Law § 241 (6). Atlantic also objects, and contends that plaintiff has failed to specify which provision of the section she is claiming was violated, or how any violation was the proximate cause of her accident.

Section 23-1.5 of the Industrial Code has been determined to be a generic directive which is insufficient to support causes of action made pursuant to Labor Law § 241 (6). *See Sihly v New York City Transit Authority*, 282 AD2d 337, 337 (1st Dept 2001) ("[t]he alleged violation of 12 NYCRR 23-1.5, a regulation that only sets general safety standards, would not constitute a

basis for a claim under Labor Law § 241 [6].") Therefore, plaintiff's claims made pursuant to this section of the Industrial Code must be dismissed.

Plaintiff contends that section 23-5.1 (f) of the Industrial Code was violated. Section 23-5.1 (f) states:

> [s]caffold maintenance and repair. Every scaffold shall be maintained in good repair and every defect, unsafe condition, or noncompliance with this Part (rule) shall be immediately corrected before further use of such scaffold.

Tishman, the Convention Center defendants, and Atlantic contend that section 23-5.1 (f) is not specific enough to constitute a proper predicate for a Labor Law 241§ (6) claim since it is a subdivision of section 23-5.1 entitled "General Provisions for All Scaffolds," which is a generalized regulation. *See Moutray v Baron*, 244 AD2d 618, 619 (3d Dept 1997) (holding "[t]he regulation plaintiffs rely on, 12 NYCRR 23-5.1 (f), does not meet this standard as it is a subpart of the general provisions for all scaffolds and, as such, lacks any degree of specificity").

Even if this section was held to be a specific regulation, plaintiff fails to demonstrate that the scaffold was in poor maintenance, not in good repair, or defective.

Therefore, because section 23-5.1 (f) is not sufficiently specific enough to support a Labor Law § 241 (6) claim, plaintiff's claim that this section was violated must be dismissed.

Plaintiff also contends that section 23-1.15 of the Industrial Code was violated. Section 23-1.15 provides:

> [w]henever required by the Part (rule), a safety railing shall consist as a minimum of an assembly constructed as follows:
>
> a. A two inch by four inch horizontal wooden hand rail, not less than 36 inches nor more than 42 inches above the walking level, securely supported by two inch by four inch vertical posts at intervals of not more than eight feet.
> b. A one inch by four inch horizontal midrail.
> c. A one inch by four inch toeboard except when such safety railing is installed at grade or ground level or is not adjacent to any opening, pit or other area which may be occupied by any person.

> d. The hand rail of every safety railing should be smooth and free from splinters and protruding nails.
> e. Other material or construction may be used for safety railings required by this Part (rule) provided such assemblies have equivalent strength and assure equivalent safety.

These sections of the Industrial Code have been held to be specific to sustain a cause of action pursuant to Labor Law § 241 (6). *See Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 510 (1st Dept 2009). Defendants maintain that these provisions are inapplicable to scaffolds because section 23-5 of the Industrial Code specifically discusses scaffolding. Glabe states in his affidavit that section 23-1.15 of the Industrial Code applies to guardrail systems used on open sided edges of floors and does not apply to stairwells on scaffold stairs. Defendants argue that even if this section was applicable to the facts of this case, there is no evidence presented by plaintiff that the handrails violated any of these provisions.

Here, plaintiff fails to refute the findings of Glabe and demonstrate that this section of the Industrial Code could be applicable to stairwells. Therefore, plaintiff's allegation that section 23-1.15 was violated must be dismissed.

In opposition and in her supplemental bill of particulars, plaintiff alleges that sections 23-1.16 (b) and 23-1.7 (b) (1) (c) of the Industrial Code were violated.

Section 23-1.16 (b) provides:

> Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by the Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall, such fall shall not exceed five feet.

Section 23-1.16 (b) is sufficiently specific enough to sustain a cause of action under Labor Law § 241 (6). *See Jerez v Tishman Constr. Corp. of N.Y.*, 118 AD3d 617, 618 (1st Dept 2014).

Section 23-1.7 (b) (1) (c) provides that when workers are required to work close to the edge of a hazardous opening, employees shall be protected with "[a]n approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage." This section has been held to be sufficiently specific enough to sustain a cause of action under Labor Law § 241 (6). *See Boss v Integral Constr. Corp.*, 249 AD2d 214, 215 (1st Dept 1988) (holding "the sections of the Industrial Code cited by plaintiff (12 NYCRR 23-1.7 [b], [d], [e]) are sufficiently specific to support a Labor Law § 241 (6) cause of action").

Here, plaintiff fails to demonstrate that these sections are applicable to her accident. Plaintiff testified that she was walking up a staircase to go to another floor. She was not located on the edge of an opening. It is unclear to the court how a longer length and affixed line would have prevented her fall as the harness which got caught was attached to her body.

Therefore, because plaintiff fails to demonstrate that either sections 23-1.16 (b) or 23-1.7 (b) (1) (c) of the Industrial Code are applicable, such sections must be dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants Tishman Construction Corporation, New York Convention Center Development Corporation, New York Convention Operating Corporation, The Jacob K. Javitz Center Convention Center, New York State Economic Development Corporation, and New York State Urban Development Corporation d/b/a Empire State Development Corporation's motion for summary judgment, sequence 002, is granted, and the complaint and any cross claims are dismissed against said defendants with costs and disbursements to defendants as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk is directed to enter judgment accordingly, and it is further

ORDERED that Atlantic Hoisting & Scaffolding, LLC's motion for summary judgment, sequence 004, is granted, and the complaint and any cross claims are dismissed against said defendants with costs and disbursements to defendants as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

4/9/2019
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE