Harris v NYU Langone Med. Ctr.
2019 NY Slip Op 31357(U)
May 10, 2019
Supreme Court, New York County
Docket Number: 160783-2015
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29
--x
KENDALL HARRIS,

Plaintiff,

-against- Index No.: 160783-2015

NYU LANGONE MEDICAL CENTER, NYU HOSPITALS CENTER and TURNER CONSTRUCTION COMPANY,

Defendants.
--x

KALISH, J.:

Defendants NYU Langone Hospitals s/h/a NYU Langone Medical Center and "NYU Hospitals Center" (NYU) and Turner Construction Company (Turner) (collectively, defendants), move, pursuant to CPLR 3212, for an order granting summary judgment as to plaintiff Kendall Harris's (plaintiff) claim of a violation of Labor Law § 241 (6).

Plaintiff cross-moves, pursuant to CPLR 3043, to supplement his bill of particulars listing additional violations of the Industrial Code–23-1.5 (c)(3), 23-1.7 (a) (1)-(2), 23-6.1 (a)-(c) (1), 23-6.1 (e) (1), and 23-6.2 (a) (2) (i)-(ii)–and if granted, for an order, pursuant to CPLR 3212, granting summary judgment as to his claim of a violation of Labor Law § 241 (6).

Plaintiff has withdrawn his claims for common law negligence and a violation of Labor Law§ 200, as was confirmed at the oral argument for the motion and cross motion on February 27, 2019. Oral Arg Tr at 3:11-4:21. In addition, at oral argument, plaintiff's counsel stated that plaintiff would only pursue his causes of action, under Labor Law 241 (6), predicated on violations Industrial Code sections 23-1.5 (c)(3), 23-1.7 (a) (1)-(2), 23-6.1 (a)-(c) (1), 23-6.1 (e)

(1), and 23-6.2 (a) (2) (i)-(ii); and that any other claims for alleged Industrial Code violations were abandoned. Id.

At said oral argument the Court granted plaintiff's application to supplement his bill of particulars, finding that the proposed supplemental bill of particulars did not present any new factual allegations or new theories of liability, and rather plaintiff sought only to list new specific sections of the Industrial Code as being violated. As such, the Court determined that there was no cognizable surprise or prejudice and granted plaintiff leave to supplement his bill of particluars. Oral Arg Tr 7:07-8:20; *see also Walker v Metro-N. Commuter R.R.*, 11 AD3d 339, 341 (1st Dept 2004); *Adams v Santa Fe Constr. Corp.*, 288 AD2d 11, 12 (1st Dept 2001).

After reviewing the parties written and oral arguments, this Court now grants defendants' motion for summary judgment and denies plaintiff's cross-motion for summary judgment for the reasons stated herein.

FACTUAL ALLEGATIONS

Plaintiff testified that he was employed on the day of the subject accident –September 24, 2015 – by non-party Stonebridge, Inc. (Stonebridge) as a journeyman ironworker for a job at NYU Hospital on 34th Street and First Avenue. He maintains that Turner was the construction manager at the project site and that Stonebridge was erecting the steel for the building. Plaintiff was tasked with placing bolts into a tube, before the cantilevered end of the building was pulled up by a crane. Plaintiff testified that his job included taking bolts, sticking them into holes, and fastening them. He maintains that there were hoists in use at the site, including material hoists and a man hoist. However, he testified that a material hoist was not located between the sixth and seventh floor. Plaintiff testified that no one from Turner supervised his work although they

did conduct safety meetings. He did not observe anyone from Turner giving any specific safety instruction to "the bolters."

On the day of his accident, plaintiff was wearing a vest, harness, hard hat, and safety glasses. He was working with partner Jerome Moley (Moley). Plaintiff and Moley were located on the sixth floor. As there was a shortage of bolts on site, Moley went on search for the bolts they needed which were ¾ inch in diameter, four inches in length TC bolts. After about ten to fifteen minutes of not hearing from Moley, plaintiff decided to get his tape measure and find the bolts himself. Plaintiff testified that he took about two steps towards the scaffold, that he had just erected, when he was struck by a metal bucket on the left side of his head. Plaintiff did not see the bucket before he was struck. Plaintiff recalls that the bucket looked like it was holding 20 bolts. Plaintiff saw a white nylon line attached to the handle of the bucket which was about twelve to fourteen feet. The bucket weighed about 120 pounds. Plaintiff does not believe that the area above him had any decking.

Following his accident, plaintiff remained on the deck for about a half an hour. He believes that when he returned to work, after the accident, either his co-worker Duane Owens or Ronny Barlow told him that the bucket was attached to two nylon lines that were tied together and that the bucket fell when the knot tying the two lines together became loose. Plaintiff believes that he was told that the bucket came from a worker named "Corey" who was located above from where plaintiff was standing and that it was in the process of being lowered. Plaintiff testified that he has never observed two nylon ropes being tied together in that manner and that a single manilla line is usually utilized to lower items. Plaintiff testified that manilla lines could be obtained through Stonebridge. Plaintiff testified that the vertical distance between

the sixth floor on which he was working and the seventh floor from where the bolts were being lowered was roughly the height of three traditional building stories or at least sixty feet.

Plaintiff testified that he believed that the lines came apart above him at about one to two stories and that the bucket had fallen about twenty to forty feet. Plaintiff did not know if anyone from NYU or Turner was present on the sixth or seventh floor when he was struck.

Matthew Shinske (Shinske) testified that he worked for Turner as an assistant safety manager and that Turner is a general contractor/construction manager for commercial and residential construction projects. He maintains that Turner was the construction manager for the Kimmell Pavillion project. Shinske testified that in April of 2014, he was assigned to the Kimmel project at which his duties included reviewing pre-test plans and job hazard analysis, drafting incident reports and minutes for safety meetings, reviewing job hazard analysis and pre-task planning, and speaking with the licensed site-safety manager. Shinske first heard of plaintiff's accident over the radio when Ed Schippel (Schippel) was requested to go to the sixth floor. He maintains that Schippel, who worked for Total Safety, stated that an ambulance was to be called. After the ambulance arrived, Shinske brought the responders to the sixth floor.

Shinske testified that after the responders spoke with plaintiff, he observed plaintiff stand up and walk in order to travel down to the lower level. Shinske saw a bucket with bolts on its side on the floor with one rope attached. He also saw the Stonebridge safety manager named Mark Paiotti (Paiotti) talking to ironworker Corey Klinge (Klinge). Paiotti told Shinske that Klinge was on a scaffold on the sixth floor at about twelve feet high and was lowering a bucket of bolts, when the knot in the rope which it was tied to hit a guide cable undoing the knot, and causing the bucket to fall. Shinske maintains that an accident report indicates that there was a rope on the site which could have been utilized that was the appropriate length. Shinske testified

that Stonebridge should have established a controlled access zone to prohibit other personnel from entering the area.

Defendants also submit an affidavit from Shinske, dated August 6, 2018, which states that at the time of the alleged accident, the sixth floor of the building was not an area which was normally exposed to falling materials or objects and that the only trade performing work in the location was Stonebridge. He states that there were no complaints about falling materials or objects in that area prior to September 22, 2015. Shinske states that he learned that on September 22, 2015, plaintiff was struck by a bucket of bolts that one of his fellow Stonebridge employees was lowering from the seventh floor. He maintains that the bucket fell four feet and made contact with plaintiff's left shoulder.

Plaintiff submits an affidavit from Dwayne Owen (Owen), a journeyman ironworker who was employed at the job site on the day of the accident. On the date of plaintiff's accident, Owen observed Klinge lowering a bucket from a beam on the seventh floor to the sixth floor with plaintiff directly underneath. Owen states that before he could yell a warning to plaintiff, the bucket fell 25 feet and struck plaintiff. He maintains that the bucket, which was holding about 25 bolts, weighed approximately 150 pounds. Owen states that Klinge was using white life line rope which is not a hoisting rope, and that he had knotted two pieces together. Owen states that this method is improper as manilla rope is always used for this task because life line rope is known to lack traction.

Owen states that Klinge did not have a rigging license. He maintains that Klinge should have lowered the bolts with a partner who was positioned on the sixth floor to act as a signalman and that a controlled access zone should have been established. Owen states that he spoke with Klinge after the accident who explained that he should not have tied the ropes together, that the

rope was improper, and that he was working alone and did not warn those below that he was lowering the material.

Defendants submit an affidavit from Stephen Haney (Haney), dated August 3, 2018. Haney states that he is an Assistant Director of Construction Safety at NYU Langone Hospitals. He states that he was notified about plaintiff's accident on September 22, 2015, and that plaintiff alleged that he was struck by a bucket of bolts in the course of his employment with Stonebridge. Haney states that he was not aware that any NYU employees or personnel were present at the time of plaintiff's accident. Haney maintains that NYU did not supervise, direct, or control the work performed by Stonebridge employees and did not control the means and methods which Stonebridge used to perform its work. He states that NYU did not provide any supplies or equipment to Stonebridge at any time. Haney states that on September 22, 2015, Stonebridge was solely responsible for supervising, directing, and controlling its own employees during the work at the project.

Defendants submit the Stonebridge Incident/Investigation Form dated September 28, 2015. This document states that "[a]t approximately 9:40 a.m. Corey Klinge was lowering a bucket with 16 6" bolts from the 7th to 6th Floor. Corey used 2 ropes tied together to increase length. The knot in the rope hit a cable being lowered and knot came loose causing basket to fall and strike Kendall Harris." It also states that "white life line rope was used to lower bucket which is not a lifting line. Ropes should not be tied together when proper length rope is available." Defendants' affirmation, exhibit I.

Defendants also submit Turner's Investigation Report. The report states that "[a] worker from the 7th floor beam was lowering a bucket of 6" bolts using 2 ropes tied together to allow the rope to reach the 6th floor deck. The knot in the rope hit a guy cable and came loose causing

the bucket of bolts to fall approximately 4' striking Mr. Harris on the left side of his helmet and back of his left shoulder." Defendants' affirmation, exhibit K.

DISCUSSION

Summary Judgment Standard

"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).

Labor Law § 241 (6) Standard

Defendants allege that summary judgment must be granted as to plaintiff's claim that Labor Law § 241 (6) was violated. 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).

The court will now examine whether the Industrial Code sections alleged by plaintiff in the supplemental bill of particulars are applicable to plaintiff's accident.

Section 23-1.5 (c) (3)

Section 23-1.5 (c) (3) of the Industrial Code provides:

> "(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."

Section 23-1.5 (c) (3) places an affirmative duty on an employer to repair, replace or remove damaged equipment and has been held to be specific enough to uphold a claim made pursuant to Labor Law § 241(6). *See Becerra v Promenade Apts., Inc.*, 126 AD3d 557, 558 (1st Dept 2015) (holding "[t]he motion court erred in finding that section 23-1.5 (c) (3) was too general to support plaintiff's Labor Law § 241 (6) claim"); *Jackson v Hunter Roberts Constr. Group, LLC*, 161 AD3d 666, 667 (1st Dept 2018) (same).

Defendants argue that the instant section applies to power tools and not a rope and bucket as was used here. Plaintiff argues the rope being used by defendants was a hoisting device which was improperly made and utilized. Therefore plaintiff argues that Klinge's device is subject to the instant provision. Plaintiff further argues the equipment being used as the hoisting device was not proper.

Contrary to plaintiff's argument, the Court finds that this section of the Industrial Code is inapplicable to plaintiff's accident. Klinge, plaintiff's co-worker, allegedly decided to lower a bucket of materials using two ropes which he tied together. The two ropes subsequently came apart. In addition, according to the testimony, a stronger rope should have been utilized.

As such, there is no indication that the two ropes or the bucket were not kept in sound, operable condition or needed repair or were damaged. Instead, the rope Klinge used was not correct for the task. That is to say, the subject accident was not caused by the failure to maintain equipment in sound and operable condition, but rather was caused by the failure of Klinge – plaintiff's co-worker – to choose the proper equipment for the job.

Therefore, plaintiff's allegation that section 23-1.5 (c) (3) of the Industrial Code was violated, is dismissed. *McKee v Great Atl. & Pac. Tea Co.*, 73 AD3d 872, 875 (2d Dept 2010 ("Moreover, 12 NYCRR 23-1.5(c)(3) and 23-9.2(a), which require employers to provide equipment and power tools that are in good repair, have no application here, since there is no allegation that McKee was using a tool that was defective or in need of repair.").

Section 23-1.7 (a) (1) (2)

Section 23-1.7 (a) (1) (2) of the Industrial Code provides:

> "(a)(1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.
>
> (a)(2) Where persons are lawfully frequenting areas exposed to falling material or objects but wherein employees are not required to work or pass, such exposed areas shall be provided with barricades, fencing or the equivalent in compliance with this Part (rule) to prevent inadvertent entry into such areas."

Section 23-1.7 (a) of the Industrial Code has been found to be specific enough to uphold a claim made pursuant to Labor Law § 241(6). *See Zuluaga v P.P.C. Constr., LLC*, 45 AD3d 479, 480 (1st Dept 2007) (holding "[p]artial summary judgment was properly granted to plaintiff

on his Labor Law § 241 (6) cause of action based on sufficiently specific violations of Industrial Code 23-1.7 [a] . . .").

With regard to section 23-1.7 (a) (1), Defendants argue Shinske states in his affidavit that the sixth floor of the building was not an area which was normally exposed to falling materials or objects, that the only trade performing work in the location was Stonebridge, and that there were no complaints about falling materials or objects in that area prior to September 22, 2015. Plaintiff testified that the area above him did not have decking. During oral argument the Court stressed its belief to plaintiff's counsel that subsections (a) (1) and (2) could not both apply to the instant case, and plaintiff's counsel responded that (a) (2) is the relevant provision. Oral Arg Tr at 23:01-27:04.

The Court finds that this not a case of an object "falling" by accident as it was being used but rather "falling" as a result of being lowered so that an overhead deck or netting would not be required to protect workers below. Moreover, defendants have submitted evidence establishing that the subject area was not normally exposed to falling objects, and plaintiff has failed to submit evidence raising a triable issue of fact on this point. Therefore, because section 23-1.7 (a) (1) of the Industrial Code is inapplicable to plaintiff's accident, plaintiff's allegation that this sub-section was violated is dismissed.

As to subsection (a) (2), plaintiff argues that he was not part of the work that Klinge was doing, and thus a controlled access zone should have been established by barricading the area off so that a worker, like himself, did not unknowingly enter an area subject to falling object hazards. Defendants argue that subsection (a) (2) is not applicable because plaintiff was required to work in the subject area, as was evidenced by the fact that he had just erected scaffold in said area.

With regard to subsection 23-1.7 (a) (2), notwithstanding Klinge's deposition statement that Stonebridge should have established a controlled access zone, that subsection would also not be applicable as plaintiff testified that he was working in the subject area where he was injured and, as Shinske stated, there had been no complaints about falling objects in the area prior to plaintiff's accident. Indeed, Plaintiff testified that the accident took place just steps away from where he previously was standing and that he was still in the process of working when the accident took place, as he was waiting for bolts to be supplied.

Therefore, as the location of the accident was in an area in which plaintiff was required to work and was in an area without any history of falling objects, plaintiff's allegation that section 23-1.7 (a) (2) of the Industrial Code was violated is dismissed.

Section 23-6.1 (a)-(c)(1), (e) (1)

Section 23-6.1 of the Industrial Code which is entitled "General requirements" and which is part of the "Material Hoisting" subdivision provides:

> "(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.
>
> "(b) Maintenance. Material hoisting equipment shall at all times be maintained in good repair and proper operating condition with sufficient inspections to insure such maintenance. All defects affecting safety shall be immediately corrected either by necessary repairs or replacement of parts, or such defective equipment shall be immediately removed from the job site.
>
> "(c) Operation. (1) Only trained, designated persons shall operate hoisting equipment and such equipment shall be operated in a safe manner at all times."
>
> "(e) Signal system required. (1) Operators and signalmen. Material hoists shall be operated only in response to a signal system and all operators and signalmen shall be able to comprehend the signals readily and to execute them properly."

Defendants argue that 23-6.1(a), (b) and (c)(1) are too general and not applicable to the facts of the instant case since it does not involve a material hoist. Plaintiff argues that these subsections are sufficiently specific and apply to the makeshift device used by Klinge.

Sections 23-6.1(a), (b) and (c)(1) of the Industrial Code hve been found to be insufficiently specific to impose liability. *Cardenas v American Ref-Fuel Co.*, 244 AD2d 377, 378 (2d Dept 1997) ("Industrial Code § 23-6.1 (a) cannot support a Labor Law § 241 (6) cause of action because it does not set forth a safety standard, general or specific; it merely excepts certain types of hoisting equipment from the regulations that follow."); *Barrick v Palmark, Inc.*, 9 AD3d 414, 415 (2d Dept 2004) (holding "[c]ontrary to the plaintiff's contention, 12 NYCRR 23-6.1 (b) cannot form the basis of a Labor Law § 241 (6) claim because it does not contain a concrete and specific standard relevant to the facts of this case"); *Schwab v A.J. Martini, Inc.*, 288 AD2d 654, 656 (3d Dept 2001) ("[P]laintiffs' motion to amend their bill of particulars, denied by Supreme Court, sought to assert violations of 12 NYCRR [] 23-6.1 (a) and (b), provisions which merely 'relate to general safety standards and are not concrete specifications sufficient to impose a duty on defendants.'"); *Gonzalez v Glenwood Mason Supply Co.*, Inc., 41 AD3d 338, 339 (1st Dept 2007) (finding that § 23-6.1(b) was not sufficiently specific to support a statutory violation under the circumstances); *Sharrow v Dick Corp.*, 233 AD2d 858, 861 (4th Dept 1996) (holding "section 23-6.1 (c) (1) is unquestionably general insofar as it mandates that hoisting equipment be operated in a "safe manner at all times.").

Even though subsection 23-6.1 (e) (1) has been found to be sufficiently specific, this subsection is inapplicable to plaintiff's accident because the device which Klinge was utilizing was not a material hoist. A plain reading of Industrial Code Section 23-6.1, as a whole, makes clear that that "material hoisting equipment" refers to more complex hoisting devices that are

"designed" by a "manufacturer." 12 NYCRR 23-6.1 (d). It contemplates devices with "hoist breaks," that must be kept lubricated, that have "controls" that are only operated by "trained, designated persons," and that must use a "signal system." 12 NYCRR 23-6.1 c, e, j, k. Accordingly, courts in this state have recognized that "[a] material hoist is a mechanical device, not a simple block and tackle." *Soles v Eastman Kodak Co.*, 162 Misc 2d 406, 409 [Sup Ct, Monroe County 1994], affd, 216 AD2d 973 [4th Dept 1995]; *see also Cardenas v Am. Ref-Fuel Co. of Hempstead*, 244 AD2d 377, 378 (2d Dept 1997) (citing *Soles* with approval on issue of whether "the lug in question was a material hoist within the meaning of that section"); *Smith v Homart Dev. Co.*, 237 AD2d 77, 80 (3d Dept 1997) ("All references to such equipment in 12 NYCRR 23-6.1 imply more than just a rope connected through the actual item that is being lifted and the regulation refers to items or loads that swing or turn freely."); *Zdunczyk v Ginther*, 15 AD3d 574, 574 (2d Dept 2005) (finding that section 23-6.1 did not apply where the plaintiff "plaintiff allegedly sustained injuries to his hand when, while assisting a coworker in lowering a bucket of construction debris, the coworker suddenly released the rope to which the bucket was attached"); *Suarez ex rel. Suarez v State*, 50 Misc 3d 544, 553 (Ct Cl 2015) (finding that section 23-6.1 did not apply to a "come-along" used to lower materials, and explaining that "[t]he quoted portions of the Industrial Code contain specifications for the sort of equipment that should have been used but was not and it makes little sense to say that the come-along violated standards that do not apply to it in the first place"). Indeed, in a factually similar case the Second Department found that that section 23-6.1 did not apply to the plaintiff who "injured his back at a construction site while using a rope to lower a bucket containing 80 to 90 pounds of steel bolts" because the plaintiff "was not using any type of mechanical hoisting device to lower the bolts." *Aloi v Structure-Tone, Inc.*, 2 AD3d 375, 375 (2d Dept 2003); *compare Lopez v Boston*

Properties Inc., 41 AD3d 259, 260 (1st Dept 2007) (finding issues of fact concerning whether subsections 23-6.1 (e) or (j) were violated where worker fell from beam while operating two-man "pulley system used to hoist overloaded buckets" that plaintiff had "voiced numerous complaints [about] at safety meetings and to foremen").

Certainly, as plaintiff points out, a material hoist can be "manually-operated" as expressly described in the section and need not be "motor-driven." While plaintiff cites to several cases applying section 23-6.1 to manually operated material hoists, these all involved more complex hoisting devices and/or larger hoisting operations requiring material hoisting equipment. *See e.g. Carroll v Metro. Life Ins. Co.*, 264 AD2d 336, 337 (1st Dept 1999) (applying section 23-6.1 to "hand-cranked hoist [that], although expected to lock automatically with a click, did not do so"); *Mills v Tumbleweed Mgt. Co.*, 270 AD2d 121, 121 (1st Dept 2000) (finding material issue of fact as to section violation where plaintiff attempting to hoist materials to roof was "violently jerk[ed] forward" when materials became stuck on way up); *Hayden v 845 UN Ltd. Partnership*, 304 AD2d 499, 500 (1st Dept 2003) (finding section applicable where the plaintiff-elevator construction worker "was drawing an elevator cable up to a 'cat-head' by pulling on a rope tied to the cable").

As such, this Court finds that the Klinge's tying together two nylon ropes to lower a bucket of roughly 20 bolts, weighing 120 pounds, did not constitute "material hoisting equipment" within the meaning of Industrial Code Section 23-6.1.

Furthermore, with specific regard to subsection (b), plaintiff fails to demonstrate that the two ropes which Klinge utilized to lower the bolts were not properly maintained, defective, or were the type of equipment which would require "sufficient inspections" as dictated by this

section of the Industrial Code. Again, Klinge's testimony and the submitted evidence establishes that the accident was caused by Klinge's decision to use a makeshift contraption that was inappropriate for the job–not because the ropes and bucket were insufficiently maintained. *See Hawkins v City of New York*, 275 AD2d 634, 635 (1st Dept 2000) ("12 NYCRR 23-6.1 and 23-6.2 govern the use and maintenance of ropes and hoists but do not state when such safety devices must be used. Since plaintiff was not using a hoist, there could be no violation of either regulation.").

Therefore, plaintiff's causes of action premised on alleged violations of sub-sections 23-6.1(a)-(c)(1) and (e) (1) of the Industrial Code are dismissed.

Section 23-6.2 (a) (2) (i) (ii)

Section 23-6.2 (a) (2) (i) (ii) of the Industrial Code, titled "Rigging, rope and chains for material hoists," provides:

"(a) Hoisting rope.

...

(2) Fibre rope.

(i) Fibre rope shall be first grade manila hemp or synthetic fibre. Means to prevent chafing shall be provided where necessary. Proper size blocks to accommodate the rope shall be used. Fibre rope shall be protected where acid or any other harmful or corrosive agent or chemical is used. All fibre rope shall be stored in a dry condition and in a dry place protected from the elements.

(ii) Fibre rope that is unsound in any way or that shows the effects of severe wear, deterioration or abrasion shall not be used and shall be removed from the job site. Frozen rope shall be thawed before being used."

Section 23-6.2 (a) has been found to be specific enough to uphold a claim made pursuant to Labor Law § 241(6). *See Hayden v 845 UN Ltd. P'ship*, 304 AD2d 499 (1st Dept 2003) ("Contrary to defendants' contention, the Industrial Code sections cited by plaintiff in support of his Labor Law § 241 (6) claim (12 NYCRR 23-6.1 [d]; 23-6.2 [a]) mandate compliance with concrete specifications applicable to this case . . .").

Defendants maintain that this section is not applicable because "a material hoist" was not involved in plaintiff's accident. Plaintiff argues that this section does apply because Klinge was partaking in a hoisting activity by lowering the bucket with the ropes.

While this section of the Industrial Code discusses the type of rope which should be used with a material hoist, this Court has already found that Klinge's device was not a material hoist within the meaning of Industrial Code section 23-6.1. Because Klinge's device was not a material hoist, section 23-6.2 (a) (2)'s requirements did not apply to it. *See Hawkins v City of New York*, 275 AD2d 634, 635 (1st Dept 2000) ("12 NYCRR 23-6.1 and 23-6.2 govern the use and maintenance of ropes and hoists but do not state when such safety devices must be used. Since plaintiff was not using a hoist, there could be no violation of either regulation.") Accordingly, plaintiff's causes of action premised on alleged violations of section 23-6.2 (a) (2) (i)-(ii) are dismissed.

To be clear, that the Court finds that Klinge's makeshift contraption did not violate the aforesaid Industrial Code provisions is not to say that Klinge's decision to tie two nylon ropes together and lower the bucket in the subject area would not give rise to liability based on other provisions of the law. It is only to say that the specific Industrial Code provisions, put forward as predicates for liability under Labor Law § 241 (6), did not regulate Klinge's activity.

Article 26 of the Occupational Safety and Health Administration

To the extent that plaintiff alleges violations of OSHA, violations of OSHA do not provide a basis for defendants' liability pursuant to Labor Law § 241 (6) and must be dismissed. *See Greenwood v Shearson, Lehman & Hutton*, 238 AD2d 311, 313 (2d Dept 1997) (holding "violations of OSHA standards do not provide a basis for liability under Labor Law § 241 [6]").

CONCLUSION

As defendants have met their burden and have demonstrated that they did not violate a specific, applicable regulation of the Industrial Code, and as plaintiff fails to meet his burden in opposing the defendants arguments regarding the applicability of the newly alleged sections of the Industrial Code, defendants motion for summary judgment pursuant to Labor Law § 241 (6) must be granted.

Accordingly, it is

ORDERED that defendants NYU Langone Hospitals s/h/a NYU Langone Medical Center and "NYU Hospitals Center" and Turner Construction Company's motion for summary judgment as to plaintiff Kendall Harris's claim of a violation of Labor Law § 241 (6) is granted; and it is further

ORDERED that the part of plaintiff's cross-motion seeking summary judgment as to his claim of a violation pursuant to Labor Law § 241 (6) is denied.

The foregoing constitutes the decision and order of the Court.

Dated: May 10, 2019

ENTER: ______________
J.S.C.
HON. ROBERT D. KALISH
J.S.C.