O'Brien v City of New York
2019 NY Slip Op 33157(U)
October 10, 2019
Supreme Court, Kings County
Docket Number: 510237/16
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK

KINGS COUNTY

PRESENT: HON. PAUL WOOTEN PART 97
Justice

PATRICK O'BRIEN and MARGARET MCGRAIL,

Plaintiffs,

INDEX NO. 510237/16

MOTION SEQ. NO. 2,3,4,8,9,10

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION,

Defendants.

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION,

Third-Party Plaintiffs,

-against-

JUDLAU CONTRACTING, INC.,

Third-Party Defendant.

In accordance with CPLR 2219(a), the following papers were read on the herein motions.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1-3, 4-5, 6-7, 8-9, 10-13, 14-17
Answering Affidavits — Exhibits (Memo)	15 22 19-21 18

Replying Affidavits (Reply Memo) 23

Supplemental Affirmation in Further Support/Opp 24 24

Motion sequence numbers 2, 3, 4, 8, 9, and 10 consolidated for purposes of disposition.

This is a personal injury action commenced by plaintiffs Patrick O'Brien (O'Brien or plaintiff) and Margaret McGrail (collectively, plaintiffs) against defendants the City of New York (the City), the New York City Department of Environmental Protection (the DEP), and the New York City Economic Development Corporation (the EDC) (collectively, defendants) to recover damages for injuries that occurred as a result of an accident on November 18, 2015 during the course of a construction project.

Before the Court, in motion sequence 3, is a motion by plaintiffs, pursuant to CPLR 3212, for summary judgment on their Labor Law § 240(1) cause of action against defendants the City, the DEP, and the EDC.

Defendants move, in motion sequence 2, for an Order, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' Labor Law §§ 241(6) and 200 causes of action insofar as asserted against them. By separate cross-motion, in motion sequence 4, defendants move, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' Labor Law § 240(1) cause of action insofar as asserted against them.

By Order to show cause (OSC), in motion sequence 10, plaintiffs move, pursuant to CPLR §§ 603 and 1010: (1) to sever the third-party action; (2) to preclude defendants and other parties from holding any nonparty depositions of liability witnesses, including Joseph Ryan; (3) to quash the nonparty subpoena directed to Joseph Ryan; (4) for a protective order striking the subpoena directed to Joseph Ryan; and, (5) to stay any pending nonparty depositions, including but not limited to the deposition of nonparty Joseph Ryan, pending a hearing and determination of this motion.

Third-party defendant Judlau Contracting, Inc. (Judlau) moves, by OSC in motion sequence 9, for an Order pursuant to §§ 603 and 1010 to sever the third-party action and to stay all proceedings pending determination of its motion.

The EDC moves, in motion sequence 8, pursuant to 22 NYCRR § 520.11(a)(1), for admission of Robert Devine, Esq. and Michael Horner, Esq., on a pro hace vice basis, to participate in all aspects of this action.

BACKGROUND

The subject accident occurred on November 18, 2015, when a load of cables secured by a nylon strap to a crane allegedly came loose and fell on plaintiff while he was standing on a flatbed truck. At the time of the accident, plaintiff was working for nonparty Tully/OHL, JV (OHL) at the Staten Island Siphon Water Tunnel Project (the project), while on the "Brooklyn Side Shaft," i.e. the Brooklyn side of the project. The project originated with the Port Authority and involved building a new water main or tunnel to replace two existing water siphons (or tunnels) in New York Harbor which extended from Brooklyn to Staten Island. The Port Authority and the DEP hired the EDC to manage the project. The EDC hired OHL to be the general contractor for the project. OHL hired Judlau to perform certain general construction work at the project. At the time of the accident, the City owned the existing water siphons and the new tunnel.

Plaintiff testified at his General Municipal Law § 50-h hearing and depositions that on the day of the accident, he was a union sandhog[1] employed by OHL at the Staten Island Siphon Water Tunnel Project, where he was working as a crane signalman, directing cranes to move up and down.

The purpose of the project was to build a two-mile long water tunnel next to the

[1] An underground construction tunnel worker.

Verrazano Bridge from Brooklyn to Staten Island, and to close off two other existing "water pipes." When plaintiff first reported to the project, workers were in the process of boring the tunnel, which was 10 feet in diameter and 10 feet high. Plaintiff received all of his instructions from Andrew Hickey, the OHL shop steward, or other OHL superintendents, and no one from the City, the DEP or the EDC directed his work.

The day before the accident, Hickey told plaintiff to report to the Brooklyn side of the project the next day to assist in assembling a mobile crane. The crane would then be used to load the head of the tunnel boring machine (TBM) onto a truck arriving from Canada.

On the date of the accident, plaintiff and his partner, Joe Ryan, an OHL sandhog, assisted in assembling the crane. After assembling the crane, and while waiting for the truck to arrive from Canada, a teamster, also employed by OHL, told plaintiff and/or Ryan that an OHL supervisor named "Franco" wanted them to remove all the "baloney cable" from the job site and to place them on his truck.

The teamster's truck had a blue cabin which was approximately 10 feet high from the ground; a 25 to 30-foot flatbed which was approximately 8 feet wide and 5 feet from the ground; low side rails approximately two feet from the floor or bed of the truck; and a high back door. "Baloney cable" was a trade term used to describe the electric cable inside the tunnel that had been used to power the TBM. The electric cable had previously been cut into 300 to 400 pieces, assembled into bundles weighing "thousands of pounds," removed from the shaft/tunnel by a crane, and placed at ground level. There was nothing holding each bundle together, such as some sort of material or tie. The cables were long, heavy, made of copper and insulation, and measured two inches in diameter. They were located 20 to 30 feet from the truck and 80 feet from the crane. On the day of the accident, there were only four bundles remaining on the ground.

Plaintiff walked to where the cables were located, and he and Ryan "rigged" the first

bundle of baloney cable ("one big long piece"), by placing a 4-inch by 12-foot wide nylon strap around it. Plaintiff then walked to the crane and told the crane operator that they had a couple of "picks" ("a bunch of cable") to place on the truck while they were waiting for the truck from Canada to arrive. Plaintiff returned to where the first bundle of cables was located, signaled with his radio to the crane operator that it was time to lift the cable off the ground, confirmed that the crane operator was ready, and the crane operator swung out his boom. Plaintiff then attached the nylon strap to the hook of the crane, made sure the hook was locked, and told the crane operator to lift the load slowly.[2] The crane operator lifted the load slowly, approximately 120-150 feet high to the top of the crane, while plaintiff stood by watching. Plaintiff then told the crane operator to swing the load over the flatbed of the truck. While Ryan watched the load, plaintiff climbed onto the back of the flatbed of the truck in order to unhook the load. When the load was in the center of the truck, plaintiff told the crane operator to stop moving the load. According to plaintiff, the cable bundle was "like a big ball up here and like spaghetti [-] it all comes down all around the place and you have to catch it and put it in, make sure it goes into the truck and . . . wind it into the truck . . . like a long donut . . . " After the load stopped swinging, plaintiff told the crane operator to lower the load slowly so he could make sure it went onto the truck.

While standing to the side of the load at the back door in the left hand corner of the truck, plaintiff guided the load onto the truck bed with his hands. Pieces of the cable, approximately 120 feet long, were hanging down the sides of the nylon strap. All the cable needed to be on the truck before the strap could be removed. When the load of cables was on the truck and the strap was slack and at eye/chest level, plaintiff took the strap off the hook of

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[2] Plaintiff explained that he choked the strap around the bundle, attached the choke strap to the hook of the crane, and knew the cables were secure when attached to the crane because the choke tightened up.

the crane and gave it to Ryan. Plaintiff then told the crane operator to raise the load and swing it back over to where Ryan was standing with the other bundles. The strap was not defective in any way. Plaintiff then pushed down the cables on the truck to keep them "tight" in order to facilitate the placement of the next load. The load ran the entire length of the truck bed.

Ryan then placed a different strap on the second bundle and put the strap on the hook of the crane.[3] Ryan signaled to plaintiff and plaintiff signaled the crane operator to raise the second bundle. The crane operator picked up the second bundle, raised it to the top of the crane, and swung the load over to the truck. Plaintiff signaled the crane operator to lower the load slowly. While plaintiff was still standing on the floor of the truck bed, he grabbed the cable onto the truck, unhooked the bundle from the crane, and lowered the second bundle onto the truck bed floor without incident.[4] After the second bundle was unloaded, plaintiff had one foot on the truck bed floor and the other foot on the side of the truck. Plaintiff gave Ryan the strap and the crane swung over to Ryan again. The strap was not defective.

The same procedure was repeated for the third bundle. At this point, both of plaintiff's feet were on the cables, and the process was more difficult because the bottom of the truck was higher due to the two previous loads of cable, which were uneven on the truck bed.

Ryan then put the second strap around the fourth bundle and attached it to the hook of the crane. The bundle weighed approximately 600 pounds. Plaintiff signaled the crane operator to raise the load. Once the load was all the way up, plaintiff signaled the crane to lower it. At this point, plaintiff was standing in the back corner of the truck bed, with both feet on top of the cables, approximately 3½ to 4 feet above the truck bed and 9 to 10 feet above the ground.

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[3] At his 50-h hearing, plaintiff testified that there was only one strap.

[4] Plaintiff also testified that he had one foot on the truck bed and one foot on the cables.

While the load was centered over the truck, the main ball of the cable was 80 to 100 feet above plaintiff, "up [top] in the hook," and plaintiff was manually guiding the cable strands, which were hanging off the cable. As plaintiff was watching the load come down, the bundle of cables suddenly fell out of the strap and hit him on the left side of the head, shoulder, neck, and ear.[5] Plaintiff was knocked to the right side of the truck, his hard hat and glasses flew off, he fell on his right side and back ("it was a bit of both"); and the cables continued to fall on his body.[6] Plaintiff's right foot/ankle then got caught in the cable, and the top half of his body was hanging off the right side of the truck by his right foot. Someone, likely Ryan, came up underneath him "to catch his weight."

In the seconds before the accident, plaintiff did not notice anything wrong with the hook. Plaintiff believed his head hit the cables. No one told plaintiff he needed to stand on the back of the truck in order to unload the baloney cables but it was necessary in order to perform his job.

On December 22, 2015, plaintiffs filed their Notice of Claim with the City, the DEP and EDC. On May 6, 2016, plaintiff appeared for his 50-h hearing. On or about June 16, 2016, plaintiffs commenced the instant action against defendants alleging common-law negligence, violations of Labor Law §§ 240(1), 241(6) and 200, and a claim for loss of consortium. On or about July 25, 2016, defendants joined issue by serving their verified answer generally denying the allegations of the complaint. Plaintiffs filed their Note of Issue and Certificate of Readiness on December 21, 2017.

On February 16, 2018, plaintiffs moved for summary judgment against defendants on

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[5] Plaintiff also testified that: "There was a big bundle on top and then it started to fall and then I fell," and that his accident occurred because "[t]he cable fell out of the strap off the hook." He also testified that the nylon strap did not become loose.

[6] Plaintiff also testified that his "leg slipped into the other cable" and then he fell;" that as he was falling, he could feel the cables striking him on the left side of his body; and that he fell across the truck and the cable kept falling on top of him.

their Labor Law § 240(1) cause of action. On February 19, 2018, defendants moved for summary judgment to dismiss plaintiffs' Labor Law § 241 (6) and 200 cause of action. On May 21, 2018, defendants cross-moved for summary judgment dismissing plaintiffs' Labor Law § 240 (1) cause of action.[7]

On or about February 8, 2019, defendants commenced a third-party action against Judlau for contribution, common-law and contractual indemnification, and breach of contract to procure insurance. On or about March 13, 2019, Judlau filed an answer to the third-party complaint, generally denying its allegations. On or about March 21, 2019, plaintiffs moved by OSC to sever the third-party action and to preclude/quash the deposition of nonparty Ryan, plaintiff's coworker. On or about March 22, 2019, Judlau also moved by OSC to sever the third-party action. Thereafter, on or about April 23, 2019, the EDC moved for admission of Robert Devine and Michael Horner, Esqs. to the New York bar with respect to all matters relating to this action on a pro hace vice basis. The foregoing motions are presently before the Court for disposition.

DISCUSSION

A. *Motions to Sever* - Motion sequences 9 and 10

Plaintiff and Judlau separately move by OSC to sever the third-party action. "CPLR 603 permits a court to sever claims '[i]n furtherance of convenience or to avoid prejudice'" (*Isidore Margel Trust Mitzi Zank Trustee v Mt. Hawley,* 155 AD3d 618, 619 [2d Dept 2017], quoting CPLR 603). CPLR 1010 applies specifically to third-party actions. It provides that:

> "[t]he court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim . . . [and . . .] in

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[7] In support of their cross-motion, defendants annexed the affidavit of nonparty Anthony Petito (Petito), in which Petito stated that he had been on the truck with plaintiff at the time of the accident and had witnessed part of the accident. On March 15, 2019, Petito was deposed pursuant to the Court's Order as set forth in the transcript of proceedings dated October 17, 2018 and in its subsequent order dated January 11, 2019.

> exercising such discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party" (*Arasim v 38 Co. LLC*, 2016 NY Slip Op 30221[U], *4 [Sup Ct, NY County 2016], quoting CPLR 1010).

"Severance is generally 'inappropriate where the claims against the defendants involve common factual and legal issues, and the interests of judicial economy and consistency of verdicts will be served by having a single trial'" (*New York Schs. Ins. Reciprocal v Milburn Sales Co., Inc.*, 138 AD3d 940, 941 [2d Dept 2016], quoting *New York Cent. Mut. Ins. Co. v McGee*, 87 AD3d 622, 624 [2d Dept 2011]). On the other hand, severance of a third-party action is warranted where discovery in the main action is complete, there was an inordinate delay in commencing the third-party action, the third-party defendant did not have an opportunity to obtain discovery, and where there is prejudice to the plaintiff, who is ready for trial (*Whippoorwill Hills Homeowners Assn., Inc. v Toll at Whippoorwill, L.P.*, 91 AD3d 864, 865 [2d Dept 2012]; *Torres v Visto Realty Corp.*, 106 AD3d 645, 645 [1st Dept 2013]; *Abreo v Baez*, 29 AD3d 833, 834 [2d Dept 2006]; *Singh v City of New York,* 294 AD2d 422, 423-424 [2d Dept 2002]; *Wassel v Niagara Mohawk Power Corp.*, 307 AD2d 752, 753 [4th Dept 2003]).

In support of that branch of their OSC to sever, filed April 10, 2019, plaintiffs argue: (1) that this matter has been sub judice for over three years and has been on the trial calendar for over one year; (2) that the court-ordered deadline for commencing a third-party action expired over a year ago; (3) that new counsel, substituted on the eve of trial (January 11, 2019), are attempting to engage in a last minute flurry of activity in violation of court orders and accepted case law; (4) that Judlau's involvement in the matter was clear the day after the accident occurred because it filed an accident report; and, (5) that plaintiff will be significantly prejudiced if required to wait another six months for Judlau to obtain discovery because he is being forced to support his family on his limited Workers' Compensation benefits.

In support of its own motion, Judlau argues: 1) that it would be grossly prejudiced if the third-party action were not severed because it could not complete all discovery needed to defend itself by March 24, 2019, the "Standards and Goals" date for trial, and would have to move to strike the entire action; 2) that severance should be granted because the determination of its liability is not necessary to the determination of defendants' liability; and 3) that absent severance, the delay would impose unnecessary costs and prejudice upon plaintiff due to duplicative discovery proceedings.

In opposition, defendants argue that severance of their third-party claims would be a waste of judicial resources since determination of the third-party claims is dependent upon the determination of the claims in the main action. In support of this argument, defendants point out that "the two actions arise from a common nucleus of facts" (*Neckles v VW Credit, Inc.*, 23 AD3d 191, 192 [1st Dept 2005]). Specifically, defendants assert that Judlau was clearly involved at the site at the time of the accident because: (1) Judlau contracted with OHL, plaintiff's employer, to perform certain work at the project; (2) Judlau owned the vehicle upon which plaintiff sustained his injuries; and (3) a Judlau employee, nonparty Petito, was present and assisted loading the subject baloney cables which allegedly struck plaintiff.

Defendants also claim that when indemnification is asserted against a third-party defendant, severance is inappropriate when continued consolidation would allow the third-party defendant to participate in the damages phase of the main action (*id.*). In addition, defendants contend that if severance were granted, they would be substantially prejudiced because they would be required to defend two cases and proceed with two trials, and that it is preferable for the two actions to be held together to avoid the risk of inconsistent verdicts. Lastly, defendants state that plaintiffs have failed to demonstrate prejudice because: (1) discovery is ongoing and will continue until the end of June, 2019 due to plaintiff's most recent surgery in January, 2019; (2) the parties agreed by letters dated October 19, 2017 and January 11, 2019 that

independent medical examinations (IMEs) could only be performed after plaintiff's "surgeries"; and (3) that the matter is currently stayed pending the completion of discovery, with no set trial date.

As plaintiffs note, when the third-party action was commenced on or about February 19, 2019, this action had already been before the Court for three years, and the Note of Issue and motions for summary judgment had been filed one year earlier. While defendants argue that they would be severely prejudiced were the action severed, it is undisputed that they were aware of Judlau's involvement in this action even before plaintiffs commenced the main action - yet fail to provide any explanation for their delay in commencing the third-party action (*see Admiral Indem. Co. v Popular Plumbing & Heating Corp.*, 127 AD3d 419, 419 [1st Dept 2015]).

Moreover, discovery in the main action is complete. Specifically, assuming the parties adhered to the March 12, 2019 discovery order - the only discovery defendants claim is outstanding in the main action - discovery with respect to plaintiff's most recent surgery concluded by the end of June, 2019, at the latest. Defendants also argue that pursuant to their October 19, 2017 and January 11, 2019 correspondence that IMEs would only proceed after "[p]laintiff's further surgeries," but the agreement in fact referenced plaintiff's ankle surgery, which took place on July 26, 2017, and his neck surgery, which took place in January, 2019, not any additional "surgeries." Accordingly, apart from any additional discovery relating to damages, discovery is not ongoing in the main action, and "delay will necessarily attend prosecution of the third-party action" (*Garcia v Gesher Realty Corp.*, 280 AD2d 440, 440 [1st Dept 2001]), which will prejudice plaintiff. Under the circumstances, "any prejudice thereby caused to defendants is less than the prejudice caused to plaintiff by further delay (*id.*).

In addition, although defendants argue that their third-party claims are dependent upon a determination of the existing claims in the main action, "a judgment against defendants in the main action will not impede their ability to obtain a judgment against third-party defendants in a

severed third-party action" (*id.* at 440-441). With respect to defendants' argument regarding the risk of inconsistent verdicts, inasmuch as plaintiffs have withdrawn their Labor Law § 200 cause of action against defendants, there is no possibility of inconsistent verdicts with respect to defendants' claims for indemnification against Judlau in the third-party action. In sum, "[t]he third-party plaintiff unduly delayed in commencing the third-party action, the parties in the main action have . . . completed their discovery, and would be prejudiced by the delay necessary to allow the third-party defendants to engage in discovery" (*Ambriano v Bowman*, 245 AD2d 404, 405 [2d Dept 1997]).

In view of the foregoing, the motions of plaintiff and Judlau to sever the third-party action are granted.

B. *Motion to Preclude/Quash/Protective order* - Motion sequence 10

Plaintiffs also move to preclude defendants from holding any nonparty depositions of liability witnesses, including the deposition of nonparty Joe Ryan, plaintiff's coworker, to quash the nonparty subpoena directed to Ryan, and for a protective order striking that subpoena on the grounds that this action has been on the trial calendar for one year, discovery has been completed, and motions for summary judgment have been filed in early 2018 staying discovery. In support of this branch of their motion, plaintiffs argue that even before the action was commenced, defendants were aware that Ryan had worked with plaintiff on the day of the accident because plaintiff testified about Ryan's involvement at his 50-h hearing in May of 2016, in August of 2016 plaintiffs listed Ryan as an eyewitness in response to defendants' combined demands, and plaintiff testified at his May of 2017 deposition that Ryan was his coworker.

Further, anticipating defendants' argument, plaintiffs assert that while the Court permitted the post-Note of Issue deposition of nonparty Petito in January of 2019, the same relief should not be granted with respect to the deposition of Ryan because plaintiff and defendants appeared before the Court on numerous occasions litigating the issue of deposing

Petitio, but defendants never raised the issue of deposing Ryan.

Defendants oppose, arguing that they should be permitted to depose Ryan since plaintiffs have recently been afforded the opportunity to depose Petito, that Ryan's subpoena should be deemed timely because current counsel for defendants (who subpoenaed Ryan) was only recently substituted in this matter, for which defendants should not be punished, and that Ryan's testimony is critical given that he was plaintiff's coworker at the time of the accident.

Defendants also assert that plaintiffs have failed to satisfy their burden that the subpoena should be quashed by failing to show that Ryan's testimony is either "utterly irrelevant to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious" (*Kapon v Koch*, 23 NY3d 32, 38 [2014] [internal citations and quotation marks omitted]), that they satisfied the notice requirement on the face of the subpoena showing why they are seeking Ryan's testimony, in accordance with CPLR 3101[a][4], and that even assuming plaintiffs have satisfied their burden on this motion, Ryan's testimony is "material and relevant" (*id.*).

"Post-note discovery . . . may only be sought under two procedural circumstances set forth in 22 NYCRR 202.21" (*Tirado v Miller*, 75 AD3d 153, 157 [2d Dept 2010]). "[O]ne method of obtaining post-note discovery is to vacate the Note of Issue within 20 days of its service pursuant to 22 NYCRR 202.21(e), by merely showing that discovery is incomplete and the matter is not ready for trial" (*id.*). Further, "[t]he second method, beyond that 20 days, requires that the movant, pursuant to 22 NYCRR 202.21(d), meet a more stringent standard and demonstrate 'unusual or unanticipated circumstances and substantial prejudice' absent the additional discovery" (*id.*, quoting *Audiovox Corp. v Benyamini*, 265 AD2d 135, 138 [2d Dept 2000]).

The motion to preclude/quash and for a protective order is granted. While defendants assert that they moved to vacate the Note of Issue on February 12, 2019, before issuing the

subpoena to Ryan, that motion was premised upon defendants' request to compel plaintiff to submit to a continued deposition regarding his January 8, 2019 neck surgery and related treatment, not upon the need to depose Ryan. In any event, the Order which decided that motion, dated March 12, 2019, did not vacate the Note of Issue. In addition, defendants "did not move pursuant to 22 NYCRR 202.21(d) for permission to conduct post-Note of Issue discovery on the ground that 'unusual or unanticipated circumstances' had developed after the filing of the note of issue" (*Singh v Finneran*, 100 AD3d 735, 726 [2d Dept 2012], quoting 22 NYCRR 202.21[d]). In any event, inasmuch as defendants were aware that Ryan was plaintiff's coworker since before this action had even begun, and were subsequently apprised of this fact on two separate occasions before the Note of Issue was filed, they could not have established that "unusual or unanticipated circumstances" had developed after the filing of the note of issue (22 NYCRR 202.21[d]). Defendants' reliance upon *Kapon* (23 NY3d 32 [2014]) is misplaced because that case does not involve post-Note of Issue discovery. Accordingly, that branch of plaintiffs' motion to quash/prelude and for a protective order and related relief is granted to the extent of quashing the subpoena directed to Ryan and granting a protective order precluding defendants from taking Ryan's deposition.

C. *Pro Hace Vice* - Motion sequence 8

The EDC moves for the admission of out-of-state attorneys Robert Devine, Esq. and Michael Horner, Esq., *pro hace vice*, to participate in all aspects of this action pursuant to 22 NYCRR § 520.11(a)(1). Mr. Joshua R. Tumen, Esq., associate at the law firm of White and Williams, LLP., attorneys for the EDC, is the nominating attorney of record who has submitted this motion.

Here, both out-of-state attorneys have submitted current certificates of good standing from each jurisdiction in which they are admitted (New Jersey and Pennsylvania) (22 NYCRR § 500.4). Further, in accordance with 22 NYCRR 520.11(e)(1) and (2), both attorneys have

averred in their respective affidavits that they are "familiar with and shall comply with the standard of professional conduct imposed upon members of the New York bar, including the rules of the court governing conduct of attorneys and the Rules of Professional Conduct," and that if the motion is granted, they "shall be subject to the jurisdiction of the court of New York with respect to any acts occurring during the course of my participation in this matter."

Further, both proposed attorneys aver that they are familiar with construction site personal injury matters, like those involved in the present action, that they maintain a particularized knowledge of this area of the law, and that they have a professional relationship with AIG, the insurer for the EDC. With respect to AIG, Mr. Tumen affirms that his client, EDC, has requested that these attorneys be involved in the representation of its interest in this lawsuit, and that the EDC's insurer, AIG, has also requested same. Mr. Tumen also affirms that if the motion is granted, he will be the attorney of record for the matter (22 NYCRR § 520.11[c]). Finally, the motion is unopposed.

Pursuant to 22 NYCRR § 520.11(a)(1), "whether an out-of-State attorney should be admitted pro hace vice to participate in a particular matter is a determination best left to the Supreme Court's discretion" (*Neal v Ecolab, Inc.*, 252 AD2d 716, 716 [3d Dept 1988]; *see also Perkins v Elbilia*, 90 AD3d 543, 544 [1st Dept 2011]; *Giannotti v Mercedes Benz U.S.A., LLC,* 20 AD3d 389, 390 [2d Dept 2005]). Moreover, "[w]hile pro hace vice admission furthers this State's policy favoring representation by counsel of one's own choosing, that policy must be balanced against the interest in promoting judicial efficiency and a trial court's considerable authority to control its courtroom and calendar" (*Neal,* 252 AD2d at 716 [internal citations and quotation marks omitted]).

The proposed attorneys have fully complied with the court rules governing pro hace vice admission. Further, although this motion was filed in April, 2019, after the motions for summary judgment were filed, the Court finds that admitting two additional attorneys will not have a

"discernable adverse impact upon considerations of judicial efficiency or the court's management of its courtroom and calender" (*Giannotti,* 20 AD3d at 391), or that plaintiffs will be prejudiced. Accordingly, the motion is granted.

D. *Labor Law §§ 240(1), 241(6)* - Motion sequences 2, 3, and 4

i. Labor Law §§ 240(1)

Plaintiffs moves for summary judgment on their Labor Law § 240(1) cause of action. Defendants cross-move for summary judgment dismissing this cause of action and also move for summary judgment dismissing plaintiffs' Labor Law §§ 241(6) and 200 causes of action.[8]

As an initial matter, plaintiffs argue that defendants violated the rule against making successive motions for summary judgment because plaintiffs timely moved for summary judgment on their § 240(1) claim on February 16, 2018, and defendants timely moved for summary judgment to dismiss plaintiff's §§ 241(6) and 200 claims on February 20, 2018, but defendants made an untimely cross-motion on May 30, 2018 for summary judgment dismissing plaintiffs' § 240(1) cause of action.

First, defendants' cross-motion shall be considered inasmuch as it addresses the same claim as plaintiffs' motion (*Munoz v Salcedo*, 170 AD3d 735, 736 [2d Dept 2019] [internal citations and quotation marks omitted] ["(a)n untimely motion or cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary

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[8] Although the Court has granted the motions of plaintiffs and Judlau to sever the third-party action, the Court is empowered to decide the motions relating to Labor Law §§ 240(1) and 241(6). Specifically, "[p]ursuant to CPLR 3212 (e), which governs partial summary judgment and severance, the court may grant summary judgment 'as to one or more causes of action . . . in favor of any one or more parties, to the extent warranted, on such terms as may be just'" (*ACP Master, Ltd. v Vitro S.A.B. de C.V.*, 34 Misc 3d 1201 [A] [Sup Ct, NY County 2011], 2011 NY Slip Op 52313[U], *5 [Sup Ct, NY County 2011], *appeal dismissed* 95 AD3d 565 [1st Dept 2012]). Here, by virtue of its motion to sever, Judlau in effect concedes that it does not require further discovery with respect to these causes of action and in any event does not make this argument. Lastly, because these causes of action are premised solely upon defendants' vicarious liability, "without regard to any party's actual negligence or relative fault" (*cf. Jones v New York City Health & Hosps. Corp.*, 2017 NY Slip Op 31929 [U], *7 [Sup Ct, Bronx County 2017]), determination of the motions will not prejudice Judlau.

judgment was made on nearly identical grounds"]). Second, defendants' motion and cross-motion do not qualify as successive motions since they do not address the same issues and since the Court has not yet rendered a determination with respect to defendants' initial motion (*see generally Vinar v Litman*, 110 AD3d 867, 868 [2d Dept 2018]). Finally, even assuming defendants' cross-motion is considered a successive motion for summary judgment, inasmuch as it is "substantively valid" and its determination will "further the ends of justice and eliminate an unnecessary burden on the resources of the courts," it may be entertained (*Verizon N.Y., Inc. v Supervisors of Town of N. Hempstead*, 169 AD3d 740, 744 [2d Dept 2019], *appeal dismissed* 33 NY3d 1060 [2019] [internal citations and quotation marks omitted]).

Turning to the merits of plaintiffs' claim, Labor Law § 240(1) provides that:

> "[a]ll 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."

The statute "imposes a nondelegable duty upon owners and general contractors to provide safety devices to protect workers from elevation-related risks" (*Salinas v 64 Jefferson Apts., LLC*, 170 AD3d 1216, 1222 [2d Dept 2019], *appeal dismissed* 170 AD3d 1224 [2019]; *see also Carlton v City of New York*, 161 AD3d 930, 931 [2d Dept 2018]), "'instead of on workers, who are scarcely in a position to protect themselves from accident'" (*Mingo v Lebedowicz*, 57 AD3d 491, 493 [2d Dept 2008], quoting *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985] [internal quotation marks omitted]). In particular, "[t]he statute was designed to prevent accidents in which a 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" (*Sullivan v New York Athletic Club of City of N.Y.*, 162 AD3d 950, 953 [2d Dept

2018], *lv dismissed* 32 NY3d 1196 [2019]). "The extraordinary protections of Labor Law § 240 (1) extend only to a narrow class of special hazards, and do not encompass any and all perils that may be connected in some tangential way with the effects of gravity" (*Simmons v City of New York*, 165 AD3d 725, 726 [2d Dept 2018] [internal citations and quotations marks omitted]). Nevertheless, the statute's purpose of protecting workers "is to be liberally construed" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]).

Accordingly, "[t]he purpose of the statute is to protect against 'such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured'" (*Mendez v Jackson Dev. Group., Ltd.*, 99 AD3d 677, 678 [2d Dept 2012], quoting *Ross,* 81 NY2d at 501). In a falling object case, "[a] plaintiff must show that, at the time the object fell, it was being hoisted or secured or required securing for the purposes of the undertaking" (*Gabrus v New York City Hous. Auth.,* 105 AD3d 699, 700 [2d Dept 2013] [internal citations and quotation marks omitted]). "To succeed on a cause of action pursuant to Labor Law § 240 (1), the plaintiff must establish that an owner or contractor failed to provide appropriate safety devices at an elevated work site and that such violation of the statute was the proximate cause of his injuries" (*Ramsey v Leon D. DeMatteis Constr. Corp.,* 79 AD3d 720, 722 [2d Dept 2010]).

Here, plaintiff testified that as he was manually guiding the cable strands hanging off the bundle which was attached to the crane onto the truck, the bundle of cable suddenly fell out of the strap, struck him on the left side of his body, knocked him down, and that cables continued to fall on him, injuring him. Similarly, plaintiff's coworker Ryan avers in his affidavit that when the load came over the truck and the crane operator began to lower the load, "suddenly the cables dropped out from the straps securing it to the crane, causing the load to come down onto Pat pushing him sideways amongst other cables on the truck." Therefore, plaintiffs have established their entitlement to judgment as a matter of law under Labor Law § 240(1) by

showing that plaintiff was struck by a falling object, the bundle of cables, that was improperly hoisted or inadequately secured by the nylon strap (*see Gabrus,* 105 AD3d at 700 [where plaintiff went to free "drag line" for a load of roofing material which was being lifted to the top of the building by means of a hoist, and the load of material broke apart when it was nearing the top of the building, and fell on him, plaintiff made prima facie showing entitling him to summary judgment on his Labor Law § 240(1) claim]; *Flowers v Harborcenter Dev., LLC,* 155 AD3d 1633, 1634-1635 [4th Dept 2017] [internal citations and quotation marks omitted] [where bundle of steel rebar, tied with a nylon strip, also known as a choker, was attached to a crane hook, and crane raised the bundle in air, and the bundle fell and struck plaintiff's head, "any safety devices . . . used [i.e. the chokers] failed in their core objective of preventing the [rebar] from falling, and . . . such failure was a proximate cause of the accident"]; *Jock v Landmark Healthcare Facilities, LLC*, 62 AD3d 1070, 1071-1072 [3d Dept 2009] [where load of steel decking hoisted 100 to 150 feet above plaintiff by a crane abruptly came down and struck him on the head, plaintiffs entitled to partial summary judgment on their Labor Law § 240(1) claim because plaintiff was "exposed to an elevation-related hazzard, was hit and injured by a falling object, i.e. a load that required securing because of the absence of adequate safety devices, which was a proximate cause of the accident"]; *Ray v City of New York,* 62 AD3d 591, 591-592 [1st Dept 2009] [where plaintiff was injured when he was struck by an 8,000-pound steel beam approximately 60 feet long and 2 to 3 feet thick as it was being lowered into place by a crane atop two 25-foot-high steel towers, the "accident involved an elevation-related risk within the meaning of Labor Law § 240 (1)" resulting from, in part, "defendants' failure to provide proper protection as mandated by the statute"]; *Brown v VJB Constr. Corp.*, 50 AD3d 373, 374, 376 [1st Dept 2008] [where 1,000-pound slab which was lifted three feet off the ground and secured to forklift by clamp fell onto the ground and pinned plaintiff's wrist between slab and wall, plaintiff entitled to summary judgment on Labor Law § 240(1) claim because slab fell a distance

of three feet while it was being hoisted due to failure of clamp]; *Panattoni v Inducon Park Assoc.*, 247 AD2d 823, 823 [4th Dept 1998] [internal citations and quotation marks omitted] [where plaintiff was injured when he was struck by a section of pipe that was being lowered by a backhoe - and pipe was attached to backhoe by a strap or choke collar, which broke - plaintiff entitled to summary judgment on his Labor Law § 240(1) claim because he was injured "as a result of being struck by a falling object that was improperly hoisted or inadequately secured"]).[9]

In their cross-motion and in opposition to plaintiffs' motion, defendants argue that plaintiff's injuries were not caused by the application of the force of gravity to the load or from an elevation-related hazard because plaintiff merely lost his balance and fell. In support of this claim, defendants rely upon the May 29, 2018 affidavit of Petito (the 2018 affidavit) and the affidavit of their expert, Dr. Angela DiDominco (Dr. DiDominco), a biomechanical engineer and Certified Professional Erogonomist.

Petito avers in his 2018 affidavit that he is an employee of Judlau and that on the day of the accident, he was standing with plaintiff an a flat bed truck assisting plaintiff, who was directing a crane, to arrange bundles of cables being placed onto the bed of the truck by the crane. He further avers that in the moments before the accident, he saw plaintiff, while standing, grab one piece of hanging cable while the rest of the bundle was still wrapped and remaining in the choker attached to the crane; that he briefly turned away; and that when he turned back around, he saw plaintiff lying in the truck bed on cables which had already been placed, near that one piece of hanging cable, while the rest of the bundle was still intact, attached to the crane about 20 to 25 feet above the truck, which never came undone. Petito

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[9] In their factual recitation, plaintiffs also argue that the accident report, prepared by Judlau, confirms their version of the way in which the accident occurred. Specifically, the report states that: "The employee was on the rack truck loading cable while the crane was lifting it and lowering it for the employee to organize. Towards the end of the cable, it allegedly came loose off the crane and struck the employee."

concludes that based on the position of plaintiff's body, "it appeared he had fallen while reaching for the one piece of hanging cable, and was never struck by the bundle or that one piece of cable."

Dr. DiDominco avers in her affidavit that based upon her review of the record, including plaintiff's deposition testimony, plaintiff's "fall event" described by Petito was consistent with a loss of balance (i.e. when the body's center of mass unexpectedly moves beyond its base of support) without being struck by the cable.

Defendants also argue that at the very least, plaintiff's own testimony and the affidavit of Dr. DiDomenico, raise a triable issue of fact as to how the accident occurred because plaintiff testified, among other things, that he did not know what happened, what part of his body hit the right side of the truck, or how many cables struck him.

In their supplemental affirmation, filed after Petito was deposed, defendants again argue that plaintiff's accident did not involve an elevation-related risk. In support of this affirmation, defendants annex a May 20, 2016 unsworn, handwritten statement signed by Petito (the 2016 statement), the deposition testimony of Petito, and the sworn affidavit of Christopher Aleksandrowicz (Aleksandrowicz), a Project Engineer for OHL, who wrote plaintiff's accident report and took plaintiff to the hospital after the accident.

Specifically, in his 2016 statement, Petito asserts that on the date of the accident, he was in charge of two Judlau employees/sandhogs in the process of removing 100-foot plastic cables from the tunnel and placing it on a six-wheel dump truck. According to Petito, when he and plaintiff were on the truck, plaintiff tripped over some coiled cable, lost his balance and then grabbed onto a piece of hanging cable (eight feet long) in order to keep from falling further, but still landed on his back on the coiled cable pile, whereupon he stood up, said he hurt his ankle or foot, finished coiling the rest of that cable, and left the truck limping.

Aleksandrowicz avers in his affidavit that on the day of the accident, plaintiff told him

that "while directing the last bundle of cables, the load of cables was below eye-level and moving horizontally and one of the cables attached to the load impacted him and he sprained his right ankle while trying to move out of the way." Aleksandrowicz further states in his affidavit that following the accident, plaintiff told him that:

> "he was not struck by any of the electrical cables or the bundle/load. Instead, while attempting to reach for the bundle/load, he claimed to me that he lost his balance on top of the cables that were already on the flatbed truck. The load was not moving at the time of the alleged incident and no cable or any part of the load actually impacted Mr. O'Brien."

At his deposition, Petito testified that his 2016 statement was written in his presence as he was providing the information to a female, and that he signed the statement. Petito also testified that before signing the 2018 affidavit, he had read the portion which states that: "[b]ased on the position of Pat's body, it appeared that he had fallen while reaching for the one piece of hanging cable and was never struck by the bundle or the one piece of cable," and that he signed the affidavit.

Defendants contend that Petito's deposition testimony confirms that he signed the 2016 statement and the 2018 affidavit and confirmed the validity of the statements he made in these documents, in effect that plaintiff merely lost his balance and fell, and was not struck by the falling bundle of cables. Defendants also argue that Aleksandrowicz's affidavit demonstrates that plaintiff merely lost his balance and fell. Alternatively, defendants assert that Aleksandrowicz's affidavit and Petito's deposition testimony, which are inconsistent with plaintiff's version of the accident, raises a triable issue of fact as to whether plaintiff's accident involved an elevation-related risk.

As an initial matter, defendants' reliance upon Aleksandrowicz's affidavit and Petito's 2016 statement is misplaced since they were submitted for the first time in defendants'

supplemental affirmation, in effect, defendants' reply[10] (*A.M. Med. Servs., P.C. v Liberty Mut. Ins. Co.*, 29 Misc 3d 87, 89 [App Term 2d Dept 2010] ["since defendant's attorney's 'supplemental' affirmation was, in fact, a reply affirmation, the factual allegations asserted for the first time therein must be disregarded"]; *Qureshi v Vital Transp., Inc.*, 173 AD3d 1076, 1078 [2d Dept 2019] [improper to submit evidence for the first time with reply papers]).

Nevertheless, based on Petito's 2018 affidavit, his deposition testimony, and plaintiff's deposition testimony, a triable issue of fact exists as to how the accident occurred, warranting denial of plaintiffs' motion for summary judgment on his Labor Law § 240(1) cause of action. In short, Petito's 2018 affidavit contradicts plaintiff's version of the accident, and Petito's deposition testimony confirms and contradicts the statements he made in his affidavit.

As indicated, Petito avers in his 2018 affidavit that in the moments before the accident, he saw plaintiff, while standing, grab one piece of hanging cable while the rest of the bundle was still wrapped and remained in the choker attached to the crane; that he briefly turned away; and that when he turned back around, he saw plaintiff lying in the truck bed on cables which had already been placed, near that one piece of hanging cable, while the rest of the bundle was still intact, attached to the crane about 20 to 25 feet above the truck, which never became "undone." Petito concludes that based on the position of plaintiff's body, "it appeared he had fallen while reaching for the one piece of hanging cable, and was never struck by the bundle or that one piece of cable."

At his deposition,[11] Petito testified that before signing the 2018 affidavit, he had read the portion which states that it appeared that "plaintiff had fallen while reaching for the one piece of

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[10] The Court concludes that the supplemental affirmation shall not be considered upon review of the correspondence submitted by the plaintiff and defendants, dated May 3, 2019 and May 6, 2019, respectively, in accordance with this Court's directive at oral argument on April 24, 2019.

[11] The deposition was held after the motion and cross-motion were filed.

hanging cable and was never struck by the bundle or the one piece of cable," and that he signed it, in effect confirming its veracity (*Ocampo v Pagan*, 68 AD3d 1077, 1078-1079 [2d Dept 2009] [internal citations and quotation marks omitted] ["Statements contained in a verified complaint, or made by a party as a witness, *or contained in a deposition*, a bill of particulars, or an affidavit constitute informal judicial admissions. As such, they are generally admissible pursuant to an exception to the hearsay rule. While not conclusive, they are evidence of the fact or facts admitted"] [emphasis added]).

Nevertheless, Petito also testified that he disagreed with his statement in his 2018 affidavit that it appeared plaintiff had fallen while reaching for that one piece of cable and was never struck by the bundle or the cable and, when asked why he disagreed, he responded "I just don't remember." Further, with respect to his statement in his 2018 affidavit that he saw plaintiff touching one piece of hanging cable immediately before the accident, he testified that he did not "independently recall" plaintiff doing that. In addition, with respect to his statement in his 2018 affidavit that after the accident, he saw "the one piece of hanging cable resting on the top of the already coiled cables a few inches from [plaintiff's] feet," he testified that he did not recall "that testimony . . . in the affidavit," nor did he recall whether he had been referencing the cable that fell from the load. On the other hand, he testified that his statement in the 2018 affidavit that the rest of the cables were still in the air, attached to the crane about 20-25 feet over the truck, was correct; however he also testified that in moments before the accident occurred, he saw one of the cables come down from the bundle, which is inconsistent with his 2018 affidavit.

In addition, as plaintiffs points out, Petito testified that he did not merely look away briefly before the accident, as he asserted in his 2018 affidavit, but "ducked" because he wanted to avoid being struck by one of the cables which slipped and fell out of the bundle which was connected to the crane 25-50 feet above him. Thus, this testimony contradicts the

description of the accident Petito provided in his 2018 affidavit.

Also, Petito states in his 2018 affidavit that he was standing on the truck when the accident occurred, when plaintiff testified that he was the only person on the truck bed when the accident occurred, and that the only other people at the site were Ryan; the crane operator; the crane oiler; an OHL laborer who was going to be "flagging" trucks; and an Asian DEP or City employee.

Plaintiffs assert that Petito's 2018 affidavit is not inconsistent with plaintiff's version of the accident, Ryan's version of the accident, and the accident report. However, while Petito averred in his 2018 affidavit that he did not see whether the piece of hanging cable which plaintiff grabbed had fallen on plaintiff, Petito also averred in that affidavit, contrary to plaintiff's testimony, that the load in the bundle did not fall out of the strap, namely it remained intact, attached to the crane about 20-25 feet above the truck, and never came undone.

Further, plaintiffs rely in part on the accident report to show that it is consistent with plaintiff's and Ryan's description of the accident. However, the accident report is inadmissible because it is not certified.

Plaintiffs also argue that assuming the statements made by Petito in his 2016 statement and 2018 affidavit and his deposition testimony are inconsistent, "it merely at worst eliminates Petito from the conversation," and that the admissible proof, to wit, plaintiff's testimony, Ryan's affidavit, and the accident report, demonstrate plaintiffs' entitlement to summary judgment. However, the inconsistencies between the statements made by Petito in his 2018 affidavit and his deposition testimony raise a material issue of fact as to how the accident occurred, nor are they minor, as plaintiffs argue.

Plaintiffs also assert that even assuming plaintiff was not struck by the falling cable, but was injured while attempting to avoid a falling object, plaintiff would be entitled to summary judgment. However, as noted above, there is evidence that the cable did not fall at all. In his

2018 affidavit, Petito states that after the accident, the one hanging cable was a few inches from plaintiff's feet and was not touching his body, and that the rest of the cable was tied in the bundle 25 feet above, which had not come undone. Plaintiff, on the other hand, testified that the bundle of cable, not a single hanging cable, suddenly fell out of the strap and struck him.

Defendants' cross-motion for summary judgment dismissing plaintiffs' Labor Law § 240(1) claim is also denied. Defendants argue that even assuming the accident occurred as described by plaintiff, plaintiff's injuries were not attributable to an elevated-related risk because the cable which hit plaintiff only moved horizontally. More specifically, plaintiff testified that he was knocked down as he was manually guiding the hanging cables onto the truck, and that the cables were right next to him, secured to the nylon strap, which never came undone. However, although plaintiff testified that prior to the accident, the hanging cables were at his chest level, he also testified that the load of cable - which fell from the strap - was 80 to 100 feet above him.

Defendants next argue that plaintiff's conduct of positioning himself on the top the cables which exceeded to height of the side railings on the truck, in failing to use a ladder and a tag line, and in directing the crane while simultaneously organizing the load in the truck, was the sole proximate cause of his accident. However, defendants fail to cite any evidence that plaintiff was a recalcitrant worker or that any of his conduct was improper (*see Fraser v City of New York,* 158 AD3d 428, 428 [1st Dept. 2018]). Moreover, it is undisputed that Ryan, not plaintiff, rigged the cable bundles to the crane. While Petito testified that when loading a truck, the signalman normally stands on the side of the truck on the ground, he did not say that plaintiff violated any procedures by standing on the truck. In any event, he stated that when loading a truck, someone must be on the truck to release the straps, and that it was not plaintiff's decision to use the truck on the day of the accident. Further, "even if [plaintiff] was partially at fault for [standing on the cables, not using a ladder, etc.], a worker's comparative

negligence is not a defense to a claim based on Labor Law § 240 (1)" (*Garzon v Viola,* 124 AD3d 715, 716-717 [2d Dept 2015]).

Defendants also contend that plaintiff has failed to establish the absence or failure of any safety hoists or protective devices because plaintiff testified that the straps he used were not defective and that there was nothing wrong with the crane, the load, or the manner in which the load was secured. However, inasmuch as there is a triable issue of fact as to how the accident occurred, this claim is without merit. Finally, contrary to defendants' contention, Ryan's affidavit is not speculative inasmuch as he based his conclusion upon the position of plaintiff's body when plaintiff fell.[12]

In light of the inconsistent statements as to whether plaintiff's injuries arose from an elevation-related risk contemplated by the statute rather than from the usual and ordinary dangers of the construction site, plaintiffs' motion for summary judgment on their Labor Law 240(1) cause of action, and defendants' cross-motion for summary judgment dismissing this claim, are denied (*see e.g. Guaman v Ginestri,* 28 AD3d 517 [2d Dept 2006]).

ii. Labor Law § 241(6)

Defendants move to dismiss plaintiffs' Labor Law § 241(6) cause of action premised upon the various Industrial Code violations alleged by plaintiffs in their Verified Bill of Particulars (BP).

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[12] As to defendants' argument made in support of their cross-motion (i.e. before Petito was deposed) that plaintiff's testimony (because he did not know how the accident occurred etc.) and the affidavit of Dr. DiDomenico raise a triable issue of fact, the argument is essentially moot in light of defendants' supplemental affirmation. In any event, it is rejected because defendants mischaracterize present parts of plaintiff's testimony in attempting to support this claim. For example, in response to a question as to how many cables hit plaintiff, he in fact testified: "I don't know what happened, *I know they came on top of me.*" When asked which part of his body first made contact with the truck bed when he fell, plaintiff testified that he fell on his back and right side, "it was a bit of both." When asked how many cables struck him, he in fact testified that *"they* come on top of me," meaning more than one. Also, while plaintiff was unsure as to whether he lost consciousness after he was struck by the cables, his other testimony that he did not know who assisted him after the accident, suggests he did. In any event, this testimony does not raise any material issues of fact. Dr. DiDomenico's affidavit lacks probative value because it does not address plaintiff's version of how the accident occurred and relies solely upon Petito's 2018 affidavit.

Plaintiffs only oppose defendants' motion with respect 12 NYCRR § 23-1.5 (c)(1) and (2) and § 23-8.1(b)(1), (2), (3) and (f)(iv).

"Labor Law § 241 (6) imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Simmons v City of New York*, 165 AD3d 725, 727 [2d Dept 2018] [internal citations and quotation marks omitted]). "In order to establish liability under Labor Law § 241 (6), a plaintiff or a claimant must demonstrate that his [or her] injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case" (*Gosskopf v Beechwood Org.*, 166 AD3d 860, 861 [2d Dept 2018] [internal citations and quotation marks omitted]).

As an initial matter, that plaintiffs failure to allege in their BP the subparts of the Industrial Code provisions which they claim were violated is not fatal to their claim (*Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955, 958 [2d Dept 2013]). In addition, although defendants move to dismiss all of the Industrial Code provisions plaintiff alleged were violated, plaintiffs' only oppose this branch of defendants' motion with respect to 12 NYCRR § 23-1.5(c)(1) and (2), and 12 NYCRR § 23-8.1(b)(1), (2), (3), (e)(3), and (f)(iv), and have therefore abandoned their claim as it relates to the remaining provisions (*see Genovese v Gambino*, 309 AD2d 832 [2d Dept 2003]).

12 NYCRR § 23-1.5(c)(1) and (2) provide that:

> "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."

As defendants argue, "12 NYCRR § 23-1.5 (c) (1) and (2) are too general to serve as Labor Law § 241 (6) predicates" (*Jackson v Hunter Roberts Constr. Group, LLC*, 161 AD3d 666, 667 [2d Dept 2018]).

12 NYCRR § 23-8.1, entitled "General Provisions," sets forth safety requirements for inspection of mobile cranes, tower cranes, and derricks. 12 NYCRR § 23-8.1(b)(1) provides that every mobile crane, tower crane and derrick be thoroughly inspected at least monthly, and that the inspections include "all blocks, shackles, sheaves, wire rope, connectors, the various devices on the mast or boom, hooks, controls and braking mechanisms." Defendants argue that by its very definition, this provision is not sufficiently specific to support a Labor Law § 241(6) cause of action, and that assuming it were, there is no proof that it was violated and that the violation was a substantial factor in causing the accident. The Court finds that this regulation is sufficiently specific (*see McGhee v HRH Constr. LLC*, 2008 NY Slip Op 31118 [U], *10 [Sup Ct, Bronx County 2008]; *Howell v Koch Erecting Corp.*, 192 Misc 2d 491, 494 [Sup Ct, Bronx County 2002] [holding § 23-8.1 (b)(1) is sufficiently specific and that § 23-8.1 (b) (2) is not]). However, as defendants note, plaintiff testified that there was nothing wrong with the strap, the hook on the crane, or the load; that in the moments before the accident there was no sudden acceleration or deceleration of the load; and that the cables merely fell out of the strap, and that he did not know why. Accordingly, even had the crane been inspected, it would not have revealed any defects, and thus could not have been a substantial cause of the accident. Thus, this provision is inapplicable to the facts of this case.

12 NYCRR § 23-8.1(b)(2) provides how the crane inspection must be recorded, by whom it must be signed, and where it must be posted. 22 NYCRR § 23-8.1(b)(3) provides that "[e]very mobile crane, tower crane and derrick shall be inspected before being erected or operated for the first time on any job." These provisions set forth mandatory rules, and are therefore sufficiently specific to support a claim under § 241(6). In any event, given defendants' showing with respect to § 23-8.1(b)(1), defendants have made a prima facie showing that these provisions are inapplicable to the facts of this case, i.e. violations of these provisions could not have been a proximate cause of plaintiff's accident.

22 NYCRR § 8.1(e)(3), addressing "Load Handling," provides that: "Where slings are used

to hoist material of long length, spreader bars shall be used to space and keep the sling legs in proper balance." Defendants argue that this provision is inapplicable because there is no evidence that the load was not properly balanced, requiring the use of a spreader bar. Given plaintiff's testimony regarding the lack of any defects with respect to the strap, the hook, and the load, this provision is not applicable to the facts of this case. In opposition, plaintiffs argue that straps were used to hoist the cables, that the cables were "of long length," and yet spreaders were not used to hoist/keep the load together. Plaintiffs have failed to raise an issue of fact because they have failed to show that slings are the equivalent of nylon straps and, in any event, that the load was not balanced.

22 NYCRR § 23-8.1(f)(iv) provides that: "(1) Before starting to hoist with a mobile crane, tower crane or derrick the following inspection for unsafe conditions shall be made: (iv) The load is well secured and properly balanced in the sling or lighting device before it is lifted more than a few inches." As defendants argue, based upon plaintiff's testimony that there was nothing wrong with the strap, the load, or the crane hook, and that the cables just fell out of the nylon strap (*supra*), there is no evidence that the load was not initially secured and balanced before lifting. Plaintiffs have thus failed to raise a triable issue of fact that the load was not secured and properly balanced before the load was lifted.

Based upon the foregoing, this branch of defendants' motion to dismiss plaintiffs' Labor Law § 241(6) cause of action is granted.

E. *Labor Law § 200/Common-Law Negligence* - Motion sequence 2

Defendants also move to dismiss plaintiffs' Labor Law § 200/common-law negligence causes of action. In opposition, plaintiffs assert that they do not oppose that portion of defendants' motion to dismiss their Labor Law § 200 claim and that they are withdrawing it. Under the

circumstances, defendants' motion to dismiss plaintiffs' Labor Law § 200/common-law negligence[13] cause of action is granted (*Riccio v NHT Owners, LLC*, 79 AD3d 998, 999 [2d Dept 2010] ["Before the trial, the plaintiff withdrew his causes of action alleging common-law negligence and violations of Labor Law §§ 200 and 241(6)]"). Therefore, the only cause of action remaining was based on Labor Law § 240 (1)"]).

CONCLUSION

Based upon the foregoing, it is hereby

ORDERED that defendants' motion for an Order, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' Labor Law §§ 241(6) and 200 causes of action insofar as asserted against them is granted (motion sequence 2); and it is further,

ORDERED that plaintiffs' motion for an Order, pursuant to CPLR 3212, for summary judgment on their Labor Law § 240(1) cause of action against defendants is denied (motion sequence 3); and it is further,

ORDERED that defendants' cross-motion for an Order, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' Labor Law § 240(1) cause of action insofar as asserted against them is denied (motion sequence 4); and it is further,

ORDERED that EDC's motion for the admission of out-of-state attorneys Robert Devine, Esq. and Michael Horner, Esq., pro hac vice, to participate in all aspects of this action pursuant to 22 NYCRR § 520.11(a)(1) is granted (motion sequence 8); and it is further,

ORDERED that Judlau's motion for an Order, pursuant to CPLR 603 and 1010, to sever the third-party action is granted (motion sequence 9); and it is further,

ORDERED that plaintiffs' motion for an Order, pursuant to CPLR 603 and 1010, is

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[13] Although plaintiff did not withdraw his common-law negligence claim against defendants, "by failing to address this issue in [their] brief, any argument is deemed abandoned with respect thereto" (*Wiley v Marjam Supply Co., Inc.*, 166 AD3d 1106, 1109 [3d Dept 2018], *lv denied* 33 NY3d 908 [2019]).

granted to the extent that the third-party action shall be severed from this action and the branch of plaintiffs' motion to quash/prelude and for a protective order is granted to the extent of quashing the subpoena directed to Ryan and granting a protective order precluding defendants from taking Ryan's deposition (motion sequence 10); and it is further,

ORDERED that counsel for plaintiff shall serve a copy of this Order with Notice of Entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: 10/10/19

PAUL WOOTEN J.S.C.

KINGS COUNTY CLERK
FILED
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