Campolong v 50 Lex Dev. LLC
2020 NY Slip Op 30351(U)
February 7, 2020
Supreme Court, New York County
Docket Number: 153883/2017
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH **PART** IAS MOTION 29EFM

Justice

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VINCENT CAMPOLONG,

Plaintiff,

- v -

50 LEX DEVELOPMENT LLC, CERUZZI HOLDINGS LLC and TISHMAN CONSTRUCTION CORPORATION,

Defendants.

----------X

INDEX NO. 153883/2017

MOTION DATE 02/07/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

NYSCEF Doc Nos. 23–36 and 38–43 were read on this motion for summary judgment.

Motion by Plaintiff Vincent Campolong pursuant to CPLR 3212 for an order granting him summary judgment under Labor Law §§ 240 (1) and 241 (6) on the issue of liability as against Defendants 50 Lex Development LLC, Ceruzzi Holdings LLC, and Tishman Construction Corporation is granted in part to the following extent.

BACKGROUND

Plaintiff commenced the instant action on April 27, 2017, alleging that he was struck by a piece of wood on January 31, 2017, while employed by nonparty Regal Contracting ("Regal") as an ironworker at a job site located at 138 East 50th Street, New York, New York (the "Premises"), due to the negligence of Defendants. The complaint alleges that defendants 50 Lex Development LLC ("50 Lex") and Ceruzzi Holdings LLC ("Ceruzzi") were the owners of the Premises and defendant Tishman Construction Corporation ("Tishman") was the general contractor or construction manager retained by 50 Lex or Ceruzzi for the job at the Premises. The complaint further alleges that Tishman subcontracted with Regal for work at the Premises.

On or about June 22, 2017, Defendants interposed their answer, generally denying the allegations in the complaint and asserting affirmative defenses. In both the complaint and the bill of particulars, dated July 25, 2017, Plaintiff asserts that Defendants violated Labor Law §§ 200, 240 (1), and 241 (6) predicated on, as is relevant here, violations of 12 NYCRR (Industrial Code) §§ 23-1.7 and 23-2.1. Plaintiff filed his RJI on July 14, 2017, the matter was conferenced for discovery extensively by this Court at eight separate conferences over an approximately two-year period, and, on July 26, 2019, Plaintiff filed his certificate of readiness and note of issue.

On September 20, 2019, Plaintiff timely filed the instant motion pursuant to CPLR 3212 for an order granting him summary judgment under Labor Law §§ 240 (1) and 241 (6), as predicated on violations of Industrial Code §§ 23-1.7 (a) (1) and (2) and 23-2.1 (a) (1) and (2), on the issue of liability as against Defendants. Plaintiff alleges in his papers that 50 Lex was the owner and that 50 Lex contracted with Tishman to provide general contractor and construction

manager services. Plaintiff also annexes the contract between 50 Lex and Tishman. (Khashmati affirmation, exhibit 2 [Contract].) Ceruzzi is named twice in the contract as an additional insured. Plaintiff alleges, in sum and substance, that as he was hit by the piece of wood, a four-by-four as explained more fully below, and as there was no overhead protection, liability should lie as to Defendants to the extent moved on.

Plaintiff alleges in his papers that he was tying rebar with partners Dylan Nolan and Brian Morales on January 31, 2017, during his employment with Regal and while working for Regal, while carpenters were building a temporary floor about 20-25 feet above them. Plaintiff further alleges that a part of the temporary flooring known as a "rib" fell from the level above and struck his head. Plaintiff alleges the rib was 10-15 feet long.

At his EBT, when asked whether he knew how heavy the rib was, Plaintiff said, "[n]o . . . I don't know. I know they're heavy, though, thick four-by-fours." (Campolong tr at 78, lines 24–25; at 79, lines 2–3.) When asked whether he knew if the rib was more than 20 pounds, Plaintiff said "[y]es," and when asked if it was more than 50 pounds, Plaintiff said, "[p]robably not that much. I don't know, though. I don't want to say the wrong thing." (*Id.* at 79, lines 4–10.)

When asked whether he knew where the rib that struck him came from, Plaintiff said that he did and stated,"[i]t was up above -- above me where they were starting to lay out for the next floor, the temporary floor I was explaining. That's only [sic] place it could have came [sic] from. That's the only thing that was above me." (*Id.* at 74, lines 24–25; at 75, lines 2–8.) When asked whether he learned how it fell at any time, Plaintiff said, "[n]o." (*Id.* at 75, lines 9–11.) When asked whether he knew if someone dropped it, Plaintiff said, "I've heard stories. I don't know what the truth is. I truly do not. I have an opinion of probably what happened, but I don't know for sure." (*Id.* at 75, lines 12–16.) When asked to elaborate, Plaintiff said,

> "[w]ell, I've seen the way that they lay the deck out, and they kind of toss the boards down. Like they're standing on the last piece of plywood that they had laid down, which is the only really safe thing to stand on. So what they'll do is they'll toss the ribs out, you know, onto the -- every [rib] is crossed. So you have boards going this way and then you have boards going the opposite way. (Indicating.) . . . Basically it makes like a checkerboard and then they lay the plywood on top and they nail it to that. So as they were -- it's called 'rolling them out.' They kind of toss them over, and then the next one and the next one and the next one. The one that was supposed to be the edge board obviously got tossed a little too far, or it wasn't secured and it got knocked off the side. That's the only thing that could have happened. They're supposed to be nailed down thoroughly. So it either came down before he nailed it or it wasn't nailed at all."

(*Id.* at 75, lines 17–25; at 76, lines 2–20.) When asked whether the carpenters were physically throwing boards or whether that was a construction term, Plaintiff said,

> "I mean, it's not like a vicious throw, but yeah, they -- the boards come in [] a big bundle and they -- yeah, they take them and they toss them. The first ones are laid out methodically. The first, the boards going whichever way that they have them,

> east, north, south, east, west, depends. Those are laid out methodically because they have to be attached to the stilts . . . . And then the next set of them, they kind of, yeah, they just literally toss them out every 16 inches. Then they go -- there's a guy behind them that's supposed to be coming around shooting a nail into each one. And then they drop the plywood on. And again, they throw the plywood on, too."

(*Id.* at 76, lines 24–25; at 77, lines 2–16.) When asked whether the carpenters were throwing the ribs to someone or just throwing them down, Plaintiff said, "[n]o, They're just dropping -- you know, they're heavy. They're heavy, so you know, the guys -- everyone is always being pushed. Everyone is always -- especially these guys. This company is known for that. You're never going fast enough. You're never working hard enough. Nothing is ever good enough, so you know. . . ." (*Id.* at 77, lines 19–25; at 78, line 2 [ellipse in original].)

When asked, "[w]hile working on this site, are you aware of any other instances where four-by-fours would fall?" Plaintiff said, "[n]o." (*Id.* at 79, lines 12–15.)

Exhibit 6 to the motion is styled as the "Affidavit of David Wolleben." (NYSCEF Doc No. 31.) The two-page document has a signature near the printed name "David Wolleben" on both pages and, on the bottom-right corner of both pages, where "Witness by:" is printed, there is another signature.

Exhibit 7 to the motion is the affidavit of Mr. Nolan, dated September 19, 2019. The affiant states that he witnessed Plaintiff's accident. Specifically, Mr. Nolan avers that "Vincent, Brian Morales and I were tying rebar when a four-by-four[] also known as a 'rib' used for the floor by carpenters above[] came down and hit Vincent in the head. The four-by-four[] that struck Vincent was about ten to fifteen feet long and fell down from the temporary floor above." (NYSCEF Do c No. 32 [aff of Nolan].)

Defendants argue in opposition, in sum and substance, that neither Plaintiff nor anyone else can show where the falling object came from or how it fell. Defendants further argue that it is possible the rib was thrown, fell while being secured, fell while being hoisted, or something else. Defendants further argue that any Industrial Code section not moved upon in the instant motion are conceded by Plaintiff to be inapplicable to the facts of this case. Defendants further argue that Plaintiff has failed to show the work area where he was struck was normally exposed to overhead hazards. Defendants further argue that, as Plaintiff was in his work area, any Industrial Code provision regarding areas where work is not being done is inapplicable here. Defendants further argue that there is no evidence the rib was obstructing any passageway or the like or that it was being stored in any particular way prior to the accident, precluding summary judgment as to any Industrial Code provision requiring such a showing.

Defendants cite to *Doucoure v Atlantic Dev. Group* and argue that, similar to here, Labor Law § 240 (1) was not violated where a piece of concrete chipped loose by an employee fell and struck a plaintiff. (18 AD3d 337 [1st Dept 2005].) Defendants further cite to *DeNicola v Assured Sprinkler and Mech., Inc.*, again arguing that, similar to the instant matter, Labor Law § 240 (1) was not violated where part of a parapet wall fell on a worker as he stood on a roof. (25 AD3d

647 [2d Dept 2006].) Defendants further cite to *Rosado v Briarwoods Farm, Inc.* and argue it held that a piece of lumber resting on the framing of a porch overhang under construction was not an object that needed to be secured but, rather, was the type of hazard a construction worker typically encounters on a construction site. (19 AD3d 396 [2d Dept 2005].) Defendants argue that the lumber in *Rosado* is indistinguishable from the rib in the instant case.

Defendants then cite to *Fried v Always Green, LLC*, where they indicate the court held that a bag of construction debris being tossed from a roof did not result in a violation of Labor Law § 240 (1). (77 AD3d 788 [2d Dept 2010].) Defendants argue that if the rib were tossed then such would not be a violation of Labor Law § 240 (1) and, here, as Plaintiff cannot prove the rib was not tossed over the side, summary judgment should be denied. Defendants further cite to *Timmons v Barrett Paving Materials, Inc.* and argue that, where an object breaks loose or falls while it is not being hoisted or secured, there is no liability under Labor Law § 240 (1). (83 AD3d 1473 [4th Dept 2011].)

Plaintiff argues in reply that Defendants do not dispute the facts of the case as presented by Plaintiff in his papers, e.g., that he was struck by the rib, the distance the rib fell, its size, its weight. Plaintiff further argues that Defendants have not submitted any further evidence beyond an attorney's affirmation.

As is relevant here, Plaintiff argues that the relevant inquiry is whether harm flows directly from the application of the force of gravity to the falling object and a finding of liability under Labor Law § 240 (1) is not limited to cases in which the falling object is in the process of being hoisted or secured. Rather, liability may lie where the object required securing for the purposes of the undertaking.

Plaintiff argues that, here, the rib required securing. Plaintiff further argues based upon the EBT of Tishman that no protection against falling objects was in place, a fact not disputed by Defendants. Plaintiff further argues that it is of no moment that Plaintiff did not see the rib as it struck him or show the exact manner in which it fell, but must show that the risk of some injury was foreseeable. Plaintiff further argues that Plaintiff has testified as to what he was doing at the time of the accident, the work going on above, and the nature and distance traveled of the object that struck him.

Plaintiff further argues that workers underneath the work of another trade are exposed to falling objects from them. Plaintiff then argues that it is undisputed and was foreseeable that the rib placed too close the edge of a floor would endanger someone working underneath.

DISCUSSION

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted].) "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

from the case." (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Id.*) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

At the outset, the Court notes that Plaintiff has made no specific showing of entitlement to summary judgment as against Ceruzzi, an entity which Plaintiff makes no mention of in his papers. Aside from the allegation in the complaint that Ceruzzi is an owner of the Premises, an allegation denied by Defendants in their answer, the name Ceruzzi only appears thereafter in the case caption and in the Contract as an additional insured in two places. As such, the branch of the motion seeking summary judgment as against Ceruzzi is denied in its entirety.

The Court notes further that the Wolleben "affidavit" at exhibit 6 is in fact unsworn. As such, it does not constitute proof in admissible form, is not properly before the Court, and will not be considered by the Court in deciding the motion.

The Labor Law § 240 (1) Claim

Plaintiff moves for summary judgment on his Labor Law § 240 (1) claim against Defendants. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

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

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

> "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein"

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Defendants have argued that the motion should be denied because the rib was not in the process of being hoisted or secured at the time that it fell. The Court finds this argument unavailing. It is well-settled law that a falling object need not be in the process of being hoisted or secured for the accident to be covered under Labor Law § 240 (1). It is enough that said object simply needed securing "'for the purposes of the undertaking'" (*Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 964 [2d Dept 2013], quoting *Outar v City of New York*, 286 AD2d 671, 673 [2d Dept 2001], *affd* 5 NY3d 731 [2005] [Labor Law § 240 (1) applicable where plaintiff was struck by an unsecured dolly, which was being stored on top of a bench wall, and thus, it was not in the process of being hoisted or secured at the time that it fell on the plaintiff (5 NY3d at 732)]; *see also Narducci v Manhasset Bay Assoc.* (96 NY2d at 268; *Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758-759 [2008]; *Vargas v City of New York*, 59 AD3d 261, 261 [1st Dept 2009]; *Portillo v Roby Anne Dev., LLC*, 32 AD3d 421, 421 [2d Dept 2006] [Labor Law § 240 (1) liability imposed where the steel beam that fell on plaintiff needed to be secured for the purposes of the undertaking]; *Bush v Gregory/Madison Ave., LLC*, 308 AD2d 360, 361 [1st Dept 2003] [issue of fact as to whether a security device would have been necessary to shield worker from falling iron angle that was inadequately secured]; *Orner v Port Auth. of N.Y. & N.Y.*, 293 AD2d 517, 518 [2d Dept 2002]).

Here, the Court finds that Plaintiff has shown prima facie that he may recover damages for a violation of Labor Law § 240 (1) as against 50 Lex and Tishman under a falling objects theory, because the object that caused his injury, the "rib", "was 'a load that required securing for the purposes of the undertaking at the time it fell [citation omitted]'" (*Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005]; *Gabrus v New York City Hous. Auth.*, 105 AD3d 699, 699 [2d Dept 2013] [the plaintiff was entitled to summary judgment in his favor on his Labor Law § 240 (1) claim where he demonstrated that the load of material that fell on him while being hoisted to the top of the building was inadequately secured]; *Dedndreaj v ABC Carpet & Home*, 93 AD3d 487, 488 [1st Dept 2012] ["[p]laintiff established his prima facie entitlement to summary judgment by showing that defendants' failure to provide an adequate safety device proximately caused a pipe that was in the process of being hoisted to fall and strike him"]).

Because Plaintiff was working directly beneath carpenters who were in the process of building out temporary flooring at the time of the accident, the Court finds that it was foreseeable the rib components of that flooring, which were in the process of being nailed down so that they would be stable parts of the temporary flooring, required securing prior to their being nailed down so that they did not move or fall and were otherwise properly aligned in the requisite lattice structure. (*Garcia v SMJ 210 W. 18 LLC*, 178 AD3d 473, 473 [1st Dept 2019] [holding that a plaintiff showed prima facie entitlement to summary judgment on his Labor Law § 240 [1]

claim "based on the record evidence that a piece of the exterior façade of the building still under construction fell on him, that workers were performing patch work to the [façade] on the floors above plaintiff, and that the exterior façade was not complete"].)

Here, as in *Garcia*, a piece of what was being worked on above him fell during the course of that work, which was not yet complete. As there were no protective devices in place, such as a manual hoist, hangers, nets or ropes, to secure the rib from falling or causing gravity-related injury while it was being positioned, Labor Law § 240 (1) is applicable, because plaintiff's injuries were "'the direct consequence of [defendants'] failure to provide adequate protection against [that] risk'" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1,10 [2011] [citation omitted]).

Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citation omitted]). "As has been often stated, the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, 'those best suited to bear that responsibility' instead of on the workers, who are not in a position to protect themselves" (*John*, 281 AD2d at 117, quoting *Ross*, 81 NY2d at 500).

As such, the Court finds that Plaintiff has shown prima facie entitlement to summary judgment on his Labor Law § 240 (1) cause of action as against 50 Lex and Tishman, and Defendants have failed to raise a genuine issue of material fact in response.

The Labor Law § 241 (6) Claim

Plaintiff also moves for summary judgment on his Labor Law § 241 (6) claim against Defendants. Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements: . . .
>
> "(6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). However, 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, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.* at 503-505).

At the outset, Defendants argue, and Plaintiff in reply does not dispute, that those Industrial Code predicates on which Plaintiff has not moved but may have alleged applied to this case in his complaint or bill of particulars are concededly not applicable here. As such, although Defendants have not moved to dismiss, for the purpose of simplifying the issues, the Court will search the record based upon this concession and dismiss Plaintiff's Labor Law § 241 (6) cause of action solely to the extent it is predicated on a violation of any Industrial Code sections except those moved on: 23-1.7 (a) (1) and (2) and 23-2.1 (a) (1) and (2).

Industrial Code § 23-1.7 (a) (1)

Section 23-1.7 entitled "Protection from general hazards," provides, in relevant part, as follows:

> "(a) Overhead hazards.
>
> > "(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"

(12 NYCRR § 23-1.7 [a] [1]). Section 23-1.7 (a) (1) has been held to be sufficiently specific to support a plaintiff's Labor Law § 241 (6) claim (*Murtha v Integral Constr. Corp.*, 253 AD2d 637, 639 [1st Dept 1998]). In order to be applicable, the provision requires a showing that the work site is "normally exposed to falling material or objects" so as to require "suitable overhead protection" (*id.*, n 2). The First Department has held that "where an object unexpectedly falls on a worker in an area not normally exposed to such hazards, the regulation does not apply" (*Buckley*, 44 AD3d at 271).

Here, the Court finds that there is a genuine issue of material fact "as to whether the area where the accident occurred was normally exposed to falling material or objects requiring that plaintiff be provided with suitable overhead protection." (*Garcia v SMJ 210 W. 18 LLC*, 178 AD3d 473, 473 [1st Dept 2019].) Plaintiff testified that he had been required to work underneath where the temporary floor was being built out and that work was ongoing above him as he laid the rebar below. Nevertheless, Plaintiff testified that he was not aware of any other instances of ribs falling at his job site. As such, the Court finds that the mere fact that work was ongoing above Plaintiff and that something fell from above and struck him does not bring the accident within this Industrial Code provision for the purposes of imposing Labor Law § 241 (6) liability on Defendants in the instant motion.

Industrial Code § 23-1.7 (a) (2)

This section applies to "persons [who] are lawfully frequenting areas exposed to falling material or object but wherein employees are not required to work or pass." (12 NYCRR § 23-

1.7 [a] [2].) It is undisputed that Plaintiff was required to work in the area where he was struck by the rib and was in fact working on rebar at the time. As such, this section is inapplicable.

Industrial Code § 23-2.1 (a) (1)

Section 23-2.1 (a) (1) states:

"(a) Storage of material or equipment.

> "(1) All building materials shall be stored in a safe and orderly manner." Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare."

Here, there has been no testimony as to how the rib was stored prior to its fall, whether it was piled at any point, or whether it became an obstruction. Further, the obstructive nature or not of the rib has no bearing on the happening of the accident as to Plaintiff. Moreover, although Plaintiff argued the applicability of this section in his moving papers, he made no argument as to the applicability of this section in his reply papers, and this arguably could be read by the Court as a concession. As such, the Court finds that this section is inapplicable to the facts of this case.

Industrial Code § 23-2.1 (a) (2)

Section 23-2.1 (a) (2) states:

"(a) Storage of material or equipment.

> "(2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge."

Here, the Court finds that there is a genuine issue of material fact as to whether the rib was placed or stored so close to the edge prior to its fall as to endanger Plaintiff. It is undisputed that the ribs above Plaintiff comprised a lattice of beams atop which plywood was to be placed. There is no showing in the moving papers as to whether the rib that struck Plaintiff fell from the leading edge of the temporary flooring under construction, from a side edge, or from some point in the center of the flooring. As such, and similarly to the Court's finding as to section 23-1.7 (a) (1), the mere fact that a rib fell from above and struck Plaintiff does not establish that the rib had been placed or stored to close to any edge above.

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CONCLUSION

Accordingly, it is

ORDERED that the motion by Plaintiff Vincent Campolong pursuant to CPLR 3212 for an order granting him summary judgment under Labor Law §§ 240 (1) and 241 (6) on the issue of liability as against Defendants 50 Lex Development LLC, Ceruzzi Holdings LLC, and Tishman Construction Corporation is granted in part to the extent that it is

ORDERED that summary judgment is granted in favor of Plaintiff and against 50 Lex and Tishman on his Labor Law § 240 (1) claim, on the issue of liability, and the motion is otherwise denied; and it is further

ORDERED that the Labor Law § 241 (6) claim is dismissed as predicated on a violation of any Industrial Code sections not moved on, as well as sections 23-1.7 (a) (2) and 23-2.1 (a) (1); and it is further

ORDERED that, within 10 days of the NYSCEF date of the decision and order on this motion; Plaintiff shall serve a copy of this order with notice of entry on Defendants, and Defendants shall serve a copy of this order with notice of entry on Plaintiff.

The foregoing constitutes the decision and order of the Court.

2/7/2020
DATE

ROBERT DAVID KALISH, J.S.C.
HON. ROBERT D. KALISH

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