At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of May, 2020.

P R E S E N T:

HON. DAWN JIMENEZ-SALTA,
Justice.

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SHKELZEN SHASIVARI,

Plaintiff,

Index No. 510566/2017
Motion Seq. 5 & 6

- against -

NEW YORK CITY HOUSING AUTHORITY AND
THE CITY OF NEW YORK,

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of:

1) Defendant New York City Housing Authority's (Defendant) motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint, dated December 19, 2019;
2) Plaintiff Shkelzen Shasivari's (Plaintiff) motion, pursuant to CPLR 3212, for summary judgment on his Labor Law § 241(6) cause of action, dated December 20, 2019;
3) Defendant's affirmation in opposition to Plaintiff's motion for summary judgment, dated January 27, 2020;
4) Plaintiff's affirmation in opposition to Defendant's motion for summary judgment, dated January 29, 2020;
5) Defendant's affirmation in reply, dated February 4, 2020; and
6) Plaintiff's affirmation in reply, dated February 4, 2020, all of which submitted on February 5, 2020.

Papers Considered:	Papers Numbered:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	Defendant 1, 2 [Exh. A-J]; Plaintiff 3, 4 [Exh. A-O];
Opposing Affidavits (Affirmations)	Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q];
Reply Affidavits (Affirmations)	Defendant 7 [Exh. A]; Plaintiff 8.

Upon the foregoing cited papers, the Decision/Order is as follows: NYCHA's motion (motion sequence number 5) for summary judgment, pursuant to CPLR 3212, dismissing the complaint is granted to the extent that Plaintiff's Labor Law §§ 200, 240(1), and common-law negligence causes of action are dismissed. NCYHA's motion is otherwise denied. Plaintiff's motion (motion sequence number 6) for summary judgment, pursuant to CPLR 3212, on his Labor Law § 241(6) cause of action is denied.

Background

This is an action to recover for personal injuries allegedly sustained by the plaintiff Shkelzen Shasivari (Plaintiff) in the course of his employment with non-party APS Contractors, Inc. on May 23, 2016. Plaintiff was working as a laborer on the roof of 2676 Linden Boulevard in Brooklyn, New York (the Premises), owned by defendant New York City Housing Authority (NYCHA), when he was sprayed by hot tar resulting in burns to his arms and shoulders, right hand, chest, and face (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

By summons and complaint dated May 26, 2017, Plaintiff commenced the instant action against NYCHA and the City of New York[1] alleging violations of Labor Law §§ 200, 240(1), and 241(6) arising out of NYCHA's alleged failure to provide him with adequate safety equipment and for creating or providing him with an unsafe work environment. In his bill of particulars, Plaintiff premises his § 241(6) claim on violations of 12 NYCRR 23-1.7(h) (requiring that protective equipment be provided to employees using or handling corrosive substances), 23-1.8(c)(4) (requiring that employees using or handling corrosive substances be provided with appropriate protective apparel and eye protection), 23-1.9(d) (requiring that washing facilities be provided for all employees using or handling corrosive substances), and 23-1.24(d) (pertaining to required safety features and inspections of "hot roofing material transporters, also known as hot luggers"[2]) (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

At his deposition, Plaintiff testified that the accident occurred while he was working with the hot lugger on the roof. Plaintiff was wearing a hard hat, disposable work gloves, safety glasses, a long-sleeved shirt and trousers, and work boots. His employer provided him with a new pair of gloves each day. Plaintiff testified at his deposition that the remainder of the equipment and clothes he was wearing were his own (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

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[1] The City of New York was previously dismissed from the case per the court's order dated June 22, 2018 (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

[2] A "hot lugger" is an insulated container or tank used to transport hot roofing material, in this case hot tar. The lugger, located on the roof, is connected by a flexible pipe or hose to a pipe that runs down the side of the building. The pipe is connected to a truck at ground level. The truck pumps the roofing material up through the pipe and hose into the tank on the roof where it is then distributed to workers (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

On the date of the accident, Plaintiff's foreman, Luzman Cocoli, employed by APS Contractors, Inc., tasked him with filling the hot lugger on the roof with hot tar. The hot tar would then be distributed to other workers who would apply the tar to the surface of the roof. Though Plaintiff had previously worked on the roof at the Premises and observed other workers fill the hot lugger, he had never used the lugger himself prior to the date of the accident or received training on how to operate it (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

Plaintiff began working with the lugger approximately three hours before the accident occurred. He first positioned the lugger one to three feet from the perimeter of the roof and inserted the hose one-and-a-half to two feet into the tank. The hose was not attached to the tank or otherwise secured to the lugger. After inserting the hose into the tank, he signaled to the truck operator on the ground to start the flow of tar and backed away from the lugger. When the tank was full, he signaled again by shouting to the truck operator, who then stopped the flow of tar. On the date of the accident, Plaintiff repeated this process of filling the tank multiple times without incident before he was injured (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

Immediately before the accident, Plaintiff started the process of filling the lugger again by placing the hose into the tank and signaling the truck operator to start the flow of tar. After shouting to the truck operator, he approached the tank "to try and hear if the tar was actually coming." As he approached the lugger, the hose came out of the tank and "went up in the air," spraying him with hot tar. Plaintiff further explained that "the hose went into the air and it was going around like a cobra from the pressure … it was splurting [sic] out tar all over me." Plaintiff was then taken by ambulance to the emergency room of New York Presbyterian Hospital (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

NYCHA now moves for summary judgment dismissing Plaintiff's Labor Law §§ 200, 240, 241(6), and common-law negligence claims. Plaintiff also moves for summary judgment on his Labor Law 241(6) cause of action. Both motions are timely (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

NYCHA argues that Plaintiff's Labor Law § 241(6) cause of action must be dismissed on the ground that Plaintiff's failure to properly secure the hose to the lugger before signaling the truck operator to start the flow of tar was the sole proximate cause of the accident. Citing the deposition testimony of Plaintiff and his foreman, Cocoli, NYCHA asserts that Plaintiff was an experienced roofer with approximately 15 years of experience who decided to take a shortcut by not securing the hose despite knowing the dangers of failing to do so (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

NYCHA also relies upon the affidavit of Ashley Robinson, a safety inspector employed at the site, the deposition transcript of Herbert Pinnock, a construction enforcement inspector for the NYC Department of Buildings, and the affidavit of Edward Cankosyan, a licensed professional engineer. In her affidavit, Robinson avers that the hose "would not have come out of the tank and sprayed tar" if Plaintiff had properly secured it. She further stated that she instructed Plaintiff before his accident "to

put on a mask and safety glasses" as he was not wearing either item. Pinnock, who inspected the site, lugger, and hose on the day after the accident, testified that his inspection revealed no unsafe conditions. Cankosyan opines that there was no defect in the hose and that Plaintiff's accident occurred "solely due to his improper operation of the equipment in failing to secure the filling hose to the hot tar lugger." In his affidavit, Cankosyan avers that he reviewed Plaintiff's bill of particulars, his deposition and 50-h hearing transcripts, and color photographs of the subject lugger and hose. Cankosyan states that he also personally visited the premises for an inspection (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

NYCHA argues that the Industrial Code provisions cited in Plaintiff's bill of particulars are either not sufficiently specific to support Plaintiff's Labor Law § 241(6) claim or are inapplicable. NYCHA contends that Industrial Code §§ 23-1.7(h) and 23-1.8(c)(4) are inapplicable because hot tar is not a corrosive substance. In support, NYCHA cites the affidavit of Cankosyan, wherein he opines that hot tar is not a corrosive substance. NYCHA argues that Industrial Code § 23-1.9 is inapplicable for the same reason and because "having water available would not have prevented the accident." (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

NYCHA also addresses the two subsections of Industrial Code § 23-1.24(d). Citing the Cankosyan affidavit, NYCHA argues that subsection (d)(1)(i) and (d)(2)(i) are inapplicable because Plaintiff's accident occurred during a filling operation. NYCHA claims that subsection (d)(1)(ii) and (d)(2)(ii) are inapplicable because the accident did not involve any explosion or result from an "accumulation of gas." Instead, Cankosyan explains that "plaintiff's accident occurred because he failed to properly secure the filling hose to the hot tar lugger … As a result, the hose, which like any hose has a tendency to straighten out when pressurized liquid flows through it, began to straighten out and came out from the lugger and sprayed hot tar in the area of the lugger" (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

NYCHA further contends that Plaintiff was provided with all of the personal protective equipment required by Industrial Code § 23-1.8 for his work (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

In opposition, Plaintiff argues that NYCHA failed to establish that the Industrial Code provisions cited are inapplicable to the facts, or that the alleged violations were not the proximate cause of his injuries. Plaintiff claims that hot tar has been deemed a corrosive substance as a matter of law in a number of similar cases (*see, e.g., Neville v Chautauqua Lake Cent. Sch. Dist.*, 124 AD3d 1385, 1385-1386 [4th Dept 2015]; *Lee v Lewiston Constr. Corp.*, 23 AD3d 1002, 1003 [4th Dept 2005]; *Creamer v Amsterdam High Sch.*, 241 AD2d 589, 589 [3rd Dept 1997]; *Tallchief v Jemco Roofing*, 217 AD2d 915, 916 [4th Dept 1995]; *Iljazi v Pro-Metal Const., Inc.*, 2017 NY Slip Op 32038[U], 16 [Sup Ct, New York County 2017]). Plaintiff also contends that Cankosyan's affidavit is conclusory and insufficient to establish NYCHA's prima facie entitlement to summary judgment on this issue (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

Plaintiff further challenges Cankosyan's opinion regarding the inapplicability of Industrial Code § 23-1.24(d), asserting that his conclusion that the accident did not involve an "accumulation of gas" is mere conjecture. He also notes that Cankosyan failed to inspect the hot lugger involved in Plaintiff's accident (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

Plaintiff contends that NYCHA's argument that he was the sole proximate cause of his accident ignores critical facts elicited at Plaintiff's 50-h hearing and deposition. In support of this contention, Plaintiff points to his testimony that there was no rope for him to secure the hose and "nothing to secure [the hose] to" (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

In reply, NYCHA rejects Plaintiff's conclusion that hot tar is a corrosive substance as a matter of law. NYCHA states that the courts have approached the issue on a case-by-case basis depending on the facts and evidence presented by the parties. In support, NYCHA cites *Flores v. Infrastructure Repair Serv., LLC* (115 AD3d 543 [1st Dept 2014]), in which the court reviewed expert evidence submitted by defendants, including an affidavit from a professional engineer, and determined that the "hot rubberized asphalt substance" that injured the plaintiff was not a corrosive substance or chemical within the meaning of Industrial Code §§ 23-1.7(h) and 23-1.8 (c)(4) (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

In addressing Plaintiff's arguments regarding Cankosyan's affidavit, NYCHA argues that Cankosyan's opinion is based on his expertise and experience as a professional engineer as set forth in affidavit. NYCHA contends that his failure to inspect the subject lugger is immaterial because there are no allegations that there was a defect or failure in the hot lugger itself (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

NYCHA also submits a "supplemental affidavit" from Cankosyan annexed to the reply papers, in which Cankosyan further elaborates on his conclusion that hot tar is not a corrosive substance by reference to the relevant material data safety sheet for the product and OSHA definitions, which characterize hot tar as a "skin irritant" rather than a "skin corrosive" (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

In Plaintiff's motion for summary judgment on his Labor Law § 241(6) cause of action, he argues that NYCHA failed to provide him with the safety devices, protective apparel, and washing facilities required by Industrial Code §§ 23-1.7(h), 23-1.8(c), 23-1.9(d), and 23-1.24(d). As set forth above, Plaintiff asserts that hot tar is a corrosive substance within the meaning of the Industrial Code (*see Lee v Lewiston Constr. Corp.*, 23 AD3d at 1003; *Creamer v Amsterdam High Sch.*, 241 AD2d at 591; *Iljazi v Pro-Metal Const., Inc.*, 2017 NY Slip Op at 16) (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

Relying upon the aforementioned cases, his deposition testimony, Cocoli's deposition testimony, and the undisputed fact that the equipment and clothing Plaintiff was wearing at the time of the accident did not prevent the hot tar from splashing onto him and causing burns to his face, shoulders, arms, and hand, Plaintiff contends that the gloves, clothing, and "plastic safety glasses" were plainly inadequate. He also asserts that there was no equipment on site to wash the hot tar off Plaintiff after he was sprayed, further exacerbating his injuries. He claims that NYCHA failed to provide Plaintiff with the proper equipment to secure the hose (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

In opposition, NYCHA reiterates the arguments made in its moving papers that Plaintiff's accident occurred solely due to his failure to secure the filling hose to the hot lugger. NYCHA argues that the Robinson and Pinnock affidavits, along with Cocoli's deposition testimony that "any experienced roofer should know to tie the [hose] into the lugger," raise a triable issue of fact such that Plaintiff's motion must be denied. NYCHA also relies upon the initial Cankosyan affidavit submitted in support of its motion and asserts that Plaintiff failed to meet his prima facie burden as to the applicability of the Industrial Code provisions by submission of competent expert evidence (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

In reply, Plaintiff asserts that Cankosyan's conclusory expert affidavit is insufficient to establish that the Industrial Code provisions are inapplicable. Plaintiff further alleges that the issue of whether hot tar is corrosive does not require expert testimony where, as here, the undisputed evidence and nature of Plaintiff's injuries illustrate that "plaintiff's skin was scorched off through his clothing." Plaintiff also contends that the court should not consider the "supplemental affidavit" of Cankosyan annexed to NYCHA's reply papers as it constitutes an improper belated attempt to cure the defects of the original affidavit (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

Discussion

Labor Law §§ 200, 240(1), and Common-Law Negligence

NYCHA established its prima facie entitlement to summary judgment on Plaintiff's Labor Law §§ 200, 240(1), and common-law negligence causes of action by demonstrating that it did not supervise, direct, or control Plaintiff's work and that Plaintiff's accident did not involve the type of elevation-related risk contemplated by Labor Law § 240(1) (*see Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268-269 [2001]) (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

In his opposition, Plaintiff asserts that he takes no position on NYCHA's motion insofar as it seeks dismissal of his Labor Law §§ 200, 240(1), and common-law negligence causes of action. Accordingly, that branch of NYCHA's motion for summary judgment seeking dismissal of Plaintiff's Labor Law §§ 200, 240(1), and common-law negligence claims is granted (*see Pita v Roosevelt Union Free School District*, 156 AD3d 833, 835 [2d Dept 2017]; *Gaetano Development Corp. v Lee*, 121 AD3d 838, 840 [2d Dept 2014]; *Genovese v Gambino*, 309 AD3d 832, 833 [2d Dept 2003]) (Defendant 1;

Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

Labor Law § 241(6)

"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 claimant must demonstrate that his or her injuries were proximately caused by a violation of a specific and applicable provision of the Industrial Code (*see Gosskopf v Beechwood Org.*, 166 AD3d 860, 861 [2d Dept 2018]; *Grabowski v Board of Mgrs. of Avonova Condominium*, 147 AD3d 913, 914-915 [2d Dept 2017]).

To prevail on a motion for summary judgment dismissing a Labor Law § 241(6) cause of action, a defendant must demonstrate "that the Industrial Code provisions cited were inapplicable to the facts, or that the alleged violation of the same was not a proximate cause of the damages alleged" (*Abreo v URS Greiner Woodward Clyde*, 60 AD3d 878, 881 [2d Dept 2009], citing *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 [1993]; *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 664 [2d Dept 2015]; *Payne v 100 Motor Parkway Assoc., LLC*, 45 AD3d 550 [2d Dept 2007]). Though contributory and comparative negligence are valid defenses to a Labor Law § 241(6) claim, such negligence on the part of the plaintiff does not preclude a finding of liability founded upon a violation of the statute (*see Moscati v Consolidated Edison Company of New York*, 168 AD3d 717, 719 [2d Dept 2019]; *Aragona v State*, 147 AD 808, 809 [2d Dept 2017]; *Ramos v Penn Tower, LLC*, 136 AD3d 1009, 1010 [2d Dept 2016]; *Fusca v A & S Const., LLC*, 84 AD3d 1155, 1155 [2d Dept 2011]).

While the interpretation of Industrial Code provisions is generally a question of law (*see Pruszko v Pine Hollow Country Club, Inc.*, 149 AD3d 986, 988 [2d Dept 2017]; *Penta v Related Cos.*, 286 AD2d 674, 675 [2d Dept 2001]), where the meaning of specialized terms in the code is in issue, the court may entertain evidence, including expert opinions, to aid its determination (*see Morris v Pavarini Const.*, 9 NY3d 47, 51 [2014]).

To support his Labor Law § 241(6) cause of action, Plaintiff alleges violations of Industrial Code provisions 12 NYCRR 23-1.7(h), 23-1.8(c), and 23-1.9(d). Industrial Code § 23-1.7(h), entitled "Corrosive substances," provides that "[a]ll corrosive substances and chemicals shall be so … used as not to endanger any person. Protective equipment for the use of such corrosive substances and chemicals shall be provided by the employer." Pursuant to Industrial Code § 23-1.8(c)(4), entitled "Protection from corrosive substances," "[e]very employee required to use or handle corrosive substances or chemicals shall be provided with and shall be required to wear appropriate protective apparel as well as approved eye protection." Industrial Code § 23-1.9(d) requires that certain washing facilities, including warm water and soap, be provided for all employees using or handling corrosive substances (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

Plaintiff also alleges that NYCHA violated 12 NYCRR 23-1.24(d), entitled "Hot roofing material transporters, also known as hot luggers," which requires that "[c]losed containers or devices used for

transporting molten roofing materials" be equipped with "an automatic venting device designed to release any accumulation of gas pressure" in order to "minimize hazards to persons caused by blowbacks of the molten roofing materials" (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

The court will first address NYCHA's motion for summary judgment (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

Preliminarily, the Court finds that the Industrial Code provisions cited by Plaintiff are sufficiently specific to serve as a predicate for a viable cause of action under Labor Law § 241(6) (*see also Flores v Infrastructure Repair Serv., LLC*, 115 AD3d at 543 [finding 12 NYCRR 23-1.7(h) and 23-1.8(c)(4) to be sufficiently specific to serve as a predicate violation under Labor Law § 241(6)]; *Lee v Lewiston Const. Corp.*, 23 AD3d 1002, 1003 [4th Dept 2005] [same regarding 23-1.9]; *Castillo v Starrett City, Inc.*, 4 AD3d 320, 322 [2d Dept 2004] [same regarding 23-1.24(d)]). While Industrial Code § 23-1.7(h) refers to the duty of employers only, part 23 of the Industrial Code expressly states that the rules in part 23 apply to "owners, contractors and their agents obligated by the Labor Law to provide such persons with safe working conditions and safe places to work" (12 NYCRR 23-1.3; *see also Nostrom v A.W. Chesterton Co.*, 15 NY3d 502, 507-508 [2010]; *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]).

To the extent NYCHA contends that the Industrial Code §§ 23-1.7(h), 23-1.8(c)(4), and 23-1.9(d) are inapplicable because hot tar is not a corrosive substance within the meaning of the Industrial Code, the court concludes that NYCHA failed to meet its prima facie burden on the motion by submission of the expert affidavit of Edward Cankosyan. In the affidavit, Cankosyan, a licensed profession engineer, opines that Industrial Code §§ 23-1.7(h), 23-1.8(c)(4), and 23-1.9(d) were inapplicable and not violated by NYCHA because, among other reasons, "hot tar is not a corrosive substance." In his affidavit, Cankosyan fails to specify the basis of his opinion, which is rendered without explanation or reference to any scientific authority, industry guideline or standard, or pertinent regulations (*see Wass v County of Nassau*, 166 AD3d 1052, 1053 [2d Dept 2018], citing *Rabon-Willimack v Robert Mondavi Corp.*, 73 AD3d 1007, 1009 [2d Dept 2010] [an expert affidavit "must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation"] (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

The case cited by NYCHA, *Flores v Infrastructure Repair Serv. LLC*, does not compel a different conclusion. *Flores* involved a worker injured while handling an uncovered bucket of "a hot rubberized asphalt substance" (*Flores*, 115 AD3d at 543). Defendants moved for summary judgment dismissing the plaintiff's Labor Law § 241(6) cause of action, arguing that the asphalt substance was not a corrosive substance or chemical within the meaning of Industrial Code § 23-1.7(h) and 23-1.8(c)(4). Affirming the lower court's dismissal of the plaintiff's Labor Law § 241(6) claim, the court held that the defendants satisfied their prima facie burden by, among other things, submission of an affidavit of a professional engineer. In the affidavit, he opined that the particular asphalt substance at issue, "Monolithic Membrane 6125 EV," was not a corrosive substance according to the material safety and data sheet for the subject product and that the injuries received by the plaintiff were related to the temperature and not the chemical composition of the substance (*see Flores* at 543-544; brief for plaintiff-respondent in *Flores*, available at 2013 WL 12107867; brief for defendants-appellants in *Flores*, available at 2012 WL 12874342; *see*

also McKenzie v Cappelli Enterprises, Inc., 2012 NY Slip Op 32881[U], 4 [Sup Ct, NY County 2012] [defendants submitted affidavit of professional chemical engineer who stated that particular waterproofing product at issue was not a corrosive substance; expert "base[d] his conclusion on the Material Safety Data Sheet and Technical Data for the product, which indicate that none of the product's ingredients is corrosive, and the OSHA definition of a 'corrosive substance'"]) (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8),

Unlike *Flores,* here, the Cankosyan affidavit does not address the particular asphalt product at issue and fails to set forth a basis or rationale for the conclusion that hot tar is a corrosive substance (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8),

The court declines to consider the "supplemental affidavit" of Cankosyan as such submissions submitted for the first time in reply may not be used, as is the case here, to remedy basic deficiencies in a movant's prima facie showing (*Deutsche Bank Natl. Trust Co. v Adlerstein*, 171 AD3d 868, 870 [2d Dept 2019]; *Wells Fargo Bank, N.A. v Osias*, 156 AD3d 942, 943 [2d Dept 2017]; *Simak v Simak*, 121 AD3d 1090, 1091 [2d Dept 2014]; *Keneally v 400 Fifth Realty LLC*, 110 AD3d 624, 624 [1st Dept 2013] [lower court did not abuse its discretion in declining to consider the affidavit of defendants' expert opining that Industrial Code provision was inapplicable or not violated, which was submitted for the first time in reply] (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

In support of his summary judgment motion, Plaintiff cites a number of cases including *Neville*, *Lee*, *Tallchief*, *Creamer*, and *Iljazi* which he claims hold that hot tar is a corrosive substance as a matter of law within the meaning of the Industrial Code. He asserts that the court should not consider Cankosyan's affidavit on the ground that it usurps the function of the court as "sole determiner of law." The court rejects this argument (*see Morris v Pavarini Const.*, 22 NY3d 668, 671 [2014], quoting *Morris I*, 9 NY3d at 51 ("[w]hile the interpretation of the regulation presented a question of law, we determined [in *Morris I*] that 'the meaning of specialized terms in such a regulation is a question on which a court must sometimes hear evidence before making its determination'"] and declines to adopt Plaintiff's interpretation of the aforementioned cases (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

Contrary to Plaintiff's assertions, where the issue of whether a particular substance is corrosive was raised, the parties in the cases cited by Plaintiff submitted and relied upon expert evidence, such as the expert affidavit of Cankosyan here (*see Lee v Lewiston Constr. Corp.,* 23 AD3d at 1003 [plaintiff submitted expert physician affidavit stating that coal tar pitch was corrosive substance]; *Creamer v Amsterdam High Sch.*, 241 AD2d at 591 [plaintiff submitted expert affidavit stating that heated asphalt was a corrosive substance]; *Creamer v Amsterdam High Sch.*, 277 AD2d 647, 650 [3d Dept 2000] (*Creamer II*) [on subsequent appeal, Appellate Division affirmed trial court's decision to allow expert testimony on issue of whether heated asphalt was corrosive substance]; *Iljazi v Pro-Metal Const., Inc.*, 2017 NY Slip Op at 7 [plaintiff submitted expert affidavit stating that hot tar was a corrosive substance]; *cf. Neville v Chautauqua Lake Cent. Sch. Dist.*, 124 AD3d at 1386 [issue of whether particular asphalt substance at issue was a corrosive substance within meaning of Industrial Code §§ 23-1.7(h) and 23-1.8(c)(4) was not raised by parties]; *Tallchief v Jemco Roofing*, 217 AD2d at 916 [defendants moved for

summary judgment on the ground that there was no violation of Industrial Code § 23-1.24(d), not 23-1.7(h) or 23-1.8(c)(4)] (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

Counsel's argument that hot tar must be deemed a corrosive substance on the ground that "plaintiff's skin was burned off through his clothing and gloves" is insufficient to establish that hot tar is a corrosive substance within the meaning of Industrial Code §§ 23-1.7(h), 23-1.8(c)(4), and 23-1.9(d) (*see Murati v NH Const., Inc.*, 2017 WL 2734860, 4 [Sup Ct, Queens County 2017] [counsel's opinion and argument insufficient to demonstrate that hot tar is not a corrosive substance or chemical within meaning of § 23-1.8(c)(4)]) (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

With respect to Industrial Code § 23-1.24(d), the court finds that there are issues of fact as to the applicability of subsections 23-1.24(d)(1)(ii) and (d)(2)(ii). Both Plaintiff and Cankosyan present conflicting accounts as to whether an "accumulation of pressure" played any role in the accident and neither party submitted any evidence as to whether there was a lid or cover on the tank when the accident occurred (*see Castillo v Starrett City, Inc.*, 2 AD3d at 322 [23-1.24(d) "is inapplicable since it is undisputed that the tar container at issue had no lid or cover of any kind"]; *Tallchief v Jemco Roofing*, 217 AD2d at 916 [triable issue of fact as to whether defendants violated 23-1.24(d) where employee injured when hose "wedged or stuck" a few inches into the hot lugger came loose, causing the hose to "swing around" and spray hot tar]) (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

As set forth above, NYCHA also argues that adequate protective equipment was provided to Plaintiff as required by Industrial Code § 23-1.8(c). In light of the issues regarding the applicability of 23-1.8(c)(4), the nature of Plaintiff's work, and a review of the deposition transcript of Cocoli and the affidavit of Robinson, the court finds there is a triable issue of fact as to whether adequate eye protection and protective apparel was provided to Plaintiff (*see Neville v Chautauqua Lake Cent. Sch. Dist.*, 124 AD3d at 1386 [triable issue of fact where coworker testified that "he had also worked for other companies and had seen longer face masks used as protection;" it was undisputed that "the face mask provided to plaintiff did not prevent the tar from splashing onto plaintiff's face under the mask" and that "plaintiff was not wearing any protective equipment or protective apparel to protect his neck"]; *Galarza v Lincoln Ctr. for the Performing Arts, Inc.*, 2011 NY Slip Op 51435[U], 12 [Sup Ct, New York County 2011] [triable issue of fact as to whether injury could have been prevented if plaintiff had been provided with a "full-face mask" instead of "plastic glasses"]). The court notes that in the Robinson affidavit, submitted by NYCHA, Robinson claims that she informed Plaintiff that "he needed to wear a face mask" prior to his accident. At his deposition, Cocoli also testified that a mask was required when working with the hot lugger (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

With respect to NYCHA's argument that Plaintiff's failure to "tie off" the hose was the sole proximate cause of the accident, NYCHA failed to demonstrate that Plaintiff's conduct was the sole proximate cause of his injuries (*Nalvarte v Long Island University*, 153 AD3d 712, 714 [2d Dept 2017], citing *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]). NYCHA failed to establish that Plaintiff was given a rope or that there was a rope attached to the hose on the date of the accident. When shown a photograph of the subject hot lugger at his 50-h hearing, Plaintiff testified as follows:

"Q: Is that the flexible pipe that you placed in the tank on the roof?
A: Yes.
Q. Do you see the rope that is on the flexible pipe that's hanging?
A: Yes.
Q: Was that there on the date of your accident?
A: No." (Shasivari 50-h hearing tr at 153-154).

When asked whether he secured the hose to anything after inserting it into the tank, he testified "there was nothing to secure it to. We didn't have anything to secure it to" (Shasivari 50-h hearing tr at 78) (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

In light of the foregoing, the court finds that neither Plaintiff nor NYCHA demonstrated their prima facie entitlement to judgment as a matter of law with respect to Plaintiff's Labor Law § 241(6) cause of action (*see McKenzie v Cappelli Enterprises, Inc.*, 2012 NY Slip Op at 14 [where parties failed to establish whether "hot asphalt" constitutes a corrosive substance within the meaning of Industrial Code §§ 23-1.7(h) and 23-1.8(c)(4), court denied both plaintiff's and defendants' motions for summary judgment on Labor Law § 241(6) claim]. Accordingly, the branches of the respective motions seeking summary judgment on the Labor Law §241(6) claim are denied (Defendant 1; Defendant 2 [Exh. A-J]; Plaintiff 3; Plaintiff 4 [Exh. A-O]; Defendant 5 [Exh. A-E]; Plaintiff 6 [Exh. A-Q]; Defendant 7 [Exh. A]; Plaintiff 8).

Conclusion

NYCHA's motion for summary judgment dismissing the complaint is granted to the extent that Plaintiff's Labor Law §§ 200, 240(1), and common-law negligence claims are dismissed. That branch of NYCHA's motion seeking summary judgment dismissing Plaintiff's Labor Law § 241(6) claim is denied. Plaintiff's motion for summary judgment on his Labor Law § 241(6) claim is denied.

This constitutes the decision and order of the court.

Dated: May 18, 2020
Brooklyn, New York

Shkelzen Shasivari v New York City Housing Authority and City of New York
Index No. 510566/2017

ENTER,

Dawn Jimenez-Salta, J.S.C.

Hon. Dawn Jimenez-Salta
Justice of the Supreme Court

11