

McCoy v 43-25 Hunter L.L.C.

2020 NY Slip Op 32505(U)

July 28, 2020

Supreme Court, New York County

Docket Number: 161038/2015

Judge: Robert D. Kalish

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT D. KALISH PART IAS MOTION 29EFM

Justice

-----X

LUIS MCCOY and NICOLE DELEO-MCCOY,
Plaintiffs,

INDEX NO. 161038/2015

MOTION DATE 03/17/2020

MOTION SEQ. NO. 001, 002

- v -

43-25 HUNTER L.L.C., 43-25 HUNTER GC L.L.C. and
HUNTER GC L.L.C.,

DECISION + ORDER ON
MOTION

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32,
33, 34, 35, 52, 57, 58, 59, 60, 61, 62, 63, 64, 65, 70, 71, 72, 73

were read on this motion to/for JUDGMENT - SUMMARY .

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40,
41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, 55, 56, 66, 67, 68, 69

were read on this motion to/for JUDGMENT - SUMMARY .

Motion (Seq. 001) by Plaintiffs Luis McCoy (Plaintiff) and Nicole Deleo McCoy (collectively,
Plaintiffs) for an order, pursuant to CPLR 3212, granting summary judgment on their causes of
action under New York Labor Law ("Labor Law") §§ 240 (1) and 241 (6) is granted in part and
denied in part as further explained below; and the motion (Seq. 002) by Defendants 43-25 Hunter
L.L.C., 43-25 Hunter GC L.L.C. and Hunter GC L.L.C. (collectively, "Defendants") for an
order, pursuant to CPLR 3212, granting them summary judgment and dismissing Plaintiffs'
causes of action under Labor Law §§ 240 (1), 200 and common law negligence is granted in part
and denied in part as further explained below.

BACKGROUND

Plaintiff brings the instant action seeking monetary damages for injuries received when
he was pouring concrete into a rebar lattice at a construction site on October 6, 2015. Plaintiff
alleges causes of action for Labor Law §§ 240 (1), 241 (6), 200 and common law negligence.

On the date of the accident, Plaintiff was a concrete laborer employed by non-party, Park
Avenue Concrete. In this case, it is alleged that Plaintiff was injured when the concrete pump he
was operating malfunctioned causing the hose he was holding to pour concrete to strike him in
the head and that he then lost his footing on the rebar matt on which he was standing and fell
onto said rebar lattice. There is no dispute that the elevated distance between the rebar on which
Plaintiff was standing and the floor below was approximately 9-10 inches.

Plaintiff states that, prior to his accident, there had been complaints about the pump malfunctioning for several weeks and that shortly before the accident the pump and pipes had been taken apart and cleaned. (NYSCEF Doc. No. 32 at 82:03-86:14, 89:06-1:06.) Plaintiff states that at that time it was determined that there was a problem with the machine that pumped up the concrete from the ground level and not the hose/pipes. (Id.) Plaintiff further states that, on the date of the accident, he complained to his supervisor that the hose was not working properly and questioned whether it was safe to use the hose. (Id.) Plaintiff further states that his supervisor responded by telling him that he would lose his job if he did not complete his work. (Id.)

Plaintiff also states that when he would pour concrete in the past, he would “normally” stand on a piece of plywood on top of the rebar; and that after he finished pouring a particular section, his coworkers would move the plywood to another area so that he could again stand on it while pouring into a new section of the rebar lattice. (Id. at 85:21-88:08.) Plaintiff further states that he and his coworkers had prepped the area with plywood the day before his accident but that when he arrived on the morning of his accident he learned that some carpenters had taken said plywood to another building; and that with no other plywood available he was told by his foreman, “Listen, just do the work.” (Id.)

Plaintiff states that without the plywood, he stood on the rebar matt while pouring concrete into one particular section of the rebar lattice at a time. The rebar was tied together to create a series of boxes into which the concrete would be poured to make the floor.

Plaintiff states that he was initially able to control the hose, but as the day progressed the hose began “bouncing” and “shifting” in his hands. (Id. at 114:03-122:08.) Indeed, one of Plaintiff’s coworker’s, Thomas Daddio, confirmed that the hose was “running rough” and overheard Plaintiff tell his foreman “[t]he f--king pump ain't working.” (NYSCEF Doc. No. 33 at 51:12-59:22.)

According to Plaintiff, while pouring concrete, the hose slipped out of his hands and shot up into the air about eight or nine feet and then swung back and struck him in the head, so hard that Plaintiff’s hardhat was knocked off and he and stumbled and fell back onto the rebar lattice, losing consciousness upon his head striking the rebar. (NYSCEF Doc. No. 32 at 85:21-88:08, 113:20-129:23.)

Notwithstanding Plaintiff’s testimony that it was his normal practice to stand on plywood while pouring concrete into the rebar lattice, Defendants submit the affidavit of Martin Bruno (“Bruno”) – a retained opinion witness and self-declared “construction site safety expert” – who opines that “using a piece of plywood to stand on would be impractical and would impede the progress of the work since the plywood would have to be moved constantly during the pouring process” and that the plywood itself “could also create a tripping hazard for the worker standing on top of it or others working nearby.” (NYSCEF Doc. No. 30.) Bruno further opines that because the rebar lattice was only nine inches deep—in his estimation—there was no need to provide Plaintiff with any type of safety device to prevent him from falling into the rebar lattice.

On Seq. 001, Plaintiff moves for partial summary judgment, pursuant to CPLR 3212, on his causes of action pursuant to Labor Law §§ 240 (1) and 241 (6) as predicated on alleged violations of Industrial Code §§ 23-1.7 (e) (2) and 23-9.2(a). Defendants oppose Plaintiff's motion, and in their own motion for partial summary judgment (Seq. 002), argue that the Court should instead award them summary judgment dismissing Plaintiff's Labor Law § 240 (1) claim, as well as Plaintiff's claims pursuant to Labor Law § 200 and common law negligence.

The Court will analyze and discuss the arguments pertaining to each cause of action in turn.

DISCUSSION

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact 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 require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) "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 N.Y.3d 499, 503 [2012].) "Under this summary judgment standard, even if the jury at a trial could, or likely would, decline to draw inferences favorable to the [nonmoving party] . . . the court on a summary judgment motion must indulge all available inferences." (*Torres v Jones*, 26 NY3d 742, 763 [2016].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*Rotuba Extruders v Ceppos*, 46 N.Y.2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 [1st Dept 2002].)

Labor Law § 240 (1)

Labor Law § 240 (1) provides in part:

"All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"Labor Law § 240 (1) imposes a nondelegable duty upon owners and general contractors to provide safety devices to protect workers from elevation-related risks." (*Poracki v St. Mary's R.C. Church*, 82 AD3d 1192, 1194 [2011].) "To recover under Labor Law § 240 (1), the

plaintiff must demonstrate a violation of the statute and that such violation proximately caused his or her injuries.” (Id.) The Court of Appeals has held that “[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein.” (Id.)

“[T]he single decisive question [in determining whether Labor Law § 240 (1) is applicable] is whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential.” (*Runner v New York Stock Exch. Inc.*, 13 NY3d 599, 603 [2009]; see also *La Veglia v St. Francis Hosp.*, 78 AD3d 1123, 1127 [2010].) A defendant’s failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability under Labor Law § 240 (1).

“There is no bright-line minimum height differential that determines whether an elevation hazard exists.” (*Brown v 44 St. Dev., LLC*, 137 AD3d 703, 704 [1st Dept 2016]; *Thompson v St. Charles Condominiums*, 303 AD2d 152, 154 [1st Dept 2003]; see also *Arrasti v HRH Constr., LLC*, 60 AD3d 582, 583 [1st Dept 2009] [finding that 18 inches was sufficient to create an elevation hazard]; *Lelek v Verizon N.Y., Inc.*, 54 AD3d 583, 584, 863 NYS2d 429, 431 [1st Dept 2008] [noting that defendants were not relieved of liability under Labor Law § 240 (1) despite that the plaintiff’s fall was only 2 1/2 to 3 feet].) Rather, the relevant inquiry is whether the harm is one “directly flowing from the application of the force of gravity to an object or person.” (*Prekulaj v Terano Realty*, 235 AD2d 201, 202 [1st Dept 1997].)

Here, Plaintiff argues that his fall was caused by a failure to provide a safety device pursuant to Labor Law § 240 (1): namely, plywood/planking for him to stand on. (NYSCEF Doc. No. 29 ¶¶ 31-32, citing *Brown v 44th St. Dev., LLC*, 48 Misc 3d 234, 236 [Sup Ct, NY County 2015], *affd sub nom. Brown v 44 St. Dev., LLC*, 137 AD3d 703 [1st Dept 2016].) In sum and substance, Plaintiff argues that were he standing on plywood—as per his usual practice—he would not have lost his footing and would not have fallen onto the rebar lattice when he was struck by the hose. As such, Plaintiff argues that he is entitled to summary judgment on his Labor Law § 240 (1) claim.

On the other hand, Defendants argue that this Court should dismiss Plaintiff’s Labor Law § 240 (1) cause of action because the 9-10-inch depth of the rebar lattice did not present a height differential significant enough to trigger the protections of Labor Law § 240 (1). Defendants further argue that, even if the Court were to find that the 9-10 inch height differential was significant enough to trigger the protections of Labor Law § 240 (1), this Court should still dismiss said cause of action because the plywood/planking at issue could not qualify as a protective device for purposes of the statute, as it would impede Plaintiff’s ability to efficiently pour concrete. In addition, Defendants argue that Plaintiff also cannot recover, pursuant to Labor Law § 240 (1), because his injuries were proximately caused by being struck by a hose and not by a danger related to a significant elevation-differential.

This Court finds that, based on the evidence before it, it cannot determine as a matter of law: 1) whether Labor Law § 240 (1) was violated; and 2) whether any of Plaintiff's injuries were proximately caused by said violation.

As a preliminary matter, this Court finds that *Brown v 44th St. Dev., LLC*—which Plaintiffs argue is “identical” to the facts herein—is relevant to the instant case, but it is not dispositive. (48 Misc 3d 234, 236 [Sup Ct, NY County 2015], *affd sub nom. Brown v 44 St. Dev., LLC*, 137 AD3d 703 [1st Dept 2016].) In *Brown*, the plaintiff—a carpenter whose work did not involve anything related to a rebar floor—was carrying 14-foot pieces of lumber and, in order to get to his work area, was “walking on top of the rebar because there was nothing else to walk on; there were no planks or anything else laid down to walk on.” (Id. at 236.) As the *Brown* trial court explained, “[w]alking on rebar elevated above ground level would be like walking on a steel tightrope, for garden-variety rebar is no wider than an aerialist's tightrope.” (Id. at 235.) As the plaintiff was walking, “his foot slipped down through the rebar down in the hole[,]” roughly 12-18 inches deep and the plaintiff fell backwards. (Id. at 236.) The *Brown* trial court awarded summary judgment to the plaintiff on his Labor Law § 240 (1) cause of action, finding that the defendants “failed to provide him with an adequate safety device—specifically, planks to walk on.” (Id. at 246.)

In the instant case, this Court cannot determine, as a matter of law, whether or not the 9-10-inch depth of the rebar lattice constituted a significant enough elevation differential to trigger Labor Law § 240 (1)'s protections. As is often repeated, there is no bright-line minimum height differential that determines whether an elevation hazard exists for purposes of Labor Law § 240 (1). (*See supra* at 4 [collecting cases].) In *Brown*, as mentioned, the plaintiff was awarded summary judgment when his foot fell into a hole in the rebar, 12-18 inches deep, while he was walking across said rebar. Here, where Plaintiff was required to stand on the rebar matt to accomplish his work, the depth of the rebar lattice was somewhere between 2 and 9 inches less deep than in *Brown*. Nonetheless, Plaintiff testifies that he fell back and hit his head hard enough that he lost consciousness. As such, granting all favorable inferences to the non-movants, here, the Court finds that there is a triable issue of fact as to whether the 9-10 inch depth of the rebar lattice presented a significant enough elevation differential to trigger the protections of Labor Law § 240 (1).

Whether the plywood constituted a safety device for purposes of Labor Law § 240 (1) also presents an issue that cannot be determined as a matter of law. Here, Plaintiff testifies that it was his normal practice to stand on plywood while pouring concrete into the rebar lattice and that his co-workers would move pieces of plywood for him as he moved to pour a new section of the rebar lattice. On the other hand, Defendant's opinion witness, Bruno, opines that the aforesaid use of plywood was “impractical” given the nature of the work that Plaintiff was performing and because it could create a tripping hazard for Plaintiff or other workers. Thus, the question of whether plywood was an appropriate safety device for purposes of Labor Law § 240 (1) will, to some extent, require this Court to make a credibility determination between Plaintiff and Bruno—as to whom is the greater authority on the most safe and effective practice for pouring concrete into a rebar lattice. And such credibility determinations are inappropriate on motions for summary judgment.

Whereas, as previously mentioned, there is a triable issue in the instant case as to whether plywood/planking constitutes a required safety device or would be impractical for Plaintiff's task of pouring concrete, there was no such issue in *Brown*. In *Brown*, testimony from a qualified expert—as well as common sense—dictated that there was no reasonable argument for requiring a worker to walk across a “steel tightrope” rather than laying down planking. As such the *Brown* trial court found that planking was an enumerated safety device for purposes of Labor Law § 240 (1). Here, however, Defendants have raised a triable issue of fact as to whether plywood/planking was an “impractical” safety device for purposes Labor Law 240 (1), considering that it would impede Plaintiff's work and because the instant rebar lattice was only 9-10 inches deep.

Lastly, this Court finds that neither side has established as a matter of law whether or not Plaintiff's injuries were proximately caused by a failure to protect against a significant elevation differential. Defendants argue that Plaintiff's injuries were not proximately caused by a failure to protect against a significant elevation differential but rather because he was struck in the head with a hose knocking him into the rebar lattice. This argument has not been established as a matter of law.

Here, while the malfunctioning of the concrete pump set in motion a series of events that ultimately produced Plaintiff's injuries, it was also foreseeable that Plaintiff would lose his footing on the rebar and suffer injury from the fall. Put another way, that Plaintiff would lose his footing and fall into the lattice after being struck by a hose is no less foreseeable than him losing his balance while standing or while attempting to walk across the rebar. (*Compare Brown v 44th St. Dev., LLC*, 48 Misc 3d 234, 236 [Sup Ct, NY County 2015], *affd sub nom. Brown v 44 St. Dev., LLC*, 137 AD3d 703 [1st Dept 2016].) Further, Plaintiff has testified that he lost consciousness from his head hitting the rebar, and as such, Plaintiff, in opposing Defendants' motion for summary judgment, is entitled to the favorable inference that at least some of his injuries were proximately caused by a failure to protect against a significant elevation differential. (*See Prekulaj v Terano Realty, Inc.*, 235 AD2d 201, 202 [1st Dept 1997] [finding issues of fact as to whether the plaintiff's injury was proximately caused by a significant elevation differential].)

For all these reasons, the branches of Plaintiffs' and Defendants' motions for summary judgment on the Labor Law § 240 (1) cause of action are denied.

Labor Law § 241 (6)

NYLL § 241(6) provides:

“All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged,

operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.”

(Labor Law § 241[6].) 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, 505 [1993] [internal citations omitted]; *see also Allen v Cloutier Const. Corp.*, 44 NY2d 290, 297-301 [1978] [explaining that the 1969 amendment to the statute fashioned an absolute liability for breach of the requirements on contractors and owners irrespective of their control or supervision of the construction site].) However, Labor Law § 241(6) is not self-executing, and in order to show a violation of this statute, a plaintiff must show that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety. (*Ross*, 81 NY2d at 503-505.) Such violation must be a proximate cause of the plaintiff’s injuries. (*Phillips v One E. 57th St., LLC*, 2020 WL 2839200, *16, 2020 N.Y. Slip Op. 31661[U], 16 [NY Sup Ct, New York County 2020] [internal citations omitted].)

Plaintiff here moves for summary judgment, pursuant to CPLR 3212, on his causes of action under Labor Law § 241(6) as predicated on violations of Industrial Code §§ 23-1.7 (e)(2) and 23-9.2 (a), and Defendants oppose, arguing that summary judgment is precluded by triable issues of fact. The Court will analyze and discuss each side’s arguments with respect to the relevant Industrial Code provision in turn.

I. Industrial Code § 23-1.7 (e) (2)

Industrial Code §23-1.7 (e) (2) states as follows:

(e) Tripping and other hazards.

...

(2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.”

(12 NYCRR 23-1.7 [e] [2].)

Here, citing *Lopez v New York City Dept. of Environmental Protection*, (123 AD3d 982, 983 [2d Dept 2014]), Plaintiff argues that subsection (e) (2) was violated, as a matter of law, because the uncapped rebar that he fell onto was a “sharp projection” within the meaning of said

regulation. In *Lopez*, the plaintiff suffered “extensive injuries” when he “he fell backward and was impaled by an uncapped piece of a vertical rebar.” (Id. at 983.) The *Lopez* court affirmed judgment in favor of the plaintiff on his Labor Law 241 (6) claim, as predicated on a violation of Industrial Code §§ 23-1.7 (e) (2), reasoning that the plaintiff had established prima facie entitlement to judgment as a matter of law and that the defendants “failed to raise a triable issue of fact as to their allegation that the uncapped rebar was an integral part of the work that was not subject to the cited regulation or as to whether the plaintiff’s own negligence contributed to the accident.” (Id. at 984.)

In the instant case, in opposition, Defendants argue that the Court should deny this branch of Plaintiff’s motion for summary judgment because: 1) Plaintiff fails to put forward evidence that he was injured by the sharpness of the rebar; and 2) the rebar lattice—including the uncapped rebar—was an integral part of the work.¹

The Court agrees that there are triable issues of fact that preclude granting this branch of Plaintiff’s motion. Plaintiff has failed to establish prima facie evidence that that rebar lattice—including the uncapped portion—was not integral to the work being performed. (See *Vieira v Tishman Const. Corp.*, 255 AD2d 235, 235 [1st Dept 1998] [finding wire mesh that the plaintiff tripped to be “integral part of the floor being constructed”].)

Moreover, Defendants assert that Plaintiff apparently did not suffer any lacerations or impalement injuries, and Plaintiff provides no evidence to the contrary. As such, while uncapped rebar may constitute a “sharp projection” within the meaning of subsection (e) (2)—as per *Lopez*—here, there is a triable issue of fact as to whether any of Plaintiff’s injuries were caused by such a “sharp projection.”

Lastly, there does not appear to be any evidence—or argument—that the uncapped vertical rebar caused Plaintiff’s fall. In sum and substance, Plaintiff appears to argue that this section applies because he *could* have injured by the sharp projection presented by the uncapped rebar. There is no indication that he was actually so injured.

Accordingly, the branch of Plaintiffs’ motion for summary judgment on their Labor Law § 241 (6) cause of action, as predicated on a violation of Industrial Code § 23-1.7 (e) (2), is denied.

II. Industrial Code § 23-9.2 (a)

Industrial Code § 23-9.2 (a) states as follows:

¹ Defendants also argue that the *Lopez* decision is not controlling authority, apparently because it was decided by the Appellate Division, Second Department—as opposed to the First Department. To the extent Defendants so argue, this is clearly not the law. See e.g. *D’Alessandro v Carro*, 123 AD3d 1, 6 [1st Dept 2014] [“[W]here the issue has not been addressed within the Department, Supreme Court is bound by the doctrine of stare decisis to apply precedent established in another Department, either until a contrary rule is established by the Appellate Division in its own Department or by the Court of Appeals.”], citing *Mtn. View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664 [2d Dept 1984].)

“Maintenance. All power-operated equipment shall be maintained in good repair and in proper operating condition at all times. Sufficient inspections of adequate frequency shall be made of such equipment to insure such maintenance. Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement. The servicing and repair of such equipment shall be performed by or under the supervision of designated persons. Any servicing or repairing of such equipment shall be performed only while such equipment is at rest.”

(12 NYCRR 23-9.2 [a].)

It has been held that only the third sentence of Industrial Code § 23-9.2(a) constitutes a concrete specification supporting a Labor Law § 241(6) claim: “Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement.” (*Misicki v Caradonna*, 12 NY3d 511, 520-21 [2009]; *Becerra v. Promenade Apts. Inc.*, 126 A.D.3d 557, 558 [1st Dep't 2015])

For Defendants to be liable for violating § 23-9.2(a), they must have received actual notice of the defect or unsafe condition and the violation must be a proximate cause of Plaintiff's injury. (*Misicki*, 12 N.Y.3d at 521; *Salsinha v. Malcolm Pirnie, Inc.*, 76 A.D.3d 411 [1st Dep't 2010]; *Shields v. First Ave. Bldrs. LLC*, 118 A.D.3d 588, 589 [1st Dep't 2014].)

Here, Plaintiff has put forth his own testimony that as his work progressed, the hose he was operating began “bouncing” and “shifting” in his hands. (NYSCEF Doc. No. 32 at 114:03-122:08.) Plaintiff further testified that he complained about these issues to his foreman and was threatened with being fired if he did not continue working. In addition, Plaintiff also puts forward the testimony of his coworker, Daddio, who states that the hose was “running rough” and that he overheard Plaintiff tell his foreman “[t]he f--king pump ain't working.” (NYSCEF Doc. No. 33 at 51:12-59:22.)

In addition, Plaintiff has – through his own testimony and that of Daddio – established that his injuries were proximately caused by the hose malfunctioning, shooting up into the air eight to nine feet, swinging back, and striking him in the head. As such, Plaintiff has established prima facie entitlement to summary judgment for a violation of Industrial Code § 23-9.2 (a). (*Ortega v R.C. Diocese of Brooklyn*, 178 AD3d 940, 941 [2d Dept 2019] [affirming summary judgment in favor of the plaintiff concrete laborer injured by wheeled compressor for violation of Industrial Code § 23-9.2(a)].)

In opposition, Defendants have failed to raise a triable issue of fact as to any of the aforesaid showings. To the extent that Defendants argue that they should not be held liable for the accident because there was an attempt to fix the concrete pumping apparatus sometime before the accident, that argument is unavailing. Moreover, Defendants' General Superintendent Sean Cavanagh testified that he had no knowledge as to whether the subject concrete pump was ever inspected. (NYSCEF Doc. No. 34 at 35:22-37:03.) Regardless of whatever attempt was made in the days before the accident, there is clear and uncontroverted evidence in the record: that the concrete pump was malfunctioning on the day accident; that Plaintiff complained of the

malfunctions to his foreman and was told to just do his job; and that the malfunctioning worsened as the day wore on, eventually culminating in Plaintiff's accident.

Accordingly, this Court grants the branch of Plaintiff's motion seeking summary judgment on the issue of liability with respect to his Labor Law § 241 (6) cause of action, as predicated on a violation of Industrial Code § 23-9.2 (a).

Labor Law § 200 and Common Law Negligence

Labor Law § 200 states, in applicable part, as follows:

“All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment and devices in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protections to such persons.”

Labor Law § 200 “is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work” (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). There are two distinct, fact-dependent standards applicable to section 200 cases: (1) when the accident is the result of the means and methods used by a contractor to do its work; and (2) when the accident is the result of a dangerous condition that is an inherent part of the premises (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012].)

“Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work.” (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011].) Specifically, “liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work.” (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]; *see also Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007] [liability under a means and methods analysis “requires actual supervisory control or input into how the work is performed”]).

Where an injury stems from a dangerous condition on the premises, an owner may be liable in common-law negligence and under Labor Law § 200 “when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice.” (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

This is clearly a case where Plaintiff’s claims implicate the “means and methods” by which his work was performed—not a case where Defendants failed to correct a dangerous condition that they had notice of.

Further, there is no evidence that Defendants provided Plaintiff with any equipment, and Plaintiff fails to point to any evidence to suggest that Defendants supervised and controlled his work. Rather, the evidence clearly establishes that Plaintiff’s work was controlled by Plaintiff’s employer, non-party Park Avenue Concrete.

As such, Defendants having established prima facie entitlement to summary judgment dismissing Plaintiff’s causes of action pursuant to Labor Law 200 and common law negligence and Plaintiff having failed to raise a triable issue of fact thereon, this Court finds that Defendants are entitled to dismissal of said causes of action.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion (Seq. 001) by Plaintiffs Luis McCoy (Plaintiff) and Nicole Deleo McCoy (collectively, Plaintiffs) for an order, pursuant to CPLR 3212, granting summary judgment on their causes of action under New York Labor Law (“Labor Law”) §§ 240 (1) and 241 (6) is granted in part to the extent that Plaintiff is granted summary judgment on the issue of liability as to his cause of action pursuant to Labor Law § 241 (6), as predicated on a violation of Industrial Code § 23-9.2 (a), and said motion is otherwise denied; and it is further

ORDERED that the motion (Seq. 002) by Defendants 43-25 Hunter L.L.C., 43-25 Hunter GC L.L.C. and Hunter GC L.L.C. (collectively, “Defendants”) for an order, pursuant to CPLR 3212, granting them summary judgment and dismissing Plaintiffs’ causes of action under Labor Law §§ 240 (1), 200 and common law negligence is granted in part to the extent that Plaintiffs’ causes of action pursuant to Labor Law § 200 and common law negligence are dismissed, and said motion is otherwise denied; and it is further

ORDERED that within twenty (20) days of the filing of the instant decision and order, counsel shall serve a copy of said decision and order with notice of entry.

The foregoing constitutes the decision and order of this Court.

7/28/2020
DATE

Robert David Kalish
ROBERT DAVID KALISH, J.S.C.

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