

<b>Panarella v Pavarini McGovern LLC</b>
2020 NY Slip Op 32979(U)
September 10, 2020
Supreme Court, New York County
Docket Number: 109769/2011
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X

INDEX NO. 109769/2011

ROBERT PANARELLA, SR. and DOREEN PANARELLA,

MOTION SEQ. NO. 007

Plaintiffs,

- v -

PAVARINI MCGOVERN LLC, NEW YORK CRANE & EQUIPMENT CORP., FAVELLE FAVCO CRANES USA INC., WATERSCAPE RESORT, LLC, WATERSCAPE RESORT II, LLC, ABC CORPORATIONS I - X, ABC PROPERTY OWNERS I - X, DEF GENERAL CONTRACTORS I - X, JKL PROJECT MANAGERS I - X, MNO CRANE RENTERS/OWNERS I - X, PQR CRANE SUPPLIERS/ OWNERS I - X, XYZ SUBCONTRACTORS I - X, JOHN DOES I - X, 160 BROADWAY CONCRETE CORP. D/B/A BROADWAY CONCRETE, ABLE RIGGING CONTRACTORS, INC., ABLE RIGGING CONTRACTORS, INC. D/B/A ABLE RIGGING, ROBERT LACHAPPELLE, ROBERT LACHAPPELLE D/B/A ABLE RIGGING, and ABLE RIGGING, INC.,

DECISION AND ORDER

Defendants.

-----X

NEW YORK CRANE & EQUIPMENT CORP.,

Third-Party Plaintiffs,

- v -

160 BROADWAY CONCRETE CORP. d/b/a BROADWAY CONCRETE,

Third Party Defendants.

-----X

PAVARINI MCGOVERN, LLC, WATERSCAPE RESORT I LLC, WATERSCAPE RESORT II, LLC/ and 160 BROADWAY CONCRETE CORP. d/b /a BROADWAY CONCRETE.,

Second Third-Party Plaintiffs,

-against-

ABLE RIGGING CONTRACTORS, INC., ABLE RIGGING CONTRACTORS/ INC. d/b/a ABLE RIGGING, and ROBERT LACHAPPELLE, individually, and ROBERT LACHAPPELLE d/b/a

ABLE RIGGING,  
Second Third-Party Defendants.

-----X  
NEW YORK CRANE & EQUIPMENT CORP.,

Third Third-Party Plaintiffs,

- v -

ABLE RIGGING CONTRACTORS, INC., ABLE RIGGING  
CONTRACTORS, INC. d/b/a ABLE RIGGING, and ROBERT  
LACHAPELLE, individually, and ROBERT LACHAPELLE d/b/a  
ABLE RIGGING,

Third Third-Party Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 007) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122

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

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Robert Panarella Sr. ("plaintiff") on January 24, 2009 when, while working at a construction site located at 70 West 45th Street in Manhattan ("the premises"), he descended a ladder from a crane's cab and slipped on hydraulic oil on the ladder's rungs, which caused him to lose his balance and hang from his knee from a rung on the ladder.

Plaintiff and his wife, Doreen Panarella, move, pursuant to CPLR 3212, for summary judgment as to liability on plaintiff's common law negligence and Labor Law §§ 200, 240 (1) and 241 (6) claims against defendants Waterscape Resort, LLC Waterscape Resort II, LLC (collectively "Waterscape"), Pavarini McGovern, LLC ("Pavarini"), and on his common-law negligence claims against defendant Favelle Favco Cranes USA, Inc. ("Favco"), defendant/third-party plaintiff/third third-party plaintiff New York Crane & Equipment Corp. ("NY Crane"), and second third-party defendants/third third-party defendants Able Rigging Contractors Inc. d/b/a

Able Rigging, Robert Lachapelle and Robert Lachapelle d/b/a Able Rigging (collectively "Able Rigging").

Pavarini and Waterscape (collectively "the Pavarini Defendants")<sup>1</sup> cross-move, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6) claims against them, as well as for summary judgment in their favor on their common law indemnification claims against defendants Favco, NY Crane, and Able Rigging.

### **FACTUAL AND PROCEDURAL BACKGROUND:**

On the day of the accident, Waterscape was the owner of the premises. Waterscape hired Pavarini as the construction manager for a project at the premises that entailed the construction of a building ("the project"). Pavarini subcontracted the concrete installation work to third-party defendant/second third-party plaintiff 160 Broadway Concrete Corp d/b/a Broadway Concrete ("Broadway Concrete"). Broadway Concrete leased a climbing tower crane for use at the project from NY Crane. The tower crane was manufactured by Favco. Able Rigging was present at the project to effect and oversee the rigging (including the climbing) of the tower crane. Plaintiff was an employee of Broadway Concrete.

#### ***Plaintiff's Deposition Testimony***

Plaintiff testified that, on the day of the accident, he was employed by Broadway Concrete as a crane operator. His duties included operating the "220 Favco" climbing tower crane ("the crane") at the project (plaintiff's tr at 21). He was supervised by Broadway Concrete's supervisor,

---

<sup>1</sup> While counsel for Pavarini and Waterscape also represent Broadway Concrete, the cross motion seeks relief only with respect to Pavarini and Waterscape (*see* notice of cross motion, Doc. 71).

“Brian” (*id.* at 28). His son, Robert Panarella, Jr. was the mechanic/oiler for the crane at the project. Plaintiff also testified that the crane came with operation and maintenance manuals prepared by Favco (“the manuals”). He reviewed the manuals in advance of operating the crane.

To access his work area – the crane’s cab – plaintiff had to climb a series of permanently affixed vertical rung ladders up the interior of the Crane’s tower scaffolding all the way to the top of the tower. The rungs on these ladders were made of round, bare metal pipes. There was nothing on the rungs to prevent slipping (*id.* at 147). After climbing to the top of the tower, plaintiff then had to climb a 10-foot extension ladder to reach a small metal three-or four-rung “hatch ladder” that led through a hatch onto the crane’s motor deck (*id.* at 81). The door to the cab was located on the motor deck itself. He did not use any safety devices to aid his climb up or down the ladders. Plaintiff testified that the crane was delivered to the premises by NY Crane. Since it was a climbing crane, it could be raised as the building was built higher. The process of repositioning the crane – known as “jacking” or “jumping” – usually took a full day and involved unbolting the crane from the tower scaffolding, using two large hydraulic pistons to raise it to the new height, adding a pre-constructed section of tower frame under the crane and, finally, re-attaching the crane at the new elevation. The climbing portion of the crane – the “jumping frame” – housed the pistons, hydraulics, and various other components required to lift the crane.

At the beginning of the project, plaintiff was present when a crew of eight or nine other engineers erected the crane. Plaintiff testified that four members of the erecting crew were Broadway Concrete employees. Plaintiff was unsure who employed the other workers, but they wore NY Crane uniforms.

During the erection of the crane, plaintiff noticed that one of the two jumping frame piston’s hydraulic housings (“the housing”) was installed on the inside of the crane’s tower, while

the other hydraulic housing was installed on the outside. According to plaintiff, this was unsafe because it increased the risk that the housing might catch on a part of the tower during a jump and shear off. According to plaintiff, this issue could be rectified by rotating the piston so that the housing was located outside of the tower.

Plaintiff testified that, during the erection of the crane, which occurred weeks before the accident, he had notified the crane's erection crew of the issue with the housing's placement on the inside of the tower, but they did not fix it (*id.* at 312). He also notified NY Crane and his own supervisor, Brian, of the issue, but the problem was not fixed (*id.* at 323-324, 327-28). He raised his concerns again after the first failed jump attempt (*id.* at 332). He never contacted Favco regarding this issue (*id.* at 441).

During the jumping procedure, plaintiff had to be inside the crane's cab to monitor the crane's boom and to make sure that the crane would not topple over once it was unmoored. According to plaintiff, the crane had been jumped at least once prior to his accident. During the first jump, plaintiff noticed that "one of the jacking pistons wasn't working right" (plaintiff's tr at 48). That piston was the one with the housing attached to the inside of the tower ("the piston").

Plaintiff testified that, during the first jump attempt, the team responsible for lifting the crane "couldn't get pressure to jump" and, therefore, could not raise the crane (*id.* at 49). NY Crane was made aware of this issue and attempted to fix it, but could not. The first jump attempt was cancelled. Several days later, Favco was called in to check the piston during the second jump attempt. The same issue prevented the second jump from being successful. Work was able to continue for several days while repairs were performed on the jumping frame.

The third attempt at jumping the crane took place on the day of the accident. As far as plaintiff knew, NY Crane was present that day, but Favco was not. At the time of his accident,

plaintiff was in the cab of the crane preparing for the jump. That day, the crane successfully jumped three times (adding three sections of tower) but, upon attempting to jump a fourth time, the machine suddenly and rapidly “dropped” approximately four feet (*id.* at 86). He learned from a coworker, over a two-way radio that, during the jump, the housing on the piston was “ripped off” (*id.* at 86) and that “there was hydraulic oil all over the tower” (*id.* at 89). More specifically, he was told that hydraulic fluid “was flowing all over the ladders and all over the decks of the tower” (*id.* at 132). In addition, plaintiff testified that the amount of hydraulic fluid that spilled was so great that it poured out onto the public street below the crane, covering vehicles and portions of buildings with hydraulic fluid.

After the crane fell four feet, it was stabilized and re-secured to the tower frame, which took a significant amount of time. Plaintiff was then able to lower the crane’s boom and other equipment that would have been used for the jump, had it been successful (*id.* at 363-364). Only then was plaintiff able to exit the cab and begin his climb down to the building. At that time, there was no one present in the tower because everyone had left for the day. He climbed through the hatch in the motor deck and onto the hatch ladder and traversed two dry tower sections successfully. Once he got to the level that contained the housing, the decking and ladders were covered in hydraulic fluid. He began climbing down the fluid coated vertical ladder (“the ladder”). After ascending a few rungs, all of which were slippery, plaintiff’s right foot and leg “slipped through” the ladder’s rungs (*id.* at 67), causing him to lose his grip and fall backwards (*id.* at 155). He did not fall to the deck below because his knee “got caught in the rung of the ladder” and he ended up “just hanging there,” upside down with his back against the ladder (*id.* at 67). He was

able to extricate himself from the situation and continue to climb down the tower to the building, where he met with Panarella, Jr., and left for the day.<sup>2</sup>

***Deposition Testimony of Sade Obayemi (Pavarini's Project Manager)***

Obayemi testified that, on the day of the accident, she was the project manager at the site. Pavarini, the construction manager at the project, was hired by Waterscape. Pavarini was “responsible for buying out the trades, awarding contracts, managing the project on behalf of ownership” (Obayemi tr at 14). Ultimately, Waterscape had to approve all of the subcontractors Pavarini hired. Obayemi’s duties included scheduling and coordinating with the trades. Although Obayemi was not present at the premises on a regular basis, Pavarini’s superintendent, George Decristoforo (“Decristoforo”), was present every day. Decristoforo was responsible for confirming that the trades were performing their work in accordance with the architect’s plans and specifications. He was not involved in the setup, inspection or maintenance of the crane.

Obayemi was unaware of any problems with the crane, or its hydraulics or its failure to jump. She explained that Pavarini was not usually given notice of any issues with respect to the crane because it is “a special mechanism” (*id.* at 33). However, Pavarini would be given notice of issues causing delays in construction, but she did not recall receiving such a notice or any report regarding a delay (*id.* at 37). Obayemi also testified that, if there was a large hydraulic fluid spill, she would have received a report, either from the contractor or a state agency, such as the EP, and

---

<sup>2</sup> At his fourth deposition, plaintiff testified that, rather than righting himself and climbing down to the building alone, he shouted for help and his son climbed the tower and helped plaintiff free from the ladder. Panarella, Jr. then helped plaintiff descend from the tower to the building, and then from the building to his car (plaintiff’s fourth deposition tr at 62).

she did not recall ever receiving such a report (*id.* at 44). Further, Broadway Concrete, as well as all contractors, were required, by contract, to report accidents to Pavarini.

Obayemi testified that she had no personal knowledge of the accident and never received any report with respect to the accident or the situation plaintiff testified to at his own depositions. She did receive an injury report relating to plaintiff's accident, but the report itself, completed by Decristoforo, did not include any specifics as to the nature or severity of plaintiff's injuries.

Finally, Obayemi testified that she did not know the subcontractor that was responsible for erecting or jumping the crane.

***Deposition Testimony of Salvatore Isola (NY Crane's General Manager)***

Salvatore Isola ("Isola") testified that he was the general manager of NY Crane, a crane leasing company, at the time of the accident. His duties included scheduling orders and dispatching trucks and cranes to construction sites throughout New York. NY Crane owned the crane used at the project, which was manufactured by Favco.

Isola testified that, once NY Crane's cranes are at the work site, they are maintained by the renter, which in this case was Broadway Concrete. He was unaware of any issue with the crane at the project. He was also unaware of any policy, plan or procedure by NY Crane to inspect any part of the cranes it leases. Rather, an inspection is performed by the New York Department of Buildings ("the DOB") on site before the crane is erected. After the inspection is passed, the crane's renter – here, Broadway Concrete – would arrange for the erection of the crane. Once it was erected, NY Crane would then “hook up the engine, wires, electrical and the computer portion” (Isola tr at 29-30). Once the crane was erected and operable, the DOB would make a second inspection and, if the crane passed the inspection, work could commence.

According to Isola, NY Crane would hire an inspector to inspect each crane once a year. It also hired an inspector to check the cranes after they were dismantled from finished jobs. Isola was shown a dismantling inspection report for the crane from a prior job and confirmed that it included several maintenance issues. Isola testified that the issues were “all usual maintenance” (*id.* at 58). He also testified that the reports that he reviewed at the deposition did not mention any testing relating to the tower’s climbing system, also called the jumping frame.

Isola reviewed several NY Crane documents regarding the maintenance and leasing of the crane. He confirmed that a document dated January 6, 2009 indicated that work was performed on the crane’s “jacking cylinder” (*id.* at 94). Specifically, the document indicated that work was performed on the piston, including the replacement of a “relief valve” on the housing (*id.* at 96). He also confirmed that a second document indicated that after someone from NY Crane spoke to Michael Khoo of Favco, a new hydraulic jacking valve was installed on January 23, 2009 (*id.* at 106, 119).

Isola was aware that, on the day of the accident, the day after the hydraulic valve was installed, the hydraulic box was sheared off. NY Crane was first notified of the accident two days later, on January 26, 2009. A NY Crane employee was then immediately dispatched to replace the damage. A stop work order was issued by the DOB on January 24, 2009, and the stop work order was lifted on January 30, 2009, after NY Crane repaired the crane and provided a repair procedure letter from Favco.

***Deposition Transcript of Aubrey Alexander (NY Crane’s Mechanic)***

Aubrey Alexander ("Alexander") testified that, at the time of the accident, he was NY Crane’s mechanic. His duties included repairing NY Crane’s equipment, including crane

components. He was familiar with Favco cranes, including their hydraulic systems, and he recalled working on the crane at the project. He was not responsible for day to day maintenance of the crane, since this was the responsibility of plaintiff and the other machinists who were present at the project daily. He was only on site when asked to resolve a specific issue. His supervisor was Tony Quaranta, a NY Crane employee.

Alexander was involved in the initial hookup of the Crane's electrical components, but he was not involved in the actual erection of the crane or its climbing system. He was also not present during any jumps.

At his deposition, Alexander reviewed several work tickets from the project. He confirmed that, on January 6, 2009, two and a half weeks before the accident, the “[v]alves on jacking cylinders were replaced” and that one of the valves was “missing two bolts” (Alexander tr a 53-54). The missing bolts would not have caused the hydraulic box to shift or move during the jumping procedure. Typically, when Alexander replaced valves, he would align the piston by performing “a visual [inspection] in terms of [seeing] if the cylinder looks square” and confirm that it was properly aligned (*id.* at 99). He also noted that there was “only one way that [the valves] could be installed because of the alignment of the bolt holes” and that he “followed all the correct procedures in installing it” (*id.* at 181).

Alexander was also shown a work ticket for January 23, 2009, which indicated that he was sent to the project to install a “directional valve” (*id.* at 75). A “directional valve” is a valve on the jacking cylinder that controls the direction that the jacking pylons move. If the directional valve is not working, the jumping system will not work. However, as the jumping crew was not present that day, he was unable to test the valve. He also explained that the directional valve was not a part of the housing that was damaged on the day of the accident.

Alexander was then shown a work ticket that notes that on January 26, 2009, two days after the accident, a leaking valve on the jacking cylinder was repaired and/or replaced. He testified that the jacking cylinder had rotated, which caused the hydraulic box to get sheared off. He replaced the entire hydraulic box.

***Deposition Testimony of Robert Lebensfeld (Waterscape's Witness)***

Robert Lebensfeld ("Lebensfeld") testified that at the time of the accident, he was the vice president of nonparty Assa Properties ("Assa"), a real estate investment and development group. Waterscape is an affiliate of Assa. He testified that Waterscape was the owner of the premises at the time of the accident.

Waterscape hired Pavarini as the construction manager for the project. Pavarini was responsible for retaining all trade contractors to perform at the project and for overall safety at the project. Lebensfeld also testified that Waterscape had a project manager present for weekly project meetings with Pavarini.

***Deposition Testimony of John Parks (Broadway Concrete's Comptroller)***

John Parks testified that, at the time of the accident, he was Broadway Concrete's comptroller. Broadway Concrete was in the business of constructing high-rise buildings and, as part of its work, it would hire several subcontractors, including laborers, carpenters, engineers, teamsters and masons. Broadway Concrete obtained the crane from NY Crane.

***Deposition Testimony of Robert LaChapelle (Able Rigging's Executive Vice President)***

Robert LaChapelle ("LaChapelle") testified that, at the time of the accident, he was Able Rigging's executive vice president. Able Rigging was a "rigging service provider" (LaChapelle tr at 6), which would move, erect, assemble and disassemble heavy equipment such as climbing tower cranes. LaChapelle was a licensed master rigger, able to oversee the hoisting and erecting of such equipment.

According to LaChapelle, a master rigger must be present to oversee the assembly and erection of any crane in New York. LaChapelle testified that Able Rigging was not present for the assembly of the crane and did not erect it (*id.* at 16). However, it took over as the rigging company in October 2008 and LaChapelle was the master rigger at the project at time of the accident.

LaChapelle reviewed several documents and confirmed that approximately 17 Able Rigging employees worked at the project. Able Rigging did not have a constant presence at the project. It only sent workers to assemble, raise, lower or disassemble machinery, or to replace parts if needed. Able Rigging would supply four to six people to lift a tower crane and six to ten people to assemble or disassemble a crane.

LaChapelle was present on the day of the accident. His work that day included making sure that the crane jump went smoothly. His work did not include inspecting any of the bolts or making sure that parts of the crane were properly aligned. He was in the tower itself at the time of the crane's malfunction, just below the crane's deck. He testified that the "hydraulic box was not sheared off the cylinder" (*id.* at 41); rather, "[t]he atmospheric relief valve" which is located on the housing, was caught on the tower and damaged, causing it to "spew[] hydraulic fluid onto the crane and onto the adjacent parked cars and the street below" (*id.*). LaChapelle was above the relief valve at the time that it began spewing fluid (*id.* at 44). He did not recall the crane suddenly

dropping or otherwise becoming destabilized or at risk of toppling over (*id.* at 57). He stayed in the tower until the crane was lowered and re-secured. During this time, he climbed the tower's ladders and "encountered hydraulic fluid on the landings" (*id.* at 63). He did not recall any fluid on any of the ladders, including the ladder, and he did not have any problem climbing up or down.

LaChapelle testified that he was not informed of any work NY Crane had performed on the hydraulic box prior to the malfunction (*id.* at 95). Had he been so informed, he would have inspected the hydraulic box prior to attempting to jump the crane. Similarly, he had not been made aware of the work done on the directional valve the day before the jump (*id.* at 99). According to LaChapelle, NY Crane was responsible for making sure that all the bolts were properly secured and that the newly installed components were properly aligned.

After reviewing a pre-erection inspection report prepared by NY Crane, dated August 29, 2008, LaChapelle confirmed that it indicated that "[b]oth jacking valves [were] leaking at valve body" (*id.* at 138). LaChapelle confirmed that the jacking valves were the valves that were involved with the crane's failure to jump.

It was not Able Rigging's responsibility to clean the hydraulic fluid from the tower. According to LaChapelle, the "oiler" (a/k/a the maintenance engineer) assigned to the crane was responsible for its general maintenance, including cleaning any fluid leaks. He did not know who the oiler was, but he knew that the oiler was not employed by Able Rigging. Oilers are typically employed by the crane lessee, here Broadway Concrete.

Finally, LaChapelle was unaware of plaintiff's accident until he was served with the instant lawsuit.

**LEGAL CONCLUSIONS:**

“[T]he 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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must “assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions” (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

***The Labor Law § 240 (1) Claim***

Plaintiff moves for summary judgment on his Labor Law § 240 (1) claim against the Pavarini Defendants. The Pavarini Defendants cross-move for summary judgment dismissing the same as against them.

Labor Law § 240 (1), also known as the Scaffold Law, 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]). Importantly, Labor Law § 240 (1) “is designed to protect workers from gravity-related hazards . . . 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 citations omitted]).

Not every worker who falls at a construction site is afforded the protections of Labor Law § 240 (1), and “a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace” (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]). Instead, 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]). Therefore, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff’s injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]).

As an initial matter, the Pavarini defendants do not challenge that they are proper Labor Law defendants.

Here, plaintiff has established that, while in the course of descending the narrow, permanently affixed vertical ladder that provided the sole access route to and from his elevated work area, plaintiff’s foot slipped on a rounded metal rung that was covered with hydraulic fluid, causing him to fall downward and become entangled in the ladder’s rungs.

A “permanently affixed ladder [that] was the only means by which [the plaintiff] could reach his elevated work site . . . was a device within the meaning of [Labor Law] § 240 (1)” (*Stallone v Plaza Const. Corp.*, 95 AD3d 633, 633 [1st Dept 2012], citing *Crimi v Neves Assoc.*, 306 AD2d 152, 153 [1st Dept 2003]). Accordingly, the question before the court is whether the ladder was, in and of itself, a sufficient safety device to protect plaintiff from the elevation-related dangers of traveling to and from his elevated work area.

Plaintiff’s clear and consistent testimony establishes that the rungs were covered in hydraulic fluid and slippery (plaintiff’s tr at 132 [hydraulic fluid “was flowing all over the ladders and all over the decks”]; *id.* at 144 [hydraulic fluid was “all over”]; *id.* at 153 [confirming that “there was fluid all over this ladder” including every rung and the railings]; *id.* at 373 [stating that he saw “oil” on the ladder]; *id.* at 390 [confirming that he “encountered oil” on the landings and rungs below the housing]; *id.* at 451 [confirming that the fourth section of the tower was “covered in fluid” and “[i]t was all over the ladder”]). His testimony also establishes that the ladder was bare metal and had no slip protection – such as anti-slip paint or anti-slip material on the rungs or railings – and that he was not provided with any other form of fall protection. This lack of protection was a proximate cause of his fall down the ladder. Therefore, plaintiff has established that the ladder was an insufficient safety device that “proved inadequate to shield [him] *from harm directly flowing from the application of the force of gravity*” (*Williams v 520 Madison Partnership*, 38 AD3d 464, 465 [1st Dept 2007]).

Further, the existence of “a slippery substance on the very narrow, round rungs” of a permanently affixed ladder has been found to be evidence supporting a finding that plaintiff’s “injuries were at least partially attributable to defendants’ failure to take statutorily mandated safety measures to protect [plaintiff] from risks arising from an elevation differential” as required

by Labor Law § 240 (1) (*Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 494-495 [1st Dept 2004] [internal citations and quotation marks omitted]).

Accordingly, plaintiff has established his prima facie entitlement to summary judgment in his favor on his Labor Law § 240 (1) claim as against the Pavarini defendants.

In opposition, the Pavarini defendants fail to raise a question of fact sufficient to defeat plaintiff's motion. Specifically, the Pavarini defendants rely heavily on LaChapelle's testimony that there was no hydraulic fluid on the ladder when he used it shortly after the hydraulic leak occurred. However, LaChapelle's testified only about the condition of the ladder prior to the time of plaintiff's accident. LaChapelle did not testify that he observed the ladder at any time contemporaneously with, or subsequent to, plaintiff's accident. Accordingly, LaChapelle's testimony does not raise a question of fact that implicates the accuracy of plaintiff's clear and consistent testimony that the subject ladder was covered in slippery hydraulic fluid at the time of the accident (discussed *supra*).

Defendants also argue that plaintiff is required to establish that there was a defect in the ladder. This argument is incorrect (*Pierrakeas v 137 E. 38th St. LLC*, 177 AD3d 574, 574-575 [1st Dept 2019] [the "plaintiff was not required to show that the ladder was defective" to establish entitlement to summary judgment in his favor on his Labor Law 240 (1) claim]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 290-291 [1st Dept 2002] [the defendant's "contention that plaintiff was required to show that the ladder from which he fell was defective in some manner . . . is not the law"]).

To the extent that defendants argue that plaintiff's accident was unforeseeable, this Court disagrees. It is entirely foreseeable that the crane's hydraulic system could leak, causing a slick and slippery condition on the ladder. Therefore, an additional safety device was necessary to

protect against such a foreseeable hazard (*see e.g. Ortega v City of New York*, 95 AD3d 125, 128 [1st Dept 2012]).

Since defendants have failed to raise a triable question of fact as to whether the ladder was a sufficient safety device pursuant to Labor Law § 240 (1), plaintiff is entitled to summary judgment in his favor on the Labor Law § 240 (1) claim as against the Pavarini defendants. Thus, the Pavarini defendants are not entitled to summary judgment dismissing the claim.

### ***The Labor Law § 241 (6) Claim***

Plaintiff moves for summary judgment on his Labor Law § 241 (6) claim against the Pavarini defendants. The Pavarini defendants cross-move for summary judgment dismissing the same as against them.

Labor Law § 241 (6) provides, in pertinent part, that:

“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 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” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998], quoting Labor Law § 241 [6]; *see also Ross*, 81 NY2d at 501–502). Importantly, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, “concrete” implementing regulation of the

Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross*, 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*see Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

Although plaintiff alleged several violations of the Industrial Code, he moves for summary judgment solely with respect to that part of his Labor Law § 241 (6) claim arising from alleged violations of Industrial Code sections 12 NYCRR 23-1.7 (d) (slipping hazards) and 23-8.3 (c) (3) (tower crane accessibility). In their cross motion, the Pavarini defendants initially argue, incorrectly, that plaintiff's failure to move on the remaining provisions constitutes abandonment of his reliance on the same. "Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section. However, that is not the case where the plaintiff is the moving party" (*Kempisty v 246 Spring Street, LLC*, 92 AD3d 474, 475 [1st Dept 2012]). That said, the Pavarini defendants also list each industrial code provision that they seek to dismiss, and they set forth specific arguments regarding the inapplicability of those provisions. In opposition, plaintiff fails to respond to those arguments in any meaningful way. Therefore, the Court deems them abandoned (*id.*).

*Industrial Code 12 NYCRR 23-1.7 (d)*

Industrial Code section 23-1.7 (d) governs slipping hazards, and provides the following:

"Employers shall not suffer or permit any employees to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

Section 23-1.7 (d) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Velasquez v 795 Columbus LLC*, 103 AD3d 541, 542 [1st Dept 2013]).

Here, plaintiff has established his prima facie entitlement to summary judgment with respect to this industrial code violation. The protections of section 23-1.7 (d) encompass slippery conditions on ladders (*see Smith v Fayetteville-Manlius Cent. School Dist.*, 32 AD3d 1253, 1254 [4th Dept 2006] [noting that a claim based on section 23-1.7 (d) was proper where plaintiff alleged that “his feet slipped off the ladder because of the possible slippery condition”]). As discussed above, plaintiff has established that he slipped and fell due to a slippery foreign substance on the subject ladder – i.e. the hydraulic fluid – that was not properly cleaned up after the fluid spill.

In opposition, the Pavarini defendants once again argue that an issue of fact exists based on LaChapelle’s testimony that, at some point prior to plaintiff’s accident, he did not notice any hydraulic fluid on the rungs. As discussed above, this testimony does not raise a question of fact regarding the condition of the ladder at the time of plaintiff’s accident.

Thus, since plaintiff has established that section 23-1.7 (d) was violated and that such violation was a proximate cause of his accident, summary judgment is granted in his favor with respect to that branch of his Labor Law § 241 (6) claim premised on a violation of section 23-1.7 (d).

*Industrial Code 23-8.3 (c) (3)*

Industrial Code 23-8.3 governs “[s]pecial provisions for tower cranes.” Subsection (c) (3) provides that “[a]dequate and safe means of access to and egress from the cabs and machinery platforms of tower cranes shall be provided.”

Initially, it is noted that plaintiff did not include section 23-8.3 (c) (3) in his complaint. Nor did he raise it in bill of particulars prior to the filing of the instant motion. However, such a failure “need not be fatal, since amendment to remedy such deficiency should be granted freely,

absent unfair surprise or prejudice” (*Adams v Santa Fe Constr. Corp.*, 288 AD2d 11, 12 [1st Dept 2001]). Here, while the Pavarini defendants claim that they would be prejudiced by the inclusion of section 23-8.3 (c) (3), they do not articulate how they would be so prejudiced, nor is it apparent to this Court how the Pavarini defendants could be prejudiced or surprised by the addition of a claim that the means of access to and from the crane’s cab was unsafe in light of the facts of this action. Accordingly, this Court will consider section 23-8.3 (c) (3).

Next, the parties dispute whether section 23-8.3 (c) (3) is sufficiently specific to support a Labor Law § 241 (6) claim. Neither party supplies case law to support their positions and this Court’s own research finds no cases addressing this specific section. Accordingly, this Court must first determine whether this section is sufficiently specific to support a section 241 (6) claim.

This Court must assess whether section 23-8.3 (c) (3) contains “specific commands and standards” that “mandat[e] compliance with concrete specifications” that form a valid basis for liability under Labor Law § 241(6) or “general safety standards” that “invok[e] [g]eneral descriptive terms,” which only incorporate general common-law standards of care and cannot support a Labor Law § 241(6) claim (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 503, 505 [internal quotation marks omitted]).

Allegations “which rely on claimed failures to measure up to such general regulatory criteria as ‘adequate,’ ‘effective’ and ‘proper,’ are not sufficient to give rise to a triable claim for damages under Labor Law § 241 (6)” (*id.* at 502, *referencing* Industrial Code 23-1.4[a]). The term “safe” when used in this context is equivalent to “adequate,” “effective” and “proper” and is, therefore, also a general term (*see e.g. Sharrow v Dick Corp.*, 233 AD2d 858, 860 [4th Dept 1996] [finding that the requirement that equipment be operated in a “safe manner” was too general to support a section 241 (6) claim]).

The requirement found in section 23-8.3 (c) (3) that “adequate and safe” access to and from crane cabs be provided invokes only general safety standards using general safety terms and, thus, plaintiff is not entitled to summary judgment in his favor as to liability on his Labor Law § 241 (6) claim premised on a violation of Industrial Code 23-8.3 (c) (3). Based on the foregoing, the Pavarini defendants are entitled to summary judgment dismissing the same.

### ***The Common-Law Negligence and Labor Law § 200 Claims Against the Pavarini Defendants***

Plaintiff moves for summary judgment in his favor on the common-law negligence and Labor Law § 200 claims against the Pavarini defendants. The Pavarini defendants cross-move to dismiss those claims as against them.

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]). Labor Law § 200 (1) states, in pertinent 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 protection to all such persons.”

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (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 inherent in the premises” (*Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 736 [2d Dept 2008]; 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 Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

“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 [1<sup>st</sup> Dept 2012]). However, where an injury stems from a dangerous condition inherent in 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]).

Here, plaintiff’s accident was caused by the means and methods of the work – i.e. the failure to sufficiently clean the hydraulic fluid from the area in advance of plaintiff’s necessary use of the ladder to exit the crane. In addition, plaintiff’s accident was caused, in part, due to the malfunction of the crane’s hydraulic lift – i.e. a defect in the machinery provided to the project – which created the fluid leak in the first place.

### Means & Methods

Here, there is no evidence that the Pavarini defendants had the authority to supervise and control the cleaning of the tower after the hydraulic leak. Nor is there evidence that the Pavarini defendants had the authority to supervise or control the use or maintenance of the crane and its

hydraulic systems (*Gonzalez v United Parcel Serv.*, 249 AD2d 210, 210 [1st Dept 1998] [section 200 properly dismissed where owner had no control “over the manner in which the work in question was done . . . [or] supervised the use of the machine whose negligent alteration and operation is said to have caused plaintiff’s injury”]).

To the extent that plaintiff argues that the Pavarini defendants had the general authority to supervise and control the work because they had representatives at the premises that had the authority to stop work if they saw an unsafe condition, such authority is insufficient to establish liability under Labor Law § 200 (*see Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1<sup>st</sup> Dept 2014] [where a defendant “had the authority to review onsite safety, . . . [such] responsibilities do not rise to the level of supervision or control necessary to hold the [defendant] liable for plaintiff’s injuries under Labor Law § 200”]; *see also Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013] [“[T]he mere fact that a general contractor had overall responsibility for the safety of the work done by the subcontractors is insufficient to demonstrate that it had the requisite degree of control and that it actually exercised that control”] [internal quotation marks omitted]; *accord O’Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 226 [1st Dept 2005], *aff’d* 7 NY3d 805 [2006]). Therefore, the Pavarini defendants have no liability to plaintiff arising from the means and methods used by them at the site.

### Defective Tool/Machinery

Although plaintiff alleges that his accident arose from a dangerous condition inherent in the premises, this is not the case (*see Markey v C.F.M.M. Owners Corp.*, 51 AD3d at 736, 737 [a tool used at the work site was not “a dangerous condition” because it “was not inherently part of

the premises”]; *see also Strugatch v Consolidated Edison Co. of N.Y.*, 2018 WL 587140, \*6 [Sup Ct, New York County 2018] [“a slippery substance ‘was not a defect inherent in the property’”].

Instead, plaintiff’s accident occurred, in part, due to a defect in the equipment provided to him to perform his work – i.e. the crane and its hydraulic jumping system, including the piston and housing. Specifically, the housing was damaged during a jump, leading to a hydraulic spill that created the slippery surface upon which plaintiff ultimately fell.

Generally, under Labor Law § 200, an owner, its agent, or the general contractor will not be liable “where the accident arises out of a defect in the subcontractor’s tools, equipment, or methods of operation” (*Vilardi v Berley*, 201 AD2d 641, 644 [2d Dept 1994]; *see also Ortega v Puccia*, 57 AD3d 54, 62 [2d Dept 2008], citing *Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d 136, 145 [1965] [“the duty to provide a safe place to work is not breached when the injury arises out of a defect in the subcontractor’s own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work”]).

However, “[w]hen a defendant lends allegedly dangerous or defective equipment to a worker that causes injury during its use, in moving for summary judgment that defendant must establish that it neither created the alleged danger or defect in the instrumentality nor had actual or constructive notice of the dangerous or defective condition” (*Lam v Sky Realty, Inc.*, 142 AD3d 1137, 1138–1139 [2d Dept 2016]). Alternatively, where “a worker’s injury results from his or her employer’s own tools or methods, . . . a defendant . . . [would] be liable only if possessed of authority to supervise or control the work” (*Chowdhury v Rodriguez*, 57 AD3d at 130).

Here, plaintiff’s accident arose, in part, from the use of the crane, which was built by Favco, owned by NY Crane and leased by NY Crane to Broadway Concrete. The Pavarini defendants neither owned the crane nor lent it to anyone for use at the project. In addition, as discussed above,

there is no evidence that the Pavarini defendants had the authority to supervise or control the operation of the crane or its hydraulic jumping systems. Therefore, the Pavarini defendants cannot be liable for plaintiff's injuries under either prong of the defective tool analysis (*see Vilaridi v Berley*, 201 AD2d at 644).

Based on the foregoing, the Pavarini defendants are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against them and plaintiff is not entitled to summary judgment in his favor on those claims.

#### ***Plaintiff's Negligence Claim Against Able Rigging***

Plaintiff moves for summary judgment in his favor as to liability against Able Rigging. As an initial matter, Able Rigging correctly states that it is not a defendant in the principal action and plaintiff has not pleaded a cause of action as against it. In response, plaintiff does not identify a cause of action he has asserted as against Able Rigging or identify notice of such claim ever being served on Able Rigging. Thus, plaintiff is not entitled to summary judgment in his favor on his unpleaded claim of negligence as against Able Rigging.

#### ***Plaintiff's Negligence Claims against NY Crane***

Plaintiff moves for summary judgment in his favor as to liability against NY Crane for negligent inspection, maintenance, and repair of the crane. Initially, it is undisputed that Broadway Concrete, and not NY Crane, had the general day-to-day duty to maintain the crane while it was in operation. With respect to negligent inspection and repair, plaintiff argues that NY Crane's repair work on the piston, on January 6 and 23, 2009, was negligently substandard.

*Additional Facts Relevant to This Claim*

*Affidavit of Walter Konon (Plaintiff's Expert)*

Walter Konon ("Konon") states that he is a professional engineer, licensed in New York. He notes that a crane survey report, dated August 13, 2008, five months prior to the accident, reflects that "there [were] some loose bolts holding ram to climber" (Konon affidavit, ¶ 17). Based on this, Konon opined that loose bolts caused the piston to shift, which led to the damage to the housing, resulting in the hydraulic leak. Konon also asserted that the hydraulic fluid should have been cleaned in the three hours between the accident and plaintiff's attempt to climb down from the crane's cab.

*The Affidavit of Mark Nelson (Pavarini's Expert Witness)*

In his expert affidavit, submitted on behalf of the Pavarini defendants, Mark Nelson ("Nelson") states that, based on his experience as a professional engineer, it is "possible" that the bolts holding the piston to the jumping frame were loose (Nelson Affidavit, ¶ 6). According to Nelson, the bolts were either "loose when the crane arrived at the construction site when delivered by [NY Crane], or the bolts were improperly tightened during either of two repairs by [NY Crane]" (*id.*, ¶¶ 6 and 7). Nelson opines that the "possibly" improper tightening of the bolts "could have left the cylinder mounting bolts loose and unable to withstand the rotational forces on the jacking piston during 'jumping'" (*id.* at 8). He further states that Alexander (NY Crane's mechanic) "may have loosened the bolts" during his work and failed to properly tighten them (*id.*). Based on this, Nelson concludes that NY Crane was responsible for the movement of the piston, as well as the subsequent shearing-off of the housing.

*The Affidavit of Lawrence Shapiro (NY Crane's Expert Witness)*

In his expert affidavit, submitted on behalf of NY Crane, Lawrence Shapiro ("Shapiro") states that, based on his experience as a professional engineer, and on "general engineering principles," that there is "no support for the assertion that [the piston] rotated substantially during the course of this jacking operation" because "[t]here is no driving force to turn the [piston]" (Shapiro Affidavit, ¶ 7).

Rather, Shapiro opines that the piston must have "rotated gradually over the course of a number of jacking strokes" during the previous successful jumps and, therefore, "it would have been the duty of [Broadway Concrete] to note the loose mounting bolts and the rotation of the barrel during routine inspection maintenance proceeding the jump" (*id.*, ¶ 7). Additionally, according to Shapiro, Able Rigging should have monitored the jumping mechanisms during the jump to assure that all components were "free and clear" (*id.* ¶ 8).

Here, plaintiff relies on Nelson's expert disclosure to support his claim that NY Crane negligently repaired the piston. Specifically, plaintiff argues that, based on Nelson's opinion, it is "possible" that NY Crane did not properly tighten certain bolts on the piston, which "may have" caused the piston to rotate, ultimately leading to the damage to the housing, the hydraulic fluid leak, and the resulting slippery ladder.

Notably, Nelson's expert affidavit, while referencing certain documents in evidence, is generally speculative and inconclusive since it indicates only that it is "possible" that NY Crane failed to properly inspect and repair the subject piston on one of three days prior to the accident, by "possibly" failing to tighten the bolts. Also important is Shapiro's opinion that the piston gradually rotated throughout the course of several jumps, and that the correction of such rotation was a maintenance fix, which was the responsibility of Broadway Concrete (*see Mitrovic v*

*Silverman*, 104 AD3d 430, 430 [1st Dept 2013] [“contradictory affidavits, each based upon the expert’s relevant experience in the field . . . [are] sufficient to raise a disputed issue”]). Since there remain questions of fact as to how and why the piston shifted, plaintiff is not entitled to summary judgment on his negligence claim as against NY Crane.

### ***Plaintiff’s Products Liability Claims Against Favco***

Plaintiff moves for summary judgment in his favor as to liability against Favco for products liability for the allegedly faulty design of the crane and the failure to warn of dangers related to the crane. Specifically, plaintiff seeks relief under two theories: negligent product design and failure to warn.

“[A] manufacturer of a defective product is liable for injuries caused by the defect . . . [A] product has a defect that renders the manufacturer liable for the resulting injuries if it: (1) contains a manufacturing flaw; (2) is defectively designed; or (3) is not accompanied by adequate warnings for the use of the product” (*Matter of New York City Asbestos Litig.*, 27 NY3d 765, 786-787 [2016] [internal quotation marks and citations omitted]).

As an initial matter, Favco argues that plaintiff did not raise a claim for negligent product design as against it, and that part of plaintiff’s motion must be denied. In his five-paragraph reply, plaintiff does not address that branch of his motion seeking relief under a theory of negligent product design, choosing only to address the failure to warn claim. Accordingly, plaintiff is not entitled to summary judgment on that part of his motion seeking relief for negligent product design.

Next, Favco argues that plaintiff did not raise a claim for failure to warn. Plaintiff argues that the complaint establishes the existence of such a claim.

“A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known” (*Liriano v Hobart Corp.*, 92 NY2d 232, 237 [1998]). Such a duty “extends to the original or ultimate purchasers of the product, to

employees of those purchasers, and to third persons exposed to a foreseeable and unreasonable risk of harm by the failure to warn” (*Matter of New York City Asbestos Litig.*, 27 NY3d at 788-789 [internal quotation marks and citation omitted]). In addition, the failure to warn must be a proximate cause of plaintiff’s accident (*see Sosna v American Home Prods.*, 298 AD2d 158, 158 [1st Dept 2002]). That said, “when a warning would have added nothing to the user’s appreciation of the danger, no duty to warn exists as no benefit would be gained by requiring a warning” (*Liriano v Hobart Corp.*, 92 NY2d at 242).

A review of the complaint establishes that plaintiff has sufficiently alleged that Favco owed plaintiff a duty to warn (complaint, ¶¶ 15, 77, 82, 116 [each of which alleges that Favco “owed a duty to warn . . . of the above described defective and hazardous conditions”]). The “defective and hazardous conditions” referenced in the above paragraphs, describes various “slipping hazards” and other “nuisance-like conditions” at the project, including the allegedly improper installation of the crane and its hydraulic system (*id.* ¶¶ 16, 78, 83, 117). Plaintiff argues that Favco should have issued a warning that the improper installation of the housing could lead to unsafe conditions, and that plaintiff was unaware of the dangers of the improperly installed housing (plaintiff’s affidavit in support, ¶ 139-141).

However, as set forth numerous times in his testimony, plaintiff was fully aware of the danger posed by the housing’s installation. Specifically, he testified that he personally saw the allegedly improperly installed housing and warned several people of the purported danger of installing the housing in the manner that it was installed on the crane at the project (plaintiff’s tr at 26 [testified that he informed the erection crew “that the [housing] should be on the opposite side . . . . [T]hat box is going to be in the way”]; *id.* at 312 [informed erection crew of the purportedly improper installation of the housing]; *id.* at 323-324, 327-328 [warning NY Crane and Broadway

Concrete of said issue]; *id.* at 332 [explaining that plaintiff raised concerns about the housing more than once]; *see also* Konon expert affidavit ¶ 22 [noting that plaintiff “had noticed the lack of clearance between the [housing] and the tower mast” prior to the accident]). Accordingly, plaintiff, by his own testimony, acknowledged his awareness and appreciation of the alleged danger posed by installing the housing on the inside of the crane’s tower. Since a warning regarding this specific hazard “would have added nothing to [plaintiff’s] appreciation of the danger,” there was no duty to warn of this danger (*Liriano v Hobart Corp.*, 92 NY2d at 242).

In any event, plaintiff provides no analysis or testimony (expert or otherwise) as to how the purported lack of a warning regarding the alleged danger of installing the crane’s housing on the inside of the tower proximately caused his accident (*see Sosna v American Home Prods.*, 298 AD2d at 158).

Thus, plaintiff is not entitled to summary judgment in his favor on his products liability claims as against Favco.

***The Pavarini Defendants’ Common-Law Indemnification Cross Claims Against NY Crane, Favco and Able Rigging***

In their cross motion, the Pavarini defendants move for summary judgment on their common-law indemnification claims against NY Crane, Favco and Able Rigging.

“To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work” (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]; *see also McCarthy v. Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011] [“a party cannot obtain common-

law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part”).

Here, the Pavarini defendants argue that they are free from negligence with respect to both (1) the operation, construction, maintenance, inspection and repair of the crane, and (2) the cleaning of the hydraulic fluid leak because they did not actively supervise or control any of the work related to those issues, and they had no notice of any problems with the crane’s hydraulic lift system.

As discussed above, the Pavarini defendants were not actively negligent with respect to plaintiff’s accident. Accordingly, they may be entitled to common-law indemnification from any party that was, in fact, negligent. In their motion, the Pavarini defendants have failed to establish such negligence.

The Pavarini defendants argue that NY Crane “may have” loosened and then failed to properly tighten bolts on the jacking system (Prinsell aff, ¶ 44; Doc No. 72), and that “it is possible” that such bolts were loose due to NY Crane’s negligence (*id.*, ¶ 45). Such arguments are insufficient to establish, as a matter of law, that NY Crane, in fact, was negligent in its repair work. In addition, the Pavarini defendants’ unsubstantiated argument that Favco “failed to properly tighten the bolts upon manufacturing” the crane (*id.*) – seven years prior to the accident – is not sufficient to establish that Favco was negligent with respect to plaintiff’s accident. Finally, the Pavarini defendants’ argument that Able Rigging was negligent because it did not inspect the piston in advance of the jump fails to establish that Able Rigging had a duty to inspect the piston in the first instance. Therefore, the Pavarini defendants have failed to establish their prima facie entitlement to summary judgment on their cross claims against NY Crane, Favco or Able Rigging.

The parties remaining arguments have been considered and were found unavailing

Therefore, in accordance with the foregoing, it is hereby:

**ORDERED** that plaintiff Robert Panarella, Sr.'s motion, pursuant to CPLR 3212, for summary judgment on his claims against defendants Waterscape Resort, LLC Waterscape Resort II, LLC and Pavarini McGovern, LLC (together, the Pavarini defendants), Favelle Favco Cranes USA, Inc., defendant/third-party plaintiff/third third-party plaintiff New York Crane & Equipment Corp., and second third-party defendants/third third-party defendants Able Rigging Contractors Inc. d/b/a Able Rigging, Robert Lachapelle and Robert Lachapelle d/b/a Able Rigging is granted as to the Labor Law § 240 (1) claim and the § 241 (6) claim premised on a violation of Industrial Code section 23-1.7 (d) as against the Pavarini defendants, and it is otherwise denied; and it is further

**ORDERED** that the Pavarini defendants' cross motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them is granted to the extent of dismissing the common-law negligence and Labor Law § 200 claim as against them, as well as dismissing those portions of the Labor Law § 241 (6) claim premised upon violations of Industrial Code section 23-8.3 (c) (3) and all remaining abandoned Industrial Code provisions, and it is otherwise denied; and it is further

**ORDERED** that the remainder of the action shall continue; and it is further

ORDERED that, within 30 days after this order is uploaded to NYSCEF, plaintiffs' counsel shall serve a copy of this order, with notice of entry, on all parties and on the Clerk of the Court (60 Centre, 141 B), who is directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supetmanh); and it is further

ORDERED that the parties are to participate in a discovery conference by telephone on November 24, 2020 at 12:30 pm (the parties are to provide a dial-in number and access code for the call or are to have all parties on the line and then patch in the court at 646-386-5655); and it is further

ORDERED that this constitutes the decision and order of this Court.

9/10/2020  
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE