SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS A. KAHN, III** **PART** **IAS MOTION 32**

Justice

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TROY MILLER, SHERRY YOUNG,

Plaintiff,

- v -

TURNER CONSTRUCTION COMPANY, BENJAMIN CONSTRUCTION CORP., FRESH MEADOW MECHANICAL CORP., NYU LANGONE HEALTH SYSTEM, NYU HOSPITALS CENTER, HOSPITAL FOR JOINT DISEASES,

Defendant.

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INDEX NO. 151239/2016

MOTION DATE 09/18/2020

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

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FRESH MEADOW MECHANICAL CORP.

Plaintiff,

-against-

U2 RIGGING & HOISTING, INC.

Defendant.

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Third-Party
Index No. 595676/2016

The following e-filed documents, listed by NYSCEF document number (Motion 004) 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205

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

Upon the foregoing documents the motion is determined as follows:

In this action brought pursuant to, *inter alia*, section 240[1], 241[6] and 200 of the Labor Law, Plaintiff seeks to recover for injuries allegedly sustained when a gantry hoisting a chiller drive motor collapsed and the horizontal cross-member on the gantry struck Plaintiff in the head. Plaintiff, an employee of Third-Party Defendant U2 Rigging & Hoisting, Corp. ("U2"), was performing rigging work at the premises owned by Defendant NYU Hospitals Center ("NYU"). U2 was engaged in the construction project at NYU's premises by the general contractor of the HVAC project, Defendant Fresh Meadow Mechanical Corp. ("Fresh Meadow").

On October 14, 2015, Plaintiff had been working on the 18th floor of the premises located at 301 East 17th Street in Manhattan for a week. Plaintiff was employed by U2 as a "rigger" and functioned as a foreman on the job at issue. On the day of the accident, Plaintiff

and another U2 employee were assigned to work in conjunction with Fresh Meadows' workers on a collaborative effort of installing chiller drive motors for an HVAC system. Witnesses gave varying accounts of the weight of the unit from 1,600lbs. to 5,000lbs. The workers intended to use an aluminum gantry to lift the drive motor and perform the installation. It is undisputed that the gantry was owned by Fresh Meadow and was assembled at the site by its employees without Plaintiff's assistance.

Plaintiff testified at his deposition that he assisted in moving the drive motor under the gantry and that employees of Fresh Meadow attached it to the gantry with shackles and slings. Plaintiff averred that despite being the rigger on the job he provided no assistance or direction to Fresh Meadow employees while they performed their work. Plaintiff stated that the Fresh Meadow employees raised the drive motor about a foot off the ground and were in the process of taking a wood skid out from underneath the unit. Plaintiff that he was standing two to three feet away from the gantry when it collapsed and the beam supporting the drive motor struck Plaintiff in the head. The proffered testimony and other evidence appear consistent that collapse occurred when a gantry leg and/or a support bracket failed.

Plaintiff commenced this action to recover for the injuries he sustained as a result of the accident and pled causes of action under sections 200, 240[1] and 241[6] of the Labor Law. Now, Plaintiff moves for partial summary judgment on his causes of action under Labor Law §§240[1], 241[6] and 200.

Subsection 1 of Labor Law §240 provides, in relevant part: "[a]ll contractors and owners and their agents . . . shall furnish or erect, or cause to be furnished or erected . . . scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes or other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed". The duty imposed upon contractors and owners pursuant to Labor Law § 240[1] is non-delegable (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]), and a violation of the duty results in absolute liability (*see Bland v Manocherian*, 66 NY2d 452 [1985]). Ordinary negligence or culpable conduct of the injured worker is generally of no consequence (*see Rocovich v Consolidated Edison Co.*, supra).

While Labor Law § 240[1] does not protect a worker from "any and all perils that may be connected in some tangential way with the effects of gravity," the statute does protect him from "specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured...." (*Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 501 [1993]). In the end, the inquiry concerning the applicability of the statute to a particular incident is "whether the harm flows directly from the application of the force of gravity to the object" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 602-605 [2009]).

Here, Plaintiff established a *prima facie* case that the gantry that was utilized failed to provide him proper protection under the circumstances with uncontested proof that the gantry collapsed while a significantly heavy object was being hoisted such that the height differential was not *de minimis* (*see id.; Ramos-Perez v Evelyn USA, LLC*, 168 AD3d 1112, 1113 [2d Dept 2019]; *Gutierrez v Harco Consultants Corp.*, 157 AD3d 537, 537-538 [1st Dept 2018]; *Simmons v City of New York*, 165 AD3d 725, 727 [2d Dept 2018]; *Slawsky v Turner Constr. Co.*, 167

AD3d 488, 488-489 [1st Dept 2018]). No further evidence of the defective nature of the gantry was required (*see generally Fanning v Rockefeller Univ.*, 106 AD3d 484, 485 [1st Dept 2013]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289 [1st Dept 2002]).

Defendants' sole argument that there are issues of fact concerning whether Plaintiff was the sole proximate cause of accident is without merit (*see Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280; *Plywacz v 85 Broad St. LLC*, 159 AD3d 543, 544 [1st Dept 2018]; *Keenan v Simon Prop. Group, Inc.*, 106 AD3d 586, 589; *Ross v 1510 Assoc. LLC*, 106 AD3d 471, 471 [1st Dept 2013]). Since the gantry indisputably failed and was, at the very least, partly to blame for the accident, Plaintiff's acts cannot constitute the "sole proximate cause" of the accident (*see eg Perrone v Tishman Speyer Props., L.P.*, 13 AD3d 146 [1st Dept 2004]; *Torres v Monroe College*, 12 AD3d 261 [1st Dept 2004]). Any claim that Plaintiff's was to blame based upon his role as the rigger at the job site constitutes a claim of comparative negligence which is no defense to a Labor Law §240[1] claim (*see generally Cardona v New York City Hous. Auth.*, 153 AD3d 1179, 1180 [1st Dep't 2017]; *Caceres v Standard Realty Assoc., Inc.*, 131 AD3d 433, 434 [1st Dep't 2015]; *Stankey v Tishman Constr. Corp. of N.Y.*, 131 AD3d 430, 430 [1st Dept 2015]).

Accordingly, the branch of Plaintiff's motion for summary judgment on his cause of action under Labor Law §240[1] is granted.

As to whether Defendants are liable under Labor Law §241[6], a plaintiff establishes a *prima facie* case of a violation of this section with proof that relevant Industrial Code sections were violated and were a proximate cause of his injuries (*see Ortega v Roman Catholic Diocese of Brooklyn, N.Y., supra*; *Melchor v Singh*, 90 AD3d 866, 870 [2d Dept 2011]; *see also Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]; *Ross v Curtis-Palmer Hydro-Elec Co*, 81 NY2d 494, 501-505 [1993]). Each section of the Industrial Code relied upon by Plaintiff must be a "concrete specification" "mandating a distinct standard of conduct" and "not merely a restatement of common-law principles" (*see Becerra v Promenade Apartments Inc.*, 126 AD3d 557, 558 [1st Dept 2015] *quoting Misicki, supra and Ross, supra*). Although comparative fault is a viable defense to a Labor Law §241[6] cause of action (*see Drago v TYCTA*, 227 AD2d 372 [2d Dept 1996]), a plaintiff is not required to demonstrate his freedom from comparative fault on a motion for summary judgment (*Ortega v Roman Catholic Diocese of Brooklyn, N.Y., supra*; *see also Rodriguez v City of New York*, 31 NY2d 312, 313 [2018]).

Plaintiff relies on violations of six sections of the Industrial Code: 12 NYCRR §23-1.3, §23-6.1, §23-6.1[c][1], §23-1.5[b], §23-6.1[d] and §23-6.1[h].

Plaintiff's reliance on sections 23-1.3 (*Williams v White Haven Mem. Park*, 227 AD2d 923 [4th Dept 1996]), 23-1.5[b] (*Guallpa v Canarsie Plaza, LLC*, 144 AD3d 1088 [2d Dept 2016]); 23-6.1[b] (*Barrick v Palmark, Inc.*, 9 AD3d 414 [2d Dept 2004]) and 23-6.1[c][1] (*Sharrow v Dick Corp.*, 233 AD2d 858 [4th Dept 1996]) is misplaced as all these sections are not sufficiently specific to be actionable under Labor Law §241[6]. However, sections 23-6.1 and 23-6.1[h] are actionable (*see Naughton v City of New York*, 94 AD3d 1 [1st Dept 2012]; *Cruci v General Elec. Co.*, 33 AD3d 838 [2d Dept 2006]).

Concerning section 23-6.1[d], it provides, as applicable here, that "[m]aterial hoisting equipment shall not be loaded in excess of the live load for which it was designed as specified by the manufacturer". Plaintiff demonstrated *prima faice* a violation of this section with the affidavit of his expert engineer Robert J. O'Connor ("O'Connor") wherein he opined that the gantry used on the day of the incident was loaded in excess of its capacity and failed as a result.

As to Section 23-6.1[h], that provision provides, as applicable here, that "[l]oads which have a tendency to swing or turn freely during hoisting shall be controlled by tag lines". In contrast to the foregoing provision, Plaintiff failed to demonstrate how this section was violated and caused the incident at issue. Although O'Connor opined that the absence of tag lines caused the workers to be "in close proximity to the makeshift hoisting device", Plaintiff averred at his deposition that he was not involved in the actual hoisting process. He stated that he was simply "watching" the other workers from two to three feet away and did not directing them. Further, O'Connor did not opine how the existence of tag lines would have prevented the gantry from collapsing.

In opposition, other than claiming that Plaintiff was the sole proximate cause of his accident, Defendants offered no specific argument as to the existence of an issue of fact on the Labor Law §241[6] claim.

Accordingly, the branch of Plaintiff's motion for summary judgment on his Labor Law §241[6] cause of action is granted based upon a violation of §23-6.1[d] only.

The branch of Plaintiff's motion for summary judgment on his Labor Law §200 claim is denied (*see eg Fischetto v LB 745 LLC, York*, 43 AD3d 810 [1st Dept 2007]).

10/30/2020
DATE

FRANCIS A. KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III
J.S.C.

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