SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

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TIMOTHY ELIOPOULOS,

Plaintiff,

- v -

EXTELL 4110, LLC, EXTELL DEVELOPMENT COMPANY, GOTHAM CONSTRUCTION COMPANY, LLC, SOL GOLDMAN INVESTMENTS, LLC

Defendants.

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INDEX NO. 156086/2014

MOTION DATE 02/03/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (MS 003) 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, 111, 112, 113, 114, 115, 116

were read on this motion to DISMISS.

On February 24, 2014, plaintiff Timothy Eliopoulos, a laborer, was injured while working at the construction site located at 555 Tenth Avenue, in the city, state, and county of New York, when he was struck by the rear end of an excavator. Plaintiff commenced this action against defendants asserting claims under Labor Law §§ 200, 240(1), and 241(6), among others. Defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint; plaintiff opposes the motion.

FACTS

This action arises out of the construction of a fifty-three-story residential building at 555 Tenth Avenue. Plaintiff was working as a journeyman laborer for non-party Civetta, an excavation and foundation company. Extell Development Company (Extell) contracted with Gotham Construction Company (Gotham) to act as the construction manager for the project. Gotham in turn subcontracted with Civetta, plaintiff's employer, to perform excavation and cement work at the site.

A Civetta foreman, known to plaintiff as Giocomo, directed all of plaintiff's work at the site (NYSCEF # 97, plaintiff tr at 40). At the time of the incident, Giocomo instructed plaintiff to secure the placement of a pump and hose line before the arrival of the cement truck (*id.* at 47:14-50:21). The excavator, operated by another Civetta employee, Filadelfio Emanuele, was at the edge of the hole while plaintiff was working (*id.* at 53:4; NYSCEF # 102, Emanuele tr at 9-10). At Giocomo's instruction, plaintiff placed the hose line on the ground beside the

excavator (plaintiff tr at 55:18-25). Emanuele got his instructions from his excavation foreman, but Giocomo, a cement foreman, assisted Emanuele on his excavation job at the time of the incident (Emanuele tr at 45-46). As plaintiff stood up from placing the hose, his back was struck by the rear end of the cab of the excavator, pushing him ten feet towards the hole (*id.* at 61:6-24; 68:10-15). Plaintiff was able to stop himself from falling into the hole by grabbing on to an upright pole (*id.* at 69:25-70:2).

DISCUSSION

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]).

Labor Law § 200 and Common Law Negligence Claims

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 (*Conies v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite; and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]). Plaintiff's allegations indicate that the accident was caused by the means and methods of construction, namely, that plaintiff was injured by an operating excavator immediately after he placed a hose line beside it.

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (*id.* [emphasis in original]). Further, "[t]he retention of the right to generally supervise the work, to stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations, does not amount to the supervision and control of the work site necessary to impose liability on an owner or

general contractor pursuant to Labor Law § 200" (*Griffin v Clinton Green S., LLC*, 98 AD3d 41, 48 [1st Dept 2012]; *accord Hughes*, 40 AD3d at 309).

Here, defendants submit prima facie evidence demonstrating that defendants did not control the means of plaintiff's work. Plaintiff testified that while working at the premises he received instructions from only his foreman, a Civetta employee (plaintiff tr at 36:17-24; 40:10-13). Also, Edward Bigley, Gotham's vice president and general superintendent, testified that Civetta's own superintendent, not Gotham, supervised Civetta's work (NYSCEF # 100, Bigley tr at 63:25-64:7).

In opposition, plaintiff points to Gotham and Extell's authority and actions at the construction site to raise an issue of fact as to whether defendants retained control over the safety measures at the site. Anthony Lauria, Gotham's then senior project manager, testified that Gotham had the authority to stop the work at the premises if safety rules were not followed and that Gotham required on-site subcontractors receive a jobsite safety orientation (NYSCEF # 103, Lauria tr at 44:34-45:3, 51:17-52:12). Ambrose Scarimbolo, Gotham's superintendent at the project site, testified that an Extell representative would visit the premises to check on the progress of the project, but that it did not perform inspections (NYSCEF # 104, Scarimbolo tr at 12:25-13:8).

Gotham's authority to halt Civetta's work at the premises and Extell's general oversight on the progress of the project are insufficient to demonstrate that defendants retained control over the means and methods of plaintiff's work (*Griffin*, 98 AD3d at 48). As plaintiff testified, his Civetta foreman directed all his work.

Plaintiff's contention that he was injured as a result of a dangerous condition is also unavailing. Plaintiff argues that the excavator and excavated hole were not safely maintained. Plaintiff, however, does not address in any meaningful way how those conditions caused his injuries. Accordingly, plaintiff's claim under Labor Law § 200 and common law negligence is dismissed.

Labor Law § 241(6) Claims

Labor Law § 241(6) "requires owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). This section imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation or demolition (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]).

In order to recover, the claimant must allege and prove that the owner or contractor violated a rule or regulation of the Commissioner of the Department of Labor which sets forth a specific standard of conduct, as opposed to a general reiteration of the common law (*see Ross*, 81 NY2d at 502-504; *Coyago v Mapa Props., Inc.*, 73 AD3d 664 [1st Dept 2010] ["A Labor Law § 241(6) claim requires that there be a violation of some specific safety standard"]).

Among the many alleged violations, the critical one is of Industrial Code § 23-9.5(c), which states in relevant part: "No person other than the . . . excavating crew shall be permitted to stand within range of the back of a power shovel or within range of the swing of the dipper bucket while the shovel is in operation." (Industrial Code § 23-9.5[c]). To be part of an excavating crew, a plaintiff's task at the time of the injury must be an integral part of the excavation project (*Mingle v Barone Dev. Corp.*, 283 AD2d 1028, 1028 [4th Dept 2001] [finding that plaintiff was a member of the excavation crew under Industrial Code § 9.5(c) where plaintiff's task at the time of his accident was "an integral part of the excavation operation"]; *see Cunha v Crossroads II*, 131 AD3d 440, 441-442 [2d Dept 2015] [finding that defendant failed to demonstrate plaintiff was part of the excavating crew where plaintiff was not authorized or directed to work in concert with the operator of the excavator]; *Ferreira v The City of New York*, 2010 NY Slip Op 31037(U), at *5 [Sup Ct, Kings County 2010], *revd in part on other grounds* 85 AD3d 1103 [2d Dept 2011] [finding an issue of fact as to whether plaintiff's work was integral to the excavation operation where plaintiff was injured while unloading materials from a truck to pour concrete in an excavated hole]; *Martinez v Hitachi Const. Mach. Co.*, 15 Misc 3d 244, 257 [Sup Ct, Bronx County 2006] [finding that plaintiff was part of the excavating crew where he "was working where the excavator was excavating pits in the debris or ground and was part of the crew performing the work in which the excavator was engaged."]).

Defendants point out that it is undisputed that Civetta was contracted to perform excavation and foundation work, that plaintiff was Civetta's employee and worked under the direction of Civetta's cement foreman, Giocomo, and that plaintiff's work at the time of the incident was related to pouring cement into the hole. The hole in the ground was excavated by excavator operator, Filadefio Emanuele, who testified that he worked under Giocomo's direction. Defendants conclude that, under these facts, plaintiff was part of the excavation crew. Defendants also posit that *Mingle v Barone Dev. Corp.* (283 AD2d at 1028) is on point. The *Mingle* court found that the plaintiff, whose task was to clean pipes that were to be placed in a trench, was doing work that was an integral part of the excavation operation and, as part of the excavation crew, was permitted to be within range of the swing of the dipper bucket while the machine was in operation (*id.* at 1028).

Plaintiff claims that an issue of fact exists as to whether plaintiff was part of the excavating crew. Plaintiff contends that plaintiff's task of laying down hose lines at the time of the accident does not mean he was part of the excavating crew.

Defendants, as movants, have the burden to show that plaintiff was part of the excavation crew at the time of the incident. Defendants have not presented any evidence, affidavit or otherwise, indicating that plaintiff's task of setting up the hose to pump concrete into an excavated hole was integral to the excavation project such that plaintiff is part of the excavation crew under Industrial Code § 23-9.5[c]. The facts, while largely undisputed, vary with Filadelfio Emanuele's testimony on who was directing the Emanuele's operation of the excavator. While defendants state that the cement foreman, Giocomo, was directing Emanule's operation of the excavator, Emanuele's testimony was that he operated under his excavation foreman even though other foremen, such as Giocomo, assisted him at the time. Thus, Emanuele's testimony is not dispositive on whether Giocomo, the cement foreman coordinated and directed the excavation operation at the time of the incident. Defendants also insinuate that that task of laying down hose line to be one and the same as pumping the cement into the excavated hole via the hose line. But defendants do not have any evidence to support their insinuation.

Plaintiff, on the other hand, likens his case to *Cunha v Crossroads II* (131 AD3d 440 [2d Dept 2015]). In *Cunha*, the plaintiff, standing between a loader and an excavator, was signaling the loader when the excavator rolled over his legs. The *Cunha* court found that although the plaintiff was signaling the loader, he was not tasked to do so. And because defendants failed to present evidence that the plaintiff was authorized to signal the loader, defendants failed to show that plaintiff was part of the excavating crew at the time of the accident (*id.* at 441-442).

Mingle v Barone, upon which defendants rely as support for their argument that plaintiff's placement of the line hose was integral to the excavation project, is seemingly on point with the present case. The plaintiff in *Mingle*, a member of the work crew laying sewer pipe, was cleaning a pipe to be placed into an excavated hole when he was struck by the boom of a backhoe (283 AD2d at 1028). The court found that cleaning the pipe was an integral part of the excavation operation, and thus, the plaintiff was permitted to be within range of the swing of the dipper bucket while the machine was in operation (*id.*).

While the *Mingle* court found that plaintiff to be part of the excavation crew, it did not discuss how cleaning the pipe was integral to the excavation project. Thus, *Mingle* is unhelpful here in determining whether plaintiff's task of laying down the hose line as preparation for a cement pour is integral to the excavation project. Defendants have the burden to connect plaintiff's task to being part of the excavation project. Defendants did not meet this burden.

Defendants also claim that plaintiff was not hit with a "power shovel" or "dipper bucket" thus rendering Industrial Code § 23-9.5(c) inapplicable. Defendants contend that the "power shovel" and the "dipper bucket" are at the front end of the excavator; the counterweight at back end of the excavator. Defendants conclude that because the back end of the excavator hit plaintiff, § 23-9.5(c) was not violated.

Defendants conflate the meaning of "power shovel" with "dipper bucket" as contemplated by Industrial Code § 23-9.5(c). Here, the power shovel is the excavator that struck plaintiff; the dipper bucket is the digger at the front end of the machine. Indeed, plaintiff was struck by the rear end of the cab of the excavator, indicating that plaintiff was within range of a power shovel at the time of the accident.

In any event, defendants' argument that a claim under Labor Law § 241(6) predicated on a violation of Industrial Code § 23-9.5(c) is limited to an injury caused by the bucket is without support (*compare Cunha v Crossroads II*, 131 AD3d 440, 440 [2d Dept 2015] [Labor Law § 241(6) claim predicated on Industrial Code § 23-9.5(c) where excavator moving in reverse rolled over the plaintiff's legs], *with Ferreira v City of New York*, 85 AD3d 1103, 1106 [2d Dept 2011] [finding that Industrial Code § 23-9.5(c) is inapplicable were the plaintiff was fatally injured when he was pinned against a flatbed truck by the outrigger of a backhoe]).

Plaintiff's alleged violations premised on the remaining sections of Industrial Code § 23-9.5(c) are dismissed as inapplicable. Also inapplicable is plaintiff's allegation under Industrial Code § 23-1.7(b)(1)(i) pertaining to covering or fencing a hazardous opening; plaintiff did not fall into the excavated hole. Likewise, plaintiff's request for leave to amend the bill of particulars to add a violation of Industrial Code § 23-4.2(k), which also pertains to guarding open excavations, is denied (*Willis v Plaza Const. Corp.*, 151 AD3d 568 [1st Dept 2017], citing *Sparendam v Lehr Constr. Corp.*, 24 AD3d 388, 389 [1st Dept 2005]).

Plaintiff's allegations under Industrial Code §§ 23-1, 23-2, 23-5, 23-6, 23-1.7(a)(b), 23-1.8(c), 23-1.16, 23-1.17, 23-1.19, 23-1.20, 23-1.21, 23-1.25(a), 23-3, 23-3.1, 23-3.2, 23-3.3, 23-5, 23-6, 23-9(a-b, d-g) will not be addressed since plaintiff did not discuss them. As such, they are deemed abandoned and are dismissed (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]).

Defendants' unopposed request for summary dismissal of plaintiff's claims under Labor Law §§ 210, 211, and 241-a is granted, as is plaintiff's Labor Law § 240 claim, which was previously withdrawn (NYSCEF # 93, 94, June 1, 2016 order and the verified amended bill of particulars, respectively).

Accordingly, it is hereby ORDERED that defendants' motion pursuant to CPLR § 3212 for summary judgment on plaintiff's complaint is granted as to plaintiff's claims under Labor Law §§ 200, 210, 211, 240, 241-a, and 241(6) claims

predicated on Industrial Code §§ 23-1, 23-2, 23-3, 23-5, 23-6, 23-1.7, 23-1.8, 23-1.16, 23-1.17, 23-1.19, 23-1.20, 23-1.21, 23-1.25, 23-3, 23-3.1, 23-3.2, 23-3.3, 23-5, 23-6, 23-9.5(a-b, d-g), and those claims are dismissed; it is further

ORDERED that plaintiff's request for leave to amend the bill of particulars to add a violation of Industrial Code § 23-4.2(k) to his Labor Law § 241(6) claim is denied; and it is further

ORDERED that defendants shall serve a copy of this order upon plaintiff with notice of entry within fourteen (14) days of entry.

11/30/2020
DATE

MARGARET A. CHAN, J.S.C.
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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