Guzman v H.E.J. Real Estate Corp.
2020 NY Slip Op 34743(U)
November 6, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 621128/16
Judge: Carmen Victoria St. George
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SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

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MARCOS GUZMAN and ELSA CARIAS GUZMAN,

Plaintiffs,

-against-

H.E.J. REAL ESTATE CORP.,

Defendant.

-- x

Index No. 621128/16

Motion Seq:
001 MG
002 MD
003 MD

Decision/Order

The following electronically filed papers were read upon this motion:

Notice of Motion/Order to Show Cause…………	24-41; 43-61; 68-80
Answering Papers……………………………........	62-63; 66-67; 82
Reply…………………………………………….........	81; 83; 84; 85
Briefs: Plaintiff's/Petitioner's…………………..	
Defendant's/Respondent's………………	

Three motions are pending before this Court for determination: 1) Motion Sequence 001 made by defendant HEJ seeks summary judgment dismissal of the complaint; 2) Motion Sequence 002 made by plaintiffs seeks summary judgment against HEJ, holding HEJ strictly liable pursuant to Labor Law § 240 (1), and 3) Sequence 003 made by plaintiffs seeks to preclude HEJ from introducing into evidence now and at the time of trial of this action HEJ's expert disclosure/expert witness affidavit and testimony (Peter Chen, P.E.). The three motions are consolidated for determination herein.

Plaintiff's Claims

The complaint alleges three causes of action. The first cause of action sounds in negligence/premises liability in that HEJ failed to maintain the parking lot area located at 11 Old Dock Road in Yaphank in a reasonably safe and suitable condition. The second cause of action sounds in a violation of Labor Law §§ 200, 240, 241 and 242-a, alleging that HEJ breached its

statutory duties by allowing plaintiff to work/be in a defectively constructed premise and in failing to provide plaintiff with a safe place to work. The third cause of action is derivative, asserted on behalf of plaintiff's spouse and co-plaintiff.

Plaintiff's verified Bill of Particulars dated May 30, 2017 alleges, inter alia, that HEJ failed to maintain the parking lot for the use of its tenants, that HEJ negligently patched an area of the parking lot "so as to pose a hazard, uneven, slopped (sic) area upon which deliveries were made or received. . .," that the defect in the parking lot caused the high-low forklift to tip, unexpectedly causing the marble slabs to fall onto plaintiff's left foot. Plaintiff alleges that HEJ created the hazardous condition and that HEJ had actual and constructive notice thereof.

Plaintiff's Supplemental Bill of Particulars alleges violations of Labor Law §§ 200, 240 (1), 241 (6) and various violations of the Industrial Code (12 NYCRR and 29 CFR, "among other laws").

Background

Plaintiff Marcos Guzman (plaintiff) commenced this action to recover for personal injuries he suffered while he was employed by Nunzio & Sons Tile & Stone Corp. (Nunzio). It is undisputed that a load of marble located on a hi-low forklift vehicle fell onto plaintiff's left foot and ankle. His co-plaintiff, Elsa Carias Guzman, his spouse, sues derivatively.

The defendant, H.E. J. Real Estate Corp. (HEJ) is the undisputed owner of the real property and warehouse upon which Nunzio, its tenant, conducts its business, and HEJ and Nunzio had a written lease agreement in effect at the time of plaintiff's accident that occurred on June 24, 2015. Plaintiff received workers' compensation benefits from his employer, Nunzio; therefore, Nunzio is not a direct defendant in this action.[1]

It is undisputed that the incident giving rise to this action occurred on June 24, 2015, at approximately 6:30 a.m., at 11 Old Dock Road, Yaphank, Suffolk County, New York, which is owned by HEJ. That location is the address of plaintiff's employer, Nunzio, who is one of HEJ's tenants. The premises consist of a large warehouse subdivided into separate spaces for HEJ's various tenants, surrounded by a parking lot. Loading and unloading of stone for Nunzio's business generally occurred through two bay/garage doors opening onto a portion of the asphalt parking lot.

Plaintiff and two co-workers, plus the plaintiff's boss, Steven, were present when the incident occurred. Steven was driving the forklift (hi-low) at the time of the accident, and plaintiff and his co-workers were walking alongside the forklift that was transporting an unsecured load of marble from inside Nunzio's place of business to Nunzio's van/truck. The load of marble was intended to be delivered to and installed in a hotel in Mineola, Nassau County, New York. Also undisputed is the fact that one of plaintiff's co-workers said to Steven that the load of marble should be tied to the forklift before being moved, as was their usual procedure, but that Steven declined to have the load secured because it was nearly 6:30 a.m., and they were running late. Instead, Steven apparently instructed plaintiff and his co-workers to

[1] HEJ discontinued without prejudice its third-party action against Nunzio by stipulation dated January 17, 2019.

walk alongside the load with their hands on it, to keep it in place. Plaintiff was walking in front of the load of marble and his co-workers were on either side of the load when the load shifted and fell off the forklift.

Plaintiffs' Motion to Preclude Defendant's Expert (Sequence 003)

Since the defendant's expert's affidavit is offered upon HEJ's summary judgment motion, Motion Sequence 003 must necessarily be decided first.

"[A] party's failure to disclose its experts pursuant to CPLR 3101(d) (1)(i) prior to the filing of a note of issue and certificate of readiness does not divest a court of the discretion to consider an affirmation or affidavit submitted by that party's experts in the context of a timely motion for summary judgment" (***Rivers v. Birnbaum***, 102 AD3d 26, 31 [2d Dept 2012]).[2] "CPLR 3101 (d)(1)(i) requires a party to disclose his or her expert witness and certain expert information when served with a proper demand, but does not require a response at any particular time" (***Mazzurco v. Gordon***, 173 AD3d 1001, 1002 [2d Dept 2019]), nor does that statue mandate that the expert be precluded from offering testimony simply because of noncompliance with the statute (***Id.***). "Generally, preclusion is unwarranted without evidence of intentional or willful failure to disclose *and* a showing of prejudice by the party seeking preclusion" (emphasis added) (***Id.***).

Furthermore, CPLR § 3212 (b) provides in relevant part that, "[w]here an expert affidavit is submitted in support of, or in opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit."

Here, a trial certification conference order was issued by the Court on October 28, 2019. It appears that the defendant's expert's inspection occurred on September 27, 2019. Defendant's expert witness disclosure and supplemental exchange are dated February 14, 2020. Plaintiff rejected same on February 26, 2020. Plaintiff presently claims that he has been "surprise[d]" and "seriously prejudiced" by defendant's actions, specifically that defendant's actions "have seriously prejudiced Plaintiff's opposition to the Defendant's pending summary judgment motion." In response to defendant's filing of its summary judgment motion [Sequence 001] on February 28, 2020, plaintiff filed the instant motion [Sequence 003], and then filed his own summary judgment motion seeking judgment against defendant as to his Labor Law § 240 (1) claim on March 2, 2020 [Sequence 002]. Plaintiff requested only one adjournment of defendant's summary judgment motion from its return date of March 23, 2020 to April 6, 2020 (NYSCEF Document # 65). Plaintiff did not request any further adjournments for the purpose of obtaining his own expert, nor did plaintiff seek a stipulation vacating the note of issue. In fact, counsel for the parties engaged in a telephonic settlement conference with this Court on at least one occasion (June 24, 2020 and/or August 4, 2020).

[2] HEJ's motion was timely filed on February 28, 2020.

Aside from plaintiff's general claims of surprise and serious prejudice, plaintiff does not make a showing of prejudice, especially since plaintiff never moved for additional time to obtain an expert's affidavit (***Buchanan v. Mack Trucks, Inc.***, 113 AD3d 716, 718 [2d Dept 2014]; ***Jacobs v. Nussbaum***, 100 AD3d 702, 703 [2d Dept 2012]; ***SCG Architects v. Smith, Buss & Jacobs, LLP***, 100 AD3d 619 [2d Dept 2012]). Thus, there is no basis to preclude use of defendant's expert's affidavit upon defendant's summary judgment motion, or to preclude the expert from testifying at a trial of this action.

Motion Sequence 003 is denied.

Plaintiffs' Summary Judgment Motion Pursuant to Labor Law §240(1) (Sequence 002)

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v Pomeroy,*** 35 NY2d 361 [l974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party (***Makaj v Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

A party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (***Winegrad v New York Univ. Med. Center,*** 64 NY2d 851 [1985]; ***Zuckerman v City of New York,*** 49 NY2d 557 [1980]).

Plaintiffs seek to hold the defendant strictly liable pursuant to Labor Law §240 (1),[3] which reads, in pertinent part as follows:

> "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.

Plaintiff contends that his was a gravity-related accident, and that the certified police report establishes *prima facie* a violation of Labor Law §240 (1). Plaintiff also submits, *inter alia*, his own deposition transcript, the pleadings, and the deposition testimony of HEJ's managing agent, Leonard Gold. According to plaintiff, he was engaged in a covered activity when the marble slabs fell off the forklift, and HEJ breached its non-delegable duty by failing to provide safety devices necessary to protect workers subject to risks inherent in elevated work sites, specifically "the lack of tie or rigging for the unit [marble] on the Hi-Lo was insufficient to maintain balance," and the "failure to properly and adequately secure the unit [marble] on the Hi-

[3] Plaintiff does not seek summary judgment against HEJ on any other ground and/or cause of action.

Lo caused the unit [marble] to fall and injure the Plaintiff" (Affirmation in Support, ⁋⁋ 44, 46-48).

Defendant contends that plaintiff has failed to establish his *prima facie* entitlement to summary judgment on his Labor Law §240(1) claim because there is no proof that plaintiff was engaged in a covered activity at the time of his accident, nor is there any evidence that HEJ was an "owner" as contemplated by the law; accordingly, Labor Law §240(1) is not applicable to the facts of this matter.

Plaintiff's own deposition testimony establishes that he was employed by Nunzio for approximately three years prior to the date of the accident. According to plaintiff, he cut and placed ceramic tiles for Nunzio, and he would also load and install stone for Nunzio. On the day of his accident, he and another co-worker were going to a hotel in Mineola to install the stone (marble). The marble was to be loaded into a Nunzio van for transportation.

As noted by this Court, the marble was placed on the forklift inside Nunzio's units that are rented from HEJ. The marble was not secured to the forklift because plaintiff's boss, Steve, directed that it not be secured since they were running late, this despite a request from one of plaintiff's co-workers that the marble be secured to the forklift. According to plaintiff, the marble is loaded onto wheeled carts that are then secured to the forklift "to prevent them from moving or falling off. That day Steven did not want it to be fastened on to the Hi Lo. That's why the accident happened."

The load of marble was lifted by the Hi Lo forklift without any problem. Steven began driving the forklift out of the warehouse and toward the van. All three of the workers, plaintiff and his two co-workers, "were holding the load." According to plaintiff's testimony, had the load been secured by ropes, plaintiff and his co-workers would not have had to walk along with it to steady it. Plaintiff also testified that the load was to be moved from inside the garage/warehouse to the van, which was approximately eighteen to twenty or twenty-two feet away. The load of marble was about two feet off the ground as it sat on the Hi Lo forklift.

In terms of time, plaintiff testified that "[i]t was quick" from the location where the Hi Lo picked up the marble until the place where the accident happened; plaintiff then testified that it "could be two minutes." Plaintiff described that Steven drove the forklift in reverse to get out of the shop, then Steven turned the Hi Lo around to drive forward, and he started driving forward. As testified to by plaintiff, the three of them were all walking in front of the load of marble: "[o]ne in each corner. I was in the middle." When asked what caused the marble to fall off the forklift, plaintiff answered, "[a]s we were exiting the shop, the floor is not even so the Hi Loader was shaking and that's what caused the load to fall." Plaintiff identified that defendant's Exhibit A best showed the area where his accident happened. When asked what caused the forklift to shake, plaintiff stated, "[w]hat caused it was when he exited shop and made the turn, the load moved to the side, it was uneven, and that caused the Hi Lo to shake." Plaintiff was asked what caused the load to shift, and he testified, "because it was not tied. And also the uneven ground or floor, it's not level."

Referring to Exhibit A, plaintiff testified that the photograph looked like the area did on the day of his accident. During the approximately three years that plaintiff worked for Nunzio, he testified that no work had been done to the blacktop area depicted in Exhibit A. Plaintiff was also asked to point to the area where the accident occurred. The location was described for the record by defendant's counsel, and plaintiffs' counsel agreed to that description, which was stated as follows:

> The witness is describing an area that is top to bottom, roughly centered in the photo, and as far as left/right, it's kind of in line with the brick work that's between two loading doors, and it's about an inch or so, maybe an inch and a half down into the blacktop area.

The plaintiff never marked the photograph in any manner. With respect to defendant's Exhibit D, which depicts a patched area in the asphalt, plaintiff was shown this photograph and when asked if that showed the area where his accident happened, he answered, "I don't know."

The testimony of Leonard Gold, managing agent for HEJ, establishes that HEJ owns the property located at 11 Old Dock Road in Yaphank, having purchased it in the year 2000. Mr. Gold has been the managing agent for HEJ since the year 2000. Mr. Gold explained that HEJ rents the separate spaces to various tenants, and that he visits the property at least once per month to examine the interior and exterior of the building, or to respond to a tenant's complaint. HEJ's property itself if a warehouse facility that totals approximately 30,000 square feet. It is subdivided into smaller spaces occupied by HEJ's various tenants. In 2015, there were approximately seven to twelve separate spaces inside the warehouse, and the area is zoned industrial. Nunzio was one of HEJ's tenants on the date of plaintiff's accident. Each of HEJ's tenants, including Nunzio, had their own front door, rear door, and gas and electric meters.

The record as submitted by the plaintiffs establishes that HEJ is not an "owner" as contemplated by Labor Law §240 (1). HEJ was not a construction site owner at all; instead, HEJ is simply the landlord of plaintiff's employer. "[T]he term 'owners' within the meaning of section 241 of the Labor Law is not 'limited to the titleholder . . . [It encompass[es] a person who has an interest in the property and who fulfill[s] the role of owner by contracting to have work performed for his benefit" (***Kane v. Coundorous***, 293 AD2d 309, 311 [1st Dept 2002], *quoting* ***Copertino v. Ward***, 100 AD2d 565, 566 [2d Dept 1984]). Based upon the testimony of the plaintiff and Leonard Gold, it is evident to this Court that HEJ's property located at 11 Old Dock Road is not the location where the marble was to be installed, nor is that property a construction or work site where the marble was to be installed. In fact, the marble was to be installed in a contiguous county, approximately forty (40) miles away.[4] There is also no evidence in the record that HEJ owns, operates, or has any interest in the hotel in Mineola where the marble was to be installed. Furthermore, HEJ did not hire Nunzio to perform any work at the unnamed hotel in Mineola.

The record also establishes that the plaintiff was not in the process of loading the marble into the Nunzio van, nor was he installing it when the accident occurred; rather, he was walking

[4] The Court takes judicial notice of the fact that Mineola, New York is located approximately 40 miles west of Yaphank, New York according to Google Maps (*see* ***CPLR §4511 [c]***).

in front of the load, with his hand on it, at the direction of his employer. As such, plaintiff was also not involved in "construction" at the time of his accident. Applying the Labor Law to walking astride a load of unsecured marble for transportation to a location 40 miles away that is not owned or operated by this defendant "would be an untoward extension of the protection afforded by the Legislature" (***Flores v. ERC Holding LLC***, 87 AD3d 419, 421 [1st Dept 2011]).

All of the cases cited by plaintiffs in support of their motion are distinguishable. In each of those cited cases, the injured claimant was present and injured at the actual site where construction was occurring. Moreover, where owners were sued, those owners had an interest in the property under construction, and those owners had hired the general contractor and/or the injured party's employer to perform certain construction services. Here, the facts as established by the submitted record are materially distinguishable from the caselaw upon which plaintiff relies. As noted, HEJ did not hire Nunzio to install marble; HEJ did not have any interest in the hotel in in Nassau County in which the marble was to be installed, and HEJ's property at 11 Old Dock Road was a warehouse subdivided into separate spaces for HEJ's tenants, including Nunzio. Accordingly, plaintiffs have failed to establish their *prima facie* entitlement to summary judgment as a matter of law with respect to the alleged violation of Labor Law §240 (1), and the Court need not consider HEJ's opposing papers.

Defendant's Summary Judgment Motion Seeking Dismissal of the Complaint (Sequence 001)

The established record forming the basis for this Court's determination that the plaintiffs have failed to establish their *prima facie* entitlement to summary judgment on the Labor Law §240 (1) claim demonstrates defendant HEJ's *prima facie* entitlement to summary judgment as a matter of law on this same claim since HEJ did not contract to have the injury-causing work performed, HEJ did not have any nexus to the marble installation (*cf.* ***Powell v. Norfolk Hudson, LLC***, 164 AD3d 1283, 1284 [2d Dept 2018]), and plaintiff was not engaged in any a protected activity at the time of the accident.

Also, HEJ has established its *prima facie* entitlement to summary judgment dismissal of plaintiffs' common law negligence claim and their remaining Labor Law claims. In support of its summary judgment motion, HEJ submits, *inter alia*, the pleadings, the deposition transcripts of the plaintiff and Leonard Gold, photographs, the affidavits of Leonard Gold and expert Peter Chen, and an invoice establishing when asphalt aprons were installed by HEJ for its tenant, Nunzio.

A property owner is charged with the duty to maintain the premises in a reasonably safe condition (***Katz v Westchester County Healthcare Corp.***, 82 AD3d 712, 713 [2d Dept 2011]). Of course, a property owner may be held liable for damages resulting from a hazardous condition on its premises if it created the hazardous condition or had either actual or constructive notice of the condition in sufficient time to remedy it (***Gordon v American Museum of Natural History***, 67 NY2d 836, 837 [1986]). To constitute constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant to discover and remedy it (***Borenkoff v Old Navy***, 37 AD3d 749, 750 [2d Dept 2007]). To be entitled to summary judgment in a trip and fall case, a defendant is required to show, *prima facie*,

that she maintained the premises in a reasonably safe condition and she did not have notice of, or create, a dangerous condition that posed a foreseeable risk of injury to persons expected to be on the premises (***Villano v Strathmore Terrace Homeowners Assn., Inc.***, 76 AD3d 1061 [2d Dept 2010]).

The deposition testimony and affidavit of Leonard Gold, HEJ's managing agent, establish that no dangerous condition existed on HEJ's property on the date of plaintiff's accident. The asphalt aprons were installed for Nunzio in June 2013, and so had been in existence the entire time that plaintiff worked for Nunzio. In fact, the aprons were installed to eliminate a height differential between the shop floor and the parking lot thereby enabling an easier transition from one place to another, especially when using a forklift. Moreover, the evidence establishes that there were no prior complaints made to HEJ about the aprons or blacktop area prior to the day of plaintiff's accident, nor was any work performed on the apron since the subject accident. Thus, his testimony establishes that the apron is in the same condition as it was on the date of plaintiff's accident.

Not only did Mr. Gold visit the subject premises, inspecting the interior and exterior on a monthly basis, but Mr. Gold testified that he arranges for repairs to the asphalt based upon his personal inspections. Mr. Gold specifically testified that he also inspects the repairs after their completion to determine if they have been done to his satisfaction. As noted, the specific work done for Nuzio was the installation of the aprons in 2013.

When Mr. Gold was shown defendant's Exhibit A (the same photograph shown to plaintiff at his deposition), Mr. Gold testified that he believed that plaintiff's accident occurred "around the loading area" based upon what he had been told by Steven, plaintiff's boss. Mr. Gold also testified that he never received any violations from any source concerning the asphalt area of 11 Old Dock Road.

Mr. Chen's affidavit establishes that the asphalt aprons outside Nunzio's units were not unreasonably steep and did not violate any applicable code, statute or industry standard. Mr. Chen also observed that the asphalt apron was smooth and does not pose a danger. Since Mr. Gold's affidavit establishes that the apron is in the same condition as it was in 2015, Mr. Chen's observations and opinions based upon his 2019 inspection are relevant and persuasive.

Importantly, defendant's Exhibit A, identified by plaintiff as the photograph best depicting the area where his accident occurred that was taken by his co-worker Omar on the date of the accident, does not depict a dangerous condition at worst, and is insufficient to demonstrate a dangerous condition at best (*see* ***Langer v. BJ's Wholesale Club, Inc.***, 39 AD3d 714 [2d Dept 2007]). As previously noted by this Court herein, the plaintiff did not even mark the area where his accident occurred on the photograph.

Based upon the foregoing, the defendant has established, *prima facie*, that it maintained its premises in a reasonably safe condition and that it had no actual or constructive notice of a dangerous condition thereon prior to plaintiff's accident.

Having established its *prima facie* entitlement to summary judgment as a matter of law on the common law negligence claim, HEJ has also established its prima facie entitlement to summary judgment as a matter of law as to plaintiff's claim that HEJ vilated Labor Law §§ 200, 240 (1) and 241 (6) by allowing him to work in a defectively constructed premise.

Labor Law § 200 is a codification of the common law duty of owners and general contractors to provide workers with a safe place to work (***Rojas v. Schwartz***, 74 Ad3d 1046 [2d Dept 2010]). "To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have 'authority to exercise supervision and control over the work' [internal citations omitted]. Where a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a landowner may be liable under Labor Law § if it 'either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition' [internal citation omitted]" (***Id***. at 1046-1047).

Here, plaintiff alleges that he suffered injuries due to the alleged dangerous condition of the parking lot. As determined, HEJ has established that it maintained the premises in a reasonably safe condition and had no notice (actual or constructive) of any dangerous condition related to the parking lot, HEJ has also demonstrated *prima facie* entitlement to dismissal of plaintiff's Labor Law § 200 claim. There is no evidence, nor does plaintiff claim, that HEJ directed the means and methods of his work, or that HEJ had any authority to supervise or control plaintiff's work for Nunzio. Rather, the submitted evidence demonstrates that plaintiff's boss, Steven, who is also a Nunzio employee, directed that plaintiff and his co-workers walk in front of the load of unsecured marble.

As to plaintiff's Labor Law § 241 (6) claim, the statute provides in pertinent part as follows:

> 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, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

Liability cannot, however, be imposed pursuant to this statute if there is no construction, excavation or demolition work being performed when a plaintiff becomes injured. Also, in order to impose liability under this statute, a plaintiff must allege specific violations of the industrial code but not those establishing general safety standards by invoking general descriptive terms (***Vernieri v. Empire Realty Co.***, 219 AD2d 593 [2d Dept 1995]).

Here, similar to ***Vernieri*** who was moving a sign owned by defendant from the back of the building to the front, plaintiff Marcos Guzman was assisting his co-workers in moving a load of marble from his employer's garage space to his employer's van by walking with the forklift. In the case at bar, unlike ***Vernieri***, HEJ did not even own the marble that eventually fell onto plaintiff's foot. So, not only is the act of walking with the forklift not construction per ***Vernieri***,

but HEJ did not have any interest whatsoever in the load that caused plaintiff's injuries. Accordingly, Labor Law § 241 (6) is not applicable to plaintiff's accident in this case. Moreover, the specific violations alleged by plaintiff are general safety standards, inapplicable, or do not provide a basis for liability under this provision of the Labor Law (***Vernieri*, *supra*** at 597-598). Accordingly, this Court determines that HEJ has established its *prima facie* entitlement to dismissal of plaintiff's Labor Law § 241 (6) claim as well.

In opposition to HEJ's motion, plaintiffs submits what purports to be the affidavit of Marcos Guzman dated March 12, 2020, and plaintiffs rely on Mr. Guzman's deposition testimony, as well as upon Mr. Gold's deposition testimony and affidavit. Notably, plaintiffs do not specifically address defendant's arguments regarding the Labor Law claims, nor is the Labor Law discussed in any way in the opposition papers; thus, by failing to oppose that branch of the defendant's motion concerning dismissal of the Labor Law claims, those claims are deemed abandoned (*see* ***Kronick v. L.P. Thebault Co., Inc.***, 70 AD3d 648 [2d Dept 2010]).

At deposition, Mr. Guzman relied upon the services of a Spanish language interpreter. Mr. Guzman's March 12, 2020 "affidavit" is typewritten entirely in English, but the "affidavit" is not accompanied by a translator's affidavit, which is required of foreign language witnesses. There is no clear indication of who translated the three typed pages to Mr. Guzman, or the qualifications of that person to do so. The lack of a translator's affidavit renders Mr. Guzman's English affidavit facially defective and inadmissible and insufficient to raise a triable question of fact (***CPLR § 2101 [b]***; ***Saavedra v. 64 Annfield Court Corp.***, 137 AD3d 771 [2d Dept 2016]; ***Raza v. Gunik***, 129 AD3d 700 [2d Dept 2015]; ***Eustaquio v. 860 Cortlandt Holdings, Inc.***, 95 AD3d 548 [1st Dept 2012]; ***Reyes v. Arco Wentworth Management Corporation***, 83 AD3d 47 [2d Dept 2011]; *see also* ***Ramos v. Bartis***, 112 AD3d 804 [2d Dept 2013]; ***1650 Realty Associates, LLC v. Sasoun***, 52 Misc3d 139 [A] [App Term 2d Dept 2016]).

Even considering this purported affidavit, plaintiff's statements are self-serving and designed to create a feigned issue of fact. Specifically, and as noted by this Court, plaintiff never marked the area on defendant's Exhibit A where the accident took place. Plaintiff also testified that the marble was caused to fall because as they were exiting the stop "the floor is not even," that the forklift shook because the load moved to the side when his boss, Steven, exited the shop and turned the forklift around, and that the marble load shifted because "it was not tied. And also the uneven ground or floor, it's not level." Now, more than five years after the subject accident and one year after his deposition, Mr. Guzman claims that the marble "did not fall due to the apron area but due to the angle of the area between the apron and the patched area, starting in the middle of the picture and extending into the right bay area. See Exhibit A market (sic) at my deposition." Mr. Guzman further claims in his "affidavit" that "[t]he patched area, that I had walked over in front of the Hi-Lo was depressed approximately 1". I believe said depression along with the angle of ground off the apron to patched area caused the Hi-Lo to tip and the marble to fall as it travelled over the parking area." Attached to his "affidavit" is a copy of defendant's Exhibit A, which is still not marked, and another photograph of unknown date bearing an "X" marking and the initials "MG." This newly marked photograph is also

insufficient to demonstrate a dangerous condition. Aside from the foregoing, plaintiffs fail to submit any evidence of a dangerous condition.

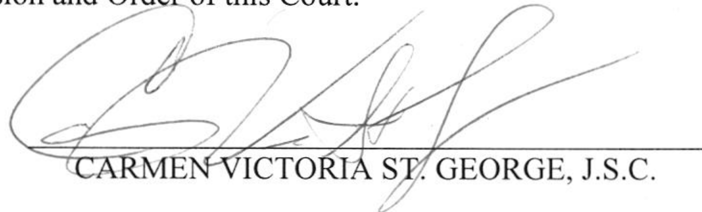
Plaintiffs' Bill of Particulars alleges that the dangerous condition was "the uneven, sloped, irregular patched (sic) portion of the parking lot upon which the HiLo carrying slabs of marble was positioned." When plaintiff Marcos Guzman testified at deposition, not only did he not mention a depressed area of the parking lot, but when he was shown defendant's Exhibit C at deposition depicting a pentagonal-shaped asphalt patch and asked if that is what the area looked like on the day of his accident, Mr. Guzman testified, "[n]o, I do not recognize it." Moreover, as previously noted herein, plaintiff testified that the entire time he worked for Nunzio, three years before the accident, he never saw any work done to that area of the blacktop depicted in defendant's Exhibit A.

Plaintiffs' counsel's affirmation in opposition wherein counsel purports to state that defendant's expert examined the wrong area of the parking lot and that the accident occurred past the apron on the way to the van is not evidence.

Plaintiffs have failed to raise a triable issue of fact sufficient to defeat HEJ's summary judgment motion; therefore, HEJ's motion is granted in its entirety and the complaint is dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: November 6, 2020
Riverhead, NY



CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [X] NON-FINAL DISPOSITION [ ]