

Pena v Pinnacle Assoc. II NY LLC
2021 NY Slip Op 30385(U)
February 8, 2021
Supreme Court, New York County
Docket Number: 162616/2014
Judge: David Benjamin Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID BENJAMIN COHEN **PART** **IAS MOTION 58EFM**

Justice

-----X

IVAN PENA,

Plaintiff,

- v -

PINNACLE ASSOCIATES II NY LLC, R & I
CONSTRUCTION, INC., PHOENIX BUILDING RESTORER
INC., EDGEHILL ASSOCIATES, INC., CENTURY PARKING
CORP., and IMPERIAL PARKING SYSTEM, INC.,

Defendants.

-----X

PINNACLE ASSOCIATES II NY LLC

Third-Party Plaintiff,

-against-

PHOENIX SUTTON STR INC.,

Third-Party Defendant.

-----X

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595554/2015

The following e-filed documents, listed by NYSCEF document number (Motion 006) 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 112, 113, 114, 115, 116, 117, 119, 120, 121, 127, 128, 134, 135, 136, 138, 155

were read on this motion to/for

SUMMARY JUDGMENT

This is an action to recover damages for personal injuries allegedly sustained by a laborer on June 11, 2013, when, while sweeping debris from the floor of a garage located at 2600 Netherland Avenue, Bronx, New York (the Premises), an I-beam that was resting on debris on the floor fell onto his ankle.¹

¹ Pursuant to stipulation of discontinuance dated August 24, 2016, this action was dismissed as against defendant Imperial Parking System, Inc. (NYSCEF Doc. No. 99).

In motion sequence number 006, defendant/third-party plaintiff Pinnacle Associates II NY LLC (Pinnacle) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it.^{2,3}

Plaintiff Ivan Pena cross-moves, pursuant to CPLR 3025 (b), for leave to amend the bill of particulars and, pursuant to CPLR 3212, for summary judgment in his favor on his Labor Law §§ 240 (1) and 241 (6) claims against Pinnacle.

BACKGROUND

On the day of plaintiff's accident, Pinnacle was the owner of the Premises. Defendant "Phoenix" (Phoenix) was hired to perform renovation work at the Premises, including the demolition and replacement of the garage's floors (the Project).⁴ Plaintiff was employed by Phoenix as a laborer.

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was employed by Phoenix as a laborer at the Project. His job included dismantling steel support "beams," lowering the beams

² On May 11, 2018, this Court dismissed the instant action due to plaintiff's failure to comply with several court orders (NYSCEF Doc. No. 127). As a part of this determination, the instant motion was denied as academic (*id.*). Plaintiff appealed the May 11, 2018 determination, and the Appellate Division, First Department reinstated the action and remanded the instant motion and cross motion to this court for consideration (NYSCEF Doc. No. 168).

³ By order and judgment dated June 15, 2017, Pinnacle was awarded summary judgment on default on its third-party claims against third-party defendant Phoenix Sutton STR Inc. (NYSCEF Doc. No. 100).

⁴ The parties never identify whether the "Phoenix" entity discussed in the motion and cross-motion papers is defendant Phoenix Building Restorer Inc. or defaulted third-party defendant Phoenix Sutton STR Inc., or whether these two entities are the same or separate entities. That said, Pinnacle's motion does not seek any relief against either Phoenix entity and plaintiff's cross motion, by its nature, applies only to direct defendants, such as Phoenix Building Restorer Inc. Therefore, going forward, the term "Phoenix" shall apply only to Phoenix Building Restorer Inc.

to the ground, and then placing them on a cart to transport them to the rear of the garage (plaintiff's tr at 21). He was a member of an 8-man team responsible for this work. In addition, plaintiff's duties included cleaning debris from the floor after a beam was removed. Plaintiff had a foreman who directed his work, but he could not remember his name.

Plaintiff explained that the subject beams were steel I-beams that were "[t]wenty to 25 feet long" (*id.* at 47). According to plaintiff, each beam weighed approximately one ton.

Plaintiff testified that, shortly before the accident, he and seven other workers had lowered a beam to the ground (the Beam). According to plaintiff, the Beam was placed at ground level, but it was resting "on top of some debris" – specifically several inches of "[r]ocks, dirt" (*id.* at 57). Plaintiff estimated that one end of the Beam was resting, flat side up, on approximately "15 centimeters" (almost six inches) of debris, while the other end was situated on approximately "11 centimeters" (slightly more than four inches) of debris (*id.* at 64).

At the time of the accident, plaintiff was using a broom to sweep small up pieces of rocks from around the Beam while other workers began loosening another beam nearby. After approximately two minutes of sweeping, the Beam shifted and "fell [on] to [plaintiff's] foot" (*id.* at 51). More specifically, plaintiff explained that he "was cleaning, and from one moment to the other the beam started to move and it turned around" and then landed on his left foot (*id.* at 55). Plaintiff explained that the Beam was "unlevel" because it had been resting on debris (*id.* at 63).

Plaintiff was asked how the Beam moved and testified that he did not know, and further testified that his sweeping did not cause the Beam to move in any way. Plaintiff also explained that no workers were moving or otherwise interacting with the Beam at the time of the accident. Plaintiff was unaware of any witnesses to the accident.

Immediately after the accident, plaintiff's coworkers lifted the beam off plaintiff's foot, rotating it back onto the debris pile. According to plaintiff, his foreman refused to call an ambulance and, instead, waited for someone to arrive to drive plaintiff to a doctor. Ultimately, after visiting the doctor, he was driven to a hospital, where his lower left leg and foot were placed in a cast.

Deposition Testimony of Stephen King (on behalf of Pinnacle)

Stephen King testified that, at the time of the alleged accident, he was the superintendent of the Premises and was employed by non-party Hampton Management, the management company for the Premises. According to King, Hampton Management is related to Pinnacle, which is also sometimes known as the "Olnick Organization" (Olnick) (King tr at 16). He was unsure whether Pinnacle/Olnick was the owner of the Premises. King's duties included managing a staff of 25 doormen, porters, and handymen at the Premises.

At the time of plaintiff's accident, the garage at the Premises was undergoing "concrete repairs" that included "full depth replacement of the concrete . . . where the whole slab is removed, and steel is put up to shore up the new concrete being poured" (*id.* at 19). King was not involved in the Project and "didn't really have any input with the [workers]" (*id.* at 20), although he would monitor the work's progress and report that information to his superiors at Pinnacle/Olnick.

He was not present in the garage at the time of the accident and only learned of it a day later "through the grapevine" from a Phoenix foreman (*id.* at 13). King did not investigate or prepare a report, although he learned that an I-beam "somehow [] slipped off and fell on [plaintiff's] leg" (*id.* at 27). According to King, the Beam was a part of the concrete formwork that was being removed from newly dried concrete. Each I-beam was "20 to 25 feet long" and

weighed around “a thousand pounds” (*id.* at 27-28). King never witnessed any of the I-beams stacked on debris.

There were also electrical and plumbing contractors on site. King oversaw those contractors, but was not involved with Phoenix and its work, except for coordinating their work with the electricians and plumbers. King denied that he ever directed Phoenix’s work (*id.* at 41).

King was also unaware of how Phoenix cleaned debris, noting that, on the occasions when he did observe the garage, “it always seemed to be pretty tidy” (*id.* at 48).

DISCUSSION

“[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]).

Procedural Issues

As an initial matter, Pinnacle argues that plaintiff’s cross motion is untimely since it was filed over 120 days past the filing of the note of issue.

This argument is unpersuasive with respect to that part of plaintiff's cross motion that seeks to amend his bill of particulars, as the filing deadline at issue applies to summary judgment motions, and not motions to amend, which may be made at any time (*see e.g. CIFG Assur. N. Am., Inc. v J.P. Morgan Sec. LLC*, 146 AD3d 60, 65 [1st Dept 2016]).

Pinnacle's argument is also unpersuasive with respect to the branch of plaintiff's cross motion seeking summary judgment. The note of issue was filed on July 27, 2017 (NYSCEF Doc. No. 66). Plaintiff's cross motion was filed on January 10, 2018 – 167 days later (NYSCEF Doc. No. 113). Accordingly, plaintiff's cross motion was filed past the 120-day deadline.

Notably, however, Pinnacle's motion seeks summary judgment dismissing the common law negligence and Labor Law §§ 200, 240 (1) and 241 (6) claims, while plaintiff's cross motion specifically seeks summary judgment in his favor against Pinnacle on two of those claims.

In *Brill v City of New York* (2 NY3d 648 [2004]), the Court of Appeals determined that courts should not consider late summary judgment motions without “a satisfactory explanation for the untimeliness” – i.e. showing good cause for the delay – even if it means permitting less than meritorious claims or defenses to continue to trial.

A cross motion is treated in the same manner. A cross motion is “merely a motion by any party against the party who made the original motion, made returnable at the same time as the original motion” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 87 [1st Dept 2013] [internal quotation marks and citation omitted]). That said, an untimely cross motion seeking relief that is nearly identical to the relief sought in a timely motion for summary judgment is not untimely (*see Altschuler v Gramatan Mgmt., Inc.*, 27 AD3d 304, 304 [1st Dept 2006] [cross motion that “was largely based on the same arguments raised in [movant's] timely motion” was not untimely and was properly considered]). Only those portions of a cross motion for summary

judgment that directly implicate parts of the direct motion may be considered (see *Kershaw*, 114 AD3d at 88 [“an untimely but correctly labeled cross motion may be considered at least as to the issues that are the same in both it and the motion, without needing to show good cause”]).

Here, because plaintiff’s cross motion seeks summary relief solely with respect to the issues raised in Pinnacle’s timely motion, plaintiff’s cross motion is not untimely.

Plaintiff’s Cross Motion for Leave to Amend

As part of his cross motion, plaintiff seeks leave, post note of issue, to amend his bill of particulars to include four industrial code sections, specifically 12 NYCRR 23-1.7 (e) (2), 12 NYCRR 23-2.1 (a) (1), 12 NYCRR 23-3.3 (k) (1) (i) and (ii) and 12 NYCRR 23-3.3 (l).

Pursuant to CPLR 3025 (b), leave to amend shall be freely granted upon a showing of merit, so long as there are no new allegations of fact or new theories of liability, and there is no prejudice to a defendant (see *Berkeley Research Group, LLC v FTI Consulting, Inc.*, 157 AD3d 486, 490 [1st Dept 2018]; *D’Elia v City of New York*, 81 AD3d 682, 684 [2d Dept 2011]).

“A party opposing leave to amend must overcome a heavy presumption of validity in favor of [permitting amendment]” (*O’Halloran v. Metro. Transp. Auth.*, 154 AD3d 83, 86 [1st Dept 2017] [internal quotation marks and citations omitted]). “Prejudice does not occur simply because a defendant . . . has to expend additional time preparing its case. Rather, prejudice occurs when the party opposing amendment has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position” (*Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652, 654-655 [1st Dept 2009]).

Here, plaintiff’s proposed amendments are insufficient as a matter of law because the four newly alleged industrial code provisions are inapplicable to plaintiff’s accident, and, therefore, have no merit to this action.

12 NYCRR 23-1.7 (e) (2)

Industrial Code section 23-1.7(e) (2) provides as follows:

“(e) Tripping and other hazards.

* * *

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

Although this section is sufficiently specific to support a Labor Law § 241 (6) claim (*see Boss v Integral Constr. Corp.*, 249 AD2d 214, 215 [1st Dept 1998]), it is evident that, by its terms, it applies to tripping hazards. Plaintiff alleges that he was injured when the Beam, resting on debris, shifted and fell on his left foot. Plaintiff does not allege, and there is no evidence indicating, that he tripped over accumulations of dirt and debris, scattered tools, materials or sharp projections, or from any other obstruction which could cause tripping (*see Waitkus v Metropolitan Hous. Partners*, 50 AD3d 260, 260 [1st Dept 2008] [section 1.7 (e) (2) “does not apply because the record contains no testimony that plaintiff was injured due to tripping in his work area, that any tools were scattered about, or that he was injured by a sharp projection”]).

Since there is no evidence that section 1.7 (e) (2) applies to the facts of this case, plaintiff is not entitled to amend his bill of particulars to include this Industrial Code provision.

12 NYCRR 23-2.1 (a) (1)

Section 23-2.1(a)(1) of the Industrial Code provides as follows:

“(a) Storage of material or equipment.

“(1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.”

Although section 23-2.1 (a) (1) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Tucker v Tishman Constr. Corp. of N.Y.*, 36 AD3d 417, 417 [1st Dept 2007]), it applies only to material that is being stored (*Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 272 [1st Dept 2007]). Materials are not stored when they are “in use” – i.e. when they are part of the active ongoing work at the time of the accident (*Cody v State of New York*, 82 AD3d 925, 928 [2d Dept 2011]).

Here, since the Beam was a part of the ongoing activity at the Project at the time of the accident, it was “in use.” Specifically, the Beam had just been removed from the support structure that was being dismantled at the time of the accident and was awaiting transport from the work area to a storage area.

In addition, the testimony reflects that the Beam was not a part of a material pile, but rather a single beam on the ground (*see Castillo v Starrett City*, 4 AD3d 320, 321 [2d Dept 2004] [holding that section 2.1 (a) (1) did not apply because, among other things, “the accident did not involve a ‘material pile’ but rather a single, small piece of insulation”]).

Since the Beam was not being stored at the time of the accident and was not part of a material pile, section 23-2.1 (a) (1) is inapplicable to this action, and plaintiff is not entitled to amend his bill of particulars to include this section.

12 NYCRR 23-3.3 (k)

Industrial code section 23-3.3 governs manual demolition and subsection 3.3 (k) governs the storage of materials during demolition, providing as follows:

“(1) General.

“(i) Materials shall not be stored on catch platforms, scaffold platforms, floors or stairways of any building or other structure being demolished, except that any such floor may be used for the temporary storage of materials when

such floor is of such strength as to safely support the load to be imposed.

“(ii) Storage areas shall not interfere with access to any stairway or passageway used by any person as a means of ingress or egress. Suitable barricades shall be provided to prevent stored materials from sliding or rebounding into any area where any person is located or passing. All materials shall be safely piled in such locations as will not interfere with any work operations nor present any hazard to any person employed at or frequenting the demolition site.”

Section 23-3.3 (k) is also sufficiently specific to sustain a Labor Law § 241 (6) claim (*Randazzo v Consolidated Edison Co. of N.Y.*, 271 AD2d 667, 668 [2d Dept 2000]). However, since the Beam was part of the active work being undertaken at the time of the occurrence, and was not being stored, the same rationale discussed with respect to section 23-2.1(a)(1) applies here. Plaintiff argues that the Beam on the floor was in “temporary storage” as contemplated by this provision. However, the temporary storage language is limited to the requirement that the floor being used as temporary storage be “of such strength as to safely support the load” (12 NYCRR 23-3.3 [k] [1] [i]). Here, there is no allegation that the concrete floor was too weak to support the Beam’s weight.

Section 23-3.3 (k) (1) (ii) is also inapplicable to plaintiff’s accident since it requires that designated storage areas do not interfere with stairways or passageways, and plaintiff’s work area was not a storage area.

Accordingly, sections 23-3.3 (k) (1) (i) and (ii) are inapplicable to plaintiff’s accident, and plaintiff is not entitled to amend his bill of particulars to include these provisions.

Industrial Code 12 NYCRR 23-3.3 (l)

Industrial Code section 23-3.3(l) provides, in pertinent part, as follows:

“(l) Safe footing required. Any person working above the first floor or ground level in the demolition of any building or other structure shall not be suffered or permitted to use accumulated debris or piled materials as a footing in the performance of his work.”

This section is also sufficiently specific to support a Labor Law 241 (6) claim (*Cueva v 373 Wythe Realty, Inc.*, 111 AD3d 876, 877 [2d Dept 2013]). However, plaintiff was not “working above the first floor or ground level” at the time of his accident. Nor was plaintiff required to use debris or piled materials as footing. Accordingly, section 23-3.3 (l) does not apply to plaintiff’s accident and plaintiff may not amend his bill of particulars to include this provision.

In accordance with the foregoing, plaintiff’s motion to amend his bill of particulars is denied since none of the Industrial Code sections plaintiff seeks to allege are applicable herein.

The Labor Law § 240 (1) Claim

Pinnacle moves for summary judgment dismissing the Labor Law § 240 (1) claim against it. Plaintiff cross-moves for summary judgment in his favor on the same claim.

Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

“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, 39-40 [2004]).

Initially, Pinnacle does not contest that it is a proper Labor Law defendant with respect to plaintiff’s accident.

In order to recover damages for a violation of Labor Law § 240 (1) under a “falling object” theory, a plaintiff must demonstrate that the object that fell – i.e., the Beam – was in the process of being hoisted or secured at the time of the accident, or that it “was a load that required securing for the purposes of the undertaking at the time it fell” (*Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005] [internal quotation marks and citation omitted]; see also *Quattrocchi v F.J. Sciamè Const. Corp.*, 11 NY3d 757, 758-59 [2008]) [“falling object”

liability under Labor Law § 240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured]).

Here, plaintiff has established his prima facie entitlement to summary judgment in his favor on the Labor Law § 240 (1) claim as against Pinnacle, because he has sufficiently established that he was injured when the unsecured 1000 - 2000 pound, 20 – 25 foot long Beam, which was situated on a four- to six-inch pile of debris, shifted and fell onto his left foot.

In opposition, Pinnacle argues that section 240 (1) does not apply to objects resting on the ground. However, plaintiff's testimony clearly and consistently establishes that the Beam was not resting on the ground, but on top of four to six inches of "debris" that was comprised of "[r]ocks" and "dirt" (plaintiff's tr at 57). Pinnacle presents no evidence contradicting plaintiff's testimony. King's testimony regarding the general cleanliness of the work site is of no moment herein, given that he was not even present at the garage on the day of the accident.

Next, Pinnacle argues that section 240 (1) does not apply to a falling object, such as the Beam, unless that object fell while being hoisted or secured because of the absence or inadequacy of a safety device. This is incorrect. A falling object does not need to be in the process of being hoisted or secured for the accident to be covered under Labor Law § 240 (1). It is enough that the object simply "required securing for the purposes of the undertaking at the time it fell" (*Cammon* 21 AD3d at 200 [internal quotation marks and citations omitted]; accord *Banscher v Actus Lend Lease, LLC*, 103 AD3d 823, 824 [2d Dept 2013]). Given that the Beam was lowered to the ground and onto a pile of debris, rather than a stable surface, it should have been braced or otherwise secured to prevent it from shifting and falling.

Finally, Pinnacle argues that it is entitled to dismissal of this claim because the Beam did not fall from a "physically significant elevation differential" (*Runner v New York Stock Exch.*,

Inc., 13 NY3d 599, 605 [2009]). It claims that a 4 – 6” drop is a de minimis distance that falls outside the scope of section 240 (1).

However, a minor elevation differential “[could not] be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating even over the course of a relatively short descent” (*Wilinski v 334 E. 92nd Hous. Dev. Fung Corp.*, 18 NY3d 1, 10 [2011], quoting *Runner*, 13 NY3d at 605; *Harris v City of New York*, 83 AD3d 104, 110 [1st Dept 2011] [“the weight of the falling object ‘and the amount of force it was capable of generating, even over the course of a relatively short descent’ must be taken into account”]). Applying *Wilinski*, plaintiff is not precluded from recovery because the unsecured Beam that fell on his foot was only six inches above the ground. Rather, given the fact that the unsecured Beam was 20 – 25 feet long and 1000 – 2000 pounds, and given the significant force that such a large object could generate during its short fall, plaintiff’s accident “‘ar[ose] from a physically significant elevation differential” (*id.*).

Thus, Pinnacle is not entitled to summary judgment dismissing the Labor Law § 240 (1) claim as against it, and plaintiff is entitled to summary judgment in his favor as to liability on the same claim.

The Labor Law § 241 (6) Claim

Pinnacle moves for summary judgment in its favor on the Labor Law § 241 (6) claim against it. Plaintiff cross-moves for summary judgment in his favor on the same claim.

Labor Law § 241 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, [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]; *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 (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

Here, plaintiff does not identify any Industrial Code violations in his bill of particulars. This, in and of itself, is not fatal to plaintiff’s claim, as he may seek to add relevant Industrial Code provisions.

“[T]he failure to identify a qualifying section [of the Industrial Code] in the complaint or bill of particulars may serve as the basis for summary dismissal of a § 241 (6) claim. However, this failure is not necessarily fatal to a § 241 (6) claim and, in the absence of unfair surprise, or prejudice, may be rectified by amendment, even where a note of issue has been filed”

(*Walker v Metro-North Commuter R.R.*, 11 AD3d 339, 340-341 [1st Dept 2004])

As discussed above, plaintiff’s motion to amend the bill of particulars to add several Industrial Code provisions was denied because the provisions asserted by plaintiff do not apply to this accident. Given this, plaintiff has failed to allege any qualifying sections of the Industrial Code to support his claim.

Thus, Pinnacle is entitled to summary judgment dismissing the Labor Law § 241 (6) claim as against it, and plaintiff is not entitled to summary judgment in his favor as to the same claim.

The Common-Law Negligence and Labor Law § 200 Claims

Pinnacle moves for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against it. 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 (*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 [1st Dept 2012]; *see also Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007] [liability under a means and methods analysis “requires actual supervisory control or input into how the work is performed”]).

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 [or contractor] created the dangerous condition causing an injury or when the owner [or contractor] 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, the accident was caused by the means and methods of the work – i.e. the placement of the unsecured Beam on debris. The record is devoid of evidence demonstrating that Pinnacle, the owner of the Premises, actually supervised or controlled the demolition that created the debris on the ground, the removal of the Beam, or the placement of the Beam on said debris.

To the extent that Pinnacle had the general authority to inspect the worksite and stop work if there was a dangerous condition, such control has long been held to be insufficient to establish liability under Labor Law § 200. “[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” (*Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013] [internal quotation marks omitted]; *see also Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st 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"]; *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"]; accord *O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 226 [1st Dept 2006]; *aff'd* 7 NY3d 805 [2006]).

Further, to the extent that plaintiff argues that the accident was caused by a hazardous condition inherent in the premises, such argument is unpersuasive, since debris on the floor is not a condition inherent in the premises. Even if it were, there is no evidence that Pinnacle created, or had actual or constructive notice of such a condition.

Thus, Pinnacle is entitled to dismissal of the negligence and Labor Law § 200 claims against it.

The parties' remaining arguments are either without merit or need not be addressed given the findings above.

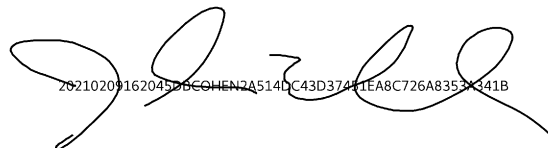
Accordingly, it is hereby:

ORDERED that the motion of defendant/third-party plaintiff Pinnacle Associates II NY LLC (Pinnacle) (motion sequence number 006), pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it is granted to the extent that the common-law negligence and Labor Law §§ 200 and 241 (6) claims against it are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the branch of plaintiff's cross-motion, pursuant to CPLR 3025 (b), for leave to amend his bill of particulars is denied; and it is further

ORDERED that the branch of plaintiff's cross-motion, pursuant to CPLR 3212, for summary judgment in his favor as to liability on his Labor Law §§ 240 (1) and 241 (6) claims is granted with respect to the Labor Law § 240 (1) claim only, and is otherwise denied; and it is further

ORDERED that the Clerk is to enter judgment accordingly.



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DAVID BENJAMIN COHEN, J.S.C.

2/8/2021
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE