

**Chuqui v Cong**

2021 NY Slip Op 31124(U)

March 2, 2021

Supreme Court, Kings County

Docket Number: 521397/2017

Judge: Devin P. Cohen

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Supreme Court of the State of New York  
County of Kings

Index Number 521397/2017

Seq# 001

Part 91

**DECISION/ORDER**

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

JOSE D. CHUQUI,

Plaintiff,

against

CONG. AHAVAS TZOOKAH V'CHESED, INC., MESIVTA  
MEOR HATORAH AND FAST BUILD, INC.,

Defendants.

**Papers**

**Numbered**

Notice of Motion and Affidavits Annexed.....	_____
Order to Show Cause and Affidavits Annexed...	<u>1</u>
Answering Affidavits.....	<u>2-3</u>
Replying Affidavits.....	_____
Exhibits.....	_____
Other .....	_____

CONG. AHAVAS TZOOKAH V'CHESED, INC. AND  
MESIVTA MEOR HATORAH ,

Third-Party Plaintiffs,

against

UPSTATE CONNECTION LLC,

Third-Party Defendant.

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Upon the foregoing papers, plaintiff's motion for partial summary judgment (Seq. 001) is decided as follows:

Plaintiff commenced this action against defendants for damages allegedly caused by injuries from an accident involving a nail gun. There appears to be no dispute that, while working as a carpenter for third-party defendant Upstate Connection Company, he was placing and nailing wooden plates using a nail gun. As he was using the nail gun, a piece of metal flew into his eye, injuring him. Plaintiff claims that he was not given gloves, a hard hat, or safety glasses. Plaintiff asserts claims for negligence and violation of Labor Law §§ 200 and 241(6).

Plaintiff moves for partial summary judgment on his claim for violation of Labor Law § 241(6). The moving party on a motion for summary judgment bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Labor Law § 241(6) imposes on owners and contractors a non-delegable duty 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" (*Lopez v New York City Dept. of Envtl. Protection*, 123 AD3d 982, 983 [2d Dept 2014]). To prove such a claim, plaintiff must prove a violation of a rule or regulation promulgated by the Commissioner of the Department of Labor (*Vita v New York Law School*, 163 AD3d 605, 608 [2d Dept 2018]).

Plaintiff asserts that defendants violated Industrial Code § 23-1.8, which requires eye protection "suitable for the hazard involved . . . and shall be used by all persons while employed in welding, burning or cutting operations or in chipping, cutting or grinding any material from which particles may fly, or while engaged in any other operation which may endanger the eyes."

The use of a nail gun is not among the specific list of actions that per se require eye protection in Section 23-1.8. Thus, plaintiff argues that using a nail gun is an "operation which may endanger the eyes". In *Quiros v Five Star Improvements, Inc.* (134 AD3d 1493 [4th Dept 2015]), the Fourth Department held that the danger to the eyes inherent in the use of a nail gun requires the protections mandated by Section 23-1.8. Conversely, the First Department has held that "[w]hether the activity in which plaintiff was engaged presented a foreseeable risk of eye

injury, requiring the furnishing of eye protection ‘suitable for the hazard involved,’ pursuant to Industrial Code § 23-1.8(a), is a question for the jury” (*Buckley v Triborough Bridge and Tunnel Auth.*, 91 AD3d 508, 509 [1st Dept 2012]).

The Second Department has not expressly held that the use of a nail gun, either generally or in a specific case, will endanger the user’s eyes. In *Montenegro v P12, LLC* (130 AD3d 695 [2d Dept 2015]) plaintiff was injured while using a nail gun. The plaintiff asserted a claim for violation of Labor Law § 241(6) based on Industrial Code § 23-1.8. Defendant moved for summary judgment to dismiss the claim and the trial court granted the motion. On appeal, the Second Department held that defendant failed to eliminate triable issues of fact as to whether the plaintiff was engaged in work that “may endanger the eyes” so as to require eye protection in accordance with Section 23-1.8 (*Montenegro*, 130 AD3d at 697).

In *Guryev v Tomchinsky* (87 AD3d 612 [2d Dept 2011]), the plaintiff’s eye was injured while using a nail gun. The plaintiff asserted a Labor Law § 241(6) claim based on Section 23-1.8. One of the defendants moved for summary judgment to dismiss the claim, and the plaintiff cross-moved for summary judgment on this claim. The trial court granted the defendant’s motion and denied the plaintiff’s cross-motion. On appeal, the Second Department held that the “plaintiff’s submissions failed to eliminate a triable issue of fact as to whether, at the time of his accident, he was engaged in work that ‘may endanger the eyes’ so as to require the use of eye protection pursuant to Industrial Code” (*Guryev*, 87 AD3d at 615, *affd*, 20 NY3d 194 [2012]).

Neither *Montenegro* nor *Guryev* clearly resolve whether the use of a nail gun itself is work that may endanger the eyes, and so requires the protections of Section 23-1.8. The Second Department’s denial of defendant’s summary judgment motion in *Montenegro* suggests that the

use of nail guns can be protected activity, and that a defendant must provide some evidence that, in these circumstances, the plaintiff's eyes were protected or never in danger. The decision in *Guryev* does not describe the submissions by each side, and so it is not clear in what way plaintiff failed to rebut defendant's prima facie case.

Here, plaintiff testified at his deposition that the nails that were loaded into the nail gun were held together by wire. He testified that, as he fired the nail gun, the air from the pneumatic mechanism blew the discarded wire into his eye (plaintiff's EBT at 32-33, 67-69).<sup>1</sup> In this court's opinion, the evidence shows that plaintiff's use of this nail gun endangered his eyes and thus required the use of eye protection, such as safety glasses, in accordance with Industrial Code § 23-1.8.

Furthermore, I agree with the appellate court in *Quiros*, which held that the use of a nail gun "clearly falls within the regulatory definition of engaging 'in any other operation which may endanger the eyes'" (*Quiros*, 134 AD3d at 1494). A nail gun is a ballistic device that operates by firing a projectile into material at high speed. By its nature, the action of the device presents a risk of harm from the projectile itself, as well as from any waste from the nail cartridge or from material into which the projectile is fired.

Third-party defendant Upstate Connection LLC, plaintiff's employer, opposes plaintiff's motion on the basis that the motion is premature. Upstate Connection argues that it was just brought into the case and that Fast Build, the general contractor, has not yet been deposed.

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<sup>1</sup> Defendants wrongly contend that plaintiff admitted to causing his own accident by "nail[ing] himself" (plaintiff's EBT at 72). Plaintiff's somewhat self-deprecating comment does not describe that how the injury occurred. Plaintiff clearly explained that a piece of wire from a nail blew into his eye when he fired the nail gun (*id.* at 32-33, 67-69).

However, Upstate Connection does not describe what additional discovery it needs to defend this motion (*Cohen v Lebgutt Realty, LLC*, 158 AD3d 740, 741 [2d Dept 2018]).

Upstate Connection also argues that plaintiff cannot claim a violation of Labor Law § 241(6) because plaintiff was a “recalcitrant worker”. Upstate Connection submits the affidavit of Luis Sarango, who claims that eye protection was available but that plaintiff did not wear it. However, a recalcitrant worker must not simply neglect to wear protection, but must rather refuse a direct order to wear it (*Garbett v Wappingers Cent. School Dist.*, 160 AD3d 812, 815 16 [2d Dept 2018]; *Silvas v Bridgeview Inv'rs, LLC*, 79 AD3d 727, 731 [2d Dept 2010]). There is no such evidence here.

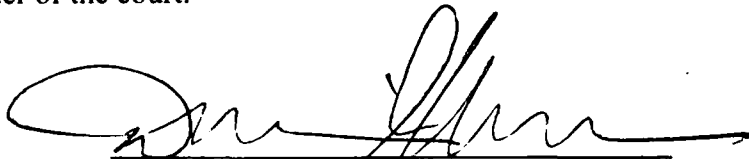
Lastly, defendant Mesivta Meor Hatorah argues that it is not liable because it had no interest in the premises. Yosef Erlich, who appeared on behalf of defendant Mesivta Meor Hatorah for a deposition, testified that the “Mesivta Meor Hatorah is also owned by the same people from the congregation who run a school in Brooklyn with the same name, with Mesivta Meor Hatorah, and they use that as a summer camp, summer residence for the boys that are in the Yeshiva” (Erlich EBT at 8-9). Mr. Erlich also states that there is a landlord/tenant relationship between Mesivta Meor Hatorah and Congregation Ahavas Tzookah V' Chesed, Inc. (*id.* at 9). There is then a discussion off the record and the subject is not pursued. In his reply, plaintiff does not oppose Mesivta Meor Hatorah’s contention that it is not liable. Accordingly, the court will not grant summary judgment against Mesivta Meor Hatorah on plaintiff’s Labor Law § 241(6) claim.

For the reasons stated above, plaintiff's motion for partial summary judgment is granted as against defendant Cong. Ahavas Tzookah V'Chesed, Inc., but not as against defendant Mesivta Meor Hatorah.

This constitutes the decision and order of the court.

March 2, 2021

DATE



DEVIN P. COHEN

Justice of the Supreme Court

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