Tripodi v BNB Ventures IV LLC
2021 NY Slip Op 33609(U)
October 6, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 609169/2016
Judge: George Nolan

SHORT FORM ORDER

INDEX No. 609169/2016

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 55 - SUFFOLK COUNTY

PRESENT:

Hon. GEORGE M. NOLAN
Justice of the Supreme Court

MOTION DATE 1/28/21
ADJ. DATE 4/22/21
Mot. Seq. # 001 MotD

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CHRISTOPHER TRIPODI,

Plaintiff,

- against -

BNB VENTURES IV LLC, BNB VENTURES LLC, and RACANELLI CONSTRUCTION & DEVELOPMENT COMPANY, INC.,

Defendants.

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BNB VENTURES IV LLC,

Third-Party Plaintiff,

- against -

NESCONSET CONSTRUCTION CO., INC.,

Third-Party Defendants.

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Upon the following papers read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendants, filed December 28, 2020 ; Notice of Cross Motion and supporting papers ___; Answering

Affidavits and supporting papers by plaintiff, filed March 22, 2021 ; Replying Affidavits and supporting by defendants, filed April 5, 2021 ; Other ___; it is

ORDERED that the motion by defendants BNB Ventures IV LLC, BNB Ventures LLC, and Racanelli Construction & Development Company, Inc., for summary judgment dismissing the causes of action pursuant to Labor Law §§ 200, 240 (1), and 241 (6) is granted to the extent of dismissing the causes of action pursuant to Labor Law §§ 200 and 240 (1), and plaintiff's reliance on certain provisions of the Industrial Code as provided herein, and is otherwise denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Christopher Tripodi on February 19, 2016, when he was run over by a skid steer loader Bobcat on the premises of a construction site at 2510 Montauk Highway, in Bridgehampton, New York, owned by defendant BNB Ventures, LLC. The accident occurred during plaintiff's employ as a laborer by Nesconset Construction Co., Inc. Defendant Racanelli Construction & Development Company, Inc. was the general contractor or construction manager of the construction project. Plaintiff asserts claims against defendants for common law negligence and violations of Labor Law §§ 200, 240, 241, 241a, and 241 (6). By stipulation dated August 6, 2018, the third-party action against Nesconset Construction Co., Inc. was discontinued.

Plaintiff testified that he worked for Nesconset Construction for almost four years as a laborer before the accident. He testified that after he arrived on the construction site on the day of the accident, his co-worker Ryan Longboat ("Ryan") operated a skid steer loader Bobcat, owned by Nesconset, to transport and spread material in the parking lot. He stated that he was never told that there was anything wrong with the Bobcat and that it was brand new. Plaintiff testified that the material was then graded and tamped using a tamper to compact a base layer of cement chips, gravel, and rocks ("RC2" or "RCA") in the parking lot in preparation of pouring asphalt. He explained that they had already spread and tamped two truck loads of material before the accident occurred.

Plaintiff testified that while waiting for the next load of material to be delivered, which Ryan would transport and spread in the parking lot with the Bobcat, he started the tamper in order to move it. He stated that he intended to move the tamper from its then current location, as the next drop of material would be in that area, to where the tamper would be needed next. Plaintiff testified that he began moving the tamper by tamping from south to north along the curb. He stated that he began to change the tamper's direction to go east and performed a visual check on the Bobcat, which was parked approximately 35 to 50 yards away in the parking lot. He stated that he tried to signal to Ryan by looking at him and making hand gestures, such as waving his hand in the air and "cursing" him. He explained that it took approximately 30 seconds to fully turn the tamper to go east and that within seconds of making the turn, he heard the Bobcat's backup alarm and turned around to see the Bobcat "right on top of [him]." Plaintiff stated that he turned into the Bobcat as it reversed and that he grabbed the arm of the bucket to pull himself up. Plaintiff further explained that he "held on for dear life" as Ryan maneuvered the Bobcat to go forward and then backwards again, and that his legs went into the gears between the track and the cab. Plaintiff stated that he banged on the occupant's section of the Bobcat to get Ryan's attention, but Ryan did not stop until someone came running out of the nearby building screaming and plaintiff then fell to the ground.

Plaintiff testified that Racanelli was a general contractor that subcontracted Nesconset for certain work. He stated that he neither received any directives, direction, or instructions from any Racanelli

employees nor observed whether any Racanelli employees gave direction or instructions to any Nesconset employees. He also testified that while no one from Racanelli directed him how to do his job, he observed the Racanelli foreman sometimes tell Ryan or Dave Longboat, secretary and partner of Nesconset Construction, that he wanted the job performed a certain way. He further stated that he did not know if Racanelli had a supervisory role with respect to Nesconset's work at the job site. He explained that Ryan or Dave Longboat would go into the foreman's trailor to discuss what work was going to be done, and that he got his directions from Dave Longboat. He stated that sometimes the foreman would watch Nesconset work after giving a direction, but that he never saw the foreman intervene when Nesconset was performing a task. Plaintiff testified that no one from Racanelli had anything to do with how he and his co-workers worked on the day of the accident. He also testified that there were no safety meetings on site or off site regarding this job.

Defendants now move for summary judgment dismissing the Labor Law §§ 200, 240 (1), 241 (6) causes of action and the common law negligence cause of action. They argue that Racanelli had no supervision or control over plaintiff's work or the operation of the Bobcat, that plaintiff's work does not come within the protection of the scaffold law, and that the accident did not result from the absence or inadequacy of safety devices. Defendants also argue that plaintiff did not allege a sufficiently specific violation of the Industrial Code applicable to the facts. They submit, in support of the motion, copies of the pleadings, the bill of particulars, photographs, and the transcript of plaintiff's deposition testimony. In opposition, plaintiff concedes that his Labor Law § 240 (1) claims should be dismissed and consents to the dismissal of his Labor Law § 200 claim asserted against defendant BNB Ventures, LLC only. Plaintiff argues that triable issues of fact remain as to defendants' violation of Industrial Code (12 NYCRR) §§ 23-4.2 (k), 23-9.4 (h)(4), and 23-9.5, and Racanelli's violation of Labor Law § 200. He submits, in opposition, photographs, the transcripts of the deposition testimony of Ryan Longboat, David Longboat, Michael Gaetan, and Douglas Winter, and the affidavit of John Coniglio.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Labor Law § 200 is a codification of the common law duty of owners or general contractors to maintain a safe construction site (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816 [1998]; ***Honeyman v Curiosity Works, Inc.***, 154 AD3d 820, 62 NYS3d 183 [2d Dept 2017]; ***Wadlowski v Cohen***, 150 AD3d 930, 55 NYS3d 279 [2d Dept 2017]; ***McKee v Great Atl. & Pac. Tea Co.***, 73 AD3d 872, 905 NYS2d 601 [2d Dept 2010]). "Cases involving Labor Law § 200 fall into two broad categories, namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (***Melendez v 778 Park Ave. Bldg. Corp.***, 153

AD3d 700, 702, 59 NYS3d 762 [2d Dept 2017], quoting ***Torres v City of New York***, 127 AD3d 1163, 1165, 7 NYS3d 539 [2d Dept 2015]). Where a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that he, she, or it had the authority to supervise or control the performance of the work (***Rizzuto v LA. Wenger Contr. Co., Inc.***, 91 NY2d 343, 352, 670 NYS2d 816 [1998]; ***Poulin v Ultimate Homes, Inc.***, 166 AD3d 667, 87 NYS3d 189 [2d Dept 2018]; ***Sullivan v New York Athletic Club of City of New York***, 162 AD3d 955, 958, 80 NYS3d 93 [2d Dept 2018]; ***Kandatyan v 400 Fifth Realty, LLC***, 155 AD3d 848, 63 NYS3d 681 [2d Dept 2017]; ***Rodriguez v Mendlovits***, 153 AD3d 566, 60 NYS3d 87 [2d Dept 2017]). "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (***Ortega v Puccia***, 57 AD3d 54, 62, 866 NYS2d 323 [2d Dept 2008]). "[M]ere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200" (***Ortega v Puccia***, *supra* at 62; ***Kandatyan v 400 Fifth Realty, LLC***, *supra*). In the alternative, where a defective premises condition is alleged, a property owner may only be held liable for violation of Labor Law § 200 if the owner either created the dangerous condition, or had actual or constructive notice of its existence (***Pacheco v Smith***, 128 AD3d 926, 9 NYS3d 377 [2d Dept 2015]; ***La Giudice v Sleepy's Inc.***, 67 AD3d 969, 890 NYS2d 564 [2d Dept 2009]; ***Chowdhury v Rodriguez***, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]; ***Ortega v Puccia***, *supra*).

Defendants established their prima facie entitlement to summary judgment dismissing plaintiff's claims in common law negligence and Labor Law § 200 through evidence that the subject accident stemmed from the manner of work, and that they did not have the authority to control or supervise the performance of the work (*see* ***Gomez v 670 Merrick Rd. Realty Corp.***, 189 AD3d 1187, 138 NYS3d 111 [2d Dept 2020]; ***Poulin v Ultimate Homes, Inc.***, 166 AD3d 667, 87 NYS3d 189 [2d Dept 2018]; ***Kandatyan v 400 Fifth Realty, LLC***, 155 AD3d 848, 63 NYS3d 681 [2d Dept 2017]; ***Melendez v 778 Park Ave. Bldg. Corp.***, *supra*; ***Zupan v Irwin Contr. Inc.***, 145 AD3d 715, 43 NYS3d 113 [2d Dept 2016]). At most, defendants' right to generally supervise the work performed did not amount to supervision and control of the performance of plaintiff's work (*see* ***Poulin v Ultimate Homes, Inc.***, *supra*; ***Zupan v Irwin Contr. Inc.***, *supra*; ***Ferreira v City of New York***, 85 AD3d 1103, 927 NYS2d 100 [2d Dept 2011]; ***Ortega v Puccia***, *supra*).

In opposition to defendants' prima facie showing of entitlement to summary judgment dismissing the cause of action pursuant to Labor Law § 200 asserted against Racanelli, plaintiff failed to raise a triable issue of fact as to whether Racanelli had the requisite supervision or control over his work (*see* ***Giglio v Turner Const. Co.***, 190 AD3d 829, 136 NYS3d 744 [2d Dept 2021]; ***Gomez v 670 Merrick Rd. Realty Corp.***, *supra*; ***Poulin v Ultimate Homes, Inc.***, *supra*; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). Michael Gaetan, Racanelli's site superintendent, testified that Racanelli was the construction manager of the subject construction site and that he was on site the day of the accident. He explained that he was responsible for ensuring that people on site had personal protective equipment and that he could stop workers from working in his capacity as superintendent. Mr. Gaetan testified that if he saw Ryan or plaintiff without safety vests, he would tell them to stop and put on a vest. He would inspect the trade's work and "would talk about it," if work was not being done correctly or safely, because "[t]here is a million ways of doing something." He stated that on the morning of the accident, Ryan and plaintiff missed the toolbox meeting, but that he spoke to them about what they were doing on the site that day. He stated that they were

"pulling final grade on the parking lot area" wherein Ryan was spreading RCA with the Bobcat and plaintiff was using the tamper. Mr. Gaetan testified that he did not instruct them as to how they were to do their job. He further testified that before the accident, he never had any complaints about the manner in which Ryan operated the Bobcat or plaintiff operated the tamper.

Douglas Winter, Racanelli's director of safety, testified that his duties included visiting various job sites weekly or biweekly to look for deficiencies in safety. He stated that he would point out safety deficiencies to the Racanelli supervisors and project managers, and make corrections on site. He testified that if he saw an imminent danger for any person on site, he would go to that person and stop them from performing the task. Mr. Winter testified that he does not give subcontractors direction unless it's a "life safety issue," as he gives direction to Mr. Gaetan, who is responsible for the site. He also stated that he did not know whether Mr. Gaetan told anyone from Nesconset how to do their work.

David Longboat, secretary and partner of Nesconset Construction, testified that Racanelli ran the construction site's toolbox meetings. He stated that if Mr. Gaetan told him to stop work, he would listen to that direction and that he would do work in a different order per Mr. Gaetan's instructions if it were beneficial to the job.

Ryan Longboat, Nesconset's equipment operator, testified that Racanelli hosted weekly toolbox meetings and safety meetings that he and plaintiff attended. He explained that Nesconset took general directions from Racanelli as to what needed to be done and when it needed to be done. He stated that while Racanelli would not say how they wanted work done, "they would give you a time schedule and we would . . . figure out how we would facilitate their plan" or they would tell Nesconset in what order they wanted things done. Ryan testified that he did not recall any particular discussions with Racanelli in regards to how he operated heavy equipment on the site, and that he did not recall whether Racanelli told him before the accident how equipment should be operated when there is more than one piece of equipment operated in a particular area. He stated that no one from Racanelli came to talk to him about the way he was doing his job on the day of the accident. He also testified that at the time of the accident, neither Racanelli nor the owner of the property were in the parking lot directing or controlling the work that he and plaintiff were doing.

Ryan Longboat testified that plaintiff was helping him with excavation, and with spreading and tamping the RCA. He explained that he was operating the Bobcat from east to west in the northern portion of the parking lot, that plaintiff was operating the tamper from east to west in the southern portion of the parking lot, and that they were at least 30 feet apart from each other. He further explained that while waiting for the next load of material to be delivered, he was "cleaning everything up so it could be compacted" by dragging the bucket while moving in reverse to smooth out the material. He stated that he did not direct plaintiff to tamp and that plaintiff did it on his own volition.

Plaintiff consents to dismissal of the cause of action pursuant to Labor Law § 200 asserted against BNB Ventures, LLC. Therefore, the cause of action pursuant to Labor Law § 200 against BNB Ventures, LLC, is dismissed.

Labor Law § 240 provides, in pertinent part, that all contractors and owners and their agents must furnish or erect, or cause to be furnished or erected, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices to give proper protection to an employee in his or her performance in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure. Labor Law § 240 (1) imposes absolute liability upon owners and contractors who fail to provide or erect safety devices necessary to give proper protection to workers exposed to elevation-related hazards (***Saint v Syracuse Supply Co.***, 25 NY3d 117, 8 NYS3d 229 [2015]; ***Misseritti v Mark IV Constr. Co., Inc.***, 86 NY2d 487, 634 NYS2d 35 [1995]; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*; ***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 577 NYS2d 219 [1991]). The hazards intended to be mitigated by Labor Law § 240 (1) "are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (***Rocovich v Consolidated Edison Co.***, *supra* at 514; *see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*). Labor Law § 240 (1) applies to both "falling worker" and "falling object" cases (***Narducci v Manhasset Bay Assocs.***, 96 NY2d 259, 727 NYS2d 37 [2001]).

The protections of Labor Law § 240 (1) apply only to a narrow class of special hazards and do not apply to any and all perils that may be connected to the effects of gravity (***Palumbo v Transit Tech., LLC***, 144 AD3d 773, 41 NYS3d 85 [2d Dept 2016]; ***Santoro v New York City Tr. Auth.***, 302 AD2d 581, 755 NYS2d 425 [2d Dept 2003]). "[T]he relevant inquiry is 'whether the harm flows directly from the application of the force of gravity to the object'" (***Kandatyan v 400 Fifth Realty, LLC***, 155 AD3d 848, 850, 63 NYS3d 681 [2d Dept 2017], quoting ***Runner v New York Stock Exchange, Inc.***, 13 NY3d 599, 604, 895 NYS2d 279 [2009]). Defendants established their prima facie entitlement to summary judgment dismissing plaintiff's claims in Labor Law § 240 (1) through evidence that the accident did not involve a gravity or elevation-related hazard (*see* ***Guallpa v Canarsie Plaza, LLC***, 144 AD3d 1088, 42 NYS3d 1088 [2d Dept 2016]; ***Torres v City of New York***, 127 AD3d 1163, 7 NYS3d 539 [2d Dept 2015]). In opposition, plaintiff concedes that the cause of action pursuant to Labor Law § 240 (1) should be dismissed. Therefore, the cause of action pursuant to Labor Law § 240 (1) is dismissed.

Labor Law § 241 "[i]mposes 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" (***Mitchell v Caton on the Park, LLC***, 167 AD3d 865, 866, 90 NYS3d 316 [2d Dept 2018]; *see* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Mendez v Vardaris Tech, Inc.***, *supra*; ***Jones v City of New York***, 166 AD3d 739, 87 NYS3d 631 [2d Dept 2018]; ***Lopez v New York City Dept. of Envtl. Protection***, 123 AD3d 982, 999 NYS2d 848 [2d Dept 2014]). "A plaintiff asserting a cause of action under Labor Law § 241 (6) must demonstrate a violation of a rule or regulation of the Industrial Code, which gives a specific, positive command, and is applicable to the facts of the case" (***Rodriguez v D & S Bldrs., LLC***, 98 AD3d 957, 958, 951 NYS2d 54 [2d Dept 2012]; *see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*; ***Jones v City of New York***, *supra*; ***Simmons v City of New York***, 165 AD3d 725, 85 NYS3d 462 [2d Dept 2018]; ***Aragona v State of New York***, 147 AD3d 808, 47 NYS3d 115 [2d Dept 2017]). The particular provisions relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles (***Misicki v Caradonna***, 12 NY3d 511, 882 NYS2d 375 [2009]). Furthermore, a

plaintiff must show that the violation of the regulation was a proximate cause of his or her accident (***Seaman v Bellmore Fire Dist.***, 59 AD3d 515, 873 NYS2d 181 [2d Dept 2009]).

Defendants established a prima facie case of entitlement to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim as to some of the alleged violations of the Industrial Code, because they are inapplicable to the case at bar or reference mere general safety standards (*see* ***Simmons v City of New York***, *supra*; ***Honeyman v Curiosity Works, Inc.***, 154 AD3d 820, 62 NYS3d 183 [2d Dept 2017]; ***Carrillo v Circle Manor Apts.***, 131 AD3d 662, 15 NYS3d 463 [2d Dept 2015]; ***Palacios v 29th Street Apts, LLC***, 110 AD3d 698, 972 NYS2d 615 [2d Dept 2013]). 12 NYCRR 23-1.5, which merely sets forth a general standard of care for employers, cannot serve as a predicate for liability pursuant to Labor Law § 241 (6) (*see* ***Honeyman v Curiosity Works, Inc.***, 154 AD3d 820, 62 NYS3d 183 [2d Dept 2017]; ***Ulrich v Motor Parkway Props., LLC.***, 84 AD3d 1221, 924 NYS2d 493 [2d Dept 2011]; ***Weinberg v Alpine Improvements, LLC***, 48 AD3d 915, 851 NYS2d 692 [3d Dept 2008]) 12 NYCRR 23–1.7 (d), and (e)(1) and (e)(2), which requires owners and general contractors, inter alia, to keep all passageways and working areas free of debris or conditions which could cause slipping and tripping, is inapplicable, as no slipping or tripping hazard was alleged (*see* ***Raffa v City of New York***, 100 AD3d 558, 955 NYS2d 9 [1st Dept 2012]; ***Mendez v Jackson Dev. Group, Ltd.***, 99 AD3d 677, 951 NYS2d 736 [2d Dept 2012]; ***Cooper v State of New York***, 72 AD3d 633, 899 NYS2d 275 [2d Dept 2010]). Plaintiff's claim predicated on 12 NYCRR 23-1.8 (c)(2) fails as a matter of law, because he does not claim injury due to failure to protect against wet footing. 12 NYCRR 23-2.1, which sets forth requirements for material or equipment storage and disposal of debris, is inapplicable under the circumstances of this case (*see* ***Gargan v Palatella Saros Builders Group, Inc.***, 162 AD3d 988, 78 NYS3d 415 [2d Dept 2018]; ***Thompson v BFP 300 Madison II, LLC***, 95 AD3d 543, 943 NYS2d 515 [1st Dept 2012]; ***Zamajtys v Cholewa***, 84 AD3d 1360, 924 NYS2d 163 [2d Dept 2011]; ***Cody v State of New York***, 82 AD3d 925, 919 NYS2d 55 [2d Dept 2011]). 12 NYCRR 5.22 is inapplicable, as plaintiff did not use stilts in performing his work on the day of the accident (*see* ***Delahaye v Saint Anns Sch.***, 40 AD3d 679, 836 NYS2d 233 [2d Dept 2007]).

Further, 12 NYCRR 23-9.2 (a) is not applicable to the facts of this case, as plaintiff does not claim that the subject Bobcat was not in good repair or proper operating conditions at the time of his accident, or that it was being serviced or repaired while not at rest (*compare* ***Golec v Dock St. Constr., LLC***, 186 AD3d 463, 129 NYS3d 160 [2d Dept 2020]). 12 NYCRR 23-9.2 (b)(1) is a generally safety standard that does not give rise to a nondelegable duty (*see* ***Nicola v United Veterans Mut. Hous. No. 2, Corp.***, 178 AD3d 937, 116 NYS3d 296 [2d Dept 2019]; ***Guallpa v Canarsie Plaza, LLC***, 144 AD3d 1088, 42 NYS3d 293 [2d Dept 2016]; ***Abelleira v City of New York***, 120 AD3d 1163, 992 NYS2d 324 [2d Dept 2014]; ***Gonzalez v Perkan Concrete Corp.***, *supra*). 12 NYCRR 23-9.3 also is inapplicable to this case, as plaintiff does not claim injury due to conveyor or cableway utilization. 12 NYCRR 23-9.4 (h)(4) fails as a matter of law, because plaintiff was a member of the work crew assigned to perform work at the job site and was not an "unauthorized person" not permitted to be adjacent to the Bobcat (*see* ***Gonzalez v Perkan Concrete Corp.***, 110 AD3d 955, 975 NYS2d 65 [2d Dept 2013]; ***Ferreira v City of New York***, 85 AD3d 1103, 927 NYS2d 100 [2d Dept 2011]; ***Mingle v Barone Dev. Corp.***, 283 AD2d 1028, 723 NYS2d 803 [4th Dept 2001]). 12 NYCRR 23-9.4 (h)(5), which prohibits "[c]arrying or swinging suspended loads over areas where persons are working or passing," is inapplicable, as the Bobcat was not carrying or swinging a suspended load over the area where plaintiff was working (*see* ***Cunha v Crossroads II***, 131 AD3d 440, 15 NYS3d 153 [2d Dept 2015]). 12 NYCRR 23-9.5 (c) is inapplicable in this case, as plaintiff was authorized to be within range of

the moving Bobcat (*see* ***Torres v City of New York***, 127 AD3d 1163, 7 NYS3d 539 [2d Dept 2015]). Defendants also demonstrated the inapplicability of 12 NYCRR 23-9.5 (g), as plaintiff testified that he heard the Bobcat's backup alarm before it struck him (*compare* ***Gonzalez v Perkan Concrete Corp.***, *supra*). In addition, it is well established that violations of Occupational Safety and Health Administration ("OSHA") standards do not provide a basis for liability under Labor Law § 241 (6) (***Marl v Liro Engineers, Inc.***, 159 AD3d 688, 73 NYS3d 202 [2d Dept 2018]; ***Shaw v RPA Assoc., LLC***, 75 AD3d 634, 906 NYS2d 574 [2d Dept 2010]; ***Cun-En Lin v Holy Family Monuments***, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]).

Defendants, however, failed to establish that they did not violate 12 NYCRR 23-9.2 (b)(2), which provides that "[o]perators of power-operated material handling equipment shall remain at the controls while any load is being handled." Defendants did not demonstrate that Ryan remained at the controls of the Bobcat while in the cab at the time of the accident. In addition, defendants failed to establish that they did not violate 12 NYCRR 23-4.2 (k), which provides that "[p]ersons shall not be suffered or permitted to work in any area where they may be struck or endangered by any excavation equipment or by any material being dislodged by or falling from such equipment" (*see* ***Cunha v Crossroads II***, 131 AD3d 440, 15 NYS3d 153 [2d Dept 2015]).

In opposition to defendants' prima facie case of entitlement to summary judgment with respect to plaintiff's claims based on violations of the other provisions of the Industrial Code, plaintiff failed to raise a triable issue of fact (*see* ***Passantino v Made Realty Corp.***, 121 AD3d 957, 996 NYS2d 53 [2d Dept 2014]). Accordingly, summary judgment dismissing the Labor Law § 241 (6) claim is granted insofar as it asserts violations of Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7 (d), 23-1.7 (e)(1), 23-1.7 (e)(2), 23-1.8 (c)(2), 23-2.1, 23-5.22, 23-9.2 (a), 23-9.2 (b)(1), 23-9.3, 23-9.4 (h)(4), 23-9.4 (h)(5), 23-9.5 (c), 23-9.5 (g), and OSHA standards, and is otherwise denied.

Dated: October 6, 2021

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION