

Vdokakes v John Sam LLC

2021 NY Slip Op 33844(U)

May 6, 2021

Supreme Court, Kings County

Docket Number: Index No. 517307/2017

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6th day of May, 2021.

P R E S E N T:

HON. CARL J. LANDICINO,
Justice.

-----X
VINCENT VDOKAKES

Plaintiff,

- against -

JOHN SAM LLC, YAKKY ENTERPRISES, INC.,
MZ BUILDERS LLC, MICHAEL HARRIS, and
PILKU CONSTRUCTION SERVICES INC.,

Defendants.

-----X

Index No. 517307/2017

DECISION AND ORDER

Motion Sequence #7

The following e-filed papers read herein:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

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Upon the foregoing papers defendants John Sam LLC (John Sam), Yakky Enterprises, Inc.,(Yakky) and MZ Builders (MZ) (collectively defendants) move (motion sequence #7), for an order pursuant to CPLR § 3212, granting summary judgment dismissing plaintiff, Vincent Vdokakes,' Labor Law §§ 240 (1), 241 (6), 200 and common law negligence causes of action.

Background and Procedural History

Yakky is the owner of property located at 246 Johnson Avenue, in Brooklyn (the “Property” or the “Site”). John Sam leased the Property from Yakky. John Sam entered into a construction agreement related to the Property which involved the demolition of existing structures and the construction of a new 30 unit residential apartment building. “A Real Advantage” was a subcontractor hired to install a new sidewalk and repair the roadway around the Property. Plaintiff was employed by A Real Advantage as a foreman.

On the morning of March 20, 2017, plaintiff and his co-workers reported to the A Real Advantage yard and received instruction from a supervisor named Larry. He directed them to go to the Property and remove a wooden construction barrier fence and the six to eight foot high steel posts that had secured the wood fence in the ground, in order to prepare for the sidewalk concrete installation. The record reveals that plaintiff and his co-workers brought jack hammers, pry bars, sledgehammers, picks and a Bobcat (compact sized construction vehicle) to the site. This was plaintiff’s first day on the Site. When he arrived at the Site plaintiff spoke with a man he purportedly believed to be working for the owner. The man instructed plaintiff to have the workers begin working on the Johnson Avenue side and wind around to the other side of the building. He also instructed where the posts were to be placed after being removed, and that he wanted the Site cleaned up, informing plaintiff where the debris should be placed. Plaintiff supervised his coworkers as they removed all of the wood panels. They were unable to manually remove the metal posts from the dirt as these were embedded in the ground.

As plaintiff was speaking with the owner's representative, one of the workers from A Real Advantage, Milton, drove the Bobcat into a post in an attempt to remove it. Plaintiff testified that he was standing approximately 30 feet away from where the post was located. As Milton struck the post with the Bobcat, the post cracked at the base and fell, striking plaintiff's forehead under his hard hat, and his right hand. Plaintiff further testified that he had not instructed Milton to drive into the post with the Bobcat and that this was the first post that Milton had attempted to remove. Plaintiff sustained various injuries.

Plaintiff commenced this action by filing of a summons and complaint on or about September 7, 2017. Defendants John Sam and MZ filed an answer on December 6, 2017. Plaintiff filed a supplemental summons and amended complaint on or about September 25, 2018. John Sam and MZ filed an answer to the supplemental summons and amended complaint on December 13, 2018. Yakky served an answer to the supplemental summons and amended complaint on or about April 4, 2019. The action against defendant Pilku Construction Services, Inc., has been discontinued without prejudice and defendant Michael Harris is apparently in default. Plaintiff served several Bills of Particulars and depositions and a medical examination has been conducted. Plaintiff filed his note of issue on May 12, 2020, and the instant motion was timely filed on or about June 18, 2020.

Discussion

Defendants move for summary judgment dismissing plaintiff's complaint in its entirety. Specifically they argue that plaintiff's Labor Law § 240 (1) claim should be dismissed as this matter does not involve an elevation related risk; that he fails to allege a specific, applicable Industrial Code provision to support his Labor Law § 241 (6) cause of action; and that his common law negligence and Labor Law § 200 causes of action must be dismissed as the incident did not involve a defective condition and none of the defendants controlled the means and methods of plaintiff's work. The court addresses each in turn.

Labor Law § 240 (1) Claim

Defendants argue that plaintiff's Labor Law § 240 (1) claim should be dismissed as plaintiff, who was standing at ground level, was directing his co-workers in the removal of a metal post, that was also located at ground level, at the time of the accident. Thus, they maintain that there was no elevation related risk because the post was not in the process of being hoisted or secured and both plaintiff and the post were at ground level and approximately the same height. Moreover, defendants contend that it would be illogical to require a protective device to prevent the post from falling, where as here, the post was in the process of demolition and its fall from its position was the goal of the work being performed. Finally, defendants maintain that plaintiff's own actions, as the foreman directing the removal of the posts, was the sole proximate cause of the accident.

In opposition, plaintiff argues that defendants have failed to establish entitlement to summary judgment dismissing his Labor Law § 240 (1) claim. The Plaintiff maintains that he was injured due to the force of gravity acting on the metal post as it fell because no safety devices were utilized to prevent it from striking him. As such, he contends that a material question of fact exists regarding whether an applicable safety device should have been provided, and whether the failure to provide such safety device was a substantial factor in causing his injury. Plaintiff maintains that the moving defendants fail to address the force of gravity on the post.

In support of his opposition, plaintiff submits an affidavit from Andrew Yarmus, a professional engineer, licensed by the State of New York. Mr. Yarmus affirms that he reviewed the Verified Bill of Particulars, the Summons and Verified Complaint; as well as the depositions of all parties. He opines that the selected method of removing the fence posts was unsafe and ill advised as the fence post was embedded into a concrete footing below grade level and was likely to fracture and cause the detached and unsecured post to strike an individual working at the site. Mr. Yarmus further opines that the accident would have been prevented if the fence post had been adequately secured against breaking off. Mr. Yarmus contends that the workers should have excavated the fence post footing and then removed the fence post from the ground. Moreover, he states that a Bobcat should not have used to strike the fence post.

In reply, defendants argue that plaintiff cannot maintain his Labor Law § 240 (1) cause of action because there was no elevation related risk involved but rather ordinary

construction activity occurring at ground level involving an object that was in the process of demolition. They contend that Mr. Yarmus fails to even opine that Labor Law § 240 (1) was violated, and in fact, his opinion supports their argument that it was the action of plaintiff and his coworkers in utilizing a Bobcat, rather than the other tools they brought to the site, that was the sole proximate cause of the accident.

Labor Law § 240 (1), states, in relevant part, that:

All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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 . . .

The purpose of Labor Law § 240 (1) is to protect workers “from the pronounced risks arising from construction work site elevation differentials” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; see also *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (see *Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2d Dept 2009], *lv dismissed* 13 NY3d 857 [2009]). Accordingly, “[t]he purpose of the statute is to protect against ‘such

specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured” (*Ross v DD 11th Ave., LLC*, 109 AD3d 604, 604-605 [2d Dept 2013], quoting *Ross*, 81 NY2d at 501). “In determining whether the plaintiff is entitled to the extraordinary protection of that strict liability statute, ‘the single decisive question is whether [the] plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential” (*Christie v Live Nation Concerts*, __ AD3d __, 2021 NY Slip Op 01747, 2 [2d Dept 2021], quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; see *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1 [2011]).

While a plaintiff is not required to present evidence as to which particular safety devices would have prevented the injury, the risk requiring a safety device must be a foreseeable risk inherent in the work” (*Carlton v City of New York*, 161 AD3d 930, 932 [2d Dept 2018], quoting *Niewojt v Nikko Constr. Corp.*, 139 AD3d 1024, 1027 [2d Dept 2016]; see *McLean v 405 Webster Ave. Assoc.*, 98 AD3d 1090 [2d Dept 2012]); see *Wilinski*, 18 NY3d at 10). However, Labor Law § 240 (1) does not apply in situations in which a hoisting or securing device of the type enumerated in the statute would not be necessary or expected” (*Ruiz v Ford*, 160 AD3d 1001, 1003 [2d Dept 2018] [internal quotation marks and citations omitted]).

The duty to provide the required “proper protection” against elevation-related risks is nondelegable; therefore, owners, contractors and their agents are liable for the

violations even if they have not exercised supervision and control over either the subject work or the injured worker (*see Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [owner or contractor is liable for Labor Law § 240 (1) violation “without regard to . . . care or lack of it”]; *see Roblero v Bais Ruchel High Sch., Inc.*, 175 AD3d 1446, 1447 [2d Dept 2019]). “To succeed on a cause of action under Labor Law § 240 (1), a plaintiff must establish that the defendant violated its duty and that the violation proximately caused the plaintiff’s injuries” (*id.*). “A worker’s comparative negligence is not a defense to a claim under Labor Law § 240 (1) and does not effect a reduction in liability” (*Ross v DD 11th Ave., LLC*, 109 AD3d 604, 604-605 [2d Dept 2013], citing *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]; *see also Garzon v Viola*, 124 AD3d 715, 716-717 [2d Dept 2015]). In this regard, “where . . . a violation of Labor Law § 240 (1) is a proximate cause of an accident, the worker’s conduct cannot be deemed solely to blame for it” (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 696 [2d Dept 2006], citing *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]). Conversely, “[a] plaintiff is the sole proximate cause of his or her own injuries and a defendant has no liability under Labor Law § 240 (1) when the plaintiff: (1) had adequate safety devices available, (2) knew both that the safety devices were available and that he or she was expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had he or she not made that choice” (*Cioffi v Target Corp.*, 188 AD3d 788, 791 [2d Dept 2020]; *see Gallagher v New York Post*, 14 NY3d 83, 88 [2010] [“Liability under section 240 (1)

does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident. In such cases, plaintiff's own negligence is the sole proximate cause of his injury"]; see *Roblero*, 175 AD3d at 1447] ["When . . . the worker's own conduct is the sole proximate cause of the accident, no recovery under Labor Law § 240 (1) is available"]).

Defendants argue that plaintiff's accident was not the result of a Labor Law § 240 (1) violation as there was no elevation related risk as any height differential between plaintiff and the post that struck him was *de minimis* and that this accident resulted from the usual and ordinary danger present at a construction site. Further defendants point to case law that holds that an object that is in the process of being demolished does not require securing with a safety device under Labor Law § 240(1). Specifically defendants point to *Ragubir v Gibraltar Mgt. Co., Inc.*, (146 AD3d 563, 564 [1st Dept 2017]), [in which the court held that plaintiff was entitled to summary judgment on his Labor Law § 240 (1) claim because the section of roof that collapsed on him was not the intended target of the demolition that was being performed]; and *Maldonado v AMMM Props. Co.*, (107 AD3d 954, 968 [2d Dept 2013]), where the court held that since "the glass pane that caused the plaintiff's injuries was slated for demolition at the time of the accident, defendants established, *prima facie*, that the glass pane was not an object that required securing for the purposes of the undertaking, that is, the demolition"]).

The court finds that defendants have demonstrated their entitlement to summary judgment dismissing plaintiff's Labor Law § 240 (1) claim. Here, it is undisputed that the post that struck plaintiff was in the process of being demolished and thus was not an object that required securing for the purposes of the undertaking (*see Wilinski*, 18 NY3d at 11) [holding that "imposing liability for failure to provide protective devices to prevent the walls or objects from falling, when their fall was the goal of the work, would be illogical"]; *Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 139-140 [2011] ["the installation of a protective device of the kind that (plaintiff) posits . . . would have been contrary to the objectives of the work plan in the basement"]; *Maldonado*, 107 AD3d at 954-955 [2d Dept 2013]; *Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 965 [2d Dept 2013] [where plaintiff standing on the ground level was struck by a small piece of sheetrock that fell from three floors above, the court granted defendant's motion dismissing plaintiff's Labor Law § 240 (1) "[b]ecause those small pieces of sheetrock were not in the process of being hoisted or secured and did not require hoisting or securing, the "special protection" of Labor Law § 240 (1) was not implicated"]; *Coward v Sands Brook, LLC*, __ Misc 3d __, 2021 NY Slip Op 30362(U), [Sup Ct, Kings County 2021] [granting defendant's summary judgment dismissing plaintiff's Labor Law § 240 (1) claim where he was struck by an object slated for demolition that would simply have been allowed to fall or drop to the ground, and it thus would not have been an object that required securing under the circumstances]).

Plaintiff fails to raise an issue of fact in opposition. In this regard, the court notes that the facts in the cases cited by plaintiff in support of his opposition are distinguishable

from the facts herein. Moreover, plaintiff's expert, Mr. Yarmus, fails to opine that there was a violation of Labor Law § 240 (1), and merely opines that the method that plaintiff and his coworkers utilized to remove the post was unsafe, ill advised and likely caused plaintiff's accident. In this regard, the court finds that Mr. Yarmus' affidavit was speculative and conclusory and fails to support plaintiff's opposition to this branch of the defendants' motion. "An expert's affidavit - - offered as the only evidence to defeat summary judgment - - 'must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent's favor'" (*Ramos v Howard Indus., Inc.*, 10 NY3d 218, 224 [2008], quoting *Adamy v Ziriakus*, 92 NY2d 396, 402 [1998]; see *Bosconi v Thomas R. Stachecki Gen. Contr., LLC*, 186 AD3d 1600, 1601 [2d Dept 2020]; *Rodriguez v D&S Bldrs., LLC*, 98 AD3d 957, 958-959 [2d Dept 2012]; *Arredondo v Valente*, 94 AD3d 920, 922 [2d Dept 2012]). Accordingly, that branch of defendants' motion seeking summary judgment in its favor dismissing plaintiff's Labor Law § 240 (1) claim is granted and said claim is dismissed.

Labor Law § 241 (6) claim

Defendants seek summary judgment dismissing plaintiffs' Labor Law § 241(6) claim arguing that all of the Industrial Code provisions alleged to have been violated are either too general to support a Labor Law § 241 (6) claim or are inapplicable to the facts herein. Labor Law § 241 (6), provides, in pertinent part, that:

“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 persons employed therein or lawfully frequenting such places.”

The statute imposes a nondelegable duty on owners, contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work, and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Misicki v Caradonna*, 12 NY3d 511 [2009]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]; *Seales v Trident Structural Corp.*, 142 AD3d 1153 [2d Dept 2016]; *Norero v 99-105 Third Ave. Realty, LLC*, 96 AD3d 727 [2d Dept 2012]). The ultimate responsibility for safety practices at building construction sites lies with the owner and general contractor (*see Allen v Cloutier Constr. Corp.*, 44 NY2d 290 [1978]). In order to prevail on a Labor Law § 241 (6) claim, it must be predicated upon violations of specific codes, rules, or regulations applicable to the circumstances of the accident (*see Moscatti v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]; *Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 53 [2d Dept 2011]). Plaintiff, in his bills of particulars, alleged the violation of multiple Industrial Code sections in support of his Labor Law § 241 (6) claim, all of which defendants argue are either not specific enough to support a Labor Law § 241 (6) claim or are not applicable to the facts herein. Specifically, plaintiff's bills of particulars allege a violations of Industrial Code §§

23-1.5, 23-1.7, 23-1.11, 23-1.18(a), 23-1.18(b), 23-5.1(b), 23-5.1(c), 23-5.1(e), 23-5.1(f), 23-5.1(h), 23-5.1(I), 23-5.6(a), 23-5.6 (c), 23-5.6(f), 23-9.1, 23-9.2(a), 23-9.2(b), and 23-9.5 (c). However, the court notes that plaintiff's opposition only raises arguments with regard to Industrial Code §§23-1.5(a), 23-1.5(b), 23-9.2(b)(I) and 23-9.5(c). Accordingly, the court finds that plaintiff has abandoned his claim that defendants violated Industrial Code §23-1.7, 23-1.11, 23-1.18(a), 23-1.18(b), 23-5.1(b), 23-5.1 (c), 23-5.1(e), 23-5.1(f), 23-5.1(h), 23-5.1(I), 23-5.6(a), 23-5.6 (c), 23-5.6(f), 23-9.1, and 23-9.2(a) (*see Videan v NRG Energy, Inc.*, 149 AD3d 1533, 1534-1535 [4th Dept 2017]; *Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014]; *Rodriguez v Dormitory Auth. of the State of NY*, 104 AD3d 529 [1st Dept. 2013]; *Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["[w]here a defendant so moves [for summary judgment], it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section"]).

In addition, plaintiff's expert, Mr. Yarmus also opines that several other Industrial Code provisions were violated herein. Specifically he addresses Industrial Code §§ 23-1.33(a)(1); 23-1.33(a)(2); (a)(3); 23-1.33(b)(1)(I); (b)(1)(ii); 23-4.2(k) and 23-9.4(h)(4) which were not asserted in plaintiff's bill of particulars.

In reply, defendants argue that the newly asserted Industrial Code violations that were never pled represent a new theory presented by plaintiff after all discovery had been completed and thus they would be severely prejudiced if the court were to consider these

new allegations. However, they assert that should the court consider these code provisions, they are either not specific enough to create liability under Labor Law § 241(6) and/or are clearly inapplicable thus insufficient to support plaintiff's Labor Law § 241 (6) claim.

The court will first address those Industrial Code provisions properly pled in plaintiff's bills of particulars that defendants assert are either too general or not applicable.

Industrial Code §§23-1.5(a) and 23-1.5(b)

Defendants correctly point out that plaintiff cannot use § 23-1.5 as a predicate for a New York State Labor Law § 241(6) violation, as it is not sufficiently specific to support such a claim (*see Martinez v 342 Prop. LLC*, 128 AD3d 408, 409 [1st Dept 2015]; *Pereira v Quogue Field Club of Quogue, Long Is.*, 71 AD3d 1104, 1105 [2d Dept 2010] [finding that section requires employers to provide safe working conditions, setting forth a general standard of care, and could not serve as a predicate for Labor Law § 241(6) liability]; *Ulrich v Motor Parkway Props., LLC*, 84 AD3d 1221, 1224 [2d Dept 2011]; *Greenwood v Shearson, Lehman & Hutton*, 238 AD2d 311, 312 [2d Dept 1997]).

Industrial Code § 23-9.2(b)(1)

Industrial Code § 23-9.2(b)(1) provides that "all power-operated equipment used in construction, demolition or excavation operations shall be operated only by trained,

designated persons and all such equipment shall be operated in a safe manner at all times.” Defendants argue that plaintiff cannot maintain a Labor Law § 241(6) violation predicated upon violation of Industrial Code § 23-9.2(b) because the Bobcat was being operated by a designated person, Milton, and point to plaintiff’s testimony that Milton was operating the Bobcat in a safe manner (plaintiff tr at p 34, lines 23-25, p. 35 lines 2-23). In opposition, plaintiff’s expert opines that “the failure on the part of those responsible for the ownership, oversight, and operation of the subject worksite to ensure that the subject Bobcat was not operated in such an unsafe and improper manner, and by someone who appears to have lacked the training and judgment to have done so, did not comply with the safety intentions of these regulations.”

The court notes that Industrial Code § 23-9.2 (b) (1) is “merely a general safety standard that does not give rise to a nondelegable duty under [Labor Law § 241 (6)]” (*Abelleira v City of New York*, 120 AD3d 1163, 1165 [2d Dept 2014], quoting *Hricus v Aurora Contrs., Inc.*, 63 AD3d 1004, 1005 [2d Dept 2009]; see *Nicola v United Veterans Mut. Hous. No. 2, Corp.*, 178 AD3d 937, 940 [2d Dept 2019]; *Gualpa v Canarsie Plaza, LLC*, 144 AD3d 1088, 1091 [2d Dept 2016]; *Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955, 958 [2d Dept 2013]). Accordingly, a violation of this Industrial Code provision cannot serve as a predicate for plaintiff’s Labor Law § 241 (6) claim.

Industrial Code § 23-9.5 (c)

Defendants assert that plaintiff cannot support his Labor Law § 241(6) claim based upon a violation of Industrial Code § 23-9.5 (c) which provides in pertinent part that:

[e]xcavating machines shall be operated only by designated persons. No person except the operating crew shall be permitted on an excavating machine while it is in motion or operation. No person other than the pitman and excavating crew shall be permitted to stand within range of the back of a power shovel or range of the swing of the dipper bucket while the shovel is in operation . . .

Defendants argue that a Bobcat is not an excavating machine, nor was it used for excavation on this project and thus this Industrial Code provision is inapplicable to the facts of this case.

In opposition, plaintiff's expert, Mr. Yarmus, opines that Industrial Code § 23-5 (c) was violated as the Bobcat was operated in an unsafe and improper manner, by someone who appears to have lacked the training and judgment to operate it properly. Thus, he asserts that defendants' failure to enure this code provision was complied with resulted in plaintiff's accident (Yarmus aff at ¶ 20).

In reply, defendants reiterate their position that this provision is not applicable to the facts herein as here the Bobcat was being used for demolition and not excavation. In addition, it was being operated by the designated person, Milton, and plaintiff was neither on the Bobcat, nor was he within the range of the Bobcat. In this regard, they note that plaintiff's own testimony reveals that he was thirty feet away from the Bobcat. The court

finds that this Industrial Code section is not applicable herein and that no violation of this provision caused plaintiff's accident (*see Cunha v Crossroads II*, 131 AD3d 440, 441-442 [2d Dept 2015]).

The court now turns to those Industrial Code provisions that plaintiff failed to assert in his bills of particulars but were raised in his expert's affirmation. "[L]eave to amend the pleadings to identify a specific, applicable Industrial Code provision 'may properly be granted, even after the note of issue has been filed, where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant'" (*Ventimiglia v Thatch, Ripley & Co., LLC*, 96 AD3d 1043, 1047 [2d Dept 2012] [internal citations omitted]; *see Jara v New York Racing Assn., Inc.*, 85 AD3d 1121, 1123 [2d Dept 2011]; *Dowd v City of New York*, 40 AD3d 908, 911 [2d Dept 2007]). At the outset, the court notes that no leave to amend was ever sought by plaintiff to assert these Industrial Code provisions. Moreover, for the reasons discussed below, such leave would not have been granted as the court finds that the asserted sections lack merit and cannot form the predicate for plaintiff's Labor Law § 241 (6) claim.

Industrial Code § 23-4.2 (k)

Mr. Yarmus opines that there was a violation of Industrial Code § 23-4.2(k) which provides that "persons 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” (Yarmus aff at ¶ 19).

In reply, defendants argue that Industrial Code § 23-4.2, and all of its subparts, concern trench and area excavations and work in the immediate vicinity and is thus, inapplicable as the work being performed by plaintiff and his coworkers did not involve excavation in an excavation trench or pit and does not involve excavation equipment within the meaning of Industrial Code § 23-4.2(k). Here, the court agrees that this Industrial Code provision is not applicable and cannot support plaintiff’s Labor Law § 241 (6) claim (*see Williams v Defoe Corp.*, 2018 NY Slip Op 30925(U) [Sup. Ct. Kings Cty. 2018])[holding that Industrial Code § 23-4.2(k) is limited to excavation working involving excavators or a backhoe, not a man lift or other devices]).

Industrial Code § 23-9.4 (h) (4)

Mr. Yarmus opines that there was a violation of Industrial Code § 23-9.4 (h) (4) which relates to power shovels and backhoes used for material handling and provides that “unauthorized persons shall not be permitted in the cab or immediately adjacent to any such equipment in operation.” Specifically, Mr. Yarmus opines that “[i]n permitting Mr. Vdokakes to oversee work being performed by a Bobcat which can be used for excavating operations in a location in which he could be struck by material being manipulated by said equipment, those responsible for the ownership, oversight, and

operation of the subject worksite failed to comply with the safety intentions of these regulations” (Yarmus aff at ¶ 19).

In reply, defendants argue that this section is inapplicable for several reasons. First, they note that plaintiff was neither on the Bobcat nor in its immediate vicinity, but rather was standing approximately thirty feet away. Moreover, defendants assert that plaintiff, as the foreman for his co-workers, was not an unauthorized person. The court finds that this Industrial Code provision is not applicable to the facts herein and thus cannot support plaintiff’s Labor Law§ 241 (6) claim (*see Cunha v Crossroads II*, 131 AD3d 440 [2d Dept. 2015]).

Industrial Code §§ 23-1.33 (a) (1), (2), (3) and (b) (1) (I) and (ii)

Mr. Yarmus further opines that defendants violated Industrial Code Rule §§ 23-1.33(a) (1), (2) and (3) as well as 1.33 (b) (1) (I) and (ii), all of which relate to the “protection of persons passing by construction, demolition or excavation operations.” In reply, defendants correctly point out that none of these Industrial Code provisions are applicable to plaintiff’s accident as these sections do not apply to workers on a construction site such as plaintiff (*see Turgeon v Vassar Coll.*, 172 AD3d 1134, 1135 [2d Dept 2019]; *Mancini v Pedra Constr.*, 293 AD2d 453, 454 [2d Dept 2002]; *Lawyer v Hoffman*, 275 AD2d 541, 542 [3d Dept 2000]; *Impoco v Mariam Supply Co., Inc.*, ___ Misc3d___, 2019 NY Slip Op 30576(U) [Sup Ct. Kings Cty 2019]). Accordingly, none

of these Industrial Code sections can serve as a predicate for plaintiff's Labor Law § 241 (6) claim.

Based upon the foregoing, that branch of defendant's motion seeking summary judgment dismissing plaintiff's Labor Law § 241 (6) claim is granted and said claim is dismissed.

Labor Law § 200/Common Law Negligence Claims

Defendants argue that plaintiff's Labor Law § 200 and common law negligence claims should be dismissed as plaintiff, who was supervising the work being performed at the time of the accident, was responsible for directing and controlling his co-workers' means and methods of performing their work at the site. Defendants assert that none of the defendants exercised the requisite degree of supervision and control over the work performed in order to be subject to Labor Law § 200 and/or common law negligence liability. In addition, they contend that this incident does not involve a defective premises condition.

Section 200 of the Labor Law statute 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 (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Haider v Davis*, 35 AD3d 363[2d Dept 2006]). "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” (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]; see *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]). “When a claim involves the manner in which the work is performed, meaning it arises out of alleged defects or dangers in the methods or materials of the work (see *Ortega*, 57 AD3d at 61), recovery against the owner or general contractor for common-law negligence or a violation of Labor Law § 200 is unavailable unless it is shown that the defendant had the authority to supervise or control the performance of the work” (*Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dept 2014]; see *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]; *Casilari v Condon*, 185 AD3d 896, 897-898 [2d Dept 2020]; *Klimowicz v Powell Cove Assoc., LLC*, 111 AD3d 605, 607 [2d Dept 2013]). “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” (*Crichigno v Pacific Park 550 Vanderbilt, LLC*, 186 AD3d 664, 665-666 [2d Dept 2020], quoting *Ortega*, 57 AD3d at 62; *Torres v Perry St. Dev. Corp.*, 104 AD3d 672, 676 [2d Dept 2013]). “[T]he right to generally supervise the work, stop the contractor’s work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence” (*Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 698 [2d Dept 2016], quoting *Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2d Dept 2010], quoting *Gasques v State of New York*, 59 AD3d 666, 668 [2d Dept 2009], affd on other grounds 15 NY3d 869

[2010]; see *Torres*, 104 AD3d at 676; *Harrison v State of New York*, 88 AD3d 951, 954 [2d Dept 2011]).

Where “a claim arises out of an alleged dangerous premises condition, a property owner or general contractor may be held liable in common-law negligence and under Labor Law § 200 when the owner or general contractor has control over the work site and either created the dangerous condition causing an injury, or failed to remedy the dangerous or defective condition while having actual or constructive notice of it” (*Mitchell v Caton on the Park, LLC*, 167 AD3d 865, 867 [2d Dept 2018], quoting *Abelleira*, 120 AD3d at 1164; see *Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d 994, 997 [2d Dept 2017]; *Marquez*, 141 AD3d at 698; *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 663 [2d Dept 2015]; *Martinez v City of New York*, 73 AD3d 993, 998 [2d Dept 2010]).

This case involves the means and methods for removal of a barricade fence and its posts that was chosen and directed by plaintiff as the foreman supervising the performance of this work. In this regard, defendants argue that it was plaintiff’s decision, as foreman, to instruct his co-workers to remove the wood planks and metal posts using the Bobcat rather than utilizing any of the other equipment they had brought to the site. Defendants note that the only conversation plaintiff had with defendants’ representative related to the area in which he wanted plaintiff and his crew to begin working and the location they were to place debris when they were finished with their work.

In opposition, plaintiff asserts that a representative of the owner was giving instructions to him as to how to perform the work at the very moment his accident occurred, and points to plaintiff's deposition testimony at pp. 42-43 in support of this. However, the court notes that a thorough reading of those pages of the transcript, in fact of the entire transcript of plaintiff's deposition, reveals that defendants did not supervise or direct the work plaintiff and his co-workers were performing at the time of the accident.

Q. Was anyone else in the area of that pole when the accident happened?

A. The Jewish guy right behind me, because he was talking to me in my ear telling what else he wanted done.

Q. Do you remember what the Jewish guy was saying, what he wanted done before the accident happened?

A. What he wanted? The planks, the wooden green posts, where he wanted them placed, and if we would clean up where he wanted the poles to be, where he wanted to be stored.

Q. Do you remember where he wanted those things to be stored?

A. Around the corner (Vdokakes tr at p 42, lines 8-23).

In reply, defendants reiterate their argument that this incident happened because of plaintiff's chosen means and methods as it is undisputed that he was the individual supervising his co-workers, not any of the defendants. Moreover, defendants argue that plaintiff's claim that a representative of the owner was directing plaintiff as to how to perform the work lacks merit as plaintiff's own testimony demonstrates that the person that plaintiff believed to be an "owner" merely told him where he wanted the work to be performed first, not how to perform it. Defendants assert that the above cited

conversation had nothing to do with the means and methods of the work being performed at the time of plaintiff's accident but rather the sequencing and cleanup of the work.

Here, it is clear that plaintiff's injuries were not the result of a physical defect at the construction site, but rather resulted from the manner in which he and his coworkers were performing their work (*see Gargan v Palatella Saros Builders Grp., Inc.*, 162 AD3d 988, 989[2d Dept 2018]). The record establishes that the injured plaintiff, as the foreman on this project, exercised direct supervisory control over the means and methods utilized to remove the pole. Plaintiff testified that Larry, his supervisor from A Real Advantage, gave him orders regarding the work to be done at the site with regard to removing the poles to get the sidewalk ready for new concrete to be installed (Vdokakes tr at p.25, lines 3-11). Moreover, plaintiff's testimony establishes that defendants merely directed him to the area where he was to begin working and the location to dispose of any debris. Accordingly, the court finds that plaintiffs' Labor Law § 200 and common-law negligence claims should be dismissed as against defendants, as the undisputed evidence establishes that none of the defendants directed or controlled the work being performed by plaintiff and his coworkers at the time of this incident. Moreover, any general supervision over the construction site and direction of where plaintiff and his coworkers should begin their work and dispose of debris is insufficient to trigger liability pursuant to Labor Law § 200 and common-law negligence (*see Debenedetto v Chetrit*, 190 AD3d 933, 938 [2d Dept 2021] [holding that the fact that defendants' employees frequently visited the work site to inspect the work, make requests, and ask questions did not

preclude summary judgment dismissing plaintiff's Labor Law 200 claim as "[m]ere general supervisory authority at [the] 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"[internal citations omitted]; *Giannas v 100 3rd Ave. Corp.*, 166 AD3d 853, 856 [2d Dept 2018]; *Messina v City of New York*, 147 AD3d 748, 749 [2d Dept 2017]). Plaintiff fails to raise a triable issue of fact in opposition. Accordingly, plaintiff's Labor Law § 200 and common-law negligence claims are dismissed as against defendants.

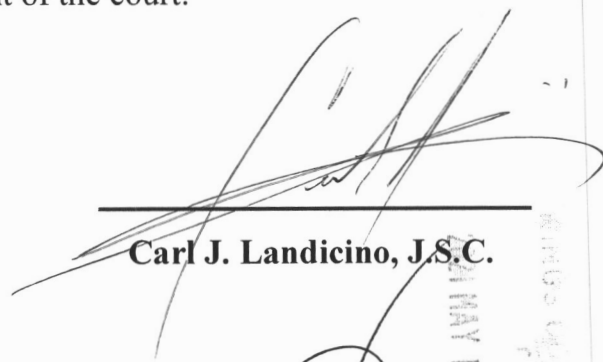
Conclusion


Accordingly, it is

ORDERED that the moving defendants' motion seeking summary judgment dismissing plaintiff's Labor Law §§ 240 (1), 241 (6), 200 and common law negligence claims is granted in its entirety and said claims are hereby dismissed as against them.

This constitutes the decision, order and judgment of the court.

ENTER:



Carl J. Landicino, J.S.C.


KINGS COUNTY CLERK
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