

Pereira v 55 Kennedy Dr. Realty LLC

2022 NY Slip Op 30603(U)

February 25, 2022

Supreme Court, New York County

Docket Number: Index No. 159765/2016

Judge: Carol Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35

Justice

-----X

JOSE ANTONIO PEREIRA,
Plaintiff,

INDEX NO. 159765/2016

MOTION DATE 05/07/2021

MOTION SEQ. NO. 003

- v -

55 KENNEDY DRIVE REALTY LLC, NEW YORK JOB
DEVELOPMENT AUTHORITY,

AMENDED
DECISION + ORDER ON
MOTION

Defendant.

-----X

55 KENNEDY DRIVE REALTY LLC, NEW YORK JOB
DEVELOPMENT AUTHORITY

Third-Party
Index No. 595435/2018

Plaintiff,

-against-

CASPERS MANAGEMENT CO., INC., TD BANK, N.A.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 69, 70, 71, 72, 73,
74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93, 94, 95, 96, 97, 98, 99, 100, 101,
102, 103, 104, 105, 106, 107, 108, 110, 112

were read on this motion to/for JUDGMENT - SUMMARY

This Court's Decision and Order dated August 30, 2021 (NYSCEF doc No. 106) is vacated in its
entirety and superseded as follows.

Upon the foregoing documents, it is

ORDERED AND ADJUDGED that Plaintiff Jose Antonio Pereira a/k/a Angel
Martinez's motion, pursuant to CPLR 3212, for summary judgment on his Labor Law § 240(1)
and § 241(6) claims (Motion Seq. 003) is granted to the extent that Plaintiff is granted summary
judgment on his Labor Law § 240(1) claim, and is otherwise denied. It is further

ORDERED AND ADJUDGED that Plaintiff's claim pursuant to Labor Law § 241(6) is
severed and dismissed from this action; and it is further

ORDERED AND ADJUDGED that the cross-motion of third-party defendant Caspert Management Co, Inc. (“Caspert”) pursuant to CPLR 3212 for summary judgment dismissing the third-party action is denied in its entirety; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Plaintiff shall serve a copy of this Order with Notice of Entry within 20 days of entry on all parties.

MEMORANDUM DECISION

In this Labor Law action, Plaintiff Jose Antonio Pereira a/k/a Angel Martinez moves, pursuant to CPLR 3212, for summary judgment on his Labor Law § 240(1) and § 241(6) claims against Defendants 55 Kennedy Drive Realty LLC (“55 Kennedy”) and New York Job Development Authority (“NYJDA”).

Third-Party Defendant Caspert Management Co., Inc. (“Caspert”) cross-moves for dismissal of the third-party action asserted against it.

Defendants oppose both Plaintiff’s motion and Caspert’s cross-motion in their entirety.

BACKGROUND AND PROCEDURAL HISTORY

On or about October 1, 2015, Plaintiff, a construction worker, was dismantling of a shelving unit in a warehouse when he fell in a building located at 55 Kennedy Drive, Hauppauge, New York (“the subject premises”) (NYSCEF doc No. 1, ¶ 16).

On the date of the accident, the deed to the subject premises was held by Defendant New York Job Development Authority (“NYJDA”). (*id.* at ¶ 10). Defendant 55 Kennedy Drive Realty LLC (“55 Kennedy”) assumed a ground lease purchase agreement for the subject premises in April 2000 that was in effect the date of the accident (NYSCEF doc No. 71 at 4).

55 Kennedy subleased a portion of the subject premises to non-party Venus Pharmaceuticals (“Venus”). Venus subsequently defaulted on its loan with former third-party defendant TD Bank (NYSCEF doc No. 71 at 5). Venus then put up certain fixtures and

equipment, including the shelving unit that is the subject of this action, as collateral (*id.*). TD Bank retained Third-Party Defendant Caspert to sell the equipment at an auction, at which Plaintiff's employer, Wellmill LLC ("Wellmill") purchased the shelving unit. Plaintiff's accident occurred as he was dismantling the shelving unit to prepare it for transport to Wellmill's facility (*id.*).

As a result of the accident, Plaintiff claims to have suffered serious and permanent physical injuries including a comminuted fracture of the tibial plateau and a fracture dislocation of the left shoulder (NYSCEF doc No. 105, ¶ 30).

Plaintiff commenced this action against Defendants 55 Kennedy and NYJDA by Summons and Complaint dated October 18, 2016 (NYSCEF doc No. 1).

On June 1, 2018, Defendants filed a Third-Party Complaint against Caspert and TD Bank, asserting claims sounding in common law indemnification and contribution; contractual indemnification; failure to procure insurance; and failure to insure, defend and indemnify (NYSCEF doc No. 12).

On July 27, 2018, TD Bank filed a motion to dismiss the Third-Party Complaint as against it pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) (Motion Seq. 001). TD Bank argued that under the terms of its contract, it was not obligated to procure insurance for Defendants or to indemnify and defend them, and that there was no basis for an obligation to defend under the common law (NYSCEF doc No. 21).

By Decision and Order dated December 11, 2018, the Court granted TD Bank's motion and dismissed it from the Third-Party Action (NYCSEF doc No. 40).

The parties proceeded with discovery and conducted depositions throughout 2019 and 2020. Plaintiff filed the Note of Issue on September 14, 2020 (NYSCEF doc No. 51).

On September 23, 2020, Defendants filed a motion to vacate Plaintiff's Note of Issue pursuant to 22 NYCRR 202.21(e) on the grounds that outstanding discovery remained (Motion Seq. 002).

On November 23, 2020, the Court issued an order denying the motion and resolving the outstanding discovery. The Court directed that summary judgment motions be filed by January 29, 2021 (NYSCEF doc No. 68).

Plaintiff's Deposition Testimony

Plaintiff appeared for deposition on June 17, 2019 (NYSCEF doc No. 76).

Plaintiff testified that he began working for Wellmill, a vitamin manufacturing company, in September 2015, where his duties included working on the assembly line at Wellmill's factory (*id.* at 36-37).

On October 1, 2015, Plaintiff was assigned by his supervisor the task of dismantling the shelving unit that Wellmill had purchased and transporting it from the subject premises to Wellmill's factory (*id.* at 41-42). Plaintiff described the shelving unit as a set of "four shelves, and each one about four or five feet apart from the shelf above or below it" (*id.* at 60, l: 2-5). The shelving unit reached the ceiling of the warehouse and was "very high.... approximately like around 20 feet or so" (*id.* at 56, l: 3-6).

Plaintiff testified that when he arrived to dismantle the shelving unit, he had to ascend the outer frame of the shelving unit while his coworker climbed up the other side (*id.* at 162). While Plaintiff was standing on the outside of the frame, his supervisor placed a "platform" on the shelving unit for him to stand on so he could complete his task (*id.* at 164, l: 18-19). Plaintiff was not given any instructions regarding how to perform his work from anyone except his direct supervisor (*id.* at 169, l: 6).

Plaintiff stated that the platform was unsecured, and he thus fell immediately while standing on it (“It wasn’t even one minute, because I actually just stood on it and it went down...I stood on the rack, and because of my weight, it just went down”) (*id.* at 165, l: 7-20). Plaintiff testified that he fell “around 12 feet or so,” hitting his shoulder and foot (*id.* at 110, l: 7-22).

Plaintiff was not provided with a ladder, scaffolding, harness, or any other type of safety device to help him ascend the shelving unit, nor did he see any such devices located anywhere on the subject premises (*id.* at 170-171, l: 17-25, 1-4).

Plaintiff stated that he was not supervised or directed by anyone other than his Wellmill supervisor (*id.* at 169).

NYJDA’s Deposition Testimony

Simon Wynn, Senior Counsel for NYJDA’s affiliate New York State Urban Development Corporation, testified on behalf of NYDJA on February 26, 2020 (NYSCEF doc No. 78).

Mr. Wynn confirmed that NYDJA acquired title to the subject premises by quitclaim deed in 1999 (*id.* at 19-20). On November 1, 1999, NYDJA entered into a lease agreement with an entity known as Blizz & Mazzucca Realty LLC (“Blizz”) (*id.* at 21). Blizz subsequently assigned its right title and interest under the lease to 55 Kennedy on April 19, 2000 (*id.* at 26).

Mr. Wynn confirmed that 55 Kennedy did not exercise its purchase option under the lease until April 1, 2016, and therefore NYDJA was the title holder of the subject premises on the date of Plaintiff’s accident (*id.* at 27).

55 Kennedy's Deposition Testimony

Ari Shalem, a co-owner of 55 Kennedy, appeared for deposition on October 25, 2019 (NYSCEF doc No. 77).

Mr. Shalem confirmed that 55 Kennedy took over the lease with a purchase option from Blizz in 2000, and during the time it held a leasehold interest in the subject premises, it “owned the property and collected income from it on a passive basis” (*id.* at 14-15, l: 25, 1-3).

Mr. Shalem also confirmed that 55 Kennedy subleased space in the subject premises to Venus, who subsequently defaulted on its loan with TD Bank, leading to TD Bank’s auction at the subject premises where Venus’ shelving unit was sold to Wellmill (*id.* at 59-60).

Mr. Shalem explained that 55 Kenney facilitated access for TD Bank to conduct the auction on the subject premises (*id.* at 65, l: 4-7). However, 55 Kennedy had no involvement in the removal of the auction items and did not provide any equipment to the laborers that came to remove items from the subject premises (*id.* at 69-71).

Caspert's Deposition Testimony

Caspert produced two witnesses for deposition: Mitchell Caspert, Vice President, who appeared March 12, 2020 (NYSCEF doc No. 80), and Bridgemohan Ramnarine, a supervisor, who appeared August 21, 2020 (NYSCEF doc No. 88).

Mr. Caspert explained that his company’s business consists of auctioning and appraising equipment and machinery on behalf of lenders (NYSCEF doc No. 80 at 9). Caspert was asked by TD Bank to list the shelving unit at the auction (*id.* at 10). However, Caspert had no involvement in the removal of the shelving unit, nor did it provide any equipment to facilitate removal, as removal was the responsibility of the purchaser (*id.* at 26-27).

Mr. Caspert was shown a copy of the letter agreement for the auction that Caspert entered with 55 Kennedy, which contains a provision stating that the “auctioneer will supervise the removal of the tagged inventory that is sold at the auction” (*id.* at 36, l: 1-3). Mr. Caspert was not personally involved in the negotiation of the agreement, but stated that the provision generally just meant that Caspert would collect the money and point the successful bidder toward their purchase (“I believe it’s whatever [the buyer] buys...we point it out to them...We don’t do anything after that”) (*id.* at 37, l: 12-16).

Mr. Ramnarine testified that he was present at the subject premises the day of the accident as his duties under his role of supervisor including collecting item deposits from purchasers (NYSCEF doc No. 88 at 9-24). Mr. Ramnarine also affirmed that Caspert did not supervise or witness the removal of the shelving unit, nor did it provide any safety equipment (*id.* at 25-26). Mr. Ramnarine did not personally witness Plaintiff’s accident, but he was informed that Plaintiff fell when he saw an ambulance arrive at the subject premises (*id.* at 27, l: 16-21). Mr. Ramnarine did not fill out an accident report and was unsure whether Caspert ever conducted any sort of investigation into the cause of the accident (*id.* at 30-31).

Wellmill’s Deposition Testimony

Michael Koschitz, the owner of Wellmill, appeared for deposition on March 12, 2020 (NYSCEF doc No. 80).

Mr. Koschitz confirmed that on the date of the accident, Plaintiff was employed by Wellmill as a production worker (*id.* at 31). Mr. Koschitz recalled that Wellmill purchased shelving units at various auctions in 2015, the year of Plaintiff’s accident (*id.*). When shown a picture of the subject shelving unit, Mr. Koschitz did not recognize it specifically but confirmed that it was the type of shelving used in Wellmill’s warehouse (*id.* at 35).

Mr. Koschitz stated that John Greenough, Wellmill's Director of Facilities, would have been responsible for coordinating the move of the shelving unit and determining what equipment was needed for the dismantling, if any (*id.* at 35, 43). Mr. Koschitz did not know if any equipment was provided to Plaintiff (*id.* at 43, l: 18).

Mr. Koschitz testified that he was told Plaintiff's accident occurred but could not recall specific details pertaining to the accident or Plaintiff's time as an employee (*id.* at 30).

The Instant Motion

On January 8, 2021, Plaintiff filed the motion now before this Court, seeking summary judgment on the issue of liability under his Labor Law § 240(1) and § 241(6) claims against Defendants (Motion Seq. 003). Plaintiff argues that he is entitled to summary judgment under § 240(1) as the evidence establishes that Defendants failed to provide Plaintiff with any safety equipment to afford proper protection while he was engaged in a height-related task, and his injuries were proximately caused by the same. Plaintiff argues that he is entitled to summary judgment under § 241(6) as Defendants failed to comply with Industrial Code § 23-1.7(b), which requires that a hazardous opening over which a person is working be guarded by a substantial cover fastened in place, as well as Industrial Code § 23-1.22(c), which sets forth safe footing requirements for a laborer working on a platform.

In opposition, Defendants argue that § 240(1) is inapplicable as Plaintiff was not engaged in work with the ambit of § 240(1) at the time the accident occurred, as Plaintiff's task of removing inventory does not constitute "erection, demolition, repairing, altering, painting, cleaning or pointing of a building" within the meaning of the statute (NYSCEF doc No. 102, ¶

3). Defendants argue that Plaintiff is not entitled to summary judgment under § 241(6) as Industrial Code § 23-1.7(b) is inapplicable to the circumstances herein.¹

The Cross Motion

On March 8, 2021, Caspert cross-moved for summary judgment dismissing the third-party action in its entirety. Caspert argues that it is not obligated to defend or indemnify Defendants as it owed no duty of care to any party in this action and there is no evidence of active or passive negligence on its part. Caspert argues that although the agreement it entered with 55 Kennedy contains a provision stating that Caspert will supervise inventory removal, the provision cannot be a basis for liability as it is a “typical recitation” that is “based on accepted and understood auction practices” to only mean that Caspert, as the auctioneer, will direct purchasers to their inventory (NYSCEF doc No. 99 at 4).

In opposition, Defendants argue that Caspert’s cross-motion should not be considered by the Court as it is not a proper “cross motion” under CPLR 2215 given that it is asserted against non-moving parties². Defendants argue that Caspert’s “cross-motion” should be deemed a separate summary judgment motion and is thus untimely as it was filed on March 8, over a month after the deadline for summary judgment motions set by the Court of January 29. Defendants aver that even if the Court were to consider the merits of the cross-motion, it should nevertheless be denied as it is premised on irrelevant extrinsic evidence regarding the meaning of the provisions in the agreement between 55 Kennedy and Caspert (NYSCEF doc No. 102 at 5).

DISCUSSION

Summary judgment is granted when “the proponent makes ‘a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the

¹ Defendants do not address Plaintiff’s argument regarding § 23-1.22(c).

² Plaintiff takes no position with respect to Caspert’s cross-motion.

absence of any material issues of fact,’ and the opponent fails to rebut that showing” (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also, *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). 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]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The function of a court in reviewing a motion for summary judgment “is issue finding, not issue determination, and if any genuine issue of material fact is found to exist, summary judgment must be denied” (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, [1st Dept 2012]). Where “credibility determinations are required, summary judgment must be denied” (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, [1st Dept 2012]). Thus, on a motion for summary judgment, the court is not to determine which party presents the more credible argument, but whether there exists a factual issue, or if arguably there is a genuine issue of fact (*DeSario v SL Green Management LLC*, 105 AD3d 421 [1st Dept 2013] (holding given the conflicting deposition testimony as to what was said and to whom, issues of credibility should be resolved at trial)).

The Court now addresses Plaintiff’s motion for summary judgment in his favor on liability predicated on his Labor Law § 240(1) and § 241(6) claims.

Labor Law § 240 (1)

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

“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.”

The Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff’s injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with “adequate protection against a risk arising from a physically significant elevation differential” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Where a violation has proximately caused a plaintiff’s injuries, owners and general contractors are absolutely liable “even if they do not have a continuing duty to supervise the use of safety equipment” (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011]).

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 [2004]).

Here, the parties dispute whether the activity Plaintiff was engaged in at the time of the accident is covered by § 240(1). Plaintiff argues that he was performing a “demolition” or “alteration” of a “structure” (the shelving unit) within the meaning of the statute at the time of his accident. Defendants argue that Plaintiff was merely engaged in “dismantling shelves” and was thus not engaged in a demolition or alteration.

The Court of Appeals has consistently defined a “structure” as “any production or piece of work artificially built up or composed of parts joined together in some definite manner” (*Joblon v Solow*, 91 NY2d 457, 464 [1998]; *Caddy v Interborough Rapid Transit Co.*, 195 NY 415, 420 [1909]). An “alteration” of a structure occurs when there is a “significant physical change to the configuration or composition” (*Joblon* at 465). “Demolition” is defined under 12 NYCRR 23-1.4(b)(16) as “work incidental to or associated with the total or partial *dismantling* of a building or other structure” (emphasis added).

Contrary to Defendants' argument, the dismantling of a shelving unit has been deemed to constitute demolition and/or alteration of a structure within the meaning of § 240(1). In *Phillips v Powercrat Corp.*, the plaintiff fell from an unsecured ladder while removing shelves that ran from floor to ceiling in a warehouse “against three second-floor walls, each 50 feet long and 8 feet high” (126 AD3d 590 [1st Dept 2015]). The First Department held that the “dismantling of the shelves was a sufficiently complex and difficult task to render the shelving a ‘structure’ within the meaning of Labor Law §§ 240(1) and 241(6)...[m]oreover, in dismantling the shelving, plaintiff was engaged in ‘demolition’ for purposes of §§ 240(1) and 241(6)...(*id.* at 591). In reaching this holding, the First Department relied in part on the Second Department case of

Kharie v South Shore Record Management, Inc., wherein a plaintiff fell while dismantling sets of free-standing shelving to prepare them for transport to a different area of a warehouse (118 AD3d 955 [2nd Dept 2014]). The Second Department held that Plaintiff's task of dismantling the shelves "was both altering and demolishing" a structure under § 240(1) (*id.* at 956).

Here, a review of the photographs of the subject shelving unit (NYSCEF doc No. 81) as well as Plaintiff's deposition testimony describing the unit reflects that the shelving unit was similar in size and complexity to the ones at issue in *Phillips and Kharie*, as it consists of multiple sets of floor-to-ceiling shelves connected with metal beams. The Court thus concludes that Plaintiff was engaged in demolition and/or alteration of a structure, a covered activity, at the time his accident occurred. Defendants offer no caselaw in support of their argument that dismantling the shelving unit should not be deemed a covered activity, nor do they dispute Plaintiff's allegation that he fell ascending a 12-foot-high elevation while standing on an unsecured platform with no safety device. Based on the circumstances presented herein, it is abundantly clear that "plaintiff's fall was the direct result of [the] absence of an adequate safety device," the exact type of accident contemplated by § 240(1) (*Conlon v Carnegie Hall Socy., Inc.*, 159 AD3d 655, 655 [1st Dept 2018]).

The Court thus finds that Plaintiff has established his prima facie entitlement to judgment as a matter of law by presenting undisputed evidence that he fell from a height while working on the subject premises owned by Defendants, that Defendants failed to provide him with safety equipment, and that this failure was a proximate cause of his injuries. Defendants have failed to raise a triable issue of fact regarding whether Plaintiff was provided any safety equipment and do not assert any defenses to contest the matter of proximate causation.

Accordingly, the branch of Plaintiff's motion seeking summary judgment on his Labor Law § 240(1) claim is granted.

Labor Law § 241 (6)

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] [emphasis in original]). The statute applies where the plaintiff is an employee within the meaning of the Labor Law (*see Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 576-577 [1990]), and the injury occurs “in an area in which construction, excavation or demolition work is being performed” (*Rhodes-Evans v 111 Chelsea LLC*, 44 AD3d 430, 433 [1st Dept 2007] [internal quotation marks omitted]). In addition, Labor Law § 241 (6) requires an owner or contractor “to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor” (*Ross*, 81 NY2d at 501-502). Not only must the rule or regulation be relevant to the action, it must also “set forth a specific requirement or standard of conduct” (*id.* at 503). “The particular [Industrial Code] provision 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, 515 [2009]). Therefore, to prevail on a Labor Law § 241 (6) claim, a plaintiff must plead and prove that there was a violation of rule or regulation setting forth a specific standard of conduct (*see Ortega v Everest Realty LLC*, 84 AD3d 542, 544 [1st Dept 2011]), and that the violation was a proximate cause of the injury.

The Court thus turns to the two Industrial Code provisions Plaintiff argues were violated, Sections 23-1.7(b) and 23-1.22(c).

Industrial Code Section 23-1.7(b)

As a preliminary matter, the Court notes that Plaintiff failed to identify the *specific* subsection or subdivision of 23-1.7(b) that he claims was violated, as is required to support a § 241(6) claim (*see McLean v Tishman Constr. Corp.*, 144 AD3d 534, 535 [1st Dept 2016]). A review of Plaintiff's papers indicates that he appears to be relying on Subsection (b)(1)(i), which states as follows:

“(1) Hazardous openings.

(i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).”

23-1.7(b)(i) is sufficiently specific to support a §241(6) claim (*see Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 451 [1st Dept 2013]). However, the Court finds this branch of Plaintiff's claim must be denied as no hazardous opening was involved in Plaintiff's accident.

The term “hazardous opening” is not defined in 23-1.7(b)(1). However, courts have found that a hazardous opening must be an opening of “significant depth and size” (*Pietrowski v ARE-East Riv. Science Park, LLC*, 86 AD3d 467, 469 [1st Dept 2011]), that is “deep enough for a person to fall all the way through” (*Favaloro v Port Auth. of N.Y. & N.J.*, 191 AD3d 524, 525 [1st Dept 2021]). Here, it is uncontroverted that Plaintiff fell onto the floor of the warehouse from an elevated height; Plaintiff did not fall through any sort of opening of any size. 23-1.7(b)(1) is thus inapplicable to the circumstances presented.

Therefore, Plaintiff's motion for summary judgment on the part of his Labor Law § 241(6) claim predicated on an alleged violation of Industrial Code 23-1.7 (b) is denied.

Industrial Code Section 23-1.22(c)

As with 23-1.7(b), Plaintiff does not identify a specific subsection of Industrial Code 23-1.22(c). However, Plaintiff appears to be relying on 23-1.22(c)(1) which provides:

“(1) Any platform used as a working area or used for the unloading of wheelbarrows, power buggies, hand carts or hand trucks shall be provided with a floor of planking at least two inches thick full size, exterior grade plywood at least three-quarters inch thick or metal of equivalent strength. Platforms used for motor trucks or heavier vehicles shall be provided with floors of planking at least three inches thick full size or metal of equivalent strength.”

Plaintiff argues that 23-1.22(c) was violated as the platform he was provided by his supervisor, in addition to being unsecured, was “thin” and “clearly less than two inches thick” as evidenced by Plaintiff’s testimony and the photographs provided (NYSCEF doc No. 71 at 17). While it is undisputed that Plaintiff was provided a thin, unsecured platform, 23-1.22(c) is nevertheless inapplicable here. It is well settled that the platforms contemplated by the subsection are limited to those “used to transport vehicular and/or pedestrian traffic” (*Dzieran v 1800 Boston Road, LLC*, 25 AD3d 336 [1st Dept 2006], citing *Curley v Gateway Communications Inc.*, 250 AD3d 888, 892 [“[T]he ramps, runaways, or platforms contemplated by 12 NYCRR 23-1.22 are those used to transport vehicular and/or pedestrian traffic”]). Given that the platform here was not used to transport traffic but was merely given to Plaintiff as a landing to stand on while he conducted his task, Plaintiff cannot argue that a violation of 23-1.22(c) caused his injuries.

Therefore, the part of Plaintiff’s motion for summary judgment predicated on an alleged violation of Industrial Code 23-1.22(c) is also denied. As 23-1.22(c) was the only other Industrial Code section cited by Plaintiff, Plaintiff’s claim under Labor Law § 241(6) is severed and dismissed from this action.

Caspert's Cross-Motion for Dismissal of the Third-Party Action

As a preliminary matter, the Court notes that while Caspert's cross-motion should have been filed as a separate, timely summary judgment motion, it will nevertheless consider the merits of Caspert's application for dismissal of the third-party action.

The Court has discretion within the course of its review of Plaintiff's motion to search the record and grant summary judgment to any non-moving party without the need for a cross-motion and can therefore disregard the untimeliness of a cross-motion. (*Matthews v 400 Fifth Realty LLC*, 111 AD3d 405 [1st Dept 2013]). As Defendants point out, the issues or causes of action on which the nonmovant or untimely cross-movant is awarded summary judgment must be "nearly identical to that on which the movant sought relief" (*Maggio v 24 W 57 APF, LLC*, 134 AD3d 621 [1st Dept 2015]). Here, while Caspert's cross-motion involves different causes of action than Plaintiff's Labor Law claims, the motion and cross-motion both raise the same factual issues and require review of the same documentary and testimonial evidence. Furthermore, review of Caspert's cross-motion does not prejudice Defendants in any way. Therefore, the Court will consider Caspert's cross-motion.

Turning to the merits of the cross-motion, the Court notes that although Defendants' third-party action against Caspert asserts claims sounding in common law indemnification and/or contribution, contractual indemnification, and breach of contract for failure to procure insurance, both Caspert's moving papers and Defendants' opposition are silent as to contractual indemnification and failure to procure insurance. Accordingly, said claims remain active against Caspert, and the Court turns to assess whether Caspert has demonstrated entitlement to dismissal of Defendants' common law claim.

Common Law Indemnification and/or Contribution

“To establish a claim for common-law indemnification, ‘the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident’” (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d at 65)]; *see also Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]). In other words, a claim for common-law indemnification is actionable only where a party has been found to be “vicariously liable without proof of any negligence . . . on its own part” (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]).

“[A] claim for common-law contribution involves the apportionment of liability amongst joint tortfeasors, both of whom owed a duty to an injured plaintiff” (*Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 247-248 [1st Dept 2013]). Apportionment by contribution requires that “the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought” (*Nassau Roofing & Sheet Metal Co.*, 71 N.Y.2d at 603).

Here, Defendants are only statutorily liable for Plaintiff’s accident as owners of the subject premises. Defendants’ common law claim against Caspert is essentially premised on the provision in the letter agreement between the parties stating that Caspert “will supervise the removal of the Tagged Inventory that is sold at the auction” (NYSCEF doc No. 94, ¶ 1). Defendants argue that Caspert breached its duty to properly supervise the removal of the inventory, resulting in Plaintiff’s accident.

Caspert argues that the provision in the letter agreement cannot support a conclusion that Caspert was placed under a legal duty to direct, supervise, or control the methods of removal,

and thus cannot serve as a basis for common law indemnification. Caspert argues that notwithstanding the plain language of the provision, “based on accepted and understood auction practices, this term only means that [Caspert] will be present at the location where the purchasers pick up what they have bought, makes sure that the purchaser is directed to the location where the purchased items are, and makes sure that whatever was bought is picked up and removed by the purchaser” (NYSCEF doc No. 99 at 4-5).

In support of this argument, Caspert cites to Plaintiff’s deposition testimony wherein he affirmed that no one other than his Wellmill supervisor directed his work, and he was not familiar with Caspert (NYSCEF doc No. 76 at 214). Caspert also cites to the deposition testimony of Mr. Caspert and Mr. Ramnarine, where, as discussed *supra*, both representatives affirm that Caspert had no involvement in disassembling the auctioned inventory nor did they play any role in supervising the removal of the same. Mr. Caspert also submitted a separate affidavit wherein he affirmed that Caspert has been in the auction business for over one hundred years and has never in that time acted in any capacity as a “construction or demolition supervisor” and its employees have never provided tools, equipment, or manpower to facilitate disassembly or transportation of inventory (NYSCEF doc No. 96, ¶ 3).

As Defendants point out in opposition, it is well settled law that “a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms” (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Parol evidence outside the four corners of the document, such as the deposition testimony and affidavit relied on by Caspert, is thus “admissible only if a court finds an ambiguity in the contract” (*Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013]).

Here, the letter agreement between Caspert and 55 Kennedy contains a provision noting that it “constitutes the entire agreement among the parties with respect to the subject matter hereof and supersedes any and all prior agreements or understandings among the parties” (NYSCEF do No. 94, ¶ 6). The Court thus sees no reason why the unambiguous term “supervise” should not be construed according to its plain, ordinary meaning: “to watch a person or activity to make certain that everything is done correctly, safely, etc”.³

Caspert also overlooks the fact that this Court, in its Decision and Order dismissing TD Bank from the third-party action, has already determined that the provision may serve as a basis for liability against Caspert: “The agreement makes it clear that Caspert was conducting the auction and therefore only supports the inference that Caspert was responsible for any obligations to indemnify the building owners” (NYSCEF doc No. 40 at 7).

The Court thus declines to consider the parol evidence on which Caspert’s argument for dismissal is entirely predicated, and finds that based on the plain, unambiguous language of the letter agreement, an outstanding issue of fact remains regarding whether Caspert breached its duty to properly supervise the inventory removal.

Therefore, Caspert is not entitled to summary judgment dismissing Defendants’ claim for common law indemnification and/or contribution. Caspert’s cross-motion for dismissal of the third-party action is thus denied in its entirety.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED that Plaintiff Jose Antonio Pereira a/k/a Angel Martinez’s motion, pursuant to CPLR 3212, for summary judgment on his Labor Law § 240(1) and § 241(6) claims (Motion Seq. 003) is granted to the extent that Plaintiff is granted summary judgment on his Labor Law § 240(1) claim, and is otherwise denied. It is further

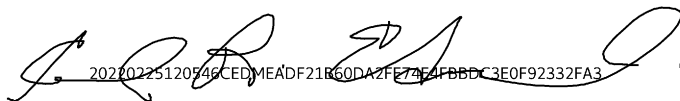
³ “Supervise.” Cambridge Online Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/supervise> (retrieved August 27, 2021).

ORDERED AND ADJUDGED that Plaintiff’s claim pursuant to Labor Law § 241(6) is severed and dismissed from this action; and it is further

ORDERED AND ADJUDGED that the cross-motion of third-party defendant Caspert Management Co, Inc. (“Caspert”) pursuant to CPLR 3212 for summary judgment dismissing the third-party action is denied in its entirety; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Plaintiff shall serve a copy of this Order with Notice of Entry within 20 days of entry on all parties.


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2/25/2022
DATE

CAROL EDMEAD, J.S.C.

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