SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART 58**

Justice

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ANTHONY MAZZEI and MICHELE MAZZEI,

Plaintiffs,

- v -

SWEET CONSTRUCTION OF LONG ISLAND LLC, SLSCO L.P., and PRO SAFETY SERVICES LLC,

Defendants.

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INDEX NO. 151546/2017

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77

were read on this motion to/for SUMMARY JUDGMENT.

In this Labor Law action, defendants Sweet Construction of Long Island LLC ("Sweet"), SLSCO LP ("SLS"), and Pro Safety Services LLC ("Safety") (collectively "Defendants") move, pursuant to CPLR 3212, to dismiss the action against them. Anthony Mazzei ("Plaintiff") and his wife Michele Mazzei (collectively "Plaintiffs") oppose the motion and cross-move seeking summary judgment on liability in their favor. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motions are decided as follows.

I. Procedural and Factual Background

On June 24, 2016, Plaintiff, employed as a "carpenter, super, [and] project manager" by non-party Nicolosi Brothers ("Nicolosi"), was injured while working on top of a scaffold at 15 Center Place, Staten Island, New York ("the premises") as part of a construction project ("the project"). Plaintiff commenced this action against Defendants alleging violations of Labor Law §§ 200, 240(1), and 241(6). SLS, the construction manager for the project, retained Sweet as the

general contractor, which, in turn, retained Safety as the site safety manager and Nicolosi to perform the construction.

At the time of the alleged incident, Plaintiff was at the premises working on a house, which was elevated off the ground, with a metal scaffold on the back of it, and another metal scaffold on the side. Both scaffolds were approximately 10 to 12 feet above ground. The only operable door to enter the house was on its right side.

Plaintiff climbed a ladder 10 to 12 feet above the ground to the walking section of the rear scaffold (Plaintiff's EBT at 130, 153-54, 156, & 200). However, he realized that he had to use the scaffold on the side to enter the house (id. at 171-72). He told Dave Ferrero ("Ferrero"), Sweet's superintendent, that he did not want to step from the rear scaffold onto the scaffold on the side of the house because "between the two scaffoldings there was like a two-foot gap" (id. at160, referencing Doc 40 [photographs]). Ferrero told Plaintiff that that he "had to" (id.). Neither scaffold had handrails, safety-rails, or end-rails (Doc 40).

As Plaintiff was stepping over this gap, he "[felt himself] slipping off the edge of the pick [walking surface of the scaffold]. … [F]earing to fall into the hole, the gap in between it, [he] kind of twisted [himself] to grab [himself], forward momentum to grab the workbench" (id. at 217). He added that "because the gap [was] so wide, [he] got himself, [his] right leg to get [him] back onto the pick so [he] wouldn't fall" (id. at 219). He twisted his left knee but did not fall (id. at 241-43).

John Mehl ("Mehl"), who was employed as a field construction inspector by construction manager SLS at the time of the incident, "made sure that the work [for the project] was getting done [and] report[ed] back to [his] office if there was progress" (Mehl EBT at 9:15-16, 10:02-03, 11:08-18; *see also id.* at 16:05-10). When Mehl would visit construction sites, he would "mak[e]

sure the sites were tidy [so that workers would not trip or get hurt and] … tell the forem[e]n to correct [any] problem[s]" (*id.* at 17:11-19:06).

Mehl testified that he was aware that there was a contract between general contractor Sweet and SLS (id. at 27:11-13). He talked to three people from Sweet, including Ferrero, regarding the progress of construction on a daily basis (id. at 28:16-30:11). He did not recall whether he "ever discuss[ed] on-site safety" about the subject house with Ferrero but said that he would discuss safety issues with him if needed generally for the project (id. at 30:07-11; 31:18-21). He also visited sites with Ferrero weekly to make progress inspections (id. at 38:06-15). Mehl also stated that "if [he] felt [Plaintiff] or anyone in his crew was engaging in an activity that [he] deemed unsafe, [he] could tell them to stop working immediately" (id. at 107:12-18).

II. The Parties' Contentions

In support of their motion for summary judgment dismissing the complaint, Defendants argue that (1) Plaintiff did not suffer any injury directly caused by gravity-related forces; (2) the absence of safety railings did not contribute to Plaintiff's injuries; and (3) there is no evidentiary basis on which to conclude that any defendant was negligent or that anything any defendant did or did not do was the proximate cause of any injury to Plaintiff.

In opposition, Plaintiff argues that the incident was caused by gravity-related forces and that the presence of a railing, gate or end-rail would have provided reasonable and adequate protection and safety that would have prevented this type of accident. Additionally, Plaintiffs cross-move seeking partial summary judgment on the issue of liability under Labor Law sections 240(1), 241(6), and 200, as well as seek leave to amend the bill of particulars, pursuant to CPLR 3025, to include violations of Industrial Code Rules §§ 23-1.5(a); 23-1.7(b)(1)(i); 23-1.7(e)(1), 23-1.7(f), 23-5.1(j)(1), and 23-5.3(e) and (f) (Doc 55).

In opposition to Defendants' motion and in support of their cross motion, Plaintiffs submit the affidavit of Nicholas Bellizi, P.E. ("Bellizzi"), a licensed professional engineer, who opines that, based on his review of the relevant materials produced as part of discovery, "[d]ue to the vertical height differential of 12 to 14 inches and the 24-inch-wide gap, [Plaintiff] had to have jumped, or leaped down from one pick to the other [and] was basically airborne and subject to gravity related forces when his left foot and leg hit the lower scaffold platform, or pick, level" (Doc 52). Bellizzi further opines that the use of the uneven and separated scaffold sections for the task that Plaintiff was performing without guardrails, railings, or end-rails was inappropriate, unsafe, dangerous and hazardous and a violation of Labor Law Sections 200, 240(1) and 241(6) and Industrial Code Rule Sections 23-1.5(a)(1), 23-1.7(b)(l)(i), 23-1.7(e)(1), and 23- 5.1(j)(1) and 23-5.3(e) and (f) (id.)

In further support of their motion, Defendants argue, inter alia, that there is no evidence that Plaintiff suffered an injury arising from a failure to protect him against a significant elevation difference.

In opposition to the cross motion, Defendants argue that: (1) over four years ago, they demanded a bill of particulars from Plaintiffs with specific Industrial Code violations, but Plaintiffs failed to identify any specific provisions until nearly eight months after they filed the note of issue; (2) based on their physicians' affirmations, Plaintiff's alleged injuries to his left knee, thoracic spine, and lumbar spine (Doc 41) were caused by degeneration and not by the alleged incident; and (3) Plaintiffs failed to submit proof in admissible form that defendants SLS and Pro Safety are agents of the owner or general contractor for purposes of Labor Law.

In opposition to the cross motion, Defendants submit the affidavits of Martin Bruno ("Bruno"), a specialist in construction-site safety, as well as Doctors Gordon Sze ("Sze") and

Craig Sherman ("Sherman"). Bruno opines, based on his review of the evidence, that Plaintiff's statements in his affidavit did not describe a hazard of the type that section 240(l) was designed to protect against and that the cited Industrial Code sections were either inapplicable or that the violation thereof did not proximately cause the incident (Doc 74). Bruno states, inter alia, that:

- Contrary to Plaintiff's claim that the lack of a handrail prevented him from holding onto any support when he stepped across the opening, the photographs (Doc 40) demonstrate that he could have held the rear work bench with his left hand as he stepped across;

- Plaintiff could have descended the ladder that he used to climb up to the back scaffold and repositioned it to use it to climb up to the side scaffold; and

- The scaffold was erected immediately adjacent to the house upon which work was being performed, the vertical support poles were strapped to the structure, and the pick was placed in the area between the vertical support poles and the exterior wall of the home and, as such, the wall of the home was the functional equivalent of the safety railing addressed in the relevant Industrial Code sections

(Doc 74).

Sze, a physician licensed to practice in the State of New York and a professor of Radiology at Yale School of Medicine employed by Defendants, opines that, based on the pre and post June 24, 2017 films of Plaintiff's thoracic spine and lumbar spine, Plaintiff's alleged spinal injuries were necessitated by the longstanding, pre-existing degenerative condition of Plaintiff's spine and were "in no way" related to the June 24, 2016 incident (Doc 75).

Sherman, a physician and a neuroradiologist licensed to practice medicine in the State of New York, opines that, based on radiographic and MRI images studies of Plaintiff's knees performed before and after the June 24, 2016 incident, there was no evidence of any injury or condition on any of Plaintiff's left knee or right knee films that can be attributed to the June 24, 2016 incident (Doc 76).

Thus, defendants not only urge that issues of fact exist regarding the cause of plaintiff's injuries, but also about how the incident occurred and whether it resulted from a Labor Law violation.

There are no reply papers in further support of Plaintiffs' cross motion.

III. Standard of Review

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). "This burden is a heavy one," requiring that the "facts . . . be viewed in the light most favorable to the non-moving party" (*Jacobsen v NY City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014] [internal quotation marks and citation omitted]). The failure to make prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the showing is met, the burden shifts to the opposing party, who must establish the existence of a triable issue of fact to defeat the summary judgment motion (*see id.* at 324).

IV. Legal Conclusions

A. Labor Law § 240(1)

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

> All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

(Labor Law § 240[1]). The legislative purpose behind this enactment is to protect workers against the "effects of gravity" by placing ultimate responsibility for safety practices on the

owner and general contractor, instead of on workers who are scarcely in a position to protect themselves from accidents (*Rocovich v Consol. Edison Co.*, 78 NY2d 509, 513 [1991]; *see also Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 284-90 [2003]; *John v Baharestani*, 281 AD3d 114, 118 [1st Dept 2001]). The statute is to "be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (*Melber v 6333 Main St., Inc.*, 91 NY2d 759, 762 [1998]).

Here, Plaintiffs' untimely cross motion may be considered since a timely motion was made seeking identical relief (*Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013]). Further, Plaintiffs establish *prima facie* that, based on Plaintiff's deposition testimony and Bellizzi's affidavit, the incident, in which Plaintiff twisted his ankle trying to step across a two-foot gap while trying not to fall 10 to 12 feet to the ground, was caused by the effects of gravity (*Hernandez v Argo Corp.*, 95 AD3d 782, 783 [1st Dept 2012] [affirming entitlement to Labor Law § 240(1) claim of a worker who fell to the ground after jumping across a three-and-half-foot gap from the platform of an elevated scaffold to the top of a sidewalk shed]; *Reavely v Yonkers Raceway Programs, Inc.*, 88 AD3d 561, 563 [1st Dept 2011] ["This Court has consistently held that the statute applies where a worker was injured in the process of preventing himself from falling[.]"]). This Court also notes that Bellizzi opines that, due to the configuration of the scaffolds, the incident was gravity related.

Thus, the branch of Defendants' motion seeking summary judgment pursuant to Labor Law § 240(1) is denied. Further, the cases cited by Defendants do not address the material facts of this action (*See Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993] [involving a worker who had to sit down at a platform's edge for nearly three hours to complete his welding job without falling from his perch and ended up injuring his back due to his body's position];

Nicometi v Vineyards of Fredonia, LLC, 25 NY3d 90, 97 [2015] [involving a worker who slipped on a patch of ice and fell to the floor while using stilts

However, based on the affirmations of Sze and Sherman, Defendants raise an issue of fact in opposition regarding whether Plaintiff's injuries were caused by the subject incident and whether the incident could have occurred in the manner described by plaintiff (*See Kozlowski v Alcan Aluminum Corp.*, 209 AD2d 930, 931 [4th Dept 1994]; *see also Aspromonte v Judlau Contr., Inc.*, 2017 NY Slip Op 31091(U), 2017 NY Misc LEXIS 1920 [Sup Ct NY Co 2017 [Freed, J.] [defendants' medical and biomechanical experts raised issues of fact regarding cause of plaintiff's injuries and how accident occurred warranting denial of plaintiff's motion for summary judgment], *aff'd* 162 AD3d 484 [1st Dept 2018]). Plaintiffs do not submit reply papers or expert affidavits or affirmations to dispute the findings of Defendants' physicians that Plaintiff's injuries were not caused by the accident.

B. Labor Law § 241(6)

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, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

(Labor Law § 241[6]).

Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers, and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor as set forth in the Industrial Code (*see Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 502

[1993]; *Norton v Park Plaza Owners Corp.,* 263 AD2d 531 [1999]). To establish a cause of action for a violation of Labor Law § 241(6), a plaintiff must plead and prove a violation of a specific provision of the Industrial Code (*Ross,* 81 NY2d at 505).

A failure to identify the Industrial Code provision in the complaint or bill of particulars is not fatal to such a claim (*Leveron v Prana Growth Fund I, L.P.*, 181 AD3d 449, 450 [1st Dept 2020]). Rather, leave 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 (*id.* at 450).

Here, Plaintiffs identified, for the first time in their cross motion, four Industrial Code provisions that provided the foundation for their Labor Law § 241(6) claim. Plaintiffs' belated identification of these regulations in their cross motion for summary judgment does not require dismissal of the claim, because it entailed "no new factual allegations, raise[d] no new theories of liability, and cause[d] no prejudice to the defendant" (*Leveron*, 181 AD3d at 450 [internal citations omitted]; *Francescon v Gucci Am., Inc.*, 71 AD3d 528, 529 [1st Dept 2010]). Further, Plaintiffs, through Bellizzi's affidavit, make a showing of merit as to these sections.

Thus, this Court grants Plaintiffs' leave to amend the bill of particulars to include violations of Industrial Code §§ 23-1.5(a), 23-1.7(b)(1)(i), 23-1.7(f), 23-5.1(j)(1), and 23-5.3(e) and (f) (*Leveron*, 181 AD3d 449; *see also Latino v Nolan and Taylor-Howe Funeral Home, Inc.*, 300 AD2d 631, 633 [2d Dept 2002]. However, this Court denies Plaintiffs leave to amend the bill of particulars to include a violation of Industrial Code § 23-1.7(e)(1), requiring that all passageways be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping, since there is no reasonable view of the evidence upon

which it can conclude that Plaintiff's injury was caused by him tripping on dirt or debris (*Leveron*, 181 AD3d 449). Defendants' request to further depose Plaintiff is denied since violations of Industrial Code §§ 23-1.5(a), 23-1.7(b)(1)(i), 23-1.7(f), 23-5.1(j)(1), and 23-5.3(e) and (f) do not provide any new facts or theories of liability (*Murillo v New York City Partnership*, 2015 N.Y. Slip Op. 30617[U] [N.Y. Sup Ct, New York County 2015]).

Further, Plaintiffs establish *prima facie* entitlement to summary judgment on their Labor Law § 241(6) claim predicated on violations of:

- Industrial Code § 23-1.7(f), requiring that stairways, ramps or runways shall be provided as the means of access to working levels above or below ground;
- Industrial Code § 23-5.1(j)(1), requiring that the open sides of all scaffold platforms be provided with safety railings;
- Industrial Code § 23-5.3(e), requiring that safety railings be provided for every metal scaffold; and
- Industrial Code § 23-5.3(f), requiring that ladders, stairs, or ramps be provided for access to and egress from platform levels of metal scaffolds more than two feet above the ground

since Plaintiffs sufficiently demonstrate that the side scaffold was not sufficiently protected and there was no ladder or stairway to access the side scaffold. Further, these Industrial Code sections set forth specific standards of conduct sufficient to support the Labor Law § 241(6) cause of action (*see Latchuk v Port Auth. of NY & New Jersey*, 71 AD3d 560 [1st Dept 2010]; *Macedo v J.D. Posillico, Inc.*, 68 AD3d 508 [1st Dept 2009]; *Picchione v Sweet Constr. Corp.*, 60 AD3d 510 [1st Dept 2009]; *Mugavero v Windows By Hart, Inc.*, 69 AD3d 694, 695 [2d Dept

2010]; *O'Hare v City of New York*, 280 AD2d 458, 458 [2d Dept 2001]).[1] Thus, Defendants are not entitled to summary judgment dismissing Plaintiff's Labor Law 241(6) claim.

Nevertheless, Defendants raise issues of fact, based on the affirmations of Sze and Sherman, and on the affidavit of Bruno, as to whether Plaintiffs' injuries were caused by the subject incident (*see Aspromonte*, 162 AD3d at 485; *cf. Brown v 43-25 Hunter, L.L.C.*, 178 AD3d 493, 494 [1st Dept 2019]) or as to whether they violated the relevant Industrial Code sections. For instance, Plaintiff used a ladder that was readily available to him to climb up the rear scaffold. It is not clear whether this ladder was available for use for the side scaffold.

C. Common Law Negligence and Labor Law § 200

Labor Law § 200 "is a codification of the common law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005] [internal citations omitted]). It provides, in pertinent part:

> All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

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[1] Industrial Code § 23-1.5(a) sets only general safety standards and thus cannot serve as a predicate for liability pursuant to Labor Law § 241(6) (*Martinez v 342 Prop. LLC*, 128 AD3d 408, 409 [1st Dept 2015]).

Although Industrial Code § 23-1.7(b)(1)(i), requiring that hazardous openings into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing, is sufficiently specific to support a claim pursuant to Labor Law § 241(6), this section does not apply to the facts here because Plaintiff did not fall through a "hazardous opening" (*see Varona v Brooks Shopping Centers LLC*, 151 AD3d 459, 460 [1st Dept 2017]; *Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014]).

(Labor Law § 200[1]). "An owner is obligated to maintain its property in a reasonably safe condition" (*Laecca v New York Univ.*, 7 AD3d 415, 416 [1st Dept 2004]; *see also Prevost v One City Block LLC*, 155 AD3d 531, 533, 534 [1st Dept 2017]; 2A N.Y. Jur. 2d Agency § 425).

Here, SLS and Safety are entitled to summary judgment dismissing the Labor Law § 200 and common-law negligence claims against them because there is no evidence that either entity exercised supervisory control over the injury-producing work (*see Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 877 [1993]; *Galvez v Columbus 95th St. LLC*, 161 AD3d 530, 531 [1st Dept 2018]). However, there is an issue of fact as to whether Sweet exercised supervisory control or had input as to how Plaintiff was to travel across the picks. Further, assuming, arguendo, that the incident arose from a dangerous condition, there is an issue of fact as to whether Sweet had actual and/or constructive notice of it.

The parties' remaining contentions are unavailing or need not be addressed in light of the above analysis.

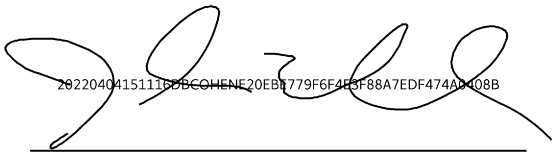
Accordingly, it is hereby:

ORDERED that the motion by defendants Sweet Construction of Long Island LLC ("Sweet Construction"), SLSCO LP ("SLS"), and Pro Safety Services LLC ("Safety") (collectively "Defendants") to dismiss the action is granted to the extent the Labor Law § 200 and common-law negligence claims are dismissed as against SLS and Safety, and the motion is otherwise denied; and it is further,

ORDERED that the cross motion by plaintiffs Anthony Mazzei and Michele Mazzei is granted to the extent Plaintiffs are granted leave to amend the bill of particulars to include violations of Industrial Code §§ 23-1.5(a), 23-1.7(b)(1)(i), 23-1.7(f), 23-5.1(j)(1), and 23-5.3(e) and (f), and the cross motion is otherwise denied; and it is further,

ORDERED that Plaintiffs are granted leave to serve Defendants with a bill of particulars amended in the manner directed above, provided the bill of particulars is served within 20 days of the date of the service of this Order, with notice of entry; and it is further

ORDERED that if the bill of particulars is not served in accordance with the time frame set forth above, then such leave shall be denied.



4/4/2022
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE