

Betances v Smitell LLC
2022 NY Slip Op 32067(U)
June 29, 2022
Supreme Court, Kings County
Docket Number: Index No. 504513/2019
Judge: Ingrid Joseph
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At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 29th day of June 2022.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS

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GABRIEL RODRIGUEZ BETANCES,
Plaintiff(s)

-against-

SMITELL LLC, SMITELL SPONSOR LLC, SMITELL DEVELOPMENT GROUP LLC, EXTELL DEVELOPMENT COMPANY, EXTELL MANAGEMENT CORP, and LENDLEASE (US) CONSTRUCTION LMB INC.

Defendant(s)

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The following e-filed papers considered herein:

- Notice of Motion/ Affirmation in Support/ Exhibits Annexed/ Statement of Material Facts/ Memorandum of Law/Affidavit of Service.....
- Affirmation in Opposition/Exhibits Annexed
- Response to Statement of Material Facts.....

Index No: 504513/2019
Motion Seq. No.: 2 & 3

DECISION

NYSCEF E-filed docs

- 28-39; 53-57
- 48-49; 59

In this matter, ("Plaintiff") Gabriel Rodriguez Betances moves (Motion Seq. 2) pursuant to CPLR §3212 for an order granting partial summary judgment as to liability on his Labor Law §§240(1) and 241(6) claims. Additionally, Plaintiff moves (Motion Seq. 3) pursuant to CPLR §3025 (b) for leave to serve a Supplemental Summons and Amended Complaint to add a loss of services claim on behalf of his wife Reyna Alvarez-Rojas ("Alvarez-Rojas"). Defendants Smitell LLC ("Smitell") and Lendlease (US) Construction LMB Inc. ("Lendlease") have opposed (Motion Seq. 2) on the grounds that there are issues of material fact as to how the incident occurred and have opposed (Motion Seq. 3) asserting prejudice if granted.

This action arises out of an incident that occurred on November 19, 2018 in which the Plaintiff sustained injuries while engaged in construction on behalf of his employer, Pinnacle Industries II, LLC at the project site located at 217 West 57th St. New York, NY ("The Premises"). Defendant Smitell is the owner of the Premises, which at the time was undergoing construction of a high rise tower comprised of two separate but connected components – a seven story retail component and a 92 floor residential component. Pursuant to an Agreement signed December 13,

2017, between Smitell and Lendlease, Lendlease was acting as the owner's agent and construction manager at the work site.

Plaintiff testified at his deposition held on August 7, 2020, that he had been working at the construction site since 2015. (Rodriguez Betances Dep. 15 lines 10-1) and that he was employed as a laborer whose duties included moving reshore jacks and stripping beams and plywood from ceilings and walls. (Rodriguez Betances Dep. 15-16; 22 lines 3-4). Plaintiff testified that he received his daily orders from his boss Steford Jarrett.¹ (Rodriguez Betances Dep. 19 lines 13-23; 21 lines 6-10).

On the date of the accident, Plaintiff claims that he was instructed by Jarrett to remove just the jacks on the 72nd floor so that he and Jarret could take them to the carpenters that were working on another floor. (Rodriguez Betances Dep. 27 lines 18-24; 28 lines 4-13); (Jarret affidavit line 3). The jacks Plaintiff was instructed to move allegedly weighed about 115 pounds and were 5-7-feet tall. (Rodriguez Betances Dep. 22 lines 1-18). In his testimony Plaintiff explained that the jacks were positioned up against the ceiling by the carpenters to protect the ceilings and plywood – the plywood is then placed on top of the beams and secured by the jack so that concrete can be poured on them (Rodriguez Betances Dep. 23 lines 1-18; 24 lines 1-17). Plaintiff stated that in order to remove the jacks, he had to hammer a pin in the middle of the jack to loosen it so that it could be turned and removed which would cause the jack to collapse a little so that he could then remove the jack by pulling on it. (Rodriguez Betances Dep. 31 lines 2-25; 32 lines 1-7).

Plaintiff states that at the time of the accident, the only persons working on the 72nd floor were he and Jarret and that the two had removed approximately 50 jacks from approximately 100 that were installed on that floor. (Rodriguez Betances Dep. 29 lines 17-22; 30 lines 10-17). Plaintiff alleges that as he was about to remove the screw to take out the jack, when he pulled out the jack, the plywood and other materials fell from the ceiling on top of him because the carpenters had not nailed the plywood against the ceiling. (Rodriguez Betances Dep. 34 lines 11-15). According to Plaintiff, typically after stripping is done, the carpenters put the plywood into place, nail them with 3 nails, and then place a jack up against it. (Rodriguez Betances Dep. 37 lines 20-25; 38 lines 1-8). Plaintiff testified that he was wearing his hard hat at the time of the

¹ Steford Jarrett is sometimes referred to as "Jared" or "Jerry" in Plaintiff's papers, but is sworn in as "Stedford Jarrett" in his affidavit.

incident. (Rodrigues Betances Dep. 29 lines 23-24). Plaintiff subsequently commenced this action against Defendants, seeking to recover for the injuries he allegedly sustained asserting claims under common-law negligence, Labor Law §§ 200, 240(1) and 241(6).

In support of his motion (Motion Seq. 2), the Plaintiff argues that the activity in which he was engaged in during the course of the construction project falls within the provisions of Labor Law § 240(1) and that he has demonstrated his prima facie entitlement to judgment as a matter of law through the submission of his deposition testimony, the affidavit of his co-worker Stedford Jarrett who was present at the time of the incident as well as the deposition testimony of Edwin Garcia (“Garcia”), a construction manager for Defendant Lendlease who had worked for Lendlease for 14 years but was not assigned to the worksite premises at the time of the incident.

In his deposition testimony, Garcia explained how the floors were erected on this project. He stated that first carpenters and lathers² build the formwork and deck for which the concrete will be poured into (Garcia Dep. 31-32). Garcia then testifies that beams would be placed that have ribs going off of them and then plywood would be placed on top of those materials to secure the beams and prevent the deck from moving when the concrete is poured (Garcia Dep. 32 line 25; 33 lines 2-25; 34 lines 2-3). Garcia described “stripping” as the removal of “all the reshores from underneath the formwork underneath that you just used to place the concrete on top.” (Garcia Dep. 35 lines 8-14). Stripping is often done in stages so that materials can be reused on different floors. (Garcia Dep. 35 lines 15-18; 36 lines 2-10). Depending on the foreman’s instructions, the jacks will either remain up for a while longer to allow the concrete to set and cure, the plywood is removed and the jack is placed directly underneath the fresh concrete, or the wood is left and the jack is placed to keep it secure. (Id. Lines 11-24).

Garcia also testified that during his inspections on other jobs, he has seen stripping work performed on ceilings of new poured decks. (Garcia Dep. 36 line 25; 37 lines 2-6). In instances when a ceiling is being stripped, the reshore jack is removed, placed to the side and then the plywood can be peeled from the top, but when the jack is removed, the plywood is usually either secured or stuck on to the concrete because it is freshly poured. (Garcia Dep. 37 lines 7-25; 38 lines 2-6).

² Lathers are laborers that install wood, metal, and gypsum lath boards that support plaster, concrete and stucco coatings used in construction.

Plaintiff further argues that the only safety device provided to him was a hard hat, which was no protection for the unsecured 40-pound plywood board and construction materials that fell on him. Thus, the incident occurred due to Defendants' failure to ensure that there was sufficient safety protection in violation of Labor Law 240(1) and that violation was the proximate cause of Plaintiff's injuries.

Defendants' attorney, in their affirmation in opposition, oppose Plaintiff's motion (Motion Seq. 2) and argue that Labor Law 240(1) is not applicable herein because Plaintiff's injury is not the type intended to be protected by this provision since this was a situation in which a hoisting or securing device of the type enumerated in the statute would not be necessary or expected because Labor Law § 240(1) was established to address the special hazards of falling objects and falling workers. Furthermore, Defendants state that the protections of the statute apply only to a narrow class of dangers that are related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and a higher level of the materials or load being hoisted or secured (*Melber v 6333 Main Street*, NE2d 933, [1998]).

Defendants assert that the entire purpose of Plaintiff's construction activity would be prohibited if the plywood panels were secured, as the goal of the activity was to detach and remove the panel from the finished ceiling.³ Thus, imposing liability for failure to provide protective devices to prevent objects from falling when their fall was the goal of the work, would be illogical (*Wilinski v 334 East 92nd Housing Development Fund Corp.*, 18 N.Y.3d 1, 7 [2011]).

It is well established that 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 demonstrate the absence of any material issues of fact (*Ayotte v. Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v. Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form,

³ Plaintiff testified that two weeks prior to the incident he was working on the 7th floor stripping the plywood flooring that the carpenters had previously installed (Rodriguez Betances Dep. 28 lines 14-23). On the date of the incident however, Plaintiff testified that he was engaged in removing jacks from the ceiling and argues the plywood should have been secured by the carpenters so that cement could then be poured on top of it.

sufficient to establish the existence of material issues of fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable (*Elzer v. Nassau County*, 111 A.D.2d 212, [2nd Dept. 1985]; *Steven v. Parker*, 99 AD2d 649, [2nd Dept. 1984]; *Galeta v. New York News, Inc.*, 95 AD2d 325, [1st Dept. 1983]). When deciding a summary judgment motion, the Court must construe facts in the light most favorable to the non-moving party (*Marine Midland Bank N.A. v. Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept. 1990]; *Rebecchi v. Whitmore*, 172 AD2d 600 [2d Dept. 1991]).

Labor Law § 240 (1)

Labor Law § 240(1)⁴ imposes absolute liability on building owners and contractors whose failure to provide protection to workers employed on a construction site proximately causes injury to a worker (*see Wilinski*; quoting *Misseritti v Mark IV Constr. Co.*, 86 N.Y.2d 487, 490 [1995]; *Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662 [2014]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). The statute is intended to provide extraordinary protections to a narrow class of dangers -- more specifically, special hazards that present elevation-related risks (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 96-97 [2015] [internal quotation marks, brackets and citations omitted]).

In order to prevail on summary judgment in a section 240 (1) falling object case, the injured worker must demonstrate the existence of a hazard contemplated under that statute and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein (*Fabrizi* at 662). Essentially, the plaintiff must demonstrate that at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking and that the object fell because of the absence or inadequacy of a safety device of the kind enumerated in the statute. (*Id.* at 662–663; *Narducci v Manhasset Bay Assoc.*, 96 NY2d at 268; *Mendez v Jackson Dev. Group, Ltd.*, 99 AD3d 677, 678 [2d Dept 2012]). While a plaintiff is not required to present

⁴ Labor Law § 240(1) states:

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.

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 (*Niewojt v Nikko Constr. Corp.*, 139 AD3d 1024; 1027 [2d Dept 2016]; *Noble v AMCC Corp.*, 277 A.D.2d 20 [2000]). Thus, 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 (see *Narducci; Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 965 [2d Dept 2013]).

In applying these legal principles, the Court finds that the Plaintiff's accident does fall within the provisions of Labor Law § 240(1). Plaintiff's testimony that the five by five piece of plywood was located approximately 16 feet above his head and weighed approximately 30 to 40⁵ pound shows that he was subject to a physically significant elevation differential between him and the materials that fell (*Wilinski*, 18 NY3d at 10; *Runner v New York Stock Exchange Inc.*, 922 N.E.2d 865 [N.Y. 2009]; *Pritchard v Tully Const. Co., Inc.*, 82 A.D.3d 730 [2011]). Moreover, Plaintiff's and Garcia's testimonies demonstrate that nails or some other securing device is commonly used to secure the plywood until the concrete is poured and cured. As such, nails would serve as a Labor Law § 240(1) securing device (*Keerdoja v Legacy Yards Tenant, LLC* 166 AD3d 418, 418-419 [1st Dept. 2018]; *Fabrizi*, 22 NY3d at 663).

Even if nails are not considered a safety device under Labor Law § 240(1), the record still shows that Plaintiff's accident was caused by the failure to employ hoists, slings, stays, ropes or other such devices and Defendants may be held liable whether the Plaintiff's injuries were caused by a height differential, or due to the materials being inadequately secured (*Barrios v 19-19 24th Avenue Company, LLC* 169 AD3d 747, 748-749 [2d Dept 2019]; see *Pritchard*, at 730-731; *Rutkowski v New York Convention Center Development Corp.*, 146 AD3d 686 [2017]).

While Defendants are correct in that *Wilinski*, does not afford protection in cases where the objects that injured the plaintiffs were themselves the target of demolition when they fell, the record does not reflect that Plaintiff was engaged in removing the plywood or stripping the floor at the time of the incident, nor does it reflect that it was intended for the plywood to fall or be removed from the ceiling. Plaintiff's testimony as well as the affidavit of Jarret assert that Plaintiff was only tasked with moving reshore jacks between floors. Garcia's testimony also establishes that the overall stripping process is often done in stages, so while the plywood would

⁵ (Rodriguez Betances Dep. 30 lines 4-5; 40 lines 7-8).

have eventually been removed at some point, it was not the target of demolition itself at the time it fell on Plaintiff.

Contrary to the Defendants' argument, the Second Department, held that the fact that the plaintiff was in the process of removing the form does not prevent recovery under Labor Law § 240(1) (*Ross v DD 11th Ave., LLC*, 109 AD3d 604 [2013]). In fact, the Second Department has found that Labor Law § 240(1) is applicable in cases where a plaintiff was injured by material that was being removed in instances where such material was found to be a load requiring securing for the purposes of the undertaking (*Sung Kyu-To*, 84 AD3d 1058, 1060 [2011]; *Mora v Boston Props., Inc.*, 19 AD3d 1109 [2010]; *Lucas v Fulton Realty Partners, LLC*, 60 AD3d 1004 [2009]; *Portillo v Roby Anne Dev., LLC*, 32 AD3d 421 [2006]; *Diaz v Raveh Realty LLC*, 182 AD3d 515 [2020]). Thus, the Plaintiff has made a prima facie showing that Labor Law § 240(1) is applicable under the circumstances of this case, and in opposition, the Defendants have failed to raise a triable issue of fact.

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

Labor Law § 240 (6)

Plaintiff also seeks partial summary judgment as to liability on his Labor Law § 241 (6) claim as premised upon Industrial Code §§ 23-1.7 (a) (1) and 23-2.2 (a), (c), and (d).

Generally, Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers without regard to direction and control (*Romero v J & S Simcha, Inc.*, 39 AD3d 838 [2d Dept 2007]). In order to prevail under this section of the Labor Law, a plaintiff must establish that specific safety rules and regulations of the Industrial Code were violated (*Ross v Curtis—Palmer Hydro—Elec. Co.*, 81 NY2d 494 [1993]; *Ares v State of New York*, 80 NY2d 959 [1992]). The rule or regulation alleged to have been breached must be a specific, positive command and be applicable to the facts of the case (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 619 [2d Dept 2008]; *Jicheng Liu v Sanford Tower Condominium, Inc.*, 35 AD3d 378, 379 [2d Dept 2006]).

Here, Plaintiff's verified bill of particulars alleges that the Defendants violated various Industrial Code sections including 12 NYCRR 23.1-7(a); 23-1.16; 23-1.17; 23-1.22; 23-2.2(b), (c), and (d). In support of the instant motion, Plaintiff asserts that his Labor Law § 241 (6) claim is predicated on Defendants' violations of only Industrial Code §§ 23-1.7 (a) (1) and 23-2.2 (a),

(c), and (d). Thus, Plaintiff has abandoned all of the other Industrial Code sections as predicates for liability under this statute (*Debenedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021] [holding that plaintiff abandoned his reliance on any other provisions of the Industrial Code by failing to address them in his brief]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]; *Palomeque v Capital Improvement Servs., LLC*, 145 AD3d 912, 914 [2d Dept 2016]).

Industrial Code § 23-1.7 (a) (1) requires employers to use appropriate safety devices to protect workers from overhead hazards (12 NYCRR 23- 1.7 [a] [1]; *Amerson v Melito Constr. Corp.*, 45 AD3d 708, 709 [2d Dept. 2007]). This provision applies when the plaintiff was injured in an area that is normally exposed to falling objects (*Portillo v Roby Anne Dev., LLC*, 32 AD3d 421, 422 [2d Dept. 2006]). Although this regulation is sufficiently specific to support a cause of action under Labor Law § 241(6) (*Id.* at 422; *Zervos v City of New York*, 8 AD3d 477, 480 [2d Dept 2004]), the Plaintiff has failed to make a prima facie showing that the area where he was working was an area normally exposed to falling objects and, therefore, whether this provision is applicable herein (*Crichigno v Pac. Park 550 Vanderbilt, LLC*, 186 AD3d 664, 665 [2d Dept 2020] [court found issues of fact existed as to whether area where plywood forms were being stripped/removed from basement ceiling was an area "normally exposed to falling material or objects"]; *Moncayo* at 965; *Mercado v TPT Brooklyn Assoc., LLC*, 38 AD3d 732, 733 [2d Dept 2007]).

In support of his motion, Plaintiff's counsel cites *Parrales v Wonder Works Const. Corp.*, A.D.3d 579, 580-81 [2d Dept. 2008], where the Court held it to be sufficient, specific, and applicable where the plaintiff, who was assigned to remove debris from the bottom of the shaft was injured by a piece of wood that fell from the fifth floor. In this case, Plaintiff's testimony that the plywood should have been secured and the absence of any other plywood falling while removing the jacks suggests that the area where he was working was not one that is normally exposed to falling material or objects.

Accordingly, that branch of Plaintiff's motion seeking summary judgment on his Labor Law § 241 (6) claim insofar as it is predicated upon a violation of 12 NYCRR 23-1.7 (a) (1) is denied.

Plaintiff also cites Industrial Code § 23-2.2(a), (c), and (d) which states:

- A. General requirements. Forms, shores and reshores shall be structurally safe and shall be properly braced or tied together so as to maintain position and shape.
- C. Beams, floors and roofs.
 1. Necessary horizontal and diagonal bracing shall be provided in both longitudinal and transverse directions to provide structural stability of beams, floors and roofs. Shores and reshores shall be properly seated top and bottom and shall be secured in place.
 2. Where shores or reshores rest upon the ground, mud sills or other bases shall be provided.
 3. Where the sum of the dead and live loads on the forms may exceed 150 pounds per square foot, the design of such forms, including shores, reshores and bracing, shall be as specified by a professional engineer licensed to practice in the State of New York. Such design plans and specifications shall be kept on the job site available for examination by the commissioner. All forms, shores, reshores and bracing shall be constructed and installed in accordance with such design plans and specifications.
- D. Stripping. After stripping, forms shall be promptly stockpiled or removed from areas in which persons are required to work or pass. Protruding nails, wire ties, and all other form accessories not necessary for subsequent work shall be pulled, cut or otherwise made safe.

Industrial Code § 23-2.2 applies to concrete work involving concrete forms, shores and reshores. Shoring, as it relates to concrete, is defined by regulations as a "system of temporary supports, either wood or metal, used to support the weight of forms and uncured concrete" (12 NYCRR 23-1.4 [b] [48]). Section 23-2.2 (a) of the Industrial Code, which relates to forms used in concrete work, has been held to be a proper predicate for a Labor Law § 241 (6) cause of action (*Corsaro v Mt. Calvary Cemetery*, 227 AD2d 957, 957-958 [1996]). However, the interpretation of the regulation presents a question of law, [and] the meaning of specialized terms in such a regulation is a question on which a court must sometimes hear evidence before making its determination (*Morris v Pavarini Const.*, 9 NY3d 47, 51 [2007]; *Millard v. City of Ogdensburg*, 274 AD2d 953, 954, [2000]).

"In the absence of any expert opinion addressing the issue of whether 12 NYCRR 23-2.2 (a) applies where the forms are in the process of being stripped, the defendants, as the proponents of the motion, did not establish their prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 241 (6) cause of action to the extent that it was premised upon an alleged violation of 12 NYCRR 23-2.2 (a)" (*Ross v DD 11th Ave., LLC*, 109 AD3d 604 [2013]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Giordano v Forest City*

Ratner Cos., 43 AD3d 1106 [2007]). Here, a more complete record is necessary as neither Plaintiff nor Defendants produced expert opinion addressing this issue.

To establish the reliability of an expert's opinion, the party offering that opinion must demonstrate that the expert possesses the requisite skill, training, education, knowledge, or experience to render the opinion (*Hofman v Toys "R" Us – NY Ltd. Partnership*, 272 AD2d 296 [2000]; *Matott v. Ward*, 48 NY2d 455 [1979]; see also, *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 [1999]; *Daubert v. Merrell Dow Pharms.*, 113 S.Ct. 2786 [1993]). In this case at bar, Defendants' construction manager Garcia testified that he received two years of college with an emphasis on civil engineering and has worked for Lendlease for 14 years, however, Garcia's deposition testimony is insufficient to qualify him as an expert. Garcia did not include any affidavit or report that would establish any specialized knowledge, experience, training, or education with regard to any of the issues in this action. Moreover, Garcia's testimony failed to identify any violations of industry-wide standards or accepted practices by the Defendants as it relates to Industrial Code provisions.

In regards to Industrial Code § 23-2.2(c), questions of fact exist as to whether the necessary horizontal and diagonal bracing were provided in both longitudinal and transverse directions to provide structural stability to the beams, floors and roofs and whether shores and reshores were properly seated, top and bottom, and secured in place. Moreover, a question of fact exists as to whether the dead and live loads on the forms exceeded 150 pounds per square foot, and whether the design of such forms was adequate. Plaintiff also asserts that Industrial Code § 23-2.2(d), which applies when stripping is completed, is applicable but there remains questions of fact as to whether stripping was actually completed on the floor at the time of the incident, or if it was being done in stages. Thus, Plaintiff has not satisfied their burden in regards to these sections.

Accordingly, that branch of Plaintiff's motion seeking summary judgment on his Labor Law § 241 (6) claim insofar as it is predicated upon a violation of 12 NYCRR 23-2.2 (a), (c), and (d) is denied.

Labor Law § 200

Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d

494, 501-502 [1993]). To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have authority to exercise supervision and control over the work (*Rojas v Schwartz*, 74 AD3d 1046, 1046 [2d Dept. 2010] quoting *Gallelo v MARJ Distribs., Inc.*, 50 AD3d 734, 735 [2008]; see *Chowdhury v Rodriguez*, 57 AD3d 121, 127-128 [2d Dept 2008]). General supervisory authority to oversee the progress of the work is insufficient to impose liability (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]; see also *Ross* at 505). A defendant has the authority to control the work for the purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed (*Sullivan v New York Athletic Club*, 162 AD3d 955, 958 [2d Dept 2018] quoting *Erickson v Cross Ready Mix, Inc.*, 75 AD3d 519, 522 [2d Dept 2010]; see *Roblero v Bais Ruchel High Sch., Inc.*, 175 AD3d 1446, 1448 [2d Dept 2019]; *Cambizaca v New York City Tr. Auth.*, 57 AD3d 701, 702 [2d Dept 2008]; *Ortega v Puccia*, 57 AD3d 54, 62 [2d Dept 2008]). If the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercises no supervisory control over the work, no liability attaches under Labor Law § 200 or the common-law (*LaRosa* at 909; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505).

In instances where a plaintiff's injuries arise not from the manner in which the work was performed, but from a dangerous condition on the premises, a defendant may be liable under Labor Law § 200 if the defendant "either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition" (*Rojas* at 1047, quoting *Ortega v Puccia*, 57 AD3d at 61). Here, the plaintiff's accident arose out of the manner in which the work was performed, rather than a dangerous condition that existed on the premises, thus defendants can only be liable under Labor Law § 200 if they had the authority to exercise supervision and control over the work (*Rojas* at 1046). In support of his motion, Plaintiff proffered the Agreement between Smitell and Lendlease which sets forth the duties and obligations of Lendlease as Construction Manager to the Owner Smitell as well as the deposition testimony of Garcia. In opposition, Defendants have not proffered any evidence to suggest they did not have authority to exercise supervision and control over the work. Nonetheless, evidence of general safety supervision at the work site is insufficient to establish whether the Defendants exercised the requisite degree of supervision and control over the injury producing activity. (*Dos Santos v STV Engrs., Inc.*, 8 AD3d 223, 224 [2d Dept. 2004]; see *Ortega; Geonie v OD & P NY*

Ltd., 50 AD3d 444 [1st Dept. 2008]). Plaintiff testified that he only received instructions from Jarrett, also employed by nonparty Pinnacle Industries II, LLC, who received directions from “the big bosses,” (Rodriguez Betances Dep. 25 lines 1-15) but questions of fact remain as to which employees, if any, employed by the Defendants instructed the activity that injured the Plaintiff.

Accordingly, that branch of Plaintiff’s motion seeking summary judgment on his Labor Law § 200 claim is denied.

Motion Seq. 3

Plaintiff also moves (Motion Seq. 3) pursuant to CPLR § 3025 (b) for leave to serve a Supplemental Summons and Amended Complaint to add a claim for Plaintiff’s wife. CPLR § 1003 provides that “[parties] may be added at any stage of the action by leave of court,” and CPLR § 3025 (b), states that “[a] party may amend his or her pleading, or supplement it, by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties.”

In the absence of prejudice or surprise resulting directly from the delay in seeking leave, applications to amend or supplement a pleading are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit (*Myung Hwa Jang v Mang*, 164 AD3d 803, 804 [2d Dept 2018], quoting *Lucido v Mancuso*, 49 AD3d 220, 222 [2d Dept 2008], see also *Jeffrey Gardens Apt. Corp. v LH Mgt., Inc.*, 157 AD3d 941, 942 [2d Dept 2018]; *Mannino v Wells Fargo Home Mtge., Inc.*, 155 AD3d 860, 862 [2d Dept 2017]; *Emigrant Sav. Bank v Walters*, 155 AD3d 829, 830 [2d Dept 2017]). When an amendment to a pleading or a bill of particulars is sought at or on the eve of trial, judicial discretion in allowing such an amendment should be “discreet, circumspect, prudent and cautious” (*Perricone v. City of New York*, 62 NY2d 661 [1984], quoting *Symphonic Electronic Corp. v. Audio Devices*, 24 AD2d 746; see also, *Davidian v. County of Nassau*, 175 A.D.2d 908, 909 [1991]; *Eggeling v. County of Nassau*, 97 AD2d 398 [1995]). Moreover, when a plaintiff has been guilty of an extended delay in moving to amend, an affidavit of reasonable excuse for the delay in making the motion and an affidavit of merit should be submitted in support of the motion (*Perricone v. City of New York*, supra).

In the present case, Plaintiff first moved to amend his summons and complaint on November 11, 2021. By then this matter had been on the trial calendar since June 9, 2021. In

support of his motion, Plaintiff claims that Alvarez-Rojas is a necessary party that needs to be added as a plaintiff based upon a theory of loss of services. Defendants have opposed the motion arguing that the motion is untimely and because the case is currently on the trial calendar, the Defendants will be prejudiced by the extended delay.

Upon consideration, the court finds that the claim for loss of services by Plaintiff's spouse does not prejudice or surprise defendants, nor is it patently devoid of merit (*see Garafola v Wing Inc.*, A.D 3d 793 [2016]; *McCaskey, Davies & Assoc. v New York City Health and Hosps. Corp.*, 59 NY3d [1983]). The statute of limitations to amend did not expire until November 19, 2021, so Plaintiff timely moved to amend. While a Note of Issue has been filed, the case is not scheduled to proceed in the Jury Coordinating Part until November, 2022. Therefore, the motion is not being made on the eve of trial as parties have adequate time to depose and conduct discovery pertaining to Plaintiff's wife.

Accordingly, it is

ORDERED that the branch of Plaintiff's motion (Motion Seq. 2) for partial summary judgment under Labor Law §§ 240(1) is granted; and it is further

ORDERED that the branch of Plaintiff's motion (Motion Seq. 2) for partial summary judgment under Labor Law § 241(6) pursuant to Industrial Codes 23-1.7 and 23-2.2 (a), (c), and (d) are denied; and it is further

ORDERED that the branch of Plaintiff's motion (Motion Seq. 2) under common-law negligence and Labor Law § 200 claim is denied; and it is further

ORDERED that the Plaintiff's motion (Motion Seq. 3) under CPLR § 3025 (b) for leave to serve a Supplemental Summons and Amended Complaint is granted and that the caption of the instant matter shall be amended to reflect

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GABRIEL RODRIGUEZ BETANCE and REYNA
ÁLVAREZ-ROJAS,

Plaintiffs,

Index no: 504513/2019

-against-

SMITELL LLC, SMITELL SPONSOR LLC, SMITELL
DEVELOPMENT GROUP LLC, EXTELL
DEVELOPMENT COMPANY, EXTELL
MANAGEMENT CORP. and LENDLEASE (US)
CONSTRUCTION LMB INC,

Defendants,

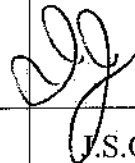
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And it is further

ORDERED, that service of the Supplemental Summons and Amended Complaint (at NYSCEF Docket No. 55) shall be satisfied on the answering defendants by services of a copy of this order with notice of entry within ten (10) days of such entry; and it is further

ORDERED, that a deposition of Reyna Alvarez-Rojas shall occur on or before September 30, 2022.

This constitutes the decision and order of the Court.



J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**