SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C2

----------X

EDY E. ABREU VELASQUEZ,

Plaintiff,

- against –

CAMBA HOUSING VENTURES, INC, CAMBA, INC., ST. MARKS PLACE & ASSOCIATES LLC, STELLAR MANAGEMENT, CASTLETON PRESERVATION HOUSING COMPANY, INC., CASTLETON PRESERVATION, LLC, CHAMP PLUMBING AND HEATING CORP.MANAGEMENT CORP. and CHAMPION COMBUSTION CORP.,

Defendants

----------X

CASTLETON PRESERVATION HOUSING COMPANY, INC. s/h/a/ CASTLETON PRESERVATION HOUSING COMPANY INC., CASTLETON PRESERVATION LLC, s/h/a, CASTLETON PRESERVATION, LLC and MEL MANAGEMENT CORP. d/b/a STELLAR MANAGEMENT,

Third-Party Plaintiffs,

-against -

CHAMPION COMBUSTION CORP., and PHOENIX ENERGY MANAGEMENT, INC.,

Third-Party Defendants.

----------X

HON. THOMAS P. ALIOTTA

DECISION & ORDER

Index No. 150476/2017

Motions 007, 008, 009, 010

Recitation as required by CPLR §2219(a) of the following papers numbered "1" through "17," were fully submitted on 10th day of November 2021:

Papers Numbered

(MS_007) Plaintiff's Notice of Motion for Partial Summary Judgement on the Issue of Liability under Labor Law §240(1), Affirmation in Support of Motion and Exhibits (dated September 23, 2021) 1, 2

Affirmation in Opposition to Plaintiff's Motion for Partial Summary Judgment (dated November 3, 2021) 3

(MS_008) Notice of Motion by Defendants/Third-Party Defendants Castleton Preservation Housing Company, Inc. and Mel Management Corp. for Summary Judgment Dismissing the Complaint, Cross Claims and Counterclaims, Affirmation in Support of Motion and Exhibits (dated September 29, 2021) 4, 5

Affirmation by Defendant/Third-Party Defendant Champion Combustion in Partial Opposition (dated November 3, 2021) 6

Plaintiff's Affirmation in Opposition to Motion Dated November 3, 2021) 7

Affirmation in Reply by Defendants/Third-Party Defendants Castleton Preservation Housing Company, Inc., s/h/a Castleton Preservation, LLC, and Mel Management Corp. d/b/a Stellar Management (dated November 9, 2021) 8

(MS_009) Notice of Motion by Defendant/Third-Party Defendant Champion Combustion Corp. pursuant to CPLR §3212 (i) Dismissing Plaintiff's Common Law Negligence and Labor Law §200 Claims, and (ii) Dismissing Plaintiff's Labor Law 241(6) Claim, Affirmation in Support of Motion and Exhibits (dated September 30, 2021) 9, 10

Memorandum of Law in Support of Motion by Champion Combustion Corp. (September 30, 2021) 11

Plaintiff's Affirmation in Opposition to Motion by Defendant/
Third-Party Defendant Champion Combustion Corp.
(dated November 9, 2021) 12

(MS_010) Notice of Cross Motion by Defendant/Third Party Defendant
Champion Combustion Corp. for Summary Judgment
Dismissing Plaintiff's Labor Law §240 Claim,
Affirmation in Support and Exhibits
(dated September 30, 2021) 13, 14

Memorandum of Law in Support of
Cross Motion by Champion Combustion Corp.
(dated September 30, 2021) 15

Plaintiff's Reply and Affirmation in Opposition
to the Cross Motion by Champion Combustion Corp.
(dated November 3, 2021) 16

Affirmation by Champion Combustion Corp.in Reply
and Further Support of Cross Motion (010)
(dated November 9, 2021) 17

Upon the foregoing papers, plaintiff's motion (Seq. No 007) for partial summary judgment on the issue of liability under Labor Law §240(1) is granted; the motion (Seq. No. 008) of Defendants/Third-Party Defendants Castleton Preservation Housing Company, Inc., s/h/a Castleton Preservation, LLC, and Mel Management Corp. for summary judgment dismissing plaintiff's complaint and all cross claims and counterclaims against them is denied; the motion (Seq. No. 009) of Defendant/Third-Party Defendant Champion Combustion Corp. for summary judgment dismissing plaintiff's common law negligence, Labor Law §200, and Labor Law §241(6) claims is granted, in part, and denied, in part; and the cross motion (010) of Defendant/Third-Party Defendant Champion Combustion Corp. for summary judgment dismissing plaintiff's Labor Law §240 claim is denied.

This action was commenced to recover damages for personal injuries allegedly sustained by plaintiff on February 11, 2016 while employed as a welder by Phoenix Energy Management, Inc. (hereinafter, "Phoenix").[1] Mr. Velasquez alleges he was injured when a large metal plate fell from a chain hoist while he was installing a new boiler in the basement of a residential apartment building located at 165-185 St. Mark's Place, Staten Island, New York. The metal plate struck plaintiff's right ankle and leg. As a result of the accident, he allegedly sustained permanent injuries, including a right ankle fracture requiring reconstructive surgery and a severe laceration on the right leg.

Defendant/third-party plaintiff Castleton Preservation, LLC (hereinafter "Castleton"), the owner of the apartment complex, contracted with defendant/third-party defendant Champion Combustion Corp. (hereinafter "Champion") as the general contractor for the removal and replacement of three boilers in the building. Champion retained plaintiff's employer, Phoenix, as a subcontractor to fabricate and install the boilers.

In the Complaint, it is alleged, *inter alia*, that defendants were negligent in the ownership, maintenance, management, operation, and control of the subject premises, and more particularly, in failing to provide a safe workplace, protection from job-related hazards, and adequate safety devices in violation of Labor Law §240(1) and §241. Relative to Labor Law §241(6), Mr. Velasquez claims that defendants violated the Industrial Code of the State of New York Sections 23-1.5, 23-1.7, 23-1.16 and 23-1.21. He further seeks recovery under Labor Law §200 and for common-law negligence.

---

[1] By Stipulation dated December 13, 2017, the third-party action was discontinued as against plaintiff's employer, third-party defendant Phoenix Energy Management, Inc. This Court dismissed the complaint as against defendants The City of New York, New York City Housing Preservation Development Corporation and Libby Management by orders dated November 21, 2018 and February 20, 2019.

Plaintiff's Motion for Partial Summary Judgment (Motion Seq. 007) and Defendant, Champion's Cross Motion for Summary Judgment (Motion Seq. 010) as to the Labor Law §240(1) Cause of Action

Plaintiff maintains the evidence in this case establishes, prima facie, his entitlement to partial summary judgment on the issue of liability under Labor Law §240(1) as against Castleton, and Mel Management Corp. d/b/a Stellar Management (collectively, "Castleton") and Champion for his injuries that flowed directly from the application of the force of gravity. In support, he submits deposition testimony from (1) Anthony Fischetti, vice president of Champion, the general contractor; (2) Peter Christian, general manager of Phoenix, plaintiff's employer; and (3) David Hodorowski, the building superintendent, an employee of Stellar Management.

Mr. Velasquez testified that he and his co-worker, Mr. Gomez, were in the process of fabricating and installing a new boiler in the basement of 165 St. Marks Place, Staten Island, New York. His supervisors were not present that day. To accomplish his task, plaintiff and his co-worker used a chain hoist, owned and supplied by Phoenix, his employer, to lift a large metal plate needed to fabricate the boilers. The metal plate was in the shape of a half-circle measuring approximately 6 or 7 feet at its widest point.

Mr. Velasquez set up the hoist by threading the chain hoist through a circular hole in the metal plate and wrapping the chain around the metal plate one time. He used an S-hook to connect the end of the chain with the segment of the chain that was wrapped around the metal plate to lift it off the ground. Plaintiff testified that in the process of hoisting the metal plate, the chain slipped and loosened. Although he attempted to fix it, "the chain…let go" and the plate fell to the ground, severely lacerating and injuring his right leg and ankle. He testified the S-hook was not equipped with a safety latch to ensure the S-hook remained in a closed position in the

event the metal plate slipped. Prior to using the chain hoist, Mr. Velasquez searched the gang-box at the jobsite for S-hooks with safety latches, but to no avail. Only two S-hooks were available on the jobsite and neither was equipped with safety latches. According to plaintiff, since the safety latches were used frequently, they routinely failed. Although he lodged complaints to his employer, the broken latches were not replaced. Mr. Velasquez unequivocally stated there were no safety latches available on the jobsite, particularly on the day of the accident. Nevertheless, he continued to perform his work using a chain hoist with an S-hook that was not equipped with a safety latch because "always we were pressured by the time…[we] had to work with whatever they have there."

Plaintiff maintains that the uncontroverted testimony of Mr. Fischetti establishes Champion took steps to investigate the incident and determined it was the product of defective equipment rather than worker fault. Mr. Fischetti testified "the equipment they used called a chain fold (i.e., chain hoist) that helps lift the steel was defective and it gave way and…instead of holding the steel up, it slipped and let go." Mr. Fischetti was advised by David Hodorowski, the building superintendent, and Jeff Solomon, an employee of Phoenix, that the chain hoist "failed and slipped". Plaintiff points out that Mr. Fischetti acknowledged the accident was a matter of a faulty tool, rather than an incapable installer. He testified that "a faulty tool has nothing to do with the guy."

Peter Christian, the general manager of plaintiff's employer, testified that Mr. Velasquez was "one of [his] best workers." According to the witness, Phoenix would not purchase new chain hoists for each job or issue a specific chain hoist to its installers. Instead, the chain hoists were kept in toolboxes on the jobsites. Mr. Christian had no idea whether the S-hooks were equipped with safety latches. He explained that the welders had discretion to choose how best to

hoist under the given circumstances. Notably, plaintiff's co-worker, Mr. Gomez, similarly testified "[i]t's up to the welder to tell how many times [the chain] should be wrapped around [the metal plate] to be secure."

In moving for summary judgment on the issue of liability under Labor Law 240(1), Mr. Velasquez submits that his unrefuted deposition testimony and the testimony of the parties' witnesses establish, prima facie, that the metal plate he was hoisting fell due to the absence of a safety device to protect him from the gravity-related risks of the tasks he was performing. He contends there is no evidence of potentially meritorious defenses that would preclude absolute liability imposed by Labor Law 240(1), i.e., that his negligent method of securing the metal plate to the chain hoist was the sole proximate cause of the accident. Plaintiff points out that regardless of the alleged negligent manner by which he secured the load, the safety latch on the S-hook was meant to prevent the chain from becoming unfastened. Therefore, the failure to provide S-hooks equipped with safety latches was a proximate cause of his injuries. As such, Mr. Velasquez asserts he is entitled to partial summary judgment on the issue of liability under Labor Law §240(1).

Champion opposes[2] plaintiff's motion and cross moves for summary judgment dismissing plaintiff's Labor Law 240(1) cause of action. Defendants allege that plaintiff's misuse of the chain hoist and his failure to use other available safety equipment was the sole proximate

[2] The Court notes that plaintiff's motion is granted as to Castleton Preservation Housing Company, Inc. and Mel Management Corp. since said defendants failed to submit a counter statement of material facts (22 NYCRR 202.8-g[b]); and all the material statement of facts in support of plaintiff's motion are deemed admitted by them (*see* 22 NYCRR 202.8-g[c] - *Each numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.*). Accordingly, the Court will only address Champion's opposition thereto, and its motion [MS_009] and cross-motion [MS_010] for summary judgment (MS_010). Further, as discussed below, the motion by Castleton Preservation Housing Company, Inc. and Mel Management Corp. is denied based upon their failure to submit a material statement of facts in support thereof (22 NYCRR 202.8-g[a]).

cause of the accident and, therefore, absolute liability under Labor Law 240(1) may not be imposed. Defendants claim Mr. Velasquez failed to properly wrap the chain around the metal plate more than once and/or neglected to weld a "pad eye" to the metal plate to securely attach the S-hook.

In support, Champion relies on the deposition testimony of Peter Christian, general manager of plaintiff's employer. He testified that an alternative method was available to properly secure the S-hook to the chain absent the availability of a safety latch. Mr. Christian explained that the method involved the use of a pad eye with a hole in it to secure the S-hook. The pad eye is welded to the metal plate for the attachment of the S-hook. According to the witness, pad eyes were available to plaintiff; they were delivered to the jobsite by Phoenix. Notably, Mr. Christian acknowledged it was an acceptable practice to wrap the chain hoist around the plate as plaintiff did, although the preferred method was to use a pad eye due to the 500-pound weight of the metal plate.

In view of the foregoing, Champion disputes liability for Mr. Velasquez' injuries on the grounds that he was a recalcitrant worker, i.e., he had adequate safety devices, including the pad eye, available to perform his work; he knew the safety devices were available and that he was expected to use them; he chose for no good reason not to do so; and would not have been injured had he not made that choice.

Champion further argues that absolute liability may not be imposed under Labor Law 240(1) where, as here, there was no significant height differential between plaintiff and the falling object. Mr. Velasquez testified that his task involved hoisting the metal plate from a flat position on the ground to a position perpendicular to the ground. The accident occurred shortly after plaintiff began hoisting the rounded side of the plate off the ground. The chain loosened and

slipped causing the plate to fall back onto the ground. Mr. Velasquez was unable to recall the exact height differential between the ground and the elevated portion of the metal plate; and hesitantly estimated the distance was approximately two feet. Champion contends the height differential was *de minimis* and insufficient to trigger the protections of Labor Law 240(1).

For these reasons, Champion maintains plaintiff failed to establish his prima facie entitlement to judgment on the issue of liability under Labor law 240(1). Moreover, Champion maintains that dismissal of the Labor Law 240(1) cause of action is warranted since the evidence demonstrates Mr. Velasquez was a recalcitrant worker whose negligence was the sole proximate cause of the accident.

ANALYSIS

New York State Labor Law 240(1) "was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or any other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). To prove a statutory violation of Labor Law 240(1), it must be shown that the object fell while being hoisted or secured because of the absence, or inadequacy, of a safety device of the kind enumerated in the statute (see *Narducci v. Manhasset Bay Assocs.*, 96 NY2d 259, 268 [2001]). "In order to obtain summary judgment on the issue of liability on a Labor Law §240 (1) cause of action, a plaintiff is required to demonstrate, prima facie, that there was a violation of the statute and that the violation was a proximate cause of his or her injuries (*Cain v. Ameresco, Inc.*, 195 AD3d 677, 678 [2d Dept 2021]; see *Barreto v. Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]; *Luna v. 4300 Crescent, LLC*, 174 AD3d 881, 883 [2d Dept 2019]).

In the matter at bar, plaintiff submits uncontroverted evidence demonstrating, prima facie, that the metal plate fell while being hoisted due to the lack of a safety latch on the S-hook which rendered the chain hoist inadequate for the purpose intended. It is undisputed that safety latches were not available to Mr. Velasquez to perform his tasks on the day of the accident. The failure to provide workers with proper equipment such as a hoist with a functional S-hook equipped with a safety latch, per se, falls within the purview of a statutory violation and forms the basis for absolute liability pursuant to Law 240(1) on the part of the property owner and general contractor.

Upon such a showing, "the burden then shifts to the defendant, who may defeat plaintiff's motion for summary judgement only if there is a plausible view of the evidence – enough to raise a fact question - that there was no statutory violation and that plaintiff's own acts or omissions was the sole proximate cause of the accident" (*Salinas v. Jefferson Apartments*, 170 AD3d 1216, 1222 [2019], citing *Blake v. Neighborhood Hous. Servs.*, 1 NY3d 280, 289 [2003]). In this case, Champion failed to raise a triable, material issue of fact to defeat plaintiff's motion on the basis that the chain hoist was not defective and Mr. Velasquez' own acts or omissions were the sole proximate cause of his injuries, i.e., plaintiff knowingly used an S-hook that lacked a safety although a pad eye was available (see *Cioffi v. Target Corporation*, 188 AD3d 788, 790 [2d Dept 2020]; *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Blake v. Neighborhood Hous. Servs.*, 1 NY3d 289; *Orellana v. 7 West 34th Street, LLC*, 173 AD3d 886, 887 [2d Dept 2019]).

It is the opinion of this Court that Champion has failed to meet their burden as there is no question that S-hooks with safety latches were not available to Mr. Velasquez to perform his task of hoisting the metal plate. Defendants did not establish the absence of an adequate S-hook

equipped with a required safety latch to prevent the load from falling was not a violation of Labor Law §240(1). As such, the lack of a safety device within the purview of Labor Law section 240(1), constituted a "substantial factor in causing plaintiff's injuries" (see *Cioffi v. Target Corporation*, 188 AD3d 791; *Deserio v. City of New York*, 171 AD3d 867, 867-868 [2d Dept 2019]).

Further, defendants' evidence of comparative and contributory negligence on the part of plaintiff is not a defense to the absolute liability imposed by the statute (see *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 NY3d at 39; *Blake v. Neighborhood Hous. Servs.*, 1 NY3d 289-290). It is well established that the plaintiff's own negligence does not furnish a defense under Labor Law 240(1) unless plaintiff's own actions are the sole proximate cause of the accident (*Luna v. 4300 Crescent, LLC*, 174 AD3d 883; see *Barreto v. Metropolitan Transp. Auth.*, 25 NY3d 433; *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 NY3d 39; *Blake v. Neighborhood Servs.*, 1 NY3d 290). Consonant with the foregoing, defendants' contentions that plaintiff's misuse of the chain hoist and the alleged negligent manner by which he secured the chain was the sole proximate cause of the accident are of no avail. Champion's allegations that the chain hoist would not have loosened had Mr. Velasquez properly wrapped it more than once around the metal plate, or that he was negligent for failing to use the eye pad, do not meet the standard for sole proximate cause and are insufficient to defeat plaintiff's prima facie showing of a violation of Labor Law 240(1) (see *Barreto v. Metropolitan Transp. Auth.*, 25 NY3d 433; *Luna v. 4300 Crescent, LLC*, 174 AD3d 883).

As for Champion's contention that the height differential between plaintiff and the falling object was *de minimis*, it is well established that a height differential cannot be considered *de minimis* if the heavy weight of the object that fell makes it capable of generating an extreme

amount of force, even though it traveled only a short distance (see *Wilinski v. 334 East 92nd Hous. Dev. Fund Corp.,* 18 NY3d 1, 7 [2011]; *Runner v. N.Y. Stock Exchange, Inc,* 13 NY3d 599 [2009]). In this case, the elevation differential cannot be viewed as *de minimis* given the 500-pound weight of the steel plate and the force it could generate during the relatively short descent. Champion's attempt to avoid liability on this theory is of no avail.

The Court finds Mr. Velasquez has met his burden of establishing, prima facie, his entitlement to judgment on the issue of liability by the submission of his unrefuted deposition testimony and the testimony of defendants' witnesses who, in effect, established the insufficient safety device at issue was a proximate cause of the accident. Therefore, plaintiff's motion must be granted and the cross motion of Champion for summary judgment dismissing plaintiff's Labor Law 240(1) cause of action is denied.

Castleton Preservation Housing Company, Inc. and Mel Management Corp.'s Motion for Summary Judgment Dismissing the Complaint and Cross Claims (Motion Seq. 008).

Castleton and Mel's motion for summary judgment dismissing the complaint and all cross claims and counterclaims asserted against them is procedurally defective. Movants failed to comply with the Uniform Civil Rules for the Supreme Court, Rule 202.8-g, effective February 1, 2021. Uniform Rule 202.8-g requires, in pertinent part that, "Upon any motion for summary judgment, other than a motion made pursuant to CPLR §3212, there shall be annexed to the notice of motion a separate, short, and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried (22 NYCRR §202.8-g[a])." Further, Uniform Rule §202.8-g[d] requires that "[e]ach statement of material fact by the movant…must be followed by a citation to evidence submitted in support of…the motion."

The moving defendants failed to comply with the foregoing requirements of the Uniform Rules without offering an explanation or requesting additional time to submit a Statement of Material Facts. Under the circumstances, the motion must be denied on this ground. As noted *infra*, since all of plaintiff's material statement of facts are deemed admitted (22 NYCRR 202.8-g[c]), the motion is also denied on that basis (See fn.1).

Defendant/Third-Party Defendant Champion Combustion Corp.'s Motion for Summary Judgment Dismissing Plaintiff's Common Law Negligence, Labor Law §200 and Labor Law 241(6) Claims (Motion Sequence 009)

"Labor Law §241(6) imposes a nondelegable duty upon owners and general contractors to provide reasonable and adequate protection and safety to construction workers" (*Kefaloukis v. Mayer*, 197 AD3d 470, 471 [2d Dept 2021], citing *Aragona v. State of New York*, 147 AD3d 808, 809 [2d Dept 2017]). To establish liability under Labor Law §241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by the violation of a "concrete specification" of the State Industrial Code that is applicable to the circumstances of the case (see *Rizzuto v. L.A. Wenger Contracting Co.*, 91 NY2d 343, 343 [1998]; *Kefaloukis v. Mayer*, 197 AD3d at 472; *Majerski v. City of New York*, 193 AD3d 715, 718 [2d Dept 2021]). New York's Industrial Code is the only statutory basis to establish liability under Labor Law §241(6).

In plaintiff's Bill of Particulars dated September 27, 2017, he alleges violations of the following sections of Rule 23 of the Industrial Code of the State of New York (12 NYCRR): Section 23-1.5, entitled "General Responsibility of Employers"; Section 23-1.7, entitled

"Protection from General Hazards; Section 23-1.16, entitled "Safety Belts, Harnesses, Tail Lines and Lifelines"; and Section 23-1.21, entitled "Ladders and Ladderways. In a Second Supplemental Bill of Particulars dated September 23, 2021, plaintiff asserts for the first time a violation of Industrial Code Section 23-6.2, entitled "Rigging, Rope and Chains for Material Hoists".

In support of the motion, Champion maintains that plaintiff's Labor Law §241(6) cause of action should be dismissed on the grounds that the Industrial Code sections plaintiff cites either lack the specificity that is required as a predicate for liability or are inapplicable to the facts in this case.

Industrial Code §23-1.5 is a regulation that merely sets forth a general safety standard rather than a concrete specification that serves as a statutory basis for liability under Labor Law §241(6) (see *Rizzuto v. L.A. Wenger Contracting Co.,* 91 NY2d 343; *Kefaloukis v. Mayer,* 197 AD3d 472). Therefore, this provision lacks the required specificity "to qualify for predicate liability under the statute" (*Kauffman v. Turner Construction Company*, 195 AD3d 1003, 1005 [2d Dept 2021]; see *Simmons v. City of New York,* 165 AD3d 725, 729 [2d Dept 2018]).

Industrial Code §23-1.7 is also inapplicable as it contains several subdivisions which have not been enumerated in the Bill of Particulars, e.g., overhead hazards, falling hazards, drowning hazards, slipping hazards, tripping and other hazards; vertical passages; air contamination and corrosive substances.

The same can be said with respect to the alleged violations of Industrial Code §23-1.16 pertaining to the use of safety belts, harnesses, tail lines and lifelines; and Industrial Code § 23-1.21 in matters involving ladders and ladderways. Mr. Velasquez was not engaged in work that required the use of such devices.

Thus, Champion has established, prima facie, that the Industrial Code provisions relied upon by plaintiff, namely §§ 23-1.5; 23-1.7; 23-1.16 and 23-1.21, are either not applicable to the facts of this case or not sufficiently specific to support a Labor Law §241(6) cause of action under the circumstances (see *Kauffman v. Turner Construction Company*, 195 AD3d 1005; *Cain v. Ameresco, Inc.*, 195 AD3d 680; *Simmons v. City of New York*, 165 AD3d 729; see also *Kefaloukis v. Mayer*, 197 AD3d 472; *Majerski v. City of New York*, 193 AD3d 718).

Accordingly, Champion is entitled to summary judgment dismissing Industrial Code §§ 23-1.5; 23-1.7; 23-1.16; and 23-1.21.

Finally, plaintiff's allegation in his Second Supplemental Bill of Particulars of a violation of Industrial Code §23-6.2, entitled "Rigging, Rope and Chains for Material Hoists", will be considered since it neither involves new factual allegations, nor raises new theories of liability; and defendants are not prejudiced by its belated assertion (see *Simmons v. City of New York*, 165 AD3d 729; *Sheng Hai Tung v. K and K 7619, Inc.*, 144 AD3d 887, 889 [2d Dept 2016]; *Ross v. DD 11th Avenue, LLC*, 109 AD3d 604, 606 [2d Dept 2013]). Champion failed to demonstrate that 12 NYCRR §23-6.2 was inapplicable under the circumstances, that the regulation was applicable but not violated, or that a violation of the regulation was not a proximate cause of plaintiff's injuries (see *Simmons v. City of New York*, 165 AD3d 729). Accordingly, Champion is not entitled to summary judgment dismissing Industrial Code Section 23-6.2.

Labor Law §200 is a codification of the common law duty of property owners and general contractors to provide workers with a safe place to work. Cases involving Labor Law §200 fall within two categories; namely, those where the workers are injured because of dangerous or defective premises conditions at a worksite, and those involving the manner by which the work is performed. Underlying both standards is the authority of the defendant to

rectify any dangerous or defective condition existing on the premises or to remedy any unsafe method or manner of work" (*Kauffman v. Turner Construction Company*, 195 AD3d 1005 [internal citations and quotation marks omitted]; see *Messina v. City of New York*, 147 AD3d 748, 749 [2d Dept 2017]).

"Where a claim arises out of alleged dangers or defects in the means and methods of the work, an owner [or general contractor] may be held liable for common law negligence or a violation of Labor Law §200 only if he or she had the authority to supervise or control the performance of the work" (*Medina-Arana v. Henry St. Prop. Holdings, LLC*, 186 AD3d 1666, 1668 [2d Dept 2020]; see *Venter v. Cherkasky*, 200 AD3d 932 [2d Dept 2021]).

In support of the branch of Champion's motion which is to dismiss plaintiff's causes of action under Labor Law §200 and for common law negligence, defendant maintains that the accident arose out of the means and methods of the work under the direction and control of plaintiff's employer. Mr. Velasquez testified that he and his helper were the only workers present at the jobsite while performing the boiler installation. He received his directions and instructions solely from Peter Christian, his employer's general manager. Phoenix owned and supplied all the materials used for the boiler installation, including the chain hoist at issue. Plaintiff's testimony was corroborated by his employer's general manager, Mr. Christian, who confirmed that Phoenix supplied the chain hoists, S-hooks and safety latches. The building superintendent, David Hodorowski, an employee of Stellar Management, testified he did not oversee or monitor the work plaintiff was engaged in; he maintained a "hands-off" policy. Finally, according to defendant's vice-president, Anthony Fischetti, Champion did not perform the actual boiler installation work or have any employees on site on the date of the accident.

Champion maintains the foregoing uncontroverted evidence establishes, prima face, that the accident occurred due to the defects or dangers in the methods and manner of the work which was performed solely under the supervision and control of plaintiff's employer.

In opposing the motion, plaintiff argues that owners and general contractors who have "authority" to supervise and control construction work are subject to Labor Law §200 regardless of whether they exercise that authority; and the extent of their involvement raises an issue of fact for a jury to decide.

It is well established that when the methods or materials of the work are at issue, "recovery against the owner or general contractor cannot be had…unless it is shown that the party to be charged had the authority to supervise or control the performance of the work" (*Kauffman v. Turner Construction Company*, 195 AD3d 1005, *citing Ortega v. Puccia,* 57 AD3d 54, 61 [2d Dept 2008]; see *Comes v. New York State Elec & Gas Corp.*, 82 NY2d 876, 877 [1993]). However, "[G]eneral supervisory authority at a worksite, the right to stop a contractor's work if a safety violation is observed, or the authority to ensure compliance with safety regulations or the terms of a contract is insufficient to impose liability under Labor Law §200" (*Messina v. City of New York*, 147 AD3d 749).

In this case, although liability under Labor Law §200 and for common law negligence is predicated on Champion's alleged actual supervision and control over plaintiff's work, there is evidence that defendant had contractual authority to exercise supervision and control over the means and methods of the work. Notably, the construction contract between Castleton and Champion, executed by Anthony Fischetti, unequivocally provides, in pertinent part:

> Section 9.1 "The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences

> and procedures and for coordinating all portions of the Work under the Contract, unless Contract Documents give other specific instructions concerning these matters."

Here, plaintiff has established that the construction contract raises a triable issue of fact that Champion contractually assumed the duties imposed under Labor Law 200 and common law. Accordingly, Champion's motion to dismiss said causes of action is denied

Accordingly, it is

ORDERED, that plaintiff's motion for partial summary judgment on the issue of liability under Labor Law §240(1) is granted **(MS_007)**; and it is further

ORDERED, that the motion by Castleton Preservation Housing Company, Inc. and Mel Management Corp. d/b/a Stellar Management for summary judgment dismissing plaintiff's complaint and all cross claims and counterclaims against them is denied with prejudice **(MS_008)**; and it is further

ORDERED, that the branch of the motion by Champion Combustion Corp. for summary judgment to dismiss plaintiff's common law negligence and Labor Law §200 claims is denied **(MS_009)**; and it is further

ORDERED, that the branch of the motion of Champion Combustion Corp. for summary judgment to dismiss plaintiff's Labor Law §241(6) claim as to Industrial Code Sections 23-1.5; 23-1.7; 23-1.16 and 23-1.21 **(MS_009)** is granted; and it is further

ORDERED, that the branch of the motion of Champion Combustion Corp. for summary judgment to dismiss plaintiff's Labor Law §241(6) claim as to Industrial Code Section 23-6.2 **(MS_009)** is denied; and it is further

ORDERED, that the cross motion by Champion Combustion Corp. for summary judgment dismissing plaintiff's Labor Law §240 cause of action is denied **(MS_010)**; and it is further

ORDERED, the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: January 25, 2022

ENTER:

HON. THOMAS P. ALIOTTA, J.S.C.