

<b>Cosgrove v Ford Found.</b>
2022 NY Slip Op 33349(U)
October 4, 2022
Supreme Court, New York County
Docket Number: Index No. 159925/2017
Judge: Shlomo S. Hagler
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. SHLOMO S. HAGLER** PART **17**

*Justice*

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DANIEL COSGROVE,

Plaintiff,

- v -

THE FORD FOUNDATION, HENEGAN CONSTRUCTION  
CO., INC., and HARBOUR MECHANICAL CORPORATION,

Defendants.

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THE FORD FOUNDATION, HENEGAN CONSTRUCTION CO.,  
INC., and HARBOUR MECHANICAL CORPORATION,

Third-Party Plaintiffs,

-against-

CELTIC SHEET METAL, INC.,

Third-Party Defendant.

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INDEX NO. 159925/2017  
MOTION DATE 04/07/2021,  
04/07/2021  
MOTION SEQ. NO. 005 008

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595752/2018

The following e-filed documents, listed by NYSCEF document number (Motion 005) 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 262, 314, 315, 316, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 386, 387, 388, 389, 390, 391, 392, 393, 394, 399, 400, 408, 409, 413

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 395, 396, 397, 398, 401, 402, 403, 404, 405, 406, 407

were read on this motion for SUMMARY JUDGMENT.

Motion sequence numbers 005 and 008 are consolidated for disposition.

This action arises out of a construction site accident that occurred on May 30, 2017 at 320 East 43<sup>rd</sup> Street, New York, New York (the premises). Plaintiff Daniel P. Cosgrove (plaintiff), a sheet metal worker, alleges that a sheet metal HVAC duct that weighed about 300 pounds, fell on him while he was installing the ductwork.

Plaintiff moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability on his first cause of action for common-law negligence, second cause of action for violation of Labor Law § 200, and third cause of action for violation of Labor Law § 240 (1) against defendants/third-party plaintiffs The Ford Foundation (Ford Foundation), Henegan Construction Co., Inc. (Henegan), and Harbour Mechanical Corporation (Harbour) (motion sequence number 005).

Third-party defendant Celtic Sheet Metal, Inc. (Celtic) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and the third-party complaint.

Ford Foundation and Henegan move, pursuant to CPLR 3211 and 3212, to dismiss the complaint in its entirety (motion sequence number 008).

Harbour cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and the third-party complaint.

### **BACKGROUND**

It is undisputed that Ford Foundation was the owner of the premises (NY St Cts Elec Filing [NYSCEF] Doc Nos. 239, 240). On October 7, 2016, Ford Foundation hired Henegan as a construction manager to renovate the premises (NYSCEF Doc No. 241). Henegan retained Harbour to perform all mechanical work, as defined in its scope of work (NYSCEF Doc No. 242). Harbour hired Celtic to install the ductwork for the HVAC system (NYSCEF Doc No. 31). There is no dispute that Celtic employed plaintiff on the date of the accident.

Plaintiff testified at his deposition that he was employed as an HVAC or sheet metal installer by Celtic (NYSCEF Doc No. 235, plaintiff tr at 16-17). Plaintiff had an accident on May 31, 2017 at the subject premises, located between 42<sup>nd</sup> and 43<sup>rd</sup> Streets by the water on the East Side (*id.* at 25). Plaintiff had been working there for about seven months before his accident (*id.* at 26). When he first arrived at the site, the job had just started, and they sent plaintiff and an apprentice to work without a foreman (*id.* at 28). Plaintiff testified that “[i]t was a complete gut job except for the exterior and the concrete slabs, floors” and the “windows were in but everything else got totally stripped, gutted” (*id.* at 29). As a sheet metal tradesman, plaintiff “install[ed] the sheet metal ductwork of the air conditioning, heating and ventilation systems that provide air through the [diffusers] in each space of the project pretty much” (*id.* at 37). Plaintiff always worked with a partner (*id.* at 41). He communicated primarily with Harbour and Henegan, and also with someone from Ford Foundation (*id.* at 43-44). Plaintiff’s foreman was John Duffy (Duffy) (*id.* at 52).

According to plaintiff, his accident occurred on Level C in the parking garage (*id.* at 27, 61). Prior to the accident, plaintiff started the installation of the duct line that included the section of connected ducts that ultimately fell on him (*id.* at 102-104). Approximately two weeks before, plaintiff installed two trapeze systems each consisting of two anchors embedded in the concrete ceiling, two threaded rods and one Kindorf in order to suspend a section of HVAC duct from the concrete ceiling (NYSCEF Doc No. 338, plaintiff tr at 179-180). On the day of the accident, plaintiff was assigned the task of connecting a section of duct with a fire damper and the remainder of the line of ductwork (NYSCEF Doc No. 235, plaintiff tr at 78, 84-86). The completed section of ductwork was going to be about 30 or 40 feet long (*id.* at 103). In order to connect the duct section, it needed to be moved two inches (*id.* at 87). Plaintiff requested a duct

lift to perform the task from Duffy, but Duffy told him that they were being used (*id.* at 91-92). Plaintiff “was told that they had to keep the job going, we were behind and that’s, you know, basically what we do is move that duct if there is no lift the way I told you” (*id.* at 92). Plaintiff “took each trapeze, pulled it back and it actually what it does is it like swings into place, moves” (*id.* at 87). According to plaintiff, a trapeze is “like a cradle that is suspended in the air where the ductwork sits on. It’s pieces of thread and rod and we call it Kindorf which is like a metal stud” (*id.* at 87-88). He further explained that he “took [his] hammer and [he] tapped each corner to get it into where it had to be and [he] hit the one corner and the anchor came out” (*id.* at 87, 155). When plaintiff struck the apparatus with the hammer, the Kindorf and the duct that was on top struck him in the head and neck area (*id.* at 168-169).

Plaintiff avers that, during the weeks leading up to the accident, Celtic suspended the subject duct using the trapeze method (NYSCEF Doc No. 226, plaintiff aff, ¶ 8). According to plaintiff, holes were drilled into the ceiling deck, and then the anchors were screwed into the ceiling deck (*id.*). The threaded rods were screwed into the head of the anchors (*id.*). “The struts (similar to flat bars with holes in them), sometimes called a Kindorf, then held the individual section of ducts in a suspended position from the ceiling” (*id.*). Plaintiff asserts that he noted that the concrete that made up the ceiling was extremely hard (*id.*, ¶ 11). The dull drill bits often expanded the holes they were drilling, since the drill bits became dull very quickly (*id.*, ¶ 12). Once the hole became enlarged, the anchors did not remain secured within the concrete ceiling (*id.*, ¶ 14). Prior to the accident, plaintiff informed Duffy that the anchors were insufficient to hold the duct that they were installing (*id.*, ¶ 15).

Bill Spranz (Spranz), Harbour’s vice president of construction, testified that Henegan hired Harbour to install the infrastructure portion of the project, including exhaust ductwork

(NYSCEF Doc No. 237, Spranz tr at 22). Spranz stated that the specifications indicated that Hilti Kwik Bolt TZ anchors were to be utilized to hang the ducts (*id.* at 46; NYSCEF Doc No. 246 at 39). Spranz testified that “[i]f they are hanging rod they would probably use a TZ expansion anchor” (NYSCEF Doc No. 237, Spranz tr at 42).

Duffy testified that he began working as a foreman on the Ford Foundation project for Celtic in 2017 (NYSCEF Doc No. 238, Duffy tr at 11-12). His job duties “were to set up men to do whatever was going on, whatever work needed to be done” (*id.* at 12). In 2017, there were four Celtic employees working on the job, including Duffy (*id.* at 14). Celtic started in Level C (*id.* at 16). Duffy heard about the accident when he was in the subcellar waiting for the elevator (*id.* at 28). When he arrived at the scene of the accident, he observed plaintiff “sitting on a seat like this,” and the paramedics came and took him away (*id.* at 32). He did not remember whether plaintiff asked for a duct lift (*id.* at 49). The duct lifts on site could have been used to lift any size of ductwork (*id.* at 50). Duffy testified that hitting the threaded rod or Kindorf is “not good practice” and is dangerous (*id.* at 71-72). According to Duffy, the anchors that were being used by plaintiff did not have an expansion component (*id.* at 140).

William Pascual (Pascual), a superintendent employed by Henegan, testified that he worked at the site (NYSCEF Doc No. 339, Pascual tr at 9, 20). His responsibilities were to maintain the construction schedule and coordinate the trades (*id.* at 29-30). Plaintiff was a foreman for Celtic (*id.* at 167). Pascual received a call on his walkie-talkie that there had been an accident on Level A (*id.* at 56). Pascual proceeded to Level A and spoke with plaintiff who told him that a piece of ductwork fell from the support that he had installed, and plaintiff told him that he was banging on the Kildorf with a hammer when the duct fell (*id.* at 65, 161).

Pascual testified that he saw a duct lift next to plaintiff's work area (*id.* at 179). Pascual prepared an accident report, which depicts a duct lift in the area (*id.* at 72, 88; NYSCEF Doc No. 344).

Andy Barthen (Barthen), plaintiff's coworker, testified that he was 20 to 30 feet away from plaintiff when the accident occurred (NYSCEF Doc No. 346, Barthen tr at 17). Plaintiff was "trying to move a Kindorf, a 'unistrut' in one direction so that we can slide the duct on the Unistrut to make some more room for us to – so that we can slide the duct on the hangers" (*id.* at 20-21). Plaintiff was manipulating the Kindorf in such a way, i.e., hitting it with a hammer, because "[i]t's faster. It's faster to do it in the way he did it than to drag the duct lift over. It's easier, it's less physical work to do it the way he did it" (*id.*). He did not remember Duffy ever refusing a request for a duct lift; "He's not going to tell you, no, you can't have a lift. That's crazy, that's why I laughed" (*id.* at 18-19).

Oscar Lowe (Lowe), an assistant project manager employed by Henegan, testified that he heard a call over his walkie-talkie that an accident had occurred, then grabbed his hardhat and proceeded to the area (NYSCEF Doc No. 250, Lowe tr at 8-9, 15, 21). Lowe typed a handwritten version of an accident that Pascual gave him (*id.* at 25). He assumed that the ductwork fell on plaintiff because the support was not in place (*id.* at 28). The ductwork looked like it had fallen or been pulled away (*id.* at 30). When shown photographs depicting a duct lift in the room, Lowe stated that he did not recall whether they fairly and accurately depicted what he saw on May 30, 2017 (*id.* at 30-31).

Plaintiff's amended complaint asserts five causes of action seeking recovery for common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6) (NYSCEF Doc No. 228).

Ford Foundation, Henegan, and Harbour subsequently impleaded Celtic, seeking indemnification, contribution, and damages for failure to procure insurance (NYSCEF Doc No. 232).

Plaintiff previously moved for partial summary judgment under Labor Law § 240 (1). By decision and order dated September 24, 2020, the court denied the motion without prejudice, with leave to renew upon completion of the liability phase of discovery and delivery by plaintiff to defendants of the transcript of his continued deposition (NYSCEF Doc No. 252).

### DISCUSSION

“On a motion for summary judgment, the moving party 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” (*Trustees of Columbia Univ. in the City of N.Y. v D’Agostino Supermarkets, Inc.*, 36 NY3d 69, 72-73 [2020] [internal quotation marks and citation omitted]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action” (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). “[T]he court’s role is solely to determine if any triable issues exist, not to determine the merits of any such issues” (*F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188 [1st Dept 2002], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957], *rearg denied* 3 NY2d 941 [1957]).

**A. Labor Law § 240 (1)**

Plaintiff moves for partial summary judgment as to liability under Labor Law § 240 (1). Plaintiff contends that the duct was in the process of being secured at the time of the accident, and should have been secured for his work. According to plaintiff, defendants failed to provide plaintiff with a duct lift, and provided plaintiff with the wrong type of anchor (which failed in its function of restraining the duct against the effects of gravity). Plaintiff asserts that the fact that the duct fell a short distance is not dispositive, given its weight and the force it was capable of generating over its descent. Furthermore, plaintiff was not the sole proximate cause of his injuries.

Ford Foundation and Henegan contend that plaintiff's actions were the sole proximate cause of his accident. They argue that plaintiff's decision to improperly install the duct section with two straps and hit the anchor with a hammer caused the accident. In opposition to plaintiff's motion, Ford Foundation and Henegan maintain that there is a question of fact as to whether plaintiff was denied a duct lift to perform his work. Harbour adopts Ford Foundation's and Henegan's arguments.

Similarly, Celtic argues that plaintiff was the sole proximate cause of his accident. Celtic asserts that plaintiff failed to use the duct lift that appears in photographs; failed to install the required third trapeze; and took a dangerous short cut to move the duct section.

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

“All contractors and owner 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.”

Labor Law § 240 (1) “imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks” (*Saint v Syracuse Supply Co.*, 25 NY3d 117, 124 [2015]). “Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or 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*” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993] [emphasis in original]). To recover under the statute, the plaintiff must show a violation of the statute, and that such violation was a proximate cause of the injuries sustained (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]).

“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 the statute ‘and the failure to use, or the inadequacy of a safety device of the kind enumerated therein’” (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662 [2014] [internal quotation marks and citation omitted]). “Essentially, the plaintiff must demonstrate that at the time the object fell, it was being hoisted or secured or required securing for the purposes of the undertaking” (*id.* [internal quotation marks and citations omitted]). In addition, “[a] plaintiff must show that the object fell . . . *because of the absence or inadequacy of a safety device of the kind enumerated in the statute*” (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001] [emphasis in original]).

At the outset, the court notes that defendants have not contested that they are responsible parties under Labor Law § 240 (1).

Here, plaintiff made a prima facie showing of entitlement to summary judgment under Labor Law § 240 (1). Plaintiff has demonstrated that the duct should have been secured for his work. “What is essential to a conclusion that an object requires securing is that it present a foreseeable elevation risk in light of the work being undertaken” (*Jordan v City of New York*, 126 AD3d 619, 620 [1st Dept 2015], quoting *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 269 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]). Plaintiff was completing the installation of a line of HVAC ductwork when a duct section struck him (NYSCEF Doc No. 235, plaintiff tr at 86-87, 168-169). Thus, it was foreseeable that plaintiff would be struck by the HVAC duct section while installing the line of ductwork.

Moreover, plaintiff has established that the duct fell because of the absence or inadequacy of a safety device of the kind enumerated in the statute. Plaintiff testified that he requested a duct lift, but none was available (*id.*, plaintiff tr at 91-92).<sup>1</sup> Plaintiff’s expert engineer, Dale Cagwin, P.E., asserts that “[a] duct lift is a device that is positioned under the duct to hold the

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<sup>1</sup> Nevertheless, the anchor identified by plaintiff was not meant to function in the same manner as the safety devices in the statute (*see Fabrizi*, 22 NY3d at 663 [compression coupling was not a safety device where “[i]ts only function was to keep the conduit together as part of the conduit/pencil box assembly”]). Plaintiff avers that, during the weeks before the accident, Celtic attached the segment of ductwork to the concrete deck above, using anchors that were screwed into the ceiling and threaded rods that were screwed into the head of the anchors (NYSCEF Doc No. 226, plaintiff aff, ¶ 8). The anchor was meant to permanently secure the duct to the ceiling, and was not meant to serve as a temporary measure to secure the duct during installation (*see Carlton v City of New York*, 161 AD3d 930, 932 [2d Dept 2018] [triable issues of fact as to whether defendants were obligated to provide appropriate safety devices of the kind enumerated in the statute to secure a flange and whether the flange fell due to the absence or inadequacy of an enumerated safety device]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2018] [“The device identified by the plaintiffs—a pin and bracket system—was not meant to function as a safety device in the same manner as those devices enumerated in Labor Law § 240 (1), but, rather, served to support the exhibition booths once fully constructed”]; *cf. Keerdoja v Legacy Yards Tenant, LLC*, 166 AD3d 418, 418 [1st Dept 2018] [“The tack welds used to secure the metal shim plate to the column were ‘safety devices’ for the purposes of Labor Law § 240 (1) because they were intended to be a temporary measure to keep the shim plate attached to the column during installation”]).

duct in place and/or lift it while it is being manipulated. The lift protects the worker, as the duct is being positioned, by supporting it from its underside and prevents it from falling” (NYSCEF Doc No. 227, Cagwin aff, ¶ 17). Cagwin states that there many types, brands and sizes of duct lifts that can be used in areas of varying size or height and ducts of varying weights (*id.*, ¶ 18). Thus, plaintiff’s injuries flowed directly from the application of the force of gravity to the duct (*see Runner*, 13 NY3d at 604), and were caused by defendants’ failure to adequately secure the duct so as to prevent it from falling (*see Zuluaga v. P.P.C. Constr., LLC*, 45 AD3d 479, 480 [1st Dept 2007]).

Defendants have failed to raise an issue of fact as to their liability. Additionally, defendants have failed to demonstrate prima facie entitlement to summary judgment.

“[I]f adequate safety devices are provided and the worker either choses for no good reason not to use them, or misuses them, the plaintiff will be deemed the sole proximate cause of his injuries, and liability will not attach under § 240 (1)” (*Fernandez v BBD Developers, LLC*, 103 AD3d 554, 555 [1st Dept 2013]; *see also Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *Robinson v East Med. Ctr, LP*, 6 NY3d 550, 554 [2006]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]). However, “the Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that ‘if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it’” (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake*, 1 NY3d at 290).

Even if plaintiff installed the duct incorrectly, his actions would constitute, at most, comparative negligence, which is not a defense to liability under section 240 (1) (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991] [“Negligence, if any, of the injured worker

is of no consequence”]; *Sinchi v HWA 1290 III LLC*, 184 AD3d 408, 409 [1st Dept 2020] [plaintiff’s alleged comparative negligence in causing roof collapse by pulling on ceiling with hook while attempting to remove sprinkler head “amounts to comparative negligence, which is not a defense to a Labor Law § 240 (1) claim”]; *Concepcion v 333 Seventh LLC*, 162 AD3d 493, 494 [1st Dept 2018] [“any failure on plaintiff’s part to ensure that his coworker had properly set up the ladder would, at most, constitute comparative negligence, a defense inapplicable to a Labor Law § 240 (1) cause of action”]. Additionally, plaintiff’s striking the duct was not so irrational, unreasonable or unnecessary so as to constitute the sole proximate cause of his accident, given plaintiff’s testimony that he asked for a duct lift and that his foreman told him that none were available (NYSCEF Doc No. 235, plaintiff tr at 92). In addition, plaintiff’s foreman testified that he had seen sheet metal workers use this method, and that he “probably” moved the Kindorf in order to move the duct (NYSCEF Doc No. 341, Duffy tr at 106-107).

Moreover, defendants have not presented any evidence that plaintiff knew he was expected to use a duct lift but chose not to do so for no good reason. In light of plaintiff’s testimony that duct lifts were unavailable, the court cannot conclude that a duct lift was “readily available” (*see Rice v West 37th Group, LLC*, 78 AD3d 492, 497-498 [1st Dept 2010] [defendants did not establish that a scaffold was “readily available” where there was evidence that the scaffold was in use nor did they establish that the scaffold would soon become available]). “The mere presence of [safety devices] somewhere at the worksite does not establish ‘proper protection’” (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524 [1985], *rearg denied* 65 NY2d 1054 [1985]).

Defendants have failed to establish that summary judgment is premature as to their liability. “The mere hope that further disclosure might uncover evidence likely to help

[defendants'] case” provides no basis for postponing summary judgment (*Maysek & Moran v Warburg & Co.*, 284 AD2d 203, 204 [1st Dept 2001]).

In light of the above, the branch of plaintiff’s motion is granted under Labor Law § 240 (1). The branches of defendants’ motions with respect to plaintiff’s Labor Law § 240 (1) cause of action are denied.

**B. Labor Law § 241 (6)**

Labor Law § 241 states that:

“All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

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“6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work . . . shall comply therewith.”

Labor Law § 241 (6) requires owners, contractors, and their agents to “provide reasonable and adequate protection and safety” for workers performing the inherently dangerous activities of construction, excavation and demolition work. To recover under Labor Law § 241 (6), a plaintiff must plead and prove the violation of a concrete provision of the New York State Industrial Code, containing specific, positive commands, rather than a provision restating common-law safety standards (*Toussaint v Port Auth. of N.Y. & N.J.*, 38 NY3d 89, 94 [2022]; *St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]; *Ross*, 81 NY2d at 505 [“we hold that, for purposes of the nondelegable duty imposed by Labor Law § 241 (6) and the regulations promulgated thereunder, a distinction must be drawn between provisions of the Industrial Code mandating compliance with concrete specifications and those that establish general safety

standards by invoking the ‘[g]eneral descriptive terms’ set forth and defined in 12 NYCRR 23-1.4 (a). The former give rise to a nondelegable duty, while the latter do not”). In addition to establishing the violation of a specific and applicable Industrial Code regulation, the plaintiff must also show that the violation was a proximate cause of the accident (*Buckley*, 44 AD3d at 271). A “plaintiff’s failure to identify a violation of any specific provision of the State Industrial Code precludes liability under Labor Law § 241 (6)” (*Kowalik v Lipschutz*, 81 AD3d 782, 783 [2d Dept 2011] [internal quotation marks and citation omitted]).

Ford Foundation and Henegan move for summary judgment dismissing plaintiff’s section 241 (6) claim, arguing that Industrial Code §§ 23-1.3, 23-1.5, 23-1.7, and 23-1.7 are insufficiently specific and inapplicable. Harbour also moves for summary judgment dismissing this claim. In opposition, plaintiff does not rely on any Industrial Code sections (NYSCEF Doc No. 400 at 23; NYSCEF Doc No. 401 at 23). Plaintiff has apparently abandoned reliance on the Industrial Code provisions cited in his bill of particulars (*see Cardenas v One State St., LLC*, 68 AD3d 436, 438 [1st Dept 2009]; *see also Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]). Consequently, plaintiff’s Labor Law § 241 (6) claim is dismissed.

### **C. Labor Law § 200 and Common-Law Negligence**

Plaintiff moves for summary judgment on his Labor Law § 200 and common-law negligence claims. Plaintiff argues that the engineer shop drawing/specifications required anchors with an expansion component to be used to affix the duct to the concrete ceiling. He argues that his accident occurred because the anchor deviated from the specifications, and subsequently failed and became dislodged.<sup>2</sup>

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<sup>2</sup> In reply, plaintiff asserts that he only moved for summary judgment on his section 200 and common-law negligence claims against Harbour (NYSCEF Doc No. 400 at 23). At the same time, however, plaintiff asserts that Ford Foundation and Henegan cannot avoid liability under

Ford Foundation and Henegan contend that these claims should be dismissed because they did not direct the methods in which plaintiff performed his work, and did not have any actual or constructive notice of any hazardous condition.

In addition, Harbour asserts that it did not supervise plaintiff's work. Furthermore, Harbour contends that it did not create or have knowledge of any dangerous condition.

It is well settled that 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" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]).

There are two distinct standards under section 200 and the common law. Under First Department case law,

"Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it. Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work"

(*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012] [citations omitted]; accord *Jackson v Hunter Roberts Constr., L.L.C.*, 205 AD3d 542, 542 [1st Dept 2022]; *Prevost v One City Block LLC*, 155 AD3d 531, 533-534 [1st Dept 2017]).

Here, plaintiff's accident arose out of the means and methods of the work, not a dangerous or defective condition inherent in the premises.

"General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled *the manner in which the plaintiff performed his or*

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section 200 and common-law negligence since they knew or should have known that incorrect and unsafe anchors were being used (NYSCEF Doc No. 401 at 23).

her work, i.e., how the injury-producing work was performed” (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007] [emphasis in original]).

While the project’s specifications required the use of anchors with expansion components (NYSCEF Doc No. 237, Spranz tr at 46-48), there is no evidence that defendants directed the installation of the anchor that failed. Plaintiff testified that he received his instructions from his Celtic foreman, and that the Ford Foundation and Henegan did not direct or control his work (NYSCEF Doc No. 338, plaintiff tr at 49-51).<sup>3</sup> Duffy testified that Celtic’s workers did not take any directions from Ford Foundation, Henegan or Harbour (NYSCEF Doc No. 238, Duffy tr at 164-165). Spranz testified that Harbour reviewed Celtic’s work on a regular basis, walked the site every day, inspected the quality of the work, and informed Celtic if it was performing certain work improperly (NYSCEF Doc No. 237, Spranz tr at 62-63, 68-70). However, monitoring and oversight of the timing and quality of the work, mere presence on the job site, and a general duty to ensure compliance with safety regulations and contract specifications, are insufficient to impose liability under section 200 or in common-law negligence (*see Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 406 [1st Dept 2018]; *Bisram v. Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014]; *Phillip v 525 E. 80th St. Condominium*, 93 AD3d 578, 579-580 [1st Dept 2012]; *Paz v City of New York*, 85 AD3d 519, 519-520 [1st Dept 2011]; *Carty v Port Auth. of N.Y. & N.J.*, 32 AD3d 732, 733 [1st Dept 2006], *lv denied* 8 NY3d 814 [2007]; *Mitchell v New York Univ.*, 12 AD3d 200, 201 [1st Dept 2004]). Moreover, the authority to stop work for safety reasons is insufficient to raise a triable issue of fact as to a defendant’s supervision and control of the work (*Hughes*, 40 AD3d at 309).

<sup>3</sup> Plaintiff vaguely testified that Henegan “explained how to do [the work] another way throughout the job,” but could not remember when or where (NYSCEF Doc No. 338, plaintiff tr at 50).

Therefore, Ford Foundation, Henegan, and Harbour are entitled to summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims.

**CONCLUSION**


Accordingly, it is

**ORDERED** that the motion (sequence number 005) of plaintiff for partial summary judgment on liability is granted under Labor Law § 240 (1) as against defendants The Ford Foundation, Henegan Construction Co., Inc., and Harbour Mechanical Corporation, with the issue of plaintiff's damages to be determined at the trial of this action; and it is further

**ORDERED** that the cross motion of third-party defendant Celtic Sheet Metal, Inc. for summary judgment is denied; and it is further

**ORDERED** that the motion (sequence number 008) of defendants The Ford Foundation and Henegan Construction Co., Inc. for summary judgment is granted to the extent of dismissing plaintiff's Labor Law § 241 (6), Labor Law § 200, and common-law negligence claims, and is otherwise denied; and it is further

**ORDERED** that the cross motion of defendant Harbour Mechanical Corporation for summary judgment is granted to the extent of dismissing plaintiff's Labor Law § 241 (6), Labor Law § 200, and common-law negligence claims, and is otherwise denied.

<u>10/4/2022</u> DATE	 SHLOMO S. HAGLER, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE