# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. JOHN J. KELLEY **PART** 56M

*Justice*

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CLARENCE BROWN and BETTY BROWN,

Plaintiffs,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF BUILDINGS, THE NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION, THE NEW YORK CITY DEPARTMENT OF EDUCATION, THE NEW YORK CITY HOUSING AUTHORITY, and DURANTE RENTALS, LLC,

Defendant.

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DURANTE RENTALS, LLC

Plaintiff,

-against-

INNOVAX-PILLAR, INC.

Defendant.

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**INDEX NO.** 150757/2019

**MOTION DATE** 09/01/2022

**MOTION SEQ. NO.** 004

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 108, 112, 121, 122, 123, 124, 125, 126, 136, 138, 139, 140, 148, 149, 150, 151, 152, 153, 154, 155, 159, 203, 209, 210, 211, 212, 213, 214, 217, 218, 219, 220, 221

were read on this motion to/for SUMMARY JUDGMENT.

## I. INTRODUCTION

This is an action to recover damages for personal injuries arising from a construction site accident, alleging common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6). The defendants The City of New York, The New York City Department of Buildings (DOB), The New York City Department of Design and Construction (DDC), The New York City

Department of Education (DOE), and The New York City Housing Authority (NYCHA) (collectively the City defendants) move pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims insofar as asserted against them. The plaintiffs oppose the motion, and cross-move pursuant to (1) CPLR 3212(a) for leave to serve and file a late cross motion for summary judgment, (2) CPLR 3042(b) and 3043(c) for leave to serve an amended bill of particulars, and (3) CPLR 3212 for partial summary judgment on the issue of liability on their Labor Law § 241(6) claims against The City of New York, the DOE, and NYCHA. The City defendants' motion is granted. The plaintiffs' cross motion is granted only to the extent that they may make a late cross motion for summary judgment and serve an amended bill of particulars as to the City defendants, and the request for summary judgment thereupon is denied on the merits.

## II. BACKGROUND

On July 28, 2010, nonparty 61 Owner, LLC, the owner of real property located at 227 West 61st Street, New York, New York (the premises), entered into an agreement to lease the premises to nonparty City of New York School Construction Authority (SCA) for the purpose of erecting the West End Secondary School thereon. On July 20, 2016, the SCA assigned the lease to the DOE. On January 1, 2017, the SCA retained the defendant Innovax-Pillar, Inc. (Innovax), as the general contractor to renovate the premises. In 2018, the plaintiff Clarence Brown (Brown), was employed by Innovax to work on the construction and renovation project at the premises. On or about April 4, 2018, the defendant third-party plaintiff, Durante Rentals, LLC (Durante), contracted with Innovax to lease, to Innovax, a Genie Z-30 articulating boom lift, a wheeled piece of equipment that must be driven to transport it from one location to another. Pursuant to their rental agreement, Durante delivered the lift to the premises by dropping it off just outside the premises on a public roadway. On May 2, 2018, after Innovax finished using the lift for work on the premises, Innovax's superintendent and Brown's supervisor, Christopher Powell, instructed Brown and his co-worker, Giovanni Tarantino, to return the lift to the public

roadway just outside the premises for pick-up by Durante. In the course of returning the lift to the drop-off and pick-up location, Tarantino drove and operated the lift, while Brown served as flagger, a task for which he stood on the ground, watched for pedestrians and other vehicles, and directed Tarantino in returning the lift to the drop-off location. While Tarantino was driving the lift, the basket of the lift in front of the driver's window was situated in its lowest position, thus partially obstructing Tarantino's view, when the basket struck Brown and injured him.

On January 24, 2019, the plaintiff commenced this action. Between March 19, 2019 and May 30, 2019, all of the defendants served their answers. On January 31, 2022, the plaintiff filed the note of issue and certificate of readiness. On April 1, 2022, the City defendants timely filed the instant motion. On June 17, 2022, the plaintiffs opposed the motion. On June 23, 2022, the plaintiffs served and filed an unauthorized amended bill of particulars, improperly designated as a supplemental bill of particulars, as to the City of New York, the DOE, and NYCHA. Shortly thereafter, on June 27, 2022, the plaintiffs filed their cross motion papers.

## III. DISCUSSION

### A. The City Defendants' Summary Judgment Motion

In both their complaint and initial bill of particulars as to the City defendants, the plaintiffs alleged that the City defendants were negligent in their ownership, operation, supervision, inspection, maintenance, management, and control of the premises. They also alleged that the City defendants violated Labor Law §§ 200, 240(1), and 241(6), the latter based upon violation of several provisions of Rule 23 of the Industrial Code of the State of New York (12 NYCRR), and the rules of the Occupational Safety and Health Administration (OSHA). In particular, the plaintiffs alleged that the City defendants violated 12 NYCRR 23-1.4(b)(2), (12), (17), and (26) (definitions of certain terms), 12 NYCRR 23-1.5(a), (b), (c) (general responsibility of employers), and 12 NYCRR 23-9.6(a)(4) (aerial basket equipment inspection), (c)(1), (2), and (3) (driving or moving of aerial basket truck), and (e)(8) (aerial basket operation).

In support of their motion, the City defendants submitted the pleadings and the deposition transcripts of the plaintiffs, Tarantino, and Powell, as well as those of Devenand Singh, the Durante driver who delivered the lift to Innovax, Brian Lochan, the Durante driver who picked up the lift on the day of the incident, Gregory Koelbel, the Project Officer for the SCA, and Syed Tanvir, the Inspector for the SCA. The City defendants also submitted the lease between 61 Owner, LLC, and the SCA, the assignment of the lease from SCA to the DOE, the construction and renovation agreement between the SCA and Innovax, and the rental agreement between Durante and Innovax. In opposition, the plaintiffs submitted the expert affidavit and curriculum vitae of the managing director and principal consultant of Occupational Safety & Environmental Assoc., Inc., John P. Conoglio, along with the CPLR 3101(d) statement referable to Conoglio, and a March 26, 2021 supplemental bill of particulars as to the City defendants.

1. Summary Judgment Standards

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie

showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id.*; *Medina v Fischer Mills Condo Assn.,* 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (*see Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

2. Labor Law and Common-Law Negligence—Parties Liable

Labor Law §§ 200, 240(1) and 241(6) apply only to owners, general contractors, and their statutory agents (*see* Labor Law §§ 200, 240[1], 241[6]; *Medina v R.M. Resources*, 107 AD3d 859, 860 [2d Dept 2013]; *Hartshorne v Pengat Tech. Inspections, Inc.*, 112 AD3d 888, 889 [2d Dept 2013]). The City defendants have established, prima facie, that, at the time of Brown's accident, the City of New York was neither an owner, nor a general contractor, nor a statutory agent of an owner or contractor for the premises. In fact, the City was not involved at all in the project. Rather, the City defendants showed that 61 Owner, LLC, was the owner, that Innovax was the general contractor, and that they were not the agent of either entity. Moreover, the premises where the accident occurred were adjacent to public school grounds where the operation, maintenance, and control of such grounds falls under "the exclusive care, custody and control of the [New York City] Board of Education, an entity separate and distinct from the City" (*Leacock v City of New York*, 61 AD3d 827, 828 [2d Dept 2009]; *see Goldes v City of New York*, 19 AD3d 448, 448 [2d Dept 2005]; *Goldman v City of New York*, 287 AD2d 689, 689-690 [2d Dept 2001]; Education Law § 2554 [4]; *cf. Bleiberg v City of New York*, 43 AD3d 969, 971

[2d Dept 2007] [although the exclusive care, custody, and control of the school premises were under the auspices of the DOE, the City, as the owner of the real property on which a school building was erected, was equivalent to an out-of-possession landlord, and thus could be held liable for its creation of a dangerous condition on the premises]).

> "While the 2002 amendments to the Education Law (L 2002, ch 91) providing for greater mayoral control significantly limited the power of the Board of Education (*see* Assembly memorandum in support, 2002 McKinney's Session Laws of NY, at 1716-1717), the City and the Board [also known as the DOE] remain separate legal entities"

(*Perez v City of NY*, 41 AD3d 378, 379 [1st Dept 2007]). Thus, the City of New York is not a proper party to this action merely because the DOE holds the long-term lease to the premises.

Moreover, the DOB and DDC are subsumed within the City of New York because they are mere agencies of the City (*see Committee for Envtl. Sound Dev. v Amsterdam Ave. Redevelopment Assoc., LLC,* 2019 NY Slip Op 30621[U], *3, 2019 NY Misc LEXIS 1047, *2-3 [Sup Ct, N.Y. County, Mar. 14, 2019] [DOB]; New York City Charter § 649 [DOB]; New York City Charter § 1200 [DDC]) and, thus, they are not proper parties to this action for the same reasons that the City is not a proper party. In any event, New York City Charter, Chapter 17, § 396, which provides that "[a]ll actions and proceedings *for the recovery of penalties* for the violation of any law shall be brought in the name of the city of New York and not in that of any agency, except where otherwise provided by law" (emphasis added), repeatedly has been construed to prohibit a plaintiff from commencing an action to recover damages or penalties against a New York City agency or officer, as distinct from the City of New York itself, "as agencies of the City are not amenable to being sued" for money damages (*Matter of Carpenter v New York City Housing Auth.*, 146 AD3d 674, 674 [1st Dept 2017] [cause of action to recover money damages does not lie against NYPD or NYC Human Resources Administration]; *see Alvarez v City of New York*, 134 AD3d 599 [1st Dept 2015] [NYPD not amenable to suit for money damages]; *Siino v Department of Educ. of City of N.Y.*, 44 AD3d 568, 568 [1st Dept 2007] [NYC Department of Investigation]; *Elisa W. v City of New York*, 2016 US Dist LEXIS 123332, 2016

WL 4750178 [SD NY 2016] [NYC Administration for Children's Services]; *Greene v Pryce*, 2015 US Dist LEXIS, 2015 WL 4069176 [ED NY 2015] [NYC Human Resources Administration]).

In opposition to the City defendants showings in this regard, the plaintiffs failed to raise a triable issue of fact. Contrary to the plaintiffs' contentions, there is, in fact, a legal distinction between the City and the DOE. For that reason, and because the DOB and DDC are not amenable to a suit to recover damages, the City, the DOB, and the DDC must be awarded summary judgment dismissing the complaint insofar as asserted against them.

The City defendants also have established, prima facie, that NYCHA was not an owner, general contractor, or statutory agent of an owner or contractor. Koelbel and Tanvir both testified that NYCHA property was situated adjacent to the premises. Koelbel testified that the NYCHA agreed to allow the use of some of its property in connection with the renovation project on the premises. Koelbel and Tanvir further testified that the only part of the NYCHA property that was used was a parking lot near the premises. Moreover, Powell and Brown testified that the aerial lift at issue merely was stored in that parking lot when not in use. Brown explained that part of that lot was fenced off, and that Innovax used the enclosed area "for us to put the boom lift, our vehicles and for the boom lift" when not in use. Finally, when asked if NYCHA was involved in the renovation work at the premises in any way other than use of the parking lot space for the boom lift, Brown replied "[n]o, they were not."

In opposition to the City defendants' showing with respect to NYCHA, the plaintiffs failed to raise a triable issue of fact. The plaintiffs contended that the NYCHA was an owner of a two-property construction project, but the record refutes their characterization of the construction project as a "two-property" project, and the plaintiffs did not provide any additional proof supporting their position. The renovation was not being done on the NYCHA property, but instead on the West End Secondary School property. While it is true that NYCHA owned the parking lot used by Innovax to store machinery, it simply agreed to allow the space to be used in that manner. It was not involved in the actual construction project at the premises in any other

capacity. NYCHA did not employ its own employees or officials in the maintenance, control, or operation of the storage area or equipment. In fact, Brown testified that neither NYCHA nor Innovax built the fence around the lot, as a third-party fence company came in and set up the enclosure. It is undisputed that the accident occurred on the public roadway just outside of the premises, and away from the storage area on the parking lot, and there is no evidence whatsoever that the accident was caused due to the negligent supervision of the parking lot or the equipment stored thereon. Thus, NYCHA must be awarded summary judgment dismissing the complaint insofar as asserted against it.

Finally, the City defendants have also established that the DOE was not an owner, general contractor, or an agent of either the owner or general contractor. Under the Labor Law, a party is deemed to be an agent of an owner or general contractor when it has the "ability to control the activity which brought about the injury" (*Guclu v 900 Eighth Ave. Condominium, LLC*, 81 AD3d 592, 593 [2d Dept 2011], quoting *Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]). Additionally, although parties with a property interest who hire the general contractor are deemed "owners" for the purposes of Labor Law §§ 240(1) and 241(6) (*see Gomez v 670 Merrick Rd. Realty Corp.*, 189 AD3d 1187, 1190 [2d Dept 2020]) and, thus, "[l]essees who hire a contractor and have the right to control the work being done are considered 'owners' within the meaning of the statutes" (*id.*, quoting *Guclu v 900 Eighth Ave. Condominium, LLC*, 81 AD3d at 593), the City defendants established that, while the lease to the premises was assigned to the DOE, the DOE was not the entity that hired the general contractor, Innovax. Rather, the nonparty SCA hired Innovax and, thus, there is no basis upon which to deem the DOE an owner within the meaning of the relevant Labor Law provisions (*see Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 [2009] [because the owner, not the lessee, hired the general contractor, the lessee could not be deemed an owner or an owner's agent within the meaning of the statute]).

In opposition, the plaintiffs argue that the SCA was acting as an agent of the DOE for the purposes of entering into the initial lease agreement with 61 Owner, LLC, and undertaking the

construction of the premises, which included hiring Innovax. The plaintiffs point to the parts of the lease assignment which state,

> "the Chancellor acting on behalf of the New York City Department of Education a/k/a Board of Education of the City School District of the City of New York (hereinafter referred to as the "Board"), approved a Request for Authorization (annexed hereto and incorporated herein as Attachment B), requesting this Second Lease Amendment and Extension for the Premises described herein;"
>
> "the Chancellor acting on behalf of the Board has authorized the [School Construction] Authority to enter into a lease and/or license for the within specified real property and to assign the Authority's interest in same to the Board."

While the Chancellor, acting on behalf of the DOE, may have allowed a second lease to be executed between 61 Owner, LLC, and the SCA for the purpose of authorizing the SCA to assign that lease to the DOE, this agreement is irrelevant as to which entity retained Innovax as the general contractor, and does not render the DOE an owner or agent for purposes of the Labor Law.

3. Labor Law and Common-Law Negligence—Substantive Provisions

Even if the SCA's retention of Innovax were enough to impute Labor Law liability to the DOE, the DOE nonetheless established its prima facie entitlement to judgment as a matter of law as to the merits of the Labor Law and common-law negligence causes of action.

a. Labor Law § 200 and Common-Law Negligence

Labor Law § 200 is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work (*see Hartshorne v Pengat Tech. Inspections, Inc.*, 112 AD3d 888, 889 [2d Dept 2013]; *see also Comes v NY State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Kennedy v McKay*, 86 AD2d 597 [2d Dept 1982]). There are two distinct standards applicable to section 200 cases, depending on the situation involved – where the accident is the result of the means and methods used by the general contractor to do its work, and where the accident is the result of a dangerous premises condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]). Where, as here, the allegation is that the accident occurred while

Tarantino was driving a lift with an obstructed view, thus causing the basket of the lift to strike Brown, the plaintiff thus is claiming an injury arising from the means and methods of the ongoing construction work, rather than an unsafe condition on the premises (*see Lemache v MIP One Wall St. Acquisition, LLC*, 190 AD3d 422, 423 [1st Dept 2021]). To find an owner, general contractor, or statutory agent liable for common-law negligence or for violation of Labor Law § 200 for dangers and injuries arising from the means, methods, or materials of the work, it must be shown that the owner, general contractor, or statutory agent had authority to supervise or control the injury-producing work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d at 877). However, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *see Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 525 [2d Dept 2007]; *O'Sullivan v IDI Constr. Co.*, 28 AD3d 225, 226 [1st Dept 2006], *affd* 7 NY3d 805 [2006]).

Here, the DOE established, prima facie, that it did not have actual supervisory control or input into how Brown's or Tarantino's work was performed. As both Brown and Tarantino testified, their work was supervised and controlled only by Powell, who was employed by Innovax as its superintendent. In opposition, the plaintiffs failed to raise a triable issue of fact. Hence, the plaintiffs failed to raise a triable issue of fact in opposition to the DOE's showing. Thus, the plaintiffs' Labor Law § 200 and common-law negligence claims must be dismissed against the DOE in any event.

b. Labor Law § 240(1)

"Labor Law § 240(1) imposes on owners, general contractors and their agents a nondelegable duty to provide safety devices to protect against elevation-related hazards on construction sites, and they will be absolutely liable for any violation that results in injury

regardless of whether they supervised or controlled the work" (*Ragubir v Gibraltar Mgt. Co., Inc.*, 146 AD3d 563, 564 [1st Dept 2017]). It is well settled that, in order to establish entitlement to judgment as a matter of law on the issue of liability under Labor Law § 240(1), the plaintiff "must establish that the statute was violated and that such violation was a proximate cause of his [or her] injury" (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]). As the injury in the case at bar did not arise from an elevation-related risk, Labor Law § 240(1) is inapplicable (*see Vicari v Triangle Plaza II, LLC*, 16 AD3d 672, 673 [2d Dept 2005] [backhoe that struck the injured plaintiff was not lifting or hoisting anything at the time of his accident]; *see also Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]; *Natale v City of New York*, 33 AD3d 772, 774 [2d Dept 2006]; *Fairchild v Servidone Constr. Corp.*, 288 AD2d 665, 666-667 [3d Dept 2001]; *Allen v Hodorowski & DeSantis Bldg. Contrs.*, 220 AD2d 959, 960-961 [3d Dept 1995]). The Labor Law § 240(1) claim thus must be dismissed against the DOE on the merits.

c. Labor Law § 241(6)

Labor Law § 241(6) imposes a nondelegable duty upon owers and general contractors "to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998] [citation and internal quotation marks omitted]; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). To sustain a Labor Law § 241(6) cause of action, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than generalized regulations for worker safety (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505). Labor Law § 241(6) requires a plaintiff to show that the safety measures actually employed on a job site were unreasonable or inadequate and that the violation was a proximate cause of his or her injuries (*see Zimmer v Chemung County Performing Arts*, 65 NY2d 513 [1985]).

Here, the plaintiffs asserted that the DOE violated 12 NYCRR 23-1.4(b)(2), (12), (17), and (26) (setting forth definitions of specific terms), 12 NYCRR 23-1.5(a), (b), (c) (general

responsibility of employers), 12 NYCRR 23-9.6(a)(4) (aerial basket equipment inspection), 12 NYCRR 23-9.6(c)(1), (2), and (3) (driving or moving of aerial basket truck), and 12 NYCRR 23-9.6(e)(8) (aerial basket operation). The DOE has established, prima facie, that the provisions of the Industrial Code identified by the plaintiffs were either not sufficiently specific, inapplicable, or not violated, or that such violations, if any, did not cause or contribute to Brown's injury.

The Industrial Code section that defines terms employed in the Code "cannot be the basis for liability because it does not create a specific, positive command" (*Torres v Eastchester Union Free Sch. Dist.*, 2021 NY Slip Op 33260[U], *8, 2021 NY Misc LEXIS 9515, *14 [Sup Ct, Westchester County, Sep. 21, 2021]). As to allegations that the DOE violated 12 NYCRR 23-1.5(a), (b), and (c), those Code provisions are not sufficiently specific to support a Labor Law § 241(6) cause of action (*see Gasques v State of New York,* 15 NY3d 869, 870 [2010] [12 NYCRR 23-1.5(c)]; *Cordeiro v TS Midtown Holdings, LLC,* 87 AD3d 904, 906 [1st Dept 2011] [entirety of 12 NYCRR 23-1.5]; *Maldonado v Townsend Ave. Enters., Ltd. Partnership*, 294 AD2d 207, 208 [1st Dept 2002] [12 NYCRR 23-1.5(a)]).

With respect to the allegations that the DOE violated the Industrial Code provisions relating to the inspection of the basket and the vehicle, driving the vehicle, or operating the basket itself, the DOE showed that there were no defects in the vehicle or basket, and hence no violation of 12 NYCRR 23-9.6(a)(4), and that Tarantino was a competent operator, that the vehicle was furnished with a warning device to indicate when the boom and basket were lifted, and that Tarantino was not operating the vehicle while the boom or basket was lifted in any event, and hence no violation of 12 NYCRR 23-9.6(c)(1), (2), and (3). They also demonstrated that neither Brown nor Tarantino entered or exited the aerial basket itself, that the accident did not occur because Brown failed to stand clear of the path of the basket and boom when the basket was being lowered, and that Brown was not in the basket while it was being lowered, thus rendering 12 NYCRR 23-9.6(e)(8) inapplicable. In opposition, the plaintiffs failed to raise a

triable issue of fact. Thus, the DOE must be awarded summary judgment dismissing the Labor Law § 241(6) cause of action on the merits insofar as asserted against it.

B. Plaintiffs' Cross Motion for Leave to Amend Bill of Particulars and for Summary Judgment on the Labor Law § 241(6) Cause of Action

Unless otherwise directed by the court, CPLR 3212(a) requires summary judgment motions to "be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown" (CPLR 3212[a]; *see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726 [2004]; *Freire-Crespo v 345 Park Ave. L.P.*, 122 AD3d 501, 502 [1st Dept 2014]). The court may fix a shorter deadline (*see* CPLR 3212[a]), which it did here. Nonetheless, the court may consider an untimely cross motion for summary judgment, "even in the absence of good cause, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion" (*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006]; *see Fahrenholz v Sec. Mut. Ins. Co.*., 32 AD3d 1326, 1328 [4th Dept 2006]). Here, the court directed the parties to file summary judgment motions no later 60 days after the filing of the note of issue. The note of issue was filed on January 31, 2022 and, thus, any summary judgment motion should have been made no later April 1, 2022 to be considered timely. The plaintiffs filed their cross motion for summary judgment on June 27, 2022. Inasmuch, however, as the plaintiffs' cross motion is seeking relief that is the mirror image of, and nearly identical to, that sought by the City defendants' timely motion, that is, their motion is addressed to causes of action alleging violations of Labor Law §§ 200, 240(1), and 241(6), while the cross motion addressed Labor Law § 241(6), this court will allow the filing of the otherwise untimely cross motion.

In support of their cross motion, the plaintiffs submitted their expert affidavit, curriculum vitae, and CPLR 3101(d) statement referable to Conoglio, and all of the bill of particulars exchanged throughout the course of this litigation, including the unauthorized June 23, 2022 bill of particulars, for which they now seek leave to serve. In opposition, the City defendants

submitted the note of issue and certificate of readiness, this court's August 17, 2022 decision and order allowing the City defendants to serve an amended answer so as to deny ownership of the premises, and Brown's phone records from May 2, 2018.

Leave to amend a pleading is to be freely given absent prejudice or surprise resulting from the amendment, provided that the evidence submitted in support of the motion indicates that the proposed amendment may have merit (*see* CPLR 3025[b]; *McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp.*, 59 NY2d 755 [1983]; *360 West 11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552 [1st Dept 2011]; *Smith-Hoy v AMC Prop. Evaluations, Inc.*, 52 AD3d 809 [1st Dept 2008]). The court must examine the sufficiency of the proposed amendment only to determine whether the proposed amended pleading is "palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]; *see Hill v 2016 Realty Assoc.*, 42 AD3d 432 [2d Dept 2007]).

Here, the plaintiffs seek only further to specify the provisions of 12 NYCRR subpart 23 that were allegedly violated, and the court can see no prejudice or surprise arising from granting the plaintiffs leave to amend their bill of particulars in this manner. The City defendants were aware that the plaintiffs were asserting violations of the Industrial Code, specifically subpart 23-9, which relates to power-operated equipment. Thus, for the plaintiffs to amend their bill of particulars to add 12 NYCRR 23-9.2(a), a provision describing the standards for maintenance of power-operated vehicles, would not cause prejudice or harm to the City defendants (*see Hageman v Home Depot U.S.A., Inc.*, 45 AD3d 730, 731 [2d Dept 2007] [holding that proposed supplemental bill of particulars did not prejudice defendant third-party plaintiff because it did not articulate a new theory of liability, but merely amplified the plaintiff's Labor Law § 241(6) cause of action]; *Dowd v City of New York*, 40 AD3d 908, 911 [2d Dept 2007] [finding that leave to amend bill of particulars to specify Industrial Code violation was proper even after note of issue filed where plaintiffs showed no prejudice to defendants]; *Scherrer v Time Equities, Inc.*, 27 AD3d 208, 209 [1st Dept 2006] [allowing supplemental bill of particulars with additional statutory

violations since it merely elaborated upon theory in original bill of particulars and raised no new theory of liability]).

Nonetheless, for the same reasons as this court granted the City defendants' motion for summary judgment in its entirety, the plaintiffs' motion for partial summary judgment on the issue of liability on their Labor Law § 241(6) cause of action as against the City of New York, the DOE, and the NYCHA must be denied, as the plaintiffs failed to make a prima facie showing of entitlement to judgment as a matter of law. Among other things, the plaintiffs failed to submit evidence supporting their contention that the boom lift was improperly maintained, while the City defendants established, prima facie, that the boom lift was properly maintained. Thus, that branch of the plaintiffs' cross motion is denied.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the motion of the defendants The City of New York, The New York City Department of Buildings, The New York City Department of Design and Construction, The New York City Department of Education, and The New York City Housing Authority for summary judgment dismissing the complaint and all cross claims insofar as asserted against them is granted, and the complaint and all cross claims are dismissed insofar as asserted against The City of New York, The New York City Department of Buildings, The New York City Department of Design and Construction, The New York City Department of Education, and The New York City Housing Authority; and it is further,

ORDERED that, inasmuch as the complaint previously had been severed against Durante Rental, LLC, the only other defendant in the action, the Clerk of the court shall enter judgment dismissing the complaint and all cross claims insofar as asserted against the defendants The City of New York, The New York City Department of Buildings, The New York City Department of Design and Construction, The New York City Department of Education, and The New York City Housing Authority; and it is further,

ORDERED that the plaintiffs' cross motion is granted to the extent of that they are granted leave to file a late cross motion for summary judgment and serve an amended bill of particulars in the form annexed to their motion papers, and the cross motion is otherwise denied.

This constitutes the Decision and Order of the court.

1/3/2023
DATE

JOHN J. KELLEY, J.S.C.

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

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