Claude v Triborough Bridge & Tunnel Auth.
2023 NY Slip Op 30057(U)
January 9, 2023
Supreme Court, New York County
Docket Number: Index No. 158354/2017
Judge: James E. d'Auguste
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **Hon. James d'Auguste** *Justice* **PART 55**

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HANS CLAUDE, ANGEL NELSON,

Plaintiffs,

- v -

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, BATTERY PARK CITY AUTHORITY, MTA BRIDGES AND TUNNEL, PORT AUTHORITY OF NEW YORK AND NEW JERSEY, THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, TULLY CONSTRUCTION CO., INC.,

Defendants.

---X

INDEX NO. 158354/2017

MOTION DATE 09/27/2019, 02/14/2020, 05/20/2020

MOTION SEQ. NO. 003 005 006

DECISION + ORDER ON MOTION

TULLY CONSTRUCTION CO., INC.

Plaintiff,

-against-

GRANITEWORKS, INC.

Defendant.

Third-Party Index No. 595280/2018

---X

TULLY CONSTRUCTION CO., INC.

Plaintiff,

-against-

GRANITWORKS, INC.

Defendant.

Second Third-Party Index No. 595346/2020

---X

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, MTA BRIDGES AND TUNNEL

Plaintiffs,

Third Third-Party Index No. 596059/2020

-against-

GRANITEWORKSM INC.

Defendant.

--X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 120, 127, 128, 129, 144, 148, 189, 192, 220, 224, 228, 234, 235

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 145, 149, 150, 190, 193, 221, 225, 227

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 184, 188, 194, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 222, 223, 226

were read on this motion to/for SUMMARY JUDGMENT.

Motion sequence numbers 003, 005 and 006 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by a construction worker on October 28, 2016, when, while working at a construction site located at the entrance to the Manhattan side of the Hugh L. Carey Tunnel (also known as the Brooklyn-Battery Tunnel) (the Premises), his hand was caught between the wall of a truck bed and a stone that was being moved by a crane.

In motion sequence number 003, plaintiff Hans Claude (plaintiff) moves, pursuant to CPLR 3212, for summary judgment in his favor on the Labor Law §§ 240 (1) and 241 (6) claims against defendants/third third-party plaintiffs Triborough Bridge and Tunnel Authority (TBTA), Metropolitan Transportation Authority (MTA) and MTA Bridges and Tunnel (MTABT) (the

MTA defendants), and defendant/third-party plaintiff/second third-party plaintiff Tully Construction Co., Inc. (Tully).[1, 2, 3, 4]

In motion sequence number 005, Tully moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it.[5]

In motion sequence number 006, the MTA defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims against them.

In connection with motion sequence number 006, plaintiff moves, pursuant to CPLR 3025 (b), for leave to amend his Bill of Particulars to assert additional Industrial Code violations in support of his Labor Law § 241 (6) claim.

BACKGROUND

On the day of the accident, the Premises was owned and operated by the MTA defendants. The MTA defendants hired Tully as the general contractor for a project at the Premises that entailed the renovation of the Manhattan side tunnel entrance of the Premises (the Project). Tully, in turn, hired third-party defendant/second third-party defendant/third third-party defendant Graniteworks, Inc. (Graniteworks) to perform masonry work at the Project. Plaintiff was an employee of Graniteworks.

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[1] By so ordered stipulation dated January 8, 2018, all claims asserted by plaintiff Angel Nelson were discontinued with prejudice (NYSCEF Doc. No. 70).
[2] By so ordered stipulation dated June 8, 2018, the action was discontinued without prejudice as to defendant Battery Park City Authority (NYSCEF Doc. No. 79).
[3] By decision and order dated June 19, 2018, the complaint was dismissed as against defendant Port Authority of New York and New Jersey (NYSCEF Doc. No. 81).
[4] By so ordered stipulation dated November 5, 2018, the third-party action was discontinued (NYSCEF Doc. No. 88).
[5] The court notes that Tully's supporting documentation to motion sequence number 005 is denominated as a cross-motion to plaintiff's motion (motion sequence number 003), though it is filed as a motion.

Plaintiff's 50-h Testimony

At his 50-h hearing, plaintiff testified that on the day of the accident, he was employed by Graniteworks as a stone laborer. His duties included assisting the masons with their work, including stone cutting and demolition (plaintiff's 50-h tr at 12). His foreman was Paul Campo, a Graniteworks employee. He worked on a team with Campo and four other Graniteworks workers.

Graniteworks' primary work was to "remove, revitalize and put stones back" (*id.* at 13). It was hired by Tully, who was the general contractor for the Project.

On the day of the accident, Graniteworks was removing stones from the tunnel entrance. Plaintiff's work included stacking and organizing the stones on the back of a "boom truck" – a truck-mounted crane (*id.* at 13).

To perform their work, two of plaintiff's co-workers would work from a "man lift" (*id.* at 20) – a mobile raised work platform – to loosen large pieces of stone from the tunnel's retaining wall. Once loosened, the workers would then place a steel sling around the stone, so that the boom truck could lift it down (*id.* at 30).

Plaintiff was positioned at the rear of the boom truck, on a flatbed. He was responsible for "stacking stones and organizing the stones as they come on the boom truck" (*id.* at 26). He described the stones as varying in size from a few inches wide and several feet long up to "[h]uge" (*id.* at 30) – approximately 13-feet wide by 20-feet long (*id.* at 32).

At the time of the accident, four stones had already been stowed in the flatbed. The next stone – which weighed "between 800 to 1,200 pounds" – was being lowered by his coworker, "Jimmy" (*id.* at 38).

Plaintiff testified that he gave Jimmy hand "signals to bring the stone down to reset the cable because it was teeter tottering" (*id.* at 36). Plaintiff wanted to "reset the cable into the middle" of the stone, to balance it while it was being hoisted into the truck (*id.* at 37). At that time, the stone was held by the crane at approximately shoulder height (*id.* at 43). Plaintiff also testified that his foreman was aware that the stone was off-balance because he saw it wobbling in the air (*id.* at 137).

Plaintiff testified that, immediately before the accident, the stone was "coming towards [him]" and he signaled the operator to lower the stone. Plaintiff then placed his right hand on top of the stone to steady it. However, instead of lowering the stone, the operator "sucked in" – i.e., he moved the crane laterally – and pinned plaintiff's right hand to the back of the flatbed truck (*id.* at 100).

Plaintiff also testified that it was standard procedure to place your hand on a teetering stone to stabilize it (*id.* at 57).

Finally, plaintiff testified that he went to Graniteworks' office a few days after the accident to fill out a workers' compensation C3 form. He spoke with Myra, an employee, who filled the form out for him. He then signed the C3 form (*id.* at 102).

Plaintiff's Deposition Testimony

Plaintiff's deposition testimony largely tracks with his 50-h hearing testimony. He testified that on the day of the accident, he was assisting in the removal of stones that weighed approximately 1200 pounds and that measured, 15-to-20-feet in length. The stones were hoisted, via boom truck, from the retaining wall to a height of approximately 15 feet, before being lowered to the bed of the truck (plaintiff's tr at 38). The stone was supposed to be supported and balanced by a steel cable, but it was not properly centered. Therefore, it "was teeter tottering"

(*id.* at 42). He later explained that the stone's motion was "[u]p and down, from left to right" (*id.* at 117).

Once the stone was lowered to plaintiff's shoulder level, plaintiff placed his hand on top of it to steady the stone's movement. Plaintiff testified that he was able to stabilize the stone's wobbly movement (*id.* at 46). After doing so, he signaled Jimmy to lower the stone the rest of the way.

Plaintiff then testified that, while moving the stone down, Jimmy "sucked in" (*id.* at 49). Plaintiff explained that "sucked in" means that "the long arm of the boom truck goes towards the . . . wall of the truck" and that, in doing so, the stone "hit [plaintiff's] hand and the stone kept coming down" (*id.* at 49). Plaintiff's hand was then pinned to the wall of the truck for a "few seconds" (*id.* at 51).

Plaintiff was shown a copy of the worker's compensation C3 report, filled out two days after the accident. Unlike at the 50-h hearing, plaintiff testified that he did not sign the document (*id* at 59) or review it (*id.* at 61). After reviewing the document at the deposition, plaintiff did not agree with the information described therein, including the cause of the accident (*id.* at 60), which was described as "the stone slipped and fell on the right hand" (*id.* at 61) or the work he was performing, which was described as "attempting to remove the cable from the small stone" (*id.* at 121).

Plaintiff also reiterated that he had been previously instructed by his foreman that the proper course of action to steady a wobbling load was to steady it with his hand (*id.* at 111). No one told him to do so on the day of the accident.

Deposition Testimony of Louis Andreani (TBTA's Facility Engineering Director)

Louis Andreani testified that on the day of the accident, he was TBTA's facility engineering director. TBTA is an entity that operates bridges and tunnels in New York City. According to Andreani, MTA Bridges and Tunnels is the business name for the TBTA – i.e., they are the same entity (Andreani tr at 23). TBTA/MTA Bridges and Tunnels owned the Premises (*id.* at 22, 23).

Andreani's duties at TBTA included oversight of capital and major maintenance programs at the Premises. He was responsible for obtaining bids and awarding the job to contractors. The Project at the Premises entailed the rehabilitation of the tunnel, to repair damage sustained from hurricane Sandy. TBTA hired Tully as the general contractor for the project (*id.* at 27). TBTA had a project manager at the Premises but did not direct or control any contractor. It also did not supply any equipment or materials.

At the deposition, Andreani was shown a contract between Tully and TBTA. He confirmed it was the general contracting agreement in place for the Project at the time of the accident.

Andreani did not witness the accident and only learned of it from an inspector report. His understanding of the accident was limited to what was in the report.

Deposition Testimony of Anthony Naletilic (Tully's Project Manager)

Anthony Naletilic testified that on the day of the accident, he was Tully's project manager for the Project. Tully is "a heavy highway contractor" that works for government entities (Naletilic tr at 17). His duties included general oversight of the Project, including "[h]andling of subcontractors, vendors, engineering, submittals and interface with the owner, which was [TBTA]" (*id.* at 10). Tully hired Graniteworks to perform stone masonry work on the

Project. Specifically, Graniteworks was hired to remove, recut and reset stones. To recut stones, Graniteworks would put the stones on a "flatbed truck with a boom on it" and then bring them to their shop (*id.* at 24). Tully did not perform any trade work at the Project, though its project manager or superintendent could stop work if they saw a dangerous activity or condition.

Naletilic did not witness the accident and learned of it the following day. To his knowledge, Tully never prepared an accident report.

At the deposition, Naletilic was shown a copy of an agreement between Tully and Graniteworks and confirmed that it was the agreement in effect on the day of the accident (*id.* at 53).

Deposition Testimony of Paul Campo (Graniteworks Foreman)

Paul Campo testified that on the day of the accident, he was Graniteworks' foreman at the Project. Plaintiff worked on his crew. Grainteworks would hold safety talks to discuss various issues at any particular jobsite. According to Campo, one such topic (out of about ten) was "pinch points" – the dangers of getting caught, or "pinched" between a moving object and a wall or vehicle (Campo tr at 15). As a part of these meetings, Campo would explain where to stand and "don't put your hand in between things" (*id.* at 16). No one from TBTA or Tully ever told him how to perform his work (*id.* at 99-100).

Campo explained that he and plaintiff worked together to direct the boom truck operator to land loads (*id.* at 23 ["I directed them over the wall to the truck, and then (plaintiff) would take over from there"]). Campo instructed plaintiff to stand on top of the truck so that he could direct the stones onto the flatbed.

According to Campo, using your hands to steady an unstable load is not a safe practice (*id.* at 29). He also testified that, sometimes, "[y]ou have to use your hand to steady the stone" (*id.* at 30 ["I am not going to say never put the hand on the stone"]).

Campo indicated that the stone was approximately three feet above the top of the flatbed immediately prior to the accident. He did not recall seeing the stone teetering while it was in the air.

Campo was near plaintiff when the accident occurred, but he did not see it happen. He knew plaintiff was directing the stone downward (*id.* at 64). Shortly thereafter, he saw plaintiff holding his hand and learned that plaintiff "got his finger pinched . . . between the stone and the headboard of the truck" (*id.* at 38).

Campo was shown an incident report and confirmed that he had signed it. He also confirmed that it stated that plaintiff "had been told numerous times not to put his hand or fingers on the stone" (*id.* at 45). He then clarified that he never actually told plaintiff not to put his hands on stones (*id.* at 46), but that he explained that to everyone at toolbox meetings.

Campo reviewed the C2 incident report. He testified that the accident did not occur in the manner in which the C2 report described it (*id.* at 64 [the stone "didn't slip from the cable"]).

Deposition Testimony of Anthony D'Angelo (Graniteworks' General Superintendent)

Anthony D'Angelo testified that on the day of the accident, he was Graniteworks' general superintendent for the Project. He was present at the Premises on the day of the accident, but he did not witness it. He testified that plaintiff came to him shortly after the accident and he told plaintiff to take the rest of the day off to go to the hospital.

D'Angelo inspected the accident site and "saw the stone – off kilter . . . at an angle which it should not have been" (D'Angelo tr at 24). D'Angelo testified that plaintiff told him that the

"stone slipped on the deck [of the flatbed] and he tried to stop it with his hand, and the stone won" (*id.* at 26). D'Angelo confirmed that an incident report that he had signed stated that plaintiff had been "told numerous times in the past to keep his hands clear of the stone" (*id.* at 32). He confirmed that this was in relation to training, and not to any prior incident.

Deposition Testimony of James Bocina (Graniteworks' Boom Truck Operator)

James Bocina testified that on the day of the accident he was employed by Graniteworks as a boom truck driver and boom crane operator at the Project. Bocina testified that general safety training around boom crane operations included keeping your hands and feet away from any moving load. He also testified that he had witnessed plaintiff place his hands on moving loads and had told him to stop doing so (Bocina tr at 24).

On the day of the accident, Bocina was operating the boom crane. The stones they were lifting weighed approximately 1000 pounds. Before the accident, he witnessed plaintiff place his hand on the stone. He stopped lifting the load and "asked [plaintiff] to remove his hands" (*id.* at 35). Plaintiff then "put his hands right back on" (*id.* at 36). He told plaintiff to remove his hand from the load five times on the day of the accident (*id.* at 37).

Bocina was shown a copy of his signed statement at the deposition. He confirmed it was an accurate copy and stated that it was made several months after the accident.

DISCUSSION

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been

established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods*., 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Plaintiff's Cross Motion for Leave to Amend the Bill of Particulars

Plaintiff cross-moves for leave to amend the bill of particulars to add several Industrial Code provisions. CPLR 3025 (b) provides the following:

> "A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court . . . . Leave shall be freely given upon such terms as may be just . . . . Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

Initially, plaintiff asserts that he seeks to add sections 12 NYCRR 23-6.1 (d) and (h) (plaintiff's cross motion, p 2, ¶3). That said, plaintiff's initial bill of particulars, dated June 14, 2018, includes a list of several Industrial Code provisions, including "23-6.1 (d)" and "23-6.1 (h)" (NYSCEF Doc. No. 167, p 4). Moreover, plaintiff's own motion for summary judgment (which was filed nearly one year prior to his cross motion) seeks relief with respect to these specific Industrial Code provisions. Accordingly, leave to amend the bill of particulars to add these already pleaded provisions is denied.

Plaintiff also appears to seek to add "12 NYCRR 23-8.2 (c) *et seq*" (plaintiff's cross motion, p 57, ¶ 252). In doing so, plaintiff notes that section 8.2 (c) (3) should apply to the facts of this action (no substantial discussion is made of any other subsection of 8.2 [c]).[6]

Leave to amend a pleading "shall be freely given absent prejudice or surprise resulting directly from the delay" (*Tri-Tec Design, Inc. v Zatek Corp.,* 123 AD3d 420, 420 [1st Dept 2014] [internal citation and quotation marks omitted]).

> "Mere delay in seeking to amend a pleading does not warrant denial of the motion, in the absence of prejudice. The type of prejudice necessary to warrant denial of the motion requires some indication that the [opposing party] has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position"

(*id.* at 420 [internal quotation marks and citation omitted]). Further, a movant "need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v. Greystone & Co., Inc.,* 74 A.D.3d 499, 500 [1st Dept 2010] [internal citation omitted]). Therefore, the court will consider whether Industrial Code 23-8.2 (c) (3) applies to the subject accident.

Industrial Code 23-8.2 governs mobile cranes, such as the boom truck at issue here. Section (c) (3) provides the following:

> "Loads lifted by mobile cranes shall be raised vertically so as to avoid swinging during hoisting except when such operations are permitted by the capacity chart. A tag or restraint line shall be used when rotation or swinging of any load being hoisted by a mobile crane may be a hazard"

[6] The court notes that plaintiff failed to include a proposed amended bill of particulars to his motion, as required by CPLR 3025 (b). That said, because the proposed amendments were limited in scope and sufficiently described in the moving papers, the proposed amendment will be considered (*see e.g. Johnson v Montefiore Med. Ctr.,* 203 AD3d 462, 462 [1st Dept 2022] [allowing proposed amendment to be considered where the proposed amended pleading was not attached, but "the proposed amendments were 'limited' and 'clearly described in the moving papers'"]).

Here, based on the testimony discussed above, a question of fact exists as to whether plaintiff's accident was proximately caused by the swinging or rotating of a load that could have been prevented through the use of a tag line.

Plaintiff testified that he placed his hand on the stone (before it struck him) in order to stabilize its wobbling – a situation that, arguably, would not have been necessary if a tag line was in use. Accordingly, this provision of the Industrial Code is not palpably insufficient or clearly devoid of merit with respect to the subject accident. Thus, leave to amend the bill of particulars to include a violation of Industrial Code section 23-8.2 (c) (3) is granted.

The Labor Law § 240 (1) Claim (Motion Sequence Numbers 003, 005 and 006)

Plaintiff moves for summary judgment in his favor on his Labor Law § 240 (1) claim against the MTA defendants and Tully. The MTA defendants and Tully move for summary judgment dismissing the same as against them.

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

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

Labor Law § 240 (1) "imposes a nondelegable duty on owners and contractors to provide devices which shall be so constructed, placed and operated as to give proper protection to those individuals performing the work" (*Quiroz v Memorial Hosp. for Cancer and Allied Diseases*, 202 AD3d 601, 604 [1st Dept 2022] [internal quotation marks and citations omitted]). It "was designed to prevent those types of accidents in which the scaffold . . . 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'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co*., 81 NY2d 494, 501 [1993]).

The absolute liability found within section 240 "is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*O'Brien v. Port Auth. of NY & NJ,* 29 NY3d 27, 33 [2017] [internal quotation marks and citation omitted]). In addition, Labor Law § 240 (1) "must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC,* 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

That said, not every worker who falls at a construction site is afforded the protections of Labor Law § 240 (1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]; *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 267 [1st Dept 2007] [section 240 (1) "does not cover the type of ordinary and usual peril to which a worker is commonly exposed at a construction site"). Instead, liability "is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

Therefore, to prevail on a section 240 (1) claim, a plaintiff must establish that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]).

Initially, the MTA defendants and Tully do not dispute that they are proper Labor Law defendants.

Next, defendants argue that section 240 (1) is inapplicable to plaintiff's accident because the accident does not arise from an elevation related hazard. In support of this argument, defendants cite to *Smith v Hovnanian Co.,* 218 AD2d 68, 70 (3d Dept 1995). In *Smith*, the plaintiff was injured when he was pinned to a wall by a piece of sheetrock moved laterally by a boom crane. In dismissing the plaintiff's Labor Law § 240 (1) claim, the *Smith* court held:

> "Plaintiff neither fell from a height nor was he struck by a falling object. Rather, plaintiff was injured as the result of the horizontal movement of the load of sheetrock. Thus, regardless of whether the extension boom was operated so as to give proper protection to plaintiff, he has no Labor Law § 240 (1) cause of action because his injury did not arise out of a 'special hazard'"

(*id.* at 70).

Here, plaintiff testified that his accident occurred when the boom truck operator moved the crane laterally, causing the subject stone to move laterally and strike plaintiff's hand. These facts are analogous to those found in *Smith*, as the stone did not fall onto plaintiff.

To the extent that plaintiff argues that the stone was hoisted and in the process of being lowered into the flatbed at the time of the accident (*see e.g. Fabrizi v 1095 Ave. of Americas, L.L.C.*, 22 NY3d 658, 662-63 [1st Dept 2014] ["the plaintiff must demonstrate that at the time the object fell, it either was being 'hoisted or secured,' or 'required securing for the purposes of the undertaking'"][internal quotation marks and citation omitted]), such argument is inapplicable here because plaintiff's accident was not caused by a falling object. The stone was moved laterally.

In addition, plaintiff's reliance on *Flores v Metropolitan Transp. Auth.,* 164 AD3d 418, 419 (1st Dept 2018) is unpersuasive. In *Flores*, section 240 (1) applied because an uncontrolled load, while in the process of being hoisted, swung into the plaintiff, causing him to fall several feet. These facts, as testified to by plaintiff and the defense witnesses, are not present in the

instant action. Specifically, here, the stone did not freely swing (and plaintiff did not fall). Rather, as plaintiff testified, the accident was caused when the stone was purposely moved laterally by the crane operator. Plaintiff's testimony that the stone wobbled prior to the accident does not constitute the type of swinging that would fall within the ambit of protections governed by Labor Law § 240 (1), such as the swinging in *Flores*.

Accordingly, in light of the foregoing, the MTA defendants and Tully are entitled to summary judgment dismissing plaintiff's Labor Law § 240 (1) claim as against them and plaintiff is not entitled to summary judgment in his favor on the same claim.

The Labor Law § 241 (6) Claim (Motion Sequence Numbers 003, 005 and 006)

Plaintiff moves for summary judgment in his favor on his Labor Law § 241 (6) claims against the MTA defendants and Tully. The MTA defendants and Tully move for summary judgment dismissing the same.

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "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:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and 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]; *see also Ross v Curtis-Palmer Hydro-Electric Co.,* 81 NY2d 494, 501–502 [1993]). Importantly, to sustain a

Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross,* 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

Here, plaintiff lists multiple violations of the Industrial Code in the bill of particulars. Except for sections 23-6.1 (d) and (h), plaintiff does not affirmatively seek relief or oppose their dismissal. These uncontested provisions are deemed abandoned (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section"]).[7]

Industrial Code 12 NYCRR 23-6.1 (d) and (h)

Industrial Code 12 NYCRR 23-6.1 governs "material hoisting." Notably, subsection (a) provides that section 6.1 "shall apply to all material hoisting equipment except cranes . . . ." Accordingly, as section 6.1 does not apply to cranes, it is inapplicable to plaintiff's accident, which involved materials hoisted by a crane.

Thus, defendants are entitled to summary judgment dismissing that part of the Labor Law § 241 (6) claim predicated upon violations of Industrial Code 12 NYCRR 23-6.1 (d) and (h), and plaintiff is not entitled to summary judgment in his favor on the same claims.

[7] As discussed above, plaintiff's request for leave to amend his bill of particulars to add a claim predicated upon a violation of Industrial Code 12 NYCRR 8.2 (c) (3) was granted, adding this violation to plaintiff's section 241 (6) claim. Therefore, because this alleged violation is, essentially, newly pleaded, no dispositive relief was sought with respect to this claim.

The Common-Law Negligence and Labor Law § 200 Claims (Motion Sequence Numbers 005 and 006)

The MTA defendants and Tully move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

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

"Liability pursuant to Labor Law § 200 may be based either upon the manner in which the work is performed or actual or constructive notice of a dangerous condition inherent in the premises" (*Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 736 [2d Dept 2008]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

"Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]). Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012])

However, where an injury stems from a dangerous condition inherent in the premises, an owner or contractor may be liable in common-law negligence and under Labor Law § 200 when

the owner or contractor "'created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice'" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

Here, plaintiff's accident was caused when his hand was struck by a stone being moved by a crane. Accordingly, plaintiff's accident was caused by the means and methods of the work.

Based on the record before the court, there is no evidence showing that the MTA defendants or Tully actually controlled or supervised Granitework's crane operations. To the extent that the MTA defendants or Tully had authority to direct Graniteworks as to where and when to perform its work, such facts, without more, only establish a general supervisory control over the subject injury producing work. Such general supervisory control is insufficient to impute liability under section 200 or the common-law (*see Bisram v Long Is. Jewish Hosp*., 116 AD3d 475, 476 [1st Dept 2014]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 309 [1st Dept 2007]; *Reilly v Newireen Assoc.*, 303 AD2d 214, 221 [1st Dept 2003]).

Accordingly, the MTA defendants and are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

Finally, while the MTA defendants and Tully seek to dismiss all crossclaims against themselves, they raise no arguments in support of such relief. Accordingly, those branches of their motions are denied.

The parties remaining arguments have been considered and were unpersuasive.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion of plaintiff Hans Claude (motion sequence number 003), pursuant to CPLR 3212, for summary judgment in his favor on the Labor Law § 240 (1) and 241 (6) claims against defendants/third third-party plaintiffs Triborough Bridge and Tunnel Authority, Metropolitan Transportation Authority and MTA Bridges and Tunnel (the MTA defendants), and defendant/third-party plaintiff/second third-party plaintiff Tully Construction Co., Inc. (Tully) is denied; and it is further

ORDERED that Tully's motion (motion sequence number 005), pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it is granted to the extent that all claims, except the Labor Law § 241 (6) claim predicated upon a violation of Industrial Code 12 NYCRR 23-8.2 (c), are dismissed; and it is further

ORDERED that the branch of the MTA defendants' motion (motion sequence number 006), pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it is granted to the extent that all claims, except the Labor Law § 241 (6) claim predicated upon a violation of Industrial Code 12 NYCRR 23-8.2 (c), are dismissed; and it is further

ORDERED that plaintiff's cross-motion, pursuant to CPLR 3025 (b), for leave to amend his bill of particulars to assert additional Industrial Code violations is granted to the extent that plaintiff is allowed to amend his bill of particulars to include a violation of Industrial Code 12 NYCRR 23-8.2 (c), and the motion is otherwise denied; and it is further

ORDERED that plaintiff is directed to serve his amended bill of particulars within 20 days of service of this order with notice of entry thereof.

This constitutes the decision and order of the Court.

1/9/2023				James d'Auguste, J.S.C.		
DATE						
CHECK ONE:	☐	CASE DISPOSED		X	NON-FINAL DISPOSITION	
	☐	GRANTED	☐ DENIED	X	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐ REFERENCE