SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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FAUSTO R. RIVERA,

Plaintiff,

- v -

95TH AND THIRD LLC, GILBANE RESIDENTIAL CONSTRUCTION LLC, STRUCTURETECH NEW YORK INC., and BARONE STEEL INC.,

Defendants.

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INDEX NO. 150811/2018

MOTION DATE 02/28/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, and 66

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, defendants' motion for summary judgment is granted in part, and plaintiff's cross-motion to amend the bill of particulars to include a claim under 12 NYCRR 23-6.1(d) and (h) is granted, in accordance with the following memorandum decision.

In this Labor Law action, plaintiff was working at a construction site located at 200 East 95th Street (verified answer, NYSCEF Doc. No. 33, ¶ 26). On November 16, 2017, plaintiff was assisting with the erection of a large stone structure on the second-floor terrace of the building (Lopez aff., NYSCEF Doc. No. 46, ¶ 6). The first stone was affixed to the floor of the terrace with epoxy, and additional stones were then stacked and pinned on top of the first (*id.*, ¶¶ 7, 9; Rivera 2019 EBT tr, NYSCEF Doc. No. 37 at 80). A gap of about a foot separated the structure from the adjoining brick wall (Rivera February 2020 EBT tr, NYSCEF Doc. No. 38 at 187-88). During construction, it became necessary to take apart the stack of blocks and relevel them (*id.* at 181-83, Lopez aff., ¶ 10). The first block could not be immediately removed, as it remained

affixed to the terrace floor with epoxy (Rivera February 2020 EBT tr, NYSCEF Doc. No. 38 at 191). While the workers attempted to move the stone using a hoist, plaintiff, while standing on a scaffold next to the stone and placed his left hand on the side of the stone facing the adjoining brick wall (*id.* at 187-88, 199-200). While standing next to the stone with his hand so located between the stone and the wall, the stone abruptly broke loose, moved toward the wall, and trapped plaintiff's hand for "a matter of seconds" before swinging away (*id.* at 202-03).

Plaintiff's Cross-Motion to Amend

Plaintiff's cross-motion to amend his bill of particulars to include a claimed violation of Labor Law § 241(6) based on 12 NYCRR 23-6.1(d) and (h) is granted, for the reasons set forth in the moving and reply papers in support of the cross-motion (NYSCEF Doc. Nos. 51, 56-57, 64) and the exhibits attached thereto, in which the Court concurs. As more specifically set forth therein, leave to amend shall be freely given upon such terms as may be just (CPLR 3025[b]). In the absence of surprise or prejudice shown by defendants, leave should be granted (*Fellner v Morimoto*, 52 AD3d 352, 353 [1st Dept 2008]). "A party opposing leave to amend must overcome a heavy presumption of validity in favor of permitting amendment" (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012] [internal quotation marks and citations omitted]). Here, upon a review of the record the court does not find that defendants can demonstrate any surprise or undue prejudice. Moreover, the competing expert affidavits establish, at this stage, the merit of the proposed amended claim (*Shillingford v New York City Tr. Auth.*, 147 AD3d 465 [1st Dept 2017] [holding that competing claims of experts were "for the jury to resolve"]).

Defendant's Motion for Summary Judgment

As an initial matter, so much of defendants' motion as seeks dismissal of plaintiff's Labor Law § 200 and common-law negligence claims is granted without opposition in favor of

all defendants. Defendants established that they did not "supervise or control the performance of [plaintiff's] work" (*LaRosa v Internap Network Servs. Corp*., 83 AD3d 905, 909 [2d Dept 2011]), and plaintiff submitted no opposition to this branch of defendants' motion. In addition, so much of defendants' motion as seeks summary judgment dismissing plaintiff's claims pursuant to Labor Law §§ 240(1) and 241(6) against defendants Structuretech New York Inc. ("Structure") and Barone Steel Inc. ("Barone") is also granted without opposition. Neither Structure nor Barone had the authority to supervise and control the work giving rise to the plaintiff's injuries and thus are not agents of the owner defendant 95th and Third LLC ("owner") or construction manager defendant Gilbane Residential Construction LLC ("Gilbane") cannot be liable under Labor Law §§ 240(1) or 241(6) (*Ahmed v Momart Discount Store, Ltd.*, 31 AD3d 307, 307 [1st Dept 2006] ["to recover under Labor Law § 200, § 240 and § 241 . . . a plaintiff must establish . . . that he was hired by the owner, the general contractor or an agent of the owner or general contractor"]).

Turning to the claim pursuant to Labor Law § 240(1), 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) 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" (*Ross v Curtis-Palmer Hydro-Elec. Co*., 81 NY2d 494, 501 [1993]). Importantly, Labor Law § 240 (1) "is

designed to protect workers from gravity-related hazards . . . and 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]). However, where plaintiff's injuries were caused by lateral movement of equipment, materials, or other construction debris, there is no liability under the statute (*Martinez v 342 Prop. LLC*, 128 AD3d 408, 409 [1st Dept 2015], *citing Wilinski v 334 E. 92nd Hous. Dev. Fund Corp*., 18 NY3d 1, 8 [2011] ["Plaintiff's testimony established that the piece of equipment that pinned him to the column was not a "falling object" and that he was not a "falling worker"]). Here, plaintiff's testimony establishes that he was injured when his hand was struck by a block moving laterally, and thus defendants are not liable under Labor Law § 240(1).

Finally, 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:
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> * * *
>
> (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). 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, defendants established entitlement to dismissal of plaintiff's Labor Law § 241(6) claims as originally, pled, as the Industrial Code sections listed in the bill of particulars were either too general or not applicable. Plaintiff raised no argument to the contrary in his opposition and so to the extent this claim is based on the originally cited provisions of the Industrial Code defendants are entitled to summary judgment (*Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["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"]). However, upon the court's grant of plaintiff's cross-motion to amend his bill of particulars, plaintiff now asserts a claim premised on 12 NYCRR 23-6.1(d) and (h). Upon review of the cited provisions, the court finds that 12 NYCRR 23-6.1(d) is not applicable, as the record adduces no triable issues of fact as to whether or not the stone was "in excess of the live load for which [the hoist] was designed . . . properly trimmed to prevent dislodgement of any portion of [the stone] . . . [or] securely slung and properly balanced." 12 NYCRR 23-6.1(h), however, requires that "[l]oads which have a tendency to swing or turn freely during hoisting shall be controlled by tag lines." As set forth above, the competing experts of the parties demonstrate issues of fact as to whether tag lines should have been used to control the stone while it was being hoisted, precluding summary judgment (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978] ["summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue"]).

Accordingly, it is

ORDERED that the motion for summary judgment of defendants Structuretech New York Inc. and Barone Steel Inc. are granted and the complaint is dismissed against them; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants Structuretech New York Inc. and Barone Steel Inc. dismissing the claims made against them in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the motion for summary judgment of defendants 95th and Third LLC and Gilbane Residential Construction LLC is granted in part and plaintiff's claims for common-law negligence and Labor Law §§ 200 and 240(1) are severed and dismissed; and it is further

ORDERED that the action shall continue as to plaintiff's claim pursuant to Labor Law § 241(6) premised on a violation of 12 NYCRR 23-6.1(h); and it is further

ORDERED that the plaintiff's motion for leave to amend the bill of particulars to the extent discussed herein is granted; and it is further

ORDERED that the plaintiff shall serve an amended bill of particulars as discussed herein within 20 days from the date of said service; and it is further

ORDERED that this matter is respectfully referred to the Clerk of the Trial Assignment Part to be scheduled for trial.

This constitutes the decision and order of the court.

2/7/2023
DATE

LOUIS L. NOCK, J.S.C.

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