At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at 360 Adams Street, Brooklyn, New York, on the 15th day of May, 2023.

P R E S E N T:

Hon. Wayne P. Saitta, Justice.

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GUSTAVO RODRIGUEZ,

Plaintiff,

Index No. 511959/2019

-against-

DSW HOMES LLS, and SLSCO L.P.,

DECISION AND ORDER
MS #3 and MS # 4

Defendants,

The following papers numbered on this motion:

	NYSCEF Doc Numbers
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	56-60, 79-82, 84
Answering Affidavit (Affirmation)	87, 83, 88
Reply Affidavit (Affirmation)	90
Supplemental Affidavit (Affirmation)	
Pleadings –Exhibits	61-72
Stipulations – Minutes	
Filed Papers	

This action arises from a construction accident in which the arm of a Bobcat mini excavator struck Plaintiff as he was filling a bucket with debris at 403 Father Capodanno Blvd., Staten Island, NY 10305 (the Premises).

Defendant SLSCO L.P. (Defendant SLSCO) was the construction manager at the Premises.

Defendant SLSCO contracted with Defendant DSW HOMES LLC (Defendant DSW) to perform work at the Premises. Defendant DSW was the general contractor at the Premises.

Defendant DSW contracted with non-party CID Construction Services LLC (non-party CID) to perform the work at the Premises.

Plaintiff was employed by non-party CID as a laborer. On the day of his accident, Plaintiff was removing demolition debris below grade level at the Premises when he was struck by the arm of a Bobcat mini excavator, with a bucket attached, that swung unexpectedly.

The operator of the Bobcat was in the cab of the excavator with the motor running and the doors to the cab closed. The cab of the excavator only has one seat, which is used for the operator.

While the operator was waiting for the bucket to fill, Michael Sterlacci, a supervisor on the site, opened the door and entered the cab. He then greeted and hugged the operator. Sterlacci was not part of the excavation work crew.

Sterlacci accidently struck one of the levers causing the arm of the excavator to strike the Plaintiff.

Plaintiff's complaint alleges three causes of action: Labor Law § 240(1), Labor Law § 241(6), and Labor Law § 200 and common law negligence.

Plaintiff moves for summary judgment on liability against Defendants pursuant to Labor Law § 241(6).

Defendants cross-move to dismiss Plaintiff's claims pursuant to Labor Law §240(1), § 241(6) and § 200.

Labor Law § 241(6)

Plaintiff moves for summary judgment on the issue of liability pursuant to Labor Law § 241(6) against Defendants.

Defendants cross-move to dismiss Plaintiff's claims pursuant to Labor Law § 241(6).

"Labor Law § 241(6) imposes a nondelegable duty upon an owner [an owner's agent] or general contractor to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Grant v. City of New York,* 109 AD3d 961, 963 [2d Dept 2013]). "To establish a cause of action for a violation of Labor Law § 241(6), a plaintiff must plead and prove a violation of a specific provision of the [Industrial] Code" (*Galarraga v. City of New York*, 54 AD3d 308, 309 [2d Dept 2008]).

Plaintiff has plead violations of several sections of the Industrial Code including §23-9.4(h)(4), § 23-4.2(k), and §23-9.5(c).

Industrial Code § 23-9.4 (h)(4)

Industrial Code § 23-9.4 (h)(4) governs "[p]ower shovels and backhoes used for material handling" and provides, in pertinent part, that "[u]nauthorized persons shall not be permitted in the cab or immediately adjacent to any such equipment in operation".

Plaintiff submits an affidavit from Herbert Heller, Jr., an expert engineer, who opines that unauthorized workers entering the cab of the Bobcat was an anticipated, known, and predictable hazard that Defendants should have expected to encounter at the site according to good construction safety practices. Heller further opined that good

construction safety practices require the operator of the machine to lock the doors of the cab while the excavator is in use, so as not permit unauthorized users to enter the cab.

Defendants argue that Industrial Code § 23-9.4(h)(4) is insufficiently specific to support a § 241(6) claim, citing *Toussaint v. Port Auth. of N.Y. & N.J.*, 38 NY3d 89 [2022]. However, the *Toussaint* case is distinguishable as it involved Industrial Code § 23-9.9(a), not § 23-9.4(h)(4).

Section 23-9.4(h)(4) is a specific rule that does not merely codify common law. (*See Cunha v. Crossroads II*, 131 AD 3d 440 [2d Dept 2015]). It is clear in this case that Sterlacci was not assigned any tasks with respect to the excavator, and thus a person who should not have been permitted to enter the cab pursuant to § 23-9.4(h)(4) (*id.*).

Defendants submit an Affidavit from Martin R. Bruno, a construction safety expert, who offered two interpretations of Industrial Code § 23-9.4(h)(4). First, he opined that the phrase "backhoes used for material handling" does not include backhoes used to remove material. Second, he opined that Sterlacci was not "permitted in the cab" within the meaning of § 23-9.4(h)(4) because he was not given permission by anyone to enter the cab.

Although expert evidence is permitted on the issue of whether a certain condition or omission was in violation of a statute or regulation and as to the meaning of specialized terms, the interpretation as to the meaning and applicability of the law is for the court (*see Morris v. Pavarini*, 9 NY3d 47 [2007]; *Franco v. Jay Cee of New York Corp.,* 36 AD3d 445 [1st Dept 2007]).

Both of Bruno's interpretations are erroneous.

According to Bruno, in the context of excavation, demolition or construction, "material" is defined as an item brought to a work site for incorporation into the building

or structure, and "debris" is defined as waste or rubbish created by the work. This opinion ignores the fact that backhoes are primarily designed to excavate or remove material.

More importantly, caselaw has held that the phrase "backhoes used for material handling" covers backhoes that are being used to remove material (*see Cunha,* 131 AD3d 440 [upheld denial of summary judgment as to a claim based on § 23-9.4(h)(4) where a backhoe was being used to remove stone and chicks of concrete]; *see also Buhr v. Concord Sq. Homes Assoc., Inc.,* 126 AD 3d 1533 [4th Dept 2015] [held that a backhoe being used to remove a broken water pipe was "being used for material handling within the meaning of § 23-9.4]" at 1534).

Defendants have offered no caselaw to the contrary. Defendants' reference to Federal Acquisition Regulation, 48 C.F.R. § 52.225-9(a) is misguided as the quoted section defines "construction material" and § 23-9.4 encompasses material generally.

Bruno also opines that § 9.4(h)(4) was not violated because Sterlacci was not given permission to enter the cab.

Bruno's interpretation that § 23-9.4(h)(4) applies only to situations where unauthorized persons are granted formal or express permission to enter the cab would render the subsection meaningless. Once a person is granted express permission, they are by definition not an unauthorized person. Under Bruno's interpretation there could never be a case where an unauthorized person was permitted to enter a cab.

A statutory construction which renders a part meaningless should be avoided (*see Matter of Anonymous v. Molik,* 32 NY3d 30 [2018]; *Avella v City of New York,* 29 NY3d 425 [2017]).

By reason of the foregoing, the entry of Sterlacci, who was not part of the demolition crew, into the cab was a violation of § 23-9.4(h)(4).

Industrial Code § 23-4.2(k)

Industrial Code § 23-4.2(k) provides that "[p]ersons shall not be suffered or permitted to work in any area where they may be struck or endangered by any excavation equipment or by any material being dislodged by or falling from such equipment".

The Second Department has held that § 23-4.2(k) is sufficiently specific to support a claim pursuant to § 241(6) (*see Zaino v. Rogers*, 153 AD3d 763, 765 [2d Dept 2017]; *Cunha*, 131 AD3d 440; *Ferreira v. City of New York,* 85 AD3d 1103 [2d Dept 2011]).

The cases cited by Defendants, *Misicki v. Cardonna*, 12 NY3d 511 [2009] and *Toussaint*, 38 NY3d 89 [2022], did not involve § 23-4.2(k), but dealt with § 23-9.2(a) and § 23-9.9(a) respectively.

Industrial Code § 23-9.5(c)

Industrial Code Section § 23-9.5(c) provides in pertinent part:

> (c) Operation. Excavating machines shall be operated only by designated persons. No person except the operating crew shall be permitted on an excavating machine while it is in motion or operation. No person other than the pitman and excavating crew shall be permitted to stand within range of the back of a power shovel or within range of the swing of the dipper bucket while the shovel is in operation.

Defendants argue that § 23-9.5(c) is insufficiently specific to support a claim pursuant to § 241(6). They contend that the term "designated persons" is overly broad. However, Plaintiff's claim is not that the backhoe was not operated by a "designated person", but that the section was violated because Sterlacci who was not part of the excavating crew was permitted in the cab.

Further, § 23-9.5(c) has been held to be a sufficient predicate for a § 241(6) claim (*see Cunha*, 131 AD3d 440, 441; *Benvento v. City of Buffalo,* 74 AD3d 1738 [4th Dept 2010]).

As discussed above, Plaintiff has established that Sterlacci' s presence in the cab constituted a violation of § 23-9.5(c)'s prohibition on persons who are not part of the operating crew being permitted on an excavating machine.

Alleged Conflict between Industrial Code § 23-4.2(k) and §23-9.5(c)

Defendants contend that § 23-4.2(k)'s prohibition on workers being permitted to work in any area where they may be struck by excavation equipment does not apply to Plaintiff because as a member of the excavation crew, he was permitted to stand within range of the arm of the backhoe pursuant to § 23-9.5(c).

However, the Second Department specifically held in *Torres v. City of New York,* 127 AD3d 1163 (2d Dept 2015), that "a person authorized pursuant to 12 NYCRR 23-9.5 to operate or be within the range of an excavator's bucket may, contrary to the city defendants' contention, still claim the protections provided by 12 NYCRR 23-4.2 (k)" (*id.* at 1166; *see also Ferreira*, 85 AD3d 1103).

Under the circumstances of this case, it was a violation of § 23-4.2(k) to have organized the work using the backhoe to remove the material in a manner that required the Plaintiff to stand next to the backhoe in order to load the material into the bucket.

Additionally, Sterlacci's presence in the cab of the excavator constituted a violation of both § 9.4(h)(4) and § 23-9.5(c).

Therefore, Plaintiff is entitled to summary judgment on liability as to his § 241(6) claim.

Labor Law § 240(1)

Defendants cross-move to dismiss Plaintiff's claims pursuant to Labor Law §240(1).

Plaintiff opposes, arguing that the arm of the Bobcat constituted a failing object that needed to be secured.

"Labor Law § 240(1) provides exceptional protection for workers against the special hazards that arise when the work site itself is either elevated or is positioned below the level where materials or load are being hoisted or secured" (*Natale v. City of New York*, 33 AD3d 772, 773 [2d Dept 2006]).

"'These special hazards do not encompass any and all perils that may be connected in some tangential way with the effects of gravity. Rather, they are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured'" (*id.* at 774, quoting *Gonzalez v. Turner Constr. Co.,* 29 AD3d 630, 631 [2d Dept 2006]).

"[T]o establish liability under Labor Law § 240(1) a plaintiff must show more than simply that an object fell, thereby causing injury to a worker . . . [a] plaintiff must show that 'the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*id.* quoting *Turczynski v. City of New York,* 17 AD3d 450, 451 [2d Dept 2005]).

Just as in *Natale*, the Plaintiff was not working at an elevation and the hazard Plaintiff encountered was not gravity related. The arm of the excavator did not hit Plaintiff because of the force of gravity. The arm of the excavator swung laterally after another worker contacted one of the levers that controlled the excavator's arm.

Injuries to workers caused by a co-worker's mechanical operation of heavy, power operated equipment are ordinary workplace hazards that do not trigger the heightened protections of Labor Law § 240(1) (*see Elezaj v. Carlin Constr. Co.*, 225 AD2d 441 [1st Dept 1996]). Therefore, Plaintiff's § 240(1) claim must be dismissed.

Labor Law § 200 and Common Law Negligence

Defendants cross-move to dismiss Plaintiff's claims pursuant to Labor Law § 200 and common law.

"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" (*Ferrero v. Best Modular Homes, Inc.*, 33 AD3d 847, 850 [2d Dept 2006]). "An implicit precondition to this duty 'is that the party charged with that responsibility have the authority to control the activity bringing about the injury'" (*id.*, quoting *Reilly v. Newireen Assoc.*, 303 AD2d 214, 219 [1st Dept 2003]).

"Where the alleged defect or dangerous condition arises from the subcontractor's methods and the owner or general contractor exercise no supervisory control over the operation, no liability attaches to the owner or general contractor under the common law or under Labor Law § 200" (*Ferrero v. Best Modular Homes, Inc.*, 33 AD3d at 850]).

Plaintiff's accident arose from the means and methods employed by the subcontractor and the Defendants did not control or supervise Plaintiff's work.

While Defendants had general supervisory authority over the project, such general authority is an insufficient basis for liability under Labor Law § 200 (*see Harrison v. State*, 88 AD3d 951 [2d Dept 2011]; *see also Debennedetto v. Chetrit*, 190 AD3d 933 [2d Dept 2021]; *Lombardi v. New York*, 175 AD3d 1521 [2d Dept 2019]; *Poulin v. Ultimate*

Homes, Inc., 166 AD3d 667 [2d Dept 2018]). To be liable pursuant Labor Law § 200, a defendant must supervise or bear responsibility for the manner in which the specific work which caused the accident was performed (*see Erickson v. Cross Ready Mix, Inc.,* 75 AD3d 519 [2d Dept 2010]; *Enos v. Werlatone, Inc.,* 68 AD3d 712 [2d Dept 2009]).

Therefore, Plaintiff's Labor Law § 200 and common law claims must be dismissed.

WHEREFORE, it is ORDERED that Plaintiff's motion for summary judgement on his claim pursuant to Labor Law § 241(6) is Granted; and it is further,

ORDERED, that that portion of Defendants' cross-motion to dismiss Plaintiff's Labor Law § 241(6) is Denied; and it is further

ORDERED, that that portion of Defendants' cross-motion to dismiss Plaintiff's Labor Law § 240(1) claims is Granted; and it is further,

ORDERED, that that portion of Defendants' cross-motion to dismiss Plaintiff's Labor Law § 200 and common law negligence claims is Granted.

This constitutes the decision and order of the Court.

ENTER,

J.S.C.