SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDY H. KIM** **PART** **05RCP**

Justice

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SILVIO CERRONE and NICOLE CERRONE,

Plaintiffs,

- v -

THE CITY OF NEW YORK, METROPOLITAN TRANSPORTATION AUTHORITY, MTA BRIDGES & TUNNELS, TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY D/B/A MTA BRIDGES AND TUNNELS,

Defendants.

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INDEX NO. 153419/2018

MOTION DATE 03/21/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 89, 90, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 117, 118, 119, 120, 121

were read on this motion for PARTIAL SUMMARY JUDGMENT.

For the reasons set forth below, plaintiffs' motion for partial summary judgment is denied, the City of New York's cross-motion for summary judgment is granted, and the cross-motion by defendants the Metropolitan Transportation Authority, MTA Bridges & Tunnels, Triborough Bridge And Tunnel Authority and Triborough Bridge and Tunnel Authority d/b/a MTA Bridges and Tunnels (collectively, the "MTA Defendants") is granted in part.

FACTUAL BACKGROUND

Silvio Cerrone's Deposition Testimony

Plaintiff testified that on June 11, 2017, he was working as a laborer for Judlau Contracting A JV on the Manhattan side of the Midtown Tunnel, about two hundred feet from the tunnel entrance, moving concrete barriers onto a flatbed tractor trailer. These barriers were twenty feet

long, three-and-a-half feet high, a foot and a half wide at the base and weighed between 7,000 and 10,000 pounds. In order to lift these barriers, a barrier clamp was attached to each barrier and then lifted by a cable attached to an excavator machine. The excavator would then lift the barrier to the flatbed truck. Plaintiff walked alongside the barrier as it was moved to the truck and then, once it reached the truck, stand on the truck's bed, to help the excavator operator guide the barrier to an open place on the truck bed where the barrier could be lowered. Specifically, plaintiff would then hold each barrier with his right hand while directing the operator with his left hand as to the placement of the barrier.

As plaintiff was guiding a barrier into place on the edge of the truck bed farthest from the excavator, the barrier contacted a barrier on the truck bed and became "unstable." Plaintiff placed both hands on the barrier to prevent it from spinning "all over the place" but, as the barrier was shifting to the right, it hit him in the chest and knocked him back two feet and off of the rear of the truck.

Affidavit of Joseph Commisso, Jr.

In his affidavit, Joseph Commisso, Jr. attests as follows:

> On June 11, 2017, I was employed by Judlau in connection with the Queens-Midtown Tunnel Rehabilitation Project. On the morning of June 11, 2017, several Judlau employees, including myself and Plaintiff Silvio Cerrone ("Plaintiff"), were loading concrete barriers onto the trailer of a flatbed truck. The barriers, which were twenty (20) feet long, were being hoisted onto the trailer by a hook and clamp attached to an excavator. The excavator, truck, and trailer were all owned by Judlau and operated by Judlau employees.
>
> As the barriers were being hoisted, Plaintiff was positioned on the trailer and was tasked with guiding each barrier into place once it reached approximately six (6) inches to a foot above the trailer bed. I was standing in the roadway as one (1) of the barriers was being hoisted off the ground and was keeping the barrier steady to prevent it from swaying. <u>As the barrier was being hoisted off the ground, I observed Plaintiff walk backwards and fall off the rear of the trailer bed, which was four (4) feet above the ground.</u>

> At the time of Plaintiff's fall, the barrier was steady and controlled and was not near Plaintiff when he fell. The barrier was approximately six (6) to eight (8) feet away from Plaintiff at the moment he stepped off the rear of the trailer and the barrier never made contact with the Plaintiff at any point in time.
>
> The truck itself was idling parked and neither the truck nor trailer moved at all during the moments leading up to and including the accident. Due to the fact that the bed of the trailer was only four (4) feet off the ground, it was not necessary or required that Plaintiff utilize fall protection while working on the bed of the trailer.

(NYSCEF Doc. No. 108 [Commisso Aff. at ¶¶2-5] [emphasis added]).

Affidavit of Sebastian Agis

> Sebastian Agis, Labor Foreman for Judlau attests that
>
> On June 11, 2017, I was working on the Queens-Midtown Tunnel Rehabilitation Project. On the morning of June 11, 2017, several Judlau employees, including myself and Plaintiff Silvio Cerrone ("Plaintiff"), were loading concrete barriers onto the trailer of a flatbed truck. The barriers, which were twenty (20) feet long, were being hoisted onto the bed of the trailer by a hook and clamp attached to an excavator.
>
> Plaintiff was standing on the trailer bed as the barriers were being hoisted. Prior to Plaintiff's accident, three (3) barriers had already been loaded onto the trailer leaving the rear twenty (20) feet of the trailer bed empty. Plaintiff s accident occurred as a fourth barrier was being hoisted off the ground to be placed on the trailer alongside the three (3) barriers already in place.
>
> I did not observe Plaintiff's fall because my view was blocked by the excavator. However, moments after the accident I observed Plaintiff on the ground and he told me that he was walking backwards on the trailer bed and lost track of where he was before stepping off the rear of the trailer. He was angry at himself and admitted that he was "stupid" for not paying attention to what he was doing. The barrier did not make contact with Plaintiff at any point in time prior to his fall.

(NYSCEF Doc. No. 87 [Agis Aff. at ¶¶1-4 [emphasis added]]).

Plaintiffs now move, pursuant to CPLR §3212, for partial summary judgment on liability in their favor on their Labor Law §240(1) and Labor Law §241(6) claims. The City of New York (the "City") opposes the motion and cross-moves for summary judgment dismissing this action as against it on the grounds that it did not own the area in which the work was performed or control

the work in question. The MTA Defendants also oppose the motion and cross-move for summary judgment dismissing those claims on the grounds that plaintiff's fall from a flatbed truck does not implicate the elevation-related risk contemplated by Labor Law §240(1) and that no Labor Law §241(6) claim lies because the underlying Industrial Code violations cited by plaintiff do not apply to the excavator at issue here.

DISCUSSION

"The 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 a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]).

The Court first addresses the defendants' respective cross-motions for summary judgment. As an initial matter, the City's cross-motion for summary judgment is granted without opposition as it is undisputed that the City did not own the area in which the work was performed or control the means and methods of the work performed at the site (See Walls v Turner Const. Co., 4 NY3d 861, 864 [2005] ["unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law"]). Accordingly, the Court grants the City's cross-motion and turns to the MTA Defendants' cross-motion for summary judgment.

The MTA Defendants' Cross-Motion for Summary Judgment

Labor Law §240(1)

That branch of the MTA Defendants' cross-motion for summary judgment dismissing plaintiffs' Labor Law §240(1) claim is denied. Labor Law §240(1), also known as the "Scaffold Law," provides that

> 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]).

"'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" (John v Baharestani, 281 AD2d 114, 118 [1st Dept 2001] [internal citations omitted]). While a four-to-five-foot fall from the bed of a flatbed trailer does not, in and of itself, involve the sort of elevation-related risk that implicates the protections of Labor Law §240(1) (See Toefer v Long Is. R.R., 4 NY3d 399, 408-409 [2005]), it applies to such a fall "where some risk-enhancing circumstance implicates the protections of the statute" (Gaffney v BOP Ne Tower Lessee LLC, 2020 NY Slip Op 30536[U], 9-10 [Sup Ct, NY County 2020]), including where "a plaintiff is struck by a falling object that was improperly hoisted or inadequately secured" (Naughton v City of New York, 94 AD3d 1, 8 [1st Dept 2012] citing Runner v New York Stock Exch., Inc., 13 NY3d 599, 604 [2009]).

The facts, as alleged by plaintiffs, fall within this exception (See Flores v Metropolitan Transp. Auth., 164 AD3d 418, 419 [1st Dept 2018] [motion court erred in denying plaintiff's

motion for partial summary judgment on his Labor Law § 240(1) claim where "plaintiff fell off a flatbed truck after a load of steel beams, without tag lines, was hoisted above him by a crane, and began to swing towards him"]; Hayek v Metro. Transportation Auth., 195 AD3d 568 [1st Dept 2021] [Labor Law § 240(1) implicated where plaintiff "was injured when struck by an improperly hoisted or inadequately secured load of L-shaped steel rebar weighing"]; Ray v City of New York, 62 AD3d 591 [1st Dept 2009] [plaintiff's motion for summary judgment granted as to Labor Law §240(1) liability based injury caused by steel beam that began to swing up and down and side to side as it was being lowered into place]). Accordingly, the MTA Defendants' motion for summary judgment dismissing the Labor Law §240(1) claim is denied.

Labor Law §241(6)

The MTA Defendants' motion for summary judgment dismissing plaintiff's Labor Law §241(6) claim is granted in part. "To prevail under Labor Law §241(6), [plaintiffs are] required to establish a violation of an implementing regulation that sets forth a specific standard of conduct as opposed to a general reiteration of common-law principles" (Colucci v Equit. Life Assur. Soc. of U.S., 218 AD2d 513, 514 [1st Dept 1995] [internal citations omitted]). The MTA Defendants' cross-motion is granted to the extent this claim is based upon violations of Industrial Code §§23-1.2, 23-1.4, 23-1.5(a), (b) and (c)(1-3), 1.7(a), 1.7 (b), 1.7 (b) (d) and (e), 23-1.15, 1.16, 23-6.1, 23-6.2, 23-9.2(a)-(d), and 23-9.5, since plaintiffs offer no opposition to the MTA Defendants' cross-motion as to these provisions. (See Kempisty v 246 Spring Street, LLC, 92 AD3d 474 [1st Dept 2012]).

However, the remainder of the MTA Defendants' motion, to dismiss plaintiffs' Labor Law §241(6) insofar as this claim is based upon alleged violations of Industrial Code §§23-8.2(c)(3), 23-8.1(f)(2)(ii), and 23-9.4(h)(1), is denied.

Industrial Code §§23-8.1 and 8.2 fall within subpart 23-8 of the Industrial Code, entitled "Mobile Cranes, Tower Cranes and Derricks." Subpart 23–8.1 "provides the general provisions for stability and strength, inspection, footings, hoisting mechanisms, load handling, load hoisting, limitations on modifications, cast iron, moving parts, protection from the elements, wire ropes, and lubrication" (Wood v State, 2 Misc 3d 931, 934 [Ct Cl 2003]). Industrial Code §23–8.1(f)(2)(i), specifically "prohibits sudden acceleration or deceleration of a moving load during a hoisting operation" (McCoy v Metro. Transp. Auth., 38 AD3d 308, 309 [1st Dept 2007]). Industrial Code §23–8.2(c)(3), in turn, "requires that tag or restraint lines be used when rotation or swinging of a load being hoisted by a mobile crane may create a hazard" (Id.).

Industrial Code §23-9.4 falls within subpart 23-9 of the Industrial Code, regulates "Power-Operated Equipment." Section 23-9.4(h)(1) mandates that "any load lifted by [power-operated heavy equipment or machinery used in construction, demolition and excavation operations] shall be raised in a vertical plane to minimize swing during hoisting."

The MTA Defendants argue none of these provisions apply because an excavator was used to hoist the barrier, rather than a crane, power shovel, or backhoe. However, the Court of Appeals has instructed that, in order to "effectuate [the Industrial Code's] purpose of protecting construction laborers against hazards in the workplace," the courts of this State are to "take into consideration the function of a piece of equipment, and not merely the name, when determining the applicability of a regulation" accounting "for those circumstances where a slightly different machine is utilized for the same risky objective that is perhaps more frequently or more efficiently achieved by the machine designated by name in the Code" (St. Louis v Town of N. Elba, 16 NY3d 411, 416 [2011]). In short, "whether a regulation applies will depend on how and for what purpose the equipment is used, not on its label or name" (McCoy v Metro. Transp. Auth., 75 AD3d 428,

429 [1st Dept 2010]). The MTA Defendants bear the burden of proof to establish that the use of the excavator did not fall within either of these categories[1] (See e.g., McCoy v Metro. Transp. Auth., 26 Misc 3d 286, 288 [Sup Ct, NY County 2009] affd, 75 AD3d 428 [1st Dept 2010]). The MTA Defendants have not met their burden, as they rely solely on the conclusory assertion of its expert, Shawn Z. Rothstein, P.E., to support this argument (NYSCEF Doc. No. 110). Accordingly, an issue of fact remains as to whether the excavator, as used, implicates these Industrial Code provisions, precluding summary judgment (See McCoy v Metro. Transp. Auth., 75 AD3d 428, 429 [1st Dept 2010]).

Plaintiffs' Motion for Partial Summary Judgment

Finally, plaintiffs' motion for summary judgment on the complaint's Labor Law §240(1) and Labor Law §241(6) claims is denied. Although Labor Law §240(1) and 241(6) are implicated by plaintiff's version of events, the affidavits of Joseph Commisso, Jr. and Sebastian Agis submitted by the MTA Defendants presents a conflicting version of events—i.e., that plaintiff fell due solely to his own carelessness—in which these provisions would not apply, precluding summary judgment for plaintiff (See e.g. Pina v Arthur Clinton Hous. Dev. Fund Corp., 188 AD3d 614, 614 [1st Dept 2020]; see also Madkins v 22 Little W. 12th St., LLC, 191 AD3d 434 [1st Dept 2021]). Contrary to plaintiff's assertion, the Court may properly consider these affidavits, as they are not "mere conclusory assertions, devoid of evidentiary facts" or based on "surmise, conjecture or speculation" (Smith v Johnson Products Co., 95 AD2d 675 [1st Dept 1983]) and do not, as in the cases cited by plaintiffs, conflict with contemporaneous accident reports or contain information

[1] The Court notes that to the extent plaintiff seeks summary judgment on its Labor Law §241(6) claim based upon violations of 12 NYCRR subparts 23-8 and 23-9.4, relief under both of these subparts would be impossible, as they are mutually exclusive—the excavator at issue cannot simultaneously function as a mobile crane and a power shovel/backhoe (See Kropp v Town of Shandaken, 91 AD3d 1087, 1088 [3d Dept 2012]).

omitted from such reports (See e.g., Cruz v R.C. Church of St. Gerard Magella, 174 AD3d 782, 783-784 [2d Dept 2019]).

Plaintiffs' argument that, even crediting MTA Defendants' version of events, summary judgment is warranted because Silvio Cerrone was in an inherently precarious position standing near the edge of the bed of the flatbed truck is without merit (Compare Toefer v Long Is. R.R., 4 NY3d 399, 408 [2005] [a "four-to-five-foot descent from a flatbed trailer or similar surface does not present the sort of elevation-related risk that triggers Labor Law §240(1)'s coverage"] and Ortiz v Varsity Holdings, LLC, 18 NY3d 335, 338 [2011] ["task of rearranging the demolition debris and placing additional debris in the dumpster" required plaintiff to "stand at the top of the dumpster, six feet above the ground, with at least one foot perched on an eight-inch ledge" is precarious]).

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED that the City of New York's cross-motion for summary judgment is granted and this action is hereby dismissed as against it; and it is further

ORDERED that the action is severed and continued against defendants the Metropolitan Transportation Authority, MTA Bridges & Tunnels, Triborough Bridge And Tunnel Authority and Triborough Bridge and Tunnel Authority d/b/a MTA Bridges and Tunnels; and it is further

ORDERED that MTA Defendants' cross-motion for summary judgment dismissing plaintiff's Labor Law §240(1) and 241(6) claims is granted to the limited extent plaintiffs' Labor Law §241(6) claim are dismissed to the extent as they are predicated upon violations of Industrial Code §§23-1.2, 23-1.4, 23-1.5(a), (b) and (c)(1-3), 1.7(a), 1.7 (b), 1.7 (b) (d) and (e), 23-1.15, 1.16, 23-6.1, 23-6.2, 23-9.2(a)-(d), and 23-9.5; and it is further

ORDERED that the caption is to be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that within ten days of the date of this decision and order, counsel for the City of New York shall serve a copy of this order with notice of entry upon all parties as well as on the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk's Office (60 Centre St., Rm. 119) who are directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on this court's website at the address www.nycourts.gov/supctmanh).

ORDERED that, as the City of New York is no longer a party to this action, the Clerk of the Court is directed to transfer this matter to the inventory of IAS Part 21, as this action falls within the remit of the Transit Part.

This constitutes the decision and order of the Court.

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11/30/2023
DATE

HON. JUDY H. KIM, J.S.C.

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