At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 20th day of November, 2023.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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RAUL GUZMAN,

Plaintiff,

-against-

345 PAS OWNER, LLC, and
NEWGRANGE CONSTRUCTION COMPANY, INC.,

Defendants.

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DECISION / ORDER

Index No.: 507093/2019
Mot. Seq. # 12 & 13

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Cross Motion, Affidavits (Affirmations) Annexed	179-212; 217-219
Opposing Affidavits (Affirmations)	215-216;
Affidavits/ Affirmations in Reply	220
Other Papers:	

Defendants move (in mot. seq. no. twelve) for an order, pursuant to CPLR 3212(a), granting them summary judgment dismissing plaintiff's complaint in its entirety as against both defendants. The amended complaint contains causes of action alleging violations of Labor Law §§ 240 (1), 200, and common law negligence. Plaintiff cross-moves, in motion sequence number thirteen, for leave to amend his complaint to add a cause of action for violations of Labor Law §241(6).

BACKGROUND

Plaintiff commenced this action by filing a summons and verified complaint on April 1, 2019. Defendant 345 PAS Owner, LLC filed its answer on May 16, 2019. Plaintiff discontinued the action against the other two defendants in 2020, and they were removed from the caption. Defendant 345 PAS Owner LLC, (hereinafter "345 PAS") then commenced a third-party action against Midre Construction Corp. (plaintiff's employer), on August 21, 2020. The third-party defendant Midre answered the third-party complaint on October 5, 2020. 345 PAS then discontinued the third-party action as against Midre, by stipulation filed on September 20, 2021 [Doc 131]. Plaintiff then moved to amend his complaint (MS #8) to add Newgrange Construction Co. as a defendant, which was granted, by order dated September 15, 2021. The court notes that the order required plaintiff to serve the new defendant with the supplemental summons and amended complaint, and to electronically file the amended complaint in NYSCEF. Plaintiff did so, and defendant Newgrange Construction Company, Inc. (hereinafter "Newgrange") answered the amended complaint on October 22, 2021 [Doc 144]. Counsel for Newgrange then assumed the defense of 345 PAS and a joint answer by both defendants to the amended complaint was filed on October 25, 2021. Plaintiff filed his note of issue on May 17, 2022, and defendants moved to strike it, claiming no depositions had been held. The motion (MS #11) was denied, and the order, dated July 5, 2022, set a deposition schedule. These motions followed. Defendants filed their motion on December

6, 2022, and plaintiff filed his on June 15, 2023. The action is on the calendar in JCP on February 15, 2024.

Plaintiff alleges in his amended complaint that he was injured on February 27, 2019. Plaintiff was deposed on September 1, 2022, in a virtual deposition with the assistance of a Spanish interpreter. He testified that he was employed by Midre on the date of the accident as a junior mechanic [Doc 200 Page 17]. It is a company that does HVAC installations. He was waiting at the defendant 345 PAS's building, along with five other Midre employees, for a delivery of ten air conditioning units which were coming by truck. They could only fit five in the truck at one time, so it would take two trips. The truck was driven by a Midre employee. They were tasked solely with bringing the units into the building, as "they didn't have the permits yet" to install them [*id.* Page 27].[1] When the truck arrived, the building did not have a forklift. The truck driver left with the truck, located a pallet jack at another building, and came back with it on the truck. Somebody from Midre then went to find someone from the building to see what else was available, and he came back with a hand truck. They decided to use the pallet jack. Plaintiff and Diego, a foreman, went into the back of the truck. The pallet jack had a pallet on it already, with an air conditioning unit on it, that plaintiff described as being twelve feet by six feet. He did not specify what the third measurement was. The other four units were also on pallets in the truck. Diego was going to operate the pallet jack. The truck's lift was raised and was level with the truck bed. Plaintiff was standing on the

[1] Document 65, ostensibly a copy of the building permit, was issued 12/17/19, months after plaintiff's accident. Newgrange as general contractor hired plaintiff's employer for the HVAC work before plaintiff's accident. The contract is Doc 66.

lift, "trying to hold the left side of the machine" when "the machine pushed me and I fell down. Diego couldn't stop the machine" [*Id.* Pages 43 and 47]. He then said he "fell off the truck" which was about five feet above the street. He had been "pushed" by the air conditioning unit on the pallet jack. He was injured from the fall. He has had surgery to his right elbow and to his lumbar spine. He received Worker's Compensation payments, which he was still receiving on the date of his EBT.

Defendants' Motion

Defendants move for summary judgment dismissing plaintiff's complaint in its entirety as against both defendants on the grounds that there are no material issues of fact regarding their liability with regard to plaintiff's claims under Labor Law §§ 240 (1), 241(6), 200, and common law negligence.

First, the court must address the part of the motion which seeks leave to make a late motion. Counsel avers that despite their motion to strike the note of issue, which was denied, that no depositions had been held at the time their motion to strike was timely filed, and that once the depositions were held, this motion was filed. This is supported by the dates on the depositions, and the order which denied the motion to strike the note of issue. The Court of Appeals has held "[w]e conclude that 'good cause' in CPLR 3212(a) requires a showing of good cause for the delay in making the motion--a satisfactory explanation for the untimeliness--rather than simply permitting meritorious, nonprejudicial filings, however tardy" (*Brill v City of NY*, 2 NY3d 648, 652 [2004]). The court finds that good cause has been shown for the delay, as required by *Brill v City of New York* (2 NY3d 648 (2004]). Thus, leave is granted.

Defendants first argue that plaintiff's Labor Law § 240 (1) claim should be dismissed "because he was not involved in a construction activity covered under Labor Law § 240" [Doc 180 ¶2], and "the work plaintiff performed, even assuming it constituted an enumerated activity, did not involve a physically significant height differential, and thus, under either scenario, the protections of Labor Law § 240 (1) were not triggered" [*id*]. Counsel claims that plaintiff was not performing any of the tasks enumerated in the statute, and was solely working on the delivery of items which were to be "stockpiled for future use" citing several cases, including *Kusayev v Sussex Apts. Assoc*., LLC, 163 AD3d 943 (2d Dept 2018).

In that case, the driver of a delivery truck was injured in the course of making a delivery of building materials. He was pulling a hand truck loaded with boxes of tile, grout, tile cement and the like, up a four-inch-high step at the entrance to the building where he was making the delivery when he lost his balance and fell. The court said the building owner was entitled to summary judgment dismissing the complaint, which included claims under common law negligence, Labor Law §§ 200, 240 (1) and 241 (6).

With regard to Labor Law §§ 240 (1) and 241 (6), the court found that "[t]he evidence supporting the motions established that at the time of the accident, the plaintiff was not engaged in construction work within the meaning of Labor Law § 240 (1), and was not working in a construction area within the meaning of Labor Law § 241 (6), since the building materials were not being 'readied for immediate use' (*Sprague v Louis Picciano, Inc*., 100 AD2d 247, 250, 474 NYS2d 591 [1984]), but were instead being 'stockpil[ed] for future use' (*Parot v City of Buffalo*, 174 AD2d 1034, 1034, 572 NYS2d

198 [1991]; see *Peterkin v City of New York*, 5 AD3d 652, 773 NYS2d 566 [2004]; *Demeza v American Tel. & Tel. Co.*, 255 AD2d 743, 744, 680 NYS2d 729 [1998])."

Labor Law § 240 (1) "imposes absolute liability on building owners and contractors whose failure to 'provide proper protection to workers employed on a construction site' proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*,18 NY3d 1, 7 [2011], quoting *Misseritti v Mark IV Constr. Co.*,86 NY2d 487, 490 [1995]; *see Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662 [2014]; *Rocovich v Consolidated Edison Co.*,78 NY2d 509, 513 [1991]). The statute is intended to provide "extraordinary protections [applicable] only to a narrow class of dangers. More specifically, [the statute] relates only to special hazards presenting elevation-related risks" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 96-97 [2015][internal quotation marks, brackets and citations omitted]).

Plaintiff opposes this branch of defendants' motion, and argues that "[t]here is no dispute that 345 PAS was the building owner of the accident location where construction was ongoing and NEWGRANGE was the general contractor of the construction and that they were required to "provide proper protection" to the employed workers at the site, under Labor Law § 240(1)" [Doc 215 ¶34]. Counsel continues "[h]ere, the AC unit fell onto Plaintiff with an extreme amount of force generated by gravity and its own weight, which caused Plaintiff to fall from the 5-feet-high truck lift. Although the AC unit was on the same level as Plaintiff when it struck him, it was moved due to the force of gravity, and the injuries "flowed directly from the application of the force of gravity" [*Id.* ¶41]. The court must note that counsel's description of the accident does not summarize

plaintiff's testimony. Plaintiff never said the unit fell onto him, or fell anywhere. He said the unit moved towards him and pushed him off the lift.

Plaintiff provides a report from an expert, an architect [Doc 216], which was not submitted in admissible form, as it is not an affidavit, but just a report. Therefore, it could not be considered.

The court finds that defendants have established that they are entitled to summary judgment dismissing the plaintiff's claim under Labor Law § 240 (1). The plaintiff was not engaged in construction work within the meaning of Labor Law § 240 (1) at the time of the accident. He himself testified that they were delivering the equipment for a future installation. This case cannot be distinguished from *Kusayev v Sussex Apts. Assoc. LLC*, 163 AD3d 943 [2d Dept 2018]. Therefore, as plaintiff was not involved in the "the erection, demolition, repairing, painting, cleaning or pointing of a building or structure," plaintiff cannot bring a claim under Labor Law § 240 (1) for this accident (*see Nicometi*, 25 NY3d at 99; *Schutt v Dynasty Transp. of Ohio, Inc.*, 203 AD3d 858, 861 [2d Dept 2022]). Accordingly, the branch of defendants' motion which seeks to dismiss plaintiff's Labor Law § 240 (1) claim is granted, and this claim is dismissed.

Next, defendants move to dismiss plaintiff's claim under Labor Law § 241 (6). Specifically, counsel states "plaintiff did not allege any violations of Labor Law § 241 (6) in his amended complaint, and plaintiff cannot allege particulars about a cause of action in his bill of particulars that is not pled in his complaint. In any event, plaintiff was not involved in a construction activity covered under Labor Law § 241 (6) either. Finally, plaintiff's alleged Industrial Code violation is a general statement of negligence, and is

insufficiently concrete to trigger liability under Labor Law § 241 (6), and was not violated in any event." Counsel clarifies that a §241(6) claim is not included in the plaintiff's amended complaint, and that asserting Industrial Code violations in his bill of particulars is insufficient to state a claim under this statute.

In response, plaintiff cross-moves (MS #13) to amend his complaint to assert a claim under Labor Law § 241 (6). The court notes that the initial complaint [Doc 1] does include this cause of action, as the Fourth Cause of Action, but plaintiff changed attorneys before he moved to amend the complaint to add Newgrange as an additional defendant, and the amended complaint [Doc 133] omitted this cause of action. Once the complaint was amended, the prior one became a nullity. The amended complaint does not divide the plaintiff's claims into causes of action and erroneously says plaintiff's name is Min Kyoung Pak.

It appears that plaintiff's first bill of particulars [Doc 73] was served on March 16, 2020, the last day before Covid-19 shut down most law offices and the courts. It makes no reference to Labor Law § 241 (6) or the Industrial Code. Another bill of particulars, which makes no mention of the first, and does not say supplemental bill of particulars, is dated October 13, 2020 [Doc 101] and also makes no mention of Labor Law § 241 (6) or the Industrial Code. Document 174 is an "amended and supplemental" bill of particulars, dated April 6, 2022. It makes no mention of Labor Law § 241 (6) or the Industrial Code. These bills of particulars are included in defendants' motion as Documents 192, 193, and 194. Defendants also provide three more "bills of particulars" at Documents 195, 196, and 197. Document 197 is entitled "supplemental bill of particulars" and is dated August

4, 2022. This was months after the note of issue had been filed. It makes claims under Labor Law 241(6) and the Industrial Code for the first time. However, it only refers to Industrial Code Section 23-1.5. Document 196 is another supplemental bill of particulars, dated September 14, 2022. It appears to supplement the damages claims, not the liability claims, and there is no mention of the Labor Law or the Industrial Code in this document. Document 197 is also called "supplemental bill of particulars" and is dated September 28, 2022. It too is solely addressed to damages.

The CPLR provides at 3042(b) that "a party may amend the bill of particulars once as of course prior to the filing of a note of issue." Section 3043(b) states that "a party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time, but not less than thirty days prior to trial. Provided however that no new cause of action may be alleged or new injury claimed." Clearly, after the note of issue is filed, leave of court must be obtained to amend the plaintiff's bill of particulars to add claims. Plaintiff did not obtain leave of court to serve Document 197, entitled "supplemental bill of particulars" dated August 4, 2022 which includes plaintiff's claim under Labor Law 241(6). The Second Department states in *Lorincz v Castellano*, 208 AD3d 573, 574-575 [2d Dept 2022], quoting other precedent, "Leave to amend a bill of particulars is ordinarily to be freely given in the absence of prejudice or surprise (see *Kirk v Nahon*, 160 AD3d 823, 824, 75 N.Y.S.3d 237). However, once discovery has been completed and the case has been certified for trial, a party will not be permitted to amend the bill of particulars except upon a showing of special and extraordinary circumstances (see *Skerrett v LIC Site B2 Owner, LLC*, 199

AD3d 956, 960, 158 N.Y.S.3d 186; *Cioffi v S.M. Foods, Inc.*, 178 AD3d 1015, 1016, 116 N.Y.S.3d 68; *Anonymous v Gleason*, 175 AD3d 614, 617-618, 106 N.Y.S.3d 353). Where the motion for leave to amend a pleading is made long after the action has been certified for trial, 'judicial discretion in allowing such amendments should be discrete, circumspect, prudent, and cautious'" (*Morris v Queens Long Is. Med. Group, P.C.*, 49 AD3d 827, 828, 854 N.Y.S.2d 222, quoting *Clarkin v Staten Is. Univ. Hosp.*, 242 AD2d 552, 552, 662 N.Y.S.2d 91)."

It is clear that a plaintiff may not assert a new cause of action in a supplemental bill of particulars. Further, Industrial Code Section 23-1.5, which is the only section plaintiff asserts as the predicate for a violation of Labor Law 241(6), is not applicable to plaintiff's accident. As plaintiff has not stated which subsection of 23-1.5 he claims was violated, the court provides the entire section 1.5, which states as follows:

> "Section 23-1.5 - General responsibility of employers
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> These general provisions shall not be construed or applied in contravention of any specific provisions of this Part (rule).
>
> **(a)** Health and safety protection required. All places where employees are suffered or permitted to perform work of any kind in construction, demolition or excavation operations shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection for the lives, health and safety of such persons as well as of persons lawfully frequenting the area of such activity. To this end, all employers, owners, contractors and their agents and other persons obligated by law to provide safe working conditions, personal protective equipment and safe places to work for persons employed in construction, demolition or excavation operations and to protect persons lawfully frequenting the areas of such activity shall provide or cause to be provided the working conditions, safety devices, types of construction,

methods of demolition and of excavation and the materials, means, methods and procedures required by this Part (rule). No employer shall suffer or permit an employee to work under working conditions which are not in compliance with the provisions of this Part (rule), or to perform any act prohibited by any provision of this Part (rule).

(b) General requirement of competency. For the performance of work required by this Part (rule) to be done by or under the supervision of a designated person, an employer shall designate as such person only such an employee as a reasonable and prudent man experienced in construction, demolition or excavation work would consider competent to perform such work.

(c) Condition of equipment and safeguards.

(1) No employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition.

(2) All load carrying equipment shall be designed, constructed and maintained throughout to safely support the loads intended to be imposed thereon.

(3) All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers without regard to direction and control (*see Romero v J & S Simcha, Inc.*, 39 AD3d 838 [2d Dept 2007]). This statute states "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places." In order to prevail under this section of the Labor Law, a plaintiff must establish that he was engaged in "covered

work" and that the alleged injuries were proximately caused by a violation of a specific safety rule or regulation in the Industrial Code promulgated by the Commissioner of the Department of Labor (*see Ross v Curtis—Palmer Hydro—Elec. Co.*, 81 NY2d 494 [1993]; *Ares v State of New York*, 80 NY2d 959 [1992]). The rule or regulation alleged to have been breached must be a specific, positive command and be applicable to the facts of the case (*see Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 619 [2d Dept 2008]; *Jicheng Liu v Sanford Tower Condominium, Inc.*, 35 AD3d 378, 379 [2d Dept 2006]).

For the reasons discussed above in relation to the branch of defendants' motion addressed to labor Law 240(1), the branch of defendants' motion seeking dismissal of plaintiff's Labor Law § 241(6) claim, is granted. Plaintiff was not engaged in covered work, and even if he was, he has not established that a violation predicated on Industrial Code 23-1.5 occurred. Therefore, there is similarly no basis to permit plaintiff to amend his complaint to add this cause of action.

Next, defendants move to dismiss plaintiff's Labor Law § 200 and Common Law Negligence claims. Defendants argue that plaintiff's Labor Law § 200 and common law negligence claims should be dismissed as defendants did not create or have notice of a dangerous condition, and did not direct, supervise, or control plaintiff's work.

Section 200 of the Labor Law 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 (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Londono v Dalen, LLC*, 204 AD3d 658, 659 [2d Dept 2022]; *Haider v Davis*, 35 AD3d

363, 363 [2d Dept 2006]). "Cases involving Labor Law § 200 fall into two broad categories, namely, those where workers are injured as a result of a dangerous or defective premises condition at a work site, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]; *see Daeira v Genting N.Y., LLC*, 173 AD3d 831, 835 [2d Dept 2019]; *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]). Where "a claim arises out of an alleged dangerous premises condition, a property owner or general contractor may be held liable in common-law negligence and under Labor Law § 200 when the owner or general contractor has control over the work site and either created the dangerous condition causing an injury, or failed to remedy the dangerous or defective condition while having actual or constructive notice of it" (*Mitchell v Caton on the Park, LLC*, 167 AD3d 865, 867 [2d Dept 2018], quoting *Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dept 2014]; *see Bessa v Anflo Indus., Inc.*, 148 AD3d 974, 978 [2d Dept 2017]; *Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d 994, 997 [2d Dept 2017]; *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 663 [2d Dept 2015]; *Martinez v City of New York*, 73 AD3d 993, 998 [2d Dept 2010]).

With regard to common law negligence and Labor Law § 200, the court in *Kusayav* said "'[W]hen a worker at a job site is injured as a result of a dangerous or defective premises condition, a property owner's liability under Labor Law § 200 and for common-law negligence rests upon whether there is evidence that the property owner created the condition, or had actual or constructive notice of it and a reasonable amount of time within which to correct the condition (*Reyes v Arco Wentworth Mgt. Corp.*, 83

AD3d 47, 49, 919 NYS2d 44 [2011]; see *Chowdhury v Rodriguez*, 57 AD3d 121, 130, 867 NYS2d 123 [2008]). [W]hen a worker at a job site is injured as a result of dangerous or defective equipment used in the performance of work duties, the property owner's liability under Labor Law § 200 and for common-law negligence rests upon whether the property owner had the authority to supervise or control the means and methods of the work' (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d at 49; see *Ortega v Puccia*, 57 AD3d 54, 61, 866 NYS2d 323 [2008]). Where 'an accident is alleged to involve defects in both the premises and the equipment used at the work site, the property owner moving for summary judgment with respect to causes of action alleging a violation of Labor Law § 200 is obligated to address the proof applicable to both liability standards' (*Reyes v Arco Wentworth Mgt. Corp., 83 AD3d at 52*)."

Defendants maintain that there is no merit to any contention that a dangerous or defective premises condition existed, as plaintiff had not entered into the premises, and was injured while standing on his employer's delivery truck. Counsel argues that "To the extent that this court finds that this accident was a defective premises-condition-based accident, neither 345 PAS nor Newgrange created or had any notice of the allegedly defective condition on the subject premises." Further, defendants assert that "it is clear that this was a means-and-methods-based claim and both 345 and Newgrange clearly lacked any supervisory control over the means and methods of the project. The means and methods were controlled by Midre" [Doc 180 ¶22].

In opposition, plaintiff does not claim that there was a dangerous premises condition, but argues that he has raised an issue of fact and overcome the defendants'

prima facie showing as "defendants claim that no one from Newgrange was at the site of the accident on the date of the accident . . . Angelo A. Bologna testified that he was aware of the delivery of an AC unit in that building on the date of the accident . . . When asked if any supervisors from NEWGRANGE was present at the site when the accident happened, he testified that although he does not recall, they 'have a superintendent that would be stationed at the site at the time of any work.' . . . Also, his answer was that he doesn't know whether there was a supervisor from 345 PAS OWNER. There is still a question of fact whether the supervisor from Defendants who had the ability to stop work for safety reasons at the site when this accident happened, and hence, Defendants should not be granted summary judgment on these matters" [Doc 215 ¶56].

The court finds that the accident falls under the "means and methods" of the work rubric, and that defendants have established their entitlement to summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims. General supervisory authority for the purpose of overseeing the progress of the work, is insufficient to impose liability. *Van Nostrand v Race & Rally Constr. Co.*, Inc., 114 AD3d 664, 667 [2d Sept 2014]. In any event, there was no "work" going on at the time of the plaintiff's accident, as plaintiff was merely making a delivery.

Plaintiff's Cross Motion for Leave to Amend Pleadings

In support of his cross motion for leave to amend his complaint to include a cause of action for a violation of Labor Law 241(6), predicated on an alleged violation of Industrial Code section 23-1.5, counsel notes that this cause of action was in the original

complaint, and that there would be no surprise or prejudice to defendants if he were permitted to amend.

As the court has found, in connection with defendants' motion to dismiss, that a cause of action under labor Law §241(6) has no merit, as plaintiff was not engaged in "construction, excavation or demolition work" at the time of his accident, the plaintiff's motion to amend his complaint must be denied.

CONCLUSIONS OF LAW

Accordingly, it is hereby **ORDERED** that the defendants' motion (mot. seq. no. 12) for summary judgment dismissing plaintiff's complaint is granted, and the complaint is dismissed.

It is further **ORDERED** that the plaintiff's motion (#13) for leave to amend his complaint post-note is denied.

All relief not specifically granted herein has been considered and is denied.

The foregoing constitutes the decision and order of the court.

E N T E R:

Hon. Debra Silber, J.S.C.