At an IAS Part 83 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 18th day of December 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

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JAMES V. DONATO,

Plaintiff,

-against-

455 BROADWAY REALTY LLC and
MUJI U.S.A. LIMITED,

Defendants.

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DECISION AND ORDER
Index No. 512759/18
Mot. Seq. Nos. 2-3

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Cross Motion, Affirmations (Affidavits), with Exhibits Annexed	40-47; 53-60
Affirmations (Affidavits) in Opposition and in Reply, with Exhibits Annexed	61; 64-65
Other Documents (Answer of 455 Broadway Realty LLC)	9

In this action to recover damages for personal injuries, defendants 455 Broadway Realty LLC and Muji U.S.A. Limited ("defendants") jointly move for summary judgment dismissing the amended complaint of plaintiff James V. Donato ("plaintiff") as against them, whereas plaintiff cross-moves for partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim, as well as on his Labor Law § 241 (6) claim, as predicated on the alleged violations of Industrial Codes §§ 23-1.7 (e) (2), 23-1.7 (f), and 23-2.1 (a).[1]

On Monday morning, March 25, 2018,[2] plaintiff, an elderly[3] laborer with nonparty Michilli, Inc. ("Michilli"), arrived for his first day on the job on the ground floor of defendants'

[1] The factual recitation of the circumstances surrounding the accident is based, in its entirety, on the deposition testimony of plaintiff, as supplemented (where appropriate) by the deposition testimony of his coworker Marco Antonio Orejuela ("Orejuela") (NYSCEF Doc Nos. 46 and 47, respectively). True to the principle that "[i]nferences and opinions must be grounded on more than flights of fancy, speculations, hunches, intuitions, or rumors" (*Rand v CF Indus., Inc.*, 42 F3d 1139, 1146 [7th Cir 1994]), the Court has disregarded plaintiff's post-deposition affidavit (NYSCEF Doc No. 58), which seeks to embellish and expand his deposition testimony (*see Saitta v Marsah Props., LLC*, 211 AD3d 1062, 1065 [2d Dept 2022]; *Garcia-Rosales v Bais Rochel Resort*, 100 AD3d 687 [2d Dept 2012], *lv denied* 20 NY3d 858 [2013]; *see also Haxhia v Varanelli*, 170 AD3d 679, 682 [2d Dept 2019]; *Choi Ping Wong v Innocent*, 54 AD3d 384, 385 [2d Dept 2008]; *Mayancela v Almat Realty Dev., LLC*, 303 AD2d 207, 208 [1st Dept 2003]).

[2] *See* Plaintiff's EBT tr at page 42, lines 8-10. The accident date of August 26, 2018, as alleged in ¶ 1 of plaintiff's Verified Bill of Particulars, dated July 1, 2019 (NYSCEF Doc No. 45), is incorrect.

[3] *See* Plaintiff's EBT tr at page 10, line 7 (testifying that he was born in 1943).

construction/renovation project at 455 Broadway in Lower Manhattan. His task that day was to lay the Masonite sheets (the "Masonite") on the ground floor – which, at the time, was "[o]ne big room"[4] – to protect it from damage.[5]

Initially, plaintiff had carried the Masonite onto the ground floor by hand (one or two pieces at a time) from the outside of the store where it was stored.[6] After he had carried 20 to 25 pieces by hand into the store, he decided (without consulting with, or receiving any instructions from, Michilli) to ease his task of transporting the remainder of the Masonite onto the ground floor by using a pallet jack.[7] Before he could use a pallet jack, however, he needed to have a level surface between the inside and outside of the store.[8] Towards that end, he decided (again acting on his own initiative) to fashion a makeshift ramp out of a piece of a silver-colored metal (with the estimated weight of 200 pounds) (the "metal plate") that was leaning against one of the front walls of the ground floor.[9] As he was approaching the metal plate, it suddenly shifted – according to plaintiff, it had been surrounded by wood debris[10] – and started falling.[11] While he was either reaching toward or, alternatively, trying to grab the metal plate to arrest its fall,[12] the plate cut across the inside of his left thumb, as it was falling to the floor.[13] He sought first aid at

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[4] *Id.* at page 33, line 23 to page 34, line 24.

[5] *Id.* at page 18, lines 22-24; page 20, lines 9-11; page 21, lines 14-22; page 22, lines 14-18.

[6] *Id.* at page 24, line 6 to page 25, line 4.

[7] *Id.* at page 25, line 5-7 and lines 21-24; page 56, line 18 to page 58, line 3. The record is silent as to whether a pallet jack was, in fact, available at the worksite.

[8] The lobby level was one step-up of "about a couple of inches" above the street level (*see* Orejuela's EBT tr at page 27, line 11 to page 28, line 8; page 54, lines 6-12).

[9] *See* Plaintiff's EBT tr at page 25, lines 8-24; page 26, line 16; page 28, lines 3-10 and lines 14-23; page 29, line 23 to page 30, line 6; page 40, lines 8-10. Plaintiff's coworker, Orejuela, testified (at page 28, lines 17-23) that ramps were made of "plywood or wood," and that he never used "metal plates" to make a ramp.

[10] Although the debris was "*around*" the floor and "*all over the place*" (Plaintiff's EBT tr at page 30, lines 17-18 and 24, and at page 32, line 10 [emphasis added]), plaintiff's assertion that "the metal plate . . . had been left leaning against the wall at an angle, *on top of a lot of debris*, including wood, sheetrock and other construction debris" is unsupported by the record (*see* Plaintiff's Affirmation in Opposition and in Support of Cross Motion for Partial Summary Judgment on Liability, dated November 1, 2022 [NYSCEF Doc No. 54] ["Plaintiff's Affirmation in Opposition"], ¶¶ 22, 24, at pages 13-14 [emphasis added]). No photographs showing the debris and/or the metal plate were authenticated at plaintiff's pretrial deposition (*cf. Piedra v 111 W. 57th Prop. Owner LLC*, ___ AD3d ___, 2023 NY Slip Op 04737 [1st Dept 2023]).

[11] *See* Plaintiff's EBT tr at page 30, lines 15-24; page 31, line 25 to page 32, line 10.

[12] Plaintiff's pretrial testimony is inconsistent on this point. His accident was unwitnessed (Plaintiff's EBT tr at page 33, lines 4-18).

[13] *See* Plaintiff's EBT tr. at page 30, line 25 to page 31, line 14; page 32, line 25; page 35, lines 4-19.

a local urgent-care clinic and approximately a month later underwent an in-hospital "[d]igital nerve repair" of his left thumb.[14] He has not worked in any capacity since the day of his accident.

On June 20, 2020, plaintiff commenced this action against defendants for his left-thumb injury. Plaintiff asserted claims under: (i) Labor Law § 240 (1); (ii) Labor Law § 241 (6) to the extent predicated on, among other Industrial Code provisions, 12 NYCRR §§ 23-1.7 (e) (2), 23-1.7 (f), and 23-2.1 (a); and (iii) Labor Law § 200/common-law negligence. After discovery was completed and a Note of Issue was filed on January 26, 2022, the aforementioned motion and cross motion, each for summary judgment, were served on March 28, 2022 and November 1, 2022, respectively (NYSCEF Doc No. 40 and 53). On May 10, 2023, the Court heard oral argument, reserving decision.

Although plaintiff's cross motion is untimely, having been made more than 60 days after the filing of the Note of Issue,[15] the Court may nonetheless consider it because "a timely motion for summary judgment was made on nearly identical grounds" (*Grande v Peteroy*, 39 AD3d 590, 591-592 [2d Dept 2007]). "In such circumstances, the issues raised by the untimely . . . cross motion are already properly before the court and thus, the nearly identical nature of the grounds may provide the requisite good cause (*see* CPLR 3212 [a]) to review the untimely . . . cross motion on the merits" (*id.* at 592). Accordingly, the Court will consider plaintiff's cross motion on the merits (*see Connor v AMA Consulting Engineers PC*, 213 AD3d 483, 484 [1st Dept 2023]; *Jenkin v Cadore*, 185 AD3d 558, 561 [2d Dept 2020]).

It is well established that 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 (*Ayotte v. Gervasio,* 81 NY2d 1062, 1063 [1993], citing *Alvarez v. Prospect Hospital,* 68 NY2d 320, 324 [1986]; *Zapata v. Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form,

[14] *See* Plaintiff's Bill of Particulars, ¶ 19 (d) (i).

[15] Kings County Supreme Court Uniform Civil Term Rules require (in Part C, § 6) that "motions for summary judgment [in actions not involving the New York City Corporation Counsel] may be made no later than sixty (60) days after the filing of a Note of Issue."

sufficient to establish the existence of material issues of fact which require a trial of the action. (*Zuckerman v. City of New York,* 49 NY2d 557 [1980]).

Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable (*Elzer v. Nassau County*, 111 A.D.2d 212, [2nd Dept. 1985]; *Steven v. Parker*, 99 AD2d 649, [2nd Dept. 1984]; *Galeta v. New York News, Inc.*, 95 AD2d 325, [1st Dept. 1983]). When deciding a summary judgment motion, the Court must construe facts in the light most favorable to the non-moving party (*Marine Midland Bank N.A. v. Dino & Artie's Automatic Transmission Co.,* 168 AD2d 610 [2d Dept. 1990]; *Rebecchi v. Whitemore,* 172 AD2d 600 [2d Dept. 1991]).

Labor Law § 240(1)[16] imposes absolute liability on building owners and contractors whose failure to provide protection to workers employed on a construction site proximately causes injury to a worker (*see Wilinski;* quoting *Misseritti v Mark IV Constr. Co.,* 86 N.Y.2d 487, 490 [1995]; *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 to a narrow class of dangers -- more specifically, special hazards that present elevation-related risks (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 96-97 [2015] [internal quotation marks, brackets and citations omitted]).

Generally, 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 *(Romero v J & S Simcha, Inc.,* 39 AD3d 838 [2d Dept 2007]). In order to prevail under this section of the Labor Law, a plaintiff must establish that specific safety rules and regulations of the Industrial Code were violated *(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

[16] Labor Law § 240(1) states: All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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.

facts of the case *(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]).

In order to prevail on summary judgment in a section 240 (1) falling object case, the injured worker must demonstrate the existence of a hazard contemplated under that statute and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein (*Fabrizi* at 662). Essentially, 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 and that the object fell because of the absence or inadequacy of a safety device of the kind enumerated in the statute. (Id. at 662–663; *Narducci v Manhasset Bay Assoc.*, 96 NY2d at 268; *Mendez v Jackson Dev. Group, Ltd.*, 99 AD3d 677, 678 [2d Dept 2012]). While a plaintiff is not required to present evidence as to which particular safety devices would have prevented the injury, the risk requiring a safety device must be a foreseeable risk inherent in the work (*Niewojt v Nikko Constr. Corp.*, 139 AD3d 1024; 1027 [2d Dept 2016]; *Noble v AMCC Corp.*, 277 A.D.2d 20 [2000]). Thus, Labor Law § 240 (1) does not apply in situations in which a hoisting or securing device of the type enumerated in the statute would not be necessary or expected (*see Narducci; Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 965 [2d Dept 2013]).

Here, the court finds that the record presents genuine issues of triable fact as to: (1) whether plaintiff's injury flowed directly from the application of the force of gravity to (and by) the metal plate; (2) whether the elevation differential between the top of the metal plate and the floor was "physically significant" or, in the alternative, "de minimis"; (3) whether, considering the lean-to position of the metal plate, its weight could generate a significant amount of force as it fell; (4) whether there was a causal nexus between plaintiff's injury and a lack or failure of a device prescribed by Labor Law § 240 (1); and (5) whether anyone had instructed plaintiff to use a pallet jack to move the Masonite and to use the metal plate as a makeshift ramp for that purpose (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 9 [2011]; *Connor v AMA Consulting Engineers PC*, 213 AD3d 483, 484 [1st Dept 2023]; *Kuylen v KPP 107th St., LLC*, 203 AD3d 465 [1st Dept 2022]; *O'Brian v 4300 Crescent LLC*, 180 AD3d 437, 438 [1st Dept 2020]; *Jardin v A Very Special Place, Inc.*, 138 AD3d 927, 930 [2d Dept 2016]; *see also Lombardi v City of NY*, 175 AD3d 1521, 1522 [2d Dept 2019]; *Carrasco v Weissman*, 120 AD3d 531, 533 [2d Dept 2014]; *Mendez v Jackson Dev. Group, Ltd.*, 99 AD3d 677, 678 [2d Dept 2012]; *Oakes v Wal-Mart Real Estate Bus. Tr.*, 99 AD3d 31, 39 [3d Dept 2012]).

Accordingly, Defendant's motion for summary judgment on the basis of Labor Law 240(1) and Plaintiff's cross-motion for summary judgment on liability pursuant to Labor Law 240(1) are denied.

Plaintiff initially alleged various Industrial Code violations as predicates for his Labor Law § 241 (6) claim,[17] however, he has not addressed (in his cross motion and opposition papers) many of the predicate Industrial Code provisions, with the exception of 12 NYCRR §§ 23-1.7 (e) (2), 23-1.7 (f), and 23-2.1 (a). Therefore, the Court treats the remaining Industrial Code provisions as abandoned (*see Romano v New York City Tr. Auth.*, 213 AD3d 506, 508 [1st Dept 2023]; *Elam v Ryder Sys., Inc.*, 176 AD3d 675, 676 [2d Dept 2019]; *Pita v Roosevelt Union Free School Dist.*, 156 AD3d 833, 835 [2d Dept 2017]).

12 NYCRR § 23-1.7 (e) (2) ("Tripping and other hazards" – "Working areas") requires that "[t]he parts of floors, platforms and similar areas where persons work or pass . . . be kept free from accumulations of dirt and debris . . . and from sharp projections insofar as may be consistent with the work being performed." Industrial Code § 23-1.7 (e) (2) does not apply to the facts of this case for two reasons. First, plaintiff did not slip or trip on the debris, nor did the debris cut him (*see Urbano v Rockefeller Ctr. N., Inc.*, 91 AD3d 549, 550 [1st Dept 2012]; *Cooper v State*, 72 AD3d 633, 635 [2d Dept 2010]; *Romeo v Prop. Owner [USA] LLC*, 61 AD3d 491, 492 [1st Dept 2009]). Second, whether the debris proximately caused the instability of the metal plate which, in turn, caused his accident is highly speculative, as his pretrial testimony (as more fully set forth in the margin) reflects[18] (*see Mendez v Jackson Dev. Group, Ltd.*, 99 AD3d 677, 679 [2d Dept 2012]; *Zanki v Cahill*, 2 AD3d 197, 198-199 [1st Dept 2003], *affd* 2 NY3d 783 [2004]).[19]

Next, 12 NYCRR § 23-1.7 (f) requires, in relevant part, that "[s]tairways, ramps or runways . . . be provided as the means of access to working levels above or below ground."

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[17] *See* Verified Bill of Particulars, dated July 1, 2019, at page 5, ¶ 18 (c) (broadly alleging violations of 12 NYCRR §§ 23-1.2, 23-1.3, 23-1.5, 23-1.7, 23-1.8, 23-1.30, 23-1.32, 23-1.33, 23-2.1, 23-3.3, and 23-3.4).

[18] *See* Plaintiff's EBT tr at page 30, lines 15-24 ("Q. Did something happen to cause the piece of metal to move? A. There was a lot of debris all around the ground, a lot of debris. Q. But was there something that made the piece of metal move? A. *It could've.* Q. What was it that made the piece of metal move? A. There's a lot of wood all over the place."); page 32, lines 4-10 ("Q. What was it that made the piece of metal fall? A. *I guess* – . . . . Q. Don't guess. Do you know? A. The debris on the ground.") (Emphasis added).

[19] Of further note is that the allegedly sharp part of the metal plate did not project from the floor (*see Mooney v BP/CG Ctr. II, LLC*, 179 AD3d 490, 491 [1st Dept 2020], *lv dismissed* 35 NY3d 1125 [2020]).

Here, plaintiff's accident did not involve a fall that was caused by (or was related to) the absence of a ramp[20] (*see Pisciotta v St. John's Hosp.*, 268 AD2d 465, 466 [2d Dept 2000], *lv denied* 95 NY2d 763 [2000]).

Finally, 12 NYCRR § 23-2.1 (a) (1) ("Storage of material or equipment") requires, in relevant part, that "[a]ll building materials . . . be stored in a safe and orderly manner" so as "not [to] obstruct any passageway, walkway, stairway or other thoroughfare." Here, defendants have established their prima facie entitlement to judgment as a matter of law dismissing this cause of action with evidence demonstrating that such provision is inapplicable because the accident happened in an open area of the worksite, not in a "passageway, walkway, stairway or other thoroughfare" (*see Guallpa v Leon D. DeMatteis Const. Corp.*, 121 AD3d 416, 419 [1st Dept 2014]; *Grygo v 1116 Kings Highway Realty, LLC*, 96 AD3d 1002, 1003 [2d Dept 2012], *lv denied* 20 NY3d 859 [2013]; *see also Wiley v Marjam Supply Co., Inc.*, 166 AD3d 1106, 1109 [3d Dept 2018], *lv denied* 33 NY3d 908 [2019]).

"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" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Here, defendants have established, prima facie, that neither of them created or had actual or constructive notice of any dangerous condition at the worksite (*see Mendez v Vardaris Tech, Inc.*, 173 AD3d 1004, 1005 [2d Dept 2019]). Moreover, defendants have established, prima facie, that neither of them possessed authority to supervise or control the performance of the work at the site (*see McFadden v Lee*, 62 AD3d 966, 967 [2d Dept 2009]). "Evidence of mere general supervisory authority to oversee the progress of the work, to inspect the work product, and/or to make aesthetic decisions is insufficient to impose liability under Labor Law § 200" (*id.*).

In opposition, plaintiff has failed to raise a triable issue of fact (*see Campanello v Cinquemani*, 179 AD3d 763, 765 [2d Dept 2020]; *Davies v. Simon Prop. Group, Inc.*, 174 AD3d 850, 855 [2d Dept 2019]; *Ortega v Puccia*, 57 AD3d 54, 63 [2d Dept 2008]). His contention that "the plate had to have been left there since the Friday before [his accident], when the space was last open to workers, or put there over the weekend by the owner or tenant, the only other persons or entities with access to the space," and that the plate "was either there for a minimum

[20] Put another way, the absence of a ramp was not a factor in proximately causing plaintiff's accident.

of three days [from the preceding Friday night to the Monday morning of the day of the accident], or [had been] placed there by one of the defendants,"[21] is pure conjecture. To the contrary, plaintiff testified at his pretrial deposition that he did not know who had leaned the metal plate against the interior wall and for how long the plate had been so positioned – in fact, the accident date was his first day on this worksite.[22]

Accordingly, it is,

ORDERED that in mot. seq. no. 2, defendants' motion for summary judgment is *granted to the extent* that plaintiff's Labor Law § 241 (6) claim and his Labor Law § 200/common-law negligence claim are both *dismissed* without costs and disbursements; and the remainder of their motion is denied; and it is further

ORDERED that in mot. seq. no. 3, plaintiff's cross motion for partial summary judgment on the issue of liability on his Labor Law §§ 240 (1) and 241 (6) claims is *denied in its entirety*; and it is further,

ORDERED that the action shall continue solely on plaintiff's Labor Law § 240 (1) claim as against defendants; and it is further,

ORDERED that defendants' counsel is directed to electronically serve a copy of this decision and order with notice of entry on plaintiff's counsel and to electronically file an affidavit of service thereof with the Kings County Clerk; and it is further,

This constitutes the decision and order of the Court.

HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice

[21] *See* Plaintiff's Affirmation in Opposition, ¶ 24, at page 14.

[22] *See* Plaintiff's EBT tr at page 13, lines 11-16; page 28, line 24 to page 29, line 7; page 29, lines 18-19; page 33, lines 2-7.