dos Santos v BOP Greenpoint D Holdings LLC
2024 NY Slip Op 30194(U)
January 18, 2024
Supreme Court, Kings County
Docket Number: Index No. 503549/2021
Judge: Debra Silber

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 12th day of January, 2024.

P R E S E N T:

Hon. Debra Silber, Justice

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SANDRO CAETANO DOS SANTOS,

Plaintiff,

-against-

DECISION / ORDER

BOP GREENPOINT D LLC,
BOP GREENPOINT D HOLDINGS LLC,
BROOKFIELD PROPERTIES LLC,
BROOKFIELD PROPERTIES ACQUISITION LLC,
BROOKFIELD OFFICE PROPERTIES ACQUISITIONS LLC,
BROOKFIELD PROPERTIES INVESTOR LLC,
and NEW LINE STRUCTURES & DEVELOPMENT LLC,

Index No. 503549/2021

Mot. Seq. # 2 & 3

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Cross Motion, Affidavits (Affirmations), and Exhibits Annexed	31-45; 53-62
Opposing Affidavits (Affirmations) and Exhibits Annexed	47-52; 67-70
Reply Affirmations and Exhibits Annexed	71-73; 74

Upon the foregoing papers in this action to recover damages for personal injuries, plaintiff Sandro Caetano Dos Santos moves for an order, pursuant to CPLR 3212, granting him partial summary judgment on the issue of liability on his causes of action under Labor Law §§ 240 (1) and 241 (6) against two of the seven defendants, BOP GREENPOINT D LLC and NEW LINE STRUCTURES & DEVELOPMENT LLC (motion sequence

number 2).[1] Defendants cross-move, pursuant to CPLR 3212, for an order granting them summary judgment and entirely dismissing the plaintiff's complaint as against three of the defendant entities, BOP GREENPOINT D HOLDINGS LLC, BROOKFIELD PROPERTIES ACQUISITION LLC, and BROOKFIELD PROPERTIES INVESTOR LLC, and dismissing some of the plaintiff's claims under Labor Law §241 (6) and all of his claims under Labor Law § 200 against the other two defendant entities, BOP GREENPOINT D LLC and NEW LINE STRUCTURES & DEVELOPMENT LLC (motion sequence number 3).

Plaintiff's complaint, dated February 12, 2021 (NYSCEF Doc No. 1), is 48 pages long, and asserts causes of action premised on violations of Labor Law §§ 240 (1), 241 (6), 241-a, and 200, as well as for common-law negligence. His lawsuit stems from a construction-site accident which took place on November 13, 2020. Plaintiff named seven different defendants in the complaint. An answer was interposed [Doc 5] on March 17, 2021 by one law firm on behalf of five of the defendants, and counsel states in footnote 1 to the answer that "The entity sued herein as 'Brookfield Properties LLC' is not a part of the Brookfield Properties organization and the entity sued herein as 'Brookfield Office Properties Acquisitions LLC' does not exist." As plaintiff has not moved for a default judgment order as against these two defendants, and the default was more than a year ago, he has abandoned the action as against them, and thus the action is dismissed as against them, and they are hereby removed from the caption. The note of issue was filed on October

[1] This is not clear from the notice of motion, which reads as though the motion is addressed to all of the defendants but is clarified in counsel's affirmation in support.

25, 2022, and the case is on the trial calendar. The next appearance in JCP is on April 10, 2024.

Plaintiff claims he was injured while working for Highbury Concrete Inc. ("Highbury") as a laborer/carpenter. The job site, located at 221 West Street, Brooklyn, NY, also known as 1 Eagle Street, was owned by defendant BOP GREENPOINT D LLC and NEW LINE STRUCTURES & DEVELOPMENT LLC was the general contractor. Highbury was hired by New Line to perform the concrete superstructure work at the site, a new building in the Greenpoint Landing project. On the date of the accident, plaintiff was working in an elevator shaft. He alleges that he was provided "with an unsecured defective wooden ladder constructed at the site to enable plaintiff to get from the 11th to the 12th floor. Not only was this makeshift wooden ladder not fully secured but the plaintiff was not provided with any cables, tie lines, or other device that would have allowed him to tie off to prevent him from falling. As a result of defendants' violation of Labor Law §240 (1) and §241 (6), Mr. Santos sustained severe injuries to his cervical spine requiring a discectomy with fusion; to his lumbar spine requiring joint sacroiliac joint fusion; to his left shoulder requiring arthroscopic surgery for rotator cuff repair; to his right knee requiring cortisone injections; as well as a medical meniscus tear at his left knee" [Doc 32 ¶¶4, 5].

The court must address a procedural issue first. The plaintiff's motion, filed on 12/22/22, was timely made, but defendants' motion, filed on 7/14/23, was not. Defendants' counsel does not ask for leave to make a late motion, instead stating "Plaintiff thereafter filed a motion for partial summary judgment against BOP-D and New Line on December 22, 2022. . . . This cross-motion, which addresses substantially the same issues raised on

Plaintiff's summary judgment motion, ensued." The Court notes that plaintiff did not object to the cross motion as being untimely, nor does he argue that plaintiff's Labor Law § 200 and common law negligence causes of action are not addressed in plaintiff's motion. Instead, plaintiff's counsel stated at oral argument that she had not opposed the branch of the cross motion which seeks to dismiss plaintiff's claims under Labor Law 200 and common law negligence. In light of this concession at oral argument, the court agreed on the record to dismiss the plaintiff's Labor Law 200 and common law negligence claims against these two defendants. It is noted that under the "good cause" analysis of *Brill v City of* NY2 NY3d 648 [2004], and CPLR 3212 (a) governing untimely motions for summary judgment, the court may entertain a cross motion which addresses nearly the identical issues as plaintiff's timely motion (*see e.g., Lennard v Khan*, 69 AD3d 812, 814 [2d Dept 2010]; *Grandev v Peteroy*, 39 AD3d 590, 591-592 [2d Dept 2007]). It is well settled that "an untimely cross motion for summary judgment may be considered by the court where . . . a timely motion for summary judgment was made on nearly identical grounds" (see *Snolis v Clare*, 81 AD3d 923, 925 [2011]). The court thus has no opinion, in light of plaintiff's consent, on the issue of whether Labor Law 200 and common law negligence are "nearly identical" to Labor Law 240 (1) and 241 (6).

The remaining branch of defendants' cross motion, for summary judgment dismissing the complaint as against defendants BOP GREENPOINT D HOLDINGS LLC, BROOKFIELD PROPERTIES ACQUISITION LLC, and BROOKFIELD PROPERTIES INVESTOR LLC on the basis that they "did not have any ownership interest in the Building at the time of the subject accident, were not Contractors working thereat, or Agents of the

Building's Owner or any Contractor because they did not supervise or control any aspect of Plaintiff's work, it is respectfully submitted that they are improper parties to this action requiring that their cross-motion for summary judgment dismissing the Complaint as against them be granted in its entirety" [Doc 54 Page 8] is also not opposed by plaintiff, and thus is granted without opposition. These defendants are also removed from the caption.

The court next turns to consideration of the merits of plaintiff's motion for partial summary judgment under Labor Law §§ 240 (1) and 241 (6), and defendants cross motion for summary judgment as regards Labor Law § 241 (6).

Labor Law 240 (1)

Plaintiff first moves for summary judgment on his Labor Law § 240 (1) cause of action against the two remaining defendants, the property owner and the general contractor. Plaintiff supports his motion with an affirmation of counsel, a memo of law, the pleadings, his bills of particulars [Doc 36], and the EBT transcripts of plaintiff and defendants, accompanied by photos which were authenticated at the EBTs, two accident reports and part of the contract between the defendants.

The plaintiff was deposed at a virtual deposition on February 8 and 9 of 2022 [Doc 37]. He was provided with a Portuguese interpreter. He was born in 1980, and so is currently forty-three years old. He came to the United States from Brazil in 2016 and lives with his sister in New Jersey. He was hired by Highbury about two and a half years before this accident. On the day of his accident, plaintiff's supervisors were Rodolfo and Toninho. He has not worked since the day of the accident. He completed the OSHA 30-hour course in 2016 and the OSHA 40-hour course in 2020.

Plaintiff described the accident as follows. He was working for Highbury on the superstructure work for this new building. They had started there three or four months earlier. They had poured the concrete for the first twelve floors and were working on the thirteenth. The building was going to be 40 floors high when done. He was wearing construction boots with rubber soles, a tool belt, gloves, safety goggles, a hardhat, and a harness. It was a cold and rainy day. He arrived at 7:00 a.m. and "swiped in" with his ID card and went to his work area on the 12th floor. He was to continue with the carpentry for the elevator shaft. He was installing plywood in the elevator shaft. There was no area to congregate with other workers, and no morning meetings, or toolbox talks, at this job site.

Plaintiff was shown a number of photos next. He authenticated the photo of the "temporary stairs" between the 11th and 12th floors. Plaintiff said the work elevator only went to the 10th floor, and then they had to walk up the temporary stairs. He testified that "more than one hundred people go up and down those stairs" [Doc 37 Page 74]. He said "I would go up those stairs about ten times a day" [*id.*]. This temporary stair/ladder had been in place for about a week, after they had poured the 12th floor slab. It had been built by Highbury employees [*id.* Page 79]. It had been leaned against the 12th floor slab and was not fastened to anything at the top [*id.* Page 84]. The stair/ladder was "nailed at each foot" (to a cross piece) on the 11th floor [*id.*]. The distance from one floor to the next was about 10 feet, and the steps were made of 2 x 4's spaced about one foot apart. At the time of his accident, plaintiff was working with a partner, Edilson. This was the first day he had worked with him.

Plaintiff testified that at around 11:00 a.m., he was descending the left side of the stair/ladder from the 12th floor to the 11th floor to get more plywood, facing the ladder as he descended and holding on with both hands, and when he reached the third step from the top, the 2 x 4 "step" broke, and he fell backwards, hit his back into the wall behind him, and landed on his back at the bottom of the ladder on the 11th floor [*id.* Page 104]. He got up and climbed up the right side of the ladder to find his foreman Toninho and tell him that the step had broken. He was in pain in his neck, back and left shoulder [*id.* Page 115]. They went together to look at the step. Toninho called out on his radio and told somebody to fix it. They then went down to the office to fill out an accident report. Both Toninho and Rodolfo spoke Portuguese [*id.* Pages 121-122]. The safety officer was in the office. Plaintiff said he had never seen the report [*id.* Page 132]. He was shown the report (defendant's I, at Doc 41). He said he signed it but did not fill it out. He does not know whose handwriting it is. Nobody read it to him in Portuguese before he signed it. He testified that it incorrectly states that he fell because he "missed the step" and also that he fell from a spot three steps from the bottom instead of three steps from the top [*id.* Pages 137-142]. Plaintiff was then taken to an urgent care center. The deposition broke for the day and continued the next day with a different interpreter. The questions are addressed to a discussion of his care and treatment, not liability.

Douglas Demsen was deposed on March 9, 2022 for defendant New Line, the general contractor. He said he read the incident report and looked at the pictures attached to it but had not reviewed anything else prior to his deposition. He was the "lead super" for Site D, which was comprised of three buildings. New Line had a trailer on site. The site safety

manager worked for a different company, CRSG, but had a desk there too. Mr. Demsen was shown his daily report for the day of the accident. It states that Highbury had 230 workers on site that day. He agreed that it does not mention the plaintiff's accident, and that it "should have" [Doc 40 Page 25]. Mr. Demsen was asked if the site safety plan referenced the "shop-built ladders" that plaintiff fell from, and he answered that he did not know [*id.* Page 33]. He learned about the accident from a phone call he received. He then went to look at the place where the accident took place. He prepared an incident report. It says there are pictures attached, and that the ladder was "removed for inspection." He testified that "Once I took photos and everything, we took that ladder out, put it to the side and put in a new ladder" [*id.* Page 61]. The photos are not attached to the document submitted with the motion but are included in Document 38. He took three photos. They are only of the bottom part of the ladder, as "plaintiff said he slipped on the bottom second or third rung" [*id.* Page 61]. Mr. Demsen claimed the description of the accident was given to him by the plaintiff, via a translation by his foreman. He wrote down that "Worker slipped on bottom second or third rung from the bottom of ladder" [Doc 40 Page 51]. Since Mr. Demsen does not speak Portuguese, he had no way to know if the translation was accurate. He could not locate any eyewitnesses. Mr. Demsen said he was unaware of any specifications or codes that apply to ladders such as these.

Defendants oppose the motion and provide affidavits from several of plaintiff's co-workers. Rodolfo Da Silva's affidavit [Doc 62] states that he is a general foreman for Highbury and has personal knowledge of the incident. He states that the "job-built ladders" were the only means of access above the 10th floor, as no staircases had been installed as yet.

He states that plaintiff did not complain to him about the ladder breaking, and did not show him ”the step that he claims broke” [Doc 62 ¶13]. Mr. Da Silva avers that “Following Mr. Dos Santos' accident, which I understand occurred when he simply missed a step at the lower end of the ladder closest to the 11th floor, I went to view the ladder with Jose Pereira, who was Mr. Dos Santos' team leader or foreman, and who also goes by the nickname "Toninjo." Highbury Safety Officer, Alan, was also there at this time. When I looked at the ladder at that time, which was within just a few minutes after the alleged accident, I did not observe any step to the ladder being broken or defective or the ladder being unsecured at either the base or at the top of the ladder. Moreover, I did not observe any condition that would have caused the ladder or any of its steps or rungs to be in a slippery or defective condition. In fact the ladder at issue continued to be used by workers to access the 12th floor for the remainder of that day and a few subsequent days” [*id.* ¶¶ 14-16].

Jose Antonio Pereira, also a foreman for Highbury, and who is apparently “Toninho,” also provides an affidavit [Doc 61] and states that he oversaw plaintiff’s crew. His affidavit is almost identical to Mr. Da Silva’s.

Alan McInerney, Highbury’s Concrete Site Safety Officer, provides an affidavit [Doc 59]. He says he received a call about the accident and went to the office, and “because I do not speak Brazilian Portuguese, and Mr. Dos Santos did, I enlisted the services of one of the many women that work for Highbury who do speak Brazilian Portuguese to serve as an Interpreter. I cannot recall which woman served in this capacity. Through the Interpreter Mr. Dos Santos told me, amongst other things, that he was descending the job-built ladder between the 12th and 11th floors at the Building and that when he got to 2-3 steps from the

bottom of the ladder, he missed a step and fell backwards into the wall. He never at that time mentioned that a step near the top of the ladder broke causing him to fall. After obtaining this information, I thereafter prepared a Highbury Accident/Incident Report (which is done on every accident which is brought to my attention) and populated that report with information provided by Mr. Dos Santos through the Interpreter. Had he mentioned that a step had broken on the ladder I would have put that in the report. Since Mr. Dos Santos also told me that he had missed his step, I also took a photograph of the shoes he was wearing at the time of the accident which were in poor condition. After getting this information from Mr. Dos Santos, I also went to look at the subject ladder within a few minutes of meeting with him. When I went to look at the ladder in question, I was joined by "Rodolfo" who is the General Foreman, and Jose Pereira, who was Mr. Dos Santos' direct foreman on the date of the accident. At that time I did not observe any problem with the job-built ladder. More specifically, the ladder was secured at both its base and at the top of the ladder. In addition, I specifically examined the steps or rungs of the ladder and none of the rungs to the ladder were loose, broken, defective, slippery, or otherwise in a state of disrepair. In fact the ladder at issue continued to be used by all workers to access the 12th floor for the remainder of that day and a few subsequent days until the ladder was taken out of service" [*id.* ¶¶ 8-12].

Leomar Oliveiera, a former safety foreman for Highbury also provides an affidavit [Doc 60]. He states that "As part of my duties as Safety Foreman with Highbury, I was responsible for inspecting the job-built ladders made by Highbury to ensure that they were sturdy and safe. Given the fact that in excess of 100 workers would use these ladders on any given day, my inspections of these ladders, which were done just prior to the start of the

workday at around 7:00 a.m., and again at several other times throughout the workday, consisted of inspections not only with respect to the overall safety and structural integrity of the job-built ladders, but also included specific inspections of each rung on the job-built ladder to make sure the rungs were not slippery, defective, unsteady or loose. 1In addition to inspecting the rungs, I also inspected each handrail on the job-built ladder to make sure they were sturdy and not loose, and to make sure that these ladders were firmly secured at both the base of the ladder and at the top of the job-built ladder. If my inspections of these ladders found any problem or defect with respect to the structural integrity of the ladder, or with the manner in which it was secured at either the base or top of the ladder, the workers would not be permitted to use the ladder until it was reinforced, repaired, and made safe for use by the workers on site. I would also put my initials "LO" on the inspection tag on the ladder to indicate that I had inspected it and that it was safe for use. I usually did this when I did my last inspection of the day. I have been made aware of the claims being asserted by Mr. Sandro Caetano Dos Santos in this matter, and in particular that a step on the upper portion on the job-built ladder broke on November 13, 2020, causing him to fall into the wall on the 11th floor as he attempted to descend the ladder. I also specifically remember conducting a complete inspection of the job-built ladder at issue in that location at approximately 6:30 a.m. on that day at the start of the work shift and shortly before Mr. Dos Santos claims he was involved in an accident" [*id.* ¶¶ 9-12].

Discussion

Labor Law section 240 (1) "requires certain contractors and property owners to provide adequate safety devices when workers engage in particular tasks involving

elevation-related risks" (*Healy v EST Downtown, LLC*, 38 NY3d 998, 999 [2022]), such as risks associated with workers falling from a height and/or with objects falling on workers (*see e.g., Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]). As the Court of Appeals cautioned, "[l]iability may . . . be imposed under the statute only where the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a *physically significant elevation differential*" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015] [internal quotation marks omitted; emphasis added], *rearg denied* 25 NY3d 1195 [2015]). "Consequently, the protections of Labor Law § 240 (1) do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity" (*id*. [internal quotations marks omitted; emphasis in the original]). "Rather, liability remains contingent upon the existence of a hazard contemplated in section 240 (1) *and* the failure to provide, or the inadequacy of, a safety device of the kind enumerated therein" (*id*. [internal quotation marks and brackets omitted; emphasis added]). Stated otherwise, Labor Law section 240 (1) is not applicable unless the plaintiff's injuries result from both an elevation-related risk *and* a statutorily enumerated safety device which was either absent or inadequate.

Here, plaintiff's Labor Law § 240 (1) claim meets both of the aforementioned prongs. Plaintiff has made a prima facie showing of a section 240 (1) violation through his deposition testimony that he fell to the ground from a defective fabricated ladder. He testified that the 2x4 wooden rung broke and he fell backwards, hitting his back against the wall and falling to the floor (*see Mena v 5 Beekman Prop. Owner LLC*, 212 AD3d 466, 467 [1st Dept 2023]; *Leon-Rodriguez v Roman Catholic Church of Sts. Cyril & Methodius*, 192 AD3d 883, 885

[2d Dept 2021]; *Morocho v Boulevard Gardens Owners Corp.*, 165 AD3d 778, 778 [2d Dept 2018]; *Kupiec v Morgan Contr. Corp.*, 137 AD3d 872, 873 [2d Dept 2016]; *Poracki v St. Mary's R.C. Church*, 82 AD3d 1192, 1194-1195 [2d Dept 2011]; *cf. Torres v New York City Hous. Auth.*, 199 AD3d 852, 854 [2d Dept 2021]; *Medina-Arana v Henry St. Prop. Holdings, LLC*, 186 AD3d 1666, 1668 [2d Dept 2020]).

In opposition, defendant's witness Mr. Demsen testified that he did not know if the shop-built ladder needed to be constructed to any code, rule, or regulation, or to any specifications [Doc 40 Page 58]. He said that he removed it from service and had it replaced right after he photographed it, but he did not keep it or take a picture of the entirety of it. Mr. Demsen acknowledges that this was the sole means of accessing the plaintiff's work area. He was asked if this "ladder" was regularly inspected, and he testified that the general contractor does not "sign off" on the ladders, but they use them, and if they saw a problem, they would fix it or remove it and replace it [Doc 40 Page 62]. He said there were daily inspections of the ladders by Highbury, but they are not recorded in a report. The inspector would record it on a tag on the ladder. Mr. Demsen completed a daily log which made no mention of this accident, and he wrote up an incident report which solely relies on the worker's explanation having been translated for him, without any verification from the worker that the translated description was accurate. He said the translator was plaintiff's foreman.

However, the four affidavits from Highbury employees raise factual issues which call the plaintiff's credibility into question. "It is not the court's function on a motion for summary judgment to assess credibility" (*Ferrante v American Lung Assn.*, 90 NY2d 623,

631 [1997]; *see also Scott v Long Is. Power Auth.*, 294 AD2d 348 [2002]), and "[t]he credibility of the witnesses, the truthfulness and accuracy of the testimony, whether contradicted or not, and the significance of weaknesses and discrepancies are all issues for the trier of facts" (*Sorokin v Food Fair Stores*, 51 AD2d 592, 593 [1976]). Here, the four Highbury workers provide affidavits, which constitute sworn testimony, which contradict plaintiff's version of how the accident occurred. They also contradict Mr. Demsen's claim that the ladder was removed under his supervision shortly after the accident and replaced. They claim a woman in the office was the translator for plaintiff. The court cannot decide issues of credibility.

In conclusion, while plaintiff has made a prima facie case for summary judgment on his Labor Law § 240 (1) cause of action, defendants have overcome the motion and demonstrated the existence of factual issues requiring a trial. Accordingly, the branch of plaintiff's motion for partial summary judgment on the issue of liability as against the defendants on his Labor Law § 240 (1) cause of action is denied.

Labor Law § 241 (6)

The Court next turns to plaintiff's Labor Law § 241 (6) cause of action. Labor Law § 241 (6) requires building owners and contractors to "provide reasonable and adequate protection and safety" for workers involved in building construction, excavation, or demolition and to comply with safety rules and regulations promulgated by the State Commissioner of Labor (*Ross v Curtis Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 502, 601 N.Y.S.2d 49, 618 N.E.2d 82). To assert a sustainable cause of action under section 241 (6), a plaintiff "must allege a violation of a concrete specification of the [Commissioner's

regulations in the] Industrial Code" (*Noetzell v Park Ave. Hall Hous. Dev. Fund Corp*., 271 A.D.2d 231, 232, 705 N.Y.S.2d 577). To prevail under this statute, a claimant must demonstrate the existence of an injury sustained in an area where "construction, excavation or demolition work is being performed" (Labor Law § 241 [6]; see *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348, 693 NE2d 1068, 670 NYS2d 816 [1998]), "the violation of a regulation setting forth a specific standard of conduct applicable to the working conditions which existed at the time of the injury" (*Lawyer v Hoffman*, 275 AD2d 541, 542, 711 NYS2d 618 [2000]; see St. Louis v Town of N. Elba, 70 AD3d 1250, 1250, 894 NYS2d 587 [2010], affd 16 NY3d 411, 947 NE2d 1169, 923 NYS2d 391 [2011]) and that the violation was the proximate cause of the injury (see *Auchampaugh v Syracuse Univ*., 57 AD3d 1291, 1293, 870 NYS2d 564 [2008]; *Shields v General Elec. Co*., 3 AD3d 715, 718, 771 NYS2d 249 [2004]).

Plaintiff's bills of particulars [Doc 36] allege violations of Industrial Code (12 NYCRR) §§ 23-1.5(a) and (c), 23-1.7(a) and (f), 23-1.11(a)-(c); 23-1.15; 23-1.16(b)(1); 23-l .2l(b)(3)(i)-(iv); 23-1.21 (b)(4)(i)-(iv); 23-1.2l(b)(5)(i)-(ii); 23-1.21(c); 23-1.30 and 23-3.3. In her affirmation in support of plaintiff's motion for summary judgment, counsel lists all of the sections cited in the plaintiff's bills of particulars but does not state which sections the plaintiff's motion for summary judgment is premised on. In her memo of law in support of the plaintiff's motion, counsel claims the motion is predicated on violations of 12 NYCRR 23-1.5(a) and (c), 23-1.7(f), 23-1.11(a)-(c), 23-1.16, 23-1.21(b)(1), 23-1.21(b)(3)(i)-(iv), 23-1.21(b)(4)(i)-(iv), 23-1.21(b)(5)(i)-(ii), 23-1.21(c) and 23-1.30 [Doc 33 Page 9]. However, counsel does not discuss all of the above subsections in the memo of law. As the plaintiff

makes no affirmative arguments in support of his claims regarding the remaining Industrial Code sections and subsections cited in his bills of particulars in support of his motion or in opposition to the defendants' motion to dismiss them, they are deemed abandoned. Defendants are entitled to dismissal of the plaintiff's section 241 (6) cause of action to the extent that it is premised on those sections (*see Debennedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]).

The court will discuss the sections addressed by plaintiff in his motion individually.

The first section referred to in plaintiff's memo of law in support of his motion for summary judgment is 12 NYCRR § 23-1.5(c)(3), (General responsibility of employers) which provides:

> "(c) Condition of equipment and safeguards.
> (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."

Counsel avers that "The fact that the third rung from the top broke when plaintiff stepped on it, causing him to fall to the ground below, demonstrates that the makeshift wooden ladder constructed by Highbury so the workers could access the 11th floor of the elevator shaft, was not sound or operable, and constitutes defendants' violation of Labor Law §241(6) predicated on 12 NYCRR 23-1.5(c)(3)" [Doc 33 Page 10]. Defendants claim that the four affidavits they submitted from Highbury "make it clear that there are issues of fact as to whether the 3rd step to the ladder broke as plaintiff claims" [Doc 47 Page 10].

The court disagrees that this section is applicable. Putting aside that the ladder was not inside the elevator shaft as plaintiff claims, this section is addressed to the obligations to keep equipment in good repair. The ladder was a "safety device," but there is no evidence

it was damaged or was not in good repair prior to the plaintiff's accident. Here, as there was no visible defect in the step before plaintiff's accident, and there was testimony of regular inspections of the ladders, and notations of the inspections on the tags on the ladders, this section would only apply to what needed to be done after the step broke, not before or during. While this section has been found to be sufficiently specific to be enforceable, it is not appliable here (*Cruz v 1142 Bedford Ave., LLC*, 192 AD3d 859 [2d Dept 2021]).

Next, § 23-1.7(f) (Protection from general hazards) provides:

> Vertical passage. Stairways, ramps, or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided."

Counsel avers that this section was violated as the plaintiff was not provided with a safe means of access between the floors of the building. This section is sufficiently specific to be the basis of a claim. However, this type of ladder is not, as plaintiff's counsel avers, "makeshift." Document 72 is an OSHA fact sheet on best practices for use of "job-made wooden ladders." It references OSHA's Construction Standards, Subpart X, Stairways and Ladders. Those specs are not provided in the motion. Plaintiff claims the ladder at issue was not made in conformity with these standards. This raises a triable issue of fact whether the ladder was a safe means of access. The mere fact that the ladder may not have been constructed by Highbury in compliance with OSHA standards is not a prima facie violation of the Industrial Code. It would be nice if New York's laws could be updated to incorporate OSHA regulations, as the Industrial Code has not been updated in about fifty years, but this court can only apply the law, not rewrite it. Defendants correctly note that "there are clearly issues of fact with respect to whether the Ladder in this case failed to prove a safe means of

access to Plaintiff and others who travelled between the 11th and 12th floors at the Building" [*id.*].

Next, § 23-1.11(a) (Lumber and nail fastenings) provides:

> "(a) The lumber used in the construction of equipment or temporary structures required by this Part (rule) shall be sound and shall not contain any defects such as ring shakes, large or loose knots or other defects which may impair the strength of such lumber for the purpose for which it is to be used."

Counsel avers that "23-1.11(a) is sufficiently specific to support plaintiff's Labor Law §241(6) claim. Plaintiff further respectfully submits that 23-1.11(a) is applicable to the facts of this case." Defendants respond that "While this Code provision has been found to be sufficiently specific to support a claim under Labor Law §241(6), there are no allegations---nor is there any credible evidence---to conclude that the lumber used by Highbury to make the Ladder was unsound or had any of the enumerated defects listed in 12 NYCRR 23-1.11. There is also no credible evidence on this record that the lumber used to make the makeshift Ladder lacked the proper strength, or that the Ladder was built using nails, much less nails which were not of the proper size, length or number." The court finds that as plaintiff alleges that the lumber used to make the ladder was deficient, and that it would not have broken otherwise, this provision is applicable. However, as there is no expert testimony, and the ladder was not retained, photographed, or inspected by defendants, and instead was inspected by Highbury's employees, whose affidavits contradict the testimony of New Line's employee, there are issues of fact which prevent the court from granting summary judgment to either side with regard to this Industrial Code section.

Next, § 23-1.16 (Safety belts, harnesses, tail lines and lifelines) is relied on by plaintiff's attorney, who argues that it is sufficiently specific to serve as a predicate for a §241(6) claim, and that "in this case plaintiff was wearing his protective device but had nowhere to attach it. Consequently, 23-1.16 is applicable and defendants have violated Labor Law 241(6) as predicated upon §23-1.1" [Doc 33 Page 12]. There is no need to set forth the language of this provision. It is not applicable. Hundreds of workers had to go up and down these ladders each day. A person going up and down between floors need not tie-off to a ladder.

Next, §23-1.21(b)(1) and (b)(3)(i)-(iv) (ladders and ladderways) provide:

> (1) Strength. Every ladder shall be capable of sustaining without breakage, dislodgment or loosening of any component at least four times the maximum load intended to be placed thereon.
>
> (3) Maintenance and replacement. All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist:
> (i) If it has a broken member or part.
> (ii) If it has any insecure joints between members or parts.
> (iii) If it has any wooden rung or step that is worn down to three-quarters or less of its original thickness.
> (iv) If it has any flaw or defect of material that may cause ladder failure.

Plaintiff's counsel's argument, in its entirety, is "Considering that the 3rd rung of the wooden ladder broke as plaintiff descended, section 23- 1.21(b)(3)(i)-(iv) is applicable to this case and establishes defendants' violation of Labor Law §241(6) predicated on this code" [Doc 33 Page 12]. Defendants respond that "Again, because there are clear issues of fact in this case as to whether the 3rd rung on the Ladder broke thereby causing Plaintiff to fall, it is respectfully submitted that Plaintiff's motion for summary judgment against BOP-D and

New Line under Labor Law §241(6) which are predicated upon an alleged violation of this provision of the Industrial Code must also be denied" [Doc 47 Page 14]. The court agrees.

Finally, 12 NYCRR § 23-1.30 (Illumination) states in its entirety:

> "Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass."

As there is no claim that the lighting in this case was inadequate, this section is inapplicable to the facts of this case.

In conclusion, the branch of plaintiff's motion which seeks summary judgment based upon his Labor Law § 241 (6) cause of action is denied. The branch of defendants' motion which seeks to dismiss plaintiff's Labor Law § 241 (6) cause of action is also denied. There are triable issues of fact with regard to the aforementioned sections of the Industrial Code, §§ 23-1.7(f); 23-1.11(a); §23-1.21(b)(1) and (b)(3)(i)-(iv), which the court finds are applicable. Thus, these claims are not dismissed. Whether these regulations were violated must be determined by the jury.

In conclusion, the court finds that there are triable issues of fact as to the merits of plaintiff's Labor Law § 241 (6) cause of action solely as predicated on the alleged violations of Industrial Code §§ 23-1.7(f); 23-1.11(a); §23-1.21(b)(1) and (b)(3)(i)-(iv).

Conclusions of Law

Based on the foregoing and after oral argument on the record, it is

ORDERED that the plaintiff's motion (motion sequence number 2), for summary judgment on his claims under Labor Law § 240 (1) and 241(6), is denied; and it is further

ORDERED that the branch of defendants' cross motion for summary judgment (MS #3) dismissing plaintiff's Labor Law § 241 (6) cause of action is denied to the extent it is predicated on alleged violations of Industrial Code §§ 23-1.7(f); 23-1.11(a); §23-1.21(b)(1) and (b)(3)(i)-(iv), and is otherwise granted; and it is further

ORDERED that the branch of defendants' cross motion for summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence causes of action is granted without opposition, and these claims are dismissed; and it is further

ORDERED that the branch of defendants' cross motion for summary judgment dismissing plaintiff's complaint as against defendants BOP GREENPOINT D HOLDINGS LLC, BROOKFIELD PROPERTIES LLC, BROOKFIELD PROPERTIES ACQUISITION LLC, BROOKFIELD OFFICE PROPERTIES ACQUISITIONS LLC, and BROOKFIELD PROPERTIES INVESTOR LLC is granted, and it is

ORDERED that the caption is amended to read as follows:

----------X
SANDRO CAETANO DOS SANTOS,

Plaintiff, Index No. 503549/2021

-against-

BOP GREENPOINT D LLC, and
NEW LINE STRUCTURES & DEVELOPMENT LLC,

Defendants.
----------X

This constitutes the decision and order of the court.

E N T E R:

Hon. Debra Silber, J.S.C.