

Dempsey v Metropolitan Transp. Auth.

2024 NY Slip Op 32095(U)

June 21, 2024

Supreme Court, New York County

Docket Number: Index No. 150824/2019

Judge: Richard Tsai

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. RICHARD TSAI **PART** **21**

Justice

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LOUIS DEMPSEY and DEBRA DEMPSEY,

Plaintiffs,

INDEX NO. 150824/2019

MOTION DATE 04/18/2024

MOTION SEQ. NO. 002

-v-

METROPOLITAN TRANSPORTATION AUTHORITY, CITY OF NEW YORK, METROPOLITAN TRANSIT AUTHORITY (CAPITAL CONSTRUCTION COMPANY), THE NEW YORK CITY TRANSIT AUTHORITY, and TUTOR PERINI BUILDING CORP.,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 53-66, 68, 72-80, 82, 83, 88, 89, 92, 93

were read on this motion for SUMMARY JUDGMENT.

In this action alleging violations of Labor Law §§ 240 (1), 241 (6), and 200 and alleging common-law negligence, plaintiff Louis Dempsey (plaintiff), a journeyman ironworker, alleges that, while he was working on the East Side Access Project on July 5, 2018, a steel tube weighing between 1,000 to 2,000 pounds that was being hoisted with a chain fall hoist struck him on his head, neck, and right shoulder.

Plaintiff and his wife, plaintiff Debra Dempsey, now move for partial summary judgment as to liability on their Labor Law §§ 240 (1) and 241 (6) claims against defendants Metropolitan Transportation Authority (MTA) and Tutor Perini Building Corp. (Tutor Perini). Defendants oppose the motion.

BACKGROUND

The parties stipulated that, on the day of the accident, MTA was the “owner” of the East Side Access Project at Grand Central Terminal for purposes of Labor Law §§ 240 (1) and 241 (6) (NY St Cts Elec Filing [NYSCEF] Doc No. 92 ¶ 1). MTA retained Tutor Perini to act as the general contractor on the East Side Access Project (*id.* ¶ 2). Tutor Perini, in turn, hired nonparty Seiko Ironworks (Seiko) as a subcontractor (*id.* ¶ 3). Plaintiff was employed as a journeyman ironworker by Seiko (NYSCEF Doc No. 61, verified bill of particulars ¶ 5).

Plaintiff's 50-H Testimony (NYSCEF Doc No. 58)

Plaintiff testified at his 50-h hearing that he worked for Seiko for about a month from June 2018 through July 2018 (NYSCEF Doc No. 58, plaintiff's 50-h hearing tr at 19, lines 13, 16; at 20, lines 18, 21-22). Plaintiff testified that he was a journeyman (*id.* at 21, lines 18, 20).

As a journeyman, he was erecting stairs or substeel for stairs (*id.* at 22, lines 21-22). Plaintiff was working at a site on 49th Street, and was working on the train platforms (*id.* at 23, lines 8, 15). The stairs connected the platform to a sublevel (*id.*, line 25; through 24, line 2). Plaintiff also testified that “[t]hey had some substeel that went up that were called stringers . . . I believe they were going to put concrete slabs for steps on it. And then we had substeel that went around the stringers to enclose the stairwell” (*id.* at 24, lines 14-20). Plaintiff stated that a stringer looks like an elongated Z that was made of steel (*id.* at 26, lines 19-20, 22). The crew consisted of five workers including a foreman (*id.*, lines 2-3). At the time of the accident, the stringers had been put in place using a crane (*id.*, lines 14-16; at 27, line 13). After the substeel had been set, they put the concrete in last (*id.* at 27, lines 22-24). The substeel consisted of two “4-by-4 tubes running 24 feet long” that were “connected by a five-foot 4-by-4 four [sic] tube steel in between” (*id.* at 28, lines 3-7).

According to plaintiff, the workers were hoisting the steel tubes using a manually-operated chain fall (*id.* at 29, lines 8-9; at 30, line 12). He described the chain fall as follows: “it has a pull chain on one side of it and you could go either up or down and then it has a chain with a hook on the end of it which goes up and down as you pull your chain left to right. And it picks up the steel” (*id.* at 29, lines 14-20). He stated that they were “piggybacking them [the two chain falls] because one wasn’t long enough to reach down to the ground, 24 feet. So we had one on the upper one and we just hooked them together” (*id.* at 30, lines 3-8).

Plaintiff’s foreman told the workers that they “had to place some I-beams overhead along with some chain falls and a trolley to pick up the . . . substeel pieces” (*id.* at 36, lines 18-21). Plaintiff stated that he was going to get the substeel from a location halfway down the platform (*id.* at 37, lines 3-4, 7-9). The pieces of substeel varied in size from about 1,000 to 2,000 pounds (*id.*, lines 15-17). He testified that there was an electrical manlift that obstructed the area where they were working (*id.* at 39, lines 7-9). He believed that the manlift had a dead battery, and that it belonged to Tutor Perini (*id.* at 41, lines 9-10, 16).

They attached a choker to the steel to drag the steel tube into place (*id.* at 39, lines 11-13). Once they got the steel into place, they reattached the choker to pick up the piece of steel (*id.*, lines 14-16). As the workers were pulling on the chain fall, they “realized the piece was backwards, so we tried spinning the piece around and we couldn’t because we didn’t have enough room on the platform due to a manlift in the way” (*id.*, lines 17-21). Plaintiff explained that the steel was backwards because the “clips on the steel that married into the stringer” did not align with the stringer (*id.* at 46,

lines 7-8). The crew then landed the steel half in the tracks and half on the platform (*id.* at 40, lines 2-3).

Plaintiff further testified that his accident occurred when they

“reattached the choker so we could pull it up out of the tracks. So we were coming up on the chain fall, I went to get -- I walked in between the piece because it’s shaped like a . . . rectangle, because I couldn’t go around because the manlift was in the way. As I walked to go grab the piece on the other end, the gentleman kept coming up on the chain fall, the piece jumped up in the air about a foot and landed on the back of [his] neck”

(*id.* at 40, lines 11-23). He testified that if the manlift had not been there, the workers could have landed the steel flat on the ground (*id.* at 43, lines 13-14).

Plaintiff’s Deposition Testimony (NYSCEF Doc No. 59)

Plaintiff testified at his deposition that, on the date of the accident, he was working in the West End Cavern Tunnel on the East Side Access Project (NYSCEF Doc No. 59, plaintiff’s deposition tr at 34, lines 23-24; at 35, line 3). Frank Schrecker was his foreman (*id.*, lines 13, 15-16).

On the day of his accident, “We were bringing out a piece of steel that landed in the tracks . . . up on the platform” and “half of it landed in the tracks and half of it landed on top of the platform” (*id.* at 37, lines 19-22, 25; through 38, lines 2-3). The workers were installing a cage for the stairs (*id.* at 38, lines 22-23). Plaintiff stated that the workers had to get the materials halfway down the platform, put it on two carts, and bring it up to where they were working to install it (*id.* at 40, 7-10). He was wearing a hardhat, glasses, vest, gloves, and boots that day (*id.*, lines 13-14, 16). He described the piece of steel as 24 feet long by about five feet wide, and weighed about 2,000 pounds (*id.* at 42, lines 2-3; at 56, line 10). The piece of steel was going to be moved up to the mezzanine level using two chain falls “back to back” (*id.* at 42, lines 14-15, 18).

According to plaintiff, the chain fall was a “chain device mechanism with a hook on it”; he stated that you “Pull one end and it brings the hook up” (*id.*, lines 20-22). He also stated that “There’s a load chain with a hook and then you have a longer chain that’s on a wheel. Pull one side. One side goes up. You pull the other side and the other side goes down. That’s the chain fall. And then the hook goes up – up or down” (*id.* at 44, lines 12-17). He never experienced any problems with the chain falls and had never made any complaints about the chain falls (*id.* at 43, lines 10, 15). At some point, the piece of steel was attached to the chain fall by a choker and hook in two places (*id.* at 45, lines 12, 19).

The workers lifted the piece of steel using the chain fall, and plaintiff was “on one of the tag lines at the bottom of the piece” (*id.* at 46, line 22, 25; through 47, line 2). Plaintiff explained, “We tie a piece of rope to the bottom of the piece, so when we hoist the material we have some control over it” (*id.* at 47, lines 8-10).

Plaintiff further stated that they tried to hoist the piece of steel using the chain fall, but realized that it was backwards, so they had to bring the piece back down (*id.* at 49, lines 6-9). The workers had difficulty bringing the piece of steel down because there was a manlift in the way, “[s]o it ended half onto the tracks and half on the platform” (*id.*, lines 9-13). He testified that the workers were going to “bring it [the piece of steel] back on the platform and re-hook it and make sure it’s the right way before we picked it up again” (*id.* at 53, lines 18-20). Plaintiff testified that, at that time, he was not tied to the steel; the rope was in the tracks (*id.* at 54, lines 5-6, 11).

He testified,

“[t]hey rehooked the steel and they started coming up on the chain. So to try and help out with the gentlemen, the guys, I had to go in between the steel because I couldn’t walk around because the manlift was there. I had to go in between the steel, put my hands on the top end of the steel, and then they started coming up on the chain fall. I was there to position myself to help the steel coming up”

(*id.* at 54, lines 21-25; through 55, lines 2-6). Plaintiff testified that he was on the platform at the time (*id.* at 46, lines 8-10; at 55, lines 7-9). According to plaintiff,

“I had my hands on top of the – on the steel. And all of a sudden out of the corner of my eye I see that it’s hung up on the platform, one of the clips, and it just popped up and jumped about a foot over my head, came down and landed on the back of [his] neck”

(*id.* at 55, lines 24-25; through 56, lines 2-6). Plaintiff stated that the piece of steel

“got caught on a clip [on the edge of the platform]. So everything was up in the air and he just kept pulling the chain fall and there was tension. So when it popped – when the clip finally got uncaught, the thing jumped up about a foot over my head”

(*id.* at 57, lines 5-10). As a result of the impact, plaintiff fell to the ground, causing him to fall forward on his knees and then down on his face (*id.* at 58, line 16; at 62, lines 13-14). Plaintiff testified that the piece of steel was still attached to the chain fall when the accident occurred (*id.* at 60, line 3).

He testified that there were four witnesses to the accident (*id.* at 36, lines 2-3).

The Sworn Witness Statements (NYSCEF Doc No. 63)

Darius Johnson gave a sworn witness statement dated October 26, 2022, in which he stated:

“On July 5, 2018 while working for Glenridge Fabricator at East Side Access Project under Grand Central Terminal, NYC. Working on the mezzanine level above the tracks. The chain falls were lifting a heavy load when I was told by the foreman (Frank Schrecker) to come down to the tracks that Mr. Dempsey got hurt. When I got down to the tracks Mr. Dempsey looked disoriented and was holding the back of the head/neck. The foreman stated that the load hit Mr. Dempsey. Me and the rest of the crew had to secure the load which was dangling in the back down to the floor”

(NYSCEF Doc No. 63 at 1).

Schrecker, plaintiff's foreman, gave a sworn witness statement dated November 7, 2022, stating:

“On July 5, 2018 myself and Lou Dempsey were on the platform on opposite sides of the load that was being lifted by the chain fall. Our job was to control the load as it was being raised so it would not get caught up or hung up on anything. Mr. Dempsey decided to let go of his side and walked towards me keeping his back towards the load. As the load was coming up Mr. Dempsey apparently was hit somewhere on his back (I actually did not see the load striking him). I saw him fall to the ground. A radio call was made to safety. The safety director (Darrell) came down to the platform then all three of us (me Darrell & Lou) walked up the stairs to Med Corp (which was unmanned). Lou Dempsey decided to see his own doctor and left work. Note Mr. Dempsey was wearing a hard hat, safety glasses & gloves”

(NYSCEF Doc No. 63 at 2).

Jason Brady stated in a sworn witness statement November 1, 2022 as follows:

“On July 5, 2018 under employment of Glenridge Fabricators at the East Side Access Jobsite under grand Central Station. While lifting a heavy load into position it spun and when I turned around Dempsey was on the ground”

(NYSCEF Doc No. 63 at 3).

Alrick Grant stated in a sworn statement dated October 25, 2022 as follows:

“On July 5, 2018, while employed by Glenridge Fabricators, working on East Side Access (under Grand Central Terminal) while operating the chain fall

(lifting a heavy load of steel tubes) Mr. Dempsey walked under the load (Mr. Dempsey was on the tracks below the platform). At the time the load partially dropped down on one end from shifting and struck Mr. Dempsey around the head/shoulder area”

(NYSCEF Doc No. 63 at 4).

The Accident Report (NYSCEF Doc No. 64)

An injury report form dated July 6, 2018 indicates that:

“On 7/5/18 on the Lower Level of the West Cave[r]n SBOH at approximately 1:15 PM Al Grant was lifting a load of tube steel from the ground using a chain pull. Apparently, some part of the load became snagged on something. Al continued lifting the load obviously creating tension and when the load finally pulled free it jerked and struck Louis (who was walking by) in the back of the neck. Louis was taken to Medcor and drug tested. When I offered to a local urgent care he refused saying he wanted to see his own doctor”

(NYSCEF Doc No. 64 at 1).

Ashraf Mittias’s Deposition Testimony (NYSCEF Doc No. 60)

Ashraf Mittias testified that he was the lead inspector employed by nonparty AECOM on the East Side Access Project (NYSCEF Doc No. 60, Mittias tr at 15, lines 11, 15-16). Mittias testified that Tutor Perini was the general contractor on the East Side Access Project (*id.* at 18, line 25). He further testified that MTA was the owner of the project (*id.* at 23, line 25). Mittias did not witness the accident, and never saw an accident report regarding plaintiff’s accident (*id.* at 27, line 5; at 28, line 4).

PROCEDURAL HISTORY

Plaintiffs commenced this action on January 25, 2019, seeking recovery for violations of Labor Law §§ 200, 240 (1), and 241 (6) and for common-law negligence (NYSCEF Doc No. 1, verified complaint ¶ 21). Plaintiff Debra Dempsey asserts a derivative cause of action for loss of consortium (*id.*, ¶ 27). In their verified complaint and bill of particulars, plaintiffs allege violations of 12 NYCRR subpart 23-6 and 12 NYCRR subpart 23-8, among other things (NYSCEF Doc No. 56, verified complaint ¶ 21; NYSCEF Doc No. 61, verified bill of particulars ¶ 12).

DISCUSSION

“On a motion for summary judgment, the moving party 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” (*Trustees of Columbia Univ. in*

the City of N.Y. v D'Agostino Supermarkets, Inc., 36 NY3d 69, 73-74 [2020] [internal quotation marks and citation omitted]; see also CPLR 3212 [b]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the moving party meets its burden, the burden shifts to the non-moving party “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]). “On a motion for summary judgment, facts must be viewed ‘in the light most favorable to the non-moving party’” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to raise an issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Plaintiffs move for partial summary judgment in their favor as to liability under Labor Law § 240 (1) and Labor Law § 241 (6) against MTA and Tutor Perini.

A. Labor Law § 240 (1)

Labor Law § 240 (1), commonly known as the Scaffold Law, provides as follows:

“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) “imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks” (*Saint v Syracuse Supply Co.*, 25 NY3d 117, 124 [2015]). “Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder 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*” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). To recover under the statute, the plaintiff must demonstrate a violation of the statute, and that such violation was a proximate cause of the injuries sustained (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003] [“liability is contingent on a statutory violation and proximate cause”]). However, “[w]here a plaintiff’s actions [are] the sole proximate cause of his injuries, . . . liability under Labor Law § 240 (1) [does] not attach” (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [internal quotation marks and citation omitted]).

The legislative intent behind the statute is to place ultimate responsibility for safety practices on owners and general contractors, rather on workers, who “are scarcely in a position to protect themselves from accident” (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citation omitted]). Thus, the comparative negligence of the injured worker is not a defense to liability (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]).

In determining whether a plaintiff is entitled to the extraordinary protections of Labor Law § 240 (1), “the single decisive question is whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential” (*Runner*, 13 NY3d at 603). To determine whether a height differential is physically significant, the court must consider “the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent” (*id.* at 605; *see also Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 10 [2011]).

“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 the statute ‘and the failure to use, or the inadequacy of a safety device of the kind enumerated therein’” (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662 [2014] [internal quotation marks and citation omitted]). “Essentially, the plaintiff must demonstrate that at the time the object fell, it was being hoisted or secured or required securing for the purposes of the undertaking” (*id.* [internal quotation marks and citations omitted]). In addition, “[a] plaintiff must show that the object fell . . . *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute” (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001] [emphasis in original]).

Plaintiffs argue that the steel tube, which weighed between 1,000 to 2,000 pounds, was improperly hoisted and inadequately secured during the hoisting operation, in violation of Labor Law § 240 (1), which therefore caused one end of the steel tube to strike plaintiff on the head, neck, and shoulder. Plaintiffs contend that there are no issues of fact as to whether plaintiff was a recalcitrant worker or the sole proximate cause of his accident.

In opposition, defendants argue that plaintiffs have failed to meet their prima facie burden. Defendants argue that plaintiff’s accident did not occur as the result of a statutory violation. Defendants maintain that plaintiff cannot show that any enumerated safety device failed, and that such failure caused his injury. According to defendants, “the chain fall being used at the time of the accident was a proper device to use to hoist the platform” (NYSCEF Doc No. 77 at 5). Rather, by plaintiff’s admission, the accident occurred because one of the clips got stuck on the platform.

Furthermore, defendants contend that plaintiff was the sole proximate cause of his injuries. Defendants argue that plaintiff made the decision to stand in an unsafe location in between the steel while it was being hoisted with the chain fall, and that

plaintiff was never instructed by his foreman to stand there. Additionally, plaintiff abandoned the tag line that was being used in the hoisting operation. Finally, defendants contend that safety devices would not have prevented his accident because plaintiff was standing in an unsafe location.

As a preliminary matter, the court notes that the parties agreed that MTA was the owner of the East Side Access Project for purposes of Labor Law §§ 240 (1) and 241 (6), and that it hired Tutor Perini as the general contractor for the project (NYSCEF Doc No. 92 ¶¶ 1, 2). Accordingly, the court holds that plaintiffs have met their prima facie burden that MTA is an owner for purposes of the Labor Law (see *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984] [an “owner” encompasses “a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit”]).

Additionally, there is no dispute that Tutor Perini was the general contractor on the East Side Access Project. “A general contractor will be held liable under [Labor Law §§ 240 (1) and 241 (6)] if it was responsible for coordinating and supervising the entire construction project and was invested with a concomitant power to enforce safety standards and to hire responsible contractors” (*Kulaszewski v Clinton Disposal Servs.*, 272 AD2d 855, 856 [4th Dept 2000]). It is well established that an entity’s “right to exercise control over the work denotes its status as a contractor, regardless of whether it actually exercised that right” (*Milanese v Kellerman*, 41 AD3d 1058, 1061 [3d Dept 2007]). Mittias testified that Tutor Perini was the general contractor on the site (NYSCEF Doc No. 60, Mittias tr at 18, line 25), and the parties stipulated that MTA hired Tutor Perini as the general contractor (NYSCEF Doc No. 92 ¶ 2). Thus, plaintiffs have established that Tutor Perini is a responsible party under Labor Law §§ 240 (1) and 241 (6).

Here, plaintiffs have established prima facie entitlement to summary judgment under section 240 (1).

First, plaintiff was exposed to an elevation-related hazard within the meaning of the statute. The harm to plaintiff “was the direct consequence of the application of the force of gravity to the [steel tube]” (*Runner*, 13 NY3d at 604), i.e., that “the risk to be guarded against [arose] from the unchecked or insufficiently checked descent of the object” (*Torres-Quito LLC v 1711 LLC*, —AD3d—, 2024 NY Slip Op 01279, *2 [1st Dept 2024] [internal quotation marks and citation omitted]). Plaintiff testified that the steel tube weighed about 1,000 to 2,000 pounds, one of the clips got “hung up on the platform,” “jumped about a foot over [his] head,” and “came down and landed on the back of [his] neck” (NYSCEF Doc No. 58, plaintiff’s 50-h hearing tr at 37, lines 16-17; at 40, lines 19-23; NYSCEF Doc No. 59, plaintiff’s deposition tr at 56, lines 2-6, 10). Given the weight of the steel and the force it was capable of generating over its descent, the elevation differential of about one foot cannot be viewed as de minimis (see *Runner*, 13 NY3d at 603).

Second, plaintiff's deposition testimony established that one end of the steel tube, which was being hoisted, fell onto the plaintiff (NYSCEF Doc No. 59, plaintiff's deposition tr at 47, lines 8-10; at 54, lines 5-6, 8, 11; at 56, lines 2-6). The steel tube was inadequately secured, in that no device was used to prevent that end of the steel tube from falling onto the plaintiff (*see Naughton v City of New York*, 94 AD3d 1, 8 [1st Dept 2012]).

Thus, plaintiffs have demonstrated a violation of the statute that served as a proximate cause of plaintiff's injuries (*see Hayek v Metropolitan Transp. Auth.*, 195 AD3d 568, 568 [1st Dept 2021] [plaintiff was entitled to summary judgment under section 240 (1) "where the undisputed evidence showed that he was injured when he was struck by an improperly hoisted or inadequately secured load of L-shaped steel rebar weighing between 2000 and 3000 pounds"]; *Mayorga v 75 Plaza LLC*, 191 AD3d 606, 607 [1st Dept 2021], *appeal denied* 37 NY3d 962 [2021] ["plaintiff was entitled to summary judgment because the rope proved inadequate to prevent the damper from falling"]; *Gallegos v Bridge Land Vestry, LLC*, 188 AD3d 566, 567 [1st Dept 2020] [worker was entitled to summary judgment under 240 where a stone slab weighing more than half a ton that was being raised by a chain hoist or remote-controlled crane came loose from the sling or straps and struck his leg]).

Defendants failed to raise an issue of fact warranting denial of plaintiffs' motion. Although defendants argue that the chain fall was a proper device to hoist the steel tube, they have not presented any evidence that raises an issue of fact as to whether the steel tube was adequately secured to prevent it from falling onto plaintiff. It is irrelevant whether the steel was still attached to the chain fall after the accident. Plaintiff's testimony that he had no previous problems with the chain fall is also irrelevant, as a violation of Labor Law § 240 (1) does not require proof that defendants had prior notice of a defect in a safety device.

As defendants point out, plaintiff testified that he was on the platform (plaintiff's deposition tr at 46, lines 8-10; at 55, lines 7-9), whereas Grant wrote in a witness statement, "Mr. Dempsey was on the tracks below the platform" (NYSCEF Doc No. 63). However, any inconsistencies between plaintiff's own testimony and the witness statements as to where plaintiff was standing do not raise material issues of fact warranting denial of summary judgment, as these statements do not contradict that plaintiff was struck by the steel teel being hoisted (*see Bartley v 76 Eleventh Ave. Prop. Owner LLC*, 226 AD3d 528, 529 [1st Dept 2024]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002] ["possible discrepancies in Mr. Orellano's description of how or why he fell off the ladder are irrelevant since there is no dispute that his injuries were caused by his fall"]).

Further, defendants did not raise any issue of fact as to whether plaintiff was the sole proximate cause of his accident. Because plaintiffs have demonstrated a violation of the statute, plaintiff cannot be solely responsible for his injury under the statute (*see Blake*, 1 NY3d at 290 ["if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it"]; *Cazho v Urban Bldrs. Group, Inc.*, 205 AD3d

411, 412 [1st Dept 2022]). Thus, “even if . . . plaintiff was in an area of the worksite where he was not supposed to be at the time of his accident, this would at most constitute comparative negligence, which is not a defense to a Labor Law § 240 (1) claim” (*Hewitt v NY 70th St. LLC*, 187 AD3d 574, 575 [1st Dept 2020] see *Mayorquin v Carriage House Owner’s Corp.*, 202 AD3d 541, 542 [1st Dept 2022]).

Meade v Rock-McGraw, Inc. (307 AD2d 156 [1st Dept 2003]) and *Miro v Plaza Construction Corporation* (38 AD3d 454 [1st Dept 2007], *mod* 9 NY3d 948 [2007]), which defendants cite, are distinguishable, as those cases did not involve an issue as to where the plaintiff was positioned.

Meade involved the alleged improper use of a safety device. There, the Appellate Division, First Department held that there were issues of fact as to whether the plaintiff was the sole proximate cause of his injuries where he placed a ladder against a wall in a closed position, an improper use of the ladder (*Meade*, 307 AD2d at 160). *Miro* presented the issue of whether an adequate safety device was available to the plaintiff could be determined as a matter of law. In *Miro*, the plaintiff was injured while climbing down a ladder that was covered in fireproofing material (*Miro*, 38 AD3d at 454). While the Appellate Division, First Department ruled that the plaintiff had knowingly used a defective ladder, the Court of Appeals ruled, “[a]ssuming that the ladder was unsafe, it is not clear from the record how easily a replacement ladder could have been procured” (*Miro*, 9 NY3d at 949).

Evidence that a plaintiff who chooses to use a safety device that the plaintiff knows to be defective, when the plaintiff is aware that other non-defective safety devices are readily available, presents the issue of whether the plaintiff’s own actions are the sole proximate cause of the accident (see *Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167 [2020]; *Cahill v Triborough Bridge and Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 292 [2003]).

However, in this case, the plaintiff’s decision to position himself does not equate to the deliberate use of a known, defective safety device. It is not enough for defendants to show that plaintiff chose to position himself near the steel tube instead of using the tag line. Plaintiff testified, “I had to go in between the steel because I couldn’t walk around because the manlift was there” (Plaintiff’s deposition tr at 54, lines 23-25). Plaintiff testified that his foreman had spoken to Tutor Perini about moving the manlift before the accident (*id.* at 50, lines 4-10). Defendants did not submit evidence that the choice not to use the tag line was “for no good reason,” or that plaintiff would not have been injured had he not made the choice to let go of the tag line (see *Biaca-Neto*, 34 NY3d at 1167).

In light of the above, plaintiffs are entitled to partial summary judgment in their favor as to liability under Labor Law § 240 (1) against MTA and Tutor Perini.

B. Labor Law § 241 (6)

Labor Law § 241 (6) requires owners, contractors, and their agents to “provide reasonable and adequate protection and safety” for workers performing the inherently dangerous activities of construction, excavation and demolition work. “Since an owner or general contractor’s vicarious liability under section 241 (6) is not dependent on its personal capacity to prevent or cure a dangerous condition, the absence of actual or constructive notice sufficient to prevent or cure [is] irrelevant to the imposition of Labor Law § 241 (6) liability” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]).

To establish liability under Labor Law § 241 (6), a plaintiff must plead and prove the violation of a concrete specification of the New York State Industrial Code, containing a “specific standard of conduct,” rather than a provision reiterating common-law safety standards (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]; *Ross*, 81 NY2d at 505). The plaintiff must also show that the Industrial Code violation “caused the complained-of injury” (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012]).

Here, plaintiffs allege violations of 12 NYCRR 23-6.1 (d) and (h), 12 NYCRR 23-6.2 (d) (1), 12 NYCRR 23-8.1 (f) (1) (iv), 12 NYCRR 23-8.1 (f) (2) (ii), and 12 NYCRR 23-8.1 (f) (6).

12 NYCRR 23-6.1 (d) & 12 NYCRR 23-6.1 (h)

Subpart 23-6 of the Industrial Code governs “all material hoisting equipment except cranes, derricks, aerial baskets, excavating machines, used for material hoisting and fork lift trucks” (12 NYCRR 23-6.1 [a]). Section 23-6.1 (d) is sufficiently specific to support liability under Labor Law § 241 (6) (*see Kretowski v Braender Condominium*, 57 AD3d 950, 952 [2d Dept 2008]; *Rissel v Nornew Energy Supply*, 281 AD2d 880, 881 [4th Dept 2001]). Contrary to defendants’ argument, section 23-6.1 (h) is also sufficiently specific, under appellate precedent that is binding upon this court (*Naughton*, 94 AD3d at 9), which is split from the other judicial departments (*see Morrison v City of New York*, 5 AD3d 642, 643 [2d Dept 2004]; *Smith v Homart Dev. Co.*, 237 AD2d 77, 80 [3d Dept 1997]).

As a threshold matter, the court rejects defendants’ argument that Subpart 23-6 does not apply to manual hoisting equipment. Defendants’ expert engineer, Shawn Rothstein, P.E., concludes that “the regulations appear to be intended for power-operated equipment,” whereas the chain fall was manually powered (NYSCEF Doc No. 79, Rothstein affirmation ¶ 11).

“The interpretation of [an Industrial Code] regulation presents a question of law” (*Morris v Pavarini Constr.*, 9 NY3d 47, 51 [2007]). Here, 12 NYCRR 23-6.1 (a) states that Subpart 23-6 governs “all material hoisting equipment,” with exceptions that do not apply here. Meanwhile, Subpart 23-9, which applies “to power-operated heavy equipment or machinery used in construction, demolition and excavation operations,”

clearly and unambiguously states that Subpart 23-9 “shall not apply to material or personnel hoists (see Subpart 23-6) nor to cranes and derricks (see Subpart 23-8)” (12 NYCRR 23-9.1; see also *Misicki v Caradonna*, 12 NY3d 511, 516 [2009]). By implication, the equipment governed by Subpart 23-6 is therefore either not power-operated or not heavy equipment.

Turning to the merits, Section 23-6.1 (d) provides as follows:

“(d) Loading. Material hoisting equipment shall not be loaded in excess of the live load for which it was designed as specified by the manufacturer. Where there is any hazard to persons, all loads shall be properly trimmed to prevent dislodgment of any portions of such loads during transit. Suspended loads shall be securely slung and properly balanced *before they are set in motion*”

(12 NYCRR 23-6.1 [d] [emphasis supplied]).

Plaintiffs assert that the steel tube was not properly balanced when it was hoisted by the chain fall, based on plaintiff’s testimony that, before the steel tube was hoisted, half of the steel tube was positioned on the tracks, and the other half was on the platform (see plaintiffs’ memo of law at 19-20).

In opposition, Rothstein opines that this provision does not apply because there is no evidence that the hoist was overloaded, that the steel was dislodged from its attachment to the chain fall, or that it was improperly balanced before it was lifted (NYSCEF Doc No. 79, Rothstein affirmation ¶¶ 12). Rothstein notes that the load remained attached to the chain fall after the accident, and concludes that the only problem was that a clip in the steel assembly became caught on the platform edge as it was lifted (*id.*).

Plaintiffs failed to establish prima facie entitlement to summary judgment based on a violation of section 23-6.1 (d). Plaintiffs did not establish that the steel tube was improperly balanced at the moment when it was lifted (see *Martinez v 342 Prop. LLC*, 128 AD3d 408, 409 [1st Dept 2015] [section 23-6.1 (d) did not apply where “there was no evidence that plaintiff’s accident was caused by . . . an overloaded or improperly balanced load being moved by material hoisting equipment”).

Plaintiff had testified that the steel tube was entirely on the platform before the accident took place (see *id.* at 42, lines 7-10). Plaintiff’s testimony that one end of the steel tube was resting on the tracks and the other was resting upon the platform establishes only that the steel tube was not level at that point in time (see plaintiff’s deposition tr at 37, line 25; at 38, lines 2-3). However, the court cannot conclude that any load that is not level when hoisted would be unbalanced as a matter of law.

Therefore, summary judgment in plaintiffs’ favor based on a violation of section 23-6.1 (d) is denied.

Section 23-6.1 (h), entitled “Tag lines,” states that “Loads which have a tendency to swing or turn freely during hoisting shall be controlled by tag lines” (12 NYCRR 23-6.1 [h]). Plaintiffs contend that the steel tube was not controlled with tag lines when it was hoisted by the chain fall.

In opposition, defendants argue that this provision was not violated because plaintiff let go of the tag line that was being used. Thus, according to defendants, they cannot be held responsible for any violation of section 23-6.1 (h), where a tag line was present but plaintiff decided not to use it.

It can be reasonably inferred from plaintiff’s deposition testimony that there was more than one tag line used to hoist the steel tube, for he stated, “I was on one of the tag lines at the bottom of the piece” (Plaintiff’s deposition tr at 46, line 25; at 47, line 2). And it is undisputed that plaintiff was not holding his own tag line at the time the steel tube struck plaintiff, for plaintiff testified that he had let go of the rope, “the rope was in the tracks” and that he was not tied to it (*id.* at 54, lines 8, 11).

However, although not raised by defendants, the court cannot determine, as a matter of law, that the steel tube was not controlled by any tag lines at all to establish a violation of 23-6.1 (h), based on the evidence that plaintiff’s own tag line was not used.

Assuming, for the sake of argument, no tag lines controlled the steel tube, then an issue of fact arises as to whether a violation of 23-6.1 (h) was a proximate cause of plaintiff’s injuries.

23-6.1 (h) requires tag lines for loads that tend to swing or sway. As discussed above, a clip became caught on the platform edge while the steel tube was being hoisted. Plaintiffs submitted no evidence to indicate that the clip became caught because the steel tube had been swinging or turning, or that, had someone been holding onto the tag line which plaintiff had let go, the end of the steel tube would not have rebounded upwards the moment that the clip became free.

Assuming, for the sake of argument that a violation of 23-6.1 (h) was a proximate cause of plaintiff’s injuries, summary judgment should nevertheless be denied as to this violation.

“[A] violation of section 241(6) “is ‘merely some evidence which the jury may consider on the question of defendant’s negligence” (*Rizzuto*, 91 NY2d 343, 349 [1998]). “[I]t is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiff’s injury” (*id.* at 350). That being said, the Appellate Division, First Department has consistently upheld summary judgment as to liability in the plaintiff’s favor as to Labor Law § 241 (6) based on proof of the violation alone (see *e.g. Favaloro v Port Authority of N.Y. & N.J.*, 191 AD3d 524 [1st

Dept 2021]; *Stigall v State of N.Y.*, 189 AD3d 469 [1st Dept 2020]; *Anderson v MSG Holdings, L.P.*, 146 AD3d 401 [1st Dept 2017]).¹

To the extent that a violation of 23-6.1 (h) is based on the fact that plaintiff was not holding onto a tag line, this raises an issue of fact as to whether plaintiff's own conduct was the sole proximate cause of the violation. On the record presented, viewing the facts in the light most favorable to the non-movants, the fact that plaintiff let go of his tag line would be not an issue of plaintiff's comparative fault,² as there was no evidence that "some actor in the construction chain was negligent" (*Leonard v City of New York*, 216 AD3d 51, 56 [1st Dept 2023]) other than plaintiff—that someone else ought to have been holding onto the tag line which plaintiff had let go.

Therefore, summary judgment in plaintiffs' favor based on a violation of section 23-6.1 (h) is denied.

12 NYCRR 23-6.2 (d) (1)

Section 23-6.2 contains regulations for the use of chains in material hoists, and provides that "[c]hains shall not be used as slings in hoisting operations except for the raising or lowering of wooden piles, large timbers, large pieces of masonry or large stones" (12 NYCRR 23-6.2 [d] [1]). Section 23-6.2 (d) is sufficiently concrete to support a Labor Law § 241 (6) cause of action (*Puckett v County of Erie*, 262 AD2d 964, 966 [4th Dept 1999]).

Plaintiffs argue that section 23-6.2 (d) (1) was undisputedly violated because a chain was used as a sling in the hoisting of the steel tube.

Defendants counter that there is no evidence that the chain fall failed, malfunctioned or was defective. They further argue that, even if the chain were used as a sling, a violation of 23-6.2 (d) (1) was not a proximate cause of plaintiff's injuries, as the load remained attached to the chain after the accident. Rothstein asserts that photographs show that a wire rope, not a chain, was used to attach the hook to the end of the chain fall (NYSCEF Doc No. 79, Rothstein affirmation ¶ 15).

¹ Perhaps, it would be more accurate to say that the Industrial Code violations were established as a matter of law, rather than the "negligence of some party to, or participant in, the construction project" was established as a matter of law, based solely on the proof of the violations alone.

² Plaintiffs' counsel states, "comparative negligence is not a defense" to a violation of Labor Law § 241 (6) (plaintiffs' memo of law at 23). That is not an accurate statement of the law. "Contributory and comparative negligence are valid defenses to a section 241(6) claim" (*Misicki*, 12 at 515; *Rizzuto*, 91 NY2d at 350). Rather, as plaintiffs' counsel indicates, "Negligence on plaintiff's part may require an apportionment of liability but does not absolve defendants of their own liability under section 241 (6)" (*Maza v University Ave. Dev. Corp.*, 13 AD3d 65, 66 [1st Dept 2004]). Thus, comparative negligence would not bar granting a plaintiff's motion for partial summary judgment in their favor as to liability.

The court cannot determine whether 12 NYCRR 23-6.2 (d) (1) is applicable, because it is unclear from the record that the chains were being used *as a sling* to hoist the steel tube. The plain, ordinary meaning of a “sling” is “a usually looped line (as of strap, chain, or rope) used to hoist, lower, or carry something” (<https://www.merriam-webster.com/dictionary/sling> [last visited June 17, 2024]). Plaintiff did not submit an expert affidavit that the chain fall was used as a sling, and it is not clear from plaintiff’s testimony that the chain fall itself (or other chains) was looped around the steel tube.

Plaintiff gave the following description of chain falls: “There’s a load chain with a hook and then you have a longer chain that’s on a wheel. Pull one side. One side goes up. That’s the chain fall. And then the hook goes up – up or down” (NYSCEF Doc No. 59, plaintiff’s deposition tr at 44, lines 12-17). He testified that the steel tube was attached to the chain fall by a choker and hook in two places (*id.* at 45, lines 12, 19; NYSCEF Doc No. 58, plaintiff’s 50-h hearing tr at 39, lines at 11-16; at 40, lines 11-13). When shown photographs depicting a steel tube at his deposition, plaintiff testified that the photographs depicted a type of choker and a tube, but was not sure if they represented the exact choker that they used (NYSCEF Doc No. 59, plaintiff’s deposition tr at 79, lines 24-25; at 80, lines 5-6, 12; NYSCEF Doc No. 80 at 10). It is unclear from his testimony whether the choker was made of a chain.

Accordingly, summary judgment in plaintiffs’ favor based on a violation of 23-6.2 (d) (1) is denied, regardless of the sufficiency of defendants’ opposition (*see Winegrad*, 64 NY2d at 853).

12 NYCRR 23-8.1 (f) (1) (iv), 12 NYCRR 23-8.1 (f) (2) (ii), and 12 NYCRR 23-8.1 (f) (6)

Plaintiffs are not entitled to summary judgment based on violations of subdivisions of section 23-8.1, which are inapplicable. Subpart 23-8.1 governs mobile cranes, tower cranes, and derricks used in construction, excavation or demolition operations (*see* 12 NYCRR 23-8.1). As defendants’ expert engineer pointed out, “[t]he subject chain fall was a small manually operated lifting device and is distinguishable from cranes and derricks in many ways, including that it has no mast or tower” (NYSCEF Doc No. 79, Rothstein affirmation ¶ 16).

Plaintiffs Did Not Abandon the Remaining Industrial Code Provisions and Statutes Cited in their Bill of Particulars

Finally, contrary to defendants’ contention, plaintiffs did not abandon all other Industrial Code provisions and statutes cited in their bill of particulars which were not raised in plaintiffs’ motion for summary judgment in their favor. Abandonment does not occur “where the plaintiff is the moving party” (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]).

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that plaintiffs' motion for partial summary judgment against defendants Metropolitan Transportation Authority and Tutor Perini Building Corp. (Seq. No. 002) is **GRANTED IN PART TO THE EXTENT** that plaintiffs are granted summary judgment in their favor as to liability against defendants Metropolitan Transportation Authority and Tutor Perini Building Corp., on so much of the first cause of action that alleges a violation of Labor Law § 240 (1), and the remainder of plaintiffs' motion is otherwise denied.



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6/21/2024
DATE

RICHARD TSAI, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE