

**Josan v City of New York**

2024 NY Slip Op 32700(U)

August 2, 2024

Supreme Court, Kings County

Docket Number: Index No. 507488/2020

Judge: Kerry J. Ward

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Supreme Court of the State of New York  
County of Kings

Index Number 507488/2020  
Seqs. 004, 005

Part 9

**DECISION/ORDER**

BAJ JOSAN AND NARINDER KAUR,  
Plaintiffs,

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion.

against

**NYSCEF Docs. Numbered**

CITY OF NEW YORK, NEW YORK CITY  
SCHOOL CONSTRUCTION AUTHORITY and  
NYC DEPARTMENT OF EDUCATION,

Notice of Motion and Affidavits Annexed . . . . .	<u>59-60, 79, 82-83</u>
Order to Show Cause and Affidavits Annexed . . . . .	<u>83, 119</u>
Answering Affidavits . . . . .	<u>Var.</u>
Replying Affidavits . . . . .	<u>Var.</u>
Exhibits . . . . .	<u>Var.</u>
Other . . . . .	<u>Var.</u>

Defendants.

Plaintiff Baj Josan’s (hereinafter “Plaintiff”) lawsuit alleges causes of action for common law negligence as well as violations of Labor Law §§ 200, 240(1), and 241(6). In support of his Labor Law § 241(6) claim, Plaintiff alleges that Movants violated Industrial Code §§23-1.5 and 23-9.2(a), (c), and (h). Defendants move for i) summary judgment, dismissing Plaintiffs’ Complaint, with prejudice, as to their Labor Law §200 claim and common law negligence claim, ii) summary judgment dismissing Plaintiffs’ Complaint, with prejudice, as to their Labor Law §240 claim, and iii) summary judgment dismissing Plaintiffs’ Complaint, with prejudice, as to their Labor Law §241(6) (Mot. Seq. 4). Plaintiff cross-moves for i) summary judgment under Labor Law § 240(1), and ii) summary judgment under Labor Law §241(6) against Defendants City of New York, New York City School Construction Authority, and NYC Department of Education (hereinafter, “Defendants”).

**Statement of Facts**

The instant action arises out of an accident that purportedly occurred on January 9, 2020, whereon Plaintiff alleges that he was injured while working at a project site located at 4004 4th Avenue, Brooklyn, New York, known as I.S.136/Charles O. Dewey Middle School (hereinafter, “Job Site”). Specifically, Plaintiff alleges that while working at the Job Site as an employee of non-party, J&N Construction Group Corp. (hereinafter, “J&N”), he sustained injuries to his

pelvis, lumbar spine, cervical spine, and right knee, when a forklift he was personally operating tipped over onto its side.

Plaintiff began working for J&N at the Job Site on or about December 19, 2019. The subject forklift was brand new, having arrived at the Job Site only one week prior to Plaintiff having begun working there. Since he began working for J&N at the Job Site, Plaintiff operated the forklift approximately five days per week, until the date of the accident, January 9<sup>th</sup>, 2020 (Josan EBT at 50, 71-73).

Plaintiff began working at around 3:30 PM on the date of the accident, with the accident having occurred at around 7:30 PM. On that day, his supervisor, Mr. Lakhwinder Pal, J&N's Site Superintendent, instructed him to use the forklift to unload scaffolding from a delivery truck at the Job Site and bring it to the workers located in the yard (Josan EBT at 66). Using the forklift, he unloaded and carried scaffolding materials from the truck to the yard, three times, without incident. The accident happened on the fourth load (Josan EBT at 70).

After Plaintiff had unloaded and carried the first three bundles of scaffolding to the yard, using the forklift, the truck driver secured the fourth bundle to the forklift. The driver then moved his hands up and down and told Plaintiff that the load was secure and that he could lift it. Plaintiff testified that the load was level, and that he personally checked the forklift on the date of the accident, and it was in good condition and "looked fine." In addition to Plaintiff and the driver, there were three flagmen present in the area at the time. These flagmen also indicated with their hands for Plaintiff to lower the forklift, once the load been secured (Josan EBT at 86-90).

Plaintiff testified that once the scaffolding was secured, he lifted the forklift, then turned it to the right (Josan EBT at 92). When the forklift started to tilt to the right, he then jumped over to the left side of the forklift. He then removed his seatbelt and was about to jump out of the forklift, when his right foot slipped. He did not slip on a wet surface. He then fell to the ground, approximately 2 to 2.5 feet from the forklift and 4 to 5 feet down from where he had been seated, onto his right side. No part of his body struck any part of the forklift before or while he fell. The forklift tilted completely over onto its right side (Josan EBT at 100-102).

### Labor Law §200

Labor Law § 200 is “a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work” (*see Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). To prove a violation of Labor Law § 200, a plaintiff must show that the defendant owner and/or contractor exercised supervision or control over the work performed by the contractor’s employees, or that it had actual or constructive notice of the unsafe condition causing the accident. (N.Y. Lab. Law § 200 [McKinney]). Additionally, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work. Although property owners often have a general authority to oversee the progress of the work, mere general supervisory authority at a worksite for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200. “A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed” (*see Ortega v. Puccia*, 57 A.D.3d 54, 62, 866 N.Y.S.2d 323, 330 [2008]).

Plaintiff was employed by J&N on the date of the subject accident. He was responsible for forklift operation while working for J&N at the Job Site (Josan Virtual Video Examination at 26). His only supervisor at the Job Site was Mr. Lakhwinder Pal, J&N’s Site Superintendent. Mr. Pal would provide Plaintiff with his assignments on a daily basis and instructed Plaintiff on how to operate the subject forklift at the Job Site (Josan Virtual Video Examination at 31-34). Plaintiff testified that he did not know what role NYC School Construction Authority (hereinafter “NYCSCA”), the City of New York (hereinafter “the City”), the Board of Education (hereinafter “BOE”), or the Department of Education (hereinafter “DOE”) had with respect to the project (Josan, Virtual Video Examination at 121-122). Mr. Rajib Imteaz, NYCSCA Safety Inspector, testified that he would visit the Job Site at least once per week to check the public protections, the workers’ activities, and whether the workers were following safety guidelines and working in a safe manner (NYCSCA EBT at 8-9). Mr. Imteaz testified that his job was not to advise as to the means and methods of the work performed by J&N’s workers. Moreover, he at no time advised Mr. Pal regarding use of the forklift at the Job Site, and at no time held any safety meetings

regarding transfer of materials using a forklift prior to Plaintiff's accident (NYCSCA EBT at 24). With respect to the City and BOE, in his affidavit, Christopher Dickerson, Senior Insurance Claims Specialist of the City of New York Law Department stated that neither the City nor BOE directed, supervised, or controlled the means or methods of Plaintiff's work, of J&N's work, or of the work of any J&N employee at the Job Site, either on or prior to the date of the subject accident (Dickerson Affidavit at 3). He further stated that neither the City, nor BOE performed any construction, employed any laborers to perform any construction, or provided, fabricated, inspected, or maintained any tools, equipment, devices, or materials to Plaintiff or any J&N employee at the Job Site, either on or prior to the date of the subject accident (Dickerson Affidavit at 3-4). The record before the Court suggests that Defendants did not supervise nor control the means and methods of Plaintiff's work at the Job Site before or at the time of his accident while operating the subject forklift.

Plaintiffs' Bill of Particulars states that Defendants "permitted and allowed a dangerous, hazardous and defective condition to exist..." However, with respect to Plaintiff's accident, the record before the Court fails to provide a particularized allegation of a purported defect in the subject forklift, or a dangerous condition at the Job Site. Therefore, Defendants could not have had and did not have actual or constructive notice of any such defective or dangerous condition at the Job Site. Therefore, Plaintiff has failed to meet the requirements to prove a violation of Labor Law § 200.

Based on the record before the Court, it is not apparent that Defendants NYCSCA, the City, BOE, or DOE exercised supervision or control over the work performed by the Plaintiff, or that they had actual or constructive notice of the unsafe condition that caused Plaintiff's accident. Plaintiff alleges that his accident arose out of alleged defects or dangers in methods or materials of the work, but he cannot recover under Labor Law § 200 because he failed to show that Defendants had the authority to supervise or control the performance of his work. As previously stated, although property owners often have a general authority to oversee the progress of the work, mere general supervisory authority at a worksite for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200.

Thus, Defendants' motion for summary judgment to dismiss Plaintiffs' Complaint as to their Labor Law § 200 claim is granted (Mot. Seq. 4).

**Labor Law 240(1)**

Labor Law § 240(1) was designed to protect workers from elevation/gravity-related risks (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 618 N.E.2d 82 [1993]). Liability under Labor Law § 240(1) is "absolute" where the failure of a safety device enumerated by the statute (e.g. a ladder) is the proximate cause of the plaintiff's accident (*Blake v. Neighborhood Hous. Services of New York City, Inc.*, 1 N.Y.3d 280, 287 [2003] [citing *Haines v. New York Tel. Co.*, 46 N.Y.2d 132, 136 (1978) and *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 500 (1993)]).

As aforementioned, with respect to Plaintiff's accident, the record before the Court fails to provide a particularized allegation of a purported defect in the subject forklift, or a dangerous condition at the Job Site. When asked what he believed caused the forklift he was operating at the time of the subject accident to tip over, he replied, "I don't know. It happened so suddenly that I don't know" (Josan Virtual Video Examination at 91).

It is undisputed that the subject forklift was brand new, and Plaintiff had been using the same forklift every day since he began working at the Job Site; approximately three to four weeks (Josan EBT at 50, 71-73). On the day of the accident, Plaintiff successfully completed four or five loads and unloads with the subject forklift prior to his accident, and recalled not noticing any problems or issues with it (Josan EBT at 62).

In Plaintiff's Affirmation in Opposition to Motion and in Support of Cross-Motion, the subject forklift itself is categorized as the safety device in question. More specifically, the motion papers state "...he (Josan) was using the (safety) device provided, the forklift, when it flipped. The forklift, the safety device provided, was inadequate as it flipped over due to a shifting load" (Plaintiff's Affirmation in Opposition to Motion and in Support of Cross-Motion at 23). However, during his deposition, when asked if the forklift was in good repair and proper operating condition on the date of the accident, Plaintiff testified that it was in good condition, and that he did not notice any structural defect or any unsafe conditions with the forklift. (Josan EBT at 90). Further, in his sworn affidavit, defenses' expert Peter Chen testifies that "the forklift

operated by Plaintiff was well-equipped, with overhead object protection and frame system, as well as a seatbelt for the seat. Indeed, there were no applicable safety or protective devices which could or should have been employed in order to potentially prevent Plaintiff's accident, that were not..." (Peter Chen Supplemental Affirmation at 13). Plaintiff's expert, Walter Konon, did not dispute this in his sworn affidavit. He also confirms that Plaintiff was wearing "a hard hat, work boots, vest, gloves and safety glasses" at the time of his accident (Walter Konon Expert's Affidavit at 5). Plaintiff confirms this, adding that he was also wearing work boots (Josan Virtual Video Examination at 56-58).

The record before the Court has not demonstrated that Defendants failed to provide an adequate safety device to Plaintiff, and that his injury resulted from the lack of said safety device. Therefore, Plaintiffs have failed to meet their burden, and Defendants are entitled to summary judgment and dismissal of Plaintiffs' Labor Law § 240(1) claim.

#### ***Sole Proximate Cause/Recalcitrant Worker***

The defenses of sole proximate cause and recalcitrant worker only apply when the plaintiff's conduct alone was the sole proximate cause of the harm suffered (*Blake v Neighborhood Hous. Servs. of N. Y. City*, 1 NY3d 280, 291 [2003]). It is "conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury" (*id.* at 291). Thus, if a violation of Labor Law §240 (1) is partly to blame for plaintiff's injury, the defenses of recalcitrant worker and sole proximate cause are unavailable (*id.*).

As discussed above, in order for a plaintiff to be entitled to recover under Labor Law § 240(1), he is obligated to show that the alleged violation of § 240(1) by the defendant was the proximate cause of his injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d 280 (2003); *Robinson v. East Med. Ctr., LP*, 6 N.Y.3d 550 [2006]). Therefore, where the plaintiff is the sole proximate cause of his alleged injuries, it necessarily means that there has been no statutory violation by the defendant, and liability under § 240(1) does not attach. Moreover, where adequate safety devices are available at the job site, and a worker either does not use or misuses them, liability under § 240(1) does not apply (*Montgomery v. Fed. Express Corp.*, 4 N.Y.3d 805 [2005]).

Gabriel Melendez, laborer/flagman employed by J&N on the date of the subject accident, testified that he was ten feet away from the subject forklift being operated by Plaintiff at the time of the accident. Upon viewing the bundles of pipe scaffolding, one of the J&N carpenters present at the Job Site, and Mr. Melendez, "both told Mr. Josan that the bundles were too heavy to be loaded onto the forklift, and that instead, the metal straps should be removed from the scaffold pipes so that the pipes could be unloaded from the truck by hand. Despite these repeated warnings, Mr. Josan refused to agree to unload the scaffold - pipes by hand, and instead, insisted on using the forklift. In doing so, he stated "I've got this." Mr. Josan drove the forklift to the driver's side of the delivery truck and the truck driver secured the bundles of pipe scaffolding to the forklift forks/blade" (Melendez, Affidavit at 3). Further, Mr. Josan then began to lift the load of scaffolding with the forklift. He lifted the load up as high as the forklift would allow, with the blades approximately 15 feet up in the air. As soon as Mr. Melendez saw this, he alleges that he yelled out, "Too high! Too high!" Because of how high Mr. Josan had raised the forklift blades, Mr. Melendez testified that he could tell that the load was going to swing once Mr. Josan began to move the forklift. Despite his warnings, Mr. Josan did not lower the forklift blades (Melendez, Affidavit at 4). In his sworn affidavit, defenses' expert, Mr. Chen, testified that in his professional opinion, "the proximate cause of Plaintiff's accident was Plaintiff's attempt to turn too quickly with the load in maximum or near maximum-elevated position. Such improper usage is specifically warned against in the operator's manual for the subject forklift" (Peter Chen, Expert Affidavit at 8).

Further, Mr. Chen testified that Plaintiff's alleged injuries were caused by Plaintiff jumping out of the forklift. "The forklift was equipped with an overhead object protection and frame system. The forklift was equipped with a seat belt for the seat. Per the operator's manual and per standard forklift operator training and certification, the proper course of action in the event of a tip over was/is to stay within the seat and brace oneself. By jumping from the forklift, Plaintiff not only caused his own injuries, but potentially exposed himself to being crushed by the overhead object protection or frame system, or the forklift chassis, mast tower, forks, or the load itself" (Peter Chen, Expert Affidavit at 10).

Gleaned from the record before the Court, it appears that both Plaintiff's fall, and the injuries he allegedly sustained as a result therefrom, did not flow from any alleged

inadequacy of the forklift. As per both the expert opinions of Mr. Chen and the first-hand account of Mr. Melendez, the Court finds that Plaintiff's misuse of the forklift was the sole proximate cause of the subject accident, and of the injuries alleged to have resulted therefrom. Additionally, Plaintiff's was a recalcitrant worker as a result of his failure to heed the warnings and instructions of Mr. Melendez. As such, liability under §240(1) cannot properly attach.

Seeing as the subject forklift was not defective or dangerous in any manner, Plaintiff was provided with and wearing adequate safety gear at the time of his accident, and Defendants' have met their burden in finding Plaintiff to be the sole proximate cause of his accident as well as a recalcitrant worker, the Court must grant summary judgment in favor of Defendants, dismissing Plaintiffs' Complaint as to their Labor Law § 240(1) claim (Mot. Seq. 4), and deny Plaintiff's motion for summary judgment under Labor Law § 240(1) (Mot. Seq. 5).

#### **Labor Law 241(6)**

Plaintiff alleges that Defendants violated Labor Law § 240(1) as predicated upon New York City Industrial Code §§ 23-1.5 and 23-9.2 (a), (c), and (h).

#### ***§ 23-1.5***

Industrial Code § 23-1.5 generally covers health and safety protections of workers, as well as the required condition of equipment and safeguards. While applicable, this section of the Industrial Code was not violated, as the subject forklift was in safe and operable working condition at the time of the incident that resulted in Plaintiff's injury. Therefore, this section of the code must be dismissed.

#### ***§ 23-9.2(a), (c), and (h)***

Industrial Code § 23-9.2(a) states that "all power-operated equipment shall be maintained in good repair and in proper operating condition at all times... Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement." N.Y. Comp. Codes R. & Regs. tit. 12 § 23-9.2. While applicable, this section of the Industrial Code was not violated, as Defendants maintained the subject forklift, and were not on notice regarding any defect or unsafe condition of said forklift that could be remedied. In fact,

as aforementioned, Plaintiff testified himself that the forklift was in good working condition. Therefore, this section of the code must be dismissed.

The second sentence of § 23-9.2(c) pertains to the loading of power-operated equipment, and the relevant portion states that "All loads shall be properly trimmed, to prevent dislodgment of any part of such loads during transit." The facts of the case at bar make Rule 23-9.2(c) applicable, namely that Plaintiff alleges that the load was not properly trimmed, and it is undisputed that the load shifted and started the events that led to the forklift flipping over. As stated in the affidavit of Mr. Konon, Plaintiff's expert, "the scaffold frame bundle was not prevented from dislodgement when Baj Josan started the turning and transit of the forklift. The belt strapping which was placed to keep the bundle trimmed and secured failed to do so. The bundle shifted off center which caused the forklift to tilt sideways and fall over" (Walter Konon, Plaintiff's Expert Affidavit at 8). However, while this Industrial Code section is applicable, it remains disputed whether or not it was violated. Plaintiff claims that the load on the forklift was not properly trimmed, which caused the entire bundle to shift, thus causing the forklift to tilt and fall over. In contrast, Defendants' expert, Peter Chen, stated in his affidavit that "the proximate cause of Plaintiff's accident was Plaintiff's attempt to turn too quickly with the load in maximum or near maximum-elevated position. Such improper usage is specifically warned against in the operator's manual for the subject forklift" (Peter Chen, Defendant's Expert Affidavit at 9). Thus, while this Industrial Code section is applicable, it is unclear whether defendant violated it. Therefore, summary judgment is denied as to § 23-9.2(c), as there are outstanding material issues of fact.

Industrial Code § 23-9.2(h) pertains to required roll-over protection and seat belts for any new self-propelled earth-moving, excavating, or grading equipment or machines. The forklift operated by Plaintiff at the Job Site was equipped with both roll-over protection and a seatbelt. Thus, while applicable to the case at bar, this section of the Industrial Code was not violated and is therefore dismissed.

Therefore, Plaintiff's motion for summary judgment under Labor Law § 241(6) is denied (Mot. Seq. 5). The branch of Defendants' motion for summary judgment seeking to dismiss plaintiff's Labor Law § 241(6) claim is granted to the extent that said claim is predicated

upon Industrial Code sections § 23-9.2(a), 23-9.2(h), and § 23-1.5; and denied as based upon Industrial Code section 23-9.2(c) (Mot. Seq. 4).

### Conclusion

Defendants' motion for summary judgment to dismiss Plaintiffs' Complaint as to their Labor Law § 200 claim is granted (Mot. Seq. 4).

Defendants' motion for summary judgment dismissing Plaintiffs' Complaint as to their Labor Law § 240(1) claim is granted (Mot. Seq. 4), and Plaintiff's motion for summary judgment under Labor Law § 240(1) is denied (Mot. Seq. 5).

Plaintiff's motion for summary judgment under Labor Law § 241(6) is denied (Mot. Seq. 5). The branch of Defendants' motion for summary judgment seeking to dismiss plaintiff's Labor Law § 241(6) claim is granted to the extent that said claim is predicated upon Industrial Code sections 23-9.2(a), 23-9.2(h), and § 23-1.5, and denied as based upon Industrial Code section 23-9.2(c) (Mot. Seq. 4).

This constitutes the order and judgment of the Court.

DATED: 8/2/24

ENTER:

  
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HON. KERRY J. WARD  
A.J.S.C.

HON. KERRY J. WARD