

Cruz v Sylvandale Assoc., LLC

2024 NY Slip Op 34697(U)

April 30, 2024

Supreme Court, Bronx County

Docket Number: Index No. 25203/2018E

Judge: Kim Adair Wilson

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, NEW YORK: Part IA-12

-----X

JORGE CRUZ,
Plaintiff,

Index No. 25203/2018E

-against-

Hon. KIM ADAIR WILSON
Justice Supreme Court

SYLVANDALE ASSOCIATES, LLC, BOGEE
SUPERMARKET, INC., MORTOMER MURPHY,
and C.A.P.H. CONTRACTING INC.,
Defendants.

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The following papers (NYSCEF Docs 1, 5, 7, 21, 38, 40 - 59, 67 - 69, 71 - 83), read on this SUMMARY
JUDGMENT MOTION (seq. 2), noticed on 5/18/2023, as NYSCEF Doc 40.

	NYSCEF Doc. No.
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits	
Replying Affidavit and Exhibits	
Other: Stipulation	

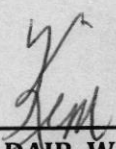
Upon the foregoing papers,

This motion is decided in accordance with the annexed Decision and Order.

Motion is Respectfully Referred to Justice:

Dated:

Dated: April 30, 2024

Hon. 

KIM ADAIR WILSON, J.S.C.

- 1. CHECK ONE.....
- 2. MOTION IS.....
- 3. CHECK IF APPROPRIATE.....

- CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT
- NEXT APPEARANCE DATE: _____



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, NEW YORK: Part IA-12

-----X

JORGE CRUZ,
Plaintiff,

-against-

SYLVANDALE ASSOCIATES, LLC, BOGEE
SUPERMARKET, INC., MORTOMER MURPHY,
and C.A.P.H. CONTRACTING INC.,
Defendants.

-----X

Kim Adair Wilson, J.:

DECISION AND ORDER
Index No. 25203/2018E
Motion Seq. #: 002

HON. KIM ADAIR WILSON

“NOTICE OF MOTION” (NYSCEF Doc 40), dated and filed May 17 and 18, 2023, respectively, and signed by one Kevin T. Forde, Esq. (Litchfield Cavo LLP), counsel for defendants Mortomer Murphy (“Murphy”), and C.A.P.H. Contracting, Inc. (“C.A.P.H.”) seeking an Order, “pursuant to CPLR 3211 and/or 3212 dismissing plaintiff’s Complaint as to common law, Labor Law 200, 240, and 241(6); [and] dismissing any crossclaims against the defendants MORTOMER MURPHY and C.A.P.H. CONTRACTING INC. [.]” and “NOTICE OF CROSS-MOTION” (NYSCEF Doc 71) dated and filed August 11 and 18, 2023, respectively, by John M. Daly, Esq. (Fitzgerald Law Firm, P.C.), counsel for the named plaintiff, seeking “1. An Order pursuant to CPLR 31212 granting partial summary judgment for the plaintiff against the defendants on plaintiff’s cause of action under Labor Law § 241(6) predicated on violation of Industrial Code § 23-1.7(b)(1)(i); and 2. [a]n Order pursuant to CPLR 3212 granting partial summary judgment for the plaintiff against the defendants on plaintiff’s cause of action under Labor Law § 241(6) predicated on violation of Industrial Code § 23-1.7(d); and 3. [a]n Order pursuant to CPLR 3025(b) granting leave for the plaintiff to amend his Second Supplemental Verified Bill of Particulars by filing the proposed Third Supplemental Verified Bill of Particulars in the form attached as Exhibit 2 to the Daly Aff;” is consolidated for the purpose of disposition, and are decided as set forth below.

The instant matter was commenced on May 3, 2018, by the filing of plaintiff’s Verified Complaint seeking monetary damages for injuries allegedly sustained on or about January 6, 2017, when it is alleged that plaintiff “fell from a height while in the course of his employment

with Tito's Iron Works, Inc.," at the premises known as 5421 Sylvan Avenue, Bronx, New York ("Subject Premises"), allegedly owned and/or controlled by defendants Sylvandale Associates, LLC ("Sylvandale"), Bogee Supermarket, Inc. ("Bogee"), Murphy and C.A.P.H.. Plaintiff's Complaint alleges five causes of action, including negligence, jointly and severally, and for the defendants' alleged collective violation of New York State Labor Law Section 200, *et seq.* On May 15, 2018, co-defendants Murphy and C.A.P.H. filed their Verified Answer (NYSCEF Doc 5), asserting a general denial and twenty-one affirmative defenses, as well as crossclaims against co-defendants Sylvandale and Bogee for contribution, common law and contractual indemnity. Subsequently, on October 5, 2018, co-defendants Sylvandale and Bogee filed a Verified Answer also asserting a general denial and 13 affirmative defenses. A Note of Issue (NYSCEF Doc 21) filed on November 23, 2024, but the time to file summary judgment motions was effectively extended until September 7, 2023, by the Order (NYSCEF Doc 38) entered March 23, 2023 (Julia I. Rodriguez, J.).

Movants Murphy and C.A.P.H. seek to dismiss plaintiff's Verified Complaint, as well as any crossclaims, as against the movants. In support of the instant motion, movants submit their "AFFIRMATION IN SUPPORT" (NYSCEF Doc 41), dated and filed May 17 and 18, 2023, respectively, by movants' aforementioned attorney, and the annexed "MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS MORTOMER MURPHY AND C.A.P.H. CONTRACTING INC.'S MOTION FOR SUMMARY JUDGMENT" (NYSCEF Doc 42). Submitted as admissible evidence in support is Contractor Agreement between Sylvandale and C.A.P.H. (NYSCEF Doc 46), dated November 1, 2016, and signed by Gee Eng, for Sylvandale, and Mortomer Murphy, for C.A.P.H.; Plaintiff Jorge Cruz's deposition transcript dated October 20, 2020 (NYSCEF Doc 47); Plaintiff Jorge Cruz's continued deposition transcript dated September 13, 2021 (NYSCEF Doc 48); a color photograph depicting the worksite (NYSCEF Doc 49); Plaintiff Jorge Cruz's continued deposition transcript dated September 15, 2021 (NYSCEF Doc 50); Plaintiff Jorge Cruz's continued deposition transcript dated October 27, 2021 (NYSCEF Doc 51); Gee Eng's deposition transcript dated March 16, 2022 (NYSCEF Doc 52); John Bogovic's deposition transcript dated June 1, 2022 (NYSCEF Doc 53); Defendant Mortomer Murphy's deposition transcript dated August 11, 2022 (NYSCEF Doc 54); Angel Pagan's deposition

transcript dated October 20, 2022 (NYSCEF Doc 55); and the Affidavit of Michael Cronin, Professional Engineer, dated May 18, 2023 (NYSCEF Doc 56).

In the Affirmation (NYSCEF Doc 41) and accompanying Memorandum of Law (NYSCEF Doc 42) submitted by the movants' counsel, movants assert that the claims against defendant C.A.P.H. must be dismissed because C.A.P.H. has been a "defunct entity" since July 11, 2001, and bears no relation to CAPH Contracting Inc., ("CAPH Inc."), the corporation under which defendant Murphy currently does business. Movants offer evidence showing that on November 1, 2016, Sylvandale and CAPH Inc. entered a contract under which CAPH Inc. would perform repairs to a garage and outdoor parking lot located on the Subject Premises (See NYSCEF Doc 46). Movants argue that because Labor Law 200 does not permit recovery against an owner or general contractor unless they exercised supervisory control over the work, plaintiff's Labor Law 200 and common law claims must be dismissed. Movants cite the deposition testimonies of plaintiff, Gee Eng, owner of Sylvandale, defendant Murphy, and Angel Pagan, also known as Tito ("Tito"), owner of Tito's Iron Works (NYSCEF Docs 47, 52, 54, and 55) to show that plaintiff performed welding on-site at the Subject Premises under the employ of Tito's Iron Works, who had been subcontracted by CAPH Inc. to remove and replace steel beams as part of the parking lot remodel. Although CAPH Inc.'s on-site work was largely supervised by defendant Murphy, movants contend that Murphy cannot be liable for plaintiff's injuries because Murphy was not present on the date of the alleged accident, and that due to the nature of their respective roles, CAPH Inc. and Tito's Iron Works each performed work on alternating days when the other contractor was not present. Further, movant asserts, plaintiff's testimony establishes that plaintiff's work was supervised and directed solely by Tito, and that, on the date of the incident, January 5, 2017, it was Tito himself that swept the snow off the aluminum platform prior to plaintiff's usage.

Movants also argue that plaintiff's claims grounded in Labor Law § 240(1) must be dismissed because plaintiff does not claim that the accident occurred to a defective platform, or due to the failure or absence of a safety device enumerated under the statute. Further, movants assert that all claims under Labor Law § 241(6) must be dismissed for failing to show that the party to be held liable violated the Labor Law or applicable Industrial Code Regulation. At his deposition Tito attested that, although he provided safety equipment to

his employees, plaintiff was not directed to wear a safety harness because, at the time, plaintiff had only been working at an elevation of four or five feet. Movants submit the Affidavit of Engineer Michael Cronin (NYSCEF Doc 56), which states that he performed a site inspection on November 7, 2022, and also reviewed plaintiff's deposition transcripts, and that although the steel beams had since been covered by a slab of concrete, estimated that the height of the aluminum platform would have been between 5'9" and 5'10", below the six-foot threshold above which a harness or fall arrest system would have been required, and which would have necessitated the utilization of railings or curbs on the platform itself. Furthermore, because said elevation did not encompass one floor, or fifteen feet, the space between the beams and the aluminum planks did not constitute a "hazardous opening" within the meaning of Industrial Code § 23-1.7(b)(1). Further, movant argues, the photograph (NYSCEF Doc 49) submitted in support, that plaintiff verified to accurately depict the worksite on and around the time of the alleged accident, clearly shows that the workers were easily capable of standing at the base of the hole to perform work on the steel beams. Additionally, movants also contend that plaintiff failed to take steps to mitigate his risk of harm, in that plaintiff testified to using the platform multiple times after it had been cleared of snow, including immediately afterward, and that plaintiff had taken no steps to either ameliorate, or otherwise compensate for, the alleged slipperiness/wetness of the platform.

In opposition, and in support of plaintiff's cross-motion, plaintiff submits the "ATTORNEY AFFIRMATION IN OPPOSITION TO SUMMARY JUDGMENT AND IN SUPPORT OF (1) PLAINTIFF'S CROSS MOTION TO AMEND THE BILL OF PARTICULARS AND (2) FOR PARTIAL SUMMARY JUDGMENT" (NYSCEF Doc 72), dated and filed August 18, 2023, respectively by plaintiff's above-mentioned counsel, and the annexed "PLAINTIFF'S MEMORANDUM OF LAW" (NYSCEF Doc 76). Also submitted as admissible evidence the Affidavit of plaintiff Jorge Cruz (NYSCEF Doc 73), dated and filed August 10 and 18, 2023; the Affidavit of Andrew R. Yarmus, Professional Engineer (NYSCEF Doc 74), dated August 11, 2023; the Physician's Affirmation of Irving Friedman, M.D. (NYSCEF Doc 75), dated August 7, 2023.

In his Affirmation and Memorandum of Law (NYSCEF Docs 72 and 76) opposing the movant's motion, plaintiff's counsel asserts that the movants' papers "do not eliminate all material issues of fact with respect to their liability for common law negligence, or under Labor Law §§ 200 and 241(6)." Plaintiff states that defendant Murphy, in his deposition testimony, admits to having constructed the aluminum plank without railings, to facilitate access to the garage during the construction. Therefore, plaintiff's counsel contends, because plaintiff fell from the aluminum platform to the ground because there was no safety railing to grab onto, or to break his fall, or to guard against his fall from the platform, which the movants do not dispute to be the proximate cause of the plaintiff's injuries, the movants are therefore liable for violations under Labor Law § 241(6). Further, plaintiff argues, the installation of railings on the platform would not have been inconsistent with the work being performed. Plaintiff also contends that the question of whether or not the drop below the aluminum platform exceeded 15 feet, or one floor, is not controlling on whether the gap between the beams constituted a "hazardous opening" within the meaning of Industrial Code § 23-1.7(b)(1)(i), and that the provision is properly applicable to any unguarded floor opening "large enough for someone to fall through." Plaintiff also concurrently moves to amend its Bill of Particulars to allege "violation by the defendants of Industrial Code §23-1.7(b)(1)(i), supporting liability under Labor Law § 241(6)."

Plaintiff's cross-motion seeks partial summary judgment against all defendants for plaintiff's Labor Law §§ 240(1) and 241(6) claims based on the defendants' violation of Industrial Code §§ 23-1.7(b)(1)(i) and 23-1.7(d). In support of their cross-motion, plaintiff posits that he has established that both the owners and the contractor are liable for the violations of Industrial Code § 23-1.7(b)(1)(i) that proximately caused plaintiff's injuries, in that the aluminum plank from which plaintiff fell undisputedly lacked a safety railing. Plaintiff also contends that the defendants have failed to offer admissible evidence refuting plaintiff's testimonial assertions that the plank was slippery when plaintiff traversed it, in violation of Industrial Code § 23-1.7(d), and that the unsafe condition precipitated his accident. The Affidavit of Andrew R. Yarmus, P.E. (NYSCEF Doc 74), states that the affiant is a licensed professional engineer who conducted a site inspection on November 7, 2022, and also reviewed various evidence including, *inter alia*, plaintiff's Affidavit (NYSCEF Doc 73), the

Affidavit of Michael Cronin, P.E. (NYSCEF Doc 56), the photograph depicting the condition of the worksite (NYSCEF Doc 49), whereby he concludes, “to a reasonable degree of engineering certainty,” that the defendants’ failure to install railings on the aluminum platform, or to adequately ensure the dryness thereof, exhibited noncompliance with Industrial Code §§ 23-1.7(b)(1)(i) and 23-1.7(d). Additionally, the Affirmation of Irving Friedman, M.D. (NYSCEF Doc 75), also submitted in support of plaintiff’s cross-motion, states that Dr. Friedman is a licensed physician who conducted a “neurologic and medical” assessment of plaintiff on January 11, 2023, and also reviewed plaintiff’s medical records from the accident, and from which he opines that plaintiff’s injuries are “consistent with an unrestrained fall of not less than 5 to 6 feet.”

In reply, movants submit their “REPLY IN SUPPORT OF MOTION SUMMARY JUDGMENT AND AFFIRMATION IN OPPOSITION TO CROSS MOTION FOR SUMMARY JUDGMENT” (NYSCEF Doc 81), dated and filed August 25, 2023, respectively, restates the previous arguments in support and asserts that plaintiff’s have failed to raise a triable issue of fact in opposition. Movant opposes that branch of plaintiff’s motion to amend its Bill of Particulars, stating, without elaboration, that it is prejudiced. Movant also argues that plaintiff has not met its burden on its Labor Law § 240 claims, whereby plaintiff must demonstrate the existence of the type of hazard contemplated under the statute and must also show that the accident was “attributable, at least in part, to the failure to provide or use, or to the inadequacy of, a proper safety device of the kind enumerated in the statute.”

Plaintiff filed no reply papers on his cross-motion.

Defendants Sylvandale and Bogee did not file papers in opposition to the motion or the cross-motion, but have filed a subsequent motion for summary judgment (NYSCEF Doc 60) seeking dismissal of plaintiff’s common law Labor Law 200, 240, and 241(6) claims, as well as any cross-claims asserted against them.

At the outset, this Court notes that movants’ motion papers do not specify the grounds on which it moves pursuant to CPLR 3211, as is required by CPLR 2214. Therefore, this Court will construe the instant motion as proceeding solely under the provisions of CPLR 3212.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law. *Giuffrida v Citibank Corp.*, 100N Y2d 72 (2003); *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. *Winegrad, supra* at 853. “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to rebut the movants claims and establish that triable issues of fact exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

Where a construction accident arises out of the means and methods of the work, as opposed to a dangerous condition on the site, liability under Labor Law § 200 or for common law negligence may be imposed where the defendant “exercised control or supervision over the work and had actual or constructive notice of the purportedly unsafe condition.” *Alonzo v. Safe Harbors of the Hudson Hous. Dev. Fund Co.*, 104 A.D.3d 446, 449 (1st Dept. 2013); *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 (1993). However, a plaintiff injured while working solely under the direction and supervision of a subcontractor will not attach vicarious liability to a defendant general contractor or owner under Labor Law § 200. See *Comes, supra* at 877.

Labor Law § 240(1), often called the “scaffold law,” imposes a nondelegable duty on all contractors and owners to furnish or erect, or cause to be furnished or erected, 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 workers employed on the premises. *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 499–500 (1993). The hazards contemplated by section 240(1) are those related to the effects of gravity where protective devices are called for because of a difference between the elevation level of the required work and a lower level. *Gordon v. E. Ry. Supply, Inc.*, 82 N.Y.2d 555, 561 (1993). To recover under section 240 (1), the plaintiff must establish that the statute was violated and that such violation was a proximate cause of his injury. *Barreto v. Metro. Transp. Auth.*, 25 N.Y.3d 426, 433 (2015). Importantly, however, where an owner or contractor fails to provide any safety devices, liability is mandated by the statute

without regard to external considerations such as rules and regulations, contracts or custom and usage. *Zimmer v. Chemung Cnty. Performing Arts, Inc.*, 65 N.Y.2d 513, 523 (1985). In *Hoyos v. NY-1095 Ave. of the Americas, LLC* (156 A.D.3d 491, 495 [2017]), the New York State Appellate Division, First Department, held that, where a plaintiff fell from a four foot loading dock, the absence of a “railing, chain, demarcation or other protective safety device” constituted a violation of section 240(1). An injured worker's contributory negligence is not a defense to a claim brought under Labor Law § 240(1), however, where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability. *Barreto, supra* at 433; *Gordon, supra* at 562.

Labor Law § 241(6) imposes a general duty on owners and contractors to provide reasonable and adequate protection and safety for workers, as well as a non-delegable duty to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. *Toussaint v. Port Auth. of New York & New Jersey*, 38 N.Y.3d 89, 93 (2022); *Ross, supra*, at 501-502. To prevail on a claim brought under section 241(6), a plaintiff must show that an applicable regulation of the Industrial Code has been breached, and that such breach is the proximate cause of plaintiff's injury. See *Ross, supra* at 494. Further there is no need to show that an owner exercised supervision or control over the worksite to establish a claim. *Toussaint, supra* at 94; *Ross, supra* at 505. As relevant here, Industrial Code § 23-1.7 (b)(1)(i) aims to protect construction workers against falls from an elevated area to a lower area through openings large enough for a person to fit, by mandating the installation of “a substantial cover fastened in place or by a safety railing.” *Messina v. City of New York*, 300 A.D.2d 121, 123 (2002); 12 NYCRR 23-1.7(b)(1)(i). Although there appears to be no well-defined, bright line rule, the First Department has previously held that elevations below 15 feet in depth may constitute a hazardous opening requiring a barrier or safety railing under Section 23-1.7 (b)(1)(i) (see *Alonzo v. Safe Harbors, supra* at 450; also see *Reavely v. Yonkers Raceway Programs, Inc.*, 88 A.D.3d 561, 565 (1st Dept. 2011) holding that the absence of a safety railing where plaintiff fell into a 10-foot trench was a violation of Section 23-1.7(b)(1)(i) and also the proximate cause of plaintiff's injuries), but has also declined to apply the regulation to elevations of only 10 feet (see *Dzieran v. 1800 Bos. Rd., LLC*, 25 A.D.3d 336, 337 (1st Dept. 2006), where claims under Labor Law § 241(6) alleging

violation of Section 23-1.7(b)(1)(i) were dismissed because the platform that plaintiff fell from was only 10 feet in height). Industrial Code § 23-1.7 (d), also applicable here, imposes an affirmative duty on employers to provide safe footing by requiring that any “foreign substance which may cause slippery footing shall be removed to provide safe footing.” *Bazdaric v. Almah Partners LLC*, No. 11, 2024 WL 674245, at *3 (N.Y. Feb. 20, 2024); *Rizzuto v. L.A. Wenger Contracting Co.*, 91 N.Y.2d 343, 351 (1998). Vicarious liability extends to the owners and general contractor where someone within the chain of the construction project is deemed negligent by not exercising reasonable care, or acting within a reasonable time, to prevent or remediate a slipping hazard, and that plaintiff's slipping, falling and subsequent injury proximately resulted from such negligence. See *Rizzuto, supra* at 351.

Upon review and an analysis of the statutory authority, case law, the submitted papers and the record, this Court determines that the movants, defendants Murphy and C.A.P.H. have met their burden in demonstrating that defendant C.A.P.H. is entirely unrelated to the underlying construction project, or to plaintiff's injuries, and that therefore all claims against defendant C.A.P.H. Defendant Murphy has also adequately established that he exercised no direct supervision over the plaintiff so as to incur liability under Labor Law §§ 200 (see *Alonzo, supra* at 449; *Comes, supra* at 877), thus warranting dismissal of those claims. Further, this Court determines that, in keeping with the First Department's holding in *Dzieran*, Industrial Code Section 23-1.7(b)(1)(i) does not apply to falls from platforms below 10 feet in height (*Dzieran, supra* at 337), and therefore plaintiff cannot prevail on its corresponding claim under Labor Law § 241(6). With respect to plaintiff's section 421(6) claims alleging defendants' violation of Industrial Code § 23-1.7 (d), the discrepancies between the account depicted in plaintiff's Affidavit (NYSCEF Doc 73) and deposition testimony (NYSCEF Doc 50, at 171:7-21), and that illustrated by Tito's deposition testimony (NYSCEF Doc 55, at 33:25 to 34:2-4), demonstrate the existence of a triable issue of material fact as to whether the aluminum platform was wet and slippery at the time of plaintiff's accident. Finally, as it is undisputed that plaintiff's injuries were proximately caused by his impact with the slope beneath the aluminum platform, it is evident to this Court that his accident resulted from a gravity-related hazard of the type contemplated under Labor Law § 240(1), and which a jury might reasonably find to have been preventable by the presence

of a safety railing or other arresting device (see *Hoyos v. NY-1095 Ave. of the Americas, LLC*, *supra*). Therefore, the movants are not entitled to summary judgment dismissing plaintiff's claims brought under Labor Law § 240(1). In light of the above, the movants' motion for summary judgment is **GRANTED solely to the extent**, as stated herein.

Turning now to plaintiff's cross-motion, that branch thereof seeking partial summary judgment on the defendants' liability under Labor Law § 241(6) for violations of Industrial Code §§ 23-1.7(b)(1)(i) and 23-1.7(d) is **DENIED** for the foregoing reasons.

Finally, we turn to that branch of plaintiff's cross-motion seeking to amend its Bill of Particulars. Although amendments to bills of particulars should be freely granted, when a question as to the sufficiency or meritoriousness of the proposed amendment is raised, that question should be resolved at the threshold in order to obviate the possibility of needless time consuming litigation. *Farago v. Shulman*, 104 A.D.2d 965, 966 (1984), *aff'd*, 65 N.Y.2d 763, 481 N.E.2d 572 (1985); also see *Sharapata v. Town of Islip*, 56 N.Y.2d 332, 334 (1982). Consistent with the reasoning stated above, that branch of plaintiff's motion seeking to amend its Bill of Particulars lacks merit in that the proposed amendment fails to state a cause of action upon which the relief sought can be granted. Therefore, plaintiff's cross motion is **DENIED in the entirety**.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the parties was not addressed by the Court, it is hereby denied.

Accordingly, it is hereby

ORDERED that defendants Mortomer Murphy's and C.A.P.H. Contracting, Inc.'s joint motion seeking summary judgment pursuant to CPLR 3211 and/or 3212 dismissing plaintiff's Complaint as to common law, Labor Law 200, 240, and 241(6); dismissing any crossclaims asserted against those defendants, is GRANTED solely to the extent of (i) dismissing all claims and cross-claims asserted against defendant C.A.P.H. Contracting, Inc.; (ii) dismissing plaintiff's negligence claims under common law and Labor Law § 200 as to defendant Mortomer Murphy; and (iii) dismissing


plaintiff's negligence claims under Labor Law §241(6) for violation of Industrial Code Section 23-1.7(b)(1)(i) as to defendant Mortomer Murphy; and it is further

ORDERED that plaintiff Jorge Cruz's motion seeking partial summary judgment on the defendants' liability under Labor Law § 241(6) for violation of Industrial Code §§ 23-1.7(b)(1)(i) and 23-1.7(d), and seeking to amend his Bill of Particulars to allege violations of of Industrial Code Section 23-1.7(b)(1)(i), is DENIED, and it is further

ORDERED that the movants are directed to serve a copy of this Decision and Order with Notice of Entry, upon all parties within thirty (30) days of entry, and to file proof of service with the Court.

This constitutes the Decision and Order of this Court.

**Dated: April 30, 2024
Bronx, New York**



Hon. Kim Adair Wilson, J.S.C.