

**Gawronski v Global 1845 Broadway LLC**

2025 NY Slip Op 34229(U)

November 5, 2025

Supreme Court, New York County

Docket Number: Index No. 150647/2020

Judge: David B. Cohen

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

**PRESENT: HON. DAVID B. COHEN PART 58**

*Justice*

-----X

TADEUSZ GAWRONSKI,  
  
Plaintiff,  
  
- v -

**INDEX NO.** 150647/2020  
  
**MOTION DATE** 03/27/2025,  
04/01/2025  
  
**MOTION SEQ. NO.** 001, 002

GLOBAL 1845 BROADWAY LLC, ALBA SERVICES INC.,  
ALBA ENVIRONMENTAL, INC.,  
  
Defendants.

**DECISION + ORDER ON  
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 175, 178, 186, 187, 188, 189, 190, 191, 192

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 162, 163, 166, 167, 168, 169, 170, 171, 172, 173, 174, 176, 177, 179, 180, 181, 183, 184, 185, 193

were read on this motion to/for JUDGMENT - SUMMARY.

Motion sequence numbers 001 and 002 have been consolidated for disposition. In motion sequence 001, defendant Global 1845 Broadway, LLC (Global), moves, pursuant to CPLR 3212, for an order granting it summary judgment and dismissing plaintiff’s claims alleging violations of Labor Law §§ 200, 240 (1) and 241 (6). Global also moves for an order granting it conditional summary judgment with respect to its cross-claim for contractual indemnification as against Alba Services, Inc. (Alba).

Alba cross-moves, pursuant to CPLR 3212, for an order granting it summary judgment against plaintiff and dismissing the claims alleging violations of Labor Law §§ 200, 240 (1), 241

(6) and common law negligence, and awarding it contractual indemnification on its cross-claim against defendant Alba Environmental, Inc. (Environmental).

Plaintiff cross-moves, pursuant to CPLR 3025 (b), for an order granting leave to amend his bill of particulars to include a violation of Industrial Code section 23-9.2 (a).

In motion sequence 002, plaintiff moves, pursuant to CPLR 3212, for an order granting summary judgment on the issue of liability on his claim of a violation of Labor Law § 240 (1) against defendants.

Environmental cross-moves for an order granting it summary judgment and dismissing plaintiff's claims alleging violations of Labor Law §§ 200, 240 (1), and 241 (6) and common-law negligence against it.

#### I. BACKGROUND

##### Plaintiff's deposition (NYSCEF 90, 91).

Plaintiff testified that he was involved in an accident on January 6, 2020 (NYSCEF DOC. NO. 90, at 53), at which time he was employed by Main Service as a driver for whom he drove box trucks, vans, and trucks which weighed up to 28,000 pounds (*id.* at 24, 27, 53). Anton Dragonides (Dragonides) of Main Service provided plaintiff with verbal instructions as to what to do during the course of the day (*id.* at 30-31) and instructed plaintiff when making deliveries and as to which vehicles to utilize (*id.* at 31). Plaintiff only took instructions from Dragonides.

Main Service employees would load deliveries and pallet jacks into their trucks (*id.* at 35). Plaintiff maintains that when unloading delivery vehicles, he utilized electric pallet jacks which were owned by Main Service (*id.*). On the date of his accident, plaintiff first arrived at Main Service's business location in Maspeth, New York (*id.* at 53), and then entered a truck (*id.*

at 54), driven by Boguslaw Micek (*id.* at 55). Plaintiff's role was to act as the driver's assistant or helper (*id.* at 54).

Plaintiff and Micek proceeded with one large delivery to 1845 Broadway in Manhattan (*id.* at 61). At that location, plaintiff maintains that workers from Alba, who he testified was the general contractor on the project there, told them where to stop the vehicle (*id.* at 68). After the vehicle parked, plaintiff and Micek exited the vehicle, proceeded to the back of the truck, and opened the back lift on the truck (*id.* at 69-70). The lift was about six feet above the ground and at the same level as the flatbed (*id.* at 80). Plaintiff lowered the lift, walked on to it, and raised it to get to the level of the flatbed (*id.* at 72). At this point, plaintiff was about six feet off of the ground on the lift and remained on the lift because the truck was loaded to its maximum with about 12 pallets (*id.* at 73). Plaintiff had two meters of space on the lift and there was no room to test the pallet jack (*id.* at 76).

Plaintiff proceeded to try to use pallet jack while standing on the lift, and as he attempted to pull the pallet jack toward him, it sped up rapidly because the vehicle was parked on an incline, and plaintiff was unable to stop it (*id.* at 83). Plaintiff recalls hearing Micek yell that the pallet jack had no brake (*id.* at 89). Plaintiff noticed the pallet jack moving on its own and he was pushed to the ground from the lift (*id.* at 89). Plaintiff maintains that if the brakes of the pallet jack had worked properly, the accident would not have occurred (*id.* at 84).

#### Deposition of Alix Lebrun

Alix Lebrun (Lebrun) testified that he is currently employed by Global (NYSCEF DOC. NO. 92, at 9). In January of 2022 he was working as the superintendent of 1841 Broadway (*id.* at 10). Global managed the building, but Lebrun was unaware who owned it (*id.* at 38-39). He did not recall if there was a delivery for the project on January 6, 2020, and neither himself, nor

other employees of Global, were responsible for receiving deliveries for the building (*id.* at 23-24).

Lebrun was unsure who hired Alba, but Alba was performing demolition at the building (*id.* at 40). Lebrun maintains that Alba had discretion as to how and in what manner the deliveries were received and Global did not receive instructions from Alba about how the deliveries were made (*id.* at 30). There were no guidelines regarding the delivery of materials once Alba commenced demolition (*id.* at 50-51).

#### Deposition of Andrew Horan

Andrew Horan (Horan) testified that he is Alba's president and in charge of its operation and management (NYSCEF DOC. NO. 93, at 5-6). Alba was hired by Global for the demolition of a 12-story building at 1841-1845 Broadway (*id.* at 6-7). Horan maintains that Alba was more of the demolition contractor than a general contractor (*id.* at 27). Environmental was the subcontractor responsible for asbestos abatement at the premises (*id.* at 7-8).

Horan was not present at the site on January 6, 2020 (*id.* at 12), and to the best of his knowledge, neither were any Alba employees (*id.* at 13). Asbestos abatement would have started after the accident date (*id.* at 14). There was a third-party site safety company hired for the duration of the structural demolition (*id.* at 16). Alba was responsible for debris removal at the site, which was placed in dumpsters in the street (*id.* at 18-19). No employees of the building's management company supervised Alba's work (*id.* at 28).

Horan believed that Environmental hired Main Service for this project (*id.* at 36). Whenever deliveries were made by Main Service, its employees were responsible for unloading their trucks (*id.* at 45). In January of 2020, Alba did not have any input and did not direct or supervise Main Service's loading or unloading of materials onto their truck, supervise how its

employees loaded their pallet jacks, or have control of the pallet jack involved in this accident (*id.* at 61).

#### Deposition of Wilson Chimborazo

Wilson Chimborazo (Chimborazo) testified that he is Environmental's owner and president, and that Environmental is an asbestos abatement contractor (NYSCEF DOC. NO. 95, at 11, 60), and was hired for asbestos abatement work at the premises (*id.* at 13).

Environmental is a subcontractor of Alba, which was conducting demolition at the premises (*id.* at 14-15). The companies are not connected in any way (*id.*). Main Service supplied materials for the project and provided supplies to Environmental for the abatement (*id.* at 16-17).

Environmental had its own foreman or project manager working at the premises (*id.* at 83). For deliveries, a worker from Main Service would call to let them know that a truck or a van was arriving with materials (*id.* at 85). Environmental's supervisor would not tell the driver from Main Service where to park or provide any instructions on how to unload the truck (*id.* at 87). Chimborazo was unaware how Main Service trucks were unloaded (*id.* at 40).

On the day of plaintiff's accident, Chimborazo was inside the building at the premises (*id.* at 42). He was alerted regarding plaintiff's accident by a worker and saw plaintiff on the ground, but did not witness the actual occurrence (*id.* at 44, 52). An Environmental supervisor told him that plaintiff was pulling material off the truck, lost control of his body, and fell (*id.* at 89).

#### Affidavit of Boguslaw Micek

Micek submits an affidavit dated March 2, 2020 (NYSCEF DOC. NO. 128), in which he states that on January 6, 2020, he was employed by Main Service Corp. and was working as a

driver for a construction project located at 1841 Broadway in Manhattan (*id.* at ¶¶ 2-3). On that day, he was operating a freightliner vehicle and his boss directed him and plaintiff to deliver construction materials to Alba at the site (*id.* at ¶¶ 3-4). Around 9:20 a.m., they arrived at the site and he attempted to park the right side of the truck on the sidewalk, but there was scaffolding placed there (*id.*), and the truck ended up leaning to the right side as the roadway was not level at the location (*id.*).

Micek and plaintiff needed to unload 12 pallets of heavy construction materials and equipment (*id.*). Once Micek parked the truck, he and plaintiff started unloading the pallets with an electric pallet jack on the truck bed (*id.* at ¶¶ 6-8). The pallet jack weighed 1,000 pounds (*id.* at ¶ 8).

Immediately before plaintiff's accident, Micek observed that the pallet jack started to push plaintiff off the truck bed and Micek attempted to use a hand brake (*id.* at ¶ 10). He shouted a warning to plaintiff, advising him that the brake was faulty and did not work (*id.*), and the pallet jack did not stop and pushed plaintiff off the bed of the truck, causing him to land on the ground (*id.*).

While Micek personally knew that the hand brake was faulty, plaintiff had not been made aware of it (*id.* at ¶ 11). After the accident, the pallet jack was immediately repaired at a warehouse (*id.* at ¶ 12).

## II. PLAINTIFF'S LABOR LAW 240(1) CLAIM

### A. Summary Judgment Standard

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64

NY2d 851, 853 [1985]). The failure to make such a showing "requires denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*). Once this showing has been made, the burden shifts to the nonmoving party to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "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] [internal quotations omitted]).

B. Timeliness of cross-motion

Plaintiff contends that Environmental's cross-motion to his motion is untimely, as the Note of Issue was filed on December 3, 2024, and the deadline to file dispositive motions was therefore April 2, 2025.

Environmental did not file its cross-motion until April 3, 2025, and while it acknowledges in its papers that the motion was made one day late, its only excuse for the delay was that plaintiff's motion was served on April 1, 2025.

While Environmental thus fails to establish "good cause" for its delay in making the cross-motion (*see* CPLR 3212 [a], *Miceli v State Farm Mut. Auto. Inc. Co.*, 3 NY3d 725, 726 [2004]), "a court may entertain an untimely cross-motion for summary judgment if the court is deciding a timely motion for summary judgment made on nearly identical grounds" (*Alexander v Gordon*, 95 AD3d 1245, 1247 [2d Dept 2012]).

Here, as the court is already determining whether a violation of Labor Law § 240 (1) occurred as part of plaintiff's motion, only that part of Environmental's cross-motion is

considered (*see Jarama v 902 Liberty Ave. Hous. Dev. Fund Corp.*, 161AD3d 691 [1st Dept 2018]).

C. Analysis

Labor Law § 240 (1) imposes a nondelegable duty upon owners, general contractors, and their agents to provide workers with safety devices to protect from risks at elevated work sites (*See McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]), and it provides, in part:

[a]ll contractors and owners and their agents, except owners of one and two family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

The failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident" (*Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 [1st Dept 2009] [internal quotation marks and citations omitted]; *see also Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 96 [2015]).

The Court of Appeals has held that "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 267 [2001]; *citing Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

Furthermore, to show that a plaintiff's actions were the sole proximate cause of an injury,

the defendant must establish that a plaintiff “had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured” (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 10 [1st Dept 2011], quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]). However, “if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it” (*Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 290 [2003]).

In support of its motion for summary judgment, Global argues that plaintiff does not establish a violation of Labor Law § 240 (1) because a fall from the back of a truck does not constitute an elevation-related hazard under the statute. Moreover, Global contends that it is well-settled that a claim under Labor Law § 240 (1) must be premised upon a failure to provide a plaintiff with an adequate safety device and that the delivery work being performed by plaintiff did not require the use of any of the safety devices enumerated under the statute.

Alba also moves and Environmental cross-moves for dismissal of plaintiff’s Labor Law § 240 (1) claim, arguing that plaintiff was not engaged in one of the enumerated protected activities identified in the statute, that defendants were not required to provide plaintiff with any safety devices or equipment, and that his accident was not proximately caused by the failure of defendants to provide a scaffold, lift, harness or any other type of safety device enumerated under the statute.

In reply, plaintiff contends that he falls within the class of workers protected by Labor Law § 240 (1) because he was delivering and unloading materials to a work site at which materials were to be utilized for an activity such as demolition or alteration. Plaintiff maintains that the pallet jack was the safety device provided for securing, lifting and lowering the heavy

construction materials off the truck, but it was defective and malfunctioned when its brakes failed.

The Court of Appeals has generally held that a fall from a flatbed truck does not present the kind of elevation-related risk contemplated by Labor Law 240 (1) (*Toefer v Long Island R.R.*, 4 NY3d 399, 408 [2005] [fall from flatbed truck “is not attributable to the sort of elevation-related risk that Labor Law § 240 (1) was meant to address”]; *see also Vaneer v 993 Intervale Ave. Hous. Dev. Fund Corp.*, 5 AD3d 161, 163 [1st Dept 2004] [“The Labor Law § 240 (1) cause of action was properly dismissed since plaintiff’s injuries, which were caused by a fall from a flatbed truck, did not result from an elevation-related risk”]; *Rodriguez v D & S Bldrs., LLC*, 98 AD3d 957, 958 [2d Dept 2012] [“plaintiffs’ decedent was not exposed to an elevation-related hazard inasmuch as, at the time the decedent was struck by a bundle of forms, the forms were not being hoisted or secured, and the decedent was working on a flatbed truck at the same level as the bundle of form”]; *Rice v Bd. of Educ.*, 302 AD2d 578, 580 [2d Dept 2003] [“the plaintiff’s contention that the platform of the flatbed truck constituted the type of elevation-related risk contemplated by the statute was properly rejected by the trial court. The task of unloading a truck is not an elevation-related risk simply because there is a difference in elevation between the ground and the truck bed”]).

Furthermore, “[a]lthough gravity-related injuries may occur at a construction site during activities such as getting down from a cab of a truck or falling off the back of a truck, these accidents come within the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law 240 [1]” (*Berg v Albany Ladder Co., Inc.*, 40 AD3d 1282, 1284 [3d Dept 2007] [internal quotation marks and citations omitted]).

In *Pitang v Beacon Broadway Company, LLC*, the Appellate Division, First Department, held that a plaintiff's four-foot fall from a flatbed area of a parked truck to the sidewalk was not the type of elevation-related risk protected by Labor Law 240(1), and it was distinguishable from "other cases where the worker was exposed to a significant elevation differential of 10 or more feet while working on top of stacked materials on a flatbed truck, in which circumstances safety devices of the kind enumerated in Labor Law 240(1) were deemed warranted" (231 AD3d 414, 415 [1st Dept 2024]).

Here, as in *Pitang*, plaintiff fell approximately six feet from the flatbed to the ground when the pallet jack malfunctioned, and thus his accident did not occur because of a failure of the defendants to provide him with a scaffold, lift, harness or any other type of safety device, but because of a malfunctioning pallet jack. While plaintiff notes that a pallet jack may be considered a safety device for certain purposes, the jack at issue here was not utilized to prevent a worker from falling off a truck, but to move loads of materials.

In other cases involving injuries while loading or unloading materials on flatbed trucks, a violation of Labor Law 240(1) was found when the plaintiff was injured by an object that had a significant weight to it and generated a sufficient amount of force to injure the plaintiff (*see Schoendorf v 589 Fifth TIC I LLC*, 206 AD3d 416 [1st Dept 2022] [plaintiff injured when trying to lift 400-pound elevator platform]; *Ali v Sloan-Kettering Institute for Cancer Research*, 176 AD3d 561 [1st Dept 2019] [plaintiff injured when 300 pound coil fell on his leg as coil was being unloaded from truck]; *Landi v SDS William St., LLC*, 146 AD3d 33 [1st Dept 2016] [pallet jack slid down wet surface of ramp and ran over plaintiff's foot]).

Here, no object fell on or injured plaintiff, rather, he fell off the truck when the pallet jack malfunctioned.

Therefore, plaintiff fails to meet his burden of demonstrating that defendants violated Labor Law 240(1) and/or that the violation caused his accident, while defendant demonstrate that they did not violate Labor Law 240(1), and thus plaintiff's Labor Law 240(1) claim is dismissed.

### III. REMAINING CLAIMS

#### A. Procedural issues

In its motion, Global moves for summary judgment dismissing plaintiff's Labor Law 200, 241(6) and 240(1) claims, and granting it conditional judgment on its contractual indemnity claim against Alba.

Alba filed its cross-motion on April 1, 2025, in which it seeks summary judgment dismissal of plaintiff's claims against it, and a judgment granting it contractual indemnity against Environmental. However, as the cross-motion does not seek any relief against the moving party, Global, it is an improper cross-motion (*see Kershaw v Hosp. for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). Accordingly, it is deemed a separate, stand-alone motion.

#### B. Labor Law § 200

Plaintiff does not oppose dismissal of the common-law negligence and Labor Law § 200 claims against defendants, and they are thus dismissed (*see Linares v Massachusetts Mut. Life Ins. Co.*, 225 AD3d 520, 521 [1st Dept 2024] [holding the “Supreme Court should have dismissed plaintiff's common law negligence and Labor Law § 200 claims as abandoned against (defendants) because plaintiff expressly opted not to oppose their dismissal on summary judgment”]; *Leveron v Prana Growth Fund I, L.P.*, 181 AD3d 449, 450 [1st Dept 2020] [“Plaintiff abandoned his common-law negligence and Labor Law § 200 claims as against the . . . defendants by failing to oppose that portion of their motion seeking the dismissal of those claims”]).

C. Labor Law § 241 (6)

Labor Law § 241 (6) provides, in pertinent part:

[a]ll contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

\* \* \*

(6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places . . . .

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection for workers and to comply with specific safety rules which have been set forth by the Commissioner of the Department of Labor (*see St. Louis v Town of N. Elba*, 16 NY3d 411, 413 [2011]). In order to demonstrate liability pursuant to Labor Law § 241 (6), it must be shown that the defendant violated a specific, applicable regulation of the Industrial Code, rather than a provision containing only generalized requirements (*Nostrum v A.W. Chesterton Co.*, 15 NY3d 502, 507 [2010]).

Plaintiff does not oppose the branch of the motion seeking dismissal of the Labor Law § 241(6) claims predicated as to Industrial Code sections 23-1.5 (a)-(b), 23-1.7, 23-1.8, 23-1.10, 23-1.15, 23-1.16, 23-1.17, 23-1.22, 23-1.31, 23-1.32 and 23-2.1. However, plaintiff maintains that issues of fact preclude dismissal of his Labor Law § 241 (6) claim predicated on Industrial Code sections 23-1.5 (c), 23-9.8 and 23-9.7. Plaintiff also cross-moves for an order permitting him to amend his bill of particulars to add a violation of Industrial Code section 23-9.2 (a).

12 NYCRR § 23-9.2 (a)

Leave to amend a bill of particulars “ ‘may properly be granted, even after the note of issue has been filed, where to plaintiff makes a showing of merit, and the amendment involves

no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant' ” (*D’Elia v City of New York*, 81 AD3d 682, 684 [2d Dept 2011], quoting *Galarraga v City of New York*, 54 AD3d 308, 310 [2d Dept 2008]). However, “where the proposed amendment clearly lacks merit and serves no purpose but to needlessly complicate discovery and trial, such a motion should be denied” (*Katechis v Our Lady of Mercy Med. Ctr.*, 36 AD3d 514, 516 [1st Dept 2007]).

Section 23-9.2 (a) of the Industrial Code provides:

a) Maintenance. All power-operated equipment shall be maintained in good repair and in proper operating condition at all times. Sufficient inspections of adequate frequency shall be made of such equipment to insure such maintenance. Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement. The servicing and repair of such equipment shall be performed by or under the supervision of designated persons. Any servicing or repairing of such equipment shall be performed only while such equipment is at rest.

Parts of section 23-9.2 (a) have been held to be specific enough to impose an affirmative duty on the employer pursuant to Labor Law § 241 (6) (*See Misicki v Caradonna*, 12 NY3d 511, 520-521 [2009] [holding that "the first two sentences of section 23-9.2 (a)--which employ only such general phrases as 'good repair,' 'proper operating condition,' '[s]ufficient inspections,' and 'adequate frequency'--are not specific enough to permit recovery under section 241 (6) against a nonsupervising owner or general contractor. We reach the opposite conclusion about the third sentence, however"]]).

Here, defendants are not prejudiced by plaintiff amending the bill of particulars to include a violation of section 23-9.2 (a), as they were aware that plaintiff alleged that he sustained injuries as a result of a defective pallet jack since at least June 9, 2020 when it was discussed in his bill of particulars. Plaintiff further elaborated when he testified on May 24, 2021 that the pallet jack had a problem with its brake (*see Marte v Tishman Constr. Corp.*, 223 AD3d 527, 529

[1st Dept 2024] [holding that plaintiff's belated identification of a section of the Industrial Code did not entail new factual allegations, raise new theories of liability, or result in prejudice to the defendants]). Therefore, leave to amend is granted.

Turning to the merits, plaintiff argues that the pallet jack's brakes were not working and if they had functioned properly, his accident would not have occurred. He maintains that he was told by his co-worker just prior to the accident that they were not functioning, and Micek affirmed that he knew that the brakes were broken before the accident.

In opposition, defendants fail to demonstrate that they followed any inspection and maintenance procedures related to the pallet jack, and whether they were on notice of any structural defect or unsafe condition. Furthermore, defendants do not demonstrate that the violation of this provision did not proximately cause plaintiff's accident (*Cabrera v DIRECTTV, LLC*, 205 AD3d 605, 606 [1st Dept 2022] [holding that the court "properly denied defendants' motion with respect to plaintiff's claim that they violated Industrial Code § 23-1.21 (b) (4) (iv), since defendants did not meet their prima facie burden of demonstrating that violation of that provision did not proximately cause the accident"]).

Thus, Global and Alba's motions seeking dismissal of plaintiff's claim predicated on an alleged violation of Industrial Code 23-9.2 (a) is denied.

12 NYCRR § 23-1.5 (c)

Plaintiff alleges a violation of Industrial Code section 23-1.5 (c). This section provides:

(c) Condition of equipment and safeguards.

(1) No employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition.

(2) All load carrying equipment shall be designed, constructed and maintained throughout to safely support the loads intended to be imposed thereon.

(3) All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged.

In support of their motions, Global and Alba contend that this section of the Industrial Code should be dismissed as it is not specific enough to trigger liability pursuant to Labor Law § 241 (6). However, caselaw indicates that while subsections (c)(1) and (2) are insufficiently specific, (c)(3) is specific enough (*Jackson v Hunter Roberts Constr. Group, LLC*, 161 AD3d 666, 667-668 [1st Dept 2018], citing *Becerra v Promenade Apts., Inc.*, 126 AD3d 557, 558 [1st Dept 2015]). Therefore, the part of defendants' motion and cross motion for summary judgment seeking to dismiss violations of subsections 23-1.5 (c) (1) and (2) is granted.

As to Industrial Code section 23-1.5 (c) (3), plaintiff contends that his testimony demonstrates that the brake was faulty and that the pallet jack did not stop. He maintains that therefore, the pallet jack should have been repaired, restored, or immediately removed from service.

Given that Micek conceded that he knew that the pallet jack's brake was broken before plaintiff attempted to use it, plaintiff raises a triable issue as to whether defendants violated 23-1.5(c)(3) by failing to repair or remove the jack (*see Nicholson v Sabey Data Ctr. Props., LLC*, 205 AD3d 620 [1st Dept 2022] [subsection potentially violated as plaintiff testified he had been having problems with pallet jack before it suddenly engaged and jumped back, causing plaintiff to fall]).

#### 12 NYCRR § 23-9.8

Plaintiff argues that sections 9.8 (c), (d), (e) and (h) of the Industrial Code were violated.

This section provides:

“(c) Brakes and load-elevating mechanisms. Every power-operated fork and lift truck shall be provided with a lockable brake. The load-elevating mechanism shall be capable of being locked at any elevation.

- (d) Hand-lift handles. Every pallet truck having a hand-lift handle shall be provided with an automatic device to retain the raised load and free the handle until it is re-engaged by the operator.
- (e) Operating surfaces. No lift or fork truck shall be used on any surface that is so uneven as to make upsetting likely.
- (h) Support of pallets. Loaded pallets shall be kept level at all times. Masonry units used as pallet supports shall be securely lashed to the pallet and shall be of proper quality and number to provide stable footing for the load. Loose material and other unstable supports for pallets shall not be used.”

This section of the Industrial Code has been held to be specific enough to serve as a predicate for Labor Law § 241 (6) (*Torres v 40 E. End Ave. Assoc. LLC*, 2024 NY Slip Op 34442 [U]\*\* [Sup Ct, NY County 2024]; *Dreher v City of New York*, 2012 NY Slip Op 32498 [U]\*\* [Sup Ct, NY County 2012]).

Global and Alba contend that there has been no evidence that a violation of this section has occurred or was a proximate cause of his accident. Plaintiff contends that issues of fact exist as to whether this section was violated as the truck on which plaintiff was working was parked on an incline, the brake was defective on the pallet jack, and these circumstances resulted in the loaded pallet jack pushing plaintiff off of the truck.

As the relevant testimony suggests that the lift may have been uneven due to the manner in which the vehicle was parked, and as the brake was allegedly not operating correctly, there is no basis to dismiss sections 9.8 (c), (e), and (h) of the Industrial Code. However, as plaintiff does not allege that a hand-lift handle was not provided, the part of defendants’ motion seeking to dismiss Industrial Code section 9.8 (d) is granted.

12 NYCRR § 23-9.7

This subsection relates to “motor trucks.” Global and Alba contend that this subsection is inapplicable, while plaintiff contends that it applies to his accident.

Global and Alba demonstrate, prima facie, that the pallet jack was not being used as a “motor truck,” and plaintiff does not show otherwise. Moreover, plaintiff’s generalized statement, without any support that this section may be applicable, is insufficient to withstand dismissal (*see Scott v Am. Museum of Natural History*, 3 AD3d 442, 443 [1st Dept 2004] [“in view of the inapplicability of 12 NYCRR § 23-9.7 (d) to the injury-producing activity, plaintiff’s Labor Law § 241 (6) claim predicated upon that Code section should have been dismissed”).

Therefore, the part of defendants’ motion seeking to dismiss the violation of Industrial Code section 23-9.7 is granted.

#### Contractual Indemnification

#### Global’s contractual indemnification cross-claim against Alba

Global contends that it should be awarded a conditional order of summary judgment with respect to its cross-claim for contractual indemnification against Alba pursuant to the agreement between them, which provides that Alba shall defend, indemnify and hold harmless Global against any and all claims, damages, losses, liabilities and expenses arising out of or resulting from the performance of the work. Global contends that plaintiff’s accident arose out of or resulted from Alba’s work as it hired plaintiff’s employer.

In opposition, Alba argues that the record demonstrates that it did not direct, control and/or supervise the work that gave rise to plaintiff’s alleged accident or injuries, and that, therefore, the indemnification provision in their agreement was not triggered.

Here, it is undisputed that at the time of his accident, plaintiff was working for Main Services and was in the process of delivering construction materials to Alba, which would have used the materials for the project at issue.

As plaintiff was performing work in furtherance of Alba's work, plaintiff's injuries arose from the performance of that work. Therefore, Global is granted an order for conditional summary judgment with respect to its claim for contractual indemnification against Alba.

Alba's contractual indemnification cross-claim against Environmental

Alba did not assert a cross-claim against Environmental until after it submitted its motion, and without seeking leave of the court do so. Its cross-claim is thus denied and dismissed.

CONCLUSION

Accordingly, it is

ORDERED that defendant Global 1845 Broadway, LLC's motion for summary judgment (seq. 001) is granted to the extent of severing and dismissing violations of Labor Law §§ 200, 240 (1), and 241(6) premised on Industrial Code §§ 23-1.5 (a)-(b), 23-1.5 (c) (1) and (2), 23-1.7, 23-1.8, 23-1.10, 23-1.15, 23-1.16, 23-1.17, 23-1.22, 23-1.31, 23-1.32, 23-2.1, 23-9.7, 23-9.8 (d) against it, and is otherwise denied; and it is further

ORDERED that the part of defendant Global 1845 Broadway, LLC's motion seeking a conditional order of summary judgment for contractual indemnification as against Alba Services, Inc. is granted; and it is further

ORDERED that defendant Alba Services, Inc.'s cross-motion for summary judgment is granted to the extent of severing and dismissing violations of Labor Law §§ 200, 240 (1), and 241(6) premised on Industrial Code §§ 23-1.5 (a)-(b), 23-1.5 (c) (1) and (2), 23-1.7, 23-1.8, 23-1.10, 23-1.15, 23-1.16, 23-1.17, 23-1.22, 23-1.31, 23-1.32, 23-2.1, 23-9.7, 23-9.8 (d) against it, and is otherwise denied; and it is further

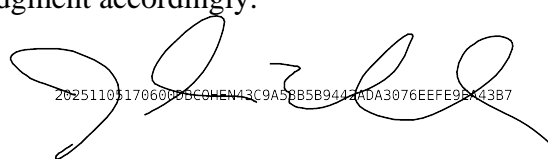
ORDERED that the part of Alba Services, Inc.’s cross-motion seeking summary judgment for contractual indemnification as against defendant Alba Environmental, Inc. is denied, and upon searching the record, the cross-claim is dismissed; and it is further

ORDERED that plaintiff’s cross-motion for leave to amend his bill of particulars to include a violation of Industrial Code section 23-9.2 (a) is granted; and it is further

ORDERED that plaintiff’s motion for summary judgment pursuant to Labor Law § 240 (1) is denied (seq.002); and it is further

ORDERED that Alba Environmental, Inc.’s cross-motion for summary judgment is granted solely to the extent of severing and dismissing plaintiff’s Labor Law § 240 (1) claim against it, and it is otherwise denied; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.



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11/5/2025  
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART
				<input type="checkbox"/>	OTHER
				<input type="checkbox"/>	SUBMIT ORDER
				<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: