SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NICHOLAS W. MOYNE **PART** 41M

Justice

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JAN WITTE,

Plaintiff,

- v -

GOTHAM CONSTRUCTION COMPANY,LLC,44TH STREET DEVELOPMENT LLC

Defendant.

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INDEX NO. 159347/2013

MOTION DATE 03/06/2025

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 120

were read on this motion to/for STRIKE PLEADINGS.

Upon the foregoing documents, it is

Plaintiff, Jan Witte, commenced the underlying action against defendants, Gotham Construction Company, LLC ("Gotham"), and 44th Street Development, LLC ("44th Street"), to recover for personal injuries allegedly sustained on or around August 27, 2013, when the plaintiff was caused to trip and fall over an exposed projection of rebar while working on a construction project at the premises located at 550 West 45th Street, New York. Plaintiff's complaint in this action included claims against defendants for alleged violations of Labor Law § 200, Labor Law § 241(6) and/or Rule 23 of the Industrial Code of the State of New York, and common law negligence.

Now, in Motion Sequence 004, Gotham and 44th Street move for an order, pursuant to CPLR §§ 3043(b) and (c), striking the plaintiff's "Fourth Supplemental Verified Bill of Particulars" (the "Bill") and prohibiting plaintiff from further supplementing to include a claim for, or liability under, Labor Law § 241(6). Defendants move to strike on grounds that the Bill

does not seek to amplify prior allegations but rather improperly attempts to add new causes of action. For the reasons set forth below, the motion is granted.

Procedural History:

The facts and procedural history relevant to the present motion are as follows. In the complaint for this action, plaintiff asserted a Labor Law § 241(6) claim that included alleged violations of Rule 23 of the Industrial Code, including sections: 23-1.5, 23-1.7 and (e) 2. In the Verified Bill of Particulars dated March 12, 2014, plaintiff alleged that defendants "violated Labor Law §200 and §241(6) and the following sections of the Industrial Code of the State of New York: §23-1.3, §23-1.5, 23-1.7 and (e) 2" (NYSCEF Doc. No. 101 ¶ 20). After service of this original Bill of Particulars, plaintiff then served three Supplemental Bills of Particulars, including additional allegations as to the following: (1) a Supplemental Verified Bill of Particulars in 2014, supplementing the claimed permanent injuries provided under paragraph 11; (2) a Second Supplemental Verified Bill of Particulars in 2015, supplementing the claimed permanent injuries under paragraph 11, employment/earnings under paragraph 14, and special damages under paragraph 17; and (3) a Third Supplemental Verified Bill of Particulars in 2017, supplementing the claimed permanent injuries under paragraph 11 (*see* NYSCEF Doc. No. 102). On or around June 19, 2019, the Note of Issue was filed by plaintiff (NYSCEF Doc. No. 43).

Subsequently, on August 14, 2019, Gotham and 44th Street filed a CPLR § 3212 motion (Motion Sequence 002) seeking summary judgment in defendants' favor and dismissing the plaintiff's complaint (NYSCEF Doc. No. 43; 47-70). On or around January 21, 2020, the Hon. Robert D. Kalish of this Court heard oral argument on the motion and, issuing a decision on the record as well as a written Decision and Order, granted the defendants' motion for summary judgment as to the plaintiff's Labor Law § 241(6) cause of action but denied the motion as to the

Labor Law § 200 claim (NYSCEF Doc. No. 72; 76). Following the determination on the summary judgment motion, on or around February 23, 2024, counsel for plaintiff was substituted (NYSCEF Doc. No. 86), and in accordance with the Stipulation signed by the parties and dated March 4, 2024, the Note of Issue was vacated on consent (NYSCEF Doc. No. 88).

On or around June 28, 2024, plaintiff served a "Fourth Supplemental Verified Bill of Particulars", including the following allegation under paragraph 20: "[t]he Court will take judicial notice of any and all applicable statutes, laws, rules, regulations and/or ordinances violated by [d]efendants at the trial of this action including but not limited to Labor Law Sections §200 and §241(6) and the following sections of the Industrial Code of the State of New York: §§ 23-1.3, 23-1.5(c)(1)(2)(3), 23-1.7(d), 23-1.7(e)(1)(2), 23-1.30, 23- 2.1(a)(1)(2), 23-2.1(b) and OSHA Rules" (NYSCEF Doc. No. 90). However, in opposition to the present motion it was advised that "[p]laintiff withdraws all Industrial Codes referenced in its Fourth Supplemental Verified Bill of Particulars except Industrial Code § 23-1.7(e)(1)" (NYSCEF Doc. No. 115 ¶ 18). Therefore, largely at issue in the present motion is the inclusion of a Labor Law § 241(6) claim and alleged violation of Industrial Code § 23-1.7(e)(1) within the Fourth Supplemental Verified Bill of Particulars.

Discussion:

In their motion, defendants assert that the Bill should be stricken as the plaintiff attempts to assert new causes of action and/or relitigate previously decided issues that are now law of the case. Defendants allege that a bill of particulars may be supplemented, but not amended, without leave of court and the plaintiff attempts to improperly assert new allegations rather than amplify the current pleadings. Under CPLR § 3042(b), "[a] party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of

court at any time… [p]rovided however that no new cause of action may be alleged or new injury claimed". "[T]he purpose of a bill of particulars is to amplify pleadings, not add a new theory or cause of action" (*Valentine v 2147 Second Ave. LLC*, 203 AD3d 531, 532 [1st Dept 2022]). Additionally, it "may not be used to supply allegations essential to a cause of action that was not pleaded in the complaint" (*Paterra v Arc Dev. LLC*, 136 AD3d 474, 475 [1st Dept 2016]). Therefore, defendants argue that the Bill should be stricken as it does not amplify prior allegations but instead attempts to add or substitute a new theory of liability (*Wolfer v 184 Fifth Ave. LLC*, 27 AD3d 280 [1st Dept 2006]; *c.f. Scherrer v Time Equities, Inc.*, 27 AD3d 208, 209 [1st Dept 2006]).

Although the Bill is labeled as "supplemental", it appears from the motion papers that plaintiff now intends for it to be treated as "amended" (*see Licht v Trans Care N.Y., Inc.*, 3 AD3d 325, 326 [1st Dept 2004]; *Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389, 391 [1st Dept 2006]). In opposition, plaintiff asserts that he is entitled to amend the Bill to include a Labor Law § 241(6) claim based on Industrial Code § 23-1.7(e)(1) as of right because the Note of Issue for the action was vacated and there is no prejudice or surprise by the amendment. Pursuant to CPLR § 3042(b), "[i]n any action or proceeding in a court in which a note of issue is required to be filed, a party may amend the bill of particulars once as of course prior to the filing of a note of issue". Where a note of issue has been filed, a bill of particulars may be supplemented, but not amended, without leave of court (*Matias v W. 16th Realty LLC*, 197 AD3d 1043 [1st Dept 2021]). However, where a note of issue has been vacated, an amended bill of particulars may be properly served without leave of court due to the pre-note posture of the case (*see Fields v Lambert Houses Redevelopment Corp.*, 105 AD3d 668, 671 [1st Dept 2013], citing *Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389, 391 [1st Dept 2006]). Therefore, considering that the

original Note of Issue from 2019 was vacated, the plaintiff is correct that he could be entitled to amend the Bill at this posture once as of right.

However, plaintiff is not entitled to now amend the Bill to include an Industrial Code § 23-1.7(e)(1) violation because the plaintiff's Labor Law § 241(6) cause of action was dismissed. As shown by the transcript and Decision and Order, Judge Kalish determined defendants had established their entitlement to judgment and dismissal of the Labor Law § 241(6) claim in its entirety as a matter of law (NYSCEF Doc. No. 72; 76).

First, contrary to plaintiff's argument otherwise, this dismissal has a preclusive effect to amendment as the dismissal was on summary judgment. "The grant of summary judgment is the procedural equivalent of a trial" (*News Am. Mktg., Inc. v Lepage Bakeries, Inc.*, 16 AD3d 146, 149 [1st Dept 2005]), and "an order granting summary judgment resolves an issue as a matter of law" (*Lebedev v Blavatnik*, 193 AD3d 175, 182 [1st Dept 2021]). While the Decision and Order itself did not expressly state the dismissal was "with prejudice", "CPLR 5013 does not require that the prior judgment contain the precise words 'on the merits'... it suffices that it appears from the judgment that the dismissal was on the merits. Indeed, one would not expect to find any such explicit recital in a judgment of dismissal based on a grant of summary judgment for insufficiency of proof" (*Strange v Montefiore Hosp. and Med. Ctr.*, 59 NY2d 737, 739 [1983]).[1]

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[1] The two cases cited by plaintiff in support of the contention that the dismissal was without prejudice are easily distinguishable or otherwise inapplicable as both cases involve dismissals under CPLR § 3211 for procedural or pleading deficiencies which could be curable, rather than dismissed on the merits (*see Landau v LaRossa, Mitchell & Ross*, 11 NY3d 8, 15 n 3 [2008]).
The case of *Favourite Ltd. v Cico*, 42 NY3d 250, 258 (2024) contemplated a trial court's ability to grant leave to amend a complaint following dismissal of the complaint by the Appellate Division due to a lack of standing or capacity. The Court of Appeals found that where the Appellate Division's dismissal was without prejudice and there were other claims in the original action which remained pending in the Supreme Court even after this dismissal, leave to amend could be granted (the dismissal of the complaint was without prejudice and other claims in the action remained pending *(Id.* at 261). In the case of *Parker v Trustees of Spence School, Inc.*, 231 AD3d 628, 628 (1st Dept 2024), the First Department found a plaintiff was not precluded from seeking leave to amend the complaint where the claim had been dismissed due to the insufficiency of the allegations and the dismissal was not with prejudice.

Further, as it involves legal determinations resolved on the merits and the plaintiff did not appeal or seek leave to renew or reargue within the applicable time period to do so (CPLR §§ 5513; 2221), the Decision and Order remains binding (*People v Evans*, 94 NY2d 499, 504 [2000]; *c.f. Baldasano v Bank of New York*, 199 AD2d 184, 185 [1st Dept 1993]).

Next, plaintiff also asserts that the prior motion was granted only as to the Industrial Code violations that were pled[2] and therefore, dismissal of the Labor Law § 241(6) claim based on those sections does not preclude amendment to allege a violation of a different and separate code section. At the time defendants filed the motion for summary judgment, the pleadings included alleged violations of Industrial Code sections 23-1.3, 23-1.5, 23-1.7 (e) (2), but did not identify section 23-1.7(e)(1). More specifically, at no point in this litigation did the plaintiff allege a violation of Industrial Code § 23-1.7(e)(1) as a predicate for the Labor Law § 241(6) claim in either the complaint or any of his Bills of Particulars. Additionally, the plaintiff never sought leave to amend the pleadings to include this Industrial Code provision (*see Velocci v Stop and Shop*, 188 AD3d 436, 441 [1st Dept 2020]). Rather, Industrial Code § 23-1.7(e)(1) was improperly raised for the first time in the plaintiff's papers in opposition to the defendants' motion for summary judgment (*Schwartz v Mount Sinai Hosp.*, 231 AD3d 416, 417 [1st Dept 2024]; *Biondi v Behrman*, 149 AD3d 562, 563-64 [1st Dept 2017] ["a plaintiff cannot defeat a summary judgment motion that made out a prima facie case by merely asserting, without more, a new theory of liability for the first time in the opposition papers"]).

However, plaintiff's argument is unavailing as the issue of Industrial Code § 23-1.7(e)(1) was considered and addressed by the Court when the motion for summary judgment was granted and the Labor Law § 241(6) claim was dismissed. The Court, noting on the record at argument

[2] At oral argument the plaintiff did not object to dismissal of Industrial Code sections 23-1.3, 23-1.5, 23-1.7 (e)(2) as being inapplicable and thus, the motion was granted as to those sections (NYSCEF Doc. No. 76, tr at 35, lines 7-14).

that section (e)(1) had not been alleged and there was no request to amend pending, nonetheless considered the amendment and addressed the applicability of section 23-1.7(e)(1) to the facts (NYSCEF Doc. No. 76, tr at 35-39). Judge Kalish held that amendment would be improper under the circumstances and even if the Court were to allow it, plaintiff had not sufficiently established a basis to include an alleged violation under section 23-1.7(e)(1) as there was insufficient information to indicate a passageway (NYSCEF Doc. No. 76, tr at 39, lines 4-18). The Court then clarified the award of summary judgment, stating: "[a]lthough I thought I said it, I want to be clear. That even if I had allowed or allow the plaintiff to go forward on 23-1.7 (e) (1), the [C]ourt would still grant summary judgment on behalf of the defendants based upon the EBT of Ruziecki. The [C]ourt finds that there was no -- that there is no triable issue of fact that the accident happened in a passageway" (*Id.* at 41, lines 23-25; at 42, lines 1-5). Thus, as there were no qualifying Industrial Code sections to support the plaintiff's Labor Law § 241(6) claim, summary judgment was granted and the claim was dismissed (*see Reilly v Newireen Assoc.*, 303 AD2d 214, 218 [1st Dept 2003]).

Considering the above, a plaintiff is not permitted to anew the very cause of action previously dismissed on a motion for summary judgment (*6 Harbor Park Dr., LLC v Town of N. Hempstead*, 159 AD3d 777, 779 [2d Dept 2018]). "Once a court has granted or denied a summary judgment motion based on the facts adduced before it, the matter is res judicata; new life may not be breathed into it through permissive repleading, even upon a showing of merit" (*Buckley & Co., Inc. v City of New York*, 121 AD2d 933, 935 [1st Dept 1986] [internal citations omitted]). "The conclusive effect of a judgment on the merits may not be fatally undermined, [] by allowing the party whose cause is dismissed a second chance to litigate the matter" (*Id.*). The granting of a motion for summary judgment and dismissal of a cause of action is preclusive of

said claim being again asserted in amended pleadings (*Baker v 16 Sutton Place Apt. Corp.*, 2 AD3d 119, 120 [1st Dept 2003], *c.f. Duane Reade v Cardinal Health, Inc.*, 21 AD3d 269, 270 [1st Dept 2005]). Accordingly, an order granting summary relief in an action cannot be circumvented by a subsequent effort to amend (*Seavey v James Kendrick Trucking, Inc.*, 4 AD3d 119 [1st Dept 2004]), or be reasserted through repleading in an amended bill of particulars (*Chapman v Tovar*, 235 AD3d 552, 553 [1st Dept 2025]). Simply, as plaintiff's claim was dismissed on summary judgment, there is no longer a Labor Law § 241(6) claim under which the new Industrial Code violation could be asserted or included (*Jeffrey L. Rosenberg & Assoc., LLC. v Kadem Capital Mgt., Inc.*, 306 AD2d 155, 156 [1st Dept 2003] [Plaintiffs' complaint was previously dismissed on summary judgment in a prior, unappealed order, and thus there was no basis for an amendment as there was no complaint left to amend]).

Considering, the plaintiff is precluded from amending his Bill of Particulars to include any supposed violation under Labor Law § 241(6), including Industrial Code § 23-1.7(e)(1), as the cause of action was conclusively decided on the merits. Therefore, the plaintiff's "Fourth Supplemental Verified Bill of Particulars" or "Amended Verified Bill of Particulars" must be stricken to the extent it asserts allegations regarding a violation of Labor Law § 241(6).

Accordingly, it is hereby

ORDERED that Motion Sequence 004, the motion of defendants to strike the plaintiff's Fourth Supplemental Verified Bill of Particulars, is granted; and it is further

ORDERED that the plaintiff's Fourth Supplemental Verified Bill of Particulars is stricken, and plaintiff is precluded from further supplementing or amending the Bill of Particulars to include allegations relevant to a Labor Law § 241(6) cause of action; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 327, 80 Centre Street, New York, New York, on January 15, 2026, at 2:15 PM.

This constitutes the decision and order of the Court.

12/8/2025
DATE

NICHOLAS W. MOYNE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE