Difiore v Cardella Trucking Co.
2026 NY Slip Op 31522(U)
April 6, 2026
Supreme Court, New York County
Docket Number: Index No. 161409/2020
Judge: Leslie A. Stroth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LESLIE A. STROTH** **PART** **12M**

Justice

---X

ANTHONY DIFIORE, ANGELA DIFIORE,

Plaintiff,

- v -

CARDELLA TRUCKING CO., INC.,BOP NE LLC,BOP NE TOWER LESSEE LLC,BOP NE TOWER LESSEE LLC C/O BROOKFIELD FINANCIAL PROPERTIES, L.P., BROOKFIELD FINANCIAL PROPERTIES, L.P., BOP NE TOWER LESSEE LLC C/O BROOKFIELD OFFICE PROPERTIES INC.,BROOKFIELD OFFICE PROPERTIES INC.,TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, SAFET SEJMENOVIC

Defendant.

---X

INDEX NO. 161409/2020

MOTION DATE 03/06/2025, 03/06/2025

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 134, 137, 138, 139, 140, 141, 143, 145, 146, 150, 152, 154

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 133, 135, 136, 142, 144, 147, 148, 149, 151, 153

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

The instant action arises from an accident at a construction site, where Plaintiff Anthony Difiore was allegedly injured when a hoisted dumpster fell onto a roll-off truck, pushing the truck forward and striking Plaintiff. Defendants BOP NE LLC, BOP NE Tower Lessee LLC (together, the "BOP Defendants") are the owners of the property and Tishman Construction Corporation of New York ("Tishman") was the general contractor. The complaint asserts claims for Labor Law §§ 240(1), 241(6), and 200, as well as common-law negligence.

Plaintiffs now move, pursuant to CPLR 3212, for summary judgment on the issues of Labor Law §§ 240(1) and 241(6) against the BOP Defendants and Tishman (motion sequence

004). The BOP Defendants and Tishman also move for summary judgment, pursuant to CPLR 3212, seeking to dismiss all claims and cross-claims (motion sequence 005).

FACTUAL BACKGROUND

Plaintiff alleges that the accident occurred on January 6, 2018, at or around 7:30am at a construction site located at 401 Ninth Avenue, New York, New York. Plaintiff was employed by Navellus, a concrete subcontractor for the project, and he asserts that on January 6, 2018, he was assigned to assist the driver of Defendant Cardella Trucking Co., Inc. ("Cardella") with the drop-off of an empty 30-yard dumpster and pickup of a full 30-yard dumpster.

The alleged accident occurred while Plaintiff and the Cardella driver were trying to load the full dumpster, weighing approximately 16,000 to 20,000 pounds, onto the Cardella roll-off truck. To accomplish this, the Cardella driver used a chain to hoist the full dumpster and position it onto the truck. While the dumpster was being hoisted, Plaintiff walked toward the open gate, located in front of the truck. When the dumpster was approximately two feet in the air, the chain snapped, causing the dumpster to fall on the truck, propelling the truck forward approximately two to three feet and striking Plaintiff.

LEGAL STANDARD

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 323 [1986]). Once a party has submitted competent proof demonstrating that there is no substance to its opponent's claims and no disputed issues of fact, the opponent, in turn, is required to "lay bare [its] proof and come forward with some admissible proof that would require a trial of the material questions of fact on which [its] claims rest" (*Ferber v Sterndent Corp.*, 51 NY2d 782, 783 [1980]). The party

opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted (*see Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, [1st Dept 1990]).

DISCUSSION

A. Labor Law § 240(1)

Labor Law § 240 (1) provides, in relevant part, as follows:

> "All contractors and owners and their agents, . . . , in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Labor Law § 240(1) "imposes a nondelegable duty on owners and contractors to provide 'devices which shall be so constructed, placed and operated as to give proper protection to' those individuals performing the work" (*Quiroz v Memorial Hosp. for Cancer & Allied Diseases*, 202 AD3d 601, 604 [1st Dept 2022], quoting *Montalvo v J. Petrocelli Const., Inc.*, 8 AD3d 173, 174 [1st Dept 2004]). "[I]n order 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 Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015], *rearg denied* 25 NY3d 1211 [2015]).

The Court of Appeals has noted that, "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Additionally, the Court of Appeals has stated that "Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*" (*Id.*

[emphasis in original], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

Here, Plaintiffs argue that this case clearly falls under Labor Law § 240(1) because it occurred as a result of Defendants' failure to provide adequate safety devices to secure the dumpster, causing the dumpster to fall and propel the truck forward.

In opposition, Defendants contend that Labor Law § 240(1) does not apply because Plaintiff did not fall from an elevation, nor was Plaintiff struck by a falling object. Instead, Defendants argue that both Plaintiff and the truck were on the same level when the accident occurred and as such Labor Law § 240(1) does not apply.

However, the caselaw relied on by Defendants, in which courts declined to grant summary judgment on Labor Law § 240(1), is inapposite to the facts of this case. In *O'Donnell v Buffalo-DS Assoc., LLC*, 64 AD3d 1421 [4th Dept 2009] involved a plaintiff who dislocated his shoulder while using hand-operated hoisting crank. In *Toefer v Long Island R. R.*, 4 NY3d 399 [2005], a plaintiff was struck by a wooden beam that "inexplicably flew at him either upwards or horizontally." The Court in *Toefer* specifically noted that it was unclear why the wooden beam struck the plaintiff, stating "a wooden lever, for some reason that has not been explained, flew back at [plaintiff] with enormous force . . ." (*id.* at 405).

Conversely, in the case at hand, it is clear the accident occurred from harm flowing directly from the application of the force of gravity onto the truck. The deposition testimony of Plaintiff and Cardella driver establishes that Plaintiff's accident occurred when a 16,000 to 20,000 pound dumpster fell from approximately two feet in the air onto the Cardella truck, propelling the truck forward. Therefore, Plaintiffs' motion for summary judgment on Labor Law

§ 240(1) is granted and Defendant's motion for summary judgment on Labor Law § 240(1) is denied.

B. Labor Law § 241(6)

Labor Law § 241 (6) provides:

> "All 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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, . . . , shall comply therewith."

Labor Law § 241 (6) "imposes a *nondelegable* duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety'" to workers performing construction, excavation or demolition (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998] [emphasis in original]). To recover under Labor Law § 241 (6), a plaintiff must plead and prove that the "defendant violated an Industrial Code regulation 'that sets forth a specific standard of conduct and [is] not simply a recitation of common-law safety principles'" (*Toussaint v Port Auth. of N.Y. & N.J.*, 38 NY3d 89, 94 [2022], quoting *St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]). In addition to establishing the violation of a specific and applicable regulation, the plaintiff must also show that the violation was a proximate cause of the accident (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012]).

Here, Plaintiffs allege violations of Industrial Code §§ 23-1.5(c), 23-9.2(a), and 23-6.2(a).[1]

[1] Plaintiffs also state that Industrial Code § 23-1.7(d) is applicable to the instant matter but does not present any arguments regarding this section in its motion for summary judgment or in opposition to Defendants' motion for summary judgment.

12 NYCRR § 23-1.5(c) 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 there-on.
> (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.

12 NYCRR § 23-9.2 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.

12 NYCRR § 23-6.2(a) imposes requirements for hoisting ropes.

Defendants argue that summary judgment cannot be granted with respect to these Industrial Codes because, while Plaintiffs pled other industrial codes in their Bill of Particulars, these three were not specifically pled. Defendants assert that this is fatal to Plaintiffs' motion because Plaintiffs did not seek to amend their Bill of Particulars.

Plaintiffs counter that amendment of the bill of particulars is routinely allowed, even after the note of issue has been filed, where there is no unfair surprise or new factual allegations and no prejudice to Defendants.

Courts have found that the failure to include industrial codes in a bill of particulars "is not necessarily fatal to a section 241(6) claim and, in the absence of unfair surprise or prejudice, may be rectified by amendment, even where the note of issue has been filed" (*Marte v Tishman Constr. Corp.*, 223 AD3d 527 [1st Dept 2024]; *see also Harris v City of New York*, 83 AD3d 104

[1st Dept 2011]). However, in such cases, a plaintiff has only been permitted to amend the bill of particulars, not to rely on the Industrial Codes for the first time on summary judgment. Here, Plaintiffs have not sought to amend the bill of particulars and as such, are not entitled to summary judgment on Industrial Codes §§ 23-1.5(c), 23-9.2(a), and 23-6.2(a). Therefore, Plaintiff's motion for summary judgment on Labor Law § 241(6) predicated on Industrial Codes §§ 23-1.5(c), 23-9.2(a), and 23-6.2(a) is denied.

Additionally, Plaintiff's did not oppose Defendants' motion for summary judgment on Labor Law § 241(6) predicated on the 23 Industrial Codes pled in the Bill of Particulars, specifically Industrial Codes §§ 23-1.18(c)(1), (2), (3); 23-1.29(a), (b); 23-1.33(a)(1), (2), (3), (c)(1)-(8), (d)(1), (2); 23-1.7(b); 23-4.2(h)(k); 23-6.3; 23-9.2(b)(1); 23-9.5(g); 23-9.7(d). Accordingly, Defendants' motion for summary judgment on Labor Law § 241(6) predicated on these industrial codes is granted.

C. Labor Law § 200 and Common-Law Negligence

It is well settled that Labor Law § 200 "'is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site'" (*DiBrino v Rockefeller Ctr. N., Inc.*, 230 AD3d 127, 131 [1st Dept 2024], quoting *Rizzuto*, 91 NY2d at 352). Section 200 (1) provides as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section."

"There are two distinct standards applicable to Labor Law § 200 cases, depending upon whether the accident is the result of a dangerous condition, or whether the accident is the result of the means and methods used by the contractor to perform its work" (*Britez v Madison Park*

Owner, LLC, 36 Misc 3d 1233[A], 2012 NY Slip Op 51586[U], *9 [Sup Ct, NY County 2012], *affd* 106 AD3d 531 [1st Dept 2012]).

"'Where the worker is injured as a result of the manner in which the work is performed, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work'" (*Castro v Brito*, 235 AD3d 527, 529 [1st Dept 2025], quoting *Prevost v One City Block, LLC*, 155 AD3d 531, 533-534 [1st Dept 2017]). On the other hand, "[w]here an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca*, 99 AD3d at 144 [internal quotation marks and citation omitted]). Fundamentally, "section 200 does not impose vicarious liability on owners and general contractors" (*Solarte v Brearley Sch.*, 238 AD3d 541, 542 [1st Dept 2025] [internal quotation marks and citation omitted]).

Defendants argue that they are entitled to summary judgment on the Labor Law § 200 and common-law negligence claims because none of the Defendants controlled the means and methods of Plaintiff's work. Defendants argue that Plaintiff only received assignments from employees of Navillus, that the Cardella truck driver suggested hoisting the dumpster with the chain, and that neither the BOP Defendants nor Tishman were involved with this operation. Specifically, as to the BOP Defendants, Defendants assert that they did not supervise or control the job site and that they never provided Cardella any chains or hoists for their work on the job site. As to Tishman, Defendants assert that it did not provide safety devices to contractors or subcontractors, that it had no direct dealings with Cardella, that it was not involved with Cardella's removal of debris from the jobsite, and that Plaintiff did not see Tishman's foreman on the day of the alleged incident.

In opposition, Plaintiffs argue that this accident was caused by an unsafe condition and an unsafe method of work. Plaintiffs argue that Tishman was responsible for safety of the jobsite, which was overseen by five Tishman managers, that Tishman maintained a detailed Site Safety Plan, and that Tishman was responsible for the coordination of debris removal. Plaintiffs do not oppose summary judgment on the Labor Law § 200 and common-law negligence claims with respect to the BOP Defendants.

In reply, Defendants argue that liability would only attach if Tishman and the BOP Defendants had supervisory control over the means and methods of the loading and the unloading of the dumpsters, which they did not.

Here, Tishman's testimony demonstrates that Tishman was responsible for jobsite safety, which included having five safety managers, as well as coordination of all work at the construction site (NYSCEF Doc. No. 126, Tishman EBT). As to the coordination of the work, Tishman's contract specifically states that it "shall employ . . . efficient business administration, coordination and management, and its best efforts, skill and judgment, to cause the Subcontractors to perform the Work in the most expeditious and economical manner . . ." (NYSCEF Doc. No. 128, Tishman Contract at 20). Additionally, the superintendent for Tishman testified that he was responsible for "[c]oordinating the work of all the subcontractors" that were on the construction site (NYSCEF Doc. No. 126, Tishman EBT at 13). Therefore, there is an issue of fact as to whether Tishman actually exercised supervisory control over the dumpster removal work.

As such, Defendant's motion for summary judgment on the Labor Law § 200 and common-law negligence claims is granted as to the BOP Defendants and denied as to Tishman.

D. Cross-Claims

Defendants Cardella and Sejmenovic submitted a partial opposition to the BOP Defendants and Tishman's motion for summary judgment, arguing that no evidence or case law was submitted supporting dismissal of the cross-claims. Indeed, the BOP Defendants and Tishman's motion for summary judgment does not present any arguments as to why the cross-claims should be dismissed. In reply, the BOP Defendants and Tishman merely state that if Plaintiffs' claims are dismissed, the cross-claims should be dismissed as well. As all of Plaintiffs' claims were not dismissed, this section of the BOP Defendants and Tishman's motion for summary judgment is denied.

Accordingly, it is

ORDERED that Plaintiffs' motion for summary judgment (motion sequence 004) is granted with respect Labor Law § 240(1) and is denied with respect to Labor Law §241(6); and it is further

ORDERED that the BOP Defendants and Tishman's motion for summary judgment (motion sequence 005) is denied with respect to the Labor Law § 240(1) and cross-claims, and is granted with respect to Labor Law §241(6) predicated on Industrial Codes §§ 23-1.18(c)(1), (2), (3); 23-1.29(a), (b); 23-1.33(a)(1), (2), (3), (c)(1)-(8), (d)(1), (2); 23-1.7(b); 23-4.2(h)(k); 23-6.3; 23-9.2(b)(1); 23-9.5(g); 23-9.7(d), and these claims are dismissed; and it is further

ORDERED that the BOP Defendants and Tishman's motion for summary judgment (motion sequence 005) on the Labor Law §200 and common-law negligence claims is granted as to the BOP Defendants, and these claims are dismissed against the BOP Defendants, and denied as to Tishman; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

4/6/2026						
DATE				LESLIE A. STROTH, J.S.C.		
CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE