

Oculi v 80 Adams Prop. Owner LLC
2026 NY Slip Op 31558(U)
April 13, 2026
Supreme Court, Kings County
Docket Number: Index No. 504645/2020
Judge: Richard J. Montelione
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At IAS Part 99 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, NY 11201, on the 13 day of April 2026.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

**DECISION
and
ORDER**

-----X
PIUS OCULI,

Plaintiff,

-against-

Index No.: 504645/2020
Mot. Seq. Nos.: 2 & 3

80 ADAMS PROPERTY OWNER LLC and
TRITON CONSTRUCTION COMPANY, LLC,

Defendants.
-----X

After oral argument, the following papers were read on this motion pursuant to CPLR 2219(a):

<u>Papers</u>	<u>NYSCEF DOC. #</u>
Summons & Verified Complaint, filed 2/25/2020	1
Verified Answer, filed 5/15/2020	5
MS# 2: Plaintiff's Notice of Motion for partial summary judgment on the issue of defendants' liability pursuant to NYS Labor Law 240(1) & 241(6)/ Gail S. Kelner, Esq., Attorney Affirmation in Support dated 7-25-2024/Statement of Material Facts/Exhibits A-K	28-41
MS# 3: Defendants' Notice of [Cross] Motion pursuant to CPLR 3212, for summary judgment dismissing the Complaint and all causes of action asserted therein/Brian C. Mayer, Esq. Attorney Affirmation in Support dated 7-26-2024/Memorandum of Law in Support/Exhibits A-I	42-53
MS# 2: Defendant's Affirmation In Opposition of Brian C. Mayer, Esq. dated 1-7-2025/Memorandum of Law In Opposition/Response to Statement of Material Facts/Exhibits 1-6	56-64
MS# 3: Plaintiff's Affirmation in Opposition of Gail S. Kelner, Esq. dated 1-8-2025/Memorandum of Law In Opposition/Exhibits A-F	65-73
MS# 3: Defendant's Affirmation in Reply of Brian C. Mayer, Esq. dated 1-14-2025/Memorandum of Law in Reply/Exhibit J	74-76
MS# 2: Plaintiff's Affirmation in Reply of Gail S. Kelner, Esq. dated 1-21-2025/Memorandum of Law in Reply	79-81

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MONTELIONE, RICHARD J., J.

This is a personal injury action commenced on February 25, 2020, when plaintiff filed a summons and verified complaint (NYSCEF Doc # 1). The action was brought by plaintiff PIUS OCULI against defendants 80 ADAMS PROPERTY OWNER LLC and TRITON CONSTRUCTION COMPANY, LLC (NYSCEF Doc # 1). The complaint alleges three causes of action arising from an accident that occurred on January 28, 2019, at premises known as 74-80 Adams Street, Brooklyn, New York (NYSCEF Doc # 1, ¶¶ 4-6). The first cause of action alleges violations of Labor Law §§ 200, 240(1), and 241(6), as well as applicable provisions of the NYCRR and New York Industrial Code, stemming from plaintiff's claimed injuries resulting from a fall from an elevation differential while performing construction work at the subject premises (NYSCEF Doc # 1, ¶¶ 39-49). The second cause of action alleges common law negligence based on defendants' alleged knowledge of dangerous and defective conditions at the premises and failure to remedy same (NYSCEF Doc # 1, ¶¶ 51-60). The third cause of action reiterates claims of Labor Law violations (NYSCEF Doc # 1, ¶¶ 62-65).

Defendants 80 ADAMS PROPERTY OWNER LLC (80 Adams Property) and TRITON CONSTRUCTION COMPANY, LLC (Triton) filed their verified answer on May 15, 2020 (NYSCEF Doc # 5). Issue is joined.

By Motion Seq. # 2, plaintiff moves for summary judgment on the issue of liability under Labor Law §§ 240(1) and 241(6) against 80 Adams and Triton.

By Motion Seq. # 3, defendants cross move for summary judgment pursuant to CPLR 3212 dismissing the complaint in its entirety, including the Labor Law §§ 240(1), 241(6), 200, and common-law negligence claims.

The motions are consolidated for disposition.

Background

Plaintiff was employed by Demar as a plumber assigned to perform plumbing and sprinkler work at a construction project located at 80 Adams Street, also described as 98 Front Street, in Brooklyn, New York, an approximately 11-story building under construction. (Plaintiff's 11/4/2022 EBT Transcript, NYSCEF Doc # 36, (Plaintiff's EBT), pp. 40-41; Defendant Triton's witness Jeffrey Vigil's 2/6/2023 EBT Transcript, NYSCEF Doc # 37, (Defendant's EBT), p. 29.) He had worked for Demar for approximately six to seven years up to the time of the accident. (Plaintiff's EBT, NYSCEF Doc # 36, pp. 11-12, 22-24.)

On January 28, 2019, plaintiff was working at the Project as a Demar plumber under the supervision of a foreman he identified as "Pulavia," whom he described as the Demar foreman who assigned and directed his work at the site. (Plaintiff's EBT, NYSCEF Doc # 36, pp. 41-42, 48-49.)

Plaintiff and his co-worker, Mariusz Sieminska (also referred to as "Mario"), were assigned on that date to carry and install six-inch sprinkler piping from the ground floor to the

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upper floors of the building, including the fourth floor, as part of the fire sprinkler system serving the building hallways. (Plaintiff's EBT, NYSCEF Doc # 36, pp. 48–49, 51–53.)

Plaintiff testified at his examination before trial that he and Mariusz had previously carried and installed sprinkler pipes for the first, second, and third floors, and that they had completed the left side of the fourth floor the day before the accident, January 27, 2019. (Plaintiff's EBT, NYSCEF Doc # 36, pp. 51, 63–67.)

On the morning of January 28, 2019, plaintiff reported to work at approximately 7:30 a.m., received instructions from his foreman in the shanty, and was assigned to work with Mariusz to bring a six-inch sprinkler pipe from the ground floor to the right side of the fourth-floor hallway. (Plaintiff's EBT, NYSCEF Doc # 36, pp. 46–49, 67–69, 83–85.)

Plaintiff described the six-inch sprinkler pipe they were carrying that day as heavy, estimating its weight at approximately 300 to 400 pounds, and stating that such pipes were ordinarily carried by multiple workers. (Plaintiff's EBT, NYSCEF Doc # 36, pp. 51–53.)

Plaintiff testified that there was a hoist at the Project intended to be used for transporting heavy materials but that, on the date of the accident, the hoist was not yet operational, requiring him and Mariusz to carry the sprinkler pipe manually up the stairs from the ground floor to the fourth floor. (Plaintiff's EBT, NYSCEF Doc # 36, pp. 57–58.)

According to plaintiff, the stairway they used to reach the fourth floor consisted of wood framing, plywood, and exposed rebar, without poured concrete on the treads, and the rebar and plywood were wet from ongoing concrete work, creating a slippery condition. (Plaintiff's EBT, NYSCEF Doc # 36, pp. 70–71, 82, 95–97, 100–101.)

Plaintiff testified that he and Mariusz lifted the pipe onto their shoulders, with Mariusz walking in front and plaintiff behind him, and they proceeded up the stairway toward the fourth-floor platform. (Plaintiff's EBT, NYSCEF Doc # 36, pp. 69–70.)

Plaintiff stated that as they reached the area near the fourth-floor platform, while Mariusz was walking on the rebar and plywood, Mariusz slipped or “slide[d],” dropped his end of the pipe, and the entire weight of the pipe shifted onto plaintiff. (Plaintiff's EBT, NYSCEF Doc # 36, pp. 70–72, 108.)

Plaintiff testified that when the weight came onto him, he also dropped his end of the pipe; in doing so, the pipe struck his right knee and caused pain to his left hip/waist area, and the pipe then came to rest partly on the fourth-floor platform and partly on the stairs. (Plaintiff's EBT, NYSCEF Doc # 36, pp. 73–75, 80–82, 109–110.)

Plaintiff further testified that immediately after the incident he experienced pain in his right knee and left hip/waist, that his co-workers moved the pipe, and that his foreman Pulavia brought him to the shanty, where his knee was cleaned, after which he was sent home in a cab. (Plaintiff's EBT, NYSCEF Doc # 36, pp. 82–83, 90–91, 109–110.)

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Plaintiff returned to the Project the following day, January 29, 2019, reported that he was unable to work due to pain, and was transported for medical evaluation; he testified that January 29, 2019 was the last day he was physically present at the construction site. (Plaintiff's EBT, NYSCEF Doc # 36, pp. 85, 91, 110–111, 144.)

Plaintiff testified that as a result of the accident he continues to experience pain and limitations, uses a cane that was prescribed by a treating physician, and reports significant restrictions in his ability to engage in physical activities and employment. (Plaintiff's EBT, NYSCEF Doc # 36, pp 116–118, 145–146.)

FACTUAL DISPUTES

The parties have significant factual disputes regarding the circumstances of the alleged accident and the conditions at the construction site on January 28, 2019.

Dispute Regarding Mariusz's Actions: There is a factual dispute as to whether co-worker Mariusz Sieminska slipped or tripped while carrying the sprinkler pipe on January 28, 2019. Plaintiff testified that Mariusz “slip[ped]” or “trip[ped]” on wet rebar and plywood near the fourth-floor platform, causing him to drop his end of the pipe. (Plaintiff's EBT, NYSCEF Doc # 36, pp. 70–72, 75, 82, 108, 148.) In contrast, Mariusz averred in his affidavit that he “did not slip, trip, or fall at any time while carrying the standpipe with PIUS OCULI on January 28, 2019.” (Affidavit of Plaintiff's Co-Worker Mariusz Parendyk a/k/a Mariusz Sieminska, dated 6/1/2023, NYSCEF Doc # 53 (Mariusz Affidavit), ¶ 7.)

Dispute Regarding Stairway Conditions: There is a related dispute concerning the condition of the stairway used to reach the fourth floor. Plaintiff described the stairs as consisting of two-by-four framing, plywood, and exposed rebar without poured concrete, and testified that the rebar and plywood were wet and slippery from concrete-pouring operations. (Plaintiff's EBT, NYSCEF Doc # 36, pp. 70–71, 82, 95–97, 100–101, 105.) Mariusz, however, stated that on January 28, 2019 “the stairway by which we accessed the work area at the 4th floor of Stair B consisted of fully poured concrete” and that “at no point” did they climb stairs made only of wood forms or exposed rebar, further averring that the stairway “was not wet” and that he saw no debris while they carried the pipe. (Mariusz Affidavit, NYSCEF Doc # 53, ¶¶ 4–6.)

Dispute Regarding Plaintiff's Observation of Mariusz Slipping: There is also a dispute as to what plaintiff actually observed at the moment of the incident. Plaintiff testified that he did not see Mariusz's feet at the time he let go of the pipe and acknowledged that he did not actually see Mariusz slip, instead inferring that Mariusz must have slipped because he dropped the pipe while walking on the rebar. (Plaintiff's EBT, NYSCEF Doc # 36, at 107–108.) Mariusz, by contrast, expressly denied slipping, tripping, or losing his balance. (Mariusz Affidavit, NYSCEF Doc # 53, ¶ 7.)

Dispute Regarding Whether Co-Worker Dropped the Pipe: The parties further dispute whether Mariusz dropped his end of the pipe and whether both ends of the pipe struck the floor. Plaintiff testified that Mariusz dropped his end of the pipe first, shifting the weight onto plaintiff and causing plaintiff then to drop his own end, with both ends ultimately on the ground

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and the pipe striking his right knee. (Plaintiff's EBT, NYSCEF Doc # 36, pp. 73–80, 90–91.) Mariusz stated in his affidavit that he “did not drop the standpipe at any time while carrying it up the stairs with PIUS OCULI on January 28, 2019.” (Mariusz Affidavit, NYSCEF Doc # 53, ¶ 8.)

Dispute Regarding Pipe Weight: There is a dispute regarding the weight of the pipe being carried. Plaintiff estimated that the six-inch sprinkler pipe weighed “300 something pound” or possibly “400” pounds, explaining that such pipes are usually carried by four workers. (Plaintiff's EBT, NYSCEF Doc # 36, pp 51–53.) Mariusz, however, averred that the standpipe they carried “weighed about 100 to 150 pounds.” (Mariusz Affidavit, NYSCEF Doc # 53, ¶ 3.)

Dispute Regarding How the Pipe Was Carried: There is agreement that plaintiff and Mariusz carried only one standpipe on January 28, 2019, but the manner in which that pipe was carried and the events at the fourth-floor platform remain disputed. Plaintiff testified that he and Mariusz were carrying a single six-inch pipe to the fourth floor when the accident occurred. (Plaintiff's EBT, NYSCEF Doc # 36, pp. 68–70, 76–80.) Mariusz similarly stated that they “installed only one standpipe in Stair B and did not carry any other pipes up the stairs that day,” but denied slipping or dropping the pipe and denied any hazardous condition on the stairway. (Mariusz Affidavit, NYSCEF Doc # 53, ¶¶ 3–8.)

Dispute Regarding Plaintiff's Injury Complaints: The parties also dispute what injuries and complaints plaintiff reported contemporaneously with the incident. Plaintiff testified that after the pipe struck him he told his foreman that he was in “a lot of pain” in his right knee and left hip/waist and that he was then sent home and, the following day, taken for medical treatment. (Plaintiff's EBT, NYSCEF Doc # 36, pp. 83, 90–91, 109–111.) In contrast, Mariusz, (plaintiff's co-worker and not his supervisor), stated that plaintiff did not tell him at any time that he had injured his back or knee on January 28, 2019 as a result of carrying the standpipe, did not say he could not work because of injury, and did not request medical assistance from him. (Mariusz Affidavit, NYSCEF Doc # 53, ¶¶ 9–11.)

ISSUES PRESENTED

The motions present the following principal issues:

Whether plaintiff is entitled to summary judgment under Labor Law § 240(1) on the theory that the pipe was a falling object inadequately secured against the force of gravity, or whether defendants are entitled to dismissal of § 240(1) on the ground that the accident involved only ordinary manual material handling without a qualifying elevation-related risk.

Whether plaintiff is entitled to summary judgment under Labor Law § 241(6) based on alleged violations of 12 NYCRR 23-1.7(d) (slipping hazards) and (e) (tripping hazards), or whether defendants are entitled to dismissal of § 241(6) for failure to plead applicable subsections and lack of evidence of a slip or trip on a covered passageway or work surface.

Whether the affidavit of Mariusz Parendyk a/k/a Sieminska should be considered as competent non-party eyewitness evidence on these motions, or disregarded as a feigned,

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self-serving submission under the line of cases disfavoring affidavits that contradict prior sworn testimony.

Whether defendants, as owner and general contractor/construction manager, are entitled to summary judgment on plaintiff's Labor Law § 200 and common-law negligence claims based on lack of supervisory control over plaintiff's work and/or lack of notice of any dangerous condition, or whether factual issues preclude dismissal.

ATTORNEY ARGUMENTS

Motion Seq. 2:

Plaintiff's arguments (in favor of granting his motion)

Plaintiff argues that Labor Law § 240(1) applies because the heavy metal pipe being carried up Stairway B, with the coworker on a higher step and plaintiff on a lower step, became a dangerous falling object when the coworker slipped on wet rebar and dropped his end, causing the pipe to descend and strike plaintiff. He asserts that the pipe was not properly secured for the task, that no hoist or elevation-related safety device was provided to move the pipe to the fourth-floor stair installation location, and that defendants' failure to provide such protection is a blatant violation of § 240(1). Plaintiff argues that § 240(1) covers "special hazards" related to elevation differentials, including falling objects where the harm flows directly from gravity's effect on an inadequately secured load, and that short-distance falls of heavy objects that generate significant force fall within § 240(1) when those objects are not properly secured.

On § 241(6), plaintiff argues that he is entitled to summary judgment based on violations of 12 NYCRR 23-1.7(d) and (e). He contends that the stairway where the accident occurred was a slippery, elevated passageway under construction, with moisture and rebar/wood forms, and that allowing workers to use it in that condition violated § 23-1.7(d)'s prohibition on using a slippery floor, passageway, walkway, scaffold, platform or other elevated working surface, and § 23-1.7(e)'s prohibition on tripping hazards in passageways. Plaintiff argues that wet or debris-covered work surfaces and passageways create actionable slipping and tripping hazards under § 23-1.7(d) and (e).

Plaintiff further contends that the affidavit of Mariusz Parendyk a/k/a Sieminska is a self-serving, feigned submission offered under an alias, unsupported by any prior testimony, and contradicted by construction logs, photographs, and Vigil's testimony admitting moisture on the stair and such a feigned affidavit should be disregarded as lacking evidentiary value.

Defendants' arguments (against granting plaintiff's motion)

Defendants argue that § 240(1) is inapplicable because the accident described by plaintiff is a routine manual material-handling task on a permanent stair, not an elevation-related hazard involving either a falling worker or a falling object within the meaning of the statute. They argue that Labor Law § 240(1) is limited to special elevation-related risks and does not apply where a worker is injured by the ordinary strain of carrying materials at the same level or by striking his

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own knee while setting an object down. They note that plaintiff testified he felt back pain from the sudden increase in weight and that his knee struck the pipe while he was putting it down, and that he never testified that a free-standing object fell from above and struck him.

On § 241(6), defendants argue that plaintiff's Verified Bill of Particulars cites only "12 NYCRR 23-1.7" without identifying any subsection, which is insufficient. Further, even if §§ 23-1.7(d) and (e) are now considered, defendants assert that plaintiff's own testimony—explicitly denying that he slipped or tripped and admitting that he did not see Mariusz slip—reduces his theory that Mariusz slipped on wet rebar to mere speculation. Defendants argue that § 23-1.7(d) only applies where there is evidence of an actual slip and fall and that speculation about a coworker's slip is insufficient. They also argue that a permanent stairway is not a "passageway" under § 23-1.7(d) unless it is the sole means of access, and that Stair B was not the only means of access to the fourth floor. As to § 23-1.7(e), they argue that any alleged rebar form was integral to the work and not the kind of debris or foreign substance contemplated by the rule.

Defendants further contend that the Mariusz affidavit is proper testimonial evidence, sworn before a notary, from the only other person who would know whether a slip or trip occurred, and that the "feigned issue of fact" cases cited by plaintiff concern affidavits contradicting the affiant's own prior deposition testimony, not a non-party eyewitness contradicting a plaintiff's account. They argue the court may not disregard this affidavit merely for contradicting plaintiff's testimony, and that it creates factual disputes precluding summary judgment for plaintiff.

Motion Seq. 3:

Plaintiff's arguments (against granting defendants' motion)

Plaintiff argues that defendants are not entitled to dismissal of § 240(1) because, when the evidence is viewed in the light most favorable to him, his testimony, the safety logs, and site photographs show that the accident occurred on a partially completed, wet stairway under construction, with temporary wood and rebar forms, and that the heavy pipe descended from a higher level when dropped by his coworker, striking plaintiff below. Plaintiff argues that these facts present a classic falling-object scenario under § 240(1), and that at minimum, defendants' motion fails to eliminate triable issues of fact as to the presence of an elevation-related hazard.

On § 241(6), plaintiff contends that 12 NYCRR 23-1.7(d) and (e) are concrete, specific Industrial Code provisions applicable here and that defendants had ample notice of these theories. He asserts that the logs and photographs, together with Vigil's testimony identifying moisture on the stairs and describing unfinished stair conditions on Stair B above the second floor, support his account that the stairway was a slippery, debris-laden passageway under construction, thereby bringing it within § 23-1.7(d) (slipping hazards) and (e) (tripping hazards).

Plaintiff maintains that the Mariusz affidavit is a self-serving document, contradicted by logs, photographs, and Vigil's testimony regarding moisture and stair construction, and that it should be disregarded as a feigned attempt to manufacture issues of fact. He argues that defendants' failure to produce the logs and photographs with their moving papers and their

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reliance on an affidavit from a witness who has never been deposed further undermines the affidavit's probative value.

As to Labor Law § 200 and common-law negligence, plaintiff argues that Triton exercised control over site safety, as evidenced by the safety logs and Vigil's testimony, and had actual or constructive notice of the hazardous stair conditions; accordingly, issues of fact exist as to both supervisory control and premises liability, precluding summary judgment.

Defendants' arguments (in favor of granting their motion)

Defendants argue that the § 240(1) claim should be dismissed because, even on plaintiff's own version, he did not fall from a height and was not struck by a free-standing object that fell from above; rather, he experienced the ordinary strain of carrying a pipe and struck his own knee while putting it down. Defendants contend that § 240(1) does not apply to such routine material-handling risks, which are not the "special hazards" the statute targets. They assert that plaintiff fails to cite any case in which § 240(1) has been applied to a worker claiming injury solely from the weight of an object he was carrying at the same level.

On § 241(6), defendants argue that plaintiff's failure to identify specific subdivisions of § 23-1.7 in his pleadings is fatal and that, in any event, the record contains no admissible evidence of a slip or trip. They stress plaintiff's deposition testimony that he did not slip or trip and "didn't see" Mariusz slip, and they characterize his belief that Mariusz slipped or tripped as mere conjecture, which is insufficient. They further argue that § 23-1.7(d) is limited to slipping hazards in passageways and elevated working surfaces, and, does not encompass a permanent stairway that is not the sole means of access, particularly where other stairways and a hoist were available. With respect to § 23-1.7(e), they contend that the alleged rebar forms are integral to the stair construction and therefore outside the scope of that subsection, which is aimed at debris or foreign objects.

Defendants argue that the Mariusz affidavit is not a feigned revision of his own prior testimony but a first-time, sworn account by a non-party eyewitness that contradicts plaintiff's version, and that the "tailored affidavit" doctrine is inapplicable. They point to contemporaneous accident reports, plaintiff's written statement, photographs, and logs, which they say corroborate their version and undermine plaintiff's credibility.

On Labor Law § 200 and common-law negligence, defendants argue that this is purely a "means and methods" case, that all direction and control over plaintiff's work came from plaintiff's employer (Demar's foreman), and that there is no evidence Triton or 80 Adams supervised plaintiff's work methods or had actual or constructive notice of a hazardous condition on Stair B. They therefore seek dismissal of the § 200 and negligence claims.

LEGAL ANALYSIS

A. Labor Law § 240[1]

Labor Law § 240[1] states in pertinent part:

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All 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 Appellate Division, in the case of *Schutt v. Dynasty Transportation of Ohio, Inc.*, 203 A.D.3d 858, 860–61 [2d Dept 2022], stated:

With respect to the causes of action asserted against Habberstad and T.G. Nickel, Labor Law § 240 (1) generally requires contractors and property owners to properly protect workers against risks arising from “a physically significant elevation differential” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; see *Ortega v Puccia*, 57 AD3d 54, 58 [2008]). “[L]iability arises under Labor Law § 240 (1) only where the plaintiff’s injuries are the ‘direct consequence’ of an elevation-related risk, not a separate and ordinary tripping or slipping hazard” (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 98–99 [2015], quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d at 603 [citations omitted]; see *Melber v 6333 Main St.*, 91 NY2d 759 [1998]).

The statute is aimed at hazards arising from a difference in elevation between the work and a lower level, or between the worker and a higher level at which materials or loads are hoisted or secured. *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, pp. 513-14 (1991).

In *Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 267 (2001), the Court of Appeals stated that “not every object that falls on a worker gives rise to the extraordinary protections of Labor Law § 240(1). In *Toefer v Long Island R.R.*, 4 N.Y.3d 399, the Court of Appeals, cited *Narducci* and went further: “In some cases involving falls and objects, we have held that where a plaintiff ‘was exposed to the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law § 240 (1),’ the plaintiff cannot recover under the statute.” *Toefer*, 4 N.Y.3d at 407. (internal citations omitted)

Defendants, point to plaintiff’s deposition testimony emphasizing back strain from a sudden increase in weight and a knee impact while setting the pipe down, and they contend that plaintiff did not testify to being struck by an object falling from above, but only to the ordinary consequences of carrying a pipe. They also offer the Mariusz affidavit flatly denying any slip, trip, or drop, and asserting that no such accident occurred, thereby squarely contesting whether the pipe ever functioned as a falling object.

Whether this incident constituted a routine manual material handling, or whether a hoist would have been necessary is crucial in determining the applicability of § 240(1) and cannot be resolved as a matter of law in favor of either party. Credibility determinations regarding plaintiff’s testimony, the logs, photographs, Vigil’s testimony, and the Mariusz affidavit are for the trier of fact, not for the court on summary judgment. Plaintiff has not established his

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entitlement to judgment as a matter of law, and defendants have not eliminated all triable issues of fact as to whether the accident involved the failure to provide a safety device in the form of a hoist under § 240(1).

B. Labor Law § 241(6) – 12 NYCRR 23-1.7(d), (e)

Labor Law § 241[6] states:

All 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, 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, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

The Appellate Division, Second Department, in the case of *Hamm v. Rev. Assocs., LLC*, 202 A.D.3d 934, 935 (2d Dept 2022), stated:

“Labor Law § 241 (6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers” (*Aragona v State of New York*, 147 AD3d 808, 809 [2017] [internal quotation marks omitted]; see *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]). “To establish liability under Labor Law § 241 (6), a plaintiff or a claimant must demonstrate that his [or her] injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case” (*Aragona v State of New York*, 147 AD3d at 809; see *Hricus v Aurora Contrs., Inc.*, 63 AD3d 1004, 1005 [2009]).

1. Pleading of specific subsections

Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers. *Ricottone v. PSEG Long Island, LLC*, 221 A.D.3d 1032 (2d Dept 2023). “To establish liability under Labor Law § 241(6) a plaintiff must demonstrate that the injuries allegedly sustained were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case.” *Ricottone*, 221 A.D.3d 1034.

Plaintiff’s Verified Bill of Particulars cites “12 NYCRR 23-1.7” generally, without specifying a subsection. Defendants correctly note that courts have treated failure to identify specific subsections of multi-part provisions as a pleading deficiency. (NYSCEF Doc. # 43, Defendant’s Memorandum of Law, pp. 7-8.)

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However, plaintiff's motion and opposition papers expressly identify §§ 23-1.7(d) and (e) and fully brief those subsections, and defendants themselves respond on the merits of those provisions. Under these circumstances, the court addresses §§ 23-1.7(d) and (e) substantively, recognizing that any remaining pleading defects may be cured by amendment, and focusing instead on applicability and causation.

2. Section 23-1.7(d) – slipping hazards

Section 23-1.7(d) provides that “[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition.” and that ice, snow, water, grease, and other foreign substances causing slippery footing shall be removed, sanded, or covered. Plaintiff contends that Stairway B, between the third and fourth floors, was precisely such a slippery elevated surface, under construction, with moisture and rebar/wood forms, used as a passageway to carry heavy pipe, and that his coworker slipped on wet rebar, causing him to drop the pipe. Plaintiff relies on a line of cases where wet or otherwise slippery surfaces were held to fall under § 23-1.7(d). (NYSCEF Doc. # 66, Plaintiff's Memorandum of Law, pp. 9-11.)

Defendants respond that plaintiff himself admitted he did not slip and did not see Mariusz slip, and that his belief that Mariusz slipped is speculative, which cannot defeat summary judgment. Defendants argue that § 23-1.7(d) requires evidence of an actual slip and fall, and that mere speculation that a coworker slipped is insufficient. They further argue that Stair B was a permanent stairway, and a permanent stairway is not a “passageway” covered by § 23-1.7(d) unless it is the sole means of access, which they claim it was not. (NYSCEF Doc. # 43, Defendant's Memorandum of Law, pp. 9-11.)

The record contains conflicting evidence about (i) the presence and extent of moisture on the stairs (including Vigil's testimony identifying moisture in photographs); (ii) whether Stair B was fully concrete or partially temporary at the accident location; and (iii) whether Mariusz slipped or fell while carrying the pipe. The Mariusz affidavit denies any slip, while plaintiff's testimony and the logs and photographs support his contrary account. Given these factual disputes, the court cannot determine, as a matter of law, either that § 23-1.7(d) applies and was violated, or that it is wholly inapplicable.

3. Section 23-1.7(e) – tripping hazards

Section 23-1.7(e) addresses tripping hazards in passageways and work areas. Plaintiff argues that rebar and formwork and any debris in Stair B created tripping hazards in a passageway under construction and that his coworker tripped as well as slipped, causing the pipe to be dropped. Plaintiff argues that materials used on a job site can become tripping hazards within § 23-1.7(e) when they create unsafe footing in a passageway. (NYSCEF Doc. # 66, Plaintiff's Memorandum of Law, pp. 11-12.)

Defendants argue that plaintiff has not presented non-speculative evidence of any trip and that his assertion that Mariusz both slipped and tripped is uncorroborated, particularly in light of Mariusz's sworn denial. They also contend that the alleged tripping condition—rebar forms for

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concrete stairs—is integral to the work and thus falls outside § 23-1.7(e), which targets debris and foreign objects.

As with § 23-1.7(d), there are triable issues of fact regarding the precise condition of Stair B at the accident site, whether the rebar and forms were integral parts of the ongoing concrete work or created separate tripping hazards in a passageway, and whether any trip actually occurred. Defendants have not demonstrated as a matter of law that § 23-1.7(e) is entirely inapplicable, and plaintiff has not established a violation and causation so conclusively as to warrant summary judgment in his favor.

C. Mariusz Parendyk / Sieminska affidavit

Plaintiff presses for the court to disregard the Mariusz affidavit as a self-serving, feigned document contradicted by other evidence. Plaintiff argues a line of cases that plaintiff alleges allow courts to disregard affidavits that plainly contradict the affiant’s own prior deposition testimony and appear tailored solely to avoid the consequences of that testimony. (NYSCEF Doc. # 66, Plaintiff’s Memorandum of Law, pp. 2-4.)

Defendants persuasively note that here however, Mariusz has not previously testified, and the affidavit does not contradict any prior testimony from him. Rather, it contradicts plaintiff’s account. Defendant argues a line of cases indicating that the “feigned issue” doctrine has generally been applied where a party or its witness attempts to contradict their own sworn deposition testimony, not where a non-party eyewitness contradicts the plaintiff’s version. (NYSCEF Doc. # 76, Defendant’s Memorandum of Law, pp. 2-5.) In addition, accident reports produced in 2021 identified Mariusz as a witness, and plaintiff had his contact information, undermining any claim of surprise.

On this record, the court concludes that the Mariusz affidavit may not be disregarded as a matter of law. Its credibility, and the weight to be given to its statements in light of other evidence such as logs, photographs, and Vigil’s testimony, are classic questions for the jury.

D. Labor Law § 200 and common-law negligence

“Labor Law § 200 (1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work” (*Ortega v Puccia*, 57 AD3d 54, 60 [2008]). “Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed” (*id.* at 61). *Poulin v. Ultimate Homes, Inc.*, 166 A.D.3d 667, 670, 87 N.Y.S.3d 189 (2018).

The Appellate Division, Second Department, in the case of *Hamm v. Rev. Assocs., LLC*, 202 A.D.3d 934, 935 (2d Dept 2022), stated:

Under the common law, a property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition. Indeed, a landowner has a duty to exercise reasonable care in maintaining its property in a safe

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condition under all of the circumstances, including the likelihood of injury to others, the seriousness of the potential injuries, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property. In order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence. In a premises liability case, a defendant landowner, or a party in possession or control of real property, moving for summary judgment has the burden of establishing, prima facie, that it did not create the alleged dangerous condition or have actual or constructive notice of its existence for a sufficient length of time to have discovered and remedied it. Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury. A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it.

Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work. To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have authority to exercise supervision and control over the work. Where a plaintiff's injuries arise not from the manner in which the work was performed, but from a dangerous condition on the premises, a defendant may be liable under Labor Law § 200 if it either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition. When an accident is alleged to involve defects in both the premises and the equipment used at the work site, a defendant moving for summary judgment with respect to causes of action alleging a violation of Labor Law § 200 is obligated to address the proof applicable to both liability standards. A defendant moving for summary judgment in such a case may prevail only when the evidence exonerates it as a matter of law for all potential concurrent causes of the plaintiff's accident and injury, and when no triable issue of fact is raised in opposition as to either relevant liability standard.

Defendants moving for summary judgment with respect to causes of action alleging a violation of Labor Law § 200 and common-law negligence must examine the plaintiff's complaint and bill of particulars to identify the theory or theories of liability, in order to properly direct proof to premises issues, or means and methods issues, or both, as may be indicated on a case-by-case basis. (internal quotation marks and citations are omitted)

Defendants contend this is a "means and methods" case in which Demar's foreman alone directed plaintiff's work, and Triton and 80 Adams had no control over how the standpipe was carried. Defendants neither controlled the means and methods nor had notice of a dangerous condition, and therefore summary judgment dismissing the § 200 and common-law negligence claims is warranted.

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RULINGS ON EACH BRANCH

Motion Seq. 2 – Plaintiff’s motion for summary judgment

Labor Law § 240(1)

That branch of the motion in which plaintiff seeks summary judgment on the cause of action alleging a violation of Labor Law § 240(1) is **DENIED**. As discussed, disputed issues of material fact exist concerning the mechanism of the accident and whether it involved a qualifying elevation-related “falling object” risk.

Labor Law § 241(6)

That branch of the motion in which plaintiff seeks summary judgment on the cause of action alleging a violation of Labor Law § 241(6), predicated on 12 NYCRR §§ 23-1.7(d) and (e), are **DENIED**. Triable issues remain as to the applicability and alleged violation of those subsections and whether any such violation was a proximate cause of plaintiff’s injuries, in light of the competing evidence.

Motion Seq. 3 – Defendants’ motion for summary judgment

Labor Law § 240(1)

That branch of the motion in which defendants seek summary judgment dismissing the cause of action alleging a violation of Labor Law § 240(1) is **DENIED**. Plaintiff’s evidence, if credited, could support a claim that a hoist should have been used due to the weight of the object and defendants have not eliminated all issues of fact.

Labor Law § 241(6)

That branch of the motion in which defendants seek summary judgment dismissing the cause of action alleging a violation of Labor Law § 241(6) is **GRANTED**.

Labor Law § 200 and common-law negligence

That branch of the motion in which defendants seek summary judgment dismissing the causes of action alleging violations of Labor Law § 200 and common-law negligence is **GRANTED**. The record contains no triable issues concerning defendants’ lack of supervisory control and notice of any hazardous condition on Stair B, based on Vigil’s testimony, site logs, and accident documentation.

For the foregoing reasons, it is hereby

ORDERED, that Motion Seq. # 2 is **DENIED**, in its entirety, to the extent it seeks summary judgment in favor of plaintiff on his causes of action pursuant to Labor Law §§ 240(1)

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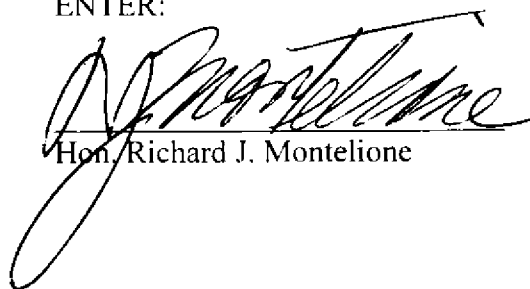
and 241(6), and plaintiff's motion for partial summary judgment on the issue of liability under those statutes is denied; and it is further

ORDERED, that Motion Seq. # 3 is **GRANTED** to the extent it seeks summary judgment in favor of defendants 80 Adams Property Owner LLC and Triton Construction Company, LLC dismissing plaintiff's causes of action pursuant to Labor Law § 241(6), Labor Law § 200, and common-law negligence, and those causes of action shall proceed; and it is further

ORDERED, that all other requests for relief are denied.

This constitutes the decision and order of the Court.

ENTER:



Hon. Richard J. Montelione