[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ **PART** _____
Justice

Index Number : 114548/2009
MARSHALL, WILLIAM
VS
METROPOLITAN TRANSIT AUTHORITY
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ , were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

RECEIVED
JUN 26 2012
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

FILED
JUN 27 2012
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 6/21/12

_____, **J.S.C.**

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

----------x

WILLIAM MARSHALL,

Plaintiff,

-against-

METROPOLITAN TRANSIT AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY and THE CITY OF NEW YORK,

Defendant.

----------x

Index No. 114548/09

DECISION/ORDER

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross Motion and Answering Affidavits.....	2
Affirmations in Opposition to the Cross-Motion.....	3
Replying Affidavits.....	4
Exhibits.....	5

Plaintiff commenced this action to recover for injuries he allegedly sustained when a boulder fell out of an excavator and hit his knee in the course of his employment. He now brings this motion for partial summary judgment pursuant to Labor Law §240(1). Defendants cross-move for summary judgment dismissing plaintiff's Labor Law §240(1) claim, his Labor Law §241(6) claim, his Labor Law §200 claim and his negligence claim. For the reasons set forth more fully below, plaintiff's partial summary judgment motion is granted and defendants' cross-motion for summary judgment is granted in part and denied in part.

The relevant facts are as follows. On May 18, 2009, plaintiff William Marshall was struck by a boulder which fell out of an excavator while he was at work as a construction foreman on the New York City Number 7 Line Subway Extension Project. At the time of the accident, the workers were blasting a new tunnel at 34th Street and 11th Avenue. After blasting, debris known as "muck" is left behind. An excavation machine with a bucket attached to an arm scoops up the muck, which consists of rocks and boulders, and moves it into piles. At the time of the accident, the excavator bucket contained a large boulder weighing several hundred pounds. The operator began to swing the bucket to the right to deposit the boulder. The boulder was approximately 4 feet in diameter and 5 feet in length. Plaintiff testified that the excavator bucket was approximately 3 feet by 3 feet in size or "maybe a little bigger." Upon seeing plaintiff, who was standing in the way of the bucket, the excavator abruptly stopped the machine, causing the boulder to fall and hit plaintiff.

Defendant The City of New York (the "City") owned the construction site. Defendants the Metropolitan Transit Authority (the "MTA") and the New York City Transit Authority (the "NYCTA") contracted with plaintiff's employer, S3II Tunnel Constructors, for the construction of a tunnel at the construction site.

The court now turns to plaintiff's motion for summary judgment on his Labor Law §240(1) claim and defendants' cross-motion seeking to dismiss that same claim. Labor Law §240(1) requires that:

> All contractors and owners and their agents . . . who contract for but do not 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.

Labor Law §240(1) was enacted to protect workers from hazards related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of materials or load being hoisted or secured. *See Rocovich v. Consolidated Edison*, 78 N.Y.2d 509, 514 (1991). Liability under this provision is contingent upon the existence of a hazard contemplated in §240(1) and a failure to use, or the inadequacy of, a safety device of the kind enumerated in the statute. *Narducci v. Manhasset Bay Associates*, 96 N.Y.2d 259 (2001). Owners and contractors are subject to absolute liability under Labor Law §240(1), regardless of the injured worker's contributory negligence. *See Bland v Manocherian*, 66 N.Y.2d 452 (1985). Only if the plaintiff was the sole proximate cause of his injuries would liability under this section not attach. *See Robinson v East Medical Center, LP*, 6 N.Y.3d 550 (2006). A workplace accident can have more than one proximate cause. *See Pardo v Bialystoker Center & Bikur Cholim, Inc.*, 308 A.D.2d 384, 385 (1st Dept 2003).

In the instant case, plaintiff's motion for summary judgment on his Labor Law 240(1) claim is granted. As an initial matter, plaintiff's accident certainly involved an elevation-related risk. It is well-settled that Labor Law §240(1) applies to accidents involving objects that fall while being hoisted or secured. *See Rocovich*, 78 N.Y.2d at 514. The boulder at issue was being hoisted and moved when it fell on to plaintiff. Although it may not have been practical to secure the boulder to the bucket, since it needed to be dropped out of the bucket, defendants could have roped off the area in question or provided those in the area with protective devices. Moreover,

defendants fail to raise an issue of fact as to whether plaintiff was the sole proximate cause of the accident. Even if plaintiff forced the operator to stop suddenly because of his presence, the presence of workers in the area was foreseeable and could not constitute more than contributory negligence. In *Dedndreaj v ABC Carpet & Home*, 93 AD3d 487 (1st Dept 2012), the First Department held that "even assuming the plaintiff disregarded warnings" and walked through a passageway and under a pipe that fell on him, "such conduct was not the sole proximate cause of the injury." Similarly, in *Lopez v Boston Props. Inc.*, 41 A.D.3d 529 (1st Dept 2007), the First Department found that even where plaintiff's action reaching for a bucket caused him to lose his balance and fall, plaintiff's action was not the sole proximate cause of his injury where his action was foreseeable. The instant case is analogous. It was foreseeable that workers might step into the path of the excavator and no safety devices were in place to prevent them from doing so or to protect them from the danger of objects falling out of the excavator's bucket. Accordingly, plaintiff's motion for partial summary judgment on his Labor Law §240(1) claim is granted and, conversely, defendants' cross-motion for summary judgment dismissing this claim must be denied.

The court now turns to defendants' cross-motion for summary judgment dismissing plaintiff's Labor Law §241(6) claim. Section 241(6) of the Labor Law requires owners and contractors, or their agents, to provide reasonable and adequate protection and safety for workers and to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. *See Ross v Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494 at 502 (1993). A plaintiff must plead and prove that a specific Industrial Code safety regulation was violated. Plaintiff has pled that 12 NYCRR §§23-1.7, 23-1.1(b)(4)(i), 23-1.21(b)(4)(ii), 23-

1.21(e)(3), 23-2.2, 23-3.2, 23-6.1, 23-8.1, 23-8.2 and 23-9.2 were violated. Plaintiff also states that he is supplementing his allegations to add that other such provisions were violated.

As an initial matter, plaintiff can raise additional Industrial Code violations in opposition to a motion for summary judgment as long as defendants suffer no prejudice therefrom. *See Burton v CW Equities, LLC*, 92 A.D.3d 509 (1st Dept 2012). Although defendants claim prejudice in the instant case, these new claims arise out of the same facts and theories of liability and result in no prejudice to defendants. *See Harris v City of New York*, 83 A.D.3d 104 (1st Dept 2011). Therefore, the court will consider these additional provisions, 12 NYCRR §§23-9.4(e), (h)(1) and (5), below.

Defendants are not entitled to summary judgment dismissing plaintiff's claim pursuant to Labor Law §241(6) predicated on 12 NYCRR §23-1.7(a). That provision states:

> (1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection...
>
> (2) Where persons are lawfully frequenting areas exposed to falling material or objects but wherein employees are not required to work or pass, such exposed areas shall be provided with barricades, fencing or the equivalent in compliance with this Part (rule) to prevent inadvertent entry into such areas.

The court cannot determine as a matter of law whether the tunnel where the work was taking place was "normally exposed to falling material or objects." That is a question of fact for the jury.

The court can also not determine as a matter of law whether §23-9.4(h)(1) and (5) were violated. §23-9.4 provides:

> Where power shovels and backhoes are used for material handling, such equipment and use thereof shall be in accordance with the following provisions:

(h) General operation.

(1) Any load lifted by such equipment shall be raised in a vertical plane to minimize swing during hoisting...

(5) Carrying or swinging suspended loads over areas where persons are working or passing is prohibited.

The court cannot determine as a matter of law whether these provisions were violated. Whether the load was lifted vertically and whether it was swung over an area where people were passing or working are questions for the finder of fact.

The remainder of plaintiff's Labor Law §241(6) claim is dismissed as follows. 12 NYCRR §23-1.21(b)(4)(i) does not apply to the instant case as it only applies to the use of ladders and no ladders were used here. Similarly,12 NYCRR §23-2.2 applies only to incidents that involve concrete work but plaintiff was not performing concrete work at the time of the accident. 12 NYCRR §23-3.2 also does not apply to the accident at issue as it only applies to the demolition of buildings or structures and no building or structure was being demolished here. Plaintiff cannot base this claim on 12 NYCRR §23-.6.1 as that provision by its terms specifically excludes "excavating machines used for material hoisting" which is exactly the machine that was being used in the instant case. 12 NYCRR §§23-8.1 and 8.2 also do not apply to excavating machines. 12 NYCRR §23-9.2(a) provides that "all power-operated equipment shall be maintained in good repair" and that defects shall be corrected. As there are no allegations that the excavator used here was in poor condition or was defective, this provision does not apply. 12 NYCRR §23-9.2(b)(1) is a general safety standard that does not give rise to a nondelegable duty under the statute. *See Hricus v Aurora Contrs., Inc.*, 63 A.D.3d 1004 (2nd Dept 2009). 12 NYCRR §23-9.2(b) requires that the operator of power-operated equipment remain at the

controls at all time and there is no allegation theat the operator of the machine did not remain at the controls. The rest of 23 NYCRR §23-9.2 is inapplicable. §23-9.4(e) discusses the attachment of loads suspended from the bucket or bucket arm of a power shovel or backhoe. Even if "the manner in which the equipment is used rather than its name or label" is what matters and therefore this section could apply to an excavator *(see St. Louis v Town ov North Elba*, 16 N.Y.3d 411, 414-15 (2011) (citations omitted)), the instant case does not involve a load suspended from the bucket of a machine. Therefore, this section is inapplicable. Finally, plaintiff cannot base this cause of action on violations of OSHA rules. *See Vernieri v Empire Realty Co.*, 219 A.D.2d 593 (2nd Dept 1995). Therefore, defendants' motion for summary judgment dismissing plaintiff's Labor Law §241(6) claim is granted except to the extent it is predicated on 12 NYCRR §23-1.7(a) and 12 NYCRR §23-9.4(h)(1) and (5).

This court now turns to defendants' cross-motion seeking to dismiss plaintiff's Labor Law §200 and common-law negligence claims. Labor Law §200 codifies the common law duty of an owner and general contractor to maintain a safe workplace. Where plaintiff's injury is caused by a dangerous condition, liability for either of these causes of action will only attach if the defendant "had the authority to control the activity bringing about the injury." *Russin v Louis N. Picciano & Son*, 54 N.Y.2d 311 at 317 (1981). The First Department has held that to be held liable under Labor Law §200 or common-law negligence where the alleged defect or dangerous condition arises from the contractor's methods, an owner or construction manager must be found to have exercised supervision or control over the injury-producing work. *See Conforti v Bovis Lend Lease LMB, Inc.*, 37 A.D.3d 235, 236 (1st Dept 2007) (*citing Buccini v 1568 Broadway Assocs.*, 250 A.D.2d 466, 469 (1st Dept 1998); *Dalanna*, 308 A.D.2d 400. However, "[t]he

general duty to supervise the work and ensure compliance with safety regulations does not constitute such control of the work site as would render the supervisory entity liable for the negligence for the contractor who performs the day-to-day operations." *Id.* *See also Curtis v 37th Street Assocs.*, 198 A.D.2d 62 (1st Dept 1993) (construction superintendent's coordination of subcontractors' work insufficient to establish liability for common law negligence). Even the "authority to stop work for safety reasons" is insufficient to establish liability pursuant to these theories. *Dalanna*, 308 A.D.2d 400 (1st Dept 2003).

In the instant case, defendants are entitled to summary judgment dismissing plaintiff's Labor Law §200 and common-law negligence claims. Defendants make out a prima facie case that they did not supervise the injury-producing work. Plaintiff was supervised by a supervisor who worked for his employer, S3II Tunnel Constructors. He provided some of his own clothing and the rest was provided by his employer. Paul Matthews, an employee of the NYCTA as a construction manager on the project in question, testified that no one from the NYCTA or the MTA attended safety meetings. He also testified that if a safety issue was brought to the attention of the MTA or the NYCTA, they would speak to the project manager employed by S3II. There was no testimony that the MTA or the NYCTA controlled the injury-producing work. Therefore, there are no questions of fact as to whether defendants are subject to liability pursuant to Labor Law §200 or for common-law negligence. Defendants are entitled to summary judgment dismissing those claims.

Accordingly, plaintiff's motion for partial summary judgment on his Labor Law §240 claim is granted. Defendants' cross-motion for summary judgment dismissing that claim is denied. Defendants' cross-motion for summary judgment dismissing plaintiff's Labor Law

§241(6) is granted except to the extent it is predicated on a violation of 12 NYCRR §23-1.7(a) and 12 NYCRR §23-9.5(h)(1) and (5). Defendants' cross-motion for summary judgment dismissing plaintiff's Labor Law §200 claim and common-law negligence claim is granted. This constitutes the decision and order of the court.

Dated: 6/21/12

Enter: _____
J.S.C.