At an IAS Term, Part 36 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of August, 2016.

PRESENT:

HON. BERNARD J. GRAHAM,
Justice.

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EDUARDO BOSCARELLO,

Plaintiff,

- against - Index No. 500341/13

FC BEEKMAN ASSOCIATES, LLC AND KREISLER BORG FLORMAN GENERAL CONSTRUCTION COMPANY, INC.,

Defendants.

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The following papers numbered 1 to 8 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-4
Opposing Affidavits (Affirmations)	5-7
Reply Affidavits (Affirmations)	8
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendants FC Beekman Associates, LLC (Beekman) and Kreisler Borg Forman General Construction Company, Inc., (KBF) (collectively defendants) moves for an order, pursuant to CPLR 3212, granting defendants summary judgment dismissing plaintiff Eduardo Boscarello's complaint.

Background

On July 20, 2012, plaintiff was injured while working at a construction site located at 8 Spruce Street in Manhattan, known as the Beekman Tower. The premises was owned by FC Beekman Associates which had entered into a construction management services agreement with KBF to serve as the construction manager for the Beekman Tower project. The Beekman Tower was a mixed use tower including residential units on the upper floors and a New York City Public school, retail stores and an Ambulatory Care Center on the lower levels. Plaintiff was employed by Kensico Construction Company Inc., (Kensico). Kensico was KBF's labor force on this project. On this date, plaintiff and his coworkers were instructed to move various appliances that had been delivered to the outside of the building up to various apartments. They moved these appliances for a couple of hours and then were told to move a large Sub-zero refrigerator up to the penthouse. Plaintiff testified that the Sub-zero was already loaded onto an aluminum hand truck, which was approximately six feet and had two wheels, when he and his coworkers came down to move it. This was the first time that he had used this particular hand truck. He did not know who had loaded it onto the hand truck. Plaintiff and his coworkers moved the Sub-zero on the hand truck with plaintiff positioned in the rear so that when the hand truck was tilted backward the weight was resting on plaintiff's shoulder. They had to push it up a ramp then down a hallway, onto an elevator and then into the penthouse apartment where they unpacked and placed it. Plaintiff testified that he felt pain on the right side of his neck, shoulder and lower back afterward. He thought

the pain would go away but when he was still in pain three days later he reported it to his supervisor Nicky and filled out an accident report.

Plaintiff instituted the instant action alleging violations of Labor Law§§241(6), 200 and common law negligence. Defendants move for an order, pursuant to CPLR 3212, seeking summary judgment dismissing plaintiff's complaint in its entirety.

Discussion

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], *citing Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). Failure to make such a showing requires the denial of the motion , regardless of the sufficiency of the papers in opposition (*Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also, Smalls v AJI Industries. Inc.,* 10 NY3d 733, 735 [2008]). Moreover, "'[a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in opponent's proof, but must affirmatively demonstrate the merit of its claim or defense'" *(Pace v International Bus. Mach.*, 248 AD2d 690,691 [1998], *quoting Larkin Trucking Co. V. Lisbon Tire Mart* 185 AD2d 614, 615 [1992]; *see also, Peskin v New York City Transit Auth.,* 304 AD2d 634 [2003]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in

admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Defendants argue that plaintiff's Labor Law §241 (6) claim must be dismissed because he failed to plead a specific concrete violation of an Industrial Code provision. Labor Law § 241(6) provides, in pertinent part, that:

> "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 persons employed therein or lawfully frequenting such places."

Labor Law § 241(6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code (*Ross*, 81 NY2d at 501-502). Accordingly, in order to support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable given the circumstances of the accident, and sets forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*id.* at 502; *Ares v State*, 80 NY2d 959, 960 [1992]; *see also Adams v Glass Fab*, 212 AD2d 972, 973 [1995]).

Defendants note that plaintiff's Verified Supplemental Bill of Particulars states that defendants violated the Industrial Code without specifying which provision and merely cites to violations of specific OSHA sections.[1]

In opposition, plaintiff claims that his Labor Law §241 (6) claim is predicated on a violation of Industrial Code 23-1.28 which relates to hand trucks.

Industrial Code §23-1.28(a) and (b)

> (a) Maintenance. Hand-propelled vehicles shall be maintained in good repair. Hand-propelled vehicles having damaged handles or any loose parts shall not be used.
>
> (b) Wheels and handles. Wheels of hand-propelled vehicles shall be maintained free-running and well secured to the frames of the vehicles. Buggy handles shall not extend beyond the wheels on either side.

Plaintiff argues that although this provision was not set forth in his complaint or Bill of Particulars, the belated identification is not prejudicial to defendants because as early as his March 2014 deposition, defendants were aware that he was alleging that the hand truck was missing its center handle, and that the truck's wheels were wobbly. Thus, he states he is not raising a new theory of liability or factual allegation.

In reply, defendants argue that the court should not permit this late identification of this Code provision because he has failed to seek permission of the court to supplement his Bill of Particulars and contends that this belated identification does involve new factual

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[1]It is undisputed that a violation of OSHA regulations may not be used as a predicate for a Labor Law §241 (6) claim.

allegations and theories of liability. Defendants argue that plaintiff's deposition testimony was that the hand truck never broke and remained in the same condition as when he first started using it. In support of this contention, defendants point to plaintiff's testimony on page 84, lines 11-20:

> Q. At any time during the wheeling of the refrigerator from all the way from the ground floor all the way to where you deposited it, did the hand truck break?
>
> A. No, it didn't break. It was pretty much wobbly.
>
> Q. In other words, it remained in the same condition it was when you first started with it?
>
> A. Yes.

Here the court finds that plaintiff's belated allegation that defendants violated 12 NYCRR 23-1.28 (a) and (b) (1) did not involve any new factual allegations, or raise new theories of liability, and thus there would be no prejudice to defendants for the court to consider it (*see Przyborowski v A&M Cook*, LLC, 120 AD3d 651, 654 [2014]; *Klimowicz v Powell Cove Assoc., LLC*, 111 AD3d 605 [2013]; *Ross v DD 11th Ave., LLC*, 109 AD3d 604, 606 [2013] *D'Elia v City of New York*, 81 AD3d 682, 684 [2011]; *Kelleir v Supreme Indus. Park*, 293 AD2d at 513-514). In fact, a careful reading of plaintiff's deposition testimony indicates that he believed that the wheels on the hand truck were wobbly . Specifically, he testified on page 61, lines 17-25 as follows:

> Q. Did the hand truck have wheels?
>
> A. Two wheels, wobbly wheels.

> Q. When did you first realize that the wheels were wobbly?
>
> A. When we actually started, you know, tilting it, and we started moving it two guys pushing it from the side, and I was in the middle of the hand truck, pretty much the support was on my back.

On pages 65-66 he also testified that this was the type of hand truck that would have something with a bracket that comes out with an additional wheel to support handling a large device such as the Sub-zero refrigerator and this was not present. On pages 70-71 plaintiff testified that he heard his coworker tell their supervisor Nicky that the hand truck was missing a middle arm that could be cranked. He also testified that the hand truck was bent.

Initially the court notes that the first sentence of section 23-1.28 (a) is a general directive that cannot serve as a predicate for liability under Labor Law § 241 (6) (*see Garcia v 95 Wall Assoc., LLC,* 116 AD3d 413 [2014]; *Maldonado v Townsend Ave. Enters.*, 294 AD2d 207, 208; *Wegner v State St. Bank & Trust Co.*, 298 AD2d 211, 212 [2002]). However, "the second sentence of 12 NYCRR 23-1.28 (a), providing "[h]and-propelled vehicles having damaged handles or any loose parts shall not be used," sets forth a sufficiently specific, positive command, the violation of which may serve as a predicate for plaintiff's cause of action pursuant to Labor Law § 241 (6)" (*Garcia v 95 Wall Assoc., LLC*, 116 AD3d 413, 413-414 [2014]; see *Brasch v Yonkers Constr. Co.*, 306 AD2d 508, 509 [2d Dept 2003]; *Gray v Balling Constr. Co.*, 239 AD2d 913, 914 [1997]).

In opposition to defendants' motion and in support of his claim, plaintiff submits the affidavit and report of Herbert Weinstein, a Professional Engineer, who reviewed plaintiff's

deposition testimony and photographs of hand truck at issue. Mr. Weinstein opines that the hand truck was damaged and that plaintiff and his coworkers should have been provided with a hand truck with a center handle which would have allowed the laborers to control it to a greater degree. As discussed above, plaintiff testified that he believed that the hand truck he utilized was missing an arm and that he heard his coworkers telling their supervisor Nicky that it was missing an arm. He further testified that the hand truck was bent and that the wheels were wobbly.

In reply, defendants argue that plaintiff's deposition testimony does not establish that a problem with the hand truck caused his injuries and that plaintiff admits that the hand truck did not break while being utilized. Defendants contend that plaintiff and his coworkers used the hand cart in a manner which caused the plaintiff to bear the majority of the weight of the load they were moving.

The court finds that plaintiff's testimony, as well as the report and affidavit submitted by Mr. Weinstein, are sufficient to raise a question of fact regarding whether plaintiff's accident was proximately caused by a violation of Industrial Code 23-1.28 (a). However, the court finds that Industrial Code 23-1.28 (b) is inapplicable to the facts of the instant case and thus cannot serve as a predicate for his Labor Law §241 (6) claim.

Next, defendants argue that plaintiff's Labor Law §200 and common law negligence claims should be dismissed as there has been no evidence presented that Beekman or KBF, as the construction manager for the project, supervised or controlled plaintiff's work.

"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]; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505). "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" (*Garcia v Market Assoc.*, 123 AD3d 661, 664 [2014] *quoting Rojas v Schwartz*, 74 AD3d 1046, 1046 [2010] [internal quotation marks and citation omitted]; *see DiMaggio v Cataletto*, 117 AD3d 984, 986 [2014]).

Defendants argue that plaintiff's own testimony reveals that he worked only with other Kensico employees and was only supervised by Kensico foreman Nicky. Defendants contend that although KBF as the construction manager, had a duty under its agreement with Beekman to monitor the performance of the work by the Trade Contractors for the project it did not supervise, control or direct the means, method or manner in which plaintiff was performing his work claiming that the work was controlled by the general foreman, Kensico employee Nick Dirubbo.

In opposition, plaintiff argues that the agreement between Beekman and KBF (the agreement) contemplates work to be performed by trade contractors as well as work to be performed by KBF's own forces, which was responsible for performing cleaning and general maintenance. The work performed by KBF's own forces was to be supervised by the "maintenance foreman" which was listed among the Construction Manager's employees on page 13, section 2F and on page 21 of the agreement. It has been testified that a man named

Boris was the super for KBF on this project. Plaintiff testified a man named Nicky was the foreman for this job and that on the day of his accident he met with the foreman and some supers and they had instructed him to go upstairs and continue completing the tasks on the punch list (page 44) and that he was unsure whether Nicky, his foreman, was employed by Kensico or by KBF (page 45). He further testified that the super was a guy named Boris (page 45). He believes he spoke only with Nicky on the day of his accident (page 45). Plaintiff testified that Nicky told him to take the middle part of the Sub-zero because he was the biggest (page 74).

Michael Leone testified on behalf of the owner, Beekman. Mr. Leone testified that he was the project manager for Beekman on the Beekman Tower project. He testified that Nicholas DiRubbo was employed by KBF (page 10-11) . However, later in his testimony, he stated that Nick DiRubbo was the foreman for Kensico (page 26)and that Boris Faigonbaeum was the superintendent on the project for KBF. The record reveals that the accident report generated with regard to this incident lists Boris as the supervisor.

Based upon the contractual provisions obligating KBF to supervise its own forces which included those workers preforming general cleaning and maintenance, work that was being performed by plaintiff, along with the conflicting testimony regarding who, plaintiff's supervisor Nicky was employed by, a question of fact has been raised regarding whether KBF had the authority to supervise and control the work performed by plaintiff (*see Clavijo v Universal Baptist Church*, 76 AD3d 990, 991 [2010] [holding that "party may be liable under Labor Law § 200 and the common law where it has the authority to supervise or control the

performance of the work, even where the party does not actually exercise this authority" (*see Ortega v Puccia*, 57 AD3d 54, 62 n 2, 866 NYS2d 323 [2008]). Thus, the evidence submitted by the defendants failed to establish, prima facie, that KBF lacked the authority to supervise or control the performance of the work (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Accordingly, that branch of defendants' motion seeking summary judgment dismissing plaintiff's claims as asserted against KBF based upon Labor Law §200 and common law negligence is denied

With regard to Beekman's liability under Labor Law §200 and common law negligence, defendants argue that the record is clear that Beekman did not supervise or control plaintiff's work, thus it could only be held liable if it had notice that the hand truck was in an unsafe condition (*see Rodriguez v Trades Constr. Servs. Corp.*, 121 AD3d 962, 965 [2014] noting that an owners general supervisory authority over a work site is insufficient to impose liability under Labor Law § 200 or common-law negligence (*see Ortega v Pucccia*, 57 AD3d at 62; *Natale v City of New York*, 33 AD3d 772, 773[2006]). A cause of action sounding in violation of Labor Law § 200 or common-law negligence may arise from either dangerous or defective premises conditions at a work site or the manner in which the work is performed (*see Ortega v Puccia*, 57 AD3d 54, 61 [2008]). Where as here, the defect alleged consists not of a premises defect, but of unsafe work practices, it is settled that "[a]n implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it

to avoid or correct an unsafe condition." (*Russin v Picciano & Son*. 54 NY2d 311, 317 [1981]).

As noted above, there is nothing in the record indicating that anyone from Beekman supervised or controlled the plaintiff's work. Plaintiff himself testified that he received his instructions from Nicky, who was either employed by KBF or Kensico. In opposition, the plaintiff has failed to raise a triable issue of fact establishing otherwise (*see Alvarez v Prospect Hosp*., 68 NY2d at 324; *Gleason v Gottlieb*, 35 AD3d 355, 356-357 [2006]). Thus, plaintiff's common-law negligence and Labor Law § 200 causes of action are hereby dismissed as against Beekman (*see Ortega v Puccia*, 57 AD3d at 61).

In sum, that branch of defendants' motion seeking summary judgment dismissing plaintiff's Labor Law §241 (6) claim as based upon a violation of Industrial Coder 23- 1.28 (a) is denied as is that branch of the motion seeking dismissal of plaintiff's Labor Law §200 and common law negligence claim as asserted against KBF. That branch of the motion seeking dismissal of plaintiff's Labor Law §200 and common law negligence claim as asserted against Beekman is granted.

The foregoing constitutes the decision, order and judgment of the court.

ENTER,

J. S. C.

HON. BERNARD J. GRAHAM

Nancy T. Sunshine

NANCY T. SUNSHINE
Clerk