Pandolfo v RCPI 600 Fifth Holdings, LLC
2017 NY Slip Op 30186(U)
January 27, 2017
Supreme Court, New York County
Docket Number: 160045/2013
Judge: Nancy M. Bannon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

----------X

PETER C. PANDOLFO and RUTH PANDOLFO,

Plaintiffs,

-against-

Index No. 160045/2013

RCPI 600 FIFTH HOLDINGS, LLC,
RCPI LANDMARK PROPERTIES, LLC,
CRANE CONSTRUCTION COMPANY, LLC, and
ARITZIA ILLINOIS, LLC,

Motion Sequence No. 004

Defendants.

----------X

CRANE CONSTRUCTION COMPANY, LLC,

Third-Party Plaintiff,

DECISION AND ORDER

-against-

I

O'KANE ENTERPRISES, LTD.,

Third-Party Defendant.

----------X

NANCY M. BANNON, J.S.C.:

I. INTRODUCTION

In this action arising out of a construction site accident, the plaintiffs Peter C. Pandolfo (Pandolfo) and Ruth Pandolfo move, pursuant to CPLR 3212, for summary judgment against the defendants RCPI 600 Fifth Holdings, LLC, and RCPI Landmark Properties, LLC (the RCPI defendants), Crane Construction Company, LLC (Crane), and Aritzia Illinois, LLC (Aritzia), on the issue of liability on the causes of action alleging violations Labor Law §§ 240(1) and 241(6). Crane cross-moves, pursuant to

CPLR 3212, for summary judgment dismissing the complaint insofar as asserted against it.

II. BACKGROUND

This action arises out of an accident that allegedly occurred on October 24, 2012, inside a building at Rockefeller Center in Manhattan. It is undisputed that the RCPI defendants are the owners of the land and the subject commercial building located thereon. Aritzia was a commercial tenant leasing the first floor and lower level space for the operation of a women's retail clothing store. Aritzia took possession of the leased space in May 2012, and began renovation of the premises with the intent to open the store on November 23, 2012. Aritzia retained Crane as the general contractor on the project. Crane retained the third-party defendant O'Kane Enterprises, Ltd. (OEL), as the carpentry subcontractor. Pandolfo was employed as a journeyman carpenter by OEL on the date of the accident.

Pandolfo testified at his deposition that he was assisting his coworkers, Matthew Flanagan and a man named Shelton, whose first name he could not remember, to install tongue and groove wood slats on the ceiling of the main level of the store. Flanagan and Shelton were working on baker's-style scaffolding platforms, which are assembled, tiered metal scaffolds on wheels, while Pandolfo worked as the "cut guy" who remained on the floor

and was responsible for taking measurements, cutting the wood on a saw, and handing the wood up to his coworkers. Pandolfo was also responsible for moving the scaffolds as needed.

Pandolfo asserted that he and his coworkers set up four baker scaffolds in a line to create a walking platform spanning approximately 20 feet. As Pandolfo explained it, while Flanagan and Shelton completed work in one area of the ceiling, Pandolfo would take the rear scaffold and wheel it to the front to advance the platform forward. At some point, Pandolfo and his coworkers could not position the scaffolding beneath the work area because there were gigantic escalator frames and wooden pallets located on the floor. According to Pandolfo, his foreman, Greg Clark, had instructed Pandolfo and his coworkers to use heavy-duty planks as a bridge between each of the four scaffolds in case they "needed to span the difference between one baker and another as a platform to stand on." Pandolfo explained that he and his coworkers created planking bridges connecting each scaffold to the one adjacent to it. He stated that he accomplished this by handing one plank up to Flanagan, who was standing on one scaffold, and another plank to Shelton, who was standing on another scaffold, and that Flanagan and Shelton slid the planks together. Pandolfo stated that "[b]ecause they were so heavy and so thick, they were able to support both guys on the planks with some minimal flexing but not enough flexing to be dangerous."

Pandolfo stated that Flanagan and Shelton both stood on the planking bridges on numerous occasions while working on the ceiling.

Pandolfo asserted that the subject accident occurred when he released the wheel lock on one of the scaffolds and began to push it so as to relocate it closer to the work being done, while bending forward and looking down to avoid the debris and stored equipment. He testified that he momentarily forgot that bridging planks were on top of the scaffolding he had been moving, and that those planks fell on his head and back. Although Flanagan did not directly observe the planks striking Pandolfo, he corroborated Pandolfo's testimony as to how the work was performed, and that he observed Pandolfo holding his head immediately after learning from Pandolfo that the planking had struck Pandolfo in the neck and head.

Clark states in an affidavit that, on October 24, 2012, Pandolfo told him that he had been struck in the head by planking that fell from a baker scaffold, but that Pandolfo never complained to him about any injury from that accident. Clark further asserts that he never instructed Pandolfo to use the planks as bridging between two baker scaffolds.

Pandolfo completed and file a C-3 workers' compensation form with respect to the October 24, 2012, incident, in which he stated that he was rearranging the scaffold to access different

parts of the ceiling when two planks fell off the scaffold he had been moving and onto his head, thus injuring his head and neck.

According to Pandolfo, on each work day from October 24, 2012, through November 14, 2012, he worked "the whole day and in pain." Pandolfo asserts that, on November 14, 2012, he was moving "extremely heavy" dressing room partitions, and did not at first notice any pain that was any different than the continuing pain arising from the October 24, 2012, accident, but that, as he continued to move the partitions, he felt pain different in kind and degree in his back. He thus completed an additional C-3 workers' compensation claim form indicating that, on November 14, 2012, while he was moving fitting room partitions weighing approximately 260 to 300 pounds, he felt an immediate burning sensation in his back.

In an affidavit, Daniel O'Kane, an OEL field representative, states that, on November 15, 2012, Pandolfo reported that he was unable to work due to a workplace injury he allegedly sustained to his back on November 14, 2012. O'Kane asserts that OEL learned for the first time during that conversation that Pandolfo had been in an accident on October 24, 2012.

On October 31, 2013, the plaintiffs commenced this action against the RCPI defendants, Crane, and Aritzia, seeking to recover damages for personal injuries arising from violations of Labor Law §§ 240, 241-a, 241(6), and 200, and under principles of

common-law negligence. The plaintiff Ruth Pandolfo also seeks to recover for loss of services, companionship, and consortium. Crane subsequently impleaded O'Kane, seeking indemnification and contribution.

The plaintiffs now move for summary judgment on the Labor Law §§ 240(1) and 241(6) causes of action, while Crane cross-moves for summary judgment dismissing the complaint insofar as asserted against it. In support of their motion, the plaintiffs submit the pleadings, Pandolfo's affidavit, the affidavit of their retained professional engineer, Herbert Heller, Jr., an attorney's affirmation, deeds and leases referable to the subject premises, the relevant general contract and subcontracts, a photo of a baker scaffold, transcripts of the parties' depositions, and a medical report of Pandolfo's retained expert physician, Stuart B. Kahn. In opposition to the motion, and in support of its cross motion, Crane relies on the plaintiffs' submissions, and also submits the pleadings, deposition transcripts, workers' compensation claim forms and reports completed by Pandolfo and OEL, and affidavits of Clark, O'Kane, and its construction safety expert, Martin R. Bruno. The RCPI defendants and Artizia oppose the motion with an attorney's affirmation, excerpts of the parties' deposition transcripts, and workers' compensation forms completed both by Pandolfo and OEL.

III. DISCUSSION

"[T]he proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." Ostrov v Rozbruch, 91 AD3d 147, 152 (1st Dept. 2012); see also Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action." Cabrera v Rodriguez, 72 AD3d 553, 553-554 (1st Dept. 2010). "On a motion for summary judgment, issue-finding, rather than issue-determination, is key." Shapiro v Boulevard Hous. Corp., 70 AD3d 474, 475 (1st Dept. 2010). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. Rotuba Extruders v Ceppos, 46 NY2d 223, 231 (1978).

A. Labor Law § 240(1)

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

> "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 legislative intent behind the statute is to place ultimate responsibility for safety practices on owners and general contractors, rather than on workers, who "are scarcely in a position to protect themselves from accident." Zimmer v Chemung County Performing Arts, 65 NY2d 513, 520 (1985) (internal quotation marks and citations omitted). "Thus, section 240(1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused an injury." Gordon v Eastern Ry. Supply, 82 NY2d 555, 559 [1993). To succeed on a cause of action asserted pursuant to Labor Law § 240(1), the plaintiff need only prove: (1) a violation of the statute, i.e., that the owner or contractor failed to provide adequate safety devices; and (2) that the statutory violation was a proximate cause of the injuries sustained. Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 290 (2003); Campos v 68 E. 86th St. Owners Corp., 117 AD3d 593, 593 (1st Dept. 2014).

"Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protection of Labor Law § 240(1)." Narducci v Manhasset Bay Assoc., 96 NY2d 259, 267 (2001). "'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 worker *from harm directly flowing*

from the application of the force of gravity to an object or person.'" Runner v New York Stock Exch., Inc., 13 NY3d 599, 604 (2009), quoting Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 (1993) (emphasis added).

To establish liability based upon a falling object, the plaintiff must show that, at the time the object fell, it was "being hoisted or secured" (Narducci, supra, at 268), or "required securing for the purposes of the undertaking." Outar v City of New York, 5 NY3d 731, 732 (2005). Moreover, the plaintiff must show that the object fell "*because* of the absence or inadequacy of a safety device of the kind enumerated in the statute." Narducci, supra, at 268 (emphasis added); see also Fabrizi v 1095 Ave. of Ams., LLC, 22 NY3d 658, 662 (2014).

The RCPI defendants, which concededly owned the premises, are subject to liability under the statute. "Liability rests upon the fact of ownership and whether [the owner] had contracted for the work or benefitted from it are legally irrelevant." Gordon, supra, 82 NY2d at 560. "A lessee of property under construction is deemed to be an 'owner' for purposes of liability under article 10 of New York's Labor Law." Kane v Coundorous, 293 AD2d 309, 311 (1st Dept. 2002). Moreover, an "owner" encompasses "a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit." Copertino v Ward, 100 AD2d 565, 566 (2nd Dept.

1984). Since Aritzia leased the subject premises from the RCPI defendants, and retained Crane to perform the construction work, Aritzia is subject to the mandates of Labor Law § 240(1). Crane has not disputed that it was the general contractor on the project. Indeed, Crane's project superintendent on the job testified that "[Crane was] the general contractor, so it was our responsibility to sub out all of the contractors that were required and, again, schedule and coordinate and get the project built." As such, Crane is also subject to the requirements of Labor Law § 240(1). See Milanese v Kellerman, 41 AD3d 1058, 1061 (3rd Dept. 2007).

"The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of . . . a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." Rocovich v Consolidated Edison Co., 78 NY2d 509, 514 (1991). Pandolfo testified that the planks that struck him were approximately 12 or 14 feet long, 12 to 14 inches wide, and weighed 80 to 120 pounds each. Pandolfo explained that the top of the baker scaffolds were approximately 6 1/2 feet above the floor, and that he was bending forward when the planks struck him, so that the planking fell approximately 3 to 4 feet. Thus, the plaintiffs established, prima facie, that the harm that Pandolfo suffered "'flow[ed] directly from the

application of the force of gravity to the [planks].'" Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., 18 NY3d 1, 10 (2011), quoting Runner, supra, 13 NY3d at 604.

In opposition the plaintiffs showing in this regard, Crane failed to raise a triable issue of fact, since its contention that the planks fell only nine inches at most was based on speculation, and thus does not refute Pandolfo's testimony that he was "bent forward" and "hinged at [his] pelvis" when he was struck by the planks, thus increasing the distance between his head and the top of the scaffolding. Crane has not pointed to any contradictory evidence. The court therefore rejects Crane's contention that Labor Law § 240(1) does not apply because the planks fell a de minimis distance. In determining whether an elevation differential is physically significant or de minimis, the court must consider not only the height differential itself, but also the mass or weight of the falling object and the amount of force it was capable of generating, even over the course of a relatively short descent. See Wilinski, supra, 18 NY3d at 10. Considering the amount of force that the planks were capable of generating, the height differential cannot be viewed as de minimis. See Humphrey v Park View Fifth Ave. Assoc. LLC, 113 AD3d 558, 559 (1st Dept. 2014). As explained by the First Department in Thompson v St. Charles Condominiums (303 AD2d 152, 154 [1st Dept. 2003]):

> "[w]hile the absence of any appreciable height differential between the falling objects and the plaintiff could call into question the applicability of section 240(1), *the statute must still apply to the collapse of a scaffold, the purpose of which is to hold construction supplies and workers at a raised level.* That it was "only" four feet above the ground does not constitute a basis for ignoring the requirements of section 240(1), especially when liability is based upon a defect in a protective device specifically listed in the statute." (citations omitted and emphasis added); see Agresti v Silverstein Props., Inc., 104 AD3d 409, 409 (1st Dept. 2013)

Since Pandolfo was allegedly injured when the bridging of the scaffolding collapsed, this rule is germane to this dispute.

In addition, the plaintiffs demonstrated that the planks fell due to the absence or inadequacy of a safety device of the kind enumerated in the statute. "[W]here a safety device has been furnished, and it collapses, a prima facie case of liability under Labor Law § 240(1) is established. . . [T]his is so whenever the employee is injured as a result of this collapse, regardless of whether the employee was *on* or *under* the scaffold when it collapsed." Thompson v St. Charles Condominiums, supra, at 154 (citations omitted); see McAllister v 200 Park, L.P., 92 AD3d 927, 929 (2nd Dept. 2012); Cantineri v Carrere, 60 AD3d 1331, 1333 (4th Dept. 2009). The plaintiffs demonstrated that the planks fell on Pandolfo because they were not fastened or secured in any way to the baker scaffolds. They further established, with Flanagan's deposition testimony, that it was feasible to fasten them, inasmuch as Flanagan asserted that he

had previously seen planks tied to baker scaffolds with wire. Moreover, Crane's project superintendent testified at his deposition that the planks could have been wired to the baker scaffold or screwed to clips.

Crane failed to establish, prima facie, that Pandolfo was the sole proximate cause of his accident, and, in opposition to the plaintiffs' prima facie showing of entitlement to judgment as a matter of law on the Labor Law § 240(1) cause of action, neither Crane nor the other defendants raised a triable issue of fact as to whether Pandolfo's conduct may have been the sole proximate cause.

> "Liability under section 240 (1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident. In such cases, plaintiff's own negligence is the sole proximate cause of his injury." Gallagher v New York Post, 14 NY3d 83, 88 (2010), citing Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35, 39-40 (2004); see Barreto v Metropolitan Transp. Auth., 25 NY3d 426, 433 (2014).

Nevertheless, if "a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it." Blake, 1 NY3d at 290.

> "To raise a triable issue of fact as to whether a plaintiff was the sole proximate cause of an accident, the defendant must produce evidence that adequate devices were available, that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained." McCrea v Arnlie Realty Co. LLC, 140

AD3d 427, 429 (1st Dept. 2016) (internal quotation marks and citations omitted).

Here, the plaintiffs established that the defendants' failure to secure the planks was a cause of Pandolfo's accident, and the defendants failed to raise a triable issue of fact in opposition to that showing. For the same reason, Crane failed to make a prima facie showing that its failure to secure the planks did not contribute to the accident. Thus, Pandolfo cannot be the sole proximate cause of his accident. See Blake, supra, 1 NY3d at 290. The fact that Pandolfo moved the scaffold without removing the planks would constitute, at most, comparative negligence, which is not a defense to liability. See Rocovich, supra, 78 NY2d at 513.

Moreover, contrary to the contention of the RCPI defendants and Aritzia, Pandolfo's failure to wear a hard hat does not defeat the Labor Law § 240(1) cause of action, since "'[a] hard hat is not the type of safety device enumerated in Labor Law § 240(1) to be constructed, placed and operated, so as to give proper protection from extraordinary elevation-related risks to a construction worker.'" Mercado v Caithness Long Is., LLC, 104 AD3d 576, 577 (1st Dept. 2013), quoting Singh v 49 E. 96 Realty Corp., 291 AD2d 216, 216 (1st Dept. 2002). Furthermore, the RCPI defendants and Aritzia have not presented any evidence to support their contention that Pandolfo was the sole proximate cause of the accident by virtue of his knowledge of the availability of

adequate tools or a scissor lift, and that he was expected to use them, or that he chose not to use them for no good reason. Similarly, although Pandolfo's "failure to ask a coworker for support amounts to comparative negligence" (Noor v City of New York, 130 AD3d 536, 541 [1st Dept. 2015]), such a failure is not a defense to liability under Labor Law § 240(1).

Although the RCPI defendants and Aritzia argue that there are triable issues of fact as to Pandolfo's credibility, on a motion for summary judgment, the court is not permitted to assess credibility, and these defendants raise no serious question as to whether the planks struck Pandolfo or as to any other material fact. See Klein v City of New York, 89 NY2d 833, 835 (1996); Mannino v J.A. Jones Constr. Group, LLC, 16 AD3d 235, 236 (1st Dept. 2005); Perrone v Tishman Speyer Props., L.P., 13 AD3d 146, 147 (1st Dept. 2004). "The fact that the plaintiff may have been the sole witness to the accident does not preclude the award of summary judgment in [his or her] favor." Campbell v 111 Chelsea Commerce, L.P., 80 AD3d 721, 722 (2nd Dept. 2011). The defendants have not offered any evidence of a conflicting version of the accident for which they would not be liable, or any evidence that the accident did not happen at all.

While the RCPI defendants and Aritzia contend that Pandolfo worked the entirety of October 24, 2012, without reporting any injury to his employer, Pandolfo's foreman states that Pandolfo told him, on that date, that he had been struck in the head by a

plank on top of a baker scaffold. Pandolfo also filed a C-3 workers' compensation report regarding the October 24, 2012, accident, in which he wrote that "2 PLANKS FELL OFF SCAFFOLD ONTO MY HEAD." A C-2 workers' compensation report dated November 19, 2012, and completed by OEL, recites that "a plank hit him on head on a previous date." O'Kane also states, in his affidavit, that Pandolfo told him, on November 15, 2012, that he was involved in an accident on October 24, 2012, when two planks on top of the scaffold hit his head. The nature and extent of Pandolfo's back injuries, and the extent to which either accident caused any particular injury, go to the issue of Pandolfo's damages, not the issue of whether the defendants are liable for the October 24, 2012, accident. See Gramigna v Morse Diesel, 210 AD2d 115, 116 (1st Dept. 1994).

In view of the above, that branch of the plaintiffs' motion which is for summary judgment on the issue of liability on the Labor Law § 240(1) cause of action is granted, and that branch of Crane's cross motion which is for summary judgment dismissing that cause of action insofar as asserted against it is denied.

B. Labor Law § 241(6)

Labor Law § 241(6) provides as follows:

> "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."

Labor Law § 241(6) imposes a "*nondelegable* duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety'" to construction workers. Rizzuto v L.A. Wenger Constr. Co., 91 NY2d 343, 348 (1998), quoting Labor Law § 241(6) (emphasis added). To establish liability under Labor Law § 241(6), the plaintiff "'must specifically plead and prove the violation of an applicable Industrial Code regulation'" Garcia v 225 E. 57th St. Owners, Inc., 96 AD3d 88, 91 (1st Dept. 2012), quoting Buckley v Columbia Grammar & Preparatory, 44 AD3d 263, 271 (1st Dept. 2007). The violation must constitute a "specific, positive command," and must also be a proximate cause of the accident. Buckley, supra, 44 AD3d at 271. Unlike a cause of action alleging a violation of Labor Law § 240(1), a plaintiff's comparative negligence is a defense to liability under section 241(6). See St. Louis v Town of N. Elba, 16 NY3d 411, 413 (2011).

The plaintiffs' verified bill of particulars alleges violations of 12 NYCRR 23-1.5; 12 NYCRR 23-1.6; 12 NYCRR 23-1.7;

12 NYCRR 23-1.8; 12 NYCRR 23-2.1; 12 NYCRR 23-5.1; and 12 NYCRR 23-5.18. In a supplemental verified bill of particulars, the plaintiffs additionally allege violations of 12 NYCRR 23-2.1(a)(1) and 12 NYCRR 23-5.18(i). The plaintiffs' motion, however, is premised only upon violation of 12 NYCRR 23-5.18(i), while Crane's cross motion seeks summary judgment dismissing the cause of action only to the extent that it is based on 12 NYCRR 23-5.18(i) and 12 NYCRR 2.1.

1. 12 NYCRR 23-5.18

Section 23-5.18(i) of the Industrial Code, entitled "Bridging prohibited," provides that "[b]ridging between two or more manually-propelled mobile scaffolds or between any such scaffold and other supports is prohibited." 12 NYCRR 23-5.18(i). The plaintiffs argue, based on the expert affidavit of their retained professional engineer, Herbert Heller, Jr., that the fact that the planks dislodged and struck Pandolfo is evidence that the planks were placed improperly. In support of its cross motion, and in opposition to the plaintiffs' motion, Crane argues, relying on an affidavit from their construction site safety expert, Martin Bruno, that section 23-5.18 was solely intended to protect workers working at an elevation, not workers who are standing on the ground like Pandolfo. In opposition to the plaintiffs' motion, the RCPI defendants and Aritzia contend, among other things, that there are triable issues of fact as to whether Pandolfo was the sole proximate cause of his accident,

since he was not wearing a hard hat.

Although there do not appear to be any reported cases interpreting 12 NYCRR 23-5.18(i), the court concludes that this subdivision of section 23-5.18 is sufficiently specific to support a Labor Law § 241(6) cause of action, since it mandates a specific standard of conduct by expressly prohibiting bridging between manually-propelled scaffolds.

"The interpretation of [an Industrial Code] regulation presents a question of law, but the meaning of specialized terms in such a regulation is a question on which a court must sometimes hear evidence before making its determination." Morris v Pavarini Constr., 9 NY3d 47, 51 (2007); see Messina v City of New York, 300 AD2d 121, 123 (1st Dept. 2002). The Court of Appeals has explained that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace." St. Louis, supra, at 416.

Crane's argument that Industrial Code section 23-5.18 is intended to protect workers only who are working at an elevation is not supported by the plain language of section 23-5.18(i). Section 23-5.18(i) states that bridging between two or more manually-propelled scaffolds is prohibited, and does not limit its applicability to situations in which workers either standing on the scaffold bridging or below it are working at any particular elevation. It is undisputed that the baker scaffolds

employed by Pandolfo and his coworkers are manually-propelled mobile scaffolds, as they were equipped with wheels, and Pandolfo was only able to move the scaffold into position by hand. In addition, the court concludes that the plaintiffs established, prima facie, that section 23-5.18(i) was violated, given that Pandolfo's coworkers undisputably used the planks to bridge the baker scaffolds. In opposition to that showing, none of the defendants raised a triable issue of fact, as they adduced no evidence that the scaffolding was designed or constructed in a contrary manner, and no evidence that planking was not employed as a bridge spanning two or more scaffolds.

Nonetheless, summary judgment on a cause of action alleging a violation of Labor Law § 241(6) may only be awarded to the plaintiff where a defendant fails to raise a triable issue of fact as to any defenses, including proximate cause and comparative negligence. See Restrepo v Yonkers Racing Corp., Inc., 105 AD3d 540, 541 (1st Dept. 2013); Catarino v State of New York, 55 AD3d 467, 468 (1st Dept 2008); Pichardo v Urban Renaissance Collaboration Ltd. Partnership, 51 AD3d 472, 473 (1st Dept. 2008). Pandolfo's foreman alleges in his deposition testimony that Pandolfo was not wearing a hard hat on October 24, 2012, and that there were hard hats available on the job site in the gang box for every employee. The defendants' submissions demonstrate that, when Pandolfo began working for OEL, he signed off on the company's safety procedures, acknowledging that "all

employees must wear hard hats and safety goggles *at all times*" (emphasis added). Accordingly, the defendants raised triable issues of fact as to whether Pandolfo was comparatively negligent in failing to wear a hard hat. See Mercado, supra, at 577.

Therefore, plaintiffs' motion for summary judgment on the issue of liability on the Labor Law § 241(6) cause of action, based upon a violation of 12 NYCRR 23-5.18(i), must be denied. In light of the existence of triable issue of fact as to comparative negligence, that branch of Crane's cross motion which is for summary judgment dismissing the plaintiffs' Labor Law § 241(6) cause of action against it, insofar as predicated on a violation of section 23-5.18, must also be denied.

2. 12 NYCRR 23-2.1

Industrial Code section 23-2.1 provides that:

"(a) Storage of material or equipment.

"(1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.

"(2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge.

"(b) Disposal of debris. Debris shall be handled and disposed of by methods that will not endanger any person employed in the area of such disposal or any person lawfully frequenting such area"

(12 NYCRR 23-2.1).

Crane argues that section 23-2.1(a) does not apply to the accident because it occurred in an open area. Crane further contends that section 23-2.1(b) is insufficiently specific to support a Labor Law § 241(6) cause of action. The plaintiffs only addressed Crane's contention with respect to 12 NYCRR 23-2.1(a)(1), but not to the other subdivisions, arguing that section 23-2.1(a)(1) applies because Pandolfo testified that the area where the accident happened was a very tight area.

Crane established, prima facie, that section 23-2.1(a)(1) is inapplicable. Pandolfo testified that the baker scaffolds could not be placed beneath the work area because heavy equipment and wooden pallets were located on the floor beneath the work area. However, section 23-2.1 does not apply because the accident did not occur in a passageway, walkway, stairway, or other thoroughfare; rather, Pandolfo's accident occurred in a working area. See Rodriguez v Dormitory Auth. of the State of N.Y., 104 AD3d 529, 530 (1st Dept. 2013); Waitkus v Metropolitan Hous. Partners, 50 AD3d 260, 260 (1st Dept. 2008).

To the extent that the plaintiffs' Labor Law § 241(6) claim is predicated on 12 NYCRR 23-2.1(a)(2) and (b), they have abandoned reliance on these subdivisions. See Kempisty v 246 Spring St., LLC, 92 AD3d 474, 475 (1st Dept. 2012).

Hence, that branch of Crane's cross motion which is for summary judgment dismissing the Labor Law § 241(6) cause of

action against it, based on alleged violations of 12 NYCRR 23-2.1, must be granted.

The court notes that Pandolfo's affidavit was executed and notarized in Pennsylvania, and Heller's affidavit was executed and notarized in Florida, but that neither includes the certificate of conformity required by CPLR 2309. The defects do not require the denial of any portion of the plaintiffs' motion or the granting of any particular portion of Crane's cross motion, and may be cured by the submission of the proper certificates nunc pro tunc. See Todd v Green, 122 AD3d 831, 832 (2nd Dept 2014); see also Bank of New York v Singh, 139 AD3d 486, 487 (1st Dept 2016).

CONCLUSION

Accordingly, it is

ORDERED that the plaintiffs' motion (sequence # 004) for summary judgment is granted to the extent that they are awarded summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1) against the defendants RCPI 600 Fifth Holdings, LLC, RCPI Landmark Properties, LLC, Crane Construction Company, LLC, and Aritzia Illinois, LLC, with the issue of their damages to await the trial of this action, and the motion is otherwise denied; and it is further,

ORDERED that the cross motion of the defendant Crane Construction Company, LLC, for summary judgment is granted to the extent that it is awarded summary judgment dismissing the Labor Law § 241(6) cause of action against it, insofar as that cause of action is predicated upon a violation of 12 NYCRR 23-2.1(a)(1), 12 NYCRR 23-2.1(a)(2), and 12 NYCRR 23-2.1(b), and the cross motion is otherwise denied.

This constitutes the Decision and Order of the court.

Dated: 1/27/17

ENTER:

J.S.C.