SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29

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MICHAEL GREENE, Index No.: 150592/2015

Plaintiff,

-against-

BROOKFIELD PROPERTIES W 33RD CO. L.P., BROOKFIELD PROPERTIES 9TH AVENUE LLC, BOP WEST 31ST STREET, LLC and TURNER CONSTRUCTION COMPANY,

Defendants.

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Kalish, J.:

Motion sequence numbers 005 and 006 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by a journeyman ironworker on March 21, 2014, when, while working at a construction site located at 371-401 9th Avenue, New York, New York (the Premises), a tag line, which he was using to control and guide a 90,000 pound steel column, as it was being hoisted via a crane from the bed of a trailer, detached from the column, causing him to fall off the trailer and onto the ground.

In motion sequence number 005, plaintiff Michael Greene moves, pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law §§ 240 (1) and 241 (6) claims against defendants Brookfield Properties W 33rd Co. L.P., Brookfield Properties 9th Avenue LLC (together, Brookfield), BOP West 31st Street, LLC (BOP) and Turner Construction Company (Turner) (collectively, defendants).

In motion sequence number 006, defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint against them.

BACKGROUND

On the day of the accident, Brookfield owned the Premises where the accident occurred. Brookfield hired Turner to serve as the construction manager of a project at the Premises, which entailed building a mix-use development over the rail yards located along Ninth Avenue between 31st and 33rd Streets in Manhattan (the Project). Nonparty Total Safety was in charge of site safety monitoring at the site, pursuant to a contract with Brookfield and Turner, and Gus Clery served as its site safety manager. Plaintiff was employed as an ironworker by nonparty Stonebridge Erection Inc. (Stonebridge), the structural steel contractor on the Project.

Plaintiff's Deposition Testimony

Plaintiff testified that on the morning of the accident, he and his Stonebridge coworkers were called to an unloading area to offload a steel column from a four-foot-high trailer. The column measured approximately 18 feet long and weighed approximately 90,000 pounds. Thereafter, the column was to be transported to a storage location. Plaintiff asserted that his Stonebridge foreman, Robert Johnson, supervised this work.

Plaintiff testified that the column was being hoisted by a crane that sat on the bed of the trailer. At that time, plaintiff was working as a "hooker on," which meant that he was responsible for attaching a hook to the load, as well a "line tag man," which meant that he was responsible for helping to control the load with a tag line. Plaintiff explained that, while standing on the bed of the trailer, he and a coworker, Kevin Sabbagh, initially rigged the column by wrapping metal ropes, or chokers, around each end of it. The chokers were then connected to hooks that were attached to the crane. Thereafter, the men attached tag lines, which consisted of ropes tied to the metal hooks, to each end of the column, so that they could control the column as

it was being hoisted and then moved. The tag lines were provided by Stonebridge. Once everything was attached, plaintiff held the tag line connected to the end of the column located nearest to the cab of the trailer while standing on the trailer, and Sabbagh held the tag line connected to the end of the column located nearest to the rear of the trailer while standing on the ground. Plaintiff then signaled to the crane operator to raise the hook to tighten the chokers. In order to properly position the column for landing, the men had to turn it around by pulling on the tag lines as the crane was lifting it.

Plaintiff explained that the accident occurred when, as the crane was lifting the column, the crane's lifting mechanism suddenly accelerated, causing plaintiff to have to pull down hard on his tag line "with all [of his] might," in an attempt to turn the column (plaintiff's tr at 7). As he was simultaneously pulling down on the tag line and moving toward the back of the trailer, the tag line suddenly detached from the hook, sending plaintiff flying off the side of the trailer and onto the ground, injuring him.

Plaintiff testified that after recovering from his fall, he "looked at the hook" and observed that "it was spread" (*id.* at 156). Plaintiff opined that the hook "bent when [they] were trying to turn [the column] . . . because when the crane came up, [the crane operator] sped up and started to move . . . fast" (*id.* at 149). Plaintiff did not see "the hook disengage from the load before [he] fell off the truck" (*id.* at 152).

Deposition Testimony of Robert Johnson (Plaintiff's Stonebridge Foreman)

Robert Johnson testified that he was the Stonebridge foreman on the day of the accident. He maintained that the hooks that were used on the Project to connect the tag lines were deficient. He explained that they were "not the right hooks" because they were "smaller . . .

weaker" than the ones that were "normally use[d] for a tag line" (Johnson tr at 47). Prior to the accident, Johnson had complained about the deficient hooks at least three or four times to James Kenna, Stonebridge's general superintendent. Plaintiff had also complained to him about the hook not being "the right hook" (*id.* at 96). Plaintiff told Johnson that he fell when "the tag line came out" (*id.* at 84). Thereafter, Johnson "got the tag line and . . . looked at the hook and figured out why the tag line came out" (*id.* at 85). Johnson later delivered the subject hook to plaintiff's counsel.

Deposition Testimony of Kevin Dillon (the Crane Operator)

Kevin Dillon testified that on the day of the accident, he was operating a crane at the Premises, along with another crane operator. As part of his duties as crane operator, Dillon was responsible for inspecting and testing his crane daily. Except for an air-conditioning problem, he did not remember having any issues with the crane on the Project. In the past, whenever there was a problem with "the swing" of the crane, mechanics would come and check it out (Dillon tr at 20).

Dillon explained that the crane had two speeds; a low speed and a high speed. As it was necessary to "come up slow," in order for the chokers to properly grab onto their loads, he never operated the crane at high speed (*id.* at 36). He further explained that in order to transition from low to high speed, he had to stop lifting the load and flip a switch before he could resume hoisting. Dillon testified that he could also control the crane's rate of acceleration with a joy stick, noting that "the more you pull it back the faster it goes" (*id.*). When Dillon was asked if he recalled "to what level [of speed he] was hoisting the load" on the day of the accident, Dillon replied, "No, I have no recollection of whatever happened that day" (*id.* at 11).

Dillon asserted that the first time that he learned of plaintiff's accident was when he received a letter in the mail. He also maintained that he never saw anyone fall off a trailer bed while working on the Project, nor was he ever told that he had brought up any loads too quickly.

Affidavit of James Kenna (Stonebridge's General Superintendent)

In his affidavit, Kenna stated that he was Stonebridge's superintendent on the day of the accident. As such, his job duties included "managing construction projects, as well as investigating accidents involving Stonebridge employees and preparing accident reports" (Kenna aff). After learning of the accident, when Kenna spoke with plaintiff about what had happened, plaintiff explained to him that he was standing on the bed of the trailer and holding a tag line that was attached to a column at the time of the accident, and that he was caused to fall off the trailer "when the hook of the tag line fell out of the hole of the column that it had been in" (*id.*). Kenna was unaware of any complaints in regard to the size of the hook.

Brookfield's Incident Investigation Report

In Brookfield's incident investigation report (the Incident Report), Clery, the site safety manager, described the accident, as follows:

> "[Plaintiff] stated that he was rigging a column to get off the tractor trailer. He pull[ed] on the tag line to control the load as it got off the floor of the trailer. The tag line became lose [sic] upon disengagement and caused him to loose [sic] his balance, falling off the trailer"

(plaintiff's notice of motion, exhibit 11, the Incident Report). In addition, Clery wrote that "plaintiff stated that he was pulling on a tag line that was not properly secured to the load causing it to get disengaged to the load" (*id.*).

Expert Affidavit of Richard Hoffman, P.E.

In his affidavit, put forth by defendants, Richard Hoffman, P.E. stated that, based on his

chemical analysis of the base metal in the subject hook, the hook was comprised of plain manganese carbon steel. As such, it would require a minimum amount of 333 pounds of force to deform the hook.

Expert Affidavit of Kristopher Seluga, P.E.

In his affidavit, put forth by defendants, Kristopher Seluga, P.E. stated that, based on "his human strength and testing," plaintiff's weight of 165 pounds "would not be able to produce a pulling force of 300 pounds or more on the subject tag line" (Seluga aff).

DISCUSSION

"'The 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 eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The Labor Law § 240 (1) Claim

Plaintiff moves for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants. Defendants move for dismissal of said claim against them. Labor

Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

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

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

> "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein"

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Initially, defendants assert that the Labor Law § 240 (1) claim against them should be dismissed, because, as plaintiff fell just four feet to the ground from the bed of a tractor trailer, he "was not exposed to an elevation-related risk and his injury did not directly flow from the application of gravity's force. Rather, plaintiff's accident arose from activities and circumstances that arise on a construction site, and are not covered by section 240 (1)'s elevation-differential protections" (*DeRosa v Bovis Lend Lease LMB, Inc.*, 96 AD3d 652, 654 [1st Dept 2012] [internal citations omitted]; *Lavore v Kir Munsey Park 020, LLC*, 40 AD3d 711, 712 [2d Dept 2007] [the approximately five-foot elevation between the top of the truck's utility bin where plaintiff was standing and the ground was not considered by the court to be an elevation-related risk for the purposes of the statute]; *Toefer v Long Is. R.R.*, 4 NY3d 399, 408 [2005]).

In support of this argument, defendants put forth that courts have determined that the activities conducted from trucks are not elevation-related risks within the meaning of Labor Law § 240 (1) (*see Berg v Albany Ladder Co.*, 10 NY3d 902, 904 [2008]; *Toefer*, 4 NY3d at 407-408; *DeRosa*, 96 AD3d at 654; *Landa v City of New York*, 17 AD3d 180, 181 [1st Dept 2005] [the unloading of a truck was not an elevation-related risk within the meaning of Labor Law § 240 (1)]; *Cabezas v Consolidated Edison*, 296 AD2d 522, 523 [2d Dept 2002] [the task of unloading a truck was not an elevation-related risk, but rather, "it was the type of ordinary risk inherent in construction work"]; *Jacome v State of New York*, 266 AD2d 345, 346 [2d Dept 1999] [Court determined that "[t]he task of unloading a truck is not an elevation-related risk simply because there is a difference in elevation between the ground and the truck bed"]).

However, importantly, not only does Labor Law § 240 (1) apply to those gravity-related accidents where a plaintiff falls from height, it *also* applies to those accidents that are caused by

the failure of a safety device intended to protect the worker from dangers associated with objects that fall from a height, such as the hook and/or tag line at issue in the instant case.

In order to recover damages for a violation of Labor Law § 240 (1) under a falling objects theory, such as the case at hand, a plaintiff can demonstrate that the object that fell was in the process of being hoisted or secured, or that it "was 'a load that required securing for the purposes of the undertaking at the time it fell,'" and that defendants failed to provide a proper safety device to protect plaintiff (*Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005] [citation omitted]; *Dedndreaj v ABC Carpet & Home*, 93 AD3d 487, 488 [1st Dept 2012] ["Plaintiff established his prima facie entitlement to summary judgment by showing that defendants' failure to provide an adequate safety device proximately caused a pipe that was in the process of being hoisted to fall and strike him"]).

Here, first and foremost, while the column was in the process of being hoisted, plaintiff was exposed to an elevation-related hazard when the tag line of the hoisting system failed by detaching from the hook as he was pulling down on it, which, in turn, caused him to fly off the bed of the trailer and become injured. Therefore, plaintiff is entitled to judgment in his favor under Labor Law § 240 (1) under a falling objects theory (i.e. the detaching of the hook).

In any event,"[w]hile falling from the bed of a truck is not the kind of elevation-related hazard contemplated by the statute, Labor Law § 240 (1) can be applied where some risk-enhancing circumstance implicates the protections of the statute" (*Intelisano v Sam Greco Constr., Inc.*, 68 AD3d 1321, 1323 [3d Dept 2009] [where the plaintiff's work of unloading bundles of insulation required him to get on top of bundles and attach a strap around them to a crane, the Court found that the "circumstance[s] constitute[d] an elevation-related risk greater

than merely falling from the bed of a trailer"]).

In addition, in the case of *Flores v Metropolitan Transp. Auth.* (164 AD3d 418, 419 [1st Dept 2018]), where the "plaintiff fell off a flatbed truck after a load of steel beams, without tag lines, was being hoisted above him by a crane," the Court found that Labor Law § 240 (1) applied, nevertheless, because "[t]he risk of the hoisted load or beams without tag lines triggered the protections set forth in [the statute]."

Here, plaintiff's work involved pulling down hard on the tag line in his attempt to control the 90,000 pound column, which ultimately resulted in the failure of the hoisting system. As such, like *Flores*, "the risk of the hoisted load . . . triggered the protections set forth in Labor Law § 240 (1)" (*Flores,* 164 AD3d at 419; *Naughton v City of New York*, 94 AD3d 1, 8 [1st Dept 2012] [Labor Law § 240 (1) applied where, while working from the top of a flatbed truck, the plaintiff was knocked 15 feet to the ground below when a bundle, that was in the process of being hoisted, swung toward him, because the tag line that it was attached to "got slack"]). There is no reason why Labor Law § 240 (1) should not protect plaintiff here – who fell as he was attempting to turn a load that suddenly accelerated as it was being hoisted – any differently than the plaintiff in *Flores* who fell from a truck as the load swung towards him.

It is also of no consequence that none of the falling objects in this case, i.e., the column, hook and/or the tag line, did not actually strike plaintiff, as plaintiffs are not deprived of the protection of section 240 (1) merely because they were not struck by the falling objects themselves. Rather, "[t]he relevant inquiry - one which may be answered in the affirmative even in situations where the object does not fall on the worker - is rather whether the harm flows directly from the application of the force of gravity to the object" (*Runner v New York Stock*

Exch., Inc., 13 NY3d 599, 604 [2009]; *see also Skow v Jones, Lang and Wooton Corp.*, 240 AD2d 194, 195 [1st Dept 1997] ["That plaintiff neither fell from a height nor was struck by a falling object does not require dismissal of his section 240 (1) claim, the proof being sufficient to show that his injury was caused by his effort to prevent the pump from falling"]).

Defendants also argue that the Labor Law § 240 (1) claim should be dismissed because the hook that allegedly failed is not one of the safety devices enumerated in the statute. However, defendants' argument on this issue fails, because the hook was clearly part of a larger hoisting system, or considered to be among the "other devices" contemplated by the statute (*see Naughton*, 94 AD3d at 8 [awarding summary judgment to plaintiff where tag line "got slack" causing load to swing towards him].)

Defendants further assert that the Labor Law claims should be dismissed against them because not only can they prove that the hook did not belong to them, but also because their experts have established that it was mechanically, scientifically and physically impossible for the accident to have occurred as a result of the hook bending when plaintiff pulled down on it, as plaintiff opined.

However, importantly, who owned the hook, or whether or how the hook bent, is of no consequence in this case, as what is important is that plaintiff's work posed an elevation-related hazard which called for the provision of an enumerated device, and plaintiff's injuries were caused by the failure of said device (*see Williams v Town of Pittstown*, 100 AD3d 1250, 1251 [3d Dept 2012]; *Skow*, 240 AD2d at 195).

Moreover, it is not necessary for plaintiff to prove that the hook was defective in order to recover under Labor Law § 240 (1), as "[i]t is sufficient for purposes of liability under section

240 (1) that adequate safety devices to . . . protect plaintiff . . . were absent" (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]; *Diaz v City of New York*, 110 AD3d 577, 577 [1st Dept 2013]; *McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 333-334 [1st Dept 2008] [where plaintiff sustained injuries "when the unsecured ladder he was standing on to drill holes in a ceiling tipped over," the plaintiff was not required to demonstrate, as part of his prima facie showing, that the ladder he was working on at the time of the accident was defective]; *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004] [where plaintiff was injured as a result of an unsteady ladder, plaintiff did not need to show that ladder was defective for the purposes of liability under Labor Law § 240 (1), only that adequate safety devices to prevent the ladder from slipping or to protect the plaintiff from falling were absent]).

Defendants further argue that, as plaintiff was allegedly the one responsible for attaching the tag line to the hook, they are entitled to dismissal of the Labor Law § 240 (1) claim because he was the sole proximate cause of the accident. Where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1) (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]). "[T]he duty to see that safety devices are furnished and employed rests on the employer in the first instance" (*Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1st Dept 1994]). "When the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]).

However, in support of their sole proximate cause argument, defendants have failed to

put forth any evidence whatsoever to establish that plaintiff did, in fact, improperly rig the subject load. To the contrary, defendants attempt to cast doubt on how the accident occurred, but the overwhelming evidence in the record indicates that the hoisting system failed because the hook was either not strong enough for the subject task at hand or defective.

Accordingly, any alleged negligence on plaintiff's part in regard to this issue goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Vail v 1333 Broadway Assoc., L.L.C.*, 105 AD3d 636, 637 [1st Dept 2013] ["Given that the scaffold was inadequate in the first instance, any failure by plaintiff to hydrate himself could not be the sole proximate cause of his injuries"]; *Berrios v 735 Ave. of the Ams., LLC*, 82 AD3d 552, 553 [1st Dept 2011] [Court held that "even if plaintiff could be found recalcitrant for failing to use a harness, defendants' 'failure to provide proper safety [equipment] was a more proximate cause of the accident'"]; *Milewski v Caiola*, 236 AD2d 320, 320 [1st Dept 1997] [Court held that "even if plaintiff could be deemed recalcitrant for not having used the harness, no issue exists that the failure to provide proper safety planking was a more proximate cause of the accident"]).

"[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake*, 1 NY3d at 290; *Vega v Rotner Mgt. Corp.*, 40 AD3d 473, 474 [1st Dept 2007] ["It does not avail defendants to argue that the manner in which plaintiff set up and stood on the ladder was the sole cause of the accident, where

there is no dispute that the ladder was unsecured and no other safety devices were provided."].). Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002]; [internal quotation marks and citations omitted]; *see also White v 31-01 Steinway, LLC*, 2018 NY Slip Op 06685, at *3 [1st Dept Oct. 9, 2018].).

It should be noted that while defendants repeatedly call to the court's attention that the accident was unwitnessed, it would be improper to deny plaintiff summary judgment merely because plaintiff has not provided the testimony of other witnesses who observed the accident (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d at 290 [Court granted plaintiff, who was alone at time of accident and fell from an A-frame ladder which had no protective devices while installing a light fixture, summary judgment on his section 240 (1) claim "[r]egardless of the precise reason for his fall"]; *Campbell v 111 Chelsea Commerce, L.P.*, 80 AD3d 721, 722 [2d Dept 2011] ["The fact that the plaintiff may have been the sole witness to the accident does not preclude the award of summary judgment in her favor"]).

Finally, the minor inconsistencies in plaintiff's testimony, as put forth by defendants, "[do] not relate to a material issue," and, thus, they do not preclude an award of partial summary judgment as to liability in plaintiff's favor (*Laconte v East End Owners Corp.*, 80 AD3d 669, 671 [2d Dept 2011]; *Anderson v International House*, 222 AD2d 237, 237 [1st Dept 1995]).

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citations

omitted]).

Thus, plaintiff is entitled to partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against defendants, and defendants are not entitled to summary judgment dismissing said claim.

The court has considered defendants' remaining arguments on this issue and finds them to be unavailing.

The Labor Law § 241 (6) Claim

Plaintiff moves for summary judgment in his favor as to liability on the Labor Law § 241 (6) claim against defendants, and defendants move for dismissal of said claim against them. Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers" (*Ross*, 81 NY2d at 501). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.* at 503-505).

Initially, although plaintiff alleges multiple violations of the Industrial Code in the bill of particulars, with the exception of Industrial Code sections 23-6.1 (h) and 23-8.2 (c) (3), either plaintiff does not move for summary judgment in his favor or oppose the dismissal of these sections, and therefore, they are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]).

Thus, defendants are entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on the abandoned provisions.

Industrial Code 12 NYCRR 23-6.1 (h)

Initially, Industrial Code section 23-6.1 (h), which requires that "[l]oads which have a tendency to swing or turn freely during hoisting shall be controlled by tag lines," is insufficient to support a Labor Law § 241 (6) cause of action (*see Morrison v City of New York*, 5 AD3d 642, 643 [2d Dept 2004]; *Smith v Homart Dev. Co.*, 237 AD2d 77, 80 [3d Dept 1997]). Indeed, a review of plaintiff's testimony reveals that tag lines were in use at the time of the accident. In addition, plaintiff's injury did not result from the swinging of the load and a failure of the tag line to control said swinging, but rather plaintiff's injuries arose when the tag line unexpectedly detached as he was attempting to turn the load during an unexpected acceleration of the hoisting.

Thus, plaintiff is not entitled to summary judgment in his favor on that part of the Labor Law § 241 (6) claim, and defendants are entitled to dismissal of the same.

Industrial Code 12 NYCRR 23-8.2 (c) (3)

Section 23-8.2 (c) (3), which also deals with special provisions for mobile cranes,

provides:

> "Loads lifted by mobile cranes shall be raised vertically so as to avoid swinging during hoisting except when such operations are permitted by the capacity chart. A tag or restraint line shall be used when rotation or swinging of any load being hoisted by a mobile crane may create a hazard."

Initially, section 23-8.2 (c) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Flores*, 164 AD3d at 419; *Locicero v Princeton Restoration, Inc.*, 25 AD3d 664, 667 [2d Dept 2006]).

Here, section 23-8.2 (c) (3) does not apply to this case, as plaintiff asserts that the accident was caused when the tag line detached from the hook, rather than being caused as a result of the rotation or swinging of any load.

Thus, plaintiff is not entitled to summary judgment in his favor on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-8.2 (c) (3), and defendants are entitled to dismissal of the same.

The Common-Law Negligence and Labor Law § 200 Claims

Defendants move for dismissal of the common-law negligence and Labor Law § 200 claims against them. Labor Law § 200 is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000] [internal quotation marks and citation omitted]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]).

Labor Law § 200 (1) states, in pertinent part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such

places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

Here, plaintiff does not oppose dismissal of the common-law negligence and Labor Law § 200 claims as against defendants. Thus, defendants are entitled to dismissal of said claims against them.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the part of plaintiff Michael Greene's motion (motion sequence number 005), pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against defendants Brookfield Properties W 33rd Co. L.P., Brookfield Properties 9th Avenue LLC, BOP West 31st Street, LLC and Turner Construction Company (collectively, defendants) is granted, and the motion is otherwise denied; and it is further

ORDERED that the parts of defendants' motion (motion sequence number 006), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims is granted, and these claims are dismissed as against defendants, and the motion is otherwise denied; and it is further

ORDERED that the action shall continue.

This constitutes the decision and order of the Court.

Dated: Dec 6, 2018

ENTER:

HON. ROBERT D. KALISH
J.S.C.