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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

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LOREN McLEAN and SIDIAN McLEAN,

Plaintiffs,

-against-

Index No. 151890/13

TISHMAN CONSTRUCTION CORPORATION, NEW YORK CONVENTION CENTER DEVELOPMENT CORPORATION, NEW YORK CONVENTION CENTER OPERATING CORPORATION, EMPIRE STATE DEVELOPMENT CORPORATION, NEW YORK STATE DEVELOPMENT CORPORATION and THE CITY OF NEW YORK,

Defendants.

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Joan M. Kenney, J.:

Motions with sequence numbers 004 and 005 are hereby consolidated for disposition.

This action arises out of an accident which occurred during renovations at the Jacob K. Javits Convention Center of New York (Javits Center) located at 655 West 34th Street in Manhattan. In motion sequence number 004, defendants[1] move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. In motion sequence number 005, plaintiffs move, pursuant to CPLR 3212, for summary judgment in their favor on their Labor Law § 240 (1) claim, and for an immediate trial on the issue of damages.

BACKGROUND

[1]This action was discontinued as against the City of New York by Stipulation of Discontinuance dated April 15, 2015.

Defendant New York Convention Center Development Corporation (CCDC) owns the Javits Center. Defendant New York Convention Center Operating Corporation operates the premises. CCDC retained defendant Tishman Construction Corporation (Tishman) as the construction manager and agent for the renovations. Tishman hired nonparty Atlantic Hoisting and Scaffolding (Atlantic) as the project's scaffolding prime contractor. While the project was ongoing, Safway Scaffolding purchased Atlantic, and became Safway Atlantic LLC (Safway). For the remainder of the project, Safway performed its services pursuant to the Tishman/Atlantic contract.

On the day of the accident, July 10, 2012, plaintiff and a coworker, a forklift operator, were engaged in removing I-beams from dismantled scaffolding onto the flatbed of a truck. These beams were centered on the tines of the forklift, and lifted from a dolly to the flatbed of the truck. In order to guide the forklift operator in the placement of the beams, plaintiff was standing on the flatbed. The beams were placed in layers, with pieces of wood separating the layers. The first layer of beams had already been loaded. Plaintiff was standing on this layer, directing the forklift operator as to the placement of the second layer. While the forklift operator was delivering a beam to plaintiff, plaintiff realized that the beam was too close, so he motioned to the forklift operator to back

up. When the forklift operator backed up, the tines of the forklift vibrated, the tines listed in plaintiff's direction, and the beam fell. Although plaintiff attempted to avoid the beam, his right foot became pinned between two beams and plaintiff lost his balance. He fell over the side of the truck, his left hand making contact with the asphalt, while his body hung from the side of the truck. He managed to pull his foot free from the beams, and he landed safely on the asphalt below.

THE PLEADINGS

Plaintiffs' complaint alleges four causes of action, sounding in common-law negligence, violations of Labor Law §§ 200, 240 (1), 241 (6), and plaintiff's wife's claim for loss of consortium. Defendants' answer generally denies the allegations of the complaint.

In plaintiffs' October 29, 2013 bill of particulars, plaintiffs assert violations of the Industrial Code (12 NYCRR Part 23), sections 23-1.5 (a), (c) (1), (c) (2), 23-1.16, 23-2.3, 23-6.1, and 23-8.1.

DISCUSSION

Summary Judgment Standard

"Since summary judgment is the equivalent of a trial . . ." (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]), and is a "drastic remedy" (*Kebbeh v City of New York*, 113 AD3d 512, 512 [1st Dept 2014]), the proponent of a summary judgment motion

> "is required to demonstrate that there are no material issues of fact in dispute and that he is entitled to judgment and dismissal as a matter of law. Only when this burden is met, is the opposing party required to submit proof in admissible form sufficient to create a question of fact requiring a trial [internal citations omitted]"

(*Pokoik v Pokoik*, 115 AD3d 428, 428 [1st Dept 2014]). "In deciding the motion, the court will draw all reasonable inferences in favor of the nonmoving party. If the moving party fails to make a prima facie showing of entitlement to summary judgment, [however,] its motion must be denied [internal citations omitted]" (*Fayolle v East W. Manhattan Portfolio L.P.*, 108 AD3d 476, 478-479 [1st Dept 2013]). Once the movant makes the required showing, "the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 81-82 [1st Dept 2013]). "A court's function on a motion for summary judgment involves issue finding rather than issue determination" (*Farias v Simon*, 122 AD3d 466, 468 [1st Dept 2014]).

Labor Law § 240 (1)

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

> "All contractors and owners and their agents . . . in the erection, demolition . . . 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) . . . evinces a clear legislative intent to provide 'exceptional protection' for workers against the 'special hazards' that arise when the work site either is itself elevated or is positioned below the level where 'materials or load [are] hoisted or secured' [internal quotation marks omitted]" (*Harris v City of New York*, 83 AD3d 104, 108, [1st Dept 2011], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500-501 [1993]). "[T]he extraordinary protections of the statute . . . apply only to a narrow class of dangers . . . [and] do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity [internal quotation marks and citations omitted]" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 96-97 [2015]). Rather, the statute "imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks" (*Saint v Syracuse Supply Co.*, 25 NY3d 117, 124 [2015]). This liability may be imposed "regardless of the absence of control, supervision, or direction of the work" (*Romero v J & S Simcha, Inc.*, 39 AD3d 838, 839 [2d Dept 2007]).

In order for an injured worker to state a claim under Labor Law § 240 (1), "[a]mong other prerequisites, a worker must

demonstrate the existence of an elevation-related hazard contemplated by the statute and a failure to provide the worker with an adequate safety device" (*Berg v Albany Ladder Co., Inc.*, 10 NY3d 902, 904 [2008]). Even if a worker establishes that he was subject to an elevation-related hazard, if he does not "adduce proof sufficient to create a question of fact regarding whether his fall resulted from the lack of a safety device" (*ibid.*), his claim under Labor Law § 240 (1) must fail (*see also DeRosa v Bovis Lend Lease LMB, Inc.*, 96 AD3d 652, 659 [1st Dept 2012]). Moreover, liability under the statute is contingent "upon the existence of a hazard contemplated in section 240 (1) . . . [internal quotation marks and citation omitted]" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d at 97).

"[T]he single decisive question [in determining Labor Law § 240 (1) liability] is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

Plaintiff alleges that his fall was the result of an elevation-related hazard, i.e., the flatbed of the truck, approximately six or seven feet from the ground. This contention is unavailing.

> "We decide in these cases that workers who fall when working on, or getting down from,

> the surface of a flatbed truck that is between four and five feet off the ground may not recover under Labor Law § 240 (1), because their injuries did not result from the sort of 'elevation-related risk' that is essential to a cause of action under that section"

(*Toefer v Long Is. R.R.*, 4 NY3d 399, 405 [2005]; *see also Biscup v E.W. Howell, Co., Inc.*, 131 AD3d 996, 998 [2d Dept 2015] ["'A four-to-five foot descent from a flatbed trailer or similar surface does not present the sort of elevation-related risk that triggers Labor Law § 240 (1)'s coverage,'" quoting *Toefer v Long Is. R.R.*, 4 NY3d at 408]). Although the height involved in this matter was a foot or so higher than in *Toefer* or *Biscup*, such additional height is de minimis. "It is well established that the surface of a flatbed truck does not constitute an elevated work surface for purposes of Labor Law § 240 (1) [internal quotation marks and citation omitted]" (*Brownell v Blue Seal Feeds, Inc.*, 89 AD3d 1425, 1426 [4th Dept 2011]). Indeed, a fall from a flatbed truck does not come within section 240 (1)'s protections because "the use of statute's enumerated safety devices [is] normally associated with more dangerous activity" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012]).

Plaintiff asserts that he was subjected to an elevation-related hazard because he was struck by a falling object, i.e., the beam that fell from the tines of the forklift.

Although this argument would have merit if plaintiff were actually struck by a falling object (*see Hyatt v Young*, 117 AD3d 1420, 1420 [4th Dept 2014] ["Although flatbed trucks 'd(o) not present the kind of elevation-related risk that the statute contemplates' (*Toefer v Long Is. R.R.*, 4 NY3d 399, 408 [2005]), the accident in this case was caused by a falling object, which distinguishes this case from *Toefer*"]), plaintiff here was not struck by a falling object.

Plaintiff was struck by a beam that fell off a forklift. It is uncontested that the beam was about chest-high to plaintiff. The Court of Appeals has rejected the "same level rule" [that where the worker and the falling object are on the same level, the claim does not fall within section 240 (1)] "which ignores the nuances of an appropriate section 240 (1) analysis" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 9 [2011]). However, when the falling object which was at the same level as a plaintiff was not being hoisted or secured, section 240 (1) does not apply (*see e.g. Rodriguez v D & S Bldrs., LLC*, 98 AD3d 957, 958 [2d Dept 2012] ["decedent was not exposed to an elevation-related hazard inasmuch as, at the time the decedent was struck by a bundle of forms, the forms were not being hoisted or secured, and the decedent was working on a flatbed truck at the same level as the bundle of forms"]).

Plaintiff contends that the forklift was hoisting the

beam at the time that it fell, and thus, that plaintiff was exposed to an elevation-related risk, citing two decisions in the *McCoy v Metropolitan Transp. Auth.* case, 75 AD3d 428 (1st Dept 2010) and 53 AD3d 457, 458 (1st Dept 2008). In the *McCoy* case, the machine at issue was a "Gradall 534B rough terrain forklift" (*McCoy*, 53 AD3d at 458), a device that is "a multipurpose machine capable of functioning as both a forklift and a mobile crane depending on the type of attachment being used" (*McCoy*, 75 AD3d at 429). Here, there is no evidence that the forklift was anything other than a forklift. There is no reference that it was a multipurpose machine or that it had or used any type of attachment. Nor has plaintiff referred to any case law that indicates that a forklift is a hoist.

Plaintiff asserts that the beam that fell was being hoisted and should have been secured, and that he was injured because adequate safety devices were not provided to him.

> "[I]n a 'falling object' case under Labor Law § 240 (1), a plaintiff must show that, at the time the object fell, it was being hoisted or secured or required securing for the purposes of the undertaking. The plaintiff also must show that the object fell *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute. The statute does not apply in situations in which a hoisting or securing device of the type enumerated in the statute would not be necessary or expected [internal quotation marks and citations omitted]"

(*Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 964-965 [2d Dept

2013]; *see also Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662-663 [2014]; *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d at 8, citing *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268-269 [2001]; *Roberts v General Elec. Co.*, 97 NY2d 737, 738 [2002] ["'This was not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected,'" quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d at 268-269 ["The absence of a necessary hoisting or securing device of the kind enumerated in Labor Law § 240 (1) did not cause the falling glass here"]; *Gaffney v Norampac Indus., Inc.*, 109 AD3d 1210, 1210 [4th Dept 2013] ["Labor Law § 240 (1) . . . does not apply here because (t)his was not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected (internal quotation marks and citations omitted)"]).

In this case, not only were the types of safety devices enumerated in Labor Law § 240 (1) neither necessary nor expected, any use of such devices "would have been contrary to the objectives of the work plan" (*Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 139-140 [2011]; see also *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d at 11 ["imposing liability for failure to provide protective devices to prevent the walls or objects from falling, when their fall was the goal of the work, would be illogical"]). Here, the forklift was being used to position

beams onto the flatbed of a truck. The purpose of the procedure was to position the beams from the tines to the flatbed. Securing the beams onto the tines would have been illogical and counterproductive.

Accordingly, plaintiffs' motion for summary judgment in their favor on their Labor Law § 240 (1) cause of action must be denied. Plaintiff was not subjected to an elevation-related hazard, and he did not establish that the statute was violated and that defendants are liable because they failed to provide him with appropriate safety devices. The part of defendants' motion which seeks summary judgment dismissing plaintiffs' section 240 (1) claim is granted.

Labor Law § 241 (6)

Labor Law § 241 (6) provides, in relevant part:

> "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:
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> * * *
>
> "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 . . . shall comply therewith."

As has been held many times,

> "Labor Law § 241 (6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation, or demolition work is being performed. To state a claim under section 241 (6), a plaintiff must identify a specific Industrial Code provision 'mandating compliance with concrete specifications' [internal citations omitted]"

(*Capuano v Tishman Constr. Corp.*, 98 AD3d 848, 850 [1st Dept 2012]). "To establish a claim under the statute, a plaintiff must show that a specific, applicable Industrial Code regulation was violated and that the violation caused the complained-of injury" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012]).

Plaintiff asserts violations of sections 23-1.5 (a), (c) (1), (c) (2), 23-1.16, 23-2.3, 23-6.1 and 23-8.1. However, sections 23-1.16, 23-2.3, 23-6.1 and 23-8.1 all have multiple sections and subsections, none of which has plaintiff specified as a basis for his section 241 (6) claim. As such, these sections are deemed abandoned (*see Pantelis v Skanska*, 2012 WL 6682162, 2012 NY Misc LEXIS 5754 [Sup Ct, NY County 2012] ["The Court deems all the provisions and subdivisions that plaintiff has not expressly specified in his motion papers to be abandoned"]).

Industrial Code § 23-1.5 provides, in relevant part:

> "(a) Health and safety protection required. All places where employees are suffered or

> permitted to perform work of any kind in construction, demolition or excavation operations shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection for the lives, health and safety of such persons as well as of persons lawfully frequenting the area of such activity. To this end, all employers, owners, contractors and their agents and other persons obligated by law to provide safe working conditions, personal protective equipment and safe places to work for persons employed in construction, demolition or excavation operations and to protect persons lawfully frequenting the areas of such activity shall provide or cause to be provided the working conditions, safety devices, types of construction, methods of demolition and of excavation and the materials, means, methods and procedures required by this Part (rule). No employer shall suffer or permit an employee to work under working conditions which are not in compliance with the provisions of this Part (rule), or to perform any act prohibited by any provision of this Part (rule).
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> * * *
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> "(c) Condition of equipment and safeguards.
>
> (1) No employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition.
>
> (2) All load carrying equipment shall be designed, constructed and maintained throughout to safely support the loads intended to be imposed thereon."

The Second, Third and Fourth Departments have held that 23-1.5 "merely establishes a general safety standard that does not give rise to the nondelegable duty imposed by Labor Law § 241

(6)" (*Sparkes v Berger*, 11 AD3d 601, 601 [2d Dept 2004]; *Madir v 21-23 Maiden Lane Realty, LLC*, 9 AD3d 450, 452 [2d Dept 2004]; *Hasty v Solvay Mill Ltd. Partnership*, 306 AD2d 892, 894 [4th Dept 2003]; *Schwab v A.J. Martini, Inc.*, 288 AD2d 654, 656 [3d Dept 2001]).

The First Department has also held that section 23-1.5 (a) sets forth "generic directives" and "general safety standards," and may not serve as a predicate for a section 241 (6) claim (*see e.g. Maldonado v Townsend Ave. Enters., Ltd. Partnership*, 294 AD2d 207, 208 [1st Dept 2002]; *Hawkins v City of New York*, 275 AD2d 634, 635 [1st Dept 2000]).

The same has been held for section 23-1.5 (c) (1) (*see e.g. Sajid v Tribeca N. Assoc. L.P.*, 20 AD3d 301, 302 [1st Dept 2005]; *Maldonado*, 294 AD2d at 208; *Hawkins*, 275 AD2d at 635).

In this matter, section 23-1.5 (c) (2) is inapplicable, because there has been no evidence that any lack of sufficient load-bearing capacity of the forklift was instrumental in causing the accident.

Accordingly, the part of defendants' motion which seeks summary judgment dismissing plaintiffs' section 241 (6) claim is granted.

Labor Law § 200 and Common-Law Negligence

Labor Law § 200 (1) provides, in relevant part:

"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. The board may make rules to carry into effect the provisions of this section."

"It is well established that Labor Law § 200 is a codification of the common-law duty imposed on an owner or general contractor to maintain a safe construction site. In other words, a claim arising pursuant to the provision is 'tantamount to a common-law negligence claim in a workplace context' [internal citations omitted]" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d at 149). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed [internal quotation marks and citation omitted]" (*Makarius v Port Auth. of N.Y. & N.J.*, 76 AD3d 805, 817 [1st Dept 2010]). "Where . . . the injury is caused not by the methods of [a plaintiff's] work, but by a defective condition on the premises, liability depends on whether the owner or general contractor created or had actual or constructive notice of the hazardous condition" (*Bayo v 626 Sutter Ave. Assoc., LLC*, 106 AD3d 648, 648 [1st Dept 2013]). When the accident results from

the means and methods of a plaintiff's work, "the determination to be made is whether defendants exercised supervision and control over plaintiff's work" (*Singh v 1221 Ave. Holdings, LLC*, 127 AD3d 607, 608 [1st Dept 2015]).

In this matter, plaintiff's injuries arose from the means and methods of his work. Plaintiff attests that only his Safway supervisors supervised and directed his work. In fact, all Safway work was performed by Safway employees, under Safway supervision, and with Safway equipment, including forklifts. This testimony is unrefuted.

Tishman, as construction manager and agent of the owner, coordinated the trades, provided laborers, operating engineers and superintendents, and had stop-work authority. None of these responsibilities is sufficient to impose section 200 or common-law negligence liability on defendants (*see e.g. Quiroz v Wells Reit-222 E. 41st St., LLC*, 128 AD3d 442, 442 [1st Dept 2015] ["general oversight duties, work coordination, and safety reviews do not constitute supervision and control under Labor Law § 200"]; *Singh*, 127 AD3d at 608 ["Regular inspection of the site to ensure that work is progressing according to schedule or the authority to stop any work perceived to be unsafe constitutes a general level of supervision that is not sufficient to warrant holding defendants liable under Labor Law § 200"]). There is no evidence that any of the defendants directed, controlled or

supervised plaintiff's work. Therefore, the part of defendants' motion which seeks summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims is granted.

As plaintiff's wife's claim is derivative of plaintiff's, her cause of action for loss of consortium is also dismissed.

CONCLUSION

Accordingly, it is

ORDERED that defendants Tishman Construction Corporation, New York Convention Center Development Corporation, New York Convention Center Operating Corporation, Empire State Development Corporation, and New York State Development Corporation's motion (motion sequence number 004) for summary judgment is granted and the complaint is dismissed with costs and disbursement to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion of plaintiffs Loren McLean and Sidian McLean (motion sequence number 005) is denied.

Dated: 12/18/2015

ENTER:

J.S.C.