**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK: IAS PART 21**

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JASON D. STARR,

Plaintiff,

- against -

Index No.
155203/2012

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, CITY OF NEW YORK and LONG ISLAND RAIL ROAD,

**Decision and Order**

Defendants.

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**HON. MICHAEL D. STALLMAN, J.:**

In motion sequence number 003, defendants New York City Transit Authority, Metropolitan Transportation Authority, City of New York, and Long Island Rail Road move, pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety. Plaintiff Jason D. Starr cross-moves, pursuant to CPLR 3025 (b), to amend his bill of particulars, and pursuant to CPLR 3212, for summary judgment against defendants.

## BACKGROUND

This is an action to recover damages for a personal injury suffered by plaintiff, a laborer on the "MTA East Side Access Project" (the Project), while working in the eastbound cavern of an underground tunnel with an

entrance located at 28 East 48th Street in Manhattan. The accident occurred when the grinder plaintiff was using slipped and struck his left arm. The general contractor for the Project was "Dragados" (notice of motion, exhibit E, William Ury's deposition at 7). "Dragados," which is the joint venture of Judlau Contracting, Inc. and Dragados USA (Judlau Dragados), is plaintiff's employer. Ownership of the accident site is unclear; however, defendants do dispute that they are the owners and proper parties to the lawsuit.

***Plaintiff's Deposition and 50-h Testimony***

Plaintiff testified that, on October 12, 2011, the day of the accident, he was removing 14 washers "incorrectly placed on the inside ceiling of the form" (notice of cross motion, exhibit D at 30; *see also* notice of cross motion, exhibit C, plaintiff's 50-h testimony at 28). Plaintiff had worked on this assignment for two days prior to the accident (*id.* at 31; *see also* plaintiff's 50-h testimony at 29). Plaintiff's supervisor, foreman Anthony Rozito (Rozito), also an employee of Judlau Dragados, gave plaintiff a grinder and hammer drill to complete the work (*id.* at 32-34; 43-44). The grinder had a slot for a side handle, but the handle was missing (*id.* at 44). Plaintiff had several conversations with Rozito, during the three days he

was working on removing the washers, about the grinder's inadequate strength for the job (*id.* at 48), and Rozito's response was "we're going to have to make it work" (*id.* at 49).

When the accident occurred, plaintiff was holding the grinder above his head with both hands grinding in between the washers and the form (*id.* at 53). While grinding one of the washers from the form, the blade of the grinder got pinched between the two pieces of metal, causing the grinder's blade to stop spinning. The torque pulled the grinder from plaintiff's hands, causing the blade to come in contact with plaintiff's left arm, specifically inside his left elbow (notice of cross motion, exhibit D at 55-57; *see also* plaintiff's 50-h testimony at 40). This caused a four-inch long, half-inch deep gash (*id.*). Following the accident, plaintiff was taken to Bellevue Hospital where surgery was performed to repair three severed veins (*id.* at 66; 68-71).

***Deposition Testimony of William Ury***

William Ury (Ury) is a senior quality engineer with URS Corporation (URS), a nonparty construction manager for the Project. As the construction manager, URS oversaw the work taking place at the Project (William Ury's deposition at 6). Ury was not present when plaintiff's

accident occurred and does not have any personal knowledge of the accident (*id.* at 7-8). Ury testified about two documents that were prepared by Judlau Dragados and submitted to URS "as a matter of course" (*id.* at 9). These documents confirm plaintiff's allegation that the grinder he used did not have a handle on it (*id.* at 11). Ury testified that he did not know whether the failure to have a handle on the grinder was a violation of the Industrial Code, but testified it was a violation of general safety.

***Expert Affidavit of Kathleen Hopkins***

In support of his cross motion, plaintiff submits an affidavit by Kathleen Hopkins (Hopkins), a certified safety manager with over 35 years of experience in the construction safety field. Hopkins opined that defendants were in violation of Labor Law § 241 (6), because of their failure to provide a grinder with a vibration control handle, which would have given plaintiff more control over the grinder, extra support, and would have allowed him to place pressure on the grinder to keep it from jumping or kicking back. Hopkins further opined that, if the grinder had the vibration control side handle, plaintiff's hands would not have come off the body of the grinder and plaintiff would have been able to keep control of it, preventing it from falling on his arm (notice of cross motion, exhibit H at 6).

No other deposition testimony, reports, or expert opinions have been made available to the Court in support of these motions.

***Procedural History***

On August 6, 2012, plaintiff commenced this action based on Labor Law §§ 200 and 241 (6). Defendants' answer was served on September 6, 2012. On January 14, 2013, plaintiff filed an amended summons and complaint, correcting the date of the accident. On March 1, 2012, plaintiff appeared for a 50-h hearing, and, on August 19, 2012, he appeared for examination before trial. On February 11, 2013, plaintiff served his verified bill of particulars. Plaintiff filed a note of issue and certificate of readiness on October 23, 2014. Defendants now move for summary judgment dismissing the amended complaint. Plaintiff cross-moves to amend his bill of particulars and for summary judgment in his favor.

**ANALYSIS**

***Plaintiff's Abandoned Labor Law Claims***

Plaintiff does not oppose the part of defendants' motion seeking dismissal of his Labor Law § 200 claim. Accordingly, this claim is deemed abandoned, and defendants are entitled to summary judgment dismissing it (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003]). Plaintiff

also does not oppose the defendants' motion to dismiss his Labor Law § 241 (6) claim based on a violation of Industrial Code 12 NYCRR 23-1.12 (c). Thus, any claim based on this Industrial Code provision is deemed abandoned and dismissed (*id.*).

***Plaintiff's Cross Motion to Amend His Bill of Particulars***

Before the Court addresses the motion and cross motion for summary judgment, it must decide the portion of plaintiff's cross motion seeking leave to amend his bill of particulars. Here, plaintiff seeks to add alleged violations of Industrial Code 12 NYCRR 23-9.2 (a) and 12 NYCRR 23-1.5 (c) (3) to support his Labor Law § 241 (6) claims, as in order to bring a claim for a violation of section 241 (6), "plaintiff must allege a violation of a specific and applicable provision of the Industrial Code" (*D'Elia v City of New York*, 81 AD3d 682, 684 [2d Dept 2011][citations omitted]).

> "Leave to amend pleadings, including a bill of particulars, is to be freely given, absent prejudice or surprise (*see* CPLR 3025 [b]; *Sahdala v New York City Health & Hosps. Corp.*, 251 AD2d 70 [1st Dept 1998]). Where there is 'extended delay in moving to amend, an affidavit of reasonable excuse for the delay in making the motion and an affidavit of merit should be submitted in support of the motion' (*Volpe v Good Samaritan Hosp.*, 213 AD2d 398, 398-399 [2d Dept 1995]). 'In the absence of prejudice, mere delay is insufficient to defeat the amendment' (*Sheppard v Blitman/Atlas Bldg. Corp.*, 288 AD2d 33, 34 [1st

> Dept 2001]). Prejudice requires 'some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position' (*Loomis v Civetta Corrino Constr. Corp.*, 54 NY2d 18, 23 [1981])"

(*Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007]). Further, the court may properly grant such motion "'even after the note of issue has been filed, where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant'" (*Jara v New York Racing Assn., Inc.*, 85 AD3d 1121, 1123 [2d Dept 2011], quoting *D'Elia v City of New York*, 81 AD3d at 684).

Defendants argue that plaintiff's excuse for delay is unreasonable, because there is no explanation as to why plaintiff's attorney was only made aware of the two Industrial Code provisions he seeks to add after discussing the case with plaintiff's expert. Although this excuse for delay could be "more compelling," the delay time is not so egregious (approximately two years after filing the original bill of particulars and seven months after becoming aware of these two provisions) compared to other instances where courts have denied leave to amend (*Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d at 365).

Furthermore, defendants have failed to show that they would be prejudiced by such an amendment. Claims based on plaintiff's allegation that the grinder he was using was missing a handle are not a "surprising and substantial departure" from what was indicated by the original bill of particulars, which alleged that defendants failed to ensure that the grinder was fitted with the appropriate safety devices and guards and that defendants permitted plaintiff to use inadequate equipment (*id.*). Defendants were made aware early on in the litigation, by both plaintiff's 50-h hearing testimony and deposition testimony, as well as by the deposition testimony of Ury, of plaintiff's allegation that the grinder he was using lacked a handle and that this was a possible cause of the accident.

Defendants argue that if they had known that plaintiff was going to include claims based on a violation of 12 NYCRR 23-9.2 (a), specifically, they would have deposed a representative from Judlau Dragados and foreman Rozito on the issue of notice, which is a requirement of this provision.

As previously mentioned, given the deposition testimony, which sets forth the allegation that the grinder was missing a handle, it cannot be said that defendants were taken by surprise that the grinder and its condition

would be at the center of the case. Defendants made the choice to refrain from deposing these witnesses, and the circumstances of this judgment call are not disclosed in the record. However, this choice cannot be bootstrapped into an assertion that defendants did not have an adequate notice of the potential relevance of these witnesses in light of plaintiff's allegations made early on in the litigation. Plaintiff is simply amending a document, which is in the nature of a pleading, to conform with the proof.

As to whether plaintiff has made a sufficient showing of merit in regard to his Labor Law § 241 (6) claims based on violations of 12 NYCRR 23-9.2 (a) and 12 NYCRR 23-1.5 (c) (3), the Court answers in the affirmative. "On a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010] [internal citations omitted]).

The third sentence of 12 NYCRR 23-9.2 (a) "imposes an affirmative duty on employers to 'correct[] by necessary repairs or replacement' 'any structural defect or unsafe condition' in equipment or machinery '[u]pon discovery' or actual notice of the structural defect or unsafe condition"

(*Misicki v Caradonna*, 12 NY3d 511, 521 [2009], quoting the third sentence of 12 NYCRR 23-9.2 [a]). It is well settled that this portion of section 23-9.2 (a) is sufficiently specific to support a Labor Law § 241 (6) claim (*id.*; *Becerra v Promenade Apts. Inc.*, 126 AD3d 557, 558 [1st Dept 2015]; *Hricus v Aurora Contrs., Inc.*, 63 AD3d 1004, 1005-1006 [2d Dept 2009]).

The Appellate Division, First Department has also held that the third paragraph of 12 NYCRR 23-1.5 (c) (3), which provides that all "equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged," is sufficient to support a Labor Law § 241 (6) claim (*Becerra v Promenade Apts., Inc.*, 126 AD3d at 559 [finding that final paragraph of section 23-1.5 [c] is functionally indistinguishable from the third sentence of section 23-9.2 [a], in that both mandate a distinct standard of conduct, rejecting the suggestion that the preamble of section 23-1.5 precludes any reliance on the section for purposes of Labor Law § 241 [6]).

Thus, based on the foregoing analysis, the portion of plaintiff's cross motion to amend his bill of particulars to add alleged violations of 12 NYCRR 23-9.2 (a) and 12 NYCRR 23-1.5 (c) (3) to support his Labor Law § 241 (6) claims is granted.

***Summary Judgment Motions on Labor Law § 241 (6) Claims***

On a motion for summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]). Once the movant has demonstrated entitlement, the burden shifts to the opposing party to produce evidence sufficient to raise an issue of fact warranting a trial (*id.*).

Liability Under Labor Law § 241 (6)

Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], citing Labor Law § 241 [6]). To prevail on a Labor Law § 241 (6) cause of action, "a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that sets forth specific safety standards, and is applicable to the facts of the case" (*Opalinski v City of New York*, 110 AD3d 694, 696 [2d Dept 2013] [internal quotation marks and citation omitted]).

Violation of 12 NYCRR 23-1.10 (b) (1)

12 NYCRR 23-1.10 (b) (1) states, in relevant part, that "[e]very electric and pneumatic hand tool shall be equipped with a cut-off switch within easy reach of the operator." The record presented establishes that the grinder had a six-foot cord with an extension, and was plugged into a power source in the area where plaintiff was performing his work (notice of cross motion, exhibit D at 45). However, the record fails to evidence whether or not the grinder had a cut-off switch within easy reach.

Thus, neither party has met their burden on their motions. Defendants have not shown that they were in compliance with 12 NYCRR 23-1.10 (b) (1), and plaintiff has not shown that defendants were in violation of this provision. Thus, summary judgment is denied to both sides on this issue.

Violation of 12 NYCRR 23-9.2 (a)

As stated above, the third sentence of 12 NYCRR 23-9.2 (a) "imposes an affirmative duty on employers to 'correct[] by necessary repair or replacement' 'any structural defect or unsafe condition' in equipment or machinery '[u]pon discovery' or actual notice of the structural defect or unsafe condition" (*Misicki v Caradonna*, 12 NY3d at 521). Thus, this

provision requires notice of the defect or unsafe condition.

Here, there is an issue of fact as to whether defendants had notice of the alleged unsafe condition of the grinder, i.e., the missing side handle. Plaintiff testified that he complained of the grinder's inadequate strength to foreman Rozito, but there is no evidence that he complained about the missing handle, which would have clearly given Rozito notice of the alleged unsafe condition. Plaintiff did, however, testify that Rozito gave him the grinder, which raises an issue of fact as to whether Rozito examined the grinder and was aware that it was missing a side handle.

As neither party has met their burden of showing whether or not this provision of the Industrial Code was violated, summary judgment is denied to both sides on this issue.

Violation of 12 NYCRR 23-1.5 (c) (3)

12 NYCRR 23-1.5 (c) (3) puts an affirmative duty on an employer to repair, replace or remove damaged equipment (*Becerra v Promenade Apts., Inc.*, 126 AD3d at 558; *see also McKee v Great Atl. & Pac. Tea Co.*, 73 AD3d 872, 875 [2d Dept 2010]). Specifically, section (c) (3) states, "[a]ll safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately

removed from the job site if *damaged*" (emphasis added).

Defendants argue that plaintiff has put forth no evidence that the grinder was "damaged," triggering the mandate that damaged equipment must be immediately repaired, restored or removed from the job site. Defendants assert that plaintiff did not testify that the grinder was damaged in any way, but rather, that a handle was not attached to the appropriate slot. Defendants conclude that, while plaintiff can argue that the missing handle made the grinder unsafe, he cannot argue that the grinder was "damaged."

Webster's Dictionary defines "damaged" as "1. changed so as to reduce value, function, or other desirable trait; 2. Rendered imperfect by impairing the integrity of some part, or by breaking." The grinder here was certainly "changed so as to reduce" its "function." The change in the grinder was the missing side handle. The absence of this handle reduced the function of the grinder, allowing it to jump and kick back, as described by plaintiff's expert Hopkins (*see* notice of cross motion, exhibit H at 6). Thus, as a matter of law, there was a violation of this provision of the Industrial Code.

Nevertheless, an issue of fact exists as to whether plaintiff's injuries

were proximately caused by defendants' violation of this Industrial Code provision (*Opalinski v City of New York*, 110 AD3d at 696). Therefore, summary judgment is denied to both sides on this issue.

**CONCLUSION**

Accordingly, it is

ORDERED that plaintiff Jason D. Starr's cross motion is granted, in part, to the extent that he is permitted to amend his bill of particulars to add claims for violations of Industrial Code 12 NYCRR 23-1.5 (c) (3) and 12 NYCRR 23-9.2 (a); the portion of the cross motion seeking summary judgment is denied; and it is further

ORDERED that defendants New York City Transit Authority, Metropolitan Transportation Authority, City of New York, and Long Island Rail Road's motion for summary judgment is granted, in part, to the extent that plaintiff's Labor Law § 200 claim and any claims for a violation of Labor Law § 241 (6) based on a violation of Industrial Code 12 NYCRR 23-1.12 (c) are dismissed; and it is further

ORDERED that the action shall continue as to the claims for a violation of Labor Law § 241 (6) based on violations of Industrial Code 12

NYCRR 23-1.5 (c) (3), 12 NYCRR 23-1.10, and 12 NYCRR 23-9.2 (a).

**Dated: December 8, 2015**
**New York, New York**

**ENTER:**

J.S.C.

MICHAEL D. STALLMAN
J.S.C.