Sawczyszyn v New York Univ.
2017 NY Slip Op 30069(U)
January 11, 2017
Supreme Court, New York County
Docket Number: 158910/2014
Judge: Joan M. Kenney

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

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KRZYSZTOF SAWCZYSZYN and BEATA SAWCZYSZYN,

Index No.: 158910/2014

Plaintiffs,

-against-

NEW YORK UNIVERSITY and NYU HOSPITALS CENTER,

Defendants.

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Kenney, J.:

Motion sequence numbers 003 and 004 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by an asbestos removal worker on May 24, 2014, when, while unloading materials at a dock (the Dock), which was located within the Medical Science Building of NYU Langone Hospital, 550 1st Avenue, New York, New York (the Hospital), he fell from a makeshift ramp that collapsed.

In motion sequence number 003, plaintiffs Krzysztof Sawczyszyn (plaintiff) and Beata Sawczyszyn move, pursuant to CPLR 3212, for partial summary judgment in their favor on the Labor Law §§ 240 (1) and 241 (6) claims against defendants New York University and NYU Hospitals Center (together, NYU).

In motion sequence number 004, NYU moves, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6) claims asserted against it.

Plaintiffs also cross-move for an order granting them permission to amend the bill of particulars to allege a violation of Industrial Code 12 NYCRR 23-1.7 (f) in further support of the

Labor Law § 241 (6) claim.

It should be noted that the derivative consortium claims of plaintiff Beata Sawczyszyn have been withdrawn pursuant to a stipulation of discontinuance.

BACKGROUND

On the day of the accident, NYU owned the Hospital where the accident occurred. Plaintiff was employed as an asbestos worker by nonparty PAR Environmental Corp. (PAR), an asbestos abatement contractor retained to remove asbestos from the upper floors of the Tisch Building, one of several buildings located within the Hospital (the Project).

Plaintiff's Deposition Testimony

Plaintiff testified that the accident occurred on the first day of the Project, shortly after he and his PAR coworkers arrived at the Dock. Prior to beginning their abatement work on the Project, it was necessary for the men to unload some material and equipment from two PAR trucks, which were parked at the Dock. After unloading, they intended to take the material and equipment up a service elevator to their work location. Plaintiff testified that PAR supervisors solely supervised the unloading of the subject material and equipment. Plaintiff also maintained that he never spoke to anyone from NYU. In addition, no one from NYU ever instructed any of the PAR workers as to how to unload the material and equipment from the truck.

Plaintiff testified that, prior to the time of the accident, a PAR worker had backed one of the PAR trucks up to the Dock "as far as it could go" (plaintiff's tr at 105). At this time, the truck made contact with "rubber bumpers," which were attached to the Dock in order to protect it (*id.* at 106). Due to the width of the rubber bumpers, a "five-to-six inch gap" existed between the back of the truck and the Dock (*id.*). Plaintiff noted that the bed of the truck was approximately 8 to 12 inches

lower than the height of the Dock.

Once the truck was backed up to the Dock, plaintiff and his coworkers began to unload the materials needed for the Project. Initially, plaintiff and his coworkers unloaded several machines from the back of the truck by wheeling the machines to the edge of the truck bed and then lifting them up and onto the floor of the Dock. Later, "somebody placed a [piece of] plywood that created . . . kind of a slanted ramp between [the Dock] and the bed of the truck" (*id.* at 106). This allowed the workers "to roll out . . . carts . . . in order to get them to the top of the loading dock" (*id.* at 106-107). Some of the containers were filled with materials, and some were empty.

Plaintiff testified that it was the PAR supervisors who made the decision to use a four-foot by eight-foot piece of plywood as a makeshift ramp to facilitate the unloading of the four-wheeled containers. Plaintiff testified that the plywood, which was both owned and placed by PAR, was not secured to either the Dock or the truck bed. When asked if anyone from NYU ever instructed him to use the subject plywood board as a way to cover the gap between the truck and the Dock, plaintiff replied, "No" (*id.* at 147).

Plaintiff explained that the accident occurred as he was pulling one of the four-wheeled containers up the plywood board from the bed of the truck onto the loading dock. The container was approximately 3 by 4 feet in size and was filled with approximately 100-200 pounds of materials. As he was walking backwards up the makeshift ramp and while pulling the container by "holding it on either the edge or rim of the cart," the plywood board slipped out from the edge of the Dock and fell 8 to 12 inches down onto the bed of the truck (*id.* at 121). Thereafter, the container that plaintiff had been pulling also fell down onto the bed of the truck. The container did not fall all the way to the ground, because, as it fell, its wheels got wedged in the gap between the Dock and the truck.

Plaintiff further testified that, because his hands were holding the sides of the container when it fell, he was jerked downward, causing him to injure his back.

Affidavit of Herbert Heller (Plaintiff's Safety Expert)

In his expert affidavit, Herbert Heller stated that Labor Law §§ 240 (1) and 241 (6) were violated in this case, because the plywood board that comprised the makeshift ramp was not thick enough to support plaintiff and the container, nor was it properly secured and braced, so as to prevent it from failing and plaintiff from falling.

Affidavit of Stephen Haney (NYU's Assistant Director of Construction Safety)

In his affidavit, Stephen Haney stated that he was NYU's director of construction safety on the day of the accident. He explained that the Dock was located on the ground floor of the Medical Science Building and accessible from the FDR Service Road. He maintained that NYU never "supervise[d] or control[led] the work performed by PAR employees . . . and the NYU entities did not direct, instruct or supervise the means or methods that PAR used to perform its work" (NYU's notice of motion, Haney aff). He also asserted that the plywood board and container involved in the accident "were brought to the site by PAR" (*id.*). In addition,"[n]one of the NYU entities provided any supplies or equipment to PAR at any time" (*id.*). Further, PAR's asbestos abatement work "did not call for or include the construction of any ramp . . . in the loading dock area" (*id.*).

Affidavit of Martin Bruno (NYU's Construction Safety Expert)

In his expert affidavit, after reviewing plaintiff's testimony regarding the accident, Martin Bruno concluded that Labor Law § 240 (1) was not violated in this case, because plaintiff and his coworkers could have simply lifted the subject items from the bed of the truck and onto the Dock, rather than utilizing a ramp. Bruno also maintained that Labor Law § 240 (1) does not apply to the

facts of the case, because the vertical distance that plaintiff fell, which plaintiff estimated to be between 8 and 12 inches, did not present the kind of elevation-related risk that the statute was intended to cover.

In addition, Bruno asserted that NYU is entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code 12 NYCRR 23-1.22 (b), because this regulation pertains to ramps and runways, rather than sheets of plywood "casually laid down on a finished loading dock" (NYU's notice of motion, Bruno aff.). He also maintained that said regulation does not apply, because the four-wheeled plastic container that plaintiff was pulling at the time of the accident was not a "wheelbarrow, power buggy, hand truck or hand cart," as required by the provision (*id.*).

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 (motion sequence numbers 003 and 004)

Plaintiffs move for partial summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against NYU. NYU moves for dismissal of said claim against it.

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]).

Here, as plaintiffs argue, Labor Law § 240 (1) was violated, because, while plaintiff was subjected to an elevation-related risk, the unsecured makeshift ramp, which was in use as a safety device to protect plaintiff from falling between the Dock and the truck bed as he unloaded materials, collapsed (*see Arrasti v HRH Constr. LLC*, 60 AD3d 582, 583 [1st Dept 2009] ["[t]he ramp from which plaintiff fell while wheeling a loaded A-frame cart full of construction materials was the sole means of access to the concrete floor, which was approximately 18 inches below the hoist platform, and was thus a device to protect against an elevation-related risk within the meaning of Labor Law § 240"]).

Notably, "[w]hether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials" (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]; *Casasola v State of New York*, 129 AD3d 758, 759 [2d Dept 2015] [Labor Law § 240 (1) liability where the A-frame ladder that the plaintiff was working on "tipped over," causing him to become injured]; *Seferovic v Atlantic Real Estate Holdings, LLC*, 127 AD3d 1058, 1059 [2d Dept 2015] [Labor Law § 240 (1) liability where the plaintiff was injured when the A-frame ladder he was working on "twisted out from under him while he was lifting materials"]; *Serra v Goldman Sachs Group, Inc.*, 116 AD3d 639, 639 [1st Dept 2014]; *Cuentas v Sephora USA, Inc.*, 102 AD3d 504, 505 [1st Dept 2013]).

It addition, contrary to NYU's contention, in addition to the failure of the subject safety device, i.e., the makeshift ramp, plaintiff was also injured "due to the application of gravity to the [cart], and the elevation differential (measured from the ramp to the bed of the truck) was not de minimis given the weight of the [cart], which generated sufficient force to pull plaintiff [downwards] and cause injury" (*Serowik v Leardon Boiler Works Inc.*, 129 AD3d 471, 471 [1st Dept 2015] [Labor

Law § 240 (1) applied where plaintiff was injured when, while lowering a four-to-five hundred pound tank down a flight of stairs with a rope, he was pulled forward into a pipe around which the rope was wrapped]).

To explain, in order for Labor Law § 240 (1) to apply, the hazard must have arisen out of an appreciable differential in height between the object that fell and the work (*see Melo v Consolidated Edison Co. of N.Y.*, 92 NY2d 909, 911 [1998]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). However, importantly, in *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* (18 NY3d 1, 9 [2011]), the Court of Appeals "decline[d] to adopt the 'same level' rule, which ignores the nuances of an appropriate section 240 (1) analysis." In *Wilinski*, the plaintiff was struck by metal pipes, which stood 10-feet tall and measured 4 inches in diameter. Quoting *Runner v New York Stock Exch., Inc.* (13 NY3d 599 [2009]), the Court in *Wilinski* determined that the "'the elevation differential . . . [could not] be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent" (*id.* at 10, quoting *Runner*, 13 NY3d at 605); *see also Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 409 [1st Dept 2013]).

Applying *Runner* and *Wilinski* to the instant case, given the significant amount of force that the subject container generated as it fell, plaintiff's accident "'ar[ose] from a physically significant elevation differential'" (*id.* at 10, quoting *Runner*, 13 NY3d at 603).

In any event, as discussed previously, Labor Law § 240 (1) applies herein, as plaintiff was injured due to the failure of a provided protective device specifically listed in the statute and intended to protect plaintiff from falling in the first place (*see Thompson v St. Charles Condominiums*, 303 AD2d 152, 154 [1st Dept 2003] [Court noted that, while the scaffold at issue was only four feet above

the ground, this did 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]; *Gettys v Port Auth. of N.Y. & N.J.*, 248 AD2d 226, 227 [1st Dept 1998] [in a case where the exact height of the makeshift platform that the plaintiff fell from was in dispute, the court noted that "even a platform elevated only 2 feet from the ground would be subject to the protection of the statute"]).

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 [internal citations omitted]" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]). Thus, plaintiffs are entitled to partial summary judgment in their favor as to liability on the Labor Law § 240 (1) claim, and NYU is not entitled to dismissal of the said claim against it.

The Labor Law § 241 (6) Claim (motion sequence numbers 003 and 004)

Plaintiffs move for partial summary judgment in their favor as to liability on the Labor Law § 241 (6) claim against NYU, and NYU moves for dismissal of said claim against it. 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:
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> * * *
>
> (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" (*see Ross v Curtis-Palmer Hydro-Elec.*

Co., 81 NY2d at 501-502). 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.*).

Initially, although plaintiffs list multiple alleged violations of the Industrial Code in the bill of particulars, with the exception of Industrial Code sections 23-1.22 (b), entitled "Runways and ramps," plaintiffs do not address these alleged Industrial Code violations in their motion or in opposition to NYU's motion, and, thus, 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]; *Musillo v Marist Coll.*, 306 AD2d 782, 783 n [3d Dept 2003]). As such, plaintiffs are not entitled to judgment in their favor on those parts of the Labor Law § 241 (6) claim predicated on those abandoned provisions, and NYU is entitled to dismissal of the same.

Industrial Code 12 NYCRR 1.22 (b)

Initially, as the makeshift ramp at issue in this case was intended for the use of plaintiff *and* a hand cart, as opposed to "motor trucks or heavier vehicles" (*see* section 23-1.22 [b] [1]) or "persons only" (*see* section 23-1.22 [b] [2] and [4]), only Industrial code section 23-1.22 (b) (3) may apply to the facts of this case. Section 23-1.22 (b) (3) states, in pertinent part, as follows:

> "Runways and ramps constructed for the use of wheelbarrows, power buggies, hand carts or hand trucks shall be at least 48 inches in width. Such runways and ramps shall be constructed of planking at least two inches thick full size or metal of equivalent strength. Such runways and ramps shall be substantially supported and braced to prevent excessive spring or deflection. Where planking is used on such

> runways and ramps, it shall be laid close, butt jointed and securely nailed. Such runways and ramps shall be provided with timber curbs at least two inches by eight inches full size, set on edge and placed parallel to, and secured to, the sides of such runways and ramps. Bracing for such runways and ramps shall be installed at a maximum of four foot intervals."

It should be noted that Industrial Code section 23-1.22 (b) (3) is sufficiently specific to support a Labor Law § 241 (6) claim (*Arrasti v HRH Constr. LLC*, 60 AD3d 582, 583 [1st Dept 2009]); *O'Hare v City of New York*, 280 AD2d 458, 458 [2d Dept 2001]).

That said, a review of the evidence in this case reveals that section 23-1.22 (b) (3) applies to the facts of this case, because the statute was intended to cover the subject four-wheeled container filled with 100-200 pounds of materials that plaintiff was moving at the time of the accident, and because the plywood board that comprised the makeshift ramp was not secured or fastened in anyway, so as to brace it against movement or collapse. In addition, as the plywood board was only 5/8 inch thick, it was subject to deflection when plaintiff stepped on it to transport the container/cart.

Thus, plaintiffs are entitled to summary judgment in their favor as to liability on that part of the Labor Law § 241 (6) predicated on an alleged violation of section 23-1.22 (b) (3), and NYU is not entitled to dismissal of the same.

Whether Plaintiffs Are Entitled to Leave To Amend the Bill of Particulars (Plaintiffs' Cross Motion)

Plaintiffs cross-move for an order granting them leave to amend the bill of particulars to also allege a violation of Industrial Code section 12 NYCRR 23-1.7 (f) in further support of the Labor Law § 241 (6) claim.

> "Leave to amend pleadings under CPLR 3025 (b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law. A party opposing leave to amend must overcome a heavy presumption of validity in favor of

> permitting amendment. Prejudice to warrant denial of leave to amend requires some indication that the defendant[] ha[s] been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position [internal quotation marks and citations omitted]"

(*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]).

Importantly, "'[a] failure to identify the Industrial Code provision in the complaint or bill of particulars is not fatal to such a claim'" (*Jara v New York Racing Assn., Inc.,* 85 AD3d 1121, 1123 [2d Dept 2011], quoting *D'Elia v City of New York*, 81 AD3d 682, 684 [2d Dept 2011]).

> "'Rather, leave to amend the pleadings to identify a specific, applicable Industrial Code provision "may properly be granted, 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"'"

(*id.* [citation omitted]).

In seeking amendment, a plaintiff need not establish the merits of the proposed allegations, but rather, he must "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]).

Here, plaintiffs' belated identification of the subject alleged Industrial Code provision will result in no prejudice to NYU. In addition, the claim is meritorious. To begin, Industrial Code 12 NYCRR 23-1.7 (f) contains specific directives that are sufficient to sustain a cause of action under Labor Law § 241 (6) (*Doto v Astoria Energy II, LLC, 129 AD3d 660 [2d Dept 2015]; Intelisano v Sam Greco Constr., Inc.*, 68 AD3d 1321, 1323 [3d Dept 2009]).

In addition, Industrial Code 12 NYCRR 23-1.7 (f) provides:

> "(f) Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or progress of the work prevents their installation in which case ladders or other safe means of access shall be provided."

As discussed previously, due to the fact that the subject plywood board, which comprised the makeshift ramp, was flimsy and not properly secured, it failed to provide a safe means of access from the bed of the truck to the surface of the Dock located 12 inches above it. Thus, plaintiffs are entitled to leave to amend the pleadings to add an alleged violation of Industrial Code 12 NYCRR 23-1.7 (f) in further support of the Labor Law § 241 (6) claim.

The Common-Law Negligence and Labor Law § 200 Claims (motion sequence number 004)

NYU moves for dismissal of the common-law negligence and Labor Law § 200 claims against it. 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' [citation omitted]" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "1. 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."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or

constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work, because the injury arose from the condition of the work place created by or known to contractor, rather than the method of the work]).

It is well settled that, in order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff's injury was caused by lifting a beam and there was no evidence that the defendant exercised supervisory control or had any input into how the beam was to be moved]).

Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *see also Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009] [Court dismissed common-law negligence and Labor Law § 200 claims where the deposition testimony established that, while the defendant's "employees inspected the work and had the authority to stop it in the event they observed dangerous conditions or procedures," they "did not otherwise exercise supervisory control over the work"]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where the defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]).

Here, the accident was caused due to plaintiff's utilization of a makeshift ramp, which was constructed out of flimsy plywood, and which was not properly secured to the truck and/or the Dock. Therefore, plaintiff was injured, not because of any inherently dangerous condition of the property itself, but rather, because of "'a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work'" (*Lombardi v Stout*, 178 AD2d 208, 210 [1st Dept 1991], *affd as mod* 80 NY2d 290 [1992], quoting *Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d 136, 145 [1965]; *McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581, 1582 [4th Dept 2010] [tripping hazard created by pin, which was stored on a wooden form and was to be inserted into a form to hold it together during a concrete pour, was created by the manner in which plaintiff's employer performed its work, rather than an unsafe premises condition]; *Ortega v Puccia*, 57 AD3d 54, 62 [2d Dept 2008]; *Dalanna v City of New York,* 308 AD2d 400, 400 [1st Dept 2003] [Court determined that the protruding bolt in the concrete slab that the plaintiff tripped on was not a defect inherent in the property, but instead, it was the result of the manner in which the plaintiff's employer performed its work]). Therefore, in order to find NYU liable under common-law negligence and Labor Law § 200 theories, it must be shown that it exercised some supervisory control over the manner in which the subject makeshift ramp constructed and placed.

That said, "[t]he evidence fails to raise a triable issue of fact that [NYU] supervised or controlled plaintiff's work at the construction site, caused or created the dangerous condition, or had actual or constructive notice of the unsafe condition of which plaintiff complains" (*Arrasti v HRH Constr. LLC*, 60 AD3d at 583] [citation omitted]). Plaintiff testified that PAR supervisors solely supervised the unloading of PAR's material and equipment at the Dock. Plaintiff also testified that PAR owned and placed the subject plywood board, thus creating the makeshift ramp. In addition,

Haney maintained that NYU never supervised or directed the means and methods of PAR's work, nor did it provide any supplies or equipment to the PAR workers.

Thus, NYU is entitled to dismissal of the common-law negligence and Labor Law § 200 claims against it.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiffs Krzysztof Sawczyszyn (plaintiff) and Beata Sawczyszyn's motion (motion number 003), pursuant to CPLR 3212, for partial summary judgment in their favor on the Labor Law §§ 240 (1), as well as that part of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code 12 NYCRR 23-1.22 (b) (3) against defendants New York University and NYU Hospitals Center (together, NYU) is granted, and the motion is otherwise denied; and it is further

ORDERED that NYU's motion (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law § 200 claims, as well as those parts of the Labor Law § 241 (6) claim predicated on abandoned Industrial Code provisions, is granted, and these claims are severed and dismissed as against NYU, and the motion is otherwise denied; and it is further

ORDERED that plaintiffs' cross motion, pursuant to CPLR 3025 (b), for an order granting them permission to amend the bill of particulars to allege a violation of Industrial Code section 12 NYCRR 23-1.7 (f) in further support of the Labor Law § 241 (6) claim is granted; and it is further

ORDERED that the matter shall remain off the Court's calendar until such time as a Notice of Motion to restore is interposed.