Schisler v City of New York
2017 NY Slip Op 31717(U)
July 5, 2017
Supreme Court, Bronx County
Docket Number: 21364/13
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

----------X **Index No. 21364/13**

Juliana Schisler, Individually and as
Administratrix of the Estate of Paul Schisler,
Deceased,

Plaintiff,

-against- **DECISION and ORDER**

City of New York,
Defendant.
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Present:
Hon. Julia I. Rodriguez
Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered in review of plaintiffs' motion for partial summary judgment on its Labor Law 240(1) claim, defendant's motion for summary judgment, dismissing the complaint, and plaintiffs' cross-motion for partial summary judgment on its Labor Law 241(6) claim.

Papers Submitted	Numbered
Pls. Notice of Motion, Affirmation & Exhibits	**1**
Affirmation in Opposition & Exhibits	**2**
Reply Affirmation	**3**
Defs. Notice of Motion, Affirmation & Exhibits	**4**
Pls. Notice of Cross Motion, Affirmation, Reply Affirmation & Exhibits	**5**
Defs. Affirmation in Opposition & Reply	**6**

The complaint in the instant action, alleges causes of action for negligence, wrongful death, and violations of Labor Law §§200, 240(1) and 241(6).

Plaintiff now moves for partial summary judgment, as to liability, on her Labor Law §240(1) claim on the grounds that: (1) plaintiff's decedent was not provided with a harness, and (2) even if a harness had been provided, the personal fall arrest system failed to provide adequate/proper protection in that: (a) defendant failed to provide an adequate anchorage capable of supporting at least 5,000 pounds, (b) the anchorage was also inadequate because it was attached to the guardrail system, (c) the personal fall arrest system was improperly rigged and (d) a safety net system was not provided.

Defendant moves for summary judgment, dismissing the complaint, on the grounds that: (a) plaintiff's decedent was the sole proximate cause of his accident, (b) any alleged Industrial Code violations are either too general to support the claim or factually inapplicable, © defendant

did not have sufficient supervisory control over the means and manner of the work, and (d) there is no evidence of a dangerous condition proximately causing decedent's accident.

Plaintiff cross-moves for partial summary judgment, as to liability, on her Labor Law §241(6) claim on the grounds that defendant violated Industrial Code §§23-1.7(b), Protection from general hazards, and 23-1.16, Safety belts, harnesses, tail lines and lifelines.

The following facts are not in dispute. On January 15, ~~3013~~ 2013, the decedent was seriously injured and died as a result of a 111-foot fall from the High Bridge in Bronx, NY. The City of New York ("the City") contracted with Schiavone Construction Corporation ("Schiavone") to renovate the High Bridge, which was constructed in 1848 as an aqueduct spanning Bronx and New York Counties. In the 1860s, a footpath with handrails was built over the aqueduct. In the 1960s, the High Bridge was closed to the public. As part of the renovation project, the historic handrails, which had not been maintained for at least 50 years, were to be removed, repaired and reinstalled. Prior to removing the historic handrails, a temporary guardrail system was to be installed. The temporary guardrail system was at the edge of the footpath. For fall protection, Schiavone used the historic handrails as an anchorage point for a personal fall arrest system. Under OSHA guidelines, an anchorage post must be able to support at least 5,000 pounds per person. To ensure that the post was suitable, the project manager, Bryan Diffley, hit the post and the rail with a 28-ounce hammer, pushed and pulled on the post and the rail, and visually inspected each post for rust and decay. Some of the handrails were deemed inadequate for such use and were marked with red tape. The historic handrails were used as a guardrail system while the temporary guardrail was being installed. A safety net system was not erected. In its bid for the project, the City required that holes not be made in the coping stone, which comprised the area where the historic handrails were and the edge of the bridge. Most conventional guardrail systems would require the posts to be bolted into or embedded into the stone. Instead, Schiavone devised a post which acted as a clamp, clamping onto the top portion and bottom portion of the coping stone, at the very edge of the bridge. Each post weighed approximately 70-75 pounds. The clamp and the post are one piece. The clamp slides onto the coping stone and is then fastened to the stone. On the day of the accident, the decedent, an engineer employed by

Schiavone, was present on the job site to assist in a weight test to ensure that the temporary guardrail system complied with OSHA mandates. As the post design was an unusual application, the decedent was concerned as to whether the posts would be able to perform their function in the event a worker should fall. He wanted to ensure that the posts, positioned at the edge of the bridge, would not fail. A traditional safety line system was not used because the City did not allow Schiavone to drill into the existing masonry because it did not want the stone to be damaged in any way.

On the day of the accident, plaintiff brought a camera with him onto the bridge to document the weight test and whether the posts would be able to perform their function and adhere to the coping stone in the event a person should fall. Every clamp was on the outside of the historic handrails. Sixteen photographs were taken that day using plaintiff's camera. The only individuals who took photographs with plaintiff's camera that day were plaintiff and Steven DiMeglio, Schiavone's carpenter foreman/competent person. Some of the photographs were taken outside of the handrails. Plaintiff was never given a safety harness on the day of the accident. After the accident, plaintiff's camera was recovered from the bridge inside of the historic handrails near the location where he fell.

Present on the bridge with plaintiff that day were Diffley, DiMeglia, Herrera (the Schiavone site safety manager), and two City of New York inspectors, Younus and Marcel. During the inspection, all of these individuals were within feet of each other. Later, Diffley asked if everyone was done and everyone said yes. He then stated that he would meet everyone back by the car and walked away. After Diffley walked away, DiMeglio picked up what was on the ground and started to walk off with Marcel. DiMeglio and Marcel were some distance behind Diffley. Younus and Herrera were behind DiMeglio. Plaintiff was behind Younus and Herrera. At some point, Younus observed the plaintiff coming back over the historic handrail without a safety harness. Later, Herrera turned around and did not see plaintiff on the bridge. Plaintiff was found lying on the ground below the bridge.

In support of summary judgment, plaintiff submitted, *inter alia,* the deposition testimony of Bryan Diffley, Carlos Herrera and Steven DiMeglio, the affidavits of Adam Cooper and Padraig Tarrant, several photographs and a Schiavone Incident Report dated 2/6/13.

At his deposition, Diffley testified, *inter alia,* as follows: Either a day or one week before the installation began, his team determined that the historic handrail would be used as an anchorage point because it was the only "substantial piece" that was on the High Bridge. He believed it could handle the required loads. The anchorage points on the historical handrail were never inspected by an engineer. He had never installed a temporary handrail system using the method he employed at the instant job site. He knew that one of the reasons the decedent had a camera with him on the bridge was to document the temporary guardrail posts. He has taken pictures of installations in the past and, in his experience, the best way to examine an installation was not to look at a picture but to "eyeball it." That is the "gold standard."

At his deposition, Carlos Herrera testified, *inter alia,* as follows: A lifeline is part of a fall protection system but it was not utilized on the renovation project on the bridge. It is a half-inch cable that is installed as per an engineer's design to support 5,000 pounds of pressure in the event that someone should fall. It allows one to traverse from one end to another in the event there is not an anchorage point directly above one. A lifeline is placed above one's head. It is important that it is overhead as it would limit the distance that a person would fall. A lifeline could have been engineered on this project but it would have been an extra cost. Safety nets are installed underneath work that is normally taking place 30 feet above the ground. Safety nets are frequently erected when other fall arrest systems are in place. A safety net is a catch system so that if something or someone were to fall, the safety net is there to catch them. It would have been safer and better to have a safety net system on this job.

At his deposition, Steven DiMeglia testified, *inter alia,* as follows: A personal fall arrest system is a body harness, lanyards or retractables, and a proper place to tie off to. Before he began the installation of the brackets (clamps) and the cable, Diffley instructed him to tie off to the base of the vertical posts of the existing handrail, which were 8 to 10 feet apart. It is better to tie off above oneself than below because if one should fall, one would fall a lesser distance. He

observed rust and decay around the old vertical posts. Some posts were so bad that you could not use them to tie off. Caution tape was placed on posts that Diffley determined were insufficient as anchorage points. On some of the vertical posts, even though they were not marked with caution tape, there was rust and decay. The correct way to determine whether the posts were sufficient to support the weight of a worker is to have a professional engineer inspect and test the posts. On the day of the accident, he took photographs on the decedent's camera on the south side of the bridge. The decedent wanted a picture underneath the coping stone, but the coping stone was about 10 inches deep and he was "not about to" do it. He could not get a picture that would show the underside of the bracket. There was something that concerned the decedent about the underside of the bracket. If a safety net had been installed in the area of the accident, the decedent would be alive today.

At his deposition, Saad Younus testified, *inter alia,* as follows: It was his job to ensure that the work being performed on the High Bridge was performed in conformity with the terms and conditions of the Schiavone/City of New York contract. The City of New York did not want any holes put into the coping stone. A contractor must provide a personal fall arrest system that is in conformity with the mandates of OSHA. In the event that a personal fall arrest system is not in conformity with the OSHA mandates, and a guardrail system is being installed, a safety net system must be provided.

In his affidavit, Cooper, Chief Medical Photographer for North Shore/LIJ Health System, states that he inspected the decedent's camera, the sixteen images from its metadata card and the deposition testimony in this case. Cooper concluded that the last photograph was taken by plaintiff while he was positioned outside of the historic handrail. He also concluded that this photo was taken one minute and forty-five seconds after the prior photo which depicts the other individuals on the bridge standing together. Cooper also concluded that plaintiff took other pictures while standing outside of the historic handrail.

In his affidavit, Padraig Tarrant, a Master Rigger, states that he is a Master Rigger and, among other things, he designs rigging systems for the construction or demolition of structures. His responsibilities include analyzing existing structures for applied loads to see if connections,

such as bolts, rivets or welds will hold or fail. He reviewed all of the deposition testimony in this case, the photographs, accident reports and the construction plan for the installation of the temporary guardrails. Tarrant concluded that even if plaintiff were provided with a harness, there was not an adequate person fall protection system in place because: (1) the use of the 150 year-old historic handrails, which had not been maintained in fifty years, violated good, safe and accepted construction practices. OSHA mandates that anchorages used for the attachment of a personal fall arrest system shall be independent of any anchorage being used to support or suspend platforms and capable of supporting at least 5,000 pounds per employee attached. The Schiavone test of banging on the post with a 28-ounce hammer and pushing/pulling the post is inadequate to make this determination. According to Tarrant, using the historical handrail as an anchorage point violated OSHA mandates, which provide that a personal fall arrest system shall not be attached to a guardrail system. The positioning of the anchorage point behind the worker also violated OSHA mandates. Tarrant concluded that, given the substantial height of the bridge, the substantial hazard to those involved with the temporary handrail system, and the fact that the bridge spans both the Major Deegan Expressway and Metro North, a safety net system should have been employed even if an adequate personal fall arrest system was provided. The City's failure to provide the decedent with a safety net system, Tarrant opined, was a deviation from good and accepted construction safety standards and a substantial factor in causing his death.

The Schiavone incident report, which Diffler signed, does not indicate that plaintiff was offered a safety harness, yet, according to Diffler, this is a "very important fact" as it pertains to the accident.

In opposition to summary judgment, the City submitted the affidavits of Robert Bove and Eugenia Kennedy. In his affidavit, Robert Bove states that he holds a Ph.D. and M.S.E. in bioengineering and analyzes injury biomechanics. He conducted a biomechanical analysis of the decedent's accident and determined that when the decedent fell, he was not positioned on the walkway within the historic handrail and that he did not have to be outside of the historic handrail to have taken the photographs that it is alleged he took. Bove also concluded that in

order for plaintiff to have fallen off the bridge, he had to have climbed over the historic handrail and outside its confines onto the coping stone.

In her affidavit, Eugenia Kennedy, a Certified Safety Professional, states that she reviewed all of the deposition testimony, accident reports, construction plans, inspector reports, safety audits and responses, and photographs. Kennedy concluded that if a worker was to cross over the historic railing, either a safety net or personal fall protection equipment was required. Kennedy also concluded that, in the area of the fall, there was no evidence that the historic railing was detached, damaged or dislodged. Kennedy further concluded that plaintiff ignored Schiavone's site safety plan, OSHA training, and OSHA regulations by exposing himself to a fall hazard without wearing personal fall arrest equipment.

In support of its motion for summary judgment, the City contends that: Plaintiff's Labor Law§ 240(1) should be dismissed because the decedent was the sole proximate cause of his accident; Plaintiff's Labor Law §241(6) claim should be dismissed because the alleged Industrial Code violations are either too general or inapplicable; Plaintiff's Labor Law §200 and common law negligence claims should be dismissed because the City did not have sufficient supervisory control over the means and manner of the work and there is no evidence that any dangerous condition proximately caused the decedent's death.

In support of the dismissal of plaintiff's Labor Law §240(1), the City points to the deposition testimony of Kalpesh Patel, Diffley, DiMeglio, Marcel, and the decedent's son. At his deposition, Diffley testified, *inter alia,* as follows: Before the installation began, he examined and tested the historic handrail to confirm its various sections could withstand the load of someone tying off on it. Sections that were rusted or not strong enough were tagged with red tape and not to be used as an anchorage point. He believes that the decedent had a hard hat and vest as protective safety equipment when he arrived on the site. After the load test was performed, the decedent told Diffley that he wanted a clearer idea of how the c-clamp system was working to make sure it was fully weight bearing and to make sure it was safely secured to the coping stone. He asked the decedent if he wanted a harness so he could personally "go out there" or whether DiMeglio could do it for him. The decedent said he did not want a harness and

that it would be fine for DiMeglio to take photographs. He would have gotten a harness for the decedent if the decedent had told him that he wanted to go out on the coping stone. If no harness was available, he would have told the decedent to come back another time. At the end of the inspection, he asked the decedent if he had everything he wanted, the decedent said yes, and Diffley said it was time for everyone to go. He turned towards the Bronx and departed and the rest of the group followed at some distance behind him.

At his deposition, DiMeglio testified, *inter alia,* as follows: In order to install the system, he had to be positioned on the coping stone outside of the historic handrail. He wore a full body harness which he tied off to the base of the historic handrail at the opposite side of the walkway from the side on which he was working. Whenever the decedent was seen taking photographs on the bridge he was on the bridge walkway within the historic handrail. The decedent told him that he wanted pictures of the bottom of the bracket to see how it attached to the bridge.

At his deposition, Kalpesh Patel testified, *inter alia,* as follows: He is a civil engineer employed by the NYC Department of Design and Construction ("DDC"): He was the engineer in charge of the High Bridge project. He was on the site daily. Quality Assurance inspectors had stop work authority and visited the site periodically to report on safety issues. Schiavone decided how the work was to be performed. On January 5, 2015, DDC inspectors had issued an audit report noting as a deficiency the lack of documentation by a professional engineer that the personal fall arrest system historic handrail anchorage point had the OSHA required 5,000 pound capacity. A stop work order was not issued. Between January 9th and January 30th, the requisite testing was performed and the anchorage point was found by Schiavone to be OSHA compliant.

At his deposition, the decedent's son, a civil engineer, testified that his father had worked on bridges before, had been in the business a long time and was known to be someone who knew what he was doing.

In reply to the City's opposition to her 240(1) motion (and in support of her cross-motion), plaintiff submitted an additional affidavit of Padraig Tarrant and various documentation concerning audits, inspections and field reports of the bridge work. A DDC Field Exit Conference Report, dated January 24, 2013, and two DDC Report of Construction Audits, dated

January 9, 2013 and January 24, 2013, respectively, indicate that there was no professional engineer documentation "for personal fall arrest systems regarding installation of construction railings where employees attached to the existing railings." The Schiavone Fall Protection System Engineering Inspection, dated January 30, 2013 and signed by Diffler, indicates that a test for a "5,000 pound attachment load" was performed and the box at the bottom of the first page next to the word "PASS" was marked. However, there are lines crossed through four Pass and Fail boxes next to four questions, in a section entitled "Inspection After Testing" which is located above the box marked "PASS." One of the questions reads "Posts/rails capable of supporting load without failure?" The second page of the inspection document contains three photos which depict testing at, at most, two locations on the bridge.

In his affidavit, Tarrant concluded that the January 30, 2013 weight test conducted by Schiavone was improper in that it was performed in the wrong direction and the wrong equipment was used. According to Tarrant, such testing is only useful if it provides information about how an anchorage would perform when loaded in the same direction "as a force and a fall will generate." Tarrant concluded that the test performed by Schiavone was conducted inboard when the force of the fall would be outboard and, therefore, the result is invalid. In addition, Tarrant opined, the digital crane scale used to ascertain the weight of the load was designed to be used in a vertical position but was used "laying horizontally" on the bridge and, for that reason also, the results of the test are invalid. Tarrant noted that Schiavone's inspection report indicates that only two anchorage points, one on the north side of the bridge and one directly opposite on the south side of the bridge, were tested. In Tarrant's opinion, given that the posts were clamps, as opposed to being embedded in concrete, welded, nailed or bolted into place, it was necessary for the decedent to personally examine, test and inspect this system, including closely observing it and placing his hands upon it to satisfy himself that the temporary guardrail system was safe and would perform its intended function.

In opposition to the City's motion, plaintiff contends that the City's motion is "essentially predicated entirely" on evidence that is inadmissible under the Dead Man's Statute

(CPLR 4519). In particular, plaintiff contends that the City improperly relies upon conversations between plaintiff and Schiavone employees, Diffley and DiMeglio, in the minutes before his fatal fall. The Court does not find CPLR 4519, the so-called Dead Man's Statute, to be applicable here to preclude consideration of the deposition testimony of Diffley and DiMeglio in support of the City's summary judgment motion. Neither Diffley nor DiMeglio has such an interest that they "will either gain or lose by the direct legal operation and effect of the judgment." *See Laka v. Krystek,* 261 N.Y. 126, 130 184 N.E. 732, 733 (1933).

In his affirmation in support of plaintiff's cross-motion, plaintiff's counsel contends that plaintiff is entitled to partial summary judgment under Labor Law §241(6) because the City failed to provide "life nets" which are required to be furnished where harnesses (safety belts) are not provided pursuant to Industrial Code Section 23-1.7(b), and the City failed to furnish a lifeline to which decedent's lanyard could have been attached as required by Industrial Code Section 23-1.16(e).

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The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center,* 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court; the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted, and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *See Aasaf v. Ropog Cab Corp.,* 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 1989). Summary judgment will be granted only if there are no material, triable issues of fact. *Sillman v. Twentieth Century-Fox Film Corp.,* 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957).

I. Labor Law § 200 and Common Law Negligence

Labor Law § 200 is a codification of the common-law duty imposed upon owners and general contractors to provide construction site workers with a safe place to work. *See Comes v.*

New York State Elec. & Gas Corp., 82 N.Y.2d 876, 877 (1993). An implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition. As such, liability under this section may be imposed only against parties that have the authority to control the activity bringing about the injury. *See Russin v. Louis N. Picciano & Son,* 54 N.Y.2d 311, 317 (1981). Thus, where an alleged defect or dangerous condition arises from a contractor's methods and the owner exercises no supervisory control over the work, no liability attaches under section 200. *See Cahill v. Triborough Bridge & Tunnel Auth.*, 31 A.D.3d 347, 350, 819 N.Y.S.2d 732 (1st Dept. 2006). "The mere fact that an owner or general contractor had overall responsibility for the safety of the work done by the subcontractors is insufficient to demonstrate that it had the requisite degree of control and that it actually exercised that control." *See Alonzo v. Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 A.D.3d 446, 449, 961 N.Y.S.2d 91 (1st Dept. 2013). Here, while plaintiff does not expressly address the City's contention that her common law negligence and Labor Law §200 claims should be dismissed, the record evidence establishes that the City lacked sufficient control over the means and manner of the work and did not create or have notice of any dangerous condition. As such, plaintiff's Labor Law §200 and common law negligence claims are hereby dismissed.

II. Labor Law §240(1)

Labor Law §240(1) provides:

> 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.

To establish entitlement to recovery under the statute, the plaintiff must demonstrate both that a violation of the statute, i.e., a failure to provide the required protection at a construction site proximately caused the injury, and that the injury sustained is the type of elevation-related

hazard to which the statute applies. *See Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d 1,7 (2011). The "single decisive question 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." *See id.* at 10. An owner's statutory duty under Labor Law §240(1) is not met merely by providing safety instructions or by making other safety devices available, but by furnishing, placing and operating such devices as to give proper protection to the worker. *See Gordon v. Eastern Ry. Supply, Inc.* A.D.2d 990, 991, 581 N.Y.S.2d 498 (4th Dept. 1992). In order for liability to be imposed under Labor Law §240(1), the owner or contractor must fail to provide appropriate safety devices, and that lapse must be a proximate cause of his injuries. *See Miglionico v. Bovis Lend Lease, Inc.*, 47 A.D.3d 561, 564, 851 N.Y.S.2d 48 (1st Dept. 2008). Here, through the affidavits of Tarrant and the deposition testimony of DiMeglia and Herrera, plaintiff established, *prima facie,* that adequate safety protection was not provided to the decedent.

To raise an issue of fact that the decedent was the proximate cause of the accident, the City must produce evidence that adequate safety devices were available, that the decedent knew that they were available and was expected to use them, and that the decedent unreasonably chose to do so, causing the injury sustained. *See Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 603, 895 N.Y.S.2d 279 (2009); *Blake Neighborhood Hous. Servs. Of N.Y. City,* 1 N.Y.3d 280, 287, 771 N.Y.S.2d 484 (2003). Here, plaintiff's expert opined that, even if a harness was provided to the decedent, there was not an adequate personal fall arrest system in place because: (1) the use of the 150-year-old historic handrails, which had not been maintained in 50 years violated good, safe and accepted construction practices, (2) the test performed by Diffley was inadequate to determine whether the handrail could support 5000 pounds, (3) a guardrail system should not be used as an anchorage point, (4) the positioning of the anchorage point behind the worker violated OSHA mandates and was not good practice and accepted construction safety practice, and (5) a safety net system should have been employed even if an adequate personal fall arrest system was in place. On the other hand, the City provided no expert opinion, or evidence, to rebut Tarrant's conclusions. Even assuming a harness had been provided, the only

conclusion supported by this record is that it would not have provided the necessary protection. While it is disputed whether a safety harness was offered to the decedent, in the absence of proof that a harness, if provided, would have actually furnished adequate protection, the City failed to raise an issue of fact whether plaintiff's actions were the sole proximate cause of the accident. *See Miglionico v. Bovis Lend Lease, Inc., supra* at 565.

III. Labor Law §241(6)

Labor Law §241(6) provides:

> 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 frequently such places.

In order to support a claim under this section, a plaintiff must allege a violation of a specific "concrete" provision of the Industrial Code. *See Ross v. Curtis-Palmer Hydro-Elec. Co.,* 81 N.Y.2d 494, 505, 601 N.Y.S.2d 49 (1993). Provisions of the Industrial Code that establish only general safety standards by invoking "general descriptive terms" such as adequate, effective, proper, or suitable do not give rise to the nondelegable duty imposed by this section. *See id.* In support of her Labor Law §241(6) claim, plaintiff contends that defendants violated Industrial Code§§23-1.7(b)(2) and 23-1.16(e).[1] Section 23-1.7(b)(2)(I) provides that approved safety belts shall be provided for and used by persons employed at elevations greater than 30 feet above land or water during bridge or highway overpass construction. Section 23-1.7(b)(2)(ii) provides that scaffolds, platforms or approved life nets may be provided as alternatives to approved safety belts. Here, there is a factual dispute as to whether the decedent was provided with a safety harness. As such, plaintiff has not established that she is entitled to judgment as a matter of law on her Labor Law §241(6) claim predicated on a violation of Section 23-1.7(b)(2)(I). By its terms, Section 23-1.7(b)(2)(ii) does not require life nets but merely states

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[1]In her cross-motion and opposition to the City's motion, plaintiff only claims violations of Labor Law §§23-1.7(b)(2) and 23-1.16(e). As such, the Court assumes that plaintiff has abandoned the remaining Industrial Code violations alleged in the complaint.

that a life net may be provided as an alternative to a safety belt. As such, that section has not been violated. Section §23-1.16(e) provides that any hanging lifeline . . . shall be not more than 300 feet in length from the point of suspension to grade, building setback or other surface and that every hanging lifeline shall be securely attached to a sufficient anchorage. Unlike Labor Law §240, comparative negligence is a defense to a claim under Labor Law §241(6). Based upon the submissions of the parties, triable issues of fact exist as to whether the decedent was negligent. As such, plaintiff is not entitled to judgment as a matter of law on her Labor Law §241(6) claim predicated on a violation of Industrial Code Section 23-1.16(e).

Based upon the foregoing, plaintiff's motion for partial summary judgment as to liability on her Labor Law §240(1) claim is **granted**. The City's motion for summary judgment is **granted solely to the extent that** plaintiff's claims for common law negligence, under Labor Law §200, and under Labor Law §241(6), predicated on alleged violations of Industrial Code sections other than §23-1.16(e) and 23-1.7(b)(2)(i), are dismissed. Plaintiff's cross-motion for summary judgment as to liability on her Labor Law §241(6) claim, predicated on alleged violations of Industrial Code§§23-1.7(b)(2) and 23-1.16(e), is **denied.**

Dated: Bronx, New York
~~June , 2017~~
July 5, 2017

Hon. Julia I. Rodriguez, J.S.C.