Kelly v NYU Langone Med. Ctr.
2018 NY Slip Op 30648(U)
April 11, 2018
Supreme Court, New York County
Docket Number: 150212/2016
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** 2

Justice

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DENNIS KELLY,

Plaintiff,

- v -

NYU LANGONE MEDICAL CENTER, NYU HOSPITALS CENTER, and TURNER CONSTRUCTION COMPANY,

Defendants.

INDEX NO. 150212/2016

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is decided as follows.

This action arises out of a worksite accident that occurred on December 22, 2015 at East 34th Street in Manhattan. Plaintiff Dennis Kelly moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law §§ 240 (1) and 241 (6). Defendants NYU Hospitals Center s/h/a NYU Langone Medical Center and NYU Hospitals Center (collectively NYU) and Turner Construction Company (Turner) cross-move, under CPLR 3212, for summary judgment dismissing the complaint.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff was allegedly injured during a project involving the construction of the Science Building on the NYU Langone Medical Center campus in Manhattan. NYU hired Turner as a construction manager on the project. Turner hired nonparty Cives Steel Company (Cives) to

provide and install the structural steel for the new building. Cives, in turn, subcontracted some of this work to nonparty JF Stearns Company, LLC (JF Stearns).

Plaintiff testified at his deposition that he was employed by JF Stearns as an ironworker on the date of his accident (plaintiff tr at 57). His foreman was Steven Marmo (Marmo) (*id.*). He began working on the jobsite in the spring of 2015 (*id.*). Plaintiff was a member of the raising gang, the ironworkers who were responsible for the erection of steel on the project (*id.* at 60). One of his coworkers was John Chiarello (Chiarello) (*id.* at 59). At the time of the accident, plaintiff and his work crew were on the derrick floor, the top floor of the building under construction, "shaking out" steel (*id.* at 88, 94, 99, 101, 105). The "shaking out" process entailed separating steel beams from the bundle in which they came by moving them a few feet away from the bundle (*id.* at 98). Plaintiff's coworker, Lawrence Melfi, signaled the crane operator (*id.*).

According to plaintiff, a tower crane was in the process of moving a 20- to 25-foot long steel beam that weighed at least a ton when the beam "shot out" at plaintiff, pinching him between the hoisted piece of steel and another piece of steel stored in that location (*id.* at 99, 100). Plaintiff could not recall whether there was a tagline on the piece of steel that was being hoisted at the time of the accident (*id.* at 107, 109). However, he believed that a tagline was "not technically" required during the shaking-out process (*id.* at 110-111). Plaintiff explained that "[t]he particular piece that [they] were shaking out, [they] were just moving it over just to make a little room to shake out the rest of the pieces" (*id.*). The gang told plaintiff after the accident that the boom was off center (*id.* at 117).

In an affidavit, Matt Veach (Veach) states that he was a member of the raising gang (Veach aff, ¶ 1). At the time of the accident, the gang was moving a steel beam, approximately 25 feet long and weighing about a ton, with a crane (*id.*). Plaintiff and Chiarello were the connectors, and

they were waiting for the piece to help place it on the ground (*id.*). When the crane "got up" on the piece of steel (*id.*), the piece of steel suddenly shot out at plaintiff, crushing him between another piece of steel that was stored in that location (*id.*). Plaintiff fell to the ground in pain (*id.*). The gang then helped plaintiff get into the basket, where he was rigged off the floor and taken to the hospital (*id.*). The piece of steel shot out at plaintiff because the boom on the crane was off center (*id.*, ¶ 2). There was no tagline on the piece of steel to steer it or hold it into place (*id.*). The work area was a very tight space in which a great deal of steel was stored.

Although Harry Harriendorf (Harriendorf), a project site safety director employed by Turner, was not on the site on the date of the accident (Harriendorf tr at 6, 44), he testified that the raising gang would typically communicate with the tower crane with a hardline and with hand signals (*id.* at 51). During the shaking out process, a load is raised no more than 12 inches (*id.* at 62-63). According to Harriendorf, there is no OSHA or Department of Buildings standard calling for taglines on steel being shaken out (*id.* at 63). Nevertheless, he believed that the Industrial Code required taglines for hoisting operations, and admitted that shaking out was a form of hoisting (*id.*).

Turner's accident report dated December 22, 2015 states, under headings titled "incident description" and "investigation," that:

> "During the process of shacking [sic] out steel on the 14th floor (Q-decking) injured worker claims that the steel they were shacking [sic] out drifted towards him catching him on his right ankle. Worker was taken by ambulance to Belvue [sic] hospital and x-rays were taken . . .
>
> ***
>
> "Area for laydown was the correct location, and the process of shacking [sic] out had been followed, however load was locked by configuration from the initial pick off of the delivery truck, however even though the load was only lifted no more than 12" off the deck it should have had tag lines"

(Mayer affirmation in support, exhibit 5).

Michael McDermott (McDermott), JF Stearns' safety director, states in an affidavit in support of the motion that Gerard McCloskey, a safety manager formerly employed by JF Stearns, investigated the accident, took witness statements from two of plaintiff's co-workers, Marmo and Chiarello, and drafted an accident report (McDermott aff, ¶¶ 1, 2). McDermott states that a true and complete copy of the accident report dated December 23, 2015 is annexed to his affidavit as exhibit A (*id.*, ¶ 3). In the witness statement included within the accident report, Chiarello states that:

> "We were shaking out on the 14th floor. [Chiarello] was on one end. [Plaintiff] was on the other end. We were moving steel around. The crane got up on the load. It drifted towards [plaintiff] and he got caught in between the piece and the load of steel which his ankle was between"

(*id.*). A witness statement by Marmo included within the accident report indicates that:

> "shaking out with the sorting hooks. We got up on the load. And at this time the piece drifted toward the east where there was another load of steel. The load was only suspended six inches off the deck. This is when [plaintiff] got his ankle between two pieces of steel"

(*id.*).

A C-2 report dated December 23, 2015 states that "Dennis Kelly was handling a piece of steel being lifted by a crane. The beam moved towards him which hit his leg up against another piece of steel" (Donnelly affirmation in support, exhibit D).

Plaintiff filed the complaint on January 11, 2016, seeking recovery for violations of Labor Law §§ 200, 240, and 241 (6), and common-law negligence (complaint, ¶ 13). The complaint and bill of particulars allege violations of Industrial Code §§ 23-1.5; 23-1.7; 23-2.1; 23-2.3; 23-6; 23-7; 23-8; 23-8.1; 23-8.2; 23-8.3; 23-8.4; 23-8.5; and article 1926 of the Occupational Safety and Health Act (*id.*; verified bill of particulars, ¶ 6).

LEGAL CONCLUSIONS:

It is well settled that "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 demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such prima facie "showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]).

Timeliness of Defendants' Cross Motion for Summary Judgment

Defendants cross-move for summary judgment dismissing plaintiff's Labor Law §§ 240 (1), 241 (6), and 200 and common-law negligence claims. In opposition, plaintiff contends that defendants' cross motion should not be considered because it is untimely. Alternatively, plaintiff argues that the court may consider defendants' cross motion to the extent that it addresses the same issues as plaintiff's motion.

The preliminary conference order directed that motions for summary judgment were to be made within 60 days of the filing of the note of issue (Mayer reply and opposition affirmation, exhibit 1). Also, the compliance conference additional directives provide that motions for summary judgment must be made within 60 days of the note of issue date or will be denied (*id.*, exhibit 2, ¶ 1). Plaintiff filed the note of issue on May 2, 2017 (*id.*, exhibit 3). Since defendants e-filed their cross motion for summary judgment on August 24, 2017, it is therefore untimely (*see* CPLR 2211).

Defendants offer no "good cause" for their late motion for summary judgment in their moving papers. CPLR 3212 (a) "requires a showing of good cause for the delay in making the motion—a satisfactory explanation for the untimeliness—rather than simply permitting meritorious, nonprejudicial filings, however tardy" (*Brill v City of New York*, 2 NY3d 648, 652 [2004]). "No excuse at all, or a perfunctory excuse, cannot be 'good cause'" (*id.*). Absent a showing of good cause, "a court has no discretion to entertain even a meritorious, nonprejudicial summary judgment motion" (*Hesse v Rockland County Legislature*, 18 AD3d 614, 614 [2d Dept 2005]).

However, "[a]n otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion" (*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006], *appeal dismissed* 9 NY3d 862 [2007]). "Although a court may decide an untimely cross motion, it is limited in its search of the record to those issues or causes of action 'nearly identical' to those raised by the opposing party's timely motion" (*Guallpa v Leon D. DeMatteis Const. Corp.*, 121 AD3d 416, 419 [1st Dept 2014], quoting *Filannino*, 34 AD3d at 281).

This Court may consider defendants' cross motion to the extent that it addresses the same causes of action and issues as plaintiff's motion, i.e., Labor Law §§ 240 (1) and 241 (6) insofar as predicated upon alleged violations of 12 NYCRR 23-2.3 (c) and 12 NYCRR 23-8.1 (f) (2) (*see Vitale v Astoria Energy II, LLC*, 138 AD3d 981, 983-984 [2d Dept 2016] [trial court properly denied defendants' cross motion for summary judgment as untimely, where defendants failed to establish good cause for the delay in making their motion, and the issues were not sufficiently identical to the issues raised by plaintiff's timely motion]; *Maggio v 24 W. 57 APF, LLC*, 134

AD3d 621, 628 [1st Dept 2015] [court properly declined to consider plaintiff's untimely cross motion for summary judgment under Labor Law § 240 (1), where owner and lessee sought summary judgment under Labor Law § 200 and common-law negligence claims, even though plaintiff argued that his accident was caused by defendants' failure to provide him with an adequate safety device]; *Filannino*, 34 AD3d at 281 [declining to consider plaintiff's untimely cross motion where "defendants' motion was addressed to the causes of action under Labor Law §§ 200 and 241 (6), while plaintiff's cross motion concerned a different cause of action (i.e., Labor Law § 240)"]).

Labor Law § 240 (1)

Plaintiff moves for partial summary judgment as to liability under Labor Law § 240 (1). According to plaintiff, he is entitled to judgment because he was struck by steel that was improperly hoisted by a crane at the time of the accident. Plaintiff maintains that there is no dispute that the steel beam was lifted in a fast manner with the boom off center, causing it to suddenly accelerate and strike him while being hoisted and elevated above the ground.

Defendants contend that plaintiff was not struck by a falling object that was improperly hoisted or secured. To the contrary, they assert plaintiff was struck by an object that was moving horizontally at a slow rate of speed, and was approximately six inches off the decking. Defendants argue that plaintiff's own testimony establishes that a tagline would not have prevented the accident.

In support of their motion, defendants submit the affidavit of Shawn Z. Rothstein, M.S., P.E. (Rothstein), a registered professional engineer, who opines that Labor Law § 240 (1) does not apply to the facts of this case (Rothstein aff, ¶ 11). First, Rothstein states that none of the devices called for in the statute would have prevented the accident (*id.*, ¶ 13). Rothstein emphasizes that

plaintiff himself testified that a tagline would not have prevented the accident (*id.*). Second, Rothstein asserts that plaintiff was not struck by a falling object (*id.*, ¶ 14).

For the following reasons, however, plaintiff has established a violation of Labor Law § 240 (1), which was a proximate cause of his accident.

Labor Law § 240 (1) provides, in relevant part, as follows:

> "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, hoist, stay ladder or other protective device proved inadequate to shield the worker from harm directly flowing from the application of the force of gravity to an object or person'" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). To impose liability under Labor Law § 240 (1), the plaintiff must prove: (1) a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices); and (2) that the statutory violation proximately caused his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 [2003]).

To establish liability based upon a falling object, the plaintiff must show that, at the time the object fell, it was "being hoisted or secured" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]), or "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]). Moreover, the plaintiff must show that the object fell "*because of* the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268; *see also Fabrizi v 1095 Ave. of Ams., L.L.C.*, 22 NY3d 658, 662 [2014]).

As a preliminary matter, the court notes that defendants have not disputed that Turner had the "ability to control the activity giving rise to the injury" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]). In addition, it is uncontested that NYU was the owner of the premises (*see Gordon v Eastern Ry. Supply*, 82 NY2d 555, 560 [1993] ["Liability rests upon the fact of ownership and whether (the owner) had contracted for the work or benefitted from it are legally irrelevant"]).

Contrary to defendants' contention, plaintiff's accident involved an elevation-related risk within the meaning of Labor Law § 240 (1) (*see Naughton v City of New York*, 94 AD3d 1, 8 [1st Dept 2012]; *Ray v City of New York*, 62 AD3d 591, 591 [1st Dept 2009]). As noted by the First Department, "the extent of the elevation differential is not necessarily determinative of whether an accident falls within the ambit of Labor Law § 240 (1)" (*Brown v VJB Constr. Corp.*, 50 AD3d 373, 376 [1st Dept 2008]). The dispositive inquiry is not merely how far the steel fell, but "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*, 13 NY3d at 603). It is undisputed that the steel beam was about 20 to 25 feet long and weighed about a ton (plaintiff tr at 100; Veach aff, ¶ 1). Additionally, plaintiff testified that the piece of steel was lifted about a foot off the decking before it struck him (plaintiff tr at 115; *see also* Mayer affirmation in support, exhibit 5). Such an elevation differential "cannot be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating" (*Runner*, 13 NY3d at 605).

Moreover, plaintiff has established that no safety devices such as taglines were provided (Veach aff, ¶ 2), and that the failure to provide such devices was a proximate cause of the accident (*see Cammon v City of New York*, 21 AD3d 196, 201 [1st Dept 2005]).

Although defendants contend that plaintiff's motion should be denied because there are conflicting versions of the accident, they have failed to set forth a version of the accident for which they would not be liable. Thus, summary judgment in favor of plaintiff under section 240 (1) is warranted.

Rothstein's expert affidavit fails to raise an issue of fact since it is conclusory and not adequately based on facts in the record. *See Cooper v Starrett City Inc.*, 122 AD3d 440 (1st Dept 2014). In opining that a tagline would not have prevented the accident, Rothstein principally relies on plaintiff's deposition testimony to this effect. Plaintiff tr., at p. 137. However, Rothstein does not support this conclusion with any sufficient explanation based on accepted engineering principles. Rothstein also ignores plaintiff's testimony that the accident "could have [been] prevented" if the boom of the crane had been centered. *id.*, at p. 137. Thus, plaintiff's testimony contradicts Rothstein's conclusion that none of the safety devices envisioned by Labor Law section 240 (1) could have prevented the incident. Moreover, the *Runner* case, discussed above, clearly undermines Rothstein's representation that section 240 (1) is inapplicable herein because the beam was not a falling object.

Defendants' reliance on *Toefer v Long Is. R.R.* (4 NY3d 399, 408 [2005]) is misplaced, since plaintiff's accident did not involve a fall from the surface of a flatbed truck.

Accordingly, the branch of plaintiff's motion for partial summary judgment under Labor Law § 240 (1) is granted, and the branch of defendants' cross motion for summary judgment under the statute is denied.

Labor Law § 241 (6)

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, 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."

Labor Law § 241 (6) "requires 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*, 81 NY2d at 501-502 [internal quotation marks omitted]). To recover under Labor Law § 241 (6), a plaintiff must plead and prove the violation of an Industrial Code provision containing "a specific standard of conduct and not simply a recitation of common-law safety principles" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]; *see also Ross*, 81 NY2d at 505 ["provisions of the Industrial Code mandating compliance with concrete specifications . . . give rise to a nondelegable duty"]). In addition to establishing the violation of a specific and applicable regulation, the plaintiff must also show that the violation was a proximate cause of the accident (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]). Liability under section 241 (6) may be imposed "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]).

As noted above, the court shall only consider plaintiff's cause of action under Labor Law § 241 (6) to the extent that it is based on 12 NYCRR 23-2.3 (c) and 12 NYCRR 23-8.1 (f) (2).

12 NYCRR 23-2.3 (c)

Section 23-2.3, entitled "Structural steel assembly," provides in subdivision (c) that "(c) Tag lines. While steel panes or structural steel members are being hoisted, tag lines shall be provided and used to prevent uncontrolled movement of such panels or members" (12 NYCRR 23-2.3 [c]).

Plaintiff argues that there was no tagline on the piece of steel at the time of the accident. Defendants contend, in their cross motion, that this section was not violated based upon plaintiff's own testimony that a tagline was not required during the shaking out process, and that it would not have prevented the accident.

Courts have held section 23-2.3 (c) to be sufficiently specific to support a Labor Law § 241 (6) claim (*see Martin v State of New York*, 148 AD3d 439, 439 [1st Dept 2017]).

Here, the court finds that section 23-2.3 (c) was violated as a matter of law (*compare Cruz v Neil Hospitality, LLC*, 50 AD3d 619, 621 [2d Dept 2008] [section 23-2.3 (c) was inapplicable where ironworker's leg was caught and crushed while attempting to move steel beam over dirt mound by pushing it on top of another beam]). It is undisputed that the steel beam struck plaintiff when it was being hoisted, and that no taglines were provided, as required by the provision (Harriendorf tr at 63; Veach aff, ¶ 2). Plaintiff has also established that the violation was a proximate cause of his injuries. Defendants have failed to raise an issue of fact in response to plaintiff's motion (*see Rizzuto*, 91 NY2d at 350).

12 NYCRR 23-8.1 (f) (2)

Subpart 23-8 of the Industrial Code governs mobile cranes, tower cranes, and derricks. Section 23-8.1, entitled "General provisions," provides as follows:

"(f) Hoisting the load.

***

"(2) During the hoisting operation the following conditions shall be met:

"(i) There shall be no sudden acceleration or deceleration of the moving load unless required by emergency conditions.

"(ii) The load shall not contact any obstruction"

(12 NYCRR 23-8.1 [f] [2] [i], [ii]).

Plaintiff contends, in moving for summary judgment, that the load was lifted in an accelerated manner and off balance.

According to defendants, the eyewitness statements and incident reports make clear that there was no sudden acceleration, and that the steel beam that struck plaintiff "drifted" at him at a low rate of speed, horizontally, six inches off the decking.

The Court of Appeals has noted that the "Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis*, 16 NY3d at 416).

In *McCoy v Metropolitan Transp. Auth.* (38 AD3d 308, 309-310 [1st Dept 2007]), a particularly instructive case, the First Department wrote that:

> "[section 23-8.1 (f) (2) (i) is] not rendered inapplicable as a matter of law simply because the accident occurred while the beam was being propelled in a forward direction, having already been lifted a foot off the ground. When a crane is being used to move a large, heavy or unwieldy item from one spot to another, the term 'hoisting' should not be read so narrowly as to apply only to the part of the process in which the item is being moved in an upward direction, and to preclude the part of the operation when the load, having been lifted upward, is being propelled horizontally. There is little logic to the idea that the Code would require a tag or restraint line to protect workers and others from the rotation or swinging of a load, but only when the load is being raised, and not when an already raised load is being moved horizontally."

Thus, it is evident that section 23-8.1 (f) (2) has been held to require a specific standard of conduct and is applicable under the circumstances of this case.

Plaintiff has demonstrated that section 23-8.1 (f) (2) was violated as a matter of law, and that the violation was a proximate cause of plaintiff's injuries (*see Harris v City of New York*, 83 AD3d 104, 111 [1st Dept 2011]). Whether the load was moving horizontally, having been lifted off the ground, is not dispositive (*see McCoy*, 38 AD3d at 309-310). Moreover, plaintiff has demonstrated that the steel beam suddenly accelerated, causing his injury. "Sudden" is defined as "[h]appening without warning; unforeseen" and "[c]haracterized by rapidity; quick and swift" (American Heritage Dictionary 1729-1730 [4th ed 2000]). Both plaintiff and Veach state that the piece of steel "shot out" at plaintiff, when it was lifted by the crane (plaintiff tr at 99; Veach aff, ¶ 1).

While defendants rely on the witness statements within JF Stearns' accident report, neither witness statement indicates that the steel beam did not quickly or unexpectedly shoot out at plaintiff. In this connection, it is noted that "drift" may mean "[t]o wander from a set course or point of attention; stray" (American Heritage Dictionary 547 [4th ed 2000]).[1] Thus, defendants have failed to raise an issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] ["mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise an issue of fact]).

In view of the above, the branch of plaintiff's motion seeking partial summary judgment under Labor Law § 241 (6) based upon violations of 12 NYCRR 23-2.3 (c) and 12 NYCRR 23-

[1] Although plaintiff argues that the witness statements are inadmissible hearsay, defendants have sufficiently demonstrated that the accident report containing the witness statements may be admissible as a business record (*see Harrison v Bailey*, 79 AD3d 811, 813 [2d Dept 2010]; *Bradley v IBEX Constr., LLC*, 54 AD3d 626, 627 [1st Dept 2008]; *Buckley v J.A. Jones/GMO*, 38 AD3d 461, 463 [1st Dept 2007]).

8.1 (f) (2) is granted. For the same reasons, the branch of defendants' cross motion seeking dismissal of plaintiff's Labor Law § 241 (6) cause of action insofar as predicated upon these Industrial Code provisions is denied.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by plaintiff Dennis Kelly for partial summary judgment on the issue of liability under Labor Law § 240 (1), and under Labor Law § 241 (6) based upon violations of 12 NYCRR 23-2.3 (c) and 12 NYCRR 23-8.1 (f) (2), is granted as against defendants NYU Hospitals Center s/h/a NYU Langone Medical Center and NYU Hospitals Center and Turner Construction Company, with the issue of plaintiff's damages to await the trial of this action; and it is further

ORDERED that the cross motion of defendants NYU Hospitals Center s/h/a NY Langone Medical Center and NYU Hospitals Center and Turner Construction Company is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

4/11/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE