SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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ERIC CORTES,

Plaintiff,

-against- Index No.: 157421/13

MADISON SQUARE GARDEN COMPANY a/k/a MADISON SQUARE GARDEN, INC., and TURNER CONSTRUCTION COMPANY,

Defendants.

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COHEN, J.:

Plaintiff Eric Cortes moves, pursuant to CPLR 3212, for an order granting summary judgment as against defendants Madison Square Garden Company a/k/a Madison Square Garden, Inc. (MSG), and Turner Construction Company (Turner), for violations of Labor Law §§ 240 (1) and 241 (6). Plaintiff contends that defendants' affirmative defenses should be dismissed if the court grants the part of plaintiff's motion seeking summary judgment as to Labor Law § 240 (1). Plaintiff alternatively requests, that if his motion is denied, that he be allowed to move again for summary judgment at the conclusion of the discovery process.

Defendants MSG and Turner cross-move, pursuant to CPLR 3212, for an order granting summary judgment and dismissing plaintiff's claims for common law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6).

FACTUAL ALLEGATIONS

Plaintiff maintains that he suffered personal injuries on August 5, 2011, while working at a construction project at Madison Square Garden. Plaintiff testified that at the time of his accident, he was employed by WDF as a journeyman/steamfitter. He maintains that WDF was

hired to work at Madison Square Garden on the air conditioning, heating, HVAC, and sprinkler systems. Billy Parr (Parr), a foreman from WDF whom plaintiff would report to on a daily basis, would provide plaintiff with instructions. Plaintiff was provided with a hard hat, glasses, and a vest.

On the date of his accident, plaintiff's work location at Madison Square Garden was on a second floor ramp which was next to an escalator. Plaintiff worked at the site with a partner named Jimmy Forbes (Forbes). Plaintiff testified that while working at the site, no one from Turner instructed him regarding the performance of his work. Plaintiff maintains that if he had a question at work, he asked Parr. Plaintiff testified that he only consulted with steamfitters or the foreman who talked to workers at Turner.

Plaintiff testified that on the date of his accident, he was working on another project when Parr instructed the workers that a pipe fitting known as a "union" needed to be removed. Parr told the workers to bring in a ladder to break the pipe as it was located above an escalator. Plaintiff maintains that the A-frame ladder which he was utilizing was wooden, six feet long, and was placed on top of masonite. Plaintiff testified that he utilized the ladder several times before his accident, that he did not have any problems with the ladder on prior occasions, and that he checked it before putting it to use. In order to perform the work, the ladder had to be placed facing uphill and plaintiff had to lean over to his side. Plaintiff testified that the union which he had to break was approximately ten feet high.

Before his accident, plaintiff testified that he locked the ladder. He maintains that Forbes was holding the ladder and masonite was covering the floor for protection. Plaintiff believed that the masonite was placed by Turner's laborers, but states that he was not certain as he did not

know when it was placed and did not observe anyone placing the masonite on the ground. Plaintiff was aware that Turner was responsible for covering holes.

Plaintiff testified:

> "[s]o we set everything up, locked the ladder in place. I leaned over– there are two foot wrenches, so I leaned over to break it and the masonite kicked out and I just went flying on my back."

Plaintiff's EBT, at 64.

Plaintiff maintains that both the ladder and the masonite moved, and that the masonite "kicked out" because it was not taped to the floor. He testified that the ladder moved to the right, and that he proceeded to fall backwards. At the time of his accident, plaintiff was holding a wrench and was located about four feet up the ladder. Plaintiff testified that the union was about ten feet high because it was located over the escalator. Plaintiff was uncertain if the ladder had rubber stoppers on its bottom.

Plaintiff testified that the ramp on which plaintiff was working ran parallel to the escalator, that the pipe was located over the ramp, and that the ladder did not shake or move while Forbes was holding it. He maintains that the ladder did not start shaking until he started applying force with his wrench. Plaintiff testified that a scissor lift could not be used for the angle in which he had to work because it could tip over as the area was located on a ramp. Plaintiff maintains that the workers could have used a scaffold to reach the pipe and union, however that decision was to be made by Parr.

Following his accident, plaintiff told the deputy foreman what had happened and he instructed plaintiff to fill out an incident report and to visit the nurse located at the site. Plaintiff testified that he had never made any previous complaints about safety at the site.

Vincent Ranieri (Ranieri), a project superintendent for Turner, testified that in August of 2011, he was assigned to the subject project which included the complete reconstruction of the Madison Square Garden facility. Turner was the general contractor for the project and had hired WDF as a subcontractor. Although he was located at the construction site on the date of plaintiff's accident, Ranieri learned of plaintiff's accident through his lawyer. He had no personal knowledge of where plaintiff fell and did not know who filled out the daily construction report on the date of the accident.

Ranieri testified that Turner had weekly safety meetings on the job site and conducted inspections of the work. He maintains that journeymen are supervised by a foreman who may answer to a superintendent from the general contractor. The superintendents had the authority to stop work if they a saw a dangerous condition. He maintains that plaintiff was working for WDF, that WDF was hired by Turner, and that Turner was hired by MSG.

Ranieri testified that plaintiff was conducting HVAC work on the second floor ramp near the escalator, which included breaking a union of a pipe. He maintains that the ceilings were partially taken down. Ranieri testified that WDF had scaffolding located in the area which was available for plaintiff's use. However, he maintains that scaffolding would not be able to be built at the location where plaintiff fell because of the angle of the ramp. Ranieri testified that the ladder was the correct device for plaintiff to access the ceiling. Ranieri did not believe that he had communicated with Parr.

Ranieri testified that he did not recall if there was masonite protecting the floors. He maintains that if there was masonite in the area, Turner would have placed it. He testified that if there was an individual sheet of masonite or localized protection, the subcontractor would have

placed it. Ranieri believes that every trade put down masonite in certain areas and that he has no evidence that plaintiff placed masonite underneath his ladder. He maintains that masonite was taped so that the humidity does not warp the board and that it is not typically taped to prevent it from moving.

Forbes submits an affidavit which states that he worked for WDF in August of 2011 as a steamfitter and that he was plaintiff's partner at the MSG construction site. On August 5, 2011, the workers obtained their instructions from Parr. He maintains that they were instructed to disconnect a union from a pipe located in the ceiling of an open hallway on the second level. Forbes states that neither Turner nor MSG provided direction and control, nor did they control the means and methods of their work. He maintains that they had only worked on that task that evening and did not receive a pre-task plan or specific instructions.

Forbes saw plaintiff set up the ladder to disconnect the union. Forbes inspected the ladder and did not observe any visual defects, hazards, insecure joints or warping. He maintains that plaintiff also inspected the ladder. Forbes states that the ladder's spreaders were locked and fully extended, and that its rungs were safe and stable. Forbes maintains that the ladder did not have rubber shoes, and that they were not missing or broken. He maintains that the lack of shoes did not cause the ladder to move. Forbes states that plaintiff's movement of leaning on the ladder while using the wrench, caused the ladder to move.

Forbes maintains that plaintiff did not set the ladder directly underneath the union and that if he did, he would not have had to lean over. Forbes maintains that the ladder was in good working order and that it did not display any signs of distress which were visually observable. He maintains that the ladder was not caused to fall by any debris or other material including

masonite.

Forbes states that while plaintiff was wearing safety glasses, a vest, and a hardhat, he was not wearing a harness because he was standing at or about the ladder's middle rung which was located below six feet. He maintains that plaintiff's possible use of wearing a harness with a lifeline and/or retractor was unnecessary and would not have prevented a fall. Forbes did not recall if WDF owned the ladder, but believed that it was the proper equipment for plaintiff's work. He states that the ladder was not defective, did not wobble, and was stable while it stood on the floor. Forbes states that while baker scaffolds and scissor lifts were available onsite, they were not the appropriate equipment for the work.

Michael Van Bree (Van Bree) submits an affidavit dated June 15, 2017. Van Bree is a mechanical engineer that specializes in climbing equipment such as ladders and scaffolds. Van Bree states that he has reviewed the deposition transcripts, marked deposition exhibits, and visited the accident location in advance of providing his opinion. He states that wooden A-frame ladders, such as the type which plaintiff was utilizing, are traditionally manufactured without rubber feet, unlike aluminum or metal ladders. Van Bree states that this type of ladder is self supporting, so long as the ladder is firmly placed on the ground. He states that, according to the testimony, the ladder was inspected by plaintiff and his partner on the date of his accident.

Van Bree states that at his inspection, he noticed that there were no pipes located above the escalator, and that plaintiff may have been working outside of the working zone of the ladder. He states that notwithstanding that there are no pipes located above the escalators, the slope of the area next to the second floor escalators is essentially a flat surface. He maintains that based upon the plaintiff standing at the fourth rung, plaintiff would have been able to safely reach an

overhead union at ten feet off the ground. He maintains that as plaintiff testified that he had a partner holding the ladder, a partner would afford additional protection if the ladder shifed.

Van Bree concludes that based upon the evidence and his inspection of the subject location, a ladder was the appropriate tool to be used to break a union in the location of the accident site as it was on a flat surface. He also concludes that from an engineering perspective, it is more likely than not that plaintiff's use of force and leaning off the ladder caused him to slip and fall. He maintains that the accident would not have occurred, but for the plaintiff's excessive use of force, the plaintiff leaning away from the ladder's base of support, and the failure of plaintiff to place the ladder directly underneath the union.

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 . . . ." *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).

Defendants contend that any allegation made by plaintiff that they were negligent under the common law or that they violated Labor Law § 200 must be dismissed. The Court of Appeals has held:

> "[s]ection 200 of the Labor Law merely codified the common-law duty imposed upon an owner or general contractor to provide construction site workmen with a safe place to work. 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."

Russin v Louis N. Picciano & Son, 54 NY2d 311, 316-317 (1981) (citations omitted).

"Liability pursuant to Labor Law § 200 may be based either upon the manner in which the work is performed or actual or constructive notice of a dangerous condition inherent in the premises." *Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 736 (2d Dept 2008). In order for an owner or general contractor to be liable for common-law negligence or a violation of Labor Law § 200 for claims involving the manner in which the work is performed, it must be shown that the defendant had the authority to supervise or control the performance of the work. For claims which arise out of an alleged dangerous premises condition, it must be demonstrated that an owner or general contractor had control over the work site and either created the dangerous condition causing an injury, or failed to remedy the dangerous or defective condition, while having actual or constructive notice of it. *See Abelleira v City of New York*, 120 AD3d 1163, 1164 (2d Dept 2014).

Furthermore, "[w]here a claimant's injuries stem not from the manner in which the work was being performed but, rather, from a dangerous condition on its property, an owner may be liable for common-law negligence and violation of Labor Law § 200 if it has actual or constructive notice of the dangerous condition, irrespective of whether it supervised the claimant's work." *Wynne v State*, 53 AD3d 656, 657 (2d Dept 2008). In order "[t]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986).

Defendants contend that plaintiff's claim pursuant to Labor Law § 200 must be dismissed

because they did not direct or supervise plaintiff's work. Defendants contend that plaintiff's work was supervised by his employer WDF, and plaintiff testified that no one from Turner or MSG provided instructions regarding the performance of his work. Defendants contend that there was no defective condition, and that even if there was, neither Turner nor MSG had notice of such a condition. They argue that plaintiff himself caused the dangerous condition by failing to place the ladder directly underneath the union. Defendants also contend that Turner does not recall installing the alleged piece of masonite in the area where plaintiff fell, and therefore, cannot be attributed to have notice of its presence.

Plaintiff contends that Labor Law § 200 is applicable as MSG owned the facility, and contracted with Turner to have the renovation work performed. Defendants argue that Turner, on behalf of the owner, subcontracted with WDF to have the HVAC wet system redone, and that WDF employed plaintiff as a journeyman steamfitter.

To the extent that plaintiff alleges that his accident was caused by the manner of his work, there is no evidence that MSG or Turner exercised supervisory control over his work. Plaintiff testified that a foreman from WDF provided him with instructions and that nobody from Turner or MSG told him what to do regarding the performance of his work. While Ranieri testified that the supers had the authority to stop work if they a saw a dangerous condition, "[g]eneral supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed." *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 (1st Dept 2007); *see also Paz v City of New York*, 85 AD3d 519, 520 (1st Dept 2011); *Dalanna v City of New York*, 308 AD2d 400, 400 (1st Dept 2003).

However, to the extent that plaintiff alleges that his accident was caused by a dangerous condition at the work site, it remains inconclusive from the testimony if defendants were aware that masonite was covering the subject ground where plaintiff was working, the length of the time period in which masonite was being used in the subject area, and whether defendants were aware that the subject piece of masonite was not properly secured and could be slippery.

Therefore, as it remains unclear if defendants had constructive notice of the unsecured masonite which may have caused plaintiff's accident, the part of defendants' motion for summary judgment seeking dismissal of plaintiff's claims for Labor Law § 200 and common law negligence must be denied.

Plaintiff maintains that summary judgment must be granted as to his claims pursuant to Labor Law § 240 (1). Labor Law § 240 (1) provides, in relevant part:

> "[a]ll 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 a claim under this provision, a plaintiff must show that the statute was violated and that the violation proximately caused his injury." *Keenan v Simon Prop. Group, Inc.*, 106 AD3d 586, 588 (1st Dept 2013) (internal quotation marks and citation omitted). Plaintiff "must have suffered an injury as the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." *Soto v J. Crew, Inc.*, 21 NY3d 562, 566 (2013) (internal quotation marks and citation omitted).

Plaintiff maintains that his injuries were proximately caused by defendants' failure to

supply safety devices, instructions, and a safe means of working at a height. He argues that the failure of an owner to properly secure a ladder on which an injured worker was standing while engaged in a protected activity constitutes a prima facie violation of Labor Law § 240 (1).

Defendants contend that plaintiff was the sole proximate cause of his accident, that he was provided with adequate protection, and that he cannot establish any casual nexus between his accident and the lack of or failure of any safety device. Defendants contend that plaintiff admitted that he not only chose not to place the ladder directly underneath his work space, but that he also chose to lean off of the ladder. Defendants argue that pursuant to the affidavit from Van Bree, the only plausible explanation for the accident is that plaintiff's action of leaning overcame the ladder's base of stability. Defendants maintain that plaintiff testified that the ladder did not have any defects, that there was no grease or oil, and that the subject ladder was safe. Plaintiff also testified that the ladder was the proper means to access the ceiling.

Upon reviewing the testimony and affidavits of the various witnesses, it remains disputed as to why plaintiff fell and whether it was due to the placement of the ladder on masonite without rubber feet or due to plaintiff leaning off of the ladder.

Plaintiff testified that the cause of his accident was the placement of the ladder on the masonite. He testified that after the ladder was placed on masonite and he began working, the masonite moved as it was not taped which caused his fall. Conversely, Forbes states that plaintiff leaned while using a wrench which caused the ladder to move. Forbes states that if plaintiff set the ladder directly underneath the union, he would not have had to lean to disconnect the union. He maintains that the ladder did not display any signs of distress, that it was in good working order, and that the ladder was not caused to fall by any debris or other material including

masonite.

Van Bree states that the ladder was the appropriate tool to be used by plaintiff. He maintains that the accident would not have occurred, but for plaintiff's excess use of force, plaintiff's action of leaning away from the ladder's base of support, and the failure of plaintiff to place the ladder directly underneath the union.

Here, because the testimony is in dispute as to the cause of plaintiff's fall and whether the ladder's placement on masonite without rubber feet provided adequate protection pursuant to Labor Law § 240 (1), the part of both plaintiff's motion and defendants' cross motion seeking summary judgment as to this section of the Labor Law must be denied.

Plaintiff also contends that if this court grants his motion for summary judgment as to Labor Law § 240 (1), the affirmative defenses regarding liability must be dismissed. As issues of fact exist as to how and why plaintiff fell, the part of plaintiff's motion seeking to dismiss the affirmative defenses is denied without prejudice.

Defendants contend that summary judgment must be granted as to the part of plaintiff's complaint alleging a violation of Labor Law § 241 (6). Labor Law § 241 (6) provides, in pertinent part:

> "[a]ll contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (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 . . . ."

Labor Law § 241 (6) is not self-executing, and in order to demonstrate 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 regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety. *See Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 (1st Dept 2007).

Defendants contend that although plaintiff alleged sections of the Industrial Code in his bill of particulars, plaintiff's opposition papers fail to address in any manner sections 23-1.5; 23-1.7; 23-1.15; 23-1.17; 23-2.1; 23-2.3; and 23-2.4. As plaintiff does not oppose dismissal of these sections, defendants are entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on sections 23-1.5; 23-1.7; 23-1.15; 23-1.17; 23-2.1; 23-2.3; and 23-2.4. S*ee 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.

Plaintiff contends that defendants specifically violated sections 23-1.16; 23-1.21 (b) (3); 23-1.21 (b) (4) (ii); and 23-1.21 (b) (4) (iv) of the Industrial Code.

Section 23-1.16 of the Industrial Code discusses safety belts, harnesses, tail lines and lifelines. This section states:

> "(a) Approval required. Safety belts, harnesses and all special devices for attachment to hanging lifelines shall be approved.
>
> (b) Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet.
>
> (c) Instruction in use. Every employee who is provided with an approved safety

belt or harness shall be instructed prior to use in the proper method of wearing, using and attaching such safety belt or harness to the lifeline.

(d) Tail lines. The length of any tail line shall be the minimum required in order for an employee to perform his work, but in no case shall be longer than four feet. Such tail line shall be attached to a hanging lifeline or to a substantial structural member at a point no lower than two feet above the working platform or working level. Tail lines shall be first grade manila or synthetic fibre rope at least one-half inch in diameter with a breaking strength of not less than 4,000 pounds or shall be fabricated of other approved materials.

(e) Lifelines. Any hanging lifeline required by this Part (rule) shall be not more than 300 feet in length from the point of suspension to grade, building setback or other surface. Every hanging lifeline shall be securely attached to a sufficient anchorage. Every hanging lifeline shall be provided with padding, wrapping, chafing gear or similar means of protection from contact with building edges or other objects which may cut or abrade such lifeline. Lifelines shall be fabricated of wire rope at least five-sixteenths inch in diameter or first grade manila or synthetic fibre rope at least one-half inch in diameter with a breaking strength of not less than 4,000 pounds.

(f) Inspection and maintenance.

(1) Every safety belt, harness, tail line and lifeline shall be inspected by a designated person prior to each use. Employers shall not suffer or permit any employee to use any such equipment which shows any indication of mildew, broken fibre or fabric, excessive wear or any other damage or deterioration which could materially affect the strength of such safety belts, harnesses, tail lines or lifelines. Any such equipment found to be unsafe shall be removed from the job site.

(2) When not in use, safety belts, harnesses, tail lines and lifelines shall be stored in such areas and in such a manner as to prevent their deterioration and to protect them from being damaged."

Defendants contend that while this section of the Industrial Code concerns the proper use, instruction, maintenance, and measurements for safety belts, harnesses, tail lines, and lifelines, it does not specify requirements for when these devices are required to be utilized. Defendants argue that because plaintiff testified that he was not using these devices at the time of the incident, this section is not applicable. They also maintain that these devices were not required

for plaintiff's work and could not be utilized by plaintiff which was confirmed by the affidavits of Forbes and Van Bree.

The First Department has determined that section 23-1.16 is sufficiently specific as to serve as a predicate for a Labor Law § 241(6) claim. *See Latchuk v Port Auth. of N.Y. & N.J.*, 71 AD3d 560, 560 (1st Dept 2010). However, the First Department has held that this section is applicable when a worker was provided with a safety belt or harness. *See Dzieran v 1800 Boston Rd., LLC*, 25 AD3d 336, 337 (1st Dept 2006).

Here, it is undisputed that plaintiff was never provided with such equipment. Plaintiff was utilizing an A-frame ladder which was six feet long and it is unclear if one of the specified devices would have been able to be utilized with this ladder. Therefore, as plaintiff fails to demonstrate how this section is applicable, defendants are entitled to summary judgment dismissing that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.16 (b) of the Industrial Code.

Plaintiff contends that section 23-1.21 (b) (4) (iv) of the Industrial Code was violated. Section 23-1.21 (b) (4) (iv) of the Industrial Code states:

> "(iv) When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used."

Section 23-1.21 (b) (4) (iv) of the Industrial Code is sufficiently specific to support a Labor Law § 241 (6) cause of action. *See Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173,

176 (1st Dept 2004).

Plaintiff contends that he was working at a height higher than ten feet above the ladder footings, that it is undisputed that the ladder fell over, that the ladder had to be placed on unsecured masonite, that it was not secured on the top or bottom, and that the work required leaning over an escalator.

Defendants argue that this section is not applicable because plaintiff has testified that he was four feet in the air, that the ladder was only six feet long, and that plaintiff testified that Forbes was holding the ladder. They contend that it would be impossible for plaintiff to be more than ten feet high.

Section 23-1.21 (b) (4) (iv) of the Industrial Code would not be applicable. First, the ladder was not a leaning ladder as discussed by the statute, but was an A-frame ladder. With regards to the height in which plaintiff was working, Forbes states that plaintiff was standing at or about the ladder's middle rung which was located below six feet. Plaintiff testified that he was standing about four feet up the ladder. Plaintiff testified that the union which he had to break was approximately ten feet in the air. Therefore, it is unclear how plaintiff would be working at a height higher than ten feet. Also, as required by section 23-1.21 (b) (4) (iv) of the Industrial Code, plaintiff testified that the ladder was being held in place by Forbes.

Therefore, because plaintiff fails to demonstrate that section 23-1.21 (b) (4) (iv) of the Industrial Code is applicable, defendants are entitled to summary judgment dismissing that part of the Labor Law § 241 (6) claim predicated on an alleged violation of this section.

Plaintiff contends that section 23-1.21 (b) (4) (ii) of the Industrial Code was violated. This section states:

> "(ii) All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings."

Section 23-1.21 (b) (4) (ii) of the Industrial Code is sufficiently specific to support a Labor Law § 241 (6) claim. *See Sprague v Peckham Materials Corp.*, 240 AD2d 392, 394 (2d Dept 1997).

Defendants contend that this section is not applicable because there is no evidence to support a finding that any slippery surface or insecure objects such as bricks and boxes were used as a ladder footing. Forbes states that the ladder's movement was not caused by the masonite. Instead, Forbes states that the ladder's spreaders were locked and fully extended, that it did not wobble, and that it was stable while it stood on the floor.

Plaintiff testified that the masonite "kicked out" from under the ladder, which conflicts with Forbes' testimony and questions whether the surface was slippery and unsecured. As an issue of fact exists as to whether the ladder was placed on a slippery surface when plaintiff fell, the part of defendants motion seeking to dismiss section 23-1.21 (b) (4) (ii) of Labor Law 241 (6) must be denied.

Plaintiff argues that section 23-1.21 (b) (3) of the Industrial Code was violated. This section states:

> "(3) Maintenance and replacement. All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist:
> (i) If it has a broken member or part.
> (ii) If it has any insecure joints between members or parts.
> (iii) If it has any wooden rung or step that is worn down to three-quarters or less of its original thickness.
> (iv) If it has any flaw or defect of material that may cause ladder failure."

Section 23-1.21 (b) (3) (iv) of the Industrial Code would be the only subsection that may be considered to be applicable as there is no allegation that the ladder was broken, had insecure

joints, or worn down steps or rungs. Section 23-1.21 (b) (3) (iv) has been held to be sufficiently specific to support a Labor Law § 241 (6) claim. *See De Oliveira v Little John's Moving, Inc.*, 289 AD2d 108, 109 (1st Dept 2001).

Plaintiff contends that the lack of rubber feet or cleats of the ladder is sufficient to establish a violation of this section and is a defect which may have caused his accident. Van Bree, defendants' expert, states that the ladder did not malfunction or break and maintains that ladders like the one in which plaintiff was using, are traditionally manufactured without rubber feet and are fully compliant with applicable safety standards. Forbes states that the ladder's lack of rubber shoes did not cause the ladder to move, but that the movements of plaintiff leaning while using the wrench caused the ladder to move.

Here, because it is disputed as to what caused the ladder to fall and because the lack of rubber feet may have contributed to the ladder slipping, the court declines to dismiss the part of plaintiff's complaint alleging a violation of section 23-1.21 (b) (3) of the Industrial Code. *See De Oliveira v Little John's Moving, Inc.*, 289 AD2d at 108-109 (holding that section 23-1.21 (b) (3) (iv) may apply if plaintiff's testimony is credited in which he states that he noticed that the ladder from which he fell did not have rubber feet); *Soodin v Fragakis*, 91 AD3d 535, 535 (1st Dept 2012) (holding that the evidence that the ladder, which lacked rubber footing, collapsed or malfunctioned for no apparent reason establishes noncompliance with section 23-1.21 [b] [3] [i]-[ii] and [iv]).

Finally, to the extent that plaintiff seeks to move again for summary judgment following the conclusion of discovery, if appropriate, such motion must be filed within 120 days from the filing of the note of issue.

CONCLUSION AND ORDER

Accordingly, it is

ORDERED that plaintiff Eric Cortes' motion for summary judgment as against Madison Square Garden Company a/k/a Madison Square Garden, Inc. and Turner Construction Company, pursuant to Labor Law §§ 240 (1) and 241 (6) is denied without prejudice, and it is further

ORDERED that plaintiff may file a subsequent motion for summary judgment within 120 days from the filing of the note of issue; and it is further

ORDERED that the part of defendants' cross motion, seeking summary judgment and dismissing plaintiff's claims alleging common law negligence and violations of Labor Law §§ 200 and 240 (1) is denied; and it is further

ORDERED that the part of defendants' cross motion seeking to dismiss that part of plaintiff's Labor Law § 241 (6) claim predicated on a violation of sections 23-1.5; 23-1.7; 23-1.15; 23-1.17; 23-2.1; 23-2.3; 23-2.4; 23-1.16; and 23-1.21 (b) (4) (iv) is granted.

Dated: 6-29-2018

ENTER:

J.S.C.

HON. DAVID B. COHEN
J.S.C.