

Talarico v New York & Presbyt. Hosp.

2019 NY Slip Op 30027(U)

January 4, 2019

Supreme Court, New York County

Docket Number: 157304/15

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

-----X
WILLIAM TALARICO,

Plaintiff,

-against-

Index No. 157304/15

THE NEW YORK AND PRESBYTERIAN
HOSPITAL and TURNER CONSTRUCTION
COMPANY,

Mot. Seq. Nos. 003 & 004

Defendants.
-----X

PAUL A. GOETZ, J.:

In this action arising out of a construction site accident, plaintiff William Talarico moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law §§ 240 (1), 241 (6), and 200 (motion sequence number 003). Defendants New York and Presbyterian Hospital (NYPH) and Turner Construction Company (Turner) also move for summary judgment¹ (motion sequence number 004). The motions are consolidated for disposition.

BACKGROUND

On December 30, 2014, plaintiff was injured on a construction project located at 1283 York Avenue in Manhattan. Pursuant to a construction manager agreement dated March 1, 2013, NYPH hired Turner as a construction manager. Turner retained nonparty John Civetta & Sons, Inc. (Civetta) as a foundation subcontractor. Plaintiff was employed as a laborer by Civetta on the date of the accident.

¹Although defendants' notice of motion also requests dismissal of all cross claims against them, defendants' memorandum of law and affirmation in support of summary judgment make clear that they seek summary judgment dismissing the complaint.

Plaintiff testified at his deposition that, on December 30, 2014, he was working at 68th Street and York Avenue on the New York Presbyterian construction project (Plaintiff's Deposition Tr. at 44). At the time of the accident, plaintiff was standing on 69th Street in a blocked-off lane, inside a barricade (*id.* at 50). There were concrete trucks on 69th Street that were pouring concrete into a bucket (*id.* at 51, 53). A crane was raising the bucket into the work pit (*id.*). Before the accident, plaintiff was signaling to the crane operator to raise the bucket and guiding the bucket up while it was being elevated by the crane operator (*id.* at 53). Plaintiff testified that the crane was about 30 feet below him (*id.* at 54). He stated that the signalman would signal the crane, and that two workers would guide the bucket as the crane would elevate it to bring it into the pit (*id.* at 56). However, for about an hour before the accident, they were working without a signalman (*id.* at 92).

Plaintiff further testified that, as the crane operator lifted the bucket up, the bucket got caught on shackles, twisted from right to left "in a real violent spin," dropped "a little bit," and then knocked him down (*id.* at 94, 101-102, 107, 233). After he was struck by the bucket, plaintiff tripped over the rock ties that were up against the fence area of the pit, which caused him to fall (*id.* at 256). Plaintiff stated that he fell over "[a] lot more than one" rock tie (*id.* at 284). The bucket was about a foot or two off the ground at the time of the accident (*id.* at 102). The apparatus that struck plaintiff weighed about 6,000 pounds when filled with concrete (*id.* at 106). Plaintiff testified that he did not know whether there were tag lines on the bucket at the time; however, he also stated that they used tag lines that day (*id.* at 220). According to plaintiff, tag lines were not always used because one had to go underneath the bucket to grab the tag line (*id.* at 225). He testified that he was not instructed about how to use tag lines on the job (*id.* at 322). Plaintiff did not have full control over the bucket because he was in the middle of

signaling and running over to guide the bucket (*id.* at 264). Plaintiff stated that he could have used an air horn to signal the operator (*id.* at 277). Air horns were locked in a cabinet in Turner's safety trailer (*id.* at 277-278). Plaintiff was not certified to be a signalman in New York City (*id.* at 312).

Sean Lee (Lee) states, in a statement sworn to on December 15, 2017, that he was working with plaintiff when he had his accident (Haskel Affirmation in Support, Exhibit F). The concrete bucket weighed about 6,000 pounds once it was filled with concrete (*id.*). The foreman signaled to the crane operator when to lift the concrete bucket (*id.*). Plaintiff and Lee directed the bucket while it was being lifted into the pit (*id.*). According to Lee, about an hour before the accident, the foreman left plaintiff and Lee to signal to the crane operator and direct the bucket (*id.*). Since it was getting late in the day, plaintiff and Lee agreed that plaintiff would both signal and direct the bucket, and plaintiff would direct it once it had been hoisted (*id.*). They did not have any walkie talkies (*id.*). Immediately before the accident, the concrete truck had filled the bucket at street level (*id.*). Plaintiff went to the edge of the pit and signaled to the crane operator that the bucket was ready to be hoisted (*id.*). Plaintiff then returned to help direct the bucket (*id.*). As the bucket was being hoisted in the air, it shifted and twisted towards plaintiff and struck him in the chest, causing him to fall backwards over the "dooy dags" (flexible rods) that were located on the edge of the pit (*id.*).

Diane Raetz (Raetz) testified at her deposition that she was Turner's site safety manager (Raetz Deposition Tr. at 8, 11-12). Raetz walked the job site to answer questions (*id.* at 25). She testified that the site safety plan required that the signalman and crane operator use hand signals if they were within line of sight or a radio if they were not (*id.* at 31). The signalman was required to obtain signalman training (*id.*). Raetz had the authority to stop the work if she saw a

dangerous condition (*id.* at 39). Raetz stated that, when the crane was operating within the foundation pit, there should have been a signalman on site, and that there should have been an air horn blast indicating that the crane was picking something up (*id.* at 45). She testified that if she had noticed that there was no tag line, she would have told Civetta's safety manager to put the tag line on, but she would not have interrupted an activity already in progress (*id.* at 56-57).

Eugene Campbell (Campbell), Civetta's site safety manager, testified at his deposition that Raetz had the authority to stop Civetta's work (Campbell Deposition Tr. at 6, 22). Turner's representative would tell Civetta what needed to be done, but Civetta's employees determined the means and methods of its work (*id.* at 24).

Plaintiff's complaint seeks recovery for violations of Labor Law §§ 200, 240, 241 and under principles of common-law negligence. In their answer, defendants admit that NYPH has an ownership interest in the property located at 1283 York Avenue (Answer, ¶ fifth).

Plaintiff filed the note of issue and certificate of readiness in this action on December 20, 2017 (NYSCEF Doc No. 41).

DISCUSSION

"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'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Once this showing has been made, the burden shifts to the party opposing the motion 'to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action'" (*Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 [1st Dept 2012], quoting *Alvarez*, 68 NY2d at 324).

A. Labor Law § 240 (1)

Plaintiff argues that he is entitled to partial summary judgment under Labor Law § 240 (1) against NYPH, the owner, and Turner, the general contractor on the project. According to plaintiff, the bucket dropped and struck him, and the entire apparatus weighed about 6,000 pounds. Plaintiff asserts that he was forced to act as a signalman and laborer at the same time. In addition, plaintiff points out that he did not have a walkie talkie and there was no air horn.

For their part, defendants contend that Labor Law § 240 (1) does not apply. Defendants argue that plaintiff was on flat ground, that they provided plaintiff with proper protection, and that plaintiff's injuries were not the direct consequence of the application of the force of gravity to the bucket. Additionally, defendants contend that plaintiff's injuries were not caused by the absence or inadequacy of a safety device contemplated by the statute. Defendants assert that plaintiff was the sole proximate cause of his accident because he failed to use the tag line.

To support their position, defendants submit an affidavit from a professional engineer, Rahul Ratakonda (Ratakonda), who indicates that he reviewed images of the bucket at issue, plaintiff's markings of the various components of the bucket on those images, and plaintiff's testimony (Ratakonda Aff., ¶ 10). Ratakonda states that the crane's load terminates at a pulley that has a hook at the bottom, and that the rigging below the crane hook consisted of a wire rope sling with an eye at each end, a D-shackle, a swivel, and another D-shackle (*id.*, ¶ 11). The bottom D-shackle was attached to a spreader arm that was part of the crane bucket (*id.*). According to Ratakonda, "[t]he swivel allows rotation of the load, without twisting the crane's cables" (*id.*). Ratakonda opines, to a reasonable degree of engineering certainty, that there would be no sudden twisting, rotating or tilting of the bucket, once the bucket was in the air, and it would not have caused the violent rotation as described by plaintiff (*id.*, ¶ 14). The rigging

assembly does not involve any vertical drop after it has been lifted into the air (*id.*, ¶ 15). In light of these mechanics, the rigging would not have caused a vertical drop as described by plaintiff (*id.*). Ratakonda further notes that plaintiff testified that a tag line was connected to the bucket, but neither he nor his coworker used it at the time of the accident (*id.*, ¶ 17).

Ratakonda further indicates that, even if plaintiff's description of the movement of the concrete bucket was physically possible, it would have occurred at the point that the load lost contact with the ground, and not after the bucket assembly had been lifted two feet off the ground (*id.*, ¶ 19). In addition, Ratakonda states that:

"I further note that there is no allegation here that there were high winds, that the bucket was overloaded, that any part of the hoisting mechanism snapped or broke, or that the crane was inadequate or undersized. Given the repeated use of the crane without incident for hours on the date of the plaintiff's incident, there is nothing to suggest that the safety equipment provided to the plaintiff was defective or that any other safety device would have been required to safely perform the work. From the testimony and pictures of the site reviewed, there appears to be no unsafe condition present because even the rock ties that [plaintiff] claims he fell on were apparently stacked on wood, organized in rows and columns and placed against or near a fence"

(*id.*, ¶ 20).

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) imposes absolute liability on owners, contractors, and their agents for failing to provide proper protection to workers on a construction site which proximately causes an injury (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662 [2014]; *Bland v Manocherian*, 66 NY2d 452, 459 [1985]). To establish liability under Labor Law § 240 (1), the

plaintiff must prove a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices), and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]). “[T]he 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” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

“In order to prevail on summary judgment in a section 240 (1) ‘falling object’ case, the injured worker must demonstrate the existence of a hazard contemplated under that statute ‘and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein’” (*Fabrizi*, 22 NY3d at 662, quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). In a falling object case, the plaintiff must show that, at the time the object fell, it was “being hoisted or secured” (*Narducci*, 96 NY2d at 268), or “required securing for the purposes of the undertaking” (*Outar v City of New York*, 5 NY3d 731, 732 [2005]). Labor Law § 240 (1) “does not automatically apply simply because an object fell and injured a worker; a plaintiff must show that the object fell . . . because of the absence or inadequacy of a safety device of the kind enumerated in the statute” (*Fabrizi*, 22 NY3d at 663 [internal quotation marks, citation and emphasis omitted]).

“There is no bright-line minimum height differential that determines whether an elevation hazard exists” (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 9 [1st Dept 2011]). In determining whether an elevation differential is de minimis, the Court of Appeals has held that “the weight of the object and the amount of force it is capable of generating, even over the course of a relatively short descent,” should be considered (*see Runner*, 13 NY3d at 605).

Plaintiff argues that Ratakonda's affidavit in support of defendants' motion and in opposition to plaintiff's motion should not be considered because defendants failed to provide any expert disclosure pursuant to CPLR 3101(d). However, CPLR 3212 (b) provides that:

“[w]here an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit.”

The amendment to CPLR 3212 (b) was effective on December 11, 2015, and applies “to all pending cases for which a summary judgment motion is made on or after [that date] and all cases filed on or after [that date]” (Higgitt, 2017 Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3212). Consequently, Ratakonda's affidavit will be considered.

Plaintiff testified that the crane was lifting the bucket, and that the bucket was about one foot off the ground at the time of the accident, when it dropped a bit and struck him (Plaintiff Tr. at 94, 101-102, 107, 233). He testified that the entire apparatus, when filled with concrete, weighs about 6,000 pounds (*id.* at 106). Given the object's weight and the force it was capable of generating over its descent, the height differential cannot be de minimis (*see Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 409 [1st Dept 2013]; *McCallister v 200 Park, L.P.*, 92 AD3d 927, 928-929 [2d Dept 2012]; *Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 474 [1st Dept 2012]).

Nevertheless, neither side is entitled to summary judgment. Although plaintiff argues that his accident resulted from the absence of a signalman, walkie talkie, and air horn, these do not constitute safety devices “constructed, placed and operated as to give proper protection” from the falling bucket (*see Fabrizi*, 22 NY3d at 663 [compression coupling was not a safety device where its only function was to keep the conduit together as part of the conduit/pencil box assembly]; *cf. Keerdoja v Legacy Yards Tenant, LLC*, -- AD3d --, 2018 NY Slip Op 07537, *1,

2018 WL 5831001, *1 [1st Dept Nov. 8, 2018] [tack welds were “safety devices” within the meaning of section 240 (1) where “they were intended to be a temporary measure to keep the shim plate attached to the column during installation”]). Therefore, plaintiff has failed to demonstrate that his accident was caused by the absence or inadequacy of a safety device of the kind enumerated in the statute (*Narducci*, 96 N.Y.2d at 268-69).

Moreover, Ratakonda’s affidavit is insufficient to establish defendants’ prima facie entitlement to summary judgment. It is well settled that an expert’s opinion ““must be based on facts in the record or personally known to the witness”” (*Hamsch v New York City Tr. Auth.*, 63 NY2d 723, 725 [1984], quoting *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959], *rearg denied* 6 NY2d 882 [1959]). “An expert may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion” (*Rosato v 2550 Corp.*, 70 AD3d 803, 805 [2d Dept 2010]; *see also Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 714-715 [1st Dept 2005]).

Ratakonda bases his conclusion on his review of plaintiff’s deposition testimony and photographs that plaintiff identified at his deposition (Ratakonda Aff, ¶ 4). However, at plaintiff’s deposition, plaintiff testified that he did not know who took the photographs, and that he did not know when they were taken (Plaintiff Tr. at 63-64, 67; Beatty Affirmation in Support, Exhibit J). Thus, Ratakonda’s opinion that plaintiff’s accident was not caused by the absence or inadequacy of a safety device, and that plaintiff’s version of the accident is physically impossible, is speculative and conclusory (*see Henningham v Highbridge Community Hous. Dev. Fund Corp.*, 91 AD3d 521, 522 [1st Dept 2012] [“motion court properly disregarded the affidavit by defendants’ mechanical engineer since the expert’s opinion was speculative and unsupported by any evidence”]; *Oboler v City of New York*, 31 AD3d 308, 308-309 [1st Dept 2006], *affd* 8

NY3d 888 [2007] [expert's testimony was properly excluded; although expert indicated that he had reviewed photographs of manhole cover, there was no evidence regarding who took the photographs or when they were taken]).

Furthermore, defendants have not demonstrated that plaintiff was the sole proximate cause of his accident as a matter of law.

“Liability under section 240 (1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident. In such cases, plaintiff's own negligence is the sole proximate cause of his injury”

(*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *see also Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433-434 [2015]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]).

Although Ratakonda states that a tag line was connected to the bucket, and that plaintiff did not use the tag line (Ratakonda aff, ¶ 17), plaintiff testified that he did not know whether the tag line was on the bucket (plaintiff tr at 220). Defendants have also not pointed to any evidence that plaintiff knew that he was expected to use the tag line, or that he chose not to use the tag line for no good reason (*compare Kerrigan v TDX Constr. Corp.*, 108 AD3d 468, 470-471 [1st Dept 2013], *lv denied* 22 NY3d 862 [2014] [worker's own conduct, in misrigging the boom lift, failing to use tag lines to steady the load, and use of hand signals rather than “squawk box” speaker in the crane's cab, was sole proximate cause of the accident]). Plaintiff testified that he was not sure whether tag lines were required with the bucket; “[i]f the operator moved the wrong lever, it would fall on [his] head” (*id.* at 225). Therefore, a question of fact exists as to whether plaintiff was provided a tag line, knew of its purpose and chose not to use it.

Accordingly, the branch of plaintiff's motion for partial summary judgment under Labor Law § 240 (1), and the branch of defendants' motion seeking dismissal of this claim, must be denied.

B. Labor Law § 241 (6)

Labor Law § 241 (6) provides 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:

“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, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.”

Labor Law § 241(6) “imposes a *nondelegable* duty of reasonable care upon owners and contractors ‘to provide reasonable and adequate protection and safety’ to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998] [emphasis in original]). “To establish a claim under the statute, a plaintiff must show that a specific, applicable Industrial Code regulation was violated and that the violation caused the complained-of injury” (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012]). “The Code regulation must constitute a specific, positive command, not one that merely reiterates the common-law standard of negligence” (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]).

The complaint alleges violations of the following Industrial Code provisions: 12 NYCRR 23-1.5; 12 NYCRR 23-1.7; 12 NYCRR 23-1.8; 12 NYCRR 23-1.12; 12 NYCRR 23-1.16; 12 NYCRR 23-1.21; 12 NYCRR 23-6.2; and 12 NYCRR 23-6.3 (verified complaint, ¶ 39). In addition, plaintiff's bill of particulars alleges the following Code violations: 12 NYCRR 23-1.7 (e) (1), (2); 12 NYCRR 23-1.16; 12 NYCRR 23-1.17; 12 NYCRR 23-2.1; 12 NYCRR 23-6.1 (a) through (e), (g), (h), and (j); 12 NYCRR 23-6.2; 12 NYCRR 23-8.1 (a) through (e), (f); and 12 NYCRR 23-8.2 (c) (1), (3) (verified bill of particulars, ¶ 27).

Plaintiff moves for partial summary judgment under Labor Law § 241 (6) based upon violations of 12 NYCRR 23-1.7, 12 NYCRR 23-1.7 (e) (1) and (2), 12 NYCRR 23-2.1, 12 NYCRR 23-6.1 (a) through (h) and (j), 12 NYCRR 23-6.2, 12 NYCRR 23-8.1 (a) through (f), and 12 NYCRR 23-8.2 (c) (1) and (3).

Defendants also move for summary judgment dismissing plaintiff's section 241 (6) claim, arguing that the cited provisions are either insufficiently specific, inapplicable or were not violated in this case. In opposition to defendants' motion, plaintiff addresses the same Industrial Code provisions as in his own motion for summary judgment (Moore affirmation in opposition, ¶ 89). Therefore, plaintiff has abandoned reliance on 12 NYCRR 23-1.5, 12 NYCRR 23-1.8, 12 NYCRR 23-1.12, 12 NYCRR 23-1.16, 12 NYCRR 23-1.17, and 12 NYCRR 23-1.21 (*see Cardenas v One State St., LLC*, 68 AD3d 436, 438 [1st Dept 2009] ["Plaintiff abandoned any reliance on the various provisions of the Industrial Code cited in his bill of particulars by failing to address them either in the motion court or on appeal . . ."]). Thus, only the disputed Industrial Code provisions will be considered.

12 NYCRR 23-1.7 (e)

Plaintiff moves for partial summary judgment based upon violations of Industrial Code sections 23-1.7 (e) (1) and (2). Plaintiff argues that these provisions are applicable because he tripped over rock ties.

Defendants contend that these provisions are inapplicable and were not violated because plaintiff did not fall over accumulated debris or a slippery condition. Additionally, defendants argue that section 23-1.7 (e) (1) is inapplicable because he was not in a passageway at the time of his accident.

Section 23-1.7 provides as follows:

“(e) Tripping and other hazards.

“(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

“(2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed”

(12 NYCRR 23-1.7 [e] [1], [2]).

Sections 23-1.7 (e) (1) and (2) have been held to be sufficiently specific to support a Labor Law § 241 (6) claim (*Smith v McClier Corp.*, 22 AD3d 369, 370 [1st Dept 2005]; *Colucci v Equitable Life Assur. Socy. of U.S.*, 218 AD2d 513, 514-515 [1st Dept 1995]).

“Although the regulations do not define the term ‘passageway’ . . . , courts have interpreted the term to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area” (*Quigley v Port Auth. of N.Y. & N.J.*, -- AD3d -- , 2018 NY Slip Op 08577, *1, 2018 WL 6537004, *1 [1st Dept Dec. 13, 2018], quoting *Steiger v*

LPCiminelli, Inc., 104 AD3d 1246, 1250 [4th Dept 2013]; *see also Meslin v New York Post*, 30 AD3d 309, 310 [1st Dept 2006]).

In *Quigley, supra*, the plaintiff slipped on a pile of snow-covered pipes located outside the entrance door to his employer's shanty (*Quigley*, 2018 WL 6537004 at *1). The Court held that the term "passageway" in this subsection "pertains to an interior or internal way of passage inside a building," and that "[t]he accident involved in this case, caused by pipes in an outdoor area near the shanty door, is entirely distinguishable from an accident occurring in an internal hallway or interior side of a doorway" (*id.* at *2). Here, plaintiff was injured in an outdoor area when he tripped over rock ties near the fence (plaintiff tr at 237, 256, 284). Thus, section 23-1.7 (e) (1) does not apply.

Turning to section 23-1.7 (e) (2), courts have reasoned that section 23-1.7 (e) (2) does not apply where the tripping hazard was an integral part of the work being performed (*see Thomas v Goldman Sachs Headquarters, LLC*, 109 AD3d 421, 422 [1st Dept 2013] ["protective covering had been purposefully installed on the floor as an integral part of the renovation project"]; *Johnson v 923 Fifth Ave. Condominium*, 102 AD3d 592, 593 [1st Dept 2013] [plaintiff tripped over a piece of plywood that was purposefully placed over the sidewalk and was an integral part of the work]; *Tucker v Tishman Constr. Corp. of N.Y.*, 36 AD3d 417, 417 [1st Dept 2007] ["the rebar steel over which plaintiff tripped was an integral part of the work being performed, not debris, scattered tools and materials, or a sharp projection"]).

Plaintiff testified that the rock ties were staged where he fell, were stacked two to three high, and that they were used by the "guy that run[s] the drill," a Civetta employee (plaintiff tr at 124, 126, 172). Therefore, plaintiff's testimony establishes that the rock ties, which were waiting to be installed, were an integral part of the work (*see Flynn v 835 6th Ave. Master L.P.*,

107 AD3d 614, 614-615 [1st Dept 2013]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 383 [1st Dept 2007]). Thus, section 23-1.7 (e) (2) is inapplicable.

12 NYCRR 23-2.1

Section 23-2.1, entitled “Maintenance and housekeeping,” provides in subsection (a) (1) that “All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare” (12 NYCRR 23-2.1 [a] [1]). This section has been held to be sufficiently specific to support a Labor Law § 241 (6) claim (*Cafarella v Harrison Radiator Div. of Gen. Motors*, 237 AD2d 936, 938 [4th Dept 1997]).

Here, plaintiff testified that he tripped over rock ties that were up against the fence area of the pit (plaintiff tr at 256). He also stated that it was “[a] lot more than one” rock tie (*id.* at 284). In light of this evidence, there are questions of fact as to whether the rock ties were “stored in a safe and orderly manner” in violation of this provision (12 NYCRR 23-2.1 [a] [1]; *see also Quigley*, 2018 NY Slip Op 08577 at *2 [“issue of fact regarding whether the pipes were safely stored, pursuant to 12 NYCRR 23-2.1 (a) (1)”]; *Rodriguez v DRLD Dev., Corp.*, 109 AD3d 409, 410 [1st Dept 2013] [“the fact that the sheetrock fell on plaintiff raises an issue of fact as to whether the boards were stored in a ‘safe and orderly manner’”] [citation omitted]). Therefore, plaintiff’s motion for summary judgment on this basis must be denied.

12 NYCRR 23-6.1 and 12 NYCRR 23-6.2

Plaintiff moves for partial summary judgment based upon violations of sections 23-6.1 (a) through (h), and (j). According to plaintiff, there was no intercommunication system, and the signalman and crane operator did not have a clear view of each other at all times. Plaintiff also

seeks partial summary judgment predicated upon section 23-6.2. Defendants contend that subpart 23-6 does not apply to cranes.

Subpart 23-6 of the Industrial Code governs material hoisting. Section 23-6.1 (a), entitled “Application of this Subpart,” provides that “[t]he general requirements of this Subpart shall apply to all material hoisting equipment except cranes, derricks, aerial baskets, excavating machines used for material hoisting and fork lift trucks” (12 NYCRR 23-6.1 [a] [emphasis added]). Plaintiff testified that Civetta was using a crane to lift the bucket (plaintiff tr at 51). Therefore, as argued by defendants, subpart 23-6 does not apply and their motion to dismiss on this ground must be granted.

12 NYCRR 23-8.1 and 12 NYCRR 23-8.2

Plaintiff moves for partial summary judgment based upon violations of sections 23-8.1 (a) through (f). Specifically, plaintiff argues that section 23-8.1 imposes an obligation to inspect all shackles and components. In addition, plaintiff moves for partial summary judgment based upon a violation of sections 23-8.2 (c) (1) and (3). Essentially, plaintiff maintains that defendants failed to prevent the horizontal shifting of the bucket as it was being hoisted, defendants failed to prevent the kinking and twisting of the shackles, and that Civetta did not use tag lines during the hoisting process.

Defendants contend that these provisions were not breached and did not cause plaintiff’s accident. Additionally, defendants assert that plaintiff was provided with a tag line, and that he failed to use it for no good reason.

Subpart 23-8 of the Industrial Code concerns mobile cranes, tower cranes, and derricks. Subpart 23-8 “provide[s] detailed rules to be followed when . . . cranes are used” (*Toefer v Long Is. R.R.*, 4 NY3d 399, 410 [2005]).

As a preliminary matter, section 23-8.1 (a) has been held to be insufficiently specific to support a Labor Law § 241 (6) claim (*Goss v State Univ. Constr. Fund*, 261 AD2d 860, 861 [4th Dept 1999], *lv dismissed and denied in part* 94 NY2d 847 [1999]; *Thompson v Ludovico*, 246 AD2d 642, 643-644 [2d Dept 1998], *abrogated on other grounds by Misicki v Caradonna*, 12 NY3d 511, 521 [2009]).

However, neither plaintiff nor defendants are entitled to partial summary judgment based upon the alleged violations of 12 NYCRR 23-8.1 (b), (d), and (e), which concern inspection of cranes, hoisting mechanism brakes and locking devices, and load handling. Plaintiff and defendants only make conclusory arguments in support of their motions, and have, therefore, failed to meet their respective burdens (*see Alvarez*, 68 NY2d at 324). Moreover, these provisions constitute “specific, positive commands” (*Buckley*, 44 AD3d at 271).

Section 23-8.1 (f) provides as follows:

“(f) Hoisting the load.

“(1) Before starting to hoist with a mobile crane, tower crane or derrick the following inspection for unsafe conditions shall be made:

“(i) The hoisting rope shall be free from kinks.

“(ii) Multiple part lines shall not be twisted around each other.

“(iii) The hook shall be brought over the load in such manner and location as to prevent the load from swinging when hoisting is started.

“(iv) The load is well secured and properly balanced in the sling or lifting device before it is lifted more than a few inches.

“(v) If there is a slack rope condition, it shall be determined that the hosting [sic] rope is properly seated on the drum and in the sheaves”

“(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]).

In addition, section 23-8.2 (c) provides as follows:

“(c) Hoisting the load.

“(1) Before hoisting a load the person directing the lift shall see that the mobile crane is level and, where necessary, blocked.

“(2) Before hoisting any load at a new job site, the boom of a mobile crane shall be test operated to its maximum height.

“(3) Loads lifted by mobile cranes shall be raised vertically so as to avoid swinging during hoisting except when such operations are permitted by the capacity chart. A tag or restraint line shall be used when rotation or swinging of any load being hoisted by a mobile crane may create a hazard.

“(4) When a mobile crane is operated at a fixed radius, the boom-hoist pawl or other positive locking device shall be engaged”

(12 NYCRR 23-8.2 [c]).

Sections 23-8.1 (f) (1) and 23-8.2 (c) have been held to be specific provisions of the Industrial Code (*Cammon v City of New York*, 21 AD3d 196, 199 [1st Dept 2005]; *Locicero v Princeton Restoration, Inc.*, 25 AD3d 664, 666 [2d Dept 2006]).

In *McCoy v Metropolitan Tr. Auth.* (38 AD3d 308 [1st Dept 2007]), the First Department considered whether sections 23-8.1 (f) and 23-8.1 (c) applied in a case where the plaintiff was run over by a mobile forklift. The First Department explained that:

“These provisions are 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”

(*id.* at 309-310).

In this case, plaintiff testified that the bucket got caught on the shackles, twisted from right to left “in a real violent spin,” and then dropped “a little bit,” causing his injury (plaintiff *tr* at 94, 101-102, 107, 233). Since the only evidence offered to contradict plaintiff’s account of the accident is Ratakonda’s affidavit, which has been disregarded as speculative, the court finds that sections 23-8.1 (f) (1) (i) through (iii) and 23-8.2 (c) (3) were violated as a matter of law (*see Harris v City of New York*, 83 AD3d 104, 111 [1st Dept 2011]).

However, there are questions of fact as to whether section 23-8.2 (c) (1) was violated and was a proximate cause of the accident. It cannot be determined on this record that the crane was “level” or that it should have been “blocked” (12 NYCRR 23-8.2 [c] [1]).

While defendants argue that plaintiff failed to use a tag line, the Court of Appeals has recently held in *Rodriguez v City of New York* (31 NY3d 312, 324 [2018]), that an injured worker is not required to demonstrate the absence of his or her own comparative fault to obtain partial summary judgment on the issue of liability.

Accordingly, plaintiff is entitled to partial summary judgment under Labor Law § 241 (6) based upon violations of 12 NYCRR 23-8.1 (f) (1) (i), (ii), and (iii) and 12 NYCRR 23-8.2 (c) (3).

C. Labor Law § 200 and Common-Law Negligence

Plaintiff moves for partial summary judgment under Labor Law § 200, arguing that the condition of the workplace caused his accident. According to plaintiff, there was no signalman,

there were not enough workers doing the particular job, there were no walkie talkies or air horns, and there was a tripping hazard at plaintiff's feet that exacerbated the danger.

Defendants move for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims. Defendants contend that they did not have the authority to control the means and methods of plaintiff's work. Additionally, defendants assert, in opposition to plaintiff's motion, that defendants supervised Civetta's work.

Labor Law § 200 (1) provides as follows:

"All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section."

Liability under Labor Law § 200 "generally falls into two broad categories: instances involving the manner in which the work is performed, and instances in which workers are injured as a result of dangerous or defective premises conditions at a work site" (*Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dept 2014]). "These two categories should be viewed in the disjunctive" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

"Where a defect is not inherent but is created by the manner in which the work is performed, the claim under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing on the premises" (*Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 406 [1st Dept 2018]).

By contrast, where the worker's injury stems from a dangerous or defective premises condition, "a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or

defective condition of which he or she had actual or constructive notice” (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]).

Contrary to plaintiff’s contention, his accident arose out of the means and methods of the work. Plaintiff has not pointed to any evidence indicating that there was a defect inherent in the property. All of the contributing causes of plaintiff’s accident directly resulted from the manner in which the work was being performed on the site (*see Cappabianca*, 99 AD3d at 144).

Defendants have demonstrated that they did not actually exercise supervisory control over the injury-producing work. Civetta’s safety manager testified that Turner’s representative told Civetta what had to be done, but not how to do it (Campbell tr at 23-24). In addition, Turner’s site safety representative stated that “Turner doesn’t direct the means and methods. It is up to the subcontractor to determine what machine they are going to use to cut a hole in the ground or how many trucks they are going to bring to remove debris or something like that” (Raetz tr at 40-41). There is no evidence that defendants “gave anything more than general instructions on what needed to be done, not how to do it, and monitoring and oversight of the timing and quality of the work is not enough to impose liability under section 200” (*Paz v City of New York*, 85 AD3d 519, 519 [1st Dept 2011]). “Nor is a general duty to ensure compliance with safety regulations or the authority to stop work for safety reasons enough to impose such liability” (*id.* at 519-520). Plaintiff has failed to raise an issue of fact in this regard.

Accordingly, plaintiff’s Labor Law § 200 and common-law negligence claims must be dismissed.

CONCLUSION

Accordingly, it is

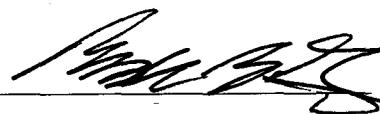
ORDERED that the motion (sequence number 003) of plaintiff William Talarico for partial summary judgment is granted on the issue of liability under Labor Law § 241 (6) insofar as predicated upon violations of 12 NYCRR 23-8.1 (f) (1) (i), (ii), and (iii) and 12 NYCRR 23-8.2 (c) (3) as against defendants New York and Presbyterian Hospital and Turner Construction Company, with the issue of plaintiff's damages to be determined at the trial of this action, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 004) of defendants New York and Presbyterian Hospital and Turner Construction Company is granted to the extent of dismissing:

- (1) plaintiff's Labor Law § 241 (6) based on the alleged violations of 12 NYCRR 23-1.7(e)(1) and (2), 12 NYCRR 23-6.1, and 12 NYCRR 23-6.2; and
- (2) plaintiff's Labor Law § 200 claim; and
- (3) plaintiff's common-law negligence claim, and is otherwise denied.

Dated: 1/4/19

ENTER:



Hon. Paul A. Goetz, JSC