Terranova v ERY Tenant, LLC
2019 NY Slip Op 30120(U)
January 14, 2019
Supreme Court, New York County
Docket Number: 152855/17
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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CIRO TERRANOVA and JACQUELINE TERANOVA,

Plaintiffs,

-against-

ERY TENANT, LLC, HUDSON YARDS CONSTRUCTION, LLC, and TISHMAN CONSTRUCTION CORPORATION.

Defendants.

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Index No. 152855/17
Motion Sequence 01

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

The plaintiff, Ciro Terranova (Plaintiff), is an ironworker who severely injured his finger on March 17, 2017 while working at the Hudson Yards Tower A construction project located at 500 West 33rd Street in Manhattan. After the accident Mr. Terranova commenced this personal injury action in which he claims that the defendants' violations of the common-law and the New York State Labor Law caused his injuries. Defendants ERY Tenant, LLC, Hudson Yards Construction, LLC, and Tishman Construction Corporation (collectively, Defendants) now move pursuant to CPLR 3212 for an order dismissing Plaintiff's action in its entirety. Plaintiff cross-moves for summary judgment on the issue of liability on his Labor Law 240(1) and Labor Law 241(6) claims. The motion and cross-motion are decided as set forth below.

BACKGROUND

Plaintiff testified[1] that he worked at Hudson Yards for non-party W&W Steel Erectors (W&W Steel) as part of a six-person steel lifting and erection crew. Their job was to lift giant steel beams between floors. Plaintiff was the "tag line"[2] person for the operation. On the day of the

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[1] NYSCEF Doc. 23 (Terranova Dep).

[2] According to OSHA, a tag line is a rope attached to a load to prevent it from spinning and from pendular motions. See 29 CFR 1926.1401

incident he worked on the Tower's 34th floor. In describing his work, Plaintiff explained that one of his colleagues attached the beam to the crane and another signaled the crane operator to begin lifting. Plaintiff would guide the moving beam through any obstructions. The other team members worked on the Tower's 36th floor. They were responsible for receiving and disconnecting the beams once they were in place (Terranova Dep. pp. 26, 45-50).

Before he was injured, the Plaintiff and his crew lifted one or two steel beams without incident. Each beam measured 40 feet in length and weighed approximately 5,000 pounds (*id.* at 53, 57). The process of hoisting the beam that injured Plaintiff began without incident. At one point, however, the beam became caught on a column but the crane operator continued to hoist it upwards, creating tension on the line. Eventually the beam became dislodged and began to swing. The Plaintiff slipped while trying to get out of the beam's path. Plaintiff described the incident as follows (*id.* at 55-56):

Q. So can you tell me how your accident happened?

A. So the crane from overhead comes down to pick up a beam that my partner hooked onto. As the beam came up just a few feet off the ground, we're checking it, make sure it was leveled. Then I began to turn the beam and bear down on the beam as I was turning it. Then the signalman started to bring the beam up with the crane and I couldn't turn it and it got hung up, it shot up and it got hung up, and there was a lot of tension on the choker and I guess the crane didn't stop moving. I saw that it was going to either part or shoot up from the choker. I began to get out of the way and it jumped really fast . . . it came loose from where it was hung up. So the beam teetered and as I was trying to get out of the way I slipped and [the] beam went back down and crushed my hand against another piece of steel.

Upon further questioning Plaintiff testified that the beam was originally in a horizontal position. When it became free from the column it began to swing in a pendulum motion (*id.* pp. 57-58):

Q. And you said you were trying to turn the beam and bear down on it. What does that mean?

A. I was turning it, directing it so I could bear down. As it comes up you send it through the two floors of iron. As it was coming up it hit a beam or an obstruction and it got stuck. The crane is still pulling on it.

Q. When you say it was going to part does it mean it was going to detach from where it was attached on the crane?

A. It looked like it could but it didn't.

Q. When you say shoot up it was going to become vertical?

A. It did. Once it got loose from the obstruction it shot because it's only hooked up in the middle, so beam, it came flying back down. . . .

Q. Sorry, the beam went from a horizontal position to a vertical position and then came back down to a horizonal position?

A. Yeah, slammed it down against my hand.

When asked how he fell, Plaintiff explained that he slipped on melting snow and ice (*id.* at 59, 67):

Q. You mentioned that you slipped on something. What did you slip on?

A. Ice, snow, ice.

* * * *

Q. Did you notice any issues with the floor, steel deck?

A. Besides being covered in snow? . . . No.

Q. Do you remember the last time it snowed before your accident?

A. No. You know, couple of days, maybe two days.

Q. How much snow was on the ground?

A. I don't know.

Q. Is it like a foot of snow or like --

Q. Foot of snow in some areas.

Richard Switzer, the construction site's safety manager, was deposed on behalf of defendant Tishman.[3] Mr. Switzer testified that he or one of his fellow supervisors walked the construction site daily. Mr. Switzer did not have the authority to stop the work, but he did have the authority to give directives to subcontractors to remedy an unsafe condition. If necessary Mr. Switzer would call on Tishman laborers to remedy a situation if he could not identify an otherwise responsible party (Switzer Deposition p. 12-14), but according to Mr. Switzer W&W Steel was responsible for maintaining the steel decks where the Plaintiff and his colleagues worked, including the removal of

[3] Defendants' exhibit H (Switzer Deposition).

snow and ice. Mr. Switzer specifically recalls encountering ice in these areas and notifying W&W Steel to remedy the situation. When these efforts went ignored, he would report the issue to his Tishman supervisors, who would make sure that the snow and ice was removed (*id.* at 18-20, 42-46).

Mr. Switzer was responsible for investigating Plaintiff's accident. He went to the location where Plaintiff was injured where he observed that the steel deck was covered in snow and ice (*id.* at 29-30):

Q. Did you ask what they were doing precisely before the accident that anticipated his hand being caught?

A. Yes.

Q. And what did they tell you?

A. He told me that they was – he was guiding a beam into place . . . and his hand got caught between a piece of steel that was already set and the loose piece, the free piece.

Q. Did you go up to the area?

A. Yes.

Q. Did you observe snow and ice on the floor?

A. Yes.

Mr. Switzer confirmed that the photograph attached to Plaintiff's accident report accurately depicted the snow and ice condition at the time of Plaintiff's accident.[4]

Attached to Defendants' moving papers is an affidavit from Cole Rojas, Site Safety Director for W&W Steel.[5] Mr. Rojas responded to Plaintiff's accident and saw the beam in question. He avers that there was a tag line attached to the beam and that tag lines were generally available to W&W Steel's workers, including the Plaintiff (Rojas Affidavit ¶ 4). Defendants' also submit an affidavit from Bernard Lorenz, a professional engineer.[6] Based upon his review of the testimony,

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[4] Plaintiff's exhibit 4.

[5] Defendants' exhibit F (Rojas Affidavit).

[6] Defendants' exhibit I (Lorenz Affidavit).

affidavits, and other evidence in this case, he avers that the Plaintiff was the sole proximate cause of his accident because he did not use the tag lines that were available to him (Lorenz Affidavit ¶¶ 14-15, emphasis omitted):

> . . . it is my opinion within a reasonable degree of engineering and construction safety certainty that the accident was caused by plaintiff's failure to use a tag line, and not due to the failure or inadequacy of any safety equipment . . . .
>
> . . . the Industrial code regulations . . . require that loads be properly balanced and lifted to minimize swing and/or spin, but swing and/or spin cannot be completely prevented. Hence, the standard and safe procedure in the construction industry is to always make sure that all workers are standing well clear of any load while it is being lifted, and that tag lines are to be used while hoisting structural steel.

Mr. Lorenz also opines that the accident was not caused by a Labor Law 240 or Labor Law 241(6) violation as Plaintiff contends (*id.* at ¶ 18, 32):

> The accident in this case . . . does not involve the uncontrolled descent of an object due to gravity, nor does it involve the failure or inadequacy of a safety device meant to prevent such an incident. The beam that struck the Plaintiff did not fall or descend, but rather "teetered" as it was being lifted, after it became hung up on an obstruction.
>
> . . . nothing in the evidence indicates that plaintiff's accident or injury occurred due to his alleged slip on snow or ice. The accident was caused by what preceded the alleged slip, which Mr. Terranova claims occurred as he was trying to get out of the way of the teetering beam. The reason Mr. Terranova was "in the way" in the first place is that he was not using the tag line and standing clear of the load.

Asserting that Defendants' counsel never questioned him regarding several key issues in this case, Plaintiff submitted an affidavit[7] in opposition to Defendants' motion in which he explains why he was unable to use a tagline:

> . . . the attorney questioning me at my deposition never asked a single question pertaining to the use of a tag line at the time of my accident or even the general manner by which we use taglines. If she had asked questions, I would have been able to clearly explain to her that a tagline would have been impossible to use at the commencement of the hoisting operation. As I stated in my deposition, the forty foot steel beam had to be slowly and carefully angled through a narrow opening above the area where I was working.
>
> There was a tagline on the steel beam that I was positioning it had been attached to the end of the beam closest to me and was still resting on the ground. When the load was lifted, it was necessary for me to place all my weight down on my end of the steel beam, where the tagline was still resting on the ground, so that the other end would rise and be angled into the

[7] Plaintiff's exhibit 1 (Terranova Affidavit).

> opening. This was the precise reason only one sling was placed in the center of the load. To enable me the ability to push down and angle the piece. A tagline does not and cannot perform this function when the side of the steel beam that the tagline is on must remain at a lower level than the piece angled in above.

Plaintiff then clarifies that the beam descended vertically in addition to "teetering" back and forth:

> [b]ecause the hoisted beam was only connected in the center, when the load was forced past the obstruction, it initially went up in the air and then dropped down vertically at least fifteen feet like a see saw and struck me. If the load had not become caught on the steel lattice work above and then abruptly dropped vertically fifteen feet (a distance the Defendants' attorney did not ask me) and had I not slipped on snow and ice, my accident would have never occurred.

Plaintiff's cross-motion is supported by a report[8] prepared by Douglas Miller, President of Occupational Safety Consultants. Like Mr. Lorenz, Mr. Miller reviewed the testimony, affidavits, and other evidence in this case, but unlike Mr. Lorenz, he concludes that Plaintiff's accident was caused, in part, by the fact that the beam was not secured and hoisted properly:

> Techniques or devices that could have been used to complete this operation could have included the rigging of the steel towards one end so that the center of gravity of the load was below the slings attachment point. This pick point would cause more of the beam to be below the attachment point and the beam would have been lifted more vertically. Once it was hoisted near the installation point the beam could have been set down and the sling repositioned to the middle so the beam could be hoisted horizontally into position.

The accident report[9] acknowledges that Matt Shepardson, one of Plaintiff's co-workers, was the only eyewitness to the accident. In his hand-written affidavit[10], Mr. Shepardson corroborates the Plaintiff's version of events, including that the beam became caught on an obstruction, swung "in a see-saw manner at a height of approximately 15 ft", and that the Plaintiff slipped on 2-3 inches of snow and ice that accumulated across the steel deck floor.

DISCUSSION

[8] Plaintiff's exhibit 3 (Miller Report).

[9] Plaintiff's exhibit 4.

[10] Plaintiff's exhibit 2 (Shepardson Affidavit).

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). "[R]ank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact." *Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 (1st Dept 2010); *see also Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

I. Application of Labor Law 240(1)

Labor Law 240(1), commonly known as the scaffold law, creates a duty that is nondelegable, and owners, general contractors, and their agents who breach that duty may be held liable regardless of whether they had exercised supervision or control over the injury-causing work. *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 (1993). Specifically, Labor Law 240(1) provides in relevant part:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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.

"The purpose of this statute is to protect workers and to impose the responsibility for safety practices on those best suited to bear that responsibility. . . ." *Ross*, 81 NY2d at 500. Labor Law

240(1) is limited to specific gravity-related accidents, such as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. *Id.* at 501. In falling object cases, liability will generally be established where an object descends quickly or forcefully because of the failure of a safety device to stop it from doing so. *See Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 602 (2009); *see also Harris v City of New York*, 83 AD3d 104, 106 (1st Dept 2011) (Labor Law 240 violation established where giant slab descended to ground, shattering floorboard upon which plaintiff was standing).

At the outset, the court rejects Defendants' contention that Labor Law 240(1) does not apply to this case at all because the beam was not being lifted upwards in the moments directly before Plaintiff was injured. Such a restrictive interpretation of the term "hoist" as urged by Defendants is inconsistent with the Labor Law 240's purpose. *See Rocovich v Consolidated Edison*, 78 NY2d 509 (1991). The proper lens to view this case is that the process of lifting the beam created an elevation-related risk that it might fall and strike workers like the Plaintiff below. *See Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 269 (1st Dept 2007). As such, Defendants were required to comply with the provisions of Labor Law 240(1).

The issue is whether the crane was placed, and the beam hoisted, so as to provide Plaintiff with the statutorily required proper protection. Here, the evidence definitely shows that the beam was attached to the crane at its center. The crane suddenly accelerated before Plaintiff had an opportunity to aim it through the columns above him and the beam became lodged. The crane operator continued to put tension on the obstructed load until it broke free.

This is where the parties' recitations diverge. According to Defendants, once the beam became dislodged it did not descend, but rather teetered like a seesaw while remaining attached to the crane choker. Defendants thus argue that the crane and the line performed as designed and that Plaintiff would not have been injured were it not for his own decision to forego using the tag line.

Plaintiff contends that the center of the beam descended 15 feet before striking the Plaintiff and that he could not have used the tag line because of the narrow opening.

As point of fact, the Plaintiff was not questioned on these specific issues in enough detail to make it exactly clear what happened. As a result the court cannot determine, as a matter of law, whether the center of the beam actually descended or not before striking the Plaintiff's hand or whether a tag line should or should not have been used.

Either way Defendants are liable. If the beam did fall and a tag line could not have been used, then Defendants liability under Labor Law 240(1) would be unquestionable. *See Runner*, 13 NY3d at 602; *see also Harris*, 83 AD3d at 106. But even if the beam did not descend and the tag line should have been used, the fact remains that the crane operator accelerated the beam into an obstruction and continued to put tension on the line until it snapped. This is sufficient proof that the crane was improperly operated. Moreover, given Defendants' admission that the 5,000 pound beam swung like a pendulum, and considering the amount of force such a movement can generate, whether the beam's center descended before striking the Plaintiff is irrelevant. *Runner*, 13 NY3d at 605.

To be sure, courts have held that liability under Labor Law 240(1) may not be established where an object does not descend but rather moves laterally, or where the object moves for reasons unrelated to a safety device. In *Toefer v Long. Is. R.R.*, 4 NY3d 399, 407-408 (2005), for example, a worker was struck by a wooden lever which "for some reason that has not been explained" flew towards the plaintiff, striking him on the head and propelling him backwards. The Court of Appeals found that the Labor Law did not apply because the plaintiff was not struck by a beam or by a falling object, but by an object that "struck him inexplicably." *Id*. at 408. And in *Desharnais v Jefferson Concrete Co.*, 35 AD3d 1059, 1060 (3d Dept 2006), the defendant was delivering a septic tank when a lifting mechanism attached to defendant's truck swung loose and hit plaintiff. The

court held that the Labor Law was not applicable because the mechanism did not fall and was not construction material being hoisted or secured at the time.

Toefer and *Desharnais* are plainly not applicable here. This case is more in line with a trio of First Department cases cited by Plaintiff. *See Naughton v City of New York*, 94 AD3d 1 (2012); *Ray v City of New York*, 62 AD3d 591 (1st Dept 2009); *Cammon v City of New York*, 21 AD3d 196, 200 (2005). In *Naughton*, the tag lines used to guide a large bundle being hoisted became "slack," causing the load to swing toward plaintiff. The court found that the hoist proved inadequate to shield the plaintiff from harm and awarded him summary judgment on his Labor Law 240(1) claim. In *Ray*, an 8,000-pound steel beam was being lowered into place when it started to swing both up and down and side to side. The trial court found that the accident involved an elevation-related risk, but denied Plaintiff's motion for summary judgment because there was a dispute as to how the accident occurred. On appeal, the First Department held that Plaintiff should have been awarded summary judgment: "Since plaintiff's injuries were attributable at least in part to defendants' failure to provide proper protection as mandated by the statute, his motion for summary judgment on the issue of liability thereunder should have been granted." *Id*. at 592. In *Cammon*, the plaintiff was on a barge using a chain saw to cut timber attached to a crane cable. The barge was rocked by a wave, causing the cable to tighten and eventually snap back and propelling the timber 10 feet into the air. The court rejected the defendant's argument that Labor Law 240(1) did not apply because the plaintiff was not struck by a falling object but by a horizontally moving object. The plaintiff's testimony was that the timber went up in the air at least 10 feet and struck him from above. The plaintiff also presented unrefuted evidence that the proper use of ropes or slings could have prevented the dislodged timber from swinging about wildly and causing his injury.

Defendants assert that *Cammon* and *Ray* are distinguishable because the injury-causing objects in those cases moved vertically, not laterally. While this may be true, it is not enough to

bring this case in line with *Toefer* and its progeny. Nor does it matter that those cases did not involve a sole proximate cause defense. As set forth *infra*, the sole proximate cause defense has no merit in this case for summary judgment purposes.

In sum, the court finds that Plaintiff has established his entitlement to summary judgment on his Labor Law 240(1) claim.

II. Labor Law 241(6)

Labor Law 241(6) imposes a nondelegable duty upon owners, contractors, and their agents to provide reasonable and adequate protection and safety to workers:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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 [New York State Commissioner of Labor] 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.

To recover damages on a Labor Law 241(6) cause of action Plaintiff must establish a violation of an Industrial Code provision which sets forth specific safety standards and that such violation was a proximate cause of his accident. *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 (1998). In his pleadings, Plaintiff alleges that Defendants violated numerous Industrial Code provisions. Of these, Plaintiff's cross-motion only refers to 12 NYCRR 23-1.7(d)[11] and 12 NYCRR 23-8.1(f)(2)(i)-

[11] 12 NYCRR 23-1.7(d) provides: "Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

(ii)[12]. Any claims based upon the remaining Industrial Code provisions are dismissed as abandoned.[13]

The unrefuted testimony in this case shows that the crane operator accelerated the beam upwards in violation of 12 NYCRR 23-8.1(f)(2)(i) and that the beam made contact with iron columns in violation of 12 NYCRR 23-8.1(f)(2)(ii). No material issue of fact is created by Defendants' claim that the beam was not actually being hoisted in an upward motion when the Plaintiff was injured. *See McCoy v Metropolitan Transp. Auth.*, 38 A.D.3d 308, 309 (1st Dept 2007) ("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").

Without citing any caselaw to support his position, Mr. Lorenz opines that 12 NYCRR 23-1.7(d) does not apply because the corrugated steel deck does not qualify as a "floor". While the court disagrees, he also fails to acknowledge that the Industrial Code pertains not only to floors, but to other surfaces like "elevated working surfaces." *C.f. Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 (1st Dept 2014) (defining a "metal deck flooring" as an "elevated platform" for Labor Law 240 purposes); *Beltrone v City of New York*, 299 AD2d 306, 308 (2d Dept 2002) (defendant's burden to show that a "deck platform" used by plaintiff to reach his work area was not the "type of surface contemplated under section 23-1.7(d)); *Howell v. Karl Koch Erecting Corp.*, 192 Misc. 2d 491, 496 (Sup. Ct. Bronx Co. July 11, 2002, Thompson, J.) (applying 23-1.7(d) where evidence showed the crane deck where plaintiff fell was used for "normal work"). All of the photographic

[12] 12 NYCRR 23-1.8 provides, in relevant part: "Hoisting the load. . . . 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.

[13] Insofar as Plaintiff also did not address his Labor Law 200 claims, they are hereby dismissed.

and testimonial evidence in this case indicates that the area where Plaintiff fell was a normal, elevated, non-open work area covered by snow and ice in violation of 12 NYCRR 23-1.7(d).

Taken together, the court finds that these Labor Law 241(6) violations proximately caused Plaintiff's injuries. *See Pardo v Bialystoker Center & Bikur Cholim, Inc.*, 308 AD2d 384, 385 (1st Dept 2003) (A workplace accident can have more than one proximate cause); *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 (1980) (Proximate cause is demonstrated by showing that a party's act or failure to act was a "substantial cause of the events which produced the injury.") Defendants' argument that Plaintiff contributed to his own injuries by maneuvering the beam instead of using a tag line is unavailing. As set forth below, Plaintiff cannot be deemed to be the sole proximate cause of his injuries, and any comparative negligence on Plaintiff's part is irrelevant in light of Defendants' Labor Law violations. *See Concepcion v 333 Seventh LLC*, 162 AD3d 493, 494 (1st Dept 2018); *Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 403 (1st Dept 2013).

III. Sole Proximate Cause

There are several factual disputes which preclude Defendants' sole proximate cause defense. *See Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 (2004) (A plaintiff may be deemed to be the sole proximate cause of his injuries where the "plaintiff had adequate safety devices available ... knew both that they were available and that he was expected to use them . . . chose for no good reason not to do so," and would not have been injured had he used an adequate safety device.); *see also Weininger v Hagedorn & Co.*, 91 NY2d 958, 960 (1998). First, while Mr. Lorenz opines that Plaintiff's failure to use a tag line caused his accident, the Plaintiff was never questioned at his deposition on this issue. In his affidavit, the Plaintiff explained that he could not use the tag line because it would have been impossible to do so given the narrow space through which the beam was being lifted. Second, the sole proximate cause defense only applies where a worker misuses an

available safety device or knowingly chooses not to use an available device despite being instructed to do so. *Boyd v Schiavone Constr. Co., Inc.*, 106 AD3d 546, 548 (1st Dept 2013). Here, there is evidence that tag lines were available, but no evidence that Plaintiff was told to use it and refused to do so. Third, Plaintiff's expert opines that Defendants should have rigged the beam in such a way that it would have more easily fit through the narrow opening. This raises a material issue of fact whether the beam was properly secured and hoisted in the first place. Finally, and most importantly, the court's findings (*supra*) that Defendants violated Labor Law 240(1) and 241(6) preclude a sole proximate cause defense as a matter of law. *See Melito v ABS Partners Real Estate, LLC,* 129 AD3d 424, 425 (1st Dept 2015) ("Nor can defendants rely upon the defense of sole proximate cause, since they failed to provide adequate safety devices in the first instance."); *DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 46 (1st Dept 2014) ("As plaintiff was not provided with an adequate safety device, defendant cannot avail itself of the sole proximate cause defense.").

CONCLUSION

In light of the foregoing, it is hereby

ORDERED that Defendants' motion for summary judgment is granted in part and denied in part; and it is further

ORDERED that Plaintiff's Labor Law 200, common-law negligence, and Labor Law 241(6) claims are hereby severed and dismissed, except those Labor Law 241(6) claims predicated upon 12 NYCRR 23-1.7(d) and 12 NYCRR 23-8.1(f)(2)(i)-(ii), which shall continue; and it is further

ORDERED that Defendants' motion is otherwise denied; and it is further

ORDERED that Plaintiff's cross-motion for summary judgment on the issue of liability under Labor Law 240(1) and Labor Law 241(6) is granted to the extent set forth herein; and it is further

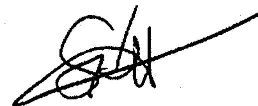
ORDERED that all remaining causes of action shall continue as against all remaining defendants; and it is further

ORDERED that counsel appear for a pre-trial conference in Part 30 on January 28, 2019 at 10:00AM.

The Clerk of the Court shall mark his records accordingly.

This constitutes the decision and order of the court.

ENTER:



DATED: 1-14-19

SHERRY KLEIN HEITLER, J.S.C.