At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 1st day of June, 2021.

PRESENT: HON. LOREN BAILY-SCHIFFMAN
JUSTICE

JOSEPH LAMBRO and JENNIFER LAMBRO, Plaintiffs, - against - 43-22 QUEENS STREET L.L.C., CAULDWELL-WINGATE COMPANY, LLC, ATLANTIC STATES LUBRICANTS CORP. and HENRI LEE, Defendants.	Index No.:501089/2017 Motion Seq. # 5 & 6 DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	PAPERS NUMBERED
Plaintiff's Notice of Motion	1
Affirmation & Exhibits	2
Affirmation in Opposition by 43-22 & C-W	3
Affirmation in Opposition by Atlantic & Lee	4
Reply Affirmation	5
Notice of Cross-Motion	6
Affirmation in Support of Cross-Motion & Exhibits	7
Affirmation in Opposition to Cross-Motion by Atlantis & Lee	8
Reply Affirmation	9

Upon the foregoing papers, Plaintiffs move this Court for an Order pursuant to CPLR § 3212 granting summary judgment in their favor as against: Defendants 43-22 Queens Street LLC (43-22) and Cauldwell-Wingate Company, LLC (C-W) pursuant to Labor Law § 200 and 241(6); Defendant Lee pursuant to VTL §1146, 1211 and NYC Traffic Rule 4-07; and Defendant Atlantic States Lubricants Corp. (Atlantic) pursuant to VTL § 388. Defendants Atlantic and Henri

Lee (Lee) cross-move (motion sequence # 6) for an Order dismissing Plaintiffs' causes of action brought pursuant to Labor Law § 200, 240 (1) and 241(6).

BACKGROUND

On or about January 13, 2017 Plaintiff, Joseph Lambro, was injured while working on a construction site located at 43-22 Queens Street in Long Island City. Defendant, 43-22, the property owner, entered into a Construction Management Agreement with Defendant, C-W. Total Safety Consulting (Total Safety), a non-party, was retained by C-W to oversee site safety. Plaintiff, Joseph Lambro was employed by non-party and C-W's subcontractor, Park Avenue Concrete/ High Rise Safety Systems (PAC), as a flagman. The construction site was located on the west side of Queens Street and C-W was responsible for maintaining a two-way path of travel only 12 feet wide.

At the time of the accident, Plaintiff and co-worker, Christopher Juno were in the street about to assist a crane "pick". Two flagmen are required to be on the street when the crane operator brings down a load of rebar to street level (crane "pick"). According to the deposition testimony of Robert Tillis, the Site Safety Manager, New York City regulations require that if anything is being lifted by a crane, pedestrian and vehicle traffic within the immediate area must be stopped. The submissions indicate that the flagmen would place a barricade at the intersection of Jackson Avenue and Queens Street to prevent traffic from coming down the street during a crane pick pursuant to 12 NYCRR § 23-1.29 (a). When delivery trucks have to enter, the flagmen usually removed the barricade and guided the trucks down Queens Street pursuant to 12 NYCRR § 23-1.29 (b).

However, on the day of the accident someone had removed the barricade that would have prevented Atlantic's truck from entering Queens Street. Peter De Palma, a Senior Construction Superintendent for C-W, testified that usually the flagmen would work in tandem to make sure no pedestrians or vehicles were in the area where the crane pick was occurring. Further, the flagmen had to be aware of the crane pick at the same time. On the day of the accident Plaintiff was facing the crane and the dead-end part of Queens Street. Mr. Juno was 50 feet away facing the intersection of Jackson Avenue and Queens Street.

C-W kept a record of the scheduled deliveries. Prior to a delivery day C-W prepared a list of the deliveries and a copy was given to PAC. PAC would hand off the delivery schedule to the flagmen so that they could be present during deliveries to direct the trucks backing down Queens Street. Mr. De Palma supplied the "traffic control signs" that were used. Plaintiff testified that the delivery being made by Atlantic on January 17, 2017 was not included in the schedule for that day. The accident herein occurred when Defendant, Mr. Lee, driver of the Atlantic vehicle, backed the truck down Queens Street without direction from the flagmen present. Mr. Lee testified that although he saw the Plaintiff at first, he began backing down the street after Mr. Lambro was no longer in his line of vision. Plaintiff was struck by the truck driven by Mr. Lee and owned by Atlantic when he was directly behind it, in a "blind spot". The truck was travelling at 2 miles per hour when it hit Plaintiff.

Analysis

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact. ***Jablonski v Rapalje, 14 AD3d 484, 486 (2nd Dept 2005), citing Rotuba Extruders v Ceppos, 46 NY2d 223, 231 (1978).*** The

court may not determine issues of credibility or fact, but rather identify whether questions of fact exist requiring resolution by a jury. ***Sillman v Twentieth Century–Fox Film Corp, 3 NY2d 395, 404 (1957); Marcum, LLP v Silva, 117 AD3d 919, 920 (2nd Dept 2014).***

The moving parties must establish 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. ***Ciccone v Bedford Cent School Dist, 21 AD3d 437,438 (2nd Dept 2005), leave to appeal denied 6 NY3d 702 (2005), citing Alvarez v Prospect Hosp, 68 NY2d 320, 324 (1986).*** Once this showing is made, the burden shifts to the opposing party to raise a triable issue of fact. ***Zuckerman v City of New York, 49 NY2d 557, 562 (1980).*** If the movant fails to meet this initial burden, summary judgment must be denied "regardless of the sufficiency of the opposing papers." ***Winegrad v New York Univ Med Ctr, 64 NY2d 851, 853 (1985); Vega v Restani Constr Corp, 18 NY3d 499, 503 (2012).***

It is well established that the Labor Law statutes require a liberal construction to achieve the goals intended by the legislature in enacting these provisions. ***Panek v County of Albany, 99 NY2d 452, 457 (2003), citing Gordon v Eastern Ry Supply, 82 NY2d 555, 559 (1993).*** Contrary to Defendants' contention that the accident herein was not a work site accident thus making the provisions of the Labor Law inapplicable, Labor Law protections are not limited to the actual construction site. "Generally, the scope of a work site must be reviewed as 'a flexible concept, defined not only by the place but by the circumstances of the work to be done." ***Gonnerman v Huddleston, supra at 995; Holgerson v. South 45th St. Garage, 16 A.D.2d 255, 258, affd. 12 N.Y.2d 1011.***

Defendants Atlantic and Lee argue that there can be no liability against them in the instant action as they are neither an owner nor a contractor. However, the Second Department has specifically addressed this issue and held that evidence of a truck backing into the area where Plaintiff was working at a construction site, without being guided by another person who was properly positioned, was sufficient to raise a triable issue of fact of a violation of the Labor Law. ***Erickson v Cross Ready Mix, Inc., 75 AD3d 524, 526 (2d Dept 2010).***

Labor Law § 200

Plaintiff seeks an Order granting summary judgment against Defendants for violating Labor Law § 200. Labor Law §200 is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work. ***Ortega v Puccia, 57 AD3d 54, 60–61 (2d Dept 2008), citing Rizzuto v LA Wenger Contr Co, 91 NY2d 343, 352 (1998).*** An owner or contractor may be held liable for a violation of Labor Law §200 only if it had authority to supervise or control the work. ***Klimowicz v Powell Cove Assoc, LLC, 111 AD3d 605, 608 (2d Dept 2013); Hurtado v Interstate Materials Corp, 56 AD3d 722, 723 (2d Dept 2008).*** Specifically, in order to impose liability against an owner or contractor pursuant to Labor Law §200, a showing that the supervision or control was over the methods or means of a plaintiff's work. ***Vazquez v Humboldt Single Lofts, 145 AD3d 709, 710 (2d Dept 2016), citing Pacheco v Smith, 128 AD3d 926 (2d Dept 2015); Rojas v Schwartz, 74 AD3d 1046 (2d Dept 2010).***

The law is clearly established that liability pursuant to Labor Law §200 also applies to agents of owners or contractors. ***Romang v Welsbach Elec Corp, 74 AD3d 789 (2d Dept 2008); Paladino v Society of NY Hosp, 307 AD2d 343, 344-345 (2d Dept 2003); Yong Ju Kim v Herbert Constr Co, 275 AD2d 709, 712-713 (2d Dept 2000).***"A party is deemed to be an agent of an

owner or general contractor when it has supervisory control and authority over the work being done when a plaintiff is injured." ***Vazquez v Humboldt Single Lofts, supra, citing Delahaye v Saint Anns School, 40 AD3d 679, 683 (2d Dept 2007)***. Plaintiff has failed to eliminate all questions of fact establishing that the Defendants had supervision or control over the methods or means of Plaintiff's work. However, Defendants Atlantic and Lee in their cross-motion have eliminated all questions of fact and demonstrated they did not violate Labor Law §200.

Labor Law §241(6)

Labor Law §241(6) imposes a nondelegable duty upon an owner or general contractor to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. ***Grant v City of New York, 109 AD3d 961, 963 (2d Dept 2013); Misicki v Caradonna, 12 NY3d 511, 515 (2009); Rizzuto v LA Wenger Contr Co, supra at 348.*** An action brought pursuant to Labor Law §241(6) must allege a violation of a specific and concrete provision of the Industrial Code. ***Klimowicz v Powell Cove Assoc, LLC, supra at 608 (2d Dept 2013); Ross v Curtis-Palmer Hydro-Elec Co, 81 NY2d 494, 503 (1993); Kowalik v Lipschutz, 81 AD3d 782, 783 (2d Dept 2011); Samuel v ATP Dev Corp, 276 AD2d 685, 686 (2d Dept 2000)***. The provision relied upon must set forth specific positive commands rather than general safety standards. ***Ross, supra at 501-502; Rizzuto, supra at 349.*** Plaintiff failed to eliminate all questions of fact as to whether the alleged sections of the Industrial Code are applicable herein and whether Defendants violated them. However, questions of fact remain as to whether Defendants violated them. Defendants, Atlantic and Lee, also failed to meet their burden of demonstrating that the regulations do not apply and that no violation of them exists.

Vehicle & Traffic Law

Both Plaintiff and Defendants, Atlantic and Lee, have moved for summary judgment on the causes of action against said Defendants for violations of the VTL. Neither party has eliminated all questions of fact as to the applicability of the alleged VTL provisions and whether said Defendants violated the sections alleged in the complaint.

Conclusion

Conflicting evidence has been submitted whether 1) it was the usual practice for a flagman or someone (possibly driver's assistant) to direct the trucks as they backed down Queens Street; 2) it was usual practice to use barricades to block traffic entering Queens Street; and whether Plaintiff was holding the traffic control sign at the time of the accident. Defendants sufficiently raised questions of fact as to the application of all the other Industrial Code and Vehicle and Traffic Law provisions. Under these circumstances, Plaintiff is not entitled to summary judgment. Atlantic and Lee have also failed to demonstrate their entitlement to summary judgment. The parties' remaining contentions are without merit. Accordingly, it is

ORDERED, that Plaintiff's motion (sequence #5) is denied in its entirety, and it is further

ORDERED, that Atlantic and Lee's cross motion for summary judgment (sequence #6) is granted to the extent that Plaintiff's cause of action pursuant to Labor Law §200 as against Defendants and Lee is dismissed. The remaining relief requested in the cross motion (sequence # 6) is denied.

ENTER,

LOREN BAILY-SCHIFFMAN
JSC
HON. LOREN BAILY-SCHIFFMAN

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