STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

JONATHON WARD,
Plaintiff,

v.

TRANSITOWNE DODGE ASSOCIATES, L.P.,
Defendants

Decision & Order
Index No. 804099/2019

Aaron C. Gorski, Esq.
Attorney for Plaintiff

Ann M. Campbell, Esq.,
Attorney for the Defendant

Walter, J.:

The following papers were read on this motion by Defendant for summary judgment pursuant to CPLR § 3212 and Plaintiff's cross-motion for summary judgment on liability pursuant to Labor Law §§ 240 and 241.

	NYSCEF Doc. Nos.
Notice of Motion, Affidavit, Exhibits	10-25
Affidavit in Support of Motion, Exhibit	27-28
Notice of Cross-Motion	38
Affidavit in Support, Exhibits	40-46
Affidavit, Exhibit, Memorandum of Law, Exhibit	48-52
Affidavit in Opposition, Affidavit in Reply, Affidavit, Exhibits	53-57
Affirmation in Reply	59

Injured plaintiff, Jonathon Ward (hereinafter "plaintiff"), commenced this action to recover damages pursuant to Labor Law §200, §240(1) and §241(6), and for common-law negligence, for injuries he allegedly sustained while lifting garage door panels onto a scissor lift at a premises owned by the defendant Transitowne Dodge Associates, L.P. (hereinafter "defendant" or "Transitowne"). At the time of the alleged injury, plaintiff was employed by National Overhead Door and assigned to demolish and install a commercial service garage door.

Defendant moves for summary judgment dismissing the plaintiff's complaint in its entirety pursuant to CPLR §3212. Plaintiff cross-moves for an order granting partial summary judgment on the issue of liability under Labor Law §§ 240(1) and 241(6) based on a violation of New York Industrial Code Rule § 23-6.1(a)(d) and denying defendant's motion for summary judgment.

The Court recognizes that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact (see *Kelsey v. Degan*, 266 A.D.2d 843 [4th Dept. 1999]; *Moskowitz v. Garlock*, 23 A.D.2d 943 [3d Dept. 1965]). The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]). On a motion for summary judgment, the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact (*S.J. Capelin Assoc. v. Globe Manufacturing Corp.*, 34 N.Y.2d 338 [1974]). To defeat a motion for summary judgment, the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material issues of fact, and importantly mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]).

As the Court of Appeals stated in *Comes v New York State Elec. & Gas Corp.*, (82 N.Y.2d 876 [1993]), § 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. An implicit precondition to this duty "is that the party charged with that responsibility have the authority to control the activity bringing about the injury" (*Comes, quoting Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]). Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200 (*Comes, citing Lombardi v Stout*, 80 NY2d 290, 295 [1992]).

Moving defendant established a prima facie case that the plaintiff's claims under Labor Law § 200 and common law negligence must be dismissed. In support of this branch of the motion, moving defendants submitted, inter alia, the examination before trial transcript testimony of plaintiff himself as well as Transitowne service manager, Ted Czwojdak. The plaintiff testified that he did not allow anyone from Transitowne to be in the area where he was working (NYSCEF Doc. No. 17 pp. 132-133, 139-141). Mr. Czwojdak testified that Transitowne had no supervision or control over plaintiff's activity (NYSCEF Doc. No. 18 pp. 44, 56-65). The record indicates that Transitowne had no authority to control the plaintiff's work and did not exercise any supervisory control over the plaintiff's methods. The plaintiff fails to raise any material issues of fact. Defendant's actions to block off the work area to ensure its own customers would avoid the area where the plaintiff was working does not rise to the level of exercising supervisory control and therefore plaintiff's causes of action under Labor Law § 200 and common-law negligence are dismissed.

In contrast, the duty imposed by § 240(1) of the Labor Law is nondelegable, and the liability of an owner or general contractor under this section is not dependent on whether the owner or general contractor exercised control or supervision over the work (*see, Ross v Curtis-Palmer Hydro-Elec.* Co., 81 NY2d 494 [1993]; *Rocovich v Consolidated Edison Co.,* 78 NY2d 509 [1991]; *Allen v Cloutier Constr. Corp.,* 44 NY2d 290 [1978]; *O'Donnell v Buffalo-DS Associates*, LLC, 67 A.D.3d 1421 [4th Dept. 2009]).

Labor Law § 240(1) protects "workers against the 'special hazards' that arise when the work site either is itself elevated or is positioned below the level where 'materials or loads [are] hoisted or secured" (*Ross* at 500-01, quoting *Rocovich* at 514). It is applicable to situations in which a worker is exposed to the risk of falling from an elevated worksite or being hit by an object falling from an elevated worksite (*see, Rocovich* at 526). Therefore, it applies "where the accident is the result of a difference in elevation between the worker and the work being performed, or a difference between the elevation level where the worker is positioned and the higher

level of the material being hoisted or secured (*see, Melber v 6333 Main St.*, 91 NY2d 759 [1998]; *Rocovich v Consolidated Edison Co.*, [78 NY2d 509, 514 (1991)]; *Jacome v State*, 266 AD2d 345, 346 3 [1999]). "Falling object" liability under the statute, however, is not limited to objects that are in the process of being hoisted or secured (*see, Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758-759 [2008]), but extends also to objects that "requir[e] securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]). "[T]he dispositive inquiry framed by our cases does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker. Rather, the 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" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d 1 [2011] *emphasis added; Kuhn v. Giovanniello*, 145 AD3d 1457 [4th dept. 2016]).

In the instant case, the plaintiff testified that he was on the man lift and his coworker, Jeff Wainright, was handing him the door panels to set down on the lift. The plaintiff testified that he would then lift the panels over his head to set down on the other side of the lift. The plaintiff went on to testify that he injured his shoulder when he "was going over his head with it to set it on the lift" (NYSCEF Doc. No. 17 pp. 154-155). Mr. Wainright testified that he would hand the panels to the plaintiff who would set it on the rail of the scissor lift and then unnecessarily lift it over his head and set it back down on the railing (NYSCEF Doc. No 20 pp 62-63, 67).

Based on the undisputed testimony of both the plaintiff and Mr. Wainright, the panels were handed from Mr. Wainright to the plaintiff who lifted it with his own hands to the other side of the lift. That is the point at which the plaintiff testified he injured his shoulder. There is no evidence that the panel ever fell or dropped and at no time was there a "physically significant elevation differential" between the panel and the plaintiff. The Court therefore concludes that the alleged injury occurred when the plaintiff was lifting a heavy item due to a "routine workplace risk" and not a risk arising from a physically significant elevation

differential (see *Horton v. Board of Educ. Of Campbell-Savona Cent School Dist.*, 155 A.D.3d 1541, 1543 [4th Dept. 2017]). The plaintiff fails to raise a triable issue of fact.

Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide necessary equipment to maintain a safe working environment, provided there is a specific statutory violation causing plaintiff's injury (see, *Toefer v. Long Island R.R.*, 4 NY3d 399 [NY 2005]; *Bland v. Manocherian,* 66 NY2d 452 [1985]; *Kollmer v. Slater Electric, Inc.,* 122 AD2d 117 [2d Dept 1986]). The Court of Appeals has held that the standard of liability under this section requires that the regulation alleged to have been breached be a "specific positive command" rather than a "reiteration of common law standards which would merely incorporate into the State Industrial Code a general duty of care" (*Rizzuto v. LA Wenger Contracting*, 91 NY2d 343 [NY 1998]). To support a Labor Law § 241(6) cause of action, such a regulation cannot merely establish only "general safety standards" but rather must establish "concrete specifications" (*Ross v Curtis Palmer Hydro-Elec. Co.,* 81 N.Y.2d 494, 504-05 [1993]).

Plaintiff alleges that defendant violated 12 NYCRR 23-6.1(a)(d), 23-1.7(a), 23-1.7(b), and 26-6.2. There is no support in the record for claims under Section 23-1.7(a), 23-1.7(b), or 26-6.2, nor does the plaintiff argue there is. Therefore, the claims made under 241(6) in reference to those sections of the industrial code are dismissed.

Plaintiff is, therefore, left with his claim under Industrial Code Rule NYCRR 23-6.1(a)(d) which relates to "Material Hoisting." Assuming, as the plaintiff asserts, that that those regulations are sufficiently specific to support a Labor Law § 241 (6) cause of action, this court must then determine whether the use of a scissor lift falls under the definition of hoisting equipment and, if so, whether such use violated the Industrial Code, such violation constituted a failure to use reasonable care, and that the violation was the proximate cause of the incident.

A thorough review of the case law fails to show any decisions where the Courts equate the use of a scissor lift with hoisting equipment. A scissor lift has

been determined to be functionally similar to a scaffold (*see, Brown v Ciminelli-Cowper, Inc.*, 2 A.D.3d 1308 [4th Department]), as well as an aerial basket (*Karcz v Klewin Bldg.Co., Inc.*, 85 A.D.3d 1649, 1651 [4th Dept. 2011]).

In the instant case, while the plaintiff may argue that he was going to use the scissor lift as a hoist to lift the panels into place, at the time of his alleged injury he was not using it in such a manner and, therefore, the scissor lift cannot be considered material hoisting equipment for purposes of § 23-6.1. Defendant, therefore, established a prima facie case that § 23-6.1 does not apply since such section applies to maintenance, operation and safety features of certain material hoisting equipment and no material hoisting equipment was involved in this case (*Filhan v. Cornell Univ.* 280 A.D.2d 994 [4th Dept. 2001], *see also Georgakopoulos v. Shifrin*, 83 AD3d 659 [2d Dept. 2011]). Plaintiff fails to raise a triable issue of fact.

Accordingly, it is hereby

ORDERED, that the Defendant's motion for summary judgment pursuant to CPLR § 3212 is hereby **GRANTED** in its entirety, and it is also

ORDERED, that Plaintiff's cross motion is hereby **DENIED** in its entirety.

Dated: September 26, 2022

Raymond W. Walter, J.S.C.

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