SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY **PART** 56M

Justice

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ANTONIO ANSIOSO,

Plaintiff,

- v -

CROSS COUNTRY CONSTRUCTION, LLC, VNO 225 WEST 58TH STREET LLC, LENDLEASE (US) CONSTRUCTION, INC., LENDLEASE (US) CONSTRUCTION LMB, INC., and WOODWORKS CONSTRUCTION CO, INC.,

Defendants.

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INDEX NO. 158460/2018

MOTION DATE 01/18/2023

MOTION SEQ. NO. 011

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 011) 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 151, 154, 155, 157, 167, 168, 169

were read on this motion to/for SUMMARY JUDGMENT.

I. INTRODUCTION

In this action to recover damages for personal injuries for common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6), arising from a construction site accident, the plaintiff moves pursuant to CPLR 3212 for summary judgment on the issue of liability on his causes of action alleging common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6) insofar as asserted against the defendants Cross Country Construction, LLC (CCC), VNO 225 West 58th Street LLC (VNO), Lendlease (US) Construction Inc. (Lendlease, Inc.), Lendlease (US) Construction LMB, Inc. (Lendlease LMB),and Woodworks Construction Co., Inc. (Woodworks) (collectively the defendants). The defendants oppose the motion. The motion is granted to the extent that the plaintiff is awarded summary judgment on his Labor Law §§ 240(1) and 200 and common-law negligence causes of action insofar as assert against VNO and Lendlease LMB, and the motion is otherwise denied.

II. BACKGROUND

On March 16, 2018, the plaintiff was employed by nonparty Del Savio Construction (DSC) as a mason tender in connection with the construction of a building at 220 Central Park South, New York, New York (the premises). His duties consisted of preparing concrete and mortar for the bricklayers, erecting scaffolds, loading the scaffolds with cinder blocks, bricks, and mortar, and transporting deliveries from the loading dock to wherever they were needed on the premises. VNO owned the premises, while Lendlease LMB served as the construction manager, and CCO and Woodworks served as trade contractors. The parties disagree as to whether Lendlease, Inc., was also a contractor for any of the work being done at the premises. The plaintiff claimed that, on March 16, 2018, he was advised that a delivery of concrete bags and cinder blocks had arrived, and was instructed by his foreman to transport pallets of the concrete bags from the street level to the second-floor patio. The plaintiff claimed that he used an electric pallet jack, owned by DSC, to pick up the pallets, which weighed approximately 5,000 pounds, travel through the front entrance, and wait for a hoist to take him to the second floor, whereupon he was to transport the pallets to the outside patio. The plaintiff explained that there "was a doorway to go on the outside patio and there was a three-foot ledge to get over" and, thus, a plywood structure had been installed that consisted first of a ramp going up the ledge, measuring approximately eight to nine feet long, followed by a platform measuring four feet long, and ended with a ramp going down to the patio, measuring approximately 10 to 12 feet long (hereinafter the "ramp-platform structure"). The plaintiff claimed that the plywood structure was built and maintained by Woodworks, since it employed the only carpenters on site, and explained that the structure was wet, and "corroded, warped, holes, cracked."

The plaintiff explained that, after he successfully transported the first load of concrete bags, the pallet jack's battery died, at which time he asked someone from CCC if he could borrow one of its pallet jacks. The person, whom the plaintiff knew to be named Tommy, and whom he assumed was the foreman, pointed to a jack, and told the plaintiff that he could use it.

The plaintiff claimed that he told Tommy that the jack looked old, but Tommy told him "just take that one, it's fully charged." The plaintiff inspected the CCC pallet jack and proceeded to use it without incident to transport another 5,000-pound load of concrete bags. The plaintiff claimed, however, that on his second trip with the CCC pallet jack, the subject accident occurred. The plaintiff explained that he proceeded down the final ramp portion of the ramp-platform structure in a backwards fashion, with the pallet jack above him on the ramp, while two stationary pallet jacks, holding scaffolding equipment, had been parked behind him at the bottom of the ramp. The plaintiff further claimed that, as he descended the final ramp portion of the ramp-platform structure, he found himself in what he described as "a channel," where on one side of the final ramp there was a scaffold, and on the other side of that ramp there were materials and parts that belonged to the other subcontractors on the premises. He claimed that, as he made his way slowly down final ramp portion of the ramp-platform structure, which was rocking, he tried to apply the brakes on the pallet jack, but that they failed and, as such, the pallet jack continued to move down, crushed his left foot, and pinned him against the parked pallet jacks at the end of the ramp.

On September 12, 2018, the plaintiff commenced this action against CCO and VNO, under Index Number 158460/2018. On March 3, 2021, the plaintiff commenced a separate action against Lendlease Inc., Lendlease LMB, and Woodworks, under Index Number 152160/2021. On July 12, 2021, this court granted the plaintiff's motion fully to consolidate the two actions into the action pending under Index Number 158460/2018. On June 29, 2022, the plaintiff filed the note of issue and certificate of readiness. On August 26, 2022, the plaintiff timely filed the instant motion.

III. DISCUSSION---THE SUMMARY JUDGMENT MOTION

In his complaint, the plaintiff alleged that the defendants were negligent and careless in their ownership, control, maintenance, supervision, and operation of the premises and all its appurtenances, such as the defective pallet jack that he was using. The plaintiff also alleged

that the defendants failed to provide a safe instrument and a safe working environment, thereby causing and/or creating a dangerous, defective, and unsafe condition. The plaintiff further alleged that the defendants violated Labor Law §§ 200, 240, and 241. In his bill of particulars, the plaintiff asserted that the defendants were negligent, careless, and reckless in causing, permitting, and allowing a dangerous, hazardous, and defective condition to exist and/or remain at the premises. He further asserted that the defendants were negligent in subjecting him to an unreasonable risk due to the dangerous and hazardous condition at the premises. He also asserted that the defendants were negligent in failing to maintain the braking mechanism of the pallet jack in a proper and adequate condition, and in failing to provide him with safe and effective equipment. The plaintiff alleged that the defendants negligently failed to provide him with proper safety equipment and protection, and failed to warn him of the dangerous condition that existed at the premises. The plaintiff alleged that the defendants had actual and constructive notice of the dangerous and defective condition at the premises. Finally, the plaintiff asserted that the defendants violated Labor Law §§ 200, 240, and 241.

In support of his motion, the plaintiff submitted the pleadings and his own deposition transcript, as well as the deposition transcripts of Lendlease LMB's general superintendent, James Fallon, and CCO's former construction supervisor, James J. Costigan. The plaintiff also submitted the trade contract agreement between Lendlease LMB and Woodworks, and the expert affidavit of licensed professional engineer Vincent A. Ettari. In opposition, the defendants submitted the pleadings and the deposition transcript of the plaintiff, Fallon, and Costigan. In addition, they submitted the deposition transcripts of Woodworks' general foreman, Octavio Goncalves, CCO's pickup foreman, Thomas Canty, CCO's cleanup foreman, Thomas Zangara, and CCO's general carpentry foreman, Darren McCallion. The defendants also submitted the trade contract agreement between Lendlease LMB and Woodworks and between Lendlease LMB and CCO, as well as the construction management agreement between VNO and Lendlease LMB. Finally, the defendants submitted the March 12, 2018 witness statement of

nonparty Port Morris's employee, Brandon Morgenstern, and the expert affidavit of licensed professional engineer George H. Pfreundschuh.

Ettari opined that construction at the premises where the plaintiff was injured was subject to the requirements of the 2008 New York City Building Code § 315.1.4, New York State Industrial Code (12 NYCRR) § 23-1.22(b) and 23-1.28(a), and Occupational Safety and Health Administration (OSHA) regulations 29 CFR 1926.305(a)(2) and 1926.451(e)(5)(ii) and (iii). Building Code § 315.1.4 requires that ramps shall not have a slope steeper than one in four, which is 25%, or 14 degrees. Additionally, Building Code § 315.1.4 and OSHA regulation 29 CFR 1926.451(e)(5)(iii) requires that ramps with a slope steeper than one in eight (12.5%. or 7 degrees) shall have cleats spaced not more than 14 inches apart and securely fastened to the planking. OSHA regulation 29 CFR 1926.451(e)(5)(ii) requires that all ramps and walkways not be inclined with a slope greater than one vertical to three horizontal, or 20 degrees. Based on the plaintiff's testimony that the slope of the ramp in question was between 30 to 45 degrees, and that it did not have cleats, the defendants failed to satisfy the Building Code or OSHA requirements. Ettari opined that if the subject ramp had been equipped with cleats, it would have "slopped [sic] the pallet level from pushing the plaintiff down the ramp."

12 NYCRR 23-1.22(b) requires that runways and ramps that have been constructed for the use of wheelbarrows, power buggies, hand carts, or hand trucks shall be constructed with planking of at least two inches thick, and that the planking must be laid close, butt jointed, and securely nailed. The planking of the ramp at issue was 3/4 inch thick and, thus, was in violation of the Industrial Code. Moreover, 12 NYCRR 23-1.28(a) requires hand-propelled vehicles to be maintained in good repair, while OSHA regulation 29 CFR 1926.305(a)(2) requires that all jacks have a positive stop to prevent overtravel. Ettari explained that the pallet jack used by the plaintiff was not maintained in good condition and was not equipped with a positive stop. According to Ettari, the defendants also violated Labor §§ 200, 240(1), and 241(6). Ettari explained that the ramp-platform structure was an elevated walking surface and thus qualified

as a "scaffold" within the meaning of Labor Law § 240(1). Finally, Ettari opined that the various violations all served as the proximate causes of the plaintiff's accident.

Pfreundschuh opined that multiple questions of fact existed as to the arrangement of the ramp-platform structure as described by the plaintiff. Pfreundschuh explained that, based on the dimensions provided by the plaintiff, the subject ramp had a slope of one to four, which is 25% or 14 degrees, and not the 30 to 45 degrees that the plaintiff described. He further explained that because the dimensions given by the plaintiff were rough estimates, it is possible that the slope of the ramp was less than 14 degrees. Pfreundschuh also opined that there were questions of fact regarding the construction of the subject ramp. He explained that, aside from testifying that the ramp was 3/4 inches thick, the plaintiff could not testify as to the structure of the framing underneath the plywood, nor could he testify as to whether multiple layers of plywood decking were present to enhance the load-bearing capacity of the two ramps and intermediate platform.

Pfreundschuh further opined that there was a question of fact regarding whether the subject pallet jack had brakes that actually malfunctioned. He explained that the same pallet jack worked just before the accident, when the plaintiff applied the brakes on a load of the same weight as he attempted to stop on a flat surface. He also explained that the plaintiff's testimony that the ramp was wet raised the possibility of loss of control and drive-wheel sliding during sudden braking. Pfreundschuh explained that, because the make and model of the subject pallet jack, as well as its specifications, including maximum load capacity or maximum "gradeability" at full load are unknown, there is no way of ascertaining, from an engineering standpoint, whether the pallet jack could properly brake when carrying and stopping a 4,000 pound-plus payload down a ramp of an unknown slope. Because of these questions of fact, Pfreundschuh opined that Ettari's opinions and conclusions were speculative. Finally, Pfreundschuh opined that the plaintiff's accident did not arise from an elevation related risk as

defined by Labor Law § 240(1), in that nothing fell vertically down onto the plaintiff's body, nor did his body fall vertically down to a significantly lower elevation.

A. SUMMARY JUDGMENT STANDARDS

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id.*; *Medina v Fischer Mills Condo Assn.,* 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (*see*

Koulermos v A.O. Smith Water Prods., 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United* Synagogue of Conservative Judaism, 135 AD3d 458, 462 [1st Dept 2016]).

B. PARTIES SUBJECT TO THE LABOR LAW

Labor Law §§ 200, 240(1), and 241(6), and the common-law obligation to provide a safe place to work, apply only to owners, general contractors, and their statutory agents (*see* Labor Law §§ 200; 240[1]; 241[6]; *Medina v R.M. Resources*, 107 AD3d 859, 860 [2d Dept 2013]; *Hartshorne v Pengat Tech. Inspections, Inc.*, 112 AD3d 888, 889 [2d Dept 2013]). Under the Labor Law, a party is deemed to be an agent of an owner or general contractor when it has the "ability to control the activity which brought about the injury" (*Guclu v 900 Eighth Ave. Condominium, LLC*, 81 AD3d 592, 593 [2d Dept 2011] quoting *Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]). Moreover, a subcontractor can be deemed an agent, and held liable under the Labor Law, if it has been "delegated the supervision and control either over the specific work area involved or the work which gave rise to the injury" (*Pooler v Shawmut Design & Constr.*, 2022 NY Slip Op 33735[U], *3, 2022 NY Misc LEXIS 6701, *3 [Sup Ct, N.Y. County, Nov. 1, 2022], quoting *Headen v Progressive Painting Corp.*, 160 AD2d 319, 320 [1st Dept 1990]). Where the subcontractor's area of authority is over a different work area or type of work than the one in which the plaintiff was injured, there can be no liability (*see Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 193 [1st Dept 2011]).

The plaintiff has established, prima facie, that, at the time of his accident, VNO owned the premises, that Lendlease LMB was the construction manager that served as a general contractor, and that Woodworks was a trade contractor, or, in other words, a subcontractor. Although defendants admitted that CCC was a trade contractor at the time of the plaintiff's accident, the plaintiff failed to establish that either CCC or Woodworks was a statutory agent of VNO or Lendlease LMB within the meaning of the Labor Law. The court notes that, although the plaintiff could not show that Woodworks and CCC were statutory agents, he could still have shown that they were negligent under the common law for launching a force or instrument of

harm. The plaintiff, however, also failed to make a prima facie showing that either Woodworks or CCC was liable for common-law negligence under that theory, in that his testimony was unequivocal that he did not know if Woodworks installed the subject ramp, and that he inspected the subject pallet jack before use and found no issues with it or the brakes. In fact, Woodworks expressly denied installing the subject ramp or any other temporary ramps used throughout the site, while CCC expressly denied having had problems with the brakes on its electric pallet jacks. As such, summary judgment on the issue of liability pursuant Labor Law §§ 200, 240(1) and 241(6), or for common-law negligence---whether for failing to provide a safe place to work or for launching a force or instrument of harm---cannot be awarded to the plaintiff insofar as asserted against CCC, Lendlease, Inc., and Woodworks.

C. LABOR LAW § 240(1)

Labor Law § 240(1) provides, in pertinent part, that

> "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."

The statute "imposes absolute liability on building owners and contractors whose failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker" (*Laverty v 1790 Broadway Assoc., LLC*, 2017 NY Slip Op 32309[U], *4, 2017 NY Misc LEXIS 4148, *3 [Sup Ct, N.Y. County, Oct. 27, 2017] quoting *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011]). To establish liability, the plaintiff must prove a violation of the statute and that the violation was a proximate cause of his or her injuries (*see id.*). "The plaintiff need not demonstrate that the [safety device] was defective or failed to comply with applicable safety regulations, but only that it proved inadequate to shield [plaintiff] from harm directly flowing from the application of the force of gravity to an object or person" (*Soriano v St.*

Mary's Indian Orthodox Church of Rockland, Inc., 118 AD3d 524, 526 [1st Dept 2014] [internal quotation marks and citation omitted]).

The plaintiff has established his prima facie entitlement to judgement as a matter of law on the issue of liability on his Labor Law § 240(1) cause of action. The plaintiff argued that the raised ramp-platform structure upon which he was walking on constituted a scaffold, and exposed him to a height-related danger. The plaintiff established that he was not provided with safe equipment, including the pallet jack itself, or any other safety devices, that would have prevented the approximately 5,000 pounds of concrete from sliding down the ramp when the brakes on the pallet jack malfunctioned. The plaintiff also established that the unsafe pallet jack and lack of safety devices were the proximate cause of his accident.

In opposition, the defendants failed to raise a triable issue of fact. The defendants argued that the plaintiff testified to having inspected the subject pallet jack before using it and observed no mechanical issues or defect, including with respect to the brakes. The defendants also argued that the plaintiff used the pallet jack for a previous trip, carrying a similar load of concrete bags, and had no issues with the jack. The defendants further argued that Labor Law § 240(1) is inapplicable because the plaintiff did not fall from any height and that a scaffold was not involved but, rather, that the plaintiff tripped over a separate stationary pallet jack on the ground while maneuvering the subject pallet jack carrying the concrete bags. Thus, the defendants argued that tripping cannot be attributed to the force of gravity. To support this position, the defendants point to Morgenstern's witness report, in which he stated that

> "I saw him coming down the ramp with the pallet jack and he must have went to turn but behind was a cement pallet and he tripped over it and the jack was going still and it then ran over his foot after he fell."

While the plaintiff's testimony that the pallet jack's brakes failed and Morgenstern's statement that the plaintiff tripped over a stationary pallet behind seem to be somewhat contradictory in describing the manner in which the accident occurred, Morgenstern confirmed that the pallet jack employed by the plaintiff was still moving down the ramp due to the effects of gravity when

it ran over the plaintiff's foot. The court thus rejects the defendants' contention that Labor Law § 240(1) is inapplicable.

The courts have consistently rejected suggestions that injuries resulting from slipping or tripping, rather than any elevation-related risk, do not fall within the ambit of Labor Law § 240(1), where the accident *also* was proximately caused by the lack of any safety devices to prevent heavy equipment from being pulled downward due to gravity caused by a significant elevation differential (*see Landi v SDS William St., LLC*, 146 AD3d 33, 36 [1st Dept 2016] [plaintiff's accident was proximately caused by *both* a water-covered ramp and the grade of the slope of the ramp, which caused a heavy, loaded pallet jack to slide down the ramp when the brakes failed, and ran over his foot]; *see also Aramburu v Midtown W. B, LLC*, 126 AD3d 498, 499 [1st Dept 2015] [while the plaintiff's injuries resulted in part from slipping on ice on a ramp, Labor Law § 240(1) was still applicable, since his injuries were also proximately caused by the lack of safety devices to prevent him from being struck by heavy equipment falling from a significant elevation above him]; *Gove v Pavarini McGovern, LLC*, 110 AD3d 601, 602 [1st Dept 2013] [even where the plaintiff's injuries resulted, in part, from tripping or slipping on an object on a platform, the evidence demonstrated that the injuries resulted directly from the elevation-related risks that required the plaintiff to struggle with a bundle of rebar while on the platform]).

Moreover, even if the brakes were functioning properly or the accident occurred in a manner unrelated to the application of the brakes, such as the plaintiff tripping and falling, an elevation differential still exists within the purview of Labor Law § 240 (1). As noted, both the plaintiff's testimony and the witness statement established that the plaintiff was coming down the ramp and that, when he lost hold of the pallet jack, it continued to roll down anyway. "The relevant inquiry--one which may be answered in the affirmative even in situations where the object does not fall on the worker--is rather whether the harm flows directly from the application of the force of gravity to the object" (*Runner v NY Stock Exch., Inc.*, 13 NY3d 599, 604 [2009]). Additionally, the weight of an object and the amount of force that object can generate, even over

the course of a relatively short descent, must be considered when determining whether an elevation differential is significant under the statute (*see id.* at 605; *see also Bain v 50 W. Dev., LLC*, 191 AD3d 496, 497 [1st Dept 2021]).

Here, regardless of how the plaintiff lost hold of the pallet jack, it is undisputed that the pallet jack came rolling down towards the plaintiff, which could not have occurred without the effects of gravity working upon the jack. Of equal importance is the fact that the pallet jack carried approximately 5,000 pounds of concrete bags that came down upon the plaintiff and rolled over his foot. Clearly, such weight traveling in such a manner as described by the parties is bound to generate an amount of force that reflects a physically significant elevation differential (*see Touray v HFZ 11 Beach St. LLC*, 180 AD3d 507, 507 [1st Dept 2020]; *Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 409 [1st Dept 2013]; *see also McCallister v 200 Park, L.P.*, 92 AD3d 927, 928-929 [2d Dept 2012] [plaintiff's injury was the result of an elevation differential within the scope of Labor Law §240(1), even where the plaintiff was on the same level as the scaffold and it travel a short distance]).

Additionally, since the pallet jack itself was a safety device, the defendants failed to raise a triable issue of fact that the jack was adequate to shield the plaintiff from the harm he incurred (*see Landi v SDS William St., LLC*, 146 AD3d at 38 [explaining that the pallet jack was insufficient in protecting plaintiff where he had to move a heavy load down a ramp that was covered with water, which rendered the process more hazardous]; *Guanopatin v Flushing Acquisition Holdings, LLC*, 127 AD3d 812, 812 [2d Dept 2015] [finding that the pallet jack used to lift concrete planks was not suitable to protect the plaintiff from an elevation-related hazard, and that the planks should have been hoisted and/or secured as well]). Finally, the defendants' argument that the plaintiff was negligent in traveling backwards down the ramp with the pallet jack above him is unavailing, as comparative fault is not a defense to a Labor Law § 240(1) cause of action (*see Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280, 287

[2003]). Thus, summary judgment on the issue of liability on the Labor Law § 240(1) cause of action must be awarded to the plaintiff against VNO and Lendlease LMB.

D. LABOR LAW § 241(6)

Labor Law § 241(6) imposes a nondelegable duty upon general 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] [citation and internal quotation marks omitted]; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). To sustain a Labor Law § 241(6) cause of action, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than generalized regulations for worker safety (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505). Labor Law § 241(6) requires a plaintiff to show that the safety measures actually employed on a job site were unreasonable or inadequate and that the violation was a proximate cause of his or her injuries (*see Zimmer v Chemung County Performing Arts*, 65 NY2d 513 [1985]; *Baptiste v RLP-East, LLC*, 182 AD3d 444, 445 [1st Dept 2020] ["While a violation of Labor Law § 240(1) in and of itself is a finding of negligence and liability, violation of a provision of the Industrial Code is only evidence of negligence, and Labor Law § 241(6) requires the additional finding that the violation showed a lack of reasonable care."]).

Here, the plaintiff asserted violation of 12 NYCRR 23-1.22(b), 23-1.28(a), and 23-5.1(f). The court notes that the plaintiff did not plead these provisions or any other specific provisions of the Industrial Code in either his complaint or bill of particulars but, rather, did so for the first in his affirmation in support of his summary judgment motion and in his expert's affidavit. Nevertheless, the court does not find those omissions, in and of themselves, defeats the plaintiff's Labor Law § 241(6) claim or this summary judgment motion, as there is no prejudice or unfair surprise to the defendants (*see Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 232 [1st Dept 2000]; *see also Sheng Hai Tong v K & K 7619, Inc.*, 144 AD3d 887,

889 [2d Dept 2016]; *Harris v Rochester Gas & Elec. Corp.*, 11 AD3d 1032, 1033 [4th Dept 2004]; *Kelleir v Supreme Indus. Park, LLC*, 293 AD2d 513, 514 [2d Dept 2002]). That branch of plaintiff's motion nonetheless must be denied on the merits.

12 NYCRR 23-1.22(b) provides, in pertinent part, that,

> "[r]unways and ramps constructed for the use of wheelbarrows, power buggies, hand carts or hand trucks shall be at least 48 inches in width. Such runways and ramps shall be constructed of planking *at least two inches thick full size* or metal of equivalent strength. ... Where planking is used on such runways and ramps, it shall be laid close, butt jointed and securely nailed."

(12 NYCRR 23-1.22[b][3] [emphasis added]). The plaintiff failed to establish, prima facie, that the planking of the ramp that he was on when his accident occurred was not at least two inches thick. The plaintiff's expert opined that the defendants did not comply with this provision of the Industrial Code because the plaintiff testified that the planking of the subject ramp was three-quarters of an inch thick. That, however, was not the plaintiff's testimony. When asked if he knew the thickness of the plywood on the ramp, the plaintiff answered "[w]ell, yes, on the job site it should be about three-quarter plywood, three-quarter of an inch." The plaintiff was then asked "[w]as the thickness of this plywood on *this* ramp three-quarters of an inch," to which he replied, "I don't know" (emphasis added). From this testimony, it is clear that the plaintiff did not know the specific thickness of the plywood used on the subject ramp, but rather understood generally that, on the job site, three-quarter-inch-thick plywood was used. This is insufficient to establish that subject ramp was only three-quarters or an inch thick, especially because the plaintiff also testified that "[t]here was joined together plywood," when asked if pieces of plywood were layered on top of one another on the subject ramp. Thus, summary judgment on the issue of liability on the Labor Law § 241(6) cause of action insofar as it was premised upon violation of this Industrial Code provision cannot be awarded to the plaintiff.

12 NYCRR 23-1.28(a) pertains to "[m]aintenance," and provides that

> "[h]and-propelled vehicles shall be maintained in good repair. Hand-propelled vehicles having damaged handles or any loose parts shall not be used."

This provision of the Industrial Code is insufficiently specific and as such cannot serve as a predicate for liability under Labor Law § 241(6) (*see Wegner v State St. Bank & Trust Co.*, 298 AD2d 211, 212 [1st Dept 2002]; *Maldonado v Townsend Ave. Enters., LP*, 294 AD2d 207, 208 [1st Dept 2002] [holding that terms such as "good repair" are generic directives insufficient to establish liability under Labor Law § 241(6)]). Moreover, while the second sentence of 12 NYCRR § 23-1.28(a) may serve as a predicate for liability under Labor Law § 241(6) (*see Garcia v 95 Wall Assoc., LLC*, 116 AD3d 413, 413 [1st Dept 2014]), it is inapplicable here, as the plaintiff is not alleging that the pallet jack had damaged handles or any loose parts. In any event, the plaintiff has not established that this provision applies to pallet jacks (*see Wegner v State St. Bank & Trust Co.*, 298 AD2d at 212). Thus, summary judgment on the issue of liability on the Labor Law § 241(6) cause of action insofar as it was premised upon violation of this Industrial Code provision cannot be awarded to the plaintiff.

12 NYCRR 23-5.1(f) pertains to "[s]caffold maintenance and repair," and provides that

> "[e]very scaffold shall be maintained in good repair and every defect, unsafe condition or noncompliance with this Part (rule) shall be immediately corrected before further use of such scaffold."

This provision of the Industrial Code is not sufficiently specific to support a Labor Law § 241(6) claim (*see Pontes v F&S Contr., LLC*, 146 AD3d 829, 830 [2d Dept 2017]; *Klimowicz v Powell Cove Assoc., LLC*, 111 AD3d 605, 607 [2d Dept 2013]; *Surko v 56 Leonard LLC*, 2021 NY Slip Op 32123[U], *16, 2021 NY Misc LEXIS 5460, *38-39 [Sup Ct, N.Y. County, Oct. 27, 2021]). Thus, summary judgment on the issue of liability on the Labor Law § 241(6) cause of action insofar as it was premised upon violation of this Industrial Code provision cannot be awarded to the plaintiff.

The court notes that, inasmuch as the plaintiff may be asserting various OSHA regulations and New York City Building Code provisions as a basis for liability under Labor Law §241(6), those claims must be rejected, since a plaintiff ultimately must plead and prove an applicable regulation of the Industrial Code instead to support liability under that statute (*see*

Alberto v Disano Demolition Co., 194 AD3d 607, 608 [1st Dept 2021]; *Garcia v 225 E. 57th St. Owners, Inc.*, 96 AD3d 88, 91 [1st Dept 2012]). Thus, summary judgment on the issue of liability on the Labor Law § 241(6) cause of action cannot be awarded to the plaintiff.

E. LABOR LAW § 200 AND COMMON-LAW NEGLIGENCE

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 (*see Hartshorne v Pengat Tech. Inspections, Inc.*, 112 AD3d 888, 889 [2d Dept 2013]; *see also Comes v NY State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Kennedy v McKay*, 86 AD2d 597 [2d Dept 1982]). There are two distinct standards applicable to section 200 cases, depending on the situation involved – where the accident is the result of the means and methods used by the general contractor to do its work, and where the accident is the result of a dangerous premises condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796 [2d Dept 2007]). To the extent that the plaintiff's allegation is that the accident occurred while he was maneuvering the pallet jack down a ramp when the brakes failed, which caused the pallet jack to crush his foot and pin him down, the plaintiff is claiming an injury due to the means and methods of the ongoing construction (*see Lemache v MIP One Wall St. Acquisition, LLC*, 190 AD3d 422, 423 [1st Dept 2021]). Inasmuch as the plaintiff has also alleged that the ramp was wet and corroded, the plaintiff is also claiming an injury due to a dangerous premises condition (*see Jackson v Hunter Roberts Constr., LLC*, 205 AD3d 542, 543 [1st Dept 2022]; *Favaloro v Port Auth. of NY & New Jersey*, 191 AD3d 524, 525 [1st Dept 2021]).

To find an owner, general contractor, or statutory agent liable under Labor Law § 200 for dangers arising from the means, methods, or materials of the work, it must be shown that the owner, general contractor, or statutory agent had authority to supervise or control the injury-producing work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d at 877). However, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v*

Tishman Constr. Corp., 40 AD3d 305, 311 [1st Dept 2007]; *see Bednarczyk v Vornado Realty Trust*, 63 AD3d 427 [1st Dept 2009]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378 [1st Dept 2007]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523 [2d Dept 2007]).

The plaintiff failed to establish, prima facie, that any of the defendants had the authority to supervise or control his work. The plaintiff contended only that CCC possessed supervisory control of the work site since it instructed him to utilize the subject pallet jack. He also contended that the defendants had an active supervisory and directive role over the work site by directing him to utilize the ramp-platform structure to complete his task. The plaintiff, however, testified that he only received instructions on how to perform his duties from DSC's supervisors. Moreover, the plaintiff testified that CCC instructed him to use the subject pallet jack only *after* he asked for it, which does not constitute supervisory control. Thus, summary judgment on the issue of liability on the Labor Law § 200 cause of action insofar as it was premised upon a means and methods standard cannot be awarded to the plaintiff.

To sustain a common-law negligence claim for an injury resulting from a dangerous premises condition, a plaintiff must demonstrate that an owner or other responsible entity either created the allegedly dangerous condition or had actual or constructive notice of it (*see Early v Hilton Hotels Corp.*, 73 AD3d 559, 560-561 [1st Dept 2010]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 838 [1986] [citations omitted]).

The plaintiff established, prima facie, that VNO and Lendlease LMB had constructive notice of the ramp's condition. The plaintiff testified that the ramp-platform structure was old, corroded, and was "never" changed. He also testified that the ramp was wet due to rain and snow from the days preceding the accident. In opposition, VNO and Lendlease raised triable issues of fact as to whether they had constructive notice. Thus, summary judgment on the

issue of liability on the Labor Law § 200 cause of action insofar as it was premised upon a dangerous premise standard cannot be awarded to the plaintiff.

The plaintiff's remaining contentions are without merit.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the plaintiff's motion is granted to the extent that he is awarded summary judgment on his Labor Law § 240(1) cause of action insofar as asserted against the defendants VNO 225 West 58th Street, LLC, and Lendlease (US) Construction LMB, Inc., and his Labor Law §200 and common-law negligence causes of action to that are based upon allegations of a dangerous premises condition insofar as asserted against VNO 225 West 58th Street, LLC, and Lendlease (US) Construction LMB, Inc., and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

4/18/2023
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE