At an IAS Term, Part 18 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, Brooklyn, New York, on the 15th day of March 2016.

PRESENT:

HON. BERNADETTE BAYNE

Justice.

JAMES JOHNSON,

Plaintiff,

- against -

LEND LEASE CONSTRUCTION LMB INC., OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK and METROPOLITAN ENTERPRISES, INC.,

Defendants.

DECISION AND ORDER

Index No. 13645/2013

The following papers numbered 2 to 4 read on this motion:	Papers Numbered
Notice of Motion/ Affidavits (Affirmations) Annexed	2
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Plaintiff, JAMES JOHNSON ("Plaintiff"), a steamfitter, alleges that while engaged in construction work he fell causing a medial meniscus tear in his left knee. Thereafter, Plaintiff commenced a personal injury action against defendants, LEND LEASE CONSTRUCTION LMB

INC. ("LEND LEASE"), THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK s/h/a COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK ("COLUMBIA UNIVERSITY") and METROPOLITAN ENTERPRISES, INC. ("METROPOLITAN") or collectively "Defendants." Plaintiff's Verified Complaint alleges violations of the provisions of the N.Y. Labor Law, to wit: §§200, 240 (1) and 241(6) against the Defendants. By notice of motion filed on or about September 9, 2015 under motion sequence two (2), Defendants move this Court for an Order, pursuant to CPLR §3212, dismissing Plaintiff's Verified Complaint. Plaintiff opposes Defendants motion.

Defendants argue that they are entitled to a dismissal of Plaintiff's Verified Complaint because "[Plaintiff's] claims wholly fail to satisfy the requirements for establishing claims under Labor Law provisions cited within [his] complaint."

In reply, Plaintiff argues, in his affirmation in opposition to Defendants' motion that Plaintiff is protected under the provisions of Labor Law §§200, 240 (1) and 241(6) and common law negligence because he was engaged in work covered by the aforementioned Labor Law provisions.

Procedural History

Plaintiff alleges by his Summons and Complaint and amplifies in his Verified Bill of Particulars that COLUMBIA UNIVERSITY is the owner and general contractor of the site; that it hired and/or retained construction managers, general contractors, and sub contractors to perform construction, alteration, renovation, and rehabilitation at the premises; its agents, servants, and/or employees were, inter alia: negligent, reckless and careless in the construction, renovation, rehabilitation, alteration, rigging, control, possession and inspection of the above; they failed to provide Plaintiff with a safe place to work, they failed to provide Plaintiff with proper fall protection

devices and safety equipment (i.e., ladders, stairways, plywood scaffold and hoists) and allowed unsafe work practices to be followed.

Plaintiff alleges that LEND LEASE was hired to perform construction, alteration, renovation, and rehabilitation at the premises; that its agents, servants, and/or employees were, inter alia: negligent, reckless and careless in the construction, renovation, rehabilitation, alteration, rigging, control, possession and inspection of the above; they failed to provide Plaintiff with a safe place to work, they failed to provide Plaintiff with proper fall protection devices and safety equipment (i.e., ladders, stairways, plywood scaffold and hoists) and allowed unsafe work practices to be followed.

Plaintiff alleges that METROPOLITAN was hired to perform construction, alteration, renovation, and rehabilitation at the premises; that its agents, servants, and/or employees were, inter alia: negligent, reckless and careless in the construction, renovation, rehabilitation, alteration, rigging, control, possession and inspection of the above; they failed to provide Plaintiff with a safe place to work, they failed to provide Plaintiff with proper fall protection devices and safety equipment (i.e., ladders, stairways, plywood scaffold and hoists) and allowed unsafe work practices to be followed.

Background

COLUMBIA UNIVERSITY, as the owner of the subject property located at 605 W. 129th Street, contracted with LEND LEASE, as the general contractor, to perform construction, alteration, renovation and/or rehabilitation at the subject property. This construction project was also known as the "Columbia Manhattanville project." This project encompassed the construction of three (3) buildings - the Mind Brain Building ("MBB"), the Central Energy Plant ("CEP") and the Lenfest

Building - on a twenty (20) acre site[1]. LEND LEASE subsequently entered into sub-contracts with various trades to perform work at the site. FRESH MEADOW MECHANICAL CORP. ("FRESH MEADOW"), Plaintiff's employer, was hired to do the mechanical work. JF Sterns was hired to perform the iron work; Rod Busters was hired to install the rebar; and Creative Carpentry was hired for carpentry work.

On or about February 20, 2013, the ground floor stage of construction was underway at the MBB. Mark Beatini ("Beatini), the site safety manager for LEND LEASE was present at the construction site on a daily basis. As a site safety manager, Beatini had been licensed by the Department of Buildings. Some of his responsibilities at the work site was to observe the progress of the job and to ensure that the Department of Buildings regulations were being enforced at the construction sight, to wit: "ensuring that the sidewalk bridges are okay, making sure the netting is up, egresses (i.e., stairways) are clear," and "ensuring the cleanliness of [what is commonly referred to as the Q-deck or Q-decking] making sure there was no holes in the deck itself." Beatini would also look for holes in the deck (that had been drilled by the trades[2]) that needed to be protected. He did this by "walking" the site daily; sometimes twice a day. Beatini also held meetings, that included safety talks, for the foreman from the various trades.

Pursuant to Beatini's examination before trial testimony, JF Sterns ironworkers were responsible for the installation of the Q-deck. A Q-deck is "corrugated ground that's not exactly flat. It rises from like two and a half inches (2 ½) up to two and a half inches (2 ½) down. ... it's

[1]At defense witness, Mark Beatini's in his May 18, 2015examination before trial, Plaintiff's attorney asked Mr. Beatini to describe the dimensions of the jobsite. Mr. Beatini was uncertain but that " -- he's been hearing the number 15, 16 acres." At that point defense attorney, Mr. Richmond answered that "[I]t's actually 20."

[2]Beatini, stated that other trades also made holes in the Q deck. (Beatini EBT).

made of steel, galvanized and slippery."[3] The FRESH MEADOW steamfitters, working in teams of two (2), were responsible for the installation of the pipes or T-bars[4] into the Q-deck. This required the steamfitters to drill holes into the Q-deck, install sleeves[5] into the holes and then insert the pipes into the sleeves and for the installation of T-bars. The diameter of the holes were dependant upon the size of the pipe that was going to be installed. Pursuant to Beatini, the hole diameters ranged from three (3) to thirty (30) inches. However, any hole with a diameter greater than six (6) inches needed to be protected with a piece of plywood as a safety precaution.[6] The sleeves that were installed protruded several inches up from the Q-deck. The Rod Busters lathers were responsible for installing the rebar onto the Q-deck. The rebar consisted of intersecting metal bars that resembled a mat or grid in appearance. The holes, in the shape of squares, created by the intersecting metal bars were approximately fourteen (14) inches to sixteen (16) inches diagonally. The rebar extended eighteen (18) inches above the Q-deck. This space would eventually be filled with concrete. Beatini stated that some trades put down planks over the rebar for easier access, but he could not recall whether he asked any of the trades to do so at this jobsite.

Beatini, in a notarized affidavit, states that METROPOLITAN was hired to place scaffolding and temporary stairways at the Columbia Manhattanville project job site. However, Beatini further states that METROPOLITAN did not control, direct, and/or supervise the steamfitting work performed by FRESH MEADOW or the installation of the rebar at the Columbia Manhattanville

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[3]As described by Plaintiff, in his October 10, 2014 examination before trial.

[4]Pursuant to Plaintiff, a T-bar is a threaded rod that is "a solid steel bar that you put a nut on that holds a clamp that holds a giant clamp that holds very heavy material down below through the Q-deck that hangs below it."

[5]Beatini, described the sleeves as openings left for the pipe to eventually come through.

[6]The installation of the plywood would be done by the carpenters. (Beatini EBT).

project job site.

Pursuant to Plaintiff's examination before trial testimony, Plaintiff, a journeyman steamfitter and a member of Local 638, began working at the site on February 20, 2013. He worked at the Columbia Manhattanville project job site for two (2) days prior to his accident. The first day Plaintiff began work at the jobsite, the Q-deck had already been installed. but the rebar had not.

On February 21, 2013, the date of the accident[7], Plaintiff arrived at the jobsite at 6:00 a.m. The work day was from 6:00 a.m. until 2:00 p.m. He testified that the temperature was "20 below" with "heavy, heavy wind, icy deck." He was partnered with John Mooney[8] on that day and supervised by a FRESH MEADOW employee named Michael. Plaintiff alleges that the rebar had been installed by this time; but that, he and John Mooney had not completed their part of the job. The rebar grid consisted of holes or squares that were large enough for Plaintiff's foot to fit through but not his whole body. Plaintiff stated that the holes were "diagonally the size of his foot which is about fourteen (14) inches long." He further clarified the measurement by stating that the hole measures "14 to 16. My foot fits through." Prior to Plaintiff's accident, he had been drilling holes up to 1¼ inches in diameter into the Q-deck and inserting a T-bar through the Q-deck. He used either a sledgehammer and a spike or a drill to drive holes through the Q-deck. FRESH MEADOW provided Plaintiff with safety training[9] and the tools that he needed for this job assignment. Prior to February 21, 2013, Plaintiff had never walked on top of rebar as a steamfitter or installed T-bars or sleeves at any jobsite

[7]Additionally, at some point prior to his accident, Plaintiff had taken photographs, prior to his injury, of the jobsite within that time frame "to show [his] girlfriend, the girl that [he] was dating where [he] was working, ... why [his] job is fun."

[8]Plaintiff testified that John Mooney did not witness his accident.

[9]Plaintiff received between one (1) to three (3) hours of safety training - in addition to the training Plaintiff already received at OSHA and from other job sites.

where rebar was already installed. At the time of the accident, Mooney "was marking out the holes and [he] would follow him up and make the holes."

At the time of his accident, Plaintiff had just finished drilling a hole and installing a T-bar into the Q-deck. As he attempted to climb out of the hole, he lost his footing. Plaintiff initially states that he "believe[d][his] leg was in the grid and [he] went to come out of the grid and got snagged or just lost [his] footing. [He] was carrying all [his] gear and tools and [he] fell to the side." Later, he states "[he] got out of it. As [he] got out of it, one leg was out, the other was still down there. I fell to the side with all my tools in my hands..." Further along in his testimony, Plaintiff states that " I put them all, you know, into the bucket, then I step out of it with one leg out and one leg in and then you got to pull your other foot through. I slipped back into the hole that I was pulling my leg out of and then fell to the side." Plaintiff then claims that he was not carrying the drill at the time of his accident ("I didn't have the drill, shit"). He states that after his foot fell back below the rebar "[he] fell to the side because he had the drill." Plaintiff further states that "[He] made it up to both feet to the rebar height, but [his] left foot went right back through ... and he fell to the side because he had the drill.." He landed on the drill and his shoulder but did not fall all the way to the ground. Plaintiff never reported the accident to anyone at the worksite that day. He returned to work the next day, February 22, 2013, at 69th Street and York Avenue (the Cornell worksite)[10] and reported the accident to the FRESH MEADOW foreman at that site.[11] After reporting the accident, Plaintiff did not work that day or at any point during the following two (2) to three (3) weeks.

On or about February 23, 2013, Plaintiff went to visit Dr. Butani, complaining about knee and ankle pain. He received physical therapy. Dr. Butani also referred him to Dr. Ravich, an orthopedic

[10]Plaintiff had been working at 69th Street and York Ave. at the Cornell jobsite for sixteen (16) months before going to help at the Columbia Manhattanville project for those two (2) days.

[11]The FMMC Incident Investigation Report is dated February 27, 2013.

doctor. Plaintiff subsequently had an MRI taken of his left knee nine months after the accident. He subsequently had out-patient surgery in April of 2014.

Annexed to DEFENDANTS' motion papers are the following; copies of the pleadings; copies of Plaintiff's verified bill of particulars and supplemental verified bill of particulars; a copy of Plaintiff's examination before trial transcript; a copy of LEND LEASE's witness, Mark Beatini's, examination before trial transcript, a copy of an Affidavit from Mark Beatini, and a copy of the February 27, 2013 FMMC Incident Investigation Report.

Discussion

Summary Judgment Standard

The proponent of a motion for summary judgment must demonstrate entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (see *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503, 965 N.E.2d 240, 942 N.Y.S.2d 13 [2012]; *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 573, 508 N.Y.S.2d 923, 925 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 476 N.E.2d 642,643, 487 N.Y.S.2d 316, 317 [1985]; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 404 N.E.2d 718, 720, 427 N.Y.S.2d 595, 596 [1980]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404, 144 N.E.2d 387, 165 N.Y.S.2d 498, 505 [1957]). Once a showing is made, the burden shifts and the party opposing the motion must tender evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which would require a trial or tender an acceptable excuse for his failure to do so (see *Greenberg v Coronet Prop. Co.*, 167 A.D.2d 291, 562 N.Y.S.2d 33[1st Dept.1990]; see *Zuckerman*, 49 NY2d at 557).

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues of material fact"

(*Bonaventura v. Galpin*, 119 A.D.3d 625, 988 N.Y.S.2d 886 [2nd Dept. 2014], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 320 N.E.2d 853, 363 N.Y.S.2d 131[1974]; see *Colonresto v. Good Samaritan Hosp.*, 128 A.D.2d 825, 828, 513 N.Y.S.2d 748 [2nd Dept. 1987]; *Krupp v. Aetna Life & Cas. Co.*, 103 A.D.2d 252, 261, 479 N.Y.S.2d 992 [2nd Dept. 1984]). For this reason, a party opposing a motion for summary judgment is entitled to every favorable inference that may be drawn from pleadings, affidavits and competing contentions of the parties (see *Nicklas v. Tedlen Realty Corp.*, 305 AD2d 385, 386, 759 N.Y.S.2d 171 [2nd Dept. 2003]; see also *Akseizer v. Kramer*, 265 A.D.2d 356, 356, 696 N.Y.S.2d 849 [2nd Dept. 1999]). If the existence of an issue of fact is even arguable, summary judgment must be denied (see *Museums at Stony Brook v. Vil. Of Patchogue Fire Dept.*, 146 A.D.2d 572, 573, 536 N.Y.S.2d 177 [2nd Dept. 1989]).

Labor Law §200 (1) and Common Law Negligence

New York Labor Law §200 (1) is a codification of a landowner's and general contractor's common law duty to maintain a safe workplace (*Rizzuto v. L.A. Wagner Contracting Co,, Inc.*, 91 N.Y.2d 343, 693 N.E.2d 1068, 670 N.Y.S.2d 816 [1998]) and reads in pertinent part:

> 1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. N.Y. Lab. Law § 200 (McKinney)

Moreover, "cases involving Labor Law §200 [claims] fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed [and that] these two categories should be viewed in the disjunctive." (see *Ortega v. Puccia*, 57 A.D.3d 54, 866 N.Y.S. 2d 323 [2nd Dept. 2008]; *Cook v. Orchard Park Estates, Inc.*, 73 A.D.3d 1263, 1264, 902 N.Y.S.2d 674

[2010]; *Chowdry v. Rodriguez*, 57 A.D.3d 121, 867 N.Y.S. 2d 123 [2nd Dept. 2008]).

In those cases "where an existing defect or dangerous condition caused the injury, liability attached if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 950 N.Y.S.2d 35 [1st Dept. 2012]; accord *Mendoza v. Highpoint Assoc., IX, LLC*, 83 A.D.3d 1, 9, 919 N.Y.S.2d 129 [2011]; *Seda v Epstein*, 72 A.D.3d 455, 455 (1st Dept. 2010)

In those cases involving the manner in which the work is performed, an owner or general contractor will be liable only if it "ha[d] the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 352, 693 N.E.2d 1068, 670 N.Y.S.2d 816 [1998] [internal quotation marks and citation omitted]; see *Cook v. Orchard Park Estates, Inc.*, 73 A.D.3d 1264, 902 N.Y.S.2d 674 [3rd Dept. 2010]; *Fassett v. Wegmans Food Mkts., Inc.*, 66 A.D.3d 1274, 1276, 888 N.Y.S.2d 635 [3rd Dept. 2009]; *Nelson v. Sweet Assoc., Inc.*, 15 A.D.3d 714, 715, 788 N.Y.S.2d 705 [3rd Dept 2005]). A defendant has the authority to supervise or control the work for purposes of Labor Law §200 when that defendant bears the responsibility for the manner in which the work is performed (*Ortega v. Puccia*, 57 A.D.3d 54, 62, 866 N.Y.S.2d 323, 330 [2nd Dept.2008]).

On the contrary, "[a]n owner or general contractor's retention of general supervisory control, presence at the worksite or authority to enforce general safety standards is insufficient to establish the necessary control for a [Labor Law] §200 claim" (*Wojcik v. 42nd Street Development Project*, 386 F.Supp.2d 442 quoting *Soshinsky v. Cornell University*, 268 A.D.2d 947, 947, 703 N.Y.S.2d 550 (3rd Dept. 2000); see also *Poulin v. E.I. Dupont DeNemours and Co.*, 883 F. Supp. 894, 899 [W.D.N.Y.1994]). "Evidence of general supervisory control or mere presence at the work site is not adequate to establish control over the work activity that caused the injury" (*Cook v. Orchard Park*

Estates, Inc., 73 A.D.3d 1264 [2010]; see *Fassett v. Wegmans Food Mkts., Inc.*, 66 A.D.3d at 1276; *Blysma v. County of Saratoga*, 296 A.D.2d 637, 639 [3rd Dept. 2002]; *Delishi v. Property Owner (USA) LLC*, 83 A.D.3d 872, 920 N.Y.S.2d 697[2nd Dept. 2011).

In this case, the Court finds that Defendants did not supervise or control Plaintiff's work for purposes of Labor Law §200. Plaintiff testified that he only received supervision from Michael, a FRESH MEADOW employee during his two days at the worksite. This Court further finds that there is no evidence that Defendants created a dangerous or defective premises condition at the worksite that caused Plaintiff's accident. Moreover, Plaintiff's testimony as to what caused him to fall is insufficient to raise a triable issue of fact. Plaintiff is not sure if his leg "got snagged or [he] just lost [his] footing." (Plaintiff's examination before trial). Defendants have met their initial burden by tendering evidence that eliminates any material issues of fact. Plaintiff has failed to submit evidence in admissible form sufficient to establish the existence of material issues of fact.

Therefore, based upon the forgoing, Defendants' motion for summary judgment on Plaintiff's Labor Law §200 and common law negligence causes of action is granted.

Liability under Labor Law §240 (1)

Defendants move for an Order granting summary judgment dismissing Plaintiff's Labor Law §240 (1) cause of action on the basis that Plaintiff was not exposed to the risk of falling from an elevated worksite. Defendants primarily rely on the Second Department holding in *Avila v. Plaza Construction Corp.*, 73 A.D.3d 670, 900 N.Y.S.2d 378 (2nd Dept. 2010).

Plaintiff argues that he should be afforded the protections of Labor Law §240 (1) since he was engaged in the type of work contemplated by the statute. Plaintiff asserts that he was required to "traverse the rebar grid 18 inches above ground level" and the Defendants failure to provide a safety device was the proximate cause of his injury. Plaintiff primarily relies on the New York County case,

Brown v. 44th Street Development, LLC, 48 Misc.3d. 234, 5 N.Y.S. 3d 692 (Sup. Ct. N.Y. County, 2015) to distinguish the facts from this instant case from those in *Avila*.

New York Labor Law §240 (1) reads in pertinent 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. N.Y. Lab. Law § 240(1) (McKinney)

New York Labor Law §240 (1) "is for the protection of work[ers] from injury and undoubtedly is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (*Zimmer v. Chemung County Performing Arts*, 65 N.Y.2d 513, 482 N.E.2d 898, 493 N.Y.S.2d 102 [1985], quoting *Quigley v. Thatcher*, 207 N.Y. 66, 68, 100 N.E. 596 [1912]). The legislative purpose behind this enactment is to protect "workers by placing 'ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor' (1969 NY Legis Ann, at 407), instead of on workers who 'are scarcely in a position to protect themselves from accident" (*Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 583 N.E.2d 932, 577 N.Y.S.2d 219 (1991), quoting from *Koenig v. Patrick Constr. Co.*, 298 N.Y. 313, 83 N.E.2d 133 [1948]). "The Court [of Appeals] has made clear that section 240(1) imposes on an owner a non-delegable duty and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks." (*Saint v. Syracuse Supply Company*, 25 N.Y.3d 117, 30 N.E.3d 872, 8 N.Y.S.3d 229 [2015]; see also *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 512, 583 N.E.2d 932, 577 N.Y.S.2d 219 [1991]).

Further, the Court of Appeals reiterated in *Blake v. Neighborhood Housing Services of New York City*, 1 N.Y.3d 280, 771 N.Y.S.2d 484, 803 N.E.2d 757 [2003], what it previously stated in *Duda v. John W. Rouse Const. Corp.*, 32 N.Y.2d 405, 298 N.E.2d 667, 345 N.Y.S.2d 524 [1973], "that liability is contingent on a statutory violation and proximate cause ... [a] violation of the statute alone is not enough; plaintiff [is] obligated to show that the violation was a contributing cause of his fall." (*Blake*, 1 N.Y.3d 280 at 287). Therefore, in order for a Plaintiff to prevail on a Labor Law §240 (1) claim, the Plaintiff must show that the statute was violated and that this violation was a proximate cause of his injuries (see *Robinson v. East Med. Ctr.*, LP, 6 N.Y.3d 550, 553-555, 847 N.E.2d 1162, 814 N.Y.S.2d 589 (2006); *Blake v. Neighborhood Hous.Servs of N.Y. City*, 1 N.Y.3d 280, 287, 803 N.E.2d 757, 771 N.Y.S.2d 484 (2003); *Przyborowski v. A& M Cook, LLC*, 120 AD3d 651, 992 N.Y.S.2d 56 [2nd Dept. 2014]).

Defendants argue that "the opening in the rebar grid located on the ground floor does not present an elevation related risk to which the protective devices enumerated in Labor Law §240 (1) are designed to apply." Here, Defendants contend that when Plaintiff "attempted to step from the Q-deck up onto the rebar grid he lost his footing and slipped back through the 14" opening onto the Q-deck which was 18" below the rebar grid. Since the opening was only large enough for his foot to go through, and not his entire body, the opening in the rebar grid clearly did not 'present an elevation-related hazard to which the protective devices enumerated in Labor Law §240 (1) are designed to apply.

Plaintiff argues that he had to "cut the rebar in order to access the q-deck thus creating a larger hole.... The accident occurred as Plaintiff was attempting to climb out of the hole to access the upper level of the floor which was comprised of rebar grid. ... that was 18 inches above the ground level." Plaintiff contends that, as such, "work performed on and below the rebar involves an elevation risk

within the purview of Labor Law §240 (1)." Plaintiff asserts Defendants violated the statute by failing to provide him with adequate safety devices or safe egress from the q-deck to the rebar grid.

In this case, the Court finds that Plaintiff's accident does not fall within the ambit of Labor Law §240 (1). This Court, following the holding of the Second Department in *Avila*, finds that the holes, measuring approximately fourteen (14) inches to sixteen (16) inches in diameter were not of a dimension that permitted Plaintiff's body to fall through. Thus, the opening did not constitute an "elevation-related hazard to which the protective devices enumerated [in Labor Law §240 (1)] are designed to apply." (*Avila* v. *v. Plaza Construction Corp.*, 73 A.D.3d 670, 671, 900 N.Y.S.2d 378 [2nd Dept. 2010]; *Barillaro v. Beechwood RB Shorehaven, LLC*, 69 A.D.3d 543, 894 N.Y.S.2d 434 [2nd Dept. 2010]).

In *Avila*, the Plaintiff was working at a construction site and standing on top of the rebar grid when the hose he was holding recoiled and hit him in the head causing him to lose his balance and fall down. Plaintiff's body landed on the rebar but his right foot fell approximately three feet down into the openings. The Court held that the rebar grid (with openings that measured approximately one square foot) "were clearly not of a dimension that would have permitted Plaintiff's body to fall through and land on the dirt floor below, and therefore 'did not present an elevation-related hazard to which the protective devices enumerated' [in Labor Law §240 (1)] are designed to apply." (*Avila*, quoting *Rice v. Board of Educ. Of City of N.Y.*, 302 A.D.2d 578, 580, 755 N.Y.S.2d 419 [2nd Dept. 2003] quoting *Alvia v. Teman Elec. Contracting, Inc.*, 287 A.D.2d 421, 421-422, 731 N.Y.S.2d 462 [2nd Dept. 2001]. Here, Plaintiff's left foot slipped back into the hole which caused him to fall "onto the drill and his shoulder but not fall all the way to the ground." The hole, measuring from approximately fourteen (14) inches to sixteen (16) inches in diameter, was only big enough for his feet to fit through but not big enough for his body to fit through. Based on Plaintiff's testimony, the Court finds that the hole did not constitute an elevation-related hazard for purposes of Labor Law

§240 (1). Therefore, Defendants' motion for summary judgment dismissing Plaintiff's cause of action pursuant to Labor Law §240 (1) is granted.

Liability under Labor Law §241 (6)

Plaintiff's Labor Law §241 (6) cause of action against Defendants asserts various violations of the Industrial Code ("12 NYCRR 23")[12], to wit: §§23-1.7(b)(1)(i)(ii)(iii)(a)(b)(c)(d)(e)(1)(2)(f); 23-1.15 (a)(b)(c)(d)(e); 23-1.16 (a)(b)(c)(d)(e)(f)(1)(2); 23-1.17(a)(b)(c)(d)(e); 23-1.9 (a)(b)(1)(2)(3)(c)(d); 23-1.21; 23-2.2.4 (a)(b)(1)(i)(ii)(2); 23-5.1 (a)(b)(c)(1)(2)(d)(1)(2)(3)(4)(e)(1)(2)(i)(ii)(iii)(3)(i)(ii)(ii)(f)(4)(5)(i)(ii)(f)(g)(h)(i)(j)(1)(2)(3); 23-5.2; 23-5.3; 23-5.4; 23-5.5; 23-5.6; 23-5.7; 23-5.8; 23-5.9; 23-5.10; 23-5.11 23-5.12; 23-5.13; 23-5.14; 23-5.15; 23-5.16; 23-5.17; 23-5.18; 23-5.19; 23-5.20; 23-5.21; 23-5.22.

With respect to Plaintiff's claimed New York Labor Law §241 (6) violations, New York Labor Law §241 (6) reads in pertinent part:

> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

This statute imposes a non-delegable duty on owners to provide "reasonable and adequate protection and safety" to employees working in construction, excavation or demolition (*Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 501, 618 N.E.2d 82, 601 N.Y.S.2d 49 [1993]). Additionally, to find a defendant liable pursuant to this section, a plaintiff must show that the defendant violated a specific provision of the Industrial Code Rules and Regulations, codified under 12 NYCRR Part 23. (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 502-504; *Rizzuto*

[12]Plaintiff did not allege in either his Verified Complaint or Verified Bill of Particulars any OSHA violations.

v. L.A. Wenger Contracting Co., Inc., 91 N.Y.2d 343, 350, 693 N.E.2d 1068, 670 N.Y.S.2d 816 [1998]).

Here, Plaintiff presents a catalogue of alleged Industrial Code Rules and Regulations violations without specifying how Defendants actually violated these provisions, or how any of these devices would have prevented Plaintiff's accident. Defendants argue that none of the Industrial Codes Plaintiff claims Defendant violated are applicable. The Defendants refute, with particularity, alleged violations of Industrial Code provision: §§23-1.7 (b)(1)(d)(e) and (f) and §23-5.

Defendants contend that §23-1.7 (b)(1) is inapplicable because this Code does not apply to an opening the size of which existed on the rebar grid at issue in this matter. Plaintiff argues that since the rebar grid "was well below" the minimum eighteen (18) inch wide walking surface[13], that the hole should have been covered or that planking should have been provided; however, there is no evidence before the Court regarding the measurements of the walking surfaces. Moreover, the Court finds that the hole at issue in this case was not large enough for Plaintiff's body to fall through thereby rendering this Industrial Code provision inapplicable (*Rice v. Board of Educ. of City of N.Y.*, 302 A.D.2d 578, 580, 755 N.Y.S.2d 419 [2nd Dept. 2003], quoting *Alvia v. Teman Elec. Contracting, Inc.*, 287 A.D.2d 421, 421-422, 731 N.Y.S.2d 462 [2nd Dept. 2001].

Defendants contend that §23-1.7(d) and (e), are inapplicable because Plaintiff did not fall as a result of a slippery condition or the result of a tripping hazard. Plaintiff argues that he lost his footing because he slipped off the "icy" rebar. However, based on Plaintiff's testimony, there is no evidence before the Court that Plaintiff slipped on the rebar because of ice or any other alleged slippery condition or that Plaintiff lost his footing due to any accumulations of dirt and debris. (*Doodnath v. Morgan Contr. Corp.*, 101 A.D.3d 477, 956 N.Y.S2d 11 [1st Dept. 2012]; *Costa v. State*,

[13]Plaintiff asserts that 1926.451 (b)(2) of OSHA requires a minimum eighteen (18) inch wide walking surface.

123 A.D.3d 648, 997 N.Y.S.2d 690 [2nd Dept. 2014]. Further, §23-1.7(f) is also inapplicable. There is no basis in the record for any claim that the stairways, ramps, or runways identified in §23-1.7(f) were required" given that Plaintiff was working at ground level on the Q-deck drilling holes, approximately eighteen inches below the rebar when he lost his footing attempting to exit the hole (*Francescon v. Gucci America, Inc.*, 105 A.D.3d 503, 964 N.Y.S.2d 8 [1st Dept. 2013]). Industrial Code provision §23-5 (scaffolds) is also inapplicable for the aforementioned reasons.

The Court finds the remainder of Plaintiff's claimed Industrial Code Rules and Regulations violations, to wit: §§23-1.15 (safety railing); 23-1.16 (safety belts, harnesses, tail lines and lifelines); 23-1.17 (life nets); 23-1.9 (catch platforms); 23-1.21 (ladders and ladderways); and 23-2.2.4 equally inapplicable based on the facts of this case.

Therefore, based on the foregoing, Defendants' motion for summary judgment dismissing Plaintiff's cause of action pursuant to Labor Law §240 (1) is granted.

Conclusion

Accordingly, it is

ORDERED, that the branch of Defendants' motion for summary judgement on the issue of liability dismissing Plaintiff's Labor Law §200 and common-law negligence cause of action is granted.

ORDERED, that the branch of Defendants' motion for summary judgement on the issue of liability dismissing Plaintiff's Labor Law §240(1) cause of action is granted.

ORDERED, that the branch of Defendants' motion for summary judgement on the issue of liability dismissing Plaintiff's Labor Law §241(6) cause of action is granted.

This constitutes the Decision and Order of the Court.

E N T E R

Bernadette Bayne

HON. BERNADETTE BAYNE
J. S. C.

BERNADETTE BAYNE
Supreme Court Justice