| **Miranda v 2815 Atl. Holdings LLC** |
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| 2024 NY Slip Op 33945(U) |
| October 25, 2024 |
| Supreme Court, Kings County |
| Docket Number: Index No. 526888/2021 |
| Judge: Devin P. Cohen |
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**Supreme Court of the State of New York**
**County of Kings**

Part LL1M

VINICIUS FERREIRA MIRANDA,

Plaintiff,

against

2815 ATLANTIC HOLDINGS LLC, KEAP GARDENS HOLDINGS LLC, AND SUNSHINE CONSTRUCTION USA INC.,

Defendants.

**Index Number** 526888/2021
Seqs. 004, 005

**DECISION/ORDER**

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

| | Papers Numbered |
|---|---|
| Notice of Motion and Affidavits Annexed | 1–3 |
| Order to Show Cause and Affidavits Annexed | |
| Answering Affidavits | 2–4 |
| Replying Affidavits | 5 |
| Exhibits | Var. |
| Other | |

Based on the foregoing papers, defendants' motion for summary judgment (Seq. 004) and plaintiff's motion for summary judgment (Seq. 005) are decided as follows:

**Introduction**

Plaintiff commenced this action to recover for damages he claims to have sustained on July 8, 2021, when he was struck by a crane hook at 2817 Atlantic Avenue, Brooklyn, NY (the premises). It is undisputed that 2815 Atlantic Holdings LLC (Atlantic) and Keap Gardens Holdings LLC (Keap) owned the premises. Sunshine Construction USA Inc. (Sunshine) was retained as the general contractor. Sunshine sub-contracted Capital Drilling NY Inc (Capital), and Capital employed the plaintiff as a carpenter.

**Factual Background**

Plaintiff testified as follows: On July 8, 2021, plaintiff was assigned to level the decks on the second floor by his coworker, Filippe De Almeida (Miranda EBT at 42). At the time, the

second floor was the top floor of the new construction (*id.* at 44). Mr. De Almedia called out to the workers to help receive a load of two-by-fours that was being delivered by a crane (*id.* at 46; 99–100). Plaintiff was the closest to the load and believed the instruction to help was for him and two other workers (*id.*). After the load was resting on the roof, someone unhooked the cable and the truck started to pull it away (*id.* at 48). This retraction caused the hook to swing and strike the plaintiff in the left side of his face (*id.* at 50–51; 54–57).

**Analysis**

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Labor Law § 240 (1)

Labor Law § 240 (1) imposes upon owners and general contractors a non-delegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). The purpose of the statute is to safeguard workers from "gravity-related accidents [such] as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v Curtis Palmer Hydro Electric Co.*, 81 NY2d 494, 501 [1993]).

Defendants seek summary judgment on plaintiff's Labor Law § 240 (1) claims because, they claim, plaintiff was not exposed to an elevation-related risk. Defendants rely on *Giraldo v Highmark Ind., LLC*, where the plaintiff was struck by a modular unit that was being hoisted by a crane that moved "upwards and toward" the plaintiff (226 AD3d 874, 876 [2d Dept 2024]). In

*Giraldo*, the Appellate Division, Second Department affirmed the lower court's denial of plaintiff's motion for summary judgment on his Labor Law § 240 (1) claim.

In support of his own motion for summary judgment, plaintiff argues that the crane hook was not moving upwards but was swinging due to the act of gravity upon it. Plaintiff contends that it was the "flow[] of gravity to an object," the crane hook, that caused the plaintiff's injury, and therefore this is a Labor Law § 240 (1) case (*Ross*, 81 NY2d at 501). In support of the motion, plaintiff's counsel contends that the failure to properly place the boom plumb over the load or to employ tag lines to steady the line while it was being retracted were a proximate cause of his accident.

There is a notable lack of caselaw on the applicability of Labor Law § 240 (1) to accidents where workers are struck by swinging loads. The First Department has appeared to indicate that Section 240 (1) may apply in these circumstances (*see Rivera v 95th and Third LLC*, 228 AD3d 412 [1st Dept 2024]; *see also Flores v Metro. Trans. Auth.*, 164 AD3d 418, 419 [1st Dept 2018]). However, this court is required to follow the precedent of the Second Department. Here, plaintiff testified that the crane was pulling the hook up and it was swinging (Miranda EBT at 54). Additionally, plaintiff's own papers claim that the "hook was raised" (plaintiff's memorandum of law in opposition at 17). That testimony brings this case in line with *Giraldo, supra*, where the Appellate Division held that Labor Law § 240 (1) was not applicable to a swinging object that was in the process of being mechanically raised. The court is, therefore, obligated to deny plaintiff's motion for summary judgment on Section 240 (1) and to grant defendants' motion on Section 240 (1).

Labor Law § 241 (6)

To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show that he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury (4) the proximate cause of which was a violation of an Industrial Code provision (*Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]).

In support of his Labor Law § 241 (6) claim, plaintiff alleges violations of several Industrial Code provisions. Of those, many are either insufficiently specific or inapplicable to the facts of this case. 12 NYCRR 23-1.5 (c) (1–2) are not specific enough to support a Labor Law § 241 (6) claim (*Gasques v State*, 59 AD3d 666 [2d Dept 2009], certified question answered, order affd, 15 NY3d 869 [2010]; *Vernieri v Empire Realty Co.*, 219 AD2d 593, 598 [2d Dept 1995]). Rules 23-1.5 (a) and (b) are also insufficiently specific (*Pereira v Quogue Field Club of Quogue, Long Is.*, 71 AD3d 1104 [2d Dept 2010]). The following Rules are inapplicable: 23-1.11 (no testimony about lumber and nail fastening), 23-6.1 (e) (1) (there is no testimony about a signal system or signalman), 6.2 (c) (there is no allegation that the hook was not drop forged), 23-2.1 (a–b) (the two-by-fours were not the proximate cause of plaintiff's accident), 23-1.30 (there is no testimony about inadequate illumination, and this accident took place during the day in natural light), 23-1.15 (there is no testimony that the lack of safety railings caused plaintiff's accident), 23-1.16 (there is no testimony that safety belts, harnesses, and tail-lines [which are different from "tag lines"] were required or would have prevented plaintiff's accident), and New York City Administrative Code § 28-404.1 (inadequate to support a Labor Law § 241 (6) claim, as such a claim must be predicated on an Industrial Code provision). For the foregoing reason, plaintiff's motion to amend his bill of particulars to allege a violation of New York City Administrative Code § 28-404.1 is also denied.

The Second Department has not ruled on whether Rule 23-6.1 (c) (1) is sufficiently specific to support a Labor Law § 241 (6) cause of action. However, the First Department and Fourth Departments have ruled that "§ 23–6.1 (c) (1) . . . is unquestionably general" (*Lopez v Halletts Astoria LLC*, 205 AD3d 573, 575 [1st Dept 2022]; *Sharrow v Dick Corp.*, 233 AD2d 858, 860 [4th Dept 1996]). Additionally, the Second Department has held that the substantially similar Rule 23-9.2 (b) (1) "is merely a general safety standard that does not give rise to a nondelegable duty under Labor Law § 241 (6)" (*Guallpa v Canarsie Plaza, LLC*, 144 AD3d 1088, 1091 [2d Dept 2016]). In light of the foregoing, it seems highly probably that Second Department would find Rule 23-6.1 (c) (1) to be insufficiently specific to support a cause of action. Therefore, plaintiff's motion is denied and defendants' motion is granted as to this provision of the Industrial Code.

With respect to Rule 23-8.2 (c) (3), the Second Department held "that 12 NYCRR 23–8.2 (c) (3) . . . is designed to protect workers from hazards created by the horizontal movement of a load being hoisted by a crane" and does not apply where "the crane was not hoisting a load at the time of the accident" (*Penta v Related Companies, L.P.*, 286 AD2d 674, 675 [2d Dept 2001], *lv. denied* 100 NY2d 515 [2003]). *Penta* has not been overruled and has been cited favorably since it was decided (*see Pruszko v Pine Hollow Country Club, Inc.*, 149 AD3d 986 [2d Dept 2017]; *see also McCoy v Metro. Transp. Auth.*, 38 AD3d 308, 310 [1st Dept 2007]).

Finally, plaintiff alleges that defendants violated Rule 1.5 (c) (3). The Appellate Division held "that 12 NYCRR 23–1.5 (c) (3) is sufficiently concrete and specific to support the plaintiff's Labor Law § 241(6) cause of action" (*Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2d Dept 2015]). That rule requires "All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed

from the job site if damaged." The absence of components, including safeguards, is a violation of the rule (*see Cruz v 1142 Bedford Ave., LLC*, 192 AD3d 859, 862 [2d Dept 2021]). The record is not clear what caused the hook to swing freely. Since the court is obliged to "view the evidence in the light most favorable to the nonmoving party," and the record does not demonstrate as a matter of law whether adequate safeguards were provided to prevent the hook from swinging freely, both parties' motions are denied as to this Industrial Code provision.

Both parties' motions are denied as to plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 1.5 (c) (3); defendants' motion is granted as to the remaining Industrial Code provisions alleged.

Labor Law § 200

Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). Thus, claims for negligence and for violations of Labor Law § 200 are evaluated using the same negligence analysis (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). "[W]hen a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work. Although property owners often have a general authority to oversee the progress of the work, mere general supervisory authority at a worksite for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200. 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" (*id.* at [internal citations omitted]).

Initially, plaintiff does not oppose defendants' motion for summary judgment on his Labor Law § 200 claims with respect to Atlantic and Keap. Therefore, Atlantic's and Keap's motions is granted on this claim.

The plaintiff and defendant Sunshine moved for summary judgment on plaintiff's Labor Law § 200 claim against Sunshine. Sunshine contends that it did not exercise supervision and control over the plaintiff's work. However, "exercising" authority is not the standard for liability under Labor Law § 200. A party is liable if it "had authority" over the work, and is not absolved of responsibility by neglecting or delegating that authority (*see e.g. Tomyuk v Junefield Assoc.*, 57 AD3d 518, 521 [2008]). Here, Sunshine had authority over the work based on its contract with the owner (general contract at § 9.2). Sunshine's retention of sub-contractors did not waive its authority to supervise and control the work, or to maintain safety at the site. The uncontroverted testimony here is that plaintiff, a carpenter with no training as a rigger, was directed to assist a rigging crew in receiving and unloading two-by-fours that were being delivered by crane. Mathan Kohn, project manager for Sunshine, testified that it would be safety violation for "a non-rigger [to] assist a rigging crew" in the context of receiving loads (Kohn EBT at 77). In light of Sunshine's contractual authority over the work at the site and its own project manager's admission that a non-rigger assisting a rigging crew constituted unsafe means of performing the work, plaintiff's motion for summary judgment is granted as to Labor Law § 200 and defendant Sunshine's motion is denied. To the extent plaintiff was comparatively at fault for his accident, that question is preserved for the time of trial (*Ortega v R.C. Diocese Brooklyn*, 178 AD3d 940, 941–942 [2d Dept 2019]; *see Rodriguez v City of New York*, 31 NY3d 312 [2018]).

**Conclusion**

Defendants' motion (Seq. 004) is granted as to plaintiff's Labor Law § 240 (1) claim, as to plaintiff' Labor Law § 241 (6) claim to the extent that alleged violations of the Industrial Code except Rule1.5 (c) (3) are dismissed, and as to plaintiff's Labor Law § 200 claims against Atlantic and Keap in their entirety. The motion is otherwise denied.

Plaintiff's motion (Seq. 005) is granted as to his Labor Law § 200 claim against Sunshine only. The motion is otherwise denied.

This constitutes the decision and order of the court.

October 25, 2024
**DATE**

**DEVIN P. COHEN**
Justice of the Supreme Court