[*1] SCANNED ON 10/18/2007

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan PART 36

Justice

Index Number : 119147/2003

PEREIRA, ROBERTO

INDEX NO.

vs

RFD SECOND AVENUE,LLCP.

MOTION DATE

Sequence Number : 003

MOTION SEQ. NO.

PARTIAL SUMMARY JUDGMENT

MOTION CAL. NO.

cross-motion

otion to/for summary judgment

1-9

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	7, 8, 9
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No 3, 4, 5, 6

Upon the foregoing papers, it is ordered that this motion + cross-motion are decided in accordance with the attached memorandum decision.

FILED
OCT 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

HON. DORIS LING-COHAN

Dated: 10/12/07

J.S.C.

FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

----------x

ROBERTO PERIERA,

Plaintiff,

-against-

RFD SECOND AVENUE, LLC, TISHMAN CONSTRUCTION CORPORATION and CITYWIDE DEMOLITION AND RUBBISH REMOVAL, INC.,

Defendants.

----------x

Index No.: 119147/03

Motion Seq. No.: 003

Ling-Cohan, J.:

This is an action to recover damages for personal injuries allegedly sustained by a laborer as a result of a fall from a scaffold at a construction site located at 300 East 77th Street, New York, New York on September 10, 2001. Plaintiff Roberto Periera moves, pursuant to CPLR 3212, for partial summary judgment granting his Labor Law § 240 (1) claim as against defendants RFD Second Avenue, LLC (RFD) and Tishman Construction Corporation (Tishman). Defendants RFD and Tishman cross-move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim as against them. Defendant Citywide Demolition and Rubbish Removal, Inc. (Citywide) cross-moves for summary judgment dismissing plaintiff's complaint as against it.

BACKGROUND

On the date of plaintiff's alleged accident, plaintiff was employed as a laborer on a construction project to build a high-rise residential building (the project). Defendant RFD was the owner of the property on which the construction was taking place. RFD's agent, non-party

Davis Construction Company Inc. (Davis), hired defendant Tishman to be the construction manager on the project pursuant to a contract dated June 29, 1999. Tishman retained defendant Citywide to remove the construction debris from the building site. Plaintiff was an employee of non-party Resto Tech Empire Group (Resto), a subcontractor hired by Tishman to install windows. Plaintiff's duties included cleaning up after the mechanics who did the actual installation of the windows.

On September 10, 2001, plaintiff was directed by the Tishman laborer foreman, Augie Fioreolo (Fioreolo), to assist with debris removal. In order to remove the debris at the construction site, garbage was brought down by Tishman workers from the upper floors of the building in moveable dumpsters, which were supplied by Citywide, to a temporary loading dock which was approximately four feet above ground level.

The debris was then loaded into the back of a rubbish compactor truck (the truck), which was also supplied and operated by Citywide. In order to load the debris into the back of the truck, it was necessary for workers to stand on a movable scaffold which was placed between the loading dock and the truck. This scaffold, which was usually put into place by Tishman workers, had wheels and wheel locks. In addition, although there were railings on the street side and the backside of the scaffold, there were no railings on the side of the scaffold facing the loading dock or the side facing the truck. In order to account for a slight elevation difference between the loading dock and the scaffold, an unsecured metal plate was placed so as to straddle the edge of the loading dock and the edge of the scaffold, serving as a makeshift bridge.

Plaintiff noted that the scaffold seemed stable and was not moving when he initially stepped onto it in order to load the wood debris into the truck.

Plaintiff also testified that, at the time of his alleged accident, he was loading 10-to-12 foot long planks of wood into the back of the truck by hand to be crushed. In order to perform this task, plaintiff had to stand on the scaffold. Plaintiff stated that he was injured when a plank of wood that he was loading pushed back out and struck the scaffold, causing the scaffold to begin to move away from the loading dock. In an effort to quickly exit the scaffold to safety, plaintiff took a step onto the metal plate. At this point, due to the fact that the scaffold's movement away from the loading dock created a gap of approximately two feet between the edge of the loading dock and the edge of the scaffold, the unsecured metal plate and plaintiff fell to the ground between the scaffold and the truck simultaneously, causing injury to plaintiff's left knee.

DISCUSSION

"'The proponent of 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'" (Santiago v Filstein, 35 AD3d 184, 185-186 [1st Dept 2006], quoting Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]; DeRosa v City of New York, 30 AD3d 323, 325 [1st Dept 2006]; see also Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). If there is any doubt as to

the existence of a triable fact, the motion for summary judgment must be denied (Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Housing Corp., Inc., 298 AD2d 224, 226 [1st Dept 2002]).

LABOR LAW § 240 (1)

Labor Law § 240 (1), also known as the Scaffold Law (Ryan v Morse Diesel, Inc., 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> 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.

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (Torres v Monroe College, 12 AD3d 261, 262 [1st Dept 2004]; Blake v Neighborhood Housing Services of New York City, Inc., 1 NY3d 280, 287 [2003]; Felker v Corning Inc., 90 NY2d 219, 224-225 [1997]).

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold ... or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (John v Baharestani, 281 AD2d 114, 118 [1st Dept 2001], quoting Ross v Curtis-Palmer Hydro-Electric Company, 81 NY2d 494, 501 [1993]). The Scaffold Law does not apply merely because work is performed at elevated heights, but rather applies where the work itself involves risks related to

differences in elevation (Binetti v MK West Street Company, 239 AD2d 214, 214-215 [1st Dept 1997]; see Ross v Curtis-Palmer Hydro-Electric Company, 81 NY2d at 500-501]).

As a threshhold matter, in his affirmation in opposition to Citywide's cross motion for summary judgment, plaintiff states that he does not oppose defendant Citywide's cross motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim as against it, and plaintiff withdraws this claim. Thus, defendant Citywide is entitled to summary judgment on its cross motion dismissing plaintiff's Labor Law § 240 (1) claim as against it.

In addition, RFD, as owner of the property on which the construction for the project was taking place, may be liable under Labor Law § 240 (1). However, it should be noted that defendant Tishman does not address whether, as construction manager, it may be liable for plaintiff's injuries under Labor Law § 240 (1) as a statutory agent of owner defendant RFD. Nevertheless, as detailed below, Tishman may be liable for plaintiff's injuries under Labor Law § 240 (1) as a statutory agent of owner RFD.

A review of the record in this case reveals that Tishman is to be considered a statutory agent of owner RFD so as to be liable for plaintiff's injuries under Labor Law § 240 (1). "The label of construction manager versus general contractor is not necessarily determinative" (Walls v Turner Construction Company, 4 NY3d 861, 864 [2005]). "Although a construction manager of a work site is generally not responsible for injuries under Labor Law § 240 (1), one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the

injury" (id. at 863-864; Falsitta v Metropolitan Life Insurance Company, Inc., 279 AD2d 879, 880-81 [3d Dept 2001]).

When the work giving rise to the duty to conform to the requirements of Labor Law § 240 (1) is delegated to a third party, that third party then obtains "'the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor'" (Walls v Turner Construction Company, 4 NY3d at 864, quoting Russin v Louis N. Picciano & Son, 54 NY2d 311, 318 [1981]). The parties' actual course of practice is controlling for the purposes of determining whether a construction manager is a statutory agent of the owner for the purposes of Labor Law § 240 (1) (Ortega v Catamount Construction Corporation, 264 AD2d 323, 324 [1st Dept 1999] [statutory agency found where construction manager was understood to be in charge of the project and to have overall responsibility for the work, including matters of safety]).

Here, defendant Tishman was in charge of hiring various subcontractors for the project, including plaintiff's employer, Resto. The subcontract between Tishman and Resto provided that Tishman "shall have the right to exercise complete supervision and control over the work to be done by [Resto]," though it also noted that "such supervision and control shall not in any way limit the obligations of [Resto] or shift responsibility for such supervision and control to [Tishman]" (Plaintiff's Notice for Partial Summary Judgment, Exhibit G, Resto Contract, at 9).

In addition, Lawrence Long (Long), Tishman's construction superintendent on the project, who had no personal knowledge of plaintiff's alleged accident, testified that Tishman was hired by owner RFD to be the construction manager for the project, and that his job duties

included keeping daily logs and making sure that subcontractors complied with job specifications for the project. Long also stated that he met with RFD's site safety manager, who was at the site every day and who held safety meetings about safety issues. Most importantly, plaintiff testified that he reported directly to Augie Fioreolo, Tishman's laborer foreman, every morning for his orders, and that Fioreolo told plaintiff how to perform his work. Thus, Tishman is to be considered a statutory agent of owner RFD so as to be liable under Labor Law § 240 (1).

It is noted that, as the scaffold from which plaintiff fell and sustained injury was approximately four feet high, the scaffold falls within the purview of Labor Law § 240 (1) (see Thompson v St. Charles Condominiums, 303 AD2d 152, 154 [1st Dept 2003] [Court noted that even though the scaffold at issue was only four feet above the ground, this did not "constitute a basis for ignoring the requirements of section 240 (1), especially when liability is based upon a defect in a protective device specifically listed in the statute"]; Gettys v Port Authority of New York and New Jersey, 248 AD2d 226, 227 [1st Dept 1998]).

Defendants RFD and Tishman assert that plaintiff's Labor Law § 240 (1) claim must be dismissed as against them, as plaintiff's own negligent action in trying to exit the moving scaffold was the sole proximate cause of his injuries. Where plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1) (Robinson v East Medical Center, LP, 6 NY3d 550, 554-55 [2006][plaintiff's own negligent actions in choosing a ladder he knew was too short for the work to be accomplished, and then standing on the ladder's top cap in order to reach the work, were, as a matter of law, the sole proximate cause of his injuries]; Montgomery v Federal Express Corporation, 4 NY3d 805, 806 [2005]; Cahill v

Triborough Bridge and Tunnel Authority, 4 NY3d 35, 39 [2004][where an employer has made available adequate safety devices and an employee has been instructed to use them, the employee may not recover under Labor Law § 240 (1) for injuries caused solely by his violation of those instructions]; Blake v Neighborhood Housing Services of New York City, Inc., 1 NY3d at 290). "Instead, the owner or contractor must breach the statutory duty under section 240 (1) to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries" (Robinson v East Medical Center, LP, 6 NY3d at 554).

However, where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence [internal quotation marks and citations omitted]" (Tavarez v Weissman, 297 AD2d 245, 247 [1st Dept 2002][emphasis in original]).

Here, defendants RFD and Tishman's failure to provide adequate safety devices to prevent the scaffold from moving and plaintiff from falling constituted a violation of Labor Law § 240 (1), and plaintiff's alleged negligence does not shield defendants from liability (see Torres v Monroe College, 12 AD3d at 262 [Court noted that even if another cause of the accident was plaintiff's own improper use of an unopened A-Frame ladder leaned against the wall from atop the scaffold, defendant's failure to ensure that the scaffold plaintiff needed to use to perform his assigned task provided proper protection, and was properly secured and braced, constituted a proximate cause of the accident]; Tavarez v Weissman, 297 AD2d at 246-247). Comparative fault is not a defense to a Labor Law § 240 (1) cause of action because the statute imposes

absolute liability once a violation is shown (Jamison v GSL Enterprises, Inc., 274 AD2d 356, 361 [1st Dept 2000] [Labor Law § 240 (1) applied although plaintiff's injuries were caused in part by his fateful decision to abandon a tilting scaffold in order to escape to the roof]; Bland v Manocherian, 66 NY2d 452, 460 [1985]; Dos Santos v State of New York, 300 AD2d 434, 434 [2d Dept 2002]).

In addition, although defendants argue that plaintiff has failed to establish that either the wheels were unlocked or that they were not working properly at the time of the accident, and that the scaffold could have moved as a result of the force of the wood hitting it, it was foreseeable that, under the circumstances, large pieces of wood might shoot back out of the truck and strike the scaffold, causing it to begin to move and plaintiff to attempt to exit the scaffold to safety (see Nimirovski v Vornado Realty Trust Company, 29 AD3d 762, 762-763 [2d Dept 2006] [as it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake, additional safety devices were required to satisfy Labor Law § 240 (1)]; Bush v Goodyear Tire & Rubber Company, 9 AD3d 252, 253 [1st Dept 2004]).

As such, the scaffold at issue was inadequate to protect the plaintiff against this potential hazard of plaintiff's work, and additional safety devices were needed in order to satisfy Labor Law § 240 (1). Thus, plaintiff is entitled to partial summary judgment on the issue of liability regarding his Labor Law § 240 (1) claim as against defendants RFD and Tishman. In addition, defendants RFD and Tishman are not entitled to summary judgment on their cross motion to dismiss plaintiff's Labor Law § 240 (1) claim as against them.

COMMON-LAW NEGLIGENCE AND LABOR LAW §§ 200 and 241 (6) CLAIMS AS AGAINST DEFENDANT CITYWIDE

Labor Law § 200 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' [citation omitted]" (Cruz v Toscano, 269 AD2d 122, 122 [1st Dept 2000]; see also Russin v Louis N. Picciano & Son, 54 NY2d at 316-17). Labor Law § 200 (1) states, in pertinent part, as follows:

> "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."

Here, Citywide cross-moves for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims against it. As discussed prior, plaintiff was discarding a piece of wood into the truck when the wood pushed out into the scaffold and caused it to move and plaintiff to fall. Thus, plaintiff's alleged accident is a result of a defect or danger arising out of the methods or materials used.

It is well-settled that in order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (Comes v New York State Electric & Gas Corporation, 82 NY2d 876, 877 [1993]; Fresco v 157 East 72nd Street Condominium, 2 AD3d 326, 328 [1st Dept 2003] [plaintiff submitted no evidence that defendant had the right to control his work, or in fact controlled the injury-producing activity]; Cruz v Toscano, 269 AD2d at 122 [the duty to provide a safe workplace not breached where

plaintiff's alleged injuries arose out of an alleged defect in his employer's tools and methods]; Colon v Lehrer, McGovern & Bovis, 259 AD2d 417, 419 [1st Dept 1999]).

Here, although Citywide may have had some authority over the proper usage and loading of the compactor truck, there is no evidence in the record to suggest that Citywide had any authority to control or supervise plaintiff's work, nor did it exercise such control and supervision so as to be liable for plaintiff's injuries under Labor Law § 200. In fact, a review of the contractual and testimonial evidence in the record reveals that Tishman, as the construction manager from whom plaintiff took his orders, and Resto, plaintiff's employer, had supervisory control over the performance of plaintiff's work. Thus, Citywide is entitled to summary judgment on its cross motion dismissing plaintiff's Labor Law § 200 claim as against it.

Although Citywide is not a proper Labor Law defendant in this case, Citywide may be liable for plaintiff's injuries under common-law negligence principles, independent of plaintiff's Labor Law § 200 claim (see Urbina v 26 Court Street Associates, LLC, 12 AD3d 225, 226 [1st Dept 2004] [the circumstance that defendant company which erected allegedly defective scaffold was not plaintiff's employer and did not supervise his work did not preclude a finding of liability against it on a common-law theory of negligent installation of scaffolding]; Giovengo v P&L Mechanical, 286 AD2d 306, 306 [1st Dept 2001]; Kanney v Goodyear Tire & Rubber Company, 245 AD2d 1034, 1036 [4th Dept 1997]).

Defendant Citywide argues that, as Citywide had no connection to the construction and operation of the moveable scaffold that caused plaintiff's alleged accident, it owed no duty to the plaintiff, nor did it have actual or constructive notice of the unsafe device that caused plaintiff's

accident. However, it is not Citywide's alleged negligence in connection to the moveable scaffold that is at issue here, but whether it was negligent in the manner in which it controlled the loading of the wood into the compactor truck.

Louis Carrillo (Carrillo), employed by Citywide as a compactor truck driver who performed rubbish removal for the project, testified that he did not know of plaintiff and was not aware of plaintiff's alleged accident. However, he did explain that only Citywide drivers operated the controls of the truck, which included controlling the blade which crushed the debris. As the blade was being operated, it was possible to observe the blade and the garbage entering the truck.

Carrillo noted that, although the compactor truck could crush just about anything, the larger pieces of wood, which were over four feet long, were supposed to be placed into a 30-yard-long container. However, if there was any wood that was longer than four feet that made it into the back of the truck, he would make sure that people were far away from the truck, as sometimes pieces would come back out from the truck. Specifically, Carrillo testified that sometimes when things were crushed "a little piece comes out from the truck." (Citywide's Notice of Cross Motion, Exhibit F, Carrillo Deposition, at 31-32). Carrillo also stated that if he observed a piece of wood that was not entirely within the truck at the time the blade was coming down, he would stop the blade.

Plaintiff testified that about 20 minutes before his alleged accident, the truck driver, who was able to see that he was putting wood into the truck, "tried to stop us from putting any more wood in there because he said it was illegal and he was doing a favor to [the] Tishman foreman"

(Citywide's Notice of Cross Motion, Exhibit D, Periera Deposition, at 136). In addition, plaintiff stated that the "driver said that it was illegal to put the wood into the truck because it was too long. So he said, he told him not to bring any more wood" (id. at 137-38).

Here, upon the submitted papers, triable issues of fact exist as to whether Citywide, as supplier and operator of the compactor truck, owed plaintiff a duty of care in making sure that the wood was loaded into the back of the compactor truck in a safe manner. In addition, there is a further triable issue of fact as to whether Citywide was negligent in the discharge of this duty when its driver allowed plaintiff to load a 10-to-12 foot long plank of wood into the back of the truck as a favor to the Tishman foreman, especially in light of testimony to the effect that Citywide knew that such an activity was not only illegal, but dangerous to workers present in the area of the truck (see Kanney v Goodyear Tire & Rubber Company, 245 AD2d at 1036). Thus, Citywide is not entitled to summary judgment on its cross motion to dismiss plaintiff's common-law negligence claim as against it.

In addition, plaintiff's complaint and bill of particulars also set forth a claim for relief pursuant to Labor Law § 241 (6). However, in its opposition papers, Citywide fails to address, let alone meet its burden under summary judgment, its entitlement to summary judgment dismissing plaintiff's Labor Law § 241 (6) as against it. Thus, Citywide is not entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim as against it.

CONCLUSION AND ORDER

For the foregoing reasons, it is

ORDERED that plaintiff Roberto Periera's motion for partial summary judgment as against defendants RFD Second Avenue, LLC (RFD) and Tishman Construction Corporation (Tishman) granting judgment in his favor regarding his Labor Law § 240 (1) claim is granted; and it is further

ORDERED that defendants RFD and Tishman's cross motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim as against them is denied; and it is further

ORDERED that the part of defendant Citywide Demolition and Rubbish Removal, Inc.'s (Citywide) cross motion for summary judgment dismissing plaintiff's Labor Law §§ 200 and 240 (1) claims as against it is granted, and such portion of the complaint is dismissed as to this defendant; and it is further

ORDERED that the part of defendant Citywide's cross motion for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 241 (6) claims as against it is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties with notice of entry.

DATED: 10/16/07

Hon. Doris Ling-Cohan, J.S.C.

G:\Supreme Court\Summary Judgment\periera.rfdsecond ave.wpd