Lamia v City of New York
2008 NY Slip Op 32136(U)
July 30, 2008
Supreme Court, New York County
Docket Number: 0102609/2004
Judge: Carol R. Edmead
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SCANNED ON 7/31/2008

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

PRESENT: ______________________ Justice

PART 35

Index Number : 102609/2004
LAMIA, CHRISTOPHER
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. ______
MOTION DATE 4/17/08
MOTION SEQ. NO. 001
MOTION CAL. NO. ______

this motion to/for ______

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits ______
Replying Affidavits ______

FILED
JUL 31 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

The motion and cross motion herein are decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the part of defendants' motion, pursuant to CPLR 3212, which seeks summary judgment dismissing plaintiff Christopher Lamia's complaint as against Tishman Harris J.V. Whitehall Ferry, Tishman Construction and Total Safety Consulting Corporation is granted, and the complaint is severed and dismissed as to these defendants, and the Clerk is directed to enter judgment in favor of these defendants, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the part of defendant's motion, pursuant to CPLR 3212, which seeks summary judgment dismissing plaintiff's Labor Law § 241 (1) through (5), 241-a, and common-law negligence and Labor Law § 200 claims as against City of New York is granted, and the motion is otherwise denied; and it is further

ORDERED that the part of plaintiff's cross motion for partial summary judgment in his favor on his Labor Law § 240 (1) claim, as well as its Labor Law § 241 (6) claim predicated on violations of Industrial Code 12 NYCRR 23-1.7 (b) (1) (I) and (ii) as against defendant City of New York is granted, and the cross motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 7/30/08

CAROL EDMEAD
J.S.C.

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 35

---x

CHRISTOPHER LAMIA,

Index No.: 102609/04

Plaintiff,

-against-

THE CITY OF NEW YORK, TISHMAN HARRIS J.V. WHITEHALL FERRY, JOHN SMITH (name being fictitious as General Partner), TISHMAN CONSTRUCTION and TOTAL SAFETY CONSULTING CORP.,

Defendants.

---x

THE CITY OF NEW YORK, TISHMAN HARRIS J.V. WHITEHALL FERRY, JOHN SMITH (name being fictitious as General Partner), TISHMAN CONSTRUCTION and TOTAL SAFETY CONSULTING CORP.,

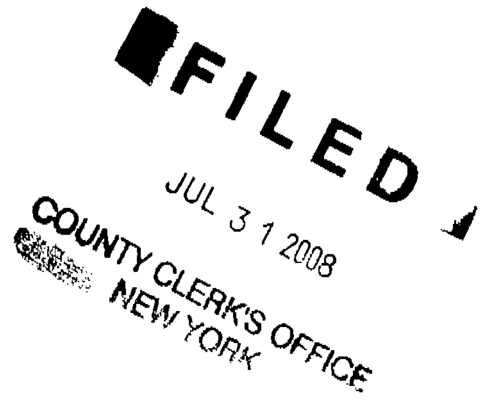
Third-Party Plaintiffs,

-against-

JOHNSON CONTROLS, INC. and NUNEZ ELECTRIC, INC.,

Third-Party Defendants.

---x



Edmead, J.:

This is an action to recover damages sustained by a worker when he fell through a hole in a floor while working on the renovation of the Whitehall Ferry Terminal in New York, New York on March 11, 2003. Defendants City of New York (City), Tishman Harris J.V. Whitehall Ferry, Tishman Construction (together, Tishman) and Total Safety Consulting Corporation (Total) (collectively, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Christopher Lamia's complaint against them. Plaintiff cross-moves for partial summary judgment in his favor on his common-law negligence and Labor Law §§ 200,

240 (1) and 241 (6) claims against defendants.

BACKGROUND

On the day of plaintiff's accident, defendant City owned Whitehall Ferry Terminal (the terminal) where plaintiff's accident took place. The New York City Economic Development Corporation (NYCEDC), an agency of City, contracted with defendant Tishman to perform consulting services on a project to renovate the terminal. Tishman hired defendant Total to serve as safety consultant on the project. Plaintiff was employed as an electrician by third-party defendant Nunez Electric, Inc. (Nunez).

In his deposition and affidavit, plaintiff stated that, on the day of his accident, he was advised by his foreman to join his co-worker John Roberti (Roberti) and then proceed to an area of the terminal to install conduit, which is tubing which carries electrical wiring. Plaintiff was told that they needed to "finish up in this area since waterproofing was going to be put down prior to the pouring of additional concrete" (Plaintiff's Notice of Cross Motion, Exhibit A, Plaintiff's March 5, 2008 Affidavit).

Plaintiff stated that when he and his co-worker arrived at their work location, the floor was covered with debris, which included paper bags, coffee cups, garbage and pieces of plywood. In order to utilize the scissor lift that was needed to perform their work, it was necessary to first clear the debris from the surface of the floor. While Roberti retrieved the scissor lift, plaintiff began clearing the area of debris. Plaintiff explained that, while he was clearing the debris, he observed an approximately two to three-foot by four-foot piece of unmarked plywood present in the work location. As the piece of plywood did not seem to be fastened or weighted down in any way, plaintiff assumed that it was debris that needed to removed.

In his affidavit, plaintiff described the events leading up to his accident as follows:

> (10) In an attempt to remove the plywood from our working area I attempted with my hands to slide the plywood forward out of the work area by lifting it up just enough to walk it forward.
>
> (11) I lifted the plywood just high enough to get my fingers underneath the board and began to slide it forward. There was no resistence to my push. The plywood was just laying flat on the surface of the concrete and was loose. I was unable to see the hole lurking below the plywood which continued to shield my view of the hole which was smaller than the plywood that had been concealing it.
>
> (12) While I was pushing the sheet of plywood forward, my whole body fell approximately three (3) feet, up to my chest, into an approximately six foot hole and landed on loose concrete, dirt and debris. There were no rails, ropes, nets or other safety devices on the outside or inside of the hole to prevent me from falling. The only reason that I did not fall all the way to [the] bottom of the hole was that there was some loose debris in the hole

(id.).

Plaintiff testified that, after falling into the approximately two-foot by two-foot wide and six-foot deep hole, he noticed that the surface of the hole reached somewhere "between my waist and my ribs" (Plaintiff's Notice of Cross Motion, Exhibit C, Plaintiff's Deposition, at 31-32).

On the day following his accident, plaintiff returned to the subject area to take some photographs, at which time he observed the presence of a waterproofing membrane surrounding the hole and which had not been present at the time of his accident.

Louis Gilmore (Gilmore), Tishman's project superintendent, testified that the hole was part of the structural design of the ferry terminal. The hole's purpose was to allow access to piping underneath the concrete floor. Eventually, the hole would be covered by a diamond steel plate access door. Gilmore explained that the foundation contractor would have created the opening in the floor when the concrete was originally poured. After this initial layer of concrete

floor was poured, a piece of plywood would then be nailed over the hole. After the concrete dried, which could take up to three weeks, the waterproofing contractor would place a waterproofing membrane down. At this time, the waterproofing contractor would have to remove the plywood protection, so that the waterproofing membrane could be pulled up to the edge of the hole.

Gilmore further explained that, once the waterproofing membrane was applied, the plywood would not be able to be re-nailed down, as the nails would puncture the membrane. Once the waterproofing membrane was installed, another layer of concrete would then be placed over it. Gilmore maintained that no one was to be allowed in the area of the waterproofing membrane before the top layer of concrete is poured, as maintaining the integrity of the waterproofing layer was very important. Gilmore also noted that, if he ever observed openings in the floor that were covered by pieces of unsecured plywood, he would tell a safety manager to find the offending party and bring the problem to their attention.

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]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; DeRosa v City of New York, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the

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

PLAINTIFF'S LABOR LAW § 240 (1) CLAIM AGAINST DEFENDANTS

Labor Law § 240 (1), also known as the Scaffold Law (Ryan v Morse Diesel, 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.

"'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 also 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]).

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 (Blake v Neighborhood Housing Services of New York City, 1 NY3d 280, 287 [2003]; Felker v Corning Inc., 90 NY2d 219, 224-225 [1997]; Torres v Monroe College, 12 AD3d 261, 262 [1st Dept 2004]).

Initially, it should be noted that City, as owner of the construction site, may be liable to plaintiff under Labor Law §§ 240 (1) and 241 (6). However, it must be determined whether defendants Tishman, as construction consultant/construction manager, and Total, Tishman's safety consultant, may be vicariously liable for plaintiff's injuries under Labor Law §§ 240 (1) and 241 (6) as statutory agents of the owner.

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 861, 864 [2005], 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]).

As to Tishman, a review of the record establishes that defendant Tishman did not have sufficient authority to supervise and control the injury-producing work at issue, so as to be held vicariously liable for plaintiff's injuries as a statutory agent of the owner under Labor Law §§ 240 (1) and 241 (6) (see Smith v McClier Corporation, 22 AD3d 369, 371 [1st Dept 2005] [Labor Law § 241 (6) claim dismissed as against defendant subcontractor because defendant was not owner or general contractor, and did not have authority to supervise and control injury-producing work]; Lazarou v Turner Construction Company, 18 AD3d 398, 399 [1st Dept 2005] [Labor Law

§ 240 (1) claim dismissed as against defendant where record established that defendant did not have sufficient supervision or control over the injury-producing work]).

Gilmore testified that Tishman was hired by NYCEDC to served as consultant to the owner for the renovation of the terminal. Gilmore stated that he did not consider Tishman to be the general contractor on the project, as every contractor was a prime contractor on the job, each holding a separate contract with NYCEDC.

As to Tishman's duties on the project, Gilmore stated:

> It was to handle submissions, scheduling, the logistics on the site, making sure everybody had a place to hang their hat, put their trailers, coordination between trades, consulting with the owner for that

(Plaintiff's Cross Motion, Exhibit F, Gilmore Deposition, at 6). Gilmore also testified that Tishman employed various personnel, including project managers, superintendents, administrative staff and a site safety manager. However, Gilmore maintained, "There were no laborers on this site, we were nothing but consultants" (id. at 96). Gilmore further explained that Rob Demagela, the owner's representative employed by the NYCEDC, was the person in charge of the entire project, and that he reported any problems at the site to him. In addition, Gilmore noted that another prime contractor, Arena Construction, actually employed the laborers who conducted debris removal at the site.

Frank Damigella (Damigella), a civil engineering consultant employed by NYCEDC to serve as its on-site representative, testified that it was his job to oversee, coordinate and monitor the work of the construction manager, consultants and design consultants, as well as to review their work. Damigella also stated that he did not report to anyone else at the job site.

The "General Scope of Services" provision of what is titled the "Consultant Contract"

[* 9]

between Tishman and NYCEDC, dated January 5, 1998 (the contract), gives Tishman the responsibility to coordinate and schedule work among the prime contractors, arrange for meetings and prepare reports. However, it specifically did not give Tishman the authority to direct and control the means and methods employed by the contractors retained by City, as set forth below:

> The Construction Manager shall not be responsible for construction means, methods, techniques, sequences and procedures employed by Contractors in the performance of their work, but shall be responsible for reviewing the same and shall verify that the Contractors carry out work in accordance with the Contract Documents. The Construction Manager shall immediately advise the Corporation if the construction means, methods ... employed by Contractors are dangerous or in the opinion of the Construction Manager is not in the best interests of the Project or the Corporation

(Plaintiff's Notice of Cross Motion, Exhibit G, January 5, 1998 Tishman/NYCEDC Consultant Contract, Scope of Construction Management Services, at Appendix A-8).

In addition, the contract also sets forth that, in the performance of the terms of the contract, Tishman and its subcontractors are to be considered independent contractors and not agents of City. To this effect, the contract specifically states:

Section 9.01 Consultant as Independent Contractor

> Notwithstanding anything contained herein to the contrary, it is specifically understood and agreed that in the performance of the terms, covenants and conditions of this Contract, the Consultant and its employees, agents and subcontractors shall not be deemed to be acting as agents, servants or employees of the Corporation or the City by virtue of this Contract or by virtue of any approval, permit ... or other authorization given by the City or the Corporation ... in connection with this contract, but shall be deemed independent contractors performing professional services for the Corporation, and shall be deemed solely responsible for all acts taken by them pursuant to this Contract

(id. at 25). As such, defendant Tishman is not to be considered a statutory agent of the owner for

the purposes of Labor Law §§ 240 (1) and 241 (6) liability.

Thus, defendant Tishman is entitled to summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims as against it. Accordingly, plaintiff is not entitled to partial summary judgment in his favor on his Labor Law §§ 240 (1) and 241 (6) claims as against Tishman.

As to Total, a review of the record establishes that defendant Total also did not have sufficient authority to supervise and control the injury-producing work at issue, so as to be held vicariously liable for plaintiff's injuries as a statutory agent of the owner under Labor Law §§ 240 (1) and 241 (6). Gilmore described Total's job on the project as follows:

> They would look for unsafe conditions and things like that, they would hold weekly meetings, safety meetings, and they did a safety orientation for each employee ... they made sure that the contractors were holding their weekly meetings, safety meetings

(Plaintiff's Notice of Cross Motion, Exhibit F, Gilmore Deposition, at 19).

Richard Green (Green), Total's site safety manager, testified that Total's duties and responsibilities included being "consultants to the general contractors on a job site to review safety procedures and hazardous conditions on the job site. We report them" (Plaintiff's Notice of Cross Motion, Exhibit D, Green Deposition, at 6). In addition, Green explained that Total's duties also entailed walking the job site, reporting hazardous conditions to the office, meeting with the project superintendents and contractors, discussing daily work, checking on various contractors, writing reports and holding progress meetings. Green stated that, during his walk-throughs of the job site, he would watch the contractors while they were working to see if they were working safely. Green stated that, although each contractor or subcontractor was responsible for cleaning up its own area, Tishman and Total walked the job site to make sure that

the contractors were cleaning their work areas. If Green found that their workers were working in an unsafe manner, he would tell the foreman, who would inform his workers that they were doing something wrong and that they had to correct it. Specifically, Green stated that, if he observed any unsafe conditions, he would "[f]ind out who was the contractor working in that area and ask them to fix it and then notify Tishman" (Plaintiff's Notice of Cross Motion, Exhibit D, Green Deposition, at 22). To that effect, Total was not authorized to stop work in the event of an unsafe condition or work practice. Although Total may have been under a general contractual obligation to ensure compliance with safety regulations, that is insufficient to support the imposition of liability on an agency theory (see Smith v McClier Corporation, 22 AD3d at 371).

Moreover, it should also be noted that, pursuant to the Tishman/NYSEDC contract, Total, as a subcontractor hired by Tishman to oversee its safety program, is not to be considered an agent of City. As such, defendant Total is not to be considered a statutory agent of the owner for the purpose of Labor Law §§ 240 (1) and 241 (6) liability.

Thus, defendant Total is entitled to summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims as against it. Accordingly, plaintiff is not entitled to partial summary judgment in his favor on his Labor Law §§ 240 (1) and 241 (6) claims as against Total. It should be noted that plaintiff's injury falls within the protection of Labor Law § 240 (1), as his work involved a gravity-related risk at the time of his accident (O'Connor v Lincoln Metrocenter Partners, L.P., 266 AD2d 60, 61 [1st Dept 1999] [Labor Law § 240 (1) applied where construction worker was injured when he fell into a three-foot by four-foot opening in the floor after plywood that had been placed over the opening gave way]; Carpio v Tishman Construction Corporation of New York, 240 AD2d 234, 235 [1st Dept 1997] [Court held that, as there was a

difference between the elevation level of the plaintiff's required work and a lower level, plaintiff's partial fall through a hole was related to the effects of gravity]).

Labor Law § 240 (1) requires that persons working at an elevation be provided with appropriate safety equipment to secure them from falling (Valensisi v Greens at Half Hollow, LLC, 33 AD3d 693, 695 [2d Dept 2006] ["The statute is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed (internal citations omitted)"]; Wasilewski v Museum of Modern Art, 260 AD2d 271, 271 [1st Dept 1999] [defendant liable under Labor Law § 240 (1) for failure to provide other safety devices, such as a safety belt, to a worker who fell from an unsecured ladder]).

In its opposition to plaintiff's cross motion for summary judgment, defendant City alleges that Labor Law § 240 (1) does not apply to the facts of this case, as plaintiff was responsible for creating the unsafe condition when he moved the plywood covering from the hole. Where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1) (see Robinson v East Medical Center, LP, 6 NY3d 550, 554 [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).

Contrary to defendant City's contention, plaintiff was not the sole proximate cause of his injuries, as any alleged contributory negligence attributable to him is immaterial, because the statutory violation has been established as a proximate cause of his injuries (see Figueiredo v New Palace Painters Supply Co. Inc., 39 AD3d 363, 364 [1st Dept 2007] [plaintiff sustained her prima facie burden under Labor Law § 240 (1) through admissible evidence that her decedent fell through an open hole when an unsecured piece of plywood laid over beams shifted and no safety device was provided to prevent the decedent's fall]; Valensisi v Greens at Half Hollow, LLC, 33 AD3d at 696 [where decedent was killed when he fell through an opening in a fiberglass grating while he was moving a plywood covering, Court found defendants' failure to provide or erect safety devices to prevent plaintiff's fall a Labor Law § 240 (1) violation]).

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]).

Here, plaintiff testified that the plywood cover was not marked, so as to warn workers of the hole. In addition, plaintiff was not provided with any safety devices, nor was there any secured covering or barricades or railings in place, so as to prevent plaintiff from falling into the hole while performing his work.

Thus, plaintiff is entitled to partial summary judgment in his favor on his Labor Law § 240 (1) claim as against City. Accordingly, City is not entitled to summary judgment dismissing plaintiff's Labor Law § 240 (1) claim as against it.

LABOR LAW § 241 (6)

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. ..."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (see Ross v Curtis-Palmer Hydro-Electric Company, 81 NY2d at 501-502). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (id.).

Although plaintiff lists multiple violations of the Industrial Code in his bill of particulars, with the exception of Industrial Code 12 NYCRR 23-1.7 (b) (1) (I), (ii) and (iii) and 23-1.15, 23-1.16 and 23-1.17, plaintiff does not address these Industrial Code violations in his moving papers. Thus, this court deems those parts of plaintiff's Labor Law § 241 (6) claim predicated on those violations not mentioned by plaintiff as abandoned (see Genovese v Gambino, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was

wrongfully terminated was deemed abandoned]).

In any event, with the exception of Industrial Code 12 NYCRR 23-1.7 (b) (1) (I) and (ii), the alleged violations are either not specific enough to sustain a cause of action under Labor Law § 241 (6), or they do not apply to the facts of this case.[1] Thus, plaintiff is not entitled to partial summary judgment in his favor on his Labor Law § 241 (6) claim predicated on these provisions. Accordingly, defendant City is entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on these provisions.

Industrial Code 12 NYCRR 23-1.7 (b) (1) (I) and (ii) state:

(b) Falling hazards
(1) Hazardous openings.

> (I) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).
>
> (ii) Where free access into such an opening is required by work in progress, a barrier or safety railing constructed and installed in compliance with this Part (rule) shall guard such opening and the means of free access to the opening shall be a substantial gate. Such gate shall swing in a direction away from the opening and shall be kept latched except for entry and exit.

"[A]lthough the term 'hazardous opening' is not defined in 12 NYCRR 23-1.7 (b), based upon a review of the regulation as a whole--particularly the safety measures delineated therein--it is apparent that the regulation is 'inapplicable where the hole is too small for a worker to fall

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[1]It should be noted that the regulations set forth in Industrial Code 12 NYCRR 23-1.15, 23-1.16 and 23-1.17, which set the standards for safety railings, safety belts, and life nets, respectively, are inapplicable in the instant case, because the plaintiff was never provided with any of these devices (see Dooley v Peerless Importers, Inc., 42 AD3d 199, 206 [2d Dept 2007] [plaintiff's reliance on Industrial Code 12 NYCRR 23-1.15 was misplaced, as that provision does not require safety railings in the first place, and the plaintiff was not provided with such a device]; Dzieran v 1800 Boston Road, LLC, 25 AD3d 336, 337 [1st Dept 2006]).

through'" (Rice v Board of Education of City of New York, 302 AD2d 578, 579 [2d Dept 2003] quoting Alvia v Teman Electrical Contracting, Inc., 287 AD2d 421, 422-423 [2d Dept 2001] ["hazardous openings" regulation did not apply where the 16 inch hole that worker fell into was too small for him to fall through]; Piccuillo v Bank of New York Company, 277 AD2d 93, 94 [1st Dept 2000] [where plaintiff was injured when he stepped into a hand hole, Court held that plaintiff's accident was not caused by the type of hazardous opening for which defendants would have been required to provide a cover or safety railing]; Messina v City of New York, 300 AD2d 121, 123 [1st Dept 2002] [the drainpipe hole into which plaintiff stepped was not considered a "hazardous opening"]; Serrano v St. James Episcopal Church, 12 Misc 3d 1190[A], 2006 NY Slip Op 51511[U] [Sup Ct, King County 2006] [court noted that the approximately one and half by two-foot hole that plaintiff fell into was "arguably big enough for someone to fall through"]).

Initially, it should be noted that Industrial Code 12 NYCRR 23-1.7 (b) (1) (I), requiring that hazardous openings into which a person may step or fall be guarded by a substantial cover fastened in place or by a safety railing, is sufficiently concrete in its specifications to support plaintiff's Labor Law § 241 (6) claim (see Scarso v M.G. General Construction Corporation, 16 AD3d 660, 661 [2d Dept 2005]; Olsen v James Miller Marine Service, Inc., 16 AD3d 169, 171 [1st Dept 2005]).

Here, plaintiff is entitled to partial summary judgment in his favor on that part of his Labor Law § 241 (6) claim predicated on a violation of Industrial Code 23-1.7 (b) (1) (I), because the subject two-foot by two-foot hole, which was arguably large enough for plaintiff to fall through, was not sufficiently guarded by a cover or railing, so as to prevent plaintiff from stepping into it.

Industrial Code 12 NYCRR 23-1.7 (b) (1) (ii), which requires a barrier or safety railing with a substantial gate where free access into such an opening is required by the work, is also sufficiently concrete in its specifications to support plaintiff's Labor Law § 241 (6) claim (see Messina v City of New York, 300 AD2d at 123; Piccuillo v Bank of New York Company, 277 AD2d at 94]).

Here, plaintiff is entitled to partial summary judgment in his favor on that part of his Labor Law § 241 (6) claim predicated on a violation of Industrial Code 23-1.7 (b) (1) (ii), as evidence in the record indicates that defendants failed to guard the opening of the subject pit, which was created in order to allow free access to piping underneath the concrete floor by workers, with a barrier or safety railing with a substantial gate, as required by the provision.

Thus, defendant City is not entitled to summary judgment dismissing that part of plaintiff's Labor Law § 241 (6) claim predicated on violations of Industrial Code 12 NYCRR 23-1.7 (b) (I) and (ii) as against it. Accordingly, plaintiff is entitled to partial summary judgment in his favor on his Labor Law § 241 (6) claim predicated on violations of Industrial Code 12 NYCRR 23-1.7 (b) (I) and (ii) as against defendant City.

COMMON-LAW NEGLIGENCE AND LABOR LAW § 200 CLAIMS

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 317). 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."

Although defendants argue the issue of supervision, or lack thereof, on their part, that standard applies in Labor Law § 200 cases which involve injuries resulting from the means and methods of the work. However, in this case, plaintiff's injuries allegedly arose from an unsafe condition created when the plywood protection over the hole was left unsecured. In such a case, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident (see Keating v Nanuet Board of Education, 40 AD3d 706, 708-709 [2d Dept 2007] [where plaintiff's injuries stemmed not from the manner in which the work was performed, but rather from a dangerous condition on the premises, general contractor was liable in common-law negligence and Labor Law § 200 when it had control over the work site and actual or constructive notice of the same]; Thomas v Claffee, 24 AD3d 749, 751 [2d Dept 2005]; Murphy v Columbia University, 4 AD3d 200, 202 [1st Dept 2004] [to support finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff because the injury arose from the condition of the work place created by or known to contractor, rather than the method of plaintiff's work]).

Here, there is no indication in the record to support a finding that any of the defendants created the unsafe condition at issue, or that they had actual or constructive notice of the same. Even in the event that it is demonstrated that defendants should have known that the hole existed, no evidence was presented to demonstrate that they were made aware that the plywood protection had been loosened prior to plaintiff's accident. Thus, defendants are entitled to summary

judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims against them. Accordingly, plaintiff is not entitled to partial summary judgment in his favor on his common-law negligence and Labor Law § 200 claim against defendants.

In addition, as plaintiff has not opposed defendants' motion to dismiss his Labor Law § 241 (1) through (5) and 241-a claims against defendants, this court deems these claims to be abandoned (see Genovese v Gambino, 309 AD2d at 833). In any event, these claims do not apply to the facts of this case. Thus, defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (1) through (5) and 241-a claims against them.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the part of defendants' motion, pursuant to CPLR 3212, which seeks summary judgment dismissing plaintiff Christopher Lamia's complaint as against Tishman Harris J.V. Whitehall Ferry, Tishman Construction and Total Safety Consulting Corporation is granted, and the complaint is severed and dismissed as to these defendants, and the Clerk is directed to enter judgment in favor of these defendants, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the part of defendant's motion, pursuant to CPLR 3212, which seeks summary judgment dismissing plaintiff's Labor Law § 241 (1) through (5), 241-a, and common-law negligence and Labor Law § 200 claims as against City of New York is granted, and the motion is otherwise denied; and it is further

ORDERED that the part of plaintiff's cross motion for partial summary judgment in his favor on his Labor Law § 240 (1) claim, as well as its Labor Law § 241 (6) claim predicated on

violations of Industrial Code 12 NYCRR 23-1.7 (b) (1) (I) and (ii) as against defendant City of New York is granted, and the cross motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

DATE: July 30, 2008

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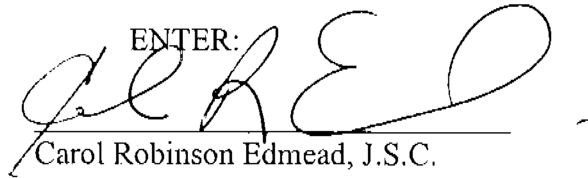

Carol Robinson Edmead, J.S.C.

CAROL EDMEAD J.S.C.

FILED
JUL 31 2008
COUNTY CLERK'S OFFICE
NEW YORK