

Figueroa v City of New York

2008 NY Slip Op 32341(U)

August 21, 2008

Supreme Court, New York County

Docket Number: 0102967/2006

Judge: Walter B. Tolub

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PRESENT: **WALTER B. TOLUB**

PART 15

Justice

Index Number : 102967/2006

FIGUEROA, CARLOS

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED


IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

AUG 25 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/21/08



WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15**

-----X
CARLOS FIGUEROA and ROSLYN FIGUEROA,

Index No.: 102967/06

Plaintiffs,

-against-

THE CITY OF NEW YORK and RC DOLNER, LLC,

Defendants.

-----X
RC DOLNER, LLC,

Third-Party Plaintiff,

-against-

DONALDSON ACOUSTICS CO., INC.,

Third-Party Defendant.

-----X
Tolub, J.:

This is an action to recover damages sustained by a worker while performing ceiling framing work at the Metropolitan Museum of Art (the museum) in New York, New York on July 6, 2005. Plaintiffs Carlos Figueroa (plaintiff) and Roslyn Figueroa move, pursuant to CPLR 3212, for partial summary judgment in their favor on the issue of defendants City of New York (City) and RC Dolner, LLC's (Dolner) liability under Labor Law 240 (1), as well as an order setting this case down for an immediate assessment of damages on this issue. Defendant City cross-moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6) claims as against it. Defendant and third-party plaintiff Dolner cross-moves, pursuant to CPLR 3212, for summary judgment dismissing

plaintiff's complaint in its entirety, together with all cross claims and counterclaims as against it.

BACKGROUND

Defendant City is the owner of the property where plaintiff's accident took place. Defendant and third-party plaintiff Dolner served as construction manager on a project to renovate a wing of the museum, pursuant to a construction management agreement with the museum. Plaintiff's employer, third-party defendant Donaldson Acoustics Company, Inc. (Donaldson), was hired to perform certain interior construction work pursuant to a subcontract with Dolner.

At his deposition, plaintiff testified that, at the time of his accident, he had been working as a carpenter for Donaldson for six years and on the museum project for close to two years. Plaintiff stated that he reported solely to his foreman, Vinny Spinelli (Spinelli), of Donaldson. In addition, plaintiff only received his work instructions from Spinelli.

Plaintiff testified that on the day before his accident, he began work on a project which involved framing the ceiling over the windows located on the mezzanine level of the wing. In front of each of approximately 12 windows, an opening in the shape of a semicircle was cut into the mezzanine floor. These openings measured the exact width of the windows and extended five feet in front of each window.

In order to reach the ceiling area above the window where he was to begin his work, plaintiff built a platform out of two-by-fours and plywood, which he then set up over the opening in front of the window that he planned to frame first. Plaintiff noted that, initially, the platform he had constructed was unbalanced, so he balanced it out. When he finished his work that day, his foreman told him to leave the platform in place, as there was still some work to do in that

area.

When plaintiff arrived to work the next day, Spinelli directed him to begin framing the ceiling over another window. Plaintiff noticed that the opening in front of that window was not covered, so he spoke to the Donaldson shop steward about the problem. The shop steward then spoke to his foreman who advised plaintiff that some protection would be put in place for him.

Plaintiff testified that he later observed laborers, who were hired by Dolner, covering the opening with a temporary platform. The laborers assembled the temporary platform by laying two 12-inch wide by 16-foot long aluminum picks, which resembled ladders, in a horizontal manner next to the window and then covering the picks with two pieces of plywood. Plaintiff then placed an eight-foot A-frame ladder on top of the temporary platform, so that he could reach the area of the ceiling to be framed. Plaintiff testified that, after he had completed his framing work without incident, Spinelli directed him to move the temporary platform on which he had been working to the opening in front of next window over. Plaintiff then exited the platform as he removed the ladder.

Plaintiff explained that, after discussing how to best move the temporary platform, his partner, Jerry Bruen (Bruen), assisted him in moving it. At this point, Bruen stood on the mezzanine floor, while plaintiff stood on one of the pieces of plywood. The two men then lifted the other piece of plywood which was located adjacent to where plaintiff was standing. As they moved this piece of plywood towards Bruen, plaintiff attempted to step onto the newly exposed pick located closest to the window. Plaintiff stated that he felt his feet slide out from under him as he fell through the open hole in the floor.

Specifically, plaintiff testified:

[W]e moved the plywood a little bit so we could reach it and lift it right and I step forward and my right feet and put my feet on top of the pick and I don't know what happened. I slip, probably something is wet or something - It was so fast. It was just - it kind of moved. So I just right there, went down

(Plaintiff's Notice of Motion, Exhibit C, Figueroa Deposition, at 59-60).

Plaintiff also maintained that he was forced to stand on one of the sheets of plywood while moving the other one, because it was necessary to maneuver the plywood around a stack of sheetrock which was located approximately three feet away from the opening.

In his affidavit of March 7, 2008, Spinelli stated that he was working at the museum as a foreman for Donaldson at the time of plaintiff's accident. As plaintiff's foreman, Spinelli maintained that he alone directed plaintiff's work, and that "no other entity or individual supervised, directed or controlled the means and methods of his work" (Dolner's Amended Notice of Cross Motion, Exhibit F, Spinelli Affidavit).

Spinelli also stated that, before plaintiff began work on the day of his accident, he instructed plaintiff to continue the framing work on the mezzanine level ceiling of the museum. Spinelli explained that plaintiff had completed the framing work without incident, and that, upon finishing, along with his partner, plaintiff "elected to attempt to move the platform," and in doing so, plaintiff fell to the floor below (*id.*). Spinelli maintained that he "did not direct plaintiff" or his partner to move the platform, as "plaintiff's assignment was to continue framing the area of the ceiling adjacent to where the platform was located" (*id.*). Specifically, Spinelli stated:

Plaintiff was not moving the platform at my behest or request, and, in fact, the platform was to stay in place until moved by another entity on site. Plaintiff was aware that it was another entity's responsibility to move the platform

(*id.*).

Michael Jones (Jones), Dolner's project manager, testified that Dolner was hired to serve as construction manager on the ongoing renovation project at the museum. Jones explained that, on the date of plaintiff's accident, the mezzanine floor slab on the east side of the project was in place. The mezzanine floor contained cutouts located in front of each of approximately 12 windows. These window cutouts, which were a design feature, were each approximately four feet wide by six feet long in size and surrounded the perimeter of the gallery. Eventually, each of the window cutouts would get a glass rail around it, so that one could walk up to the glass rail in front of the window and look down to the first floor 10 to 12 feet below.

In the meantime, protective coverings were in place over the window cutouts. These protective coverings were each comprised of a two-foot wide by six-foot long wooden frame, which was then screwed into the side of a concrete slab. A sloped plywood cover was then screwed into the wooden frame of each covering.

Jones stated that, due to the sloping nature of the protective covering over the openings, in order for Donaldson's workers to be able to utilize their ladders, it was necessary for the protective coverings to be removed and a more level temporary platform to be set up over the openings. Jones explained that the temporary setup consisted of two metal picks laid horizontally over the openings. Two pieces of plywood were then secured over the picks. However, the picks were not secured to anything. Jones maintained that the temporary platform was installed as soon as the original protective covering was removed. Jones noted that the method of working above the window cutouts was not one that was approved by Dolner, but one that the trade contractors devised on their own as their means and method to install their work.

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 defendant Dolner, as construction manager, may be vicariously liable for plaintiff's injuries under Labor Law §§ 240 (1) and 241 (6) as a statutory agent of the owner.

“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 (Walls v Turner Construction Company, 4 NY3d 861, 863 [2005]). “When the work giving rise to [the duty to conform to the requirements of Labor Law § 240 (1)] has been 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” (*id.*, 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]).

Jones testified that Dolner was hired by the museum, pursuant to a “Construction Management Agreement,” for the ongoing renovation project. In describing Dolner’s role as construction manager on the project, Jones stated that Dolner would “basically act as representatives for the Metropolitan Museum of Art for all of the construction activities, hire the subcontractors, schedule the coordination” (Plaintiff’s Notice of Motion, Exhibit D, Jones Deposition, at 11). With respect to the coordination of the project, Jones noted that this meant “[m]aking sure that the subcontractors perform the work in accordance with the plans and specifications issued by the architect” (*id.*, at 12). In addition, when coordinating the work, safety is taken into consideration in that “[w]hen setting a trade to work into an area, we kind of make

sure the area is safe, to the best of our knowledge" (*id.* at 12-13).

Jones explained that Dolner had approximately 10 to 15 employees working on the project, including two superintendents who were responsible for scheduling the work, coordinating the trades and running the job per schedule. In addition, the superintendents would walk the job site on a daily basis, look for unsafe conditions and maintain daily logs. These superintendents also had the authority to stop work if they observed an unsafe condition. Jones noted that he would walk the job site at least twice a week to check job progress, though he would not necessarily be looking for unsafe conditions. If he did come across an unsafe condition, he would report it to the site safety manager or one of the superintendents, though he did have the authority to stop work if he observed an unsafe condition.

Jones also testified that, pursuant to a written agreement, Dolner hired Adam Galvin (Galvin) of Safety and Quality Plus to serve as a safety manager at the site. Galvin's duties included walking the job site to make sure that the safety measures that had been put in place were followed and holding site safety meetings. If Galvin noticed any corrective measures that needed to be taken, he would report them to the superintendent and then document the condition. Dolner, as well as all of the trade contractors, was required to submit a site safety plan, which was reviewed by Dolner's site safety manager. The various trades on the project also attended their own safety meetings. Although no one from Dolner attended those meetings, the trades submitted the minutes of their meetings to Dolner's site safety manager.

Pursuant to the terms of the construction management agreement, the museum's employees, Nicholas Cameron and Eric Hahn, were designated as the museum's representatives and were vested with "full power and authority, on behalf of the Owner [MMA], to administer

this Agreement on behalf of the Owner ... ” (Dolner's Amended Notice of Cross Motion, Dolner/MMA Agreement, Exhibit A, at 2). The construction management agreement also stated:

The Owner also reserves the right to retain an independent firm to render additional representation and construction administrative services on behalf of the Owner. The Construction Manager hereby agrees that it shall also fully cooperate with any such independent firm as directed by Owner

(id.).

Although Dolner's duties included making recommendations regarding the hiring of subcontractors, the construction management agreement limited Dolner's authority to hire subcontractors. To this effect, the construction management agreement stated:

2.3. Nothing contained in this Agreement shall be deemed to authorize the Construction Manager to perform with its own forces or to subcontract for any act which would constitute the rendering of professional services, such as the practice of architecture, engineering ...

(id. at 3).

However, the agreement did permit Dolner to subcontract out portions of its own work, though all subcontracts were subject to the museum's prior written approval. As to its own subcontracts, the construction management agreement required that Dolner “supervise the performance of the Work of all Subcontractors,” as well as “guarantee the performance of all Work, whether by its own forces or pursuant to a Subcontract” (id. at 10).

Here, a review of the record establishes that, although laborers hired by Dolner had a hand in setting up the temporary platform that was necessary for plaintiff to perform his work, Dolner did not have sufficient authority to supervise and control the injury-producing work at issue, i.e., the method by which plaintiff and his co-worker disassembled the temporary platform, 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]).

As such, defendant Dolner 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 Dolner 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 summary judgment in his favor on his Labor Law § 240 (1) claim as against Dolner.

In its opposition to plaintiff's motion for summary judgment, defendant City argues that it is not liable for plaintiff's injuries under Labor Law § 240 (1), as the temporary platform at issue was sufficiently safe for the purposes of plaintiff's ceiling framing work. As plaintiff's duties did not include moving the temporary platform, it was unforeseeable that plaintiff would be exposed to an elevation-related risk. There must be "a foreseeable risk of injury from an elevation-related hazard to impose liability under the statute" (Shipkoski v Watch Case Factory Associates, 292 AD2d 587, 588 [2d Dept 2002]).

However, evidence in the record indicates that plaintiff's duties did, in fact, include the installation of temporary coverings over the openings in the area where he was to work. As such, it was foreseeable that plaintiff would undertake the task of moving the temporary platform to the next window area in order to continue his ongoing job of ceiling framing. Plaintiff testified that,

on the day prior to his accident, it was he who constructed and installed the platform over the opening where he was to perform his assigned ceiling framing work. In addition, Spinelli told plaintiff to leave this platform in place, not because it was not plaintiff's job to move it, but because there was still more work to be done in the area.

It should be noted that, although City maintains that, in Spinelli's affidavit, Spinelli stated that plaintiff attempted to move the platform after Spinelli specifically directed him not to do so, in fact, Spinelli stated only that he did not direct plaintiff to move the platform, and that his instruction to plaintiff was to "continue this framing work as the entirety of the mezzanine level ceiling, a very large area, needed to be framed" (City's Amended Notice of Cross Motion, Exhibit F, Spinelli Affidavit). Thus, as plaintiff was not specifically instructed not to move the temporary platform, it was foreseeable that plaintiff would find it appropriate to take on the task himself, as he had done the day prior to his accident. In addition, as the picks were not secured in any way, the set up was not overly difficult to move. While it is true that Spinelli maintained that plaintiff was aware that it was another entity's responsibility to remove the platform, such a vague assertion is not sufficient to create an issue of fact as to the whether plaintiff's action in attempting to move the temporary platform was a foreseeable one.

Defendant City also alleges that Labor Law § 240 (1) does not apply to the facts of this case, as plaintiff's unsafe method of moving the temporary platform made plaintiff the sole proximate cause of his injuries. Where a plaintiff's actions in 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).

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]; see also 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 693, 696 [2d Dept 2006] [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]).

Here, plaintiff testified that, although a harness could have been made available to him to use while he performed his ceiling framing work, he did not request one as there was nothing to tie a harness off to. At his 50H hearing, plaintiff testified that he was not provided with any fall protection, harness or place to tie off while working over the open hole. He also noted that the

picks were not fastened to the ground in any manner.

In addition, even if the plywood cover over the hazardous opening at issue is deemed a safety device, “the availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures” (Clark v Fox Meadow Builders, Inc., 214 AD2d at 884, quoting Conway v New York State Teachers' Retirement System, 141 AD2d 957, 958-959 [3d Dept 1988]). Although the plywood cover may have provided proper protection while it was in place over the subject hazardous opening, once it was removed, plaintiff was “exposed to an elevation-related risk which required additional precautionary measures or devices” (id.).

It should also be noted that the fact that it was plaintiff who removed the plywood cover does not create a question of fact on the proximate cause issue (see Justyk v Treibacher Schleifmittel Corporation, 4 AD3d 882, 883 [4th Dept 2004] [concluding that the plaintiff's exposure of the hole that he fell into was not an unforeseeable, intervening act, the Court noted that, although the plaintiff was the one who exposed the hole when, in accordance with his duties, he removed a section of the roof with a serrated shovel, plaintiff's conduct did not create a question of fact on the issue of proximate cause because plaintiff's own carelessness was irrelevant]; Clark v Fox Meadow Builders, Inc., 214 AD2d 882, 883-884 [3d Dept 1995] [Court held that plaintiff's injuries fell within the purview of Labor Law § 240 (1)] where plaintiff fell through an opening that he created as part of his work of installing insulation board]).

This is also not a case of a recalcitrant worker, wherein a plaintiff was specifically instructed to use a safety device and refused to do so (see Olszewski v Park Terrace Gardens, 306

AD2d 128, 128-129 [1st Dept 2003]; Morrison v City of New York, 306 AD2d 86, 87 [1st Dept 2003]; DePalma v Metropolitan Transportation Authority, 304 AD2d 461, 461 [1st Dept 2003] [Court rejected a recalcitrant worker defense where there was no evidence that plaintiff's decedent had refused to use a safety harness, and the fact that safety harnesses may have been available at the work site was insufficient to allow defendants to escape Labor Law § 240 (1) liability]; Crespo v Triad, Inc., 294 AD2d 145, 147 [1st Dept 2002]; Sanango v 200 East 16th Street Housing Corporation, 290 AD2d 228, 228-229 [1st Dept 2002]). "[T]he duty to see that safety devices are furnished and employed rests on the employer in the first instance" (Aragon v 233 West 21st Street, 201 AD2d 353, 354 [1st Dept 1994]).

Here, there is no evidence from which an inference can be made that plaintiff refused to avail himself of an available safety harness. Plaintiff testified that, although a safety harness could have been made available to him, there was no place to tie off to. In addition, Jones testified that, although there were locations where the Donaldson workers could tie off and those locations were made known to the workers, Dolner did not direct them to tie off, as it was not Dolner's responsibility "to tell [those] guys how to do their work ... their means and methods on how they install their work is up to them" (Plaintiff's Notice of Motion, Exhibit D, Jones Deposition, at 45). In fact, Dolner stated that he would not consider it an unsafe condition to have a worker on the platform system who was not tied off, as there was no need to be tied off when the window cutouts were properly covered.

Thus, plaintiff is entitled to summary judgment in his favor on his Labor Law § 240 (1) claim as against defendant City. Accordingly, defendant 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) and (iii) (b) and (c) and 23-1.16, 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 (iii) (b), 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 It should also be noted that, contrary to plaintiff's contention, it is well settled that violations of OSHA standards do not provide a basis for liability under Labor Law § 241 (6) (see Vernieri v Empire Realty Company, 219 AD2d 593, 597 [2d Dept 1995]; McGrath v Lake Tree Village Associates, 216 AD2d 877, 878 [4th Dept 1995]).

Thus, defendant City is entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on these abandoned provisions.

Industrial Code 12 NYCRR 23-1.7 (b) (1) (i) states:

- (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).

Initially, it should be noted that Industrial Code 12 NYCRR 23-1.7 (b) (1) (i) 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]).

¹It should be noted that the regulations set forth in Industrial Code 12 NYCRR 23-1.16, which sets the standards for safety belts, harnesses, tail lines and lifelines, are inapplicable in the instant case, because the plaintiff was never provided with any of these devices (see Dzieran v 1800 Boston Road, LLC, 25 AD3d 336, 337 [1st Dept 2006]; Avendano v Sazerac, Inc., 248 AD2d 340, 341 [2d Dept 1998]).

Here, defendant City is entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 23-1.7 (b) (1) (i), as this provision does not apply to the situation at hand. During the time that plaintiff was performing his ceiling framing work, it was necessary to replace the original protective covering with a temporary platform, as that original covering was slanted and did not provide the level surface needed for plaintiff to perform his work. Had railings been in place, it would not have been possible to install and utilize the temporary platform. Thus, defendant City is 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) (1) (i).

Initially, it should be noted that Industrial Code 12 NYCRR 23-1.7 (b) (1) (iii) (b) is sufficiently concrete in its specifications to support plaintiff's Labor Law § 241 (6) claim (see Luckern v Lyonsdale Energy Ltd. Partnership, 281 AD2d 884, 886-887 [4th Dept 2001]).

Industrial Code 12 NYCRR 23-1.7 (b) (1) (iii) (b) states:

- (b) Falling hazards.
- (1) Hazardous openings.
 - (iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows:
 - * * *
 - (b) An approved life net installed not more than five feet beneath the opening.

Here, as plaintiff was required to work next to a hazardous opening, and as evidence in the record indicates that plaintiff was not provided with an approved life net installed not more than five feet beneath the opening, defendant City is not entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.7 (b) (1) (iii) (b).

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.”

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of a dangerous condition, and when the accident is the result of the means and methods used by the contractor to do its work (see e.g. McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints, 41 AD3d 796, 797-798 [2d Dept 2007]).

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] [no Labor Law § 200 liability where plaintiff’s injury was caused by lifting a beam and there was no evidence that defendant exercised supervisory control or had any input into how the beam was to be moved]). Moreover, “general supervisory control is insufficient to impute liability pursuant to Labor Law §

200, which liability requires actual supervisory control or input into how the work is performed” (Hughes v Tishman Construction Corporation, 40 AD3d 305, 311 [1st Dept 2007]; Burkoski v Structure Tone, Inc., 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where defendant construction manager did not tell subcontractor or its employees how to perform subcontractor’s work]; Smith v 499 Fashion Tower, LLC, 38 AD3d 523, 524-525 [2d Dept 2007]).

When the accident arises from a dangerous condition on the property, 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, and plaintiff need not demonstrate that the defendant exercised supervision and control over the work being performed (see Murphy v Columbia University, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor’s supervision and control over plaintiff’s work because the injury arose from the condition of the work place created by or known to contractor, rather than the method of the work]).

Here, it appears that the accident resulted from both an allegedly dangerous condition (the fact that the pick that plaintiff was standing on at the time of his accident was unsecured) and the means and methods of the work (the fact that plaintiff attempted to disassemble the platform while still standing on it, rather than instead standing on the mezzanine floor).

However, as to defendant City, whether the accident resulted from the means and methods of the work or from a dangerous condition, City is entitled to summary judgment dismissing plaintiff’s common-law negligence and Labor Law § 200 claims as against it. There is no indication in the record to support a finding that City exercised supervisory control over the

means and methods of the work, or had actual or constructive notice of the unsafe condition at issue.

Plaintiff testified that he was supervised solely by his supervisor, Spinelli. Spinelli stated in his affidavit that he alone directed plaintiff's work, and that "no other entity or individual supervised, directed or controlled the means and methods of his work" (Dolner's Amended Notice of Cross Motion, Exhibit F, Spinelli Affidavit). Spinelli also stated that, on the date of plaintiff's accident, he instructed plaintiff to continue the framing work on the mezzanine level ceiling of the museum.

In addition, plaintiff, who testified that he had worked at the site for approximately two years, testified that he had never seen any representatives from City at the site. In addition, Jones also had no knowledge of any involvement by City with the project.

As to Dolner, as discussed previously, there is no evidence in the record to indicate that Dolner exercised supervisory control or had any input into how plaintiff performed his work. In fact, Jones testified that Dolner did not direct the Donaldson workers to tie off, as the means and methods as to how the Donaldson workers installed their work was up to them. Moreover, while Dolner may have had some overall responsibility for job safety at the site, this duty to enforce general safety was insufficient to raise a question of fact as to any negligence on its part (see O'Sullivan v IDI Construction Company, Inc., 28 AD3d 225, 226 [1st Dept], aff'd 7 NY3d 805 [2006] [while the general contractor's safety manager may have had overall responsibility for safety at the job site, this duty to enforce general standards of safety was insufficient to raise a question of fact as to any negligence on its part]; Singh v Black Diamonds LLC, 24 AD3d 138, 140 [1st Dept 2005] [where it was demonstrated that plaintiff never took orders from defendant

and defendant had no responsibility to oversee the work performed by plaintiff or his employer, and that defendant conducted regular walk-throughs of the site and, if he observed an unsafe condition, had the authority to correct it, or, if necessary, to stop work, Court held that defendant's general supervision and coordination of the work site was insufficient to trigger Labor Law § 200 liability)).

However, as Dolner's laborers set up the temporary platform at issue in this case, it cannot be said that Dolner did not create or have actual or constructive notice of the unsafe condition that caused plaintiff's accident. Thus, defendant Dolner is not entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims as against it. In addition, as Dolner has not established its entitlement to dismissal of any cross claims and counterclaims as against it, that part of Dolner's cross motion seeking dismissal of said claims is denied.

As plaintiff's common-law negligence and Labor Law §§ 200 and 241 (6) claims are still pending, plaintiff's request, pursuant to CPLR 3212 (c), for an order setting this matter down for an immediate trial on the issue of damages owed to plaintiff by defendants for their violation of Labor Law § 240 (1) is denied, and the issue of damages is to be determined at trial.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiffs Carlos Figueroa and Roslyn Figueroa's motion for partial summary judgment on the issue of defendants' liability under Labor Law § 240 (1) is granted only as against City of New York (City), with the issue of the amount of damages to await trial; and it is further

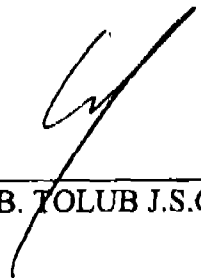
ORDERED that the parts of defendant City's cross motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims, as well as dismissing plaintiff's Labor Law § 241 (6) claim predicated on violations of those Industrial Code provisions alleged by plaintiff, with the exception of Industrial Code 12 NYCRR 23-1.7 (b) (1) (iii) (b), as against it are granted, and these claims are severed and dismissed as against this defendant, and City's cross motion is otherwise denied; and it is further

ORDERED that the part of defendant and third-party plaintiff RC Dolner, LLC's cross motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims as against it is granted, and these claims are severed and dismissed as against this defendant, and Dolner's cross motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

Counsel for the parties are directed to appear for a pre-trial conference on September 26, 2008 at 11:00AM in room 335 at 60 Centre Street.

DATED: _____



WALTER B. TOLUB J.S.C.

MAILED
AUG 25 2008
COUNTY CLERK'S OFFICE
NEW YORK