Haimeur v Astoria Energy LLC

2009 NY Slip Op 31086(U)

May 13, 2009

Supreme Court, New York County

Docket Number: 109910/06

Judge: Carol R. Edmead

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SCANNED ON 5/18/2009

[* 1]

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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Index Number : 109910/2006

HAIMEUR, JAMAL

VS.

ASTORIA ENERGY LLC

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

MAY 18 2009

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

It is hereby

ORDERED that motion sequence 002 and 003 are decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that defendants Astoria Energy LLC (Astoria), Stone & Webster, Inc., Stone & Webster Construction Company, Inc., Stone & Webster Construction, Inc., Stone & Webster Management Consultants, Inc., Stone & Webster Management Consultants Inc., Stone & Webster A Shaw Group Company (together, S&W) and Thyssenkrupp Safway, Inc.'s motion (motion sequence number 002), pursuant to CPLR 3212, for summary judgment dismissing plaintiff Jamal Haimeur's common-law and Labor Law § 200 claim is granted, and these claims are severed and dismissed, and the motion is otherwise denied; and it is further

ORDERED that the part of plaintiff's motion (motion sequence number 003), pursuant to CPLR 3025 (b), granting plaintiff leave to supplement his bill of particulars to include alleged Industrial Code violations not previously pled in his bill of particulars is granted; and it is further

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

Dated: _____ _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

ORDERED that plaintiff's motion (motion sequence number 003), pursuant to CPLR 3212, for partial summary judgment in his favor on the issue of defendants' liability on his Labor Law § 240 (1) claim, as well those parts of his Labor Law § 241 (6) claim predicated on violations of Industrial Code 12 NYCRR 23-1.7 (f), 23-5.1 (j) (1) and 23-5.3 (f), is granted as to defendants Astoria and S&W only, and the motion is otherwise denied; and it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty days of entry on all counsel; and it is further

ORDERED that the remainder of the action shall continue.

FILED
MAY 18 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated 5/13/09 ENTER: _____, J.S.C.
HON. CAROL EDMEAD

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

JAMAL HAIMEUR,

Index No.: 109910/06

Plaintiff,

-against-

DECISION/ORDER

ASTORIA ENERGY LLC, STONE & WEBSTER, INC., STONE & WEBSTER CONSTRUCTION COMPANY, INC., STONE & WEBSTER CONSTRUCTION, INC., STONE & WEBSTER MANAGEMENT CONSULTANTS, INC., STONE & WEBSTER MANAGEMENT CONSULTANTS INC., STONE & WEBSTER A SHAW GROUP COMPANY and THYSSENKRUPP SAFWAY, INC.,

Defendants.

----------x

Edmead, J.:

MEMORANDUM DECISION

Motion sequence numbers 002 and 003 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries sustained by a steamfitter when he fell from a scaffold while working at a construction site located at 17-10 Steinway Street in Astoria, New York on November 17, 2005.

In motion sequence number 002, defendants Astoria Energy LLC (Astoria), Stone & Webster, Inc., Stone & Webster Construction Company, Inc., Stone & Webster Construction, Inc., Stone & Webster Management Consultants, Inc., Stone & Webster Management Consultants Inc., Stone & Webster A Shaw Group Company (together, S&W) and Thyssenkrupp Safway, Inc. (Safway) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Jamal Haimeur's complaint.

In motion sequence number 003, plaintiff moves, (1) pursuant to CPLR 3025 (b), for an

order granting him leave to supplement his bill of particulars, and (2) pursuant to CPLR 3212, for partial summary judgment in his favor on the issue of liability on his Labor Law §§ 240 (1) and 241 (6) claims against defendants.

BACKGROUND

On the date of the accident, defendant Astoria owned the Astoria Energy Powerhouse (the premises) where the accident occurred. Astoria hired defendant S&W to serve as general contractor on a project to build a power house to generate energy for New York City (the project). Plaintiff was employed as a steamfitter by non-party Durr Mechanical Construction (Durr), which was hired to install all of the heat, ventilation and air conditioning (HVAC) systems for the project. Durr retained defendant Safway, pursuant to contract, to erect and dismantle scaffolding at the jobsite. Once the scaffolding was erected, Safway would turn it over to Durr for use.

Plaintiff testified that, at the time of his accident, he was stepping down from the top of a two-level scaffold that he was working on in order to get to the next lower level, which was located approximately five feet below, in order to take some measurements for some pipes to be installed. Plaintiff explained that the top level of the scaffold possessed an opening in the handrail riser rail, which resembled a doorway, and which would normally lead to a step-down ladder to the lower level. The lower level of the scaffold was located in front of and below the upper scaffold, like a step.

Plaintiff's accident occurred when he started to step backwards in an attempt to utilize the ladder. However, on the day of plaintiff's accident, the ladder was missing. In addition, plaintiff testified that scaffold planking blocked his line of sight to where the ladder should have been. As

a result, when plaintiff turned and stepped down off the scaffold, he fell, grabbing the scaffold with his right arm, which twisted, causing him injuries. Plaintiff noted that his safety line did not activate, because he did not fall far enough for it to activate. The accident report and Workers' Compensation Board C2 form both state that plaintiff's shoulder was injured when he stepped off the scaffold deck. Plaintiff also testified that it had been necessary for him to reach the top level of the scaffold, which was approximately 40 feet from the ground, via a man-lift, because the scaffold did not run to the ground.

In his complaint and verified bill of particulars, plaintiff alleges violations of common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6) against defendants.

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]). "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])" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept

2006]).

Initially, it should be noted that Astoria, as owner of the premises, can be held vicariously liable under Labor Law §§ 240 (1) and 241 (6) (*Smith v McClier Corporation*, 22 AD3d 369, 371 [1st Dept 2005]; *Rizzo v Hellman Electric Corporation*, 281 AD2d 258, 259 [1st Dept 2001]).

Defendant S&W contends that it cannot be held liable under Labor Law §§ 240 (1) and 241 (6), because it did not serve as a general contractor on the project. However, a review of the evidence in this case, which demonstrates that defendant S&W was authorized to direct workers during the construction project, hired subcontractors and oversaw both safety and the construction progress at the jobsite, is sufficient to hold it liable as a general contractor under section 240 (1) (*Szpakowski v Shelby Realty, LLC*, 48 AD3d 268 269 [1st Dept 2008] [evidence that defendant was authorized to direct workers during the construction project, and that he negotiated with and hired subcontractors and oversaw construction progress was sufficient to hold it liable as general contractor]).

The record also establishes that defendant S&W had sufficient authority to supervise and control the injury-producing work at issue, so as to impose liability on it as a statutory agent pursuant to Labor Law §§ 240 (1) and 241 (6). One may be 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]). To hold a defendant liable as a statutory agent on the basis of Labor Law §§ 240 (1) and 241 (6), "there is no requirement that actual supervision or control have been exercised," just that it retain the non-delegable authority to supervise and control the work being performed at the time of the injury (*Rizzo v Hellman Electric Corporation*, 281 AD2d at 259).

Here, the contract between Astoria and S&W states that S&W was to be solely responsible for the engagement and management of the subcontractors on the project, as well as being solely responsible for all construction means and methods at the job site. These responsibilities included overseeing and supervising all demolition, site preparation and construction at the job site. Specifically, paragraph 3.14 of the contract between Astoria and S&W states, in pertinent part:

> 3.14. Safety. Contractor (S&W) shall have sole responsibility for all construction, means, methods, techniques, sequences, and safety and security programs in connection with the performance of the Work

(Plaintiff's Notice of Motion, Exhibit 3, Astoria/S&W Contract, at 19).

However, as conflicting testimony exists as to whether Safway supervised and controlled the removal of the ladder from the scaffold once the scaffold had been erected and turned over to Durr for use, a question of fact exists as to whether defendant Safway was a statutory agent of general contractor S&W for the purpose of Labor Law § 240 (1) liability.

Sal Impieri (Impieri), Safway's regional manager, testified that Safway was retained, pursuant to contract, by Durr to erect and dismantle scaffolding at the site. Durr leased the scaffolds from Safway on a monthly basis. Impieri stated that, once the scaffold was erected, Safway would turn it over to Durr for use. To that effect, Impieri maintained, "At that point, it's

their competent person that's assigned and responsible for the scaffold" (Defendants' Notice Exhibit K, Impieri Deposition, at 25). Impieri stated that a Safway foreman was available at the job site on the days when there was an installation or a removal of scaffolding, though there was no one present for the maintenance of the scaffold on an everyday basis.

Impieri also explained that access between the different levels of the scaffolds was accomplished with either an access ladder or a stair unit, and that it was necessary to use a wrench or ratchet to remove the access ladder from the scaffold. In this case, as the project progressed, either the trade contractor, who was using the scaffold, would remove the ladder itself, or it would call Safway to come and remove it for it. Thus, as a question of fact exists as to whether Safway supervised and controlled the removal of the ladder, defendant Safway is not entitled to summary judgment dismissing plaintiff's Labor Law § 240 (1) claim as against it, and plaintiff is not entitled to partial summary judgment in his favor on his Labor Law § 240 (1) claim as against defendant Safway.

Labor Law § 240 (1) requires that persons working at an elevation be provided with appropriate safety equipment to secure them from falling (*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]).

Contrary to defendants' contention that plaintiff's accident was not gravity-related, there is no dispute that plaintiff was injured as a result of a fall from an elevated work site, so as to bring this matter squarely within the purview of Labor Law § 240 (1) (*Kyle v City of New York*, 268 AD2d 192, 196 [1st Dept 2000]). The question to be decided is whether partial summary

judgment in plaintiff's favor on the issue of section 240 (1) liability is warranted.

Here, the fact that defendants' actions or omissions were a proximate cause of plaintiff's injuries is established as a matter of law by the undisputed fact that, while subjected to an elevation-related risk, plaintiff was not provided with safe access, such as a ladder, between the top and lower levels of the scaffold (*see Figueiredo v New Palace Painters Supply Company*, 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]).

"There is no question that the statutory requirement that a 'ladder' be supplied and properly 'placed' was designed to protect against precisely the type of 'elevation-related' hazard presented" in this case (*Limauro v City of New York Department of Environmental Protection*, 202 AD2d 170, 171 [1st Dept 1994]). Thus, by failing to provide a ladder, defendant "failed to serve the core objective of the requirement of Labor Law § 240 (1) by failing to provide a means for the worker to negotiate the height differential safely" (*id.*). In addition, the evidence in this case also indicates that there was no rail or other protection in the area where the ladder should have been in order to prevent plaintiff from falling from the scaffold.

Defendants' evidence does not raise an issue of fact as to whether the scaffold possessed a ladder or a protective rail in the area where the ladder should have been (*Miglionico v Bovis Lend Lease, Inc.*, 47 AD3d 561, 565 [1st Dept 2008]). As such, there is no issue of fact as to whether the insufficiency in the provided protective devices constituted a proximate cause of plaintiff's accident (*Vergara v SS 133 West 21, LLC*, 21 AD3d 279, 280 [1st Dept 2005]

[plaintiffs made a prima facie showing that plaintiff was not provided with the adequate protection required where there was no dispute that the six-foot high manually propelled scaffold had no side rails and no other protective device was provided to plaintiff]).

Defendants assert that they are not liable for plaintiff's injuries under Labor Law § 240 (1), because plaintiff's negligence in not looking backwards before descending the scaffold constituted the sole proximate cause of his injuries (*Robinson v East Medical Center, LP*, 6 NY3d 550, 554 [2006] [where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1)]). However, "the Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of New York*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake v Neighborhood Housing Services of New York City*, 1 NY3d at 290).

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]; *Bland v Manocherian*, 66 NY2d 452, 461 [1985] [where defendants did not erect or place plaintiff's ladder in a way so as to provide plaintiff with proper protection, defendants were held absolutely liable regardless of any carelessness on the part of plaintiff which might have contributed to his accident]).

Further, it was foreseeable that plaintiff might have stepped from the scaffold to ladder

without looking backwards first in anticipation of the ladder being present (*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]).

Thus, defendants Astoria and S&W are not entitled to summary judgment dismissing plaintiff's Labor Law § 240 (1) claim as against them, and plaintiff is entitled to partial summary judgment in his favor on the issue of liability under Labor Law § 240 (1) as against defendants Astoria and S&W.

PLAINTIFF'S LABOR LAW § 241 (6) CLAIM AGAINST DEFENDANTS

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.*).

Initially, it should be noted that, for reasons discussed previously, an issue of fact exists as to whether defendant Safway is a statutory agent of general contractor S&W, so as to be held liable for plaintiff's injuries under Labor Law § 241 (6). Thus, defendant Safway is not entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim as against it, and plaintiff is not entitled to partial summary judgment in his favor on his Labor Law § 241 (6) claim as against defendant Safway.

In addition, the alleged violations of OSHA standards cited by plaintiff do not provide a basis for liability under Labor Law § 241 (6) (*Schiulaz v Arnell Construction Corporation*, 261 AD2d 247, 248 [1st Dept 1999]).

Although plaintiff lists multiple violations of the Industrial Code in his bill of particulars, plaintiff does not address these Industrial Code violations in his opposition papers, and thus, they are deemed 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]). As such, defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on these provisions.

Plaintiff moves for leave to serve a supplemental bill of particulars alleging violations of Industrial Code 12 NYCRR 23-1.7 (f), 23-5.1 (j) (1) and 23-5.3 (f). CPLR 3025 (b) authorizes applications for leave to file amended bill of particulars:

(b) Amendments and supplemental pleadings by leave. A party may amend his

> pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

"While a plaintiff asserting a cause of action under Labor Law § 241 (6) must allege a violation of a concrete specification of the Industrial Code, his failure to identify the Code provision in his complaint or bill of particulars need not be fatal to his claim [internal citation omitted]" (*Noetzell v Park Avenue Hall Housing Development Fund Corporation*, 271 AD2d 231, 232 [1st Dept 2000]). "A plaintiff may serve a supplemental bill of particulars, even without leave of court, to assert statutory violations which merely amplify his or her theories of liability" (*Balsamo v City of New York*, 287 AD2d 22, 27 [2d Dept 2001]; *Noetzell v Park Avenue Hall Housing Development Fund Corporation*, 271 AD2d at 232 [plaintiff's service, without leave of court, of a supplemental bill of particulars identifying a particular alleged Industrial Code violation was proper, "since allegations of Code violations merely amplify and elaborate upon facts and theories already set forth in the original bill of particulars and raise no new theory of liability"]).

Here, plaintiff is entitled to leave to serve a supplemental bill of particulars alleging violations of Industrial Code Industrial Code 12 NYCRR 23-1.7 (f), 23-5.1 (j) (1) and 23-5.3 (f), as plaintiff's belated identification of these proposed Industrial Code violations merely expound on plaintiff's Labor Law § 241 (6) cause of action, which was pleaded in plaintiff's first bill of particulars.

Industrial Code 12 NYCRR 23-1.7 (f) is sufficiently concrete in its specifications to support plaintiff's Labor Law § 241 (6) claim (*see Miano v Skyline New Homes Corporation*, 37

AD3d 563, 565 [2d Dept 2007]; *O'Hare v City of New York*, 280 AD2d 458, 458 [2d Dept 2001]).

Industrial Code 12 NYCRR 23-1.7 (f) states:

> Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.

Industrial Code 12 NYCRR 23-1.7 (f) requires that a ladder be provided for safe access between vertical working levels. Here, it was necessary for plaintiff to move from the upper level of the scaffold to a lower level, and since no ladder or other safe means of access to the lower level was provided, and since the absence of this ladder was a proximate cause of plaintiff's accident, defendants Astoria and S&W are 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 (f) as against them, and plaintiff is entitled to partial summary judgment on his Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.7 (f) as against defendants Astoria and S&W.

Industrial Code 12 NYCRR 23-5.1 (j) (1) is sufficiently concrete in its specifications to support plaintiff's Labor Law § 241 (6) claim (*see Crespo v Triad, Inc.*, 294 AD2d 145, 147 [1st Dept 2002]).

Industrial Code 12 NYCRR 23-5.1 (j) (1) states, in pertinent part:

> (j) Safety railings.
> (1) The open sides of all scaffold platforms ... shall be provided with safety railings constructed and installed in compliance with this Part (rule).
> Exceptions: Any scaffold platform with an elevation of not more

than seven feet[.]

Here, there was no railing in the area where the ladder should have been. Since the absence of this railing was a proximate cause of plaintiff's accident, defendants Astoria and S&W are not entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-5.1 (j) (1) as against them, and plaintiff is entitled to partial summary judgment on his Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-5.1 (j) (1) as against defendants Astoria and S&W.

Industrial Code 12 NYCRR 23-5.3 (f) is sufficiently concrete in its specifications to support plaintiff's Labor Law § 241 (6) claim (*see Sopha v Combustion Engineering*, 261 AD2d 911, 912 [4th Dept 1999]).

Industrial Code 12 NYCRR 5.3 (f) states:

> (f) Access. Ladders, stairs or ramps shall be provided for access to and egress from the platform levels of metal scaffolds which are located more than two feet above or below the ground, grade, floor or other equivalent level.

Here, as there existed a four-to five-foot height difference between the two levels of the scaffolding at issue, a ladder was required for safe access and egress to the platform levels in this case. As no ladder was provided between the two levels of the scaffolding at issue, and this failure was a proximate cause of plaintiff's accident, defendants Astoria and S&W are not entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-5.3 (f), and plaintiff is entitled to partial summary judgment on his Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-5.3 (f) as against defendants Astoria and S&W.

PLAINTIFF'S COMMON-LAW NEGLIGENCE AND LABOR LAW § 200 CLAIMS AGAINST DEFENDANTS

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 311, 317 [1981]). 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, plaintiff does not address that part of defendants' motion for summary judgment seeking to dismiss plaintiff's common-law negligence and Labor Law §200 claims. Thus, defendants Astoria, S&W and Safway are entitled to summary judgment dismissing these claims, as they are deemed abandoned (*see Genovese v Gambino*, 309 AD2d at 833).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendants Astoria Energy LLC (Astoria), Stone & Webster, Inc., Stone & Webster Construction Company, Inc., Stone & Webster Construction, Inc., Stone & Webster Management Consultants, Inc., Stone & Webster Management Consultants Inc., Stone & Webster A Shaw Group Company (together, S&W) and Thyssenkrupp Safway, Inc.'s motion (motion sequence number 002), pursuant to CPLR 3212, for summary judgment dismissing

plaintiff Jamal Haimeur's common-law and Labor Law § 200 claim is granted, and these claims are severed and dismissed, and the motion is otherwise denied; and it is further

ORDERED that the part of plaintiff's motion (motion sequence number 003), pursuant to CPLR 3025 (b), granting plaintiff leave to supplement his bill of particulars to include alleged Industrial Code violations not previously pled in his bill of particulars is granted; and it is further

ORDERED that plaintiff's motion (motion sequence number 003), pursuant to CPLR 3212, for partial summary judgment in his favor on the issue of defendants' liability on his Labor Law § 240 (1) claim, as well those parts of his Labor Law § 241 (6) claim predicated on violations of Industrial Code 12 NYCRR 23-1.7 (f), 23-5.1 (j) (1) and 23-5.3 (f), is granted as to defendants Astoria and S&W only, and the motion is otherwise denied; and it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty days of entry on all counsel; and it is further

ORDERED that the remainder of the action shall continue.

DATE: May 13, 2009

ENTER:

J.S.C.

HON. CAROL EDMEAD

FILED
MAY 18 2009
COUNTY CLERK'S OFFICE
NEW YORK