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

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Haddock, Steven

- v -

Turner Construction Co., et al.

INDEX NO. 115367/08

MOTION DATE 7/21/09

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for dismiss actin

PAPERS NUMBERED

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

Answering Affidavits — Exhibits

Replying Affidavits

FILED SEP 10 2009 COUNTY CLERK'S OFFICE NEW YORK

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant, Turner Construction Company, for summary judgment (CPLR §3212) dismissing the Complaint and all cross-claims against it, is granted, and the action and all cross-claims as asserted against said defendant are hereby severed and dismissed, and the Clerk may enter judgment accordingly; and it is further

ORDERED that the branch of the cross-motion by plaintiff for summary judgment on its Labor Law 240(1) claim is denied as to Turner Construction Company; and it is further

ORDERED that the branch of the cross-motion by plaintiff for summary judgment on its Labor Law 240(1) claim is denied as to defendants Lincoln Center, Inc. and JDP Mechanical, as premature, and without prejudice; and it is further

ORDERED that the remaining parties shall appear for a preliminary conference on October 27, 2009, 2:15 p.m.; and it is further

ORDERED that defendant Turner Construction Company serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 9/8/09

HON. CAROL EDMEAD J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

STEVEN HADDOCK,

Plaintiff,

Index No.: 115367/08

-against-

TURNER CONSTRUCTION COMPANY, LINCOLN CENTER FOR THE PERFORMING ARTS, INC. and JDP MECHANICAL, INC.,

Defendants.

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MEMORANDUM DECISION

In this Labor Law and negligence action, defendant, Turner Construction Company ("Turner") moves for summary judgment (CPLR 3212) dismissing the Complaint and all cross-claims against it. In response, plaintiff Steven Haddock ("plaintiff") cross moves for summary judgment in its favor and against all defendants on his Labor Law 240(1) claim.

Factual Background

Plaintiff was injured on December 11, 2007 while working at the premises located at 140 West 65th Street, New York, New York (the "Premises" or "Lincoln Center") as an employee of Hugh O'Kane Electric Co., LLC ("O'Kane Electric"). The accident report indicates that plaintiff was injured while "getting down off of a ladder when the ladder shifted." It is alleged that prior to the accident, defendants Turner, Lincoln Center for the Performing Arts, Inc. ("Lincoln Center Inc.") and JDP Mechanical, Inc. ("JDP Mechanical") entered into written agreements with each other for construction, renovation and/or demolition work to be performed at the Premises. It is further alleged that Turner was the general contractor at the Premises, and that Turner entered

into a contract with plaintiff's employer, O'Kane Electric, as the electrical subcontractor.[1] Plaintiff claims that his injuries were caused by defendants' negligence in causing and permitting unsafe and hazardous conditions to exist at the site at the time of the plaintiff's accident, and that defendants violated Labor Law 200, 240(1), 241(6).

Turner's Motion for Summary Judgment

Turner argues that it was not the general contractor on plaintiff's work so as to be deemed liable under Labor Law 240(1) and 241(6), which renders owners and "general contractors" absolutely liable for statutory violations. An entity is a "contractor" within the meaning of the Labor Law only if it had the power to enforce safety standards and choose responsible contractors. Only direct or prime contractors are considered "general contractors" for purposes of Labor Law 240(1) and 241(6). Thus, the mere status or designation of a party as a "general contractor" does not establish liability. Further, if liability is to be premised on supervisory control, it must be control over the work in which plaintiff was engaged at the time of his injury. Whether a party may be deemed a "general contractor" or agent of an owner under the Labor Law is based on the "nature of the work in which plaintiff was engaged at the time of the injury" and who retained such employer.

Turner contends that plaintiff was working for O'Kane Electric in the central mechanical plant located within Lincoln Center at the time of the accident. The subcontract between JDP Mechanical and O'Kane Electric indicates that the scope of the work thereunder was "central

[1] Turner claims that after receiving the Summons and Complaint, Turner's counsel advised plaintiff's counsel that Turner was not the general contractor on plaintiff's work, but that plaintiff's employer was retained by JDP Mechanical (see correspondence sent to plaintiff on February 9, 2009, along with an affidavit from Turner, Exhibit "B").

mechanical plant upgrade project" and that JDP Mechanical was the general contractor on the plaintiff's work. Although Turner was a general contractor at the site under its contract with Lincoln Center Inc.,[2] Turner was working in a different portion of the Premises and had no contractual or actual authority over the plaintiff's work. In further support, Michael Handler, Turner's Project Manager, attests that although Turner "retained Hugh O'Kane Electric to perform work at these premises, Hugh O'Kane's work under the agreement with Turner was not being performed in the Central Mechanical Plant, where Plaintiff was allegedly injured. Instead, Hugh O'Kane Electric [was] working in this area of the site pursuant to a contract with JDP Mechanical, who [was] retained by the owners of the premises, and not by [Turner]."

Further, Turner did not provide plaintiff with any equipment or tools so as to serve as a basis for a claim of common law negligence or a claim under Labor Law 200 against Turner.

Turner also argues that it did not supervise or control plaintiff's work so as to be deemed negligent under the common law or Labor Law 200. An owner or general contractor cannot be held liable under Labor Law 200 if they did not supervise or control the plaintiff's work giving rise to the injury. Given that the legislative purpose of Labor Law 200 "is to provide a safe place to work for the employees of a sub-contractor retained by a general contractor or owner," plaintiff cannot establish that Turner owed a duty to plaintiff under this statute because Turner exercised no control over the plaintiff's work; nor did Turner provide plaintiff with the ladder or equipment he was using when the accident occurred. In light of the fact that Turner did not

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[2] The Lincoln Contract is actually between Lincoln Center Development Project, Inc. and JDP Mechanical. Lincoln Center Development Project, Inc. was created in 2001 to "manage certain Lincoln Center Redevelopment projects, including the 65th Street Redevelopment Project" on behalf of the Lincoln Center Inc. (see Construction Agreement, page 1).

exercise any degree of control over the plaintiff herein, nor create any of the conditions which plaintiff claims caused the accident, there is no basis for liability against Turner under either Labor Law §200 or the common law.

Turner was not responsible for any work taking place in the central mechanical plant, nor did it perform any work in this area. Thus, due to the total lack of evidence that it may be liable to plaintiff under the Labor Law or common law, summary judgment is proper.

Plaintiff's Cross-Motion for Summary Judgment

Plaintiff opposes Turner's motion, and cross moves for summary judgment against all defendants. Plaintiff initially points out that Turner's motion was served before any meaningful discovery or discovery conference has taken place, and that plaintiff has not had an opportunity to obtain the necessary discovery to establish a *prima facie* case against Turner. Further, Turner failed to meet its burden for summary judgment. In support of its motion, Turner attached a purchase order demonstrating that JDP Mechanical subcontracted with O'Kane Electric, plaintiff's employer, to perform certain electrical work at Lincoln Center. Turner also provided a copy of a contract demonstrating that Lincoln Center Inc. hired Turner as the general contractor for a construction project, entitled the 65th Street Redevelopment Project, at Lincoln Center. Notably, the contract between Lincoln Center Inc. (the owner of the Premises) and JDP Mechanical appears to be for a small portion of the 65th Street Redevelopment Project involving the central mechanical plant. Turner also supplied a self-serving affidavit claiming that JDP Mechanical's work was unrelated to Turner's work. However, the affidavit appears to contradict the documentary evidence, as both JDP Mechanical's and Turner's work were part of the same 65th Street Redevelopment Project. Additionally, in its Answer, Turner denies knowledge and

information sufficient to form a belief as to plaintiff's allegation that JDP Mechanical was the general contractor for this construction site. And, JDP Mechanical does not admit to being the general contractor for the construction project in its Answer. Therefore, Turner's motion fails to establish a *prima facie* entitlement to summary judgment.

In support of his cross-motion under Labor Law 240(1), plaintiff argues that pursuant to Labor Law 240(1) and 241(6), owners, general contractors and their agents are charged with a non-delegable duty to ensure compliance with the requirements of the statutes. Plaintiff was installing a large pull-box in the ceiling, from which electrical wiring and conduit run. The work was at least ten feet off the ground. In order to perform this work, he used an eight-foot A-frame ladder. No other safety equipment was provided to him. While descending the ladder, it shook and fell over, causing him to be thrown off the ladder to the ground, resulting in injuries. The work being performed by plaintiff falls squarely within the ambit and protection of Labor Law 240(1) and defendants violated the statute. Plaintiff here was installing electrical fixtures into the ceiling, as part of a massive renovation project. It is clear that plaintiff was a construction worker working in a building involved in the construction and alteration of that building, and that he was exposed to an elevation-related risk and fell off the ladder because it was inadequate to protect him. The work that was taking place at the time falls squarely within the express language and protection of Labor Law 240(1), and plaintiff's injuries were proximately caused by defendants' failure to supply plaintiff with safety devices, instructions or a safe ladder. The failure of an owner and its agents to secure a ladder, on which an injured worker was standing while engaged in a protected activity (here construction), against slippage by any means whatsoever constitutes a *prima facie* violation of Labor Law 240(1) as a matter of law. The only

evidence available regarding the proximate cause of the accident is the injured plaintiff's own uncontroverted testimony that the ladder tipped over causing him to fall. The fact that plaintiff is the only witness to the fall does not present a bar to summary judgment where his testimony on that subject is neither inconsistent with other accounts nor contradicted by other evidence. Nor is it relevant that the ladder was not defective or that plaintiff himself placed the ladder. Any possible availability of safety devices somewhere at the work site which could have been used to secure the ladder does not establish that the plaintiff was provided with "proper protection" in satisfaction of the defendants' responsibilities under this statute. Further, it is of no moment that plaintiff's employer supplied the ladder in question. Thus, there is no view of that evidence by which a jury could reasonably find that the failure to secure the ladder was not a proximate cause of the plaintiff's injuries and, thus, summary judgment is mandated.

Plaintiff contends that it is uncontested that defendant Lincoln Center Inc. was the owner for this construction work; Lincoln Center Inc. admits in its Answer to being the owner of the Premises. Further, Turner and JDP Mechanical were the general contractors, or owner's agents, and fall under the statute as well, and the evidence Turner presents to dispute that fact is incomplete. Thus, summary judgment on Labor Law 240(1) must be granted against owner Lincoln Inc. and general contractors JDP Mechanical and Turner.

Opposition by Lincoln Center Inc. and JDP Mechanical

Defendants Lincoln Center Inc. and JDP Mechanical oppose the portion of plaintiff's motion which seeks summary judgment against them. Defendants contend that this motion was prematurely made prior to having had the opportunity to take plaintiff's deposition and conduct other discovery. Further, the assertions of plaintiff's counsel along with plaintiff's self-serving

affidavit are insufficient to support summary judgment at this time.

Further, the mere fact that plaintiff fell from a ladder, in the absence of any other possible issues in the case, does not establish liability against these defendants. Plaintiff failed to establish that section 240 has been violated, that the defendants failed to provide proper protection. There are various inconsistencies within plaintiff's own papers, that must be explored and resolved. Although paragraph 6 of the affirmation of plaintiff's counsel states that the ladder "shook" and "fell over," paragraph 16, indicates that the ladder "tipped over." However, in plaintiff's affidavit, he claims that the ladder "shifted." Thus, there are questions of fact as to how this accident occurred, and what caused this ladder to shake, shift or tip. Further, there is no evidence that the ladder was in any way defective, that it was inappropriate for the task which plaintiff was performing, or that the ladder was improperly placed. Also, it is well established that if it can be shown that a plaintiff was the sole proximate cause of his own accident, then there will be no liability under Labor Law 240. Plaintiff could have been hanging off the side of the ladder, holding on with one hand while swinging his foot in the air. Plaintiff could have been intoxicated or otherwise impaired. Neither is it sufficient for plaintiff to submit yet another self-serving affidavit in reply, as evidence and related arguments, when adduced for the first time in reply papers, constitutes reversible error.

Plaintiff also states that he was not provided with any other equipment to do this job. Although it has not been established that any other equipment was necessary, or that the equipment that he was using was unsafe or improper, plaintiff's affidavit does not mention what, if anything plaintiff was told about using any other equipment, and what plaintiff's response might have been in such a circumstance. It is well established that if a worker is told to use

certain specific safety equipment, and such equipment is available, and plaintiff knows such equipment is available, that he may be found to be a recalcitrant worker, and that no liability under section 240 will be found in such a case. Nor is there any specific evidence that the ladder was in any way unsafe, or that plaintiff needed to be instructed in its use, or that plaintiff was not properly instructed in its use. There is no evidence that the ladder slipped. In fact, there is no evidence that the ladder functioned improperly in any way. And, the cases plaintiff cites are factually distinguishable.

Plaintiff's self-serving affidavit is also unreliable; in paragraph 4, plaintiff opines that Turner was the general contractor for this project. However, this in incorrect. As alluded to by plaintiff's counsel, O'Kane Electric was working pursuant to its contract with JDP Mechanical, and JDP Mechanical had been contracted by Lincoln Center Inc. to perform the central mechanical plant upgrades and improvements. In fact, Turner had nothing whatsoever to do with the work which plaintiff was performing, and does not belong in this case.

Furthermore, the accident report indicates that plaintiff was working with Eric Costanza at the time of the accident, who is a witness to the accident. Therefore, there is an employee of O'Kane Electric, not under the control of the defendants, who may have relevant information regarding this accident. Plaintiff claims to have been alone, and has submitted no evidence that either of the defendants was present at the time of the accident, or directed or controlled his work.

CPLR 3212(f), specifically authorizes a denial or continuance where there are facts unavailable to the opposing party. Therefore, based upon the foregoing, that this case is not yet ripe for a summary determination in plaintiff's favor.

Turner's Reply and Opposition to Plaintiff's Cross-Motion

There is ample proof that Turner was not delegated the responsibility to perform or supervise the work being conducted by plaintiff's employer, O'Kane Electric, in the central mechanical plant at the time of the accident. Turner's contract specifically excludes the central mechanical plant from the scope of work, and the subcontract between JDP Mechanical and O'Kane Electric specifically includes such work.

The sole evidence relied on by plaintiff in the cross-motion against Turner is plaintiff's affidavit which indicates that he "believes" that Turner was the general contractor at the project. However, plaintiff does not even maintain that he possesses any information regarding the scope of the work under the Turner Contract or the work within the scope of JDP Mechanical's subcontract with O'Kane Electric. As plaintiff possesses no knowledge of the scope of Turner's work, nor does he even mention any Turner employees by name as directing his work, his affidavit cannot be used to create a question of fact as to whether Turner was the general contractor for purposes of statutory liability. As a result, the affidavit may not be used as proof to either support plaintiff's cross-motion for or to defeat Turner's motion. Since plaintiff has failed to submit any evidence that Turner was the general contractor or "construction manager" on the work in which plaintiff was engaged at the time of the injury, plaintiff's cross-motion must be denied as against Turner.

Finally, the claims under both the common law and Labor Law 200 must also be dismissed as Turner cannot be deemed actively negligent as they took no actions in causing or creating the conditions which led to the accident.

Analysis

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (CPLR 3212 [b]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (CPLR §3212 [b]; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, 413

NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

Common Law Negligence, Labor Law 200, 240(1) and 241(6)

Labor Law 200 codifies the common-law duty imposed on an owner or general contractor to provide construction site workers with a safe work site *(Nevins v Essex Owners Corp.*, 276 AD2d 315, 714 NYS2d 38 [1st Dept 2000]; *citing Blessinger v The Estee Lauder Co.*, 271 AD2d 343, 707 NYS2d 78), but "[a]n implicit precondition to this duty 'is that the party charged with that responsibility have the authority to control the activity bringing about the injury'" (*Blessinger, supra, quoting Russin v Picciano & Son,* 54 NY2d 311, 317, 445 NYS2d 127). Thus, in order to establish liability for common-law negligence or a violation of Labor Law 200, the plaintiff must establish that the defendant in issue had "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin v Picciano & Son,* 54 NY2d 311, 317 [1981]; *see Rizzuto v Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Singleton v Citnalta Constr. Corp.*, 291 AD2d 393, 394 [2002]), or had actual or constructive notice of the defective condition causing the accident (*see LaRose v Resinick Eighth Ave. Assoc., LLC,* 26 AD3d 470, 810 NYS2d 493; [2006]; *Gatto v Turano,* 6 AD3d 390, 391 [2004]; *Abayev v Jaypson Jewelry Manufacturing Corp.*, 2 AD3d 548 [2003]; *Duncan v Perry,* 307 AD2d 249 [2003]; *Giambalvo v Chemical Bank,* 260 AD2d 432 [1999]; *Cuartas v Kourkoumelis,* 265 AD2d 293[1999]; *Sprague v Peckham Materials Corp.*, 240 AD2d 392 [1997]).

Labor Law 240(1) imposes absolute liability upon an owner or contractor for failing to

provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (*Ernish v City of New York*, 2 AD3d 256, 768 NYS2d 325 [1st Dept 2003], *citing Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]). In enacting this statute, the legislative intent was to protect workers "by placing 'ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor' (1969 N.Y. Legis. Ann., at 407), instead of on workers, who 'are scarcely in a position to protect themselves from accident' [citation omitted]" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520, 493 NYS2d 102 [1985]). The statute imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559, 606 NYS2d 127 [1993]; *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 500 [1993], *supra*; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]).

Labor Law 241(6) also imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation or demolition (*see Ross*, 81 NY2d at 501-502). In order to recover a claimant need not prove that the owner or contractor exercised supervision or control over the work being performed (*see Ross*, 81 NY2d at 501-502; *Long v Forest-Fehlhaber*, 55 NY2d 154 [1982]).

Turner

Turner's motion to dismiss the plaintiff's common law negligence and Labor Law 200, 240(1) and 241(6) claim is granted.

It is not uncommon that a contractor "may act as a general contractor and have

responsibility as such for only part of a construction project" (*Urban v No. 5 Times Square Development LLC*, 2008 WL 620546, 2008 WL 620546 [Sup Ct New York County], *citing Wong v New York Times Co.*, 297 AD2d 544, 549, 747 NYS2d 213 [1st Dept 2002]). Further, an "owner may contract with prime contractors in addition to a general contractor" (*Urban v No. 5 Times Square Development LLC*, 2008 WL 620546). Thus, a general contractor "may not be held liable for injuries to a plaintiff who was working under a separate, prime contract" (*Urban v No. 5 Times Square Development LLC, citing Balthazar v Full Circle Construction Corp.*, 268 AD2d 96, 98, 707 NYS2d 70 [1st Dept 2000] and *Reid v Lehrer McGovern Bovis*, 248 AD2d 324, 324, 670 NYS2d 476 [1st Dept 1998]).

In *Reid, supra*, plaintiff alleged violations of Labor Law 200, 240(1) and 241(6) for injuries he sustained when he fell off a ladder while working on the 11th floor of a building. On plaintiff's appeal of the dismissal of his Complaint, the First Department first noted that the 1990 contract between plaintiff's employer and the project owner, referring to defendant as construction manager and calling for sheet metal work, was not the contract under which plaintiff was working at the time of his accident. Instead, the Court continued, the 1992 contract under which plaintiff was working was between plaintiff's employer and the project owner for HVAC work and specifically referred to the "project: 11th floor." Defendant was not mentioned in the "11th floor" contract. Further, there was "documentary evidence" *i.e.*, a contract showing that defendant's presence in the building at the time of the accident was related to work on other floors of the building. The Court then stated that plaintiff's assertions that persons on the 11th floor giving him instructions were defendant's employees was "too speculative to raise a genuine issue of fact."

Here, Lincoln Center Inc.'s contract with JDP Mechanical, "as Contractor," was "Pertaining To" "Central Mechanical Plant Upgrades and Improvements Lincoln Center 65th Street Development Project Lincoln Center New York City, New York West 65th Street and Broadway." This contract defined the scope of work as "associated with the Central Mechanical Plant Upgrade Project." No mention of Turner is made in this contract. JDP Mechanical's subcontract with plaintiff's employer, O'Kane Electric, indicates that O'Kane Electric was to provide "All labor and Material necessary for a complete Electrical Installation." Notably, such subcontract was "subject to the Approval of the Owner [Lincoln Center Inc.], Engineer, Architect and JDP Mechanical (the Contractor). No mention is made of Turner in this subcontract either.

Lincoln Center Inc.'s contract with Turner "As Construction Manager," on the other hand, also pertained to the "65th Street Development Project Lincoln Center New York City, New York." However, while Lincoln's contract included many portions of Lincoln Center, such as Alice Tully Hall, the Rose Building, and the Juilliard School, to name a few, such contract *expressly excluded* the area of plaintiff's accident from the scope of Turner's work. Exhibit 1.1, Page 11, to Turner's Contract provides *"P-8.0 CENTRAL MECHANICAL PLANT (EXCLUDED FROM SCOPE OF WORK) (emphasis added).* While Turner acknowledges that it "retained Hugh O'Kane Electric to perform work at these premises," and such contract with O'Kane was not submitted, Turner's general contracting duties under its contract with Lincoln Center Inc. in this regard expressly excluded the Central Mechanical Plant, in any event. Thus, Turner was clearly not the construction manager for the electrical work that plaintiff was performing in the central mechanical plant.

In his affidavit, plaintiff admits that O'Kane Electric was hired by JDP Mechanical to

perform electrical construction work on the central mechanical plant, and that he was working as an electrician for O'Kane Electric at the time of his accident (¶5). Thus, plaintiff's accident clearly occurred in the central mechanical plant, and such area was separate and apart from the areas for which Turner was the construction manager. Turner did not retain plaintiff's employer, O'Kane Electric, to perform any work in the central mechanical plant, where plaintiff was allegedly injured. Plaintiff sets forth no argument that Turner's contract was in any way related to the work being performed within the central mechanical plant, other than to note that the central mechanical plant was part of the entire 65th Street Development Project at Lincoln Center, undoubtedly, a massive complex. Although discovery has not commenced, the terms of the relevant contracts are undisputed. Further, plaintiff, who is in possession of information as to who his supervisors were at the worksite at the time of his accident does not even assert that any of Turner's employees instructed, supervised, or controlled the manner of any of the work he was performing. Thus, plaintiff's conclusory "belief" that Turner was the general contractor on the project is insufficient

As plaintiff failed to raise an issue of fact to whether Turner was the construction manager at plaintiff's worksite, or otherwise exercised any supervisory control over the work plaintiff was performing at the central mechanical plant when he fell off the ladder supplied by his employer, Turner is entitled to summary dismissal of the complaint as asserted against it (*see also, Mocarska v 200 Madison Assocs., L.P.*, 262 AD2d 163 [1st Dept 1999] [affirming dismissal of Labor Law 200, 240(1) and 241(6) claims where defendant's work was "wholly separate from that of plaintiff's employer, an asbestos removal contractor" even though defendant performed work upon the premises where plaintiff allegedly sustained her injury]; *Nowak v Smith &*

Mahoney, P.C., 110 AD2d 288 [dismissing Labor Law 200 and 240(1) claims against general contractor where it was "conceded that when the accident occurred, plaintiff's work activities were entirely related to the performance of his employer's prime electrical contract" with owner, and defendant was not a party to prime contract or had supervisory control over employer's performance, thereby dispelling negligence and 200 claim; since "contractually and statutorily" defendant was never in a position to direct, supervise or enforce safety measures, 240(1) also dismissed]).

Thus, summary judgment dismissing the plaintiff's common law negligence and Labor Law 200, 240(1) and 241(6), and dismissing all cross claims in Turner's favor, is granted.

Plaintiff

Based on the above grant of Turner's motion to dismiss, the branch of plaintiff's cross-motion for summary judgment on his Labor Law 240(1) claim against Turner is denied.

As to the remaining defendants, plaintiff's cross-motion for summary judgment under Labor Law 240(1) is denied, as premature.

Plaintiff attests that he was assigned to install a large pull box in the ceiling at least ten feet from the ground, and that a ladder was thus required to perform this task. The ladder was provided by his employer, O'Kane Electric. Plaintiff states that neither the owner, the general contractor, nor his employer provided him with any other safety equipment to perform this elevated construction work. While descending the ladder, the ladder shifted and caused plaintiff to be thrown to the ground, resulting in his injuries.

Plaintiff is "under no obligation to show that the ladder was defective in some manner or to prove [some defect in the floor] to make out a Labor Law § 240(1) violation. It is sufficient to

show the absence of adequate safety devices to prevent the ladder from sliding or to protect plaintiff from falling" (*Bonanno v Port Authority of New York and New Jersey*, 298 AD2d 269, 270 [1st Dept 2002]). However, not every accident at a work site means that the Labor Law has been violated (*Berberi v Fifth Ave. Development Co., LLC*, 20 Misc 3d 1106, 866 NYS2d 90 [Sup Ct Bronx County] *citing Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280 [2003]). Specifically, not every fall from a ladder indicates a violation of Labor Law 240(1) (*Id.*).

A defendant can defeat summary judgment by demonstrating that facts essential to oppose the motion are in plaintiff's exclusive knowledge and possession and may be obtained by discovery (CPLR 3212(f)). While plaintiff attests that the ladder "shifted," the circumstances under which the ladder shifted is not explained, and has not yet been explored, to warrant summary judgment in plaintiff's favor at this juncture. Plaintiff claims that the "uncontroverted testimony" of the plaintiff warrants the relief sought. However, defendants have not had the opportunity to discover any evidence in order to controvert plaintiff's self-serving affidavit. "Not every worker who falls at a construction site . . . gives rise to the extraordinary protections of Labor Law § 240(1)," since "only those accidents proximately caused by a Labor Law § 240(1) violation will result in the imposition of liability under the statute" (*Lazza v Harman Realty Brooklyn LLC*, 22 Misc3d 1116, 880 NYS2d 224 [Sup Ct New York County 2009] *citing Blake v Neighborhood Hous. Ser. of the New York City*, 1 NY3d 280, 287). Where a gravity-related accident is caused solely by the plaintiff's own negligence rather than a violation of the statute, no liability will attach under Labor Law 240(1) (*Blake*, 1 NY3d 280, 289). Thus, the remaining defendants should be permitted the opportunity to depose plaintiff and complete discovery

pertaining to the circumstances surrounding plaintiff's alleged descent and shifting of the ladder, and explore a defense to this claim, prior to the award of summary judgment in plaintiff's favor (*see Yun-Shou Gao v City of New York*, 29 AD3d 449, 814 NYS2d 523 [1st Dept 2006] [stating "The motion was made before any disclosure had been conducted and was properly denied in the circumstances presented"]; *Bradley v Ibex Const. LLC*, 22 AD3d 380, 801 NYS2d 901 [1st Dept 2005] [stating "motions, which were made before a preliminary conference had been held and before defendants had any opportunity to obtain disclosure, were properly denied as premature under the circumstances presented"]; *McGlynn v Palace Co.*, 262 AD2d 116, 691 NYS2d 514 [1st Dept 1999] [holding that it was error for Supreme Court to grant summary judgment on plaintiff's Labor Law 240(1) claim prior to affording defendants an opportunity to depose plaintiff]). The Court also notes that the deposition or statements from plaintiff or the alleged witness to his accident may reveal facts that raise an issue as to whether the ladder provided by plaintiff's employer satisfied defendants' statutory duty (*see, e.g., Adams v Owens-Corning Fiberglass Corp.*, 260 AD2d 877, 688 NYS2d 788 [3d Dept 1999] [error to grant summary judgment on Labor Law 240(1) claim where the record establishes that plaintiff directed a co-worker to kick the ladder out from under him in order to break the connection from the circuit that was electrocuting him; the ladder did not slip, collapse or otherwise fail to perform its function of protecting plaintiff from falling]).

Therefore, the branch of plaintiff's cross-motion for summary judgment against defendants Lincoln Center, Inc. and JDP Mechanical, is denied, at this juncture, without prejudice.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant, Turner Construction Company, for summary judgment (CPLR 3212) dismissing the Complaint and all cross-claims against it, is granted, and the action and all cross-claims as asserted against said defendant are hereby severed and dismissed, and the Clerk may enter judgment accordingly; and it is further

ORDERED that the branch of the cross-motion by plaintiff for summary judgment on its Labor Law 240(1) claim is denied as to Turner Construction Company; and it is further

ORDERED that the branch of the cross-motion by plaintiff for summary judgment on its Labor Law 240(1) claim is denied as to defendants Lincoln Center, Inc. and JDP Mechanical, as premature, and without prejudice; and it is further

ORDERED that the remaining parties shall appear for a preliminary conference on October 27, 2009, 2:15 p.m.; and it is further

ORDERED that defendant Turner Construction Company serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: September 8, 2009

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED

SEP 10 2009

COUNTY CLERK'S OFFICE
NEW YORK