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

PRESENT: NANCY S. FRIEDMAN **PART** 57

Index Number : 117273/2006

RAMOS, JOAQUIM ISMAEL

vs

ANSONIA ASSOCIATES

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ **were read on this motion and cross-motion for** summary judgment

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause — Affidavits — Exhibits ...~~ and cross-motion	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	5, 6

Ramos Exhs 1-11

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion are

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED

FEB 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2-7-11

_____ J.S.C.
NANCY S. FRIEDMAN

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 57

PRESENT: Hon. Marcy S. Friedman, JSC

JOAQUIM ISMAEL RAMOS and MARGARIDA RAMOS,

Plaintiff(s),

Index No.: 117273/06

- against -

DECISION/ORDER

ANSONIA ASSOCIATES LIMITED PARTNERSHIP, et al.,

Defendant(s).

In this Labor Law action, plaintiff sues for injuries sustained when he allegedly fell through a mezzanine floor that was being demolished as part of a construction project. Defendants Ansonia Associates Limited Partnership (Associates), Stahl Real Estate, Inc. (Stahl), Ansonia Condominium (Condominium), Ansonia Commercial Corp. (Commercial) and Ansonia Commercial LLC (collectively the Ansonia defendants) move for summary judgment dismissing plaintiff's complaint against them. Plaintiff cross-moves for summary judgment on his claims under Labor Law §§ 240(1), 241(6), and 200, and for common law negligence against defendants Commercial, Associates, Condominium, and Sirius, LLC (Sirius).[1] By separate motion, defendants Ansonia Realty, LLC (Realty) and Sirius move for summary judgment dismissing plaintiff's complaint and all cross-claims against it.

The following material facts are undisputed: The accident occurred in the ground floor

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[1] While defendants correctly contend that plaintiff's cross-motion is untimely as it was made more than 120 days after the filing of the note of issue, the court, in its discretion, will consider it, as it addresses the same Labor Law causes of action that are the subject of defendants' timely motions. (See Wilinsky v 334 East 92nd Hous. Dev. Fund Corp., 71 AD3d 538 [1st Dept 2010]; Filannino v Triborough Bridge & Tunnel Auth., 34 AD3d 280 [1st Dept 2006].)

commercial unit at 2109 Broadway in Manhattan. Condominium owns the building. Commercial owns the commercial unit at the premises. Associates is the sponsor for residential units at the premises. Sirius is the managing agent of both the residential and commercial units of the building. Stahl is an entity which has an ownership interest in Condominium. Realty is the broker for the residential units at the building. (See Dep. of Marc Lippman [Sirius' General Manager] at 7-9.)

Plaintiff was employed as a foreperson by non-party Rite-Way Demolition (Rite-Way). Rite-Way was hired by Condominium for the project. Prior to his accident, plaintiff was working on the mezzanine level of the commercial space, demolishing the walls and floor. (See P.'s Dep. at 56.) After completing removal of the walls, plaintiff had removed two planks of plywood from the floor. (Id. at 58.) As plaintiff walked across the floor, the floor collapsed and he fell nine or ten feet. (Id. at 59-61.)

As a threshold matter, plaintiff does not oppose the branch of Realty's motion dismissing the complaint against it. As to defendant Sirius, the managing agent, there is no dispute that it neither owned nor leased the commercial unit in which plaintiff's accident occurred. Plaintiff correctly contends that Sirius, as the managing agent for the entire condominium, may be found liable as the owner's "agent" for the purposes of Labor Law liability if Sirius had the authority to supervise and control plaintiff's work. (See Voultepsis v Gumley-Haft-Klierer, 60 AD3d 524 [1st Dept 2009].) However, the general manager of Condominium and Sirius, Marc Lippman, testified that Sirius had no responsibility for supervising Rite-Way's work at the premises. (Lippman Dep. at 18.) Moreover, plaintiff testified that he took all of his instructions from a foreman at Rite-Way, Ramon. (See P.'s Dep. at 41, 45.) In opposition to Sirius' prima facie

showing, plaintiff fails to raise a triable issue of fact. This general supervisory authority is insufficient to demonstrate that Sirius' was acting as the owner's agent under the Labor Law. (See Walls v Turner Constr., 4 NY3d 861, 864 [2005].) Accordingly, plaintiff's complaint should be dismissed as against defendants Realty and Sirius.

Labor Law § 240(1) Claim

Labor Law §240 (1) provides:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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.

"The purpose of the section is to protect workers by placing the 'ultimate responsibility' for worksite safety on the owner and general contractor, instead of the workers themselves." (Gordon v Eastern Ry. Supply, Inc., 82 NY2d 555, 559 [1993]; Rocovich v Consolidated Edison Co., 78 NY2d 509 [1991].) "Thus, section 240(1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury." (Gordon, 82 NY2d at 559.) "The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." (Rocovich, 78 NY2d at 514.) " [A]n accident alone does not establish a Labor Law §240(1) violation or causation." (Blake v Neighborhood Hous. Servs. of New York City, Inc., 1 NY3d 280, 289 [2003].) In order to establish liability under §240(1), it must be shown that the

statute was violated and that the violation was a contributing cause of the plaintiff's fall. (Id. at 287-289.)

In moving for summary judgment, the Ansonia defendants contend that there was no elevation-related risk requiring the protections of § 240(1). Contrary to defendants' contention, plaintiff's claim is not barred under § 240(1) on the ground that he fell through a permanent structure. It is undisputed that both the walls and floor of the mezzanine were being demolished. Plaintiff testified that "[w]e had to remove the whole floor [of the mezzanine]. Everything was going down." (P.'s Dep. at 48.) He also testified that prior to his fall, he was dismantling the walls and floor of the mezzanine (id. at 56-61), and that, on the day of his accident, workers were removing the ceiling on the first floor below the mezzanine floor on which plaintiff was working. (Id. at 73.) Defendants' manager confirmed that the mezzanine was to be taken down as part of the project. (See Lippman Dep. at 16-17.)

Thus, the condition of the floor on which plaintiff was working placed him at an elevation-related risk.[2] (See Mihelis v I. Park Lake Success, LLC, 56 AD3d 355 [1st Dept 2008].) As recently explained in Kindlon v Schoharie Cent. Sch. Dist., (66 AD3d 1200, 1202 [3d Dept 2009]), "[t]he collapse of the work site itself, even if it is part of a permanent structure, will constitute a prima facie violation of the statute, especially if the structure being worked upon is acting as the functional equivalent of a scaffold" [internal quotation marks and citation omitted].

Jones v 414 Equities LLC (57 AD3d 65, 66 [1st Dept 2008]), on which defendants rely, is not to the contrary. This case held that a plaintiff can recover under § 240(1) even if he was

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[2] Contrary to defendants' contention (see Ds.' Aff. In Opp., ¶¶ 10-12), it is immaterial whether plaintiff fell through a gap in the metal decking beneath the mezzanine floor or through a weak area of the floor itself. In either case, it was the condition of the floor that posed an elevation-related risk.

injured as a result of the collapse of a permanent floor, but that "liability . . . under these circumstances requires a showing that the collapse of the floor was foreseeable." Here, an independent showing of foreseeability is not required, as the floor through which plaintiff fell was being removed, and it was "apparent from the nature of the work that plaintiff was exposed to an elevation-related risk." (Id. at 80.) Finally, it is undisputed that notwithstanding that plaintiff was exposed to an elevation-related risk, plaintiff was not provided with a safety harness, lifeline, or other safety device. (P.'s Dep. at 88.) Plaintiff is accordingly entitled to summary judgment on his § 240(1) claim.

Labor Law § 241(6)

Labor Law §241(6) provides:

> All contractors and owners and their agents . . . shall comply with the following requirements:
>
> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

It is well settled that this statute requires owners and contractors and their agents "to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." (Ross v Curtis Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993].) This duty is nondelegable, and a plaintiff need not show that the defendant exercised supervision or control over the worksite to recover under this section. (Id. at 502.) In order to maintain a viable claim

under Labor Law §241(6), however, the plaintiff must allege a violation of a provision of the Industrial Code that mandates compliance with "concrete specifications," as opposed to a provision that "establish[es] general safety standards." (Id. at 505.)

In opposition to defendants' motion and cross-motions for summary judgment, plaintiff alleges that defendants violated Industrial Code §§ 23-1.7(b)(1)(i), 23-1.7(b)(1)(iii)(b) and (c), 23-3.3(b)(3), and 23-3.3(c).[3]

Industrial Code §§ 23-1.7(b)(1)(i) and (b)(1)(iii)(b) and (c),[4] which pertain to protections for hazardous openings, are sufficiently specific to support liability under this section. (See Olsen v James Miller Marine Serv., Inc., 16 AD3d 169 [1st Dept 2005]; O'Connor v Lincoln Metrocenter Partners, L.P., 266 AD2d 60 [1st Dept 1999].) However, it is undisputed that plaintiff did not fall through an opening. Rather, he stepped on a part of the floor which collapsed. (See P.'s Dep. at 60.) Accordingly, § 23-1.7(b)(1)(i) is inapplicable to plaintiff's accident. Sections 23-1.7(b)(1)(iii)(b) and (c) are also inapplicable, as plaintiff was not working "close to the edge" of an opening.

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[3] Although plaintiff cites numerous other Industrial Code provisions allegedly violated by defendants, the above-cited provisions are the focus of plaintiff's cross-motion. (See Rutman Aff. ¶¶ 79-90.)

[4] §§ 23-1.7(b)(1)(i) and (b)(1)(iii)(b) provide in pertinent part:
"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). . . .
(iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows: (*a*) Two-inch planking, full size, or material of equivalent strength installed not more than one floor or 15 feet, whichever is less, beneath the opening; or (*b*) An approved life net installed not more than five feet beneath the opening; or (*c*) An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage."

Industrial Code § 23-3.3(b)(3),[5] which pertains to guarding of demolition sites, although sufficiently specific to support liability under § 241(6) (see Perillo v Lehigh Const. Group, Inc., 17 Ad3d 1136 [4th Dept 2005]), is inapplicable to plaintiff's accident. Plaintiff fails to make any showing that a failure to "guard" the ongoing demolition was a proximate cause of plaintiff's accident. Rather, as held above, it was the failure to provide adequate safety devices that proximately caused plaintiff's accident.

Industrial Code § 23-3.3(c),[6] which relates to inspections during hand demolition activities, is sufficiently specific to support liability under § 241(6). (See Vasqez v Urbahn Assocs., 79 AD3d 493 [1st Dept 2010]; Perillo, 17 AD3d at 1138.) There is no evidence in this record demonstrating that any inspections were made of the demolition activity conducted on or below the floor on which plaintiff was working. Accordingly, plaintiff should be awarded judgment as to liability on his § 241(6) claim based on Industrial Code § 23-3.3(c). (See id.)

Labor Law § 200 and Common Law Negligence

Labor Law §200(1) provides in pertinent part, as follows:

> 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.

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[5] § 23-3.3(b)(3) provides that:
"(b) *Demolition of walls and partitions. . . .(3) Walls, chimneys and other parts of any* building or other structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration."

[6] § 23-3.3(c) provides that:
"(c) Inspection. During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means."

Labor Law §200 is a codification of the common law duty imposed upon an owner or contractor to provide construction workers with a safe place to work. (See Comes v New York State Elec. and Gas Corp., 82 NY2d 876 [1993].) An implicit precondition to this duty "is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition." (Russin v Louis N. Picciano & Son, 54 NY2d 311, 317 [1981].)

Thus, "[w]here the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law §200." (Comes, 82 NY2d at 877. See also Ross, 81 NY2d at 505 [same for general contractor]; Reilly v Newireen Assocs., 303 AD2d 214 [1st Dept 2003], lv denied 100 NY2d 508.)

As was held above as to defendant Sirius, the Ansonia defendants make a prima facie showing that they did not supervise or control plaintiff's work at the site. (See Lippman Dep. at 18-19.) In opposition, plaintiff fails to submit evidence sufficient to raise a triable issue of fact as to whether defendants controlled the method or manner of plaintiff's work in demolishing the mezzanine. Accordingly, the Labor Law § 200 and negligence claims should be dismissed as against all defendants.

Indemnification

Defendants Sirius and Realty also cross-move for the dismissal of the Ansonia defendants' cross-claims for contractual indemnification against them. Sirius and Realty do not address these cross-claims in their papers, and do not submit the parties' indemnification agreements. This branch of their motion must accordingly be denied.

Accordingly, it is hereby ORDERED that the motion of defendants Ansonia Associates

Limited Partnership, Stahl Real Estate, Inc., Ansonia Condominium, Ansonia Commercial Corp., and Ansonia Commercial LLC is granted to the extent that plaintiff's claims against them under Labor Law § 200 and for common law negligence are dismissed; and it is further

ORDERED that plaintiff's claim against the above defendants under Labor Law § 241(6) is dismissed except to the extent that plaintiff relies upon Industrial Code § 23-3.3(c); and it is further

ORDERED that plaintiff's cross-motion for summary judgment is granted to the extent that plaintiff Joaquim Ismael Ramos is awarded judgment as to liability against defendants Ansonia Associates Limited Partnership, Stahl Real Estate, Inc., Ansonia Condominium, Ansonia Commercial Corp., and Ansonia Commercial LLC on his claims under Labor Law § 240(1) and under § 241(6) to the extent that it is based on Industrial Code § 23-3.3(c); and it is further

ORDERED that the motion of defendants Ansonia Realty, LLC and Sirius, LLC is granted to the extent that plaintiff's complaint is dismissed as against them, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remaining claims are severed and shall continue.

This constitutes the decision and order of the court.

Dated: New York, New York
February 7, 2011

MARCY FRIEDMAN, J.S.C.