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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUDGE DORIS LING-COHAN _____ PART 36

Justice

Index Number : 105039/2010
SOTTILE, PHILLIP
vs
ELEVENTH AVENUE
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for Summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2

Answering Affidavits — Exhibits _____ | No(s). 3

Replying Affidavits _____ | No(s). 4

Upon the foregoing papers, it is ordered that this motion ~~is~~ by plaintiff for summary judgment is denied in accordance with the attached memorandum decision.

(consolidated for disposition with motion sequence number 004)

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

Dated: 10/16/13

_____, J.S.C.
JUDGE DORIS LING-COHAN

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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PHILLIP SOTTILE,

Plaintiff,

-against-

ELEVENTH AVENUE, L.P., DD 11TH AVENUE, LLC., DOUGLASTON DEVELOPMENT, LLC., and LEVINE BUILDERS,

Defendants.

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Index No. 105039/10

Mot. Seq. Nos. 003 & 004

DORIS LING-COHAN, J.:

Motion sequence numbers 003 and 004 are consolidated for disposition.

This action arises out of a workplace accident which occurred on September 30, 2008 at 316 11th Avenue, New York, New York. In motion sequence number 003, plaintiff Phillip Sottile moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law § 240 (1) as against defendants DD 11th Avenue, LLC and Levine Builders.

In motion sequence number 004, defendants Eleventh Avenue, L.P., DD 11th Avenue, LLC, Douglaston Development, LLC, and Levine Builders move for an order: (1) pursuant to CPLR 3212, dismissing plaintiff's Labor Law § 241 (6), Labor Law § 200, and common-law negligence causes of action; and (2) pursuant to CPLR 3126 and 3212, dismissing the complaint for spoliation of evidence.

BACKGROUND

Eleventh Avenue, L.P. was the owner of the premises located at 316 11th Avenue, New

York, New York.[1] DD 11th Avenue, LLC hired Levine Builders as a construction manager to construct a luxury residential building consisting of 369 rental apartments and one cellar on the premises. Levine Builders retained Mastercraft Masonry, Inc. (Mastercraft) as a subcontractor to perform masonry work on the project. Plaintiff was an employee of Mastercraft.

Plaintiff testified at his deposition that, on September 30, 2008, he was employed by Mastercraft as a journeyman laborer (Plaintiff EBT, at 10, 80). Plaintiff's primary responsibilities were to move mortar and blocks to the masons who were using these materials to fabricate walls (*id.* at 43, 56). On that date, plaintiff was directed by his foreman, Ralph Lee, to use a pulley to lift cinder blocks to a receiving area on an overhead scaffold (*id.* at 58, 59-60). According to plaintiff, the pulley was attached to a load-bearing wall, and a rope was strung through the pulley and hooks tied to one end of the rope (*id.* at 67-68).

Plaintiff's job was to attach cinder blocks to the hooks at ground level and then pull the rope so that the blocks were lifted to another worker who was standing on a scaffold about 12 feet above him (*id.* at 59, 60, 68). Plaintiff stated that "[t]he thing just snapped. The cinder block snapped and the pulley snapped" and that "I don't know if the cinder block, you don't know when something like that happens. All I know is something coming down and the pulley and the rope" (*id.* at 92). According to plaintiff's testimony, "[t]he whole thing came down," meaning the pulley, rope, and cinder block (*id.* at 93). When asked what caused the pulley to fall, plaintiff stated that "[he] couldn't determine the exact thing. All [he] know[s] is the whole structure that was meant to pull these things up failed" (*id.* at 92). Plaintiff's right foot was

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[1]Contrary to plaintiff's assertion, DD 11th Avenue, LLC did not admit ownership of the premises in its answer (Answer, ¶ 6). Rather, Eleventh Avenue, L.P. admitted that it was the owner (*id.*, ¶ 5).

struck with the rope and a cinder block (*id.* at 96). Plaintiff testified that he fell to the ground, and that a couple of "safety site guys" came over to him (*id.* at 97). After his accident, plaintiff stayed on the ground for a while because he was in a lot of pain, and had to cut his boot off because he felt his foot getting bigger and bigger (*id.* at 98).

Rizo Ramusevic testified that he was employed by Levine Builders when the construction project began at 316 Eleventh Avenue (Ramusevic EBT, at 8). Ramusevic testified that the project was "basically ground-up construction, 35-story, poured-in-place concrete reinforced steel buildings, 369 units" (*id.* at 16). Ramusevic stated that Levine Builders retained Mastercraft to perform masonry work on the project (*id.* at 27-28). Ramusevic was told by several Mastercraft workers that plaintiff had been carrying a cinder block by hand when he caused his own injuries (*id.* at 47-48).

Fred Milteer, a construction site safety manager employed by nonparty Total Safety Consulting, testified that, on September 30, 2008, he was working on a construction site located at 316 Eleventh Avenue (Milteer EBT, at 8-9). According to Milteer, on that date, plaintiff got his attention and told him that he was injured on the job site (*id.* at 14-15). Plaintiff told Milteer that a cinder block fell from the pulley system onto his foot (*id.* at 15). Plaintiff was standing up, putting his weight on both of his feet, and was wearing his construction boots (*id.* at 15, 35, 36). Milteer asked to see plaintiff's foot, and took a photograph of his foot (*id.* at 15; Lamboley Affirm. in Support, Exh. H). Milteer testified that the pulley system was intact, and was in good working order both prior to and after the accident (Milteer EBT, at 32). Milteer prepared an accident report the following day on October 1, 2008, which states that "[w]hile the employee was pulling and receiving concrete block on a pulley system, there was a cut cinder block that

broke off the pulley and struck the injured's right foot big toe area" (Hayt Affirm. in Support, Exh. J; Milteer EBT, at 19). Milteer testified that this information was based entirely on what plaintiff told him (Milteer EBT, at 24).

After a hearing, the Workers' Compensation Board found that plaintiff suffered a work-related injury and awarded plaintiff workers' compensation benefits as a result of his accident (Hayt Affirm. in Support, Exh. K).

DISCUSSION

"[T]he proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). "On a motion for summary judgment, issue-finding, rather than issue-determination, is key" (*Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 475 [1st Dept 2010]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Labor Law § 240 (1)

Plaintiff moves for partial summary judgment under Labor Law § 240 (1) as against DD 11th Avenue, LLC and Levine Builders. Plaintiff contends that he is entitled to summary judgment because he was struck by a cinder block that fell while being hoisted, and that these

defendants failed to provide adequate protective devices to prevent his injury.

Defendants argue that plaintiff's motion should be denied, because there are issues of fact as to plaintiff's credibility and the manner in which the accident occurred. According to defendants, there are issues of fact in view of: (1) plaintiff's testimony that the cinder block and pulley "snapped," that he had to cut his boot off, and that he spoke to Milteer while he was on the ground; (2) Milteer's testimony that the pulley system was intact and that when he spoke with plaintiff, he was putting weight on both feet and was wearing construction boots; (3) the accident report indicates, contrary to plaintiff's deposition testimony, that the cinder block "broke off" the pulley (Hayt Affirm. in Support, Exh. J); (4) Ramusevic's testimony that he was told by several workers that plaintiff had been carrying a cinder block by hand when he dropped it on his own foot; (5) inconsistencies in plaintiff's testimony as to where he was standing in relation to the hoist; and (6) the absence of corroboration as to the collapse of the hoist.

Labor Law § 240 (1), commonly known as the Scaffold Law, provides, in relevant part, that:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering . . . 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, 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) imposes absolute liability on owners, contractors, and their agents for any breach of the statutory duty which proximately causes an injury (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]; *Haimes v New York Tel. Co.*, 46 NY2d 132, 136 [1978]). The duty imposed is "nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control

over the work" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]).

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder 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*'" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], quoting *Ross*, 81 NY2d at 501). To prevail under Labor Law § 240 (1), the plaintiff must establish the following two elements: (1) a violation of the statute, i.e., that the owner or general contractor failed to provide adequate safety devices; and (2) that the statutory violation was a proximate cause of the injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 [2003]).

To establish liability under Labor Law § 240 (1) based upon a falling object, the plaintiff must show that, at the time the object fell, it was "being hoisted or secured" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]), or "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]). Moreover, the plaintiff must show that the object fell "*because of* the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268).

In *Boyle v 42nd St. Dev. Project, Inc.* (38 AD3d 404, 405 [1st Dept 2007]), a case relied upon by plaintiff, the plaintiff was struck by a threaded rod that fell while it was being installed two floors above him. The First Department held that the plaintiff was entitled to summary judgment under the section 240 (1), stating that "[t]he motion court erred in vacating its initial determination. The accident clearly falls within the purview of the statute inasmuch as plaintiff was struck by a falling object that had been inadequately secured" (*id.* at 406).

In *Arnaud v 140 Edgecomb LLC* (83 AD3d 507, 508 [1st Dept 2011]), the plaintiff was

injured while moving planks from the fourth floor of a building to the second floor using a pulley and rope (*id.*). While on the second floor, the plaintiff was struck by a wood plank, when he had his arms outstretched through a window to grab the wood as it was lowered (*id.*). The First Department held that:

> "In the context of falling objects, the risk to be guarded against is the unchecked or insufficiently checked descent of the object. In this case, the wood was an object that required securing for the purposes of the undertaking. A lack of certainty as to exactly what preceded plaintiff's accident does not create an issue of fact as to proximate cause. Nor does the fact that plaintiff did not point to any particular defect in the pulley defeat his entitlement to summary judgment. Labor Law § 240 (1) provides for liability where safety equipment such as hoists are not 'placed and operated as to give proper protection.' Thus, it is not necessary that plaintiff establish that the pulley was defective, only that he was not given 'proper protection'"

(*id.* at 508 [citations omitted]).

In *Clarke v Morgan Contr. Corp.* (60 AD3d 523 [1st Dept 2009]), the injured plaintiff was injured when two metal stud beams that were being hoisted from the street were dropped from a sidewalk and landed on his face, chest and shoulders. The Court held that "[p]laintiffs met their burden of demonstrating that defendant's failure to provide adequate safety devices was a contributing cause of plaintiff's injuries in violation of section 240 (1), and plaintiff, was not, under any view of the evidence, the sole proximate cause of his injuries" (*id.* [citations omitted]).

Here, as detailed below, while plaintiff has demonstrated a *prima facie* entitlement to summary judgment, defendants have raised factual issues to warrant a denial of plaintiff's motion for partial summary judgment on his Labor Law §240(1) claim. Plaintiff testified that, while he was hoisting a cinder block to an elevated area, the pulley, rope and cinder block fell to the ground when the cinder block reached a level of about 10 to 12 feet above ground (Plaintiff EBT,

at 91-96). The cinder block struck plaintiff's right foot (*id.* at 96). Thus, plaintiff has demonstrated that the harm that he suffered was the direct consequence of the force of gravity to the cinder block that was being hoisted (*see Dedndreaj v ABC Carpet & Home*, 93 AD3d 487, 488 [1st Dept 2012] ["Plaintiff established his prima facie entitlement to summary judgment by showing that defendants' failure to provide an adequate safety device proximately caused a pipe that was in the process of being hoisted to fall and strike him"]; *Kretowski v Braender Condominium*, 57 AD3d 950, 951 [2d Dept 2008] [worker established prima facie that defendants were liable under Labor Law § 240 (1) based upon his deposition testimony that a brick fell on him while it was being hoisted to the roof]; *Zuluaga v P.P.C. Constr., LLC*, 45 AD3d 479, 479-480 [1st Dept 2007] ["Partial summary judgment was properly granted to plaintiff on his Labor Law § 240 (1) claim . . . , where plaintiff, while performing asbestos removal work on the building's first floor was injured when he was struck by a six-foot-long pipe that fell from several floors above where other workers were performing demolition work . . ."]).

Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing the motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact'" (*People v. Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). Here, defendants have established that there are issues of fact as to how plaintiff's accident occurred or whether it happened at all. Where there is an issue of fact as to the plaintiff's *prima facie* case or plaintiff's credibility as to a material fact, summary judgment should be denied (*see Klein v City of New York*, 89 NY2d 833, 835 [1996]; *Grant v Steve Mark, Inc.*, 96 AD3d 614 [1st Dept 2012]; *Rodriguez v Forest City Jay St. Assoc.*, 234 AD2d 68, 69-70

[1st Dept 1996]; *Muhammad v Hyman Constr.*, 216 AD2d 206 [1st Dept 1995]; *Manna v New York City Hous Auth.*, 215 AD2d 335, 335-336 [1st Dept 1995]). In *Grant, supra*, the plaintiff allegedly fell from a ladder after it tipped over (*Grant*, 96 AD3d at 314). The Court held that "[t]he manner of the happening of the accident is within the exclusive knowledge of plaintiff, and the only evidence submitted in support of defendants' liability is plaintiffs' own account" (*id.*). The Court continued, stating that "[d]efendants should have the opportunity to subject plaintiff's testimony to cross-examination to explore whether she misused the ladder and was the sole proximate cause of the accident, and to have her credibility determined by a trier of fact" (*id.*). The *Grant* Court cited to *Manna*, where an issue of fact was presented as to defendants' liability where the worker presented evidence that he was struck by a cinder block that was thrown from a third floor by a co-worker named "Brian," the employer alleged that it never employed a worker named Brian, and no broken pieces of cinder block were ever found (*Manna*, 215 AD2d at 335). The First Department in *Manna* held that:

> "where the manner of the happening of the accident is within the exclusive knowledge of the plaintiff, an award of summary judgment on liability is inappropriate because the defendant should have the opportunity to subject the plaintiff's testimonial account to cross-examination and have his credibility determined by the trier of fact"

(*id.* at 336). In *Muhammad, supra*, in affirming the denial of summary judgment to the plaintiff under section 240 (1), the First Department ruled that: "apparent inconsistencies between plaintiff's deposition testimony and his affidavit in support of the motion raise an issue of fact whether the carpenter's stud that allegedly struck plaintiff and caused him to fall from a ladder came from above him, and was thus an elevation-related hazard covered by Labor Law § 240 (1)" (*Muhammad*, 216 AD2d at 206).

In this case, there are issues of fact as to the manner of the happening of the accident, which is within the exclusive knowledge of plaintiff. Plaintiff testified that "[t]he thing just snapped," "[t]he cinder block snapped and the pulley snapped," and that "the whole structure that was meant to pull these things up failed" (Plaintiff EBT, at 92). Plaintiff further testified that the "[t]he whole thing came down," including the pulley, rope, and cinder block (*id.* at 93). In contrast, the accident report, based upon information which plaintiff provided, states that "there was a cut cinder block that broke off the pulley and struck the injured's right foot big toe area" (Hayt Affirm. in Support, Exh. J). Fred Milteer, the construction site safety manager, testified that when he observed the pulley after the accident, it had not collapsed, was intact and was in good working order after the accident (Milteer EBT, at 32). Rizo Ramusevic, the director of risk management for Levine Builders, testified that he discussed plaintiff's accident with plaintiff's co-workers from Mastercraft, and they told him that "this gentleman was lifting concrete blocks, and in the process of lifting them he dropped them on his foot causing his own injuries, his own accident" and that "they said he was lifting the blocks by hand and dropped them on his foot causing his own accident" (Ramusevic EBT, at 47-48). While this testimony is hearsay, it is not the only evidence contradicting plaintiff's account of the accident, and therefore may be considered to defeat plaintiff's motion (*see O'Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010] [hearsay may be considered to defeat a motion for summary judgment as long as it is not the only evidence submitted in opposition]). Therefore, defendants "should have the opportunity to subject the plaintiff's testimonial account to cross-examination and have his credibility determined by the trier of fact" (*Manna*, 215 AD2d at 336). It is for the jury to determine whether the cinder block fell on plaintiff when the pulley "snapped," collapsed, or

failed, whether the cinder block broke off the pulley, or whether plaintiff dropped the cinder block on his foot while carrying it. In view of the above, plaintiff's motion for partial summary judgment under Labor Law § 240 (1) is denied.

Labor Law § 241 (6)

Defendants also move for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim, arguing that plaintiff has failed to identify a specific or applicable Industrial Code provision.[2]

Labor Law § 241 states that:

> "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:
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> ***
>
> "6. 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."

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[2]The court rejects plaintiff's contention that the unsigned transcripts of Ramusevic and Milteer's depositions submitted by defendants are not in admissible form. The First Department has held that unsigned deposition transcripts may be submitted as proof in support of a motion for summary judgment, as long as they are certified by the court reporter as accurate (*White Knight Ltd. v Shea*, 10 AD3d 567 [1st Dept 2004]; *Morchik v Trinity School*, 257 AD2d 534, 536 [1st Dept 1999]; *Zabari v City of New York*, 242 AD2d 15, 17 [1st Dept 1998]). Here, the deposition transcripts are certified by the court reporters as accurate (Lamboley Affirm. in Support, Exhs. F, G). Moreover, plaintiff does not challenge any specific portions of these transcripts as inaccurate and, in fact, relies on these transcripts.

Labor Law § 241 (6) imposes a "*nondelegable* duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety'" to construction workers (*Rizzuto v L.A. Wenger Constr. Co.*, 91 NY2d 343, 348 [1998]). To establish liability under Labor Law § 241 (6), the plaintiff "'must specifically plead and prove the violation of an applicable Industrial Code regulation'" (*Garcia v 225 E. 57th St. Owners, Inc.*, 96 AD3d 88, 91 [1st Dept 2012], quoting *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]). The violation must constitute a "specific, positive command," and must also be a proximate cause of the accident (*Buckley*, 44 AD3d at 271). A "plaintiff's failure to identify a violation of any specific provision of the State Industrial Code precludes liability under Labor Law § 241 (6)" (*Kowalik v Lipschutz*, 81 AD3d 782, 783 [2d Dept 2011] [internal quotation marks and citation omitted]).

Here, plaintiff's verified bill of particulars alleges violations of 12 NYCRR 23-1.5, 12 NYCRR 23-1.7, 12 NYCRR 23-1.8, 12 NYCRR 23-1.11, 12 NYCRR 23-1.15, 12 NYCRR 23-1.16,[3] 12 NYCRR 23-1.17, 12 NYCRR 23-2.1, 12 NYCRR 23-2.2, 12 NYCRR 23-2.4, 12 NYCRR 23-2.5, 12 NYCRR 23-2.6, 12 NYCRR 23-2.7, 12 NYCRR 23-5, and article 1926 of OSHA (Verified Bill of Particulars, ¶ 14). In opposition to defendants' motion, however, plaintiff only relies upon section 23-1.7 (a) (1), entitled "Overhead hazards," which states that:

> "Every place where persons are required to work or pass that is *normally exposed to falling material or objects* shall be provided with *suitable overhead protection*. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot"

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[3]The verified bill of particulars cites a section "23-11.6," which appears to be a typographical error (Verified Bill of Particulars, ¶ 14).

(12 NYCRR 23-1.7 [a] [1] [emphasis added]).

Section 23-1.7 (a) (1) has been held to be sufficiently specific to serve as a predicate for a Labor Law § 241 (6) claim (*Clarke*, 60 AD3d at 524; *Murtha v Integral Constr. Corp.*, 253 AD2d 637, 639 [1st Dept 1998]). In order to be applicable, the provision requires a showing that the work site is "normally exposed to falling material or objects", so as to require "suitable overhead protection." "[W]here an object unexpectedly falls on a worker in an area not normally exposed to such hazards, the regulation does not apply" (*Buckley*, 44 AD3d at 271).

The parties disagree over whether this section is applicable in this case. On the one hand, defendants argue that there is no evidence that the area where plaintiff was working was "normally exposed to falling material or objects." Defendants also maintain that installing the overhead protection described in the regulation would have been contrary to the objective of the work, and would have prevented plaintiff from hoisting cinder blocks to workers above. Plaintiff contends, on the other hand, that defendants have failed to present any evidence showing that the location where his accident occurred was not normally exposed to falling objects or that they provided plaintiff with suitable overhead protection.

Here, there is no evidence that plaintiff was injured in an area "normally exposed to falling material or objects" (*compare Buckley*, 44 AD3d at 271 [elevator worker who was injured while testing an elevator platform in course of installing a new elevator was not injured in an area "normally exposed to falling material or objects"], *and Sears v Niagara County Indus. Dev. Agency*, 258 AD2d 918 [4th Dept 1999] [section 23-1.7 (a) (1) was inapplicable where construction worker was injured when metal clip slipped down column and struck hand], *with Gonzalez v TJM Constr. Corp.*, 87 AD3d 610, 611 [2d Dept 2011] [where mason was struck by a

brick, construction manager failed to establish the absence of triable issues of fact as to whether area where plaintiff was injured was not "normally exposed to falling material or objects," where work involved replacement of loose bricks from the building's façade], *Parrales v Wonder Works Constr. Corp.*, 55 AD3d 579, 582 [2d Dept 2008] [where the plaintiff was assisting in demolition inside building and was working in elevator shaft that was used as a chute for disposal of debris, section 23-1.7 (a) (1) was applicable], *and Zervos v City of New York*, 8 AD3d 477, 480 [2d Dept 2004] [section 23-1.7 (a) (1) was applicable where the plaintiff, while painting building exterior, was struck by a piece of brick from above, and plaintiff claimed that about a half an hour before the accident, small pieces of cement and bricks fell from the roof in the same manner, without hitting anyone]). Indeed, the falling cinder block was an unexpected occurrence. Accordingly, section 23-1.7 (a) (1) is inapplicable to these facts.

Because plaintiff has failed to identify a specific and applicable Industrial Code provision, plaintiff's Labor Law § 241 (6) claim is dismissed (*see Kowalik*, 81 AD3d at 783).

Labor Law § 200 and Common-Law Negligence

Defendants move for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims. Defendants contend that they did not direct, supervise or control the means or methods used by plaintiff or his employer, Mastercraft.

In response, plaintiff contends that defendants admittedly had the right to control the use of hoists on the job, but have not shown that they did not have prior notice of dangerous conditions involving the hoists.

It is well settled that Labor Law § 200 "is a codification of the common law duty imposed upon an owner or general contractor to maintain a safe construction site" (*Rizzuto*, 91 NY2d at

352). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). "These two categories should be viewed in the disjunctive" (*id.*).

Where a premises condition is at issue, "a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]). Similarly, a general contractor may be liable under section 200 and the common law if it had "control over the work site and knew or should have known of the unsafe condition that allegedly brought about plaintiff's injury" (*Gallagher v Levien & Co.*, 72 AD3d 407, 409 [1st Dept 2010]).

In contrast, where the worker is injured as the result of the manner in which the work is performed, including dangerous or defective equipment, "the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]; *see also Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]).

It is well settled that "the duty to provide a safe place to work is not breached when the injury arises out of a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work" (*Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d 136, 145 [1965], *rearg denied* 16 NY2d 883 [1965]). In

Persichilli, the Court of Appeals reasoned that, although a subcontractor must furnish safe ladders and scaffolds to its employees, a subcontractor's failure to provide safe appliances does not render the "premises" unsafe or defective (*id.* at 146).

Here, plaintiff's accident arose out of the means and methods of his work, not a dangerous or defective condition on the premises. The record reflects that the pulley was provided by Mastercraft, plaintiff's employer. Plaintiff testified that his foreman directed him to use the pulley, and that only Mastercraft workers used the pulley (Plaintiff EBT, at 57, 58). Rizo Ramusevic, the witness for Levine Builders, testified that each trade contractor was responsible for providing its own tools and equipment (Ramusevic EBT, at 76).

Defendants have made a prima facie showing that they did not exercise supervisory control over plaintiff's work. Plaintiff testified that he only received directions and instructions as to how to perform his work from Mastercraft's employees (Plaintiff EBT, at 21-22).

Plaintiff has failed to raise an issue of fact as to defendants' liability under section 200 or in common-law negligence.[4] Although plaintiff contends that defendants have not established that they did not have notice of unsafe conditions with hoists, this was unnecessary. "Mere notice of unsafe methods of performance is not enough to hold the owner or general contractor vicariously liable under this section" (*Colon v Lehrer, McGovern & Bovis*, 259 AD2d 417, 419 [1st Dept 1999]; *see also Comes*, 82 NY2d at 878 ["this Court has not . . . imposed liability under the statute solely because the owner had notice of the allegedly unsafe manner in which the work was performed"]). While Levine Builders' safety director testified that it had the right to

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[4]The court notes that plaintiff relies on *Bush v Gregory/Madison Ave.* (308 AD2d 360 [1st Dept 2003]), which was overruled by the First Department in *Hughes* (40 AD3d at 309).

stop any unsafe practices (Ramusevic EBT, at 77), the authority to stop work for safety reasons is insufficient to raise a triable issue of fact as to a defendant's supervision and control of the work (*see Foley*, 84 AD3d at 478; *Hughes*, 40 AD3d at 309). Moreover, defendants' mere presence on the job site, and monitoring and oversight of the timing and quality of the work are insufficient to impose liability under section 200 or in common-law negligence (*see Phillip v 525 E. 80th St. Condominium*, 93 AD3d 578, 579-580 [1st Dept 2012]; *Paz v City of New York*, 85 AD3d 519, 519-520 [1st Dept 2011]).

Therefore, plaintiff's Labor Law § 200 and common-law negligence claims are dismissed.

Spoliation Sanctions

Defendants finally contend that the complaint should be dismissed because plaintiff destroyed, lost or refused to provide photographs that he testified corroborate his claim that a cinder block fell onto his foot due to the collapse of a pulley.[5]

Plaintiff argues, in opposition, that spoliation sanctions are not warranted because the photographs were taken by his physician, and that he never possessed the photographs. In addition, plaintiff contends that defendants waived any right to discovery sanctions because they failed to move for this relief within 20 days of plaintiff's filing of the note of issue, and have failed to establish any prejudice.

CPLR 3126 (3) permits the court to "dismiss[] the action or any part thereof" when a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article." The trial court has broad discretion in supervising disclosure (*Art Capital Group LLC v Rose*, 54 AD3d 276, 278 [1st Dept

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[5]Defendants submit an affidavit of good faith pursuant to 22 NYCRR 202.7.

2008]), and the nature and degree of the penalty to be imposed under this section is committed to the sound discretion of the trial court (*Gradaille v City of New York*, 52 AD3d 279, 283 [1st Dept 2008]).

It is well settled that spoliation sanctions may be imposed where a litigant, intentionally or negligently, disposes of crucial items of evidence (*Standard Fire Ins. Co. v Federal Pac. Elec. Co.*, 14 AD3d 213, 218 [1st Dept 2004]; *Squitieri v City of New York*, 248 AD2d 201, 202-203 [1st Dept 1998]; *Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]). "Spoliation sanctions . . . are not limited to cases where the evidence was destroyed willfully or in bad faith, since a party's negligent loss of evidence can be just as fatal to the other party's ability to present a defense" (*Squitieri*, 248 AD2d at 203 [citation omitted]). In determining the sanction to be imposed on a spoliator, the court must examine the extent that the non-spoliating party is prejudiced by the destruction of the evidence and whether dismissal is warranted as "a matter of elementary fairness" (*Kirkland*, 236 AD2d at 175 [internal quotation marks and citation omitted]). Where the evidence destroyed or lost is not key evidence, the court may properly limit its sanction to an adverse inference charge (*see Tommy Hilfiger, USA v Commonwealth Trucking*, 300 AD2d 58, 60 [1st Dept 2002]), or a missing evidence charge (*see Hulett v Niagara Mohawk Power Corp.*, 1 AD3d 999, 1002 [4th Dept 2003]).

Here, defendants' request for spoliation sanctions is denied, as defendants have failed to establish that they have been deprived of the means of defending against plaintiff's claims. Moreover, defendants have failed to demonstrate that plaintiff lost, destroyed or otherwise disposed of the photographs of his foot. Plaintiff testified that he went to an orthopedic surgeon "with [his] feet like blown out and full blown episode of RSD," and that the doctor "wrote a full

report" and "documented that, took pictures" of his foot (Plaintiff EBT, at 138). Plaintiff further testified that "*we* have pictures of my foot blowing up like a tree trunk, it's blue, yellow, that just doesn't happen out of the clear. That's a sign of RSD" (*id.* at 145 [emphasis added]). Plaintiff submits an affidavit indicating that he does not have and never possessed the photographs of his foot (Plaintiff Aff. in Opposition, ¶ 2). While defendants argue that plaintiff's affidavit directly contradicts his deposition testimony, the court cannot say that this is the case. "[A] party may not be compelled to produce or sanctioned for failing to produce information which he does not possess" (*Sagiv v Gamache*, 26 AD3d 368, 369 [2d Dept 2006]). Even if the photographs were destroyed or lost by plaintiff's physician, spoliation sanctions should not be imposed against a party who is not responsible for the spoliation (*Fotiou v Goodman*, 74 AD3d 1140, 1141 [2d Dept 2010]; *McLaughlin v Brouillet*, 289 AD2d 461 [2d Dept 2001]; *Maliszewska v Potamkin N.Y. LP Mitsubishi Sterling*, 281 AD2d 353 [1st Dept 2001]).

DD Eleventh Avenue, LLC and Douglaston Development, LLC

Defendants have failed to demonstrate that DD Eleventh Avenue, LLC and Douglaston Development, LLC are not proper Labor Law defendants, as a matter of law (*see Winegrad*, 64 NY2d at 853; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]). Defendants only argue that Eleventh Avenue, L.P. admitted that it was the owner of the premises, and that Levine Builders admitted that it entered into contracts regarding the work on the site (Lamboley Affirm. in Support, ¶¶ 88-89).

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 003) of plaintiff for partial summary

judgment is under Labor Law § 240 (1) is denied; and it is further

ORDERED that the motion (sequence number 004) of defendants Eleventh Avenue, L.P., DD 11th Avenue, LLC, Douglaston Development, LLC, and Levine Builders is granted to the extent of dismissing plaintiff's Labor Law §§ 200, 241 (6) and common-law negligence claims, and is otherwise denied; and it is further

ORDERED that within 30 days of entry of this order, defendants Eleventh Avenue, L.P., DD 11th Avenue, LLC, Douglaston Development, LLC, and Levine Builders shall serve a copy of this order, with notice of entry, upon plaintiff.

Dated: 10/16/13

Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\SottilevEleventhAveLP.gatto.wpd