Jerdonek v 41 West 72 LLC
2014 NY Slip Op 30957(U)
April 8, 2014
Sup Ct, New York County
Docket Number: 103694/10
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 7
Justice

ORFEUSZ M. JERDONEK,

Plaintiffs,

- against-

41 WEST 72 LLC, PROPERTY MARKETS GROUP, INC., DOMINION PROPERTY GROUP LLC, THE BOARD OF MANAGERS OF THE HERMITAGE CONDOMINIUM, AS AGENT FOR AND ON BEHALF OF ALL UNIT OWNERS and BAR CONSTRUCTION CORP.,

Defendants.

INDEX NO. 103694/10

MOTION SEQ. NO. 001

41 WEST 72 LLC, PROPERTY MARKETS GROUP, INC. and BAR CONSTRUCTION CORP.,

Third-Party Plaintiffs,

- against -

DELTA STAR ELECTRIC, INC. and DELTA STAR III ELECTRIC, INC.,

Third-Party Defendants.

INDEX NO. 590726/10

The following papers were read on this motion for partial summary judgment. PAPERS NUMBERED

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

Answering Affidavits — Exhibits (Memo)_____ _____

Replying Affidavits (Reply Memo) _____

Cross-Motion: ■ Yes ☐ No

Motion sequence numbers 001 and 002 are hereby consolidated for purposes of disposition.

In this action, plaintiff seeks monetary damages for alleged injuries he sustained while working at a construction site. In motion sequence number 001, plaintiff moves, pursuant to

CPLR 3212, for partial summary judgment on the issue of defendants' (except Property Markets Group, Inc.) liability under Labor Law § 240(1). Plaintiff also cross-moves for leave to amend his bill of particulars to assert violations of certain provisions of New York State's Industrial Code (12 NYCRR Part 23).

In motion sequence number 002, defendants move for summary judgment dismissing: (1) plaintiff's Labor Law §§ 200, 240(1) and 241(6) claims as against 41 West 72 LLC (41 West 72) and Property Markets Group, Inc. (Property Markets); (2) the Labor Law § 200 claim as against Dominion Property Group LLC (Dominion), The Board of Managers of the Hermitage Condominium, as Agent for and on Behalf of All Unit Owners (BOM), and Bar Construction Corp. (Bar Construction); (3) the Labor Law § 240(1) claim as against Dominion, BOM and Bar Construction; and (4) the Labor Law § 241(6) claim as against Dominion, BOM and Bar Construction.

BACKGROUND

On February 4, 2009, plaintiff, an electrician then employed by third-party defendants Delta Star Electric, Inc. and Delta Star III Electric, Inc. (collectively, Delta), was installing conduit for electrical wires in the basement ceiling at premises located at 41 West 72nd Street in Manhattan. He was standing on a scaffold, it moved, and plaintiff fell to the ground.

Plaintiff's original complaint sought relief from 41 West 72, Property Markets and Bar Construction, alleging causes of action sounding in common-law negligence and violations of Labor Law §§ 200, 240(1) and 241(6). Plaintiff's amended complaint asserted the same causes of action, but added BOM and Dominion as party defendants.

In 41 West 72, Property Markets and Bar Construction's third-party action against Delta, third-party plaintiffs assert claims for contribution, common-law and contractual indemnity, and breach of contract to procure insurance and to name third-party plaintiffs as additional insureds. Delta's third-party answer brings a counterclaim against 41 West 72, Property Markets and Bar

Construction for contribution or common-law indemnification.

DISCUSSION

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65

NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

A. Plaintiff's Motion (motion sequence 001) for Partial Summary Judgment on the Issue of Defendants 41 West 72, Dominion, BOM, and Bar Construction's Liability Under Labor Law § 240(1)

Labor Law § 240(1)

Labor Law § 240(1) provides, in pertinent part:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"The statute imposes absolute liability on building owners and contractors whose failure to 'provide proper protection to workers employed on a construction site' proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011], quoting *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995]). "To establish liability under Labor Law § 240 (1), a plaintiff must demonstrate both that the statute was violated and that the violation was a proximate cause of injury; the mere occurrence of an accident does not establish a statutory violation" (*DeRosa v Bovis Lend Lease LMB, Inc.*, 96 AD3d 652, 659 [1st Dept 2012]). When considering a section 240(1) claim, "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

However, "liability does not attach where a plaintiff's actions are the sole proximate cause of his injuries. Specifically, if adequate safety devices are provided and the worker either

chooses for no good reason not to use them, or misuses them, then liability under section 240 (1) does not attach" (*Paz v City of New York*, 85 AD3d 519, 519 [1st Dept 2011] [internal citations omitted]; *see also Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004] [no liability under the statute where a plaintiff's own actions are the sole proximate cause of the accident]).

On the other hand, "'the Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence'" (*Kielar v Metropolitan Museum of Art*, 55 AD3d 456, 458 [1st Dept 2008], quoting *Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008]). Indeed, once a violation of the statute is shown, and that violation is a proximate cause of a worker's injury, the worker's "contributory negligence . . . is not a defense to a section 240 (1) claim" (*Ernish v City of New York*, 2 AD3d 256, 257 [1st Dept 2003]).

I. The Issue of Ownership

Under section 240(1), an "owner" may be an owner in fee, as well as someone who has an interest in the property. "Liability rests upon the fact of ownership" (*Gordon v Eastern Ry. Supply,* 82 NY2d 555, 560 [1993]).

> "Given the legislative history of section 240 and our affirmance in *Celestine* [*v City of New York*, 86 AD2d 592 (2d Dept 1982), *affd* 52 NY2d 938 (1983)], we hold that when the Legislature imposed the duties of section 240 (1) on '[a]ll . . . owners' it intended to include owners in fee . . ." (*id.* at 560).

"[T]he term 'owner' has [also] been held to include, inter alia, those entities with interests in the property which have the right, as a practical matter, to hire and fire the subcontractors and to insist that proper safety practices are followed" (*Lynch v City of New York*, 209 AD2d 590, 591 [2d Dept 1994]; *see also Frierson v Concourse Plaza Assoc.*, 189 AD2d 609, 611 [1st Dept 1993] [same]).

A deed, dated January 21, 2000, identifies 41 West 72 as the owner of the property at

41 West 72nd Street (Plaintiff's Volume II of Exhibits, exhibit 13). However, the Agreement Between Owner and Contractor, BOM and Bar Construction, identifies BOM (c/o Dominion) as the owner and Bar Construction as the contractor for the project (*id.*, exhibit 9). On the other hand, page 10 of the Rider to that contract identifies The Hermitage Condominium (c/o Dominion) as the owner and Bar Construction as the contractor. According to Anthony Coen, who negotiated the BOM/Bar Construction contract on behalf of Bar Construction, the contract was "Between the Hermitage board members and Bar Construction. Hermitage Condominium" (Coen tr at 13). Unfortunately, both of the copies of the contract submitted to the Court on these motions are missing several pages (i.e., pages 3-5 and 8) that might, or might not, identify, or at least clarify, the parties' respective roles and responsibilities under the contract.

In his amended complaint, plaintiff alleged that 41 West 72 was the owner of the property, which 41 West 72 denied (Amended Complaint, ¶ 7; Defendants' Answer to Amended Complaint, ¶ 2). In his amended complaint, plaintiff also alleged that BOM was the owner of the property, which BOM denied (Amended Complaint, ¶ 40; Defendants' Answer to Amended Complaint, ¶ 6). Plaintiff served a notice to admit on defendants, wherein plaintiff asserted that 41 West 72 was the owner of the property, which 41 West 72 denied (Plaintiff's Notice to Admit, ¶ 5; Defendants' Response to Plaintiff's Notice to Admit, ¶ 5).

Paragraph 59 of plaintiff's amended complaint alleges "[t]hat at all times hereinafter mentioned, and on, or prior to, February 4, 2009, Defendants, their agents, servants and/or employees, hired and/or retained Delta Star Electric III Inc." In paragraph 3 of defendants' answer to plaintiff's amended complaint, defendants admitted this, without designating which one or more of defendants hired Delta. However, Anthony Coen, Bar Construction's vice president/owner in 2009, attested that Bar Construction hired Delta (Coen tr at 15, 24).

Given the conflicting and incomplete evidence before the Court, it is not possible at this time to determine whether 41 West 72, BOM, or nonparty The Hermitage Condominium was

the owner of the building at the time of plaintiff's accident. The evidence does not answer the questions, among others, of whether 41 West 72 was the record owner in fee of the site, and whether 41 West 72 and/or BOM had an interest in the property in 2009.

II. The Issue of Agency

> "An agency relationship for purposes of section 240 (1) arises only when work is delegated to a third party who obtains the authority to supervise and control the job. Where responsibility for the activity surrounding an injury was not delegated to the third party, there is no agency liability under the statute" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 293 [2003]).

In their answer to plaintiff's amended complaint, defendants admitted that Dominion was the managing agent for the property (Amended Complaint, ¶ 34; Defendants' Answer to Amended Complaint, ¶ 3). In addition, the BOM/Bar Construction contract shows that both BOM and The Hermitage Condominium were "c/o Dominion."

However, there is no evidence or allegation that Dominion was delegated any authority to supervise or control the job, or that Dominion had any responsibility for any activity surrounding the work that produced plaintiff's injury. Thus, although Dominion was the managing agent for BOM and The Hermitage Condominium, it was not an "agent" as envisioned by the statute. No one has alleged that Dominion was either the owner of the premises or the general contractor for the project, and there is no evidence before the court that it was either.

Accordingly, as Dominion was neither the owner, agent or general contractor for the property and the project, it is not liable under Labor Law § 240(1), and the part of plaintiff's motion which seeks summary judgment on its Labor Law § 240(1) claim must be denied as to Dominion, and the part of defendants' motion which seeks summary judgment dismissing plaintiff's section 240(1) claim as against Dominion is granted.

III. The Issue of Which Defendant, If Any, Was the General Contractor at the Site

In plaintiff's amended complaint, he alleged that Bar Construction was the general contractor or construction manager at the site, both of which allegations defendants denied (Amended Complaint, ¶¶ 53, 54; Answer to Amended Complaint, ¶ 4). However, when counsel for Delta asked Coen, "As the general contractor[,] was Bar Construction responsible to perform any work on this renovation project?", after defendants' counsel objected to the form, Coen replied, "Yes" (Coen tr at 14-15). Shortly thereafter, when asked what work Bar Construction performed at the site, Coen replied, "We were the GP . . ." (*id.* at 15). No one asked Coen to clarify what he meant by "GP," and there was no errata sheet annexed to the transcript submitted to the Court, so it is unclear whether "GP" was simply a scrivener's error for "GC" (general contractor) or whether it meant something else.

In their response to plaintiff's notice to admit, defendants admitted that Bar Construction was the general contractor for the project (Response to Notice to Admit, ¶ 29). As the general contractor, Bar Construction may be found liable under Labor Law § 240(1).

IV. The Issue of Whether Plaintiff was the Sole Proximate Cause of His Injuries

"[W]here a plaintiff's own actions are the sole proximate cause of the accident or injury, no liability attaches under [Labor Law § 240 (1)]" (*Barreto v Metropolitan Transp. Auth.*, 110 AD3d 630, 632 [1st Dept 2013]).

> "The sole proximate cause defense generally applies where the worker misused, removed, or failed to use an available safety device that would have prevented the accident, or knowingly chose to use an inadequate device despite the availability of an adequate device. However, the Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence[,] and contributory negligence . . . is not a defense to a section 240 (1) claim [internal quotation marks and citations omitted]" (*Boyd v Schiavone Constr. Co., Inc.*, 106 AD3d 546, 548 [1st Dept 2013]; *see also Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 402-403 [1st Dept 2013]).

In order for plaintiff to prevail on his section 240(1) claim, and defeat a sole proximate cause defense, he must "show that the statute was violated and that the violation proximately caused

his injury" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]).

> "Under Labor Law § 240 (1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]).

Here, defendants cannot prevail on their sole proximate cause defense. Their assertions that plaintiff was told not to use the scaffold, but that he did anyway, do not establish that plaintiff was the sole proximate cause of his injuries, because no alternative safety device that would have adequately protected plaintiff was made available to him.

The nondelegable duty, under both Labor Law §§ 240(1) and 241(6), to provide workers at elevated work sites with proper protection is imposed "regardless of the absence of control, supervision, or direction of the work" (*Romero v J & S Simcha*, 39 AD3d 838, 839 [2d Dept 2007]). Thus, whether Bar Construction directed plaintiff or not, as general contractor, Bar Construction is absolutely liable to plaintiff under Labor Law § 240(1). In sum, plaintiff's motion for summary judgment on his Labor Law § 240(1) claim against defendants (except Property Markets) is granted with respect to Bar Construction, and is denied with respect to 41 West 72, Dominion and BOM.

B. Plaintiff's Cross-Motion for Leave to Amend His Bill of Particulars to Assert Violations of Certain Industrial Code Provisions[1]

The Note of Issue (NOI) in this matter was filed on June 20, 2012. Both motions for summary judgment and the cross-motion for leave to amend the bill of particulars were made after the filing of the NOI.

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[1] The Court notes that plaintiff's reply affirmation, dated January 14, 2013, was sworn to by one attorney and subscribed by another; thus, plaintiff's reply affirmation was unsworn and unsigned, and is not properly before the court. As such, the reply affirmation has not been considered on these motions.

"CPLR 3025(b) provides that leave to amend pleadings shall be freely given, and this rule has been applied to the amendment of bills of particulars as well . . ." (*Katechis v Our Lady of Mercy Med. Ctr.*, 36 AD3d 514, 516 [1st Dept 2007]).

> "[L]eave to amend the pleadings to identify a specific, applicable Industrial Code provision may properly be granted, even after the note of issue has been filed, where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant (*Ventimiglia v Thatch, Ripley & Co., LLC*, 96 AD3d 1043, 1047 [2d Dept 2012] [internal quotation marks and citations omitted]").

"In general, leave to amend a pleading may be granted at any time, including during trial, absent prejudice or surprise to the opposing party, unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Galarraga v City of New York*, 54 AD3d 308, 310 [2d Dept 2008]). "[W]here the proposed amendment clearly lacks merit and serves no purpose but to needlessly complicate discovery and trial, such a motion should be denied" (*Henchy v VAS Exp. Corp.*, ___ AD3d ___, 2014 NY Slip Op 01545, *2 [1st Dept 2014] [internal quotation marks and citation omitted]).

Here, plaintiff has conceded that the Industrial Code sections alleged in his present bill of particulars, sections 23-1.16(a) through (f) (safety belts, harnesses, tail lines and lifelines), and 23-1.21(a) through (f) (ladders and ladderways), do not apply. His cross-motion seeks to amend his bill of particulars to substitute sections 23-5.1(a), (c) (1), (c) (2), (e) (1), and (j) as bases for his section 241(6) claim.

Defendants argue that the cross-motion must be denied because the NOI has already been filed and they already had filed their motion for summary judgment 56 days prior to plaintiff making his cross-motion. Defendants contend that they will be prejudiced if plaintiff is allowed to amend his bill of particulars.

"Prejudice requires some indication that the defendant has been hindered in the

preparation of his case or has been prevented from taking some measure in support of his position" (*Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007] [internal quotation marks and citation omitted]). The Court finds that defendants' arguments are an insufficient basis on which to deny plaintiff's cross-motion. In spite of plaintiff's filing of the cross-motion 56 days after defendants moved for summary judgment, defendants had notice of plaintiff's proposed Industrial Code sections while defendants' motion was pending, and had the opportunity to respond to plaintiff's cross-motion. Defendants used that opportunity to oppose plaintiff's cross-motion, specifically arguing with respect to each Industrial Code section that plaintiff wants to assert.

Section 23-5.1 sets forth "General Provisions for All Scaffolds." Section 23-5.1(b) provides:

> "(b) Scaffold footing or anchorage. The footing or anchorage for every scaffold erected on or supported by the ground, grade or equivalent surface shall be sound, rigid, capable of supporting the maximum load intended to be imposed thereon without settling or deformation and shall be secure against movement in any direction. Unstable supports, such as barrels, boxes, loose brick or loose stone, shall not be used."

Industrial Code § 23-5.1(b) "is insufficiently specific to constitute a proper predicate [for a Labor Law § 241(6) claim] since it is a subdivision of Industrial Code (12 NYCRR) § 23-5.1, 'General Provisions for All Scaffolds'" (*Kosovrasti v Epic (217) LLC*, 96 AD3d 695, 696 [1st Dept 2012]).

Section 23-5.1(c)(1) and (2) pertain to scaffold structure:

> "(c) Scaffold structure.
>
> > (1) Except where otherwise specifically provided in this Subpart, all scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use. . . . Such maximum weight shall be construed to mean the sum of both dead and live loads.

* * *

(2) Every scaffold shall be provided with adequate horizontal and diagonal bracing to prevent any lateral movement."

The Appellate Division, First Department, has found that section 5.1(c) is "insufficiently specific to support a section 241 (6) claim" (*Greaves v Obayashi Corp.*, 55 AD3d 409, 410 [1st Dept 2008]; *Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 510 [1st Dept 2009] [section 23-5.1(c)(1) "is insufficiently specific to support a section 241 (6) claim"]). In addition, section 23-5.1(c)(1) is inapplicable here. There is no evidence that the scaffold was unable to support the required weight, or that any such failure was a cause of plaintiff's fall.

Section 23-5.1(c)(2) is also inapplicable. There is no evidence that any failure to brace the scaffold to prevent lateral movement was a cause of plaintiff's injuries.

Industrial Code § 23-5.1 (e) (1) governs scaffold planking:

"(e) Scaffold planking.

(1) Except on needle beam and pole scaffolds, scaffold planks shall extend not less than six inches beyond any support nor more than 18 inches beyond any end support. Such six inch minimum requirement shall not apply when such planks are securely fastened in place. Scaffold planks shall be laid tight and inclined planking shall be securely fastened in place."

Both the First and Second Appellate Divisions have determined that section 23-5.1(e)(1) is sufficient and a "proper predicate" for a Labor Law § 241(6) claim (*see e.g. Susko v 337 Greenwich LLC*, 103 AD3d 434, 436 [1st Dept 2013]; *see also Klimowicz v Powell Cove Assoc., LLC*, 111 AD3d 605, 607 [2d Dept 2013]). However, there is no indication that any placement of the planks of less than 18 inches caused plaintiff's accident in any way. This provision is therefore inapplicable in this matter.

Section 23-5.1 (j) pertains to safety railings:

"(j) Safety railings.

(1) The open sides of all scaffold platforms, except those

> platforms listed in the exception below, shall be provided with safety railings constructed and installed in compliance with this Part (rule).
>
> Exceptions: Any scaffold platform with an elevation of not more than seven feet; the platforms of needle beam scaffolds; floats and rivet heater platforms in use by structural ironworkers; ladder jack scaffold platforms; and trestle and extension trestle ladder scaffold platforms.
>
> (2) All scaffolds under which any person is likely to work or pass shall be provided with a wire mesh screen of not less than No. 18 U.S. gage steel with openings that will reject a one-inch diameter ball. Such wire mesh screen shall be installed between the toeboard and the top guard rail on both ends and on the outboard side of the scaffold platform.
>
> (3) Any end or side of any scaffold platform that is located within six feet horizontally of an unenclosed side of a material hoist tower, construction elevator or similar moving equipment shall be effectively screened to a height of at least six feet above the scaffold platform. Such screen shall be constructed of wire mesh of not less than No. 18 U.S. gage steel with openings that will reject a one-inch diameter ball."

The First Department has stated that section 23-5.1(j) is sufficient because it "specifically requires safety railings for *all* scaffold platforms" (*Macedo v J.D. Posillico, Inc.*, 68 AD3d at 510). Section 23-5.1(j) has three subsections and a paragraph of exceptions, but plaintiff has failed to specify which of these subsections he wants to include in his proposed amended bill of particulars. Nevertheless, it appears that only the first subsection and the exceptions may apply.

One of the exceptions to section 23-5.1(j)(1) pertains to scaffolds "with an elevation of not more than seven feet." The evidence before the Court raises a question of fact with respect to the height of plaintiff's scaffold, and therefore, whether this section of the Industrial Code is applicable here. Plaintiff attested that the ceiling in the boiler room was 20 to 25 feet high (Plaintiff tr at 48). The scaffold was metal, and was around 20 feet high (*id.* at 50). The

scaffold had two levels, the first about 10 feet from the ground, and the second about 20 feet from the ground (*id.* at 51). Plaintiff was working on the first level (*id.* at 55). Carlos Alvarado, a laborer employed by Bar Construction, testified that when the scaffold was completed, it had two levels, the lower six feet, and the second 12 feet from the ground (Alvarado tr at 53). The ceiling was about 15 feet high (*id.* at 56). Because it cannot be determined whether the scaffold fell within the height-related exception, it cannot be said at this time whether this provision applies in this matter.

Accordingly, plaintiff's cross-motion for leave to amend his bill of particulars is granted solely with respect to section 23-5.1(j), and is in all other respects denied.

C. Defendants' Motion (motion sequence 002) for Summary Judgment

(1) Dismissing Plaintiff's Labor Law §§ 200, 240(1) and 241(6) as Against 41 West 72 and Property Markets

I. Property Markets

None of the parties in this action have presented adequate evidence to establish whether Property Markets was or was not an owner or an agent of the owner or general contractor at the time of plaintiff's accident. Plaintiff alleged in his amended complaint that Property Markets owned, operated, maintained, controlled, managed or leased the building, and that Property Markets was a lessor or lessee of the building, all of which were denied in paragraph two of defendants' answer to the amended complaint (Amended Complaint, ¶¶ 18-26).

In seeking summary judgment, the movant must demonstrate its entitlement to judgment as a matter of law. Defendants have failed to do so with respect to Property Markets. Therefore, the portion of defendants' motion which seeks summary judgment dismissing plaintiff's Labor Law causes of action as against Property Markets is denied.

II. 41 West 72

A. **Labor Law § 200/Common-Law Negligence**

Labor Law § 200(1) provides, in relevant part:

> "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. The board may make rules to carry into effect the provisions of this section."

Section 200(1) of the Labor Law codifies an owner's or general contractor's common-law duty to provide construction site workers with a safe place to work.

> "Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed. Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it. Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work [internal citations omitted]" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]).

This case involves a dangerous condition, i.e., the unfinished scaffold and the lack of an alternative safety device. "Where, as here, the injury is caused not by the methods of [plaintiff's] work, but by a defective condition on the premises, liability depends on whether the owner or general contractor created or had actual or constructive notice of the hazardous condition" (*Bayo v 626 Sutter Ave. Assoc., LLC*, 106 AD3d 648, 648 [1st Dept 2013]).

Since Bar Construction was the general contractor on the project and set up the scaffold from which plaintiff fell, it cannot be said that 41 West 72 created the dangerous condition. Moreover, whether 41 West 72 was the owner or not, there is no evidence that it had notice of any kind of the unfinished scaffold.

Accordingly, the part of defendants' motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against 41 West 72 is granted.

B. **Labor Law § 240(1)**

As set forth above, because there is a question of fact with respect to whether or not 41 West 72 was an owner of the premises on the day of plaintiff's accident, that portion of defendants' motion which seeks dismissal of the section 240(1) claim as against 41 West 72 is denied.

C. **Labor Law § 241(6)**

Labor Law § 241(6) 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, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> "6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, 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."

The Appellate Division, First Department, has stated that:

> "Labor Law § 241 (6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation, or demolition work is being performed. To state a claim under § 241 (6), a plaintiff must identify a specific Industrial Code provision 'mandating compliance with concrete specifications'" (*Capuano v Tishman Constr. Corp.*, 98 AD3d 848, 850 [1st Dept 2012] [internal citations omitted]).

In addition, a plaintiff must show that the violation of section 241(6) "caused the complained-of injury" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d at 146). Liability under the statute may be imposed "'regardless of the absence of control, supervision or direction of the work'" (*Morton v State of New York*, 15 NY3d 50, 54 [2010] [citation omitted]). However, "[t]he owner or contractor may raise any valid defense to the imposition of vicarious liability under Labor Law § 241(6), including contributory and comparative negligence" (*Catarino v State of New York*, 55 AD3d 467, 468 [1st Dept 2008]).

As discussed above, only one of the Industrial Code sections that plaintiff sought on his cross-motion to amend his bill of particulars, 12 NYCRR 23-5.1(j), had any possibility of being both specific and applicable. This Court has determined that there is a question of fact concerning whether this section of the Industrial Code is applicable in this matter. In addition, this Court has found that there is a question of fact with respect to whether 41 West 72 was an "owner" under Labor Law § 240(1) and this statute. Accordingly, that portion of defendants' motion which seeks summary judgment dismissing plaintiff's Labor Law § 241(6) as against 41 West 72 is denied.

(2) Dismissing the Labor Law § 200/Common-Law Negligence Claims as Against Dominion, BOM, and Bar Construction

I. Dominion

As this Court decided above, Dominion was neither an owner, agent or general contractor for the premises and project at the time of plaintiff's accident. There is no evidence that it created the unfinished scaffold, or that it had any notice, whether actual or constructive, of the hazardous condition. Therefore, the part of defendants' motion which seeks summary judgment dismissing the Labor Law § 200 and common-law negligence claims as against Dominion is granted.

II. BOM

There is a question of fact as to whether BOM was an owner of the premises at the time of plaintiff's accident. But, like 41 West 72, no liability attaches under Labor Law § 200 or common-law negligence whether BOM was an owner or not. Specifically, there is no evidence that BOM created the incomplete scaffold, or had any notice of its dangerous condition. Accordingly, the portion of defendants' motion which seeks summary judgment dismissing plaintiff's section 200 and common-law negligence claims as against BOM is granted.

III. Bar Construction

Bar Construction, the general contractor, erected the scaffold, and thus created and had actual notice of the scaffold's allegedly dangerous condition. Although Bar Construction advised plaintiff not to go on the scaffold, or even go into that area, this warning did not obviate Bar Construction's responsibility to provide workers with "reasonable and adequate protection" (Labor Law § 200; *also see e.g. England v Vacri Constr. Corp.*, 24 AD3d 1122, 1124 [3d Dept 2005] ["While . . . the allegedly dangerous condition . . . was readily observable and well known to plaintiff prior to the accident, these circumstances merely 'negated any duty that defendant[ ] . . . owed plaintiff to warn of potentially dangerous conditions'; they do not, without more, obviate the duty to provide a reasonably safe workplace" (*England v Vacri Constr. Corp.*, 24 AD3d 1122, 1124 [3d Dept 2005] [citation omitted]).

Therefore, the portion of defendants' motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action as against Bar Construction is denied.

(3) Dismissing Plaintiff's Labor Law § 240(1) Claim as Against Dominion, BOM and Bar Construction

I. Dominion

Dominion was neither an owner, general contractor or agent of either; therefore it does not fall within the intendment of section 240(1). Accordingly, the portion of defendants' motion

which seeks summary judgment dismissing plaintiff's section 240(1) claim is granted as to Dominion.

II. BOM

There is a question of fact as to whether BOM was an owner of the premises on the date of plaintiff's accident. Therefore, summary judgment dismissing plaintiff's section 240(1) claim as to BOM must be denied.

III. Bar Construction

It is established that Bar Construction was the general contractor for the project, and that it erected the scaffold from which plaintiff fell. Because it falls within the intendment of section 240(1), summary judgment dismissing plaintiff's Labor Law § 240(1) claim must be denied.

(4) Dismissing Plaintiff's Labor Law § 241 (6) Claim as Against Dominion, BOM and Bar Construction

I. Dominion

As set forth above, Dominion does not fall within the intendment of the Labor Law. Thus, the portion of defendants' motion which seeks summary judgment dismissing plaintiff's section 241 (6) claim as against Dominion is granted.

II. BOM and Bar Construction

There are questions of fact concerning whether Industrial Code § 23-5.1 (j) is applicable here, and whether BOM was an owner of the premises on the day of plaintiff's accident. Therefore, the portion of defendants' motion which seeks summary judgment dismissing plaintiff's section 241(6) claim as against BOM and Bar Construction must be denied.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion (motion sequence 001) for partial summary judgment

on the issue of defendants' liability under Labor Law § 240(1) is denied as to 41 West 72 LLC, Board of Managers for the Hermitage Condominium, as Agent for and on Behalf of All Unit Owners (BOM) and Dominion Property Group LLC, but is granted as to Bar Construction Corp.; and it is further,

ORDERED that plaintiff's cross-motion for leave to amend his bill of particulars is granted solely with respect to Industrial Code § 23-5.1(j), and is in all other respects denied; and it is further,

ORDERED that the portion of defendants' motion (motion sequence 002) which seeks summary judgment dismissing plaintiff's Labor Law § 240(1) claim as against Dominion Property Group LLC is granted; and it is further,

ORDERED that the part of defendants' motion which seeks summary judgment dismissing plaintiff's section 240(1) claim is denied as against Bar Construction Corp. and 41 West 72 LLC; and it is further,

ORDERED that the portion of defendants' motion which seeks summary judgment dismissing plaintiff's Labor Law causes of action as against Property Markets Group, Inc. is denied; and it is further,

ORDERED that the portion of defendants' motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against 41 West 72 LLC is granted; and it is further,

ORDERED that the portion of defendants' motion which seeks summary judgment dismissing plaintiff's Labor Law § 241(6) claim as against 41 West 72 LLC is denied; and it is further,

ORDERED that the portion of defendants' motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against Dominion Property Group LLC and BOM is granted, but is denied as to Bar Construction Corp.; and it is

further,

ORDERED that the portion of defendants' motion which seeks summary judgment dismissing plaintiff's Labor Law § 240(1) claim with respect to Dominion Property Group LLC is granted, but as to BOM and Bar Construction Corp., is denied; and it is further,

ORDERED that the portion of defendants' motion which seeks summary judgment dismissing plaintiff's Labor Law § 241(6) as against Dominion Property Group LLC is granted, but, as against BOM and Bar Construction Corp., is denied; and it is further,

ORDERED that plaintiff is directed to serve a copy of this Order with Notice of Entry upon all parties and upon the County Clerk who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 4-8-14

PAUL WOOTEN ***J.S.C.***

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**