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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Joan A. Madden **PART** 11

Justice

Index Number : 103666/2011
PELAEZ, ANGEL
vs
TURNER CONSTRUCTION
Sequence Number : 002
DISMISS

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision/Order.

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

Dated: July 11, 2014

_____, J.S.C.

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 11

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ANGEL PELAEZ,

Plaintiff,

-against-

Index No. 103666/11

TURNER CONSTRUCTION COMPANY,

Motion Sequence Nos. 002 & 003

Defendant.

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JOAN A. MADDEN, J.:

In this action arising out of a construction site accident, defendant Turner Construction Company (Turner) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint which asserts claims under Labor Law §§ 240 (1), 241 (6), and 200 and for common-law negligence (motion seq. no. 002). Plaintiff opposes the motion and separately moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim (motion seq. no. 003).[1]

BACKGROUND

Turner was retained as a general contractor in connection with demolition and construction occurring at the Federal Reserve Bank (the Bank) located at 33 Liberty Street, New York, New York. Plaintiff, a demolition worker employed by Turner's subcontractor, Fortune Interior Dismantling Corp. (Fortune), was injured on March 18, 2011 on the eighth floor of the Bank, when he fell from a six-foot, A-frame ladder while removing air conditioning ducts.

Plaintiff testified at his deposition that, on the date of the accident, he was working on the eighth floor of the Bank with another Fortune employee, Manuel Paguay (Plaintiff EBT tr at 61,

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[1]Motion sequence numbers 002 and 003 are consolidated for disposition.

81). Plaintiff stated that he took directions and instructions regarding the work from Paguay (*id.* at 61-62). According to plaintiff, Paguay gave plaintiff a ladder to use during the demolition work (*id.* at 73). The ladder was a six-foot aluminum A-frame ladder (*id.* at 59, 72, 80). He testified that they were "bringing down some air conditioning" (*id.* at 59). Plaintiff stated that he set up the ladder properly (*id.*). Plaintiff inspected the floor surface before placing the ladder under the air conditioning ducts, and found the floor to be free of any defects (*id.* at 80). Plaintiff ensured that the ladder was locked in place before climbing up the ladder (*id.* at 72). He further stated that "after [he] made sure that it was set [up] properly and safely, [he] started climbing the ladder to do [his] work. When [he] was on the fourth rung of the ladder, the ladder slipped and [he] fell" (*id.* at 59). Plaintiff testified that the ladder was in "perfect" condition (*id.* at 86). In addition, plaintiff stated that he inspected the feet of the ladder to ensure that the footings were correct, and found that they were (*id.* at 91).

Joseph Morello testified that he was employed as a site supervisor by Turner on the date of the accident (Morello EBT tr at 7). The Bank hired Turner as a general contractor for a "demo and fit-out" of the Bank's interior floors, to make new offices, pantries, and restrooms (*id.* at 8, 10-11). Turner did not perform any of the demolition work itself, but rather subcontracted all of the demolition work to Fortune (*id.* at 11). Turner did not supply any equipment or tools to Fortune, and did not supervise or direct any of Fortune's work on the site (*id.* at 16). Morello testified that plaintiff told him that he "slipped" as he was climbing the ladder (*id.* at 24).

On March 25, 2011, plaintiff commenced the instant action against Turner, asserting violations of Labor Law §§ 200, 240 (1), 241 (6), 12 NYCRR 23-1.21, and seeking recovery under principles of common-law negligence.

DISCUSSION

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (*Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012] [internal quotation marks and citation omitted]). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment" (*id.*). "Once this showing has been made, 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" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

A. Labor Law § 240 (1)

Plaintiff moves for partial summary judgment on the issue of liability under Labor Law § 240 (1), arguing that he is entitled to judgment because: (1) he was performing covered work; and (2) the ladder was unsecured against movement, which caused him to fall from the ladder. In support of his position, plaintiff relies on his affidavit, in which he states that, at the time of his accident, he was using a new, six-foot, A-frame ladder to reach the air conditioning ducts (Plaintiff aff, ¶ 6). Plaintiff's foreman had provided the ladder (*id.*). Just before his accident, plaintiff had placed the ladder on concrete tiles in the middle of the floor; there were areas of dried glue on the floor but plaintiff did not place the ladder on any areas of glue (*id.*, ¶ 8). According to plaintiff, the ladder was set up in an open position with both metal spreaders/braces locked down on both sides (*id.*, ¶ 9). The ladder had rubber feet on all four legs (*id.*). Plaintiff

checked that the ladder was set up firmly, properly, and safely (*id.*, ¶ 10). Plaintiff states that:

> "While [he] was holding the top of the ladder with both hands, [he] looked at the duct to see where the screws were that [he] had to remove. Suddenly the ladder moved and slipped forward and then fell forward to the floor. Because of the movement and slipping forward, the ladder fell. [He] was then caused to lose [his] balance and fell backwards onto the floor. [He] first landed with [his] weight on [his] extended left hand and arm and [he] then landed on [his] back on the concrete floor"

(*id.*, ¶ 11).

Turner contends that plaintiff's Labor Law § 240 (1) claim should be dismissed because the ladder was an appropriate safety device which was properly placed and was free of defects. Additionally, Turner maintains that plaintiff was the sole proximate cause of his injuries, and that plaintiff's accident did not occur due to an elevation-related risk. Turner offers an affidavit from Paguay, plaintiff's foreman, in which he states that:

> "As [he] was working from a ladder, pulling duct work down from the ceiling, [he] asked Mr. Pelaez to push the duct slightly towards me so [he] could complete the removal of the ductwork. Mr. Pelaez walked away and retrieved a 6 foot, aluminum, A-Frame ladder, which was green in color. Mr. Pelaez did not open the ladder completely [he] believe[s] and when he stepped on the first step, the ladder fell over. Mr. Pelaez did put his hand out to stop his fall and injured his right hand. The ladder fell over because it was not opened properly. . . [He] do[es] not know who the ladder Mr. Pelaez was using at the time of the incident belonged to. [He] do[es] not know where Mr. Pelaez retrieved the ladder from. [He] did not see the ladder to not be fully opened at the time of the incident. But it was [his] belief that the ladder was not fully opened as it fell over. The ladder will only lock in place when the arms are fully extended and the hinge is straight and locked. The ladder was not completely opened when it was laying on the ground after the incident. [He] observed this, and this also led [him] to think the ladder was not fully opened at the time of the incident"

(Paguay aff at 1-2). Paguay states that "[he] ha[s] read the previous 2 pages and certif[ies] they are true to the best of [his] knowledge," and the affidavit also indicates that it was "sworn to me 23rd day of August 2013" before a notary (*id.* at 2).

In response, plaintiff contends that Paguay's statement[2] is missing a jurat and is not sworn to under the penalties of perjury.

Labor Law § 240 (1), commonly known as the Scaffold Law, requires that contractors "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" "furnish or erect, or cause to be furnished or erected for the performance of such labor, . . . , *ladders*, . . . and other devices which shall be *so constructed, placed and operated as to give proper protection to a person so employed*" (emphases added).

"Labor Law § 240 (1) imposes a nondelegable duty and absolute liability upon owners and contractors for failing to provide safety devices necessary for workers subjected to elevation-related risks in circumstances specified by the statute" (*Soto v J. Crew Inc.*, 21 NY3d 562, 566 [2013]). "'*[T]he 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*'" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 10 [2011], quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). To establish liability on a Labor Law § 240 (1) cause of action, the plaintiff must show: (1) a violation of the statute, and (2) that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287-289 [2003]). "Section 240 is intended to place the ultimate responsibility for building practices on the owner and general contractor in order to protect the workers who are required to be there but who are scarcely in a

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[2]Plaintiff argues that Paguay's statement is "rife" with the following incorrect facts: (1) Paguay's statement references the wrong date of the accident; (2) Paguay states that plaintiff injured his right hand; (3) Paguay claims that plaintiff went to the hospital by ambulance; and (4) Paguay is primarily a Spanish-speaking individual, yet there is no affidavit of a qualified translator or interpreter.

position to protect themselves from accidents" (*Lombardi v Stout*, 80 NY2d 290, 296 [1992]).

"Labor Law § 240 (1) requires that safety devices such as ladders be so 'constructed, placed and operated as to give proper protection' to a worker" (*Klein v City of New York*, 89 NY2d 833, 834-835 [1996]). "Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1)" (*Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004] [internal quotation marks and citations omitted]).

Here, plaintiff has made a prima facie showing of entitlement to judgment under Labor Law § 240 (1). Plaintiff states that when he was standing on the fourth step of the ladder, the ladder "moved and slipped forward" (Plaintiff aff, ¶ 11). The ladder was in the open position at the time of his accident (*id.*, ¶ 9). Additionally, plaintiff similarly testified at his deposition that, while standing on the fourth step of the ladder, the ladder "moved forward," causing him to fall (Plaintiff EBT tr at 75-76). Plaintiff's evidence that the ladder "collapsed or malfunctioned for no apparent reason" raises the presumption that the ladder "was not good enough to afford proper protection" (*Blake*, 1 NY3d at 289 n 8; *see also Panek v County of Albany*, 99 NY2d 452, 458 [2003]). Plaintiff is not required to prove that the ladder was somehow defective (*see Estrella v GIT Indus., Inc.*, 105 AD3d 555 [1st Dept 2013]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 290-291 [1st Dept 2002]).[3]

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[3]Although not argued, I note that plaintiff submits deposition testimony of Morello who testified that he was employed as a supervisor for Turner. While Morello testified that plaintiff told him that he "slipped" when he was climbing the ladder (Morello E.T. tr at 24), Morello was not a witness to the accident, and his testimony does not indicate that plaintiff told him that the ladder was secured at the time of the accident or that it did not move forward (*see Liparis v AT*

Contrary to plaintiff's contention, Paguay's affidavit may be considered by the court. A "jurat" is defined by statute as "a clause wherein an attesting officer certifies, among other matters, that the subscriber has appeared before him and sworn to the truth of the contents thereof" (Penal Law § 210.00 [7]). Paguay's affidavit indicates that it was "sworn to" before the notary public, and contains a notary stamp (Paguay aff at 2). CPLR 2309 (b) states that an oath "shall be administered in a form calculated to awaken the conscience and impress the mind of the person taking it in accordance with his religious or ethical beliefs." Although the affidavit does not indicate that it was sworn to under the penalties of perjury, Paguay states that he "read the previous 2 pages and certif[ies] they are true to the best of [his] knowledge" (Paguay aff at 2). Thus, Turner's affidavit is admissible (*see Collins v AA Truck Renting Corp.*, 209 AD2d 363 [1st Dept 1994] [written statement was properly considered where statement contained jurat and stamp of notary public; although statement did not say that affiant had been duly sworn, he did say that the statement was "true, factual, and voluntarily given"]; Siegel, NY Prac § 205 [5th ed]).

Turner argues, relying on Paguay's affidavit, that plaintiff was the sole proximate cause of his accident because he did not fully open the ladder and lock it in place before stepping onto it. "[I]f adequate safety devices are provided and the worker either chooses for no good reason not to use them, or misuses them, the plaintiff will be deemed the sole proximate cause of his injuries, and liability will not attach under § 240 (1)" (*Fernandez v BBD Developers, LLC*, 103 AD3d 554, 555 [1st Dept 2013]). However, "if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" (*Blake*, 1 NY3d at 290). In *Blake*, a case

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Spring, LLC, 92 AD3d 502, 504 [1st Dept 2012]; *Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [1st Dept 2012]).

relied upon by Turner, the Court of Appeals held, after a jury verdict in favor of the defendant, that the record fully supported a jury's findings that a plaintiff was the sole proximate cause of his injuries when he neglected to lock extension clips in place on an extension ladder (*Blake*, 1 NY3d at 291).

Paguay states that "Mr. Pelaez did not open the ladder completely *[he] believe[s]*," "*[He] did not see* the ladder to not be fully opened at the time of the incident, but it was [his] belief that the ladder was not fully opened," "*the ladder was not completely opened when it was laying on the ground after the incident. [He] observed this, and this also led [him] to think the ladder was not fully opened at the time of the incident*" (Paguay aff at 1-2 [emphases added]). It is apparent from Paguay's affidavit that he did not observe whether the ladder was fully opened at the time of plaintiff's accident. Thus, Paguay's affidavit with respect to whether the ladder was in an open position is speculative and, based on his statements, insufficient to raise a triable issue of fact (*see Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 409 [1st Dept 2013] [speculative summary judgment affidavit of worker's foreman was insufficient to raise a triable issue of fact on plaintiff's Labor Law § 240 (1) claim where foreman observed the scene shortly after the accident but did not witness it]; *Bruce v Fashion Sq. Assoc.*, 8 AD3d 1053, 1054 [4th Dept 2004] [employer's general manager's testimony was speculative where he admitted that he had no personal knowledge of the circumstances of the accident and was insufficient to raise a triable issue of fact]).

However, as to Paguay's statement that plaintiff fell from the first step of the ladder, even assuming, as argued by Turner, that this was the case, "falling from the bottom rung of a ladder at a construction site is the type of elevation-related risk the statute was intended to cover" (*Binetti*

v MK W. St. Co., 239 AD2d 214 [1st Dept 1997]). The relevant inquiry is whether the hazard is one "directly flowing from the application of the force of gravity to an object or person" (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]). Here, an adequate ladder that remained upright would have shielded plaintiff from such harm.

Accordingly, plaintiff is entitled to partial summary judgment on the issue of liability under Labor Law § 240 (1) against Turner. The portion of Turner's motion seeking dismissal of plaintiff's Labor Law § 240 (1) cause of action is denied.

B. Labor Law § 241 (6)

Labor Law § 241 (6) states, in pertinent part, that:

> "All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavation 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, . . . shall comply therewith."

"Labor Law § 241 (6), by its very terms, imposes a *nondelegable* duty of reasonable care 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 is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998] [internal quotation marks and citation omitted]). "To establish a claim under the statute, a plaintiff must

show that a specific, applicable Industrial Code regulation was violated and that the violation caused the complained-of injury" (*Cappabianca v Skanska USA Bldg., Inc.*, 99 AD3d 139, 146 [1st Dept 2012]). "Where the Industrial Code provision relied upon mandates compliance by invoking '[g]eneral descriptive terms' defined with general safety standards rather than 'concrete specifications,' the plaintiff cannot benefit from the reduced burden of proof applicable to causes of action under Labor Law § 241 (6)" (*Colucci v Equitable Life Assur. Socy. of U.S.*, 218 AD2d 513, 514 [1st Dept 1995]). A "plaintiff's failure to identify a violation of any specific provision of the State Industrial Code precludes liability under Labor Law § 241 (6)" (*Owen v Commercial Sites*, 284 AD2d 315 [2d Dept 2001]).

In plaintiff's verified bill of particulars, plaintiff alleges violations of 12 NYCRR 23-1.5; 12 NYCRR 23-1.7; 12 NYCRR 23-1.15; 12 NYCRR 23-1.16; 12 NYCRR 23-1.17; 12 NYCRR 23-1.21; 12 NYCRR 23-5; and 12 NYCRR 23-9.6 (verified bill of particulars, ¶ 20).

Turner argues that plaintiff's Labor Law § 241 (6) claim should be dismissed because each of the cited regulations in plaintiff's bill of particulars is inapplicable as a matter of law, even if plaintiff's testimony is accepted as credible. Plaintiff opposes dismissal of his Labor Law § 241 (6) claim based only upon a violation of 12 NYCRR 23-1.21 (b) (1). Plaintiff has apparently abandoned reliance on the remaining Industrial Code provisions. Therefore, the court shall only consider whether plaintiff is entitled to proceed based upon a violation of section 23-1.21 (b) (1).

12 NYCRR 23-1.21, which governs "Ladders and ladderways," states in subdivision (b) (1) as follows:

"(b) General requirements for ladders.

> (1) Strength. Every ladder shall be capable of sustaining without breakage, dislodgment or loosening of any component at least four times the maximum load intended to be placed thereon"

(12 NYCRR 23-1.21 [b] [1]).

Turner contends that there is no evidence that any component of the ladder involved in the accident became dislodged, broke, or became loose. In fact, according to Turner, plaintiff contends that the ladder "moved forward" or "became loose," but cannot specifically identify anything wrong with the ladder itself that caused the alleged movement. Plaintiff asserts, citing *Riccio v NHT Owners, LLC* (51 AD3d 897 [2d Dept 2008]), that section 23-1.21 (b) (1) is applicable. Specifically, plaintiff claims that "dislodgement" applies to a ladder that moves from its place or position.

A plaintiff's Labor Law § 241 (6) cause of action is properly sustained based upon section 23-1.21 (b) (1) where there is evidence that the accident was caused by an insufficiency in the strength of the ladder. In *Soodin v Fragakis* (91 AD3d 535 [1st Dept 2012]), the plaintiff sustained injuries while working on an old, weak, and shaky ladder that lacked rubber footings and was placed on a slippery polyurethane floor. The ladder toppled over, causing the plaintiff to fall (*id.*). The First Department held that "[t]he evidence that the ladder collapsed or malfunctioned for no apparent reason raises the presumption that the ladder 'was not good enough to afford proper protection' under the statute. It also establishes noncompliance with Industrial Code (12 NYCRR) 23-1.21 (b) (1), (3) (i)- (ii) and (iv), and (4) (ii)" (*id.* at 536 [citation omitted]). In *Riccio* (51 AD3d 897), a case relied upon by plaintiff herein, the plaintiff was standing on the second or third step from the top of a ladder when he felt the ladder move and fall backwards (*Riccio*, 51 AD3d at 898). The Second Department held that the defendant's

motion for summary judgment dismissing the plaintiff's Labor Law § 241 (6) cause of action was properly denied, to the extent that it was predicated on 12 NYCRR 23-1.21 (b) (1) and (b) (3) (iv) (*id.* at 899). According to the Court, these regulations were sufficiently specific, and the defendant failed to make a prima facie showing that they were not violated (*id.*).

However, courts have dismissed section 241 (6) claims predicated on section 23-1.21 (b) (1) where the ladder was in good condition and where the plaintiff had previously used the ladder without incident. In *Campos v 68 E. 86th St. Owners Corp.* (117 AD3d 593, 594 [1st Dept 2014]), the Court held that "[t]here is no evidence that the ladder was unable to sustain plaintiff's weight, or was not in good condition, or that the floor underneath it was slippery. Plaintiff testified that he had used the ladder in question without incident before the accident" (citation omitted). In *Croussett v Chen* (102 AD3d 448, 449 [1st Dept 2013]), the First Department held that a worker's section 241 (6) claim based on 23-1.21 (b) (1) was without merit, since there was "no evidence that the ladder was incapable of supporting four times the maximum load intended to be supported thereon." In *Amantia v Barden & Robeson Corp.* (38 AD3d 1167, 1169 [4th Dept 2007]), a case in which the plaintiff fell from a form, the Court held that even if the form could be considered a ladder within the meaning of the Industrial Code regulations, there was no evidence that the accident was caused by or related to any insufficiency in the strength of the form.

Here, section 23-1.21 (b) (1) does not apply, as there is no evidence that any component of the ladder broke, dislodged, or loosened (12 NYCRR 23-1.21 [b] [1]). Unlike *Soodin* and *Riccio*, there is no evidence that plaintiff's accident was caused by any insufficiency in the strength of the ladder (*see Campos*, 117 AD3d at 594; *Amantia*, 38 AD3d at 1169). Plaintiff

testified that he inspected the ladder before he fell, and that it was in "perfect" condition (Plaintiff EBT tr at 86). The ladder had rubber feet (*id.* at 91; *see also* Plaintiff aff, ¶ 9). Moreover, plaintiff had used the ladder without incident about 20 times before his accident (Plaintiff EBT tr at 75). Thus, since plaintiff has failed to identify a specific and applicable Industrial Code provision, his Labor Law § 241 (6) claim is dismissed (*see Owen*, 284 AD2d at 315).

C. Labor Law § 200 and Common-Law Negligence

Turner moves for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims. Turner argues that it did not supervise or control plaintiff's work, and did not create or have notice of any dangerous condition with the ladder.

Plaintiff counters that Turner has failed to establish that it provided a safe workplace to plaintiff. According to plaintiff, Turner gave plaintiff instructions as to what to do and/or how to do it.

It is well established that Labor Law § 200[4] codifies the common-law duty imposed upon owners and general contractors to provide workers with a reasonably safe place to work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). The duty is twofold: to make and keep the place of work safe (*see Zucchelli v City Constr. Co.*, 4 NY2d 52, 56 [1958]).

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[4]Labor Law § 200 (1) provides, in relevant part, that:

"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."

"'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'" (*Rodriguez v BCRE 230 Riverdale, LLC*, 91 AD3d 933, 934 [2d Dept 2012], quoting *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Where the plaintiff was injured as the result of a dangerous or defective premises condition, "a general contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition" (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009] [internal quotation marks and citation omitted]). In contrast, where the worker was injured as a result of the manner in which the work is performed, including tools or equipment provided by the plaintiff's employer, "liability for common-law negligence or under Labor Law § 200 may be imposed against . . . [a] general contractor if it 'actually exercised supervisory control over the injury-producing work'" (*Suconota v Knickerbocker Props., LLC*, 116 AD3d 508 [1st Dept 2014], quoting *Cappabianca*, 99 AD3d at 144).

In this case, plaintiff's accident arises out of the means and methods of his work, and not a dangerous or defective condition. Plaintiff testified that his foreman told him "what [they] were doing" on the date of the accident (Plaintiff EBT tr at 61-62). Plaintiff's foreman gave him a ladder to use during the demolition work (*id.* at 73). Plaintiff also testified that the floor was free of any debris (*id.* at 80). In addition, Turner's job site supervisor testified that Turner did not supply any work tools or equipment to Fortune, and did not direct or supervise any of Fortune's work (Morello EBT tr at 16). Plaintiff points to Paguay's vague statement that "Fortune's instructions came from Turner Construction" (Paguay aff at 2). However, the record does not

reveal any evidence that Turner "gave anything more than general instructions on what needed to be done, not how to do it, and monitoring and oversight of the timing and quality of the work is not enough to impose liability under [Labor Law] section 200" (*Paz v City of New York*, 85 AD3d 519 [1st Dept 2011]; *see also Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]; *Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003]).

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

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion (sequence number 002) of defendant Turner Construction Company for summary judgment is granted to the extent of dismissing plaintiff's Labor Law §§ 241 (6), 200 and common-law negligence claims, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 003) of plaintiff for partial summary judgment on the issue of liability under Labor Law § 240 (1) is granted as against defendant Turner Construction Company; and it is further

ORDERED that the parties shall proceed to mediation.

Dated: July 11, 2014

ENTER:

J.S.C.