SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

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RICHARD VIGAY,

Plaintiff,

Index No.: 153253/2012

-against-

TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, NEW YORK CITY HOUSING AUTHORITY and HCZ PROMISE LLC,

Defendants.

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Kenney, J.:

Motion sequence numbers 003 and 004 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries sustained by a laborer when he fell from a ladder while working at a construction site located at 245 West 129th Street, New York, New York on November 9, 2011.

In motion sequence number 003, plaintiff Richard Vigay moves, pursuant to CPLR 3212, for partial summary judgment in his favor on the section 240 (1) and 241 (6) claims against defendants Tishman Construction Corporation of New York (Tishman) and HCZ Promise LLC (HCZ) (together, defendants).

In motion sequence number 004, defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint against them in its entirety.

BACKGROUND

On the day of the accident, the premises where the accident occurred was owned by defendant HCZ. HCZ purchased the premises from defendant New York City Housing Authority (NYCHA) with the intent to build a five-story charter school called Harlem Children Zone Promise Academy (the project). HCZ hired defendant Tishman to serve as construction manager

on the project. Tishman hired nonparty Eurotech Construction Corporation (Eurotech) to perform the concrete work on the project. Plaintiff worked as a mason laborer for Eurotech. Pursuant to a stipulation of discontinuance with prejudice, defendant NYCHA is no longer a defendant in this case.

Plaintiff's City of New York 50-H Hearing Testimony

At his 50-H hearing with the City of New York, plaintiff testified that he was hired by Eurotech to work as a mason laborer on the project. Plaintiff maintained that he received work instructions and supervision solely from his Eurotech foreman. On the day of the accident, plaintiff was instructed to place plastic over a landing located just beneath the second floor of the premises (the landing). The landing, which measured approximately 24 to 36 inches in width and approximately five or six feet in length, was located approximately 12 feet off the ground.

In order to perform his work, it was necessary for plaintiff to utilize a 12-foot A-frame ladder (the ladder). The ladder was provided to plaintiff by Eurotech. Plaintiff testified that, before stepping onto the ladder, he checked its stability and made sure that it was properly locked in place. Plaintiff also testified that the ground underneath the ladder was clear of debris, and was level and flat. In addition, plaintiff shook the ladder to make sure it was safe.

As plaintiff climbed the ladder, he held onto the ladder with one hand, and he held onto a box containing a roll of plastic with his other, balancing it on his right shoulder. As plaintiff reached the third to last step of the ladder, he leaned on the ladder and placed the plastic on the landing. After placing the plastic on the landing, plaintiff ascended two more steps. As he was attempting to step onto the top step, the ladder shifted and plaintiff fell. Plaintiff noted that over half of his body was above the top step when the ladder shifted. At the time of the accident,

plaintiff weighed approximately 260 pounds.

Plaintiff's Deposition Testimony

At his deposition, plaintiff testified that he only took instruction from Eurotech employees, and that he was never supervised by any other entities. On the day of the accident, plaintiff was instructed by a Eurotech worker named "Kenny" to go to the landing and cover it with plastic, because Eurotech was going to be pouring concrete that day and the landing needed to be protected. Plaintiff testified that Kenny stated, "[y]ou see that ladder over there, go get that ladder. See the plastic over there on the table, go get that plastic and cut a piece of plastic and put it on the landing" (plaintiff's notice of motion, exhibit C, plaintiff's tr at 45).

Before climbing the ladder, plaintiff made sure the ladder's locking mechanism was locked into place, and that the ground beneath the ladder was clear. Plaintiff testified that, as he was in the process of stepping up onto the top of the ladder, "[t]he ladder shifted inward" and moved forward toward the landing (*id.* at 69). Plaintiff then fell "on top of the ladder" (*id.* at 71). Plaintiff noted that he "tried to grab onto one of the bars that was up [in order to prevent himself from falling] and [he] missed it" (*id.*). Plaintiff did not know what caused the ladder to shift.

Deposition Testimony of Joe Calise (Tishman's Superintendent)

Joe Calise testified that he was Tishman's superintendent at the project on the day of the accident. Calise, who was at the job site on a daily basis, explained that his duties as superintendent included hiring the subcontractors, walking the site to check the progress of the work, preparing daily reports, taking head counts and handling logistics and deliveries. He maintained that the subcontractors were responsible for their own safety. However, if he observed an unsafe activity at the site, he had the authority to tell the worker to stop work.

Calise further testified that he never had any contact with the Eurotech workers, including plaintiff. Calise asserted that Tishman did not provide any equipment or tools to the subcontractors on the project, nor did Tishman tell the workers how to perform their work. Specifically, Calise testified that the subcontractors "provid[ed] all their own material, equipment, means and methods" (plaintiff's notice of motion, exhibit L, Calise tr at 42).

Deposition Testimony of Lauren Scopaz (Director of Strategic Initiatives at Harlem Children's Zone)

Lauren Scopaz testified that she was the director of strategic initiatives for the charter school. She explained that HCZ was the owner of the premises, and that Tishman served as the construction manager on the project. She noted that there were no general contractors on the project. On the day of the accident, the foundation of the building was poured and the superstructure was in place. Scopaz testified that HCZ never communicated with the subcontractors on the project. In addition, HCZ never provided any ladders to any of Eurotech's employees.

Affidavit of David Walsh (Eurotech's Foreman)

In his affidavit, Eurotech's foreman, David Walsh, testified that he gave plaintiff his work instructions on the day of the accident. Walsh stated that plaintiff was not instructed to wrap the landing, but rather, he was instructed to wrap a steel beam which was located just seven feet from the ground (the beam). Walsh maintained that he "instructed [plaintiff] to use a brand new 12 foot A-frame ladder" to perform this work (*id.*). Walsh noted that, in order to perform this work, it was only necessary for plaintiff to stand on the ladder's fourth step. As such, the task did not require a harness and tie off. Walsh asserted that there had never been any complaints regarding the safety of the ladder.

Affidavit of Defendants' Liability Expert Eugenia Kennedy

In her affidavit, Eugenia Kennedy states that, according to the affidavit of Walsh, plaintiff was instructed to cover a steel beam located only seven to eight feet above the ground. As such, plaintiff used the ladder improperly, because, considering the height of the beam relative to the ladder, it was not necessary for plaintiff to climb to the top of the ladder. Kennedy also opined that plaintiff was the sole proximate cause of the accident, because he should have cut the plastic into individual pieces, rather than trying to carry the entire roll of plastic up the ladder.

Affidavit of Plaintiff's Liability Expert Kathleen Hopkins

In her affidavit, Kathleen Hopkins stated that "[b]y the fact that the unsecured ladder fell over sideways as the Plaintiff was in the process of stepping up onto the top step of the ladder to physically get onto the landing . . . Plaintiff was not provided with a safe means of vertical access to safety access his work area of the elevated 2nd floor landing" (plaintiff's notice of motion, exhibit Q, Hopkins affidavit at 6). In addition, Hopkins stated that the ladder was "an improper and unsafe elevation device," because there was "no anchorage point on which to tie or anchor the stepladder," and plaintiff was not provided a co-worker to hold the ladder for him or any fall protection (*id.*). Hopkins maintained that, in order to be safe, plaintiff should have been provided with a scaffold or a hoist such as a man lift.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden

then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). "If there is any doubt as to the existence of a triable fact," the motion for summary judgment must be denied (*Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Plaintiffs' Labor Law § 240 (1) Claim Against Defendants (motions 003 and 004)

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> "[a]ll 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."

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . 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'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

> "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein"

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Makarius v Port Auth. of N.Y. & N.J.*, 76 AD3d 805, 807 [1st Dept 2010] ["a distinction must be made between those accidents caused by the failure to provide a safety device required by Labor Law § 240 (1) and those caused by general hazards specific to a workplace"]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Initially, as the undisputed owner of the premises where the accident took place, defendant HCZ may be held liable for plaintiff's injuries under Labor Law §§ 240 (1) and 241 (6). However, it must be determined as to whether defendant Tishman, as construction manager, may also be liable under the Labor Law as a statutory agent of the owner.

While

> "a construction manager of a work site is generally not responsible for injuries under Labor Law § 240 (1) [and 241 (6)], one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury"

(*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

> "When the work giving rise to [the duty to conform to the requirements of Labor Law §§ 240 (1) and 241 (6)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor"

(*Russin v Louis N. Picciano & Son*, 54 NY2d at 318).

A review of the record in this case reveals that Tishman did not supervise and control the activity that brought about the injury, so as to be liable as an agent of the owner. To that effect, Tishman did not provide the allegedly defective ladder to plaintiff, nor did Tishman instruct plaintiff as to how to perform his work. In fact, plaintiff and Calise both testified that Eurotech provided the ladder to plaintiff, and that plaintiff was solely supervised by Eurotech employees. As Tishman is not an agent for the purposes of Labor Law §§ 240 (1) and 241 (6), Tishman is entitled to dismissal of these claims against it. Therefore, the remainder of this decision will only address said claims as against owner HCZ.

Here, plaintiff testified that the accident occurred when the ladder shifted at about the time he was reaching the top step of the ladder.[1] "'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 at 173, 174 [1st Dept 2004] [where plaintiff was injured as a result of unsteady ladder, plaintiff did not need to show that ladder was defective for the purposes of liability under Labor Law § 240 (1), only that adequate safety devices to prevent the ladder from slipping or to protect the plaintiff from falling were absent], quoting *Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152, 153 [1st Dept 1998]; *Klein v City of New York*, 89 NY2d 833, 835 [1996]; *Hart v Turner Constr. Co.*, 30 AD3d 213, 214 [1st Dept 2006] [plaintiff met his prima facie burden through testimony that while he

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[1]It should be noted that while plaintiff asserts in his affirmation that the ladder both shifted and slipped, a review of plaintiff's testimony in the record clearly indicates that plaintiff only testified as to the ladder shifting.

performed his assigned work, the eight-foot ladder on which he was standing shifted, causing him to fall to the ground]).

Important to the facts of this case, "a presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions 'for no apparent reason'" (*Quattrocchi v F.J. Sciame Constr. Corp.*, 44 AD3d 377, 381 [1st Dept 2007], quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d at 289). "Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials" (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]; *Cuentas v Sephora USA, Inc.*, 102 AD3d 504, 505 [1st Dept 2013]; *Peralta v American Tel. and Tel. Co.*, 29 AD3d 493, 494 [1st Dept 2006] [unrefuted evidence that the unsecured ladder moved, combined with evidence that no other safety devices were provided, warranted a finding that the owners were liable under Labor Law § 240 (1)]; *Chlap v 43rd St.-Second Ave. Corp.*, 18 AD3d 598, 598 [2d Dept 2005]).

Defendants argue that plaintiff has not met his prima facie burden, because he has not demonstrated that the ladder was defective in any way. However, plaintiff is not required to demonstrate that the ladder was defective, as "[i]t is sufficient for purposes of liability under section 240 (1) that adequate safety devices to . . . protect plaintiff from falling were absent" (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]; *Carchpulla v 6661 Broadway Partners, LLC*, 95 AD3d 573, 573 [1st Dept 2012]; *McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 333 [1st Dept 2008] [where plaintiff sustained injuries "when the unsecured ladder he was standing on to drill holes in a ceiling tipped over," the plaintiff was not required to demonstrate, as part of his prima facie showing, that the ladder he was working on at the time of

the accident was defective]; *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d at 174).

Defendants also argue that plaintiff is not entitled to summary judgment in his favor on the Labor Law § 240 (1) claim against HCZ, and that HCZ is entitled to dismissal of said claim, because evidence in the record raises a question of fact as to whether plaintiff was the sole proximate cause of his accident. In support of this argument, defendants put forth the affidavit of David Walsh, wherein he states that plaintiff was not instructed to wrap the landing, which was located approximately 12 feet from the ground, but rather, he was instructed to wrap a beam, which was located just seven feet from the ground. As such, it was not necessary for plaintiff to climb to the top of the ladder, as he could have reached the beam from the fourth step of the ladder. Defendants also put forth the affidavit of liability expert Eugenia Kennedy, who concluded that plaintiff was the sole proximate cause of the accident, because he tried to carry the entire roll of plastic up the ladder, rather than cutting the plastic into smaller pieces which would have been easier to transport.

"[T]the duty to see that safety devices are furnished and employed rests on the employer in the first instance" (*Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1st Dept 1994]). "When the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1)]; *Montgomery v Federal Express Corp.*, 4 NY3d 805, 806 [2005]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d

35, 39 [2004] [where an employer has made available adequate safety devices and an employee has been instructed to use them, the employee may not recover under Labor Law § 240 (1) for injuries caused solely by his violation of those instructions]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d at 290).

Initially, the affidavit of David Walsh should not be considered by this court, due to defendants' failure to identify Walsh as a witness, as required by the preliminary conference order, dated January 3, 2013, which ordered all parties to exchange the names and addresses of witnesses (*see Dunson v Riverbay Corp.*, 103 AD3d 578, 578-579 [1st Dept 2013]["Given that plaintiff had represented to defendant that he had no witness information before filing his summary judgment motion, less than two weeks before he filed his note of issue and certificate of readiness for trial affirming that all discovery was complete, the motion court properly refused to consider a letter and affidavit from a previously undisclosed notice witness"]; *Ortega v New York City Tr. Auth.*, 262 AD2d 470, 470 [2d Dept 1999] [the Court agreed with the lower court's decision to not consider the affidavits of a notice witness, which were submitted by the plaintiffs in opposition to defendant's summary judgment motion, where "[t]he plaintiffs advised the defendant . . . in response to discovery demands that they had no such witnesses, and the plaintiffs filed a note of issue and certificate of readiness for trial . . . certifying that discovery proceedings were completed"]).

Moreover, the statements concerning plaintiff's work instructions on the day of the accident contained in the affidavit of Walsh are "unsupported by any evidence" (*Henningham v Highbridge Community Hous. Dev. Fund Corp.*, 91 AD3d 521, 522 [1st Dept 2012]). It should also be noted that defendants' liability expert, put forth in support of its motion and in opposition

to plaintiff's motion, stated that she based her opinions on the statements contained in Walsh's affidavit.

In any event, defendants' argument goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Velasco v Green-Wood Cemetery*, 8 AD3d 88, 89 [1st Dept 2004] ["Given an unsecured ladder and no other safety devices, plaintiff cannot be held solely to blame for his injuries"]; *Klein v City of New York*, 222 AD2d at 352). "[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y.*, 1 NY3d at 290).

Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence [internal quotation marks and citations omitted]" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002]; *see Velasco v Green-Wood Cemetery*, 8 AD3d at 89 ["(p)laintiff's use of the ladder without his coworker present amounted, at most, to comparative negligence"]; *Ranieri v Holt Constr. Corp.*, 33 AD3d 425, 425 [1st Dept 2006] [Court found that failure to supply plaintiff with a properly secured ladder or any safety devices was a proximate cause of his fall, and there was no reasonable view of the evidence to support defendants' contention that plaintiff was the sole proximate cause of his injuries]; *Lopez v Melidis*, 31 AD3d 351, 351 [1st Dept 2006]; *Torres v Monroe Coll.*, 12

AD3d at 262 [Court noted that, even if another cause of the accident was plaintiff's own improper use of an unopened A-frame ladder leaned against the wall from atop the scaffold, defendant's failure to ensure that the scaffold plaintiff needed to use to perform his assigned task provided proper protection, and was properly secured and braced, constituted a proximate cause of the accident]).

In addition, defendants have not demonstrated that this is a case of a recalcitrant worker, wherein a plaintiff was specifically instructed to use a safety device and refused to do so (*see Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008]; *Olszewski v Park Terrace Gardens*, 306 AD2d 128, 128-129 [1st Dept 2003]; *Morrison v City of New York*, 306 AD2d 86, 87 [1st Dept 2003]; *Crespo v Triad, Inc.*, 294 AD2d 145, 147 [1st Dept 2002]; *Sanango v 200 E. 16th St. Hous. Corp.*, 290 AD2d 228, 228-229 [1st Dept 2002]). There is no evidence in the record to indicate that plaintiff was given any specific instruction that he should use a different ladder or a scaffold, nor was he ever offered any safety devices which he refused to utilize. Although defendants argue that he should have had someone hold the ladder, a human being is not a safety device for the purposes of the statute, and certainly is not of the type of enumerated devices listed in the statute.

Further, in light of the testimony regarding the height from which plaintiff was working, as well as plaintiff's weight, it is quite possible that the A-frame ladder was not the proper safety device for the job at hand in the first place. "'[T]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures'" (*Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006], quoting *Conway v*

New York State Teachers' Retirement Sys., 141 AD2d 957, 958-959 [3d Dept 1988]; *Lightfoot v State of New York*, 245 AD2d 488, 489 [2d Dept 1997]; *Pritchard v Murray Walter, Inc.*, 157 AD2d 1012, 1013 [3d Dept 1990]).

Here, additional safety devices, such as a device with rails, such as a Baker scaffold, would have been more suitable for the job in order to prevent plaintiff and the ladder from falling (*see Nimirovski v Vornado Realty Trust Co.*, 29 AD3d at 762-763 [as it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake, additional safety devices were required to satisfy Labor Law § 240 (1)]; *Bush v Goodyear Tire & Rubber Co.*, 9 AD3d 252, 253 [1st Dept 2004]).

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed [internal citations omitted]" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]). "As has been often stated, the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, 'those best suited to bear that responsibility' instead of on the workers, who are not in a position to protect themselves" (*John v Baharestani*, 281 AD2d at 117, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500).

Thus, plaintiff is entitled to partial summary judgment on the issue of liability under Labor Law § 240 (1) against defendant HCZ. Accordingly, HCZ is not entitled to dismissal of the Labor Law § 240 (1) claim against it.

Plaintiff's Labor Law § 241 (6) Claim Against HCZ

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "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:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. ..."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501-502). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Although plaintiff lists multiple violations of the Industrial Code in his bill of particulars, with the exception of Industrial Code sections 23-1.21 (b) (4) (ii) and 23-1.7 (f), plaintiff does not address these alleged Industrial Code violations in his opposition papers, and thus, they are deemed abandoned (*see Genovese v Gambino*, 309 AD2d at 833; *Musillo v Marist College*, 306 AD2d 782, 784 n [3d Dept 2003]). As such, defendants are entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on those provisions.

Industrial Code 12 NYCRR 23-1.21 (b) (4) (ii)

Industrial Code 12 NYCRR 23-1.21 (b) (4) (ii) requires that "[a]ll ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder

footings."

Initially, it should be noted that Industrial Code 12 NYCRR 23-1.21 (b) (4) (ii) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Sprague v Peckham Materials Corp.*, 240 AD2d 392, 394 [2d Dept 1997]).

Here, plaintiff testified that, as he was in the process of stepping up onto the top step of the ladder, "[t]he ladder shifted inward"(plaintiff's notice of motion, exhibit C, plaintiff's tr at 69). At no point in his testimony did plaintiff ever assert that his accident was caused because of any problems with the floor surface in the area where he set up the ladder. In fact, plaintiff testified that the ground underneath the ladder was clear of debris, level and flat (*see Arigo v Spencer*, 39 AD3d 1143, 1144 [4th Dept 2007] [section 23-1.21 (b) (4) (ii) did not apply where the record established that the ladder was not placed on a slippery or unstable object]).

Thus, as section 23-1.21 (b) (4) (ii) does not apply to the facts of this case, plaintiff is not entitled to summary judgment in his favor on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code 23-1.21 (b) (4) (ii). Accordingly, defendant HCZ is entitled to dismissal of this alleged Industrial Code violation against it.

Industrial Code 12 NYCRR 23-1.21 (e) (3)

In his motion, for the first time, plaintiff alleges a violation of Industrial Code section 23-1.21 (e) (3). Industrial Code 12 NYCRR 23-1.21 (e) (3), which applies to "[s]tepladder footing," is also sufficiently specific to support a Labor Law § 241 (6) claim (*see Schroeder v Kalenak Painting & Paperhanging, Inc.*, 27 AD3d 1097, 1099 [4th Dept 2006], *affd* 7 NY3d 797 [2006]). Section 23-1.21 (e) (3) requires:

"Standing stepladders shall be used only on firm, level footings. When work is

> being performed from a step of a stepladder 10 feet or more above the footing, such stepladder shall be steadied by a person stationed at the foot of the stepladder or such stepladder shall be secured against sway by mechanical means."

Contrary to defendants' argument, although plaintiff failed to allege a violation of Industrial Code section 23-1.21 (e) (3) in response to defendants' demand for a verified bill of particulars, that omission is not necessarily fatal to his claim (*Gonzales v Perkan Concrete Corp.*, 110 AD3d 955, 958 [2d Dept 2013]). As noted by the Court in the case of *Walker v Metro-North Commuter R.R.* (11 AD3d 339, 341[1st Dept 2004]), the failure to identify a qualifying section of the Industrial Code is "not necessarily fatal to a section 241 (6) claim and, in the absence of unfair surprise or prejudice, may be rectified by amendment, even where a note of issue has been filed"]).

However, as plaintiff has not properly sought to amend the bill of particulars to add Industrial Code section 23-1.21 (e) (2) as an alleged violation, plaintiff is not entitled to summary judgment in his favor on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code 23-1.21 (e) (3). Accordingly, defendant HCZ is entitled to dismissal of this claim.

Industrial Code 12 NYCRR 23-1.7 (f)

Industrial Code NYCRR 23-1.7 (f) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Miano v Skyline New Homes Corp.*, 37 AD3d 563, 565 [2d Dept 2007]; *Akins v Baker*, 247 AD2d 562, 562 [2d Dept 1998]).

Section 23-1.7 (f) requires:

> "Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe

means of access shall be provided."

Here, the nature of plaintiff's work at the time of the accident required a safe means of access between the ground level and the landing level. As plaintiff's ladder did not provide safe access, in that it shifted, causing plaintiff to fall, section 23-1.7 (f) applies to the facts of this case (see *Harris v Hueber-Breuer Constr. Co.*, 67 AD3d 1351, 1353 [4th Dept 2009] [section 23-1.71 (f) applicable where the plaintiff was injured while attempting to descend a multi-tier scaffold with allegedly inadequate planking]; *Miano v Skyline New Homes Corp.*, 37 AD3d at 565 [section 23-1.7 (f) applicable where the worker fell backwards while descending temporary wooden forms he was using as a means of access to a basement worksite]).

Thus, plaintiff is entitled to judgment in his favor on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code section 23-1.7 (f), and defendant HCZ is entitled to dismissal of the same.

Plaintiff's Common-Law Negligence and Labor Law § 200 Claims Against Defendants **(motion sequence number 004)**

Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work' [citation omitted]" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d at 316-317). Labor Law § 200 (1) states, in pertinent part, as follows:

> "1. 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."

There are two distinct standards applicable to section 200 cases, depending on the kind of

situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work, because the injury arose from the condition of the work place created by or known to contractor, rather than the method of the work]).

It is well-settled that, in order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff's injury was caused by lifting a beam and there was no evidence that the defendant exercised supervisory control or had any input into how the beam was to be moved]).

Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *see also Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009] [Court dismissed common-law negligence and Labor Law § 200 claims where the deposition testimony established

that, while the defendant's "employees inspected the work and had the authority to stop it in the event they observed dangerous conditions or procedures," they "did not otherwise exercise supervisory control over the work"]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where the defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]).

"Under either liability standard, the common-law duty of the owner to provide a safe place to work, as codified by Labor Law § 200 (1), has been extended to include the tools and appliances without which the work cannot be performed and completed" (*Chowdhury v Rodriguez*, 57 AD3d 121, 128-129 [2d Dept 2008]). 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]). For example, "[i]f the employer furnishes a ladder or a scaffold for the contractor's employees to work on he must be careful to furnish a safe appliance, but if the contractor furnishes such appliances the employer does not thereby become responsible for their sufficiency" (*id.*at 146).

Accordingly, where a defendant owner provides the worker with a piece of defective equipment, it must be shown that said defendant either created or had actual or constructive notice of the defective condition (*Gonzalez v Perkan Concrete Corp.*, 110 AD3d at 959; *Cevallos v Morning Dun Realty, Corp.*, 78 AD3d 547, 549 [1st Dept 2010]; *Navarro v City of New York*, 75 AD3d 590, 592 [2d Dept 2010]; *Chowdhury v Rodriguez*, 57 AD3d at 131). As in the case of other dangerous premises conditions, "it logically follows that a property owner's liability should

be predicated upon evidence of the owner's creation of the condition or actual or constructive notice of it, since the property owner in charge of the site has authority to remedy any dangers or defects existing at its own premises" (*Chowdhury v Rodriguez*, 57 AD3d at 130).

However, where, as here, "a worker's injury results from [the plaintiff's] employer's own tools or methods . . . a defendant property owner [will] be liable only if possessed of authority to supervise or control the work" (*id.*; *see Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d at 146). "[I]t makes sense that a defendant property owner be liable only if possessed of authority to supervise and control the work, since such defendant is vested with the authority to remedy any dangers in the methods or manner of the work" (*id.*).

Here, as discussed previously, there is no evidence in the record to support an argument that defendants either supplied the ladder to plaintiff, or that they controlled the manner and methods of plaintiff's work. Thus, defendants are entitled to dismissal of the common-law negligence and Labor Law § 200 claims against them. For the foregoing reasons, it is hereby

ORDERED that the parts of plaintiff Richard Vigay's motion (motion sequence number 003), pursuant to CPLR 3212, for partial summary judgment in his favor on the Labor Law § 240 (1) claim, as well as that part of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code section 23-1.7 (f), are granted as against defendant HCZ Promise LLC (HCZ), and the motion is otherwise denied; and it is further

ORDERED that the part of defendants Tishman Construction Corporation of New York (Tishman) and HCZ's motion (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety as against defendant Tishman is

granted, and the action is dismissed as to this defendant, and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that those parts of defendants Tishman and HCZ's motion (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law § 200 claims, as well as those parts of the Labor Law § 241 (6) claim predicated on alleged violation of Industrial Code sections 23-1.21 (b) (4) (ii) and 23-1.21 (e) (3), as against defendant HCZ are granted, and these claims are severed and dismissed as to this defendant, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

DATED: September 16, 2014

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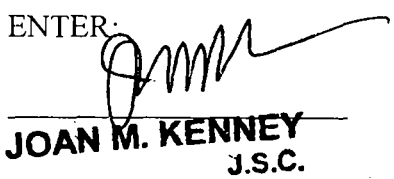

JOAN M. KENNEY
J.S.C.