Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IA Part 6**
Justice

RICHARD BELMONT,
Plaintiff,

-against-

THE NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY and IANNELLI CONSTRUCTION CO., INC.,
Defendants.

Index Number 11817/11

Motion Date November 27, 2013

Motion Seq. No. 3

Motion Cal. No. 5

The following papers numbered 1 to 11 read on this motion by defendants The New York City School Construction Authority (SCA) and Iannelli Construction Co., Inc. (Iannelli) for summary judgment in their favor dismissing plaintiff's complaint, including plaintiff's claims based on Labor Law § § 200, 240 (1) and § 241 (6) and common-law negligence, and on this cross motion by plaintiff for partial summary judgment in his favor and against defendants SCA and Iannelli on the issue of liability pursuant to Labor Law § 240 (1), and to set the case down for an immediate assessment of damages.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits	5-8
Reply Affidavits	9-11

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff alleges that he sustained injuries on January 6, 2011, in the course of his employment as a steamfitter with nonparty Gould Sprinklers (Gould), while working on construction of a school, PS 196, in Forest Hills, Queens, New York. Defendant SCA was the owner of the subject premises and hired defendant Iannelli as the general

contractor for the project. Defendant Iannelli hired nonparty Gould to install the automatic fire sprinkler system in the building.

Plaintiff testified as follows: On the date of the subject accident, he was standing on a twelve-foot aluminum A-frame ladder, drilling holes in the fourteen-foot ceiling for the hangers for pipe. The drill he used was a Hilti hammer drill, with a 3/8 inch bit, provided by his employer, nonparty Gould. His foreman, Thomas McKenna, was on the floor fabricating pipe. The area where plaintiff was working, a fourteen to eighteen-inch space between a duct and the wall, was difficult to access. It would have helped to have a scaffold or lift to get into that tight spot, but he and Thomas McKenna did not have either. He sustained injuries to his right shoulder, right hand and neck when, while using the drill, which operates by a start/stop trigger, in his right hand, the drill bit became stuck on rebar or electrical pipe and the drill kept spinning. His torso turned with the drill and the torque of the drill made his body and the ladder shift around. The ladder twisted away from the wall, and its spreader bars twisted or bent in. He held onto the drill because the area where he was working was so tight that he was sort of stuck to it, and also so that he would not fall. He was unable to remove his finger from the drill trigger until someone pushed the ladder back against the wall, and he was then able to climb down the ladder.

In an affidavit, defendant Iannelli's employee, Kevin DeMatteis, avers, among other things, that he was the construction superintendent for the subject project, and was present at the site on a daily basis. Kevin DeMatteis also avers that no one from defendant Iannelli or defendant SCA supervised, directed or controlled the means and methods the work of nonparty Gould's employees. He further avers that defendants Iannelli and SCA did not provide any equipment, tools or materials for the job, and that nonparty Gould was responsible for providing its own equipment, tools and materials for the job.

In an affidavit, plaintiff's foreman, Thomas McKenna, avers, among other things, that he inspected the subject ladder before and after the accident and that no part thereof was broken, bent, twisted or otherwise defective; that the ladder was never taken out of service; and that the ladder was appropriate and safe for the task that plaintiff was performing.

Plaintiff, in his complaint, interposes claims for negligence and violations of Labor Law § § 200, 240 (1) and § 241 (6).

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing an entitlement to judgment as a matter of law (*see Giuffrida v Citibank*

Corp., 100 NY2d 72 [2003]; *see also Ayotte v Gervasio*, 81 NY2d 1062 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once the requisite showing has been made, the burden shifts to the opposing party to produce admissible evidence sufficient to establish the existence of a triable issue of fact (*see Giuffrida v Citibank Corp.*, *supra*; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, *supra*).

Labor Law § 240 (1), commonly known as the "scaffold law," requires owners and contractors to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured." (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Labor Law § 240 (1) creates a duty that is nondelegable, and an owner or general contractor who breaches that duty may be held liable in damages regardless of whether they had actually exercised any supervision or control over the work (*Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra*). Specifically, 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]). The legislative purpose behind Labor Law § 240 (1) is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owner and general contractor or their agent instead of on workers, who are "scarcely in a position to protect themselves from accident." (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]).

To prevail on a cause of action alleging a violation of Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*see Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280 [2003]).

In this case, the Court is unpersuaded by the argument of defendants SCA and Iannelli that, because plaintiff did not fall off the ladder, the accident is not one contemplated by Labor Law § 240 (1) (*see Vislocky v City of New York*, 62 AD3d 785 [2009]; *see also Abreo v URS Greiner Woodward Clyde*, 60 AD3d 878 [2009]; *Lacey v Turner Constr. Co.*, 275 AD2d 734 [2000]). Nevertheless, in order to prevail upon a claim pursuant to Labor Law § 240 (l), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his or her injuries (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, *Inc.*, *supra*; *see also Wagner v Barney Skanska Constr. Co.*, 289 AD2d 324 [2001]; *Sprague v Peckham Materials Corp.*, 240 AD2d 392 [1997]). Here, triable issues of fact exist which preclude the granting of summary judgment to either plaintiff or defendants SCA and Iannelli on the Labor Law § 240 (1) cause of action. These issues of fact concern the condition of the subject ladder based on

the conflicting testimony of plaintiff and Thomas McKenna, and whether the subject ladder was a proximate cause of plaintiff's alleged injuries based on, among other things, plaintiff's own testimony regarding the drill getting stuck and his torso twisting from the torque of the drill.

Accordingly, the branch of the motion of defendants SCA and Iannelli seeking summary judgment dismissing plaintiff's Labor Law § 240 (1) cause of action is denied, and plaintiff's cross motion for partial summary judgment in his favor and against defendants SCA and Iannelli on the issue of liability pursuant to Labor Law § 240 (1) is also denied.

Labor Law § 241 (6) imposes a nondelegable duty of reasonable care upon owners, contractors and their agents, regardless of their control or supervision of the work site, to provide reasonable and adequate protection and safety to all persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed (*see Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]; *see also Ross v Curtis-Palmer Hydro-Electric Co.*, *supra*; *Miranda v City of New York*, 281 AD2d 403 [2001]). In order to support a Labor Law § 241(6) cause of action, a plaintiff must allege a New York Industrial Code violation (12 NYCRR 23-1.1 et seq.) that is both concrete and applicable given the circumstances surrounding the accident. (*see Rizzuto v L.A. Wenger Contracting Co., Inc.*, *supra*).

In his pleadings and cross motion/opposition papers, plaintiff alleges violations of Industrial Code sections 23-1.10 (b) (1), 23-1.21 (b) (1) and 23-1.21(b) (3) (iv).

12 NYCRR 23-1.10 (b) (1) provides, in relevant part, as follows: "(b) Electrical and pneumatic hand tools. (1) Power shut-off requirements. . . . Every electric and pneumatic hand tool shall be equipped with a cut-off switch within easy reach of the operator."

While defendants SCA and Iannelli acknowledge that this provision is sufficiently specific, they contend that there was no violation because the subject drill was equipped with a cut-off switch within easy reach of the operator. In support of this contention, defendants SCA and Iannelli submit the affidavit of their expert, Martin R. Bruno, who avers that the subject Hilti drill operates when the trigger is depressed, and that this trigger acts as a cut-off switch because the drill ceases operating instantly when the trigger is released. Plaintiff, in opposition, failed to submit any competent evidence raising a triable issue of fact as to whether the subject drill complied with the requirements of 12 NYCRR 23-1.10 (b) (1). As such, this regulation may not serve as a predicate to plaintiff's Labor Law § 241 (6) claim.

12 NYCRR 23-1.21 (b) (1), which requires that "[e]very 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," and 12 NYCRR 23-1.21(b) (3) (iv), which relates to the maintenance and conditions of ladders, and provides that "[a] ladder shall not be used . . . [i]f it has any flaw or defect of material that may cause ladder failure," are sufficiently specific (*see Riccio v NHT Owners, LLC*, 51 AD3d 897 [2008]). Triable issues of fact exist, however, concerning the condition of the subject ladder, whether 12 NYCRR 23-1.21 (b) (1) and 12 NYCRR 23-1.21(b) (3) (iv) were violated, and whether the alleged violations of these sections of the Industrial Code proximately caused plaintiff's injuries.

Accordingly, to the extent that plaintiff's Labor Law § 241 (6) cause of action is based upon alleged violations of Industrial Code sections 23-1.21 (b) (1) and 23-1.21(b) (3) (iv), the branch of the motion of defendants SCA and Iannelli seeking summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action is denied.

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." (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). It follows that the party charged with responsibility must have the authority to control the activity that caused the injury, or have actual or constructive notice of the alleged unsafe condition to be liable under common-law negligence and/or Labor Law § 200 (*see Comes v New York State Elec. & Gas Corp.*, *supra*; *see also Duarte v State of New York*, 57 AD3d 715 [2008]; *Dennis v City of New York*, 304 AD2d 611 [2003]).

Defendants SCA and Iannelli established their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging common-law negligence and a violation of Labor Law § 200 by demonstrating that the subject accident was caused by the means and methods of plaintiff's work, that plaintiff's work was directed and controlled by his employer and that they had no authority to exercise supervisory control over his work (*see Comes v New York State Elec. & Gas Corp.*, *supra*; *see also Koat v Consolidated Edison of N.Y., Inc.*, 98 AD3d 474 [2012]; *Schwind v Mel Lany Constr. Mgt. Corp.*, 95 AD3d 1196 [202]). Plaintiff does not oppose dismissal of these claims.

Accordingly, the branches of the motion of defendants SCA and Iannelli seeking summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action are granted.

Dated: June 27, 2014

Howard G. Lane, J.S.C.