SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

----------X

ANGEL PORTALATIN,

Plaintiff,

- *against* -

TULLY CONSTRUCTION CO.-E.E. CRUZ & COMPANY, JV LLC, E.E. CRUZ & COMPANY, INC., TULLY CONSTRUCTION CO., INC., CRUZ CONSTRUCTION CORP. and TURNER CONSTRUCTION COMPANY,

Defendants.

----------X

TULLY CONSTRUCTION CO.-E.E. CRUZ & COMPANY, JV LLC, E.E. CRUZ & COMPANY, INC., and TULLY CONSTRUCTION CO., INC.,

Third-Party Plaintiffs,

- *against* -

CHELMSFORD CONTRACTING CORP.,

Third-Party Defendant.

----------X

CHELMSFORD CONTRACTING CORP.,

Second Third-Party Plaintiff,

- *against* -

PROFESSIONAL PAVERS CORP.,

Second Third-Party Defendant.

----------X

DCM PART 6

Present:
Hon. Philip G. Minardo

Index No. 100879/2013
Motion Nos. : 910 - 004
950 - 005

Third-Party Complaint
Index No. A100879/2013

Second Third-Party Complaint
Index No. B100879/2013

The following papers numbered 1 to 6 were fully submitted on the 31st day of July, 2015.

Papers Numbered

Notice of Motion for Summary Judgment
by Third-Party Defendant Chelmsford Contracting Corp.,
with Supporting Papers (dated February 17, 2015)..... 1

PORTALATIN vs. TULLY CONSTRUCTION

Upon the foregoing papers, the motions for summary judgment by third-party defendant Chelmsford Contracting Corp. (Seq. No. 004) and by defendants/third-party plaintiffs Tully Construction Co.-E.E. Cruz & Company, JV LLC, E.E. Cruz & Company, Inc. and Tully Construction Co., Inc. (Seq. No. 005), are decided as follows.

Plaintiff Angel Portalatin (hereinafter, "plaintiff") commenced this action to recover damages for personal injuries he allegedly sustained on June 14, 2010 while employed by second third-party defendant Professional Pavers Corp. as a "stone tender" at a construction project undertaken pursuant to a contract between New York State Department of Transportation and defendant/third-party plaintiff Tully Construction

Co.-E.E. Cruz & Company, JV LLC, a joint venture (hereinafter, "Tully - Cruz"). The project entailed, *inter alia*, the building and installation of granite sidewalks, walkways, medians and crosswalks along the West Side Highway between Battery Place and Chambers Street. It is undisputed that Tully - Cruz was the general contractor for the project, and that third-party defendant Chelmsford Contracting Corp. (hereinafter, "Chelmsford") was a subcontractor retained by the former as "stone setters". Chelmsford, in turn, hired plaintiff's employer, Professional Pavers Corp., to install these stones at 75 West Street, near Rector Street in Manhattan, the vicinity of plaintiff's accident.[1]

Plaintiff maintains that at the time of the incident, he and his supervisor, Rui Menedes, were in the process of lifting and setting a granite paving stone measuring eight feet by four feet into an area of the sidewalk that had been prepared for its installation. According to plaintiff, while standing on opposite sides of the stone, he and his supervisor used two nylon straps to lift a 500-600 pound granite stone approximately 18 to 20 inches off the ground from its position "about four feet" from its intended location. Allegedly, after the two men lifted the stone and took two steps, plaintiff's supervisor "dropped his end", whereupon the entire stone "hit the ground", striking the top of plaintiff's right foot and causing him to fall forward and land on top of the stone. In his Verified Bill of Particulars, plaintiff alleges that defendants were negligent in

[1] This action has been discontinued as against defendants Cruz Construction Corp. and Turner Construction Company.

maintaining the workplace in a dangerous and hazardous condition while performing the task at hand, and more particularly, in failing to provide him with adequate protection and safety devices, as well as failing to have available at the site sufficient manpower and/or equipment to lift the paving stones into position.

Presently before the Court are the separate motions of (1) defendants/third-party plaintiffs Tully - Cruz (the joint venture), E.E. Cruz & Company, Inc. and the Tully Construction Co., Inc. (hereinafter, collectively, "Tully and Cruz"), and (2) third-party defendant Chelmsford, for summary judgment dismissing plaintiff's claims under Labor Law §§240(1), 241(6) and 200.

In support of their motions, movants allege that Labor Law §240(1) is inapplicable to the facts of this case since plaintiff's accident did not encompass the type of elevation-related risk contemplated by the statute, nor was there a failure to provide him with protective equipment that could have prevented the accident. More specifically, movants contend that the record is devoid of any evidence that (1) a relevant safety device was either absent from the workplace or defective, and (2) said absent or defective safety device was a proximate cause of plaintiff's injures. To the contrary, it is argued that the use of nylon straps to lift and transport a granite stone was "standard procedure", and that the stone did not fall due to the breaking or failure of the straps. Moreover, movants point out that plaintiff was transporting the paving stone from ground level, and that it fell a distance of merely 18 to 20 inches from its lifted position. This, it is argued, does not present a significant elevation differential requiring

the use of one of the safety devices enumerated in the statute. The Court agrees.

It is well established that "Labor Law §240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (Runner v New York Stock Exch., Inc., 13 NY3d 599, 604, quoting Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [internal quotation marks and emphasis omitted]). Accordingly, liability may be imposed under the statute only where the "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; *see* Nicometi v Vineyards of Fredonia, LLC, 25 NY3d 90, 97; Berg v Albany Ladder Co., Inc., 10 NY3d 902, 904). Stated otherwise, section 240(1) is inapplicable per se unless the plaintiff's injuries were proximately caused by both an elevation-related risk and the lack of adequate safety devices (*see* Nicometi v The Vineyards of Fredonia, LLC, 25 NY3d at 97; Fabrizi v 1095 Ave. of Ams. LLC, 22 NY3d 658, 663; Runner v New York Stock Exch., Inc., 13 NY3d at 603). Accordingly, it has been routinely held that the extraordinary protections of Labor Law §240(1) are intended to provide exceptional protection for workers against the special hazards that arise when the work site is either elevated or positioned below the level where materials are, *e.g.*, hoisted or secured, and "do not encompass any and all perils that may be connected in some tangential way to the effects of gravity" (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d at 501; see Ortiz v

Varsity Holdings, LLC, 18 NY3d 335, 339), or the "usual and ordinary dangers of a construction site" (Rodriguez v Margaret Tietz Ctr. for Nursing Care, 84 NY2d 841, 843).

Applying the foregoing principles to the facts at bar, it is the Court's opinion that movants have met their burden of demonstrating that plaintiff was not engaged in any activity at the time of his injury which presented a significant elevation differential posing the type of extraordinary elevation risks envisioned by Labor Law §240(1). Hence, the use of one of the safety devices enumerated therein was not required (*id*. at 843; *see* LaRosa v Internap Network Servs. Corp., 83 AD3d 905, 908; *see also* Christiansen v Bonacio Constr., Inc., 129 AD3d 1156, 1157-1158). In this regard, plaintiff testified at his deposition that although he was shown how to use a pulley and a hoist, he never used one to lift and set the stones on the sidewalk since those devices were implemented *only* to transport and position "the bigger stones", *i.e.*, stones greater than eight-feet in length, that "weigh heavier than manpower can pick up". According to plaintiff, the use of a pulley or a hoist to lift and set an eight-foot stone on the sidewalk was not required; rather, he was instructed at general meetings and specifically by his supervisor that an "eight-footer is a four-man stone". He further testified that although on one or two prior occasions he had moved a similarly sized stone "using only two people" instead of four, that was not the customary practice. On the day of the incident, plaintiff maintains that he requested that two additional men assist in lifting and placing the granite stone, however, his supervisor directed him to proceed without them since

"they needed this sidewalk [to be] done".

Under these circumstances, it cannot be said that the nature of plaintiff's work at the time of his injury posed a *significant* gravity-related risk, or that the failure to provide him with "proper protection" under Labor Law §240(1) was the proximate cause of his injury due to the falling stone. To the contrary, if any fault is to be ascribed, it was his employer's failure to allocate sufficient "manpower" rather than the absence of adequate safety devices which resulted in plaintiff's injury (*see* McLean v 405 Webster Ave. Assoc., 98 AD3d 1090, 1095-1096). Under these circumstances, "no protective device[s] pursuant to Labor Law §240(1) [are] required" (*id*. at 1095-1096; *cf.* Pritchard v Tully Constr. Co., Inc., 82 AD3d 730, 731 [inadequate hoist and unsecured ladder cited as proximate cause of plaintiff's injury by falling object]). In opposition to movants' prima facie showing that moving the paving stone into location did not "require[] securing for the purposes of [this] undertaking" (Outar v City of New York, 5 NY3d 731, 732), or that the accident resulted from the failure to use, or the use of a defective device of the type enumerated in Labor Law §240(1), plaintiff has failed to tender any legally sufficient evidence to rebut defendants' proof and raise a triable issue regarding defendants' liability under section 240(1) of the Labor Law. For example, plaintiff has failed to provide this Court with an expert's affidavit opining that pulleys, hoists or any other protective equipment specified in section 240(1) of the Labor Law constituted an appropriate safety device whose use would have prevented plaintiff's injury.

PORTALATIN vs. TULLY CONSTRUCTION

Turning to those branches of defendants' and third-party defendant's motions which are to dismiss plaintiff's causes of action predicated on the alleged violation of Labor Law §241(6), movants correctly maintain that in order to prevail on such a claim, a plaintiff must demonstrate that the injury in question was caused by defendants' violation of a concrete provision of Rule 23 of the New York State Industrial Code (12 NYCRR 23-1.1 *et seq.*) setting forth a specific safety standard as opposed to a general reiteration of common-law tort principles (*see* Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d at 502).

Based on the foregoing, so much of the complaint as is predicated on the alleged violation of 12 NYCRR 23-1.5 is legally insufficient, since it merely sets forth "general regulatory criteria" as held in Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d at 502. As for the balance of the Industrial Code provisions cited by plaintiff, movants correctly point out that the claims predicated on the alleged violation of 12 NYCRR 23-2.1(a)(1), 23-2.2, 23-6.1 and 23-6.2 (which pertain to, *e.g.*, the storage of material or equipment; concrete forms, shores and re-shores; the general requirements for hoisting materials; rigging, ropes and chains used for such hoisting) are patently inapplicable (*see e.g.* Ginter v Flushing Terrace, LLC, 121 AD3d 840, 844). Moreover, it should be noted that the record is devoid of any evidence that the devices specified in the above regulations were required under the circumstances herein. By his own admission, plaintiff was not engaged in "material hoisting" at the time of his injury, nor has it been alleged that the nylon straps used by plaintiff and his supervisor were either defective or

inadequate.

In any event, inasmuch as plaintiff has failed to submit any evidence in opposition thereto, those branches of defendants and third-party defendants' motions which seek the dismissal of plaintiff's Labor Law §241(6) claims shall be treated as unopposed (*see* Onewest Bank, FSB v Prince, 130 AD3d 700).

Turning to plaintiff's remaining claims, it is well settled that Labor Law §200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction workers with a safe place to work. Of course, an implicit precondition to this duty is that the party to be charged have the authority to control the activity from which the injury arises (*see* Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 352; Comes v New York State Elec. & Gas Corp., 82 NY2d 876). "Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law §200 unless it had the authority to supervise or control the performance of the work. General supervisory authority to oversee the progress ... is insufficient to impose liability. [In addition,] [i]f the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercises no supervisory control over the work, no liability attaches under Labor Law §200 or the common law" (LaRosa v Internap Network Servs. Corp., 83 AD3d at 909).

In the instant matter, it is undisputed that plaintiff's injuries arose from the manner in which the work was performed (*see* Gomez v City of New York, 56 AD3d 522, 523), rather than any dangerous or defective condition inherent in the premises itself (*see* Ortega

v Puccia, 57 AD3d 54, 61). As such, the seminal question is whether or not the movants have demonstrated prima facie, as a matter of law, that they lacked the authority to supervise and control the injury-producing work. Pertinent in this regard, is plaintiff's deposition testimony to the effect that Tully - Cruz did not direct his work, and that even on the day of his accident, although their purported "safety guys" were present at his work site at the time of his injury, none of the above provided plaintiff with any instructions pertaining to the manner or method of his work. Rather, plaintiff overheard them informing his supervisor of the need to move the last stone into place. In this regard, there is no evidence that they instructed plaintiff's supervisor how this might be accomplished. To the contrary, the manner in which the stone would be "set" was provided by plaintiff's supervisor, who rejected plaintiff's request for two additional men to complete the installation and insisted that the two of them could "set" the stone. [2] Nevertheless, after plaintiff and his supervisor had lifted the stone and were attempting to maneuver it into place, the supervisor apparently lost his grip, causing the stone to fall and injure plaintiff.

On these facts, defendants and third-party defendant have made a prima facie showing of their right to dismissal of plaintiff's cause(s) of action under Labor Law §200 and common-law negligence. "Where an alleged defect or dangerous condition arises

[2] Although plaintiff had previously been instructed by his supervisor that a stone of this size was "a four man stone", he acknowledged that on one or two occasions he had moved a similarly sized stone "using only two people".

from the subcontractor's methods over which [a] defendant exercises no supervisory control, liability will not attach under either the common law or section 200 of the Labor Law" (Buckley v Columbia Grammar & Preparatory, 44 AD3d 263, 272). In opposition, plaintiff has failed to raise a triable issue of fact.

Although plaintiff avers in his affidavit dated April 9, 2015, that he had directed his request for additional manpower to both his supervisor and the three purported "safety men", this affidavit varies materially from his deposition testimony, depriving it of evidentiary significance. "[A] party's affidavit that contradicts [his or] her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat...summary judgment" (Pippo v City of New York, 43 AD3d 303, 304 [internal quotation marks omitted]; *see* Burkoski v Structure Tone, Inc., 40 AD3d 378, 383). In any event, plaintiff has failed to demonstrate that the alleged direction by these Tully - Cruz employees requiring that the stone be "set" in order "to open up the sidewalk", constrained or prevented plaintiff's supervisor from assigning additional workers to the task.

Accordingly, it is

ORDERED, that so much of the separate motions for summary judgment of defendants/third-party plaintiffs Tully Construction Co.-E.E. Cruz & Company, JV LLC, E.E. Cruz & Company, Inc. and Tully Construction Co., Inc. are granted, and the complaint and any cross claims predicted upon their alleged liability under Labor Law §§240(1), 241(6), 200 and common-law negligence are severed and dismissed; and it is

further

ORDERED, that the Clerk enter judgment accordingly.

E N T E R,

Dated:
September 30, 2015

/s/ Philip G. Minardo
J.S.C.