DeMarco v Mount Sinai Med. Ctr., Inc.
2016 NY Slip Op 30829(U)
May 5, 2016
Supreme Court, New York County
Docket Number: 153060/2013
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 29

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Anthony R. DeMarco,

Plaintiff,

-against-

The Mount Sinai Medical Center, Inc. and The Mount Sinai Hospital,

Defendants.

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Index Number:

153060/2013

Robert D. Kalish, J.:

The Defendants' motion for summary judgment pursuant to CPLR §3212 is hereby granted solely to the extent of dismissing the Plaintiff's claims based upon Labor Law §§ 240(1), 241(6), and the portion of the Plaintiff's Labor Law §200 and common law claims that relate to the means and methods of work as follows:

Underlying Allegations

The Plaintiff, Anthony R. DeMarco, alleges that on July 1, 2011, he was working for Blackmon Mooring Steamatic[1] ("BMS"), a restoration company, at the Dubin Cancer Center (the "Dubin Center") of the Mount Sinai Hospital, New York, New York (supplemental bill of particulars, items, 4, 23; Plaintiff EBT at 27, 38). Plaintiff testified at his EBT that BMS was doing restoration work (the "Project") at the Dubin Center to repair damages from a water leak and had been engaged in the Project for approximately two weeks (Plaintiff EBT at 39; Vancott EBT at 37-38). Plaintiff testified that at the time of his accident, the Plaintiff and a co-worker, Charles, were the only BMS employees at the Dubin Center. The Plaintiff further testified that he was finishing up by cleaning a series of small examination

[1] The Defendants state in their verified answer that Mount Sinai Hospital entered into an agreement with BMS Catastrophe, Inc.

rooms by mopping them down (Plaintiff EBT at 50, 52-54).

The Plaintiff testified that all equipment, including mops, gloves, plastic sheeting, rags, and chemicals, were provided by BMS. He further testified that all instructions as to how to perform his work of mopping, cleaning and vacuuming were given to him by Nigel, his supervisor at BMS and that there were no hospital employees in the damaged area of Dubin Center that was undergoing restoration work (Plaintiff EBT at 43-45, 48-50, 82). The Plaintiff testified that, as he entered one of the small examination rooms by opening the door, the top of the door came in contact with a wire connecting a square metal light fixture (the "Fixture"), causing the Fixture to fall and strike the top of his left arm (Plaintiff EBT at 61-62, 64, 69-70). The Plaintiff states that the Fixture was hanging from the ceiling, connected by the wire. He further testified that the impact cut his arm, resulting in nerve damage and leading to stitches and reconstructive surgery (Plaintiff EBT at 67-68, 83, 95-101, 112).

Plaintiff's complaint asserts causes of action against the Defendants for alleged violations of Labor Law §§ 240 (1), 241 (6) and certain regulations, Labor Law §200 and common-law negligence.

The Defendants admit ownership of the Dubin Center and also that they entered into an agreement with BMS for work at the Dubin Center (verified answer, ¶¶ 3-4). The Defendants, by Thomas Vancott, testified that they did not supervise BMS's work on the Project (Vancott EBT at 34-37; Plaintiff EBT at 43-45).

The Defendants now move for summary judgment dismissing the Plaintiff's claims made pursuant to Labor Law §§ 240(1), 241(6), 200 and common law negligence. The Defendants argue that the Plaintiff was not involved in the type of elevation-related work to which the statute is addressed and that there was no construction-related work being done by the Plaintiff involved. The Defendant further argues that the regulations cited by the Plaintiff as the basis for his Labor Law §241(6) are inapplicable to the underlying action. The Defendant further argues that the Plaintiff's claims for violations of Labor

Law § 200 and common-law negligence should be dismissed, since the Defendants lacked control over the Plaintiff's work and that the Defendants were unaware of any dangerous or defective condition.

Analysis

Summary Judgment Standard

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 (NY App Div 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]). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted)). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 (1978); Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226 (NY App Div 1st Dept 2002)).

In deciding the motion, the Court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (See Branham v Loews Orpheum Cinemas, Inc., 8 NY3d 931 (NY 2007); Dauman Displays, Inc. v Masturzo, 168 AD2d 204, 205 (NY App Div 1st Dept 1990), lv dismissed 77 NY2d 939 (NY 1991)). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (Sommer v Federal Signal Corp., 79 N.Y.2d 540, 555 (NY 1992)).

Defendant is entitled to summary judgment dismissing the Plaintiff's cause of action under Labor Law § 240(1)

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

> "All contractors and owners ... 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 (NY App Div 1st Dept 2001) quoting Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 (NY 1993)). "The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." (Rocovich v Consolidated Edison Co., 78 NY2d 509, 514 (NY 1991)). "With respect to falling objects, Labor Law § 240 (1) applies where the falling of an object is related to 'a significant risk inherent in ... the relative elevation ... at which materials or loads must be positioned or secured'" (Narducci v Manhasset Bay Assocs., 96 NY2d 259, 267-268 (NY 2001) citing Rocovich v Consolidated Edison Co., 78 NY2d 509, 514 (NY 1991). Further, the Scaffold Law is to be liberally construed to accomplish its purpose, which is to protect workers against the special hazards and risks involved in elevation differentials, by placing responsibility for safety practices at building construction sites on owners and contractors (See Rocovich v Consolidated Edison Co., 78 NY2d 509, 512-513 (NY 1991)).

The Court of Appeals has held that this duty to provide safety devices is nondelegable (Gordon v Eastern Ry. Supply, 82 NY2d 555, 559 (NY 1993)), and that absolute liability is imposed where a breach has proximately caused a plaintiffs injury (Bland v Manocherian, 66 NY2d 452, 459 (1985)). However, the mere fact that an object fell and injured a worker does not automatically imply that Labor Law §240(1) is applicable (See Moncayo v Curtis Partition Corp., 106 AD3d 963, 964 (NY App Div 2d Dept 2013) citing Toefer v Long Island R.R., 4 NY3d 399 (NY 2005); Narducci v Manhasset Bay Assocs., 96 NY2d 259 (NY.2001)). "The extraordinary protections of Labor Law § 240 (1) extend only to a narrow class of special hazards, and do 'not encompass any and all perils that may be connected in some tangential way with the effects of gravity'" (Nieves v. Five Boro Air Conditioning & Refrigeration Corp., 93 NY2d 914, 915-916 (NY 1999) quoting Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 (NY 1993)).

In order to prevail in a falling object claim, the Plaintiff must show a gravity-related hazard, and "the failure to use, or the inadequacy of, a safety device of the kind enumerated" by the statute (Fabrizi v 1095 Ave. of the Ams., L.L.C., 22 NY3d 658, 662 (NY 2014)) (internal quotation marks and citation omitted)). "Essentially, the plaintiff must demonstrate that at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking" (id. at 662-663 (internal quotation marks and citation omitted)). "A plaintiff must show that the object fell . . . because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (Fabrizi v 1095 Ave. of the Ams., L.L.C., 22 NY3d 658, 663 (NY 2014) quoting Narducci v Manhasset Bay Assocs., 96 NY2d 259, 268 (NY 2001); see also Bednarczyk v Vornado Realty Trust, 63 AD3d 427, 428 (NY App Div 1st Dept 2009); Quattrocchi v F.J. Sciame Constr. Co., 11 NY3d 757 (NY 2008)). Further the plaintiff must show that this failure was a proximate cause of the plaintiff's injuries (Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 287 (NY 2003); Felker v Corning Inc., 90 NY2d 219, 224-225 (NY

1997); Auriemma v Biltmore Theatre, LLC, 82 AD3d 1, 9-10 (NY App Div 1st Dept 2011); Torres v Monroe Coll., 12 AD3d 261, 262 NY App Div 1st 2004)).

Further, Courts have reasonably applied Labor Law § 240 (1) to types of cleaning projects that present hazards comparable in kind and degree to those presented on a construction site (Soto v. J. Crew Inc., 21 N.Y.3d 562, 568 (NY 2013). As used in Labor Law § 240 (1) "cleaning" is expressly afforded protection under section 240 (1) "whether or not incidental to any other enumerated activity" (Broggy v Rockefeller Group, Inc., 8 N.Y.3d 675, 680 (NY 2007).

"To recover, a plaintiff must have been engaged in 'the erection, demolition, repairing, altering, painting, **cleaning** or pointing of a building or structure'. An activity cannot be considered 'cleaning' under the statute if it: '(1) is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises; (2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; (3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and (4) in light of the core purpose of Labor Law § 240 (1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project'. The factors are to be considered as a whole, and the ''presence or absence of any one is not necessarily dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the other'" (Torres v St. Francis Coll., 129 AD3d 1058, 1059-1060 (NY App Div 2d Dept 2015) citing Labor Law § 240(1); Soto v J. Crew Inc., 21 NY3d 562, 566, 568 (NY 2013); Rocovich v Consolidated Edison Co., 78 NY2d 509, 513 (NY 1991); Collymore v 1895 WWA, LLC, 113 AD3d 720, 721 (NY App Div 2d Dept 2014); Pena v Varet & Bogart, LLC, 119 AD3d 916 (NY App Div 2d Dept 2014).

Applying said factors the Court finds as a threshold matter that the Plaintiff has established prima facie that the Plaintiff's activity of mopping an active work site as part of an ongoing restoration project falls within the scope of "cleaning" as the term is used in Labor Law §240(1). It is undisputed that the Project had been going on for at least two weeks to repair extensive water damage at Dubin Center (Plaintiff EBT at 39; Vancott EBT at 37-38). As such, it is clear that Plaintiff's activities were part of the overall repair/restoration project and therefore fell within the scope of "cleaning" under Labor Law §240(1) (See Nagel v D & R Realty Corp., 99 NY2d 98, 102-103 (NY 2002); Garcia v 225 E. 57th St. Owners, Inc., 96 AD3d 88, 91 (NY App Div 1st Dept 2012); Maes v 408 W. 39 LLC, 24 AD3d 298, 300-301 (NY App Div 1st Dept 2005) lv denied 7 NY3d 716 (NY 2006)).

However, the fact that the Plaintiff's activities constituted "cleaning" for the purposes of Labor Law §240(1) is not in and of itself dispositive as to the question of whether or not the Plaintiff has established a prima facie cause of action under Labor Law §240(1). The Court must also look to the precise nature of the alleged accident to determine if it is an example of the type of harm that Labor Law §240(1) was designed to prevent. Specifically, assuming the truth of the Plaintiff's factual allegations, the Court must determine if the alleged accident is the type of accident that Labor Law §240(1) was designed to prevent.

Upon review of the submitted papers and having conducted oral argument, the Court finds that the circumstances of the Plaintiff's accident, specifically being struck by a light fixture that fell from the ceiling while Plaintiff was entering an examination room to mop the floor and clean up (as part of the repair/restoration project), is not the type of elevation-related risk of the kind that would be addressed by Labor Law § 240(1) (See Bednarczyk v Vornado Realty Trust, 63 AD3d 427, 428 (NY App Div 1st Dept 2009); Nicometi v Vineyards of Fredonia, LLC, 25 NY3d 90, 97 (NY 2015)). Specifically, although the Plaintiff argues to the contrary, based upon the submitted papers and oral argument, this Court finds that

there is insufficient evidentiary proof to establish that the light fixture fell and injured the Plaintiff due to a failure to provide a protective device contemplated by Labor Law § 240(1), or that such a device was necessary (See Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., 18 NY3d 1, 8 (NY 2011)). Similarly, this Court finds that the submitted papers and oral argument were insufficient to establish that a hoisting or securing device of the kind enumerated in Labor Law § 240(1) would have been necessary or even expected as to the light fixture, and/or that the absence of such a device caused the underlying accident (See Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., 18 NY3d 1, 8 (NY 2011) quoting Narducci v Manhasset Bay Assocs., 96 NY2d 259, 268-269 (NY 2001)). "[T]here is no basis to conclude that the object that fell and hit the Plaintiff was "being 'hoisted or secured' or 'required securing for the purposes of the undertaking'" (Fabrizi v 1095 Ave. of the Ams., LLC, 22 NY3d 658, 662-663 (NY 2014)(citations omitted)).

As such, although the Plaintiff was engaged in "cleaning" activities as part of the overall repair/renovation project, which falls within the scope of Labor Law §240(1), the alleged accident was not the type of "elevation-related risk" or harm addressed by Labor Law §240(1).

As such, the Court finds that the Defendant has established prima facie entitlement to summary judgment dismissing the Plaintiff's Labor Law §240(1) claim and the Plaintiff has failed to create an issue of fact as to said claim.

Accordingly, the portion of Defendants' motion seeking dismissal of the Plaintiff's Labor Law §240 (1) is hereby granted.

Defendant is entitled to summary judgment dismissing the Plaintiff's cause of action under Labor Law §241(6)

Labor Law § 241 provides:

> 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, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to [workers] ... [in accordance with rules promulgated by the Commissioner of Labor]."

Labor Law § 241(6) imposes a nondelegable duty on owners, contractors, and their agents to "provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations" set forth in the Industrial Code (See Misicki v Caradonna, 12 NY3d 511, 515 (NY 2009) (internal quotation marks and citation omitted)). The legislative purpose in enacting the statute was to place "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor" (See Stringer v Musacchia, 11 NY3d 212, 216 (NY 2008); Sanatass v Consolidated Investing Co., Inc., 10 NY3d 333, 342 (NY 2008); Rizzuto v LA Wenger Contr Co., 91 NY2d 343 (NY 1998)).

To recover under Labor Law § 241(6), a plaintiff must plead and prove the violation of an applicable and concrete provision of the New York State Industrial Code, containing "specific, positive command[s]," and show that the violation was a proximate cause of the accident (Buckley v Columbia Grammar & Preparatory, 44 AD3d 263 (NY App Div 1st Dept 2007) lv denied 10 NY3d 710 (NY 2008) citing Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 503-504 (NY 1993)). "The Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (St. Louis v Town of N. Elba, 16 NY3d 411, 416 (NY 2011)).

In the underlying action, the Plaintiff alleges that the Defendants violated Industrial Code sections 23-1.7 (e) and 23-2.1 (a)

New York State Industrial Code section 23-1.7 (e) is not applicable to the underlying action

Code section 23-1.7 (e) states as follows:

> (e) Tripping and other hazards
>
> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> (2) Working areas. The parts of floors, platforms or similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Code section 23-1.7 (e) is sufficiently specific to support a Labor Law §241(6) claim (See Murphy v Columbia Univ., 4 AD3d 200 (NY App Div 1st Dept 2004)). Liability under 12 NYCRR 23-1.7(e) depends upon a showing by the Plaintiff that he was injured in a passageway, as required by section (e)(1), or in a working area, as required by section (e)(2). The "passageway" section of the regulation does not apply to an accident that occurs in an open area of the construction site, and not within a defined walkway or "passageway" (See Morra v White, 276 AD2d 536 (NY App Div 2d Dept 2000); Lenard v 1251 Ams. Assocs., 241 AD2d 391 (NY App Div 1st Dept 1997)).

In the underlying action, the Plaintiff alleges in sum and substance that he was struck by something that allegedly fell from the ceiling while he was entering a room. Said allegations do not provide any basis to conclude that the Plaintiff's accident occurred in a "passageway". Instead said allegations describe the accident as occurring inside of a room that the Plaintiff had just entered or was in the process of entering. Even assuming that the accident occurred while the Plaintiff was entering the room, this does not transform the doorway and/or area immediately inside the room in front of the doorway into a "passageway".

As such, the Court finds that the Defendant has established prima facie entitlement to summary judgment dismissing the Plaintiff's Labor Law §241(6) claim based upon an alleged violation of 12 NYCRR 23-1.7(e) and the Plaintiff has failed to create an issue of fact as to said claim.

Accordingly the Defendant's motion to dismiss the Plaintiff's Labor Law §241(6) claim based upon an alleged violation of 12 NYCRR 23-1.7(e) is hereby granted.

New York State Industrial Code section 23-2.1(a) is not applicable to the underlying action

Code section 23-2.1 (a) states as follows:

> (a) Storage of material or equipment.
> (1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.
> (2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge.

Code section 23-2.1(a) is sufficiently specific to support a Labor Law §241(6) claim (See Randazzo v Consolidated Edison Co., 271 AD2d 667 (NY App Div 2d Dept 2000)).

Upon review of the submitted papers and having conducted oral argument, the Court finds that the Fixture was not "building materials or equipment" and it was not stored on a "floor, platform or scaffold". Specifically, nothing in the submitted papers or presented at oral argument created any basis for the Court to conclude that the Fixture was being stored or subject to storage at the time of the accident. Therefore, Code section 23-2.1 (a) does not apply to the underlying action (See Waitkus v. Metropolitan Hous. Partners, 50 AD3d 260 (N.Y. App. Div. 1st Dept 2008). Further, the Plaintiff's accident occurred in a room as or immediately after he entered said room to perform cleaning work. Therefore, the room where the accident occurred was the Plaintiff's "work area", not a passageway, further removing the injury from the scope of section 23-2.1(See Waitkus v Metropolitan Hous. Partners,

50 AD3d 260 (NY App Div 1st Dept 2008)). Neither is there any basis for the Court to conclude that the Plaintiff's accident was caused by "accumulations of dirt and debris" and/or "scattered tools and materials" which might cause a worker to trip or slip (See Costa v State of New York, 123 AD3d 648 (NY App Div 2d Dept 2014).

As such, the Court finds that the Defendant has established prima facie entitlement to summary judgment dismissing the Plaintiff's Labor Law §241(6) claim based upon an alleged violation of 12 NYCRR 23-2.1 and the Plaintiff has failed to create an issue of fact as to said claim.

Accordingly the Defendant's motion to dismiss the Plaintiff's Labor Law §241(6) claim based upon an alleged violation of 12 NYCRR 23-2.1 is hereby granted.

Defendant is entitled to summary judgment dismissing the Plaintiff's causes of action under Labor Law § 200 and Common-Law Negligence stemming from the means and methods of the Plaintiff's work

Labor Law §200 is a codification of common-law negligence (See Comes v N.Y. State Elec. & Gas Corp., 82 NY2d 876, 877-878 (NY 1993)). Liability under Labor Law § 200 "generally falls into two broad categories: instances involving the manner in which the work is performed, and instances in which workers are injured as a result of dangerous or defective premises conditions at a work site" (See Abelleira v City of New York, 120 AD3d 1163, 1164 (NY App Div 2d Dept 2014)). "These two categories should be viewed in the disjunctive" (Ortega v Puccia, 57 AD3d 54, 61 (NY App Div 2d Dept 2008)).

In cases where the worker's injury stems from the manner in which the work is performed, "liability for common-law negligence or under Labor Law §200 may be imposed against an owner or general contractor if it 'actually exercised supervisory control over the injury-producing work'" (Suconota v Knickerbocker Props., LLC, 116 A.D.3d 508, 508 (NY App Div 1st Dept 2014) quoting Cappabianca v Skanska USA Bldg. Inc., 99 AD3d 139, 144 (NY App Div 1st Dept 2012)). There is no

liability under this section of the Labor Law for an owner or general contractor that exercises no supervisory control over the operation, where the purported defect or dangerous condition arose from the contractor's methods (See Lombardi v Stout, 80 NY2d 290, 295 (NY 1992)). "An implicit precondition to [the duty under Labor Law § 200] to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (Russin v Louis N. Picciano & Son, 54 NY2d 311, 317 (NY 1981); Fiorentino v Atlas Park LLC, 95 AD3d 424, 426 (NY App Div 1st Dept 2012)).

However, "[w]here a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a landowner may be liable under Labor Law § 200 if it 'either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition'" (Rojas v Schwartz, 74 AD3d 1046, 1047 (NY App Div 2d Dept 2010) citing Ortega v Puccia, 57 AD3d 54 (NY App Div 2d Dept 2008)). An owner may have liability under Labor Law § 200 where it has "actual or constructive notice of the hazardous condition" (Garcia v DPA Wallace Ave. I, LLC, 101 AD3d 415, 417 (NY App Div 1st Dept 2012); see also Rajkumar v Budd Contr. Corp., 77 AD3d 595, 596 (NY App Div 1st Dept 2010); Cahill v Triborough Bridge & Tunnel Auth., 31 AD3d 347, 350-351 (NY App Div 1st Dept 2006)).

Upon review of the submitted papers and having conducted oral argument, the Court finds that the Defendants have established prima facie that they had no supervisory authority over plaintiff or how he performed his work (Plaintiff EBT at 43-45; Vancott EBT at 34-37) (See Comes v N.Y. State Elec. & Gas Corp., 82 NY2d 876, 877-878 (NY 1993); Lombardi v Stout, 80 NY2d 290, 295 (NY 1992); Austin v Consolidated Edison, Inc., 79 AD3d 682, 683-684 (NY App Div 2d Dept 2010)). Further, the Plaintiff has failed to create an issue of fact on this point.

However, the Defendants have not established that they lacked actual or constructive notice of the allegedly dangerous condition of the Fixture. Specifically, the Defendants have not shown when the area where the accident occurred was previously inspected, who had access to it and for how long.

As such, the Court finds that the Defendant has established prima facie entitlement to summary judgment dismissing the Plaintiff's Labor Law §200 claim and common-law negligence claim relating to the means and methods of the Plaintiff's work and that the Plaintiff has failed to create an issue of fact as to said claim. However, the Defendant has failed to establish prima facie entitlement to summary judgment dismissing the Plaintiff's Labor Law §200 claim and common-law negligence claim relating to the condition of the Plaintiff's work area.

Accordingly, the portion of Defendants' motion that seeks dismissal of the portion of plaintiff's Labor Law § 200 claim and common-law negligence claim relating to the means and methods of the Plaintiff's work is granted, and the portion of Defendants' motion that seeks dismissal of the portion of plaintiff's Labor Law §200 claim and common-law negligence claim based upon "actual or constructive notice of the [allegedly] hazardous condition" is denied.

Conclusion

Accordingly, it is hereby

ORDERED that the Defendants' motion for summary judgment dismissing the Plaintiff's complaint is granted solely to the extent of dismissing the Plaintiff's claims based upon Labor Law § 240 (1), Labor Law § 241(6), and the portion of Plaintiff's Labor Law §200 claim and common law negligence claim that relates to the means and methods of work, and is otherwise denied.

The foregoing constitutes the ORDER and DECISION of the Court.

Dated: January 5, 2016

ENTER:

_____, JSC

HON. ROBERT D. KALISH

J.S.C.