

<b>DeMarco v Tishman Constr. Corp.</b>
2016 NY Slip Op 31051(U)
March 18, 2016
Supreme Court, New York County
Docket Number: 158273/2012
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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DeMarco, Jr., Michael

Plaintiff,

Index No. 158273/2012

-against-

Tishman Construction Corporation and Cornell  
University

Defendants.

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**KALISH, J.:**

The Plaintiff's motion for partial summary judgment for liability on his claims pursuant to Labor Law §§ 240(1) & (2) and 241(6) based upon the Defendants' alleged violations of 12 NYCRR 23-1.7, 12 NYCRR 23-2.5 and 12 NYCRR 23-5.10 is denied and the Defendants' cross-motion for partial summary judgment dismissing the Plaintiff's Labor Law § 241(6) claim, common-law negligence claim and Labor Law §200 claim is granted in part and denied in part to the extent as follows:

Underlying Dispute

Without reiterating the entirety of the pleadings, the underlying action arises from an accident that allegedly occurred on December 16, 2011 during the construction of a medical research building located at 413 E. 69th Street in Manhattan. Specifically, the Plaintiff alleges that he was employed by D-Aprile Inc. ("D-Aprile"), a contractor working on said construction and that during the course of said work, the Plaintiff's hand was injured by a falling object (described in the complaint as a "brick"). The Plaintiff further alleges that the Defendant Tishman Construction Corporation ("Tishman") was the general contractor for said construction and that the Defendant Cornell University ("Cornell") hired Tishman to be the general contractor overseeing the construction.

The Plaintiff alleges four causes of action against the Defendants:

- first cause of action: common law negligence;
- second cause of action: statutory liability based upon violation(s) of Labor Law §200;
- third cause of action: statutory liability based upon violation(s) of Labor Law §240; and
- fourth cause of action: statutory liability based upon violation(s) of Labor Law §241(6) and specific subsections of rule 23 of the Industrial Code.

The Plaintiff alleges that the Defendants violated rule 23 of the Industrial Code, and specifically alleges in the verified bill of particulars that the Defendants violated 12 NYCRR 23-1.5, 12 NYCRR 23-1.7, 12 NYCRR 23-1.8, 12 NYCRR 23-1.18, 12 NYCRR 23-1.24, 12 NYCRR 23-2.1 and 12 NYCRR 23-2.1(a)(2) and (b). In addition, the Plaintiff has filed a total of ten supplemental verified bills of particulars. In the Plaintiff's fifth supplemental bill of particulars the Plaintiff alleges that the Defendants violated 12 NYCRR 23-2.5 and in Plaintiff's seventh supplemental bill of particulars the Plaintiff alleges that the Defendants violated 12 NYCRR 23-5.10; 12 NYCRR 23-5.10(1)(2); and 12 NYCRR 23-1.15(a)(b)(c).

The Plaintiff has attached with his moving papers copies of the deposition transcripts taken of the Plaintiff and Mr. Jonathan Crowe for the Defendant Tishman. The Plaintiff also attaches an affidavit by the Plaintiff in support of the motion.

## Analysis

### Parties' Contentions

#### Plaintiff's motion for partial summary judgment

The Plaintiff argues in the moving papers that based upon the deposition testimony, he has established as a matter of law that the Defendants failed to provide him with proper protection as required pursuant to Labor Law §240(1) & (2) and that said failures were the proximate cause of his injuries. Specifically, the Plaintiff argues that the object that hit him came from about 4 stories above where he was working, where co-workers were working on a scaffold outside the building. The Plaintiff claims that the above scaffold (where the object allegedly fell from) was not properly secured so as to prevent movement away from the building, and that there were bricks on the scaffold that were not properly secured. Plaintiff argues that Labor Law §240(2) should be read together with 12 NYCRR 23-1.15, which defines safety railings.

The Plaintiff further argues that he has established that he is entitled to summary judgment on his claims pursuant to Labor Law §241(6) on the basis that the Defendants violated certain provisions of the Industrial Code of the State of New York, specifically 12 NYCRR 23-1.7, 12 NYCRR 23-2.5 and 12 NYCRR 23-5.10. The Plaintiff attaches with his moving papers copies of the deposition transcripts taken of the Plaintiff and Mr. Jonathan Crowe for the Defendant Tishman. The Plaintiff also attaches an affidavit by the Plaintiff in support of the motion.

#### Defendants' opposition to Plaintiff's motion for summary judgment

In opposition to the Plaintiff's motion, the Defendants argue that the Plaintiff has not sustained his burden as to his Labor Law §240(1) & (2) claims. The Defendants argue that the Plaintiff had no personal knowledge of what object hit him, and only started referring to the object as a brick after talking to the D'Aprile laborer working several floors above him on a hanging scaffold. The Defendants further argue that the Plaintiff has failed to establish through proof in admissible form that there was a scaffold

above the Plaintiff; that any such scaffold was improperly constructed, secured and/or operated; that any brick fell from the scaffold; and/or that the Plaintiff was struck by a brick. Defendants conclude that the Plaintiff has not presented any evidence in admissible form as to the nature of the object that hit him and/or how it came to fall (assuming that the object came from the scaffold). As such, Defendants argue that the Plaintiff fails to make a prima facie showing as to how his accident happened and is not entitled to summary judgment on any of his claims.

The Defendants further argue that the Plaintiff is not entitled to summary judgment on his Labor Law §241(6) claim based upon the Defendants' alleged violation of 12 NYCRR 23-5.10. Specifically, the Plaintiff has failed submit any proof in admissible form to establish that the underlying action was caused by a scaffold and/or a multiple-point suspension scaffold. As 12 NYCRR 23-5.10 only applies to multiple-point suspension scaffolds, the Defendants argue that the Plaintiff has failed to establish that said statute is applicable to the underlying action.

The Defendants further argue that the Plaintiff is not entitled to summary judgment on his Labor Law §241(6) claim based upon the Defendants' alleged violations of 12 NYCRR 23-1.7 and 12 NYCRR 23-2.5. Specifically, the Defendants argue that 12 NYCRR 23-1.7 is not applicable to the underlying action, since said statute only applies to areas where employees are not required to work and that are "normally exposed to falling material or objects". The Defendants argue that based upon the deposition testimony, it is clear that the Plaintiff was required to work in the subject area, and that said area was not normally exposed to falling material or objects. The Defendants further argue that 12 NYCRR 23-2.5 only applies to people working in "shafts" and that the Plaintiff was working in the interior of the subject building when the accident occurred. As such, Defendants argue that 12 NYCRR 23-2.5 is not applicable to the underlying action. Upon these grounds, the Defendants also argue that they are entitled to summary judgment dismissing the Plaintiff's Labor Law §241(6) claim based upon the Defendants' alleged violations of 12 NYCRR 23-1.7 and 12 NYCRR 23-2.5.

Defendants' cross-motion for summary judgment

The Defendants cross-move for summary judgment dismissing the Plaintiff's Labor Law §241(6) claims stemming from alleged violations of 12 NYCRR 23-1.5, 12 NYCRR 23-1.8, 12 NYCRR 23-1.15, 12 NYCRR 23-1.18 and 12 NYCRR 23-1.24, as well as Plaintiff's negligence and Labor Law §200 claims. The Defendants argue in sum and substance that 12 NYCRR 23-1.5, 12 NYCRR 23-1.8, 12 NYCRR 23-1.15, 12 NYCRR 23-1.18 and 12 NYCRR 23-1.24 are not applicable to the underlying action and as such the Plaintiff's Labor Law §241(6) claims stemming from said statutes should be dismissed.

The Defendants further argue that the Plaintiff's negligence and Labor Law §200 claims arise from the manner in which the work at issue was performed, and not due to a dangerous or defective condition in the premises. The Defendants further argue that based upon the deposition testimonies, the Defendants did not supervise, direct or control the activity that gave rise to the Plaintiff's accident. As such, absent a showing of supervisory control, the Defendants argue that they cannot be held liable for the activity that lead to the Plaintiff's injury under common law negligence and/or Labor Law §200.

Plaintiff's reply and opposition to the Defendants' cross-motion.

In his reply and opposition to the Defendants' cross-motion, the Plaintiff reiterates his arguments for summary judgment, and specifically opposes the Defendants cross-motion to dismiss the Plaintiff's Labor Law § 241(6) claims based upon the Defendants' alleged violations of 12 NYCRR 23-1.7 and 12 NYCRR 23-2.5. Specifically, the Plaintiff argues that he was working in a shaft and that the required overhead protection was lacking. The Plaintiff further argues that the Defendants are not entitled to summary judgment dismissing the Plaintiff's Labor Law §200 claim, since the Plaintiff's accident was not the result of the methods and manner in which the workers on the scaffold chose to work. Plaintiff argues that his accident arose from a dangerous condition of which the Defendants had actual or constructive notice. The Plaintiff attaches two copies of the incident reports regarding plaintiff's accident: one prepared by Tishman and one filled out by Plaintiff's employer, D'Aprile.

The Plaintiff's reply papers do not address the Defendants' arguments for the dismissal of his Labor Law § 241(6) claim based upon alleged violations of 12 NYCRR 23-1.5, 12 NYCRR 23-1.8, 12 NYCRR 23-1.15, 12 NYCRR 23-1.18 and 12 NYCRR 23-1.24.

Oral argument

On December 22, 2015, the Parties appeared before this Court for oral argument on the instant motion and cross-motion. The Parties reiterated the arguments presented in their submitted papers. At oral argument, Plaintiff's attorney confirmed that he was moving for summary judgment on Labor Law §241(6) claim based upon alleged violations of 12 NYCRR 23-2.5, 12 NYCRR 23-1.7(a)(1) and (a)(2); and 12 NYCRR 23-5.10. The Court indicated at oral argument that the Plaintiff's had not alleged in the bill of particulars that the Defendants had violated 12 NYCRR 23-2.5 or 12 NYCRR 23-5.10, and as such, the Court would not consider the Plaintiff's motion for summary judgment on his Labor Law §241(6) claim based upon the alleged violation of 12 NYCRR 23-2.5 or 12 NYCRR 23-5.10. The Court recognized that the Defendants had cross-moved for summary judgment dismissing the Plaintiff's Labor Law §241(6) claim based upon alleged violations of multiple subsections of rule 23 of the Industrial Code. However, the Plaintiff's submitted papers in opposition to the cross-motion had only responded to the Defendants' motion to dismiss the Plaintiff's Labor Law §241(6) claim based upon alleged violations of 12 NYCRR 23-2.5, 12 NYCRR 23-1.7(a)(1) and (a)(2), and 12 NYCRR 23-5.10. Plaintiff's attorney agreed that any Labor Law §241(6) claims based upon alleged violations that the Plaintiff did not address in his response to the Defendants' cross-motion would be deemed abandoned (See Kempisty v. 246 Spring St., LLC, 92 AD3d 474, 475 (NY App Div 1st Dept 2012)). As such, the Court dismissed the Plaintiff's Labor Law §241(6) claim based upon alleged violations of 12 NYCRR 23-1.5, 12 NYCRR 23-1.8, 12 NYCRR 23-1.18, 12 NYCRR 23-1.18(2) 12 NYCRR 23-1.24, and 12 NYCRR 23-2.1.

Subsequent to oral argument, Plaintiff's attorney sent the Court a letter indicating that Plaintiff's counsel had mistakenly represented at oral argument that Plaintiff did not allege a violation of 12 NYCRR 23-2.5 in the pleadings. Plaintiff further indicated in said letter that the Plaintiff had alleged said violation in his supplemental bill of particulars. However, said letter made no mention of the Plaintiff's Labor Law §241(6) claim based upon alleged violations of 12 NYCRR 23-5.10. Further, upon examination of the Plaintiff's seventh supplemental bill of particulars, the Court found, unbeknownst to Plaintiff's counsel, that the Plaintiff had also alleged that the Defendants violated 12 NYCRR 23-5.10.

Although the Court indicated at oral argument that it would not consider the Plaintiff's motion for summary judgment on his Labor Law §241(6) claim based upon alleged violations of 12 NYCRR 23-2.5 and 12 NYCRR 23-5.10, based upon the Plaintiff's letter and the Court's review of the Plaintiffs' supplemental bills of particulars, it is clear that that Plaintiff did allege that the Defendants violated 12 NYCRR 23-2.5 and 12 NYCRR 23-5.10. As such, the Court will consider the Plaintiff's motion for summary judgement including the Plaintiff's Labor Law §241(6) claim based upon alleged violations of 12 NYCRR 23-2.5, 12 NYCRR 23-1.7(a)(1) and (a)(2) and 12 NYCRR 23-5.10. Further, based upon the Parties' submitted papers, the Court finds that both of the Parties have fully addressed the Plaintiff's Labor Law §241(6) claim based upon alleged violations of 12 NYCRR 23-2.5 and 12 NYCRR 23-5.10 even in the absence of oral argument on these statutes.

To reiterate, Plaintiff's counsel indicated to the Court that the Plaintiff was abandoning his Labor Law §241(6) claims based upon alleged violations 12 NYCRR 23-1.5, 12 NYCRR 23-1.8, 12 NYCRR 23-1.18, 12 NYCRR 23-1.18(2) 12 NYCRR 23-1.24, and 12 NYCRR 23-2.1. As such, the only issues before this Court on the instant motion and cross-motion are as follows:

- The Plaintiff's motion for summary judgment pursuant to Labor Law §§ 240 and 241 based upon the Defendants' alleged violation of 12 NYCRR 23-1.7, 12 NYCRR 23-2.5 and 12 NYCRR 23-5.10 and
- Defendants' cross-motion for summary judgment dismissing the Plaintiff's Labor Law §241(6) claims based upon the Defendants' alleged violation of 12 NYCRR 23-1.7 and 12 NYCRR 23-2.5, Plaintiff's common-law negligence claim and Plaintiff's Labor Law §200 claim

#### Parties' Deposition Testimonies

##### Plaintiff's Deposition

The Plaintiff testified that on December 16, 2011, he was working as a bricklayer for the non-party contractor D'Aprile on the second floor of the subject building. Plaintiff testified that he was preparing to continue erecting an exterior wall, and that as he mounted a scaffold while working inside the building, he was hit by a falling object that skimmed off his hard-hat and slammed into his left hand (Plaintiff's Deposition pp. 53-54). Plaintiff stated: "I had my left hand on the block wall and something from above hit off my hard-hat, I jumped back and it smashed into my hand" (id. at 53).

Plaintiff further testified that he came to learn, not long after the accident, that the object that struck him was a brick. Plaintiff testified that after reporting the accident that "[t]he foreman took me upstairs to ... to the hanging scaffold that was outside and he told [other D'Aprile employees] that an object had hit me and one of the laborers said that a brick, a few had fallen" (id. p. 58). Plaintiff testified that a D'Aprile employee told him that "the scaffold had blown away from the wall and some, a few bricks had fallen" (id. p. 60). Plaintiff observed the hanging scaffold and testified that it was

“maybe 8 inches away” from the exterior of the building and that “it had brick on it” (id.).

Defendants contend that plaintiff had no personal knowledge of what object hit him, and only started referring to the object as a brick after talking to the D’Aprile laborer working several floors above him on a hanging scaffold. Defendants conclude that, as plaintiff has not presented any evidence in admissible form as to what object hit him and how it came to fall assuming it was from the scaffold, he fails to make a prima facie showing as to how his accident happened and thus is not entitled to summary judgment on any of his claims.

#### Jonathan Crowe’s Deposition

Jonathan Crowe testified that for almost eight years he has been employed as a superintendent by Tishman (Crowe’s Deposition pp. 8-10). He further testified that he first learned of plaintiff’s accident when he was asked to give testimony about it, approximately one month before his deposition in January 2015 (Crowe Deposition pp. 45-46). Mr. Crowe testified that in preparation for his deposition, he looked at three incident reports regarding plaintiff’s accident: one prepared by his employer, Tishman, one filled out by plaintiff’s employer, D’Aprile, and one prepared by nonparty Select Safety Consulting Services, Inc. (“Safety Select”) (Crowe Deposition pp. 47-48).<sup>1</sup>

Mr. Crowe testified, after reading the Safety Select report, that the second floor, including the exterior wall on the west side of the building where plaintiff’s accident happened, were “part of my duties” (Crowe Deposition pp. 50). Although Mr. Crowe could not remember plaintiff’s accident, he did recall the area where he was working: “he was working on that wall from the inside of the building not the exterior, he was building from inside out” (id.).

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<sup>1</sup> The Plaintiff attaches a copy of the Safety Select Accident report (Exhibit E) and the D’Aprile report (Exhibit F) with Plaintiff’s reply papers.

Even though the Plaintiff was working from the inside of the building, Mr. Crowe acknowledged that Plaintiff, through his work, would be directly exposed to an exterior area that Crowe refers to as a “light well” between the building and an adjacent building (id. p. 51). Mr. Crowe described that area more specifically: “It was just pretty much like a light well or an open safety shaft that kind of connected – not connected, but there was a space in between the two buildings that was going to be permanent – going to be a permanent fixture (id. pp. 51-52). Mr. Crowe estimated that the “light well was only, you know, maybe four feet wide” (id. p. 53). Mr. Crowe testified that he did not know if there was work taking place above plaintiff in the light well (id. p. 52). Despite not being able to recall whether any work was taking place above plaintiff’s head, Mr. Crowe did recall that the unremembered work took place on a scaffold with toeboards:

“Yeah, the scaffolding, the rig they were working on I know there was – we kind of went through it and I know there were toeboards. When they first started their work there was lack of toeboards and then as safety got involved they decided that toeboards needed to be installed around all four sides of their scaffolding rig”

(id. p. 54).

Mr. Crowe goes on to testify that the toeboards were in place on the hanging scaffold on the day of the Plaintiff’s accident and that the purpose of toeboards is to prevent objects from sliding off the hanging scaffold (id. pp. 55-56). However, he acknowledged that toeboards would not prevent an object that falls from the side of the hanging scaffold from dropping further below, and that another safety device, such as netting, would work better for that purpose (id. p. 56). Mr. Crowe also acknowledged that there was no overhead protection in the light shaft (id. p. 57). The Safety Select report, which is submitted by plaintiff in his reply papers, states that plaintiff’s hand was struck by a brick (Safety Select accident report at 1). Both of the accident reports submitted by plaintiff -- the D’Aprile and the Safety Select reports – state that the accident involved a falling brick (D’Aprile accident report at 2; Safety Select accident report at 1).

### 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 1<sup>st</sup> 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 1<sup>st</sup> Dept 2002)).

Plaintiff is not entitled to Summary Judgment on his claim pursuant to Labor Law §240 (1)

While Defendants do not seek dismissal of Plaintiff’s Labor Law §240 (1) & (2) claim, the Plaintiff does seek summary judgment on liability as to said claim.

Labor Law §240(1) provides, in relevant part:

All 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.

The Court of Appeals has held that this duty to provide safety devices is nondelegable (Gordon v Eastern Ry. Supply, 82 NY2d 555, 559 (1993)), and that absolute liability is imposed where a breach has

proximately caused a plaintiffs injury (Bland v Manocherian, 66 NY2d 452, 459 (1985)). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with adequate protection against a risk arising from a physically significant elevation differential (Runner v New York Stock Exch., Inc., 13 NY3d 599, 603 (NY 2009)). Where a violation is a proximate cause of a plaintiffs injuries, owners and general contractors are absolutely liable even if they do not have a continuing duty to supervise the use of safety equipment (Matter of East 51st St. Crane Collapse Litig., 89 AD3d 426, 428 (NY App Div 1st Dept 2011)(citation omitted)).

For Labor Law §240(1) falling object cases, however, the statute “does not automatically apply simply because an object fell and injured a worker” (Fabrizi v 1095 Ave. of the Ams., L.L.C., 22 NY3d 658, 663 (NY 2014)). 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 (id. at 662 (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)).

It is fundamental that a party moving for summary judgment must make a showing warranting judgment as a matter of law “and he must do so by tender of evidentiary proof in admissible form” (Zuckerman v New York, 49 NY2d 557, 562 (NY 1980)). Merely relying upon hearsay would be insufficient to establish prima facie entitlement to summary judgment. Further a Plaintiff is not entitled to summary judgment on a Labor Law §240(1) falling object claim where “[t]he plaintiff failed to eliminate all questions of fact as to whether the [object] that struck him was an object that required securing for the purposes of the undertaking being performed” (Gonzalez v TJM Constr. Corp., 87 AD3d 610, 611 (NY App Div 2nd Dept 2011)).

The question before this Court is whether the Plaintiff has made a prima facie showing as to his explanation of the accident and Defendants' violation of the relevant statutes. The Plaintiff contends that his own deposition testimony provides enough circumstantial evidence as to how the accident occurred for this Court to find, as a matter of law, that the Defendants violated Labor Law §240(1). A Plaintiff may obtain partial summary judgment as to liability under Labor Law §240(1) "through the use of circumstantial evidence" (Rios v 474431 Assoc., 278 AD2d 399 (NY App Div 2nd Dept 2000); see also Affenito v PJC 90th St. LLC, 5 AD3d 243 (NY App Div 1st Dept 2004)(holding that a plaintiff may make a prima facie showing of common-law negligence on circumstantial evidence alone)). However, where circumstantial evidence fails to resolve a question of fact as to whether a violation of the statute caused the plaintiff's injuries as in the instant case summary judgment must be denied (Podobedov v East Coast Constr. Group, Inc., 133 AD3d 733, 735 (NY App Div 2nd Dept 2015)).

In Podobedov, plaintiff's "mere belief" as to provenance of the falling object that struck him was insufficient to establish a prima facie violation. Similarly, in the underlying action, the Plaintiff's mere belief that a brick fell from the scaffold which was above him, by itself, is insufficient to make a prima facie showing of a violation of the statute. The fact that an object falls from above and strikes someone is not enough, the Plaintiff must show that the accident occurred because of the absence or inadequacy of a safety device of the kind enumerated in the statute. Further, the Plaintiff's assertion that it was a brick that fell upon him is based upon hearsay. Even assuming that it was a brick from a scaffold above that fell and hit him, the Plaintiff would still have to establish that the brick was inadequately secured in violation of Labor Law §240(1), and that said violation was the proximate cause of Plaintiff's accident/injury.

Upon consideration of the Plaintiff's moving papers including both the Plaintiff's moving papers and reply papers (and the attached accident reports) the Court finds that the Plaintiff has failed to establish prima facie that he was hit by a falling brick or that said brick was inadequately secured in violation of Labor Law §240(1). Further, even assuming arguendo that the Plaintiff had established that he had been hit by a brick falling from a scaffold above him, the Plaintiff has failed to establish prima facie that there are no issues of fact as to whether the Defendant violated Labor Law §240(1) and that said violation was the proximate cause of Plaintiff's accident/injury. As such, the burden does not shift to the Defendants and the Court need not consider the sufficiency of the Defendants' opposition to the Plaintiff's motion for summary judgment as to Plaintiffs Labor Law §240(1).

Accordingly, the branch of plaintiff's motion that seeks partial summary judgment as to liability on his Labor Law §240(1) claim is denied.

Plaintiff is not entitled to Summary Judgment on his claim pursuant to Labor Law §240 (2)

Labor Law § 240(2) provides:

“Scaffolding or staging more than twenty feet from the ground or floor, swung or suspended from an overhead support or erected with stationary supports, except scaffolding wholly within the interior of a building and covering the entire floor space of any room therein, shall have a safety rail of suitable material properly attached, bolted, braced or otherwise secured, rising at least thirty-four inches above the floor or main portions of such scaffolding or staging and extending along the entire length of the outside and the ends thereof, with only such openings as may be necessary for the delivery of materials. Such scaffolding or staging shall be so fastened as to prevent it from swaying from the building or structure.”

The Plaintiff argues in their moving papers that Labor Law § 240(2) should be read together with 12 NYCRR 23-1.15 in that 12 NYCRR 23-1.15(c) requires that whenever safety railings are required pursuant to the Industrial Code, said safety rail shall consist in part of “[a] one inch by four inch toeboard except when such safety railing is installed at grade or ground level or is not adjacent to any opening, pit or other area which may be occupied by any person”.

The Plaintiff argues in his moving papers in sum and substance that although Mr. Crowe testified that he recalled the scaffolds did have toeboards on the date of the Plaintiff's accident, that the "fall of the brick implies there was no toeboard" (Plaintiff's Affirmation in Support of Motion p. 12, para 60)

Upon consideration of the Plaintiff's moving papers including both the Plaintiff's moving papers and reply papers, the Court finds that Plaintiff has failed to make out a prima facie on his Labor Law §240(2) claim for the same reasons that he is not entitled to summary judgment on his Labor Law §240(1) claim. Specifically, the Plaintiff's motion for summary judgment on his Labor Law §240(2) claim is based upon hearsay evidence as to bricks allegedly falling from a hanging scaffold. Further, given Mr. Crowe's deposition testimony, the Plaintiff has failed to establish prima facie that there are no issues of fact as to whether or not the scaffold that was allegedly hanging above him lacked toeboards in violation of 12 NYCRR 23-1.15(c), or that said alleged violation was the proximate cause of the Plaintiff's accident/injuries. The Court finds that the mere allegation that a brick fell from a scaffold and hit the Plaintiff is not sufficient to establish as a matter of law that said scaffold lacked a toeboard and/or that said alleged violation of 12 NYCRR 23-1.15(c) was the proximate cause of the Plaintiff's accident/injuries. As such, the burden does not shift to the Defendants.

Accordingly, the branch of plaintiff's motion that seeks summary judgment as to liability under Labor Law §240(2) is also denied.

The Court will now address the Plaintiff's motion for summary judgment on his Labor Law §241(6) claim based upon the Defendants' alleged violation of 12 NYCRR 23-2.5(a)(1) and the Defendants' cross-motion for summary judgment dismissing said claim.

Plaintiff is not entitled to summary judgment on his Labor Law §241(6) claim based upon Defendants' alleged violation of 12 NYCRR 23-2.5(a)(1) nor are the Defendants entitled to summary judgment dismissing said claim.

The Plaintiff moves for summary judgment as to liability on his Labor Law §241(6) claim based upon Defendants' alleged violation of 12 NYCRR 23-2.5(a)(1), and the Defendants cross-move for summary judgments dismissing Plaintiff's Labor Law §241(6) claim under said statute. The Court will first address the Defendants' cross-motion and then the Plaintiff's motion for summary judgment on this claim.

Labor Law §241(6) provides, in relevant part:

All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

It is well settled that this statute requires owners and contractors and their agents to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 (NY 1993) quoting Labor Law §241(6)). While this duty is nondelegable and exists even in the absence of control or supervision of the worksite (Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 348-349 (NY 1998)), comparative negligence remains a cognizable affirmative defense to a section 241(6) cause of action (St. Louis v Town of N. Elba, 16 NY3d 411, 414 (NY 2011)).

To maintain a viable claim under Labor Law §241(6), plaintiffs must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (Misicki v Caradonna, 12 NY3d 511, 515 (NY 2009)). The Court of Appeals has noted that [t]he 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, 414 (NY 2011)).

In the underlying action, it is clear that the Plaintiff was engaged in covered activity, as he was erecting a perimeter wall pursuant to the construction of a building. Moreover, both Tishman and Cornell are proper section 241(6) Defendants as they were the general contractor and owner, respectively, of the subject construction.

12 NYCRR 23-2.5 (a) (1) provides that “[p]ersons required to perform work in or at shafts, other than elevator shafts, shall be provided with the following protection”:

“(1) A tight covering consisting of planks at least two inches thick full size, exterior grade plywood at least three-quarters inch thick or material of equivalent strength shall be installed so as to cover the entire cross-sectional area of the shaft. Such cover shall be located at a point in the shaft not more than two stories or 30 feet, whichever is less, above the level where persons are working.”

12 NYCRR 23-2.5 (a) (1) is sufficiently specific to serve as a predicate for section 241(6) liability (see Parrales v Wonder Works Constr. Corp., 55 AD3d 579 (NY App Div 2nd Dept 2008)).

The Parties dispute as to whether or not 12 NYCRR 23-2.5(a)(1) is applicable to the underlying action. The Plaintiff argues that this regulation is applicable to the underlying action because he was working at a light well/shaft at the time of the accident, while the Defendants argue that the statute is inapplicable because the Plaintiff was working at an exterior wall inside a building rather than inside a shaft.

Upon review of the submitted papers and arguments presented at oral argument, this Court finds that 12 NYCRR 23-2.5 (a) (1) is applicable to the underlying action. Specifically, in the underlying action, although the Plaintiff was not inside the shaft, the Plaintiff was working at a shaft which falls within the plain language of 12 NYCRR 23-2.5 (a) (1). Further, Plaintiff's work required him to build the wall of a building that would in effect create a portion of the shaft. Even Tishman's own witness, Mr. Crowe, described the area the Plaintiff was working at as an "open safety shaft" (Crowe's Deposition at pp. 51-52). Thus, contrary to Defendants' arguments, the Defendants were required to comply with 12 NYCRR 23-2.5 (a) (1). As such, based upon the Defendants' submitted papers and oral argument, they have failed to establish prima facie entitlement to summary judgment.

Accordingly, the branch of Defendants' cross-motion seeking dismissal of Plaintiff's Labor Law §241(6) claim based upon alleged violations of 12 NYCRR 23-2.5(a)(1) is denied.

Although the Defendants are not entitled to summary judgment based on the regulation, the Court finds that there still remain questions of fact as to whether the regulation was violated and whether the alleged violation was a proximate cause of Plaintiff's accident/injury. As previously discussed in the instant decision, there is insufficient admissible evidence before the Court as to how the object that struck Plaintiff fell and the circumstances thereof. It would be for the jury as the finders of fact to determine whether the accident was foreseeable and whether the equipment, operation or conduct at the worksite was reasonable and adequate under the circumstances.

Accordingly, the Plaintiff's motion for summary judgment on Labor Law §241(6) claim based upon alleged violations of 12 NYCRR 23-2.5(a)(1) is also denied.

Plaintiff is not entitled to Summary Judgment on his claim pursuant to Labor Law §241(6) based upon Defendants' alleged violation of 12 NYCRR 23-1.7 (a)(1) &(2) and the Defendants are entitled to summary judgment dismissing said claim only as to alleged violations of 12 NYCRR 23-1.7 (a)(2).

Plaintiff also contends that he is entitled to summary judgment under section 241(6) because defendants violated 12 NYCRR 23-1.7 (a)(1) &(2) and the Defendants cross-move for summary judgment dismissing said claim.

12 NYCRR 23-1.7 (a) deals with overhead hazards and provides that:

“(1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.

(2) Where persons are lawfully frequenting areas exposed to falling material or objects but wherein employees are not required to work or pass, such exposed areas shall be provided with barricades, fencing or the equivalent in compliance with this Part (rule) to prevent inadvertent entry into such areas.”

12 NYCRR 23-1.7(a) is sufficiently specific to support a Labor Law §241(6) claim (see Moncayo v Curtis Partition Corp., 106 AD3d 963 (NY App Div 2nd Dept 2013)(dismissing Labor Law §241(6) claim because 12 NYCRR 23-1.7 (a) was inapplicable, rather than insufficiently specific)). Plaintiff argues that 12 NYCRR 23-1.7 (a) is applicable to the underlying action because Plaintiff was required to work in a place that was “normally exposed to falling material or objects” and no protections were built to protect him from such objects. As to 12 NYCRR 23-17 (a) (1), Defendants argue that the Plaintiff was not working in an area that was normally exposed to falling materials or objects. The Defendants further argue that 12 NYCRR 23-1.7 (a)(2) is not applicable to the underlying action because Plaintiff was required to work in the area where his accident occurred, and 12 NYCRR 23-1.7 (a)(2) only applies to areas where employee are not required to work or pass.

Upon review of the submitted papers and having conducted oral argument, the Court finds that neither of the Parties has made an evidentiary showing as to whether or not plaintiff was working in an area that is normally exposed to falling material or objects. Thus, the Court has no basis to determine this issue as a matter of law (See Ginter v Flushing Terrace, LLC, 121 AD3d 840 (NY App Div 2nd Dept 2014); Gonzalez v TJM Constr. Corp., 87 AD3d 610 (NY App Div 2nd Dept 2011)). As such neither the Plaintiff nor the Defendants have met their prima facie burden for summary judgment. Further, even assuming arguendo that the area in question was “normally exposed to falling material or objects” and therefore came within the scope of 12 NYCRR 23-1.7 (a) (1), it is for a jury to decide whether the falling of the alleged object was foreseeable and “whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances” (See Amerson v Melito Constr. Corp., 45 AD3d 708, 709 (NY App Div 2nd Dept 2007) citing Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343 (NY 1998); Zervos v City of New York, 8 AD3d 477 (NY App Div 2nd Dept 2004); Belcastro v Hewlett-Woodmere Union Free Sch. Dist. No. 14, 286 AD2d 744 (NY App Div 2nd Dept 2001); Terry v Mutual Life Ins. Co., 265 AD2d 929 (NY App Div 4th Dept 1999); Murtha v Integral Constr. Corp., 253 AD2d 637 (NY App Div 1st Dept 1998).

Accordingly, as neither Party has made a prima facie showing as to the applicability of 12 NYCRR 23-1.7 (a) (1) (or lack thereof), the Plaintiff’s motion for summary judgment on his Labor Law §241(6) claim based upon alleged violations of 12 NYCRR 23-1.7(a)(1) and the Defendants’ cross-motion for summary judgment dismissing said charge are both denied.

Further, upon review of the submitted papers and having conducted oral argument, the Court finds that 12 NYCRR 23-1.7(a)(2) is inapplicable to the underlying action. Specifically, there is no dispute that the Plaintiff was required to work in the area in question.

Accordingly, the Plaintiff's motion for summary judgment on his Labor Law §241(6) claim based upon alleged violations of 12 NYCRR 23-1.7(a)(2) is denied and the Defendants' cross-motion for summary judgment dismissing said charge is granted.

Plaintiff is not entitled to summary judgment on his Labor Law §241(6) claim based upon alleged violations of 12 NYCRR 23-5.10(d)(1) & (2).

Plaintiff also contends that he is entitled to summary judgment under section 241(6) because defendants violated 12 NYCRR 23-5.10 (d)(1) & (2). 12 NYCRR § 23-5.10(d) deals with safety railings and screenings for "multiple-point suspension scaffolds" and provides that

(1) The open side and ends of every multiple-point suspension scaffold shall be provided with a safety railing constructed and installed in compliance with this Part (rule). In addition, every such safety railing shall be provided with an enclosure of wire mesh installed from the toeboard to the top railing. Such wire mesh shall be not less than No. 18 U.S. gage steel with openings that will reject a one-inch diameter ball.

(2) The inboard side (side next to the building or other structure) of every multiple-point suspension scaffold shall be provided with a toeboard.

The Plaintiff argues in his moving papers that "[t]he scaffold from which the brick fell, on information and belief, since it swayed from the building, blew away from the building, must have been a multiple-point suspension scaffold (Plaintiff's Affirmation in Support of Motion p. 12, para 61).

For the reasons previously stated in the instant decision, the Court finds that the Plaintiff has failed to establish prima facie that his accident was caused due to work performed on a scaffold, let alone a multiple-point suspension scaffold. As previously stated, the Plaintiff's assertions that a brick that fell upon him and that said brick came from the scaffold above him are both based upon hearsay. Further, even assuming arguendo that the Plaintiff had established that a brick fell from a scaffold above him and hit him, the Plaintiff's argument that the alleged scaffold "must have been a suspension scaffold" based upon "information and belief" that it "swayed from the building" is insufficient to establish that said scaffold was a multiple point suspension scaffold as a matter of law. As such, the Plaintiff has not met his prima facie burden to establish that 12 NYCRR 23-5.10 (d)(1) and/or (2) are

applicable to the underlying action.

Accordingly, the Plaintiff's motion for summary judgment on his Labor Law §241(6) claim based upon alleged violations of 12 NYCRR 23-5.10 (d)(1) & (2) is denied.

Defendants are entitled to summary judgment dismissing the Plaintiffs's Labor Law §241(6) claims based upon alleged violations of 12 NYCRR 23-1.5, 12 NYCRR 23-2.1, 12 NYCRR 23-1.8, 12 NYCRR 23-1.18, 12 NYCRR 23-1.24 and 12 NYCRR 23-1.18(2) as the Plaintiff has abandoned said claims.

Finally, as previously stated in the instant decision, the Plaintiff's attorney indicated at oral argument that the Plaintiff was abandoning his Labor Law §241(6) claims based upon alleged violations 12 NYCRR 23-1.5, 12 NYCRR 23-1.8, 12 NYCRR 23-1.18, 12 NYCRR 23-1.18(2), 12 NYCRR 23-1.24 and 12 NYCRR 23-2.1 (See Kempisty v 246 Spring St., LLC, 92 AD3d 474, 475 (NY App Div 1st Dept 2012)).

Accordingly, the Plaintiff's Labor Law §241(6) claims based upon alleged violations 12 NYCRR 23-1.5, 12 NYCRR 23-1.8, 12 NYCRR 23-1.18, 12 NYCRR 23-1.18(2), 12 NYCRR 23-1.24 and 12 NYCRR 23-2.1 are hereby dismissed as abandoned.

Defendants are entitled to summary judgment dismissing Plaintiff's Labor Law §200 and Common-Law Negligence Claims

The Defendants seek dismissal of the Plaintiff's Labor Law §200 and common-law negligence claims. 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 (See Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 (NY 1993)). Labor Law §200 claims fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (Urban v No. 5 Times Sq. Dev., LLC, 62 AD3d 553 (NY App Div 1st Dept 2009)).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work (See Hughes v Tishman Constr. Corp., 40 AD3d 305 (NY App Div 1st Dept 2007)). General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed (id.).

In contrast, when “the accident arises not from the methods or manner of the work, but from a dangerous premises condition, ‘a property owner [and/or general contractor] is liable under Labor Law §200 when the owner [and/or general contractor] created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice’” (See Mendoza v Highpoint Assoc., IX, LLC, 83 AD3d 1, 9 (NY App Div 1st Dept 2011) citing Chowdhury v Rodriguez, 57 AD3d 121 (NY App Div 2nd Dept 2008); Schultz v Hi-Tech Constr. & Mgt. Servs., Inc., 69 AD3d 701 (NY App Div 2nd Dept 2010); Artoglou v Gene Scappy Realty Corp., 57 AD3d 460 (NY App Div 2nd Dept 2008); see also Minorczyk v Dormitory Auth. of the State of New York, 74 AD3d 675 (NY App Div 1st Dept 2010)). In the dangerous-condition context, whether a defendant controlled or directed the manner of plaintiff’s work is irrelevant to Labor Law §200 and common-law negligence claims (See Seda v Epstein, 72 AD3d 455 (NY App Div 1st Dept 2010)).

In the underlying action, the Defendants argue that Tishman did not have supervisory authority over the Plaintiff's work and that Tishman did not direct or control the methods of the workers on the scaffold. Further, Tishman argues there is no evidence that Tishman caused or created the condition or had any notice of any condition that lead to the Plaintiff's accident. The Plaintiff argues in his submitted papers that his Labor Law §200 claim is not a "means and methods" argument, but rather that Tishman is negligent because it failed to properly supervise and were on notice of the work being done. At oral argument, the Plaintiff's attorney further argued that the underlying action was caused by the Defendants' failure to coordinate the work being done at the the job site so as to keep the Plaintiff from working underneath the employees working above him, presumably on a scaffold, and to keep said employees from working in an area above the Plaintiff.

Upon review of the submitted papers and having conducted oral argument, this Court finds that Plaintiff's cause of action under Labor Law §200 is a "means and methods" claim, rather than a "defect" claim. The accident allegedly arose from the means and methods of another D'Aprile employee's labor, specifically, the Plaintiff's co-workers were working on a scaffold outside the building. As such, the Plaintiff must show that the Defendants had supervisory control over the work that allegedly caused his accident.

Mr. Crowe testified at his deposition that Tishman's role on the project was to coordinate subcontractors and make sure that work met specifications, as well as time and budgetary constraints (Crowe Deposition pp. 7-10, 20). Further, the Plaintiff himself testified that his work was controlled by D'Aprile employees or principles (Plaintiff Deposition p. 39) and that he never had any interaction with anyone from Cornell (Plaintiff Deposition p. 41). Based upon said testimony, the Court finds that the Defendants have made a prima facie showing that they did not

have supervisory control over D'Aprile's work, including the work done by Plaintiff's co-workers working on a scaffold outside the building. The Court further finds that the Plaintiff has fails to rebut this showing, and instead argues, unpersuasively, in his papers and at oral argument that his accident was caused by a defect in the premises.

Accordingly, the Defendants are entitled summary judgment dismissing the Plaintiff's Labor Law §200 and common-law negligence claims.

Conclusion

Accordingly, it is hereby

ORDERED that the Plaintiff's motion seeking partial summary judgment as to liability on his claims under Labor Law §§ 240(1) & (2) and 241(6) is denied in its entirety; it is further

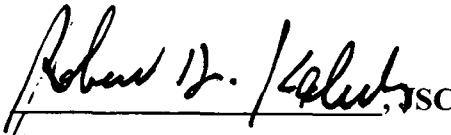
ORDERED that defendants' cross-motion for summary judgment is granted solely to the extent that plaintiff's Labor Law §200 and common-law negligence claims and the Plaintiff's Labor Law § 241(6) claims based upon the Defendants' alleged violation of 12 NYCRR 23-1.7 (a)(2); it is further

ORDERED that Plaintiff's Labor Law §241(6) claim based upon alleged violations of 12 NYCRR 23-1.5, 12 NYCRR 23-1.8, 12 NYCRR 23-1.18, 12 NYCRR 23-1.18(2), 12 NYCRR 23-1.24 and 12 NYCRR 23-2.1 are hereby dismissed as abandoned.

The foregoing constitutes the ORDER and DECISION of the Court.

Dated: March 18, 2010

ENTER:

  
HON. ROBERT D. KALISH  
J.S.C.