Latuner v Benchmark Bldrs., Inc.
2016 NY Slip Op 31971(U)
October 14, 2016
Supreme Court, New York County
Docket Number: 151845/13
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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MICHEL LATUNER,

Plaintiff,

-against-

Index No. 151845/13

BENCHMARK BUILDERS, INC., APOLLO GLOBAL MANAGEMENT, LLC, SOLOW BUILDING COMPANY, II, L.L.C., SOLOVIEFF REALTY CO., II, L.L.C., and APOLLO MANAGEMENT HOLDINGS, L.P.,

Defendants.

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JOAN A. MADDEN, J.:

In this action arising out of a construction accident, plaintiff Michel Latuner moves for summary judgment against defendants as to liability on his Labor Law § 241 (6) claim. Defendants Benchmark Builders, Inc. (Benchmark), Apollo Global Management, LLC, Solow Building Company, II, L.L.C. (Solow), Solovieff Realty Co., II, L.L.C. (SRC), and Apollo Management Holdings, L.P. (Apollo)[1] (collectively, defendants) cross-move for summary judgment dismissing the complaint and all cross claims asserted against them.

BACKGROUND

Plaintiff alleges he was injured on February 13, 2013,

[1]The status of Apollo Global Management, LLC in this action is unclear. It is Apollo Management Holdings, L.P. alone that is named as the Apollo entity on the lease and on the contract with Benchmark. As the Global Management party is not even mentioned in these motion papers, the court will assume, without deciding, that both Apollo entities may be considered as one.

while performing electrical grounding work in an electrical closet located on the 48th floor of 9 West 57th Street in Manhattan (The Building). At the time of the accident, SRC was the owner of the Building, Solow was the net lessee of the Building, and Apollo was the tenant of the 48th floor. Before occupying the leased space, Apollo contracted with Benchmark, as general contractor/construction manager, for the build-out of the 48th floor, and Benchmark subcontracted with plaintiff's employer, non-party, Commercial Electrical Contractors, Inc. (Commercial). The subcontract required Commercial to provide, among other things, "all Tel/Data/Security/Building Electric Closets work" (Benchmark/Commercial Purchase Order at 1 of 3). By letter dated March 15, 2011, Solow approved of Apollo's renovation plans, and authorized the performance of the construction plan.

The installation of the electrical components of the build-out was subject to inspection by the Bureau of Electrical Control and Inspection (BEC). In January 2013, BEC inspected Commercial's work, and issued a violation for the failure to ground the wires in the 48th floor electrical closet. At the time of the accident, plaintiff was grounding the wires to correct the violation for an inspection the following day. Plaintiff was injured when a wire he was attempting to ground contacted a portion of the energized main electrical riser,

resulting in an explosion and fire. Plaintiff suffered second-degree burns on his hands, wrists, forearms and face.

Plaintiff commenced this action seeking to recover damages for common negligence and violations of Labor Law §§ 200 and 241 (6). In its answer, Apollo asserted cross claims against the other defendants for contribution, common-law and contractual indemnification, and breach of contract by the failure to procure insurance. In their answer, SRC and Solow also asserted cross claims against the other defendants for contribution, common-law indemnification, breach of contract by failing to indemnify and save harmless SRC and Solow, and breach of contract for failure to name SRC and Solow as additional insureds on co-defendants' insurance policies.

Plaintiff previously moved for summary judgment as to liability on his section 241(6) claim based on statements in his affidavit. The court denied the motion as premature since there had not been any discovery. The court also noted that "while it appears that Solow and [SRC] qualify as owners for the purposes of the Labor Law, and that the work was being done in connection with construction at their building, on this record these facts cannot be established as a matter of law."

Discovery is now complete and plaintiff is again seeking summary judgment as to liability on its section 241(6) claim. At his deposition, plaintiff testified that on the date of the

accident he was a union electrician employed by Commercial and his foreman was Nick Bonelli (Bonelli).

According to plaintiff, he began working at the Building at the beginning of 2012, and while employed there he performed various types of electrical work, including maintaining the lights and electrical system, "repairing broken fixtures, lights that were out, circuits that blew and some new construction, renovation" (Plaintiff dep at 30). Plaintiff testified that the accident happened on the 48th floor after his foreman, Bonelli came up to him and told him "to install ground on the 48th floor in the work closet" (*id* at 47). He described the scope of the work he was to perform as "installing the grounds in the switch gear that was installed by Commercial Electric on the renovation of [the 48th floor]" (*id*). According to plaintiff, Bonelli told him that work had to be done because the "inspector was coming in the morning" of the next day and that "violations had to be fixed" (*id* at 123). When asked whether in addition to the service call he was providing electrical renovation work in the building, plaintiff responded "no" (*id* at 47). Plaintiff also responded "no" when asked if Commercial was doing renovation work on the 48th floor (*Id* at 47-48).

Plaintiff further testified that "[i]n the renovation done earlier, [Commercial] installed new panels, new transformers and new disconnects [and that he went to the 48th floor] ... to

install the grounds that were not installed during the renovation" (*id* at 48). He clarified that by ground he meant to "install ground wires for each piece of equipment" (*id* at 49).

Plaintiff testified that to perform the work the materials needed were wires and lugs, (which he described as L-shaped and made of aluminum) which are used when "you run a wire from cabinet to cabinet through a pipe or a sleeve" (*id* at 51), and that the equipment needed included "[a] drill, pliers, screwdriver and wire" (*id*). At the time of the accident, plaintiff was finishing up the work by "connecting the ends" (*id* at 53). Specifically, the accident happened inside an electrical closet containing the main rises as plaintiff "was skinning the end of the ground wire and [he] was putting [the wire] under the lug and as I was reaching back for my tools, my pouch, the wire popped out and hit the top of the line fuse, line side of the fuse" (*id* at 56-57). According to plaintiff, the flexible stranded wire he was installing was spooled and was like a "slinky" so that even if it was straightened it would sometime spring back (*id* at 66-67), as it did at the time of the accident(*id* at 69, 74). Plaintiff described the explosion at the time of the accident as "gigantic" and as causing a "big ball of fire" and sparks (*id* at 76-77).

Plaintiff responded "yes" when asked whether he knew before he did the work that "the disconnect switch was energized" (*id* at

70). He also agreed that doing this work when he knew the switch was energized was contrary to the training he received as a unionized electrician (*id* at 70). However, plaintiff testified that he told Bonelli that "we have to shut this down" before he performed the work, Bonelli said "no" (*id* at 141). Plaintiff also testified that he did not have the ability to shut down the power in the Building and that to do so, Bonelli would have to speak the Building's superintendent who would "have to tell the owner ...we got to shut off five floors of your building and that probably would not happen" (*id* at 138-139).

He further testified that Bonelli and Commercial's superintendent, Robert March, were the only individuals that he was aware of who knew about the his working on the switch (*id* at 142). Plaintiff responded "no" when asked if he was wearing any personal protective equipment, such as goggles or gloves at the time of the accident but he also testified that his safety training did not require him to wear this any such equipment for doing the work (*id* at 72).

Bonelli, plaintiff's foreman at the time of the accident, testified that he had worked at the Building for Commercial "on maintenance" for approximately two years before the accident, and received his assignments for the day from a representative of the Building (Bonelli Dep 11-12). He did not have any interaction with Benchmark. On the day of the incident, the super of

Commercial told him there was a grounding violation on the 48th floor. He testified that he had fixed these kind of violations with the power on and off that the reason the power is left on is if "tenants are there...you try not to shut down the power if possible" (id at 16). He also testified that there was "personal protective equipment" at the job site at the time of the accident including "[e]ye protection, head protection, ear plugs, a flash suit" (*id* at 22). He described a flash suit as "an arc suit when you are turning on and off switches" (*id*). According to Bonelli the flash suit and other protective equipment is stored in "our shanty" meaning "a storage facility or closet" and that it was either on the 51, 29 or 20 floor (*id* at 23). When asked whether it was the responsibility of the person working with a live switch to wear protective equipment, Bonelli responded that "Yes, I guess to a point. Um, I guess how the person feels comfortable as far as what they're working on to make the judgment. It is always available" (*id*).

William Reynolds (Reynolds), who was the Director of Operations for Benchmark at the time of the accident, was deposed. He confirmed that Benchmark had been hired by Apollo to perform the build-out of the 48th floor and that Benchmark hired Commercial to perform electrical work in connection with the project. He also testified that the electrical closet on the 48th floor in which plaintiff was working at the time of the accident

was within the scope of work for the job, and that Benchmark was the general contractor for all the work on that floor. Benchmark was not at the Building at the time of the accident, but was notified by Commercial about it on the date it occurred. According to Reynolds, under the applicable "rules and regulations, ...[Commercial] was the only one permitted to work in their [electrical] closets...[and that he] did not recall if it called for [the closets] to be grounded by the drawings" (Reynolds Dep at 56,57). While Reynolds testified that the electrical work for the project was completed before the accident, he also testified that it was subject to inspection by the BEC at a later date. Specifically, he testified that the BEC, which "inspects electrical installations ...verifies that [Commercial] did [its] job" (*id* at 57). According to Reynolds BEC usually "performs the inspection after the job is complete and [Benchmark] gets a copy of the inspection, you know the pass...from the electrician", although he did not know if Benchmark ever received a report for the job at issue (*id* at 70-71).

Plaintiff moves for summary judgment as to liability on his Labor Law § 241(6) claim based on a violation of Industrial Code section 23-1.13(b)(4), which provides, in relevant part, that "[n]o employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may

contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means." Plaintiff argues that he is entitled to summary judgment based on evidence that "the circuit he was instructed to work on was not de-energized, nor grounded or guarded by effective insulation or other means and same was the proximate cause of plaintiff's accident and injuries" (Fox Affirmation, ¶ 6).

In support of his motion, plaintiff relies on, *inter alia*, his deposition testimony and that of Reynolds as well as his affidavit which he submitted with his prior motion for summary judgment. In his affidavit, plaintiff states that the accident occurred on the 48th floor when he was installing ground wiring in the east electrical closet. According to plaintiff, "the electrical work consisted, in part, of grounding high voltage transformers and disconnect switches in the electrical box in the east electrical closet which required pulling wires from the electrical closet panels to the disconnect switches and from the disconnect switches to the high voltage transformers." (Plaintiff's Aff, ¶ 5). Plaintiff states that at the time the work was being performed "[t]he electrical power to the electrical closet was not de-energized because, in order to shut off the power, the power would have to be shut for the floor, as

well as several other connecting floors. But, Apollo employees [were] working on 48th floor, so the power could not be cut off until after business owners and [Bonelli]... told me that the bosses at Commercial ... did not want to pay overtime so we had to work doing regular business hours with the power on while the electrical work was being done" (*id* ¶ 4). Plaintiff also states that the accident happened when he was "connecting ground wire in the east electric closet on the 48th floor to a lug switch. The ground wire slipped away from the lug and contacted with the electrical power from the energized electrical box causing a flash and an explosion" (id, ¶ 6).

Plaintiff also argues that the work performed was done in connection with the build-out of the 48th floor and involved the alteration of a building or structure within the definition of construction work, within the meaning of section 241(6), citing, inter alia, *Joblon v. Solow*, 91 NY2d 457 [1998]. Moreover, plaintiff asserts that defendants are subject to liability under the statute as an owner (SRC), an owner's agent (Solow), a lessee (Apollo) and a contractor (Benchmark).

Defendants oppose the motion and cross move to dismiss the complaint, including the Labor Law § 241(6) claim.[2] With respect

[2]As plaintiff does not provide arguments in opposition to that part of the motion seeking to dismiss the claims under Labor Law § 200 and for common law negligence that court will focus on defendants' arguments regarding the claim under section 241(6).

to the section 241(6) claim, defendants argue that plaintiff's work did not fall within the protections of this provision because his task was not part of the construction, demolition or excavation involved in the build-out, but, instead, involved "routine maintenance," which is not covered by the statute, particularly as the renovation work for the build-out was completed during the summer of 2011, or almost a year and a half before plaintiff's accident. In support of their position, defendants submit the affidavit of Roderick K. Johnson ("Johnson"), the Property Manager for the Building, who states that the work was substantially complete on June 17, 2011 and that "on July 16, 2011 (19th months before the accident) the 48th floor was ready for Apollo's occupancy" (Johnson aff, ¶ 9), and the affidavit of Fred Sacramone ("Sacramone"), the President of Benchmark, who states that "Benchmark fully and totally completed the subject work on August 11, 2011" (Sacramone aff, ¶ 4). Sacramone also states that Benchmark completed the final punchlist of items prior to August 11, 2011, and was paid in full for its work on July 7, 2011 (*id*).

Defendants further argue, based on statements in Johnson's affidavit, that SRC and Solow had no connection to the renovation work performed on the 48th floor or plaintiff's work on the accident date, and did not control, direct, or supervise the tenant alteration work or plaintiff's work on the accident date,

and did not provide any tools to any worker involved at the job site, including on the 48th floor. As for Benchmark, defendants argue that it had no involvement at the Building after the renovation work was completed on August 11, 2011, and that in its role as maintenance contractor Commercial was made aware of issues performed under its contract with Benchmark, but failed to inform Benchmark of these issues and corrected the violation without informing Benchmark. In support of its position, Benchmark relies on Sacramone's statement that "Benchmark did not have any involvement with, perform, oversee or have any notice of any construction operations or work of any kind pertaining to the leased space at any time after August 11, 2011, until it was served with the action" (*id* ¶ 5).

Defendants also argue that, at the very least, there are issues of fact as to whether section 23-1.13(b)(4) was violated and whether plaintiffs' injuries were proximately caused by the violation, including whether plaintiff was comparatively negligent in installing ground wire without de-energizing the panel he was working on, and in his failure to use protective equipment which Bonelli testified was available at the job site. Defendants also submit Bonelli's affidavit in which he states that "[t]he work could be done safely with proper safety precautions, even with the panel energized. One possible method to work safely with the live panel would have been to cover the

disconnect switch with a rubber mat" (Bonelli Aff, ¶ 10). Defendants further argue that factual issues exist as to whether the plaintiff's conduct in this regard was the sole proximate cause of his injuries.

In reply, plaintiff argues that the electrical grounding work at issue qualifies as "construction work" under the applicable regulations, *citing Snowden v. New York City Transit Auth*, 248 AD2d 235 (1st Dept 1998). Plaintiff also argues, based on Reynold's deposition testimony and the language of the subcontract between Commercial and Benchmark, that the work performed on the electrical closet was within the scope of the subcontract, since it was not complete until it was inspected by the BEC, and Benchmark was to receive an inspection report stating that the work had passed BEC's inspection.

In addition, plaintiff argues that there is no evidence that he was comparatively negligence or the sole proximate cause of his own injures, and contrary to Bonelli's unsupported statement that a rubber mat would have protected plaintiff, there is no evidence that the work on the energized panel could be performed safely even with the use of safety equipment. Moreover, plaintiff argues that defendants' argument that plaintiff was negligent performing his grounding work on a live system is without merit since defendants had the duty to protect plaintiff from the known risk of doing so.

Plaintiff also argues that defendants are responsible parties under Labor Law § 241(6), and such liability is vicarious and exists regardless of whether they had notice of the defective condition or exercised control over the worksite.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] .

Labor Law § 241(6)

Labor Law § 241 (6) 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:
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> * * *
>
> "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 the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work . . . shall comply therewith."

"Labor Law § 241 (6) imposes a nondelegable duty on owners, contractors, and their agents . . . . Pursuant to that duty, owners, contractors, and their agents must comply with those provisions of the Industrial Code that set forth specific requirements or standards" (*Torres v City of New York*, 127 AD3d 1163, 1166 [2d Dept 2015]). Liability under the statute may be imposed "'regardless of the absence of control, supervision or direction of the work' [citation omitted]" (*Morton v State of New York*, 15 NY3d 50, 54 [2010]). However, "[t]he owner or contractor may raise any valid defense to the imposition of vicarious liability under Labor Law § 241 (6), including contributory and comparative negligence" (*Catarino v State of New York*, 55 AD3d 467, 468 [1st Dept 2008]).

The threshold issue is whether the various defendants are subject to liability under the statute as owners, contractors or agents of owners or contractors. As for SRC, as the owner in fee of the property, it has a nondelegable duty under the statute. As such, SRC may be held vicariously liable under Labor Law § 241 (6) if a violation of the Industrial Code is found, even if it has no control over the work contracted for by its tenant (*see*

Crawford v Williams, 198 AD2d 48, 48-49 [1st Dept 1993], *lv denied* 83 NY2d 751 [1994][Labor Law § 241(6) imposes a nondelegable duty on out-of-possession owners]; *Wrighten v. ZHN Constr Corp*, 32 AD3d 1019 [2d Dept 2006] [liability under section 241 (6) is not dependent on an owner's capacity to prevent or cure dangerous condition)].

Moreover, "[t]he meaning of 'owners' under Labor Law ... § 241 (6) [and § 240(1)] has not been limited to titleholders but has 'been held to encompass a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit' [citations omitted]" (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 618 [2d Dept 2008]; *see also Kane v. Coundorous*, 293 AD2d 309, 311 [1st Dept 2002]["the term 'owners' within the meaning of § 241 of the Labor Law[] is not 'limited to the titleholder ... [it] encompass[es] a person who has an interest in the property and who fulfill[s] the role of owner by contracting to have work performed for his benefit'" quoting *Copertino v. Ward*, 100 AD2d 565 [2d Dept 1984]; *Addonisio v. City of New York*, 112 AD3d 554 [1st Dept 2013[Con Ed was not an owner for the purposes of Labor Law § 241(6) in the absence of evidence that it contracted to have the work performed or had authority to control the work at the site]).

Apollo, the lessee/tenant of the 48th floor, has an interest in the property and entered into a contract with Benchmark as the

general contractor/construction manager for the build-out of its leasehold, for its benefit. In addition, as indicated below, the work performed by plaintiff fell within the scope of the contract between Apollo and Benchmark. Thus, Apollo may be considered an "owner" with a nondelegable duty to provide a safe work place for the workers performing the build-out.

In contrast, although Solow was the net lessee of the Building, and thus had an interest in the property, and approved the construction plan for Apollo's renovation of the 48th floor, it did not contract to have work done for its benefit, nor is there any evidence that it had any authority to control over the build-out work, or plaintiff's work on the accident date.[3] Therefore, it cannot be deemed an "owner" under Labor Law § 241 (6). Likewise, Solow does not qualify as a statutory agent of an owner or contractor, since it lacked the authority to supervise and control plaintiff's work (*See Russin v. Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]; *Seferovic v Atlantic Real Estate Holdings, LLC*, 127 AD3d 1058, 1059 [2d Dept 2015]).

With respect to Benchmark, as the general contractor/construction manager, it qualifies as "a contractor" under Labor Law § 241 (6) and owes a nondelegable statutory duty

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[3]While there is testimony that to shut off the power Commercial would need to receive permission from representatives of the Building, there is no evidence that such permission was sought or that Solow was aware of the work performed by plaintiff at the time of the accident.

whether or not it had supervision or control over the injury producing work (*Rizzuto v. LA Wenger Contracting Co*, Inc, 91 NY2d 343, 348-349 [1998]). Thus, with the exception of Solow, defendants are potentially liable under Labor Law § 241(6).

The next issue is whether the work performed by plaintiff is "construction work" within the meaning of Labor Law § 241(6). The Industrial Code defines "construction work" as "[a]ll work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures, whether or not such work is performed in proximate relation to a specific building or other structure and includes, by way of illustration but not by way of limitation, the work of ... equipment installation and ...other building materials in any form or for any purpose." While the definition of construction includes "maintenance," to fall within 241(6) the work must be performed "in the context of construction, demolition or excavation work" (*Rajkumar v Budd Contr. Corp.*, 77 AD3d 595, 595 [1st Dept 2010] [plaintiff's Labor Law § 241 (6) claim dismissed where the work involved the manufacture and hanging of a 300-pound mirror in a hotel lobby]).

Here, contrary to defendants' position, the work performed by plaintiff in installing wires for various pieces of equipment in the electrical closet constitutes construction work covered by the statute, and does not constitute "routine maintenance" (*see eg*

Snowden, 248 AD2d at 235[finding that "[t]he negative equalization work that plaintiff was performing, under a contract that called for, *inter alia*, communications and signal work, wires and cable, copper bars, miscellaneous iron and steel, galvanizing, construction of a circuit breaker, is clearly the sort of hazardous construction work to which 12 NYCRR 23 § 1.3(b)(4) is meant to apply"]).

Furthermore, while the construction work to build-out the 48th floor was completed during the summer of 2011, the record shows that plaintiff's grounding of the wires in the electrical contract in order to pass BEC's inspection was in furtherance of such work (*see eg Hotaling v. Corning Inc*, 12 AD3d 1064 [4th Dept 2004][installation of audio visual equipment in recently constructed auditorium constituted "construction work" for the purposes of Labor Law § 241(6)]). Specifically, the Benchmark/Commercial subcontract states that Commercial's scope of work was "all Tel/Data/Security/Building Electric Closets work." In addition, under the subcontract, Commercial's obligation to properly complete the work continued after final payment. Specifically, paragraph B, of Article 7, entitled Inspection, provides that "[n]either acceptance of the Work, nor any payment (including final payment)...shall be construed as acceptance of defective material or workmanship, or shall be evidence of Subcontractor's satisfactory performance of the Work, and shall

not relieve [Commercial] of its obligations hereunder." Moreover, the unrefuted record shows that the inspection by BEC realted to the electrical component of the build-out, and that plaintiff was in process of remedying the violation found as a result of such inspection at the time of the accident. Accordingly, contrary to defendants' argument, the work plaintiff was performing at the time of the accident constitutes "construction work" under Labor Law § 241(6) which falls within the scope of the Benchmark/Commercial subcontract.

The remaining issue concerns whether plaintiff is entitled to summary judgment based on defendants' asserted violation of Industrial Code section 23-1.13 (b) (4). This section provides in relevant part:

> "(4) Protection of employees. No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means . . . ."

Section 23-1.13 (b) (4) is sufficiently specific to support a claim under Labor Law § 241 (6) (*see e.g. Hernandez v Ten Ten Co.*, 31 AD3d 333, 333-334 [1st Dept 2006]; *Rice v City of Cortland*, 262 AD2d 770, 773 [3d Dept 1999]; *Snowden*, 248 AD2d at 236). This provision requires that "before work is started, it is to be ascertained whether the work will bring a worker into contact with

an electric power circuit, and, if so, that the worker not be permitted to come into contact with the circuit without it being de-energized" (*DelRosario v United Nations Fed. Credit Union*, 104 AD3d 515, 516 [1st Dept 2013]).

In this case, plaintiff have made a prima facie showing of a violation of section 23-1.13 (b) (4) based on evidence that electrical power in the closet where plaintiff was working at the time of the accident was not de-energized, and that he was not provided with any effective means of guarding against injury from the energized switch, including effective insulation, and that such violation was a proximate cause of his injuries (*DelRosario*, 104 AD3d at 516).

Moreover, defendants have not controverted this showing as it is undisputed that the electrical closet where plaintiff was working was energized, and defendants point to no evidence that plaintiff was provided with effective insulation to protect him from the energized switch. In this connection, although Bonelli attests that plaintiff could have covered the disconnect switch with a rubber mat, there is no evidence that Bonelli made a rubber mat available to plaintiff. Nor is there any evidence that Bonelli instructed plaintiff to use the flash suit, or that plaintiff was aware that it was available or that it was stored on one of the three floors mentioned by Bonelli. Nor is there evidence that the flash suit or other equipment described by

Bonelli would have protected plaintiff from the explosion and fire. Thus, contrary to defendants' position, the circumstances here are not comparable to those in *Snowden,* which also involved a violation of section 23-1.13 (b) (4), but where the plaintiff was provided with mats and the court found issues of fact as whether the mats provided effective insulation and as to whether plaintiff negligently placed the mats.

Furthermore, while plaintiff knew the electrical closet was energized, his uncontroverted testimony was that his request to turn the power off was denied and that he had no ability to do so on his own. Next, it cannot be said the plaintiff was the sole proximate cause of his injuries. To defeat summary judgment on this ground, it must be established that plaintiff " 'had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured' " (Kosavick v Tishman Constr. Corp. of N.Y., 50 AD3d 287, 288 [1st Dept 2008], quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]; *see also Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *Ritzer v 6 E. 43rd St. Corp.*, 57 AD3d 412 [1st Dept 2008]). Mere "generic statements of the availability of safety devices" are insufficient (*Kosavick*, 50 AD3d at 289). Here, as indicated above, the record is devoid of evidence that plaintiff refused to use protective

gear or equipment, or that the failure to use such protective devices resulted in his injuries.

Under these circumstances, it cannot be said that his work on the live electrical switch was the sole proximate cause of his injuries, and to find otherwise would be to ignore the Labor Law is intended to "protect[ ] workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor... instead of on workers, who are scarcely in a position to protect themselves from [an] accident" (*Zimmer v. Chemung County Performing Arts, Inc.*, 65 NY2d 513, 520 [1985])

As for comparative negligence, the court likewise finds that the record does not raise an issue of fact in this regard, particularly as it is devoid of evidence that plaintiff's was provided with protective equipment and refused to use it, or that he had the authority to de-energize the switch before he performed the injury producing work (*see Valasquez v. 795 Columbus LLC,* 103 AD3d 541, 541-542 [1st Dept 2013][affirming grant of summary judgment on Labor Law § 241(6) claim where testimony established that defendant was vicariously liable for negligence of plaintiff's foreman in directing plaintiff to work on mud covered floor in violation of 12 NYCRR 23-1.7 (d)]; *Harris v Arnell Constr. Corp.* 47 AD3d 768, 768 [trial court properly granted summary judgment on worker's § 241(6) claim where record showed

that there was a violation of 12 NYCRR 23-1.13 (b)(3)and (b)(4) which proximately caused the worker's injuries and defendant failed to raise an issue of fact as to worker's comparative negligence); *Crespo v. HRH Constr. Corp*, 24 Misc3d 1246(A) [Sup Ct NY Co. 2009][summary judgment properly granted in favor of plaintiff on Labor Law § 241(6) claim based on violation of 12 NYCRR 23-1.13 (b)(4) where there was no evidence that the injury to plaintiff caused by was the result of his own negligence in failing to de-energize the electrical panel on which he was working];*compare Lorefice v. Reckson Operating Partnership, L.P.*, 269 AD2d 572 [2d Dept 2000][plaintiff's decision to work at a live electrical panel with full knowledge of the risk of electrical shock is relevant to issue of comparative negligence]).

As plaintiff has established as a matter of law that there was a violation of 23-1.13 (b)(4) which proximately caused his injuries, summary judgment is warranted as to liability on plaintiff's Labor Law § 241(6) claim (see *DelRosario v. United Nations Federal Circuit Credit Union*, 104 AD3d 515 (1st Dept 2013)[reversing trial court's denial of summary judgment on Labor Law § 241(6) claim predicted on violations of 12 NYCRR 23-1.13 (b)(3)and (b)(4) and granting summary judgment to plaintiff where record showed that live circuit in ceiling which hit plaintiff's face while he was working on a ladder was a proximate cause of his injuries]; *Harris v Arnell Constr. Corp*. 47 AD3d at 768; *Crespo v.*

HRH Constr. Corp, 24 Misc3d 1246(A)).

Accordingly, plaintiff is entitled to summary judgment on its Labor Law § 241(6) claim against defendants SRC, Benchmark and Apollo based on the violation of 12 NYCRR 23-1.13 (b)(4), and defendants' cross motion to dismiss this claim is granted only to the extent of dismissing the claim against Solow.

As plaintiff does not oppose that part of defendants' cross motion seeking to dismiss his common law negligence and Labor Law § 200 claims, and as there is no evidence that defendants exercised control over the means and methods of plaintiff's work, these claims are dismissed (*see Picchione v Sweet Constr. Corp.*, 60 AD3d 510, 513 [1st Dept 2009] [walking the site to monitor compliance with specifications is general supervision and does not establish liability under section 200 and common-law negligence]; *Mora v Sky Lift Distrib. Corp.*, 126 AD3d 593, 594 [1st Dept 2015] [no liability without "'the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition' (citation omitted)"]).

Finally, while defendants seek summary judgment dismissing the various cross claim asserted against them, they provide no basis for such dismissal, and thus this aspect of their cross motion must be denied.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff Michel Latuner's motion for summary judgment as to liability on his Labor Law § 241 (6) claim is granted against defendants Benchmark Builders, Inc., Apollo Global Management, LLC, Solow Building Company, II, L.L.C., Solovieff Realty Co., II, L.L.C. and Apollo Management Holdings, L.P. and is denied as to Solow Building Company, II, L.L.C.; and it is further

ORDERED that defendants cross motion for summary judgment is granted only to the extent of dismissing the Labor Law § 241(6) claim against Solow Building Company, II, L.L.C. and dismissing the common law negligence and Labor Law § 200 claims against all the defendants, and is otherwise denied.

Dated: October 14, 2016

HON. JOAN A. MADDEN
J.S.C.