Bonano v City of New York
2017 NY Slip Op 32274(U)
October 24, 2017
Supreme Court, New York County
Docket Number: 158140/2012
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29

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HENRY BONANO, Index No.: 158140/2012

Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION and WEST HARLEM GROUP ASSISTANCE, INC.,

Defendants.

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Kalish, J.:

This is an action to recover damages for personal injuries allegedly sustained by a porter on July 9, 2012, when, while working at the Oberia D. Dempsey Multi-Service Center, located at 127 West 127th Street, New York, New York (the Premises), he fell from a scaffold while preparing a wall for painting.

Defendants the City of New York, the New York City Human Resources Administration (together, the City) and West Harlem Group Assistance, Inc. (West Harlem) (collectively, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint against them in its entirety.

Plaintiff Henry Bonano cross-moves, pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law §§ 240 (1) and 241 (6) claims against defendants.

BACKGROUND

Plaintiff's Deposition Testimony

Plaintiff testified that he was working at the Premises as a "porter/maintenance [man]" on

the day of the accident. Dorisabel Cruz and Eddy Bardowell, both employees of West Harlem, interviewed and hired him for the job (plaintiff's tr at 33). Plaintiff described the Premises as "a repurposed school," which housed "different agencies that utilized the building" (*id.* at 15). As part of the porter/maintenance staff at the Premises, plaintiff cleaned, swept, stripped floors and did some light painting.

Plaintiff testified that, on July 8, 2012, the day before the accident, he injured his lower back while lifting a cabinet. When he arrived at the Premises the next day, he told Cruz that, nevertheless, he was feeling well enough to work, and that he would be using his mother's back brace. Later that day, Bardowell directed plaintiff to go to Room 308 of the Premises "to scrape plaster, any holes, remove any pictures that were on the wall, prepare the walls for painting, and then paint the walls" (*id.* at 32-33).

In order to perform the subject work, plaintiff and his supervisor, Jose Gallardo, brought an unassembled scaffold up from another floor and set it up. Plaintiff testified that he had never set up a scaffold before, nor had he ever used one. Plaintiff described the scaffold as standing approximately eight to nine feet high and having four wheels. The scaffold only took a few minutes to set up. While the scaffold was structurally sound, it lacked guards and/or railings around the top of it.

Plaintiff explained that, at the time of the accident, he was using the scaffold while preparing the wall for painting, and that he could not recall whether he locked the scaffold's wheels before climbing onto it. He also noted that he was never told "to look at the wheels [to see if they were locked]" (*id.* at 53). Just prior to the accident, the scaffold was situated approximately 18 inches from the wall, and plaintiff was kneeling on its platform and facing the

wall.

Plaintiff testified that, as he began applying plaster to the wall, "the pressure of applying the plaster, smoothing it out . . . [caused the scaffold to] roll[] out from underneath [him], away from the wall . . . [and he] didn't have anything to hold on to; [he] just fell straight down" (*id.* at 55). Plaintiff noted that the scaffold remained upright and did not collapse.

Right after the accident, plaintiff told Cruz that he thought his shoulder was dislocated, as a result of the accident. In addition, plaintiff told various medical personnel and firemen that he "had hurt [his] shoulder, [his] neck, that [he] had [fallen] from a scaffold" (*id.* at 64). He also advised them that he had also hurt his back the day before. Once at the hospital, plaintiff complained of pain in his legs, middle and lower back, wrist, shoulder and neck.

Deposition Testimony of Dorisabel Cruz (West Harlem's Director for the Premises)

Cruz testified that she was employed by West Harlem as the director of the Oberia D. Dempsey Multi-Service Center, located at the Premises, on the day of the accident. Cruz managed the day-to-day operations of the Premises and had hired plaintiff to work as a porter. She explained, in pertinent part, that:

> "The City of New York owns the [Premises]. Oberia D. Dempsey Multi-Service Center is the name of the actual building, and West Harlem Group Assistance is the sponsor. [West Harlem] manage[s] the [Premises] . . . on behalf of the City of New York"

(Cruz tr at 8). Cruz testified that plaintiff's work was supervised by Bardowell, and that Bardowell was "the only supervisor" at the Premises (Cruz tr at 17).

Deposition Testimony of Eddy Bardowell (West Harlem's Director of Building Services)

Bardowell testified that he was employed by West Harlem as the director of building

services on the day of the accident. Bardowell's duties included overseeing the maintenance functions at the Premises, including "[p]ainting, repairs, [and] general cleaning of the building" (Bardowell tr at 8). He explained that, at the time of the accident, plaintiff, who was also an employee of West Harlem, was performing painting work on "a wall that was defective" (*id* at 13). Said work required plaintiff to "[s]crape the wall and put plaster over it, prime it and paint it" (*id.*).

Bardowell also testified that, shortly after the accident, when he asked plaintiff how the accident occurred, plaintiff told him that "he unlocked the wheels [of the scaffold] and he forgot to lock them and he fell back off the scaffold" (*id.* at 12). When Bardowell went to Room 308 to investigate what had happened, he observed the scaffold standing upright, with its wheels unlocked. Thereafter, Bardowell climbed onto the scaffold and completed the tasks that had been previously assigned to plaintiff. Bardowell made sure to lock the scaffold's wheels before beginning this work. When asked if he had any concerns regarding the safety of the scaffold, Bardowell replied, "No. I didn't see no problem" (*id.* at 27).

The Bill of Particulars

In the bill of particulars, plaintiff alleges that, as a result of the subject accident, he suffered the following injuries, in pertinent part:

> "* Comminuted Undisplaced Fracture of the Lateral Aspect of the Left Humerus of Greater Tuberosity and the Lesser Tuberosity;
>
> * Tear of the Left Anteroinferior Labrum;
>
> * * *
>
> * Disc Bulge with Indentation and Narrowing of the Neural Foramina at C4-5"

(defendants' notice of motion, exhibit D, the bill of particulars).

The Workers' Compensation Board's Documents

The Workers' Compensation Board issued a decision in regard to the back injury that plaintiff sustained on July, 8, 2012, the day before the subject accident. In that decision, plaintiff's employer is listed as "Oberia D Demsey MSC" (defendants' notice of motion, exhibit I). The Workers' Compensation Board also generated various other reports and notices in regard to both plaintiff's July 8, 2012 back injury and the accident at issue in this case. These reports and notices indicate that plaintiff was employed by "West Harlem Group Assistance Inc." (*id.*).

Affidavit of John G. O'Connor, P.E. (Defendants' Expert Engineer)

In his affidavit, John G. O'Connor, P.E. stated that he "conducted a structural inspection of the scaffold system to have been used by plaintiff" (defendants' notice of motion, exhibit M, O'Connor aff). During his inspection, he observed that each of the scaffold's wheels locked individually, and that the scaffold contained labels warning users to lock the wheels. O'Connor also described the scaffold as being "in sound condition, with no visible signs of overstress, damage, cracking or defects" (*id.*). Further,"[t]he scaffold was the appropriate device for the maintenance task that [plaintiff] was performing" (*id.*).

Plaintiff's Letter of Appointment

In plaintiff's May 7, 2012 letter of appointment from Donald C. Notice, West Harlem's executive director (the Letter of Appointment), Notice stated, in pertinent part, as follows:

> "On behalf of the Board of Directors of [West Harlem], I am pleased to offer you a full-time position of Night Porter at WHGA/Oberia Dempsey Multi-Service Center beginning Monday, May 7, 2012.
>
> * * *
>
> This letter and your job description forms the basis of an agreement under which you are accepting employment with [West Harlem]"

(defendants' notice of motion, exhibit N, the Letter of Appointment). Plaintiff's signature appears at the bottom of the Letter of Appointment.

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]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Whether Plaintiff's Cross Motion Is Timely

Defendants assert that plaintiff is not entitled to summary judgment in his favor on the Labor Law §§ 240 (1) and 241 (6) claims, because his cross motion is untimely. Initially, plaintiff concedes that his cross motion was filed outside of the 60-day post-note-of-issue deadline set by the court. To that effect, the note of issue in this case was filed on January 16, 2017, and plaintiff did not file his cross motion for summary judgment until April 20, 2017.

However, as plaintiff notes,

> "[a] cross motion for summary judgment made after the expiration

> of the [60-day] period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion. An otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion (CPLR 3212 [b]). The court's search of the record, however, is limited to those causes of action or issues that are the subject of the timely motion"

(*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006] [internal citations omitted]; *see also Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 419-420 [1st Dept 2014], citing *Filannino*).

Here, plaintiff's cross motion seeks relief on causes of action which are "nearly identical" to those raised by defendants in their timely motion, i.e., the Labor Law §§ 240 (1) and 241 (6) claims. In their motion, defendants specifically request that the court dismiss the complaint against them in its entirety. A review of the complaint reveals that plaintiff asserted, among other things, Labor Law §§ 240 (1) and 241 (1) claims against defendants. In addition, in their motion papers, defendants argued that "[t]he evidence establishes that [plaintiff's] failure to lock the scaffold wheels was the sole proximate cause of the accident and, therefore, *all* Labor Law causes of action, including the § 240 (1) claim, should be dismissed in favor of all defendants" (defendants' notice of motion, ¶ 55 [emphasis added]). Accordingly, it is evident that defendants moved to dismiss the Labor Law §§ 240 (1) and 241 (6) claims against them.

Thus, based upon the foregoing, the court will consider plaintiff's cross motion for summary judgment in his favor as to liability on the Labor Law §§ 240 (1) and 241 (6) claims against defendants.

The Labor Law § 240 Claim Against Defendants

Defendants move for dismissal of the Labor Law § 240 (1) claim against them. Plaintiff cross-moves for summary judgment in his favor as to liability on said claim against defendants.

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), 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."

"'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 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

> "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein"

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v*

Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Initially, contrary to plaintiff's contention, no question of fact exists as to the identity of his employer. To that effect, the testimonial and documentary evidence in this case clearly establish that plaintiff was an employee of West Harlem on the day of the accident.

As plaintiff was an employee of West Harlem, relevant to this issue is Workers' Compensation Law § 11, which prescribes, in pertinent part, as follows:

> "An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot . . . or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Therefore, "[a]n employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]). That said, "[e]ven in the absence of grave injury, an employer may be subject to an indemnification claim based upon a provision in a written contract" (*Mentesana v Bernard Janowitz Constr. Corp.*, 36 AD3d 769, 771 [2d Dept 2007]; *see also Echevarria v 158th St. Riverside Dr. Hous. Co., Inc.*, 113 AD3d 500, 502 [1st Dept 2014]).

Plaintiff's injuries, as alleged in the bill of particulars, do not rise to the level of "grave" as defined by New York Workers' Compensation Law § 11. In addition, there are no contracts between the parties evincing an intent for West Harlem to indemnify any party for plaintiff's

injuries. Thus, pursuant to Workers' Compensation Law § 11, West Harlem may not be held liable for plaintiff's injuries. Therefore, in the remainder of this decision, the Labor Law claims will be addressed in regard to the City only.

Here, plaintiff's "unrebutted contention" is that he was injured when, while preparing the wall for painting, the scaffold slid and/or rolled away from the wall, causing him to fall off the scaffold and become injured. Notably, in opposition, defendants have "not offer[ed] any evidence, other than mere speculation, to refute . . . plaintiff['s] showing or to raise a bona fide issue as to how the accident occurred" (*Pineda v Kechek Realty Corp.*, 285 AD2d 496, 497 [2d Dept 2001]; *Desouter v HRH Constr. Corp.*, 216 AD2d 249, 250 [1st Dept 1995]).

As such, the facts of this case fall squarely within the protections of Labor Law § 240 (1) (*see Celaj v Cornell*, 144 AD3d 590 [1st Dept 2016] [affirming summary judgment in favor of plaintiff on Labor Law § 240 (1) claims where plaintiff's undisputed evidence that he "fell off a scaffold without guardrails that would have prevented his fall" and plaintiff's "'failure to use the locking wheel devices and his movement of the scaffold while standing on it' were at most comparative negligence, which is not a defense to a Labor Law § 240 (1) claim"]; *Crespo v Triad, Inc.*, 294 AD2d 145, 146, 742 N.Y.S.2d 25 [1st Dept 2002] [same]).

"[A] presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions 'for no apparent reason'" (*Quattrocchi v F.J. Sciame Constr. Corp.*, 44 AD3d 377, 381 [1st Dept 2007] [citation omitted], *affd* 11 NY3d 757 [2008]). "Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials" (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]; *Cuentas v Sephora USA, Inc.*, 102 AD3d 504, 504 [1st Dept 2013]).

In support of its motion, and in opposition to plaintiff's cross motion, the City argues that Labor Law § 240 (1) does not apply to the facts of this case, because plaintiff was only performing routine touch-up work at the time of the accident, which was not intended to be covered by the statute. However, this argument fails, as "plaintiff was engaged in the painting of a building when injured, and . . . is therefore protected by Labor Law § 240 (1)" (*Gonzalez v 310 W. 38th, L.L.C.*, 14 AD3d 464, 464 [1st Dept 2005]; *see also Aarons v 401 Hotel, L.P.*, 12 AD3d 293, 294 [1st Dept 2004] ["The work plaintiff was performing, i.e., light scraping, plastering, skim coating and painting, did not constitute 'routine maintenance' excluded from the ambit of sections 240 (1) and 241 (6) of the Labor Law"]). Indeed, in the instant case plaintiff was required to use a scaffold that was stored away that needed to be assembled, and plaintiff was further required to complete a preliminary plastering of the room before he could paint the room. The level of preparation and the equipment required in the instant case indicates that plaintiff was not engaged in routine maintenance–as defendants contend–but that Plaintiff was engaged in the type of work intended to be covered by the broad mandate of Labor Law § 240 (1)–which is intended to "to protect workers by placing the 'ultimate responsibility' for worksite safety on the owner" (*Gordon v E. Ry. Supply, Inc.*, 82 NY2d 555, 559 [1993]).

In addition, contrary to the City's contention, it is not necessary for plaintiff to show that the scaffold was defective in order to recover under Labor Law § 240 (1), as "[i]t is sufficient for purposes of liability under section 240 (1) that adequate safety devices to . . . protect plaintiff from falling were absent" (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]; *Serra v Goldman Sachs Group, Inc.*, 116 AD3d 639, 640 [1st Dept 2014] [Court properly granted partial summary judgment as to liability on the plaintiff's Labor Law § 240 (1) claim

"since plaintiffs submitted uncontradicted deposition testimony that the unsecured extended ladder upon which plaintiff was working slipped and fell out from underneath him"]; *McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 333-334 [1st Dept 2008] [where plaintiff sustained injuries "when the unsecured ladder he was standing on to drill holes in a ceiling tipped over," the plaintiff was not required to demonstrate, as part of his prima facie showing, that the ladder he was working on at the time of the accident was defective]). Here, there is no dispute that the approximately eight-to-nine foot high, manually propelled scaffold–which plaintiff was directed to utilize in plastering and painting the walls–had no guard rails around the perimeter and that no other safety device was provided to plaintiff that would have protected him from falling off the sides (*see Vanriel v A. Weissman Real Estate*, 262 AD2d 56 [1st Dept 1999] [modifying order on appeal to grant plaintiff summary judgment on Labor Law § 240 (1) claim where there was "no dispute that the scaffold on which he was working did not prevent him from falling"]).

It is also insufficient to deny plaintiff summary judgment merely because no other witnesses observed the accident (*Orellano,* 292 AD2d at 290 [where plaintiff fell from an A-frame ladder that had no protective devices, the Court granted plaintiff, who was alone at the time of the accident, summary judgment on his section 240 (1) claim "[r]egardless of the precise reason for his fall"]; *Campbell v 111 Chelsea Commerce, L.P.*, 80 AD3d 721, 722 [2d Dept 2011] ["The fact that the plaintiff may have been the sole witness to the accident does not preclude the award of summary judgment in her favor"]).

The City also argues that it is entitled to dismissal of the Labor Law § 240 (1) claim against it, because plaintiff's admitted failure to properly lock the scaffold's wheels makes him the sole proximate cause of the accident. Where a plaintiff's own actions are the sole proximate

cause of the accident, there can be no liability under Labor Law § 240 (1) (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]). "[T]he duty to see that safety devices are furnished and employed rests on the employer in the first instance" (*Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1st Dept 1994]). "When the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]).

However,"[t]o the extent that plaintiff may have failed to lock the wheels of the scaffold, it cannot be said that this was the sole proximate cause of his accident," as the scaffold's lack of guardrails also contributed to the scaffold's failure to keep plaintiff from falling (*Lawrence v Forest City Ratner Cos.*, 268 AD2d 380, 380-381 [1st Dept 2000] [although he failed to lock the wheels of his scaffold, the plaintiff was not the sole proximate cause of his accident where "the scaffold upon which he was working . . . broke in two and he was thrown against a wall"]; *see also Celaj v Cornell*, 144 AD3d 590 [1st Dept 2016]; *Crespo v Triad, Inc.*, 294 AD2d 145, 146, 742 N.Y.S.2d 25 [1st Dept 2002]; *Vanriel v Weissman Real Estate*, 262 AD2d 56, 56 [1st Dept 1999]).

In any event, any alleged negligence on plaintiff's part in not properly locking the scaffold's wheels goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Vail v 1333 Broadway Assoc., L.L.C.*, 105 AD3d 636, 637 [1st Dept 2013] ["Given that the scaffold was inadequate in

the first instance, any failure by plaintiff to hydrate himself could not be the sole proximate cause of his injuries"]; *Berrios v 735 Ave. of the Ams., LLC*, 82 AD3d 552, 553 [1st Dept 2011] [Court held that "even if plaintiff could be found recalcitrant for failing to use a harness, defendants' 'failure to provide proper safety [equipment] was a more proximate cause of the accident'"]; *Milewski v Caiola*, 236 AD2d 320, 320 [1st Dept 1997] [Court held that "even if plaintiff could be deemed recalcitrant for not having used the harness, no issue exists that the failure to provide proper safety planking was a more proximate cause of the accident"]).

"[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake*, 1 NY3d at 290). Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002] [internal quotation marks and citations omitted]).

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Thus, plaintiff is entitled to partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against the City, and the City is not entitled to summary judgment dismissing the same.

The court has considered the parties' remaining arguments on this issue and finds them to be unavailing.

The Labor Law § 241 (6) Claims Against the City

The City moves for dismissal of the Labor Law § 241 (6) claim against it. Plaintiff cross-moves for summary judgment in his favor as to said claim against the City.

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "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, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers" (*Ross,* 81 NY2d at 501). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.* at 503-505).

Although plaintiff alleges multiple violations of the Industrial Code in the bill of particulars, with the exception of Industrial Code section 23-5.18 (b), plaintiff does not oppose dismissal of these sections, nor does he move for summary judgment in his favor on the same, and thus, they are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept

2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]).[1] Thus, the City is entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on those abandoned provisions.

Industrial Code 12 NYCRR 23-5.18 (b)

Initially, section 23-5.18 (b) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Ritzer v 6 E. 43rd St. Corp.*, 57 AD3d 412, 412-413 [1st Dept 2008]; *Vergara v SS 133 W. 21, LLC*, 21 AD3d 279, 281 [1st Dept 2005]).

Section 23-5.18 (b), which applies to "[m]anually-propelled mobile scaffolds," requires that "[t]he platform of every manually-propelled mobile scaffold . . . shall be provided with a safety railing constructed and installed in compliance with this Part (rule)."

Here, a review of plaintiff's testimony, as well as various photographs of the scaffold contained in the record, establish that the scaffold, which was manually propelled, did not possess railings, as required by section 23-5.18 (b). In addition, defendants have not put forth any evidence refuting plaintiff's assertion that the scaffold lacked proper railings, and that this was a proximate cause of the accident.

Thus, plaintiff is entitled to summary judgment in his favor as to that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-5.18 (b). Accordingly,

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[1] It should be noted that, although plaintiff also moves for summary judgment in his favor on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code 12 NYCRR 23-1.16 (b), which deals with safety belts, harnesses and tail lines, plaintiff did not assert said alleged violation in his complaint or bill of particulars. Therefore, plaintiff is not entitled to summary judgment in his favor as to that part of the Labor Law § 241 (6) claim predicated on the alleged violation of said provision.

defendants are not entitled to dismissal of the same.

Further, it should be noted that, although plaintiff argues that defendants violated various OSHA violations, an OSHA regulation does not impose a non-delegable duty on an owner, and therefore, it may not be used as a predicate for a Labor Law § 241 (6) claim (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]).

The Common-Law Negligence and Labor Law § 200 Claims Against Defendants

Defendants move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them. 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" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000] [internal quotation marks and citation omitted]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]).

Labor Law § 200 (1) states, in pertinent part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work, "because the injury arose from the condition of the work place created by or known to the contractor, rather than the method of [the] work"]).

It is well settled that, in order to find an owner or its agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff's injury was caused by lifting a beam, and there was no evidence that the defendant exercised supervisory control or had any input into how the beam was to be moved]).

Initially, plaintiff has not opposed that part of the City's motion which seeks dismissal of the common-law negligence and Labor Law § 200 claims against it. That said, with the exception of asserting that they are entitled to dismissal of all of the Labor Law claims asserted against them, on the ground that plaintiff was the sole proximate cause of the accident, which argument has already been rejected by the court, the City has offered no specific arguments or evidence, whatsoever, in support of dismissal of these claims as against it.

Thus, the City is not entitled to dismissal of the common-law negligence and Labor Law § 200 claims against it.

Whether the City is Entitled to Dismissal of Plaintiff's Back Injury Claims

Finally, the City asks this court to dismiss plaintiff's back injury claims, because he admitted that he injured his back moving a cabinet the day before the accident. However, there is ample testimonial and documentary evidence in the record to create at least a question of fact as to whether plaintiff sustained additional injuries to his back, as a result of his fall from the scaffold, or, at the very least, exacerbated his previous back injury.

Thus, the City is not entitled to dismissal of plaintiff's claim for back injuries.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the part of defendants the City of New York, the New York City Human Resources Administration (together, the City) and West Harlem Group Assistance, Inc.'s (West Harlem) (collectively, defendants) motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against West Harlem is granted, and the complaint is dismissed as against West Harlem, with costs and disbursements to West Harlem as taxed by the Clerk of Court, and the Clerk is directed to enter judgment accordingly in favor of West Harlem; and it is further

ORDERED that the part of defendants' motion, pursuant to CPLR 3212, for summary judgment dismissing those parts of the Labor Law § 241 (6) claim against the City, which were abandoned, is granted, and these abandoned claims are dismissed as against the City, and the motion is otherwise denied; and it is further

ORDERED that the parts of plaintiff Henry Bonano's cross motion, pursuant to CPLR

3212, for summary judgment in his favor as to liability on the Labor Law §240 (1) claim, as well as that part of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code 12 NYCRR 23-5.18 (b), is granted as against the City only, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that counsel are to proceed to an Early Settlement Conference at 60 Centre Street, Room 422, on November 2, 2017, at 10:00 AM.

Dated: October 24, 2017

ENTER:

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