Sang Chul Kim v E. 7th ISS LLC
2017 NY Slip Op 32378(U)
October 30, 2017
Supreme Court, New York County
Docket Number: 155476/2014
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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SANG CHUL KIM,

Index No.: 155476/2014

Plaintiff,

-against-

E. 7TH ISS LLC and GOLDEN FOOD MARKET, INC.,

Defendants.

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Cohen, J.:

This is an action to recover damages for personal injuries allegedly sustained by a sign installer on March 31, 2014, when he fell from a ladder while replacing an awning at a grocery store located at 118 First Avenue a/k/a 91 East 7th Street, New York, New York (the Premises).

Plaintiff Sang Chul Kim moves, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants E. 7th ISS LLC (ISS) and Golden Food Market, Inc. (Golden) (together, defendants).

Defendants cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint against them.

BACKGROUND

On the day of the accident, ISS was the owner of the Premises where the accident occurred. Golden, a tenant at the Premises, entered into a contract with nonparty ABC & P Sign, LLP (ABC), whereby ABC would remove the old awnings and install new awnings on two sides of the storefront. In addition, the work required ABC to remove an old sign, which was located underneath one of the old awnings. Plaintiff, who was employed as the president of ABC, was

injured when, while removing the old sign, it fell and struck the ladder that he was working on, causing the ladder to shift and plaintiff to fall to the ground.

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was employed as the president of ABC. On that day, pursuant to a contract with Golden, he and a few of his workers were removing two awnings at the Premises and installing new ones in their place (the Project). One of the awnings was located on the 7th Street side of the Premises, and the other was located on the First Avenue side of the Premises. Plaintiff testified that, at a meeting that he held with his workers, he used diagrams of the awnings to explain to them how to perform the installation work. Plaintiff also supervised site safety for the Project. Plaintiff asserted that ISS and Golden had no role in instructing the workers as to how they were to remove and install the subject awnings.

Plaintiff also testified that, in order to perform the work, ABC supplied four ladders, two of which were 10-foot long aluminum extension ladders, which could extend up to 20 feet. Plaintiff maintained that the ladders were in good condition. ABC also brought ropes and extension ladder brackets to the Premises. Plaintiff asserted that ABC never used scaffolds for the type of work that ABC was performing at the Premises on the day of the accident. He also explained that ABC only used boom trucks for "second floor or for heavy stuff" (plaintiff's tr at 35).

Plaintiff testified that, as the awnings were "rather big, large," it was necessary for two men to work on the right side of the awning, and for two men to work on the left side of the awning (*id.* at 46). In addition, the awning installation work required the use of a drill to "put the

anchors in that you put the awning on" (*id.* at 37). In addition, the men had "to make a hole on the wall and then put the anchor in it and then put the bracket and then using [a] screw . . . install [the] sign, using many brackets" (*id.* at 37-38). Plaintiff noted that, although electrical connections were made in conjunction with the Project, ABC's work "[had] nothing to do with electricity" (*id.* at 53).

Plaintiff explained that he and his workers began the job by removing the old awning from the 7th Street side of the storefront. After this was completed, they turned to removing and installing the awning on the First Avenue side of the storefront. However, after removing the old awning on the First Avenue side, it was revealed that a 20- to 30- year old sign, which measured approximately two feet wide and 20 feet in length, was affixed to the building's wall. As it was ABC's responsibility to remove the old sign, plaintiff climbed up on a ladder to inspect it. Plaintiff's inspection revealed that, due to the sign's old age and condition, removing it would be very difficult and dangerous. Although plaintiff advised Ali Fardos, Golden's owner, that it would be unwise to attempt to remove the old sign, Fardos insisted that the old sign be removed.

After retrieving a wrench, plaintiff climbed back up on the ladder to release the bolt that held the old sign in place. As he was ascending the ladder, he observed that the ladder was not "shaking" or "unstable" (*id.* at 101). Plaintiff climbed seven to eight rungs up the ladder, to a point where he was standing approximately eight to 10 feet above the ground. As he was releasing the bolt that held up the old sign, "the sign collapsed in front of [him] and then [the sign] hit the ladder" (*id.* at 112). This caused the ladder to shake and plaintiff to "[fall] together with the ladder" to the ground (*id.* at 113).

Plaintiff maintained that the ladder that he was working on at the time of the accident was

not tied off to anything. At his deposition, when he was asked why the ladder was not tied off, plaintiff explained that there was "no place to tie" it off to (*id.* at 86). When asked if anyone was holding the ladder for him at the time of the accident, plaintiff responded, "I don't recall that" (*id.* at 117).

Deposition Testimony of Ali Fardos

Fardos testified that he was the owner of Golden, a grocery store, on the day of the accident. Golden hired ABC to remove the old awnings and install the new awnings at the Premises. At his deposition, when he was asked why it was necessary to have the awnings replaced, he explained that, about a week prior to the accident, someone had climbed up on one of the awnings to spray graffiti. As he was afraid that "someone might climb up again and fall through [the deteriorated awning] . . . [he] wanted to change the whole frame so no one would be able to climb up again on it and do the same thing over again and falling and then suing [him]" (Fardos tr at 13).

Fardos further testified that, just prior to the accident, he watched ABC workers remove the old sign by "cutting it with grinders" (*id.* at 66-67). Specifically, the workers were "cutting the anchors . . . that [held] the sign . . . to get it loose to get it down" (*id.* at 69). Fardos did not offer any instruction to the workers regarding how to remove the sign. Fardos testified that, when plaintiff pulled on the sign, "the sign shifted" (*id.* at 75). At this point, plaintiff "thought that the sign was going to give and cut his legs off," so "[h]e panicked and he jumped" (*id.*). Fardos did not see whether or not any portion of the sign made contact with the ladder. He also testified that the ladder was not tied off, and that no one was holding the bottom of the ladder while the men performed the subject work.

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]).

The Labor Law § 240 (1) Claim

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

Plaintiff maintains that he is entitled to summary judgment in his favor as to liability on the Labor Law § 240 (1) claim, because defendants failed to provide him with sufficient safety devices to keep him safe while working at an elevation. In support of his argument, plaintiff asserts that, while working at an elevation, he was caused to fall and become injured, because defendants failed to provide proper and/or adequate safety devices to secure the sign during its removal, so as to prevent it from falling and striking the ladder. In addition, defendants failed to provide proper safety devices, such as a tie off point, to secure the ladder, so as to prevent it from shifting when the sign struck it.

Initially, plaintiff may recover damages for a violation of Labor Law § 240 (1) under a

falling objects theory, because the object that fell on the ladder, i.e. the old sign that he was removing at the time of the accident, "was 'a load that required securing for the purposes of the undertaking at the time it fell'" (*Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005] [citation omitted]; *Gabrus v New York City Hous. Auth.*, 105 AD3d 699, 699 [2d Dept 2013] [the plaintiff was entitled to summary judgment in his favor on his Labor Law § 240 (1) claim where he demonstrated that the load of material that fell on him, while being hoisted to the top of the building, was inadequately secured]; *Dedndreaj v ABC Carpet & Home*, 93 AD3d 487, 488 [1st Dept 2012] ["[p]laintiff established his prima facie entitlement to summary judgment by showing that defendants' failure to provide an adequate safety device proximately caused a pipe that was in the process of being hoisted to fall and strike him"]).

In addition, "'[w]here a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection'" (*Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004], quoting *Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152, 153 [1st Dept 1998]; *Hart v Turner Constr. Co.*, 30 AD3d 213, 214 [1st Dept 2006] [the plaintiff "met his prima facie burden through testimony that while he performed his assigned work, the eight-foot ladder on which he was standing shifted, causing him to fall to the ground"]). "Whether the [ladder] provided proper protection is a question of fact, except when the [ladder] collapses, moves, falls, or otherwise fails to support the plaintiff and his materials" (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]; *DelRosario v United Nations Fed. Credit Union*, 104 AD3d 515, 515 [1st Dept 2013] [the plaintiff was entitled to partial summary judgment on the Labor Law § 240 (1) claim, where "[t]he record establishe[d] that the ladder provided to [the] plaintiff was inadequate to the task of preventing his fall when he came into contact with the exposed wire and was a proximate cause of

his injury"]).

Here, as it was foreseeable that, while removing the old sign, the sign might collapse and fall onto the ladder, a ladder, alone, was not sufficient to keep plaintiff safe from falling. As such, additional safety devices were necessary to prevent plaintiff from falling. "'[T]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures'" (*Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006], quoting *Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]; *see also Hoffman v SJP TS, LLC*, 111 AD3d 467, 467 [1st Dept 2013] [the plaintiff was not at fault for not tying off his safety harness, where "there was no appropriate anchorage point to which the lanyard could have been tied-off"]).

In sum, a tie off point for the ladder; other means of vertical elevation, like a device with rails, such as a Baker scaffold; and/or other fall protection, such as a harness and horizontal safety line, would have been more suitable for the job in order to prevent plaintiff from falling (*see Vukovich v 1345 Fee, LLC*, 61 AD3d 533, 534 [1st Dept 2009] [Labor Law§ 240 (1) liability found where "[t]he ladder provided to plaintiff was inadequate to prevent him from falling . . . to the floor after being shocked, and was a proximate cause of his injuries"]; *Nimirovski*, 29 AD3d at 762-763 [as it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake, additional safety devices were required to satisfy Labor Law § 240 (1)]).

Defendants argue that plaintiff is not entitled to summary judgment in his favor, and that they are entitled to dismissal of the Labor Law § 240 (1) claim against them, because the tasks

that plaintiff was retained to perform, i.e., the removal of the old awnings and the installation of the new awnings, are not among the enumerated tasks intended to be covered under Labor Law § 240 (1). Specifically, defendants argue that, as these tasks merely involved a cosmetic change to the appearance of the Premises, rather than a "significant physical change" to the structure of the building, they do not constitute "altering," for the purposes of the statute (*Joblon v Solow*, 91 NY2d 457, 465 [1998]).

It should be noted that, "[i]n determining whether a project falls within the definition of 'altering,' the court 'must examine the totality of the work done on the project to determine whether it resulted in a significant physical change' to the building or structure" (*Maes v 408 W. 39 LLC*, 24 AD3d 298, 300 [1st Dept 2005], quoting *Aguilar v Henry Mar. Serv., Inc.*, 12 AD3d 542, 543 [2d Dept 2004]). As is clear, the facts of this case differ from those prior cases, wherein the Court found that the plaintiff's activity constituted only a mere change to the outward appearance of a billboard advertisement or building (*compare Adika v Beth Gavriel Bukharian Congregation*, 119 AD3d 827, 827-828 [2d Dept 2014] [no Labor Law § 240 (1) liability where plaintiff was painting decorative images on large wooden panels to be installed on the walls of a temple]; *Bodtman v Living Manor Love, Inc.*, 105 AD3d 434, 434 [1st Dept 2013] [plaintiff's task of attaching a temporary sign to the roof of a building, which required the drilling of holes, was only a slight change to the building, and did not constitute altering]).

Here, the Project involved the total removal and then the installation of new awnings, which included electrical work, changing out the awnings' underlying frames and reattaching new covers, a process requiring drilling for anchors, as well as multiple screws and brackets. Therefore, as the Project involved a significant change to the Premises, the work that plaintiff was

performing at the time of the accident falls within the purview of Labor Law § 240 (1) (*see Joblon*, 91 NY2d at 465 [the plaintiff's work in hanging a clock on the wall was deemed a significant changed to the building, because it also involved "[b]ringing an electrical power supply" to the clock]; *Saint v Syracuse Supply Co.*, 25 NY3d 117, 126 [2015] [citation omitted] [Labor Law § 240 (1) liability where the installation of a new billboard advertisement involved "a change to the billboard's size and adjustment of the frame to accommodate the unique shape of the advertisement]).

Further, the new awnings can be considered structures for the purposes of the statute, and, thus, within its purview. Case law has defined a structure as "'any production or piece of work artificially built up or composed of parts joined together in some definite manner'" (*Joblon*, 91 NY2d at 464, quoting *Lewis-Moors v Contel of N.Y.*, 78 NY2d 942, 943 [1991]; *see McCoy v Kirsch*, 99 AD3d 13, 14-15 [2d Dept 2012] [wedding chupah, which "was a 10-foot-high device made of pipe, wood, and a fabric canopy at its top," was a structure for the purposes of Labor Law § 240 (1)]; *Sinzieri v Expositions, Inc.*, 270 AD2d 332, 333 [2d Dept 2000] [the exhibit, "which was composed of interlocking parts," fell within the definition of "'structure' under Labor Law § 240 (1)"]).

Defendants also argue that they are entitled to dismissal of the Labor Law § 240 (1) claim, because a question of fact exists regarding whether plaintiff was the sole proximate cause of the accident. To that effect, defendants argue that plaintiff testified that he was in charge of site safety for the Project, that he supplied the ladders for the Project, and that he instructed the men in regard to how to perform their work. Defendants also argue that plaintiff brought a rope and extension ladder brackets to the Premises, yet he chose not to use them. Further, plaintiff caused

his accident, because he did not direct one of his workers to hold the ladder for him.

"[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]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1)]).

Here, plaintiff cannot be held solely responsible for the accident, because, first and foremost, the accident was caused due to the fact that the old sign was not first properly secured in place, so as to prevent it from falling during its removal, and defendants failed to provide sufficient safety devices to keep plaintiff from falling while he performed the subject work (*Baugh v New York City Sch. Constr. Auth.*, 140 AD3d 1104, 1106 [2d Dept 2016] [where "the plaintiff was provided with only an unsecured ladder and no safety devices, the plaintiff [could] not be held solely at fault for his injuries"]; *Seferovic v Atlantic Real Estate Holdings, LLC*, 127 AD3d 1058, 1059 [2d Dept 2015]).

In any event, that plaintiff had a rope is of no consequence, because he testified that there was no place to tie the ladder off to. In addition, any action on the part of plaintiff regarding the means of work used in removing the old sign, or in securing the ladder, 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, 459 [1985]; *Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 [1st Dept 2012]). "[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]; *see Ranieri v Holt Constr. Corp.*, 33 AD3d 425, 425 [1st Dept 2006] [Court found that the failure to supply plaintiff with a properly secured ladder or any safety devices was a proximate cause of his fall, and there was "no reasonable view of the evidence to support defendants' contention that plaintiff was the sole proximate cause of his injur(ies)"]).

Moreover, there is no evidence in the record to indicate that plaintiff was given any specific instruction that he should utilize one of his workers to hold the ladder, nor was he ever offered any safety devices which he refused to utilize. Therefore, this is not a case of a recalcitrant worker, wherein a plaintiff was specifically instructed to use a safety device and refused to do so (*see Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 403 [1st Dept 2013]; *Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 [1st Dept 2012]; *Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008]). It should be noted that, contrary to defendants' assertion, a human being is not to be considered a "safety device" for the purposes of the statute, and certainly is not of the type of enumerated safety devices listed in the

statute.

Further, defendants argue that plaintiff is not within the class of persons intended to be covered by the Labor Law, because he was the president of ABC, and because he supervised the subject work. However, importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards such as falling from a height 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]). "As has been often stated, the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, 'those best suited to bear that responsibility' instead of on the workers, who are not in a position to protect themselves" (*John*, 281 AD2d at 117, quoting *Ross*, 81 NY2d at 500).

Here, plaintiff was not an owner or a general contractor at the Premises, but, rather, the president of a subcontractor, ABC, which was hired by Golden, a tenant/owner, to remove old awnings (and the old sign) and then reinstall new ones. Accordingly, plaintiff was within the class of persons intended to be covered by the statute.

Finally, it is of no consequence that, while plaintiff testified that the accident occurred as a result of the sign hitting the ladder, causing it to shake, Fardos testified that plaintiff was injured when the 20-30 pound sign shifted, causing plaintiff to panic and jump in order to avoid being struck by it (*see Lockwood v National Valve Mfg. Co.*, 143 AD2d 509, 510 [4th Dept 1988] [Labor Law ¶ 240 (1) applied where the "[p]laintiff either fell or jumped out of the way in order to avoid being struck by the falling pipe and landed on a catwalk approximately 25 feet from the place he was originally standing"]). Here, plaintiff "established his prima facie entitlement to judgment as

a matter of law by showing that he was not provided with a proper safety device with which he could perform his job, and that the defendants' failure to provide such protection was a proximate cause of his injuries" (*Laconte v 80 East End Owners Corp.*, 80 AD3d 669, 671 [2d Dept 2011]). Importantly, "[t]he dispute here does not relate to a material issue, as the plaintiff would be entitled to summary judgment under either set of facts" (*id.*).

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

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

The Labor Law § 241 (6) Claim

Defendants cross-move for dismissal of the Labor Law § 241 (6) claim against them. 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 lists multiple violations of the Industrial Code in the bill of particulars, with the exception of Industrial Code sections 23-1.21 (b) (4) (iv), plaintiff does not address those alleged Industrial Code violations in his opposition to defendants' motion, 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]). As such, defendants are entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on those abandoned provisions.

In addition, as "the Industrial Code includes 'work of the types performed in the construction, erection, *alteration*, repair, maintenance . . . of buildings or other structures' in the definition of construction work (12 NYCRR 23-1.4 [b] [13]," and as the awnings were structures for the purposes of the Labor Law, the facts of this case fall within the purview of Labor Law § 241 (6) (*Joblon*, 91 NY2d at 466).

Industrial Code 12 NYCRR 23-1.21 (b) (4) (iv)

Initially, Industrial Code 12 NYCRR 23-1.21 (b) (4) (iv) is sufficiently specific to support a Labor Law § 241 (6) cause of action (*see Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 176 [1st Dept 2004]).

Section 23-1.21 (b) (4) (iv) requires that "[w]hen work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a

person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means."

Here, as plaintiff testified that he did not know whether the subject ladder was being held in place by any of his workers at the time of the accident, a question of fact exists as to whether section 23-1.21 (b) (4) (iv) applies to the facts of this case. In addition, there is a question of fact "as to whether the accident occurred because the ladder slid or slipped out of place" (*Deshields v Carey*, 69 AD3d 1191, 1194 [3d Dept 2010]).

Thus, defendants are not entitled to summary judgment dismissing that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.21 (b) (4) (iv).

The Common-Law Negligence and Labor Law § 200 Claims

Defendants cross-move for dismissal of 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]).

Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *see also Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009] [Court dismissed common-law negligence and Labor Law § 200 claims where the deposition testimony established that, while the defendant's "employees inspected the work and had the authority to stop it in the

event they observed dangerous conditions or procedures," they "did not otherwise exercise supervisory control over the work"]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where the defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]).

Here, plaintiff was injured because the old sign was not properly secured against falling during its removal, and because the ladder that he was using at the time of the accident was not sufficient to prevent him from falling while performing the subject work. Therefore, plaintiff's accident must be analyzed according to a means and methods theory.

That said, defendants are entitled to dismissal of the common-law negligence and Labor Law § 200 claims against them, because they did not direct or supervise the above-mentioned work that caused the accident. Plaintiff testified that he was in charge of safety at the site, and that he supervised and directed the work on the Project. In addition, plaintiff testified that ABC supplied the ladders for the work. Moreover, he testified that neither ISS nor Golden gave any instruction regarding the means and methods of the sign removal work that resulted in plaintiff's accident.

Thus, defendants are entitled to dismissal of the common-law negligence and Labor Law § 200 claims against them.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff Sang Chul Kim's motion, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants

E. 7th ISS LLC and Golden Food Market, Inc. (together, defendants) is granted; and it is further

ORDERED that defendants' cross motion, pursuant to CPLR 3212, for summary judgment dismissing is granted to the extent of dismissing the common-law negligence and Labor Law § 200 claims against them, and these claims are severed and dismissed as against defendants; and the motion is otherwise denied.

Dated: 10-30-2017

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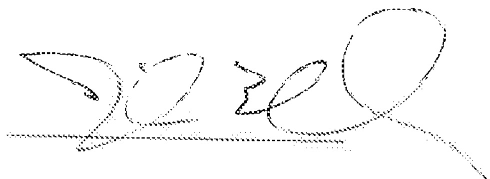

J.S.C.