SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

PATRICK J. BRENNAN,
Plaintiff,

- against -

BOVIS LEND LEASE LMB, INC., LEND LEASE (US) CONSTRUCTION LMB INC., DAVIS BRODY BOND, LLP, and THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,
Defendants.

INDEX NO. 158621/2014
MOTION DATE 11/29/2017
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4 - 6
Replying Affidavits	7 - 8

Cross-Motion: ☐ Yes X No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Upon a reading of the foregoing cited papers, it is Ordered that Defendants Lend Lease Construction LMB Inc., s/h/a Bovis Lend Lease LMB, Inc., Lend Lease (US) Construction LMB Inc. ("Lend Lease"), and The Trustees of Columbia University in the City of New York's ("Columbia University," herein together the "Moving Defendants") motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiff's Verified Complaint, is granted to the extent that Plaintiff's Labor Law §240[1] and §241[6] claims are dismissed. The remainder of the motion is denied.

On August 13, 2013 Plaintiff sustained injuries when he fell off a staircase after the top step broke. Plaintiff was leaving the restroom in the basement of the field office when the accident occurred. He was employed as a construction project safety manager by non-party EE Cruz Co. Inc. to work with Defendant Lend Lease as safety consultant for a construction project located at Defendant Columbia University's premises at 605 West 129th Street, New York, New York. On September 3, 2014 Plaintiff commenced this action to recover damages for the personal injuries sustained in the accident.

The Moving Defendants now move for summary judgment pursuant to CPLR §3212 to dismiss the Verified Complaint. Plaintiff opposes the motion.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v City of New York, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v Delhi Constr. Corp., 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (SSBS Realty

Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (Kornfeld v NRX Tech., Inc., 93 AD2d 772, 461 NYS2d 342 [1983], aff'd 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]). The drastic remedy of summary judgment should not be granted when there is any doubt as to the existence of a triable issue of fact or where such an issue is even arguable (Holender v Fred Cammann Productions, 78 AD2d 233, 434 NYS2d 226 [1st Dept. 1980]).

The "public policy [of] protection of workers requires that the [Labor Law] statutes in question be construed liberally to afford the appropriate protections to the worker" (Kosavick v Tishman Constr. Corp. of New York, 50 AD3d 287, 855 NYS2d 433 [1st Dept. 2008]).

Labor Law §240[1] imposes absolute liability on owners, contractors and their agents for their failure to provide workers with safety devices that properly protect against elevation-related hazards while they are engaged in certain enumerated activities (Runner v New York Stock Exch., 13 NY3d 599, 895 NYS2d 279, 922 NE2d 865 [2009]). A plaintiff is entitled to protection from the gravity-related risk under §240 when he demonstrates: (i) the injury was caused by the inadequacy or absence of a protective device of the kind enumerated in Labor Law §240[1] (*Id*); and (ii) the nature of the task being performed by the plaintiff at the time of his accident presented a foreseeable risk of a gravity-related injury (Narducci v Manhasset Bay Assoc., 96 NY2d 259, 727 NYS2d 37, 750 NE2d 1085 [2001]). "The critical inquiry in determining coverage under the statute is what type of work the plaintiff was performing at the time of the injury" (Panek v County of Albany, 99 NY2d 452, 788 NE2d 616, 758 NYS2d 267 [2003]). A plaintiff's §240[1] protection ceases once the "protected activity" has ended (Beehner v Eckerd Corp., 307 AD2d 699, 762 NYS2d 756 [4th Dept. 2003]).

"Labor Law §241[6] imposes a nondelegable duty of reasonable care upon workers and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (Rizzuto, supra). "The statute is meant to protect workers engaged in duties connected to the inherently hazardous work of construction, excavation or demolition" (Nagel v D & R Realty Corp., 99 NY2d 98, 752 NYS2d 581, 782 NE2d 558 [2002]).

The Moving Defendants make a prima facie showing that Plaintiff's §240[1] and §241[6] claims must be dismissed. Plaintiff was not engaged in any protected activity covered by these statues when the accident occurred. He was inside an off-site field office, one-block away from the construction project's location and outside the perimeter fence - returning from the restroom- when he fell off the staircase because the top step broke. In Plaintiff's deposition he conceded that at the time of the accident he was not performing any construction work (Moving Papers Ex. D). Furthermore, since Plaintiff did not raise any defense to dismissal of his §240[1] claim in his opposition papers, he has abandoned it (Perez v Folio House, Inc., 123 AD3d 519, 999 NYS2d 29 [1st Dept. 2014]).

Labor Law §200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site (Rizzuto v L.A. Wenger

Contracting Co., 91 NY2d 343, 670 NYS2d 816, 693 NE2d 1068 [1998]). In a §200 claim, liability is found if defendant exercised control or supervision over the work (Zak v UPS, 262 AD2d 252, 692 NYS2d 374 [1st Dept. 1999]). "Even in the absence of supervision or control by the contractor, the statute applies, *inter alia*, to owners and contractors who either create or have actual or constructive notice of a dangerous condition" (Bradley v Morgan Stanley & Co., Inc., 21 AD3d 866, 800 NYS2d 620 [2nd Dept. 2005]). Constructive notice requires that a defect be visible and apparent and exist for a sufficient length of time prior to the incident to permit the defendant to discover and remedy it (Gordon v Am. Museum of Natural History, 67 NY2d 836, 501 NYS2d 646, 492 NE2d 774 [1986]). "If a reasonable inspection would have disclosed the dangerous condition, the failure to make such an inspection constitutes negligence (Colon v Bet Torah, Inc., 66 AD3d 731, 887 NYS2d 611 [2nd Dept. 2009]).

The Moving Defendants have not made any arguments as to their lack of liability in Plaintiff's fall due to lack of actual or constructive notice. As for damages, the Moving Defendants contend that Plaintiff's August 13, 2013 accident was not the cause of his injuries. Plaintiff alleged damages to his right knee, both shoulders and his spinal chord (Moving Papers Exs. B, C). Plaintiff was involved in three previous slip-and-fall injuries- March 2, 2009, January 26, 2012 and October 29, 2012 (*Id* at Exs. C, H). The Moving Defendants submitted an April 29, 2016 examination conducted by Dr. Yong H. Kim, MD, a spinal surgeon, who concluded that Plaintiff's cervical condition was degenerative in nature and not casually related to Plaintiff's accident (*Id* at Ex. G). Furthermore, the cervical surgery that was ultimately performed after the accident was the same procedure recommended in May 2013, approximately three (3) months prior to the accident (*Id* at Exs. G, D). Herbert S. Sherry, MD, an orthopedic surgeon, conducted an examination of Plaintiff on August 24, 2016 and opined that Plaintiff's alleged injuries to his shoulders were degenerative and pre-existing in nature (*Id* at Exs. Q, H).

However, the Moving Defendants' motion for summary judgment to dismiss Plaintiff's Labor Law Labor Law §200 and common law negligence claims must be denied. Following the August 13, 2013 accident Dr. Richard N. Weinstein MD, Plaintiff's treating orthopedist, issued an August 16, 2013 examination and report concluding that the accident caused new injuries and exacerbated his prior shoulder and knee injuries (Opposition Papers Ex. 5, 8). An MRI of Plaintiff's shoulders conducted on September 26, 2013 references new injuries that were not reported on a June 25, 2012 MRI, signifying new injuries (Moving Papers Ex. K). On August 27, 2013 a report by Dr. Syed Rahman, MD of Westchester Health orthopedics & Sports Medicine, was issued detailing the worsening condition of Plaintiff's pre-existing cervical injury after the accident (Opposition Papers Ex. 9). Furthermore, an independent medical orthopedic examination scheduled by the Worker's Compensation carrier, that was conducted by Dr. Menachem Y. Epstein, MD, concluded that Plaintiff's injuries and symptoms were 60% attributable to his accident of August 13, 2013 (*Id* at Ex. 11). Conflicting medical reports raise issues of fact warranting the denial of summary judgment (Bengston v Wang, 41 AD3d 625, 839 NYS2d 159 [2nd Dept. 2007]).

Accordingly, it is ORDERED, that the Moving Defendants - Lend Lease Construction LMB Inc., s/h/a Bovis Lend Lease LMB, Inc., Lend Lease (US) Construction LMB Inc., and The Trustees of Columbia University in the City of New York's motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiff's Verified Complaint, is

granted to the extent that Plaintiff's Labor Law §240[1] and §241[6] claims are dismissed, and it is further,

ORDERED, that Plaintiff's Labor Law §240[1] and Labor Law §241[6] causes of action are hereby severed and dismissed against the Moving Defendants, and it is further,

ORDERED, that the causes of action asserted in the Verified Complaint under Labor Law §200 and common law negligence remain in effect against the Moving Defendants, and it is further,

ORDERED, that the Clerk enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: December 13, 2017

Manuel J. Mendez
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE