Gelvez v Tower 111, LLC
2018 NY Slip Op 30114(U)
January 9, 2018
Supreme Court, New York County
Docket Number: 159225/12
Judge: Sherry Klein Heitler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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EDUARDO GELVEZ and DANIELA CISNERO, Individually, and as husband and wife,

Plaintiffs,

-against-

TOWER 111, LLC, PAV-LAK CONTRACTING, INC., 885 AVENUE OF THE AMERICAN MANAGEMENT COMPANY, LLC, ATLANTIC REALTY AND DEVELOPMENT CORP., STONEHENGE PROPERTIES, LLC, STONEHENGE PARTNERS, L.P., STONEHENGE PARTNERS, INC., GOLF & BODY NYC, LLC, and TD BANK, N.A. ENTERPRISE REAL ESTATE,

Defendants.

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Index No. 159225/12
Motion Sequences 005, 006, 007

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

Motion sequence nos. 005 (MS 005), 006 (MS 006), and 007 (MS 007) are consolidated for disposition herein.

In MS 005, defendants Tower 111 LLC (Tower), 885 Avenue of the American Management Company, LLC (AMC), and Stonehenge Properties, LLC (Stonehenge) (collectively, Defendants) move pursuant to CPLR 3121(a), CPLR 3126, and CPLR 3101 for an order precluding the testimony and reports of any "IME Watchdog" who accompanied plaintiff Eduardo Gelvez (Plaintiff) to his independent medical examinations (IME). In MS 006, Defendants move to dismiss Plaintiff's claims against them in their entirety. In MS 007, Plaintiff moves for summary judgment on his Labor Law 240 and Labor Law 241(6) claims. These motions are decided as set forth below.

BACKGROUND

This Labor Law personal injury action arises from an October 8, 2012 accident that occurred when a scaffold fell over at a construction site located at 885 Avenue of the Americas in Manhattan. At the time of the accident the building was undergoing renovations which included the demolition of

[1]

three cinderblock walls. Plaintiff was employed by United Drilling & Cutting Corp. (United Drilling), the contractor hired by Defendants to perform this demolition work. Before this job Plaintiff worked on several other demolition projects and had experience with scaffolds and jackhammers like the ones he used at the construction site in question. Neither party disputes that the building was owned by defendant Tower and managed by defendant AMC. Stonehenge, according to Defendants, is a "silent partner" and member of Tower.

Plaintiff commenced this action by E-filing a summons and complaint on December 12, 2012. The complaint and bill of particulars allege that Plaintiff sustained personal injuries as a result of Defendants' negligence as well as their violations of Labor Law §§ 200, 240(1), 241(6) and various New York State Industrial Codes.

Plaintiff gave deposition testimony on September 2, 2015.[1] He testified that he first reported to the worksite the Friday before the accident. On that day, Plaintiff's foreman showed Plaintiff and his co-worker, Mr. Jose Ortiz, the three 15-20 foot high walls they were hired to demolish. The foreman also gave them the tools and equipment they needed to perform their duties, including a jackhammer and a baker scaffold. Plaintiff and Mr. Ortiz began by jackhammering the bottom of the wall. When they could no longer reach the wall without assistance they used a scaffold, alternating their position with one man positioned on top of the scaffold and the other working from the floor. (Gelvez Deposition pp. 41, 45, 53, 79-83). That day they demolished approximately one and one half of the three walls.

The following Monday, Plaintiff and Mr. Ortiz finished the second wall in the morning without incident and began working on the third wall. In the afternoon Plaintiff assumed his position on top of the scaffold platform. After about five minutes of work, while Plaintiff was jackhammering, a large

[1] A copy of Mr. Gelvez' deposition transcript is submitted as Defendants exhibit E in MS 006 (Gelvez Deposition).

portion of the wall fell and struck the scaffold, causing it to tip over. Plaintiff fell approximately eight feet to the ground and a large amount of debris fell on top of him. Coworkers were able to remove some of the debris and an ambulance took Plaintiff to the hospital. (Gelvez Deposition pp. 87, 96, 99-108, 128). According to the bill of particulars, Plaintiff fractured his right ankle which required several surgeries to repair. He also injured his back. Notably, Mr. Ortiz was never deposed.

Plaintiff later attended orthopedic and neurological independent medical examinations (IME) at Defendants' request. A so-called "IME Watchdog" employed by IME Watchdog, Inc. accompanied Plaintiff to both IMEs and to a Vocational Rehabilitation assessment. A printout from the company's website indicates that IME Watchdog can be retained to accompany clients to their IMEs, take detailed notes of the intake questions asked by the examiner and the tests performed, and prepare a report describing what took place during the examination.[2]

With respect to how the accident occurred, Plaintiff testified that the scaffold shifted back and forth and vibrated as a result of his using the jackhammer (*id.* at 84, 95-97):

Q. On the first day did you experience any issues with the scaffold moving?

A. Yes. The movement and the vibration I noticed.

* * * *

Q. In the approximate[ly] five minutes you had been working on the scaffold before the accident took place, did the scaffold move?

A. For the first five minutes I was working it was moving, yes.

Q. Can you describe how it was moving?

A. Yes, it was moving so to speak from right to left. And with the vibration that [any jackhammer produces], you could feel that very same vibration underneath.

Q. During the few minutes before the accident took place, do you know where your co-worker was? In the five minutes or so you were working on the scaffold, do you know where Mr. Ortiz was?

A. He was on the ground to my left. He was at about 20 to 30 feet distance from me and was watching what I was doing.

Q. Approximately how high was the platform that you were standing on positioned above the ground at the time of the accident?

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[2] Defendants' exhibit F to MS 005.

A. I would say that it was something like at an eight feet height.

Q. In the few moments before the accident occurred, did you feel any instability with the actual platform itself? . . .

A. Yes, it was moving as usual.

Q. Did the platform feel loose in the moments before the accident?

A. I know that it was moving. I know that the vibration made it move even more, but loose I don't know.

Q. Can you describe for us how the accident took place? . . .

A. I was banging on the wall on the platform and standing on the platform banging with the jackhammer with the usual vibration and movement I mentioned. It was everything I would define as normal, and all of a sudden the wall got loose and the wall hit against the scaffold and then I fell and the scaffold fell on me.

Plaintiff worked on several demolition jobs before he was injured. For this particular job, Plaintiff was supervised by Saul Cisneros, United Drilling's head foreman, who explained to Plaintiff how to demolish the walls with a jackhammer (*id.* at 45-48):

Q. On that first day when he told you how to demolish the wall what did he actually say?

A. He told us there were three walls to be demolished; he showed us the walls and he told we can start with any one of them and we should start by breaking those walls, and as we should approach a different height we should use the scaffolds to do so to continue the job.

Q. Beginning just dealing with that first day, did Saul explain where on the wall the demolition work should begin, on what part of the wall demolition work should begin?

A. Yes, he told us to get a section in the lower part of the wall and then break around that first hole to weaken the rest of the wall.

Q. Did he as part of those instructions ever say anything about which part of the wall to start, in other words, like left or middle or right or anything to that effect?

A. Left or right, any side of the walls.

Q. On that first day any other instructions from Saul in terms of how to demolish the walls?

A. No, to simply we have to break all over because there was no need for cutting. . . .

Q. So it was your understanding based upon what Saul said that you guys were to demolish the walls starting from the bottom and work your way in an upward direction? . . .

A. Yes.

As part of his motion for summary judgment Plaintiff submitted an affidavit to supplement his deposition testimony.[3] Therein Plaintiff confirms that he demolished the walls as instructed by his supervisors (Gelvez Affidavit ¶¶ 7, 10, 11):

> In the moments before the incident I was working from a scaffold elevated approximately eight feet above the ground. The scaffold was unstable and had been shifting, moving and vibrating as I worked from it using a jackhammer. . . .
>
> I was never instructed on this project to perform this work in any way other than the way in which I was performing it, and I was performing it in the exact fashion in which I had been directed to do so. This was the same method that had been used for the previously demolished walls on this project. . . .
>
> I was working the entire time taking turns with my co-worker Jose Ortiz, who was also my foreman when Saul Cisneros was not around, as was the case at the time of this incident.

Kenneth Christopher was Tower and AMC's on-site representative for this construction project.[4] Mr. Christopher described each wall as being approximately 19 feet high, 8 inches thick, and 12 feet wide. None of the walls were structural or load bearing. Mr. Christopher hired United Drilling to demolish the walls, but there was no contract between Tower and United Drilling. Instead Mr. Christopher spoke with Nick Costidis, United Drillings' owner, and the two came to an oral agreement regarding the scope of the work. United Drilling provided all of the tools and equipment for the job, including the scaffold at issue (Christopher Deposition pp. 48, 50-55).

Mr. Christopher did not see the accident, but based on conversations with other people he attributes it to the fact that Plaintiff and Mr. Ortiz improperly chose to demolish the walls from the bottom-up (*id.* at pp. 71-73):

> Q: Did you ever speak to him about how the accident occurred?
>
> A. I believe it was either him or Saul explained what happened.
>
> Q. And what did Saul or [Mr. Ortiz] tell you?
>
> A. That they were jackhammering from the bottom up and the wall gave way on top of their scaffold and knocking [sic] him down to the ground.

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[3] Mr. Gelvez' affidavit is annexed to Plaintiff's moving papers (MS 007) as exhibit N (Gelvez Affidavit).

[4] Mr. Christopher was deposed on December 9, 2015. A copy of his deposition transcript is submitted as Defendant's exhibit H in MS 006 (Christopher Deposition).

Q. And do you recall who specifically told you that?

A. It was Mr. Ortiz or – I believe it was Mr. Ortiz.

* * * *

Q. Did you ever have any conversation with Nick Costidis after this accident occurred?

A. I did.

Q. What was the sum and substance of that conversation?

A. I asked him what happened and he told me he can't believe how stupid his guys were.

Nick Costidis owns United Drilling.[5] He confirmed that company foreman Saul Cisneros provided workers with the tools and materials they needed to perform their duties and supervised their work. Mr. Costidis was not present at the construction site on the day of the accident and learned about the accident from Mr. Cisneros (Costidis Deposition pp. 13-14):

Q. Do you recall what Mr. Cisneros told you during this conversation?

A. Yeah. He was a little upset, he was upset because our guys are trained to do work a certain way and Mr. Gelvez didn't follow the proper procedure and that's why he had gotten hurt.

Q. Did he give you details of that?

A. Yes. . . . He said that the guys initially started demolition of a wall, a block wall, not a full concrete wall, and for some reason they had started chopping it from the top and started from the bottom, and that's when the wall gave in.

The motion papers also contain a sworn affidavit from Mr. Costidis in which he avers, in relevant part, as follows (Costidis Affidavit, ¶¶ 4, 5, 7):[6]

> United was retained to demolish cinderblock walls at the subject site. United employee Saul Cisneros was the project manager for the site. Plaintiff was a laborer on the site. Mr. Cisneros directed the United employees how to perform their work.
>
> Job equipment for the subject site included a baker scaffold. The scaffold was about 2 feet in height, purchased from York and had six sections, platforms, railings and crossbars. There were never any complaints or issues regarding the scaffold prior to the date of loss. . . .
>
> Neither myself nor Mr. Cisneros would have directed a United employee to demolish a wall from the bottom up.

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[5] Mr. Costidis' was deposed on February 28, 2017. His deposition transcript is submitted as Defendant's exhibit K in MS 006 (Costidis Deposition).

[6] Mr. Costidis' affidavit, sworn to August 30, 2016, is submitted as part of Defendant's exhibit I in MS 006 (Costidis Affidavit).

Saul Cisneros was deposed on February 28, 2017.[7] He testified that he was on his way to the construction site when the accident occurred. His knowledge of the accident derives from his conversations with Mr. Ortiz, who sometimes served as foreman in Mr. Cisneros' absence, and in fact was serving in that capacity on the date of the incident. Like Mr. Costidis, Mr. Cisneros believes that the accident occurred because Plaintiff demolished the wall improperly (Cisneros Deposition pp. 22-25):

Q. When you arrived at the scene of the accident, did you have any further discussion with Mr. Ortiz about what had happened?

A. Yes. . . . I asked how could it happen, because it wasn't supposed to happen. He explained to me that Mr. Gelvez, he had been a big soccer player, he wanted to leave early because he had a game in the afternoon, which I didn't know. So I wonder why he didn't call me. He knows that he wanted to leave early, I could have talked to the GC so he could leave a little early. . . .

Q. Did Mr. Ortiz tell you that the wall collapsed because they were demolishing it from the bottom to the top instead of top to bottom?

A. Yeah. In the afternoon they started to go that route because Mr. Gelvez wanted to leave early. . . .

Q. Mr. Gelvez wanted to go early so they decided to do it from the bottom to the top? . . .

A. I would assume he decided. He was the one on the scaffold, he was the one that got hurt.

Q. That's true. At the time of the incident, Mr. Ortiz was acting as foreman in your absence?

A. Yes.

Q. As a foreman, if you're on a United Drilling corp job site and you saw guys demolishing walls from the bottom to top, would you stop that? . . .

A. There's a lot of situations there. As a foreman you're not just looking at the guys. You're performing other duties, you can be picking up debris, making sure nobody is around there to fall in debris, something like that. It's really difficult to understand why somebody would do something so stupid like that.

Q. I guess what I'm trying to ask is this. If you're on a job site and acting as foreman and you're watching the demolition take place, you see them start to demolish the wall from the bottom to top, would you tell them to stop? . . .

A. Yes. . . .

Q. Is part of the responsibility as a foreman like you or a foreman acting like Mr. Ortiz to make sure certain safety practices are followed. . . .

A. Yes.

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[7] Mr. Cisneros' deposition transcript is submitted as Defendant's exhibit J in MS 006 (Cisneros Deposition).

Mr. Cisneros also submitted an affidavit on this motion which confirms his deposition testimony[8] (Cisneros Affidavit, ¶¶ 5-6):

> Mr. Ortiz called me on the date of loss and told me a cinderblock wall collapsed on plaintiff. Mr. Ortiz said the wall collapsed because of the way it had been demolished — from the bottom up. When I asked Mr. Ortiz why the wall had been demolished this way, Mr. Ortiz stated that him and plaintiff originally began demolishing the walls the correct way (from the top to the bottom, but began demolishing from the bottom up on the wall that fell, because they wanted to leave early. Mr. Ortiz never made any reference to any defective scaffold or issues with the scaffold in connection with the subject incident.
>
> I never directed anyone to demolish a wall from the bottom up on the subject site. I actually instructed the workers on the subject site to demolish the walls from the top, and work their way down. Per Mr. Ortiz, plaintiff wanted to get out of work early so began to demolish the wall from the bottom to the top, which led to it collapsing on him.

Professional Engineer Rudi Sherbansky was retained by Defendants as an expert in this case.[9] Based upon his investigation, which included a review of the deposition transcripts and photographs taken of the scene of the accident, Mr. Sherbansky concludes that Plaintiff's decision to demolish the wall from the bottom to the top created a dangerous condition that ultimately caused the accident. He also concludes that the scaffold could not have withstood the weight and force of the wall whether or not it was properly constructed (Sherbansky Report, ¶¶ 8, 11-12):

> . . . I find that it was unsafe and improper for plaintiff to demolish a concrete cinderblock wall from the bottom to top. Demolishing a wall in this manner is contrary to construction and industry practice and sound safety practices generally used in construction.
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> * * * *
>
> . . . I find that even assuming the subject scaffold felt wobbly, unstable or was moving in the moments before the accident (as plaintiff claims), the purported defectiveness of the subject scaffold did not cause the accident, because even a York scaffold in perfect condition with none of the purported defects would not have been able to withstand the dynamic force of the 12,000 plus pounds of cinderblock wall that came down upon it. . . .
>
> I find that plaintiff was the sole cause of his accident by incorrectly and intentionally demolishing the subject wall in such a way that left no support for the top of the cinderblock wall, causing it to come crashing down on the scaffold.

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[8] Mr. Cisneros affidavit, sworn to August 30, 2016, is submitted as part of Defendants' exhibit I to MS 006 (Cisneros Affidavit).

[9] Mr. Sherbansky's report, sworn to October 11, 2016, is submitted as Defendants' exhibit L to MS 006 (Sherbansky Report).

Based upon the testimony and the Sherbansky Report, Defendants move to dismiss Plaintiff's claims in their entirety, arguing that Plaintiff was the sole proximate cause of his injuries. Plaintiff responds that he is entitled to summary judgment on his Labor Law 240(1) and Labor Law 241(6) causes of action because he was instructed to demolish the wall from the ground up and was provided with a faulty scaffold.

DISCUSSION

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). "[R]ank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact." *Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 (1st Dept 2010); *see also Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

I. Labor Law 200

Labor Law 200 codifies the common law duty imposed upon owners and general contractors to provide a safe workplace.[10] *See Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352 (1998).

[10] Labor Law 200 provides in relevant part that "[a]ll 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. The board may make rules to carry into effect the provisions of this section."

Labor Law 200 claims are generally predicated upon a two-pronged showing that the owner or contractor either had the "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition," (*Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]), or that it had actual or constructive notice of the defective condition which caused the plaintiff's injuries (*see Comes v N. Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Philbin v A.C. & S., Inc.*, 25 AD3d 374, 374 [1st Dept 2006]).

As for the first prong, Plaintiff acknowledged that he received his instructions from his foreman, Mr. Cisneros, and in his absence, from Mr. Ortiz, neither of whom were employed by any of the Defendants. Despite Plaintiff's arguments to the contrary, Mr. Christopher's broad testimony regarding project safety (Christopher Deposition, p. 66) evinces only general supervisory authority over the construction site, not the specific control over the Plaintiff's work needed to implicate Labor Law 200. *See Pipia v Turner Constr. Co.*, 114 AD3d 424, 428 (1st Dept 2014); *Fiorentino v Atlas Park LLC*, 95 AD3d 424 (1st Dept 2012); *Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 (1st Dept 2011); *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 (1st Dept 2007).

With respect to the second prong, the uncontroverted evidence is that the scaffold in question and all of the equipment and materials used by Plaintiff were provided to him by his employer. There is nothing to show that Defendants knew or should have known that the scaffold was defective. Accordingly, Plaintiff's Labor Law 200 claims are dismissed.

II. Labor Law 241(6)

Labor Law 241(6) imposes a nondelegable duty upon owners, contractors, and their agents to provide reasonable and adequate protection and safety to workers:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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, 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 [New York State Commissioner of Labor] may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

To recover damages on a Labor Law 241(6) cause of action Plaintiff must establish a violation of an Industrial Code provision which sets forth specific safety standards and that such violation was a proximate cause of his accident. *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 (1998).

Plaintiff's Fourth Supplemental Bill of Particulars claims that Defendants violated numerous Industrial Code provisions. Of these regulations, Plaintiff's motion papers only reference 12 NYCRR 23-1.7(a) (Protection from general hazards),[11] 12 NYCRR 23-3.3(c) (Demolition by hand),[12] and 12 NYCRR 23-5.1(b) (General provisions for all scaffolds).[13] None of these Industrial codes provide a basis of Plaintiff's Labor Law 241(6) claim. 12 NYCRR 23-5.1(b) is not specific enough to serve as a predicate for a Labor Law 241(6) claim. *See Varona v Brooks Shopping Ctrs. LLC*, 151 AD3d 459, 460 (1st Dept 2017); *Kosovrasti v Epic [217] LLC*, 96 AD3d 695, 696 (1st Dept 2012). 12 NYCRR 23-1.7(a) is specific enough, but does not apply to this case because Plaintiff was not working in an area that was "normally exposed to falling material or objects".

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[11] 12 NYCRR 23-1.7(a) provides, in relevant part, that "[e]very place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot."

[12] 12 NYCRR 23-3.3(c) provides, "Inspection. During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means."

[13] 12NYCRR 23-5.1(b) provides, "Scaffold footing or anchorage. The footing or anchorage for every scaffold erected on or supported by the ground, grade or equivalent surface shall be sound, rigid, capable of supporting the maximum load intended to be imposed thereon without settling or deformation and shall be secure against movement in any direction. Unstable supports, such as barrels, boxes, loose brick or loose stone, shall not be used."

12 NYCRR 23-3.3(c) also does apply to this case. A 12 NYCRR 23-3.3(c) violation occurs where the hazard arises from structural instabilities caused by the progress of demolition but not by the performance of the work itself. For example, in *Medina v City of New York*, 87 AD3d 907, 929 NYS2d 582 (1st Dept 2011), plaintiff was working in a subway tunnel as part of a five-year signal improvement contract. The First Department found a 12 NYCRR 23-3.3(c) violation had occurred where a section of subway rail that plaintiff was cutting sprang free and fell on him. In *Ortega v Everest Realty LLC*, 84 AD3d 542 (1st Dept 2011), the plaintiff was injured when the wall of an aluminum shed fell on him as he was sawing through it. The court found that there was an issue of fact whether the wall fell as a result of structural instability caused by the vibrations. In this case, unlike *Medina* and *Ortega,* Plaintiff was injured from the demolition work itself. A virtually identical situation to this one was at issue in *Smith v New York City Hous. Auth*, 71 AD3d 985 (2010). There, the plaintiff was using a jackhammer to demolish a four-foot wall when a cinderblock fell from the wall and injured him. The court dismissed plaintiff's 12 NYCRR 23-3.3(c) claim, holding that the falling block condition arose from the performance of the demolition work and not from structural instability caused by the progress of demolition. *Id.* at 987. This case is no different.

Case law is also clear that Plaintiff's activities do not constitute "demolition work" within the meaning of Industrial Code.[14] In this regard, the First Department has held that the work must involve "'changes to the structural integrity of the building' as opposed to mere renovation of the interior." *Cardenas v One State St.*, LLC, 68 AD3d 436, 439 (1st Dept 2008) (quoting *Solis v 32 Sixth Ave. Co. LLC*, 38 AD3d 389, 390 [1st Dept 2007]); *see also Quinlan v City of New York*, 293 AD2d 262, 263 (1st Dept 2002) (the removal of a portion of a wall does not constitute demolition work); *Zuniga v*

[14] "Demolition work" is defined at 12 NYCRR § 23-1.4(b)(16) as "[t]he work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment."

Stam Realty, 169 Misc. 2d 1004, 1010 (Sup. Ct. Queens Co. Aug 22, 1996, Goldstein, J.) *aff'd* 245 AD2d 561 (2d Dept 1997):

> Demolition, consistent with the Industrial Code definition, necessitates the total or partial dismantling or razing of a building or structure. Surely, this anticipates more than mere painting, plastering or removal and installation of new sheetrock. What the rule envisions is some structural change of the building, in whole or in part, i.e., some interference with, alteration or change in the structural integrity of the building, sufficient to constitute a dismantling or razing of the building, either in whole or in part.

It is undisputed that the walls at issue in this case were non-structural and non-load bearing, and it appears that the project itself was part of a minor renovation as opposed to a major overall of the building's structural integrity. As a result, I find that Plaintiff's activities do not fall within the scope of "demolition work" under the Industrial Code. *See Cardenas,* 68 AD3d at 439; *Quinlan*, 293 AD2d at 263.

It should also be noted that Plaintiff's entire recitation on this issue is limited to an assertion that the Defendants did not conduct regular safety inspections. While this may be true, Plaintiff has not shown, either through testimony or an expert affidavit, that the wall collapsed because of its alleged deteriorated condition and that such deterioration would have been discovered had regular inspections occurred. Plaintiff also has not shown that he could have performed his duties if Defendants secured the wall and that this would have prevented it from collapsing in the manner in which it did. Accordingly, Plaintiff has not raised a triable issue of fact as to whether Defendants' alleged failure to make inspections was a proximate cause of Plaintiff's injuries. Plaintiff's Labor Law 241(6) claims are therefore dismissed.

III. Labor Law 240

Like Labor Law 241(6), Labor Law 240(1), commonly known as the scaffold law, creates a duty that is nondelegable, and owners, general contractors, and their agents who breach that duty may be held liable regardless of whether they had actually exercised supervision or control over the injury-

causing work. *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 (1993). Specifically, Labor Law 240(1) provides in relevant part:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

"The purpose of this statute is to protect workers and to impose the responsibility for safety practices on those best suited to bear that responsibility . . . ." *Ross*, 81 NY2d at 500. Labor Law 240(1) is limited to specific gravity-related accidents, such as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. *Id.* at 501. A violation of this duty that proximately causes injuries to a member of the class for whose benefit the statute was enacted renders the owner, general contractor, or agent strictly liable for such injuries. *See Callan v Structure Tone, Inc.*, 52 AD3d 334, 335 (1st Dept 2008).

Labor Law 240(1)'s safeguards do not apply to the cinderblock wall itself. The wall was not being "hoisted" or "secured," and there is nothing to show that there were any special circumstances that required it to be braced while being demolished. This makes sense from a practical standpoint since, as Defendants assert, the very nature of the work was to break the wall apart. Plaintiff does not submit an expert report to challenge Mr. Sherbansky's conclusions in this regard, nor does he identify any equipment Plaintiff's employer or the Defendants could have utilized under the circumstances that would have prevented the wall from striking the scaffold.

The real issue is whether the scaffold was properly constructed. "In cases involving ladders or scaffolds that collapse or malfunction for no apparent reason", the Court of Appeals has "continued to aid plaintiffs with a presumption that the ladder or scaffolding device was not good enough to afford proper protection. . . . Once the plaintiff makes a prime facie showing the burden then shifts to the defendant, who may defeat plaintiff's motion for summary judgment only if there is a plausible view

of the evidence – enough to raise a fact question – that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident." *Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, n.8 (2003). Here, Plaintiff's testimony that he was told to demolish the walls from the bottom up, that the scaffold was unstable, that it shifted back and forth while using his jackhammer, and that it toppled over as the detached wall portion fell upon it is sufficient to make a *prima facie* showing of a Labor Law 240(1) violation. *See Thompson v St. Charles Condos.*, 303 AD2d 152, 154 (1st Dept 2003) ("where a safety device has been furnished, and it collapses, a prima facie case of liability under Labor Law § 240(1) is established.").

But, Plaintiff is not entitled to summary judgment on the issue of liability since the testimony and evidence raise the possibility that there might not have been a statutory violation. Indeed, Plaintiff does not assert that the scaffold was missing any parts or that United Drilling failed to provide him with other necessary safety equipment, such as a harness. It is also important to note that the scaffold did not actually break apart or collapse until after it had tipped over and was struck with the massive wall piece that fell on it. Defendants' expert concluded that because the piece of wall that fell was so heavy and fell with such incredible force, a baker scaffold like the one used by the Plaintiff would not have been able to stay upright whether or not it was defective. Again, Plaintiff did not submit a competing expert report to rebut this conclusion. While the scaffold may have shaken during the demolition, or "vibrated" as Plaintiff testified, a trier of fact could determine that these vibrations were the natural and normal consequence of the fact that Plaintiff was using a jackhammer. In point of fact, Plaintiff testified that the vibrations were a normal part of the job and thus he did not see fit to complain (Gelvez Deposition pp. 65, 97). Under these circumstances, a trier of fact could determine that the scaffold was operating properly.

Again, Defendants' contention is that Plaintiff's injuries were the result of his own actions. Liability under Labor Law 240(1) does not attach if a plaintiff's action is the sole proximate cause of

his injuries. *Weininger v Hagedorn & Co.*, 91 NY2d 958, 960 (1998) (*see also Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 (2004) (a plaintiff may be deemed to be the sole proximate cause of his injuries where the "plaintiff had adequate safety devices available . . . knew both that they were available and that he was expected to use them . . . chose for no good reason not to do so," and would not have been injured had he used an adequate safety device). Here, both Mr. Costidis and Mr. Cisneros testified that they always instructed workers to demolish walls from the top down and never instructed the Plaintiff to do otherwise. According to Defendants, Plaintiff chose to demolish the wall from the top down in order to finish the job quickly so he could leave for a soccer game. Read in conjunction with Mr. Sherbansky's uncontradicted report that the wall broke because of the method by which Plaintiff chose to perform his duties, Defendants' have raised a sole proximate cause issue for trial.

The cases Plaintiff cites in support of its summary judgment motion are all distinguishable from the case at bar. For example, Plaintiff relies upon *Saldivar v Lawrence Dev. Realty, LLC*, 95 AD3d 1101 (1st Dept 2012) for the proposition that a court may grant summary judgment to a plaintiff injured when falling debris disrupts his/her demolition activities. In that case, however, the scaffold on which the plaintiff was standing before it collapsed was makeshift, nothing more than a wooden plank on top of a few A-frame ladders, and clearly inappropriate for the job. The plaintiff in *Rivera v Dafna Constr. Co., Ltd.*, 27 AD3d 545 (2d Dept 2006) was injured while attempting to demolish a 10-foot high ceiling while standing on an unsecured A-frame ladder when a large portion of the ceiling collapsed, causing the plaintiff to fall. Neither party disputed that defendants provided no safety devices. In granting the plaintiff summary judgment as to liability under Labor Law 240, the court noted that the defendant did not offer any evidence to undermine the plaintiff's prima facie case or present a triable issue regarding the plaintiff's credibility as to a material fact. *Id.* at 545-46. Just the

opposite is true here. As set forth above, Defendants have offered deposition testimony which they believe raises questions regarding Plaintiff's credibility.

Notwithstanding, Defendants are not entitled to summary judgment either. Glaringly absent from the record is deposition testimony from Mr. Ortiz, the only person who may have actually witnessed Plaintiff's accident. For whatever reason, he was not deposed. However, according to the other witnesses he is the one who told them that Plaintiff demolished the wall from the ground up in order to get to a soccer game. Without his first-hand account of the accident, Defendant's proximate cause argument is arguably based upon hearsay, which cannot form the basis of a summary judgment motion. *See Wertheimer v New York Prop. Ins. Underwriting Ass'n*, 85 AD2d 540, 541 (1st Dept 1981) ("evidence, otherwise excludable at trial, may be considered to deny a motion for summary judgment provided that this evidence does not form the sole basis for the Court's determination."). This conclusion holds especially true in light of Plaintiff's testimony that he performed his work in the manner in which he was directed to by his employer. His is the only first-hand account of the accident in the record, and the court must view it as true in considering Defendants' motion. *See Maheras v Awan*, 151 AD3d 643, 645 (1st Dept 2017) (when considering a defendant's summary judgment motion the facts must be viewed in a light most favorable to plaintiff with all reasonable inference being drawn in plaintiff's favor).

In sum, the testimony raises many material issues of fact. These issues include whether the scaffold was unstable and unfit for use as Plaintiff argues, or whether its movement was the natural, safe, and normal consequence of Plaintiff's jackhammer making contact with the wall. The record is not entirely clear whether Plaintiff acted on his own to demolish the wall from the ground up or did so only at the behest of his foreman. If the trier of fact finds Plaintiff's account to be credible, a jury could also determine both that the collapse of the wall was foreseeable, and that the baker scaffold, even if properly constructed, was not sufficient for the job in question. All of these issues require a

determination as to each witnesses credibility, a task that must be undertaken by the trier of fact at trial, not by the court on these summary judgment motions. *See Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 255 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ."); *see also Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013); *Alvarez v NY City Hous. Auth.*, 295 AD2d 225, 226 (1st Dept 2002); *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996). Accordingly, Defendants' motion to dismiss Plaintiff's Labor Law 240 claims is denied, and Plaintiff's motion for summary judgment on its Labor Law 240 claim is denied.

IV. IME Watchdog

Before the note of issue was filed in this case, but after Plaintiff's IME's were completed, Defendants moved for an order directing additional IME's outside the presence of an IME Watchdog. I denied Defendants' motion by order dated January 12, 2017.[15] At that time, the law permitted the plaintiff to have a representative present during a physical examination provided that the representative did not interfere with the conduct of the examination. *See Ramsey v N.Y. Univ. Hosp. Ctr.*, 14 AD3d 349, 350 (1st Dept 2005); *Bermejo v New York City Health & Hosps. Corp.*, 135 AD3d 116, 143 (2d Dept 2015); *Ponce v Health Ins. Plan*, 100 AD2d 963, 964 (2d Dept 1984). Finding that neither of Plaintiff's IME's were hampered as a result of the IME Watchdog, the court saw no reason to compel any further examinations. Neither party appealed from that order.

Since then, the First Department decided *Kattaria v Rosado*, 146 AD3d 457 (1st Dept 2017), which Defendants rely upon for the proposition that IME Watchdogs should be barred from testifying at trial. In *Kattaria*, the court found that the motion court "providently exercised its discretion" in granting defendant's motion to exclude non-attorneys from the plaintiff's IME since plaintiff did not "timely object to defendant's notice" and "failed to demonstrate 'special and unusual circumstances'

[15] The court's prior order is incorporated herein by reference and made a part hereof.

warranting the nonlegal representative's presence" (*id.* at 458). A few months later, however the First Department clarified that *Kattaria* does not comport with New York Law (*Santana v Johnson*, 154 A.D.3d 452, 452 [1st Dept 2017]):

> To the extent that this Court has implicitly suggested that a representative can be barred from an examination if the plaintiff fails to demonstrate special and unusual circumstances (*see Kattaria v Rosado*, 146 AD3d 457 [1st Dept 2017]), that is not the current state of the law in either the First, Second or Fourth Departments and is inconsistent with the general principle that plaintiffs are entitled to have a representative present at their medical examinations. . . .

The *Santana* court reaffirmed that "Plaintiffs are entitled to have a representative present at their physical examinations as long as the representative does not interfere with the examinations conducted by defendants' designated physician or prevent defendants' physician from conducting a meaningful examination." *Id.* at 452; *see also Guerra v McBean*, 127 AD3d 462, 462 (1st Dept 2015); *Henderson v Ross*, 147 AD3d 915, 916 (2d Dept 2017); *Marriott v Cappello*, 151 AD3d 1580, 1582 (4th Dept 2017). With this standard in mind, and in light of my prior ruling that the IME Watchdogs in this case did not prevent the IME doctors from conducting a meaningful examination, Defendants' motion is denied. In fairness, however, Defendants are given leave to depose the specific IME Watchdog(s) who accompanied Plaintiff to his IMEs and vocational rehabilitation assessment. *See Santana, supra*, at 452.

CONCLUSION

Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgment is denied in its entirety; and it is further

ORDERED that Defendants' summary judgment motion is granted with respect to Plaintiff's Labor Law 200, Labor Law 241(6), and common law negligence claims against them; and it is further

ORDERED that Defendants' summary judgment motion is otherwise denied; and it is further

ORDERED that Defendants' motion to preclude the testimony and reports of any IME Watchdogs who accompanied Plaintiff to his IMEs is denied; and it is further

ORDERED that Defendants are given leave to depose the IME Watchdogs. Any such depositions must be noticed within 20 days of the date of entry of this decision and must be completed no later than 30 days after being noticed.

The Clerk of the Court shall enter judgment and mark his records accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 1.9.18

SHERRY KLEIN HEITLER, J.S.C.