

<b>Hanratty v 56 Leonard LLC</b>
2018 NY Slip Op 31092(U)
May 31, 2018
Supreme Court, New York County
Docket Number: 159320/2014
Judge: Gerald Lebovits
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY: PART 7

EMMETT A. HANRATTY,

Plaintiff,

-against-

56 LEONARD LLC & LEND LEASE (US)  
CONSTRUCTION LMB, INC.,

Defendants.

Index No.: 159320/2014  
**DECISION/ORDER**  
Motion Sequence No. 3

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants' motion for summary judgment.

<b>Papers</b>	<b>Numbered</b>
Defendants' Notice of Motion .....	1
Plaintiff's Affidavit in Opposition .....	2
Defendants' Reply Affirmation .....	3

*Edelman, Krasin & Jaye, PLLC*, Westbury (Kara M. Rosen of counsel), for plaintiff.  
*Ropers Majeski Kohn & Bentley*, New York (Douglas H. Miller of counsel), for defendants.

Gerald Lebovits, J.

Defendants 56 Leonard LLC (56 Leonard) and Lend Lease Construction (Lend Lease) move under CPLR 3212 for summary judgment as well as to strike plaintiff's errata sheet in which plaintiff corrected his examination before trial (EBT) testimony. Plaintiff, Emmett Hanratty, argues that material issues of fact require a trial and that his errata sheet should be admitted into evidence.

In his complaint, Hanratty alleges that he was injured on December 24, 2013, while he was working as a plumber for a construction project at 56 Leonard Street in New York County. The building was allegedly owned by 56 Leonard. Lend Lease entered into a contract with 56 Leonard for Lend Lease to provide construction management and general contracting services for the construction project. Lend Lease contracted with Almar Plumbing & Heating Corporation (Almar), plaintiff's employer, for its plumbing services on the construction project.

Plaintiff maintains that he worked at 56 Leonard Street for Almar. Plaintiff was Almar's foreman, supervising Almar plumbers at the job site. (Defendants' Notice of Motion, Exhibit E, Hanratty EBT, at 23-24, 42-44.) At his EBT he testified that his accident occurred as he was giving directions to a journeyman. (*Id.* at 49, 52.) Plaintiff testified that he injured himself on a pallet jack.

Plaintiff refers to the object as a pallet jack, pump jack, and pilot jack. For purpose of consistently, the court will refer to it as a pallet jack. Plaintiff described the pallet jack as a forklift with two arms; it has a handle that one can pump hydraulically up to move carts and heavy items. (*Id.* at 54, lns 13-18.) It is about six feet long by three feet wide. (*Id.* at 54, lns 20-23.)

Defendants move for summary judgment to dismiss plaintiff's New York Labor Law claims under § 240 (1), § 241 (6), § 200, and common-law negligence. In support of their summary-judgment motion, defendants contend that plaintiff's changes on the errata sheet were improper because they substantively changed his EBT testimony and are tailored to avoid the consequences of his original testimony. Defendants argue that the reasons plaintiff gave in the amended errata sheet — for "clarification" or "correction" purposes — are unacceptable.

Also, defendants contend that Lend Lease is not a general contractor or owner of the project and therefore is not liable under New York Labor Law. Defendants define Lend Lease's role as that of construction manager and that role was merely administrative and managerial. (Defendant's Notice of Motion, Exhibit P.) Defendants maintain that the subcontractors — such as Almar — were self-directing and that Lend Lease's role largely consisted of reviewing the work according with the plans rather than as a general contractor, who has the authority to supervise and control the job. (Defendants' Notice of Motion, Exhibit F at 35-36.)

In support of their motion, defendants allege that the facts do not support a § 240 (1) violation. Defendants also allege that plaintiff's EBT testimony was that he denied tripping and falling. His original testimony is that plaintiff's foot became stuck in the pallet jack which then caused him to fall. Defendants maintain that plaintiff denied at his EBT that debris played a role in causing his accident. On his errata sheet, however, plaintiff testified that he first made contact with the pallet jack with his right foot and then was unable to stabilize himself with his left foot because he stepped on a loose pile of debris causing him to fall. (Defendants' Notice of Motion, Exhibit I.) Because of these alleged facts, defendants maintain that plaintiff's claim under § 241 (6) and the various claims under the Industrial Code, § 23-1.7 (e) and § 23-2.1, are without merit.

Defendants also argue that although § 200 may impose a general duty on general contractors and owners, plaintiff's claim is not substantiated because the condition — the pallet jack in which plaintiff got his foot stuck — was an open and obvious condition.

Plaintiff opposes the motion to strike the amended errata sheet. He argues that the corrections he made to his EBT testimony were timely, permissible, consistent, and reasoned. Plaintiff further contends that a court may not determine credibility issues on a motion for summary judgment.

Plaintiff argues that Lend Lease is a general contractor as defined under New York Labor Law. Plaintiff alleges that Lend Lease's role, as defined in its contract with 56 Leonard, was not designated as a general contractor. Plaintiff, however, argues that defendant Lend Lease was substantially in charge of and in supervisory control of the worksite. Lend Lease allegedly managed the day-to-day activities of the construction process, was responsible for safety, had

various managers on site such as a fire safety manager and a site safety manager, and provided laborers in charge of cleaning the debris. (Defendants' Notice of Motion, Exhibit F, at 13-14, 36-37, 39.)

Plaintiff also opposes defendants' motion for summary judgment under § 241 (6). Plaintiff argues that defendants have failed to establish that the pallet jack was not a tripping hazard under Industrial Code § 23-1.7 (e) (2). Plaintiff alleges that defendants have failed to establish that the debris in the area of the accident did not contribute to the accident and that the pallet jack was not an integral part of the work performed.

Also, plaintiff alleges that defendants are liable under Industrial Code § 23-2.1 because the pallet jack was not in use and was improperly stored in the work area. Plaintiff contends that because the pallet jack was improperly stored, the pallet jack caused debris to accumulate on the pallet jack creating a dangerous condition.<sup>1</sup> (See Plaintiff's Affirmation in Opposition.)

Plaintiff also opposes defendants' motion for summary judgment under § 200. Plaintiff alleges that the pallet jack contributed to a dangerous condition because it was left in the middle of the floor and its forks were obscured by a debris pile; therefore, plaintiff contends, the pallet jack contributed to the accident. (Defendants' Notice of Motion, Exhibit E at 52.) Plaintiff also contends that the pallet jack was not an open and obvious condition. (Plaintiff's Affirmation in Opposition.) In any event, plaintiff contends whether the pallet jack was an open and obvious condition is a fact for a jury to decide.

I. Motion to Strike the Errata Sheet

Defendants' motion to strike the errata sheet is denied.

CPLR 3116 (a) provides that witnesses may make "changes in form or substance" to their deposition testimony as long as such changes are accompanied by "a statement of the reasons given by the witness for making them." A court will reject corrections on an errata sheet where a witness's proffered reason for the change is inadequate. (*Torres v Bd. Of Educ. Of City of N.Y.*, 137 AD3d 1256, 1257 [2d Dept 2016], citing *Ashford v Tannenhauser*, 108 AD3d 735, 736 [2d Dept 2013].) A court will find unpersuasive a witness's errata sheet when a witness does not provide a reason for correcting the errata sheet. (See *Smith v Costco Wholesale Corp.*, 50 AD3d 499, 501 [1st Dept 2008]; accord *Cillo v Resjefal Corp.*, 295 AD2d 257, 257 [1st Dept 2002] ["Defendant's motion to strike plaintiffs' amended errata sheets or for further depositions was properly denied since a witness may make substantive changes to his or her deposition testimony provided the changes are accompanied by a statement of the reasons therefor."].) A witness who uses an errata sheet to make "material or critical changes to testimony" is also prohibited. (*Torres*, 137 AD3d at 1257, citing *Horn v 197 5th Ave. Corp.*, 123 AD3d 768, 770 [2d Dept 2014].)

In *Torres*, the Second Department struck plaintiff's errata sheets relating to plaintiff's EBT testimony. (137 AD3d at 1256.) The *Torres* Court noted the following:

<sup>1</sup> Plaintiff did not testify that the pallet jack was improperly stored.

“Here, the defendants demonstrated that the plaintiff made numerous and significant corrections to his deposition testimony on his errata sheets. Such corrections sought to substantively change portions of the plaintiff’s deposition testimony which would have been in conflict with his earlier testimony at his General Municipal Law § 50–h hearing on issues concerning the basis for the defendants’ alleged negligence as alleged in the plaintiff’s pleadings. Moreover, the plaintiff’s stated reasons that he ‘mis-spoke’ and that he was clarifying his testimony were inadequate to warrant the corrections.” (*Id.* at 1257.)

If changes to an errata sheet raise issues of credibility, the issue of credibility should be decided by a jury. (*Cillo*, 295 AD2d at 257 [“The changes raise issues of credibility that do not warrant further depositions but rather should be left for trial.”]; *accord Binh v Bagland USA, Inc.*, 286 AD2d 613, 614 [1st Dept 2001] [holding that the court “correctly ruled that the conflict between the original deposition testimony and the errata sheet raised an issue of credibility inappropriate for summary judgment treatment. Upon this record, plaintiff’s deposition correction does not appear to be patently untrue or tailored to avoid the consequences of his earlier testimony, made as it was before defendants moved for summary judgment.”]; *Boyce v Vasquez*, 249 AD2d 724, 726 [3d Dept 1998] [“Decedent also contends that the corrections should not be considered because they are not credible. This contention is unavailing since it is not the court’s function on a summary judgment motion to assess credibility unless untruths are clearly apparent. On the present state of the record, plaintiff’s corrections do not appear to be patently untrue as they conform to Vazquez’s version of the accident and, thus, we shall leave the credibility issue to the jury.”] [citations omitted].)

At his EBT, plaintiff explained that he caught his foot under the pallet jack, under the forklift. (Defendants’ Notice of Motion, Exhibit E, at 56.) At his EBT, plaintiff testified about the pallet jack and the debris as follows:

“I was actually giving directions and going over a few things looking and as I turned to walk there was a pile of debris all around me that was being gathered and I basically turned – I was done speaking, I was going to go talk to somebody else, turned to my right and actually caught my work boot under like a little pilot jack, a pump jack and I actually rolled and fell on the debris, fell down to the ground and my boot was caught in – my ankle got caught underneath and it didn’t come up with me and it broke.” (Defendants’ Notice of Motion, Exhibit E, at 52, Ins 5-17.)

Plaintiff further testified that he “fell into the debris.” (Defendants’ Notice of Motion, Exhibit E, at 54, Ins 3-4.) He explained that “there was debris over [him] that [he] was trying to step around and [he] caught [his] leg underneath the pilot jack. [He] didn’t see it there.” (Defendants’ Notice of Motion, Exhibit E, at 57.) He explains that “as soon as [he] turned to the right [he] caught,

[he] was in the midst of the debris and the pump jack itself.” (Defendants’ Notice of Motion, Exhibit E, at 58.)

He also testified to the following about the pallet jack and the debris:

“I am not sure if the pump jack was level as it should be or it was just kind of in with the debris. It could have been tilted to the side enough for me to get under. I am not sure exactly how far off the ground it was, but when I took a step I was under it.” (Defendants’ Notice of Motion, Exhibit E, at 59-60.)

\* \* \*

“Q: So it’s fair to say you don’t know if the debris played any role in this accident?

A: It’s fair to say.

Q: There may have been debris there, but your foot got caught under the fork arm of the pump jack?

A: Well, there was definitely debris there and as far as the pump jack that is where – just where my foot got caught. I am not sure if I would have even fell if there wasn’t debris as well, because my next leg over was my left leg and I stepped on the sheetrock and went down, but my right leg caught underneath.” (Defendants’ Notice of Motion, Exhibit E, at 61.)

On August 3, 2015, plaintiff submitted an amended errata sheet to his EBT. (Defendants’ Notice of Motion, Exhibit I.)

Plaintiff made eight corrections to his EBT. Only six of the eight corrections are relevant on this motion.<sup>2</sup>

**A. Correction to page 54, line 7**

At his EBT, he was asked “the debris didn’t actually cause you to fall, correct?” (Defendants’ Notice of Motion, Exhibit E, at 54, ln 5-6.) He answered: “that’s correct.” (Defendants’ Notice of Motion, Exhibit E, at 52, ln7.)

On his errata sheet he states that his answer should read: “I first made contact with the pilot jack with my right foot and then was unable to stabilize myself with my left foot which stepped on a loose pile of debris causing me to fall.” (Defendants’ Notice of Motion, Exhibit I.)

Plaintiff has not materially or critically changed his testimony. Plaintiff’s correction is consistent with his EBT testimony.

**B. Correction to page 55, line 22**

At his EBT, he was asked: “When you see them [pallet jack] they are big things, they

---

<sup>2</sup> He corrected his EBT twice to reflect that the incident occurred on the third floor, not the second floor. (Defendants’ Notice of Motion, Exhibit I.)

are pretty obvious that you see them?" (Defendants' Notice of Motion, Exhibit E, at 55.) He answered "Yes." (Defendants' Notice of Motion, Exhibit E, at 55, line 22.)

On his errata sheet, he states that his answer should read: "Yes but the forks were obscured by the pile of debris." (Defendants' Notice of Motion, Exhibit I.)

Plaintiff has not materially or critically changed his testimony. Plaintiff's correction is consistent with his EBT testimony about the debris and the pallet jack. And in any event, plaintiff explains that he is correcting and clarifying his answer. (Defendants' Notice of Motion, Exhibit I.)

#### **C. Correction to page 57, line 21**

At his EBT, plaintiff testified to the following: "I was trying to step around and I caught my leg underneath the pilot jack. I didn't see it there." (Defendants' Notice of Motion, Exhibit E, at 57, lines 20-22.)

On his errata sheet, he states that his answer should read: "I caught my leg under the fork of the pilot jack which was not visible."

Plaintiff has not materially or critically changed his testimony. Plaintiff's correction is consistent with his EBT testimony. And in any event, plaintiff explains that he is correcting and clarifying his answer. (Defendants' Notice of Motion, Exhibit I.)

#### **D. Correction to page 61, line 10**

At his EBT, he answered that it is "fair to say" that he did not know if the debris played any role in this accident. ((Defendants' Notice of Motion, Exhibit E, at 61, line 10.)

On his errata sheet, he states that his answer should read: "It prevented my left foot from stabilizing me and it obscured the forks on the pump jack." (Defendants' Notice of Motion, Exhibit I.)

Plaintiff has not materially or critically changed his testimony. Plaintiff's correction is consistent with his EBT testimony. And in any event, plaintiff explains that he is correcting and clarifying his answer. (Defendants' Notice of Motion, Exhibit I.)

#### **E. Correction to page 61, lines 14-21**

His correction to page 61, lines 14-21 is an addition to the word "which moved" after sheetrock:

"Well, there was definitely debris there and as far as the pump jack that is where – just where my foot got caught. I am not sure if I would have even fell if there wasn't debris as well, because my next leg over was my left leg and I stepped on the sheetrock *which moved* and went down, but my right leg caught underneath." (emphasis added.)

Plaintiff has not materially or critically changed his testimony.

**F. Correction to page 62, lines 9-10**

At his EBT he testified that “[w]hen [his] left leg struck it stood on the debris itself and then [he] went down.” On his errata sheet, he states that his answer should read: “When my left leg struck it stood on the debris itself, which moved, and then I went down.” (Defendants’ Notice of Motion, Exhibit I.)

Plaintiff has not materially or critically changed his testimony.

Defendants’ motion to strike plaintiff’s errata sheet is denied. Plaintiff has not materially and critically changed his EBT testimony.

In any event, if his changes to the errata sheet raise issues of credibility, the issue of credibility should be decided by a jury. (*See Cillo*, 295 AD2d at 257.) It is “not the court’s function on a summary judgment motion to assess credibility unless untruths are clearly apparent.” (*Boyce*, 249 AD2d at 726.) Plaintiff’s corrections do not appear to be patently untrue as they conform to his version of the accident. (*See id.*)

**II. Whether Lend Lease is a General Contractor under New York Labor Law**

Lend Lease is a general contractor under New York Labor Law.

A construction manager is a general “contractor” within the meaning of New York Labor Law if the “‘construction manager’ was substantially in charge of and in supervisory control of the worksite.” (*Kenny v Fuller Co*, 87 AD2d 183 [2d Dept 1982].) Whether Lend Lease qualifies as a general contractor is determined by their actions rather than what the parties define its role in the parties’ contract. Therefore, defendants’ contention that the contract between 56 Leonard LLC and Lend Lease defined Lend Lease’s role as a construction manager and that it could delegate responsibility for safety management and for the means and methods of the contractors’ work is unpersuasive.

Lend Lease was substantially in charge of and in supervisory control of the worksite. Not only was it in charge of building the construction project but it also had various safety managers on site throughout the construction. (Defendant’s Notice of Motion, Exhibit F, Powell EBT at 13-14.) Lend Lease employees ran safety meetings. (*Id.* at 28.) Lend Lease employees reviewed the work to be done each day and walked the construction site. (*Id.* at 11-12) Lend Lease was in charge of the construction site because it hired the subcontractors, including Almar, and provided laborers who were directly involved in the construction of the building (*Id.* at 15.)

Therefore, Lend Lease is a general contractor for purposes of New York Labor Law and is a proper defendant in this case.

**III. Defendants' Motion for Summary Judgment**

Defendants' motion for summary judgment is granted in part and denied in part. The movant on 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 . . ." (*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].)

**A. Labor Law § 240 (1)**

56 Leonard and Lend Lease argue that § 240 (1) is not applicable because plaintiff's fall was not an elevation-related incident.

Plaintiff does not oppose this aspect of defendant's motion. In any event, plaintiff denies that he fell from a heightened surface. (*See* Defendants' Notice of Motion, Exhibit E, at 137, Ins. 9-16.) This aspect of defendants' motion seeking summary judgment to dismiss plaintiff's claims under § 240 (1) is granted.

**B. Labor Law § 241 (6)**

Defendants' motion for summary judgment is granted on plaintiff's § 241 (6) claim.

To prevail on a cause of action under Labor Law § 241 (6), a plaintiff must prove a violation of a provision of the Industrial Code that sets forth a specific safety standard. (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 505 [1993].) In *Ross*, the Court of Appeals held that

"for purposes of the nondelegable duty imposed by Labor Law § 241 (6) and the regulations promulgated thereunder, a distinction must be drawn between provisions of the Industrial Code mandating compliance with concrete specifications and those that establish general safety standards by invoking the '[g]eneral descriptive terms' set forth and defined in 12 NYCRR 23-1.4 (a). The former give rise to a nondelegable duty, while the latter do not." (*Id.*)

Plaintiff must also prove that defendants' violation proximately caused plaintiff's injuries.

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

"[a]ll 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, 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 . . . .”

Labor Law § 241 (6) is not self-executing, and to show a violation of this statute and withstand a motion for summary judgment, plaintiff must show that defendants violated a specific, applicable regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety. (*See Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007].)

Contributory and comparative negligence are valid defenses to claims asserted under Labor Law § 241 (6). (*Ross*, 81 NY2d 494, n 4.) Breaching a duty imposed by a regulation “promulgated under Labor Law § 241 (6) is merely some evidence of negligence,” which is different from absolute liability under § 240 (1). (*Id.*)

Plaintiff alleges in his verified bill of particulars that defendants violated Industrial Code sections 23-1.5, 23-1.7, 23-17 (d) (e) (f), 23-1.22, 23-1.32, 23-1.33, 23-2.1, 23-2.2, 23-2.4, and 23-3.2. In his opposition papers, plaintiff argues only that defendants violated Industrial Code sections 23-1.7 (e) (2) and 23-2.1.

Section 23-1.7 (e) (2) refers to tripping and other hazards and sets forth in part:

“Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.”

Plaintiff never testified that the pallet jack was a scattered tool; he never testified that it was improperly stored or placed. Nor does plaintiff offer any evidence that the pallet jack was a sharp projection. (*See Defendant’s Notice of Motion, Exhibit E at 54.*)

But the debris could have caused a hazardous condition. (*See Licata v AB Green Gansevoort. LLC*, 158 AD3d 487, 489 [1st Dept 2018] [“Although plaintiff could not state with certainty whether or not the garbage and debris actually covered the hole, when his extensive deposition testimony is viewed in its entirety, an inference may be drawn that strewn garbage and debris obscured his view of the floor and hid the hole from him, even if it did not actually cover it, thereby creating a hazardous condition. . . . Thus, because strewn garbage and debris obstructing his view of the hole may have contributed to plaintiff’s accident, defendants were not entitled to dismissal of his Labor Law § 241(6) claim predicated on 12 NYCRR 23–1.7(e)(2).”] [internal citations omitted].) Given plaintiff’s EBT testimony, the court cannot tell what role the debris played in plaintiff’s accident. Plaintiff testified that he got his foot caught under the pallet

jack. Plaintiff also testified that he did not see the forks of the pallet jack because of the debris. Defendants' motion is denied.

Section 23-2.1, which refers to maintenance and housekeeping, sets forth in part:

“(a) Storage of material or equipment.

(1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.

(2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge.

(b) Disposal of debris. Debris shall be handled and disposed of by methods that will not endanger any person employed in the area of such disposal or any person lawfully frequenting such area.”

Section 23-2.1 (a) (1) is inapplicable. The pallet jack is not building “material” under the Industrial Code. And plaintiff was not in a passageway, walkway, stairway or other thoroughfare when the accident occurred. (*See Militello v 45 W. 36th St. Realty Corp.*, 15 AD3d 158, 158-160 [1st Dept 2005] [finding no violation § 23-2.1(a) (1) where plaintiff was injured while working in a room, “not a passageway”].)

If the debris played any role in his accident, section 23-2.1 (a) (1) also inapplicable; the debris was errant debris, not stored material. (*See Asencio v JP Morgan Chase Bank, N.A.*, 34 Misc 3d 1226 [A], \*2, 2012 NY Slip Op 50261 [U], \*2, 2012 WL 539845, at \*2 [Sup Ct, Queens County 2012] [“[T]he accident did not involve a ‘material pile’ but rather demolition debris and/or tools.”].)

Subsection 2.1 (a) (2) applies only to platforms where material is stored which exceeds the carrying capacity of such platform. Here, plaintiff did not testify that the pallet jack was not in use or was improperly stored. Therefore, liability cannot attach under § 23-2.1 (a). (*See Buckley*, 44 AD3d at 272 [finding that § 23-2.1 [a] does not apply to material and equipment that is properly stored].) In any event, the pallet jack is not stored material.

Section 23-2.1 (b) is not specific enough to give plaintiff a basis for liability under § 241 (6). (*See Quinlan v City of New York*, 293 AD2d 262, 262 [1st Dept 2002] [noting that 23-2.1(b) “does not sufficiently set forth ‘a specific standard of conduct as opposed to a general reiteration of common-law principles’ for its violation to qualify as a predicate for a Labor Law § 241(6) cause of action.”] [internal citations omitted].)

Therefore, defendants' motions for summary judgment dismissing plaintiff's claims under Labor Law § 241 (6) is granted.

**C. Labor Law § 200 and Common-Law Negligence**

Defendants' motion for summary judgment under § 200 and common-law negligence is denied. 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].)

Labor Law § 200 (1) provides, in part:

"[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."

Liability under § 200 "may be based either upon the manner in which the work is performed or actual or constructive notice of a dangerous condition inherent in the premises." (*Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 736 [2d Dept 2008].)

For an owner or its agent to be liable for common-law negligence or a violation of Labor Law § 200 for defects or dangers arising from a subcontractor's methods or means, a plaintiff must show that the owner or agent had the authority to supervise or control the injury-producing work. (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993].)

At issue is the manner in which the work was performed, not whether a defective or dangerous condition existed. Plaintiff testified that the laborers would gather the debris and that they worked for defendant Lend Lease. (Defendants' Notice of Motion, Exhibit E, at 53.)

Defendant Lend Lease's witness, Robert Powell, testified that Lend Lease's laborers were responsible for cleaning the debris. (Defendants' Notice of Motion, Exhibit F at 39.) He testified that at the end of the day, the laborers swept and cleaned the floor and put the garbage and debris in mini containers. (Defendants' Notice of Motion, Exhibit F at 40.) He testified that if he observed any debris that was "not reasonable," he would have someone clean the debris right away. (Defendants' Notice of Motion, Exhibit F at 40.) He stated that he did not observe any unreasonable amount of debris on the day and time of plaintiff's accident. (Defendants' Notice of Motion, Exhibit F at 41.)

Pablo Sobrevilla, a labor foreman for Lend Lease, testified that he observed plaintiff fall. He testified that he did not see any debris near the accident. (Affirmation in Opposition, Exhibit A, at 31.) He testified that he removed debris the morning of the accident. (Affirmation in

Opposition, Exhibit A, at 32.)

A jury must assess plaintiff's, Powell's, and Sobrevilla's credibility. Given their divergent testimonies about the debris, a material issue of fact exists. Summary judgment is thus denied.

Accordingly, it is

ORDERED that defendants Lend Lease and 56 Leonard LLC's motion to strike plaintiff's errata sheet is denied; and it is further

ORDERED that defendants Lend Lease and 56 Leonard LLC's motion for summary judgment is granted and plaintiff's Labor Law § 240 (1) and § 241 (6) claims are dismissed, and the motion is otherwise denied; and it is further

ORDERED that defendants serve a copy of this decision and order with notice of entry on plaintiff and on the County Clerk's office, which is directed to enter judgment accordingly.

Dated: May 31, 2018



**HON. GERALD LEBOVITS**  
J.S.C.