

**Blake v Brookfield Props. One WFC Co., LLC**

2018 NY Slip Op 32150(U)

August 30, 2018

Supreme Court, New York County

Docket Number: 162041/15

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE  
*Justice*

PART 12

-----X

STEVEN BLAKE,  
Plaintiff,

INDEX NO. 162041/15

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 3, 4

BROOKFIELD PROPERTIES ONE WFC CO., LLC,  
*et al.*,  
Defendants.

**DECISION AND ORDER**

-----X

By notice of motion, defendant Holt Construction Corp. moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and any cross claims against it. Plaintiff opposes and cross-moves for an order granting him partial summary judgment on his claim pursuant to Labor Law § 240(1) (mot. seq. three). Holt opposes the cross motion.

By notice of cross motion, defendant Creative Office Pavilion moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross claims against it. Plaintiff and Holt oppose the cross motion on the ground that it is untimely filed.

By notice of motion, defendants Brookfield Properties One WFC Co., LLC, The Clearing House Association, LLC, and The Clearing House Payments Company, LLC (collectively, Brookfield) move pursuant to CPLR 3212 for an order summarily dismissing the complaint and any cross claims against them (mot. seq. four). Plaintiff opposes and moves by cross motion for

an order granting him partial summary judgment on his claim pursuant to Labor Law § 240(1).

Brookfield opposes the cross motion.

The motions are consolidated for disposition.

### I. PERTINENT BACKGROUND

On March 16, 2015, plaintiff was allegedly injured when a wooden cabinet fell on him while he was installing a cabinet on the fifth floor of premises located at 200 Liberty Street in Manhattan, that is owned by a Brookfield Properties entity and leased to Clearing House Association. Clearing House had retained Creative Office Pavilion to provide office furniture for their leased space, which then hired plaintiff's employer Al Lee Installation to perform the installation. (NYSCEF 1, 67).

At the time of plaintiff's accident, Holt was managing construction work on a separate renovation project taking place at the premises. Holt had contracted with Brookfield One for the project, which consisted of a "fit-out" or build-out of the leased office space at issue, with Holt as the project's general manager. Holt agreed to "administer, manage, supervise, direct, coordinate and cause the proper and efficient performance and furnishing, through Subcontractors or its own forces, of all work, labor, materials, equipment, tools . . . required for the complete construction and/or installation" of the project, and to "perform any and all other services that are customarily performed by construction managers" for similar projects. (NYSCEF 81).

A separate contract governed the work Al Lee's work for Creative Office, which required that Al Lee deliver and install furniture at the premises. Creative Office provided the furniture, including mounting hardware, to Al Lee, and Al Lee installed it. The job at issue was to last 30

days, and Al Lee's employees were expected to bring with them to the job site their hand tools and a screw gun. (NYSCEF 78).

On the date of plaintiff's accident, plaintiff's employer directed him to go to the fifth floor, which had been built out into individual offices. Right before his accident, plaintiff was on his knees in front of a desk, leveling the desk return, the piece of furniture that attaches to the left or right side of the desk. Once the return was attached, plaintiff's task was to level it. A co-worker had previously affixed an overhead cabinet and two tack boards to the wall above the desk by wood screws into a stud, which plaintiff conceded was the correct hardware. He described the typical installation of such a cabinet as follows:

A wood cleat is provided by the manufacturer that you install on the wall and there's another piece that comes already installed by the manufacturer on the back of the cabinet in a 45-degree angle, you find the studs first, the wood screws into the studs. If the cleat does not land on a stud you put a toggle bolt there so it doesn't flap away from the wall. And you hang the cabinet onto that cleat.

He identified the tools for installing the cabinet as a screw gun, drill bits, a level, and stud finders. (NYSCEF 75).

While plaintiff was working on the fifth floor, light electrical work was being performed there and carpeting was being installed. Co-workers were installing furniture. Plaintiff received all of his instructions and directions on the project from Al Lee's foreperson. He had previously seen a Holt representative on the premises, who appeared to be in a supervisory capacity, and Al Lee employees would customarily meet with a general contractor or construction manager on a job to ensure that the job site was prepared for the furniture delivery and, "as a courtesy," to ask for direction as to where they could work without interfering with the other work. Plaintiff had no interaction with anyone from Brookfield or Clearing House while he was at the premises. (*Id.*).

## II. LABOR LAW § 240(1)

In pertinent part, Labor Law § 240(1) “was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder 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.” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *Verdon v Port Auth. of N.Y. & N.J.*, 111 AD3d 580, 581 [1<sup>st</sup> Dept 2013]). The statute protects workers engaged in the “erection, demolition, repair, altering, painting, cleaning or pointing of a building or structure.” (Labor Law § 240 [1]).

Plaintiff claims that his work on the project constitutes the “altering of 30-40 new offices on the 5<sup>th</sup> floor of the building which were being ‘built out’ specifically” for Clearing House’s tenancy, and that he was a member of a team involved in a month-long project to alter the offices.” (NYSCEF 110).

“Altering,” within the meaning of Labor Law § 240(1), encompasses “making a significant physical change to the configuration or composition of the building or structure.” (*Joblon v Solow*, 91 NY2d 457, 465 [1998]). In *Joblon*, the Court held that the plaintiff was engaged in altering when he installed a clock on a wall, as it required that he bring an electrical power supply to an adjoining room, extend the wiring within the room, and chisel a hole through a concrete wall to reach the other room. Following *Joblon*, the Court in *Prats v Port Auth. of New York and New Jersey*, observed that “the threshold for altering” is drilling through concrete. (100 NY2d 878, 882 [2003]).

Other cases involving “altering” also reflect work or tasks that are more complex than hanging or installing an item on a wall using screws and brackets. For example, in *Weininger v*

*Hagedorn & Co.*, the plaintiff was engaged in altering when he ran computer and telephone cable through the ceiling from an existing room in an office to a new space, which involved standing on a ladder to access holes punched in the ceiling and pulling wiring through canals that had been made in the ceiling. (91 NY2d 958 [1998]). In *Goodwin v Dix Hills Jewish Ctr.*, the plaintiff's installation of wood paneling on building walls "changed the dimension, thickness, and composition of the sheetwork walls and steel doors," and thus constituted a significant physical change. (144 AD3d 744, 746 [2d Dept 2016]). And in *Smith v Pergament Enter. of S.I.*, in order to install computer equipment in an office, the plaintiff ran cable from a server located in one room, up a pillar, into an area above an eight-foot high drop ceiling, pull and toss cable across the area above the ceiling, and then drop it down through the interior walls into various rooms, which required him to remove ceiling tiles and use a saw to cut holes in sheetrock walls near the computer work stations. (271 AD2d 870 [3d Dept 2000]).

Here, plaintiff's leveling of a desk required no attachment to a wall or floor, and thus effected no physical change to a building or structure, and the installation of the cabinet on the wall required nothing beyond screwing a wooden cleat into preexisting wall studs and then hanging the cabinet onto the cleat. Plaintiff does not demonstrate that these tasks involved a "significant" physical change to the composition or configuration of a building or structure. (See e.g., *Lannon v 356 W. 44<sup>th</sup> St. Restaurant, Inc.*, 136 AD3d 528 [1<sup>st</sup> Dept 2016] [installation of flag holders on exterior of building façade not altering as it entailed marking location of screws, drilling three holes for each bracket, placing fasteners in holes, and attaching holders with three screws to hold them in place]; *Adika v Beth Gavriel Bukharian Congregation*, 119 AD3d 827 [2d Dept 2014] [plaintiff not engaged in covered activity while installing decorative wooden panels on walls]; *Bodtman v Living Manor Love, Inc.*, 105 AD3d 434 [1<sup>st</sup> Dept 2013] [drilling of few

holes in roof to attach sign did not constitute altering as it entailed slight change to building]; *Amendola v Rheedlen 125<sup>th</sup> St., LLC*, 105 AD3d 426 [1<sup>st</sup> Dept 2013] [hanging window shades by securing brackets with screws to ceiling or wall and inserting shades into bracket not altering]; *Croce v City of New York*, 297 AD2d 257 [1<sup>st</sup> Dept 2002] [attachment of bulletin board to wall not altering]).

Moreover, plaintiff has not established that his work was part of a larger construction project then underway. Rather, the room in which he worked had been built into an office and there is no indication that any further construction was needed or pending. Nor did plaintiff or Al Lee have any role with the actual buildout of the offices, and it was a co-worker who installed the cabinet that fell on plaintiff. It appears, therefore, that plaintiff's work encompassed the separate and concluding portion of the office buildout, akin to decorating, rather than a part of Holt's construction of the premises, a conclusion supported by plaintiff's testimony that the other work being performed on the floor at the time consisted of light electrical wiring and carpet installation. (See e.g. *Davis v City of New York*, 147 AD3d 904 [2d Dept 2017] [plaintiff's allegation that work part of larger project involving replacement of gas main unsupported by record; gas main work done by different entity and completed before plaintiff began his work, plaintiff and his employer had no role in gas main work, and work performed by plaintiff separate and distinct phase of overall project]; *Jones v Vill. of Dannemora*, 27 AD3d 844 [3d Dept 2006] [while plaintiff alleged that work he performed was undertaken in connection with larger project, third party was in charge of that project, plaintiff's work was not performed contemporaneously with other project, and it fell "into a separate phase easily distinguishable from other parts of the larger construction project"]; see also *Adair v Bestek Lighting and Staging Corp.*, 298 AD2d 153 [1<sup>st</sup> Dept 2002] [plaintiff's task of focusing lights above stage not

altering as lights had already been installed and stage erected and thus work was not part of erection or alteration of stage]).

Defendants thus demonstrate that plaintiff's work does not constitute "altering" and is not a protected activity under Labor Law § 240(1), and plaintiff raises no triable issue in opposition. For the same reason, plaintiff fails to establish his entitlement to judgment on this claim.

### III. LABOR LAW § 241(6)

Pursuant to Labor Law § 241(6), owners and contractors bear a non-delegable duty to provide workers with reasonable and adequate protection and safety. To establish a violation of this section, a plaintiff must show that the defendants violated a regulation setting forth a specific standard of conduct. Given the non-delegable duty imposed on an owner and general contractor, a plaintiff need not establish that a defendant and general contractor had notice of the alleged violation or caused or created it by exercising supervision and control over the injury-producing work. (*See Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998] [general contractor may be held liable despite absence of control over worksite or notice of violation]; *Rubino v 330 Madison Co., LLC*, 150 AD3d 603 [1<sup>st</sup> Dept 2017] [owner and/or general contractor's lack of notice irrelevant to liability]; *Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955 [2d Dept 2013] [plaintiff need not show that defendants exercised supervision and control over work or worksite]).

Plaintiff relies on the following industrial code rules and regulations as the basis for his Labor Law § 241(6) claim: 12 NYCRR 23-1.5(c)(3) and 23-1.7(a). He is deemed to have waived reliance on any other regulations.

A. 12 NYCRR § 23-1.5(c)(3)

A claimed violation of 12 NYCRR § 23-1.5(c)(3) is sufficiently specific to support a claim under Labor Law § 241(6). (*Salerno v Diocese of Buffalo*, 161 AD3d 1522 [4<sup>th</sup> Dept 2018]; *Becerra v Promenade Apartments, Inc.*, 126 AD3d 557 [1<sup>st</sup> Dept 2015]). However, the regulation requires that “all safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged.” Plaintiff submits no evidence or authority establishing that the cabinet which fell on him or any part of the cabinet constitutes a safety device, safeguard, or equipment. (*See e.g., Jackson v Hunter Roberts Constr. Group, LLC*, 161 AD3d 666 [1<sup>st</sup> Dept 2018] [ramp which allegedly bowed while plaintiff walked on it and caused him to lose balance did not constitute safety device, safeguard, or equipment, and thus 12 NYCRR § 23-1.5(c)(3) inapplicable]).

To the extent that plaintiff’s expert identifies the absence of anti-dislodgement screws to secure the cabinet to the wall as an absent “safety device,” the industrial regulation at issue pertains to the provision of non-defective and operable safety devices, not the failure to supply them. (*See e.g., Zaino v Rogers*, 153 AD3d 763 [2d Dept 2017] [12 NYCRR 23-1.5(c)(3) requires repair of safety defects]; *McKee v Great Atlantic & Pacific Tea Co.*, 73 AD3d 872 [2d Dept 2010] [as regulation requires employers to provide equipment in good repair, it was inapplicable absent allegation that plaintiff was using equipment that was defective or in need of repair]).

In any event, in *Fabrizi v 1095 Ave. of the Americas, LLC*, the Court held that a compression and set screw coupling, the purpose of which was to keep together a box containing wires affixed to a wall, and not to provide protection against the risk of falling on a worker, did

not constitute a safety device as defined by the Labor Law, and thus the failure to provide or use a “more secure” coupling is not a violation of the Labor Law. (22 NY3d 658 [2014]). Similarly, in *Honeyman v Curiosity Works, Inc.*, it was held that a pin and bracket system used to support an exhibition booth was not meant to function as a safety device, and thus the failure to use such a system or its defectiveness did not support the plaintiff’s Labor Law claim arising from the fall of the booth’s panels on him. (154 AD3d 820 [2d Dept 2017]; see also *Carlton v City of New York*, 161 AD3d 930 [2d Dept 2018] [tack welds used to secure flange did not constitute safety device]).

Defendants thus establish that this industrial code violation does not apply here, and plaintiff does not demonstrate a triable issue of fact.

B. 12 NYCRR 23-1.7(a)(1)

Pursuant to 12 NYCRR § 23-1.7(a)(1) (“overhead hazards”), “every 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, consisting of planks, plywood, or other equivalent materials.” Absent any record evidence suggesting that plaintiff was working in a place “normally exposed to falling material or objects,” this regulation is inapplicable. (See e.g., *Daly v City of New York*, 254 AD2d 214 [where plaintiff was injured while working at ground level lubricating joint and ceiling collapsed on him, he presented no evidence that work he was engaged in was normally exposed to falling material or objects]).

Moreover, plaintiff’s expert does not mention a violation of this regulation in his report. (See e.g., *Murphy v Broadway 48-49<sup>th</sup> St. Assocs.*, 246 AD2d 392 [1<sup>st</sup> Dept 1998] [plaintiff did not establish claim for violation of industrial code regulation absent expert testimony or proof of industry standards showing that regulation applied to facts at issue]).

As plaintiff was not engaged in altering within the meaning of Labor Law § 240(1), he likewise fails to show that he was engaged in a protected activity under Labor Law § 241(6). (*Cf. Joblon v Solow*, 91 NY2d 457 [1998] [as plaintiff engaged in altering under Labor Law § 240(1), he stated claim for violation of section 241(6), which applies to work performed in, among others, alteration of buildings or other structures]).

#### IV. LABOR LAW § 200 and NEGLIGENCE

Pursuant to Labor Law § 200, an owner may not be held liable for failing to provide a safe place to work for any alleged injuries arising out of the method and manner of the work being performed, unless it actually exercised supervisory control over the injury-producing work. (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1<sup>st</sup> Dept 2012]).

While plaintiff argues that the defectively-installed cabinet constitutes a dangerous condition on the premises, his allegations essentially implicate the means and manner in which he performed his work and not a defect inherent in the worksite. (*See Cappabianca*, 99 AD3d at 144 [liability for dangerous condition on premises generally pertains to “a defect inherent in the property,” not to manner in which work performed]; *Villanueva v 114 Fifth Ave. Assocs. LLC*, 162 AD3d 404 [1<sup>st</sup> Dept 2018] [no evidence that Labor Law § 200 claim arose from alleged defect or dangerous condition on premises; “(w)here a defect is not inherent but is created by the manner in which the work is performed, the claim under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing on the premises.”]). In any event, plaintiff alleges that the cabinet was defectively installed by his co-worker, not by defendants, and there is no evidence that Holt and/or Brookfield had notice of the defective installation.

Plaintiff neither argues nor offers proof establishing that Holt or Brookfield actually exercised supervision and/or control over his work. (*See Suconota v Knickerbocker Props., LLC*,

116 AD3d 508 [1<sup>st</sup> Dept 2014] [defendant did not control work that caused plaintiff's accident as plaintiff testified that he worked solely under supervision of his employer-subcontractor's foreman and did not receive direction from anyone else]; *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446 [1<sup>st</sup> Dept 2013] [plaintiff worked under direction of his own employer's foreman and was not supervised by anyone else]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378 [1<sup>st</sup> Dept 2007] [plaintiff testified that defendant did not tell plaintiff's employer or its employees how to perform its work and defendant testified that it did not supervise subcontractors' work and did not tell them what to do]; *see also Castellon v Reinsberg*, 82 AD3d 635 [1<sup>st</sup> Dept 2011] [as it was undisputed that defendant did not tell plaintiff how to do his work, plaintiff's Labor Law § 200 claim should have been dismissed]).

Thus, dismissal of these claims is warranted. (*See Galvez v Columbus 95<sup>th</sup> St. LLC*, 161 AD3d 530 [1<sup>st</sup> Dept 2018] [Labor Law § 200 and common law negligence claims dismissed as plaintiff's employer, not defendant, installed defective scaffold and defendant had no notice it was inadequate or defective, nor did it supervise, control, or direct plaintiff's work, and its authority to stop unsafe work insufficient to establish requisite degree of control or that it actually exercised control]).

#### V. CREATIVE'S CROSS MOTION

As Creative interposed its motion for summary judgment more than 60 days after the note of issue was filed, in contravention of the Part rules, it is untimely. (CPLR 3212). Moreover, absent any allegation or showing of good cause, and as Holt sought no relief in its motion against Creative nor Creative against Holt, and as Creative moved to dismiss plaintiff's complaint on grounds that are not "nearly identical" to those raised in Holt's timely motion, the cross motion is not considered. (*See Muqattash v Choice One Pharmacy Corp.*, 162 AD3d 499 [1<sup>st</sup> Dept 2018])

[court properly declined to consider untimely cross motions absent good cause for delay, and as motions were not true cross motion as they sought relief against nonmoving parties, and did not raise nearly identical issues to timely motions]).

#### VI. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants Holt Construction Corp.'s motion (sequence three) for an order granting it summary judgment is granted to the extent of dismissing plaintiff's claims and all cross claims against it, and the complaint is severed and dismissed as against said defendant with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; it is further

ORDERED, that plaintiff's cross motions for partial summary judgment on liability are denied; it is further

ORDERED, that defendant Creative Office Pavilion's cross motion for summary judgment is denied; it is further

ORDERED, that the motion of defendants Brookfield Properties One WFC Co., LLC, The Clearing House Association, LLC, and The Clearing House Payments Company, LLC for an order granting them summary judgment (sequence four) is granted to the extent of dismissing plaintiff's claims and all cross claims against them, and the complaint is severed and dismissed as against said defendants with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

8/30/2018

DATE

  
BARBARA JAFFE, J.S.C.

HON. BARBARA JAFFE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

DO NOT POST

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE