SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART** **IAS MOTION 18EFM**

Justice

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DANIEL KELLY,

Plaintiff,

- v -

NYU LANGONE HEALTH SYSTEM, TURNER CONSTRUCTION COMPANY

Defendants.

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INDEX NO. 156158/2017

MOTION DATE 04/10/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 84, 85, 86, 87, 90

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Upon the foregoing papers, plaintiff moves for partial summary judgment on his Labor Law § 240 (1) and § 241 (6) claims. Defendants cross move for summary judgment dismissing the complaint in its entirety.

BACKGROUND

Plaintiff commenced the instant action seeking damages for personal injuries allegedly sustained on June 19, 2017 at a construction site while employed as a carpenter by non-party Donaldson Interiors (Donaldson) (NYSCEF Doc. No. 33 [plaintiff's affidavit] at ¶ 3).

In support of plaintiff's motion, plaintiff submits his affidavit, his examination before trial (EBT) testimony, and the EBT testimony of Harry Harriendorf, a site safety manager of defendant Turner Construction Company (Turner), who was deposed on behalf of both defendants.

Plaintiff's EBT Testimony

Plaintiff's employer Donaldson was hired by defendant Turner to perform work at the building located at 534 East 30th Street in the County, City and State of New York, owned by defendant NYU

Langone Health System (NYU). No one from NYU or Turner supervised plaintiff at his job (NYSCEF Doc. No. 38 [plaintiff's EBT transcript] at 30-31).

On the date of the accident, plaintiff and his co-worker were instructed by the Donaldson foreman, Mark McLaughlin, to install a door buck (id. at 30, 37-39). McLaughlin also instructed plaintiff to use a baker scaffold for this task (id. at 39-40). Plaintiff had previous experience with baker scaffolds, but not the particular one at issue in his accident (id. at 40-41). The one he was using that day had a four-foot long platform with corresponding four-foot arms, and six-foot legs (id. at 68). He could not remember if there were four rungs on each side or less (id. at 54).

Plaintiff began his task and locked the wheels on the scaffold, climbed up the rungs to the platform, and performed the work (id. at 42-45). He began to climb down the scaffold the same way as he ascended, using the cross bars, or rungs, on one side of the scaffold (id. at 46). He "stepped over" the first rung and placed his feet on a rung that was a few inches below the platform, and "reached down to grab [his] hands on the top harness[1] to gain [himself]" (id. at 47-48; 56-57). Both feet were on the same rung (id. at 56-57). He then "felt it tipping backwards" (id. at 47-48; 56-57). He felt his body and the scaffold tipping, he panicked and tried to grab something, and was "torqueing" his body looking for something to hold on to, but instead just came down (id. at 48; 57). His right leg "banged off the scaffold" and he landed on his left leg (id. at 57; see id. at 54-58).

At prior job sites, plaintiff testified that he was provided with a ladder when working with a baker scaffold (id. at 63). He could not recall exactly when he had asked his foremen for a ladder, but he asked when he first started on the job site whether he could have a ladder to get onto a baker and his requests were denied (id. at 64-65). He had "asked for a ladder plenty of times and was told that there is a Baker there, you don't need a ladder" (id. at 64).

[1] He also testified that he "bent down to grab the rung to get [his] balance" (id. at 55). It is unclear if "top harness" is the same thing as the "rung" referenced in his testimony.

Turner had a "ladders last" policy, which he was advised of when he first started the job (id. at 65). "We were told that . . . [i]f we wanted a ladder, we needed a permit to use a ladder and they won't supply a ladder if you can get access with a Baker" (id. at 65).

Harriendorf's EBT Testimony

Harriendorf testified as the designated representative for both defendants (NYSCEF Doc. No. 39 [Harriendorf EBT transcript] at 9-10). He was employed by Turner and was the assigned site safety manager on the project (id. at 13). Turner managed the construction pursuant to an agreement with NYU, who owned the property (id. at 19-20; 12-13).

Turner hired plaintiff's employer Donaldson for carpentry work (id. at 17-18). NYU approved the contract between Turner and Donaldson, and supervised Turner's performance of the contract (id. at 18-19).

Turner supervised Donaldson's carpentry work (id. at 17-18). For example, if Harriendorf saw something unsafe involving a trade partner like Donaldson, he would discuss it with the appropriate representative of Donaldson that was responsible for that activity, and possibly write up memoranda or e-mails regarding the same (id. at 23-24).

Part of the agreement between Turner and Donaldson related to the use of scaffolds, and Turner's "Ladders Last policy" (id. at 28-29). "Ladders Last" means "any other means to access work at heights, without the use of a ladder" (id. at 29). In other words, workers working at a height should not be using a ladder "unless that's their only means of accomplishing a task" (id. at 29). If plaintiff wanted to use a ladder to access the Baker scaffold, he would have to ask someone from Donaldson, who would have to get permission from Turner to use a ladder because of the "Ladders Last" policy (id. at 47-49).

Harriendorf stated, "I don't see why [plaintiff] would need to use a ladder to use a Bakers. It doesn't make sense actually . . . What would be the purpose to get on top of the Bakers, when you have

rungs to climb up to the Bakers?" (47-48). Although, a ladder might be used to access scaffolds if the height ratio calls for it.

> Q: What would be the trigger height, so to speak? When would you expect a worker to use a ladder to access a scaffold?
>
> A: When a ratio is four times or greater than the width of the scaffolding. The height ratio is where you start looking at different accesses, because of the tremendous amount of height.
>
> Q: When you say "height ratio," can you explain that? Because, remember, a jury could have to hear that, and it would be helpful to have it in layman terms.
>
> A: The law requires, under scaffolding standards, that any time your base is greater than your height, it's a 4 to 1 ratio. You need to have scaffolding, so it doesn't tip over. Either outriggers, things of that nature -- it usually starts at anything over 10 feet.
>
> MR. DONNELLY: I think counsel's question is: When do you need a ladder to get onto a scaffold? And I think you said it's over ten feet, or something different?
>
> A: Bakers scaffoldings have different configurations. Usually, you use the rungs of the frame, itself, to climb up. Based on the configuration of your Baker scaffold and your height, you may use another system (id. at 29-31).

DISCUSSION

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). The "evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party" (Valentin v Parisio, 119 AD3d 854, 855 [2d Dept 2014]). "In considering a motion for summary judgment, the function of the court is not to determine issues of fact or credibility, but merely to determine whether such issues exist" (Rivers v Birnbaum, 102 AD3d 26, 42 [2d Dept 2012]; see Ferrante v American Lung Assn., 90 NY2d 623, 631 [1997]), and the motion "should not be granted where there are facts in dispute, where conflicting inferences may be drawn from

the evidence, or where there are issues of credibility" (Ferguson v Shu Ham Lam, 59 AD3d 388, 389 [2d Dept 2009]).

Labor Law § 240 (1)

"Section 240 (1) of the Labor Law, often referred to as the 'scaffold law,' provides that '[a]ll contractors and owners and their agents' engaged in cleaning a building or structure shall furnish or erect proper scaffolding, ladders and similar safety devices to protect employees in the performance of the work" (Gordon v Eastern Ry. Supply, 82 NY2d 555, 559 [1993]). It "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" (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993] [emphasis removed]). "[Courts] have adhered to the bedrock principle that the statute is to be construed liberally to achieve its purpose of protecting workers" (O'Brien v Port Auth. of N.Y. & N.J., 29 NY3d 27, 35-36 [2017] [Rivera, J., dissenting]). However, not every accident where a worker falls off a scaffold will "give[] rise to the extraordinary protections of Labor Law § 240 (1)" (Blake v Neighborhood Hous. Services of New York City, Inc., 1 NY3d 280, 288 [2003], quoting Naducci v Manhasset Bay Assoc., 96 NY2d 259, 267 [2001] [internal quotations omitted]).

As an initial matter, the Court finds that plaintiff met his burden demonstrating that Labor Law § 240 (1) liability is applicable to both defendants. The statute "imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury," and "does not require that the owner exercise supervision or control over the worksite before liability attaches" (Gordon, 82 NY2d at 559-60). Here, the record clearly demonstrates that NYU would be liable as the owner of the work site. Turner is also liable as a general contractor or the agent of the owner. While the record does not define Turner as the "general contractor," but rather the "construction manager," such labels are "not necessarily determinative" (Walls v Turner Constr. Co., 4 NY3d 861,

864 [2005]). "[O]ne may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager [like Turner] had the ability to control the activity which brought about the injury" (id. at 863-64). "Turner's broad responsibility was both that of coordinator and overall supervisor for all the work being performed on the job site" (id. at 864). Further, Turner had the duty to oversee Donaldson's work and, most notably, Harriendorf "acknowledg[ed] that Turner had authority to control activities at the work site and to stop any unsafe work practices" (id.). Accordingly, both defendants would be subject to liability under Labor Law § 240 (1).

In order to meet his prima facie burden, plaintiff must demonstrate both a violation of the statute and causation (see Blake, 1 NY3d at 289). To assist a plaintiff with meeting that burden, there is a presumption connecting the two "[i]n cases involving ladders or scaffolds that collapse or malfunction for no apparent reason" "that the ladder or scaffolding device was not good enough to afford proper protection" (id., n 8). "Once the plaintiff makes a prima 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" (id.; see O'Brien, 29 NY3d at 37). One necessarily negates the other: "if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation" (Blake, 1 NY3d at 290).

Here, plaintiff met his initial burden through his testimony that he was caused to fall when the baker scaffold tipped backward for no apparent reason as he was attempting to descend the scaffold (see, e.g., Rom v Eurostruct, Inc., 158 AD3d 570, 570-71 [1st Dept 2018]; Ellerbe v Port Auth. of N.Y. & N.J., 91 AD3d 441, 441-42 [1st Dept 2012]; Kosavick v Tishman Constr. Corp. of N.Y., 50 AD3d 287, 288-90 [1st Dept 2008]). Accordingly, "[t]he burden then shift[s] to defendants to rebut and present 'evidence of a triable issue of fact relating to the prima facie case or to plaintiff's credibility'" (O'Brien,

29 NY3d at 40-41, quoting Klein v City of New York, 89 NY2d 833, 835 [1996]). More specifically, defendants must refute the presumption that the device was inadequate and that the sole cause of the accident was plaintiff's own acts.

In opposition and in support of their cross motion, defendants argue that plaintiff's actions were the sole proximate cause and, therefore, there can be no liability under Labor Law § 240 (1). Defendants submit affidavits from Harriendorf, McLaughlin (plaintiff's foreman) and Scott Hogan, a safety manager for Donaldson.[2] The Donaldson employees, McLaughlin and Hogan, both stated that "Donaldson had step ladders available at the side, including on the ground floor of the project where [plaintiff] was working, on June 19, 2017 that [plaintiff and his co-worker] could have obtained and used" (NYSCEF Doc. No. 68 [McLaughlin affidavit] at ¶ 4; NYSCEF Doc. No. 69 [Hogan affidavit] at ¶ 4).

McLaughlin's affidavit further states that he went to the location of the incident as soon as he was notified and spoke with plaintiff and his co-worker (NYSCEF Doc. No. 68 [McLaughlin affidavit] at ¶ 3). McLaughlin prepared an incident report in the ordinary course of Donaldson's business, which was attached to his affidavit. In the report's description of the accident, McLaughlin wrote "Climbing off scaffold slipped off step" (NYSCEF Doc. No. 68, exhibit A to McLaughin affidavit). Under the section entitled "employee statement," McLaughlin wrote "when climbing off scaffold his foot slip off rung and went down 3 ½ feet to the floor. Still standing upright and holding on to scaffold" (id.).

As such, defendants claim that plaintiff set up the scaffold himself, used the rungs of the scaffold to ascend and descend "without obtaining a step ladder that was available to him at the time" (NYSCEF

[2] Defendants submit other evidence, including an expert report and workers compensation forms. In reply and in opposition to defendants' cross motion, plaintiff claims that all of defendants' evidence is inadmissible. However, the Court finds that, at the very least, McLaughlin's affidavit constitutes an admissible business record (see CPLR 4518). Because the Court finds that McLaughlin's affidavit and incident report presents an issue of fact (infra), the Court need not make any further rulings on the admissibility of the other evidence defendants submitted in support of their cross motion, including the plaintiff's own statement in his C-3 form. To the extent that it is duplicative of the idea that plaintiff merely slipped off the scaffold on his own accord, those other pieces of evidence, if admissible, would properly be afforded to the weight of the evidence which is irrelevant for the purposes of this motion.

Doc. No. 65 at ¶ 32). In other words, defendants claim that plaintiff was a recalcitrant worker (see generally, Cahill v Triborough Bridge and Tunnel Auth., 4 NY3d 35, 39 [2004]). Defendants also claim the accident was not occasioned by the failure to provide an appropriate safety device, because the scaffold was appropriate and plaintiff "merely landed awkwardly while stepping off it" or slipped from a misstep (NYSCEF Doc. No. 65 at ¶ 32).

In order to defeat summary judgment based on the "recalcitrant worker" theory, defendants must submit evidence demonstrating that "plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (Cahill, 4 NY3d at 40). However, "generic statements of the availability of safety devices are [in]sufficient to create an issue of fact that plaintiff was the sole proximate cause of his injury" (Kosavick, 50 AD3d at 289). Defendants have submitted the Donaldson employees' affidavits, tersely stating that plaintiff could have obtained and used a step ladder. Such "generic statements" are plainly insufficient to defeat plaintiff's prima facie showing that no other safety devices were provided to him or made available to him, especially given the "ladders last" policy as testified to by defendants' representative. Accordingly, that branch of the defendants' motion claiming plaintiff was the sole proximate cause as a recalcitrant worker is without merit.

Aside from that theory, defendants also claim that plaintiff merely made a misstep, and slipped off the scaffold rung, which would be entirely his fault and, therefore, not a violation of Labor Law § 240 (1). First, the Court agrees with plaintiff that defendants mischaracterize plaintiff's testimony — he never testified that he lost his balance or missed a rung on a scaffold. Rather, he consistently testified that the scaffold tipped which caused him to fall.

However, the core inquiry here is whether the evidence presented in opposition, namely, the foreman's report which infers that plaintiff told McLaughlin that he "slipped," without referencing any

tipping, raises an issue of fact as to whether the plaintiff was the sole proximate cause of the accident. The Court finds that it does.

Notably, evidence that plaintiff "missed a step" (DiCembrino v Verizon N.Y. Inc., 149 AD3d 541, 541-42 [1st Dept 2017]), or "lost his footing" (Ellerbe, 91 AD3d at 442), or had a "foot . . . slip[] . . . onto the scaffold" (Albino v 221-223 W. 82 Owners Corp., 142 AD3d 799, 800-01 [1st Dept 2016]) demonstrates an issue of fact as to whether the incident resulted from a violation of the statute.

Here, the Donaldson report indicates that plaintiff told McLaughlin that he "slipped," and made no reference to tipping, which is entirely plausible given plaintiff's testimony. It cannot be said that "slipping" is the same, or consistent with, plaintiff's alleged version of the accident that the scaffold was inadequate because it tipped on its own (cf. Rom, 158 AD3d at 571 [1st Dept 2018] [an accident report stating that "plaintiff lost his balance and fell" "did not contradict plaintiff's consistent testimony that he fell because the ladder suddenly moved" and was therefore insufficient to raise an issue of fact]; Hill v City of New York, 140 AD3d 568, 569-70 [1st Dept 2016] [plaintiff's affidavit submitted in support of the motion stating that he "lost [his] balance and fell off the ladder" was not inconsistent with his prior testimony that he fell off the ladder after it "unexpectedly wobbled"]). "Where credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment inappropriate" (Ellerbe, 91 AD3d at 442). Thus, because "slipping" off the scaffold rung is not necessarily consistent with plaintiff falling off a scaffold that tipped over, denial of summary judgment on this claim is appropriate.

For example, in Ellerbe, the plaintiff testified at his deposition that the "ladder from which he fell had only been 'tied off' at the top right side and the ladder had "reared back' when he attempted to dismount from the top of the ladder by stepping to his left onto the deck floor" (id. at 441-42). However, the construction manager's site safety manager named Jackson "testified that plaintiff told him, immediately after the fall and while plaintiff was still on the ground, that he fell because he 'lost his

footing.' This account was memorialized in [an] incident report completed by Jackson that day" (id. at 442). The Appellate Division, First Department held that "[w]hile it is undisputed that plaintiff made out a prima facie case, the aforementioned incident report and testimony of Jackson, which is inconsistent with Ellerbe's account, raises a triable issue of fact as to whether Ellerbe's accident in fact resulted from a violation of the statute" (id.).

Similarly, in Albino, the plaintiff claimed that "as he attempted to swing down from the roof to the scaffold, a wire attaching the scaffold to the building snapped, causing the scaffold to swing away from the wall and result[ed] in plaintiff's fall to the ground below" (142 AD3d at 800). "The foreman, however, testified that, in conversation after the accident, plaintiff had admitted to him that he fell because his foot had slipped as he stepped onto the scaffold from the roof, without mentioning any movement of the scaffold" (id.). Accordingly, the Appellate Division reasoned that "[t]hese two versions of how the accident happened, each given by plaintiff, the sole witness to the incident, are inconsistent with each other and give rise to an issue of fact as to whether plaintiff's fall was caused by a failure of a safety device within the purview of section 240 (1)" (id. at 800-801).

Further, there is other evidence in the record inferring that the baker scaffold may have been an adequate safety device. Harriendorf's testimony explicitly acknowledged the possibility that ladders may be provided to access baker scaffold platforms depending on the height ratio. He also acknowledged that, depending on the height and base length of a scaffold, another "system" may be appropriate to prevent the scaffold from tipping. There is varying evidence as to the exact height of the scaffold used by plaintiff that day, which therefore raises issues as to whether the baker scaffold may have been properly accessible via its own rungs or whether a ladder would have been the appropriate device.

Accordingly, that branch of plaintiff's motion seeking partial summary judgment on Labor Law § 240 (1) is denied, and that branch of defendants' cross motion seeking summary judgment dismissing the same claim is also denied.

Labor Law § 241 (6)

Labor Law § 241 (6) requires owners, contractors, and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (Ross, 81 NY2d at 501-02; Everitt v Nozkowski, 285 AD2d 442, 443 [2d Dept 2001]). As with Labor Law § 240 (1), the duty imposed under Section 241 (6) is nondelegable (Ross, 81 NY2d at 502-503).

Plaintiff argues in support of his motion that he is entitled to summary judgment as to liability on his Labor Law § 241 (6) claim because defendants violated 12 NYCRR 23-1.7 (f) and 12 NYCRR 23-5.3 (f) in failing to supply him with a ladder to access and exit the scaffold. In opposition and in support of their cross motion, defendants claim that both regulations are inapplicable to the facts of the case and, therefore, cannot serve as a predicate for Labor Law § 241 (6) liability. Specifically, Rule 1.7 (f), does not apply because plaintiff did not allege "that he was seeking to gain access to another working level but was merely performing a task at a height" (NYSCEF Doc. No. 65 at ¶ 51). Defendants further claim that Rule 5.3 (f) is not specific enough to impose liability under the statute; even if it were, any violation was not the proximate cause of the accident because plaintiff missed a step and/or lost his footing.

12 NYCRR 23-1.7

Rule 1.7 (f) of Part 23 of the Industrial Code provides as follows:

> (f) Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.

The Court finds that plaintiff failed to meet his prima facie burden, and that defendants met their prima facie burden that Rule 1.7 (f) is inapplicable to the facts of this case (cf. Doto v Astoria Energy II, LLC, 129 AD3d 660, 664 [2d Dept 2015]). Courts have found this regulation applicable where the accident involved the worker accessing a different, separate working level, whether above or below ground (see e.g., id. at 661 [plaintiff instructed "to work on the permanent platform, which was three or

four stories above the ground, but had not received any instructions on how to access the platform"]; Conklin v Triborough Bridge & Tunnel Auth., 49 AD3d 320, 320-21 [1st Dept 2008] [plaintiff was injured on a "makeshift ladder" which was "the sole means of access to his employer's shanty"]; Miano v Skyline New Homes Corp., 37 AD3d 563, 565 [2d Dept 2007] [regulation applicable where evidence showed plaintiff was not "provided with a safe means of access to the basement apartment"]; Gdoviak v Southbridge Towers, Inc., 20 Misc 3d 1129[A], 2008 NY Slip Op 51661[U], *2 [Sup Ct NY County 2008] [regulation applicable where plaintiff tripped on a defective stairway while "haul[ing] up" materials "to the garage roof"]).

Conversely, courts have found the regulation inapplicable where the plaintiff's accident did not involve accessing another work level but was instead an accident that merely happened at an elevated height (see Torkel v NYU Hosps. Ctr., 63 AD3d 587, 588 [1st Dept 2009]; Miranda v NYC Partnership Hous. Dev. Fund Co., Inc., 122 AD3d 445, 445-46 [1st Dept 2014]; Sawczyszyn v New York Univ., 158 AD3d 510, 511-12 [1st Dept 2018] [regulation inapplicable where accident involved "a vertical distance of about one foot or less" on a "ramp from the truck bed to the dock"]; Francescon v Gucci Am., Inc., 105 AD3d 503, 504 [1st Dept 2013] [where "the subfloor was only approximately 12 to 15 inches below the first floor from which [plaintiff] fell"]; Smiley v Allgaier Constr. Corp., 162 AD3d 1481, 1482 [4th Dept 2018] [where plaintiff and coworker, "performing work on a mechanical door," had to lift "a heavy motor approximately four feet onto the deck of a scissor lift"]).

For example, the Appellate Division, First Department held that Rule 1.7 (f) could not serve as a predicate for Labor Law § 241 (6) liability where the plaintiff was injured after makeshift ramp collapsed, which was used "to bridge the gap in height between the edge of the work site, at curb level, and the street" (Torkel, 63 AD3d at 588). The Court held that the ramp "did not provide access to an above- or below-ground working area within the meaning of the regulation" (id. at 590; see id. at 601-02

[Andrias, J., dissenting] [also finding no evidence "that plaintiff's activities required a means of access to another working level within the meaning of Industrial Code § 23-1.7 (f)"]).

Even working as high as fourteen (14) feet above ground "to perform the work . . . at heights approaching the 20-foot ceiling" will not bring an injured worker to "another working level" within the meaning of the regulation (see Miranda, 122 AD3d at 446). Accordingly, here, the Court finds the regulation is inapplicable to plaintiff's case, as he testified that he was performing work by installing a doorbuck at a height of five to six (5-6) feet, and there is no evidence that he was attempting to access another work level (see Torkel, 63 AD3d at 590; Miranda, 122 AD3d at 446; Lavore v Kir Munsey Park 020, LLC, 40 AD3d 711, 712 [2d Dept 2007] [plaintiff fell "while descending from the side of his utility truck" and the height from the utility truck could not "be said to be a working level above ground requiring a stairway, ramp, or runway under that section"]).[3] Further, there is no contention that a stairway, ramp, or runway would have been the appropriate safety device to avert plaintiff's accident. Therefore, that branch of defendants' cross motion for summary judgment on the Labor Law § 241 (6) claim to the extent predicated on 12 NYCRR 23-1.7 (f) is granted and the claim is dismissed. The same branch of plaintiff's motion is denied.

12 NYCRR 23-5.3

Plaintiff's Labor Law § 241 (6) claim is also predicated on Rule 5.3 (f) of Part 23 of the Industrial Code, which states:

> (f) Access. Ladders, stairs or ramps shall be provided for access to and egress from the platform levels of metal scaffolds which are located more than two feet above or below the ground, grade, floor or other equivalent level.

Contrary to defendants' contention, the Court finds that the regulation is specific enough to impose Labor Law § 241 (6) liability. While Part 23 of the Industrial Code was promulgated to serve as

[3] While plaintiff contends that Miranda is distinguishable because the injured plaintiff was "not climbing up or down," (NYSCEF Doc. No. 84 at 19), this Court finds that the matter of Lavore renders that distinction as irrelevant.

a predicate for Labor Law § 241 (6) liability (see Nostrom v A.W. Chesterton Co., 15 NY3d 502, 507-08 [2010]), not every rule within that part will give rise to such liability. Courts must analyze the critical distinction between general and specific commands — "provision[s] that merely incorporate[] the general common-law standard" are treated "differently from the provisions containing specific commands and standards" (Ross, 81 NY2d at 503). "The latter have been held to create duties that are nondelegable, while the former do not" (id. [internal citation omitted]). Here, the Court finds that Rule 5.3 (f) is clear, specific, and essentially "self-executing." The regulation provides no room for construction or consideration of rules, regulations, contracts, or other "outside sources to determine the standard by which a defendant's conduct must be measured" (see id. [quotations and citation omitted]).

Defendants' claim that plaintiff can only cite to one case outside of the First Department that has held the regulation is specific enough to impose liability, namely Klimowicz v Powell Cove Assoc., LLC, 111 AD3d 605 (2d Dept 2013). However, other courts have held the same (see, e.g., Sopha v Combustion Eng'g, 261 AD2d 911 [4th Dept 1999]; Pisarcik v Triboro Bridge & Tunnel Auth., 17 Misc 3d 1126[A], 20007 NY Slip Op52154[U], *1, *4 [Sup Ct Queens County 2007]). Further, even if the Appellate Division, First Department has not specifically ruled on the issue, this Court "must follow an Appellate Division precedent set in any department in the State until its own appellate division decides otherwise" (Stewart v Volkswagen of Am., 181 AD2d 4, 7 [2d Dept 1992], revd on other grounds 81 NY2d 203 [1993], citing Mountain View Coach Lines v Storms, 102 AD2d 663, 664 [2d Dept 1984] [noting that "[t]he Appellate Division is a single statewide court divided into departments for administrative convenience"]).

The Court finds that the plaintiff met his initial prima facie burden by demonstrating that the provision is applicable to the facts of this case, and that defendants violated Rule 5.3 (f) by not providing, e.g., a ladder, to access and exit the scaffold platform. However, as with the Labor Law § 240 (1) claim above, defendants submitted evidence raising issues of fact as to whether the device was

adequate, and plaintiff was the sole proximate cause of the accident (see Notaro v Bison Const. Corp., 32 AD3d 1218, 1219 [4th Dept 2006]). Accordingly, those branches of plaintiff's motion and defendants' cross motion regarding Labor Law § 241 (6) to the extent premised upon 12 NYCRR 23-5.3 (f) are both denied.

Labor Law § 200 & Common Law Claims

Defendants move to dismiss plaintiff's common law negligence and Labor Law § 200 claims arguing that defendants NYU and Turner did not exercise any actual control or oversight of the plaintiff's work. They further argue that there was nothing wrong with the baker scaffold, and no defective or dangerous condition was alleged to have existed. Plaintiff claims in opposition that the record reflects that NYU and Turner supervised and controlled Donaldson's activities, which included the "ladders last" policy. "If it were not for that policy, Plaintiff's request to use a ladder would have been granted" (NYSCEF Doc. No. 84 at 21). Plaintiff claims that there are at least issues of fact regarding the level of control and supervision.

"Section 200 of the Labor Law merely codified the common-law duty imposed upon an owner or general contractor to provide construction site workmen with a safe place to work" (Russin v Louis N. Picciano & Son, 54 NY2d 311, 316-17 [1981]; see Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 352-54 [1998]). "An implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (Russin, 54 NY2d at 317 [1981]; see Cappabianca v Skanska USA Bldg. Inc., 99 AD3d 139, 144 [1st Dept 2012]).

The Court finds that defendants met their initial burden by relying on, inter alia, plaintiff's deposition testimony that neither NYU nor Turner supervised his work. In opposition, plaintiff fails to demonstrate an issue of fact with respect to NYU. The evidence in the record shows that NYU may have

supervised Turner but did not actually exercise supervisory control over the injury-producing work (see Cappabianca, 99 AD3d at 145-46).

However, the Court finds that the record presents issues of fact with respect to Turner's liability. Harriendorf testified that Turner had the ability and contractual obligation to supervise Donaldson's work and stop any unsafe practices (see Rizzuto, 91 NY2d at 352-53 [1998]). He also testified that he occasionally exercised such responsibilities. Further, as plaintiff pointed out, because of Turner's "ladders last" policy, obtaining the ladder (the alleged appropriate safety device) was within Turner's control and discretion (see id.). Accordingly, a jury could find that Turner had authority and control to avoid or correct an unsafe condition or practice by providing a ladder and is therefore potentially subject to liability under Labor Law § 200 and the common law. Therefore, that branch of defendants' motion is granted in part with respect to NYU and denied as to Turner.

CONCLUSION

It is hereby ORDERED that plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240 (1) and § 241 (6) claims is denied in its entirety; and it is further

ORDERED that defendants' cross motion for summary judgment is granted solely to the extent that: 1) plaintiff's Labor Law § 241 (6) claim predicated on 12 NYCRR 23-1.7 (f) is dismissed; 2) plaintiff's common law and Labor Law § 200 claim insofar as asserted against defendant NYU is dismissed; and the cross motion is otherwise denied. This constitutes the decision and order of the Court.

HON. ALEXANDER M. TISCH

5/29/2019
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE