SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KELLY O'NEILL LEVY **PART** IAS MOTION 19

Justice

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INDEX NO. 153703/2013

RYERSON, DAVID

MOTION DATE 06/12/2019

Plaintiff,

MOTION SEQ. NO. 005

- v -

580 PARK AVENUE, INCORPORATED

DECISION + ORDER ON MOTION

Defendant.

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580 PARK AVENUE, INCORPORATED, BROWN HARRIS STEVENS RESIDENTIAL MANAGEMENT, LLC

Third-Party
Index No. 595340/2014

Plaintiff,

-against-

RICHARD GUTMAN, ROSANN GUTMAN

Defendant.

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FOUR STAR AIR CONDITIONING CO, LLC

Second Third-Party
Index No. 595807/2015

Plaintiff,

-against-

ECRO RESTORATION CORP.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 110, 111,112, 113, 114, 115, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 174, 175, 176, 177, 178, 179, 180 were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 110, 111, 112, 113, 114, 115, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 174, 175, 176, 177, 178, 179, 180 were read on this motion to/for JUDGMENT - SUMMARY.

In this action seeking recovery for personal injury, defendant/third-party plaintiff Four Star Air Conditioning, Co., LLC ("Four Star") moves for summary judgment against plaintiff

David Ryerson pursuant to CPLR § 3212, dismissing the complaint and all cross-claims against it. Plaintiff opposes this motion.

"The drastic remedy of summary judgment may only be granted where, viewing the facts in the light most favorable to the non-movant, 'the moving party has "tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact,"' and the non-moving party has subsequently 'fail[ed] "to establish the existence of material issues of fact which require a trial of the action"'...Summary judgment disposition is inappropriate where varying inferences may be drawn, because in those cases it is for the factfinder to weigh the evidence and resolve any issues necessary to a final conclusion." *Dormitory Authority v. Samson Constr. Co.*, 30 N.Y.3d 704, 717 (2018) (citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 (2012)).

Background

On June 21, 2010, Plaintiff was allegedly injured while working on the renovation of an apartment at a residential cooperative building located at 580 Park Avenue. Plaintiff had been instructed to paint the exterior bricks outside of the apartment and was allegedly directed to use a suspended platform known as a "catcher", which acted as a scaffold. Plaintiff alleges that as he attempted to stand up to climb back into the window upon completion of his paint work for the bricks, he tripped over his lanyard, which was on the floor of the scaffold, and hit his right knee against the window sill. Plaintiff contends that the confined space within the scaffold caused him to trip over his lanyard.

Labor Law § 200 and Common Law Negligence

Labor Law § 200(1) "codifies an owner's or general contractor's common-law duty of care to provide construction site workers with a safe place to work." *Cappabianca v. Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 143 (1st Dep't 2012). Four Star moves for summary judgment dismissing the Labor Law § 200 and common law negligence claims against it.

As this court noted in a prior decision relating to this action, Plaintiff's Labor Law § 200 claims depend on control of the manner in which plaintiff was performing his work. *See Ryerson v. 580 Park Ave., Inc.*, 2019 WL 295233 (2019); *see generally Hughes v. Tishman Const. Corp.*, 40 A.D.3d 305, 306 (1st Dep't 2007) ("Where a claim under Labor Law § 200 is based upon alleged defects or dangers arising from a subcontractor's methods or materials...it must be

demonstrated that the contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury producing work was performed…General supervisory authority is insufficient.").

Plaintiff has testified that the foreman on-site worked for Four Star, that Four Star's employees rigged the scaffold and told him what work needed to be done, and that two workers from Four Star were moving the scaffold from window to window. *Id.* at 51-56. As Four Star notes, there is ample testimony that could indicate that Four Star did not control the manner and means of Plaintiff's work, but at the summary judgment phase "the court's role is limited to issue finding, not issue resolution." *See, e.g., Kriz v. Schum*, 75 N.Y.2d 25, 33 (1989). Thus, when the allegations are viewed in the light most favorable to Plaintiff, there exist material issues of fact as to whether Four Star controlled the manner and means of Plaintiff's work.

Four Star's motion for summary judgment is therefore denied as to Plaintiff's common law negligence and Labor Law § 200(1) claims.

Labor Law § 240(1)

Four Star moves for summary judgment dismissing the Labor Law §240(1) claim against it. Labor Law § 240(1) provides, in relevant part:

> All contractors and owners and their agents . . . 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.

Courts have recognized that "Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold . . . 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 N.Y.2d 494, 501 (1993). And "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." *Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 267 (2001); *Hill v. Stahl*, 49 A.D.3d 438, 442 (1st Dep't 2008); *Buckley v. Columbia Grammar & Preparatory*, 44 A.D.3d 263, 267 (1st Dep't 2007). As this court previously stated in a previous summary judgment decision relating to this matter:

> Labor Law § 240(1) does not apply here because plaintiff's injury was only tangentially related to gravity, and not caused by the kind of gravity-related risks that the statute was intended to cover. Therefore, while plaintiff may have been working at a height while on the catcher, his injury was not the result of him falling from a height or being struck by a falling object. Rather, he was injured because of tripping on a lanyard

> and hitting his knee against the window sill...Therefore, the court grants the branch of moving defendants' motion predicated on a Labor Law § 240(1) claim and dismisses that claim as against all defendants.

Ryerson v. 580 Park Ave., Inc., 2019 WL 295233 (2019). Plaintiff's injury was not caused by the kind of gravity related risks Labor Law § 240(1) was intended to cover. Therefore, Four Star's motion for summary judgment as to Plaintiff's Labor Law § 240(1) claim is granted.

Labor Law § 241(6)

Four Star moves for summary judgment dismissing the Labor Law § 241(6) claim against it. Labor Law § 241(6) provides, in pertinent part:

> All 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. The commissioner 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.

(emphasis added). Labor Law § 241(6) imposes a nondelegable duty to owners and contractors to provide reasonable and adequate protection and safety to workers. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501-02 (1993). "In order to prevail on a cause of action under Labor Law § 241(6), a plaintiff must establish a violation of an implementing regulation which sets forth a specific standard of conduct." *Ortega v. Everest Realty LLC*, 84 A.D. 542, 544 (1st Dep't 2011); *see also Ross*, 81 N.Y.2d at 502-503.

Plaintiff claims that the defendants failed to comply with Sections 23-1.5(a), 23-1.7, 23-1.7(b), 23-1.7(b)(1), 23-1.7(d), 23-1.7(e), 23-1.7(e)(1), 23-1.7(f), 23-5, 23-5.1, 23-5.1(b), 23-5.1(c), 23-5.1(f), 23-5.1(h), 23-5.1(j), 23-5.2, 23-5.7, 23-5.8, 23-5.18, and 23-5.18(b) of the Industrial Code. Defendant disagrees and argues that none of these sections of the Industrial Code apply to the facts of this case.

A new theory of liability may not be raised for the first time in opposition to a motion for summary judgment. *See Abalola v. Flower Hosp.*, 44 A.D.3d 522, 522 (1st Dep't 2007). Plaintiff's affirmation in opposition to this motion attempts to raise questions of fact regarding violations of Sections 23-1.16 and 23-1.19 of the Industrial Code. However, these sections had

not previously been raised in the complaint or bills of particulars. Therefore, they may not form a basis for a Labor Law § 241(6) claim.

Section 23-1.5(a), which sets forth an employer's general responsibility to the health and safety of their workers, "is insufficiently specific to support a section 241 (6) claim." *Carty v. Port Auth. of N.Y. & N.J.*, 32 A.D.3d 732, 733 (1st Dep't 2006). Similarly, Sections 23-5.1(b), 23-5.1(c), and 23-5.1(f) are insufficient to form a basis for a Labor Law § 241(6) claim. *See Kosovrasti v. Epic (217) LLC*, 96 A.D.3d 695, 696 (1st Dep't 2012); *Greaves v. Obayashi Corp.*, 55 A.D.3d 409, 410 (1st Dep't 2008); *Schiulaz v. Arnell Const. Corp.*, 261 A.D.2d 247, 248 (1st Dep't 1997).

Section 23-1.7(b) governs falling hazards, with 23-1.7(b)(1) governing hazardous openings and 23-1.7(b)(2) governing bridge and highway overpass construction. That section does not apply here because it was not in the context of bridge or highway construction, nor did Plaintiff fall into a "hazardous opening." *See Boss v. Integral Const. Corp.*, 249 A.D.2d 214, 215 (1st Dep't 1998) (holding that Section 23-1.7(b) did not apply to the facts of a case where a plaintiff was injured when he tripped on sheetrock while installing windows.). Section 23-1.7(d) does not apply since there is no evidence of a slippery condition. *See e.g. Cross v. Noble Ellenburg Windpark, LLC*, 157 A.D.3d 457, 458 (1st Dep't 2018). This Court has already held in an earlier motion that Section 23-1.7(e)(1) is inapplicable. *See Ryerson v. 580 Park Ave., Inc.*, 2019 WL 295233 (2019). Section 23-1.7(f) is also inapplicable, since Plaintiff was not attempting to access another working level. *See Miranda v. NYC Partnership Hous. Dev. Fund Co., Inc.*, 122 A.D.3d 445, 446 (1st Dep't 2014). Section 23-5.1(j) is inapplicable to the facts of this case because Plaintiff did not claim that he fell due to inadequate railings. *See Santos v. Condo 124 LLC*, 161 A.D.3d 650, 655 (1st Dep't 2018).

Section 23-5.8 which governs all suspended scaffolds is the section of the Scaffolding Subpart of the Industrial Code applicable to the catcher used by Plaintiff. By contrast, Sections 23-5.7 (outrigger scaffolds), 23-5.18 (manually-propelled mobile scaffolds), and 23-5.2 ("any scaffold of a type not named") are not applicable to Plaintiff's Labor Law § 241(6) claim.

Four Star argues that Section 23-5.8 is inapplicable because Plaintiff does not allege that the scaffold was the proximate cause of the injury. However, Plaintiff explains in his testimony that the lanyard on which he tripped was on the ground due to improper suspension and installation of the scaffolding:

Q: Is that typically how it works with a scaffold doing brick staining, that a portion of the lanyard would be lying down on the ground because the rope-grab and harness are close together?
A: No.
Q: Why is that?
A: Because normally, if I could position the scaffolding the right way, I would be standing up in the scaffold working on the brick and it would be above my head, and it would have been – you could adjust with the rope-grabber where the lanyard is, and it would be above my head and it would be in the way.
Q: Typically if you stand up, the rope-grabber would be at some point above you and the lanyard would be connected to a position above you?
A: Yes.

Plaintiff Dep. at 93:17-94:12. Therefore, there is a question of fact as to whether the suspended scaffolding proximately caused Plaintiff's injury.

Furthermore, Section 23-5.1(h) requires that the erection and removal of a scaffold be supervised by a designated person. The proper erection of scaffolding is a critical question of fact in this case, which is best left for a fact finder to determine.

Finally, Section 23-1.7(e)(2) governs tripping hazards and requires that working areas "shall be kept free . . . from scattered tools and materials." Four Star argues that the lanyard was an integral part of the work being performed, and therefore does not constitute a violation of Section 23-1.7(e)(2). *See e.g. Appelbaum v. 100 Church L.L.C.*, 6 A.D.3d 310, 310 (1st Dep't 2004). Whether the lanyard constitutes an integral part of the work performed is yet another question of fact best determined by a fact finder.

Therefore, Four Star's motion for summary judgment on the Labor Law § 241(6) claim is denied, because questions of fact remain regarding violations of Industrial Code Sections 23-5.8, 23-5.1(h), and 23-1.7(e)(2).

Indemnification and Contribution

While Four Star asserts a request for this court to dismiss the cross claims against it for contribution and indemnification in its notice of motion for summary judgment, these claims were not addressed specifically in the motion. Thus, Four Star has not met their burden in establishing a prima facie case for summary judgment.

Accordingly, it is hereby

ORDERED that Four Star's motion for summary judgment is granted as to Plaintiff's Labor Law § 240(1) claim; and it is further

ORDERED that Four Star's motion for summary judgment is denied as to Plaintiff's common law negligence, Labor Law § 200, Labor Law § 241(6) claims, and cross-claims for indemnification and contribution.

This constitutes the decision and order of the court.

8/26/2019
DATE

KELLY O'NEILL LEVY, J.S.C.
KELLY O'NEILL LEVY
JSC

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