SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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CHRISTOPHER WENK,

Index No. 152492/2014
[Mot. Seq. Nos. 003 & 004]

Plaintiff,

- against -

EXTELL WEST 57TH STREET LLC, LEND LEASE (US) CONSTRUCTION LMB INC. and L. MARTONE & SONS INC.,

Defendants.

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HON. DAVID B. COHEN:

Motion sequence numbers 003 and 004 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by an ironworker on November 4, 2013, when he stepped into an approximately 12-inch-deep hole, while working on the roof of a construction site located at 157 West 57th Street, in New York, New York (the Premises).

In motion sequence number 003, plaintiff Christopher Wenk moves, pursuant to CPLR 3212, for summary judgment in his favor as to liability on his Labor Law § 240 (1) claim against defendants Extell West 57th Street LLC (Extell) and Lend Lease (US) Construction LMB Inc. (Lend Lease), and on his common-law negligence and Labor Law § 200 claims against defendant L. Martone & Son Inc. (L. Martone) (collectively defendants).

In motion sequence number 004, defendants move, pursuant to CPLR 3212, for summary judgment dismissing the amended complaint in its entirety.

BACKGROUND

On the day of the accident, Extell owned the Premises where the accident occurred.

Extell hired Lend Lease to serve as the construction manager for a project at the Premises, which entailed the construction of a 70-plus story, mixed-use luxury hotel and condominium building (the Project). Lend Lease, in turn, retained L. Martone to perform roofing and waterproofing work at the Premises.

On the day of the accident, plaintiff was employed by non-party Tower Installation LLC (Tower). Tower was hired to perform ironwork for the Project.

The amended complaint alleges causes of action against defendants sounding in common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6).

Plaintiff's Deposition Testimony

During his deposition, plaintiff testified that on the day of the accident, he was working on the roof level of the Premises as an ironworker for Tower, when he stepped into a 12-inch deep hole (the Hole) causing him to fall to the floor. The Hole was concealed by black felt.

At the time, plaintiff and his team were "ripping out back pans to expose louvers in the panels and installing drip caps on the interior" (plaintiff's tr at 35-36). Plaintiff explained that the back pans, which were roughly 50 feet long and about 18 inches deep, were carried over by one of plaintiff's co-workers, and then clamped onto a waist-height, steel girder. Plaintiff would then stand and cut the side tabs off the pans using a hand-held grinder. When he was finished, he would un-clamp the back pan.

Plaintiff testified that at the time of the accident, he had just finished grinding off a side tab. Plaintiff stepped back as his co-worker, "Jimmy," stepped towards him to grab the back pan plaintiff had just finished grinding. When plaintiff stepped back, he stepped into the Hole and fell backwards. Plaintiff explained that his "right foot went back and then [his] left foot went back,

which is when [his] foot fell into the hole" (*id. at 76*). Plaintiff further testified:

> "Q. How far did your foot or leg go into the hole?
>
> A. A little -- about a foot possibly.
>
> Q. From the level of the floor down about a foot?
>
> A. Yes.
>
> Q. When your foot went into that hole, did it land or contact anything?
>
> . . .
>
> A. It contacted the drain below it, the hole below it. When I hit the hole is when my foot stopped, the edge of the hole.
>
> I should say to better explain it, the edge of the hole at the bottom.
>
> . . .
>
> Q. When your left foot went into that hole, did any other portion of your body contact any part of that hole; the side of it or the top of it?
>
> . . .
>
> A. My foot hit the ground, hit the lower hole. The side of my calf hit the edge of the top and then I fell backwards "

(*id.* at 77-78).

Plaintiff also noted that after he landed, his left foot stayed in the Hole, which was "around a foot wide by about a little bit longer than a foot in length" (*id.* at 86). He testified that the black felt covering the Hole was the thickness of a piece of cardboard and pulled tight over the Hole. It was not tacked or nailed down. Plaintiff maintained that when his foot went into the felt, there was only a minimal amount of resistence.

Plaintiff testified that he never saw the Hole before the accident. In addition, he was never notified that there were holes covered by black felt on the roof where he was working, and nothing warned him of the Hole's presence.

Deposition of Nathaniel Martone (L. Martone's Vice President)

Nathaniel Martone (Nathaniel) testified that L. Martone was hired to perform roofing and waterproofing for the Project, and that he acted as foreman and supervisor for L. Martone for the duration of the Project.

Nathaniel explained that each floor of the building was comprised of concrete. Holes were cut through the concrete for pipe installation. L. Martone was responsible for laying down insulation on top of the concrete. As part of this process, L. Martone's workers cut holes in the insulation for the pipes. Eight drain holes were needed in the insulation for the pipes on the 77th floor where plaintiff's accident occurred.

After the workers installed two layers of insulation, they placed a black felt fabric/mat over the insulation which covered the entire roof. In addition, bags of crushed limestone were delivered to the roof, which L. Martone's workers would then spread over the entire surface, so as to cover the black felt, and also placed a bag of limestone on each of the drain holes to act as a marker. This way, if someone stepped in the area of a hole, their foot would come into contact with the bag, as opposed to going into the hole.

Nathaniel explained that the bag of limestone covering each drain hole was only temporary. To that effect, the bag would remain there only until a drain basket or strainer could be permanently installed over the drain hole, which would be even with the surface of the roof. The plumbers were responsible for installing this permanent hardware.

Nathaniel testified that it was the responsibility of L. Martone's workers to place the bag of limestone in the drain holes to act as markers until the permanent covering was installed. When the permanent covering was ready to be installed, the bag was taken out of the hole, the

felt was cut, and the plumber installed the drain.

Specifically, Nathaniel testified, in pertinent part, regarding the drain holes:

"Q. Is there somebody from Martone who had the responsibility to inspect any holes that were cut in insolation [sic] at or about the time period of November 4, 2013 to make sure or ensure that bags of limestone were placed in there until other layers were placed above the hole?

. . .

A. The general duty would be the foreman's responsibility.

Q. So, that was part of your job duties or who was acting as a foreman at that time?

A. Yes"

(Nathaniel Martone tr at 47-48).

Nathaniel further testified that if a bag was not placed over a hole, he would rectify it right away. He also told workers at safety meetings that if they saw this type of situation, they needed to address it immediately. Nathaniel also maintained that it was not L. Martone's policy or procedure to place signs near the holes to let other workers know that the bags should not be removed, and there was never any request from Lend Lease or Extell to place signs, ropes, or cones at those locations, so as to make people aware that there were holes underneath the bags.

Nathaniel testified that he did not know where the bags of stone were placed on the 77th floor on the date of the accident, and that it is possible that even if the bag of stones had been placed on the felt covering the Hole, someone could have moved it prior to the date of the accident.

Deposition of James Fegel (Plaintiff's Co-Worker)

James Fegel testified that on the date of the accident, he was working for Tower, assisting plaintiff in cutting trim. Fegel described the roof they were working on that day as

being covered in black felt. In addition, there were bags filled with stones in multiple locations located sporadically throughout the roof. Fegel maintained that he did not move any of the bags and that he never observed plaintiff moving any of the bags.

Fegel testified that he observed the accident from about a foot away. Fegel explained that he was facing plaintiff, grabbing a piece of trim, when plaintiff stepped back and stepped into the Hole. At that point, plaintiff "spun himself around, and he fell on the ground" (Fegel tr at 30). Plaintiff landed with his left leg inside the Hole. Prior to the accident, the felt covering the Hole was not cut or broken, and it looked the same as the felt everywhere else in that area.

After the incident, Fegel pulled the felt away from the Hole and observed that it was about 12 inches deep. Fegel testified that "[n]obody told anybody or warned anybody about the hole in the roof" (*id.* at 76).

Deposition of Matthew Ross (Site Safety Manager for Lend Lease)

Matthew Ross (Ross) testified that he was Lend Lease's site safety manager for the Project. Ross's responsibilities on the Project included coordination of weekly site safety meetings, as well as performing inspections and walk-throughs of the Project site to make sure everything was being done in a safe and proper manner. If Ross observed a safety concern, it was part of his duties to make sure that the issue was corrected. He also had the authority to stop work until the problem was rectified. Ross maintained that Lend Lease was the only site safety company hired for the Project.

Ross testified that during the site safety orientation, he discussed the issue of "floor hole penetrations," which had to be covered with metal, wood, or plastic (Ross tr at 36-37).

He also checked for improperly covered "floor hole penetrations" as part of his daily walk-through of the Project. However, Ross maintained that the Hole involved in plaintiff's accident was a drain hole, not a "floor hole penetration," and, therefore, the procedures for covering "floor hole penetrations" did not apply.

Ross testified, in pertinent part, regarding L. Martone's procedure for covering the drain holes:

> "Q. . . . did Lend Lease have a policy and procedure in effect as to how Martone was supposed to cover or fill these cuts in the insulation on the 77th floor rooftop?
>
> A. No, It [sic] means and methods were left to the subcontractors and this is how they said they were going to remove tripping hazards"

(*id.* at 59).

Affidavit of Brian McGrath (Vice President of Extell's Affiliate)

In his affidavit, Brian McGrath (McGrath) stated that he is the Vice President of Extell Development Company, an affiliate of defendant Extell. McGrath explained that Extell owned the Premises and entered into an agreement with Lend Lease, pursuant to which Lend Lease served as the construction manager for the Project. As construction manager, Lend Lease entered into contracts with various sub-contractors, including Tower, and had overall responsibility for the Project.

McGrath stated that to his knowledge, Extell had no employees. McGrath managed the Project on Extell's behalf. Consequently, McGrath was involved with contracts, schedules and budgets, and dealt directly with Lend Lease on matters relating to the Project.

McGrath also stated that he visited the Project site on occasion to attend meetings at Lend Lease's field office and that he "occasionally walked through the Project to generally observe the

general progress of construction" (McGrath affidavit ¶ 7). McGrath was usually not present at the site on a daily basis or for extended periods of time and did not make safety inspections. Job-site safety was the responsibility of Lend Lease and its subcontractors. Although on occasion, McGrath was on the different roof levels of the building, he could not recall his last visit to the site prior to the date of the accident. Before that date, he "was never aware of, [he] never observed, and no one ever informed [him], that any holes were present [on any] roof level[] that were covered in roofing paper or felt, or were otherwise hidden and not barricaded or protected" (*id.* at ¶ 8).

McGrath also maintained that before the date of the accident, he had never been informed that anyone had sustained injury at the Project by stepping into such a hole. In addition, no one at Extell Development Company or Extell was aware of any such condition on the roof level, nor had been notified of the same. Moreover, McGrath stated that Extell had no involvement in supervising, directing or controlling the work of ironworkers on the Project, including that of plaintiff, and/or his employer Tower.

DISCUSSION

"On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party'" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). The "movant bears the heavy burden of establishing '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'" (*Deleon v New York City Sanitation Dept.*, 25 NY3d 1102, 1106 [2015], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985];

Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). "Once this showing has been made . . . , the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *see Zuckerman v City of New York*, 49 NY2d at 562).

"[S]ummary judgment is a drastic remedy that should be employed only when there is no doubt as to the absence of triable issues" (*Aguilar v City of New York*, 162 AD3d 601, 601 [1st Dept 2018]). "[T]he court's function is issue finding rather than issue determination" (*Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC*, 157 AD3d 479, 481 [1st Dept 2018]).

The Labor Law § 240(1) Claim

Plaintiff moves for summary judgment in his favor as to liability on his Labor Law § 240 (1) claim against defendants Extell and Lend Lease. Defendants move for summary judgment dismissing the Labor Law § 240 (1) claim against them.

Labor Law § 240 (1), commonly referred to as the Scaffold Law, provides, in 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."

"[T]he statute places absolute liability upon owners, contractors, and their agents for any breach of the statutory duty which has proximately caused injury and, accordingly, it is to be construed as liberally as necessary to accomplish the purpose for which it was framed" (*Hill v Stahl*, 49 AD3d 438, 441-442 [1st Dept 2008]). The protections of the statute, however,

> "'do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity . . . . [It] was designed to prevent those types of accidents in which 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*'"

(*id.* at 442 [emphasis in original], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). The hazards contemplated by the statute

> "are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured"

(*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]).

"[T]he duty imposed by Labor Law § 240 (1) is nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500). In order to prevail on a section 240 (1) claim, plaintiff must show that the statute was violated and that the violation was a proximate cause of his or her injuries (*see Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]; *Felker v Corning, Inc.*, 90 NY2d 219, 224-225 [1997]; *Santos v Condo 124 LLC*, 161 AD3d 650, 654 [1st Dept 2018]).

Here, as the owner of the Premises where the accident occurred, Extell may be liable for plaintiff's injuries under the Labor Law. However, it must be determined whether Lend Lease, as the construction manager, and L. Martone, as the roofing subcontractor, may also be liable for plaintiff's injuries.

Initially, Lend Lease does not seek dismissal on this ground. As to L. Martone, it should be noted that

> "[a]lthough sections 240 and 241 . . . make nondelegable the duty of an owner or

> general contractor to conform to the requirement of those sections . . . , the duties themselves may in fact be delegated. When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor"

(*Russin v Louis N Picciano & Son*, 54 NY2d 311, 318 [1981]; *see Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]). Accordingly, "[t]o be treated as a statutory agent, [a] subcontractor must have been 'delegated the supervision and control either over the specific work area involved or the work which [gave] rise to the injury'" (*Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 193 [1st Dept 2011], quoting *Headen v Progressive Painting Corp.*, 160 AD2d 319, 320 [1st Dept 1990]; *Oliveri v City of New York*, 146 AD3d 522, 522 [1st Dept 2017]).

Here, plaintiff fell after stepping into a drain hole concealed by black felt. The accident was caused due to the fact that the bag of limestone that should have been covering the Hole was either never positioned there, or removed. Nathaniel testified that L. Martone was charged with installing the bags of limestone at the location of the job site where plaintiff fell. He also testified that L. Martone's workers were responsible for placing a bag full of limestone in the holes until permanent coverings could be put over the holes (Nathaniel Martone tr at 45-46) and that L. Martone's foreman was responsible for inspecting "any holes that were cut in insolation [sic] at or about the time period of November 4, 2013 to make sure or ensure that bags of limestone were placed in there until other layers were placed above the hole" (*id.* at 47-48).

L. Martone argues that it is not a statutory agent because it did not have the right to control the construction site or plaintiff's work. However, whether L. Martone had the ability to control the construction site in general, or plaintiff's work, is not dispositive. As noted prior, the question is whether it had the "ability to control the activity which brought about the injury"

(*Walls v Turner Constr. Co.*, 4 NY3d at 863-864), i.e., the activity of covering the drain holes at the location of the job site where plaintiff fell with bags of limestone until permanent covers were installed.

Accordingly, since L. Martone had the ability to control the work that caused the accident, it is a proper defendant under Labor Law §§ 240 (1) and 241(6), and is not entitled to dismissal of the claims on this basis.

In any event, Labor Law § 240 (1) is inapplicable to the facts of this case because plaintiff's injury was not caused by the kind of gravity-related risks that the statute was intended to cover. To that effect, plaintiff testified that he fell to the ground after stepping into the Hole which was only 12 inches deep, which does not constitute the type of physically significant elevation differential intended to be covered by the statute (*see Rocovich v Consolidated Edison Co.*, 78 NY2d at 514-515 ["While the extent of the elevation differential may not necessarily determine the existence of an elevation-related risk, it is difficult to imagine how plaintiff's proximity to the 12-inch trough could have entailed an elevation-related risk which called for any of the protective devices of the types listed in section 240(1)"]; *Jackson v Hunter Roberts Constr. Group, LLC*, 161 AD3d 666, 667 [1st Dept 2018]["The height differential of 6 to 10 inches mediated by the ramp did not constitute a physically significant elevation differential covered by [Labor Law § 240(1)]"]; *Sawczyszyn v New York Univ.*, 158 AD3d 510, 511 [1st Dept 2018]["Plaintiff admitted that the vertical distance from the surface of the truck bed to the surface of the dock was about 8 to 12 inches, which under the circumstances, does not constitute a physically significant elevation differential covered by Labor Law § 240 (1)"]; *Grottano v City of New York*, 2017 NY Slip Op 31305[U], *14-*15 [Sup Ct, NY County 2017][section 240 (1) inapplicable where plaintiff fell when his foot went 6 to 7 inches inside a 12-inch-deep drain hole

located in the middle of a cement floor]).

In support of his motion, plaintiff draws this court's attention to cases involving workers falling through holes at construction sites (*see e.g. Kupiec v Morgan Contr. Corp.*, 137 AD3d 872, 872 [1st Dept 2016]["plaintiff was working . . . on a scaffold between the second and third floors of a building and was injured when he stepped into a hole in the scaffold and fell through it"]; *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446 [1st Dept 2013][plaintiff fell through a concealed hole 10 or 12 feet to the story below]; *O'Connor v Lincoln Metrocenter Partners,* 266 AD2d 60, 61 [1st Dept 1999]["plaintiff fell into a three-foot by four-foot opening in the floor when the plywood that had been placed over it shifted and gave way [and] was able to avoid falling to the floor below by holding himself chest-deep in the opening until co-workers could pull him out"]).

However, the cases cited by plaintiff are distinguishable because the Hole at bar was too small for plaintiff to have fallen through.

Therefore, under the circumstances of this case, plaintiff's injury was not caused by an extraordinary elevation-related risk protected by Labor Law § 240 (1), but by a "usual and ordinary danger[ ] at [the] construction site" (*Nieves v Five Boro A.C. & Refrig. Corp.,* 93 NY2d 914, 916 [1999]; *see Alvia v Teman Elec. Contr., Inc.*, 287 AD2d 421, 422 [2d Dept 2001]).

Thus, plaintiff is not entitled to summary judgment in his favor as to liability on his Labor Law § 240 (1) claim against defendants Extell and Lend Lease, and defendants are entitled summary judgment dismissing the Labor Law § 240 (1) claim against them.

The Labor Law § 241(6) Claim

Defendants move for summary judgment dismissing the Labor Law § 241 (6) claim against them. Labor Law § 241 (6) requires all contractors and owners 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. As is the duty imposed by Labor Law § 240 (1), the Labor Law § 241 (6) duty to comply with the Commissioner's regulations is nondelegable" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501-502, quoting Labor Law § 241 [6]). The statute

> "is not self-executing. To establish liability under the statute, a plaintiff must specifically plead and prove the violation of an applicable Industrial Code regulation (*Ross*, 81 NY2d at 502). The Code regulation must constitute a specific, positive command, not one that merely reiterates the common-law standard of negligence (*id.* at 503-504). The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury"

(*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007]).

In the verified bill of particulars, plaintiff alleges violations of multiple Industrial Code provisions, which in moving for summary judgment, defendants contend are either not specific enough or inapplicable. Since plaintiff does not oppose this part of defendants' motion, he has indicated an intention to abandon this as a basis for liability (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]; *Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 478 [1st Dept 2011]).

Thus, defendants are entitled to summary judgment dismissing the Labor Law § 241 (6) claim against them.

The Common-Law Negligence and Labor Law § 200 Claims

Plaintiff moves for summary judgment in his favor as to liability on his common-law negligence and Labor Law § 200 claims as asserted against L. Martone. Defendants move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

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

> "All 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."

"Section 200 of the Labor Law 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" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). "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 v Louis N. Picciano & Son*, 54 NY2d at 317). "Without this authority to control the activity producing the injury, [a defendant can not] be liable to plaintiff under section 200 for failure to provide a safe place to work" (*id.*).

"Claims under Labor Law § 200 and under the common law either arise from an alleged defect or dangerous condition existing on the premises or from the manner in which the work was performed" (*Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 406 [1st Dept 2018]).

> "Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work. Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it"

(*Prevost v One City Block LLC*, 155 AD3d 531, 533-534 [1st Dept 2017][internal quotation marks and citations omitted]).

As noted previously, plaintiff's accident was caused because the Hole, covered by black felt, was allowed to remain unprotected, and there were no barricades or signs to warn of the

concealed hazard. Therefore, the accident was not caused by a defect inherent in the property, but rather it was caused by the manner in which work was being performed, i.e., the procedure used to temporarily cover the drain holes until permanent covers were installed (see *Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d at 406 [where "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"]).

Where, as here, the claim falls under the means and methods category, "the party against whom liability is sought must have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Griffin v Clinton Green S., LLC*, 98 AD3d 41, 48 [1st Dept 2012][internal quotation marks and citation omitted]). Thus, "[i]f the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercises no supervisory control over the work, no liability attaches under Labor Law § 200 or the common law" (*Sullivan v New York Athletic Club of City of N.Y.*, 162 AD3d 955, 958 [2d Dept 2018]). In this regard, general supervisory authority over the work is insufficient to establish liability (*see Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). Rather, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012] [emphasis in original]). Even though a defendant may possess the authority to stop the work for safety reasons, or exercise general supervisory control over the construction site, such authority is insufficient to establish the degree of supervision and control necessary to impose liability (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d at 407; *Hughes v Tishman Constr. Corp.*, 40 AD3d at 306-307; *Dalanna v City of New York*, 308 AD2d 400, 400 [1st Dept 2003]).

As to the claim against L. Martone, Nathaniel's testimony established that L. Martone was charged with installing the bags of limestone at the location of the job site where plaintiff fell. Nathaniel further testified that L. Martone's workers were responsible for placing the bags of limestone in the holes until permanent coverings could be installed (Nathaniel Martone tr at 45-46) and that L. Martone's foreman was responsible for inspecting "any holes that were cut in insolation [sic] at or about the time period of November 4, 2013 to make sure or ensure that bags of limestone were placed in there until other layers were placed above the hole" (*id.* at 47-48).

In addition, plaintiff testified during his deposition that he fell into one of these drain holes, which was concealed by black felt, and that there was nothing warning him of the presence of the hole. As plaintiff asserts, even assuming L. Martone's workers initially placed a bag of limestone over/inside the concealed drain hole, it is undisputed that L. Martone did nothing to prevent someone from removing the bag.

In light of the foregoing, plaintiff established that L. Martone controlled the activity that caused plaintiff's accident, so as to trigger liability under section 200 and the common law. In opposition, L. Martone failed to raise a question of fact on this issue.

Thus, plaintiff is entitled to summary judgment in his favor as to liability on the common-law negligence and Labor Law § 200 claims against L. Martone, and L. Martone is not entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against it.

That said, Lend Lease and Extell are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims asserted against them. In this regard, Ross's deposition testimony indicates that Lend Lease's authority was limited to general supervisory authority at the work site, ensuring compliance with safety regulations, and stopping

work for safety reasons, which is insufficient to impose liability under Labor Law § 200 or the common law (*see generally McLean v Tishman Constr. Corp.*, 144 AD3d 534, 535-536 [1st Dept 2016] ["While defendant Tishman, in its capacity as construction manager, had general supervisory and coordinating responsibilities, it did not have the requisite level of direct supervision and control over the injury-producing activity . . . . Nor is Tishman's authority to control safety at the work site and stop work if it observed a dangerous condition sufficient to support the Labor Law § 200 and common-law negligence claims as against it"][internal citations omitted]) .

Similarly, McGrath's affidavit established that Extell did not supervise or control the work performed at the site (*see generally Comes*, 82 NY2d at 877 ["Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200"]). In opposition, plaintiff failed to raise an issue of fact as to whether Lend Lease or Extell possessed authority to supervise or control the injury producing work sufficient to render them liable under section 200 or the common law.

Thus, Lend Lease and Extell are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the branch of plaintiff's motion which is for summary judgment in his favor on the issue of liability on his common-law negligence and Labor Law § 200 claims insofar as asserted against defendant L. Martone & Son Inc. is granted, and plaintiff's motion is otherwise denied; and it is further

ORDERED that the branch of defendants' motion which is for summary judgment dismissing the amended complaint insofar as asserted against defendants Extell West 57th Street LLC and Lend Lease (US) Construction LMB Inc. is granted, and the amended complaint is dismissed as against Extell West 57th Street LLC and Lend Lease (US) Construction LMB Inc., with costs and disbursements to them as taxed by the Clerk of Court, and the Clerk is directed to enter judgment in favor of Extell West 57th Street LLC and Lend Lease (US) Construction LMB Inc.; and it is further

ORDERED that defendants' motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

The foregoing constitutes the decision and order of this Court.

Dated: 9-16-2019

ENTER:

J.S.C.

HON. DAVID B. COHEN
J.S.C.