

Guida v Extell Dev. Co.
2020 NY Slip Op 31094(U)
April 24, 2020
Supreme Court, New York County
Docket Number: 160194/2015
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 160194/2015

GIUSEPPE GUIDA, MARIA GUIDA,

Plaintiff,

MOTION SEQ. NO. 004

- v -

EXTELL DEVELOPMENT COMPANY, LEND LEASE (US)
SERVICES, INC., COMPONENT ASSEMBLY SYSTEMS,
INC., HYATT CORPORATION, LENDLEASE (US)
CONSTRUCTION LMB INC. F/K/A BOVIS LEND LEASE
LMB, INC., EXTELL WEST 57TH STREET LLC, SEFINA
INDUSTRIES LIMITED

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 119, 120, 121, 122, 123

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

In this personal injury action commenced by plaintiff Giuseppe Guida and his wife Maria Guida against defendants Extell Development Company (“EDC”), Lend Lease (US) Services, Inc. (“LLUS”), Component Assembly Systems, Inc. (“CAS”), Hyatt Corporation (“Hyatt”), Lendlease (US) Construction LMB Inc. f/k/a Bovis Lend Lease LMB, Inc. (“LLUSC”), Extell West 57th Street LLC (“EW57”) and Sefina Industries Limited (“Sefina”), defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from an incident on April 29, 2014, in which plaintiff Giuseppe Guida was allegedly injured when, while working as a painter for nonparty Spectrum Painting (“Spectrum”) at a construction site on the 17th floor of 157 West 57th Street in Manhattan, he attempted to move uninstalled wooden panels and they fell on him. He thereafter commenced this action against defendants EDC, LLUS, CAS, and Hyatt by filing a summons and complaint on October 5, 2015. Doc. 1. In the complaint, plaintiff alleged common law negligence as well as violations of Labor Law sections 200, 240(1) and 241(6). Maria Guida alleged a claim for loss of consortium. Doc. 1.

Plaintiff thereafter filed amended complaints naming the additional defendants. Docs. 30, 31, 33, 55. In their answers to the complaints, defendants denied all substantive allegations of negligence and asserted various affirmative defenses.

In his bill of particulars, plaintiff alleged that, on April 29, 2014 at approximately 11:00 A.M., he sustained personal injuries while working within the course of his employment for Spectrum when, while attempting to move uninstalled wooden wall panels on the 17th floor of the premises located at 157 West 57th Street, New York, New York, the panels fell on him. Doc. 99. Plaintiff alleged common law negligence as well as violations of Labor Law

sections 200, 240(1), and 241(6). He further claimed that defendants triggered liability under Labor Law section 241(6) by violating sections 23-1.5, 23-1.7(a)(1)&(2), 23-1.7(e)(2), and 23-2.1(a)(1) of the New York State Industrial Code.

At his deposition, plaintiff testified that, in April 2015, he was employed as a foreman and painter by Spectrum on a project at a Hyatt Hotel project located at 157 West 57th Street in Manhattan. Doc. 95 at 13, 29-30. His duties included supervising, directing and controlling the work of Spectrum employees, as well as painting. The only other person who instructed Spectrum painters on site was Patsy Monteforte, plaintiff's supervisor. Doc. 95 at 24, 110-11. For Spectrum, the project included preparing walls, delivering wallpaper, painting rooms, and wallpapering. Doc. 95 at 30-31.

Plaintiff identified LLUSC as the general contractor with which he coordinated on the project. Doc. 95 at 31-32; Doc. 101. Spectrum's work at the site typically followed the work of electricians, carpenters, and tapers. Doc. 95 at 45. As Spectrum's foreman, he directed, controlled and supervised its work and, if something were done incorrectly, it was his duty to ensure it was remedied. Doc. 95 at 110-111.

Plaintiff stated that, if materials belonging to other trades prevented Spectrum from performing its work, he would have been unable to move such items because he did not have the authority to do so. Doc. 95 at 58, 80-81.

On the date of the alleged accident, plaintiff was assigned to complete work on the 17th floor. The work entailed preparing rooms to be wallpapered and painting walls. Doc. 95 at 59-60, 65-66. Plaintiff was working with three other Spectrum employees, one of whom was named Reuben. Doc. 95 at 66. When plaintiff arrived to the 17th floor at approximately 7:00 a.m., he inspected the first and second rooms to be painted, saw they were clean, and had the Spectrum employees begin preparing those rooms for work. Plaintiff then inspected the third room, a junior suite, and noticed that it was not ready for work. Doc. 95 at 66, 72, 75-76. The junior suite had wood paneling and a headboard leaning against the walls, which impeded Spectrum's ability to work in that area. Doc. 95 at 14-20. The wood panels were to be installed by CAS. Doc. 95 at 91-92. There were two or three wood panels, about 4-6 feet tall and about 4 feet wide, behind the door to the room and leaning against a wall. There was also a headboard from a bed, which was about 4 feet tall and 6-8 feet wide, placed horizontally up against the right wall of the main room. Doc. 95 at 86, 89, 95-97. There was another set of wood panels located near the far wall of the room, which plaintiff estimated was approximately four feet away from the headboard. There were approximately four

wood panels in this set and they were the same type as those leaning near the door of the room. Doc. 95 at 101-102. All of the panels in the room rested on blue felt paper which LLUSC directed CAS to use to protect the stone floor, which had already been completed. Doc. 95 at 158-160.

At approximately 10:45 A.M., after plaintiff observed that the panels and headboard were still in the junior suite and had not moved since he first saw them earlier that morning, Diana Rios of LLUSC directed him to move the same. Doc. 95 at 133-143.¹ Plaintiff asked his colleague Reuben to help him move the paneling. Doc. 95 at 142. Although plaintiff had previously seen laborers moving wood paneling with an A-frame cart, he did not obtain one. Instead, he chose to move the panels by hand with him on one side and Reuben on the other. Doc. 95 at 146-148.

Plaintiff and Reuben decided they were going to first move the panels on the far side of the room closer to the headboard. Doc. 95 at 149-150. Plaintiff grabbed the first of the four panels by one side, with his left hand towards the bottom of the panel and his right hand towards the top, and Reuben did the same. Doc. 95 at 150-153. Plaintiff estimated that the panel weighed approximately 80-90 pounds. Doc. 95 at 162. Plaintiff and Reuben lifted the panel approximately eight inches off the

¹ This contradicts plaintiff's testimony that he was only supervised by Monteforte. It also contradicts his testimony that he was not permitted to move materials belonging to other contractors.

ground and walked away from the column. When they were approximately three feet away from the three panels which had been leaning behind the panel being carried, the remaining panels slid along the floor and at least one came into contact with the plaintiff's right foot. This caused plaintiff to lose his balance and move backwards, and his right elbow struck the corner of the headboard. Doc. 95 at 156-157, 166. When the panel contacted plaintiff's right foot, it came off of the ground, but his left foot did not. This prevented him from falling to the ground. Instead, his body came into contact with the headboard. Doc. 95 at 170-171, 179.

At the time of the incident, plaintiff was standing on blue felt paper which had been placed down to protect the newly installed floor from damage, and he felt the paper move when the panels struck him. Doc. 95 at 169-172. Although plaintiff had asked prior to the incident whether the felt paper could be taped down, a superintendent from LLUSC said that it could not be taped because taping it could damage the new floor. Doc. 95 at 172.

Prior to the date of the accident, plaintiff had never touched any wood paneling at the site. Doc. 95 at 88, 91. Further, in all of his time working at 157 West 57th Street, the plaintiff never made any complaints to anyone about the job site. Doc. 95 at 112.

Michael Marrone, Senior Vice President of Field Operations and Superintendent for LLUSC, testified that Bovis Lend Lease LMB, Inc. and

LendLease (US) Construction LMB, Inc. were the same company, and Bovis Lend Lease LMB, Inc. was a former name of said company. Doc. 96 at 12-13.² On April 29, 2014, Marrone was a senior superintendent for the project located at 157 West 57th Street, working for LLUSC, which was the project's construction manager. Doc. 96 at 11, 20. As senior superintendent, he was in charge of all field operations for the project, which was a skyscraper meant for commercial and residential use with a Hyatt hotel on the lower floors and condominiums on the top. Doc. 96 at 13-15. Floors 17 and 18 were part of the commercial portion of the building. Doc. 96 at 19. As construction manager, LLUSC oversaw the construction of the project and coordinated all trade activities. Doc. 96 at 20.³

Marrone identified CAS as the drywall carpentry contractor hired by LLUSC for the hotel. Doc. 96 at 31. He identified Sefina as the project millwork contractor in charge of manufacturing and supplying the cabinetry, finished products, doors, frames and paneling for the project. Doc. 96 at 35. Marrone testified that, if subcontractors were storing materials on site, it was expected that they would be stored in a safe manner and out of the path of workers. Doc. 96 at

² Although Marrone was not specifically questioned about the relationship of defendant Lend Lease (US) Services, Inc. to LLUSC, this Court will, in light of the testimony discussed above, treat LLUS and LLUSC as the same entity.

³ Pursuant to a contract dated September 9, 2011, Sefina was hired by LLUSC as millwork contractor on the project and CAS was Sefina's subcontractor for the millwork. Doc. 109. The same contract reflects that LLUSC was general contractor on the project and that EW57 was the owner of the building. Doc. 109.

56-57. He also testified that one contractor was not meant to move the materials of another contractor. Doc. 96 at 60-61.

Marrone further testified that, if one were storing wood panels, such as the ones located in the rooms on the 17th floor, leaning them against the wall without bracing or tying them down would be a proper way to secure them. Doc. 96 at 74-75.

CAS appeared for deposition by its General Superintendent Vincent Malley. His duties as general superintendent on the day of the incident were to oversee the foremen on the 157 West 57th Street Project. He described CAS as a drywall and millwork contractor. Doc. 97 at 8-10. Malley described the project as a high-rise building with high-end luxury condominiums on the top and a hotel on the bottom. Doc. 97 at 10-11. CAS contracted with LLUSC to perform drywall work at the site, and separately contracted with Sefina to perform millwork installation on site. Doc. 97 at 11. With respect to drywall work, CAS contracted with LLUSC to frame, install sheetrock and tape the walls and ceilings. However, the millwork conducted by CAS was done exclusively pursuant to its contract with Sefina. Doc. 97 at 13, 15-16.

Malley stated that, pursuant to its contract with Sefina, CAS was responsible for unloading millwork off of the delivery trucks, transporting the millwork to the location where it was to be installed, and storing it until such time as it would be

installed. Doc. 97 at 19-20. Malley testified that Spectrum painters generally painted the walls of a room, then CAS would install wall panels, and finally Spectrum would come in and finish the painting. Doc. 97 at 25.

According to Malley, Sefina performed no physical work on site and no Sefina employees installed any wood panels. Doc. 97 at 26-27. He further testified that Sefina was not involved in stacking panels in the individual rooms and that Sefina's representative, Jeremy Ascher, was neither consulted with respect to where panels should be placed nor as to how they should be stacked. Doc. 97 at 79-80.

CAS employees, supervised by CAS's foreman, Vinny Gangemi, removed the wood panels from the delivery trucks. The wood panels were delivered to the rooms by CAS employees. Then, under the supervision of its foreman, Christopher Robinson, CAS would install wood panels. Doc. 97 at 45-48. Malley further testified that CAS' workers used an A-frame cart to transport the wood panels. Doc. 97 at 49. Gangemi or Robinson decided where the panels would be placed. Doc. 97 at 53. The panels were leaned horizontally against a wall so that they would not fall or slip. Four or five panels could be leaned against each other on one section of wall and friction would keep the panels from sliding out. Doc. 97 at 53-55.

Malley insisted that, during his 30 years working as a carpenter, he had never seen panels which were leaning against a wall slide down. Doc. 97 at 55-56. He also corroborated Marrone's testimony that one trade was not supposed to move materials belonging to another trade. Doc. 97 at 60.

Mark Goldman, Chief Financial Officer for Sefina, described the company as a Canadian-based manufacturer of millwork, including products such as doors, frames, and cabinetry. Doc. 98 at 7-10. After submitting a winning bid for work at the site, Sefina entered into a contract with LLUSC to supply and install millwork. Sefina then contracted with CAS to perform the installation of all millwork on site. Sefina itself did not install any millwork. Doc. 98 at 13-16. Sefina's consultant, Jeremy Ascher, observed the unloading of Sefina's materials at the site and ensured that all millwork ordered was delivered. However, Ascher played no role in unloading the millwork or in where to put the panels at the site. Doc. 98 at 23-24. Rather, CAS was responsible for unloading and distributing the millwork at the site. Doc. 98 at 20, 24, 26. Sefina did not have any personnel on site performing construction related activity. Doc. 98 at 29. Goldman stated that there were no specific rules or regulations regarding how to store, stand up, or pack millwork.

On January 30, 2017, defendants served a response to the plaintiffs' Notice to Admit in which they admitted that, on April 29, 2014, defendant EW57 was the

owner of the premises located at 157 West 57th Street, New York, New York.

Docs. 100, 101.

Christina Urbanski, Director of Legal Services for Hyatt, testified that Hyatt, which manages a portfolio of Hyatt-branded hotels in the United States, was neither an owner nor a contractor for the subject construction project. Doc. 105. According to Urbanski, Hyatt did not begin its management and operation of the subject property until August 5, 2014 and, thus, did not control any portion of the construction phase, including plaintiff's work, which led to his injury on April 29, 2014.

Plaintiff filed a note of issue and certificate of readiness on April 29, 2019. Doc. 102. By so-ordered stipulation dated May 9, 2019, this Court extended the time to move for summary judgment until August 27, 2019. Doc. 103.

Defendants now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. In support of the motion, EDC, Hyatt and Sefina assert that they are entitled to summary judgment because they are not proper Labor Law defendants and thus did not have the authority to supervise plaintiff's work. All of the defendants argue that plaintiff's claim pursuant to Labor Law section 240(1) must be dismissed since plaintiff's accident did not arise from a gravity-related risk. They further assert that plaintiff's claim pursuant to Labor Law section 241(6) must be dismissed since he failed to allege that they violated applicable and

specific sections of the New York State Industrial Code. Additionally, defendants argue that plaintiff's Labor Law section 200 claim must be dismissed because they did not supervise plaintiff's work or have notice of any dangerous condition at the site.

In support of the motion, defendants submit the affidavit of their expert, Bernard P. Lorenz, P.E., a professional engineer, who attests that defendants did not violate Labor Law sections 240(1) or 241(6) and did not store the panels in a dangerous manner. Doc. 106. Lorenz concludes that the manner in which the four wood panels were stored, i.e., leaning up against a wall, was in accordance with standard custom and practice in the construction industry and in accordance with the Industrial Code. Doc. 106. Specifically, Lorenz noted that the panels remained stable until plaintiff and Reuben removed the outermost panel and that "[p]rior to that panel being removed, there was sufficient friction between the bottoms of the panels and the floor surface to resist the movement of said panels." Doc. 106. Based on the foregoing, Lorenz found that "it can be reasonably concluded that the movement of the outer panel by plaintiff and his co-worker exerted a force on the remaining three (3) static and stable panels which caused them to become unstable and slide away from the wall." Doc. 106.

Lorenz opines that no enumerated safety devices were required to be used in order to store the four wood panels, and, thus, there was no violation of Labor Law

§ 240(1); that there was no violation of Industrial Code 12 NYCRR 23-1.7(e)(2) since the floor area where plaintiff was attempting to move the wood panels was free from the accumulation of dirt, debris, tools, materials, and sharp objects; that there was no violation of 12 NYCRR 23-2.1(a)(1) as it is in accordance with standard custom and practice in the construction industry and with that regulation to store wood panels leaning up against a wall; and that since there were no violations of the Industrial Code sections mentioned above, there was therefore no violation of Labor Law § 241(6). Doc. 106.

In conclusion, Lorenz states that it is his opinion "within a reasonable degree of engineering and construction safety certainty that the four (4) wooden panels were stored in a manner that was safe, static and stable and did not present an unsafe condition. The actions of plaintiff and his co-worker disrupted the stability of the stored panels which caused plaintiff's accident." Doc. 106.

In an affidavit submitted in support of the motion, Ahuva Genack, General Counsel for EDC, affirmed that she was familiar with EDC's corporate records, real estate developments and holdings, real estate ownership status, and corporate relationships and that EDC was not an owner of the property or a contractor on the project. Doc. 104. Rather, maintains Genack, EDC never owned the subject premises and EDC was never a contractor for construction at the subject premises. Doc. 104.

Plaintiff opposes the motion, arguing that questions of fact exist regarding whether: 1) he should have been provided with safety devices envisioned by Labor Law section 240(1); 2) defendants violated Labor Law section 241(6); and 3) defendants violated Labor Law section 200. In attempting to invoke liability pursuant to Labor Law section 241(6), plaintiff claims that defendants violated Industrial Code Regulations 23-1.7(e)(2) and 23-2.1(a)(1), which were alleged in the bill of particulars, as well as Regulations 23-1.7(d) and 23-1.7(e)(1), which are raised for the first time in opposition to the motion. In opposing the motion, plaintiff submits the affidavit of Andrew Yarmus, P.E., a licensed engineer, who avers that defendants violated Labor Law sections 200, 240(1), and 241(6) and that these violations caused plaintiff's injuries.

In reply, defendants argue that the Labor Law section 240(1) claim must be dismissed since plaintiff's injuries were not caused by a height differential. Defendants further assert that the Labor Law section 241(6) claim must be dismissed. Specifically, they maintain that, since plaintiff did not object to the dismissal of the section 241(6) claim as premised on Industrial Code sections 23-1.5, 23-1.7(a)(1) and 23-1.7(a)(2), any claim of liability based on those sections has been abandoned. Defendants further assert that plaintiff's section 241(6) claim must otherwise be dismissed since the remaining Industrial Code sections allegedly violated are inapplicable or insufficiently specific to impose liability under that

statute. Further, defendants maintain that plaintiff's common law negligence claim and claim pursuant to Labor Law section 200 must be dismissed since defendants did not have the authority to direct or supervise plaintiff's work and had neither actual nor constructive notice of any dangerous condition.

In a further affidavit submitted in reply, Lorenz reiterates his opinion that defendants did not cause or contribute to plaintiff's injuries.

Malley also submits a further affidavit in reply, attesting to the fact that CAS used a product called Albert Floorotex to protect the finished floors at the project.

In a sur-reply affirmation filed with Court leave, plaintiff, replying on a further affidavit submitted by Yarmus, argues that material issues of fact exist which warrant the denial of defendants' motion.

LEGAL CONCLUSIONS:

The "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). "Failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment 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*, 68 NY2d at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

“Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable.” *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 (2004). “On a summary judgment motion, facts must be viewed in the light most favorable to the non-moving party.” *Vega v Restani Const. Corp.*, 18 NY3d 499, 503 (2012), quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 (2011). The role of the court in determining the “drastic remedy” of summary judgment is “issue - finding,” not “issue - determination.” *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotation marks and citation omitted).

Labor Law Section 240(1)

Labor Law § 240 (1) provides in part:

All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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.

Since EDC and Hyatt have established they were not owners, contractors, or agents within the meaning of the statute, they have established their prima facie entitlement to summary judgment dismissing plaintiff's claim pursuant to Labor Law section 240(1), and no issue of fact has been raised in opposition. However, since Sefina entered into a contract with LLUSC to provide millwork at the site, it is not entitled to dismissal on the ground that it was not a contractor within the meaning of this section. Additionally, since EW57 was the owner of the site, it is not entitled to dismissal on the ground that it is not a proper Labor Law defendant.

Nevertheless, plaintiff's Labor Law section 240(1) claim is subject to dismissal as against all defendants on the ground that the plaintiff was not injured by a risk contemplated by the statute. Although defendant's expert, Lorenz, opines that defendants were not required to provide plaintiff with any of the devices set forth in the statute, and plaintiff's expert, Yarmus, raises an issue of fact in opposition with his opinion that plaintiff should have been provided with a safety device prescribed by section 240(1), the issue of fact raised is not material so as to warrant denial of this branch of the motion since plaintiff was not injured by a risk arising from a violation of Labor Law section 240(1) as a matter of law. *Cf.*, *Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513, 524 (1985) (summary judgment granted to plaintiff on liability pursuant to section 240[1] as a

matter of law despite conflicting opinions of experts).

In order to prevail on summary judgment in a section 240 (1) "falling object" case, the injured worker must demonstrate the existence of a hazard contemplated under that statute "and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Essentially, the plaintiff must demonstrate that at the time the object fell, it either was being "hoisted or secured" (*Narducci*, 96 NY2d at 268), or "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]; see *Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 759 [2008]). . . [S]ection 240 (1) does not automatically apply simply because an object fell and injured a worker; "[a] plaintiff must show that the object fell . . . because of the absence or inadequacy of a *safety device* of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268 [second emphasis supplied]).

Fabrizi v 1095 Ave. of the Ams., L.L.C., 22 NY3d 658, 662-663 [2014]

Several appellate decisions have held that injuries occurring under circumstances similar to those herein did not give rise to liability pursuant to section 240(1).

The facts of *Wiley v Marjam Supply Co., Inc.*, 166 AD3d 1106 (3d Dept 2018) *lv denied* 34 NY3d 907 (2019) are very similar to those in this case.

Plaintiff in that action was injured while walking across a room where sheetrock had been stacked on the ground on its long side. When plaintiff was about 4 feet away from the sheetrock, he pivoted and the sheetrock fell and struck him on his ankle, causing him to fall to the ground. The Appellate Division, noting that the

sheetrock and the plaintiff were at the same level, dismissed the claim pursuant to section 240(1) based on the absence of a significant elevation differential.

In *Seales v Trident Structural Corp.*, 142 AD3d 1153 (2d Dept 2016), plaintiff was injured by a piece of sheetrock which had been stored by leaning it against a wall. The Appellate Division held that plaintiff's section 240(1) claim was subject to dismissal since the sheetrock was "not a material being hoisted or a load that required securing for the purposes of the undertaking at the time it fell" and that, under the circumstances of the case, it could not be expected that the sheetrock would require securing for the purposes of the work at the time of the incident.

In *Hebbard v United Health Servs. Hosps., Inc.*, 135 AD3d 1150 (3d Dept 2016), plaintiff was injured when a stack of about 30 scaffold frames about 6 feet long, 4 to 5 feet wide and 45 to 50 pounds each, standing vertically on the same level, and at about the same height as plaintiff, fell onto plaintiff while he was attempting to move one of the frames. The court dismissed plaintiff's claim pursuant to section 240(1) on the ground that plaintiff failed to establish that the accident was caused by a significant elevation differential.

In contrast, in *Rodriguez v DRLD Dev. Corp.*, 109 AD3d 409 (1st Dept 2013), plaintiff was injured when he tripped on a cable, thereby dislodging sheetrock boards, approximately eight feet high and which had been leaning

against a wall, which struck him. In holding that section 240(1) applied to the facts of that case, the Appellate Division reasoned that the boards had been resting on blocks of wood which were approximately two feet high, and that, unlike here, there was a sufficient height differential which implicated section 240(1).

Although Yarmus opines that the panels struck plaintiff with a significant amount of force, this Court nevertheless finds that the section 240(1) claim must be dismissed given the absence of any appreciable height differential.

Thus, plaintiff's claim pursuant to section 240(1) is dismissed as against all defendants.

Labor Law Section 241(6)

Labor Law § 241 (6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). To state a claim, the plaintiff must demonstrate that his or her injuries were proximately caused by a violation of a specific and applicable provision of the New York State Industrial Code (12 NYCRR 23 *et seq* *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 502; *see also Ortega v Everest Realty LLC*, 84 AD3d 542, 544, 923 NYS2d 74 [1st Dept 2011]).

Licata v AB Green Gansevoort, LLC, 158 AD3d 487, 488 (1st Dept 2018).

Plaintiff alleged in his bill of particulars that defendants violated Industrial Code sections 23-1.5, 23- 1.7(a)(1) and (a)(2), 23-1.7(e)(2), and 23-2.1(a)(1), and, in support of their motion, defendants assert that none of these sections supports a claim pursuant to Labor Law section 241(6). However, in opposition to the motion, plaintiff alleges violations of Industrial Code sections 23-1.7(d), 23-1.7(e)(1) and (e)(2), and 23-2.1(a)(1). By failing to oppose that branch of defendants' motion seeking dismissal of the 241(6) claim premised on sections 23-1.5, 1.7(a)(1) and (a)(2) of the Industrial Code, plaintiff has abandoned such arguments. *See Harsch v City of New York*, 78 AD3d 781 (2d Dept 2010). Contrary to defendants' contention, however, plaintiff was not prohibited from asserting the violation of additional Industrial Code provisions, specifically sections 23-1.7(d) and 23-1.7(e)(1), in opposition to the instant motion. *See Wowk v Broadway 280 Park Fee, LLC*, 94 A.D.3d 669 (1st Dept 2012); *Kelleir v Supreme Indus. Park, LLC*, 293 AD2d 513, 513-514 (2d Dept 2002). This Court will address the remaining Industrial Code violations alleged seriatim.

23-1.7(d) provides as follows:

(d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

Since this provision regulates “elevated working surface[s] which [are] in a slippery condition”, it is clearly inapplicable. There is no dispute that plaintiff was standing on the floor when the accident occurred. Additionally, there is no evidence that a slippery condition such as water, grease or any other foreign substance caused the accident.

23-1.7(e)(1) and (e)(2) provide as follows:

(e) Tripping and other hazards.

(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

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

Section 23-1.7(e)(1) does not apply to the facts of this case since plaintiff was injured in a room and not in a passageway. *See Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 382 (1st Dept 2007); *Militello v 45 W. 36th St. Realty Corp.*, 15 AD3d 158, 159-160 (1st Dept 2005).

Additionally, section 23-1.7 (e) (2) does not apply because the panels which allegedly struck plaintiff did not constitute "debris" or scattered tools or materials, but, rather, were "consistent with" the work being performed in the room since they were going to be installed therein. *See Cumberland v Hines Interests LP*, 105

AD3d 465, 466 (1st Dept 2013); *Burkoski v Structure Tone, Inc.*, 40 AD3d at 383; *Kinirons v Teachers Ins. & Annuity Assn. of Am.*, 34 AD3d 237, 238 (1st Dept 2006).

23-2.1(a)(1) provides as follows:

(a) Storage of material or equipment.

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

This section is also inapplicable to the facts herein since the location where plaintiff was working at the time of the accident was not a "passageway, walkway, stairway or other thoroughfare," as the rule requires. *See Burkoski v Structure Tone, Inc.*, 40 AD3d at 382; *Militello v 45 W. 36th St. Realty Corp.*, 15 AD3d at 159-160.

Thus, plaintiff's claim pursuant to Labor Law section 241(6) is dismissed in its entirety.

Labor Law Section 200/Common Law Negligence

Labor Law §200 is a codification of common-law negligence. *See Comes v N.Y. State Elec. & Gas Corp.*, 82 NY2d 876 (1993). Liability under section 200 "generally falls into two broad categories: instances involving the manner in which the work is performed, and instances in which workers are injured as a result of

dangerous or defective premises conditions at a work site." *See Abelleira v City of New York*, 120 AD3d 1163, 1164 (2d Dept 2014).

Where a worker's injury stems from the manner in which the work is performed, "liability for common-law negligence or under Labor Law §200 may be imposed against an owner or general contractor if it 'actually exercised supervisory control over the injury-producing work.'" *Suconota v Knickerbocker Props., LLC*, 116 A.D.3d 508, 508 (1st Dept 2014) quoting *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012). There is no liability under this section of the Labor Law for an owner or general contractor that exercises no supervisory control over the operation, where the purported defect or dangerous condition arose from the contractor's methods. *See Lombardi v Stout*, 80 NY2d 290 (1992). "An implicit precondition to [the duty under Labor Law § 200] 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 311, 317 (1981); *Fiorentino v Atlas Park LLC*, 95 A.D.3d 424 (1st Dept 2012).

"Where a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a landowner may be liable under Labor Law § 200 if it 'either created the dangerous condition that caused the accident or had actual or constructive notice of the

dangerous condition" *Rojas v Schwartz*, 74 AD3d 1046, 1047 (2d Dept 2010) citing *Ortega v Puccia*, 57 AD3d 54 (2d Dept 2008); see also *Garcia v DPA Wallace Ave. I, LLC*, 101 A.D.3d 415 (1st Dept 2012).

The evidence submitted in connection with the motion reflects that, of the defendants, only CAS, LLUS, and LLUSC had any involvement at all with the panels. Since CAS unloaded the panels and stored them at the site, there is a question as to whether it created the allegedly unsafe condition by negligently storing them. Additionally, since Rios told plaintiff to move the panels, there is a question of fact regarding whether LLUS and/or LLUSC supervised plaintiff's work and/or had actual or constructive notice of a hazardous condition.

Additionally, an issue of fact exists regarding who placed the blue felt paper on the ground under the panels and whether this caused or contributed to plaintiff's injuries since he felt the paper move at the time of the incident. Thus, summary judgment dismissing plaintiff's claim pursuant to Labor Law section 200 is granted to all defendants except CAS, LLUS, and LLUSC.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of defendants' motion seeking summary judgment dismissing plaintiff's claim pursuant to Labor Law section 240(1) is granted; and it is further

ORDERED that the branch of defendant's motion seeking dismissal of plaintiff's claim pursuant to Labor Law section 241(6), as predicated upon violations of Industrial Code sections 23-1.5, 23-1.7(a)(1), and 23-1.7(a)(2) is granted insofar as plaintiff has abandoned his reliance on these provisions; and it is further

ORDERED that the branch of defendants' motion seeking dismissal of plaintiff's claim pursuant to Labor Law section 241(6), as predicated upon violations of Industrial Code sections 23-1.7(d), 23-1.7(e)(1), 23-1.7(e)(2), and 23-2.1(a)(1) is granted; and it is further

ORDERED that the branch of defendants' motion seeking dismissal of plaintiff's claim pursuant to Labor Law section 200 is granted as to defendants Extell Development Company, Hyatt Corporation, Extell West 57th Street LLC and Sefina Industries Limited, and is denied as to defendants Lend Lease (US) Services, Inc., Component Assembly Systems, Inc. and Lendlease (US) Construction LMB Inc. f/k/a Bovis Lend Lease LMB, Inc.; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, within 20 days of entry of this order, counsel for the defendants is to serve this order, with notice of entry, upon all parties and upon the County Clerk (Room 141 B) and the Clerk of the Trial Support Office (Room 158) and said Clerks are directed to mark their records accordingly; and it is further

ORDERED that service upon the County Clerk and the Clerk of the Trial Support Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that this constitutes the decision and order of the court.

4/24/2020

DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE