Dobson v 250 E. 57th St. LLC
2020 NY Slip Op 31146(U)
May 5, 2020
Supreme Court, New York County
Docket Number: 154723/2016
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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GERANIMO DOBSON and DALIAH DOBSON, his lawfully wedded wife,

Plaintiffs,

- v -

250 EAST 57TH STREET LLC, WORLD-WIDE HOLDING CORP., LEND LEASE (US) CONSTRUCTION LMB INC., SNOWPLOW LH LLC, THE CITY OF NEW YORK, and NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendants.

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INDEX NO. 154723/2016

MOTION DATE

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 129, 130 131, 132, `133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 195, 197 198, 199, 200, 201, 202, 207, 208, 209, 210, 211, 212, 213, 214, 216, 217, 218, 219, 220

were read on this motion for PARTIAL SUMMARY JUDGMENT.

Hill & Moin LLP, New York, NY (David S. Zwerin of counsel), for plaintiff Geranimo Dobson.
Cerussi & Spring, White Plains, NY (Crista D'Angelica of counsel), for defendants Lend Lease (US) Construction LMB Inc., Snowplow LH LLC, the City of New York, and New York City Department of Education.

Gerald Lebovits, J.:

This is an action to recover damages for personal injuries allegedly sustained by a carpenter, plaintiff Geranimo Dobson on August 25, 2015, while working on a construction project at 250 East 57th Street in Manhattan. Dobson was injured when a panel, to which he was attached by a harness and chain, fell, causing him to fall with the panel to the ground below.

Dobson brought this action against various entities involved in the construction project on which he was injured, asserting claims in common-law negligence and Labor Law §§ 200, 240 (1), and 241 (6).[1] He now moves for summary judgment on liability on his Labor Law § 240 claim and his Labor Law § 241 claim predicated on alleged violations of Industrial Code 12 NYCRR 23-2.2 (a) and 23-1.16 (b). He also moves for summary judgment on his common-law

[1] Plaintiff's wife, Daliah Dobson, also asserts a claim for derivative losses. That claim is not at issue on this motion and cross motion.

negligence and Labor Law § 200 claims as asserted against defendants Lend Lease (US) Construction LMG Inc. (Lend Lease) and Snowplow LH LLC (Snowplow).

Defendants the City of New York (the City), New York City Department of Education (the DOE), Lend Lease, and Snowplow cross-move for summary judgment dismissing the Labor Law § 241 (6) claim predicated on alleged violations of Industrial Code 12 NYCRR 23-2.2 (a), 23-1.16 (b) and 23-5, and the common law negligence and Labor Law § 200 claims as asserted against them. The memorandum of law in support of the cross-motion, also seeks dismissal of the Labor Law § 240 (1) claim asserted against the City and DOE; this court deems defendants' cross-motion to encompass that request for relief as well.

Dobson's motion for summary judgment is granted in full as to his Labor Law § 240 claim, is granted in part and denied in part as to his Labor Law § 241 claim, and is denied as to his Labor Law § 200 and common-law negligence claims. Defendant's cross-motion is granted on the Labor Law § 200 and negligence claims, granted in part on the Labor Law § 241 claim, and denied on the Labor Law § 240 claim.

BACKGROUND

At the time of the accident, Snowplow leased the Premises from the New York City Construction Fund (the Construction Fund) and was in the process of constructing a residential tower (the Project). Snowplow hired Lend Lease to serve as the general contractor for the Project. Lend Lease subcontracted with non-party Navillus Tile to do concrete work for the Project. Plaintiff was employed by Navillus as a carpenter at the time of the accident.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was employed as a carpenter by Navillus, clamping together DOKA panels to create walls for concrete forms in which concrete would later be poured. The DOKA panels, which measured 2' by 9', were made of metal and plywood.

Plaintiff testified that while building the walls, he and his partner clamped the DOKA panels together to form a grid. They would place one panel on top of another, and then use the clamps to hold the panels together. The clamps would attach to the lip of the panel and then a stake went through each clamp to hold it in place. As the walls they were constructing grew higher, plaintiff and his partner had to climb onto the wall itself in order to continue building it. To do this, they each used a harness and 16" chain provided by Navillus. They attached the chain to the center of their harness and then hooked the other side through a hole in one of the panels that had already been secured with four clamps—two on each side.

Plaintiff testified that his foremen from Navillus instructed him on how to do this work. Only the Navillus foremen told him what to do and instructed the manner in which he and his partner did their work. The site safety officer never instructed them on how to do their work.

Plaintiff testified that immediately prior to his accident, he and his partner were standing on a wall they were in the process of building. Two other laborers were passing the panels up to plaintiff's partner for installation. Plaintiff secured the panel they were installing on his side using two clamps. His partner, standing about 9 feet away from him, then put two clamps on the right side of the panel. Plaintiff then anchored his chain to that panel and observed one of the clamps his partner had just installed fly open. He observed the second clamp his partner installed fly open and the wall started to fall. Since plaintiff was hooked to the panel, his body weight brought the panel down the rest of the way, causing him to fall 9 feet to the ground.

Plaintiff asserted that this was not the first time he observed a clamp fail. Prior to his accident, he observed claims fail for various reasons, including vibrations in the wall, the manner in which the clamp was installed, and due to the clamp being defective. He testified that some of the clamps he and his partner were required to use were not in good condition and that defective clamps were sometimes placed back in the same bin as the properly working clamps. Plaintiff testified that he and his partner were nevertheless expected to use the clamps to perform their work. Plaintiff testified that he complained about this on several occasions to his foremen. He was told by his foremen that they "would look into it" (Plaintiff tr at 92-93).

Plaintiff further testified that on more than one occasion prior to his accident, he and the other Navillus carpenters asked their foreman for a scaffold. They were told by the foreman that they would not be provide a scaffold because using the harness and chain was faster. Plaintiff also asked for a ladder at least five or six times, but these requests were also denied.

Plaintiff testified that on other job sites, he had always been provided with a scaffold or ladder to perform this type of panel installation. He had never built this type of wall by climbing on the wall itself, secured by just a chain attached to the wall.

Plaintiff's Affidavit

The statements made in plaintiff's affidavit substantially mirror statements he made during his deposition testimony. In his affidavit, plaintiff also avers, among other things that he was not provided with a place overhead to tie off a safety lanyard.

Deposition Testimony of Edwin Garcia (Employee of Lend Lease)

Edwin Garcia (Garcia) testified that on the date of the accident, he worked for Lend Lease. Garcia testified that Lend Lease was the general contractor for the Project. It hired the subcontractors for the Project and had the authority to fire the subcontractors. Lend Lease gave the subcontractors a schedule by which their work needed to be completed, but it did not have the authority to direct the manner in which the subcontractors performed their work.

Garcia testified that Lend Lease hired Navillus as the concrete subcontractor for the Project. When Garcia started work at the Premises, he was instructed to "be with the concrete guys" (Garcia tr at 26). When asked if Lend Lease "in any way direct[ed] Navillus on how they should build the forms," Garcia responded "No" (*id.* at 31).

Garcia testified that Lend Lease had safety managers on site daily and prepared daily reports, which detailed what contractors were on site and what was being done each day. Garcia or another superintendent would do walk-throughs with a person he understood to be the owner of the Premises. Lend Lease's lead safety manager prepared a daily log, which was prepared by Garcia when the lead safety manager was not present. Garcia testified that he prepared the log on the date of the accident which showed that safety inspections were performed that day. Garcia testified that he would have made the inspection, but could not recall when he performed any of the inspections. Garcia could not recall whether Navillus was erecting form panels on the date of the accident and did not recall inspecting any form walls.

Deposition Testimony of Jodi Gerstmin (Authorized Agent for Snowplow)

Jodi Gerstmin testified that Snowplow was the developer of the Premises and that she was "an authorized agent for Snowplow" (Gerstmin tr at 10). She performed transactions on behalf of Snowplow, including the negotiation of the ground lease for the Premises between Snowplow and the Construction Fund and other legal documents related to the development.

From early 2014 until August 22, 2015, Snowplow was the developer of the Premises, which was to be a 65-story residential building. Gerstmin stated that the Construction Fund was the nominal owner of the land and Snowplow was the owner of the building, but still a tenant of the Construction Fund under the ground lease. The construction manager for the Project was Lend Lease, and Navillus was a subcontractor.

The Construction Contract Between Snowplow and Lend Lease

Snowplow and Lend Lease entered into a "Standard Form Agreement Between Owner and Construction Manager" (Construction Contract) in which Snowplow is denominated as the "Owner" and Lend Lease as the "Construction Manager" (Construction Contract, exh K to Plaintiff's Notice of Motion). Pursuant to the Construction Contract, Lend Lease agreed to "furnish efficient construction administration, management services and supervision; to furnish at all times an adequate supply of workers and materials; and to perform the Work in an expeditious and economical manner" (*id.* at page 1, section 1.2).

The Subcontract Between Lend Lease and Navillus

As relevant here, the subcontract between Lend Lease and Navillus provides: "Contractor [Navillus] shall stop any part of the Work which Construction Manager [Lend Lease] deems unsafe until corrective measures satisfactory to Construction Manager have been taken" (Lend Lease/Navillus Subcontract at section 15.8, exh F to Affirmation in Opposition to Defendant's Cross Motion).

Affidavit of John P. Caniglio, CSP (Plaintiff's Expert)

In his affidavit, John P. Caniglio, CSP states that he is a safety professional with over 40 years of experience in the construction industry (Expert Affidavit, exh H to plaintiff's Notice of Motion). Caniglio states that he rendered his opinion based upon his review of the deposition

testimony of the parties. According to Caniglio, "[t]he facts of the matter establish that [plaintiff] was not provided with proper fall protection and as a result he sustained injuries" (*id.* at paragraph 8). Caniglio opined that plaintiff should have been provided with a secure scaffold from which he could have tied off to prevent falling. As a second choice, he should been provided with a secure ladder. As a third choice, he should have been provided with a secure anchor for fall protection and at the very least should have been provided with properly functioning clamps to attach the panels together.

Caniglio further opined:

> "A worker who is required or allowed to install form panels at a height without a safety harness and lanyard attached to a secure and unmovable anchor has not been given proper protection from falling. This is not accepted safety protocol when installing form panels. A panel clamped together to another panel is not a secure anchor point for a wall chain and is insufficient to prevent a fall. Moreover, the defective clamps should have been removed from the work site as they posed a dangerous risk to [plaintiff] and the other carpenters. Even if every clamp was working properly, there is still a grave risk to using them to anchor someone nine feet above the ground as they can suddenly and unpredictably release due to vibrations on the job site or failure to place them properly. It is my opinion, based on the testimony, that the combination of harness, wall chain, panel and clamps, failed to prevent [plaintiff's] fall" (*id.* at 12).

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; *accord Zuckerman v City of New York*, 49 NY2d at 562).

Timeliness of Defendants' Cross Motion

As an initial matter, plaintiff argues that defendants are not entitled to summary judgment in their favor on their cross motion for summary judgment because their cross motion is not timely. Defendants do not dispute that their cross motion is untimely. They assert that the court may nevertheless consider their cross motion on the ground that the relief they seek is nearly identical to that sought by plaintiff in its motion for summary judgment.

"[E]ven in the absence of a good cause," the court may consider an untimely cross motion for summary judgment "where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion." This authority exists because a court, "in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion (CPLR 3212 [b])." By the same token, though, "the court's search of the record" is "limited to those causes of action or issues that are the subject of the timely motion" (*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006] [internal citations omitted]). In other words, "[t]he merits of [an] untimely cross motion for summary judgment [may] properly [be] reached t*o the extent that it is based on the same issues raised by the motion*" (*Palomo v 175th St. Realty Corp.*, 101 AD3d 579, 581 [1st Dept 2012] [emphasis added]).

Here, the issues raised by that part of defendants' cross motion seeking relief on the Labor Law § 241 (6), common law negligence, and Labor Law § 200 claims are "nearly identical" to those raised by plaintiff in his motion only as those issues pertain to the claims asserted against Snowplow and Lend Lease.

This court therefore considers only that part of defendants' cross-motion seeking dismissal of the common-law negligence and §§ 200 and 241 (6) claims as against Snow Plow and Lend Lease. Defendants' cross-motion is otherwise denied as untimely.

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 Lend Lease and Snowplow. 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 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 494, 500 [1993]).

"Not 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 Assocs.*, 96 NY2d 259, 267 [2001]; *see Fernandez v BBD Developers, LLC*, 103 AD3d 554, 555 [1st Dept 2013). 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]).

Initially, Lend Lease does not dispute that, as the general contractor for the Project, it is a proper Labor Law defendant. Snowplow also does not dispute that it may be liable for plaintiff's injuries under the Labor Law. Indeed, "[t]he meaning of 'owners' under Labor Law § 240 (1) and § 241 (6) has not been limited to titleholders but has 'been held to encompass a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit'" (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 618 [2d Dept 2008], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]). Here, it is undisputed that Snowplow leased the Premises for the purpose of development and hired Lend Lease as the general contractor for the Project. Since Snowplow had an interest in the Premises and fulfilled the role of owner by contracting for work for its benefit, it may be considered an owner for the purposes of Labor Law § 240 (1).

As to Lend Lease and Snowplow's liability under Labor Law § 240 (1), plaintiff met his prima facie burden of establishing that Labor Law § 240 (1) was violated. To that effect, plaintiff testified that while he performed his assigned work, clasps that were holding in place the panel he was installing flew open. As a result, the panel and the plaintiff fell nine feet to the ground below, injuring plaintiff. Plaintiff contends that Lend Lease and Snowplow are liable for his injuries because the harness and chain he was using did not prevent him from falling, due to the chain being anchored to the very panel he was installing. And plaintiff was not provided with other necessary safety devices to keep him from falling, such as a scaffold, ladder, or a safety harness and lanyard with another anchor point.

Since plaintiff was clearly subject to an elevation related risk and the harness and chain did not prevent plaintiff from falling while performing his work, Lend Lease and Snowplow are liable for his injuries under section 240 (1). Indeed, "[w]hether a device provides proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his or her materials" (*Melchor v Singh*, 90 AD3d 866, 868 [2d Dept 2011]; s*ee Peralta v American Tel. and Tel. Co*., 29 AD3d 493, 494 [1st Dept 2006] [unrefuted evidence that the unsecured ladder moved, combined with evidence that no other safety devices were provided, warranted a finding that the owners were liable under Labor Law § 240 (1)]).

Additionally, since it was foreseeable that panels held together with clamps could become unstable during installation, a harness and chain attached to the panel itself was not an adequate safety device for the job at hand. "'[T]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures'" (*Nimirovski v Vornado Realty Trust Co*., 29 AD3d 762, 762 [2d Dept 2006] [scaffold alone, as a safety device, was inadequate to protect the plaintiff, "where it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake"][citations and quotation marks omitted]). Here, additional safety devices to prevent plaintiff from falling were required (s*ee Ortega v City of New York*, 95 AD3d 125, 131 [1st Dept 2012]; *Bush v Goodyear Tire & Rubber Co.*, 9 AD3d 252, 253 [1st Dept 2004]).

In opposition to plaintiff's motion, Lend Lease and Snowplow argue that plaintiff is not entitled to judgment in his favor because plaintiff's 50-h hearing testimony and his deposition testimony present differing versions of the accident. This court disagrees. The minor inconsistencies in plaintiff's testimony "[do] not relate to a material issue," and thus do not preclude an award of partial summary judgment as to liability in plaintiff's favor (*Leconte v 80 E. End Owners Corp.*, 80 AD3d 669, 671 [2d Dept 2011]; *see Anderson v International House*, 222 AD2d 237, 237 [1st Dept 1995]).

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]). "As has been often stated, the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, those best suited to bear that responsibility instead of on the workers, who are not in a position to protect themselves" (*John v Baharestani*, 281 AD2d 114, 117 [1st Dept 2001] [internal quotation marks and citations omitted]).

Thus, plaintiff is entitled to partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against Snowplow and Lend Lease. Defendants' remaining arguments on this issue are unavailing.

The Labor Law § 241 (6) Claim

Plaintiff moves for summary judgment in his favor against Lend Lease and Snowplow on that part of the Labor Law § 241 (6) claim predicated on an alleged violations of Industrial Code sections 23-2.2(a) and 23-1.16(b). Lend Lease and Snowplow cross-move for summary judgment dismissing these claims and the claim predicated on an alleged violation of Industrial Code section 23-5.

> Labor Law § 241 (6) provides, in pertinent part, as follows:
> "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, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers" (R*oss v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d at 501). However, Labor Law § 241 (6) is not self-executing. To show a violation of this statute, a plaintiff must show that the defendant violated a specific, applicable,

implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.* at 503-505).

Initially, it is noted that in his bill of particulars, plaintiff asserts an alleged violation of Industrial Code section 23-5. He does not, however, move for summary judgment on that claim. In response to Lend Lease and Snowplow's cross-motion to dismiss, plaintiff concedes that this "general provision is not sufficiently specific" and that he is only claiming violations of Industrial Code sections 23-2.2(a) and 23-1.16(b) (Affirmation in Opposition to Defendants' Cross Motion, at 9, n1). Therefore, plaintiff's Labor Law § 241 (6) claim is dismissed insofar as it is predicated on an alleged violation of section 23-5 of the Industrial Code.

Industrial Code 12 NYCRR 23-2.2 (a)

12 NYCRR 23-2.2(a) states:

"23-2.2 Concrete work

(a) General requirements. Forms, shores and reshores shall be structurally safe and shall be properly braced or tied together so as to maintain position and shape"

Initially, that part of section 23-2.2 (a) that requires forms to be "properly braced or tied together so as to maintain position and shape" is sufficiently specific to support a Labor Law § 241 (6) claim (*see Morris v Pavarini Constr.,* 22 NY3d 668, 671 [2014]; *Morris v Pavarini Constr.,* 9 NY3d 47, 50-51 [2007]).

Lend Lease and Snowplow argue that section 23-2.2 (a) does not apply to the facts of this case because it only applies to "concrete work" and the concrete had not yet been poured into the form at the time of plaintiff's accident. However, contrary to defendants' contention, section 23-2.2 (a) applies to forms in the process of being assembled (*see Morris v Pavarini Constr*., 22 NY3d at 675 ["Interpreting the regulation as defendants suggest would result in diminished protections for workers during the assembly of forms, as compared with the concrete pouring process stage of the work, a reading of the regulation that runs counter to its text and undermines the legislative intent to ensure worker safety"]).

Thus, plaintiff is entitled to partial summary judgment in his favor as to liability against Lend Lease and Snowplow on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-2.2 (a), and Lend Lease and Snowplow are not entitled to summary judgment dismissing that part of plaintiff's § 241 (6) claim.

Industrial Code 12 NYCRR 23-1.16(b)

12 NYCRR 23-1.16 (b) provides:

"Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and

> whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet."

Initially, section 23-1.16 (b) is sufficiently specific to support a cause of action under Labor Law § 241 (6) (*see Jerez v Tishman Constr. Corp. of N.Y.*, 118 AD3d 617, 618 [1st Dept 2014]).

Lend Lease and Snowplow assert that at the time of the accident, plaintiff was not wearing the type of harness contemplated by section 23-1.16 (b) and therefore, this section of the Industrial Code is inapplicable to the facts of this case. Their contention is without merit as it is undisputed that plaintiff was given a harness that was not—indeed could not be—"properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline," and further that the attachment plaintiff was using was not "so arranged" that if he should fall, his fall would "not exceed five feet" (12 NYCRR 23-1.16 [b]; *see Jerez v Tishman Constr. Corp. of N.Y.*, 118 AD3d at 618). Therefore, section 23-1.16 (b), which sets standards for when safety belts and harness are in use, applies to the facts of this case.

Thus, plaintiff is entitled to partial summary judgment in his favor as to liability against Lend Lease and Snowplow on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.16 (b), and Lend Lease and Snowplow are not entitled to summary judgment dismissing that part of plaintiff's § 241 (6) claim.

The Common-Law Negligence and Labor Law § 200 Claims

Plaintiff moves for summary judgment in his favor against Lend Lease and Snowplow on his common-law negligence and Labor Law § 200 claims. Lend Lease and Snowplow cross-move for summary judgment dismissing these claims as against them.

Labor Law § 200 "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" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing C*omes v New York State Elec. & Gas Corp*., 82 NY2d 876, 877 [1993]). Labor Law § 200 (1) provides as follows:

> "1. 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."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by the contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see McLeod v Corporation of Presiding Bishop of Church of Jesus*

Christ of Latter Day Sts., 41 AD3d 796, 797-798 [2d Dept 2007]; *Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

Here, the accident was caused when the clamps, holding together the panel to which plaintiff was attached by a harness and chain, flew open, causing the plaintiff and the panel to fall. Accordingly, plaintiff's claims implicate the means and methods of plaintiff's work.

"Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]). Indeed, establishing liability under Labor Law § 200 "requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]).

Lend Lease and Snowplow argue that they are entitled to dismissal of the common-law negligence and Labor Law § 200 claims against them, because they did not supervise or direct plaintiff's work. Plaintiff testified that only the Navillus foremen supervised and directed the means and methods of his work and that he only received direction from his foremen. He also testified that he reported to his foremen that some of the clamps they were using to hold together the panels were not working properly, but that he was expected to use them anyway. Further, he testified that he asked his foremen for a scaffold or ladder to perform his work, but was told to continue working in this fashion since it was faster. Further, Garcia testified that Lend Lease did not control the means or methods of any subcontractor's work at the Premises. Rather, it gave timelines to the subcontractors in which they were expected to complete portions of the Project. Also, when asked specifically if Lend Lease "in any way direct[ed] Navillus on how they should build the forms," Garcia responded "No" (Garcia tr at 31).

In opposition, plaintiff points to the fact that Lend Lease reviewed onsite safety and that Garcia, a Lend Lease employee, was tasked to "be with the concrete guys" (Garcia tr at 26). Plaintiff also notes that Garcia testified that Lend Lease had safety managers on site daily and prepared daily superintendent's reports, which detailed what contractors were on site and what was being done each day. He testified that Lend Lease's lead safety manager prepared a daily log, which was prepared by Garcia when the lead safety manager was not present. Garcia testified that he prepared the log on the date of the accident which showed that safety inspections were performed that day. Plaintiff also asserts that pursuant to its subcontract with Navillus, Lend Lease had the authority to stop the work in the event that Garcia or another Lend Lease employee observed an unsafe condition.

General supervisory control, however, is insufficient to impute liability under Labor Law § 200. Even where an entity "may have coordinated the subcontractors at the work site or told them where to work on a given day, and had the authority to review onsite safety . . . those responsibilities do not rise to the level of supervision or control necessary to hold the [entity] liable for plaintiff's injuries under Labor Law § 200" (B*isram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014]). Instead, "it must be demonstrated that the [owner or] contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept

2007] [emphasis in original]). Plaintiff has not demonstrated that Lend Lease and Snowplow exercised this degree of control.

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

Accordingly, for the foregoing reasons it is hereby

ORDERED that the branch of plaintiff Geranimo Dobson's motion under CPLR 3212 seeking partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as asserted against defendants Lend Lease and Snowplow is granted; and it is further

ORDERED that the branch of plaintiff Geranimo Dobson's motion under CPLR 3212 seeking partial summary judgment in his favor as to liability on that part of the Labor Law § 241 (6) claim predicated on alleged violations of Industrial Code 12 NYCRR 23-2.2 (a) and 23-1.16 (b), as asserted against defendants Lend Lease and Snowplow is granted; and it is further

ORDERED that the branch of plaintiff Geranimo Dobson's motion under CPLR 3212 seeking partial summary judgment in his favor as to liability on the Labor Law § 200 and common-law negligence claims as asserted against defendants Lend Lease and Snowplow is denied; and it is further

ORDERED that the branch of defendants' cross-motion under CPLR 3212 seeking summary judgment dismissing plaintiff Geranimo Dobson's Labor Law § 241 (6) claim predicated on alleged violations of Industrial Code 12 NYCRR 23-5, and the common-law negligence and Labor Law § 200 claims, as asserted against defendants Lend Lease and Snowplow is granted, and these claims are dismissed; and it is further

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

ORDERED that the parties shall confer and shall notify chambers (by email to mhshawha@nycourts.gov) as to how they intend to proceed on those of plaintiff's claims that are not resolved by this decision and order.

HON. GERALD LEBOVITS
J.S.C.

05/05/20
DATE

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