Ahmad v 540 W. 26th St. Prop. Invs. IIA, LLC
2020 NY Slip Op 31915(U)
June 4, 2020
Supreme Court, Kings County
Docket Number: 505130/17
Judge: Lawrence S. Knipel
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of June, 2020.

PRESENT:

HON. LAWRENCE KNIPEL

Justice.

----------X

HUSSAIN AHMAD,

Plaintiff,

- against -

Index No. 505130/17

540 WEST 26TH STREET PROPERTY INVESTORS IIA, LLC, AND TRITON CONSTRUCTION COMPANY, LLC,

Defendants.

----------X

The following e-filed papers read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	110-135, 137-164
Opposing Affidavits (Affirmations)	167-184, 185-188
Reply Affidavits (Affirmations)	190-195, 196-204
Affidavit (Affirmation)	

Upon the foregoing papers, plaintiff Hussain Ahmad (plaintiff) moves, pursuant to CPLR 3212, for an order granting partial summary judgment as to liability on his Labor Law § 240 (1) claim against defendants 540 West 26th Street Property Investors IIA, LLC (540 West) and Triton Construction Company, LLC (Triton). Defendants 540 West and Triton move, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's complaint in its entirety.

Factual Background

This is an action to recover monetary damages for personal injuries allegedly sustained by the plaintiff on September 26, 2016, while at a construction site located at 540 West 26th Street in New York City (hereinafter, the premises). 540 West was the owner of the premises, which was undergoing construction of a seven-story mixed-use facility with commercial space and a school. 540 West hired Triton to act as the construction manager for the project. Triton contracted with ACS-NY, LLC (ACS) (not a party herein) to perform superstructure concrete work on the jobsite. ACS, in turn, subcontracted the rebar installation work to non-party TMG Contracting (TMG). Plaintiff was employed by TMG as a lather at the time of the accident.

During his deposition, the plaintiff testified that he had worked for TMG for approximately six to seven months before his accident occurred. His TMG foreman was Fernando Apolinar (Fernando). Plaintiff worked with a crew of other TMG workers (approximately 8-10) under the supervision of Santo, who worked underneath Fernando. Plaintiff testified that this crew did rebar installation for floors, walls, stairways, beams and columns. He explained that when laying a deck, the lather workers installed the steel rebar, the carpenters put in the forms, and then the concrete would be poured. The forms would then be removed a day or two later. Plaintiff testified that he received his work assignments from either Santo or Fernando. On the day of the accident, the plaintiff was tasked with working on the fourth floor to assist a co-worker who needed help laying and tying rebar. The deck for the fourth floor was the ceiling of the third floor, which had been poured earlier. In order to access the floors, there was a main staircase located in the middle of the building, and two construction ladders, one on the west side of the building and the other on the east side. Plaintiff testified that, on the day of the accident, the main staircase was cluttered with debris and garbage, and therefore could not be used. As a result, plaintiff used the west side ladder to access the fourth

floor where he was going to work. The west side ladder was firmly affixed to the second floor and to the deck of the third floor. At one point while he was working, the plaintiff descended the ladder from the third floor to the second floor in order to retrieve spray paint from the TMG toolbox. During his ascent back up the ladder, plaintiff suddenly felt something heavy hit him on his head, causing him to fall backwards off the ladder, landing on the second floor. The ladder did not move, shift or otherwise fall. Plaintiff testified that he was struck by a piece of plywood. Although he did not see it fall, he recalled looking up after he fell and observed a piece of plywood wedged in between the steps, and that he heard somebody say "do not touch that, do not move that, leave it right there". Plaintiff described the plywood that hit him as measuring four feet by eight feet, which was used as a form for the deck cement work. Plaintiff estimated that the plywood weighed about 120 pounds, and that the distance between the two decks was about 25 feet. Plaintiff was wearing a hard hat at the time of the accident. He further testified that prior to the accident, he did not see any caution tape in place at the top or between the second and third floors, or on the subject west side ladder. Plaintiff claimed that the tape depicted in various photographs he was shown at his deposition was not there before his accident. According to plaintiff, workers came and put tape around the ladder and the area after he fell, not before. Plaintiff also testified that he never received any notice or warnings not to use the west side ladder between the third and second floor.

Plaintiff subsequently commenced the within action on or about March 13, 2017 against defendants seeking to recover for personal injuries he allegedly sustained as a result of the incident. His complaint alleges violations of Labor Law §§ 240 (1), 241 (6), 200 and common-law negligence. Defendants interposed an answer generally denying the allegations. The parties subsequently engaged in discovery, and the plaintiff filed a note of issue on or about December 11, 2018. Pursuant to an order of this court, dated January 22, 2019, the time for all

parties to file summary judgment motions was extended to May 11, 2019. The following motions ensued and are timely.

Discussion

540 West and Triton (collectively, defendants) seek summary judgment dismissing plaintiff's entire complaint as asserted against them, which is comprised of Labor Law §§ 240 (1), 241 (6), 200 and common-law negligence claims. Plaintiff seeks partial summary judgment as to liability on his Labor Law § 240 (1) claim against both defendants.

It is well settled that "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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also, Smalls v AJI Industries. Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie demonstration 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 (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Labor Law § 240 (1) claim

In support of his motion for summary judgment on his Labor Law § 240 (1) claim, plaintiff argues that the defendants 540 West, as the owner, and Triton, as its statutory agent, are liable for their failure to provide him with adequate safety devices to prevent him from an elevated-related risk. Relying on his own deposition testimony, as well as his sworn affidavit, which is submitted herein, plaintiff contends that it is undisputed that he was working at an

elevated height when he was struck by a falling object, an unsecured piece of plywood, thereby causing him to fall and sustain various injuries. Plaintiff maintains that the plywood, which was used as a form in the concrete work, was an object that required securing for the purpose of the undertaking. As such, he argues that defendants' failure to secure it in any manner, and provide a suitable safety device to protect him from such falling objects constitutes a violation of Labor Law § 240 (1), which was a proximate cause of his accident and injuries. Plaintiff further contends that his version of how the accident occurred is corroborated by the accident report of Triton, and its site safety director.

In addition, plaintiff argues that the ladder from which he fell lacked guardrails and handrails to prevent him from falling after being struck by the plywood and, thus, was also a violation of section 240 (1). Plaintiff claims that he was never told that the west side ladder access point was closed for use between the third and second floors due to ACS's stripping work taking place on the third floor. He further contends that a review of photographic evidence that was marked for identification at his deposition reveals that certain safety precautions, such as taping placed at the base of the ladder on the second floor to prevent usage, were put in place after the accident occurred. Under these circumstances, plaintiff maintains that he is entitled to summary judgment in his favor since defendants failed to provide him with adequate protection to prevent him from the gravity-related risk.

In opposition to plaintiff's motion, and in support of their own motion, defendants argue that the west side ladder from which the plaintiff fell provided proper protection in that there is no evidence in the record that it shifted or collapsed while plaintiff was on it. More importantly, defendants contend that the ladder was located in an area which was designated a controlled access zone (CAZ), which had been barricaded with yellow caution tape on its top and bottom to specifically prevent access and usage. Defendants further contend that, on the

morning of the accident date, the plaintiff was specifically warned and instructed by his supervisor, Fernando, not to use the west side ladder, but chose to disregard those instructions. Defendants, therefore, argue that the plaintiff was a recalcitrant worker and is precluded from recovering pursuant to Labor Law § 240 (1) because his actions were the sole proximate cause of the accident. In support of this contention, defendants submit the affidavit of Jerome Smiley, who was employed by ACS as a laborer/stripper from 2015 to 2017 (Zunno Affirmation, exhibit H). Smiley affirms that he was assigned to work at the subject work site, and that he created the CAZ the morning of the accident (7:00 a.m.) by affixing yellow caution tape in an approximate 20 foot by 20 foot area around the west side ladder on the fourth, third and second floors of the building. He states that he positioned the tape at approximately 3 ½ feet in height above the floor slab and that a second tape was placed approximately 1 ½ feet above the wood constructed platform. He avers that all taping was in place before the accident.

Additionally, defendants submit the affidavit of Fernando, a TMG foreman who supervised the plaintiff at the work site (*id.*, exhibit J). Fernando avers that on the morning of the accident, he personally told his crew, including the plaintiff, that the west side ladder was closed from the second floor to the third floor, and that he directed them to use the two other access points, either the center staircase or the east side ladder. Fernando further avers that before the accident occurred, he observed that the caution tape was in place at the top of the west side ladder from the third floor to the second floor, and further observed that there was also a four-by-eight foot piece of plywood at the top of the ladder. He also noticed that ACS workers were preparing to strip the forms in the area above the west side ladder (exh J).

Defendants also submit an affidavit by Michael Florio, a Concrete Safety Manager employed by Structure Compliance Group (not a party herein) who was onsite on the day of the accident (*id.*, exhibit K). Florio avers that on the morning of the day of the accident, before

work commenced, he informed everyone by radio transmission that the west side ladder from the second to the third floors had been placed under a CAZ warning because stripping activity above the third floor was going to take place. He furthers avers that CAZ safety issues were covered in the required OSHA ten-hour construction course the workers were required to take. Florio also claims that he observed that caution tape was in place on the third floor surrounding the two-by-four guardrail protection to the west side ladder, and that there was caution tape at the bottom of the ladder around the shoring posts that were approximately five feet away from the base of the ladder on the second floor. Florio claims that the bottom and top areas of the ladder were entirely and properly taped off. He did not witness the plaintiff's accident, but arrived on the scene about five minutes after it occurred. When he got there, he saw the plaintiff on the floor, and noticed that the yellow caution tape was still in place just as it was when he went on his site walk that morning.

Defendants submit an affidavit by Kevin Kelly, an employee of Total Safety Consultants (not a party herein), who worked at the site (*id.*, exhibit I). Kelly avers he was onsite the day of the accident. He did not witness the plaintiff's accident, but heard it happen and responded to the scene approximately 15 seconds after it occurred. Kelly claims that he observed a four-by-eight foot section of plywood stuck in position in the guard rail of the opening above the west side ladder on the third floor. He did not see anything on the ground around the plaintiff. He also observed that there was yellow caution tape present on the top of the west side ladder on the third floor and at the base of the ladder on the second floor, which was still in position. Kelly avers that this taping completely blocked access to the west side ladder. Kelly additionally avers that there were two additional points of access between the third and second floors, the center core temporary ladder and the east side ladder.

Defendants additionally point to the deposition testimony of Triton's Job Superintendent, Ramkaveshwar Ramnarase, who was assigned to work at the job site at the time of the accident. Ramnarase testified that on the morning of the accident, he conducted a daily walkthrough of all the floors, and observed that the third floor had been cordoned off. He claimed that the area of the accident, as well as the west side ladder, was taped off with caution tape, with signage up stating that stripping was to commence. He further testified that this taping was in place prior to the plaintiff's accident. According to Ramnarase, Triton's responsibilities on the site included ensuring that the various trades performed their work in compliance with the drawings and building specifications in a safe manner. He further testified that ACS was responsible for the means and methods of how it performed its stripping work at the site. While Triton had the authority to stop any unsafe work that it observed, he claimed it neither directed nor controlled the work of ACS or plaintiff's employer, TMG.

Defendants argue that the foregoing evidence establishes that the accident occurred in a caution-taped-off CAZ area, and that the plaintiff was specifically instructed not to enter said area or use the west side ladder. Defendants, therefore, contend that plaintiff's actions in entering the CAZ area, and in disregarding his supervisor's instructions, which were given that morning, was the sole proximate cause of his accident and resulting injuries. Defendants further argue that the plywood that hit plaintiff was not being hoisted or secured at the time of the accident; nor did it require securing for the purpose of the undertaking. In this regard, defendants contend that the forms were in the process of being stripped/removed, and therefore did not need securing. Under these circumstances, defendants maintain that the plaintiff's Labor Law § 240 (1) claim should be dismissed.

In response, plaintiff maintains that the area was not cordoned off or taped at the time of his accident, and that any evidence to the contrary was placed there after his accident

occurred, not before. In a "Further Affidavit," submitted herein, plaintiff avers that on the day of the accident, he was not given a two-way radio, and further denies that he received any verbal instructions not to use the west side ladder due to ACS's ongoing stripping work. Plaintiff also affirms that various photographs (Schaktman Affirmation, exh 8, 9, 10), which show no caution taping in place, are accurate depictions of the area before his accident occurred.

In addition, plaintiff reiterates his argument that the plywood form was an object that required securing for the purpose of the undertaking, and therefore the defendants were required, pursuant to Labor Law § 240 (1), to provide him with adequate safety devices to protect him from the potential falling object. In support, the plaintiff submits an expert affidavit by Joseph C. Cannizzo, a professional engineer, who opines, to a reasonable degree of engineering certainty, that the plywood form should have been adequately secured before and/or during the stripping process, and that defendants' failure to secure it was the proximate cause of plaintiff's accident. In this regard, he opines that the defendants should have provided safety devices such as jacks, scissor lifts, scaffolding, netting, ropes, and/or other devices to protect the plaintiff from being struck by the falling form.

Labor Law § 240 (1) imposes upon owners, general contractors, and their agents a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites (*see Escobar v Safi*, 150 AD3d 1081, 1082 [2017]). To prevail on a motion for summary judgment in a Labor Law § 240 (1) "falling object" case, the plaintiff must demonstrate that at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking (*see Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662–663 [2014]; *Passos v Noble Constr. Grp., LLC*, 169 AD3d 706, 707 [2019]; *Romero v 2200 N. Steel, LLC*, 148 AD3d 1066, 1067 [2017]). Labor Law § 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 (*see Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d at 663). Where the hoisting or securing of a device of the kind enumerated in the statute would not have been necessary or even expected, Labor Law § 240 (1) does not apply (*see Romero v 2200 N. Steel, LLC*, 148 AD3d at 1067, *citing Narducci v Manhasset Bay Assoc.*, 96 NY2d 259[2001]).

Moreover, "[t]o impose liability pursuant to Labor Law § 240 (1), there must be a violation of the statute and that violation must be a proximate cause of the plaintiff's injuries" (*Tama v Gargiulo Bros., Inc.*, 61 AD3d 958, 960 [2009]; *see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Godoy v Neighborhood P'ship Hous. Dev. Fund Co.*, 104 AD3d 646, 647 [2013]). "Where there is no statutory violation, or where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery under Labor Law § 240 (1)" (*Treu v Cappelletti*, 71 AD3d 994, 997 [2010]).

The Second Department case, *Godoy v Neighborhood P'ship Hous. Dev. Fund Co.* (104 AD3d 646), is particularly instructive here. In *Godoy*, the plaintiff, a demolition worker, was working on the first floor of a building picking up debris that had fallen as a result of prior demolition work that occurred on the second floor. At the same time, demolition of the basement floor was taking place. While plaintiff was in the process of picking up debris, the floor beneath her collapsed, causing her to fall to the basement floor below. Plaintiff subsequently commenced an action alleging, among other claims, Labor Law § 240 (1). In denying both plaintiff's and defendants' respective motions for summary judgment on the Labor Law § 240 (1) claim, the Second Department held that a triable issue of fact existed as to whether plaintiff's actions were the sole proximate cause of her alleged injuries (*id.* at 647–48). In so holding, the court noted that the third-party defendant had submitted an affidavit by an employee supervisor who claimed that the area where the plaintiff fell had been cordoned off due to the floor's instability, and that he had specifically told the plaintiff several times not to

enter the restricted area, the last of which was just 30 minutes before the accident. The court further noted that plaintiff's deposition testimony denying that the area was cordoned off, or that she received any warnings of same, raised issues of fact, thereby precluding summary judgment (*id.* at 647).

Here, as in *Godoy*, there is evidence that the area in question was a designated CAZ, or was otherwise cordoned off by caution tape in order to prevent entry into that location and usage of the west side ladder. Moreover, there is evidence in the record that, on the morning of the accident, plaintiff's supervisor, Fernando, personally told plaintiff that the west side ladder was closed off from the third to the second floors because of ACS's stripping work, and that he was not to enter that area or use the ladder. During his deposition, the plaintiff denied that there was any caution tape, or that the west side ladder had been closed off. He further denied receiving any instructions not to enter the area that morning. Under these circumstances, the court finds that issues of fact exist as to whether the plaintiff's actions were the sole proximate cause of his accident, thereby precluding an award of summary judgment in any parties' favor (*see Godoy*, 104 AD3d at 647; *John v Klewin Bldg. Co., Inc.*, 94 AD3d 1502, 1503 [2012] [summary judgment on Labor Law § 240 (1) denied where triable issues of fact existed whether, before the accident and on the date thereof, plaintiff was specifically instructed to work only on the flat portion of roof rather than the sloped portion from which he fell]; *Serrano v Popovic*, 91 AD3d 626, 627–628 [2012]). Indeed, where there are conflicting versions, as here, the trier of fact could draw conflicting inferences as to how the accident actually occurred (*see Godoy*, 104 AD3d at 648; *John v Klewin Bldg. Co., Inc.*, 94 AD3d at 1503–1504; *see also Delahaye v Saint Anns School*, 40 AD3d 679, 680 [2007]; *Becovic v Scoria & Diana Assoc., Inc.*, 12 AD3d 388 [2004]; *Reborchick v Broadway Mall Props., Inc.*, 10 AD3d 713 [2004]). Moreover, resolution of the resulting credibility issues would be inappropriate on a motion for summary judgment (*see Miraglia v H & L Holding Corp.*, 306 AD2d 58 [2003]). Accordingly, plaintiff's motion for summary judgment on the issue of

liability on his Labor Law § 240 (1) claim is denied, and that branch of defendants' motion seeking to dismiss said claim is also denied.

Labor Law § 241 (6) Claim

Defendants seek summary judgment dismissing plaintiff's Labor Law § 241 (6) claim as against them. Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers without regard to direction and control (*see Romero v J & S Simcha, Inc.*, 39 AD3d 838 [2007]). In order to prevail under this section of the Labor Law, a plaintiff must establish that specific safety rules and regulations of the Industrial Code promulgated by the Commissioner of the Department of Labor were violated (*see Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494 [1993]; *Ares v State of New York*, 80 NY2d 959 [1992]). The rule or regulation alleged to have been breached must be a specific, positive command and be applicable to the facts of the case (*see Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 619 [2008]; *Jicheng Liu v Sanford Tower Condominium, Inc.*, 35 AD3d 378, 379 [2006]).

Here, in his bill of particulars, the plaintiff alleges that defendants violated Industrial Code 12 NYCRR 23-1.7 (a) (1), 23-1.7 (a) (2), 23-1.7 (c) (1), 23-1.8 (c) (1), 23-1.16 (b), 23-1.16 (c), 23-1.16 (d), 23-1.21 (a), 23-1.21(b) (3), 23-1.21 (b) (4) (iv), 23-1.21 (b) (5), 23-2.2 (a), 23-2.2 (b), 23-2.2 (d), 23-2.7 (a) and 23-2.7(b). Plaintiff also alleges violations of various OSHA regulations. In support of their motion, defendants argue that the above-referenced code sections are either not applicable to the facts herein, or are not sufficiently specific, and in any event, were not a proximate cause of the plaintiff's accident. In opposition to defendants' motion, however, the plaintiff only relies upon the alleged violations of sections 23-1.7 (a) (1), 23-1.7 (a) (2), 23-2.2 (a), 23-2.2 (b), and 23-2.7 (e), the last of which he raises for the first time. With the exception of these code provisions referenced in plaintiff's opposition, the remaining Industrial Code provisions set forth in plaintiff's bill of particulars are hereby deemed abandoned by the plaintiff (*see Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835

[2017] [court held plaintiff abandoned his reliance on certain provisions of the Industrial Code where he failed to address those provisions in his opposition to the defendants' motion, and in his brief on appeal]; *Palomeque v Capital Improvement Servs., LLC*, 145 AD3d 912, 914 [2016]; *Harsch v City of New York*, 78 AD3d 781, 783 [2010]; *Cardenas v One State St., LLC*, 68 AD3d 436, 438 [2009]).

As an initial matter, the court notes that OSHA violations cannot support a Labor Law § 241 (6) cause of action (*see Marl v Liro Engrs., Inc.*, 159 AD3d 688, 689 [2018]). Turning to section 23-1.7 (a) (1), that provision, entitled "Overhead hazards," states that:

> Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot (12 NYCRR 23-1.7 [a] [1] [emphasis added]).

This provision has been held to be sufficiently specific to serve as a predicate for a Labor Law § 241 (6) claim (*see Clarke v Morgan Contracting Corp.*, 60 AD3d 523, 524 [2009]; *Zervos v City of New York*, 8 AD3d 477, 480 [2004]; *Murtha v Integral Constr. Corp.*, 253 AD2d 637, 639 [1998]). Defendants maintain that, before stripping work commenced on the third floor, a CAZ was established with yellow caution tape, in order to prevent anyone from entering into the area below where such work was occurring. They contend the caution tape was sufficient to comply with the mandate of section 23-1.7 (a) (1). Further, in light of the stripping work, defendants argue that a physical overhead barrier, such as a sidewalk bridge or its equivalent, would not have been practical. Defendants additionally contend that the CAZ had warnings in place, as well as verbal and immediate instructions for the plaintiff not to use the west side ladder that morning. Defendants further contend that ACS workers were the only ones required to work in the area who were potentially exposed to falling debris, but other trades, including

plaintiff and his TMG co- employees, were not required to work in such area. Defendants contend this is why caution tape was used to create a CAZ, thereby complying with section 23-1.7 (a) (1). Defendants, therefore, argue that the plaintiff was not supposed to be in the area where the plywood fell, and thus he was not normally exposed to the hazards of falling material.

Plaintiff, on the other hand, disputes that the area was designated a CAZ, or was otherwise cordoned off with caution tape. He further disputes that he received verbal instructions to not enter the area or use the west side ladder, and claims that he used it as a means of getting to his fourth floor work location that day. He further contends that issues of fact exist as to whether ACS was supposed to be performing stripping work on the third floor in the area of the accident, especially since such work was not listed on Triton's daily logs for that day.

Based upon a review of the parties' submissions, the court finds that triable issues of fact exists as to whether the plaintiff was required "to work or pass" in the subject area, and if so, whether it was "normally exposed to falling objects" within the meaning of section 23-1.7 (a) (1). Thus, that branch of defendants' motion seeking to dismiss plaintiff's Labor Law § 241 (6) claim insofar as it is predicated on section 23-1.7 (a) (1) is denied.

As to section 23-1.7 (a) (2), which is sufficiently specific to support a Labor Law § 241 (6) claim (*see Vatavuk v Genting New York, LLC*, 142 AD3d 989, 990 [2016]), this provision requires "barricades, fencing or the equivalent" to cordon off areas for the safety of those not required to work or pass within the sectioned-off area. Based upon a review of the record, issues of fact exist as to whether the defendants complied with this provision as plaintiff claims that there were no tape or any warnings in place.

Plaintiff also alleges that defendants violated section 23-2.2 (a), entitled "Concrete Work," which states that "[f]orms, shores and reshores shall be structurally safe and shall be properly braced or tied together so as to maintain position and shape" (12 NYCRR 23–2.2[a]). Initially, the court notes that this provision is sufficiently specific to support a Labor Law § 241

(6) claim (*see Ross v DD 11th Ave., LLC*, 109 AD3d 604, 606 [2013]; *Zervos v City of New York*, 8 AD3d 477, 480 [2004]).

Defendants argue that this provision is not applicable because the forms at issue were in the process of being stripped and, therefore, the very nature of such work required that the forms no longer maintain their position and shape since they were being taken down. Defendants contend this is why a CAZ was created in the subject area. Defendants, however, have failed to proffer an expert opinion as to whether the forms must be secured during the stripping process. As such, defendants have failed to meet their burden in establishing that section 23-2.2 (a) is not applicable herein (*see Ross v DD 11th Ave., LLC*, 109 AD3d at 606 ["In the absence of any expert opinion addressing the issue of whether 12 NYCRR 23-2.2 (a) applies where the forms are in the process of being stripped, the defendants, as the proponents of the motion, did not establish their prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 241 (6) cause of action to the extent that it was premised upon an alleged violation of 12 NYCRR 23-2.2 (a)"]).

Next, section 23-2.2 (b), entitled "Inspection," states that "[d]esignated persons shall continuously inspect the stability of all forms, shores and reshores including all braces and other supports during the placing of concrete. Any unsafe condition shall be remedied immediately." (12 NYCRR 23-2.2 [b]). The court finds that defendants have likewise failed to make a prima facie showing that this section is not applicable, or that they made the necessary inspections as to the stability of the forms.

Lastly, the court will consider plaintiff's belated allegation that defendants violated section 23-2.7 (e) since it involved no new factual allegations, raised no new theories of liability, and caused no prejudice to the defendants (*see Ross v DD 11th Ave., LLC*, 109 AD3d at 606; *Kelleir v Supreme Indus. Park*, 293 AD2d at 513–514 [2002]). Section 23-2.7 (e), entitled "Stairway Requirements During the Construction of Buildings," states as follows:

> (e) Protective railings. The stairwells of temporary wooden stairways and of permanent stairways where enclosures or guard rails have not been erected shall be provided with a safety railing constructed and installed in compliance with this Part (rule) on every open side. Every stairway and landing shall be provided with handrails not less than 30 inches nor more than 40 inches in height, measured vertically from the nose of the tread to the top of the rail.

Plaintiff alleges that there were no guardrails or handrails on the west side ladder for him to grab onto and stop himself from falling after being hit by the plywood. Defendants' expert, Mr. Lorenz, opines that this provision, which pertains to "stairways," is not applicable herein since the west side ladder from which the plaintiff fell was not a "stairway" and, thus, protective railings were not required under these circumstances. This court agrees. A review of the record evidence (parties' deposition testimony including plaintiff, as well as photographic evidence) overwhelmingly establishes that plaintiff's accident involved a construction ladder, not a temporary staircase within the meaning of section 23-2.7 (e). Therefore, this provision cannot provide a basis for plaintiff's § 241 (6) claim.

Additionally, the court notes that issues of fact, as discussed in relation to plaintiff's Labor Law § 240 (1) claim, preclude granting defendants summary judgement dismissing his Labor Law § 241 (6) claim on the ground that his actions in entering the cordoned off area and using the west side ladder, despite instructions not to, were the sole proximate cause of his accident.

Labor Law § 200/Common-law Negligence Claims

Defendants also seek summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against them. Labor Law § 200 codifies the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*see Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709 [2000]). Where a plaintiff's injuries stem from a dangerous condition on the premises, a [defendant] 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 [2010], quoting *Ortega v Puccia*, 57 AD3d 54, 61 [2008]; *see Banscher v Actus Lend Lease, LLC*, 132 AD3d 707, 709 [2015]). However, "[w]here . . . a claim arises out of the means and methods of the work, a [defendant] may be held liable for common-law negligence or a violation of Labor Law § 200 only if he or she had 'the authority to supervise or control the performance of the work'" (*Forssell v Lerner*, 101 AD3d 807, 808 [2012], quoting *Ortega v Puccia*, 57 AD3d at 61). "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d at 62). "[T]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence" (*Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2010] [internal quotation marks omitted]; *see Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955, 959 [2013]; *Allan v DHL Express [USA], Inc.*, 99 AD3d 828, 832 [2012]; *Harrison v State of New York*, 88 AD3d 951, 954 [2011]; *Cambizaca v New York City Tr. Auth.*, 57 AD3d 701, 702 [2008]; *Peay v New York City School Constr. Auth.*, 35 AD3d 566, 567 [2006]).

The court finds that plaintiff's Labor Law § 200 and common-law negligence claims should be dismissed as against 540 West as it is undisputed that it neither directed nor controlled plaintiff's work at the site, nor any of the work performed by the subcontractors. Additionally, there is no evidence in the record that 540 West created or had any notice of any alleged dangerous condition (*see Mitchell v Caton on the Park, LLC*, 167 AD3d 865, 867 [2018]; *Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 699 [2016]).

As to Triton, it has submitted sufficient evidence demonstrating, prima facie, that it had no authority to supervise or control the performance of the plaintiff's work or the work of his employer, TMG, or its sub-subcontractor, ACS, at the site. The record evidence clearly

establishes that the work performed on the date of the accident was under the supervision and control of TMG and ACS. Additionally, it is clear that only TMG employees exercised direct supervisory control over the method and manner of plaintiff's work. Plaintiff testified that he received his instructions from either Santo or Fernando, who are both TMG employees (Plaintiff tr at 50-51, 53-54, 85-86). Triton has also demonstrated that it did not create or have notice of the allegedly dangerous condition (*see Marquez*, 141 AD3d at 699; *Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000]).

In opposition, the plaintiff fails to raise a triable issue of fact. Contrary to plaintiff's assertion, Triton's general supervision over the construction project, which involved task scheduling, daily walkthroughs and coordination of work, and inspecting work to ensure compliance with contract plans and specifications, is insufficient to trigger liability pursuant to Labor Law § 200 and common-law negligence (*see Vasiliades v Lehrer McGovern & Bovis*, 3 AD3d 400, 401–402 [2004]; *Reilly v Newireen Associates*, 303 AD2d 214, 218–221 [2003] *lv denied* 100 NY2d 508 [2003]; *Loiacono v Lehrer McGovern Bovis, Inc.*, 270 AD2d 464 [2000]).

Additionally, plaintiff's argument that Triton is liable pursuant to Labor Law § 200 and common-law negligence because it was contractually delegated the authority to supervise and control the work site is also unavailing. In this regard, plaintiff points to a provision in the contract between 540 West and Triton, which states "the Contractor [Triton]"shall supervise and direct the work" and "shall be solely responsible for, and have control over, construction means, methods, techniques . . . ." Where, as here, Triton did not actually direct and control the work at issue, this contractual provision does not render it liable pursuant to Labor law § 200 and common-law negligence (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377–378 [2011] [Court specifically held that in the related context of common-law indemnification, the mere authority to supervise in insufficient to impose liability; instead actual supervision is required], *affg* 72 AD3d 539 [2010], *affg* 24 Misc.3d 1245[A] [Sup Ct, N.Y. County 2009]

[containing the same contractual provision]; *see LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2011] ["If 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"]). Thus, in the absence of any evidence showing that Triton actually exercised control or supervision over the day-to-day work of plaintiff or the work performed at the time of the accident, it may not be held liable under Labor Law § 200 or common-law negligence (*see LaRosa,* 83 AD3d at 909; *Peay v New York City School Const. Authority*, 35 AD3d 566, 567 [2006]). Accordingly, that branch of defendants' motion seeking to dismiss plaintiffs's Labor Law § 200 and common-law negligence claims is granted.

Conclusion

Based upon the foregoing, it is hereby:

ORDERED that plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240 (1) claim is denied; and it is further

ORDERED that branch of defendants' motion seeking summary judgment dismissing plaintiff's Labor Law § 240 (1) claim as against them is denied; and it is further

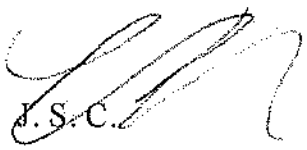
ORDERED that branch of defendants' motion seeking to dismiss plaintiff's Labor Law § 200 and common-law negligence claims as against them is granted, and said claims are hereby dismissed; and it is further

ORDERED that branch of defendants' motion seeking to dismiss that portion of plaintiff's Labor Law § 241 (6) claim that is predicated upon 12 NYCRR 23-1.7 (c) (1), 23-1.8 (c) (1), 23-1.16 (b), 23-1.16 (c), 23-1.16 (d), 23-1.21 (a), 23-1.21(b) (3), 23-1.21 (b) (4) (iv), 23-1.21 (b) (5), 23-2.2 (d), 23-2.7 (a), 23-2.7 (b) and 23-2.7 (e) is granted; and it is further

ORDERED that branch of defendants' motion seeking to dismiss that portion of plaintiff's Labor Law § 241 (6) claim that is predicated upon the claimed violations of 12 NYCRR 23-1.7 (a) (1), 23-1.7 (a) (2), 23-2.2 (a) and 23-2.2 (b) is denied.

The foregoing constitutes the decision and order of the court.

ENTER



Justice Lawrence Knipel