Moschitta v Lend Lease (US) Constr. LMB, Inc.
2020 NY Slip Op 32682(U)
June 16, 2020
Supreme Court, Queens County
Docket Number: 703905/2017
Judge: Maureen A. Healy
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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HONORABLE Maureen A. Healy IAS Part 13
Justice

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BALDASSARE MOSCHITTA and KATHY MOSHITTA,
Plaintiffs,

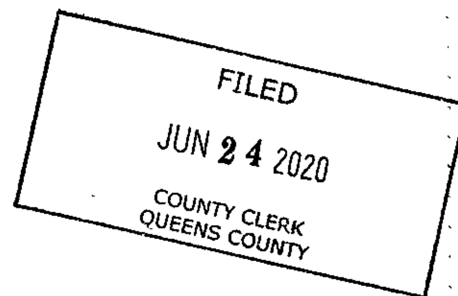
Index No.:703905/2017

Motion Date: 5/1/2019

- against -

Motion Seq. No: 4 & 5

LEND LEASE (US) CONSTRUCTION LMB, INC., BROADWAY TRIO, LLC, EMPIRE TRANSIT MIX, INC.,PINNACLE INDUSTRIES, INC., PINNACLE INDUSTRIES II,LLC, and PINNACLE INDUSTRIES III,LLC, and SMITELL LLC,
Defendants.



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The following electronically filed papers read on this motion by Defendants LEND LEASE (US) CONSTRUCTION LMB, INC., BROADWAY TRIO, LLC, PINNACLE INDUSTRIES II, LLC, and SMITELL LLC, (hereinafter collectively referred to as "Defendants") for an order pursuant to CPLR §3212, granting summary judgment to Defendants, including Plaintiff's common law negligence and Labor Law §§ 200, 240 and 241(6) claims, and dismissing Plaintiff's complaint in its entirety as well as any of co-defendants cross claims; and plaintiff's motion for summary judgment on his common law negligence and Labor Law §§ 200, 240 and 241(6) claims.

Papers	Numbered
Defts.Notice of Motion-Affirmation-Exhibits-Service	92-109
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Upon the foregoing papers, defendants Lend Lease (US) Construction LMB, Inc. ("Lend Lease"), Broadway Trio, LLC ("Broadway"), Pinnacle Industries II, LLC

("Pinnacle") and Smitell LLC ("Smitell") motion for summary judgment and plaintiff's motion for summary judgment are consolidated for purposes of this decision. For the reasons set forth herein, defendants' motion for summary judgment on plaintiff's Labor Law §240(1) claim is denied; the branch of defendants' motion that seeks dismissal of plaintiff's claims pursuant to Labor Law §241(6) is granted, with the exception of the claims pursuant to §23-1.7(b)(1)(i) and §23-1.7(f), for which plaintiff has raised issues of fact; the branch of defendants' motion that seeks dismissal of plaintiff's Labor Law §200 and common law negligence is granted to the extent that the claim is dismissed as to defendants Smitell and Lend Lease, and denied as to defendant Pinnacle; the branch of defendants' motion that seeks dismissal of all claims as to defendant Broadway Trio is granted; plaintiff's motion for summary judgment on his Labor Law §240(1) claim is granted; the branch of plaintiff's motion that seeks summary judgment on his Labor Law §241(6) claim is denied; and the branch of plaintiff's motion that seeks summary judgment on his Labor Law §200 and common law negligence is denied.

Background

The within action involves personal injuries sustained by plaintiff as a result of an accident on July 19, 2016 at a construction site located at 217 West 57th Street in Manhattan. At the time of the accident, plaintiff was in the course of his employment with Empire Transit Mix, Inc. ("Empire") and was delivering and unloading cement at the jobsite. The property where the accident occurred was owned by defendant Smitell LLC. Defendant Lend Lease was the construction manager on the project and defendant Pinnacle was the contractor responsible for all of the cement and concrete work at the site.

Plaintiff testified at his deposition that on the date of the accident, he arrived at the jobsite, and the Pinnacle workers helped him back the cement truck up to the pump, where he attached the chutes to the back of the truck and connected it to the pump. There was a large concrete block that was positioned between the truck and pump which was approximately three to four feet high, three to four feet long and two feet wide. Plaintiff testified that the concrete block was there to hold the pipe which was connected to the pump and was used to push the cement to the upper floors. Plaintiff testified that because of the concrete block, he could not properly back the truck up to reach the pump where they were dumping the cement, so extra chutes were required to be able to reach the pump. In total, the chute was approximately 12 feet long. The chute was connected to a hopper, into which the cement was dumped right before it entered the pump, which would suck the cement and push it out of the pipes to the upper floors. Plaintiff testified that he was required to observe the inside of the hopper as the cement was being poured, in order to ensure there was a steady flow of cement pouring in, because if the flow of cement was too low, the pump would suck air, which would then get pushed into the pipes with immense pressure and cause the cement that was already pumped to shoot out of the pipes.

Due to the positioning of the concrete block, plaintiff stated the only way he could look into the hopper was by standing on top of the concrete block. He also testified that he

needed to stand on top of the concrete block in order to access the levers of his truck. While the truck was dumping, he was walking back and forth between the truck and the hopper on a wooden plank that was being used as a walking platform. The plank was between the hopper and the concrete block, and it was used to walk across to check the hopper. Plaintiff testified that the cement block was unsafe to stand on because it was uneven and there were metal rods protruding out of it. On the right side of the concrete block was a wall, with approximately two feet of space between the concrete block and the wall. On the other side of the block was the wooden plank that ran from the concrete block to the top of the fender of the pump. Although plaintiff's cement truck had a ladder, it was welded to the truck and could not be detached.

Plaintiff testified that it was the Pinnacle workers who directed him as he backed up his truck, and told him where to position the truck. Plaintiff testified that he could not use the ladder because the area where the Pinnacle workers directed that he position his truck was not at the right angle to be able to look into the hopper while on top of the ladder. Additionally, plaintiff testified that the ladder was not tall enough to enable him to look into the hopper. During the year prior to his accident when plaintiff was delivering concrete to the jobsite, the laborers from Pinnacle always directed him on where and how to setup his truck at this site.

Immediately prior to the accident, plaintiff was standing on top of the concrete block and was trying to step onto the wooden plank to get to the levers on his truck, when his right foot got caught and tripped on the metal rod sticking out of the concrete block, causing him to lose his balance, and fall off the concrete block and into the two foot space between the concrete block and the wall. Right before he fell, plaintiff stepped on the rod with his right foot, tried to catch his balance, stepped on the concrete pipe, lost his balance again and fell. To keep an eye on the hopper, plaintiff was walking backwards at the time his foot got caught on the rod. Plaintiff further testified that he had been delivering to the jobsite since the project began, two to three times per week, for approximately one year before his accident. During his deliveries of cement to the jobsite, he observed "every driver" on top of the concrete block. During this time, he made numerous complaints to everyone there, including Pinnacle employees, regarding the dangerous cement block.

John Abate, a concrete superintendent with Lend Lease, testified that Lend Lease is in the business of construction management and they oversaw the construction of the building at the subject jobsite. The project was to build a steel and concrete podium with a concrete tower on top. The bottom of the building would be commercial and the top would be condominiums. Lend Lease hired "everyone that's needed to put together a building", all the subcontractors, and coordinated all the work between the trades. As Lend Lease's superintendent, Mr. Abate would make sure all the trades were where they were supposed to be, ensured they kept the schedule, and that everything was installed pursuant to the structural and architect drawings. Mr. Abate was present at the site everyday and generally would watch the trades work in the area that concrete work was ongoing. As superintendent, Mr. Abate had interaction with Pinnacle which consisted of talking to their foreman to make

sure they were working in the right place, and to ensure that Pinnacle work was coordinating with the drawings, as well as going over any changes with them. He was also responsible to ensure that Pinnacle had the proper flag men to bring in the cement delivery trucks and to ensure pedestrians safety. Mr. Abate testified that Lend Lease had the authority to stop work for any unsafe work practice observed on the jobsite. Lend Lease also had the authority to direct and control the work, including directing Pinnacle to move and relocate the concrete block or cut the metal rods if they were deemed unsafe. Lend Lease also had the authority to stop the work of Empire employees if their work was determined to be unsafe. Mr. Abate testified that Pinnacle installed the hopper, the concrete pump and the concrete block. No one from Lend Lease instructed Pinnacle on how to set up the concrete pump, the hopper or the piping. Mr. Abate could not recall anyone complaining about the concrete block prior to plaintiff's accident. Lend Lease did not provide fall protection for Empire drivers. Lend Lease did not provide scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes or any other safety devices to plaintiff.

Andre Hinds, a concrete safety manager with Pinnacle, testified that Pinnacle was in the business of building high rise buildings and it was the cement and concrete contractor at this construction project. His responsibilities as a concrete safety manager were to ensure the work was being safely performed and that the workers were wearing proper protective equipment. Pinnacle was responsible for pouring concrete for the project, pursuant to its agreement with Lend Lease (who Pinnacle states was the general contractor for this project). Mr. Hinds testified that as the general contractor, Lend Lease had the authority to direct and control the work of all contractors, including Pinnacle and Empire. Pinnacle made the determination as to when, where and how cement was delivered. Pinnacle employees directed where plaintiff's truck would go in relation to the hopper and pump. The pump operator, who was employed by Pinnacle, was in charge of the pumps and the entire pouring process. The driver of the cement truck and the pump operator then worked together to get concrete into the hopper. An employee from Pinnacle would monitor the hopper and tell the driver when to stop adding concrete. The pump operator stands on the platform where the pump is located and the driver stands on the ladder of his truck. Pinnacle installed the concrete block with the rods embedded within in order to stabilize the concrete pipe. Pinnacle owned the pump truck and hopper, and installed the pump, the piping system, the metal rods sticking out of the concrete block, and the planks for the pump operators to access the hopper. Mr. Hinds testified that the concrete block had been there since the start of construction work a year prior. He saw other truck drivers stand on top of the concrete block on prior occasions and told them to get down since it was dangerous and no one should be standing up there. After the plaintiff's accident, the concrete block was removed. Dina Tammaro, comptroller of Empire, testified that Empire delivered concrete to the subject jobsite that was ordered by defendant Pinnacle. She testified that Empire prepared the cement at their plant and delivered it to the subject jobsite to Pinnacle. After the accident, plaintiff went to Ms. Tammaro's office and told her he slipped off a block and hurt his shoulder.

Plaintiff submits the affidavit of John P. Coniglio, a safety professional, who opines

to a reasonable degree of professional safety certainty, that defendants violated Labor Law §240(1) in that they failed to provide plaintiff with safety equipment or devices to protect him from falling from the concrete block. Mr. Coniglio further opines to a reasonable degree of professional safety certainty that defendants Lend Lease, Pinnacle and Smitell failed to ensure compliance with, and thus violated Labor Law §241(6) through violations of the Industrial Code Regulations 12 NYCRR §§23-1.7(b)(1)(i), 23-1.7(e)(1), 23-1.7(e)(2), 23-1.7(f) and 23-1.22(c)(1). Mr. Coniglio also opines to a reasonable degree of professional safety certainty that defendants Lend Lease, Pinnacle and Smitell failed to ensure compliance with, and thus violated Labor Law §200 and common law negligence by allowing plaintiff to use the cement block, which had uneven surfaces, no safety railing of any kind, and with metal rods protruding out of it as a platform or makeshift scaffold, which was a dangerous condition, and defendants created the dangerous condition which had existed for approximately one year before plaintiff's accident.

Defendants submit their own expert affidavit from Ibrahim Erdem, Ph.D, P.E., S.E., who opines, to a reasonable degree of engineering certainty, that since the concrete block was not a work platform or walking surface, the presence of the piping and rods on the concrete block did not make the concrete block unsafe. He further opines to a reasonable degree of engineering safety that plaintiff did not have to step on the concrete block to pour the concrete, and plaintiff should not have stepped on the concrete block since it was not a walking surface. To a reasonable degree of engineering certainty, he states that the fall occurred due to plaintiff's own actions of stepping on the concrete block and walking backwards. Mr. Erdem also opines that defendants did not violate Labor Law §240(1) or §241(6).

Defendants' motion for summary judgment

Defendants move for summary judgment seeking dismissal of plaintiff's claims sounding in common law negligence and alleging violations of Labor Law §§200, 240(1) and 241(6), and the dismissal of Empire's cross-claims.[1] Lend Lease, Broadway Trio and Pinnacle argue that they are not proper New York State Labor Law defendants. Lend Lease contends that it served only as the construction manager on the subject project who did not direct or control the work of the sub-contractors, especially the activity which brought about plaintiff's injury. Instead, argues Lend Lease, its role was to simply coordinate the construction and Mr. Abate's interaction with Pinnacle consisted of speaking with the foreman to ensure that they were working in the right location and to coordinate with drawings, as well as going over any changes. Lend Lease argues that Mr. Abate did not interact with anyone from Empire, including plaintiff. Pinnacle argues that the action against it must be dismissed because it was not an owner, a general contractor or construction

[1] Empire Transit Mix, Inc., was granted summary judgment by this Court on March 7, 2019 in this action along with dismissal of all cross-claims against Empire.

manager. Pinnacle contends that it was a "sub-contractor" so it is immune from Labor Law liability because it did not have supervisory control or authority over the work plaintiff was performing at the time of his accident. Broadway Trio argues that it was not the owner of the premises at the time of the incident. Broadway Trio had formally changed its name to Smitell, as reflected in the Certificate of Amendment to Certificate of Formation of Broadway Trio LLC dated May 24, 2016, so the action against it must be dismissed.

Defendants also argue that plaintiff was the sole proximate cause of his accident as his truck had a ladder attached to it from which he could operate his truck and perform his work, thus, he had no reason to climb on the concrete block. Defendants argue that it was not plaintiff's responsibility to check the hopper of the concrete pump, and therefore, there was no reason for him to traverse the wooden plank. Plaintiff admits being provided with a proper safety device, the ladder on his truck, and disregarded it in favor of climbing on the concrete block. Regarding plaintiff's common law negligence and Labor Law §200 claims, defendants argue that the claims must also be dismissed. Furthermore, defendants argue that the rod, protruding from a concrete block, that plaintiff tripped over, was integral to the work being performed and, as such, is an absolute bar to liability under this section.

Defendants Lend Lease, Broadway, Pinnacle and Smitell argue that they did not supervise, direct or control any aspect of the work being performed at the time of the incident. Additionally, none of these defendants would have directed plaintiff to observe the hopper while he was performing the delivery because there was an operating engineer present to perform the task. With respect to Labor Law §241(6), defendants argue that the numerous alleged code violations alleged by plaintiff are inapplicable to this case.

Plaintiff's motion for summary judgment

Plaintiff moves for summary judgment arguing that defendants Lend Lease, Broadway, Pinnacle and Smitell controlled the activities and safety of the worksite where plaintiff was injured and failed to provide him with any fall protection equipment or devices, such as a ladder, scaffold or any other type of safe platform to prevent him from falling from an elevated height while performing his work. Plaintiff testified that none of the defendants, Lend Lease, Pinnacle II, Broadway or Smitell ever provided him with any kind of fall safety protection devices or any alternative method for performing his work, and as such, the only way he was able to perform his job and look inside the hopper was by climbing on top of that cement block. Furthermore, plaintiff alleges that he complained to other workers, including Pinnacle workers, that the concrete block was unsafe and dangerous to stand on, but nothing was done.

Discussion

The court's function on this motion for summary judgment is issue finding rather than issue determination. *Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223

(1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. *Stone v. Goodson*, 8 N.Y.2d 8 (1960); *Sillman v. Twentieth Century Fox Film Corp., supra.*

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. *300 East 34th Street Co. v. Habeeb*, 683 N.Y.S.2d 175 (1st Dept. 1997).

Labor Law §240(1)

Labor Law §240(1) provides in pertinent part as follows: "[a]ll 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... 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." Strict liability under §240(1) is limited only to risks associated with an elevation or gravity-related injury. *See, Clark v. FC Yonkers Associates, LLC,* 172 A.D.3d 1159, 1161 (2nd Dept. 2019). Moreover, once it is determined that the owner or contractor failed to provide the necessary safety devices required to give the worker proper protection, absolute liability is unavoidable under §240(1). *See, Bland v. Mamocherian*, 66 N.Y.2d 452, 459(1985).

An owner of a premises has a non-delegable duty under the Labor Law to provide a safe work environment. However, an implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition. *Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311 (1981) citing *Reynolds v Brady & Co.*, 38 A.D.2d 746 (2nd Dept. 1972). Moreover, the work giving rise to these duties may be delegated to a third person or party. *Russin* 54 N.Y. 2d at 317. When the work giving rise to these duties has been delegated to a third-party, that third-party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor. Thus, the authority to supervise and control the work operates to transform the subcontractor into a statutory agent of the owner or construction manager and the agent then becomes fully liable to indemnify the owner for any damages assessed against the owner or general contractor. *Kelly v. Diesel Construction Division of*

Karl A. Morse, Inc., 35 N.Y.2d 1 (1974).

The purpose of Section 240(1) is to protect workers by placing the ultimate responsibility for worksite safety on the owner and general contractor instead of the workers themselves. *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 500 (1992). Thus, Section 240(1) imposes absolute liability on an owner, contractors and their agents for any breach of the statutory duty which has proximately caused injury. *Rocovich v. Consolidated Edison Co.* 78 N.Y.2d 509 (1991). The Court of Appeals has held that the duty imposed is "nondelegable and... an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control." *Id.* at 513. Section 241(6) also provides that the statutory duty is non-delegable and does not require that the owner exercise supervision or control over the worksite before liability attaches. *See, Ross, supra* at 502.

Plaintiff met his burden on his motion for summary judgment on his Labor Law §240(1) claim as he has established that his injuries were caused, at least in part, by the absence of proper protection required by the statute. Plaintiff has adduced evidence that he was performing work covered by §240(1) of the Labor Law and that he is a member of the protected class contemplated by the statute. Plaintiff has further submitted evidence that he was standing on an elevated concrete block, with protruding metal rods, that caused him to fall. Moreover, he has submitted evidence in admissible form that he was not provided with the necessary safety equipment or safeguards. See, *Bland v. Mamocherian*, supra at 459 ("Once it is determined that the owner or contractor failed to provide the necessary safety devices required to give the worker 'proper protection', absolute liability is 'unavoidable' under §240(1).") Also, he has submitted evidence that the failure to provide adequate safety measures was a proximate cause of his injury. *See, Striegel v. Hillcrest Heights Development Corp.*, 100 N.Y.2d 974 (2003).

Here, defendants argue that the rod and pipe on the concrete block were integral to the work being performed by plaintiff, and as such, a cause of action is not supported where the object that caused plaintiff's injury was an integral part of the work being performed. *Lopez v. New York City Department of Environmental Protection*, 123 A.D.3d 982 (2nd Dept. 2014); *Marinaccio v. Arlington Central School District*, 40 A.D.3d 714 (2nd Dept. 2007); *Alvia v. Teman Electrical Contracting, Inc.*, 287 A.D.2d 421 (2nd Dept. 2001). In these cases cited by defendants, the only reason the Court discussed the issue of whether the tripping hazard was integral is because plaintiff in each of those cases alleged violations of Industrial Code §§23-1.7(e)(1) and (e)(2). The issue raised in those cases of whether a tripping hazard was integral to plaintiff's work was not discussed in any of the other Labor Law claims; it was limited to the violations of those Industrial Codes statutes. Moreover, defendants fail to show how the metal rod was an integral part of plaintiff's work. The entire metal rod was encased inside the concrete block and around the pipe through which the cement was being pumped, and the purpose of the metal rod was to hold down the pipe and prevent it from moving. The photographs provided to the Court show the end of the metal rod protruding from the top of the concrete block. The metal rod was not necessary for plaintiff to perform

his work which was to observe the pouring of the cement. Mr. Abate testified that Lend Lease had the authority to cut down the rods to avoid someone tripping on them. "If it was unsafe, we would, yes." Additionally, if it was deemed unsafe, Lend Lease had the authority to move the entire concrete block and pipes to a different area.

Defendants' contention that "the policy at the site was that no workers should be on top of the concrete block to perform their work" is not supported by the evidence. There was no testimony from any witness that this was the "policy" at the site. The testimony actually shows that defendants were on notice of this alleged dangerous condition and did nothing to change it as Mr. Hinds testified that if he happened to see one of the drivers on top of it, he would tell them to come off the block because it was dangerous. Thus, there was no testimony or evidence presented that there was a "policy" in place at the construction site regarding the concrete block.

The Court must award summary judgment to plaintiff on his Labor Law §240(1) claim where plaintiff was not provided with the proper fall safety equipment while working at an elevated height. In *Hanna v. Gellman*, 29 A.D.3d 953 (2nd Dept. 2006), plaintiff was installing pipes while standing on a spackle bucket when he fell. The Court granted plaintiff's motion for summary judgment on his Labor Law §240(1) claim on the grounds that defendants failed to provide ladders or similar equipment to allow plaintiff to safely install the pipes. In *Swiderska v. New York University*, 10 N.Y.3d 792, the Court of Appeals held that plaintiff, a commercial window cleaner, was engaged in activity encompassed within the scaffold law, where the worker was injured while cleaning 10-foot-high windows in a college dormitory with a rag, which required her to climb upon pieces of furniture in order to complete her work, and she was not provided a ladder, scaffold, or other safety device. In *Tabickman v. Batchelder Street Condominiums By the Bay, LLC*, 52 A.D.3d 593 (2nd Dept. 2008), plaintiff's motion for summary judgment on his Labor Law §240(1) claim was properly granted when the makeshift platform he was standing on to perform his work at defendant's condominium collapsed, causing him to fall. The Court held that plaintiff demonstrated a violation of the scaffold law, and established that such violation was a proximate cause of his injuries.

In the instant matter, defendants have failed to raise any issues of fact regarding plaintiff's Labor Law §240(1) claim. Defendants' argument that plaintiff was the sole proximate cause of the accident is without merit. The recalcitrant worker defense allows defendants to escape liability imposed by Labor Law §240(1). However, in order to establish a recalcitrant worker defense, a defendant must show that a plaintiff deliberately refused to use available safety devices provided by the owner or contractor. *Hagins v. State of New York*, 81 N.Y.2d 921, 922-923 (1993); *Stolt v. General Foods Corp.*, 81 N.Y.2d 918 (1993). The defense is not established by merely showing that the worker failed to comply with an employer's instruction to avoid using unsafe equipment or engaging in unsafe practices or to use a particular safety device, or by the mere presence of safety devices on the work site. *Hagins v. State of New York*, *supra*; *Gordon v. Eastern Railway*, 82 N.Y.2d 555 (1993). To show that plaintiff was the sole proximate cause of an injury, defendant must establish that

"plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured." *See, Cahill v. Triborough Bridge & Tunnel Authority*, 4 N.Y.3d 35, 40 (2004). However, "if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it." *Blake v Neighborhood Housing Services of N.Y. City*, 1 N.Y.3d 280 (2003).

Defendants' argument that the only cause of the accident was plaintiff's own negligence in standing on the concrete block is inadequate to defeat plaintiff's motion. The argument overlooks plaintiff's evidence that no safety devices were provided to protect him from the two-foot-gap between the concrete block and the wall. Given the gap and no safety devices, plaintiff cannot be held solely to blame for his injuries. The act of plaintiff standing on the block, even if it had been cordoned off, amounts at most to comparative negligence, which is not a defense to a section 240(1) claim. *See, Orellana v. 7 West 34th Street, LLC*, 173 A.D.3d 886 (2nd Dept. 2019). The fact that there were no other witnesses to plaintiff's accident does not alter this result. *Verdon v. Port Authority of New York and New Jersey*, 111 A.D.3d 580 (1st Dept. 2013).

Here, defendants' argument that plaintiff had the necessary safety equipment on his truck, i.e., the ladder, does not absolve defendants from liability pursuant to Labor Law §240. Plaintiff testified that the manner in which he was directed by Pinnacle employees to back his truck up in order to pour the cement did not allow for him to use the ladder on his truck, which was permanently affixed to the truck and was not removable. Contrary to defendants' contention that plaintiff did not need to be on the concrete block to perform his job, plaintiff testified that he had to look inside the hopper while the cement was being poured and the only place to do that was standing on the concrete block. In fact, the evidence clearly shows that plaintiff was not the only worker that used the concrete block to stand on to perform their work. Mr. Hinds testified that he would see workers on the block and he would tell them to get off because it was dangerous. Thus, Pinnacle was aware that the block was dangerous and was being used by the cement truck drivers to perform their work. It could have been removed at the direction of Lend Lease or Pinnacle, but it was not, even with the knowledge that workers were using it to perform their work. Here, defendants had actual knowledge of the dangerous condition of the cement block as Pinnacle itself created the cement block and the evidence shows that defendants were aware that the concrete block was being used by the workers. Therefore, defendants' argument regarding plaintiff being the sole proximate cause of his accident fails. Plaintiff was required to perform his work on an elevated, uneven concrete block, when his foot got caught on the protruding metal rod causing him to fall. It is undisputable that defendants never provided plaintiff with any ladders, scaffolds or other kinds of platforms or safety devices that allowed plaintiff to safely look inside the hopper from an elevated height.

Section 240(1) imposes absolute liability on an owner, contractors and their agents for any breach of the statutory duty which has proximately caused injury. Moreover, once it is determined that the owner or contractor failed to provide the necessary safety devices

required to give the worker proper protection, absolute liability is unavoidable under §240(1). Here, defendant Smitell, as the owner of the premises, is absolutely liable to plaintiff pursuant to its nondelegable duty. Defendant Lend Lease's argument that it is not liable to plaintiff under Labor Law §240(1) because it acted only as the construction manager for the project and only coordinated the trades is without merit. The Court of Appeals has held that "although a construction manager of a work site is generally not responsible for injuries under Labor Law §240(1), one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought the injury." *Walls v. Turner Construction Co.*, 4 N.Y.3d 861 (2005). See also, *Pino v. Irvington Union Free School District*, 43 A.D.3d 1130, 1131 (2nd Dept. 2007); *Lodato v. Greyhawk North America, LLC*, 39 A.D.3d 491 (2nd Dept. 2007).

Here, Mr. Abate, the superintendent for Lend Lease, testified unequivocally that Lend Lease had the power and authority to stop any unsafe work practice of any of the contractors or subcontractors on the site, including Pinnacle and Empire, and to dismiss any worker if they were performing any of the work in an unsafe manner. Lend Lease also had the ability to direct Pinnacle to move and relocate the concrete block or cut the metal rods if they were deemed unsafe. Mr. Hinds, the concrete safety manager for Pinnacle, testified that Lend Lease was the general contractor for this project. The permit and signs posted at the jobsite also indicated that Lend Lease was the general contractor. A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured; to impose such liability, the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition. *See, Cabrera v. Arrow Steel Window Corp.*, 163 A.D.3d 758,759(2nd Dept. 2018). A defendant's potential liability for Labor Law violations is based on whether it had the right to exercise control over the work, not whether it actually exercised that right. *Id.* at 760. Thus, Lend Lease is liable to plaintiff pursuant to Labor Law §240(1).

Defendant Pinnacle is also liable under Labor Law §240(1) because they were the general contractor's statutory agent. The Courts have held that a subcontractor may be held liable under the Labor Law "if it had the authority to supervise and control the work giving rise to the obligations imposed by these statutes, which would render it the general contractor's statutory agent... To be treated as a statutory agent, the subcontractor must have been 'delegated the supervision and control either over the specific work area involved or the work which gave rise to the injury.'" *Nascimento v. Bridgehampton Construction Corp.*, 86 A.D.3d 189, 193 (1st Dept. 2011). Here, Pinnacle was hired as the concrete contractor and was responsible for the entire cement and concrete operation for this jobsite. Pinnacle made the determination as to when, where and how the cement was delivered, and had full control and authority in directing the Empire employees, including plaintiff, with respect to the delivery and pouring process. Pinnacle employees directed plaintiff as to where his truck would go in relation to the hopper and pump. Pinnacle owned the pump truck and hopper, and installed the pump, the piping system, the concrete block, and the planks for the pump

operators to access the hopper. Thus, Pinnacle had the authority to supervise the work, including plaintiff's work, and other workers who Mr. Hinds previously found standing on the concrete block and directed to get off because it was dangerous. Pinnacle created the subject concrete block that is the subject of this lawsuit, and as a subcontractor, it may be held liable for negligence where the work it performed created the condition that caused the plaintiff's injury, even if it did not possess any authority to supervise and control the plaintiff's work or work area. *See*, *Tabickman*, supra at 594.

Labor Law 241(6)

Labor Law §241(6) concerns reasonable and adequate protection and safety through the worksite. This section provides that contractors and owners must assure that: "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places." In order to plead a violation of Labor Law §241(6), plaintiff must allege a specific violation of the New York State Industrial Code. *See, Jones v. City of New York,* 166 A.D.3d 739, 741 (2nd Dept. 2018). Labor Law §241(6) imposes a nondelegable duty upon an owner or general contractor who does not control, supervise or direct the worksite, to comply with the regulations promulgated by the Commissioner of the Department of Labor that mandate compliance with concrete specifications in the Industrial Code. *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494 (1993). Neither actual or constructive notice is a prerequisite to recovery under Section 241(6). *See, Reynoso v. Bovis Lend Lease LMB Inc.,* 125 A.D.3d 740, 742 (2nd Dept. 2015).

The nondelegable duty of general contractors and owners under §241(6) is attributable to subcontractors as statutory agents where it is shown that the subcontractor controlled or supervised the plaintiff's work. *See, Tomyuk v. Junefield Assoc., et.al.,* 57 A.D.3d 518, 521 (2nd Dept. 2008). As the duty to comply is nondelegable, it is not necessary for plaintiff to show that defendants exercised supervision and control over the work site, only that they had the ability to do so. Thus, Labor Law § 241(6) imposes a nondelegable duty upon owners to provide reasonable and adequate protection to workers, making them liable for damages even in the absence of a showing that they controlled, directed or supervised the work site. *See, Ferrero v. Best Modular Homes Inc.,* 33 A.D.3d 847, 851 (2nd Dept. 2006).

Section 23-1.7(b)(1)(i)

In the instant matter, defendants seek dismissal of all of plaintiff's claims pursuant to Labor Law §241(6) and plaintiff seeks summary judgment on his claims pursuant to alleged violations of §23-1.7 (b)(1)(i); §23-1.7(e)(1) and (2); §23-1.7(f); and §23-1.22. Plaintiff had pled numerous other violations of regulations of the Industrial Codes, but those have been abandoned. Section 23-1.7(b)(1)(i) "Hazardous openings" provides as follows: "(i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial

cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)." The Labor Law § 241(6) claim predicated on a violation of 12 NYCRR §23–1.7(b)(1)(i) is applicable to the facts of this case as the area through which plaintiff fell, the two-foot space between the concrete block and the wall, constitutes a hazardous opening within the meaning of §23–1.7(b)(1)(i). *See, Norero v. 99-105 Third Ave. Realty, LLC* 96 A.D.3d 727, 728(2nd Dept. 2012).

The regulation does not define "hazardous opening." The interpretation of an Industrial Code regulation and determination as to whether a particular condition is within the scope of the regulation present questions of law for the Court. *Messina v. City of New York*, 300 A.D.2d 121 (1st Dept. 2002). A two-foot-gap is big enough to allow for a person to fall through as plaintiff claims happened here. Plaintiff testified that his body fell through the two-foot-gap, and the cases hold that for §23-1.7(b)(1)(i) to apply the "hazardous opening" all speak to protections against falls from an elevated area to a lower area through openings large enough for a person to fit. In *Messina*, the Court noted that "[r]eading the regulation as a whole, it is clear that it was not intended to apply to the type of opening involved in this case. As its heading reflects, 12 NYCRR 23–1.7(b) establishes rules for protections against 'falling hazards.' The safety measures required — planking installed below the opening, safety nets, harnesses and guard rails — all bespeak of protections against falls from an elevated area to a lower area through openings large enough for a person to fit." Cases where the Courts have found §23-1.7(b)(1)(i) inapplicable involved smaller openings where a person could not fall through. See, *Messina*, 300 A.D.2d at 122 (10 to 12–inch gap is not a "hazardous opening" for purposes of the regulation). Thus, plaintiff has raised an issue of fact that precludes dismissal of this claim.

Section 23-1.7(e)(1) and (2)

With respect to §23-1.7(e)(1) and (2) "Tripping and other hazards" provides:

> (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) in inapplicable here as the accident did not involve a passageway. Section 23-1.7(e)(2) is also inapplicable as the concrete block was not part of a floor, platform or similar area, and there was no evidence of accumulations of debris or scattered tools or sharp projections.

Section 23-1.7(f)

Section 23-1.7(f) "Vertical passage" provides that "[s]tairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided." Plaintiff has shown that §23-1.7(f) applies, based on his testimony that he could not access the hopper and perform his job without standing on the concrete block. Based on how he was instructed to back his truck in, he could not have accessed the hopper without standing on the block. See, *Gonzalez v. Pon Lin Realty Corp.*, 34 A.D.3d 638 (2nd Dept. 2006); *O'Hare v. City of New York*, 280 A.D.2d 458 (2nd Dept. 2001). Thus, plaintiff has raised an issue of fact regarding this claim.

Section 23-1.22(c)(1)

Section 23-1.22(c)(1) "Structural runways, ramps and platforms" provides:

> Any platform used as a working area or used for the unloading of wheelbarrows, power buggies, hand carts or hand trucks shall be provided with a floor of planking at least two inches thick full size, exterior grade plywood at least three-quarters inch thick or metal of equivalent strength. Platforms used for motor trucks or heavier vehicles shall be provided with floors of planking at least three inches thick full size or metal of equivalent strength.

Section 23-1.22(c)(1) is inapplicable to this case as the work did not involve a wheelbarrow, power buggy, hand cart or hand truck, thus, the claim is dismissed.

Labor Law §200 and Common Law Negligence

Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner and/or general contractor to maintain a safe place to work. *Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 N.Y.2d 343 (1998). Liability may arise out of the means and methods used to perform the work or from a defective condition on the property. See, *Chowdhury v. Rodriguez*, 57 A.D.3d 121 (2nd Dept. 2008). Liability under the statute is therefore governed by common-law negligence principles. Plaintiff's §200 claim should be dismissed upon proof that the owner and/or general contractor was not responsible for supervision, controlling and directing plaintiff, or the means and methods by which he performs his work. *See, Smith v. 499 Fashion Tower LLC.*, 38 A.D.3d 523 (2nd Dept. 2007). Where plaintiff's injuries stem from not the manner in which the work was being performed but, rather, from a dangerous condition on the premises, a contractor/owner may be liable in common law negligence and under Labor Law §200 only if it had control over the work site and either created or had notice of the dangerous condition. See, *Rizzuto v. L.A. Wenger Contracting Co.*, *supra* at 352.

In the instant matter, the branch of defendants Lend Lease and Smitell's motion for summary judgment on plaintiff's Labor Law §200 and common law negligence must be granted. Mr. Abate testified that Lend Lease had the authority to stop work at the jobsite for safety reasons. While it is undisputed that Lend Lease exercised general supervisory control

over the job site, there is no evidence that it provided actual supervision or direction over plaintiff's work. Labor Law § 200 and common-law negligence liability cannot be imposed upon defendant Lend Lease premised on the methods and means of the work because it merely exercised general supervisory authority over the injured plaintiff's work. There was no evidence that Lend Lease provided actual supervision or direction over plaintiff's work in delivering the cement. See, *O'Sullivan v. IDI Construction Co., Inc.*, 7 N.Y.3d 805 (2006); *Ficano v. Franklin Stucco Supply, Inc.*, 72 A.D.3d 1018 (2nd Dept. 2010); *Cabrera v. Revere Condominium*, 91 A.D.3d 695 (2nd Dept. 2012); *Vazquez v. Humboldt Seigle Lofts, LLC*, 145 A.D.3d 709 (2nd Dept. 2016). Thus, defendant Lend Lease established prima facie that they did not have the authority and control over the injury-producing work necessary to support the Labor Law §200 and common-law negligence claims. While defendant Lend Lease, in its capacity as construction manager, had general supervisory and coordinating responsibilities, it did not have the requisite level of direct supervision and control over the injury-producing activity. Nor is Lend Lease's authority to control safety at the work site and stop work if it observed a dangerous condition sufficient to support the Labor Law § 200 and common-law negligence claims as against it. *See, Rashid v. Hartke*, 171 A.D.3d 1226, 1227 (2nd Dept. 2019); *Sullivan v. New York Athletic Club,* 162 A.D.3d 955, 958 (2nd Dept. 2018). With respect to defendant Pinnacle, plaintiff has raised an issue of fact regarding his Labor Law §200 and common law negligence claims, based on his testimony that Pinnacle workers directed him as to where to place his truck.

Conclusion

Accordingly, defendants' motion for summary judgment on plaintiff's Labor Law §240(1) claim is denied; the branch of defendants' motion that seeks dismissal of plaintiff's claims pursuant to Labor Law §241(6) is granted in part and denied in part. The claims pursuant to Labor Law 241(6) are dismissed with the exception of the claims based on §23-1.7(b)(1)(i) and §23-1.7(f), for which plaintiff has raised issues of fact. The branch of defendants' motion that seeks dismissal of plaintiff's Labor Law §200 and common law negligence is granted to the extent that the claim is dismissed as to defendants Smitell and Lend Lease, and denied as to defendant Pinnacle. The branch of defendants' motion that seeks dismissal of all claims as to defendant Broadway Trio is granted. Plaintiff's motion for summary judgment on his Labor Law §240(1) claim is granted. The branch of plaintiff's motion that seeks summary judgment on his Labor Law §241(6) claims is denied. The branch of plaintiff's motion that seeks summary judgment on his Labor Law §200 and common law negligence claim is also denied.

This constitutes the decision and Order of this Court.

FILED
JUN 24 2020
COUNTY CLERK
QUEENS COUNTY

Dated: June 16, 2020

MAUREEN A. HEALY, J.S.C.