Shehu v Board of Mgrs. of the 210 Joralemon St. Condominium
2020 NY Slip Op 33104(U)
September 17, 2020
Supreme Court, New York County
Docket Number: 162198/2015
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

----------X

INDEX NO. 162198/2015

MOTION DATE 9/2/2020

MOTION SEQ. NO. 011 012 013

FITIM SHEHU,

Plaintiff,

- v -

THE BOARD OF MANAGERS OF THE 210 JORALEMON STREET CONDOMINIUM, STANTEC CONSULTING SERVICES INC., STANTEC ARCHITECTURE INC., ASHNU INTERNATIONAL INC., ZDG LLC., 210 MUNI, LLC, UNITED AMERICAN LAND, LLC,

DECISION + ORDER ON MOTION

Defendant.

----------X

THE BOARD OF MANAGERS OF THE 210 JORALEMON STREET CONDOMINIUM,

Third-Party
Index No. 595807/2019

Plaintiff,

-against-

ALLIEDBARTON SECURITY SERVICES LLC

Defendant.

----------X

STANTEC CONSULTING SERVICES INC., STANTEC ARCHITECTURE INC.

Second Third-Party
Index No. 595898/2019

Plaintiff,

-against-

ALLIEDBARTON SECURITY SERVICES, LLC

Defendant.

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 011) 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 354, 355, 356, 357, 358, 359, 360, 361, 374, 393, 396, 399, 417, 418, 425, 426, 429, 430

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

The following e-filed documents, listed by NYSCEF document number (Motion 012) 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 373, 394, 397, 400, 413, 414, 415, 416, 424

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 013) 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 391, 395, 398, 401, 405, 406, 407, 408, 409, 410, 411, 412, 419, 420, 421, 422, 423

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

These motions are decided in accordance with the attached memorandum Decision and Order.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

9/17/2020
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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

----------x

FITIM SHEHU,

Plaintiff,

-against- DECISION AND ORDER

THE BOARD OF MANAGERS OF THE 210 JORALEMON STREET CONDOMINIUM, STANTEC CONSULTING SERVICES INC., STANTEC ARCHITECTURE INC., ASHNU INTERNATIONAL INC., ZDG LLC., 210 MUNI, LLC, UNITED AMERICAN LAND, LLC, Index No. 162198/2015
MOT SEQ 011, 012, 013

Defendants.

----------x

THE BOARD OF MANAGERS OF THE 210 JORALEMON STREET CONDOMINIUM,

Plaintiff, Third-Party Index No. 595807/2019

-against-

ALLIED BARTON SECURITY SERVICES LLC

Defendant.

----------x

STANTEC CONSULTING SERVICES INC., STANTEC ARCHITECTURE INC.

Plaintiffs, Third-Party Index No. 595898/2019

-against-

ALLIED BARTON SECURITY SERVICES, LLC

Defendant.

----------x

NANCY M. BANNON, J.:

I. INTRODUCTION

In this personal injury action, the plaintiff, Fitim Shehu, moves pursuant to CPLR 3212 for partial summary judgment on the

issue of liability on his Labor Law § 240(1) claim against defendants Stantec Architecture Inc. (Stantec) and The Board of Managers of the 201 Joralemon Street Condominium (the Board) (MOT SEQ 011). Stantec, and related defendant Stantec Consulting Services, Inc. (Stantec Consult), oppose the motion and move pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's claims for negligence and violations of Labor Law §§ 200, 240(1), and 241(6), and all cross-claims as asserted against them (MOT SEQ 012). The Board also opposes the motion and moves pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's claims for negligence and violations of Labor Law §§ 200, 240(1), and 241(6) (MOT SEQ 013). The plaintiff's motion is denied, and motions of Stantec and Stantec Consult and the Board are granted in part.

II. BACKGROUND

The building located at 201 Joralemon Street in Brooklyn is a mixed-use building with a non-residential condominium on the upper floors owned by The City of New York, and a retail area on the ground floors owned by United American Land Retail. Pursuant to a Declaration of Condominium, The City of New York, through The Department of Citywide Administrative Services (DCAS) and

United American Land Retail appointed the Board to operate and maintain the common elements in the building.

To comply with New York City Local Law 11 of 1998, which requires building owners to hire a professional to inspect the façade of a building and make any necessary repairs, DCAS entered into an agreement with Stantec. Then, on June 14, 2012, Stantec entered a contract with Apple Restoration and Waterproofing (Apple) to restore portions of the building's façade. The project commenced on November 28, 2012.

The plaintiff, an employee of Apple, reported to the building to begin work on November 28, 2012. Upon arriving at the site with several other Apple employees, the plaintiff and a co-worker were assigned to install safety fasteners on the top of the scaffolding already erected. After they emptied the truck of equipment, the plaintiff and his co-worker grabbed the safety fasteners, entered the building and took an elevator to the upper floors to gain access to the top of the scaffolding. They were met downstairs by a security guard who brought them to the 10th floor of the building and led them to a window through which they could access the outside of the building. The security guard opened the window and drew the blinds so that the plaintiff and his co-worker could exit onto a ledge or parapet where they would be working. The window was approximately four

to five feet off the floor inside and four feet up from the ledge outside. The plaintiff estimates his height as 5'5". He did not use a ladder in getting through the window. Instead, he and his co-worker used an overturned bucket.

Shortly after the plaintiff began fastening the scaffolding to the ledge, he received a call from his supervisor at Apple telling him and his co-worker to stop working since there was an issue with the building permits at the site. While attempting to re-enter the building, the plaintiff noticed that the window had been closed. The plaintiff opened the window from the outside, put down his tools, and then sat down on the windowsill facing away from the building so that he could turn himself and pull his legs through the window and then lower himself down onto the floor. However, while the plaintiff was pulling his leg through the window, his left foot became caught by the window blind cord. The cord allegedly caused the plaintiff to fall through the window to the floor, causing injury to right ankle which required two surgeries and physical therapy to repair.

Three years later, on November 27, 2015, the plaintiff filed the complaint in this action alleging claims for negligence and violations of Labor Law §§ 200, 240(1), and 241(6). In their answers, Stantec, Stantec Consult, and the Board offer general denials, affirmative defenses including,

inter alia, that the plaintiff was the proximate cause of his own injury and assert cross-claims as against each other for contribution. Discovery was conducted and third-party actions were commenced. On October 18, 2019, the Note of Issue was filed. The instant motions ensued.

III. DISCUSSION

A. Summary Judgment Standard

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980).

Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra. However, if the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v Prospect

Hospital, supra; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851 (1985); O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue." Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

B. Plaintiff's Motion for Partial Summary Judgment (MOT SEQ 011)

The plaintiff moves for partial summary judgment against the Board and Stantec on the issue of liability on his Labor Law § 240(1) claim. Labor Law § 240(1), provides, in relevant part, as follows:

> "All contractors and owners and their agents 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."

"Labor Law § 240(1) imposes a nondelegable duty and absolute liability upon owners or contractors for failing to

provide safety devices necessary for protection to workers subject to the risks inherent in elevated work sites who sustain injuries proximately caused by that failure." Jock v Fien, 80 NY2d 965, 967-968 (1992); see also Rocovich v Consolidated Edison Co., 78 NY2d 509 (1991). To impose liability under Labor Law § 240(1), the plaintiff must prove a violation of the statute (*i.e.*, that the owner or general contractor failed to provide adequate safety devices), and that the statutory violation proximately caused his or her injuries. See Blake v Neighborhood Hous. Sews. of N.Y. City, 1 NY3d 280 (2003).

"[T]he single decisive question is whether the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." Runner v New York Stock Exch., Inc., supra. There is no bright-line minimum height differential that determines whether an elevation hazard exists. See Thompson v St. Charles Condominiums, 303 AD2d 152 (1st Dept. 2003); Arrasti v HRH Constr., LLC, 60 AD3d 582 (1st Dept. 2009); Lelek v Verizon N.Y., Inc., 54 AD3d 583 (1st Dept. 2008). Rather, the relevant inquiry is whether the hazard is one "directly flowing from the application of the force of gravity to an object or person." Prekulaj v Terano Realty, 235 AD2d 201, 202 (1997), *citing* Ross v Curtis Palmer Hydro-Elec. Co., supra.

In support of his motion, the plaintiff submits, *inter alia*, Apple's contract with Stantec, the plaintiff's deposition transcript, detailing how his alleged injury occurred, and the deposition transcripts of Anne Marie Edden, a senior associate at Stantec who worked on the 201 Joralemon Street project, and walked through the site the day before the accident, and Matthew Berk, the executive director of planning and dispositions for DCAS and the president of the Board.

The plaintiff's submissions are insufficient to establish the plaintiff's *prima facie* entitlement to partial summary judgment on the issue of liability as against Stantec or the Board. The submissions demonstrate that the plaintiff was exposed to an elevation-related hazard for which no safety device was provided in that the plaintiff climbed in and out of a window approximately five feet off the ground with only an overturned bucket for assistance, and the defendants do not seriously refute those facts. However, the plaintiff's submissions do not establish that the plaintiff's injuries were proximately caused by the defendants' failure to provide a ladder. Although the plaintiff, in his deposition, testified that he would have used a ladder were one provided to him, the plaintiff does not establish, as a matter of law, none was available, or that the existence of a ladder would have altered the way in which the plaintiff entered into the building, by

sitting on the window ledge and swinging his legs inside before descending from the ledge, or how the existence and use of a ladder would have prevented him from having his foot get caught in the window blind cord as passed through the window.

Moreover, in their respective oppositions, Stantec and the Board raise a triable issue of fact as to whether the plaintiff proximately caused his own injury, as he had access to a ladder. Where safety equipment, such as a ladder, is readily available and it would be a "normal and logical" response for a plaintiff to obtain a ladder, a plaintiff's failure to do so may be sufficient to preclude relief under Labor Law §240(1). Montgomery v Fed. Express Corp., 4 NY3d 805, 806 (2005); see Cherry v Time Warner, Inc., 66 AD3d 233, 237 (1st Dept. 2009).

In that regard, the plaintiff gave conflicting deposition testimony regarding whether Apple had packed a ladder in the truck that brought him to the building. During the plaintiff's first deposition on July 18, 2017 he testified that he helped load an Apple truck with equipment for this project which included scaffolding material and ladders. He explained that they use the ladders to get on top of the sidewalk bridge. During his second deposition on March 26, 2019, the plaintiff testified that Apple did not bring any ladders to the project and that another worker must have forgotten to load the ladders.

He testified that the Apple foreman told them to use the bucket to climb up. These inconsistencies raise an issue of fact regarding the presence of ladders at the site and the plaintiff's credibility, which are best determined by a finder of fact and not on a motion for summary judgment. See Vega v Restani Const. Corp., 18 NY3d 499 (2012); Hutchings v Yuter, 108 AD3d 416 (1st Dept. 2013). Therefore, the plaintiff's motion for partial summary judgment is denied.

C. Stantec and Stantec Consult's Motion for Summary Judgment (MOT SEQ 012)

Stantec and Stantec Consult move for summary judgment dismissing the plaintiff's claims for negligence and violations of Labor Law §§ 200, 240(1), and 241(6), and all cross-claims asserted as against them. Stantec Consult moves for summary judgment on the additional ground that it is a legally separate entity from Stantec and was not involved in the construction project.

More specifically, Stantec argues that it is entitled to summary judgment on the grounds that (i) it was acting solely as a design professional, and therefore is exempted from liability under Labor Law §§ 240 and 241, (ii) it did not direct or control the plaintiff's work, and therefore did not owe a duty to the plaintiff rendering the negligence and Labor Law § 200

claims unviable, (iii) the plaintiff's alleged accident was not from a significant elevation differential, and was proximately caused by the plaintiff's failure to use his own ladder, and therefore the plaintiff's Labor Law §240(1) claim must be dismissed, and (iv) the regulations that the plaintiff alleges were violated under Labor Law §241(6) are either too general to support a claim or are inapplicable to the plaintiff's claims.

1. Stantec Consult

In support of the portion of Stantec and Stantec Consult's motion for summary judgment dismissing the complaint as against Stantec Consult, the movants submit, *inter alia*, the professional services contract entered into between Stantec and the DCAS, the proposal to DCAS for the inspection and remediation of the building's façade, and the contract between Apple and Stantec, all of which name only Stantec as a party. The movants also submit the affidavit of Anne Edden, averring that she was the only Stantec employee to work on the construction project, and that Stantec Consult is a separate legal entity that was not involved with the project at all.

These submissions establish, *prima facie*, Stantec Consult's entitlement to summary judgment dismissing the plaintiff's complaint as against it, as Stantec Consult was neither an owner or contractor, and did not owe any duty to the plaintiff. The

plaintiff fails to address the portion of the movants' motion seeking dismissal of the complaint as against Stantec Consult, and thus fails to raise a triable issue of fact. Therefore, the complaint is dismissed as against Stantec Consult.

2. Stantec

i. Stantec's Exemptions Under Labor Law §§ 240 and 241

Both Labor Law §§ 240 and 241 exempt architects and engineers from liability thereunder when the architect or engineer acts solely as a design professional and does not direct or control the work for activities other than planning and design. See Ohadi v Magnetic Constr. Grp. Corp., 182 AD3d 474 (1st Dept. 2020). Stantec moves for summary judgment on the plaintiff's Labor Law §§ 240 and 241 claims on the grounds that it only provided architectural design services to DCAS, and therefore cannot be found liable for violations of Labor Law §§ 240 and 241.

In support of its motion, Stantec submits, *inter alia*, a June 5, 2012 letter between DCAS and Stantec, directing Stantec to provide architectural and engineering services to establish a detailed scope of work for the exterior rehabilitation and stabilization of the façade of the building. Stantec further submits the affidavit of Anne Edden, which avers that (i) pursuant to the contractor agreement between Stantec and Apple,

Apple retained full and complete control and responsibility for its performance of the contract and supervision of its employees and (ii) Stantec did not have any role in directing Apple's work or inspecting workers' safety at the premises. These submissions establish, *prima facie*, that Stantec did not provide services beyond directing or controlling the planning of the construction project on the façade of the building, such that it is entitled to the exemptions provided by Labor Law §§ 240 and 241.

However, in opposition, the plaintiff raises a triable issue of fact as to whether Stantec was acting as a general contractor for the project, and therefore is not entitled to any exemption from liability.

Labor Law §§ 200, 240 and 241 do not define general contractor; however, it is understood that a general contractor is generally responsible for the coordination and execution of all the work at the worksite. See Russin v Picciano & Son, 54 NY2d 311(1981); Bjelicic v Lynned Realty Corp., 152 AD2d 151 (1st Dept. 1989). "A party which has the authority to enforce safety standards and choose responsible subcontractors is considered a contractor under Labor Law § 240(1)." Williams v Dover Home Improvement, 276 AD2d 626, 626 (2nd Dept. 2000); see also Guanopatin v Flushing Acquisition Holdings, LLC, 127 AD3d 812 (1st Dept. 2015). Even where a party is not explicitly specified

as a general contractor for a project, or is otherwise termed a construction manager, such a party may be considered a general contractor when it is contractually given the ability to "monitor performance of the work on the project" and "demand compliance by the contractors with all applicable Federal, state and local statutes, rules, regulations and codes regarding safety." Lodato v Greyhawk North America, LLC, 39 AD3d 496 (2nd Dept. 2007).

In support of his position, the plaintiff submits, *inter alia*, the portion of Stantec's contract with Apple which requires Apple to comply with all applicable safety regulations, including all "applicable Federal, state, provincial or local laws, rules, regulations and codes" and the deposition transcript of Anne Edden, wherein she testified that she hired Apple to perform work on the project, acted as a go-between for Apple and DCAS, and went to the construction site at least once a week to inspect the progress on the project. These submissions raise a triable issue of fact as to whether Stantec could be found liable as a general contractor, as they demonstrate that Stantec had the authority to choose subcontractors such as Apple, as well as monitor the performance of the project, and Stantec's contract with Apple provided Stantec with the ability to demand Apple's compliance with all required safety

regulations. See Lodato v Greyhawk North America, LLC, supra; Williams v Dover Home Improvement, supra.

ii. Stantec's Direction and Control of the Plaintiff's Work – Labor Law § 200 and Common-Law Negligence

Labor Law § 200(1), codifies landowners' and general contractors' common-law duty to maintain a safe workplace. See Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 (1993). "When a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work." Ortega v Puccia, 57 AD3d 54, 61 (2nd Dept. 2008).

Stantec moves for summary judgment on the plaintiff's negligence and Labor Law § 200 claims on the grounds that it did not have the authority to either supervise or control the plaintiff's performance of his work. In support of its position, Stantec submits, *inter alia*, Stantec's contract with Apple which provides that "[Apple] shall have full and complete control and responsibility for performance of the services, including the means, methods, techniques, sequences, procedures and use of equipment of any nature whatsoever, whether reviewed by Stantec

or not" and that "[a]ll personnel furnished by [Apple] shall be under the supervision and control of [Apple]."

These submissions establish, *prima facie*, that Stantec did not have the authority to control or supervise the plaintiff's performance of his work, such that summary judgment dismissing the plaintiff's negligence and Labor Law § 200 claims is warranted. In opposition, the plaintiff merely restates, in conclusory fashion, that Stantec did have authority to control and supervise the plaintiff's work, and advances a separate argument that Stantec breached its duties under Labor Law § 200 and the common-law by failing to remedy a worksite hazard. However, as correctly noted by Stantec, a party may only be found liable for a worksite hazard where they "either exercised supervision and control or had actual or constructive notice of the unsafe condition." As Stantec did not exercise supervision and control over the window leading onto the 10th floor parapet, and could not have had constructive notice of the unsafe condition, as the plaintiff's injuries were caused by him getting caught in the window blind cord, the plaintiff fails to raise a triable issue of fact. Higgins v 1790 Bronx Assoc., 261 AD2d 223 (1st Dept. 1999). Indeed, the plaintiff testified that his work was directed by the Apple foreperson at the site. He also testified that, although he sometimes worked as a contractor, he was working on the project as an employee of

Apple and, as such, did not have occasion to even view the plans and drawings. Therefore, the portion of Stantec's motion summary judgment on the plaintiff's claims for negligence and violations of Labor Law § 200 is granted.

iii. Non-Height Differential Injury and Proximate Cause – Labor Law § 240(1)

In addition to its argument that it is exempt from liability under Labor Law § 240(1) because it was acting solely as a design professional, Stantec further argues that it is entitled to summary judgment dismissing the plaintiff's claim because (i) the plaintiff's alleged injuries were not caused by the type of height differential contemplated under Labor Law § 240(1), and (ii) the plaintiff proximately caused his own injuries by failing to use the ladder that Apple brought to the construction site.

In support, Stantec cites to the portions of the plaintiff's deposition transcript wherein he testifies that he fell between four and five feet from the window, and that Apple had a ladder in the truck that the plaintiff arrived at the construction site in. However, such testimony does not entitle Stantec to summary judgment. As already discussed herein, there is no bright-line minimum height differential that determines whether an elevation hazard exists, and the plaintiff's injuries

resulted from a fall, the type of which is contemplated under Labor Law § 240(1). See Thompson v St. Charles Condominiums, supra; Prekulaj v Terano Realty, supra. Furthermore, as already discussed herein, the plaintiff's deposition testimony that he had access to a ladder is contradicted by his subsequent deposition testimony that Apple workers forgot to pack the ladder, raising a triable issue of fact as to whether the plaintiff proximately caused his own injuries. Therefore, the portion of Stantec's motion seeking to dismiss the plaintiff's claim for violation of Labor Law § 240(1) is denied.

iv. Industrial Code – Labor Law § 241(6)

Stantec also moves for summary judgment dismissing the plaintiff's Labor Law § 241(6) claim on the grounds that the plaintiff fails to cite to any applicable regulations violated by Stantec. "Labor Law § 241(6)... 'requires owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor.'" St. Louis v Town of N. Elba, 16 NY3d 411, 413 (2011), quoting Ross v Curtis-Palmer Hydro Elec Co., 81 NY2d 494, 501-502 (1993). Labor Law § 241(6) is not self-executing because it depends upon an outside source, the Industrial Code. See Long v Forest-Fehlhaber, 55 NY2d 154 (1982). Therefore, to recover under Labor Law § 241(6), "the plaintiff must

demonstrate that his or her injuries were proximately caused by a violation of a specific and applicable provision of the New York State Industrial Code." Licata v AB Green Gansevoort, LLC, 158 AD3d 487, 488 (1st Dept. 2018).

The plaintiff's Bill of Particulars alleges violations of the following sections of the Industrial Code - 12 NYCRR 23-1.17; 23-1.17(b); 23-1.17(c); 1.5; 23- 1.5(a); 23-2.1; 23-2.1(a); 23-2.1(b); 23- 1.7(d); 23-1.7(e)(1); 23-1.7(e)(2); 23.1.30; 23-5.1; 23-5.1(b); 23-5.1(c); 23-5.1(d); 23-5.1(e); 23-5.1(f); 23-5.1(j); 23-5.1(k); 23-5.3; 23-5.8; 23-5.8(a); 23-5.8(b); 23-5.8(c); 23-5.8(d); 23-5.8(e); 23-5.8(f); 23- 5.8(g); 23-5.8(h); 23-5.9; 23-5.9(a); 23-5.9(b); 23-5.9(c); 23-5.9(d); 23-5.9(e); 23-5.9(f); 23-5.9(g); 23-5.10; 23-5.10(a); 23-5.10(b); 23-5.10(c); 23- 5.10(d); 23-5.11; 23-5.11(a); 23-5.11(b); 23-5.11(c); and 23-5.11(d).

As correctly noted by Stantec, none of these provisions are applicable to the plaintiff's claim. Sections 23-1.5, 23-2.1, and 23-5.1(f) of the Industrial Code are OSHA standard violations that are too general to support a claim under Labor Law § 241(6). See Greenwood v Shearson, Lehman & Hutton, 238 AD2d 311 (2nd Dept. 1997). Section 23-1.17 only applies where a life net is used, which was not the case here. Section 23-1.7(d) only applies to slipping hazards, such as ice, water, snow, or

grease, which the plaintiff does not allege. Section 23-1.30 concerns lighting, and the plaintiff makes no allegations regarding improper lighting contributing to his accident. Sections 23-5.1(a)-(k); 23-5.3; 23-5.8; 23-5.9; 23-5.10; 23-5.11 all concern scaffolding, which is unrelated to the plaintiff's fall through a window. Therefore, the portion Stantec's motion for summary judgment seeking to dismiss the plaintiff's claim for violations of Labor Law § 241(6) is granted.

v. Stantec's Motion to Dismiss Cross-Claims

Although Stantec, in its Notice of Motion, moved to dismiss all cross-claims asserted against it, its moving papers fail to address the cross-claims. Therefore, any portion of the motion seeking such relief has been deemed abandoned. See Faith v Town of Goshen, 167 AD3d 980 (2nd Dept. 2018); 87 Chambers LLC v 77 Reade, LLC, 122 AD3d 540 (1st Dept. 2014); Rodriguez v Dormitory Auth. of State of New York, 104 AD3d 529 (1st Dept. 2013).

D. The Board's Motion for Summary Judgment (MOT SEQ 013)

The Board moves for summary judgment dismissing the plaintiff's claims for negligence and violations of Labor Law §§ 200, 240(1), and 241(6) on the grounds that (i) the alleged accident occurred outside the common elements of the building, and thus the Board is not a proper defendant, (ii) the Board did not direct or control the plaintiff's work, and therefore did

not owe a duty to the plaintiff rendering the negligence and Labor Law § 200 claims unviable, (iii) the plaintiff's alleged accident was not from a significant elevation differential, and was proximately caused by the plaintiff's failure to use his own ladder, and therefore the plaintiff's Labor Law §240(1) claim must be dismissed, and (iv) the regulations that the plaintiff alleges were violated under Labor Law §241(6) are either too general to support a claim or are inapplicable to the plaintiff's claims.

i. Location of Accident Beyond Common Areas of the Building

It is well settled that for a plaintiff to recover against a board of managers of a condominium for injuries sustained in the building, such claim must arise out of injuries sustained within the common elements or areas of the condominium, as any injuries sustained outside the common areas must be brought against the individual owners of a property. See Jerdonek v 41 West 72 LLC, 143 AD3d 43 (1st Dept. 2016); Pekelnaya v Allyn, 25 AD3d 111 (1st Dept. 2005). The Board moves for summary judgment dismissing the plaintiff's claims on the basis that the plaintiff was injured outside of the common areas in the building.

In support of its motion, the Board submits, *inter alia*, the Condominium Declaration wherein The City of New York and

United American Land LLC appointed the Board and defined the common elements of the building, and the deposition transcript of Matthew Berk wherein he testified that the façade of the building on the 10th floor is owned by the City of New York, and is outside of the Board's purview.

These submissions are insufficient to establish the Board's entitlement to summary judgment. The Board relies upon Berk's deposition testimony to support its position that the plaintiff's alleged injuries did not occur within the common areas of the building, but during repairs to the façade. However, the Board does not address the proof that the injuries occurred while the plaintiff was reentering the building through a window, not while he was repairing the façade. Furthermore, regardless of whether the plaintiff's injuries occurred while working on the façade or while climbing through the window, the Declaration does not expressly define common areas to exclude the windows of the building, the façade of the building, or any portion of the outside of the building. Therefore, the Board does not establish, *prima facie*, that the plaintiff's alleged accident occurred outside of the common elements of the building such that they would not be a proper defendant in this matter. See Jerdonek v 41 West 72 LLC, supra; Pekelnaya v Allyn, supra.

ii. The Board's Direction and Control of the Plaintiff's Work – Labor Law § 200 and Common-Law Negligence

The Board also moves for summary judgment dismissing the plaintiff's negligence and Labor Law § 200 claims on the grounds that it did not have the authority to either supervise or control the plaintiff's performance of his work. In support of its position, the Board submits, *inter alia*, Stantec's contract with Apple, wherein Apple retains all supervision and control of its employees. The Board further submits Edden's deposition transcript, wherein she testifies that the Board did not have the authority to supervise or control the plaintiff, or any contact with the plaintiff or Apple, as the work was being done on behalf of DCAS, through Stantec.

These submissions establish, *prima facie*, that the Board did not have the authority to control or supervise the plaintiff's performance of his work. In opposition, the plaintiff fails to address his claims for negligence or violations of Labor Law § 200 as against the Board. As such the plaintiff fails to raise a triable issue of fact and the portion of the Board's motion for summary judgment dismissing the plaintiff's negligence and Labor Law § 200 claims is granted.

iii. Height Differential Injury and Proximate Cause – Labor Law § 240(1)

The Board also argues that it is entitled to summary judgment dismissing the plaintiff's claim because (i) the plaintiff's alleged injuries were not caused by the type of height differential contemplated under Labor Law § 240(1), and (ii) the plaintiff proximately caused his own injuries by failing to use the ladder Apple brought to the site.

As already discussed herein, the plaintiff's injuries are the type contemplated by Labor Law § 240(1), involving a height differential, and a triable issue of fact is raised as to whether the plaintiff was the proximate cause of his own injuries. Therefore, the portion of the Board's motion seeking to dismiss the plaintiff's claim for a violation of Labor Law § 240(1) is denied.

iv. Inapplicable Regulations – Labor Law § 241(6)

The Board also argues that it is entitled to summary judgment dismissing the plaintiff's Labor Law § 241(6) claim claim on the grounds that the plaintiff fails to cite to any applicable regulations that were violated by the Board. As already discussed herein, none of the regulations that the plaintiff alleges were violated are applicable here. Therefore, the portion of the Board's motion for summary judgment dismissing the plaintiff's Labor Law § 241(6) claim is granted.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the motion of plaintiff, Fitim Shehu, for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim against defendants Stantec Architecture Inc. and The Board of Managers of the 201 Joralemon Street Condominium (MOT SEQ 011) is denied; and it is further,

ORDERED that the motion of defendants Stantec Architecture, Inc., and Stantec Consulting Services, Inc. for summary judgment dismissing the plaintiff's claims for negligence and violations of Labor Law §§ 200, 240(1), and 241(6), and all cross-claims as asserted against them (MOT SEQ 012) is granted to the extent that the complaint is dismissed against Stantec Consulting Inc., and the plaintiff's claims for negligence and violations of Labor Law §§ 200 and 241(6) are dismissed as against Stantec Architecture Inc., and the motion is otherwise denied; and it is further,

ORDERED that the motion of defendant The Board of Managers of 201 Joralemon Street Condominium for summary judgment dismissing the plaintiff's claims for negligence and violations of Labor Law §§ 200, 240(1), and 241(6) (MOT SEQ 013) is granted to the extent that the plaintiff's claims for negligence and

violations of Labor Law §§ 200 and 241(6) are dismissed, and the motion is otherwise denied; and it is further,

ORDERED that the parties shall contact chambers on or before October 30, 2020 to schedule a settlement conference.

This constitutes the Decision and Order of the court.

Dated: September 17, 2020

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON