Palmeri v City of New York
2020 NY Slip Op 34252(U)
December 23, 2020
Supreme Court, Kings County
Docket Number: 14992/2015
Judge: Lara J. Genovesi
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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 23rd day of December 2020.

P R E S E N T:
HON. LARA J. GENOVESI,
J.S.C.

---X

JOSEPH PALMERI,

Plaintiff,

Index No.: 14992/2015

DECISION & ORDER

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, WILDLIFE CONSERVATION SOCIETY and TURNER CONSTRUCTION COMPANY,

Defendants.

---X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	NYSCEF Doc. No.:
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	3 - 9
Opposing Affidavits (Affirmations)	10
Reply Affidavits (Affirmations)	11

Introduction

Plaintiff, Joseph Palmeri, moves by notice of motion, sequence number 14, pursuant to CPLR § 2221(d) for leave to reargue the decision and order dated December 12, 2019. Defendants oppose this application.

Background & Procedural History[1]

Plaintiff allegedly sustained personal injuries on April 13, 2015, while working at the New York- Coney Island Aquarium Complex, located at 602 Surf Avenue, Brooklyn, New York. The premises is owned by the City of New York, Department of Parks and Recreation and Wildlife Conservation Society (Wildlife). Wildlife hired Turner Construction Company (Turner) as the general contractor to construct a new shark exhibit. Turner hired JD Traditional as a subcontractor. Plaintiff, who was employed by JD Traditional as a Local 926 carpenter, was installing sheetrock and fell from a Baker scaffold when one of the wheels came off.

In the underlying motion, plaintiff moved and defendant cross-moved on Labor Law §§ 240(1), 241(6) and 200. Plaintiff's motion for summary judgment was denied in its entirety. This Court held that questions of fact exist as to whether plaintiff was on top of the moving scaffold at the time of the accident. That branch of defendant's cross-motion for summary judgment on Labor Law § 241(6) as predicated on §§ 23-1.5(c)(3) and 23-5.18(e), was denied. This Court held that questions of fact exist, since it was unclear from the record before this Court whether the scaffold was damaged or defective at the time plaintiff used it or whether the accident was caused by misuse of the scaffold. Questions of fact exist as to whether plaintiff violated Industrial Code § 23-5.18(g) and (h), since it is unclear whether plaintiff and another worker were on a moving scaffold at the time of the accident.

[1] This Court notes that the parties consented to convert this action to NYSCEF on August 12, 2020.

That branch of defendant's cross-motion seeking summary judgment and dismissing plaintiff's Labor Law § 241(6) claim, as predicated on: Industrial Code §§ 23-1.4(b)(32), 23-1.7, 23-1.8, 23-1.14, 23-1.16, 23-1.17, 23-1.21, 23-1.22, 23-1.32, 23-5, 23-5.19 through 23-5.22; OSHA regulations: 1926.452(w), 1926.452(w)(5), 1926.452(w)(6), 1926.452(w)(6)(I), 1910.28, 1910.29, 1910.132 through and including 1910.138; and Building Code § 3314.18 was granted, without opposition. As plaintiff's opposition was silent as to these codes, they were deemed abandoned. That portion of defendant's motion for summary judgment dismissing plaintiff's Labor Law § 200 cause of action was granted. This Court notes that plaintiff only opposed dismissal of their Labor Law § 200 cause of action as against defendant Turner.

Therefore, plaintiff's causes of action pursuant to Labor Law § 240(1), and Labor Law § 241(6) as predicated on Industrial Code §§ 23-1.5(c)(3) and 23-5.18(e) survived.

Discussion

Motion to Reargue

"Motions for reargument are addressed to the sound discretion of the court which decided the original motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision [quotation marks omitted]" (*Fuessel v. Chin*, 179 A.D.3d 899, 116 N.Y.S.3d 395 [2 Dept., 2020], quoting *Bueno v. Allam,* 170 A.D.3d 939, 96 N.Y.S.3d 623 [2 Dept., 2019]; *see also* CPLR § 2221[d][2]). "[A] motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented" (*Coke-Holmes v. Holsey Holdings, LLC*, --

A.D.3d --, 2020 N.Y. Slip Op. 07537 [2 Dept., 2020]; *see also Rodriguez v. Gutierrez*, 138 A.D.3d 96, 431 N.Y.S.3d 97 [2 Dept., 2016]). "[N]o appeal lies from an order denying reargument" (*Raghavendra v. Stober*, 171 A.D.3d 814, 97 N.Y.S.3d 182 [2 Dept., 2019]).

Plaintiff contends that the court misapprehended numerous points of fact and law, as discussed below. After careful consideration, that branch of plaintiff's motion to reargue his underlying motion for summary judgment as to his Labor Law §§ 240(1) and 241(6) claims is denied. That branch of plaintiff's motion to reargue his underlying motion for summary judgment as to his Labor Law § 200 claim as against Turner is granted.

Labor Law § 240(1)

The Court of Appeals in *Blake v. Neighborhood Hous. Servs. of New York City, Inc.,* addressed the statutory intent of the scaffold law, in depth (1 N.Y.3d 280, 803 N.E.2d 757 [2003]). Labor Law § 240(1) is a strict liability statute. Under the scaffold law, there is a presumption that where a scaffold breaks, it is an insufficient safety device. "The [1897] amendment [to the scaffold law] did two things: it placed the onus directly on the employer, and it prompted our Court to interpret the law as creating a presumption of employer liability when a scaffold (or ladder) collapses. We recognized that sound scaffolds and ladders do not simply break apart" (*id.* citing *Stewart v. Ferguson,* 164 N.Y. 553, 58 N.E. 662 [1900]). However, at the same time, "[a]t no time, however, did the Court or the Legislature ever suggest that a defendant should be treated as an insurer after having furnished a safe workplace. The point of Labor Law § 240(1) is to compel

contractors and owners to comply with the law, not to penalize them when they have done so" (*id.*). Therefore, while employers have an absolute duty to provide adequate safety devices, that does not mean that defendants are automatically liable any time a device fails.

> Given the varying meanings of strict (or absolute) liability in these different settings, it is not surprising that the concept has generated a good deal of litigation under Labor Law § 240(1). The terms may have given rise to the mistaken belief that a fall from a scaffold or ladder, in and of itself, results in an award of damages to the injured party. That is not the law, and we have never held or suggested otherwise. As we stated in *Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 267, 727 N.Y.S.2d 37, 750 N.E.2d 1085 [2001], "[n]ot every worker who falls at a construction site, and not any object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)." Also, the Appellate Division had recognized as much in *Beesimer v. Albany Ave./Rte. 9 Realty,* 216 A.D.2d 853, 854, 629 N.Y.S.2d 816 [3d Dept.1995], stating: "the mere fact that [a plaintiff] fell off the scaffolding surface is insufficient, in and of itself, to establish that the device did not provide proper protection" (*see also Alava v. City of New York,* 246 A.D.2d 614, 615, 668 N.Y.S.2d 624 [2d Dept.1998] ["a fall from a scaffold does not establish, in and of itself, that proper protection was not provided"])

(*id.*).

While comparative negligence is not a defense to Labor Law § 240(1), liability can only attach where there is a violation of the statute and the defendant's breach proximately caused plaintiff's injury. Which is why where a plaintiff is deemed to be the "sole proximate cause" of his injuries, a defendant cannot be held liable under Labor Law § 240(1).

In the instant case, this Court denied plaintiff's motion and defendant's cross-motion for summary judgment on Labor Law § 240(1). The court held that there was no evidence that the scaffold was inadequate. It was equipped with guardrails. As it was under six feet in height, a safety line was not required. It was theorized by plaintiff in the underlying motion that perhaps the scaffold was insufficient to carry the working load. While that certainly could have been true, this Court held that there was not enough evidence submitted to support such a theory.

> Plaintiff theorizes that the wheels were insufficient to carry the working load of the scaffold. However, plaintiff failed to provide any evidence as to the type of wheels on the scaffold, the condition of the wheels, or what kind of wheels would have been adequate for the work performed. Defendants, in opposition, stated that the scaffold has a weight capacity of 1200 pounds and the wheels have a capacity of 300 lbs. A question exists as to whether plaintiff and Mathieson were on top of the scaffold at the time of the accident. This Court notes that in such a scenario, the weight of tools or materials on the scaffold as well as the weight of the two workers who were positioned on top at the time of the accident are unknown.

(J. Genovesi, Decision & Order, December 19, 2019).

Plaintiff argues herein that he has no obligation to demonstrate that the safety device provided was insufficient. "In holding that Plaintiff failed to meet his burden in establishing that the scaffold was an insufficient safety device, the underlying Decision and Order incorrectly found that plaintiff failed to provide any evidence that the scaffold was defective" (Affirmation in Support at ¶ 29). Plaintiff relies on the Appellate Division, Second Department's decision in *Melchor v. Singh,* for the proposition that "[w]hether a device provides proper protection is a question of fact, except when the

device collapses. moves. falls. or otherwise fails to support the plaintiff and his or her materials (90 A.D.3d 866, 935 N.Y.S.2d 106 [2 Dept., 2011]). However, the Appellate Division in *Melchor,* specifically stated that "A fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240(1) … There must be evidence that the subject ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries" (*id.*, citing *Xidias v. Morris Park Contr. Corp.,* 35 A.D.3d 850, 828 N.Y.S.2d 432 [2 Dept., 2006]; *see also Artoglou v. Gene Scappy Realty Corp.*, 57 A.D.3d 460, 869 N.Y.S.2d 172 [2 Dept., 2008]).

Plaintiff also relies on the Appellate Division, Second Department's decision *Pineda v. Kechek Realty Corp.,* where plaintiff made a prima facie showing of entitlement to summary judgment by demonstrating "that the scaffold upon which the injured plaintiff was working failed to provide proper protection as required by Labor Law § 240(1), and that this violation was the proximate cause of the accident, by submitting proof that the scaffold collapsed without an apparent reason" (285 A.D.2d 496, 727 N.Y.S.2d 175 [2 Dept., 2001]). However, unlike the facts in *Pineda,* here, or in the other cases provided by plaintiff, in the instant case there is an issue of causation. While plaintiff is correct that the collapse of a scaffold or ladder "for no apparent reason" creates a presumption that the device did not afford proper protection and would suffice to meet a plaintiff's burden on summary judgment (*see Cruz v. Roman Catholic Church of St. Gerard Magella,* 174 A.D.3d 782, 106 N.Y.S.3d 389 [2 Dept., 2019]), the facts herein do not demonstrate that the scaffold collapsed for no apparent reason.

This Court held that a question of fact exists as to whether the plaintiff was being pushed on the scaffold at the time the wheel broke. Contrary to plaintiff's contentions herein, this is directly relevant as it impacts causation. Defendant, in support of its underlying motion, argued that plaintiff was a recalcitrant worker and was the sole proximate cause of his injuries because of the allegation that plaintiff did not descend from the scaffold prior to moving it. This Court held that based on the conflicting testimony of plaintiff and his co-workers as to whether plaintiff was being pushed on the scaffold when the wheel broke or whether the wheel broke while the scaffold was stationary, a question of fact exists. Plaintiff herein argues that this Court misapprehended the law and "defendants are responsible for violating Labor Law §240(1) whether the scaffold was stationary or moving. Under both circumstances the safety device failed for its intended purposes" (Affirmation in Support at ¶ 28). This Court disagrees. This is not a question of whether plaintiff was comparatively negligent. The question of whether plaintiff and his colleagues were misusing the scaffold directly impacts causation. It raises a question of whether the condition of the scaffold proximately caused plaintiff's injuries, or whether the alleged misuse of the scaffold proximately caused plaintiff's injuries. As the Court of Appeals clearly stated in *Blake,* liability under Labor Law § 240(1) cannot attach without causation.

Plaintiff further alleges that no triable issue of fact exists as to whether plaintiff's conduct was the sole proximate cause of the incident and that the court incorrectly paraphrased the testimony provided. Plaintiff testified that Michael Bennardo was pushing the scaffold with plaintiff on it at the time it fell. Bennardo clearly testified that

he had no recollection of moving the scaffold with plaintiff on it.[2] Mathieson clearly testified that the workers always got off the scaffold before it was moved, and he would have never taken the chance leaving plaintiff on top. The relevant testimony is quoted as follows:

> Q On Friday, when you first started working there, and you were putting these sheetrock pieces on the ceiling, did you, as a group, meaning the three people working together, ever have to move the scaffold?
> A Yes.
> Q What was the procedure for doing that?
> A Well, we were on the top, and like the next board over, whoever was on the floor, would push us to the next board.
> Q Did you rotate who the three people were in terms of some people on the top and some people on the bottom, or did the positions remain the same on Friday?
> A No. Basically me and Floyd on top, and Mike on the bottom.
>
> . . .
>
> Q When you did that work before in your past, were men on the platform while it was being moved?
> A Yes.
> Q Did you ever, on this Friday or the day of your accident, ever protest that procedure to your shop steward or the foreman, saying, I want to get down off of this thing when they push it?
> A No.
> Q How about Floyd? Did he protest being pushed with the thing?
> A No.
>
> . . .
>
> Q Just before the scaffold fell, was somebody moving it?
> A Yes.
> Q Who was moving it?

[2] This Court notes that Bennardo's deposition transcript was not attached to the instant motion to reargue in document number four with the other exhibits. Defendant provided the transcript, in opposition.

A Mike.
Q Was he moving it from --

MR. KAHN: Can you clarify? You said just before. At the time he fell, was he in the process of moving? Is that what you're asking?

MR. CORDREY: I'll adopt that question.

Q At the time that the scaffold fell, was Mike moving it?
A Yeah.
Q Was it to put in the next piece of sheetrock?
A Yes.

. . .

Q At the time that the accident occurred, you and Floyd were both in the scaffold at the same time, correct?
A Yes.
Q Mike Bernardo was below?
A Yes.

(NYSCEF Doc. # 4, Plaintiff EBT at 66-67, 68, 83-84, 109).

Q. At any time in while you were working in this room installing Styrofoam, had you moved scaffold yourself?
A. No. We would move it together
Q. When you would move it together, would someone come down off the scaffold and help you move it?
A. Yes.
Q. And do you recall ever moving it with somebody still up in the scaffold?
A. No.
Q. Had you ever instructed Joe Palmeri to come down from the scaffold and he said, no, I'm not coming down, just move it with me in it?
A. I don't recall.

. . .

Q. Is there anything in this statement that you think is untrue as you've read it?
A. I don't recall pushing the scaffold.
Q. Okay. Is it Possible that you were pushing the scaffold?
A. I don't recall. I don't recall pushing it.

(NYSCEF Doc. # 10, Bennardo EBT at 40, 70).

> Q. Okay. Had you been on scaffolds at that job before where someone moved the scaffold while other people were on it? Had that occurred?
> A. Well, they were telling us to get off the scaffold, come down, move it, and get back on the scaffold. Instead of moving the scaffold with someone on it, come off, and come down. And that's what we were doing.
> Q. Okay. And that procedure that they had been telling you, had that been followed before this or were there times when someone would move the scaffold with people still on it?
> A. Well, some people take chances because the scaffold is not high. It's just low like this, so you don't have to step down. I'm just telling you the truth of the whole thing, because it's this high or this high. After a certain height, you got to come down or else its dangerous.
> Q. So all I'm trying to find out on this job, whether it was the Friday before the day of the accident, when you were working on this particular scaffold, were you and Mr. Palmeri staying on the scaffold while the scaffold was being moved?
> A. No, because he's a heavy guy -- he was a heavy guy, and I wouldn't take the chance for a big, heavy guy and a scaffold, and we would be moving the scaffold, there would be a guy down there moving the scaffold. I wouldn't take the chance, so he had to come down.
> Q. Okay. And you came down as well?
> A. Yeah.
> Q. At all times every time the scaffold was moved?
> A. At all times, at all times.

(NYSCEF Doc. # 4, Mathieson Deposition at p 18-19, 38-39).

"[A] motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented" (*Coke-Holmes v. Holsey Holdings, LLC*, -- A.D.3d --, *supra*). As plaintiff

failed to establish that this Court misapprehended the facts and law when denying both motions for summary judgment on the issue of Labor Law § 240(1) for the reason that questions of fact exist.

Labor Law 241(6)

"To establish liability under Labor Law § 241(6), a plaintiff or a claimant must demonstrate that his [or her] injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case" (*Rodriguez v. 250 Park Ave., LLC*, 161 A.D.3d 906, 76 N.Y.S.3d 107 [2 Dept., 2018], quoting *Aragona v State of New York,* 147 A.D.3d 808, 47 N.Y.S.3d 115 [2 Dept., 2017]). "The predicate Industrial Code provision must 'set[ ] forth specific safety standards'" (*Rodriguez v. 250 Park Ave., LLC*, 161 A.D.3d 906, *supra,* quoting *Hricus v. Aurora Contrs., Inc.,* 63 A.D.3d 1004, 883 N.Y.S.2d 61 [2 Dept., 2009]).

In the instant case, plaintiff alleges violations of Industrial Code § 23-1.5(c)(3) and 5.18(e), (g) and (h). § 23-5.18 provides, in relevant part:

> (e) Casters. Casters shall be properly designed for strength and dimensions to support four times the maximum load intended to be imposed thereon. All casters shall be provided with positive locking devices to hold the scaffolds in position.
>
> (g) Scaffold footing. Whenever any such scaffold is in use and is occupied by any person, such scaffold shall rest upon a stable footing, the platform shall be level and the scaffold shall stand plumb. All casters or wheels shall be locked in position.
>
> (h) Moving the scaffold. Provisions shall be made to prevent such scaffolds from tipping or falling during their movement from one location to another. Scaffolds shall be moved only on level floors or equivalent surfaces free from obstructions

> and openings. No person shall be suffered or permitted to ride on any manually-propelled mobile scaffold while it is being moved.

(12 NYCRR 23-5.18).

§ 23-1.5(c)(3) provides "All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged" (12 NYCRR 23-1.5).

Here, for the same reason as stated above, this Court held that plaintiff failed to establish that his injuries were *proximately caused* by a violation of these Industrial Codes [emphasis added]. Here, plaintiff failed to demonstrate how the Court misapprehended the facts and law.

Labor Law § 200

"Labor Law § 200 is a codification of the common-law duty to provide workers with a safe work environment" (*Davies v. Simon Prop. Grp., Inc.,* 174 A.D.3d 850, -- N.Y.S.3d -- [2 Dept., 2019], quoting *Azad v. 270 5th Realty Corp.,* 46 A.D.3d 728, 848 N.Y.S.2d 688 [2 Dept., 2007]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed…These two categories should be viewed in the disjunctive" (*Robles v. Taconic Mgmt. Co., LLC*, 173 A.D.3d 1089, 103 N.Y.S.3d 571 [2 Dept., 2019], quoting *Ortega v. Puccia,* 57 A.D.3d 54, 866 N.Y.S.2d 323 [2 Dept., 2008]).

"When a worker at a job site is injured as a result of the 'means and methods' of the performance of the work, the property owner's liability under Labor Law §200 and for

common-law negligence is determined by whether the property owner had the authority to supervise or control the means and methods of the work" (*see Sullivan v. New York Athletic Club of City of N.Y.*, 162 A.D.3d 955, 80 N.Y.S.3d 93 [2 Dept., 2018]). "A defendant has the authority to supervise or control the work for purposes of § 200 when that defendant bears the responsibility for the manner in which the work is performed" (*Turgeon v. Vassar Coll.*, 172 A.D.3d 1134, 100 N.Y.S.3d 374 [2 Dept., 2019], quoting *Ortega v. Puccia*, 57 A.D.3d 54, *supra*). "[M]ere general supervisory authority at a worksite for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200." (*id.,* citing *Suconota v. Knickerbocker Props., LLC,* 116 A.D.3d 508, 984 N.Y.S.2d 27 [1 Dept., 2014]).

Where "a plaintiff alleges that he or she was injured at a work site as a result of a dangerous premises condition, a property owner's liability under Labor Law § 200 and for common-law negligence rests upon whether the property owner created the condition, or had actual or constructive notice of it and a reasonable amount of time within which to correct the condition (*Gurewitz v. City of New York,* -- A.D.3d --, 2019 N.Y. Slip Op. 06384 [2 Dept., 2019], citing *Wadlowski v. Cohen,* 150 A.D.3d 930, 55 N.Y.S.3d 279 [2 Dept., 2017]).

In the instant case, plaintiff's motion to reargue is granted with respect to Labor Law § 200. Plaintiff contends that this Court misapprehended the factual record and failed to apply the relevant law with respect to both categories of Labor Law § 200. With respect to actual or constructive notice, the underlying decision stated "defendants established that Turner had no actual or constructive knowledge of a dangerous or

defective condition. Singleton stated in his affidavit that no complaints were made about defective equipment" (J. Genovesi, Decision & Order dated December 19, 2019 at p 17). While this Court addressed actual notice, counsel is correct that this Court failed to address constructive notice. Upon reargument, plaintiff failed to demonstrate what evidence this Court misconstrued which established that defendants had constructive notice. Plaintiff argues that "[i]ndeed, moving scaffolds with workers standing on them was such a common occurrence that Defendant's imposed a policy wherein any worker caught on a moving scaffold with other workers on it would be terminated" (Affirmation in Support at ¶ 59). As an initial matter, it is unclear how plaintiff considers the actions of the workers to be "a defective or dangerous condition". A broken wheel on a baker scaffold would be a dangerous or defective condition. Worksites have all kinds of safety procedures in place. Perhaps they had constructive notice that the workers engaged in this type of behavior. But it is unclear how that is constructive notice of a defective or dangerous condition.

With respect to the means and methods prong of Labor Law § 200, this Court held that defendant established that Turner did not control the means and methods of plaintiff's work. Plaintiff and Mathieson both testified that they were given instructions by their foreman, not by Turner. The affidavit of Greg Singleton demonstrated that Turner did not supply equipment or direct JD Traditional employees. Turner gave instructions regarding safety to the foreman, who relayed the information to the workers. This Court further held that "[t]he fact that Turner held safety meetings and would stop work if it was not in compliance with safety directives does not establish that they

directed and controlled the work. Mere general supervisory authority is insufficient. There is no evidence that Turner employees directed the manner of the work" (J. Genovesi, Decision & Order dated December 19, 2019 at p 17).

Here, plaintiff demonstrated that this Court overlooked testimony relevant to the means and methods prong of Labor Law § 200. In moving to reargue, plaintiff alleges that Turner's authority went far beyond mere general supervisory authority. This Court overlooked the testimony that Mr. Singleton spent 3-4 hours a day walking the site and that he and other Turner superintendents walked the site daily looking for safety issues. This, in conjunction with the testimony that Turner held safety meetings and would stop work if workers were not in compliance with safety directives establishes that Turner's behavior goes beyond mere supervisory authority. Here, Turner took responsibility for the manner in which the work was performed (*see Caban v. Plaza Const. Corp.*, 153 A.D.3d 488, 61 N.Y.S.3d 47 [2 Dept., 2017], citing *Ortega v. Puccia,* 57 A.D.3d 54, *supra*). Accordingly, that portion of plaintiff's motion for summary judgment on his claim pursuant to Labor Law § 200 should have been granted.

Conclusion

Accordingly, plaintiff's motion to reargue is granted solely as to plaintiff's motion for summary judgment on the issue of Labor Law § 200. Upon reargument, plaintiff's motion for summary judgment on the issue of Labor Law § 200 against Turner is granted.

The foregoing constitutes the decision and order of this Court.

E N T E R:

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J.S.C.

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