| **Kuylen v KPP 107th St., LLC** |
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| 2020 NY Slip Op 34924(U) |
| October 22, 2020 |
| Supreme Court, Bronx County |
| Docket Number: Index No. 26398/2015 |
| Judge: Lucindo Suarez |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seqs. # 5, 6

ELDON KUYLEN,

Plaintiff,

- against -

KPP 107TH STREET, LLC and EMPACT GROUP, INC.,

Defendants.

Index No.: 26398/2015

**DECISION and ORDER**

PRESENT: Hon. Lucindo Suarez

The issue in Defendants KPP 107th LLC's ("KPP") and Empact Group, Inc's ("Empact") summary judgment motions is whether they are respectively entitled to a dismissal of Plaintiff's Labor Law §§240(1), 241(6), and 200 claims. This court finds in the affirmative.

According to Plaintiff, on the day of loss he was employed by non-party KPP Management Inc., to perform renovation work to the interior of apartments located on the construction site. His task included plastering, painting, and tile work. Plaintiff testified that while he was on break, he was meeting up with a coworker who was completing renovation work to an apartment located on the first floor of the construction site. As he walked into the subject apartment Plaintiff testified that he observed approximately 25-30 sheetrock pieces stacked against the living room wall of the apartment at a seventy-degree angle. Plaintiff alleges that the sheetrock began tipping over on its own and ultimately fell on him rendering him injured.

I. Proper Labor Law Defendant

Empact seeks a dismissal from the action as it alleges that it is not a proper Defendant under the Labor Law. Labor Law §§240 and 241 imposes a nondelegable duty upon an owner, general contractor or their agents to conform to the requirement of those Labor Law provisions. *See*

*Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 429 N.E.2d 805, 445 N.Y.S.2d 127 (1981). An agency relationship for purposes of the Labor Law arises only when work is delegated to a third party who obtains the authority to supervise and control the job. *See Blake v. Neighborhood Hous. Servs. of NY City, Inc.,* 1 N.Y.3d 280, 803 N.E.2d 757, 771 N.Y.S.2d 484 (2003). Where responsibility for the activity surrounding an injury was not delegated to the third party, there is no agency liability under the statute. *Id.* Further, a general contractor will be held liable under Labor Law §§240(1), 241(6) or 200 if it was responsible for coordinating and supervising the entire construction project and was invested with a concomitant power to enforce safety standards and to hire responsible contractors. *See Kosovrasti v. Epic (217) LLC*, 96 A.D.3d 695, 948 N.Y.S.2d 260 (1st Dep't 2012).

Empact argues that as a matter of law because it was not the owner, general contractor or their agent, thus, there exist no basis to subject it to liability under Plaintiff's Labor Law claims. It further argues that it is undisputed that it did not own nor manage the subject construction site.

It also contends that it was not the general contractor or its agent because it was retained by Defendant KPP to perform renovations to the common areas of the construction site. Empact claims that it was not contracted to perform, and it did not perform any work to the interior of any apartments at the construction site. It further claims that it did not supervise, inspect or provide any instructions for Plaintiff's work nor for any of the renovation work performed to the interior of the apartments. Also, it contends that it did not provide any tools, equipment or materials for the work performed to the interior of the apartments and that Empact did not retain any contractors to perform renovation work at the construction site.

Moreover, Empact relies upon Plaintiff's testimony to establish that non-party KPP Management, Inc., exclusively controlled the interior renovation work, including the apartment

where Plaintiff was injured. Therefore, Empact argues that Plaintiff's accident occurred outside of Empact's alleged scope of work, thus, it was not the general contractor for the subject construction site. Lastly, Empact claims that although it did bring sheetrock to the construction site, it alleges that it did not store any of the sheetrock in the interior of apartments, but it only stored sheetrock in common areas of the construction site.

In opposition, KPP argues that Empact was the general contractor for the subject construction site. KPP relies upon Empact's principal owner, Haigan Lee's, testimony to establish that Empact was in fact hired by KPP to be the general contractor over the subject construction site. KPP further argues that Mr. Hee accepted the terms of the proposal to be the general contractor specifically for work to be completed in the interior apartments. In addition, KPP argues that KPP's Managing Principal, Michael Mikelic, testified that Empact was the general contractor that performed sheetrock installation not only at the lobby, but that the scope of the work under the work permit also included interior apartment renovations, which at a minimum raises triable issues of fact.

In addition, Plaintiff proffered opposition that since Empact controlled the sheetrock that led to Plaintiff's injuries liability should attach. Plaintiff further contends that irrespective of whether Empact had actual control the determinative factor in imputing liability under the Labor Law is whether Empact had the right to exercise control of the work not whether it actually exercised that right. Moreover, Plaintiff relies upon Mr. Mikelic's testimony that Empact did perform work to the interior of apartments located at the construction site.

This court finds that Empact is not a proper Labor Law Defendant. Empact established its *prima facie* burden that it did not supervise or control Plaintiff's injury-producing work, nor did it have the authority to insist that proper safety practices be followed with respect to the

renovation work occurring inside the apartment at the construction site. This court further finds that KPP and Plaintiff failed to controvert that Empact did not supervise or control Plaintiff's injury-producing work and the work permit that listed Empact as the general contractor is alone insufficient to establish general contractor status. *Id.*; *see also Aversano v. JWH Contr., LLC,* 37 A.D.3d 745, 831 N.Y.S.2d 222 (2d Dep't 2007).

II. Labor Law §240(1)

KPP seeks a dismissal of Plaintiff's Labor Law §240(1) claim. Labor Law §240(1), imposes absolute liability on building owners, contractors, and their agents whose failure to provide adequate protection to workers employed on a construction site proximately causes injury to a worker. *Santos v. Condo 124 LLC,* 161 A.D.3d 650, 78 N.Y.S.3d 113 (1st Dep't 2018). To establish liability under Labor Law §240(1), a plaintiff must show that the statute was violated, and that the violation was a proximate cause of the injury. *Id.* In addition, a plaintiff must demonstrate that his injury was attributed to a specific gravity-related injury such as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. *See Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.,* 18 N.Y.3d 1, 959 N.E.2d 488, 935 N.Y.S.2d 551 (2011).

KPP argues that Plaintiff was not exposed to elevated-related risk, which would garner the protections of Labor Law §240(1). KPP contends that the sheetrock pieces that fell upon Plaintiff were not being hoisted nor did it require securing for the purposes of the undertaking nor were they expected to fall. Further, KPP posits that since Plaintiff was on break at the time of loss that he was not engaged in a construction-related activity, therefore, he should not receive the protections afforded under Labor Law §240(1).

Lastly, KPP argues that Plaintiff's expert affidavit of Anthony M. Dolhon, who is a

professional engineer should not be entertained as his averments were based on conjecture, which failed to raise an issue of fact. KPP posits that Mr. Dolhon had no personal knowledge of the pieces of sheetrock that struck Plaintiff nor the location where it occurred.

In opposition, Plaintiff argues that it was undisputed that Plaintiff's injuries were proximately caused by the falling of the 25-30 pieces of sheetrock, which had been improperly stored at a seventy-degree angle against a wall without any protections to arrest them in the event of their fall. Thus, Plaintiff contends that because he was exposed to a gravity related risk that he is entitled to judgment under his Labor Law §240(1) claim irrespective if the sheetrock that fell was being hoisted or needed to secured for the purpose of the undertaking.

Furthermore, Plaintiff relies upon his expert witness, Mr. Dolhon, to support its proposition that the construction industry's best practice is to store materials like sheetrock on a flat surface or to use fencing or a barricade to protect the sheetrock from falling over. Therefore, Plaintiff posits that due to the absences of the above-referenced safety devices to prevent the sheetrock from tipping over this court should find that KPP violated Labor Law §240(1).

This court finds that Plaintiff's arguments are unpersuasive. Plaintiff's proposition that he is entitled to judgment on his Labor Law §240(1) claim solely due to the fact his injury was gravity related is a misreading of the case law. This court finds that Labor Law §240(1) applies to this case even though the sheetrock that fell upon plaintiff was located on the same first-floor level as Plaintiff. *See Rodriguez v. DRLD Dev., Corp.,* 109 A.D.3d 409, 970 N.Y.S.2d 213 (1st Dept 2013).

However, this court finds that Plaintiff is not entitled to judgment on his Labor Law §240(1) claim because the pieces of sheetrock, which was being stored against a wall, was not being hoisted or a load that required securing at the time it fell, nor was it expected that it would

require securing. *Id.*; *see also Seales v. Trident Structural Corp.,* 142 A.D.3d 1153, 38 N.Y.S.3d 49 (2d Dep't 2016). This court is also unpersuaded by Plaintiff's expert witness as his averments were based on speculation, which is insufficient to defeat summary judgment. *See Wright v. NY City Hous. Auth.,* 208 A.D.2d 327, 624 N.Y.S.2d 144 (1st Dep't 1995). Therefore, KPP is entitled to a dismissal of Plaintiff's Labor Law §240(1) claim as they demonstrated their *prima facie* burden, and Plaintiff failed to raise any triable issues of facts.

III. Labor Law §241(6)

KPP seeks to dismiss Plaintiff's Labor Law §241(6) claim. Labor Law §241(6), imposes a nondelegable duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety" to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. *Rizzuto v. L.A. Wenger Contr. Co.,* 91 N.Y.2d 343, 693 N.E.2d 1068, 670 N.Y.S.2d 816 (1998). The standard of liability under Labor Law §241(6), requires that a plaintiff allege that an owner or general contractor breached a specific rule or regulation containing a positive command. *See Ross v. Curtis-Palmer Hydro-Elec. Co.,* 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993). In addition, Labor Law §241(6), requires that a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident. *See Gonzalez v. Stern's Dept. Stores*, 211 A.D.2d 414, 622 N.Y.S.2d 2 (1st Dep't 1995).

Plaintiff alleges that KPP violated 12 NYCRR §23-2.1(a)(1), which provides that: "All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare." In addition, Plaintiff alleges that KPP violated 12 NYCRR §23-1.7(e)(2), which provides in pertinent part that: "All passageways shall be kept free from

accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping…"[1]

KPP argues that 12 NYCRR §23-2.1(a)(1) is not applicable to the facts at bar as Plaintiff's accident occurred inside of a living room, which does not constitute a passageway, walkway, stairway or other thoroughfare. In addition, KPP argues that said Industrial Code is not applicable because Plaintiff's accident did not occur due to the passageway being obstructed.

In opposition, Plaintiff argues that because the sheetrock was stored against a wall at a seventy-degree angle and not stored flat on the floor that KPP violated 12 NYCRR §23-2.1(a)(1) as the sheetrock was not stored in safe and orderly manner. Moreover, Plaintiff's rely upon their expert witness, Mr. Dolhon, that in order for KPP to comply with the instant Industrial Code it would have required utilizing a barricade, fencing or clips to prevent the sheetrock from tipping over.

This court finds that 12 NYCRR §23-2.1(a)(1) is inapplicable because Plaintiff's injuries did not occur in passageway, walkway, stairway or other thoroughfare as required by the instant Industrial Code. *See Militello v. 45 W. 36th St. Realty Corp.*, 15 A.D.3d 158, 789 N.Y.S.2d 23 (1st Dep't 2005).

As to 12 NYCRR §23-1.7(e)(2), KPP argues that said Industrial Code is not applicable to the facts at bar as Plaintiff did not allege that the sheetrock that caused his injuries was a tripping hazard or that Plaintiff tripped over the sheetrock. In opposition, Plaintiff argues that the placement of unsecured heavy pieces of sheetrock at/or near the area in which Plaintiff had to pass, presents facts which establish a violation of the instant Industrial Code. This court finds

[1] Plaintiff abandoned all other predicates, and the claims are dismissed to that extent. *Burgos v. Premier Props. Inc.*, 145 A.D.3d 506, 42 N.Y.S.3d 161 (1st Dep't 2016); *see also 87 Chambers, LLC v. 77 Reade, LLC*, 122 A.D.3d 540, 998 N.Y.S.2d 15 (1st Dep't 2014).

that the instant Industrial Code is inapplicable as Plaintiff did not allege, he tripped and his accident was not caused by an accumulation of dirt or debris, scattered tools or materials, or a sharp projection. *See Ali v. Sloan-Kettering Inst. for Cancer Research*, 176 A.D.3d 561, 112 N.Y.S.3d 14 (1st Dep't 2019).

IV. Labor Law §200

KPP seek the dismissal of Plaintiff's Labor Law §200 claim. Labor Law §200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. *Licata v. AB Green Gansevoort, LLC,* 158 A.D.3d 487, 71 N.Y.S.3d 31 (1st Dep't 2018). Where an existing defect or dangerous condition causes injury, liability under Labor Law §200 attaches if the owner or general contractor created the condition or had actual or constructive notice of it. *Id.* In addition, under Labor Law §200, liability for a dangerous condition may arise from the methods employed by a subcontractor, over which the owner or general contractor exercises supervision and/or control. *Makarius v. Port Auth. of NY & New Jersey,* 76 A.D.3d 805, 907 N.Y.S.2d 658 (1st Dep't 2010).

KPP argues that Plaintiff's Labor Law §200 claim must fail as KPP is comprised solely of financial investors and it did not have any employees at any time, nor did it hire any employees or workers to perform any work at the construction site. It argued that KPP Management, which is a different entity than KPP supervised and controlled the work being completed at the construction site. It further argues that KPP had no authority to supervise or control the manner or methods of how KPP Management performed its work. Lastly, KPP argues that Plaintiff did not complain about any dangerous conditions at the property at any time and there was no evidence as to how long the alleged sheetrock was leaning against the wall before it fell upon Plaintiff. In opposition, Plaintiff argues that KPP did not present any evidence in admissible

form that it did not store sheetrock in any of the apartments.

This court finds that KPP established its *prima facie* burden for a dismissal of Plaintiff's Labor Law §200 claim. This court further finds that Plaintiff failed to raise any triable issues of fact whether KPP had notice or constructive notice of the stored sheetrock. Moreover, this court finds that it went uncontroverted that KPP did not exercise supervision and/or control over Plaintiff's injury-producing work.

Accordingly, it is

ORDERED, that KPP's motion for summary judgment (Mtn. Seq. # 5) for the dismissal of Plaintiff's complaint is granted; and it is further

ORDERED, that Empact's motion for summary judgment (Mtn. Seq. #6) for the dismissal of Plaintiff's complaint is granted; and it is further

ORDERED, that Plaintiff's cross-motion for summary judgment is denied; and it further

ORDERED, that the Clerk of Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: October 22, 2020

Lucindo Suarez, J.S.C.

**LUCINDO SUAREZ, J.S.C.**