SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III **PART** IAS MOTION 32

Acting Justice

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JAMES GRIFFIN,

Plaintiff,

- v -

THE CITY OF NEW YORK, METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY and FRONTIER-KEMPER CONSTRUCTORS, INC.

Defendants.

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INDEX NO. 154160/2017

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 40-53, 55, 59-65 were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, the motion is determined as follows:

Plaintiff James Griffin alleges that on February 28, 2017 while working as a laborer for non-party Superior Gunite on the East Side Access construction project in an underground location identified as GTC three cavern, he was struck on his back by a piece of spray concrete (called shotcrete) that had fallen from overhead after it had been applied to the ceiling and walls of a newly constructed tunnel as he was removing the excess concrete from the scaffold he was working on. At the time of his accident, Plaintiff claims that scaffolding planks meant to provide him overhead protection from this hazard were removed. Plaintiff asserts that the construction site is owned by Defendant The City of New York ("City") and leased by Defendant New York City Transit Authority ("NYCTA") which is a subsidiary of Defendant Metropolitan Transportation Authority ("MTA"). He further identifies MTA as the entity that hired the general contractor and also oversaw the work and site safety. Plaintiff claims that Defendant Frontier-Kemper Constructors, Inc ('Frontier") was the general contractor. Frontier sub-contracted with Superior Gunite to install the shotcrete.

On May 4, 2017, Plaintiff commenced this action by filing his summons and complaint asserting causes of action in common-law negligence and pursuant to Labor Law §§200, 240[1] and 241[6]. During discovery only Plaintiff and Michael Lang, a field engineer for Frontier, were deposed.

Now, Plaintiff moves for summary judgment against City, MTA and Frontier[1] on his Labor Law §§240[1] and 241[6] claims. It is well settled that "the proponent of a summary

[1] Plaintiff does not move for any relief against Defendant NYCTA.

judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993] *citing Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also Smalls v AJI Industries. Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

For Plaintiff's motion for summary judgment on his claims under Labor Law §§240[1] and 241[6], Plaintiff was required to establish *prima facie* proof of each element of these claims (*see Ortega v Roman Catholic Diocese of Brooklyn, N.Y.*, 178 AD3d 940, 941 [2d Dept 2019]; *see also Davis v Commack Hotel*, 174 AD3d 501, 502 [2d Dept 2019], *citing Andre v Pomeroy*, 35 NY2d 361, 364-65 [1974]).

The parties that may be held liable under these statutes is limited to contractors, owners and their agents (*see* Labor Law §§240[1] and 241[6]; *Gordon v Eastern Ry. Supply*, 92 NY2d 555 [1993])). However, ownership of the area "standing alone" is not sufficient where the owner did not contract for the work and no nexus exists between the owner and worker (*see Morton v State of New York*, 15 NY3d 50, 56 [2010]).

Here the Plaintiff has not sufficiently demonstrated that the City is the owner of the subject property. In his motion, Plaintiff asks this Court to take judicial notice that the City owns the subway tunnels and that NYCTA, a subsidiary of MTA, leases the subway tunnels from the City (Plaintiff's affirmation in support, page 5, paragraph 18). However, as Defendants correctly point out, and as set forth in Plaintiff's motion, the East Side Access construction project was to allow Long Island Commuter Railroad trains access to Grand Central Terminal. Aside from establishing that this accident occurred underground and north of Grand Central Terminal, Plaintiff failed to proffer any evidence the City owned the area where Plaintiff fell. Further, as it is clear that the MTA, not the City, contracted with Frontier to perform the work at issue, Plaintiff offered no evidence or explanation of a nexus between the City and Plaintiff (*see Morton v State of New York*, *supra*). Michael Lang testified at his deposition that he did not know the role the City played in this construction project. Also, the Court cannot take judicial notice that the City owned the accident location since "ownership of property is not a proposition of general knowledge capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy" (*Zeta v Vornado Realty Trust*, __Misc3d__, 2006 NY Slip Op 30742 [U] [Sup Ct. New York County, 2006]).

Concerning Defendant MTA, as the entity which admittedly hired Frontier for the work at issue and was present at the site on a regular basis observing the work, it is an owner in this case under Labor Law §§240[1] and 241[6] (*see Gordon v City of New York*, 164 AD3d 1110, 1111 [1st Dept 2018]). In opposition, Defendants only claimed the City was not an owner and offered no such disclaimer on behalf of MTA (*see Kuehne & Nagel, Inc., v Baiden*, 36 NY2d

539, 544 [1975] ["Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed admitted"]).

Plaintiff has also established that Frontier was the general contractor for this project. Michael Lang testified that Frontier was the general contractor for this project and hired Superior Gunite, Plaintiff's employer, as a subcontractor. He also stated that Frontier had personnel walking through the site on a daily basis to monitor safety. As per Lang, Frontier had the authority to stop the work of Superior Gunite if it observed an unsafe practice or condition. Moreover, Frontier provided the scaffolding used by Plaintiff at the time of his alleged accident. Only Frontier was authorized to alter the planks on a scaffold. Based on this deposition testimony, Frontier as a general contractor was subject to Labor Law §§240[1] and 241[6] (*see Hewitt v NY 70th Street LLC*, 187 AD3d 574 [1st Dept 2020]; *compare to Millette v Tishman Const. Corp.*, 144 AD3d 1113 [2 Dept 2016]).

"In order to prevail on summary judgment in a Labor Law §240[1] "falling object" case, the injured worker must demonstrate the existence of a hazard contemplated under that statute "and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Fabrizi v 1095 Ave. of the Ams., LLC*, 22 NY3d 658, 662 [2014]). Specifically, a Plaintiff must prove when the object fell it was being "hoisted or secured" or "required securing for the purposes of the undertaking" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

Plaintiff testified that his accident occurred while he was working at GCT3 on the East Side Access Project. As others in his crew shot shotcrete onto the tunnel wall and ceiling while positioned on the top tier of the three-level scaffold installed by Frontier, Plaintiff worked beneath them removing excess shotcrete from the middle section of the scaffold. Describing the scaffold as approximately 30 feet in length and 5 feet wide, Plaintiff indicated that when he began his work, for the entire length of the scaffold, five or six planks protected Plaintiff overhead. He walked backwards hunched over, shoveling the shotcrete into bags going from one end of the scaffold to the other and then turn around and go the back the other way.

Plaintiff's accident occurred as he was cleaning the scaffold for the second time. While he was walking backwards along the scaffold, at approximately 15 feet something suddenly hit Plaintiff on his back and knocked him down on the scaffold floor and knocked off his hard hat. When Plaintiff got off the scaffold, Plaintiff saw a 3-feet by 5-feet section of shotcrete missing from the ceiling. He also then saw for the first time that the 2-inch by 10-inch planks that had been in place overhead on the scaffolding were now missing, allowing Plaintiff to be struck. Several days later, Plaintiff was treated for his injuries. By this testimony, Plaintiff makes a *prima facie* showing of entitlement to judgment as a matter of law on the issue of liability under Labor Law §240 [1] as against MTA and Frontier (*see Garcia v SMJ 210 W 18 LLC,* 178 AD3d 473 [1st Dept 2019]; *Hill v Acies Grp.,* 122 AD3d 428, 429 [1st Dept 2014]).

As such, Defendants were required to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact to preclude summary judgment (CPLR §3212[b]; *see Alvarez v Prospect Hosp.*, 68 NY2d at 324). Here, the Defendants produced the affidavit of Joseph Contri, superintendent for Superior Gunite on the East Side Access project. Contri averred that his day-to-day duties included walking through the job site to

"ensure there were no immediate dangers to life and health" and "to confirm that the work was being performed in a safe manner." "This included checking the condition of scaffolding to be utilized by Superior Gunite teams."

Contri further stated that on the date of Plaintiff's accident, he was Plaintiff's supervisor. Plaintiff worked on a scaffold set up by Frontier and only Frontier had the authority to move and/or alter the scaffold. At all times, he observed the scaffold to have all planking in place. Moreover, he never observed nor was informed of a 3-feet by 5-feet section of shotcrete falling. He also did not observe a depression or void in the ceiling made by the purported fallen shotcrete.

Although on the worksite, Mr. Contri stated he was not advised of any incident involving falling shotcrete nor of any incident and injury involving Plaintiff. Contri attested that on the date of his alleged accident, Plaintiff worked a full eight-hour shift plus four hours of overtime. Plaintiff also worked the next three days: March 1, 2017, March 2, 2017 and March 3, 2017 without mentioning the alleged accident. Plaintiff contacted Contri on March 4, 2017 to report the accident. By his affidavit, Contri authenticated the daily report and which makes no mention of Plaintiff's accident. He also provided a statement for the incident report dated March 9, 2017 reporting Plaintiff's claimed accident.

Defendants also rely on the deposition testimony of Michael Lang. On the date of Plaintiff's accident, Mr. Lang routinely passed through the area where Plaintiff was working to check on safety. If Lang had seen planking was missing from the scaffold, he would have stopped work to have the scaffold fully planked. Further, Lang authenticated photographs of the scaffold used by Plaintiff. Like Mr. Contri, Lang was on-site at the time of Plaintiff's alleged accident but was not made aware of it.

Summary judgment should not be granted when there is any doubt as to the existence of a triable issue or when the issue is arguable (see *Chiat/Day Inc. v Kalimian*, 105 AD2d 94, 98 [1st Dept 1984] *citing Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). "[I]f the issue is fairly debatable a motion for summary judgment must be denied" (*Stone v Goodson*, 8 NY2d 8, 12 [1960]). Moreover, in deciding whether there is a material triable issue of fact, "the facts must be viewed in the light most favorable to the nonmoving party" (*Matter of Council of City of New York v Bloomberg*, 6 NY3d 380, 401 [2006] *citing Matsushita Elec. Industrial Co. v Zenith Radio Corp.*, 475 US 574, 587 [1986]). Since Defendants have raised an issue of fact as to whether Plaintiff's accident occurred in the manner claimed or at all, the branch of Plaintiff's motion for summary judgment on his Labor Law §240[1] claim is denied (*see Guerrero v 115 Cent. Park W. Corp.*, 168 AD3d 408 [1st Dept 2019]; *Santos v Condo 124 LLC*, 161 AD3d 650, 653-654 [1st Dept 2018]; *Nieves v Trustees of Columbia University in the City of New York*, 158 AD3d 464 [1st Dept 2018]).

As to the branch of Plaintiff's motion for summary judgment on his claim under Labor Law §241[6] that section provides that areas in which construction is being performed shall be "guarded, arranged, operated, and conducted" in a manner which provides "reasonable and adequate protection and safety to the persons employed therein," that the Commissioner of Labor may make rules to implement the statute, and that owners, contractors, and their agents shall

comply with them (*see Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). The duty imposed under Labor Law §241[6] upon owners and contractors is also nondelegable and exists regardless of their control and supervision of the job site (*see Rizzuto v L.A. Wenger Contracting Co., Inc., supra*).

To prevail on his motion, Plaintiff must make a *prima facie* case of a violation of this section with proof that relevant Industrial Code sections were violated and were a proximate cause of his injuries (*see Ortega v Roman Catholic Diocese of Brooklyn, N.Y., supra*; *Melchor v Singh*, 90 AD3d 866, 870 [2d Dept 2011]; *see also Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]; *Ross v Curtis-Palmer Hydro-Elec Co*, 81 NY2d 494, 501-505 [1993]). Each section of the Industrial Code relied upon by Plaintiff must be a "concrete specification" "mandating a distinct standard of conduct" and "not merely a restatement of common-law principles" (*see Becerra v Promenade Apartments Inc.*, 126 AD3d 557, 558 [1st Dept 2015] *quoting Misicki, supra and Ross, supra*). Although comparative fault is a viable defense to a Labor Law §241[6] cause of action (*see Drago v TYCTA*, 227 AD2d 372 [2d Dept 1996]), Plaintiff is not required to demonstrate his freedom from comparative fault in his motion for summary judgment (*Ortega v Roman Catholic Diocese of Brooklyn, N.Y., supra*; *see also Rodriguez v City of New York*, 31 NY2d 312, 313 [2018]).

Plaintiff relies on a violation Industrial Code 12 NYCRR §23-1.7[a]. This section is specific enough to sustain a Labor Law §241[6] claim (*see Podobedov v East Coast Const. Grp. Inc.*, 133 AD3d 733, 736 [2d Dept 2015]; *Murtha v Integral Constr. Corp.*, 253 AD2d 637, 639 [1st Dept 1998]). This section entitled "Overhead hazards" requires that "[e]very place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot."

In the present case, Plaintiff again has made a *prima facie* showing for summary judgment on his Labor Law §241[6] claim as against MTA and Frontier. However, in light of Defendants' opposition that raises a question of fact as to whether Plaintiff was injured as he claims, the branch of the motion must also be denied.

Accordingly, Plaintiff's motion for summary judgment is denied in its entirety.

1/11/2020
DATE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE