| **Gallina v VNO 225 W. 58th St. LLC** |
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| 2021 NY Slip Op 31337(U) |
| April 22, 2021 |
| Supreme Court, New York County |
| Docket Number: 151925/2017 |
| Judge: Frank P. Nervo |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV

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SALVATORE GALLINA,

Plaintiff,

-against-

VNO 225 WEST 58TH STREET LLC, VORNADO REALTY TRUST, EXTELL DEVELOPMENT COMPANY, and LEND LEASE (US) CONSTRUCTION LMB INC.,

Defendants

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**DECISION AND ORDER**

Index. No. 151925/2017

Mot. Seq. 003

NERVO, J.:

Defendants VNO 225 West 58th Street, Vornado Realty Trust, and Lend Lease Construction (hereinafter collectively "defendants") move for summary judgment dismissing the complaint against them. Plaintiff opposes contending that issues of fact preclude summary judgment.

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). "Where a defendant moves for summary judgment and establishes a prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact" (*Kesselman v. Lever House Rest.*, 29 AD3d 302 [1st Dept 2006]). However, a "feigned

issue of fact" will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alverez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

**Labor Law § 240(1)**

Labor Law § 240(1) provides, in pertinent part:

> all contractors and owners ... in the erection, demolition, 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.

The duty imposed by Labor Law § 240(1) is nondelegable; an owner or contractor may be held liable regardless of whether such party actually exercised supervision or control over the work (*Haimes v. New York Tel. Co.*, 46 NY2d 132 [1978]; *compare Russin v. Picciano & Son*, 54 NY2d 311 [1981], Labor Law § 200). Labor Law § 240(1) "is to be construed as liberally as may be for the accomplishment of the purpose for which it was ... framed" (*Koenig v. Patrick Constr. Corp.*, 298 NY 313 [1948] quoting *Quigley v. Thatcher*, 207 NY 66 [1912]). However, the injury claimed under § 240(1) must result from elevation-related hazards, "injuries resulting from other types of hazards are not compensable under that statute even if proximately caused by the absence of an adequate scaffold or other required safety device" *(Ross v. Curtis-Palmer Hydro-Electric Co.*, 21 NY2d 494 [1993] Back strain alleged because platform was

placed in manner requiring worker to contort not within class of hazards contemplated by Labor Law § 240[1]; *Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991]).

Plaintiff alleges he was caused to fall while walking on a wooden plank covering a hole between the 63rd and 62nd floors of the subject construction site on his way to a temporary staircase. Plaintiff alleges that when he stepped on the plank it twisted or flipped in such a manner as to cause him to fall backward onto the same floor upon which he was walking (Plaintiff's Deposition at p. 93, 108 [NYSCEF Doc. No. 61]). Plaintiff does not allege that he was caused to fall from the 63rd floor to the 62nd floor. Defendants contend that because plaintiff fell to the floor of the same level he was walking, his injuries are not encompassed by Labor Law § 240(1) *(see Reyes v. Magnetic Constr., Inc.*, 83 AD3d 512 [1st Dept 2011]).

The Appellate Division, First Department has held that a plaintiff cannot recover under Labor Law § 240(1) where he falls onto the same level upon which he is walking; "[t]hat plaintiff fell while he was at an elevated level does not render the injury a result of an elevation-related risk, as the accident occurred at the same level of plaintiff's work site" (*Reyes v. Magnetic Constr., Inc.*, 83 AD3d 512, 513 [1st Dept 2011]). "No labor law § 240 (1) liability exits where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first place" (*Cohen v. Memorial Sloan-kettering Cancer Ctr.*, 11 NY3d 823 [2008]; *see also Auchampaugh v. Syracuse University*, 57 AD3d 1291 [3d Dept 2008]).

Here, plaintiff was caused to fall backwards onto the same level he was walking by the "usual and ordinary dangers at a construction site" (*Nieves v. Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914 [1999]). Like the plaintiff in *Auchampaugh*, *supra*, here the plaintiff tripped on a platform and fell to the same level as the platform. This is not the type of gravity related risk requiring protective devices "because of a difference between the elevation level of the required work and a lower level" (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991]). Accordingly, plaintiff's Labor Law § 240(1) must be dismissed and summary judgment in favor of movants granted.

**Labor Law § 200**

Defendants seek summary judgment dismissing plaintiff's Labor Law § 200 claim, contending they did not exercise control over plaintiff's work or have notice of the alleged defect.

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" (*Comes v. New York State Electric and Gas Corp.*, 82 NY2d 876, 877 [1993]; *Allen v. Cloutier Constr. Corp.*, 44 NY2d 290 [1978]). It provides, in pertinent part:

> All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protection to all such persons

(Labor Law § 200).

The party responsible under Labor Law § 200 must, therefore, have control over the activity bringing about the injury (*Russin v. Picciano & Son*, 54 NY2d 311 [1981]). Accordingly, a breach of Labor Law § 200 is, effectively, a breach of the common law duty to maintain a safe work site (*Allen v. Cloutier Constr. Corp.*, 44 NY2d at 299). If the dangerous condition or defect arises from the contractor's methods, the owner will not be liable under § 200 or the common law, absent a showing the owner exercised some control or supervision over the operation (*Comes v. New York State Electric and Gas Corp.*, 82 NY2d at 877; *see also Lombardi v. Stout*, 80 NY2d 290, 295 [1992]). However, where the plaintiff's injuries arise from a dangerous condition on the premises not caused by the contractor's methods, liability will attach if the property owner had control over the work site and notice of the dangerous condition (*Bradley v. HWA 1290 III LLC*, 157 AD3d 627 [1st Dept 2018]; *Mendoza v. Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]).

Here, the defendants did not have control over the activity bringing about plaintiff's injuries. Plaintiff testified that he was instructed by his employer, Cross Country, on how to perform the work, was supervised by Cross Country forepersons, and was provided the requisite tools and materials by Cross Country (Plaintiff's Deposition at p. 32-33, 57, 59, 65). Likewise, there is no evidence that the openings in the floor, and their coverings, were installed or maintained by an entity other than Cross Country (Michael Valerio Deposition at p. 26, 33-34). Defendants have proffered evidence that they did not control or supervise the method or manner of the work, and plaintiff has failed to proffer evidence to rebut this. Consequently, plaintiff cannot maintain his Labor Law § 200 action under the theory of means or methods liability.

Similarly, the evidence does not establish that defendants had notice of the alleged defective condition. Defendant's concrete superintendent testified that he was unaware of the wood plank condition and plaintiff testified that he had not raised the condition to defendants (*supra*). Accordingly, plaintiff's Labor Law § 200 claim is dismissed.

**Labor Law § 241(6) & Industrial Code**

Defendants also move for dismissal of plaintiff's Labor Law § 241(6) claims of violations of the Industrial Code.

As an initial matter, plaintiff opposes defendants' motion seeking to dismiss his Labor Law § 241(6) claim only as to alleged violations of 12 NYCRR 23-1.7(b)(1) and (e)(1) (*see* Memorandum of Law at p. 10, "In the case at bar, [t]he subsections that are the basis of plaintiff's Labor Law § 241(6) claim are 23-1.7(b)(1)(i) and (e)(1)"). Accordingly, the plaintiff's claims of violations of the Industrial Code, excluding § 23-1.7(b)(1)(i) and (e)(1), are deemed abandoned and dismissed (*see e.g. Masiello v. 21 E. 79th St. Corp.*, 126 AD3d 596 [1st Dept 2015]).

Labor Law § 241(6) requires contractors, owners, and their agents to "'provide reasonable and adequate protection and safety' for workers" as well as comply with the rules and regulations as promulgated by the Department of Labor (*Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 NY2d at 501-02; *see* Labor Law § 241). As with Labor Law § 240(1), the duty imposed by Labor Law § 241(6) is nondelegable as it relates to compliance with the Industrial Code. However, to the extent Labor Law § 241(6) relates

to general safety standards, it does not give rise to the same non-delegable duty (*id.*). Thus, § 241(6) is best described as a "hybrid" between the common law duty of Labor Law § 200 and the specific duties imposed by § 240(1) (*id.*). Put differently, where a plaintiff has alleged a violation of Labor Law § 241(6) predicated upon the violation of specific rules promulgated by the Labor Commissioner "he need not show that defendants exercised supervision or control over his worksite in order to establish his right of recovery" (*id.* at 502).

As to § 23-1.7(b)(1)(i) of the Industrial Code, that section reads:

> Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with the Part (rule).

Here, the uncontroverted evidence supports that the subject opening between floors constitutes a hazardous opening within the meaning of the Industrial Code. Plaintiff testified that the opening was large enough for him to fall through it to the floor below (Plaintiff's Deposition at p. 118). Plaintiff further testified that had the hole not been present, he would not have fallen (*id.* at 113). As plaintiff alleges a violation of a specific rule of the Industrial Code, he need not show defendants had control or supervision over the subject area, as was required to sustain his claims under Labor Law § 200 above. Consequently, an issue of fact exists as to whether the board in question violated § 23-1.7(b)(1)(i) of the Industrial Code and summary judgment dismissing this claim is inappropriate.

Industrial Code § 23-1.7(e)(1) provides, in pertinent part:

> All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping.

Here, plaintiff testified that the hole was near the base/landing of a temporary stairway (Plaintiff's Deposition, *pasim*). Stairways are passageways, for the purposes of § 23-1.7(e)(2) (*see Holloway v. Sacks & Sacks*, 275 AD2d 625 [1st Dept 2000]). Given the hole's proximity to the stairway's landing, an issue of fact exists as to whether defendants violated § 23-1.7(e)(1).

To the extent that defendants contend plaintiff failed to adequately plead or put them on notice of § 23-1.7(b)(1)(i), defendants' contention is summarily rejected (*see e.g. Noetzell v. Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231 [1st Dept 2000]). Likewise, defendants' contention that plaintiff "fell" rather than "tripped," and therefore the Industrial Code does not apply, is a semantic difference without distinction, and is, in any event, without merit. During plaintiff's deposition, defense counsel alternated between the words "trip/tripped" and "fall/fell" when describing the accident.

Accordingly, it is

ORDERED that defendants' motion is granted to the extent of dismissing plaintiff's Labor Law § 240, Labor Law § 200 claims, and Industrial Code violations

other than § 23.17(b)(1)(i) and (e)(1), and otherwise denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: April 22, 2021

Enter:

Hon. Frank P. Nervo, J.S.C.