Surko v 56 Leonard LLC
2021 NY Slip Op 32123(U)
October 27, 2021
Supreme Court, New York County
Docket Number: Index No. 156246/2016
Judge: Richard G. Latin
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD G. LATIN** **PART** **46V**

Justice

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WILLARD SURKO,

Plaintiff,

- v -

56 LEONARD LLC,LEND LEASE (US) CONSTRUCTION LMB INC. AND LEND LEASE (US) CONSTRUCTION INC.,

Defendants.

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INDEX NO. 156246/2016

MOTION DATE 10/15/21

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98

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

Upon the foregoing documents, it is ordered that defendants' motion for summary judgment dismissing plaintiff's Labor Law §§ 200, 240(1) and 241(6) causes of action, dismissing plaintiff's common law negligence claims, dismissing plaintiff's claims made under New York State Industrial Code, and Occupational Health and Safety Administration (OSHA), and dismissing all claims against construction manager Lend Lease (US) Construction LMB, Inc. and Lend Lease (US) Construction Inc. ("Lend Lease"), as it is an improper Labor Law defendant, and plaintiff's cross motion for an order pursuant to CPLR 3212 and Labor Law §§ 240 (1), 240(6) granting plaintiff's partial summary judgment against defendants 56 Leonard LLC and Lend Lease, Labor Law §200 granting plaintiff partial summary judgment against defendant Lend Lease (US) Construction LMB Inc; and dismissing defendants' affirmative defenses based upon plaintiff's alleged comparative fault and culpable conduct are determined as follows:

BACKGROUND

Plaintiff Willard Surko commenced the instant action to recover for injuries he allegedly sustained on March 7, 2016, while working as a tile setter for V.A.L Floors Inc. ("VAL") on a construction project located at 56 Leonard Street, New York. Plaintiff claimed that he was injured while he was working on a scaffold that was improperly planked, placed, situated, and constructed. The plaintiff alleged that he was moving from the left side of the scaffold to the right side and attempted to step around his co-worker who was sitting on the scaffold, when he twisted his right foot. Plaintiff contends that but for the two-by-six that he placed on the scaffold, he would have fallen off the scaffold.

Defendant, 56 Leonard LLC, as owner, retained co-defendant Lend Lease the construction manager for the project at 56 Leonard Street. Lend Lease in turn hired subcontractor VAL, plaintiff's employer, to perform the tile work.

Plaintiff's Testimony

Plaintiff testified at his deposition that he worked for VAL as a tile setter for approximately a year and a half prior to his accident. Plaintiff stated that his accident occurred in the west end or west side of the lobby. He further averred that on the date of the accident, his supervisor was Mark Molinaro from VAL. Plaintiff stated that he received instructions from Molinaro the day prior to his accident. Plaintiff was working on a "tubing" scaffold which was blue, had a plank and scissors on the side to hold it together. He stated that "we were tiling the walls going up" and then would "lift the plank and go to the next one (level)." The plank of the scaffold plaintiff was standing on was "about 18 inches wide" away from the wall, and about 14 feet above the ground. The scaffold was described as six feet long, eight feet high, and five feet wide Plaintiff stated that he had not used a similar scaffold like this one on other projects. He stated that this scaffold had one plank and that he had requested more from Molinaro but did not receive any. When he started the job, plaintiff was working at 14 feet, and had he continued the work, he would have been at 30 feet and would have needed wider planks. He stated that the scaffold was previously erected by VAL when he arrived at work. He stated that Molinaro gave direction at the site and he did not receive direction from anyone else.

He explained that on the date of the accident, he was working with his partner David LoMonaco, who was also employed by VAL. He explained that LoMonaco was assigned to him 15 minutes prior to the accident. At the time of the assignment, the plaintiff was putting three by 24-inch elongated oval tiles on the edges of the wall with cement going from the right to left and from top to the bottom. The plaintiff stated that LoMonaco was pulling out spacers between the tiles while sitting on the plank. He further testified that ten seconds before the accident, he just stopped putting tile up and was regrouping and repositioning to the other side to step around LoMonaco. The plaintiff was asked how he was able to get up on the plank and he explained that there are ladders on each side of the scaffold. He was then asked if there was anything that could have prevented him from going down the ladder on the left-hand side of the scaffold or walking across and going up the ladder on the other side. The plaintiff responded that he did not think the scaffold was positioned to climb that way.

When plaintiff stepped around LoMonaco, LoMonaco was positioned right between the plaintiff's legs. The plaintiff testified that he was unable to step over him and had to go around him. When the plaintiff attempted to step around him, he caught the edge of the scaffold with his right foot, lost his balance, and almost fell off the scaffold. The plaintiff stated that if not for the two-by-six staging plank that he placed on the scaffold, he probably would have fallen off. He twisted his foot on the edge of the board and felt the scaffold shake. Plaintiff averred that the purpose of the two-by-six staging plank was to absorb some of the bending that he had to do. Instead of placing a bucket on the platform, there was a staging platform there to hold Thinset mortar and tiles. The plaintiff stated that he did not fall off the scaffold as a result of the two-by-six staging plank. In fact, although he lost his footing, he, nor the scaffold, nor any of the planks actually fell.

In plaintiff's affidavit, he further testified and added to his account that at the time of the accident, he was working on a mobile scaffold with wheels on the bottom.

Defendants in opposition to plaintiff cross-motion assert that plaintiff's affidavit "contains some minor alterations to plaintiff's deposition testimony regarding the accident mechanism." Defendants herein explain that during plaintiff's deposition testimony, he was asked what other type of scaffold he used during his other tasks on that project, and plaintiff stated, "I was on bakers, sheetrock, bakers, orange, with wheels on the bottom when we're doing the bathrooms." Plaintiff, however, was not specifically asked at his deposition whether the scaffold he was working on had wheels. However, defendants state that plaintiff contradicts his testimony in his affidavit when he stated that the scaffold, he was using on the date of the accident was a mobile scaffold "with wheels on the bottom." The defendants claim that plaintiff makes a distinction of working on "a bakers scaffold with wheels" and differentiates that scaffold from the pipe/pole scaffold involved in the alleged accident.

It is well settled that a party cannot successfully oppose summary judgment by offering an affidavit which reverses his or her prior deposition testimony for the purpose of avoiding the consequences of that testimony (*see Colucci v AFC Constr.,* 54 AD3d 798 [2d Dept 2008]; *Israel v Fairharbor Owners, Inc.,* 20 AD3d 392 [2d Dept 2005]; *Smith v Taylor,* 279 AD2d 566 [2d Dept 2001], *lv denied* 96 NY2d 711 [2001]; *Bloom v La Femme Fatale of Smithtown, Inc.,* 273 AD2d 187 [2d Dept 2000]). But this rule does not apply where the affidavit is not directly contradictory of the prior deposition testimony (*see O'Leary v Saugerties Cent. School Dist.,* 277 AD2d 662 [3d Dept 2000]), amplifies the prior testimony (*Castro v New York City Tr. Auth.,* 52 AD3d 213 [1st Dept 2008], or provides a potentially meritorious explanation for any inconsistency (*see Mickelson v Babcock,* 190 AD2d 1037 [4th Dept 1993]).

As noted above, plaintiff was not asked at his deposition whether or not the scaffold he was working on at the time of the accident had wheels. Defendant is incorrectly using the answer to the question of what other types of scaffolds he used at his job to suggest that the type of scaffold he utilized on the date of the accident was different. It cannot be indisputably inferred from this prior answer to a separate question in which plaintiff referred to a bakers scaffold as mobile, and that this "tubing" scaffold was not on wheels. Moreover, it is not inherent to the nature of a "tubing" scaffold that it cannot be on wheels or mobile. Therefore, the court will consider plaintiff's affidavit in support of plaintiff's cross motion.

Deposition testimony of Antonio Corso (Employee of Lend Lease)

Antonio Corso is the superintendent for Lend Lease US Construction. He has been employed by Lend Lease on and off for fifteen years. Corso was superintendent for two months, and prior to that he was site safety manager for seven years. In 2016, he was the site safety manager and his daily duties included walking the site to make sure that the subcontractors and the site were operating within the Department of Buildings, OSHA regulations, and Lend Lease standards. He reported to Marty Trank, a superintendent employed by Lend Lease. Trank's responsibilities included coordination of the subcontractors onsite, managing the construction, and coordinating between contractors working in the same area. In Corso's training as a site safety manager, he

learned how to "recognize a safely built scaffold or what a safely built scaffold should look like." With respect to mobile scaffolds, he stated that the wheels must be locked when you are working on them. If they need to be moved, you need to exit the scaffold, put it in place, and lock the wheels. On a daily basis at the 56 Leonard site, Corso would make his rounds on every floor and if he found something was wrong or needed to be fixed, he would call the subcontractor or sometimes the superintendent, and later confirm that the issue had been resolved. Corso also stated that if he observed a mobile scaffold's wheels were not in a locked position, or there was inadequate planking on the scaffold, he had the authority to stop a subcontractor from working if he observed work being performed in an unsafe manner. He explained that he would take photographs of potential safety hazards or violations. Corso stated that he would download these images to a computer, print them, and attach them to the site safety log.

With respect to manually propelled mobile scaffolds, Corso stated that it is supposed to be a fully planked platform, not exceeding the pipe scaffolding, it should have a toe board, and a rail at certain heights. The planking has to consist of planks not less than two inches thick, full size. He testified that the type of planking used on the mobile scaffolds are captive planks made of aluminum that encapsulate the area and lock in. He stated that if he observed a mobile propelled scaffold was not fully planked, he would ask the employee to come down, make the scaffold safe, and then instruct the worker that it was safe to resume work.

Corso was shown a photograph of the plaintiff standing on a platform on the scaffolding. Corso testified that the scaffolding was a pipe scaffold. He was not a witness and did not know the plaintiff and did not recall seeing him at the job site. Corso first learned about plaintiff's accident when he was contacted by Lend Lease's attorney. He was not aware of any investigations conducted by Lend Lease with respect to plaintiff's accident and was not aware of any photographs taken of the scaffold after plaintiff's accident.

Deposition testimony of Mark Molinaro (Employee of VAL)

Mark Molinaro has been a foreman for VAL for about twenty years. As foreman, his job responsibilities include generating the layouts, ordering all the materials, communicating with the general contractor, architects, and workers. Molinaro was present on the date of plaintiff's accident. It was his understanding that Lend Lease was the general contractor at the job site. To his knowledge, the scaffold was erected by VAL employees. However, when asked who erected the scaffold as shown in a photograph, he did not know who specifically erected it. Additionally, he could not recall whether the scaffold used on the date of the accident had wheels. Molinaro indicated that the size of the scaffold leads him to believe that it did not have wheels because it would be too heavy. He was asked if by looking at the photograph if he could tell whether it was the scaffold being used on the date of the accident and he stated, "I believe it was." He explained that he believed this to be the scaffold because it is "the only other scaffold that we have to go up that high is that color." The color of the scaffold was blue. Molinaro explained that the footing would be a screwable foot with a square plate on the bottom. He further testified that the screwable foot is in case you're on unlevel surfaces. He stated that the scaffold that was being used by the plaintiff was a pipe scaffold. The width of each section of the scaffold was six feet long and eight feet high. He estimated that the entire scaffold might be 20 feet in height. Molinaro testified that the workers would stand on a catwalk or platform if men were working at a certain elevation on

the scaffold. He explained, that in order to get to a particular height on the scaffold you can climb up a ladder but was unsure if there was a ladder available on the day of the accident.

Molinaro stated that he did not receive any complaints about the scaffold plaintiff was using any time prior to the accident. He also said specifically, plaintiff did not make any complaints to him about the scaffold at the time of the accident. Molinaro clarified that he is the individual who would provide the plaintiff with his daily instructions and directions on how to do his job. Moreover, he stated that there was no one other than him that provided any kind of supervision, direction, or instruction to the plaintiff in terms of how to do his job. The scaffold that plaintiff had been working on, on the date of the accident, had been there for several days. The first time he was made aware of plaintiff's accident was when the plaintiff reported it to him directly. He is unaware of any eyewitnesses to the accident. When he asked the plaintiff about the accident, Molinaro claims that the plaintiff stated that he fell on the platform on his knee, and that he tripped over material on the scaffold. He does not recall whether the plaintiff informed him as to the type of material he tripped over. After the plaintiff reported the accident, Molinaro called the safety person from Lend Lease and completed paperwork about the accident. Molinaro stated that he did not make any observations with respect to the scaffold and did not conduct any post-accident investigation, as that was for Lend Lease to perform. He does not recall whether anyone from VAL inspected the scaffold prior to plaintiff's accident. Molinaro stated that if he saw a platform that his workers were working on that was not fully planked, he would advise them that another set of planks was needed.

Deposition testimony of David LoMonaco (Employee of VAL Floors)

LoMonaco testified that he worked as a tile finisher for VAL for approximately a year and a half to two years. While working at 56 Leonard, his job responsibilities included grouting tile and tiling the floors. On the date of the accident, VAL was performing work on the lobby walls. He described the scaffold in question as a regular metal, pipe scaffold with planks. He recalled being on a rectangular scaffold consisting of two or three levels. He was unsure who owned the scaffold and who erected it. He was on the scaffold at the time of plaintiff's accident and recalled it being maybe ten or twelve feet above the lobby ground level. LoMonaco believed that the pipe scaffold he was working on with the plaintiff was on wheels but was unsure. He described the scaffold as having railings, also known as scaffold pipes.

At the time of plaintiff's accident, he was pulling shims from in between the tiles. Other than Molinaro, no one else was giving him direction at the jobsite. When the accident occurred, he recalled being on the scaffold pulling the shims and he believed that the plaintiff was on his left side setting the tiles. In relation to the plaintiff, LoManaco said that he is always positioned behind him so he can remove the shims from the tiles. Essentially, he explained that as the tile gets set, the shims are inserted, the tile dries, the shims are removed, and grout is applied. At the time of the accident, he stated that he was probably standing. He did not personally make any complaints about the scaffold that he was working on or the job site conditions on the date of the accident. LoMonaco was asked if there was any debris other than dust that he observed that would have been an impediment to walking back and forth on the planks. He replied that the plaintiff "probably had tiles next to him I would think." LoMonaco testified that there was nothing that he may have placed on the scaffold which could have caused the plaintiff to trip. Although he was present on

the scaffold, he did not witness the accident. He claimed that the plaintiff stated that he stepped on something and might have heard his knee pop.

At some point after the accident, LoMonaco was asked to provide a statement. He thought that it was Lend Lease who asked for the statement. LoMonaco did not recall the conversation exactly but mentioned that he and the plaintiff were on the scaffold, the plaintiff informed him that he got injured, and then the plaintiff left. Sometime after the accident, he recalled seeing the plaintiff at the job site and then leaving as a result of injuring his knee.

DISCUSSION

Defendants now seek an order pursuant to CPLR 3212 granting summary judgment, dismissing plaintiff's Labor Law §§§200, 240(1), and 241(6) causes of action, dismissing plaintiff's common law negligence claims, dismissing plaintiff's claims made under the New York State Industrial Code, and Occupational Health and Safety Administration (OSHA) and dismissing all claims against construction manager Lend Lease as it is an improper Labor Law defendant.

Plaintiff cross-moves for an order pursuant to CPLR 3212 and Labor Law §§ 240(1) and 241(6), granting partial summary judgment against defendants 56 Leonard LLC and Lend Lease (US) Construction LMB Inc., and § 200 for partial summary judgment against defendant Lend Lease (US) Construction LMB Inc., and dismissing defendants' affirmative defenses based upon plaintiff's alleged comparative fault and culpable conduct.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating that absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.,* 100 NY2d 72 [2003]; *see also Alvarez v Prospect Hosp.,* 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez,* 68 NY2d at 324; *see also Zuckerman v City of New York,* 49 NY2d 557 [1980]; *Chance v Felder,* 33 AD3d 645, 645-646 [2d Dept 2006]).

Plaintiff's Labor Law §200 Claim

With respect to plaintiff's Labor Law § 200 and common law negligence claims, defendants argue that these claims should be dismissed as these entities did not exercise any direction, supervision, or control over the means and methods of the contracted work and did not create or have notice of the alleged dangerous condition.

Plaintiff, however, takes the position that pursuant to the subcontract between the Lend Lease defendants and VAL, that Lend Lease is liable for the inadequately planked scaffold which created a dangerous or defective premises condition at the worksite in violation of numerous OSHA regulations. Additionally, it is asserted that plaintiff's Labor Law § 200 claim rests upon the fact defendant Lend Lease (US) Construction LMB Inc. had the authority to supervise and control the work.

The management agreement between 56 Leonard, LLC and Lend Lease (US) Construction LMB, Inc. states in pertinent parts:

> Section 3.1.1: Construction Manager shall provide all of the construction management services which are provided by and consistent with those services reflective of a first-class construction management organization with the credentials, skills and experience necessary to fully manage and successfully complete a project of scale and quality comparable to the Project consistent with the Contract Documents. The Construction Manager shall provide all administration, management, accounting, purchasing, scheduling, budgeting, cost and quantity estimating, coordination, document archival, reporting, and other services necessary to fulfill its obligation under this Agreement and as required under the Contract Documents.
>
> Section 3.1.2: The Construction Manager shall establish and maintain an organization with chains of command in order to properly and fully oversee, coordinate, manage, and administer the progress of each phase of the Project and shall furnish a competent and experienced staff to diligently administer, sequence, schedule, budget (and all of its components), coordinate and manage the Work in order to avoid mistakes and mitigate disputes. All services required for the complete management and coordination of the Work and of the Subcontractors shall be performed by the Construction Manager's own staff. Notwithstanding the foregoing, in advance of achieving the TCO, Construction Manager shall prepare and furnish to Owner a proposed staffing schedule to complete the remaining Work for the Owner's approval, which shall not be unreasonably withheld.
>
> Section 3.2.1: …Nothing herein is intended to preclude the Construction Manager from delegating responsibility and control over construction means, methods, techniques, sequences and procedures ("Means and Methods") to Subcontractors performing portions of the Work but, in all events, remain fully responsible to Owner for all Means and Methods including safety implementation and safety function.
>
> Section 3.1.3: The Construction Manager shall directly retain all Subcontractors and shall ensure that the Work is fully, properly, and completely performed in accordance with the Construction Documents and the rest of the Contract Documents. Construction Manager shall provide all services, business administration and supervision, necessary for, or incidental to, the prosecution and Final Completion of the Work in the most expeditious and economical manner, consistent with lawful construction practices and the interests of Owner as made known to Construction Manager but the Construction Manager shall not be responsible if the Construction Documents fail to conform to applicable codes, rules and regulations or the Owner's interests. The Work shall be performed by

> qualified and efficient workers, in strict conformance with the Contract Documents. Contractor acknowledges that it is the intention that workers employed by any Unit Purchasers or Unit Purchasers' Contractors may be performing Unit Purchasers' "fit-out" work while Construction Manager and Subcontractors are performing Work.
>
> Section 7.3.1: Construction Manager shall be fully responsible for the work, acts and omissions of Subcontractors and of any other persons performing any portion of the Work by, through or under Construction Manager, including those solely and directly or indirectly employed by Subcontractors.
>
> The agreement between Lend Lease and VAL states in pertinent part:
>
> 4. Safety Notices / Violations: 1. Subcontractor acknowledges that LL has the authority to issue safety deficiency notices. Subcontractor shall correct any conditions or acts identified in these notices in the timeline directed. 2. In the event the Subcontractor fails to respond or correct any violation in the allotted time frame, LL reserves the right to take any corrective action deemed necessary and the costs of such actions shall be the responsibility of the Subcontractor in accordance with the terms and conditions of the Subcontract.
>
> 28. Scaffolding: 1. Shall erect all scaffolds according to the scaffold manufacturer's specifications and be in compliance with OSHA standards per 29 CFR 1926 Subpart L. 2. All scaffold components must be inspected prior to each use for damage or defects by the Subcontractor assigned competent person. Additional inspections by Subcontractor are required after any occurrence which could affect a scaffold's structural integrity such as alteration, repair work or adverse weather impacts. 3. Scaffold access shall be by scaffold stairs. Where scaffold stairs are impractical, the Subcontractor shall review alternative means with LL. 4. General: iii. Work platforms are to be fully decked by Subcontractor with handrail, midrails, and toeboards installed as a minimum. 5. All scaffolds under construction must be red tagged by Subcontractor "DO NOT USE." All scaffolds missing any guardrails or toeboards having incomplete platforms or improper access must be yellow tagged by Subcontractor with an explanation of concern to user. All completed scaffolds with no existing hazards must be green tagged by Subcontractor.

Section § 200 of the Labor Law is not a strict liability statute but a "negligence statute" codifying the owner's or general contractor's common law duty to maintain a safe workplace (*see Comes v New York State Elec. and Gas Corp.,* 82 NY2d 876, 877 [1993]). An owner, lessee or contractor will be held liable for a violation of Labor Law § 200 and common law negligence when the injury complained of falls into one of two categories; 1) those involving the manner in which

the work was performed, or 2) those where workers are injured as a result of a dangerous condition at the work site (*see Ortega v Puccia,* 57 AD3d 54, 61 [2d Dept 2008]).

Unlike §§ 240 and 241(6) of the Labor Law, liability will only be imposed upon an owner or general contractor under § 200 of the Labor Law where the worker's injuries were sustained as a result of a dangerous condition at the work site, and then only if the defendant exercised supervisory control over the work performed at the site, or had sufficient authority to control the activity bringing about the injury in order to enable that defendant to avoid or correct an unsafe condition *(see Rizzuto v L.A. Wenger Constr. Co., Inc.,* 91 NY2d 343, 352 [1998]).

Hence, a party's duty under § 200 is contingent upon contractual or other actual authority to control the activity bringing about the injury *(see Nowak v Smith & Mahoney, P.C.,* 110 AD2d 288, 289 [3d Dept 1985]) as well as proof that the defendant had actual or constructive notice of the alleged unsafe condition or location (*see Canning v Barney's New York,* 289 AD2d 32 [1st Dept 2001]). It is well settled that evidence of general supervisory control, presence at the worksite or authority to enforce general safety standards is insufficient to establish the necessary control over the work activity that caused the injury (*see Alonzo v Safe Harbors of the Hudson Housing Dev. Fund Co., Inc.,* 104 AD3d 446 (1st Dept 2013]). That a general contractor has an on-site safety manager with responsibility for the safety of the work done by subcontractor, or for holding safety meetings, does not provide "any basis for imposing liability on the general contractor based on an injury allegedly caused by a subcontractor's work" (*see O'Sullivan v IDI Constr. Co.,* 28 AD3d 225 [1st Dept 2006]).

Rather, "[a]bsent any evidence that [the owner or general contractor] gave anything more than general instructions as to what needed to be done, as opposed to how to do it, these entities cannot be held liable under Labor Law § 200 or for common-law negligence" (*id.*). An owner or general contractor thus will not be liable under § 200 where the evidence demonstrates that plaintiff's employer, and not the owner or general contractor, specifically controlled the methods by which the plaintiff's work was performed (*id.*). In contrast, where the general contractor has or exercises the authority to control the methods by which plaintiff's work is performed, liability may be established (*see Rizzuto,* 91 NY2d 343).

Where, however, the injury arises out of a "dangerous condition on the site," rather than "the methods or materials" used by the worker or his employer, it is "not necessary to show that [the owner or general contractor] exercised supervisory control over the manner of performance of the injury producing work," only that it "had notice of the condition" (*see Minorczyk v Dormitory Auth. of State of New York,* 74 AD3d 672 [1st Dept 2010]; *Seda v Epstein,* 72 AD3d 455 [1st Dept 2010]; *Murphy v Columbia Univ.,* 4 AD3d 200 [1st Dept 2004]). "General awareness" that a dangerous condition may be present is insufficient (*see Gordon v American Museum of Natural History,* 67 NY2d 836, 838 [1986]). "The notice must call attention to the specific defect or hazardous condition and its specific location" (*see Mitchell v New York Univ.,* 12 AD3d 200, 201 [1st Dept 2004]). Furthermore, constructive notice of a defect requires that the "defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*id.*).

Applying these principles to the instant case, the court finds that defendants 56 Leonard and the Lend Lease entities make a prima facie showing that they did not supervise or control plaintiff's work. The court holds that plaintiff's injury arose of out the means and methods of the subcontractor's work, as it is undisputed that he was injured while working on the scaffold while performing work for VAL. The issue is therefore whether defendants exercised supervisory control over the work.

According to Anthony Corso on behalf of Lend Lease, he was responsible for ensuring that work was proceeding according to schedule, regularly inspected the worksite for that purpose and had the authority to stop any work he observed to be unsafe. However, that general level of supervision is not enough to warrant holding defendants liable for plaintiff's injuries (*see Burkoski v Structure Tone, Inc.,* 40 AD3d 378, 381[1st Dept 2007]). There is no evidence in the record that the Lend Lease entities or 56 Leonard ever instructed plaintiff as to the means by which plaintiff's work should be performed, did not supervise plaintiff's work, and did not have notice of the alleged condition.

Further, defendants rely on the undisputed evidence that plaintiff's employer, VAL, supervised his work. Plaintiff testified that on the date of his accident, he did not receive any instruction or supervision from any employee of Lend Lease. Indeed, plaintiff testified that on the date of his accident, he only received instructions from Mark Molinaro, his supervisor, foreman and an employee of VAL. Such testimony has repeatedly been held to satisfy a defendant's burden of showing that it did not supervise or control the activity that gave rise to the injury, and to shift the burden to the plaintiff to raise a triable issue of fact (*see Reilly v Newireen Assoc.,* 303 AD2d at 220 [1st Dept 2003]; *Hughes v Tishman Constr. Corp.,* 40 AD3d at 307-308 [1st Dept 2007]). In opposition, plaintiff fails to meet his burden.

Defendants' motion to dismiss plaintiff's claims under Labor Law §200 is granted and those claims are hereby dismissed. Plaintiff's cross motion for partial summary judgment under Labor Law §200 as to the Lend Lease entities is denied.

Plaintiff's Labor Law §240(1) Claim

Defendants herein also move for summary judgment dismissing plaintiff's Labor Law § 240(1) cause of action. Defendants assert that since plaintiff did not fall from the scaffold, he was not exposed to an elevation hazard, warranting dismissal.

Plaintiff in opposition and in support of their cross motion for summary judgment takes the position that although plaintiff did not fall from the scaffold, plaintiff nonetheless should be entitled to recover under Labor Law §240(1) when plaintiff is injured in an attempt to prevent a fall.

Labor Law §240(1), commonly referred to as the "scaffold law," provides, in relevant part:

> All contractors and owners and their agents, except owners of two family dwellings who contract for but do not direct or control the work, 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 First Department summarized the requirements of Labor Law § 240(1) in *Vasquez v Cohen Brothers Realty Corp.,* 105 AD3d 595 [1st Dept 2013]). The Court stated:

> "An owner or its agent is liable under Labor Law Section 240(1) if the plaintiff was injured while engaged in an activity covered by the statute and [was] exposed to an elevation-related hazard for which no safety device was provided or the device provided was inadequate. The statute requires "owners and their agents" to provide workers with adequate safety devices when they engage in activities such as repairing or altering a building. The purpose of the statute is to protect workers by placing the ultimate responsibility for worksite safety on the owner, and Labor Law Section 240(1) imposes strict liability on the owner for a breach of the statutory duty which has proximately caused injury" (*Vasquez,* 105 AD3d at 597).

The purpose of Labor Law § 240(1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, those best suited to bear the responsibility, instead of on the workers, who are not in a position to protect themselves (*see John v Baharestani,* 281 AD2d 114, 117 [1st Dept 2001]).

"In evaluating a claim under Labor Law § 240(1), the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against the risk arising from a physically significant elevation differential" (*see Cuentas v Sephora USA, Inc.,* 102 AD3d 504 [1st Dept 2013]). The statute must be construed as liberally as may be for the accomplishment of the purpose of protecting workers who are exposed to gravity related risks (*see Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc.,* 118 AD3d 524, 526 [1st Dept 2014]). The question as to whether the statute applies to a particular accident is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against harm directly flowing from the application of the force of gravity to an object or person (*see Arnaud v 140 Edgecomb LLC,* 83 AD3d 507, 508 [1st Dept 2011]).

A worker injured by a fall from an elevated worksite must generally prove that the absence of or defect in a safety device was the proximate cause of his injuries (*see Felker v Corning, Inc.,* 90 NY2d 219, 244 [1st Dept 2001]). It is well settled that a worker may recover pursuant to Labor Law Section 240(1) if he is injured by a gravity-related accident, even if he did not actually fall (*see Reavely v Yonkers Raceway Programs Inc.,* 88 AD3d 561 [1st Dept 2011]). If the plaintiff did not fall, the injuries allegedly sustained in preventing himself from falling may be compensable under Labor Law § 240(1) if shown to have resulted from a failure to provide a proper safety device in accordance with the requirements of that statute (*see Dominguez v Lafayette-Boynton*

Hous. Corp., 240 AD2d 310 [1st Dept 1997]; *Lopez v Boston Properties Inc.,* 41 AD3d 259, 260, 838 NYS2d 527 [1st Dept 2007]; *Abreo v URS Greiner Woodward Clyde,* 60 AD3d 878, 875 NYS2d 577 [2d Dept 2009]; *Franklin v Dormitory Auth.,* 291 AD2d 854, 736 NYS2d 816 [4th Dept 2002]; *Lacey v Turner Constr. Co.,* 275 AD2d 734, 713 NYS2d 207 [2d Dept 2000]; *Kyle v City of New York,* 268 AD2d 192, 198, 707 NYS2d 445 [1st Dept 2000], *lv denied* 97 NY2d 608, 739 NYS2d 97 [2002]). A defendant is not liable under Labor Law § 240(1) when a plaintiff's own negligence was the sole proximate cause of the accident (*see Blake v Neighborhood Housing Services of New York City, Inc.,* 1 NY3d 280 [2003]).

There are two main defenses to a Labor Law § 240 claim: (1) the recalcitrant worker defense; and (2) the sole proximate cause defense (*see Torres v 1148 Bryant Ave., Inc.,* 81 AD3d 467 [1st Dept 2011]; *Cordeiro v Shalco Investments,* 297 AD2d 486, 488 [1st Dept 2002]). A defendant wishing to invoke the recalcitrant worker defense must show that the injured worker refused to use the safety devices that were provided by the owner or employer (*see Stolt v General Foods Corp.,* 81 NY2d 918 [1993]). As to whether plaintiff was the sole proximate cause of his injury, to raise such an issue of fact in a § 240(1) claim, defendants must present evidence that "adequate safety devices [were] available; that [plaintiff] knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (*see Auriemma v Biltmore Theatre, LLC,* 82 AD3d 1, 5 [1st Dept 2011]). In other words, under this defense, a "defendant can avoid liability under the statute if it can demonstrate that it did not violate the labor law, and that the proximate cause of the plaintiff's accident was plaintiff's own negligence" (*see Blake,* 1 NY3d 280).

Defendants assert that plaintiff's § 240(1) claim should be dismissed since plaintiff was not struck by a falling object nor did plaintiff fall of the scaffold, he merely lost his footing. Moreover, defendants argue that a high differential of 12 to 18 inches, which is not present in this case, does not expose a plaintiff to an elevation-related hazard under § 240(1). However, it is an oversimplification to suggest that Labor Law 240(1) does not apply solely on the distance involved (*see Megna v Tishman Constr. Corp. of Manhattan,* 306 AD2d 163 [1st Dept 2003]).

Here, plaintiff testified that the scaffold was not planked for its full width and if not for the two-by-six staging plank that he placed on the scaffold, he probably would have fallen off. He testified that because the plank was only 18 inches wide, he tried to get around his co-worker, and caught part of the scaffolding plank with his right foot. This caused him to lose his balance and almost fall. He testified that since there was only the one 18-inch-wide plank at that level, he would have fallen through the open space about 14 to 15 feet to the lobby floor below but for the two-by-six board, which was used to hold materials.

However, David LoMonaco, plaintiff's co-worker, testified that the planks upon which he and the plaintiff were standing were "wide enough for us to work," and that there was nothing about the assembly or configuration of the scaffold that caused or contributed to the plaintiff's accident. He described the scaffold as a regular metal scaffold with planks. He also testified that he was unsure if the pipe scaffolding that he was working on was set on wheels. Additionally, he was unsure as to the size of the scaffold, who owned it, and who erected it. He estimated that they were working approximately 10 to 12 feet above the lobby level. LoMonaco believed that the planks ran the entire length of the scaffold but was unsure as to the width of the planks. As to how

the accident occurred, LoMonaco stated that he did not believe that the plaintiff fell, but that he recalls plaintiff saying that he stepped on something.

Mark Molinaro of Lend Lease testified that the scaffold was erected by VAL employees. Additionally, he could not recall whether the scaffold used on the date of the accident had wheels. Molinaro indicated that the size of the scaffold leads him to believe that it did not have wheels because it would be too heavy. He stated that the scaffold that was being used by the plaintiff was a pipe scaffold. The width of each section of the scaffold was six feet long and eight feet high. He estimated that the entire scaffold might be 20 feet in height. Molinaro testified that the workers would stand on a catwalk or platform if men were working at a certain elevation on the scaffold. He explained, that in order to get to a particular height on the scaffold you can climb up a ladder but was unsure if there was a ladder on the day of the accident. When he asked the plaintiff about the accident, he stated that he fell on the platform on his knee, and that he tripped over material on the scaffold. He does not recall whether the plaintiff informed him as to the type of material he tripped over. The plaintiff also did not make any complaints to Molinaro about tripping over any kind of debris while he was on the scaffold. After the plaintiff reported the accident, Molinaro called the safety person from Lend Lease and completed paperwork. Molinaro stated that he did not make any observations with respect to the scaffold and did not conduct any post-accident investigation, as that was for Lend Lease to perform. He does not recall whether anyone from VAL inspected the scaffold prior to plaintiff's accident. Molinaro stated that if he saw a platform on which one of his workers was working that was not fully planked, he would advise them that another set of planks was needed.

Therefore, based on the testimony and evidence, triable issues of fact exist as to who owned the scaffold and whether it was properly planked to provide plaintiff with a safe space to work. Additionally, the defendants have not shown, as a matter of law, that the plaintiff is a recalcitrant worker, and the present record contains no evidence that the plaintiff ignored safety instructions or refused to use supplied safety equipment. While some of plaintiff's purported conduct has been called into question, the record contains no testimony which indisputably proves that the plaintiff's actions were the sole proximate cause of the accident (*see Blake,* 1 NY3d 280).

Nevertheless, the Lend Lease entities argue that they were not the general contractor on plaintiff's work so as to be deemed liable under Labor Law §§ 240(1) and 241(6), which renders owners and "general contractors" absolutely liable for statutory violations. An entity is a "contractor" within the meaning of the Labor Law only if it had the power to enforce safety standards and choose responsible contractors. Only direct or prime contractors are considered "general contractors" for purposes of Labor Law §§ 240(1) and 241(6). Thus, the mere status or designation of a party as a "general contractor" does not establish liability. Further, if liability is to be premised on supervisory control, it must be control over the work in which plaintiff was engaged at the time of his injury. Whether a party may be deemed a "general contractor" or agent of an owner under the Labor Law is based on the "nature of the work in which plaintiff was engaged at the time of the injury" and who retained such employer.

Although a construction manager is generally not considered a contractor responsible for the safety of the workers at a construction site pursuant to Labor Law §§ 240(1) and 241(6), it may nonetheless become responsible if it has been delegated the authority and duties of a general

contractor, or if its functions as an agent of the owner of the premises (*see generally Walls v Turner Constr. Co.,* 4 NY3d 861 (2005). "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured (*see Linkowski v City of New York,* 33 AD3d 971 (2006). To impose such liability, the defendant must have the authority to supervise or control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition (*id.*). It is not a defendant's title that is determinative, but the degree of control or supervision exercised (*see generally Aranda v Park E. Constr.,* 4 AD3d 315 [2d Dept 2004]).

"[A] general construction manager charged with the duty of coordinating 'all aspects' of a construction project is a 'contractor' with nondelegable duties under Sections 240 and 241 of the Labor Law" (*see Kenny v George A. Fuller Co.,* 87 AD2d 183, 190 [2d Dept 1982]). On the appellate level, construction managers have been held liable under the statute when they were "responsible 'for coordinating and supervising the…project and [were] invested with a concomitant power to enforce safety standards and to hire responsible contractors'" (*see Ewing v ADF Construction Corp.,* 16 AD3d 1085 [4th Dept 2005]); when they "had the responsibility to coordinate and the authority to supervise all aspects of the renovation project" (*see Maniscalco v Liro Engineering Construction Management, P.C.,* 305 AD2d 378, 380 [2d Dept 2003]); when their construction management agreement "unambiguously authorized [them] to select the various contractors and to supervise and control their work" (*see Griffin v MWF Development Corp.,* 273 AD2d 907, 908 [4th Dept 2000]).

However, appellate courts have also found that a construction manager had no status as a general contractor or agent when the "role was only one of general supervision, which is insufficient to impose liability under Labor Law 240(1) and 241(6)" (*see Linkowski c City of New York,* 33 AD3d 971, 975 [2d Dept 2006]), and when they "only coordinated the different subcontractors, created work schedules, and prepared progress reports for the instant construction project" (*see Armentano v Broadway Mall Properties,* 30 AD3d 450, 451 [2d Dept 2006]). Appellate courts have also found questions of fact when "[t]he agreement [between the construction manager and owner] gave the construction manager many of the powers of a general contractor" (*see Nienajadlo v Infomart New York, LLC,* 19 AD3d 384, 385 [2d Dept 2005]), and when the construction manager "was on the job full time to supervise and manage the subtrades" (*see Crespo v Triad, Inc.,* 294 AD2d 145, 146 [1st Dept 2002]).

Here, considering the contracts referenced above and the deposition testimony of Anthony Corso, Lend Lease's site safety manager, the Lend Lease entities are not the proper Labor Law defendants. Based on Corso's testimony, it is clear that he did not do anything more than exercise general supervision at the 56 Leonard site. Moreover, he averred that he did not supervise or direct the work of the trade subcontractors.

As previously stated in the Labor Law § 200 above, the court finds that the defendants made a prima facie showing that they did not supervise or control plaintiff's work. The court holds that plaintiff's injury arose out of the means and methods of the subcontractor's work, as it is undisputed that he was injured while working on the scaffold performing work for VAL. Accordingly, plaintiff's § 240(1) claim is dismissed as to the Lend Lease entities.

Plaintiff's § 241(6) Claim

As a preliminary matter, and as previously stated, for the reasons above plaintiff's § 241(6) claim as to the Lend Lease defendants is dismissed as these entities are not proper Labor Law defendants. As to the owner, 56 Leonard, the outcome is different under Labor Law § 241(6).

Labor Law § 241(6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents…when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> ***
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped …as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

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" (*see,* 91 NY2d at 348; *see also Ross v Curtis-Palmer Hydro-Electric Co.,* 81 NY2d 494, 501-502 [1993]). To sustain a Labor Law § 241(6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross,* 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*see Annicaro v Corporate Suites, Inc.,* 98 AD3d 542, 544 [2d Dept 2012]). Moreover, plaintiff's "comparative fault, if any, would not absolve a defendant of liability pursuant to Labor Law § 241(6)" (*see Owen v Schulmann Const. Corp.,* 26 AD3d 362, 363 [2d Dept 2006]).

> "When the work giving rise to [the duty to conform to the requirements of Labor Law §§ 240(1) and 241(6) has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241" (*see Russin v Louis N. Picciano & Son,* 54 NY2d 311, 318 [1981]).

Therefore, for a party to be "vicariously liable as an agent of the property owner for injuries sustained under the statute," it must have "had the ability to control the activity which brought about the injury" (*see Walls v Turner Constr. Co.,* 4 NY3d 861, 863-864 [2005]).

Plaintiff asserted against all defendants multiple alleged Industrial Code violations in his bill of particulars, such as 12 NYCRR 23-1.5(c)(1), (2), and (3), 23-1.15, 23-1.16(a),(b),(c), (d), (e), and (f), 23-5.1(b), (c) (1), (c)(2),(e),(f),(g) and (j), and 23-5.3 along with various sections of

the article 1926 of Occupational Safety and Health Administration (OSHA). In his second supplemental bill of particulars, plaintiff alleges a violation of 12 NYCRR 23-5.18 and the fourth supplemental bill of particulars alleges violations of 12 NYCRR 23-5.18(a) and (c). However, in opposition to defendants' motion and in support of plaintiff's cross motion, plaintiff relies only on violations of 12 NYCRR 23-5.18(a), 23-1.5(c)(3), 23-5.1(f), thereby effectively abandoning those remaining violations (*see Palomeque v Capital Improvement Services, LLC,* 145 AD3d 912, 43 NYS3d 483 [2d Dept 2016]; *Harsch v City of New York,* 78 AD3d 781, 910 NYS2d 540 [2d Dept 2010]).

12 NYCRR 23-5.1(f)

12 NYCRR 23-5.1(f), entitled "Scaffold maintenance and repair," states that "[e]very scaffold shall be maintained in good repair and every defect, unsafe condition or noncompliance with this Part (rule) shall be immediately corrected before further use of such scaffold." This provision has been found to be too general to support a § 241(6) claim (*see Schiulaz v Arnell Construction Corp.,* 261 AD2d 247 [1st Dept 1999]); *Klimowicz v Powell Cove Assoc., LLC,* 111 AD3d 604 [2d Dept 2016]). In the aftermath of *Misicki v Cardonna,* upon which plaintiff relies, courts have still routinely found 23-5.1(f) to be too general (*see Klimowicz; contra* 12 NY3d 511, 518 [2009]).

Accordingly, defendants' motion for summary judgment is granted with respect to plaintiff's Labor Law § 241(6) claim under 12 NYCRR 23-5.1(f) and that branch of plaintiff's cross motion for summary judgment on the issue of liability under this provision is denied.

12 NYCRR 23-1.5(c)(3)

This provision states: (c) Condition of equipment and safeguards.(3) 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.

As a preliminary matter, Industrial Code § 23-1.5(c)(3) is sufficiently specific to maintain a Labor Law § 241(6) claim *(see Becerra v Promenade Apts. Inc.,* 126 AD3d 557, 558 [1st Dept 2015]). Here, it is undisputed that scaffolds are safety devices and that the particular scaffold was supposed to be fully planked for the full width of the scaffold. Thus, based on plaintiff's testimony there are triable issues of fact as to whether the scaffold was fully and adequately planked as to constitute in "sound and operable" condition.

Accordingly, both defendants' motion for summary judgment and plaintiff's cross motion for summary judgment with respect to Labor Law §241(6) claim under 12 NYCRR 23-1.5(c)(3) are denied.

As to Industrial Code 12 NYCRR 23-5.18(a) and it applicability in pertinent part says:

"Platform planking":

Scaffold platforms for manually-propelled mobile scaffolds shall be tightly planked for the width of the scaffolds except for necessary access openings. Such planking shall consist of planks not less than two inches thick full size, exterior grade plywood at least three-quarters inch thick or material of equivalent strength.

Defendants herein assert that regardless of whether the scaffold was equipped with a metal plank which was 18 to 24 inches wide, or planks described by LoMonaco, the width of the scaffold planking was not a proximate cause of the alleged accident.

Plaintiff testified that he was standing on a plank which served as a platform to the scaffold that was approximately 18 inches wide on the date of the alleged accident. Molinaro initially testified that the platform or catwalk of the pipe scaffolding was two feet wide, and that the scaffold used did not have wheels as it was "too heavy", and the scaffold was twenty feet high with sections that were six feet by eight feet. LoMonaco averred that he and the plaintiff were working on a pipe scaffold that had "metal planks" and when asked how wide the planks were, he testified that both he and the plaintiff were standing on it, "so it was wide enough for us to work there" but did not testify as to the specific width of the planks. Additionally, LoMonaco was uncertain as to whether the scaffold was set on wheels, however, plaintiff averred in his affidavit that it did have wheels.

Since there are questions of fact as to the type of scaffold, whether the scaffold had wheels, and whether the scaffold was tightly planked for the width of the scaffold, defendants' motion for summary judgment as to § 241(6) with respect to 12 NYCRR 23-5.18(a) is denied and plaintiff's cross motion for summary judgment as to this provision is similarly denied.

Plaintiff's OSHA Claims under Labor Law §241(6)

It is clear that violations of OSHA standards do not provide a basis for liability under Labor Law § 241(6) (*see McGrath v Lake Tree Vil. Assocs.,* 216 AD2d 877 [4th Dept 1995]; *McSweeney v Rochester Gas & Elec. Corp.,* 216 AD2d 878 [4th Dept 1995]; *Landry v General Motors Corp.,* 210 AD2d 898 [4th Dept 1994]; *Pellescki v City of Rochester,* 198 AD2d 762 [4th Dept 1993]). Therefore, plaintiff's OSHA claims as they relate to Labor Law § 241(6) are hereby dismissed.

Plaintiff's cross motion to dismiss defendants' affirmative defenses

Plaintiff herein cross-moves to dismiss defendants' affirmative defenses of comparative fault/culpable conduct on the basis that "plaintiff did absolutely nothing wrong" other than use a defective safety device which his employer provided to him. Plaintiff further asserts that the mere use of an inadequately planked scaffold, cannot standing alone, give rise to any comparative fault on the part of the plaintiff.

To the contrary, defendants take the position that plaintiff was negligent in attempting to step around or over his co-worker in lieu of asking him to step out of the way so that he could navigate his way around him. Additionally, defendants contend that plaintiff was also negligent in failing to use the ladder on the far side of the scaffold and leaving construction material on the scaffold.

Inasmuch as plaintiff's Labor Law § 200/common law negligence claim has been dismissed, any issues of plaintiff's comparative fault are moot (*see Quizhpi v South Queens Boys & Girls Club, Inc.*, 166 AD3d 683, 685 [2d Dept 2018] (plaintiff granted summary judgment on Labor Law § 241[6] claim, regardless of the existence of issues of fact as to plaintiff's comparative negligence); *Quizhpi v South Queens Boys & Girls Club, Inc.*, 2016 WL 11565196 [Sup Ct, Kings County 2016] ("plaintiff's contributory negligence does not affect liability to statutory parties as contributory negligence is not a defense to a Labor Law 240(1) claim"). On the other hand, with respect to plaintiff's Labor Law §240(1) and §241(6) claims, either the statutory violation is the proximate cause or plaintiff is the proximate cause (*see Blake*, 1 NY3d 280). Thus, defendants can only maintain affirmative defenses concerning plaintiff's culpable conduct to the extent that he is the sole proximate cause of his injuries.

Accordingly, plaintiff's cross motion to dismiss defendants' affirmative defenses sounding in comparative fault/culpable conduct are granted solely to the extent that all affirmative defenses based on comparative fault are dismissed and any affirmative defenses based on plaintiff's culpable conduct are limited to asserting he was the sole proximate cause.

Conclusion and Order

For the foregoing reasons, it is hereby

ORDERED that defendants' motion pursuant to CPLR 3212, for summary judgment dismissing plaintiff's common law negligence and Labor Law Section 200 claim is granted; and it is further

ORDERED that plaintiff's cross motion for partial summary judgment on the Labor Law § 200 claim as to the Lend Lease entities is denied; and it is further

ORDERED that defendants' motion pursuant to CPLR 3212, for summary judgment dismissing plaintiff's Labor Law § 240(1) claim is granted solely as to the Lend Lease defendants and not to defendant 56 Leonard; and it is further

ORDERED that plaintiff's cross motion pursuant to CPLR 3212, for partial summary judgment on the Labor Law § 240(1) claim is denied; and it is further

ORDERED that defendants' motion pursuant to CPLR 3212 for summary judgment dismissing plaintiff's Labor Law § 241(6) claim is granted in part as to the Lend Lease defendants and denied in part as to 56 Leonard as stated above; and it is further

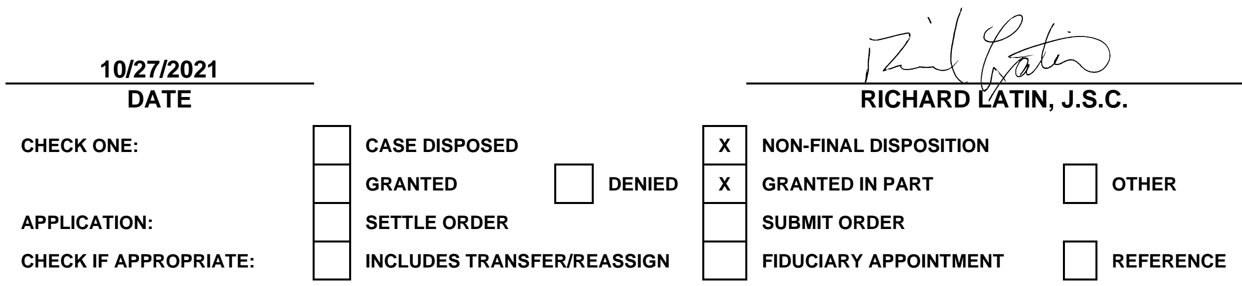
ORDERED that plaintiff's cross motion for partial summary judgment on the Labor Law § 241(6) claim is denied; and it is further

ORDERED that plaintiff's cross motion for an order dismissing defendants' affirmative defenses based on plaintiff's alleged comparative fault and culpable conduct is granted solely to the extent as described above; and it is further

ORDERED that defendants' motion and plaintiff's cross motion are otherwise denied in all other respects.

Plaintiff is directed to serve a copy of this order, with notice of entry, on defendants within 30 days of its upload onto NYSCEF.

This constitutes the decision and order of this Court.



10/27/2021
DATE

RICHARD LATIN, J.S.C.

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