ORIGINAL

SHORT FORM ORDER

INDEX No. 611891/2018
CAL. No. 202000571OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 12/10/20 (001 & 002)
ADJ. DATE 1/7/21
Mot. Seq. # 001 MG
Mot. Seq. # 002 Mot D

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CHARLES BROOKS,

Plaintiff,

- against -

STAGECOACH ELEMENTARY SCHOOL and THE MIDDLE COUNTRY CENTRAL SCHOOL DISTRICT,

Defendants.

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Upon the following papers read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by plaintiff, dated October 8, 2020; Notice of Motion and supporting papers by defendant, dated October 16, 2020; Answering Affidavits and supporting papers by plaintiff, dated December 14, 2020; Answering Affidavits and supporting papers by defendant, dated December 22, 2020; Replying Affidavits and supporting papers by plaintiff, dated December 23, 2020; Replying Affidavits and supporting papers by defendant, dated January 4, 2021; Other ___; it is

ORDERED that the motion (001) by plaintiff and the motion (002) by defendant are consolidated for the purpose of this determination; and it is further

ORDERED that the motion (001) by plaintiff for partial summary against defendant with respect to his claim under Labor Law § 240 (1) is granted; and it is

ORDERED that the motion (002) by defendant for summary judgment is granted to the extent indicated herein, and is otherwise denied.

The plaintiff commenced this action against defendant Middle Country Central School District s/h/a "Stagecoach Elementary School and The Middle Country Central School District" ("Middle Country") for alleged injuries arising from an accident which occurred on October 25, 2017 at Stagecoach Elementary School in Selden, New York. Plaintiff's employer, Arrow Steel Window Corp.

("Arrow"), was hired to replace the windows at the school. At the time of the alleged accident, the plaintiff was standing on a scaffold while removing plywood boards from window openings. Plaintiff alleges that, as he stepped onto a section of the scaffold, an unsecured plank flipped up, causing him to fall backwards and sustain injury. In his complaint, the plaintiff asserts claims against the defendant for violations of Labor Law §§ 240, 241, 200, and common law negligence.

The plaintiff now moves for partial summary judgment with respect to his claims under Labor Law § 240 (1). In this regard, plaintiff argues that he was not provided with an appropriate scaffold or other safety device sufficient for him to safely perform his work, and that the failure to provide such equipment proximately caused his accident. In support of his motion, the plaintiff submits, inter alia, copies of the pleadings, his General Municipal Law § 50-h testimony, the deposition testimony of the parties, and the contract between Middle Country, as owner, and Arrow for the subject window replacement work. Plaintiff also submits the nonparty deposition testimony of his co-worker, Vincent Connors. However, as Connors' transcript was not executed and there was no proof that it had been forwarded to him for review, it is not in admissible form, and was not considered in the determination of the plaintiff's motion (*see* CPLR 3116; *see also* ***Kahan v Spira***, 88 AD3d 964, 932 NYS2d 76 [2d Dept 2011]).

Middle Country opposes plaintiff's motion, and moves for summary judgment dismissing the plaintiff's claims under Labor Law §§ 240 (1), 241 (6), 200 and common law negligence. With respect to plaintiff's claims under Labor Law § 200 and common law negligence, Middle Country argues that dismissal is warranted because it did not direct or control the plaintiff's work, and because it did not have prior notice of any condition which proximately caused the accident. With respect to plaintiff's claims under Labor Law § 241 (6), Middle Country argues that the Industrial Code violations alleged by plaintiff are inapplicable or too general to be actionable. With respect to the plaintiff's claims under Labor Law § 240 (1), Middle Country argues that the statute is not applicable to plaintiff's accident because the plaintiff did not fall off of the scaffold. In support of its motion, Middle Country submits, inter alia, the pleadings, the parties' deposition testimony, and the nonparty deposition testimony of Vincent Connors. However, as noted above, Connors' transcript is inadmissible as it was not executed and there was no proof that it was forwarded to him for review.

Plaintiff testified that his accident occurred on October 25, 2017. On that date, he was employed as a window installer for Arrow. His supervisor at Arrow was Eric Baron. Plaintiff was working at an elementary school, on a project which involved the replacement of all the windows at the school. On the date of the accident, plaintiff and six other Arrow employees were working on the rear side of the school building. He testified that he did not receive instructions regarding his work from anyone other than his Arrow supervisor, and that he did not have any interaction with any employees of the school district while working at the site. A scaffold was erected in the area by Arrow employees Dennis Williams and Vincent Connors. The scaffold was provided by Arrow, and was six or seven feet in height. The surface of the scaffold comprised planks, each measuring two-feet by ten-feet, made of wood and aluminum. Plaintiff testified that he had set up the scaffold at the site on prior occasions, and that the planks are supposed to manually lock together. Prior to the accident, plaintiff was standing on the scaffold, removing plywood panels from the window openings. After removing two such panels, he moved to the left, stepping onto the next section of the scaffold. Plaintiff testified that when he stepped onto the

plank, it flipped up, causing him to fall and strike his left elbow. He further testified that he "flipped backwards to the ground." Plaintiff testified that he believes that the plank flipped up because it was not "clicked in" properly when the scaffold was erected.

Robert Hiller testified on behalf of Middle Country in this matter. Hiller testified that he is employed as the head custodian for Stagecoach Elementary School. He had no knowledge regarding the plaintiff's accident. He testified that neither he, nor the other custodians who worked at the school, had any involvement with the window replacement project. A contractor was hired by the school district to perform the project. Hiller was unfamiliar with Arrow. He further testified that he never saw any scaffolding used for the window replacement project.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must offer evidence in admissible form, and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; *see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Labor Law § 240 (1) imposes absolute liability upon owners and contractors who fail to provide or erect safety devices necessary to give proper protection to workers exposed to elevation-related hazards such as falling from a height (*see* ***Misseritti v Mark IV Constr. Co.***, 86 NY2d 487, 634 NYS2d 35 [1995]; ***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 577 NYS2d 219 [1991]; ***Ortiz v 164 Atlantic Ave., LLC***, 77 AD3d 807, 909 NYS2d 745 [2d Dept 2010]). Specifically, Labor Law § 240 (1) requires that safety devices be so "constructed, placed and operated as to give proper protection to a worker" (***Klein v City of New York***, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). To prevail on a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*see* ***Bland v Manocherian***, 66 NY2d 452, 497 NYS2d 880 [1985]; ***King v Villette***, 155 AD3d 619, 63 NYS3d 500 [2d Dept 2017]; ***Sprague v Peckham Materials Corp.***, 240 AD2d 392, 658 NYS2d 97 [2d Dept 1997]). The statute must be liberally construed to accomplish the purpose for which it was formed, that is " to protect 'workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owner and general contractor' . . . instead of on workers, 'who are scarcely in a position to protect themselves from accident'" (***Rocovich v Consolidated Edison Co.***, *supra* at 513, citing ***Koenig v Patrick Constr. Co.***, 298 NY 313, 318 [1948]).

Plaintiff has established prima facie entitlement to partial summary judgment on his Labor Law § 240 (1) claim by submitting evidence that he was not provided with an adequate safety device, and that the violation of the statute was the proximate cause of his injuries (*see* ***Mora v Wyth and Kent Realty LLC***, 171 AD3d 426, 95 NYS3d 527 [1st Dept 2019]; ***Vetrano v J. Kokolakis Contr., Inc.***, 100 AD3d 984, 954 NYS2d 646 [2d Dept 2012]; ***Ortiz v 164 Atlantic Ave., LLC***, *supra*; ***Smith v Cari, LLC***, 50

AD3d 879, 855 NYS2d 245 [2d Dept 2008]). Plaintiff testified that the scaffold plank "flipped up" at the time of the accident, causing him to fall backwards. Thus, the accident was caused by the malfunction, or failure, of the safety device which plaintiff was using. Contrary to Middle Country's contention, even if plaintiff did not fall all the way to the ground, it would not preclude his entitlement to summary judgment with respect to defendant's liability for the violation of Labor Law § 240 (1), "since the safety devices proved inadequate to shield him from gravity-related injuries" (***Lopez v Boston Properties Inc.***, 41 AD3d 259, 260, 838 NYS2d 527 [1st Dept 2007]; *see* ***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]). In opposition to plaintiff's motion, Middle Country failed to raise an issue of fact regarding the existence of a Labor Law § 240 (1) violation, or whether plaintiff's actions were the sole proximate cause of his accident (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Vetrano v J. Kokolakis Contr., Inc.***, *supra*; ***Ortiz v 164 Atlantic Ave., LLC***, *supra*; ***Smith v Cari, LLC***, *supra*). "Where, as here, a violation of Labor Law § 240 (1) is a proximate cause of an accident, the worker's conduct cannot be deemed solely to blame for it" (***Valensisi v Greens at Half Hollow***, 33 AD3d 693, 696, 823 NYS2d 416 [2d Dept 2006]). Accordingly, plaintiff's motion for partial summary judgment with respect to his claims under Labor Law § 240 (1) is granted, and the branch of Middle Country's motion for summary judgment dismissing plaintiff's claims under Labor Law § 240 (1) is denied.

The branch of Middle Country's motion for dismissal of plaintiff's claims under Labor Law § 241 (6) is denied. Labor Law § 241 (6) imposes a nondelegable duty upon owners and general contractors to provide reasonable and adequate protection and safety for workers, and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see* ***Comes v New York State Elec. & Gas***, 82 NY2d 876, 609 NYS2d 168 [1993]). To prevail on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the violation of an Industrial Code provision that sets forth specific, applicable safety standards (*see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]). In his bill of particulars, plaintiff alleged violations of Industrial Code (12NYCRR) sections 23-1.5, 23-1.7, 23-1.8, 23-1.15, 23-1.16, 23-1.17 and 23-5. In opposition to Middle Country's motion, plaintiff claims only that Industrial Code sections 23-5.1 (e), (f), (h) and (j) were violated. Thus, plaintiff has abandoned his claims with regard to the remaining Industrial Code 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]).

Industrial Code section 23-5.1 (f) sets forth a general, rather than specific, safety standard and is therefore insufficient to support a Labor Law § 241 (6) cause of action (*see* ***Debennedetto v Chetritt***, 190 AD3d 933, ___ NYS3d ___ [2d Dept 2021]; ***Klimowicz v Powell Cove Assoc., LLC***, 111 AD3d 605, 975 NYS2d 419 [2d Dept 2013]). Industrial Code section 23-5.1 (j), which requires that certain scaffolds be equipped with railings, states that it is not applicable to "any scaffold platform with an elevation of not more than seven feet." As plaintiff testified that the subject scaffold was six or seven feet in height, 12 NYCRR 5.1 (j) is inapplicable to the subject accident. In addition, 12 NYCRR 23-5.1 (h), which provides that "[e]very scaffold shall be erected and removed under the supervision of a

designated person," is inapplicable to the facts of this case because the scaffold was not being erected or removed at the time of plaintiff's accident (*see* ***Allan v DHL Express (USA), Inc.***, 99 AD3d 828, 952 NYS2d 275 [2d Dept 2012]). However, with regard to the alleged violation of 12 NYCRR 23-5.1 (e), which requires that scaffold planks "shall be laid tight," the evidence submitted in support of defendant's motion fails to eliminate questions of fact regarding whether the provision was violated, and if so, whether any such violation proximately caused plaintiff's accident. In light of these issues of fact, the branch of Middle Country's motion for summary judgment with respect to plaintiff's claims under Labor Law § 241 (6), as predicated on a violation of 12 NYCRR 23-5.1 (e), is denied (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Contreras v 3335 Decatur Ave. Corp.***, 173 AD3d 496,497, 99 NYS3d 879 [1st Dept 2019]; ***Harkin v Country of Nassau***, 121 AD3d 942, 996 NYS2d 289 [2d Dept 2014]; ***Abreo v URS Greiner Woodward Clyde***, *supra*).

Middle Country established prima facie entitlement to summary judgment with respect to plaintiff's claims under Labor Law § 200 and common law negligence. Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide workers with a safe place to work (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Shaughnessy v Huntington Hosp. Assn.***, 147 AD3d 994, 47 NYS3d 121 [2d Dept 2017]; ***Quituizaca v Tucchiarone***, 115 AD3d 924, 982 NYS2d 524 [2d Dept 2014]). Where a claim arises out of alleged dangers in the method of the work, there can be no recovery unless it is shown that the owner had the authority to control the means and manner of the plaintiff's work (*see* ***Rizzuto v LA. Wenger Contr. Co., Inc.***, 91 NY2d 343, 670 NYS2d 816 [1998]; ***Mitchell v Caton on the Park, LLC***, 167 AD3d 865, 90 NYS3d 316 [2d Dept 2018]). Here, Middle Country has made a prima facie showing of entitlement to summary judgment with regard to plaintiff's claims under Labor Law § 200 and common law negligence through the deposition testimony establishing that it did not supervise or direct plaintiff's work, or have prior notice of any alleged dangerous condition. Plaintiff failed to oppose this branch of Middle Country's motion and therefore failed to present any evidence raising a triable issue of fact. Accordingly, plaintiff's claims against Middle Country under Labor Law § 200 and common law negligence are dismissed (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316; ***Wejs v Heinbockel***, 142 AD3d 990, 37 NYS3d 569 [2d Dept 2016]; ***Monterroza v State Univ. Constr. Fund***, 56 AD3d 629, 869 NYS2d 113 [2d Dept 2008]).

Dated: MAR 31 2021

HON. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION