

<b>Douglass v Tishman Constr. Corp.</b>
2021 NY Slip Op 33589(U)
August 3, 2021
Supreme Court, Bronx County
Docket Number: Index No. 29292/2017E
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 19

Mtn. Seq. # 8

JAYDEE DOUGLASS,

Index No.: 29292/2017E

Plaintiff,

- against -

**DECISION and ORDER**

TISHMAN CONSTRUCTION CORPORATION, BOP  
NE TOWER LESSEE LLC, NAVILLUS  
CONTRACTING, EMPIRE STATE CARPENTERS,

Defendants.

	<u>PAPERS NUMBERED</u>
Plaintiff's Notice of Motion, Affirmation in Support, Exhibits	1, 2, 3
Defendants Tishman Construction Corporation and BOP NE Tower Lessee LLC's Notice of Cross-Motion, Affirmation in Opposition/Support, Memorandum of Law in Opposition/Support, Exhibits	4, 5, 6, 7
Plaintiff's Affirmation in Opposition/Further Support, Exhibits	8, 9
Defendants Tishman Construction Corporation and BOP NE Tower Lessee LLC's Reply Affirmation, Exhibits	10, 11

Upon the enumerated papers; and due deliberation; this court finds:

Plaintiff seeks summary judgment on his Labor Law §§240, 240(1), and 241(6) causes of action. Defendants Tishman Construction Corporation and BOP NE Tower Lessee LLC (collectively "Defendants") cross-move seeking a dismissal of Plaintiff's causes of action under Labor Law §§240(1), 241(6), and 200. This court holds Plaintiff's summary judgment motion seeking judgment on liability with respect to his Labor Law §§240, 240(1), and 241(6) causes of action and Defendant's cross-motion seeking a dismissal are both granted in part.

According to Plaintiff, on the day of his accident he was employed by Defendant Navillus Contracting as a lather<sup>1</sup>. He testified that his foreman assigned him to install a rebar

<sup>1</sup> A Lather is a worker who installs the strips used in lath and plaster wall construction. See <https://en.wikipedia.org/wiki/Lather> [last visited on August 2, 2021].

brace/cage in order to secure the inside of a wall. He further testified that he observed two carpenters place behind him two unsecured wooden forms approximately fifteen to twenty feet high and eight feet wide, which they left leaning against the rebar brace/cage. He claims that as he was in the process of installing the rebar brace/cage the two unsecured wooden forms suddenly fell on top of him rendering him injured.

I. Proper Labor Law Defendants

A lessee of property under construction is deemed to be an “owner” for purposes of liability under Article 10 of the Labor Law. *Kane v. Coundorous*, 293 A.D.2d 309, 739 N.Y.S.2d 711 (1st Dep’t 2002). In addition, the label of construction manager versus general contractor is not necessarily determinative. *Walls v. Turner Constr. Co.*, 4 N.Y.3d 861, 831 N.E.2d 408, 798 N.Y.S.2d 351 (2005). Although a construction manager of a work site is generally not responsible for injuries under Labor Law §240(1), one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury. *Id.*

Plaintiff made a *prima facie* showing that Defendants are subject to liability under Labor Law §§240(1), 241(6), and 200. In opposition, Defendants’ failed to raise any triable issues of fact concerning same as it was undisputed that they were the lessee and construction managers of the subject construction site. Furthermore, they failed to eliminate triable issues of fact as to whether it was delegated the authority and responsibility to correct unsafe conditions at the construction site and to ensure that the Plaintiff’s employer carried out its work in a safe manner. *See Kavouras v. Steel-More Contr. Corp.*, 192 A.D.3d 782, 144 N.Y.S.3d 84 (2d Dep’t 2021).

Therefore, this court finds that Defendants are subject to liability under Labor Law §§240(1), 241(6), and 200.

II. Labor Law §240(1)

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

Plaintiff established his *prima facie* burden in demonstrating that Defendants violated Labor Law §240(1) as it was uncontroverted that his injuries were proximately caused from being struck by a falling object (i.e., wooden forms) that had been inadequately secured. *See Boyle v. 42nd St. Dev. Project, Inc.*, 38 A.D.3d 404, 835 N.Y.S.2d 7 (1st Dep't 2007). In opposition, Defendants failed to raise any triable issues of fact.

The recalcitrant worker defense requires a showing of the “injured worker’s deliberate refusal to use available and visible safety devices” and the affidavits of Matthew Streeter, Robert Corrigan, and Augustine Clery failed to establish same. Moreover, Defendants’ sole proximate cause argument is without merit as it is not possible for there to be both a statutory violation that serves as a proximate cause of Plaintiff’s injury and an act by Plaintiff that serves as the sole proximate cause of the injury. *Montalvo v. J. Petrocelli Constr., Inc.*, 8 A.D.3d 173, 780 N.Y.S.2d 558 (1st Dep't 2004).

Therefore, this court finds that Plaintiff is entitled to judgment as to liability on his Labor Law §240(1) claim.

III. Labor Law §241(6)

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

Plaintiff failed to establish his *prima facie* burden with respect to his claim under Labor Law §241(6) predicated upon 12 NYCRR §23-2.1(a)(1)(2). 12 NYCRR §23-2.1(a)(1) is inapplicable as his injury did not occur as a result of improperly stored building material or equipment and, further, the injury did not occur in a “passageway, walkway, stairway or other thoroughfare.” *See Bianchi v. NY City Tr. Auth.*, 192 A.D.3d 745, 144 N.Y.S.3d 101 (2d Dep’t 2021). Similarly, 12 NYCRR §23-2.1(a)(2) is inapplicable as there is no evidence to suggest that the subject wooden forms were being stored or that same exceeded the safe carrying capacity of the floor it was placed upon. *See Buckley v. Columbia Grammar & Preparatory*, 44 A.D.3d 263, 841 N.Y.S.2d 249 (1st Dep’t 2007).

Likewise, Plaintiff failed to establish his *prima facie* burden with respect to his claim under Labor Law §241(6) predicated upon 12 NYCRR §23-1.7(a)(1)(2). This regulation only applies to places normally exposed to falling material or objects, thus, where as here, an object unexpectedly falls on a worker in an area not normally exposed to such hazards, the regulation does not apply. *Id.*; see also *Perillo v. Lehigh Constr. Group, Inc.*, 17 A.D.3d 1136, 795 N.Y.S.2d 808 (4th Dep't 2005). In addition, the claimed violations of OSHA and the 2008 New York City Building Code do not provide a basis for liability under Labor Law §241(6). See *Alberto v. Disano Demolition Co.*, 194 A.D.3d 607, 2021 N.Y. Slip. Op. 03276 (1st Dep't 2021).

However, this court finds that Plaintiff did establish his *prima facie* burden relating to his Labor Law §241(6) claim predicated upon Industrial Code 12 NYCRR §23-2.2(a)(b). This Industrial Code is applicable because it regulates the use of forms. Moreover, Plaintiff demonstrated that the wooden forms that caused his injuries were not properly braced or tied as to maintain its position and shape and Defendants did not designate a person to continuously inspect the stability of the wooden forms in order to immediately correct any unsafe conditions.

In opposition, Defendants failed to issue any triable issues of fact. The Court of Appeals has held that the subject Industrial Code is applicable to forms in the process of being assembled irrespective of whether the forms were completed and filled with concrete.<sup>2</sup> See *Morris v. Pavarini Constr.*, 22 N.Y.3d 668, 8 N.E.3d 317, 985 N.Y.S.2d 202 (2014).

Therefore, this court finds that Plaintiff's Labor Law §241(6) claim premised upon Industrial Codes 12 NYCRR §§23-2.1(a)(1)(2) and 23-1.7(a)(1)(2) must be dismissed. Additionally, Plaintiff's Labor Law §241(6) claim premised upon violations of OSHA and the

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

2008 New York City Building must be dismissed. However, Plaintiff is entitled to judgment as to liability on his Labor Law §241(6) claim premised upon Industrial Code 12 NYCRR §23-2.2(a)(b).

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

Defendants made a *prima facie* showing entitling them to a dismissal of Plaintiff's claims under Labor Law §200 and common law negligence. They demonstrated that they did not have actual or constructive notice of the dangerous conditions that led to Plaintiff's injuries nor did they control or supervise his injury-producing work. *See Villanueva v. 114 Fifth Ave. Assoc. LLC*, 162 A.D.3d 404, 78 N.Y.S.3d 87 (1st Dep't 2018).

In opposition, Plaintiff failed to raise any triable issues of fact. He admitted in his deposition testimony that he only received instruction and supervision for his injury-producing work from Defendant Navillus Contracting's foreman. In addition, he admitted that he only gave notice of the dangerous conditions existing at his worksite to Defendant Navillus Contracting's foreman.

Therefore, this court finds that Defendants are entitled to a dismissal of Plaintiff's Labor Law §200 and common law negligence claims.

V. Leave to Amend Answer

Under CPLR §3025 a party may amend a pleading "at any time by leave of court." A request to amend is determined in accordance with the general considerations applicable to such motion, including the statute's direction that leave "shall be freely given upon such terms as may be just." *Kimso Apts., LLC v. Gandhi*, 24 N.Y.3d 403, 23 N.E.3d 1008, 998 N.Y.S.2d 740 (2014).

Considering the liberal standard articulated under CPLR §3025(b), Defendants should be allowed to amend their answer to assert the affirmative defense of collateral estoppel as Plaintiff failed to show that prejudice or surprise will result from the amendment.

VI. Collateral Estoppel

Collateral estoppel prohibits the re-litigation, by a party, of an issue which has been decided against it in a prior action. *Color by Pergament, Inc. v. O'Henry's Film Works, Inc.*, 278 A.D.2d 92, 717 N.Y.S.2d 573 (1st Dep't 2000). A party seeking to invoke the doctrine must establish, first, that the identical issue was necessarily decided in the prior action and is decisive in the present action. *Id.* To prevent the application of the doctrine, an opponent must establish that there was no full and fair opportunity to litigate the issue in the prior proceeding. The "full and fair opportunity" prong is satisfied only if it can be established that the subject issue was actually litigated and determined in the prior action. *Id.*

The viability of Plaintiff's traumatic brain injury and cognitive disorder claims were precisely the issues previously raised and conclusively decided in his Workers' Compensation Board proceeding. The Workers' Compensation Board disallowed Plaintiff's traumatic brain

injury and cognitive disorder as he failed to provide any medical reports diagnosing him with same. Thus, despite Plaintiff's contentions otherwise, he was provided a "full and fair opportunity" to litigate the issues relating to his traumatic brain injury and cognitive disorder claims at the Workers' Compensation Board hearing.

Therefore, Plaintiff is collaterally estopped from asserting said claims in the instant litigation. *See Vega v. Metro. Transp. Auth.*, 133 A.D.3d 518, 21 N.Y.S.3d 19 (1st Dep't 2015).

Accordingly, it is

ORDERED, that Plaintiff's summary judgment motion is granted in part; and it is further

ORDERED, that Defendants' cross-motion for summary judgment is granted in part; and

it is further

ORDERED, that Plaintiff's application for judgment on liability as to his Labor Law §240(1) claim is granted; and it is further

ORDERED, that Plaintiff's application for judgment as to his Labor Law §241(6) claim is granted only to the extent that it was predicated under 12 NYCRR §23-2.2(a)(b); and it is further

ORDERED, that Defendants' application seeking a dismissal of Plaintiff's Labor Law §241(6) claim is granted to the extent that the predicates under 12 NYCRR §§23-2.1(a)(1)(2) and 23-1.7(a)(1)(2), OSHA and the New York City Building Codes are dismissed; and it is further

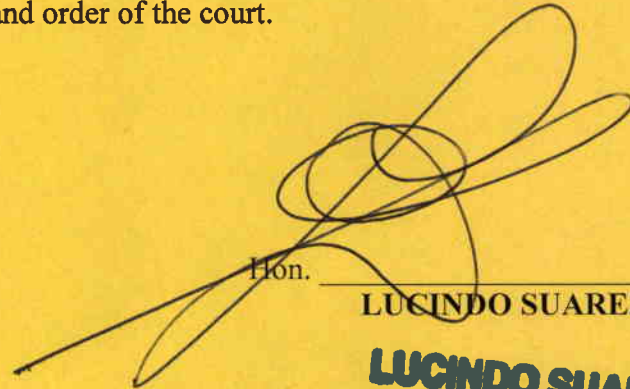
ORDERED, that Defendants' application seeking a dismissal of Plaintiff's Labor Law §200 and common law negligence claims is granted; and it is further

ORDERED, that Defendants' application for leave to amend their answer to include the affirmative defense of collateral estoppel is granted; and it is further

ORDERED, that Plaintiff's traumatic brain injury and cognitive disorder claims are dismissed.

This constitutes the decision and order of the court.

Dated: 8/3/2021



Hon. \_\_\_\_\_

LUCINDO SUAREZ, J.S.C.

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