

Molina v Brooklyn GC LLC

2022 NY Slip Op 30540(U)

February 14, 2022

Supreme Court, Kings County

Docket Number: Index No. 511367/19

Judge: Ingrid Joseph

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At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 14th day of February, 2022.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X

KENNY OMAR MOLINA

Plaintiff,

-against-

Index No.: 511367/19

BROOKLYN GC LLC, GEDALIA WERDE, 1550
BEDFORD AVE LLC, and ALL YEAR MANAGEMENT
LLC,

Defendants.

-----X

BROOKLYN GC LLC and 1550 BEDFORD AVE LLC,

Third-Party Plaintiffs,

-against-

MONCON, INC.

Third-Party Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Nos.:

| | | |
|---|-------|----------------------|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed | _____ | 50-52, 54-61, 90-104 |
| Opposing Affidavits (Affirmations) | _____ | 73-88, 144, 146 |
| Affidavits/ Affirmations in Reply | _____ | 147 |
| Other Papers: Memoranda of Law | _____ | 53, 145, 148 |

Plaintiff Kenny Omar Molina (“plaintiff”) moves (Motion Seq. 2) for an order, pursuant to CPLR § 3212, granting partial summary judgment as to liability on his Labor Law §§ 240 (1) and 241 (6) claims. Defendants/third-party plaintiffs Brooklyn GC LLC (“Brooklyn GC”) and 1550 Bedford Ave LLC (“1550 Bedford”) move (Motion Seq. 3) for an order, pursuant to CPLR § 3212, granting summary judgment dismissing the plaintiff’s complaint as against them and defendant Gedalia Werde.

This action arises out of an incident in which the plaintiff sustained injuries on January 24, 2019, while working at premises located at 1550 Bedford Avenue in Brooklyn, New York (“the premises”). Defendant 1550 Bedford is the owner of the premises which, at the time, was undergoing the construction of a new building. Brooklyn GC was the general contractor for the construction project. Third-party defendant Moncon, Inc., (“Moncon”) was retained on the project to perform the concrete and rebar work. At the time of the accident, the plaintiff was employed by Moncon as an iron worker.

During his deposition, the plaintiff testified that his work for Moncon involved assembling metal columns and walls of metal and rebar into which concrete was to be poured. Walter Bersian was the Moncon foreman in charge. On the date of the accident, Bersian assigned the plaintiff to work in the basement with two Moncon co-workers, Saul Hernandez and Manuel. Plaintiff and his co-workers were instructed to remove plywood forms that were supporting a recessed ceiling in the basement. Plaintiff and his co-workers took turns using a scaffold to reach the ceiling and using hammers to remove the plywood. The scaffold was about six feet above the basement floor. Just before the accident occurred, Hernandez and Manuel were on the scaffold platform in the process of removing

the plywood. Once they removed the plywood, they would hand it down to plaintiff, who was standing on the basement floor. The plaintiff would then carry the plywood to another location where it was being stacked. At some point, while standing on the basement floor, the plaintiff began draining water from his gloves that had gotten wet from the day before. As he did so, Hernandez began striking a metal support with his hammer, which slipped out of his glove and fell down on the plaintiff striking him in his left eye. Plaintiff described the hammer as being made of metal with a rubber grip on the outside, and weighing about four to ten pounds. At the time of the accident, plaintiff was wearing a hard hat, but not goggles. Plaintiff testified that he did not have goggles with him at the worksite. He claimed that he had asked a man named Frank from the safety company at the site for goggles on prior occasions but was told none were onsite. Although Frank promised to bring some goggles, plaintiff claims he never did so. Plaintiff's co-workers, Hernandez and Manuel also had not been provided with any goggles or safety glasses.

Plaintiff subsequently commenced this action against Brooklyn GC, Gedalia Werde, 1550 Bedford and All Year Management LLC, seeking to recover for the injuries he allegedly sustained, asserting claims under common-law negligence, Labor Law §§ 200, 240 (1) and 241 (6).¹

Discussion

Plaintiff seeks for an order, pursuant to CPLR § 3212, granting partial summary judgment as to liability on his Labor Law §§ 240 (1) and 241 (6) claims as premised upon

¹ Plaintiff's action against All Year Management LLC was discontinued with prejudice pursuant to a Stipulation of Discontinuance dated November 17, 2020.

12 NYCRR § 23-1.8 (a) and 23-1.7 (a) (1). Brooklyn GC and 1550 Bedford (collectively, defendants) move (Motion Seq. 3) for an order, pursuant to CPLR § 3212, granting summary judgment dismissing plaintiff's complaint as against them as well as against Gedalia Werde, who was Brooklyn GC's project superintendent at the time of the accident.

Summary judgment is a drastic remedy and may be granted only when it is clear that no triable issue of fact exists (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The moving party is required to make a prima facie showing of entitlement to judgment as a matter of law, and evidence must be tendered in admissible form to demonstrate the absence of any material issues of fact (*see Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]). The papers submitted in the context of the summary judgment application are always viewed in the light most favorable to the party opposing the motion (*see Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]). If the initial prima facie showing has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial (*see CPLR § 3212 [b]*; *see also Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). Generally, the party seeking to defeat a motion for summary judgment must tender evidence in opposition in admissible form, and "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (*Zuckerman*, 49 NY2d at 562).

In support of his motion, the plaintiff argues that the activity in which he was engaged as an iron worker during the course of a construction project clearly falls within the ambit of Labor Law § 240 (1). He further argues that he has demonstrated his prima

facie entitlement to judgment as a matter of law through the submission of his deposition testimony which establishes that he was hit by an unsecured hammer that fell approximately six feet from above, thereby striking him in the eye. Plaintiff contends that when workers are using hand tools, including hammers, at elevated worksites like scaffolding, it is critical that these tools, which are known to slip from gloved and even bare hands, be secured against falling. Thus, plaintiff argues that the accident occurred due to defendants' failure to ensure that the hammer in question was secured with a lanyard to Hernandez's wrist, and that their failure to provide such protection from falling objects was in violation of Labor Law § 240 (1).

Defendants oppose plaintiff's motion, and in support of their own motion, argue that Labor Law § 240 (1) is not applicable herein as the hammer in question was not an object that required "securing for the purposes of the undertaking." In this regard, defendants contend that the hammer was a hand-held instrument in use at the time it fell, and therefore does not fall within the type of hazard that requires securing in order to use it for the removal of concrete forms. Further, defendants argue that the hammer was neither being hoisted nor secured at the time of the accident. Moreover, they argue that in order to recover under Labor Law § 240 (1), plaintiff must show that the object fell because of the absence or inadequacy of a safety device of the type enumerated within the statute. Thus, defendants contend that plaintiff's Labor Law § 240 (1) cause of action should be dismissed.

In addition, defendants argue that an accident report prepared by Brooklyn GC's project superintendent, Gedalia Werde, and New York Presbyterian's hospital records

contradict the plaintiff's version of how the accident occurred, indicating that plaintiff himself may have been the one using the hammer when it kicked back and hit him in the eye (NYSCEF Doc Nos. 83 & 84). In the hospital record, the statement that the plaintiff accidentally hit himself in the eye with a hammer is attributed to an unnamed "friend" of the plaintiff who accompanied him to the emergency room (NYSCEF Doc No. 84). In addition, Gedalia Werde, who did not witness the accident, avers in an affidavit that he filled out the accident report based upon information he learned from another Moncon employee (NYSCEF Doc No. 88).

Labor Law § 240 (1) "imposes absolute liability on building owners and contractors whose failure to 'provide proper protection to workers employed on a construction site' proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011], quoting *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995]; see *Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662 [2014]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). The statute is intended to provide "extraordinary protections [applicable] only to a narrow class of dangers. More specifically, [the statute] relates only to special hazards presenting elevation-related risks" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 96-97 [2015] [internal quotation marks, brackets and citations omitted]). "In order to prevail on summary judgment in a section 240 (1) 'falling object' case, the injured worker must demonstrate the existence of a hazard contemplated under that statute 'and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein'" (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d at 662, quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

“Essentially, the plaintiff must demonstrate that at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking” (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d at 662–663 [citations and internal quotation marks omitted]). “[F]or section 240 (1) to apply, a plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell . . . because of the absence or inadequacy of a safety device of the kind enumerated in the statute” (*Narducci v Manhasset Bay Assoc.*, 96 NY2d at 268; *Mendez v Jackson Dev. Group, Ltd.*, 99 AD3d 677, 678 [2d Dept 2012]). However, Labor Law § 240 (1) “does not apply in situations in which a hoisting or securing device of the type enumerated in the statute would not be necessary or expected” (*Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 965 [2d Dept 2013]; see *Narducci v Manhasset Bay Assoc.*, 96 NY2d at 268).

As an initial matter, the court notes that the accident report and the hospital records proffered by the defendants constitute inadmissible hearsay and therefore, the defendants have failed to raise an issue of fact as to the plaintiff’s version of how the accident occurred (see *Casasola v State*, 129 AD3d 758, 759 [2d Dept 2015]; *Harrison v V.R.H. Const. Corp.*, 72 AD3d 547, 548 [1st Dept 2010]). Nonetheless, the court finds that the defendants have established their prima facie entitlement to judgment as a matter of law dismissing plaintiff’s Labor Law § 240 (1) claim. Contrary to plaintiff’s contention, his accident does not fall within the ambit of Labor Law § 240 (1). The hammer, which was “in use” by plaintiff’s co-worker at the time it slipped out of his hand, was not a material being hoisted or a load that required securing for the purposes of the undertaking at the time it fell (see *Narducci v Manhasset Bay Assoc.*, 96 NY2d at 268; see also *Galvan v Triborough*

Bridge and Tunnel Auth., 29 AD3d 517, 517-518 [2d Dept 2006]). Furthermore, it cannot be said that, under the circumstances of this case, one of the enumerated safety devices in the statute would have been necessary, or even expected (see *Moncayo v Curtis Partition Corp.*, 106 AD3d at 965, citing *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d at 8 and *Narducci v Manhasset Bay Assoc.*, 96 NY2d at 268-269). Thus, the “special protection” of Labor Law § 240 (1) was not implicated herein (see *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d at 7; *Moncayo v Curtis Partition Corp.*, 106 AD3d at 965; *Goodleaf v Tzivos Hashem, Inc.*, 19 Misc. 3d 1104[A] [Sup. Ct. 2008] [Labor Law § 240 (1) claim dismissed where plaintiff was injured at a job site when a sledgehammer in use by co-worker slipped out of his hands and fell through an opening in the floor striking plaintiff in the head], *aff'd*, 68 AD3d 817 [2d Dept 2009]). Therefore, the hammer falling on plaintiff was a general hazard of the workplace, and not one contemplated by Labor Law § 240 (1) (see *Narducci v Manhasset Bay Assoc.*, 96 NY2d at 268–269). Accordingly, the defendants have made a prima facie showing that Labor Law § 240 (1) is not applicable under the circumstances of this case, and in opposition, the plaintiff has failed to raise a triable issue of fact in this regard (see *Zuckerman v City of New York*, 49 NY2d at 562). That branch of plaintiff’s motion seeking partial summary judgment as to liability on his Labor Law § 240 (1) cause of action is denied, and that branch of defendants’ motion seeking to dismiss said claim is granted.

Plaintiff also seeks partial summary judgment as to liability on his Labor Law § 241 (6) claim as premised upon Industrial Code §§ 23-1.8 (a) and 23-1.7 (a) (1). Defendants

oppose and seek summary judgment dismissing plaintiff's Labor Law § 241 (6) claim in its entirety.

Generally, Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers without regard to direction and control (*see Romero v J & S Simcha, Inc.*, 39 AD3d 838 [2d Dept 2007]). In order to prevail under this section of the Labor Law, a plaintiff must establish that specific safety rules and regulations of the Industrial Code promulgated by the Commissioner of the Department of Labor were violated (*see Ross v Curtis—Palmer Hydro—Elec. Co.*, 81 NY2d 494 [1993]; *Ares v State of New York*, 80 NY2d 959 [1992]). The rule or regulation alleged to have been breached must be a specific, positive command and be applicable to the facts of the case (*see Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 619 [2d Dept 2008]; *Jicheng Liu v Sanford Tower Condominium, Inc.*, 35 AD3d 378, 379 [2d Dept 2006]).

Here, plaintiff's verified bill of particulars alleges that the defendants violated various Industrial Code sections including 12 NYCRR 23-1.5, 23-1.7, 23-1.8, 23-1.15, 23-1.16, 23-1.17, 23-1.24, 23-1.33, 23-2.1, 23-2.3, 23-2.5, 23-3.2, 23-3.3, 23-6.1, 23-5.1, 23-5.2, 23-1.30 and all sub-sections of the sections cited. However, in support of the instant motion, plaintiff asserts that his Labor Law § 241 (6) claim is predicated solely on defendants' violations of Industrial Code § 23-1.8 (a) and 23-1.7 (a) (1). In addition, plaintiff's opposition to defendants' motion only references sections 23-1.8 (a) and 23-1.7 (a) (1) and makes no reference to the other provisions. Thus, plaintiff has abandoned all of the other Industrial Code sections as predicates for liability under this statute (*see*

Debenedetto v Chetrit, 190 AD3d 933, 936 [2d Dept 2021] [holding that plaintiff abandoned his reliance on any other provisions of the Industrial Code by failing to address them in his brief]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]; *Palomeque v Capital Improvement Servs., LLC*, 145 AD3d 912, 914 [2d Dept 2016]; *Harsch v City of New York*, 78 AD3d 781, 783 [2d Dept 2010][plaintiff deemed to have abandoned his reliance on Industrial Code provisions where he failed to address them in his brief]; *Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003]; *see also Rodriguez v Dormitory Auth. of the State of N. Y.*, 104 AD3d 529 [1st Dept 2013]; *Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] [“Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section”]).

As to Industrial Code § 23-1.7 (a) (1), that provision requires employers to use appropriate safety devices to protect workers from overhead hazards (*see* 12 NYCRR 23-1.7 [a] [1]; *Amerson v Melito Constr. Corp.*, 45 AD3d 708, 709 [2d Dept. 2007]). Importantly, the provision only applies when the plaintiff was injured in an area that is normally exposed to falling objects (*see Portillo v Roby Anne Dev., LLC*, 32 AD3d 421, 422 [2d Dept. 2006]). Although this regulation is sufficiently specific to support a cause of action under Labor Law § 241(6) (*see Portillo v Roby Anne Dev., LLC.*, 32 AD3d at 422; *Zervos v City of New York*, 8 AD3d 477, 480 [2d Dept 2004]), the plaintiff has failed to make a prima facie showing that the area where he was working was an area normally exposed to falling objects and, therefore, whether this provision is applicable herein

(see *Crichigno v Pac. Park 550 Vanderbilt, LLC*, 186 AD3d 664, 665 [2d Dept 2020] [court found issues of fact existed as to whether area where plywood forms were being stripped/removed from basement ceiling was an area “normally exposed to falling material or objects”]; *Moncayo v Curtis Partition Corp.*, 106 AD3d at 965; *Mercado v TPT Brooklyn Assoc., LLC*, 38 AD3d 732, 733 [2d Dept 2007]). Thus, that branch of plaintiff’s motion seeking summary judgment on his Labor Law § 241 (6) claim insofar as it is predicated upon a violation of 12 NYCRR 23-1.7 (a) (1) is denied.

The court also finds that the defendants have failed to establish, *prima facie*, that the area where the accident occurred was *not* “normally exposed to falling material or objects,” and that 12 NYCRR 23–1.7 (a) (1) is inapplicable (see *Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 843 [2d Dept 2014]; see *Gonzalez v TJM Constr. Corp.*, 87 AD3d 610, 611 [2d Dept 2011]). Accordingly, that branch of defendants’ motion seeking to dismiss plaintiff’s Labor Law § 241 (6) claim as based upon section 23-1.7 (a) (1) is denied.

Industrial Code § 23-1.8 (a) requires the furnishing of eye protection equipment to employees who are “engaged in any ... operation which may endanger the eyes.” It provides in pertinent part:

(a) Eye protection. Approved eye protection equipment suitable for the hazard involved shall be provided for and shall be used by all persons while employed in welding, burning or cutting operations or in chipping, cutting or grinding any material from which particles may fly, or while engaged in any other operation which may endanger the eyes.

At the outset, the court notes that Industrial Code § 23-1.8 (a) is sufficiently specific to support plaintiff’s Labor Law § 241 (6) claim (see *Montenegro v P12, LLC*, 130 AD3d 695,

696-697 [2d Dept 2015]; *Dennis v City of New York*, 304 AD2d 611, 612 [2d Dept 2003]). Plaintiff argues that the failure to provide him with goggles or other suitable eye-protection was a substantial factor in causing his injuries. In his affidavit, the plaintiff avers that when workers are working in areas where plywood forms are being removed from a ceiling after a concrete pour, pieces of plywood and pieces of the support structure frequently fall (NYSCEF Doc No. 59, at 5, ¶16). In areas where this is occurring, he contends that persons and entities at the worksite responsible for ensuring a safe workplace usually provide goggles or other suitable eye-protection to prevent falling objects from hitting workers in their eyes (*id.* at 5-6, ¶16)). During his deposition, the plaintiff testified that he was not wearing goggles at the time of the accident because he did not have any at the worksite (Plaintiff tr at 23). According to plaintiff, despite his requests for goggles at the site, neither he nor his co-workers, Hernandez and Manuel, were provided with any safety glasses. In addition, plaintiff notes that eye protection was necessary for the work he was performing and refers to Brooklyn GC's "Worker Orientation Booklet" which states that "Appropriate eye protection . . . with side shields are required to be worn in the work area per OSHA regulations." (NYSCEF Doc No. 60, at exhibit "A"). Based upon the foregoing, plaintiff argues that the defendants' failure to provide him with goggles or suitable eye protection was in violation of section 23-1.8 (a), and a proximate cause of his injuries.

Defendants oppose and argue that there is no evidence that plaintiff was engaged in any activity or operation that involved a danger to his eyes. Defendants maintain that the plaintiff's task at the time of his accident carried no more risk to his eyes than any

construction-related task. As such, defendants argue that section 23-1.8 (a) is not applicable herein.

Here, the court finds that the plaintiff's submissions fail to eliminate a triable issue of fact as to whether, at the time of his accident, he was engaged in work that "may endanger the eyes" so as to require the use of eye protection pursuant to Industrial Code § 23-1.8 (a) (*see Pedras v Authentic Renaissance Modeling & Contr., Inc.*, 16 AD3d 567, 567-568 [2d Dept 2005]; *Fresco v 157 E. 72nd St. Condominium*, 2 AD3d 326 [1st Dept 2003]; *Cappiello v Telehouse Intl. Corp. of Am.*, 193 AD2d 478, 479-480 [1st Dept 1993]). Although Brooklyn GC's "Worker Orientation Booklet" required appropriate eye protection to be worn in the work area per OSHA regulations, it is unclear whether the activity in which the Moncon workers were engaged triggered the eye protection requirements of Industrial Code § 23-1.8 (a).

Likewise, the court finds that the defendants' submissions fail to establish as a matter of law that the plaintiff was *not* engaged in work that "may endanger the eyes" within the meaning of section 23-1.8 (a) (*see Montenegro v P12, LLC*, 130 AD3d 695, 696 [2d Dept 2015] [court held "triable issues of fact exist[ed] as to whether the plaintiff's use of a pneumatic nail gun at the time of the accident made the possibility of injury to his eye sufficiently foreseeable so as to require eye protection"]; *Guryev v Tomchinsky*, 87 AD3d 612, 613 [2d Dept 2011], *affd* 20 NY3d 194 [2012]; *Pedras v Authentic Renaissance Modeling & Contr., Inc.*, 16 AD3d at 567-568; *Fresco v 157 E. 72nd St. Condominium*, 2 AD3d at 328). Indeed, triable issues of fact exist as to whether the removal of plywood supports from the basement ceiling made the possibility of injury to plaintiff's eye

sufficiently foreseeable so as to require eye protection (*see Roque v 475 Bldg. Co., LLC*, 171 AD3d 543, 544 [1st Dept 2019]; *Guryev v Tomchinsky*, 87 AD3d at 613).

Accordingly, that branch of the plaintiff's motion seeking summary judgment on his Labor Law § 241 (6) claim to the extent it is predicated upon section 23-1.8 (a) is denied. That branch of defendants' motion seeking to dismiss plaintiff's Labor Law § 241 (6) claim as based upon section 23-1.8 (a) is also denied.

Defendants Brooklyn GC and 1550 Bedford seek summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against them as well as Gedalia Werde. Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). "To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have 'authority to exercise supervision and control over the work'" (*Rojas v Schwartz*, 74 AD3d 1046, 1046 [2d Dept 2010] quoting *Gallelo v MARJ Distribs., Inc.*, 50 AD3d 734, 735 [2008]; *see Chowdhury v Rodriguez*, 57 AD3d 121, 127-128 [2d Dept 2008]). General supervisory authority to oversee the progress of the work is insufficient to impose liability (*see LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505). "A defendant has the authority to control the work for the purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (*Sullivan v New York Athletic Club*, 162 AD3d 955, 958 [2d Dept 2018] quoting *Erickson v Cross Ready*

Mix, Inc., 75 AD3d 519, 522 [2d Dept 2010]; *see Roblero v Bais Ruchel High Sch., Inc.*, 175 AD3d 1446, 1448 [2d Dept 2019]; *Cambizaca v New York City Tr. Auth.*, 57 AD3d 701, 702 [2d Dept 2008]; *Ortega v Puccia*, 57 AD3d 54, 62 [2d Dept 2008]). If the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercises no supervisory control over the work, no liability attaches under Labor Law § 200 or the common-law (*see LaRosa v Internap Network Servs. Corp.*, 83 AD3d at 909; *see also Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d at 505). Where a plaintiff's injuries arise not from the manner in which the work was performed, but from a dangerous condition on the premises, a defendant may be liable under Labor Law § 200 if it “either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition” (*Rojas v Schwartz*, 74 AD3d at 1047, quoting *Ortega v Puccia*, 57 AD3d at 61).

Here, since the plaintiff's accident arose out of the manner in which the work was performed, rather than a dangerous condition that existed on the premises, defendants can only be liable under Labor Law § 200 if they had the authority to exercise supervision and control over the work (*see Rojas v Schwartz*, 74 AD3d at 1046). As to Brooklyn GC, the court finds that defendants have established, prima facie, that it lacked the authority to supervise or control the means and methods of the plaintiff's work (*see Chowdhury v Rodriguez*, 57 AD3d 121, 132 [2008]). In support of their motion, defendants have proffered the affidavit of Gedalia Werde, the project superintendent for Brooklyn GC at the time of the accident. Werde asserts that Brooklyn GC did not supervise, direct or control the means and methods of Moncan's workers, and although Brooklyn GC monitored the

work of Moncan and checked its progress to ensure that it conformed with the plans, Moncan alone was responsible for directing its employees with respect to how work was performed (NYSCEF Doc No. 92 at 2, ¶ 7). In addition, the plaintiff himself testified that he received daily instructions on what work to do from a Moncan employee, Walter (Plaintiff tr at 34-35).

Contrary to plaintiff's assertion, the fact that Brooklyn GC's project superintendent, Werde, was on the premises daily, that he held meetings with Moncon regarding the coordination of Moncon's work, or that he kept a daily record of the work being performed on the site is insufficient to impose liability for common-law negligence and under Labor Law § 200 (*see Ortega v Puccia*, 57 AD3d at 62; *Geonie v OD & P NY Ltd.*, 50 AD3d 444 [1st Dept 2008]) [evidence that general contractor's project superintendent coordinated work of trades, conducted weekly safety meetings with subcontractors and conducted regular walk-throughs was insufficient to raise triable fact issue as to whether contractor exercised the requisite degree of supervision and control over the work]; *Dos Santos v STV Engrs., Inc.*, 8 AD3d 223, 224 [2d Dept 2004]). Defendants established, prima facie, that Brooklyn GC did no more than general safety supervision at the work site and did not have supervisory control over plaintiff or Moncon's injury-producing work (the removal of plywood supports from the basement ceiling) (*see Castellano v Ann/Nassau Realty LLC*, 199 AD3d 558 [1st Dept 2021]; *Wein v E. Side 11th & 28th, LLC*, 186 AD3d 1579, 1582 [2d Dept 2020] [contractor's general supervisory authority at the job site held insufficient to impose liability under section 200 of the Labor Law]; *Sullivan v New York Athletic Club*, 162 AD3d at 958; *Chowdhury v Rodriguez*, 57 AD3d at 128).

As to 1550 Bedford, however, defendants have failed to proffer any evidence to establish, prima facie, that 1550 Bedford lacked the authority to supervise or control the manner in which the plaintiff performed the work (*see Going v Toomey*, 81 AD3d 688, 689 [2d Dept 2011]). Accordingly, that branch of defendants' motion seeking to dismiss plaintiff's Labor Law § 200 and common-law negligence claims as against 1550 Bedford is denied.

Lastly, defendants argue that plaintiff's complaint should be dismissed in its entirety as against Gedalia Werde. In his affidavit, Werde attests that he was employed by Brooklyn GC as a project superintendent at the time of the accident, and that he had no ownership interest in the premises, and did not supervise, direct or control the means or methods of Moncon's work (NYSCEF Doc No. 92, at ¶¶ 1, 7-8).

It is well settled that claims under Labor Law §§ 240 (1), 241 (6) and 200 may be brought only against owners, contractors and their agents (*see* Labor Law § 240 [1]; § 241 [sub-provisions applying to "[a]ll contractors and owners and their agents"]; *Hill v Mid Island Steel Corp.*, 164 AD3d 1425, 1426 [2d Dept 2018]; *Merino v Cont'l Towers Condo.*, 159 AD3d 471, 472 [1st Dept 2018]). "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" (*Diaz v Trevisani*, 164 AD3d 750, 754 [2d Dept 2018] [quotations omitted]; *see Linkowski v City of New York*, 33 AD3d 971, 974-975 [2d Dept 2006]; *see also Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). "To impose . . . liability [under the Labor Law], the defendant must have the authority to control the activity

bringing about the injury so as to enable it to avoid or correct the unsafe condition” (*Linkowski v City of New York*, 33 AD3d at 975; see *Rodriguez v Mendlovits*, 153 AD3d 566, 568 [2d Dept 2017]; *Samaroo v Patmos Fifth Real Estate, Inc.*, 102 AD3d 944, 946 [2d Dept 2013]).

Here, defendants have established that Werde was neither the owner of the premises, the general contractor, nor an agent as he did not possess any authority to supervise and control the plaintiff’s work. As such, he cannot be held liable under Labor Law §§ 240 (1), 241 (6) or 200 (see *Thomas v Benton*, 112 AD3d 812, 812-813 [2d Dept 2013]; *Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 698-99 [2d Dept 2016]). Therefore, plaintiff’s Labor Law claims against Werde are dismissed as he is not a proper Labor Law defendant. Plaintiff’s common-law negligence claim is also dismissed as against Werde as there is no evidence in the record that Werde was in any way negligent or that his actions or omissions caused the plaintiff’s injuries. In opposition, the plaintiff has failed to raise an issue of fact regarding same. Accordingly, plaintiff’s complaint is dismissed as against Werde.

Based upon the foregoing analyses, it is hereby

ORDERED that plaintiff’s motion (Motion Seq. 2) for partial summary judgment is denied in its entirety; and it is further

ORDERED that branch of defendants’ motion (Motion Seq. 3) to dismiss plaintiff’s Labor Law § 240 (1) claim is granted, and said claim is hereby dismissed; and it is further

ORDERED that branch of defendants' motion seeking to dismiss plaintiff's Labor Law § 241 (6) claim is granted except to the extent said claim is predicated upon Industrial Code sections 23-1.7 (a) (1) and 23-1.8 (a); and it is further

ORDERED that branch of defendants' motion seeking to dismiss plaintiff's common-law negligence and Labor Law § 200 claim is granted to the extent that said claims are dismissed only as against Brooklyn GC and Gedalia Werde, and that branch of defendants' motion seeking to dismiss plaintiff's Labor Law § 200 and common-law negligence claims as against 1550 Bedford is denied; and it is further

ORDERED that branch of defendants' motion seeking to dismiss plaintiff's entire complaint insofar as asserted against Gedalia Werde is granted and this action is severed accordingly.

The forgoing constitutes the decision, order and judgment of the court.

E N T E R,



HON. INGRID JOSEPH, J. S. C.

**Hon. Ingrid Joseph
Supreme Court Justice**