SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

MANUEL CHICAIZA et al.,

INDEX NO. 161300/2018

MOT. DATE

- v -

MOT. SEQ. NO. 3&4

145 NORTH WOODS LLC et al.,

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s)._____
Replying Affidavits ECFS Doc. No(s)._____

In this labor law action arising from personal injuries sustained on a construction site, there are two motions for summary judgment which are hereby consolidated for consideration and disposition. In motion sequence 3, defendants 145 North Woods LLC ("North Woods") and Locus Construction, Inc. ("Locus") move for summary judgment in their favor. Plaintiffs Manuel Chicaiza and Evelyn Carpio oppose that motion and in motion sequence 4 move for partial summary judgment on liability on Chicaiza's Labor Law § 240(1) cause of action against the defendants. Issue has been joined and the motions were timely brought after note of issue was filed.

At the outset, plaintiffs take no position with respect to the portion of defendants' motion for summary judgment dismissing plaintiff's Labor Law §§ 240(2) and 240(3) causes of action, and withdraw Chicaiza's Labor Law § 241(6) claim premised upon violations of Industrial Code §§ 23-1.5, 23-1.7(d), (e), (f), 23-1.15; 23-1.16, 23-1.17, 23-1.21, 23-1.30, 23-2.1(a)(1), 23-5.1, 23-5.2, 23-5.6, 23-5.12, 23-5.13, 23-5.14, 23-5.15, 23-5.16, 23-5.17, 23-5.18, 23-6.1, 23-6.2 and 23-6.3(a)(b). Accordingly, those claims are severed and dismissed.

Many of the relevant facts are not in dispute. Chicaiza was injured on November 20, 2018 at the construction site located at 145 West 110th Street, New York, New York (the "premises"). On that date, plaintiff was working at the site for nonparty DeFalco Construction ("DeFalco"). Plaintiff was injured while ascending a wooden ladder from the 11th floor to the 12th floor inside an elevator shaft when a metal beam suddenly fell from at least the 12th floor and struck his hand, causing him to fall off the ladder onto the 11th floor. The metal beam was four to five feet long, four inches wide and weighed approximately 25 to 30 pounds. At his deposition, plaintiff explained his accident as follows:

Dated: 3-15-22

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐GRANTED ☐ DENIED ☐ GRANTED IN PART ☑ OTHER

3. Check if appropriate: ☐SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐FIDUCIARY APPOINTMENT ☐ REFERENCE

Q. As you were climbing the ladder to get to the tube what happened?

A. From the deck a metal piece fell on my hand.

Q. Where were you looking at the time of the incident?

A. I was looking at the ladder that I was climbing.

Q. So you were looking directly in front of you or up or somewhere else?

A. In front of me.

Q. Did you ever see that metal piece prior to your accident?

A. No.

Q. Do you know where it was located prior to your incident?

A. Yes, it was put upstairs.

Q. Put upstairs by someone from DeFalco?

A. Yes.

Q. Normally when they brought the metal up where would they place the metal after they brought it up before they used it to install?

A. In the middle of two big pieces of metal as well.

Q. Was that to secure it?

A. Yes.

...

Q. So when you said that they would bring up the metal and put it in between two metal pieces to secure it where is that located?

A. They are like this and the metal piece that fell on me was crossed.

Q. But do you know where that metal piece came from?

A. I don't know.

Q. Do you know what that metal piece what its purpose was?

A. Support the plywood.

Q. Were there any trades working above you on the day of your incident?

A. Only from the company.

Q. From DeFalco?

A. Yes.

North Woods owned the premises and Locus was the construction manager for the ongoing construction project which involved the new construction of a thirteen story multi-family residential building. Defendants produced Thomas Gluck for a deposition. Gluck was employed by Locus. Gluck authenti-

cated Locus' contract with North Woods, which has been provided to the court. The contract required Locus "to procure, construct and administer the Work in accordance with the terms of this Agreement" and "procure services to construct the Work by engaging Subcontractors and Vendors, pursuant to a form of subcontract agreement subject to Owner's prior written reasonable approval (each a "Subcontract")." During the construction phase, the contract specifically provides in pertinent part as follows:

> 2.2 CONSTRUCTION PHASE SERVICES.
>
> ...
>
> 2.2.1 The Construction Manager shall provide, or require the Subcontractors and Vendors to provide, all necessary construction supervision, in section, construction equipment, labor, materials, tools and subonctracted items necessary to complete the Work in accordance witht the Construction Documents.
>
> ...
>
> 2.2.5 The Construction Manager shall take necessary precautions for the safety of its employees on the Project, **and shall comply, and require all Subcontractors and Vendors to comply, with all applicable provisions of federal, state and municipal safety laws to prevent accidents or injury to persons on, about or adjacent to the Project site.** The Construction Manager, **directly or through the Subcontractors, shall erect and properly maintain at all times, as required by the conditions and progress of the Work, necessary safeguards for the protection of workers and the public**. The Construction Manager, however, shall not be responsible for the elimination or abatement of safety hazards created or otherwise resulting from work at the Project site, if any, carried on by the Owner or its employees, agents, separate contractors or tenants. The Owner agrees to cause its employees, agents, separate contractors and tenants, if any, to abide by and fully adhere to all applicable provisions of federal, state and municipal safety laws and regulations and all safety rules promulgated by the Construction Manager or the Subcontractors. The above provision shall not relieve the Subcontractors of their responsibility for the safety of persons or property in the performance of their work, nor for compliance with all applicable provisions of relevant laws.
>
> (Emphasis added.)

Finally, the contract required Locus to "comply and require all Subcontractors and Vendors to comply, with all applicable provisions of federal, state and municipal safety laws to prevent accidents or injury to persons on, about or adjacent to the Project site" and "erect and properly maintain at all times, as required by the conditions and progress of the Work, necessary safeguards for the protection of workers and the public."

Gluck testified that Locus "performs zero work" but admitted that Locus hired the subcontractors for the job. He further stated that the owner had representatives at the site regularly, namely Yiannes Einhorn and Roman Gardner. Meanwhile, Locus had employees at the site daily, with Gluck admitting that he was Locus' top representative present at the site along with Charles Gosrisirikul and that Locus had an office there. Gluck did not witness Chicaiza's accident and did not recall when he learned about it. Otherwise, Gluck testified that neither defendant provided fall protection equipment to construction workers at the site, that neither performed inspections and that it was a subcontractor called Xtreme's responsibility to ensure safety for the workers. Gluck testified that Xtreme performed "[e]xcavation, foundation and superstructure" work. Xtreme, in turn, hired Chicaiza's employer, DeFalco.

Preliminarily, defendants assert that Locus is not a proper Labor Law defendant. Defendants further argue that plaintiffs' common law negligence and Labor Law § 200 causes of action should be dismissed because they did not breach a duty of care to plaintiff because they did not cause or create the dangerous condition nor did they have notice. Defendants argue that there was no Labor Law §

240(1) violation because the beam was not being hoisted and did not need to be secured nor did it fall because of the absence or inadequacy of an enumerated safety device. As for plaintiff's Labor Law § 241(6) claim, defendants argue that Industrial Code §§ 23-1.7(a)(1) and 23-2.1(a)(2) do not apply because Chicaiza's accident did not occur on a worksite that was normally exposed to falling material or objects, citing *Sears v. Niagara Cty. Indus Dev Agency*, 258 AD2d 918 (4th Dept 1999).

Meanwhile, plaintiffs maintain that triable issues of fact preclude summary judgment on the Section 200 common law negligence claim and Section 241(6) claim premised upon Industrial Code §§ 23-1.7(a)(1) and 23-2.1(a)(2). As for the Section 240(1) claim, plaintiffs maintain Locus was a general contractor and/or statutory agent of North Woods and that plaintiffs are entitled to summary judgment on liability as to this claim.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Locus' status as a labor law defendant

Defendants argue that Locus was a mere "construction manager, without any involvement in plaintiff's work..." Plaintiff contends that Locus was actively involved in the project; it hired all subcontractors and pursuant to its contract with North Woods, it agreed to comply and require all subcontractors to comply, with all applicable provisions of federal, state and municipal safety laws to prevent accidents or injury and erect and maintain safeguards for the protection of workers and the public. The court agrees with plaintiff that there is no real dispute that Locus acted as the statutory agent of the owner and/or general contractor of the owner and can be properly held liable as a defendant under the Labor Law (*see i.e. Walls v. Turner Construction Company*, 4 NY3d 861 [2005]; *Kenny v. Georae A. Fuller Co.*, 87 AD2d 183 [2d Dept 1982] lv. to app den 58 NY2d 603 [1982]; *Russin v. Picciano & Son*, 54 NY2d 311 [1981]).

A construction manager of a work site is generally not responsible for injuries under Labor Law § 240(1) (*Walls, supra* at 863). Courts must, however, look beyond labels; a construction manager may be vicariously liable as an agent of the property owner for injuries sustained under the Labor Law when the manager has the ability to control the activity which brought about the injury (*Walls, supra* at 863-864; *see also Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]). Like in *Walls*, North Woods delegated to Locus the responsibility to erect and maintain necessary safeguards for construction workers and comply and require all subcontractors to comply with the Labor Law. Locus was also required to provide, or require the subcontractors and Vendors to provide, all necessary construction supervision (*Russin v. Picciano & Son*, *supra*). Thus, Locus is a proper labor law defendant.

Section 200 and common law negligence

Labor Law § 200 codifies the common law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Comes v. New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993]). There are two categories of Labor Law § 200 and common law negligence claims: injuries arising from dangerous or defective premises conditions and injuries arising from the manner or means

in which the work was performed (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). In order to demonstrate a *prima facie* case under the former category, a plaintiff must prove that the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v. Highpoint Asoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). Where the injury was caused by the manner of the work, the owner or general contractor will be liable if it exercised supervisory control over the work performed (*Foley v. Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 [1st Dept 2011]).

Plaintiffs' Section 200 and common law negligence claim is premised upon a hazardous condition, to wit, the beam was unsecured and there was a lack of overhead protection. There is no dispute that the defendants did not create the condition which caused Chicaiza's accident. Defendants argue that there is no proof of notice. The court agrees. Plaintiff himself did not observe the improperly secured and/or unsecured beam before it fell and does not know why the beam fell or where it even fell from. There is nothing in the record which would establish actual notice, and defendants have shown that they cannot be charged with constructive notice of the condition. "To constitute constructive notice, a 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" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Contrary to plaintiff's contention, defendants need not submit proof of when the area where his accident occurred was last inspected because Chicaiza himself did not observe the condition before his accident and there is no dispute that there were no similar incidents before Chicaiza's accident or safety complaints about the area where his accident occurred. Therefore, defendants' motion dismissing the Section 200 and common law negligence claim is granted.

Section 240(1)

Labor Law § 240(1), which is known as the Scaffold Law, imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v. Eastern Railway Supply, Inc.*, 82 NY2d 555 [1993]). The statute provides in pertinent part as follows:

All contractors and owners and their agents, ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a premises 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.

Labor Law § 240 protects workers from "extraordinary elevation risks" and not "the usual and ordinary dangers of a construction site" (*Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841 [1994]). "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)" (*Narducci v. Manhasset Bay Associates*, 96 NY2d 259 [2001]).

Section 240[1] was designed to prevent accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person (*Runner v. New York Stock Exchange, Inc.*, 13 NY3d 5999 [2009] quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). The protective devices enumerated in Labor Law § 240 (1)must be used to prevent injuries from either "a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991]).

The court agrees that the facts here are similar to those present in other falling object cases such as *Matthew v. 400 Fifth Realty LLC* (111 AD3d 405 [1st Dept 2013]), *Rutkowski v New York Convention Center Development Corp.* (146 AD3d 686 [1st Dept 2017]) and *Greenwood v. Whitney Museum of American Art* (161 AD3d 425 [1st Dept 2018]). In each of these cases, the plaintiff was injured by an object that was not adequately secured to prevent it from becoming dislodged or falling during the work. Contrary to defendants' contention, the metal beam should have been properly secured to prevent it

from falling and injuring workers in the elevator shaft. Thus, the court rejects defense counsel's argument that "... no material ... needed securing was involved in plaintiff's MANUEL CHICAIZA's accident." Indeed, it defies common sense for defense counsel to argue that the metal beam didn't "require[] securing for the purpose of the undertaking". There is no dispute that the purpose of the metal beam was to support the ceiling. Without proper securing, it was entirely foreseeable that the metal beam could fall. Further, there is no dispute that there were no safety devices provided to protect workers in the elevator shaft from falling objects. Accordingly, plaintiff's motion is granted and defendants' motion as to the Section 240(1) claim is denied.

Section 241(6)

Labor Law § 241(6) imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

> [a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

The scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57th Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]).

Section 23-1.7 (a)(1) provides the following:

> (a) Overhead hazards.
>
> (1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.

The court agrees with plaintiffs that defendants have failed to meet their *prima facie* burden by showing that Industrial Code § 23-1.7 (a)(1) was not violated as a matter of law. The court rejects defendants' argument that the area where Chicaiza was working was not normally exposed to falling objects as a matter of law. Indeed, plaintiff was on a ladder in an elevator shaft that was open to the 12th floor. At best, there is a question of fact as to whether the area where plaintiff was working normally carried a risk of falling objects and thus defendants were required to provide overhead protection.

As for Section 23-2.1(a)(2), the court agrees with defendants that this branch of plaintiffs' 241(6) claim must be dismissed. Section 23-2.1(a)(2) provides as follows:

> (a) Storage of material or equipment.
>
> (2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge.

Although there is no dispute that plaintiff was hit by a fall object and not given any overhead protection (see discussion re: Section 23-1.7(a)(1), *supra*), plaintiff cannot show that Section 23-2.1(a)(2) was violated because he has no idea where the beam came from nor is there any admissible evidence that would support a finding that the beam was improperly stored on the 12th floor and thus a fact-finder could not permissibly conclude that this section was violated. Accordingly, defendants' motion as to Industrial Code § 23-2.1(a)(2) is granted and plaintiffs' Labor Law § 241(6) claim premised upon this provision of the Industrial Code is severed and dismissed.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiffs' motion is granted to the extent that plaintiffs are granted summary judgment on liability on the Labor Law § 240(1) cause of action; and it is further

ORDERED that defendants' motion is granted to the following extent: [1] plaintiffs' Labor Law § 200 and common law negligence claim is severed and dismissed; [2] plaintiffs' Labor Law §§ 240(2) and 240(3) causes of action are severed and dismissed; and [3] plaintiffs' Labor Law § 241(6) claim premised upon all provisions of the Industrial Code except Industrial Code §§ 23-1.7 (a)(1) is severed and dismissed; and it is further

ORDERED that defendants' motion is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 3/15/22
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.