SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

----------X

JOHN RIZZI,

Plaintiff,

- v -

THE RELATED COMPANIES, L.P, THE RELATED COMPANIES, INC.,OXFORD PROPERTIES GROUP INC.,TISHMAN CONSTRUCTION CORPORATION

Defendants.

----------X

INDEX NO. 154518/2018

MOTION DATE 05/06/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99

were read on this motion to/for JUDGMENT - SUMMARY.

The motion by plaintiff for summary judgment on his Labor Law §240(1) claim is denied. The cross-motion by defendants for summary judgment is granted in part and denied in part.

Background

Plaintiff brings this Labor Law case about two separate incidents in which he was allegedly injured. The first incident involved plaintiff's contention that he was hit by the door of a debris box as it was being lowered by a lull. In the second incident (a few months later), plaintiff allegedly tripped over a plate while walking through an entrance to the worksite.

Plaintiff testified that he brought this debris box to the area where they were working and that it was brought with a lull (a machine similar to a giant forklift) (NYSCEF Doc. No. 66 at 26). He explained that his task that day was to "open up the box, put the small debris box into the

big debris box with the lull and then dump the debris box and then bring the debris box back into the job site" (*id*. at 28).

Plaintiff added that he and a co-worker opened the door to the debris box and then "secure[d] the door onto the other side, lift up the box, put the box inside the debris box, unhook the two front hooks" (*id*. at 41). After the contents were removed and as they were bringing the box back into the job site, plaintiff contends he was hit by the door (*id*. at 43). He testified that he thought he was hit by the door because the safety equipment (i.e. the hook that holds the metal door in the open position) malfunctioned (*id*. at 46). Plaintiff noted that, usually, these debris boxes are not transported via the lull with the door open but that it was in this instance because there was another truck on the way and they needed to rush (*id*. at 47). Normally the debris box is lowered to the ground and the doors are closed before it is moved (*id*. at 46-49). Plaintiff insists that after the accident, he saw that the "safety latch popped off" and there was a "chain malfunction" (*id*. at 51).

Labor Law § 240(1) for the First Incident

Plaintiff moves for summary judgment on his Labor Law 240(1) claim for the first incident (the debris box). He contends that the debris box carried by the lull was above him and that this constitutes a gravity-related accident for which defendants are strictly liable. Plaintiff insists that defendants are liable because they did not ensure that the steel door of the debris box was adequately secreted as it was being lowered. He argues that defendants failed to furnish adequate safety devices to provide proper protection to plaintiff.

In opposition, defendants insist that it was plaintiff's job to secure the door and so the fact that he was hit by the door is an accident he caused. They point out that the lull was driven

by another employee while plaintiff and a co-worker helped unload the debris box into a dumpster. Defendants emphasize that plaintiff could not recall if he or his co-worker actually latched the door in the open position although they acknowledge plaintiff maintains that someone did latch it.

In reply, plaintiff claims that defendants failed to raise an issue of fact with respect to whether plaintiff was a recalcitrant worker or the sole proximate cause of his own accident. He emphasizes that although he did not recall who exactly latched the door in the open position (whether it was plaintiff or his co-worker), plaintiff did remember that the door was secured in the open position before the accident. Plaintiff points out that it was not his sole responsibility to latch the door because it was 500-pound door and clearly a two-man job.

"Labor Law § 240(1), often called the 'scaffold law,' provides that all contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . 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 construction workers employed on the premises" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500, 601 NYS2d 49 [1993] [internal citations omitted]). "Labor Law § 240(1) was designed to prevent those types of 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" (*id.* at 501).

"[L]iability [under Labor Law § 240(1)] is contingent on a statutory violation and proximate cause . . . violation of the statute alone is not enough" (*Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 287, 771 NYS2d 484 [2003]).

The accident in question was gravity related (*see Gallegos v Bridge Land Vestry, LLC*, 188 AD3d 566, 136 NYS3d 247 [1st Dept 2020] [granting summary judgment on a Labor Law § 240(1) claim where a slab being raised by a chain came loose from the straps securing it and fell on plaintiff]). Here, the debris box's door, controlled by a lull from above, swung open and purportedly hit plaintiff. As stated above, a lull is a machine similar to a forklift and it moves the debris boxes up and down.

Defendants' attempts to argue that plaintiff was responsible for his accident raise an issue of fact. A fact finder must determine whether the debris box door was properly latched or whether it malfunctioned and, if was not property latched, who was responsible for not properly latching the door. A jury could potentially conclude that plaintiff did not properly latch the door, did not follow the proper procedure and so he is at fault for his accident.

Plaintiff testified that the door was secured before the debris box was moved by the lull (NYSCEF Doc. No. 66 at 42). He also claimed that he could not remember whether he or his co-worker latched the debris box door. However, the affidavit of his foreman (Mr. Mangan), contends that plaintiff was struck "because the door was not properly locked onto the side of the box, allowing it to disengage and swing out of position while in transition out of the dumpster (NYSCEF Doc. No. 88 at 2). He claims that plaintiff was injured because he did not follow proper procedure and that it was plaintiff's job to open the door prior to dumping and lock the door (*id.*).

That Mr. Mangan offered somewhat conflicting testimony at his deposition does not compel the Court to grant plaintiff's motion (although it certainly compels the Court to deny defendants' request to dismiss plaintiff's Labor Law § 240[1] claim). Mr. Mangan testified that he did not remember if he looked at the debris box involved in the accident or whether there was

anything wrong with the latch system (NYSCEF Doc. No. 91 at 31). When confronted with the fact that he made affirmative assertions in a prior affidavit, he simply stated that "You know what, maybe I don't remember that, but that's probably wrong what I said, you know, because I wasn't really there, so it's probably wrong what I said" (NYSCEF Doc. No. 91 at 48)

Unlike a typical situation in which an affidavit is dated *after* a deposition (and a Court may conclude it is a "feigned" issue of fact), the affidavit in question here is dated prior to the deposition. This Court cannot make a credibility determination on a summary judgment motion and, therefore, it cannot disregard the affidavit or the deposition of Mr. Mangan. And the affidavit contains a specific assertion that Mr. Mangan inspected the box after the accident and found no defect (NYSCEF Doc. No. 88 at 3). That raises an issue of fact about whether plaintiff is responsible by not properly locking the debris box door.

Defendants' Cross-Motion

Defendants cross-move for summary judgment dismissing plaintiff's claims asserted under Labor Law §§ 200, 240(1) and 241(6).

With respect to Labor Law § 240(1), defendants claim that the second incident (tripping over a plate and a piece of wood) is not an accident applicable to this provision. They detail how each of the claimed Industrial Code sections do not apply and therefore compel the Court to dismiss his 241(6) cause of action. Defendants also claim that they did not direct or control the work and they had no notice of the allegedly dangerous conditions and so plaintiff cannot recover under a general negligence or Labor Law § 200 theory.

Defendants also argue that the Related Companies, L.P., the Related Companies, Inc. and Oxford Properties Group, Inc. are improper defendants because they did not own, occupy or control the property. They claim that defendant Tishman was the general contractor and that the

MTA, ERY North Tower RHC Tenant LLC was the owner and ground lease holder at the construction site. Defendants point out that plaintiff only deposed defendant Tishman.

In opposition, plaintiff claims that the Related companies are proper defendants because they had an active role in the project as the "executive construction manager and owner's agent." Plaintiff contends that Related hired a site safety company and that they gave Tishman authority to direct the site safety company what to do on the job site.

With respect to 241(6), plaintiff only addresses whether a specific Industrial Code Section (23-1.7(e)(2) applies to the second accident—the tripping incident. Plaintiff contends that his Labor Law § 200 claim should survive with respect to the tripping accident because it was a dangerous condition.

In reply, defendants contend that the Industrial Code section upon which plaintiff relies (about tripping hazards) does not apply because plaintiff contends that he tripped over plates laid at the entryway which were integral to the work instead of over tools and materials as contemplated in the subject Industrial Code section. Defendants contend that plaintiff's employer controlled the work and so they have no responsibility under a common law negligence theory (pursued under Labor Law § 200).

As an initial matter, for the reasons described above, the Court denies the branch of defendants' cross-motion to dismiss the Labor Law §240(1) claim. There are issues of fact about whether the debris door latch was properly secured and who undertook to secure it before it was moved.

Labor Law § 200

Labor Law § 200 "codifies landowners' and general contractors' common-law duty to maintain a safe workplace" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY3d 494, 505, 601

NYS2d 49 [1993]). "[R]ecovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation . . . [A]n owner or general contractor should not be held responsible for the negligent acts of others over whom the owner or general contractor had no direction or control" (*id.* [internal quotations and citation omitted]).

"Claims for personal injury under this statute and the common law fall under two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-44, 950 NYS2d 35 [1st Dept 2012]). "Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*id.* at 144).

"Where an alleged defect or dangerous condition arises from a subcontractor's methods over which the defendant exercises no supervisory control, liability will not attach under either the common law or section 200" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272, 841 NYS2d 249 [1st Dept 2007]).

The Court dismisses this claim with respect to the first accident (the debris door) as plaintiff only addressed its application to the second accident.

The Court denies the branch of the motion that seeks to dismiss the Labor Law § 200 claim with respect to the second accident. The fact is that the alleged defect-- the plate at the entryway-- was certainly present long enough to provide constructive notice to defendants. The photograph of the defect (NYSCEF Doc. No. 94) shows an uneven surface with a wooden plank sticking out. Put simply, this Court cannot conclude as a matter of law that this was not an actionable defect.

The Court also cannot conclude that defendants can evade liability on the ground that they did not exert control over plaintiff's work. The documents attached to this motion show that the Related defendants hired a site safety contractor to oversee the work site and potentially acted as an agent for the owner (NYSCEF Doc. Nos. 97 and 98). Clearly, these defendants attempted to exert control over what happened at the job site.

Labor Law § 241(6)

"The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable. In order to support a claim under section 241(6) . . . the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna*, 12 NY3d 511, 515, 882 NYS2d 375 [2009]). "The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury" *(Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 271, 841 NYS2d 249 [1st Dept 2007]).

The Court dismisses this claim in its entirety. Plaintiff did not oppose this branch of the cross-motion except for his reliance on 23-1.7(e)(2). That section provides that: "The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed." The Court finds that this section is inapplicable to plaintiff's trip and fall. He does not contend that he fell over dirt, debris, scattered tools or materials. Instead, he allegedly fell over an area with metal plates and a piece of wood by the entryway. Apparently, this area was set up to help equipment roll into the job site.

The Related Defendants

"Where the owner or general contractor delegates to a third party the duty to conform to the requirements of the Labor Law, that third party becomes the statutory agent of the owner or general contractor. The key question is whether the defendant had the right to insist that proper safety practices were followed. Unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law" (*Yiming Zhou v 828 Hamilton, Inc.*, 173 AD3d 943, 945, 103 NYS3d 472 [2d Dept 2019] [internal quotations and citations omitted]).

The Court finds that there are issues of fact with respect to whether the Related Companies, L.P. and The Related Companies, Inc. are agents of the owner. However, the Court dismisses the claims against Oxford Properties Group, Inc.

Plaintiff offers in opposition a site safety plan that mentions the Related entities (NYSCEF Doc. No. 97). In fact, the sample jobsite injury forms include a Related company logo at the top. That is enough to raise an issue of fact about these two entities control over the job site. However, Oxford Properties is only mentioned as an entity entitled to receive notice in the construction agreement involving defendant Tishman (NYSCEF Doc. No. 98 at 35). The Court finds that is not enough to raise an issue of fact and so the claims against this entity are dismissed.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment on his Labor Law § 240(1) claim with respect to the debris door is denied; and it is further

ORDERED that the cross-motion by defendants is granted to the extent that plaintiff's Labor Law § 241(6) claim and all claims against defendant Oxford Properties Group Inc. are severed and dismissed; and it is further

ORDERED that the cross-motion is granted to the extent it sought to dismiss the Labor Law § 200 claim but only with respect to its application to the debris box incident as plaintiff did not offer arguments in opposition on this point; and it is further

ORDERED that the remaining branches of the cross-motion are denied.

5/12/2022
DATE

ARLENE BLUTH, J.S.C.

CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
		GRANTED	**DENIED**		**GRANTED IN PART**	[X]	**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**