Moreno v VS 125, LLC
2022 NY Slip Op 31950(U)
June 21, 2022
Supreme Court, Kings County
Docket Number: Index No. 517332/2018
Judge: Debra Silber
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At an IAS Term, Part 9 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 21st day of June, 2022.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

- X

OMAR MORENO,

Plaintiff,

- against -

VS 125, LLC, PLAZA CONSTRUCTION LLC, TIME SQUARE CONSTRUCTION INC, and PLAZA/TIME SQUARE JOINT VENTURE,

Defendants.

- X

DECISION / ORDER

Index No. 517332/2018
Mot. Seq. #2, 3

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion and Affidavits (Affirmations) Annexed	37-49 52-69
Opposing Affidavits (Affirmations)	87-92 72-84
Reply Affidavits (Affirmations)	93-95 98

Upon the foregoing papers, defendants VS 125, LLC (VS), Plaza Construction, LLC (Plaza), Time Square Construction, Inc. (Times Square), and Plaza/Time Square Joint Venture (Plaza/Time Square) (collectively, defendants) move (in motion sequence [mot. seq.] two) for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the causes of action asserted by plaintiff Omar Moreno (Moreno) for violations of Labor Law §§ 200, 240 (1), 240 (2), 240 (3) and 241 (6), as well as for common-law negligence.

Plaintiff Moreno also moves (in mot. seq. three) for an order, pursuant to CPLR 3212, granting him partial summary judgment against defendants on the issue of liability under Labor Law §§ 240 (1) and 241 (6).[1]

Background

On August 24, 2018, Moreno commenced this action by filing a summons and a verified complaint against defendants VS and Plaza. Moreno alleges therein that on August 10, 2018, he suffered an injury while directing traffic near the construction site at 125 Greenwich Street in Manhattan.[2] More specifically, on that date Moreno was working as a "flagman" employed by non-party Structuretech, New York, Inc. (STNY) when he heard the sound of an object striking metal, and, immediately thereafter, felt an object strike his left leg. He fell to the ground and sustained a fractured fibula as a result.

At the time of the incident, there was a high-rise building under construction at the site; on the date of the accident, STNY employees were performing concrete superstructure work between the 40th and 51st floors. To prevent against falling hazards, a so-called Doka climbing system or fence[3] was being used around the then-top levels of the building during construction. This equipment consisted of a 2-story high metal fence that was secured with large metal bolts[4] (about five inches long and two inches across, weighing approximately five pounds) to the floor. As work would progress upward on the building

[1] Moreno's notice of motion also asserts that he is seeking partial summary judgment on the issue of defendants' Labor Law § 200 liability, however, no arguments are raised about this statute in his moving papers.
[2] The building was to be 72 stories high when completed.
[3] Occasionally referred to as a "cocoon."
[4] Occasionally referred to as a "Doka bolt."

under construction, the bolts would be removed, the equipment would be moved and the fence would then be bolted down again. There were also nets intended to prevent objects from falling from the worksite to the ground surrounding the building, which were deployed at lower floors.

After the accident, Moreno located one of the Doka bolts about ten feet from where he fell. Moreno was then helped by Patrick Gadson, an STNY co-worker who had been operating a forklift nearby, and he brought the bolt to Michael Duffy, STNY director of field operations, who identified the bolt as a "Doka" bolt of the kind used to secure the fence around the top floors of the building under construction.

Moreno infers that the subject bolt must have fallen from the topmost floors and struck his leg. Because of this, Moreno alleged in his original complaint that defendants violated Labor Law §§ 240 (1) and 241 (6), as well as certain applicable provisions of the Industrial Code (12 NYCRR Ch 1, sub. A) by allowing the bolt to fall; Moreno alleges that defendants are owners, contractors, or agents thereof, and therefore, are vicariously liable for these violations of the Labor Law without regard to fault or responsibility. Moreno also alleges causes of action based on Labor Law §§ 200, 240 (2), 240 (3) and common-law negligence. Moreno claims that these Labor Law violations and negligent acts or omissions proximately caused his personal injuries. Lastly, Moreno argues that he was on

a construction site performing construction work.[5] Moreno seeks damages against defendants for his claims.

The original defendants, VS and Plaza, interposed an answer, and discovery ensued. By a November 22, 2019 motion, Moreno sought leave to amend the pleadings to add Time Square and Plaza/Time Square Joint Venture as defendants. By a January 8, 2020 order, Moreno's motion was granted; Moreno subsequently filed and served a supplemental summons and amended complaint. The amended pleadings indicate specifically that defendant VS is the owner of the subject premises and, pursuant to a written agreement, hired defendants Plaza and Time Square (together known as defendant Plaza/Time Square Joint Venture) as the project construction manager. This joint venture then hired STNY to construct the superstructure. The amended pleadings reiterate that all defendants are either owners, contractors, or agents thereof and are, thus, vicariously liable for the claimed Labor Law violations.

Defendants interposed an amended answer and discovery (including non-party depositions) continued. on August 26, 2021, Moreno filed a note of issue with a trial by jury demand, certifying that discovery was complete and that this matter was ready for trial. The instant motions for summary judgment ensued.

[5] Work within the scope of the Labor Law's vicarious liability provisions is commonly referenced as "protected" activities, tasks, or work. Workers covered by the statute are commonly referenced as "protected" workers.

Defendants' Summary Judgment Motion

On October 18, 2021, defendants moved for summary judgment and an order dismissing the complaint. Defendants argue that Moreno's Labor Law § 200 and common-law negligence claims must be dismissed. Defendants maintain that such claims are only sustainable in two situations: first, where the allegedly liable party supervised or controlled the work that produced the injury, and second, when the allegedly liable party either created or had actual or constructive notice of a dangerous premises condition that produced the injury. Defendants point out that, here, there was no dangerous premises condition alleged. Instead, defendants aver, Moreno asserts that he was struck with a falling bolt; defendants note that he justifies this assertion by claiming that STNY workers were using such bolts at the top of the subject building. Defendants assert that, therefore, the accident occurred as a result of the methods and equipment which was being used by Moreno's employer.

In such a case, defendants claim, only the parties that exercised authority over the work are subject to liability pursuant to common-law negligence or Labor Law § 200. They argue that the authority exercised must be specific to the work and that the general authority to supervise construction and/or inspect the premises is insufficient for liability purposes. Here, they continue, the record establishes that both Moreno's work and the work that allegedly precipitated the accident was only supervised by STNY personnel. They also assert that their agents never undertook to direct or control such tasks.

Assuming for the sake of argument that this court considers the alleged accident to have been caused by a hazardous premises condition, defendants emphasize that they are

still not subject to liability pursuant to Labor Law § 200 or common-law negligence. This is because, defendants argue, owners, contractors and their agents are not liable for a hazardous premises condition unless they either created it or had actual or constructive notice of it and failed to correct it within a reasonable time. Given that Moreno testified that only STNY workers were present on the then-top floor, defendants reason that it is obvious that their agents could not have created the allegedly dangerous condition (i.e., falling items). By the same reasoning, defendants conclude that they could not have had notice of such a condition, since they did not have personnel positioned on the top of the building at relevant times. Also, defendants maintain that they could not reasonably be charged with having had notice of such a transitory situation as falling items. For these reasons, defendants assert that this court should dismiss Moreno's common-law negligence and Labor Law § 200 claims.

Next, defendants argue that Moreno's Labor Law § 240 (1) claim should be dismissed because it is not supported by any record evidence. Defendants point out that an injured worker is entitled to recover damages pursuant to Labor Law § 240 (1) only when the injury sustained is due to an elevation-related hazard. Defendants note that, here, Moreno did not fall from a height; accordingly, the Labor Law § 240 (1) claim is sustainable only if Moreno can demonstrate that an object fell and struck him, causing injuries. However, defendants continue, the record here contains no direct evidence that Moreno was hit by a falling object. Instead, defendants claim, it is undisputed that Moreno did not actually see an object either fall or strike him. Defendants also claim that Patrick

Gadson (Gadson), the only potential witness and the only other person who was near Moreno when the alleged incident occurred, testified that he did not see any object fall and strike Moreno. In fact, defendants claim that Gadson testified that he heard Moreno moan as he drove the forklift by him; Gadson also testified that he saw no object on the ground nearby when, after parking the forklift, he went back to check on Moreno. Lastly, defendants assert that the record contains no indication that any person, including Gadson, ever told Moreno that they saw an object fall and strike Moreno. Defendants conclude that since the record contains no direct evidence that an object fell and struck Moreno, the plaintiff's Labor Law § 240 (1) claim is unsustainable.

Alternatively, defendants assert that they are entitled to summary judgment dismissing Moreno's Labor Law § 240 (1) claim because Moreno's version of events with regard to the accident is mere speculation and is implausible. Defendants note Moreno's testimony is that he believes he was hit with a bolt that fell from the 50th floor of the building because, on that day, STNY workers on the then-top floor were using such bolts. However, defendants continue, Moreno's beliefs are not based on actual observations – either his or those of anyone else. Also, defendants add, no other evidence in the record suggests that such a bolt fell and struck Moreno.[6] Therefore, defendants reason, Moreno's belief that the subject bolt fell from the top of the building and struck him is mere speculation, which is insufficient to defeat summary judgment.

[6] Defendants point out that the first STNY incident report states that Moreno was injured in a different context; the second STNY incident report stated only that Moreno said that he had been struck with an unidentified falling object.

Defendants also characterize Moreno's version of the events as implausible for several reasons. First, defendants claim, it would have been just short of impossible for the bolt to fall from the then-top floor of the building and strike Moreno at street level because there was, at all relevant times, an approximately seven-foot high perimeter fence around the top floor. Defendants further point out that the STNY site supervisor, Michael Duffy, saw Moreno approximately twenty minutes after the alleged incident; Duffy later testified that for an object to clear the top of the perimeter fence, somebody would have had to have intentionally thrown it over the top. Moreover, defendants assert that, at all relevant times, there were also catch nets extending 15 feet from the building deployed below the fence on all sides of the building. Defendants note that Duffy verified this at his deposition. Additionally, continue defendants, horizontal nets at lower floors that extended in all directions were deployed to protect pedestrian traffic on Greenwich Street. Defendants claim that, if Moreno is to be believed, the bolt would: (1) have been intentionally thrown over the top of the fencing; (2) have been thrown beyond the reach of nets just below the fence; and (3) had to land past the additional nets at street level protecting Greenwich Street. Defendants characterize this hypothetical set of facts as implausible.

Alternatively, defendants add, if an STNY worker intentionally threw the item that struck and injured Moreno – and if Moreno could prove this – the intentional act of an STNY worker would not constitute a Labor Law § 240 (1) violation for which defendants

would be vicariously liable.[7] Also, defendants add, according to Duffy, the bolt that allegedly struck Moreno was not damaged; there were no breaks or cracks, only scratches from wear and tear. Moreover, state defendants, Duffy testified that he saw no damage to the street near the construction gate; this testimony, defendants argue, is inconsistent with Moreno's speculation that a five-pound metal screw fell 50 stories and struck the ground.

Additionally, defendants argue, Moreno's testimony concerning the accident and injuries is inconsistent. Defendants note that Moreno testified that he was struck by the bolt on the outer part of his left leg while he was facing left near the construction gate. However, defendants state, Moreno also testified that after he fell, he saw the bolt on the ground ten feet away to his right. Defendants claim that unless the bolt made a sharp right turn after bouncing off the outside of Moreno's left leg, his story must be completely false. Defendants bring up that Moreno has, under oath, admitted to prevarications; he testified at his deposition that he signed the first (false) incident report, which indicated that he had been injured elsewhere, while unloading a truck.

In sum, defendants urge this court to disregard Moreno's recitation of the facts of the accident. Defendants acknowledge that, ordinarily, the assessment of the value of a witness's testimony constitutes an issue for resolution by the trier of fact. However, defendants argue that where a plaintiff's testimony is flatly contradicted by the record or is otherwise illogical, this court may properly decide the issue summarily. For this additional

[7] Defendants note that although Moreno testified that a STNY worker told him that he had dropped the bolt, defendants emphasize that neither Moreno nor Duffy could definitively identify that STNY worker.

reason, defendants conclude that this court should grant their motion for summary judgment dismissing Moreno's Labor Law § 240 (1) claim.

Next, defendants argue that this court should also dismiss the claims asserted pursuant to Labor Law §§ 240 (2) and (3); defendants state that these claims are inapplicable here. Defendants contend that these subdivisions of Labor Law § 240 relate to the manner in which certain scaffolding is to be constructed and the amount of weight it must be able to bear. Here, defendants note, no scaffold is at issue, and the record contains no indication that a relevant scaffold was either improperly constructed or could not bear the required weight. Accordingly, defendants conclude, neither §§ 240 (2) nor (3) has any applicability to the instant matter, and, therefore, both claims should be dismissed.

With respect to Moreno's Labor Law § 241 (6) claim, defendants note that in order for an owner, contractor, or agent to be liable under Labor Law § 241 (6), a plaintiff is required to establish a breach of a rule or regulation of the Industrial Code (12 NYCRR Ch. 1, sub. A) that gives a specific, positive command. Defendants further argue that even if the worker alleges the breach of such a specific Industrial Code rule, the Labor Law § 241 (6) claim is unsustainable if the identified rule is not applicable to the facts of the case. Here, defendants continue, Moreno alleges violations of Industrial Code §§ 23-1.5 (a), 23-1.5 (b), 23-1.5 (c), 23-1.7 (a), 23-1.7 (b) (1), 23-1.7 (b) (2), 23-1.7 (d), 23-1.7 (e) (1), 23-1.7 (e) (2), 23-1.8, 23-1.30, 23-1.32, 23-1.33 (a), 23-2.1, 23-2.2, 23-2.5 (a), 23-2.6 (a), 23-3.2, 23-3.3, 23-3.4, 23-5.1, 23-5.3, 23-5.7, 23-5.8, 23-5.9 and 23-5.10. Defendants argue that perusing these sections demonstrates that the majority of these provisions are

either not sufficiently specific to support a Labor Law § 241 (6) claim or are inapplicable to the instant facts. For the ones that are both sufficiently specific and applicable, defendants continue, the record either lacks evidence that the provisions were violated or demonstrates (for example, § 23-2.6 [a] requiring catch platforms) that the provisions were complied with. Accordingly, defendants reason, the Labor Law § 241 (6) claim should be dismissed based on Moreno's failure to identify an applicable and sufficiently specific supporting Industrial Code provision that was violated. For these reasons, defendants conclude that Moreno's Labor Law § 241 (6) claim should be dismissed; along with the other arguments, defendants submit that this court should grant their motion for summary judgment in its entirety.

Moreno's Opposition to Defendants' Summary Judgment Motion

Moreno, in opposition, first emphasizes those facts that are either undisputed or supported by sworn testimony. Moreno notes that, on the date of the accident, the subject building under construction was approximately 51 stories high. Moreno points out that STNY employees were performing "stripping" on the 40th, 42nd, 49th and 50th floors that day. The workers, continues Moreno, used a Doka climbing system on the (then) top level of the building; this equipment is used as a two-story high safety fence around the top of the building to prevent workers from falling. Moreno states that large metal bolts, of the kind that struck him, are used to attach parts of the equipment to the floor; however, even when attached, a significant gap exists between the floor and the base of the fence. Moreover, adds Moreno, every time the workers were ready to start building the next

highest floor, the equipment would have to be taken apart, placed on the floor above and again bolted down. Moreno suggests that these facts easily support a conclusion that one of the bolts either became loose or was dropped or thrown from the top of the structure; either way, the inference is proper that a bolt fell, struck him, and caused his injuries.

Also, Moreno emphasizes his uncontradicted testimony, as well as other sworn testimony that supports his position. He testified that on the date of the accident, while he was flagging traffic at street level, he was struck by a large metal bolt, causing him to fall; he also stated that he heard a loud noise just before he felt the impact to his left leg. Then, he continued, he heard the bolt hit the construction fence next to him and finally rest several feet away. Moreover, Moreno adds, immediately after this occurred, he noticed an indentation in the concrete next to him.

Moreno emphasizes that the deposition testimony establishes that, after the accident, Gadson, a forklift operator,[8] helped Moreno up from the ground. Also, Moreno continues, the deposition testimony suggests that Gadson picked up the bolt that struck Moreno and gave it to Duffy.[9] Moreno points out that safety supervisor Jonathan Nunez testified that when he arrived at the accident scene, he was told that something fell off the building and hit Moreno in the leg; shortly thereafter, Nunez accompanied Moreno to get medical care.

[8] In response to defendants' theory that the bolt, instead of falling from the top of the building, could have been propelled into Moreno by Gadson driving the forklift over the bolt, Moreno points out his testimony that at the time he was hit by the bolt, the forklift that Gadson was operating was turned off and not moving.

[9] Michael Duffy testified that he remembered that someone gave him the bolt in question and stated that it might have been Patrick Gadson but he was not sure.

With respect to defendants' accusations of his falsifying an internal accident report, Moreno again refers to Nunez' testimony. Nunez averred that during a phone conversation with one of his supervisors at STNY, who learned of Moreno's accident and injury, Nunez was told to direct plaintiff to lie about how the accident occurred. More specifically, Nunez testified that he was told by his superiors that the subject site had too many accidents and injuries, and for that reason it was important for Moreno to say he was hurt elsewhere. Nunez further testified that, in accordance with these directions, he told Moreno that accurately reporting the accident would cause a stop work order and everyone to lose their jobs; Moreno testified that he followed Nunez' instructions and said that he was injured while unloading a truck at 222 Broadway, an STNY office. However, Nunez testified that, later, he issued a second incident report with the correct information indicating that Moreno had been injured after being hit by a metal bolt that fell from the building.

Moreno argues that if this undisputed and/or sworn testimony does not entitle him to partial summary judgment with respect to liability pursuant to Labor Law § 240 (1), at least this testimony evinces the existence of triable issues of fact. Moreno contends that the subject bolt was used to hold the Doka climbing system equipment, at least 40 stories above ground level, in place. Moreno infers that the construction site was not operated safely, and if safety devices were put in place to prevent falling objects, they failed to prevent this Doka bolt from falling and striking him. Furthermore, Moreno continues, a Labor Law § 240 (1) claim based on a falling object is sustainable even if the injured worker did not either see the object fall or exactly where it fell from. Indeed, Moreno adds,

in contrast with the reasonable inferences here, defendants' alternate theories (e.g., that the bolt was propelled into Moreno by the forklift) are the ones unsupported by the record. In conclusion, Moreno asserts that this accident could not have happened but for either the failure of or absence of appropriate safeguards; accordingly, a Labor Law § 240 (1) claim is evident from the record, and defendants' motion should be denied insofar as it seeks summary judgment dismissing this claim.

With respect to Labor Law § 241 (6), Moreno emphasizes that Industrial Code §§ 23-1.7 (a) and 23-2.6 (a) and (b) contain specific, positive commands, and are thus sufficient to support his § 241 (6) cause of action. Indeed, Moreno continues, these provisions require that adequate nets, planks, platforms and/or other fall-arresting equipment are deployed on any construction site where a risk exists that objects may fall from a height and injure workers at lower levels. Here, claims Moreno, defendants have not established, prima facie, that they did not breach their non-delegable duty to provide him and other workers with adequate planks, platforms, nets, and similar materials to prevent falling object hazards. Moreno acknowledges defendants' statement that safety nets were in fact deployed; nevertheless, Moreno continues, the subject nets were inadequate to prevent the subject bolt from falling and striking him. Therefore, Moreno reasons, the Industrial Code provisions requiring adequate protection from overhead hazards were not complied with; accordingly, Moreno concludes, defendants have not demonstrated their entitlement to summary judgment dismissing his Labor Law § 241 (6) claims.

Lastly, Moreno argues that defendants' motion for summary judgment should be denied with respect to Labor Law § 200. Moreno claims that this section requires owners and contractors to keep a construction site reasonably safe; owners and contractors may be liable under Labor Law §200 for hazardous conditions on the site. Also, Moreno maintains that a moving defendant must tender evidence showing that they lacked supervision or control over the work producing the injury to establish prima facie entitlement to judgment as a matter of law in this regard.

Moreno claims that, here, defendants and their agents had nearly complete control over the worksite. He emphasizes, specifically, that applicable agreements involving defendants and their agents demonstrate that defendants had the authority to stop the work when site conditions or work practices presented an imminent danger to life or health until those conditions or practices were corrected. Moreno reasons that, therefore, under the relevant agreements, defendants had the right and the responsibility to supervise and control the work being performed at this jobsite. Moreno claims that any affidavit submitted in support of defendants' motion that does not acknowledge these contractual responsibilities should not be considered. Also, Moreno suggests that defendants, had they exercised their responsibilities, would have noticed unsafe practices and equipment, such as the failure of the safety nets that caused the subject bolt to strike him. For these reasons, Moreno contends that there are issues of fact as to whether defendants had notice of hazardous conditions on the subject job site. Accordingly, Moreno argues, summary judgment dismissing his Labor Law § 200 claims should be denied.

Defendants' Reply

Defendants, in reply, first reiterate that there is no evidence in the record that Labor Law § 240 (1) was violated. Defendants note that Moreno claims that the bolt fell and struck him, however, they argue that it is undisputed that Moreno did not see a falling object hit him, that Patrick Gadson (the only person nearby at the time) also saw no object fall and strike Moreno and that no one told Moreno that they saw an object fall and hit him. As such, claim defendants, by his own admission, Moreno has no personal knowledge as to what allegedly struck him; any statement that the subject bolt fell and struck him is speculative. Thus, conclude defendants, there is no evidence in the record that Labor Law § 240 (1) was violated.

Moreover, defendants assert that Moreno's recitation of the events is not possible. Specifically, defendants maintain that, according to where Moreno claims to have stood before he was allegedly struck, the five-pound bolt could not have settled where it did unless it made a sharp right turn after bouncing off the outside of Moreno's left leg. Also, defendants point out that Michael Duffy, STNY's site supervisor, testified that he inspected the subject bolt after Moreno was injured, and noted that the bolt had not sustained any damage; defendants characterize the condition of the bolt as impossible if it fell approximately 50 floors and struck the ground. Also, and responding to Moreno's argument that the STNY daily log supports his theory of the case, defendants acknowledge that, at relevant times, segments of the cocoon system on the east side (and only on that side) of the building were moved; however, defendants continue, the east side of the

building was the other side of the building from where Moreno was injured. Defendants emphasize that the cocoon on any one side of the building could be moved up or down on that side of the building independently from the cocoon system that was at any of the other three sides of the building. According to defendants, this rebuts any inference that moving the cocoon system dislodged a bolt and caused it to fall and strike Moreno. Lastly, defendants note that during his deposition testimony, Moreno was equivocal about whether he saw a damaged part of the ground nearby after the accident; defendants claim that, contrary to Moreno's uncertainty about the damage done to the ground, a five-pound bolt that fell 50 floors and struck the ground would cause significant damage to any surface. In sum, defendants claim that the evidence in the record refutes any falling object theory.

Also, defendants characterize Moreno's testimony as unreliable. Defendants refer to Moreno as "generally untruthful" because, among other things, he executed a false written statement in connection with his employer's first report of his injury. Defendants note that Moreno later amended his report to include a reference to a falling object; however, defendants continue, Moreno has given sworn testimony indicating that he did not see an object fall and strike him. Lastly, defendants contend, any references to unidentified individuals – specifically, Moreno's insistence that an unnamed STNY worker stated to Duffy and Moreno that he had dropped the bolt from the top of the building – should be ignored as hearsay by this court.[10] Defendants conclude that, accordingly, since

[10] Defendants emphasize that Duffy testified he had never heard anyone from STNY say any such thing.

there is no evidence in the record that a falling object struck Moreno, the court should grant the motion as to the Labor Law § 240 (1) claim.

Next, defendants reiterate that they are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim. First, they assert that this claim is not viable insofar as based on Industrial Code § 23-1.5 (a) because appellate authority has deemed this provision not sufficiently specific. Defendants reiterate that there is no evidence in the record that § 23-1.5 (c) was violated; Moreno only speculates that an object fell on him because the safety devices must have become damaged. Defendants acknowledge that §§ 23-1.7 (a) (1), (a) (2) and 23-2.6 (a) and (b) do require protection against overhead hazards (also catch platforms); however, defendants press that there was overhead protection at relevant times: namely, the perimeter fencing system at the top of the building and the catch nets just below it. Again, defendants claim that Moreno has submitted no evidence that he was struck by a falling object such that an inference can be drawn that such overhead protection was not operable or was otherwise damaged at the time. Defendants conclude that the Industrial Code provisions relied on by Moreno are not sufficiently specific, are inapplicable or were not violated here; accordingly, Moreno's Labor Law § 241 (6) claims should be dismissed.

Defendants turn to plaintiff's common-law negligence and Labor Law § 200 claims, and state that the record cannot support them. Defendants argue that they did not supervise or control any STNY work, including Moreno's work or the work alleged to have caused his alleged injuries. Defendants assert that they did not create, or have any notice of, any

defective condition on the premises. Finally, defendants state that Moreno failed to submit any evidence raising a question of fact with respect to these claims; acknowledging that Moreno emphasized the construction management agreement, defendants contend that it does not reflect any supervision or control over STNY work, let alone Moreno's work or the work alleged to have caused his alleged injuries. For these reasons, defendant urge that this court should dismiss the Labor Law § 200 and common-law negligence claims.[11]

Moreno's Summary Judgment Motion

On October 25, 2021, Moreno moved for partial summary judgment on the issue of liability. Moreno first asserts that the facts in the record establish, prima facie, his entitlement to judgment as a matter of law. He points out that when the accident occurred, he was employed by STNY to direct pedestrian and vehicle traffic at street level near the entrance of a construction site; at the relevant time, the building under construction had fifty floors. He notes that when the accident occurred, new floors were under construction; therefore, workers were present and actively working on the then-top floor. He states that on the relevant date, while he was "flagging" traffic, he first heard a loud sound then felt an object strike his left leg; he claims that he was "knocked to the ground" and that his leg was fractured as a result. He further states that he then heard a second sound as a five-pound bolt struck an adjacent fence; he also noted that the pavement near where he had

[11] Defendants also state that Moreno's claims pursuant to Labor Law §§ 240 (2) and (3) should be dismissed as abandoned.

been standing had an indentation in it. Lastly, he claims that the bolt was of a kind used by workers on the top floor.

Moreno suggests that the logical deduction is that a worker on the top floor must have dropped the subject bolt, which fell, struck him, and caused his injuries. Moreno notes that the building had "catch nets" around it between the top floor and street level; Moreno surmises that the nets failed to prevent the bolt from falling and striking him.

Next, Moreno notes that to obtain partial summary judgment pursuant to Labor Law § 240 (1) in a "falling object" case, the claimant 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. He also must show that the object fell because of the absence of or inadequacy of a safety device of the kind enumerated in Labor Law § 240 (1). Lastly, Moreno acknowledges that he must show that he was a protected worker engaged in a protected activity when the accident occurred.

Here, Moreno claims, there are no issues of fact with respect to defendants' liability under Labor Law § 240 (1). He argues that he was struck by a falling object and injured while working at this construction project; accordingly, he is protected under the statute. He contends that defendants are "contractors and owners and their agents" who are vicariously liable for violations of the statute. Moreover, he notes that he suffered an elevation-related accident, since a five-pound bolt fell approximately fifty floors and struck him. Additionally, he maintains that since the "safety equipment" rigged at the site – namely, the catch nets surrounding the building – was inadequate to prevent the object

from falling and striking him. Indeed, continues Moreno, the risk was foreseeable that an object could fall from the top of the building where construction workers were active, and given that the subject bolt fell, it follows that if the protection nets had been adequate, the subject accident could not have occurred. He characterizes the subject bolt as an object that required securing for the purposes of its undertaking but was not. Moreno posits that the Labor Law § 240 (1) violation is evident. Also, Moreno reasons that since he was struck and injured by an unsecured falling object, there is no issue of fact as to whether the Labor Law § 240 (1) violation proximately caused his injuries.

Having established that Labor Law § 240 (1) was violated, Moreno continues, the record shows that defendants are owners, contractors and/or agents thereof, and they are thus absolutely liable for the violation. Moreno alleges that his negligence, if any, is of no consequence. Also, claims Moreno, the duty imposed to protect workers from elevation-related risks is non-delegable and the owner, contractor and/or agents are liable even when they do not exercise control or supervision over either plaintiff's work or the work that led to the injury. Thus, Moreno reasons, prima facie entitlement to judgment as a matter of law against defendants on the issue of Labor Law § 240 (1) liability is established by the record.

Moreno contends that any purported defense is insufficient, and acknowledges that he neither saw the bolt falling before it hit him nor knew exactly where it fell from. However, Moreno argues, not seeing the bolt falling or knowing where it fell from is inconsequential, as a matter of law, and he cites appellate authority. It suffices, Moreno

avers, that the record here establishes a direct causal connection between the bolt falling and his injuries; the record also shows that the catch nets did not prevent a falling object from striking him. Moreno claims that defense counsel, during depositions, questioned witnesses about other ways that the subject bolt might have fallen or come to rest where it did; these include theories that a worker threw it over a fence or that it was propelled into a fence by a tire on the roadway. Moreno characterizes these alternative explanations as nonsensical; he states that the record does not support defendants' assertions, and, moreover, reemphasizes that the bolt he saw was of the kind used by the workers who were active approximately fifty floors above him on the date of the accident. Instead, the correct inference, posits Moreno, is that if proper safety equipment had been used, the subject bolt would not have landed on the ground; defendants offer nothing but conjecture and theoretical or possible alternative scenarios in response. For these reasons, Moreno concludes that he is entitled to partial summary judgment against defendants on the issue of liability pursuant to Labor Law § 240 (1).

Next, Moreno claims that he is entitled to partial summary judgment against defendants with respect to Labor Law § 241 (6). Moreno points out that, like § 240 (1), § 241 (6) imposes absolute vicarious liability without regard to fault against owners, contractors, and their agents for any violations of the Industrial Code that proximately cause injuries to construction workers. Here, Moreno continues, applicable Industrial Code provisions required defendants to provide him with safe working conditions and personal protective equipment; he claims they did not. Furthermore, Moreno adds, the Industrial

Code required defendants to provide him with suitable overhead protection, consisting of a supporting structure capable of shouldering a load of at least 100 pounds per square foot; Moreno asserts that no such structure existed. Lastly, Moreno cites another regulation that required defendants to provide, along the exterior of the building, a catch platform, barricade, or fence; Moreno points out that here, only the catch nets were deployed.

Moreno claims that defendants' failure to ensure compliance with these provisions violated the Industrial Code, proximately caused his injuries, and establish a prima face Labor Law § 241 (6) claim. Moreno asserts that no applicable defenses to such a claim exist, and reasons that, therefore, his motion under Labor Law § 241 (6) should be granted insofar as it seeks partial summary judgment regarding liability against defendants.

Defendants' Opposition to Moreno's Motion

Defendants, in opposition, assert that the record does not establish Moreno's entitlement to judgment as a matter of law with respect to Labor Law § 240 (1). Defendants point out that an allegedly injured worker is entitled to recover damages pursuant to Labor Law § 240 (1) only when the injury sustained is due to an elevation-related hazard. In contrast, defendants aver, here, the record contains insufficient evidence to remove any doubt that Moreno was struck by a falling bolt, let alone by one that fell from the subject building. Alternatively, defendants add, if Moreno's recitation of events is considered prima facie sufficient for judgment as a matter of law, defendants have nevertheless submitted evidence in opposition that demonstrates the existence of triable questions of fact.

More specifically, defendants claim, Moreno relies almost exclusively on deposition testimony to support his motion. However, defendants assert that Moreno mischaracterizes his own testimony. For example, defendants note, although Moreno now contends that he was struck by a falling bolt, the deposition testimony is quite different; in fact, Moreno specifically testified that *he did not see an object hit him*, nor did he see an object rebound off the ground and hit him, let alone actually see an object fall and hit him. Indeed, defendants continue, the relevant testimony suggests only that Moreno heard a noise and then felt something strike his leg;[12] defendants argue that this is hardly evidence that establishes he was hit by an object that fell from the building. Defendants surmise that, by his own admission, Moreno has no knowledge of what allegedly struck him; any current contention otherwise is speculative and thus insufficient for this court to grant him partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1).

With respect to other witnesses, defendants note that Gadson, the only known person in the vicinity at the time of the alleged incident, testified that he saw no object fall and strike Moreno. Moreover, Moreno also testified that no one (not Gadson or anyone else) ever told him that they saw an object fall and hit him.[13] Defendants suggest that, therefore, this court should disregard any contention that Gadson's sworn testimony establishes that a bolt fell from the subject building and struck Moreno.

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[12] Specifically, Moreno testified that he heard a bang that was "like metal" at the same time he felt something hit his leg. He averred that "[i]t felt like a loud bang as something fell on my leg, and then did a rebound on the floor and it struck the gate that's there."

[13] Moreno did testify that that Gadson told him that Gadson found the bolt that struck him; nevertheless, defendants emphasize that Gadson did not see the bolt either fall or hit Moreno.

Defendants next point out that the sworn testimony about the work area where Moreno was directing traffic when the accident happened is inconsistent, and defendants also question the inferences Moreno draws from certain statements and observations. For example, defendants aver, Moreno emphasizes that after he felt an object strike him, he then heard the object strike the construction fence next to him. Defendants note that this statement is not proof that anything fell and hit Moreno; moreover, Moreno has no reason to think that the noise was caused by the same object that struck him (let alone a bolt that fell from the top of the building). Defendants also question how, assuming that a bolt hit Moreno, that bolt could strike a human leg and then strike a construction area gate five feet away. Additionally, defendants state, to the extent Moreno observed a bolt on the ground after he was struck, that observation does not eliminate all issues of fact; defendants point out that Moreno testified that he was facing away from the gate when he was struck. Defendants contend that Moreno is asking this court to make inferences from unreliable testimony.

Next, defendants maintain that Moreno's recitation of the facts is inconsistent with the laws of physics. Defendants note that Moreno alleges that the bolt that struck him weighed five pounds and fell approximately fifty floors. Defendants observe that such an object, accelerated by gravity during freefall for such a distance, would surely shatter Moreno's leg and possibly kill him; instead, after the alleged accident, Moreno merely had a visible (testified to by Gadson) bruise about the size of a quarter. Also, defendants note, Moreno now claims that the bolt left an indentation or small hole when it struck the street;

however, at deposition, Moreno stated that he saw a "mark on the floor" that was the "same color as the street." Defendants also claim that at his deposition, Moreno was unable to identify the location of the indentation/hole/mark on a photograph of the relevant area. Moreover, defendants add, Moreno, at his deposition, frequently claimed that he couldn't recall salient details. Furthermore, defendants note, for the same reason that Moreno's injuries are too slight to be caused by a five-pound object that fell fifty floors, the same object would cause significant and visible damage when it struck the ground. In short, defendants argue, Moreno's testimony is contradictory and unreliable.

Defendants emphasize that Moreno's apparent understanding that the subject bolt hit him was based on Gadson allegedly locating the bolt, identifying it as the offending object and relaying that to Moreno. However, defendants state, Gadson testified that he did not see any object strike Moreno; rather, he just heard Moreno moan nearby. Defendants note that Gadson also testified that he saw no object on the ground near Moreno when he went back to check on Moreno's condition. Also, defendants note, Duffy testified that he examined the subject bolt and saw no visible damage, breaks, or cracks to it – only scratches from wear and tear; defendants characterize this as unbelievable if the bolt had fallen fifty floors and struck the ground. Furthermore, defendants point out that multiple sets of protective structures deployed – the so-called cocoon system, completely enclosing the exterior of the highest floors of the subject building, and the so-called diaper netting system below, which prevented materials from falling to street level (and was inspected by STNY daily) as well as additional catch nets closer to street level – would have certainly

caught the bolt. For these reasons, defendants assert that the record is replete with facts and testimony that contradict Moreno's contentions in support of his motion.[14]

Defendants next point out that the record establishes that Moreno cannot be trusted. Defendants claim that Moreno, at his deposition, testified that he knowingly and willingly signed a false statement regarding the alleged incident. Moreover, defendants add, Duffy testified that he was told conflicting versions of the event at the scene, including scenarios that did not involve the bolt falling at all. Defendants also claim that Duffy testified that Moreno never told him that he could specify where the bolt had come from. Defendants further point out that Duffy testified that for an object such as the bolt to go over the perimeter fence near the top of the building, a person would had to have intentionally thrown it. Defendants note that Moreno claims to know that an unidentified person intentionally threw or dropped the bolt, and then informed Duffy of the same; however, at deposition, Duffy denied that he had any such conversation. Defendants emphasize that Duffy testified that he was not told anything of the sort, and also that he did not reprimand anyone for dropping or throwing a bolt. Lastly, defendants note that Duffy's testimony (in

[14] Specifically, defendants argue that multiple scenarios – none of which would constitute a Labor Law § 240 (1) violation – are consistent with the record. Defendants argue that although it is not their obligation in opposing plaintiff's motion to offer alternate scenarios as to how Moreno may have been injured, it could have happened in any number of ways, including by Moreno stepping on something that was on the ground and then falling with his leg onto something, by Moreno being struck by something that Gadson ran over with the forklift that was propelled into Moreno's leg, or Gadson may have backed the forklift into Moreno's leg as Moreno was facing in the other direction towards Greenwich Street. Defendants assert that Skillman's affirmation recounting that Moreno heard noises, saw a bolt on the ground and an indentation on the street is short of being sufficient evidence that Moreno was hit by a falling object, especially given the internal inconsistencies in Moreno's testimony, the testimony of Gadson and Duffy that contradicts Moreno's version of events and the implausibility of Moreno's version of the incident.

contrast to Moreno's) indicated that on the date of the accident no worker on the top of the building was handling bolts of the same kind that allegedly struck Moreno. In short, defendants conclude, neither Moreno nor anyone else witnessed the bolt striking him, and the record shows that there is no factual basis for Moreno's inferences about where the bolt came or fell from. For these reasons, defendants argue, the record does not establish that Moreno was struck by a falling object – or that he suffered any elevation-related injury at all – and, therefore, Moreno's motion should be denied insofar as it seeks partial summary judgment for violations of Labor Law § 240 (1).

Lastly, defendants assert that Moreno is not entitled to partial summary judgment on the issue of liability pursuant to Labor Law § 241 (6). Defendants note that Moreno's Labor Law § 241 (6) claims are premised on alleged violations of Industrial Code §§ 23-1.5 (a), 23-1.5 (c), 23-1.7 (a), 23-2.6 (a) and 23-2.6 (b); defendants characterize all the allegations as unsustainable. First, defendants note that appellate decisions hold that § 23-1.5 (a) is not sufficiently specific to support a Labor Law § 241 (6) claim. Next, defendants point out that § 23-1.5 (c) requires repair or replacement of damaged "safety devices, safeguards and equipment in use" and assert that no such devices or equipment were involved in the alleged accident. Defendants then argue that this court should disregard any alleged violation of § 23-1.7 (a) relating to overhead hazards for the same reasons that plaintiff's Labor Law § 240 (1) claim lacks merit. Lastly, defendants maintain that the record does not show that §§ 23-2.6 (a) and (b), requiring nets/catch platforms were violated; and that to the contrary, the record establishes that defendants complied with

those requirements. Since every Industrial Code provision noted by Moreno is either insufficiently specific, inapplicable or has been complied with, defendants contend that Moreno's Labor Law § 241 (6) claims lack merit. Accordingly, defendants conclude, Moreno's motion should be denied insofar as it seeks partial summary judgment with respect to Labor Law § 241 (6).

Moreno's Reply

Moreno, in reply, reiterates that appellate courts have held that an injured worker who was struck by a falling object can recover damages pursuant to Labor Law § 240 (1) even if the worker did not see the object fall. Moreno acknowledges that he did not see the bolt strike him, but nevertheless asserts that ample evidence exists to suggest that the bolt fell from the building under construction. Moreno points out that it is undisputed that he suffered a fractured leg and that the subject bolt was found nearby; moreover, Moreno claims that it is sufficient that he testified that the heard the bolt fall and strike a surface. Moreno emphasizes that the bolt that struck him is the exact type of bolt that was being used to secure the movable safety fence installed near the top of the subject building; Moreno adds that it is undisputed that the fence was moved on date of the accident. In sum, Moreno characterizes the inferences made as reasonable and logical in the face of defendants contending that no accident happened. For these reasons, Moreno concludes that he is entitled to summary judgment on liability under Labor Law § 240 (1).

With respect to Labor Law § 241 (6), Moreno emphasizes that the record suggests that a metal bolt from the upper floors of the high-rise building under construction fell,

struck him, and broke his leg. Moreno claims that it is proper to infer that this accident would not have happened if adequate overhead protection and catch nets were properly deployed at relevant times. In sum, Moreno suggests that the fact that his leg was fractured and that the subject bolt was found a few feet away establishes that any safety fences or nets did not constitute adequate protection against falling objects; therefore, Moreno reasons, the record shows that defendants are responsible for the violations of Industrial Code §§ 23- 1.7 (a) (1) and (2) (requiring protection from overhead hazards) and 23-2.6 (a) and (b) (requiring catch platforms). For these reasons, Moreno concludes that he is entitled to partial summary judgment regarding defendants' liability under Labor Law § 241 (6).

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "[T]he 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 demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]). The motion

should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]).

If a movant meets the initial burden, the court must then evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [1985], *affd* 66 NY2d 701 [1985]). Parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2009], citing *Nicklas v Tedlen Realty Corp*., 305 AD2d 385 [2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1991]; *see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]); *see also Akseizer v Kramer*, 265 AD2d 356 [1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [1976]). The court must view the totality of evidence presented in the light most favorable to the nonmoving party and accord that party the benefit of every favorable inference (*see Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2019]).

The court must then evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [1987]; *Columbus Trust Co. v Campolo*, 110

AD2d 616 [1985], *affd* 66 NY2d 701 [1985]). Nevertheless, summary judgment "should not be granted where there is any doubt as to the existence of such issues or where the issue is 'arguable'; issue-finding, rather than issue-determination, is the key to the procedure" (*Sillman,* 3 NY2d at 404 [internal citations omitted]). "The court's function on a motion for summary judgment is 'to determine whether material factual issues exist, not resolve such issues'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010] quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2009]). With these principles in view, the court turns to the underlying substance of the motions.

Labor Law § 200 and Common-Law Negligence

Labor Law § 200 states, in applicable part:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment and devices in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protections to such persons."

Labor Law § 200 codifies the common-law duty of an owner, general contractor and their agents to provide workers with a safe place to work (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 850 [2006]; *Brown v Brause Plaza, LLC*, 19 AD3d 626, 628 [2005]; *Everitt v Nozkowski*, 285 AD2d 442, 443 [2001]; *Giambalvo v Chemical Bank*, 260 AD2d

432, 433 [1999]). This duty "applies to owners, contractors, or their agents who exercise control or supervision over the work, or either created the allegedly dangerous condition or had actual or constructive notice of it" (*Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000], citing *Russin v Picciano & Son*, 54 NY2d 311 [1981]; *Lombardi*, 80 NY2d at 294-295; *Jehle v Adams Hotel Assocs.*, 264 AD2d 354 [1999]; *Raposo v WAM Great Neck Assn. II*, 251 AD2d 392 [1998]; *Haghighi v Bailer*, 240 AD2d 368 [1997]). "An implicit precondition to this duty 'is that the party charged with that responsibility have the authority to control the activity bringing about the injury'" (*Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [1999], quoting *Comes*, 82 NY2d at 877 and *Russin*, 54 NY2d at 317). Labor Law § 200 and common-law negligence liability "will attach when the injury sustained was a result of an actual dangerous condition, and then only if the defendant exercised supervisory control over the work performed on the premises or had notice of the dangerous condition which produced the injury" (*Sprague v Peckham Materials Corp.*, 240 AD2d 392, 394 [1997], citing *Seaman v Chance Co.*, 197 AD2d 612 [1993]).

Given that "[c]ases involving Labor Law § 200 generally fall into two categories: those where workers were injured as a result of dangerous or defective conditions at a worksite and those involving the manner in which the work was performed" (*Villada v 452 Fifth Owners, LLC*, 188 AD3d 1292, 1293 [2020], citing *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2008] and *Ortega v Puccia*, 57 AD3d 54, 61 [2008]), the parties here dispute whether the instant matter should be analyzed as a "manner of work" case or as a "hazardous condition" case. However, the dispute is irrelevant; under either standard, Moreno's Labor Law § 200 and common-law negligence claims must be dismissed.

Under the "manner of work" analysis, "[l]iability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the work" either that was performed by plaintiff or that produced the injury (*Aranda v Park East Constr.*, 4 AD3d 315, 316 [2004], citing *Lombardi v Stout*, 80 NY2d 290, 295 [1992]). Here, the record establishes that defendants did not control or supervise Moreno, his work, or any of the STNY workers. Accordingly, if Moreno's injuries are considered a consequence of the manner of his work or of STNY's work removing or installing Doka bolts near the top of the building, defendants are not subject to liability for causes of action sounding in common-law negligence and/or for violations of Labor Law § 200 (*id.*).

Accordingly, Moreno's Labor Law § 200 and common-law negligence claims are sustainable against the defendants only if the claims are viable according to ordinary premises liability principles (*cf. Azad v 270 5th Realty Corp.*, 46 AD3d 728, 730 [2007] ["(w)here a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, an owner (or its agent) may be held liable in common-law negligence and under Labor Law § 200 if it had control over the work site and either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident"]). More specifically, Moreno suggests that the fences and nets surrounding the building were defective because they ostensibly failed to prevent a five-pound bolt from falling from the then-top of the building to ground level. However, the record contains no indication that defendants or their agents were ever informed that either the Doka system or the nets had

failed to protect against falling hazards. Therefore, the record establishes a lack of actual notice.

Similarly, the record does not contain any indication that defects, if any, in either the Doka system or the nets were visible for any appreciable length of time; accordingly, there is thus no evidence that any of the defendants had constructive notice of the allegedly dangerous condition (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986] ["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"]). Lastly, there is no indication that defendants or their agents were responsible for creating a defect in either the Doka system or the nets. Accordingly, Moreno has no viable Labor Law § 200 or common-law negligence claims against defendants.

Moreno's arguments to the contrary lack merit. As stated above, a defendant is not subject to Labor Law § 200 or common-law negligence liability unless the defendant either exercised supervisory control over the means and methods of the work performed, or either created or had notice of the allegedly dangerous condition (*Sprague*, 240 AD2d at 394). The fact that defendants here either had a duty (contractual or otherwise) to inspect the site or actually did inspect the site is insufficient to demonstrate an issue of fact as to the requisite supervision and control (*Putnam v Karaco Indus. Corp.*, 253 AD2d 457, 459 [1998] ["(a) defendant's mere presence at the worksite is insufficient to give rise to a question of fact as to the defendant's direction and control"]; *see also Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Enos v Werlatone, Inc.*, 68 AD3d 712,

713 [2009]; *Loiacono v Lehrer, McGovern, Bovis, Inc.*, 270 AD2d 464 [2000]; *Richichi v Constr. Mgt. Tech.*, 244 AD2d 540, 542 [1997]).

The fact that defendants had authority over site safety and had the right to stop work if a safety violation existed are immaterial, since the authority to enforce safety standards is insufficient to establish the supervision and control necessary to impose liability pursuant to Labor Law § 200 or common-law negligence (*Biance v Columbia Washington Ventures*, LLC, 12 AD3d 926, 927 [2004] ["(t)he retention of general supervisory control, presence at a work site, or authority to enforce safety standards is insufficient to establish the control necessary to impose liability"], citing *Shields v General Elec. Co.* , 3 AD3d 715, 716-717 [2004]; *Sainato v City of Albany*, 285 AD2d 708, 709 [2001]). More specifically, the right to generally supervise the work, stop a contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common law negligence (*Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2010]; *see also Allan v DHL Express (USA), Inc.*, 99 AD3d 828, 832 [2012]).

Lastly, Moreno suggests that the hazard must have been noticeable for an appreciable length of time, otherwise, the subject bolt could not have escaped both safety systems and fallen to the ground. However, evidence of notice of a hazard must be precise in order to create an issue of fact; general awareness of the danger of a particular condition is legally insufficient to constitute constructive notice (*see e.g. Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]), as is vague testimony that does not establish the length

of time an allegedly hazardous condition existed before the subject accident (*see e.g. Kobiashvilli v Hill*, 34 AD3d 747, 747-748 [2006]). In sum, since Moreno has not demonstrated that defendants supervised or controlled either his work, or STNY's work at the top floors, or that defendants had any notice of an allegedly hazardous condition, or that they created an alleged hazardous condition, defendants are entitled to summary judgment dismissing Moreno's Labor Law § 200 and common law negligence claims (*see e.g. Payne v 100 Motor Parkway Assoc., LLC*, 45 AD3d 550, 553 [2007]).

Labor Law § 240 (2) and § 240 (3)

In relevant part, Labor Law § 240, entitled "Scaffolding and other devices for use of employees," states:

> 2. Scaffolding or staging more than twenty feet from the ground or floor, swung or suspended from an overhead support or erected with stationary supports, except scaffolding wholly within the interior of a building and covering the entire floor space of any room therein, shall have a safety rail of suitable material properly attached, bolted, braced or otherwise secured, rising at least thirty-four inches above the floor or main portions of such scaffolding or staging and extending along the entire length of the outside and the ends thereof, with only such openings as may be necessary for the delivery of materials. Such scaffolding or staging shall be so fastened as to prevent it from swaying from the building or structure.
>
> 3. All scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use."

As defendants correctly point out, these two provisions relate to the manner in which certain scaffolding is to be constructed and the amount of weight it must be able to bear.

Since the instant action does not involve a scaffold, let alone the failure of a scaffold to bear weight, neither subdivision of Labor Law § 240 applies here (*see e.g., Viera v WFJ Realty Corp.,* 140 AD3d 737 [2016]). Indeed, by failing to address these causes of action in opposition to defendants' motion, Moreno has abandoned them (*Elam v Ryder Sys., Inc.*, 176 AD3d 675, 676 [2019], citing *Pita v Roosevelt Union Free Sch. Dist.,* 156 AD3d 833, 835 [2017]; *Palomeque v Capital Improvement Servs., LLC,* 145 AD3d 912, 914 [2016]; *Harsch v City of New York*, 78 AD3d 781, 783 [2010]). Accordingly, Moreno's claims under Labor Law § 240 (2) and § 240 (3) are dismissed.

Labor Law §§ 240 (1) and 241 (6)

Labor Law § 240 (1) states, in relevant part, that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building 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 . . ."

The purpose of Labor Law § 240 (1) is to protect workers "from the pronounced risks arising from construction work site elevation differentials" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *Rocovich v Consolidated Edison Co.,* 78 NY2d 509, 514 [1991]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a

protected task (*Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2009], *lv dismissed* 13 NY3d 857 [2009]; *see also Ienco v RFD Second Ave., LLC*, 41 AD3d 537 [2007]; *Ortiz v Turner Constr. Co.*, 28 AD3d 627 [2006]; *Lacey v Turner Constr. Co.*, 275 AD2d 734, 735 [2000]; *Smith v Artco Indus. Laundries*, 222 AD2d 1028 [1995]). The duty to provide the required "proper protection" against elevation-related risks is nondelegable; therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [holding that owner or contractor is liable under Labor Law § 240 (1) "without regard to . . . care or lack of it"]).

A successful cause of action under Labor Law § 240 (1) requires that the plaintiff establish both "a violation of the statute and that the violation was a proximate cause of his injuries" (*Skalko v Marshall's Inc.*, 229 AD2d 569, 570 [1996], citing *Bland v Manocherian*, 66 NY2d 452 [1985]; *Keane v Sin Hang Lee*, 188 AD2d 636 [1992]; *see also Rakowicz v Fashion Inst. of Tech.*, 56 AD3d 747 [2008]; *Zimmer*, 65 NY2d at 524). One of the hazards contemplated by the statute is the risk that a worker will be injured by an object falling from a height (*see e.g., Thompson v Ludovico*, 246 AD2d 642, 642-643 [1998]; *see also White v Dorose Holding*, 216 AD2d 290 [1995]; *Lanzilotta v Lizby Assocs.*, 216 AD2d 229 [1995]; *Rocovich*, 78 NY2d at 514). To recover in a "falling object" case, a plaintiff must show that the object 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 658, 662-663 [2014], quoting *Narducci v Manhasset Bay Assoc.*, 96

NY2d 259, 268 [2001] and *Outar v City of New York*, 5 NY3d 731, 732 [2005]). The plaintiff must also demonstrate that the object fell "because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268). Lastly, this statute "is to be construed as liberally as may be" to protect workers for injury (*Zimmer*, 65 NY2d at 520-521 [1985], quoting *Quigley v Thatcher*, 207 NY 66, 68 [1912]; *see also Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* 18 NY3d 1, 7 [2011] ["a defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability"]).

Next, Labor Law § 241 states, in applicable part, as follows:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements: . . .
>
> "6. All 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 commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to comply with the specific safety rules and regulations set forth in the Industrial Code in connection with construction, demolition or excavation work (*Ascencio v Briarcrest at Macy Manor, LLC*, 60 AD3d 606, 607 [2009], citing *Rizzuto*, 91 NY2d at 348; *Ross*,81

NY2d 5044, 501-502 [1993]; *Nagel v D & R Realty Corp.*, 99 NY2d 98, 102 [2002]; *Valdivia v Consolidated Resistance Co. of Am., Inc.*, 54 AD3d 753, 754 [2008]). The vicarious liability provisions of Labor Law § 241 (6) apply to owners, contractors, and their agents (*Alfonso v Pacific Classon Realty, LLC*, 101 AD3d 768, 770 [2012]), which are subject to Labor Law § 241 (6) liability irrespective of fault or negligence (*Rizzuto*, 91 NY2d at 349-350 [owner or contractor is liable without regard to fault if Labor Law § 241 (6) violation is established]).

A sustainable Labor Law § 241 (6) claim requires the allegation that defendants violated an Industrial Code provision that contains "concrete specifications" (*Ramcharan v Beach 20th Realty, LLC*, 94 AD3d 964, 966 [2012], citing *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *see also Ross*, 81 NY2d at 505) and "mandates a distinct standard of conduct, rather than a general reiteration of common-law principles" (*Rizzuto*, 91 NY2d at 349). "To support a cause of action under Labor Law § 241 (6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident" (*Rivera v Santos*, 35 AD3d 700, 702 [2006], citing *Ross*, 81 NY2d at 502; *Ares v State of New York*, 80 NY2d 959, 960 [1992]; *Adams v Glass Fab*, 212 AD2d 972 [1995]).

Here, neither Moreno nor defendants have established entitlement to judgment as a matter of law regarding either of the foregoing provisions. Contrary to Moreno's arguments, the fact that he did not see the bolt fall and strike him is sufficient for the court to deny him summary judgment on the issue of liability. In *Pazmino v 41-50 78th St. Corp.* (139 AD3d 1029 [2016]), the Appellate Division, affirming the denial of a plaintiff's

motion for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1), noted that although the plaintiff believed a piece of wood fell and struck him, at deposition "[t]he plaintiff further testified that he did not see the wood fall or where it fell from" (*id*. at 1030). For that reason, the Appellate Division stated that "[t]he evidence submitted by the plaintiff was insufficient to establish that the wood fell because of the absence or inadequacy of a safety device. The plaintiff's mere belief that the wood that struck him was a part of the hoist mechanism is insufficient to establish that it was a component of the safety device itself" (*id.*, citing *Fabrizi*, 22 NY3d at 663; *see also Podobedov v East Coast Constr. Group, Inc.*, 133 AD3d 733 [2015]; *Wysk v New York City School Constr. Auth.*, 87 AD3d 1131 [2011]; *Galvan v Triborough Bridge & Tunnel Auth.*, 29 AD3d 517 [2006]). Similarly, the court stated that "under the circumstances, including that the plaintiff did not see where the wood fell from, the plaintiff did not establish, prima facie, that his injuries were proximately caused by the absence or inadequacy of a safety device or other violation of the statute" (*id.*, citing *Podobedov*, 133 AD3d at 735-736; *Wysk*, 87 AD3d at 1132).

Pazmino is indistinguishable from the instant matter. Moreno here may infer, with good reason, that the subject bolt he and Gadson found had fallen from a Doka fence anchor and struck him. However, this inference, under *Pazmino*, is insufficient to entitle Moreno to judgment as a matter of law. Since inferences must be made before a conclusion that the bolt fell and struck Moreno can be established, summary judgment is unwarranted, and the circumstance of his accident must be resolved by the trier of fact. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences

from the facts are jury functions, not those of a judge . . . on a motion for summary judgment" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314-315 [2004], quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 [1986]; *see also Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]; *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2002]). Since neither Moreno nor any other witness saw the subject bolt strike Moreno, his summary judgment motion is denied on the issue of Labor Law § 240 (1) liability (*Pazmino*, 139 AD3d 1029-1031).

The same facts establish that Moreno has not conclusively demonstrated that defendants violated an applicable provision of the Industrial Code, and, as such, Moreno is not entitled to partial summary judgment under Labor Law § 241 (6) (*see e.g.*, *Wysk*, 87 AD3d 1131 [holding that lower court correctly denied plaintiff summary judgment on Labor Law § 241 (6) among other sections because plaintiff did not see object that struck him fall or know how it fell]). Therefore, Moreno's motion is denied insofar as it seeks partial summary judgment on the issue of liability under Labor Law § 241 (6) (*Wysk*, 87 AD3d 1131).

However, defendants are also not entitled to summary judgment dismissing the plaintiff's Labor Law § 240 (1) and § 241 (6) claims. As stated above, it can reasonably be inferred that the subject bolt had fallen from a Doka fence anchor before it struck Moreno[15] and, therefore, the determination of how the accident occurred is reserved for the

[15] Defendants' contention that a five-pound bolt, falling from approximately 50 floors above would strike Moreno and/or the ground with enough force to injure Moreno or the ground more severely, disregards the possibility that the bolt did not fall straight down to the ground without deflection or redirection. Indeed, it is a plausible assumption that the speed of the falling object was slowed

trier of fact (*Forrest*, 3 NY3d at 314-315). Although Moreno is not entitled to summary judgment for the reasons given, it is also true that defendants have failed to make a prima facie showing that they did not violate Labor Law § 240 (1) or that Moreno's injuries were not caused by any violation of the statute. They submitted no evidence that controverted Moreno's testimony that he was struck by material dropped by [workers] above him (*Salcedo v Sustainable Energy Options, LLC*, 190 AD3d 439, 439 [2021], citing *Delgado v Martinez Family Auto*, 113 AD3d 426, 427 [2014]). "Contrary to defendants' contention, Moreno is not required to show the exact circumstances of the fall of the material (*Salcedo*, 190 AD3d at 439, citing *Vargas v City of New York*, 59 AD3d 261 [2009]; *Humphrey v Park View Fifth Ave. Assoc. LLC*, 113 AD3d 558 [2014]; *Mercado v Caithness Long Is. LLC*, 104 AD3d 576, 577 [2013]). For the purposes of summary judgment, the fact that the bolt could plausibly have fallen from the Doka fences above Moreno and consequently struck him is sufficient to defeat defendants' motion (*id.*).

Similarly, to successfully oppose a motion for summary judgment dismissing a Labor Law § 241 (6) claim, a plaintiff must cite an applicable provision of the Industrial Code that contains concrete specifications with which owners and contractors must comply (*Donovan v S & L Concrete Constr. Corp., Inc.*, 234 AD2d 336, 337 [1996]). Here, Moreno alleges that defendants violated (among other provisions) Industrial Code § 23–1.7 (a) ("Overhead hazards"), which states that:

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due to colliding with the building, the nets, or other objects. Also plausible is that the bolt had previously fallen from the top of the building to a lower level (but still higher than ground level), came to rest, and then fell again, this time reaching the ground.

> (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.
>
> (2) Where persons are lawfully frequenting areas exposed to falling material or objects but wherein employees are not required to work or pass, such exposed areas shall be provided with barricades, fencing or the equivalent in compliance with this Part (rule) to prevent inadvertent entry into such areas.

This provision of the Industrial Code is sufficiently specific to support a Labor Law § 241 (6) claim and is applicable to the facts of this case (*Zervos v City of New York*, 8 AD3d 477, 480 [2004] [sustaining lower court's denial of summary judgment dismissing Labor Law § 241 (6) claim on overhead protection grounds], citing *Ross*, 81 NY2d 494 [1993]; *O'Hare v City of New York*, 280 AD2d 458 [2001], *Belcastro v Hewlett-Woodmere Union Free School Dist. No. 14*, 286 AD2d 744 [2001]). Given that a reasonable inference can be made that plaintiff was struck by a falling bolt, defendants' motion to dismiss Moreno's Labor Law § 241 (6) claims must be denied.[16] Accordingly, it is hereby

[16] Defendants' suggestion that this court should summarily determine that Moreno is not credible is rejected as meritless. "It is not the court's function on a motion for summary judgment to assess credibility" (*Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]; *see also Scott v Long Is. Power Auth.*, 294 AD2d 348 [2002]). "The credibility of the witnesses, the truthfulness and accuracy of the testimony, whether contradicted or not, and the significance of weaknesses and discrepancies are all issues for the trier of facts" (*Sorokin v Food Fair Stores*, 51 AD2d 592, 593 [1976]).

ORDERED that defendants' summary judgment motion (mot. seq. two) is granted to the extent that Moreno's claims pursuant to Labor Law §§ 200, 240 (2), 240 (3) and common-law negligence are dismissed; and the motion is otherwise denied; and it is further

ORDERED that Moreno's summary judgment motion is denied.

This constitutes the decision and order of the court.

E N T E R,

Hon Debra Silber, J.S.C.