Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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DIEGO RAMIRO GUAMAN VIVANCO,

Plaintiff(s),

- against -

VS 125 LLC, PLAZA CONSTRUCTION LLC, and TOTAL SAFETY CONSULTING LLC,

Defendant(s).

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Index No.: 710527/18

Motion Date: 7/27/21

Motion Cal. No.: 32

Motion Seq. No.: 6

The following papers numbered 1 - 9 read on this motion by defendants VS 125 LLC and Plaza Construction LLC for summary judgment dismissing the complaint as against them.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits-Service	1 - 4
Affirmation in Opposition-Service	5 - 6
Reply Affirmation-Exhibits-Service	7 - 9

Upon the foregoing papers, it is **ORDERED** that the above-referenced motion is decided as follows:

Plaintiff, a laborer hired by non-party Structure Tech New York, Inc. (hereinafter, "STNY"), allegedly sustained injuries on September 29, 2017 when he fell while moving rebar. The accident occurred at 125 Greenwich Street in New York, New York (hereinafter the construction site). Defendant VS 125 LLC, owner of the construction site, hired defendant Plaza Construction LLC (hereinafter, "Plaza") and non-party Time Square Construction, Inc. as construction managers. VS 125 LLC and Plaza (hereinafter, collectively, "defendants") now move for summary judgment dismissing plaintiff's claims brought under common law negligence and Labor Law §§ 240 (1), 241 (6) and 200.

"On a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party." (*Sage v Taylor*, 195 AD3d 971 [2d Dept 2021], *quoting Gobin v Delgado*, 142 AD3d 1134, 1135 [2d Dept 2016].) The court's function is to

determine whether material factual issues exist, not to resolve them. (*See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Doyle v Wieber*, 194 AD3d 785 [2d Dept 2021].) "Summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility.'" (*Kaziu v Human Care Servs. for Families & Children, Inc.*, 167 AD3d 588, 588 [2d Dept 2018], *quoting Ruggiero v DePalo*, 153 AD3d 870, 872 [2d Dept 2017].)

Labor Law § 240 (1)

"Labor Law § 240 (1) imposes a non-delegable duty … upon owners and general contractors and their agents to provide safety devices necessary to protect workers from risks inherent in elevated work sites." (*Reyes v Astoria 31st St. Developers, LLC*, 190 AD3d 872 [2d Dept 2021], *quoting Von Hegel v Brixmor Sunshine Sq., LLC*, 180 AD3d 727, 728 [2d Dept 2020].) "Whether a plaintiff is entitled to recovery under Labor Law § 240 (1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies." (*Garbett v Wappingers Cent. Sch. Dist.*, 160 AD3d 812, 814 [2d Dept 2018], *quoting Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011].)

In support of their motion, defendants appended, *inter alia*, the deposition testimony of STNY's foreman, Luis Lema, who testified that he was plaintiff's foreman and supervisor, and plaintiff was a member of STNY's laborer group. He stated that the accident occurred on the second floor and plaintiff was moving rebar at the time. Prior to the accident, plaintiff and Lema's crew placed plywood over the rebar grid. Lema averred that he and his crew stood on top of the plywood, and without walking, they passed rebar along. The rebar was about 18 to 20 feet long. Lema further testified that he stood next to plaintiff and saw plaintiff's right foot slip backward off the plywood and fall through the rebar grid beneath.

Lema estimated the space in the rebar grid to be about one foot per one foot and twelve to 18 inches deep. Lema averred that the plywood did not move while the men were standing on top and that plaintiff was standing and not walking when rebar was being passed. Lema further testified that plaintiff did not fall after putting his foot through the rebar grid, but instead came to a crouching position for a minute or two, and then sat down on the surface. After the accident, Lema recalled going to the basement with plaintiff to speak to nonparty David Farrell, and plaintiff was able to walk to the basement without any help.

However, plaintiff provided a different account of how the accident occurred. According to his deposition testimony, also

submitted with defendants' moving papers, he was working on the third floor at the time of his accident. He stated that he was instructed to carry rebar on the third floor, from one side of the building to the other side. He recalled transporting rebar with six other men by carrying rebar in his arms while walking along plywood on the ground. While walking and carrying the seventh rebar, he felt the plywood beneath him move backward and he lost his footing. As a result, his left foot went into a hole in between two pieces of plywood and the rebar he was holding, which plaintiff estimated to be 36 feet long, fell on his right leg, causing his whole body to fall into the rebar grid. He estimated the depth between the top and lower rebar grid to be four to five feet and that two working boots could fit in the rebar grid square. Plaintiff averred that after his fall, he could not walk, and approximately five laborers moved the rebar off of him and another five helped him up. He then went to the first floor to file a report but he needed help getting downstairs. Plaintiff recalled getting to the second floor by "hugging the person to help [him] walk because [he] couldn't stand," and someone else carried him to from the second floor to the first floor.

The deponents gave inconsistent accounts of the accident. (*See Lozada v St. Patrick's R C Church*, 174 AD3d 879, 881 [2d Dept 2019]; *McRae v Venuto*, 136 AD3d 765 [2d Dept 2016].) Since defendants failed to eliminate all triable issues of fact as to where and how the alleged accident occurred, this branch of their motion is denied regardless of the sufficiency of the opposing papers. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Bonilla-Reyes v Ribellino*, 169 AD3d 858, 860 [2d Dept 2019].)

Labor Law § 241 (6)

Labor Law § 241 (6) provides that:

> "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."

"Labor Law § 241 (6) imposes a non-delegable duty upon an owner and general contractor to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." (*Cruz v 1142 Bedford Ave., LLC*, 192 AD3d 859, 862 [2d Dept 2021], *see Carlton v City of New York*, 161 AD3d 930, 934 [2d Dept 2018].) To prevail on a cause of action under this statute, "plaintiff must demonstrate that his or her injuries were

proximately caused by a violation of an Industrial Code regulation that is applicable to the circumstances of the accident." (*Yaucan v Hawthorne Vil., LLC*, 155 AD3d 924, 926 [2d Dept 2017]; *see Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 878 [1993].)

Plaintiff's pleadings assert that defendants violated various sections of the Industrial Code. Plaintiff has opposed this branch of defendants' motion solely with regard to 12 NYCRR 23-1.7 (b) (1) (I), thereby, effectively abandoning those remaining violations by failing to demonstrate that said specific regulations applied to the facts herein, and that they were violated.

12 NYCRR 23-1.7 (b) (1) (I), provides the following: "Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)." Defendants argue that the hole into which plaintiff allegedly fell in this case was not a hazardous opening within the meaning of this section.

While this section of the Industrial Code is sufficiently specific to support a Labor Law § 241 (6) claim (*see Palumbo v Tr. Tech., LLC*, 144 AD3d 773, 774 [2d Dept 2016]; *Barillaro v Beechwood RB Shorehaven, LLC*, 69 AD3d 543, 544 [2d Dept 2010],) defendants failed to eliminate issues of fact as to the size of the opening in the rebar grid and whether this regulation is applicable. Consequently, this branch of defendants' motion seeking summary judgment predicated upon Labor Law § 241 (6), to the extent that it is predicated upon a violation of 12 NYCRR 23-1.7 (b) (1) (I), is denied regardless of the sufficiency of the opposition papers. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853; Kavouras v Steel-More Contr. Corp., 192 AD3d 782, 785 [2d Dept 2021].)

Labor Law § 200

"Labor Law § 200 codifies the common-law duty of an owner or contractor to provide employees with a safe place to work." (*Leon-Rodriguez v R.C. Church of Saints Cyril and Methodius*, 192 AD3d 883, 886 [2d Dept 2021], see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993].) Under this statute, owners and contractors may be liable for injuries to workers where they supervised or controlled the work which caused the injury. (*See Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505; *Lombardi v Stout*, 80 NY2d 290, 295 [1992].) "[T]he right to generally supervise the work, stop the 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." (*Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 698 [2d Dept 2016], *quoting Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2d Dept 2010]; *Guallpa v Canarsie Plaza,*

LLC, 144 AD3d 1088 [2016]; *Messina v City of New York*, 147 AD3d 748 [2d Dept 2017].) Similarly, a duty to coordinate the contractors on the site and direct where to work on a given day does not rise to the level of supervision or control predicating liability under Labor Law § 200. (*See Loiacono v Lehrer McGovern Bovis, Inc.*, 270 AD2d 464 [2d Dept 2000].)

Claims brought under this section generally fall into two categories: those where workers were injured as a result of dangerous or defective conditions at a work site and those involving the manner in which the work was performed. (*Kearney v Dynegy, Inc.*, 151 AD3d 1037, 1039 [2d Dept 2017]; *Korostynskyy v 416 Kings Hwy., LLC*, 136 AD3d 758 [2d Dept 2016].) Where, as here, "a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that she or he had the authority to supervise or control the performance of the work." (*Villada v 452 Fifth Owners, LLC*, 188 AD3d 1292, 1294 [2d Dept 2020]; *see Crichigno v Pacific Park 550 Vanderbilt, LLC*, 186 AD3d 664, 665 [2d Dept 2020].)

Defendants demonstrated that they did not have the authority to supervise or control plaintiff's work. Michael Chiodo, trade project manager for Plaza, affirmed in his affidavit that defendants Plaza and Time Square Construction, Inc., were construction managers for the construction site, and STNY was a subcontractor. He averred that STNY "devised the way in which its work was to be done" and "supervised the means and methods of STNY's work." Similarly, Lema testified at his deposition that he was the only person who supervised plaintiff's work. Plaintiff also stated at his deposition that he received daily work instructions from Lema. Thus, defendants established their *prima facie* entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 200. (*See Boody v El Sol Contr. & Constr. Corp.*, 180 AD3d 863 [2d Dept 2020]; *Babcock v Orange & Rockland Util., Inc.*, 179 AD3d 882 [2d Dept 2020]; *Pchelka v Southcroft, LLC*, 178 AD3d 836 [2d Dept 2019]; *Clark v FC Yonkers Assoc., LLC*, 172 AD3d 1159 [2d Dept 2019].) As plaintiff does not oppose this branch of defendants' motion, this claim is deemed abandoned. (*See Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003].)

The parties' remaining arguments and contentions are either without merit, or need not be addressed in light of the foregoing determinations.

Accordingly, the branch of defendants' motion for summary judgment dismissing plaintiff's claim brought under Labor Law § 240 (1) is denied. The branch of defendants' motion dismissing plaintiff's claim brought under Labor Law § 241 (6) is also denied to the extent that it is predicated upon a violation of 12 NYCRR

23-1.7 (b) (1) (I). The remaining branches of defendants' motion dismissing plaintiff's claims brought under common law negligence and Labor Law §§ 200 and 241 (6) are granted.

The foregoing shall constitute the decision and order of this court.

Dated: January 7, 2021

JANICE A. TAYLOR, J.S.C.

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