Tisselin v Memorial Hosp. for Cancer & Allied Diseases
2022 NY Slip Op 32919(U)
August 26, 2022
Supreme Court, New York County
Docket Number: Index No. 159986/2016
Judge: Francis A. Kahn III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS KAHN, III** **PART** **32**

Justice

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INDEX NO. 159986/2016

FRISNER TISSELIN, JOCELYN TISSELIN,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 003 004

- v -

MEMORIAL HOSPITAL FOR CANCER AND ALLIED DISEASES, TURNER CONSTRUCTION COMPANY, SAFWEWAY ATLANTIC, LLC.,

DECISION + ORDER ON MOTION

Defendant.

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TURNER CONSTRUCTION COMPANY, SAFWEWAY ATLANTIC, LLC.

Third-Party
Index No. 595409/2019

Plaintiff,

-against-

FUTURE TECH CONSULTANTS OF NEW YORK, INC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 106, 107, 108, 110, 115, 116, 117, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 134

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 109, 111, 112, 113, 114, 118, 130, 131, 132, 133, 135

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

Upon the foregoing documents the motions and cross-motion are determined as follows:

In this action Plaintiff, Frisner Tisselin ("Tisselin"), seeks to recover for injuries sustained when riding in a personnel hoist he was struck in the head by an access ladder which fell from approximately 8 feet. The accident occurred at a premises being constructed at 530 East 74th Street, New York, New York . At the time, Tisselin was employed by Third-Party Defendant Future Tech Consultants Of New York, Inc. ("Future Tech") as a project manager. Defendant Memorial Hospital for Cancer and Allied Diseases ("Memorial") was the owner of the premises and contracted with Defendant Turner Construction Company ("Turner") to act as the construction manager on the project. Defendants

Safeway Atlantic, LLC. ("Safeway") was retained by Turner to be a subcontractor on the project. Safeway installed the personnel hoist where Plaintiff's accident occurred.

Plaintiff alleges that on September 13, 2016, he was riding in the personnel hoist from the first to the second floor when the access ladder, which was bolted to the ceiling of the personnel hoist, detached, fell, and struck Plaintiff in the head. In his complaint, Plaintiff pleads causes of action against Memorial, Turner and Safeway under Labor Law §§240[1], 241[6] and 200, as well as for common-law negligence. All Defendants commenced a third-party action against Future Tech seeking, *inter alia*, common-law, and contractual indemnification. The third-party action was later discontinued by stipulation (NYSCEF Doc No 136).

Now, all parties file motions for summary judgment. Defendants move (Motion Seq No 3) for summary judgment dismissing Plaintiff's complaint. Plaintiff did not technically file opposition, rather he filed his own motion for summary judgment which contains arguments in support which counter certain of Defendants' arguments. Future Tech cross-moves for summary judgment, but that motion is now moot. Plaintiff moves (Motion Seq No. 4) for summary judgment on the Labor Law §240[1] cause of action against Memorial and Turner. Memorial and Turner oppose the motion.

Plaintiff's Deposition

Plaintiff testified that he started working for Future Tech in 2006. On the day of the accident, he held the position of project supervisor and reported to the project manager employed by Future Tech. He described his duties as engineering inspection and managerial tasks. The latter included closing the job, attending meetings, and performing final inspection for Future Tech. Plaintiff averred that he did not perform manual labor as part of his job.

Plaintiff stated that the construction project at issue began in 2014 and he was assigned there in April 2016. He had an office at the site, reported there every day and typically worked from 7:00 am to 3:30 pm. Plaintiff said he attended weekly safety meetings but had no supervisory responsibility for safety at the project. His role concerned the superstructure, the steel, rebar and concrete at the project.

On the morning of the incident, Plaintiff checked the installation of rebar in the shear wall located in the core of the building in advance of concrete that was to be poured that day. At the time, the building under construction had reached the fifth floor of the planned twenty-five. His inspection lasted until 10:00 am or 11:00 am, when the pour began and continued throughout the remainder of the day.

Plaintiff testified that the incident occurred at approximately 2:00 pm as the pour continued. Plaintiff stated he was riding in the personnel hoist, which is a temporary elevator installed for use during the construction. Plaintiff stated he was wearing a hard hat and was in the hoist with the driver and a concrete worker. He averred that at the top of the personnel hoist was a ladder which existed to provide hoist workers access to perform maintenance on the motor which powers the hoist. Plaintiff described the personnel hoist as approximately 15 to 18 feet in height. Plaintiff testified that while riding the hoist from the first to second floor, he was struck in the head and shoulder by the ladder, which weighed approximately 75 pounds, and rendered unconscious. He stated that the ladder partially detached, and a portion fell roughly 7 to 8 feet. After the accident, Plaintiff was removed from the site by stretcher and transported by ambulance to the hospital.

Steven Schefler -- Turner Construction

Steven Schefler ("Schefler"), an employee of Turner, testified that he was an Area Site Safety Manager on the day of the incident. He stated that Memorial retained Turner to execute construction of a new building at the premises, about 450 feet in height, with some 22 occupiable floors. Turner retained various subcontractors who performed the physical construction. Schefler averred that, at the time, he was only assigned to the subject project. As part of his duties, Schefler would prepare a written daily safety report/log. In addition, he would receive daily logs from multiple "area supervisors" employed by Turner. Schefler testified that one, Patrick Clancy, "was in charge of all the temporary structures, a temp hoist, overhead protection, anything to do with Safeway." This included the personnel lift where Plaintiff's accident occurred.

Schefler averred that Plaintiff was employed by Future Tech and that its role was as inspectors on the project. In addition to the subject hoist, which was identified as either "car one" or "car A", there were three additional hoists at the site, one similar in size to the subject hoist and two other larger hoists, which were needed lift materials. He stated that Turner engaged Safeway to install the hoists at the premises. Schefler testified that he was present after Plaintiff's accident and prepared a written incident/accident report which contained all of his findings. He acknowledged preparing the information in a box in the report under the title incident description. That description is as follows:

> Worker was riding in hoist (car "A") when the service ladder that is mounted on the ceiling came down onto his head. The worker was wearing his hard hat. The weight of the ladder is approx.. 75 pounds. After further investigation it was discovered that the washer that is welded to the rung of the ladder broke at the weld. Only the front part of the ladder fell. The other end stayed up as it is hinged. The worker was removed by ambulance and all test [sic] were negative and he was released that night.

Schefler stated that the hoist operators were Turner employees and that the other worker on the hoist with Plaintiff was a concrete worker for Pinnacle named Henry. He spoke to Henry after the accident who confirmed how the accident occurred. Schefler claimed that this type of accident was the first of its kind to occur on the project. He stated that Clancy, and for that matter Turner, did not perform inspections of the hoist and that task was Safeway's responsibility. Schefler averred that Safeway provided Turner with written maintenance reports/logs about the hoists on a quarter-annual basis.

Albert Leon – Safeway

Albert Leon ("Leon"), an employee of Safeway, testified that he was a hoist mechanic at the site when the incident occurred. He described a hoist as an outside elevator which is used at construction sites. Leon did not know whether Safeway installed any of the hoists at the site, but he acknowledged it was his responsibility to maintain them. Leon had no knowledge of the accident and did not recall being summoned to repair a hoist on September 13, 2016.

Leon identified that a hoist elevator that was depicted in a photograph marked as Exhibit 2. Within that photograph he noted the presence of an "escape ladder" which would be used to exit the hoist. Leon testified that the ladder is folded when stored and is affixed to the roof of the hoist by a bolt through the roof. He noted that such a ladder could be secured by a wing nut or piece of chain. Leon

stated that hoists were inspected by Safeway employees every 90 days which consisted of "mainly" drop tests. Such examinations also included the switches, safety features on the hoists and the escape ladders. The inspection of the ladders is visual and encompasses the wing nut, washer and bold that secures it to the roof. However, there is no written record of the ladder inspection made.

Dennis Pagliano – Future Tech

Dennis Pagliano ("Pagliano"), an employee of Future Tech, testified that he was a project manager at the site on the day of the incident. He stated that Plaintiff was the project supervisor, a role which included, in addition to inspections, dealing with construction managers on a project. Pagliano described Future Tech's role as performing "special inspections for New York City building departments as a third-party inspector". Their purpose was to provide information to the Buildings Department to approve ongoing aspects of the project and to obtain its sign-off when the work is completed. He also agreed that Future Tech's employees were involved in "observing and analyzing the construction that other tradesmen [were] doing". Overall, Pagliano estimated that Future Tech inspected some 40 different items in the project. However, they were not obligated to inspect the hoists. He stated that daily written inspection reports were provided to Turner. Pagliano testified that he learned of Plaintiff's accident either the day of or the day after it occurred. He was aware the Plaintiff was "looking at the steel reinforcement" that day, which was his day-to-day role at that time period.

Discussion

"[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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], *citing Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hospital*, 68 NY2d at 324). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of triable material issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]).

"Labor Law § 240(1) imposes 'upon owners, contractors, and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work' for failure to provide workers proper protection from elevation-related hazards" (*Aslam v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 135 AD3d 790, 791 [2d Dept 2016] *quoting Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]). "The purpose of the statute is to protect workers… 'from the pronounced risks arising from construction work site elevation differentials'" (*Villa v East 85th Realty, LLC*, 189 AD3d 1661 [2d Dept 2020] *quoting 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]). Generally, the protections of the statute are triggered where a worker's "task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against" (*Soto v J.Crew Inc.*, 95 AD3d 721, 722 [1st Dept 2012] *quoting Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]). "[L]iability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Kebe v Greenpoint-Goldman Corp.*, 150 AD3d 453, 453-454 [1st Dept 2017] *quoting Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

Defendants challenge whether Plaintiff was a "covered worker" at the time of his accident. To come with the special class of persons for whom the Labor Law was created a "plaintiff must demonstrate that he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent" (*Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971 [1979]). Labor Law §240[1] further requires that protections extend to "person[s] so employed" in "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (*see Eliassian v G.F. Constr., Inc.,* 163 AD3d 528, 529 [2d Dept 2018]; *DeSimone v City of New York,* 121 AD3d 420 [1st Dept 2014]; *Blandon v Advance Contr. Co.*, 264 AD2d 550, 552 [1st Dept 1999]).

"[A]n individual need not actually be engaged in physical labor to be entitled to coverage under the Labor Law" (*Coombs v Izzo Gen. Contr., Inc.*, 49 AD3d 468, 468 [1st Dept 2008]). "Expressed more pointedly, the statute may be applicable 'despite the fact that the particular job being performed at the moment [a] plaintiff was injured did not in and of itself constitute construction'" (*Campisi v Epos Contr. Corp.*, 299 AD2d 4, 6 [1st Dept 2002], *citing Covey v Iroquois Gas Transmission Sys.*, 218 AD2d 197, 199 [3d Dept 1996]). Stated differently, a plaintiff must "perform work integral or necessary to the completion of the construction project" (*Coombs v Izzo Gen. Contr., Inc.* supra) or be "a member of a team that undertook an enumerated activity under a construction contract" (*Prats v Port Auth.*, 100 NY2d 878, 882 [2003]).

In the present case, Plaintiff was not employed by an entity performing physical work and his role was inspection of the work performed by other trades. Nevertheless, Future Tech was contracted to provide inspection services at a location where a building was being erected, which was necessary for both individual aspects of the work to proceed and to obtain approval of the Buildings Department throughout the project, including its conclusion. Plaintiff's overall role at the work site, as a project supervisor responsible for, on the day of the accident, inspection of structural rebar before concrete was poured, was integral to Future Tech's contracted work. As such, Plaintiff's work was a covered activity under the Labor Law (*see Campisi v Epos Contr. Corp.*, supra; *see also Eliassian v G.F. Constr., Inc.*, 190 AD3d 947, 948 [2d Dept 2021]; *Channer v ABAX Inc.*, 169 AD3d 758, 760 [2d Dept 2019]; *DeSimone v City of New York*, supra; *Longo v Metro-North Commuter R.R.*, 275 AD2d 238 [1st Dept 2000]). Moreover, that he was not engaged in inspection work at the exact moment of his accident is of no moment as "injuries sustained while a worker was on site, although entering or exiting the site, or on a break, come within the protections of Labor Law § 240 (1)" (*Hoyos v NY-1095 Ave. of the Ams., LLC*, 156 AD3d 491, 495 [1st Dept 2017]; *Crutch v. 421 Kent Dev.*, 192 AD3d 977, 980 [2d Dept 2021]).

Defendants also argue that the accident was not amongst the category of hazards under Labor Law §240[1]. As drafted, Labor Law §240[1] does not "specify the [precise] hazards to be avoided" (*Rocovich v Consolidated Edison Co.*, 78 NY 2d 509, 513 [1991]). The Court of Appeals has held that the activities covered under the statute "all entail a significant risk inherent in the particular task because of the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured" (*id.* at 514). To prevail on it motion, Defendants must demonstrate that Plaintiff "was exposed to the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law §240[1]" (*see Toefer v Long Island R.R.*, 4 NY3d 399, 407 [2005] *quoting Rodriguez v Margaret Tietz Ctr. For Nursing Care, Inc.*, 84 NY2d 841, 843 [1994]).

Defendants posit that the ladder which detached, fell and struck Plaintiff was "permanently affixed" to the personnel hoist and therefore is not a cover hazard under the Labor Law. To constitute a "falling object" under the statute "the plaintiff must demonstrate that at the time the object fell, it either

was being 'hoisted or secured' . . . or 'required securing for the purposes of the undertaking' [citations omitted]" (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662-663 [2014]). This is because "not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law §240[1]" (*Narducci v Manhasset Bay Assoc.*, supra at 267). Thus, the "worker must establish that the object fell *because of* the inadequacy or absence of a *safety device* of the kind contemplated by the statute [emphasis added]" (*Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 418 [1st Dept 2014], *citing Fabrizi v 1095 Ave. of the Ams., L.L.C.*, supra at 663).

Defendants' attempt to analogize this action to cases involving the collapse of permanent structures, including fixed ladders not proving sole access to the work site (*see Griffin v. N.Y. City Transit Auth.*, 16 AD3d 202 [1st Dept 2005), is inapposite. The deposition testimony established that the personnel hoist was a temporary installation for use during the construction, not a permanent part of the building under construction. Indeed, had the hoist mechanism failed entirely causing Plaintiff to fall, liability would exist despite the so-called "permanency" of the hoist (*see eg Rich v West 31st St. Assoc., LLC,* 92 AD3d 433, 434 [1st Dept 2012]; *Montero v Myrtle Ave. Bldrs.*, LLC, 42 Misc. 3d 1219(A) [Sup Ct Kings Cty]).

Rather, "[w]hat is essential to a conclusion that an object requires securing is that it present a foreseeable elevation risk in light of the work being undertaken" (*see Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 270 [1st Dept 2007]). Here, there is no evidence that Plaintiff was injured in an area ordinarily exposed to falling material or objects or that there was some advance indication of a problem with the fixation of the ladder (*see Garcia v DPA Wallace Ave. I, LLC*, 101 AD3d 415, 416 [1st Dept 2012]; *Doucoure v Atlantic Dev. Group, LLC*, 18 AD3d 337, 339-340 [1st Dept 2005]; *Buckley v Columbia Grammar & Preparatory*, supra; *see also Morera v New York City Tr. Auth.,* 182 AD3d 509, 510 [1st Dept 2020]). Likewise, the bolt, washer, and wing nut which retained the ladder was not a safety device under the statute. Safety devices "predominantly concern those used on elevated work sites" (*Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 491 [1995]) and fall into two main types: [1] those used to protect workers "in gaining access to or working at sites where elevation poses a risk" and [2] devices "used for lifting or securing loads and materials employed at work" (*id.* at 513-514). Here, there is no proof the fixation that failed was meant to function as a safety device in the same manner as the enumerated safety devices under the statute (*see Blake v Brookfield Props. One WFC Co., LLC,* 180 AD3d 422, 423 [1st Dept 2020]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820 [2d Dept 2017]).

Accordingly, Plaintiff's claim pursuant to Labor Law §240[1] fails as a matter of law.

Defendants do not contend Plaintiff is not a covered worker under Labor Law §241[6].[1] Instead, Defendants posit that none of the Industrial Code sections relied upon by Plaintiff are applicable. To establish liability on a Labor Law §241[6], a claimant must demonstrate that their injuries were proximately caused by a violation of the Industrial Code applicable to the situation (*see Reyes v Astoria 31st Street Developers, LLC*, 190 AD3d 872 [2d Dept 2021]; *Ortega v Roman Catholic Diocese of Brooklyn, N.Y.*, 178 AD3d 940 [2d Dept 2019]; *Melchor v Singh*, 90 AD3d 866, 870 [2d Dept 2011]; *see also Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). Each section of the Industrial Code relied upon by a claimant must be a "concrete specification" "mandating a distinct standard of conduct" and "not merely a restatement of common-law principles" (*see Becerra v Promenade Apartments Inc.*, 126 AD3d 557, 558 [1st Dept 2015], *quoting Misicki v Caradonna, supra and Ross v Curtis-Palmer Hydro-Elec.*

[1] Even if they had proffered such a claim, it would fail based upon the Court's determination above (*Whelen v Warwick Val. Civic & Social Club*, supra).

Co., supra; *see also Alberto v DiSano Demolition Co., Inc.*, 194 AD3d 607 [1st Dept 2021]). Although comparative fault is a viable defense to a Labor Law §241[6] cause of action (*see Drago v TYCTA*, 227 AD2d 372 [2d Dept 1996]), a claimant is not required to demonstrate freedom from comparative fault on a motion for summary judgment (*see Ortega v Roman Catholic Diocese of Brooklyn, N.Y.*, supra; *see also Rodriguez v City of New York*, 31 NY2d 312, 313 [2018]). To be entitled to summary judgment dismissing such a claim, a defendant is required to show that all the sections pled by plaintiff are not concrete, inapplicable or did not cause the injury (*see generally Spencer v Term Fulton Realty Corp.*, 183 AD3d 441, 442 [1st Dept 2020]; *Armental v 401 Park Ave. S. Assoc., LLC*, 182 AD3d 405, 407 [1st Dept 2020]).

In support of the motion, Defendants demonstrated that all the Industrial Code sections cited by Plaintiff were either inapplicable or insufficiently specific to be actionable. Plaintiff raised no argument in opposition on this branch of the motion and, therefore, abandoned reliance on these claims (*see Murphy v. Schimenti Constr. Co., LLC*, 204 AD3d 573 [1st Dept 2022]).

Accordingly, Plaintiff's claim pursuant to Labor Law §241[6] fails as a matter of law.

Labor Law §200 is a codification of the common-law duty of landowners and general contractors, as well as their agents, to provide a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d at 352). "A claim for common-law negligence may lie even though there is no Labor Law § 200 liability" (*Mullins v Ctr. Line Studios*, 194 AD3d 421, 422 [1st Dept 2021]). "Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). Although "[t]hese two categories should be viewed in the disjunctive" (*Ortega v Puccia*, 57 AD3d 54 [2d Dept 2008]), meaning that cases ordinarily fall into one category or another, this principle is not absolute and a plaintiff may claim that an accident was caused by both a defect in the premises and the manner in which the work was performed (*see eg Mitchell v Caton on the Park, LLC*, 167 AD3d 865, 867 [2d Dept 2018])

Where the accident is a consequence of a defective condition on a premises "'a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice'" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], *citing Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]). "A contractor may be liable in common-law negligence and under Labor Law § 200 in cases involving an allegedly dangerous premises condition 'only if it had control over the work site and either created the dangerous condition or had actual or constructive notice of it'" (*Doto v Astoria Energy II, LLC*, 129 AD3d 660 [2d Dept 2015], *citing Martinez v City of New York*, 73 AD3d 993, 998 [2d Dept 2010]; *see also Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Here, the condition at issue, a failed nut, washer and wing nut, must be analyzed under the dangerous condition standard as it "was not part of the work plaintiff was performing" (*DeMercurio v 605 W. 42nd Owner LLC*, 172 AD3d 467 [1st Dept 2019]; *see also Armental v 401 Park Ave. S. Assoc., LLC*, 182 AD3d 405 [1st Dept 2020]; *Radeljic v Certified of N.Y., Inc.*, 161 AD3d 588 [1st Dept 2018]; *Prevost v One City Block LLC*, 155 AD3d 531 [1st Dept 2017]).

Defendants, therefore, were required to demonstrate, *prima facie*, that one or more of the essential elements of these claims are negated as a matter of law (*see Poon v Nisanov,* 162 AD3d 804 [2nd Dept 2018]; *Nunez v Chase Manhattan Bank,* 155 AD3d 641 [2nd Dept 2017]). Therefore, all Defendants were required to show they did not create the hazardous condition (*see eg Ceron v Yeshiva Univ.*, 126 AD3d 630, 632 [1st Dept 2015]). An owner must also demonstrate it did not have actual or constructive notice of that condition for a sufficient length of time to discovery and remedy same (*id.*). A contractor or subcontractor is only required to show it lacked constructive notice if it had the authority to supervise a plaintiff's work or the work area in general (*see Doto v Astoria Energy II, LLC*, supra; *Poracki v St. Mary's Roman Catholic Church*, supra). To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant's employee to discovery and remedy it (*see Johnson v 101-105 S. Eighth St. Apts. Hous. Dev. Fund Corp.,* 185 AD3d 671 [2d Dept 2020]; *see also Gordon v American Museum of Natural History, supra).*

Defendants established, with the deposition testimony and inspection report dated August 30, 2016, that Memorial, Turner and Safeway lacked constructive notice of any defect in the fastener that failed, and that Memorial and Safeway lacked direct control over Plaintiff or the work on the project (*see Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 554 [1st Dept 2009]; *Bell v Bengomo Realty, Inc.*, 36 AD3d 479, 481 [1st Dept 2007]; *Ryder v Mount Loretto Nursing Home Inc.*, 290 AD2d 892 [3rd Dept 2002] *cf. Gallagher v Levien & Co.*, 72 AD3d 407 [1st Dept 2010]). Also, it was shown that neither Memorial nor Turner installed the personnel hoist at issue. Therefore, Plaintiff's Labor Law §200 and common-law negligence claims fail as against Memorial and Turner.

As to Safeway, it is undisputed that it installed all the personnel hoists at the site but was neither a general contractor nor owner. Thus, irrespective of its potential creation of the defective condition, that fact is still insufficient to base a Labor Law §200 claim against a subcontractor (*see Frisbee v 156 R.R. Ave. Corp.*, 85 AD3d 1258, 1259 [3d Dept 2011]; *Urban v No. 5 Times Sq. Dev., LLC*, supra). However, "[a] claim for common-law negligence may lie even though there is no Labor Law § 200 liability" (*Mullins v Ctr. Line Studios*, 194 AD3d 421, 422 [1st Dept 2021]). "'[A] subcontractor . . . may be held liable for negligence where the work it performed created the condition that caused the plaintiff's injury even if it did not possess any authority to supervise and control the plaintiff's work or work area'" (*Poracki v St. Mary's Roman Catholic Church*, 82 AD3d 1192, 1195 [2d Dept 2011], *citing Tabickman v Batchelder St. Condominiums by the Bay, LLC*, 52 AD3d 593, 594). No evidence was proffered in support of the motion that established, as a matter of law, the installation of the personnel hoists, which included the nut, bolt and wing nut securing the access ladder, was performed by Safeway without negligence.

Accordingly, Plaintiff's Labor Law §200 claims against all Defendants fail. Yet, Plaintiff's common-law negligence cause of action against Safeway is viable as a *prima facie* case was not established. This is true irrespective of the sufficiency of the opposition papers (*see Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also Smalls v AJI Industries. Inc.,* 10 NY3d 733, 735 [2008]).

Accordingly, it is

ORDERED that Defendants' motion for summary judgment (Motion Seq No 3) is granted to the extent that all Plaintiffs' claims are dismissed, except the common-law negligence claim against Defendant Safeway Atlantic, LLC, and it is

ORDERED that the Third-Party Defendant's cross-motion (Motion Seq No 3) is denied as moot, and it is

ORDERED that Plaintiff's motion for summary judgment against Memorial and Turner is denied.

8/26/2022
DATE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.

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