At an IAS Term, Part 35 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 4th day of November, 2022.

P R E S E N T:

HON. KAREN B. ROTHENBERG,
Justice.

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CHRISTOPHER DAVILA,

Plaintiff,

-against-

Index No.: 517326/17

THE CITY OF NEW YORK, NEW YORK CITY BOARD OF EDUCATION, NEW YORK CITY DEPARTMENT OF EDUCATION, NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, and E.W. HOWELL CO., LLC,

Defendants,

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The following e-filed papers read herein:	NYSCEF Doc. Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	72-74, 76, 105-106, 108
Opposing Affidavits (Affirmations)	115
Affidavits/ Affirmations in Reply	119, 121, 122, 123

Upon the foregoing papers, defendants The City of New York (City), New York City Board of Education, New York City Department of Education, New York City School Construction Authority (SCA), and E.W. Howell Co., LLC, (E.W. Howell) move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint (M.S. 4). Plaintiff Christopher Davila cross moves for an order, pursuant

to CPLR 3212, granting him partial summary judgment with respect to liability on his Labor Law §§ 240 (1) and 241 (6)

causes of action and summary judgment dismissing defendants' first and fifth affirmative defenses premised on assumption of risk and comparative fault (M.S. 5).

Defendants' motion is granted to the extent that plaintiff's causes of action premised on Labor Law §§ 240 (1) and 241 (6) are dismissed and plaintiff's

common-law negligence and Labor Law § 200 causes of action are dismissed to the extent that they are premised on a means and methods theory of liability. Defendants' motion is otherwise denied.

Plaintiff's cross motion is granted only to the extent that defendants' first and fifth affirmative defenses are dismissed to the extent that they are

premised on assumption of the risk.[1] Plaintiff's cross motion is otherwise denied.

Background

In this action plaintiff alleges that he was injured on January 24, 2017

when a "duct lift" tipped onto him while he and two coworkers were attempting to roll the duct lift down a short plywood ramp that traversed, in essence, a single step located in

[1] The court rejects defendants' assertion that plaintiff's cross motion is untimely under Kings County Supreme Court Uniform Civil Term Rules, Part C, Rule 6 because the note of issue, filed in March 2020, has since been vacated (*see Wells Fargo Bank, NA v Apt*, 179 AD3d 1145, 1146 [2d Dept 2020]). Plaintiff's cross motion would, in any event, be deemed timely in view of the executive orders that tolled court deadlines because of the Covid-19 pandemic (*see Brash v Richards*, 195 AD3d 582, 583-585 [2d Dept 2021]). Moreover, plaintiff's cross motion could be considered even if deemed untimely because it is a cross motion that addresses the same issues raised in defendants' timely motion (*see Cruz v 1142 Bedford Ave., LLC*, 192 AD3d 859, 863 [2d Dept 2021]; *Sikorjak v City of New York*, 168 AD3d 778, 780 [2d Dept 2019]).

an interior area of a school (P.S./I.S. 338) that was being constructed in Brooklyn. The parties do not address who owned the project site or the relationship amongst the defendants other than to indicate that the SCA hired E.W. Howell as general contractor for the project and that E.W. Howell, in turn, hired non-party AWL to perform HVAC and duct work for the project. At the time of the accident, plaintiff was employed as an apprentice sheet-metal worker by AWL.

According to plaintiff's testimony at his General Municipal Law § 50-H hearing and his deposition, on the date of the accident plaintiff's supervisors directed him to assist in preparing for the duct/welding work that was to be performed. As part of this preparation, plaintiff assisted his supervisor, Adam, and a co-worker, Jessie, in moving a "duct lift". The duct lift was approximately six to seven feet high, weighed approximately 400 pounds, and had four wheels upon which it could be rolled. Their path required the use of a plywood ramp to move the duct lift down a 10 to 12 inch elevation differential. Plaintiff held onto the left fork of the lift and Jessie did the same on the right side of the lift. Adam held and pushed the handle at the back of the lift. As they started down the ramp in this manner, the ramp shifted towards Jessie, which caused the lift to topple onto plaintiff and cause his injuries. Plaintiff did not fall to the ground and his coworkers were able to push the lift off of plaintiff and push it upright and back onto the

higher portion of the floor.[2] Based on how the accident occurred, plaintiff believed that the ramp was not properly secured.

Discussion

Labor Law § 240 (1)

Labor Law § 240 (1) imposes absolute liability on owners and contractors or their agents when they fail to protect workers employed on a construction site from injuries proximately caused by risks associated with falling from a height or those associated with falling objects (*see Wilinski v 334 E. 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). For a defendant to be held liable under Labor Law § 240 (1), a plaintiff's injuries must be "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see Wilinski*, 18 NY3d at 10). Where the accident involves a falling object, the "plaintiff must show more than simply that an object fell causing injury to a worker" (*Narducci*, 96 NY2d at 268; *see also Fabrizzi v 1095 Ave. of Ams., L.C.C.*, 22 NY3d 658, 663 [2014]). Rather, a plaintiff must show that, at the time the object fell, it was "being hoisted or

[2] Photographs of the elevation differential, the ramp and the duct lift are attached as exhibits to the portion of plaintiff's deposition transcript submitted by plaintiff (NY St Cts Elec Filing [NYSCEF] Doc No. 107).

secured" (*Narducci*, 96 NY2d at 268) or "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]; *see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758 [2008]) and 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; *see Fabrizzi*, 22 NY3d at 663).

Applying this law to the facts here, this court finds that the 10 to 12 inch elevation differential traversed by the ramp is not a physically significant elevation differential for purposes of section 240 (1) (*see Eliassian v F.F. Constr., Inc.*, 190 AD3d 947, 949 [2d Dept 2021]; *Jackson v Hunter Roberts Constr. Group, LLC*, 161 AD3d 666, 667 [1st Dept 2018]; *Sawcyszyn v New York Univ.*, 158 AD3d 510, 511 [1st Dept 2018]; *Torkel v NYU Hosps. Ctr.*, 63 AD3d 587, 590 [1st Dept 2009]; *DeMayo v 1000 N. of N.Y. Co.*, 246 AD2d 506, 507 [2d Dept 1998]; *see also Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514-515 [1991]; *cf. Kandatyan v 400 Fifth Realty, LLC*, 155 AD3d 848, 850-851 [2d Dept 2017] [plaintiff pushing heavily loaded cart on a four-to-five-foot-high ramp]). Additionally, under the circumstances, the court finds that there is no section 240 (1) safety device which would have been expected or needed based on the apparent stability of the duct lift (*see Miles v Buffalo State Alumni Assn., Inc.*, 121 AD3d 1573, 1574 [4th Dept 2014]; *Grygo v 1116 Kings Highway Realty, LLC*, 96 AD3d 1002, 1003 [2d Dept 2012], *lv denied* 20 NY3d 859 [2012]; *cf. Wilinski*, 18 NY3d at 10-11). The court notes that the Appellate Division, Second Department, in cases addressing accidents involving heavy objects falling from carts or pallet jacks, has generally granted defendants summary judgment based on findings that the accidents were not gravity

related and/or that they did not involve a failure to provide a section 240 (1) device (*see Chuqui v Amna, LLC*, 203 AD3d 1018, 1020-21 [2d Dept 2022]; *Simmons v City of New York*, 165 AD3d 725, 726-727 [2d Dept 2018]; *Grygo*, 96 AD3d at 1003; *see also Parrino v Rauert*, 208 AD3d 672, 673-674 [2d Dept 2022]). In addition, the conclusory assertions of plaintiff's engineer are insufficient to demonstrate the applicability of section 240 (1) (*see Nicola v United Veterans Mut. Hous. No. 2, Corp.*, 178 AD3d 937, 940 [2d Dept 2019]). Defendants are thus entitled to summary judgment dismissing the Labor Law § 240 (1) cause of action and plaintiff's cross motion in this respect must be denied.

Labor Law § 241 (6)

Regarding plaintiff's Labor Law § 241 (6) cause of action, under that section, an owner, general contractor or their agent may be held vicariously liable for injuries to a plaintiff where the plaintiff establishes that the accident was proximately caused by a violation of an Industrial Code section stating a specific positive command that is applicable to the facts of the case (*Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 349-350 [1998]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2017]). Here, plaintiff, in his bill of particulars, alleges, in support of his section 241 (6) cause of action, that defendants violated Industrial Code sections 12 NYCRR 23-1.7 (f) and 23-1.22. Initially, this court rejects defendants' assertion that plaintiff's failure to specify the Industrial Code sections that were violated in his notice of claim requires dismissal (*see Matute v Town of Hempstead*, 179 AD3d 1047, 148-

1049 [2d Dept 2020]; *Baker v Town of Niskayuna*, 69 AD3d 1016, 1017 [3d Dept 2010];

see also Se Dae Yang v New York City Health & Hosps. Corp., 140 AD3d 1051, 1052 [2d Dept 2016]). Nevertheless, the court finds that section 23-1.7 (f) and 23-1.22 are inapplicable to the facts herein.

12 NYCRR 23-1.7 (f) states that "[v]ertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided." This provision is inapplicable here because the ramp traversing the different levels in the room covering a vertical distance of a foot or less, "did not provide access to an above- or below-ground working area within the meaning of the regulation" (*Sawczyszyn*, 158 AD3d at 511-512, quoting *Torkel*, 63 AD3d at 590; *see Johnson v Lend Lease Constr. LMB, Inc.*, 164 AD3d 1222, 1223 [2d Dept 2018]; *Francescon v Gucci Am., Inc.*, 105 AD3d 503, 504 [1st Dept 2013]).

Although 12 NYCRR 23-1.22 (b) addresses the adequacy of ramps,[4] this court, in the absence of appellate authority holding otherwise (*see Mountain View Coach Lines v Storms*, 102 AD2d 663, 664 [2d Dept 1984]), is bound by the Appellate Division, First

Department's holding in *Torkel v NYU Hosps. Ctr.* (63 AD3d 587) that section 23-1.22 (b) only applies to "ramps used by "motor trucks or heavier vehicles," "wheelbarrows, power buggies, hand carts or hand trucks" or by "persons only," and that "[t]he use of the ramp in question as a means for workers to move wheeled dumpsters does not fall

[4] By their plain terms, 12 NYCRR 23-1.22 (a), which provides that the section does not apply to ramps constructed of earth and gravel, and 12 NYCRR 23-1.22 (c), which addresses platform safety, are inapplicable to the ramp at issue and plaintiff makes no assertion to the contrary.

within the regulation's enumerated categories" (*Torkel*, 63 AD3d at 590-591). In view of the Appellate Division, First Department's narrow reading of section 23-1.22 (b) in *Torkel* as demonstrated by its holding that a wheeled dumpster is not akin to a wheelbarrow, power buggy, hand cart or hand truck covered by section 23-1.22 (b) (3), this court finds that this section does not apply to the wheeled duct lift at issue here (*Torkel*, 63 AD3d at 590-591; *see also Gray v City of New York*, 87 AD3d 679, 680-681 [2d Dept 2011], *lv denied* 18 NY3d 803 [2012]; *cf. Bain v 50 W. Dev., LLC*, 191 AD3d 496, 497 [1st Dept 2021]; *Sawczyszyn*, 158 AD3d at 511-512).

Accordingly, defendants are entitled to dismissal of plaintiff's Labor Law § 241 (6) cause of action and plaintiff's cross motion in this respect must be denied.

Labor Law § 200 and Common-Law Negligence

When common-law negligence and Labor Law § 200 claims arise out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged with liability had the authority to supervise or control the performance of the work (*see Rizzuto*, 91 NY2d at 352; *Hart v Commack Hotel, LLC*, 85 AD3d 1117, 1118 [2d Dept 2011]). Where a premises condition is at issue, property owners and general contractors may be held liable under common-law negligence and for a violation of Labor Law § 200 if they have control over the worksite and they either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*see Marquez v L&M Dev. Partners, Inc.*, 141 AD3d 694, 698 [2d

Dept 2016]; *Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dept 2014]; *Bauman v Town of Islip*, 120 AD3d 603, 605 [2d Dept 2014]).

Defendants, through the deposition testimony of plaintiff and of defendants' witnesses demonstrate prima facie, that they did not exercise more than general supervisory authority over the work at issue and thus, they may not be held liable under a means and methods theory of liability (*see Abelleira v City of New York*, 201 AD3d 679, 680 [2d Dept 2022]; *Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 670-673 [2d Dept 2018]; *Goldfien v County of Suffolk*, 157 AD3d 937, 938 [2d Dept 2018]; *Messina v City of New York*, 147 AD3d 748, 749-750 [2d Dept 2017]). Plaintiff does not oppose defendants' showing and, therefore,

defendants are entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 causes of action to the extent that they are premised on a means and methods theory of liability.

With respect to the dangerous condition theory of liability, plaintiff, in his bill of particulars, alleges that the ramp constituted a dangerous condition because, among other reasons, it was not properly secured. Defendants make no argument that they were not in control of the worksite, but they assert that they did not cause or create any issue with the ramp nor did they have actual or constructive notice of any defect with the ramp.

In support of their assertions, defendants submit an affidavit from an Insurance Claims Specialist for the City, who asserts that he performed a search of the City's records, and that he found no complaints relating to the ramps at the project. In addition,

defendants submit an affidavit from Joseph Petito, a project manager for E.W. Howell, who stated that E.W. Howell did not have any employees on the project who would have installed or maintained the temporary ramps at the project, that he never received any complaints relating to the condition of the ramps, that he is not aware of anyone having an accident on a temporary ramp at any time prior to plaintiff's accident, and that he walked the entire project twice daily and he does not recall seeing any broken or defective temporary ramps at the project location. With his affidavit, Petito submitted copies of the site safety inspection logs provided by E.W. Howell's site safety subcontractor who inspected the property on a daily basis, and these logs contain no reference to any issues with the temporary ramps at issue. Dennis Ramlogan, a project officer for the SCA asserts in his affidavit essentially the same things as Petito did and he appends copies of reports from SCA safety officers that contain no reference to any issue with the ramps.

Petito and Ramlogan's affidavits, however, only demonstrate their general inspection practices, and the safety logs and reports themselves do not specifically mention that the inspections included inspections of the ramp at issue. As such, defendants' evidence relating to the ramps is insufficient to demonstrate, prima facie, the lack of constructive notice with respect to the condition of the ramp since it fails to demonstrate, prima facie, when the ramp at issue was last inspected relative to the time of the accident (*see Buffalino v XSport Fitness*, 202 AD3d 902, 903 [2d Dept 2022]; *Johnson v Pawling Cent. Sch. Dist.*, 196 AD3d 686, 688 [2d Dept 2021]; *Fortune v Western Beef, Inc.*, 178 AD3d 671, 673 [2d Dept 2019]; *Rodriguez v New York City*

Hous. Auth., 169 AD3d 947, 948 [2d Dept 2019]). Moreover, Petito's affidavit relating to the ramp is undermined by his deposition testimony that he could not remember if he had seen the ramp at issue here during his walkthroughs and Ramlogan's affidavit is undermined by his deposition testimony that he could not recall there being a step down at the accident location that required the ramp at issue.

Contrary to defendants' contentions, plaintiff's testimony at his § 50-H hearing and his deposition is insufficient to demonstrate that the failure to secure the ramp was not visible or apparent. Although plaintiff stated at his hearing that the ramp did not appear cracked or broken, he also specifically stated that he did not check to see if the ramp was in any way secured and, at his deposition, he added that he did not walk on the ramp prior to the accident (*see Catalano v Tanner*, 23 NY3d 976, 977 [2014], *reversing* 112 AD3d 1299, 1299-1300 [4th Dept 2013]; *Hayden v 334 Dune Rd., LLC*, 196 AD3d 634, 636 [2d Dept 2021]; *Farrauto v Bon-Ton Dept. Stores, Inc.*, 143 AD3d 1292, 1293 [4th Dept 2016]; *Bergin v Golshani*, 130 AD3d 767, 768 [2d Dept 2015]; *Kowalczyk v Time Warner Entertainment Co., L.P.*, 121 AD3d 630, 631 [1st Dept 2014]; *cf. Gray v City of New York*, 87 AD3d 679, 680 [2d Dept 2011], *lv denied* 18 NY3d 803 [2012]).

In addition, plaintiff in his § 50-H hearing testimony, stated that he observed an E.W. Howell supervisor, he knew as Paul, constructing the ramp and at deposition plaintiff testified that Paul was a supervisor of E.W. Howell's laborers to whom he spoke on a regular basis relating to debris

removal.[5] Plaintiff's testimony is sufficient to create a factual issue with respect to whether E.W. Howell caused or created a defect with the ramp (*see Torkel*, 63 AD3d at 591-592; *see also Madonia v City of New York*, 164 AD3d 1320, 1323 [2d Dept 2018]; *Rajkumar v Budd Contracting Corp.*, 125 AD3d 446, 446-447 [1st Dept 2015]; *Kittelstad v Losco Group, Inc.*, 92 AD3d 612, 613 [1st Dept 2012], *affirming* 29 Misc 3d 1236[A], 2010 NY Slip Op 52169[U], *8 [Sup Ct, New York County 2010]). Contrary to defendants' contention, plaintiff's deposition testimony that he did not recall seeing the ramp prior to the date of the accident only goes to credability not its competence (*see Yefet v Shalmoni*, 81 AD3d 637, 637-638 [2d Dept 2011]; *Alvarez v New York City Hous. Auth.*, 295 AD2d 225, 226-227 [1st Dept 2002]; *Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]).

Accordingly, defendants motion in regards to having caused or created a dangerous condition or having notice thereof must be denied regardless of the sufficiency of plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Comparative Fault and Assumption of the Risk

The portion of plaintiff's cross motion seeking dismissal of defendants' first and fifth affirmative defenses is granted to the extent that the first and fifth affirmative

[5] Petito, in his deposition testimony stated that the first name of E.W. Howells's labor supervisor was Paul.

defenses include the affirmative defense of assumption of the risk as that doctrine is generally limited to the risks arising from voluntary participation in athletic and recreational activities (*see Trupia v Lake George Cent. School Dist.*, 14 NY3d 392, 395-396 [2010]; *Walter v State of New York*, 235 AD2d 623, 624 [3d Dept 1997]; *Maddox v City of New York*, 108 AD2d 42, 46 [2d Dept 1985], *affd* 66 NY2d 270 [1085]). Moreover, a worker does not assume the risk of an unsafe worksite (*see Narducci v Manhasset Bay Assocs.*, 270 AD2d 60, 62-63 [1st Dept 2000], *reversed on other grounds* 96 NY2d 259 [2001]).

The issue of comparative fault, which almost always presents a factual question (*see Reichmuth v Family Video Movie Club, Inc.*, 201 AD3d 1348, 1349 [4th Dept 2022]), cannot be determined as a matter of law on the facts here. Most notably, plaintiff's contention that defendants had constructive notice of the defect with the ramp presupposes that the defect was visible and apparent (*Gray*, 87 AD3d at 680; *see also Martinez v 281 Broadway Holdings, LLC*, 183 AD3d 716, 719 [2d Dept 2020]). That plaintiff did not observe the issue with the ramp prior to the accident would not preclude a finding of comparative fault if the danger was readily visible (*see Thoma v Ronai*, 82 NY2d 736, 737 [1993]; *Dasher v Wegmans Food Mkts.*, 305 AD2d 1019, 1019 [4th Dept 2003]) and his assertion that he was performing the work as directed by his supervisor merely presents a factual issue as to whether plaintiff would have been able to raise an objection to rolling the duct lift down a ramp in the face of an obvious danger (*see Finocchi v Live Nation, Inc.*, 204 AD3d 1432, 1434 [4th Dept 2022]). The court thus

denies plaintiff's cross motion to the extent that it seeks dismissal of the affirmative defenses that are premised on comparative fault (*see Martinez*, 183 AD3d at 719; *see also Lopez v 1675 Realty*, ___ AD3d ___, 2022 NY Slip Op 05500, *1 [1st Dept 2022]; *Dasher*, 305 AD2d at 1019; *Thoma v Ronai*, 189 AD2d 635, 636-637 [1st Dept 1993], *affd* 82 NY2d 736 [1993]).

This constitutes the decision and order of the court.

E N T E R

J.S.C.