SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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JOSE MANUEL JUAREZ,

Plaintiff,

- v -

PRIMEWORK CONSTRUCTION CORP., AVACON MANAGEMENT LLC D/B/A AVACON BUILDERS DEVELOPERS, 45 JOHN NY LLC,

Defendant.

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INDEX NO. 160728/2017

MOTION DATE 01/21/2022, 01/21/2022

MOTION SEQ. NO. 006 007

DECISION + ORDER ON MOTION

AVACON MANAGEMENT LLC D/B/A AVACON BUILDERS DEVELOPERS

Plaintiff,

-against-

SKITTLES SERVICES CORP.

Defendant.

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Third-Party
Index No. 595635/2018

The following e-filed documents, listed by NYSCEF document number (Motion 006) 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 159, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 179, 180, 181, 182, 183, 184, 185, 187, 188

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 160, 171, 172, 173, 174, 175, 176, 177, 178, 186, 239, 240, 241

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

Upon the foregoing documents, plaintiff's motion for summary judgment is granted and defendant, 45 John NY LLC's motion is granted in part.

Facts

On November 22, 2017, plaintiff was employed by Skittles Services Corp., and working at 45 John Street New York, New York. Defendant, Avacon Management Llc D/B/A Avacon

Builders Developers (Avacon), was hired by 45 John NY LLC, owners of the subject location, to be the general contractor of the project. Plaintiff testified that he was standing on a scaffold while removing bricks from a wall to expose the beams. Plaintiff was not provided any protective gear, specifically plaintiff was neither given a harness nor a hardhat. Plaintiff testified that the scaffold, which was 12 to 14 feet high collapsed, causing plaintiff to sustain severe injuries.

Plaintiff's Motion (Mot. Seq. 006)

Plaintiff moves for summary judgment on the grounds that plaintiff was not provided with an appropriate safety device pursuant to Labor Law § 240(1).

Labor Law § 240(1)

Labor Law Section 240 provides protection for workers against the special hazards that arise when the worksite either is itself elevated or is positioned below the level where "materials or load are hoisted or secured." The "special hazards" do not encompass any and all perils that may be connected in some tangential way with the effects of gravity. Rather, the special hazards are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or in adequately secured. (*Ross v Curtis-Palmer Hydroelectric Co.*, 81 NY2d 494 [1983]).

It is well established law that "an accident alone does not establish a Labor Law § 240(1) violation or causation." (*Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280, 289 [2003]). Rather, plaintiff must show that a safety mechanism failed in order to establish liability pursuant to Section 240(1). *See id*.

Defendants oppose the motion on the grounds that there are questions of fact that preclude summary judgment. Specifically, defendants cite to the testimony of plaintiff's

supervisor that plaintiff was instructed not to use the scaffold. Consequently, defendants contend that there exists a question of fact as to whether plaintiff was the sole proximate cause of the accident and cannot establish entitlement to judgment pursuant to Labor Law Section 240 (1).

The Court does not agree. Defendant's proffered testimony is of plaintiff's supervisor that was not at the work site on the date of the incident, thus any recitation of the orders plaintiff was given that day are inadmissible hearsay.

This Court finds, that based on the record, plaintiff has established entitlement to judgment as a matter of law on his Labor Law § 240(1) claim by showing that he was not provided an adequate safety device. Accordingly, plaintiff's motion for summary judgment is granted as against defendants, Avacon and 45 John LLC.

45 John LLC's Motion (Mot. Seq. 007)

Defendant, 45 John NY LLC, moves to dismiss plaintiff's complaint as to Labor Law § 200, for conditional summary judgment against Defendant/Third-Party Plaintiff, Avacon, on the cross claims for contractual indemnification and, for summary judgment against Third-Party Defendant, Skittles Services Corp. (Skittles), on the cross claim for contractual indemnification.

Labor Law § 200

It is well-settled law that an owner or general contractor will not be found liable under common law or Labor Law § 200 where it has no notice of any dangerous condition which may have caused the plaintiff's injuries, nor the ability to control the activity which caused the dangerous condition. *See Russin v Picciano & Son*, 54 NY2d 311[1981]; *see also Rizzuto v Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Singleton v Citnalta Constr. Corp.*, 291 AD2d 393, 394 [2002].

Moreover, "General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law § 200." (*Dos Santos v STV Engrs., Inc.*, 8 AD3d 223, 224, [2004], *lv denied,* 4 NY3d 702, 790 [2004]).

Defendant 45 John Street contends that plaintiff's labor law 200 claims and common law negligence claims should be dismissed as it neither supervised plaintiff's work nor had notice of any defective condition. During oral argument, plaintiff conceded this point. Accordingly, plaintiff's claims pursuant to Labor Law Section 200 and common law negligence are dismissed as against defendant 45 John NY LLC only.

As to 45 John Street's motion for conditional summary judgment as to the contractual indemnification claims against Avacon, after oral argument that portion of the motion is granted without opposition. The parties agreed that if at the time of trial negligence is found on behalf of Avacon and/or its subcontractors 45 John Street is entitled to indemnification.

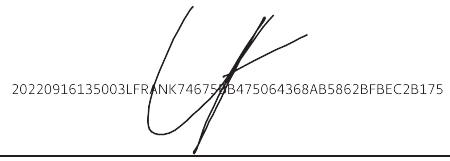
As to the portion of 45 John Street's motion that seeks summary judgment as against Skittles, that portion is denied. Plaintiff's accident arose as he was standing "on the scaffold doing demolition work on the ceiling". *See* NYSCEF Doc. 144, 92:11-14. A witness for defendant Skittles testified that it was contracted to perform "compound, painting and cleaning." *See* NYSCEF Doc. 147. The Court finds that there is a question of fact as to whether plaintiff was injured, not in the scope of his employment with Skittles, but within the scope of the work in the contract between Avacon and Skittles. Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment is granted; and it is further

ORDERED that defendant 45 John NYLLC's motion for summary judgment seeking dismissal of plaintiff common law negligence and Labor Law Section 200 claims as against it only is granted; and it is further

ORDERED that defendant 45 John NY LLC is granted conditional judgment against Management LLC D/B/A Avacon Builders Developers subject to a determination whether plaintiff's accident arose out of the negligence of Avacon's or its subcontractors work; and it is further

ADJUDGED that defendant 45 John NY LLC's motion for summary judgment on its contractual indemnification claim as against Skittles Services Corp. is denied.



9/16/2022
DATE

LYLE E. FRANK, 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