SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART** **58**

Justice

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SEGUNDO BRAVO,

Plaintiff,

- v -

RPH HOTELS 51ST STREET OWNER, LLC,LHOTSE CONTRACTING CORP., LHOTSE CORP., INTERSYSTEM INSTALLATION CORP.,

Defendant.

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INDEX NO. 159445/2019

MOTION DATE 06/11/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

INTERSYSTEM INSTALLATION CORP.

Plaintiff,

-against-

GERALD FAST SYSTEM CORP.

Defendant.

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Third-Party
Index No. 595282/2020

LHOTSE CONTRACTING CORP., LHOTSE CORP.

Plaintiff,

-against-

INTERSYSTEM S&S CORP., GERALD FAST SYSTEM CORP.

Defendant.

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Second Third-Party
Index No. 595083/2021

The following e-filed documents, listed by NYSCEF document number (Motion 002) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 92, 93, 94, 95, 96, 97, 98

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

In this Labor Law action, plaintiff moves, pursuant to CPLR 3212, for summary judgment against defendant RPH Hotels 51st Street Owner, LLC ("RPH") and defendants Lhotse

Contracting Corp. and Lhotse Corp. (collectively, "Lhotse") on the issue of liability under Labor Law §§ 240(1) and 241(6). RPH and Lhotse oppose.

Factual and Procedural Background

This case arises from an incident on December 11, 2018 in which plaintiff was allegedly injured while dismantling a sidewalk bridge located at 851 Eighth Avenue in Manhattan ("the premises") (Doc Nos. 1, 75). Plaintiff commenced the above-captioned action against RPH, Lhotse, and defendant Intersystem Installation Corp. ("Intersystem") alleging violations of Labor Law §§ 240(1) and 241(6) (Doc No. 1).

Deposition Testimony of Plaintiff

At his deposition, plaintiff testified that, on the day of the incident, he and several coworkers were responsible for dismantling a sidewalk bridge on the premises (Doc No. 75). He began by standing on the sidewalk bridge and handing wooden boards down to coworkers standing in the bed of a flatbed truck, but eventually stepped down into the truck bed to begin stacking boards himself (Doc No. 75). The truck bed was covered almost entirely with boards stacked approximately six feet high, some of which were wet; only a small portion of the bed near the cabin was uncovered (Doc No. 75). He then positioned himself atop the boards (Doc No. 75). When he took a step to reposition himself, his foot slipped on one of the boards and he fell off the truck bed onto the sidewalk (Doc No. 75). He then informed two supervisors that he had fallen, and they spoke to nearby coworkers about the accident (Doc No. 75).

Deposition Testimony of Michael Badzio of Intersystem

Michael Badzio, a supervisor for Intersystem, explained that Intersystem was responsible for dismantling the sidewalk bridge and subcontracted the project out to a company called Gerald Fast (Doc No. 80). On the date of the incident, he arrived at the premises to pick up Juan Arias, a

Gerald Fast employee, and take him to a different project site (Doc No. 80). Shortly after plaintiff was injured, Badzio and Arias returned to the premises and saw plaintiff sitting on the sidewalk (Doc No. 80). After Arias spoke to several of the other workers who witnessed the accident, he informed Badzio that plaintiff injured himself after he jumped from the sidewalk bridge to the bed of the truck (Doc No. 80).[1]

Deposition of Zbigniew Chrzanowski of Lhotse

Zbigniew Chrzanowski, the president and owner of Lhotse, testified that his company did business under the name Trident Contracting ("Trident"), had a contract with RPH to perform the roof repair, and served as the general contractor on the project (Doc Nos. 78-79). He also confirmed that Lhotse hired Intersystem to dismantle the sidewalk bridge (Doc No. 78).

Deposition Testimony of Timothy Dowd on behalf of RPH

Timothy Dowd, an employee of the hotel located on the premises, testified that RPH owned the building and had a contract with Trident to perform the roof repairs, and that Trident was the general contractor running the project (Doc No. 77).

Legal Analysis and Conclusions

Plaintiff argues that he is entitled to judgment as a matter of law on his Labor Law § 240(1) claim since RPH and Lhotse are the statutory property owner and general contractor, his work involved an elevation-related hazard because standing on the boards in the truck bed was functionally equivalent to standing on a scaffold, and he was not a recalcitrant worker or the sole proximate cause of his injuries. Regarding his Labor Law § 241(6) claim, he argues that he has demonstrated that RPH and Lhotse violated Industrial Code § 23-1.7(d) by requiring him to work on a slippery surface.

[1] Badzio did not speak to the other workers himself because he did not speak Spanish (Doc No. 80).

RPH and Lhotse oppose, arguing that Labor Law §§ 240(1) and 241(6) are inapplicable because plaintiff's work in the truck bed did not constitute an elevation risk and the stacked boards were not a floor, walkway, passageway, or other elevated working surface for purposes of Industrial Code § 23-1.7(d). They further argue that a question of fact exists regarding the cause of plaintiff's accident, since there is deposition testimony that he was injured after jumping from the sidewalk bridge to the truck, not by slipping while standing in the truck bed.

In reply, plaintiff contends that RPH and Lhotse fail to raise a triable issue of fact as they rely solely on inadmissible hearsay to argue that there is a dispute as to the cause of his accident.

Plaintiff's Labor Law § 240(1) Claim

Under Labor Law § 240(1), "owners, general contractors and their agents have a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites. To establish liability on a Labor Law § 240(1) cause of action, a plaintiff is required to show that the statute was violated and that the violation was a proximate cause of his injuries" (*Naughton v City of New York*, 94 AD3d 1, 7 [1st Dept 2012] [internal quotation marks and citations omitted]; *see O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33 [2017]).

Here, plaintiff has made a prima facie showing that he is entitled to judgment on liability as a matter of law. Plaintiff's work while standing on the boards in the truck bed has been deemed to involve an elevation-related risk covered by Labor Law § 240(1) (*see Idona v Manhattan Plaza, Inc.*, 147 AD3d 636, 636 [1st Dept 2017] [finding fall from atop scaffolding materials stacked in flatbed truck bed subject to statute]; *Myiow v City of New York*, 143 AD3d 433, 436 [1st Dept 2016] [finding worker's fall from steel beams placed in flatbed truck bed "constitutes precisely the type of elevation-related risk envisioned by the statute" (internal quotation marks and citations omitted)]; *Phillip v 525 E. 80th St. Condominium*, 93 AD3d 578, 579 [1st Dept 2012] [similar]).

Here, plaintiff testified that he was required to stand on the boards in order to continue stacking them because the entire floor of the trailer was covered except for a small space near the truck cabin. It is also undisputed that RPH and Lhotse were the property owner and general contractor involved in the project at issue. This is sufficient to establish plaintiff's entitlement to summary judgment (*see Idona*, 147 AD3d at 636; *Myiow*, 143 AD3d at 436; *Phillip*, 93 AD3d at 579).

In opposition, RPH and Lhotse rely exclusively on Badzio's testimony that he was informed by Arias that other workers who witnessed the accident told Arias that plaintiff injured himself after jumping from the sidewalk bridge to the truck bed. This testimony, however, is inadmissible double hearsay evidence (*see MG West 100 LLC v St. Michael's Protestant Episcopal Church*, 127 AD3d 624, 625 [1st Dept 2015] [finding statements made by third party about what bishop said to former rector were inadmissible as double hearsay statements]).

"While hearsay may be considered in opposition to a summary judgment motion, it is insufficient to defeat summary judgment where, as here, it is the only evidence upon which denial of summary judgment would be based" (*Clarke v Empire Gen. Contr. & Painting Corp.*, 189 AD3d 611, 612 [1st Dept 2020] [citations omitted]; *see Matter of New York City Asbestos Litig.*, 7 AD3d 285, 285 [1st Dept 2004] ["[E]vidence otherwise excludable at trial may be considered in opposition to a motion for summary judgment as long as it does not become the sole basis for the court's determination"]). As Badzio's hearsay testimony is the only evidence supporting denial of summary judgment, it is insufficient to defeat plaintiff's prima facie showing (*see Clarke*, 189 AD3d at 612 [granting summary judgment on liability under Labor Law § 240(1) after plaintiff made prima facie showing and defendant relied solely on hearsay testimony to demonstrate

existence of questions of fact]; *Ying Choy Chong v 457 W. 22nd St. Tenants Corp.*, 144 AD3d 591, 592 [1st Dept 2016] [similar]).

Plaintiff's Labor Law § 241(6) Claim

Since plaintiff is entitled to summary judgment on liability on his Labor Law § 240(1) claim, it is unnecessary to address his Labor Law § 241(6) claim; because his damages are the same under either theory of liability and he may only recover once, the issue is academic (*see Corleto v Henry Restoration Ltd.*, 206 AD3d 525, 526 [1st Dept 2022] [deeming issue of Labor Law § 241(6) claim academic after finding plaintiff entitled to partial summary judgment on Labor Law § 240(1) claim]; *Jerez v Tishman Constr. Corp. of N.Y.*, 118 AD3d 617, 617-618 [1st Dept 2014] [similar]; *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 12 [1st Dept 2011] [similar]).

However, if considered, plaintiff fails to show that he is entitled to summary judgment on liability under Labor Law § 241(6). "[Labor Law § 241(6)] imposes a nondelegable duty on premises owners and contractors at construction sites to provide reasonable safety and adequate safety to workers. To establish a claim under the statute, a plaintiff must show that a specific, applicable Industrial Code regulation was violated and that the violation caused the complained-of injury" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012] [internal citations omitted]).

Here, plaintiff alleges that RPH and Lhotse violated section 23-1.7(d) of the Industrial Code, which provides that "'[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease[,] and any other foreign substance which may cause slippery footing shall be removed, sanded[,] or covered to provide safe footing'" (*Bazdaric v Almah*

Partners LLC, 203 AD3d 643, 643 [1st Dept 2022], quoting 12 NYCRR 23-1.7 [d]; *see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350-351 [1998]).

"Although 12 NYCRR 23-1.7(d) . . . is specific enough to support a Labor Law § 241(6) cause of action" (*Francis v Aluminum Co. of Am.*, 240 AD2d 985, 987 [3d Dept 1997]; *see e.g. Tolk v 11 W. 42 Realty Invs., L.L.C.*, 201 AD3d 491, 492 [1st Dept 2022]), the allegedly wet boards stacked in the truck bed here do not constitute a slippery work surface for purposes of Labor Law § 241(6) (*see Doodnath v Morgan Contr. Corp.*, 101 AD3d 477, 478 [1st Dept 2012] [finding wet boards stacked in truck bed did not constitute slippery work surface]). Therefore, plaintiff has failed to satisfy his burden of showing that a provision of the Industrial Code was violated (*see Alvarado v SC 142 W. 24 LLC*, 209 AD3d 422, 423 [1st Dept 2022] [granting summary judgment dismissing Labor Law 241(6) claim after finding no violation of 12 NYCRR 23-1.7(d)]; *Pina v Arthur Clinton Hous. Dev. Fund Corp.*, 188 AD3d 614, 614 [1st Dept 2020] [affirming denial of summary judgment on Labor Law § 241(6) claim where questions of fact existed about cause of injury]). "In view of [plaintiff's] failure to establish [his] prima facie entitlement to judgment as a matter of law, there is no need to consider the sufficiency of the opposition papers" (*Zabawa v Sky Mgt. Corp.*, 183 AD3d 430, 431 [1st Dept 2020]).

Accordingly, it is hereby:

ORDERED that the branch of plaintiff's motion seeking summary judgment on liability under Labor Law § 240(1) as against defendants RPH Hotels 51st Street Owner, LLC, Lhotse Contracting Corp., and Lhotse Corp. is granted; and it is further

ORDERED that the branch of plaintiff's motion seeking summary judgment on liability under Labor Law § 241(6) as against defendants RPH Hotels 51st Street Owner, LLC, Lhotse Contracting Corp., and Lhotse Corp. is denied as academic; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B), and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Case* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the parties are to appear in-person at 71 Thomas Street, Room 305, on Tuesday, January 24, 2023 at 10:00 a.m., for a conference on motion sequence 003.

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1/17/2023
DATE

DAVID B. COHEN, 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