SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **47**

Justice

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MIGUEL COLON,

Plaintiff,

- v -

TURNER CONSTRUCTION COMPANY, MEMORIAL SLOAN-KETTERING CANCER CENTER

Defendants.

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INDEX NO. 150702/2018

MOTION DATE 11/04/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115

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

In this Labor Law personal injury action involving a construction site located at 530 East 74th Street, New York, New York (the project), plaintiff Miguel Colon moves, pursuant to CPLR § 3212, for partial summary judgment on the issue of liability on his claims under Labor Law §§ 240 [1] and 241 [6] (motion seq no 002). Defendants Turner Construction Company (Turner), the general contractor, and Memorial Sloan-Kettering Cancer Center (MSK), the owner of the building, cross-move, pursuant to CPLR § 3212, for summary judgment dismissing the complaint.[1]

[1] Defendants' cross-motion was not made returnable the same date as plaintiff's notice of motion but almost a year after (*see* CPLR § 2215). However, since it did not cause undue prejudice to plaintiff and because it seeks summary judgment on the same causes of action as plaintiff's motion for summary judgment, it will be considered.

BACKGROUND

Plaintiff's Testimony

Plaintiff testified that the accident occurred on May 17, 2017 while he was working as a sheet metal worker for Heritage Mechanical Services (Heritage) on the project (Plaintiff EBT at 17, 20, 22, NYSCEF Doc No 46). Plaintiff's job was to install heating and air-conditioning systems (NYSCEF Doc No 46, p 14). According to plaintiff, on the date of the accident he was putting together ducts in a shaft—specifically, installing angles on the wall of the shaft which the duct hangs from (*id.* at 25-26). The shaft went up about twenty floors above him and there was a big hole at the top (*id.* at 26-27). Plaintiff said he was secured by a harness and wore gloves and a hardhat but there was no overhead protection above him (*id.* at 36). He also testified that no one was supposed to be working above him and that his partner was not present at the time of the accident (*id.* at 26, 36).

At approximately 12:45 p.m., while plaintiff was drilling into a cement wall of the shaft to install an anchor, he heard a noise and as he looked up, he was hit in the left shoulder and top of the chest by a falling piece of plywood (*id.* at 34-36). He testified the plywood was approximately three-quarters of an inch thick, eighteen inches wide and thirty-six inches long (*id.* at 37-38). Plaintiff also alleged that the plywood that fell was the plywood used by different trades working on the project and was going to be installed and used as part of the project (Colon Aff at ¶¶ 5-7, NYSCEF Doc No 47).

Plaintiff went to the medic shanty and did not return to work that day (NYSCEF Doc No 46 at 39-40). He sought medical attention the following day and received shoulder surgery on April 14, 2021 (*id.* at 39-40; Supplemental Bill of Particulars, NYSCEF Doc No 48).

Joshua Clarke's Testimony

Joshua Clarke, an engineer for Turner who served as the liaison between Heritage and Turner, testified that he spoke with plaintiff on the date of the accident in the medic shanty and plaintiff told him about the accident (Clarke EBT at 6, 8-9, 13-14). Clarke proceeded to check the shaft where plaintiff was working to conduct an informal investigation and did not notice anything abnormal in the surrounding area or anything that could have caused the plywood to fall (*id.* at 18-20, 26-27).

Incident Reports

Various reports were made from the incident. The Employee Report of Injury Form, written by plaintiff, states he was hit by plywood, with dimensions of three-quarters of an inch thick, twelve inches wide by twelve inches long, falling down the shaft (NYSCEF Doc No 49). Plaintiff signed a First Aid/Medical Treatment Waiver (NYSCEF Doc No 50). The Heritage Accident Report states that plaintiff was injured while working on the tenth floor of the shaft when he was struck by a falling piece of plywood (NYSCEF Doc No 51). The Safe Site Medical Report states that a worker was injured on the tenth floor of the shaft when plywood fell and struck him in the upper left chest (NYSCEF Doc No 52). The Worker's Compensation (C-3) Form also states that plaintiff was injured while working inside a shaft when a piece of plywood fell on him (NYSCEF Doc No 46 at 76-79).

DISCUSSION

"It is well settled that 'the 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'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make

such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined "in the light most favorable to the non-moving party" (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

Labor Law § 240 [1]

Plaintiff moves for partial summary judgment and defendants cross-move on plaintiff's Labor Law § 240 [1] claim. Plaintiff contends that he is entitled to judgment as a matter of law given the evidence that the piece of plywood suddenly fell from above onto his chest and shoulder while he was working in the shaft. Defendants counter that there is no evidence of the existence of a hazard as contemplated by the statute such that any ongoing construction work conducted in, above, or near the shaft could cause a piece of plywood to fall down the shaft nor was there a failure to use a safety device enumerated in the statute (*i.e.*, a rope, pulley, or iron) to prevent the piece of plywood from falling.

Labor Law § 240 [1], also known as the Scaffold Law, provides, in relevant part:

> All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

Labor Law § 240 [1] "imposes absolute liability on building owners and contractors whose failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011] [internal quotation marks and citation omitted]). To prevail on a Labor Law § 240 [1] cause of action, the plaintiff must establish that the statute was violated, and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287-289 [2003]). "[T]he single decisive question is whether plaintiff's injuries were 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]).

The legislative intent behind the statute is to place "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citations omitted]). Therefore, the statute should be liberally construed to achieve the purpose for which it was framed (*Rocovich v Consol. Edison Co.*, 78 NY2d 509, 513 [1991]).

Here, plaintiff met his *prima facie* burden by the submission of his sworn testimony that the shaft he was working in on the date of the accident had "a big hole going up" without any

protection placed above him and that the failure to install fall protection was the proximate cause of the accident (NYSCEF Doc No 46 at 27 and NYSCEF Doc No 47) (*Blake*, 1 NY3d 280 [2003]).

Defendants' argument that plaintiff has failed to establish the requisite proof of hazard because no ongoing construction work was being conducted in, above, or outside the shaft disregards precedent covering accidents under the Labor Law that occur when an object falls by failing to properly secure it. In *Franco v 1221 Ave. Holdings, LLC*, 189 AD3d 615 [1st Dept 2020], the First Department affirmed that plaintiff was entitled to summary judgment when an unsecured pipe fell from the ceiling and struck him. Here, plaintiff submitted a sworn affidavit stating that the plywood that fell on him was used by carpenters and laborers in the middle of the floors as construction material for the project and that no one was working around him at the time of the accident (NYSCEF Doc No 47). Therefore, plaintiff has "establishe[d] prima facie that his injuries resulted 'directly from the application of the force of gravity' and that, having failed to provide proper safety devices, defendants are liable for these injuries under Labor Law 240 [1]" (*id.* at 615, quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009]).

Defendants speculate in an affidavit from Clarke, that the plank must have been deliberately or accidentally thrown down the shaft and therefore, the accident is not covered under Labor Law § 240 [1] (NYSCEF Doc No 86). Yet, it does not matter if plaintiff cannot identify where the object came from and defendants present no appellate authority for their proposition that an object deliberately thrown exempts defendants from liability under Labor Law § 240 [1] (*see Humphrey v Park View Fifth Ave. Assoc.*, 113 AD3d 558, 559 [1st Dept 2014] ["The fact that plaintiff did not see the beam hit the stringer or know where the beam fell from does not preclude partial summary judgment in his favor, as the testimony demonstrates

that the beam came from somewhere above plaintiff and was a proximate cause of his injuries."]; *see also Pados v City of New York*, 192 AD3d 596, 596 [1st Dept 2021]).

Additionally, defendants' reliance on *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259 [2001], is unavailing since that case held that Labor Law § 240 [1] did not apply to a falling piece of glass that was part of the pre-existing building since it *was not* material for the ongoing construction whereas here, plaintiff testified that the plywood was part of the ongoing construction of the floors of the building (NYSCEF Doc No 47, ¶¶ 5-7). Therefore, plaintiff's sworn statement is sufficient to meet the *prima facie* burden of a Labor Law § 240 [1] claim under the theory that the plywood was not properly secured when the accident occurred.

Defendants' argument that summary judgment is not warranted because plaintiff has failed to identify any safety device of the kind enumerated in the statute whose absence or inadequacy caused the plywood to fall is incorrect. Plaintiff is not "required to present evidence as to which particular safety devices would have prevented his injury" (*Noble v AMCC Corp.*, 277 AD2d 20, 21 [1st Dept 2020]) nor "to prove what additional safety devices would have prevented his injury" (*Miranda v Norstar Bldg. Corp.*, 79 AD3d 42, 48 [3d Dept 2010]).

As to defendants' argument that they did not have notice, actual or constructive, of the type of incident that occurred in this matter is irrelevant "[since] an owner or general contractor's vicarious liability under [Labor Law] is not dependent on its personal capability to prevent or cure a dangerous condition" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Sanatass v Consol. Inv. Co., Inc.,* 10 NY3d 333, 340 [2008] ["our precedents make clear that so long as a violation of the statute proximately results in injury, the owner's lack of notice or control over the work is not conclusive . . . this is precisely what is meant by absolute or strict liability in this context"]).

Defendants' final argument that numerous genuine and material questions of fact exist as to how the accident occurred, the details of the plywood, and the nature of plaintiff's injury is also unavailing. First, the First Department permits courts to rely upon statements made in accident reports "concerning how the accident occurred" (*Mayorquin v Carriage House Owner's Corp.*, 202 AD3d 541, 541 [1st Dept 2022]). Here, the multiple reports made as a result of the incident detail that a piece of plywood fell on plaintiff from an unknown height causing significant pain (*see* NYSCEF Doc No 49, 50, 52, 54). Second, issues related to where the injury occurred should be left for the determination "of damages, not liability" (*Gramigna v Morse Diesel*, 210 AD2d 115, 116 [1st Dept 1994]). Regardless, the Safe Site report states that the "Injury Type" was of "Left Shoulder and Upper left chest pain" so defendants' questioning of whether the incident caused only chest pain or chest and shoulder pain is directly contradicted (NYSCEF Doc No 52). Third, and most importantly, plaintiff is not required to show exactly how the circumstances surrounding the event occurred, like where the object came from (*Humphrey*, 113 AD3d at 558-59).

Accordingly, plaintiff is entitled to partial summary judgment as to liability under Labor Law § 240 [1] as against defendants.

Labor Law § 241 [6]

Plaintiff moves for partial summary judgment and defendants cross-move for summary judgment on plaintiff's Labor Law § 241 [6] claim. Labor Law § 241 [6] provides, in relevant part, as follows:

> All contractors and owners and their agents, . . . when constructing or demolishing buildings to doing any excavation in connection therewith, shall comply with the following requirements:
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> 6. 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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, . . . shall comply therewith.

Labor Law § 241 [6] imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection for workers and to comply with specific safety rules which have been set forth by the Commissioner of the Department of Labor (*St. Louis v Town of N. Elba*, 16 NY3d 411, 413 [2011]). "The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). In addition, "[t]he [Industrial Code] provision relied upon by [a] plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*id.*, citing *Ross*, 81 NY2d at 504-505). Therefore, in order to prevail on a Labor Law § 241 [6] claim, "a plaintiff must establish a violation of an implementing regulation which sets forth a specific standard of conduct" (*see Ortega v Everest Realty LLC*, 84 AD3d 542, 544 [1st Dept 2011]), and that the violation was a proximate cause of the injury (*see Egan v Monadnock Constr., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

To support his motion on his Labor Law § 241 [6] claim, plaintiff relies on Industrial Code 12 NYCRR § 23-2.5 [a] [1], which provides that:

> "Persons required to perform work in or at shafts, other than elevator shafts, shall be provided with the following protection:
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> ***
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> 1. Protection from falling material. A tight covering consisting of planks at least two inches thick full size, exterior grade plywood at least three-quarters inch thick or material of equivalent strength shall be installed so as to cover the entire cross-sectional area of the shaft. Such cover shall be located at a point in the shaft not more than two stories or 30 feet, whichever is less, above the level where the persons are working."

Here, plaintiff submitted sworn testimony that the shaft he was working in on the date of the accident "was a big hole going up" without any protection placed above him (NYSCEF Doc No 46 at 27). He also argues that the failure to install fall protection was the proximate cause of the accident, otherwise he would not have been struck by the plywood (NYSCEF Doc No 47). Therefore, plaintiff has made a prima facie showing that defendants violated Labor Law § 241 [6] premised on Industrial Code 23-2.5 [a] [1].

Defendants counter that placing planks two stories above plaintiff's head would be antithetical to his work of installing angles on successive floors and to hang duct work with a chain block from a much higher floor. Citing *Greenwood v Whitney Museum of Am. Art*, 161 AD3d 425 [1st Dept 2018], defendants argue that the installation of overhead protection would be antithetical to plaintiff's work of installing angles on successive floors. However, *Greenwood* involved the placement of overhead protection of planks that obstructed plaintiff's view, whose job it was to watch out for fires (*id.*). Here, overhead protection would not block plaintiff's view because he was installing angles on the wall parallel to him. Additionally, defendants proffer no evidence in the record supporting the proposition that plaintiff was working upwards at the time of the incident.

Defendants also assert that a genuine issue of material fact exists as to whether the plywood fell from greater than two stories, which would make the requirement of a cover at "not more than two stories or 30 feet, whichever is less, above the level where the persons are working" ineffective at preventing the incident at hand (Industrial Code 12 NYCRR § 23-2.5 [a] [1]). However, defendants' reliance on *McLean v 405 Webster Ave. Assoc.*, 98 AD3d 1090 [2d Dept 2012], and *Boyle v 42nd St. Dev. Project, Inc.*, 38 AD3d 404 [1st Dept 2007], in support of this argument is misplaced. Both of these cases involved circumstances where there needed to be

an opening above the worker/s because the work involved hoisting objects (*McLean*) or installing something up the shaft (*Boyle*). Here, plaintiff testified he was working on a beam on the 10th floor, stationary, to install an angle for the shaft when the plywood fell (NYSCEF Doc No 46 at 35, 67). Defendants proffer no evidence to rebut this so an inference cannot be made that plaintiff's work involved upward movement at the time of the accident.

Finally, defendants' argument that this type of accident was unforeseeable is unavailing. Defendants could have anticipated that an object or material part of the construction project could have fallen down an open shaft. Additionally, defendants' reliance on *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263 [1st Dept 2007] is unpersuasive here considering its unique factual situation of an elevator platform's counterweights.

Accordingly, plaintiff is entitled to partial summary judgment as to liability under Labor Law § 241 [6], predicated on Industrial Code § 2.5 [a] [1], as against defendants.[2]

Defendants also move for summary judgment on plaintiff's Labor Law § 241 [6] claims to the extent they are based on violations of the Occupational Safety and Health Administration (OSHA) codes. Plaintiff concedes that the facts of this case do not support a Labor Law § 241 [6] claim based on OSHA violations. Accordingly, plaintiff's Labor Law § 241 [6] claims to the extent they are supported by an OSHA code violation will be dismissed as abandoned/withdrawn.

[2] Defendants move for summary judgment on plaintiff's Labor Law § 241 [6] Industrial Code violations based on other Industrial Code violations. Plaintiff concedes that the facts of this case do not support any other Industrial Code violations except for violations based on Industrial Code §§ 1.7 [a] [1] and 2.1 [a]. But plaintiff did not brief his Labor Law § 241 [6] claim based on violations of Industrial Code §§ 1.7 [a] [1] and 2.1 [a], and therefore they are deemed abandoned.

Labor Law § 200

Defendants move for summary judgment on plaintiff's Labor Law § 200 and negligence claims. Plaintiff concedes that the facts of this case do not support a Labor Law § 200 claim. Accordingly, plaintiff's Labor Law § 200 claim will be dismissed as abandoned/withdrawn.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment on the issue of liability under Labor Law §§ 240 [1] and 241 [6], predicated on a violation of 12 NYCRR § 23-2.5 [a] [1], is granted; and it is further

ORDERED that defendants' cross-motion for summary judgment on plaintiff's Labor Law §§ 240 [1] and 241 [6] claims is denied; and it is further

ORDERED that plaintiff's Labor Law § 241 [6] claim, as predicated on any additional violation of the Industrial Code or OSHA are permitted to be withdrawn or deemed abandoned; and it is further

ORDERED that plaintiff's Labor Law § 200 claim is permitted to be withdrawn.

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1/27/2023
DATE

PAUL A. GOETZ, 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