SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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HENRY VERA,

Plaintiff,

- v -

YYY 62ND STREET LLC and JOY CONSTRUCTION CORPORATION,

Defendants.

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INDEX NO. 153449/2018

MOTION DATE 01/28/2022

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 004) 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 156, 157, 158, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 188, and 189 were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, plaintiff's motion for summary judgment on liability as to its three causes of action for violation of Labor Law §§ 200, 240(1), and 241(6) is granted in part, for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 109, 111, 182) and the exhibits attached thereto, in which the court concurs, and pursuant to the following memorandum decision.

Background

The following facts, except where otherwise stated, are largely undisputed. Plaintiff Henry Vera ("Vera") is a construction worker, and at the time of the accident giving rise to this action was working at a construction site for a new building located at 328 East 62nd Street, New York, New York (Incident Report, NYSCEF Doc. No. 122). Defendant YYY 62nd Street LLC ("YYY") was the owner of the premises (complaint, NYSCEF Doc. No. 112, ¶ 7; answer, NYSCEF Doc. No. 113, ¶ 4), and defendant Joy Construction Corporation ("Joy") was general contractor for the project (Staff EBT tr, NYSCEF Doc. No. 118 at 22). Vera was employed by

former third-party defendant Fernando and Jose Construction Corp. ("F&J"), and former third-party defendant JDV Safety, Inc. was the site safety manager ("JDV").[1]

On February 1, 2018, Vera was helping build the deck and concrete walls at the project (Vera EBT tr, NYSCEF Doc. No. 117 at 35). Specifically, he was installing "pour stops," wooden boards affixed to the exterior of the building to prevent concrete from spilling over the edge of the building, which he had been instructed to do that morning by his supervisor with F&J (*id.* at 45). He was standing on a wooden plank laid across two pieces of steel that were part of the exterior excavation within which the building was being constructed, and was not secured to the steel (*id.* at 50-52; Staff EBT tr, NYSCEF Doc. No. 118 at 72, 74). Pictures of the plank he was standing on were attached to the moving papers (accident location photos, NYSCEF Doc. No. 120). Vera testified that the plank had been set up by someone before he reported to work, and was not tied down to anything (Vera EBT tr, NYSCEF Doc. No. 117 at 48, 73, 77-78). The plank was over a ten-foot drop between the exterior excavation and the new building (*id.* at 56). At the time of the accident, he was wearing a safety harness tied off to a piece of rebar, and had one foot on the plank and another on the building (*id.* at 45, 52). As Vera drilled the pour stop into the building, the plank beneath his feet wobbled, causing him to slip off (*id.* at 58, 82). He fell forward into the rebar on the deck of the building in front of him, dislocating his shoulder (*id.*at 58, 88-89). He was able to push himself off the rebar, whereupon he fell backward and collapsed onto the plank (*id.* at 58). The Joy incident report stated that Vera "slipped and lost his footing" and "leaned forward into a rebar in front of him" (incident report, NYSCEF Doc. No. 122).

[1] The various third-party actions were severed from this action by prior order of the court dated July 12, 2022 (decision and order on motion, NYSCEF Doc. No. 187).

Vera testified that a different kind of thicker plank, mandated by the Occupational Health and Safety Administration ("OSHA"), should have been used instead (Vera EBT tr, NYSCEF Doc. No. 117 at 70-71). He asked Joy's site safety representative if such a plank was available, but was told there was not (*id.* at 71-72). His supervisor from F&J also said there was no alternative plank available, and that Vera should just use what was there (*id.* at 73, 76-77).

Jason Ruivo, employed by JDV as a concrete safety manager for the site, oversaw all concrete operations on the site (Ruivo EBT tr, NYSCEF Doc. No. 119 at 11-12). He did not have authority to direct F&J workers such as Vera, nor could he issue a stop work order (*id.* at 16). He observed the plank that Vera was working on and knew it was unsafe and not the standards set by the New York City Department of Buildings (*id.* at 47). He strongly advised Vera and his colleague to come off the plank and told them they should get a supervisor to give them appropriate planks for the job (*id.* at 42-43, 48). He also spoke to the F&J supervisor on site and told him that the plank needed to be an OSHA-approved plank and tied off to be safe to use (*id.* at 50). Ruivo testified that the supervisor responded by saying "yeah, yeah, yeah, don't worry about it, I got it" (*id.*).

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, "the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring

a trial" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]). Moreover, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assoc. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Discussion

Vera asserts violations of Labor Law §§ 200, 240(1), and 241(6). As Labor Law § 200 is the codification of common-law negligence as it relates to construction sites, the court will first address those sections of the Labor Law providing for strict liability.

Labor Law 240(1)

Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

> "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) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to

accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Not every worker who falls or is struck by a falling object at a construction site is afforded the protections of Labor Law § 240(1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]). Instead, liability "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" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). Therefore, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]).

Here, as set forth above, Vera has established prima facie entitlement to summary judgment by showing that he was not provided with proper scaffolding on which to stand above a ten-foot drop to perform the work of installing pour stops on the building, that the improper plank he was directed to stand on shifted and caused him to fall, and that this fall caused him to suffer damages. Defendants raise no issues of fact as to the inappropriateness of the plank as a safety device. Rather, defendants argue in opposition that because Vera fell forward onto something on the same level that he was working on, specifically the rebar, his injuries are not the sort of elevation related risk that the Scaffold Law was meant to prevent. However, "the statute does not require a complete fall from an elevated safety device for an event to come within its protection" (*Monfredo v Arnell Constr. Corp.*, 171 AD3d 600 [1st Dept 2019]). As the Appellate Division, First Department, has recently held, where a worker falls because the

structure he stands upon shifts, and that worker than lands on something at the same elevation as the structure he fell from, he is protected by the statute (*Ging v F.J. Sciame Constr. Co., Inc.*, 193 AD3d 415, 417 [1st Dept 2021]).

Defendants also argue that Vera was the sole proximate cause of his injuries, or, in the alternative, a recalcitrant worker, because he chose to use a safety device that he himself testified was inadequate. However, where, as here, the plaintiff is not provided with an adequate safety device in the first instance, neither defense is applicable (*Stolt v Gen. Foods Corp.*, 81 NY2d 918, 920 [1993] [recalcitrant worker defense "requires a showing that the injured worker refused to use the safety devices that were provided by the owner or employer"]; *Collins v W. 13th St. Owners Corp.*, 63 AD3d 621, 622 [1st Dept 2009] ["In order for a plaintiff to be considered the sole proximate cause of his injuries, it must be shown that an appropriate safety device was available, but that plaintiff chose not to use the device"]). Moreover, Vera was never instructed not to use the plank that was previously set up for him. Indeed, the record indicates that he was told to use the plank and that no other planks were available (Vera EBT tr, NYSCEF Doc. No. 117 at 70-73, 76-77). Defendants argue that Ruivo, the concrete safety manager, advised Vera not to use the plank as assembled, but Ruivo also testified that he had no authority to order Vera not to use the plank or to stop work (Ruivo EBT tr, NYSCEF Doc. No. 119 at 16). The comments of a site safety manager with no authority to stop work are not sufficient to establish a recalcitrant worker defense (*Saavedra v 89 Park Ave. LLC*, 143 AD3d 615 [1st Dept 2016]).

Finally, to the extent that defendants argue Vera's deposition testimony contradicts the incident report, Vera's more detailed description of the accident is not inconsistent with the more terse statement of how the accident occurred in the incident report (*Rom v Eurostruct, Inc.*, 158 AD3d 570, 570-71 [1st Dept 2018] ["Although defendants also submitted an unsworn accident

report containing a statement from a coworker that plaintiff lost his balance and fell, this did not contradict plaintiff's consistent testimony that he fell because the ladder suddenly moved"]). Moreover, where an inadequate safety device is provided, liability under the statute attaches in either case (*Lin v 100 Wall St. Prop. L.L.C.*, 193 AD3d 650, 653 [1st Dept 2021] ["It is also of no moment whether the ladder shook prior to plaintiff's fall, or as defendants maintain, after plaintiff lost his balance and grabbed the top of it to steady himself. In either event, the ladder was an inadequate safety device for the work in question"]).

Labor Law 241(6)

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating 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, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998). Importantly, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross*, 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

Here, plaintiff cites two provisions of the Industrial Code: 12 NYCRR 23-1.22(c)(1), which requires all platforms used as working areas "shall be provided with a floor of planking at least two inches thick full size, exterior grade plywood at least three-quarters inch thick or metal of equivalent size," and 12 NYCRR 23-1.22(c)(2), which provides that all platforms at least seven feet above the ground "shall be provided with a safety railing." Both provisions have been held sufficiently specific that the violation thereof establishes a violation of Labor Law § 241(6) (*Ramirez v Metropolitan Transp. Auth.*, 106 AD3d 799, 800-01 [2d Dept 2013] [12 NYCRR 23-1.22(c)(1)]; *Silvas v Bridgeview Invs., LLC*, 79 AD3d 727, 732 [2d Dept 2010] [12 NYCRR 23-1.22(c)(2)]). As set forth above, plaintiff adequately establishes prima facie entitlement to summary judgment by showing that the plank he was provided did not conform to the dimensions of the Industrial Code, and that the working area he was using was more than seven feet above the ground and had no railings (accident location photos, NYSCEF Doc. No. 120). Moreover, plaintiff establishes that he fell and was injured due to the insufficient construction of his work area. Defendants offer no relevant opposition to plaintiff's claim under Labor Law § 241(6).

Labor Law § 200

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so

> placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

"Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (*LaRosa v Internap Network Servs. Corp*., 83 AD3d 905, 909 [2d Dept 2011]). Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]). However, where an injury stems from a dangerous condition inherent in the premises, an owner or contractor may be liable in common-law negligence and under Labor Law § 200 when the owner or contractor "'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], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

Here, contrary to plaintiff's arguments, plaintiff's claim implicates the means and methods of the work rather than a dangerous condition inherent in the premises. The accident was caused by the use of the plank to allow plaintiff to install the pour stops, which is not the result of a dangerous condition (*see Breslin v Macy's, Inc.*, 211 AD3d 569 [1st Dept 2022] ["the defective ladder from which plaintiff fell was an aspect of the means and methods of performing

the work, not a condition of the premises"]). Moreover, "[g]eneral supervisory authority to oversee the progress of the work is insufficient to impose liability (*LaRosa*, 83 AD3d at 909). "If the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercises no supervisory control over the work, no liability attaches under Labor Law § 200 or the common law" (*id.*). Plaintiff fails to establish that either YYY or Joy exercised actual supervision over the selection and placement of the plank, and Vera testified that it was his supervisor from F&J who directed him to stand on the plank to install the pour stops (Vera EBT tr, NYSCEF Doc. No. 117 at 73, 76-77). Thus, plaintiff cannot establish prima facie entitlement to summary judgment on its claim pursuant to Labor Law § 200.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is granted to the extent of granting partial summary judgment in favor of plaintiff and against defendants, and, thusly, defendants are found liable to plaintiff on the second cause of action pursuant to Labor Law § 240(1) and the third cause of action pursuant to Labor Law § 241(6), and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 1166, 111 Centre Street on March 1, 2023, at 10:00 AM.

This constitutes the decision and order of the court.

2/6/2023
DATE

LOUIS L. NOCK, 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