SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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PUBLIC ADMINISTRATOR OF NEW YORK COUNTY AS ADMINISTRATOR OF THE ESTATE OF JUAN PAZ-REYES,

Plaintiff,

- v -

6 GRAMATAN REALTY LLC,1978 THIRD AVENUE, LLC,11285 AV, LLC,

Defendant.

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INDEX NO. 157071/2016

MOTION DATE 06/22/2022

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

1978 THIRD AVENUE, LLC, 11285 AV, LLC

Plaintiff,

-against-

GLOBAL GENERAL CONSTRUCTION, INC.

Defendant.

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Third-Party
Index No. 595599/2017

The following e-filed documents, listed by NYSCEF document number (Motion 007) 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179

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

This action arises out of the unfortunate incident that occurred at a worksite on November 5, 2016, resulting in the death of Juan Paz-Reyes. Plaintiff now moves for summary judgment as against defendants, 1978 Third Avenue, LLC, and 11285 Av, LLC, collectively referred to as "the Owners", on its claims pursuant to Labor Law §§ 240(1) and 241(6). The Owners oppose the instant motion and cross-move to dismiss plaintiff's claims of conscious pain and suffering, plaintiff's Labor Law § 200 claims, as well as common law indemnification and breach of

contract against third-party defendant, Global General Construction Inc., "Global". For the reasons set forth below, plaintiff's motion is granted, and defendants' cross-motion is denied.

Background

The Owners contracted with Global to perform multiple jobs on the roof, bulkheads, and exterior of the subject premises, located at 6 Gramatan Avenue in the City of Mount Vernon, County of Westchester, State of New York. Decedent-plaintiff, Juan Paz-Reyes, was employed by Global as a laborer/roofer on the date of the incident.

On the roof of the building there is a "shaft room", also called the bulkhead, that housed the shaft for the three elevators in the building. As part of the contract, Global was directed to clean out and repair the bulkhead. It is undisputed that within the bulkhead there was an opening in the floor, that was covered by a thin piece of sheet metal. Decedent stepped on the thin piece of sheet metal and fell through the elevator shaft approximately 22 feet and died as a result of the fall.

Summary Judgment Standard

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

Owners' Cross Motion

Owners cross-move to dismiss plaintiff's Labor Law §200 and common law negligence claims as well as plaintiff's conscious pain and suffering. The Owners also seek summary judgment as to its common law indemnification and insurance procurement claims against Global. Plaintiff and Global oppose the cross-motion.

Labor Law §200 and common law negligence claims

"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" (*Edwards v State Univ. Constr. Fund,* 196 AD3d 778, 780 [2021] [internal quotation marks and citations omitted]; *see Wiley v Marjam Supply Co., Inc*., 166 AD3d 1106, 1109 [2018], lv denied 33 NY3d 908 [2019]). Liability under Labor Law § 200 "generally falls into two broad categories: instances involving the manner in which the work is performed, and instances in which workers are injured as a result of dangerous or defective premises conditions at a work site" *Abelleira v City of New York,* 120 AD3d 1163, 1164 [2nd Dept 2014]; see *Cantalupo v Arco Plumbing & Heating, Inc.,* 194 AD3d at 689 [2nd Dept 2021].

A defendant is charged with having constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the happening of an accident to permit the defendant to discover and remedy the same (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). "Moreover, if a reasonable inspection would have disclosed the dangerous condition, the failure to make such an inspection constitutes negligence and may make the owner liable for injuries proximately caused by the condition" (*Colon v Bet Torah, Inc.*, 66 AD3d 731, 732 [2d Dept 2009]).

In support of its motion to dismiss this cause of action, the Owners contend that they were not on notice of any dangerous or defective condition on the worksite. The Owners contend that they had gained possession of the building approximately one month before the accident and upon its inspection the area where the accident occurred was boarded up and inaccessible.

The Owners have not provided any evidence to establish that the area in question was inspected and lacked any defects, as such the Court finds that they have failed to meet their burden with respect to this issue. The Owners lack of diligence in conducting a proper inspection, and not discovering the defect, cannot be used as a basis to establish lack of notice. There is no dispute that there was a defect that caused the accident in this action, accordingly, the motion seeking dismissal of these claims is denied.

Conscious Pain and Suffering

In support of the motion that seeks dismissal of this claim, the Owners' arguments are akin to allegations that plaintiff will be unable to prove these claims at the time of trial. There has been no admissible evidence submitted to establish a *prima facie* finding that plaintiff did not suffer any conscious pain and suffering prior to his death. Accordingly, that portion of the Owners cross-motion is denied.

Indemnification

The Owners contend that it is undisputed that at the time of the accident the decedent was acting within the scope of his employment and was supervised by Global, and any finding of negligence would be based on the conduct of either the decedent or Global, thus entitling it to conditional summary judgment on the common law indemnity claims. Additionally, the Owner

allege that Global is in breach of contract for having failed to have liability coverage for this loss as it was obligated to provide liability coverage naming the Owners as an additional insured.

Plaintiff takes no position as to this portion of the motion, however Global opposes. In opposition, Global contends and this Court agrees that the Owners cannot establish that they are entitled to common law indemnification because they have failed to establish that they are free from negligence, in light of what was discussed above.

As to the breach of contract claims as against Global, the Court finds that the Owners have failed to burden on this issue as well. The Owners repeatedly contends that Global was required, pursuant to the contract, to procure and maintain insurance on a primary basis, however, the plain reading of the contract does not indicate so. Contrary to the cases cited by the Owners, Global has provided evidence that it complied with the terms of the contract and named the Owners as additional insureds. Accordingly, that portion of the Owners' motion is denied.

Plaintiff's Motion

Plaintiff moves for partial summary judgment as to liability under Labor Law §§ 240(1) and 241(6), as against the Owners. The Owners oppose the instant motion on the grounds that decedent was not working at the time of the accident, thus the Labor Law does not apply.

Labor Law §240(1)

Labor Law §240(1) states in pertinent part as follows: "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." The statute imposes absolute liability upon

owners, contractors and their agents where a breach of the statutory duty proximately causes an injury. *Gordon v. Eastern Railway Supply, Inc*., 82 NY2d 555, 559 [1993]; *Ross v. Curtis–Palmer Hydro–Elec. Co.,* 81 NY2d 494, 500 [1993]; *Rocovich v. Consolidated Edison Co*., 78 NY2d 509, 513 [1991].

Labor Law §241(6)

Labor Law § 241(6) places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code (*Ross at 501-502)*. Accordingly, to support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable given the circumstances of the accident and sets forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*id. at 502; Ares v State,* 80 NY2d 959, 960, 590 NYS2d 874 [1992]; see also *Adams v Glass Fab,* 212 AD2d 972, 973 [4th Dept 1995]). Plaintiff's claim under §241(6) is based on defendants' failure to guard, cover, or erect safety railings around the opening into which the decedent fell, constituting a violation of 22 NYCRR 23- 1.7(b)(i). As well as the lack of safety nets below the opening, or harnesses with anchor points near the opening, were equipped to protect the decedent from falling down the elevator shaft in violation of Industrial Code § 23-1.7(b)(1)(iii)(b) or (c).

In opposition, the Owners contend that plaintiff was not working at the time of the incident and thus not afforded protection pursuant to the Labor Law. In support of this argument, the Owner cite to two Second Department cases that are not binding on this court in light of relevant First Department case law and in any event are distinguishable to the facts in the instant matter.

In both cases cited, *Ferenczi v Port Auth. of NY & New Jersey*, (34 AD3d 722 [2d Dept 2006]) and *McKnight v Metro-North R.R.*, (192 AD3d 679 [2d Dept 2021]), the plaintiff left the

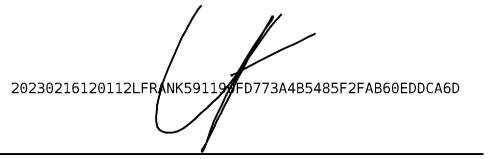
worksite and returned when their accident occurred. Here, it is not alleged that decedent ever left the worksite, the only similarity with the cases cited is that the Owners contend that the workday was over. However, in support of their cross-motion the Owners contend that the decedent was acting within the scope of his employment with Global.

The First Department cases cited by the plaintiff involve defective work conditions where the Court did not base its holding on whether or not the injured worker was actively participating in the enumerated activity protected under the Labor Law. *See Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 43 [1st Dept 2005] (holding that a worker injured, in an on-site accident because of a defective scaffold, while on a lunch break at is entitled to the protection of Labor Law § 240 (1)); *see also*, *Amante v Pavarini McGovern, Inc.*, 127 AD3d 516, 8 NYS3d 54 [1st Dept 2015] (holding that a worker injured when he fell into an excavated hole at a work site is entitled to the protections of Labor Law § 240 (1) although the worker was not yet performing his tasks).

Here, the Court finds the plaintiff has established that decedent's injures were proximately caused by the Owners' failure to provide adequate protection required by the applicable provisions of the Labor Law. Notably, the Owners make the argument that at the time of the accident decedent was acting within the scope of his employment with Global; however in opposition to plaintiff's motion avers there is a question of fact as to whether decedent was engaged in protected activity for the purposes of the Labor Law. The Owners cannot "have their cake and eat it too," advancing contradictory arguments to the differing Labor Law claims. As such, the Owners have failed to raise a triable issue of fact. Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment as against defendants 1978 Third Avenue, LLC, and 11285 Av, LLC, as to Labor Law §§ 240(1) and 241(6) is granted; and it is further

ADJUDGED that defendants' 1978 Third Avenue, LLC, and 11285 Av, LLC cross-motion is denied in its entirety.



2/16/2023
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