SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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RUSSIUS DOS SANTOS COSTA,

Plaintiff,

- v -

301 EAST 80TH REALTY LLC and CM AND ASSOCIATES CONSTRUCTION MANAGEMENT LIMITED LIABILITY COMPANY,

Defendants.

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INDEX NO. 162138/2019

MOTION SEQ. NO. 003 & 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 131, 132, 135

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 133, 134, 136

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

In this Labor Law action, defendants move (Seq. 003), pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes the motion and moves separately (Seq. 004), pursuant to CPLR 3212, for summary judgment against defendants on the issue of liability under Labor Law § 240(1). Defendants oppose the motion.

Factual and Procedural Background

This case arises from an incident on April 15, 2019, in which plaintiff was allegedly injured after being struck by a falling wooden board while working at a construction site located at 301 East 80th Street in Manhattan (the premises) (NYSCEF Doc Nos. 109, 132). Plaintiff commenced this action against defendants alleging, violations of Labor Law §§ 200, 240(1), and 241(6) (Doc No. 90). Defendants joined issue by their answer dated April 6, 2020, denying all substantive allegations of wrongdoing and asserting various affirmative defenses (Doc No. 91).

Deposition Testimony of Plaintiff

At his deposition, plaintiff testified that, on the day of the incident, he was employed by nonparty R.C. Structures (R.C.) and working on the premises (Doc No. 98). He was given instructions by his supervisor, who was the only person he received instructions from on what jobs to do and how to do them (Doc No. 98). He and several coworkers were responsible for assembling floor decking on the premises (Doc No. 98).

He and a coworker were positioned on one level of decking, while a second coworker was stationed on the level above them (Doc No. 98). One section of the decking above plaintiff was completed but another was open, leaving an opening in the decking (Doc No. 98). There was no netting or other protection installed overhead, which was consistent with the setup they used when assembling decking on other levels (Doc No. 98). Plaintiff and his coworker each began handing boards to the second coworker by passing them through the opening (Doc No. 98). While plaintiff was bent over, the second coworker above dropped a board handed to him by plaintiff's other coworker (Doc No. 98). It fell and struck plaintiff on his head, shoulder, back, and wrist (Doc No. 98).

Plaintiff stated that the use of machines to lift the boards varied based on how far the boards had to be moved; at shorter distances, the boards were passed by hand, whereas at longer distances, they were hoisted by a machine (Doc No. 98). On the day of the incident, the boards had to be moved vertically roughly 16-18 feet, which was a distance where workers normally did not use tools like ropes, hoists, or other machines to lift them (Doc No. 98). He also testified that boards had fallen before when they were passed by hand, stating that it "always happens," but he never told any of his supervisors (Doc No. 98).

Deposition Testimony of Defendants

Giancarlo Sarracino, a site superintendent for defendant CM and Associates Construction Management LLC (CM) testifying on behalf of defendants, stated that the premises were owned by defendant 301 East 80th Realty LLC (301 East), 301 East hired CM to be the construction manager for the project, and R.C. was subsequently hired as a subcontractor (Doc No. 99). CM maintained a health and safety program that covered, among other things, situations involving open flooring and falling objects, as well as fall protection measures such as guardrails and netting, all of which applied to subcontractors like R.C. (Doc No. 99).

He was not aware of plaintiff's accident and stated that it was never reported to CM (Doc No. 99). R.C. had control over its own "means and methods" for performing the required work, but CM did have the ability to stop work if something was deemed hazardous or unsafe (Doc No. 99). In his opinion, the work being done by R.C. did not require workers to pass materials from floor to floor through any openings in the decking (Doc No. 99).

Deposition Testimony of Plaintiff's Supervisor

Plaintiff's supervisor, a foreman for R.C., testified that he was responsible for giving plaintiff and the other R.C. employees instructions every morning on what work to perform (Doc No. 100). He had no personal knowledge of plaintiff's accident because he did not witness it, and only learned of the accident from plaintiff the day after it happened (Doc No. 100). However, he stated that plaintiff was tasked with a position working on the upper level above the other workers on the date of the accident and would have had no other workers above him, although he could not confirm whether plaintiff was actually in that position at the time of the accident (Doc No. 100). He did not direct plaintiff to pass boards by hand through the opening in the decking and had no prior complaints from plaintiff about falling boards (Doc No. 100). He could not state whether protective barricades were in place on the date of the accident but opined that such barricades

should have been in place (Doc No. 100). He also opined that protective netting to prevent items falling from the floor above did not exist (Doc No. 100).

Deposition Testimony of Plaintiff's Coworker

One of plaintiff's coworkers, another R.C. employee who witnessed plaintiff's accident, testified that the sworn statement he provided prior to his deposition (Doc No. 108) was accurate (Doc No. 105). He and plaintiff were directed by plaintiff's supervisor to pass the boards, by hand, to the floor above through an opening in the decking (Doc No. 105). No hoisting ropes, protective barricades, or netting were provided, although they never asked for such items because they normally did not use them when performing that type of work (Doc No. 105). He stated that multiple boards fell from above and struck plaintiff (Doc No. 105), which contradicted plaintiff's testimony that he was struck by a single board (Doc No. 98). He also initially stated that the boards fell because the second coworker above lost his grip, but later clarified that he did not witness the other coworker lose his grip and assumed he had somehow lost control of the boards, either by not holding them correctly or by stepping on them (Doc No. 105). He also stated that the boards were already on the floor above when they fell (Doc No. 105).

Affidavit of Plaintiff's Expert

In his affidavit, plaintiff's expert, a professional engineer licensed in New York, opined that "the failure to use a hoist or elevator to move [the boards]" and "the lack of guardrails" were "a substantial factor" in causing plaintiff's injuries (Doc No. 130). He opined further that passing boards by hand from one floor to another is "inherently dangerous," and it is "reasonably foreseeable" that a board will fall when this process occurs (Doc No. 130). Lastly, he averred that guardrails on the upper floor would have prevented the board from falling (Doc No. 130).

Legal Analysis and Conclusions

In support of their summary judgment motion, defendants contend that they are entitled to judgment as a matter of law on plaintiff's Labor Law § 240(1) claim because the statute is inapplicable, as plaintiff's accident did not involve an elevation-related risk. They further assert that his injuries were not caused by an elevation differential and resulted from a general hazard at the construction site. They contend that the Labor Law § 241(6) claim must be dismissed because plaintiff failed to allege an applicable provision of the Industrial Code. With respect to his Labor Law § 200 and common-law negligence claims, they contend that dismissal is warranted because they did not have actual or constructive notice of the allegedly dangerous condition, and did not exert authority or control over the manner in which plaintiff performed his job.

Plaintiff opposes, arguing that defendants did not satisfy their initial burden because Labor Law § 240(1) covers his work handing the boards up through the decking and a safety device would have prevented the accident. Although not expressly described as such, he asserts that, even assuming defendants satisfied their burden, questions of fact exist related to the efficacy of a safety device. Regarding defendants' Labor Law § 200 and common-law negligence contentions, he argues that defendants had authority or control over the work performed and prior notice of boards falling; and, even assuming defendants satisfied their burden, questions of fact exist as to defendants' notice.

In reply, defendants reiterate their prior arguments related to the Labor Law §§ 200 and 240(1) and common-law negligence claims.

In support of his summary judgment motion, plaintiff contends that he has made a prima facie showing that defendants are subject to Labor Law § 240(1), the statute was violated, and such violation caused his injuries. Defendants oppose, reiterating their argument made in support of

their motion that plaintiff's work did not involve an elevation-related risk. They also argue that adequate safety devices were provided to plaintiff.

In reply, plaintiff reiterates his arguments made in support of his initial motion.

Plaintiff's Labor Law § 240(1) Claim

"Labor Law § 240(1) imposes a nondelegable duty and absolute liability upon owners and contractors for failing to provide safety devices necessary for workers subjected to elevation-related risks in circumstances specified by the statute" (*Soto v J. Crew Inc.*, 21 NY3d 562, 566 [2013]; *see Healy v EST Downtown, LLC*, 38 NY3d 998, 999 [2022]). A plaintiff seeking summary judgment on the issue of liability "must establish that the statute was violated and that such violation was a proximate cause of his injury" (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]; *see Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 405 [1st Dept 2018]), whereas a defendant must show the opposite to obtain summary dismissal (*see Salcedo v Sustainable Energy Options, LLC*, 190 AD3d 439, 439 [1st Dept 2021]).

Here, defendants have failed to show that the statute was not violated, as courts have found that the statute applies to instances of falling boards striking and injuring a plaintiff (*see Passos v Noble Constr. Group, LLC*, 169 AD3d 706, 707 [2d Dept 2019]; *Escobar v Safi*, 150 AD3d 1081, 1083 [2d Dept 2017]; *Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005] [finding statute applicable to falling piece of timber because it was "a load that required securing for the purposes of the undertaking at the time it fell" (internal quotation marks and citations omitted)]).

Plaintiff, however, has established his entitlement to judgment as a matter of law on the issue of liability on his Labor Law § 240(1) claim. By submitting, among other things, testimony from him and his coworker that he was struck by a falling board, and that no lifting tools, overhead netting, or other protective devices were provided, and his expert affidavit that the lack of such

tools and safety devices was a substantial factor in causing his injuries, he has "submitted evidence showing that he was engaged in an activity covered by the statute, that defendants failed to provide an adequate safety device to protect him, and that such violation was a proximate cause of the accident" (*Villanueva*, 162 AD3d at 405; *see Escobar*, 150 AD3d at 1083; *Hill v Acies Group, LLC*, 122 AD3d 428, 429 [1st Dept 2014] [finding plaintiff made requisite prima facie showing after submitting testimony describing being "suddenly struck by a falling brick, in the absence of any overhead netting or other such protective devices"]).

In opposition, defendants failed to raise a triable issue of fact as to whether the statute was violated or whether plaintiff was the sole proximate cause of the accident; therefore, plaintiff is entitled to summary judgment on the issue of liability on his Labor Law § 240(1) claim (*see Tinti v Alpha Omega Bldg. & Consulting Corp.*, 208 AD3d 1120, 1121 [1st Dept 2022] [granting plaintiff summary judgment on issue of liability on Labor Law § 240(1) claim involving falling hose]; *Douglas v Tishman Constr. Corp.*, 205 AD3d 570, 571 [1st Dept 2022] [affirming grant of summary judgment on issue of liability on Labor Law § 240(1) claim involving falling wooden door]).

Plaintiff's Labor Law § 241(6) Claims

Since plaintiff is entitled to summary judgment on liability on his Labor Law § 240(1) claim, it is unnecessary to address defendants' arguments related to his Labor Law § 241(6) claims; 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]).

However, if considered, defendants have demonstrated that they are entitled to judgment as a matter of law on plaintiff's Labor Law § 241(6) claims. That statute imposes a nondelegable duty that "requires owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commission of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993] [internal quotation marks and citations omitted]). However, "to state a claim under [the statute], [a] plaintiff must allege that [a] defendant violated an Industrial Code regulation that sets forth a specific standard of conduct and is not simply a recitation of common-law safety principles" (*Toussaint v Port Auth. of N.Y. & N.J.*, 38 NY3d 89, 94 [2022] [internal quotation marks, brackets, and citations omitted]; *see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349 [1998] [holding that "the rule or regulation alleged to have been breached (must) be a specific, positive command" (internal quotation marks and citations omitted)]).

In his bill of particulars, plaintiff alleged violations of Industrial Code (12 NYCRR) §§ 23-1.5 and 23-2.1(a)(1) (Doc No. 121). His Labor Law § 241(6) claims predicated on section 23-1.5, however, must be deemed abandoned "since [he] failed to specify any particular subsections and subdivisions of the[] provision[]" (*McLean v Tishman Constr. Corp.*, 144 AD3d 534, 535 [1st Dept 2016] [parentheses omitted] [dismissing plaintiff's Labor Law § 241(6) claims predicated on Industrial Code (12 NYCRR) §§ 23-1.16, 23-2.3, 23-6.1, and 23-8.1 because he failed to identify specific subsections of enumerated provisions]; *accord Caminiti v Extell W. 57th St. LLC*, 166 AD3d 440, 441 [1st Dept 2018] [same as to violation of section 23-1.5]).

Plaintiff's Labor Law § 241(6) claims predicated on section 23-2.1(a)(1) must also be dismissed. Although that subsection of the Industrial Code is sufficient as a predicate for such a claim (*see Rodriguez v DRLD Dev., Corp.*, 109 AD3d 409, 410 [1st Dept 2013]), it applies only

to situations involving whether materials were "stored in a safely and orderly manner" (Industrial Code [12 NYCRR] § 23-2.1 [a] [1]; *see Nicholson v Sabey Data Ctr. Props., LLC*, 205 AD3d 620, 621 [1st Dept 2022] [denying summary judgment where issues of fact existed as to whether pipes were improperly stacked]; *Armental v 401 Park Ave. S. Assoc., LLC*, 182 AD3d 405, 407 [1st Dept 2020] [similar]). Here, plaintiff was struck by a falling board mishandled by a coworker; therefore, his accident does not entail the storage of materials (*cf. Padilla v Touro Coll. Univ. Sys.*, 204 AD3d 415, 416 [1st Dept 2022] [finding sheetrock leaned against wall involved factual questions related to storage of material]; *Rodriguez*, 109 AD3d at 410 [similar]).

Plaintiff's Labor Law § 200 and Common-Law Negligence Claims

Similar to plaintiff's Labor Law § 241(6) claims, it is unnecessary to address his Labor Law § 200 and common-law negligence claims since he is entitled to summary judgment on the issue of liability on his Labor Law § 240(1) claim; because his damages are the same under either theory and he may only recover once, the issue is academic (*see Burgos Caba v 587-91 Third Owner, LLC*, ___ AD3d ___, ___, 2023 NY Slip Op 00924, *1 [1st Dept 2023]; *Cronin v New York City Tr. Auth.*, 143 AD3d 419, 420 [1st Dept 2016]).

However, if considered, defendants have demonstrated that they are entitled to judgment as a matter of law on plaintiff's Labor Law § 200 and common-law negligence claims. "Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]; *see Lemanche v MIP One Wall St. Acquisition, LLC*, 190 AD3d 422, 423 [1st Dept 2021]). Where, as here, "the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually

exercised supervisory control over the injury-producing work" (*Cappabianca*, 99 AD3d at 144; *see Ross*, 81 NY2d at 505; *Villanueva*, 162 AD3d at 406).

Defendants have made a prima facie showing that they did not exercise authority or control over the work plaintiff was performing when his injury occurred. Between plaintiff's testimony that his supervisor was the only person who told him what work to perform and how to do it, which was confirmed by the testimony from plaintiff's supervisor, and defendants' testimony that R.C. controlled the "means and methods" of the work it was required to perform, defendants demonstrated that they "did not control the work that caused the accident" (*Cappabianca*, 99 AD3d at 144 [dismissing Labor Law § 200 and common-law negligence claims related to plaintiff's use of saw because defendants did not provide it, direct him on how to use it, or supervise his use of it]). Although defendants testified that their site superintendent conducted walkthroughs of the worksite and they had the ability to stop work in certain situations, "regular inspection of the site or the authority to stop any unsafe work is a general level of supervision that is not sufficient to warrant holding [defendants] liable" under the statute and the common law (*Ruisech v Structure Tone Inc.*, 208 AD3d 412, 415 [1st Dept 2022]; *see DaSilva v Toll First Ave., LLC*, 199 AD3d 511, 513 [1st Dept 2021] ["(T)he authority . . . to ensure the overall safety of the work site and to stop any unsafe work does not rise to the level of supervision and control required to hold owners and general contractors liable"]).

In opposition, plaintiff fails to raise a triable question of fact regarding defendants' authority and control over his work. Therefore, defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims (*see Arnold v Empire 326 Grand LLC*, 202 AD3d 528, 530 [1st Dept 2022] [granting summary judgment to defendants and dismissing Labor Law § 200 and common-law negligence claims after defendants made prima

showing of no authority or control over work]; *Santana v MMF 1212 Assoc. L.L.C.*, 190 AD3d 505, 506 [1st Dept 2021] [similar]).

Accordingly, it is hereby:

ORDERED that plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240(1) as against defendants 301 East 80th Realty LLC and CM and Associates Construction Management Limited Liability Company (Seq. 004) is granted; and it is further

ORDERED that the motion by defendants 301 East 80th Realty LLC and CM and Associates Construction Management Limited Liability Company seeking summary judgment (Seq. 003) is decided as follows:

(1) motion denied as academic as to plaintiff's Labor Law §§ 241(6) and 200 and common-law negligence claims;

(2) motion denied as to plaintiff's Labor Law § 240(1) claim;

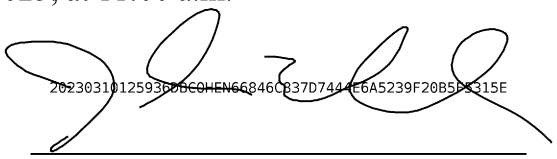
and it is further

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 shall appear for a settlement/trial scheduling conference in person at 71 Thomas Street, Room 305, on March 29, 2023, at 11:00 a.m.



3/10/2023
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