At an IAS Part Term, Part 75 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 30th day of March, 2023.

P R E S E N T:

HON. ROBIN S. GARSON,
Justice.

----------X

SHALVA METREVELI,

Plaintiff,

-against-

Index No.: 500218/18

OCEANVIEW MANOR ACQUISITION I, LLC, OCEANVIEW MANOR HOME FOR ADULTS, INC., AND THE CITY OF NEW YORK,

(MOT. SEQ. 5 AND 6)

Defendants.

----------X

The following papers considerd herein:	NYSEF Doc Nos.:
Notice of Motion/Order to Show Cause/Petition/ Cross Motion and Affidavits (Affirmations)	96-118, 129-130, 132-134
Opposing Affidavits (Affirmations)	121-127, 135 136
Reply Affidavits (Affirmations)	137, 138

Plaintiff Shalva Metreveli moves for an order, pursuant to CPLR § 3212, granting partial summary judgment on the issue of liability against defendants Oceanview Manor Acquisition I, LLC (OMA) and Oceanview Manor Home for Adults, Inc. (OMH) (collectively Defendants) on his Labor Law § 241 (6) claim.

Defendants cross-move for an order, pursuant to CPLR § 3212, granting summary judgment dismissing plaintiff's common law negligence and Labor Law §§ 200 and 240 (1) claims.

This action arises from an accident on November 18, 2016, in which plaintiff sustained injuries after falling through an unprotected opening while working at a construction project at 3010 West 33rd Street in Brooklyn, New York (premises). The premises, owned by OMA and leased to OMH, was undergoing the construction of a five-story addition to a nursing home and installation of mechanical and electrical equipment around the perimeter of both buildings. OMH hired Atlas Builders, LLC (Atlas) as the general contractor for the construction project in August 2015. At the time of the accident, plaintiff was employed by Atlas as a laborer.

There were seven to eight other Atlas laborers at the premises during the course of the construction project. The laborers were given their daily work instructions from Niurka Valera, the Atlas foreman. From time to time Atlas' principals also gave instructions to the laborers. In addition, Atlas held safety meetings and provided plaintiff with safety tools and equipment when required by his duties. No one else directed or controlled his work or provided him with tools and equipment at the premises.

Plaintiff testified to the following: He arrived at the premises at 7:30 a.m.; he was instructed by the foreman to bring construction materials, which included wood beams, from the exterior yards into the new addition; that he was wearing a helmet, jacket, gloves, pants, and safety boots; the day of the accident was the first day that he returned to the premises, after working at a different Atlas job site during the preceding two to three days; when he first saw the side yard that day, he noticed piles of dirt and sand throughout the yard, which partially covered the construction materials; that he was not warned about the

condition of the yard before the accident, and neither made any complaints about the yard before the accident nor knew of any such complaints. Plaintiff surmised that a tractor was used to dig holes in the yard while he was at the other job site, since Atlas was in the process of installing underground stormwater detention tanks (wells) with pipe connections around the perimeter of the buildings. When a well was installed, it was required to be sealed with a square cement cover, then a metal grate would be placed to cover the ground opening and would be flush with the ground.

Plaintiff also testified that he had been retrieving construction materials for approximately one hour before the accident. There were no tractors or other workers in the yard at that time. The foreman was in a trailer away from the accident site. The Atlas owners were not at the premises. Immediately before the accident, plaintiff was attempting to dislodge a wood beam, which was partially buried under dirt and sand, but was having difficulty doing so. After he exerted more effort, the beam moved and, as a result, he stepped backwards twice. Upon his second step, his left foot entered an unguarded opening in which Atlas had installed a well, causing him to fall approximately four feet onto the well's cement cover and sustain injuries. Although the well's cement cover was in place, the metal grate was missing, and there were no barriers around the opening. Plaintiff did not see the opening before the accident due to the piles of dirt and sand in the area. He was not using safety tools or equipment at the time of the accident since they were not required for his assigned task. Plaintiff denied installing or cleaning the well opening into which he fell or being instructed to do so.

Plaintiff contends that defendants violated Industrial Code (12 NYCRR) §§ 23-1.7 (b) (1) (i) and/or (ii) by failing to cover, protect or guard a hazardous opening into which he fell, at the premises and that this violation was a proximate cause of his injuries. Plaintiff avers that OMA, as the owner of the premises, and OMH, as the lessee of the premises who contracted for and benefited from the construction work at the premises, are both liable for said violation as "owners" under the Labor Law, regardless of any alleged comparative negligence on the part of plaintiff.

In opposition, defendants do not dispute that the opening was hazardous or unprotected. However, defendants argue that this fact does not conclusively determine liability as against them. Instead, relying on the deposition testimony of Michael Yusim, one of Atlas' principals and Operations Officer, defendants contend that there remain triable issues of fact as to whether plaintiff was a recalcitrant worker, whether his actions were the sole proximate cause of his injuries or whether plaintiff was otherwise comparatively negligent, which preclude the grant of summary judgment to him. Yusim's testimony consists of surmise and speculation and otherwise unsupported hearsay. Yusim was not present at the accident site, arriving an hour and a half after the accident. He surmised that plaintiff caused his own accident by removing, and not replacing, the metal grate and failing to place barriers to protect the opening before the accident, despite knowing that barriers were available at the premises for this purpose.

Defendants also cross-move for dismissal of plaintiff's Labor Law § 240 (1) claim on the basis that his accident did not involve a gravity-related hazard and plaintiff's common law negligence and Labor Law § 200 claims on contending that defendants neither had authority to supervise or control the work that plaintiff was performing at the time of the accident nor created or had actual or constructive notice of the alleged condition.

Plaintiff does not oppose that branch of defendants' cross motion seeking dismissal of his Labor Law § 240 (1) claim. However, plaintiff opposes those branches of the cross motion seeking dismissal of his common law negligence and Labor Law § 200 claims solely on procedural grounds. Plaintiff argues that said branches should be denied as untimely.

Defendants argue that, as their cross motion seeks identical relief to that sought in plaintiff's motion, the court can properly consider their cross motion, particularly since plaintiff has not demonstrated any resulting prejudice. Therefore, defendants argue that they are entitled to dismissal of plaintiff's common law negligence and Labor Law § 200 claims, since plaintiff failed to raise a triable issue of fact as to whether defendants had authority to supervise or control plaintiff's work, created the alleged condition, or had actual or constructive notice of alleged condition.

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers without regard to direction and control (*see Romero v J & S Simcha, Inc.*, 39 AD3d 838 [2d Dept 2007]). In order to prevail under this section of the Labor Law, a plaintiff must establish that the

alleged injuries were proximately caused by a violation of specific safety rules and regulations of the Industrial Code promulgated by the Commissioner of the Department of Labor (*see Ross v Curtis—Palmer Hydro—Elec. Co.*, 81 NY2d 494 [1993]; *Ares v State of New York*, 80 NY2d 959 [1992]). The rule or regulation alleged to have been breached must be a specific, positive command and be applicable to the facts of the case (*see Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 619 [2d Dept 2008]; *Jicheng Liu v Sanford Tower Condominium, Inc.*, 35 AD3d 378, 379 [2d Dept 2006]).

OMA, as titleholder of the premises, and OMH, as the lessee of the premises who contracted with Atlas and benefited from the construction of the new addition to its nursing home, are both considered "owners" under Labor Law 241 (6) (*see Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984] [where the court held that the definition of "owners" under Labor Law 241 (6) "is not limited to the titleholder. The term has been held to encompass a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit"]; *see also Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734 [2d Dept 2008]; *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616 [2d Dept 2008]). Here, plaintiff's request for summary judgment as to his Labor Law § 241 (6) claim is predicated on alleged violations of 12 NYCRR 23-1.7 (b) (1) (i) and/or (ii).

12 NYCRR 23-1.7 (b) (1), which relates to "Falling hazards" and "Hazardous openings," states, in pertinent part, the following:

> "(i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).
>
> "(ii) Where free access into such an opening is required by work in progress, a barrier or safety railing constructed and installed in compliance with this Part (rule) shall guard such opening and the means of free access to the opening shall be a substantial gate. Such gate shall swing in a direction away from the opening and shall be kept latched except for entry and exit."

It is well settled that 12 NYCRR 23-1.7 (b) (1) (i) and (ii) are specific, positive commands and, thus, sufficiently support a Labor Law § 241 (6) claim (*see Scarso v M.G. Gen. Constr. Corp.*, 16 AD3d 660 [2d Dept 2005]). Furthermore, 12 NYCRR 23-1.7 (b) (1) (i) is arguably applicable herein, given plaintiff's testimony that he unwittingly stepped, and then fell, into an unprotected opening at the premises. As to 12 NYCRR 23-1.7 (b) (1) (ii), the opening was nonetheless not guarded in compliance with 12 NYCRR § 23-1.7 (b) (1) (ii).

Notably, defendants do not dispute that the opening through which plaintiff fell was unprotected or hazardous. The court nevertheless notes that an opening is considered hazardous under 12 NYCRR 23-1.7 (b) (1) if it is of sufficient depth and dimension such that the plaintiff's body could pass through it (*see Norero v. 99-105 Third Ave. Realty, LLC*, 96 AD3d 727 [2d Dept 2012] [where the Second Department reversed the Supreme Court's denial of plaintiff's motion for summary judgment on his Labor Law § 241 (6) claim based upon 12 NYCRR 23-1.7 (b) (1) (i), after plaintiff "partially fell into an unprotected opening in the floor that was large enough for his body to have passed through"]; *see also Ortiz v*

164 Atl. Ave., LLC, 77 AD3d 807 [2d Dept. 2020] [where the Second Department reversed the Supreme Court's denial of plaintiff's request for summary judgment on his Labor Law § 241 (6) based upon 12 NYCRR 23-1.7 (b) (1) (i), after plaintiff fell through an unprotected three-by-four foot hole in the temporary plywood at a construction site]). Here, it is undisputed that the opening was of sufficient depth and dimension, since plaintiff passed through it and then fell four feet onto the well's cement cover.

Defendants' only opposition to plaintiff's motion is premised upon their contentions that plaintiff was a recalcitrant worker and/or the sole proximate cause of his injuries or, alternatively, that plaintiff was otherwise comparatively negligent. However, defendants failed to submit any admissible evidence to support these claims.

To raise a triable issue of fact as to whether plaintiff was a recalcitrant worker and/or the sole proximate cause of his injuries, defendants must produce admissible evidence showing that a necessary and adequate safety device was available, that plaintiff knew that the device was available and that he was expected to use it, and that plaintiff unreasonably chose not to do so, causing the injury sustained (*see Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1168 [2020]; *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 662 [2d Dept 2015]). Here, there is no admissible evidence showing that plaintiff chose not to use a necessary, adequate and available safety device while retrieving and transporting construction materials after knowing of its availability and expected use. Likewise, there is no admissible evidence showing that plaintiff was instructed to clean

sand out of the well opening on the day of the accident and chose not to cover the opening with an adequate and available metal grate or place adequate and available protective barriers around the opening before his accident.

Contrary to defendants' contentions, Yusim's deposition testimony does not support their arguments since he was not at the premises before the accident that day and only speculated as to the cause of the accident after viewing the accident location one and a half hours after the accident. Furthermore, although he testified that he was told that plaintiff was instructed to clean sand out of the well opening, no deposition testimony or affidavit from that person was produced to substantiate this claim. Yusim's surmise, conjecture and unsubstantiated allegations are insufficient to defeat plaintiff's prima facie showing of entitlement to summary judgment (*see Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *Morgan v New York Tel.*, 220 AD2d 728, 729 [2d Dept 1995]; *Fredette v Town of Southampton*, 95 AD3d 939, 940 [2d Dept 2012]).

Significantly, Yusim authenticated the Atlas accident report, which corroborates plaintiff's version of the accident. More specifically, he testified that the report was prepared by the Valera, the foreman, on the day of the accident during the ordinary course of Atlas' business and represented an honest account of the accident based upon her conversations with plaintiff and his co-worker Levan after the accident. In describing how the accident occurred in the report, Valera states that plaintiff "was trying to get a piece of 4x4 that was partially burry [sic] on [sic] the sand then as he was pulling the wood he step

[sic] back and fell into the 4 feet [sic] . . . detention tank that didn't have its cover on top but next to it . . ." In responding to the preprinted question on the report as to why the accident happened, she checked the boxes indicating "unguarded hazard" and "no training or insufficient training."

Plaintiff's contention that he was not cleaning sand out of the well is also corroborated by the deposition testimony of his co-worker. Levan testified that he was inside the new addition, when he heard a noise in the side yard. He then went to the yard and heard plaintiff yelling. Thereafter, he found plaintiff standing inside an opening in the ground in which Atlas had previously installed a well. He could only see plaintiff's head and shoulders; the rest of his body was inside the opening. After discovering plaintiff in the opening, he tried unsuccessfully to pull plaintiff out. Levan did not recall seeing shovels, buckets or vacuums in the opening, which would have been needed if plaintiff was tasked to clean sand from the well opening as testified by Yusim.

In light of the foregoing, defendants failed to raise a triable of fact as to whether plaintiff was a recalcitrant worker, as the submitted evidence does not demonstrate that the accident resulted from plaintiff's unreasonable refusal to use a necessary, adequate and available safety device after given specific instructions to do so (*see Doto v Astoria Energy II, LLC*, 129 AD3d at 662; *Hagins v State*, 81 NY2d 921 [1996]; *cf. Garcia v Ermerick Gross Real Estate, L.P.*, 196 AD3d 676 [2d Dept 2021]). In fact, the Atlas accident report states that the accident resulted from an "unguarded hazard" and "no training or insufficient

training." Similarly, defendants' contention that plaintiff was the sole proximate cause of his injuries is also wholly unsupported by the evidence. Instead, the evidence demonstrates that defendants violated 12 NYCRR 23-1.7 (1) (b) (i) and that this violation was a proximate cause of plaintiff's injuries.

Plaintiff is entitled to partial summary judgment on the issue of liability against defendants based upon his Labor Law 241 § (6) claim as it relates to 12 NYCRR 23-1.7 (b) (1) (i) only. As to the prong of the motion for summary judgment based upon a violation of 12 NYCRR 23-1.7 (b) (1) (ii) it is denied as to plaintiff's common law negligence and Labor Law § 200 claims.

Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). "To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have 'authority to exercise supervision and control over the work'" (*Rojas v Schwartz*, 74 AD3d 1046, 1046 [2d Dept 2010].

Furthermore, "[a] property owner is not liable in negligence unless he or she created the allegedly dangerous condition or had actual or constructive notice of its existence" (*Winby v Kustas*, 7 AD3d 615, 615 [2d Dept 2004]; *see also Labella v Willis Seafood*, 296 AD2d 382 [2d Dept 2002]).

In their cross motion, defendants satisfy their prima facie burden, showing entitlement to summary judgment in their favor with regard to plaintiff's common law negligence and Labor Law § 200 claims. The deposition testimonies of plaintiff and Yusim make clear that Atlas solely had the authority to supervise and control plaintiff's work at the time of the accident. Furthermore, plaintiff and Yusim testified that Atlas created the openings at the premises for the well installations; and plaintiff testified that he did not complain of the condition of the accident location before the accident and did not know of any such complaints. In opposition, plaintiff failed to raise a material issue of fact that necessitates a trial on plaintiff's common law negligence and Labor Law § 200 claims. As such, those branches of defendants' cross motion seeking summary judgment in their favor as to plaintiff's common law negligence and Labor Law § 200 claims are granted.

As plaintiff did not oppose that branch of the cross motion seeking dismissal of his Labor Law § 240 (1) claim, that branch of the cross motion is also granted.

Accordingly, it is hereby

ORDERED that plaintiff's motion seeking partial summary judgment in his favor on the issue of liability based upon his Labor Law § 241 (6) claim is granted solely to the extent that it relates to 12 NYCRR 23-1.7 (b) (1) (i) and the remainder of plaintiff's motion is denied; and it is further

ORDERED that defendants' cross motions seeking dismissal of plaintiff's common law negligence and Labor Law §§ 200 and 240 (1) claims is granted and said claims are hereby dismissed as against OMA and OMH.

This constitutes the decision and order of the court.

E N T E R,

March 30. 2023 Robin S. Garson

J. S. C.

HON. ROBIN S. GARSON
A.J.S.C.