SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS A. KAHN, III** **PART** **32**

Justice

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EDUARDO HARO,

Plaintiff,

- v -

353-357 BROADWAY LLC,TOLL BROS., INC.,TOLL BROTHERS REAL ESTATE, INC.,TOLL GC LLC

Defendant.

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INDEX NO. 150410/2017

MOTION DATE

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 105, 107, 108, 109, 110, 111, 129, 130

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 106, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 131, 132, 133

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motions are determined as follows:

This is an action to recover damages for personal injuries allegedly sustained by a construction worker on August 26, 2012, when, while working at a construction site located at 351-355 Broadway, New York, New York (the Premises),[1] he fell from an elevated beam to the ground below.

In motion sequence number 003, plaintiff Eduardo Haro moves, pursuant to CPLR 3212, for summary judgment in his favor on his Labor Law § 240 (1) claim against defendants 353-357 Broadway LLC (Broadway), Toll Bros, Inc. (TBI) and Toll GC LLC (TGC).

In motion sequence number 004, all defendants (including defendant Toll Brothers Real Estate, Inc. [TBRE]) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against TBRE, and dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims as against defendants.

On the day of the accident, the Premises was owned by Broadway. TBI was the controlling entity of Broadway. Broadway hired TGC as the general contractor for a project at the Premises that entailed the demolition of three buildings. TGC hired non-party Red Hook Construction Group, II, LLC (Red Hook) to provide demolition services on the Project. Plaintiff was employed by Red Hook.

[1] Also known as 91 Leonard Street, New York, New York.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident he was employed by Red Hook as a construction worker. His work entailed demolition. His supervisor was a Red Hook foreman named "Segundo" (plaintiff's tr at 53). He received instruction and direction from Red Hook coworkers and supervisors. He received his tools from Red Hook (*id.* at 67). He also received safety equipment from Red Hook (*id.* at 131).

At the time of the accident, most of the demolition work had been completed. Red Hook was dismantling the last floor of the Premises, so most of the work was at "sidewalk level" (*id.* at 70). Plaintiff's task that day was to "cut the main support beam of the building" (*id.* at 75.). The support beam was made of wood (*id.* at 130) and was approximately "15 to 20" feet in the air (*id.* at 89). There was "wood, debris [and] metal" on the ground underneath the beam (*id.* at 110). To perform his work, plaintiff needed to stand on top of the beam (*id.* at 89-90). He was not provided a safety harness or lanyard (*id.* at 131-135).

On the day of the accident, plaintiff spoke with Segundo, his foreman, and requested a harness and lanyard for his work on the beam (*id.* at 138). He was not given one.

Prior to the accident, plaintiff successfully cut "[t]hree or four" segments off of the support beam (*id.* at 122). Then, while he was standing on the beam, preparing to cut another section, an "excavator hit the beam where [he] was standing," causing it to shake (plaintiff's second deposition at 18). Specifically, plaintiff witnessed the arm of the excavator (a type of construction vehicle) strike the beam. "Immediately" after the excavator's arm struck the beam, plaintiff fell to the ground below (*id.* at 20). He landed on "[b]ricks, debris, metal, wood" (*id.* at 24).

Plaintiff further testified that the excavator was operated by a Red Hook worker.

Deposition Testimony of Joseph Clark (TBI's Director of Construction)

Joseph Clark testified that on the day of the accident, he was TBI's director of construction.[2] His duties included scheduling, budgeting and "sequencing the development" of buildings (Clark tr at 25). He was responsible for "overall coordination of the process of the demo[lition,]" including logistic plans, permits, scheduling and budgets (*id.* at 26). He had the authority to stop work if he saw an unsafe condition or activity (*id.* at 27). He would visit the cite approximately once a week (*id.* at 64). Aside from himself, TBI also had a project manager present, whose duties included scheduling, budgeting and coordination of the work.

Clark testified that TGC is a wholly owned subsidiary of TBI (*id.* at 9). Specifically, TGC is the "contracting entity" of TBI – it performs general contractor duties on behalf of TBI (*id.* at 39). He was unfamiliar with TBRE.

Clark testified that neither TBI, TGC or Broadway provided any equipment or safety devices for any subcontractors (Clark's second tr at 32). He also confirmed that TGC hired Red Hook for the Project. He acknowledged that Red Hook hired subcontractors, but he did not know who they were.

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[2] At Clark's second deposition, the parties stipulated that Clark's appearance at his depositions was on behalf of TBI, TGC and Broadway) (Clark's second tr at 25).

Clark testified that he was unsure whether he was present at the Premises on the day of the accident. He did not witness the accident and was unfamiliar with the specifics of it (*id.* at 38) and did not learn of the accident until the commencement of litigation (*id.* at 42). He was unsure whether an accident report had been prepared or if any defendant had been informed by Red Hook of the accident.

The Labor Law § 240 (1) Claims (Motion Sequence Numbers 003)

Plaintiff moves for summary judgment in his favor on his Labor Law § 240 (1) claim against defendants.

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) "imposes a nondelegable duty on owners and contractors to provide devices which shall be so constructed, placed and operated as to give proper protection to those individuals performing the work" (*Quiroz v Mememorial Hosp. for Cancer & Allied Diseases*, 202 AD3d 601, 604 [1st Dept 2022] [internal quotation marks and citations omitted]). It "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'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], *quoting Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

The absolute liability found within section 240 "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" (*O'Brien v. Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33 [2017] [internal quotation marks and citation omitted]). In addition, Labor Law § 240 (1) must be construed "liberally so as to accomplish its purpose of protecting workers" (*Greenfield v Macherich Queens Ltd. Partnership,* 3 AD3d 429, 430 [1st Dept 2004]).

Not all workers who fall at a construction site are protected under Labor Law § 240 (1). Section 240 (1) "does not cover the type of ordinary and usual peril to which a worker is commonly exposed at a construction site" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]; *see also 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 establish that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]).

As an initial matter, defendants argues that TBRE was not an owner or general contractor, nor was it otherwise involved with the Premises or the Project. Defendants seeks dismissal of the complaint as against TBRE based on these facts. Plaintiff does not oppose TBRE's dismissal. Accordingly, summary judgment is warranted dismissing the complaint as against TBRE. The remaining defendants, as owners and general contractor, are proper Labor Law defendants.

Here, plaintiff has established his prima facie entitlement to summary judgment in his favor on the Labor Law § 240 (1) claim against defendants. Plaintiff has established that he was required to work from a height, was not provided a safety device to prevent him from falling and, subsequently, was caused to fall when the elevated beam he was working from was struck by a construction vehicle (plaintiff's tr at 18-20 [testifying that he worked from a height, without a harness and fell "[i]mmediately" after a construction vehicle struck the beam]). In addition, it is undisputed that no safety harness, safety line, or other tie-off opportunity was provided to plaintiff (*see eg. Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 519 [1985] [holding that the failure "to provide any safety devices for workers" is a violation of section 240 (1)]).

In opposition, defendants argue that plaintiff was the sole proximate cause of his accident because he agreed to work from the beam even though he was not provided any safety equipment. This argument seeks to place on plaintiff the responsibility for his own safety. In other words, it turns the entirety Labor Law § 240 (1) on its head and ignores the statute's non-delegable nature (*see e.g. Quiroz*, 202 AD3d at 604). To the extent that defendants argue that plaintiff was a recalcitrant worker, defendants do not identify what direction plaintiff ignored or what safety device he refused to use (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004] [to find a plaintiff recalcitrant, a defendant must establish that the plaintiff knew "both that [adequate safety devices] were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured."

Defendants raise no other argument. Accordingly, defendants have not shown the existence of a question of fact with respect to this issue.

Thus, plaintiff is entitled to summary judgment in his favor on his Labor Law § 240 (1) claim against defendants.

The Labor Law § 241 (6) Claims (Motion Sequence Number 004)

Defendants move for summary judgment dismissing the Labor Law § 241 (6) claim against them.

"Labor Law § 241(6) imposes a nondelegable duty 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" (*Capuano v Tishman Constr Corp.*, 98 AD3d 848, 850 [1st Dept 2012]). 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 (*see Corona v HHSC 13th Street Dev. Corp.*, 197 AD3d 1025, 1026 [1st Dept 2021]).

Here, plaintiff lists several violations of the Industrial Code in the bill of particulars. Defendants materially address each of these Industrial Code provisions. Plaintiff does not oppose their dismissal. Accordingly, these uncontested provisions are deemed abandoned (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section"]).

Thus, as no Industrial Code violations remain at issue in this case, defendants are entitled to summary judgment dismissing the Labor Law § 241 (6) claim as against them.

Common-Law Negligence and Labor Law § 200 Claims (Motion Sequence Number 003)

Defendants move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

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 Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012] ["Claims for personal injury under [section 200] 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"]).

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 actually exercised supervisory control over the injury-producing work" (*Jackson v Hunter Roberts Constr, L.L.C.*, 205 AD3d 542, 543 [1st Dept 2022] [internal quotation marks and citation omitted]; *Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012] ["liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work"]). "General supervisory authority is insufficient to constitute supervisory control" (*Hughes v Tishman Constr Corp.*, 40 AD3d 305, 306 [1st Dept 2007]).

Where "a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a general contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition" (*Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708 [2d Dept 2007]; *Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]). Notably, "[w]here a defect is not

inherent but is created by the manner in which the work is performed, the claim under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing on the premises" (*Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 406 [1st Dept 2018]).

Here, plaintiff's accident occurred when, while working, unsecured, from a height, plaintiff was caused to fall when a construction vehicle struck the beam where he was working. Accordingly, plaintiff's work contemplates the means and methods of the work. The record is devoid of any evidence that defendants exercised actual supervision or control over the injury producing work – i.e. plaintiff's work on top of the beam (see e.g. *Comes v. New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [section 200 liability does not attach where the plaintiff was injured while lifting a beam, and there was no evidence that the defendant exercised actual control or had any input into the method of moving the beam]).

In opposition, plaintiff argues that defendants had a contractual obligation to oversee safety at the Project. Such an obligation establishes nothing more than general supervisory control. General supervisory control is insufficient to impute liability under section 200 (*see Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014] [where an entity "had the authority to review onsite safety, . . . [such] responsibilities do not rise to the level of supervision or control necessary to hold the [entity] liable for plaintiff's injuries under Labor Law § 200"]).

Thus, defendants are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

The parties remaining arguments have been considered and were unavailing.

Accordingly, for the foregoing reasons, it is

ORDERED that the motion of plaintiff Eduardo Haro (motion sequence number 003), pursuant to CPLR 3212, for summary judgment on his Labor Law § 240 (1) claim against defendants 353-357 Broadway LLC, Toll Bros, Inc. and Toll GC LLC (collectively, defendants) is granted; and it is further

ORDERED that the branch of the motion of defendants and defendant Toll Brothers Real Estate, Inc. (TBRE) (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing the complaint as against TBRE is granted, and the matter is severed and dismissed with respect to this defendant, with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that the branch of defendants' motion for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims against them is granted.

4/27/2023
DATE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED		X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE