SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART 18**

Justice

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RAFAEL MENDEZ,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, PROCIDA CONSTRUCTION CO., LLC, PROCIDA CONSTRUCTION CORP., PROCIDA CONSTRUCTION CORP. OF NY, PROCIDA REALTY & CONSTRUCTION CORP. OF NY, TEP CHARTER SCHOOL ASSISTANCE INC..,

Defendants.

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INDEX NO. 157238/2019

MOTION DATE 01/18/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

PROCIDA CONSTRUCTION CORP., TEP CHARTER SCHOOL ASSISTANCE INC..

Plaintiffs,

-against-

METROPOLIS HVAC CONTRACTORS, INC.

Defendant.

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Third-Party
Index No. 595983/2020

The following e-filed documents, listed by NYSCEF document number (Motion 001) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 67, 69, 70, 71, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105

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

Upon the foregoing documents, plaintiff moves pursuant to CPLR 3212 for summary judgment on the issue of liability against defendants/third-party plaintiffs TEP Charter School Assistance, Inc., Procida Construction Corp.; and defendant Procida Construction Co. LLC. In opposition, said defendants/third-party plaintiffs TEP Charter School Assistance, Inc., and Procida Construction Corp. cross-move pursuant to CPLR 3212 for summary judgment, and to deny plaintiff's motion for summary judgment.

BACKGROUND

This action arises out of an incident that occurred on December 6, 2018, in which plaintiff Rafael Mendez allegedly sustained personal injuries while working as a helper for Metropolis HVAC contractors ("Metropolis"), a sub general contractor that was hired by the general contractor, Procida Construction Corp., for the completion of the Equity Project Charter School's ("TEP") new eight-story middle school building.

According to Byron Plummer, the owner of Metropolis, Metropolis was contracted to install the mechanical systems within the school, such as the heating, air conditioning, rigging of equipment, installation of ductwork, piping, and control work (NYSCEF Doc. No. 63 [B. Plummer deposition transcript] page 9, 10-18). On the date of accident, Plummer drove a flatbed truck to the project site to drop off the ductwork (NYSCEF Doc. No. 63 [B. Plummer deposition transcript] page 25-26, 23-15). When Plummer arrived at the project site, he noticed that the first lane in front of the site was blocked, which forced Plummer to park in front of the church that was next door to the project site (NYSCEF Doc. No. 63 [B. Plummer deposition transcript] page 28-29, 25-18). After parking, Plummer saw plaintiff and a few other Metropolis employees and told them to wait for him before they began to unload the truck, because Plummer had to use the restroom and he was the individual who unloads the truck and passes the equipment to Metropolis employees (NYSCEF Doc. No. 63 [B. Plummer deposition transcript] page 27-28, 17-7). Upon returning from the restroom, Plummer noticed that plaintiff was grabbing his arm, standing next to the truck (NYSCEF Doc. No. 63 [B. Plummer deposition transcript] page 33, 14-24). Plummer was informed that plaintiff fell off the truck while he was gone and suffered personal injuries (NYSCEF Doc. No. 63 [B. Plummer deposition transcript] page 27-28, 17-7).

According to plaintiff, he entered the truck by placing his left foot on a metal bar that was located on the back left side of the truck, while also using his right foot to gain positioning on the truck bed, as he pulled his body up to enter (NYSCEF DOC. No. 60 [Plaintiff's deposition transcript] page 43-44, 13-4). The truck was filled with ductwork, so plaintiff was only able to gain positioning on the edge of the truck bed (NYSCEF DOC. No. 60 [Plaintiff's deposition transcript] page 43-44, 25-4). Plaintiff testified that Plummer instructed him to unload the ducts from the delivery truck, and that there was only 2 inches of space for him to occupy on the edge of the truck bed NYSCEF DOC. No. 60 [Plaintiff's deposition transcript] page 36, 14-19; 44, 5-8). As plaintiff tried to position himself on the truck bed, the front of plaintiff's right boot entered a hole in the truck bed, causing plaintiff to fall forward off the truck and into the street (NYSCEF DOC. No. 60 [Plaintiff's deposition transcript] page 44-45, 20-15). Plaintiff testified that the hole was about 4 to 8 inches wide (NYSCEF DOC. No. 60 [Plaintiff's deposition transcript] page 87, 15-18).

PARTIES CONTENTIONS

Plaintiff argues that he is entitled to summary judgment against defendants/third-party plaintiffs TEP Charter School Assistance, Inc., Procida Construction Corp., and defendant Procida Construction Co. LLC, because said parties violated Labor Law sections 240 (1) and 241 (6) which led to plaintiff sustaining personal injuries. In opposition, defendants/third-party plaintiffs TEP Charter School Assistance, Inc., and Procida Construction Corp. argue that they are entitled to summary judgment, and plaintiff's motions for such should be denied because the Labor Law sections plaintiff relies upon are inapplicable.

DISCUSSION

Pursuant to CPLR 3212, a motion for summary judgment may be granted when the moving party demonstrates that a genuine issue of material fact does not exist and makes a prima facie

showing that they are entitled to judgment as a matter of law (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). To successfully oppose a motion for summary judgment, the opposing party must present "'facts sufficient to require a trial of any issue of fact'" (Zuckerman v City of New York, 49 NY2d 557, 562 [1980], quoting CPLR 3212[b]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to withstand dismissal (id. at 562).

Labor Law § 240 (1)

Plaintiff argues that the failure to provide adequate or proper safety devices to prevent a fall from an elevated height constitutes a violation of Labor Law § 240 (1). Defendants/third party plaintiffs argue in opposition that plaintiff's cause of action should be dismissed because Labor Law § 240 (1) does not apply to falls from an elevated height of five (5) feet or less, and that plaintiff's actions were the sole cause of his injury.

Labor Law § 240 (1) provides, in pertinent part that:

> "[a]ll 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 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:
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> "'Labor Law § 240(1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites'" (Corchado v 5030 Broadway Props., LLC, 103 AD3d 768, 768 [2d Dept 2013] quoting McCarthy v Turner Constr., Inc., 17 NY3d 369, 374 [2011]). 'To impose liability pursuant to Labor Law § 240(1), there must be a violation of the statute and that violation must be a proximate cause of the plaintiff's injuries' (Nunez v City of New York, 100 AD3d 724, 724 [2d Dept 2012] [internal quotation marks omitted]). 'Where there is no statutory violation, or where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery under Labor Law § 240(1)' (Treu v Cappelletti, 71 A.D.3d 994, 997 [2d Dept

2010]; see Loretta v Split Dev. Corp., 168 AD3d 823, 824 [2d Dept 2019]) (Palamar v State, 186 AD3d 722, 722–23 [2d Dept 2020]).

The First Department has held that Labor Law § 240 was "designed to protect workers from hazards associated with 'gaining access to or working at sites where elevation poses a risk'" (Galloway v Tenth City Assocs., 228 AD2d 254, 255 [1st Dept 1996] quoting Brooks v City of New York, 212 AD2d 435, 436 [1st Dept 1995]). Though a discrepancy is present as to whether plaintiff was instructed to wait for Plummer to remove the ducts, or to begin removing the ducts by himself, plaintiff nonetheless was allegedly injured while trying to remove the ducts from the elevated truck bed. During his deposition, plaintiff testified that the truck bed was about five (5) feet off the ground, and the metal bar he used to assist himself onto the truck bed was two and a half (2.5) feet off the ground (NYSCEF DOC. No. 60 [Plaintiff's deposition transcript] page 43, 16-21). Plummer testified that the truck bed was about four (4) feet off the ground (NYSCEF DOC. No. 63 [B. Plummer deposition transcript] page 31, 16-19). Due to the height of the truck bed and the type of work plaintiff was performing, the Court finds that plaintiff was not engaged in the type of work that presented an elevation-related risk that Labor Law § 240 was designed to protect against. Most notably because plaintiff's accident was not the "direct result of a gravity-related risk" (see Suwareh v State, 24 AD3d 380, 381 [1st Dept 2005]). The Court of Appeals held in Rocovich v Consol. Edison Co. that

> "[t]he contemplated hazards [Labor Law § 240 protects against] are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured. It is because of the special hazards in having to work in these circumstances, we believe, that the Legislature has seen fit to give the worker [] exceptional protection" (Rocovich v Consol. Edison Co., 78 NY2d 509, 514 [1991]).

Furthermore, like the Court of Appeals' finding in Melber v 6333 Main St., Inc., 91 NY2d 759, 763 [1998], a hole in the floor of a flatbed truck "is a hazard in the workplace against which employees should be protected [] [h]owever[]...[it] is [not] a risk that can be avoided by proper placement or utilization of one of the devices listed in Labor Law § 240(1)." For the "protective equipment envisioned by the statute is simply not designed to avert the hazard plaintiff encountered here[] [moreover]...the ''proper' 'erection,' 'construction,' 'placement' or 'operation' of one or more devices of the sort listed in section 240(1)' would not have prevented plaintiff's injuries" (id.; see also Brown v New York Presbyterian Healthcare Sys., Inc., 123 AD3d 612, 612–13 [1st Dept 2014] ["plaintiff was working on a flatbed trailer at the time of the accident and was not exposed to any gravity-related risk arising from his work...there is no indication...as to the manner of safety device that should have been provided to plaintiff to prevent his accident"]).

Since there is no statutory violation, there can be no recovery under Labor Law § 240 (1). Accordingly, plaintiff's claim in relation to this section is dismissed.

Labor Law § 241 (6)

Plaintiff argues that defendants/third-party plaintiffs' failure to ensure that the hole on the truck bed was covered constitutes a failure to provide the reasonable and adequate protection and safety that is required under Labor Law § 241 (6). More specifically, plaintiff argues that the defendants/third-party plaintiffs violated Industrial Code § 23-1.7 (b) (1), which entitles plaintiff to a summary judgment ruling in his favor. The defendants/third-party plaintiffs argue in opposition that the NYCRR provision that plaintiff relies upon is inapplicable and was not violated.

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

> "[a]ll 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, equipped, guarded, arranged, operated and conducted 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 on owners and contractors to provide reasonable and adequate protection for workers and to comply with specific safety rules which have been set forth by the Commissioner of the Department of Labor (St. Louis v Town of N. Elba, 16 NY3d 411, 413 [2011]). In order to demonstrate liability pursuant to Labor Law § 241 (6), it must be shown that the defendant violated a specific, applicable regulation of the Industrial Code, rather than a provision containing only generalized requirements (Nostrom v A.W. Chesterton Co., 15 NY3d 502, 507 [2010]). Though plaintiff's bill of particulars allege that defendants/third-party plaintiffs violated numerous Industrial Codes, plaintiff's papers for summary judgment argue that only one Industrial Code was violated. Thus, as plaintiff does not oppose dismissal of his Labor Law § 241 (6) claims based upon any alleged violations, other than 12 NYCRR § 23-1.7 (b) (1), said claims are dismissed as 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"]).

Industrial Code § 23-1.7 (b) (1)

Section 23-1.7 (b) (1) states that "[e]very 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)" [12 NYCRR § 23-1.7 (b) (1)]. "Although [23-1.7 (b) (1)] ...is sufficiently specific to support a Labor Law § 241(6) claim... [the hole that caused plaintiff to trip and fall] cannot be considered...a hazardous opening within the meaning of the regulation" (Kobel v Niagara Mohawk Power Corp., 83 AD3d 1435, 1436 [4th Dept 2011]).

Because "[p]laintiff's accident was not caused by the type of hazardous opening for which defendants would have been required to provide a cover or safety railing pursuant to the cited sections of the Industrial Code" (Piccuillo v Bank of New York Co., 277 AD2d 93, 94 [1st Dept 2000]), because such "hazardous openings [must be] of significant depth and size" (Lupo v Pro Foods, LLC, 68 AD3d 607, 608 [1st Dept 2009]). Though significant depth and size has not been defined, courts have held 12 NYCRR § 23-1.7 (b) (1) "inapplicable where the hole is too small for a worker to fall through" (Rice v Bd. of Educ. of City of New York, 302 AD2d 578, 579 [2d Dept 2003] quoting Alvia v Teman Elec. Contracting, Inc., 287 AD2d 421, 423 [2d Dept 2001] [see also Johnson v Lend Lease Constr. LMB, Inc., 164 AD3d 1222, 1223 [2d Dept 2018] ["The provision pertaining to 'hazardous openings' (12 NYCRR 23–1.7[b][1]) does not apply to openings that are too small for a worker to completely fall through"]; Vitale v Astoria Energy II, LLC, 138 AD3d 981, 983 [2d Dept 2016] ["This Court has repeatedly held that 12 NYCRR 23–1.7, which concerns 'hazardous openings,' does not apply to openings that are too small for a worker to completely fall through"]; Brown v New York Presbyterian Healthcare Sys., Inc., 123 AD3d 612, 613 [1st Dept 2014] ["Plaintiffs allege a violation of Industrial Code § 23–1.7(b)(1)(i), which pertains to hazardous openings. However, that regulation has been construed to apply to openings that persons can fall through in their entirety"]).

Plaintiff testified that the hole was about four (4) by eight (8) inches wide but did not provide the depth of the hole (NYSCEF DOC. No. 60 [Plaintiff's deposition transcript] page 88, 15-18). Plummer testified that the hole was about ten to twelve (10-12) inches long and about four (4) inches wide, but he also did not provide the depth of the hole (NYSCEF Doc. No. 63 [B. Plummer deposition transcript] page 31-32, 24-3). Nonetheless, plaintiff testified that the front of his right boot entered a hole which caused him to fall forward off the truck and into the street

(NYSCEF DOC. No. 60 [Plaintiff's deposition transcript] page 44-45, 20-15). Given that the hole simply caused plaintiff to trip, and not fall through the hole in his entirety, Industrial Code § 23–1.7(b)(1) is inapplicable, as it "is not meant to apply to the type of hole at issue here" (Alvia v Teman Elec. Contracting, Inc., 287 AD2d 421, 423 [2d Dept 2001]).

Accordingly, plaintiff's claim in relation to this section is dismissed

Labor Law § 200 & Common Law Claim

"Section 200 of the Labor Law merely codified the common-law duty imposed upon an owner or general contractor to provide construction site workmen with a safe place to work" (Russin v Louis N. Picciano & Son, 54 NY2d 311, 316-17 [1981]; see Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 352-54 [1998]). "An implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (Russin, 54 NY2d at 317 [1981]; see Cappabianca v Skanska USA Bldg. Inc., 99 AD3d 139, 144 [1st Dept 2012]).

Plummer, Metropolis' owner, testified that Metropolis was a specialized contractor, and that Procida did not direct Metropolis regarding the work Metropolis was hired to do (NYSCEF Doc. No. 63 [B. Plummer deposition transcript] page 14, 17-22). Moreover, John DeGenova, the project superintendent for Procida during the relevant period testified that Procida did not direct or get involved with Metropolis' delivery of different materials (NYSCEF Doc. No. 62 [J. DeGenova deposition transcript] page 40, 15-22). Additionally, Plaintiff testified that Procida never instructed him on how to do his job for Metropolis while working at the job site.

Thus, plaintiff's Labor Law § 200 and common law claim are dismissed as defendants/third-party plaintiffs have established that they lacked the authority to control the activity that allegedly caused injury to plaintiff.

It is hereby ORDERED that plaintiff's motion for summary judgment is denied, and defendant's cross-motion for summary judgment is granted in its entirety and the Clerk of the Court is directed to enter judgment in favor of defendants TEP CHARTER SCHOOL ASSISTANCE, INC. and PROCIDA CONSTRUCTION CORP. dismissing the complaint insofar as asserted against them, with costs and disbursements as taxed by the Clerk.

This constitutes the decision and order of the Court.

6/16/2023
DATE

ALEXANDER M. TISCH, J.S.C.

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