SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS **PART** 57TR

Justice

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GIULIO MANNINO,

Plaintiff,

- v -

WALDORF EXTERIORS, LLC,SITE SAFETY, LLC,TDX CONSTRUCTION CORP., CALVIN MAINTENANCE INC.,ARCHITECT ENGINEERS JOE DOE, BOARD OF TRUSTEES OF FASHION INSTITUTE OF TECHNOLOGY, FASHION INSTITUTE OF TECHNOLOGY, THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant.

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INDEX NO. 160092/2017

MOTION DATE 07/05/2023

MOTION SEQ. NO. 005 006

DECISION + ORDER ON MOTION

TDX CONSTRUCTION CORP., BOARD OF TRUSTEES OF FASHION INSTITUTE OF TECHNOLOGY, FASHION INSTITUTE OF TECHNOLOGY, THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION

Plaintiff,

-against-

W5 GROUP LLC, WALDORF EXTERIORS LLC., CALVIN MAINTENANCE INC.

Defendant.

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Third-Party
Index No. 595878/2020

The following e-filed documents, listed by NYSCEF document number (Motion 005) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 143, 144, 145, 146, 147, 148, 151, 152, 153, 155, 157

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 138, 139, 140, 141, 142, 149, 150, 154, 156, 158

were read on this motion to/for SUMMARY JUDGMENT.

BACKGROUND

This New York Labor Law action stems from an October 28, 2017 accident at 300 7th Avenue, New York, New York. The City of New York ("City") owns the subject premises. The Board of Trustees of Fashion Institute of Technology, and Fashion Institute of Technology ("FIT") retained TDX Construction Corp. ("TDX"), as the construction manager and nonparty, Vanguard Construction & Development Co. ("Vanguard") as the general contractor for a renovation project.

Plaintiff was employed by Vanguard. Vanguard retained Defendants/Third-Party Defendants W5 Group, LLC, Waldorf Exteriors, LLC and Calvin Maintenance (collectively "Waldorf") as the demolition subcontractor.

Plaintiff alleges that he sustained injuries when a piece of concrete from a column fell and struck him.

ALLEGED FACTS

On October 28, 2017, Plaintiff was working at the construction project at FIT. Plaintiff was supervised by Sebastian, a project superintendent. Part of Waldorf's job was to demolish and remove stone veneer and some concrete fireproofing that encased vertical columns in the lobby, and specifically to chop out pockets in the concrete so structural steel could be added to the vertical columns by ironworkers.

About a month before the incident, some concrete fell from a vertical beam in the lobby. A Request for Information was submitted by Vanguard to David Smotrich, the architect, to determine what should be done about the remaining concrete. After a walk-through and site inspection, it was determined that the fireproofing concrete encasing the columns should be removed.

On the morning of the incident, Plaintiff was instructed to remove the remaining concrete encasement from the vertical columns. He used a scissor lift and a chopping gun to perform this work. After chopping out some concrete from the upper section, Plaintiff descended in the scissor lift to the ground. After the cleanup work was complete, he ascended the scissor lift to continue the chopping work in the middle section and got about 12-15 feet up, when suddenly chunks of concrete fell striking him and causing him to sustain injuries.

PENDING MOTIONS

On February 21, 2023, Plaintiff moved for partial summary judgment on liability as to his claims under Labor Law §240(1) and Labor Law §241(6).

On March 10, 2023, Waldorf cross-moved for summary judgment as to liability on the same claims.

On April 12, 2023, TDX, FIT and the City moved for summary judgment dismissing Plaintiff's complaint and all cross-claims asserted against them and granting them summary judgment on their cross-claims against Waldorf as to contractual indemnification, common law indemnification, contribution and breach of contract.

On July 5, 2023, the court heard oral argument on the motions and reserved decision.

The motions are consolidated herein for disposition and determined as set forth below.

DISCUSSSION

To prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851 (1985)*; Zuckerman v. City of New York,* 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be

denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]).

However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez,* 68 NY2d at 324). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso,* 50 AD3d 535,544 [1st Dept 2008]).

"On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v Citibank, N.A.,* 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong,* 2 AD3d 166,168 [1st Dept 2003] ["The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues"], *citing Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404 [1957]).

Plaintiff's Labor Law §240(1) Claim Is Dismissed

Section 240[1] of the Labor Law states:

> All contractors and owners and their agents, except owners of one and two family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure, shall furnish or erect...scaffolding, hoists, stays...and other devices, which shall be so constructed, placed and operated as to give proper protection to a person so employed.

The Labor Law was enacted to protect workers by placing ultimate responsibility for safety practices on owners and contractors rather than on workers themselves. *See, Panek v. Albany County*, 99 NY2d 452, 457 [2003]; *Martinez v. NYC*, 93 NY2d 322 [1999]. The statute is construed liberally in favor of construction workers (*Rocovich v. Con Ed*, 78 NY2d 509 (1991)),

because such workers "are scarcely in a position to protect themselves from accidents" (*Koenig v. Patrick Constr. Co.*, 298 NY 313, 319 [1948]; *Quigley v. Thatcher*, 207 NY 66, 68 [1912]). 1

Violation of the statute results in absolute liability for injuries proximately caused as a consequence thereof (*Zimmer v Chemung County Performing Arts, Inc.* 65 NY2d 513 [1985]). The duty imposed by the statute is nondelegable, and when violation of same causes injury to a member of the class for whose benefit the statute was enacted, the owner, general contractor and their agents are liable (*Haimes v. N.Y. Telephone Co.*, 46 NY2d 132 [1978]). This remains true even where the owner exercises no supervision, control or direction of the work (*id*).

Labor Law §240(1) applies to both "falling worker" and "falling object" cases. *Narducci*, 96 NY2d at 267-68. In "falling object" cases, the plaintiff must establish that at the time the object fell, "it either was being hoisted or secured, or required securing for the purposes of the undertaking." *Fabrizi*, 22 NY3d at 662-63.

However, liability will not attach for failure to provide safety devices if it would defeat or be contrary to the purpose of the work. *Ragubir v Gibraltar Mgt. Co., Inc.*, 146 AD3d 563, 564 [1st Dept 2017]; *Maldonado v AMMM Properties Co.*, 107 AD3d 954, 955 [2d Dept 2013]. It would be illogical and contrary to the objectives of the plan to require bracing, shoring or netting of objects that are intended to fall. *Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 140 [2011]. Indeed, the Court of Appeals in *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 11 [2011] wrote that there is an important distinction between falling objects that fell as a result of demolition and objects that were specifically targeted to be demolished. It would be illogical to "impos[e] liability for failure to provide protective devices to prevent the walls or objects from falling, when their fall was the goal of the work." *Id.*

Plaintiff argues that the column he was working on was divided into three tiers, and that defendants should have shored the tiers which Plaintiff was not working on. Defendants argue that no shoring was appropriate as the concrete that fell was the target of the demolition.

At his deposition Plaintiff testified that the top tier was already done, and he was going back up to do the middle tier (Ex D p.66 Lines 21-23; p.68 Lines 18-23), and the concrete that hit him fell from the same middle section he was going to work on (Ex D p.70 Lines 10-13).

Accepting Plaintiff's version of the facts, the column was divided into three tiers. Plaintiff finished removing the concrete from the top tier. Returned to the floor and cleaned it up and then reascended to do the middle tier. The middle tier is where the concrete that hit Plaintiff fell from. Therefore, even accepting Plaintiff's proposal for how the work and shoring should have been done, since he was going to work on the middle tier, that part would not have been shored as it was very precisely the target of his demolition, and the middle tier is where the concrete fell from.

Plaintiff's Labor Law §241(6) Claim is Dismissed

Labor Law §241(6) relates to construction, excavation and demolition work and provides in part:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> 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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

The language of Labor Law §241(6) requires owners, contractors and their agents to provide a safe worksite. *Zimmer v. Chemung County Performing Arts, Inc*, 65 N.Y.2d 513 (1985). As such, this section imposes upon owners. contractors and their agents a non-delegable duty, making them vicariously liable for a breach of such duty by third parties that proximately causes injury. *Toefer v. Long Island R.R.*, 4 N.Y.3d 399 (2005); Ross v. Curtis-Palmer Hydro-Electric Ca, 8 l N.Y.2d 494 (1993).

Liability under Labor Law §241(6), requires a showing of a violation of specific provisions of the New York Industrial Code, Part 23. *Rizzuto v. LA. Wegner Contracting Co.*, 91 N.Y.2d 343 (1998).

Plaintiff alleges a violation of industrial Code 12 NYCRR 23-3.3[c] which requires on-going inspections, shoring and bracing during hand demolition work to protect workers from falling debris or loosened material. However, as noted above as the middle section that Plaintiff was on his way to remove was the precise target of his demolition it could not have been shored at that time.

Additionally, the concrete that fell was alleged to have been loose and unstable for months prior to the time Plaintiff commenced his hand demolition work, thus the section relied upon by plaintiff is inapplicable.

> … rule 23-3.3 of the State Industrial Code (12 NYCRR 23-3.3 [c]) … provides "(c) *Inspection*. During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means."
>
> The thrust of this subdivision is to fashion a safeguard, in the form of "continuing inspections", against hazards which are created by the progress of the demolition work itself. It does not address itself to the situation where, as here, the danger was present before the demolition work began.

Monroe v. City of New York, 67 A.D.2d 89, 100 (1979); *see also Campoverde v. Bruckner Plaza Assocs., L.P.*, 50 A.D.3d 836, 837 (2008). In this case there was no testimony or evidence that the instability was caused by the demolition work plaintiff was doing. Plaintiff's express testimony was that the instability was caused by work done six months earlier (Ex D p.51, 58, 146). Additionally, statutory inspection of the concrete would have not prevented Plaintiff's accident because it was an already known hazard that Plaintiff was tasked to remove.

Plaintiff has abandoned §241(6) claims that are predicated on violations of other Industrial Code provisions cited in his Bill of Particulars since he did not pursue or address them in his summary judgment motion. *Rodriguez v Dormitory Auth. of State*, 104 AD3d 529, 530-31 [1st Dept 2013]; *Cardenas v One State St., LLC*, 68 AD3d 436, 438 [1st Dept 2009].

Dismissal Of the Labor Law §200 and Common Law Negligence Claims Is Not Warranted

Labor Law §200 is the codification of the landowner, general contractor or their agent's common-law duty to maintain a safe workplace. *Ross*, 81 NY2d at 500-01. Claims for personal injury under the statute 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, 144 [1st Dept 2012]. Liability under §200 claims that arise from condition on the premises attach when the landowner or its agent has control over the work site and either created the dangerous condition or had actual or constructive notice of the condition and failed to remedy it. *Id.*

Defendants failed to meet their initial burden on summary judgment of making a *prima facie* showing they did not create the hazard or have notice of it, by establishing when they last inspected the area. *See, Padilla v. Touro College University System*, 204 AD3d 415 [1st Dept.

2022]; *Williams v. Beth Israel Hospital Association*, 201 AD3d 429 [1st Dept. 2022; *Deleo v. JPMorgan Chase & Co.*, 199 AD3d 482 [1st Dept. 2021].

Even if Defendants had met their *prima facie* burden, Plaintiff raises issues of fact about defendants' actual knowledge of the unsafe condition based on his testimony that FIT TDX and others had a walk through, climbed on the scissor lift, touched the loose concrete and took pictures of it (see eg Ex. D. 141).

WHEREFORE it is hereby:

ORDERED that Plaintiff's motion for summary judgment (Mo Seq No 5) is denied and the cross-motion seeking dismissal of said claims is granted; and it is further

ORDERED that Defendants' motion for summary judgment (Mo Seq No 6) is granted to the extent of dismissing the claims under Labor Law §§ 240(1) and 241(6) and denied as to plaintiff's remaining claims; and it is further

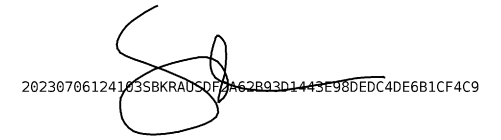
ORDERED that the remaining portions of Defendants' motion for summary judgment on its claims for contractual indemnification, common law indemnification, contribution and breach of contract is granted without opposition; and it is further

ORDERED that, within 20 days from entry of this order, defendants shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.



7/6/2023
DATE

SABRINA KRAUS, 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