SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **49M**

Justice

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SILVA, CARLITO

Plaintiff,

-against-

770 BROADWAY OWNER LLC, FACEBOOK, INC., and L & K PARTNERS, INC.

Defendants.

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770 BROADWAY OWNER, LLC

Third-Party Plaintiff,

-against-

FACEBOOK, INC, L&K PARTNERS, INC, CONSOLIDATED CARPET WORKROOM, LLC

Third-Party Defendants.

----------X

FACEBOOK, INC, L&K PARTNERS, INC

Second Third-Party Plaintiff,

-against-

CONSOLIDATED CARPET WORKROOM, LLC,

Third Third-Party Defendant,

----------X

CONSOLIDATED CARPET WORKROOM, LLC,

Third Third-Party Plaintiff,

-against-

STONEY ROAD INDUSTRIES, LLC,

Third Third-Party Defendant.

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INDEX NO. 155857/2017

MOTION DATE 11/28/2022

MOTION SEQ. NO. 006 007 008 009

DECISION + ORDER ON MOTION

Third-Party
Index No. 595829/2018

Second Third-Party
Index No. 595586/2019

Third Third-Party

The following e-filed documents, listed by NYSCEF document number (Motion 006) 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 301, 302, 303, 304, 305, 306, 307, 308, 312, 313, 314, 318, 319, 320, 321, 328, 329

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 264, 265, 266, 296, 297, 298, 309, 310, 311, 315, 330

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

The following e-filed documents, listed by NYSCEF document number (Motion 008) 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 267, 268, 269, 273, 274, 275, 276, 277, 316, 322, 323, 324, 325, 326, 327, 340

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

The following e-filed documents, listed by NYSCEF document number (Motion 009) 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 270, 271, 272, 299, 300, 317, 331, 332, 333, 334, 335, 336, 337, 338, 339

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

Plaintiff Carlito Silva, an employee of non-party Marble Floors, worked on a construction and renovation job (project) in defendant Facebook, Inc.'s offices at 770 Broadway (the premises) in the city, state, and county of New York. Defendant 770 Broadway Owner, LLC owns the building, and defendant L & K Partners, Inc. was the general contractor on the project. On March 26, 2016, plaintiff was placing duct tape on the floor at the premises when a heavy object fell on his head rendering him unconscious briefly and causing injuries. Plaintiff brought suit against defendants alleging violations of Labor Law §§ 200, 240(1) and 241(6).

This Decision and Order addresses motion sequences (MS) 006, 007, 008, and 009). In MS 006, Facebook, Inc. (Facebook) and L & K Partners, Inc. (L&L), who are represented by the same counsel, moves for summary judgment pursuant to 3211 and/or 3212 dismissing plaintiff's complaint and any crossclaims against them; plaintiff cross moves for partial summary judgment on his Labor Law 240(1). In MS 007, 770 Broadway Owner, LLC (Owner) moves under CPLR 3212 for summary judgment dismissing the complaint and the cross claims/counter claims against it. In MS 008, the subcontractor Consolidated Carpet Workroom, LLC (CCW) seeks indemnification from second third-party defendant Stoney Road Industries (Stoney Road) and to dismiss plaintiff's complaint[1], all cross claims and third-party claims

[1] Plaintiff's complaint does not name CCW as a defendant.

against CCW. In MS 009, Stoney Road moves, pursuant to CPLR 3212, for an order granting CPLR 3212 summary judgment and dismissing the third third-party complaint and all claims against it, which CCW opposes as do Facebook and L&K.

FACTS

Plaintiff informs that non-party Marble Floors hired him to be a "helper" for Facebook's construction and renovation project. Plaintiff's job at Marble Floors was to mix and deliver the chemical material to workers pouring the mixture on the floors (NYSCEF # 180 – Silva tr at 22:9-14). His specific duties at the time he was injured was putting duct tape throughout the floor (*id.* at 30:10-13, 46:3-4). His supervisor at Marble Floors was Carlos Carvalho, and it was Carvalho who sent him to the job site (*id.* at 33:4-6). A worker named "Cases" (aka Cassio) was Marble Floors' team leader or manager at the job site (*id.* at 33:10-14). Plaintiff received all of his job instructions from Cases (*id.*). The evening before his accident, the area where he was to work the next day was cordoned off with caution tape to keep people out (*id.*, pltf's cont'd tr at 104:4-14). There were two other people, whom plaintiff did not know, drawing on the floor (*id.* at 105:18-106:3). They had only a measuring tape and paper – no tools or ladder (*id.* at 106:12-107:11). The area was cleared for plaintiff to do his taping work on the floor (*id.* at 107:12-25).

Plaintiff testified that he recalls that just prior to his accident, as he was crouching down to place duct tape on the floor, he saw a ladder leaning against a wall at an angle (NYSCEF 180 at 53-54). Plaintiff later clarified that he did not see the ladder but knew there was ladder leaning against the wall because there was a caution tape on the wall which indicates a ladder was there (NYSCEF 180 at 109). As he was crouching down to do his work, he did not see anyone moving about (*id.* at 61:18-20). He also heard nothing before the ladder fell and hit him on his head and right shoulder (*id.* at 63:11-25). And since he learned that a ladder fell on him, a ladder had to have been leaning against the wall in the area where he worked (*id.* at 108:19-110:18). A year after the accident, at his lawyer's request, Cassio send plaintiff photos depicting the accident site (*id.* at 115:1-9). Cassio was not present when his accident occurred but had helped him afterwards (*id.* at 120:21-24).The photos that Cassio sent him were taken toward the end of the project (*id.* at 119:2).

L&K's superintendent, Sean Hall, testified that L&K subcontracted CCW to apply a Tnemec product, a heavy epoxy paint, to the floor (NYSCEF # 288 at 18:2-13). The subcontractor provided all of the labor, tools, materials and equipment (*id.* at 18:23-19:14). When he went to the site to ensure that the contract specifications were being complied with, he reviewed safety practices. L&K did not have ladders on site, but if he saw an unsecured ladder, it would draw his attention (*id.* at 27:10-22). And Hall was authorized to stop work if he deemed it necessary. L&K's duties included cleaning, maintaining the site, and removing garbage. L&K did not have any interactions with the ownership or management of the building (*id.* at 48).

Hall did not have any first-hand knowledge of plaintiff's accident, but received information from a subcontractor's representative. Hall never received as incident report on plaintiff's accident (*id.* at 49). Hall did not recall Marble Floors or Stoney Road working on the project (*id.* at 55:3-10).

As CCW's project manager, Alexander Feldman, tells it, CCW performed the carpeting work and subcontracted the concrete finishing work to Stoney Road, but Feldman has not heard of Marble Floors (NYSCEF # 280 – Feldman tr at 11:4-8; 23:24-24:1). According to Feldman, Stoney Road supplied its own tools, materials and supplies. And as all their work is on the ground, no ladders were needed (*id.* at 24:5-14).

Stoney Road's owner, Gaetano Condorelli, testified that Stoney Road contracted with CCW to do a polish concrete job for the project (NYSCEF # 290 – Condorelli tr at 19-21, 29). Condorelli also never heard of Marble Floors. Condorelli claims that Stoney Road never hired plaintiff for the project (*id.* at 31:5-9). Stoney Road subcontracted with Floors Professional; which is now defunct. The contact person at Floors Professional was Carlos Carvalho (*id.* at 27-28). Upon learning about plaintiff's accident from L&C days later, Condorelli called Carlos to let him know that one of Carlos's employees was hurt and asked for the paperwork on the accident (*id.* at 32:6-25; 34:25-36-11). Condorelli assumed that plaintiff was one of Floors Professional's employee (*id.* at 38:11-39:3). Condorelli did not get any paperwork about the accident from Carlos Carvalho (*id.* at 36:9-11).

DISCUSSION

A party moving for summary judgment must demonstrate its defense or cause of action sufficiently to eliminate any material issues of fact (*Ryan v Trustees of Columbia Univ. in the City of NY, Inc.*, 96 AD3d 551, 553 (1st Dept 2012). Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form which is sufficient to establish the existence of a material issue of fact (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]).

Labor Law § 200 (MS 006 and 007)

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] [internal citations omitted]). Liability under Labor Law § 200 may be based either upon the means and method by which the work is performed or actual or constructive notice of a dangerous condition inherent in the premises. When the accident arises from a dangerous condition on the property, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of

the allegedly unsafe condition that caused the accident (*see Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004]).

In order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's method or manner, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Jackson v Hunter Roberts Constr., LLC.*, 205 AD3d 542, 543 [1st Dept 2022]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]).

Facebook and L&K in MS 006, and Owner in MS 007 (Facebook, L&K, and Owner, collectively, defendants) contend that plaintiff's Labor Law § 200 claim must be dismissed because they did not control plaintiff's work nor did they create or had any notice of the defective condition which allegedly was the ladder in the room. They point out that plaintiff testified that all of his instructions came from his employer. Further, there is no evidence to indicate that any of the defendants spoke with or contacted plaintiff or controlled the means and methods of his work. To underscore their point, defendants highlight plaintiff's testimony that only his co-workers were present when the accident occurred and that there were no other individuals present in the area where he worked as it was roped off to prevent people from entering the area. They argue that it is clear that defendants did not have the necessary level of control, nor did they have actual or constructive notice of the ladder leaning against the wall where plaintiff worked to impose liability pursuant to Labor Law § 200 or the common law.

As such, defendants have made a prima facie showing that they are not liable under Labor Law § 200 or the common law. Indeed, plaintiff testified that he received all of his instructions from Cases and that he had not heard of L&K or speak with anyone from Facebook. And Hall testified that L&K did not have any ladders on-site. Furthermore, there is no evidence to suggest that any of the defendants had actual or constructive notice regarding the ladder or that the ladder was in that location.

In opposition, plaintiff urges this court to accept the Statement of Facts under 202.g and his affidavit (NYSCEF ## 292, 291, respectively) submitted in his cross motion for partial summary judgment under Labor Law § 240(1) and to review only the incident report (NYSCEF 282) that plaintiff submitted as an exhibit to his cross motion (NYSCEF # 302 - pltf's aff in opp ¶¶ 9-10).

Plaintiff posits that "[t]he record is perfectly cleasr [sic] that under the labor law each of the defense movants was an owner, contractor or agent under the labor

law. The plainness o[f] this truth is so clear that no further argument is needed." (*id.* ¶ 18). Indeed, no argument followed.

In any event, while plaintiff seemingly posits that the incident report, written about nine minutes after the incident, is all the proof needed to find liability against defendants. The information in the incident report, as relayed by a witness, show that a ladder fell on plaintiff striking his head. However, this incident report does not otherwise present any argument that would raise any issues of fact on defendants' lack of supervisory control over plaintiff's work or lack of actual or constructive notice of the ladder at the location where plaintiff worked. As such, plaintiff's claims under Labor Law § 200 and common law are dismissed.

Labor Law § 240 (1) (MS006 and 007)

Defendants contend that Labor Law § 240 (1) is not applicable here. Plaintiff's cross motion for partial summary judgment against defendants under Labor Law § 240 (1) is addressed here as well.

Initially, defendants argue that plaintiff's cross motion is late as it was filed after the court-imposed deadline for filing dispositive motions (60 days from the filing of the Note of Issue). However, a cross motion for summary judgment made after the expiration of the dispositive deadline "may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief nearly identical to that sought by the cross motion" (*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006] [citations and internal quotations omitted]). As the issue is whether Labor Law § 240 (1) is applicable in both the main motion and cross motion, plaintiff's cross motion will be addressed.

Labor Law § 240 (1) imposes absolute liability on building owners and contractors

> 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)).

Defendants argue that plaintiff did not fall from a ladder or height, nor did anything fall from a height onto plaintiff which should have been secured. They maintain that plaintiff was on the ground when he was allegedly struck by

something and that he has never identified what it was that struck him. They contend that such speculation is fatal to plaintiff's claims and Labor Law § 240 is not applicable as plaintiff's alleged accident did not involve the force of gravity. But, even if plaintiff's injury was caused by the ladder, there is no showing of a "causal nexus between the worker's injury and a lack of failure of a device prescribed by section 240(1)" (NYSCEF # 164 – at 8 quoting *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 9 [2015]).

In contrast, plaintiff argues that the incident report demonstrates that the cause of the accident was a "ladder leaning over caution tape, accidentally tipped over" . . . "by mistake hitting [plaintiff] over the head" (NYSCEF # 282). And, as the construction site was owned, controlled, and under general contracting authority of defendants, plaintiff contends that the ladder was an object that required securing in order for the work beneath it to be completed safely and that it was not secured, braced, or removed.

"[T]he protections of Labor Law § 240 (1) do not encompass any and all perils that may be connected in some tangential way with the effects of gravity. Rather, liability [remains] 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 (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015]). "Whether a plaintiff is entitled to recovery under Labor Law § 240 (1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011]). In a falling object case, plaintiff must establish that, at the time the object fell, it was being hoisted or secured, or required securing for the purposes of the undertaking (*id.*). Plaintiff, however, is not required to demonstrate the specific circumstances of how the object made contact with his body (*see Malan v FSJ Realty Group II LLC,* 213 AD3d 541, 542 [1st Dept 2023] ["plaintiff's prima facie case was not dependent on whether he had observed what hit him"]; *Salcedo v Sustainable Energy Options, LLC,* 190 AD3d 439, 439 [1st Dept 2021] ["[c]ontrary to defendants' contention, plaintiff is not required to show the exact circumstances of the fall of the material"]).

Here, plaintiff claims he was struck by a falling object – a six-rung ladder. Defendants claim that plaintiff has no admissible non-hearsay evidence that it was a ladder that fell on him. Plaintiff, in reply, submits an eyewitness affidavit, dated January 10, 2023, to dispell this issue (NYSCEF # 321). The eyewitness is Cassio Estevam, who avers that he was the "witness" indicated on the incident report. Cassio now claims that he saw a worker, who was not part of his crew, knock over the ladder causing the ladder to fall on plaintiff's head (*id.*). This affidavit, which was drafted and filed in plaintiff's reply in further support of his cross motion, contradicts plaintiff's testimony taken in 2021 that Cassio was not on the scene when the accident happened. Curiously, this nugget of information did not come out

until now in plaintiff's reply even though plaintiff was apparently in contact with Cassio during this litigation as Cassio supplied plaintiff's attorney with photos of the project. This affidavit, in any event, does not aid plaintiff.

As alleged, plaintiff's task at the time of the accident was to put duct tape on the floor to prepare it for painting, and a ladder leaning against a nearby wall tipped over and fell on plaintiff. Here, plaintiff's task required him to be crouched on the floor; such task does not pose an elevation-related risk. While a ladder is implicated as the cause of the accident, it is not a device for which plaintiff needed for his floor taping job. And the toppling of the ladder, as alleged, was not "being hoisted or secured, or required securing for the purposes of the undertaking" (*Wilinski*, 18 NY3d at 7; *see Fabrizi v 1095 Ave. of Americas, LLC*, 22 NY3d 658, 662-663 [2014] [stating that to prevail on summary judgment on a § 240 (1) claim, "the plaintiff must demonstrate that at the time the object fell, it either was being 'hoisted or secured"; *Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 269 [2001] [same]). As such, plaintiff's Labor Law § 240 (1) claim fails.

Labor Law § 241 (6) (MS 006 and 007)

Defendants contend that plaintiff's claims of a violation of Labor Law § 241 (6) should be dismissed as plaintiff must plead and prove a violation of a specific applicable Industrial Code regulation.

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 in the Industrial Code (*see 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]).

Defendants contend that the only section of the Industrial Code cited by plaintiff, § 23-1.21 entitled 'Ladders' and 'Ladderways' is inapplicable since plaintiff did not use a ladder. Plaintiff offers no opposition to this argument. As such, plaintiff is deemed to have abandoned this claim (s*ee Genovese v Gambino*, 309 AD2d 832, 833 (2d Dept 2003). Accordingly, the branch of defendants' respective motions seeking dismissal of plaintiff's Labor Law § 241(6) is granted.

Conclusion

Given the dismissal of plaintiff's Labor Law claims, defendants' respective motions for summary judgment dismissing the complaint are granted. Consequently, the remaining indemnification issues in the main action, the third

party action, the second third-party action and the third third-party action are academic.

Accordingly, based on the foregoing, it is

ORDERED that defendants Facebook, Inc. and L & K Partners, Inc.'s motion for summary judgment (MS 006) and defendant 700 Broadway Owners, LLC's motion for summary judgment (MS 007) are granted; and the complaint is dismissed; and it is further

ORDERED that plaintiff Carlito Silva's cross motion for summary judgment (MS 006) is denied; and it is further

ORDERED that any cross claims and counter claims against 770 Broadway Owner, LLC for common-law indemnification are dismissed as academic; and it is further

ORDERED that the branch of 770 Broadway Owner, LLC's motion seeking contractual indemnification from Consolidated Carpet Workroom, LLC and Facebook, Inc. is dismissed as academic; and it is further

ORDERED that Consolidated Carpet Workroom, LLC's motion for summary judgment (MS 008) is dismissed as academic; and it is further

ORDERED that Stoney Road Industries, LLC's, motion for summary judgment (MS 009) is dismissed as academic; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon the other parties and the Clerk of the Court within ten days of the date of this order.

9/7/2023
DATE

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