At an IAS Term, Part 83 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 19th day of December, 2023.

PRESENT:

HON. INGRID JOSEPH,
Justice.

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KLEBER ROMERO,

Plaintiff,

-against-

Index No.: 514168/18

201 WEST 79th STREET REALTY CORP. d/b/a LUCERNE HOTEL ASSOCIATES and GRAND AMERICA ASSOCIATES LLC,

DECISION AND ORDER

Defendants.

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201 WEST 79th STREET REALTY CORP. d/b/a LUCERNE HOTEL ASSOCIATES and GRAND AMERICA ASSOCIATES LLC,

Third-Party Plaintiffs,

-against-

PHOENIX SUTTON STR. INC. and PHOENIKS INC.,

Third-Party Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	99-100, 102, 107, 136-138, 139
Opposing Affidavits (Affirmations)	123-125, 132, 158, 160
Affidavits/ Affirmations in Reply	155, 169

Upon the foregoing papers, plaintiff moves for an order, pursuant to CPLR 3212, granting partial summary judgment in his favor with respect to liability on his Labor Law §§ 200, 240 (1) and 241 (6) causes of action as against defendants/third-party plaintiffs 201 West 79th Street Realty Corp. d/b/a Lucerne Hotel Associates ("Hotel Lucerne") and Grand America

Associates LLC ("Grand America") (collectively referred to as "defendants") (motion sequence number 5). Defendants move for an order, pursuant to CPLR 3212, dismissing plaintiff's complaint (motion sequence number 6).

In this action premised on common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6), plaintiff alleges that he suffered injuries while constructing a sidewalk bridge[1] in front of a corner building located on West 79th Street when he slipped off the piping on which he was standing and fell to the ground below. Grand America owned the building at issue and Hotel Lucerne acted as the managing agent for the building. Hotel Lucerne contracted for third-party defendant Phoenix Sutton Str. Inc. ("Phoenix") to install a sidewalk bridge over the sidewalk surrounding the building and plaintiff was employed by Phoenix as a scaffolding assembler.

According to plaintiff's deposition testimony, Phoenix began assembling the sidewalk bridge on January 8, 2018. On that day, plaintiff and his coworkers stood on a rolling scaffold (also referred to as a baker scaffold and a rolling tower) to perform their scaffold assembly work. However, plaintiff's supervisor Conrad (also spelled Konrad) did not bring the rolling scaffold to the job site on January 9, 2018, the date of plaintiff's accident, because he thought it took too much time to use. Thus, on January 9, 2018, Phoenix's workers only had a single fourteen-foot-tall A-frame ladder to assemble the sidewalk bridge.

If there had been another ladder at the worksite, plaintiff testified that he would have performed his pipe installation work, in the time leading up to the accident, from a ladder. Other workers, however, needed the ladder to perform their work, so plaintiff used the ladder to climb up onto piping that had already been installed to perform his work. Although he had not been specifically instructed to stand on the pipes, he had done so in the past when the rolling scaffold was not available. These pipes were approximately 14 feet above the ground, and while he was standing there installing other pipes, plaintiff was able to tie off the lifeline attached to the harness he was wearing onto one of the pipes. The pipes on which he was standing were slippery and icy because they had been covered with snow and ice where they had been stored. After plaintiff had been working in this manner for approximately three minutes, Conrad told plaintiff to come down from the sidewalk bridge. Plaintiff testified that he did not have the option of waiting for the other workers to finish using the ladder because he had to obey

[1] The sidewalk bridge is also referred to as a sidewalk shed.

Conrad's direction to climb down. Accordingly, plaintiff then unhooked his lifeline, which was four feet long, in order to climb down on the pipes. Upon unhooking the lifeline, plaintiff immediately slipped and fell 14 feet to the ground.

Plaintiff, in moving, has also submitted an affidavit from Oscar Donaldo ("Donaldo"), a coworker who worked with plaintiff on the date of the accident. Donaldo states that the rolling scaffold was not available on the date of the accident. Donaldo averred that, shortly before the accident, he stood on the ground handing piping to plaintiff. At that time, plaintiff was standing directly on the steel piping of the sidewalk bridge with his harness clipped onto one of the bridge's pipes. Donaldo stated that the framework for the sidewalk bridge was wet and icy and according to Donaldo, plaintiff unhooked his safety harness in order to climb down and had only descended approximately a foot when he fell to the ground.

Section 240 (1) imposes absolute liability on owners and contractors or their agents when they fail to protect workers employed on a construction site from injuries proximately caused by risks associated with falling from a height or those associated with falling objects (*see Wilinski v 334 E. 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]).

Here, there is no dispute that Grand America, as owner (*see Gordan v Eastern Ry. Supply*, 82 NY2d 555, 559-560 [1993]), and Hotel Lucerne, as the managing agent of the property that contracted Phoenix to perform the work, (*see Merino v Continental Towers Condominium*, 159 AD3d 471, 472 [1st Dept 2018]; *Ragubir v Gibralter Mgt. Co., Inc.*, 146 AD3d 563, 564-565 [1st Dept 2017]; *Corona v Metropolitan 298-308 Assoc.*, 281 AD2d 447, 447-448 [2d Dept 2001]) may be held liable under section 240. It is further undisputed that plaintiff's work in erecting the sidewalk bridge is of the kind of work that is covered under section 240 (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 881-883 [2003]; *Kyle v City of New York*, 268 AD2d 192, 197-198 [1st Dept 2000], *lv denied* 97 NY2d 608 [2002]), or that plaintiff was working at an elevation for purposes of section 240 (*see Davies v Simon Property Group, Inc.*, 174 AD3d 850, 853 [2d Dept 2019]; *Ventimiglia v Thatch, Ripley & Co., LLC*, 96 AD3d 1043, 1043 [2d Dept 2012]; *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 9 [1st Dept 2011]). Plaintiff has also demonstrated his prima facie entitlement to summary judgment with respect to liability on his section 240 (1) cause of action through his deposition testimony and the

affidavit of Donaldo demonstrating that plaintiff was not provided with adequate safety devices to prevent him from falling and that the absence of such devices was a proximate cause of his injuries (*see Mogrovejo v JG Hous. Dev. Fund., Inc.*, 207 AD3d 457, 460 [2d Dept 2022]; *Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 402 [1st Dept 2017], *lv dismissed* 29 NY3d 1100 [2017]; *Vetrano v J. Kokolakis Contr., Inc.*, 100 AD3d 984, 985-986 [2d Dept 2012]; *Zender v Madison-Oneida County BOCES*, 46 AD3d 1361, 1362 [4th Dept 2007]; *Romero v John's Fruits & Vegetables, Inc.*, 23 AD3d 364, 365 [2d Dept 2005]).

In opposing the motion, defendants argue that the ladder, harness, and lifeline provided to plaintiff constituted adequate safety devices and that plaintiff's own actions were the sole proximate cause of his accident. Defendants, however, have failed to present any evidence that plaintiff was ever instructed to tie off while ascending or descending (*see Gallagher v New York Post*, 14 NY3d 83, 88-89 [2010]; *Mushkudiani v Racanelli Constr. Group, Inc.*, 219 AD3d 613, 615 [2d Dept 2023]; *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 662 [2d Dept 2015]; *Murray v Arts Ctr. & Theater of Schenectady, Inc.*, 77 AD3d 1155, 1156-1157 [3d Dept 2010]). Defendants have also failed to refute plaintiff's testimony that the lifeline was only approximately four feet long and they have submitted no evidence that there were appropriate anchorage points to which plaintiff could have tied off his lifeline while ascending or descending (*see Martinez v Kingston 541, LLC*, 210 AD3d 556, 556-557 [1st Dept 2022]; *Gomez v Trinity Ctr. LLC*, 195 AD3d 502, 503 [1st Dept 2021]; *Anderson*, 146 AD3d at 404; *Garzon v Viola*, 124 AD3d 715, 716-717 [2d Dept 2015]). With respect to the ladder, it cannot be deemed readily available for plaintiff's use in view of plaintiff's testimony that it had been moved from where plaintiff was working and was being used by other workers at the time of the accident (*see Gonzalez v DOLP 205 Props. II, LLC*, 206 AD3d 468, 470 [1st Dept 2022]; *Lojano v Soiefer Bros. Realty Corp.*, 187 AD3d 1160, 1163 [2d Dept 2020]; *Pena v Jane H. Goldman residuary Trust No. 1.*, 158 AD3d 565, 565 [1st Dept 2018]; *DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 46-47 [1st Dept 2014]; *Zender*, 46 AD3d at 1362). Nor does plaintiff's failure to wait for the other workers to finish using the ladder constitute the sole proximate cause of the accident in view of his testimony that he started climbing down at the direction of his supervisor, who was at the jobsite and was undoubtedly aware that plaintiff had no ladder at the time of his request (*see Finocchi v Live Nation Inc.*, 204 AD3d 1432, 1433-1434 [4th Dept 2022]; *Lojano*, 187 AD3d at 1163; *DeRose*, 120 AD3d at 46-47; *cf. Graziano v Source Bldrs. & Consultants, LLC*, 175 AD3d

1253, 1257-1258 [2d Dept 2019]). At the very least, the record demonstrates that plaintiff's manner of performing his work had the tacit approval of his supervisor and that plaintiff thus cannot be found to have been the sole proximate cause of his accident (*see Vicki v City of Niagara Falls*, 215 AD3d 1285, 1288 [4th Dept 2023]; *Portillo v DRMBRE-85 Fee LLC*, 191 AD3d 613, 614 [1st Dept 2021]; *Zholanji v 52 Wooster Holdings, LLC*, 188 AD3d 1300, 1302 [2d Dept 2020]; *Rico-Castro v Do & Co N.Y. Catering, Inc.*, 60 AD3d 749, 750-751 [2d Dept 2009]; *see also Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167-1168 [2020]).

With respect to plaintiff's Labor Law § 241 (6) cause of action, under that section, an owner, general contractor or their agent may be held vicariously liable for injuries to a plaintiff where the plaintiff establishes that the accident was proximately caused by a violation of an Industrial Code section stating a specific positive command that is applicable to the facts of the case (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349-350 [1998]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2017]). Here, plaintiff, in his bill of particulars, premises his section 241 (6) cause of action on violations of Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7 (a), (b), (d), (e) and (f), 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-1.22, 23-1.24, 23-2.6, 23-4.1 and Occupational Safety & Health Administration ("OSHA") rules. Defendants have demonstrated, prima facie, that Industrial Code (12 NYCRR) §§ 23-1.7 (a), (e), (f), 23-1.15, 23-1.17, 23-1.22, 23-1.24, 23-2.6, 23-4.1 either fail to state specific standards or are inapplicable to the facts of this case (*see generally Rizzuto*, 91 NY2d at 349-350; *Dyszkiewicz v City of New York*, 218 AD3d 546, 548 [2d Dept 2023]; *Honeyman*, 154 AD3d at 821), and plaintiff has abandoned reliance on these sections by failing to address them in his moving and opposition papers (*see Debennedetto v Chetrit*, 190 AD3d 933, 935 [2d Dept 2021]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]).

Plaintiff does address Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7 (b) (1), 23-1.7 (d), 23-1.16 and 23-1.21 (b) (4) (i). Nevertheless, section 23-1.5 (a), (b), (c) (1), and (2) are not specific enough to support a section 241 (6) cause of action (*see Carrillo v Circle Manor Apts.*, 131 AD3d 662, 663 [2d Dept 2015], *lv denied* 27 NY3d 906 [2016]), and section 23-1.5 (c) (3), which applies to defective equipment (*see Canty v 133 E. 79th St., LLC*, 167 AD3d 548, 549 [1st Dept 2018]), is inapplicable to the facts herein. Section 23-1.7 (b) (1) is inapplicable because the elevation differential at issue does not involve a dangerous opening within the meaning of that

section (*see Ramirez v Metropolitan Transp. Auth.*, 106 AD3d 799, 801 [2d Dept 2013]; *see also Lazo v New York State Thruway Auth.*, 204 AD3d 774, 777 [2d Dept 2022]) and section 23-1.21 (b) (4) (i) is inapplicable because the ladder and/or the sidewalk bridge piping at issue were not being used as a regular means of access between floors or levels under that section (*see Amantia v Barden & Robeson Corp.*, 38 AD3d 1167, 1169 [2d Dept 2007]). In his moving and opposition papers, Plaintiff, in a conclusory fashion, states that defendants violated OSHA rules without citing to any specific rule or regulation. Nonetheless, violations of OSHA regulations do not provide a basis for liability under Labor Law § 241 (6) (*see Alberto v DiSano Demolition Co., Inc.*, 194 AD3d 607, 608 [1st Dept 2021]; *Wetter v Northville Indus. Corp.*, 185 AD3d 874, 876 [2d Dept 2020], *lv denied* 35 NY3d 918 [2020]).

Defendants, however, have failed to demonstrate, prima facie, that Industrial Code (12 NYCRR) §§ 23-1.7 (d) and 23-1.16 are inapplicable or were not violated here. Under Section 23-1.7 (d), which addresses slipping hazards,[2] an owner or general contractor need not possess actual or constructive notice of a slippery condition to be held liable under section 23-1.7 (d). Nevertheless, the evidence must still demonstrate that, "someone within the chain of the construction project was negligent in not exercising reasonable care, or acting within a reasonable time, to prevent or remediate the hazard, and that [a] plaintiff's slipping, falling[,] and subsequent injury proximately resulted from such negligence" (*Rizzuto*, 91 NY2d at 351; *see Dyszkiewicz*, 218 AD3d at 550; *Bocanegra v Chest Realty Corp.*, 169 AD3d 750, 751-752 [2d Dept 2019]). This entity in the "chain" of the project may include plaintiff's own employer (*see Lois v Flintlock Constr. Servs., LLC*, 137 AD3d 446, 447 [1st Dept 2016]). Here, plaintiff's deposition testimony that he believes that Conrad would have been aware that the piping was icy because the piping on the truck had been covered in snow as the result of an earlier snow storm, that he observed the ice when he got up on the piping, and that he fell because he slipped off of the piping demonstrates the existence of factual issues as to whether a violation of section 23-1.7 (d) was a proximate cause of plaintiff's injuries (*see Bocanegra*, 169 AD3d at 751-752; *Lois*, 137 AD3d at 447; *Booth v Seven World Trade Co., L.P.*, 82 AD3d 499, 501-502 [1st Dept 2011]; *cf. Dyszkiewicz*, 218 AD3 at 550).

[2] Industrial Code (12 NYCRR) § 23-1.7 (d) provides that, "[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

With respect to Industrial Code (12 NYCRR) § 23-1.16 (b), which addresses the proper use, instruction, maintenance and measurements for safety belts, harnesses, tail lines and life lines,[3] defendants have failed to meet there prima facie showing because they have presented no evidentiary proof demonstrating that plaintiff had a proper location to tie off the tail line to his harness when he was climbing down the sidewalk bridge supports (*see Anderson*, 146 AD3d at 405; *see also Yaucan v Hawthorne Village, LLC*, 155 AD3d 924, 926-927 [2d Dept 2017]).

Plaintiff, however, has also failed to demonstrate the absence of factual issues with respect to whether Industrial Code (12 NYCRR) §§ 23-1.7 (d) and 23-1.16 (b) were violated. Notably, plaintiff, in his deposition testimony, conceded that he did not notice the ice on the pipe pieces until he was working on them and there is thus a reasonable view of the evidence that plaintiff's supervisor may not have been aware that the pipe pieces were icy at the time plaintiff slipped. Accordingly, plaintiff has failed to demonstrate as a matter of law that someone in the chain of the project had notice of the ice conditions as required to demonstrate a violation of section 23-1.7 (d) (*see Dyszkiewicz*, 218 AD3 at 550; *cf. Thompson v 1241 PVR, LLC*, 104 AD3d 1298, 1298-1299 [4th Dept 2013]). With respect to section 23-1.16 (b), that section, although it sets standards for harnesses, tail lines and lifelines, "does not specify when such safety devices are required" (*Partridge v Waterloo Cent. School Dist.*, 12 AD3d 1054, 1056 [4th Dept 2004]; *see Thompson v Sithe/Independence, LLC*, 107 AD3d 1385, 1387-1388 [4th Dept 2013]), and plaintiff has failed to identify an Industrial Code rule requiring plaintiff to tie off the harness he was wearing under the circumstances here or that his employer required its workers to tie off under the circumstances like those here.

Therefore, defendants are entitled to summary judgment dismissing the Labor Law § 241 (6) cause of action to the extent that it is premised on violations of Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7 (a), (b), (e) and (f), 23-1.15, 23-1.17, 23-1.21, 23-1.22, 23-1.24, 23-2.6, 23-4.1 and OSHA rules, but the portion of their motion addressing the section 241 (6) cause of action is denied with respect to Industrial Code (12 NYCRR) §§ 23-1.7 (d) and 23-1.16. In addition, the portion of plaintiff's motion addressed to Labor Law § 241 (6) must be denied.

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[3] Industrial Code (12 NYCRR) § 23-1.16 (b), provides that, "Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work *whenever required by this Part (rule) and whenever so directed by his employer*. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet" (emphasis added).

With respect to plaintiff's common-law negligence and Labor Law § 200 causes of action, it is undisputed that the accident occurred because of Phoenix's means and methods of performing the work in erecting the sidewalk bridge rather than as the result of a dangerous property condition (*see Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 671-673 [2d Dept 2018]; *Melendez v 778 Park Ave. Bldg. Corp.*, 153 AD3d 700, 702 [2d Dept 2017], *lv denied* 31 NY3d 909 [2018]). Where the plaintiff's injuries arise from the manner in which the work is performed, "there is no liability under the common law or Labor Law § 200 unless the owner or general contractor exercised supervision or control over the work performed" (*Carranza v JCL Homes, Inc.*, 210 AD3d 858, 860 [2d Dept 2022], quoting *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 801 [2d Dept 2005]; *see Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 435 [2015]; *Valencia v Glinski*, 219 AD3d 541, 545 [2d Dept 2023]). Moreover, under a methods and manner of work theory of liability, "no liability will attach to the owner solely because it may have had notice of the allegedly unsafe manner in which work was performed" (*Dennis v City of New York*, 304 AD2d 611, 612 [2d Dept 2003]; *see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]; *Cody v State of New York*, 82 AD3d 925, 927 [2d Dept 2011]).

Here, plaintiff's deposition testimony in effect provided that he received directions regarding the performance of his work exclusively from Phoenix's supervisors and that he had no contact with any of defendants' representatives. Additionally, defendants have demonstrated, prima facie, that they did not supervise or control the work at issue (*see Wilson v Bergon Constr. Corp.*, 219 AD3d 1380, 1383 [2d Dept 2023]; *Kefaloukis v Mayer*, 197 AD3d 470, 471 [2d Dept 2021]; *Lopez v Edge 11211, LLC*, 150 AD3d 1214, 1215-1216 [2d Dept 2017]). Contrary to plaintiff's contentions, defendants' general supervisory authority over the injury-producing work is insufficient to demonstrate supervision and control for purposes of liability under the common law and Labor Law § 200 (*see Wilson*, 219 AD3d at 1383; *Murphy v 80 Pine, LLC*, 208 AD3d 492, 495 [2d Dept 2022]; *Poulin*, 166 AD3d at 670-673; *Goldfien v County of Suffolk*, 157 AD3d 937, 938 [2d Dept 2018]; *Messina v City of New York*, 147 AD3d 748, 749-750 [2d Dept 2017]).[4] Plaintiff, who has presented no evidence demonstrating that defendants exercised more

[4] Plaintiff, in essence, argues that defendants may be held liable under a standard akin to that for a statutory agent under Labor Law §§ 240 (1) and 241 (6) (*see Santos v Condo 124 LLC*, 161 AD3d 650, 653 [1st Dept 2018]). While the authority to act as statutory agency is a necessary element of liability under Labor Law § 200, it is clear from the case law addressing liability for a common-law negligence and Labor Law § 200 causes of action cited

than general supervisory control over the work, has failed to show the existence of a factual issue warranting denial of defendants' motion with respect to the common-law negligence and Labor Law § 200 causes of action and defendants are thus entitled to dismissal of those causes of action. For these reasons, the portion of plaintiff's motion requesting partial summary judgment in his favor with respect to the common-law negligence and Labor Law § 200 causes of action must also be denied.

Accordingly, it is hereby

ORDERED, that Plaintiff's motion (motion sequence number 5) is granted to the extent that he is granted partial summary judgment with respect to liability on his Labor Law § 240 (1) cause of action. Plaintiff's motion is otherwise denied; and it is further

ORDERED, that Defendants' motion (motion sequence number 6) is granted only to the extent that plaintiff's common-law negligence and Labor Law § 200 causes of action are dismissed and plaintiff's Labor Law § 241 (6) cause of action is dismissed to the extent that it is premised on violations of Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7 (a), (b), (e) and (f), 23-1.15, 23-1.17, 23-1.21, 23-1.22, 23-1.24, 23-2.6, 23-4.1 and Occupational Safety & Health Administration (OSHA) rules. Defendants' motion is otherwise denied.

This constitutes the decision and order of the court.

ENTER

HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice

above, that a defendant must have greater involvement in the injury producing work to be held liable under a means and methods theory of liability (*see Santos*, 161 AD3d at 656).