

Berrezueta v 12 Ave Real Prop. LLC

2024 NY Slip Op 30252(U)

January 17, 2024

Supreme Court, Kings County

Docket Number: Index No. 518718/2020

Judge: Debra Silber

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At an IAS Term, Part 9 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 17th day of January, 2024.

P R E S E N T:

Hon. Debra Silber, Justice

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HENRY BERREZUETA,

Plaintiff,

-against-

12 AVE REAL PROPERTY LLC,
JJSS DH LLC,
TSANG CONSTRUCTION, INC.,
and YU HUA CONSTRUCTION CORP.,

Defendants.

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DECISION / ORDER

Index No. 518718/2020

Mot. Seq. # 4 & 5

The following e-filed papers read herein:

NYSCEF Doc Nos.:

| | | |
|---|---------------|----------------|
| Notice of Motion, Affidavits (Affirmations), and Exhibits Annexed_____ | <u>69-82;</u> | <u>83-97</u> |
| Opposing Affidavits (Affirmations) and Exhibits Annexed_____ | <u>112</u> | <u>101-106</u> |
| Reply Affirmations_____ | <u>113</u> | <u>114</u> |

Upon the foregoing papers in this action to recover damages for personal injuries, defendants 12 AVE REAL PROPERTY LLC, and TSANG CONSTRUCTION, INC., (hereafter “12 Ave” and “Tsang”) move, pursuant to CPLR 3212, in motion sequence #4, for an order granting them summary judgment and entirely dismissing the plaintiff’s complaint as against them. Plaintiff moves, pursuant to CPLR 3212, (motion sequence number 5) for an order granting him partial summary judgment on the issue of liability on his cause of action under Labor Law § 240 (1) as against defendants 12 Ave and Tsang.

Plaintiff's complaint, dated October 2, 2020 (NYSCEF Doc No. 1), asserts causes of action premised on violations of Labor Law §§ 240 (1), 241 (6), and 200, as well as for common-law negligence. His lawsuit stems from a construction-site accident which took place on June 9, 2020. Plaintiff named four different defendants in the complaint. An answer was interposed [Doc 9] on December 7, 2020 by one law firm on behalf of two of the defendants, 12 Ave and Tsang. Plaintiff moved for a default judgment order as against the other two defendants, which was granted on October 26, 2021. The note of issue was filed on January 31, 2023, and the case is on the trial calendar. The next appearance is on January 22, 2024.

Plaintiff claims he was injured while working for non-party Right Choice Construction Corp.¹ The job site, located at, "6301/6323 12th Avenue, also known as 1202/1216 63rd Street, also known as 1284 63rd Street, also known as 1201/1215 64th Street" (complaint) in Brooklyn, NY, was owned by defaulting defendant JJSS DH LLC and by moving defendant 12 Ave, as tenants in common, on the date of plaintiff's accident. About a month after plaintiff's accident, 12 Ave transferred all of its interest in the property to JJSS DH LLC, and that entity transferred it to different parties subsequently. It was known as Block 5739, Lots 1, 5 and 10, which are three adjacent parcels. Currently, Lot 1, which is a landmarked property that had been a church-owned property, is owned by an entity named 6301 12th Ave LLC. Lot 5 is owned by an entity named 1222 Realty Group LLC, and Lot 10 was transferred back to defendant 12 Ave Real Property LLC. Defendant

¹ This was determined to be plaintiff's employer by the Workers' Compensation judge [Doc 79] and plaintiff's counsel then amended plaintiff's bill of particulars accordingly [*id.*].

12 Ave as Sponsor filed a condominium declaration in 2022, for a condominium called Dyker Gardens Condominium. Defendants' counsel avers that defendant Tsang was the construction manager, and as it was not the general contractor, it is not a proper Labor Law defendant, and that plaintiff's claims should be dismissed against this defendant on this basis [Doc 70 ¶5].

The court must address a procedural issue first. The defendants' motion was timely made, but plaintiff's motion was filed a few days late. It is noted that under the "good cause" analysis of *Brill v City of NY* 2 NY3d 648 [2004], and CPLR 3212 (a) governing untimely motions for summary judgment, the court may entertain a cross motion which addresses nearly the identical issues as a timely motion (*see e.g., Lennard v Khan*, 69 AD3d 812, 814 [2d Dept 2010]; *Grandev v Peteroy*, 39 AD3d 590, 591-592 [2d Dept 2007]). It is well settled that "an untimely cross motion for summary judgment may be considered by the court where . . . a timely motion for summary judgment was made on nearly identical grounds" (*see Snolis v Clare*, 81 AD3d 923, 925 [2011]). This is clearly applicable here, even though plaintiff does not call his motion a cross-motion.

Next, a determination must be made on the issue of whether Tsang is a proper Labor Law defendant. The NYC Buildings Department issued a permit to Tsang Construction Inc. in March of 2020, which lists this entity as General Contractor # GC-039964. It is for the installation of a construction fence at 6301 12th Avenue, Brooklyn, and states that it is issued "in conjunction with New Building Permit # 321830426", for a new building on Lot 10 of the same block, known as 1238 63rd Street. This building, now a condominium, has 146 apartments, according to the NY State Attorney General's Real Estate Financing

database.² Defendants do not provide anything in support of its claim that Tsang was not the general contractor other than the testimony of its witness, Mark Chin. He testified [Doc 78 Page 16] that there was a contract between Tsang Construction and Right Choice, but no copy is provided. Right Choice was plaintiff's employer. There is no contract between the owner and any contractor, general or subcontractor, provided and no building permits. Mr. Chin was asked if he was familiar with a project at 1250 63rd Street, and he said yes, it was new construction and that it was also known as 1238 63rd Street. Tsang is listed as the general contractor on the building permit for that new construction. It is their liability insurance that was provided to the Buildings Department so the permit would be issued. Therefore, the court concludes that Tsang was the general contractor for the project and is thus subject to the Labor Law.

The court next turns to consideration of the merits of the motions.

Labor Law 240 (1)

Defendants move for summary judgment dismissing plaintiff's Labor Law § 240 (1) cause of action. They support their motion with an affirmation of counsel, the pleadings, the EBT transcripts for the plaintiff and of Mark Chin for Tsang, the decision of the Workers' Compensation Board, a memo of law, and an incident report. Plaintiff moves for summary judgment on his Labor Law § 240 (1) cause of action against the two appearing (and moving) defendants. Plaintiff supports his motion with an affirmation of counsel, the pleadings, plaintiff's bills of particulars, the EBT transcripts of plaintiff and

² <https://offeringplandatasearch.ag.ny.gov/REF/planFormServlet#tabs-2>

defendant Tsang, as well as one of non-party Wesley Braz, and an expert affidavit from a certified site safety manager.

Plaintiff was deposed on October 22, 2021 and November 23, 2021 [Docs 76 and 77]. He was provided with a Spanish interpreter. Plaintiff testified that he has not worked since the accident. He has gained 38 pounds. He is currently approximately forty-three years old. He uses a cane to walk. He came to the United States from Ecuador on March 11, 2020, a few months before this accident. He came here for work, and started work right away, as he had a cousin named Manuel who remodeled homes [Doc 76 Page 34]. He worked for his cousin for around a month and was paid in cash. Then the work “dried up” presumably due to the Covid-19 Pandemic. He has an OSHA certificate which he obtained after he stopped working for his cousin. One day in May of 2020 he walked into a construction site near his cousin’s home, and was hired by someone he met there, Mr. Wally [*id.* Pages 39-43]. Mr. Wally was the foreman for EBW Construction. Plaintiff worked there for approximately three weeks until the date of his accident. They paid him in cash, on Fridays. Mr. Wally gave him a work vest, which said EBW, and a hard hat. Plaintiff said he worked from 7:00 a.m. to 5 p.m. He was supervised by Mr. Wally. Plaintiff could not say if Wally’s legal name was Wesley Braz.

Plaintiff testified that on the day of his accident, he signed in, put on his vest and hard hat and proceeded to work. This is as far as he got when the deposition was stopped because he said he was in too much pain to continue. The deposition continued on November 23, 2021. Plaintiff said he had also been given goggles and gloves, but he brought his own tools. Wally was the only one who assigned him his tasks. There were

some safety meetings, but they were held in English, and he did not go. That day, in addition to being asked to pick up the trash, Wally gave him a shovel “to remove some dirt and some wood” [Doc 77 Page 14]. Mr. Wally gave him a dolly to put the wood on. He had a hammer of his own. The basement was still a dirt floor. They were going to pour cement. He had to clean from the first floor up to the third floor. He had a co-worker named “Flaco.” He worked with him regularly, and he was with him that entire day. At around 3:30 p.m., he thinks he was on the second floor, and while he was picking up garbage, a metal pipe fell and hit him, causing him to fall to the ground. It hit him on his left shoulder, his left knee and his left foot. There was a video that he was shown previously, and said that he identified himself in it, laying on the ground.

Plaintiff was then asked additional questions about the accident. He did not know who had placed the metal “poles” where they were. He referred to them as having been “installed.” He could not provide the specifications for the poles. He said the pole hit his foot first, then his shoulder, which knocked him down. The pole then fell to the ground. Flaco came right up to him while he was on the ground and said he would go find Wally [*id.* Page 28]. Wally came to see him shortly afterwards. A number of people came over to him, helped him up and took him to a “company car” and brought him to the hospital. The remainder of the deposition is about his care and treatment.

Mark Chin was deposed on behalf of Tsang on September 28, 2022. He testified that he works for Tsang as a project manager, and that Tsang had no laborers on this project, and all the work was subcontracted out [Doc 78 Page 20]. He said he did not know who the building owners are, and he had never seen a contract between Tsang and the

owners for the work [*id.* Page 22]. He did not know if there were any subcontractors other than Right Choice. Then, he said there were, but he did not know who they were. He did not know if there was a site safety person. He did not know who at Tsang negotiated the subcontracts [Doc 78 Page 24]. He testified that he was at the site “once every couple of weeks” [*id.* Page 26]. He was asked if he “look to see if the work confirmed with the drawing and specifications” when he was at the site, and he said “No, I don’t get involved in that” [*id.* Page 28]. He was then asked, “do you know if Tsang did anything to block off an area when there was work being performed above it?” and he responded “Tsang wasn't involved in the construction. We only involved in the scheduling” [*id.* Page 31]. He acknowledged that Tsang hired the subcontractors, but “did not monitor the work of the subcontractors” [*id.*] and did not monitor site safety conditions [*id.* Page 32]. He did not know if anybody prepared daily logs, and said that Tsang did not “require the subcontractors to submit any documentation as to what work was being performed on any given day” [*id.*].

Mr. Chin was shown several documents at the EBT. He testified that Hong Ping Tsang is his boss, and is the owner and president of Tsang [*id.* Page 38]. He identified Mr. Tsang’s signature on a document, the nature of which was not identified. On Page 39, he was shown something that “at the top it says ASC Allied Safety LLC” and he said he did not recognize it or any of the signatures. He was then shown something called “incident report form” and said he had not seen it, and did not recognize the handwriting [*id.* Page 40]. He was never told about the plaintiff’s accident until he was asked to come to the

deposition. He was next shown a document the attorney called “Exhibit E” and identified his boss’ signature on it.

Mr. Chin said that when he went to the site, he spoke with Wesley Perez from Right Choice, and he did not meet with any other subs. He did not do a walk through when he came [*id.* Page 43]. He said it was Right Choice’s responsibility to make sure that the site was in a safe condition and work was being performed safely [*id.*]. Mr. Chin testified that “Tsang Construction had no responsibility for site safety whatsoever” [*id.* Pages 45-46]. The deposition then abruptly concluded.

Discussion – Labor Law §240(1)

Labor Law section 240 (1) “requires certain contractors and property owners to provide adequate safety devices when workers engage in particular tasks involving elevation-related risks” (*Healy v EST Downtown, LLC*, 38 NY3d 998, 999 [2022]), such as risks associated with workers falling from a height and/or with objects falling on workers (*see e.g., Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]). As the Court of Appeals cautioned, “[l]iability may . . . be imposed under the statute only where the plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a *physically significant elevation differential*” (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015] [internal quotation marks omitted; emphasis added], *rearg denied* 25 NY3d 1195 [2015]). “Consequently, the 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” (*id.* [internal quotations marks omitted; emphasis in the original]). “Rather, liability remains contingent upon the

existence of a hazard contemplated in section 240 (1) *and* the failure to provide, or the inadequacy of, a safety device of the kind enumerated therein” (*id.* [internal quotation marks and brackets omitted; emphasis added]).

Defendants’ motion must be denied for failing to make a prima facie case for summary judgment dismissing this claim. The only evidence submitted by defendants in support of the motion is plaintiff’s EBT testimony and Mr. Chin’s EBT testimony. The “incident report” at Doc 80 could not be considered because, as plaintiff’s attorney points out, it is not in admissible form. In fact, it is not signed by anyone, and ends “Sincerely, Management.” The plaintiff testified that he was hit by a falling object, a “pole” which counsel called “reshore” at oral argument. Defendants’ EBT witness, Mr. Chin, claimed that he did not know anything about much, other than that Tsang was not responsible for anything but hiring and scheduling subcontractors.

Turning to plaintiff’s motion for summary judgment on his Labor Law 240(1) claim, the court finds that plaintiff makes a prima facie case for summary judgment. The standard for a case such as this is that “[i]n order to prevail on summary judgment in a section 240(1) ‘falling object’ case ... the plaintiff must demonstrate that at the time the object fell, it either was being ‘hoisted or secured’ ... or ‘required securing for the purposes of the undertaking’ [citations omitted].” The plaintiff must also “show that the object fell ... because of the absence or inadequacy of a safety device of the kind enumerated in the statute’ [citation omitted, emphasis in original].” (*Fabrizi v 1095 Ave. of Americas, L.L.C.*, 22 NY3d 658 [2014]). As in that case, the plaintiff was “[c]learly” exposed to a gravity-related hazard within the meaning of the statute.” Further, he has

established that “a tool capable of stabilizing the conduit pipe — whether brace, clamp, coupling, or otherwise—would be precisely the sort of device contemplated by section 240(1).”

Plaintiff provides the EBT testimony of Wesley Braz [Doc 95] of Right Choice. It was held virtually, and the witness was testifying on a cell phone from a truck in Queens. He testified that at the time of the plaintiff’s accident he worked for Right Choice. He was a foreman. Rodrigo was the owner’s name. He did not know his last name. He was paid in cash. He was there every day. When someone came from the office with the cash, he turned over the sign in sheets to that person [Doc 95 Page 14]. There were about 40 workers at the job site who worked for Right Choice. The project took about a year.

Mr. Braz was next asked about plaintiff. He said he worked for about two weeks, and then “sued everybody” [*id.* Page 17]. He was upset that plaintiff did not return to the job site after his accident and fill out an accident report. There was a site safety person they paid “tons of money” to, and there was no report when he learned of the lawsuit. [*id.* Page 19]. Mr. Braz said plaintiff was a laborer on the housekeeping crew. He was the only one who gave plaintiff directions, other than the site safety guy, who might, for example, tell him “Yo, you see those 2 by 4s down there, take the nails out. Just something, like, about safety” [*id.* Page 21]. He later said the site safety person’s name was Malique [Page 59].

Mr. Braz was shown an incident report at his EBT, which he said he had not seen before. He did not know if there were any witnesses to the accident. He was shown a document that may be the contract between Tsang and Right Choice, but the stenographer

wrote “Saint” instead of “Tsang” which had his name at the bottom followed by “President Wesley Braz” and said it was not his signature and that he is not the president of Right Choice [*id.* Page 31]. He was then asked what the business address was for Right Choice, and he said he did not know. When told that the business address was the home address he provided to the attorneys, he said that had to be incorrect [*id.* Page 38]. Mr. Braz was asked who the general contractor was for the job, and he responded “Tsang” [*id.* Page 42]. He was asked who oversaw that the work was getting done and he said “the owner has his own people there” [Page 43] and he said “I think he is a Kevin” [*id.*]. He acknowledged giving plaintiff and all the other workers shirts that said “EBW” and said “we grab from the company’s we work before” to explain why, and he denied that he is the owner of EBW [Pages 54-55]. Wesley Braz was then asked if he knew a worker named Walter Nieves and he responded that he needed to see a picture, as “by the name it's too complicated. Because you know, majority of the people who Spanish have almost the same name. Like Jose, so it's a -- if I tell you -- the guys when they work with us, you know, like the whole project to tell me -- I don't know. Cause it's so many guys, you know” [Page 56]. Then, asked about Wally and Tito, he said “You know, we have a bunch of people with nicknames. Only if I see them I could recognize you know, but like, nicknames it's complicated, you know” [Page 64]. Wesley Braz was asked if he knew that Walter Nieves and two other workers were fired because they had helped plaintiff get medical attention after his accident, and he said “I never heard about that” [Page 58]. He was then asked who would have fired them if it wasn't him, and Mr. Braz said that it could have been “this guy named Jersey” [*id.*]. Mr. Braz then said he had to respond to his boss' call, and the deposition was

adjourned to the next day. It does not seem he completed his EBT. The questioning never addressed the circumstances of the plaintiff's accident.

Plaintiff also provides an affidavit from Kathleen Hopkins, a certified site safety manager [Doc 88]. She avers that while plaintiff was gathering debris, "an 8-foot vertical steel reshore post supporting the uncured concrete 3rd floor Ceiling, fell onto the Plaintiff. The Defendants failed to secure the reshore with stays, blocks, braces, irons, ropes or other devices to prevent it from falling and striking the Plaintiff. In addition, the Defendants failed to properly brace or tie the reshore so as to maintain position and shape" [Doc 88 ¶8-9]. She concludes "The Plaintiff being struck by a falling vertical metal reshore post that resulted in the Plaintiff's injuries was indisputably a gravity-based accident. The very purpose of Labor Law §240(1) is to protect workers against gravity/height related accidents such as this. These violations of Labor Law §240(1) were direct, substantial and proximate causes of the Plaintiff's accident and injuries. The Defendants thus failed to protect the Plaintiff from this height related accident The Plaintiff was not provided with a worksite that was so equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the Plaintiff" [*id.* ¶11, 15].

In opposition to the plaintiff's motion, defendants do not provide any evidence in admissible form that was not already submitted in connection with the motions. Plaintiff's attorney submits a reply affirmation that points this out and urges the court to grant plaintiff summary judgment.

There is no question that the plaintiff has established that the falling object caused him to fall to the ground, and that the harm to him flowed directly from the application of

the force of gravity to the object. The court finds that plaintiff has made a prima facie case for summary judgment on his Labor Law § 240 (1) cause of action, defendants have not overcome the motion and demonstrated the existence of factual issues requiring a trial. “With respect to falling objects, Labor Law § 240(1) applies where the falling of an object is related to ‘a significant risk inherent in ... the relative elevation ... at which materials or loads must be positioned or secured ... [A] plaintiff must show that, at the time the object fell, it was being hoisted or secured, or that the falling object required securing for the purposes of the undertaking’ ... A plaintiff must also show that ‘the object fell ... because of the absence or inadequacy of a safety device of the kind enumerated in the statute’” (*Castano v. Algonquin Gas Transmission, LLC*, 213 AD3d 905, 906-908 [2d Dept 2023]; see also *Parrino v Rauert*, 208 AD3d 672 [2d Dept 2022]; *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 9 [2011] [irrelevant that plaintiff was standing on the ground]). Further, the fact that “plaintiff was unable to explain how or why the beam fell did not preclude summary judgment in his favor” (*Fuentes v YJL Broadway Hotel, LLC*, 210 AD3d 552, 553 [1st Dept 2022]). Accordingly, the plaintiff’s motion for partial summary judgment on the issue of liability as against the defendants on his Labor Law § 240 (1) cause of action is granted.

Labor Law § 241 (6)

The Court next turns to the branch of defendants’ motion seeking to dismiss plaintiff’s Labor Law § 241 (6) cause of action. Labor Law § 241 (6) requires building owners and contractors to "provide reasonable and adequate protection and safety" for workers involved in building construction, excavation, or demolition and to comply with

safety rules and regulations promulgated by the State Commissioner of Labor (*Ross v Curtis Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 502, 601 N.Y.S.2d 49, 618 N.E.2d 82). To assert a sustainable cause of action under section 241 (6), a plaintiff "must allege a violation of a concrete specification of the [Commissioner's regulations in the] Industrial Code" (*Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 A.D.2d 231, 232, 705 N.Y.S.2d 577). To prevail under this statute, a claimant must demonstrate the existence of an injury sustained in an area where "construction, excavation or demolition work is being performed" (Labor Law § 241 [6]; see *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348, 693 NE2d 1068, 670 NYS2d 816 [1998]), "the violation of a regulation setting forth a specific standard of conduct applicable to the working conditions which existed at the time of the injury" (*Lawyer v Hoffman*, 275 AD2d 541, 542, 711 NYS2d 618 [2000]; see *St. Louis v Town of N. Elba*, 70 AD3d 1250, 1250, 894 NYS2d 587 [2010], *affd* 16 NY3d 411, 947 NE2d 1169, 923 NYS2d 391 [2011]) and that the violation was the proximate cause of the injury (see *Auchampaugh v Syracuse Univ.*, 57 AD3d 1291, 1293, 870 NYS2d 564 [2008]; *Shields v General Elec. Co.*, 3 AD3d 715, 718, 771 NYS2d 249 [2004]).

Plaintiff's bill of particulars [Doc 92] alleges violations of the Industrial Code (12 NYCRR) specifically, §§ 23-1.5(a)(b)(c)(1),(c)(2) 84 (c)(3), 23-1 .7(a)(1)(i), 23-1.7(a)(2), 23-1 .7(b)(1)(i), (1)(ii), (1)(iii)(a),(b),(c)), 23-1.7(d), 23-1.7(e)(1) 81. (2), 23-1.8, 23-1.11, 23-1.15, 23-1.17, 23-1.18, 23-1.19, 23-1.27, 23-1.28, 23-1.31, 23-1.32, 23-1.30, 23-2.1(a)(1)(2), 23-2.1(b), 23-2.3, 23- 3, 23-3.3(g), 23-4, 23-5, 23-5.1 through 23-5,22, 23-6, 23-7.1 through 23-7.3, 23-8".[Doc 92 ¶25]. In his affirmation in opposition to defendants' motion for summary judgment however, plaintiff's counsel does not mention any sections

of the Industrial Code or argue that there are sections that plaintiff does not wish to have dismissed as predicates for an alleged violation of Labor Law section 241(6). Defendants' attorney goes through the sections which plaintiff cites in his bill of particulars, and concludes that they are all either too general to be actionable, or are inapplicable [Doc 70].

As the plaintiff makes no affirmative arguments in support of his claims regarding the Industrial Code sections cited in his bill of particulars in opposition to the defendants' motion to dismiss them, they are deemed abandoned. Plaintiff conceded this at oral argument. Defendants are therefore entitled to dismissal of the plaintiff's section 241 (6) cause of action (*see Debenedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]).

Labor Law §200 and common law negligence

Labor Law § 200 states, in applicable part:

“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 protections to such persons.”

Labor Law § 200 codifies the common-law duty of an owner, general contractor and their agents to provide workers with a safe place to work (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 850 [2006]; *Brown v Brause Plaza, LLC*, 19 AD3d 626, 628 [2005]; *Everitt v Nozkowski*, 285 AD2d 442, 443 [2001]; *Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [1999]). This duty “applies to owners, contractors, or their agents who exercise

control or supervision over the work, or either created the allegedly dangerous condition or had actual or constructive notice of it” (*Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000], citing *Russin v Picciano & Son*, 54 NY2d 311 [1981]; *Lombardi*, 80 NY2d at 294-295; *Jehle v Adams Hotel Assocs.*, 264 AD2d 354 [1999]; *Raposo v WAM Great Neck Assn. II*, 251 AD2d 392 [1998]; *Haghighi v Bailer*, 240 AD2d 368 [1997]). “An implicit precondition to this duty ‘is that the party charged with that responsibility have the authority to control the activity bringing about the injury’” (*Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [1999], quoting *Comes*, 82 NY2d at 877 and *Russin*, 54 NY2d at 317). Labor Law § 200 and common-law negligence liability “will attach when the injury sustained was a result of an actual dangerous condition, and then only if the defendant exercised supervisory control over the work performed on the premises or had notice of the dangerous condition which produced the injury” (*Sprague v Peckham Materials Corp.*, 240 AD2d 392, 394 [1997], citing *Seaman v Chance Co.*, 197 AD2d 612 [1993]).

“Cases involving Labor Law § 200 generally fall into two categories: those where workers were injured as a result of dangerous or defective conditions at a worksite and those involving the manner in which the work was performed” (*Villada v 452 Fifth Owners, LLC*, 188 AD3d 1292, 1293 [2020], citing *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2008] and *Ortega v Puccia*, 57 AD3d 54, 61 [2008]). Under the “manner of work” analysis, “[l]iability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the work” that either was performed by plaintiff or produced the injury (*Aranda v Park East Constr.*, 4 AD3d 315, 316 [2004], citing *Lombardi v Stout*, 80 NY2d 290, 295 [1992]).

The second category mirrors ordinary premises liability principles with respect to hazards (*cf. Azad v 270 5th Realty Corp.*, 46 AD3d 728, 730 [2007] [“(w)here 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, an owner (or its agent) may be held liable in common-law negligence and under Labor Law § 200 if it had control over the work site and either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident”]).

Here, plaintiff has no viable claim against defendants under these causes of action, and thus they are entitled to dismissal of plaintiff’s common-law negligence and Labor Law § 200 causes of action. Plaintiff’s own testimony regarding how the accident occurred demonstrates that the accident did not occur as the result of a dangerous or defective premises condition, but rather, was the result of his employer’s means and methods of performing the work (*see Przyborowski v A&M Cook, LLC*, 120 AD3d 651, 652-653 [2d Dept 2014]; *Ortega v Puccia*, 57 AD3d 54, 61-63 [2d Dept 2008]; *cf. Seem v Premier Camp Co., LLC*, 200 AD3d 921, 924-925 [2d Dept 2021]; *Chowdhury v Rodriguez*, 57 AD3d 121, 129-130 [2d Dept 2008]). 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]; *Ortega*, 57 AD3d at 61; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 851 [2d Dept 2006], *lv dismissed* 8 NY3d 841 [2007]).

Defendants have established 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]; *Przyborowski*, 120 AD3d at 652-653; *Ortega*, 57 AD3d at 61-63; *cf. Chowdhury*, 57 AD3d at 129-130). As plaintiff has failed to demonstrate the existence of an issue of fact with respect to defendants’ supervision and control of the work, which plaintiff’s attorney conceded at oral argument, defendants are entitled to dismissal of plaintiff’s common-law negligence and Labor Law § 200 causes of action.

Conclusions of Law

Based on the foregoing and after oral argument on the record, it is

ORDERED that the branch of defendants’ motion (motion sequence number 4), for summary judgment dismissing plaintiff’s cause of action under Labor Law § 240 (1) is denied; and it is further

ORDERED that the branch of defendants’ motion for summary judgment dismissing plaintiff’s Labor Law § 241 (6) cause of action is granted and this cause of action is dismissed; and it is further

ORDERED that the branch of defendants' motion for summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence causes of action is granted without opposition, and these claims are dismissed; and it is further

ORDERED that the plaintiff's motion (motion sequence number 5), for partial summary judgment on his cause of action under Labor Law § 240 (1) is granted.

This constitutes the decision and order of the court.

ENTER:



Hon. Debra Silber, J.S.C.