# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. LYLE E. FRANK** **PART** **11M**

***Justice***

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IVOIR DASILVA, NAIR DASILVA,

Plaintiff,

- v -

SUPER P57, LLC,HUNTER ROBERTS CONSTRUCTION GROUP, LLC,HUDON RIVER PARK TRUST, RXR REALTY, INC.,

Defendant.

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**INDEX NO.** 160766/2017

**MOTION DATE** 01/19/2024, 01/19/2024

**MOTION SEQ. NO.** 006 007

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 403, 404, 405

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 383, 384, 385, 386, 387, 388, 389, 390, 391, 402

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

This action arises out of injuries allegedly sustained by plaintiff as a result of alleged violations of the Labor Law. Specifically, plaintiff alleges that he was caused to fall because of an unsecured OSHA plank. Defendant moves for summary judgment, motion sequence 006, seeking dismissal of the complaint in its entirety. Plaintiff opposes the motion and moves separately for summary judgment, motion sequence 007, on its claims pursuant to Labor Law §§ 240(1), 241(6). For the reasons set forth below, defendant's motion for summary judgment is granted in part and plaintiff's motion for summary judgment is granted in part.

*Background*

Defendant Hunter River Park Trust was a legislatively created New York State public-benefit corporation created to plan, design, construct, operate and maintain Hudson River Park.

Defendant Super P57 LLC was the lessee in possession of the property, that retained Hunter Roberts Construction Group LLC (Hunter Roberts) to be the construction manager for the project. Global Iron Works Inc. (Global) a subcontractor of Hunter Roberts.

On September 14, 2017, plaintiff, while employed by Global and working at a construction project at Pier 57 located at 29 11th Avenue, Manhattan, NY 10011, was standing on an OSHA plank, when he was caused to fall. Plaintiff was wearing a harness and was tied off. Plaintiff testified that he was not instructed to secure the plank nor was it his normal practice to secure plank.

*Summary Judgment Standard*

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

**Defendants' Motion for Summary Judgment**

Defendants seek dismissal of all claims and causes of action pursuant to Labor Law § 240(1), § 241(6), § 200 and common law negligence.

*Labor Law §240(1)*

Labor Law §240(1) states in pertinent part as follows:

> "All contractors and owners and their agents … in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or 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."

The statute imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury. *Gordon v. Eastern Railway Supply, Inc.*, 82 NY2d 555, 559 [1993]; *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 500 [1993]; *Rocovich v. Consolidated Edison Co.*, 78 NY2d 509, 513 [1991].

It is well established law that an accident alone does not establish a Labor Law § 240 (1) violation or causation. (*Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280 [2003]; *Rudnik v Brogor Realty Corp.*, 45 AD3d 828 [2d Dept 2007]; *Forschner v Jucca Co.*, 63 AD3d 996 [2d Dept 2009]. Rather, the protections afforded by this section are invoked only where plaintiff demonstrates that he was engaged in an elevation-related activity and the failure to provide him with a safety device was the proximate cause of his injuries. *See* id.

In support of its motion, defendants contend that plaintiff was the sole proximate cause of his accident. Defendants rely on the recalcitrant worker doctrine and contend that no liability pursuant to Labor Law § 240 (1) exists. The recalcitrant worker doctrine is a defense "limited to cases in which a worker has been injured as a result of a refusal to use available safety devices provided by the employer or owner" (*Hagins v State*, 81 NY2d 921, 923 [1993]). The Court of Appeals further clarifies in *Cahill* that when an employee is provided with "adequate safety derives and […] has been instructed to use them, the employee may not recover under Labor Law § 240 (1) for injuries caused solely by his violation of those instructions, even though the instructions

were given several weeks before the accident occurred"(*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 37 [2004]).

Defendants fail to establish its prima facie case simply by relying on plaintiff's years of experience, and the argument that essentially, he should have known better than to use the plank unsecured. That is neither the standard in these cases or consistent with the record before this court. The record is devoid of testimony that plaintiff was instructed at any point to secure the plank or that he was provided with the hardware necessary to secure the plank and prevent it from moving. As such the Court finds that defendants have failed to establish that plaintiff was the sole proximate cause of the accident.

*Labor Law § 200*

"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" (*Edwards v State Univ. Constr. Fund,* 196 AD3d 778, 780 [2021] [internal quotation marks and citations omitted]; *see Wiley v Marjam Supply Co., Inc*., 166 AD3d 1106, 1109 [2018], lv denied 33 NY3d 908 [2019]). Liability under Labor Law § 200 "generally falls into two broad categories: instances involving the manner in which the work is performed, and instances in which workers are injured as a result of dangerous or defective premises conditions at a work site" *Abelleira v City of New York,* 120 AD3d 1163, 1164 [2nd Dept 2014]; see *Cantalupo v Arco Plumbing & Heating, Inc.,* 194 AD3d at 689 [2nd Dept 2021]. Those two broad categories of actions are where a worker's injuries arise as a result of dangerous or defective premises conditions at a work site, and those involving injuries arising from the method and the manner in which the work is performed (*see Modugno v Bovis Lend Lease Interiors, Inc.,* 184 AD3d 820, 822 [2nd Dept 2020])

It is well-settled law that an owner or general contractor will not be found liable under common law or Labor Law § 200 where it has no notice of any dangerous condition which may have caused the plaintiff's injuries, nor the ability to control the activity which caused the dangerous condition. *See Russin v Picciano & Son*, 54 NY2d 311[1981]; *see also Rizzuto v Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Singleton v Citnalta Constr. Corp.*, 291 AD2d 393, 394 [2002]. The First Department has held that liability pursuant to Labor Law § 200 only attaches where the owner or contractor had the "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition"(*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012] internal citations omitted).

Defendants contend that there was not a defective condition on the worksite, thus actual or constructive notice of a defect is not applicable. Rather defendants contend that they did not directly supervise or control the injury inducing work. Plaintiff was employed by Global, thus as his employer directed the means and methods of plaintiff's work.

In opposition, plaintiff fails to raise an issue of fact. In a conclusory fashion plaintiff contends that defendants were aware of the "dangerous conditions" plaintiff was subjected to at the time of the incident, however other than the alleged safety device, there are no defects alleged within the work area. Moreover, plaintiff does not cite to any admissible evidence that defendants rather than Global, controlled the means and methods of plaintiff's work. Accordingly, defendants have established entitlement to dismissal of the claims pursuant to Labor Law § 200.

*Labor Law § 241 (6)*

It is well settled law that for there to be liability pursuant to Labor Law § 241(6), there must be a violation shown of the Industrial Code. *See e.g., Ross v Curtis-Palmer Hydro-Elec.*

*Co.*, 81 NY2d 494 [1993] (§ 241(6) imposes a non-delegable duty upon owners and general contractors and their agents for violation of the statute).

Plaintiff's claim under § 241(6) is based on alleged violations of Industrial Code Sections 23-1.5; 23-1.7; 23-1.15; 23-1.16(d); 23-1.17, 23-5.1; 23-5.2; and 23-5.3[1].

Industrial Code Section 12 NYCRR § 23-1.16 (d), reads in relevant part:

> Tail lines. The length of any tail line shall be the minimum required in order for an employee to perform his work, but in no case shall be longer than four feet. Such tail line shall be attached to a hanging lifeline or to a substantial structural member at a point no lower than two feet above the working platform or working level.

Industrial Code §12 NYCRR §23-5.2 entitled Approval Required reads "The use of any scaffold of a type not named, specified or described in this Part (rule) is prohibited unless such scaffold has been granted a special approval."

The Court finds that defendants have established that the above sections of the Industrial code are too general to form a basis for liability pursuant to Labor Law § 241(6). Plaintiff has failed to raise a triable issue of fact. Accordingly, the portion of defendants' motion seeking dismissal of the Labor Law § 241(6) claims is granted.

**Plaintiff's Motion for Summary Judgment**

Plaintiff moves for partial summary judgment as to its claims pursuant to Labor Law §§ 240(1), 241(6). Plaintiff has established entitlement to judgment as a matter of law as to 240(1). The record is undisputed that plaintiff was provided a plank to perform work at an elevated height, and not provided instruction or the hardware to secure the plank. Moreover, while plaintiff was equipped with a harness and it was tied off, it did not prevent plaintiff from falling.

[1] In opposition to defendants' motion and in support of plaintiff's motion, plaintiff only relies on Industrial Code § 23-1.16(d) and Industrial Code § 23-5.2, as such the Court deems the alleged violations of the remaining Industrial Code sections abandoned.

Conversely, and for the same reasons defendants' motion for summary judgment is granted, plaintiff fails to establish liability pursuant to Labor Law § 241(6). Plaintiff has not provided any case law and specific factual allegations to establish that the cited Industrial Codes are sufficient to establish liability and are applicable to the instant matter. Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment, motion sequence 006, is granted in part in that plaintiff's claims pursuant to Labor Law § 200 and Labor Law § 241(60 are dismissed; and it is further

ORDERED that plaintiff's motion for summary judgment, motion sequence 007, is granted in part, in that plaintiff is entitled to summary judgment on its claims pursuant to Labor Law § 240(1).

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6/21/2024
DATE

LYLE E. FRANK, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
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| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |