Palumbo v CitiGroup Tech., Inc.
2024 NY Slip Op 32539(U)
July 18, 2024
Supreme Court, New York County
Docket Number: Index No. 155343/2020
Judge: Richard G. Latin
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD G. LATIN** **PART** **46M**

Justice

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MATTHEW PALUMBO, ALLISON PALUMBO

Plaintiff,

- v -

CITIGROUP TECHNOLOGY, INC.,TISHMAN CONSTRUCTION CORPORATION OF NEW YORK,

Defendant.

----------X

INDEX NO. 155343/2020

MOTION DATE 06/14/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65

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

This is an action to recover damages for personal injuries allegedly sustained by a union mason on November 25, 2019, at a construction site located at 390 Greenwich Street, New York, New York (the Premises), when, while working on top of a pallet, his foot broke through the pallet, causing him to fall off the pallet to the ground and injure his knee.

Plaintiff Matthew Palumbo (plaintiff) asserts claims sounding in common-law negligence and Labor Law §§ 200, 240 and 241 (6). Plaintiff's spouse, Allison Palumbo asserts derivative claims.

In motion sequence number 001, defendants Citigroup Technology, Inc (Citigroup) and Tishman Construction Corporation of New York (Tishman) (together, defendants), move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Plaintiffs cross-move for summary judgment as to liability in their favor on the Labor Law § 240 (1) claim as against defendants.

BACKGROUND

On the day of the accident, the Premises was owned by Citigroup. Citigroup hired Tishman to provide construction management services for a project at the Premises that entailed restructuring two existent buildings into one, as well as the exterior and interior renovation of those buildings. Tishman subcontracted all masonry and concrete work for the Project to non-party Eurotech Construction Corp. (Eurotech). Plaintiff was employed by Eurotech.

Plaintiff's Deposition Testimony (NYSCEF Doc. No. 24)

Plaintiff testified that on the day of the accident he was a union bricklayer employed by Eurotech. He worked on the Project. He was also Eurotech's shop steward (plaintiff's tr at 13). His job involved cutting and laying cement blocks, known as "CMUs" (*id.* at 38). To do so he would use a "wet saw" – a motorized saw with a "pump that sprays water as you cut to cut down on the amount of dust that you make while cutting" (*id.* at 42). Eurotech provided the wet saw (*id.* at 41). His supervisor was Daniel Cotter, a Eurotech foreman (*id.* at 39). He received his directions from Cotter. Tishman did not direct how he performed his job (*id.* at 120).

Plaintiff testified that at the time of the accident, he was "at the top of a ramp" leading from the ground floor to the Premises' loading dock (*id.* at 40). The "floor itself did have a slight slope to it" (*id.* at 40). The ground was finished concrete (*id.* at 53).

Plaintiff was using a wet saw to cut CMUs. The wet saw was situated on the slope of the ramp itself, but it was "as level as could be" (*id.* at 40). To use the saw, plaintiff had to stand on two "heavy duty" wooden pallets that were set up next to the saw (the Platform) (*id.* at 51, 52). Plaintiff approximated that each pallet was 10 inches tall and estimated that the Platform was approximately two feet above the concrete floor (*id.* at 57).

The pallets had not always been necessary. Plaintiff explained that several months before the day of the accident, there was a "report of water leaking" from the saw (*id.* at 54). Tishman held an informal meeting regarding this problem with Eurotech. Plaintiff "was there for the discussion" on that issue (*id.* at 54). After the meeting, Tishman and/or Eurotech decided to place the saw inside a "plastic tub and on top of cinder blocks" (*id.* at 53). Tishman and/or Eurotech laborers installed the saw (*id.* at 41 ["I'm not sure if it was Tishman's or Eurotech's [laborers], but it was the laborer's job to move it and set it up"]) and the tub (*id.* at 54).

Plaintiff then explained that "the reason for the pallets was to, basically, bring [plaintiff] to the level" of the raised saw so he could "still operat[e] at a normal height" (*id.* at 53). The pallets had been in place "for months" (*id.* at 53) but were replaced approximately "two to three weeks" prior to the accident (*id.* at 67). Laborers performed this work. Plaintiff was unsure if it was Tishman or Eurotech laborers who replaced and installed the pallets (*id.* at 67 ["I just don't know if it was Tishman or Eurotech laborers. I just know it's the laborers that do that"]).

Plaintiff also testified that "[t]here would be no reason to step up to a higher level" if the saw was on the ground (*id.* at 54). Plaintiff "felt okay working on [the Platform]" and did not know of any complaints about the pallets (*id.* at 58-59).

On the day of the accident, plaintiff was using the saw while standing on the Platform. He had made "at minimum, five cuts" before the accident occurred (*id.* at 73). Then, after cutting a block and preparing to step down from the Platform, plaintiff's foot "went through the slats on the pallet" (*id.* at 77). Specifically, one slat on the pallet "gave in and [his] foot went right through" (*id.* at 78). This caused him to lose his balance and fall from the Platform to the floor, landing on his knees.

Plaintiff testified that one week after the accident, he went back to the Premises and had a meeting with Joe Casey, the site safety supervisor. Plaintiff testified that Casey had the broken pallet in his office and informed him that it was "impossible" that the pallet broke in the way plaintiff described (*id.* at 106).

Deposition Testimony of Frank Servidio (Tishman's Senior Superintendent) (NYSCEF Doc. No. 26)

Frank Servidio testified that at the time of the accident, he was Tishman's senior superintendent for the Project. Tishman was the construction manager for the Project. The Project entailed joining two buildings together into one building. Tishman was responsible for the exterior work on the Project. Tishman hired the subcontractors for the Project and had several superintendents on site every day (Servidio tr at 17).

Eurotech was one of Tishman's subcontractors on the Project (*id.* at 24). Tishman also had its own laborers on site. Tishman also hired the safety representative for the Project, nonparty CSRG (*id.* at 27).

Servidio testified that Eurotech was responsible for setting up its work area and saws (*id.* at 32). It was Eurotech's responsibility "not to affect another portion of the building" (*id.* at 33). Servidio did not recall whether Tishman was involved with the decision to place the saw in a tub (*id.* at 34). He also did not recall being aware that Eurotech used pallets as platforms for their saws. Had he seen such a setup, Servidio "would never allow it to happen" because "it's against the most basic safety rules" and would be an "[i]mproper work platform" (*id.* at 40). He testified that he would have reported the issue to Tishman's safety project manager, Joe Casey (*id.* at 41).

Servidio did not witness the accident, nor did he investigate it (*id.* at 56). Casey would have performed an investigation.

Deposition Testimony of Joseph Casey (Tishman's Safety Director) (NYSCEF Doc. No. 27)

Joseph Casey testified that on the day of the accident, he was Tishman's safety director for the Project at the Premises. He was directly employed by Tishman (Casey tr at 8). His typical day on the Project included walking the site with the project supervisor and the site safety manager from the City of New York (*id.* at 9). If he saw an unsafe activity, he had the authority to stop work. Casey had regular contact with Eurotech's superintendent and foreman. He would conduct safety talks.

Casey testified that the subject saw was set up on a "garage ramp" (*id.* at 14). Casey "was not involved in" deciding where Eurotech set up its equipment (*id.* at 15).

Casey testified that he was familiar with two ways that a masonry contractor could set up a wet saw, including placing the saw in a plastic tub to catch the water runoff from the saw's use (*id.* at 16). At the deposition, he was shown several photographs and confirmed that they depicted the subject saw in a tub (*id.* at 19). He also confirmed that Eurotech used wooden pallets as platforms for the saws (*id.* at 22). The pallets were provided by Eurotech (*id.* at 30). This was a common practice, often done so that the workers could "get off the ground a little bit" allowing the water to drain through the pallets so that "their boots [would] stay dry" (id at 23). Casey and Eurotech never discussed using pallets in this manner.

Casey did not witness the accident. He also could not recall whether he was at the Premises on the day of the accident. He learned of the accident sometime later in the day. He understood that plaintiff was on a pallet, which broke, causing him to fall. He investigated the accident and inspected the pallet. He confirmed that there was a hole in the pallet (*id.* at 35). He recalled being surprised that the pallet broke (*id.* at 29). Casey testified that he "stood" and "jumped" on the pallet to check its strength and that when he did so, it did not break any more (*id.* at 36 and 44).

Further, when he inspected the pallet, he "did not see any sogging or sagging" or other evidence of water damage to the pallet (*id.* at 40).

Affidavit of Mark Nucci (Defendants' Investigator) (NYSCEF Doc. No. 34)

Mark Nucci avers that he was contacted by "counsel for the defendants" who asked him to obtain measurements of the broken pallet (Nucci aff, ¶ 4). He contacted Casey and learned that the Pallet was held by Tishman. He then physically inspected the pallet and took measurements. He found that "[f]rom the top of the pallet to the ground, the pallet was 5 1/4 inches high" (*id.* ¶ 5). He took photographs depicting the pallet along with a measuring tape showing the pallet's dimensions (*id.*, ¶ 6).

Nucci further avers that he interviewed plaintiff and wrote down his statement. He states that plaintiff read and signed that statement in Nucci's presence (*id.* ¶ 8). Nucci further states that plaintiff stated to him that the pallet was approximately "5 inches high" (*id.*, ¶ 8).

DISCUSSION

"'[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [emphasis omitted]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993] [internal quotation marks and citation omitted]). "If

there is any doubt as to the existence of a triable issue, the motion [for summary judgment] should be denied" (*Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; citing *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

The Labor Law 240 (1) Claims

Defendants move for summary judgment dismissing the Labor Law § 240 (1) claims as against them. Plaintiffs cross-move for summary judgment in their favor as to liability on the same claim.

Labor Law § 240 (1), known as the Scaffold Law, provides as relevant:

> "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."

Labor Law § 240 (1) "imposes a nondelegable duty on owners and contractors to provide devices which shall be so constructed, placed and operated as to give proper protection to those individuals performing the work" (*Quiroz v Memorial Hosp. for Cancer & Allied Diseases*, 202 AD3d 601, 604 [1st Dept 2022] [internal quotation marks and citations omitted]). It "'was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co*., 81 NY2d 494, 501 [1993]).

The absolute liability found within section 240 "is 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" (*O'Brien v Port Auth. of N.Y. & N.J.,* 29 NY3d 27, 33 [2017]

[internal quotation marks and citation omitted]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). Therefore, section 240 (1) "does not cover the type of ordinary and usual peril to which a worker is commonly exposed at a construction site" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]). Accordingly, to prevail on a Labor Law § 240 (1) claim, a plaintiff must establish that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]).

As an initial matter, defendants do not dispute that they are proper defendants under the Labor Law.

Here, plaintiff's accident occurred when the topmost pallet of a two-pallet stack that he was standing on cracked underneath him, causing him to lose his balance and fall approximately ten and a half inches to the concrete floor.[1]

Notably, "there is no bright-line rule minimum height differential that determines whether an elevation hazard exists" (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 9 [1st Dept 2011]). That said, given the circumstances of plaintiff's fall – that the pallets he fell from were resting directly on the concrete floor and that their combined height totaled less than one foot – plaintiff's accident did not involve the type of elevation related hazard that falls within the scope of Labor Law § 240 (1) (*see Fischer v VNO 225 W. 58th St. LLC,* 215 AD3d 486, 487 [1st Dept 2023] ["Even accepting as true plaintiff's approximation that he fell a distance of one and one-half to two feet . . . under the circumstances here, the distance was not a physically significant height elevation differential to trigger the protection of Labor Law § 240 (1)"]; *Cappabianca v Skanska USA Bldg.*

[1] While plaintiff argues that the pallets were over two feet in height, photographic evidence (and plaintiff's signed statement) establishes that each pallet was five and one quarter inches thick (Nucci Aff, exhibit A). Therefore, as defendants argue, two pallets stacked together would be ten and a half inches in height.

Inc., 99 AD3d 139, 146 [1st Dept 2012] [section 240 (1) did not apply to a plaintiff who fell off of a pallet that "was at most 12 inches above the floor"]; *Jackson v Hunter Roberts Construction Group, LLC*, 161 Ad3d 666, 667 [1st Dept 2018] [A height differential of 6 to 10 inches "did not constitute a physically significant elevation differential covered by" section 240 (1)]; *Torkel v NYU Hosps. Ctr.,* 63 AD3d 587 [1st Dept 2009] [plaintiff was not exposed to an elevation related hazard where a ramp was "resting on the street and the top was resting on the adjacent sidewalk curb, and the height differential from the bottom to the top was at most 12 to 18 inches"]).

Plaintiffs argue that plaintiff's fall falls within the scope of section 240 (1). In support of this position, plaintiff relies on cases involving significantly higher distances (*Frierson v Concourse Plaza Assoc.*, 189 AD2d 609, 610 [1st Dept 1993] [the plaintiff worked on wooden planks "four or five stories above the ground"]; *Bras v Atlas Const. Corp.*, 166 AD2d 401 [2d Dept 1990] [fall of 12 to 15 feet]). These cases are unpersuasive. Similarly, plaintiff's reliance on *Brown v 44th Street Dev*., LLC (137 AD3d 703 [1st Dept 2016]) – where a worker fell into an open gap on an unfinished floor he was required to traverse – is unpersuasive as the facts are inapposite to the instant case. Finally, plaintiff's reliance on *Flores v Exotic Design & Wire LLC* (221 AD3d 428 [1st Dept 2023]) is also unpersuasive, as the plaintiff in Flores was required to work from a platform elevated three feet off the ground and not, as here, from a platform located directly on the ground. Therefore, it cannot be said that the subject pallets – which rested directly on the ground – "served conceptually and functionally, as an elevated platform or scaffold" (*see e.g. Becerra v City of New York*, 261 AD2d 188, 189 [1st Dept 1999]).

Given the foregoing, plaintiff's accident did not involve the type of elevation related hazards that would require the use of a protective device as contemplated by Labor Law § 240 (1). Accordingly, Labor Law § 240 (1) is inapplicable to plaintiff's accident.

Thus, defendants are entitled to summary judgment dismissing plaintiffs Labor Law § 240 (1) claim as against them, and plaintiffs are not entitled to summary judgment in their favor as to the same claim.

The Labor Law § 241 (6) Claims

Defendants move for summary judgment dismissing the Labor Law § 241 (6) claims as against them.

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross v Curtis-Palmer Hydro-Electric Co.,* 81 NY2d at 501–502).

To sustain a Labor Law § 241 (6) claim, it must be established that the defendant violated a specific, "concrete specification" of the Industrial Code, rather than a provision that considers only general worker safety requirements (*Messina v City of New York,* 300 AD2d 121, 122 [1st Dept 2002]; quoting *Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231 [1st Dept 2000]). Such violation must be a proximate cause of the plaintiff's injuries (*Yaucan v Hawthorne Vil., LLC*, 155 AD3d 924, 926 [2d Dept 2017] ["a plaintiff must demonstrate that his or her injuries

were proximately caused by a violation of an Industrial Code regulation that is applicable to the circumstances of the accident"]; *see also Sutherland v Tutor Perini Bldg. Corp.*, 207 AD3d 159, 161 [1st Dept 2022]). "Whether a regulation applies to a particular condition or circumstance is a question of law for the court" (*Harrison v State of New York,* 88 AD3d 951, 953 [2d Dept 2011]).

As an initial matter, plaintiffs list multiple violations of the Industrial Code in the bill of particulars. Except for section 23-1.5 (c) (3), plaintiffs do not seek relief in their favor or oppose their dismissal. These uncontested provisions are deemed abandoned (*Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section"]).

Industrial Code 12 NYCRR 23-1.5 (c) (3)

Industrial Code 12 NYCRR 23-1.5 (c) (3) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Becerra v Promenade Apartments Inc.*, 126 AD3d 557, 559 [1st Dept 2015]). It governs the "Condition of equipment and safeguards" and provides, as relevant:

> "(3) All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged"

Here, plaintiff's accident occurred when a slat on the pallet he was standing on broke, causing him to lose his balance and fall.

In their motion, defendants do not address section 1.5 (c) (3) with specificity. In their reply/opposition to cross-motion, defendants argue that this section applies only to injuries arising out of unguarded or defective power equipment. There is no language in 12 NYCRR 23-1.5 (c) or any of its subsections that indicates that this rule applies only to power equipment (*c.f. Canty v*

133 East 179th Street, LLC (167 AD3d 548 [1st Dept 2018]). Accordingly, defendants' argument is insufficient to establish, prima facie, that this provision is inapplicable to plaintiff's accident.

Defendants also argue, for the first time in reply, that the pallet plaintiff stood on does not constitute "a 'safety device,' 'safeguard,' or 'equipment' as used in the provision" (*Jackson,* 161 Ad3d at 668). Importantly, *Jackson* involved a ramp that was only ancillary to the plaintiff's work, while here, the pallet was explicitly provided to plaintiff as his work surface. This distinction gives rise to a question of fact as to whether the pallet is "equipment" as contemplated in the provision.

As defendants do not discuss this issue with any specificity, they have failed to establish their entitlement to summary judgment dismissing the Labor Law § 241 (6) claim predicated upon a violation of Industrial Code 12 NYCRR 23-1.5 (c) (3).

The Common-Law Negligence and Labor Law § 200 Claims

Defendants move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

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], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "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 protection to all such persons."

"Liability pursuant to Labor Law § 200 may be based either upon the manner in which the work is performed or actual or constructive notice of a dangerous condition inherent in the

premises" (*Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 736 [2d Dept 2008]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

"Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (*LaRosa v Internap Network Servs. Corp*., 83 AD3d 905, 909 [2d Dept 2011]; *DaSilva v Toll First Ave., LLC,* 199 AD3d 511, 513 [1st Dept 2021]; *Andino v Wizards Studios N. Inc.*, 223 AD3d 508, 509 [1st Dept 2024]). Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012])

However, where an injury stems from a dangerous condition inherent in the premises, an owner or contractor may be liable in common-law negligence and under Labor Law § 200 when the owner or contractor "'created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice'" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

Here, plaintiff's accident occurred when a slat on the pallet he was working from broke, causing him to lose his balance and fall. Testimony establishes that the pallet was installed to assist plaintiff in the performance of his work. In sum, plaintiff's accident arose from the performance of his work on top of the pallet.

Accordingly, the accident arose from the manner in which plaintiff was directed to perform his work, and not from an inherent condition in the Premises (*Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 406 [1st Dept 2018] ["Where a defect is not inherent but is created by the manner in which the work is performed, the claim under Labor Law § 200 is one for means and

methods and not one for a dangerous condition existing on the premises"]; *see also Cappabianca v Skanska USA Bldg. Inc*., 99 AD3d 139, 144 [1st Dept 2012] [slippery condition on pallet created by work performed "directly arose from the manner and means in which [the plaintiff] was performing his work"]).

Here, the record shows that the owner, Citigroup, did not actually direct, supervise or control any work on the Project, let alone the injury producing work. Accordingly, it is entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against it.

As to the general contractor, Tishman, the record establishes that it did not actually supervise or control Eurotech's workers or the methods of their work, or actually direct plaintiff to work from the pallets. Specifically, plaintiff testified that he only received his directions from his Eurotech foreman and not from Tishman (plaintiff's tr at 39, 120-121), while Servidio testified that Eurotech was the entity responsible for setting up and "provide[ing] [a] proper work area" for its workers (Servidio tr at 32). Similarly, Casey, Tishman's safety supervisor, testified that he "was not involved in" deciding where Eurotech set up its equipment (Casey tr at 15). Casey also testified that the subject pallets were Eurotech's material (Casey tr at 30). Accordingly, Tishman has set forth sufficient evidence to establish that it did not control the means and methods of the injury producing work – setting up the pallet and directing plaintiff to work thereupon.

In opposition, plaintiffs fail to raise a question of fact overcoming Tishman's prima facie entitlement to summary judgment. Plaintiffs argue that plaintiff's testimony that Tishman laborers may have installed the subject pallet gives rise to a question of fact as to whether Tishman actually controlled at least a part of the work that led to his accident – the selection of the pallet. Plaintiff's testimony, however, at best, is based upon speculation (*see* plaintiff's tr at 41 ["I'm not sure if it

was Tishman's or Eurotech's [laborers], but it was the laborer's job to move it and set it up"] and 67 ["I just don't know if it was Tishman or Eurotech laborers. I just know it's the laborers that do that"]). "[A] motion for summary judgment may not be defeated by a response based on surmise, conjecture and suspicion" *Marino v Parish of Trinity Church*, 67 AD3d 500, 502 [1st Dept 2009] [internal quotation marks and citation omitted]).

To the extent that plaintiffs argue that Tishman had the authority to control Eurotech's work because it directed Eurotech on where to work/set up its workstations, such control amounts only to a general authority to oversee the Project. Such general authority is insufficient to establish liability under Labor Law § 200 (*see Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014] [where a contractor "may have coordinated the subcontractors at the work site or told them where to work on a given day, and had the authority to review onsite safety . . . those responsibilities do not rise to the level of supervision or control necessary to hold the [contractor] liable for plaintiff's injuries under Labor Law § 200"]; *Balcazar v Commet 380, Inc.*, 199 AD3d 403, 404-405 [1st Dept 2021]).

Accordingly, Tishman is entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against it.

The parties' remaining arguments have been considered and were determined to be unavailing.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion of defendants Citigroup Technology, Inc and Tishman Construction Corporation of New York (motion sequence number 001), pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them is granted to the extent that the

common-law negligence and Labor Law §§ 200 and 240 (1) claims, and the § 241 (6) claims, except for that part of the section 241 (6) claim predicated upon a violation of Industrial Code 23-1.5 (c) (3), are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the cross-motion of plaintiffs Matthew and Allison Palumbo, pursuant to CPLR 3212, for summary judgment in their favor as to liability on the Labor Law § 240 (1) claim as against defendants is denied.

This constitutes the decision and order of the court.

7/18/2024
DATE

RICHARD G. LATIN, J.S.C.

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