At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12th day of September 2024.

P R E S E N T:

HON. WAYNE SAITTA, Justice.

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BOGDAN BIALOBRZESKI

Plaintiff

Index No. 512098/2017

-against-

MS #6 & #7

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, DSENY BUILDING SERVICES, INC., AND DSENY ENGINEERING SERVICES, P.C.

DECISION and ORDER

Defendants

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The following papers read on this motion:

	NYSCEF Doc Nos
Notice of Motion/Order to Show Cause/ Petition/Affidavits (Affirmations) and Exhibits	86-107
Cross-motions Affidavits (Affirmations) and Exhibits	110-137
Answering Affidavit (Affirmation)	140-165
Reply Affidavit (Affirmation)	168-169, 171-173
Supplemental Affidavit (Affirmation)	

Plaintiff was injured when he stepped into a gap between two platforms of the scaffold he was working on.

The scaffold had two different platforms. A main platform that was set back from the face of the building, and between the main platform and the building, an outrigger or “bicycle platform”. The bicycle platform that could be raised or lowered to be at a different height than the main platform.

There was a gap between the main platform and the bicycle platform. The gap had two dimensions. The vertical distance between the platforms was between 12 and 16 inches. The horizontal distance between the platforms is contested but was between 2 inches and less than a foot. The gap extended down to the next story below the main platform.

At the time of the accident, Plaintiff was on the main platform and was moving a stone windowsill with a co-worker. As Plaintiff was carrying the windowsill, he stepped into the gap and fell onto the bicycle platform. He did not fall through the gap to the story below but landed on the bicycle platform and the windowsill landed on his stomach.

Plaintiff commenced this action alleging violations of Labor Law § 240(1), § 241(6) and § 200.

Plaintiff moves for summary judgment alleging that the scaffold did not provide proper protection because of the unprotected gap between the two platforms. Plaintiff also argues that the lack of guard rails and toe-boards on the side of the main platform facing the gap violated the New York State Industrial Code and constituted a dangerous condition.

Defendants move for summary judgment dismissing Plaintiffs complaint, arguing that Plaintiff's accident was not elevation related because he did not fall off the platform and that the gap between the platforms was not a hazardous opening because it was not large enough for a person to fall through. Defendants also argue that they did not create or have notice of a dangerous condition.

Labor Law § 240(1)

As a preliminary matter, the fact that Plaintiff did not fall totally through the gap does not take his accident outside of the scope of § 240(1) *(Gramigna v. Morse Diesel,* 210 AD2d 115 [1s Dept 1994]; *Pietsch v Moog, Inc.,* 156 AD2d 1019 [4th Dept 1989]; *Robertti v. Chang*, 227 AD2d 542 [2d Dept 1996]; *Carpio v Tischman Const. Corp.,* 240 AD2d 234 [1st Dept 1997]).

The facts in *Gramigna v. Morse Diesel* are similar to the present case. There the plaintiff was working on a scaffold that has a bicycle platform separated from the main platform. When the plaintiff stepped from the main platform to the bicycle platform, the planks of the platform cracked causing him to fall partially between the platforms and get caught between the main platform and the wall of the building. The Appellate Division upheld the granting of summary judgment to the plaintiff on § 240(1) even though he did not fall to the ground (*id.*).

The case of *Alvia v. Teman Elec. Contracting Inc.,* 287 AD2d 421 [2d Dept 2001], cited by Defendants, is distinguishable in that the plaintiff there was not working at an elevation, but fell to the floor when he stepped in an uncovered hole in a permanent concrete floor.

The case of *Johnson v. Lend Lease Constr. LMB Inc.,* 164 AD3d 1222 [2d Dept 2018], also cited by Defendants is also distinguishable as that plaintiff was not working at an elevation but fell attempting to step up onto a rebar grid 18 inches above the steel decking he was standing on.

In the present case, Plaintiff's injury was gravity related as he fell because he stepped into an unguarded gap between the platforms of the elevated scaffold.

Plaintiff's expert engineer opined that the unguarded gap constituted a violation of § 240(1) and that the gap should have been protected by guardrails and toe-boards, which would have prevented Plaintiff from stepping into the gap.

Defendants counter that the design of the scaffolding was approved by the New York City Department of Buildings and the scaffold complied with standard and customary practices in the construction industry. Defendants argue that standard practice in the industry is not to put guardrails, netting, or toe-boards on the inner side of the main scaffold platform facing the building, because the workers need to access the bicycle platform to work on the building facade.

However, the design plans for the scaffold by Defendant DSENY ENGINEERING SERVICES, P.C. (Defendant DSENY) in fact specified that 1 x 6 toe-boards were required at all open planked levels.

Further, the reports of the inspector of Defendant NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY (Defendant SCA), contained several citations for lack of toe-guards or other fall protection at the inner edge of the scaffold platforms.

While the installation of guardrails on the side of the main platform facing the bicycle platform might have interfered with access to the bicycle platform, a 1 x 6-inch toe-boards would not have interfered with access to the bicycle platform.

Defendants also argue that a toe-board is not fall protection, but only overhead protection. That is, that its function is to prevent objects but not workers from falling off the platform.

However, had a 1 x 6-inch toe-board been provided it would have alerted Plaintiff that he was at the edge of the main platform and prevented him from accidently stepping into the gap between the platforms.

Both Defendants' design plans and its inspection reports demonstrate that toe-boards or other fall protection were necessary for the inner edge of the main platform facing the bicycle platform to prevent a worker from stepping into the gap between the platforms.

For these reasons, Plaintiff is entitled to summary judgment against Defendants THE CITY OF NEW YORK (Defendant CITY) and NEW YORK CITY DEPARTMENT OF EDUCATION (Defendant DOE) on his claims pursuant to Labor Law § 240(1).

Labor Law § 241(6)

Plaintiff alleges that the lack of a toe-guard or other device to protect Plaintiff from stepping into the gap violated Sections 1.15; 1.7(b)(1)(i); 1.7(e)(1); 5.1(e)(1); 5.1(f) and 5.1(j)(1) of Part 23 of the New York State Industrial Code.

Section 23-1.7(b)(1)(i) requires that "[e]very hazardous opening into which a person may step or fall into" be guarded by a cover or safety railing. Section 23-1.15 provides that a safety railing includes a toe-board. These sections are sufficiently specific to support a claim pursuant to Labor Law § 241(6) (*Donahue v. CJAM Assoc.,* LLC, 22 AD3d 710 [2d Dept 2005]; *Wrobel v. Pendelton,* 120 AD3d 963 [4th Dept 2014]).

Also, as discussed above, while a guardrail might have interfered with access to the bicycle platform, a 1 x 6-inch toe-board would not have impeded access to the bicycle platform.

Defendants argue that section 1.7(b)(1) does not require a toe-board on the edge of the main platform facing the bicycle platform because the gap between the platforms is not large enough for a person to fall through.

There is a question of fact whether the gap was a hazardous opening and whether it was big enough for a person to fall through. The vertical distance between the platforms

was between 12 and 16 inches. The horizontal distance between the platforms is unclear. Dominic Stiller of Defendants DSENY testified that the horizontal space was two inches, but he also testified that the diameter of the pipes which support the platforms was 2 inches. The photos of the platform show that the support consisted of two vertical pipes and a welded cross piece. There was no testimony as to the length of the cross piece. The photo of the scaffold clearly shows that horizontal distance of the gap, which is as wide as the width of the support, is more than 2 inches but less than a foot.

The other Industrial Code sections cited by Plaintiff are either too general or not applicable to the situation herein.

As there remain questions whether the gap was large enough for a person to fall through, and whether it was a hazardous opening within the meaning of section 1.7(b)(i), summary judgment must be denied to both Plaintiff and Defendants.

Labor Law § 200

Although Plaintiff moved for summary judgment against all Defendants on his Labor Law § 200 claim, his moving papers only addressed the liability of Defendants DSENY and SCA pursuant to Labor Law § 200.

Plaintiff's claim based on the unguarded gap between the scaffold platforms is one of a dangerous condition, rather than a means and methods case.

Defendant DSENY

Defendant DSENY argues that the complaint should be dismissed against it as it is not a proper labor law defendant because it was not an owner, contractor, or agent of the owner. The action was previously discontinued as against DSENY BUILDING SERVICES, INC.

Defendant DSENY also argues that it did not create the condition complained of or have actual or constructive notice of it.

Plaintiff argues that Defendant DSENY is liable under the Labor Law because it inspected the scaffold as well as designing it.

Defendant DSENY was the subcontractor who contracted with the general contractor, Whitestone Construction. It did not have a contract with either Defendant CITY or Defendant SCA. Pursuant to the contract, Defendant DSENY was to design the scaffold and inspect it after it was completed. Defendant DSENY did not construct the scaffold and to the extent that Plaintiff's claims are based on the failure to install a toe-guard on the main platform, DSENY's design plan included a toe-guard.

Defendant DSENY inspected the scaffolding at six-month intervals but did not have the authority to impose safety standards. Regular inspections of the scaffold were conducted by Defendant SCA who was responsible to correct any safety conditions found.

Defendant DSENY's contract and the obligation to conduct inspections at six-month intervals is not a sufficient basis to impose upon DSENY a duty to Plaintiff. Defendant DSENY did not displace the owners or general contractors' duty to ensure the premises were in a safe condition.

For these reasons, the complaint must be dismissed as to Defendant DSENY.

Defendants CITY and SCA

Defendant CITY, the building owner, and Defendant SCA, the construction manager, argue that they cannot be held liable pursuant to Labor Law § 200 because the gap between the platforms did not constitute an unsafe condition. However, as discussed above, there is a question of fact whether the gap was a hazardous opening.

Defendants CITY and SCA further maintain that they did not create the condition nor have notice of the condition.

While neither Defendant CITY or Defendant SCA created the condition, there remains a question whether they had actual or constructive notice of the condition. The gap between the platforms was not a transient condition but a feature of the scaffolding.

Haythem Awad, a project officer of Defendant SCA, testified that SCA oversaw construction at the site, conducted regular inspections of the scaffold and had the authority to stop work at the site if they find an unsafe condition.

SCA inspectors had inspected the scaffold several days before the accident and recorded observations which cited missing guard rails, which includes toe-boards, on the inner edge of scaffolding.

While it is not clear whether the cited observations were of the location where the Plaintiff fell, it is not contested that there were not toe-guards in the location where the Plaintiff fell into the gap. The inspections and citations by SCA are sufficient to raise a question whether the CITY and SCA had either actual or constructive notice of the lack of toe-boards at the location of Plaintiff's accident.

For these reasons, summary judgment cannot be granted to either Plaintiff or Defendants CITY or SCA as to Plaintiff's Labor Law § 200 claims against them.

WHEREFORE, it is hereby ORDERED that Plaintiff is granted summary judgment against Defendants CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF EDUCATION on his claims pursuant to Labor Law § 240(1); and it is further,

ORDERED, that that portion of Plaintiff's motion for summary judgment on his claims pursuant to Labor Law § 241(6) is denied; and it is further,

ORDERED, that that portion of Plaintiff's motion for summary judgment on his claims pursuant to Labor Law § 200 is denied; and it is further,

ORDERED, that that portion of Defendants' motion for summary judgment dismissing Plaintiff's complaint as against DSENY ENGINEERING SERVICES, P.C. is granted; and it is further,

ORDERED, that that portion of Defendants' motion for summary judgment dismissing Plaintiff's complaint as against CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, and NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY's is denied.

This constitutes the Decision and Order of this Court.

E N T E R:

JSC