

Franzoso v 1461-1469 Third Ave. Owner LLC

2024 NY Slip Op 33260(U)

September 3, 2024

Supreme Court, Kings County

Docket Number: Index No. 521826/2021

Judge: Ingrid Joseph

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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 3rd day of September 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

-----X
PETER FRANZOSO and DANIELLE FRANZOSO,
Plaintiff,

-against-

Index No.: 521826/2021
Motion Seq. 2-3

1461-1469 THIRD AVE. OWNER LLC, LEEDING
BUILDERS GROUP, LLC, GOTHAM DRYWALL INC.,
and SAFWAY ATLANTIC, INC.,
Defendants.

DECISION AND ORDER

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____

35-52, 53-71

Opposing Affidavits (Affirmations) _____

78-80, 81-86

Affidavits/ Affirmations in Reply _____

87-89

Upon the foregoing papers, plaintiffs Peter Franzoso and Danielle Franzoso move, in motion (Motion Seq. 2), for an order, pursuant to CPLR 3212, granting partial summary judgment in their favor with respect to liability on plaintiff's¹ Labor Law § 240 (1) cause of action as against defendants 1461-1469 Third Ave. Owner LLC, (Third Ave.), Leeding Builders Group, LLC, (Leeding), and Gotham Drywall, Inc., (Gotham). Defendants Third Ave., Leeding, Gotham, and Safway Atlantic, Inc. (Safway) move (Motion Seq. 3) for an order, pursuant to CPLR 3211 and/or CPLR 3212, granting them summary judgment dismissing the plaintiff's causes of action pursuant to Labor Law §§ 240 (1), 241 (6), 200, as well as plaintiff's claim for common law negligence.

In this action premised upon common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6), plaintiff alleges that, on June 2, 2021, at approximately 5:50 p.m., while working on a construction project located at 200 East 83rd Street in New York City, he suffered injuries while descending a permanent interior stairwell leading from the 22nd to the 21st floor. During his deposition, plaintiff testified that just before the accident occurred, he had just finished his shift working as a crane operator for non-party Trident General Contracting (Trident) and had climbed down the crane and walked across a catwalk before entering the core of the building to climb down the stairs to exit the building at street level. Plaintiff

¹ Although there are two plaintiffs in this action, the pending motions pertain only to plaintiff, Peter Franzoso, and thus all references to "plaintiff" herein pertain to Mr. Franzoso.

further testified that he would normally take the exterior hoist elevator down from the crane when his shift ended but, on the date of his accident, when he called down on the radio to have the hoist come up, he was told that if he wanted to take the hoist elevator down, he would have to wait an hour (Plaintiff tr at 42). Rather than wait, the plaintiff safely climbed down the crane to the 32nd floor, where he entered the subject building, and began descending the permanent interior stairwell. As plaintiff reached the landing on the 22nd floor, he started to descend the staircase. As he did so, he grabbed the handrail on the left wall, but after taking approximately two steps, the handrail started to come off the wall. Plaintiff claimed that when the handrail came loose in his left hand, he then grabbed it with his right hand to steady himself. At that point, plaintiff claimed that the entire handrail detached from the wall, causing him to fall down the stairs from the 22nd floor to the landing below on the 21st floor.²

Plaintiff testified that he had been in the subject stairwell prior to the accident but did not notice any problems. He described the staircase as being made of concrete and that the surrounding walls in the stairwell were also made of concrete, which were covered in sheetrock in the area where plaintiff's accident occurred (*id.* at 49). The stairwell was lit, and he had no problem seeing the stairs. Plaintiff's employer, Trident, had built the concrete stairs (*id.* at 51), which were a permanent structure (*id.* at 66). Plaintiff believed that Gotham had installed the sheetrock and the handrails in the stairwells (*id.* at 78-79) and stated that the handrails were made of wood (*id.* at 49). He further stated that the stairwell was completely enclosed (*id.* at 49), and that there were approximately thirteen or fourteen steps from the landing between the floors and the top of the landing at the 21st floor (*id.* at 56). Plaintiff testified that the floor of the subject staircase was dry and that he did not trip or slip on anything (*id.* at 65-66). Plaintiff was alone when the accident happened and there were no witnesses (*id.* at 56). The plaintiff claimed that after he fell, he had to walk down the remaining stairs until he reached the ground level (*id.* at 59). The first people that plaintiff spoke to after the accident were his two signal men and a person named "Seamus," who plaintiff believed was a concrete safety manager who worked for Leeding. Plaintiff told all three individuals that he had fallen down the stairs (*id.* at 59).

Two accident reports were generated after the subject accident, one by Leeding and one by Trident. According to plaintiff, Leeding prepared its report on the night of the accident, which plaintiff believed was written by Seamus (*id.* at 63-64), despite the fact that it was signed by Michael Fruchter, who was identified by the witness produced by Leeding as another one of their superintendents. Plaintiff claimed that he only spoke with Seamus, but that Mike ultimately prepared the report (*id.* at 71). Although plaintiff claimed that the description of how the accident occurred and how he landed were not what he told Seamus, he never told anyone from Leeding that the report was not accurate (*id.* at 70). Part of Leeding's accident report

² Plaintiff initially testified that he fell from the 21st floor, but soon thereafter corrected himself and stated that he fell from the 22nd floor (*id.* at 55).

includes a group of pictures, some of which plaintiff recognized as having been taken by one of his signal men, Orlando Gonzales, on the night of the accident (*id.* at 76-77). Plaintiff testified that there were some pictures where he could not identify what was in the photo and that there were some photos that he had never seen before (*id.* at 82, 84). The person who took the photos that plaintiff did not recognize, which were part of the Leeding accident report, was not identified. In the plaintiff's motion papers, he offers color copies of five pictures claimed to have been taken by Mr. Gonzalez, one of his signal men. To that end, the plaintiff offers both a witness statement and an affidavit from Mr. Gonzalez, the person who plaintiff identified as the individual who took photos immediately after his accident.

In his affidavit, Mr. Gonzalez states that, on June 2, 2021, he was employed by Trident, working at the site. According to Mr. Gonzales, his coworker, plaintiff, had to walk down the stairwell from the 22nd to the 21st floor because Leeding took the hoist out of service. Mr. Gonzales stated as follows:

"After speaking to [plaintiff], I climbed up to the 21st floor and photographed the handrail which became detached from the wall, causing [plaintiff] to fall. Annexed to the instant motion as Exhibit "I" are photographs that I took, which depict the 22nd to 21st stairwell at the construction site between approximately 6:00-6:30 p.m. that day. While present in the subject stairwell at that time, I observed that only one of the mounts, or blocks, that was used to attach the handrail was nailed to the wall. The other two mounts had no nails or screws to support the handrail. The annexed photos fairly and accurately depict my observations and the condition of the handrail and stairway at the time of the accident."
(NYSCEF Doc No. 44)

When questioned about the photos, the plaintiff was able to identify both the subject staircase where he fell and the handrail. While reviewing the pictures at the deposition, plaintiff also testified that he believed that Gotham was the company that installed the handrails and the sheetrock and that they were not installed by his employer, Trident (Plaintiff tr at 78).

Leeding also questioned the plaintiff about the accident report prepared by Trident, the plaintiff's employer, which is included as an exhibit to the defendants' motion. When asked about the report, the plaintiff confirmed that it was prepared by Yashpreet Singh, the plaintiff's project manager, after the plaintiff spoke with him about the accident (*id.* at 85). Plaintiff testified that the description of how the accident occurred, and the resulting injuries, were accurate. In addition, plaintiff noted that he never spoke with Miguel Lee, the project manager, who is identified in the report as the individual who reviewed the report (*id.* at 85-87).

In their motion papers, the defendants concede that Third Ave. was the owner of the premises, which hired Leeding as the construction manager/general contractor for a project involving the construction

of a high rise building.³ At the deposition of Leeding, its witness, Christopher Gleckler, who was working as a superintendent for Leeding on the date of the accident, testified that Leeding was hired to be the construction manager for the project, that Leeding hired subcontractors that were used in the performance of the work, and that as construction manager, “we basically oversee and supervise the construction of a new building based on approved contract drawings and budget” (Gleckler tr at 16). Thereafter, Leeding subcontracted with Gotham to do drywall and rough carpentry work; with Safway to construct hoists and sidewalk bridges; and with Trident, as the concrete construction company. Mr. Gleckler testified that his responsibility was to oversee exterior façade and roofing, and that he was occasionally involved in interior work. He further stated that all Leeding superintendents were responsible for safety and that if a foreman came to him about an interior issue, he would refer them to the interior superintendent (*id.* at 17). Mr. Gleckler stated that there were multiple superintendents for the interior and that the superintendent in charge of the stairwells and sheetrock was George Rodriguez (*id.* at 18).

Mr. Gleckler further testified that Leeding’s role was to oversee all provisions of labor, equipment, materials and services (*id.* at 20). He also stated that there was a full-time safety manager from a company called Construction Realty Safety Group, named Seamus O’Connor (*id.* at 22). Mr. Gleckler also testified that, separate and apart from Construction Realty’s inspections, Leeding conducted its own safety inspections daily (*id.* at 23). The inspections that Leeding would conduct were mainly observations and were not documented. When someone observed a potential safety problem or violation, Mr. Gleckler stated that whatever trade is responsible for the problem, the superintendent had to direct them to have it fixed right away (*id.* at 24).

Mr. Gleckler was familiar with the plaintiff but did not believe that he spoke with him about the subject accident. He did speak with the superintendent who wrote the accident report for Leeding, Michael Fruchter, but had no recollection of speaking with Seamus O’Connor or anyone else about the plaintiff’s accident (*id.* at 25-27), and he did not recall if he visited the location of the accident after it occurred (*id.* at 29). Mr. Gleckler testified that Gotham erected the drywall and the handrail on the 21st floor (*id.* at 29). He had no recollection if there were any requirements that Leeding gave to Gotham regarding Gotham’s work; he did not believe that there were any complaints about the handrails or sheetrock on the interior stairs prior to the date of the plaintiff’s accident; and he did not believe that there were any accidents involving a handrail becoming dislodged from the drywall in an interior stairway prior to the date of the plaintiff’s accident (*id.* at 29-30).

Mr. Gleckler was unsure if he spoke with Trident’s project manager, Yashpreet Singh, about the accident. He repeated that the cause of the plaintiff’s accident should have been investigated by Mr.

³ The deposition testimony of Leeding’s witness and its contract with Third Ave. demonstrate that Leeding acted as the general contractor for the project within the meaning of the Labor Law.

Fruchter, but he did not remember if Mr. Fruchter ever reported his findings to him, and did not recall if he ever learned, from anyone at the job site, what caused the plaintiff's accident. Although the accident report prepared by Trident indicated that the cause of the accident was that a guardrail was loose and came out of the wall, Mr. Gleckler had no recollection of learning the cause of the accident. When asked if anyone from Leeding went to the location of the accident to take photos and find out what happened, Mr. Gleckler stated that he was sure that Mr. Fruchter did an investigation for the Leeding accident report (*id.* at 32-35). Mr. Gleckler identified documents from June 2, 2021, as daily logs for the scope of work that was happening that day. The witness testified that the log indicated that Gotham was sheetrocking the stairs from the 20th to 30th floors on that date. The witness also confirmed that the sheetrocking and installation of the temporary handrails on the 21st floor were being performed by Gotham (*id.* at 36-38).

When shown photos of the subject stairwell, Mr. Gleckler could not confirm if the stairwell in the photo was the one where the plaintiff's accident occurred. When asked about how the handrail was affixed to the drywall, he stated that "[t]ypically, there's a piece of stock behind, flat stock, like a heavy gauge piece of metal that's affixed to the framing of the wall, and then the sheetrock is placed over it and then the handrail is usually fastened to that." He further stated that it is fastened with a tap screw that goes through the flat stock metal (*id.* at 40-41). When asked about a wooden block that's present in the same photo as the subject handrail, Mr. Gleckler was unable to discern from the photo whether the pieces of metal sticking out of the block were either nails or screws (*id.* at 43-44).

When Mr. Gleckler was shown the subcontract between Leeding and Gotham, and specifically a clause which calls for Leeding to issue a written warning if a subcontractor fails to follow site rules, regulations and operating procedures, he was unsure if Leeding had issued a warning to Gotham in connection with the subject accident or if it had issued a warning regarding the method in which the temporary handrails were affixed to the drywall (*id.* at 48). Mr. Gleckler stated that Gotham had "a bunch of subforeman," but he could not recall any of their names (*id.* at 52). He further testified that Gotham had employees, which he referred to as a "safety crew," that he believed would specifically install the temporary handrails between the 20th and 30th floors. When asked why a safety crew would install the handrails as opposed to a general laborer or carpenter, Mr. Gleckler responded that "the safety crew handles all the safety throughout the project," and further stated that he believed that the handrails would fall under the purview of the safety crew (*id.* at 53-54).

Derek Mulligan appeared for a deposition on behalf of Gotham. Mr. Mulligan testified that he was the project manager for Gotham at the subject project, and that his job was to oversee scheduling, manpower on site, material purchasing, additional work and estimating. He stated that Gotham was the carpenter responsible for the installation of drywall and handrails in the stairwells (Mulligan tr at 13-14). Mr. Mulligan further testified that he knew that Seamus O'Connor was the site safety officer, but he did not

know who employed him and he had no interaction with him in the performance of the work being done. He stated that he was unaware of the plaintiff's accident, or its location, and had not conducted an investigation regarding the accident or seen any photos of the subject stairwell (*id.* at 17-19).

According to Mr. Mulligan, the normal procedure for affixing the handrails onto the sheetrock in the stairwells would be to use screws, not nails. He stated that the drywall itself was also affixed with screws and a drill, but that it only gets affixed to metal, not concrete (*id.* at 20-22). Mr. Mulligan testified that Gotham employees do not get trained about affixing handrails to concrete or metal because "it's not something you train for." He further testified that he did not recall how often he was at the project worksite in June of 2021; that inspections of the stairwells were not something he or anyone at Gotham would do; and that a foreman would go around and check progress, but it was not memorialized in any way (*id.* at 22, 24-25). He also stated that he did walk up and down the stairwells in the project and believes that he walked between the 22nd and 21st floors, but never observed the handrails in that location and has no recollection if he ever used the handrails in that location. He also stated that he never observed any looseness of the handrails in the staircase (*id.* at 29-30).

When shown a photo of a portion of a handrail with a wooden block attached to it, Mr. Mulligan identified it as a wall mount and stated that it should be affixed with screws to the stud behind the drywall. Mr. Mulligan testified that the first thing that would be done for the installation of sheetrock and handrails in a stairwell with concrete on both sides would be to install metal frames on both sides to hold the sheetrock, so the stairwells will be enclosed with drywall. He further testified that initially "a temporary handrail would be installed by the concrete guy before any metal or sheetrock is done" (*id.* at 32-35). When it came time to install the metal framing, they would remove the temporary handrail, install the metal framing and then re-install the temporary handrail. Prior to the installation of the sheetrock, the temporary handrail is removed again and, after the sheetrock is installed, the handrail would be re-installed once again. According to Mr. Mulligan, Gotham was responsible for affixing the handrail to the wall after the drywall was installed, and that the handrail would be attached using screws anchored to the metal frame. Although nails would not normally be used, he testified that the concrete contractor might use them when the handrail is initially installed, but once the sheetrock is installed, screws are necessary in order to anchor the handrail to the wall (*id.* at 35-36).

When Mr. Mulligan was shown a photo of the handrail with a block attached and metal objects sticking out of the block, he was unable to discern whether the metal objects were nails or screws. He testified that the blocks were mounts which would have to be affixed with screws to support the long handrail. When shown another photo of the rail with a mounting block that was located somewhere in the middle of the rail, Mr. Mulligan testified that it appeared that there were neither screws nor nails in the block. Mr. Mulligan stated that, if necessary, mounting blocks would be used when the concrete company

initially installs the handrail but that, thereafter, Gotham would maintain the handrail, and that once the drywall was up, Gotham would re-attach the handrail to the wall. When shown another photo of the subject handrail with a mounting block closest to the bottom, Mr. Mulligan testified that “it looks like there’s two holes there and the screws were removed.” (*id.* at 40-43). Lastly, Mr. Mulligan testified that he never spoke with anyone about the handrails coming out of the wall or re-attaching the handrail to the wall after it had come off the wall. He also stated that he was unaware of any violations being issued to Gotham.

Plaintiff moves, in mot. seq. no. two, for summary judgment on his Labor Law § 240 (1) cause of action. Labor Law § 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, 7 [2011]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). For a defendant to be held liable under Labor Law § 240 (1), a plaintiff’s injuries must be “the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see Wilinski*, 18 NY3d at 10).

Not every accident involving an elevation differential, however, falls within the protections of Labor Law § 240 (1). In this regard, the Appellate Division, Second Department has held that no liability under section 240 (1) attaches where a fall occurs on a permanent stairway that serves as a normal appurtenance in the building (*see Verdi v SP Irving Owner, LLC*, 227AD3d 932, 936 [2d Dept 2024]; *Sullivan v New York Athletic Club of City of N.Y.*, 162 AD3d 955, 957 [2d Dept 2018] [“no liability attaches under Labor Law § 240 (1) with regard to the plaintiff’s act of descending a permanent stairway”], *lv dismissed* 32 NY3d 1196 [2019]; *Gallagher v Andron Constr. Corp.*, 21 AD3d 988, 989 [2d Dept 2005] [“Where a fall occurs from a permanent stairway, no liability pursuant to Labor Law § 240 (1) can attach”]; *Parsuram v I.T.C. Bargain Stores, Inc.*, 16 AD3d 471, 472 [2d Dept 2005] [Labor Law § 240 (1) claim dismissed where “[t]he staircase upon which the plaintiff was injured was a normal appurtenance to the building and was not designed as a safety device to protect him from an elevation-related risk”]; *see also Stiegman v Barden & Robeson Corp.*, 162 AD3d 1694, 1696 [4th Dept 2018]; *Milanese v Kellerman*, 41 AD3d 1058, 1060 [3d Dept 2007]).⁴

In this case, the plaintiff testified that the subject stairwell was located in the core of the building and that the staircase was permanent. The witness produced by Gotham testified that the concrete stairs had

⁴ While the Appellate Division, First Department, has held that the fact that a staircase was constructed as a permanent structure does not remove it from the reach of Labor Law § 240 (1) (*see DaSilva v Toll GC LLC*, 224 AD3d 540, 541 [1st Dept 2024]; *Waldron v City of New York*, 203 AD3d 565, 565-566 [1st Dept 2022]), the court notes that it is bound by Second Department case law on this issue (*see Mountain View Coach Lines, Inc. v Storms*, 102 AD3d 663, 664 [2d Dept 1984]; *see also Verdi*, 227AD3d at 936; *Sullivan*, 162 AD3d at 957).

sheetrock walls on both sides. When reviewed in concert with the photos of the stairwell where the accident occurred, it is clear that the internal staircase at issue was indeed intended to be part of the permanent structure of the building and thus no liability would generally attach under section 240 (1) (*see Verdi*, 227AD3d at 936; *Sullivan*, 162 AD3d at 957).

To the extent that the staircase here may fall within the ambit of a line of cases holding that a permanently installed structure may be covered by Labor Law § 240 (1) where such a structure serves as a workers only means of accessing a work area (*see Esquivel v 2707 Creston Realty, LLC*, 149 AD3d 1040, 1041 [2d Dept 2017]; *Beharry v Public Stor., Inc.*, 36 AD3d 574, 574-575 [2d Dept 2007]; *see also O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33-34 [2017]; *Crutch v 421 Kent Dev., LLC*, 192 AD3d 977, 980 [2d Dept 2021]), plaintiff has still failed to demonstrate his prima facie entitlement to summary judgment, as there is no proof in the record that the subject stairwell was the only means of accessing the work area. The plaintiff's failure to make a prima facie showing of his entitlement to judgment as a matter of law requires the denial of his motion, regardless of the sufficiency of the defendant's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Therefore, the plaintiff's motion is denied.

The defendants move, in mot. seq. no. three, for summary judgment dismissing plaintiff's Labor Law §§ 240 (1), 241(6) and 200 claims, as well as plaintiff's common law negligence claims. In light of the court's determination as to plaintiff's Labor Law § 240 (1) cause of action, that branch of defendants' motion seeking to dismiss the claim is granted (*see Verdi*, 227AD3d at 936; *Sullivan*, 162 AD3d at 957).

The defendants also argue that the Labor Law claims against defendants Gotham and Safway should be dismissed in their entirety because they are not proper Labor Law defendants. In support of their motion, defendants contend that neither Gotham nor Safway were the owner, contractor or an agent of Third Ave. or Leeding in that they both lacked control over the work plaintiff was performing at the time of the accident. To support their position, defendants refer to plaintiff's testimony that all of his instructions and directions pertaining to his work came from his employer, Trident.

It is well settled that claims under Labor Law §§ 240 (1), 241 (6) and 200 may be brought only against owners, contractors and their agents (*see* Labor Law § 240 [1] [applying to "[a]ll contractors and owners and their agents"]; § 241 [sub-provisions applying to "[a]ll contractors and owners and their agents"]; *Hill v Mid Island Steel Corp.*, 164 AD3d 1425, 1426, [2d Dept 2018]; "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured" (*Diaz v Trevisani*, 164 AD3d 750, 754 [2d Dept 2018 [quotations omitted]; *see Linkowski v City of New York*, 33 AD3d 971, 974-975 [2d Dept 2006]; *see also Walls v Turner Constr. Co.*, 4 NY3d 861, 863—864 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

Here, defendants have made a prima facie showing of entitlement to judgment as a matter of law dismissing plaintiff's Labor Law causes of action insofar as asserted against Gotham and Safway. The court notes that the plaintiff's opposition papers fail to address this branch of the defendants' motion. Thus, the plaintiff's claims made pursuant to the Labor Law, as asserted against Gotham and Safway, are hereby dismissed.

The defendants also seek summary judgment and dismissal of the plaintiff's Labor Law § 200/common law negligence claims against Safway and Gotham, arguing that neither of these parties had either actual or constructive notice with respect to the handrail in question.

A subcontractor "may be held liable for negligence where the work it performed created the condition that caused the plaintiff's injury even if it did not possess any authority to supervise and control the plaintiff's work or work area" (*Poracki v St. Mary's R.C. Church*, 82 AD3d 1192, 1195 [2d Dept 2011] [internal quotation marks omitted]; see *Erickson v Cross Ready Mix, Inc.*, 75 AD3d 519, 523 [2d Dept 2010]). An award of summary judgment in favor of a subcontractor on a negligence or Labor Law § 200 cause of action is improper "where the 'evidence raise[s] a triable issue of fact as to whether [the subcontractor's] employee created an unreasonable risk of harm that was the proximate cause of the injured plaintiff's injuries' " (*Erickson v Cross Ready Mix, Inc.*, 75 AD3d at 523, quoting *Marano v Commander Elec., Inc.*, 12 AD3d 571, 572—573 [2d Dept 2004]).

Here, since there is no proof in the record that Safway, whose involvement in the project was limited to the hoist and the sidewalk sheds, created the condition that caused the plaintiff's accident, or that it had either actual or constructive notice of the condition, plaintiff's common law negligence claim is dismissed against Safway. As to Gotham, however, defendants have failed to demonstrate, prima facie, that Gotham did not create the handrail condition that allegedly caused the plaintiff's injury. The record is clear that Gotham was responsible for hanging the sheetrock in the stairwells and thereafter installing the handrails. Accordingly, that branch of defendants' motion seeking to dismiss plaintiff's common law negligence claim against Gotham is denied (see *Cando v Ajay Gen. Contracting Co. Inc.*, 200 AD3d 750, 754 [2d Dept 2021]).

The defendants also seek dismissal of the plaintiff's Labor Law § 200/common law negligence claims against Third Ave. and Leeding, arguing that Third Ave. exercised no supervisory control over the project and that neither defendant had actual or constructive notice of any issues with respect to the handrail on the staircase between the 21st and 22nd floors. Labor Law § 200 is a codification of common law negligence regarding the duty of owners and general contractors to construction workers (see *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Where such a claim arises out of alleged defects or dangers arising from a subcontractor's methods or materials, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control

over the operation (*see Lombardi v Stout*, 80 NY2d 290 [1992]; *Kappel v Fisher Bros., 6th Ave. Corp.*, 39 NY2d 1039, [1976]). This rule is an outgrowth of the basic common-law principle that “an owner or general contractor should not be held responsible for the negligent acts of others over whom the owner or general contractor had no direction or control (*see Allen v Cloutier Constr. Corp.*, 44 NY2d 290 [1978]).

Here, there is nothing in the record that shows that Third Ave. exercised any supervisory control over plaintiff’s work, or that it had any notice of any defective condition in the stairwell where plaintiff was injured. The plaintiff offers no opposition to this portion of the defendants’ motion. Therefore, that branch of defendants’ motion seeking summary judgment dismissing plaintiff’s Labor Law § 200 and common law negligence claims as against Third Ave. is granted.

However, that branch of defendants’ motion seeking to dismiss plaintiff’s Labor Law § 200 and common law negligence claims as against Leeding is denied. Based upon a review of the parties’ submissions, the court finds that questions of fact regarding Leeding’s exercise of control over plaintiff’s work and/or the work of his employer, as well as whether it had constructive notice of the handrail condition that allegedly caused the plaintiff’s accident preclude granting summary judgment in Leeding’s favor. Leeding’s witness, Christopher Gleckler, testified that Leeding conducted safety inspections daily and that one of its employees, George Rodriguez, was specifically delegated with overseeing the stairwells and the sheetrocking in the interior of the building, thereby raising issues of fact.

Defendants seek dismissal of plaintiff’s Labor Law § 241 (6) claim. Pursuant to that provision, 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 (*see 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]; Labor Law § 241 [6]).

In his bill of particulars, the plaintiff identified multiple sections of the Industrial Code that he alleges are applicable to his case. Specifically, plaintiff claims that the defendants violated Industrial Code (12 NYCRR) §§ 23-1.5; 23-1.6; 23-1.7 (d), (e) and (f); 23-1.15; 23-2.7 (e); 23-7.1; 23-9.2; 23-9.4; and 23-9.5. In support of their motion, defendants have made a prima facie showing that 12 NYCRR §§ 23-1.5; 23-1.6; 23-1.7 (d) and (e); 23-7.1; 23-9.2; 23-9.4; and 23-9.5 do not state specific standards or are inapplicable to the facts herein. Since plaintiff has abandoned reliance on those sections by failing to address them in his motion or opposition papers, defendants Third Ave. and Leeding are entitled to dismissal of plaintiff’s section 241 (6) cause of action to the extent that it is premised on those sections (*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]).

Plaintiff opposes dismissal of three sections of the Industrial Code, §§ 23-1.7 (f), 23-1.15 and 23-2.7. Contrary to defendants' contention, plaintiff's belated allegation (raised for the first time in his opposition papers) that section 23-1.7 (f) was violated is not barred from consideration herein since the claimed violation does not involve any new factual allegations, raise any new theories of liability, or cause prejudice to defendants (*see Simmons v City of New York*, 165 AD3d 725, 729 [2d Dept 2018]; *Klimowicz v Powell Cove Assoc., LLC*, 111 AD3d 605, 607 [2d Dept 2013]; *Ross v DD 11th Ave., LLC*, 109 AD3d 604, 606 [2d Dept 2013]).

Section 23-1.7 (f), entitled "Vertical Passages," provides that, "[s]tairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided." The Appellate Division, Second Department has held that section 23-1.7 (f) is sufficiently specific to sustain a Labor Law § 241 (6) cause of action (*see Akins v Baker*, 247 AD2d 562 [1998]); *Gielow v Coplan Home*, 251 AD2d 970 [1998]). In this case, the plaintiff's accident occurred on a permanent staircase and was not installed or created to allow workers access to the worksite, but rather was a pre-existing structure. In the Court's view, it is clear from the plain language of the regulation that it addresses stairways, ramps or runways that are installed specifically in connection with a construction project to allow workers access to various levels of the project, and not pre-existing structures such as the stairway at issue here. Thus, inasmuch as plaintiff's accident occurred on a permanent, concrete stairway that was a part of the building, section 23-1.7 (f) is inapplicable (*see Tesoro v BFP 300 Madison II, LLC*, 98 AD3d 1031, 1032 [2d Dept 2012]).

Turning to Industrial Code § 23-1.15, that provision provides:

"[w]henever required by this Part (rule), a safety railing shall consist as a minimum of an assembly constructed as follows:

(a) A two inch by four inch horizontal wooden hand rail, not less than 36 inches nor more than 42 inches above the walking level, securely supported by two inch by four inch vertical posts at intervals of not more than eight feet.

(b) A one inch by four inch horizontal midrail.

(c) A one inch by four inch toeboard except when such safety railing is installed at grade or ground level or is not adjacent to any opening, pit or other area which may be occupied by any person.

(d) The hand rail of every safety railing shall be smooth and free from splinters and protruding nails.

(e) Other material or construction may be used for safety railings required by this Part (rule) provided such assemblies have equivalent strength and assure equivalent safety."

The Appellate Division, Second Department has found that 12 NYCRR 23-1.15 is specific enough to support a Labor Law § 241 (6) claim (*see Ferreira v Unico Serv. Corp.*, 262 AD2d 524, 524-525 [1999]);

Skudlarek v Bethlehem Steel Corp., 251 AD2d 973, 974 [1998]; *Sasso v NYMED, Inc.*, 238 AD2d 799, 801 [1997]). The defendants argue that this section is inapplicable because the section “concerns the requirements for proper assembly of safety railings,” as opposed to a temporary handrail, which is what plaintiff claims fell off the stairwell wall in this case. The Court finds that section 23–1.15 is inapplicable, as that provision sets standards for safety railings, but does not require them in the first instance (*see Dooley v Peerless Importers, Inc.*, 42 AD3d 199 [2007]).

In the plaintiff’s bill of particulars, he lists Industrial Code § 23-2.7, entitled “Stairway requirements during the construction of buildings,” however, in his opposition papers to the defendants’ motion, it is clear that he is relying specifically on subsection (e), entitled “Protective railings,” which provides as follows:

“The stairwells of temporary wooden stairways and of permanent stairways where enclosures or guard rails have not been erected shall be provided with a safety railing constructed and installed in compliance with this Part (rule) on every open side. Every stairway and landing shall be provided with handrails not less than 30 inches nor more than 40 inches in height, measured vertically from the nose of the tread to the top of the rail.”

The defendants argue that this section is inapplicable to Third Ave. and Leeding because defendant “Gotham installed the 21st floor handrail and it was their responsibility to direct, control and supervise such installation so that it was performed satisfactorily.” The court finds that this provision is applicable, and that defendants have failed to establish, as a matter of law, that they were in compliance with it. Thus, a question of fact exists that must be resolved by a jury. As to defendants Third Ave. and Leeding’s claim that the within section is inapplicable to them because Gotham installed the subject handrail, “Labor Law § 241 (6) imposes a *nondelegable duty* of reasonable care upon an owner or general contractor to provide reasonable and adequate protection to workers, and a violation of an explicit and concrete provision of the Industrial Code by a participant in the construction project constitutes some evidence of negligence for which the owner or general contractor may be held vicariously liable,” (*Edwards v C&D Unlimited*, 295 AD2d 310, 311 [2002]; *see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 [1998]). “An owner or general contractor may, of course, raise any valid defense to the imposition of vicarious liability under section 241 (6), including contributory and comparative negligence” (*Rizzuto*, 91 NY2d at 350). Therefore, that branch of defendants’ motion seeking to dismiss plaintiff’s Labor Law § 241 (6) claim as predicated upon section 23-2.7 (e) as against Third Ave. and Leeding is denied.


Accordingly, it is hereby,

ORDERED that plaintiff’s motion (mot. seq. no. two) is denied in its entirety; and it is further

ORDERED that branch of defendants’ motion (mot. seq. no. three) seeking summary judgment dismissing plaintiff’s Labor Law § 240 (1) claim is granted and dismissed as against all defendants; that

branch of defendants' motion seeking to dismiss all Labor Law claims as against Gotham and Safway on the ground that they are not proper Labor Law defendants is granted; that branch of defendants' motion seeking to dismiss plaintiff's Labor Law § 241 (6) cause of action as against Third Ave. and Leeding is *granted except to the extent* that said claim is predicated upon Industrial Code § 23-2.7 (e); that branch of defendants' motion seeking dismissal of the plaintiff's Labor Law § 200/common law negligence claims is granted and dismissed as against Third Ave. and Safway, and denied as to Gotham and Leeding. The remainder of the defendants' motion is otherwise denied.

This constitutes the decision and order of the court.



Hon. Ingrid Joseph J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**