

Casilari v Interior Mgt., LLC

2024 NY Slip Op 34687(U)

July 5, 2024

Supreme Court, New York County

Docket Number: Index No. 153967/2018

Judge: Verna L. Saunders

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36M

Justice

-----X

INDEX NO. 153967/2018

JOSE CASILARI, Plaintiff,

MOTION SEQ. NO. 002; 003

-against-

INTERIOR MANAGEMENT, LLC, FIFTEEN CENTRAL PARK WEST CONDO, JOHN WALDRON, and EINSTEIN ELECTRICAL CORPORATION, Defendants.

DECISION + ORDER ON MOTION

-----X

INTERIOR MANAGEMENT, LLC, FIFTEEN CENTRAL PARK WEST CONDO, and JOHN WALDRON, Third-Party Plaintiffs,

Third-Party Index No. 595882/2019

-against-

EINSTEIN ELECTRICAL CORPORATION, Third-Party Defendant.

-----X

INTERIOR MANAGEMENT, LLC, FIFTEEN CENTRAL PARK WEST CONDO, and JOHN WALDRON, Second Third-Party Plaintiffs,

Second Third-Party Index No. 595812/2022

-against-

SANDEMAR FINISHES, LLC, Second Third-Party Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 130, 133, 134, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185 were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 131, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211 were read on this motion for SUMMARY JUDGMENT.

In this action arising out of a construction site accident, defendant/third-party defendant Einstein Electrical Corporation ("Einstein") moves, pursuant to CPLR 3212, for summary

judgment dismissing the complaint and the third-party complaint. Einstein also requests costs and sanctions pursuant to CPLR 8303-a and 22 NYCRR 130-1.1 (Mot. Seq. 002).

Plaintiff Jose Casilari (“plaintiff”) moves, pursuant to CPLR 3212, for partial summary judgment as to liability under Labor Law § 240(1) against defendants John Waldron (“Waldron”) and Interior Management, LLC (“Interior”) (Mot. Seq. 003).

Second third-party defendant Sandemar Finishes, LLC (“Sandemar”) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff’s Labor Law §§ 240(1) and 241(6) claims.

Defendants/second third-party plaintiffs/third third-party plaintiffs Interior, Fifteen Central Park West Condo, and Waldron cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims against them in their entirety.

Mot. Seqs. 002 and 003 are consolidated for disposition.

This action arises out of an accident that occurred on October 12, 2017, at a condominium building located at 15 Central Park West in Manhattan. Waldron owned Apartments 5D and 5E (the, “premises”) on the date of the accident. Waldron retained Interior to renovate the premises. Fifteen Central Park West Condo was the owner of the land beneath the condominium building. Interior hired Einstein as an electrical contractor and Sandemar as the carpentry contractor, respectively. Plaintiff was employed by non-party Sterling Coat Painting (“Sterling”).

Plaintiff testified that he had an accident on October 12, 2017 while working for Sterling, which was Pedro de Sousa’s company (NYSCEF Doc. No. 120, *plaintiff’s tr at 45*). Plaintiff was performing painting and compound work (*id.* at 46). On the day of the accident, plaintiff was working at 15 Central Park West, Apartment 5E (*id.* at 59). He did not know who owned the apartment (*id.*). Plaintiff had been working there for two weeks (*id.*). Sterling had nine to ten employees on site, including the owner (*id.* at 60). Plaintiff testified that the job was a “whole renovation” (*id.*). When plaintiff first arrived at the site, the project was halfway finished (*id.* at 61). There were plumbers, carpenters, painters, electricians, cleaning personnel, and project managers on site (*id.* at 62). Plaintiff testified that he initially painted but, as the job progressed, he did compound work (*id.* at 63). Plaintiff stated that the apartment was large with many bedrooms, living rooms, and a bathroom in each room (*id.* at 65). According to plaintiff, the apartment took up the whole floor of the building (*id.*). Plaintiff also testified that he was working between the kitchen and the dining area (*id.*).

On the day of the accident, plaintiff arrived at the site at 9:00 A.M. (*id.* at 69). Plaintiff was going to finish “doing compound on the ceiling” of the kitchen and dining room (*id.* at 70). He had been doing this work for two days (*id.*). Luis Zumba was Sterling’s supervisor on the site (*id.* at 79). He stated that he was “looking for mix to mix the compound, to make it ready... for the finish” (*id.* at 82). He testified that he used a drill with an attachment to mix the compound and mixed the compound in a five-gallon bucket (*id.* at 82, 83). He stated that he used a plate, a 5-inch-long spatula, and a 10-inch spatula (*id.* at 83). He further testified that the

ceilings were eight feet, five inches high (*id.* at 84). Plaintiff was working on a yellow scaffold with wheels (*id.*). He was working alone (*id.* at 85). Just prior to the accident, plaintiff was cleaning out his empty five-gallon compound bucket using water and a rag (*id.* at 85, 86). Plaintiff testified that the bucket was dirty and had pieces of wood inside (*id.* at 86). He testified that he added water to the dirty bucket to clean it, but he had not mixed the compound because that was when the accident happened (*id.* at 89). As plaintiff was drying out his bucket, an electrician got on a ladder taller than plaintiff's ladder almost directly in front of plaintiff about eight feet away and put a piece of metal on top of plaintiff's ladder (*id.* at 98). According to plaintiff, he was "kneeling on the floor with kneecaps" and was drying out his bucket, next to his scaffold and the ladder that he used to get on the scaffold (*id.* at 94). He testified that he "cleaned [the bucket]. And then that's when the [electrician] came with the machine, and everything went in [plaintiff's] face, and everything was over" (*id.* at 90). When asked what hit his face, he stated that he "felt what was coming off of the machine, when you cut metal. And that's what hit [him] in the face and, as [he] said, [his] nose and [his] mouth" (*id.* at 104). Plaintiff testified that he "didn't see him. Because [plaintiff] looked up, and then [he] felt it on [his] face. The guy cut the metal, when he saw [plaintiff], he apologized. He asked [plaintiff] for help, but then [plaintiff] didn't see him after that and he left" (*id.* at 102-103).

Plaintiff further testified that the electrician was coming and going between eight (8) to ten (10) times all morning (*id.* at 95). He testified that the electrician had a "normal" build, weighed about 200 pounds, and had blond hair and blue eyes (*id.* at 107). Plaintiff understood that the electrician "had put an outlet in the ceiling, and it wasn't in the plans in that area. And he was moving it. And he was putting holes in the ceiling to find the area where it belonged" (*id.* at 95). The electrician had to move the outlet about two feet from where he had previously placed it (*id.* at 97). According to plaintiff, the electrician was using a handheld Makita grinder with a five-inch disc that did not have a safety guard on it (*id.* at 104-106). Plaintiff was not wearing safety glasses at the time (*id.* at 103). His employer did not provide him with any safety glasses to wear while painting (*id.* at 104). After the accident, a house cleaner gave plaintiff some Visine (*id.* at 111).

William Martinez ("Martinez") testified that he was a managing member of Interior (NYSCEF Doc. No. 121, *Martinez tr* at 7). Interior has two other managing members (*id.*). Interior is a general contractor that performs high-end residential construction work (*id.* at 9). Interior performed work for Waldron at 15 Central Park West beginning in January 2017 (*id.* at 15, 16). Interior was a general contractor on the project (*id.* at 17). The project entailed combining two apartments, Apartments 5D and 5E (*id.*). Apartments 5D and 5E were single-level apartments (*id.*). As a general contractor, Interior retained subcontractors and oversaw the execution of the work (*id.* at 18). According to Martinez, the work involved "demolition, and then building a new apartment from scratch" (*id.*). Interior hired Einstein, the electrical contractor; Rose Demolition, the demolition contractor; and Sandemar, the carpentry carpenter (*id.* at 19). Sterling was not involved in the Waldron project (*id.* at 29). Martinez testified that Sterling performed the actual painting work but did not know which entity employed the painters (*id.* at 30). Martinez testified that the first time that he heard about the accident was when he received the summons and complaint (*id.* at 37). Interior provided safety masks and safety glasses "for anybody and everybody that needs them" (*id.* at 40). The painting work was ongoing at the same time as the electrical work (*id.* at 41). When Martinez did a walkthrough in

April 2017, he saw workers wearing safety glasses that “run straight across with a lens [and] little shields on the sides” (*id.* at 43, 44). The subcontractors’ foremen were informed about where the masks, glasses, and gloves were located (*id.* at 49). He did not know if plaintiff knew where the safety glasses were located (*id.* at 52).

Sydney Wolfe (“Wolfe”) testified that he is another managing member of Interior (NYSCEF Doc. No. 122, *Wolfe tr at 10*). John and Amanda Waldron retained Interior (*id.* at 16). Interior coordinated the trades at the site (*id.* at 23). Einstein was the electrical contractor on site (*id.* at 27). Wolfe testified that the project was a “full gut” job (*id.* at 28). The architect would have been provided with the electrical details and drawings (*id.* at 28-29). He did not recall if there were records reflecting whether Einstein had to change outlets on the date of the accident (*id.* at 32). Steve Sacripanti (“Sacripanti”) was Interior’s project manager, who was responsible for daily activities and site safety (*id.* at 34, 35).

Sacripanti testified that he was Interior’s project manager at 15 Central Park West on October 12, 2017 (NYSCEF Doc. No. 123, *Sacripanti tr at 10*). His duties were “to oversee the project schedule, the project budget, and make sure that it was completed as close to on time or on schedule, and within our budget, and within the specifications given by the architect and our designer” (*id.*). Interior had first aid kits, masks, gloves, and eye protection available for the contractors (*id.* at 18). Einstein performed electrical work on the job (*id.* at 21). He did not recall any discussions about moving outlets in the kitchen (*id.* at 36). The project was a “full gut” job, meaning that Interior “stripped the apartment down to the subfloor” and installed “[n]ew mechanical systems, new partitions, new flooring, new sheetrock, new millwork . . . as per the architect’s specs” (*id.* at 48). The job took one year (*id.*). Sacripanti testified that if Interior saw workers cutting above another worker, Interior “would suggest that they wear goggles and a mask, and [Interior] would suggest that they stop doing what they are doing and go somewhere else for the time” (*id.* at 67). He testified that “[i]t doesn’t make sense” for a worker to be “working under somebody that was cutting something” (*id.* at 68).

Einstein served a notice to admit dated September 9, 2022, pursuant to which plaintiff admitted that the “third individual (from left to right, holding trophy with left hand) in the attached picture is the individual grinding and that caused injury to Plaintiff on October 12, 2017” (NYSCEF Doc. No. 104).

Brian McNaughton (“McNaughton”) testified that he was the president of Sandemar (NYSCEF Doc. No. 105, *McNaughton tr at 7*). Sandemar was Interior’s subcontractor (*id.*). Sacripanti was Interior’s project manager at 15 Central Park West (*id.* at 9). In 2017, Sandemar was the only company performing carpentry work at 15 Central Park West in October 2017 (*id.* at 13). Sandemar provided metal framing and sheetrock, and installed the doors (*id.*). McNaughton did not perform any work other than overseeing carpenters (*id.* at 15). When shown a photograph depicting four men with a trophy, McNaughton testified that he was the third person from the left of the photograph (*id.* at 17). McNaughton is five feet, six inches tall and weighs about 165 to 170 pounds, and has never weighed 200 pounds (*id.* at 20). Sandemar did not have any employees that fit the description of a white male that was five feet, six inches tall and weighed 200 pounds with blond hair and blue eyes (*id.* at 27-28).

Plaintiff commenced this action on April 25, 2018, seeking recovery for common-law negligence and violations of Labor Law §§ 200, 240, and 241(6) (NYSCEF Doc. No. 157).

On October 11, 2019, Interior, Fifteen Central Park West Condo, and Waldron commenced a third-party action against Einstein, seeking indemnification, contribution, and damages for failure to procure insurance (NYSCEF Doc. No. 158).

On July 6, 2020, plaintiff filed a supplemental summons and amended verified complaint adding Einstein as a direct defendant, asserting the same claims against Einstein (NYSCEF Doc. No. 159).

On October 11, 2022, Interior, Fifteen Central Park West Condo, and Waldron commenced a second third-party action against Einstein (NYSCEF Doc. No. 166).

“On a motion for summary judgment, the moving party 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” (*Trustees of Columbia Univ. in the City of N.Y. v D’Agostino Supermarkets, Inc.*, 36 NY3d 69, 73-74 [2020] [internal quotation marks and citation omitted]; see also CPLR 3212 [b] [“The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party”]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “On a motion for summary judgment, facts must be viewed ‘in the light most favorable to the non-moving party’” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]).

Plaintiff moves for partial summary judgment under Labor Law § 240(1) against Waldron and Interior. Plaintiff contends that Waldron was the owner of Apartment 5E and that he cannot invoke the homeowners’ exemption because there is no evidence that he lived at the premises before, during, or after the accident. Plaintiff further contends that Interior was the general contractor on the site. He asserts that he was engaged in a covered activity, painting. According to plaintiff, Waldron and Interior failed to provide him with safety goggles or other safety devices to prevent the metallic debris from falling and injuring him.

Sandemar cross-moves for summary judgment dismissing plaintiff’s Labor Law § 240(1) claim. Sandemar argues that no object fell on plaintiff; rather, plaintiff’s injuries resulted from metal fragments/particles that flew into his eyes when an electrician was grinding metal. Sandemar contends that plaintiff’s injuries resulted from an ordinary hazard of the workplace, and not an elevation-related hazard. Sandemar further asserts that the lack of an enumerated safety device was not a proximate cause of plaintiff’s injuries, and protective eyewear is not considered an enumerated safety device within the meaning of the statute.

As support for its position, Sandemar also submits an affidavit from a professional engineer, Robert Fuchs, P.E. (“Fuchs”), who states that handheld portable grinders are equipped with a semicircular metal safety guard (NYSCEF Doc. No. 142, *Fuchs aff.*, ¶ 7). According to Fuchs, when the grinder is equipped with a safety guard, sparks, metal fragments, and metal particles are deflected away from the operator (*id.*, ¶ 8). Fuchs further opines that “[t]he guards are not intended nor capable of capturing nor collecting sparks, metal fragments, metal particles, or dust which are produced during the grinding process” (*id.*).

Interior, Fifteen Central Park West Condo, and Waldron also cross-move for summary judgment dismissing plaintiff’s Labor Law § 240(1) claim. They contend that Fifteen Central Park West Condo was not an owner of the property where plaintiff was injured, and Waldron owned the apartment as a single-family home, did not lease or rent the premises, and did not direct or supervise, direct or control plaintiff’s work. Interior, Fifteen Central Park West Condo, and Waldron further assert that plaintiff was not subjected to an elevation-related hazard. Even if a safety guard was missing from the grinder, a safety guard would not have prevented the shavings from being generated (NYSCEF Doc. No. 142, *Fuchs aff.*, ¶¶ 7-8).

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

“All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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.”

It is well established that Labor Law § 240(1) applies to “extraordinary elevation risks,” and not the “usual and ordinary dangers of a construction site” (*Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 843 [1994]). To establish liability under Labor Law § 240(1), the plaintiff must establish the following two elements: (1) a violation of the statute, i.e., that the owner or general contractor failed to provide adequate safety devices; and (2) that the statutory violation was a proximate cause of the injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 [2003]).

“In order to prevail on summary judgment in a section 240(1) ‘falling object’ case, the injured worker must demonstrate the existence of a hazard contemplated under that statute ‘and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein’” (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662 [2014], quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). “Essentially, the plaintiff must demonstrate that at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking” (*Fabrizi*, 22 NY3d at 662-663 [internal quotation marks and citations omitted]). In addition, “[a] plaintiff must show that the object fell . . . because of the absence or inadequacy of a safety device of the kind enumerated in the statute” (*Narducci*, 96 NY2d at 268).

In determining whether a plaintiff is entitled to the extraordinary protections of Labor Law § 240(1), “the single decisive question is whether plaintiff’s injuries were 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]). To determine whether a height differential is physically significant, the court must consider “the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent” (*Ladd v Thor 680 Madison Ave LLC*, 212 AD3d 107, 114 [1st Dept 2022], quoting *Runner*, 13 NY3d at 605).

Initially, Fifteen Central Park West Condo has demonstrated that it was not an owner for purposes of Labor Law §§ 240(1) and 241(6) (see *Guryev v Tomchinsky*, 20 NY3d 194, 201 [2012] [“ownership is a ‘necessary condition’ although ‘not a sufficient one’ for a non-contracting party’s liability under section[s] [240(1)] and 241(6), and the condominium did not own the Tomchinsky’s apartment”]). Waldron owned Apartments 5D and 5E in fee simple absolute at the time of the accident and was therefore entitled to exclusive possession of the apartments (see NYSCEF Doc. No. 168, *Waldron aff.*, ¶ 1). Plaintiff has failed to raise an issue of fact. Accordingly, Fifteen Central Park West Condo is entitled to dismissal of plaintiff’s Labor Law § 240(1) and 241(6) claims.

Waldron invokes the homeowner’s exemption under the statute. In order to receive the protection of the homeowner’s exemption, a defendant must satisfy two prongs: (1) that the work was conducted at a dwelling that is a residence for only one or two families, and (2) that the defendant “did not direct or control that work” (see *Chowdhury v Rodriguez*, 57 AD3d 121, 126-127 [2d Dept 2008], quoting Labor Law §§ 240[1], 241[6]; see also *Lopez v Dagan*, 98 AD3d 436, 438 [1st Dept 2012], *lv denied* 21 NY3d 855 [2013]).

As to the first prong, the Court of Appeals has held that “[t]he determination whether the exemption is available to an owner in a particular case turns on the site and purpose of the work” (*Khela v Neiger*, 85 NY2d 333, 337 [1995]). In *Khela*, the Court of Appeals determined that an owner was entitled to the homeowner’s exemption where “the site and purpose of the construction was solely connected with remodeling the building into a residential and single tenant space, not creating or enhancing a commercial usage” (*id.* at 338).

As to the second prong, “[t]he statutory phrase ‘direct or control’ is construed strictly and refers to situations where the owner supervises the method and manner of the work” (*Ortega v Puccia*, 57 AD3d 54, 59 [2d Dept 2008]). Monitoring the progress of the work, visiting the site regularly, approving the aesthetics of the work, and overseeing the general quality of the work are insufficient to constitute supervision of the methods and manner of the work (see *Affri v Basch*, 13 NY3d 592, 596 [2009]; *Thompson v Geniesse*, 62 AD3d 541, 542 [1st Dept 2009]).

Waldron avers that he purchased Units 5D and 5E to reside there with his family, and that he has never leased, rented or used the premises for commercial purposes (NYSCEF Doc. No. 168, *Waldron aff.*, ¶ 2). Therefore, Waldron has demonstrated that the work served no commercial purpose (see *Ovalle v Buckwalter*, 187 AD3d 583, 584 [1st Dept 2020]; *Castro v Mamaes*, 51 AD3d 522, 523 [1st Dept 2008]). He further states that he was not present to observe the construction work, did not supervise or control any of the work, and did not have any

tools, ladders, or other equipment within the premises which would have been used by the construction workers (NYSCEF Doc. No. 168, *Waldron aff.*, ¶¶ 3-5). This affidavit is sufficient to demonstrate *prima facie* that Waldron did not direct or control the work (see *Lopez*, 98 AD3d at 437).

Plaintiff has failed to raise an issue of fact as to whether Waldron is entitled to summary judgment under the homeowner's exemption. In opposing Waldron's request, plaintiff relies on an unauthenticated computer printout from the website realtyhop.com, which purportedly lists a property records search for "John E. Waldron" (NYSCEF Doc. No. 195). As pointed out by Waldron, this printout is hearsay, and "hearsay evidence may be considered to defeat a motion for summary judgment as long as it is not the only evidence submitted in opposition" (*O'Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010]). Plaintiff does not submit any other evidence on the issue of whether the work was conducted at Waldron's family residence. Moreover, plaintiff's reliance on cases discussing affidavits in the context of CPLR 3211 motions are inapposite, as Waldron did not move to dismiss pursuant to CPLR 3211, but rather moved for summary judgment under CPLR 3212. Therefore, Waldron is entitled to dismissal of plaintiff's section 240(1) and 241(6) claims.

Here, considering the size and weight of the metal fragments or particles from the grinder (NYSCEF Doc. No. 120, *plaintiff's tr at 104*), plaintiff's accident occurred as the result of a "general hazard of the workplace," and "[t]his was not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected" (*Narducci*, 96 NY2d at 268, 269; see also *Connor v AMA Consulting Engrs. PC*, 213 AD3d 483, 484 [1st Dept 2023], *lv dismissed in part, denied in part* 40 NY3d 1088 [2024] [worker exposed to ordinary hazard of the workplace where a piece of drywall that was two feet wide and eight feet high and portion of drywall tipped over no more than three feet and struck him]; *Herrera v Kent Ave. Prop III LLC*, 203 AD3d 512, 513 [1st Dept 2022] [accident not covered under section 240(1) where plaintiff was struck by an excavator]; *Paulino v Hearts Serv. Co., Inc.*, 28 AD3d 362, 362 [1st Dept 2006] [falling window was not covered under section 240(1)]; *Sahota v Celaj*, 11 AD3d 308, 309-310 [1st Dept 2004] [worker's broken arm caused by fire escape ladder was a general hazard of the workplace]).

Moreover, the metal fragments or particles did not fall because of the "absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268). Safety goggles are not a protective device within the meaning of Labor Law § 240 (1) (*Peters v Structure Tone, Inc.*, 204 AD3d 522, 524 [1st Dept 2022]; *Shaheen v International Bus. Machs. Corp.*, 157 AD2d 429, 432 [3d Dept 1990] ["It may well be that protective glasses might have guarded against the hazard created by the loose wire, but Labor Law § 240(1) does not impose any obligation to provide such eyeglasses simply by virtue of plaintiff's elevated position"]; see also *Mercado v Caithness Long Is. LLC*, 104 AD3d 576, 577 [1st Dept 2013] [hard hat is not safety device within the meaning of section 240(1)]). Furthermore, a safety guard on a grinder is not the type of safety device within the contemplation of the statute. As indicated by Fuchs, such guards are not intended nor capable of collecting metal fragments, particles, and dust produced during the grinding process (NYSCEF Doc. No. 142, *Fuchs aff.*, ¶ 8). Although plaintiff challenges Fuchs's conclusions, the court finds that his opinion is well supported. Fuchs bases his opinion on his use and operation of handheld grinders and relies on a stock image of a five-

inch Makita grinder and guard. Plaintiff does not offer expert testimony to contradict his assertions. Plaintiff has, therefore, failed to raise an issue of fact. Accordingly, plaintiff's section 240(1) claim must be dismissed.

Labor Law § 241(6) “imposes a *nondelegable* duty of reasonable care upon owners and contractors ‘to provide reasonable and adequate protection and safety’” to workers performing construction, excavation or demolition (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998] [emphasis in original]). To recover under Labor Law 241(6), a plaintiff must plead and prove that the “defendant violated an Industrial Code regulation ‘that sets forth a specific standard of conduct and [is] not simply a recitation of common-law safety principles’” (*Toussaint v Port Auth. of N.Y. & N.J.*, 38 NY3d 89, 94 [2022], quoting *St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]). In addition to establishing the violation of a specific and applicable regulation, the plaintiff must also show that the violation was a proximate cause of the accident (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2022]).

Interior, Fifteen Central Park West Condo, Waldron, and Sandemar move for summary judgment dismissing plaintiff's Labor Law § 241(6) claim, arguing that plaintiff has failed to identify a specific or applicable Industrial Code violation. In response to defendants' motions, plaintiff only relies on 12 NYCRR 23-1.5¹ and 12 NYCRR 23-1.7(a)(1) (NYSCEF Doc. No. 193, *plaintiff's affirmation in opposition* ¶¶ 71, 72). Accordingly, plaintiff abandoned the remaining Industrial Code provisions cited in his bills of particulars (see *Cardenas v One State St., LLC*, 68 AD3d 436, 438 [1st Dept 2009] [“Plaintiff abandoned any reliance on the various provisions of the Industrial Code cited in his bill of particulars by failing to address them either in the motion court or on appeal . . .”]). Thus, the court shall consider whether plaintiff has a valid section 241(6) claim based on 12 NYCRR 23-1.5 and 12 NYCRR 23-1.7(a)(1).

The First Department has held that section 23-1.5(a), which concerns required health and safety protection, is too general to support a section 241(6) claim (see *Marte v Tishman Constr. Corp.*, 223 AD3d 527, 529 [1st Dept 2024]; *Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904, 906 [1st Dept 2011]). Moreover, “12 NYCRR 23-1.5 (b) serves to amplify other provisions of the Industrial Code that require a designated individual to perform or supervise work, and thus does not provide an implementing regulation upon which to predicate a Labor Law § 241(6) cause of action” (*Guallpa v Canarsie Plaza, LLC*, 144 AD3d 1088, 1091 [2d Dept 2016]). Additionally, “12 NYCRR 23-1.5 (c)(1) and (2) are ‘too general to serve as Labor Law § 241(6) predicates’” (*Ortega v Trinity Hudson Holding LLC*, 176 AD3d 625, 626 [1st Dept 2019], quoting *Jackson v Hunter Roberts Constr. Group, LLC*, 161 AD3d 666, 667 [1st Dept 2018]).

12 NYCRR 23-1.5(c)(3) provides that “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.” In contrast to subsections (c)(1) and (2), the First Department has determined that this subdivision is sufficiently specific to result in liability pursuant to Labor Law § 241(6) (*Becerra v Promenade Apts. Inc.*, 126 AD3d 557, 559 [1st Dept 2015]; see also *Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2d Dept 2015]).

¹ Plaintiff cites 12 NYCRR 23-1.5(d). However, there is no such subdivision of this regulation.

In prior cases, courts have held that the use of a grinder without a guard was sufficient to allege a violation of 23-1.5(c)(3) (see e.g., *Desprez v United Prime Broadway, LLC*, 225 AD3d 518, 519 [1st Dept 2024]; *Viruet v Purvis Holdings LLC*, 198 AD3d 587, 588 [1st Dept 2021]; *Tuapante v LG-39, LLC*, 151 AD3d 999, 1000 [2d Dept 2017]; *Becerra*, 126 AD3d at 559).

Even though plaintiff testified that the electrician's handheld grinder did not have a guard (NYSCEF Doc. No. 120, *plaintiff's tr at 105*), any violation of section 23-1.5(c)(3) was not a proximate cause of his injuries (see *Santos v Condo 124 LLC*, 161 AD3d 650, 656 [1st Dept 2018] ["violation of this provision could not have been a proximate cause of the accident"]). As previously noted, Fuchs opines that the guard of a grinder is intended to protect the operator, and that "[t]he guards are not intended nor capable of capturing and collecting sparks, metal fragments, metal particles, or dust which are produced during the grinding process" (NYSCEF Doc. No. 150, *Fuchs aff*, ¶¶ 7, 8). Plaintiff's unsupported and conclusory assertions that the guard could have prevented his accident are insufficient to raise an issue of fact.

12 NYCRR 23-1.7(a)(1), entitled "Overhead hazards," provides that:

"Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot."

The First Department has held that section 23-1.7(a)(1) "is sufficiently specific to a cause of action under section 241(6)" (*Clarke v Morgan Contr. Corp.*, 60 AD3d 523, 523-524 [1st Dept 2009]; see also *Murtha v Integral Constr. Corp.*, 253 AD2d 637, 639 [1st Dept 1998]).

Section 23-1.7(a)(1) requires suitable overhead protection in areas that are "normally exposed to falling material or objects" (*Griffin v Clinton Green S., LLC*, 98 AD3d 41, 49 [1st Dept 2012], quoting 12 NYCRR 23-1.7 [a] [1]; see also *Amato v State of New York*, 241 AD2d 400, 402 [1st Dept 1997], *lv denied* 91 NY2d 805 [1998] [section 23-1.7(a) was inapplicable where there was no evidence that plaintiff was injured in an area where workers were "normally exposed to falling objects" and where overhead work was not the primary focus of the worksite]). "[W]here an object unexpectedly falls on a worker in an area not normally exposed to such hazards, the regulation does not apply" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]).

Applying these principles, there is no evidence that the accident occurred in an area "normally exposed to falling material or objects" (12 NYCRR 23-1.7[a][1]). Plaintiff testified that the electrician was coming and going all morning; that he did not notice the electrician put a piece of metal on plaintiff's ladder; he "didn't know where the noise was coming from . . . when [he] heard the machine against the metal"; and that he "didn't think that was going to happen. Because he would come and go all morning" (NYSCEF Doc. No. 120, *plaintiff's tr at 95, 101, 102*). He stated that he first noticed that plaintiff was using a Makita grinder within minutes of

his accident (*id.* at 105). He further testified that he had not been exposed to falling materials in the area prior to the date of the accident (*id.* at 147-148). Therefore, section 23-1.7(a)(1) does not apply (see *Reyes v Sligo Constr. Corp.*, 214 AD3d 1014, 1017-1018 [2d Dept 2023] [section 23-1.7 (a) (1) was inapplicable where plaintiff was struck by a piece of wood on a house renovation project]; *Blake v Brookfield Props. One WFC Co., LLC*, 180 AD3d 422, 423 [1st Dept 2020], *lv dismissed in part, denied in part* 35 NY3d 1059 [2020] [section 23-1.7(a)(1) was inapplicable to plaintiff's work in newly-renovated space]). Plaintiff has failed to raise an issue of fact in opposition to defendants' motions. Since plaintiff has failed to identify a specific or applicable Industrial Code violation, his section 241(6) claim is dismissed (see *Kowalik v Lipschutz*, 81 AD3d 782, 783 [2d Dept 2011]).

Fifteen Central Park West Condo and Waldron argue that they are entitled to dismissal of plaintiff's Labor Law § 200 and common-law negligence claims because: (1) they were not present at the time of the accident, (2) they did not supervise, direct or control plaintiff's work, and (3) they did not create or have notice of any dangerous condition.

Interior asserts that the court should dismiss plaintiff's section 200 and common-law negligence claims because it did not own a Makita grinder with a missing guard (NYSCEF Doc. No. 169, *Sacripanti aff.*, ¶¶ 3-4).

Plaintiff did not specifically oppose dismissal of his Labor Law § 200 and common-law negligence causes of action.

Labor Law § 200(1) provides 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. The board may make rules to carry into effect the provisions of this section.”

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 [2d Dept 2014]). “Where the worker is injured as a result of the manner in which the work is performed, ‘the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work’” (*Prevost v One City Block, LLC*, 155 AD3d 531, 533-534 [1st Dept 2017], quoting *Cappabianca*, 99 AD3d at 144). On the other hand, “[w]here an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it” (*Prevost*, 155 AD3d at 534 [internal quotation marks and citation omitted]).

Here, plaintiff's accident arose out of the means and methods of the work performed. Thus, whether defendants created or had notice of the dangerous nature of the work is irrelevant.

It is well established that general supervision is insufficient to demonstrate supervisory control; monitoring and oversight of the timing and quality of the work, mere presence on the job site, and a general duty to ensure compliance with safety regulations, are insufficient to impose liability under section 200 or in common-law negligence (see *Phillip v 525 E. 80th St. Condominium*, 93 AD3d 578, 579-580 [1st Dept 2012]; *Paz v City of New York*, 85 AD3d 519, 519-520 [1st Dept 2011]; *Dalanna v City of New York*, 308 AD2d 400, 400 [1st Dept 2003]).

Waldron avers that, in January 2017, he retained Interior as a general contractor, to remodel and combine Apartments 5D and 5E into one apartment (NYSCEF Doc. No. 168, *Waldron aff.*, ¶ 2). Waldron states that he was not present to observe any of the construction work, and did not supervise any of the construction work (*id.*, ¶¶ 3-4). Waldron further indicates that he did not have any tools, ladders, or other equipment within the premises for use by the construction workers (*id.*, ¶ 5). Gregg Carlovich, the resident manager for Fifteen Central Park West Condo, states that it does not supervise the actual construction work as it is taking place in an individual unit (NYSCEF Doc. No. 167, *Carlovich aff.*, ¶ 8). In light of this evidence and given that plaintiff did not oppose dismissal of his section 200 and negligence claims against Waldron and Fifteen Central Park West Condo, these claims are dismissed (see *Murphy v Schimenti Constr. Co., LLC*, 204 AD3d 573, 574 [1st Dept 2022]; *Norris v Innovative Health Sys., Inc.*, 184 AD3d 471, 473 [1st Dept 2020]).

As for Interior, the court also finds that plaintiff abandoned these claims against Interior (see *Romano v New York City Tr. Auth.*, 213 AD3d 506, 508 [1st Dept 2023]). Plaintiff only notes that the fact that Interior did not own the grinder is irrelevant to strict liability but does not mention his Labor Law § 200 and negligence claims (NYSCEF Doc. No. 193, *plaintiff's affirmation in opposition* ¶¶ 69, 70). Accordingly, plaintiff's section 200 and common-law negligence claims are dismissed as against Interior.

Einstein moves for summary judgment, arguing that plaintiff's response to its notice to admit conclusively demonstrates that it was not responsible for plaintiff's injuries. Einstein contends that it was not the company grinding metal, and, therefore, cannot be found to be negligent. Einstein also seeks sanctions against plaintiff and Interior, Fifteen Central Park West Condo, and Waldron for continuing their claims against Einstein after McNaughton's deposition, in which he confirmed that he was the individual that plaintiff identified as the person that was grinding and caused his injury.

In opposition, Interior, Fifteen Central Park West Condo, and Waldron argue that Einstein's motion should be denied because: (1) McNaughton testified that he never performed physical work at the site, and did not fit plaintiff's description of the worker that was grinding; (2) plaintiff testified that the worker that caused his injury was an electrician; (3) plaintiff's counsel has advised that his client was mistaken in identifying McNaughton; (4) Einstein has not demonstrated that it did not have employees performing work in close proximity to plaintiff; and (5) Fifteen Central Park West Condo's sign-in sheet refutes Einstein's claim that it did not have a worker on site. Further, Interior, Fifteen Central Park West Condo, and Waldron contend that the notice to admit is not binding as to them. And finally, Interior, Fifteen Central Park West Condo, and Waldron contend that they have not engaged in sanctionable conduct.

For his part, plaintiff contends that Einstein's notice to admit was palpably improper. Plaintiff further argues that there are issues of fact as to the identity of the individual that caused his injury. According to plaintiff, he has not engaged in frivolous conduct.

CPLR 3123(a) provides that:

“a party may serve upon any other party a written request for admission by the latter of the genuineness of any papers or documents, or the correctness or fairness of representation of any photographs, described in and served with the request, or of the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry.”

Admissions made in response to a request for admissions may be used in support of a motion for summary judgment (see e.g., *Beneficial Fin. Co. N.Y. v Youngman*, 57 AD2d 727, 727 [4th Dept 1977]). “A notice to admit pursuant to CPLR 3123 is to be used only for disposing of uncontroverted questions of fact or those that are easily provable, not for the purpose of compelling admission of fundamental and material issues or ultimate facts that can only be resolved after a full trial” (*Meadowbrook-Richman, Inc. v Cicchiello*, 273 AD2d 6, 6 [1st Dept 2000]; see *Hawthorne Group v RRE Ventures*, 7 AD3d 320, 324 [1st Dept 2004]). Stated differently, a request for admission is “palpably improper” when it goes “to the heart of the issue” (*Stanger v Morgan*, 100 AD3d 545, 546 [1st Dept 2012]).

Here, Einstein has failed to demonstrate *prima facie* entitlement to summary judgment. Einstein's notice to admit sought admission of the identity of the individual that was grinding above plaintiff and caused his injury. Thus, Einstein's notice to admit was improper in that it sought admission of a material or ultimate issue. Moreover, plaintiff's response to the notice to admit is not binding on Interior, Fifteen Central Park West Condo, and Waldron (see *Mack v Arnold Gregory Mem. Hosp.*, 90 AD2d 969, 969 [4th Dept 1982]).

In any event, viewing the evidence in the light most favorable to plaintiff and third-party plaintiffs, there are issues of fact as to whether Einstein caused plaintiff's injury (see *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 312 [1980], *rearg denied* 52 NY2d 784 [1980] [“As a general rule, the question of proximate cause is to be decided by the finder of fact. . .”]). There is evidence that Einstein was performing electrical work on the project (NYSCEF Doc. No. 121, *Martinez tr at 19*; NYSCEF Doc. No. 122, *Wolfe tr at 27*). A sign-in sheet indicates that Einstein had an employee named Larry who was working at the premises on October 12, 2017 (NYSCEF Doc. No. 172; NYSCEF Doc. No. 167, *Carlovich aff.*, ¶¶ 3, 4, 5).² Plaintiff testified

² Contrary to Einstein's contention, Fifteen Central Park West Condo sufficiently authenticated the sign-in sheet (see Jerome Prince, Richardson on Evidence § 9-103, at 703-704 [Farrell 11th ed]). Carlovich states that the building enters information regarding construction workers into the building's Building Link system, which is kept in the regular course of business, and is maintained by Carlovich and those who report to him (NYSCEF Doc. No. 167, *Carlovich aff.*, ¶¶ 3, 4, 5). He further states that true and correct copies of the Building Link entries for the date of the accident show that an employee named “Larry,” who worked for Einstein, signed into the building at 8:53 A.M. and left at 4:11 P.M. (*id.*). The court may also consider hearsay as it is not the only evidence on this issue.

that an electrician was grinding above him on a ladder, had a normal build, and weighed about 200 pounds (NYSCEF Doc. No. 120, *plaintiff's tr at 94, 95, 96, 107*). By contrast, McNaughton testified that his company, Sandemar, performed carpentry work on the project, and that he did not perform any physical work there (NYSCEF Doc. No. 124, *McNaughton tr at 13, 15*). He further testified that he was an Irish immigrant who weighed about 165 pounds (*id.* at 20). In view of the above, Einstein is not entitled to summary judgment.

22 NYCRR 130-1.1 gives the court “in any civil action or proceeding before the court,” the authority, in its discretion, to award “costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees, resulting from frivolous conduct as defined in this Part” and/or to impose “financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part” (22 NYCRR 130-1.1 [a]). Frivolous conduct is defined as conduct that: (1) “is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law”; (2) “is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another”; or (3) “asserts material factual statements that are false” (22 NYCRR 130-1.1 [c]). In determining whether sanctions are appropriate, the court must look at the broad pattern of conduct by the offending parties or attorneys (*Levy v Carol Mgt. Corp.*, 260 AD2d 27, 33 [1st Dept 1999]).

CPLR 8303-a (a) similarly provides:

“If in an action to recover damages for personal injury, injury to property or wrongful death, or an action brought by the individual who committed a crime against the victim of the crime, and such action or claim is commenced or continued by a plaintiff or a counterclaim, defense or cross claim is commenced or continued by a defendant and is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs and reasonable attorney's fees not exceeding ten thousand dollars.”

In light of the above issues of fact as to whether Einstein caused plaintiff’s injury, the court declines to award costs or sanctions. Accordingly, it is

ORDERED that the motion (Seq. 002) of defendant/third-party defendant Einstein Electrical Corp. for summary judgment and for sanctions is denied; and it is further

ORDERED that the motion (Seq. 003) of plaintiff Jose Casilari for partial summary judgment under Labor Law § 240(1) is denied; and it is further

ORDERED that the cross-motion of second third-party defendant Sandemar Finishes, LLC for summary judgment dismissing plaintiff’s Labor Law §§ 240(1) and 241(6) claims is granted, and said claims are dismissed; and it is further

ORDERED that the cross-motion of defendants/third-party plaintiffs/second third-party plaintiffs Interior Management, LLC, Fifteen Central Park West Condo, and John Waldron for summary judgment is granted and the complaint and all cross-claims against are dismissed in

their entirety against said defendants, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon all parties, as well as the Clerk of the Court, who shall enter judgment accordingly; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

ORDERED that the action is severed and continued against the remaining defendants.

July 5, 2024


HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE