SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LISA S. HEADLEY** **PART** **28M**

Justice

----------X

INDEX NO. 153509/2020

MOTION DATE 10/03/2024

MOTION SEQ. NO. 002

STEVEN BECKLEY, JESSICA BECKLEY,

Plaintiff,

- v -

J.E. LEVINE BUILDER INC. D/B/A LEVINE BUILDERS, REGAL RECONSTRUCTION CORP., WEST SIDE 11TH & 29TH LLC,DD WEST 29TH LLC,

DECISION + ORDER ON MOTION

Defendant.

----------X

J.E. LEVINE BUILDER INC. D/B/A LEVINE BUILDERS, WEST SIDE 11TH & 29TH LLC, DD WEST 29TH LLC

Third-Party
Index No. 595092/2023

Plaintiff,

-against-

TOTAL SAFETY CONSULTING, LLC, D/B/A TOTAL SAFETY CONSULTING

Defendant.

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 85, 86, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 159, 161, 167, 168, 169

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Procedural History

On May 27, 2020, plaintiffs, Steven Beckley and Jessica Beckley (collectively, "plaintiffs"), commenced this action with the filing of a Summons and Complaint against J.E. Levine Builder Inc. d/b/a Levine Builders, Regal Reconstructions Corp.[1], West Side 11th & 29th LLC, and DD West 29th LLC (collectively, referred to as "Defendants Levine" or "third-party plaintiffs/defendants"). *(See, NYSCEF Doc. No. 100)*. On November 18, 2020, Defendants Levine filed an Answer. *(See, NYSCEF Doc. No. 101)*. In the Complaint, the first cause of action asserts

[1] Co-defendant, Regal Reconstruction Corp, was discontinued from this action, without prejudice, pursuant to the Stipulation dated March 30, 2021. (*See, NYSCEF Doc. No. 175)*.

negligence and violations of the New York Labor Law as against all defendants, and the second cause of action asserts loss of services.

Before the Court is the motion filed by plaintiffs for an Order granting summary judgment on the issue of liability as against defendants, J.E. Levine Builder Inc., d/b/a Levine Builders, West Side 11th & 29th LLC and DD West 29th LLC ("defendants"). Defendants filed opposition, including a counter statement of material facts. (*NYSCEF Doc. Nos. 140-157*).

I. Background

Plaintiff submits Statements of Facts, which the plaintiff claims are undisputed. (*See, NYSCEF Doc. No. 39*). In the Statement of Facts, plaintiff, Steven Beckley, asserts he was performing construction and excavation work at the subject premises located at 401 9th Avenue, New York, New York ("subject premises"). Plaintiff submits that the defendant, West Side 11th and 29th LLC, was the fee owner of the subject premises and West Side 11th & 29th LLC leased the subject building to DD West 29th LLC, pursuant to a ground lease. *Id*. Plaintiff asserts that DD West engaged JE Levine Builders Inc d/b/a Levine Builders as the general contractor for the subject premises to construct a mixed-use residential and commercial tower. *Id*. In addition, plaintiff submits that Levine engaged Moretrench, the plaintiff's employer, to perform work related to the building's foundation, which included "driving steel sheet pilings to shore up the perimeter of the foundation." *Id*.

As to the cause of the incident, the plaintiff claims that while "attempting to secure the 2x2 piece of shoring sheet metal to the shoring sheet with c-clamps, he and his co-worker, Mike, were unable to secure the metal by hand underneath the vibratory hammer until the hammer could grasp the shearing sheet and the metal to continue pile driving." Plaintiff specifically alleges when he was attempting to perform his task as directed, the 2x2 piece of sheet metal was caused to fall and injure him when it was contacted by the vibratory hammer as it was lowered onto the shoring sheet/piece of metal." *Id*. As a result of the incident, plaintiff claims he sustained permanent serious physical personal injuries that left him confined to his bed, as well as psychological injuries. Co-plaintiff, Jessica Beckley, is Steven Beckley's wife, who claims she was permanently deprived of consortium, society and services of plaintiff Steven Beckley.

II. Plaintiff's Motion for Summary Judgment

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such *prima facie* showing requires denial of the motion, regardless of sufficiency of the opposing paper." *Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320 (1986). Under *CPLR §3212*, "[o]n a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *See, CPLR §3212*. "Summary judgment is a drastic remedy, to be granted only where the moving party has rendered sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action." *Vega v. Restani Constr. Corp.,* 18 N.Y.3d 499, 503 (2012) [internal citation and quotation marks omitted].

a. Labor Law §240(1)

In support of the motion, plaintiffs submit, *inter alia*, the deposition testimony of plaintiff, Steven Beckley (*Doc. No. 51*); Dominick Bove, Levine's superintendent of construction (*Doc. No. 52*); Dominick Giarraputo, the site safety manager assigned by Total Safety, which was Levine's site safety contractor for the subject building (Doc. No. 53); the Moretrench accident report (*Doc. No. 55);* the Levine accident report (Doc No. 56); photographs (Doc No. 67); and the affidavit of Walter Konon, P.E., a licensed professional engineer, and building construction safety expert (*Doc. No 65*).

The plaintiffs argues that they are entitled to summary judgment as a matter of law, pursuant to *Labor Law §240(1),* because plaintiff Steven Beckley was not provided the adequate safety devices to prevent an object from falling that caused his injuries. Plaintiffs contend that the "2x2 piece of sheet pile" fell due to gravity and the metal piece was in the process of being secured by hand at the time it fell, with plaintiff and his co-worker holding it in place. Plaintiffs assert that the safety devices provided, including the RTG rig, which is a hoist under the statute, were not operated properly, or failed to prevent an object from falling, and the safety devices, including the bridge clamps or heavy-duty c-clamps, were not provided and would have prevented the accident. Plaintiffs argue that the "2x2 metal piece of sheet pile" fell because of a combination of the force of gravity and the absence and inadequacy or improper operation of safety devices. To the contrary, the defendants argue that the plaintiff failed to establish his entitlement to protections under *Labor Law §240(1)* because the incident did not involve a significant elevated risk, and "the distance the smaller piece of sheet metal at issue fell, and its weight, are *de minimis* as a matter of law."

Labor Law §240(1), also known as "New York's Scaffold Law" imposes "absolute liability on building owners and contractors whose failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker." *Wilinski v. 334 E. 92nd Hous. Dev. Fund. Corp.*, 18 N.Y.3d 1, 7 (2011). The Scaffold law provides:

> "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."

N.Y. Labor Law § 240(1).

The legislative intent behind the statute is to place the "ultimate responsibility for safety practices at building construction jobs…on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident." *Zimmer v. Chemung County Performing Arts*, 65 NY2d 513, 520 (1985). To prevail in a *Labor Law § 240(1)* cause of action, the plaintiff must establish that the violation of the statute was a proximate cause of his or her injuries. *Blake v. Neighborhood Hous. Servs. of New York City, Inc.*, 1 N.Y.3d 280, 286 (2003). The duty imposed by *Labor Law § 240(1)* is nondelegable, meaning that an owner or contractor who violates this duty can be held liable for damages, regardless of whether they exercised actual

supervision or control over the work. *See, e.g., Haimes v. New York Tel. Co.,* 46 N.Y.2d 132, 136–137 (1978). Liability under the Scaffolding Law depends upon the injury having resulted from "the failure to use, or the inadequacy of ... a device" within the purview of the statute. *Ortiz v. Varsity Holdings, LLC,* 18 N.Y.3d 335, 340 (2011) (internal quotation marks omitted). "[T]here can be no liability under section 240(1) when there is no violation and the worker's actions ... are the sole proximate cause of the accident." *Cahill v. Triborough Bridge & Tunnel Auth.,* 4 N.Y.3d 35, 40 (2004).

For a claim under *Labor Law § 240(1)* to succeed, "the plaintiff must demonstrate that the task involved a significant risk related to elevation and that the safety devices specified by the statute—such as scaffolds or harnesses—were necessary to protect against this risk. These devices are intended to shield workers from the dangers of falling from a height or being struck by a falling object." *See*, *Broggy v. Rockefeller Grp., Inc.,* 8 N.Y.3d 675, 680 (2007).

This Court finds that the plaintiffs' claims as to how the accident occurred does meet the threshold requirements under *Labor Law 240(1).* In his deposition, plaintiff, Steven Beckley, testified that on the date of the incident he was in the lift with his co-worker, Mike (*Doc. No. 51, page 80 -81*), and he was attempting to attach the c-clamps, and Mike was holding the 2x2 piece of steel in place (*Id. at pages 86-87*). Plaintiff testified that the c-clamps did not work so they were forced to just hold it with their hands and get ahead of the machine. (*Id. at page 87, lines 1-8*). Plaintiff testified that the Levine worker did not give them any direction on how to use the "2 by 2-foot" sheet and how to attach it to the existing sheet that was damaged. (*Id. at page 87 lines 19 – 25).* Plaintiff also testified that the Levine worker did not instruct him to hold it with his hands when the c-clamps did not work. (*Id. at page 88 Lines 1-6*). Plaintiff further testified that "he signaled the operator of the bucket lift to come down while plaintiff had one hand on the "2-foot by 2-foot" piece of steel, and as the machine was coming down to grab the piece, the piece dropped down and took his arm with it." (*Id. at page 91*). The plaintiff testified that "the 2 by 2 piece of steel fell downwards about 6 inches." (*Id. at page 92 lines 1-4*).

The Court of Appeals explained in *Rocovich v. Consolidated Edison Co.,* 78 N.Y.2d 509, 514, 577 N.Y.S.2d 219, 583 N.E.2d 932 (1991), that "*Labor Law § 240(1)* is intended to protect against risks caused by 'the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured.' With this concern at the forefront, *Labor Law* §*240(1)* imposes strict liability on owners and contractors for accidents arising from the absence of, or defects in, such protective devices as ladders and scaffolds." *Thompson v. St. Charles Condominiums,* 303 A.D.2d 152, 153 (1st Dept 2003). Here, the "materials or loads"- that being the 2 by 2 sheet metal - slid down while the plaintiff was on the bucket lift, and the sheet metal weighing 40 to 50 pounds moved down about 6 inches while plaintiff was holding it, which caused the plaintiff's injury. Although the defendant considers the 6-inch fall as *de minimus,* this Court disagrees and find that the contractor shall be held strictly liable for the alleged elevation risk and the absence of protective devices to prevent the subject incident from occurring. Therefore, the portion of the plaintiffs' motion for summary judgment regarding the *Labor Law §240(1*) claim as

against defendants, J.E. Levine Builder Inc., d/b/a Levine Builders, West Side 11th & 29th LLC and DD West 29th LLC is granted.

b. *Labor Law §241(6)*

Next, the plaintiff argues that *Labor Law §241(6)* applies because the defendants violated *Industrial Code Rules 23-1.5 (c)(3)* and *23-4.2(k)*. *Labor Law §241(6)* requires owners and contractors to provide reasonable and adequate protection and safety for construction workers. *Labor Law §241(6)*; *see e.g., Gervasi v. FSP 787 Seventh LLC*, 228 A.D.3d 459 (1st Dep't 2024). Specifically, the statute "imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed." *Ochoa v. JEM Real Estate Co., LLC*, 223 A.D.3d 747, 749 (2d Dep't 2024).

i. Industrial Code Rule 23-1.5(c)(3)

Industrial Code Rule 23-1.5(c)(3) requires "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." *12 NYCRR 23-1.5(c)(3)* (1972).

Here, Plaintiff alleges that his work location "underneath the machine clearly put him in danger and caused him to be injured when the piece of shoring sheet metal he was holding dislodged and fell." (*See, NYSCEF Doc. No. 40*). Specifically, the plaintiff argues the c-clamps he was provided to perform his task of stabilizing the shoring sheet metal so that it could be grasped by the "vibrohammer's jaws" were either not in good condition or not working properly, and the defendant's failure to repair, replace, or remove them from the worksite was a substantial factor in causing the subject accident. Plaintiff asserts that he was instructed by Levine's employee to perform his work "to secure a 2x2 piece of shoring sheet metal on the side of one of the shoring sheets and underneath the vibratory pile driving hammer as it was lowered onto the shoring sheet." (*See, NYSCEF Doc. No. 39*).

In opposition, defendants argue that the plaintiffs fail to meet the burden for the *Labor Law §241(6)* claim because the alleged Industrial Code provisions in the pleadings, *12 NYCRR 23.1.5(c)* and *4.2(k)*, are inapplicable, and there are questions of fact for the jury to determine whether the provisions are applicable. Contrary to plaintiffs' assertions, the defendants argue that these provisions are too general to support the *Labor Law §241(6)* claim. Defendants submit that there is no evidence to any inoperable safety equipment that required repair. (See, NYSCEF Doc. No. 140). The defendants assert that plaintiff's deposition testimony and the testimony of Water Konon lacks detail as to why the c-clamps could not hold the smaller piece of sheet metal and he did not explain why plaintiff "could not cut the top of the sheet metal with the acetylene torches as he done earlier[.]" *Id*. Defendants argue "plaintiff made no attempt to get different clamps or to find an alternative method to hold the smaller piece of sheet metal in position." *Id*.

Plaintiff Steven Beckley testified that he was trying to attach the c-clamps, Mike was holding the 2 x 2 piece of steel in place (*Id. at pages 86-87*) and the c-clamps did not work so they were forced to just hold it with their hands and get ahead of the machine. (*Id. at page 87, lines 1-8*). Mr. Konon opined that the c-clamps that plaintiff was provided were equipment that was not

in "sound" nor "operable" condition to perform their intended task of supporting a piece of steel weighing upwards of fifty pounds. The 'upon discovery' language in *§ 23–1–5(c)(3)* placed an affirmative duty on defendant to conduct all necessary inspections to ensure compliance with safety regulations and remove the grinder from the worksite." *See, Becerra v. Promenade Apts. Inc.,* 126 A.D.3d 557, 558, 6 N.Y.S.3d 42 (1st Dep't 2015); *see also, Viruet v. Purvis Holdings LLC,* 198 A.D.3d 587, 588 (1st Dep't 2021). Thus, the portion of the plaintiffs' motion for summary judgment as to the *Labor Law § 241(6)* claim predicated on violation of *Industrial Code §23.1.5(c)* is granted.

ii. Industrial Code Rule 23-4.2(k)

Industrial Code Rule 23-4.2(k) states that: "[p[ersons shall not be suffered or permitted to work in any area where they may be struck or endangered by any excavation equipment or by any material being dislodged by or falling from such equipment." *12 NYCRR 23-4.2*. The Appellate Division, First Department Court has previously held that *Industrial Code §23–4.2(k)* is insufficiently specific to support a *Labor Law § 241(6)* claim[.]" See, *Mann v. Mezuyon, LLC,* 225 A.D.3d 569, 570 (1st Dep't 2024), *lv to appeal granted*, 42 N.Y.3d 907 (2024). [internal citations omitted]. "The regulation is overly broad as it applies to every worker at an excavation site and does not set forth concrete rules to promote safety, as required. It is a general statement that care should be taken for the safety of workers at such sites." *Lombardi v. 79 Crosby St. LLC,* 35 Misc. 3d 1220(A) (Sup. Ct. 2012). Thus, the portion of the plaintiffs' motion for summary judgment as to the *Labor Law § 241(6)* claim predicated on violation of *Industrial Code § 23–4.2(k)* is denied.

c. *Labor Law §200*

Labor Law §200 claims arise from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed. *N.Y. Labor Law §200.* Plaintiffs argue they are entitled to summary judgment as a matter of law pursuant to *Labor Law §200* because Levine directed him to perform his work by using objectively dangerous means and methods, which led to his injury. Defendants argue they did not direct or control the plaintiff's work and there must be a showing of supervision and control over the plaintiff's work, which resulted in his injury. Defendants argue that based on the plaintiff's own deposition testimony, as a foreman, he directed the Moretrench workers how to perform their work, and how to perform the task involved in the subject accident. Further, defendants contend that it was plaintiff himself who made the decision to hold the small piece of sheet metal that moved.

Here, this Court finds that defendant Levine has established the existence of material issues of fact regarding who exercised supervisory control over plaintiff's injury producing work, including whether defendants directed plaintiff to hold the sheet metal with his hand. As such, Plaintiffs' motion for summary judgment on their *Labor Law §200* claim is denied. *See also, Harney v. Site 3 DSA Owner LLC.,* 2024 N.Y. Slip Op. 30463[U], 6-7 (N.Y. Sup Ct, New York County 2024).

III. Conclusion

Accordingly, it is hereby

ORDERED that the portion of the plaintiff's motion for summary judgment regarding the *Labor Law §240(1)* claim as against defendants, J.E. Levine Builder Inc., d/b/a Levine Builders, West Side 11th & 29th LLC and DD West 29th LLC is GRANTED; and it is further

ORDERED that the portion of the plaintiffs' motion for summary judgment as to the *Labor Law §241(6)* claim predicated on violation of *Industrial Code §23.1.5(c)* is GRANTED; and it is further

ORDERED that the portion of the plaintiffs' motion for summary judgment as to the *Labor Law § 241(6)* claim predicated on violation of *Industrial Code § 23–4.2(k)* is DENIED; and it is further

ORDERED that the portion of the plaintiffs' motion for summary judgment regarding the *Labor Law §200* claim as against defendant J.E. Levine Builder Inc., d/b/a Levine Builders is DENIED; and it is further

ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon all parties with notice of entry.

1/21/2025	20250121101323LHEADLEY253F450AD6C84CB18729FB62D785D769
DATE	**LISA S. HEADLEY, J.S.C.**

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