SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NICHOLAS W. MOYNE** **PART** **41M**

Justice

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HECTOR NUNEZ,

Plaintiff,

- v -

THE HISPANIC SOCIETY OF AMERICA, WESTERMAN CONSTRUCTION COMPANY, INC.,EAGLE SCAFFOLDING SERVICES, INC.,

Defendant.

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INDEX NO. 161031/2018

MOTION DATE 11/30/2022, 12/01/2022

MOTION SEQ. NO. 006 008

DECISION + ORDER ON MOTION

WESTERMAN CONSTRUCTION COMPANY, INC.

Plaintiff,

-against-

EAGLE SCAFFOLDING SERVICES, INC.

Defendant.

----------X

Third-Party
Index No. 595424/2019

THE HISPANIC SOCIETY OF AMERICA

Plaintiff,

-against-

WESTERMAN CONSTRUCTION COMPANY, INC.

Defendant.

----------X

Second Third-Party
Index No. 595337/2020

EAGLE SCAFFOLDING SERVICES, INC.

Plaintiff,

-against-

MAXWELL PLUMB MECHANICAL CORP.

Defendant.

----------X

Third Third-Party
Index No. 595360/2020

WESTERMAN CONSTRUCTION COMPANY, INC. Fourth Third-Party
Index No. 595622/2020

Plaintiff,

-against-

MAXWELL PLUMB MECHANICAL CORP.

Defendant.
----------X

THE HISPANIC SOCIETY OF AMERICA Fifth Third-Party
Index No. 595626/2020

Plaintiff,

-against-

MAXWELL PLUMB MECHANICAL CORP.

Defendant.
----------X

The following e-filed documents, listed by NYSCEF document number (Motion 006) 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 248, 252, 260, 261, 262, 263, 264, 265, 266, 269, 277, 278, 279, 286, 290, 291, 292

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

The following e-filed documents, listed by NYSCEF document number (Motion 008) 238, 239, 240, 241, 242, 243, 244, 270, 280, 281, 282, 285, 293, 294, 295, 296

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

Upon the foregoing documents, it is

Motion sequences 006 and 008 are consolidated herein for disposition. Motion sequence 006 is plaintiff HECTOR NUNEZ' ("Nunez") motion for partial summary judgment on his Labor Law § 240(1) claim against defendants THE HISPANIC SOCIETY OF AMERICA ("Hispanic Society" or "defendant") and WESTERMAN CONSTRUCTION COMPANY ("Westerman"). Motion sequence 008 is defendant Hispanic Society's motion for summary judgment dismissing the complaint and all cross-claims against it.

Pursuant to the decision dated August 21, 2024 (NYSCEF Doc. No. 297), defendant Westerman's motion for summary judgment dismissing the complaint, claims, and cross-claims against it was granted. Accordingly, the portion of plaintiff's motion seeking summary judgment against WESTERMAN CONSTRUCTION COMPANY is denied for the reasons set forth on the record on August 21, 2024.

The plaintiff alleges that he was injured while working at a construction site on a property owned by defendant Hispanic Society. Defendant Westerman was the general contractor on a roofing project at the site. Plaintiff was an employee of a plumbing

contractor, Maxwell Plumb Mechanical Corp. ("Maxwell") involved in a separate construction project, to convert the building from oil to gas. Plaintiff asserts claims under Labor Law §§ 200, 240(1), and 241(6).

On the day of the accident the plaintiff was at the location to pick up some materials which had been left behind at the job site. Plaintiff was working with a driver from Maxwell. In order to retrieve a pipe from the sidewalk well, plaintiff and the driver were setting up a winch to lift the pipe. In order to do this, the plaintiff placed a piece of wood onto an existing scaffold at the building. The plaintiff and/or the driver were then going to attach the winch to the wood. While trying to adjust the piece of wood, the plaintiff leaned over the railing which separated the sidewalk well from the sidewalk and he slipped, fell over the railing, and fell onto a pipe and valves on an elevated platform within the sidewalk well.

Summary Judgment

"The 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 eliminate any material issues of fact from the case. 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]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of any material issues of fact or where the issue is arguable (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). "If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion" (CPLR § 3212[b]). "In considering a summary judgment motion, evidence should be analyzed in the light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). "In opposing a motion for summary judgment, once a prima facie showing has been made, it is incumbent upon a defendant to come forward with matters of an evidentiary nature to demonstrate the presence of triable issues. General averments do not suffice. The defendant is required to assemble, lay bare, and reveal his proofs in order to show that his defenses are real and capable of being established upon a trial" (*Steingart Assoc., Inc. v Sandler*, 28 AD2d 801, 802-03 [3d Dept 1967]).

Labor Law § 240(1)

The defendant's motion seeking summary judgment dismissing the plaintiff's Labor Law § 240(1) claim, and the plaintiff's motion seeking summary judgment as to liability on the Labor Law § 240(1) claim must be denied. The defendant contends that Labor Law § 240(1) is inapplicable because the plaintiff was not required to work from an elevation, the plaintiff did not fall from a significant or exceptionally dangerous elevation, and the plaintiff's accident was not due to the lack of or defect in a safety device. Furthermore, the defendant contends that the plaintiff's conduct was the sole proximate cause of the accident.

"It is well established that contractors and owners have a statutory duty to provide adequate safety devices for their workers. The failure to provide a safety device is a *per se* violation of the statute for which an owner/contractor is strictly liable" (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 8 [1st Dept 2011]). "The plaintiff may recover under § 240(1) if he was engaged in an activity covered by the statute and exposed to an elevation-related hazard for which no safety device was provided or the device provided was inadequate" (*Id*.). In a Labor Law § 240(1) case, the work site itself must be elevated above or positioned below the area where materials or load are hoisted or secured (*Thompson v St. Charles Condominiums*, 303 AD2d 152, 153-54 [1st Dept 2003], *leave denied* 100 NY2d 556 [2003]). In this case, the plaintiff fell as he was attempting to set up a winch to retrieve materials which were within a sidewalk well, which was approximately fifteen feet below the sidewalk where he was standing (*see* Nunez April 27, 2021 Tr at p. 56 – 57; NYSCEF Doc. No. 182)[1]. Clearly, the plaintiff was exposed to an elevation related risk – he was working on the precipice of a drop from the street level to the sidewalk well, which was at the basement level (*see Bell v Bengomo Realty, Inc.*, 36 AD3d 479, 480 [1st Dept 2007] [fall from ground level into a trench is the type of elevation-related risk for which section 240(1) provides protection]).

The plaintiff's deposition testimony is sufficient to raise an issue of fact as to whether the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential. Plaintiff testified that "I went to put it on, and when I put it on, the board slipped and I fell with the board and wood all together down" (Nunez April 27, 2021 Tr at p. 65 ln 14 – 16). Nunez reached above his head to place the wood on the scaffolding (*Id*. at p. 71, ln 7, 17). He had to lean over the fence, over the gap, to center the board, and he fell while centering the board (*Id*. at p. 73). It was when he leaned over that he slipped (*Id*. at p. 71, ln 2). Taken together, this testimony is sufficient to support the conclusion that gravity was the impetus for the plaintiff's fall.

Defendant contends that that there was not a physically significant elevation differential from where Nunez was standing to where he landed. There is no bright-line minimum height differential that determines whether an elevation hazard exists, and even a height differential of twelve to eighteen inches can be sufficient (*see Brown v 44 St. Dev., LLC*, 137 AD3d 703, 704 [1st Dept 2016]; *Megna v Tishman Const. Corp. of Manhattan*, 306 AD2d 163, 164 [1st Dept 2003] ["the shortness of the distance of plaintiff's fall--at least two feet according to plaintiff, no more than 16 inches according to defendants--is irrelevant"]). Furthermore, the defendant's contention that the plaintiff only fell one and a half to two feet is based upon the testimony of Kirk Seubert, who estimated that the sidewalk well was six to eight feet deep, and that the platform holding the pipe/valves that the plaintiff fell onto was four and a half to five feet above the floor of the sidewalk well (*see* Seubert March 29, 2022 Tr at p. 31 ln 6 – 8, p. 73, ln 15 – 19, NYSCEF Doc. No. 160). However, as noted above, the plaintiff testified that the depth of the sidewalk well was approximately fifteen feet. Accordingly, there is an issue of fact

[1] Another estimate of the depth of the sidewalk well was six to eight feet deep (*see* Seubert March 29, 2022 Tr. at p. 31, NYSCEF Doc. No. 160).

as to how far the plaintiff fell. Therefore, it cannot be determined on a summary judgment motion that there was not a significant elevation differential.

There remains the question of whether the plaintiff's actions were the sole proximate cause of the accident. There can be no liability under Labor Law § 240(1) where the worker's actions are the sole proximate cause of the accident (*see Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 290 [2003]). Hispanic Society argues that the plaintiff was not required to work from an elevation. Plaintiff's supervisor, Kirk Seubert, testified that he instructed both Mr. Nunez and his coworker, Larry, to take a refrigerator style hand truck and pick up the debris, clean up everything that was there, and to use the stairs to bring the items up (*see* Seubert March 29, 2022 Tr at p. 78, ln 3 – 25, p. 129, ln 14 – 17, p. 130, ln 17 – 22). Defendant further contends that if plaintiff had followed these instructions, he would never have been subject to any elevation related risk, and there was therefore no need for a safety device. Therefore, they argue, the sole proximate cause of the plaintiff's injury was his decision to attempt to set up a winch. Seubert does not know if the hand truck was actually loaded on the truck the plaintiff took to the job site (*Id*. at p. 80, ln 12 – 19). There were stairs thirty feet away from where plaintiff fell (*Id*. at p. 105, ln 12-15). Plaintiff testified that it was his co-worker, the "Italian guy" who gave him the instructions to remove the pipe and to use the winch (*see* Nunez May 25, 2021 Tr at p. 164-165).[2] Plaintiff understood enough English that, combined with hand signals, he knew what to do (*Id.*). Accordingly, there is a question of fact as to whether plaintiff was actually instructed as to the means and method of performing his work – to wit, the use of the hand truck and the stairway – and whether the plaintiff chose to ignore those instructions, instead using a method that unnecessarily exposed him to an elevation related risk. Where it is not necessary for a worker to work at an elevation, then they are not exposed to an elevation-related hazard of the type contemplated by section 240(1) (*see D'Antonio v 1251 Americas Assoc.*, 284 AD2d 204, 205 [1st Dept 2001]; *see also Maracle v Autoplace Infiniti, Inc.*, 161 AD3d 1524, 1525 [4th Dept 2018]). Alternatively, the defendant contends that Nunez was provided with a safety device, a ladder, which was readily available, and which plaintiff did not use (*see* Nunez May 25, 2021 Tr at p. 102 – 103). Therefore, there is an issue of fact as to whether the plaintiff's actions were the sole proximate cause of his accident. Accordingly, both plaintiff's and defendant's motions for summary judgment as to the plaintiff's Labor Law § 240(1) claim must be denied.

Labor Law § 200 and Common Law Negligence

Labor Law § 200 is a codification of the common-law duty to provide workers with a safe work environment (*Everitt v Nozkowski*, 285 AD2d 442, 443 [2d Dept 2001]). It applies to owners, contractors, or their agents who have the authority to exercise supervision and control over the work bringing about the injury to enable it to avoid or correct an unsafe condition (*Id*.). "Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in

[2] There is some dispute as to whether "the Italian Guy" was plaintiff's supervisor or merely a co-equal co-worker.

which the work was performed. Where 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. Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012] [internal citations omitted]).

Here, neither party clearly sets forth the manner in which the Hispanic Society was allegedly negligent. To the extent that the Plaintiff contends that the defendant's negligence stems from the manner in which the work was performed, there is no allegation that the Hispanic Society exercised supervisory control over the injury producing work, which was performed at the direction of plaintiff's employer, Maxwell Plumbing. Accordingly, to the extent that plaintiff's negligence/Labor Law § 200 claim is premised upon the manner and means of the work, it must be dismissed.

The plaintiff contends, in his opposition to the Hispanic Society's motion for summary judgment, that there existed a dangerous condition in that the sidewalk railings were inadequate and insufficient. Defendant contends that the sidewalk well was an open and obvious hazard, which was protected by a railing, and that it was only the plaintiff's act of leaning over the railing that caused his fall, not that the railing itself was defective. The risk of harm involved in the instant matter, falling into the sidewalk well was an open and obvious condition. Nunez was well aware of the drop into the sidewalk well – he was attempting to set up a winch to lift items from below when he fell. "Even if a hazard qualifies as 'open and obvious' as a matter of law, that characteristic merely eliminates the property owner's duty to warn of the hazard, but does not eliminate the broader duty to maintain the premises in a reasonably safe condition" (*Powers v 31 E 31 LLC*, 123 AD3d 421, 422 [1st Dept 2014]). However, a court is not precluded from granting summary judgment to a landowner on the ground that the condition complained of by the plaintiff was both open and obvious and, as a matter of law, was not inherently dangerous (*Id*.). "[W]hether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case (*Id*.). As set forth herein above, there is a question as to whether the plaintiff's conduct was the sole proximate cause of his injuries. There is a question as to whether Nunez engaged in reckless, unforeseeable or extraordinary conduct, i.e. that the plaintiff recognized the danger and chose to disregard it. Accordingly, there are questions of fact as to whether or not the condition of the sidewalk well and the railing around it was inherently dangerous, or constituted a reasonably safe environment. Therefore, the defendant's motion to dismiss the common law negligence/Labor Law § 200 cause of action must be dismissed.

Labor Law § 241(6)

Plaintiff's opposition to Hispanic Society's motion for summary judgment does not address the motion for summary judgment dismissing the Labor Law § 241(6) claims. Where a defendant moves for summary judgment to dismiss Labor Law § 241(6) claims, it is appropriate to find that a plaintiff who fails to respond to allegations that a

certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]; *see also 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"]). Accordingly, the defendant's motion for summary judgment dismissing the plaintiff's Labor Law § 241(6) claims is granted.

Cross-claims

The Hispanic Society is the only remaining defendant in this action. Accordingly, any cross-claims against them are dismissed.

Conclusion

For the reasons set forth herein above, it is hereby

ORDERED that the plaintiff's motion for partial summary judgment (motion sequence 006) is denied; and it is further

ORDERED that defendant The Hispanic Society Of America's motion (motion sequence 007) for summary judgment is granted to the extent that the plaintiff's cause of action pursuant to Labor Law § 241(6) is dismissed; and it is further

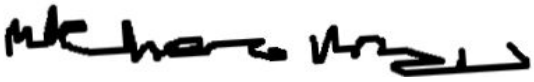
ORDERED that defendant The Hispanic Society Of America's motion (motion sequence 007) for summary judgment is granted to the extent that all cross-claims against it are dismissed; and it is further

ORDERED that defendant The Hispanic Society Of America's motion for summary judgment dismissing the complaint is otherwise denied.

(see next page for signatures)

This constitutes the decision and order of the court.

Motion Sequence 006

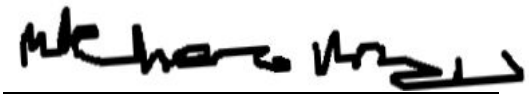


5/7/2025
DATE

NICHOLAS W. MOYNE, J.S.C.

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

Motion Sequence 008



5/7/2025
DATE

NICHOLAS W. MOYNE, 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