SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LETICIA M. RAMIREZ **PART 29**

Justice

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PHILIP ANGLIN,

Plaintiff,

- v -

EXTELL DEVELOPMENT COMPANY, LENDLEASE (US) CONSTRUCTION LMB INC., RAEL AUTOMATIC SPRINKLER COMPANY, INC., SAFWAY ATLANTIC, LLC, SMITELL LLC, SMITELL RETAIL LLC, and EPIC MECHANICAL CONTRACTORS, LLC,

Defendants.

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INDEX NO. 161117/2020

MOTION DATE 01/15/2025, 01/15/2025

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003 and 004) 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 154, 155, 157, 158, 159, 160, 161, 162, 163, 164 172, 173, 174.

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

Under motion sequence #3, plaintiff moves pursuant to *CPLR § 3212* for summary judgment on the issue of liability against Defendants based on *Labor Law §§ 200 and 240(1)*. Defendants oppose the motion. Defendants also move under *CPLR § 3212* for summary judgment dismissing Plaintiff's complaint under motion sequence #4. The court consolidates both motions for disposition.

Plaintiff commenced this action on December 22, 2020, seeking damages for personal injuries he allegedly sustained on August 29, 2018, while working as a construction worker at 217 West 57th Street, New York, NY. Issue was joined on March 5, 2021. A preliminary conference was held on May 10, 2021, and the Note of Issue was filed on March 22, 2024.

Plaintiff argues he is entitled to summary judgment under *Labor Law § 240(1)* because several defendants were responsible for unsafe conditions at the job site. According to Plaintiff, Extell Development Company (hereinafter "Extell"), Smitell LLC, and Smitell Retail LLC (hereinafter collectively "Smitell") were the owners of the premises; Lendlease (US) Construction LMB Inc. (hereinafter "Lendlease") was the general contractor; and Epic Mechanical Contractors (hereinafter "Epic") was a subcontractor. Plaintiff also claims that Rael Automatic Sprinkler Company, Inc. (hereinafter "Rael") and Safway Atlantic, LLC (hereinafter "Safway") were statutory agents of the owner or general contractor and therefore share liability under *Labor Law § 200* and common law negligence.

Plaintiff argues defendants violated *Labor Law § 240(1)* when they placed about 25 scaffold frames against a column and failed to secure them against falling onto plaintiff. In opposition, defendants argue that they should be granted summary judgment because the accident did not involve an elevation-related hazard under *Labor Law § 240(1)* since there was no significant height differential. Defendants further argue that plaintiff's *Labor Law § 200* claim should also be dismissed because they did not supervise or

control the work that caused the accident and did not create or know about any dangerous conditions. Defendants argue that the Industrial Code sections cited by Plaintiff are inapplicable to the facts of this case or are too general to support liability and therefore dismissal is warranted.

In reply, plaintiff contends that defendants have not eliminated all factual issues and that there is enough evidence to show potential violations of *Labor Law §§ 200, 240(1), and 241(6)*. Plaintiff maintains that the accident was caused by defendants' unsafe scaffold storage and the cited Industrial Code sections do apply.

On December 6, 2022, plaintiff appeared for a deposition where he testified, he worked as a general labor foreman (i.e., above a foreman) for non-party Pinnacle, a construction company hired to pour concrete. His duties were mixed: he would direct and supervise the work, but his boss also required him to perform the physical work. At its peak, plaintiff was responsible for 125 workers, setting up for the day, payroll, attendance, acquiring permits, and supervising that the concrete work was getting done per the guidelines set. Plaintiff was employed by Pinnacle from 2008 until September 2021.

Plaintiff started working at the subject worksite in 2010 and his supervisor was Danny Bachelor. At the jobsite, Pinnacle had two safety people, Mr. Andre Hinds, who was the concrete safety manager of record, and PJ Odarti, who was the office liaison. Plaintiff was also a concrete safety manager certified by NYC. As part of his duties as a general foreman, plaintiff had to ensure safety protocols were followed and he had the power to stop Pinnacle's work if he saw a dangerous or unsafe condition occurring onsite.

Plaintiff stated his accident occurred on the 69th floor. On that day, most of the Pinnacle workers were on the floor prepping to pour it (with concrete). Workers from the other trades were also on the floor. In terms of stage of completion, the 69th floor had concrete walls up and a lot of materials to erect the floor. Plaintiff testified that his workers were responsible for helping all the carpenters (e.g., when the carpenters were doing the walls, plaintiff's workers would have to neatly stack all the walls). Plaintiff also stated that his workers were responsible for the cleanliness on the job, for any egress off the job if there was an issue and pouring the concrete (which constituted the main scope of their work). Plaintiff would constantly perform safety walk throughs on the jobsite, "just constantly moving, constantly eyeing, trying to protect the guys. They do whatever you want and sometimes they will do it to their own peril. So, you have to really keep an eye them."

Plaintiff stated that after having his lunch, he took the hoist to the 69th floor and started directing the workers where they needed to perform their work. Plaintiff stated there were many workers from different trades and materials of all kinds from every contractor. It was not within the scope of a laborer's work to move other contractor's materials. For the most part, if a material belonged to a specific contract, it was placed by that contract in that location. After plaintiff spoke to the workers around 12:45pm, he was standing in the first room off the hoist talking to a few of the workers when a whole stack of dismantled scaffold was knocked over on top of him. The scaffold was a Baker scaffold. There were two types of scaffolds on the job: EDC and Baker scaffolds. The EDC scaffolds were rented by Pinnacle while the Baker scaffolds were used by Safway.

Plaintiff was standing six feet away from the stack of scaffold when it fell on him. The scaffold had just been recently brought on the job, and plaintiff believes the workers were "just actually need[ing] it because – they were using it inside the job. The workers were "using the scaffold for inside the job for the duplex had a spiral staircase in the southeast corner of the building. They had to put scaffold in with plywood so people c[ould] walk out that southeast corner and … erect the next floor." The scaffold was stacked straight up. Plaintiff would have stacked it flat so it wouldn't have tipped. The scaffold was leaning against the column. At the base the scaffold's width was 5 or 6 feet wide and its height was 8 feet. About

25 or 30 pieces of the scaffold were stacked against the column. Each weighing approximately 60 pounds. When the pieces fell, a few of them hit plaintiff first and then the rest tipped over. Plaintiff was hit right above his left hip, in the torso area, pushing plaintiff to the ground.

Plaintiff stated that the pieces of scaffold were caused to tip over when the Rael workers were hoisting pieces of pipe over the top of the scaffolding. As the Rael workers were hoisting the pipes, a hook from one of the pipes was caught in the middle and it caused the scaffold to come down. The Rael workers had been told to move the pipes to the new location by Lendlease because that is the area where the pipes were located, and that was the area where the concrete was going to be poured the next day. Prior to the accident, plaintiff was directing workers as he was looking at the Rael workers moving the "scaffold." Plaintiff saw the scaffolding tip over before it made contact with him. He also saw when the pipe caused the scaffold to tip over.

In order to prevail in a Labor Law Section 240 case, a plaintiff must prove that (1) he is a member of the class of workers that the statute was designed to protect, (2) the statute was violated, and (3) the breach of duty was a proximate cause of plaintiff's injuries (*See, Koenig v. Patrick Construction Co.,* 298 N.Y. 313 [1948]; *Crawford v. Leimzider,* 100 A.D.2d 568, 473 N.Y.S2d 498 [2nd Dept. 1984]).

Section 240(1) of the Labor Law states:

> All contractors and owners and their agents … 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.

The Labor Law was enacted to protect workers by placing ultimate responsibility for safety practices on owners and contractors rather than on workers themselves (*See, Panek v. Albany County,* 99 N.Y.2d 452, 457 [2003]; *Martinez v. NYC,* 93 N.Y.2d 322 [1999]). The statute is construed liberally in favor of construction workers (*Rocovich v. Con. Ed.,* 78 N.Y.2d 509 [1991]), because such workers "are scarcely in a position to protect themselves from accidents" (*Koenig v. Patrick Constr. Co.,* 298 N.Y. 313, 319 [1948]; *Quigley v. Thatcher,* 207 NY 66, 68 [1912]). Violation of the statute results in absolute liability for injuries proximately caused as a consequence thereof (*Zimmer v. Chemung County Performing Arts, Inc.* 65 N.Y.2d 513 [1985]). The duty imposed by the statute is nondelegable, and when violation of same causes injury to a member of the class for whose benefit the statute was enacted, the owner, general contractor and their agents are liable (*Haimes v. N.Y. Telephone Co.,* 46 N.Y.2d 132 [1978]). This remains true even where the owner exercises no supervision, control or direction of the work (*Id.*).

Labor Law § 200 "codifies landowners' and general contractors' common-law duty to maintain a safe workplace" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505, 618 NE2d 82, 601 NYS2d 49 [1993]). "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 which the work was performed" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144, 950 NYS2d 35 [1st Dept 2012]). "Where … the accident arises … from a dangerous premises condition, a property owner is liable under Labor Law § 200 when the owner created the dangerous condition … or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9, 919 NYS2d 129 [1st Dept 2011] [internal quotation marks omitted]). "It is settled law that where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory

control over the operation, no liability attaches to the owner under the common law or under section 200 of the Labor Law (*Lombardi v. Stout,* 80 N.Y.2d 290, 604 N.E.2d 117, 590 N.Y.S.2d 55 [1992]). Similarly, where the dangerous condition arises from a subcontractor's methods or materials, "recovery against the … general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation" (*See Reilly v. Newireen Assocs.,* 303 A.D.3d 214, 756 N.Y.S.2d 192 [1st Dept. 2003]).

Labor Law § 241(6) "requires owners and contractors to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v. Curtis-Palmer Hydro-Elec. Co.,* 81 N.Y.2d 494, 501, 618 N.E.2d 82, 601 N.Y.S.2d 49 [1993]. "[T]he duty to comply with the Commissioner's regulations is nondelegable" (*Id.,* 81 N.Y.2d 502). "Labor Law § 241 (6) is, in a sense, a hybrid, since it reiterates the general common-law standard of care and then contemplates the establishment of specific detailed rules through the Labor Commissioner's rule-making authority" (*Id.* 81 N.Y.2d 503). Traditionally, provisions that merely incorporate the general common-law standard are treated differently from provisions containing specific commands and standards (*See Ross*, supra at 503). "The latter have been held to create duties that are nondelegable … while the former do not" (*Id.*).

Here, the Court finds that plaintiff has established his *prima facie* entitlement to summary judgment on the issue of liability on his *Labor Law § 240(1)* claim, as the defendants violated the statute when they failed to properly secure the pieces of scaffolding to prevent them from being tipped over and falling on plaintiff (See *Ruiz v. Phipps Houses,* 216 A.D.3d 522 [1st Dept. 2023] [plaintiff was entitled to summary judgment when a heavy scaffolding pole, which was approximately 10 to 14 feet tall, weighing 80 to 100 pounds, fell on his head and shoulder when coworker tried to hold the pole upright but could not do so because it was not secured] see also *Argueta v. 39 W 23rd St. LLC*, 236 A.D.3d 564 [1st Dept. 2025] [plaintiff properly awarded summary judgment by testifying that a metal post, which was 9 to 11 feet long and weighed approximately 150 pounds, was leaning against a truck and fell on him as he was kneeling].

Defendants' argument that the height deferential was *de minimus* is unavailing and fails to raise a genuine issue of fact. Plaintiff testified that the pieces of scaffolding were approximately 5 or 6 feet wide and 8 feet tall. There were about 25 or 30 pieces in total stacked vertically against the column, each weighing approximately 60 pounds. When the first 6 or so pieces fell on plaintiff, he was subsequently struck by the rest, causing him to fall to the ground. Even assuming that plaintiff is 6 feet 2 inches tall—as defendants argue—the Court does not find that the elevation differential was *de minimus* in light of the height of the pieces, the number of pieces that fell, and their aggregate weight (*Argueta*, supra, at 236 A.D.3d at 565).

Defendants' second argument that there is no evidence that the scaffold needed securing as they were being temporarily stored and were at the same level as plaintiff is also unavailing. Defendants rely on *Seales v. Trident Structural Corp.,* 142 A.D.3d 1153 [2nd Dept. 2016]); yet, *Seales* is a Second Department precedent whereas this Court will follow more recent First Department cases on this issue (e.g., *Ruiz, Argueta*)[1].

Therefore, plaintiff's motion for summary judgment on his *Labor Law § 240(1)* claim on the issue of liability must be granted and defendants' motion for summary judgment as to plaintiff's *Labor Law § 240(1)* claim is hereby denied.

[1] It is well-settled that where the First Department has addressed an issue, the trial court is not required to follow Second Department caselaw.

Next, plaintiff has moved for summary judgment on his *Labor Law § 200* claim as against Rael and Safway only. Plaintiff argues Safway is liable under *§200* because it created the dangerous condition by failing to properly secure the leaning scaffold. Plaintiff also argues that Rael is liable under *§200* because it controlled the injury-producing work that caused the accident when their employees were hoisting the pipes over the unsecured scaffold frames and their foreman had the authority to stop the work if it was being performed in an unsafe manner. In opposition, Rael and Safway claim they were not statutory agents for liability to attach under *§ 200* because they did not have the authority to supervise or control the injury-producing work.

Here, the Court finds that plaintiff's deposition establishes a *prima facie* showing that defendants Safway created the dangerous condition by stacking the scaffold pieces vertically and leaning against the column. Plaintiff's deposition also establishes Rael's employees controlled the means and methods of the injury-producing work when they were hoisting the pipes over the scaffold pieces, causing one of the pipes to be caught in between the scaffolds and tipping the same over onto plaintiff.

Defendants' argument that plaintiff, as the general labor foreman, was actually the individual who controlled the injury-producing work because he was in-charge of all Pinnacle workers fails to raise a genuine issue of fact. Specifically, defendants rely on two affidavits by Danny Bacheller, who was Pinnacle's Superintendent on the date of the accident to raise this issue. However, Mr. Bacheller's first affidavit dated June 24, 2022 states that he did not witness plaintiff's accident, he "do[es] not know who specifically was working in the area at th[e] time," and he "believe[s]" plaintiff was overseeing and "possibly" assisting the Pinnacle workers in "straightening up, stripping and general housekeeping of the scaffold on the 69th floor." Mr. Bacheller's second affidavit dated May 2024 also fails to raise a genuine issue of material fact to warrant denial of plaintiff's motion. Mr. Bacheller's statements therein are contradicted by his first affidavit where in the June Affidavit he stated that he didn't know who was working in the area, but in the May Affidavit he states that plaintiff's workers were stripping down the scaffold.

Defendants' next argument that plaintiff's deposition establishes that the subject scaffold was "just brought to the job" and therefore they were not on the site "long enough" to impute constructive notice on the defendants is also unavailing and does not raise an issue of fact where the plaintiff's deposition has demonstrated that Safway *created* the dangerous condition by stacking the scaffold pieces vertically against the column.

Therefore, since defendants have failed to raise a genuine issue of fact to overcome plaintiff's *prima facie* showing, plaintiff's motion for summary judgment as to liability on his *Labor Law § 200* claim must be granted, and defendants' motion is hereby denied.

Lastly, defendants seek dismissal of plaintiff *Labor Law § 241(6)* claim predicated on a myriad of Industrial Code sections which the defendants argue are too general or inapplicable to this matter. Plaintiff opposes this part of defendants' motion only to the extent of arguing that defendants violated Industrial Code *§ 23-1.7(a)(2)* and *§ 23-2.1(a)*. In reply, defendants argue that, because plaintiff did not oppose dismissal of the other Industrial Code sections, they should be dismissed. Defendants further contend that the remaining two sections should also be dismissed as inapplicable to this case.

Industrial Code *§ 23-1.7(a)(2)* states "Where persons are lawfully frequenting areas exposed to falling material or objects but wherein employees are not required to work or pass, such exposed areas shall be provided with barricades, fencing or the equivalent in compliance with this Part (rule) to prevent inadvertent entry into such areas."

Industrial Code *§ 23-2.1(a)* states, regarding storage of material or equipment "(1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions

and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare. (2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge."

Here, the Court finds that both sections are inapplicable and therefore must be dismissed. Regarding *§ 23-1.7(a)(2)*, plaintiff's accident did not take place in an area exposed to falling material or objects "wherein employees [were] not required to work or pass" and therefore no barricades, fencing or equivalent device was required. Regarding *§ 23-2.1(a)(2)*, the record does not establish that the pieces of scaffold were "stored upon a floor … in such quantity or of such weight as to exceed the safe carrying capacity of" the 69th floor and therefore it must be dismissed.

Regarding *§ 23-2.1(a)(1)*, the Court finds that issues of fact remain whether the defendants violated this section when they failed to store the pieces of scaffold "in a safe and orderly manner." Plaintiff's deposition established the proper way of placing the pieces of scaffold was horizontally and not vertically, leaning against a column.

Therefore, in light of the foregoing, defendants' motion seeking an order dismissing plaintiff's *Labor Law § 241(6)* claim is granted to the extent that all Industrial Code sections are dismissed, except for *§ 23-2.1(a)(1)*.

Accordingly, it is

ORDERED: Plaintiff's motion pursuant to *CPLR § 3212* seeking an Order granting him summary judgment on the issue of liability on his *Labor Law § 240* and *§ 200* claims is hereby granted;

ORDERED: Defendants' motion pursuant to *CPLR § 3212* seeking an Order granting them summary judgment dismissing plaintiff's claims is hereby granted, solely to the extent that all Industrial Code sections that form the basis of plaintiff's *Labor Law § 241 (6)* are hereby dismissed, except *§ 23-2.1(a)(1)*.

This constitutes the Decision and Order of this Court.

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10/10 /25
DATE

LETICIA M. RAMIREZ, 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