SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD G. LATIN** **PART** **46M**

Justice

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ORLANDO JOSE RODRIGUEZ PENA,

Plaintiff,

- v -

HARLEM-VALLEY HOUSING DEVELOPMENT FUND CORPORATION,

Defendant.

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INDEX NO. 154095/2023

MOTION DATE 02/24/2025

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HARLEM-VALLEY HOUSING DEVELOPMENT FUND CORPORATION

Plaintiff,

-against-

FER GENERAL CONSTRUCTION CORP

Defendant.

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Third-Party
Index No. 595779/2024

The following e-filed documents, listed by NYSCEF document number (Motion 002) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 95, 96, 97, 98, 99

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

Upon the foregoing documents, plaintiff Pena's motion pursuant to CPLR 3212 for an order granting partial summary judgment under his Labor Law § 240(1) claim (NYSCEF # 64) and defendant Harlem-Valley Housing Development Fund Corporation's ("Harlem-Valley Housing") cross-motion pursuant to CPLR 3212 for an order granting summary judgment to dismiss plaintiff's complaint in its entirety (NYSCEF # 84) are determined as follows:

Background

Plaintiff's accident occurred at 16-18 West 101st Street, New York, NY (NYSCEF # 65 at 4; NYSCEF # 82 at 1). Defendant Harlem-Valley Housing is the owner of the property at 16-18 West 101st Street, New York, NY (*see id.*). Plaintiff was hired by general contract Fer General Construction Corp. ("Fer") and alleged after plaintiff inspected the living room ceiling and he was directed by Fer to demolish a deteriorate living room ceiling (NYSCEF # 65 at 4). Pieces and portions of the ceiling had already fallen by the time plaintiff arrived (*see id.*). The ceiling was ten to eleven feet high (*see id.*). Plaintiff was tasked to measure the ceiling for demolition, which he climbed approximately six to eight feet on an A-frame ladder (*see id.;* NYSCEF # 82 at 3). Plaintiff alleges while standing atop the ladder, a part of the ceiling collapsed and stuck both the ladder and plaintiff's head, which caused the ladder to fall to the ground along with plaintiff (NYSCEF # 65 at 5).

Discussion

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Grossman v Amalgamated Haus. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Labor Law § 240(1)

The crux of the issue is whether plaintiff's alleged ceiling inspection prior to its demolition, when he was struck by ceiling debris, was within the scope of activities protected by the Labor Law.

The question of whether inspection work falls within the purview of Labor Law § 240(1) and § 241(6) must be determined on a case-by-case basis, depending on the context of the work (*see Prats v Port Auth. of New York and New Jersey*, 100 NY2d 878, 880 [2003]; *see also Nelson v Sweet Assoc., Inc.*, 15 AD3d 714, 715 [3d Dept 2005]).

A worker who carries out an inspection for solely investigatory purposes, when no covered activities have yet been undertaken and when those activities will be carried out by a separate contractor, does not fall within the Labor Law's protections (*see Martinez v City of New York*, 93 NY2d 322, 326 [1999] [finding plaintiff's work as an environmental inspector during phase one was merely investigatory, and was to terminate prior to the actual commencement of any subsequent asbestos removal work]; *see also Beehner v Eckerd Corp.*, 3 NY3d 751, 752 [2004]). The fact that the purpose of such an inspection may be to plan future covered activities, such as the identification of asbestos for subsequent removal in *Martinez,* or the inspection of the damaged chimney in *Doskotch* does not necessarily preclude an individual from Labor Law protections (*see Martinez*, 93 NY2d at 326); see also *Doskotch v Pisocki*, 168 AD3d 1174, 1176-78 [3d Dept 2019]).

The Court of Appeals has held that a test "focused on whether [a] plaintiff's work was an 'integral and necessary part' of a larger project ... improperly enlarges the reach of [Labor Law § 240(1)] beyond its clear terms" (*Martinez,* 93 N.Y.2d at 326). An employee will be deemed covered by the statute when the employee performs, for example, inspections that are on-going

and contemporaneous with other work on a construction project pursuant to a single contract, other tasks that are enumerated by the statute, and work for a contractor engaged to provide services enumerated by the statute (*see Prats*, 100 NY2d 878, 881 [2003]; *see also Fedrich v Granite Bldg. 2, LLC*, 165 AD3d 754, 758 [2d Dept 2018] [finding construction was still taking place at the site when the accident occurred, and the injured plaintiff's inspection work was essential and integral to the progress of the construction]; *see also Reisch v Amadori Const. Co., Inc.*, 273 AD2d 855, 855-856 [4th Dept 2000]).

In *Martinez,* an inspector suffered an injury while checking for asbestos in schools. The inspection was the prelude to an asbestos removal project (*see Martinez*, 93 NY2d at 324). The purpose of the examination was to determine whether conditions warranted removal work, and inspection was to end before any asbestos removal would begin (*see id.*). The City employed one contractor to carry out the inspection and another to do the removal (*see id.* at 25). The *Martinez* court held that the "merely investigatory" inspection phase fell outside section 240(1) (*see id.* at 26). The court emphasized that the separate, sequential phases involved different employees working for different contractors (*see id.*). Under those circumstances, the court held the inspections too remote from any covered work to fall within the statute's ambit (*see id.*).

In contrast, the work in *Prats* did not fall into a separate phase easily distinguishable from other parts of the larger construction project (*see Prats*, 100 NY2d at 881). In *Prats*, plaintiff's inspection was not in anticipation of the contractor's work, nor did it take place after the work was done (*see id.*). Instead, the inspections were ongoing and contemporaneous with the other work that formed part of a single contract (*see id.*). The employees who conducted inspections also performed other, more labor-intense aspects of the project. Moreover, the plaintiff in *Prats* worked for a company that was carrying out a contract requiring construction and alteration—activities

covered by section 240(1). This contrasts with the asbestos inspector in *Martinez,* who did not work for the company that would actually remove the asbestos (*see Martinez*, 93 NY2d at 326).

Here, a confluence of factors brings plaintiff's activity within the statute: his performing ceiling demolition, which demolition is an enumerated activity; his employment with a company engaged to carry out an enumerated activity; and his participation in demolition (*see Prats*, 100 NY2d at 883). More specifically, general contractor Fer employed plaintiff to perform work that involved an enumerated activity (ceiling demolition), and, under the facts of this case, plaintiff enjoyed the protection of section 240(1) even though he was inspecting on a ladder at the moment of the accident (*see id.*; *compare Nelson v Sweet Assoc., Inc.*, 15 AD3d 714, 715-16 [3d Dept 2005] [finding plaintiff was not covered by Labor Law § 241(6) because plaintiff conceded that his tasks were limited to providing inspections rather than the relevant enumerated activities of "construction, excavation or demolition"]).

Defendant Harlem-Valley Housing also asserts plaintiff was not involved in demolition and states:

> "at no point did plaintiff have the tools necessary to actually conduct demolition. In fact, the tools were not at the subject location but, rather, were at FER's office. Plaintiff did not gather the tools until after the accident, and even the, he did not partake in any demolition thereafter. Thus Plaintiff was not conducting demolition at the time of the accident; instead he was conducting an inspection, an activity not protected under Labor Law § 240(1)" (NYSCEF # 85 at 4).

In *Campisi*, which involved whether the plaintiff was conducting repair work, another protected activity enumerated under Labor Law §§ 240(1) and 241(6), the court held the "relevant inquiry is not whether the plaintiff picked up a tool to effect a repair, but whether he had been hired to take any part in the repair work" (*Campisi v Epos Contr. Corp.*, 299 AD2d 4, 8 [1st Dept 2002]).

Here, plaintiff was hired to take part in demolition work (*see id.*). In addition, defendants pointed out that Fer and plaintiff's supervisor Carlos Zhimnay instructed plaintiff to begin ceiling demolition (NYSCEF # 85 at 4; NYSCEF # 70 at 60).

Accordingly, it is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work (*see Prats*, 100 NY2d at 882). The Labor Law's intent was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts (*see id.*). Thus, plaintiff's actions are protected as an enumerated activity provided under Labor Law §§ 240(1) and 241(6).

In addition, Harlem-Valley housing violated Labor Law § 240(1) by failing to provide adequate safety devices to plaintiff, who was injured doing demolition work when the unsecured ladder he was using to remove a ceiling was struck by a piece of falling debris, causing him and the ladder to fall to the ground (*see Paz Avila v St. David's School*, 187 AD3d 460 [1st Dept 2020]; *see also Guaman v Ansley & Co., LLC*, 135 AD3d 492, 492 [1st Dept 2016]). Here, plaintiff was not required to show that the ladder he was using was defective (*see Paz Avila*, 187 AD3d at 460; *see also Pierrakeas v 137 E. 38th St. LLC*, 177 AD3d 574, 575 [1st Dept 2019]).

Labor Law § 241(6)

Labor Law § 241(6) provides, in pertinent part, that all areas where construction is being performed should provide reasonable and adequate protection and safety to persons employed or frequenting such areas. To prevail on a cause of action under § 241(6), however, a plaintiff must establish a violation of a specific safety regulation promulgated by the Commissioner of the Department of Labor (*see Lenard v 1251 Americas Assoc.*, 241 AD2d 391, 392 [1st Dept 1997], citing *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 505 [1993]; *see also Kulis v Xerox Corp.*, 231 AD2d 922, 923 [4th Dept 1996]).

In regard to plaintiff's Labor Law § 241(6) claim, defendant's motion is denied solely as to whether it is predicated on a violation of Industrial Code (12 NYCRR) § 23–1.7(a). 12 NYCRR 23-1.7(a) provides:

> "(a) Overhead hazards.
> (1) 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.
> (2) 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."

As stated above, plaintiff's activity constituted demolition, an enumerated protected activity under Labor Law §§ 240(1) and 241(6), which would require adequate protection from falling material. Here, plaintiff was told to conduct demolition, and the inspection was ancillary to the demolition (NYSCEF # 85 at 4; NYSCEF # 70 at 60). Thus, an issue of fact remains whether plaintiff was given "suitable overhead protection" (12 NYCRR 23-1.7). Accordingly, defendant's motion to dismiss plaintiff's Labor Law §241(6) is denied.

Labor Law § 200

Labor Law § 200 is a codification of the common-law duty of a landowner to provide workers with a reasonably safe place to work (*see Lombardi v Stout*, 80 NY2d 290, 294-95 [1992]; *see also Allen v Cloutier Const. Corp.*, 44 NY2d 290, 299 [1978]). It is settled law 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 *(see Lombardi*, 80 NY2d at 295).

Plaintiff's account of the accident establishes that the ceiling was deteriorating, and pieces of the ceiling had fallen when plaintiff arrived on the premise (NYSCEF # 70 at 55). Thus, it is incumbent on defendant Harlem-Valley Housing to demonstrate that it did not have actual or constructive notice of the very defective condition whose demolition it was contracting for, which it failed to do. Inasmuch as the condition of the ceiling is an issue that relates to a defect at the premises and not the means and methods of the demolition, it is immaterial whether they had control over the means and methods. Accordingly, defendant Harlem-Valley Housing's motion to dismiss plaintiff's Labor Law § 200 is denied.

Conclusion

In view of the above, it is

ORDERED that plaintiff's motion for summary is granted as to the Labor Law § 240(1) claim; and it is further

ORDERED that defendants' cross-motion for summary judgment to dismiss plaintiff's complaint is denied; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry on defendants within 14 days of the order being uploaded onto NYSCEF; and it is further

ORDERED that the parties shall appear for a settlement at the courthouse located at 71 Thomas Street, New York, NY 10013 on December 2, 2025 @11:00AM.

This constitutes the decision and order of the court.

10/16/2025
DATE

RICHARD G. LATIN, J.S.C.

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