SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART _21___

---------- X Index №. 21905/2020E

MARCO NATAL,

-against-

Hon. MATTHEW PARKER-RASO
Justice Supreme Court

WEBSTER BUILDING D, LLC., HPDC2 HOUSING DEVELOPMENT FUND COMPANY INC., and JOY CONSTRUCTION, CORP.,

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Plaintiff's Notice of Motion, Affirmation in Support, Memo of Law, and Exhibits	NYSCEF Doc No(s). 36-48
Defendants' Affirmation in Opposition, Memo of Law, and Exhibits	NYSCEF Doc No(s). 58-63
Defendants' Notice of Motion, Affirmation in Support, Memo of Law, and Exhibits	NYSCEF Doc No(s). 52-57
Plaintiff's Affirmation in Opposition and Reply and Memo of Law	NYSCEF Doc No(s). 64-65
Defendants' Affirmation in Reply	NYSCEF Doc No(s). 68

Upon the foregoing papers, plaintiff's motion for summary judgment (Motion sequence 002) and defendant's motion for summary judgment (Motion sequence 003) are resolved pursuant to the annexed decision and order.

Dated: 3/12/25

Hon. MPR
MATTHEW PARKER-RASO J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☑ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 21

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MARCO NATAL,

Plaintiff,

-against-

WEBSTER BUILDING D, LLC., HPDC2 HOUSING DEVELOPMENT FUND COMPANY INC., and JOY CONSTRUCTION, CORP.,

Defendants.

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Index No.: 21905/2020E

DECISION/ORDER

Present:
Hon. Matthew Parker-Raso
J.S.C.

Plaintiff's Notice of Motion, Affirmation in Support, Memo of Law, and Exhibits	NYSCEF Doc No(s). 36-48
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Defendants' Affirmation in Reply	NYSCEF Doc No(s). 68

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

Plaintiff moves for partial summary judgment on the issue of liability against defendants on the Labor Law §240(1) claim. Defendants oppose the motion and argue that the Labor Law §240(1) claim should be dismissed because the statute is not applicable to the facts of this case. Defendants also move for summary judgment dismissing plaintiff's Labor Law §241(6), §200 and common law negligence claims.[1]

Plaintiff commenced this action by filing a summons and complaint on February 6, 2020. The complaint alleges, *inter alia*, personal injuries as a result of an accident at a construction site. Defendants joined issue by service of an answer denying the allegations in the complaint and setting forth affirmative defenses. On November 29, 2021 a preliminary conference order was issued. Several status conferences were held, with discovery orders being issued at each. On

[1] For purposes of judicial economy Plaintiff's motion (Sequence 002) and Defendant's Motion (Sequence 003) are resolved pursuant to this single decision/order.

October 12, 2023 plaintiff filed Note of Issue and Certificate of Readiness certifying that discovery is complete and that this matter is ready for trial.

Plaintiff alleges that on February 22, 2017, he was lawfully present at a jobsite located at 3620 Webster Avenue, Bronx, New York. At the time plaintiff was employed as a laborer by non-party, Colgate Scaffolding (See Plaintiff's Exhibit H at pg. 17). According to plaintiff on that particular day, plaintiff's job was to construct a one box sidewalk shed for the entrance of the building. The purpose of the shed is to protect people walking in and out of the building from falling objects during construction (Id. at pg. 23). In order to construct the shed, a ten foot I-beam is laid down on the ground, then two legs are attached with clamps (Id. at 29). The resulting shape is a "U" with the legs facing up (Id. at 30). The process is repeated so that ultimately the two resulting "U's" can be joined together to form a box with two girts then installed to form an "X"(Id. at 31-33). On the day of the accident, after constructing the first "U", it was laid against the wall while construction of the second "U" took place (Id.). Plaintiff alleges that while he was bent down working on the second "U", the first "U" that had been laid against the wall fell over and struck him on the head, back, and shoulder (Id. at pg. 34). Plaintiff testified that this was the usual way the job was performed and straps were only used to secure the "U" if they were working on a hill, which they were not (Id. at pg. 37).

Plaintiff now moves for partial summary judgment on liability as to the Labor Law §240(1) claim. Plaintiff contends that the failure to provide any safety equipment to secure the steel poles to prevent them from falling onto plaintiff is a violation of Section 240(1), which imposes absolute liability on defendants.

In opposition, defendants argue that §240(1) is not applicable to the facts of this case because the accident was not the result of the force of gravity, a significant height differential, or due to any failure of a safety device enumerated in the section. Defendants further contend that the pole was not being hoisted or secured, nor was it required to be secured for the purpose of the undertaking. In support of their argument, the defendants submit the affirmation and report of licensed professional engineer Robert J. Flynn (the "Flynn Report"). The Flynn report sets forth in sum and substance that the task assigned to plaintiff did not implicate the protections of Labor Law §240(1) because no elevation change was present and the work was being performed at ground level. Flyyn avers that the practice of temporarily leaning partial sections against the wall

while assembling other sections is a common and acceptable practice in the construction of sidewalk sheds and further that no additional overhead protection would be expected or needed.

The proponent of a motion for summary judgment must tender sufficient evidence in admissible form to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law *(Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [NY 1986]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [NY 1985]). Once this showing has been made the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material facts which require a trial of the action *(Zuckerman v. City of New York*, 49 N.Y. 2d 557 [1980]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party (*Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 [1st Dept. 1989]). It is well settled that issue finding, not issue determination, is the key to summary judgment (*Rose v. Da Ecib USA*, 259 A.D. 2d 258 [1st Dept. 1999]). Summary judgment will only be granted if there are no material, triable issues of fact (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [NY 1957]).

Claims Under Labor Law §240 (1)

Labor Law § 240(1) imposes a duty upon owners and contractors to furnish proper safety devices and protection during construction and related activities. The statute aims to protect workers and to impose the responsibility for safety practices on those best situated to bear that responsibility (*Ross v. Curtis–Palmer Hydro–Elec. Co.,* 81 N.Y.2d 494, 500[1993]; *see Zimmer v. Chemung County Performing Arts,* 65 N.Y.2d 513, 520 [1985]). It is well established that the duty imposed by Labor Law § 240(1) is nondelegable and that an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work (*see, e.g., Haimes v. New York Tel. Co.,* 46 N.Y.2d 132, 136–137 [1978]).

Labor Law § 240(1) relates only to "special hazards" presenting "elevation-related risk[s]" (*Rocovich v. Consolidated Edison Co.,* 78 N.Y.2d 509, 514 [1991]). Where an injury results from a separate hazard wholly unrelated to the risk, no liability exists (*Nieves v. Five Boro Air Conditioning & Refrigeration Corp.*, 93 N.Y.2d 914, 916 [1999]). The relevant and proper inquiry

is whether the hazard plaintiff encountered was a separate hazard wholly unrelated to the hazard which brought about the need for a safety device in the first instance (*Nicometi v. Vineyards of Fredonia,* LLC, 25 N.Y.3d 90, 98 [2015]). Section 240(1) is not applicable unless the plaintiff's injuries result from the elevation-related risk and the inadequacy of the safety device. *Id.*

Here, plaintiff alleges that he was injured when he was struck on the head by a metal scaffolding pole. That plaintiff is unable to explain how the pole fell does not preclude summary judgment in his favor (*Fuentes v. YJL Broadway Hotel*, LLC, 210 A.D.3d 552, 553 [1st Dep't., 2022]). It is undisputed that at the time of the accident, there was no height differential between the plaintiff, who was working at ground level, and the pole, that was resting against the building at ground level. There is no bright-line minimum height differential that determines whether an elevation hazard exists (*Brown v 44 St. Dev., LLC*, 137 AD3d 703, 704 [1st Dept 2016]). However, contrary to defendants' argument, there is also no "same level rule" barring §240(1) recovery for injuries caused by falling objects that, at the time of the accident, were on the same level as the plaintiff (*See Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d 1, 9 [2011]).

Where a load positioned on the same level as the injured worker falls a short distance, Labor Law § 240(1) nevertheless applies if the load, due to its weight, is capable of generating significant force (*Grigoryan v. 108 Chambers St. Owner, LLC*, 204 A.D.3d 534, 534, [1st Dep't., 2022]). The First Department has previously held that unsecured scaffolding poles, such as the one at issue in this case, are able to generate large amounts of force during their descent (*See Ruiz v. Phipps Houses*, 216 A.D.3d 522 [1st Dep't., 2023] *affirming partial summary judgment for plaintiff on liability on §240(1) claim where plaintiff struck on the head with 10-14 foot scaffolding pipe that his coworker was unable to hold upright*).

Indeed, most recently in *Mejia v. 770 Broadway Owner, LLC,* No. 160479/16, 2025 WL 309415, at *1 (N.Y. App. Div. Jan. 28, 2025), the First Department modified the trial court's decision and granted plaintiff summary judgment on the Labor Law §240(1) under a similar fact pattern to what is presented here. A review of the record in *Mejia* reveals that plaintiff therein was also engaged in the construction of a sidewalk shed when he was struck by a scaffolding pole left leaning against a building. Defendants there argued that there was no elevation differential between plaintiff and the pole, and further that the pole was there because it was going to be used in the work that was being performed. Nevertheless, the Court held that the plaintiff's accident was

encompassed by §240(1) and further that the weight of the pipe and its descent were not de minimis.

Here, plaintiff establishes prima facie entitlement to partial summary judgment on liability as to its Labor Law §240(1) claim. Defendants fail to raise a triable issue of fact in opposition. The Flynn Report is insufficient to raise an issue of fact as it sets forth legal conclusions contrary to established case law. Further, defendants' expert's opinion that the practice of leaning incomplete sections of scaffolding against the wall accorded with industry customs and regulations is irrelevant under Labor Law § 240(1)(*Celaj v. Cornell*, 144 A.D.3d 590, 591[1st Dep't., 2016]). Plaintiff's own uncontroverted testimony established that there were securing devices available, that have been used previously, and would have prevented this accident. In accordance with the above, plaintiff's motion for partial summary judgment on the Labor Law §240(1) claim is granted. The branch of defendants' motion seeking to dismiss that claim is denied.

Turning to the remainder of defendants' motion. Defendants move to dismiss the Labor Law §241(6) and argue that the Industrial Code sections relied upon by plaintiff are either inapplicable, insufficiently specific to support a cause of action, or there was no evidence that they were violated. Defendants further argue that the Labor Law §200 and common law negligence claims should be dismissed because the accident was not caused by a dangerous or hazardous condition, defendants had no notice of any allegedly dangerous condition, and they did not direct, control or supervise the means or methods of plaintiff's work.

Plaintiff opposes and argues that the accident was caused by both the manner that the work was being performed, as well as a defective condition on the premises. Plaintiff contends that there was loose dirt on the ground because the sidewalk had not yet been constructed, and further that the defendants had constructive notice of that condition. Plaintiff further argues that there is a question of fact as to whether defendants exercised control over the work because the contract between defendants and plaintiff's employer sets forth a safety plan and gives defendants the authority to stop work if that plan is not being followed.

Claims Under Labor Law §241 (6)

Labor Law §241(6) is a "hybrid" statute, as the first sentence, "reiterates the general common-law standard of care," while the second sentence imposes a nondelegable duty with respect to compliance with rules of the Commissioner which contain "specific, positive

command[s]" (*Ross v. Curtis–Palmer Hydro–Elec. Co.,* 81 N.Y.2d 494, 503–504 [1993]). Thus, an owner or general contractor, "is vicariously liable without regard to [their] fault," and, "even in the absence of control or supervision of the worksite," where a plaintiff establishes a violation of a specific and applicable Industrial Code regulation (*Rizzuto v. L.A. Wenger Contr. Co., Inc.,* 91 N.Y.2d 343, 348–350, 670 N.Y.S.2d 816, 693 N.E.2d 1068 [1998]). In addition, Labor Law § 241 (6) requires that a plaintiff establish that the violation of the safety regulation was the proximate cause of the accident (*see Gonzalez v Stern's Dep't Stores*, 211 A.D. 2d 414 [1st Dep't., 1995]).

Here, a review of plaintiff's bill of particulars reveals that plaintiff alleges defendants violated 12 NYCRR §§'s 23-1.2, 23-1.5, 23-1.7(a)(1), 23-1.7(e)(1) and (2), 23-1.8, 23-1.16, 23-1.19, 23-2.1, 23-2.2, 23-2.4 and 23-2.5.

Initially, §23-1.7(a)(1) provides that workers should be provided with overhead protection consisting of planks and plywood, and further sets forth the building requirements for the same. Essentially, this provision mandates the placement of the sidewalk shed that plaintiff was building at the time of the accident. It is circular reasoning to argue that defendants failed to provide a scaffold for overhead protection during the construction of the scaffold for overhead protection. Notably plaintiff fails to cite any case law to support that contention. Accordingly, this Court finds that section is not applicable to the facts of this case.

§23-1.2 entitled "Finding of Fact" contains no concrete specifications. Provisions of the Industrial Code that reiterate general common-law standards and that do not mandate compliance with concrete specifications are not a basis for liability under section 241(6) (See *Ross v. Curtis-Palmer Hydro-Elec. Co.,* 81 N.Y.2d 494, 505 [1993]). Similarly, §23-1.5 predominantly sets forth general responsibilities of employers. However, the First Department has held that the directive in paragraph (3) can provide a basis for liability under Labor Law § 241(6)(*See Becerra v. Promenade Apartments Inc.*, 126 A.D.3d 557, 559 [1st Dep't., 2015]). Nevertheless, that section does not apply to the facts of this case because there are no allegations of defective or otherwise inoperable safety equipment. In fact, plaintiff testified that at the time of the accident, he was wearing work boots, a safety harness, a safety toolbelt, safety goggles, and a helmet (See Exhibit H at pg. 39-40). Given plaintiff's testimony regarding the personal protective equipment he was wearing at the time of the accident, there is also no evidence that defendants violated §23-1.8 which sets forth when such equipment should be provided.

Additional sections plead by the plaintiff have no applicability under the facts of this case. For example, § 23-2.5 deals with the protection of persons in shafts, but plaintiff herein was not working in a shaft. §23-2.2 sets forth different requirements for concrete work. No concrete work was being performed. §23-2.4 sets forth the flooring requirements in building construction. However, plaintiff's accident did not take place inside the building that was under construction, but rather outside of the building. Therefore the flooring requirements for that building do not form a basis for liability.

Plaintiff also alleges defendants violated §23-1.16 which sets forth the requirements for safety belts, harnesses, tail lines and lifelines. While plaintiff doesn't allege a specific subsection of §23-1.16, a review of the entire section reveals that the same relates to safety belts that are attached to hanging life lines, as opposed to a belt or strap securing a load on the ground. Accordingly, the facts of this case do not apply to the section.

§23-1.19 sets forth the regulations for constructing catch platforms. However, there is no evidence that there was a catch platform at the location of plaintiff's accident, making this section inapplicable. Moreover, the section expressly prohibits using catch platforms as working platforms or for the storage of material. Therefore, any argument that the failure to provide a catch platform contributed to plaintiff's accident is unavailing since it could not be used to work on or for storage. Defendants argue that plaintiff has failed to demonstrate any evidence that defendants violated §23-2.1, which refers to maintenance and housekeeping of passageways, walkways, and other thoroughfares. Plaintiff fails to address this argument in its opposition. 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 (Kempisty v. 246 Spring St., LLC, 92 A.D.3d 474, 475 (1st Dept., 2012). The Court notes that plaintiff also did not address §23-1.7(e)(1), which nonetheless is inapplicable because plaintiff's accident did not take place in a passageway.

Indeed, plaintiff's opposition only specifically asserts that plaintiff has adequately alleged a violation of Industrial Code §23-1.7(e)(2), which sets forth that:

> "The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed".

Plaintiff alleges that there are issues of fact as to whether defendants violated this section by failing to keep the work area free from dirt and debris based on plaintiff's testimony that there was loose dirt on the ground where the "U" structure was placed, which plaintiff alleges constitutes an unsafe condition that caused the scaffold to fall. The Court is not persuaded by this argument. §23-1.7(e)(2) is inapplicable because plaintiff, by his own testimony was working in an outdoor area where the ground was composed of dirt. Therefore, there cannot be an accumulation of the very thing the floor is composed of (*See Carrera v. Westchester Triangle Hous. Dev. Fund Corp.*, 116 A.D. 3d 585, 586 [1st Dep't, 2014]). Accordingly, this section must also fail.

As set forth above, plaintiff has failed to adequately allege and prove that defendants have violated any sections of the Industrial Code. Therefore, plaintiff cannot form a basis for liability under Labor Law §241(6) and any claims thereunder must fail. Accordingly, the branch of defendant's motion seeking summary judgment on plaintiff's Labor Law §241(6) claim is granted.

Turning to the branch of defendant's motion seeking summary judgment on plaintiff's Labor Law §200 and common law negligence claims.

Claims Under Labor Law §200 and Common Law Negligence Claims

Section 200(1) of the Labor Law codifies an owner's or general contractor's common-law duty of care to provide construction site workers with a safe place to work (*Perrino v. Entergy Nuclear Indian Point 3, LLC,* 48 A.D.3d 229, 230, 850 N.Y.S.2d 428 [2008]). Claims for personal injury under the statute and the common law fall into two broad categories: (1) those arising from an alleged defect or dangerous condition existing on the premises and (2) those arising from the manner in which the work was performed (*see Cook v. Orchard Park Estates, Inc.*, 73 A.D.3d 1263, 1264 [2010]).

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 (*Foley v. Consolidated Edison Co. of N.Y., Inc.*, 84 A.D.3d 476, 477, 923 N.Y.S.2d 57 [2011]). Where the accident was caused by a defective premises condition, rather than the method or manner in which work was performed, liability depends on whether the owner or contractor created or had actual or constructive notice of the hazardous condition (*See Bayo v. 626 Sutter Ave. Assoc., LLC*, 106 A.D.3d 648, 648, 966 N.Y.S.2d 390 [1st Dep't., 2013]).

As discussed hereinabove, plaintiff has failed to establish there was a hazardous condition present on the worksite. While plaintiff contends there was loose dirt on the ground, plaintiff's

deposition testimony establishes that he was working outdoors and that the ground was made of dirt. Moreover, plaintiff's affidavit (Exhibit I) setting forth the circumstances of his accident makes no reference to dirt. Accordingly, the plaintiff cannot sustain a Labor Law§ 200 cause of action based on an alleged premises condition.

As to the means and methods of the work, the Court is not persuaded by plaintiff's argument that the contract between plaintiff's employer and defendant, Joy Construction Corp., ("Joy") establishes that defendants had ultimate supervisory control over the work. General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled *the manner in which the plaintiff performed his or her work,* i.e., how the injury-producing work was performed (*Hughes v. Tishman Const. Corp.*, 40 A.D.3d 305, 306 [1st Dep't., 2007]). Here, plaintiff's testimony establishes that he only spoke to and received instructions from employees of Colgate on the day of his accident. Plaintiff never spoke to anyone from the general contractor or received instructions from them on how to perform his job (Exhibit D at pg. 45-47).

Additionally, defendants submit the deposition transcript of Willmark Osorio, Assistant Project Manager for Joy. Osorio testified that Joy did not provide any men, equipment, or tools to Colgate during the assembly of the sidewalk bridge (See Exhibit E at pg. 41-42.) Osorio further sets forth that Joy had no role in assembling or supervising the assembly of the sidewalk bridge (Id. at pg. 60-61). After reviewing the testimony, the Court finds that plaintiff has failed to establish that defendants exercised supervisory control over the operation (See *Ross v. Curtis-Palmer Hydro-Elec. Co.,* 81 N.Y.2d 494, 505 [1993]). Accordingly, plaintiff cannot sustain a cause of action under Labor Law §200 and the branch of defendants' motion seeking summary judgment on the same is granted.

Accordingly, it is hereby:

ORDERED, that Plaintiff's motion for summary judgment on liability as to its Labor Law §240(1) claim is granted; and it is further,

ORDERED, that the branch of Defendants' motion seeking summary judgment on the Labor Law §240(1) claim is denied; and it is further,

ORDERED, that the branch of Defendants' motion seeking summary judgment on the Labor Law §241(6) claim is granted; and it is further,

ORDERED, that the branch of Defendants' motion seeking summary judgment on the Labor Law §200 claim is granted; and it is further,

ORDERED that the Clerk of the Court is directed to enter partial judgment accordingly; and it is further,

ORDERED that all parties shall appear for a pre-trial conference on Monday, April 28, 2025 at 9:30 am in Room 405; and it is further,

ORDERED, that Plaintiff shall serve a copy of this Order with Notice of Entry upon Defendants within thirty (30) days of the upload of this Order in NYSCEF.

This constitutes the Decision and Order of this Court.

Dated: 3/12/25
Bronx, New York

Hon. Matthew Parker-Raso, J.S.C