Garduno v 207-01 Jamaica Ave. Partners, LLC
2025 NY Slip Op 35310(U)
March 11, 2025
Supreme Court, Queens County
Docket Number: Index No. 708091/2021
Judge: Chereé A. Buggs
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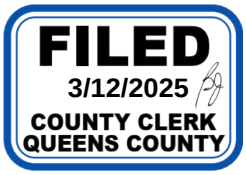

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

----------X Index No. 708091/2021

JOSE GARDUNO,

Plaintiffs,

Motion
Date: January 27, 2025

-against-

Motion Cal. No.: **15** and **16**

207-01 JAMAICA AVENUE PARTNERS, LLC., THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, THE NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, DISTRICT 29 PRE-K CENTER and GANNET FLEMING, INC.

Motion Sequence No.: **6** and **7**

Defendants.

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The following efile papers numbered EF 197-221, 253 and 255-258 submitted and considered on **motion sequence #6** by plaintiff JOSE GARDUNO (hereinafter referred to as "Plaintiff") seeking an order pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR") 3212 for summary judgment as to his causes of action alleging violation of Labor Law §§240(1) and 241(6) predicated on the defendants violation of Industrial code § 23-3.3[c] and the efile papers numbered EF 222-244, 247, 249, 251, 254 and 259 submitted and considered in support of **motion sequence #7** by defendants, 207-01 JAMAICA AVENUE PARTNER LLC, THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, THE NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY and GANNET FLEMING ENGINEERS AND ARCHITECTS, P.C. i/s/h/a GANNETT FLEMING, INC. (collectively referred to as "Defendants") seeking summary judgment pursuant to CPLR 3212 in their favor dismissing Plaintiff's Compliant with prejudice as to Labor Law §§ 200, 240(1) and 241(6) claims and common law negligence all seeking such other and further relief as this Court deems just and proper.

The branches of Plaintiff's motion seeking summary judgment on his Labor Law §§ 240(1) and 241(6) claims as it pertains to Industrial Code §23-3.3(c) are **granted,** and the branches of Defendants' motion that seek to dismiss the same are **denied**. Further, the branches of Defendants' motion seeking to dismiss Plaintiff's remaining Labor Law §§ 241(6), 200 and common law negligence claims are **granted**.

Papers

	Numbered
Motion sequence #6	
Notice of Motion - Affidavits - Exhibits	EF 197-220
Stipulation…….	EF 221
Stipulation…….	EF 253
Reply Aff.- Exhibits……...	EF 255-258
Motion sequence #7	
Notice of Motion- Aff in Supp and Opp-Exhibits…….	EF 222- 244
Aff in opp- Resp to SMF- Exhibits……...	EF 247, 249 and 251
Stipulation……..	EF 254
Aff in Reply……..	EF 259

I. The Facts and Allegations

The incident at issue allegedly occurred at the premises located at 207-01 Jamaica Avenue, Queens, NY. Plaintiff asserts that defendant, 207-01 JAMAICA AVENUE PARTNERS LLC (individually referred to as "Owners") owned the premises and leased the premises to NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY (individually referred to as "SCA") who assigned the lease to defendant NEW YORK CITY DEPARTMENT OF EDUCATION a/k/a The Board of Education of the City of New York. Plaintiff further contends that defendant GANNET FLEMING (individually referred to as "Gannett") was the project's construction manager who contracted with SCA to hire the projects subcontractors. Plaintiff's employer, non-party Ashnu International, Inc. (hereinafter "Ashnu") was the general contractor. The project consisted of the demolition and rehabilitation of the building. As a laborer for Ashnu, Plaintiff's work entailed demolition and trash collection.

On January 17, 2020 between 8:00 and 8:30 AM, Plaintiff was working with his co-workers Simon Morocho and Miguel Vasquez on the second floor. In continuation of their work the prior day, Simon and Miguel were removing a sheet rock wall and Plaintiff was collecting the debris to dispose of the same when he was struck by sheet rock causing him to sustain injuries. Plaintiff did not actually see the sheet rock hit him but provided testimony recalling the moments before he was hit. It is undisputed that the Plaintiff was wearing standard PPE at the time of the accident, including a hard hat.

At his 50-H, Plaintiff testified as follows regarding the incident:

Q: I appreciate your response. Your job was to collect the trash and place it in a pile approximately 10 to 12 feet from the wall, right?
A: Yes
Q: Before you placed it in that pile 10 to 12 feet from the wall, where was that garbage in relation to the other workers?

A: It was close to them. It was close to them like three or four feet way [sic[from the wall that they were working on. Because you have to remove it so they can continue demolishing.
Q: So right before your accident happened, when you were crouched over grabbing supplies, was that when you were three or four feet from the wall collecting the trash or was that when you were dropping the trash off ten to 12 feet from the wall?
A: No. I was at the place where I was dropping the trash, like 10 or 12 feet away.
(EF 211 pg 62-63 lines 4-25 and 2-3)

Q: I'm asking, at the time of your incident, were you fully upright or were you stooped over?
MR. McKenna: Objection to form. It could be something in between stooped over and standing upright.
A: No. As I will repeat, I was stooped over and I was getting up and I was turning around. So I wasn't completely upright.
Q: Where were you looking at the time of the incident?
A: Towards my workmates.
Q: How far down did the Sheetrock fall?
A:I don't know exactly, but I remember before the accident that I saw it being 16 feet up.
Q: Where did it hit you?
A: In my head.
(EF 211 pg 64-65 lines 20-25 and 2-15)

Plaintiff's co-worker, Simon Morocho signed a statement dated January 24, 2020 regarding the accident and later testified to its truthfulness. In part, the statement states:

I was pulling off sheetrock using a pipe when a separate piece of sheetrock, which was about 4ft x 4ft, came loose and fell from about 7 to 10 feet in height and struck Jose on the right side of his hardhat.

Within their motion papers, Defendants dispute the validity of this statement pointing to Simon's testimony that he did not remember if he saw the sheetrock prior to the date of the deposition as it is written in English.

Simon testified in part as follows at his deposition held on April 28, 2023:

Q: How did it fall?
A: I think I was pulling it. But sometimes those pieces of sheetrock they are already loose. So we don't have control. We don't know it's loose.
(EF 207 pg 49 lines 12-16)

Q: What did you mean by that? What did you mean by "I don't know why the piece of sheetrock became loose"?

A: That's because sometimes there are pieces that are loose while we doing this. I don't think that I was pulling out this piece of sheetrock that fell on him.
(EF 207 pg 62 lines 8-14)

Q: Where were you in relationship to where Mr. Garduno was? How far away was Mr. Garduno from where you were at the time of the accident?
A: I didn't notice. I only saw him when he was already on the floor.
Q: When you saw him when he was already on [sic] floor. How far was he when he was working on the floor from where you were working?
A: Maybe 15 feet. From 10 to 15 feet.
Q: And how did you make that determination that he was 10 to 15 feet?
A: So because I know that these things that's behind us. He can't go in front of us because we're removing sheetrock. So he went in the back of us and that distance was behind us 10 to 15 feet.
(EF 207 pg 50-51 lines 17-25 and 2-9)

Q: Were you directed to put it or store it in a certain place?
A: No.
Q: Was the debris from the demolition fenced off by any railing?
A: No. There is no fence, but in general it falls close to the wall that's in front of us.
Q: I think you probably answered this, but please let me ask this in a different way. Is there any kind of barricade for debris?
A: No.
(EF 207 pg 53 lines 24-25, pg 54 lines 2-17)

Q: Was there anything done at the demolition site to ensure the foundation of the walls to prevent collapsing?
A: No
(EF 207 pg 55 lines 14-17)

Plaintiff further contends that Defendants failed to inspect the subject sheetrock wall for any defects prior to the commencement of Plaintiff's work. Mariusz Tutkas (hereinafter "Mario") the foreman for Ashnu who was present at the project on the subject date testified, in part, as follows:

Q: Sure. At this project, were there daily walkthroughs by anyone at Ganett Fleming or the SCA?
A: Yeah.
Q: Who did the walkthroughs? Was it someone from the SCA, was it someone—
A: Usually- usually, Steve.
Q: So Steve did the walkthroughs, right?
A: Yes.
Q: And did Steve work for Ganett Fleming?

A: Yes.
Q: And did the walkthroughs occur on a daily basis?
A: Yes.
Q: And did they occur every day that you were on-site, from the day you started working on that project, until January 17, 2020?
A: Yes.
Q: How many walkthroughs occurred per day?
A: Is that, maybe 4 or 5.
(EF 209 pg 29-30 lines 24-25 and 2-23)

He further testified that Steve performed a walkthrough prior to the incident at some point prior to 7 AM.

Steve Kontarines of Gannett Fleming testified as follows:

Q: What is your position with Gannett Fleming Architect and Engineers?
A: Site supervisor.
Q: In general, as a site supervisor what do you do?
A: I review the drawings, make sure that the work is being performed as per the drawings, walk the site, make sure everyone is working safely and report back to my office.
Q: How long have you worked with Gannett Fleming Architecture?
A: Almost four years now.
Q: Four?
A: Yes.
Q: Is it fair to say that back in January of 2020, you worked for Gannett Fleming?
A: Yes.
Q: Were you also a site supervisor at that time in January of 2020?
A: Yes.
Q: Were your responsibilities in 2020 the same that you just told us now?
A: Yes.
(EF 210 pg 9-10 lines 11-25 and 2-9)

Q: Once you're on-site at this project and demolition is occurring, what is it that you do as a site supervisor?
A: I walk the site, I make sure that they're taking down the correct walls, everyone is working safely and take pictures, make a record and record it on my daily report.
(EF 210 pg 32 lines 5-11)

Q: When you say taking down the correct walls, are you talking about interior walls or exterior walls?
A: It depends on the project. If there are exterior walls that need to be removed, we'll make sure that they're actually removing the correct walls, so that's why you

walk the site prior to that to make sure that you know which walls are being removed, which walls are to remain, and don't take down the wrong ones.
(EF 210 pg 32-33 lines 23-25 and 2-9)

Q: What time did you get to the site on January 17, 2020?
A: 7:15. 7:30. At start time.
Q: When you arrived on that day, January 17, 2020, what was the first thing that you did?
A: I would enter every day from the entrance at 201st Street and do a walk through of the first floor, take some pictures, if needed. And I will go up the second staircase in the back to the second floor and complete my morning walkthrough for the second floor right when the work gets started.
Q: During those walkthroughs, would you perform a visual inspection of the site?
A: Visual, yes.
Q: If you deemed it necessary, if you saw a condition or something like that, would you take a picture at that time?
A: I would take a picture and would ask for it to be corrected.
Q: During the walkthrough on the date of the actual accident, did you see anything that caused you concern or have to take a picture of during that morning walkthrough?
A: No.
Q: Throughout that particular day, in addition to your morning walkthrough, when you arrived on-site would you perform any other walkthroughs that day?
A: It's a constant walkthrough all day. But let me clarify, though, during my morning walkthrough, at the location where the accident happened, I had not gotten there yet. I came up those stairs from the other side of the building and was on the other side of the building when that happened. I didn't walk there yet. It was during my morning walkthrough when it happened.
(EF 210 pg 44-45 lines 4-25 and 2-16)

Q: What were you told in terms of how this accident happened?
A: I was told that they were removing a wall and a piece of Sheetrock fell from above, dislodged and struck him on the head.
Q: When you say "removing a wall" were they taking down a wall, were they removing Sheetrock, were they removing brick; what was being taken down?
A: It was a Sheetrock wall, metal studs with Sheetrock veneer on it. It was a regular Sheetrock wall that they were removing as part of the demolition aspect of the work.
Q: When you said that a piece of Sheetrock dislodged, what did you mean by that?
A: It came off the wall up above.
Q: Was work being performed on the Sheetrock below that and then a piece of Sheetrock from above came down; what happened?
A: I don't know. I don't know if they were trying to remove the piece that hit him or they were removing something below that. I really don't know that.
(EF 210 pg 50-51 lines 4-25 and 2-3)

Q: Did you or your company provide any tools to Ashnu?
A: No
Q: In this location where the accident happened, were the men using any ladders or scaffolding?
A: I didn't notice. There was a ladder there. When I got there, everything was moved out of the way.
(EF 210 pg 55 lines 15-23)

Plaintiff argues that the Defendants had a duty to secure objects that could foreseeably fall during the demolition process which were not the target of the demolition. That, Simon's testimony demonstrates that the piece of sheetrock that struck Plaintiff was not the target of the demolition when it detached and hit Plaintiff, but he noted that it was common for sheetrock that was not the target of the removal to fall. Simon further testified that there was no fence or barricade in place to prevent the debris from projecting beyond a certain point during the demolition process. Plaintiff further contends that Defendants failed to inspect the subject wall prior to the incident which is supported by Steve Kontarines' testimony that he did not complete the portion of his morning walkthrough that included the subject wall prior to the incident.

In further support of the motion, Plaintiff presented the expert affirmation of Kathleen Hopkins a certified site safety manager. Hopkins reviewed the bills of particulars, site photographs, the SCA safety manual, interview of the Plaintiff, Plaintiff's typed statement, Plaintiff's deposition transcripts, Steve Kontarines' transcript, the typed statement and transcript of Simon Morocho, and the typed statement and transcript of Mario.[1]

Hopkins opined to a reasonable degree of professional safety certainty that Defendants violated Labor Law § 240(1) by failing to "furnish or erect, or cause to be furnished or erected, scaffolding stays, braces, irons, ropes and other devices that were so constructed, placed and operated as to give proper protection". Hopkins further opined that had Defendants provided proper protection and had the sheetrock that struck Plaintiff been secured by "stays, blocks, braces, irons, and/or other devices the incident would not have occurred and the failure to provide the same was the "direct, substantial and proximate cause" of Plaintiff's injuries. Hopkins explained that the piece that struck the Plaintiff was a part of an approximately 15-foot wall that fell uncontrolled and struck the Plaintiff. That, this gravity-based incident was the type of accident that Labor Law § 240(1) seeks to protect against.

As it relates to Labor Law § 241(6), Hopkins opined within a reasonable degree of professional safety certainty that the Defendants violated 12 NYCRR §23-3.3(c) by failing to ensure that continuous inspections were completed by competent persons to detect any hazards

[1] Defendants argue that Plaintiff failed to attach Hopkins' CV to the motion papers but the defect was cured in their Reply papers. This Court finds no prejudice as the Defendants were able to address Hopkins' opinions within their opposition papers. (*see* CPLR 2001).

including loosened sheetrock. That, this failure was the "direct, substantial, and proximate cause" of Plaintiff's injuries.

In support of their motion Defendants contend that they did not violate Labor Law §240 (1) as the piece of sheetrock that struck the Plaintiff was the object of the removal process. Thus, Defendants argue, any liability associated with preventing the sheetrock from falling when that was the objective of the demolition would be illogical (*see Willinski v. 334 E. 92nd Hous. Dev. Fund Corp.,* 18 NY3d 1 [2011]).

In support of this contention, Defendants point to Simon's initial testimony regarding the demolition, noted above, where he states " I think I was pulling it. But sometimes those pieces of sheetrock they are already loose. So we don't have control. We don't know it's loose." (*see* Simon's Deposition EF 207 pg 49 lines 12-16) Defendants further point to the affirmation of Steve, prepared after his deposition, which states in relevant part:

> It is also my understanding, based on the information provided to me on the date of the incident, that the piece of sheetrock that allegedly fell and struck Plaintiff was the target of demolition at the time it fell. At no time did I received any information that a separate piece of sheetrock, other than a piece that was actively demolished at the time, fell from the wall and struck Plaintiff.

Defendants further assert that the testimony of Simon suggests that the Plaintiff was not looking up and was not alert of his surroundings. Defendants further assert that Plaintiff's own testimony indicates his back was turned when he was struck by the sheetrock. Thus, Defendants assert Plaintiff was the sole proximate cause of the accident.

Defendants further contend that Labor Law §240(1) is inapplicable here where the sheetrock was neither being hoisted or secured at the time it fell.

Defendants further assert that they did not violate Industrial Code § 23-3.3(c). In support of this assertion, Defendants point to their expert, professional engineer, Michael Cronin's affirmation.

Cronin reviewed the testimony, incident reports, photographs and related construction documents in the formulation of his conclusion. As it relates to Labor Law 240(1) Cronin opined that neither slings, hoists, pulleys, irons, blocks nor ropes were necessary to "properly or safely perform the work." However, as it relates to stays, ladders and scaffolding Cronin stops short of stating that these devices were not necessary to properly or safely perform the work. Cronin opined that stays were not required "by any applicable code or industry standard". As it relates to scaffoldings and ladders, Cronin opined that they create their own height related risk that would need to be mitigated for safer performance of the work. As it relates to hangers and braces Cronin opined that the usage of these devices would be "counterintuitive, inappropriate and inapplicable". In general, Cronin opined that that the employment of any of the aforementioned safety "devices to the task of active demolition of a non-structural sheetrock wall, would have not only been

contrary to standard construction practice and accepted industry standard, but would also have defeated the purpose of the work being performed".

With regard to Labor Law § 241(6) specifically Industrial Code § 23-3.3 (c), Cronin opined that the work being performed does not fall under the definition of demolition work as defined by Industrial Code § 23-1.4(b)(16).
Industrial Code § 23-1.4(b)(16) states:

> (16) **Demolition work.** The work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment.

Cronin opined that the work being performed prior to the subject accident was simply removal of a single non-structural sheetrock partition wall. Furthermore, Cronin opined that the evidence indicates that Gannett performed routine daily inspections of the worksite and there was no evidence that there were any issues with the subject wall prior to the incident. That, neither shoring nor bracing is required for the removal of sheetrock and use of the same would have been "entirely, inappropriate, illogical and inapplicable for such purpose".

II. Discussion

A. Labor Law §240

"[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 ***." (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986].) "Where there is no statutory violation, or where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery under Labor Law § 240(1) ***." (*Treu v. Cappelletti*, 71 AD3d 994, 997 [2nd Dept 2010]; *Robinson v. East Medical Center, LP*, 6 NY3d 550 [2006])

Labor Law § 240(1) 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." (*See Blake v. Neighborhood Housing Services of New York City, Inc*. 1 NY3d 280 [2003].)

"The purpose of Labor Law § 240(1) is to protect workers from elevation-related risks." (*Reinoso v. Ornstein Layton Mgmt., Inc*., 19 AD3d 678, 678 [2nd Dept 2005.) Labor Law §240(1) protects workers against hazards "related to the effects of gravity where protective devices are

called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." (*Rocovich v. Consol. Edison Co.*, 78 NY2d 509, 514 [1991]; *Yost v. Quartararo*, 64 AD3d 1073 [3d Dept 2009].)

The duty imposed upon contractors and owners pursuant to Labor Law § 240(1) is nondelegable (*see, Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]), and a violation of the duty results in absolute liability. (*Wilinski v. 334 East 92nd Housing Development Fund,* 18 NY3d 1 [2011]; *Bland v Manocherian*, 66 NY2d 452 [1985]; *Jamindar v. Uniondale Union Free School Dist*., 90 AD3d 612 [2nd Dept 2011] ; *Paz v. City of New York*, 85 AD3d 519 [1st Dept 2011].) "[W]here an accident is caused by a violation of the statute, the plaintiff's own negligence does not furnish a defense." (*Cahill v. Triborough Bridge and Tunnel Authority,* 4 NY3d 35, 39 [2004].) Comparative negligence is not an issue which can be raised by a defendant in a claim based on Labor Law §240(1) . (*Dean v. City of Utica*, 75 AD3d 1130 [4th Dept 2010]; *Gizowski v. State of New Y ork*, 66 AD3d 1348 [4th Dept 2009].) A defendant cannot avoid liability unless the plaintiff worker's own actions were the sole proximate cause of the accident. (*Orellana v. 7 W. 34th St., LLC*, 173 AD3d 886, [2nd Dept 2019]; *Cahill v. Triborough Bridge and Tunnel Authority, supra; Blake v. Neighborhood Housing Services of New York,* 1 NY3d 280 [2003].)

In support of the motion, Plaintiff points to several cases including *Charles T. Zimmer, Jr. v. Chemung County Performing Arts, Inc. et al.* (65 NY2d 513, 519 [1985]) where the court considered the "extent to which Labor Law § 240(1) imposes liability upon an owner or contractor who has failed to provide safety devices for workers at a building worksite, and the absence of such devices is the proximate cause of injury to a worker." In *Zimmer,* the plaintiff was the connector in a crew that was erecting a steel skeleton who got injured when "in the manner usually employed by connectors" he "scaled a 31-foot vertical column in order to direct a crane operator who was raising a horizonal beam to a position where plaintiff could reach it and effect the connection with the vertical column" (*id*). However, while plaintiff was pulling himself on top of the beam he lost his grip and fell landing in an excavation outside of the structures perimeter (*id*).

Evidence indicated that ladders were present, but none were erected to assist plaintiff in this task and no safety devices were erected or provided to the plaintiff (*id*). In opposition, defendants presented evidence, that safety devices such as "netting, metal decking and lifelines" are not normally utilized during the early stages of construction such as was the case when plaintiff was injured.

In *Hunt v Spitz Constr. Co.,* the second case before the court, the plaintiff was injured when he fell 25 feet from a flat roof upon which he was welding corrugated decking. (*id* at 520). Once again, it was undisputed that safety devices were not provided to plaintiff and defendants presented evidence that "devices such as scaffolding, nets, safety lines and safety belts were never used on the type of building involved" (*id*).

The court found "… where an owner or contractor fails to provide any safety devices, liability is mandated by statute without regard to external considerations such as rules and regulation contracts or custom and usage…where injury is allegedly caused through violation of section 240(1), which establishes its own unvarying standard, evidence of industry practice is immaterial" (*id* at 523). "Neither section 241(6) nor section 200, in contrast to section 240 (1), is self-executing, but rather, both require reference to outside sources to determine the standard by which a defendant's conduct must be measured" (*id).* While plaintiff must show that the violation of section 240(1) was a proximate cause of the accident, "where there is no view of evidence to support a finding that the absence of safety devices was not a proximate cause of the injuries, the court may properly direct a verdict in plaintiff's favor" (*id* at 524).

Here, Defendants argue that the portion of sheetrock that fell was part of a wall that was slated for demolition at the time of the incident. This argument is only relevant to the extent that Defendants can establish that imposition of liability "for failure to provide protective devices to prevent the walls or objects from falling, when their fall was the goal of the work, would be illogical." (*Willinski* at 11). As noted above, Defendants' expert Cronin fails to establish that the use of a stay, ladder or scaffolding was not required to perform the work safely and that usage of the same would be, in his words, "counterintuitive, inappropriate and inapplicable". Therefore, Defendants' argument fails.

Defendants further contend that the evidence indicates that Plaintiff's inattentiveness was the sole proximate cause of the accident. This argument is unpersuasive as Defendants rely upon the testimony of Simon, who testified that he was unaware of the Plaintiff's presence prior to the accident. Furthermore, Defendants' reliance upon Plaintiff's testimony that his back was turned prior to the accident is unsupported by Plaintiff's testimony that he was looking in the direction of his co-workers when the incident occurred. Furthermore, Plaintiff's foreman Mario, testified as follows:

Q: How far was Jose when you saw him on the ground, from where Simon was removing the sheetrock? What was the distance?
A: 6 feet.
Q: Okay. In your opinion, as a supervisor, was that a proper distance to be?
A: Yes.
(EF 209 pg 53 lines 14-22)

Defendants remaining contentions related to regulations and industry standard are irrelevant as it relates to violation of Labor Law § 240(1).

B. Labor Law § 241(6)

Labor Law §241 (6) provides:

> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

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]" (see *Bazdaric v Almah Partners LLC*, 41 NY3d 310, 317 [2024]; citing *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 501-502 [1993]*; see also Toussaint v Port Auth. of New York and New Jersey*, 38 NY3d 89, 93 [2022]). 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" (*see Toussaint v Port Auth. of New York and New Jersey*, 38 NY3d 89, 93 [2022]; citing *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 501-502 [1993]; *see also St. Louis v Town of N. Elba*, 16 NY3d 411, 413 [2011]). "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" *(see Bazdaric v Almah Partners LLC*, 41 NY3d 310, 317 [2024]; citing *Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 350 [1998]; *Toussaint v Port Auth. of New York and New Jersey*, 38 NY3d 89, 94 [2022]; *Nostrom v A.W. Chesterton Co.*, 15 NY3d 502, 507 [2010]).

Industrial Code § 23-3.3 (c) states:
(c) Inspection. During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means.

In opposition to Defendants' contention that Plaintiff was not engaged in demolition at the time of the incident Plaintiff cites to *Prats v Port Auth. of NY & NJ* (100 NY2d 878, 880 [2003]) where the question before the court was whether the plaintiff's incident fell under the protections afforded by Labor Law § 240(1). The court found a determination of whether an incident falls under the guise of Labor Law § 240(1) is determined on a case-by-case basis dependent on the context of the work (*id* at 883). In rendering its decision, the court considered the plaintiff's position, his routine enumerated activity, the activity his company was engaged to carry out and his participation with the same, and where the injury occurred (*id*).

Here, Plaintiff was a laborer engaged in work associated with demolition of walls at the subject premises and Plaintiff's employer was the general contractor. Steven of Gannet testified as follows, in relevant part:

Q: Overall, what was the scope of the work that was to be performed?
A: On the project, we basically emptied out everything, we gutted all the interior, first floor and second floor, repaired floors and rebuilt a school put up new walls, A/Cs, new electrical; new everything.
(EF 210 pg 22 lines 5-11)

Q: After you reviewed the drawings to get ready for the work, what is then the first thing that happens on the project actually to begin the reconstruction of this building?
A: I don't understand. You mean work wise?
Q: Yes. Work wise.
A: The contractor will show up and get to work, start doing demolition.
Q: Which company was that?
A: Ashnu.
(EF 210 pg 29-30 lines 16-25 and 2)

Based upon the evidence the facts support a finding that the Plaintiff was engaged in demolition.

Here, it is undisputed that Steve, the site supervisor, testified that, on the date of the accident, he did not perform a walkthrough of the area where Plaintiff was injured prior to the injury. "The thrust of this subdivision is to fashion a safeguard, in the form of 'continuing inspections,' against hazards which are created by the progress of the demolition work itself" (*Monroe v City of New York,* 67 AD2d 89, 100 [2d Dept 1979]). However, the analysis does not stop there "because the failure to make diligent inspection constitutes negligence only if such inspection would have disclosed the defect" (*id* at 723). Defendants' expert Cronin does not assert that a routine inspection would have been insufficient to reveal the loose sheetrock that allegedly struck the Plaintiff. While Cronin asserts that shoring and bracing would have been "inappropriate, illogical and inapplicable" the Industrial Code does not limit protection from hazards to the same but allows for "other effective means" as well.

C. Labor Law §200

"Labor Law § 200 codifies the common-law duty ... to provide employees with a safe place to work" (*see Mushkudiani v Racanelli Constr. Group, Inc.*, 219 AD3d 613, 616 [2d Dept 2023]; *see also DeFelice v Seakco Const. Co., LLC*, 150 AD3d 677, 678 [2d Dept 2017]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*see Id.* at 616; *see also DeFelice v Seakco Const. Co., LLC*, 150 AD3d 677, 678 [2d Dept 2017]). "[W]hen a claim arises out of an alleged dangerous

premises condition, a property owner or general contractor may be held liable in common-law negligence and under Labor Law § 200 when the owner or general contractor has control over the work site and either created the dangerous condition causing an injury, or failed to remedy the dangerous or defective condition while having actual or constructive notice of it" (*see Id.* at 616). "General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law § 200" (*see Dos Santos v STV Engineers, Inc.*, 8 AD3d 223 [2d Dept 2004]).

Here, the evidence indicates that the Defendants only exercised "supervisory authority" (*id*). Plaintiff failed to raise a triable issue of fact as to the same. Therefore it is,

ORDERED, that the branches of Plaintiff's motion seeking summary judgment on his Labor Law §§ 240(1) and 241(6) claims as it pertains to Industrial Code §23-3.3(c) are **granted,** and the branches of Defendants' motion that seek to dismiss the same are **denied**; and it is further

ORDERED, that the branches of Defendants' motion seeking to dismiss Plaintiff's remaining Labor Law §§ 241(6), 200 and common law negligence claims are **granted**.

The foregoing constitutes the decision and Order of this Court.

Dated: March 11, 2025

Hon. Chereé A. Buggs, JSC

FILED
3/12/2025
COUNTY CLERK
QUEENS COUNTY