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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN, J.S.C. PART 57

Justice

Index Number : 102473/2009

MERCADO, GREGG M.

VS.

CATHNESS LONG ISLAND LLC

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for summ judgmt

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion & cross-motions are determined pursuant to the accompanying decision/order dated 4-2-12.

FILED
APR - 5 2012
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4-2-12

MARCY S. FRIEDMAN, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

GREGG M. MERCADO and CATHERINE T. MERCADO,

Plaintiffs,

Index No.102473/2009

- against -

CAITHNESS LONG ISLAND, LLC, SIEMENS ENERGY INC. f/k/a SIEMENS POWER GENERATION, INC., FRESH MEADOW MECHANICAL CORP., F&S POWER, LLC, and F&S POWER CORP.,

DECISION/ORDER

Defendants.

CAITHNESS LONG ISLAND, LLC, SIEMENS ENERGY, INC., and F&S POWER, LLC,

Third-party Plaintiffs,

- against -

FRESH MEADOW POWER, LLC,

Third-party Defendant.

In this Labor Law action, plaintiff seeks damages for injuries sustained on November 24, 2008 while working as a boilermaker. Defendants Fresh Meadow Mechanical Corp. and F&S Power Corp. (FMMC and F&S Power, respectively) (the FMMC defendants) move for summary judgment dismissing the complaint and all cross-claims. Plaintiff cross-moves for summary judgment on his Labor Law §240(1) and §241(6) claims. Third-party defendant Fresh Meadow Power, LLC (Fresh Meadow) cross-moves for summary judgment dismissing plaintiff's Labor Law §§240(1) and 241(6) claims and the claims of the Caithness defendants - Caithness Long

Island LLC (Caithness), Siemens Energy, Inc., formerly Siemens Power Generation, Inc. (Siemens), and F&S Power, LLC (F&S, a distinct entity from F&S Power Corp.) - for contractual and common law indemnification against third-party defendant Fresh Meadow.

Plaintiff has stipulated to discontinue this action as to F&S Power. (See Ex. L attached to the FMMC Aff. in Support.) The Caithness defendants oppose the FMMC defendants' motion to dismiss plaintiff's claims against F&S Power but offer no documentary evidence to support their assertion that F&S Power was involved in the project. This branch of the FMMC defendants' motion is granted.

Plaintiff was employed as a boilermaker by Fresh Meadow. (P.'s Dep. at 18, Ex. 2 to P.'s motion.) By contract dated April 12, 2007, FMMC hired Fresh Meadow as a subcontractor. (Ex. 12 to P.'s motion.) Fresh Meadow employed the boilermakers at the site. (Fresh Meadow Aff. in Support of cross-motion, ¶ 15.) By contract dated April 12, 2007, FMMC was hired by F&S as a subcontractor. (Ex. 4 to P.'s motion.) F&S was hired by Siemens Power Generation, Inc. as the general contractor under a May 1, 2007 construction agreement. (Ex.11 to P.'s motion.) Siemens was hired by Caithness as the engineering, procurement, and construction (EPC) contractor. (Caithness Aff. in Opp. to FMMC's motion and P.'s cross-motion, ¶¶ 6, 21.) Caithness was the owner of the energy center being built. (Id., ¶ 6.)

At the time of the accident, plaintiff was working on a project to build a new power plant. (P.'s Dep. at 27.) According to plaintiff, he was injured when a pipe fell from above and hit him on the head. (Id. at 43-44.) As discussed more fully below, the parties dispute what caused the pipe to fall.

The standards for summary judgment are well settled. The movant must tender evidence,

by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

Labor Law §240(1)

Defendant FMMC moves for summary judgment dismissing plaintiff's §240(1) claim on the ground that it was a subcontractor who exercised no supervisory control or authority over the work being done when plaintiff was injured, and that it was therefore not a statutory agent for purposes of liability under Labor Law §240(1). (FMMC Aff. in Support, ¶ 16.) It also argues that plaintiff was the sole proximate cause of his injury. Plaintiff cross-moves for summary judgment on his Labor Law §240(1) claim. Third-party defendant Fresh Meadow seeks summary judgment dismissing plaintiff's §240(1) claim on the ground, among others, that fact issues remain as to whether the object that struck plaintiff was being hoisted or secured at the time of injury. (See Fresh Meadow Aff. in Support, ¶ 4.) Fresh Meadow further claims that plaintiff was the sole proximate cause of his injury in choosing not to wear a hard hat when one was "provided" to him. (Id., ¶ 9.)

Labor Law §240(1) provides:

> 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 purpose of the section is to protect workers by placing the 'ultimate responsibility' for worksite safety on the owner and general contractor, instead of the workers themselves." (Gordon v Eastern Ry. Supply, Inc., 82 NY2d 555, 559 [1993]; Rocovich v Consolidated Edison Co., 78 NY2d 509, 513 [1991].) "Thus, section 240(1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury." (Gordon, 82 NY2d at 559.)

It is well-settled that "an accident alone does not establish a Labor Law §240(1) violation or causation." (Blake v Neighborhood Hous. Servs. of New York City, Inc., 1 NY3d 280, 289 [2003].) In order to establish liability under §240(1), it must be shown that the statute was violated and that the violation was a contributing cause of the plaintiff's injury. (Id. at 287-289.)

While section 240(1) should be construed liberally so as to effectuate its purpose, it is well settled that the statute applies only to "elevation-related hazards." (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500 [1993]; Rocovich, 78 NY2d at 514.) The hazards contemplated by the statute "are those 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, 78 NY2d at 514; Narducci v Manhasset Bay Assocs., 96 NY2d 259 [2001].) General hazards of the workplace are not within the contemplation of Labor Law §240(1). (Id. at 269.)

As a threshold matter, the court rejects third-party defendant Fresh Meadow's contention that the protection of Labor Law §240(1) does not apply because fact issues exist as to whether the pipe was being hoisted or secured at the time of plaintiff's accident. It is well settled that falling object liability "is not limited to cases in which the falling object is in the process of being hoisted or secured." (Quattrocchi v F.J. Sciame Constr. Co., 11 NY3d 757, 758-759 [2008]; see also Outar v City of New York, 5 NY3d 731 [2005], affg 11 AD3d 593 [2004]; Vargas v City of New York, 59 AD3d 261 [1st Dept 2009].)

The court further rejects defendants' claim that the cause of the accident is speculative. While the exact cause of the fall of the pipe is not known, it is undisputed that the pipe fell from above and injured plaintiff. (P.'s Dep. at 57.) As noted above, plaintiff testified that he was hit by a pipe that fell from the "top of the unit," which he further describes as "ninety feet up." (P.'s Dep. at 49-50.) Plaintiff had previously seen the type of pipe that hit him, which he describes as a three-foot pipe with a 90-degree elbow welded on it, when he worked "on top of the unit." (Id. at 44, 51.) Plaintiff admitted he did not see the particular pipe that hit him prior to the accident, but stated that a co-worker showed the object to plaintiff after it came into contact with his head. (Id. at 42, 44.)

Plaintiff's testimony is undisputed. Lawrence Britt, Caithness' construction manager, testified that he was told soon after the accident that "a piece of pipe had fallen from fairly high up on the HRSG (heat recovery steam generator) and struck a welder in the head." (Britt Dep. at 6, 37, Ex. 6 to P.'s motion.) Mr. Britt estimated that the top of the HRSG is about one hundred and twenty feet high. (Id. at 38.) He further identified the pipe that hit plaintiff as the type of pipe with which steamfitters were working on the top of the HRSG at the time of plaintiff's

accident. (Id. at 44.) The pipe identified as the pipe that hit plaintiff bears a sticker with the name of the local steamfitters union. (Ex. D to Caithness Aff. in Opp.) Mr. Britt observed a "gap in the toe board" on the elevated platform above the area in which plaintiff was working. (Britt Dep. at 39.) He described a toeboard as "a barrier between the floor elevation and it's usually a four-inch barrier and this would keep . . . things from falling off the grating." (Id.) Toeboards are installed "wherever you have a walkway grating and you're above ground. . . ." (Id.)

It is further noted that Wayne Smith, FMMC's corporate safety director, testified that he was told by Mr. LiPuma, a member of the safety staff hired by Siemens, that plaintiff was injured by "a pipe that had fallen from above, and that he was wearing no hard hat." (Smith Dep. at 13, 40, Ex. 8 to P.'s motion.) Mr. Smith stated that it was his understanding that the toeboard in question was not installed at the time of the incident. (Id. at 58.) Mr. Smith identified a 24 to 26 inch piece of drain pipe as the pipe that fell and struck plaintiff. (Id. at 48.) He stated that "[i]t was determined to have fallen from the catwalk above located at the top of the HRSG," which he estimated to be about ninety feet high. (Id. at 49.) The accident report filed by Mr. Smith stated that "[a] 30 inch section of 3/4 inch drain pipe (7 lbs. approx.) fell from approximately 100 feet striking [plaintiff] on the top of his head. . . " (Ex. 10 to P.'s motion.) The section of the accident report entitled "Why did it happen" states: "A 2-3" gap existing between the drum house wall and the flooring permitted the pipe length in question to fall."

Even without consideration of Mr. Smith's accident report, the court finds that the testimony of plaintiff and the testimony of Mr. Britt make a prima facie showing, unrebutted by defendants, that plaintiff was hit by a pipe that fell from above. Fresh Meadow's claim that the

source of the pipe is unknown (see Fresh Meadow Aff. in Support, ¶ 24) is based on the affidavit of Wayne Smith submitted in support of Fresh Meadow's motion. The Smith affidavit is inconsistent with his above-cited deposition testimony and his accident report. It is well settled that an affidavit that is inconsistent with a party's prior position and tailored to avoid the consequences of deposition testimony should be rejected. (Nicholas v New York City Hous. Auth., 65 AD3d 925 [1st Dept 2009]; DeLeon v New York City Hous. Auth, 65 AD3d 930 [1st Dept 2009].) Moreover, neither Fresh Meadow nor any of the other defendants submits any evidence in support of the speculative assertion that the pipe was thrown rather than fell. On the contrary, while the court does not and need not make any finding of fact on the issue, the court notes that the sole evidence in the record as to the cause of the fall is that the pipe fell through a missing part of the toe board on the HRSG unit.

The court accordingly holds that the manner in which the accident occurred falls within the purview of Labor Law §240(1). (See Zuluaga v P.P.C. Constr., LLC, 45 AD3d 479 [1st Dept 2007] [partial summary judgment was proper where plaintiff was struck by a pipe that fell several floors]; Rosa v Macy Co., 272 AD2d 87 [1st Dept 2000] [falling of a heavy object from 25 or 20 feet is precisely the sort of elevation-related risk that §240 was intended to address].)

The court further rejects FMMC's and Fresh Meadow's contention that plaintiff's failure to wear a hard hat was the sole proximate cause of his injury. It is well settled that comparative negligence is not a defense to a Labor Law §240(1) claim. (Gordon, 82 NY2d at 562.) In order for a plaintiff's acts to constitute a defense to a §240(1) claim, such acts must have been "the sole proximate cause" of the plaintiff's injuries. (Weininger v Hagedorn & Co., 91 NY2d 958, 960 [1998], rearg denied 92 NY2d 875; Blake, 1 NY3d at 290.) "[I]f a statutory violation is a

proximate cause of an injury, the plaintiff cannot be solely to blame for it." (Id.)

Plaintiff acknowledged that his employer provided him with a plastic hard hat. (Id. at 28.) However, he testified that at the time of his injury, he was wearing a welding hood that covered his face and eyes, and that he was not wearing a hard hat because the welding hood would not fit with the hard hat. (Id. at 40-41, 55.) Mr. Smith testified that there was a type of welding shield, as opposed to a welding hood, that could fit with the hard hat. (Smith Dep. at 67.)

Significantly, however, a hard hat is not an enumerated safety device under Labor Law §240(1). As the Appellate Division of this Department has held: "A hard hat is not the type of safety device enumerated in Labor Law §240(1) to be constructed, placed and operated, so as to give proper protection from extraordinary elevation-related risks to a construction worker." (Singh v E. 96 Realty Corp., 291 AD2d 216 [1st Dept 2002]; Rosa, 272 AD2d 87, supra.) As there is evidence in the record that a toe board was a type of device that could have prevented a falling pipe, but that a part of the toe board was missing in the area above plaintiff's work space, plaintiff's failure to wear a hard hat cannot have been the sole proximate cause of the injury.

The court has considered defendants' remaining contentions as to the inapplicability of Labor Law §240(1) and finds them to be without merit. The court accordingly holds that plaintiff is entitled to partial summary judgment as to liability on his §240(1) claim against Caithness as the owner, Siemens as the EPC contractor, and F&S as the general contractor.

FMMC as a Statutory Agent under the Labor Law

Plaintiff's entitlement to summary judgment against FMMC turns on whether that defendant was a statutory agent for purposes of liability under §240(1). In seeking dismissal of

plaintiff's claims against it, FMMC contends that as a subcontractor, it is not liable under the Labor Law. The standards for imposition of liability upon a subcontractor are well settled:

> "Although sections 240 and 241 now make nondelegable the duty of an owner or general contractor to conform to the requirement of those sections, the duties themselves may in fact be delegated. When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241."

(Russin v Louis N. Picciano & Son, 54 NY2d 311, 317-318 [1981] [citations omitted].) Thus, "[a] subcontractor can be deemed an 'agent' under this statute, and be held liable, if to it is delegated the supervision and control either over the specific work area involved or the work which gives rise to the injury." (Headen v. Progressive Painting Corp., 160 AD2d 319, 320 [1st Dept 1990] [decided under §240 [1]].) Subcontractors have been found to be agents of general contractors not only where the subcontractors actually exercised supervision but also where "subcontracts explicitly granted supervisory authority. . ." (Nascimento v Bridgehampton Constr. Corp., 86 AD3d 189, 193 [1st Dept 2011]; Weber v Baccarat, Inc., 70 AD3d 487, 488 [1st Dept 2010].) Evidence that a subcontractor delegated supervision and control to another subcontractor "has been cited as forming part of the proof that the first subcontractor formerly possessed that authority, and may justify imposing Labor Law liability on the first subcontractor as a statutory agent of the general contractor." (Nascimento, 86 AD3d at 193.) The standards for determining whether a subcontractor is an agent of an owner or general contractor are the same under Labor Law §§240 and 241. (Russin, 54 NY2d at 318.)

FMMC demonstrates, based on plaintiff's deposition testimony that he was given instructions only by his supervisor and his foreman (P.'s Dep. at 24-5), that FMMC did not

exercise actual supervisory authority over plaintiff's work.

In contrast, the court finds that FMMC was delegated supervisory authority under its contract with F&S. Section 2.1 of the contract between F&S and FMMC states that the subcontractor shall "assume toward the Contractor all obligations and responsibilities which the Contractor . . . assumes toward the EPC Contractor and the Architect." (Ex. E to Caithness' Aff. in Opp.) The contract requires FMMC to furnish all labor and supervision for mechanical piping and boilermaking. (Ex. E, Attachment B.) It further provides that F&S shall not give instructions to FMMC employees unless designated as authorized representatives of FMMC (id., §3.2.2), and that FMMC shall "supervise and direct the Subcontractor's work, and shall cooperate with the Contractor in scheduling and performing the Subcontractor's Work to avoid conflict, delay in or interference with the Work of the Contractor . . . ." (Id., §4.1.1.)

As discussed above, at the time of plaintiff's injury, pipes like the one that hit plaintiff were being used at the top of the unit by steamfitters. (See supra at 5.) The contract between F&S and FMMC shows that FMMC had authority over mechanical piping and boilermaking. Mr. Smith also expressly testified that FMMC had 60 to 80 of its own steamfitters on site and four to six foremen to supervise the steamfitters, ironworkers and laborers. (Smith Dep. at 81-83.)

Based on the clear terms of the contract between F&S and FMMC, as well as FMMC's own testimony, the court holds that F&S delegated supervisory authority to FMMC, and that FMMC is a statutory agent under the Labor Law. Plaintiff is accordingly also entitled to partial summary judgment as to liability against FMMC on his Labor Law §240(1) claim.

Labor Law §241(6) claim

Labor Law §241(6) provides:

> All contractors and owners and their agents * * * shall comply with the following requirements:
>
> 6. 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.

It is well settled that this statute requires owners and contractors and their agents "'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, 81 NY2d at 501-502.) In order to maintain a viable claim under Labor Law §241(6), the plaintiff must allege a violation of a provision of the Industrial Code that mandates compliance with "concrete specifications," as opposed to a provision that "establish[es] general safety standards." (Id. at 505.) "The former give rise to a nondelegable duty, while the latter do not." (Id.) "[W]hether or not plaintiff was himself negligent may require an apportionment of liability but does not absolve defendants of their own liability under section 241(6)." (Keegan v. Swissotel New York, Inc., 262 AD2d 111, 114 [1st Dept 1999], lv dismissed 94 NY2d 858 [1999].

Although plaintiff's Bill of Particulars cites numerous sections of the Industrial Code, in plaintiff's moving papers, plaintiff alleges only that defendants violated §23-1.7(a)(1),[1]

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[1] 23-1.7(a)(1) provides:

> 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

pertaining to overhead hazards, and §23-1.15,[2] pertaining to safety railings. (P.'s Memo of Law attached to P.'s Cross-Motion, at 19-21.)

Defendant Fresh Meadow argues that 12 NYCRR 23-1.7(a)(1) and 12 NYCRR 23.1-15 are inapplicable because they do not impose a specific duty and are not relevant to the manner in which the accident occurred. (Fresh Meadow Aff. in Support, ¶¶ 43-4.) Fresh Meadow also argues that plaintiff's claim should fail because plaintiff did not provide expert affidavits to support his claim.

These sections are sufficiently specific to support liability under Labor Law §241(6). (See Zuluaga, 45 AD3d 479, supra; Donohue v CJAM Assocs., LLC, 22 AD3d 710 [2nd Dept 2005].) Fresh Meadow fails to make any showing as to why compliance with the above Industrial Code provisions is not a matter within the ken of a layperson.

As to 12 NYCRR 23-1.7(a)(1), defendant represented, albeit without citations to any evidence in the record, that scaffolding was erected in the area where plaintiff was working at the time of his injury. The existence of scaffolding in plaintiff's work area itself raises a triable issue of fact as to whether this was an area normally exposed to falling objects that required overhead protection. (See FMMC Aff in Opp., ¶ 6.) Conversely, plaintiff has failed to demonstrate as a matter of law that additional safety devices were required. Therefore, summary judgment is

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structure capable of supporting a loading of 100 pounds per square foot.

[2] 23-1.15 provides:

Whenever required by this Part (rule), a safety railing shall consist as a minimum of an assembly constructed as follows:

. . .

(c) A one inch by four inch toeboard except when such safety railing is installed at grade or ground level or is not adjacent to any opening, pit or other area which may be occupied by any person.

denied as to both plaintiff and defendants on the Labor Law §241(6) claim based on this section.

As to Industrial Code section 23-1.15 regarding toe boards, the deposition testimony of Mr. Britt and Mr. Smith, as well as the accident report (see supra at 5-6), state that at least one section of toeboard was missing, creating a gap through which objects may have fallen. Plaintiff therefore makes a prima facie showing that the missing toeboard was in violation of the concrete specifications of the Labor Law, and led to his injury. That plaintiff was not wearing a hard hat does not, without more, raise a triable issue of fact as to whether non-compliance with this Industrial Code section was a proximate cause of plaintiff's injury. Plaintiff's cross-motion for summary judgment as to liability based on a violation of 12 NYCRR 23.1-15 should accordingly be granted.

Labor Law §200

Defendant FMMC moves for summary judgment on plaintiff's Labor Law §200 claim. Labor Law §200(1) provides in pertinent part:

> All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

Labor Law §200 is a codification of the common law duty imposed upon an owner or contractor to provide construction workers with a safe place to work. (See Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993].) Recent cases have clarified that liability under section 200 may arise in two circumstances: where workers are injured as a result of the manner in which the work is performed, or where they are injured as a result of a dangerous condition on the site. (Makarius v Port Auth. of New York and New Jersey, 76 AD3d 805, 808

[Roman, J., concurring], 817 [Moskowitz, J., concurring] [1st Dept 2010], citing Ortega v Puccia, 57 AD3d 54, 61 [2nd Dept 2008].)

It is well settled that "[w]here 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 Labor Law §200." (Comes, 82 NY2d at 877; see also Ross, 81 NY2d at 505 [same for general contractor]; Reilly v Newireen Assocs., 303 AD2d 214 [1st Dept 2003], lv denied 100 NY2d 508.) The rationale for this rule is that "[a]n implicit precondition to [the] duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition." (See Russin, 54 NY2d at 317.) Liability does not attach "solely because the owner had notice of the allegedly unsafe manner in which the work was performed." (Comes, 82 NY2d at 878; Ortega, 57 AD3d at 61.)

Where, however, the injury arises out of "a dangerous condition on the site," rather than "the methods or materials" used by the worker or his employer, it is "not necessary to show that [the owner or general contractor] exercised supervisory control over the manner of performance of the injury-producing work," only that it "had notice of the condition." (Minorczyk v Dormitory Auth. of State of New York, 74 AD3d 675 [1st Dept 2010]; Seda v Epstein, 72 AD3d 455 [1st Dept 2010]; Murphy v Columbia Univ., 4 AD3d 200 [1st Dept 2004].) "General awareness" that a dangerous condition may be present is insufficient. (See Gordon v American Museum of Natural History, 67 NY2d 836, 838 [1986].) "The notice must call attention to the specific defect or hazardous condition and its specific location." (Mitchell v New York Univ., 12 AD3d 200, 201 [1st Dept 2004].) Furthermore, constructive notice of a defect requires that the

"defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." (Gordon, 67 NY2d at 837.)

Defendants dispute which party was responsible for installing and inspecting toeboards. Lawrence Britt of Caithness testified that Siemens was responsible for installing the toeboards, but that they were actually installed by F&S. (Britt Dep. at 41, 42.) Wayne Smith of FMMC stated that Mark Cilla, project superintendent for F&S, directed the installation of the toeboards. (Smith Dep. at 100.) The Caithness defendants assert that Mr. Cilla was actually an employee of FMMC. (Caithness Aff. in Opp., ¶ 51.) Albert Chowlansky, site manager for Siemens at the time of the accident, testified that Mark Cilla was an employee of F&S. (Chowlansky Dep. at 7-8, 10, 19.) The Caithness defendants claim that F&S had no employees at the site, and all personnel present on behalf of F&S were employed by either FMMC or non-party Scalamandre. (Caithness Aff. in Opp., ¶ 7.) Mr. Smith testified that F&S had the responsibility of inspecting the toe guards after installation, as did Siemens. (Smith Dep. at 128.) Mr. Britt testified it was the responsibility of Mr. LiPuma, a safety consultant hired by Siemens, to inspect the toeboards after they were installed by F&S. (Id. at 42.)

As to notice of a gap in the toeboard, Lawrence Britt testified that the toeboard in question was in an unusual location, and was overlooked. (Britt Dep. at 41.) Wayne Smith testified, in contrast, that the toeboard was not installed at the time of the accident because the "schedule and progress of the job site did not at that time dictate that toeboards were required to be installed at that location based on the activity that we were engaged in at the time." (Smith Dep. at 62-3.)

In short, whether a missing toeboard involves the means and methods of performing the work or a dangerous condition at the work site, there is a conflict in the evidence as to which defendant was responsible for installing and inspecting the toe boards. FMMC therefore has not eliminated triable issues of fact as to its liability under section 200.

Indemnification

The branch of Fresh Meadow's motion to dismiss the Caithness defendants' claims for common law indemnification is granted without opposition. The branch of Fresh Meadow's motion to dismiss the Caithness defendants' claim for contractual indemnification is granted without opposition to the extent of dismissing the claim except to the extent that any recovery by plaintiff exceeds the $1,000,000 policy limits of the National Union Fire Insurance Company policy number 000711201.

Order

It is accordingly hereby ORDERED that the motion of defendant Fresh Meadow Mechanical Corp. and F&S Power Corp. for summary judgment is denied except that the branch of the motion seeking to dismiss claims against F&S Power Corp. is granted; and it is further

ORDERED that the branch of the cross-motion of Fresh Meadow Power, LLC for summary judgment dismissing plaintiff's Labor Law claims is denied; and it is further

ORDERED that the branch of the cross-motion of Fresh Meadow Power, LLC for summary judgment dismissing the claim of third-party plaintiffs Caithness Long Island LLC, Siemens Energy, Inc., and F&S Power, LLC is granted to the extent of dismissing third-party plaintiffs' claim for common law indemnification, and dismissing third-party plaintiffs' claim for contractual indemnification to the extent that any recovery by plaintiff exceeds the $1,000,000

policy limits of the National Union Fire Insurance Company policy number 000711201; and it is further

ORDERED that the cross-motion of plaintiff for summary judgment as to liability on his Labor Law §240(1) is granted against defendants Caithness Long Island LLC, Siemens Energy, Inc., F&S Power, LLC, and Fresh Meadow Mechanical Corp.; and it is further

ORDERED that the cross-motion of plaintiff for summary judgment as to liability on his Labor Law §241(6) claim is granted against defendants Caithness Long Island LLC, Siemens Energy, Inc., F&S Power, LLC, and Fresh Meadow Mechanical Corp. to the extent it is based on Industrial Code section 23.1-15, and denied to the extent it is based on Industrial Code section 23.1-7; and it is further

ORDERED that an assessment on damages shall be held at the time of trial, or after any other disposition of the underlying action, upon the filing of a note of issue and payment of the proper fees, if any.

This constitutes the decision and order of the court.

Dated: New York, New York
April 2, 2012

MARCY FRIEDMAN, J.S.C.