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SHORT FORM ORDER

INDEX No. 09-8428
CAL. No. 11-02184OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 1-11-12 (#001)
MOTION DATE 3-28-12 (#002,#003, #004)
ADJ. DATE 7-11-12
Mot. Seq. # 001 - MD # 003 - XMD
002 - MG # 004 - MG; CASEDISP

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JOHN ANDREW GARLANS III,

Plaintiff,

- against -

DUNKIN' DONUTS INCORPORATED, VINCENT DELLAFRANCA PROPERTIES, LLC, DUCOLD ENTERPRISES, LTD., DUCOLD MECHANICALS, LTD., DUCOLD ENGINEERING, LTD. and L & M AT BAY SHORE,

Defendants.

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Upon the following papers numbered 1 to 98 read on these motions and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; 10 - 27; 28 - 36; Notice of Cross Motion and supporting papers 387 - 51; Answering Affidavits and supporting papers 52 -61; 62 - 67; 68 - 69; 70 - 74; 75 - 85; 86 - 87; 88 - 89; Replying Affidavits and supporting papers 90 - 91; 92 - 94; 95 - 96; 97 - 98; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by defendant L&M at Bay Shore, the motion (# 002) by defendant Ducold Enterprises Ltd., the motion (#004) by defendants Dunkin Donuts Inc., Vincent Dellafranca Properties, LLC, and L&M at Bay Shore, and the cross motion (#003) by plaintiff John Garlans are consolidated for the purposes of this determination; and it is

ORDERED that the motion (#002) by defendant Ducold Enterprises Ltd. for summary judgment in its favor dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the motion (#001) by defendant L&M at Bay Shore for conditional summary judgment on its cross claim against Ducold Enterprises Ltd. for common law indemnification is denied; and it is further

ORDERED that the motion (#004) by defendants Dunkin Donuts Inc., Vincent Dellafranca Properties, LLC, and L&M at Bay Shore for summary judgment dismissing the complaint and all cross claims against them is granted; and it is further

ORDERED the cross motion (#003) by plaintiff John Garlans for partial summary judgment in his favor on the issue of liability is denied.

Plaintiff John Garlans commenced this action to recover damages for personal injuries allegedly sustained on August 11, 2008 when he fell from a ladder during the replacement and renovation of the air conditioning system for a Dunkin' Donuts franchise store located at 19 Bay Shore Road, Suffolk County, New York. Plaintiff allegedly was injured while attempting to lay flex piping for the installation of new air ducts in the drop ceiling of the building. A portion of the drop ceiling, including some lighting fixtures, allegedly collapsed and knocked plaintiff from the top of the ladder on which he was standing to the floor of the building. The complaint named Dunkin Donuts Inc., Vincent Dellafranca Properties, LLC (" Dellafranca"), the owner of the premises at which the store is located, and plaintiff's employer, Bech Air Corp, as defendants to the action. On March 2, 2010, plaintiff served a supplemental summons and complaint which no longer listed plaintiff's employer as a party to the action. However, the amended complaint named as additional defendants L&M at Bay Shore ("L&M"), the owner of the Dunkin Donuts franchise, Ducold Enterprises Ltd., the prime contractor for the renovation project, and Ducold Enterprises' subsidiaries, Ducold Mechanicals, Ltd., and Ducold Engineering, Ltd. The amended complaint alleges causes of action against defendants for common law negligence, and for violations of Labor Law §§ 200 and 240 (1). It further alleges a cause of action under Labor Law §241(6) based upon alleged violations of the Industrial Code. Dunkin Donuts and Ducold joined issue asserting general denials, affirmative defenses, and cross claims for contribution and contractual and/or common law indemnification.

L&M now moves for conditional summary judgment on its cross claim against Ducold for common law indemnification, arguing that it was not present at the time of plaintiff's accident and it did not direct, supervise or control the means or method of his work. Ducold opposes the motion on the bases it did not exercise actual supervisory authority over plaintiff's work, and that triable issues exists as to whether L&M's negligence caused the accident. Ducold further moves for summary judgment dismissing the complaint and all cross claims against it on the bases that plaintiff's Labor Law§241(6) claim is predicated upon inapplicable sections of the Industrial Code, and that his claim under section 240 (1) of the statute is inactionable, as it relates to the unforeseeable collapse of a part of the building's permanent structure. In addition, Ducold asserts that it is entitled to summary judgment dismissing plaintiff's claim under Labor Law §200, because it did not direct, supervise or control the means or method of plaintiff's work. Alternately, Ducold requests that it be granted summary judgment on its cross claim for common law indemnification over against Dunkin Donuts. Dunkin Donuts, L&M and Dellafranca also jointly move for summary judgment dismissing plaintiff's complaint and the cross claims against them.

Plaintiff opposes the motions seeking dismissal of his complaint, and cross-moves for partial summary judgment in his favor on the issue of liability as against defendants Ducold and Dellafranca. Plaintiff asserts that Ducold and Dellafranca failed to provide him with a safe place to work or with safety devices designed to prevent or break his fall, and that they violated numerous sections of the Industrial Code. Dunkin Donuts, Ducold, Dellafranca and L&M all oppose plaintiff's motion, arguing, inter alia, that plaintiff's claim under Labor Law §241(6) is not actionable, because it is premised upon inapplicable sections of the Industrial Code, and that his Labor Law §240 (1) claim fails as a matter of law because it relates to the unforeseeable collapse of a part of the building's permanent structure. Defendants further assert that plaintiff's claims under Labor Law §200 and the common law must be dismissed since they neither had actual or constructive notice of the alleged defective drop ceiling, nor directed, supervised or controlled the means or method of plaintiff's work.

Labor Law § 240 (1) requires owners and contractors to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 501, 601 NYS2d 49 [1993]). However, not every object that falls on a worker gives rise to the extraordinary protections of Labor Law § 240 (1) (*see* ***Narducci v Manhasset Bay Assoc.***, 96 NY2d 259, 267, 727 NYS2d 37 [2001]). To recover damages for violation of the statute, the "plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that, at the time the object fell, it was "being hoisted or secured" (***Narducci v Manhasset Bay Assoc.***, *supra* at 268) or "required securing for the purposes of the undertaking" (***Novak v Del Savio***, 64 AD3d 636, 638, 883 NYS2d 558 [2d Dept 2009]; *see* ***Quattrocchi v F.J. Sciame Constr. Corp.***, 11 NY3d 757, 758, 866 NYS2d 592 [2008]). Labor Law § 240 (1) generally does not apply to objects that are part of a building's permanent structure (*see* ***Narducci v Manhasset Bay Assoc.***, *supra* at 268), and a plaintiff must show that the object fell because of the absence or inadequacy of a safety device of the kind enumerated in the statute (*see* ***Marin v AP-Amsterdam 1661 Park LLC***, 60 AD3d 824, 875 NYS2d 242 [2d Dept 2009]). Moreover, "where an injury results from the failure of a completed and permanent structure within a building, even a building undergoing demolition or one in a dilapidated condition, a necessary element of a cause of action under Labor Law § 240(1) is a showing that there was a foreseeable need for a protective device of the kind enumerated by the statute" (***Espinosa v Azure Holdings II, LP***, 58 AD3d 287, 292-293, 869 NYS2d 395 [1st Dept 2008].

Here, Ducold established, prima facie, its entitlement to summary judgment dismissing plaintiff's claim under Labor Law §240 (1) by submitting evidence that the drop ceiling and light fixture which unexpectedly collapsed and knocked plaintiff from the ladder were not in the process of being hoisted or secured, and did not require securing for the purposes of plaintiff's work at the time of the accident (*see* ***Narducci v Manhasset Bay Assoc.***, *supra*; ***Novak v Del Savio***, 64 AD3d 636, 638, 883 NYS2d 558 [2d Dept 2009]; ***Marin v AP-Amsterdam 1661 Park LLC***, *supra* at 825; ***Balladares v Southgate Owners Corp.***, 40 AD3d 667, 835 NYS2d 693 [2d Dep 2007]). Further, Ducold submitted unrefuted evidence that the six-foot A-frame ladder utilized by plaintiff at the time of the accident provided adequate protection for plaintiff's work, and was free of any defect (*see* ***Molyneaux v City of New York***, 28 AD3d 438, 439, 813 NYS2d 729 [2d Dept 2006], *lv denied* 7 NY3d 705, 819 NYS2d 873 [2006]; ***Costello v Hapco Realty***, 305 AD2d 445, 447, 761 NYS2d 79 [2d Dept 2003]; ***Olberding v***

Dixie Contr., 302 AD2d 574, 757 NYS2d 565 [2d Dept 2003]). Significantly, plaintiff testified that the ladder he used was new and sturdy, and that he only fell because he was struck by a light fixture that swung from the roof of the store after the drop ceiling collapsed. In opposition, the conclusory assertion of plaintiff's counsel that plaintiff should have been provided with equipment to prevent the drop ceiling from collapsing is insufficient to raise a triable issue warranting denial of the motion (*see* ***Espinosa v Azure Holdings II, LP***, *supra*; ***Balladares v Southgate Owners Corp.***, *supra* at 669-670; *compare* ***Taylor v V.A.W. of Am.***, 276 AD2d 621, 622 [2d Dept 2000]). Accordingly, the branch of Ducold's motion seeking summary judgment dismissing plaintiff's claim under Labor Law §240 (1) is granted.

As for plaintiff's claims under Labor Law §200, this provision is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Haider v Davis***, 35 AD3d 363, 827 NYS2d 179 [2d Dept 2006]). It applies to owners, contractors, or their agents (***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]). "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" (***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]; *see* ***Chowdhury v Rodriguez***, 57 AD3d 121, 128, 867 NYS2d 123 [2d Dept 2008]). Where a premises condition is at issue, an owner or contractor may be held liable for a violation of Labor Law § 200 if they either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*see* ***Kuffour v Whitestone Const. Corp.***, 94 AD3d 706, 941 NYS2d 653 [2d Dept 2012]; ***Azad v 270 Realty Corp.***, 46 AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]; ***Chowdhury v Rodriguez***, *supra*; ***Kehoe v Segal***, 272 AD2d 583, 709 NYS2d 817 [2d Dept 2000]). By contrast, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work (*see* ***Rizzuto v L.A. Wenger Contr. Co., Inc.***, 91 NY2d 343, 352, 670 NYS2d 816 [1998]; ***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 317, 445 NYS2d 127 [1981];***Ortega v Puccia***, *supra*).

Here, Ducold established its prima facie entitlement to summary judgment dismissing plaintiff's Labor Law §200 claim against it by demonstrating that it did not have the authority to supervise or control plaintiff's work at the time of the accident (*see* ***Rizzuto v L.A. Wenger Contr. Co., Inc.***, *supra*; ***Ortega v Puccia***, *supra*; ***Tomecek v Westchester Additions & Renovations, Inc.***, 97 AD3d 737, 948 NYS2d 671 [2d Dept 2012]; ***Gray v City of New York***, 87 AD3d 679, 928 NYS2d 759[2d Dept 2011]; *see also* ***Circosta v. 29 Washington Sq. Corp.***, 2 NY2d 996, 163 NYS2d 611 [1957]), and that it neither created nor had actual or constructive notice of any alleged defective design or construction of the drop ceiling (*see* ***Kuffour v Whitestone Const. Corp.***, *supra*; ***Azad v 270 Realty Corp.***, *supra*; ***Chowdhury v Rodriguez***, *supra*). Significantly, plaintiff testified that he only took directions from his employer's lead mechanic while he was at the worksite, and that at no time did anyone, including Ducold, have the authority to supervise or direct the methods or manner of his work. Further, an employee of Ducold testified that both he and plaintiff's employer inspected the drop ceiling one month prior to the accident, and that neither of them noticed any defects in the drop ceiling at that time.

Additionally, Ducold provided the deposition testimony of the maintenance subcontractor hired by L&M, who testified that the drop ceiling was intact and functional prior to the alleged accident.

The burden, therefore, shifted to plaintiff to raise a triable issue warranting denial of the motion (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Plaintiff failed in this regard, as he submitted no evidence raising any triable issues as to whether Ducold had the authority to supervise or control his work at the time of the accident, or whether it created or had actual or constructive notice on any defective condition in the design or construction of the drop ceiling (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). Indeed, plaintiff's mere speculatory assertion that the drop ceiling may have collapsed because it was nailed rather than screwed into the wooden beam of the store's roof, or that the weight of signs hung from the drop ceiling in other parts of the store may have caused the collapse of the drop ceiling, is insufficient to raise such an issue (*see* ***Wheeler v Citizens Telecom. Co. of N.Y., Inc.***, 74 AD3d 1622, 905 NYS2d 293 [3d Dept 2010]; ***Settimo v City of New York***, 61 AD3d 840, 878 NYS2d 89 [2d Dept 2009]; ***Simms v City of New York***, 221 AD2d 332, 633 NYS2d 209 [2d Dept 2005]). Thus, the branch of Ducold's motion seeking summary judgment dismissing plaintiff's claim under Labor Law §200 is granted.

The branch of Ducold's motion seeking summary judgment dismissing plaintiff's claim under Labor Law §241(6) also is granted. Labor Law §241(6) requires owners and general 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 (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 348, 670 NYS2d 816 [1998]; ***Forschner v Jucca Co.***, 63 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; ***Cun-En Lin v Holy Family Monuments***, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]). To recover damages on a cause of action alleging a violation of Labor Law § 241(6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*; ***Hricus v Aurora Contrs.***, 63 AD3d 1004, 883 NYS2d 61 [2d Dept 2009]; ***Fitzgerald v New York City School Constr. Auth.***, 18 AD3d 807, 808, 796 NYS2d 694 [2d Dept 2005]). Further, the rule or regulation alleged to have been breached must be a specific, positive command, and must be applicable to the facts of the case (*see* ***Forschner v Jucca Co.***, *supra*; ***Cun-En Lin v Holy Family Monuments***, *supra*).

Here, plaintiff's bill of particulars asserts violation of various provisions of the New York Industrial Code, including 12 NYCRR 23-1.7(b)(1) (b-c), 12 NYCRR 23-1.15 (a-e), 12 NYCRR 23-1.16 (a-f), 12 NYCRR 23-1.17 (a-e), 12 NYCRR 23-1.19 (a-d), 12 NYCRR 23-1.22 (b) (1)(2)(3)(4), and 12 NYCRR 23-1.22 (c). However, the regulations set forth at 12 NYCRR 23-1.15 (a-e), 23-1.16 and 23-1.17, which set standards for safety belts, life nets and harnesses, respectively, are inapplicable under the circumstances of this case, as plaintiff was not provided with any of those devices at the time of the alleged accident (*see* ***Clavijo v Universal Baptist Church***, 76 AD3d 990, 907 NYS2d 515 [2d Dept 2010]; ***Forschner v Jucca Co.***, *supra* at 998-999; ***Dzieran v 1800 Boston Rd., LLC***, 25 AD3d 336, 808 NYS2d 36 [1st Dept 2006]). Likewise, "12 NYCRR 23-1.7(b) (1) (b-c), is not applicable to the facts of this case, as that regulation applies to safety devices for hazardous openings, and not to an elevated

hazard" (***Forschner v Jucca Co.***, *supra* at 999). 12 NYCRR 23-1. 22 (b) (1-4) and 12 NYCRR 23-1 (c), which respectively set forth standards for ramps, runways, and platforms, also are inapplicable (*see* ***Torkel v NYU Hosps. Ctr.***, 63 AD3d 587, 590-591, 883 NYS2d 8 [1st Dept 2009]; ***Dzieran v 1800 Boston Rd., LLC***, *supra*; ***Curley v Gateway Communications***, 250 AD2d 888, 892, 672 NYS2d 523 [1998]; ***Bennion v Goodyear Tire & Rubber Co.***, 229 AD2d 1003, 645 NYS2d 195 [4th Dep 1996]). Furthermore, 12 NYCRR 23-1.19 (a-d), which sets forth the standards for the use of catch platforms, is inapplicable where, as here, there has been no showing that such items were either used or required for the performance of plaintiff's work (*see* ***Fried v Always Green, LLC***, 77 AD3d 788, 910 NYS2d 452 [2d Dept 2010]).

Additionally, where, as here, Ducold demonstrated that it played no part in causing or augmenting plaintiff's alleged injuries, that it was not actively negligent, and that it neither had actual nor constructive notice of the alleged defective condition, the branch of its motion for summary judgment dismissing the cross claims by Dunkin Donuts, Dellafranca and L&M for contribution, and/or contractual or common law indemnification is granted (*see* ***McCarthy v Turner Constr., Inc.***, 17 NY3d 369, 929 NYS2d 556 [2011]; ***Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.***, 71 NY2d 599, 528 NYS2d 516 [1988]; ***Torres v LPE Land Dev. & Constr.***, 54 AD3d 668, 863 NYS2d 477 [2d Dept 2008]; ***Delahaye v Saint Anns School***, 40 AD3d 679, 836 NYS2d 233 [2d Dept 2007]). Accordingly, the motion by Ducold for summary judgment in its favor dismissing plaintiff's complaint and the cross claims against it is granted.

Based upon the foregoing determinations, the motion by L&M for conditional summary judgment on its cross claim against Ducold is denied, as moot. Furthermore, having determined that plaintiff claims under Labor Law §240(1) and §241(6) may not be maintained, and that no evidence exists that any of the defendants either created or had actual or constructive notice of the existence of any alleged defect in the design or construction of the drop ceiling, the motion by Dunkin Donuts, Dellafranca and L&M for summary judgment dismissing the complaint and all cross claims against them is granted. Finally, the cross motion by plaintiff for partial summary judgment in his favor on the issue of liability is denied, as moot.

Dated: Oct. 10, 2012

J.S.C.