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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

JON SEPPANEN,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

INDEX NO. 116260/07

MOTION SEQ. NO. 004

The following papers were read on this motion by plaintiff's for summary judgment on Labor Law 240(1) and defendant's cross-motion for summary judgment on plaintiff's Labor Law 200 and 241(6) and common law negligence claims.

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

Cross-Motion: ■ Yes ☐ No

This is a personal injury action brought by Jon Seppanen (plaintiff) to recover damages for injuries allegedly sustained on June 22, 2007, at a construction work site. The site is known as the High Line, an elevated park project located between 11th and 12th streets on the west side of Manhattan, New York, New York (work site). Plaintiff was a carpenter employed by Kiska Construction (Kiska) and on the day of the accident he and co-worker, Brian Green, were working together dismantling "braces" on an elevated platform. Plaintiff alleges that while he was working and wearing a hard hat, safety glasses and a safety harness, the plywood platform he was working on suddenly collapsed, causing him to fall a distance of approximately 4 to 6 feet before the lanyard engaged and stopped his fall. The left side of his body slammed into the face of the bridge before Mr. Green pulled him to safety. Plaintiff commenced this action by the filing of the Summons and Verified Complaint on December 7, 2007, and asserted claims

against The City of New York (defendant), the owner of the work site, for common law negligence and violations of Labor Law §§ 200, 240(1) and 241(6). Specifically, in his bill of particulars plaintiff alleges violations of New York State Industrial Code §§ 23-1.5, 23-1.7, 23-1.16 and 23-1.21 and OSHA standards.

Before the Court is a motion by plaintiff for partial summary judgement on the issue of liability on his Labor Law § 240(1) claim against the defendant. Defendant is in opposition to plaintiff's motion and cross-moves for summary judgment, pursuant to CPLR §3212, dismissing plaintiff's claims for common law negligence and violations of Labor Law §§ 200 and 241(6). Plaintiff is in opposition to defendant's cross-motion.

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR § 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227,

228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

DISCUSSION

I. *Plaintiff's Labor Law § 240(1) Claim*

Labor Law § 240(1) imposes absolute liability upon owners and general contractors who fail to fulfill their statutory obligation to furnish or erect safety devices adequate to give proper protection to a worker who sustains gravity-related injuries proximately caused by such failure (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]; *Bland v Manocherian*, 66 NY2d 452 [1985]). Specifically, Labor Law § 240(1), also known as the Scaffold Law, provides, in relevant part:

> "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" (*id.*).

The statute was enacted to "'prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*'" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], quoting *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 501 [1993]). In order to accomplish its goal, the statute places responsibility for safety practices and safety devices on owners, contractors, and their agents, who are "best situated to bear that responsibility" (*Ross*, 81 NY2d at 500). The statute is to be liberally construed to achieve this purpose (*see Lombardi v Stout*, 80 NY2d 290, 296 [1992]).

For liability to attach under Labor Law § 240(1), "'the owner or contractor must breach the statutory duty . . . to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries'" (*Kerrigan v TDX Constr. Corp.*, 108 AD3d 468, 471 [1st Dept 2013], quoting *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]). Thus, to prevail on this claim, plaintiff must show (1) a violation of the statute (i.e., that defendants breached their nondelegable duty to furnish or erect, or cause to be furnished or erected, safety devices in a manner that gave him proper protection from gravity-related risks); and (2) that the statutory violation was a contributing or proximate cause of the injuries sustained *(see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287-289 [2003]). Upon making such a showing, "[t]he burden then shifts to defendant[s] to establish that 'there was no statutory violation and that plaintiff's own acts and omissions were the sole cause of the accident'" (*Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008], quoting *Blake*, 1 NY3d at 289 n. 8). "If defendant[s'] assertions in response fail to raise a fact question as to these issues, the plaintiff must be accorded summary judgment" (*Blake*, 1 NY3d at 289 n.. 8). Contributory or comparative negligence is not a defense to absolute liability under the statute (*Jamison v GSL Enters.*, 274 AD2d 356 [1st Dept 2000]; *Johnson v Riggio Realty Corp.*, 153 AD2d 485 [1st Dept 1989]).

In support of his motion, plaintiff has presented evidence that while working at the work site that day, plaintiff was injured when the safety plywood work platform collapsed causing him to fall. His (chest) safety harness stopped his fall. Plaintiff asserts the failure of a safety device, the inadequate work platform, was the cause of his injury. Defendant argues that plaintiff's summary judgment motion should be denied. First, because it was plaintiff's creation and use of the unsecured plywood platform, which then collapsed, that was the proximate cause of his accident. Second, defendant argues that there was no violation of Labor Law § 240(1) because plaintiff was furnished with all necessary and adequate safety devices, and he disregarded them and used the unsafe platform. Third, defendant proffers that there are triable issues as to the facts of the accident.

Labor Law § 240(1) imposes liability regardless of any contributory or comparative negligence on the part of plaintiff (*see Romanczuk v Metropolitan Ins. & Annuity Co.*, 72 AD3d 592 [1st Dept 2010]). Thus, where a violation of the statute is a contributing cause of an accident, any negligence on the part of the plaintiff cannot be deemed solely to blame for it, and cannot defeat the plaintiff's claim (*Blake*, 1 NY3d 280, 290; *Ernish v City of New York*, 2 AD3d 256, 257 [1st Dept 2003]). Here, plaintiff has established that he was subjected to an elevation-related risk while working, and that the failure to provide him with adequate safety devices, namely the safe platform, was a contributing or proximate cause of his injuries.

To defeat plaintiff's motion for summary judgment on this cause of action, defendant must establish "that plaintiff 'had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured'" (*Kosavick*, 50 AD3d at 288, quoting *Cahill*, 4 NY3d at 40). Defendant has failed to establish, through admissible evidence, an issue of material fact whether plaintiff was the sole proximate cause of the accident. Accordingly, plaintiff has established that he is entitled to summary judgment as

to liability on his Labor Law § 240 claim.

II. *Defendant's cross-motion to dismiss plaintiff's Labor Law § 241(6) Claim.*

Labor Law § 241(6)

Labor Law § 241(6) states:

> "Construction, excavation and demolition work. 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, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
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> ***
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> 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) "imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers" *(Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [2003]), and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (*Ross*, 81 NY2d at 501). To sustain a cause of action under section 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable given the circumstances of the accident, and that sets forth a concrete standard of conduct rather than a mere reiteration of common-law principles (*id.*, *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]). However, while proof of a violation of a specific Industrial Code regulation is required to sustain an action under Labor Law § 241(6), such proof does not establish liability, and is merely evidence of negligence (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Recovery under this section is dependent on plaintiff's ability to set forth the relevant and specific safety provisions of Part 23 of the New York State

Industrial Code (12 NYCRR 23-1.1 et seq.), which were allegedly violated (*see Walker*, 11 AD3d at 340; *see also Ross*, 81 NY2d at 505). In addition, the provision must be applicable to the facts of the case (*see Singleton v Citnalta Constr. Corp.*, 291 AD2d 393, 394 [2d Dept 2002]). Moreover, an owner or general contractor may raise any valid defense to the imposition of vicarious liability under section 241(6), including contributory and comparative negligence (*see Long v Forest-Fehlhaber*, 55 NY2d 154, 161 [1982]; *Misicki*, 12 NY3d at 515; *Ross*, 81 NY2d at 502, n 4).

Under the fact and circumstances herein, defendant has met their prima facie burden establishing their entitlement to summary judgment dismissing the portion of plaintiff's Labor Law § 241(6) claim. New York State Industrial Code §§ 23-1.5, 23-1.7, 23-1.16 and 23-1.21 are not applicable to the facts here. New York State Industrial Code § 23-1.5 is too general to support a cause of action for violating section 241(6) of the Labor Law (*see Kochman v City of New York*, 110 AD3d 477, 477 [1st Dept 2013]; *Mouta v Essex Market Dev. LLC*, 106 AD3d 549 [1st Dept 2013]). Section 23-1.7(b) applies to hazardous openings (*see Ramirez v Metropolitan Transp. Auth.*, 106 AD3d 799 [2d Dept 2013]), and here plaintiff fell not through an opening, but from plywood that collapsed (*Kochman*, 110 AD3d at 477). Section 23-1.16 applies to safety belts, harnesses, tail lines and lifelines (*Mouta*, 106 AD3d at 550), which does not apply here because plaintiff's harness worked correctly, and 23-1.21 is inapplicable as it applies to ladders and ladderways. Moreover, it has long been held that allegations of OSHA violations do not support a Labor Law § 241(6) claim, as any such violations do not concern the Industrial Code (*see Schiulaz v Arnell Constr. Corp.*, 261 AD2d 247 [1st Dept 1999]). Hence, the defendant's cross-motion for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's claims for violations of Labor Law § 241(6) is granted.

III. *Plaintiff's Common-Law Negligence and Labor Law § 200 Claims*

Labor Law § 200 is a codification of the common-law duty of an owner or general

contractor to maintain a safe worksite (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311 [1981]). Claims involving Labor Law § 200 generally fall into two broad categories: those where workers are injured as a result of the methods or manner in which the work is performed, and those where workers are injured as a result of a defect or dangerous condition existing on the premises (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]).

Where an accident is the result of a contractor's or worker's means or methods, it must be shown that a defendant exercised actual supervision and control over the activity, rather than possessing merely general supervisory authority (*Mitchell v New York Univ.*, 12 AD3d 200 [1st Dept 2004]); *Reilly v Newireen Assoc.*, 303 AD2d 214 [1st Dept 2003]). Generally, monitoring, coordination, and oversight of the timing and quality of the work, as well as a general duty to supervise the work and ensure compliance with safety regulations, are insufficient to trigger liability under Labor Law § 200 (*see Vasiliades v Lehrer McGovern & Bovis*, 3 AD3d 400 [1st Dept 2004]; *Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003]).

Where the accident is the result of a dangerous or defective condition at the work site, it must be shown that the owner or contractor either caused the dangerous condition, or failed to remedy a dangerous or defective condition of which it had actual or constructive notice (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). "The notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken" (*Mitchell v New York Univ.*, 12 AD3d at 201). Supervision and control need not be proven where the injury arose from a dangerous condition at the worksite (*see Murphy v Columbia Univ.*, 4 AD3d 200 [1st Dept 2004]).

Defendant argues that plaintiff's common-law negligence and Labor Law § 200 claims should be dismissed because the evidence establishes that (1) defendant did not have direct

supervision or control over the means or methods of plaintiff's work, and (2) defendant did not cause, or had actual or constructive knowledge of, the dangerous condition that caused plaintiff's injury.

Plaintiff argues in opposition that defendant's coss-motion for summary judgment should be denied because there is a triable issue of fact as to whether defendant supervised his work, and had actual or constructive knowledge of the dangerous condition of the elevated platform. In support of his contentions, plaintiff points to the deposition testimony of Hakan Dalkiran, an employee of Kiska who was present on the site on the date of the accident.

To obtain summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claim, the burden is on defendant "to demonstrate, beyond a material issue of fact, that [they] bore no responsibility for plaintiff's accident" (*see Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). Specifically, defendant must "show that [it] did not exercise any authority over the means and methods of plaintiff's work, or that, to the extent the accident arose out of a dangerous condition on the premises, [they were] not liable for the condition" (*id.*, citing *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d at 148).

Here, although there is evidence that the defendant had general supervisory control over the construction site and the authority to stop unsafe work practices, there is no evidence that defendant exercised direct supervision or control over the methods and manner of plaintiff's work. There also is no evidence that defendant knew that plaintiff was working on a piece of an unsecured elevated platform. There is, however, evidence that defendant walked through the premises looking for dangerous conditions. The evidence is sufficient to give rise to an issue of fact whether defendant had the requisite notice of a dangerous condition, i.e. the defective elevated platform, in time to do something about it. Accordingly, defendant's cross-motion for summary judgment to dismiss plaintiff's common law negligence and Labor Law § 200 claims is denied.

CONCLUSION

Upon the foregoing, it is

ORDERED that plaintiff's motion for summary judgment, pursuant to CPLR 3212, on his Labor Law § 240(1) claim is granted; and it is further,

ORDERED that the portion of defendant's cross-motion for summary judgment on plaintiff's claims for common law negligence and Labor Law § 200 is denied; and it is further,

ORDERED that the portion of defendant's cross-motion for summary judgment on plaintiff's claim pursuant to section 241(6) of the New York Labor Law is granted, and said claim is hereby dismissed; and it is further;

ORDERED that defendant is directed to serve a copy of this Order with Notice of Entry upon the plaintiff, and upon the Clerk of the Court who is directed to enter judgment accordingly.

FILED

This constitutes the Decision and Order of the Court. DEC 20 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/16/17

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

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