SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29

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ANSON BARROW, Index No.: 161761/2015

Plaintiff,

-against-

HUDSON MERIDIAN CONSTRUCTION GROUP, LLC, CREF 546 WEST 44TH STREET and PATRINELY GROUP LLC,

Defendants.

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Kalish, J.:

This is an action to recover damages for personal injuries allegedly sustained by a pipe fitter on October 13, 2015, when an allegedly improperly secured 300-pound pipe, which was in the process of being hung from a basement ceiling, fell on him while he was working at a construction site located at 546 West 46th Street, New York, New York (the Premises).

Plaintiff Anson Barrow moves, pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants Hudson Meridian Construction Group, LLC (Hudson), Cref 546 West 44th Street (Cref) and Patrinely Group LLC (Patrinely) (collectively, defendants).

Defendants cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint against them.

BACKGROUND

On the day of the accident, Cref owned the Premises where the accident occurred, and Patrinely was Cref's representative. Pursuant to a contract, Patrinely hired Hudson to serve as

the general contractor on a project at the Premises, which entailed the new construction of two 14-story buildings that shared a common basement and courtyard (the Project). Plaintiff was an employee and foreman of non-party Vivid Mechanical (Vivid). Vivid was a mechanical systems subcontractor on the Project, specializing in pipe fitting and welding.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was a foreman for Vivid, the mechanical subcontractor on the Project. At the time of the accident, he and his crew of five other Vivid employees were installing four six-inch diameter prefabricated water pipes in the ceiling of the Premises. As the ceiling was low, the installation, which was being done solely at plaintiff's direction, did not require the use of a ladder. The pipes were to eventually connect to other pipes that ran along the wall and then up into the ceiling. Once installed, the pipes were to be held in place by "Kindorfs," which were metal pieces attached to the ceiling with threaded rods. These threaded rods were embedded in the concrete ceiling via expansion bolts. The horizontal pipes along the wall and the Kindorfs were installed by Vivid employees the day prior to the accident. Between the start of the workday and the time of plaintiff's accident, two of the four pipes were installed. Plaintiff described the third piece of pipe that was being installed at the time of the accident (the Pipe) as having a vertical section and a horizontal section. At the time of the accident, plaintiff was holding the open part of the horizontal section of the Pipe, which was furthest away from the vertical section and the joint. Plaintiff described the horizontal section of the Pipe as measuring approximately 10 feet in length. He explained that in order to install the Pipe, the open part of its horizontal section had to pass through a series of three Kindorfs that had already been attached to and hung from the ceiling.

Plaintiff further explained that after the Pipe was threaded through three Kindorfs, there was still about nine inches of space left between it and the pipe to which it was to be attached. As a result, it was necessary for the crew to further push the Pipe horizontally forward through the Kindorfs in order to close the gap. As the Pipe was being pushed forward by the crew, plaintiff continued to guide the open part of the horizontal section of the Pipe. Plaintiff testified that after one of his coworkers notified them that the Pipe had reached the point where it was properly aligned, the men let go of it. Plaintiff testified that "all of a sudden, the [P]ipe fell on [his] head" (plaintiff's tr at 84). Plaintiff maintained that after the Pipe fell, he looked up at the ceiling and observed that "one expansion [bolt] came out of the concrete" (*id.* at 85).

Deposition Testimony of Walter Buerle (Hudson's Superintendent)

Walter Buerle testified that he was Hudson's superintendent on the day of the accident. He explained that Hudson served as the general contractor on the Project. He explained that nonparty Henick Lane, the mechanical contractor for the Project, was hired to perform all the HVAC work at the Premises. In turn, Henick Lane hired Vivid to perform certain black pipe installation work in the basement of the Premises.

Buerle further testified that he had observed Vivid workers installing pipes in the basement. He explained that the pipes hung from "Kindorf bars," which were metal pieces that were attached to the ceiling using anchors and threaded rods (Buerle tr at 43). He explained that after Vivid's workers hung the Kindorfs, they slid the 6-inch in diameter and 10- to- 20- foot long pipes through them. Once the pipes were in place, the workers welded them to other pipes at the joints. Vivid determined how to place the pipes and did not utilize any equipment to lift the pipes into place. Buerle testified that he was told that the accident occurred when an anchor

holding up the Kindorf failed, causing the Pipe that the Kindorf was supporting to fall.

Deposition Testimony of Barry Giordano (Hudson's Project Manager)

Barry Giordano testified that he was Hudson's project manager on the day of the accident. Giordano recalled that, prior to the day of the accident, in other areas of the work site, he had observed Vivid employees using a roustabout to lift pipes into place onto Kindorfs. He maintained that he would not have used Kindorfs to support the subject pipes, because the Kindorfs do not have enough strength to support them. Rather, a Unistrut anchor would have been more appropriate. He noted that Henick Lane and Vivid were supposed to submit the types of anchors that they would be using on the Project for approval, but they failed to do so.

The Hudson Accident Report

In Hudson's accident report (the Hudson Accident Report), the accident is described, as follows:

> "[Plaintiff] was standing under one end of the 6" schedule 40 black pipe. The pipe fell when the molly anchor pulled out of the concrete causing the pipe to fall off the hangar. The end of the pipe hit him in the head"

(plaintiff's notice of motion, exhibit H, the Hudson Accident Report).

The Affidavit of Theodore Williams (Plaintiff's Vivid Co-worker)

In his affidavit, Theodore Williams stated that he was working with plaintiff "to install a section of pipe to be used as a water line" at the time of the accident (plaintiff's affirmation in opposition to defendants' cross motion, exhibit 1, Williams aff). He described the Pipe as weighing 300 pounds and consisting of a 5-foot vertical section of pipe connected to a 10-foot horizontal section of pipe. He explained that the Pipe "was going to be hung using a kindorf which is a metal bracket that is suspended from the ceiling using a threaded rod" (*id.*). The Pipe

was installed by pushing the open end of its horizontal section through a Kindorf, which had been installed the day before the accident.

Williams stated that

> "[w]hile installing other pipe at this construction, [they] were provided with a hydraulic lift or a Roust-A-Bout to hoist the pipe into position. However, due to the configuration of the basement and hallway, [they] were unable to get the hydraulic lift or the Roust-A-Bout to the basement"

(*id.*).

Williams also stated that "[a] simple Block and Tackle or any alternative hoisting device would have worked but they were not available at the job site" (*id.*). In addition, as the weight and shape of the Pipe made it difficult for the three men to navigate, "as [they] lifted the [P]ipe into place . . . and moved it through the kindorfs, the weight of the [P]ipe was such that the [P]ipe fell heavily putting downward pressure on the kindorfs" (*id.*). Therefore, the men "would lift, push and then essentially drop the [P]ipe as it passed through the kindorf" (*id.*).

Williams further explained that as the men pushed the Pipe through the third Kindorf, the Pipe's weight "pounded down on the kindorf . . . [and] [a]lmost immediately after [they] took the weight off the [P]ipe and let it rest on the kindorfs, the kindorf came out of the wall causing the end of the [P]ipe to drop down" (*id.*). Williams opined that the accident was caused due to the fact that a hoisting device was not provided to lift the Pipe into place. With the proper safety device, the men could have gently slid the Pipe through the Kindorfs, rather than lifting the Pipe and then dropping it on the Kindorfs.

Affidavit of Thomas J. Cocchiola (Plaintiff's Expert)

In his affidavit, Thomas J. Cocchiola stated that "plaintiff and his co-workers were

installing 'L-shaped' prefabricated piping" on the day of the accident (plaintiff's opposition to defendants' cross motion, exhibit 2, Cocchiola aff). He explained that the subject pipes were "support[ed]" by metal brackets, or Kindorfs, which were suspended from a concrete ceiling located approximately eight feet above the ground (*id.*). In turn, "[t]he kindorfs were supported by threaded rods connected to anchors embedded in the concrete ceiling" (*id.*).

Cocchiola stated that the day before the accident, the workers had been supplied with a hydraulic lift or Roust-A-Bout, which is a manual hoist with wheels. However, on the day of the accident, the men could not use the Roust-A-Bout because they were working in the basement. He stated that "no arrangements were made to provide a [different] hoisting device" (*id.*). As a result, the men had to manually lift the Pipe into place "by hand" and then "physically maneuver it through kindorfs before fitting it up, clamping and welding the lower end of the vertical leg to an existing pipe" (*id.*).

Cocchiola further stated that while "[t]he kindorf may have been sufficient to support the weight of the installed piping . . . the force of impact of the falling prefabricated piping caused [it] to fail, which caused the prefabricated piping to fall and injure the plaintiff" (*id.*). In addition, "[a]n appropriate hoisting safety device should have been provided and used to support the weight of the prefabricated piping while it was being maneuvered into position" (*id.*). Such safety devices could have included a block and tackle, pipe jack, lift and/or material hoist.

DISCUSSION

"'The 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 eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept

2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also 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]).

The Labor Law § 240 (1) Claim

Plaintiff moves for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants. Defendants cross-move for dismissal of said claim against them. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), 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."

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . 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'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

> "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein"

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

As noted previously, plaintiff was injured when the expansion bolt attaching the Kindorf to the ceiling failed, causing the Kindorf to fail and the Pipe that the Kindorf was supporting to fall and strike plaintiff. As a result, plaintiff may recover damages for a violation of Labor Law § 240 (1) under a falling objects theory, because the object that fell on him, i.e., the Pipe, "was 'a load that required securing for the purposes of the undertaking at the time it fell [citation omitted]'" (*Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005]; *Gabrus v New York City Hous. Auth.*, 105 AD3d 699, 699 [2d Dept 2013] [the plaintiff was entitled to summary judgment in his favor on his Labor Law § 240 (1) claim where he demonstrated that the load of material that fell on him while being hoisted to the top of the building was inadequately secured]; *Dedndreaj v ABC Carpet & Home*, 93 AD3d 487, 488 [1st Dept 2012] ["[p]laintiff established his prima facie entitlement to summary judgment by showing that defendants' failure to provide an

adequate safety device proximately caused a pipe that was in the process of being hoisted to fall and strike him"]). As the Kindorf failed to keep the Pipe from falling during its installation, Labor Law § 240 (1) was violated.

In addition, given that the circumstances of working in the basement made it necessary for the men to manually lift the Pipe and thread it through the Kindorf, which was not strong enough to take the weight, additional safety devices, such as a hoist, a stronger support bracket, slings and/or ropes, were needed to secure the Pipe against falling while it was being installed. "'[T]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures'" (*Nimirovski v Vornado Realty Trust Co.*, 29 AD3d at 762, quoting *Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]).

Defendants argue that Labor Law § 240 (1) does not apply to the facts of this case because, in order for Labor Law § 240 (1) to apply, the hazard must have arisen out of an appreciable differential in height between the object that fell and the work (*see Melo v Consolidated Edison Co. of N.Y.*, 92 NY2d 909, 911 [1998]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Here, plaintiff testified that the Pipe fell as it was being manually lifted above his head and pushed through the Kindorf, which hung from an eight-foot high ceiling.

In *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* (18 NY3d 1, 9 [2011]), the Court of Appeals "decline[d] to adopt the 'same level' rule, which ignores the nuances of an appropriate section 240 (1) analysis." In *Wilinski*, the plaintiff was struck by metal pipes, which stood 10-

feet tall and measured four inches in diameter. As in the instant case, the pipes that toppled over onto the plaintiff were located at the same level as the plaintiff. Quoting *Runner v New York Stock Exch., Inc.* (13 NY3d 599 [2009]), the Court in *Wilinski* determined that the "'the elevation differential . . . [could not] be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent" (*id.* at 10, quoting *Runner* at 605); *see also Marrero v 2075 Holding Co., LLC*, 106 AD3d 408, 409 [1st Dept 2013]).

Applying *Wilinski* to the instant case, not only is plaintiff not precluded from recovery simply because the 300 pound Pipe fell only a couple of feet, but, given the significant amount of force that it generated during its fall, plaintiff's accident "'ar[ose] from a physically significant elevation differential'" (*id.* at 10, quoting *Runner* at 603; *see also Cardenas v One State St., LLC*, 68 AD3d 436, 437 [1st Dept 2009] [holding that plaintiff's removing a heavy electrical panel "posed a significant risk to plaintiff's safety due to the position of the heavy electrical panel above the ground, even if such elevation differential was slight, and was thus a task where a hoisting or securing device of the kind enumerated in the statute was indeed necessary and expected precisely because the object was too heavy to be hoisted or secured by hand"].)

It should also be noted that during the oral argument held on October 16, 2018, defendants' counsel argued at length that Labor Law § 240 (1) does not apply to this case because, as the Kindorf was fully installed in the ceiling of the Premises at the time of the accident, it was part of the building's permanent structure, and courts have found that the statute does not apply to objects that are part of a building's permanent structure. He further argued that, as parts of a building's permanent structure are not expected to fail, such objects would not

be expected to require a safety device of the kind enumerated in the statute (*see Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001] [where the plaintiff was injured when he was struck by falling glass from a window at a building where a renovation project was underway, the Court determined that the subject glass "was not [the kind of] situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected"]; *Marin v AP-Amsterdam 1661 Park LLC*, 60 AD3d 824, 825-826 [2d Dept 2009] [Labor Law § 240 (1) not applicable where the plaintiff was injured when a metal bracket used to affix piping to a building's exterior came loose and struck him on his head, because the bracket "had been installed prior to the plaintiff's accident . . . and thus became part of the building's permanent structure"]; *Garcia v DPA Wallace Ave. I, LLC*, 101 AD3d 415, 416 [1st Dept 2012]; *Handley v White Assoc.*, 288 AD2d 855, 855 [4th Dept 2001] [Labor Law § 240 (1) did not apply where, after placing a new section of heating duct, the duct fell and struck the plaintiff on his wrist]).

However, while the fully-installed Kindorf at issue in the instant case may have been a permanent part of the building's structure, importantly, as is sometimes the case, it was *also* being utilized as a safety device to support and secure the Pipe from falling as it was being installed, thereby protecting plaintiff against an elevation-related risk.[1] As such, in order to recover under Labor Law § 240 (1), plaintiff needed only to show that he was injured when the device "failed to perform its function to support and secure him from injury" (*Ortega v City of*

[1] In Labor Law cases, it is not uncommon for a permanent part of a building be also used as a safety device (see *Gomez v City of New York*, 63 AD3d 511, 512 [1st Dept 2009] [fire escape that the plaintiff was working on when he fell was the functional equivalent of a scaffold]; *Beard v State of New York*, 25 AD3d 989, 991 [3d Dept 2006] [bridge on which the plaintiff was working as it was being taken apart was a "functional equivalent of a scaffold"]).

New York, 95 AD3d 125, 128 [1st Dept 2012], citing *Morin v Machnick Bldrs.*, 4 AD3d 668, 670 [3d Dept 2004]).

Moreover, while it may not have been foreseeable that the Kindorf would detach from the ceiling when left alone and untouched, its failure became foreseeable when it was used as a safety device to support the heavy pipe as it was threaded through the brackets by hand. For example, one would not expect a gargoyle, a permanent building structure, to need securing by a safety device in order to prevent it from falling. However, if a rope is thrown over it, so as to turn it into part of a hoisting system, it becomes foreseeable that the added pressure on it might cause it to break away from the building and fall.

In addition, this case can be distinguished from those cases cited by defendants in support of there argument that Labor Law § 240 (1) does not apply to permanent building structures that fall and injure workers. In those cases, the permanent building structures themselves fell onto the plaintiffs. Here, the permanent building structure at issue, i.e., the Kindorf, did not fall on plaintiff, but rather, plaintiff was struck by the Pipe that the Kindorf was supporting during its installation.

Further, this case can be distinguished from the case of *Fabrizi v 1095 Ave. of the Ams., LLC* (22 NY3d 658, 663 [2014]), which was put forth by defendants in support of their motion. In that case, the plaintiff, an electrician, was injured when he was struck by a piece of falling conduit pipe, which was left dangling by a compression coupling connecting it to a similar conduit. At the time of the accident, the plaintiff was "relocating a pencil box" (*id.* at 661). When he removed the pencil box, he left "the top conduit dangling by the compression coupling near the ceiling" (*id.*). About 15 minutes later, while drilling, "the top conduit fell, striking

plaintiff on the hand" (*id.*).

The Court in *Fabrizi* held that the defendants were entitled to dismissal of the Labor Law § 240 (1) claim against them, because, contrary to the plaintiff's assertion, the inadequate compression coupling, which allegedly failed to prevent the conduit from falling, was not a safety device "'constructed, placed and operated as to give proper protection' from the falling conduit" (*id.* at 663). In making its determination, the Court noted that the compression coupling's

> "only function was to keep the conduit together as part of the conduit/pencil box assembly . . . It cannot be said that the coupling was meant to function as a safety device in the same manner as those devices enumerated in section 240 (1).
>
> "It follows that defendants' failure to use a set screw coupling is not a violation of section 240 (1)'s proper protection directive. A set screw coupling, utilized in the manner proposed by plaintiff, is not a safety device within the meaning of the statute. Plaintiff concedes that compression and set screw couplings are 'basic couplings' that serve identical purposes, namely, to function as support for the conduit/pencil box assembly, not to provide worker protection"

(*id.*).

Importantly, the device at issue in *Fabrizi* was not put in place for the purpose of protecting the injured plaintiffs from an elevation or gravity-related risk, as it was intended to serve other purposes, i.e., keeping the conduit together. In contrast, the Kindorf in the instant case was intended to be constructed, placed and operated so as to support the Pipe from falling, thereby protecting plaintiff against an elevation-related risk.

Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was

framed [internal citation omitted]" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]). "As has been often stated, the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, 'those best suited to bear that responsibility' instead of on the workers, who are not in a position to protect themselves" (*John v Baharestani*, 281 AD2d at 117, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500).

Thus, plaintiff is entitled to partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants, and defendants are not entitled to dismissal of said claim against them.

The court has considered the parties' remaining arguments and finds them to be unavailing.

The Labor Law § 241 (6) Claim

Defendants cross-move for dismissal of the Labor Law § 241 (6) claim against them. Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers" (*Ross*, 81 NY2d at 501). However,

Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.* at 503-505).

Here, plaintiff does not oppose that part of defendants' cross motion which seeks dismissal of the Labor Law § 241 (6) claim against them. Thus, defendants are entitled to dismissal of the Labor Law § 241 (6) claim.

The Common-law Negligence and Labor Law § 200 Claims

Defendants cross-move to dismiss the common-law negligence and Labor Law § 200 claim against them. Labor Law § 200 (1) states, in pertinent part, as follows:

> "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."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept

2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work, "because the injury arose from the condition of the work place created by or known to the contractor, rather than the method of [the] work"]).

It is well settled that, in order to find an owner or its agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff's injury was caused by lifting a beam, and there was no evidence that the defendant exercised supervisory control or had any input into how the beam was to be moved]).

Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *see also Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009] [Court dismissed common-law negligence and Labor Law § 200 claims where the deposition testimony established that, while the defendant's "employees inspected the work and had the authority to stop it in the event they observed dangerous conditions or procedures," they "did not otherwise exercise supervisory control over the work"]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where the defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]).

As discussed previously, the accident was caused due to the fact that the Kindorf system

could not hold the weight of the Pipe as it was being pushed into place. Accordingly, either a stronger support should have been utilized for the Pipe, or additional safety devices should have been put into place to protect plaintiff from the possibility of being struck by the Pipe in the event that the Kindorf failed, during the Pipe's installation. Therefore, plaintiff's accident was caused due to the means and methods of the work.

As Vivid was the only entity responsible for the means and methods in regard to the installation of the Kindorf and the Pipe, it cannot be said that defendants supervised and directed the work the caused the accident. It should also be noted that even in the event that the failure of the fully-installed Kindorf is considered to be a defect inherent in the Premises, there is no evidence in the record to suggest that defendants had either actual or constructive notice of said defect, such that defendants would not be entitled to dismissal of the common-law negligence and Labor Law § 200 claims on an unsafe condition theory.

Thus, defendants are entitled to dismissal of the common-law negligence and Labor Law § 200 claims against them.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff Anson Barrow's motion, pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants Hudson Meridian Construction Group, LLC, Cref 546 West 44th Street and Patrinely Group LLC (collectively, defendants) is granted; and it is further

ORDERED that the part of defendants' cross motion, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims against them is granted, and these claims are dismissed as against defendants, and the motion is otherwise denied; and it is further

ORDERED that the action shall continue.

Dated: Dec. 6, 2018

ENTER:

J.S.C.
HON. ROBERT D. KALISH