Jimenez v Hudson 38 Holdings, LLC
2013 NY Slip Op 33724(U)
October 28, 2013
Supreme Court, Bronx County
Docket Number: 304580/2010
Judge: Alison Y. Tuitt
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FILED Oct 30 2013 Bronx County Clerk

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 05

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Case Disposed ☐
Settle Order ☐
Schedule Appearance ☐

---X

JIMENEZ,DELVIS

Index №. **0304580/2010**

-against-

Hon..**ALISON Y. TUITT** ,

HUDSON 38 HOLDINGS LLC

Justice.

---X

The following papers numbered 1 to 14 Read on this motion, **SUMMARYJUDGMENT LIABILITY**
Noticed on **March 12 2013** and duly submitted as No. ____ on the Motion Calendar of 6/17/13

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1,2,3	
Answering Affidavit and Exhibits	4,5,6,7,8,	9,10
Replying Affidavit and Exhibits	11,12,13,	14
______________ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion + cross-motions are decided in accordance with the annexed memorandum decision

Motion is Respectfully Referred to:
Justice: ______
Dated: ______

Dated: 10/28/2013

Hon. [signature]
ALISON Y. TUITT, J.S.C.

FILED Oct 30 2013 Bronx County Clerk

NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

DELVIS JIMENEZ,

Plaintiff,

-against-

HUDSON 38 HOLDINGS, LLC, WEST 38TH STREET, LLC, WEST 38TH STREET DEVELOPMENT, LLC and GLENWOOD MANAGEMENT CORP.,

Defendants.

HUDSON 38 HOLDINGS, LCC,

Third-Party Plaintiff,

-against-

MASTERCRAFT MASONRY 1, INC.,

Third-Party Defendants.

INDEX NUMBER: **304580/2010**

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1 to 14,

Read on this Plaintiff's Motion and Defendants' Cross-Motion for Summary Judgment

On Calendar of 6/17/13

Notices of Motion/Cross-Motions-Exhibits, Affirmations	1 - 3
Affirmations in Opposition	4 - 10
Reply Affirmations	11-14

Upon the foregoing papers, plaintiff's motion for summary judgment on his Labor Law §240(1) claim; defendants Glenwood Management Corp., West 38th Street Development, LLC and West 38th Street, LLC's cross-motion to dismiss the plaintiff complaint; third-party defendant Mastercraft Masonry 1, Inc.'s cross-motion to dismiss the third-party complaint; defendant Hudson 38 Holdings, LLC's cross-motion for summary judgment dismissing plaintiff's complaint and granting Hudson 38 Holdings, LLC's summary judgment on its contractual indemnification claim from third-party defendant Mastercraft Masonry 1, Inc.'s; and Mastercraft Masonry 1, Inc.'s cross-motion to dismiss the third-party action are consolidated for purposes of this decision.

This is a personal injury action arising out of an alleged accident on March 19, 2010 when plaintiff was allegedly injured while in the course of his employment while working at a new construction project located at 320 West 38th Street, New York, New York. Plaintiff alleges that he fell approximately 10 to 15 feet from the roof of defendant's building through an unprotected glass skylight to the floor below. Plaintiff alleges that no one provided him with a safety harness, safety belt, safety rope, lifeline or any other safety device. He further alleges that no one placed any netting or any other safety device underneath the glass skylight to protect plaintiff from falling.

The new construction project required the placement of protective covering against possible falling construction debris over the second floor rear setback roof of an adjacent building located at 330 West 38th Street. The protective covering consisted of plywood, wood planks and styrofoam over the entire second floor setback roof surface, multiple glass skylights and copings covering the parapet walls. Plaintiff alleges that his accident occurred when he was removing the wood protection on the roof of the adjacent building at 330 West 38th Street. Plaintiff removed the protective covering from one skylight and then continued to remove the wood protection in an area close to the unprotected skylight. While using a prybar/crowbar to lift up a piece of plywood protecting the roof surface, plaintiff lost his balance and went backwards onto the glass skylight, falling through and down 10 to 15 feet to the first floor.

Defendant West 38th Street, LLC (hereinafter "West 38th Street") owned the building under construction, 320 West 38th Street. Defendant West 38th Street Development, LLC (hereinafter "West 38th Development") was the general contractor for the project. Defendant Hudson 38 Holdings, LLC (hereinafter "Hudson") owned the adjacent building at 330 West 38th Street. Defendant Glenwood Management Corp.

(hereinafter "Glenwood") was both the agent for defendants West 38th Street and West 38th Development, as well as the managing agent of the two buildings. Defendant Hudson consented to the placement of the wood protective covering over the second floor roof. Plaintiff alleges that defendant Glenwood provided the construction workers access to the second floor roof to install the protective covering and also provided the construction workers access to the second floor roof to remove the protective covering at the time of plaintiff's accident.

Plaintiff appeared for a deposition and testified that, on the date of the accident, he was employed by Mastercraft Masonry 1, Inc. (hereinafter "Mastercraft") as a laborer and he had worked at the jobsite for two years before his accident. Plaintiff's accident occurred at approximately 11:45 a.m. on the back roof of the second floor of the building located at 330 West 38th Street. He had reported to work at the 320 West 38th Street building on the date of his accident and reported to his foreman Carmine Tudisco. Mr. Tudisco instructed plaintiff to go to the second floor roof of 330 West 38th Street and remove all of the wood that was on the roof with a crowbar. Mr. Tudisco did not mention anything about skylights being on the roof and did not give him any other instructions. Plaintiff testified that he did not know there were skylights on the roof prior to the date of his accident. Plaintiff testified that he did not know what the wood was specifically protecting other than the surface of the roof. The roof protection consisted of plywood, styrofoam and planks. Plaintiff's co-workers, Jose and Jorge, assisted plaintiff in removing the wood from the roof. Plaintiff began by removing the wood from a side wall. He lifted the wood and tossed it to Jorge and Jose who put the wood to the side. Plaintiff had been working on the roof for approximately two hours before his accident occurred and during that time no one mentioned the skylights. The roof was completely covered with wood and the glass skylight plaintiff fell through had its own protective covering, a wooden box. There were wooden planks on all four sides of the box with a 4 x 6 foot piece of plywood as the top cover of the box. The plywood cover and the wooden planks were all nailed together and the entire box was nailed to the wood protection on the roof. Plaintiff disassembled one complete box protecting a skylight by himself with a crowbar before his accident. Plaintiff did not know what the box covered before he disassembled it.

Plaintiff further testified that he removed the top piece of plywood cover from the box structure and saw only black dirt covering the area where he removed the plywood. Plaintiff did not see any glass and did not know what was under the dirt. Plaintiff could not see through the glass because everything was black. No

one instructed plaintiff to avoid waking near the area where he removed the box. Plaintiff continued to remove wood from the roof surface after removing the box. During the five or ten minutes after removing the box, plaintiff was removing wood from the roof surface in an area near the location where plaintiff had just removed the box. Plaintiff removed one piece of plywood from the roof surface which exposed wooden planks and Styrofoam. Plaintiff stood on one of the wooden planks and using both hands on the crowbar, placed one end underneath a second piece of plywood. While bending over and applying force to lift the plywood, plaintiff lost his balance and went backwards onto the skylight, breaking it and falling through approximately 12 to 15 feet below. Prior to the date of the accident, plaintiff had been on the second floor roof to perform cleaning and patching work. He was aware that the portion of the roof covered by the plywood box was raised approximately five inches in height and was six feet in length.

Mr. Tudisco, plaintiff's foreman, appeared for a deposition and testified that among other duties, he delegated the daily work assignments to the Mastercraft employees, including plaintiff. Mastercraft was one of the subcontractors working on the construction project at 320 West 38th Street, a 25 story residential building. Mr. Tudisco testified that plaintiff's accident occurred on the second floor setback roof of the adjacent building, 330 West 38th Street. He was present at the jobsite on the date of plaintiff's accident but did not witness the accident. Mr. Tudisco further testified that the carpenter trade place protective covering of plywood, wood planks and styrofoam over the entire second floor setback roof of the adjacent building at 330 West 38th Street to protect the roof from falling debris from 320 West 38th Street during construction. No one from Mastercraft placed any of the protective covering. The second floor setback roof of the adjacent building had multiple skylights and the protective covering included protection over the skylights. He did not know how the covering over the skylights was constructed but knew that there was a wooden box frame built around the skylight while the top of the skylight was covered with styrofoam and plywood. The plywood was attached to the wooden frame by either nails or screws. The roof protection remained throughout the roof for approximately two years prior to plaintiff's accident. On the date of the accident, Mr. Tudisco instructed plaintiff and two co-workers to remove all of the roof protection at 330 West 38th Street, which included the protection over the skylights and the copings that covered the parapet walls. Removing the plywood required the use of both hands and force. Plaintiff was provided with a pry bar to lift up the plywood and pull out the nails. Plaintiff wore the required hard hat and gloves while working and did not fail to wear anything he was required to wear. Plaintiff followed

all safety instructions prior to his accident. Shortly after plaintiff's accident, Mr. Tudisco saw pieces of the broken glass skylight covered with dirt.

Mr. Tudisco also testified that plaintiff had been on the roof area of the accident location on several prior occasions prior to the accident to patch around the skylights and apply plaster. Mr. Tudisco believed that plaintiff knew there were skylights on the roof as both he and plaintiff had been on the roof together on several occasions. Mr. Tudisco testified that he advised plaintiff and his co-workers to watch out for the skylights as they were removing the roof protection so they did not fall through them or break them.

Marc Bengualid, President of Hudson, testified at a deposition that Hudson owned the adjacent building at 330 West 38th Street, a 17 floor commercial building. Defendant Glenwood rented office space in the building and was a tenant at least since the construction project began. Mr. Bengualid gave permission to place the protective covering on the second floor setback roof to protect it from the construction. He did not witness plaintiff's accident but saw plaintiff after he landed on the first floor bleeding from his arm. Mr. Bengualid saw fire department and ambulance personnel treating the plaintiff and removing glass from his arm. He also saw the broken skylight glass on the floor. Plaintiff told Mr. Bengualid that he removed a piece of plywood covering a skylight on the roof and was in the process of removing another set of plywood when he took a step back and fell through the skylight. Hudson did not provide any of the workers with tools, material equipment or safety equipment.

Michael Palumbo testified at a deposition on behalf of defendant West 38th Development. Mr. Palumbo testified that he was the project executive for the project and his duties included bidding and buying contracts for the job, and procuring the initial building permit through the end of the job, procuring a TCO. Mr. Palumbo testified that defendant West 38th Street hired West 38th Development as the general contractor for the project. West 38th Development did not perform any of the work at the project and all of the work was performed by subcontractors. Mr. Palumbo hired Mastercraft as one of the subcontractors for the project. Mr. Palumbo further testified that West 38th Development had the authority to stop work on the project. If West 38th Development employees observed workers from a subcontractor engage in some form of dangerous activity, they had the authority to direct the worker to stop. The job duties of the West 38th Development employees at the site, the project manager, superintendent and approximately eight assistant superintendents, would all be on the job site on a daily basis and they would oversee to ensure the building was built in accordance to the

documents, plans and specifications. With respect to Glenwood, Mr. Palumbo testified that it is the parent company of West 38th Street and that it became the managing agent after the building construction. Prior to that time, Glenwood was not involved in the construction project; it did not hire any contractors for the job; did not supervise, manage or control any of the work.

Vincent Mintrone, site safety manager for West 38th Development, testified at a deposition that West 38th Development obtained permission from the owner of the adjacent building at 330 West 38th Street for the carpenters to place the protection material on the second floor setback roof and coping stones. Mastercraft was hired as a subcontractor to install the exterior brick and interior block at the premises. Mr. Mintrone instructed Mr. Tudisco to remove the protective covering from the setback roof about two weeks before the date of plaintiff's accident. Plaintiff's accident occurred when the workers just started removing the roof protection. Mr. Mintrone testified that the skylights which plaintiff fell through were raised above the roof by four inches and the protective covering was raised about four and a half inches. The area that was protecting the skylights was above the other parts of the roof that did not have skylights and was raised approximately two and a half to three inches from the surface. Further, the skylights were raised above the roof's surface approximately four inches. When he went on the roof for the first time, he observed three of the four skylights present, and did not have any problems seeing the skylights or the framing around the skylight. Mr. Mintrone did not give plaintiff any safety instructions and did not witness plaintiff's accident. Plaintiff was not required to wear any safety equipment to remove the roof protection, including protection over the skylights. Mr. Mintrone did not know what was required in removing the protection from the roof or what precautions should have been taken after the wood was removed. Mr. Mintrone conducted safety site meetings at the work site prior to plaintiff's accident, every two weeks. Plaintiff was not present for those meetings because the meetings were held with the foremen, and it was their responsibility to hold tool box meetings with their workers. Mr. Tudisco, plaintiff's foreman, attended these meetings.

Plaintiff moves for summary judgment on his Labor Law §240(1) claim on the ground that defendant owners and contractors failed to provide him with safety devices as he was exposed to an elevation risk related injury while performing construction work. Defendants Glenwood, West 38th Street and West 38th Development cross-move for summary judgment arguing that: plaintiff's Labor Law §240(1) claim should be dismissed because plaintiff failed to demonstrate that the collapse of the skylight and the need for safety devices

was foreseeable; plaintiff's Labor Law §200 and general negligence claims against West 38th Street and West 38th Development should be dismissed because defendants did not supervise or control plaintiff's work; plaintiff's Labor Law §240(2) claim should be dismissed because plaintiff was not working on scaffolding or staging at the time of the accident; and the alleged violations of the Industrial Code are insufficient to sustain a cause of action under Labor Law §241(6). Defendant Glenwood argues that the complaint against it should be dismissed as it did not manage, control, supervise maintain or oversee any of the construction work being performed. Third-party defendant Mastercraft argues that Hudson's third-party complaint against Mastercraft should be dismissed pursuant to the Worker's Compensation Law as plaintiff did not sustain a grave injury; as well as dismissal of the breach of contract claim for failure to procure insurance and the contractual indemnification claim. Defendant/third-party plaintiff Hudson moves for dismissal of the plaintiff's complaint on the grounds that it was not the owner of the building where plaintiff sustained his injuries and that it did not manage, control, supervise or direct plaintiff's work. Hudson also moves for summary judgment on its claim for contractual indemnification from Mastercraft on the grounds that plaintiff is a third-party beneficiary to the contract entered into between West 38th Development and Mastercraft.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it

began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

Labor Law §240(1) provides in pertinent part as follows: "[a]ll 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... 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." Strict liability under §240(1) is limited only to risks associated with elevation differentials. Daley v. City of New York , 716 N.Y.S.2d 50 (1st Dept 2000). Not every gravity-related hazard falls within the statute. Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487, 490-491. Moreover, once it is determined that the owner or contractor failed to provide the necessary safety devices required to give the worker proper protection, absolute liability is unavoidable under §240(1). See, Bland v. Mamocherian, 66 N.Y.2d 452 (1985).

An owner of a premises has a non-delegable duty under the Labor Law to provide a safe work environment. However, an implicit precondition to this 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. Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311 (1981) citing Reynolds v Brady & Co., 329 N.Y.S.2d 624 (2d Dept. 1972). Moreover, the work giving rise to these duties may be delegated to a third person or party. Russin 54 N.Y.2d at 317. 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. Id.

Plaintiff's motion for summary judgment on his Labor Law §240(1) claim should be granted as against defendants West 38th Street, as the owner of the premises, and West 38th Development, as the general contractor on the project. Plaintiff has adduced evidence that he was performing work covered by §240(1) of the Labor Law and that he is a member of the protected class contemplated by the statute. Plaintiff has further submitted evidence that he fell from an elevated level while performing his work. Moreover, he has submitted evidence in admissible form that he was not provided with the necessary safety equipment or safeguards. See, Bland v. Mamocherian, 66 N.Y.2d 452 (1985)("Once it is determined that the owner or contractor failed to provide the necessary safety devices required to give the worker 'proper protection', absolute liability is

'unavoidable' under §240(1).") Additionally, he has submitted evidence that the unprotected skylight and the failure to provide adequate safety measures were the proximate cause of his injuries.

In similar cases, the Appellate Courts have affirmed the award of summary judgment on plaintiff's Labor Law §240(1) claim. See, Kieler v. The Metropolitan Museum of Art, 866 N.Y.S.2d 629 (1st Dept. 2008)(Affirming summary judgment to plaintiff decedent on his Labor Law §240(1) claim where decedent fell 60 feet while re-caulking and sealing glass skylights while attempting to move counterweights over the unprotected skylights pursuant to his foreman's instructions. Decedent could not utilize the available safety rope system because the rope did not reach the skylights). See also, Timmons v. Lynx, 852 N.Y.S.2d 774 (1st Dept. 2008)(Plaintiff who was injured when he fell through a glass skylight while in the course of performing air conditioning insulation work on the fifth floor entitled to summary judgment on his Labor Law §240(1) claim); Gandley v. Prestige Roofing & Siding Co., 539 N.Y.S.2d 416 (2d Dept. 1989)(Reversing denial of summary judgment where plaintiff, while working on a roof, fell 30 feet through a plexiglass bubble that covered a skylight. Rejecting defendant's argument that there was no need for safety devices because the skylights were covered by plexiglass bubbles, the Court held that there was no evidence that such a plexiglass bubble constituted a safety device); Clark v. Fox Meadow Builders Inc., 624 N.Y.S.2d 685 (3d Dept. 1995)(That plaintiff might have been the one who removed the plywood cover does not create a question of fact on the proximate cause issue. There can be little doubt that the statutory violation based upon the failure to provide plaintiff with any protection from the elevation-related risk created by the uncovered opening was a proximate cause of plaintiff's injuries).

Defendants argue that plaintiff failed to demonstrate that the collapse of the skylight and the need for safety devices was foreseeable. Defendants further argue that while injury to workers from falling through an opening in the floor may be readily foreseeable, it is not reasonably foreseeable that a person standing on fixed plywood floor, removing plywood boxes from observable skylights, would fall through a closed, fixed and secure skylight which they were aware of. However, the First Department has held that the foreseeability requirement is limited only to accidents that are premises on a collapsing permanent structure. Vasquez v. Urbahn Associates, Inc., 918 N.Y.S.2d 1 (1st Dept. 2010). Whether the collapsed or failure of a permanent structure gives rise to liability under Labor Law §240(1) turns on whether the risk of injury from an elevation related hazard is foreseeable. Id., Jones v. 414 Equities LLC, 866 N.Y.S.2d 165 (1st Dept. 2008). Contrary to

defendants' arguments, plaintiff has established that he was exposed to a foreseeable risk of injury from a gravity related hazard that gives rise to liability under Labor Law §240(1) after he removed the wood protection from the skylight. It was foreseeable that plaintiff was exposed to a risk of injury while working near the unprotected glass skylight on the second floor roof.

Any recalcitrant worker argument is without merit. The recalcitrant worker defense would allow defendant to escape liability imposed by Labor Law §240(1). In order to establish a recalcitrant worker defense, a defendant must show that a plaintiff deliberately refused to use available safety devices provided by the owner or contractor. Hagins v. State of New York, 81 N.Y.2d 921, 922-923 (1993); Stolt v. General Foods Corp., 81 N.Y.2d 918 (1993). The defense is not established by merely showing that the worker failed to comply with an employer's instruction to avoid using unsafe equipment or engaging in unsafe practices or to use a particular safety device, or by the mere presence of safety devices on the work site. Hagins v. State of New York, *supra*; Gordon v. Eastern Railway, 82 N.Y.2d 555 (1993). The sole proximate cause defense generally applies where the worker misused, removed, or failed to use an available safety device that would have prevented the accident, or knowingly chose to use an inadequate device despite the availability of an adequate device. See Robinson v. East Med. Ctr., LP, 6 N.Y.3d 550 (2006) . However, "the Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence". Boyd v. Schiavone Const. Co., Inc., 965 N.Y.S.2d 117 (1st Dept. 2013) quoting Kielar. Moreover, "contributory negligence ... is not a defense to a section 240(1) claim". Boyd, quoting Ernish v. City of New York, 768 N.Y.S.2d 325 (1st Dept. 2003).

On these facts, the recalcitrant worker defense is inapplicable. In the instant matter, it is undisputed that plaintiff was instructed to perform work in and around the skylights by his foreman. It is undisputed that plaintiff was not provided with any safety devices to protect himself from working in the area of the skylights to avoid the elevated risk fall that occurred. It is also undisputed that plaintiff was caused to fall through a skylight, from an elevated level, 10 to 15 feet below. Such a fall on its own is sufficient to establish plaintiff's entitlement to summary judgment under Labor Law §240(1). See, Sanatass v. Consolidated Investing Co., Inc., 10 N.Y.3d 333 (2008); Sferraza v. Port Authority of New York and New Jersey, 777 N.Y.S.2d 645 (1st Dept. 2004); Ross v. Curtis-Palmer Hydroelectric Co., 81 N.Y.2d 494 (1994); Rocovich v. Consolidated Edison, 78 N.Y.2d 509 (1991); Zimmer v. Chemung County Performing Arts, Inc., 65 N.Y.2d 513 (1985). .

Plaintiff's complaint against Glenwood should be dismissed. Mr. Palumbo testified that

Glenwood did not become the managing agent of the subject premises until after the building was completed. The affidavit from Daniel Biggs, an officer of Glenwood sets forth that Glenwood did not manage, control, supervise, maintain or oversee any of the construction work being performed at the buildings, either 320 West 38th Street or 330 West 38th Street, nor did Glenwood control or supervised plaintiff in any of the work he was performing at either building. Since there is no evidence that Glenwood was involved in the premises at the time, or prior to the plaintiff's accident, the claims against Glenwood should be dismissed.

With respect to Hudson, it was the owner of the adjacent building to where the construction was ongoing. Hudson permitted the placement of protective equipment over its second floor roof to protect it from damage from the ongoing construction in the adjacent building. Hudson had no other involvement with the ongoing construction project. As such, plaintiff's Labor Law §240(1) claim against Hudson should be dismissed. See, Berrios v. TEG Management Corp., 777 N.Y.S.2d 163 (2d Dept. 2004)(Defendant was not an "owner" within the meaning of Labor Law §240(1) as it was not an entity which had an interest in the property and who fulfilled the role of owner by contracting to have work performed for its benefit. The significant factor is the "right to insist that proper safety practices were followed"; that is, "the right to control the work") (Internal citations omitted). See, also Ryba v. Almeida,815 N.Y.S.2d 623 (2d Dept. 2006). Plaintiff's claims against Hudson (and all of the defendants) pursuant to Labor Law §240(2) must be dismissed because plaintiff was not working from a scaffold or staging area at the time of the accident.

Defendant Hudson's cross-motion to dismiss plaintiff's Labor Law §200 and common law negligence claims should also be granted. Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner and/or general contractor to maintain a safe place to work. Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 N.Y.2d 343 (1998). Liability may arise out of the means and methods used to perform the work or from a defective condition on the property. See, Chowdhury v. Rodriguez, 867 N.Y.S.2d 123 (2d Dept. 2008). See also Ortega v. Puccia, 866 N.Y.S.2d 323 (2d Dept. 2008)(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 worksite, and those involving the manner in which the work is performed). Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law §200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident. Id. Liability under the statute is therefore governed by

common-law negligence principles. Absent any evidence that defendant created or had prior notice of allegedly defective conditions, the causes of action under §200 and for common-law negligence are properly dismissed. Carty v. Port Authority of New York and New Jersey, 821 N.Y.S.2d 178 (1st Dept. 2006).

Here, plaintiff claims that defendant Hudson is liable based upon a dangerous or defective condition on the premises. Thus, plaintiff is only required to show that defendant had actual or constructive notice of the dangerous or defective condition. Murphy v. Columbia University, 773 N..S.2d 10 (1st Dept. 2004); Ortega v. Puccia, 866 N.Y.S.2d 323 (2d Dept. 2008). It is well established that an owner of a premises has a duty to keep its property in a "...reasonably safe condition, considering all of the circumstances including the purposes of the person's presence and the likelihood of injury..." Macey v. Truman, 70 N.Y.2d 918 (1987); Basso v. Miller, 40 N.Y.2d 233, 241 (1976).

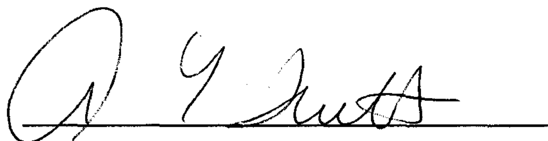
In the instant matter, there is no evidence that Hudson had actual notice of a defective condition on its property. The skylights had been properly covered with plywood and styrofoam to prevent breakage, and were raised several inches off the ground, indicating that this was not a flat ground surface. The coverings on the skylights provided protection from someone falling through the skylight. Moreover, with respect to constructive notice of a hazardous condition, there is no evidence that there was a hazardous condition on Hudson's property. It was not until plaintiff removed the coverings of the skylights that it became a dangerous condition. In order to charge a defendant with constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit its discovery and remedy. Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837 (1986). Here, it can be said that once plaintiff removed the plywood covering, it created a hazardous condition. However, from the time plaintiff removed the covering to the time he fell through the skylight was not sufficient time for Hudson to discovery and remedy the condition. Since these coverings had been placed by the construction workers and were being removed by the workers, there was no reason for Hudson to be on notice of any dangerous condition. Accordingly, plaintiff's complaint against Hudson should be dismissed. By virtue of dismissing the plaintiff's action against Hudson, the third-party action is also dismissed.

Having granted plaintiff's motion based upon Labor Law 240(1), the Court declines to consider defendants' West 38th Street and West 38th Development arguments that it is entitled to summary judgment dismissing the claims based upon the violation of Labor Law §§241(6) and 200, and common law negligence. It

is clear from the record that plaintiff's damages are the same regardless of the theory of liability, and plaintiff can only recover these damages once. As such, defendant's argument concerning the lack of merit of the other theories of liability contained in the complaint are academic. See, Fanning v. Rockefeller University, 964 N.Y.S.2d 525 (1st Dept. 2013); Carchipulla v. 6661 Broadway Partners, LLC, 945 N.Y.S.2d 4 (1st Dept. 2012); Auriemma v. Biltmore Theatre, LLC, 917 N.Y.S.2d 130 (1st Dept. 2011); Torino v. KLM Construction Co. Inc., 257 A.D.2d 541 (1st Dept.1999).

This constitutes the decision and order of this Court.

Dated:



Hon. Alison Y. Tuitt