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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY Justice

PART 8

Index Number : 106217/2010
MARSILLO, ANTHONY
vs.
ROCKEFELLER UNIVERSITY
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: 5/27/14

_____, J.S.C.
JOAN M. KENNEY

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

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Paul I. Krohn, as Trustee of the Bankruptcy Estate of Anthony Marsillo and Holly Marsillo,
Debtors as the successor in interest to the Debtors,

Plaintiffs,

-against-

Rockefeller University, Foundation for the Rockefeller University and the American Committee for the Weizmann Institute of Science, Inc., Rockefeller University Associates Philanthropic Foundation, Inc., and Turner Construction Co.,

Defendants.

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DECISION AND ORDER
Index Number: 106217/2010
Motion Seq. No.: 004, 005

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of these motions for summary judgment.

Papers	**Numbered**
Notice of Motion (004), Affirmation, Exhibits, and Memo of Law	1-10
Opposition Affirmation and Exhibits	11-16
Reply Affirmation, Memo of Law	17
Notice of Motion (005), Affirmation, Exhibits, and Memo of Law	18-32
Opposition Affirmation and Exhibits	33
Reply Affirmation, Memo of Law	34

In motion sequence number 004, plaintiffs moves for an Order, pursuant to CPLR 3212, seeking summary judgment on the issue of liability under Labor Law §240(1).

In motion sequence number 005, defendants move for an order pursuant to CPLR 3212, seeking summary judgment as to all of the plaintiffs' causes of action, and pursuant to CPLR 3124 and 3126, dismissing plaintiff Holly Marsillo's derivative claims for failure to appear for a deposition.

Motion sequence numbers 004 and 005 are consolidated herein for disposition.

Factual Background

On July 1, 2009, plaintiff Anthony Marsillo (Marsillo), who was employed by Island International as a shop steward, was allegedly struck by a bucket used to store adhesive material at a construction project located at 1230 York Avenue, New York, New York (the project). The owner of the site is Rockefeller University. The general contractor of the construction project is Turner Construction Company (Turner).

According to Marsillo, he was working on approximately the fourth level of a regular pipe scaffold at a building of 5 to 6 stories tall. Marsillo described the scaffold as approximately 8 to 10 feet deep, 6 feet wide with 2 feet at the outrigger (or bicycle plank) and another 18 to 24 inches of void between the outrigger and the building wall. While on the scaffold, Marsillo was putting up thermafiber material on the side of the building. He was sticking his head out into the void between the outrigger and the building, as he had to reach the top stick pins in order to put up the material. According to his testimony, Marsillo was "getting ready to go move my lanyard to the next section and before I could unlock it, the bucket hit me in the head. I stepped back, my foot went into that void...I grabbed onto my lanyard to try to stop myself...I felt something pop in my shoulder...I got up and then there's a bucket standing right next to me." (See Exhibit E, Plaintiff's Deposition at page 94, line 19). According to plaintiff, the bucket weighed between 25 and 37.5 pounds and fell between 15 and 23 feet.

After being struck by the bucket, Marsillo went to the roof level and saw a worker from Turner Construction named Luis to warn him that he was working below him. However, Marsillo has testified that he does not know what caused the bucket to fall. He did not see Luis before the

accident, did not know what Luis was doing, could not see Luis from where plaintiff himself was working, and never saw him on the scaffold. Additionally, Marsillo testified that there is a parapet wall on the roof that would have prevented anything from being swept over the edge or sliding off.

Marsillo then went to Turner's trailer to file an accident report. No one witnessed plaintiff's accident. Turner's safety manager, D'artagnan Delgado (Delgado), prepared the Incident Report, which recorded Marsillo as "working on the bicycle plank installing thermafiber and a can came down and struck me on the left side of my hard hat and got wedged between the bicycle plank and the building." (See Exhibit G, Incident Report). Marsillo further stated, "I'm o.k. I just want to document in case I don't feel good tomorrow." (Id.) Marsillo and Delgado then went to the location of the accident, where the bucket was resting against the building, between it and the bicycle plank. The bucket was empty and did not appear to be damaged in any way. Delgado picked up the bucket, which, according to him, weighed less than five pounds. Plaintiff confirmed that this was the bucket that had in fact hit him. There were no other buckets in the area.

Plaintiff was fired in October 2009. Between the date of the accident and the date he was fired, plaintiff did not receive any medical treatment for any of the injuries he claims were caused by this accident.

Arguments

In its motion, plaintiff argues that he is entitled to summary judgment because his accident occurred while he was engaged in the type of work specifically protected by the Labor Law §240(1).

Defendants maintain that summary judgment in favor of the plaintiff is not warranted because plaintiff has failed to demonstrate, as necessitated by the Labor Law statute, that the object that fell was one that required securing for the purposes of the undertaking and that it fell due to inadequate safety devices.

Defendants move for summary judgment as to all of plaintiff's causes of action sounding in Labor Law §240(1), §241(6), and §200 based on the fact that the case does not call for the protections afforded by the Labor Law Statute.

Plaintiff maintains that summary judgment should not be granted in defendant's favor because plaintiff is entitled to such protections under the Labor Law Statute and that there remains numerous issues of material fact.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The rule governing summary judgment is well established: "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." (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 Ad2d 201 [1st Dept 1999]).

Labor Law §240(1)

Labor Law §240(1) provides that:

> "[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 erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The aim of the statute is to protect workers by imposing liability for the failure to supply required safety devices at construction sites upon those best situated to mandate and implement their use (*see Zimmer v. Chemung County Performing Arts,* 65 N.Y.2d, 513, 520). While the statute is to be liberally construed so as to accomplish this purpose, injuries from hazards other than those falling within the context are not compensable thereunder, even if proximately caused by the lack of required safety devices (*see Rocovich v. Consolidated Edison Co.,* 78 N.Y.2d 509; *Koenig v. Patrick Constr. Corp.,* 298 N.Y. 313, 319; *Quigley v. Thatcher,* 207 N.Y. 66, 68). In 2008, the Court of Appeals held that "falling object liability under Labor Law §240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured" (*Ouattrocchi v. F.J. Sciame Const. Corp.,* 11 N.Y.3s 757, 758-759).

Accordingly, here, in light of the nature and purpose of the work being performed at the

time of the accident, there exists a triable issue of fact as to whether the bucket in question was required to be secured for purposes of the undertaking by Labor Law §240(1). Plaintiff claims that the bucket required securing because it was part of the work being performed at the construction site and that it was foreseeable that the bucket could fall when debris was being cleared overhead. Defendants claim that the bucket was not part of plaintiff's actual work. Thus, the motion and cross-motion for summary judgment under Labor Law §240(1) must be denied, as it is not clear to this Court whether the bucket was part of the work performance at the construction site.

Labor Law §241(6)

Labor Law §241 (6) requires that all contractors, owners, and their agents comply with the following requirement:

> "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 of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety'" to construction workers (*Rizzuto v L.A. Wenger Constr. Co.*, 91 NY2d 343, 348 [1998]). To establish liability under Labor Law §241(6), the plaintiff must "specifically plead and prove the violation of an applicable Industrial Code regulation," which proximately caused the accident (*Garcia v 225 E. 57th St. Owners, Inc.*, 96 AD3d 88, 91 [1st Dept 2012] [internal quotation marks and citation omitted]).

A "plaintiff's failure to identify a violation of any specific provision of the State Industrial Code precludes liability under Labor Law § 241 (6)" (*Owen v Commercial Sites*, 284 AD2d 315 [2d Dept 2001]).

Plaintiff's Verified Bill of Particulars alleges the following violations of the Industrial Code of the State of New York (12NYCRR23): §§ 23-1.2(a), (d), (e), 23-1.3, 23-1.5, 23-1.7, 23-1.7(a), 23-1.7(b)(1), 23-1.16, 23-1.17, 23-1.18, 23-1.19, 23-1.20, 23-1.33, 23-2.5(a)(1), 23-6.1-, 23-6.2, 23-6.3. In opposition to defendants' motion, plaintiff concedes that none of the asserted violations apply to this case. Accordingly, claiming liability under Labor Law §241(6) against defendants must be dismissed.

Plaintiff for the first time attempts to assert a violation of Industrial Code Section 23-2.1, stating that a cross-motion to amend the Bill of Particulars to include this violation is to be filed. (Plaintiff has not filed such a cross-motion.) This Court cannot entertain plaintiff's new argument, raised for the first time in these motion papers, that defendants violated Industrial Code 23-2.1. First, plaintiff has not sought leave to amend his Bill of Particulars. Second, even if an application to amend were granted, section 23-2.1(a)(1), is inapplicable because nothing in this case relates to the obstruction of passageways, walkways, stairways, and other thoroughfares. Section 23-2.1(a)(2) addresses the storage of material and equipment. Section 23-2.1(b) lacks the specificity required to qualify as a predicate for section 241(6) liability. (*See Lynch v. Abax, Inc.*, 268 A.D.2d 366, 702 N.Y.S.2d 271).

Labor Law §200 and Common Law Negligence

It is well settled that Labor Law §200 is a codification of an owner's and general contractor's duty to maintain a safe work site (*Comes v New York State Elec. & Gas Corp.*, 82

NY2d 876, 877 [1993]). Labor Law §200 (1) provides that:

> "All places to which this chapter applies shall be 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. The board may make rules to carry into effected the provisions of this section."

Generally, Labor Law § 200 claims fall into two categories: (1) those involving injuries arising from dangerous or defective premises conditions; and (2) those involving injuries arising from the means or methods in which the work is performed (*see generally Ventura v Ozone Park Holding Corp.*, 84 AD3d 516, 517 [1st Dept 2011]). This mater involves an allegedly dangerous condition. "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. (*Sanders v. St. Vincent Hosp.,* 95 A.D.3d 1195 [2nd Dept 2012]). "To provide constructive notice, a defect must be visible and apparent, and it must exists for a sufficient length of time prior to the accident to permit a defendant's employees to discover and remedy it" (*Schick v. 200 Blydenburgh, LLC,* 88 A.D.3d 684, 686 [2nd Dept 2011]); *see also White v. Village of Port Chester,* 92 A.D.3d 872, 876 [2nd Dept 2012] [owner liable if "had actual or constructive notice within a reasonable amount of time"]). In addition, "constructive notice of the allegedly unsafe condition that caused the accident...must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken" (*Mitchel v. New York Univ.,* 12 A.D.3d 200, 201 [1st Dept 2004]).

"The owner's duty to provide a safe workplace encompasses the duty to make reasonable

inspections" (*Kennedy v. McKa,* 86 A.D.2d 597, 598, 446 N.Y.S.2d 124), and the question of whether the danger should have been apparent upon visual inspection is generally a question of fact (*see Urban v. No. 5 Times Sq. Dev., LLC,* 62 A.D.3d at 555, 879 N.Y.S.2d 122). This duty extends to general contractors with control over the work site (*see id.* At 556, 879 N.Y.S.2d 122).

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At the outset, it is noted that plaintiff consents to dismissal of any Labor Law §200 claims against defendants Rockefeller University, Foundation for the Rockefeller University and the American Committee for the Weizman Institute of Science, Inc., and Rockefeller University Associates Philanthropic Foundation, Inc..

However, plaintiff maintains that the Labor Law §200 claim against defendant Turner Construction Co., must stand.

Here, Turner was responsible for clearing debris and keeping the work site in a clean and safe condition. On the day of the accident there was a Turner employee, who was in charge of housekeeping, working on the roof. While there is no direct evidence on what caused the bucket to fall, there is a question of fact as to whether Turner negligently performed its housekeeping duties, and/or upon performing his housekeeping duties, whether the Turner employee should have noticed that the bucket was in a dangerous position and needed to be placed in a safer location and/or secured.

Holly Marsillo's Derivative Claims

The extreme sanction of dismissal is warranted only where a clear showing has ben made that non-compliance with a discovery order was willful, contumacious, or due to bad faith. (*See Rosario v. New York City Hous. Auth.*, 272 A.D.2d 105, 106, 707 N.Y.S.2d 421 [2000]). Here, there is no evidence that plaintiff Holly Marsillo's actions were willful, contumacious or taken in bad faith. Plaintiff Holly Marsillo is to appear for a deposition by June 16, 2014. Failure to appear for this deposition will result in dismissal of her derivative claims upon Notice of Motion application. Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment is denied; and it is further

ORDERED, that defendants' application to dismiss plaintiff's causes of action under Labor Law §240(1) is denied; and it is further

ORDERED, that defendants' application to dismiss plaintiff's causes of action under Labor Law §241(6) is granted; and it is further

ORDERED, that defendants' application to dismiss plaintiff's cause of action under Labor Law §200 and common-law negligence as against Rockefeller University, Foundation for the Rockefeller University and the American Committee for the Weizman Institute of Science, Inc., and Rockefeller University Associates Philanthropic Foundation, Inc., is granted, on consent; and it is further

ORDERED, that defendants' application to dismiss plaintiff's cause of action under Labor Law §200 and common-law negligence, as against Turner Construction Company, is denied; and it is further

ORDERED, that the part of defendants' motion to dismiss Holly Marsillo's derivative

claims is denied; and it is further ORDERED that plaintiff Holly Marsillo appear for a deposition to be conducted on or before June 16, 2014 at a time and place to be decided by all counsel; and it is further

ORDERED, that the parties proceed to mediation/trial forthwith.

Dated: May 27, 2014

ENTER:

Joan M. Kenney, J.S.C.