Alvarez v City of New York
2017 NY Slip Op 31280(U)
June 14, 2017
Supreme Court, New York County
Docket Number: 152073/2014
Judge: Robert D. Kalish

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

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Pablo Alvarez,

Plaintiff,

-against-

The City of New York, New York City School Construction Authority, Skanska USA Building, Inc. and All-Safe, LLC

Defendants.

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Index Number:

152073/2014

Robert D. Kalish, J.:

Upon the foregoing papers, the Defendants' motion for summary judgment dismissing the Plaintiffs labor law claims are granted to the extent as follows:

- the Plaintiff's claims against the Defendant the City of New York ("NYC") are dismissed in their entirety and
- the Plaintiff's claims pursuant to Labor Law §§ 240 and 241(6) against the Defendants New York City School Construction Authority ("NYCCA"), Skanska USA Building, Inc. ("Skanska") and All-Safe, LLC ("All-Safe") are dismissed.

The Plaintiff's claims against NYCCA, Skanska and All-Safe for common law negligence and pursuant to Labor Law §200 remain.

Underlying Allegations

In the underlying labor law action, the Plaintiff alleges in sum and substance that he was injured on October 21, 2013 while working as a stucco wall installer at the renovation of Beacon High School located in New York City. The Plaintiff claims that he was struck on the head while ducking under a scaffold brace/tie at the job site. Plaintiff further alleges that NYCCA owned the school, Skanska was

the general contractor on the project, and that All-Safe was hired by Skanska to install the scaffolding that caused Plaintiff's accident.

The Plaintiff alleges causes of action against the Defendants for common law negligence and pursuant to Labor Law §§ 200, 240 and 241.

Parties' Contentions

The Defendants present six points in support of their motion to dismiss the Plaintiff's underlying action.

1. Defendants argue that Plaintiff's common law negligence and Labor Law 200 claim should be dismissed as the Defendants lacked supervisory control over Plaintiff and lacked notice of the alleged dangerous condition. Specifically, the Defendants argue that Plaintiff testified that he only received instructions and directions on how to perform his work by Plaintiff's employer Elite Wall Systems ("Elite"). Defendants further argue that the Plaintiff testified that Elite provided him with the tools, materials and equipment he used on the project. On the issue of "notice", the Defendants argue that there is no proof that the alleged "condition" was dangerous in any way, and therefore the Defendants could not be "on notice" of any alleged defect.

2. Defendants argue that Plaintiff's Labor Law 240 claims should be dismissed because the Plaintiff was not injured due to an elevation related hazard. Specifically, the Defendants argue that Plaintiff's alleged accident occurred when he was ducking under a brace and his head came in contact with said brace, which Defendants argue is not the type of accident that falls within the scope of Labor Law 240.

3. Defendants argue that Plaintiff's claims against the City of New York should be dismissed as a matter of law since NYC is not an owner, contractor, or agent of either and had no involvement with the Beacon High School project. The Defendants argue that NYC was not the owner of Beacon High School on the date of the Plaintiff's alleged accident, nor did NYC have any involvement with the project. Further, the Defendants argue that NYC did not in any way direct the Plaintiff in the performance of his work, nor did NYC have any notice of any alleged defects.

4. Defendants argue that Plaintiff's claims against All-Safe should be dismissed as a matter of law since All-Safe is not an owner, contractor, or agent of either and had no involvement with the Beacon High School project. Specifically, the Defendants argue that All-Safe was not the owner of the Beacon High School premises, nor the general manager of the project. Defendants further argue that once All-Safe installed the hoist, sidewalk bridges and scaffolding, All-Safe's employees no longer worked at the job site.

5. Defendants argue that Plaintiff's Labor Law 241(6) claims should be dismissed because Plaintiff cites to industrial codes that are not applicable to the facts, the Defendants did not violate the industrial code sections cited by the Plaintiff and/or that the Plaintiff's own actions were the sole proximate cause of his alleged injuries. Plaintiff cites to Industrial Code §§ 23-1.5, 23-1.7(e), 23-1.15, 23-1.22, 23-5.1, 23-5.3, and 23-5.4 as the basis for his Labor Law 241(6) claims.

6. Defendants argue that Plaintiff's Labor Law 241(6) claims based upon alleged OSHA violations are inapplicable to the underlying action as none of the named Defendants were the Plaintiff's employer at the time of the alleged accident, and OSHA does not apply to a contractor that is not the Plaintiff's employer.

In opposition, the Plaintiff argues that the area of scaffolding where the Plaintiff's accident occurred was a passageway, which the Plaintiff was required to traverse in order to access his work area. The Plaintiff further argues that his accident was caused by a low "tie-in" that created an improper obstruction in said passageway, and as such constituted a violation of Labor Law 200. The Plaintiff further argues that the low tie-in brace constituted a violation of Industrial Code 23-1.7, and as such forms a basis for a Labor Law 241(6) claim. In addition, the Plaintiff argues that the OSHA guidelines did not require that the tie-in brace be placed 4' 7" above the passageway, but only give the maximum distance requirements for the placement of tie-in braces. The Plaintiff further argues that All-Safe is liable under a general negligence theory as All-Safe installed the scaffold and tie-in braces and placed the tie-in braces so as to create the overhead obstruction.

The Plaintiff attaches with his opposition papers an expert report by Leo DeBobes, who states that he is a "Certified Safety Professional". DeBobes states that in his professional opinion the scaffold/passageway that Plaintiff was required to traverse was unsafe, improper and violated industry standards in that the tie-in brace was only 4 feet, 7.25 inches above the passageway. DeBobes further states that the tie-in brace was positioned so as to prevent the Plaintiff from being able to safely walk across the elevated platform, and that said positioning compelled the Plaintiff to duck in order to avoid the obstruction.

The Plaintiff does not address the Defendants' arguments as to dismissing the Plaintiff's claims against NYC, dismissing the Plaintiff's Labor Law 240 claims or dismissing Plaintiff's Labor Law 241(6) claims based upon alleged violations of Industrial Code §§ 23-1.15, 23-1.22, 23-5.1, 23-5.3, and 23-5.4.

In reply, the Defendants argue that Plaintiff's expert's affidavit should be disregarded by the Court since said affidavit includes unsupported legal conclusions. The Defendants further argue that there is no genuine issue of fact as to whether the Defendants caused or created the alleged condition or had notice of said alleged condition. The Defendants further argue that they are entitled to summary judgment on all of the arguments they presented in their motion for the dismissal of claims, which the Plaintiff failed to address in his opposition papers.

Oral argument

On May 9, 2017, the parties appeared for oral argument before the Court. At oral argument the Plaintiff conceded to the dismissal of his claims made pursuant to Labor Law 240 as to all of the Defendants. The Plaintiff also conceded to the dismissal of all of his claims as against the Defendant NYC. The Plaintiff also conceded to the dismissal of all of his Labor Law 241(6) claims except for his Labor Law 241(6) claims based upon the alleged violation of Industrial Code 23-1.7(e)(1).

The Defendants argued that Industrial Code 23-1.7(e)(1) does not apply to the underlying action. Defendants argue that Industrial Code 23-1.7(e)(1) addresses tripping hazards and the Plaintiff does not allege that he tripped or that his accident was caused by debris, scattered tools, scattered materials or a sharp projection.

The Defendants further argued that the Plaintiff's Labor Law 200 and common law negligence claims should be dismissed since the tie-in brace was not a dangerous condition and as such the Defendants did not create a dangerous condition. Specifically, the Defendants argued that the purpose of the tie-in brace is to hold the scaffold in place, and as such the brace cannot just be placed at any height in order to avoid making it too low for someone to trip upon or too high for them to strike their head upon. The Defendants further argued that placing the tie-in brace at other heights to avoid creating a tripping or overhead hazard could make the scaffold unstable. The Defendants argued in sum and

substance that All-Safe built the scaffold in accordance with plans created by Plan B Engineering, which were safe and included the placement of the tie-in braces. The Defendants argue that the tie-in braces did not break and served their designed purpose of securing the scaffolding.

In opposition, the Plaintiff argued that although he could not provide the Court with any case law, his expert states in the expert affidavit that the construction industry does not distinguish between an overhead hazard and a tripping hazard. As such, the Plaintiff argued that Industrial Code 23-1.7(e)(1) is applicable to the underlying alleged facts (i.e. that the Plaintiff was injured by an "overhead" hazard). Plaintiff further argued in sum and substance that the Defendants could have, safely and in accordance with OSHA regulations, placed the tie-in braces in different locations that would not have created an obstruction to workers walking across the pathways on the scaffold. Plaintiff argued, based upon the opinion of his expert, that the Defendants' placement of the tie-in brace constituted a violation of Labor Law 200. Plaintiff acknowledged that his expert did not examine the scaffold, but only examined photos of it. Plaintiff further indicated that he was not challenging the structural integrity of the scaffold.

Based upon the Plaintiff's concessions at oral argument, the claims against NYC are dismissed in their entirety. Further, the Plaintiff's only remaining claims against the remaining defendants are those alleging violations of Labor Law 200, common law negligence, and Labor Law 241(6) based upon alleged violations of Industrial Code 23-1.7(e)(1).

Deposition Testimonies

Plaintiff's Deposition March 17, 2015

The Plaintiff appeared for deposition and testified that he has a certification in plastering, which he received in 2014 (Plaintiff's Deposition 11:18-22, 12:25 -14:16). He further testified that he was injured in 2013 (Plaintiff's Deposition 18:16-18). Plaintiff testified that he worked for Elite in 2012 and 2013, and that he worked approximately 14 days at the high school project in 2013 (Plaintiff's

Deposition 24:7-17, 26:8-10, 33:2-7). He further testified that other Elite employees also worked there (Plaintiff's Deposition 33:17-23). Plaintiff further testified that the safety officers for the high school project were not employees of Elite, and were possibly employees of Skanska and/or the "School Authority" (Plaintiff's Deposition 35:7-17).

Plaintiff testified that he was at the project to install stucco to an existing exterior wall, and the job required that he perform his work on a scaffold (Plaintiff's Deposition 37:11-22, 45:22-25). He further testified that the foreman on the project was Israel Mercado, an employee of Elite, who provided Plaintiff with work instructions. Plaintiff did not recall receiving work instructions by anyone other than Israel (Plaintiff's Deposition 39:18- 40:3; 44:9-14). Plaintiff testified that he had his own tools and was provided with additional tools, such as buckets and a mixer, by Elite. He further testified that Elite also provided him with work materials (Plaintiff's Deposition 40:20- 41:5). Plaintiff testified that he brought his own safety gear and that some safety gear was given to him by Elite (Plaintiff's Deposition 41:6-10).

Plaintiff testified that he worked at the high school project from 7:00 am to 3:00 pm, Monday through Friday (Plaintiff's Deposition 41:19- 42:2). He further testified that employees of Skanska did not speak to him about his job duties, nor did they provide him with any tools or materials (Plaintiff's Deposition 42:9-16). Plaintiff did not recall speaking with any All-Safe employees while on the job site (Plaintiff's Deposition 42:21 - 24). Similarly, Plaintiff did not recall speaking with any employees of NYC while on the job site (Plaintiff's Deposition 43:13 - 21). Plaintiff further testified that he did not recall speaking with any employees New York City School Construction Authority while on the job site (Plaintiff's Deposition 43:22 - 44:3). Plaintiff did not recall ever making any complaints as to the condition of the scaffold at the job site (Plaintiff's Deposition 47: 15-21).

Plaintiff testified that he worked with a partner (another employee of Elite) installing stucco at the job site (Plaintiff's Deposition 48:14-21). He further testified that the subject accident occurred at 7:00 am on October 21, 2013 on the fourth floor of the school, while he was on a scaffold on the exterior of the building (Plaintiff's Deposition 50:13-51:5). Plaintiff testified that he was with Jose Vallalta and another laborer at the time of the accident and that Jose Vallalta is an Elite employee (Plaintiff's Deposition 52:6-53:4). Plaintiff testified that he was wearing his helmet at the time of the accident, and that he had been instructed by Israel to go up to the fourth floor, walk out to the scaffold, and wash down and strip the existing wall on the fourth floor (Plaintiff's Deposition 53:23-54:10, 61:8-12).

Plaintiff testified that he had to duck under a scaffold brace that was positioned approximately 5 feet high at "eye level" (Plaintiff's Deposition 78:21-25). He further testified that he saw the brace while he was walking on the scaffold, and that he saw the brace when he was about six to eight feet away from it (Plaintiff's Deposition 79:2-11). Plaintiff testified that Jose Vallalta ducked underneath the brace before the Plaintiff did (Plaintiff's Deposition 79:12-15). Plaintiff further testified that he had never walked on the scaffold in the area where the brace was located prior to the accident, and that the accident occurred as he was walking on the scaffold to the area where he would be working (Plaintiff's Deposition 79:23-80:2, 81:22-82:2). Plaintiff testified that he was walking on the scaffold, looked down, continued to walk and struck the scaffold brace (Plaintiff's Deposition 82:16-23). He further testified that the top of his head came into contact with the brace, and that he was wearing a hard hat at the time (Plaintiff's Deposition 89:12-23). Plaintiff did not recall looking at the brace after his head and hard hat came into contact with it (Plaintiff's Deposition 87:15-19). He further testified that he did not fall off of the scaffold after the accident (Plaintiff's Deposition 91:7-18). Plaintiff testified that after the accident, the safety officers at the work site called an ambulance (Plaintiff's Deposition 92:21-25). He did not recall if his hard hat fell off when he hit the brace (Plaintiff's Deposition 102:10-12).

At his deposition, Plaintiff was shown a photograph (Exhibit A) taken by Israel of the area where the accident allegedly occurred. Plaintiff testified that the photograph showed the tie-in brace involved the alleged accident (Plaintiff's Deposition 149:24-151:10). He was also shown a photograph (Exhibit C) taken of the area where the accident allegedly occurred and testified that the photograph showed the tie-in brace involved the alleged accident (Plaintiff's Deposition 159:12-160:4).

Plaintiff's Deposition July 29, 2015

On July 29, 2015, the Plaintiff appeared for an additional deposition and was shown three photographs of the location of the alleged accident. Plaintiff testified that he was three to four floors up at the time of the accident and that he did not fall off of the scaffold (Plaintiff's Deposition 197:7-18).

All-Safe Deposition by John Joseph O'Reilly July 29, 2015

John Joseph O'Reilly appeared for deposition and testified that he is the corporate safety director for All-Safe, and that All-Safe is a construction subcontractor that performed hoisting and scaffolding (O'Reilly's Deposition 5:17-6:2). He further testified that he was working for All-Safe at the time of the Plaintiff's alleged accident in October of 2013 (O'Reilly's Deposition 6:7-9). O'Reilly testified that his job consists of visiting job sites, developing training for employees and writing safety plans (O'Reilly's Deposition 6: 13-17). O'Reilly testified that All-Safe was doing work at New Beacon High School at 521 West 43rd Street and that he visited the job site (O'Reilly's Deposition 11:1-9, 12:12-19)

O'Reilly testified that All-Safe installed the scaffold, sidewalk bridges and a hoist at the work site (O'Reilly's Deposition 11:13-17). He further testified that the installation of the scaffolding and sidewalk bridges at the work site started before he was employed by All-Safe (O'Reilly's Deposition 11:23-12:6). O'Reilly testified that All-Safe employees would install the scaffolds and sidewalk bridges, and after installation was complete, the All-Safe employees would probably not be on the job site (O'Reilly's Deposition 13:10-14:21). He further testified that the plans for the installation of scaffolding

were drawn by subcontractor Plan B Engineering, however, Plan B did not supervise the installation of scaffolding (O'Reilly's Deposition 15:3-22, 16:20-17:6). O'Reilly testified that he would visit job sites and look at scaffolds to make sure they were being built in compliance with OSHA codes (O'Reilly's Deposition 17:24-18:6).

O'Reilly testified that he became aware of the accident on October 21, 2013 when he got a phone call from Patrick Harris, the on-site safety representative for Skanska, the general contractor on the job site (O'Reilly's Deposition 19:8-20:6). O'Reilly further testified that he was told that the accident occurred when the Plaintiff was on the scaffold and that Plaintiff hit his head on a brace (O'Reilly's Deposition 20:7-21:14). O'Reilly testified that Harris indicated to him that Harris was concerned that the brace might have been at the wrong level (O'Reilly's Deposition 22:4-10).

O'Reilly testified that he went to the work site and Harris showed him the specific tie-in brace that allegedly caused the Plaintiff's accident (O'Reilly's Deposition 26:13-27:15). He further testified that he observed that the tie-in brace was approximately 56 inches high from the work platform (O'Reilly's Deposition 27:20-25). O'Reilly testified that the tie-in braces are used to secure the scaffolding from tipping (O'Reilly's Deposition 28:7-9). He further testified that a worker would have to walk under this tie-in brace in order to get access to various parts of the scaffolding (O'Reilly's Deposition 29:1-7). O'Reilly testified that there were no OSHA requirements as to the minimum height of a tie-in brace when a worker has to walk under it and that All-Safe installed the tie-in braces at the level based upon the plan provided by Plan B (O'Reilly's Deposition 29:7-11, 32:7-11). At the deposition, O'Reilly was shown a photograph that he took of the tie-in brace and stated that the photograph indicated that the tie-in brace was approximately 5.25 inches high from the work platform (O'Reilly's Deposition 36:4-10).

Analysis

Summary Judgment Standard

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" *(Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 (1st Dept 2012) *internal quotation marks and citation omitted*). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment" (*id.*). "Once this showing has been made, 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" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 (NY 2003)). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (NY 2012) *internal quotation marks and citation omitted*). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (NY 1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002)). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 (NY 1992)).

Defendants are entitled to summary judgment dismissing the Plaintiffs Labor Law 241(6) claim based upon alleged violations of Industrial Code § 23-1.7 (e) (1)

Labor Law § 241(6) reads in relevant 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:
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> * * *
>
> "6. All areas in which construction, excavation or demolition work is being performed shall be 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) requires owners, contractors, and their agents to "provide adequate protection and safety" for workers performing the inherently dangerous activities of construction, excavation and demolition work. This statute is a hybrid provision "since it reiterates the general common law standard of care and then contemplates the establishment of specific detailed rules through the Labor Commissioner's rule-making authority" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 503 (1993)). To recover under Labor Law § 241 (6), the Plaintiff must prove the violation of a concrete provision of the New York State Industrial Code, containing "specific, positive commands," rather than a provision reiterating common law safety standards (*id.* at 503-504).

In *Ross*, the Court of Appeals held that,

> "for purposes of the nondelegable duty imposed by Labor Law § 241 (6) and the regulations promulgated thereunder, a distinction must be drawn between the provisions of the Industrial Code mandating compliance with concrete specifications and those that establish general safety standards by invoking the '[g]eneral descriptive terms' set forth and defined in 12 NYCRR 23-1.4 (a). The former give rise to a nondelegable duty, while the latter do not".

(*id.* at 505). "A violation of an explicit and concrete provision of the Industrial Code by a participant in a construction project constitutes some evidence of negligence, for which the owner or general

contractor may be held vicariously liable" (*Melchor v Singh*, 90 AD3d 866, 870 (2d Dept 2011)). In addition to establishing the violation of a specific and applicable regulation, the Plaintiff must also show that the violation was a proximate cause of the accident (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 (1st Dept 2012)). "'The interpretation of an Industrial Code regulation and determination as to whether a particular condition is within the scope of the regulation present questions of law for the court'" (*Kelmendi v 157 Hudson St., LLC*, 137 AD3d 567, 568 [1st Dept 2016], quoting *Messina v City of New York*, 300 AD2d 121, 123 (1st Dept 2002)).

As such, in order to determine the Defendants' motion for summary judgment as to the Plaintiff's Labor Law § 241 (6) claim, the Court must determine whether an alleged violation of Industrial Code § 23-1.7 (e) (1) may form a basis for a Labor Law § 241 (6) claim and if Plaintiff has sufficient grounds for alleging that the Defendants violated Industrial Code § 23-1.7 (e) (1).

Industrial Code § 23-1.7 (e) (1) provides in relevant part as follows:

"(e) Tripping and other hazards.

* * *

"(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered."

(12 NYCRR 23-1.7 [e] [1]).

Section 23-1.7 (e) (1) has been held to be sufficiently specific to support a Labor Law § 241 (6) claim (*Pereira v New School*, 148 AD3d 410 (1st Dept 2017); *Aragona v State of New York*, 147 AD3d 808 (2d Dept 2017)).

Upon review of the submitted papers and having heard oral argument, the Court finds that Industrial Code § 23-1.7 (e) (1) is not applicable to the underlying action. Specifically, there are no allegations that Plaintiff tripped and/or slipped in the underlying action. The Plaintiff alleges that his accident occurred when he struck his head upon a tie-in brace that was placed in a manner that required him to duck under it when walking on the scaffold. Said factual allegations do not fall within the scope of Industrial Code § 23-1.7 (e) (1), which addresses tripping and slipping hazards/obstructions (*See Thornton v Riverbay Corp.*, 117 AD3d 521 (1st Dept 2014) *lv denied* 24 NY3d 902 (NY 2014); *Walls v Turner Constr. Co.*, 2014 NY Slip Op 31061(U) (NY Sup Ct, NY Cnty 2014)).

As such, the Defendants are entitled to summary judgment dismissing the Plaintiff's Labor Law 241(6) claims based upon alleged violations of Industrial Code § 23-1.7 (e) (1) as a matter of law.

<u>There are issues of fact as to the Plaintiff's causes of action for common law negligence and pursuant to Labor Law 200.</u>

Labor Law § 200 (1) provides 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 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 effect the provisions of this section."

"Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Cappabianca*, 99 AD3d at 143-144). Generally, "[t]hese two categories should be viewed in the disjunctive" (*Ortega v Puccia*, 57 AD3d 54, 61 (2d Dept 2008)).

Where the worker's injury results from a dangerous or defective premises condition, "liability depends on whether the owner or general contractor created or had actual or constructive notice of the hazardous condition" (*Bayo v 626 Sutter Ave. Assoc., LLC*, 106 AD3d 648, 648 (1st Dept 2013); *see also Hernandez v Columbus Ctr., LLC*, 50 AD3d 597, 598 (1st Dept 2008); *Murphy v Columbia Univ.*, 4 AD3d 200, 201-202 (1st Dept 2004)).

In contrast, where a Plaintiff's injury stems from the means and methods in which the work is performed, including dangerous or defective equipment, "the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work" (*Cappabianca*, 99 AD3d at 144; *see also Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 (1st Dept 2011); *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 (1st Dept 2007)).

In the instant action, the Plaintiff alleges that his accident was caused by a dangerous and/or defective premises condition. Specifically, the Plaintiff alleges that the scaffold tie-in brace was placed in an unsafe location that forced the Plaintiff to duck under the tie-in brace when walking on the scaffold. Therefore, in the instant action, "whether defendants supervised or controlled Plaintiff's work is irrelevant" (*Perry v City of Syracuse Indus. Dev. Agency*, 283 AD2d 1017, 1017 (4th Dept 2001)).

The Defendants' argument for the dismissal of Plaintiff's Labor Law 200 and common law negligence claims hinge upon their assertion that the placement of the tie-in brace did not constitute an unsafe condition. However, upon review of the submitted papers and having conducted oral argument, the Court finds that there is an issue of fact on this point. Although the Defendants assert that the placement of the tie-in brace fully conformed with the OSHA requirements, said requirements do not appear to mandate a specific height that the Defendants were required to place the tie-in braces. As such, there is an issue of fact as to whether or not All-Safe had multiple options as to where to place the tie-in brace.

There does not seem to be a dispute as to how the alleged accident occurred. Further, the Defendants do not dispute that it was necessary for the Plaintiff to duck under the tie-in brace, which was approximately 4' 7" from the scaffold walkway, in order to get to his work assignment location on the scaffold. Given that the tie-in brace was located on the scaffold, that the Plaintiff had to duck under the tie-in brace in order to get to his work area, and that the Plaintiff's work required him to carry work equipment and materials to his specific work location on the scaffold, the Court cannot say as a matter of law that the placement of tie-in brace did not constitute an inherently dangerous condition. Further, the Defendants' entire argument as to lack of "notice" hinges upon their position that the tie-in brace did not constitute an inherently dangerous condition. As there is an issue of fact as to whether or not the placement of the tie-in brace constitutes an inherently dangerous condition, there also exists an issue of fact as to whether or not the Defendants had actual or constructive notice of the alleged condition.

Conclusion

Accordingly, it is hereby

ORDERED that the Plaintiff's claims against the Defendant NYC are dismissed in their entirety, and it is further

ORDERED that the Plaintiff's claims pursuant to Labor Law §§ 240 and 241(6) against the Defendants NYCCA, Skanska and All-Safe are dismissed.

The Plaintiff's claims against NYCCA, Skanska and All-Safe for common law negligence and pursuant to Labor Law §200 remain.

The foregoing constitutes the ORDER and DECISION of the Court.

Dated: June 14, 2017

ENTER:

_____, JSC
HON. ROBERT D. KALISH
J.S.C.