SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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LUIS CASTRO, JR., Index No.: 157806/2014

Plaintiff,

-against-

MERCHANDISE MART PROPERTIES, INC., WEST FORDHAM STREET RESIDENTS ASSN., INC. and GCJ CONSULTING A SERIES OF GCJ MANAGEMENT, LLC,

Defendants.

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Cohen, J.:

Motion sequence numbers 003 and 004 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries sustained by a laborer when he fell from the roof of a tent he was constructing at the Pier 94 event space located at 711 12th Avenue, New York, New York (the Premises) on March 5, 2014.

In motion sequence number 003, plaintiff Luis Castro, Jr. moves, pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law §§ 240 (1) and (3) and 241 (6) claims against defendants Merchandise Mart Properties, Inc. (Merchandise) and GCJ Consulting A Series of GCJ Management, LLC (GCJ) (together, defendants).

In motion sequence number 004, defendant GCJ moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it.

Merchandise cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the

complaint as against it.[1]

BACKGROUND

On the day of the accident, Merchandise, a real estate agency that rents out its properties for events, owned and managed the Premises where the accident occurred. That day, Merchandise was preparing for the Armory show at the Premises. GCJ served as events manager for the Armory show, and nonparty Global Exhibition Services served as general contractor. Plaintiff was employed by nonparty Arena Event Services (Arena).

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was working at the Premises as a laborer for Arena, a company specializing in erecting tents for weddings, circuses, fashion shows and sports events. Plaintiff's work was limited to tent construction. Specifically, his "duties were to erect the tents, put the final [vinyl roofs] of the tents on, sidewalls, gables and basically make sure everything was in place" (plaintiff's tr at 22). Prior to his work on the Project, plaintiff had constructed more than 50 tents for Arena. While working for Arena, plaintiff learned how to construct tents through "on-the-job training" (*id.* at 56).

Plaintiff testified that, on the day of the accident, Scott Avery was his manager on the job. That day, Avery instructed plaintiff and the rest of the Avery crew to construct two tents at the Premises. The crew consisted of 15 workers split into two groups. Plaintiff testified that no safety meetings were ever held at the job site, nor was there any safety equipment, like harnesses, located there. Plaintiff maintained that he did not need any instructions on the day of the

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[1] Defendant West Fordham Street Residents Assn., Inc. has not made an appearance in this action.

accident, because he was "fully familiar with erecting tents" (*id.* at 56).

Plaintiff explained that, when fully constructed, the subject tents, which looked like houses when finished, measured approximately 25 feet high and 50 feet long. The tents were constructed in stages. First, the metal structures of the tents were erected. Thereafter, vinyl roofs and gables were installed on the metal structures and sidewalls were hung. After the exteriors of the tents were completed, heating and cooling systems were installed inside. Everything that was needed to construct the tents was provided by Avery, including 10- to 12-foot tall A-frame ladders. Plaintiff noted that it took approximately six hours to assemble a tent.

Plaintiff testified that some complications arose during the installation of the gables on the tent that he was constructing at the time of the accident. As a result, there were significant delays in the completion of that tent. In fact, the tent's metal frame and vinyl roof were still not completed on the morning of the day of the accident. At the time of the accident, plaintiff was in the process of installing one of the tent's gables. He explained that the gables, which comprise the triangular parts of the outer wall, are placed in the upper segments of the tent's front and back walls after the tent's roof has been installed.

Plaintiff testified that, in order to install the gable on the front of the tent, it was necessary for him to stand on the roof of the tent. In order to gain access to the roof, plaintiff utilized a 10-foot A-frame ladder. Prior to beginning this work, he inspected the roof to make sure it was secured tightly by "tap[ping] the tent[to] make sure it [was] not flimsy or wavy, that it wouldn't just sink in after I would get on it" (*id.* at 70-71). Once on the roof, plaintiff slid the gable up the tent's metal frame, while another worker unfolded the gable and fed it to plaintiff. After pulling up the gable, plaintiff used a keder bar to hold it in place.

Thereafter, in order to continue his work, it was necessary for plaintiff to travel from the roof area where he had just installed the gable, which was located at the entrance of the tent, to the other side of the tent, which was located toward the exit area of the tent. To do so, plaintiff began to walk across the five vinyl bays of the roof. After he had walked across just two of the bays, the tent's vinyl roof gave way/collapsed, causing plaintiff to fall 25 feet to the floor and become injured.

When asked if he was ever specifically told to walk across the tent roof to get to the other side, plaintiff replied, "When I built my first tent, that's how I was showed" (*id.* at 81). Plaintiff also testified that, in addition to simply walking across the tent roof, he had noticed workers using other methods to get to the tent's other side, such as going down a ladder, walking around the tent, and then climbing back up onto the roof. However, it was up to the workers to decide for themselves which method they wanted to use. Plaintiff chose to walk across the roof on the day of the accident in order to save much needed time. In addition, no one ever told plaintiff not to walk across the tent roof. Plaintiff also testified that he was not familiar with the entity, GCJ.

Deposition Testimony of Glenn Charles (Owner of GCJ)

Glenn Charles testified that he was the owner of GCJ on the day of the accident. He explained that GCJ is a company that coordinates trade shows for its clients. Charles specifically set up GCJ to handle Merchandise's trade shows. On the day of the accident, GCJ was working on the Armory show for Merchandise. Charles's duties included getting proposals from and monitoring vendors, receiving deliveries and handling budget and scheduling issues. However, GCJ never handled the design of the show itself. Charles also maintained that a company hired by Merchandise, Global Exhibition Services, acted as general contractor for the Armory show.

Charles testified that the Armory show required the erection of tents. Merchandise's architect hired Arena to erect the tents, pursuant to a contract, against his advice. Although he was present at the Premises when the Arena tents were being delivered and erected, he did not engage with Arena in any way. In addition, he did not have any authority to stop any work being performed by Arena in the event that he observed that said work being done in an unsafe fashion.

Charles testified that, just prior to the accident, he instructed Avery to take down the tent that plaintiff was working on because he was afraid that it could not be completed by the start of the show. He acknowledged that the Arena workers had worked non-stop throughout the night before, and that they had rushed to get the tent erected in time for the show. As he and Avery were talking, the men observed plaintiff falling through the top of the tent. Charles testified that he did not observe any scaffolding or safety harnesses at the accident location, nor could he identify any method in which a worker could construct a tent without standing on top of it.

Deposition Testimony of Thomas Pivarnik (Merchandise's Director of Operations at the Premises)

Thomas Pivarnik testified that he was Merchandise's director of operations for the Premises on the day of the accident. He explained that Merchandise is a real estate company that rents out the Premises for shows. As director of operations, Pivarnik was responsible for the maintenance of the venue. Pivarnik had no duties in regard to the Armory show. He was only responsible for making sure that the lights, heat and plumbing were working at the Premises, and that the parking lot was open.

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. In their separate motions, GCJ and Merchandise move for dismissal of said claim. 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]).

Initially, as the owner of the Premises where the accident occurred, Merchandise may be liable for plaintiff's injuries under Labor Law § 240 (1). However, it must be determined as to whether GCJ, as the event manager for the Armory show, may also be liable pursuant to the statute (*see Walls v Turner Constr. Co.*, 4 NY3d 861 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311 [1981]).

As to GCJ,

> "'[w]hen the work giving rise to [the duty to conform to the requirements of Labor Law § 240 (1)] 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'"

(*Walls v Turner Constr. Co.*, 4 NY3d at 864, quoting *Russin v Louis N. Picciano & Son*, 54 NY2d at 318).

Here, GCJ may not be held liable under Labor Law §§ 240 (1), or 240 (3) and/or 241 (6) for that matter, because it did not supervise or control the injury-producing work, i.e., the installation of the tent roof and/or plaintiff's method for traversing it. In addition, as noted by GCJ, the contract between GCJ and Merchandise did not delegate to GCJ any authority to supervise and control said work. Moreover, plaintiff testified that he was trained in tent installation by his employer, Arena, and that he did not need any instruction regarding how to perform his work on the day of the accident.

Thus, as GCJ is not a proper Labor Law defendant, it is entitled to dismissal of the Labor Law §§ 240 (1) and (3) and 241 (6) claims asserted against it. Therefore, in the remainder of this decision, the Labor Law claims will only be addressed in regard to Merchandise.

Here, plaintiff established a prima facie entitlement to summary judgment on the issue of liability on his Labor Law § 240 (1) claim, by showing that the vinyl tent roof that he was working on at the time of the accident was "the functional equivalent of a scaffold," and, as such, a safety device for the purposes of the statute, and that it "failed to provide adequate protection for the elevation-related work he was performing" (*Gomez v City of New York*, 63 AD3d 511, 512 [1st Dept 2009]; *see also Beharry v Public Stor., Inc.*, 36 AD3d 574, 574 [2d Dept 2007] ["'metal decking' was a 'safety device' within the meaning of Labor Law § 240 (1)," because it "served as a functional equivalent of a ladder"]; *Keefe v E & D Specialty Stands*, 259 AD2d 994, 994 [4th Dept 1999] [Labor Law § 240 (1) liability where bleachers, which were being used as "the functional equivalent of a ladder," failed to protect plaintiff from falling from his elevated workplace]).

"Whether the device provided proper protection is a question of fact, except when the

device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials" (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]; *Agresti v Silverstein Props., Inc.*, 104 AD3d 409, 409 [1st Dept 2013] [Labor Law § 240 (1) liability where the makeshift scaffold failed to protect the plaintiff from falling]; *Saldivar v Lawrence Dev. Realty, LLC*, 95 AD3d 1101, 1102 [2d Dept 2012] [Labor Law § 240 (1) liability where "(t)he collapse of the makeshift scaffold . . . failed to afford the injured plaintiff proper protection for the work being performed, and . . . this failure was a proximate cause of his injuries"]; *Tapia v Mario Genovesi & Sons, Inc.*, 72 AD3d 800, 801 [2d Dept 2010] ["Since the scaffold collapsed, the plaintiff established, prima facie, that he was not provided with an adequate safety device to do his work, as required by Labor Law § 240 (1)"]). Important to this case, "Labor Law § 240 (1) applies even in those situations when the scaffold which is alleged to have failed was in the process of being dismantled or constructed" (*Kyle v City of New York*, 268 AD2d 192, 198 [1st Dept 2000]; *Beard v State of New York*, 25 AD3d 989, 991 [1st Dept 2006]).

In addition, as the tent roof proved insufficient to support plaintiff's weight, and, thus, inadequate to protect plaintiff from falling, additional safety devices, such as a scaffold or manlift, were necessary to prevent him from falling (*see Ortega v City of New York*, 95 AD3d 125, 131 [1st Dept 2012] [where the plaintiff was working on an elevated work platform that "was taller than it was wide and rested upon wooden planks atop an uneven, gravel surface," the Court considered that "[i]t was foreseeable both that the plaintiff could fall off the elevated work platform and that the . . . rack could topple over"]; *Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762-763 [2d Dept 2006] [as it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake, additional safety devices were required to satisfy Labor Law §

240 (1)]).

"'[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]).

In opposition to plaintiff's motion, defendants argue that plaintiff is not entitled to summary judgment in his favor on the Labor Law § 240 (1) claim, because at least a question of fact exists as to whether plaintiff was the sole proximate cause of his accident due to his alleged improper installation of the tent's vinyl roof, as well as taking it upon himself to walk across the vinyl tent roof to save time, rather than using the ladder to get to the ground and then walk around to the other side of the tent.

"[T]he duty to see that safety devices are furnished and employed rests on the employer in the first instance" (*Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1st Dept 1994]). "When the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1)]).

Here, plaintiff testified that his gable installation work not only required him to work from the tent's roof, it was up to the tent constructors to decide which method was best for them to

traverse from one side of the tent to the other. In any event, both of these actions on the part of plaintiff go to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 [1st Dept 2012]). "[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y.*, 1 NY3d at 290).

Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence [internal quotation marks and citations omitted]" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002]; *see Ranieri v Holt Constr. Corp.*, 33 AD3d 425, 425 [1st Dept 2006] [Court found that the failure to supply plaintiff with a properly secured ladder or any safety devices was a proximate cause of his fall, and there was "no reasonable view of the evidence to support defendants' contention that plaintiff was the sole proximate cause of his injur(ies)"]).

In addition, defendant has not demonstrated that this is a case of a recalcitrant worker by demonstrating that plaintiff was specifically instructed to use any safety device and refused to do so (*see Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008]; *Olszewski v Park Terrace Gardens*, 306 AD2d 128, 128-129 [1st Dept 2003]; *Morrison v City of New York*, 306 AD2d 86, 86-87 [1st Dept 2003]; *Crespo v Triad, Inc.*, 294 AD2d 145, 147 [1st Dept 2002]). In

addition,"[t]here is no evidence in the record that [plaintiff] knew where to find the safety devices . . . or that he was expected to use them" (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]).

Thus, plaintiff is entitled to partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against Merchandise, and Merchandise is not entitled to dismissal of said claim against it. Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed [internal citations omitted]" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]).

The court has considered Merchandise's contentions in regarding this issue, and finds them to be without merit.

The Labor Law § 240 (3) Claim

Plaintiff also moves for partial summary judgment in his favor as to liability on the Labor Law § 240 (3) claim against Merchandise, and Merchandise moves for dismissal of the same. "Labor Law § 240 [1] states when and by whom devices must be provided and then details in subdivisions (2) and (3) more specific requirements when working at an elevated height" (*Bryant v General Elec. Co.*, 221 AD2d 687, 689 [3rd Dept 1995]). Labor Law § 240 (3) provides that "[a]ll scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use."

Here, as Merchandise did not oppose that part of plaintiff's motion seeking summary judgment in his favor on the Labor Law § 240 (3) claim, this part of plaintiff's motion is granted. In addition, as Merchandise made no arguments in its cross motion in support of dismissal of the Labor Law § 240 (3) claim as against it, this branch of Merchandise's cross motion is denied.

The Labor Law § 241 (6) Claim

Plaintiff moves for partial summary judgment in his favor as to liability on the Labor Law § 241 (6) claim against defendant, and Merchandise moves for dismissal of the same. 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" (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501-502). 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.*).

Although plaintiff lists multiple violations of the Industrial Code in the bill of particulars, with the exception of Industrial Code sections 23-1.5 (c) (1) and (2) and 23-5.1 (c), plaintiff does not address those alleged Industrial Code violations in his motion or in opposition to Merchandise's cross motion, and, thus, they are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's

summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]; *Musillo v Marist Coll.*, 306 AD2d 782, 783 n [3d Dept 2003]). As such, Merchandise is entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on those abandoned provisions.

Industrial Code 12 NYCRR 23-1.5 (c) (1) and (2)

Industrial Code section 23-1.5 (c) (1) and (2) state:

"*(c) Condition of equipment and safeguards.*

"(1) No employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition.

"(2) All load-carrying equipment shall be designed, constructed and maintained throughout to safety support the loads intended to be imposed thereon."

Industrial Code sections 23-1.5 (c) (1) and (2) have been found to be not sufficiently specific to support a Labor Law § 241 (6) claim (*see Gasques v State of New York*, 15 NY3d 869, 870 [2010]; *Sajid v Tribeca N. Assoc. L.P.*, 20 AD3d 301, 302 [1st Dept 2005]; *Sihly v New York City Tr. Auth.*, 282 AD2d 337, 337 [1st Dept 2001]; *Williams v White Haven Mem. Park*, 227 AD2d 923, 923 [4th Dept 1996]; *Vernieri v Empire Realty Co.*, 219 AD2d 593, 598 [2d Dept 1995]). Thus, plaintiff is not entitled to summary judgment in his favor on that part of the Labor Law § 241 (6) claim predicated on these alleged provisions, and Merchandise is entitled to dismissal of the same.

Industrial Code 12 NYCRR 23-5.1 (c)

Industrial Code 12 NYCRR 23-5.1 (c) states that "all scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use." As section 23-5.1 (c) is not sufficiently specific to support a Labor Law § 241 (6) claim

(*see Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 510 [1st Dept 2009]; *Greaves v Obayashi Corp.*, 55 AD3d 409, 410 [1st Dept 2008]), plaintiff is not entitled to summary judgment in his favor on that part of the Labor Law § 241 (6) claim predicated on this alleged provision. In addition, Merchandise is entitled to dismissal of the same.

The Common-Law Negligence and Labor Law § 200 Claims

In their separate motions, Merchandise and GCJ move for dismissal of the common-law negligence and Labor Law § 200 claims against them. Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work' [citation omitted]" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d at 316-317). Labor Law § 200 (1) states, in pertinent part, as follows:

> "1. 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 contractor, rather than the method of the work]).

It is well settled that, in order to find an owner or his 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]).

Here, it is alleged that the accident was caused due to both the faulty installation of the tent's vinyl roof, as well as plaintiff's decision to walk across the roof to get to the other side, rather then use a ladder and walk around to the other side. Therefore, plaintiff was injured, not because of any inherently dangerous condition of the property itself, but rather, because of "'a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work'" (*Lombardi v Stout*, 178 AD2d 208, 210 [1st Dept 1991], *affd as mod* 80 NY2d 290 [1992], quoting *Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d 136, 145 [1965]; *Dalanna v City of New York*, 308 AD2d 400, 400 [1st Dept 2003] [Court determined that the protruding bolt in the concrete slab that the plaintiff tripped on was not a defect inherent in the property, but instead, it was the result of the manner in which the plaintiff's employer performed its work]).

Therefore, in order to find Merchandise and GCJ liable under common-law negligence and Labor Law § 200 theories, it must be shown that they exercised some supervisory control over the manner in which plaintiff performed the subject work. That said, "[t]he evidence fails to raise a triable issue of fact that [these defendants] supervised or controlled plaintiff's work at the construction site, caused or created the dangerous condition, or had actual or constructive notice of the unsafe condition of which plaintiff complains" (*Arrasti v HRH Constr. LLC*, 60 AD3d 582, 583 [1st Dept 2009] [citation omitted]).

Thus, GCJ and Merchandise 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 Luis Castro, Jr.'s motion (motion sequence number 003), pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law §§ 240 (1) and (3) claims against defendant Merchandise Mart Properties, Inc. (Merchandise) is granted, and the motion is otherwise denied; and it is further

ORDERED that defendant GCJ Consulting A Series of GCJ Management, LLC (GCJ)'s motion (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it is granted, and the complaint and cross claims are dismissed as against GCJ with costs and disbursements to GCJ as taxed by the Clerk of Court, and the Clerk is directed to enter judgment in favor of GCJ; and it is further

ORDERED that the action is severed and continued as against the remaining defendants; and it is further

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

ORDERED that the action shall continue.

Dated: 6-16-2017

ENTER:

J.S.C.

HON. DAVID B. COHEN J.S.C.

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