SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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MARCO SANANGO, Index No.: 159082/2013

Plaintiff,

-against-

GLENN GARDENS ASSOCIATES, LP, GRENADIER REALTY CORP. and TOP RAIL SAFETY, LLC,

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Edmead, J.:

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

This is an action to recover damages for personal injuries allegedly sustained by a laborer on January 15, 2013, when, while working at a 32-story building located at 175 West 87th Street, New York, New York (the Premises), a heavy metal "C" hook fell from the top of a pile of debris and struck his foot.

In motion sequence number 003, plaintiff Marco Sanango moves, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law §§ 240 (1) and 241 (6) claims against defendants Glenn Gardens Associates, LP (Glenn Gardens), Grenadier Realty Corp. (Grenadier) (together, the owner defendants) and Top Rail Safety, LLC (Top Rail).

In motion sequence number 004, Top Rail moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint against it in its entirety.

The owner defendants cross-move for summary judgment dismissing the complaint against them in its entirety.

BACKGROUND

On the day of the accident, Glenn Gardens owned the Premises where the accident

occurred. Grenadier, the building's manager, served as the construction manager on a project underway at the Premises, which entailed certain waterproofing work and the restoration of the building's facade (the Project). Glenn Gardens retained plaintiff's employer, nonparty Star-Cel Waterproofing (Star-Cel), to perform said work. Top Rail served as a site safety manager for the Project.

Plaintiff's Deposition Testimony

Plaintiff testified that he was employed by nonparty Star-Cel as a laborer on the day of the accident. Alongside two coworkers, plaintiff's work on the Project included demolishing the floors and exterior walls of the Premises. At the time of the accident, most of the demolition work on the Project was completed. Plaintiff explained that he and his coworkers were supervised by their Star-Cel foreman, Rafal Stec, and that no other person on the Project ever instructed them in regard to "where to work or what to do" (plaintiff's tr at 15).

On the morning of the accident, Stec instructed the men to dismantle the scaffold that spanned from the roof of the Premises to the 32nd floor. As part of the scaffold dismantling process, the men were to transport the scaffold's various pieces from the roof to the ground floor, so that it could later be returned to Star-Cel's shop. Plaintiff maintained that Stec specifically instructed the men as to "how to move the pieces" (*id.* at 30).

Accordingly, the men went up to the roof of the Premises and began to bring the various pieces of the scaffold to the bottom of the 32nd floor stairway, where they would be stored temporarily before being taken down to the ground floor. The pieces of the scaffold, which included, among other things, "hooks . . . pipes, lumber, all related to scaffolding," were placed in different piles (*id.* at 33).

Just prior to the accident, plaintiff threw a cord that he was carrying onto a pile of cords located on the stairway landing. As he turned to make his way back upstairs, an iron "C" hook fell onto his left foot from the top of a different pile, which he described as "three or four feet tall" and comprised of hooks, lumber and other materials (*id.* at 44). He described the "C" hook as "two-and-a-half to three feet . . . big" and weighing "over 50 or 60 pounds" (*id.* at 41, 43).

Plaintiff explained that the "C" hook was caused to fall, because it was improperly placed on top of the "unstable" pile of "garbage" and "debris" (*id.* at 113-114). Plaintiff noted that "the debris [was] left by another company working inside the building," and that it "was already there" when he arrived to work that morning (*id.* at 114).

Deposition Testimony of Gustavo Solorzano (Building Superintendent)

Gustavo Solorzano testified that he was employed by Glenn Gardens as the superintendent of the building on the day of the accident. He explained that, in 2012, pursuant to a contract, Glenn Gardens retained Star-Cel to perform certain facade work at the Premises (the Contract). At this same time, other contractors and trades, including electricians and plumbers, were also working at the Premises. After Star-Cel's work was completed, its workers dismantled their scaffolding equipment, bringing it from the roof of the Premises to the 32nd floor stairway. Solorzano testified that, several days before the accident, he observed piles of equipment and other debris present on the 32nd floor of the Premises. Some of the piles were at least two feet tall.

Deposition Testimony of Noelia Torres (Property Manager)

At her deposition, Noelia Torres testified that, although she is presently employed by Grenadier as the building's property manager, she was not working for Grenadier at the time of

the accident. She testified that the Project entailed the restoration of the building's facade, and that Glenn Gardens hired Star-Cel to perform certain waterproofing and restoration work at the Premises.

Torres explained that the building's superintendent, Solorzano, was responsible for overseeing the restoration work. Solorzano's "duties [were] . . . to make sure that calls come in for repair work, he [made] sure the work order[s] [got] processed, the work [got] done . . . and [he] visit[ed] [the Premises]" (Torres tr at 52-53). If Solorzano noticed any unsafe practices or conditions that needed to be reported, "he would call the management office and advise" (*id.* at 53). When Torres was asked if it "is fair to say that [Solorzano] is the eyes and ears of management?" she replied, "Yes" (*id.* at 53).

Deposition Testimony of Rafal Stec (Star-Cel's Foreman)

Rafal Stec testified that he was Star-Cel's foreman on the day of the accident. He explained that Star-Cel's work on the Project entailed facade renovation for the entire building. Stec was responsible for "supervising the workers" and making sure that the job was completed in a safe and timely manner (Stec tr at 50). Stec also discussed various safety topics with an employee of Top Rail, Vincent Laterra, such as the proper use of scaffolds and ladders. Top Rail, the site safety manager for the Project, was responsible for "mak[ing] sure everything was safe" (Stec tr at 35). In addition, Stec conducted safety meetings for the benefit of Star-Cel's workers, where he stressed their need to utilize "[h]ardhats, goggles, safety lines . . . basic construction stuff" (*id.* at 36). Stec noted that Laterra came to said meetings "a couple of times" (*id.*).

Stec further testified that the facade repair work on the Project required that the Star-Cel

workers utilize six hanging scaffolds. These scaffolds were supplied, erected and dismantled by said workers. At the time of the accident, one of the scaffolds was in the process of being dismantled, and Star-Cel workers were bringing its pieces down from the roof to a landing in the 32nd floor stairway. The pieces, which included 45-pound "C" hooks, were placed in various piles there. Later, the scaffold's pieces and the "C" hooks were transported to the ground floor, before being taken back to Star-Cel's shop.

Stec testified that, on the day of the accident, other trades were also working at the Premises. In addition, he acknowledged that a pile of debris and wood, which measured approximately one foot high, was present in the accident location at the time of the accident.

Stec testified that Solorzano had no involvement with Star-Cel's work, and that he never instructed any of Star-Cel's workers. In addition, Solorzano was not responsible for clearing away Star-Cel's materials at the site, as Star-Cel was responsible for removing their own materials and debris.

Deposition Testimony of Vincent Laterra (Sole Member and Employee of Top Rail)

Laterra testified that Top Rail is a construction site safety manager specializing in facade restoration work. On the day of the accident, he was the sole member and employee of Top Rail. Laterra visited the job site every morning for approximately two hours. His duties at the Project included walking around the Premises to make sure that the workers were wearing proper safety equipment, checking out "the sidewalk bridge, lighting, netting, top of the bridge for debris, bottom of the bridge for sidewalk pedestrians, just basically walking around the whole site" (Laterra tr at 48). Laterra shared site safety responsibilities with Star-Cel's foreman, Stec.

Laterra explained that Star-Cel employees were responsible for assembling and

disassembling the scaffold structures that they used to perform their work, although he maintained that he never witnessed them performing this work. The scaffolds required the use of "C" hooks, which he described as "piece[s] of steel . . . [that hook] up to the parapet wall [with] . . . a clamp for hanging a two-point scaffold" (Laterra tr at 65). The "C" hooks typically weighed between "40 pounds to 60 pounds" (*id.* at 67).

Laterra further explained that, after the scaffolds were disassembled, the lumber that comprised the scaffold's floor was lowered to ground level. The scaffold's other parts, including cables, power cords and "C" hooks, were brought down to the 32nd floor landing and placed in a pile. Because of their heavy weight, it took the efforts of two men to move them. Laterra explained that the men could not use a dolly to transport the "C" hooks, because the stairs were not level.

The Contract

Article 3, section 3.3.1 of the Contract provides that Star-Cel "shall supervise and direct the Work . . . [and] shall be solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract" (plaintiff's notice of motion, exhibit H, the Contract, Article 3, ¶ 3.3.1).

In addition, article 10, section 10.1 of the Contract provides that Star-Cel "shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract" (plaintiff's notice of motion, exhibit H, the Contract, Article 10, ¶ 10.1).

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 partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against the owner defendants and Top Rail. In their separate motions, the owner defendants and Top Rail move for summary judgment dismissing said claim against them. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm

directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

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

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

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

Initially, as the owner of the Premises where the accident occurred, the owner defendants may be liable for plaintiff's injuries under Labor Law §§ 240 (1) and 241 (6). However, it must be determined whether Top Rail, the subcontractor hired to serve as the Project's site safety manager, may also be liable for plaintiff's injuries as an agent of the owner.[1] To that effect,

> "[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"

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]; *see also Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]). Accordingly, in order for a party to be "vicariously liable as

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[1] It should be noted that the owner defendants do not make an argument that Grenadier is not a proper Labor Law defendant.

an agent of the property owner for injuries sustained under the statute," it must have "had the ability to control the activity which brought about the injury" (*Walls*, 4 NY3d at 863-864).

Top Rail may not be held liable for plaintiff's injuries under Labor Law §§ 240 (1) and 241 (6), because, while it had general oversight over safety issues at the Premises, it had no authority to control the activity that caused plaintiff's injury, i.e., the placement of the "C" hook on top of the unstable pile of debris (*compare Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 434 [2015] [a question of fact existed as to whether the defendant site safety consultant was a statutory agent for the purposes of Labor Law § 240 (1) liability, where it "had the authority to stop plaintiff from working in the area near the missing manhole cover," as well as for "ensur[ing] that a guardrail system was in place" and "the manhole was covered").

Here, Star-Cel was responsible for the task of disassembling the scaffold and removing its pieces from the site. In fact, plaintiff testified that Stec, his Star-Cel foreman, specifically instructed the men in regard to how the scaffold's pieces were to be moved from the roof to the ground floor. Accordingly, Stec and his workers determined where to place the scaffold's pieces, as well as the "C" hooks, once they arrived on the 32nd floor stairway landing. In addition, Laterra testified that, while he walked around the job site for two hours per day and checked for potential safety issues, if he observed any such issues, he advised the trades accordingly. It should also be noted that, pursuant to the Contract, Star-Cel was solely responsible for the means and methods of Star-Cel's work on the Project.

Therefore, as Top Rail is not a proper Labor Law defendant, plaintiff is not entitled to partial summary judgment in his favor as to liability on the Labor Law § 240 (1) and 241 (6) claims against it. In addition, Top Rail is entitled to dismissal of said claims against it.

Therefore, in the remainder of this decision, the Labor Law §§ 240 (1) and 241 (6) claims will be addressed in regard to the owner defendants only.

The owner defendants argue that Labor Law § 240 (1) does not apply to the facts of this case, because the work that plaintiff was engaged in at the time of the accident, i.e., the dismantling of a scaffold, was not a protected activity under the statute. In addition, as the facade work was completed, plaintiff was not engaged in the "erection, demolition, repairing, altering . . . cleaning or pointing of a building or structure."

However, as the subject scaffold can be considered a "structure" for the purposes of the statute, Labor Law § 240 (1) applies to the facts of this case. To that effect, case law has defined a structure as "'any production or piece of work artificially built up or composed of parts joined together in some definite manner'" *(Joblon v Solow,* 91 NY2d 457, 464 [1998], quoting *Lewis-Moors v Contel of N.Y.*, 78 NY2d 942, 943 [1991]; *see McCoy v Kirsch*, 99 AD3d 13, 14-15 [2d Dept 2012] [wedding chupah, which "was a 10-foot-high device made of pipe, wood, and a fabric canopy at its top," was a structure for the purposes of Labor Law § 240 (1)]; *Sinzieri v Expositions, Inc.*, 270 AD2d 332, 333 [2d Dept 2000] [the exhibit, "which was composed of interlocking parts," fell within the definition of "'structure' under Labor Law § 240 (1)"]).

In addition,

> "[w]hether an item is or is not a 'structure' is fact-specific and must be determined on a case-by-case basis. In determining each case, courts may consider a number of relevant factors. These factors should include, but are not necessarily limited to, the item's size, purpose, design, composition, and degree of complexity; the ease or difficulty of its assembly and disassembly; the tools required to create it and dismantle it; the manner and degree of its interconnecting parts; and the amount of time the item is to exist. However, no one factor should be deemed controlling"

(*McCoy*, 99 AD3d at 16-17).

Here, considering the scaffold's size, composition, design, interconnecting parts, complexity, difficulty of assembly and disassembly and purpose, it is evident that the scaffold that plaintiff was dismantling at the time of the accident was a structure for the purposes of Labor Law § 240 (1) liability.

That said, plaintiff may recover damages for a violation of Labor Law § 240 (1) under a falling objects theory, because the object that fell on plaintiff's foot, i.e., the "C" hook,"was 'a load that required securing for the purposes of the undertaking at the time it fell'" (*Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005] [citation omitted]; *Gabrus v New York City Hous. Auth.*, 105 AD3d 699, 699-700 [2d Dept 2013] [the plaintiff was entitled to summary judgment in his favor on his Labor Law § 240 (1) claim where he demonstrated that the load of material that fell on him, while being hoisted to the top of the building, was inadequately secured]; *Dedndreaj v ABC Carpet & Home*, 93 AD3d 487, 488 [1st Dept 2012] ["[p]laintiff established his prima facie entitlement to summary judgment by showing that defendants' failure to provide an adequate safety device proximately caused a pipe that was in the process of being hoisted to fall and strike him"]).

In addition, contrary to the owner defendants' argument, case law dictates that a falling object need not be in the process of being hoisted or secured in order for the accident to be covered under Labor Law § 240 (1). It is enough that said object simply needed securing "'for the purposes of the undertaking'" (*Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 964 [2d Dept 2013], quoting *Outar v City of New York*, 5 NY3d 731, 732 [2005] [Labor Law § 240 (1) applicable where plaintiff was struck by an unsecured dolly, which was being stored on top of a bench wall, and thus, was not in the process of being hoisted or secured at the time that it fell on

the plaintiff]). Here, the "C" hook needed to be properly and sufficiently secured while being stored with the other debris, even if only for a short time.

The owner defendants also argue that they are entitled to dismissal of the Labor Law § 240 (1) claim against them, because, in order for Labor Law § 240 (1) to apply, the hazard must have arisen out of an appreciable differential in height between the object that fell and the work (*see Melo v Consolidated Edison Co. of N.Y.*, 92 NY2d 909, 911 [1998]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Here, the "C" hook fell from a pile of debris situated at the same level as plaintiff, and it fell, at most, only a few feet onto plaintiff's foot.

However, in *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* (18 NY3d 1, 9 [2011]), a case with similar facts, the Court of Appeals "decline[d] to adopt the 'same level' rule, which ignores the nuances of an appropriate section 240 (1) analysis." In *Wilinski*, the plaintiff was struck by falling metal pipes, which stood 10-feet tall and measured four inches in diameter. Quoting *Runner v New York Stock Exch., Inc.* (13 NY3d 599 [2009]), the Court in *Wilinski* determined that the "the 'elevation differential . . . [could not] be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent'" (*id.* at 10, quoting *Runner* at 605); *see also Marrero v 2075 Holding Co., LLC*, 106 AD3d 408, 409 [1st Dept 2013]).

Applying *Runner* and *Wilinski* to the instant case, not only is plaintiff not precluded from recovery simply because the "C" hook was on his same level, but, given the significant amount of force that the subject 40 to 60 pound metal object generated during its fall, his accident "'*ar[ose] from a physically significant elevation differential*'" (*Wilinski*, 18 NY3d at 10, quoting *Runner*, 13 NY3d at 603).

Further, in light of the fact that the "C" hook was placed on a pile of unstable debris, and as there were no protective devices, such as nets or ropes, to secure the "C" hook from falling, Labor Law § 240 (1) is applicable, because plaintiff's injuries were "'the direct consequence of [defendants'] failure to provide adequate protection against [that] risk'" (*Wilinski*, 18 NY3d at 10).

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" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

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

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 the owner defendants. In addition, the owner defendants move for summary judgment dismissing said claim against them. Labor Law § 241 (6) provides, in pertinent part, as follows:

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

lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers" (*Ross,* 81 NY2d at 501). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.* at 503-505).

Although plaintiff lists multiple violations of the Industrial Code in the bill of particulars, with the exception of Industrial Code sections 23-1.7 (e) (2) and 23-2.1 (a) (1), plaintiff does not move for summary judgment in his favor as to those alleged Industrial Code violations, nor does he address them in his opposition to the owner defendants' 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]). As such, the owner defendants are entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on those abandoned provisions.

Industrial Code 12 NYCRR 23-1.7 (e)(2)

Industrial Code 12 NYCRR 23-1.7 (e) (2) is sufficiently specific to sustain a claim under Labor Law § 241 (6) (*see O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 225 [1st Dept 2006], *affd* 7 NY3d 805 [2006]).

Industrial Code section 23-1.7 (e) (2) provides, in pertinent part:

"(e) Tripping and other hazards.

> (2) Working Areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed."

Section 23-1.7 (e) (2) does not apply to the facts of this case, because this provision refers to tripping hazards, and plaintiff's accident was not caused due to tripping. Rather, as discussed previously, plaintiff was injured when the "C" hook fell on his foot.

It should also be noted that, in support of their cross motion to dismiss, the owner defendants argue that they are entitled to dismissal of the section 23-1.7 (e) (2) claims, because the "C" hook was integral to the work being performed at the time of the accident (*see Singh v 1221 Ave. Holdings, LLC*, 127 AD3d 607, 607 [1st Dept 2015] [alleged section 23-1.7 (e) (2) violation dismissed, where the plaintiff tripped over a screw, which was an integral part of the raised tile floor system being installed]; *O'Sullivan*, 7 NY3d at 806 [electrical pipe or conduit that plaintiff tripped over was an integral part of the construction]; *Cumberland v Hines Interests Ltd. Partnership*, 105 AD3d 465, 466 [1st Dept 2013] [section 23-1.7 (e) (2) did not apply where the pipe and pipe fittings that plaintiff tripped over were consistent with the work being performed in the room]; *Tucker v Tishman Constr. Corp. of N.Y.*, 36 AD3d 417, 417 [1st Dept 2007] [rebar steel that the plaintiff tripped over was not debris, scattered tools and materials, or a sharp projection, but rather, an integral part of the work being performed]).

However, the evidence in the record indicates that the subject "C" hook was not integral to any work still underway at the time of the accident, but rather, it was a scattered tool and/or material, as evidenced by the fact that it fell from a pile of debris.

Thus, plaintiff is not entitled to summary judgment in his favor as to liability as to that part

of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.7 (e) (2) as against the owner defendants. Accordingly, the owner defendants are entitled to dismissal of the same.

Industrial Code 12 NYCRR 23-2.1 (a) (1)

Industrial Code 12 NYCRR 23-2.1 (a) is sufficiently specific to sustain a claim under Labor Law § 241 (6) (*see Rodriguez v DRLD Dev., Corp.*, 109 AD3d 409, 410 [1st Dept 2013]; *Dacchille v Metropolitan Life Ins. Co.*, 262 AD2d 149, 149 [1st Dept 1999]).

Industrial Code 12 NYCRR 23-2.1 (a) (1) states:

> "(a) Storage of material or equipment.
>
> (1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare."

Here, section 23-2.1 (a) (1) applies to the facts of this case, because the accident occurred in a "stairway," as the rule requires (*see Castillo v 3440 LLC*, 46 AD3d 382, 383 [1st Dept 2007 Marlow, J., dissenting in part]). In addition, plaintiff's accident was caused due to the fact that the "C" hook was stored on top of an unsafe and unstable pile of debris.

Thus, plaintiff is entitled to summary judgment in his favor as to liability as to that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-2.1 (a) (1), and the owner defendants are not entitled to dismissal of the same.

The Common-Law Negligence and Labor Law § 200 Claims

In their separate motions, the owner defendants and Top Rail move for summary judgment dismissing 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" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000] [internal quotation marks and citation omitted]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]).

Labor Law § 200 (1) states, in pertinent part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

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

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work, "because the injury arose from the condition of the work place created by or known to the contractor, rather than the method of [the] work"]).

It is well settled that, in order to find an owner or its agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that

the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff's injury was caused by lifting a beam, and there was no evidence that the defendant exercised supervisory control or had any input into how the beam was to be moved]).

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

As discussed previously, the accident occurred because the "C" hook was improperly stored on top of an unstable pile of debris. Accordingly, this is "not a dangerous work site condition but part of the means and methods of the work, over which [the owner defendants] exercised no supervision or control" (*Grant v Solomon R. Guggenheim Museum*, 139 AD3d 583, 584 [1st Dept 2016]). In addition, although Top Rail was charged with overall safety at the site, its duties were "limited to performing safety-related tasks; it did not have the authority to control the manner in which the trades performed their work nor did it attempt to do so" (*Hughes*, 40 AD3d

at 309; *O'Sullivan*, 28 AD3d at 226 ["while the general contractor's on-site safety manager may have had overall responsibility for the safety of the work done by the subcontractors, such duty to supervise and enforce general safety standards at the work site was insufficient to raise a question of fact as to its negligence"]; *Doherty v City of New York*, 16 AD3d 124, 125 [1st Dept 2005] [site safety manager not liable in personal injury action where it "was not the supplier of safety equipment to the job site, did not direct, supervise or control plaintiff or his coworkers in the performance of their duties, and there [was] no evidence that it acted negligently or otherwise unreasonably as the site safety consultant"]).

Thus, the owner defendants and Top Rail 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 the parts of plaintiff Marco Sanango's motion (motion sequence number 003), pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law §§ 240 (1) and 241 (6) claims against defendant Top Rail Safety, LLC (Top Rail) is denied; and it is further

ORDERED that the parts of plaintiff's motion, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability against defendants Glenn Gardens Associates, LP and Grenadier Realty Corp. (together, the owner defendants) on the Labor Law § 240 (1) claim, as well as that part of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code 12 NYCRR 23-2.1 (a) (1), is granted, and the motion is otherwise denied; and it is further

ORDERED that Top Rail's motion (motion sequence number 004), pursuant to CPLR

3212, for summary judgment dismissing the complaint against it is granted, and the complaint is dismissed as against Top Rail, with costs and disbursements to Top Rail as taxed by the Clerk of Court, and the Clerk is directed to enter judgment in favor of Top Rail; and it is further

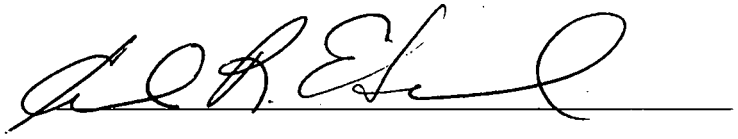
ORDERED that the part of the owner defendants' cross motion, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law § 200 claims, as well as that part of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code 12 NYCRR 23-1.7 (e) (2), is granted, and these claims are dismissed as against the owner defendants, and the motion is otherwise denied; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all counsel.

ORDERED that the action shall continue.

Dated: June 30, 2017

ENTER:



Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.