SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** 2

Justice

----------X

EDWARD KANE, EILEEN KANE

Plaintiff,

- v -

METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

----------X

INDEX NO. 153603/2013

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

The following documents filed with NYSCEF were considered on the motion by defendants and the cross motion by plaintiffs for SUMMARY JUDGMENT: Doc. Nos. 25-52.

Upon the foregoing documents, it is ordered that the motion is **granted in part.**

In this Labor Law action, plaintiff Edward Kane (plaintiff) seeks to recover damages for personal injuries he allegedly sustained on January 5, 2013, when, while working at a construction site located at 11 John Street in Manhattan (the Premises), he was struck in the face by a piece of lumber. Defendants Metropolitan Transportation Authority (MTA) and New York City Transit Authority (NYCTA) (collectively defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff and his wife, plaintiff Eileen Kane, who asserts a claim for loss of consortium, cross-move, pursuant to CPLR 3212, for partial summary judgment in their favor as to liability on their Labor Law §§ 240 (1) and 241 (6) claims against defendants.

FACTUAL AND PROCEDURAL BACKGROUND:

On the day of the accident, MTA owned the Premises where the accident occurred. MTA hired nonparty Judlau Contracting, Inc. (Judlau) to renovate the Premises and convert the building into a subway station and commercial office building (the Project). Judlau hired plaintiff to perform demolition work at the Project.[1]

Plaintiff's 50-h Hearing

At his 50-h hearing, plaintiff testified that, on the day of the accident, he was employed by Judlau as a laborer shop steward at the Project. Plaintiff explained that his duties as a laborer included demolition and cleanup work, while his duties as a shop steward included scheduling and making sure "that [his] men are working safely" (plaintiff's 50-h tr at 8). Plaintiff's foreman and plaintiff's immediate supervisor, Frank Petito, were also Judlau employees. Plaintiff only received direction and supervision from Judlau employees.

On the day of the accident, plaintiff, Petito and Jose Urgiles, another Judlau employee, were tasked with demolishing a temporary five-foot tall wooden wall (the Wall), which was located on the first floor of the Premises. The Wall was initially built to prevent people from entering the area where an escalator was being constructed. However, at the time of the accident, the Wall was no longer needed. Plaintiff testified that a second, taller and "totally separate" wall (the Second Wall), was located directly behind the Wall (*id.* at 22).

Just prior to his accident, plaintiff was using a hammer to knock two-by-fours out of the Wall, when a piece of wood that was supporting the Second Wall came loose and struck him. At his 50-h hearing, plaintiff testified that:

[1] The parties do not identify NYCTA's role in the Project.

> "We were taking [the Wall] down piece by piece and when we got close to the end of the [Wall], we started pulling it down and that's when that other wall that was separate from [the Wall], a piece of wood got loose and it smashed me right across the face"

(*id.* at 20). When he was asked at that proceeding whether he saw the piece of wood that struck him, plaintiff responded, "No, I did not, no" (*id.* at 24).

Plaintiff's Deposition Testimony

At his deposition, plaintiff testified, in pertinent part, as follows:

> "As I was taking [the Wall] down . . . a piece of wood from [the Second Wall], which was totally separate from [the Wall], came down and hit me on the side of my face.
>
> "And I say that because as it was coming, I mean I was holding it. I seen it coming from the corner of my eye."

(Plaintiff's tr at 11-12).

Plaintiff described the Second Wall as being a part of a deck that workers used to install a separate sheetrock wall. The Second Wall was approximately 8-to-10 feet tall, and it was located approximately one foot from the Wall.

Deposition Testimony of Franco Petito (Plaintiff's Supervisor)

Petito testified that, on the day of the accident, he was employed by Judlau as a supervisor, and that he supervised plaintiff. Petito testified that he was standing 15 to 20 feet away from plaintiff at the time of the accident. He did not witness plaintiff's accident because he was not facing plaintiff when it occurred.

Petito testified that he prepared a witness report following the accident. The report stated that plaintiff was struck by a 2 inch by 4 inch piece of wood that he had hit with a hammer, and

that the wood then "kicked back and struck him on the left-hand side of his face" (Petito tr at 127). When asked how he learned of these facts, Petito testified, "I was told by [plaintiff]" (*id.* at 128).

MTA's Injury Report

MTA's injury report (the MTA Report), dated January 5, 2013, was prepared by Larry Ogunyomi, a Judlau safety engineer. In the MTA Report, Ogunyomi states that plaintiff was demolishing a platform, and "[a]s [plaintiff] was removing the last piece of 2"x 4" post using a hammer, the 2" x 4" plank kicked back suddenly and hit him on the left side of the face" (defendants' notice of motion, exhibit G, the MTA Report).

In addition, the MTA Report contains two additional statements regarding the events leading up to the accident. In the first statement, dated January 7, 2013, Petito, asserted that:

> "[Plaintiff] was performing demo of the temporary platform that was at four feet in height. It consisted of 2-2x12 joist[s] and [was] supported by 2 x 4's. He removed the 2 x 4's by hitting them out with a hammer. When [plaintiff] hit the last 2 x 4 it kicked back and struck him on the left side of his face"

(*id.*).

In the second statement, which is undated, Urgiles asserted:

> "[Plaintiff] was removing 2 x 4's supporting a beam that was 2 x 12. When he knock[ed] out the last 2 x 4 support, a short 2 x 4 was still attached at the top of the 2 x 12 beam. When the beam came down, the 2 x 4 on top the beam hit him on his face (left side)"

(*id.*).

LEGAL CONCLUSIONS:

"[T]he 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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). 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]).

The Labor Law § 240 (1) Claim

Defendants move for summary judgment dismissing the Labor Law § 240 (1) claim against them. Plaintiffs cross-move for summary judgment in their favor as to liability on said claim. Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

> "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]). 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]).

Not every worker who falls at a construction site is afforded the protections of Labor Law § 240 (1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]). Instead, 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]).

Further, "[s]ection 240 (1) does not apply automatically every time a worker is injured by a falling object. Rather, the 'decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential'" (*Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 417-418 [1st Dept 2014] [internal citations omitted]; quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

Therefore, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]).

Here, there are two conflicting versions of the events leading up to the accident. Defendants argue that, at the time of the accident, plaintiff was removing a piece of wood from the Wall with a hammer and that when he struck the wood with his hammer, the wood kicked back into his face. In contrast, plaintiff maintains that he was injured when he was struck by a piece of wood that detached from the Second Wall and fell on him.

Under defendants' theory of the accident, Labor Law § 240 (1) would not apply because plaintiff's accident was caused by a general workplace hazard, rather than an elevation-related hazard that would require a safety device.

Under plaintiffs' theory of the accident, Labor Law § 240 (1) would apply under a falling object theory, because the piece of wood which allegedly fell on him from the Second Wall "constituted 'a load that required securing for the purposes of the undertaking'" (*Mora v Sky Lift Distrib. Corp.*, 126 AD3d 593, 595 [1st Dept 2015]; quoting *Narducci*, 96 NY2d at 268).

"Where credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment inappropriate" (*Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [1st Dept 2012]; *see also Buckley v J.A. Jones/GMO*, 38 AD3d 461, 462 [1st Dept 2007] [denying summary judgment on section 240 (1) cause of action where two credible theories of the accident existed, one where section 240 (1) would apply, and one where it would not]).

Thus, defendants are not entitled to summary judgment dismissing the Labor Law § 240 (1) claim against them, and plaintiffs are not entitled to summary judgment in their favor as to liability on the same.

The Labor Law § 241 (6) Claim

Defendants move for summary judgment dismissing the Labor Law § 241 (6) claim against them. Plaintiffs cross-move for summary judgment in their favor as to liability on said claim.

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 of reasonable care upon owners and contractors "'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross,* 81 NY2d at 501–502). Importantly, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross,* 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

Although plaintiff has alleged multiple Industrial Code violations in his bill of particulars, he only opposes that part of defendants' motion seeking dismissal of those parts of the Labor Law § 241 (6) claim predicated on alleged violations of sections 23-3.2 (b) (general requirements – protection of adjacent structures) and 23-3.3 (c) (demolition by hand – inspections). Accordingly, the unaddressed Industrial Code provisions, which include 23-1.5, 23-1.7, 23-1.8, 23-1.10, 23-2.1, 23-2.2, 23-2.3, 23-3, 23-3.1, 23-3.4, 23-5, 23-6, 23-7, and 23-8 (defendants' notice of motion, exhibit C) are deemed abandoned (*Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section"]). Thus, defendants are entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on the abandoned provisions set forth above.

Industrial Code 12 NYCRR 23-3.2 (b)

Industrial Code section 23-3.2 (b) is sufficiently specific to support a Labor Law § 241 (6) claim (*see e.g. Sainato v City of Albany*, 285 AD2d 708 [3d Dept 2001]). That section provides as follows:

> "Protection of adjacent structures. During the demolition of any building or other structure, the employer performing such demolition shall examine the walls of all buildings or other structures adjacent to the one which is to be demolished. Such examination shall include a determination of the thickness and method of support of any wall of such adjacent buildings or other structures. Where there is any reason to believe that an adjacent building or other structure or any part thereof is unsafe or may become unsafe because of the demolition operations, such operations shall not be performed until means have been provided to insure the stability and to prevent the collapse of such adjacent

> buildings or other structures. Such means shall consist of sheet piling, shoring, bracing or the equivalent."

Section 23-3.2 (b) "pertains solely to the protection of the stability of 'adjacent structures'" (*Perillo v Lehigh Constr. Group, Inc.*, 17 AD3d 1136, 1138 [4th Dept 2005]). Here, a question of fact remains as to whether the wood that struck plaintiff came from the Wall that he was demolishing with a hammer, or from the adjacent Second Wall.

Thus, defendants are not entitled to summary judgment dismissing that part of the Labor Law § 241 (6) claim premised on a violation of Industrial Code section 23-3.2 (b), and plaintiffs are not entitled to summary judgment in their favor on said provision.

Industrial Code 12 NYCRR 23-3.3 (c)

Industrial Code section 23-3.3 (c) is also sufficiently specific to support a Labor Law § 241 (6) claim (*see Garcia v 225 E. 57th St. Owners, Inc.* 96 AD3d 88, 92 [1st Dept 2012]). Section 23-3.3 (c) provides the following:

> "Inspection. During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means."

Neither party has set forth any evidence to establish, as a matter of law, whether any inspection took place and/or whether the failure to inspect was a proximate cause of the accident.

This Court notes that section 23-3.3 (c) does not apply to objects that come loose as a part of the actual performance of demolition work, as opposed to objects that fall because the demolition process rendered them unstable (*see Smith v New York City Hous. Auth.*, 71 AD3d 985, 987 [2d Dept 2010] [section 23-3.3 (c) did not apply where plaintiff was struck with bricks that

fell from the wall he was demolishing, as "[t]he hazard which allegedly caused the injured plaintiff's accident arose from the actual performance of the demolition work, not structural instability caused by the progress of the demolition"]). Here, as discussed previously, a question of fact exists as to whether plaintiff was struck by wood during the performance of his demolition work, such as his hammering, or whether he was struck by a piece of wood that fell from the Second Wall, which became unstable due to the demolition. Therefore, a question of fact also exists as to whether section 23-3.3 (c) applies in this case.

Thus, defendants are not entitled to summary judgment dismissing that part of the Labor Law § 241 (6) claim premised on a violation of Industrial Code section 23-3.3 (c), and plaintiffs are not entitled to summary judgment in their favor on this regulation.

The Common-Law Negligence and Labor Law § 200 Claims

Defendants 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" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). 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."

Although a question of fact exists as to whether the piece of wood which allegedly struck plaintiff originated from the Wall that he was demolishing or from the adjacent Second Wall, under either theory, plaintiff's claims implicate the means and methods of the work performed.

"Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]). Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (*Naughton v City of NY*, 94 AD3d 1, 11 [1st Dept 2012]).

Here, plaintiff testified that Judlau employees, and no one else, supervised and/or directed his work, and there is no evidence in the record that establishes that defendants exercised actual supervision of either plaintiff's demolition work or the securing of the Second Wall.

The court has considered the parties' remaining arguments and finds them to be without merit.

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendants Metropolitan Transportation Authority and New York City Transit Authority's motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint is granted to the extent of dismissing the those parts of the Labor Law § 241 (6) claim predicated on Industrial Code sections 23-1.5, 23-1.7, 23-1.8, 23-1.10, 23-2.1, 23-2.2, 23-2.3, 23-3, 23-3.1, 23-3.4, 23-5, 23-6, 23-7, and 23-8, and the motion is otherwise denied with respect to

the Labor Law § 240 (1) claim, those parts of the Labor Law § 241 (6) claim predicated on Industrial Code section 23-3.2 (b) and 23-3.3 (c), and the common-law negligence and Labor Law § 200 claims; and it is further

ORDERED that the cross motion by plaintiffs Edward Kane and Eileen Kane for summary judgment, pursuant to CPLR 3212, in their favor as to liability on their Labor Law §§ 240 (1) and 241 (6) claims is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

10/11/2017
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE