SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** 12
Justice

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CECILIO SIERRA, AZUCENA ESCOBAR,

Plaintiffs,

- v -

THE CHARLES CONDOMINIUMS, LLC, TRITON CONSTRUCTION CORP,

Defendants.

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INDEX NO. 155685/2014

MOTION DATE

MOTION SEQ. NO. 3

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 121, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 154, 155, 156, 158

were read on this application for summary judgment

By notice of motion, plaintiffs move pursuant to CPLR 3212 for an order granting them partial summary judgment on liability. Defendants oppose and, by notice of cross motion, move for an order summarily dismissing the complaint on the ground that plaintiff Sierra was the sole proximate cause of his injuries. Plaintiffs oppose the cross motion.

It is undisputed that on the date of his accident, Sierra, a carpenter, was engaged in construction work at a building owned by defendant Condominiums and on a project for which defendant Triton was the general manager. While constructing a deck on the tenth floor of the building, which consisted of laying planking over beams, Sierra allegedly stepped on a

defectively constructed and unsecured three-by-four beam or pole which shifted, causing him to fall onto the floor below. Although Sierra was wearing a harness attached to a lanyard and despite his and his coworkers' request, there was no tail line or other anchorage for him to tie off the harness. There was also no fence or safety net underneath the beams. Plaintiff asserts various Labor Law claims against defendants. (NYSCEF 51).

I. LABOR LAW § 240(1)

In pertinent part, Labor Law § 240(1) "was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder 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." (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], *quoting Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *Verdon v Port Auth. of N.Y. & N.J.*, 111 AD3d 580, 581 [1st Dept 2013]). To establish a violation of this section of the Labor Law, the plaintiff must show both a statutory violation and that the "violation . . . was a contributing cause of his fall." (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 289 [2003]). The statute is violated not only when a safety device is not provided or malfunctions, but when the safety device provided does not give proper protection. (*Harris v City of New York*, 83 AD3d 104, 111 [1st Dept 2011]).

While comparative negligence does not constitute a defense to a Labor Law § 240(1) claim (*Somereve v Plaza Constr. Corp.*, 136 AD3d 537, 539 [1st Dept 2016]), a defendant who provides adequate protection may raise as a defense that the injured worker, "who neglected to use or misused the available device–was the sole proximate cause of his or her injuries." (*DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 45 [1st Dept 2014]).

Defendants argue that Sierra was provided with a Personal Fall Protection retractor but failed to use it without explanation. They rely on the testimony of the project's safety manager that retractor devices were always on-site and provided to the employees, that he told Sierra to use it the morning of his accident, that the carpenters were instructed every morning to bring their full protection equipment, including the device, to their individual worksites, that he noticed that Sierra had the device at the start of his work shift but did not have it after his accident, and that the device would have prevented his injuries. (NYSCEF 65).

Sierra denies having been provided with a retractable device (NYSCEF 57, 69), which his coworker corroborates. (NYSCEF 70).

In light of the conflicting evidence as to whether Sierra was provided with an adequate safety device that he decided not to use for no reason, summary judgment is not warranted for either party. (*See Pietrowski v Are-E. River Science Park, LLC*, 86 AD3d 467 [1st Dept 2011] [while plaintiff submitted evidence that no choker cables were present at the location of his fall, defendants submitted evidence that cables were there, plaintiff was trained and told he was required to use them, workers were given cables for that purpose, and they knew that cables were readily available on each floor, and therefore factual question as to whether defendants failed to provide cables or whether they were made available and plaintiff failed to use them precluded summary judgment]; *see also Quinones v Olmstead Props., Inc.*, 133 AD3d 87 [1st Dept 2015] [conflicting evidence as to whether plaintiff was provided adequate safety devices but failed to use them raised triable issue as to whether he was sole proximate cause of injuries]).

II. LABOR LAW § 240(3)

Labor Law § 240(3) provides that "scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use."

Relying on their expert's affidavit, defendants assert that plaintiff was standing on "formwork" which was a walking/working surface, not a scaffold. According to plaintiffs' expert, the concrete form system in issue was being used a temporary elevated working platform and thus constitutes a scaffold. Given this conflicting evidence, plaintiffs do not establish that the system constitutes a scaffold. (*See e.g., Bellreng v Sicoli & Massaro, Inc.*, 108 AD3d 1027 [4th Dept 2013] [roof decking was not scaffold under section 240(3)]; *Olson v Pyramid Crossgates Co.*, 291 AD2d 706 [3d Dept 2002] [plywood platform was not scaffold as it was furnished to support duct work, rather than to be safety device]; *see also Frierson v Concourse Plaza Assocs.*, 189 AD2d 609 [1st Dept 1993] [whether or not device is scaffold is ordinarily factual issue]).

In any event, even if the form system were a scaffold, plaintiffs submit no evidence that it was not constructed to bear four times the maximum weight, other than their expert's reliance on the sole fact that the three-by-four tipped when Sierra stood on it as evidence that it did not and could not bear the required weight. *(See e.g., Kyle v City of New York*, 268 AD2d 192 [1st Dept 2000] [Labor Law § 240(3) claim dismissed as plaintiff offered only bald, conclusory statements that scaffold could not support four times its weight]).

Plaintiff thus fails to establish that defendants violated Labor Law § 240(1).

III. LABOR LAW § 241(6)

Pursuant to Labor Law § 241(6), owners and contractors bear a non-delegable duty to provide workers with reasonable and adequate protection and safety. In order to establish a violation of this section, a plaintiff must show that the defendants violated a regulation setting forth a specific standard of conduct. Given the non-delegable duty imposed on an owner and general contractor, a plaintiff need not establish that a defendant and general contractor had notice of the alleged violation or caused or created it by exercising supervision and control over

the injury-producing work. (*See Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998] [general contractor may be held liable despite absence of control over worksite or notice of violation]; *Rubino v 330 Madison Co., LLC*, 150 AD3d 603 [1st Dept 2017] [owner and/or general contractor's lack of notice irrelevant to liability]; *Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955 [2d Dept 2013] [plaintiff need not show that defendants exercised supervision and control over work or worksite]).

As triable issues remain as to whether plaintiff was the sole proximate cause of his injuries, there is no basis for dismissing plaintiffs' section 241(6) claims on that ground at this time. (*See Poalacin v Mall Props., Inc.*, 155 AD3d 900 [2d Dept 2017] [defendants did not establish entitlement to dismissal of Labor Law § 241(6) claim absent showing that plaintiff's conduct was sole proximate cause of accident]).

Plaintiffs rely on the following industrial code rules and regulations as the basis for their Labor Law § 241(6) claim: 12 NYCRR 23-1.7(b)(1)(iii)(b) and (c), 12 NYCRR 23-1.16(b), and 12 NYCRR 23-5.1(e)(5). They are deemed to have waived any other regulations.

A. 12 NYCRR 23-1.7(b)(1)(iii)(b) and (c)

This section pertains to falling hazards and hazardous openings, and provides that where an employee is required to work close to the edge of a hazardous opening, the employee must be protected by: (b) an approved life net installed not more than five feet beneath the opening; or (c) an approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage.

Here, it has been held that the opening that had been created between the beams through which plaintiff fell does not constitute a "hazardous opening" within the meaning of this Industrial Code section. (*Bisram v L. Is. Jewish Hosp.*, 116 AD3d 475 [1st Dept 2014]).

B. 12 NYCRR 23-1.16(b)

There is a dispute as to whether plaintiff was provided with a retractable device that would have prevented him from falling so as to satisfy this Industrial Code section which requires that an employee use an approved safety belt or harness and properly attach it to a secure anchor of some kind so that if he or she falls, the fall does not exceed five feet.

C. 12 NYCRR 23-5.1(e)(5)

This regulation pertains to the minimum width of a scaffold platform, and as plaintiffs fail to establish that the three-by-four and/or the entire form system constitutes a "scaffold" (*supra*, I.), plaintiffs do not demonstrate that the regulation applies or was violated.

IV. LABOR LAW § 200 and NEGLIGENCE

Plaintiffs contend that defendants violated Labor Law § 200 by virtue of having created or having received notice of a dangerous condition, to wit, the hazardous opening that was created during the construction of the deck, the manner in which Sierra constructed the deck which required him to walk on top of the three-by-fours, and the failure to provide him with a lifeline or tie off point. (NYSCEF 51). These contentions essentially implicate the means and manner in which Sierra performed his work and not a defect inherent in the worksite. (*See Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012] [liability for dangerous condition on premises generally pertains to "a defect inherent in the property," not to manner in which work performed]; *Villanueva v 114 Fifth Ave. Assocs. LLC*, 162 AD3d 404 [1st Dept 2018] [no evidence that Labor Law § 200 claim arose from alleged defect or dangerous condition on premises; "(w)here a defect is not inherent but is created by the manner in which the work is performed, the claim under Labor Law 200 is one for means and methods and not one for a dangerous condition existing on the premises."]).

Thus in *Bisram v L. Is. Jewish Hosp.*, the plaintiff's allegation that he fell when, after laying metal decking onto beams to create a floor, he stepped on the decking and the beam shifted, causing him to fall to the floor below, implicated the means and methods of his work, rather than a dangerous condition. (116 AD3d 475 [1st Dept 2014]). Similarly, in *Castellon v Reinsberg*, the Court held that the plaintiff's allegations related to his fall, including that one of its causes was the lack of a safety harness, were based on the method of work, and that his fall from a ladder into an unguarded window opening also arose from the manner in which the work was performed, rather than from a dangerous condition on the premises. (82 AD3d 635 [1st Dept 2011]).

Pursuant to Labor Law § 200, an owner may not be held liable for failing to provide a safe place to work for any alleged injuries arising out of the method and manner of the work being performed, unless it actually exercised supervisory control over the injury-producing work. (*Cappabianca*, 99 AD3d 139).

Here, plaintiffs neither argue nor present any evidence establishing that defendants exercised supervision and/or control over Sierra's work. (*See Suconota v Knickerbocker Props., LLC*, 116 AD3d 508 [1st Dept 2014] [defendant did not control work that caused plaintiff's accident as plaintiff testified that he worked solely under supervision of his employer-subcontractor's foreman and did not receive direction from anyone else]; *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446 [1st Dept 2013] [plaintiff worked under direction of his own employer's foreman and was not supervised by anyone else]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378 [1st Dept 2007] [plaintiff testified that defendant did not tell plaintiff's employer or its employees how to perform its work and defendant testified that it did not supervise subcontractors' work and did not tell them what to do]; *see also Castellon*, 82

AD3d at 635 [as it was undisputed that defendant did not tell plaintiff how to do his work, plaintiff's Labor Law § 200 claim should have been dismissed]).

Plaintiffs therefore fail to establish, *prima facie*, that defendants may be held liable on their claims pursuant to Labor Law § 200 or common law negligence, and upon searching the record (CPLR 3212[g]), dismissal of these claims is warranted. (*See Naupari v Murray*, AD3d , 2018 WL 3232626 [1st Dept 2018] [common law negligence claims properly dismissed as accident arose from means and manner of plaintiff's work, which was determined by his employer, and defendants asserted no supervisory control]).

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for partial summary judgment on liability is denied in its entirety; it is further

ORDERED, that plaintiffs' claims for a violation of Labor Law 241(6) premised on a violation of 12 NYCRR 23-1.7(b)(1)(iii)(b) and (c), Labor Law 200 and common law negligence are severed and dismissed; and it is further

ORDERED, that defendants' cross motion for summary judgment is denied.

8/20/2018
DATE

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

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