SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** **IAS MOTION 2EFM**

Justice

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INDEX NO. 158614/2016

ANTHONY VASQUEZ,

MOTION SEQ. NOS. 003 and 004

Plaintiff,

- v -

PLAZA CONSTRUCTION COMPANY, LLC, and HENRY V MURRAY SENIOR, LLC,

DECISION AND ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 73, 75, 76, 77, 78, 79, 80

were read on this motion for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 65, 66, 67, 68, 69, 70, 71, 72, 74, 81, 82, 83

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, it is ordered that the motions are **decided as follows.**

In this Labor Law action, plaintiff Anthony Vasquez moves (motion sequence 003), pursuant to CPLR 3212, for partial summary judgment against defendants Plaza Construction Company, LLC ("Plaza") and Henry V. Murray Senior, LLC ("Murray") on the issue of liability. In the alternative, should this Court deny summary judgment on liability, plaintiff seeks to strike defendants' first, sixth, eighth, and ninth affirmative defenses. Defendants oppose plaintiff's motion. Defendants also move (motion sequence 004), pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes defendants' motion.

After oral argument, and after reviewing the parties' papers and the relevant statutes and caselaw, it is ordered that the motions are **decided as follows.**

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff was employed by nonparty DiFama Concrete as an apprentice ironworker on the eighth floor of a building under construction at 111 Murray Street in Manhattan. (Docs. 53 at 4; 66 at 2.) Defendant Murray was the owner of the premises, and defendant Plaza acted as the construction manager on the project. (Doc. 57 at 2.)

On the ninth floor of the building, carpenters were setting up a floor. (Doc. 53 at 4.) To do so, they placed wooden beams across metal floor trusses. (*Id.*) There were no nets or other protective devices between the eighth and ninth floors. (*Id.*) Plaintiff alleges that, on the morning of August 31, 2016, a wooden beam missed its truss and fell onto his head. (*Id.*)

The instant action was commenced by plaintiff on October 12, 2016, by filing a summons and complaint against Murray, Plaza, and St. John's University.[1] (Doc. 68.) In the complaint, he alleged causes of action for common law negligence and violations of New York Labor Law §§ 200, 240(1), and 241(6). (*See* Doc. 76 at 4–11.) Murray and Plaza filed their answer on December 8, 2016. (*Id.* at 13–17.) In their first and eighth affirmative defenses, they asserted that plaintiff's injury was caused by his own culpable conduct. (*Id.* at 15–16.) Their sixth affirmative defense was based on assumption of risk. (*Id.* at 16.) Their ninth affirmative defense asserted that plaintiff was a recalcitrant worker. (*Id.*)

Plaintiff's deposition was held on March 14, 2018. (Doc. 78.) He described the carpenters' work on the ninth floor above him as follows:

> Q: You mentioned that they were setting the ribs from truss to truss. How were they doing that?
> A: The method they were using?

[1] In an order rendered on February 8, 2017, this Court (Freed, J.) dismissed the action as against St. John's University. (Doc. 76 at 22.) That decision found that St. John's University had transferred its property interests to defendant Murray, and therefore that plaintiff had no cause of action against it. (*Id.*)

Q: Yes. What did you see?
A: I noticed them kind of tossing them.
Q: Tossing them in what direction, in what way in relation to the trusses?
A: From truss to truss, so they were laying the ribs across the trusses.

(*Id.* at 23.) Although defendants' depositions were never held, the parties do not dispute the occurrence of either the work that was being done or plaintiff's accident.

The note of issue was filed on July 25, 2018. (Doc. 67.) Plaintiff now moves, in motion sequence 003, for partial summary judgment against Plaza and Murray on the issue of liability under Labor Law §§ 240(1) and 241(6). (Doc. 53 at 5–8.) He contends that they are liable under § 240(1) because there were no safety devices or intermediate barriers between the eighth and ninth floors that could have prevented the beams from falling in between the trusses. (*See id.* at 5–6.) With respect to § 241(6), plaintiff relies on New York Industrial Code §§ 23-1.7(a), which pertains to overhead hazards, and -2.4(c)(2), which mandates that building floors shall be kept covered during a building's construction. (*Id.* at 8.)

In the alternative, should this Court deny summary judgment on liability, plaintiff seeks to strike defendants' first, sixth, eighth, and ninth affirmative defenses. (*Id.* at 11.) He argues that their first and eighth affirmative defenses should be stricken because he did nothing that could be considered negligent or culpable in connection with his accident. (*Id.* at 9.) He further maintains that their sixth affirmative defense, assumption of risk, should be stricken because that doctrine has only been applied to situations where an injury occurred as a result of a plaintiff engaging in athletic or recreational activities. (*Id.* at 9–10.) He also contends that their ninth affirmative defense should be stricken because he was not a recalcitrant worker. (*Id.* at 10.)

In opposition, defendants claim that plaintiff has abandoned his common law negligence and Labor Law § 200 causes of action because he did not move for summary judgment on those

bases in his motion. (Doc. 75 at 4.) Regarding his § 240(1) cause of action, they contend that summary judgment should be denied because his accident did not involve an elevation-related hazard of the type that the statute was intended to protect. (*Id.* at 4–5.) Specifically, they argue that the incident does not fall within § 240(1)'s ambit because "plaintiff did not fall from a height, nor was he struck by a falling object that was improperly hoisted or inadequately secured." (*Id.*) Defendants insist that the accident did not result from a "physically significant elevation differential *because plaintiff never fell*" (*id.* at 9 (emphasis in original)), and they further claim that the beam that fell on plaintiff "cannot be considered a falling object within the purview of Labor Law § 240(1) as it was not a load that required securing for purposes of the work" (*id.*). With respect to plaintiff's § 241(6) cause of action, defendants argue that the Industrial Code provisions on which he relies are either inapplicable or too general to support a cause of action. (*Id.* at 10–13.)

With respect to the branch of plaintiff's motion that seeks to strike the first, sixth, eighth, and ninth affirmative defenses, defendants argue that there are questions of fact regarding plaintiff's conduct because he chose to stay on the eighth floor of the building even though he had observed carpenters working above him on the ninth floor. (*Id.* at 13–14.)

In motion sequence 004, defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. (Doc. 65.) Their arguments for dismissing plaintiff's Labor Law §§ 240(1) and 241(6) claims are identical to the contentions they raised in opposition to plaintiff's motion. (*See* Doc. 66 at 4–17.) In regard to his Labor Law § 200 and common law negligence causes of action, they argue that they cannot be held liable because they did not control or supervise his work. (*Id.* at 19.) Rather, they assert that he received all his instructions from DiFama, his employer. (*Id.*)

With respect to Labor Law §§ 240(1) and 241(6), plaintiff's arguments in opposition to defendants' motion are similar to the arguments he made in motion sequence 003. (Doc. 82 at 2–10.) Regarding § 200, plaintiff's counsel argues that defendants are not entitled to summary judgment dismissing the complaint because their arguments are based merely on plaintiff's testimony about who gave him instructions: "It is naïve or foolish . . . to rely on the understanding of an apprentice ironworker to delineate the power of an owner or of a general contractor . . . ." (*Id.* at 11.)

LEGAL CONCLUSIONS:

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The movant must produce sufficient evidence to eliminate any issues of material fact. (*Id.*) If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006].)

New York Labor Law § 240(1) requires property owners, general contractors, and their statutory agents to provide "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 construction workers. (*See* Labor Law § 240[1].) The Court of Appeals has held that "this statute is one for the protection of workmen from injury and undoubtedly is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed." (*Koenig v Patrick Constr. Corp.*, 298 NY 313, 319 [1948].) Importantly, in cases where

the plaintiff was injured by a falling object, the Court of Appeals has clarified that "falling object liability under Labor Law § 240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured." (*Quattrocchi v F.J. Schiame Constr. Corp.*, 11 NY3d 757, 758–59 [2008]) (internal quotations omitted).

Here, this Court finds that plaintiff has established his prima facie case of entitlement to judgment as a matter of law under § 240(1). Both defendants Plaza and Murray are proper Labor Law defendants within the meaning of that statute. The construction contract submitted in the docket as NYSCEF Document 57 identifies defendant Murray as the owner of the premises where plaintiff was injured. (Doc. 57 at 2–3.) (*See* Labor Law § 240[1] (placing liability on "contractors and *owners* and their agents . . . .") (emphasis added).)

The agreement also indicates that Plaza had the ability to control plaintiff's work. Indeed, paragraph 16.6(a) of the contract states that the "Construction Manager [i.e., Plaza] shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to persons engaged in the Work and other persons who may be affected thereby . . . ." (Doc. 57 at 45.) Further, under the section labeled "Preconstruction and Early Start Construction Agreement," paragraph 2(e) states that Plaza "shall at all times take reasonable precautions against the risk of injuries to persons or damage to property . . . ." (*Id.* at 65.) Thus, since the language of these provisions obligates Plaza to take precautions to prevent injury to workers, Plaza may be deemed an "agent" under the Labor Law. (*See Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981] (an entity that obtains the concomitant authority to supervise and control the plaintiff's work will be deemed an "agent" of the owner or general contractor).) This is true even if plaintiff did not receive instructions how to do his work from Plaza. (Doc. 75 at 3–4.) (*See Fox v Brozman-Archer Realty Servs., Inc.*, 266 AD2d 97, 98–99 [1st Dept 1999] (whether the defendant-entity

actually exercised its supervisory authority is irrelevant to the determination of whether it was a statutory agent under the Labor Law).) Rather, what matters is that Plaza "*possessed* the authority to supervise and control the work that gave rise to the plaintiff's injuries." (*Doyne v Barry, Bette & Led Duke Inc.*, 246 AD2d 756, 758 [3d Dept 1998] (emphasis added); *see also Santos v Condo 124 LLC*, 161 AD3d 650, 653 [1st Dept 2018] ("The determinative factor is whether the defendant had the right to exercise control over the work, not whether it actually exercised that right.").) Therefore, both Plaza—as an agent—and Murray—as the premises' owner—are proper Labor Law § 240(1) defendants.

This Court further finds that defendants are liable for plaintiff's injuries which resulted from the falling wooden beam. Nobody questions that this accident occurred or how it occurred. At his deposition, plaintiff testified that the beam fell from above and hit him directly on his head. (*See* Doc. 78 at 28–30.) Under our caselaw, this is exactly the type of accident that Labor Law § 240(1) was intended to provide protection for workers. (*See Humphrey v Park View fifth Ave. Assocs. LLC*, 113 AD3d 558, 559 [1st Dept 2014] (defendant liable where aluminum beam fell down from above and injured plaintiff); *Agresti v Silverstein Props., Inc.*, 104 AD3d 409, 409 [1st Dept 2013] (partial summary judgment granted to plaintiff where a wooden plank fell and struck him in the head); *Mercado v Caithness Long Is. LLC*, 104 AD3d 576, 576–77 [1st Dept 2013] (liability imposed on defendants where a pipe fell and struck plaintiff).) While Labor Law liability may be imposed where there is an inadequate safety device, the facts of this case are more egregious: Indeed, *no* device was being used here to prevent the injury. Given that the beam fell between the eighth and ninth floors of a building under construction, it seems readily apparent that proper protection should have been in place to avoid the accident. (*Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 268 [2001] (a plaintiff must show that the accident occurred because of

"the *absence* or inadequacy of a safety device of the kind enumerated in the statute") (emphasis added).)

Defendants' contentions to the contrary are unpersuasive. They first argue that plaintiff's accident does not fall within the purview of Labor Law § 240(1) because the beam was not being hoisted or secured. (Doc. 75 at 9.) However, the fact that the plywood was not being hoisted or secured at the time of the accident does not have any bearing on the outcome. (*See Quattrocchi*, 11 NY3d at 758–59 ("falling object liability under Labor Law § 240[1] is not limited to cases in which the falling object is in the process of being hoisted or secured") (internal quotations omitted).) Second, they argue that they cannot be liable because plaintiff did not fall. (*Id.*) But Labor Law § 240(1) has been applied to what are known as "falling worker" and "falling object" cases (*see Toefer v Long Island R.R.*, 4 NY3d 399, 407 [2005]), which are separate categories of liability under this provision. Because this is a falling object case, plaintiff need not also prove that he was injured in a fall. Defendants have therefore failed to raise a triable issue of fact in opposition.

Because liability under § 240(1) is absolute, (*see Lombardi v Stout*, 80 NY2d 290, 295 [1992] ("Liability . . . under section 240[1], in contrast to Labor Law § 200, is absolute and does not require notice of a defect nor the exercise of supervisory control by the owner.")), this Court need not address the parties' contentions regarding Labor Law §§ 200 and 241(6). Summary judgment on the issue of defendants' liability should thus be granted to plaintiff.

In accordance with the foregoing, it is hereby:

ORDERED the branch of plaintiff Anthony Vasquez's motion seeking summary judgment on the issue of liability against defendants under New York Labor Law § 240(1) (motion sequence 003) is hereby granted; and it is further

ORDERED that the branches of plaintiff's motion seeking summary judgment pursuant to Labor Law § 241(6) and, alternatively, to strike the first, sixth, eighth, and ninth affirmative defenses of defendants (motion sequence 003) are denied as moot; and it is further

ORDERED that the motion by defendants Plaza Construction Company, LLC and Henry V. Murray Senior, LLC seeking summary judgment to dismiss the complaint is hereby denied as moot; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon all parties, upon the Clerk of the Court (60 Centre Street, Room 141B), who is directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on*

*Courthouse and County Clerk Procedures for Electronically Filed Cases (access*ible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)]; and it is further

ORDERED that this matter shall proceed to trial on the issue of the amount of damages to be awarded to plaintiff; and it is further

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

9/5/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

158614/2016 VASQUEZ, ANTHONY vs. PLAZA CONSTRUCTION COMPANY,
Motion No. 003 004