Brown v Dynamic Installation Corp.
2019 NY Slip Op 33383(U)
November 12, 2019
Supreme Court, New York County
Docket Number: 154518/2017
Judge: Robert R. Reed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 43

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ANTHONY BROWN, Index No.: 154518/2017

Plaintiff,

-against-

DYNAMIC INSTALLATION CORP., BRF CONSTRUCTION CORP. and 400 TIMES SQUARE ASSOCIATES, LLC,

Defendants.

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BRF CONSTRUCTION CORP. and 400 TIMES SQUARE ASSOCIATES, LLC,

Third-Party Plaintiffs,

-against-

DYNAMIC INSTALLATION CORP. and DYNAMIC BRIDGE AND SCAFFOLDING, INC.,

Third-Party Defendants.

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Robert R. Reed, J.:

This is an action to recover damages for personal injuries allegedly sustained by a laborer on February 10, 2017, when, while working at a construction site located at 577 9th Avenue, New York, New York (the Premises), the door to a personnel hoist that he was entering failed, causing it to close on his back.

Plaintiff Anthony Brown moves, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants/third-party plaintiffs BRF Construction Corp. (BRF) and 400 Times Square Associates, LLC (Times Square)

(together, defendants).

Defendants cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint against them.

BACKGROUND

On the day of the accident, Times Square owned the Premises where the accident occurred. Times Square hired BRF, pursuant to a construction management agreement, to serve as the general contractor on a project at the Premises, which involved the new construction of a 28-story mixed-use building to be used for retail businesses, a hotel and residential apartments (the Project). BRF hired nonparty Construction Staffing Solutions (CSS) to provide laborers for the Project, whose work entailed debris and garbage removal. Plaintiff was employed by CSS as a laborer at the time of the accident.

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was employed by CSS as a full-time laborer on the Project. As an employee of CSS, plaintiff was also assigned to several different construction projects at various job sites. Plaintiff's work on these construction projects primarily involved the removal of construction debris. Plaintiff's CSS supervisors gave plaintiff his daily job assignments. At the time of plaintiff's hire, CSS gave him instructions regarding what safety equipment he was expected to wear/use each day. Plaintiff also maintained that his equipment, which included brooms, shovels, garbage bags, dust pans and masks, were provided to him by CSS and delivered to plaintiff by CSS. Plaintiff also noted that his base at the site was located in a second floor shanty which was assigned solely to the CSS laborers. In addition, plaintiff filled out his W-2 form with CSS and received his paychecks from CSS, and his

paychecks were signed by a CSS employee.

Plaintiff testified that he never had any interactions with anyone from BRF during the course of his work on the Project, and that all of the men he worked with were CSS employees. While on the Project, one of plaintiff's supervisors was a CSS employee named Wayne Perry. Plaintiff explained that "instruction[s] would come . . . down the chain of command. They would go from BRF to Wayne, and Wayne [would] give it straight to us" (plaintiff's tr at 32).

Plaintiff testified that his accident occurred on the third floor of the Premises. At the time of the accident, he and some of his CSS crew members were loading a personnel hoist with dumpsters/carts containing construction debris. Plaintiff asserted that, in the weeks prior to the accident, the cables that held the door of the nine-foot-tall hoist had broken on multiple occasions, which had prevented the hoist door from staying open. Plaintiff was told that "the cables [were] popping because people [were] opening and closing the gate carelessly" (*id.* at 65). Plaintiff further testified that, even though the workers complained about the problem to the BRF supervisors and foremen, they were nevertheless instructed to keep using the defective hoist. At the time of the accident, a metal pipe, which measured approximately two to three inches in diameter, was being used as a wedge to prop open the hoist door.

Plaintiff explained that the accident occurred as he was loading a cart filled with construction debris into the hoist. At this time, the hoist door was positioned as high as the door could go and propped open by the metal pipe wedged underneath it. As plaintiff entered the hoist, the subject pipe dislodged, causing the heavy door to fall on his upper back, bounce, and then strike him again on his lower back.

After the accident, plaintiff's CSS coworkers immediately reported the incident to Perry.

When plaintiff was later terminated from his employment with CSS, he was informed of his termination by one of the CSS supervisors, Alvin Johnson. CSS also provided plaintiff with his workers' compensation benefits in connection with the accident.

Deposition Testimony of Walter Bartels (BRF's Superintendent)

Walter Bartels testified that BRF served as the "general contractor" on the Project, and he was BRF's superintendent on the day of the accident (Bartels tr at 12). For the Project, BRF solicited and hired the various trade contractors, scheduled and coordinated the work and made sure that the work was completed on time and within the set budget. BRF maintained a sign-in sheet for the laborers, and a BRF superintendent reviewed the sign-in sheet and payrolls for consistency. Bartels also maintained that BRF provided various tools for the workers on the Project, including brooms, shovels, masks and garbage carts.

Bartels explained that BRF entered into a contract with CSS for laborers to perform "debris removal" and to chip concrete (*id.* at 20). CSS had full-time foremen present at the job site. These foreman determined when the laborers' work was properly completed. They also advised the CSS workers when they were permitted to leave the job site each day.

Bartels also maintained that the BRF supervisors only communicated with the CSS foreman with regard to the labor work provided by CSS for the Project. In addition, if CSS employees had any issues at the job site, they addressed these issues solely with a CSS foreman or supervisor. If appropriate, the CSS foreman or supervisor would discuss said issues with BRF.

Bartels testified that the hoists and cabs were installed, maintained and operated by defendant Dynamic Installation Corp. (Dynamic). He described the doors of the hoists as being

heavy, fenced, metal gates with a handle at the bottom, which would be used to lift the doors up and open, typically by an operator employed by Dynamic.

Bartels testified that cables with a counterweight were connected above the subject hoist's door, so that when the door was lifted up, the cables and the counterweights held the hoist door in place in an open position. Bartels further testified that in the weeks leading up to the accident, the cables connected to the subject hoist broke "more than once," which caused the hoist door to fall (*id.* at 50).

Statement of Jamal Williams (CSS Laborer)

In his sworn statement dated March 8, 2017, Jamal Williams attested that he was employed as a laborer on the Project by CSS on the day of the accident. At the time of the accident, he and a CSS crew were removing demolition debris on the third floor of the Premises by placing it in mini carts and moving the carts to a hoist, which would bring the carts down to the ground level. Williams maintained that

> "[f]or approximately a week to ten days prior to February 10, the hoist doors were faulty or defective. Cables that held the hoist doors open, would not work in cold or windy weather. This caused the hoist door to fall like a guillotine"

(plaintiff's notice of motion, exhibit H, Williams statement). Williams also asserted that complaints were made to the BRF foreman and the BRF superintendent, and that both of them were aware of the unsafe situation. Nevertheless, the CSS laborers were instructed to keep utilizing the hoist.

Williams explained that at the time of the accident, four mini-carts had been placed in the hoist, and a metal bar was being used to hold the door of the hoist open. Williams stated,

"At one point, I was backing the mini-cart into the hoist with the others. As the

> mini-cart entered, the hoist [shifted] a bit due to its weight. It was this shifting motion that [caused] the metal wedge [to become] dislodged, forcing the hoist doors to fall quickly. As [plaintiff] was in the process of entering the hoist, the door struck him first in the upper back and then the lower back and then it slid down his legs"

(*id.*).

Statement of Steven Clarke (CSS Laborer)

In is sworn statement dated March 8, 2017, Steven Clarke, also a CSS laborer on the Project, confirmed William's assertions that the hoist's doors were "faulty or defective" for about "a week to ten days" prior to the date of the accident (plaintiff's notice of motion, exhibit I, Clarke statement). He also confirmed that complaints were made to the BRF superintendent and foreman, yet the laborers were instructed to keep using the hoist. He stated that just before the accident, the metal pipe that was being used to hold up the hoist's door dislodged when plaintiff's mini-cart entered the hoist, which caused the hoist's door to "fall quickly" onto plaintiff's back (*id.*).

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]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *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]).

Whether Plaintiff Was A Special Employee of BRF

BRF maintains that plaintiff is not entitled to judgment in his favor on the Labor Law § 240 (1) claim against it because plaintiff was its special employee on the day of the accident, and, as such, Workers' Compensation law applies. It is well established that an employee's sole remedy against his employer for injuries sustained in the course of employment is benefits under the Workers' Compensation Law (*see* Worker's Compensation Law, §§ 11, 29 [6]; *Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 357 [2007]; *Lane v Fisher Park Lane Co.*, 276 AD2d 136, 139 [1st Dept 2000]). That said, a "special employer may avail itself of the Workers' Compensation Law to bar negligence claims against it for injuries sustained by a special employee in the course of special employment" (*Bellamy v Columbia Univ.*, 50 AD3d 160, 161 [1st Dept 2008] ["an employee, although generally employed by one employer, may be specially employed by another employer, and [a] special employer may avail itself of the Workers' Compensation Law to bar negligence claims against it for injuries sustained by a special employee in the course of special employment"]).

It should also be noted that

> "a general employee of one employer may also be in the special employ of another, notwithstanding the general employer's responsibility for payment of wages and for maintaining workers' compensation and other employee benefits. A special employee is described as one who is transferred for a limited time of whatever duration to the service of another. General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special

employer"

(*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991] [internal citations omitted]). In determining whether a special employment relationship exists, no one factor is decisive (*id.* at 558). "While not determinative, a significant and weighty feature" in making such a determination is "who controls and directs the manner, details and ultimate result of the employee's work" (*id.*). Further, "[t]o rebut the presumption of general employment the putative special employer must clearly demonstrate that the general employer [Centerline] surrendered control over the employee *and that the putative special employer* [DCM] *assumed such control*" (*Bautista v David Frankel Realty, Inc.*, 54 AD3d 549, 556 [1st Dept 2008] citing *Thompson v Grumman Aerospace Corp.*, 78 NY2d at 557).

Here, a review of the record reveals that plaintiff's relationship with BRF did not rise to the level of a special employee. Plaintiff, who was hired directly by CSS, received his paychecks and W-2 forms from CSS, reflecting that he was an employee of the same. Plaintiff was also informed of his termination from a CSS supervisor, and his Workers' Compensation benefits were provided by CSS. In addition, while BRF may have given CSS some direction as to the location of the work to be performed, plaintiff's CSS supervisors and foremen gave him his daily work assignments and supervised and directed said work. CSS determined when plaintiff's work was properly completed, and when plaintiff was permitted to leave the job site each day. CSS instructed plaintiff in regard to the safety gear that he was required to wear, also providing him with much of the equipment necessary to perform his work. CSS also maintained the shanty used by the CSS laborers. Further, BRF supervisors only communicated with the CSS foremen, and if CSS had any issues, the CSS employees addressed those issues solely with their CSS

supervisors. Under these circumstances, it is clear that CSS did not completely surrender control over plaintiff, nor did BRF assume said control.

Thus, BRF is not entitled to dismissal of the Labor Law claims on the ground that plaintiff was its special employee.[1]

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 defendants. Defendants cross-move for dismissal of 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

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[1]It should be noted that BRF, who was hired pursuant to a construction management agreement, does not argue that it is not a proper labor law defendant on the ground that it did not serve as the general contractor on the Project.

> 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]).

Here, plaintiff may recover damages for a violation of Labor Law § 240 (1) under a falling objects theory, because the object that fell on him, *i.e.* the defective heavy hoist door, "was 'a load that required securing for the purposes of the undertaking at the time it fell [citation omitted]'" (*Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005]; *Gabrus v New York City Hous. Auth.*, 105 AD3d 699, 699 [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 opposition, defendants argue that Labor Law § 240 (1) does not apply to this case because the personnel hoist and its door were part of the building's permanent structure for at least the duration of the Project, rather than a safety device, and courts have found that the statute

does not apply to objects that are part of a building's permanent structure. To explain, as parts of a building's permanent structure are not expected to fail, such objects would not be expected to require a safety device of the kind enumerated in the statute (*see Narducci v Manhasset Bay Assoc.*, 96 NY2d at 268 [where the plaintiff was injured when he was struck by falling glass from a window at a building where a renovation project was underway, the Court determined that the subject glass "was not [the kind of] situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected"]; *Marin v AP-Amsterdam 1661 Park LLC*, 60 AD3d 824, 825-826 [2d Dept 2009] [Labor Law § 240 (1) not applicable where the plaintiff was injured when a metal bracket used to affix piping to a building's exterior came loose and struck him on his head, because the bracket "had been installed prior to the plaintiff's accident . . . and thus became part of the building's permanent structure"]; *Garcia v DPA Wallace Ave. I, LLC*, 101 AD3d 415, 416 [1st Dept 2012]; *Handley v White Assoc.*, 288 AD2d 855, 855 [4th Dept 2001] [Labor Law § 240 (1) did not apply where, after placing a new section of heating duct, the duct fell and struck the plaintiff on his wrist]).

It should be noted that Labor Law § 240 (1) may apply in situations where a permanent part of a building was also being used as a safety device at the time of the accident (*see Gomez v City of New York*, 63 AD3d 511, 512 [1st Dept 2009] [fire escape that the plaintiff was working on when he fell was the functional equivalent of a scaffold]; *Beard v State of New York*, 25 AD3d 989, 991 [3d Dept 2006] [bridge on which the plaintiff was working as it was being taken apart was a 'functional equivalent of a scaffold'"] [citation omitted]).

Here, however, plaintiff is entitled to judgment in his favor because, even though the hoist and its door were allegedly permanent structures, their permanency is not a defense due to the fact

that they were hazardous in nature, as evidenced by the fact that the subject cable had a history of breaking, which made the hoist's door's collapse foreseeable. As such, defendants were required to provide a safety device sufficient enough to protect plaintiff from being struck by the falling door. "[T]o establish a prima facie case pursuant to Labor Law § 240 (1), a plaintiff must demonstrate that the risk of injury from an elevation-related hazard was foreseeable, and that an absent or defective protective device of the type enumerated in the statute was a proximate cause of the injuries alleged" (*Shipkoski v Watch Case Factory Assoc.*, 292 AD2d 587, 588 [2d Dept 2002]). Moreover, the crucial consideration is whether a particular task creates an elevation-related risk of the kind that the enumerated safety devices protect against, regardless of the permanency of the structure involved (*see Carillo v Circle Manor Apts.*, 131 AD3d 662, 662 [2d Dept 2015] [where it is foreseeable that a safety device might be needed,"the collapse or partial collapse of a permanent floor may give rise to liability under Labor Law § 240 (1)"]; *McDonald v UICC Holding, LLC*, 79 AD3d 1220, 1221 [3d Dept 2010] [although a staircase normally "constitutes a 'permanent passageway between two parts of the building'" and therefore "cannot form the basis of a Labor Law § 240 (1) claim," the staircase that collapsed "could no longer be considered a permanent passageway" because "at the time of the accident, [it] was being dismantled"]). Similarly, in *Cavanaugh v Mega Contr., Inc.* (34 AD3d 411, 412 [2d Dept 2006]), the plaintiffs were granted summary judgment on the Labor Law § 240 (1) claim, when

> "the plaintiffs submitted evidence establishing that the injured plaintiff fell from the first floor to the basement of a building undergoing renovation, after a portion of the first floor subfloor collapsed, and that the first floor subfloor was not properly braced and no safety devices were provided to help prevent or break his fall."

Here, regardless of the permanent nature of the hoist and its heavy door, as a defect in the

door, which defendants were clearly aware of, ultimately caused the door to fall, "'plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential'" (*Gory v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 113 AD3d 550, 551 [1st Dept 2014] [Labor Law § 240 (1) liability where the stairway, which was elevated, provided to the plaintiff was the "sole means of access to the floors of the building," and where the plaintiff's injuries were caused by defendant's failure to provide guard rails], quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Accordingly, as it was foreseeable that the hoist door might fail, additional safety devices were necessary in order to keep plaintiff safe while entering the hoist. "'[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 762, 762 [2d Dept 2006] [scaffold alone, as a safety device, was inadequate to protect the plaintiff, "where it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake"], quoting *Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]; *Dasilva v A.J. Contr. Co.*, 262 AD2d 214, 214 [1st Dept 1999] [where the plaintiff "was injured when the unsecured A-frame ladder he was standing on was struck by a section of pipe he had cut, causing him to fall," the Court found that "the absence of adequate safety devices was a substantial and, given the nature of the work being performed, foreseeable cause of plaintiff's fall and injury"]). Clearly, in this case, the unsecured pipe that was used to prop open the hoist door was insufficient to prevent the heavy door from falling on plaintiff.

Also, contrary to defendants' argument, under the facts of this case, Labor Law § 240 (1)

applies even though the hoist door fell only a few feet onto plaintiff's back. To that effect, defendants maintain that, 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]). However, notably, in *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* (18 NY3d 1 [2011]), the Court of Appeals "decline[d] to adopt the 'same level' rule, which ignores the nuances of an appropriate section 240 (1) analysis" (*id.* at 9). In *Wilinski*, the plaintiff was struck by metal pipes, which stood 10-feet-tall and measured 4 inches in diameter. In that case, the pipes that toppled over onto the plaintiff were located at the same level as the plaintiff. 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).

Applying *Wilinski* to the instant case, not only is plaintiff not precluded from recovery simply because the hoist door fell only a short distance, but, given the significant amount of force that it generated during its fall due to its extreme weight, plaintiff's accident "'ar[ose] from a physically significant elevation differential'" (*id.* at 10, quoting *Runner* at 603; *see also Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 409 [1st Dept 2013] [in a case where the plaintiff was injured when two 500-pound steel beams fell "a short distance" off an A-frame cart and landed on his leg, Labor Law applied "[g]iven the beams' total weight of 1,000 pounds and the force they were able to generate during their descent"]; *McCallister*, 92 AD3d at 928-929; *Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 474 [1st Dept 2012] [court held that "[t]he elevation differential

[could not] be considered de minimis when the weight of the object being hoisted [was] capable of generating an extreme amount of force, even though it only traveled a short distance"]). Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards such as falling from a height, 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 citation omitted]). "As has been often stated, the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, 'those best suited to bear that responsibility' instead of on the workers, who are not in a position to protect themselves" (*John*, 281 AD2d at 117, quoting *Ross*, 81 NY2d at 500).

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

The court has considered defendants' remaining arguments on this issue and finds them to be unavailing.

The Common-Law Negligence and Labor Law §§ 200 and 241 (6) Claims

Defendants cross-move for dismissal of the common-law negligence and Labor Law §§ 200 and 241 (6) claims against them. Notably, in his opposition, plaintiff does not oppose dismissal of said claims against defendants, and, as such, these claims 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 fn* [3d Dept 2003]).

Thus, defendants are entitled to dismissal of the common-law negligence and Labor Law §§ 200 and 241 (6) claims against them.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff Anthony Brown's motion, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) liability against defendants/third-party plaintiffs BRF Construction Corp. and 400 Times Square Associates, LLC (together, defendants) is granted; and it is further

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

ORDERED that counsel are directed to appear for a status conference in Part 43, Room 412, 60 Centre Street, on December 5, 2019, at 2:30 p.m.

Dated: November 12, 2019

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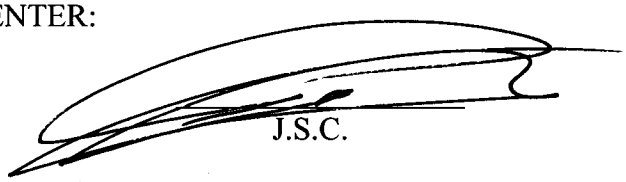

J.S.C.