SCP 3/19/19 @ 9:15 a.m.

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF WESTCHESTER

----------X

RAYMOND WALKER,

Plaintiff,

-against -

POKO-ST ANNS, L.P., HOFFMAN FUEL COMPANY OF DANBURY and GUS & G CONSTRUCTION, INC.,

Defendants.

----------X

POKO-ST ANNS, L.P. and HOFFMAN FUEL COMPANY OF DANBURY,

Third-Party Plaintiff,

- against -

GUS & G CONSTRUCTION, INC.,

Third-Party Defendant.

----------X

DECISION & ORDER

Index No. 61494/15

Sequence No. 5

LUBELL, J.

The following papers were considered in connection with this motion by defendants for an Order pursuant to CPLR 3212 granting summary judgment to the defendants and dismissing all claims and cross-claims against them:

PAPERS	**NYSCEF**
NOTICE OF MOTION/AFFIRMATION/EXHIBITS A-L	192-208
AFFIRMATION IN OPPOSITION/EXHIBITS A-C	211-215
REPLY AFFIRMATION	216
SUPPLEMENTAL REPLY AFFIRMATION	217,218

Plaintiff, an employee of Gus & G Construction, Inc., brings this action under Labor Law §§240, 241(6) and 200 and common law negligence in connection with injuries allegedly sustained when a

500 to 700 pound section of a boiler (the "Boiler") he was moving tipped over onto him. Defendant, Poko-St. Anns, is sued as the owner of the premises from which the Boiler was being removed, 510 E. 139th Street, Bronx, NY (the "Premises"). Defendant, Hoffman Fuel Company of Danbury ("Hoffman"), is sued as St. Anns boiler contractor in whose flatbed truck the Boiler was being moved and in which the incident took place. Both defendants now move for summary judgment in their favor. All other defendants are no longer in the case.

More particularly, the occurrence took place when, after having successfully moved the Boiler from the basement of the Premises, up a flight of stairs, onto the lift of a flatbed truck owned by Hoffman, and then into the back of the truck, the Boiler fell over as plaintiff and a co-worker were moving it from the back of the flatbed truck to the front of the flatbed truck by use of a hand truck.

In a strikingly similar set of circumstances, the Court in Simmons v City of New York (165 AD3d 725, 726 [2d Dept 2018]), reminds us of the following:

> "The extraordinary protections of Labor Law §240 (1) extend only to a narrow class of special hazards, and do 'not encompass any and all perils that may be connected in some tangential way with the effects of gravity'" (Nieves v. Five Boro A.C. & Refrig. Corp., 93 NY2d 914, 915-916 [1999], quoting Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]). In determining whether a plaintiff is entitled to the extraordinary protections of Labor Law §240(1), the "single 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" (Runner v. New York Stock Exch., Inc., 13 NY3d 599, 603 [2009]). "Without a significant elevation differential, Labor Law §240(1) does not apply, even if the injury is caused by the application of gravity on an object" (Christiansen v. Bonacio Constr., Inc., 129 AD3d 1156, 1158 [2015]).
>
> "With respect to falling objects, Labor Law §240(1) applies where the falling of an object is related to 'a significant risk inherent in

> . . . the relative elevation . . . at which materials or loads must be positioned or secured'" (Narducci v. Manhasset Bay Assoc., 96 NY2d 259, 267-268 [2001], quoting Rocovich v. Consolidated Edison Co., 78 NY2d 509, 514 [1991]). Therefore, "a plaintiff must show more than simply that an object fell, thereby causing injury to a worker" (Turczynski v. City of New York, 17 AD3d 450, 451 [2005]). "[A] plaintiff must show that, at the time the object fell, it was being hoisted or secured, or that the falling object required securing for the purposes of the undertaking" (Banscher v. Actus Lend Lease, LLC, 103 AD3d 823, 824 [2013]). A plaintiff must also show that "the object fell . . . because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (Narducci v. Manhasset Bay Assoc., 96 NY2d at 268; see Fabrizi v. 1095 Ave. of the Ams., L.L.C., 22 NY3d 658, 663 [2014]).

Here, as in Simmons v. City of New York , supra, movants established their prima facie entitlement to judgment in their favor as a matter of law upon a showing that plaintiff's injuries "were not caused by the elevation or gravity-related risks encompassed by Labor Law §240(1)" (Simmons v. City of New York , supra citing Gasques v. State of New York, 15 NY3d 869 [2010]; Oakes v. Wal-Mart Real Estate Bus. Trust, 99 AD3d 31 [2012]; Davis v. Wyeth Pharms., Inc., 86 AD3d 907 [2011]). In opposition, plaintiff has failed to come forward with sufficient proof in admissible form which raise a triable issue of fact. Similar to circumstances surrounding the falling of a compressor in Simmons v City of New York , supra, the Boiler was not being hoisted but was simply being wheeled at essentially ground level, whereupon it rolled off of the hand truck. Such an event does not constitute a falling object nor otherwise form the basis upon which liability may be imposed from an elevation differential. Thus, plaintiff's injury is not elevation-related within the meaning of Labor Law §240(1).

> "To prevail on a cause of action alleging a violation of Labor Law § 241(6), a plaintiff must establish the violation of an Industrial Code provision that sets forth specific, applicable safety standards, and that his or her injuries were proximately caused by such Industrial Code violation . . . [citations

omitted]."

(Moscati v. Consol. Edison Co. of New York, Inc., 91 NYS3d 209 [2d Dept 2019]). Here, the Court is satisfied that defendant demonstrate, prima facie, that the Industrial Code sections upon which plaintiff relies, §§23-1.5, 1.7, 1.8, 1.12, 1.27, 6.1, 7.1, 9.2, and 9.8, are not applicable to the underlying facts and, in response to same, plaintiff has failed to raise a material issue of fact.

Finally, defendants have also shown entitlement to judgment in their favor on the Labor Law §200 claim,.

> There are "two broad categories of actions that implicate the provisions of Labor Law § 200" (Reyes v. Arco Wentworth Mgt. Corp., 83 A.D.3d 47, 50-51, 919 N.Y.S.2d 44). The first category involves worker injuries arising out of alleged dangerous or defective conditions on the premises where the work is performed (see Grasso v. New York State Thruway Auth., 159 A.D.3d 674, 678, 71 N.Y.S.3d 604; Reyes v. Arco Wentworth Mgt. Corp., 83 A.D.3d at 51, 919 N.Y.S.2d 44; Chowdhury v. Rodriguez, 57 A.D.3d 121, 128, 867 N.Y.S.2d 123). In those circumstances, "[f]or liability to be imposed on the property owner, there must be evidence showing that the property owner either created a dangerous or defective condition, or had actual or constructive notice of it without remedying it within a reasonable time" (Reyes v. Arco Wentworth Mgt. Corp., 83 A.D.3d at 51, 919 N.Y.S.2d 44). "The second broad category of actions under Labor Law § 200 involves injuries occasioned by the use of dangerous or defective equipment at the job site" (id.). A property owner will be held liable under this category only if it possessed the authority to supervise or control the means and methods of the work (see id.; Ortega v. Puccia, 57 A.D.3d 54, 61, 866 N.Y.S.2d 323). The requisite supervision or control exists for Labor Law § 200 purposes when the property owner bears responsibility for the manner in which the work is performed (see Marquez v. L & M Dev. Partners, Inc., 141 A.D.3d 694, 698, 35 N.Y.S.3d 700). "The determinative factor is whether the party had 'the right to exercise

> control over the work, not whether it actually exercised that right'" (Johnsen v. City of New York, 149 A.D.3d 822, 822, 49 N.Y.S.3d 898, quoting Williams v. Dover Home Improvement, 276 A.D.2d 626, 626, 714 N.Y.S.2d 318

(Moscati v. Consol. Edison Co. of New York, Inc., 91 NYS3d 209 [2d Dept 2019]).

As to the owner of the building, defendant St. Anns, has come forward with a prima facie showing that it did not exercise supervision or control of the manner of plaintiff's work. Furthermore, given the location of the incident, the bed of a truck not owned by St. Anns and which was parked on an adjacent street, there is a prima facie showing that the incident did not occur due to any defect located on the premises or due to the condition thereof. In response to same, plaintiff has failed to raise triable issues of fact.

Finally, the Court finds that in response to defendant Hoffman's showing of entitlement to judgment in its favor under section 200, plaintiff has come forward with a sufficient showing through deposition testimony that there are genuine questions of fact as to whether Hoffman supervised the manner and methods of plaintiff's work such that liability may be imposed upon Hoffman.

Based upon the foregoing, it is hereby

ORDERED, that the complaint is dismissed in all respects as against Poko-St Anns, L.P.; and, it is further

ORDERED, that, except as to the Labor Law §200 claim against Hoffman Fuel Company of Danbury, all claims are dismissed as against it; and, it is further

ORDERED, that, based upon the foregoing and the earlier determinations of the Court or otherwise, it is hereby

ORDERED, that the caption hereto is hereby amended to read as follows:

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF WESTCHESTER
----------X
RAYMOND WALKER,

DECISION & ORDER

Plaintiff,

Index 61494/15

-against -

HOFFMAN FUEL COMPANY OF DANBURY,

Defendant.
----------X

All parties still in the action are directed to appear on Tuesday, March 19, 2019 at 9:15 a.m. in the Settlement Conference Part, Courtroom 1600, Westchester County Supreme Court, 111 Dr. Martin Luther King, Jr. Boulevard, White Plains, New York, prepared to conduct a settlement conference.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
February 13, 2019

HON. LEWIS J. LUBELL, J.S.C.

Jonathan E. Gold, Esq.
Rosenbaum & Rosenbaum P.C.
Attorneys for Plaintiff
100 Wall Street, 15th Fl.
New York, NY 10005

Alice Spitz, Esq.
Molod Spitz & DeSantis, P.C.
Attorneys for Defendants
1430 Broadway, 21st Fl.
New York, NY 10018

* THIS ACTION WAS DISMISSED AGAINST GUS & G CONSTRUCTION, INC. ON NOVEMBER 13, 2017.