SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN **PART** IAS MOTION 33EFM

Justice

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DARNELL BROWN,

Plaintiff,

- v -

BROADWAY TRIO, LLC, SMITELL SPONSOR LLC, LEND LEASE (US) CONSTRUCTION LMB, INC.

Defendants.

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INDEX NO. 160294/2017

MOTION DATE 06/14/2019, 06/14/2019

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 61

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 57, 59, 60, 62, 63, 64

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Plaintiff seeks to recover damages for personal injuries he sustained on March 10, 2017, when he slipped and fell while working as a laborer at a construction site located at 217 West 57th Street, in the city, county and state of New York. In motion sequence 001, plaintiff, Darnell Brown, moves pursuant to CPLR 3212 for summary judgment on his claims pursuant to Labor Law §§ 240(1), 241(6), and 200, and for an immediate trial on damages. In motion sequence 002, defendants[1], Broadway Trio, LLC, Smitell Sponsor LLC, and Lend Lease (US) Construction LMB, Inc. move pursuant to CPLR 3212 for summary judgment dismissing the complaint. The parties oppose each other's motions. Both motions are addressed together as they address the same issues.

FACTS

This action arises from a construction project, referred to as the Hard Rock Project, (the project) at the 217 West 57 Street site. Plaintiff's accident occurred while plaintiff was working for non-party Pinnacle Industries II, LLC (Pinnacle), a subcontractor hired to provide concrete services. Plaintiff testified that he was directed by "the guy that's under Phil." (NYSCEF # 35 or 48 – pltf's tr at 22-23).

[1] Defendants are represented by the same counsel.

Phil was the foreman and told plaintiff to take directions from his assistant (*id.*) The assistant directed plaintiff to wrap a sling under a toolbox that was out on the deck. The toolbox was to be hoisted by a crane (*id.* at 32:17-33:3).

Plaintiff testified that, in order to wrap the toolbox, he had to "slide the cable under the box, [and] grab it from the other side" (*id.* at 32:25-33:9; 34:6-7). The box was located on the eighth-floor deck, which was an uncovered outdoor deck and was covered with snow at the time of plaintiff's accident (*id.* at 31:9-20).

Plaintiff indicated that there was a stack of I-beams to his left, and in order to "get in between the sling, the I-beams and the box," he had to step on a single I-beam (*id.* at 34:25-35:7). The single I-beam plaintiff stepped on was covered with snow and situated on the ground (*id.* at 35:12-14). Plaintiff testified that when he "[w]ent to reach for the cable, [he] slipped" on the snow that was on the I-beam and landed on his knee (*id.* at 35:6-7, 38:16-18, 36:9-11).

It had snowed earlier on the day of plaintiff's accident. In fact, as directed by Phil's assistant, plaintiff reported to work one hour earlier than usual for snow removal duties (*id.* at 24:24-28:16). The subcontractors were responsible for cleaning up snow as they needed, as Lend Lease's Senior Environmental Health and Safety Manager, Patrick McAlarney, testified. And if the subcontractors asked for help, defendants would provide them with salt, but no physical assistance (NYSCEF # 36 or 49 – McAlarney tr at 23:11-15). As to the eighth floor, Pinnacle was responsible to clear the snow (*id.* at 17:10-20). Pinnacle was responsible for the eighth floor and would turn over the floor to defendants only after "that floor was cured with the concrete" (*id.*). There were no complaints about snow covering the I-beams on the eighth floor. And Pinnacle had two concrete safety managers on the project (*id.* at 29:14-19).

DISCUSSION

Summary Judgment

"Summary judgment must be granted if the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "regardless of the sufficiency of the opposing papers" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008] [internal quotation omitted]). The court views the evidence in the light most favorable to the non-movant (*see Milone v Scottsdale Ins. Co.*, 138 AD3d 459, 459 [1st Dept 2016]).

Proper Labor Law Defendants (MS 002)

Liability under New York's Labor Law for accidents that occur on construction sites is limited to owners and general contractors or their statutory agents (Labor Law §§ 200, 240, 241). Defendants argue that neither Broadway Trio LLC nor Lend Lease (US) Construction LMB, Inc. (Lend Lease) is a proper defendant under Labor Law as these two defendants were not an owner or a general contractor, respectively.

Defendants' argument that Broadway Trio, LLC is not a proper party as it was not an owner of the premises at the time of plaintiff's accident is supported by evidence (NYSCEF # 27 – deed and real property transfer documents) and is uncontested by plaintiff. Thus, the complaint is dismissed as against Broadway Trio, LLC.

As to Lend Lease, defendants argue that Lend Lease was a construction manager and did not have the authority to control the work plaintiff was performing at the time of his accident. Defendants conclude that Lend Lease, as a construction manager, is not liable for plaintiff's injury.

"The label of construction manager versus general contractor is not necessarily determinative" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]). Even if Lend Lease were a construction manager, it would be liable under Labor Law where it "had the ability to control the activity which brought about the injury" (*id.* at 863-864 [2005]).

Defendants, in support of their contention that Lend Lease was not general contractor, submit the contract between Lend Lease and Extell Development Company (Extell) which indicates that Lend Lease was to act as a construction manager for pre-construction at the premises (MS 002 - NYSCEF # 28).

Plaintiff contends that Lend Lease's argument that it is a construction manager rather than a general contractor is of no moment as it had authority to control the work of all the sub-contractors (MS 002 - NYSCEF # 60, ¶ 13). Plaintiff submits Patrick McAlarney's testimony that Lend Lease was responsible for monitoring the job site to meet safety standards. Plaintiff also asserts that in McAlarney's deposition, McAlarney replied yes to the question of whether Lend Lease was the general contractor on the project (MS 002 - NYSCEF # 61 – Pltf's Reply, ¶ 3 citing to McAlarrney's tr at 6:13-18). However, plaintiff's cited reference in McAlarney's transcript speaks to McAlarney's job description of his function as a Senior Environmental Health and Safety Manager, not to the admission that Lend Lease was the general contractor as plaintiff asserts. Nevertheless, Joe Montano, Senior Vice President at Extell, testified that Lend Lease was the construction

manager with "site safety responsibilities" and that Lend Lease was the general contractor at the premises (NYSCEF # 24 or 50 – Montano tr at 17:5-18:19).

The evidence, viewed in the light most favorable to plaintiff, shows that defendants have come up short in presenting a prima facie case that Land Lease is not a proper Labor Law defendant (*see Castellon v Reinsberg*, 82 AD3d 635, 636 [1st Dept 2011]; *Paljevic v 998 Fifth Ave. Corp.*, 65 AD3d 896, 897 [1st Dept 2009]). Thus, the branch of defendants' summary judgment motion based on their improper party contention is denied.

Labor Law Claims

Defendants argue that plaintiff's Labor Law claims should be dismissed nonetheless because plaintiff failed to establish any violations of Labor Law § 240(1), § 200, and § 241(6).

Labor Law § 240(1)

On his Labor Law § 240(1) claim, plaintiff contends that he was performing a protected activity, that is, securing the object to be lifted by a crane, and was not provided any protective devices when he fell. Plaintiff further contends that the I-beam was the functional equivalent of a scaffold and that the surface of the I-beam was slippery due to the snow. Contrarily, defendants argue that the I-beam was not the functional equivalent of a scaffold since it was not being used as a scaffold and that the subject I-beam was not part of plaintiff's worksite.

The Court of Appeals has held that the duty of owners and their agents to provide safety devices enumerated in § 240(1) is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]) and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in a § 240 activity with "adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

"[T]he protections of Labor Law § 240(1) 'do not encompass any and all perils that may be connected in some tangential way with the effects of gravity' " (*Nicomenti v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015], quoting *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 501 [1993]). Rather, 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]).

Here, plaintiff's injuries were not the direct consequence of a failure to provide adequate protection against a risk arising from height differential; rather plaintiff's injury was due to plaintiff's slipping on the snow coating the I-beam (*see Nicomenti*, 25 NY3d at 99 [finding that Labor Law 240(1) was inapplicable where plaintiff, who was utilizing stilts at the time of the accident, slipped on a patch of ice, which was unrelated to any elevation risk]; *Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 916 [1999] [finding that "plaintiff's injury resulted from a separate hazard wholly unrelated to the danger that brought about the need for the ladder in the first instance--an unnoticed or concealed object on the floor"]; *Serrano v Consol. Edison Co. of New York Inc.*, 146 AD3d 405, 406 [1st Dept 2016], *lv dismissed* 29 NY3d 1118 [1st Dept 2017] [finding plaintiff's slip and fall from a scaffold caused by dust and paint chips was not gravity related]). Moreover, there is no evidence demonstrating that the I-beam plaintiff used was the functional equivalent of a scaffold. Specifically, there is no evidence that plaintiff used the I-beam as a platform or scaffold to perform elevated related work. Plaintiff's Labor Law § 240(1) claim is dismissed.

Labor Law § 241(6)

At the outset, plaintiff offers no opposition to the branch of defendant's motion to dismiss plaintiff's Labor Law § 241(6) claims predicated on violations of Industrial Code §§ 23-1.5, 23-1.8, 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-1.30, 23-2.4, 23-2.5, 23-2.6, 23-2.7, 23-5, 23-5.3, 23-6, 23-7, and OSHA standards. Thus, the claims premised on these violations are dismissed (*Kempisly v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] [finding dismissal of plaintiff's Labor Law § 241(6) claim appropriate when plaintiff fails to respond to allegations that a certain Industrial Code section is inapplicable]).

On his claim pursuant to Labor Law 241(6) premised on alleged violations of Industrial Code §§ 23-2.7(d), 23-5.1(f), and 23-5.1(j), plaintiff contends that defendants failed to remove the snow on the I-beam that he used as the functional equivalent of a scaffold when he slipped on the snow on the I-beam. Defendants argue that plaintiff has not shown that he was injured while working on an elevated surface.

Section 12 NYCRR 23-1.7 (d) provides that:

> Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, . . . to provide safe footing.

As indicated above, plaintiff fails to demonstrate that he was injured while using the functional equivalent of a scaffold. While plaintiff asserts that he was working on the eighth-floor deck that was covered in snow at the time of his injury, he presented no evidence that his injury took place while using any of the surfaces enumerated in Industrial Code § 23-1.7(d). Plaintiff's allegation that he used the I-beam that was laying on the ground as a functional equivalent of a scaffold does not improve his argument since he got on the I-beam merely to cross over to get to the sling and the toolbox that were on the ground.

Plaintiff's remaining claims alleging violations of the Industrial Code §§ 23-5.1(f) and 23-5.1(j)(1), which concern scaffold safety, are likewise dismissed.

Labor Law § 200

On his Labor Law § 200 claim, plaintiff argues that defendants exercised control over the worksite and that Smitell and Lend Lease had the authority to control plaintiff's work. In opposition, defendants argue that they did not supervise plaintiff's work.

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 (*Conies v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]).

In order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes*, 82 NY2d at 877; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). The authority to stop work for safety reasons and ensure compliance with safety regulation is insufficient to impose liability under Labor Law § 200 (*Hughes v Tishman Const. Corp.*, 40 AD3d 305, 309 [1st Dept 2007]).

Where an injury stems from a dangerous condition on the premises, an owner may be liable in common-law negligence and under Labor Law § 200 "when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice" (*Mendoza v Highpoint Assoc, IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

Plaintiff submits no evidence that defendants controlled the means of plaintiff's work. Indeed, despite plaintiff's argument that defendants had authority to control plaintiff's work, there is no evidence demonstrating that defendants supervised or controlled plaintiff's work that resulted in his injury. Defendants, on

the other hand, showed that they had no control over plaintiff's work, which was under Pinnacle's direction via its foreman and his assistant.

As to the dangerous condition caused by the snow, plaintiff's employer, Pinnacle, had control of the eighth floor and was responsible for snow removal of that floor, as McAlarney testified. And, as plaintiff testified, Pinnacle had its workers report to work an hour earlier for snow removal duties. As to the alleged dangerous condition of the snow on the I-beam, there was no evidence that defendants had notice of this condition since there had been no complaints about it (NYSCEF

As such, plaintiff's motion for summary judgment on his Labor Law § 200 claim is denied; and the branch of defendants' summary judgment motion to dismiss plaintiff's Labor Law § 200 cause of action is granted.

Accordingly, it is hereby

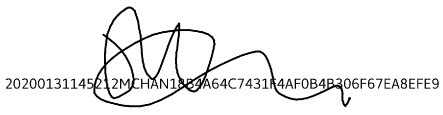
ORDERED that plaintiff's motion pursuant to CPLR 3212 for summary judgment on his complaint and for a trial on damages is denied; it is further

ORDERED that the branch of defendants' motion pursuant to CPLR 3212 for summary dismissal of Broadway Trio and Lend Lease on the basis that they are not proper labor law defendants is granted to the extent that the complaint is dismissed as against Broadway Trio, LLC only; it is further

ORDERED that the branch of defendants' motion pursuant to CPLR 3212 for summary dismissal on plaintiff's claims pursuant to Labor Law §§ 240(1), 241(6), 200 is granted, and the complaint is dismissed as to all defendants; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiff within fourteen (14) days of entry.

This constitutes the Decision and Order of the court.



1/31/2020
DATE

MARGARET A. CHAN, J.S.C.

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