SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

----------X

DIMING WU and HANA LIN,

Plaintiffs,

- v -

34 17TH STREET PROJECT LLC, NEW EMPIRE BUILDER CORP., 17TH STREET MANAGER LLC,

Defendants.

----------X

INDEX NO. 152861/2016

MOTION DATE

MOTION SEQ. NO. 001, 002

DECISION + ORDER ON MOTION

NEW EMPIRE BUILDER CORP.,

Third-party Plaintiff,

-against-

EXCELLENT BUILDING CONSTRUCTION, INC.,

Third-party Defendant.

----------X

Third-Party
Index No. 595445/2016

The following e-filed documents, listed by NYSCEF document number (Motion 001) 51-78, 104-109, 129, 130

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 79-103, 110-128, 131-133

were read on this motion for summary judgment.

By notice of motion, plaintiffs move pursuant to CPLR 3212 for an order granting them summary judgment on their Labor Law §§ 200, 240(1), and 241(6) claims. Defendants oppose. (Mot. seq. one).

By notice of motion, defendants move pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiffs oppose. (Mot. seq. two).

I. BACKGROUND

An incident report dated January 27, 2016, completed by defendant New Empire Builder Corp.'s senior project manager, reflects that at 8:15 am that day, plaintiff Wu, employed by nonparty Excellent Building Construction, Inc., was standing on a ladder to work on the ceiling of the fourth floor of the building located at 34 West 17th Street, when he lost his balance and fell over the barricaded opening of an incomplete garbage chute, causing him to fall continuously to the cellar, where he was impaled by rebars, sustaining injury. (NYSCEF 101).

By amended summons and complaint dated February 2, 2017, plaintiffs allege that defendant 34 17th Street Project LLC (Project LLC), as owner of the premises, defendant 17th Street Manager LLC (Manager LLC), as manager of the premises, and New Empire, as general contractor of the construction project, violated Labor Law §§ 200, 240(1), and 241(6). (NYSCEF 58).

At his deposition, Wu testified that he had been begun working on a renovation project at the premises two months before his accident. He was responsible for partitioning walls with sheetrock, and the only person who gave him instructions was his supervisor. While Wu had to provide his own electric drill, ladders, ranging from six to ten feet tall, were available on site. He denied having been provided with a safety harness.

Wu described the site. On each floor, the ceilings were nine feet and two inches tall. A garbage chute was being installed in the building by a nonparty, but Wu's employer was responsible for making rectangular openings on each floor for the chute. When Wu started working at the site, he saw a wooden barricade surrounding the openings, and on the fourth floor, the barricade was generally composed of two horizontal two-by-fours; on the day of his accident, there was only one.

That morning, Wu's supervisor directed him to work on the ceiling above the fourth-floor opening of the garbage chute. Wu set up a six-feet ladder, which he assembled and locked into place next to the opening. He tested the ladder to make sure it was safe to stand on and observed no defects. After climbing onto the ladder and standing on it for approximately ten minutes while he operated the electric drill, "maybe the ladder moved." On the errata sheet accompanying his deposition, Wu affirmatively states that the ladder moved and alleges that the word "maybe" was a mistranslation. (NYSCEF 70). Wu then lost his balance and fell through the chute and landed in the basement. He does not recall on which rung of the ladder he stood. He believes that the one piece of wood comprising the barricade was loose, because it fell down the chute with him.

Wu came to the United States in 2014 and has filed tax returns every year since. He denied having received payroll documentation from the company he had worked for, nor did he receive a W-2 form at the end of 2014. Each Monday, he received an unmarked envelope containing $130 in cash, which generally compensated him for five or six days of work from 8 am to 5 pm. Wu was also compensated for the infrequent occasions when he worked overtime. Up until his accident, Wu claimed to have been paid all of his wages, except for the few days before his accident. After his accident he received a check representing his full wages for the week of his accident, but he did not recall the amount. Wu began receiving his pay in the form of a check two weeks after his accident. In addition, in January 2018, his supervisor paid Wu $1,000 for Chinese New Year, and denied that the payment was intended to dissuade Wu from pursuing legal proceedings. Rather, the payment was made because the company was doing well. (NYSCEF 88).

At his deposition, New Empire's senior project manager at the site testified that he was responsible for overseeing the construction by ensuring it was code-complaint, timely, and

within budget; he daily monitored progress at the site. He never interacted with employees of Excellent apart from its foreperson, plaintiff's supervisor, and he never spoke with any of the workers about the means and methods of their work, as that was the subcontractor's responsibility. Safety harnesses were available on site, although he did not recall where, and it was Excellent's foreperson's responsibility to decide when they were necessary and to ensure that workers used them. Excellent was responsible for site safety, and had he ever seen a safety violation on site, he would have brought it to the attention of Excellent's foreperson.

At the time of Wu's accident, the project manager contended, the garbage chute had not yet been installed, but openings in the floors for the chute were cut and protected by safety netting and a barricade, installed by Excellent and composed of a top and middle wooden two-by-four guardrail. The top guardrail was three feet, six inches high. (NYSCEF 96).

At his deposition, a development associate for a nonparty who worked on behalf of Project LLC testified that Project LLC owns the premises and that Manager LLC is the property management company that was established for the work to be performed for the condominium once the building received its certificate of occupancy, and at the time of plaintiff's accident, the building was "[n]ot close" to receiving a temporary certificate of occupancy. Manager LLC was not involved in the building construction. The premises was undergoing a "gut renovation," and defendant New Empire was the general contractor. The nonparty associate alleged that he was at the site three to five days a week and was responsible for overseeing the general contractor, specifically with regard to scheduling and budgeting. He was Project LLC's only representative and he never directed a worker or foreperson on the site. He learned of Wu's accident that day when he entered the building and heard that someone had fallen. The site's architect told him that a worker had fallen through the chute; he went to the basement, and found plaintiff impaled

by three pieces of metal. (NYSCEF 67).

New Empire safety logs dated January 11, 2016, reflect that a fall protection plan was in place for the "Cellar – roof" part of the project, which required the use of harnesses, lanyards, tie-offs, and warning lines. (NYSCEF 98). A New Empire equipment safety inspection checklist dated January 26, 2016, reflects that the ladders on site were in "OK" condition. (NYSCEF 99).

A U.S. Department of Labor Occupational Safety and Health Administration (OSHA) report reflects that on January 27, 2016, the site was inspected, and Excellent was found to be in violation of 29 CFR § 1926.100(a), 29 CFR § 1926.403(i)(2)(i), 29 CFR § 1926.405(a)(2)(ii)(E), and 29 CFR § 1926.501(b)(15). The report also reflects that Excellent was in violation of 29 CFR § 1926.701(b), because of "[p]rotruding rebar in the cellar floor were left exposed and not capped." Included in the report is a picture taken by OSHA inspectors that day reflecting that the fourth-floor garbage chute opening was surrounded by a wooden barricade composed of three horizontal two-by-fours, and that an assembled A-frame ladder stood next to the opening. (NYSCEF 56).

By affidavit dated August 1, 2019, Excellent's owner and foreperson states that he supervised Wu and directed the means and methods of Excellent's work on the project. On January 27, 2016, he directed Wu to patch a hole in the ceiling on the fourth floor using a six-foot A-frame ladder owned by Excellent and about which he had received no prior complaints. As a garbage chute was being installed in the building, there was an opening on the fourth floor, surrounded by a 42-inch high barricade composed of two-by-fours, with rails at the top, middle, and bottom. He asserts that the barricade complies with OSHA and Industrial Code standards. The area which he directed Wu to patch was nine feet high and two feet from the garbage chute barricade. That morning, he saw that the barricade was in the "proper place and condition," and

maintains that Wu had no need to lean over or against the chute or barricade to complete the work.

According to Excellent's owner, after he heard a loud noise, he turned to look at Wu's work area and saw that the A-frame ladder remained in place, that the barricade around the garbage chute remained secured in the proper position, and Wu was gone, having fallen down the chute into the building's cellar. (NYSCEF 97).

By affidavit dated October 23, 2019, Wu claims, as pertinent here, that while he stood on the ladder, he leaned to press on the screw he was drilling into the ceiling, and due to the vibration from the drilling, lost his balance and fell. (NYSCEF 54).

II. DISCUSSION

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

A. Manager LLC

As it is undisputed that Manager LLC neither owned nor managed the construction site, and was not an agent of the owner or contractor and maintained no control over any of the work,

including Wu's, Manager LLC may not be held liable under Labor Law §§ 200, 240(1), or 241(6). (*See Oseguera v Lincoln Properties LLC*, 147 AD3d 704, 704 [1st Dept 2017] [defendant not liable where it was neither owner nor general contractor nor agent thereof and did not supervise or control work]).

B. Labor Law § 200

1. Contentions

Plaintiffs contend that Project LLC and New Empire violated Labor Law § 200 in relation to Wu's accident given their control over the means and methods of his work, relying on the testimony of New Empire's senior project manager that he would have ordered a worker's employer to stop such work had he seen an unsafe condition. (NYSCEF 53).

In support of their motion and in opposition to plaintiffs' motion, defendants deny that there was a dangerous condition on the premises and contend that general supervisory authority is insufficient for liability to attach. They rely on the statement of Excellent's owner that he directed the means and methods of Wu's work, and contend that they lacked notice of any problems with the barricade around the garbage chute. Moreover, they argue, Wu admitted that the ladder was in good condition. (NYSCEF 102, 104).

The parties reiterate their earlier contentions. (NYSCEF 110, 129, 132).

2. Analysis

Where, as here, plaintiffs allege that defendants violated Labor Law § 200 because they had control over the means and methods of Wu's work, defendants may be held liable only if they actually exercised supervisory control over the injury-producing work. (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]). As Wu, Excellent's owner, and New Empire's senior project manager all testified that Excellent solely controlled the means and

methods of Wu's work, defendants cannot be held liable. (*See Bonventre v Soho Mews Condo.*, 173 AD3d 411, 412 [1st Dept 2019] [defendants not liable where they lacked control of positioning and use of ladder]).

That New Empire had the authority to inspect work and stop unsafe practices does not constitute supervision and control sufficient to establish liability under this statute. (*Haynes v Boricua Vil. Hous. Dev. Fund Co., Inc.*, 170 AD3d 509, 511 [1st Dept 2019] [general responsibility for site safety does not rise to level of supervisory control]; *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446 [1st Dept 2013] [regular inspection of work to ensure it was proceeding according to schedule and authority to stop unsafe work insufficient]). Consequently, plaintiffs fail to raise an issue of fact.

C. Labor Law § 240(1)

1. Contentions

Plaintiffs contend that Project LLC and New Empire are liable under Labor Law § 240(1), as Wu was not provided with an adequate safety device. Even if the ladder had not moved, that Wu fell and lost his balance due to the vibration of drilling is evidence, they maintain, that the ladder was inadequate protection. Moreover, they claim, as Wu was working above a four-story garbage chute, he should have been provided with more than a ladder, and even if the garbage chute opening was surrounded by a barricade, it was insufficient to protect Wu from falling into the chute, and that failure is a violation of Labor Law § 240(1). (NYSCEF 53).

In support of its their motion for summary judgment and in opposition to plaintiffs' motion for summary judgment, defendants deny liability, contending that there is no safety device that could have prevented the accident. They observe that although the hole Wu was

patching was two feet from the garbage chute opening, Wu unilaterally set up the ladder right next to the opening. In support, they submit a photograph showing it. (NYSCEF 100). And, as it is undisputed that the ladder was in good condition and that the barricade was complaint with OSHA and Industrial Code standards, Wu fell because he lost his balance, and was thus, the sole proximate cause of his accident. Moreover, they maintain, having untimely submitted his errata sheet, the change it reflects is inadmissible and, in any event, Wu otherwise admitted that the cause of his accident was his loss of balance. (NYSCEF 102, 104).

In opposition to defendants' motion and in further support of their motion, plaintiffs deny that Wu's loss of balance was the sole cause of his accident, arguing that absent prejudice resulting from the untimely errata sheet, as given defendants' opportunity to question Wu on his use of the word "maybe," it should be considered. Moreover, they assert, Wu's testimony was incorrectly translated, which constitutes a valid reason for correcting the record.

Plaintiffs reiterate that even if the ladder did not move, defendants may still be held liable, especially as the barricade was insufficient to prevent Wu's fall and he was not provided with a proper safety device. They otherwise deny that Wu was the sole proximate cause of his fall, arguing that Wu's supervisor should have adjusted Wu's ladder placement if he thought it too close to the chute. Even if Wu had negligently placed the ladder, plaintiffs maintain, defendants have also violated industrial codes and OSHA regulations which were the proximate cause of Wu's accident, observing that comparative negligence is not a defense to summary judgment. (NYSCEF 110, 129).

In further support of their motion, defendants reiterate their earlier contentions. (NYSCEF 132).

2. Analysis

Pursuant to Labor Law § 240(1):

> All contractors and owners and their agents, . . . in the erection, demolition, repair, 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, hangars, 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, 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]; *Naughton v City of New York*, 94 AD3d 1, 8 [1st Dept 2012]). The statute protects workers against "'special hazards' that arise when the work site is either elevated or positioned below the level where 'materials or load [are] hoisted or secured.'" The special hazards are "limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured." (*Ross*, 81 NY2d at 502). The statute thus imposes a "'flat and unvarying' duty upon the owner and contractor despite any contributing culpability on the part of the worker" (*Bland v Manocherian*, 66 NY2d 452, 461 [1985]; *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 49 [1st Dept 2005]), even if they exercise no supervision or control over the work performed (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 287 [2003]), and it is liberally construed (*Koenig v Patrick Constr. Corp.*, 298 NY 313, 319 [1948]; *Quigley v Thatcher*, 207 NY 66, 68 [1912]).

Liability under Labor Law § 240(1) requires a showing that either safety equipment was provided but was defective or that no equipment was provided and should have been. (*See Ortiz*

v Varsity Holdings, LLC, 18 NY3d 335 [2011] [to prevail on summary judgment, plaintiff must establish existence of safety device of kind enumerated in statute that could have prevented fall]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001] [liability contingent on existence of hazard contemplated in section 240(1) and failure to use, or inadequacy of, safety device of kind enumerated therein]).

As plaintiffs' evidence reflects that Wu, while standing on the ladder with no harness or other fall prevention device, was drilling on the ceiling when he lost his balance and fell, plaintiffs demonstrate, *prima facie*, entitlement to summary judgment. (*See Nieto v CLDN NY LLC*, 170 AD3d 431, 432 [1st Dept 2019] [awarding summary judgment to plaintiff who lost balance and fell from ladder, regardless of whether ladder shook before fall]; *Caceres v Standard Realty Assocs., Inc.*, 131 AD3d 433, 434 [1st Dept 2015], *lv dismissed* 26 NY3d 1021 [2015] [awarding summary judgment where worker fell of ladder while operating drill, and no equipment was provided to guard against fall and no coworker was stabilizing ladder at time of fall]).

Whether the ladder was defective is immaterial. (*Pierrakeas v 137 E. 38th St. LLC*, 177 AD3d 574, 574–75 [1st Dept 2019] [plaintiff need not show ladder was defective]). That safety harnesses may have been available on site is also immaterial given the testimony of the senior project manager that he did know where they were and Wu's testimony that he was never provided with one. (*See Clavijo v Atlas Terminals, LLC*, 104 AD3d 475, 476 [1st Dept 2013] [defendant failed to raise issue of fact where plaintiff's employer testified "that safety harnesses were available at the site but that he did not know where they were kept or whether plaintiff knew of their existence"]). That the opening of the garbage chute may have been secured is also of no moment, as Wu's fall was due to the failure to provide him with a proper fall prevention

device while on the ladder. That the location of the patch on the ceiling was two feet from the garbage chute opening likewise raises no issue of fact as to whether Wu was the sole proximate cause of his injuries, because the ladder's location had nothing to do with his fall. Whether his injury was exacerbated by his alleged negligent placement of the ladder is an issue of comparative negligence, which pertains to damages only and does not preclude awarding summary judgment to a defendant. (*Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 403 [1st Dept 2017], *lv dismissed* 29 NY3d 1100 [2017] [comparative negligence no defense to Labor Law § 240(1) claim]).

As plaintiffs are entitled to summary judgment regardless of whether Wu's ladder moved, the validity of the errata sheet need not be addressed.

D. 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. 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 this duty, a plaintiff need not establish that the owner or contractor or their agent 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]). In addition to demonstrating that the defendant violated a regulation setting forth a specific standard of conduct, the plaintiff must

show that the alleged injuries were proximately caused by that violation. (*Ulrich v Motor Parkway Properties, LLC*, 84 AD3d 1221, 1223 [2d Dept 2011]; *Egan v Monadnock Const., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

As plaintiffs do not address 12 NYCRR §§ 23-1.5, 23-1.8, 23-1.11, 23-1.15, 23-1.17, 23-1.19, 23-1.21, 23-1.22, 23-2.5, and 23-3.3, they are deemed abandoned. (*See Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] [deeming abandoned industrial code provisions that plaintiff did not address in opposition to summary judgment motion]).

1. 12 NYCRR § 23-1.16
safety belts, harnesses, tail lines and lifelines

Plaintiffs maintain that Project LLC and New Empire are liable for not providing Wu with a safety harness and tie lines, nets, or other fall protection devices. (NYSCEF 53). Defendants contend that this provision is inapplicable because Wu did not use any of these safety devices. (NYSCEF 102, 104). In reply, plaintiffs argue that a violation of this regulation arises from the failure to provide Wu with such fall protection devices. (NYSCEF 110, 129). In reply, defendants reiterate their earlier contentions. (NYSCEF 132).

This provision is inapplicable absent an allegation that Wu was provided with any of these safety devices. (*See Dzieran v 1800 Bos. Rd., LLC*, 25 AD3d 336, 337 [1st Dept 2006] [section does not apply where plaintiff not provided with such safety devices]).

2. 12 NYCRR § 23-1.7(b)(1)
hazardous openings

Plaintiffs argue that Project LLC and New Empire are liable for failing to cover the garbage chute adequately. (NYSCEF 53). Defendants, relying on the testimony of New Empire's senior project manager testimony and the affidavit of Excellent's owner, deny having violated this provision, as the barricade around the chute was a safety railing, compliant with 12 NYCRR

§ 23-1.15. Moreover, while additional protections are required when a worker performs a task near an opening, Wu was not required to work next to the opening. Rather, he should have assembled the ladder two feet from the chute. (NYSCEF 102, 104).

In reply, plaintiffs contend that Project LLC and New Empire failed to provide planking, a life net, or an approved safety belt for Wu while he performed his tasks near the opening, in contravention of section 23-1.7(b)(1)(iii). (NYSCEF 110, 129). In reply, defendants reiterate their earlier contentions. (NYSCEF 132).

Section 23-1.7(b)(1)(i) requires that every hazardous opening be guarded by a safety railing built in compliance with section 23-1.15, which requires, in pertinent part, three horizontal four-inch securely supported wooden rails. While Wu testified that the barricade around the garbage chute was composed of one unsecured rail, the OSHA photograph reflects that there were three wooden horizontal rails, and thus, there is no issue of fact as to whether the barricade was adequately constructed. (*See Bank of N.Y. v 125-127 Allen St. Assocs.*, 59 AD3d 220, 220 [1st Dept 2009] [allegations controverted by documentary evidence insufficient to raise triable issue]).

Nevertheless, section 23-1.7(b)(1)(iii) provides that employees "required to work close to the edge" of an opening must be protected with, *inter alia*, a safety belt. While it is undisputed that Wu was not provided with a safety belt, an issue of fact remains as to whether he was required to work close to the edge of the opening, as he testified that he had placed the ladder right next to the barricade, while his foreperson states that the patch was two feet from the hole. Moreover, neither party addresses whether working two feet away from the opening constitutes "close to the edge," and thus, neither party is entitled to summary judgment.

3. 29 CFR § 1926.701(b)
reinforcing steel

Plaintiffs argue that Project LLC and New Empire are liable for failing to put caps over the protruding and exposed rebars, as found in the OSHA report. (NYSCEF 53). Defendants assert that OSHA violations cannot be used to establish a violation of Labor Law § 241(6). (NYSCEF 104). In reply, plaintiffs disagree and contend that they may premise their claim on a violation of "New York Industrial Code Section 1926.701(b)." (NYSCEF 110). In reply, defendants reiterate their earlier contentions. (NYSCEF 132).

This OSHA safety regulation is not part of the New York Industrial Code, and thus, a violation of it is no basis for liability under the Code. (*Schiulaz v Arnell Const. Corp.*, 261 AD2d 247, 248 [1st Dept 1999]).

E. Lost wages

Defendants contend that plaintiffs offer insufficient evidence of Wu's lost wages, such as tax records or a W-2, and that given plaintiffs' failure to produce such documentation in response to discovery demands, the claim should be dismissed. (NYSCEF 102). In opposition, plaintiffs argue that lost wages may be proved through the trial testimony of Excellent's owner and Wu, or based on his worker's compensation benefits, and that his medical records may be used to establish his ability to work in the future. (NYSCEF 110). In reply, defendants argue that plaintiffs may not rely on the findings of the worker's compensation board to prove lost wages. (NYSCEF 132).

Although the burden of proving lost wages at trial rests with plaintiffs (*Poturniak v Rupcic*, 232 AD2d 541, 542 [2d Dept 1996]), the burden of affirmatively proving a lack of lost wages on this motion for summary judgment lies with defendant (*see Hairston v Liberty Behavioral Mgmt. Corp.*, 157 AD3d 404, 405 [1st Dept 2018], *lv dismissed* 31 NY3d 1036

[2018] [movants bear burden of "presenting affirmative evidence" of entitlement to summary judgment, and "[m]erely pointing to gaps in an opponent's evidence is insufficient"]). While Wu's testimony alone at trial is insufficient to meet plaintiffs' burden of proving lost earnings (*Martinez v Royal Pak Sys.*, 300 AD2d 198 [1st Dept 2002]), it is not evidence that he earned nothing, especially as he testified to the amount in wages he received weekly from his employer. Having failed to provide affirmative evidence of a lack of lost earnings, defendants fail to meet their *prima facie* burden. (*Cf Deans v Jamaica Hosp. Med. Ctr.*, 64 AD3d 742, 744 [2d Dept 2009] [defendant met *prima facie* burden to summarily dismiss lost earnings claim by submitting tax returns reflecting no income for the relevant time period]). That plaintiffs offer no evidence of lost earnings in their opposition is of no moment. (*Medina*, 181 AD3d 448, 449 [1st Dept 2020]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for partial summary judgment on liability is granted on their claim under Labor Law § 240(1), and is otherwise denied (motion sequence one); and it is further

ORDERED, that defendants' motion is granted to the following extent: (1) severing and dismissing plaintiffs' causes of action against defendant 17th Street Manager LLC, (2) severing and dismissing plaintiffs' Labor Law § 200 claim, and (3) severing and dismissing plaintiffs' Labor Law § 241(6) claim, but only as to 12 NYCRR §§ 23-1.5, 23-1.8, 23-1.11, 23-1.15, 23-1.16, 23-1.17, 23-1.19, 23-1.21, 23-1.22, 23-2.5, and 23-3.3, and 29 CFR § 1926.701(b), and is otherwise denied (motion sequence two); and it is further

ORDERED, the Clerk is directed to enter judgment accordingly.

20200616142424BJAFFEC7D2C73FA4BD4AFF82455B8E2C82E3B1

6/16/2020
DATE

BARBARA JAFFE, 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