SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

----------X

JAMES PLUTA,

Plaintiff,

- v -

L & L HOLDING COMPANY, LLC,425 PARK OWNER, LLC,TISHMAN CONSTRUCTION CORPORATION

Defendant.

----------X

INDEX NO. 156428/2018

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 47, 49, 53, 57, 58, 60, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 82, 83, 84

were read on this motion to/for JUDGMENT - SUMMARY.

The motion by plaintiff for summary judgment on his Labor Law §§ 240(1) and 241(6) claims is granted in part and denied in part. The cross-motion by defendants for summary judgment dismissing plaintiff's claims is granted in part and denied in part.

Background

In this Labor Law case, plaintiff contends that he was working as Union Steamfitter and assigned to set up hangers when he fell through an unsecured opening from the second floor down to the first floor. Plaintiff testified that on the day of the accident, he was supposed to "prepare to remove the temporary standpipe line and to set them up to install the pipes that are going to s[t]ay there" (NYSCEF Doc. No. 38 at 26). He was removing duct work when he took a step on a piece of plywood and said suddenly "there was nothing there. . . The next thing I know, I was on the first floor" (*id*. at 36). Plaintiff said he did not know who put the plywood there and thought it was merely garbage (*id*. at 48-49).

He added that "generally on this job site they would paint the border orange, neon orange. And they would paint "hole" on the center of the wood, and they would also drill holes in it and either screw it or nail it to the concrete so it would never move" (*id*. at 49). None of that occurred with respect to the piece of plywood at issue here. Plaintiff moves for summary judgment on his Labor Law § 240(1) claim and his 241(6) claim.

In opposition and in support of their cross-motion, defendants contend that the Labor Law § 200 claim should be dismissed because none of the defendants supervised or controlled the means and methods of plaintiff's work. They insist that the defendants did not create or have notice of the allegedly dangerous condition that caused plaintiff's injuries.

Defendants also argue that the 240(1) claim must be dismissed because the accident could not have occurred in the way in which plaintiff says it occurred. They hired an expert who claims that there is no way that the wooden boards upon which plaintiff was working could have moved in the opposite direction. Defendants contend that there is an issue of fact relating to the conclusions of its biomechanical engineer.

Defendants maintain that defendant Tishman cannot be held liable because it was merely a "construction manager" and not a statutory agent for the owner. They also contend that defendant L&L must dismissed because it was merely the developer for the project and neither the owner nor the general contractor.

In reply and in opposition to the cross-motion, plaintiff emphasizes that the plywood that was covering the hole was not marked or nailed down to prevent plaintiff from falling from the second floor to the first floor. He argues that Tishman's self-designation of construction manager is not a basis to deny the motion; the evidence shows that Tishman acted as the general

contractor. However, plaintiff did not oppose the portion of the cross-motion with respect to L&L.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make 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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Tishman

Although Tishman claims it was merely the construction manager and is not a proper Labor Law defendant, "[t]he label of construction manager versus general contractor is not

necessarily determinative"(*Walls v Turner Const. Co.*, 4 NY3d 861, 864, 798 NYS2d 351 [2005]). Here, the contract Tishman had with plaintiff's employer leads to only one conclusion (NYSCEF Doc. No. 82): it is a proper Labor Law defendant. The label Tishman gives itself is of no moment.

Labor Law § 240(1)

"Labor Law § 240(1), often called the 'scaffold law,' provides that all contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . 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 employed on the premises" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500, 601 NYS2d 49 [1993] [internal citations omitted]). "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" (*id.* at 501).

"[L]iability [under Labor Law § 240(1)] is contingent on a statutory violation and proximate cause . . . violation of the statute alone is not enough" (*Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 287, 771 NYS2d 484 [2003]).

Here, the Court grants the motion with respect to this claim and denies the cross-motion. There is no dispute that plaintiff fell from the second floor down to the first floor through a hole in the floor. That plaintiff, a steamfitter, was unable to precisely describe the biomechanical theory of how he fell is beside the point.

He testified that he fell through the hole and attached the affidavit of Donald Dutton, a structural steel ironworker foreman, who claims that while walking to use the bathroom

"suddenly a worker literally came falling from above, just feet in front of me, landing on a dumpster and then falling over onto the ground" (NYSCEF Doc. No.39 at 1). Mr. Dutton also observed that "Immediately above the area that he fell was an opening in the slab on the 2nd floor that I could see was partially covered with plywood, but not completely" (*id*.). He also attached photos that depict the loose plywood and the hole that plaintiff fell through. Defendant presented nothing in opposition to raise an issue of fact that plaintiff fell from a height, thereby implicating Labor Law § 240(1). The First Department has observed that "We have repeatedly held that § 240(1) is violated when workers fall through unprotected floor openings" (*Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 450, 961 NYS2d 91 [1st Dept 2013] [granting summary judgment where plaintiff fell through opening the was originally covered by plywood]).

Labor Law § 241(6)

"The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable. In order to support a claim under section 241(6) . . . the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna*, 12 NY3d 511, 515, 882 NYS2d 375 [2009]). "The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury" *(Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 271, 841 NYS2d 249 [1st Dept 2007]).

Plaintiff seeks summary judgment on Industrial Code 23-1.7(b)(1). In support of their cross-motion, defendants seek summary judgment dismissing this claim to the extent that it relied on Industrial Code Sections 23-1.5, 23-1.7, 23-1.8, 23-1.11, 23-11.5, 23-11.6, 23-2, 23-2.4, 23-2.5, 23-4, 23-5. In reply, plaintiff only mentions, 23-1.7(b), 23-1.5(c), 23-1.11(a) and 23-

2.4 so the Court will explore those sections; the claims with respect to the remaining Industrial Code sections are dismissed.

With respect to 23-1.7(b)(1)(i), the Court grant's plaintiff's motion and denies defendants' cross-motion. This Industrial Code section deals with falling hazards and, specifically, hazardous openings. "Section 23–1.7(b)(1)(i), which requires that '[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing,' was violated, because the hole into which plaintiff fell was dangerous and unguarded" (*Alonzo* ,104 AD3d at 450) Clearly, the opening here was not guarded properly; the piece of plywood was not nailed down, marked with identifying features that might warn about the hole and the area was not cordoned off.

The Court dismisses this claim to the extent it is based on 23-1.5(c). This provision deals with the condition of equipment and safeguards. There is no testimony that there was anything wrong with the plywood; rather plaintiff's theory is that the plywood was not nailed down.

The Court also dismisses the claim relying on 23-1.11(a), a provision about lumber and nail fastening. Similar to the previous section, there is no evidence in this motion that there was a defect with the plywood or the nails. In fact, plaintiff's complaint is that the plywood was not nailed down and did not properly cover the hole in the floor.

Section 23-2.4(b) contains requirements for floors in a building involving skeleton steel construction. As defendant points out, there was no skeleton steel construction involved in this case. Therefore, this portion of the 241(6) claim is dismissed.

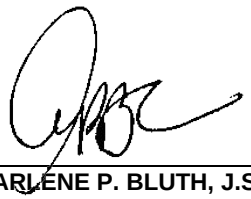
Labor Law § 200

Plaintiff did not oppose the portion of the cross-motion that sought dismissal of this claim. Accordingly, it is dismissed.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is granted on his Labor Law § 240(1) claim and his Labor Law § 241(6) cause of action based on Section 23-1.7(b) and denied to the remaining relief requested; and it is further

ORDERED that the cross-motion by defendants for summary judgment is granted only to the extent that plaintiff's claims based on Industrial Code Sections 23-1.5, 23-1.8, 23-1.11, 23-11.5, 23-11.6, 23-2, 23-2.4, 23-2.5, 23-4, 23-5 and on Labor Law § 200 are severed and dismissed, all claims against defendant L&L Holding Company, LLC are severed and dismissed and denied as to the remaining relief requested.



12/11/2020
DATE

ARLENE P. BLUTH, 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