SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL R. EDMEAD** **PART** **IAS MOTION 35EFM**

Justice

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WALDEMAR MATEUSIAK,

Plaintiff,

- v -

RIVERSIDE CENTER SITE 5 OWNER LLC, TISHMAN CONSTRUCTION CORPORATION,

Defendants.

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INDEX NO. 160862/2016

MOTION DATE 08/21/2020, 08/21/2020

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 66, 70, 100, 103, 104 were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 81, 82, 97, 106 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

ORDERED that Plaintiff Waldemar Mateusiak's motion (Motion Seq. 003), pursuant to CPLR 3212, for summary judgment on his Labor Law § 240(1) claim is granted; and it is further

ORDERED that the motion of Defendants Riverside Center Site 5 Owner LLC and Tishman Construction Corporation (Motion Seq. 004), pursuant to CPLR 3212, for summary judgment dismissing the complaint, is granted to the extent that Plaintiff's Labor Law §241(6) and Labor Law §200 and common law negligence claims are dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Defendants shall serve a copy of this Order with Notice of Entry within 20 days of entry on all parties.

MEMORANDUM DECISION

In this Labor Law action, the following motions are consolidated for disposition.

In Motion Seq. 003, Plaintiff Waldemar Mateusiak moves, pursuant to CPLR 3212, for summary judgment on his Labor Law § 240(1) claim against Defendants Riverside Center Site 5 Owner LLC ("Riverside") and Tishman Construction Corporation ("Tishman").

In Motion Seq. 004, Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

BACKGROUND FACTS

On November 8, 2016, Plaintiff, a construction worker employed by non-party Metro Tech Corporation ("Metro Tech"), was working at 1 West End Avenue in Manhattan ("the subject premises"), a new luxury condominium building owned by Riverside. Riverside hired Tishman as the general contractor for the building's construction, and Tishman in turn contracted with non-party Whitestone Construction Company to perform construction work at the site. Whitestone then hired Metro Tech to perform work.

Plaintiff was caulking a newly installed window at the subject jobsite and standing on an A-Frame ladder to perform the work. The ladder shifted under his feet and he fell to the floor along with the ladder, sustaining various injuries.

Plaintiff's Deposition Testimony

Plaintiff began working for his employer, Metro Tech, in October 2016 (NYSCEF doc No. 97, ¶ 7). On November 8, 2016, he was instructed to work at the subject premises pursuant to Metro Tech's agreement with Whitestone. He was told by his supervisors, Mr. Maczuga and Mr. Zbyszek, that his assignment that day was to caulk newly installed windows on the fifth floor of the subject premises (*id.* at ¶12).

Plaintiff was provided with an A-frame ladder to perform the caulking work, and alerted another supervisor, Wladek, that the ladder was "too big" for the work he was performing (*id.* at ¶ 16). Plaintiff asked for a smaller step stool and was told that one was not available. Plaintiff was told that a stool would be purchased for him, but in the meantime, he should use the A-frame ladder to complete his task (*id.* at ¶ 18).

Plaintiff testified that due to the size of the ladder and the location of the windows, he was forced to stand with his back facing the steps of the ladder and lean slightly forward while caulking the windows (*id.* at ¶ 19). Plaintiff needed to keep both hands on the caulking gun and positioned the ladder in such a way that would place him in the best position to apply the caulk (*id.* at ¶ 20). As he was leaning towards the window, Plaintiff felt the ladder shift under his feet and he fell along with the ladder on to the floor (*id.* at ¶ 21). At the time the ladder shifted, Plaintiff had both of his feet on the same step. Plaintiff hit his head on the cement and temporarily lost consciousness, then came to and called for his supervisor Mr. Maczuga to assist him (*id.* at ¶ 23). Mr. Maczuga helped Plaintiff to the on-site medic and then took him to an urgent care facility near the subject premises (NYSCEF doc No. 82, ¶ 42).

Defendants' Expert Affidavit

Shortly after the date of the accident, Defendants retained Roger J. Topping PE, MSME, HHS, a Licensed Professional Engineer, to conduct an examination of the ladder used by Plaintiff at the time of the accident. Following his examination, Mr. Topping submitted an affidavit wherein he stated:

> "[The Ladder was] steady and stable; had spreaders which locked securely in place; had plastic feet treads that were intact; the ladder did not exhibit any tendency towards slippages when it was climbed; the ladder had grooved aluminum steps that were evenly spaced, level, and in good condition; the ladder had back braces which were still firmly attached to the rear side rails and functional…the top cap was sound and firmly attached to the side rails; and all of the riveted connections were solid and intact."

(NYSCEF doc No. 91).

Mr. Topping concluded based on his examination and a review of Plaintiff's testimony that Plaintiff failed to position and use the ladder properly, and that by over-reaching and not keeping his body centered, he caused a reaction force on the ladder which resulted in the ladder falling over (*id*.)

Plaintiff's Expert Affidavit

Plaintiff has submitted an expert affidavit from Herman Silverberg, PE[1], who has warranted that the A-frame ladder was not a proper safety device for the work Plaintiff was performing (NYSCEF doc No. 104). Mr. Silverberg noted that since caulking work requires the use of both hands, Plaintiff was unable to hold the ladder with one of his hands to keep the ladder steady (*id.*). Mr. Silverberg concluded that "[s]uch tasks involving work at heights should instead be completed with a platform-ladder (Baker Scaffold) which is a safer alternative to a step ladder" (*id.*).

Mr. Silverberg also examined photographs of the subject ladder and identified four permanent structural defects that included "three permanently deformed horizontal braces and permanently deformed right side spreader" (*id.*). Mr. Silverberg concluded that the defects were a proximate cause of Plaintiff's accident but did not offer any further explanation or analysis (*id.*).

PROCEDURAL HISTORY

Plaintiff originally commenced his personal injury action against Defendants in December 2016 (NYSCEF doc No. 67). Plaintiff served his Verified Bill of Particulars in March

[1] The subject ladder was examined on Plaintiff's behalf by Mr. Silverberg's colleague, Joseph C. Cannizzo, PE, who passed away shortly before Plaintiff filed his motion for summary judgment. Mr. Silverberg has thus submitted the affidavit in his stead (NYSCEF doc No. 103 at 1, n. 1).

2017, followed by three supplemental Bills in January 2019, November 2019, and February 2020 (NYSCEF doc No. 69).

Following depositions, Plaintiff filed his Note of Issue on February 28, 2020 (NYSCEF doc No. 78). The motions consolidated for disposition in this decision were filed in May 2020 but are timely pursuant to Executive Order No. 202.28, which extended the time limit for the commencement of legal actions due to the earlier suspension caused by the COVID-19 pandemic (NYSCEF doc No 82, ¶ 14).

Plaintiff moves for summary judgment on his Labor Law § 240(1) claim, arguing that he has established a *prima facie* case as there is no dispute that he fell from a height from an unsecured ladder while performing construction work. Defendants oppose and also move for summary judgment in their favor on the 240(1) claim, arguing that that Plaintiff failed to demonstrate the ladder was defective and that Plaintiff was the proximate cause of his own injuries as he used the ladder improperly and caused it to fall beneath him. Defendants also move for summary judgment dismissing Plaintiff's Labor Law § 241(6) and § 200 and common law negligence claims, arguing, respectively, that Plaintiff has failed to properly allege an applicable Industrial Code violation, and that Defendants did not supervise or control the means and methods of Plaintiff's work.

DISCUSSION

Summary judgment is granted when "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]). Once the proponent has made a prima facie showing, 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], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also, 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]).

The function of a court in reviewing a motion for summary judgment "is issue finding, not issue determination, and if any genuine issue of material fact is found to exist, summary judgment must be denied" (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, [1st Dept 2012]). Where "credibility determinations are required, summary judgment must be denied" (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, [1st Dept 2012]). Thus, on a motion for summary judgment, the court is not to determine which party presents the more credible argument, but whether there exists a factual issue, or if arguably there is a genuine issue of fact (*DeSario v SL Green Management LLC*, 105 AD3d 421 [1st Dept 2013] (holding given the conflicting deposition testimony as to what was said and to whom, issues of credibility should be resolved at trial)).

Here, as each side seeks summary judgment regarding Plaintiff's Labor Law § 240(1) claim, each side bears the burden of making a prima facie showing of entitlement to a judgment on this claim as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Bellinson Law, LLC v Iannucci,* 951 N.Y.S.2d 84, 2012 NY Slip Op 50729[U] [Sup. Ct., N.Y. County 2012], aff d, 102 AD3d 563 [1st Dept 2013], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once met, this burden shifts to the

opposing party who must then demonstrate the existence of a triable issue of fact (*Alvarez, supra, Zuckerman v City of New York*, 49 N.Y.2d 557 [1980] and *Santiago v Filstein*, 35 AD3d 184 [1st Dept 2006]).

Labor Law § 240 (1)

Labor Law § 240(1) 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."

The Court of Appeals has held that this duty to provide safety devices 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 section 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]). Where a violation has proximately caused a plaintiff's injuries, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment" (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011]).

Plaintiff argues that he has established a *prima facie* case of entitlement to summary judgment in his favor under 240(1) as it is undisputed that he fell from an unsecured ladder that slipped from under him, and no safety devices were provided to prevent or protect the fall.

Defendants, both in their opposition to Plaintiff and in their own motion for summary judgment, argue that no violation of 240(1) occurred and Plaintiff has failed to establish that the subject ladder was defective or otherwise inadequate. Defendants further contend that Plaintiff's failure to use the ladder properly was the sole proximate cause of his accident.

It is well settled that the "failure to secure a ladder to insure that it remains stable and erect while the plaintiff was working on it constitutes a violation of Labor Law 240(1) as a matter of law" (*Montalvo v J. Petrocelli Const., Inc.,* 8 AD3d 173 [1st Dept 2004]*; Devlin v Sony Corp. of Am.*, 237 AD2d 201 [1st Dept 1997], *citing McNair v Salamon*, 199 AD2d 170, 171 [1st Dept 1993]).

In *McNair*, plaintiff, an electrician's helper, was injured when he fell from a ten-foot A-frame ladder while attempting to push a wire snake through a conduit pipe. The only witness to the accident was the plaintiff himself. He testified that he fell when the ladder, which was not secured in any way and did not have any rubber shoes or pads on the bottom, simply slipped out from under him. The court found that, as the ladder was not secured in any way and did not have any nonskid devices on its feet, plaintiff was not provided with proper protection in direct violation of 240(1) (*McNair* at 170).

Here, the Court finds that Plaintiff has established *prima facie* entitlement to summary judgment in his favor under 240(1). It is undisputed that Plaintiff was performing construction work while standing on top of a ladder, and thus was exposed to an elevation risk while engaged in a covered activity under 240(1). It is also undisputed that the A-frame ladder he was provided slipped while he was standing on it, causing him to fall from a height, and the ladder was not equipped either with slip-resistant feet or otherwise secured to ensure its stability. The evidentiary record also reflects that Plaintiff raised concerns about the size of the ladder to his

coworkers, who agreed to find Plaintiff a replacement device but insisted that he use the ladder in the meantime (NYSCEF doc No. ¶ 18). Thus, since the ladder was insufficient to ensure proper protection to plaintiff while he was engaged in a covered activity, Plaintiff has established a violation of 240(1) as a matter of law (*see Zimmer v Chemung County Performing Arts*, 65 NY2d 513 [1985]; *Ernish v City of New York*, 2 AD3d 256 [1st Dept 2003], *citing John v Baharestani*, 281 AD2d 114 [2001]).

The Court finds Defendants' arguments in opposition to Plaintiff unavailing. Defendants first contend that the examinations of the subject ladder establish that the ladder was not defective or in poor condition. However, this argument is of no moment as a worker does not need to establish that a ladder is defective in order to establish a violation of 240(1) (See *Perez v New York City Partnership Housing Development Fund,* 866 NYS.2d 61 [1st Dept. 2008] [Plaintiff did not have to show that the ladder on which he was standing was defective to establish liability. Liability will attach where adequate safety devices to prevent the ladder from slipping or to protect the plaintiff from falling off of the ladder are absent]). Plaintiff here argues that the ladder was unsecured and was an improper device for the task being performed. The Court also notes that the statement opined by Mr. Silverberg, Plaintiff's expert, that a Baker's scaffold would have prevented the accident given that Plaintiff could not hold on to the ladder with both hands is not contested by Defendants' engineer (NYSCEF doc No. 97, ¶ 41). Defendants also do not argue that the ladder was secured with any slip-resistant materials.

Defendants' second argument, that Plaintiff was the sole proximate cause of his accident due to his failure to properly position the ladder, is equally unavailing. It is well settled that an accident that occurs due to a defendant's statutory violation of 240(1) is a proximate cause of any injuries sustained as a result, and a plaintiff thus cannot be solely to blame (*Hernandez v Bethel*

United Methodist Church of N.Y., 49 AD3d 251 [1st Dept 2008], *citing Blake v Neighborhood House. Servs. of N.Y. City*, 1 NY3d 280; *Cahill v Triborough Bridge and Tunnel Auth*., 4 NY3d 35, 40 [2004]).

Furthermore, the "sole proximate cause" defense may be raised in a 240(1) action only when the owner or contractor establishes that adequate safety devices were provided, that "plaintiff knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1 [1st Dept 2011] *citing Cahill v Triborough Bridge and Tunnel Auth*., 4 NY3d at 40, *supra* and *Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *Ramos v Port Authority of New York and New Jersey*, 306 AD2d 147 [1st Dept 2003]; *cf. Robinson v East Medical Center, LP*, 6 NY3d 550, 554 [2006]; *Blake v Neighborhood Housing Services of New York City, Inc*., 1 NY3d 280 [2003]). A safety device is not "readily available" if the worker does not know where to find it or that he or she was expected to use it (*Gallagher*, *supra*).

In *Ramos* (*supra*), the court rejected defendants' claim that plaintiff was the sole proximate cause where defendants could not establish that a scaffold was available in the area where plaintiff was working, and held that the evidence that there might have been a scaffold was insufficient to defeat plaintiff's summary judgment motion.

Likewise in *Auriemma* (*supra*), the court held that, if a worker is expected to obtain a safety device himself, rather than having one provided to him, it should be "only when he knows exactly where a safety device is located, and that there is a practice of obtaining the safety device himself because it is easily done [. . .] The general availability of safety equipment at a work site does not relieve the defendants of liability" (*Auriemma, citing Cherry v Time Warner, Inc.*,

66 AD3d 233, 236 [1st Dept 2009] [the mere presence of ladders or safety belts somewhere at the worksite does not establish "proper protection"]).

Accordingly, here, even *assuming arguendo* that that Plaintiff may have used his ladder improperly, any comparative negligence by Plaintiff is irrelevant given that Defendants have not demonstrated that alternative safety devices were available. The evidentiary record in fact reflects that an alternative device was specifically *not* available to Plaintiff at the worksite, and Plaintiff was asked to use the subject ladder notwithstanding his concerns about the ladder's suitability for his task. Defendants have thus failed to raise a triable issue of fact as to whether Plaintiff's conduct was the sole proximate cause of the accident, and Plaintiff is entitled to summary judgment as Defendants unequivocally violated 240(1) by providing Plaintiff with an unsecured device which caused him to fall from an elevated height while engaged in a covered activity.

Therefore, Plaintiff's motion for partial summary judgment under Labor Law § 240(1) is granted, and the branch of Defendants' motion to dismiss Plaintiff's Labor Law § 240(1) claim is denied.

Labor Law § 241(6)

Labor Law § 241 (6) provides, in relevant part:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

It is well settled that this statute requires owners and contractors and their agents "to provide reasonable and adequate protection and safety measures for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of

Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law Section 241(6), plaintiffs must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that the Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace (*St. Louis,* 16 NY3d at 416).

Here, Plaintiff alleges a violation of Industrial Code § 23.1-2.1, which pertains to general requirements for ladders and ladderways.[2] Plaintiff specifically cites to Industrial Code § 23-1.21(b)(3)(iv), which holds that ladders must be maintained in good condition and should not be used if they have "any flaw or defect or material that may cause ladder failure."

Defendants argue that they are entitled to dismissal of this claim as a violation of Industrial Code § 23.1-2.1 cannot be deemed the cause of Plaintiff's accident, given Plaintiff's own testimony regarding how the accident occurred. Plaintiff does not argue that the ladder broke or collapsed on its own accord, but merely contends the ladder fell over when he lost his balance (NYSCEF doc No. 106, ¶ 66). Additionally, Defendants' expert Mr. Topping examined the ladder and found it was a standard A-frame ladder in good condition and had no flaws or defects (NYSCEF doc No. 82, ¶ 143).

[2] Plaintiff's papers also initially alleged violations under §§ 23-1.5, 23-1.7, 23-1.8, 23-1.16, 23-1.17, 23-1.30, 23-1.31, and 23-1.32., but in response to Defendants' motions, Plaintiff withdrew the aforementioned claims (NYSCEF doc No. 97, ¶ 59). The Court thus deems them abandoned.

Plaintiff, in opposition, cites to Mr. Silverberg's affidavit, wherein he identified three permanently deformed horizontal braces and a permanently deformed right side spreader after looking at photos of the subject ladder. Mr. Silverberg concluded that the three permanently deformed horizontal braces and a permanently deformed right side spreader constitute permanent defects in the ladder which can cause ladder failure, and which violate Industrial Code 23-1.21(b)(3)(iv) (NYSCEF doc No. 61, ¶ 97).

However, as Defendants point out, Mr. Silverberg's affidavit offers these conclusory statements without providing any context or explanation for how the alleged defects caused or contributed to Plaintiff's accident. It is well settled law that unsubstantiated allegations, even if advanced in an expert affidavit, are insufficient to defeat a motion for summary judgment (see *Santoni v Bertelsmann Property, Inc*., 21 AD3d 712 [1st Dept 2005]; see also *Gonzalez v. 98 MAG Leasing Corp*., 95 NY2d 124 [2000]). Furthermore, Mr. Silverberg's claims are directly contradicted by Plaintiff's own argument that he fell not because the ladder was defective, but because it was an improper piece of equipment for the caulking task given that it was too large, and he could not secure it with both hands.

Therefore, even *assuming arguendo* that the defects cited by Mr. Silverberg exist, said defects cannot be said to have caused Plaintiff's accident. As the alleged Industrial Code violation cited by Plaintiff was not a proximate cause of his injuries, Plaintiff's 241(6) claim must be dismissed in its entirety (*see Ross v Curtis-Palmer Hydro-Electric Co*., 81 NY2d 494 [1993]).

Accordingly, the branch of Defendants' motion to dismiss Plaintiff's Labor Law § 241(6) claim is granted.

Labor Law § 200 and Common Law Negligence

Defendants move for dismissal of Plaintiff's claim under both the common law and Labor Law § 200.

Labor Law § 200 "codifies landowners' and general contractors' common-law duty to maintain a safe workplace" (*Dunham v Hilco Constr. Co.*, 89 NY 2d 425 [1996], *citing Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d [1993]). Labor Law § 200 is a general duty that does not require plaintiff to be engaged in an enumerated activity, and unlike Labor Law § 241(6), Labor Law § 200 "does not require that the plaintiff be engaged in construction, excavation or demolition" (*Mejia v Levenbaum*, 30 AD3d 262 [1st Dept 2006]). Thus, this Court's dismissal of Plaintiff's other Labor Law claims does not prevent this Court from proceeding to analyze Plaintiff's Labor Law § 200 and common law negligence claim.

Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev.,* LLC, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed" (*Id.*).

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor "is liable under

Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice" (*Mendoza v Highpoint Assoc.*, IX, LLC, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; see also *Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, "whether [a defendant] controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims . . ." (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

As Plaintiff argues his accident was caused by the improper equipment he was given to complete his task, this is a "manner or methods" case, and liability cannot be imposed on Defendants under Labor Law § 200 and the common law as they did not direct or exercise any supervisory control over Plaintiff's work.

Plaintiff testified in deposition that he received all direction and assignment of tasks from his Metro Tech supervisors (NYSCEF doc No. 86 at 40). The A-Frame ladder was supplied by Metro Tech, and Plaintiff communicated his concerns about the ladder only to his supervisors (*id.*). Plaintiff stated that he spoke to no representatives from any other company at the job site (*id.* at 40). Plaintiff also stated that his only knowledge of Tishman's involvement was seeing Tishman's name on a permit at the front entrance, and his only knowledge of Riverside's involvement was seeing its name on a hard hat (*id.* at 35-36). Plaintiff's co-worker Mr. Maczuga also testified that he took all direction from his Metro Tech foreman and that no one from Tishman or Riverside instructed him on how to perform his work (NYSCEF doc No. 88 at 28-29).

Additionally, William Morrison, Tishman's superintendent of "façade trades" testified that while Tishman would occasionally inspect the subject premises and remedy any dangerous

conditions that were noticed, it did not affirmatively control its subcontractors nor did it exert control over the means and methods of their work (NYSCEF doc No. 87 at 68). Mr. Morrison specifically stated that Tishman would only become involved if it observed an unsafe condition and did not instruct workers on "how [they] go about installing, doing [their] scope of work" (*id.* at 69).

Plaintiff argues that Mr. Morrison's statement that Tishman would occasionally inspect the job site raises a question of fact regarding whether Defendants had constructive notice of the ladder. However, as discussed, constructive notice is irrelevant to Defendants' liability here as Plaintiff's claim is premised on the "manner and methods," not a defective condition on the premises. Plaintiff thus has not demonstrated that Defendants "control(lled) the activity bringing about the injury," and the fact that Defendants had broad oversight of the subject premises is insufficient to impose liability. (*Carty v Port Authority of New York and New Jersey*, 32 AD3d 732 [1st Dept 2006]).

As Defendants did not exercise supervisory control over the means and methods which caused the subject accident, the branch of Defendants' motion seeking summary judgment dismissing Plaintiffs' Labor Law § 200 and common law negligence claim is granted.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Plaintiff Waldemar Mateusiak's motion (Motion Seq. 003), pursuant to CPLR 3212, for summary judgment on his Labor Law § 240(1) claim is granted; and it is further

ORDERED that the motion of Defendants Riverside Center Site 5 Owner LLC and Tishman Construction Corporation (Motion Seq. 004), pursuant to CPLR 3212, for summary judgment dismissing the complaint, is granted to the extent that Plaintiff's Labor Law §241(6) and §200 and common law negligence claims are dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Defendants shall serve a copy of this Order with Notice of Entry within 20 days of entry on all parties.

HON. CAROL R. EDMEAD J.S.C.

12/29/2020
DATE

CAROL R. EDMEAD, J.S.C.

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