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 PUTNAM

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AVELINO MOURA and CATHY TOWNSEND,

Plaintiffs,

-against -

P & I CONSTRUCTION CORP.,

Defendant.

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P & I CONSTRUCTION CORP.,

Third Party Plaintiff,

- against -

MINGONE DRYWALL CO., INC.,

Third Party Defendant.

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DECISION & ORDER

Index No. 500091/2019
Sequence No. 1
Motion Date: 5/13/2020

GROSSMAN, J.S.C.

The following papers, numbered 1 to 34, were considered in connection with Plaintiffs Avelino Moura and Cathy Townsend's Amended Notice of Motion, dated April 16, 2020, seeking partial summary judgment on the issue of liability as against Defendant P & I Construction Corp.

PAPERS[1]	NUMBERED
Amended Notice of Motion/Affirmation in Support/Moura Affidavit in Support/Koester Affidavit in Support/Exhs. E, G-1, G-2, G-3, H-1, H-2, I-1, I-2, J-1, J-2/Memorandum of Law in Support	1-15
Affirmation in Opposition/Exhs. A-G	16-23
Tirone Reply Affirmation/Moura Supplemental Affidavit/Koester Supplemental Affidavit/Exhs. A-C/Reply Memorandum of Law	24-30
Sur-Reply to Motion/Exhs. A-C	31-34

Plaintiffs Avelino Moura and Cathy Townsend commenced this action, which arises from an incident that occurred on June 13, 2016 on a construction site located at 351 Park Avenue, Rye, New York. At the time, Moura was an employee of Third Party Defendant Mingone Drywall Co. Inc. ("Mingone"). While performing taping work to the ceiling, Moura fell from a baker's scaffold ("scaffold"), and was injured. Townsend, Moura's wife, is seeking damages for loss of consortium.

On January 17, 2019, Plaintiffs commenced this action against Defendant P & I Construction Corp. ("P&I"), the general contractor of the construction job and owner of the scaffold. P&I provided the scaffold for Moura to use on the day of his accident and from which Moura fell (Affirmation in Support at ¶4).

On or about March 19, 2019, P&I served its Amended Verified Answer. On April 2, 2019, P&I commenced a third-party action against Mingone. On or about May 1, 2019, Mingone served its Answer.

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[1] The parties and counsel shall familiarize themselves with this Court's Part Rules, which can be found on the OCA website, as parts of this motion and the responsive papers fail to comply with those Rules, to the extent that Plaintiff shall designate exhibits by number, while Defendant shall designate exhibits by letter, and exhibit lettering or numbering shall not begin anew for subsequent papers submitted by the same party. Any future motions that do not comply with this Court's Part Rules may be rejected or dismissed.

Upon completion of discovery, on February 18, 2020, Plaintiffs filed a Note of Issue.

Plaintiffs now move for partial summary judgment on liability, stating that there are no issues of fact, and that this matter falls squarely within Labor Law § 200, *et seq.*, rendering P&I liable. Plaintiffs argue that P&I failed to comply with the mandated rules and regulations as stated in New York Labor Law, which would have prevented Moura's fall from the scaffold. Plaintiffs assert that the law imposes absolute liability upon P&I, as a matter of law, and as such, there are no questions of fact. Plaintiffs allege that P&I is liable under Labor Law §§ 240(1), 241(6), and 200. Specifically, Plaintiffs assert that the lack of handrails on the scaffold and the general lack of safety equipment provide the basis for P&I's liability.

In support of their motion, Plaintiffs proffer: (1) Avelino Moura's Affidavit; (2) James Koester, P.E.'s Affidavit; (3) Verified Bill of Particulars; (4) excerpts from Avelino Moura's deposition transcript; (5) excerpts from Salvatore Inguanti's deposition transcript; (6) excerpts from Enrico Mingone's deposition transcript; (7) Koester's report with colored photographs; and (8) an OSHA fact sheet.

P&I opposes the motion, asserting that the record is replete with evidence that Moura's own conduct was the sole proximate cause of his accident and injuries. In support of its opposition, P&I proffers: (1) Affidavit of Manuel Arturo Loja Pintado ("Arturo"); (2) deposition transcript of Police Officer Mauricio Gomez; (3) copy of an unsigned police report; (4) deposition transcript of EMT Melissa Cecere; (5) ambulance report; (6) excerpts from Inguanti's deposition transcript; and (7) excerpts of Moura's deposition transcript.

Plaintiffs replied to P&I's opposition, proffering Supplemental Affidavits from Moura and Koester. The Court permitted P&I to submit a sur-reply, which included, *inter alia*,

additional pages of Moura's deposition transcript that were not included in his initial moving papers. The motion was deemed fully submitted on May 13, 2020.

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of facts are raised and cannot be resolved on conflicting affidavits (*see Millerton Agway Coop. v Briarcliff Farms*, 17 NY2d 57, 61 [1966]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Initially, "the proponent... 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 issue of fact." However, once a movant makes a sufficient showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Where the moving papers are insufficient, the court need not consider the sufficiency of the opposing papers (*id.*; *see also Fabbricatore v Lindenhurst Union Free School Dist.*, 259 AD2d 659 [2d Dept 1999]).

"'The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist'" (*Bank of New York Mellon v Gordon*, 171 AD3d 197, 201 [2d Dept 2019], quoting *Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]). "Accordingly, "'[t]he court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned'" (*Bank of New York Mellon v Gordon*, 171 AD3d at 201, quoting *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). "'[W]here credibility determinations are required, summary judgment must be denied'" (*Bank of New York*

Mellon v Gordon, 171 AD3d at 201-202, quoting *People ex rel. Cuomo v Greenberg*, 95 AD3d 474, 483 [1st Dept 2012], *aff'd* 21 NY3d 439 [2013]).

Labor Law § 240

"'Labor Law § 240(1) imposes a nondelegable duty [and absolute liability] upon owners and general contractors and their agents to provide safety devices necessary to protect workers from risks inherent in elevated work sites'" (*Von Hegel v Brixmor Sunshine Sq., LLC*, 180 AD3d 727, 728 [2d Dept 2020], quoting *Caiazzo v Mark Joseph Contr., Inc.*, 119 AD3d 718, 720 [2d Dept 2014]). "To prevail on a cause of action alleging a violation of Labor Law § 240(1), a plaintiff must prove that the defendant violated the statute and that such violation was a proximate cause of his or her injuries" (*Von Hegel v Brixmor Sunshine Square, LLC*, 180 AD3d at 729; *see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]). "Where there is no statutory violation, or where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery under Labor Law § 240(1)" (*Von Hegel v Brixmor Sunshine Square, LLC*, 180 AD3d at 729 [emphasis added]; *see Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d at 290). "'[Wlhere an accident is caused by a violation of the statute, the plaintiff's own negligence does not furnish a defense'" (*Von Hegel v Brixmor Sunshine Square, LLC*, 180 AD3d at 729, quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]). "It is still necessary, however, for the plaintiff to show that the statute was violated and that the violation proximately caused his injury" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d at 39 [emphasis added]).

As a threshold matter, it is undisputed that this case involves an elevation differential,

placing it squarely within a Labor Law § 240 analysis (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011]).

Turning to the issue of proximate cause, it is clear from the record that there is a question of fact as to whether Moura was the sole proximate cause of his accident. Moura disputes that the scaffold tipped over. He argues that had there been railings, he would not have fallen off the scaffold. Moura insists that the scaffold wobbled, causing him to fall off, and points to his own deposition testimony and affidavit in support of that position (Moura EBT at 85-86). He insists that his "fall from the scaffold occurred because it was unstable and 'wiggled'; and it did not have safety railings on it to keep me safe and prevent me from falling from the platform" (Moura Supp. Affidavit at ¶6). He denies trying to move the scaffold while standing on it (Moura Supp. Affidavit at ¶7). His boss, Mingone, testified that Moura told him that "he was reaching * * * to tap a screw, and the next thing he knew he was on the floor" (Mingone EBT at 44), but Mingone admitted that Moura did not tell him what caused him to fall (Mingone EBT at 45). Moura denied that the scaffold fell over (Moura EBT at 87).

In response, P&I proffers evidence that Moura admitted he moved the scaffold while standing on it. Specifically, P&I points to Officer Gomez's deposition testimony in which he states that Moura told him, at the scene, that he was trying to move the scaffold without descending from it, causing himself to fall (Gomez EBT at 27-28, 34-36, 38). In addition, EMT Cecere also testified that when she arrived on the scene, Moura admitted he moved the scaffold while standing on it, lost his balance, and fell off (Cecere EBT at 23-24, 31-32) (*see Scott v. Kass*, 48 AD3d 785 [2d Dept 2008][statements made to police officer who prepared report was acting in scope of his duty in recording defendant's statement and statement admissible as

admission of party]). Furthermore, Arturo, one of P&I's employees who was working at the job site that day, attested in his affidavit that he heard a "loud sound come from the room where" Moura was working, "immediately went into the room" and found Moura lying on the floor next to the scaffold, which was "completely tipped over and laying on its side next to" Moura (Arturo Affidavit at ¶¶4-5). Arturo also affirmed that earlier that same day, he had seen Moura "moving the Baker scaffold around the room while he was standing on the scaffold platform * * * several times that morning with the last time being approx. 15 minutes before the accident" (Arturo Affidavit at ¶6). Inguanti, the owner of P&I, testified that when he arrived on the scene after being notified about the accident, Moura told him that he "was moving the scaffolding," but he could not recall whether Moura told him that the scaffold moved and that was why he fell (Inguanti EBT at 69). Finally, Moura admitted that he did not look to see if the scaffold fell over or remained standing after he fell (Moura EBT at 97-98).[2] According to this evidence, the Court finds that there is an issue of fact as to whether Moura was the sole proximate cause of the accident, and denies Plaintiffs' summary judgment on this cause of action.

The Court declines to follow *Britez v Madison Park Owner, LLC* (36 Misc3d 1233[A] [Sup Ct, NY County 2012]), as it is not controlling and is distinguishable. In *Britez*, the plaintiff fell from the baker's scaffold under either scenario put forth by the parties. In the instant case, however, there is a question of fact as to whether Plaintiff was injured when he fell off the scaffold (Plaintiffs' scenario), or whether Plaintiff caused the scaffold to tip over, propelling him to the ground thereby injuring him (P&I's scenario).

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[2]The Court notes that these pages of Moura's EBT transcript were only provided by Defendant in its sur-reply. Plaintiffs not only failed to proffer these pages in their moving papers, but they failed to mention these statements.

Labor Law § 241(6)

"'Labor Law § 241(6) imposes on owners and contractors a nondelegable duty to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed'" (*Graziano v Source Budrs. & Consultants, LLC*, 175 AD3d 1253, 1258 [2d Dept 2019], quoting *Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2d Dept 2015] [internal quotation marks omitted]). "'To establish liability under Labor Law § 241(6), a plaintiff or a claimant must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case'" (*Graziano v Source Builders & Consultants, LLC*, 175 AD3d at 1258, quoting *Aragona v State of New York*, 147 AD3d 808, 809 [2d Dept 2017]). "Contributory and comparative negligence are valid defenses to a Labor Law § 241(6) claim" (*Aragona v State of New York*, 147 AD3d at 809).

To support this cause of action, Plaintiffs allege violations of 22 NYCRR § 23-1.5 ("General responsibility of employers"), 22 NYCRR § 23-1.15 ("Safety railing"), 22 NYCRR § 23-5.18 ("Manually-propelled mobile scaffolds"), as well as Occupational Safety and Health Act ("OSHA") regulations.

As a threshold matter, alleged violations of OSHA standards do not provide a basis for liability under Labor Law § 241(6) (*Graziano v Source Builders & Consultants, LLC*, 175 AD3d at 1258-1259, citing *Marl v Liro Engrs., Inc.*, 159 AD3d 688 [2d Dept 2018]). Accordingly, the allegations related to OSHA violations are dismissed (*see* CPLR § 3212[b]; *Goldstein v County of Suffolk*, 300 AD2d 441, 442 [2d Dept 2002] [court has authority pursuant to CPLR § 3212[b] to search the record and grant summary judgment to a nonmoving party with respect to an issue

that was the subject of the motion before the court]; *see also Parker v 205-209 E. 57th St. Assoc., LLC*, 100 AD3d 607, 608-609 [2d Dept 2012]).

Next, the thrust of Plaintiffs' argument focuses on the allegation that P&I violated 12 NYCRR § 23-5.18, and more specifically 12 NYCRR §23-5.18(b), by failing to provide safety railings on the subject scaffold. 12 NYCRR § 23-5.18 provides that "[t]he platform of every manually-propelled mobile scaffold" – like the one in this case – "shall be provided with a safety railing constructed and installed in compliance with this Part (rule)" (*see* 12 NYCRR § 23-5.18[b]). Plaintiffs also allege a failure to comply with 12 NYCRR § 23-1.15 ("Safety railing"), which describes the specifications that are required when railings are provided. It is undisputed that the subject scaffold did not have side rails.

In response, P&I argues that this type of scaffold was exempt from having side rails. P&I relies on 12 NYCRR § 23-5.1, which is titled, "General Provisions for All Scaffolds." According to 12 NYCRR § 23-5.1(j):

> (j) Safety railings.
> (1) The open sides of all scaffold platforms, except those platforms listed in the exception below, shall be provided with safety railings constructed and installed in compliance with this Part (rule).
> Exceptions: Any scaffold platform with an elevation of not more than seven feet * * *.

Contrary to Defendant's contention, safety rails are required on manually-propelled scaffolds without regard to height (*Vergara v SS 133 W. 21, LLC*, 21 AD3d 279 [1st Dept 2005]), and this Court is bound by *Vergara*, as its own research did not find any cases addressing this issue from the Appellate Division, Second Department (*Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664 [2d Dept 1984] [doctrine of stare decisis requires trial courts in Second Department to follow precedents set by Appellate Divisions of another department until

the Court of Appeals or the Supreme Court, Appellate Division, Second Department pronounces a contrary rule]).

However, as discussed above, there remains a question of fact as to proximate cause. Thus, the Court denies Plaintiffs' motion for summary judgment based on these two regulations.

To the extent Plaintiffs cite 12 NYCRR § 23-5.18(a) as the predicate violation to support their Labor Law 241(6) cause of action, the Court finds that Plaintiffs have failed to make out a *prima facie* case. 12 NYCRR § 23-5.18(a) provides that the scaffold platforms on this type of scaffold "shall be tightly planked for the full width of the scaffolds except for necessary access openings." In support of this position, Plaintiffs' proffer their engineer's report and affidavit based on his inspection of the scaffold over three years after the accident. While this in and of itself may not be disqualifying, Koestner failed to state that the scaffold's condition at the time of the inspection was the same as at the time of the accident (*see generally Cruz v Deno's Wonder Wheel Park*, 297 AD2d 653 [2d Dept 2002]). Furthermore, Koester's statement in his report that the scaffold's condition was in violation of this regulation was conclusory. And, although Moura stated that "the scaffold was not very tight as I noticed the two ends were not tied together," in response, Inguanti testified that he inspected the scaffold after the accident and did not find any defects in it, thereby raising a question of fact. In any event, there remains a question of fact regarding proximate cause (*Graziano v Source Builders & Consultants, LLC*, 175 AD3d at 1258, quoting *Aragona v State of New York*, 147 AD3d at 809).

With respect to the remaining Industrial Code alleged, Plaintiffs cite 12 NYCRR § 23-1.5 to support their position that insufficient safety protections were provided to Moura. "To support a claim under Labor Law § 241(6), the Industrial Code Section that a plaintiff is relying upon

'must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles'" (*Rawald v Dormitory Auth. of the State of New York*, 67 Misc3d 1210[A] [Sup Ct, NY County 2020], quoting *Misicki v Caradonna*, 12 NY3d 511, 515 [2009], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 504-505 [1993]). "Section 23-1.5 of the Industrial Code is entitled, 'General responsibility of employers' and has been held to be insufficient to support a basis for a Labor Law § 241(6) claim" (*Rawald v Dormitory Auth. of the State of New York*, 67 Misc3d at *8; *see Guallpa v Canarsie Plaza, LLC*, 144 AD3d 1088, 1091 [2d Dept 2016] [12 NYCRR § 23-1.5(b) serves to amplify other Industrial Code provisions that require a designated individual to perform or supervise work; it does not provide an implementing regulation upon which to predicate a Labor Law § 241(6) claim]). Accordingly, the Court dismisses 12 NYCRR § 23-1.5 as a basis for liability.

Labor Law §200

"Labor Law § 200 is a 'codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work'" (*Graziano v Source Builders & Consultants, LLC*, 175 AD3d at 1259, quoting *Ortega v Puccia*, 57 AD3d 54, 60 [2d Dept 2008]). "'Cases involving Labor Law 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed'" (*Graziano v Source Builders & Consultants, LLC*, 175 AD3d at 1259, quoting *Ortega v Puccia*, 57 AD3d at 61). "When, as here, a plaintiff has alleged that his injuries arose from a dangerous condition on the premises, a defendant may be liable under common law and Labor Law 200 if the defendant either created

the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition (*Graziano v Source Builders & Consultants, LLC*, 175 AD3d at 1259).

Here, Plaintiffs allege that Moura sustained his injury based on the dangerous condition of the scaffold. As such, Plaintiffs must establish that P&I had actual or constructive notice of the dangerous and defective scaffold. "To provide constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit a defendant's employees to discover and remedy it" (*Schick v Blydenburgh, LLC*, 88 AD3d 684, 686 [2d Dept 2011]). Plaintiffs demonstrated that P&I had constructive notice of the decaying and/or defective scaffold. Defendant owned the scaffold. It is undisputed that it had no safety railings or toeboards. Moura also testified that he observed the two ends to not be tied together and the scaffold wiggled. The scaffold was regularly used on P&I's job sites and remained on this job site during the entire time of the construction. P&I's own employees used it when Moura was not. Inguanti even admitted he was responsible for the scaffold and inspected it when he was on the job site (Inguanti EBT at 56). Thus, Plaintiffs established a *prima facie* case that P&I are liable under Labor Law § 200.

In response, P&I does not specifically address the Labor Law § 200 claim. Instead, it broadly argues proximate cause throughout its opposition papers as a reason to deny Plaintiff's motion. P&I proffers evidence that the purported dangerous condition did not cause Moura's injury, but rather Moura's actions in moving the scaffold without descending from it, caused it to tip over and propel him to the ground, injuring him. Simply put, regardless of whether P&I had actual or constructive notice of the purported dangerous condition, there remains a question of fact as to whether that condition caused Moura's injury (*see Capellan v King Wire, Co.*, 19 AD3d

530, 532 [2d Dept 2005] ["To impose liability for violations of the Labor Law and common-law negligence, the violations must be a proximate cause of the accident."]). As such, the Court denies Plaintiffs' motion for summary judgment as it relates to Labor Law § 200.

Accordingly, it is hereby

ORDERED that Plaintiffs' motion for summary judgment is denied; and it is further

ORDERED that the allegations related to OSHA violations are dismissed for the reasons stated herein; and it is further

ORDERED that 12 NYCRR § 23-1.5 is dismissed as a basis for liability for the reasons stated herein; and it is further

ORDERED that the parties and counsel are to appear before the undersigned on Monday, June 22, 2020 at 10:00 a.m. for a pre-trial Skype conference; counsel are advised to confirm the scheduling with the Court due to interruptions that may persist due to the COVID-19 pandemic.

The foregoing constitutes the Decision and Order of the Court.

Dated: Carmel, New York
June 11, 2020

HON. VICTOR G. GROSSMAN, J.S.C.

To: Anthony R. Tirone, Esq.
Law Office of Anthony R. Tirone, Esq., P.C.
Attorneys for Plaintiffs
170 Hamilton Avenue, Suite 300
White Plains, New York 10601

Joseph A. Orlando, Esq.
O'Connor Redd LLP
Attorneys for Defendant/Third Party
Plaintiff P&I Construction Corp.
P.O. Box 1000
242 King Street
Port Chester, New York 10573

Pascual R. Semidey
Law Offices of Craig P. Curcio
Attorneys for Third Party Defendant
Mingone Drywall Co., Inc.
384 Crystal Run Road, Suite 202
Middletown, New York 10941