Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

----------x

JUAN F. VARGAS,

Plaintiff(s),

- against -

TOLL GC LLC, TOLL FIRST AVENUE LLC, A L ONE INC., JM3 CONSTRUCTION LLC, and INDUSTRIAL CONSULTING & MARKETING, INC.,

Defendant(s).

----------x

Index No.: 705083/20

Motion Date: 9/28/21

Motion Cal. No.: 29

Motion Seq. No.: 07

The following papers numbered 1 - 12 read on this motion by plaintiff for, *inter alia*, summary judgment against defendants Toll GC, LLC, Toll First Avenue, LLC, JM3 Construction, LLC, and A L One, Inc. on the issue of liability, and summary judgment against all defendants to dismiss certain affirmative defenses.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Affirmation in Opposition-Service.....	5 - 6
Affirmation in Opposition-Exhibits-Service.....	7 - 9
Memorandum of Law.....	10
Reply Affirmation-Service.....	11 - 12

Upon the foregoing papers, it is **ORDERED** that the above-referenced motions are decided as follows:

In this personal injury action, plaintiff alleges that on October 14, 2015, a stone countertop fell on him while he was working at the construction site of a 32-story residential condominium building at 959 1st Avenue, County, City and State of New York, owned by defendant Toll First Avenue, LLC ("Toll First"). Defendant Toll GC, LLC ("Toll GC"), the general contractor on the project, retained defendant JM3 Construction, LLC ("JM3") to perform drywall and foundation work. JM3 retained defendant A L One, Inc. ("A L One"), which, in turn, retained plaintiff's employer, non-party TNT Taping, Inc., to perform the taping portion of the drywall work. Toll GC also retained defendant Industrial Consulting & Marketing, Inc. ("ICM") to manufacture, deliver, and

install marble bathroom and kitchen countertops in the building's apartments. Plaintiff asserts causes of action under Labor Law §§ 200, 240(1), 241(6), as well as common law negligence.

Plaintiff now moves for summary judgment against defendants Toll First, Toll GC, and JM3 (collectively, "the Toll defendants"), and defendant A L One on the issue of liability; and for summary judgment dismissing the affirmative defenses of all five defendants which are based on his purported comparative fault or negligence in causing the subject accident.[1] Summary judgment is a drastic remedy that will be granted only if the movant has demonstrated, through submission of evidence in admissible form, the absence of any material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), and has affirmatively established the merit of his or her cause of action or defense (*see Zuckerman v New York*, 49 NY2d 557, 562 [1980]). A failure to make a *prima facie* showing of entitlement to judgment as a matter of law "requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If a movant makes the *prima facie* showing, the burden then shifts to the non-movant to raise a material issue of fact requiring a trial (*see id*). Courts must view the evidence in the light most favorable to the non-movant (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and draw all reasonable inferences in his or her favor (*see Haymon v Pettit*, 9 NY3d 324, 327, n* [2007]).

In support of summary judgment, plaintiff submits, *inter alia*, an affidavit from an expert on site safety, as well as certified transcripts of his own deposition and those of several persons employed by the various defendants. Plaintiff testified that during the two days before his accident, he had worked on the ceilings in apartments 16A and 16B, without incident, using a "baker's scaffold" supplied by his employer, non-party TNT. He took instructions only from Thomas Giarusso, TNT's owner, who called on the morning of the accident, and told him to work in apartment 16C, which housed several carts, with countertops strapped to them. According to plaintiff, there was no barricade on the entrance to apartment 16C, and no signs warning him not to move the carts. One of the carts was blocking a spot where plaintiff needed to work. When he attempted to move the cart, it tipped over, and a kitchen countertop fell and pinned his legs to the ground. Plaintiff tried to avoid the impact, but he slipped on garbage on the floor.

The witnesses for defendants ICM and Toll GC testified that ICM delivered the countertops, wrapped and secured to "A-frame" carts, sometime before the accident. Installation is typically

[1]The defendants have separately moved for summary judgment dismissing the complaint and all respective cross-claims. These motions are addressed in a separate order and decision.

done at the time of delivery, but due to the hoist elevator's limited availability, Toll GC moved up the delivery, and had ICM put the countertops in two designated apartments on each floor, until they could be installed. ICM advised that the countertops should remain strapped to the carts because they could be damaged if placed on the ground. Since only ICM's workers were supposed to handle the carts and countertops, and no other work was to occur inside the designated apartments until after the installations, the apartments were to be secured with plywood doors screwed into the entry frame, bearing markings warning others not to enter.

Toll GC's witness testified that: it was Toll GC's decision to secure the designated apartments; Toll GC directed the installation of the plywood barriers once ICM made the deliveries; and the purposes of securing the apartments were to protect the countertops from being damaged, and prevent other workers from attempting to move the carts. ICM's witness testified that it was proper to store the countertops by attaching them to the A-frame carts, they were stored that way at ICM's facility, and storing them on the ground was less safe due to an increased risk of the bottom slipping or kicking out. Both witnesses testified that it takes two or three trained persons to properly maneuver the carts, which may not be obvious to those unfamiliar with these materials.

Toll GC's witness believed that defendant JM3 was directed to secure all of the designated apartments. JM3's witness testified that this was not part of their contract, but JM3 secured the apartments on the first six floors as a "favor," as Toll GC's employees were responsible for securing the ones on the higher levels, including the 16th floor, where the accident occurred. Both witnesses testified that before the accident, they had seen the designated apartments on the higher floors, including 16C, secured with plywood. JM3's witness also testified that when he responded to the scene within minutes after the accident, he observed a piece of plywood on the ground about 10 to 15 feet from the apartment entrance, as well as holes in the entrance doorframe from where the plywood had been secured, and plaintiff kept saying "I'm sorry."

Defendant A L One's witness testified that he knew nothing about the countertops' storage, as the company's representatives were not regularly present at the site, having subcontracted all of its work on the project to non-party TNT and another company. According to A L One's witness, he did not supervise, regularly interact with, or have day-to-day contact with its subcontractors' employees, and all directions to them, including any safety concerns, would have come from JM3 and its site supervision.

Mr. Giarusso, owner of non-party TNT, testified that TNT performed the taping work on the project pursuant to an oral contract with A L One. No one at the site had ever told him that work could not be done in the apartments where the countertops were

being stored, and he first learned about that when he responded to the scene after the accident. Giarusso was regularly present at the site, but did not recall sending plaintiff to the 16th floor on the day of the accident, nor did he know who told plaintiff to work in apartment 16C, although they may have spoken that morning. Giarusso generally instructed plaintiff on what work to perform, but did not give specific instructions on how to do it.[2]

As noted, plaintiff moves for summary judgment against the Toll defendants and A L One on all of his causes of action arising under Labor Law §§ 200, 240 (1) and 241(6), as well as the common law. The court considers each claim, separately.

Labor Law § 240 (1)

Plaintiff argues that he is entitled to summary judgment on his Labor Law § 240 (1) claim because defendant Toll First, as owner of the premises, and its purported agents – defendants Toll GC, JM3, and A L One – are strictly liable for his injuries. "To prevail on a claim pursuant to Labor Law § 240 (1), a plaintiff must establish a violation of the statute and that such violation was a proximate cause of his or her injuries" (*Plass v Solotoff*, 5 AD3d 365, 366 [2d Dept 2004]). It is well-settled that the statute "is directed solely at elevation-related hazards" (*Georgopulos v Gertz Plaza, Inc.*, 13 AD3d 478, 479 [2d Dept 2004]), and hence,

> "[a]n object falling from a minuscule height is not the type of elevation-related injury that Labor Law § 240 (1) was intended to protect against. Moreover, the object must be in the process of being hoisted or secured when it falls due to inadequate safety devices"

(*Cambry v Lincoln Gardens*, 50 AD3d 1081, 1083 [2d Dept 2008] [internal quotation marks, citations, and brackets omitted]). The A-frame cart and countertop were not in the process of being hoisted or secured when plaintiff moved them. Rather, this case presents as materially indistinguishable from *Cambry*, in which a "large piece of metal" allegedly fell from a dolly onto the claimant's foot. The *Cambry* court dismissed the Labor Law § 240 (1) claim, holding that the "slight difference in elevation between the top of the dolly and the floor" did not implicate the statute (*see id*). Similarly, before the countertop fell onto plaintiff, it was on the cart, and was not significantly elevated above the floor. The court, thus, finds, that plaintiff's accident cannot be

[2]The version of Giarusso's deposition transcript annexed to plaintiff's motion as Exhibit 12 is missing all even-numbered pages, including the witness execution and certification (*see* CPLR 3116 [a] and [b]). Since this exhibit is incomplete and not in admissible form, it was not considered on plaintiff's *prima facie* showing (*see Zuckerman*, 49 NY2d at 562). However, the Giarusso transcript was submitted in proper form with the defendants' motions, and they refer to his testimony in their papers in opposition to plaintiff's motion.

reasonably viewed as belonging to the class of "gravity-related accidents" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011]) to which Labor Law § 240 (1) is directed.

For the reasons articulated above, the branch of plaintiff's motion seeking summary judgment as to liability against the Toll defendants and A L One on his cause of action under Labor Law § 240 (1) is denied. Moreover, on the particular facts of this case, the court finds that it is appropriate to search the record and award summary judgment to all of the defendants, dismissing this cause of action against them (*see* CPLR 3212 [b]).

Labor Law § 241 (6)

Plaintiff argues that he is entitled to summary judgment on his Labor Law § 241 (6) claim because the Toll defendants and A L One failed to keep his work area free from debris, in violation of Industrial Code § 23-1.7 (e)(2). Labor Law § 241 (6) "imposes a nondelegable duty of reasonable care upon owners and contractors 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" (*Simmons v City of NY*, 165 AD3d 725, 728-729 [2d Dept 2018]). As a predicate to liability, a defendant must have violated a specific mandatory safety rule or regulation promulgated by the Commissioner of the Department of Labor, and the violation must have been a proximate cause of the plaintiff's injuries (*see id; Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Plass v Solotoff*, 5 AD3d 365, 367 [2d Dept 2004]).

Industrial Code § 23-1.7 (e)(2) generally mandates that the floors and platforms in a working area be kept free from dirt, debris, and materials "insofar as may be consistent with the work being performed." This regulation is sufficiently specific to sustain a cause of action under Labor Law § 241 (6) (*see Tomyuk v Junefield Assoc.*, 57 AD3d 518, 521 [2d Dept 2008]). Plaintiff argues that a violation is made out by his testimony that he could not get out of the way of the falling countertop because he slipped on garbage on the apartment floor. However, he did not describe the garbage in any way. It is also noted that there appeared to be confusion at the deposition, which was conducted through a Spanish language interpreter, regarding the translation and use of the terms "garbage" and "debris." Differences, if any, in the terms' respective meanings may be significant, since section 23-1.7 (e)(2) requires working areas to be kept clear of dirt, debris, and materials only insofar as may be consistent with the work being performed there, and it is unclear whether "garbage" would qualify under this exception. Plaintiff's vague testimony, therefore, does not satisfy his *prima facie* burden to affirmatively establish that whatever he slipped on was not the type of debris or materials whose presence in apartment 16C was appropriate for the kind of

work being performed there, and, thus, permitted by the regulation (*see e.g. Enriquez v B & D Dev., Inc.*, 63 AD3d 780, 781 [2d Dept 2009] [dismissing claim based on this regulation where "the alleged obstructions on the ground in (the plaintiff's) work area were an integral part of the work that he and his coworkers were performing"]). Plaintiff's failure to eliminate all triable issues of fact requires denial of summary judgment on his Labor Law § 241 (6) claim as against any of the defendants.

Common Law/Labor Law § 200

Plaintiff also moves for summary judgment on his common-law and Labor Law § 200 claim against the Toll defendants and A L One. "Labor Law § 200 is a codification of the common-law duty imposed on owners, contractors, and their agents to provide workers with a safe place to work" (*Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 698 [2d Dept 2016]; *see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Chowdhury v Rodriguez*, 57 AD3d 121, 127-128 [2d Dept 2008]). As the Second Department has explained,

> "[t]o establish liability under a theory of common-law negligence and for a violation of Labor Law § 200, an injured worker must establish that the party charged with the duty to maintain a reasonably safe construction site had the authority to control the activity bringing about the injury, to enable it to avoid or correct an unsafe condition"

(*O'Leary v Clean Cut Carpentry, Inc.*, 31 AD3d 514, 514 [2d Dept 2006]; *see also Comes v NY State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Labor Law § 200 claims arise under two disjunctive standards, each of which plaintiff invokes: 1) claims involving the means, methods or materials of the work, *i.e.*, the manner in which the work is performed; and 2) claims involving a dangerous or defective premises' condition at the work site (*see Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dept 2014]; *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]; *Chowdhury*, 57 AD3d at 128).

Plaintiff moves for summary judgment under the first standard solely against defendants Toll GC, JM3, and A L One. "To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have authority to exercise supervision and control over the work" (*Leon-Rodriguez v R.C. Church of Sts. Cyril & Methodius*, 192 AD3d 883, 886 [2d Dept 2021]). "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (*Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 698 [2d Dept 2016] [internal quotation marks and citations omitted]). However,

> "[t]he right to generally supervise the work, stop the

> contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence"

(*id* [internal quotation marks omitted]).

Plaintiff contends that the A-frame carts containing the countertops constituted "dangerous or defective equipment" because they were in the apartment in which he was assigned to work, he had to move one of the carts in order to do his job, and there were no signs warning him of the danger. However, it is undisputed that the carts and countertops were not provided to plaintiff to use as tools or equipment in furtherance of his taping work, nor has he adduced evidence indicating that any of the defendants' employees instructed him to enter apartment 16C, or to maneuver or move the carts while performing his work. Plaintiff also has not introduced any evidence indicating that the carts malfunctioned in any way. Therefore, this standard of liability does not easily lend itself to the facts at bar. In any event, plaintiff testified that while working on the project, he accepted instruction only from his employer, non-party TNT, using equipment it provided. Hence, even assuming *arguendo* that this standard applies, plaintiff has not affirmatively established that Toll GC, JM3, and A L One had more than general supervisory authority over his work, which is insufficient to impose liability under the statute or the common law (*see Marquez*, 141 AD3d at 698).

Plaintiff moves for summary judgment under the second liability standard as to each of the three Toll defendants, as well as defendant A L One. As explained by the Second Department,

> "[w]here a plaintiff's injuries arise from a dangerous condition on the premises, an owner may be liable under Labor Law § 200 if it either created or had actual or constructive notice of the dangerous condition, and a general contractor may be liable if it had control over the work site and actual or constructive notice of the dangerous condition"

(*Leon-Rodriguez*, 192 AD3d at 886; *see also Mendez v Vardaris Tech, Inc.*, 173 AD3d 1004, 1005 [2d Dept 2019]). Similarly,

> "[a] subcontractor may not be held liable under Labor Law § 200, and may not be held liable, as an agent of the owner or general contractor, under Labor Law § 240 (1) or § 241 (6), where it does not have authority to supervise or control the work that caused the plaintiff's injury"

(*Tomyuk v Junefield Assoc.*, 57 AD3d 518, 521 [2d Dept 2008]). However, "[a] subcontractor may be held liable for negligence where

the work it performed created the condition that caused the plaintiff's injury even if it did not possess any authority to supervise and control the plaintiff's work or work area" (*Sledge v S.M.S. Gen. Contrs., Inc.*, 151 AD3d 782, 783 [2d Dept 2017] [internal quotation marks and citations omitted]).

Plaintiff's motion papers do not precisely define the premises condition alleged to have been dangerous. It is, therefore, unclear whether he contends that the dangerous condition was the placement of the countertops on the A-frame carts, or the alleged failure to secure the designated apartments in which they were kept. As noted, defendant ICM's witness testified that this storage method was both customary and proper, and that it would be unsafe to put the countertops directly on the ground. Plaintiff's safety expert also indicated that proper storage of these items in this manner required the use of barriers and warning signs, and there is evidence in the record that this was done, at least initially. Since plaintiff submitted this evidence with his motion, he necessarily failed to eliminate all issues of fact so as to affirmatively establish that the use of this storage method, in and of itself, created a dangerous condition.

With respect to the failure to secure apartment 16C, plaintiff testified that the entry was open when he arrived on the morning of the accident, but he did not say how long it had been open before then. He has, thus, failed to affirmatively establish that any of the defendants possessed actual or constructive notice of the alleged failure to secure the apartment. Although creation of a dangerous condition obviates the need to establish notice, the record does not indicate who removed the plywood barrier, much less affirmatively establish that one of the Toll defendants or A L One did so. Plaintiff's failure to eliminate these issues as to creation, notice, and control over his work site requires denial of summary judgment on his claims arising under Labor Law § 200 and the common law, regardless of the sufficiency of any of the defendants' opposing papers.

Affirmative Defenses

Plaintiff also moves for summary judgment dismissing all of the defendants' affirmative defenses which are predicated upon his purported comparative fault or negligence. A plaintiff moving to dismiss a defendant's defenses "b[ears] the burden of demonstrating that those defenses [a]re without merit as a matter of law" (*Vita v NY Waste Servs., LLC*, 34 AD3d 559, 559 [2d Dept 2006]). Triable issues of fact preclude dismissal (*see Jacob Marion, LLC v Jones*, 168 AD3d 1043, 1045 [2d Dept 2019]), and the defendant "is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed" (*Warwick v Cruz*, 270 AD2d 255, 255 [2d Dept 2000]). Contrary to plaintiff's contention, viewing the facts in a light most favorable to defendants, as the non-

moving parties, there are triable issues of fact as to his comparative fault in attempting to move a cart laden with large, heavy stone countertops, without asking for permission or assistance. The record is also unclear as to who removed the barricade to apartment 16C, and whether plaintiff disregarded any warning signs or markings. Plaintiff has, thus, failed to demonstrate that these affirmative defenses are without merit as a matter of law.

Accordingly, the above-referenced motion by plaintiff for summary judgment against defendants Toll GC, LLC, Toll First Avenue, LLC, A L One, Inc., and JM3 Construction, LLC on the issue of liability, and for summary judgment dismissing the affirmative defenses of all of the defendants which are predicated on his purported comparative fault or negligence is **DENIED** in its entirety.

The foregoing shall constitute the decision and order of this court.

Dated: December 8, 2021

JANICE A. TAYLOR, J.S.C.

\\Supqns-vmfs1\jamf1\VOL1\DEPT\TAYLOR\Decisions - Part 15\Remote Decisions 2021\Summary Judgment\705083-20_Vargas_Toll_laborlaw_seq7_summaryjudgment_remotedecisions_SFO.wpd