SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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INDEX NO. 152793/2019

LUPO AGURTO,

Plaintiff,

MOTION DATE 12/23/2021, 01/25/2022, 04/29/2022

- v -

MOTION SEQ. NO. 006 007 008

ONE BOERUM DEVELOPMENT PARTNERS LLC,NORDEST SERVICES LLC., NOBLE CONSTRUCTION GROUP, LLC,

DECISION + ORDER ON MOTION

Defendant.

----------X

ONE BOERUM DEVELOPMENT PARTNERS LLC

Third-Party
Index No. 596014/2019

Plaintiff,

-against-

MAGA CONTRACTING CORP., ROCK GROUP NY CORP.

Defendant.

----------X

NORDEST SERVICES LLC.

Second Third-Party
Index No. 595084/2020

Plaintiff,

-against-

ROCK GROUP NY CORP. A/K/A ROCK GROUP CORP.

Defendant.

----------X

ROCK GROUP NY CORP.

Third Third-Party
Index No. 595832/2020

Plaintiff,

-against-

MAGA CONTRACTING CORP.

Defendant.

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 006) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 189, 191, 192, 193, 194, 195, 196, 197, 198, 206, 207, 208, 212, 213, 214, 215, 216, 217, 218, 219, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 260, 261, 262, 263, 264, 265, 269, 270, 271, 272, 273, 274, 275, 279

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 190, 199, 200, 201, 202, 203, 204, 205, 209, 210, 211, 220, 221, 222, 223, 224, 225, 236, 237, 238, 239, 240, 255, 256, 257, 258, 259, 266, 267, 268, 276, 280

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325

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

This action arises out of injuries allegedly sustained by plaintiff while working at a construction site. Plaintiff moves for summary judgment, defendants oppose, cross-move and move separately for summary judgment. Based on the reasons set forth below, plaintiff's motion is granted. The Court will discuss defendants' motions in turn[1].

Facts

On July 17, 2017, One Boerum Development Partners LLC ("One Boerum") signed a contract with Noble Construction Group ("Noble") for the redevelopment of the property located at 1 Boerum Place Brooklyn, NY, including the demolition of the existing structure followed by construction of a new residential tower. Noble subcontracted the demolition of the existing structure to Nordest Services LLC ("Nordest"). Nordest subcontracted with Rock Group NY Corp. A/K/A Rock Group Corp. ("Rock Group") to install and remove the sidewalk shed and pipe scaffolding for the project. Rock Group subcontracted the work of erecting and dismantling the sidewalk shed and scaffolding to Maga Contracting Corp[2] ("Maga").

[1] Second third-party defendant/ third third-party plaintiff, Rock Group, has not moved for summary judgment.
[2]Maga Contracting Corp. has not appeared in this action.

On November 27, 2018, while employed by Maga, plaintiff fell from scaffolding materials stacked on top of a flatbed truck while disassembling a sidewalk shed on property owned by One Boerum. At the time of the incident, plaintiff was standing on top of the scaffolding materials, about 18 feet above the ground. As plaintiff walked on top of the materials, he tripped on a board and fell 18 feet to the street below.

It is undisputed that plaintiff had a safety harness but was not provided with any anchorages or other tie-off points to which he could attach his harness. Plaintiff was not provided with any other safety devices to prevent his fall.

Plaintiff's Motion

Plaintiff moves for summary judgment on the grounds that plaintiff was not provided with an appropriate safety device pursuant to Labor Law § 240(1).

Labor Law § 240(1)

It is well established law that "an accident alone does not establish a Labor Law § 240(1) violation or causation." (*Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280, 289 [2003]). Rather, plaintiff must show that a safety mechanism failed in order to establish liability pursuant to Section 240(1). *See id.*

This Court finds, that based on the record, plaintiff has established entitlement to judgment as a matter of law as to liability pursuant to Labor Law § 240(1)[3].

In opposition, to plaintiff's motion multiple parties cite to *Toefer v Long Is. R.R.*, 4 NY3d 399 [2005], where the Court of Appeals found the falls from flatbed trucks are not the elevation related risk that the statue contemplates. That case, however, did not involve the plaintiff

[3] The Court notes that in reply to opposition papers plaintiff requested this Court grant summary judgment as to its Labor Law § 241(6) claim, although plaintiff's initial moving papers did not put the parties on notice of plaintiff's intent to seek judgment under that statute the Court will discuss plaintiff's claim as the parties have each sought dismissal as to that claim.

standing on any construction material, rather the plaintiff was standing on the flatbed truck, which was 4 feet off the ground, when he was hit in the head and propelled backward off the truck, the Court found no liability pursuant to Labor Law § 240(1). Since that case was decided, many cases in the First Department have been decided that differentiate when items fall or strike a plaintiff causing them to fall as opposed to when plaintiff simply falls off the truck.

The First Department in *Myiow*, involves facts analogous to those in the instant matter, (*Myiow v City of NY*, 143 AD3d 433 [1st Dept 2016]). In *Myiow*, the plaintiff was standing on top of construction material thus the flatbed truck was no longer just a 4-foot height differential, it became a 13–14-foot height differential. The First Department held that plaintiff met its burden to establish entitlement to judgment on the Labor Law § 240(1) claim by showing that "he was provided with a safety harness, but that it proved to be inadequate because there was no location where the harness could be secured." *Id* at 437.

Additionally, as to the opposing parties' contentions that the fact that plaintiff simply tripped, as opposed to the fall being caused by a defective work area, is a dispositive issue, the First Department has stated "plaintiff's inability to recall how he fell is irrelevant, since the evidence establishes that plaintiff fell off the truck and it is undisputed that no safety devices were provided" (*Phillip v 525 E. 80th St. Condominium*, 93 AD3d 578, 579 [1st Dept 2012]). In *Phillip*, plaintiff was standing on scaffolding material, on a flatbed truck and fell off the truck, plaintiff did not recall what caused him to fall.

As the law in this department is clear, plaintiff has established entitlement to judgment as a matter of law on his Labor Law § 240(1) claim by showing that he was provided an inadequate safety device, namely a harness with no anchorages or tie off points, plaintiff's motion for summary judgment is granted.

Labor Law §241(6)

It is well settled law that for there to be liability pursuant to Labor Law Section 241(6), there must be a violation shown of the Industrial Code. *See e.g., Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993] (§241(6) imposes a non-delegable duty upon owners and general contractors and their agents for violation of the statute).

Plaintiff alleges in his supplemental bill of particulars that the defendants violated Industrial Code 12 NYCRR 23-1.16(b). This section provides:

> (b) Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet.

Id.

The Court has searched the record and determined that plaintiff is entitled to summary judgment on its Labor Law § 241(6). The arguments in opposition are predicated on the underlying argument that plaintiff's claim pursuant to Labor Law § 240(1) is not viable. As the Court here has determined that claim is viable, there is no substantive basis provided by defendants to dismiss this claim. According, plaintiff is granted judgment as a matter of law as to his claims pursuant to a violation of Labor Law § 241(6).

Nordest's Cross-Motion

Defendant/second third party plaintiff, Nordest, cross-moves for summary judgment with respect to its third-party claim for contractual indemnification as against Rock Group, dismissing

plaintiff's complaint and all claims as against it. For the reasons, set forth below Nordest's motion is granted in part.

Preliminarily, the Court notes that Rock Group did not oppose the portion of Nordest's motion that sought dismissal of Rock Group's cross claims for contractual indemnification, common law indemnification and contribution. Accordingly, that portion of Nordest's motion is granted without opposition.

At this point, although there here has not been any evidence adduced demonstrating that Rock Group failed to comply with Labor Law §240 or that Rock Group was negligent in any way, the fact remains that a violation of Labor Law §240(1) has occurred and there is an issue of fact as to whether Rock Group or its subcontractor, Maga, is liable for the violation. Since the purported indemnification provision in the subcontract between Nordest and Rock Group requires proof of Rock Group's negligence, or its subcontractor's negligence, the Court finds that there are questions of fact as to whether Rock Group or its subcontractor were negligent in the happening of the underlying incident, thus there is a question regarding whether the indemnification clause of the contract was triggered. Accordingly, the portion of Nordest's motion seeking summary judgment as to its claim for contractual indemnification as against Rock Group is denied.

Labor Law § 200

It is well-settled law that an owner or general contractor will not be found liable under common law or Labor Law § 200 where it has no notice of any dangerous condition which may have caused the plaintiff's injuries, nor the ability to control the activity which caused the dangerous condition. *See Russin v Picciano & Son*, 54 NY2d 311[1981]; *see also Rizzuto v*

Wenger Contr. Co., 91 NY2d 343, 352 [1998]; *Singleton v Citnalta Constr. Corp.*, 291 AD2d 393, 394 [2002].

Moreover, "General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law § 200." (*Dos Santos v STV Engrs., Inc.*, 8 AD3d 223, 224, [2004], *lv denied,* 4 NY3d 702, 790 [2004]).

The Court finds that Nordest has established entitlement to dismissal of this claim against it. Nordest has established that did not have anyone present on site when the accident happened, it did not provide any material or equipment to the workers and it did not control or direct the work that was being performed by plaintiff's employer, at the time of the accident. Furthermore, there is no evidence nor any allegation of any defective condition on site that caused the accident. Plaintiff does not appear to oppose this portion of Nordest's motion. Plaintiff does not appear to oppose this portion of any defendants' motion. Accordingly, plaintiff's Labor Law § 200 claim is dismissed.

It is undisputed that Nordest was not on site, and had not been on site, for approximately two weeks prior to the subject incident, and Nordest was not the general contractor, nor did they control the means and methods of the work performed by the plaintiff.

Nordest's motion to dismiss all claims against it is granted in part, to the extent that only Noble's cross claims survive the instant motion. As stated above, there are questions of fact as to the negligence of Rock Group and Maga.

One Boerum's Motion for Summary Judgment *Mot. Seq. 007*

Defendant/third party plaintiff, One Boerum moves for summary judgment seeking an order dismissing plaintiff's claims pursuant to Labor Law §200 and Labor Law §241(6),

dismissing defendants', Nordest and Noble, cross claims, and dismissing third-party defendant's, Rock Group, cross claims and counter claims. One Boerum's motion is granted in part.

Labor Law § 200

As stated above, this portion of One Boerum's motion is granted without opposition.

Labor Law §241(6)

For the reasons stated above, this portion of One Boerum's motion is denied.

Cross Claims and Counter Claims

For the reasons stated above, the Court find that there are questions of fact that preclude dismissal of Nordest's, Noble's and Rock's cross claims and counter claims and preclude this Court from granting One Boerum summary judgment as to its cross claims against Nordest and Rock Group. The Court does note however, that the portions of One Boerum's motion that seeks dismissal of Rock Group's counter claims and Nordest's cross claims are unopposed, thus that portion of the motion is granted.

Noble's Motion for Summary Judgment *Mot. Seq. 008*

Noble moves for an order dismissing plaintiff's Labor Law claims pursuant to Labor Law §200[4], §240(1) and §241(6), granting summary judgment as to Noble's cross claims for contractual indemnification as against defendant, Nordest and third-party defendant, Rock Group and dismissing all cross claims as to Noble. Noble's motion is denied.

At the time of plaintiff's accident, November 27, 2018, Noble was no longer on site. While the crux of defendant's argument is that they were not on site, and had not been on site, for approximately two weeks prior to the subject incident, there is still a question as to whether Nobel *should* have been there as the general contractor of the project.

[4] As stated above, plaintiff claims pursuant to Labor Law §200 are dismissed as against all the moving defendants.

As stated above, plaintiff has been granted summary judgment on its claims pursuant to Labor Law§240 (1) and §241(6), thus Noble's motion for dismissal of those claims is denied.

As to Noble's motion for contractual indemnification as against Rock Group, the Court finds that Noble has failed to establish its entitlement to the relief sought. Noble's answer does not assert any cross claims as against Rock Group, accordingly that portion of Noble's motion is denied.

Accordingly, it is hereby

ORDERED that the plaintiff is granted summary judgment, mot. seq. 006, as to its Labor Law § 240(1) claim and Labor Law § 241(6) claim, predicated on the violation of Industrial Code 12 NYCRR 23-1.16(b); and it is further

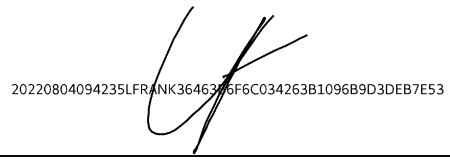
ORDERED that plaintiff's Labor Law § 200 claim is dismissed as against Noble, Nordest and One Boerum; and it is further

ORDERED that Nordest' cross motion, mot. seq. 006, is granted summary judgment to the extent that the plaintiff's complaint is dismissed in its entirety as against it only, and One Boerum's cross claims are dismissed as against it but denied as to its indemnification claims against Rock Group and denied as to dismissal of Noble's cross claims; and it is further

ORDERED that One Boerum's motion for summary judgment, mot. seq. 007 is granted in part to the extent that Noble's, Nordest's and Rock Group's claims are dismissed as against it; and it is further

ORDERED that Noble's motion for summary judgment, mot. seq. 008 is granted in part to the extent that Labor Law § 200 claim is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.



8/4/2022
DATE

LYLE E. FRANK, J.S.C.

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