SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD LATIN** **PART** **46V**

Justice

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LEONIDAS ZAMPLAKOS,

Plaintiff,

- v -

JACOB'S FIRST, LLC,BLDG MANAGEMENT CO., INC.,CREATIVE TEAM INTERIORS INC.,

Defendant.

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INDEX NO. 158876/2019

MOTION DATE 07/28/2022

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

JACOB'S FIRST, LLC, BLDG MANAGEMENT CO., INC.

Plaintiff,

-against-

PARASKEVAS KOURIS PAINTING, INC.

Defendant.

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Third-Party
Index No. 595531/2020

The following e-filed documents, listed by NYSCEF document number (Motion 004) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96

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

Upon the foregoing documents, it is ordered that defendants' motion for summary judgment is determined as follows:

Plaintiff commenced the instant action alleging that he was injured when he fell from a scaffold while working as a painter at 362 Fifth Avenue, New York, New York on April 27, 2018. Plaintiff was employed by Paraskevas Kouris Painting, Inc. ("PKP"), which was retained by defendant Creative Team Interiors, Inc. ("Creative"), the general contractor for the owner defendants. With this motion, defendants seek summary judgment dismissing plaintiff's complaint that is predicated on violations of Labor Law §§§ 200, 240(1), and 241(6)

A. Labor Law § 200 and Common-Law Negligence

Defendants argue that plaintiff's Labor Law § 200 and common-law negligence should be dismissed because they did not exercise any control over plaintiff's work, and they did not create or have notice of any dangerous condition. In their moving papers they define the dangerous condition as the condition of the scaffold and argue that they did not have notice of any condition and that only PKP directed and supervised the means and methods of his work.

In response, plaintiffs contend that the accident resulted not from the means and methods of the work, but from a dangerous condition at the workplace. Specifically, plaintiff alleges that the accident was caused by the scaffold getting stuck on a large piece of plywood that should have been removed and was covered by paper after the carpenters the carpenters intentionally put down to protect the floor. It is undisputed that the carpenters were employees of Creative and placed the paper down at the beginning of the project.

It is well settled that Labor Law § 200 is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). "Claims under Labor Law § 200 and the common law fall under two categories: 'those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed'" (*Jackson v Hunter Roberts Constr., L.L.C.*, -- AD3d -- , 2022 NY Slip Op 03321, *1 [1st Dept 2022], quoting *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]).

> "Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it. Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work"

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

Here, it is alleged that plaintiff's accident resulted from an unsafe scaffold and a covered piece of plywood on the floor.

To the extent that the accident stemmed from the scaffold, defendants have demonstrated that they did not "actually exercise[] supervisory control over the injury-producing work" (*id.*). It is undisputed that the person who actually supervised and directed plaintiff's work was Paraskevas Kouris.

Nevertheless, to the extent that plaintiff's accident resulted from the covered plywood on the floor, the defendants have failed to establish prima facie entitlement to summary judgment. The covered plywood "was not a condition created by the manner in which the work was performed by plaintiff or his employer but was rather a condition that already existed prior to plaintiff's arrival on the . . . floor that day" (*Prevost v One City Block LLC*, 155 AD3d 531, 534 [1st Dept 2017]). Defendants' conclusory assertion that they neither caused or created the dangerous condition or had notice of the condition that caused the accident involving plaintiff is insufficient. Moreover, Taras on behalf of Creative testified that it was Creative's carpenters that put down the paper over the floor. Further, the movants have failed to establish when the area was last inspected prior to the accident, or that the plywood could not have been detected based upon a reasonable inspection (*see Ladignon v Lower Manhattan Dev. Corp.*, 128 AD3d 534, 535 [1st Dept 2015] [triable issues of fact as to constructive notice of the defective condition since the record was unclear as to when the staircase was last inspected prior to plaintiff's fall]). Defendants cannot meet their burden by pointing out gaps in plaintiffs' proof (*see McCullough v One Bryant Park*, 132 AD3d 491, 492 [1st Dept 2015]). Accordingly, the branch of defendants motion as to

these claims is denied, "regardless of the sufficiency of [plaintiffs'] opposing papers" (*Winegrad*, 64 NY2d at 853).

In light of the above, plaintiff has valid Labor Law § 200 and common-law negligence claims against defendants to the extent that it is determined that his accident resulted, at least in part, from the covered plywood.

B. Labor Law § 240 (1)

Defendants argue in support of their motion that the scaffold provided was adequate and that plaintiff was the sole proximate cause of his accident. In support they submit the deposition testimony of his employer and supervisor, Paraskevas Kouris. Kouris averred that he provided the plaintiff with the only equipment he needed for the job of painting the walls, which included ladders. He also asserted that he specifically instructed the plaintiff not to use the scaffold that did not belong to PKP. Additionally, he added that even if the ladders were necessary, it would be Kouris' son, who was also working that day, who would paint from the ladder given the plaintiff's weight.

Labor Law § 240 (1), commonly known as the Scaffold Law, provides, in relevant part, as follows:

> "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."

"Labor Law § 240 (1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]; *see also Misseritti v Mark IV Constr. Co., Inc.*, 86 NY2d 487, 491 [1995], *rearg denied* 87 NY2d 969

[1996]). To prevail on a Labor Law § 240 (1) cause of action, the plaintiff must establish that the statute was violated, and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287-289 [2003]). "[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Given that a core objective of Labor Law § 240 (1) is to prevent a worker from falling, a plaintiff demonstrates a statutory violation as a matter of law where he falls from a scaffold (*see Strojek v 33 East 70th Street Corp.*, 128 AD3d 490 [1st Dept 2015]; *Garcia v 1122 E. 180th St. Corp.*, 250 AD2d 550, 551 [1st Dept 1998]).

The legislative intent behind the statute is to place "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citations omitted]). Consequently, a plaintiff's comparative negligence is not a defense to a Labor Law § 240 (1) claim (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]).

There are two main defenses to a Labor Law § 240 claim: (1) the recalcitrant worker defense; and (2) the sole proximate cause defense (*see Torres v 1148 Bryant Ave., Inc.,* 81 AD3d 467 [1st Dept 2011]; *Cordeiro v Shalco Investments,* 297 AD2d 486, 488 [1st Dept 2002]). A defendant wishing to invoke the recalcitrant worker defense must show that the injured worker refused to use the safety devices that were provided by the owner or employer (*see Stolt v General Foods Corp.,* 81 NY2d 918 [1993]). As to whether plaintiff was the sole proximate cause of his injury, to raise such an issue of fact in a § 240(1) claim, defendants must present evidence that

"adequate safety devices [were] available; 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" (*see Auriemma v Biltmore Theatre, LLC,* 82 AD3d 1, 5 [1st Dept 2011]). In other words, under this defense, a "defendant can avoid liability under the statute if it can demonstrate that it did not violate the labor law, and that the proximate cause of the plaintiff's accident was plaintiff's own negligence" (*see Blake,* 1 NY3d 280).

In opposition to this branch of the motion, plaintiff points to his own deposition testimony. He testified that his task for the day was "cutting," which means separating the wall from the ceiling with paint. He asserted that he was specifically instructed by his boss, Kouris, to take the other company's scaffold in order to perform the task. Moreover, he explained that he was the only painter on the site that day.

Thus, triable issues of fact remain as to whether plaintiff was the sole proximate cause of his accident. Accordingly, that branch of defendants' motion for summary judgment under Labor Law § 240 (1) is denied.

C. Labor Law § 241 (6)

Labor Law § 241 (6) provides as follows:

> "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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law § 241 (6) imposes a "nondelegable duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety'" to construction workers (*Rizzuto v L.A. Wenger Constr. Co.*, 91 NY2d 343, 348 [1998]). Labor Law § 241 (6) is not self-

executing because it depends upon an outside source, the Industrial Code (*Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982], *rearg denied* 56 NY2d 805 [1982]). The Court of Appeals has held that,

> "for purposes of the nondelegable duty imposed by Labor Law § 241 (6) and the regulations promulgated thereunder, a distinction must be drawn between the provisions of the Industrial Code mandating compliance with concrete specifications and those that establish general safety standards by invoking the '[g]eneral descriptive terms' set forth and defined in 12 NYCRR 23-1.4 (a). The former give rise to a nondelegable duty, while the latter do not"

(*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]).

Thus, to prevail under Labor Law § 241 (6), the plaintiff must plead and prove the violation of a specific and applicable Industrial Code provision and show that the violation was a proximate cause of the accident (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]). A "plaintiff's failure to identify a violation of any specific provision of the State Industrial Code precludes liability under Labor Law § 241 (6)" (*Kowalik v Lipschutz*, 81 AD3d 782, 783 [2d Dept 2011] [internal quotation marks and citation omitted]).

. In opposition to defendants' motion, plaintiff only relies on 12 NYCRR § 23-1.7(e)(2), § 23-1.15, and § 23-5.1 – 5.6. Accordingly, plaintiff has abandoned reliance on the remaining Industrial Code provisions cited in their bill of particulars (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]).

12 NYCRR § 23-1.7(e)(2)

12 NYCRR § 23-1.7(e)(2) states:

> (2) Working Areas. The parts of floors, platforms and similar areas where persons walk or pass shall be kept free from accumulations of dirt and debris and rom scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Here, triable issues of fact remain as to whether the plywood that was covered was an accidental remnant or an integral part of the floor preservation work. Therefore, defendants are not entitled to dismissal of this claim.

12 NYCRR § 23-1.15

This provision of the industrial code deals with how safety railings to scaffolds must be constructed. Here, plaintiff testified simultaneously that the scaffold had railings at the top but was also missing railings. As a result, triable issues of fact remain as to whether the railings on the scaffold complied with this provision if plaintiff was instructed to use the scaffold. Therefore, defendants are not entitled to dismissal of this claim.

12 NYCRR § 23-5.1 – 5.6

All of these rules have to do with standards for scaffolds. Defendants point out that we do not know what scaffold plaintiff used or how it failed, and as a result cannot determine if any of these standards are sufficiently specific. Nevertheless, defendants bear the burden of demonstrating that these provisions do not apply. Therefore, defendants are not entitled to dismissal of this claim.

Accordingly, defendants' motion is granted solely to the extent that plaintiff's Labor Law § 241(6) claims predicated on 12 NYCRR § 23-1.5, § 23-1.16, and § 23-1.4 are dismissed, and the motion is denied in all other respects.

This constitutes the decision and order of this Court.

10/6/2022
DATE

RICHARD LATIN, 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**