SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **47**

Justice

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KEITH KIRK,

Plaintiff,

- v -

STRUCTURE TONE LLC,200 PARK L.P., TISMAN SPEYER PROPERTIES, INC.,

Defendants.

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INDEX NO. 151733/2020

MOTION DATE 03/06/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

STRUCTURE TONE LLC

Plaintiff,

-against-

ADMORE AIRCONDITIONING CORP., ALFA PIPING CORP

Defendants.

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Third-Party
Index No. 595773/2020

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

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

In this personal injury Labor Law action plaintiff Keith Kirk moves, pursuant to CPLR § 3212, for partial summary judgment on the issue of liability on his claims under Labor Law §§ 240 (1) and 241 (6) (motion seq no 002). Defendants Structure Tone LLC (Structure Tone), 200 Park, L.P. (200 Park), and Tishman Speyer Properties, Inc. i/s/h/a Tishman Speyer Properties, Inc. (Tishman) cross-move, pursuant to CPLR § 3212, for summary judgment: (1) dismissing all claims against Tishman; (2) denying plaintiff's motion for partial summary judgment on his Labor Law §§ 240 (1) and 241 (6) claims; and (3) dismissing plaintiff's Labor Law § 200 claim as against Structure Tone, 200 Park, and Tishman.

BACKGROUND

Plaintiff was injured on August 13, 2019, at a construction site located at 200 Park Avenue, New York, New York 10017 (the building), owned by 200 Park and managed by Tishman (Pippo Affirm, ¶¶ 6, 30, NYSCEF Doc No 43; Statement of Material Facts, ¶ 5, NYSCEF Doc No 50). Structure Tone was hired as the general contractor to oversee the building's construction projects (NYSCEF Doc No 43, ¶ 12). On the date of the accident, plaintiff was working for non-party Alfa Piping Corp. (Alfa) as a steamfitter whose job was to install air conditioning units and brazing (*i.e.,* a process in which two or more metal items are joined together) in the building (*id.* at ¶ 9). While attempting to braze a pipe, plaintiff climbed up to the fifth rung of an 8-foot ladder that was already opened and not secured or tied to anything (*id.* at ¶¶ 13-17). This placed defendant's feet approximately five feet in the air (*id.* at ¶ 20). Plaintiff testified that he fell as a result of the ladder crumbling from underneath him due to the right safety brace on the ladder buckling inward (Plaintiff's EBT, pp 64-65, 72-74, NYSCEF Doc No 63). Plaintiff also testified that he looked over the ladder before climbing it by checking that the braces were locked down and steady in order for the ladder to stay erect and open (*id.* at p 104). As a result of the accident, plaintiff sustained a shoulder injury requiring surgical intervention (*id.* at p 28).

DISCUSSION

"It is well settled that 'the proponent of a summary judgment motion 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 issues of fact'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers"

(*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-54 [1st Dept 2010]). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-11 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined "in the light most favorable to the non-moving party" (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

Responsible Parties

As a preliminary matter, Tishman argues that as the building's management company, it is not a responsible party under the Labor Law because it does not meet the statute's definition of an owner, general contractor, or agent of either. There is no dispute that 200 Park, as the building's fee owner, and Structure Tone, as the construction project's general contractor, are considered responsible parties under the Labor Law.

Liability under the Labor Law can only be imposed upon owners, general contractors, and their agents (*Barreto v Metro. Transp. Auth.*, 25 NY3d 426, 433 [2015]). "Courts have held that the term 'owner' is not limited to the titleholder of the property where the accident occurred and encompasses a [party] 'who has an interest in the property and who fulfilled the role of

owner by contracting to have work performed for [its] benefit'" (*Scaparo v Vil. of Ilion*, 13 NY3d 864, 866 [2009], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]). In addition, a party may be held liable as a statutory agent if it was delegated the authority to supervise and control the work that gave rise to the injury (*see Solano v Skanska USA Civ. Northeast Inc.*, 148 AD3d 619, 619-20 [1st Dept 2017]). As noted in *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-18 (1981) (citations omitted),

> [a]lthough sections 240 and 241 now make nondelegable the duty of an owner or general contractor to conform to the requirement of those sections, the duties themselves may in fact be delegated. When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241

(*see also Santos v Condo 124 LLC*, 161 AD3d 650 [1st Dept 2018]).

Here, Tishman has demonstrated that it cannot be held liable under the Labor Law. There is no evidence that Tishman had an interest in the property or was involved in the construction work (*see* Landstrom Aff, NYSCEF Doc No 58). The only evidence submitted in response to Tishman's showing is plaintiff's testimony that "Tishman a lot of times subbed out jobs to mechanical companies" and that he "guess[ed Tishman was a] general contractor" (NYSCEF Doc No 63, p 27). Such vague assertions do not demonstrate a triable issue of fact (*see Glassman v Weinberg*, 154 AD3d 407 [1st Dept 2017]). Consequently, contrary to plaintiff's contention, Tishman is not an agent because it did not have the "ability to control the activity which brought about the injury" (Landstrom Aff, NYSCEF Doc No 58; *Walls v Turner Constr. Co.*, 4 NY3d 861, 863-64 [2005]; *see also Russin*, 54 NY2d at 317-18; *Reyes v Bruckner*

Plaza Shopping Ctr. LLC, 173 AD3d 570, 571 [1st Dept 2019]). Accordingly, Tishman is entitled to dismissal of plaintiff's Labor Law §§ 240 (1), 241 (6), and 200 claims as against it.

Labor Law §§ 240 (1), 241 (6)

In support of his motion for summary judgment on his Labor Law §§ 240 (1) and 241 (6) claims, plaintiff submits his attorney's affirmation which refers to testimony given by plaintiff at his deposition (NYSCEF Doc No 43). However, while the deposition testimony was referred to, plaintiff failed to attach a copy of the transcript. Therefore, while plaintiff attaches the deposition transcript to his opposition to defendant's cross motion, he cannot "remedy a fundamental deficiency in the moving papers by submitting evidentiary material with the reply" (*Ford v Weishaus*, 86 AD3d 421, 422 [1st Dept 2011]; *see also Benedetto v Hyatt Corp.*, 203 AD3d 505, 506 [1st Dept 2022] [internal quotations omitted] ["As with any summary judgment motion, the evidence submitted both in support of and in opposition must be tendered in admissible form."]).

Accordingly, plaintiff's motion for summary judgement as to liability on his Labor Law §§ 240 (1) and 241 (6) claims will be denied.

Labor Law § 200

Defendants cross-move to dismiss plaintiff's Labor Law § 200 claim against them by asserting that plaintiff was an employee of Alfa Piping Corp., a separate and distinct entity from all named defendants, they did not have actual or constructive notice of the defective condition of the ladder since there was no visible defect with it, and they did not supervise and control the injury-producing work. Plaintiff responds that defendants fail to put forth sufficient evidence proving lack of notice of the ladder's defective condition.

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" (*Singh v Black*

Diamonds LLC, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

> All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see Ruisech v Structure Tone Inc.*, 208 AD3d 412, 414 [1st Dept 2022]; *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-44 [1st Dept 2012] ["Claims for personal injury under [section 200] and the common law fall into two broad 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."]).

Where a plaintiff's claim implicates the means and methods of the work, an owner or general contractor will not be held liable under Labor Law § 200 unless "it actually exercised supervisory control over the injury-producing work" (*Jackson v Hunter Roberts Constr., L.L.C.*, 205 AD3d 542, 543 [1st Dept 2022] [internal quotation marks and citation omitted]; *Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012] ["liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work"]). "General supervisory authority is insufficient to constitute supervisory control" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). However, where a plaintiff's injuries stem not from the manner in which the work was being performed, but rather "from a dangerous condition on the premises,

a general contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition" (*Urban v No. 5 Times Sq. Dev., LLC*, 553, 556 [1st Dept 2009] [internal quotations omitted]).

Here, the means and methods test is implicated since the defective ladder was provided not by defendants, but rather by a non-party subcontractor (*see* Maierle EBT, p 21, NYSCEF Doc No 57; *Ortega v Puccia*, 57 AD3d 54, 62 [2d Dept 2008] ["In *Persichilli*, the Court of Appeals further stated that while a subcontractor must furnish safe ladders and scaffolds to its employees, a subcontractor's failure to provide safe appliances does not render the 'premises' unsafe or defective. The allegedly defective [ladder] should instead be viewed as a device involving the methods and means of the work."]).

Defendants have met their prima facie burden to dismiss plaintiff's Labor Law § 200 claim. Defendants submit sworn testimony from Mark Landstrom, general manager of Tishman, and Christopher Maierle, superintendent of Structure Tone, that "[n]either Structure Tone nor 200 Park or Tishman directed, controlled, or supervised the work that plaintiff . . . performed on this project" and did not "instruct[] Plaintiff to use any particular tools or techniques in performing his work on the Project" (Maierle Aff, ¶¶ 4, 6, NYSCEF Doc No 60; NYSCEF Doc No 58, ¶¶ 12, 13, 15). Additionally, plaintiff has failed to raise a triable issue of fact since he testified that the only person who gave him direct instructions was Huey Dung, the foreman from Alfa, noting "once they assign[] a foreman, . . . nobody else can give you instruction" (NYSCEF Doc No 63, pp 34-35). Plaintiff "d[id not] really deal with [Structure Tone]" and "all safety training c[ame] through the union" (*id.* at pp 22, 45). Therefore, defendants did not exercise the type of actual supervisory control as contemplated by the statute in order to hold an owner or general contractor liable under the manner and means test (*Cahill v Triborough Bridge & Tunnel*

Auth., 31 AD3d 347, 350 [1st Dept 2006] ["there is no evidence that anyone employed by defendant instructed plaintiff in the manner of performing his work or how to utilize safety devices while so engaged"]; *Dalanna v City of New York*, 308 AD2d 400, 400 [1st Dept 2003] ["There is no evidence that defendant general contractor gave anything more than general instructions on what needed to be done, not how to do it, and monitoring and oversight of the timing and quality of the work is not enough to impose liability under section 200"]).

Accordingly, defendants' cross-motion to dismiss plaintiff's Labor Law § 200 claim as against defendants will be granted.

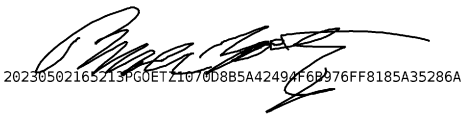
Based on the foregoing, it is hereby

ORDERED that Tishman's cross motion to dismiss plaintiff's Labor Law §§ 240 (1), 241 (6), and 200 claims as against it is granted and those claims are dismissed and the clerk shall enter judgment accordingly with costs and disbursements; and it is further

ORDERED that plaintiff's motion for summary judgment as to liability on his Labor Law §§ 240 (1) and 241 (6) claims is denied; and it is further

ORDERED that defendants' cross-motion for summary judgment seeking dismissal of plaintiff's Labor Law § 200 claim is granted and plaintiff's Labor Law § 200 claim is dismissed as against all defendants; and it is further

ORDERED that the remainder of the action is severed and continued.



5/2/2023
DATE

PAUL A. GOETZ, 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