SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 73
----------X
JOHN CAPOZZOLO,

Plaintiff,

-against-

NEW YORK CONCRETE CORP., TURNER CONSTRUCTION COMPANY, NEW YORK UNIVERSITY REAL ESTATE CORPORATION and NEW YORK UNIVERSITY,

Defendants.
----------X
NEW YORK CONCRETE CORP., TURNER CONSTRUCTION COMPANY, NEW YORK UNIVERSITY REAL ESTATE CORPORATION and NEW YORK UNIVERSITY,

Third-Party Plaintiffs,

- against –

LANGAN ENGINEERING, ENVIRONMENTAL SURVEYING, LANDSCAPE ARCHITECTURE & GEOLOGY, D.P.C.,

Third-Party Defendant(s).
----------X

Index No.: 508786/2019
Motion Date: 1-9-23
Mot. Seq. No.: 6, 7

DECISION/ORDER

Upon the following papers, listed on NYSCEF as document numbers 109-127, 131-150, 159-161 were read on these motions:

In this action to recover damages for personal injuries, the plaintiff, JOHN CAPOZZOLA, in motion sequence # 6, moves for an order pursuant to CPLR 3212, granting him partial summary judgment against defendants, NEW YORK CONCRETE CORP. ("NYCC"), on his negligence and Labor Law § 200 claim, and against TURNER CONSTRUCTION COMPANY ("Turner"), NEW YORK UNIVERSITY REAL ESTATE CORPORATION ("NYUREC") and NEW YORK UNIVERSITY("NYU") on his and Labor Law § 240(1) claim. In motion sequence # 7, defendants/third party-plaintiffs NYCC, Turner, NYUREC and NYU cross-move for an order pursuant to CPLR 3212, granting them summary

006
007

judgment and dismissing the complaint in its entirety. The two motions are consolidated for disposition.[1]

Background:

The plaintiff, JOHN CAPOZZOLO, commenced this action claiming that he sustained injury on August 23, 2018, while working at a construction site located at 81 Mercer Street in Manhattan, when an aluminum mason float handle that was approximately 20' long, which had been leaning up against a subsurface excavation wall, tipped over and fell on his hard hat. The plaintiff was employed by third-party defendant, Langan Engineering, Environmental Surveying, Landscape Architecture & Geology, D.P.C. and was conducting an inspection of the subsurface wall at the time of the accident to make sure the wall was being built done pursuant to the plans. The Plaintiff commenced the action against NYC and NYUREC, the owners of the property, and Turner, the general contractor, alleging causes of action under Labor Law §§ 240(1) and 241(6). He also sued NYCCC, the concrete subcontractor, alleging common law negligence and a claim under Labor Law § 200.

The mason float and 20' handle was being used by the employees of NYCC laborers to level out the concrete floors after they were poured. According to Mr. Kenneally, Turner's superintendent, NYCC laborers were actually working in the area of the accident when the accident occurred. He maintained that it was normal for the NYCC laborers to rest the poles against the wall when they were not being used. Mr. Kenneally did not belief that this temporary condition was dangerous or hazardous and knew of no prior similar incidents.

NYCC's labor foreman, Stanislaw Olechowski, confirmed that the mason floats and aluminum handles were used by NYCC laborers at the job site and that when they were not in use, the NYCC laborers would lean them up against the excavation wall. He explained this was done because the work was ongoing (i.e.- the tool would need to be used again in a matter of minutes. He testified that the only other option was to place them on the ground where they

[1] On January 9, 2023, when the motions were heard, the undersigned issued a short form order which dismissed plaintiff's claims under Labor Law § 241(6) and reserved decision on all other branches of the motions.

would become a tripping hazard. Mr. Olechowski, as Kenneally, did not believe that the mason float handles when leaning up against the wall constituted a dangerous or hazardous condition since the handles were extremely light. He estimated that the mason float handle that likely struck the plaintiff consisted of three six-foot sections, and that each section weighed less than a pound.

In support of that branch of plaintiff's motion partial summary judgment on his Labor Law § 240(1) claim, the plaintiff submitted, among other things, the affidavit of Eric Heiberg, P.E., a registered Professional Engineer in New York, New Jersey, Connecticut, Pennsylvania, Virginia, and Massachusetts and who has a bachelor's degree in Mechanical Engineering. Mr. Heiberg opined, in sum and substance, that the pole should have been secured by a temporarily placed steel "gear hanger", a lightweight rope or a sling, which could have been tied to any one of the many appurtenances which were laying against or jutting out along the subsurface excavation wall.

In opposition, the defendants submitted the affidavit of Martin Bruno, CHST, a purported expert in worksite safety, who opined that no devices called under Labor Law §240(1) would have prevented the incident since the mason float handle was not an object that required securing at the time of the alleged accident for the purpose of the work that was taking place. He stated that since the mason float handle was actively use at the time of the alleged accident and was only temporarily leaned up against the excavation wall while another layer of concrete was poured at which time the mason float would again be used, the mason float handle was not an object that required securing.

Discussion:

That branch of motion sequence # 6 in which the plaintiff seeks summary judgment on his negligence and Labor Law § 200(1) claims against NYCC is DENIED. Labor Law § 200 is a codification of the common-law duty of owners, contractors, and their agents to provide workers with a safe place to work (*see Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 352, 670 N.Y.S.2d 816, 693 N.E.2d 1068; *Doto v. Astoria Energy II, LLC*, 129 A.D.3d 660, 663, 11 N.Y.S.3d 201; *Annicaro v. Corporate Suites, Inc.*, 98 A.D.3d 542, 544, 949 N.Y.S.2d 717). "Where, as here, the plaintiff contends that his or her injuries arose not from the manner in which

the work was performed, but rather from an allegedly dangerous condition at the work site, liability under Labor Law § 200 and common-law negligence may be imposed upon a subcontractor where it had control over the work site and either created the allegedly dangerous condition or had actual or constructive notice of it" (*Vita v. New York Law Sch.*, 163 A.D.3d 605, 607, 80 N.Y.S.3d 387; *see Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 317, 445 N.Y.S.2d 127, 429 N.E.2d 805). Generally, the issue of whether a dangerous condition existed depends on the particular facts of each case, and is properly a question of fact for the jury (*Guidone v. Town of Hempstead*, 94 A.D.3d 1054, 1055, 942 N.Y.S.2d 632; *see Rogers v. 575 Broadway Assoc., L.P.*, 92 A.D.3d 857, 858, 939 N.Y.S.2d 517; *Sokolovskaya v. Zemnovitsch*, 89 A.D.3d 918, 919, 933 N.Y.S.2d 90; *Richardson v. JAL Diversified Mgt.*, 73 A.D.3d 1012, 1013, 901 N.Y.S.2d 676). Here, while there is ample evidence that NYCC had control over that portion of the work site where the accident occurred and that its employees created and had actual and constructive notice of the condition that caused plaintiff's accident (i.e. – the unsecured mason float handle which was leaning against the subsurface excavation wall), there are triable issue of fact as to whether the unsecured mason float handle was a dangerous condition. As stated by the Court of Appeals: "[n]egligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination. Only if it can be concluded as a matter of law that defendant was negligent, may summary judgment be granted in a negligence action" (*Ugarriza v. Schmieder*, 46 N.Y.2d 471, 474, 386 N.E.2d 1324, 1325). The matter before the Court is not such a case.

That branch of motion sequence # 6 in which the plaintiff seeks summary judgment against Turner and NYU on his Labor Law § 240(1) claim is DENIED. "The extraordinary protections of Labor Law § 240(1) extend only to a narrow class of special hazards and do 'not encompass any and all perils that may be connected in some tangential way with the effects of gravity'" (*Nieves v. Five Boro A.C. & Refrig. Corp.*, 93 N.Y.2d 914, 915–916, 690 N.Y.S.2d 852, 712 N.E.2d 1219, quoting *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 501, 601 N.Y.S.2d 49, 618 N.E.2d 82). With respect to falling object cases, "liability under Labor Law § 240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured but also where the plaintiff demonstrates that, at the time the object fell, it required securing for the purposes of the undertaking" (*Escobar v. Safi*, 150 A.D.3d at 1083, 55 N.Y.S.3d

350 [citations and internal quotation marks omitted]; *see Fabrizi v. 1095 Ave. of the Ams., L.L.C.*, 22 N.Y.3d 658, 663, 985 N.Y.S.2d 416, 8 N.E.3d 791; *Berman–Rey v. Gomez*, 153 A.D.3d 653, 655, 59 N.Y.S.3d 789). Plaintiff must also demonstrate the "object fell ... *because of* the absence or inadequacy of a *safety device* of the kind enumerated in the statute'" (*Fabrizi v. 1095 Ave. of the Ams., L.L.C.*, 22 N.Y.3d at 663, 985 N.Y.S.2d 416, 8 N.E.3d 791, quoting *Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 268, 727 N.Y.S.2d 37, 750 N.E.2d 1085). "While a plaintiff is not required to present evidence as to which particular safety devices would have prevented the injury, the risk requiring a safety device must be a foreseeable risk inherent in the work" (*Niewojt v. Nikko Constr. Corp.*, 139 A.D.3d 1024, 1027, 32 N.Y.S.3d 303 [citation omitted]; *see McLean v. 405 Webster Ave. Assocs.*, 98 A.D.3d 1090, 951 N.Y.S.2d 185).

Here, the conflicting expert affidavits raise triable issue of fact as to the mason float handle needed securing for purposes of the work being performed at the time of the accident and whether the absence or inadequacy of a *safety device* of the kind enumerated in the Labor Law § 240(1) would have prevented the accident.

That branch of motion sequence #7 in which the defendants seek summary judgment dismissing the plaintiff's Labor Law § 240(1) claim is also DENIED. As stated above, the conflicting expert affidavits raise triable issue of fact as to the mason float handle needed securing for purposes of the work being performed at the time of the accident and whether the absence or inadequacy of a *safety device* of the kind enumerated in the Labor Law § 240(1) would have prevented the accident. Further, defendants' contention that the plaintiff is not a covered person under Labor Law § 240(1) is without merit. At his deposition, the plaintiff testified as follows:

> Q. Can you explain to me exactly what happened when your accident occurred?
>
> A. Yes. I was performing a routine inspection of a subsurface wall, and as I was doing the inspection of the wall and I was bending over, looking at the wall closely, I was struck by a pole that fell over.
>
> ...
>
> Q. Is it something you do daily, weekly or about how often would you say that you typically inspect something such as a subsurface wall?

A. I did it frequently like as it was constructed. So almost daily.

Q. Who instructs you to go check on the subsurface wall? Who directs you to do that?

A. Well, I'm instructed by my employer as part of my duties.

Q. But does he tell you to do it or do you do it as part of something that's just routine?

A. I would do it as something that's routine as they build it.

Q. What's the purpose of inspecting this subsurface wall?

A. To verify the construction meets the plans.

Whether inspection falls within the purview of Labor Law § 240(1) "must be determined on a case-by-case basis, depending on the context of the work" (*Prats v. Port Auth. of N.Y. & N.J.*, 100 N.Y.2d 878, 883, 768 N.Y.S.2d 178, 800 N.E.2d 351; *see Dubin v. S. DiFazio & Sons Const., Inc.*, 34 A.D.3d 626, 627, 826 N.Y.S.2d 325; *Channer v. ABAX Inc.*, 169 A.D.3d 758, 759, 93 N.Y.S.3d 444, 446). Since the plaintiff was engaged in an inspection that was essential, ongoing, and more than mere observation (*see Dubin v. S. DiFazio & Sons Const., Inc.*, 34 A.D.3d 626, 627, 826 N.Y.S.2d 325, 326–27; *Prats v. Port Auth. of N.Y. & N.J., supra; England v. Vacri Constr. Corp.*, 24 A.D.3d 1122, 807 N.Y.S.2d 669; *Campisi v. Epos Contr. Corp.*, 299 A.D.2d 4, 7, 747 N.Y.S.2d 218; *Reisch v. Amadori Constr. Co.*, 273 A.D.2d 855, 709 N.Y.S.2d 726; *Aubrecht v. Acme Elec. Corp.*, 262 A.D.2d 994, 692 N.Y.S.2d 544; *cf. Martinez v. City of New York*, 93 N.Y.2d 322, 690 N.Y.S.2d 524, 712 N.E.2d 689) and a necessary prerequisite to the ongoing construction work, Labor Law § 240(1) applies(*see, Lombardi v. Stout*, 80 N.Y.2d 290, 590 N.Y.S.2d 55, 604 N.E.2d 117; *Mosher v. St. Joseph's Villa*, 184 A.D.2d 1000, 584 N.Y.S.2d 678; *Adams v. Alvaro Constr. Corp.*, 161 A.D.2d 1014, 557 N.Y.S.2d 584; *Cox v. LaBarge Bros. Co.*, 154 A.D.2d 947, 547 N.Y.S.2d 167; *Martin v. Back O'Beyond, Inc.*, 198 A.D.2d 479, 480, 604 N.Y.S.2d 205, 206).

Accordingly, it is hereby

ORDERED that motion sequence #s 6 and 7 are decided as indicated above.

This constitutes the decision and order of the Court.

Dated: April 28, 2023

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020