SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

----------X

ALEXIS TRAVALJA,

Plaintiff,

- v -

135 WEST 52ND STREET OWNER LLC,THE CHETRIT GROUP LLC,NEW LINE STRUCTURES, INC.,CR SAFETY AND CONSTRUCTION, CONSTRUCTION AND REALTY SERVICES GROUP, INC.,SAFETY SQUAD, INC.,

Defendant.

----------X

INDEX NO. 153366/2017

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

----------X

135 WEST 52ND STREET OWNER LLC, THE CHETRIT GROUP LLC, NEW LINE STRUCTURES, INC.

Plaintiff,

-against-

CROWNE ARCHICTECTURAL SYSTEMS, INC.

Defendant.

----------X

Third-Party
Index No. 595985/2017

HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 126, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 174

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

In this Labor Law action, plaintiff Alexis Travalja ("Plaintiff") moves for an order pursuant to CPLR 3212 granting summary judgment on her Labor Law §§ 240(1) and 241(6) causes of action against defendants 135 West 52nd Street Owner LLC ("135 West") and New Line Structures, Inc. ("New Line") and dismissing all affirmative defenses predicated upon comparative negligence and/or culpable conduct. 135 West, New Line, and defendant The Chetrit Group, LLC ("Chetrit") (collectively, "Moving Defendants") oppose the motion and

cross move for an order pursuant to CPLR 3212 granting summary judgment dismissing Plaintiff's common law and Labor Law §§ 240(1) and 241(6) causes of action as against them and for summary judgment on their third party claim for indemnification against third party defendant Crowne Architectural Systems, Inc. ("Crowne"). Plaintiff and Crowne oppose these respective branches of the cross motion.

Plaintiff's decedent and husband Bruno Travalja ("Travalja") died on September 15, 2016 after falling from the 47th floor roof of the building located at 135 West 52nd Street in Manhattan ("the building"). Travalja was at the time the owner and principal of Crowne, which had been retained by New Line to perform curtain wall and façade work on a gut renovation project at the building. New Line had in turn been contracted by 135 West to act as construction manager for the renovation.

On the day of the accident, Travalja had gone to the roof with another Crowne employee, Salvatore Massaro, and a New Line superintendent, Zane Sterling, to inspect a u-shaped metal channel near the perimeter of the roof. A glass barrier was to be set into the metal channel but was not installed at the time. An 18-inch-tall parapet wall on the far side of the metal channel was the only barrier between the rooftop terrace and the edge of the building in the relevant area of the roof (NYSCEF Doc. No. 98).

Travalja had gone to the roof with Massaro and Sterling to inspect stucco that had been applied to the barrier area on a corner in the middle of the roof's north side. The stucco had apparently blocked water drainage around the metal channel and needed to be repaired. This area had been designated as a "controlled access zone," separated from the rest of the roof by a cable. A door leading out to the terrace had a sign that read "DANGER – SAFETY HARNESS

AND LIFELINE REQUIRED – NO PUBLIC ACCESS – CONSTRUCTION WORKERS ONLY. ALL WORKERS MUST BE TIED OFF" (NYSCEF Doc. No. 155).

Travalja was wearing a safety harness at the time, but it was not attached to any safety lines, tie-offs, or anchor points. Massaro testified that neither he nor Sterling, the New Line superintendent, were wearing safety harnesses, and that there were no lifelines or anchor points in the area on which one could hook a safety harness in the vicinity of the section of parapet wall being inspected. He further stated that Travalja had approached the parapet wall and crouched down to examine the area while the three talked about the work that needed to be done.

Massaro then testified about Travalja's fatal accident:

> [Travalja] was crouched down with his right foot closer to that curb and his left foot closer to the conduit, talking about that area . . . . He started – we talked about the drainage. He came to the conclusion that we – Zane [Sterling] was going to get the stucco guy to chop out the drainage. Then it was almost like, 'All right, meeting's over.' I was standing by the two-by-four, I started to walk away and I heard, 'Oh, shit' and next thing I knew, I turned around and I saw the bottom of Bruno's [Travalja's] shoes.

(NYSCEF Doc. No. 97, Massaro EBT at 25).

He continued:

> Q: And what happened to Bruno?
> A: He fell backwards over the wall . . . .
> Q: So you saw his feet and you saw him fall over backwards?
> A: Yes.
> Q: What did you do?
> A: I froze. I didn't know what to do.
> Q: Did you get a chance to move or do anything?
> A: Yeah, I started to go to him and as I did, you could see he was fighting to hold on and then he went . . . .
> Q: Okay. So after Bruno fell, did you hear anything?
> A: Yeah.
> Q: What did you hear?
> A: Him screaming.
> Q: Do you have any idea how long that lasted?
> A: No. Maybe three, four seconds.
> Q: Did you hear anything after that?
> A: Yeah. Him landing on the overhead protection, the sidewalk bridge.

(*id*. at 26-29).

Plaintiff brought this action in her personal capacity and on behalf of the estate of Travalja on April 11, 2017. The Amended Complaint alleges causes of action under Sections 200, 240(1), and 241(6) of the Labor Law, as well as common law negligence. On November 30, 2017, the Moving Defendants initiated a third party action against Crowne seeking contractual indemnification, common law indemnification, and contribution.

Plaintiff now moves for summary judgment on its Labor Law §§ 240(1) and 241(6) causes of action as against 135 West and New Line only, and dismissing all affirmative defenses predicated on Travalja's alleged comparative fault or culpable conduct with respect to his Section 241(6) cause of action. The Moving Defendants cross move for summary judgment dismissing of all of Plaintiff's causes of action as against them and granting their third party claims for indemnification and contribution claims against Crowne.

On a motion for summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853). Should the movant make its prima facie showing, the burden shifts to the opposing party, who must then produce admissible evidentiary proof to establish that material issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Plaintiff argues that she is entitled to summary judgment on her Labor Law § 240(1) cause of action because 135 West and New Line violated the statute by not providing a place for

Travalja to attach his safety harness, not having a guardrail in place on the edge of the roof, and because the 18-inch parapet wall alone was an insufficient safety device.

The Moving Defendants counter that they are entitled to dismissal of the 240(1) claim because they allege that Travalja was the sole proximate cause of his injury, rather than any statutory violation on their part. They argue that Travalja was a "recalcitrant worker" who ignored a posted warning and did not attach his harness to safety lines that were supposedly readily available to him. In the alternative, they contend that issues of material fact as to the presence of adequate safety devices preclude summary judgment in Plaintiff's favor.

Labor Law § 240(1) "places a nondelegable duty on owners, contractors, and their agents to furnish safety devices giving construction workers adequate protection from elevation-related risks" (*Hill v City of New York*, 140 AD3d 568, 569 [1st Dept 2016]). "The 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]). Liability will not attach where a "plaintiff's actions [are] the sole proximate cause of his injuries" (*Weininger v Hagedorn & Co.*, 91 NY2d 958, 600 [1998]). "[A]n injured worker's failure to use safety devices will not constitute the sole proximate cause of the accident unless the worker knew that he or she was expected to use them but for no good reason chose not to do so" (*Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 404 [1st Dept 2017] [internal citation and quotation marks omitted]).

Here, Plaintiff tenders sufficient evidence to meet her prima facie burden of demonstrating the absence of a dispute of material fact as to 135 West and New Line's violation of Section 240(1). She submits Massaro's EBT testimony stating that no tie off points or safety

lines were available to Travalja in the vicinity of the rooftop terrace from which he fell (Massaro EBT at 31, 37-40, 67). The site safety manager, James Bencivenga, testified that he did not remember whether he saw viable tie off points or safety lines in the area from which Travalja fell after he went up to the roof after the accident (NYSCEF Doc. No. 93, Bencivenga EBT at 112-114). Jason Persaud, a New Line assistant superintendent, testified that he did not know if anybody was tied off at the time of Travalja's accident, that he was never asked about this in subsequent meetings, and that he did not ask about whether Travalja was tied off in subsequent meetings with New Line employees (NSYCEF Doc. No. 91, Persaud EBT at 121).

Plaintiff further submits EBT testimony from Dominic Stiller, the principal of a safety consulting company retained by defendants for the renovation, regarding pertinent safety regulations. In it, Stiller stated that "a guardrail is required for all workers that are not tied off" when working near a parapet wall that is less than 42 inches tall (NYSCEF Doc. No. 95, Stiller EBT at 64). Here, it is undisputed that the parapet wall was well under 42 inches tall. Additionally, Plaintiff presents an affidavit of Anthony Corrado, a certified OSHA outreach trainer and safety professional, that states that the lack of guardrails or other perimeter fall protection contributed to Travalja's fall along with the lack of safety lines or anchor points (NYSCEF Doc. No. 102). Photographs of the relevant section of the roof taken shortly after the accident shows the absence of a guardrail along the parapet (NYSCEF Doc. No. 98). Although the photographs also show a rope and clamp on the ground, Massaro testified that these were not present at the time of the accident and that they would "absolutely not" be used as fall protection as it was not suited to such use (Massaro EBT at 35, 67).

The Moving Defendants fail to submit evidence sufficient to create an issue of material fact as to their liability under Section 240(1) or for summary judgment in their favor under the

"recalcitrant worker" defense. They claim that Travalja was warned to tie off by the sign posted on the door to the terrace area from which he fell and that there were available tie off points for him to use (NYSCEF Doc. Nos. 140 ¶ 6, 141 ¶ 25). However, they fail to support these conclusory assertions with any evidence as to the location of these purported tie off points or their proximity to Travalja at the time of his fall. In contrast, Massaro testified that the nearest anchor point may have been located, at a minimum, some forty feet away from the site of the accident on a "davit base" on the south side of the roof (Massaro EBT at 109). Moreover, Massaro stated that this davit base was too far away to serve as a tie off for Travalja, who was working on the north side of the roof, and that the davit bases on the north side were covered by pavers at the time of the accident (*id.*). The Moving Defendants fail to rebut this testimony with any reference to the record. They further fail to offer any rebuttal to Plaintiff's evidence that a New Line supervisor, Sterling, was on the roof with Travalja when he fell and did not instruct him to tie off. Finally, they do not offer any explanation for the absence of a guardrail along the parapet wall as an alternative to a lifeline or anchor.

Plaintiff has therefore established her entitlement to summary judgment as a matter of law on her Labor Law § 240(1) cause of action as against 135 West and New Line (*cf. Anderson*, 146 AD3d at 403 [affirming summary judgment on 240(1) cause of action where defendants did not sufficiently refute plaintiff testimony that there was no place to tie off his harness]; *Miglionico v Bovis Lend Lease, Inc.*, 47 AD3d 561, 564 [1st Dept 2008] [affirming summary judgment where no dispute of fact as to lack of anchor points on floor from which plaintiff fell]; *Mena v 5 Beekman Prop. Owner LLC*, 212 AD3d 466, 467 [1st Dept 2023]). This branch of Plaintiff's motion is granted, and the corresponding branch of the Moving Defendants' cross motion is accordingly denied.

Plaintiff next moves for summary judgment on her Section 241(6) cause of action on the grounds that 135 West and New Line violated sections 23-1.16(b) and (d) of the Industrial Code. Defendants argue that they are entitled to dismissal of this cause of action because they contend that Travalja was the sole proximate cause of his accident or, in the alternative, that Plaintiff is not entitled to summary judgment due to material questions of fact.

Labor Law 241(6) "imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection to persons employed in . . . all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Constr. Co.*, 91 NY2d 343, 348-349 [1998]). To establish a defendant's liability under Section 241(6), "a plaintiff must show that a specific, applicable Industrial Code regulation was violated and that the violation caused the complained-of injury" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]).

12 NYCRR § 23-1.16(b) provides:

> 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 should not exceed five feet.

A plaintiff is entitled to summary judgment on a Section 241(6) claim predicated on a violation of this regulation where there is no dispute as to whether he was provided a safety harness, but "was not provided with a proper place to which to tie off his harness" (*Anderson,* 146 AD3d at 405).

12 NYCRR § 23-1.16(d) sets forth requirements for tail lines, such as maximum length, material, and attachment to a "hanging lifeline or to a substantial structural member at a point no lower than two feet above the working platform or working level."

Here, it is undisputed that Travalja was wearing a harness at the time of the accident. It is further undisputed that Travalja's harness was not attached to any anchor point, lifeline, or tail line at any time he was on the roof prior to his fall. Plaintiff's evidentiary submissions, discussed *supra*, establish prima facie that there were no anchor points or lifelines in the vicinity for him to attach his harness. Defendants fail to create an issue of material fact as to whether Industrial Code Sections 23-1.16(b) or (d) were violated (*see Anderson*, 146 AD3d at 405). The branch of Plaintiff's motion seeking summary judgment on her Labor Law § 241(6) cause of action is accordingly granted, as is the branch of her motion seeking dismissal of the Moving Defendants' sole proximate cause affirmative defense, and the corresponding branch of the Moving Defendants' cross motion seeking its dismissal is denied.

The Moving Defendants next cross move for summary judgment dismissing Plaintiff's Labor Law § 200 and common law negligence causes of action as against them, arguing that they did not exercise control over the means and method of Travalja's work. Plaintiff argues in opposition that New Line is not entitled to summary judgment on this cause of action because the Moving Defendants fail to make a prima facie showing that New Line did not exercise supervisory control over Travalja's work.

Labor Law § 200 codifies the common law duty of owners and general contractors to provide a safe workplace to construction site workers (*Comes v NY State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Where the alleged 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" (*Cappabianca*, 99 AD3d at 144). An owner or general contractor will not be liable under a method and means theory where they "at most exercised general supervisory powers over [the] plaintiff" (*see Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]). The "mere presence" of an owner or general contractor's personnel on a worksite is "insufficient to infer supervisory control" (*id.*; *Philbin v A.C. & S., Inc.*, 25 AD3d 374 [1st Dept 2006]).

Here, the Moving Defendants make a prima facie showing that 135 West and Chetrit are entitled to summary judgment dismissing the Labor Law § 200 and common law negligence causes of action as against them. There is no indication in the record that either party exercised supervisory control over Travalja's work on the day of the accident, and Plaintiff does not oppose this branch of the cross motion with respect to these defendants. This branch of the cross motion is therefore granted, and Plaintiff's Labor Law § 200 cause of action is dismissed as against 135 West and Chetrit.

This branch of the motion is denied with respect to New Line. Here, it is undisputed that a New Line supervisor, Sterling, was present on the rooftop with Travalja at the time of the accident. Additionally, another New Line supervisor, Persaud, testified that his position gave him the power to stop work if he saw a safety issue, but that his personal duties did not extend to tasks exterior to the apartments in the building (Persaud EBT at 91). A question of fact therefore exists as to the extent of New Line's supervision over the manner and means of Travalja's work on the roof for the purposes of liability under Section 200 and/or common law negligence.

The Moving Defendants next seek summary judgment on their third party indemnification and contribution claims against Crowne. They contend that the 2013 and 2014 Trade Contractor Agreements between Crowne and New Line require Crowne to indemnify New

Line and 135 West. They further argue that they are entitled to common law indemnification by Crowne because any liability on their part would be derived solely by operation of law due to the strict liability provided for by Labor Law § 240(1). Crowne opposes this branch of the cross motion, arguing that it should be denied as premature as discovery in the third party action remains outstanding. Crowne claims that it has not had an opportunity to engage in any discovery and that the Moving Defendants have not provided it any documents for it to evaluate the indemnification claims.

This branch of the cross motion is denied with leave to renew. In an order dated May 1, 2023, this Court denied Crowne's motion to vacate the Note of Issue (Motion Sequence No. 002) and Plaintiff's motion to dismiss or sever the Third Party Complaint (Motion Sequence No. 003) (NYSCEF Doc. No. 176). This decision and order further set forth a discovery schedule, with the Moving Defendants and Crowne given 60 days to complete discovery from May 1, 2023 and 60 days thereafter to make dispositive motions. Based upon this discovery schedule, and Crowne's representation that it has not yet received any paper discovery from the Moving Defendants, the Court finds that summary judgment on the third party indemnification claims would be premature.

Accordingly, it is hereby:

ORDERED that the branch of Plaintiff's motion for summary judgment on her Labor Law § 240(1) cause of action is granted as against defendants 135 West 52nd Street Owner LLC and New Line Structures, Inc.; and it is further

ORDERED that the branch of Plaintiff's motion for summary judgment on her Labor Law § 241(6) cause of action is granted as against defendants 135 West 52nd Street Owner LLC and New Line Structures, Inc.; and it is further

ORDERED that the branch of Plaintiff's motion for summary judgment dismissing defendants 135 West 52nd Street Owner LLC, New Line Structures, Inc., and The Chetrit Group LLC's sole proximate cause affirmative defense is granted; and it is further

ORDERED that the branch of the cross motion of defendants 135 West 52nd Street Owner LLC, New Line Structures, Inc., and The Chetrit Group LLC for summary judgment dismissing Plaintiff's Labor Law § 240(1) cause of action is denied; and it is further

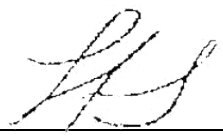
ORDERED that the branch of the cross motion of defendants 135 West 52nd Street Owner LLC, New Line Structures, Inc., and The Chetrit Group LLC for summary judgment dismissing Plaintiff's Labor Law § 241(6) cause of action is denied; and it is further

ORDERED that the branch of the cross motion of defendants 135 West 52nd Street Owner LLC, New Line Structures, Inc., and The Chetrit Group LLC for summary judgment dismissing Plaintiff's Labor Law § 200 and common law negligence cause of action is granted with respect to 135 West 52nd Street Owner LLC and The Chetrit Group LLC; and it is further

ORDERED that the branch of the cross motion of defendants 135 West 52nd Street Owner LLC, New Line Structures, Inc., and The Chetrit Group LLC for summary judgment dismissing Plaintiff's Labor Law § 200 and common law negligence cause of action is denied with respect to defendant New Line Structures, Inc.; and it is further

ORDERED that the branch of the cross motion of defendants/third party plaintiffs 135 West 52nd Street Owner LLC, New Line Structures, Inc., and The Chetrit Group LLC for summary judgment on their contractual indemnification and common law indemnification causes of action against third party defendant Crowne Architectural Systems, Inc. is denied.

This constitutes the Decision and Order of the Court.



6/29/2023
DATE

LORI S. SATTLER, 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

153366/2017 TRAVALJA, ALEXIS vs. 135 WEST 52ND STREET OWNER LLC
Motion No. 001