SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** **PART** **33M**

Justice

----------X

JEFFREY WILLIAMS,

Plaintiff,

- v -

MCALPINE CONTRACTING CO., SANDY 350 LLC,

Defendant.

----------X

INDEX NO. 159851/2019

MOTION DATE 12/13/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

MCALPINE CONTRACTING CO., SANDY 350 LLC

Plaintiff,

-against-

BEDROCK PLUMBING & HEATING, INC.

Defendant.

----------X

Third-Party
Index No. 595251/2020

The following e-filed documents, listed by NYSCEF document number (Motion 001) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 90, 91, 92

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

Upon the foregoing documents, and after oral argument which took place on April 11, 2023, with Wade T. Morris Esq. appearing for Plaintiff Jeffrey Williams ("Plaintiff"), Leslie Luke, Esq. appearing for Defendants/Third-Party Plaintiffs McAlpine Contracting Co. (the "GC") and Sandy 350 LLC (the "Owner") (together "Defendants"), and John Sandercock, Esq. appearing for Third-Party Defendant Bedrock Plumbing & Heating, Inc. ("Bedrock"), Plaintiff's motion for summary judgment against Defendants is denied, and Bedrock's cross-motion to dismiss Plaintiff's Labor Law §240(1) claims is granted.

I. Background

This is an action by Plaintiff to recover for damages he allegedly sustained on April 2,

2019 while working on the construction project at 350 Clarkson Avenue in Kings County (the "Project"). Plaintiff initiated this action against the GC and the Owner on October 9, 2019 (NYSCEF Doc. 1). The GC and Owner filed a Verified Answer on December 16, 2019 (NYSCEF Doc. 5). On March 10, 2020, the GC and Owner commenced a third-party action as against Bedrock (NYSCEF Doc 6). Bedrock filed a Verified Answer to Verified Third-Party Complaint on May 26, 2020 (NYSCEF Doc. 11).

On November 21, 2022, Plaintiff filed the instant motion, requesting summary judgment on the issue of liability against the GC and Owner and the dismissal of first and second affirmative defenses raised by the Owner and GC (NYSCEF Doc. 60). Plaintiff argues summary judgment is appropriate because, pursuant to Labor Law §200, the Owner and GC are liable for Plaintiff's workplace related injuries (NYSCEF Doc. 62 at ¶43). Plaintiff argues further that the first and second affirmative defenses pled by the Owner and GC should be dismissed because Plaintiff "did nothing wrong" (*Id.* at ¶55).

On January 19, 2023, Bedrock filed an Affirmation in Opposition to Plaintiff's motion (NYSCEF Doc. 76) and cross-moved for an Order dismissing Plaintiff's claims arising under Labor Law § 240(1) (NYSCEF Doc. 75). Bedrock argues that Plaintiff is not entitled to judgment under Labor Law §240(1) because the Complaint makes no reference to it, and Plaintiff did not fall from a height nor was he struck by a falling object (NYSCEF Doc. 76 at ¶5). Bedrock further argues that Plaintiff is not entitled to judgment on liability under Labor Law §241(6) because he has not established that the defendants violated a provision of the Industrial Code that mandates compliance with concrete specifications, and that summary judgment is inappropriate because questions regarding comparative negligence are present (NYSCEF Doc. 76 at ¶7). Finally, Bedrock contends that summary judgment should be granted dismissing

Plaintiff's claims under Labor Law §240(1) because neither the Complaint nor the Bill of Particulars alleges sufficient facts to support a finding of liability under the statute (NYSCEF Doc. 76 at ¶8).

Plaintiff filed his Reply Affirmation on January 30, 2023 (NYSCEF Doc. 90). This Decision and Order, along with Plaintiff's Reply Affirmation, do not address the arguments made by Bedrock and the Owner and GC that Plaintiff is not entitled to summary judgment on his Labor Law §241(6) claims as Plaintiff did not move for summary judgment as to those claims (*Id.* at ¶9). Plaintiff declined to oppose Bedrock's cross-motion seeking dismissal of Plaintiff's Labor Law §240(1) claims (NYSCEF Doc. 90 at p.1). Plaintiff argues there is no genuine issues of material fact, and that Bedrock's argument regarding outstanding issues of comparative negligence fails because evidence of comparative negligence does not provide a basis to deny summary judgment. (*Id.* at 8). Plaintiff counsel further reiterates the contention that Plaintiff is not culpable for the subject incident (*Id.* at 10).

II. Discussion

A. Dismissal of Affirmative Defenses

The standard of review on a motion to dismiss pursuant to CPLR § 3211(b) is similar to that used under CPLR §3211(a)(7) (*87th Street Realty v Mulholland*, 62 Misc3d 213, 215 [Civ Ct, New York City 2018]). The movant bears the burden of establishing the defense or counterclaim is without merit as a matter of law (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541 [1st Dept 2011]). This burden is a heavy one (*Alpha Capital Anstalt v General Biotechnology* Corporation, 191 AD3d 515 [1st Dept 2021]). The allegations in the answer must be liberally construed and viewed in the light most favorable to the non-movant (*182 Fifth Ave v Design Dev. Concepts*, 300 AD2d 198, 199 [1st Dept 2002]). However, conclusory and boilerplate

affirmative defenses should be dismissed (*Bankers Trust Co. v Fassler*, 49 AD2d 855[1st Dept 1975]; *366 Audubon Holding, LLC v Morel*, 22 Misc.3d 1108[A] [Sup. Ct., NY County 2008]).

The first affirmative defense raised by the Owner and GC alleges contributory negligence and/or culpable conduct of Plaintiff (NYSCEF Doc. 5 at ¶92). Mr. Cerna's testimony that Plaintiff had a safer means of ingress and egress, that the subject area was blocked off and that the curb was not intended as a walkway, raises triable questions of material fact regarding Plaintiff's contributory negligence (NYSCEF Doc. No. 69, tr. 56, 58). The Court therefore denies Plaintiff's motion to dismiss Owner and GC's first affirmative defense, as Plaintiff has failed to show that the first affirmative defense is without merit.

The second affirmative defense alleges Plaintiff's assumption of risk (NYSCEF Doc. 5 at ¶93). A plaintiff's motion to dismiss a defendant's affirmative defense of assumption of risk should be denied when the record contains evidence raising a triable issue of fact as to whether the plaintiff engaged in a "voluntary encounter with a known risk of harm" (*Buchanan v. Dombrowski*, 83 A.D.3d 1497, 1499 (4th Dept. 2011). In this case, Bedrock's witness, Pedro Cerna, testified that there was an alternative route that Plaintiff could have taken instead of walking through the barricaded area/curb. Specifically, Mr. Cerna testified that Plaintiff could have walked via a clear path along the sidewalk and through entrance #4, and that was the route other Bedrock employees utilized to get to Bedrock's shanty (NYSCEF Doc. No. 69, tr. 59-60). Mr. Cerna further testified that the subject area was blocked off and that the curb was not intended to be a walkway for people (*Id.* at p. 55, 58). These assertions by Mr. Cerna preclude dismissal of the Owner and GC's second affirmative defense because they raise triable issues of fact as to whether Plaintiff engaged in a voluntary encounter with a known risk of harm. Therefore, Plaintiff's motion to dismiss Owner

and GC's second affirmative defense is denied, as Plaintiff has failed to show that the Owner and GC's second affirmative is without merit.

B. Plaintiff's Motion for Summary Judgment

Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

i. Plaintiff's Labor Law §200 Claims

Labor Law §200 codifies an owner or general contractor's common law duty to maintain a safe construction site (*Burkoski v. Structure Tone, Inc.*, 40 A.D.3d 378, 836 N.Y.S.2d 130 (1st Dep't. 2007). To prevail on a Labor Law §200 claim against an owner or general contractor, "a Plaintiff must prove that the party so charged exercised direct supervisory control over the manner in which the activity alleged to have caused the injury was performed" (*Id.* at 381).

Plaintiff's reliance on *Santos v. Condo 124 LLC*, 161 AD3d 650, 78 NYS3d 113 (1st Dept. 2018) in support of the conclusion that the right to exercise control over work is the determining factor in assigning liability under Labor Law §200 (NYSCEF Doc. 62 at ¶50) is

misplaced. In *Santos*, the First Department addressed who was considered a statutory agent of an owner or a general contractor for the purposes of the New York Labor Law (*Santos* at 653). The *Santos* decision does not present a rule assigning liability in all Labor Law cases. Contrary to Plaintiff's contention, the First Department has determined that "where…injury results from the means and methods of the work, an owner can only be found to be negligent if it exercised actual supervision or control over the work…mere authority to supervise or control work is insufficient" (*Gonzalez v. DOLP 205 Properties II, LLC*, 206 A.D.3d 468, 471 171 N.Y.S.3d 61 [1st Dep't. 2022]).

While Plaintiff contends that the GC was responsible for site safety at the Project (NYSCEF Doc. 62 at ¶20), the testimony of Pedro Cerna, Bedrock's project manager, that he was the one that decided what to tell the workers to do and where to work each day (NYSCEF Doc. 69 p. 46) raises genuine questions of material fact regarding which party, if any, exercised direct supervisory control over the manner in which the activity alleged to have caused the injury was performed. Accordingly, Plaintiff's motion for summary judgment on liability regarding his Labor Law §200 claims is denied.

C. Third-Party Defendant Bedrock's Cross Motion to Dismiss Plaintiff's Labor Law §240(1) Claims

Third-Party Defendant Bedrock argues that Plaintiff's Labor Law §240(1) claims should be dismissed because neither Plaintiff's pleadings nor his motion papers put the Court or the parties on notice that Plaintiff was seeking such relief, or of the relevant transactions or occurrences, or the material elements of a cause of action for a breach of Labor Law §240(1) (NYSCEF Doc. 76 p.11-12). Alternatively, Bedrock argues that Plaintiff has no claim under Labor Law §240(1) because he did not fall from a height nor was he struck by a falling object (*Id.* at p.12). Plaintiff declined to oppose Bedrock's cross-motion to dismiss Plaintiff's Labor

Law §240(1) claims. (NYSCEF Doc. 90 at p.1). Failure to oppose a motion seeking dismissal of a claim constitutes the abandonment of that claim (*Jamie Ng v NYU Langone Med. Ctr.* 157 AD3d 549, 550 [1st Dept 2018]). Because Plaintiff does not oppose Bedrock's cross-motion to dismiss, Plaintiff's Labor Law §240(1) claims are dismissed as abandoned.

Accordingly, it is hereby,

ORDERED that the branch of Plaintiff Jeffrey Williams motion which sought to dismiss the first and second affirmative defenses raised by Defendants/Third-Party Plaintiffs McAlpine Contracting Co. and Sandy 350 LLC is denied; and it is further

ORDERED that the remainder of Plaintiff Jeffrey Williams motion which sought summary judgment on liability against Defendants/Third-Party Plaintiffs McAlpine Contracting Co. and Sandy 350 LLC is denied; and it is further

ORDERED that Third-Party Defendant Bedrock's cross-motion to dismiss Plaintiff's Labor Law §240(1) claims is granted; and it is further

ORDERED that within ten days of entry, counsel for Defendant shall serve a copy of this Decision and Order on Plaintiff; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

7/26/2023
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

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