SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LESLIE A. STROTH **PART** 12

Justice

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RIAN MACNAIR, JANINE MACNAIR,

Plaintiff,

- v -

11 MADISON AVENUE OWNER LLC, LLC, SL GREEN REALTY CORP., PGIM REAL ESTATE FINANCE, LLC, STRUCTURE TONE LLC,

Defendants.

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INDEX NO. 150364/2020

MOTION DATE 06/01/2023 06/01/2023

MOTION SEQ. NO. 001 002

AMENDED DECISION + ORDER ON MOTION[1]

The following e-filed documents, listed by NYSCEF document number (Motion 001) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 90, 91, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118,119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 134, 136

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 92, 93, 94, 95, 96, 97, 98, 133, 137

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

This action arises out of an incident that occurred at 11 Madison Avenue, New York 10010 (subject worksite) on October 18, 2019, when plaintiff Rian MacNair was allegedly injured moving a cart down a concrete slope.

Rian MacNair (MacNair) and his wife, Janine MacNair (collectively, plaintiffs) now move for summary judgment as against defendants, 11 Madison Avenue Owner, LLC; SL Green Realty Corp.; and PGIM Real Estate Finance, LLC (collectively, defendants)[1], on their Labor Law § 240(1) and their Labor Law § 241(6) claims premised upon alleged violations of Industrial Code

[1] The action was discontinued against *Structural Tone, LLC*, a construction company, in September 2020, but the caption has not yet been amended to reflect the discontinuance.

[2] The decision and order is amended only to the extent of omitting reference to Labor Law § 240(6) on pages 10 and 13, which was a scrivner's error, and exchanging it with the correct provision, Labor Law § 241(6).

§§ 23-1.28(b) and 23-1.5(c)(3). Defendants oppose and cross-move for an order granting them summary judgment dismissing plaintiffs' complaint in its entirety. For the reasons set forth below, plaintiffs' motion is granted, and defendants' motion is granted, in part.

I. Alleged Facts

The subject worksite is owned by 11 Madison Avenue Owner, LLC and managed by SL Green Realty Corp. and PGIM Real Estate Finance, LLC. Defendants contracted with non-party KONE, an elevator engineering company, to perform an elevator modernization project at the subject worksite. MacNair was employed by KONE as a Local 1 Elevator Mechanic's Helper.

MacNair was tasked with taking large amounts of elevator debris in a cart down a concrete ramp located at the subject worksite for disposal. KONE contracted with non-party Five Star Carts to provide the cart at issue. While moving a cart filled with elevator debris down the concrete ramp, MacNair injured his left knee. MacNair alleges that he felt the cart go out of control and tried to stop the cart from rolling into city pedestrian traffic, at which point his injury occurred. There are no direct witnesses to the incident. MacNair subsequently had knee surgery to repair a torn meniscus and now alleges permanent physical restrictions preventing him from pursuing a career as a Local 1 Elevator Mechanic.

Plaintiffs Rian MacNair and Janine MacNair commenced this action in January 2020, pleading causes of action pursuant to Labor Law § 200, 240(1), and 241(6), as well as a derivative claim for loss of services.

II. Analysis

It is well-established that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 (1st Dept 1989). As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence

of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 (1986); *Winegrad v New York University Medical Center*, 64 NY 2d 851 (1985). Courts have recognized that summary judgment is a drastic remedy that deprives a litigant of their day in court. Therefore, "[o]n a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party.'" Vega v Restani Const Corp, 18 NY3d 499, 503 (2012), quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 (2011).

A. Plaintiff's Motion for Summary Judgment

1. Labor Law § 240(1)

Plaintiffs first move for summary judgment pursuant to Labor Law § 240(1). Defendants oppose.[2] Labor Law § 240(1) states, in pertinent 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.

Liability under Labor Law § 240(1) is imposed for "contemplated hazards . . . related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." *Melber v 6333 Main St., Inc.*, 91 NY2d 759, 762 (1998), quoting *Rocovich v Consol. Edison Co.*, 78 NY2d 509, 514 (1991).

The statute imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty to provide proper protection to an employee proximately causes their injury. *Gordon v Eastern Railway Supply, Inc.*, 82 NY2d 555, 559 (1993); *Ross v Curtis–Palmer*

[2] The Court will address defendants' separate motion for summary judgment dismissing plaintiffs' Labor Law §§ 200, 240 (1) and 241(6) claims at Section II (B), *infra*.

Hydro–Elec Co., 81 NY2d 494, 500 (1993); *Rocovich v Consolidated Edison Co*, 78 NY2d 509, 513 (1991). It is well established that "an accident alone does not establish a Labor Law § 240(1) violation or causation." *Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280, 289 (2003). Rather, a plaintiff must demonstrate failure to provide any safety devices or that a safety mechanism failed in order to establish liability pursuant to Section 240(1). *See id.*

i. Elevation Differential

Plaintiffs argue that defendants violated Labor Law § 240(1), asserting that the subject ramp was an elevation-related hazard for which no safety devices were provided. They argue that the plaintiff's injury flowed directly from the application of the force of gravity to the cart and, therefore, constituted a gravity-related risk. In support of their motion, plaintiffs submit, *inter alia*, a photograph of the subject ramp (NYSCEF Doc. No. 47), MacNair's deposition transcript (NYSCEF Doc. No. 46), the deposition transcript of SL Green's Senior Property Manager Jennifer Ciccotto (NYSCEF Doc. No. 101), and an affidavit of Dean Cribbin Jr., plaintiff's co-worker at the subject worksite (NYSCEF Doc. No. 49).

In opposition, defendants argue that Labor Law § 240(1) does not apply here because MacNair's injuries did not result from an elevation-related hazard. Defendants submit, *inter alia*, photographs of the subject ramp and Five Star carts (NYSCEF doc. no. 63), excerpts from MacNair's deposition transcript (NYSCEF doc. no. 96), and excerpts from SL Green's Senior Property Manager Jennifer Ciccotto's deposition transcript (NYSCEF doc. no. 101). To further bolster their position, defendants submit the affidavit of Licensed Professional Engineer Vincent Ettari (NYSCEF doc. no. 108), in which he attests that the ramp in question complied with all applicable codes and that the grade of the ramp is shallow, with a gentle slope of 9% to 12.5%.

Defendants further allege that pushing a cart down a ramp is an ordinary task that does not fall within the specific class of special hazards covered under the Labor Law.

It is clear from the evidence adduced, such as the photograph of the ramp and the deposition testimony of plaintiff, that the ramp contains a significant elevation differential. Labor Law § 240(1) does not require that an injury result from a particular height to be gravity related, and the ramp at issue presents a sufficient elevation differential. For example, in *Ali v Sloan-Kettering Inst for Cancer Rsch*, the First Department held that injury resulting from an air conditioning coil falling off a dolly was subject to Labor Law § 240(1). *See Ali v Sloan-Kettering Inst for Cancer Rsch*, 176 AD3d 561 (1st Dept 2019). The court stated, "even in falling a relatively short distance, plaintiff's injury resulted from a failure to provide protection required by Labor Law § 240(1) against a risk arising from a significant elevation differential." *Id.* Thus, the purported expert affidavit offered by defendants attesting to the low grate of the ramp and compliance with relevant building codes is not dispositive of whether the injury is gravity related.

Rather, the ramp at issue (and the ground over which it spans) presents an elevation differential, and the momentum of the cart in this case was the direct result of gravity. Here, the "combined weight of the device and its load, and the force it was able to generate over its descent" allegedly caused MacNair's injury, thereby falling under the purview of Labor Law § 240(1). *McCallister v 200 Park, LP*, 92 AD3d 927 (2d Dept 2012).

ii. Safety Device

Defendants also argue that they did not fail to provide MacNair with a safety device that would have prevented his injury, in contravention of Labor Law § 240(1). Defendants maintain that there is no safety device that could have been provided to MacNair for the ordinary dangers of pushing a cart down a ramp. In turn, plaintiffs posit that a safer means of completing the subject

task existed, such as using a truck that could have avoided the use of the ramp or ensuring that the wheels on the cart were not sticky and inoperative, and that defendants thereby failed to give proper protection to MacNair.

The case *Landi v SDS William St., LLC*, 146 AD3d 33 (1st Dept 2016) is instructive on this point. In *Landi*, when the plaintiff was operating a motorized pallet jack down a ramp, he unsuccessfully attempted to use the brake on the jack, which then ran over his right foot. The Court held that the jack's breaking mechanism was insufficient to provide protection against the gravity-related risk inherent in transporting a heavy load down a ramp. *See Landi v SDS William St., LLC*, 146 AD3d 33. Similarly, in *Aramburu v Midtown W. B, LLC*, 126 AD3d 498, 499 (1st Dept 2015), the plaintiff was wheeling a heavy reel of wire down a ramp when he lost control of the reel, which consequently rolled over his shoulder and neck. In that case, the Court found that the plaintiff was entitled to partial summary judgment, given the evidence that no devices, such as pulleys or ropes, were used to prevent the accident.

Here, plaintiff establishes that his injuries are a direct consequence of the failure to provide a safety device, such as a break mechanism, pulley, or operable wheels, against the risk inherent in pushing a heavy cart down a ramp. *See Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 (2009). Accordingly, plaintiff has established his prima facie right to summary judgment as to liability on his Labor Law § 240(1) claim. Moreover, the activity of an employee working with a cart containing heavy materials being transported on a construction site is considered the kind of foreseeable risk within the contemplation of Labor Law § 240(1). *See e.g. McCallister v 200 Park, LP*, 92 AD3d 927 (2d Dept 2012). In turn, defendants fail to raise a triable issue of fact as to plaintiff's Labor Law § 240(1). Accordingly, plaintiffs' motion for summary judgment with respect to their Labor Law § 240(1) claim is granted.

2. Labor Law § 241(6)

Plaintiffs also move for summary judgment under Labor Law § 241(6), alleging that defendants violated Industrial Code §§ 23-1.28(b) (""Hand-propelled vehicles") and 23-1.5(c)(3) ("General responsibility of employers – Condition of equipment and safeguards")[3]. Defendants oppose.

Labor Law § 241(6) places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code. *Ross v Curtis-Palmer Hydro-Elec Co*, 81 NY2d 494 (1993) at 501-502. Accordingly, to support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an applicable Industrial Code provision given the circumstances of the accident. *Id.* at 502; *Ares v State,* 80 NY2d 959, 960, 590 NYS2d 874 (1992); *see also Adams v Glass Fab,* 212 AD2d 972, 973 (4th Dept 1995).

i. Hand-Propelled Vehicles

The first provision at issue is entitled "Hand-propelled vehicles,"12 NYCRR § 23-1.28(b), and provides, in part, "[w]heels of hand-propelled vehicles shall be maintained free-running and well secured to the frames of the vehicles…" This provision "specifically and concretely requires 'free-running' wheels that are 'well-secured.'" *Freitas v New York Tr Auth*, 249 AD2d 184, 186 (1st Dept 1998). This is "a specific, positive command" that "can be relied upon as the source of a non-delegable duty by the owner or general contractor owed to all workers performing construction chores on the premises." *Id.* (citation omitted).

[3] Plaintiffs do not move for summary judgment on their remaining Labor Law § 241(6) claims which are premised upon alleged violations of 12 NYCRR § 23-1.7 (d) and (e)(1)-(2), 12 NYCRR § 23-1.22, 12 NYCRR § 23-2.1, and Occupational Safety and Health Administration (OSHA) violations.

Plaintiffs maintain that MacNair testified at his deposition that the wheels of the cart were not free running and that they locked up while he descended the ramp, in contravention of 12 NYCRR § 23-1.28(b). *See e.g.* NYSCEF doc. no. 46 at 61, line 2 ("The wheels were broken"); 93, lines 3-9 ("I was going down the ramp and then where it happened, the dumpster started going out of control when the wheels started messing up"). MacNair also testified that the carts at the subject worksite were in poor and inoperable condition. Plaintiffs further submit the affidavit of MacNair's colleague, Dean Cribbin Jr, in which he attests that: "I have been working at the jobsite for a few years and have seen the condition of the dumpsters[4] has been pretty bad on some of them, the few are hard to move because the wheels lock up and I have seen a few fall off before." *See* NYSCEF doc. no. 49.

In opposition, defendants contend that 12 NYCRR § 23-1.28(b) does not apply to the subject incident. Defendants argue that MacNair's testimony regarding the defective wheels of the cart in question is speculative because he was unable to identify the exact cart used at the subject worksite. However, defendants do not submit any evidence in admissible form to controvert MacNair's deposition testimony or Mr. Cribbin's affidavit in which they aver that the wheels on the carts are defective.

Plaintiffs have established their *prima facie* case that Industrial Code 12 NYCRR § 23-1.28(b) was violated, namely, that defendants failed to provide free-running wheels that were "well-secured" on a hand-propelled vehicle, and therefore, plaintiff is entitled to summary judgment on such claim.

[4] Mr. Cribbin uses "cart" and "dumpster" interchangeably. Review of photographs of the carts demonstrate that the cart can also be viewed as a dumpster. *See* NYSCEF doc. no. 106.

ii. General Responsibility of Employers – Condition of Equipment and Safeguards

The second provision is entitled "General responsibility of employers – Condition of equipment and safeguards,"12 NYCRR § 23-1.5(c)(3), which provides that: "[a]ll safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged."

Plaintiffs contend that defendants' failure to remove the inoperable carts was a violation of 12 NYCRR § 23-1.5(c)(3) and proximately caused plaintiff's injury. Defendants counter that the carts at issue do not qualify as "equipment" under 12 NYCRR § 23-1.5(c)(3) and that, therefore, this section of the Industrial Code is inapplicable.

The carts herein are considered "equipment" pursuant to 12 NYCRR § 23-1.5(c)(3). *See Sancino v Metro Transportation Auth,* 184 AD3d 534, 535 (1st Dept 2020) (holding that a wheeled dumpster falls under the purview of 12 NYCRR § 23-1.5[c][3]). Additionally, MacNair offered sworn testimony that the cart he was moving down the ramp had inoperable wheels that caused it to move out of control and seriously injure him. Again, defendants fail to proffer admissible evidence to contest MacNair's first-hand account sufficient to raise a triable issue of fact.

Thus, defendants' failure to immediately remove the inoperable carts from service and restore or repair them results in a violation of section 23-1.5(c)(3), and plaintiffs' motion for summary judgment is granted on that portion of his Labor Law § 241(6) claim.

B. Defendants' Motion for Summary Judgment

Defendants separately move for summary judgment seeking dismissal of plaintiffs' claims pursuant to Labor Law §§ 200, 240 (1) and 241(6) and their claims for loss of services. For the above-stated reasons, as well as the additional analysis below, defendants' motion is granted in part.

Preliminarily, as the Court has already decided that plaintiff has established its entitlement to judgment as a matter of law for its claims pursuant to Labor Law §§ 240(1) and 241(6) for violations of Industrial Code §§ 23-1.28(b) and 23-1.5(c)(3), defendants' motion for dismissal of these causes of action is denied. In support of their motion for summary judgment, defendants submit the same proof as in their opposition to plaintiffs' motion. The proof adduced by defendants was insufficient to raise a triable issue of fact with respect to these causes of action, much less demonstrate defendants' entitlement to judgment as a matter of law.

1. Labor Law § 241(6)

However, plaintiffs failed to oppose that part of defendants' motion which seeks dismissal of plaintiff's Labor Law § 241(6) claim premised upon alleged violations of 12 NYCRR § 23-1.7 (d) and (e)(1)-(2), 12 NYCRR § 23-1.22, 12 NYCRR § 23-2.1, and Occupational Safety and Health Administration (OSHA) violations.[5] Accordingly, defendants' motion for summary judgment to dismiss the remainder of plaintiffs' Labor Law § 241(6) claim based on these alleged violations is granted as unopposed, and the claims are deemed abandoned. *See Josephson LLC v Column Fin., Inc.*, 94 AD3d 479, 480 (1st Dept 2012) ("Plaintiffs abandoned their remaining claims by failing to oppose the parts of defendants' motion that sought summary judgment dismissing those claims").

2. Labor Law § 200

Defendants move for summary judgment dismissing plaintiffs' cause of action pursuant to Labor Law § 200. Although plaintiffs do not move for summary judgment on this claim, they contend that there exist material issues of fact that preclude dismissal.

[5] Plaintiff does not move for summary judgment on these grounds.

Labor Law § 200 codifies the common law duty of an owner to provide construction workers with a safe place to work. *See Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 877 (1993). It is well-settled law that an owner or general contractor will not be found liable under common law or Labor Law § 200 where it has no notice of any dangerous condition which may have caused the plaintiff's injuries, nor the ability to control the activity which caused the dangerous condition. *See Russin v Picciano & Son*, 54 NY2d 311[1981]; *see also Rizzuto v Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Singleton v Citnalta Constr. Corp.*, 291 AD2d 393, 394 [2002].

Labor Law § 200 and common law claims 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." *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 133-144 (1st Dept 2012). Under the first category, the owner had to create the condition or had actual or constructive notice of it. *Id.* at 144. Under the second category, the owner or general contractor is liable if "it actually exercised supervisory control over the injury-producing work." *Id.*

Defendants argue that neither category applies. At the outset, defendants maintain that there was no dangerous or defective condition at the subject worksite. MacNair testified at his deposition that he does not recall ever complaining that a cart on the job site was broken or inoperable prior to the incident. Additionally, SL Green's Senior Property Manager Jennifer Ciccotto testified at her deposition that the personnel, tenants, vendors and deliverymen at the subject worksite similarly used the ramp without issue for over 80 years; the building has never received any complaints regarding the use of the ramp; and that defendants had no involvement with the carts that KONE rented from to transport debris.

Further, defendants argue that they did not exercise supervisory control over the injury producing work. Rather, they maintain that employer KONE was in charge of supervision of the work of their employee MacNair. At his deposition, he testified that he received all of his work instructions from his employer, KONE, and that he never received any work instructions, direction or supervision from defendants.

Plaintiff responds that questions of fact exist regarding defendants' control over the means and methods of MacNair's work at the time he was injured sufficient to withstand summary judgment. Specifically, plaintiff argues that a safer alternative could have been provided and that defendants controlled the loading dock and bay schedule that dictated the debris removal process.

Nevertheless, these arguments are irrelevant to a Labor Law § 200 claim. The undisputed testimony is that no defendants were on notice of a dangerous or defective condition, specifically the defective wheels on the cart, nor did defendants control the means or methods of the work that caused the condition. Plaintiff has failed to raise an issue of fact to rebut defendants' plaintiffs *prima facie* showing. Accordingly, defendants/third-party plaintiff's motion to dismiss plaintiff's claims pursuant to Labor Law § 200 is granted. Plaintiff's papers are silent as to what notice, if any, defendants had regarding the dangerous condition that caused plaintiff's accident. Further, plaintiff does not contend that defendants had the ability to control the specific activity which caused his injury, but, rather, that they controlled the loading dock, which could have been used as an alternative means for debris removal. Accordingly, the portion of defendants' motion that seeks summary judgment as to its Labor Law § 200 claims is granted.

3. Loss of Services Claim

Lastly, defendants move to dismiss Janine MacNair's derivative loss of services claim on the ground that MacNair's primary claims for Labor Law § 200, 240(1), and 241(6) should be

dismissed. As the Court has granted summary judgment in MacNair's Labor Law § 240(1) and 241(6) claims, as detailed above, Janine MacNair's loss of services claim on those counts survives. However, plaintiffs' derivative claims with respect to Labor Law § 200 are dismissed, as a derivative claim cannot stand where the primary claims are dismissed. *See Kaisman v Hernandez,* 61 AD3d 565, 566 (1st Dept 2009).

III. Conclusion

Accordingly, it is

ORDERED that defendants' motion for summary judgment to dismiss the complaint is granted, in part, to the extent that plaintiffs' primary and derivative Labor Law § 200 claim is dismissed and severed from the remaining claims; and it is further

ORDERED that plaintiffs' motion for summary judgment is granted as to their Labor Law § 240(1) claim and their Labor Law § 241(6) claims premised on violations of Industrial Code 12 NYCRR §§ 23-1.28(b) and 23-1.5(c)(3); and it is further

ORDERED that the remainder of plaintiffs' Labor Law § 241(6) claims are dismissed as abandoned, and it is further

ORDERED that, as it appears to the court that plaintiffs are entitled to judgment on their Labor Law § 240(1) claim and their Labor Law § 241(6) claims premised on violations of Industrial Code 12 NYCRR §§ 23-1.28(b) and 23-1.5(c)(3), and that the only triable issues of fact arising out of plaintiff's motion for summary judgment relate to the amount of damages to which plaintiffs are entitled, it is

ORDERED that an immediate trial of the issues regarding damages shall be had before the court; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial; and it is further

ORDERED that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website).

The foregoing constitutes the decision and order of the Court.

10/27/2023
DATE

LESLIE A. STROTH, J.S.C.

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