SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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CARLOS CHAPIN,

Plaintiff,

- v -

1818 NADLAN LLC., NEW LINE STRUCTURES AND DEVELOPMENT INC.,

Defendant.

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INDEX NO. 155884/2018

MOTION DATE 11/17/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

1818 NADLAN LLC., NEW LINE STRUCTURES AND DEVELOPMENT INC.

Plaintiff,

-against-

PERIMETER CONCRETE CORP.,

Defendant.

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Third-Party
Index No. 595974/2018

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 90, 91, 92, 93, 94, 95, 97

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

Defendants' motion for summary judgment is granted in part and denied in part. Plaintiff's cross-motion for partial summary judgment on his Labor Law §§ 240(1) and 241(6) claims are granted in part and denied in part.

Background

This Labor Law case arises out of an accident involving plaintiff at a construction site in Manhattan on February 20, 2018. Plaintiff was working for third-party defendant Perimeter

Concrete Corp. ("Perimeter") when he claims he was hit in the head by a three-by-four piece of wood from above (NYSCEF Doc. No. 71 at 133 [plaintiff's deposition transcript]). At the time of the accident, plaintiff testified that he was standing on the third floor and that the piece of wood that hit him fell from an opening on the fifth floor (*id*. at 135-36).

He explained that "I was on the third floor going up to the fifth floor and as I put, placed my hand on the ladder, this is the provisional ladder I am speaking about, and I had not set my foot on the rung yet when something hit my neck and head. And, so, I lost my balance and my neck and right shoulder hit the concrete wall" (NYSCEF Doc. No. 81 at 54). According to plaintiff, he would take this ladder up through an opening which would eventually become the elevator shaft upon completion of the building (NYSCEF Doc. No. 79 at 73).

Defendants (the owner and general contractor) argue that the entire case should be dismissed. They contend that the Labor Law § 240(1) claim is without merit because the piece of wood that hit plaintiff was not being hoisted or secured at the time of the accident and that the Industrial Code sections asserted in connection with the Labor Law § 241(6) claim are inapplicable. Defendants also argue that plaintiff's Labor Law § 200 claim should be dismissed because they did not control or direct plaintiff's work, nor did they create the condition that led to plaintiff's injury.

In opposition and in support of his cross-motion, plaintiff argues that he is entitled to summary judgment on his Labor Law § 240(1) claim because it is undisputed that he was not provided with proper protection from falling objects. He also seeks summary judgment on his Labor Law § 241(6) claim and that his Labor Law § 200 claims should survive because the general contractor (defendant New Line) exercised supervisory control over the job site.

Discussion

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id*.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Labor Law § 240(1)

"Labor Law § 240(1), often called the 'scaffold law,' provides that all contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . 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 construction workers employed

on the premises" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500, 601 NYS2d 49 [1993] [internal citations omitted]). "Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*id.* at 501).

"[L]iability [under Labor Law § 240(1)] is contingent on a statutory violation and proximate cause . . . violation of the statute alone is not enough" (*Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 287, 771 NYS2d 484 [2003]).

The Court grants plaintiff's cross-motion for summary judgment on this Labor Law § 240(1) claim and denies the branch of defendants' motion for summary judgment dismissing this cause of action. Defendants' argument- that Labor Law § 240(1) is inapplicable because the piece of wood that injured plaintiff was not being hoisted or secured - is without merit. "[F]alling object 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" (*Quattrocchi v F.J. Sciame Const. Corp.*, 11 NY3d 757, 758-59, 866 NYS2d 592 [2008]).

The record on this motion shows that there were no efforts to prevent objects from falling through the elevator shaft opening as the building was being constructed. There is no evidence that defendants took any steps to install adequate overhead protection (such as a net) to prevent workers, like plaintiff, from being hit by objects falling from above.

Plaintiff correctly pointed to the deposition of Mr. Loboda (who worked for the general contractor, defendant New Line) who admitted that these openings were not supposed to be covered and instead "would be sectioned off by guardrails and netting" (NYSCEF Doc. No. 84).

And defendants did not produce any evidence that guardrails, netting or some other protection was actually installed.

The fact is that plaintiff was working for a concrete subcontractor and a hole was left in the middle of the floor where the elevator shaft would be constructed. That opening is how plaintiff and other Perimeter workers would travel between floors; there should have been adequate protection to prevent objects from falling from above. The lack of protective devices compels the Court to grant the instant cross-motion (*Mercado v Caithness Long Is. LLC*, 104 AD3d 576, 577, 961 NYS2d 424 [1st Dept 2013] [granting plaintiff summary judgment on his Labor Law § 240(1) claim where he was hit by a falling pipe from above and there was no netting to provide protection]). Moreover, plaintiff did not have to precisely show how the piece of wood fell; it is clear that the lack of netting or other protection caused his injuries (*id*.).

Labor Law § 241(6)

"The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable. In order to support a claim under section 241(6). . . the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna*, 12 NY3d 511, 515, 882 NYS2d 375 [2009]). "The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury" *(Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 271, 841 NYS2d 249 [1st Dept 2007]).

Defendants observe that plaintiff cites numerous Industrial Code sections with respect to this cause of action, including: 12 NYCRR §§ 23-1.4(45); 23-1.5, 23-1.5(a), (b), (c)(1)(2)(3); 23-1.7, 23-1.7(a)(1), 23-1.7(a)(2), 23-1.7(b)(1)(i)(ii)(iii), 23-1.7(d), 23-1.7(e), 23-1.7(e)(2), 23-1.7(f)

; 23-1.8; 23-1.22(b)(2) ; 23-1.3; 23-1.15; 23-1.16(a)(b) ; 23-1.17; 23-1.21(b)(1)(b)(3)(i)(b)(4)(ii)(iv)(e); 23-1.32; 23-1.33(1) ; 23-2.2; 23-2.2(4) ; 23-2.3(a)(1)(2), 23-2.3(c) ; 23-2.5(a) ; 23-2.6(a) ; 23-3.2(a-d) ; 23-3.3, 23-3.3(b-m) ; 23-.4(a-c) ; 23-5.1(e)(5), 23-5.1(f)(h)(j)(1) ; 23-8.1(a)(b)(1-5)(d)(1)(2)(3)(e)(1)(5)(f)(1)(i-v)(f)(2)(i)(ii)(h); 23-8.5(b)(c)(1)(2)(3)(i)(ii)(iii)(e)(f)(h)(i)(j)(k)(l)(m); 23- 8.2(c)(3)(f)(3)(g)(1)(i)(ii)(g)(2)(1)(ii)(iii)(h), and 23-8.5(b)(c)(1)(2)(3)(i)(ii)(iii)(f)(h)(i)(j)(k)(l)(m)(n).

In opposition, plaintiff only references Industrial Code §§ 23-1.7(a)(1) and (2). Therefore, as an initial finding, the Court severs and dismisses all of the portions of plaintiff's Labor Law § 241(6) claim except for Industrial Code §§ 23-1.7(a)(1) and (2).

Industrial Code § 23-1.7 (a) provides that:

> "(1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.
>
> (2) Where persons are lawfully frequenting areas exposed to falling material or objects but wherein employees are not required to work or pass, such exposed areas shall be provided with barricades, fencing or the equivalent in compliance with this Part (rule) to prevent inadvertent entry into such areas."

Defendants contend that this Industrial Code section is inapplicable because there is no evidence that this was an area that is normally exposed to falling objects. Plaintiff insists that the elevator shaft openings contained a risk of falling objects.

The Court denies the branches of defendants' motion and plaintiff's cross-motion with respect to this code section. Neither defendants nor plaintiff met their burden on a motion for summary judgment. Defendants did not include a specific citation in their memo of law in

support (such as deposition testimony) that shows that this area was not normally exposed to falling objects. Their attempt to make arguments about plaintiff's testimony in reply is without merit because defendants cannot make such claims for the first time in reply nor did these belated arguments cite to specific portions of plaintiff's deposition transcript despite making arguments about the contents of that deposition (*see* NYSCEF Doc. No. 97, ¶ 14 [defendants' references in reply to plaintiff's testimony that do not include any citations]).

And, similarly, plaintiff did not meet his burden for summary judgment to show that the elevator shaft opening was typically exposed to falling objects. He did not point to examples of objects falling down this elevator shaft.

In sum, neither party met their burden for summary judgment and it is not this Court's role to review and hunt down parts of the deposition transcripts in order to make arguments in support or in opposition of the parties' requested relief. Rather, it is the parties' responsibility to cite to the record specifically, which neither party did here.

Labor Law § 200

Labor Law § 200 "codifies landowners' and general contractors' common-law duty to maintain a safe workplace" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY3d 494, 505, 601 NYS2d 49 [1993]). "[R]ecovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation . . . [A]n owner or general contractor should not be held responsible for the negligent acts of others over whom the owner or general contractor had no direction or control" (*id.* [internal quotations and citation omitted]).

The central question on this branch of defendants' motion is whether they had supervisory control over plaintiff. The Court denies this branch of defendants' motion. Similar

to the discussion above, defendants' memorandum of law in support does not contain citations for their contentions that plaintiff admitted he only received orders from his supervisor. Defendants cannot meet their burden on a motion for summary judgment by making an argument about plaintiff's deposition testimony without citing to the transcript or to other pieces of evidence. It is not this Court's role to review the transcript to search for evidence in support of defendants' arguments. As presented by defendants, their contentions about supervision are unsupported.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted only to the extent that plaintiff's Labor Law § 241(6) claim is severed and dismissed with respect to all of the Industrial Code sections except for 23-1.7(a)(1) and (2) and denied with respect to the remaining requests for relief; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is granted only with respect to his Labor Law § 240(1) claim as to liability only and denied with respect to his remaining requests for affirmative relief. The precise amount of damages to be awarded to plaintiff shall be decided at trial.

11/21/2023
DATE

ARLENE P. BLUTH, J.S.C.

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