Supreme Court of the State of New York
County of Kings

Part LL1

PAULA ANDREA GUTIERREZ VARON,

Plaintiff,

against

FPG CH 349 HENRY, LLC, FORTIS PROPERTY GROUP, LLC, RAY BUILDERS, INC., AND MENOTTI ENTERPRISE LLC,

Defendants.

FPG CH 349 HENRY, LLC, FORTIS PROPERTY GROUP, LLC, AND RAY BUILDERS, INC.,

Third-Party Plaintiffs,

against

UNITED CONSTRUCTION INDUSTRIES, LLC A/K/A QUAD CONSTRUCTION OF NEW YORK, LLC,

Third-Party Defendant.

FPG CH 349 HENRY, LLC, FORTIS PROPERTY GROUP, LLC, AND RAY BUILDERS, INC.,

Second Third-Party Plaintiffs,

against

F-KAM CONSTRUCTION LLC,

Second Third-Party Defendant.

Index Number 520065/2020
Seqs. 009, 010

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered

Notice of Motion and Affidavits Annexed	1–2
Order to Show Cause and Affidavits Annexed.	
Answering Affidavits	3–4
Replying Affidavits	5–6
Exhibits	
Other	

Upon the foregoing papers, plaintiff's motion for summary judgment (Seq. 009) and defendant Menotti Enterprise LLC (Menotti)'s motion for summary judgment (Seq. 010) are decided as follows:

Factual Background

Plaintiff commenced this action to recover for damages she claims to have sustained on August 13, 2020 when she fell down a flight of stairs at a construction site. Plaintiff testified as follows: plaintiff was working for third-party defendant United Construction Industries, LLC a/k/a Quad Construction of New York, LLC (Quad), an excavation/foundation contractor, on the date of the accident and the accident occurred at 347 Henry Street (Varon EBT at 47–48). It is undisputed in the instant motion that FPG CH 349 Henry, LLC and Fortis Property Group, LLC (FPG/Fortis or owners) owned the property and that Ray Builders, Inc. (Ray) was the general contractor at the site. Ray sub-contracted with Menotti, a site safety consultant, to provide a site safety manager and implement site safety during construction (Michael Menotti, principal of Menotti, EBT at 17–18, 24). The site safety manager placed at the site by Menotti was Joseph Falquecee (*id.* at 67). Mr. Falquecee has not been deposed. Ray also sub-contracted plaintiff's employer, Quad.

Plaintiff was instructed to clean up debris from the area around the exterior pool (*id.* at 54, 75). On the date of the accident, plaintiff entered the building that was under construction to retrieve a shovel and bucket to perform her work (*id.* at 78). Plaintiff found these tools on the second floor of the building and then went to the stairs to descend to the first floor and exit to the pool area where she was assigned to work (*id.* 78–80). When she began to descend the stairs, plaintiff was holding the shovel and the bucket (*id.* at 83). While descending, plaintiff slipped on "something like sand, dirt, debris" (*id.* at 88). Plaintiff also testified that there were pieces of rocks and debris "all over the place" like what "you normally find or expect to find on a construction site" (*id.* at 89).

Plaintiff also testified that she did not "recall seeing any" railings on the stairs (*id.* at 85). The picture submitted by plaintiff in support of her motion, which shows plaintiff lying on the landing of a stairwell, appears to depict at least one handrail running along the interior wall of the stairwell (affirmation in support, seq. 009, at 10). Defendants submit another photograph of a stairwell that has a permanent railing along the interior wall and a temporary, wooden handrailing along the exterior wall (affirmation in opposition, seq. 009, at 10). Plaintiff testified she was not sure whether this stairwell was the same stairwell where her accident occurred (Varon EBT at 139). Joel Werzberger, site superintendent of Ray, and Andrew Feigenbaum, senior project manager for Ray, each testified that this stairwell was the stairwell where the accident occurred (Feigenbaum EBT at 105–107; Werzberger EBT at 90, 99). There is no testimony from Mr. Falquecee, who purportedly prepared the accident report.

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Labor Law § 240 (1)

Labor Law § 240 (1) imposes a non-delegable duty upon owners, general contractors, and their agents, to provide safety devices to workers exposed to elevation-related risks. Here, it is undisputed that this accident occurred on a permanent staircase. The Second Department has held that a permanent staircase is not a safety device under the Labor Law (*Norton v Park Plaza Owners Corp.*, 263 AD2d 531, 531–32 [2d Dept 1999]). Plaintiff argues that the missing second

handrail is a safety device that was absent; however, plaintiff does not cite and the court is not aware of any caselaw to support this contention.

In light of the facts before the court and the law in this jurisdiction, defendant's motion for summary is granted as to plaintiff's Labor Law § 240 (1) claim, and plaintiff's motion is denied.

Labor Law § 241 (6)

To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show that she was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury (4) the proximate cause of which was a violation of an Industrial Code provision (*Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]). Plaintiff predicates her Labor Law § 241 (6) claim on alleged violations of Industrial Code 23-1.7 (d) (slipping hazards) and (e) (tripping hazards) and 23-2.7 (e) (failure to install protective railings on permanent staircases).

As an initial matter, defendant Menotti contends that it is not a proper Labor Law defendant because it was a site safety consultant with only general authority to control the work. However, Menotti was hired by the general contractor Ray Builders not merely as a site safety consultant, but also as a site safety manager, as shown by its employment of an on-the-ground site safety manager who performed daily walkthroughs of the site, Mr. Falquecee (Feigenbaum EBT at 75; Menotti EBT at 40–41). There is also some evidence that Mr. Falquecee was responsible for ensuring that sub-contractors conducted tool-box talks or safety meetings (Feigenbaum EBT at 121–122). There is, therefore, at least a question of fact as to whether Menotti, through its agent, had "the right to exercise control over the work" (*Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 697 [2d Dept 2016]). Menotti's motion for summary

judgment on this issue is therefore denied.

Plaintiff testified that she "slipped" and nowhere claims to have tripped (Varon EBT at 88)—therefore, Rule 23-1.7 (e), which relates to "tripping hazards," is inapplicable here (*Dyszkiewicz v City of New York*, 218 AD3d 546, 548 [2d Dept 2023]).

Plaintiff next alleges that defendants violated Rule 1.7 (d). In support, plaintiff points to her own testimony that she slipped on construction debris while descending the stairs at the site where she was working. Rule 23–1.7 (d) provides that "[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing." Plaintiff has identified a passageway that was allegedly made slippery by a foreign substance (*see e.g. Bazdaric v Almah Partners LLC*, 2024 NY Slip Op 00847 [Ct App Feb. 20, 2024] [substances enumerated in the rule do not limit the meaning of "foreign substance"; plastic paint cover on an escalator was a foreign substance under Rule 23-1.7 (d)]). Plaintiff's testimony is sufficient to support a prima facie entitlement to summary judgment on her Labor Law § 241 (6) claim.

In opposition, defendants argue that there is evidence showing that the staircase was free from debris[1] and that the motion is premature because there are depositions outstanding. Mr. Werzberger testified that, upon arriving at the jobsite and being advised of the accident by Mr. Falquecee he inspected the stairs and did not see any debris (Werzberger EBT at 151–152). Defendants argue that this testimony corroborates the daily log and incident report purportedly

[1] This also serves as the basis for Menotti's own motion for summary judgment on this issue, Seq. 010.

prepared by Mr. Falquecee on August 13, 2020, which states that all stairways and walkways are free from debris. Notably, this log is not authenticated by Mr. Falquecee. However, while hearsay alone is insufficient to resist summary judgment (*see King v North Short Long Island Jewish Hosp. at Plainview*, 127 AD3d 928 [2d Dept 2015]), Mr. Falquecee has been placed under subpoena to testify and his report corroborates the testimony of Mr. Werzberger. Defendant owners and general contractor argue that, should the report and Mr. Werzberger's testimony be insufficient to raise an issue of fact, plaintiff's motion should be denied as premature absent the testimony of Mr. Falquecee. Considering the conflicting testimony about the debris on the stairs, a material question of fact exists which warrants the denial of summary judgment.

As to the second alleged violation of the Industrial Code, plaintiff relies on her testimony that she did not recall seeing handrails on the stairway where she fell, in violation of Rule 23-2.7 (e). In opposition, defendants argue that the photograph taken by Mr. Werzberger of the stairway and the photograph that depicts plaintiff on the ground clearly demonstrate the existence of handrails. Ultimately, plaintiff does not deny the existence of handrails in her deposition testimony but instead claims uncertainty about their existence. Plaintiff has failed to offer evidence sufficient to resist summary judgment on the issue of whether a handrail was present in the stairwell where she fell.

Plaintiff's motion on Labor Law § 241 (6) is therefore denied due to questions of fact; defendant Menotti's motion is granted solely to the extent that plaintiff cannot rely on alleged violations of Industrial Code 23-1.7 (e) and 2.7 (e) in support of her Labor Law § 241 (6) claim.

Labor Law § 200

Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). Thus, claims for negligence and for violations of Labor Law § 200 are evaluated using the same negligence analysis (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). In cases where a dangerous condition is at issue, liability may attach to a defendant if it either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*id.* at 61).

As noted above, there is conflicting testimony about both the existence and the duration of the alleged dangerous condition (debris) at the worksite. There are, therefore, questions of fact about whether the owner, general contractor, and the site safety manager were actually or constructively on notice of a dangerous condition and failed to remediate it. In light of that question, summary judgment is denied to all parties.

Contractual Indemnification, Common-law Indemnification, and Contribution

Due to the foregoing question of fact about defendant Menotti's role at the site and negligence, it is not entitled to summary judgment dismissing the cross-claim for indemnification and contribution against it (*see Anderson v United Parcel Serv., Inc.*, 194 AD3d 675, 678 [2d Dept 2021]; Menotti sub-contract [requiring Menotti to indemnify owners/general contractor for injuries "arising out of or resulting from performance of the Subcontractor's Work under this Subcontract]).

Conclusion

Plaintiff's motion for summary judgment (Seq. 009) is denied. Defendant's motion for summary judgment (Seq. 010) is granted only to the extent of dismissing plaintiff's Labor Law §

240 (1) claim and plaintiff's reliance on Industrial Code 23-1.7 (e) and 2.7 (e) as a predicate for her Labor Law § 241 (6) claim; the motion is otherwise denied.

This constitutes the decision and order of the court.

April 1, 2024
DATE

DEVIN P. COHEN
Justice of the Supreme Court