Supreme Court of the State of New York
County of Kings

Part LL1M

ALFREDO VELASQUEZ,

Plaintiffs,

against

ROMA SCAFFOLDING, INC., CITY OF NEW YORK, NEW YORK CITY HOUSING AUTHORITY, AND TDX CONSTRUCTION CORP.,

Defendant.

Index Number 530248/2021
Seqs. 002, 003

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
Exhibits	
Other	

Upon the foregoing papers, defendant Roma Scaffolding, Inc. (Roma)'s motion for summary judgment (Seq. 002) and defendant's motion to stay discovery (Seq. 003) are decided as follows:

Factual Background

The facts underlying this action are largely undisputed and are derived from the plaintiff's testimony at his 50-h hearing. Plaintiff was employed by non-party San Sebastian Enterprise, LTD (San Sebastian) at the time of his accident on November 16, 2021. Plaintiff was working to remove old roofing from a NYCHA building using a "Roof Warrior"—a mobile, self-propelled machine that stripped old layers of roof materials off. While removing the roof material, plaintiff slipped on water that had been contained under the old roof layers. Both of plaintiff's feet slipped out from underneath him and the Roof Warrior fell on top of him when he braced himself against it.

Defendant NYCHA owned the premises (styled as Marcy Houses, located in Brooklyn, NY). Roma was contracted to perform work at the premises and sub-contracted plaintiff's employer. There was no precipitation on the date of the accident and no snow on the roof at the

time of the accident. It had last rained two or three days before the date of the accident. It is undisputed that the water plaintiff slipped on was underneath the insulation and roofing materials plaintiff was removing; however, the record is not clear as to whether water was observable anywhere else on the roof (*see e.g.* Velasquez 50-h hearing at 53). The water plaintiff slipped on was exposed when the roofing materials were stripped by the Roof Warrior.

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)

"The single decisive question [when assessing liability under Labor Law § 240 [1]) 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]). Here, plaintiff does not oppose defendant's motion for summary judgment on his Labor Law § 240 (1) claim. Defendant's motion is therefore granted as to this claim.

Labor Law § 241 (6)

To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show that he 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]). A plaintiff cannot

recover for injuries sustained due to conditions that are integral to the plaintiff's work (*Salazar*, 18 NY3d 134 [2011]). Here, plaintiff alleges that his injury was caused by a violation of Industrial Code § 23-1.7 (d), which requires, *inter alia*, work areas to be kept free from slipping hazards, including water.

Defendant Roma argues that it should receive summary judgment on plaintiff's Labor Law § 241 (6) claim on the basis that the water plaintiff slipped on was integral to the work he was told to perform. Specifically, defendant argues that the water was the condition that plaintiff was hired to remediate, and that plaintiff therefore cannot recover for an injury he sustained due to that condition.

However, remediating a water condition is not mentioned in Roma's bid contract and there is no indication that plaintiff's instruction for the job involved dealing with water. Roma itself calls the water a "latent defect," which is incompatible with this condition being "integral" to the work (aff. in supp. at 3). In light of the testimony and arguments before the court, defendant has not demonstrated as a matter of law that the water underneath the roof was integral to the plaintiff's work and that Rule 23-1.7 (d) was not violated.

Plaintiff also opposes dismissal of 1.7 (e) on the grounds that the water may have constituted "debris" under this Rule. However, in the evidence and arguments before the court, plaintiff only contends that he "slipped" and nowhere claims to have tripped (*see e.g.* Velasquez 50-h hearing at 57–58)—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's testimony that he slipped rendered Rule 1.7 (e) inapplicable to his Labor Law § 241 (6) claim]).

Finally, plaintiff opposes dismissal of Industrial Code §§ 23-1.7, 23-1.22, 23-1.23, 23-

1.24, 23-1.8, 23-1.30, 23-1.8, 23-1.32. On review, these provisions are inapplicable to the facts of the instant action.

Defendant's motion is therefore granted as to dismissal of all Industrial Code provisions except Rule 1.7 (d); the motion is denied as to that provision.

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).

Defendant argues that the water was a latent condition, and therefore it was not on notice of the condition. "In moving for summary judgment on the ground that the alleged defect was latent, a defendant must establish, prima facie, that the defect was indeed latent—i.e., that it was not visible or apparent and would not have been discoverable upon a reasonable inspection—and also that he or she did not affirmatively create the defect and did not have actual notice of it" (*see Arevalo*, 148 AD3d 658, 660 [2d Dept 2017]).

In opposition, plaintiff contends that there has been insufficient discovery to show that Roma did not have notice of the water condition and that Roma has not demonstrated freedom from constructive notice of the dangerous condition. In the absence of any depositions or further discovery, there is insufficient evidence before the court to show that the condition was "not

visible or apparent and would not have been discoverable upon a reasonable inspection," as required by *Arevalo*. Roma's motion is therefore denied as to this claim.

Indemnification Cross-Claims

Due to outstanding questions of fact about Roma's liability under Labor Law § 200, and therefore as to its negligence, Roma is not entitled to summary judgment on its cross-claims for indemnification (*see Anderson v United Parcel Serv., Inc.*, 194 AD3d 675, 678 [2d Dept 2021]).

Conclusion

Defendant's motion for summary judgment (Seq. 002) is granted to the extent that plaintiff's Labor Law § 240 (1) claim is dismissed, and portions of his Labor Law § 241 (6) claims as described above are also dismissed. The motion is otherwise denied. Defendant's motion to stay discovery (Seq. 003) is denied as moot. Plaintiff voluntarily withdrew his motion for relief pertaining to discovery (Seq. 004) at oral argument.

This constitutes the decision and order of the court.

March 29, 2024
DATE

DEVIN P. COHEN
Justice of the Supreme Court