NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

MICHAEL SAGINOR,

Plaintiff,

-against-

Index No.: 152479/13
DECISION/ORDER
Motion Sequence No. 5

FRIARS 50th STREET GARAGE, INC.,
OSIB-BCRE 50th STREET HOLDINGS LLC, and
FLINTLOCK CONSTRUCTION SERVICES, LLC.,

Defendants.

FRIARS 50th STREET GARAGE, INC.,
OSIB-BCRE 50th STREET HOLDINGS LLC, and
FLINTLOCK CONSTRUCTION SERVICES, LLC.,

Third-Party Plaintiffs,

-against-

Third-Party Index No.: 595050/14

SMK ASSOCIATES, INC.,

Third-Party Defendant.

FRIARS 50th STREET GARAGE, INC.,
OSIB-BCRE 50th STREET HOLDINGS LLC, and
FLINTLOCK CONSTRUCTION SERVICES, LLC.,

Second Third-Party Plaintiffs,

-against-

Second Third-Party Index No.: 595114/14

FJF ELECTRIC CO., INC.,

Second Third-Party Defendant.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants' motion for partial summary judgment and plaintiff's cross-motion for summary judgment.

Papers	**Numbered**
Defendants' Notice of Motion	1
Defendants' Affirmation in Support	2
Defendants' Memorandum of Law	3
Plaintiff's Notice of Cross-Motion	4
Defendants' Affirmation in Reply	5
Plaintiff's Reply Affirmation	6

Lipsig, Shapey, Manus & Movernman, P.C., New York (Marc E. Freund of counsel), for plaintiff.
Marshall Dennehey Warner Coleman & Goggin, New York (Thomas G. Vaughan of counsel), for defendants.
O'Connor, O'Connor, Hintz & Deveny, LLP, Melville, for Second Third-Party Defendants FJF Electric Co., Inc.

Gerald Lebovits, J.

This is an action to recover damages for personal injuries sustained by a worker, Michael Saginor, while he worked at a construction site located at 218 West 50th Street in New York County (the premises) on February 26, 2013. Plaintiff was employed by FJF Electric Co., Inc. (FJF), as an electrician. According to plaintiff's complaint, Friars 50th Street Garage, Inc. (Friars),[1] owned the premises. Friars and OSIB-BCRE 50th Street Holdings LLC (OSIB-BCRE) hired Flintlock Construction Services, LLC (Flintlock), as the general contractor to build a hotel at the premises. Friars and OSIB-BCRE hired a subcontractor, FJF, to construct, renovate, and alter the premises.

In his amended complaint, plaintiff asserts that defendants are liable for common-law negligence and under Labor Law §§ 200 and 241 (6). Plaintiff also alleges violations of Industrial Code §§ 23-1.30, 23-1.7 (d); 23-1.7 (e) (1), (e) (2); 23-2.1 (a), (b); 23-3.3 (b), (c), (e), (f), (g), (k); and 23-3.3 (1); and OSHA standards. According to plaintiff, he was injured when he fell over a partially secured metal track (metal stud) that carpenters had installed as part of the framework for a sheet-rocked interior wall. The metal track was not secured to the floor. And it protruded 18 inches into the passageway/work area. Plaintiff alleges that he tripped and fell because of inadequate lighting and because of the protrusion.

Defendants — Friars, OSIB-BCRE, and Flintlock — move for partial summary judgment against plaintiff on the Labor Law § 241 (6) claim. Plaintiff cross-moves for summary judgment on the § 241 (6) claim only as to defendants OSIB-BCRE and Flintlock.

In support of its motion, defendants argue that Labor Law § 241 (6) is inapplicable. They argue that the facts do not support Industrial Code violations. Defendants contend that plaintiff tripped over the component of a wall that was partially installed — located where a wall was planned and under construction. Defendants contend that the metal track was not debris or stored material. Defendants deny plaintiff's allegation of inadequate lighting. Defendants contend that they never had notice of any lighting deficiency. In any event, plaintiff is an electrician who was hired by FJF to do the temporary lighting at the premises. Defendants maintain that if a lighting deficiency occurred on the premises, plaintiff should have fixed the problem or reported it to his foreman. According to defendants, only plaintiff testified at his examination before trial (EBT) about the lack of light; none of the other witnesses corroborate plaintiff's version of the facts.

[1] Friars commenced a third-party action against SMK Associates, Inc. (SMK). Friars obtained a default judgment against SMK after SMK failed to answer the third-party complaint. Hon. Paul Wooten, in an order dated September 9, 2014, determined that an inquest be held at the conclusion of the action to assess damages against SMK.

In support of its cross-motion, plaintiff argues that Labor Law § 241 (6) is applicable. According to plaintiff, defendants violated Industrial Codes, 22 NYCRR, §§ 23-1.30, 23-1.7 (e) (1), and (e) (2). Plaintiff argues that his foot got caught and trapped beneath an 18-inch protruding metal track in a dark and unlit passageway/work area and that the illumination in the passageway/work area was insufficient for safe working conditions; plaintiff did not see the protruding track until after his foot was trapped. That defendants had no actual or constructive notice is irrelevant. No triable issues of fact exist, according to plaintiff.

Discussion

To obtain summary judgment, a moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The burden then shifts to the movant's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *accord DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006].) If any doubt about whether triable facts exist, a court must deny summary judgment. (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

Labor Law § 241 (6) provides as follows:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty "on owners and contractors to 'provide reasonable and adequate protection and safety' to workers." (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]).

To prevail on a cause of action under Labor Law § 241 (6), plaintiffs must prove a violation of a provision of the Industrial Code that sets forth a specific safety standard. (*Id.* at 505.) In *Ross*, the Court of Appeals found that

> "for purposes of the nondelegable duty imposed by Labor Law § 241 (6) and the regulations promulgated thereunder, a distinction must be drawn between provisions of the Industrial Code

> mandating compliance with concrete specifications and those that establish general safety standards by invoking the '[g]eneral descriptive terms' set forth and defined in 12 NYCRR 23-1.4 (a). The former give rise to a nondelegable duty, while the latter do not." (*Id.*)

Contributory and comparative negligence are valid defenses to claims asserted under Labor Law § 241 (6). (*Id.* at 494, n 4.) Breaching a duty imposed by a regulation "promulgated under Labor Law § 241 (6) is merely some evidence of negligence," which is different from absolute liability under § 240 (1). (*Id.*)

Plaintiff must also prove that defendants' violation proximately caused plaintiff's injuries.

Preliminarily, because plaintiff cross-moves for summary judgment on the Labor Law § 241 (6) claim only as to defendants OSIB-BCRE and Flintlock and do not oppose defendants' motion as to defendant Friars, the Labor Law § 241 (6) claim against Friars is dismissed.

Plaintiff opposes defendants' motion and cross-moves only with respect to the remaining defendants' alleged violations of 22 NYCRR §§ 23-1.30, 23-1.7 (e) (1), and (e) (2). Because plaintiff does not oppose defendants' motion with respect to the remaining code violations — asserted in plaintiff's complaint and bill of particulars — those claims are deemed admitted and dismissed.

The court will address only 22 NYCRR §§ 23-1.30, 23-1.7 (e) (1), and (e) (2).

22 NYCRR § 23-1.30

Issues of fact exist about whether defendants violated 22 NYCRR § 23-1.30. Defendants' motion and plaintiff's cross-motion are both denied on this issue.

Section 23-1.30 provides the following:

> "Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass."

It is unclear whether the area where plaintiff injured himself had illumination. Plaintiff testified to the following: "if you walked on the ninth floor that day, you wouldn't see too much because it was pretty black. There was no lighting on that floor. The temporary lighting was not turned on." (Plaintiff's Notice of Cross-Motion, Exhibit B, at 49.) He said that it was "real dark . . . dark enough that it was hard to see. And on the side where we came up the stairs, there was no

way I could work on that side. There was no light at all." (Plaintiff's Notice of Cross-Motion, Exhibit B, at 56.)

He described the lighting as follows:

> "Say you're in this room right now [EBT room], and the outside of the windows were blocked off with the same kind of screen on the window. They have a black mesh around the whole building because we had no windows there yet. Say if you shut off the room lights in here, you know how you get that morning light coming through your windows. That's what the whole place looked like." (Plaintiff's Notice of Cross-Motion, Exhibit B, at 50.)

He stated that electricians were not allowed to power up the temporary lighting: "We're not allowed to do that. As an electrician, we weren't allowed to touch that. Only the foreman was allowed to go turn on any power in the building." (Plaintiff's Notice of Cross-Motion, Exhibit B, at 51.) The accident happened around 8:30 a.m. and 8:45 a.m.. (Plaintiff's Notice of Cross-Motion, Exhibit B, at 53, 88.)

Plaintiff's co-worker, Ruslan Komitsev, testified that "[t]he specific area he [plaintiff] was in was possibly dim, more or less dimmer than the other location in the building. He was in the center of the building rather than the outside of the building which had windows. . . . It wasn't as bright as it could have been." (Plaintiff's Notice of Cross-Motion, Exhibit C, at 13.) Komitsev testified that "[t]here was lighting on the floor . . . . [the temporary lighting was] all lit which was our job always to make sure any lamp or lamp fixer that was not functioning was to be replaced." (Plaintiff's Notice of Cross-Motion, Exhibit C, at 13-14.)

Plaintiff's other co-worker, Mike Lizardi, testified that the lights were on and that no light bulbs were missing. (Plaintiff's Notice of Cross-Motion, Exhibit D, at 64.) He testified that nothing covered the windows. (Plaintiff's Notice of Cross-Motion, Exhibit D, at 61-62.) He also testified that the temporary lighting "stayed on all the time . . . . lights were always on." (Plaintiff's Notice of Cross-Motion, Exhibit D, at 56-57.) According to Lizardi, if he saw a light bulb missing, he had the authority to replace the bulb. (Plaintiff's Notice of Cross-Motion, Exhibit D, at 55.)

Because of the inconsistencies in the EBT testimonies, the court cannot tell whether the area was illuminated.

Also, in conclusory fashion, defendants argue that it never had any notice about the light deficiency. And the parties disagree about whether an owner or general contractor must have actual or constructive notice of a work site defect for a Labor Law § 241 (6) violation to attach. Plaintiff relies on *Rizzuto v L.A. Wenger Contr. Co.* (91 NY2d 343 [1998]), among other cases, for the proposition that an owner or general contractor need not have actual or constructive notice of a work site defect. (Plaintiff's Notice of Cross-Motion, at 12.) Defendants, however, argue that "negligence requires a tortfeasor." (Defendants' Affirmation in Reply, at 5.) Defendants further argue that they had no notice of any deficiency. (Defendants' Memorandum

of Law, at 7-8.) According to defendants, "notice to *someone* must be proven despite the acknowledged jurisprudence that pursuant to § 241 (6) notice to a subcontractor is imputed to the general contractor." (Defendants' Affirmation in Reply, at 5 [emphasis in original].) According to defendants, plaintiff has not identified any tortfeasor.

The Court of Appeals in *Rizzuto* found that "the Appellate Division erred in dismissing the Labor Law § 241(6) cause of action based on its determination that such a claim is defeated by the absence of notice, to the general contractor, of the hazardous condition causing the injury." (91 NY2d at 348.) The court went on to note that

> "we have repeatedly recognized that section 241(6) imposes a nondelegable duty upon an owner or general contractor to respond in damages for injuries sustained due to another party's negligence in failing to conduct their construction, demolition or excavation operations so as to provide for the reasonable and adequate protection of the persons employed therein. Thus, once it has been alleged that a concrete specification of the Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiff's injury. If proven, the general contractor (or owner, as the case may be) is vicariously liable without regard to his or her fault. . . . It follows that the Appellate Division erred in absolving the defendant general contractor from liability under section 241(6) by reason of its absence of control or lack of personal notice for an opportunity to cure the dangerous condition. By requiring control and/or notice for an opportunity to cure, the Appellate Division reincorporated a common-law standard of due care into section 241(6), essentially requiring direct negligent acts or omissions by the general contractor, thereby eliminating the underlying basis of vicarious liability and replicating much of what Labor Law § 200 has been interpreted to require." (*Id.* at 350.)

This court cannot absolve defendants from liability under Labor Law § 241 (6) merely because defendants had no notice of the inadequate lighting. Defendants, as owner and general contractor, may still be liable. Defendants' argument is unpersuasive on plaintiff's § 241 (6) claim.

Defendants' other argument — that if illumination were deficient at the work site, plaintiff, an electrician, had to repair it himself or report it to his supervisor — goes to contributory or comparative negligence. Defendants state that as an electrician, plaintiff could change a light bulb. But defendants have not established that plaintiff was contributorily negligent. In conclusory fashion, defendants' counsel states that it was "probably Mr. Saginor himself . . . [who was responsible for] address[ing] and correct[ing] any encountered lighting deficiency." (Defendants' Memorandum of Law, at 7.) As explained above, plaintiff's EBT testimony contradicts defendants' counsel's assertion.

It is unclear who was responsible for the lighting at the construction site. Rocky Sanicharan, plaintiff's co-worker and FJF's foreman, testified that FJF received instructions from

defendants' site safety individual: "[I]f there was lights out, the site safety guy would let us know the bulb is out on this floor so we have to change it . . . . he let us know right away if he saw there is a bulb out so we have to rechange them." (Defendants' Notice of Motion, Exhibit J, at 16.) Komitsev testified that FJF's job was to replace lamps that were not functioning and that FJF was responsible for the temporary lighting. (Defendants' Notice of Motion, Exhibit K, at 14.) Lizardi testified that if he observed a light bulb missing or noticed that the work site was dark, he would tell Rocky Sanicharan. (Defendants' Notice of Motion, Exhibit J, at 55-56.) He stated that he had the authority to change a light bulb if he noticed it missing. (Defendants' Notice of Motion, Exhibit J, at 55-56.) But plaintiff testified that he did not have the authority to change light bulbs or turn on the temporary lighting.

Defendants have not moved for summary judgment against FJF. The court will not consider defendants' argument that plaintiff's employer, FJF, was negligent.

Based on plaintiff's EBT testimony, plaintiff explains that the lack of lighting proximately caused his injuries.

22 NYCRR §§ 23-1.7 (e) (1) and (e) (2)

Defendants' motion is granted as to defendants' liability under Labor Law § 241 (6) predicated on violating Labor Law §§ 23-1.7 (e) (1) and (e) (2). Plaintiff's cross-motion is denied on this issue.

Sections 23-1.7 (e) (1) and (e) (2) are inapplicable because the metal track on which plaintiff tripped on was integral to the construction work at the site.

Section 23-1.7 (e) provides the following:

> (e) Tripping and other hazards.
>
> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

A court will not find a defendant liable if an item "causing the injury was an integral part of the floor being constructed, an integral part of the work being performed, or itself constituted a protective device." (*Lenard v 1251 Ams. Assoc.*, 241 AD2d 391, 393 [1st Dept 1997] [finding that "because the floor itself was not under construction, the door stop did not constitute an integral part of the work being performed, and the door stop cannot be deemed a protective device"] [internal citations omitted].)

Defendants are entitled to dismissal of plaintiff's Labor Law § 241 (6) claim predicated on alleged violations of §§ 23-1.7 (e) (1) and (e) (2) because the metal track was integral to the work performed at the time of the accident. (*See O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805, 805 [2006] [finding that electrical pipe or conduit that plaintiff tripped over was an integral part of the construction]; *accord Trombley v DLC Elec., LLC*, 134 AD3d 1343, 1344 [3d Dept 2015] [finding § 23-1.7 [e] inapplicable because the conduits that stuck up from the floor, which injured plaintiff, were integral to the construction underway at the project]; *Flynn v 835 6th Ave. Master L.P.*, 107 AD3d 616, 614 [1st Dept 2013] ["The court also properly granted summary judgment dismissing plaintiff's § 241(6) claim, amendment notwithstanding. Plaintiff's testimony showed that the rebar that allegedly caused him to fall was in the process of being installed and thus integral to the ongoing work, defeating his claim of a violation of 12 NYCRR 23–1.7 (e) (2)"]; *Cumberland v Hines Interests Ltd. Partnership*, 105 AD3d 465, 465 [1st Dept 2013] [finding § 23-1.7 [e] [2] inapplicable because the pipe and pipe fittings that plaintiff tripped over were consistent with the work performed in the room];; *Thomas v Goldman Sachs Headquarters, LLC*, 109 AD3d 421, 422 [1st Dept 2013] ["[T]he protective covering had been purposefully installed on the floor as an integral part of the renovation project. As such, it cannot be construed as accumulated debris or scattered materials."]; *Tucker v Tishman Constr. Corp. of N.Y.*, 36 AD3d 417, 417 [1st Dept 2007] [finding rebar steel that plaintiff tripped over was not debris, scattered tools and materials, or a sharp projection, but rather, an integral part of the work being performed]; *Vieira v Tishman Const. Corp.*, 255 AD2d 235, 236 [1st Dept 1998] [finding that "the wire mesh over which he tripped was an integral part of the floor being constructed"].)

Plaintiff testified that his foot got stuck in a metal track: "It was a three and a half-inch metal track . . .you use it for your bottom support and your high support, top of the stud. And that's where you screw your metal studs to." (Defendants' Notice of Motion, Exhibit B, at 65.) He observed an 18-inch protrusion. (Defendants' Notice of Motion, Exhibit B, at 66.) He stated that the carpenters, SMK, put it there. (Defendants' Notice of Motion, Exhibit B, at 67.) Plaintiff testified that if he had seen the protrusion before the accident, he "would have stopped and fixed it because I don't need to take these hazards like that on a job site." (Plaintiff's Notice of Cross-Motion, Exhibit B, at 69.) He testified that he "fell forward. The ladder actually twisted under me because I was carrying the ladder on the side. It twisted my hand like this and smashed the ladder and my hand into the floor. And I fell on top of the ladder, like pushing more weight on top of it." (Plaintiff's Notice of Cross-Motion, Exhibit B, at 71.) The two boxes he was carrying, containing low voltage wire, in his other hand went "flying." (Plaintiff's Notice of Cross-Motion, Exhibit B, at 58-59, 71.) Komitsev saw plaintiff after the accident: "He [plaintiff] pointed at a stud that was protruding out of the floor." (Plaintiff's Notice of Cross-Motion, Exhibit C, at 12.)

The metal stud was integral to the work performed at the construction site. The metal track was part of the structural wall about to be constructed. Smith testified that the metal stud was part of the architectural design; it was meant to be there. (Plaintiff's Notice of Cross-Motion, Exhibit E, at 62-63.) Lizardi testified that the day before the accident, he observed two studs going from the floor to the ceiling; on the day of the accident, he observed that they had been removed. (Defendants' Notice of Motion, Exhibit J, at 40-42.) Lizardi suggests that the protrusion would not have existed unless someone removed two studs. (Defendants' Notice of

Motion, Exhibit J, at 40-42.) Lizardi's testimony suggests ongoing construction to the metal track/wall.

The metal track over which plaintiff tripped had purposefully been installed on the floor; the track was integral to the carpenters' process of building a wall. Plaintiff and other witnesses, however, testified that the carpenters should not have left the metal track protruding. Komitsev testified that the carpenters "never complete[d] their task. They left this unfinished, incomplete, and loose, sticking out of the ground; that should have been completed and [s]heetrocked." (Plaintiff's Notice of Cross-Motion, Exhibit C, at 16.) But the carpenters had not left the construction site. Komitsev testified that at the time of the accident, the carpenters "were being rushed to do something else, a different task to be completed." (Plaintiff's Notice of Cross-Motion, Exhibit C, at 16.) Thus, the carpenters had not yet finished the wall. They were in the process of completing their task, namely, using the metal track to erect a wall. According to the testimony mentioned above, the construction was ongoing.

The metal track was not "dirt," "debris," "obstruction," "condition" "sharp projection," "tools," "materials," or "sharp projection" to satisfy sections 23-1.7 (e) (1) and (e) (2).

That aspect of plaintiff's Labor Law § 241 (6) claim predicated on §§ 23-1.7 (e) (1) and (e) (2) is dismissed.

Accordingly, it is hereby

ORDERED that defendants' motion is granted to the following extent: plaintiff's claim under Labor Law § 241 (6) against defendant Friars 50th Street Garage, Inc. is dismissed; plaintiff's claim against defendants OSIB-BCRE 50th Street Holdings LLC and Flintlock Construction Services, LLC under Labor Law § 241 (6), namely, Industrial Code provisions 22 NYCRR § 23-1.7 (e) (1) and (e) (2) are dismissed; and the motion is otherwise denied; and it is further

ORDERED that plaintiff's cross-motion is denied; and it is further

ORDERED that defendants serve a copy of this decision and order on all parties with notice of entry and serve the County Clerk's Office, which is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the action shall continue.

Dated: January 26, 2017

J.S.C.

HON. GERALD LEBOVITS
J.S.C.