Malcolm v New York City Hous. Auth.
2016 NY Slip Op 31203(U)
June 16, 2016
Supreme Court, New York County
Docket Number: 158076/12
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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ALFRED MALCOLM,

Plaintiffs,

-against-

NEW YORK CITY HOUSING AUTHORITY, LIRO PROGRAM AND CONSTRUCTION MANAGEMENT, PE, P.C., LIRO PROGRAM AND CONSTRUCTION MANAGEMENT, P.C., and LIRO ENGINEERS, INC.,

Defendants.

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Index No. 158076/12
Motion Sequence 001

DECISION & ORDER

HON. SHERRY KLEIN HEITLER

Defendants New York City Housing Authority ("NYCHA"), Liro Program and Construction Management, PE, P.C., Liro Program and Construction Management, P.C., and Liro Engineers, Inc. ("Liro") (collectively, "Defendants") move pursuant to CPLR 3212 for summary judgment dismissing plaintiff's common law negligence and Labor Law §§ 200, 240(1), and 241(6) claims in their entirety. For the reasons set forth below, the Defendants' motion is granted in part and denied in part.

Plaintiff Malcolm Alfred ("Plaintiff") seeks to recover for personal injuries allegedly sustained on August 30, 2011 at a construction site located at 224-226 East 28th Street in Manhattan, otherwise known as NYCHA's Strauss Houses Complex. NYCHA hired Liro as the project's construction manager, which in turn hired Plaintiff's employer, non-party Zoria Housing, LLC ("Zoria"), as the general contractor. The construction work included roof and façade replacement. It is alleged that Plaintiff worked primarily as a storekeeper who was responsible for maintaining tools and equipment in a shed on the ground level. On the date of the accident, however, Plaintiff was working on the roof of "Building 1", having been assigned to transport parts of a disassembled hoist down to the ground level. In order to get the hoist parts down, Plaintiff had to carry them through a

bulkhead door on the roof down one flight of stairs to the 20th floor corridor where they could be placed into an elevator. Plaintiff alleges that while carrying materials through the bulkhead door he tripped and fell over a coiled rope that had been placed under the bulkhead door to hold it open. He sustained multiple injuries which required, among other treatment, a total left knee replacement.[1]

Plaintiff's General Municipal Law 50-h hearing was conducted on January 9, 2012.[2] He was later deposed on December 9, 2013 and January 16, 2014.[3] Plaintiff testified that on the morning of the accident he cleaned up garbage with his coworkers. He was then given instructions by Mr. Andy Ganess, a Zoria manager, to remove the hoist parts from the roof (Malcolm Deposition pp. 62-63, 113-14, 126-27):

> Q. . . . Who was the person who gave instructions at Building 1 to dismantle the hoist; was that a foreman or someone else?
>
> A. Production manager.
>
> Q. Who was the production manager?
>
> A. Andy Ganess.
>
> Q. And who did Andy Ganess work for?
>
> A. Zoria.
>
> * * * *
>
> Q. When you got to work on the morning of August 30, 2011, did you call Andy Ganess or did he call you?
>
> A. He called me.
>
> Q. What did he say when he called you?
>
> A. He told me he wants the hoists off the roof and he's sending the truck for it. . . .
>
> Q. Did he tell you how he wanted you to take it off the roof?
>
> A. I tell him – he tells me he will send men to help me take it off the roof.
>
> Q. You said that or he said that?
>
> A. I tell him to send men to take it off the roof from the elevator room. He say, All right, he will send men. But when the truck came it was the driver alone.
>
> * * * *

[1] Defendants' exhibit E, pp. 5-6.
[2] A copy of Plaintiff's 50-h transcript is submitted as Defendants' exhibit B ("50-h Transcript").
[3] Copies of Plaintiff's deposition transcripts are submitted as Defendants' exhibit G ("Malcolm Deposition").

Q. Where were you located when the driver came to meet you?

A. By Building 1. . . .

Q. What did the driver tell you when he approached you?

A. He come for the hoists, to load the hoists. I asked him for the men. He didn't bring the men. He said Andy didn't send nobody. . . .

Q. What happened next?

A. So I take the phone from and I call Andy. I said, Where is the men to load the hoists? He tell me let the driver help me.

Plaintiff testified that when he got to the roof the bulkhead door had already been propped open with a rope by his coworker, Sukwinder Singh.[4] There is contradictory testimony whether or not Plaintiff secured the rope further prior to commencing his own work (50-h Transcript, p. 54, Malcolm Deposition pp. 133-34):

Q. When you went up to the roof, did you have to open up the door?

A. The door was already open.

Q. Was there anything that was propping open the door?

A. Yes, a rope.

Q. Where was the rope tied?

A. I don't know. . . .

Q. How was the rope fastened?

A. It is just pushed underneath the door, so I pushed the rope underneath the door to keep it open.

Q. So, if I am understanding you correctly, the rope was jammed underneath the door?

A. Yes, a coiled rope.

Q. Do you know who had placed it there?

A. I don't know. It had to be Zorinda because he takes the key from me and went upstairs to do the cement on the roof.

* * * *

Q. While you were making these trips back-and-forth, you had to go through the bulkhead door and up and down the stairs, correct?

A. That's right.

Q. How was the door propped open?

A. With that rope, a coil of rope.

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[4] Throughout the transcripts Mr. Singh's first name was spelled either "Zorinda" or "Zurinda".

Q. How did the rope get there?

A. Well, I suppose who was working there put the rope there. Because Zurinda [sic] was toting up cement to do the pointing in buckets, so he put the rope to keep the door open. When he go for cement downstairs, tote it back up, the door had to be opened. . . .

Q. So, Zurinda put the rope there. Did you push the rope further in?

A. No. I didn't interfere with no rope.

Q. Do you recall previously testifying in this case that you pushed the rope further in under the door? . . .

A. No, I never did.

At approximately 3:00 pm Plaintiff started to carry 50-pound counterweights from the roof to the elevator (Malcolm Deposition pp. 91-92). At approximately 3:30 pm, on his eighth or ninth trip, he placed a large bag which contained approximately 200 pounds of equipment over his shoulder. As he walked towards the bulkhead door the wind pushed the door towards him, causing him to trip and fall over the coiled rope (50-h Transcript pp. 62-64; Malcolm Deposition p. 136):

Q. . . . What were you in the process of doing when the accident occurred?

A. Carrying the tray with the cable. . . .

Q. Where did the incident occur? More specifically, did it happen while you were walking to the bulkhead or something else?

A. I was stepping from this bulkhead to go through the corridor, and the rope – I had the thing on the back here like that, so as I put my foot to go over, and the door, the next hooked the coil of rope and I stepped finally inside there. . . .

Q. When you say you were stepping through the bulkhead, was that the bulkhead you were going to use to go downstairs?

A. To go downstairs.

Q. Was the door still propped open with the coil of rope?

A. Yes. It is propped with a coil of rope.

Q. Had that moved at all? . . .

A. It was in the same place, but then my foot hooked it, you know.

Q. So, you tripped over the coil of rope that was propping the door open; is that correct?

A. Yes.

* * * *

Q. Did you have any trouble navigating over the rope the eight to nine times you were carrying the counterweights?

A. No. I was not going over the rope. The rope was on the side because the door was here. As I come in with this on my shoulder, the wind blow and pushed the thing, so the rope get into my foot and through [sic] me back inside the door. . . .

Q. So, the eight or nine times that you were walking with the counterweights back-and-forth, you had no trouble getting through the doorway?

A. No trouble getting through.

Mr. Ulysses Umana, NYCHA's Project Administrator for the Strauss Houses project, was deposed on May 4, 2015.[5] Mr. Umana testified that he visited the site once or twice each month and was responsible for ensuring the construction was being completed according to specifications. Mr. Umana testified that site safety was Zoria's responsibility, and that neither NYCHA nor Liro ever supplied Zoria or its employees with equipment, tools, or materials (Umana Deposition pp. 17, 22). He further testified that NYCHA did not supervise, direct, or control any work performed by Zoria or any of its employees, including the Plaintiff (*id.* pp. 23-24).

Liro's Project Manager for the Strauss Houses project, Mr. Chistopher Guiseppone, was deposed on September 21, 2015.[6] He testified that Liro was responsible for ensuring that contractors complied with their contracts and that work at the construction site was completed according to specifications. According to Mr. Guiseppone, no one at Liro ever directed, controlled, or supervised Zoria or its employees (Guiseppone Deposition pp. 7, 9, 35). Concerning the Plaintiff, Mr. Guiseppone testified that he was not permitted to remove construction equipment from the roof and in fact had no reason to ever go up to the roof since he was employed strictly as a storekeeper (*id.* pp. 34-35, 52).

Annexed to the moving papers are affidavits from Lakhi Zoria, President of Zoria Housing, LLC, Andy Ganess, Zoria's Senior Superintendant, and Sukwinder Singh, Plaintiff's Zoria Supervisor. Collectively, Messrs. Zoria, Ganess, and Singh aver that NYCHA and Liro did not direct, control, supervise, or manage Zoria or any of its employees, did not control the manner in

[5] A copy of Mr. Umana's deposition transcript is submitted as Defendants' exhibit H ("Umana Deposition").
[6] A copy of Mr. Guiseppone's deposition transcript is submitted as Defendants' exhibit I ("Guiseppone Deposition").

which Zoria's employees performed their work, and did not supply Zoria or its employees with equipment or materials. Mr. Singh further averred that he worked at the Strauss Houses project on the date of Mr. Malcolm's accident but never propped open the bulkhead door at issue with a coiled rope.

DISCUSSION

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). However, "rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact." *Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 (1st Dept 2010); *see also Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

I. Labor Law § 240

Plaintiff does not argue, and there is nothing in the record to show, that Mr. Malcolm's injuries resulted from an accident covered by Labor Law § 240.[7] *See Runner v New York Stock*

[7] Labor Law 240 provides, in pertinent part, that "[a]ll 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."

Exch., Inc., 13 NY3d 599, 604 (2009) (quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]) ("'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.'"); *see also Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 10 (2011); *Narducci v Manhasset Bay Associates*, 96 NY2d 259, 267 (2001); *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 (1991). Accordingly, Defendants' motion to dismiss Plaintiff's Labor Law § 240 claims is granted, and Plaintiff's Labor Law § 240 claims are hereby dismissed.

II. Labor Law § 200

Labor Law § 200[8] codifies the common law duty imposed upon general contractors to provide a safe workplace. *See Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352 (1998). Labor Law § 200 claims are generally predicated upon a showing that the contractor either had the "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition," (*Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]), or that it had actual or constructive notice of the defective condition which caused the plaintiff's injuries (*see Comes v N. Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Philbin v A.C. & S., Inc.*, 25 AD3d 374, 374 [1st Dept 2006]).

In this case, Plaintiff's Labor Law § 200 and common-law negligence claims must be dismissed. Such claims are not sustainable in the absence of proof that Defendants exercised actual supervision or control over the work in the course of which plaintiff was injured. There is also no proof that Defendants had any control over the manner in which the work in question was performed

[8] Labor Law § 200 provides in relevant part that "[a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section."

or that Defendants supplied the coiled rope over which he allegedly tripped or failed to provide with other safety equipment that would have prevented his fall. In this regard, the Plaintiff himself acknowledged that he received his instructions from Mr. Ganess, a Zoria Superintendent. At most it appears that Defendants had general supervisory authority over the construction but not the specific control needed to implicate Labor Law § 200. *See Pipia v Turner Constr. Co.*, 114 AD3d 424, 428 (1st Dept 2014); *Fiorentino v Atlas Park LLC*, 95 AD3d 424, 426 (1st Dept 2012); *Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 (1st Dept 2011); *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 (1st Dept 2007); *Dalanna v City of New York*, 308 AD2d 400, 400 (1st Dept 2003); *Gonzalez v UPS.*, 249 AD2d 210, 210 (1st Dept 1998).

There is also no proof that Defendants had actual or constructive notice of the injury-causing condition. *See Atashi v Fred-Doug 117 LLC*, 87 AD3d 455, 456 (1st Dept 2011) ("Actual notice may be found where a defendant . . . was aware of [a condition's] existence prior to the accident."); *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986) ("To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it."). Assuming Mr. Singh placed the coiled rope under the doorframe, there is nothing in the record to show that such condition was known to anyone other than him and to the Plaintiff, both of whom were Zoria employees. The court can only speculate as to how long the rope was under the doorframe prior to Plaintiff's accident. In the absence of such evidence, Plaintiff cannot establish a case of constructive notice. *Gordon*, 67 NY2d at 837; *see also Early v Hilton Hotels Corp.*, 73 AD3d 559, 561 (1st Dept 2010) ("The absence of evidence demonstrating how long a condition existed prior to a plaintiff's accident constitutes a failure to establish the existence of constructive notice as a matter of law").

Having failed to show that Defendants had sufficient control over Plaintiff's work or had notice of the condition which is alleged to have caused his injuries, Plaintiff's common law negligence and Labor Law § 200 claims are hereby dismissed.

III. Labor Law 241(6)

Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers. *Ross* 81 NY2d at 501-02. The statute provides, in pertinent part:

> 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. The [New York State Commissioner of Labor] may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work . . . shall comply therewith.

Defendants assert that Plaintiff did not participate in construction, renovation, or demolition as defined by Labor Law § 241(6). The court disagrees. While it is true that his regular duties may not have been construction-related for Labor Law purposes, his activities at the time of the accident were. Plaintiff testified that his project manager directed him to transport the hoist parts from the elevator bulkhead on the roof to the ground floor. The "work of hoisting" is specifically enumerated under the broad definition of "construction work" as defined by Industrial Code 23-1.4(b)(13).[9]

Labor Law § 241(6) is not self-executing, and in order to withstand a motion for summary judgment, Plaintiff must show that there was a violation of a specific, applicable, implementing

[9] Industrial Code 23-1.4(b)(13) provides that "[a]ll work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures, whether or not such work is performed in proximate relation to a specific building or other structure and includes, by way of illustration but not by way of limitation, the work of hoisting, land clearing, earth moving, grading, excavating, trenching, pipe and conduit laying, road and bridge construction, concreting, cleaning of the exterior surfaces including windows of any building or other structure under construction, equipment installation and the structural installation of wood, metal, glass, plastic, masonry and other building materials in any form or for any purpose."

regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 243, 350 [1998]; *Ross*, 81 NY2d at 503). Plaintiff's bill of particulars alleges violations of 12 NYCRR §§ 23-1.5(a)-(b) and 23-1.7(e)(1)-(2).[10] Industrial Code 23-1.5 is a general workplace safety regulation that has consistently been held to be too broad to serve as a basis for a Labor Law § 241(6) claim. *Martinez v 342 Prop. LLC*, 128 AD3d 408, 409 (1st Dept 2015) (citing *Kochman v City of New York*, 110 AD3d 477, 478 [1st Dept 2013]) ("section 23-1.5 of the Industrial Code is too general to support a cause of action for violating Labor Law § 241(6)"); *see also Timmons v Barrett Paving Materials, Inc.*, 83 AD3d 1473, 1475 (4th Dept 2011); *Spence v Island Estates at Mt. Sinai II, LLC*, 79 AD3d 936, 937 (2d Dept 2010); *Weinberg v Alpine Improvements, LLC*, 48 AD3d 915, 918 (3d Dept 2008).

12 NYCRR § 23-1.7(e), entitled "Tripping and other hazard", is specific enough to form the basis of a Labor Law § 241(6) violation. *See Matter of 91st St. Crane Collapse Litig.*, 133 AD3d 478, 480 (1st Dept 2015); *Boss v Integral Constr. Corp.*, 249 AD2d 214, 215 (1st Dept 1998). It provides:

> (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.

Defendants assert that the doorway where the accident occurred was not a "passageway" as defined by 12 NYCRR § 23-1.7(e), but it appears to have been the only means of ingress and egress from the building to the rooftop area. The plaintiff in *McCullough v One Bryant Park*, 132 AD3d 491 (1st Dept 2015) was injured in a similar manner as Mr. Malcolm, namely "while he was passing from an

[10] Plaintiff also alleges violations of several OSHA standards set forth at 29 CFR 1926. However, such alleged violations cannot serve as a predicate for Plaintiff's Labor Law 241(6) claim. *See Rizzuto*, 91 NY2d at 351.

exterior roof on a construction site to an interior room." In that case, the First Department determined that the doorway constituted a passageway within the meaning of the 12 NYCRR § 23-1.7(e). *Id.* at 492. The case at bar is not to the contrary.

Defendants' contention that the coiled rope was an "integral part" of Plaintiff's work is also misplaced. The First Department has consistently held that dismissal on the ground that a tripping hazard constitutes an integral part of the work being performed is inapplicable to 12 NYCRR § 23-1.7(e)(1) and only warranted with respect to 12 NYCRR § 23-1.7(e)(2). *See Singh v 1221 Ave. Holdings, LLC*, 127 AD3d 607, 607-08 (1st Dept 2015). In any event, it is evident that the coiled rope was not "integral" to Plaintiff's work. As an example, the plaintiff in *Thomas v Goldman Sachs Headquarters, LLC*, 109 AD3d 421, 422 (1st Dept 2013) tripped on a stack of Masonite boards the plaintiff had to use in order to install flooring. The court held that because such boards were a necessary part of the flooring project, they could not be considered debris under § 23-1.7(e)(2). Here, the coiled rope was at most attendant to Plaintiff's work and certainly not necessary for him to complete his duties. As Plaintiff points out, the rope would not have been needed had a coworker been assigned to assist him. In this regard, both Messrs. Umana and Guiseppone testified that workers assigned to move materials from one area to another should be accompanied by a co-worker because it is against NYCHA policy to prop doors open (Umana Deposition pp. 48-49; Guiseppone Deposition pp. 43-44):

> Q. During the removal of the hoist, the components, the pieces of the hoist that were carried down, was there a required method to keep that door open for the workers to go in and out with pieces?
>
> A. No. There's no method to keep the door open. They were not allowed to leave the door open. It's against NYCHA policies.
>
> Q. Why is that?
>
> A. Because of safety. . . .
>
> Q. How does the door remain open for that process? . . .
>
> A. Well, you have to hold the door open for them.

Q. Was that a NYCHA requirement?

A. Yes. You are not allowed to prop any door open with any mechanism or anything jamming the . . . frame. Between the frame and the door, you are not allowed to put anything to keep that door open.

Q. So, you can't use any type of doorstop whether it's a cement brick or rope or anything like that?

A. No. Well, you can't put nothing. It's too high.

* * * *

Q. Was there any rules or regulations in effect at this job site if materials had to be . . . removed through a doorway, that a person be designated to hold a door open to complete that process? . . .

A. It's a general work practice. It's general practice. . . .

Q. When you say, "A general work practice," is that the usual and customary practice in the industry in effect at the time, the time being August 2011?

A. I don't recall. It's just a general work practice that doors are not propped open, therefore, there should be somebody to hold the door.

Such testimony demonstrates that the coiled rope was not an integral part of Plaintiff's work, and in fact should not have been there at all.

The court rejects Defendants' contention that Plaintiff was not authorized to be on the roof in the first place. As set forth above, Plaintiff testified that Mr. Ganess, his Zoria manager, instructed him to go to the roof and remove the hoisting equipment. It strains credulity to believe that Plaintiff would go up to the roof in order to haul hundreds of pounds of equipment without having been instructed to do so. Finally, Defendants have not shown Plaintiff to be the sole proximate cause of his injuries. For summary judgment purposes, Plaintiff's unequivocal recollection that the rope was in place under the door frame before he arrived is sufficient to rebut Defendants' sole proximate cause defense. *Santelises v Town of Huntington*, 124 AD3d 863, 865 (2d Dept 2015) ("In determining a motion for summary judgment dismissing a complaint, all of the evidence must be

viewed in the light most favorable to the opponent of the motion, and all reasonable inferences must be resolved in that party's favor").[11]

CONCLUSION

Labor Law § 241(6) imposes a nondelegable duty upon the Defendants to respond in damages for injuries sustained by Plaintiff 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." *Rizzuto*, 91 NY2d at 349-350.

Here, there is an issue of fact whether Plaintiff's employer violated 12 NYCRR § 23-1.7(e)(1) by creating and/or allowing a tripping hazard to remain in a passageway, thereby causing Plaintiff's injuries. Therefore, if proven, Defendants may be held vicariously liable for such injuries without regard to their own fault.

Accordingly, it is hereby

ORDERED that Defendants' summary judgment motion is granted with respect to Plaintiff's common law negligence claims, Labor Law § 200 claims, Labor Law § 240 claims, and Labor Law § 241(6) claims, except those Labor Law § 241(6) claims predicated on a violation of 12 NYCRR § 23-1.7(e); and it is further

ORDERED that Plaintiff's common law negligence claims, Labor Law § 200 claims, Labor Law § 240 claims, and Labor Law § 241(6) claims not predicated upon 12 NYCRR § 23-1.7(e) are hereby severed and dismissed in their entirety; and it is further

[11] Plaintiff's contradictory testimony as to whether he secured the rope before beginning his own tasks goes to assessing his credibility, which is not the task of the court on a summary judgment motion. *See Robinson v NAB Constr. Corp.*, 210 AD2d 86, 87 (1st Dept 1994).

ORDERED that Defendants' motion is denied with respect to Plaintiff's Labor Law § 241(6) claim predicated upon a violation of 12 NYCRR § 23-1.7(e), and Plaintiff may proceed with such claim; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

DATE: 6-16-16

SHERRY KLEIN HEITLER, J.S.C.