SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

ADOLF RIECKEHOFF,
Plaintiff,

-against-

EXTELL WEST 57TH STREET, LLC and LEND LEASE (US) CONSTRUCTION, LMB, INC.,
Defendants.

INDEX NO.	157151/2013
MOTION DATE	11/02/2016
MOTION SEQ. NO.	001
MOTION CAL. NO.	

The following papers, numbered 1 to 11 were read on this motion for summary judgment, and cross-motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits	4 - 9
Replying Affidavits	10; 11

Cross-Motion: X Yes ☐ No

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiff's motion for summary judgment on the issue of liability on the Labor Law 240(1) and 241(6) claims, is granted to the extent of finding that the Defendants are liable to the Plaintiff under §241(6) for violations of Industrial Code §§23-1.7(e)(1), 23-1.22(b)(2) and (b)(3). Defendants' cross-motion for summary judgment dismissing the Complaint, is granted to the extent of dismissing the Labor Law §§240(1), 241(6) violations of Industrial Code §23-1.22(b)(1), 23-1.5(a), (c)(1), (c)(2), and (c)(3), 23-1.7(e)(2), and OSHA claims. The remainder of the relief requested in the motion and cross-motion is denied.

Plaintiff commenced this labor law action to recover for personal injuries he sustained on May 1, 2013, while pushing a "mortar buggy" containing 500 lbs. of concrete mixture over a makeshift ramp. The accident occurred at the construction site of 157 West 57th Street, New York, New York, a premises owned by Defendant Extell West 57th Street, LLC (herein "Extell"). Plaintiff was employed by Del Salvio Masonry Corp. (herein "Del Salvio"), a company hired by Defendant Lend Lease (US) Construction LMB Inc., incorrectly s/h/a Lend Lease (US) Construction, LMB, Inc. (herein "Lend Lease") to perform masonry work at the site. Lend Lease was hired by Extell as the construction manager for the construction project.

Plaintiff asserted claims for common law negligence, OSHA violations, and violations of Labor Law §§200, 240(1), and 241(6) for Industrial Code violations under 12 N.Y.C.R.R. §§ 23-1.11(a) and (b); 23-1.22(b)(1), (b)(2) and (b)(3); 23-1.5(a) and (c)(1), (c)(2) and (c)(3); and 23-1.7(e)(1) and (2).

Plaintiff now moves for partial summary judgment on the issue of liability for violations of Labor Law §§240(1) and 241(6) for violations of Industrial Code 23-1.7(e), 23-1.22(b)(2) and (b)(3). Plaintiff argues that Extell is liable as owner of the premises, and that Lend Lease is liable as the construction manager because under its contract with Extell it hired the subcontractors, and was in complete control of the construction site.

Plaintiff asserts that the ramp consisted of a piece of plywood and a two by four that covered an approximate three to four inch height differential in the floor. Plaintiff testified at his deposition that he and his co-worker had to traverse this makeshift ramp to move the mortar buggy from one elevation level to another, and that once the mortar buggy was over the top of the ramp, the plywood flipped up in the air, causing him to trip and fall because the plywood was not nailed in place. (Mot. Exh. 4 pp 33-35, 37-41, and 66-68). Plaintiff claims that the accident warrants protection pursuant to Labor Law 240(1) because the ramp was a safety device utilized to allow workers to move the mortar buggy from one elevation level to another, and that the unsecured plywood failed because it moved, causing Plaintiff to trip and fall. Plaintiff also claims that under 241(6), there were violations of Industrial Code 12 NYCRR 23-1.7(e)(1), 23-1.22(b)(2), and 23-1.22(b)(3) because the ramp used plywood which was an obstruction or condition on a passageway that caused tripping, and which ramp was not substantially supported and braced to prevent excessive spring or deflection, and was not securely nailed.

In support of this motion, Plaintiff attaches the contract between Extell and Lend Lease which states that Lend Lease was to provide "all services and supervision necessary for or incidental to the successful completion of the Work in conformity with the contract documents", and was "solely responsible for all construction means, methods, techniques, sequences and procedures within the scope of the Work. (Mot. Exh. 9, P 3, Section 3.1). Plaintiff submits the deposition testimony of Mr. Matt Ross, Lend Lease's site safety manager for the project, and Mr. John McGreevy, Lend Lease's senior superintendent at the site. Mr. Ross testified that upon inspecting the ramp after Plaintiff's accident he considered the ramp to be a dangerous or hazardous condition. (Mot. Exh. 5 P 50). Mr. McGreevy testified that generally ramps of this nature should be secured. (Mot. Exh. 6 pp 38-39).

Plaintiff also provides the accident report, and pictures of the accident site. The accident report completed by Lend Lease three days after the accident states that the Plaintiff was pushing a cart up a small wooden ramp, and that the weight from the cart caused the ramp to tilt forward, which caused Plaintiff to trip and fall. (Mot. Exh. 8).

The pictures of the accident site show a depression in the floor with a piece of plywood being used as a ramp to make up for the height differential in the floor. (Mot. Exh. 7).

Defendants in opposing the motion and in support of their cross-motion, argue that the accident involved only a De Minimis elevation differential of two to four inches; that none of the industrial code violations as required under Labor Law §241(6) apply to Plaintiff's accident; that the Defendants did not create or have notice of the condition, and did not supervise, direct, or control Plaintiff's work, thereby entitling them to summary judgment dismissing all of Plaintiff's common law and labor Law §200 claims.

Defendants argue that §240(1) does not apply because there was no malfunction of any safety equipment and that none of the devices under this statute would have prevented the accident. That a plywood wedge ramp is dissimilar to all safety devices enumerated under the statute, that the ramp cannot be considered the functional equivalent of a ladder, scaffold or hoist because it bridged only a De Minimis two to four inch gap between two floor surface finishes, and that this does not constitute a gravity-related hazard under the statute. Defendants contend that Plaintiff's injuries were a result of ordinary hazards of a construction site.

Defendant asserts that the accident did not involve a violation of any of the Industrial Codes required by 241(6) asserted by Plaintiff. That §23-1.11 is inapplicable because Plaintiff does not claim that the wood strength of the plywood was impaired or that it broke or separated, and that this section of the Code protects workers from injuries caused by weakened or rotted wood not capable of sustaining weight. That under §23-1.22 Plaintiff has failed to establish that the plywood positioned between the different floor surfaces constitutes a structural runway, ramp or platform; that §§23-1.22(b)(1), (2), and (3) are inapplicable because (b)(1) refers to ramps used for trucks and heavy vehicles, that under (b)(2) wheeled containers do not fit into any of the categories under this section, and that under (b)(3) a mortar buggy does not qualify as a power buggy, wheelbarrow, handcart or hand truck.

Defendants further allege that §§23-1.5(c)(1) and (c)(2) only set forth general safety standards which are insufficient to sustain a claim under §241(6) because the accident did not involve a safety device or equipment, and that Plaintiff did not allege any safety device or equipment was defective or inoperable. That §23-1.7(e) is inapplicable here because the Plaintiff did not trip on any dirt, debris, scattered tools or materials, that plaintiff testified there was nothing foreign or slippery on the plywood (Mot. Exh. C at 70), and that this section is inapplicable where the accident is caused by an object or material purposefully laid on the floor or that is a part of the floor. Defendants also argue that any claims under OSHA must be dismissed because they were not Plaintiff's employer.

Finally, Defendants contend that they are entitled to summary judgment dismissing the Labor Law §200, common law negligence, and OSHA claims. That Plaintiff was not an employee of the Defendants, that Plaintiff testified it was Del Savio foreman, George Granger, who directed and instructed him on how to perform his work, that he did not have any personal dealings with Lend Lease superintendent Mr. McGreevy, and that no one else provided him with instructions regarding his work other than Mr. Granger. (Mot. Exh. C at 24-26). That Mr. Ross and Mr. McGrath's affidavits confirm that Defendants did not provide any subcontractor employees with directions, instructions tools or materials (See Ross Aff. & McGrath Aff.). That there is no evidence that the Defendants created or had notice of the condition because the ramp was installed by an unknown contractor, that there had been no complaints about the condition of the ramp until Plaintiff's accident, and that Plaintiff cannot establish that the condition existed for a sufficient length of time because he testified that he believed the ramp was assembled the night before or the morning of the accident.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. (Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

Labor Law §240(1) imposes strict liability on "owners, contractors, and their agents" when they fail to provide adequate safety equipment and that failure causes a worker's injury in a gravity-related accident (Fabrizi v. 1095 Ave. Of the Ams., L.L.C., 22 N.Y.3d 658, 664-665, 8 N.E.3d 791, 985 N.Y.S.2d 416 [2014]). "To establish liability under Labor Law 240(1), a plaintiff must prove a violation of the statute that was the proximate cause of his injury" (Campos v. 68 E. 86th St. Owners Corp., 117 A.D.3d 593, 988 N.Y.S.2d 1 [1st Dept., 2014]). "The duty to furnish adequate safety devices is nondelegable, and those who fail to furnish such devices are absolutely liable for injuries that proximately result from an employee's elevation-related accident." 9DeRose v. Bloomingdale's Inc., 120 A.D.3d 41, 986 N.Y.S.2d 127, 129-130 [1st Dept., 2014]).

Extell is the owner of the premises where the construction took place, and Lend Lease was employed by Extell as the construction manager for the site. Aside from the Extell-Lend Lease contract stating that Lend Lease was to provide "all services and supervision necessary for or incidental to the successful completion of the Work in conformity with the contract documents", and was "solely responsible for all

construction means, methods, techniques, sequences and procedures within the scope of the Work," section 6.1 of the contract also provides that Lend Lease was "responsible for the performance of work by its subcontractors."

However, Plaintiff has not established a basis for summary judgment under 240(1). An accident does not give rise to liability under this statute when the Plaintiff "was not exposed to an elevation-related risk requiring protective safety equipment." (Cappabianca v. Skanska USA Bldg. Inc., 99 A.D.3d 139, 950 N.Y.S.2d 35 [1st Dept. 2012], citing Toefer v. Long Is. R.R., 4 N.Y.3d 399, 795 N.Y.S.2d 511, 828 N.E.2d 614 [2005]). "The single decisive question 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." (Landi v. SDS William Street, LLC, 2016 WL 7191465 [1st Dept. 2016]). The makeshift ramp covering the two to four inch differential in the floor does not pose an elevation-related risk as contemplated by the statute. (Cappabianca, supra, see also Torkel v. NYU Hosps. Ctr., 63 A.D.3d 587, 883 N.Y.S.2d 8 [1st Dept. 2009]- ramp whose bottom rested on the street and whose top rested on the adjacent sidewalk curb, with height differential of at most 12 to 18 inches, did not expose the plaintiff to type of hazard that the scaffold law contemplates). Defendants are therefore entitled to summary judgment dismissing Plaintiff's claim under 240(1).

Labor Law § 241(6) "requires owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494, 501-502, 601 N.Y.S.2d 49, 618 N.E.2d 82 [1993]). This duty is nondelegable and "to the extent that plaintiff has asserted a viable claim under Labor Law § 241(6), he need not show that defendants exercised supervision or control over his worksite in order to establish his right of recovery" (Id. at 502). "§ 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" (Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 N.Y.2d 343, at 350, 670 N.Y.S.2d 816, 693 N.E.2d 1068 [1998]).

Extell as owner, and Lend Lease as the construction manager, have a nondelegable duty to comply with specific safety rules under the Industrial Code. Whether or not the condition was caused by an unknown contractor makes no difference here. The question remains as to whether there were any Industrial Code violations.

Plaintiff moves for summary judgment on his 241(6) claim under New York Industrial Code 23-1.22(b)(2), 23-1.22(b)(3) and 23-1.7(e)(1).

23-1.22(b)(2) states: "[r]unways and ramps constructed for the use of persons only shall be at least 18 inches in width and shall be constructed of planking at least two inches thick full size or metal of equivalent strength. Such surface shall be substantially supported and braced to prevent excessive spring or deflection. Where planking is used it shall be laid close, butt jointed and securely nailed."

23-1.22(b)(3) states in relevant part that: "[r]unways and ramps constructed for the use of wheelbarrows, power buggies, hand carts or hand trucks shall be at least 48 inches in width. Such runways and ramps shall be constructed of planking at least two inches thick full size or metal of equivalent strength. Such runways and ramps shall be substantially supported and braced to prevent excessive spring or deflection. Where planking is used...it shall be laid close, butt jointed and securely nailed."

The loose and unsecured plywood that was being used as a ramp for both a person, and hand carts and/or wheelbarrows to traverse the height differential in the flooring, should have been nailed down. Defendants argument that a mortar buggy is not the type of cart to be provided for under the statute is unavailing. The mortar buggy was holding approximately 500 lbs. of cement, and the makeshift ramp was put in place in order for the buggy to traverse over the height differential in the flooring. Defendant Lend Lease's own witness testified in his deposition that in general a makeshift ramp of that nature should have been secured. (Mot. Exh. 6 pp 38-39) Therefore, the plywood ramp should have been securely nailed in place. Plaintiff has stated a basis for finding the Defendants liable under 23-1.22(b)(2) and (3).

23-1.7(e)(1) states in relevant part that: "[a]ll passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping."

The loose and unsecured plywood used as a passageway to wheel the mortar buggy over the height differential in the floor, constitutes a condition that could, and did, cause tripping. Defendants argument that this section does not apply because the plywood does not constitute dirt or debris, and because Plaintiff did not allege that any sharp projections or scattered tools were present, is unavailing. The statute provides that the passageway is to be kept free from conditions which could cause tripping. A loose piece of plywood used for a makeshift ramp certainly could cause tripping. Defendants fail to rebut Plaintiff's arguments, and fail to establish otherwise that Plaintiff was caused to trip for any other reason than the shifting plywood. Further, Defendant Lend Lease's witness, Mr. Ross, testified that he considered the unsecured ramp to be a hazardous condition upon observing it after Plaintiff's accident. (Mot. Exh. 5 P 50). Plaintiff has stated a basis for finding the Defendants liable under 23-1.7(e)(1).

Defendants also move to dismiss the remaining Industrial Code violations cited by Plaintiff in his Bill of Particulars, and the Labor Law 200, common law negligence, and OSHA claims.

Defendants have stated a basis for dismissal of the claim under 23-1.22(b)(1), as this section of the code refers to runways and ramps constructed for use by motor trucks or heavier vehicles. Defendants have also stated a basis for dismissal of the 23-1.5(a), (c)(1), and (c)(2) claims as these standards have been held to be too general and insufficiently specific to support a claim under 241(6). (See Gasques v. State of New York, 15 N.Y.3d 869 [2010], Carty v. Port Auth. Of N.Y. & N.J., 32 A.D.3d 732, 821 N.Y.S.2d 178 [1st Dept. 2006], Dann v. City of Syracuse, Dept. of Aviation, 231 A.D.2d 855, 647 N.Y.S.2d 617 [4th Dept. 1996]). Further, §23-1.5(c)(3) is dismissed as the makeshift ramp did not involve a safety device, safeguard, or equipment, and §23-1.7(e)(2) is dismissed as Plaintiff does not allege that there were any accumulations of dirt, debris, scattered tools, materials or sharp projections. Defendants have not stated a basis for dismissal of §23-1.11, however, as a question of fact remains as to whether the plywood used for the makeshift ramp was sound.

Defendant has stated a basis to dismiss Plaintiff's claims under OSHA as Plaintiff was an employee of Del Savio, not the Defendants. (See Riley v. ISS Intl. Serv. Sys., 5 A.D.3d 754, 774 N.Y.S.2d 182 [2nd Dept. 2004]).

Labor Law §200 "codifies the common law duty of an owner or employer to provide employees with a safe place to work" (Jock v. Fien, 80 NY2d 965, 590 NYS2d 878, 605 NE2d 365 [1992]). Labor Law §200 requires "that the party to be charged with that obligation have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (Rizzuto v. L.A. Wenger Contr. Co., 91 N.Y.2d 343, 352, 693 N.E.2d 1068, 670 N.Y.S.2d 816 [1998] citing to, Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311, 317, 429 N.E.2d 805, 445 N.Y.S.2d 127 [1981]). "Where a plaintiff's injuries arise not from the manner in which the work was performed, but from a dangerous condition on the premises, a defendant may be liable under Labor Law § 200 if it either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition" (Garcia v. Market Associates, 23 A.D.3d 661, 998 N.Y.S.2d 193, 197 [2nd Dept, 2014]).

Defendants are not entitled to summary judgment dismissing Plaintiff's claims under Labor Law §200, and common law negligence. Although there is no evidence that the Defendants either created the dangerous condition, or that they had actual or constructive notice of it, there remains an issue of fact as to whether or not Lend Lease supervised and/or controlled Plaintiff's work. As stated above, according to the Extell-Lend Lease contract, Lend Lease was responsible not only for all construction means and methods, but was also responsible for the performance of work by its subcontractors. Further, Mr. Ross' affidavit states that Lend Lease did not instruct or direct the subcontractors' employees or provide them with any tools. However, an issue of fact as to direction and control remains because Plaintiff testified that although he did not personally interact with Mr. McGreevy, one of Lend-Lease's superintendents, that Mr. McGreavy would interact with Plaintiff's foreman Mr. Granger who supervised Plaintiff's work (Cross-Mot. Exh. C pp 23-24), and that Plaintiff and Mr. Granger would go to Lend Lease's office in the building's basement

to see what else the super wanted done (Id. at P 27-28).

Accordingly, it is hereby ORDERED that Plaintiff's motion for summary judgment on liability under Labor Law §§240(1), and 241(6) for violations of the Industrial Code under §§23-1.7(e)(1), 23-1.22(b)2 and (b)(3), is granted to the extent of finding that the Defendants are liable to the Plaintiff under §241(6) for violations of Industrial Code §§23-1.7(e)(1), 23-1.22(b)2 and (b)(3), and it is further,

ORDERED, that Plaintiff's motion for summary judgment on the issue of liability under Labor Law §240(1) is denied, and it is further,

ORDERED, that Defendant's cross-motion for summary judgment dismissing the Complaint is granted to the extent of dismissing the Labor Law 240(1), 241(6) pursuant to Industrial Code §23-1.22(b)(1), 23-1.5(a), (c)(1), (c)(2), and (c)(3), §23-1.7(e)(2), and OSHA claims, and it is further,

ORDERED, that the Labor Law §240(1) and OSHA claims are dismissed, and it is further,

ORDERED, that the Labor Law §241(6) claim under Industrial Code violation §§23-1.22(b)(1), and 23-1.5(a), (c)(1), (c)(2), and (c)(3), and §23-1.7(e)(2) are dismissed, and it is further,

ORDERED, that Defendant's cross-motion for summary judgment on the Labor Law §200, and remaining Industrial Code violations is denied, and it is further,

ORDERED, that within 20 days from the date of entry of this Order a copy of this Order with Notice of Entry shall be served on all parties, and it is further,

ORDERED, that within 20 days from the date of entry of this Order a copy of this Order with Notice of Entry shall be served on the New York County Clerk's Office pursuant to e-filing protocol, and a separate copy of this Order with Notice of Entry shall be served pursuant to e-filing protocol on the Trial Support Clerk in the General Clerk's Office at genclerk-ords-non-mot@nycourts.gov, who shall amend their records and enter judgment accordingly.

ENTER:

Dated: December 21, 2016

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE