SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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WILLIAM GROTTANO,

Plaintiff,

-against-

THE CITY OF NEW YORK, METROPOLITAN TRANSPORTATION AUTHORITY, and LONG ISLAND RAILROAD,

Defendants.

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DECISION AND ORDER

Index No.: 151431/2013

Mot. Seq. 001

KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219 (a) OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED[1]
NOTICE OF MOTION, JEFFREY A. NEWMEROV, ESQ., AFF. IN SUPP. AND EXHIBITS ANNEXED	16-24
AFF. IN OPPOSITION, MICHAEL J. ZISSER, ESQ. AND EXHIBITS ANNEXED	26-28
AFFIRMATION IN REPLY	33

Plaintiff William Grottano moves, pursuant to CPLR 3212, for an order granting him partial summary judgment on the issue of liability pursuant to Labor Law §§ 240(1) and 241 (6) as against defendants the City of New York ("the City"), the Metropolitan Transportation Authority ("the MTA"), and the Long Island Railroad ("the LIRR").

[1] Unless otherwise indicated, the papers are referred to according to the document numbers assigned to them by the New York State Courts Electronic Filing System (NYSCEF).

FACTUAL ALLEGATIONS

Plaintiff testified at a pre-action statutory hearing and at a deposition. On the date of his accident, plaintiff was employed by nonparties Judlau and Dragados, a joint venture, ("Dragados Judlau") as a "shaper" and was working at the "East Side Access Project" at 48th Street and Madison Avenue. Plaintiff testified that he was a member of Local 147, otherwise known as the "sandhogs."

Plaintiff maintains that site safety training meetings were conducted once a week at the beginning of a shift by a safety miner named Gary. In order to access his work site, plaintiff had to walk down a staircase because his work location was six stories below street level in the "EB-4" tube. Before going all the way down to the site, plaintiff stopped at the "hog house" where he was told by Jerimiah McGuire, the foreman, that he was to move, set up, and take down "slick lines" on 55th Street. The slick lines were used to transport cement from ground level to inside the tunnel. He maintained that four other workers were to assist him with this work.

Following the meeting, plaintiff walked to 55th Street in an underground tunnel. Work was in progress as he walked through. Plaintiff testified that McGuire, as well as the workers, an engineer, and two supervisors were also at the location. He identified the supervisors as Billy Marshall, the "walking boss", and John, the supervisor, both of whom worked for Dragados. Plaintiff maintained that, although he observed several workers at the site from the MTA and the LIRR, whom he identified from their hard hats, they did not direct or discuss his work.

At the site, muck, which was mud and water which came off of the rocks, was being removed. The part of the tunnel where plaintiff was working consisted of rock with a concrete floor and walls, with muck on top of the concrete. Plaintiff was wearing muck boots provided by

the company, a hard hat, a safety vest, and work pants.

On his way out of a tunnel, plaintiff accidently stepped into an uncovered drain hole which was four or six inches wide, about 10 to 16 inches long, and 12 to 16 inches deep. Plaintiff testified that his leg went into the drain hole "[h]alfway up the boot. I would say 6 inches, 7 inches." Plaintiff's EBT tr., at 55. According to plaintiff, there was muck all over the tunnel and was about four to eight inches deep in the area where the drain hole was located. When his leg went into the hole, plaintiff's body twisted, making him fall to the ground onto his left hip. Plaintiff testified that the drain holes were supposed to be visible and have covers which were supposed to be level with the floor. A co-worker, who was about 50 feet in front of him, turned around, and proceeded to help plaintiff to the ground level. Plaintiff recalled that the lighting in the area was poor.

During the month prior to his accident, plaintiff had noticed drilling and blasting by Local 147 in the area in question. He had not made any complaints about the open drain hole and was not aware of anyone else making such complaints. Following the accident, plaintiff proceeded to visit the site's nurse, who wrapped his knee. Plaintiff later visited the hospital after experiencing pain in his left knee and in his back.

Ashraf Mittias (Mittias) was deposed on September 10, 2015. Mittias was employed by nonparty AECOM, which performed construction management for the MTA's projects, including the East Side Access Project. Mittias maintained that AECOM had a construction contract with the MTA for the excavation of tunnels for the subject project. He did not know who owned the tunnels or the land where the project was took place.

In July of 2012, Mittias worked as a senior inspector. He testified that the site was active

between five to six days per week with three shifts and Dragados Judlau was the general contractor. Mittias' company was acting on behalf of the MTA to conduct all of the inspections. In 2014, the walls had concrete and there was a central line of drainage. During construction, the drainage openings were to be covered by the contractors with plywood or a steel plate and were to be bolted to the floor in order to prevent falls and dirt. The drain pipes were to be covered after the pipe was embedded in concrete, first with plywood and then replaced and bolted with steel covers by Dragados Judlau.

Mittias testified that he had seen up to 10 inches of muck at the site and that there were occasions on which he had gone into the tunnel and its bottom was covered with muck. He testified that muck consisted of rock which mixed with water after it was blasted. Mittias maintained that, when workers were leaving the tunnel, they would have to walk through the tunnel to the lift. He testified that AECOM had someone in charge of safety and that, if there were any work or quality issues, that person would speak with Dragados Judlau's engineering. Mittias did not know whether there was an investigation of plaintiff's accident.

DISCUSSION

"The proponent of a summary judgment motion 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." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The burden then shifts to the motion'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).

Plaintiff contends that Labor Law §§ 240 (1) and 241 (6) are applicable to the LIRR and the City, since these defendants should be considered owners of the property. Plaintiff argues that the LIRR must be considered to be an owner of the area where plaintiff was injured because the LIRR was the entity for which the tunnel was being constructed. He also argues that the City had an ownership interest in the land on which the tunnel was being built.

In opposition, defendants contend that Labor Law §§ 240 (1) and 241 (6) do not apply to the LIRR and the City because plaintiff has failed to demonstrate that either entity was an owner of the subject property or supervised, directed, inspected, or controlled any of the work at the project. In an affidavit dated June 23, 2016, Christopher D'Antonio, Deputy Director of OCIP Management for the MTA, states that, based upon his knowledge of the MTA's business operations and a review of its records, neither the City nor the LIRR had any role at the project. According to D'Antonio, Dragados Judlau was a contractor for the MTA, which was owner on the project, including the work at the tunnel known as EB4. D'Antonio states that the City and the LIRR did not have any role in the subject accident and that they did not supervise, direct, inspect, or control any of the construction, demolition, excavation or other work in the tunnel where plaintiff was injured.

Plaintiff fails to submit any documents or testimony which demonstrate that the City or the LIRR was the owner of the subject property. Plaintiff also fails to demonstrate that the City or the LIRR supervised, directed, inspected, or controlled plaintiff or any of the work at the subject project on the date of, or before plaintiff's accident. *See Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 (1981) (holding that when "[w]hen the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to

supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241").

Since plaintiff fails to meet his burden of demonstrating that the City or the LIRR was a proper defendant pursuant to Labor Law §§ 240 (1) and 241 (6), i.e., an owner of the project site or an agent thereof, that branch of plaintiffs motion for partial summary judgment as against the City and the LIRR pursuant to those sections is denied.

Even assuming, *arguendo*, that the City and LIRR were proper defendants pursuant to Labor Law §§ 240 (1) and 241 (6), this motion must be denied against them, as well as the MTA, since plaintiff failed to establish its prima facie entitlement to summary judgment against each of the said defendants pursuant to those sections. Labor Law § 240 (1) provides, in part:

> "[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."

"Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . 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." *John v Baharestani*, 281 AD2d 114, 118 (1st Dept 2001), quoting *Ross v Curtis-Palmer Hydro-Elec. Co.* 81 NY2d 494, 501 (1993). In order to prevail on a Labor Law § 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the

plaintiff's injuries. *See Torres v Monroe Coll.*, 12 AD3d 261, 262 (1st Dept 2004).

Plaintiff contends that defendant's violation of Labor Law § 240 (1) was the sole proximate cause of his accident. Plaintiff argues that, because he was injured when he stepped into an unprotected opening which was along the surface where he was required to work, and as the open drainage hole constituted an elevation-related hazard, he should be entitled to partial summary judgment as to liability under Labor Law § 240 (1).

Defendants contend that plaintiff fails to meet his prima facie burden with respect to his allegation that Labor Law § 240 (1) was violated because a partial fall into a hole at ground level does not constitute a gravity-related fall. Defendants further contend that the alleged accident does not appear to be within the type of work in which a protective device listed in section 240 (1) would be applicable.

Here, plaintiff stepped into a hole while walking on a level area. Pursuant to his testimony, his foot went into the hole about six or seven inches. Plaintiff did not fall from an elevated platform to a lower level, but was walking on a level area when he stepped into the hole. As the height in which plaintiff's foot submerged was less than eight inches, a safety device, as listed in section 240 (1) of the Labor Law, would be inapplicable. *See Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 (1st Dept 2012) (plaintiff's "accident could not give rise to liability under that statute because he was at most 12 inches above the floor and was not exposed to an elevation-related risk requiring protective safety equipment"); *Lombardo v Park Tower Mgt. Ltd.*, 76 AD3d 497, 498 (1st Dept 2010) (holding that no scaffold law claim exists where a staircase step, raised 18 inches above the floor, broke and caused the plaintiff to fall).

Since plaintiff's accident was not the type of accident for which a safety device could be

utilized, that branch of plaintiff's motion seeking partial summary judgment as to the Labor Law 240 (1) claim must be denied.

Plaintiff also argues that partial summary judgment must be granted as to his claim of a violation of Labor Law § 241 (6). Labor Law § 241 (6) provides, in pertinent part:

> "[a]ll 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, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places . . . ."

Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety. *See Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 (1st Dept 2007).

Plaintiff argues that defendants violated sections 23-1.7 (d) and 23-1.7 (e) of the Industrial Code.[2] Section 23-1.7 (d) of the Industrial Code provides:

> "[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."

Industrial Code § 23-1.7 (d) has been found to be specific enough to support a section 241

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[2] Plaintiff notes in his affirmation in reply that the other sections of the Industrial Code which he alleges were violated, specifically sections 23-2.1 and 23-1.30, were not abandoned, but that plaintiff is not seeking summary judgment at this time for these alleged violations.

(6) claim. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 351 (1998). If a substance is an integral part of a construction site, then it does not constitute a foreign substance under section 23-1.7 (d) of the Industrial Code. *See Galazka v WFP One Liberty Plaza Co., LLC*, 55 AD3d 789, 790 (2d Dept 2008) (holding that summary judgment was properly granted and that section 23-1.7 (d) of the Industrial Code was not violated because the plastic on which plaintiff slipped was an integral part of the asbestos removal project).

Plaintiff testified that, at the site, muck comes off of the rock, that muck is debris which he takes out of the tunnel, that there was muck on top of the concrete floor, and that "muck boots" were provided to him for the work. Since plaintiff's testimony demonstrates that the muck on which plaintiff allegedly slipped was an integral part of his work, the part of plaintiff's motion seeking partial summary judgment pursuant to Labor Law §241(6) arising from the alleged violation of section 23-1.7 (d) of the Industrial Code must be denied.

Section 23-1.7 (e) of the Industrial Code provides:

> "[a]ll 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."

Section 23-1.7 (e) of the Industrial Code has been held to be specific enough to support a claim made pursuant to Labor Law § 241 (6). *See Smith v McClier Corp.*, 38 AD3d 322, 323 (1st Dept 2007). Plaintiff testified that he was using the area of the tunnel where he was injured as a passageway to traverse and exit and that the area was previously utilized as a work area.

In an affidavit dated April 4, 2016, which was attached to the present motion, plaintiff states:

> "[t]he accident began when my left foot slipped because of the muck on the tunnel

> floor. That foot then tripped over what I later learned was a rock that was submerged in the muck and thus was invisible to me. It then went into the drain hole, causing me to fall to the tunnel floor and sustain an injury to my left knee, among other injuries . . . [t]he path I took was the only one I could have taken to exit the tunnel."

Plaintiff's aff., ¶¶ 2-3.

Based upon the affidavit, it remains unclear to this Court how plaintiff later learned that a rock caused him to trip. It is also unclear as to why this information does not appear to have been disclosed until April 4, 2016, over three years after the complaint was filed and after the completion of two depositions. While plaintiff argues that the allegation of a trip on a rock does not contradict his earlier testimony and that plaintiff was not asked for a detailed description of the accident at his deposition, defendants argue that this information is new and contradicts his prior testimony.

Since questions of fact exist regarding how the accident occurred and whether plaintiff fell due to a tripping hazard, that branch of plaintiff's motion seeking summary judgment pursuant to Labor Law §241(6) arising from the alleged violation of section 23-1.7 (e) of the Industrial Code must be denied.

In light of the foregoing, it is hereby:

ORDERED that plaintiff William Grottano's motion seeking partial summary judgment on the issue of liability pursuant to Labor Law §§ 240(1) and 241 (6) as against defendants the City of New York, the Metropolitan Transportation Authority, and the Long Island Railroad is

denied; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: January 11, 2017

ENTER:

KATHRYN E. FREED, J.S.C.

HON. KATHRYN E. FREED
JUSTICE OF SUPREME COURT