SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** 2

Justice

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JOHN ISDITH,

Plaintiff,

- v -

THE CITY OF NEW YORK, METROPOLITAN TRANSIT AUTHORITY, METROPOLITAN TRANSIT AUTHORITY CAPITAL CONSTRUCTION, NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSIT AUTHORITY NEW YORK CITY TRANSIT, J.F. SHEA CONSTRUCTION, INC.,

Defendants.

INDEX NO. 155087/2013

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29

were read on this motion to/for PARTIAL SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is **denied**.

In this personal injury action, plaintiff John Isdith moves, pursuant to CPLR 3212, for partial summary judgment on liability on his claims against defendants the City of New York ("the City"), Metropolitan Transit Authority ("MTA"), Metropolitan Transit Authority Capital Construction ("MTACC"), New York City Transit Authority ("NYCTA"), Metropolitan Transit Authority New York City Transit ("MTAT"), and J.F. Shea Construction, Inc. ("Shea") pursuant to Labor Law sections 240(1) and 241(6). After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion is **denied**.

FACTUAL AND PROCEDURAL BACKGROUND

On October 1, 2012, plaintiff John Isdith was employed as a maintenance and operating engineer by Schiavone Shea Kiewit Joint Venture ("SSK") at a water treatment plant located at 1328 Second Avenue in Manhattan. Doc. 1; Doc. 14, at p.15, 37; Doc. 17, at p. 7, 10.[1] That day, plaintiff, who was working on the MTA's Second Avenue Subway Project, was monitoring gauges measuring water being removed from the subway tunnel under construction. Doc. 14, at p. 20, 36-38. The water was being removed to prevent flooding while the work was being performed. Doc. 14, at p. 37-38. Plaintiff's specific task was to monitor the water separation system to ensure that fill and debris being sucked up with the water would go into a separate container. Doc. 14, at p. 46. De-watering the tunnel was a 24 hour per day, 7 day per week operation. Doc. 14, at p. 38. The water treatment plant was located inside of a cargo container located at street level near 71st or 72nd Street and the office where the gauges were located was in a separate container placed on top of the first. Doc. 14, at p. 20, 37-39; Doc. 17, at p. 12, 14. The only way to access the office and control station located in the top container was by means of a wooden staircase constructed by SSK. Doc. 14, at p. 39, 43; Doc. 17, at p. 13.

On the day of the alleged incident, plaintiff began his shift by taking a "walk around" to "make sure everything [was] working, as far as no leaks, everything [was] pumping." Doc. 14, at p. 42. He then went to the second floor of the trailer to watch the gauges and, within one hour into his shift, he started to descend the steps to do another walk around. Doc. 14, at p. 42-43. As plaintiff descended the staircase, one of the steps collapsed, he twisted his shoulder, and landed on

[1] Plaintiff testified that he believed that SSK stood for "Schiavone, Shea, I think it was - - Kent Construction. It was a joint venture." Doc. 14, at p. 15. All references are to the documents filed with NYSCEF in this matter.

his back. Doc. 14, at p. 43-44, 55; Doc. 17, at p. 15. Nobody witnessed the alleged incident. Doc. 14, at p. 45.

Amitabha Mukherjee appeared for deposition on behalf of defendants. Mukherjee was an employee of WSP Parsons Brinckerhoff, an engineering consulting firm, and was the construction manager for MTA contract number C26007 at the 72nd Street Station on the Second Avenue Subway. Doc. 17, at p. 5-6. He testified that defendant Shea was one of the companies forming the SSK joint venture. Doc. 17, at p. 7-8. He further stated that the City, MTA, and MTACC were "all associated with [the] project" and the NYCTA was "[n]ot directly" associated with it. Doc. 17, at p. 8. He also said that "[MTACC] puts out the contract to build the Second Avenue Subway. [NYCTA] is the user group that is the client of MTACC, that they turn over the completed subway line for them to operate". Doc. 17, at p. 9. He then stated that he understood "those groups" to be the "owners of the project." Doc. 17, at p. 9.

Plaintiff commenced the captioned action against the City, MTA, MTACC, NYCTA, MTAT, and Shea by filing a summons and verified complaint on May 31, 2013. Doc. 1. In the complaint, plaintiff alleged that his injuries were caused by defendants' negligence as well as their violations of Labor Law sections 200, 240(1), 241(6), and 241(8) and Industrial Code section 23-2.7. Doc. 1. Plaintiff further alleges that defendants owned, maintained and/or controlled the stairway. Doc. 1. Defendants joined issue by their answer filed June 24, 2013. Doc. 2.

On October 4, 2016, plaintiff moved, pursuant to CPLR 3212, for partial summary judgment on his claims pursuant to Labor Law sections 240(1) and 241(6). In support of the motion, they submit an attorney affirmation, the summons and complaint and answer, plaintiff's deposition testimony, photographs of the accident site, Mukherjee's deposition transcript, and the

report and affidavit of plaintiff's expert engineer Paul J. Angelides, P.E. Defendants oppose the motion.

CONTENTIONS OF THE PARTIES

In support of the motion, plaintiff argues that defendants are liable for his accident pursuant to Labor Law section 240(1) since a step on the temporary stairway collapsed and was thus defective. Plaintiff maintains that this defect was established by the submissions of his expert, Angeliades. Plaintiff further asserts that defendants are strictly liable pursuant to Labor Law section 241(6) based on their violation of Industrial Code section 23-1.7(f).

In opposition to the motion, defendants argue that plaintiff failed to demonstrate that they are parties subject to liability under labor law section 240(1) and 241(6), i.e., owners or contractors. They further assert that Shea is an improper defendant since it was a member of the SSK joint venture which employed plaintiff and that plaintiff is thus barred by the Workers' Compensation Law from bringing suit against it. Defendants also maintain that plaintiff has failed to submit admissible proof that the stairway was defective. Specifically, they argue that the affidavit and report submitted by Angeliades are unsworn and unsigned and that his opinion is conclusory. They further maintain that Angeliades improperly ignored plaintiff's 50-h testimony, during which he stated that he had walked on the stairs numerous times without incident before his alleged accident. Thus, urge defendants, they had no notice that such an incident could occur or that such an incident was foreseeable. Further, defendants assert that the motion must be denied since plaintiff's records from Premier Medical Care reflect that he fell when he "missed a step."

In reply, plaintiff argues, inter alia, that, although he does not identify which entity owns the street where the alleged incident occurred, Mukherjee admitted that defendants "owned the project." Plaintiff further asserts that defendants' arguments regarding notice and foreseeability are irrelevant and that defendants' challenges to plaintiff's expert are without merit.

LEGAL CONCLUSIONS

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing." *Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 (2010) quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion "regardless of the sufficiency of the opposing papers." *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 (2008) quoting *Alvarez*, 68 NY2d at 324.

Labor Law § 240 (1)

Labor Law § 240 (1) provides, in relevant part, that:

> All 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.

The Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]) and that absolute liability is imposed

where a breach has proximately caused a plaintiff's injury. *Bland v Manocherian*, 66 NY2d 452, 459 (1985). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with "adequate protection against a risk arising from a physically significant elevation differential." *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 (2009). In order to impose liability under section 240(1), plaintiff must establish that the violation of the statute was the proximate cause of the injuries alleged. *Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 (1st Dept 2011). Here, plaintiff has not established his prima facie entitlement to partial summary judgment as to liability on his Labor Law § 240 (1) claim against defendants.

Plaintiff Has Failed to Establish that Defendants

May Be Sued Pursuant to Labor Law Section 240(1)

Initially, plaintiff has failed to meet his prima facie burden of demonstrating that any of the defendants may be held liable for the alleged violation of section 240(1). Labor Law § 240 (1) applies to "owners," "contractors" and their "agents." "The meaning of 'owners' under Labor Law § 240 (1) and § 241 (6) has not been limited to titleholders but has 'been held to encompass a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit.'" *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 618 (2d Dept 2008), quoting *Copertino v Ward*, 100 AD2d 565, 566 (2d Dept 1984). The key criterion is the "right to insist that proper safety practices were followed and it is the right to control the work that is significant, not the actual exercise or nonexercise of control." *Sarigul v New York Tel. Co.*, 4 AD3d 168, 170 (1st Dept 2004), *lv denied* 3 NY3d 606 (2004) (internal quotation marks and citation omitted).

Here, plaintiff has not made a prima facie showing that defendants are either "owners", "contractors" or "agents" within the meaning of the Labor Law. In asserting that defendants were owners of the site, plaintiff relies solely on the deposition testimony of Mukherjee. However, as noted above, Mukherjee testified that the City, MTA, and MTACC were "all associated with [the] project" and that NYCTA was "[n]ot directly" associated with it. Doc. 17, at p. 8. He further stated that "[MTACC] puts out the contract to build the Second Avenue Subway. [NYCTA] is the user group that is the client of MTACC, that they turn over the completed subway line for them to operate". Doc. 17, at p. 9. He then stated that he understood "those groups" to be the "owners of the project." Doc. 17, at p. 9. However, since Mukherjee never specified which "groups" he was referring to, his testimony is too vague to allow this Court to conclude that any of the foregoing defendants was an "owner" for purposes of the Labor Law. Although plaintiff could have clarified this issue by submitting the affidavit of someone with knowledge in support of the motion, the contract for the work to be performed, and/or proof of ownership of the area where the alleged incident occurred, he did not do so. Plaintiff's failure to submit any contract also undermines his claim that Shea, in its own capacity, contracted for work at the site or was the agent of an owner.

Plaintiff Has Otherwise Failed To Establish His Entitlement

To Partial Summary Judgment On Liability Pursuant To Section 240(1)

Plaintiff argues that he has established a violation of section 240(1) because he was not provided with a safe method by which to access the control room, which was an elevated work site. Although the Appellate Division, First Department has held that "[a] fall down a temporary staircase is the type of elevation-related risk to which section 240(1) applies," and that such a staircase, "erected to allow workers access to different levels of [a] worksite, is a safety device

within the meaning of the statute" (internal citations omitted) (*O'Brien v Port Auth. of N.Y. & N.J*, 131 AD3d 823, 824 [1st Dept 2015]), summary judgment cannot be granted to plaintiff under the facts of this case.

Where, as here, "plaintiff is the sole witness to an accident, an issue of fact may exist where he or she provides inconsistent accounts of the accident." *Albino v 221-223 W. 82 Owners Corp.*, 142 AD3d 799, 801 (1st Dept 2016) (citations omitted). As noted above, plaintiff testified at his deposition that he fell when one of the steps on the temporary wooden staircase collapsed. Doc. 14, at p. 43-44, 55. However, even if plaintiff had established that defendants were proper Labor Law defendants, defendants opposed the motion by submitting the record of Premier Care Medical of Maspeth, dated October 2, 2012, which reflect that plaintiff "took a fall yesterday at work, *missed a step* and fell on the stairs" (emphasis added). Doc. 26. Since plaintiff has given inconsistent versions of how the alleged accident occurred, his motion for summary judgment against defendants on liability must be denied on this ground as well. *Albino v 221-223 W. 82 Owners Corp.*, 142 AD3d at 801; *Stephens v Triborough Bridge and Tunnel Auth.*, 55 AD3d 410, 411 (1st Dept 2008); *Jones v West 56th St. Assoc.*, 33 AD3d 551, 551-552 (1st Dept 2006); *Eitner v 119 West 71st St. Owners Corp.*, 253 AD2d 641, 641-642 (1st Dept 1998).

Indeed, in *Eitner v 119 West 71st St. Owners Corp.*, the Appellate Division, First Department denied plaintiff partial summary judgment on liability where he testified at his deposition that he fell from a stepladder and landed on his knee, while a "patient statement" in his hospital record reflected that he twisted his knee after he stepped off the ladder. Thus, the issue of the how plaintiff's alleged accident occurred must be decided by the trier of fact.

Labor Law § 241 (6)

Labor Law § 241 (6) provides that general contractors, owners, and their agents on qualifying construction, excavation and demolition work must comply with the following:

> 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.

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, at 501-502, quoting Labor Law § 241 (6). To maintain a viable claim under Labor Law section 241 (6), a plaintiff must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications. *Misicki v Caradonna*, 12 NY3d 511, 515 (2009). The Court of Appeals has noted that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" *St. Louis v Town of N. Elba*, 16 NY3d 411, 416 (2011).

Initially, plaintiff's motion must be denied since, as addressed in the foregoing analysis of Labor Law section 240(1), he failed to establish that defendants were "owners", "contractors" or "agents". Additionally, summary judgment on liability cannot be granted given plaintiff's inconsistent versions of how the alleged incident occurred. *See Albino v 221-223 W. 82 Owners Corp.*, 142 AD3d at 801.

Further, plaintiff claimed in his complaint that defendants committed a violation of Labor Law section 241(6) insofar as they violated Industrial Code section 12 NYCRR 23-2.7 (stairway

requirements during the construction of buildings). Doc. 1. However, since plaintiff does not allege a violation of section 23-2.7 in his motion papers, he has abandoned his reliance on that section. *See Cardenas v One State St., LLC*, 68 AD3d 436, 438 (1st Dept 2009).[2]

In plaintiff's motion, he alleges that defendants violated Industrial Code section 12 NYCRR 23-1.7(f) (requirement to provide stairways, ramps or runways as means to access working levels above or below ground except where nature or progress of work prevents their installation). However, since plaintiff has not annexed his bill of particulars to the motion, and none is filed with NYSCEF, this Court cannot ascertain whether plaintiff has pleaded a violation of that section. The failure to identify an applicable section of the Industrial Code in the complaint or bill or particulars may be a ground for dismissal of a claim pursuant to section 241(6) claim. *Walker v Metro-North Commuter R.R.*, 11 AD3d 339, 340-341 (1st Dept 2004) (citation omitted). Such a failure is not necessarily fatal to a section 241 (6) claim and, in the absence of unfair surprise or prejudice, may be rectified by an amendment of the bill of particulars to plead an applicable Industrial Code section. *Walker v Metro-North Commuter R.R.*, 11 AD3d at 341. However, plaintiff has not sought such an amendment herein. Thus, plaintiff cannot be granted summary judgment on his claim pursuant to Labor Law section 241(6).

Given this Court's findings, it is unnecessary to address the parties' remaining contentions.

Therefore, in light of the foregoing, it is hereby:

[2] This Court further notes that, since section 23-2.7 pertains to buildings, it is of questionable applicability herein.

ORDERED that plaintiff John Isdith's motion for partial summary judgment on liability against defendants on his claims pursuant to Labor Law sections 240 (1) and 241 (6) is denied; and it is further

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

11/2/2017
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE