

<b>Ortiz v Bove Lend Lease, Inc.</b>
2018 NY Slip Op 30597(U)
April 5, 2018
Supreme Court, New York County
Docket Number: 150536/2013
Judge: Kelly A. O'Neill Levy
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 19

-----X	
HERBERT ORTIZ, NANCY ORTIZ,	<b>INDEX NO.</b> <u>150536/2013</u>
Plaintiff,	<b>MOTION DATE</b> <u>9/11/2017</u>
- v -	
BOVE LEND LEASE, INC., LEND LEASE (US) CONSTRUCTION INC., FRESH MEADOW MECHANICAL CORP.	<b>MOTION SEQ. NO.</b> <u>003 and 004</u>
Defendant.	

**DECISION AND ORDER**

-----X

HON. KELLY O'NEILL LEVY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 117, 119, 120, 121, 122, 123, 124  
were read on this motion to/for Summary Judgment

The following e-filed documents, listed by NYSCEF document number (Motion 004) 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 118, 125, 126, 127, 128, 129, 130, 131, 132  
were read on this motion to/for Summary Judgment

Upon the foregoing documents, it is

Motion sequence numbers 003 and 004 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries sustained at a jobsite where an electrician fell as he stepped down from a grate.

Plaintiffs Herbert Ortiz and Nancy Ortiz move, pursuant to CPLR § 3212, for summary judgment in their favor as to liability on their Labor Law §§ 240(1) and 241(6) claims (mot. seq. 003). Defendants Bove Lend Lease, Inc., Lend Lease (US) Construction Inc., and Fresh Meadow Mechanical Corp. oppose and move, pursuant to CPLR § 3212, for summary judgment in their favor as to liability on the Labor Law § 240(1) claim (mot. seq. 004). Plaintiffs oppose.

## BACKGROUND

On November 9, 2011, plaintiff Herbert Ortiz, a journeyman electrician employed by Five Star Electric, was working to install electrical branch wiring at 1 World Trade Center in Manhattan [Deposition of Plaintiff (ex. D-1-2 to the Mirman aff.) at 10-11, 58]. Bovis Lend Lease LMB, Inc. (hereinafter, Bovis) was the construction manager for the electrical branch wiring of the National September 11 Memorial and Museum and acted as agent for the Port Authority of New York and New Jersey. Bovis hired Fire Star Electric to perform electric branch wiring for the project.

On the date of the incident, plaintiff was pulling communication wire from the ceiling while standing on a two-foot high grate (*id.* at 80, 92). Plaintiff alleges he stepped backwards off the grate with his right foot and onto a loose eight to twelve-inch cast iron pipe resting on the concrete floor below and fell (*id.* at 93-98, 105). The pipe was not attached to anything (*id.* at 104-105) and plaintiff was not using it (*id.* at 134). Plaintiff asserts that he did not trip on anything (*id.* at 126-127) and that he “had no idea” what the purpose of the pipe was or the reason the pipe was there (*id.* at 134). Plaintiff first testified that before dismounting from the grate he did not look down, but later stated that he looked down but did not see the pipe (*id.* at 95-96, 116-117).

## DISCUSSION

On a summary judgment motion, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that material factual issues exist. *Zuckerman v. City of New York*, 49 N.Y.2d

557, 562 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or factual findings. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).

#### *Labor Law § 240(1) Claim*

Plaintiffs move for summary judgment in their favor as to liability on the Labor Law § 240(1) claim. Defendants also move for summary judgment in their favor on the 240(1) claim.

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

“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.”

“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 A.D.2d 114, 118 (1st Dep't 2001) (quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501 [1993]).

“Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein.”

*Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 267 (2001); *See Hill v. Stahl*, 49 A.D.3d 438, 442 (1st Dep't 2008), *Buckley v. Columbia Grammar & Preparatory*, 44 A.D.3d 263, 267 (1st Dep't 2007). The statute's objective in requiring protective devices for those working at heights

is to allow them to complete their work safely and prevent them from falling. *Nieves v. Fire Boro Air Conditioning & Refrigeration Corp.*, 93 N.Y.2d 914, 916 (1999). “Where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240(1) liability exists (internal citation omitted).”  
*Id.*

Here, plaintiff stepped off a two-foot high grate and inadvertently stepped on a loose pipe on the ground which caused him to fall. The risk of stepping on a pipe and falling is not an elevation-related hazard that the statute is designed to prevent. Furthermore, it is undisputed that plaintiff did not fall because of any defect in the grate. Thus, the court denies plaintiffs’ motion and grants defendants’ motion for summary judgment as to the Labor Law § 240(1) claim and that claim is dismissed.

#### *Labor Law § 241(6) Claim*

Plaintiffs move for summary judgment in their favor on the Labor Law § 241(6) claim, predicated on violations of Industrial Code §§ 23-1.7(e)(1) and (2) and 23-2.1(a) and (b).

Labor Law § 241(6) provides, in pertinent part, 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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.”

Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501-502. However, Labor Law § 241(6) is not self-executing, and to show a violation of this statute it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety. *Id.* The court will consider each alleged Industrial Code violation in turn.

**§ 23-1.7 Protection from general hazards.**

...

(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.

As a preliminary matter, Industrial Code §§ 23-1.7(e)(1) and (2) are sufficiently specific to sustain a claim under Labor Law § 241(6). *See Picchione v. Sweet Const. Corp.*, 60 A.D.3d 510, 512 (1st Dep't 2009); *see also Licata v. AB Green Gansevoort, LLC*, 158 A.D.3d 487, 489 (1st Dep't 2018).

The parties disagree as to whether Industrial Code § 23-1.7(e) applies here. Defendants argue that plaintiff did not trip on anything and that he merely stepped onto the pipe and fell. Plaintiff testified that he did not trip on anything (Plaintiff tr. at 126-127). However, whether the accident is characterized as a slip and fall or trip and fall is not dispositive as to the applicability of Industrial Code § 23-1.7(e)(1) and (2). *Lois v. Flintlock Const. Services, LLC*, 137 A.D.3d

446, 447-448 (1st Dep't 2016) (internal citation omitted); *see also Pereira v. New School*, 148 A.D.3d 410, 412 (1st Dep't 2017).

On the question of whether Industrial Code § 23-1.7(e)(1) was violated, it is unclear from the record whether the area where plaintiff fell constitutes a passageway or an open area.

Plaintiff testified that the grate was in an open corridor (Plaintiff tr. at 62). The photographs depicting the area of plaintiff's accident do not clarify whether the area is a passageway or an open area [Photographs (ex. E and F to the Mirman aff.)]. Whether the area in which plaintiff fell constitutes a passageway or an open area constitutes an issue of fact as to whether Industrial Code § 23-1.7(e)(1) was violated. Accordingly, the court denies the branch of plaintiffs' motion for summary judgment on the portion of the Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-1.7(e)(1).

Industrial Code § 23-1.7(e)(2) requires working areas to 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. Plaintiff established that the pipe was unrelated and inconsistent with the work he was performing, as he testified that he "had no idea" what the purpose of the pipe was or the reason the pipe was there (Plaintiff tr. at 134). It is unclear whether the pipe was debris or if it was being stored there, which creates an issue of fact regarding an Industrial Code § 23-1.7(e)(2) violation. Accordingly, the court denies the portion of plaintiffs' motion for summary judgment on the Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-1.7(e)(2).

**§ 23-2.1 Maintenance and housekeeping.**

...

(a) Storage of material or equipment.

(1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.

(2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge.

(b) Disposal of debris. Debris shall be handled and disposed of by methods that will not endanger any person employed in the area of such disposal or any person lawfully frequenting such area.

Industrial Code § 23-2.1(a) pertains to storage of materials. This section does not apply to material and equipment that is not being stored. *Buckley v. Columbia Grammar and Preparatory*, 44 A.D.3d 263, 272 (1st Dep't 2007). As discussed above, whether the pipe that plaintiff stepped on was being stored there or if it was debris is unresolved as plaintiff did not know why the pipe was there and for what purpose (Plaintiff tr. at 134). As a material question of fact remains on this issue, the court denies the branch of plaintiffs' motion for summary judgment on the Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-2.1(a).

Finally, as Industrial Code § 23-2.1(b) "does not sufficiently set forth a specific standard of conduct... for its violation" to qualify as a predicate for a Labor Law § 241(6) claim, *see Quinlan v. City of New York*, 293 A.D.2d 262, 263 (1st Dep't 2002) (quoting *Mendoza v. March Libre Assoc.*, 256 A.D.2d 133 [1st Dep't 1998]), the branch of plaintiff's Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-2.1(b) is dismissed.

The court has considered the remainder of the arguments and finds them to be without merit.

### CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

**ORDERED** that plaintiffs Herbert Ortiz and Nancy Ortiz’s motion, pursuant to CPLR § 3212, for summary judgment in their favor as to liability on the Labor Law § 240(1) claim (mot. seq. 003) is denied; and it is further

**ORDERED** that plaintiffs Herbert Ortiz and Nancy Ortiz’s motion, pursuant to CPLR § 3212, for summary judgment in their favor as to liability on the Labor Law § 241(6) claim (mot. seq. 003) is denied as to the branches predicated on violations of Industrial Code §§ 23-1.7(e)(1) and (2) and 23-2.1(a); and it is further

**ORDERED** that the branch of plaintiffs’ Labor Law § 241(6) claim predicated on violation of Industrial Code § 23-2.1(b) is dismissed; and it is further

**ORDERED** that Defendants Bove Lend Lease, Inc., Lend Lease (US) Construction Inc., and Fresh Meadow Mechanical Corp.’s motion, pursuant to CPLR § 3212, for summary judgment in their favor as to liability on the Labor Law § 240(1) claim (mot. seq. 004) is granted and the Labor Law § 240(1) claim is dismissed; and it is further

**ORDERED** that the remainder of the action shall continue.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

4-5-18  
DATE

Kelly O'Neill Levy  
KELLY O'NEILL LEVY, J.S.C.  
HON. KELLY O'NEILL LEVY  
J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	DO NOT POST		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	FIDUCIARY APPOINTMENT

<input checked="" type="checkbox"/>	OTHER
<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: