Norfleet v Tori Realty Corp.
2019 NY Slip Op 31495(U)
May 23, 2019
Supreme Court, New York County
Docket Number: 161795/2015
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - PART 42
---X
CHARLES NORFLEET,

Plaintiff,

-against-

Index No. 161795/2015
Motion Seq. No. 003

TORI REALTY CORP. and J.T. MAGEN & COMPANY, INC.

DECISION/ORDER

Defendants.
---X
HON. NANCY M. BANNON, J.:

In this personal injury action, plaintiff, Charles Norfleet (plaintiff or Norfleet), alleges that, on July 17, 2015, he was injured when the grab bar he was using gave way and caused him to fall from a ladder in a warehouse owned by defendant Tori Realty Corp (Tori) and leased by defendant J. T. Magen & Company (J.T. Magen) at 120 East 144th Street, Bronx, New York.

Defendants move, pursuant to CPLR 3212, for summary judgment to dismiss the amended complaint.

For the reasons set forth below, defendants' motion is granted in part and denied in part.

I. Background and Procedural History

This action sounding in common law negligence was commenced on November 16, 2015 against Tori. On about March 2, 2017, plaintiff amended his summons and complaint to add J.T. Magen as an additional defendant.

J.T. Magen is a general contractor for construction projects, which deals with union workers, and which owns a separate company by the name of Archstone Builders, LLC (Archstone), which works with nonunion workers (NYSCEF Doc. No. 78 at 7, 32-33).

Plaintiff alleges that, at the time of the accident, he was employed as a logistics manager and truck driver by Archstone (bill of particulars [BOP] or NYSCEF Doc. No. 72 at 6). On July 17, 2015, plaintiff contends that he was using a "four 4 step, stairs and/or ladder, blue in color, and an accompanying grab bar located at the loading dock" of the warehouse (*id.* at 3; amended complaint, ¶ 25) when the "grab bar was caused to break and/or collapse, causing [him] to fall and sustain serious and permanent injuries" (amended complaint, ¶ 25). Specifically, plaintiff claims that he was climbing down facing the ladder between the loading dock and indoor parking area within the warehouse when the vertical grab bar post affixed to the loading dock became loose causing him to fall to the ground (NYSCEF Doc. No. 74 at 40-41; NYSCEF Doc. No. 75 at 23).

In his second supplemental bill of particulars dated September 6, 2017, plaintiff alleges that, as a result of the accident, he suffered a temporary total disability from his occupation and a marked partial disability for all forms of gainful employment (NYSCEF Doc. No. 72). Plaintiff also alleges that defendants violated Building Code of the City of New York (Building Code) §§ 27-375(e)(2), 27-375(f), 27-375(f)(2), and 27-275(f)(4); United States Department of Labor Occupational Safety and Health Administration (OSHA) standards, rules and regulations [29 Code of Federal Regulations (CFR)] §§ 1910.23(e)(2), 1910.24(h), 1910.27 (b) (1) (ii), 1910.27(b) (2), 1910.27(d) (4), 1917.112 (e), 1917.112(e)(1), 1917.112 (e) (2), 1917.112(f), 1917.120(b)(1), 1917.120(b)(3), 1917.120(b)(4), 1917.120(b)(5)(ii), and 1917.120(b)(6) (NYSCEF Doc. No. 72, BOP, 3/21/2016) as well as OSHA §§ 1910.23(b)(9) and 1910.23(d)(4), Building Code § 1001.3 and Fire Code of the City of New York (Fire Code) §§ 1001.1, 1001.2, 1027.1 and 1027.3 (*id.*, third supp. BOP, 1/23/2018).

II. Defendant Tori

Turning first to defendant Tori, the court notes that, in their reply, defendants point out that plaintiff failed to oppose several portions of defendants' motion for summary judgment. Defendants contend, inter alia, that plaintiff did not oppose that portion of their motion seeking dismissal of plaintiff's claims against Tori and therefore, the plaintiff's action against Tori has been abandoned and should be dismissed.

On a motion for summary judgment, a plaintiff abandons a claim by failing to address in its opposition papers the defendant's arguments in support of its motion seeking dismissal of that claim (*Ng v NYU Langone Medical Ctr.*, 157 AD3d 549, 550 [1st Dept 2018] ["Plaintiff's failure to oppose so much of the motion as sought dismissal of the lack of informed consent claim, constituted an abandonment of the claim"]; *Saidin v Negron*, 136 AD3d 458, 459 [1st Dept 2016] ["Plaintiff abandoned his claim against the individual police officer by failing to oppose that part of the motion to dismiss the claim as against him"]; *Josephson LLC v Column Fin., Inc.*, 94 AD3d 479, 480 [1st Dept 2012] ["Plaintiffs abandoned their remaining claims by failing to oppose the parts of defendants' motion that sought summary judgment dismissing those claims"]).

Here, the record shows that plaintiff remained silent in response to defendants' arguments that Tori could not be held liable for negligence as it was an out of possession landlord with no obligation to make repairs or maintain the part of the warehouse where the accident occurred and that the alleged defect is not a significant structural or design defect and does not violate a specific statutory provision. Based on the foregoing, the court deems that plaintiff abandoned his claims as against Tori and the action is dismissed against it.

III. Defendant J.T. Magen

A. Contentions

1. Moving Papers

Defendants argue that J.T. Magen did not cause or create and did not have actual or constructive notice of the allegedly defective condition and, therefore, cannot be held liable for negligence.

Defendants contend that Patrick Doyle (Doyle), J.T. Magen's carpenter, testified at his examination before trial (EBT) that he installed the grab bar by bolting it to the loading dock with five to six lag bolts. Doyle further testified that he then tested the grab bar to check its sturdiness and make sure it would not become loose.

Defendants point out that plaintiff testified that, on the day of the accident, he arrived at the warehouse at approximately 6 a.m. and that there was no one present, that he used the grab bar on the morning of the accident shortly before he fell, at approximately 6:15 a.m.

With respect to the question of actual notice, defendants highlight that Michael Rodican (Rodican), a general foreman employed by J.T. Magen, swore in his affidavit that J.T. Magen never received any complaints about the subject grab bar prior to the accident, including any complaints that it was loose. Rodican also confirmed that there were no incidents or accidents involving the grab bar before plaintiff's accident.

Neither did defendants have constructive notice of the allegedly loose grab bar, as they allege that J.T. Magen was not present at the time of the accident and the allegedly defective condition did not exist for a sufficient length of time for J.T. Magen to discover and remedy it. Defendants argue that the condition could not have been visible and apparent, as the plaintiff testified that he climbed the ladder to get onto the loading dock, at most, fifteen minutes before

the alleged accident and the grab bar was not loose. In addition, plaintiff confirmed that he was the only person at the warehouse the morning of the accident.

Second, defendants argue that the applicability of the Building Code is an issue of law for the court to decide. Defendants contend that sections of the Building Code invoked by plaintiff, namely, sections 27-375 (e), (f), (f) (2) and (f) (4) do not apply and, therefore, could not have been violated by J.T. Magen.

Defendants argue that section 27-375 (e) of the Building Code, which sets forth the requirements for "interior stairs" is inapplicable to the subject ladder, which is neither "stairs" nor "interior stairs." Not only is the subject ladder, which was positioned at a 60-degree angle, too steep to be considered a stairway, but it did not serve as a "required exit," pursuant to section 27-232 of the Building Code. Indeed, the grab bar was located between the loading dock and the interior parking area and, therefore, could not have been designated or required to serve as a fire exit or egress to the exterior of the building.

Third, defendants argue that OSHA §§ 1910.23 (b) (9) and 1910.23(d) (4) and (e) (2); 1910.24(h); 1910.27 (b) (1) (ii), (b) (2) and (d) (4); 1917.112 (e), (e) (1), (e) (2) and (f); 1917.120 (b) (1), (b) (3), (b) (4), (b) (5) (iii) and (b) (6) invoked by plaintiff do not apply and were not violated by J.T. Magen.

Defendants point out that OSHA sets forth the rules that employers are required to follow in order to protect their employees from the hazards at work. However, defendants argue that J.T. Magen was not the plaintiff's employer and, therefore, OSHA does not apply.

The court sets forth next defendants' line of argument focusing solely on the only two subsections discussed and opposed by plaintiff in this motion sequence, namely, OSHA §§ 1910.23(b) (9) and 1910.23(d) (4). Defendants explains that OSHA §1910.23 was enacted 16

months after plaintiff's alleged accident and therefore was not in effect on the date of the accident and could not have been violated.

Moreover, OSHA § 1910.23(b) (9) dictates that employers inspect ladders "before initial use in each work shift, and more frequently as necessary, to identify any visible defects that could cause employee injury." However, this subsection does not apply, as J.T. Magen was not plaintiff's employer; the subsection refers to ladders, not grab bars; J.T. Magen was not present at the time and the defect was not visible.

With respect to OSHA § 1910.23(d) (4), which sets forth specifications for handrails affixed to "through or side-step ladders," defendants point out that the subject ladder does not meet the definitions set forth therein. The subject ladder did not have side rails and did not require the user to step sideways from it in order to reach either the loading dock or the interior parking area and, therefore, is neither a through ladder or side-step ladder.

Finally, defendants argue that Fire Code §§ 1000.1, 1000.2, 1027.1 and 1027.3 do not apply and were, therefore, not violated by J.T. Magen.

Defendants contend that plaintiff may not rely on the Fire Code as it was intended to prevent a different harm than the harm allegedly suffered by plaintiff. Defendants rely on their engineer Jeffrey J. Schwalje's (Schwalje) affidavit to make their point. In particular, section 101.3 of the Fire Code, entitled "Intent," states that the purpose of the Fire Code is "to establish reasonable minimum requirements and standards for life safety and property protection, to accomplish the purposes set forth in FC 101.2." In turn, defendants point out that Fire Code §101.2 was not intended to prevent falls from ladders in non-emergency circumstances as allegedly occurred in this case.

Even if plaintiff could rely on the Fire Code, defendants argue that the provisions invoked by plaintiff do not apply to the subject circumstances. Section 1001.1 of the Fire Code, which is entitled "Scope" simply states that Chapter 10 of the Fire Code governs the maintenance of means of egress from buildings, whereas the subject ladder did not lead to the exterior of the building, but connected the loading dock to the interior parking area.

Finally, defendants contend that plaintiff fails to establish any causal connection between any of the alleged violations and plaintiff's alleged accident. Indeed, defendants point out that plaintiff fell because the grab bar came loose, not because the permanent staircase at the end of the loading dock was allegedly blocked.

2. Opposition Papers

First, plaintiff argues that J.T. Magen, as occupier of the premises, is liable for common law negligence and that plaintiff is not required to prove that any statute or code were violated.

Plaintiff argues that an owner or tenant-in-possession of real property has a common law duty to maintain its property in reasonably safe condition. The aforementioned duty is independent of any statutory duty or administrative standards, and includes routine maintenance, as well as a responsibility for construction and design defects.

Second, plaintiff argues that J.T. Magen failed to satisfy its burden of proof as movant for summary judgment. Whereas plaintiff must present evidence that either defendant created the defective condition or had actual or constructive notice thereof in order to establish a prima facie case of a dangerous condition, conversely, the moving defendant on a summary judgment motion has the burden of showing that it neither created the alleged hazardous condition, nor had actual or constructive notice of its existence for a length of time sufficient to discover and remedy it.

In order to establish lack of constructive notice of a dangerous condition, plaintiff argues that defendants have to present prima facie evidence as to when the area in question was last inspected relative to the accident.

Plaintiff points out that defendants argue that they lacked constructive notice because Rodican and others used the ladder without noticing a problem, even though Rodican acknowledged that neither he, nor anyone else, actually inspected the ladder or grab bar.

Plaintiff highlights that defendants present no evidence of when any specific use occurred. Indeed, Rodican does not remember when he was last at the site before the accident and does not remember whether he used the ladder when he was there.

Considering the foregoing, Andrew R. Yarmus (Yarmus), plaintiff's engineer, states in his affidavit that Rodican did not perform a proper inspection (NYSCEF Doc. No. 91).

Furthermore, Yarmus states that Schwalje's conclusion, based on plaintiff's EBT testimony that the defect which allegedly caused plaintiff's fall, i.e. the loose grab bar post, was not visible, is unsupported by the evidence. Indeed, Yarmus explains that Norfleet testified on November 4, 2016 that "he does not know whether he used the grab bar when he climbed up the ladder that morning, although he thinks he did" (Yarmus aff, ¶ 12), and testified on June 27, 2017 that "he did not recall whether he held the grab bar when he went up the ladder that morning, and that he did not recall noticing that the grab bar was loose" (*id.*). Yarmus explains that:

> "there is no evidence that plaintiff actually looked at or touched the grab bar when he went up the ladder. Plaintiff's failure to recall whether he noticed any looseness in the grab bar that morning before the accident does not provide any evidence at all. Plaintiff climbing the ladder and failing to notice looseness in the grab bar is not an inspection of the grab bar. Plaintiff was simply climbing the ladder, doing his morning work, and was not trained or required to pay attention to or inspect the grab bar"

(*id.*).

Yarmus further explains that Norfleet's testimony does not indicate any misuse of the grab bar and that the lack of specific testimony of when the grab bar was last inspected is fatal to the motion. According to Yarmus, a "proper inspection by the defendants could have revealed that the grab bar had started to become loose, that fasteners were loose, that supporting wood and/or concrete below the grab bar was damaged, decayed, and/or otherwise insufficient to secure the grab bar" (*id.*, ¶ 12).

Plaintiff argues that that J.T. Magen failed its duty to conduct reasonable and proper inspections and the testimony about same must relate to the specific inspection and in specific detail to establish lack of constructive notice. In particular, where an object capable of deteriorating is concealed from view, the defendant's duty of reasonable care entails periodic inspection of the area of potential defect, or else constructive notice of the defect is imputed.

According to plaintiff, defendants fail to explain what defect caused the grab bar failure and why that defect should be considered a hidden defect, undiscoverable by a normal inspection.

Plaintiff claims that a reasonable and proper inspection by J.T. Magen would have required that it look specifically at the grab bar, including the screws and the wood it was bolted to. The cursory and casual walkthroughs by J.T. Magen do not amount to an appropriate inspection, as they did not include a specific examination of the grab bar.

Third, plaintiff contends that J.T. Magen created the condition by negligent construction of the grab bar causing its failure. Specifically, plaintiff alleges in his complaint and in his bill of particulars that a J.T. Magen employee designed and built the ladder and grab bar. Plaintiff argues that he is not required to prove notice where the defendant or its contractor created the condition.

Four, plaintiff argues that the doctrine of res ipsa loquitur raises an inference of negligence and notice under the facts of this case. According to Yarmus,

> "A grab bar that is properly designed, installed, inspected, used, and maintained does not suddenly become loose without prior warning. Mr. Norfleet's testimony does not indicate any misuse of the grab bar"

(NYSCEF Doc. 91, ¶ 13).

Plaintiff argues that since J.T. Magen designed and installed the grab bar and was responsible for the maintenance of its warehouse, including the loading dock, the ladder, and the grab bar, the doctrine of res ipsa loquitur establishes an inference that J.T. Magen was negligent in its construction and/or maintenance of the grab bar.

Plaintiff argues that the evidence establishes the three elements required to prove res ipsa loquitur. First, the failure of a grab bar is an accident which does not ordinarily occur in the absence of negligence of the installer or inspector of the grab bar. Second, the grab bar was in the exclusive control of J.T. Magen as tenant in possession; and that a J.T. Magen employee designed and built the ladder, which was on J.T. Magen's loading dock in a privately controlled warehouse, which was not open to the public. In addition, defendants argued that Tori did not have control over the area leased to J.T. Magen and that they never entered that area. Third, the accident was not due to Norfleet's voluntary action or contribution, as he was simply descending the stairs while holding the grab bar, and the grab bar should have supported him. Nor is there any evidence that Norfleet abused or otherwise caused the failure of the grab bar.

In addition, plaintiff argues that, when proceeding under the theory of res ipsa loquitur, he is not required to prove constructive notice.

Finally, plaintiff argues that defendants violated various codes and provisions in their maintenance of the premises and refers the court to Yarmus' affidavit. Therein, Yarmus focuses on Fire Code §§ 1000.1, 1001.2, 1027.1 and 1027.3; and OSHA §§ 1910.23 (b) (9) and 1910.23 (d) (4).

3. Reply Papers

Defendants argue that plaintiff has abandoned that portion of his claim predicated on alleged violations of the Building Code. In any event, defendants reiterate their contention that the sections of the Building Code invoked by plaintiff do not apply and, therefore, could not have been violated. Defendants point out that plaintiff, in his opposition, does not argue that the provisions of the Building Code apply, let alone that they were violated. Therefore, these claims have been abandoned and should be dismissed.

In addition, defendants highlight that plaintiff abandoned all but two of his OSHA claims, namely, OSHA §§ 1910.23 (b) (9) and 1910.23 (d) (4), in his opposition papers. Therefore, the claims premised on the remaining 14 OSHA provisions should be deemed abandoned and must be dismissed.

Defendants discredit Yarmus' testimony by painting it as superficial, conclusory and speculative for the following reasons. They argue that Yarmus fails to distinguish the defendants when drawing conclusions. Defendants further argue that Yarmus doesn't explain what caused the grab bar to come loose and that he does not claim that the grab bar was improperly constructed or that it was defective prior to the accident. Furthermore, Yarmus disregards Norfleet's unfavorable testimony on November 4, 2016 when he answered "I believe so" upon being asked whether he used the grab bar when climbing the ladder the morning of the accident (NYSCEF Doc. No. at 40).

Defendants challenge Yarmus' sole reliance on Norfleet's testimony to support his conclusion that a proper inspection by defendants would have uncovered loose fasteners or decayed or damaged wood or concrete.

Defendants argue that J.T. Magen did not create the allegedly defective condition. Defendants claim that plaintiff's position that Norfleet's accident occurred because the grab bar must have been installed improperly is not legally supportable. Defendants contend that the grab bar was properly installed by Doyle, that it was sturdy when it was installed and that there were no problems with it. Defendants also point out that plaintiff never identified the allegedly defective condition.

Defendants contend that plaintiff failed to raise any triable issue of fact as to whether J.T. Magen had actual or constructive notice of the loose grab bar. Defendants argue that plaintiff did not address the issue of actual notice, as he only argues that J.T. Magen had constructive notice. In any event, plaintiff argues that plaintiff confuses the standard of constructive notice and fails to raise any questions of fact that would warrant the denial of defendants' motion.

According to defendants, plaintiff's argument, that J.T. Magen's purported violation of OSHA §1910.23 (b) (9) establishes that J.T. Magen had constructive notice of the allegedly loose grab bar, is without merit. Defendants reiterate that this OSHA provision does not apply to the facts of the case, as it requires employers to inspect ladders for the benefit of their employees, and J.T. Magen was not the plaintiff's employer. Therefore, this provision does not create a duty for J.T. Magen to inspect, and even if it did, J.T. Magen did not breach that duty. Second, defendants argue that Yarmus' opinion that J.T. Magen failed to conduct a proper inspection is conclusory, and that Yarmus does not define what plaintiff means by a "proper inspection." Furthermore, plaintiff conflates the concept of inspection as a means of establishing

lack of constructive notice and what the plaintiff claims is a purported duty on the part of J.T. Magen to perform inspections to affirmatively look for unsafe conditions. Defendants contend that case law holds that, absent a statutory duty, a defendant does not have a duty to perform regular inspections of its premises. Defendants highlight that plaintiff disregards the evidence that J.T. Magen actually inspected the grab bar. Defendants point out that Rodican testified at his EBT that he inspected the grab bar by feeling it when he used it two to three times per week. In addition, defendants state that Rodican testified that he spent approximately 30 minutes each week at the warehouse making sure everything, including the ladder and the grab bar, were in working condition.

Defendants further argue that a defendant has constructive notice of a condition only where it is visible and apparent for a sufficient length of time to afford defendant an opportunity to discover and remedy it. Here, defendants claim that plaintiff confirmed that he was at the warehouse every day prior to the accident and that he never had any problems with the grab bar (reply affirmation at 12). In addition, plaintiff stated that he climbed the ladder to the loading dock at most fifteen minutes before the subject accident and did not notice the grab bar to be loose. Furthermore, Rodican testified that he felt the grab bar when he used it several times per week and found it to be safe. Finally, J.T. Magen never received any complaints that the grab bar was loose, nor that there were any prior accidents involving the grab bar.

Defendants distinguish the cases cited by plaintiff by claiming that they do not stand for the proposition that a lessee has an affirmative duty to look for unsafe conditions. Defendants contend that they do not need to submit evidence demonstrating when the grab bar was last inspected in order to establish that they lacked constructive notice, since Rodican performed an inspection and plaintiff himself used the grab bar, at most, fifteen minutes prior to the accident

without incident. Defendants stress that the First Department has routinely held that where a plaintiff was in the area of an alleged accident shortly prior thereto, and did not see the defective condition, the defendant does not need to establish when the area was last inspected in order to prove its entitlement to summary judgment.

Defendants argue that plaintiff failed to establish that J.T. Magen had a duty to inspect the warehouse. Defendants reiterate that plaintiff misapplies OSHA §1910.23(b) (9), which in their opinion, does not create a duty, and that plaintiff states in conclusory fashion and without citing to case law that J.T. Magen breached its duty of routine maintenance, and finally, that plaintiff cites to cases which do not stand for the proposition that J.T. Magen had a duty of routine maintenance.

Defendants argue that plaintiff's argument that OSHA §1910.23 (b) (9) requires defendants to inspect the property fails because the OSHA regulation is not a statute; that rule was not effective on the day of the alleged accident; that rule is facially inapplicable because it requires employers to inspect ladders and J.T. Magen was not plaintiff's employer and the plaintiff does not allege that the ladder itself was defective. Defendants reiterate that their only duty was to maintain the premises in a reasonably safe condition and that they established in their moving papers that they did not breach that duty.

Defendants dispute plaintiff's claim that they argued that the defect was hidden from view. Defendants argue that the subject grab bar was not concealed from view as it was sticking straight up from the middle of the loading dock and visible to anyone entering the space.

With respect to the doctrine of res ipsa loquitur, defendants argue that it is not applicable here. Defendants argue that J.T. Magen did not have exclusive control of the grab bar. Defendants challenge plaintiff's claim that it was a J.T. Magen employee who designed and

installed the grab bar and that the grab bar was not open to the public. Defendants also argue that the fact that Tori did not have control over the area does not prove that J.T. Magen had exclusive control. Defendants also point out that Archstone had daily access to the grab bar and, therefore, it could not have been within J.T. Magen's exclusive control.

Defendants contend that both Archstone and the plaintiff were at the warehouse every day for approximately three to four years before the subject accident occurred. In light of the fact that Archstone shared control of the premises with J.T. Magen, according to defendants, the second element of the res ipsa loquitur doctrine is not met.

B. Standard of Law

The principle is well settled that 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 (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion shall be granted if neither party has shown "facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]). However, "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad*, 64 NY2d at 853; *People v Grasso,* 50 AD3d 535, 545 [1st Dept 2008]).

CPLR 3212 (e) permits partial summary judgment "as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just."

In New York, an owner or tenant in possession has a duty to maintain his or her premises

in a reasonably safe condition (*Branch v SDC Discount Store, Inc.*, 127 AD3d 547, 547 [1st Dept 2015] [tenant had a "common-law duty, as occupier of the premises, to maintain the staircase in a reasonably safe condition"]; *Hernandez v Conway Stores, Inc.*, 143 AD3d 943, 944 [2d Dept 2016]; *see also Basso v Miller*, 40 NY2d 233, 241 [1976]).

A defendant in possession of the premises can only be held liable for a third party's injuries on the premises if he or she created the defective condition, or had actual or constructive notice of the condition (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

C. Analysis

1. Alleged Violation of Statutory Mandates and OSHA Rules

a. Abandonment of Claims

A plaintiff's failure to address the statutes, rules or regulations upon which he predicates his claims renders them abandoned as bases for liability (*see Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014]; *Foley v Consolidated Edison Co. of New York, Inc.*, 84 AD3d 476, 478 [1st Dept 2011]; *see also Gary v Flair Beverage Corp.*, 60 AD3d 413, 413 [1st Dept 2009] ["plaintiff's failure to address this issue in its responding brief indicates an intention to abandon this basis of liability"]; *Bailey v Disney Worldwide Shared Servs.*, 35 Misc3d 1201 [A], 2012 NY Slip Op 50524 [U] [Sup Ct, NY County 2012] [court held that lack of opposition against motion seeking dismissal of all claims and cross claims as against certain parties reflects an intention to abandon claims against them]).

Here, in his opposition papers, plaintiff fails to address Building Code §§ 27-375(e)(2), 27-375(f), 27-375(f)(2), and 27-275(f)(4) and OSHA §§ 1910.23(e)(2), 1910.24(h), 1910.27(b)(1)(ii), 1910.27(b)(2), 1910.27(d)(4), 1917.112(e), 1917.112(e)(1), 1917,112(e)(2),

1917.112(f), 1917.120(b)(1), 1917.120(b)(3), 1917.120(b)(4), 1917.120(b)(5)(ii), and 1917.120(b)(6). Based on the foregoing, plaintiff's claims predicated on these provisions are deemed abandoned and hereby dismissed.

b. Remaining Provisions

i. Building Code and Fire Code Provisions

Turning to the remaining provisions, plaintiff argues that Building Code § 1001.3 requires that "means of egress shall be maintained in accordance with the New York City Fire Code." With regards to Fire Code §§ 1001.1, 1001.2, 1027.1 and 1027.3, defendants' affiant, Schwaljie, asserts that these provisions are part of Chapter 10 of the Fire Code, which governs the means of egress from buildings with the City of New York. Schwaljie further avers that the subject ladder was not a means of egress because it did not lead to the exterior of the building and, therefore, these provisions do not apply to the facts of this case (NYSCEF Doc. No. 82, ¶ 19).

In opposition, plaintiff's affiant, Yarmus argues that Norfleet testified that he used the subject ladder to access the loading dock because "the normal stairs were blocked" (NYSCEF Doc. No. 74 at 34); that Doyle testified that the ladder was generally in use "mostly by the younger fellow in the warehouse and myself" but "[y]our client would use the steps to the right. He is an older heavier-set guy" (NYSCEF Doc. No. 79 at 64) and that Rodican also confirmed that the stairs would be blocked on occasion (NYSCEF Doc. No. 78 at 54).

Yarmus further avers that had defendants complied with the Fire Code requirements and always maintained the stairs free from obstruction, Norfleet could have relied upon the staircase, and avoided using the subject ladder and grab bar and avoided the accident altogether.

In reply, defendants argue that Yarmus conflates "but for" causation with "proximate cause." According to defendants, the alleged blocking of the stairs did not cause the alleged condition, i.e. the loose grab bar, and did not cause plaintiff's fall. Furthermore, the Fire Code does not apply to "interior stairs" including the subject ladder.

Here, plaintiff did not fall from the ladder because the staircase was allegedly obstructed, but because the grab bar became loose. The alleged obstruction of the staircase was not the proximate cause of the fall, rather, it merely furnished the condition that led to plaintiff's use of the ladder and resulting fall (*see Caro v Chesnick*, 155 AD3d 447, 447 [1st Dept 2017]; *see also Pinero v Rite Aid of N. Y.*, 294 AD2d 251, 252 [1st Dept 2002]). Therefore, the alleged violation of the subject Building Code and Fire Code provisions is not relevant.

ii. OSHA Provisions

As pointed out by defendants, OSHA §§ 1910.23(b)(9) [General Requirements for All Ladders] and 1910.23(d)(4) [Fixed Ladders] were not in effect at the time of the accident (NYSCEF Doc. No. 95-97). These provisions impose safety practices on employers, which defendants are not, in connection with the safe use of ladders (*see Kocurek v Home Depot, U.S.A.P.*, 286 AD2d 577, 580 [1st Dept 2001]). Namely, OSHA § 1910.23 (a) opens with the following sentence "Application. The employer must ensure that each ladder used meets the requirements of this section." In any event, the provisions do not apply to the type of ladder in this case or the circumstances of the accident.

Here, plaintiff is suing in his own right for a wrong personal to him and not as the vicarious beneficiary of a breach of duty to another (*Palsgraf v Long Is. R.R. Co.*, 248 NY 339, 342 [1928]). Therefore, plaintiff may not avail himself of these provisions and they are deemed inapplicable to the circumstances at issue.

4. Alleged Defect

Plaintiff alleges that defendants were, inter alia, negligent in designing, placing, arranging and maintaining the premises, including the subject ladder and grab bar and provided an unsafe and inadequate grab bar and ladder (NYSCEF Doc. No. 72; BOP at 2-3).

At his deposition, Doyle, who was supervised at the time by Rodican, recounts that he replaced an old ladder, which was unsafe and that he constructed and installed the subject ladder in its place (NYSCEF Doc. No. 79 at 53-59). As explained by Doyle, the ladder's side rails ended flush with the top of the loading dock and did not extend above the loading dock surface causing defendants to install a grab bar to provide those using the ladder with something to hold onto as they ascended and descended the ladder (*id.* at 51-53). Doyle also testified that where there was a cutout on "part of the top deck, the loading dock," he added a grab bar by using a piece of steel pipe he found at the warehouse and securing it with "five or six lag bolts" to the dock (*id.* at 54).

Doyle stated that upon completion of this job, he tested the strength of the grab bar to check that it remained sturdy and erect (*id.* at 64).

What transpires from the EBT transcript are Doyle's inexperience with building ladders, his unfamiliarity with ladder safety requirements and his use of a random pipe found at the warehouse to build the grab bar (*id.* at 54-62). In particular, Doyle acknowledges that he did not know the intended use of the pipe, but thought that "it looked like it would be perfect for that" (*id.* at 55) and he proceeded to install it at a 90-degree angle off the floor (*id.* at 57).

When a design defect claim is based on a theory of negligence, the question is whether the designer made reasonable choices in designing the product (1 NY Products Liability 2d § 18:3, Standard of Liability in Negligence and Strict Liability Cases).

Defendants do not proffer expert testimony discussing the general design and manufacturing standards used in the construction of the type of grab bar in question (*compare Lewis v MBD Silva Taylor Hous. Dev. Fund Co., Inc.*, 161 AD3d 489, 490 [1st Dept 2018] [in this personal injury action, court held that defendant subcontractor who installed bi-fold closet door that came apart at the hinges and fell on tenant established prima facie that it properly installed the doors through affidavit of subcontractor owner "who averred that he had installed hundreds of these closet doors pursuant to the instruction manual without problem and that he ensured that they were properly secured, correctly sized, and properly adjusted . . . tested each one by 'repeatedly' opening and closing it to ensure its safety and proper function"]; *see Zigata v Werner Co.*, 225 AD2d 484 [1st Dept 1996] [court held that there were questions of fact as to whether the quality of the material used for the ladder was inadequate to support plaintiff's weight and whether the ladder was manufactured in accordance with generally accepted standards]). Defendants also acknowledge that, after the accident, Doyle "came up with a better idea and a safer idea for the steps for the older gentlemen if they wanted to use my ladder instead of walking all the way around" (NYSCEF Doc. No. 79 at 83).

Based on the foregoing, the court finds that defendants failed to establish, as a matter of law, that the grab bar was properly designed, constructed, installed and maintained (*Branch*, 127 AD3d at 547 [notwithstanding finding that defendant did not violate Building Code provision in connection with lack of handrail or wall on open side of basement staircase from which plaintiff fell, court held that there were issues of fact as to "whether defendant was negligent in maintaining the staircase without any handrail or guard of any kind on one side"].

Defendants are hereby granted partial summary judgment in favor of J.T. Magen as set forth above in connection with the statutory provisions, rules and regulations invoked by plaintiff.

IV. Conclusion

Accordingly, it is

ORDERED that motion for summary judgment is granted to the extent of granting defendants summary judgment dismissing the amended complaint as against defendant Tori Realty Corp.; and it is further

ORDERED that motion for summary judgment is granted to the extent of granting defendants partial summary judgment dismissing all claims predicated on provisions from the Building Code of the City of New York, the Fire Code of the City of New York and standards, rules and regulations from the Occupational Safety and Health Administration as against defendant J.T. Magen & Company, Inc.; and it is further

ORDERED that counsel are directed to appear for a status settlement conference in room 1127 B at 111 Centre Street, New York, New York, on 7/25, 2019, at 3 a.m./p.m. and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 5/23/19

Nancy M. Bannon, J. S. C.

HON. NANCY M. BANNON