

<b>Meringolo v Turner Constr. Co.</b>
2020 NY Slip Op 30119(U)
January 13, 2020
Supreme Court, New York County
Docket Number: 158572/2014
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 35EFM

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ANTHONY MERINGOLO,

Plaintiff,

- v -

TURNER CONSTRUCTION COMPANY, SKANSKA USA  
BUILDING, INC AND DASNY MECHANICAL INC.,

Defendant.

INDEX NO. 158572/2014

MOTION DATE 10/07/2019

MOTION SEQ. NO. 004

**DECISION + ORDER ON  
MOTION**

-----X

HON. CAROL R. EDMEAD:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159

were read on this motion to/for PARTIAL SUMMARY JUDGMENT

Upon the foregoing documents and the memorandum decision below, it is

ORDERED that defendant Skanska USA Building Inc.'s motion for partial summary judgment dismissing Plaintiff's Labor Law § 241 (6) claim is granted; and it is further

ORDERED that the remaining claims are severed and move forward to trial; and it is further

ORDERED that counsel for Skanska shall serve a copy of this decision, along with notice of entry, on all parties within 10 days of entry.

NON-FINAL DECISION.

In this Labor Law action, defendant Skanska USA Building Inc. (Skanska) moves, pursuant to CPLR 3212, for partial summary judgment dismissing Plaintiff's Labor Law § 241 (6) claim. Plaintiff opposes the motion.

### BACKGROUND

On January 30, 2014, plaintiff Anthony Meringolo (Plaintiff) was injured during the construction project for the City University of New York (CUNY) located at 85 Nicholas Avenue in Manhattan. The project included construction of CUNY's Advanced Science Research Center, and Skanska was the general contractor. Plaintiff was employed by nonparty Tower Installation (Tower) on the day of his accident, and was performing window installation on one of the newly erected buildings on the project. As he was walking to get a box of caulk from the doorway of a nearby building, he alleges that he slipped and fell on snow and ice.

When asked in one of his depositions whether he was on a path or an open, Plaintiff testified that "it was an open area" (NYSCEF doc No. 152 at 20). When he was immediately asked, "was it a path where you regularly walked along to get your material, Plaintiff said, "Yeah" (*id.*).

Plaintiff filed his complaint on September 2, 2014, alleging that defendants are liable pursuant to Labor Law § 200 and common-law negligence, as well as Labor Law § 241 (6). Skanska here only moves against Plaintiff's Labor Law § 241 (6) claim, arguing that none of the Industrial Code provisions cited by Plaintiff are applicable to his accident. In opposition, Plaintiff alleges that there is a question of fact as to whether 12 NYCRR § 23-1.7 (d) is applicable to his action.

## DISCUSSION

"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 § 241 (6) provides, in relevant part:

"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, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiffs 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*, 16 NY3d at 416).

Here, Plaintiff abandons reliance on all Industrial Code violations except for 12 NYCRR § 23-1.7 (d) (*Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["(w)here a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section]). 12 NYCRR § 23-1.7 is entitled "Protection from general hazards," and its subsection (d), "Slipping hazards," provides:

"Employers 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."

Courts have long held that open areas are not covered under this regulation (*see e.g. Carrera v Westchester Triangle Hous. Dev. Fund*, 116 AD3d 585, 585-586 [1st Dept 2014] [12 NYCRR § 23-1.7 (d) not applicable where the plaintiff fell in an open, unpaved area]; *Raffa v City of New York*, 100 A.D.3d 558 [1st Dept 2012] [the regulation was not applicable where the plaintiff fell in an open area covered with ice and snow]). Courts, while evaluating whether something is an open area or a passageway, in the context of 12 NYCRR § 23-1.7 (e) (1), have held that even if an open area is "regularly traversed," that does not convert an open area into passageway (*see DePaul v NY Brush LLC*, 120 AD3d 1046 [1st Dept 2014]; *Dalanna v City of New York*, 308 Ad2d 400 [1st Dept 2003]).

Skanska, thus, makes a *prima facie* showing of entitlement to judgment by submitting Plaintiff's own description of the area where his accident took place as an

open area between two buildings that were under construction. In opposition, Plaintiff does not cite any caselaw supporting his position that there is a question of fact as to whether the area between the two buildings was a walkway for 12 NYCRR § 23-1.7 (d) purposes. Instead, Plaintiff argues that “the very language [of the regulation] requires that all walkways be kept free from ice, snow ... which may cause slippery footing” (NYSCEF doc No. 155, ¶ 22).

This is insufficient to raise a material issue of fact warranting denial of summary judgment where the courts have repeatedly held that the open areas, such as the one involved in Plaintiff’s accident, are not covered by 12 NYCRR § 23-1.7 (d). As Skanska has made an un rebutted showing of entitlement to partial summary judgment dismissing Plaintiff’s Labor Law § 241 (6) claim, its motion must be granted.

CONCLUSION

Accordingly, it is

ORDERED that defendant Skanska USA Building Inc.’s motion for partial summary judgment dismissing Plaintiff’s Labor Law § 241 (6) claim is granted; and it is further

ORDERED that the remaining claims are severed and move forward to trial; and it is further

ORDERED that counsel for Skanska shall serve a copy of this decision, along with notice of entry, on all parties within 10 days of entry.

1/13/2020  
DATE

  
**HON. CAROL R. EDMED**  
J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: