SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT DAVID KALISH** **PART** **IAS MOTION 29EFM**

Justice

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MICHAEL COYLE,

Plaintiff,

- v -

METROPOLITAN TRANSITY AUTHORITY, HUDSON YARDS NORTH TOWER HOLDING, LLC, HUDSON YARDS NORTH TOWER TENANT, LLC, HUDSON YARDS CONSTRUCTION, LLC, RELATED COMPANIES, L.P., OXFORD HUDSON YARDS, LLC and TISHMAN CONSTRUCTION CORPORATION,

Defendants.

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INDEX NO. 158099/2016

MOTION DATE 03/09/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

were read on this motion to/for JUDGMENT - SUMMARY.

Motion by plaintiff Michael Coyle ("Plaintiff") for an order, pursuant to CPLR 3212, granting summary judgment on his causes of action under New York Labor Law ("NYLL") § 241(6) as predicated on violations of New York Industrial Code ("Industrial Code") §§ 23-1.7(d) and (e) as against the Metropolitan Transit Authority ("MTA"), Related Companies, L.P., ("Related, L.P."), and Tishman Construction Corporation ("Tishman") (collectively, "Defendants") is denied for the reasons stated herein; and,

Cross-motion by defendants the MTA; Hudson Yards North Tower Tenant, LLC, c/o Related, L.P., Hudson Yards North Tower Tenant, LLC, c/o Related, Hudson Yards Construction, LLC, c/o Related, Related, Oxford Hudson Yards, LLC and Tishman (collectively "Named Defendants"), pursuant to CPLR 3212, for summary judgment in their favor as to liability on the NYLL § 241(6) claims as against Named Defendants is denied for the reasons stated herein.

BACKGROUND

This case arises out of an incident that allegedly occurred on May 23, 2016, while Plaintiff was working as a journeyman ironworker[1] at the Tower A/30 Hudson Yards

[1] As part of his role as a journeyman ironworker, Plaintiff states that he was in charge of keeping the job site safe from potential hazards by, *inter alia*, covering holes with temporary covers made from excess corrugated steel decking. (Memo in Supp, Ex F, NYSCEF Doc No 37 [Coyle EBT] at 85:18-88:05;

construction project ("the subject project")[2] that is part of a multi-faceted construction project ("the Hudson Yards project"). (Memo in Supp, Ex B, NYSCEF Doc No 33 [Construction Agreement dated June 30, 2015].) According to the moving papers, at the time of the incident, the MTA was the titleholder of the Hudson Yards project. In 2003, the MTA had entered into a 99-year ground lease with Related, L.P. Related, L.P, was the owner and/or agent of the owner of the Hudson Yards project. (Memo in Supp, Ex C, NYSCEF Doc No 34 [MTA Press Release dated April 10, 2013].) Hudson Yards Construction was the executive construction manager ("ECM"). Hudson Yards Construction (together with its permitted successors and assigns, the "Executive Manager" or "ECM") oversaw the construction of the Hudson Yards project. (Memo in Supp, Ex D, NYSCEF Doc No 35 [Kempf EBT] at 12:10-16 [development manager]; 40:1-10.) Related, L.P., through Hudson Yards Construction, contracted with defendant Tishman Construction Corporation ("Tishman") to act as general contractor to provide and supervise certain types of general construction work, including the types in the instant case. (*Id.* at 22:3-12; 61:1-12; Construction Agreement dated June 30, 2015 at 1, 8-14 [Management and Construction].) Related, L.P., through Hudson Yards Construction, subcontracted with Plaintiff's employer W&W Steel ("W&W) to perform, *inter alia*, structural steel work on the subject project. (Memo in Supp, Ex E, NYSCEF Doc No 36 [Trade Contract dated November 19, 2015] at 10, § 4.1[d]; at 37, § 11.1[b].) Plaintiff was an employee of W&W. (Coyle EBT at 45:13-24; 79:6-25.)

Deposition Testimony of Plaintiff

In his depositions, Plaintiff states that he was injured on May 23, 2016 when he was walking on the deck on the tenth or eleventh floor[3] and caused to slip and trip on scrap metal banding[4] while carrying approximately 100-pound[5] shelf angles[6] on his shoulder. He states that

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Memo in Supp, Ex G, NYSCEF Doc No 38 [Coyle 50-h EBT] at 40:2-12.)

[2] The subject project consists of a high-rise building that is at least seventy (70) stories above ground with 2,800,000 in total square feet, including office, retail, and building services, and with an observation deck that juts into the air. It is located at the southwest corner of West 33rd street and 10th Avenue. The subject project is part of a multi-faceted construction project ("the Hudson Yards project"). (Memo in Supp, Ex B, NYSCEF Doc No 33 [Construction Agreement dated June 30, 2015].)

[3] Richard Switzer, who worked as a site safety manager with Tishman, testified that as part of his job duties, he conducted daily walkthroughs of the construction project to observe and report on safety issues. Switzer testified that, on May 23, 2016, Plaintiff's employer W&W Steel ("W&W") was performing decking work on the 11th and 12th floors and, as such, shelf angles would have been stored on the 10th floor where other construction materials were stored. (Memo in Supp, Ex I, NYSCEF Doc No 40 [Tishman Safety Manager Daily Logs] at 1), Memo in Supp, Ex H, NYSCEF Doc No 39 [Switzer EBT] at 98:8-15.)

[4] A banding is part of what makes up the deck floor. (Coyle 50-h Tr at 58:21-59:4.) Plaintiff's employer W&W was installing pieces of steel to form the deck and placing angle iron/shelf angles to then cover temporary openings like the elevator shaft. (Memo in Supp, Ex H, NYSCEF Doc No 39 [Switzer EBT] at 97:20-98:07.)

[5] Plaintiff states that the angles were each 100 pounds in his deposition. (Coyle EBT at 96:16-19.) Plaintiff states that the angles were about 120 pounds together in his 50-h transcript. (Coyle 50-h Tr at 58:05-12.)

[6] A heavy angle known as a shelf angle is used to span some of the holes and land decking on the angles for stability and safety. (Coyle 50-h Tr at 55:17-56:7; Coyle EBT at 89:25-97:09.) The two angles were

the location where he fell was "all open air" with "no walls." He states that he was on his way back to a ladder that he would take to go back up to the derrick floor,[7] which was on the twelfth floor, to then use the shelf angles to cover holes on the derrick floor. He states that on the way to and from the ladder, there was "a lot of garbage" on the entire floor from refuse like food containers, as well as scrap steel, cardboard, and metal banding used to hold bundles of decking together. Plaintiff states that as he was on his way to the ladder,[8] looking "down and forward," his "right foot got snagged" on a banding, and—at the same time—his left foot that "was on top of some debris" "slid" and extended "all the way out," his body "twisted to the right," in a clockwise direction and "went backwards," and he "fell forward all the way to [his right] knee." He states that when he fell, he felt pain in his neck, hip, groin area, stomach, and lower back on the left side. (Memo in Supp, Ex F, NYSCEF Doc No 37 [Coyle EBT] at 85:18-138:22; Memo in Supp, Ex G, NYSCEF Doc No 38 [Coyle 50-h EBT] at 40:2-12; 52:17-54:23; 71:13-72:14.)

C-2 & C-3 Forms

On May 25, 2016, a Work-Related Injury/Illness C-2 form was completed by W&W's Human Resources Generalist, Erica Ostrowsky ("Ostrowsky") at Plaintiff's initiation which stated that Plaintiff was injured on May 23, 2016 while "bending to pick up safety post," on the "12th floor." (Memo in Opp and in Supp of Cross-Motion, Ex F, NYSCEF Doc No 60 [C-2 Form] at 12.)[9] Van Laere is named as a witness who saw the injury happen on the C-2 form. (*Id.*)

On June 3, 2016, Plaintiff completed a Workers' Compensation C-3 form which indicated that the injury to his "abdomen, groin, left hip, left leg, and lower back and [neck]" happened on May 23, 2016, when he "slipped, tripped and twisted while carrying steel." (Memo in Supp, Ex M, NYSCEF Doc No 44, [C-3 form] at 1.)

Affidavit of Adam Billings (W&W's Ironworker)

Adam Billings ("Billings"), who was working on the subject project as a W&W ironworker, states in his September 9, 2016 affidavit that on the morning of May 23, 2016, he saw Plaintiff "walking across the deck of the work area carrying steel angles on his shoulder. As he was walking across the floor, [he] saw him slip and trip on wires, banding, and other

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located on top of a stack of corrugated steel decking that was several feet high. (Coyle EBT at 123:14-16; Coyle 50-h EBT at 52:3-9; 60:5-24.) To access the angles, Plaintiff had to walk in between bundles of stacked decking on one side and a stack of steel beams on the other side creating an alleged makeshift corridor between the stored materials. (Coyle 50-h Tr at 68:18-25; 69:2-6.)

[7] The derrick was at the top of the building where workers set steel and erected iron. (Coyle EBT at 85:18-88:05.)

[8] Plaintiff was generally aware of the debris scattered about the area near the ladder; but, states that it was "the lesser of two evils" as it had less debris than any alternative route available. (Coyle EBT at 123:22-25; 124:1-6; Coyle 50-h EBT at 99:2-16.)

[9] Plaintiff denies talking with Ostrowsky to complete the C-2 form. He states that he believes that it was a "Spanish" male who took his initial report. (Coyle 50-h Tr at 82:03-05; *but see id.* at 118:06.) Further, Plaintiff states that he did not state that he hurt himself picking up safety posts and that this must have been misinterpreted by the person who completed the form. (*Id.* at 81:07-25; 82:08-22; 84:08-12.)

construction debris scattered around the work area." (Memo in Supp, Ex K, NYSCEF Doc No 42 [Billings Aff]; *see also* Coyle EBT at 146:13-22; Coyle 50-h Tr at 64:8-15.) He further states that he went to help Plaintiff in getting up.

Affidavit of Bradley Krauss (W&W's Foreman)

Bradley Krauss ("Krauss"), who was working on the subject project as "the foreman for the safety gang" for W&W at the time of the incident, states in his April 24, 2018 affidavit, that although he did not see Plaintiff's incident, he observed that the storage areas beneath the derrick floor in May of 2016 "were littered with debris, and scrap iron, and other construction material" and that "[h]ousekeeping was constantly neglected and was an ongoing issue on [the subject project]." (Memo in Supp, Ex L, NYSCEF Doc No 43 [Krauss Aff].) Krauss further states that on May 23, 2016, Plaintiff informed him that he suffered an injury after tripping while carrying angle iron while walking through a storage area beneath the derrick floor. (*Id.*)

Deposition Testimony of Richard Switzer (Tishman's Site Safety Manager)

Switzer states in his deposition on April 30, 2018 that he was aware of the condition of the floor where Plaintiff's incident occurred and that even though he did not recall any specific debris on the floor where Plaintiff's incident occurred, he recalled that there was some debris in the area. (Ex H, Switzer EBT at 82:21-25; 83:2-13.)

Witness Statement of Roger Van Laere (W&W's Ironworker)

Tishman, W&W, and Related, L.P., prepared incident reports of Plaintiff's incident. (Memo in Opp and in Supp of Cross-Motion, Ex F, NYSCEF Doc No 60 [Incident Reports].) The Tishman report includes a witness statement by Roger Van Laere ("Van Laere"), who was employed by W&W as a journeyman ironworker.

Van Laere's statement, dated May 25, 2016, includes the following:

> "On [May 23, 2016] morning, [Plaintiff] and myself were picking up and carrying safety posts. During this process, [Plaintiff] complained about pain in his hip area." (Incident Reports at 20.)

Affidavit of Roger Van Laere (W&W's Ironworker)

Van Laere states in his April 24, 2018 affidavit that he never witnessed Plaintiff get injured and that Plaintiff told him that he got injured from "something that happened earlier." (Memo in Opp and in Supp of Cross-Motion, Ex A, NYSCEF Doc No 62 [Aff Van Laere].) Van Laere also states that the area where Plaintiff allegedly got injured was always "cluttered" and "in disarray." (*Id.*)

Medical Incident Report

Harold Green ("Green"), an occupational health specialist working at Onsite Innovations who saw Plaintiff on May 25, 2016, and prepared a Medical Incident Report ("Green Report"), indicates that Plaintiff stated that the accident happened on the twelfth floor where Van Laere and he were lifting safety posts and identified Van Laere as a witness to the accident. (Memo in Opp and in Supp of Cross-Motion, Ex B, NYSCEF Doc No 56 [Green Aff & Green Report dated May 25, 2016] ¶ 5.) The Medical Incident Report is signed by both Green and Plaintiff, and states: "Patient advised Monday while lifting a safety post, he felt a sharp pain to the groin area more to the left side and that pain radiated to his lower back. Patient wants documentation of injury. Pain has not decreased since injury." (Id.) Neither the Green Affidavit nor the Green Report makes mention of Adam Billings as a potential witness. (Green Aff & Green Report dated May 25, 2016.) Green added that Plaintiff "refused medical treatment on site" and that the report was done for "documentation only." (*Id.*)

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 University Medical Center*, 64 NY2d 851, 853 [1985].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Id.*) Once this showing has been made, the burden shifts to the nonmoving party to produce "evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012].) "Under this summary judgment standard, even if the jury at a trial could, or likely would, decline to draw inferences favorable to the [nonmoving party] . . . the court on a summary judgment motion must indulge all available inferences . . . ." (*Torres v Jones*, 26 NY3d 742, 763 [2016].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*Rotuba Extruders v Ceppos*, 46 N.Y.2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 [1st Dept 2002].)

NYLL § 241(6) Claim

Plaintiff moves for summary judgment, pursuant to CPLR 3212, on his causes of action under NYLL § 241(6) as predicated on violations of Industrial Code §§ 23-1.7(d) and 23-1.7(e) against Defendants. Named Defendants cross-move for summary judgment with respect to the aforementioned subsections of the Industrial Code as well as other claims. However, this cross-motion was made after the expiration of this Court's deadline for the submission of dispositive motions, which was 60 days. (PC Order dated July 11, 2017, NYSCEF Doc No 19.) Due to the lateness of the cross-motion, the Court will only consider the cross-motion as it relates to the "nearly identical" relief regarding liability based on NYLL § 241(6) as predicated on violations

of Industrial Code §§ 23-1.7(d) and 23-1.7(e) and only to the extent the cross-motion seeks relief on behalf of those defendants against whom Plaintiff has moved for summary judgment (i.e. Defendants, as opposed to Named Defendants). As such, the Court rejects any remaining arguments brought by Defendants or by any of the other Named Defendant and will not consider them. (*Guallpa v Leon D. DeMatteis Const. Corp.*, 121 AD3d 416, 419 [1st Dept 2014]; *Willinski v 334 E. 92nd Hous Dev Fund Corp*, 71 AD3d 538, 540 [1st Dept 2010], *affd as mod*, 18 NY3d 1 [2011], *Filannino v Triborough Bridge & Tunnel Auth.*, 34 Ad3d 280 (2006).)

NYLL § 241(6) provides:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> 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. 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."

(NYLL § 241[6].) NYLL § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers." (*Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 501, 505 [1993] [internal citations omitted]; *see also Allen v Cloutier Const. Corp.*, 44 NY2d 290, 297-301 [1978] [explaining that the 1969 amendment to the statute fashioned an absolute liability for breach of the requirements on contractors and owners irrespective of their control or supervision of the construction site].) However, NYLL § 241(6) is not self-executing, and in order to show a violation of this statute, a plaintiff must show that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety. (*Ross*, 81 NY2d at 503-505.) Such violation must be a proximate cause of the plaintiff's injuries. (*Phillips v One E. 57th St., LLC*, 2020 WL 2839200, *16, 2020 N.Y. Slip Op. 31661[U], 16 [NY Sup Ct, New York County 2020] [internal citations omitted].)

For the purposes of the instant motion, it is undisputed that the MTA and Related are "owners" of the subject project for the purposes of NYLL. (*Morton v State of New York*, 15 NY3d 50 [2010].) In 2003, the MTA entered into a 99-year ground lease with defendant Related, L.P. (*Morton v State*, 15 NY3d 50, 56 [2010].) It is further undisputed that Tishman is a "contractor" or "agent of the owner" for the purposes of NYLL. (*Walls v Turner Cont Co*, 4 NY3d 861 [2005].) Accordingly, they are the proper defendants.

The Court will now analyze the Industrial Code §§ 23-1.7(d) and 23-1.7(e). Said provisions state as follows:

> "(d) Slipping Hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or 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.
>
> (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."

(12 NYCRR 23-1.7 [d]-[e].)

The Industrial Code §§ 23-1.7(d) and 23-1.7(e) have been held by courts to be sufficiently specific to provide a basis for liability under NYLL 241(6). (*Corbi v Ave. Woodward Corp.*, 260 AD2d 255 [1st Dept 1999]; *Rizzuto v L.A. Wagner Contr. Co.*, 91 NY2d 343, 350-51 [1998]; *Galarza v Lincoln Ctr. for the Performing Arts, Inc.*, 32 Misc 3d 1226(A), *10 [NY Sup Ct, New York County 2011].)

I. Plaintiff's Motion

On the instant motion, as stated, Plaintiff is seeking summary judgment against Defendants with regard to alleged violations to the aforesaid Industrial Code sections. As will be further explained, Plaintiff's motion is denied because the evidence on this motion presents conflicting accounts concerning whether and how the alleged accident occurred. (*See Hobbs v MTA Capital Constr*, 159 AD3d 544, 544 [1st Dept 2018]; *Smigielski v Teachers Ins & Asso'n of Am*, 137 AD3d 676, 676 [1st Dept 2016] ["[W]here a plaintiff is the sole witness to an accident, an issue of fact may exist where he or she provides inconsistent accounts of the accident."]; *Jones v W 56th Assoc*, 33 AD3d 551, 552 [1st Dept 2006] [holding that inconsistencies in the plaintiff's accounts of how he came to be injured raised a factual issue as to whether a violation of the NYLL was a proximate cause of the plaintiff's injury].)

Most notably, the Medical Incident Report prepared by Green ("Green Report") states: "Patient advised Monday while lifting a safety post, he felt a sharp pain to the groin area more to the left side and that pain radiated to his lower back. Patient wants documentation of injury. Pain

has not decreased since injury." (Memo in Opp and in Supp of Cross-Motion, Ex B, NYSCEF Doc No 56 [Green Report dated May 25, 2016].) Based on the Green Report, Defendants, as nonmovants, are entitled to the reasonable inference that the injury happened while Plaintiff was lifting a safety post—not because he tripped and fell as he alleges.

The Green Report further states that Van Laere was a witness to Plaintiff's injury.[10] In a Related, L.P., Witness Statement, Van Laere stated: "On [May 23, 2016] morning, [Plaintiff] and myself were picking up and carrying safety posts. During this process, [Plaintiff] complained about pain in his hip area." (Memo in Opp and in Supp of Cross-Motion, Ex F, NYSCEF Doc No 60 [Incident Reports] at 20.) It is reasonable to infer from Van Laere's Witness Statement that the injury occurred while Plaintiff was picking up and carrying safety posts. Indeed, this is the case notwithstanding that Plaintiff provides an affidavit for Van Laere—roughly two years after the latter's Witness Statement—stating that Plaintiff did not get injured while carrying a safety post and that he got injured from "something that happened earlier." (Memo in Opp and in Supp of Cross-Motion, Ex A, NYSCEF Doc No 62 [Aff Van Laere].) Given the other evidence in the record, there is a reasonable inference that Van Laere may have changed his account for the benefit of Plaintiff.

Similarly, the C-2 form indicates that per the HR generalist, Plaintiff was injured when "bending to pick up safety post," on the "12th floor." (Memo in Opp and in Supp of Cross-Motion, Ex F, NYSCEF Doc No 60 [C-2 Form] at 12.) Plaintiff, however, disputes in his 50-h transcript that he related to the HR generalist who prepared the C-2 Form that he was hurt bending to pick up the safety post. (Coyle 50-h Tr at 81:07-25; 82:08-22; 84:08-12.)

Whereas Plaintiff testified on the 50-h transcript that the C-2 report was prepared by someone outside his presence and by someone whom he never met, who in effect allegedly misunderstood what he said, Green states that the Green Report was prepared and signed by himself and Plaintiff in each other's presence. (Green Report and Green Aff ¶¶ 9, 10.) Further, the Green Report and Affidavit state the same thing as the C-2 form as to the cause of the injury.

On June 3, 2016, Plaintiff signed a form C-3 Employee Claim, where it appears for the first time that Plaintiff claimed that he slipped, tripped, and twisted himself while carrying steel angles. In this June 3 report, signed by Plaintiff, Plaintiff mentions that he fell on the twelfth floor, which is inconsistent with his deposition testimonies on the instant motion.

To reiterate, the instant motion for summary judgment is precluded by issues of fact that require credibility determinations. Most notably, there is a question of fact as to whether Plaintiff's injury occurred in the manner he alleges—when he tripped, slipped and fell—or whether it occurred when he was lifting a post, as suggested by the Green Report. Further, and as will be discussed further below regarding Defendants' cross-motion, there are questions of fact regarding whether the aforesaid Industrial Code provisions apply, even assuming that the accident occurred as Plaintiff alleges.

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[10] Similarly, Van Laere was named as a witness who saw the injury happen on the C-2 form. (Memo in Opp and in Supp of Cross-Motion, Ex F, NYSCEF Doc No 60 [C-2 Form] at 12.)

II. Defendants' Cross-Motion

As to the cross-motion for summary judgment by Defendants regarding the Industrial Code §§ 23-1.7 (d) and (e)(2), the Court finds that there are issues of fact for the jury to decide and, as such, the cross-motion is denied. Again, as demonstrated by the evidence above, to determine how the accident occurred requires the weighing of witness credibility due to the different versions. Moreover, contrary to the Defendants' arguments, although Plaintiff was working on the twelfth floor, that does not preclude the tenth or eleventh floor from being considered a working area in light of the necessity to go to the tenth floor to obtain supplies for the work being performed. In sum and substance, based on the evidence submitted on the instant motion and cross-motion, this Court cannot determine as a matter of law whether or not Plaintiff's alleged accident occurred within a "working area," as defined by the Industrial Code §§ 23-1.7 (e)(2).

Likewise, on this cross-motion, this Court also cannot rule out, as a matter of law, that Plaintiff's accident was proximately caused by one of the "slipping hazards" enumerated in the Industrial Code § 23-1.7(d). To the extent that Defendants argue that Plaintiff did not fall on a "floor" for purposes of subsection (d), the Court rejects that argument.

With regard to Industrial Code §§ 23-1.7 (e)(1)—assuming the accident occurred as Plaintiff alleges—this Court cannot determine as a matter of law whether or not Plaintiff's accident occurred within a passageway for purposes of that subsection. Here, Plaintiff, in his deposition, testifies that he tripped and slipped on metal banding and debris "between the stack of deck and the stack of iron." (Coyle 50-h EBT at 38:21-23.) He further describes the area where he fell as "like a makeshift corridor." (*Id.* at 69:2-6.) Granting all favorable inference to Plaintiff as the non-movant on the cross-motion, there is admissible evidence by which a jury could determine that Plaintiff fell within a passageway as defined by subsection (e)(1). (*See Lois v Flintlock Const. Services, LLC*, 137 AD3d 446, 447 [1st Dept 2016].)

On the other hand, Defendants refer to Plaintiff's description of the area as "a half of a football field one-way and longer than that going north and south" and "an open floor." (Memo in Opp and In Supp of Cross-Motion at 9, 11, citing Coyle EBT at 99:03-24; 104:06-24.) Further, Defendants argue that Plaintiff took the route where the incident happened not because this route was demarcated as a makeshift passageway, but rather because he wanted to use the ladder closest to the apprentice. (Memo in Opp and In Supp of Cross-Motion at 9, citing to Coyle EBT at 131:09-132:22.) This evidence could also allow a jury to determine that the area where Plaintiff alleges that he fell was not a passageway within the meaning of subsection (e) (1). (*See Quigley v Port Authority of New York*, 168 AD3d 65, 67 [1st Dept 2018].)

In sum and substance, based on the evidence presented on this motion—namely, Plaintiff's testimony—this Court cannot determine as a matter of law whether or not the area where Plaintiff alleges his accident occurred was a passageway within the meaning of Industrial Code §§ 23-1.7 (e)(1). Indeed, both sides have failed to eliminate all triable issues of fact as to the configuration and location of the area where Plaintiff alleges that he fell.[11] To the extent that

[11] And, again, there are competing narratives as to how Plaintiff was injured: whether he was injured lifting safety posts or was injured when he slipped and fell carrying safety posts.

Defendants argue that they are entitled to summary judgment on this issue because Plaintiff testified that the area where he fell was "all open air" and that "there were no walls," the Court rejects that argument. (Memo in Opp and In Supp of Cross-Motion at 11, citing to Coyle EBT at 102-103; *see also Stewart v ALCOA, Inc.*, 2020 N.Y. Slip Op. 03582 [3d Dept June 25, 2020] [rejecting argument by the defendants that the area of the plaintiff's injury could not qualify as a passageway, for purposes Industrial Code §§ 23-1.7 (d), because it was on a floor of a building that had not yet been enclosed by walls].)

For all these reasons, the motion and cross-motion are denied.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the motion by Plaintiff MICHAEL COYLE for an order, pursuant to CPLR 3212, granting summary judgment on his causes of action under New York Labor Law ("NYLL") § 241(6) as predicated on violations of New York Industrial Code §§ 23-1.7(d) and 23-1.7(e)(1) and (2) against the Metropolitan Transit Authority ("MTA"), Related Companies, L.P., ("Related"), and Tishman Construction Corporation ("Tishman") (collectively, "Defendants") is denied; and it is further,

ORDERED that the cross-motion by Named Defendants METROPOLITAN TRANSITY AUTHORITY, HUDSON YARDS NORTH TOWER HOLDING, LLC, HUDSON YARDS NORTH TOWER TENANT, LLC, HUDSON YARDS CONSTRUCTION, LLC, RELATED COMPANIES, L.P., OXFORD HUDSON YARDS, LLC, TISHMAN CONSTRUCTION CORPORATION for summary judgment is denied; and it is further;

ORDERED that counsel serve a copy of this order with notice of entry upon all parties within 20 days of entry.

The foregoing constitutes the decision and order of the Court.

7/01/2020
DATE

ROBERT DAVID KALISH, 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:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE