At an IAS Trial Term, Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 19th day of October 2020.

P R E S E N T:
Honorable Reginald A. Boddie, JSC

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BRIAN KENNEDY,

Plaintiffs,

Against

COMMET 380, INC., L&L HOLDING COMPANY, LLC, TISHMAN CONSTRUCTION CORPORATION and ALL STATE INTERIOR DEMOLITION INC.,

Defendants.

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ALL STATE INTERIOR DEMOLITION, INC.,

Third-Party Plaintiff,

Against

ALL-SAFE, LLC,

Third-Party Defendant.

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Index No. 500503/2017
Cal. No. 26-29
MS 9, 10, 11, 12

DECISION AND ORDER

Papers	Numbered
MS 9	Docs. # 170-180, 263, 266, 290-311
MS10	Docs. # 185-224, 264, 312-313
MS 11	Docs. # 226-260, 265, 276-289, 294
MS 12	Docs. # 267-275

Doc. # 315 rejected by the Court per Part 95 rules
Docs. # 316-327 untimely filed per Court's 9/3/2020 Order & not considered

Upon the foregoing cited papers, the decision and order on the above-cited motions for summary judgment, pursuant to CPLR 3212, is as follows:

Plaintiff commenced this action to recover for personal injuries he allegedly sustained in a trip and fall accident on May 9, 2016, at 390 Madison Avenue, New York, New York (the

premises). The premises was a commercial building that was owned and being developed by Commet 380, Inc. (Commet 380) and L&L Holding Company, LLC (L&L). Commet 380 hired Tishman Construction Corporation (Tishman) as the construction manager for the project.

Tishman entered into a subcontract with All State Interior Demolition Inc. (All State) for demolition. All State hired United Interior Renovation (United) as a subcontractor to perform the labor and provide materials for demolition at the premises. Tishman hired All Safe, LLC (All Safe), a scaffolding company, to perform scaffolding work at the premises. The third-party complaint against All Safe was dismissed without prejudice by order of the late Honorable Johnny Lee Baynes on January 23, 2020.

Plaintiff, a journeyman ironworker employed by nonparty Cornell & Company, was performing welding at the premises on the date of his accident. Plaintiff claims that at approximately 7:40 a.m., he tripped over a metal "pry" bar on the landing of the stairwell between the 11th and 12th floors. He believed the pry bar was being used by All State's demolition laborers to dismantle the exterior scaffolding to the building.

He testified he observed the laborers passing materials such as plywood, wood planks and steel from the scaffolding on the exterior to a laborer on the landing. Plaintiff testified that a foreman, allegedly employed by All State and witness to his accident, was standing on the landing supervising his laborers. He believed the laborers were All State laborers based on his understanding of All State's responsibilities at the jobsite and because he observed All State dumpsters outside the stairways on the 11th and 12th floors.

He also testified he did not see the pry bar on the landing when he ascended the stairs and that he was on the 12th floor for a short time, approximately two minutes, in order to retrieve and drop a power cord down a hole into the 11th floor.

Plaintiff alleged violations of Labor Law § 200 and common law negligence, Labor Law §§ 240 and 241 (6), Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7, 23-1.11, 23-1.15, 23-2.1, 23-1.10, 23-2.7, 23-5, and Article 1926 of OSHA.

United moved for Summary Judgment (Motion Sequence #9) on the grounds that neither they nor All State were doing any work in the location of plaintiff's accident on May 9, 2016, they had no part in dismantling scaffolding, and United's workers had crowbars, but not like the pry bar plaintiff tripped over. All State opposed on the grounds they subcontracted all labor associated with the demolition at the premises to United and performed no actual labor.

All State also moved for Summary Judgment (Motion Sequence #10) on the grounds that it did not cause, create or have notice of the condition which caused plaintiff's accident, have control over the worksite, do actual work, or bring any tools to the worksite. Commet 380 and L&L opposed United and All State's motions on the grounds that they have cross-claims against United and All State and both companies had workers on site on the date of plaintiff's accident who were using tools the same or similar to that which was allegedly involved in plaintiff's accident. They also argued All State had employees on site who were responsible for directing, controlling, and maintaining its subcontractor United's work.

Defendants Commet 380, L&L, LLC and Tishman moved for Summary Judgment (Motion Sequence #11) seeking dismissal of plaintiff's claims, including Labor Law §§ 200, 240 (1), and 241 (6), and all cross-claims against them. All State opposed.

Plaintiff filed a cross-motion (MS 12) for partial summary judgment on his Labor Law 241 (6) claim against Commet 380 and Tishman, as owner and general contractor, and sought leave to amend his bill of particulars (BOP), pursuant to CPLR 3025 (b), to include New York State Industrial Code (12 NYCRR) §§ 23-1.7 (e) (1) and (2).

As an initial matter, for the reasons set forth by all movants, good cause for the untimely filing of the motions for summary judgment has been shown (*see Brill v City of New York*, 2 NY3d 648 [2004]). Further, plaintiff's motion to amend his BOP to include New York State Industrial Code (12 NYCRR) §§ 23-1.7 (e) (1) and (2) is granted as the amendment is based on facts already in the record, does not involve new theories of liability, and does not prejudice defendants (*see e.g. Cioffi v S.M. Foods, Inc.*, 178 AD3d 1015, 1016 [2d Dept 2019]; *see Jara v New York Racing Assn., Inc.*, 85 AD3d 1121, 1123 [2d Dept 2011] [citations omitted]).

L&L argued it is entitled to summary judgment and dismissal of each of plaintiff's claims and any cross-claims on the grounds that it is not a proper Labor Law defendant. It alleged it did not own, operate, maintain, or manage the premises, or enter into any agreements with any of the parties in this action. All State opposed on the grounds that the contract between Commet 380 and Tishman designated William Potts, L&L's Vice President, as "Owner's representative," Tishman executed subcontracts listing L&L as Commet 380's agent and owner of the property, and Mr. Potts held himself out to subcontractors on the project as an Executive Vice President of Commet 380. In support, All State proffered various documents demonstrating such and therefore raised a triable issue sufficient to defeat this branch of the motion.

Defendants, Tishman, L&L and Commet 380, argued for summary judgment on plaintiff's Labor Law § 200 claim on the grounds that they were not negligent. They argued they did not create, or have actual or constructive notice of any alleged defect; did not control the means or methods of plaintiff's work; and did not supervise or control the work plaintiff was engaging in prior to his alleged accident. They argued for summary judgment on plaintiff's Labor Law § 240 (1) claim on the grounds that plaintiff's alleged accident did not include an elevation risk. They argued for summary judgment on plaintiff's Labor Law § 241 (6) claim on the grounds that

plaintiff cannot establish any violation of the Industrial Code, nor that any alleged Industrial Code violation was a proximate cause of the accident.

Labor Law § 200 (1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work (*Ortega v Puccia*, 57 AD3d 54, 60 [2d Dept 2008] [citations omitted]). Liability under Labor Law § 200 arises when workers are injured as a result of dangerous or defective premises conditions at a worksite or defects or dangers in the methods or materials of the work in which the work is performed (*Ortega*, 57 AD3d at 61).

All State, United, Tishman, Commet 380 and L&L sought summary judgment on the grounds that they did not cause or create or have actual or constructive notice of the tripping hazard on the stairway where plaintiff fell and did not control the manner in which the work was performed. Where a premises condition is at issue, defendants may be liable if they either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*Ortega*, 57 AD3d at 61 [citations omitted]). However, where injuries arise from the manner in which work was performed, liability arises under Labor Law § 200 and the common law only if defendant had "the authority to supervise or control the performance of the work" (*Ortega*, 57 AD3d at 61). "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (*Ortega*, 57 AD3d at 62).

Here, plaintiff alleged laborers employed by All State were using the subject pry bar to demolish scaffolding and left it on the landing where it caused his accident. A mislaid tool constitutes a premises condition only after work has ceased and it is no longer being used by workers (*Slikas v Cyclone Realty, LLC*, 78 AD3d 144, 148 [2d Dept 2010]). " . . . [T]he *Slikas* case would have fallen into the 'means and methods of the work' category if the object on which the

plaintiff stumbled had been a product of ongoing construction work, which [was] precisely the situation presented in . . . [*Cody v State*]," and is the situation presented here (*Cody v State*, 82 AD3d 925, 927 [2d Dept 2011]). Therefore, the issue is whether defendants had the authority to supervise and control the work which was being performed.

At the outset, defendants averred they were not working at the site where plaintiff fell. They argued that All Safe, the scaffolding subcontractor Tishman hired, was the only entity who was performing work in the area where plaintiff fell on May 9, 2016. They proffered the testimony of Frank Rullo from All State, Steve Srnic from United, Luis Rivera from Tishman, and Tishman's Daily Report to establish that All Safe was dismantling scaffolding on the 9th to 12th floors on May 9, 2016.

Plaintiff alleged All State's laborers were using the pry bar and he knew that based on the presence of All State's dumpsters at the worksite. He further alleged they were demolishing the scaffolding and left the pry bar on the landing where he fell. Plaintiff testified that All State's foreman was standing on the landing and witnessed his accident. However, plaintiff was unable to identify this person by name and provided only a general description of him. He also testified that none of the workers wore any clothing or safety equipment that identified them as All State employees.

On a motion for summary judgment, the non-moving party is afforded the benefit of every favorable inference and the evidence is viewed in the light most favorable to such party (*Ruggiero v DePalo*, 153 AD3d 870, 871-872 [2d Dept 2017]). Affording plaintiff all reasonable inferences and viewing the evidence in the light most favorable to plaintiff, plaintiff's testimony is insufficient to raise a triable issue of fact as to whether any entity other than All Safe was performing work at the location of plaintiff's accident (*see Ruggiero v DePalo*, 153 AD3d 870, 871-872 [2d Dept

2017]). Moreover, there is no evidence in the record that All State or United had the authority to supervise or control the performance of All Safe's work. Accordingly, All State and United's motions for summary judgment (MS 9 &10) are granted and the complaint against them is dismissed.

Commet 380 and Tishman argued they did not have to the authority to supervise or control the work that was being performed. Mr. Rivera testified that Tishman hired approximately 12 housekeeping laborers per day to clean up the worksite and had he observed a tripping hazard, he would have directed someone to address it. " . . . [T]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence" (*Gasques v State of New York*, 59 AD3d 666, 668 [2d Dept 2009]). Here, defendants established that they did not control the manner in which their subcontractor, All Safe, performed its work. Having established their prima facie entitlement to summary judgment on plaintiff's claims against them pursuant to Labor Law § 200 or for common-law negligence, the burden shifts to plaintiff to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Here, plaintiff has failed to do so.

It is well settled that "the extraordinary protections of [Labor Law § 240 (1)] . . . apply only to a narrow class of [elevation-related] dangers" " . . . where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*Melber v 6333 Main St.*, 91 NY2d 759, 762 [1998]; *Rocovich v Con Ed*, 78 NY2d 509, 514 [1991]). The contemplated hazards encompassed by Labor

Law § 240 (1) "are limited to such gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501 [1993], citing *see De Haen v Rockwood Sprinkler Co.*, 258 NY 350 [1932]; *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 491 [1995]). Here, plaintiff's accident, a trip and fall on a negligently placed tool, is the type of peril a construction worker usually encounters on the job site, but not the type of elevation-related danger contemplated by Labor Law § 240 (1) (*see e.g. Ross*, 81 NY2d at 501; *Misseritti*, 86 NY2d at 491). Accordingly, plaintiff's claim pursuant to Labor Law § 240 (1) is dismissed.

It is also well settled that the duty owed to an injured worker under Labor Law § 241 (6) by an owner, general contractor or their agent is absolute and nondelegable (*Ross v Curtis-Palmer*, 81 NY2d 494 [1993]). Proof of notice of a dangerous condition is not required to impose liability upon an owner or general contractor for a violation of Labor Law § 241 (6) (*Rizzuto v L.A. Wenger Contracting Co.*, 91 NY2d 343 [1998]). Plaintiff argued for summary judgment on his Labor Law 241 § (6) claim on the grounds that defendants violated Industrial Code (12 NYCCRR) § 23-1.7 (e) (1) and (2), alleging he was injured when All State's laborers negligently placed a pry bar they were using to dismantle scaffolding on the landing of the stairway and caused him to trip. In opposition, defendants argued Subsection (e) is inapplicable since plaintiff did not allege the accident was caused by tripping on dirt or debris.

Industrial Code § 23-1.7 (e) (1) and (2) are both sufficiently specific to support a claim pursuant to Labor Law § 241 (6) (*Jara*, 85 AD3d at 1123; citing *see Mugavero v Windows By Hart, Inc.*, 69 AD3d 694, 696 [2d Dept 2010]; *McDonagh v Victoria's Secret, Inc.*, 9 AD3d 395, 396 [2d Dept 2004]). Industrial Code § 23-1.7 (e) (1) provides, "[a]ll passageways shall be kept

free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping" (Industrial Code [12 NYCRR] § 23-1.7 [e] [1]).

Although the regulations do not define the term "passageway" (see 12 NYCRR 23-1.4), courts have interpreted the term to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area (*Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1250-1251 [4th Dept 2013] [citations omitted]). Where the site of an accident is not a passageway, but an open working area, section 23-1.7 [e] [1] is inapplicable (*Cody*, 82 AD3d at 928, citing *see Castillo v Starrett City*, 4 AD3d 320, 322 [2d Dept 2004]). Plaintiff's use of the area at the time of the accident determines whether an area is considered a passageway (*Steiger*, 104 AD3d at 1251; *Parker v Ariel Assoc. Corp.*, 19 AD3d 670, 672 [2d Dept 2005]; *Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619, 622 [2d Dept 2003]). Where an area is the only way for a worker to pass through or access the location of his or her work, the area is considered a passageway (*Rossi v 140 W. JV Mgr. LLC*, 171 AD3d 668 [1st Dept 2019] [defining "the only route [plaintiff] could take to return to his work area" as a passageway]; *Lois v Flintlock Constr. Servs., LLC*, 137 AD3d 446, 447 [1st Dept 2016]) [defining a passageway as the area where plaintiff was "required to pass through [] in order to access" his work]).

Here, plaintiff established the subject stairway, which included the landing, was a passageway based on his use of the area to access the 11th and 12th floors where he was working (*see Parker*, 19 AD3d at 672; *see also Salinas*, 2 AD3d at 622). He further testified that it was the only way he could move between the floors. Mr. Rivera also testified that the landing was a passageway for ingress and egress. Accordingly, plaintiff has established prima facie entitlement to summary judgment against Commet 380 and Tishman pursuant to Labor Law § 241 (6) and Industrial Code [12 NYCRR] § 23-1.7 (e) (1) (*see Parker*, 19 AD3d at 672; *see also Salinas*, 2

AD3d at 622; *see Rossi*, 171 AD3d 668 [1st Dept 2019]; *see also Lois*, 137 AD3d at 447). Neither defendants' argument that this section is inapplicable nor Mr. Rivera's testimony that the landing was also a working area, which should be cordoned off to prevent tripping hazards, was sufficient to establish prima facie entitlement to summary judgment or raise a triable issue of fact (*see Zuckerman*, 49 NY2d at 562; *see Winegrad*, 64 NY2d at 853 [citations omitted]).

Industrial Code (12 NYCRR) § 23-1.7 (e) (2) provides, "[t]he 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" (Industrial Code 12 NYCRR § 23-1.7 [e] [2]). Under 12 NYCRR § 23-1.7 (e) (2), the "work being performed" is defined in terms of the work plaintiff was engaged in at the time of the accident (*see Salinas*, 2 AD3d at 622; *see Harvey v Morse Diesel Intl.*, 299 AD2d 451 [2d Dept 2002]; *Alvia v Teman Elec. Contr.*, 287 AD2d 421 [2d Dept 2001]; *Sharrow v Dick Corp.*, 233 AD2d 858, 860 [4d Dept 1996]). Here, the plaintiff was an ironworker performing welding at the time of the accident. The pry bar which plaintiff tripped over was being used to dismantle scaffolding and not as part of the work he was performing. Therefore, plaintiff established his entitlement to summary judgment pursuant to Industrial Code § 23-1.7 (e) (2). Defendants' argument that 12 NYCRR § 23-1.7 (e) (2) is inapplicable because plaintiff did not trip on dirt or debris is insufficient to raise a triable issue of fact (*see Zuckerman*, 49 NY2d at 562; *see Winegrad*, 64 NY2d at 853 [citations omitted]).

Accordingly, plaintiff 's cross-motion for summary judgment (MS 12) on the issue of liability, pursuant to Labor Law § 241 (6) and 12 NYCRR § 23-1.7 (e) (1), against Commet 380 and Tishman is granted. Commet 380 and Tishman's motion for summary judgment (MS 11) is granted, without opposition, to the extent plaintiff's claims pursuant to Labor Law § 241 (6)

alleging violations of Industrial Code §§ 23-1.5, 23-1.11, 23-1.15, 23-2.1, 23-1.10, 23-2.7, 23-5, and Article 1926 of OSHA are dismissed on the grounds that they are either inapplicable or insufficient to serve as a predicate for liability under Labor Law § 241 (6). Commet 380 and Tishman's motion for summary judgment (MS 11) on plaintiff's claim pursuant to Labor Law § 241 (6) and 12 NYCRR §§ 23-1.7 (e) (1), (2) is denied.

It is therefore, ordered:

MS 9 is granted.

MS 10 is granted.

MS 11 is granted to extent plaintiff's claims pursuant to Labor Law §§ 200, 240 (1), 241 (6) and Industrial Code [12 NYCRR] §§ 23-1.5, 23-1.11, 23-1.15, 23-2.1, 23-1.10, 23-2.7, 23-5, and Article 1926 of OSHA are dismissed and denied as to plaintiff's claim pursuant to Labor Law § 241 (6) and Industrial Code [12 NYCRR] § 23-1.7 (e) (1), (2).

MS 12 is granted on the issue of liability, pursuant to Labor Law § 241 (6) and 12 NYCRR § 23-1.7 (e) (1), (2), against Commet 380 and Tishman.

ENTER:

HON. REGINALD A. BODDIE J.S.C.

Honorable Reginald A. Boddie
Justice, Supreme Court

KINGS COUNTY CLERK FILED 2020 OCT 29 AM 10:34