

<b>Miller v City of New York</b>
2021 NY Slip Op 30970(U)
March 18, 2021
Supreme Court, New York County
Docket Number: 162491/2015
Judge: Shawn T. Kelly
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 57

ROBERT MILLER,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE CITY OF NEW YORK  
DEPARTMENT OF HOUSING, PRESERVATION AND  
DEVELOPMENT, CRP/EXTELL PARCEL K, L.P.,  
TISHMAN CONSTRUCTION CORPORATION OF NEW  
YORK, W5 GROUP, LLC, PAR PLUMBING CO., INC.

Defendant.

INDEX NO. 162491/2015

MOTION DATE 11/18/2020

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 118, 121, 123, 124, 127, 129, 131, 133, 134, 136

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is

In this personal injury action, Plaintiff Robert Miller (“Plaintiff”) allegedly sustained injuries on September 8, 2014 at 1:30 p.m., when he was caused to trip and fall on a copper pipe on the 18th Floor of the premises located at 40 Riverside Boulevard, in the County, City and State of New York. Defendant CRP/Extell Parcel K, L.P. (“Defendant CRP/Extell”) owned the subject premises<sup>1</sup> and Defendant Tishman Construction Corporation of New York (“Defendant Tishman”) was hired by CRP/Extell as the construction manager of the project. Defendant W5 Group, LLC (“Defendant W5 Group”) was retained by Tishman as the carting and cleaning contractor to clean the floor or pick up garbage. Defendant Par Plumbing Co. (“Defendant Par

<sup>1</sup> Plaintiff has previously discontinued its action as against THE CITY OF NEW YORK, THE CITY OF NEW YORK DEPARTMENT OF HOUSING, PRESERVATION AND DEVELOPMENT.

Plumbing") was hired by Tishman to work on the bathrooms, kitchens, plumbing risers and plumbing roughing.

Plaintiff's Second Amended Summons and Complaint alleges negligence, violations of Labor Law § 200, and Labor Law § 241(6). Defendant W5 Group moves pursuant to CPLR § 3211 for summary judgment dismissing the plaintiff's amended complaint and all crossclaims in their entirety as against W5 Group.

Plaintiff cross moves pursuant to CPLR § 3212 and Labor Law § 241(6), granting Plaintiff partial summary judgment against Defendants, CRP/Extell Parcel K, LLP and Tishman Construction Corporation of New York. Plaintiff contends that because the uncontroverted evidence shows that he was caused to trip on an errant and negligently placed piece of plumbing pipe located on the floor of a building under construction, Plaintiff is entitled to partial summary judgment against CRP/Extell Parcel K, L.P., the owner, and Tishman Construction Corporation of New York, the construction manager, on his Labor Law §241(6) cause of action to the extent predicated upon the violation of Industrial Code (NYCRR) section 23-1.7(e)(1). Industrial Code (NYCRR) 23-1.7(e) and 23-1.7(e)(2), requires that all passageways be kept free from debris and any other obstructions or conditions which could cause tripping, and/or requiring that floors and similar areas where persons either work or pass be free from debris, materials and sharp projections.

### **Factual Allegations**

Plaintiff alleges that on September 8, 2014, at approximately 1:30 p.m., while working on the project site located at 40 Riverside Boulevard, New York, New York ("the subject premises"), on the 18<sup>th</sup> floor, he was caused to trip and fall over a piece of copper pipe. As admitted in the motion of CRP/Extell, the property where Plaintiff's accident occurred was

owned by Defendants CRP/Extell and Tishman Construction Corporation of New York was the construction manager for the project at issue (NYSCEF Doc. No. 91).

#### Plaintiff's Deposition

Plaintiff testified that he was walking in the main passageway towards the hoist while carrying a dry concrete bag at the time of this accident (NYSCEF Doc. No. 108 at p. 18 and p. 24). Plaintiff testified that he stepped on a plumber's pipe which caused him to slip and fall backwards (NYSCEF Doc. No. 108 at p. 24). Plaintiff described the plumber's pipe as a copper pipe that was an inch in diameter (NYSCEF Doc. No. 108 at p. 25). Plaintiff indicated that the plumber's pipe was located in the main passageway and that he did not see it prior to his accident (NYSCEF Doc. No. 108 at p. 25). Plaintiff stated that he could not recall seeing other pipes, materials or debris on the floor in the area of his accident (NYSCEF Doc. No. 108 at p. 25). Plaintiff only saw plumbers, electricians and carpenters working on the floor of his accident at the time of his accident. (NYSCEF Doc. No. 108 at p. 32 and p. 57). Plaintiff said that he believes a plumber from Par Plumbing may have left the plumbing pipe behind on the floor (NYSCEF Doc. No. 108 at p. 32 and p. 33).

#### Tishman Deposition

Defendant Tishman produced witness Bryan Boylan to be deposed. Mr. Boylan testified that he holds the position of Senior Project Manager for the project in question (NYSCEF Doc. No. 110 at p.8 and 12). Tishman was the Construction manager, CRP/EXTELL was the owner of the subject premises, and Par Plumbing was hired by Tishman as a subcontractor for the subject project (NYSCEF Doc. No. 110 at p.14). In its capacity as construction manager, Tishman retained various subcontractors, including Par Plumbing and W5 (NYSCEF Doc. No. 91). In addition to hiring the subcontractors pursuant to its construction management agreement,

Tishman was responsible for establishing, initiating, maintaining and supervising all safety precautions and programs in connection with the construction work (NYSCEF Doc. No. 117). Tishman also had the authority to stop work if it observed a hazardous condition (NYSCEF Doc. No. 110).

Mr. Boyle testified that Par Plumbing was hired to work on the bathrooms, kitchens, plumbing risers and plumbing roughing (NYSCEF Doc. 110 at p.19). He stated that Waldorf Demolition (which was doing business as W5 Group LLC) was the carting and cleanup contractor that would clean the floor of debris and take the garbage off site (NYSCEF Doc. 110 at pp. 26-27). Furthermore, Mr. Boyle testified that Waldorf was responsible for cleaning the floors of the entire building daily, as required by contract (NYSCEF Doc. 110 at pp. 28-29).

#### Par Plumbing Deposition

Par Plumbing produced Lawrence Frawley, a supervisor to be deposed. Mr. Frawley testified that Par Plumbing was hired by Tishman (NYSCEF Doc. No. 111 at p. 19). Mr. Frawley stated that Par Plumbing would use copper piping for temporary water lines at the project (NYSCEF Doc. No. 111 at p. 20). Par Plumbing would also use copper pipes for domestic water lines (NYSCEF Doc. No. 111 at p. 24), hooking up the water pumps (NYSCEF Doc. No. 111 at pp. 25-26), piping for faucets (NYSCEF Doc. No. 111 at p. 28) and piping for water heaters (NYSCEF Doc. No. 111 at p. 33). Mr. Frawley said that, on the date of the Plaintiff's accident, Par Plumbing was installing shower bodies and tubs on the 18th floor (NYSCEF Doc. No. 111 at p. 37). Mr. Frawley testified that this type of work would require copper pipes that went to the body of the tub (NYSCEF Doc. No. 111 at p. 40). Mr. Frawley stated that Par Plumbing would put its work debris into canvas baskets that are then wheeled to the hoist (NYSCEF Doc. No. 111 at p. 72).

### W5 Group Deposition

James Costello testified that he is employed by W5 Group as a Project Manager (NYSCEF Doc. 112 at pp. 7-8). With regards to the subject project, Mr. Costello stated that W5 Group was hired to provide general cleanup labor and disposal of garbage for a two-year period (NYSCEF Doc. 112 at p.10). Mr. Costello said that the general cleanup consisted of sweeping and keeping the floors clean, mopping the Tishman offices, emptying containers of garbage in their truck and returning them to the floors (NYSCEF Doc. 112 at p.14). Mr. Costello further testified that this work was done towards the end of the workday so that the job site would be clean for the morning (NYSCEF Doc. 112 at p.16). Mr. Costello stated that W5 Group would provide carts for the trades to put their debris into (NYSCEF Doc. 112 at pp. 24-25). Further, Mr. Costello testified that, prior to September 8, 2014, no one made any complaints regarding the manner in which W5 Group removed debris (NYSCEF Doc. 112 at p.35). Mr. Costello testified that in the event debris fell off of a canvas bag while it was being pushed by a W5 Group laborer, the W5 Group laborer would pick it up and place it back into the canvas bag (NYSCEF Doc. 112 at p.35).

### Analysis

#### Summary Judgment Standard

Defendant W5 Group LLC (“W5 Group”) moves pursuant to CPLR § 3211 for summary judgment dismissing the Plaintiff’s amended complaint and all crossclaims in their entirety as against W5 Group. “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” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1<sup>st</sup> Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden

then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1<sup>st</sup> Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also *DeRosa v City of New York*, 30 AD3d 323, 325 [1<sup>st</sup> Dept 2006]). The evidence presented in a summary judgment motion must be examined in the "light most favorable to the party opposing the motion" (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563 1<sup>st</sup> Dept 2010]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

#### Labor Law

Plaintiff acknowledges that the facts do not implicate Labor Law §240(1) and further acknowledges that subcontractor W5 Group is not a viable Labor Law entity (see NYSCEF Doc. No. 124, Plaintiff's Aff. In Support of Cross Motion/Opposition, FN 1). As such, Defendant's summary judgment motion is granted as to the causes of action under Labor Law §200 and §241(6).

#### Common Law Negligence

"[C]onduct is considered negligent when it tends to subject another to an unreasonable risk of harm arising from one or more particular foreseeable hazards" (*Di Ponzio v Riordan*, 89 NY2d 578, 584, 657 NYS2d 377 [1997]). The general duty of care in a negligence action requires an individual "to use that degree of care that a reasonably prudent person would have used under the same circumstances" (PJI 2:10). Accordingly, in order to determine whether liability exists, "the jury must compare the defendant's conduct to that of a reasonable person under like circumstances" (*Reis v Volvo Cars of N. Am.*, 24 NY3d 35, 42, 993 NYS2d 672 [2014]). Defendant has not demonstrated its *prima facie* entitlement to judgment as a matter of

law. Accordingly, Defendant's summary judgment motion is denied as to the common-law negligence cause of action.

### Plaintiff's Cross Motion

Plaintiff cross moves pursuant to CPLR § 3212 and Labor Law § 241(6), granting Plaintiff partial summary judgment against Defendants CRP/Extell Parcel K, LLP and Tishman Construction Corporation of New York<sup>2</sup>. Specifically, Plaintiff contends that Defendants CRP/Extell and Tishman are liable under Labor Law §241(6), predicated upon the violation of Industrial Code (NYCRR) section 23-1.7(e)(1), requiring in relevant part that all passageways be kept free from debris and any other obstructions or conditions which could cause tripping, and/or 23-1.7(e)(2), requiring in relevant part that floors and similar areas where persons either work or pass be free from debris, materials and sharp projections. In opposition, Defendants CRP/Extell and Tishman allege that there was no violation of Industrial Code (NYCRR) 23-1.7(e)(1) or 23-1.7(e)(2) and at a minimum, there is a question of fact that would preclude summary judgment.

Labor Law § 241 (6) provides, in pertinent part, as follows:

"All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:  
(6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety' to persons employed in,

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<sup>2</sup> The court notes that Plaintiff's cross motion is solely for relief under Labor Law §241(6) against Defendants CRP/Extell Parcel and Tishman Construction. All responsive papers submitted that do not pertain to the relief sought are not considered in this decision.

or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). Further, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, “concrete” implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross*, 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff’s injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]; *Rossi v 140 W. JV Manager LLC*, 58 Misc3d 1215(A), 95 NYS3d 126 [NY Sup Ct 2018], *aff’d*, 171 AD3d 668, 99 NYS3d 38 [2019]).

Defendants CRP/Extell and Tishman contend that there was no violation of Industrial Code (NYCRR) 23-1.7(e)(1) or 23-1.7(e)(2) and argue that at a minimum, there is a question of fact as to whether such sections were implicated and violated. Specifically, Defendants CRP/Extell and Tishman allege that there is a question of fact as to whether there was a “tripping” hazard present, or if the area where Plaintiff traversed was a “passageway.”

In support, Defendants CRP/Extell and Tishman rely upon Plaintiff’s testimony that he fell on a plumber’s pipe that he did not see prior to the accident (NYSCEF Doc. 135). Further, Defendants CRP/Extell and Tishman state that “just because plaintiff makes reference to the area as a passageway does not deem it as such.” (NYSCEF Doc. 135 at p. 4). However, Plaintiff’s testimony makes it clear that he fell on a plumber’s pipe in the passageway to the hoist, and that this passageway and was used by him and others daily. This passageway was also the only way out of the building (NYSECF Doc. 108 at pp. 18 and 24). Defendants have not adequately raised a material question of fact as to this issue. The evidentiary record shows, without genuine dispute, that Plaintiff was injured as the result of pipe left in a pathway on the construction site.

Accordingly, Plaintiff's motion for partial summary judgment as to Labor Law § 241(6) against Defendants CRP/Extell Parcel K, LLP and Tishman Construction Corporation of New York is granted.

**Conclusion**

Defendant W5 Group's motion for summary judgment is granted to the extent that the causes of action under Labor Law §200 and §241(6) are dismissed as against it. Plaintiff's motion for partial summary judgment as to Labor Law § 241(6) against Defendants CRP/Extell Parcel K, LLP and Tishman Construction Corporation of New York is granted.

It is hereby,

ORDERED that the motion for summary judgment of Defendant W5 Group is granted and the causes of action under Labor Law §200 and §241(6) are dismissed against it; and it is further

ORDERED that Plaintiff's cross motion for partial summary judgment as to Labor Law § 241(6) against Defendants CRP/Extell Parcel K, LLP and Tishman Construction Corporation of New York is granted.

3/18/2021

DATE



SHAWN TIMOTHY KELLY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE