SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
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JOHN SNELL,

Plaintiff,

-*against*-

HALMAR/A SERVIDONE-B ANTHONY JV and HALMAR/ A SERVIDONE-B ANTHONY LLC,

Defendants.
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DECISION AND ORDER

(Motion #3)

Index No.: 032706/2019

Sherri L. Eisenpress, J.

The following papers, numbered 1 to 5, were reviewed in connection with Plaintiff John Snell's Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, granting partial summary judgment on the issue of liability premised upon defendant's violations of New York Labor Law Sec. Sec. 241(6), sections 12 NYCRR 23-1.7(d) and 12 NYCRR 23-1.7(e)(2) and for such other and further relief:

PAPERS	**NUMBERED**
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS A-BB/ MEMORANDUM OF LAW IN SUPPORT	1-3
AFFIRMATION IN OPPOSITION/EXHIBIT "A"	4
AFFIRMATION IN REPLY	5

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

This is an action commenced by Plaintiff John Snell on January 25, 2018, seeking damages for serious personal injuries sustained on May 28, 2015, as a result of an accident during the course of his employment with non-party P.S. Bruckel Inc. ("Bruckel"), while on a painting/sandblasting/rehabilitation project that was taking place at the Patroon Island Bridge, near Albany, NY. Defendant Halmar was the general contractor for that

project pursuant to a written agreement with the New York State Department of Transportation. ("DOT").

Halmar subcontracted the sandblasting/lead abatement/painting and power washing work for which it was responsible for under its contract with the DOT, to Defendant Bruckel, pursuant to a written agreement. However, Halmar's employees performed some of the work on the project including the chipping, removal and replacement of the concrete deck roadway. Halmar employees were also responsible for cleaning up the debris and removing it from the containment areas, which was primarily done at night with a shovel and broom, but occasionally, a vacuum truck was used.

Bruckel's employees, including Plaintiff, were required to perform sand-blasting work within a containment area, which is essentially a fully enclosed suspended work platform or deck. Corrugated metal served as the floor of the containment area, and the ceiling of the containment was the bottom of the roadway deck, with approximately 6 ½ to 7 feet between them. The sides of the containment area were enclosed by nylon/canvas type tarps. To sand-blast the bridge, Mr. Snell used a blast hose with a nozzle attachment at the end, which is attached to a blast machine. On May 28, 2015, Mr. Snell was sandblasting on the east end of the bridge, working off the floor of the containment area. Immediately before the accident, Plaintiff was sandblasting a "bolt pattern," which is an area where two or more pieces of steel are connected by bolts. Mr. Snell testified that before raising his blast hose and aiming it at the bolt pattern above, he walked forward and put his left foot on something that he realized was not the metal deck. Plaintiff testified that he could not see his feet due to it being dark and dusty inside the containment area, and while the hose was equipped with a light at the end, it only illuminated the immediate area where the hose was pointed.

Mr. Snell testified that he was sandblasting for less than a minute while reaching towards the bolt pattern, with his left foot propped on the unknown material, when

all of a sudden, it "slipped out," causing him trip, lose his footing, and to twist as he fell. Plaintiff testified that due to the slipping/tripping, his body twisted to the left and fell to the ground. After falling, Mr. Snell observed that his foot had been positioned upon a piece of concrete debris, approximately six inches long and six inches wide, with a rounded corner. He realized that the material which had caused him to fall was a piece of concrete debris that had fallen into the containment area from the demolition and removal of the road deck above. Mr. Snell testified that on the night before the accident, concrete demolition was ongoing overhead, including concrete being broken out of the joints of the road surface in order to remove a section of the existing roadway. Prior complaints about the presence of concrete debris in the containment area had been made by Plaintiff, and Bruckel's inspection reports confirm prior occasions during which "area rubble" was observed on the decking.

The Parties' Contentions

Plaintiff moves for summary judgment as to liability with respect to his Labor Law § 241(6) cause of action. Specifically, Mr. Snell claims that Defendant violated Industrial Code Rule 12 NYCRR 23-1.7(d), entitled "slipping hazards," which prohibits employers from permitting employees to use a floor, passageway, walkway 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. Plaintiff asserts that the piece of concrete constituted a "foreign substance" which was slippery. He further argues that the concrete debris was not an integral part of plaintiff's work, as sand-blasting does not generate that type of debris. Mr. Snell also contends that Defendant violated 12 NYCRR 23-1.7(e)(2), in that the concrete debris caused him to trip. Mr. Snell argues that Defendant's violations of Section 23-1.7(d) and 23-1.7(e)(2) were a proximate cause of the Plaintiff's incident and resultant injuries.

Lastly, although Plaintiff correctly asserts that he need not establish the absence of comparative fault to be entitled to summary judgment, he contends that he was not comparatively negligent and the Court should make a finding accordingly. More specifically, Mr. Snell contends that he cannot be held comparatively negligent simply because he was aware of Defendant's violation of the Industrial Code regulation, particularly given the fact that concrete debris was present in the area all the time. He also argues that he cannot be held comparatively negligent for failing to see the concrete piece before hand since there was almost no lighting in the area, and visibility was further compounded by the presence of dust.

In opposition to Plaintiff's motion, Defendant asserts that because the Notice of Motion for summary judgment does not specifically seek a determination on the issue of comparative negligence, such relief is precluded and the issue need not be addressed. As such, Defendant does not substantively address the issue of comparative negligence. With respect to the Labor Law § 241(6) cause of action, Defendant argues that the summary judgment motion must be denied because Plaintiff's description of the accident in the Workers' Compensation C-2 form does not give rise to liability.

Plaintiff testified that he filled out, and signed, the C-2 form on July 6, 2015, and that his answers were truthful. In response to the question, "[W]hat were you doing when you were injured or became ill?", Plaintiff responded as follows:

> "reaching and twisted to blast the top of a bolt pattern."

Plaintiff also gave the following response to the question: "[H]ow did the injury happen?"

> "When I twisted I felt pain. I gradually had more pain and had to leave work."

Defendant argues that because there is no mention whatsoever of "slipping" or of "tripping" on anything, summary judgment must be denied since a jury could find that Plaintiff's injury arose not from a fall but by the common physical motion of "twisting." In response to the

question of why Plaintiff did not mention the concrete debris on the C-2 form, Mr. Snell responded that he did not think he "needed to write all that."

Legal Analysis

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., *et al*., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003).

However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). "On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party.'" Vega v. Restani Const. Corp., 18 N.Y.3d 499, 503, 942 N.Y.S.2d 13 (2012).

Labor Law § 241(6) imposes a non-delegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation or demolition. Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494, 601 N.Y.S.2d 49 (1993) Since an owner or general contractor's vicarious liability under § 241(6) is not dependent on its personal capability to prevent or cure a dangerous condition, the absence of actual or constructive

notice sufficient to prevent or cure it is also irrelevant to the imposition of Labor Law § 241(6) liability. Rizzuto v. L.A. Wenger Contracting Co., 91 N.Y.2d 343, 670 N.Y.S.2d 816 (1998). The worker must allege and prove that the owner or contractor violated a rule or regulation of the Commissioner of the Department of Labor which sets for a specific standard of conduct, as opposed to a general reiteration of the common law. Ross, 81 N.Y.2d at 502-504. Once it has been alleged that a concrete specification of the Code has been violated, the next determination is whether the negligence of some party to, or participant in, the construction project caused plaintiff's injury. Rizzuto, 91 N.Y.2d at 350. If proven, the general contractor, or owner, is vicariously liable without regard to his or her fault. Id.

Moreover, allegations of comparative fault on the part of the Plaintiff do not bar an award of partial summary judgment under Labor Law Sec. 241(6). Once the defendant's liability is established by demonstrating the violation of an applicable Industrial Code regulation, the issue of comparative negligence, if any, operates only to reduce the amount of damages otherwise recoverable by the plaintiff at trial. Rodriguez v. City of New York, 31 N.Y.3d 312, 76 N.Y.S.3d 898 (2018).

Industrial Code Sec. 23-1.7, entitled "Protection from general hazards," provides in relevant part:

> (d) Slipping hazards. 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.
>
> (e) Tripping and other hazards.
>
> (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.

New York Courts have held that Industrial Code Rule 12 NYCRR 23-1.7(d) is sufficiently specific to support a violation of Labor Law § 241(6). Rizzuto, 91 N.Y.2d at 351. The next inquiry is whether the provision has been violated in this case. To be applicable, plaintiff must show that the substance which caused the slip was "foreign" and that the slip occurred on a floor, passageway, walkway, scaffold, platform or other working surface. See 12 NYCRR 23-1.7(d). In Velasquez v. 795 Columbus LLC, 103 A.D.3d 541, 959 N.Y.S.2d 491 (1st Dept. 2013), plaintiff was caused to slip and fall on "mud, rocks and water" at a construction site. The Court found a violation of the provision because the mud was not part of the floor that plaintiff was working on and was not an integral part of plaintiff's work, thus is constituted a "foreign substance" that caused slippery footing. Id. at 542. In the instant matter, the Court finds that the rock/demolition debris was a "foreign" substance which caused slippery footing and that Plaintiff has made his prima facie showing with respect to violation of this code provision. Plaintiff has also established, prima facie, that Defendant was negligent in failing to clean up the roadway debris as required.

Similarly, Plaintiff has met his prima facie burden of demonstrating a violation of 12 NYCRR 23-1.7(e)(2). This section has been determined to be sufficiently specific to support a violation of Labor Law §241(6). White v. Village of Port Chest, 92 A.D.3d 872, 877, 940 N.Y.S.2d 94 (2d Dept. 2008) In order for a violation to occur, it must be established that the debris which Plaintiff tripped upon was not an integral part of his work. In Salinas v. Barney Skansa Constr. Co., 2 A.D.3d 619, 769 N.Y.S.2d 559 (2d Dept. 2003), the Court's found Section 23-1.7(e)(2) to be inapplicable because plaintiff testified that he tripped over demolition debris created by him and his co-workers, which was an integral part of the work being performed. In the matter at bar, however, the testimony makes clear that the concrete debris strewn about the area was created by another contractor, that it

posed a danger to Bruckel workers, and that it was supposed to be cleaned up by Halmar or another sub-contractor.

In opposition to the summary judgment motion, Defendant does not dispute the applicability of the above cited sections, or argue that Halmar did not violate them, but rather focuses its defense on the issue of proximate cause. More specifically, it is Halmar's position that the motion must be denied as there is a triable issue of fact as to whether a violation of the Industrial Code section was a proximate cause of the occurrence based upon the C-3 report and statements made to by Plaintiff to his doctors which omit details of a "slip and/or trip" as the cause of his injury. Thus, Defendant contends that the trier of fact should determine whether "debris" had any role in the happening of the incident or if it was solely caused by a twisting motion.

In Evans v. Syracuse Model Neighborhood Corp., 53 A.D.3d 1135, 1136, 862 N.Y.S.2d 425 (4th Dept. 2008), defendant argued that summary judgment must be denied because plaintiff related different versions of the accident in his amended complaint, his deposition testimony and his affidavit submitted in support of his motion. The Court rejected that argument and held that "[w]hen read as a whole, 'all of plaintiff's statements relate a consistent and coherent version of the occurrence of the accident.'" Likewise, in the matter at bar, the Court does not find that the C-3 report and statements made to his doctors which omit details of a trip/slip, when compared to Plaintiff's testimony at his examination before trial, demonstrate inconsistent versions. Plaintiff testified that the slip/trip caused his body to make a "twisting" motion, which in turn caused him pain. The statement that Plaintiff's injury was caused when his body "twisted" is not inconsistent with his testimony that he slipped/tripped on the concrete debris, causing his body to twist during the fall. Plaintiff's deposition testimony is merely more detailed. As such, the Court finds that Defendant has not demonstrated a triable issue of fact as to proximate causation sufficient

to warrant denial of the motion. Plaintiff is therefore entitled to summary judgment on his Labor Law § 241(6) cause of action.

Plaintiff also seeks a finding that he was not comparatively negligent, notwithstanding the fact that such relief was not specifically stated in the Notice of Motion itself. Contrary to defendant's position that the Court cannot grant relief not specifically set forth in the Notice of Motion, "a court may grant relief that is warranted by the facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party." Frankel v. Stavsky, 40 A.D.3d 918, 919, 838 N.Y.S.2d 90 (2d Dept. 2007); Shaw v. RPA Assoc., LLC, 75 A.D.3d 634, 906 N.Y.S.2d 574 (2d Dept. 2010).

In the instant matter, although not listed in the Notice of Motion, Plaintiff clearly sought a determination regarding the issue of comparative negligence. In fact, "Point II" of Plaintiff's Memorandum of Law is entitled "The Plaintiff was not comparatively negligent and the Court should make a finding accordingly," which is followed by approximately five pages of legal discussion as it applies to the facts in the instant case. As such, Defendant was clearly on notice of the relief sought, therefore negating any possible prejudice based upon lack of notice. Defendant was given the opportunity to respond to Plaintiff's claims and oppose the relief sought but chose not to do so. Upon examination of the testimony and Plaintiff's moving papers, Mr. Snell established a prima facie case that he was free from comparative negligence, and in opposition thereto, Defendant failed to raise a triable issue of fact sufficient to deny the application.

Accordingly, it is hereby

ORDERED that Plaintiff John Snell's Notice of Motion (#3) for an Order, pursuant to CPLR Sec. 3212, granting summary judgment on its Labor Law Sec. 241(6) cause of action is GRANTED in its entirety; and it is further

ORDERED that Plaintiff John Snell is deemed to be not comparatively negligent with respect to his Labor Law § 241(6) cause of action; and it is further

ORDERED that the parties are to appear for a settlement conference on **March 4, 2021 at 10:40 a.m**. via Microsoft Teams. Link to be provided the day prior.

The foregoing constitutes the Decision and Order of this Court on Motion #3.

Dated: New City, New York
January 22, 2021

HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

To: All parties via e-filing