SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

JONATHAN VERDI,

Plaintiff,

- against -

SP IRVING OWNER LLC and IRVING FIFTY ONE LLC,

Defendants.

- x

Index No.: 700318/2018

Motion Date: 6/3/21

Motion No.: 28

Motion Seq.: 1

The following electronically filed documents read on this motion by plaintiff for an Order pursuant to CPLR § 3025(b), granting plaintiff leave to supplement his Bill of Particulars, in the form annexed to the moving papers as Exhibit 1, to allege a violation of New York State Industrial Code § 23-3.3(e) and deem same served upon defendants *nunc pro tunc* by reason of its inclusion as an exhibit herein and pursuant to CPLR § 3212(a), granting summary judgment to plaintiff on his Labor Law §§ 240(1) and 241(6) causes of action; and on this cross-motion by defendants for an Order pursuant to CPLR § 3212, dismissing plaintiff's complaint in its entirety:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....EF	22 - 35
Notice of Cross-Motion-Affirmation.....EF	36 - 37
Affirmation in Opposition to Cross-Motion.....EF	40
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This personal injury action arises out of a construction site incident that occurred on October 10, 2016 at the premises known as 51 Irving Place, New York, New York. Defendants are the owners of subject premises.

Plaintiff commenced this action by filing a summons and complaint on January 9, 2018. Defendants joined issue by service of an answer on June 29, 2018. Plaintiff now moves for summary judgment on his Labor Law §§ 240(1) and 241(6) claims. Defendants cross-moves to dismiss the complaint in its entirety.

Plaintiff appeared for an examination before trial on May 15, 2019 and testified that at the time of the incident, he was employed by Bluestone Construction (Bluestone). His job was to perform demolition. The building where he was working was an apartment building where people live. He was performing demolition of more than one apartment on the fifth floor, and was removing garbage from the fifth floor when the incident occurred. The building had an elevator. His boss, Sal, and his immediate foreman, Victor, told him that he was not permitted to bring any debris down from the fifth floor in the elevator. He worked at the building for months prior to the incident. Some of the apartments were occupied as the work progressed. On the day of the incident, he had started work at approximately 8:30 a.m. He was bringing down the garbage form the fifth floor. The garbage was packed in black garbage plastic bags. The garbage consisted of leftover sticks and cement. He and his co-workers would each carry one bag with debris down the steps to get to the first floor where they could access a window that leads them to a scaffold/sidewalk bridge. From the top of the scaffold/sidewalk bridge, they would dump the plastic garbage bag in a dumpster. When the incident occurred, he was carrying a toilet down the stairs over his right shoulder with his right hand under the toilet and his left hand on top of the toilet. On a prior trip down the stairs, he observed demolition debris on the stairs. He was on the landing and went to step down with his right foot, when his left foot slipped because of the demolition material that was on the landing. The toilet fell down the stairs. He tried to grab the handrail on the right side, but was unable to reach it. He fell down the stairs to the landing below. There was a lot of debris on the steps and on the landing.

Abraham Singer appeared for an examination before trial on June 27, 2019 on behalf of defendants. He was employed as a property manager by Spring House Management since 2014. His job duties include making sure that the buildings are clean and compliant with various New York City Codes. One of the buildings assigned to him is the subject building. The building is mixed use, multi-family, with retail stores on the bottom/first floor and six stories of fifty-six residential units. There is an elevator that services all of the residential floors. There is also a set of stairs for the residential floors. He would go to the property at least three to four times a week and sometimes multiple times per day. Bluestone was hired to perform renovation work. He was the person in charge with regard to the ownership entities. He was involved in hiring Bluestone. Bluestone was hired to perform work in multiple apartments. There was a proposal prepared for each apartment unit that was renovated. Bluestone performed work in approximately 40 apartments. Bluestone did not perform any work in the common areas of the building, including the hallways, lobby, elevators or stairway. Euro T1, Inc. (Euro) was hired to work in the common areas, but

not the stairway. A Tenant Protection Plan (TPP) was filed with the New York City Department of Buildings, which outlines procedures that need to be used to keep the tenants safe while construction took place. When Bluestone performed demolition of the apartments, it would remove the sheetrock and walls in each unit down to the studs. Bluestone workers would carry bags down the stairs. He did observe workers utilizing the elevator from time to time to bring down debris, but they were not permitted to bring down anything that was heavy enough to break the elevators. A super for the building, Marco, would clean and sweep the stairway in the morning before Bluestone started work. Marco would also sweep the stairs again at the end of the work day.

The proponent of a summary judgment motion has the initial burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing an entitlement to judgment as a matter of law (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v City of New York, 49 NY2d 557 [1980]). Once the requisite showing has been made, the burden shifts to the opposing party to produce admissible evidence sufficient to establish the existence of a triable issue of fact (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]).

Labor Law § 240(1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "such specific 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-Elec. Co., 81 NY2d 494, 501 [1993]). To prevail on a Labor Law § 240(1) cause of action, a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident (see Blake v Neighborhood Hous. Servs. of New York City, Inc., 1 NY3d 280 [2003]).

Here, plaintiff failed to establish his prima facie case under Labor Law § 240(1). "Where a fall occurs from a permanent stairway, no liability pursuant to Labor Law § 240(1) can attach" (Gallagher v Andron Constr. Corp., 21 AD3d 988, 989 [2d Dept. 2005]; see Sullivan v New York Athletic Club of City of N.Y., 162 AD3d 955, 957 [2d Dept. 2018]["there is no liability arising from the plaintiff's act of descending the stairs"]). Moreover, the protective equipment envisioned by the statute is not designed to avert the hazard plaintiff encountered here (see Berg v Albany Ladder Co., 10 NY3d 902 [2008]). Rather, plaintiff was exposed to the ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law § 240(1), and his § 240(1) claim is dismissed.

As to plaintiff's Labor Law § 241(6) claim, Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners, contractors and their agents, regardless of their control or supervision of the work site, to provide reasonable and adequate protection and safety to all persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed (see Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343 [1998]; Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494 [1993]; Miranda v City of New York, 281 AD2d 403 [2d Dept. 2001]). To support a Labor Law § 241(6) cause of action, a plaintiff must allege a New York Industrial Code violation that is both concrete and applicable given the circumstances surrounding the incident (see Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343 [1998]).

The Bill of Particulars alleges that defendants violated New York Industrial Code §§ 23-1.7(d)(2), 23-1.7(e)(1), and 23-1.7(e)(2). Additionally, plaintiff seeks leave to supplement his Bill of Particulars to allege a violation of New York State Industrial Code § 23-3.3(e).

12 NYCRR § 23-1.7(d)(2) provides the following:

> 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.

Here, the accumulation of debris does not constitute a slippery condition within the meaning of § 23-1.7(d)(2)(see Murphy v NYU Hosps. Ctr., 2020 NY Slip Op 34277[U][Sup Ct, N.Y. Cnty 2020]; Nankervis v Long Is. Univ., 78 AD3d 799 [2d Dept. 2010]). Accordingly, § 23-1.7(d)(2) is inapplicable to the facts of this matter.

12 NYCRR § 23-1.7(e)(1) provides that "[a]ll passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping". 12 NYCRR § 23-1.7(e)(2) "prohibits tripping hazards in passageways and working areas". Here, plaintiff was engaged in removing debris at the time of the incident. Accordingly, the debris was an integral part of the work he was performing, and thus, §§ 23-1.7(e)(1) and (e)(2) are inapplicable (see Lech v Castle Vil. Owners Corp., 79 AD3d 819 [2d Dept. 2010]). Moreover, plaintiff does not oppose the dismissal of such.

Regarding that branch of plaintiff's motion to supplement the Bill of Particulars, CPLR § 3025(b) allows a party to amend

its pleadings by setting forth additional transactions or occurrences at any time by leave of court or by stipulation of all parties. In the absence of significant prejudice or surprise to the opposing party, leave to amend a pleading should be freely given unless the proposed amendment is palpably insufficient or patently devoid of merit (see CPLR 3025[b]; Edenwald Contr. Co. v City of New York, 60 NY2d 957 [1983]; Russo v Lapeer Contr. Co., Inc, 84 AD3d 1344 [2d Dept. 2011]; Martin v Village of Freeport, 71 AD3d 745 [2d Dept. 2010]; Malanga v Chamberlain, 71 AD3d 644 [2d Dept. 2010]). Mere lateness is not a barrier to an amendment in the absence of significant prejudice (see Edenwald Contr. Co. v City of New York, 60 NY2d 957 [1983]).

Here, plaintiff seeks to supplement his Bill of Particulars to include a violation of Industrial Code § 23-3.3(e), which provides that "[w]here the demolition of any building or other structure is being performed by hand, debris, bricks and any other materials shall be removed. . . [b]y means of chutes. . . buckets or hoists; or. . . [t]hrough openings in the floors of the building or other structure".

Defendants oppose this branch of the motion on the grounds that allowing plaintiff to supplement his Bill of Particulars would be unfairly prejudicial to defendants since defendants did not have the opportunity to question the parties at their depositions regarding whether chutes, buckets, and/or hoists were used, the location of such devices, and whether such devices could have possibly been used given the circumstances that the entire structure was not being demolished at the work site. Defendants also contend that § 23-3.3(e) is inapplicable to the facts of this matter as plaintiff was not engaged in demolition at the time of the subject incident.

Here, regardless of whether permitting plaintiff to supplement his Bill of Particulars would be prejudicial to defendants, § 23-3.3(e) is inapplicable. Demolition is defined in the Industrial Code as "work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment" (12 NYCRR 23-1.4[b][16]). "Courts have consistently held that in order to constitute demolition within the meaning of § 23-3.3. the work must involve changes to the structural integrity of the building as opposed to mere renovation of the interior" (Garcia v 1000 Dean LLC, 2019 NY Slip Op 31151[U][Sup Ct, Kings Cnty 2019][internal quotation marks omitted]; see Cardenas v One State St., LLC, 68 AD3d 436 [1st Dept. 2009]; Solis v 32 Sixth Ave. Co. LLC, 38 AD3d 389 [1st Dept. 2007]).

Here, the work being performed did not change the structural integrity of the building. As such, the proposed amendment is devoid of merit since § 23-3.3 is inapplicable to the facts.

Lastly, defendants seek dismissal of plaintiff's Labor Law § 200 and common law negligence claims. Labor Law § 200 is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]). When a plaintiff alleges that his or her injuries arise from a dangerous condition on the premises, as here, a defendant may be liable under the common law and Labor Law § 200 only if the defendant either created the dangerous condition that caused the incident or had actual or constructive notice of the dangerous condition (see Graziano v Source Bldrs. & Consultants, LLC, 175 AD3d 1253 [2d Dept. 2019]; Pacheco v Smith, 128 AD3d 926 [2d Dept. 2015]).

Plaintiff does not oppose this branch of the cross-motion. It is undisputed that plaintiff did not receive any direction from defendants, and defendants did not have the authority to direct or control plaintiff's manner of work. Moreover, there is no evidence that defendants created the alleged dangerous condition or that they had notice of such. Accordingly, plaintiff's Labor Law § 200 and common law negligence claims shall be dismissed.

Accordingly, for the reasons stated above, it is hereby

ORDERED, that the motion is denied; and it is further

ORDERED, that the cross-motion is granted, and the complaint is dismissed in its entirety.

Dated: Long Island City, NY
June 7, 2021

Robert J. McDonald

ROBERT J. McDONALD
J.S.C.