SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

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NINO COPPOLINO, Index No. 713801/17

Plaintiff, Motion
Date: August 24, 2020

-against-

M# 3 & 4

TISHMAN CONSTRUCTION COMPANY OF NEW YORK, et al.,

Defendants.

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The following papers numbered EF 48-75 read on this motion by the plaintiff for summary judgment on the claim pursuant to Labor Law § 241(6) (Sequence No. 3); and separate motion by the defendants for summary judgment (Seq. No. 4).

	PAPERS NUMBERED
2 Notices of Motion - Affidavits - Exhibits....	EF 48-67
Affirmations in Opposition - Exhibits	EF 70-72
Replying Affirmations.....	EF 73-75

Upon the foregoing papers it is ordered that this motion by the plaintiff for summary judgment on the claim pursuant to Labor Law § 241(6)(Seq. No. 3) and the separate motion by defendants for summary judgment (Seq. No. 4) are jointly decided as follows:

At the outset, the court notes that plaintiff states in his affirmation in opposition to motion sequence number 4 that he is withdrawing his claims pursuant to Labor Law § 240(1) and Labor Law § 241(6) to the extent that claim is based upon Industrial Code provisions §§ 23-1.5, 23-1.30, 23-1.31, 23-1.32 and 23-2.1(a).

Plaintiff alleges that he sustained serious injuries when he tripped over construction material at a work site located at 327 Beach 87th Street in Queens County on December 19, 2016. Defendant City of New York hired defendant Tishman Construction Corporation of New York ("Tishman") as the general contractor for the project. Tishman hired Kel-Tech Construction ("Kel-Tech"),

plaintiff's employer, to perform work prior to December 19, 2016, and such work included installing drywall, sheetrock and firewall.

At the time of the incident, plaintiff was underneath the premises, which had been raised during the project. Plaintiff was in the process of bringing his tools underneath the house to prepare to install sheetrock/fireproofing. Plaintiff alleges that as he was walking towards the middle of the house, he slipped on a piece of metal, specifically a tracking stud, causing his injuries. The tracking studs were used to fasten the dry wall together.

Plaintiff subsequently commenced the instant action to recover damages for negligence, alleging violations of Labor Law §§ 200, 240(1), 241(6) as well as common law negligence. Plaintiff now seeks summary judgment on the issue of liability on the claim pursuant to Labor Law § 241(6). Plaintiff asserts that defendants are liable under Labor Law § 241(6) because they violated sections 23-1.7(d), (e)(1), (e)(2) and 23-2.1(b) of the Industrial Code. Defendants, by separate notice of motion, seek summary judgment dismissing the complaint.

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 demonstrate the absence of any material issues of fact. (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993].) Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. (*Peerless Ins. Co. v Allied Bldg. Prods. Corp.*, 15 AD3d 373, 374 [2d Dept 2005].)

The court will first address defendants' motion for summary judgment on the Labor Law § 241(6) cause of action. Labor Law § 241(6) imposes a nondelegable duty upon an owner and general contractor to provide adequate and reasonable protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. (*Oretga v Roman Catholic Diocese of Broolyn*, 178 AD3d 940, 941 [2d Dept 2019]; *Grant v City of New York*, 109 AD3d 961, 963 [2d Dept 2013].) To recover under Labor Law § 241(6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is

applicable under the circumstances of the accident. (*Rivera v Santos*, 35 AD3d 700, 702 [2d Dept 2006].)

Plaintiff alleges that defendant violated § 23-2.1(b) of the Industrial Code. However, this provision, which deals with the general responsibility of an employer, are too general to support a finding of liability under Labor Law § 241(6). (*Longo v Long Is. R.R.*, 116 AD3d 676, 677 [2d Dept 2014].) It is well settled that provisions that merely reiterate common law standards and do not mandate compliance with concrete specifications are not a basis for liability under Labor Law § 241(6). (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 502.) Plaintiff also alleges a violation of §23-1.7(d) of the Industrial Code. Section 23-1.7(d) provides that "[e]mployers 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."

The piece of metal plaintiff tripped on is not the type of foreign substance contemplated by § 23-1.7(d) inasmuch as it is not a "slipping" hazard. (*see Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619, 622 [2003]; *D'Acunti v New York City School Constr. Auth.*, 300 AD2d 107, 107 [2002].) Thus, § 23-1.7(d) is not applicable to the facts of this case.

Plaintiff also alleges a violation of Industrial Code § 23-1.7(e)(1). This section 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." Passageway has been referred to as a "long, defined, narrow walkway or pathway used to traverse between discrete areas as opposed to an open area." (*Quigley v Port Auth. of N.Y. & N.J.*, 168 AD3d 65, 67 [1st Dept 2015].) Further, a passageway refers to "an interior or internal way of passage inside a building." (*see Quigley v Port Auth. of N.Y & N.J.*, 168 AD3d at 67.) Here, there are issues of fact as to whether plaintiff fell in a passageway. Although plaintiff asserts he fell within such a passageway, he also testified that there were no designated walkways or passageways in the area underneath the house where he was working and everything in the area was open.

Plaintiff alleges that defendants violated § 23-1.7 (e)(2). This section provides that "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." As noted above, plaintiff was working in this area and tripped on debris. As such, defendants' motion for summary judgment dismissing the Labor Law §241(6) claim based on this section is denied.

The above factual issues similarly prevent an award of summary judgment in plaintiff's favor on the § 241(6) claims.

The court will now address the motion by defendants for summary judgment dismissing the claims pursuant to Labor Law § 200 and for common law negligence.

Labor Law § 200 codifies the common law duty of an owner or contractor to provide employees with a safe place to work. (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [].) A cause of action sounding in violation of Labor Law § 200 or common-law negligence may arise from dangerous or defective conditions of the premises, or the manner in which the work is performed (*Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 670 [2d Dept 2018].) To be held liable under Labor Law § 200 for injuries arising from the manner in which the work is performed, a defendant must have the authority to exercise supervision or control over the work. (*Dasilva v Nussdorf*, 146 AD3d 859, 860 [2d Dept 2017].) Where a plaintiff's injuries arise from a dangerous condition on the property, an owner may be liable under Labor Law § 200 if it either created or had notice of the dangerous condition. (*Salgado v Rubin*, 183 AD3d 617 [2d Dept 2020]; *Dasilva v Nussdorf*, 146 AD3d at 860.)

Here, there are triable issues of fact as to whether the defendants supervised or controlled the plaintiff's work. Plaintiff testified at his deposition that he was supervised by the foreman for his employer. Further, plaintiff testified that his employer provided the tools and materials that were used in the work being performed. However, at his deposition, Michael Legate, the Assistant Project Manager for defendant Tishman, testified that if Tishman saw something unsafe at the job site, it had the authority to stop it. Moreover, there are also triable issues as to whether the defendants had notice of a defective condition, to wit, the piece of metal which plaintiff tripped on. There are issues as to how long this object was at the site prior to plaintiff's fall.

Accordingly, this motion by the Plaintiff for summary judgment is denied. (Sequence No. 3).

The branch of the motion by defendants for summary judgment dismissing the claim pursuant to Labor Law § 240(1) is granted

inasmuch as plaintiff states he is withdrawing those claims. (Seq, No. 4).

The branch of the motion by defendants for summary judgment dismissing the claim pursuant to Labor Law § 241(6) is granted to the extent that the claims predicated upon 22 NYCRR §§ 23-1.7(d) and 23-2.1(b) are dismissed. (Seq. No. 4).

The branch of the motion for summary judgment dismissing the claim pursuant to Labor Law § 241(6) is denied to the extent that the claim is predicated upon 22 NYCRR §§ 23-1.7(e)(1) and (e)(2). (Seq. No. 4).

The branch of the motion by defendants for summary judgment dismissing the claim pursuant to Labor Law § 200 and for common law negligence is denied. (Seq. No. 4).

Dated: March 31, 2021

CARMEN R. VELASQUEZ, J.S.C.

FILED
4/6/2021
1:02 PM
COUNTY CLERK
QUEENS COUNTY