SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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VITORE TROSHANI,

Plaintiff,

- v -

ONE BRYANT PARK LLC,THE DURST ORGANIZATION, BANK OF AMERICA, N.A., CBRE, INC.,STRUCTURE TONE, LLC,ALBERT WEISS AIR CONDITIONING PRODUCTS, INC.,

Defendant.

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INDEX NO. 150772/2019

MOTION DATE 01/25/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

BANK OF AMERICA, N.A.

Plaintiff,

-against-

ABM INDUSTRY GROUPS, LLC

Defendant.

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Third-Party
Index No. 595373/2019

BANK OF AMERICA, N.A.

Plaintiff,

-against-

STRUCTURE TONE, LLC, ALBERT WEISS AIR CONDITIONING PRODUCTS, INC.

Defendant.

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Second Third-Party
Index No. 595987/2019

HON. LORI SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Upon the foregoing documents, Plaintiff Vitore Troshani's motion to amend the complaint to include claims under Labor Law §§ 240(1), 241(6), and 200 is granted with respect

to the proposed § 200 claim and denied with respect to the proposed §§ 240(1) and 241(6) claims. Defendant CBRE, Inc.'s cross-motion to dismiss Plaintiff's proposed Labor Law causes of action pursuant to CPLR § 3211(a)(7) is denied.

This action arises out of injuries Plaintiff sustained while working inside One Bryant Park ("premises") on November 14, 2018. Plaintiff was employed as a cleaner by ABM Industry Groups, LLC ("ABM"). ABM assigned Plaintiff to clean Bank of America facilities on the premises. Plaintiff was assigned to clean the premises' tenth and twelfth floors for eight hours a day, five days per week, and cleaned the premises' fourth floor during her overtime. In this capacity, Plaintiff performed cleaning work such as sweeping, dusting, vacuuming, and removing garbage. Plaintiff states that she was injured while working overtime on the fourth floor. A construction project that involved the removal of flooring was underway on the fourth floor of the premises at the time of Plaintiff's injury. The flooring on the fourth floor was raised two feet above the concrete base to provide for an air ventilation system. Plaintiff states that she sustained her injuries after her right foot and leg fell into a hole in the raised floor. Plaintiff later learned that the hole was an uncovered air vent.

Discretionary leave to amend pleadings under CPLR 3025(b) should be freely given unless doing so would result in surprise or prejudice to the nonmoving party (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]). Leave to amend a complaint will be denied when the proposed pleading fails to state a cause of action, is palpably insufficient as a matter of law, or is devoid of merit (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]; *Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 [1st Dept 2011], quoting *MBIA Ins. Corp v Greystone & Co., Inc*, 74 AD3d 499, 500 [1st Dept 2010]). The party seeking leave to amend need not establish the merit of proposed allegations (*Perrotti* at 498). In the

instant case, Plaintiff alleges that Defendant's conduct violated Labor Law §§ 240(1), 241(6), and 200, while Defendant argues that these proposed causes of action are palpably insufficient and/or devoid of merit. The court's inquiry therefore turns to whether the Labor Law causes of action in Plaintiff's proposed amended complaint are either palpably insufficient or devoid of merit.

Plaintiff's motion to amend her complaint to include a Labor Law § 240(1) claim must be denied because it lacks merit. Known as the Scaffold Law, § 240(1) requires contractors, owners, and agents who contract for the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" to furnish scaffolding, ladders, and other devices to give proper protection to persons employed in such tasks. Routine cleaning that does not involve heightened elevation-related risks or other risks comparable to those present on a construction site does not fall under the special protection of § 240(1) (*Soto v. J. Crew Inc.*, 21 NY3d 562, 568 [2013]). Plaintiff was not exposed to the elevation-related risks that the safety measures in §240(1) are intended to protect against (*id*; *Cf. Broggy v Rockefeller Group, Inc.* 8 NY3d 675, 681 [2007]). Consequently, Plaintiff's proposed claims under Labor Law § 240(1) are devoid of legal merit and leave to amend the complaint to include these claims is denied.

Plaintiff's motion to amend her complaint to add § 241(6) must be denied because the proposed claim lacks merit. Labor Law § 241(6) requires contractors to provide "reasonable and adequate protection" to persons employed in "[a]ll areas in which construction, excavation or demolition work" is performed. In order to state a claim under § 241(6), a plaintiff must show that a specific applicable Industrial Code regulation was violated and that the violation caused the plaintiff's injury (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]). In the instant case,

Plaintiff alleges two specific violations of Section 23 of the Industrial Code. First, Plaintiff asserts that Defendant violated 12 NYCRR 23-1.7(b)(1)(i), which requires that "[e]very hazardous opening into which a person may step or fall" be guarded by a "substantial" cover or safety railing. Second, Plaintiff asserts that Defendant violated 12 NYCRR 23-1.7(e)(1), which mandates that passageways be kept free from "accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping."

With respect to the first alleged Industrial Code violation, the uncovered air vent did not constitute a "hazardous opening" within the meaning of 12 NYCRR 23-1.7(b)(1)(i). The purpose of the regulation is protection against falling hazards involving openings that are large enough to fit a person (*Brown v New York-Presbyterian HealthCare Sys., Inc.*, 123 AD3d 612, 613 [1st Dept 2014]; *Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002]). Here, the air vent into which Plaintiff's leg fell was wide enough to fit one of her legs but not a whole human body. Plaintiff fails to show a violation of this section of the Industrial Code and is therefore unable to state a claim under Labor Law § 241(6) using this regulation.

The area traversed by Plaintiff was not a "passageway" for the purposes of 12 NYCRR 23-1.7(e)(1). Although undefined by the regulation, a "passageway" can be understood as synonymous with a corridor, hallway, or other long and narrow ways that connect parts of a building (*Quigley v Port Auth. of N.Y. & N.J.*, 168 AD3d 65, 67 [1st Dept 2018]). In contrast, common open areas do not constitute a passageway for the purposes of the regulation (*see, e.g. Dalanna v City of New York*, 308 AD2d 400, 401 [1st Dept 2003] [finding that a regularly-traversed slab between job site and street was not an "open area" rather than a "passageway."]). Plaintiff states that she was walking between desks and conference rooms prior to her fall; Plaintiff's photographic exhibit showing the uncovered air vent shows that the desks were set up

in an open space. Plaintiff fails to show a violation of this Industrial Code regulation and is therefore unable to state a claim under Labor Law § 241(6).

Plaintiff is given leave to amend her complaint to include the Labor Law § 200 claim because that claim is not entirely without merit or palpably insufficient. Labor Law § 200 imposes on employers a general duty to provide "reasonable and adequate protection" to all persons employed at or frequenting a workplace. Owners and contractors are liable for injuries resulting from a dangerous or defective premises condition if the owner or contractor created the condition or possessed actual or constructive notice of the condition (*Haynes v Boricua Vil. Hous. Dev. Fund Co, Inc.*, 170 AD3d 509, 511 [1st Dept 2019]; *Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]). Plaintiff was injured while at Defendant's workplace on the premises. Consequently, the proposed claim under § 200 cannot be said to be entirely without merit.

Defendant's cross-motion to dismiss is denied as moot with respect to Plaintiff's proposed Labor Law §§ 240(1) and 241(6) claims and is denied as premature with respect to Plaintiff's proposed Labor Law § 200 claims. CPLR 3211(a) stipulates that "[a] party may move for judgment dismissing one or more causes of action *asserted* against him," (emphasis added). The use of past tense in the rule indicates that a party may move for dismissal of claims already brought, not proposed or future claims. Plaintiff has not yet asserted a cause of action Labor Law § 200; she has merely proposed such cause in her motion to amend the complaint. It is therefore premature for Defendant to seek dismissal of the proposed claim.

Accordingly, it is hereby:

ORDERED that the plaintiff's motion for leave to amend the complaint is granted, in part, as follows: leave is granted to amend the fifth cause of action as set forth in the proposed amended

complaint in the form annexed to the moving papers, but leave is denied with respect to the proposed second, third, and fourth causes of action; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry and the amended complaint in conformity herewith; and it is further

ORDERED that the defendant shall answer the amended complaint or otherwise respond thereto within 20 days from the date of said service.

This constitutes the Decision and Order of the Court.

3/2/2022
DATE

LORI SATTLER, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE