# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. SABRINA KRAUS** **PART** **57TR**

***Justice***

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CARLOS CAVEDO,

Plaintiff,

- v -

FLUSHING COMMONS PROPERTY OWNER, LLC,TISHMAN CONSTRUCTION CORPORATION,

Defendant.

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**INDEX NO.** 151350/2017

**MOTION DATE** 3/22/2022

**MOTION SEQ. NO.** 005 006

**DECISION + ORDER ON MOTION**

FLUSHING COMMONS PROPERTY OWNER, LLC, TISHMAN CONSTRUCTION CORPORATION

Plaintiff,

-against-

FIVE STAR ELECTRICAL CONTRACTING CORP.

Defendant.

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Third-Party
Index No. 595128/2019

The following e-filed documents, listed by NYSCEF document number (Motion 005) 63[1], 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 255, 259, 264, 266, 268, 269, 272, 275, 276, 277, 278

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 256, 258, 260, 261, 262, 263, 265, 267, 273, 274, 279, 280, 281

were read on this motion to/for JUDGMENT - SUMMARY.

[1] NYSCEF Doc 63 was not submitted in connection with the pending motions. It was submitted in connection with the prior motions for summary judgment which Judge Reed declined to rule upon substantively. However, the Heller Affidavit is addressed in the Levitan affidavit submitted by defendants in support of their motion for summary judgment and therefore the court has reviewed it and considered same in making its determination herein.

## BACKGROUND

Plaintiff commenced this action seeking damages for personal injuries he alleges were incurred when he tripped and fell at a construction site in the course of his employment. Flushing Commons Property Owner, LLC (Flushing) is the owner of the Subject Premises and Tishman Construction Corporation (Tishman) was the General Contractor on the job.

## PENDING MOTIONS

The parties had originally moved for summary judgment in the fall of 2020. On December 23, 2020, the Court (Reed, J) declined to substantively rule on the motions and essentially directed the parties to refile the motion papers after a new note of issue was filed.

A new note of issue was filed in June 2021.

On September 14, 2021, plaintiff refiled its motion for partial summary judgment as to liability (Mo Seq No 5), and on September 20, 2021, defendants refiled their motion for summary judgment and dismissal of the complaint (Mo Seq No 6).

On March 22, 2022, the court heard oral argument and reserved decision.

The motions are consolidated herein for determination and granted to the extent set forth below.

## ALLEGED FACTS

On December 19, 2016, plaintiff, a drywall finisher for Zapata Construction Corporation, was working on the 13th floor of the building located at 138-35 39th Avenue, in the County of Queens, City and State of New York (Subject Premises). Plaintiff was working in connection with a project involving the new construction of a 17-story residential and commercial building. Plaintiff arrived at the Subject Premises at approximately 6:30 a.m. and went to the 14th floor to speak with his foreman, Sergio Torro, to get his daily job assignment.

Plaintiff's foreman instructed him to work on the 13th floor to apply compound to the hallway walls and ceiling. After speaking with his foreman, plaintiff went to the 13th floor and looked at his work area to see how much compound he needed for his job assignment. When he did this, he noticed debris consisting of cardboard boxes lying all over the floor. Plaintiff then went back to the 14th floor to speak with one of the laborers at the job site and asked him to clean the 13th floor so he could perform his work. The laborer, who was responsible for removing debris from the floor, was employed with Tishman. The laborer responded that he would speak with his foreman about cleaning the 13th floor.

After speaking with the Tishman laborer, plaintiff went to the 11th floor to get the compound and other materials he needed for his work. About 35-45 minutes after speaking with the laborer, plaintiff returned to the 13th floor. He unloaded his compound and observed that the hallway floor appeared cleared of the boxes. He then began working on applying compound to one of the hallway walls.

Immediately prior to the accident, plaintiff had finished applying compound to one side of the hallway. He climbed down from the scaffold he was working on and walked down the hallway towards the freight elevator so he could get more compound. He had stored the compound inside the apartment located next to the elevator. Walking through the hallway was the only possible route plaintiff could take to get from the area where he was applying the compound to the apartment where he had stored the compound on the 13th floor.

After plaintiff walked about 30-40 feet down the hallway, his left foot got caught inside a plastic strap that was left on the floor. Plaintiff alleges the strap he tripped on was discarded debris that came from the cardboard boxes he previously saw left lying throughout the hallway floor.

Plaintiff did not see the plastic strap that he tripped on prior to his accident. As soon as his left foot got caught in the plastic strap, his right foot also got caught. Due to both feet getting caught inside the strap; plaintiff was caused to fall forward. Plaintiff was unable to stop his fall due to his holding tools in both hands and landed on the floor, striking his knees, elbows and the right side of his head.

It is undisputed that Tishman's laborers were responsible for removing debris from the construction site. Debris on the sight was usually put into piles and removed during the day.

Richard Landers (Landers), a site safety manager with Total Safety Consulting, worked as site safety manager at the Subject Premises. After receiving a call notifying him of the accident, Landers arrived at the 13th floor and observed plastic straps on the floor. Landers determined the plastic strap that plaintiff tripped on came from a cardboard box containing hardware used by Component Assembly (Component), which was the drywall and framer contractor. Component's workers had hardware at the site that they were installing which were contained in carboard boxes. Landers believed Component was the only contractor at the site which had cardboard boxes that were secured with plastic straps, but Landers did not recall seeing Component actively working on the 13th floor when he arrived at the accident location. Landers testified he did not consider the plastic strap necessary and integral to the project because after its removal from the cardboard boxes it served no further function.

Robert Torrieri (Torrieri), the corporate safety director for Component testified that his responsibilities included making sure all safety rules and regulations were followed by Component workers. Torrieri would go to the site once every two weeks, where he would speak with the foreman and then visit the floors to check on what the workers were doing. Component's work at the project involved installing drywall and framing, doors and hardware,

trim and all accessories. Plaintiff's employer, Zapata, was hired by Component as a taping subcontractor. Component's Daily Log Report showed that on the date of the accident Component was not working on the 13th floor, nor was there any indication from the log that Component was installing floor molding at the Subject Premises on the date of the accident.

**DISCUSSION**

It is well established that CPLR § 3212 authorizes the grant of summary judgment if it can be shown that no issues of material fact exist which require a trial. *Sillman v. Twentieth Century Fox Film Corp*., 3 N.Y.2d 395, 404 (1957). *See also Andre v. Pomeroy*, 35 N.Y.2d 361, 364 (1974) (*where there is no genuine issue to be resolved at trial, the case should be summarily decided*). To establish entitlement to judgment as a matter of law, the movant must make a *prima facie* showing by tendering sufficient evidence to eliminate any material issues of fact from the case. *Penthouse Terraces, Inc. v. McGrath*, 163 A.D.2d 144 (1st Dep't 1990). Once the moving party demonstrates its entitlement to summary judgment, the burden then shifts to the opposing party to present facts demonstrating that genuine, triable issues of fact exist, which would preclude the granting of summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

***Labor Law §241(6)***

Labor Law §241 sets forth in relevant part that:

> 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 . . . [subsection] (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

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, or lawfully frequenting all areas in which construction, excavation or demolition work is being performed." *Rizzuto v. LA Wenger Contr. Co.*, 91 N.Y.2d 343 (1998); *see also, Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 (1993); *Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d 290 (1978). The owners and contractors' duty under Labor Law § 241(6) is nondelegable, "regardless of their control or supervision of the jobsite." *Whalen v. City of New York*, 270 A.D.2d 340 (2d Dept. 2000); *see also Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d 290 (1978).

To support a cause of action pursuant to Labor Law §241(6), plaintiff must demonstrate that a specific, applicable Industrial Code was violated, and the violation was the proximate cause of his or her injuries. *Cappabianca v. Skanska USA Building Inc.*, 99 A.D.3d 139 (1st Dept. 2012); *Ferrero v. Best Modular Homes, Inc.*, 33 A.D.3d 847 (2d Dept. 2006).

Plaintiff asserts that defendants were in violation of Industrial Code Sections 12 NYCRR 23-1.7(e)(1) and 23-1.7(e)(2).

Industrial Code § 23-1.7(e)(1) states:

> (e) Tripping and other hazards. (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

The Appellate Division, First Department, has consistently held that Industrial Code § 23- 1.7(e)(1) contains specific directives that are sufficient to sustain a cause of action under Labor Law § 241(6). *See Rossi v. 140 West JV Manager LLC*, 171 A.D.3d 668 (1st Dept. 2019); *Pereira v. New School*, 148 A.D.3d 410 (1st Dept. 2017); *Lois v. Flintlock Constr. Services, LLC*, 137 A.D.3d 446 (1st Dept. 2016); *Picchione v. Sweet Construction Corp.*, 60 A.D.3d 510

(1st Dept. 2009). Moreover, the Courts have consistently held that evidence of a construction worker becoming injured due to a tripping hazard on a passageway establishes a *prima facie* entitlement to summary judgment pursuant to Labor Law § 241(6) based on a violation of Industrial Code Section 23-1.7(e)(1). *See Rossi v. 140 West JV Manager LLC*, 171 A.D.3d 668 (1st Dept. 2019); *Aragona v. State*, 147 A.D.3d 808 (2d Dept. 2017); *Lois v. Flintlock Constr. Services., LLC*, 137 A.D.3d 446 (1st Dept. 2016); *Rodriguez v. BCRE 230 Riverdale, LLC*, 91 A.D.3d 933 (2d Dept. 2012).

It is not disputed by defendants that the hallway constituted a passageway within the meaning of the code, and the Court finds that plaintiff met its burden of establishing a *prima facie* case for summary judgment on this cause of action.

Defendants assert that the strap was not debris but was an integral part of work being performed by Component workers alongside of plaintiff. The court disagrees. There can be no way that a plastic strap that was used to hold together a cardboard box can be considered an integral part of the work being performed, assuming *arguendo* there was sufficient evidence linking that strap to work actually being performed at the time of plaintiff's fall. As held by the Appellate Division:

> The debris, consisting of cables from elevator shaft demolition, was not inherent in, or an integral part of, the work being performed by either plaintiff electrician or Vanquish at the time of the accident (*see Pereira v New Sch.*, 148 AD3d 410, 412 [1st Dept 2017]), but rather constituted an accumulation of debris from which Vanquish was required to keep work areas free (*see Lester v JD Carlisle Dev. Corp., MD.*, 156 AD3d 577 [1st Dept 2017]).
>
> *Rossi v. 140 W. JV Manager LLC*, 171 A.D.3d 668 (2019).

Defendants cite Money v BP/CG Center II, LLC (179 AD3d 490) for the proposition that a single strap cannot constitute an accumulation of debris as contemplated by the statute. However, while the strap is what caused the fall, the strap was not the only piece of debris in the

area. The photos taken at the time of the fall show scattered debris in addition to the strap that caught plaintiff's foot.

Based on the foregoing, the court awards plaintiff summary judgment as to liability on this claim. However, the other claims asserted under this provision are dismissed without opposition. These are a violation of Labor Law § 241(6) predicated on breaches of 12 NYCRR §§ 23-1.5, 23-1.22, 23-1.30, 23-1.32 and 23-1.33.

***Labor Law §200 and Common Law Negligence***

The duty to provide a safe worksite imposed upon owners, general contractor and their agents are based upon supervision and control. "The purpose of the [Labor Law] is to protect workers by placing the "ultimate responsibility' for worksite safety on the owner and general contractor instead of the workers themselves." *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 500; *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513. Labor Law § 200 is the codification of the common-law duty of owners, general contractors and their agents to protect the health and safety "of all persons employed therein or lawfully frequenting such places." *Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d 290, 299(1978). An implicit precondition of this duty "is that the party charged with that responsibility has the authority to control the activity bringing about the injury." *Russin v. Picciano & Son*, 54 N.Y.2d 311, 317 (1981).

Labor Law § 200 applies where workers are injured as a result of dangerous or defective premises conditions at a worksite or where a worker is injured by the manner in which the work is performed. When a premises condition is at issue, the owner may be held liable for a violation of the statute if the owner created the condition that caused the accident or had actual or constructive notice of the dangerous condition. *See, Azad v. 270 5th Realty Corp.*, 46 A.D.3d 728, 730 (2d Dep't 2008); *Kerins v. Vassar Coll.*, 15 A.D.3d 623, 626 (2d Dep't 2005).

Defendants' motion to dismiss the causes of action pursuant to Labor Law §200 and common law negligence raise a triable issue of fact as to whether defendants were on notice of the dangerous condition. It is undisputed that immediately before the accident plaintiff complained of the debris on the 13th floor to Tishman employees and asked them to clear it. Whether the strap was left by the employees who cleared part of the debris and left that strap there, or whether the strap was newly discarded on the floor after the debris had been cleaned cannot be determined on this record.

***The Cause of Action Pursuant to Labor Law §240(1) Is Dismissed***

It has long been recognized that "Labor Law § 240(1) imposes a nondelegable duty and absolute liability upon owners or contractors . . . for failing to provide safety devices necessary for protection to workers subject to the risks inherent in elevated work sites who sustain injuries proximately caused by that failure*" Jock v. Fien*, 80 N.Y.2d 965, 967–968 (1992); *quoting Rocovich v. Consolidated Edison Co*., 78 N.Y.2d 509; *and also citing Lombardi v. Stout*, 80 N.Y.2d 290 (1992); *Bland v. Manocherian*, 66 N.Y.2d 452, 459 (1985). Labor Law §240(1) applies to both "falling worker" as well as "falling object" fact pattern where there is a significant risk inherent in the relevant elevation from which the object or materials fall and "falling object" cases. *Rocovich v. Consolidated Edison Co*., *supra* at 514. Here, plaintiff's accident was not caused by a hazard contemplated by Labor Law §240(1). Plaintiff did not fall from an elevated worksite and was not struck by a falling object. Accordingly, as a matter of law, the cause of action for violation of Labor Law § 240(1) cannot be sustained and must be dismissed. The court notes plaintiff submits no opposition to this portion of defendants' motion.

## CONCLUSION

WHEREFORE it is hereby:

ORDERED that defendants' motion for summary judgment is granted to the extent of dismissing the cause of action pursuant to Labor Law §240(1) and the causes of action pursuant Labor Law § 241(6) predicated on breaches of 12 NYCRR §§ 23-1.5, 23-1.22, 23-1.30, 23-1.32 and 23-1.33 and is otherwise denied; and it is further

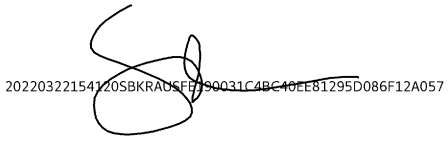
ORDERED that plaintiff's motion for summary judgment as to liability on its claim pursuant to Labor Law § 241(6) predicated upon a violation of Industrial Code Section 23-1.7(e)(1) is granted; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.




3/22/2022
DATE

SABRINA KRAUS, J.S.C.

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| 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 |