At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 1st day of June 2022.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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ANTON G. POLLIDORE,

*Plaintiff,*

-against-

203 JAY ST. ASSOCIATES, LLC, BRAVO BUILDERS, LLC and CONSTRUCTION AND REALTY SERVICES GROUP, INC,

*Defendants.*

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Index No. 501464/2019

DECISION AND ORDER

Motions Sequence #3

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

| Papers Numbered (NYSCEF) | |
|---|---|
| Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed | 42-52, |
| Opposing Affidavits (Affirmations) | 55-58, |
| Reply Affidavits (Affirmations) | 59-60, |
| Memorandum of Law | 53, |

After a review of the papers and oral argument, the Court finds as follows:

Plaintiff Anton G. Pollidore (hereinafter the "Plaintiff") alleges causes of action pursuant to New York State Labor Law §§200, 240, and 241(6) and common law negligence as against Defendants 203 Jay St. Associates, LLC, Bravo Builders, LLC and Construction and Realty Services Group, Inc. (hereinafter referred to individually or collectively as the "Defendants"). Plaintiff alleges that on May 11, 2018, he was employed by non-party R and S United Services, Inc. (R&S) and working at a construction project at 203 Jay Street, Brooklyn, New York (hereinafter the "Premises" or "Project"). Plaintiff alleges that he "slipped on dirt and debris left by an excavation at the Project causing Plaintiff to drop a band saw he was using to cut pipes and sustained severe and permanent injuries including a laceration to his wrist's subcutaneous tissue." (See Affirmation in Opposition Paragraph 3).

The Defendants now move (motion sequence #3) for an order pursuant to 3212 for summary judgment as to the Plaintiff's common law negligence, Labor Law 200, 240(1), 241-a and 241(6) claims. The Defendants contend that the motion should be granted as to the common law negligence and Labor Law 200 claims given that there is no indication that the Defendants had actual or constructive notice of the alleged conditions at issue or that the Defendants supervised or controlled the Plaintiff's work. The Defendants also argue that the Plaintiff's Labor Law 240(1) claim should be dismissed as the Plaintiff's injury was not caused by a gravity related risk. The Defendants also contend that the Plaintiff's Labor Law 241-a claim should be dismissed as inapplicable to the facts alleged. Finally, the Defendants contend that the Plaintiff's Labor Law 241(6) claim should be dismissed as the code violations alleged by the Plaintiff are either insufficiently specific or inapplicable to the facts of this case.

The Plaintiff opposes the motion. The Plaintiff contends that the Defendants have failed to address whether they caused or created the dangerous condition alleged by the Plaintiff that caused the Plaintiff's injuries under a common law negligence theory and Labor Law 200. The Plaintiff also argues that the question of defendants' supervision or control over the Plaintiff is immaterial where injury is caused by the condition of the Premises rather than the method of Plaintiff's work. As to the Plaintiff's Labor Law 240(1) claim, the Plaintiff argues that the Defendants have failed to meet their burden to show that the Plaintiff's injuries were not the product of a gravity related injury. The Plaintiff further contends that the Defendants' application should be denied as it relates to his Labor Law 241(6) claim as to the remaining Industrial Codes provisions 23-1.7(d), 23-1.7(e)(1); 23-1.7(e)(2) and 23-2.1. The Plaintiff argues that these provisions are relevant and that each provision supports a cause of action to recover damages pursuant to Labor Law 241(6) under the circumstances.[1]

[1] As an initial matter, the Plaintiff does not oppose the Defendants' motion as it relates to the dismissal of the Plaintiffs' Labor Law§ 241-a claim. Also, the Plaintiff does not oppose the Defendants' motion as it relates to the dismissal of the Plaintiff's Labor Law§ 241(6) claim relating to a violation of Industrial Code provisions 23-1.10, 23-1.12, 23-1.13; 23-1.23 and 23-1.7(a). Therefore, these claims are dismissed. This Decision and Order will relate to the Plaintiffs' remaining claims. *See Allan v. DHL Exp. (USA), Inc.*, 99 AD3d 828, 832, 952 N.Y.S.2d 275, 280 [2nd Dept, 2012].

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

***Labor Law § 200***

Turning to the merits of the Defendants' motion in relation to the Plaintiff's Labor Law §200 claim, the Court finds that the Defendants have failed to meet their *prima facie* burden. "Where, as alleged here, the plaintiff's accident arose from an allegedly dangerous premises condition, a property owner may be held liable in common-law negligence and under Labor Law § 200 when the owner has control over the work site and either created the dangerous condition causing an injury, or failed to remedy the dangerous or defective condition while having actual or constructive notice of it." *Korostynskyy v. 416*

*Kings Highway, LLC*, 136 AD3d 758, 759, 24 N.Y.S.3d 747, 748 [2d Dept 2016]. In the instant proceeding, the Defendants rely almost exclusively on the deposition testimony of Jennifer Levy (December 18, 2019), who stated that she worked as a Project Manager for Defendant Bravo Builders. When asked how often she inspected the Project prior to the Plaintiffs May 11, 2018 alleged accident she stated "[n]ot often during the first two weeks of May 2018." When asked how often her co-workers with similar responsibilities as she inspected the Project she stated "I don't know." (See Defendants' Motion, Exhibit E, Page 36-37) When asked if she had seen debris on the floor in the area where the Plaintiff was injured, she stated that she had but added "[t]ypically if there was anything there it was for one of the subcontractor's work they were performing at the time." When asked if there was a company that Defendant Bravo hired to maintain and clean up the work site, Ms. Levy stated there were laborers who maintained the site, employed by Bravo Builders' contractor named "[t]rade off construction." (See Defendants' Motion, Exhibit E, Page 38-39). This testimony, take together, is insufficient for the Defendants to establish their *prima facie* burden. The testimony fails to show that the "the alleged dangerous condition did not exist for a sufficient length of time to afford [the Defendants] a reasonable opportunity to discover and remedy it." *Mowla v. Wu*, 195 A.D.3d 706, 708, 145 N.Y.S.3d 368, 370 [2d Dept 2021]. Further, the Defendants do not address the issue of whether they created the alleged condition. *See Ventimiglia v. Thatch, Ripley & Co., LLC*, 96 A.D.3d 1043, 947 N.Y.S.2d 566 [2d Dept 2012]; *Chilinski v. LMJ Contracting, Inc.*, 137 AD3d 1185, 1186, 28 N.Y.S.3d 390 [2d Dept 2016]; *see generally Murphy v. Columbia Univ.*, 4 AD3d 200, 201, 773 N.Y.S.2d 10 [1st Dept 2004].

***Labor Law § 240(1)***

Labor Law § 240 (1) is designed to protect employees on construction sites from elevation-related risks. This section provides that:

> "All contractors and owners and their agents ... who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Turning to the merits of the Defendants' motion relating to a violation of Labor Law 240(1), the Court finds that the Plaintiff's claim in relation to this violation is dismissed. The Defendants have shown that this accident was not gravity related as contemplated by the statute. As an initial matter, the Court notes that the Plaintiff directs the Court to cases relating to substantial falls from a height. These cases relate to work on a ladder, a fall from the cab of a toppling crane or a fall into a ten-foot trench. That is not what is alleged here. In this case, the Plaintiff alleges that he was on ground level cutting a pipe when he slipped and lost his balance and the band saw he was using dropped and lacerated part of his body. Although the saw dropped, clearly as a result of gravity, Plaintiff was not elevated, he did not fall from a height, the force on the pipe was precipitated by the band saw's pressure on the pipe and this was allegedly caused by what the Plaintiff contends was a slippery debris ridden surface. During his deposition, the Plaintiff explained that he was, at the time of the accident, performing work outside of the improvement rather than inside. He further stated that he did not have the use of a tripod outside. He further explained why he believed the tripod was a safe means by which to perform his work. "It's safe because the tripod is built to help stabilize the material and it also has a chain that locks the material so that it's a safe platform to work on. When you have a bench, you can put the copper pipe on there and you can also hang your band saw and your tools on the bench." He indicated that there was a bench inside but that he could not use it where he was working "[b]ecause there was not a stable platform. It was unstable because they were doing some excavating and there was a lot of dirt and debris and garbage all around the floor." (See Plaintiff's deposition, pages 53-57, NYSCEF Doc. #47). The Plaintiff specified that "[t]here was dirt,

garbage, debris, gravel, sand, rocks." He further stated that he had not worked outside of the building previously. (Pages 63-64). He stated that the platform was three feet from the ground. (Page 69). The Plaintiff described how the accident occurred. "I was proceeding to cut the copper pipe. My foot slipped because of the dirt and the gravel that we were in and my foot slipped. When I slipped, the copper pipe—that's how I got cut, because my foot slipped while I was proceeding to cut, my foot slipped, and I got cut like that." (Pages 73-74).

The Court has been clear that a trip or loss of balance caused by debris on ground level does not implicate the protection of the statute. *See Ghany v. BC Tile Contractors, Inc.*, 95 AD3d 768, 768, 945 N.Y.S.2d 657, 658 [1st Dept 2012] [Plaintiff tripped on a stone while carrying a one hundred pound stone] *Jackson v. Hunter Roberts Constr. Grp., LLC*, 161 AD3d 666, 667, 78 N.Y.S.3d 310, 312 [2d Dept 2018] ["the impetus for the pipe's descent was the Plaintiff's loss of balance"], *Perron v. Hendrickson/ Scalamandre/Posillico* (TV), 22 AD3d 731, 731, 803 N.Y.S.2d 106, 107 [2d Dept 2005] [Plaintiff working at ground level, object that fell "was, at most, two feet off the ground."]; *see also Wynne v. B. Anthony Const. Corp.*, 53 AD3d 654, 655, 862 N.Y.S.2d 379 [2d Dept 2008]; *Cambry v. Lincoln Gardens*, 50 AD3d 1081, 1082, 857 N.Y.S.2d 225 [2d Dept 2008]; *Georgopulos v. Gertz Plaza, Inc.*, 13 AD3d 478, 479, 788 N.Y.S.2d 121 [2d Dept 2004]. Accordingly, the Plaintiff's claim pursuant to Labor Law 240(1) is dismissed.

***Labor Law § 241(6)***

Labor Law §241(6) imposes on owners and contractors a non-delegable duty "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." *Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2nd Dept, 2015]; Lopez *v New York City Dept. of Envtl. Protection,* 123 AD3d

982, 983 [2nd Dept, 2014]. To establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision mandating compliance with concrete, or clear, specifications. *See Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 505 [1993]; *La Veglia v St. Francis Hosp.*, 78 AD3d 1123 [2nd Dept, 2010]; *Pereira v Quogue Field Club of Quogue, Long Is.*, 71 AD3d 1104 [2nd Dept, 2010].

In the Plaintiff's Verified Bill of Particulars, the Plaintiff claims a violation of Labor Law §241(6) in relation to New York State Industrial Code sections, 23-1.7(d)(a), 23-1.10, 23- 1.12, 23-1.13, 23-1.23, and 23-2.1. Plaintiff's Supplemental Bill of Particulars alleged violation of section 23-1.7(e)(1) & (2). (See Defendants' Motion, Exhibit C, Paragraph 20).[2] The Court shall now address the remaining Labor Law 241(6) Industrial Code provisions: 23-1.7(d), 23-1.7(e)(1) & (2), 23-2.1(a)(1), and (2) & 23-2.1(b). The Defendants' application as it relates to Industrial Code 23–2.1(b) is granted as this section lacks the specificity required to support a cause of action under Labor Law § 241(6). *See Madir v. 21-23 Maiden Lane Realty, LLC*, 9 A.D.3d 450, 452, 780 N.Y.S.2d 369, 371 [2d Dept 2004]. As to the Plaintiff's allegation of violation of provision 23-2.1(a)(1) the Court finds that this provision is inapplicable to this case. This accident occurred at an "open area at a work site." *Desena v. N. Shore Hebrew Acad.*, 119 A.D.3d 631, 632, 989 N.Y.S.2d 505 [2d Dept 2014]; *see also Costa v. State*, 123 A.D.3d 648, 997 N.Y.S.2d 690 [2d Dept 2014]; *Ginter v. Flushing Terrace, LLC*, 121 A.D.3d 840, 842, 995 N.Y.S.2d 95 [2d Dept 2014]; *Grygo v. 1116 Kings Highway Realty, LLC*, 96 A.D.3d 1002, 1003, 947 N.Y.S.2d 586 [2d Dept 2012]. As to the Defendants' application in relation to provision 23-2.1(a)(2) the Court finds that it is inapplicable to the facts of the case. This provision relates to safe carrying capacity of a floor, platform or scaffold in the placement of material or equipment. As such, that claim is dismissed.

[2] The Court has already addressed sections 23-1.10, 23-1.12, 23-1.13, 23-1.23, and 23-1.7(a) which have been dismissed.

The Defendants' application to dismiss Plaintiff's claim, that Defendants violated Labor Law 241(6) in relation to Industrial Code sections 23-1.7(d) & (e) is denied. In the instant proceeding, the Plaintiff alleges that his accident was arguably caused as a result of debris and other material on the ground as a result of a violation of Industrial Code provisions 23-1.7(d) and (e). The Plaintiff stated that the ground or surface upon which he was working was covered with debris, gravel, dirt, sand and rocks which interfered with a sturdy footing and caused him to slip during his use of a band saw. That saw allegedly fell and injured the Plaintiff. *See Kowalik v. Lipschutz*, 81 AD3d 782, 783, 917 N.Y.S.2d 251 [2d Dept 2011] [sand qualifies as a substance covered by the relevant provisions]; *see also Pereira v. Hunt/Bovis Lend Lease All. II*, 193 AD3d 1085, 147 N.Y.S.3d 628 [2d Dept 2021]; *Toalongo v. Almarwa Ctr., Inc.*, 202 A.D.3d 1128, 1129, 164 N.Y.S.3d 162 [2d Dept 2022].

Based upon the foregoing, it is hereby Ordered that:

The Defendants' motion (motion sequence #3) is granted solely to the extent that the Plaintiff's Labor Law §240(1), § 241-a, and Labor Law 241(6) claims as they relate to Industrial Code provisions 23-1.7(a), 23-1.10, 23-1.12, 23-1.13, 23-1.23, 23-2.1(a)(1) & (2), 23-2.1(b) and 23-2.1(e)(1) are dismissed. Plaintiff's Labor Law Section 200 and common law negligence claims and Labor Law section 241(6) claims relating to the violation of Industrial Code provisions 23-1.7(d) & (e)(2) shall continue.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

**Carl J. Landicino, J.S.C.**



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