SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART 58**

Justice

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RAFAEL DELGADO and WILKIAM DELGADO,

Plaintiffs,

- v -

56TH AND PARK (NY) OWNER, LLC, MACKLOWE PROPERTIES, L.L.C., MACKLOWE PROPERTIES, INC., and LEND LEASE (US) CONSTRUCTION LMB INC.,

Defendants.

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INDEX NO. 150308/2015

MOTION SEQ. NO. 003 and 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 98, 103, 104, 105

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 101, 102, 106

were read on this motion to/for SUMMARY JUDGMENT.

In this Labor Law action, defendants 56th and Park (NY) Owner, LLC ("56th and Park"), Macklowe Properties, L.L.C. ("MPLLC"), Macklowe Properties, Inc. ("MPI"), and Lend Lease (US) Construction LMB Inc. ("LLUSC") move, pursuant to CPLR 3212 (Mot. Seq. 003), for summary judgment dismissing the complaint against them. Rafael Delgado and Wilkiam Delgado ("plaintiff" and "Ms. Delgado", respectively, and collectively "the plaintiffs") oppose the motion and move for partial summary judgment on liability against the defendants (Mot. Seq. 004) pursuant to Labor Law section 241(6). Defendants oppose the plaintiffs' motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an incident on September 22, 2014 in which plaintiff, a foreman for nonparty Enclos Corporation ("Enclos"), was allegedly injured during the construction of two new buildings, a retail building and a residential tower located next to each other at 440 Park Avenue and 432 Park Avenue, respectively ("the project"). Doc. 77; Doc. 82 at 16-17, 24; Doc. 83 at 12-13. 56th and Park, as the site owner, and LLUSC, as the construction manager and/or general contractor, entered into a construction management agreement for the project. Doc. 77; Doc. 83 at 12-13; Doc. 86; Doc. 101. Enclos' role at the project was to install curtain walls in the retail building and windows in the residential tower. Doc. 77; Doc. 82 at 15; Doc. 83 at 27, 66.

Plaintiffs commenced the captioned action in January 2015. Doc. 1. In the complaint, plaintiff alleged that he was injured as a result of defendants' negligence, as well as their violations of Labor Law sections 200, 240(1), and 241(6). Doc. 1. Ms. Delgado asserted a claim for loss of consortium. Doc. 1. Defendants joined issue in March 2015, denying all substantive allegations of wrongdoing and asserting various affirmative defenses. Doc. 6.

In his bill of particulars, plaintiff alleged, inter alia, that he was injured because defendants "allowed tarps to be improperly placed." Doc. 81. He reiterated his allegation that he was injured as a result of defendants' negligence, as well as their violations of Labor Law sections 200, 240(1), and 241(6) and claimed that his Labor Law 241(6) claim was predicated on a litany of Industrial Code violations, specifically 23-1.5 (a), 23-1.5(b), 23-1.5(c) 23-1.5 (3), 23-1.7 (d), 23-1.7(e), 23-1.7 (2), 23-1.8 (2), 23-1.8(d), 23-1.15, 23-2.1(a), 23-2.1(2), and 23-2.1(2)(b). Doc. 81. Plaintiffs specifically alleged that the defendants "failed to ensure that work areas, passageways and thoroughfares were free of dirt, debris, *loose materials* and other tripping hazards and obstructions" (*emphasis added*). Doc. 81.

On the day of the alleged incident, plaintiff and the crew he was supervising were preparing to install curtain walls made of glass panels in the retail building. Doc. 77; Doc. 82 at 32; Doc. 83 at 66, 80. Plaintiff received his daily instructions from his supervisor, Rick Nolan, the general foreman of Enclos. Doc. 77; Doc. 82 at 27, 30. Although none of the exterior walls of the retail building had been constructed by that time, plaintiff and his crew had previously installed clips which were to hold the glass panels. Doc. 77; Doc. 82 at 25, 31-32. On the morning of the day of the alleged incident, the plaintiff met with Nolan to receive his instructions. Doc. 77; Doc. 82 at 26-27, 30, 33). Nolan advised the plaintiff that he and his crew would be receiving the first delivery of glass panels for the curtain walls of the retail building. Doc. 77; Doc. 82 at 33-35. The plaintiff then instructed half of his crew to continue installing the clips to the retail building, which installation was approximately 90% complete, told the other half of the crew to stand by while the glass panels were unloaded from the delivery truck, and went to the unloading area to assist with the delivery of the glass panels. Doc. 77; Doc. 82 at 31, 34-36, 38. As the truck was being unloaded, Kim Simon, another foreman, told plaintiff that some curtain wall clips had been misplaced, at which time both of them left the unloading area to look for the clips. Doc. 77; Doc. 82 at 38-44. The plaintiff and Simon walked approximately twenty to twenty-five feet away from the unloading area, on a sidewalk located on the same side of the retail building and inside the construction site, in order to see the installed clips. Doc. 77; Doc. 82 at 44-48. The sidewalk, located on East 56th Street between Park and Madison Avenues, existed prior to the commencement of the project, but had a construction fence around it. Doc. 77; Doc. 82 at 48-50, 66, 71. It was also about ten feet wide and extended from the retail building to the curb. Doc. 77; Doc. 82 at 63-64. The construction fence running along the

sidewalk approximately 15 feet from the curb formed a zone in which construction materials were delivered. Doc. 77; Doc. 82 at 63-64.

After walking along the sidewalk, the plaintiff and Simon arrived at the retail building, looked up, pointed towards the building, and discussed the problematic clips. Doc. 77; Doc. 82 at pp. 44-49, 67. After agreeing to a solution regarding the clips, the plaintiff and Simon continued to walk an additional ten steps, still looking up at the retail building, at which time the plaintiff tripped over a rolled up tarp, about 5 feet long and 2 feet high, which was partially on the sidewalk. Doc. 77; Doc. 82 at 49-53, 56-59, 68. Part of the tarp was also on a sidewalk which intersected the one they were walking on. Doc. 77; Doc. 82 at 60, 68-70, 73. Although he had been in the area the prior day, the plaintiff did not see the tarp, which he believed was used by concrete workers to cover freshly poured concrete, until after he fell. Doc. 77; Doc. 82 at 56- 57, 74-76. He was not certain who put the tarp on the sidewalk or how long it was there. Doc. 77; Doc. 82 at 74-75. The plaintiff conceded, however, that he had seen similar tarps at the site. Doc. 82 at 75-76.

Patrick McAlarney, senior environmental health and safety manager for LLUSC, testified on behalf of that entity. He believed that the tarps were used for the delivery of sheetrock and belonged to a trucking company. Doc. 77; Doc. 83 at 83-84. Deliveries were made to a loading dock which served both buildings. Doc. 83 at 67. According to McAlarney, LLUSC employees were on site every day cleaning and performing safety inspections and that, had the tarp been seen by someone working for the company, it would have been moved. Doc. 77; Doc. 83 at 51-54, 99-101.

The plaintiff filed a note of issue on May 27, 2021. Doc. 74.

The defendants now move, pursuant to CPLR 3212 (motion sequence 003), for summary judgment dismissing the complaint. Docs. 76-88. In support of the motion, they argue, inter alia, that they were not negligent and did not violate sections 200, 240(1), or 241(6) of the Labor Law. Doc. 88. They further assert that they did not create, or have actual or constructive notice of, the allegedly hazardous condition. Doc. 88. Additionally, they maintain that the plaintiff cannot recover herein since the tarp was an open and obvious condition. Doc. 88. The defendants also assert that they did not proximately cause the plaintiff's injuries and that the alleged accident resulted solely from his actions. Doc. 88.

In opposition to the motion, the plaintiffs concede that there is no liability pursuant to Labor Law section 240(1) and withdraw this claim. Doc. 103 at par. 3. However, they assert that the defendants' motion must otherwise be denied because they have failed to establish their prima facie entitlement to summary judgment dismissing the Labor Law section 200 and 241(6) claims. Doc. 103. Specifically, the plaintiffs argue that their claim pursuant to Labor Law section 241(6), as predicated on Industrial Code section 23-1.7(e)(1), is meritorious since plaintiff's accident occurred in a "passageway". Doc. 103. They further maintain that plaintiff's claim pursuant to Labor Law section 241(6), as predicated on Industrial Code section 23-1.7(e)(2), is meritorious since he fell due to "materials" left in his "working area". Doc. 103. The plaintiffs further contend that their claim pursuant to Labor Law section 200 should not be dismissed since questions of fact exist regarding whether the defendants had notice of the allegedly dangerous condition. Doc. 103.

In reply, the defendants argue, inter alia, that, in addition to withdrawing their Labor Law section 240(1) claim, the plaintiffs narrow their Labor Law section 241(6) claim to predicate it only on violations of Industrial code sections 23-1.7(e)(1) and (e)(2), which are inapplicable

herein. Doc. 105. Defendants argue that section 23-1.7(e)(1) is inapplicable herein because the plaintiff's accident did not occur in a "passageway" and that section 23-1.7(e)(2) is inapplicable because the plaintiff did not fall in his "working area". Doc. 105. The defendants further assert that the plaintiffs' claim pursuant to Labor Law section 200 must be dismissed since they did not have notice of the presence of the tarp and had no complaints regarding the tarp. Doc. 105. Additionally, they assert that the plaintiffs failed to address their argument that the tarp was an open and obvious condition. Doc. 105.

The plaintiffs move for partial summary judgment against defendants as to liability (motion sequence 004) asserting, inter alia, that defendants violated section 241(6) of the Labor Law because they failed to comply with Industrial Code sections 23-1.7 (e) (1) and (e) (2). Docs. 91-97. They allege that section 23-1.7(e)(1) was violated because plaintiff was injured by an obstruction in a "passageway" and that section 23-1.7(e)(2) was violated because plaintiff was injured by materials left at the site. Doc. 91.[1]

In opposition to the plaintiffs' motion, the defendants argue that Industrial Code section 23-1.7(e)(1) is inapplicable herein because plaintiff did not trip in a "passageway." Doc. 102. The defendants also maintain that Industrial Code section 23-1.7(e)(2) is inapplicable herein since the alleged incident did not occur in a "working area" and the tarp was not the type of tripping hazard envisioned by that provision. Doc. 102. Additionally, the defendants assert that the plaintiff's own actions, i.e., looking up at the retail building while taking the ten steps preceding his fall, constituted the sole proximate cause of the accident. Doc. 102.

[1] Although the plaintiff argues that it is "undisputed" that he fell in a passageway (Doc. 91 at par. 21), this contention is clearly disingenuous given that the defendants moved for summary judgment on the ground that he did *not* fall in a passageway.

In reply, the plaintiffs reiterate their argument that Industrial Code sections 23-1.7 (e) (1) and (e) (2) are applicable herein. Doc. 106. They further contend that plaintiff could not have been the sole proximate cause of his accident since a violation of one or both of these Industrial Code sections contributed to the accident. Doc. 106.

After the submission of all of the motion papers, the plaintiffs stipulated to withdraw their claims against MPLLC and MPI. Doc. 107. Thus, the only defendants remaining in this action are 56th and Park and LLUSC.

Defendants' Motion For Summary Judgment (Mot. Seq. No. 003)

> [S]ummary judgment is a drastic remedy, to be granted only where the moving party has "tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact" (*Kebbeh v City of New York*, 113 AD3d 512, 512 [1st Dept 2014], *quoting Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). When the movant fails to make this prima facie showing, the motion must be denied, "regardless of the sufficiency of the opposing papers" (*id.*). When deciding a motion for summary judgment, the court's function is issue finding rather than issue determination (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). Moreover, the evidence will be construed in the light most favorable to the nonmoving party (*id.*). Summary judgment must be denied "where there is any doubt as to the existence of a triable issue" (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978] [internal quotation marks omitted]) or where "the issue is arguable" (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968] [internal quotation marks omitted]).

(*Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC*, 157 AD3d 479, 481-482 [1st Dept 2018]).

Plaintiffs' Labor Law Section 240(1) Claim

Since the plaintiffs have withdrawn their claims pursuant to Labor Law section 240(1), the branch of the defendants' motion to dismiss the claim under that section is denied as moot.

Plaintiffs' Labor Law Section 241(6) Claim

The plaintiffs only oppose the dismissal of their Labor Law section 241(6) claims as predicated on Industrial Code sections sections 23-1.7(e) (1) and (e) (2). Thus, their claims of liability under the other Industrial Code sections alleged in their bill of particulars are deemed abandoned (*See Murphy v Schimenti Constr. Co., LLC*, 204 AD3d 573 [1st Dept 2022]).

Defendants have established their prima facie entitlement to summary judgment dismissing plaintiff's claim pursuant to Labor Law section 241(6), as predicated on Industrial Code sections 23-1.7(e) (1) and (e) (2). Those sections provide as follows:

> (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.
>
> (2) Working areas. 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.

Although the regulations do not define the term "passageway" (*Venezia v LTS 711 11th Ave.*, 201 AD3d 493, 494 [1st Dept 2022] [*citation omitted*]), the Appellate Division, First Department has defined it as "an interior or internal way of passage inside a building" (*Quigley v Port Auth. Of N.Y. & N.J.*, 168 AD3d 65, 67 [1st Dept 2018]). Since plaintiff testified that the incident occurred outdoors, his accident clearly did not occur on a passageway and, thus, the plaintiff's claim pursuant to Labor law section 241(6), as predicated on Industrial Code section 23-1.7(e)(1), is dismissed.

The defendants have also established their prima facie entitlement to summary judgment on the plaintiff's section 241(6) claim as predicated on Industrial code section 23-1.7 (e)(2). As noted above, the plaintiff alleged in his bill of particulars that the defendants "failed to ensure that work areas, passageways and thoroughfares were free of dirt, debris, loose materials and

other tripping hazards and obstructions." Doc. 81. However, since the plaintiff did not allege, or testify that, he tripped over "dirt and debris," "scattered tools and materials" or "sharp projections" in his work area, this claim is also dismissed. (*Harasim v Eljin Constr. of NY, Inc.*, 106 AD3d 642, 643 [1st Dept 2013]). Although the plaintiffs argue that the defendants are liable pursuant to section 23-1.7(e)(2) because it is "undisputed" that the plaintiff's working area "was not kept free of obstructions" (Doc. 91 at par. 28), this section does not even mention the term "obstruction", which is found, however, in 23-.17 (e)(1), the section addressing passageways.

In opposition, the plaintiffs have failed to raise a triable issue of fact warranting denial of these branches of the defendants' motion.

Plaintiffs' Common-Law Negligence And Labor Law Section 200 Claims

Labor Law section 200 is a codification of an owner or general contractor's common-law duty to maintain a safe work site (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Claims pursuant to this section generally fall into two categories: (1) those involving injuries arising from dangerous or defective premises conditions; and (2) those involving injuries arising from the means or methods in which the work is performed (*see Ventura v Ozone Park Holding Corp.*, 84 AD3d 516, 517 [1st Dept 2011]). Where, as here, the plaintiff's accident allegedly arose out of a dangerous or defective premises condition, an owner or general contractor may be held liable only if it created or had actual or constructive notice of the dangerous condition (*Raffa v City of New York*, 100 AD3d 558 [1st Dept 2012]; *Lopez v Dagan*, 98 AD3d 436, 438 [1st Dept 2012]; *Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]).

Here, as the plaintiffs assert, McAlarney testified that LLUSC had several employees performing "walk-throughs" at the site to inspect for any dangerous conditions and, if one of those individuals saw a tarp "jutting out within a walkway or passageway" the company would direct whichever contractor was responsible "to move it out of the way" (Doc. 96 at 50-53). Since the defendants did not provide any evidence regarding when the last walk-through before the accident was conducted, they have failed to establish that they were not on actual or constructive notice of the presence of the tarp (*see Powell v BLDG 874 Flatbush LLC*, 201 AD3d 534 [1st Dept 2022]).

Nor have the defendants established that the tarp was an open and obvious condition. It is well settled that there is no clear test for determining whether a hazard is open and obvious. The test is whether "[a]ny observer reasonably using his or her senses would see" the condition *(Tagle v Jakob,* 97 NY2d 165 [2001]). The First Department has held that the issue of whether a condition is a hazard or open and obvious is usually a question of fact for the jury (*See Shulman v Old Navy/The Gap, Inc.,* 45 AD3d 475 [1st Dept 2007]), although a court may determine the condition to be open and obvious "when the established facts compel that conclusion" *(Tagle v Jakob,* 97 NY2d at 169 [citations omitted]). Proof that a condition is open and obvious does not, in and of itself, preclude a finding of liability against a defendant for its failure to maintain its property in safe condition but, rather, is relevant to the issue of a plaintiff's comparative negligence (*See, Gonzalez v G. Fazio Constr. Co., Inc.*, 176 AD3d 610, 611 [1st Dept 2019] *citing Maza v Univ. Ave. Dev. Corp.*, 13 AD3d 65, 66 [1st Dept 2004]). "[A] court is not precluded from granting summary judgment, where the condition complained of was both open and obvious and, as a matter of law, not inherently dangerous (*Boyd v New York City Hous. Auth.*, 105 AD3d 542, 543 [1st Dept 2013] [*citations omitted*]). Here, although the defendants

argue that the tarp was not inherently dangerous as a matter of law, they do not submit any evidence to support this contention and, thus, fail to establish their entitlement to summary judgment on this ground.

Finally, given that it is undisputed that the tarp was at least partially obstructing the sidewalk where plaintiff was walking, the defendants fail to establish that the plaintiff's own actions were the sole proximate cause of his accident as a matter of law (*See Acevedo v Camac*, 293 AD2d 430 [2d Dept 2002]).

Plaintiffs' Motion For Summary Judgment (Mot. Seq. No. 004)

Since plaintiffs' claims pursuant to Labor Law section 241(6), as predicated on Industrial Code sections 23-1.7(e)(1) and (e)(2) have been dismissed, their motion for summary judgment based on those provisions is necessarily denied.

The parties' remaining contentions are either without merit or need not be addressed in light of the conclusions set forth above.

Accordingly, it is hereby:

ORDERED that the branch of the motion (mot. seq. 003) by defendants Macklowe Properties, L.L.C. and Macklowe Properties, Inc. seeking summary judgment dismissing the complaint pursuant to CPLR 3212 is denied as moot, insofar as the plaintiffs have discontinued their claims against the said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants, 56th and Park (NY) Owner, LLC and Lend Lease (US) Construction LMB Inc.; and it is further

ORDERED that the caption is hereby amended to reflect the discontinuance against defendants Macklowe Properties, L.L.C. and Macklowe Properties, Inc., and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that the branch of the motion (mot. seq. 003) by defendants 56th and Park (NY) Owner, LLC and Lend Lease (US) Construction LMB Inc. ("LLUSC") seeking summary judgment dismissing the complaint pursuant to CPLR 3212 is granted to the extent of dismissing plaintiffs' claims pursuant to Labor Law section 241(6), as predicated on Industrial Code sections 23-1.7(e) (1) and (e) (2); and it is further

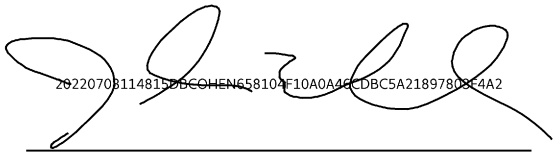
ORDERED that the plaintiffs' claims pursuant to Labor Law section 241(6), as predicated on Industrial Code sections 23-1.5 (a), 23-1.5(b), 23-1.5(c) 23-1.5 (3), 23-1.7 (d), 23-1.7 (2), 23-1.8 (2), 23-1.8(d), 23-1.15, 23-2.1(a), 23-2.1(2), and 23-2.1(2)(b) are dismissed as abandoned; and it is further

ORDERED that the branch of the motion (mot. seq. 003) by defendants 56th and Park (NY) Owner, LLC and Lend Lease (US) Construction LMB Inc. ("LLUSC") seeking summary judgment dismissing plaintiffs' claim pursuant to Labor Law section 240(1) is denied as moot since that claim has been discontinued against said defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the branch of the motion (mot. seq. 003) by defendants 56th and Park (NY) Owner, LLC and Lend Lease (US) Construction LMB Inc. ("LLUSC") seeking summary judgment dismissing plaintiffs' common-law negligence claim and claim pursuant to Labor Law section 200 is denied; and it is further

ORDERED that the motion by plaintiffs Rafael Degado and Wilkiam Delgado seeking summary judgment pursuant to CPLR 3212 on its claims pursuant to Labor Law section 241(6), as predicated on Industrial Code sections 23-1.7(e) (1) and (e) (2) (mot. seq. 004), is denied in all respects.



7/8/2022
DATE

DAVID B. COHEN, J.S.C.

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