

<b>Nolan v Memorial Hosp. for Cancer &amp; Allied Diseases</b>
2022 NY Slip Op 32830(U)
August 18, 2022
Supreme Court, New York County
Docket Number: Index No. 153139/2018
Judge: John J. Kelley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

-----X

JOHN NOLAN and JILL NOLAN

Plaintiffs,

- v -

MEMORIAL HOSPITAL FOR CANCER AND ALLIED DISEASES and TURNER CONSTRUCTION COMPANY,

Defendants.

-----X

INDEX NO. 153139/2018

MOTION DATE 05/25/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 70, 71

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

In this action to recover damages for personal injuries arising in the course of a construction project, the plaintiffs move pursuant to CPLR 3212 for summary judgment on the issue of liability on their causes of action alleging common-law negligence and violation of Labor Law §§ 200 and 241(6). The defendants oppose the motion. The motion is granted to the extent that the plaintiffs are awarded summary judgment on the issue of whether the defendants violated 12 NYCRR 23-1.7(f) and 12 NYCRR 23-2.7(b), and the motion is otherwise denied.

The plaintiff John Nolan (hereinafter Nolan) was injured in the course of a construction project at premises owned by Memorial Hospital for Cancer and Allied Diseases and located at 530 East 74th Street in Manhattan (the premises). The defendant Turner Construction Company (Turner) was the general contractor for the project, which entailed the erection of an approximately 23-story medical facility. According to the plaintiffs, Turner maintained an office on the premises, and at least four Turner employees walked the site daily who had authority to correct mistakes in the construction process or to stop work, if necessary. Furthermore, the plaintiff alleged that Turner maintained general and site-specific safety manuals, investigated

accidents, and reviewed and approved all subcontractors' Health and Safety Plans, while also conducting site safety orientations and general safety meetings. He nonetheless testified at his deposition that only his employer, nonparty Benson Industries (Benson), exercised authority in directing the tasks that he was required to perform.

On May 1, 2017, Nolan was employed at the premises as an ornamental ironworker by Benson, with whom Turner had subcontracted to install the building's curtain wall, among other things. At approximately 9:30 a.m. on that date, Nolan and coworker Steve Ferraro travelled to the 20th floor of the building under construction, via its exterior hoist, to transport steel welding embeds that Benson intended to weld at that level. As the plaintiffs explained it, prior to that date, either nonparty carpentry subcontractor Component Assembly or nonparty hoist operator subcontractor Safe Way had constructed wooden steps or a ramp at the end of the hoist's landing platform to permit workers safely to descend from the platform to a lower level located approximately two feet below the platform, where corrugated or ridged metal floor decking had been installed. They alleged that someone had removed the steps or ramp prior to Nolan's arrival on the 20th floor and, in its place, had erected what the plaintiff characterized as a "two-step makeshift staircase" out of unsecured rectangular, unequally sized blocks or boards of foam insulation, so that workers could still descend to the decked level from the hoist landing platform. On that date, as Nolan attempted to descend from the platform to the decked level via the blocks of foam, while carrying one 85-to-100 pound steel welding embed in each arm, the top block of foam shifted as he placed one foot upon it, causing his other foot, located on the bottom block, to skid and become wedged underneath steel meshing, causing him to trip and fall forward, and to sustain injuries as a consequence.

In their motion, the plaintiffs alleged that the defendants were liable for common-law negligence and violations of Labor Law § 200, and further alleged that they violated three provisions of the Industrial Code. Specifically, they asserted that the defendants violated 12 NYCRR 23-1.7(e)(1), entitled "Tripping and other hazards," which provides, in pertinent part 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. Sharp projections which could cut or puncture any person shall be removed or covered.” They further alleged that the defendants violated 12 NYCRR 23-1.7(f), entitled “Vertical Passage,” which provides, in relevant part, that “[s]tairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.” In addition, the plaintiff alleged that the defendants violated 12 NYCRR 23-2.7(b), part of a section entitled “Stairway requirements during the construction of buildings,” which provides, in relevant part, that “[t]emporary stairways shall have treads constructed of wood planks.”

The defendants contended that none of these Industrial Code provisions was applicable, as the accident did not occur in a “passageway” and the placement of the foam boards did not constitute a “tripping hazard” in any event. They further asserted that the accident site was neither a “vertical passage,” nor a “temporary stairway.” Specifically, they asserted that the unsecured foam blocks or boards did not constitute a temporary staircase or stairway, but instead “were being used to create a level surface on the uneven Q-decking surface so that the workers would not have to step on the ‘peaks’ or ‘valleys’ of the corrugated floor material.”

The defendants relied on the expert affirmation of professional engineer Jeffrey J. Schwalje, who asserted the subject foam insulation blocks, which are used for a variety of applications, including as a filler under concrete slabs, were constructed of polystyrene material. He opined that, as such, the boards were rigid and rated at 25 pounds per square inch in compressive strength, and thus “should not slide or cause a worker to slide when stepped upon.” Upon reviewing the photographs of the foam blocks or boards, Schwalje concluded that, even though they were depicted as having been placed on the corrugated deck floor immediately beneath the wooden hoist landing platform, they were being employed to “level out

a stepping surface on the uneven decking which would ultimately be the structural floor,” and not as a stepping device to connect the two levels.

Schwalje also set forth several legal conclusions, averring that the defendants could not be held liable for common-law negligence or violation of Labor Law § 200 because, as established by the parties’ deposition testimony, they did not control the means and methods of Nolan’s work. He further asserted that Nolan

“blatantly disregarded Turner’s Safety program and ignored instructions that workers were not to carry more than 50 pounds unassisted. As such, Mr. Nolan was negligent in carrying 170 pounds worth of steel embeds by himself. Mr. Nolan’s recalcitrant actions of carrying at least 120 pounds more than the Turner Safety lifting limit were more likely than not the sole and proximate cause of the alleged incident.”

As relevant to the allegations of Industrial Code violations set forth in the plaintiff’s motion papers, Schwalje asserted that 12 NYCRR 23-1.7(e) and (f) were either inapplicable or not violated by the defendants because

“First, the rigid foam block was not inherently slippery and should not cause a worker with proper footwear to slip. Therefore, there was no slipping hazard. Secondly, there was no accumulation of debris or materials or sharp objects relating to the foam board steps. There was also no passageway involved in plaintiff’s accident and no condition that caused a tripping accident. As such, there was no tripping hazard. Lastly, a hoist platform was provided to access the steel deck.”

Schwalje asserted that 12 NYCRR 23-2.7(b) was inapplicable since the blocks involved were provided when the building was under construction “with elevators or stairways not constructed at the time of plaintiff’s accident. Further, the two small blocks were not a ‘temporary stairway’ but simply a temporary level surface between the hoist platform and the deck.”

It is well settled that the movant on a summary judgment motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the

pleadings and other proof such as affidavits, depositions, and written admissions (see CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, “[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility” (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (see *Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *id.*; *Medina v Fischer Mills Condo Assn.*, 181 AD3d 448, 449 [1st Dept 2020]).

“The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even ‘arguable’” (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]; see *Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (see *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

Labor Law § 200 is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work (see *Hartshorne v Pengat Tech. Inspections, Inc.*, 112 AD3d 888, 889 [2d Dept 2013]; see also *Comes v NY State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Kennedy v McKay*, 86 AD2d 597 [2d Dept 1982]). There are two distinct standards applicable to Labor Law §200 causes of action, depending on the situation presented—where the accident is the result of the means and methods used by the general contractor to do its work, and where the accident is the result of a dangerous premises condition

(see *McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796 [2d Dept 2007]). “In claims arising from an alleged defective or dangerous condition existing at the premises, liability may attach to the owner or general contractor if they either created the condition or had actual or constructive notice of it” (*Davis v Trustees of Columbia Univ. in the City of N.Y.*, 199 AD3d 481,482 [1st Dept 2021]), regardless of whether the owner or general contractor had authority to control the plaintiff’s work. Where the means and methods of the work are implicated in the accident, a plaintiff must establish that the owner or general contractor had authority to control his or her work (see *Comes v New York State Elec. & Gas Corp.*, 82 NY2d at 877). In such cases, “general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed” (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; see *Bednarczyk v Vornado Realty Trust*, 63 AD3d 427 [1st Dept 2009]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378 [1st Dept 2007]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523 [2d Dept 2007]).

The court concludes that, based on the parties’ contentions, Nolan’s accident implicates both a dangerous premises condition and the means and methods of his work (see generally *Banscher v Actus Lend Lease, LLC*, 132 AD3d 707, 709-170 [2d Dept 2015] [both means and methods and dangerous premises condition are implicated where plaintiff was injured while installing shingles on a pitched roof, and a co-worker’s water jug rolled down the roof and struck him, causing him to fall onto the surface of the roof]; *Pineda v Elias*, 125 AD3d 738, 738 [2d Dept 2015] [both theories may be implicated in fall from ladder]).

In *Ferguson v Durst Pyramid, LLC* (178 AD3d 634, 635 [1st Dept 2019]), a worker fell while trying to access an elevated work platform by stepping up onto an inverted bucket, which was the only device he could obtain at the time. That bucket is analogous to the employment of the foam insulation boards in the instant action, as they both constituted improvised methods for climbing from one level to another. In that case, the Appellate Division, First Department,

concluded that the use of the bucket implicated the means and methods of the plaintiff's work, and not the condition of the premises at which he worked. In the instant action, the parties agree that the foam insulation boards at issue were not integral to the work, that is, they were not meant to be incorporated into the finished structure (*cf. Davis v Trustees of Columbia Univ. in the City of N.Y.*, 199 AD3d at 481 [defective premises case in which a plaintiff tripped over a piece of wood left on the floor was characterized by the defendant as being integral to the work and characterized by the plaintiff as debris from previous work]). Nonetheless, in *Ferguson*, the plaintiff never alleged that the bucket was placed near the platform for the express purpose of serving as a step stool. Where some sort of device is, in fact, placed or installed so as to serve as a step stool or ladder, and proves to be inadequate, the case may also be deemed to implicate whether the premises were in a dangerous or hazardous condition (*see Abreu v Rodriguez*, 195 AD3d 1277, 1279 [3d Dept 2021]; *Chowdhury v Rodriguez*, 57 AD3d 121, 129 [2d Dept 2008]).

There are disputed issues of fact as to whether the foam boards were installed to serve as a replacement for a wooden stairway, ramp, or ladder and, hence, whether the defendants may be held liable for a defective premises condition by virtue of having constructive notice of that condition. This approach is appropriate whether the foam boards were merely debris impeding a passageway, as also argued by the plaintiff in a somewhat contradictory fashion, or whether they were meant to provide a flat surface covering the corrugated metal floor decking so that workers would not trip on or in the grooves in the decking, as argued by the defendants.

The plaintiffs established, *prima facie*, that the foam insulation boards constituted an insufficiently safe ladder, and thus should be deemed to constitute a dangerous premises condition. In opposition to the plaintiffs' *prima* showing that the boards had remained the same location for a sufficient period of time to permit the defendants to remedy the condition (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 838 [1986]) by replacing them with a safer alternative, such as a new wooden stairway or ramp, the defendants raised a triable

issue of fact as to whether they had constructive notice of the condition. Specifically, Nicholas Swain, Turner's project safety assistant, testified at his deposition that he did not know that the two foam boards had been stacked under the hoist landing platform at any time prior to Nolan's accident, and that prior walk-throughs of the 20th floor did not reveal the placement of the boards.

To the extent that the foam boards either constituted debris, or were placed to prevent tripping on the corrugated metal decking, thus implicating the means and methods of work, the plaintiffs were obligated to establish that the defendants had authority to supervise and control Nolan's work. Nolan averred in his affidavit that Turner either exercised or had authority to supervise or control his work because it had authority to stop any work if it discovered safety violations. This allegation, however, is insufficient to establish that Turner had the necessary degree of authority or control over Nolan's work (*see Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 406 [1st Dept 2018]; *Hughes v Tishman Constr. Corp.*, 40 AD3d at 309; *but see Davies v Simon Prop. Group, Inc.*, 174 AD3d 850, 854 [2d Dept 2019]). In any event, Nolan, at his deposition, averred that Benson, and not the defendants, directed, supervised, and controlled his work. Hence, the plaintiffs failed to establish their prima facie entitlement to judgment as a matter of law on their common-law negligence and Labor Law § 200 causes of action to the extent that those causes of action were based on an accident arising from the means and methods of work.

Moreover, the defendants raised a triable issue of fact in opposition to the plaintiffs' prima facie showing that the boards constituted a hazardous or dangerous condition, as their expert opined that the boards, regardless of their use, did not constitute a dangerous condition or a tripping or slipping hazard.

Hence, those branches of the plaintiffs' motion seeking summary judgment on their common-law negligence and Labor Law § 200 causes of action must be denied.

Labor Law § 241(6) imposes a nondelegable duty upon general 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 L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998] [citation and internal quotation marks omitted]; see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). To sustain a Labor Law § 241(6) cause of action, it must be shown that the defendant violated a specific, “concrete” implementing regulation of the Industrial Code, rather than generalized regulations for worker safety (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505). Labor Law § 241(6) requires a plaintiff to show that the safety measures actually employed on a job site were unreasonable or inadequate and that the violation of the relevant Industrial Code provision was a proximate cause of his or her injuries (see *Zimmer v Chemung County Performing Arts*, 65 NY2d at 521-522). In other words, “violation of a provision of the Industrial Code is only evidence of negligence, and Labor Law § 241(6) requires the additional finding that the violation showed a lack of reasonable care” (*Baptiste v RLP-East, LLC*, 182 AD3d 444, 445 [1st Dept 2020]; see *Rizzuto v Wenger Contr. Co.*, 91 NY2d at 351; *Allen v Cloutier Constr. Corp.*, 44 NY2d 290 [1978]). Hence, for a plaintiff to be awarded summary judgment on the issue of liability on a Labor Law § 241(6) cause of action, he or she must show more than the mere violation of an Industrial Code provision, but also must establish that the violation constituted negligence and that the negligence proximately caused his or her injuries.

Regardless of how the defendants characterized the two-foot drop from the hoist landing platform to the corrugated metal decking, “[b]ecause no stairways, ramps, or runways were available to plaintiff to access the [metal floor from the] platform, he was entitled to summary judgment on his Labor Law § 241(6) claim predicated upon Industrial Code (12 NYCRR) § 23-1.7(f)” (*Ferguson v Durst Pyramid, LLC*, 178 AD3d at 635; see *Miano v Skyline New Homes Corp.*, 37 AD3d 563, 565 [2d Dept 2007]). The defendants failed to raise triable issues of fact in opposition to the plaintiffs’ showing that the accident location constituted a vertical passage and

that they violated that Code provision by failing to install a proper stairway or ramp. Moreover, contrary to the defendants' contentions, the fact that Nolan was carrying between 150 and 200 pounds of steel welding embeds when he slipped did not establish that his conduct was the sole proximate cause of his accident. The fact that the upper foam insulation board slipped when he stepped on it, despite the defendants' expert's opinion that it should not have slipped, is sufficient to defeat that defense, although Nolan himself ultimately may be found by the trier of fact to be partly at fault as well (*see Purcell v Metlife, Inc.*, 2012 NY Slip Op 31149[U], \*9, 2012 NY Misc LEXIS 2036, \*13 [Sup Ct, N.Y. County, Mar. 30, 2012] [manner in which worker carried a 40-to-60 pound steel beam, measuring four feet by five feet, could not be said, as a matter of law, to constitute the sole proximate cause of the worker's accident]). Hence, the plaintiffs must be awarded summary judgment on the issue of whether the defendants violated 12 NYCRR 23-1.7(f).

In connection with the alleged violation of 12 NYCRR 23-2.7(b), which imposes an obligation to equip required stairways with wooden treads, the plaintiffs established their prima facie entitlement to judgment as a matter of law on the issue whether the defendants violated that provision, as the two-foot drop from the hoist landing platform to the corrugated metal decking required the installation of a stairway (*see Ramputi v Ryder Constr. Co.*, 12 AD3d 260, 260-261 [1st Dept 2004]; 12 NYCRR 23-1.7[f]; *cf.* 12 NYCRR 23-5.3 ["Ladders, stairs or ramps shall be provided for access to and egress from the platform levels of metal scaffolds which are located more than two feet above or below the ground, grade, floor or other equivalent level"]), and the device employed here as a staircase clearly were not equipped with wooden treads. The plaintiffs also established, prima facie, that this violation constituted a negligent act proximately causing Nolan's injuries. The court rejects the defendants' contention that the Industrial Code is inapplicable because neither the subject drop nor the stacked boards constituted a stairway in and of themselves. Nonetheless, although the defendants did not raise a triable issue of fact as to whether they violated that Code provision, they did raise triable

issues of fact as to whether the violation constituted a negligent act that proximately caused Nolan's injuries.

In light of the foregoing, the plaintiffs' entitlement to summary judgment on their Labor Law § 241(6) cause of action is limited to summary judgment on the issues of whether the defendants violated 12 NYCRR 23-1.7(f) and 12 NYCRR 23-2.7(b), and not on whether the defendants' violation of those Industrial Code provisions constituted negligence, that is, a failure to use due care, or whether that negligence proximately caused Nolan's injuries. In other words, the plaintiffs are not fully entitled to summary judgment on the issue of liability on their Labor Law § 241(6) cause of action. In this regard, although the plaintiffs have thus established "some evidence of negligence" by virtue of the violations, the defendants have raised triable issues of fact with their expert's affidavit as to whether the installation, placement, and continued presence of the foam boards were indeed negligent acts or failures to act, and whether that negligence was a contributing cause of the accident and injuries. Despite the existence of triable issues of fact as to the defendants' negligence, proximate cause, and comparative fault, the plaintiffs are still entitled to partial summary judgment on the issue of whether the defendants violated the Industrial Code (*see generally Rodriguez v City of New York*, 31 NY3d 312 [2018]).

With respect to the alleged violation of 12 NYCRR 23-1.7(e)(1), the plaintiffs failed to establish their prima facie entitlement to judgment as a matter of law, as their allegations and submissions reflected the existence of triable issues of fact as to whether the foam board constituted material installed or placed for a specific purpose, rather than debris, as required by the Code provision. In any event, the area where Nolan fell was not a "passageway" within the meaning of the Code provision, but a work area, and, hence, the provision is inapplicable (*see Coaxum v Metcon Constr., Inc.*, 93 AD3d 403, 404 [1st Dept 2012]; *Canning v Barneys N.Y.*, 289 AD2d 32, 34-35 [1st Dept 2001]).

Accordingly, it is

ORDERED that the plaintiffs' motion is granted to the extent that they are awarded summary judgment on the issue of whether the defendants violated 12 NYCRR 23-1.7(f) and 12 NYCRR 23-2.7(b), and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

8/18/2022

DATE

*[Handwritten signature in blue ink]*  
\_\_\_\_\_  
JONATHAN M. SHELLE, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: