SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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MIGUEL PEREZ

Plaintiff,

- v -

TISHMAN CONSTRUCTION CORPORATION OF NEW YORK,

Defendant.

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INDEX NO. 160272/2019

MOTION DATE 10/20/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for SUMMARY JUDGMENT.

In this Labor Law action, plaintiff moves, by notice of motion, for an order granting him partial summary judgment on his Labor Law §§ 240(1), 241(6), and 200 and common law negligence claims. Defendant Tishman Construction Corporation of New York d/b/a AECOM Tishman, a member of "AECOM Tishman/IC:ICTAS US Inc., a joint venture" i/s/h/a Tishman Construction Corporation of New York (TCCNY) opposes.

I. PERTINENT BACKGROUND

Based on the parties' statements and counterstatements of material undisputed facts (NYSCEF 37, 54, 58), the following facts are undisputed:

(1) Plaintiff was injured on October 9, 2019, while working for Force Installation LLC, a subcontractor performing work at a jobsite at 821 First Avenue in Manhattan;

(2) The construction manager for the project was defendant AECOM Tishman/IC:ICTAS US Inc., a joint venture (AECOM), and AECOM employee Mike Amato generally supervised the subcontractors on the project;

(3) Force owned the equipment used by plaintiff at the site, and plaintiff did not know any Tishman or AECOM employees, nor did he have any substantive interaction with them; he only received direction from Force;

(4) On October 9, 2019, plaintiff was walking on the 28th floor of the jobsite when he stepped on a broken cover over an opening in the floor, which caused his leg to go into the opening;

(5) The cover had been broken by Force's forklift;

(6) AECOM received notice of the broken cover 33 minutes before plaintiff's accident;

(7) New York City Acoustics (NYCA) was the contractor at the project responsible for providing protection for floor openings;

(8) Minutes after receiving notice of the broken cover, Amato asked NYCA to repair it;

(9) Force was also responsible for maintaining the safety of the areas where it performed work;

(10) Plaintiff did not need to walk over the cover at the time of the incident and he could have gone around it; and

(11) Plaintiff did not recall any other trades working on the 28th floor on the date of the accident.

II. WHETHER TCCNY IS A PROPER PARTY

TCCNY denies it is a proper party in this action as it was not the construction manager for the project, but rather the construction manager was the joint venture in which TCCNY is a

member, and observes that plaintiff addresses his motion against "Tishman Construction Corporation," not TCCNY (NYSCEF 53).

Plaintiff argues that members of a joint venture are held jointly and severally liable for acts or omissions committed in the course of the joint venture's business, and the joint venture employed a superintendent at the site and it entered into subcontracts with various subcontractors for work on the project, including Force (NYSCEF 57).

As parties to a joint venture are liable for acts committed by other members in the venture, TCCNY is a proper defendant here (*See Kauffman v Turner Constr. Co.*, 195 AD3d 1003 [2d Dept 2021], *lv denied* 38 NY3d 908 [2022] [finding that partner in joint venture, which was general contractor at jobsite, could be held liable for plaintiff's Labor Law claims]

III. LABOR LAW § 240(1) CLAIM

Plaintiff contends that defendants violated Labor Law § 240(1) by failing to ensure that the cover was not broken, and that as the cover did not protect him from falling partially into the opening underneath, it was an inadequate safety device (NYSCEF 36).

Defendant maintains that it cannot be held liable to plaintiff as he was the sole proximate cause of his injuries, as the cover was properly cleated to the ground and plaintiff did not have to walk on it, but did so anyway, thereby causing the accident (NYSCEF 53).

In reply, plaintiff argues that the cover was broken and therefore did not constitute a proper safety device, and, moreover, as defendant violated Labor Law § 240(1), he cannot be the sole proximate cause of his accident. He observes that there is no evidence that he knew the cover was broken or that he was instructed to not step on it (NYSCEF 57).

To establish a claim under Labor Law § 240(1), a plaintiff must show that the statute was violated and that the violation was the proximate cause of the injury (*Santos v Condo 124 LLC*, 161 AD3d 650 [1st Dept 2018]).

As it is undisputed that the cover of the opening was broken and that when plaintiff stepped on it, he broke through the cover and fell partially into the opening beneath it, he establishes, *prima facie*, a violation of the statute (*See Rubio v New York Proton Mgt., LLC*, 192 AD3d 438 [1st Dept 2021] [defendants violated Labor Law § 240(1) where plywood sheet covering trench gave way when plaintiff walked on it, causing him to fall into trench]).

Even if plaintiff did not have to step on the cover, in light of the absence of evidence that he knew the cover was broken or that was he was instructed to avoid it, and as he established that defendant violated the statute, defendant fails to demonstrate that plaintiff was the sole proximate cause of the accident (*See Cazho v Urban Builders Group, Inc.*, 205 AD3d 411 [1st Dept 2022], quoting *Kielar v Metro. Museum of Art*, 55 AD3d 456, 458 [1st Dept 2008] ["Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it."]; *Magee v 438 E. 117th St. LLC*, 56 AD3d 376 [1st Dept 2008] [where plaintiff stepped onto plywood which broke or shifted, causing him to fall, even if he could have walked around plywood rather than stepping on it, it would not have been sole proximate cause of accident]).

IV. LABOR LAW § 241(6) CLAIM

Plaintiff asserts that defendants violated Industrial Code § 23-1.7(b)(1)(i), which provides that "every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place . . ." He argues that the hole or opening into which he fell

constitutes a "hazardous opening" as it was large enough for him to fall through to a lower elevation, even though he did not actually fall all the way through it (NYSCEF 36).

Defendant contends that the Industrial Code violation relied on by plaintiff is inapplicable as there was no hazardous opening and the cover was fastened in place. In order for an opening or hole to qualify as "hazardous," it must be large enough for a person to fit in and fall through entirely, and here, defendant maintains, the size of the hole was not big enough for plaintiff to have fallen through it entirely. Moreover, it was covered with a cover fastened in place (NYSCEF 53).

In reply, plaintiff contends that the hole was large enough for him to fall through, relying on the testimony of defendant's site safety manager, who estimated that it was 18 inches wide and 36-48 inches long, and, as the cover was broken, the Code section was violated (NYSCEF 57).

Plaintiff testified he did not know the dimensions of the hole (NYSCEF 42), but his co-worker estimated that the hole was two feet by three feet (NYSCEF 44), while the site safety manager testified that the hole was approximately one foot long and wide (NYSCEF 47), and the photographs of the accident reflect that after plaintiff fell through the hole, it created an opening big enough to fit in plaintiff's foot and lower thigh, with some room to spare (NYSCEF 43). It appears that no one measured the hole's dimensions, and plaintiff offers no expert testimony as to whether the hole was large enough to have fallen through it entirely. Plaintiff thus fails to establish, *prima facie*, that the opening in which he fell constitutes a "hazardous opening" within the meaning of the Code (*See Favaloro v Port Auth. of New York & New Jersey*, 191 AD3d 524 [1st Dept 2021] [plaintiff did not fall into hazardous opening as, inter alia, "no measurement in the record supports an inference that plaintiff could have fallen all the way through the hole."];

see also Coleman v Crumb Rubber Mfrs., 92 AD3d 1128 [3d Dept 2012] [defendant did not establish, *prima facie*, that hole was not hazardous opening based on employee's opinion as to potential for person to fall through hole or photographs of hole]).[1]

V. LABOR LAW § 200 AND COMMON LAW NEGLIGENCE CLAIMS

Plaintiff maintains that defendants acted negligently by failing to fix the broken cover despite having notice of the dangerous condition (NYSCEF 36).

Defendant denies that it can be held liable as it did not control the means or methods of plaintiff's work, or the area where the accident occurred. Nor did it create the hole, and while it had actual notice of the hole, defendant acted reasonably in directing NYCA to repair it within minutes of being notified of its existence (NYSCEF 53).

Plaintiff argues that defendant's admission of having received notice of the hole is sufficient to hold it liable, and its employee's direction to NYCA to repair the hole demonstrates that it had the authority to correct the condition (NYSCEF 57).

It is undisputed that defendant did not control the means and methods of plaintiff's work, and therefore, it cannot be held liable on this ground. However, to the extent that the broken cover constitutes a dangerous condition, the relevant inquiry is whether defendant created the condition or had actual or constructive notice of it and control of the place where the injury occurred (*Rosa v 47 E. 34th St. [NY], L.P.*, 208 AD3d 1075 [1st Dept 2022]; *Wynne v B. Anthony Constr. Corp.*, 53 AD3d 654 [2d Dept 2008]).

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[1] Even though summary judgment is denied on this claim as plaintiff did not establish that the hole qualifies as a hazardous opening, plaintiff does demonstrate that while the cover may have been fastened, it was already broken, and thus was not, at the time of the incident, a "substantial" cover within the meaning of the Code provision (*See e.g., Bonse v Katrine Apt. Assocs.*, 28 AD3d 990 [3d Dept 2006] [triable issues as to whether defendant violated Code provision, where plaintiff stepped onto subflooring and foot broke through it]).

Even if defendant had notice of the cover, there is a triable issue as to whether it had control of the area where the accident occurred, given plaintiff's testimony that he did not have interaction with defendant's employees and that Force was responsible for maintaining the safety of the area where it was performing work.

VI. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for partial summary judgment is granted to the extent of granting judgment on his Labor Law § 240(1) claim, and denying summary judgment on his Labor Law §§ 241(6) and 200 and common law negligence claims; and it is further

ORDERED, that if the parties would like to schedule a settlement conference with Justice Cohen, they may contact the court jointly by email to SFC-Part58@nycourts.gov and cpaszko@nycourts.gov.

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1/6/2023
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