SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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WILLIAM BROWN,

Plaintiff,

- v -

TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, BOP NE LLC

Defendant.

INDEX NO. 154484/2019

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

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HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 88, 89, 90, 91

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

Plaintiff William Brown ("Plaintiff") moves for summary judgment on his Labor Law § 241(6) cause of action as against all defendants. Defendants Tishman Construction Corporation of New York ("Tishman") and BOP NE LLC ("BOP") (collectively "Defendants") oppose the motion and cross-move for summary judgment dismissing Plaintiff's Complaint in its entirety.

Plaintiff alleges injury in a workplace construction accident at 401 9th Avenue, New York, New York ("the building"), on February 26, 2018. He was employed as a lather foreman by nonparty Navillus, which was subcontracted by Tishman for construction of the building. BOP was the owner of the building and had contracted for Tishman to perform construction management services.

At the time of the accident, Plaintiff was constructing a rebar-reinforced exterior concrete wall on the 60th floor of the building. His task involved stuffing rebar into prefabricated wall cages that served as the frame for the exterior wall. According to Plaintiff, the practice at the

worksite was to carry a few pieces of rebar at a time from a central location to one's section of the wall. As he was walking through different sections of the worksite, he encountered a pile of rebar created by another foreman, Steve Morales, who was working on an interior wall. Plaintiff alleges that Morales had created a pile of rebar near his work area rather than carrying a few pieces at a time. This pile allegedly protruded into and obstructed the walkway that Plaintiff was using to reach his work area from the location where the rebar was stored.

As Plaintiff was attempting to step over the pile, Morales allegedly lifted a rebar out of the pile, which then struck Plaintiff and caused him to lose his footing. As Plaintiff tried to regain his balance, his feet came down on the loose rebar in Morales's pile, which rolled and scattered under his feet and prevented him from regaining his footing. This allegedly caused Plaintiff to fall and sustain injuries.

Plaintiff commenced this action on May 1, 2019, asserting causes of action under Sections 200 and 241(6) of the Labor Law and for common law negligence. After discovery, he moved for summary judgment on his Labor Law § 241(6) cause of action and Defendants subsequently cross moved for summary judgment dismissing the entire Complaint.

On a motion for summary judgment, the moving party "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. Center*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853). Should the movant make its prima facie showing, the burden shifts to the opposing party, who must then produce admissible evidentiary proof to establish that material issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Plaintiff argues he is entitled to summary judgment on his 241(6) claim because there is no dispute of fact as to whether Defendants violated the Industrial Code, specifically 12 NYCRR §§ 23-2.1(a), 23-1.7(e)(1), and 23-1.7(e)(2). Defendant argues that the 241(6) cause of action should be dismissed as the rebar on which Plaintiff tripped was "integral to the work being performed" and therefore was not a tripping hazard or "stored material pile" under the applicable Industrial Code regulations (12 NYCRR §§ 23-1.7[e][1]-[2], 12 NYCRR 23-2.1[a][1]).

Labor Law 241(6) "imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection to persons employed in . . . all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Constr. Co.*, 91 NY2d 343, 348-349 [1998]). To establish a defendant's liability under Section 241(6), "a plaintiff must show that a specific, applicable Industrial Code regulation was violated and that the violation caused the complained-of injury" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494). Industrial Code Section 23-2.1(a)(1) reads:

> (a) Storage of material or equipment.
>
> (1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.

Plaintiff argues that this regulation was violated when his coworker obstructed the walkway that he was using with a pile of rebar, which was both being stored and constituted a material pile. He maintains that the regulation was violated even if the rebar was not being "stored," as it also prohibits any material piles from obstructing thoroughfares, regardless of whether the material in question was in storage. In opposition, Defendants argue that Section 23-2.1(a)(1) is inapplicable because the rebar was not being stored at the time of Plaintiff's accident.

Section 23-2.1(a) refers to storage of material and does not apply to material being used or installed at the time of an alleged accident (*Waitkus v Metropolitan Hous. Partners*, 50 AD3d 260 [1st Dept 2008]). It is undisputed that Morales was drawing from the pile of rebar at the time of the accident as part of his work of stuffing rebar into the interior wall. The rebar pile was therefore not "in storage" under the meaning of the regulation and therefore Defendants cannot be liable for a violation of Section 23-2.1(a) as a matter of law.

Plaintiff next contends that Defendants violated Sections 23-1.7(e)(1) and (2) of the Industrial Code because the pile of rebar obstructed a passageway and/or an open working area through which workers passed. Defendants argue that they cannot be held liable under these regulations because the site of the accident was not a "passageway" and because the rebar was integral to the work being performed.

Industrial Code Section 23-1.7(e)(1) states in relevant part "[a]ll passageways shall be kept free from accumulations and dirt and debris and from any other obstructions or conditions which could cause tripping." "Passageway" may be defined as a corridor, hallway, or other long and narrow way that connects parts of a building (*Quigley v Port Auth. of N.Y. & N.J.*, 168 AD3d 65, 67 [1st Dept 2018]). Open common areas do not constitute a passageway for the purposes of this section (*see Dalanna v City of New York*, 308 AD2d 400, 401 [1st Dept 2003]). Section 23-1.7(e)(2) instructs that "[t]he parts of floors, platforms and similar areas where persons work or pass shall be kept free from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed."

There is no violation of Industrial Code Sections 23-1.7(e)(1) or (2) where a plaintiff is injured by an obstacle that is integral to the work being performed (*Bazdaric v Almah Partners LLC*, 203 AD3d 643, 644-645 [1st Dept 2022]). This defense "applies to things and conditions

that are an integral part of the construction, not just to the specific task a plaintiff may be performing at the time of the accident" (*Krzyazanowski v City of New York,* 179 AD3d 479, 481 [1st Dept 2020], citing *O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805, 806 [2006]). An object is integral to the work being performed only where it was being used at the time of the accident (*see Rossi v 140 W. JV Mgr. LLC*, 171 AD3d 668 [1st Dept 2019]).

Here, the record indicates that Morales created the pile of rebar that allegedly caused Plaintiff's injury in the two hours before the accident and was actively removing rebar from that pile as part of his work stuffing the interior wall cage. The undisputed facts establish that there was no violation of Industrial Code Section 23-1.7(e)(2) as a matter of law. Morales's rebar pile was being used at the time of the accident and was therefore an integral part of the work being performed. Even if the pile of rebar by Morales's workspace was not being actively used at the time of the accident, the Court finds that it did not constitute "scattered tools and materials" in violation of Section 23-1.7(e)(2). The branch of Defendants' cross motion for dismissal of the Labor Law § 241(6) cause of action is granted.

Defendants cross-move for summary judgment dismissing Plaintiff's Labor Law § 200 and common law negligence causes of action. They argue that there is no issue of fact as to their lack of supervisory control over the means or method of Plaintiff's work. They also argue that they cannot be held liable because Plaintiff was injured by a hazard that was either readily observable or inherent in the work being performed.

Labor Law § 200 codifies the common law duty of owners and general contractors to provide a safe workplace to construction site workers (*Comes v NY State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Where the alleged injury was "caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually

exercised supervisory control over the injury-producing work" (*Cappabianca*, 99 AD3d at 144). An owner or general contractor will not be liable under a method and means theory where they "at most exercised general supervisory powers over [the] plaintiff" (*see Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]). The "mere presence" of an owner or general contractor's personnel on a worksite is "insufficient to infer supervisory control" (*id.*; *Philbin v A.C. & S., Inc.*, 25 AD3d 374 [1st Dept 2006]). When a general contractor or owner does exercise supervisory control over a plaintiff, their duty to provide a safe workplace under Section 200 "does not extend to hazards which are part of or inherent in the very work being performed or to those hazards that may be readily observed by reasonable use of the senses in light of the worker's age, intelligence and experience" (*Bodtman v Living Manor Love, Inc.*, 105 AD3d 434, 434-435 [1st Dept 2013], quoting *Bombero v NAB Constr. Corp.*, 10 AD3d 170, 171 [1st Dept 2004] [internal quotation marks omitted]).

This branch of the cross motion is granted as to BOP and denied as to Tishman. The Court finds there is no dispute of material facts as to BOP's lack of supervisory control over Plaintiff's work. During his second EBT, Plaintiff answered in the negative when asked whether the building's owner (referred to as "Brookfield Properties" in the EBT) ever directed him on how to perform his work, provided him with tools for his work, or received complaints about the project from him or his coworkers (NYSCEF Doc. No. 63, Brown EBT part 2 at 46-47). However, Plaintiff also testified that Tishman would at times direct his work and instruct him about workplace safety:

> Q: Did anyone from Tishman tell you how to perform your work?
> A: It depends. It depends if – if I was doing something unsafe they would have to correct that.
> Q: Do you have a specific recollection of Tishman coming to you and telling you how to perform your work?
> A: Yes.

> Q: What I am referring to you is means and methods?
> A: Yes.
> Q: Tell me about that?
> A: Well, just saying like the placement of bars. They used to call me JD. JD, you can put these bars here, it is not safe, like stuff like that, you know.
> Q: Other than that?
> A: Or JD, make sure the guys have their harness on or make sure the guys are hooked on so if anything happens they won't hurt themselves.
> Q: Who from Tishman said that?
> A: Tishman has safety guys up there, you know. . . .
> Q: They told you these things because you were the foreman, right?
> A: Yes. But they can tell anyone on the job. They have higher authority than everybody up there.

(*id*. at 43-44). A question of material fact therefore exists as to whether Tishman exercised supervisory control over the manner and means of Plaintiff's work such that it could be held liable under Labor Law § 200 and common law negligence.

The Court finds unavailing Defendants' argument that Tishman should not be held liable due to a hazardous condition being inherent in Plaintiff's work or otherwise readily observed by him. Plaintiff testified that the accepted practice at the worksite was to keep rebar stored in a central location on the floor on which work was being performed and to bring a few pieces at a time to one's work area, rather than to keep a larger pile at or near one's workstation as Morales was allegedly doing (Brown EBT at 164-168). He further testified that he had been taking a long step over Morales's protruding pile of rebar and was only caused to step on and subsequently trip on the pile when Morales lifted a rebar off it (*id*. at 169; Brown EBT part 2 at 91-95). Plaintiff also contends that the area through which he was walking was the only path available from the location where the rebar was stored to his workstation. The Court therefore cannot say that, as a matter of law, Morales's placement of a pile of rebar by his workspace and allegedly across a commonly used open walkway was an inherent part of Plaintiff's work or was a readily observable hazard.

Accordingly, it is hereby:

ORDERED that Plaintiff's motion is denied; and it is further

ORDERED that Defendants' cross motion for summary judgment is granted with respect to Plaintiff's Labor Law § 241(6) cause of action, and said cause of action is dismissed as against all Defendants; and it is further

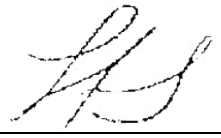
ORDERED that Defendants' cross motion for summary judgment is granted with respect to Plaintiff's Labor Law § 200 and common law negligence causes of action as against defendant BOP NE LLC only; and it is further

ORDERED that Defendants' cross motion for summary judgment is denied with respect to Plaintiff's Labor Law § 200 and common law negligence causes of action as against defendant Tishman Construction Corporation of New York; and it is further

ORDERED that the Complaint is dismissed as against defendant BOP NE LLC with costs and disbursements to defendant BOP NE LLC as taxed by the Clerk upon the submission of an appropriate bill of costs and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the balance of the action is severed and continued as against the remaining defendant, Tishman Construction Corporation of New York.

This constitutes the Decision and Order of the Court.



6/13/2023
DATE

LORI S. SATTLER, J.S.C.

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**