SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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ERIC BARON, ELIZABETH BARON

Plaintiffs,

- v -

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, TURNER CONSTRUCTION COMPANY,

Defendants.

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INDEX NO. 156565/2020

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

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

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Eric Baron, a construction worker who was injured on June 3, 2020, when, while pushing an unwheeled cart at a construction site located at 614 West 131st Steet in Manhattan (premises), he tripped over a pipe on the ground.

By notice of motion, defendants the Trustees of Columbia University in the City of New York (Columbia) and Turner Construction Company (Turner) (collectively defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiffs oppose.

I. PERTINENT BACKGROUND

It is undisputed that on the day of the accident, Columbia owned the premises and had hired Turner to serve as the construction manager for the project at issue. Eric Baron was employed by non-party W&W Glass (W&W) as a glazier for the project.

Plaintiff Eric Baron's Testimony (NYSCEF 33)

Mr. Baron testified that he was working on the project for approximately seven months before the accident, and he was supervised by his foreperson, a W&W Employee, from whom he exclusively received instruction and supervision. His equipment was provided by W&W, and his duties included the installation of glass at the premises, which also entailed the occasional receipt of deliveries and movement of glass. While working at the premises, Mr. Baron complained to his foreperson about "[t]he amount of garbage around" the "loading dock area," including "wood . . . blue foam . . . pipes [and] broken glass" (NYSCEF 33 at 29).

On the day of the accident, at approximately 7 a.m., Mr. Baron was assigned to work in the loading dock area, which was located outside of the premises. Shortly before the accident, he and two other W&W workers were tasked with moving a cart from the loading dock to make room for other equipment. The cart was five to six feet tall, made of steel, and without wheels. Rather, it had poles running front to back to facilitate lifting and moving, and it was mostly empty but still weighed several hundred pounds.

Mr. Baron and his coworkers began lifting and moving the cart, with him lifting and pushing from the back and his coworkers lifting and pulling from the front. As he pushed the cart, Mr. Baron tripped over a "smaller black pipe . . . maybe an inch in diameter and maybe a foot or two long," causing him to stumble, lose his balance and fall forward. The cart then dropped to the ground, causing Mr. Baron to wrench his shoulder and fall to his knees.

Plaintiff has seen the pipe lying on the ground "three or four days" before the accident, and had complained about it previously to his foreperson.

Statement of Mr. Brown's Coworker (NYSCEF 41)

By sworn statement dated August 16, 2020, Mr. Brown's coworker states that on the day of Mr. Brown's accident, he and Mr. Brown and another W&W worker were instructed to move things around to make space in the loading dock area, which was atypical as it was more like a courtyard where supplies and equipment were stored for the project.

While moving the cart at issue, the coworker noticed that it suddenly became difficult to push, and when he looked toward the back of the cart, he saw that Mr. Baron had fallen, but did not actually see him fall. The coworker observed debris and materials in the area of the fall, including blue foam bands, pipes, and other discarded materials.

Deposition Testimony of Columbia (NYSCEF 34)

Columbia's project director for the project at issue testified that Columbia hired Turner to provide construction management services for the project, with Turner responsible "for all of the construction and the management of construction," including the hiring of subcontractors and their supervision and coordination.

The director's duties at the project included general oversite, including oversite of Turner's work, and the project itself involved the new construction of two buildings, with "a green space in the middle" (NYSCEF 34 at 23-24). Columbia did not provide any materials for the project, nor did it employ any construction workers.

According to the director, Turner was required to keep the work site clean and in good order, and it employed laborers to perform, among other things, "daily cleaning" of the worksite (*id.* at 29), which included "sweeping floors, picking up debris, [and] moving debris from the location to a central location" (*id.* at 30). Turner was also responsible for cleaning the job site at the end of each workday, including the loading dock area.

II. DISCUSSION

It is well established that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Reif v Nagy*, 175 AD3d 107, 125 [1st Dept 2019], quoting *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]).

"[F]acts must be viewed in the light most favorable to the non-moving party" (*Matter of Larchmont Pancake House v Bd. of Assessors*, 33 NY3d 228, 252 [2019], quoting *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Schmidt v One N.Y. Plaza Co. LLC*, 153 AD3d 427, 428 [1st Dept 2017]).

A. Labor Law § 240(1) Claim

As defendants establish that plaintiff's accident did not involve a gravity-related hazard covered by section 240(1) (*see e.g., O'Brien v. Port Auth. of N.Y. & N.J.,* 29 NY3d 27, 33 [2017]), and as plaintiffs do not oppose dismissal of this claim, it is dismissed.

B. Labor Law § 241(6) Claim

Labor Law § 241(6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
> * * *
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and]

> equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and 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]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 501–502 [1993]). To sustain a Labor Law § 241(6) claim, the plaintiff must demonstrate that the defendant violated a specific and concrete implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross,* 81 NY2d at 505), and that the violation was a proximate cause of the plaintiff's injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

Here, while plaintiff has alleged several Industrial Code violations in his complaint and bill of particulars, he only opposes those parts of defendants' motion that seek dismissal of alleged violations of sections 12 NYCRR 23-1.7(e)(1) and (2) and 12 NYCRR 23-2.1(a)(1). The unaddressed Industrial Code provisions are thus deemed abandoned, and defendants are entitled to dismissal of them (*Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section"]).

1. Industrial Code 12 NYCRR 23-1.7(e)(1) and (2)

Industrial Code 12 NYCRR 23-1.7(e) governs "[t]ripping and other hazards," and is sufficiently specific to support a Labor Law § 241(6) claim (*Singh v Young Manor, Inc.*, 23 AD3d 249, 249-250 [1st Dept 2005]). Subsection (e)(1) governs "passageways," and provides that:

> 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.

"A 'passageway' is commonly defined and understood to be 'a typically long narrow way connecting parts of a building' and synonyms include the words corridor or hallway. In other words, it pertains to 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]).

Here, Mr. Baron alleges that he tripped and fell while working in the loading dock area, which was located outside of the premises. Even considering the new facts set forth for the first time in Mr. Baron's reply affidavit (*cf Parkinson v FedEx Corp.*, 184 AD3d 433 [1st Dept 2020] [declining to consider new facts improperly submitted for first time in reply papers]), his assertion that the loading dock constituted a passageway within the meaning of this Code subsection because there was material piled on both sides of it, thereby creating a passageway through which workers were forced to walk, is nonetheless unavailing given the undisputed fact that the dock was not located in the premises' interior (*see Potenzo v City of New York*, 189 AD3d 705, 707 [1st Dept 2020] [observing that in *Quigley*, Court held that "since the area where the accident occurred was not in the interior of a building, it could not be a 'passageway' under 12 NYCRR 23–1.7(e)(1)"]).

2. Industrial Code 12 NYCRR 23-1.7(e)(2)

Section 23-1.7(e)(2) governs "working areas," and provides that:

> 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.

Defendants argue that, as a matter of law, section 1.7(e)(2) does not apply to an open construction area exposed to the elements, relying mainly on *O'Gara v Humphreys & Harding, Inc.* (282 AD2d 209 [1st Dept 2001]), in which the Appellate Division, First Department held that the plaintiff's accident, which occurred on muddy ground near the construction site "did not occur on a floor, platform . . . or similar work area" as defined by this provision.

However, the holding in *O'Gara* must be confined to its facts, especially given the existing and contrary caselaw (*see eg Quigley,* 168 AD3d at 68 [question of fact existed whether exterior area was "working area"]; *Maza v University Ave. Dev. Corp.,* 13 AD3d 65, 68 [1st Dept 2004] [finding exterior courtyard which was completely enclosed by surrounding buildings, and which plaintiff had to traverse to get to and from work, was not passageway but a "working area"]; *Smith v Hines GS Properties, Inc.*, 29 AD3d 433, 433 [1st Dept 2006] [holding that question of fact exists as to whether exterior area was "working area"]).

Here, as Mr. Baron and his coworkers were directed to work in the loading dock on the accident date, defendants do not establish that the dock was not an "area where persons work," and, moreover, plaintiffs allege that the cause of Mr. Baron's accident was debris and/or scattered materials that had been present there for a significant amount of time before the accident (*see Lester v JD Carlisle Dev. Corp., MD*, 156 AD3d 577 [1st Dept 2017] [violation of 1.7(e)(2) established where plaintiff was injured while working on roof when he slipped on

accumulated debris consisting of loose granules]; *Serrano v Consolidated Edison Co. of New York, Inc.*, 146 AD3d 405 [1st Dept 2017], *lv dismissed* 29 NY3d 1118 [2017] [violation found as plaintiff slipped on accumulated debris on exterior scaffold platform]).

3. Industrial Code 12 NYCRR 23-2.1(a)(1)

Industrial Code section 12 NYCRR 23-2.1 governs "maintenance and housekeeping," with subsection (a) governing the "storage of material or equipment" and providing that:

> (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.

Absent any evidence that the pipe on which Mr. Baron tripped was not "building material" or part of a pile of material, defendants do not establish that this section of the Code is inapplicable or was not violated (*see Pereira v New School*, 148 AD3d 391 [1st Dept 2017] [triable issue as to whether piece of concrete deposited on plywood on floor was properly stored]; *Costa v State*, 123 AD3d 648 [2d Dept 2014] [defendant failed to establish that pile of wood on which plaintiff stepped was properly stored]; *White v Farash Corp.*, 224 AD2d 978 [4th Dept 1996] [dismissal of claim properly denied as plaintiff stepped on piece of iron left on floor by other workers]).

C. Common-law Negligence and Labor Law § 200 Claims

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). It states, in pertinent part:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of

> all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (1) when the accident results from the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition on the premises (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.,* 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

Here, Mr. Baron's accident was caused when he tripped on a piece of pipe that allegedly had been lying on the ground for several days, which implicates a dangerous condition on the premises (*Prevost v One City Block LLC*, 155 AD3d 531 [1st Dept 2017] [as plaintiff slipped on loose pipe on ground, relevant issue was whether pipe constituted dangerous condition, and accident did not implicate means and methods analysis as loose pipe not created by manner in which plaintiff performed work]).

Where an injury stems from a dangerous condition inherent in the premises, an owner may be liable in common-law negligence and under Labor Law § 200 "'when the owner [or contractor] created the dangerous condition [causing an injury] or when the owner [or contractor] failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice'" (*Bradley v HWA 1290 III LLC*, 157 AD3d 627, 630 [1st Dept 2018], quoting *Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]).

Here, defendants' main argument is that the pipe was an open and obvious condition, of which Mr. Baron was aware since he had seen the pipe on the ground days earlier, and that, therefore, they cannot be held liable in negligence. However, whether the condition was open

and obvious does not negate defendants' liability but rather must be considered in relation to Mr. Baron's comparative negligence (*Maza*, 13 AD3d at 65 ["(l)iability under section 200 is not negated by plaintiff's awareness that workers were throwing debris into the courtyard, or by the 'open and obvious' nature of any danger; rather, these factors go to plaintiff's comparative negligence"]; *Tulovic v Chase Manhattan Bank, N.A.*, 309 AD2d 923, 924 [2d Dept 2003] ["the fact that the (unsafe condition was) open and obvious does not negate (defendant's) duty to maintain its premises in a reasonably safe condition"]).

Defendants also fail to discuss, much less prove, that they did not create or have notice of the pipe before the accident, and only raise the issue for the first time in their reply papers, which is improper (*see Savlas v City of New York*, 167 AD3d 546 [1st Dept 2018] [city failed to demonstrate that its employees did not create or have actual or constructive notice of alleged dangerous condition and therefore Labor Law 200 and common-law negligence claims were not dismissed; alternative argument that defect was open and obvious found unavailing]).

Defendants therefore fail to establish their entitlement, prima facie, to an order summarily dismissing plaintiff's Labor Law § 200 and common-law negligence claims.

D. Plaintiff Elizabeth Baron's Derivative Claims

Defendants seek dismissal of Mrs. Baron's derivative claims if all of Mr. Baron's claims against them are dismissed. As discussed above, several of his claims are not dismissed and, therefore, this branch of defendants' motion is denied.

The parties remaining arguments have been considered and were found unavailing.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is decided as follows:

(1) on plaintiffs' Labor Law § 240(1) claim, the motion is granted and the claim is severed and dismissed;

(2) on plaintiffs' Labor Law § 241(6) claim, the motion is granted to the extent of dismissing all of the cited Industrial Code violations except Industrial Code 12 NYCRR 23-1.7(e)(2) and 23-2.1(a)(1);

(3) on plaintiffs' Labor Law 200 and common-law negligence claim, the motion is denied; and

(4) on plaintiffs' derivative claim, the motion is denied;

it is further

ORDERED, that the clerk enter judgment accordingly; and it is further

ORDERED, that the parties appear for a trial scheduling/settlement conference on October 25, 2023 at 11:30 a.m.

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6/26/2023
DATE

DAVID B. COHEN, 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