SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS **PART** 57TR

Justice

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KEVIN BATTCHER, DOROTHY BATTCHER,

Plaintiff,

- v -

ERY NORTH TOWER RHC TENANT LLC,HUDSON YARDS CONSTRUCTION LLC,TISHMAN CONSTRUCTION CORPORATION,

Defendant.

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INDEX NO. 157133/2020

MOTION DATE 07/28/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

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

BACKGROUND

Plaintiff commenced this action under New York Labor Law seeking damages for personal injuries alleged sustained when he slipped on a patch of ice and twisted his knee while working as an electrician.

On June 16, 2023, Plaintiff moved for partial summary judgment as to liability under Labor Law §241(6). On July 28, 2023, the motion was fully briefed, marked submitted and the court reserved decision.

The motion is denied for the reasons set forth below.

ALLEGED FACTS

This action arises from an accident that occurred on February 12, 2020, at a construction site known as Hudson Yards, Building E, located at 35 Hudson Yards in the Borough of Manhattan. Hudson Yards Construction LLC was the owner of the project. Tishman

Construction Corporation ("Tishman") was the general contractor. Plaintiff was employed at the site as a Local 3 electrician by S.J. Electric, Inc.

On the date of his accident, Plaintiff arrived at the jobsite at approximately 6:30 a.m. and went to the SJ. Electric shanty. Plaintiff's task that day was to continue working in a "service room" located one or two floors above where the shanty was located. Plaintiff and a crew of 4-6 electricians were engaged in pulling cable to the service room that morning.

Plaintiff's accident happened at approximately 9:30 a.m. when he went to use a porta potty located next to an exterior wall of the room. Plaintiff exited the service room, made a right turn down a small corridor, and then entered an open space that constituted the "landing zone" for an Alamac, where workers would exit and enter the hoist. Exterior walls had not yet been constructed in the area and it was exposed to the elements.

As Plaintiff made a turn toward the restroom, his foot slipped on a small patch of ice. In his attempt to avoid falling, Plaintiff twisted his right knee. Plaintiff regularly saw Tishman laborers clearing ice and snow at the jobsite, particularly in the area immediately outside the Alamac. The laborers typically did ice and snow removal in the morning. He does not recall seeing any laborers doing so on the date of his accident.

Plaintiff testified that the patch of ice was small "looked like wet concrete floor." Plaintiff did not see ice anywhere else on the job site that day, does not recall what the weather was like, and has not offered any evidence tending to show how long the small patch existed. No one else saw the accident or the ice.

After his accident, Plaintiff used the restroom and returned to work. He also called his foreman and reported the icy condition and his accident.

DISCUSSION

To prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 (1986). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Alvarez*, 68 NY2d at 324.

Proof of a violation of an alleged Industrial Code Rule is insufficient to establish liability under Labor Law § 241(6). The Plaintiff must also prove that "someone within the chain of the construction project was negligent in not exercising reasonable care, or acting within a reasonable time, to prevent or remediate the hazard". *Rizzuto v. Wenger Contr. Co.*, 91 N.Y.2d 343, 351 (1998); *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 501 (1993). As the Court of Appeals has made clear, "once it has been alleged that a concrete specification of the Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused [the] plaintiff's injury". *Id.* at 350.

Plaintiff has failed to meet his *prima facie* burden because there is no evidence as to how long the ice was present. Plaintiff's assertion that the ice was in place for at least the two and a half hours that the work site was open has no evidentiary support in the record and is nothing more than conjecture. Moreover, Plaintiff's own testimony that it was "just a small patch" and

"just looked like wet concrete floor" creates questions of fact as to whether any person on the job knew or should have known of the ice.

A violation of Industrial Code regulations only constitutes some evidence of negligence, there must also be evidence that defendants or someone in the chain of the construction project had notice of the condition or should have known of the condition. *DeStefano v. Amtad New York, Inc*., 269 A.D.2d 229 (1st Dept. 2000); *McCague v. Walsh Const*., 225 A.D.2d 530 (2d Dept, 1996).

WHEREFORE it is hereby:

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

ORDERED that, within 20 days from entry of this order, Defendants shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that this constitutes the decision and order of this court.

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8/7/2023
DATE

SABRINA KRAUS, J.S.C.

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