SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **47**

Justice

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JUAN LOPEZ,

Plaintiff,

- v -

METROPOLITAN TRANSIT AUTHORITY, NEW YORK TRANSIT AUTHORITY, THE CITY OF NEW YORK

Defendants.

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INDEX NO. 162233/2015

MOTION DATE 05/29/2018

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 140, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 160, 161, 163, 164, 166, 180, 181, 182, 183, 184, 185, 186, 187, 190

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Plaintiff, who worked as a latherer for non-party Capable Construction Corp., commenced this action after he was injured on March 3, 2015 while working on the Second Avenue Tunnel installing rebar. At the time of his accident, plaintiff was carrying a large piece of steel rebar on his shoulder while walking on an 18-inch wide beam that was elevated about 4 feet off the ground. Plaintiff was carrying the rebar in order to install it on the wall when he allegedly tripped on a piece of debris on the beam and fell to the ground. Plaintiff's co-worker, Marcos Alcantara, was walking on the beam directly behind plaintiff and witnessed the accident.

Plaintiff commenced this action on November 30, 2015 and asserted claims under Labor Law 240(1), Labor Law 241(6) and Labor Law 200. In 2018, the parties cross-moved for summary judgment and the motions were denied as untimely by order dated June 3, 2019. On February 11, 2021, the First Department reversed this court's decision on the summary judgment motions and remanded it to this court for a decision on the merits.

With regard to the first claim, Labor Law § 240(1) imposes liability on contractors and owners for exposing workers to certain elevation-related hazards and failing to provide adequate safety devices for these risks (*Keenan v. Simon Property Group, Inc.*, 106 A.D.3d 586, 587 [1st Dep't 2013]). In order for a plaintiff to demonstrate entitlement to summary judgment on an alleged violation of Labor Law § 240(1), he must establish that there was a violation of the statute, which was the proximate cause of the workers' injuries" (*Cherry v. Time Warner, Inc.*, 66 A.D.3d 233, 236 [1st Dep't 2009] [internal citations omitted]). Here, plaintiff asserts that he should have been provided with a ladder to transport the rebar. However, according to the testimony of plaintiff's co-worker Mr. Alcantara, the ladders were not required in order for them to perform their work (Affirmation of Robert J. Paliseno dated May 29, 2018, Exh. K [Alcantara Dep. at 75]). Indeed, plaintiff's supervisor Fritz Jean-Pierre testified that the ladders were used to ascend and descend the beams, otherwise the ironworkers would have to climb up and down the beams "monkey bar style" (Paliseno Aff., Exh. J [Jean-Pierre Dep. at 36-37, 46]). However, plaintiff was injured while walking on the beam, not while ascending or descending the beam, and thus plaintiff has not shown that defendants' alleged failure to provide a ladder or any other safety device enumerated in the statute was a proximate cause of the accident (*Nazario v. 222 Broadway, LLC*, 28 N.Y.3d 1054, 1055 [2016]; *Morera v. New York City Transit Auth.*, 182 A.D.3d 509, 510 [1st Dep't 2020]). Likewise, defendants' argument that plaintiff was the sole proximate cause of his accident lacks merit as they have failed to show that the ladders were readily available to plaintiff or that they would have prevented the accident (*Pena v. Jane H. Goldman Residuary Trust No. 1*, 158 A.D.3d 565 [1st Dep't 2018]).

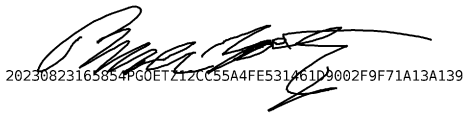
Turning to the Labor Law 241(6) claim, plaintiff does not oppose the defendants' motion to dismiss its Labor Law 241(6) claim with respect to Industrial Code Sections 12 NYCRR 23-

1.5, 12 NYCRR 23-1.6, and 12 NYCRR 23-2.2, and thus these provisions are deemed abandoned (*see Perez v. Folio House, Inc.*, 123 AD3d 519, 520 [1st Dep't 2014]). With regard to 12 NYCRR 23-1.7(f), plaintiff's accident did not occur while he was descending or ascending to a different level and thus this provision is inapplicable. With regard to 23-1.7(d), plaintiff claims that he tripped, rather than slipped, on debris and thus this section is inapplicable. Likewise, Industrial Code Section 23-2.1 is inapplicable here as the alleged debris which caused plaintiff to trip was not being stored (*Buckley v. Columbia Grammar and Preparatory*, 44 A.D.3d 263, 272 [1st Dep't 2007]). With regard to the violations of 23-1.2(e), there is an issue of fact as to whether there was debris on the beam which caused plaintiff to fall as plaintiff's co-worker, Mr. Alcantara, testified that he did not see any debris on the beam and plaintiff himself did not see the debris until it was on the ground (Exh. K [Alcantara Dep. 67-69; Exh. D [Plaintiff 50-h Hrg. at 15-16]).

Finally, with regard to plaintiff's Labor Law 200 claim, neither party has met its *prima facie* burden for summary judgment on this claim. Plaintiff has not met his *prima facie* showing because he has not presented evidence that defendants had constructive notice of the tripping hazard by establishing that the debris was on the beam for a sufficient length of time for defendants to discover and remedy the issue. Likewise, defendants have failed to come forward with any evidence to show when the area in question was last inspected in order to demonstrate a lack of constructive notice (*see Quigley v Port Auth. of N.Y. & N.J.*, 168 AD3d 65, 68 [1st Dept 2018]). Accordingly, it is

ORDERED that the defendants' motion for summary judgment is granted to the extent that the Labor Law 241(6) claim premised on violations of 12 NYCRR 23-1.5, 23-1.6, 23-1.7(d), 23-2.1, and 23-2.2, are dismissed and is otherwise denied; and it is further

ORDERED that the plaintiff's cross-motion for summary judgment is denied.



8/23/2023
DATE

PAUL A. GOETZ, 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