SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. James E. d'Auguste **PART 55**

Justice

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DENIS MCATEER,

Plaintiff,

- v -

L&L HOLDING COMPANY, LLC, COMREF 380 LLC, CLARION PARTNERS, LLC, TISHMAN CONSTRUCTION CORPORATION, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, RAD & D'APRILE CONSTRUCTION CORP.,

Defendants.

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INDEX NO. 156920/2018

MOTION DATE 11/04/2022

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

This is an action to recover damages for personal injuries allegedly sustained by a construction worker on May 1, 2018, when, while working at a construction site located at 390 Madison Avenue, New York, New York (the Premises), a cinderblock that was allegedly a part of a temporary stairway, shifted underneath him and caused him to fall.

In motion sequence number 005, defendants L&L Holding Company, LLC (L&L), Comref 380 LLC (Comref), Clarion Partners, LLC (Clarion), Tishman Construction Corporation (TCC), Tishman Construction Corporation of New York (TCCNY), Tishman Interiors Corporation (TIC) (together, the Tishman Defendants), and RAD & D'Aprile Construction Corp. (RAD) (collectively, defendants) move, pursuant to CPLR 2221 (d), for leave to reargue this Court's September 29, 2022, Decision and Order ("the Prior Order") regarding the parties' prior

summary judgment motions (motion sequence numbers 003 and 004) and upon reargument, pursuant to CPLR 3212, granting summary judgment dismissing the complaint as against them.

Relevant Procedural History

By notice of motion dated May 5, 2021, plaintiff, Denis McAteer moved, pursuant to CPLR 3212, for summary judgment in his favor as to liability on his common-law negligence and Labor Law Sections 200, 240(1) and 241(6) claims against defendants (motion sequence number 003). Shortly thereafter, defendants moved, pursuant to CPLR 3212, for summary judgment dismissing the same claims (motion sequence number 004).

In the Prior Order (NYSCEF Doc. No. 135), this Court granted plaintiff relief in his favor against L&L, Comref and TIC on the Labor Law Section 240(1) claim and otherwise denied plaintiff's motion (*id.* at 11). As to defendants' motion, the Court dismissed Clarion from the case and further granted dismissal as to the remaining defendants on the Labor Law Section 240(1) claim and otherwise denied defendants' motion (*id.* at 12).

Defendants now move to reargue the Prior Order. Specifically, defendants argue that the Court misapprehended the facts and the law with respect to the following: (1) defendants' sole proximate cause and recalcitrance arguments; (2) purported overlooked questions of fact surrounding plaintiff's accident; (3) purported overlooked facts regarding defendants' lack of notice; and (4) purported misapplied facts regarding L&L, the Tishman Defendants and RAD's status as proper Labor Law defendants.

ANALYSIS

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the Court in determining the prior motion" (CPLR

2221[d][2]). A party may not use a motion to reargue as a vehicle to advance arguments different from those provided on the original application (*see Mariani v. Dyer*, 193 A.D.2d 456, 458 [1st Dep't 1993]), or to argue a new theory of law or raise new questions not previously advanced (*Levi v. Utica First Ins. Co.*, 12 A.D.3d 256, 258 [1st Dep't 2004]).

Proper Labor Law Defendants

Defendants argue that the Court overlooked that L&L, the Tishman Defendants and RAD are not owners, general contractors, or agents of either.

The Prior Order addressed this exact issue and determined that TIC (one of the Tishman defendants) – while named a construction manager – acted as a general contractor on the project at the Premises (the Project) (Prior Order, p. 3-4). Defendants raise no specific argument regarding what fact or issue the Court misapprehended with respect to this entity.

Indeed, defendants do not raise any specific argument with respect to the other defendants – L&L, TCC, TCCNY or RAD – or their status, instead they merely rely on the conclusory statement that these entities are "not owners, general contractors or agents of either" (defendants' affirmation in support, ¶42).

As defendants have not sufficiently set forth how the Court misapprehended or overlooked this issue, that part of defendants' motion to reargue seeking dismissal of L&L, the Tishman Defendants and RAD on the ground that they are not proper Labor Law defendants must be denied.

The Labor Law § 240(1) Claim

Defendants' argument on the Section 240(1) claim are twofold. First, they argue that the Court misapprehended the facts and overlooked the law with respect to defendants' sole proximate cause defense – i.e. plaintiff chose to use the cinderblocks when a safer route was

available – which should result in dismissal of this claim. Second, they argue that, if plaintiff was not the sole proximate cause of his accident, plaintiff's grant of summary judgment was improper based on questions of fact that the Court overlooked.

Sole Proximate Cause/Recalcitrance

"[W]here a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability" (*Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 39 [2004]). That said, a plaintiff cannot be the sole proximate cause of his accident where a defendant "failed to provide an adequate safety device in the first instance" (*Hoffman v. SJP TS, LLC*, 111 A.D.3d 467, 467 [1st Dep't 2013]; *see also Nimirovski v. Vornado Realty Trust Co.*, 29 A.D.3d 762 [2d Dep't 2006]).

Here, the Prior Order addressed whether the cinderblocks constituted a temporary stairway. First, the Court noted that:

> "Non-party Smith's deposition testimony reflects that the cinderblocks were 'placed at the loading dock to enable like stairs, that's the only way they were set up. They were staggerdly [sic] stored so you could use them as steps'"

(Prior Order, at 9). Next, the Court noted that cinderblocks set up as stairs have been found to be temporary stairs – a safety device for the purposes of Labor Law Section 240(1) (*see McGarry v. CVP I LLC,* 55 A.D.3d 441, 441 [1st Dep't 2008] [makeshift cinderblock staircase "served as the 'functional equivalent of a ladder'"), and that a "fall down a temporary staircase is the type of elevation related risk the statute was intended to cover" (*id.* at 441 [citation omitted]).

In other words, in the Prior Order the Court determined that the subject cinderblocks were the functional equivalent of a ladder, and that said safety device failed to prevent plaintiff from falling, in violation of Section 240(1) (*Kijak v. 330 Madison Ave. Corp.*, 251 A.D.2d 152, 153 [1st Dep't 1998] ["Where [an item] is offered as a work-site safety device, it must be

sufficient to provide proper protection" and its failure will constitute a violation of Section 240(1)]).

Here, as considered in the Prior Order, plaintiff understood that the cinderblocks were a temporary stairway leading from the ground floor to the door of the loading dock. Defendants' contention that the cinderblocks were merely stacked materials and not intended to be used as a stairway was considered and was insufficient to raise a question of fact as to the nature of the cinderblocks. Specifically, defendants' contention is belied by photographic evidence showing cinderblocks stacked in the shape of stairs, and the safety logs (which predated the accident), which included photographs of the cinderblocks and noted that a proper temporary stairway, railing, and barricade needed to be installed (plaintiff's affirmation in opposition, exhibit A).

Accordingly, as set forth in the Prior Order, plaintiff had sufficiently established that the temporary cinderblock staircase shifted while he used it and caused him to fall, in violation of Labor Law Section 240(1). As such, plaintiff cannot be the sole proximate cause of his accident (*Hoffman,* 111 A.D.3d at 467).

To the extent that defendants argue that the Court overlooked their argument that plaintiff was recalcitrant, defendants are correct. While the Court refers to defendants' recalcitrance argument, the Prior Order did not fully address the issue. Accordingly, leave to reargue this issue is granted.

Upon reargument, defendants have failed to establish that plaintiff was recalcitrant. Specifically, to establish recalcitrance, a defendant must show that plaintiff "(1) had adequate safety devices available, (2) knew both that the safety devices were available and that [they were] expected to use them, (3) chose for no good reason not to do so, and (4) would not have

been injured had they not made that choice" (*Biaca-Neto v. Boston Rd. II Hous. Dev. Fund Corp.*, 34 N.Y.3d 1166, 1167-68 [2020] [internal quotation marks and citation omitted]).

While defendants argue that plaintiff refused to use the ramp leading to the door, plaintiff has asserted that said door was often locked (plaintiff's tr at 68 [noting that at the time of the accident – around 4 a.m. – "everything was locked up], 102 ["the doors are all locked. They're always locked. [The cinderblock staircase] was the only way to get up and down"], 170 ["everything else was locked. All gates were locked. All entrances were locked"]). In addition, plaintiff noted that when the door was locked, workers would use the makeshift cinderblock staircase to access/egress the Premises via the loading dock (plaintiff's tr at 96; *see also* Smith tr at 24-26). Defendants fail to establish that plaintiff was instructed that workers were not to use the cinderblock staircase to enter the Premises when the doors were locked early in the morning. Defendants also have not established that the primary entrance/egress door was unlocked at the time of plaintiff's accident, such that the door was available for plaintiff's use, or that he failed to use the door for no good reason.

Accordingly, defendants have not established that plaintiff was recalcitrant.

Next, defendants' repeatedly note that the accident was unwitnessed. While this issue was not explicitly discussed in the Prior Order, it is unavailing. Absent inconsistent statements or testimony about how the accident occurred, "[t]hat the accident was unwitnessed does not preclude summary judgment" (*Casabianca v. Port Auth. of N.Y. & N.J.*, 237 A.D.2d 112, 113 [1st Dep't 1997]; *Franco v. Jemal*, 280 A.D.2d 409, 410 [1st Dep't 2001]). Plaintiff's testimony that he fell when a cinderblock shifted underneath him is unopposed, and defendants point out no specific testimony contradicting plaintiff's version of the accident.

Purported Overlooked Questions of Fact

Next, defendants argue that the Court improperly granted plaintiff relief on his Section 240(1) claim against Comref, L&L and TIC on the ground that factual disputes existed that should prevent a finding in plaintiff's favor on this claim.

Defendants provide a list of purported fact disputes that prevent a finding, as a matter of law, that Labor Law Section 240(1) applies to plaintiff's accident and was violated.[1] Some of the alleged factual disputes were addressed in the Prior Order and the remainder fail to raise questions of fact relevant to Section 240(1).

Specifically, the first issue raised appears to apply only to L&L and fails to set forth why L&L was not "involved with the subject project" (affirmation in support, p18). Issues two through five are immaterial to a determination under section 240(1). Issues six and eight were

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[1] Specifically, defendants list the following disputes in their affirmation in support (NYSCEF Doc. No. 123, ¶ 67):

"67 . . .

- [1] Whether any other entities other than Tishman Interiors Corporation, as the construction manager, and ComRef 380 LLC, as the owner, were involved with the subject project.
- [2] Whether defendants supervised plaintiff's work on the jobsite.
- [3] Whether the subject loading dock was barricaded and netted.
- [4] Whether plaintiff's co-worker, David Smith, was involved in a similar incident and complained to Mr. Polemeni.
- [5] Whether the doors to enter and exit the jobsite were locked or open.
- [6] Whether proper safety devices were provided in compliance with Labor Law § 240(1).
- [7] Whether any applicable Industrial Code sections were violated.
- [8] Whether the cinderblocks were used as a makeshift staircase or just stacked in the area.
- [9] Whether RAD owned and placed the cinderblocks at the location where the incident occurred."

addressed and determined in the Prior Order. Issue seven applies only to Labor Law Section 241(6). Finally, issue nine is addressed to RAD – an entity against whom plaintiff's Section 240(1) claim was dismissed.

Accordingly, defendants have failed to set forth any question of fact that the Court purportedly overlooked regarding the grant of plaintiff's motion as against Comref, L&L or TIC. Therefore, leave to renew on this issue is denied.

The Labor Law § 241(6) Claims

Defendants argue that the Court overlooked or misinterpreted facts and law with respect to the Labor Law Section 241(6) claims against them.

In the Prior Order, the Court determined only that there were questions of fact regarding whether the alleged Industrial Code provisions were applicable to plaintiff's accident. The Court primarily based this on the dispute between the parties' experts. As defendants note, however, there is a threshold of applicability that the Court needs to review with respect to each Industrial Code provision (*Kelmendi v. 157 Hudson St., LLC*, 137 A.D.3d 567, 568 [1st Dep't 2016], quoting *Messina v. City of New York*, 300 A.D.2d 121, 123 [1st Dep't 2002] ["'The interpretation of an Industrial Code regulation and determination as to whether a particular condition is within the scope of the regulation present questions of law for the court'"]).

Accordingly, defendants' motion to reargue the Labor Law Section 241(6) claims is granted.

Labor Law Section 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."

Section 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 N.Y.2d 343, 348 [1998]; *see also Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501–502 [1993]). Importantly, to sustain a Labor Law Section 241(6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross*, 81 N.Y.2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*Annicaro v. Corporate Suites, Inc.*, 98 A.D.3d 542, 544 [2d Dep't 2012]).

As an initial matter, in the underlying motions, plaintiff lists multiple violations of the Industrial Code in the bill of particulars. Except for Sections 23-1.7 (f), 23-1.15, 23-1.16, 23-1.30, 23-2.1 and 23-2.7 (b) and (e), plaintiff did not seek affirmative relief or oppose their dismissal. These uncontested provisions are deemed abandoned (*see Kempisty v. 246 Spring St., LLC*, 92 A.D.3d 474, 475 [1st Dep't 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"]). The Court will now address the remaining claims.

Industrial Code 12 NYCRR 23-1.7 (f)

Section 23-1.7 (f) governs vertical passages. It is sufficiently specific to support a Labor Law Section 241(6) claim (*see Torkel v. NYU Hosps. Ctr.*, 63 A.D.3d 587, 590 [1st Dep't 2009]). It provides, in pertinent part, as follows:

> "Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation . . ."

Here, on reargument, defendants' have failed to establish as a matter of law that this provision was not violated. Specifically, defendants argue that the cinderblock stairway did not constitute a passageway to another level because it was only a four-foot difference. In support of this they rely on *Torkel,* 63 A.D.3d 587, which was a case that involved a fall from a sidewalk curb to the road surface. The facts in Torkel are not present in the instant case (*see Lelek v. Verizon N.Y., Inc.*, 54 A.D.3d 583, 584 [1st Dep't 2008] [three-foot height difference between areas implicated section 23-1.7 (f)]).

Defendants' reliance on *Miranda v. NYC Partnership Hous. Dev. Func Co., Inc.,* 122 A.D.3d 445 (1st Dep't 2014) is also unavailing. *Miranda* involved a worker who fell from a ladder while performing work atop that ladder. Unlike here, the ladder in *Miranda* was not purportedly provided as a means of access to a different level and the plaintiff was not attempting to access another level.

Accordingly, defendants have failed to establish entitlement to summary judgment dismissing this claim.

Industrial Code 12 NYCRR 23-1.15 and 23-1.16

Industrial Code Section 23-1.15 governs safety railings. Section 23-1.16 governs safety belts and harnesses. Both provisions are sufficiently specific to sustain a Labor Law Section

241(6) claim. These sections do not apply where the safety devices were not provided in the first place (*Dzieran v. 1800 Boston Rd., LLC*, 25 A.D.3d 336, 337 [1st Dep't 2006] [Sections 23-1.15 and 23-1.16 "which set standards for safety railings, safety belts and life nets, respectively, do not apply because plaintiff was not provided with any such safety devices"]).

As plaintiff was not provided with such devices, these two sections do not apply to plaintiff's accident as a matter of law. Accordingly, defendants are entitled to summary judgment dismissing that part of the Labor Law Section 241(6) claim predicated upon violations of Industrial Code Sections 23-1.15 and 23-1.16.

Industrial Code 12 NYCRR 23-1.30

Industrial Code Section 23-1.30 governs "illumination." It is sufficiently specific to support a Labor Law Section 241(6) claim (*Murphy v. Columbia Univ.*, 4 A.D.3d 200, 202 [1st Dep't 2004]). It provides the following:

> "Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction . . . but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass."

Here, defendants note that testimony establishes that temporary lighting was installed in the area in compliance with this provision. Plaintiff's testimony that the area was dark, without more, is insufficient to establish that this provision was violated (*Cahill v. Triborough Bridge & Tunnel Auth.*, 31 A.D.3d 347, 349 [1st Dep't 2006] ["conclusory and nonspecific assertions . . . that the area was "dark" . . ." was "insufficient to create an inference that the amount of lighting fell below the specific statutory standard"]).

Accordingly, defendants established entitlement to summary judgment dismissing that part of the Labor Law Section 241(6) claim predicated on a violation of Section 23-1.30.

Industrial Code 12 NYCRR 23-2.1

Section 23-2.1 governs the storage of materials. While plaintiff does not specify which section he seeks relief under, the facts of this accident limit it to a purported violation of Section 23-2.1 (a) (1).[2]

Section 23-2.1 (a) (1) provides as relevant, that "[a]ll 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 . . . stairway . . ."

Here, plaintiff has alleged – and the Court has found – that the subject cinderblocks were a temporary stairway, not a material pile (*see e.g. Alvarado v. 450 W. 14th St. Corp.*, 2017 WL 4777615, *3 [Sup Ct, Queens County 2017] [holding that moving defendants were entitled to dismissal of the Section 23-2.1 (a) (1) claim because a "ladder is not a 'material pile'" and "it did not obstruct a 'passageway, walkway, stairway or . . . thoroughfare'"] [quoting *Rodriguez v. D&S Bldrs., LLC*, 98 A.D.3d 957, 959 [2d Dep't 2012]).

Accordingly, defendants have established that Section 23-2.1 (a) (1) is inapplicable to the subject accident and are entitled to summary judgment dismissing that part of the Labor Law Section 241(6) claim predicated upon alleged violations of the same.

Industrial Code 23-2.7 (b) and (e)

Sections 23-2.7 (b) and (e) govern temporary stairway construction and protective railings for such temporary stairways, respectively. Defendants merely argue that the subject provisions do not apply because the accident did not occur in a stairway. Given the findings of this Court in the Prior Order, underscored herein, this argument is unpersuasive.

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[2] Section 23-2.1 (a) (2) governs weight limits of stored materials and how to store such materials at a height. Section 23-2.1 (b) governs disposal of debris.

Accordingly, defendants are not entitled to summary judgment dismissing these provisions.

The Common-Law Negligence and Labor Law § 200 Claims

Defendants argue that the Court overlooked that they did not have any notice of a hazard. This is incorrect. In the Prior Order, the Court noted the following:

> "Non-party AMS Safety ("AMS" was hired as the site safety contractor; they noted and reported the hazardous cinderblocks as a safety violation almost one month prior to this incident . . . and again just one day before the incident . . . and such logs were sent to TIC"

(Prior Order, at 6). A review of the safety logs also established that the recommendation was that the subject cinderblocks be replaced with a proper temporary stairway.

Notably, defendants do not single out any specific defendant or explain how that specific defendant did not have the alleged notice, instead electing to group all defendants together.

Given the foregoing, defendants have failed to show that the Court overlooked the issue of constructive notice.

As defendants raise no other argument regarding common-law negligence or Labor Law Section 200, that part of its motion seeking to reargue said claims is denied.

The parties remaining arguments were considered and were found unavailing.

CONCLUSION AND ORDER

Accordingly, it is hereby

ORDERED that the motion of defendants L&L Holding Company, LLC (L&L), Comref 380 LLC (Comref), Clarion Partners, LLC (Clarion), Tishman Construction Corporation (TCC), Tishman Construction Corporation of New York (TCCNY), Tishman Interiors Corporation (TIC) (together, the Tishman Defendants), and RAD & D'Aprile Construction Corp. (RAD)

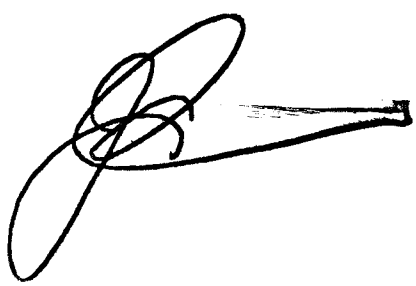
(collectively, defendants) for leave to reargue plaintiff's prior summary judgment motion (motion sequence number 003) and their own prior summary judgment motion (motion sequence number 004) is granted with respect to the Labor Law Sections 240(1) and 241(6) claims, and is otherwise denied; and it is further

ORDERED that, upon reargument with respect to the Labor Law Section 240(1) claims, the Court adheres to its Prior Order, dated September 29, 2022 (NYSCEF Doc. No. 135); and it is further

ORDERED that, upon reargument with respect to the Labor Law Section 241(6) claims, the Court rescinds that portion of the Prior Order, dated September 29, 2022, that denied defendants motion for summary judgment on plaintiff's Labor Law Section 241(6) claim, and hereby grants defendants summary judgment dismissing the Labor Law Section 241(6) claims predicated upon a violation of the Industrial Code, except for those claims predicated upon violations of 12 NYCRR 23-1.7 (f) and 23-2.7 (b) and (e); and it is further

ORDERED that reargument with respect to the common-law negligence and Labor Law Section 200 claims is denied.

This constitutes the decision and order of this Court.



10/25/2023
DATE

James d'Auguste, 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