NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART IA2

----------X

KEVON TELESFORD AND BISA TELESFORD,

Plaintiffs,

- against -

PORT AUTHORITY OF NEW YORK AND NEW JERSEY, TISHMAN/TURNER, A JOINT VENTURE, GEM MARBLE & GRANITE CORP., and GEM CONSTRUCTION & RESTORATION CORP.,

Defendants.

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Index №. 25178/2016E
Hon. **Elizabeth A. Taylor**,
Justice Supreme Court

The following papers were read on this motion **(Seq. No. 3)**

| **Sequence** | Doc. Nos. |
|---|---|
| Notice of Motion – Exhibits and Affidavits Annexed | 57-71 |
| Answering Affidavit and Exhibits, Memorandum of Law | 72-80 |
| Reply Affidavit | 81-84 |

Upon the foregoing papers, the above motion is decided in accordance with the annexed decision and order.

Dated: OCT 16 2024

Hon. _____
**Elizabeth A. Taylor, J.S.C.**

CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
MOTION IS..... ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

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DECISION and ORDER
Index No. 25178/2016E

Elizabeth A. Taylor, J.

Plaintiffs move for an Order pursuant to CPLR 3212 for partial summary judgment against defendants PORT AUTHORITY OF NEW YORK AND NEW JERSY (hereinafter, "PORT AUTHORITY"), and TISHMAN/TURNER A JOINT VENTURE (hereinafter, "TISHMAN") on plaintiffs' causes of action premised upon violation of New York Labor Law Section 240(1) and 241(6).

Plaintiff was injured on March 24, 2016, during construction at the World Trade Center Transportation Hub in lower Manhattan. At the time of the accident, plaintiff was in the process of travelling to his work area in connection with the installation of cladding on the exterior of an escalator. Plaintiff was descending an unfinished, permanent marble staircase. As he reached the bottom landing of the stairs, he stepped on what he thought was a landing covered with correx (a kind of non-weight bearing, corrugated plastic used as a protective cover during construction). The correx, however, did not cover a finished landing, but instead, had been placed over an opening. The correx bent as plaintiff's left foot sunk into the opening below. The correx did not break, but plaintiff's leg fell into a hole or opening approximately 8 to 12 inches deep. Plaintiff fell forward, turned to his left, and caught himself on a rail to prevent himself from falling. Although he did not fall to the floor, he sustained injuries to his knee.

Tomechko, a supervisor employed by defendant TISHMAN, testified at his deposition that the stair was a permanent marble staircase. All the steps had been completed other than the bottom step or landing. He did not know why the opening had been covered with correx. Tomechko testified, in substance, that the presence of the opening under correx was hazardous, and that plywood should have been placed in that area to protect from falls into the opening. Further, he stated that there was

no reason to block or barricade off this staircase, and that its use was suitable for use by the workers.

In opposition to the plaintiff's motion, Tomechko submits an affidavit which recites, contrary to his earlier testimony, that on March 24, 2016, employees of Champion (plaintiff's employer), including plaintiff, were specifically informed by him that the stairs were unfinished, and "not to utilize the bottom of the staircase when travelling to their work area." He further states that, "The unfinished flooring/landing was left uncovered as the height or step riser from the last step to the bottom of the unfinished flooring was less than 12 inches and, therefore, was not considered a hazardous opening. Additionally, Champion employees were specifically informed by me, including Mr. Telesford, not to use the bottom of the staircase due to the unfinished flooring... The piece of Corex that Mr. Telesford allegedly stepped on was being utilized by Champion as a work material to place behind the metal panels that they were installing at the time on the incident on March 24, 2016."

In addition, plaintiff submits the affidavit of Matthew Crawford, a previously unidentified witness, who was employed by non-party Gem Construction and Restoration Corp. ("GEM"), as a foreman on the World Trade Center Transportation Project. He states that "on and around March 24, 2016, I had caution tape blocking the staircase from top and bottom in order to stop Champion employees, including Kevon Telesford, and employees from other trades from using the unfinished subject staircase....On and around March 24, 2016, the subject staircase was incomplete because a piece of the marble landing was on backorder from the supplier....On and around March 24, 2016, my employees and I did not at any time install any Corex on top of the marble staircase treads on the subject staircase."

ARGUMENT

Plaintiff argues, first, that he is entitled to summary judgment under Labor Law § 240(1), which imposes liability on an owner or general contractor for failing to provide certain safety devices where the lack of those devices or a defect safety device causes a worker to be injured. Plaintiff contends that he was engaged in a protected activity at the time his accident occurred, and that he was injured as a result of a gravity-related risk, as due to the improperly placed piece of correx, plaintiff was caused to step into a 12" deep opening. Further, despite the fact that the contract between PORT AUTHORITY and TISHMAN identified TISHMAN as the Construction Manager, plaintiff maintains that TISHMAN is a proper Labor Law defendant, as TISHMAN was substantially in charge of and in supervisory control of the worksite.

Plaintiff also maintains that he has established his prima facie case entitling him to summary judgment as matter of law against PORT AUTHORITY and TISHMAN on Plaintiff's claim under Labor Law §241(6) based on violations of 12 NYCRR 23-1.7(e)(1), 23-1.7(e)(2) and 23-2.7(b). It is undisputed, plaintiff asserts, that the correx was an improper safety device that was protecting an opening over a staircase, and that the staircase that plaintiff was descending was a "passageway" that the plaintiff used during his work. Due to the defendants' failure to properly install a proper stair or a proper safety device in place of a stair, plaintiff maintains, he was exposed to a tripping/slipping hazard that caused his accident and injuries. As such, based upon applicable case law, the plaintiff contends that he is entitled to partial summary judgment on liability, pursuant to Labor Law § 241(6), against defendants PORT AUTHORITY and TISHMAN.

In opposition, defendants argue that: (1) plaintiff's accident did not result from an exposure to gravity; (2) at no point did plaintiff actually fall; (3) the "step" did not collapse; (4) the correx on which plaintiff stepped was not an enumerated device that triggers Labor Law §§ 240(1) or 241(6); (5) plaintiff did not fall through an opening; (6) the floor did not collapse; (7) plaintiff did not fall through an unprotected floor opening.

In reply, plaintiff argues that the affidavits of Tomechko and Crawford cannot be considered.

## DISCUSSION

Labor Law § 240(1) imposes a nondelegable duty upon owners and general contractors to provide safety devices to protect workers from elevation-related risks. (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 618 NE2d 82, 601 NYS2d 49 [1993]). Labor Law § 240(1) imposes upon owners, contractors and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work. Where an accident is caused by a violation of the statute, a plaintiff's own negligence will not furnish a defense; however, where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability. Thus, in order to recover under Labor Law § 240(1), the plaintiff must establish that the statute was violated and that such violation

was a proximate cause of his injury. (*Barreto v. Metropolitan Transp. Auth.*, 25 N.Y.3d 426, 430, 34 N.E.3d 815, 817, 13 N.Y.S.3d 305, 307 [2015].)

Labor Law § 240(1) "imposes absolute liability on building owners and contractors whose failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker" (Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., 18 NY3d 1, 7, 959 N.E.2d 488, 935 N.Y.S.2d 551). "Whether a plaintiff is entitled to recovery under Labor Law § 240(1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies" (id. at 7.) "The dispositive inquiry does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker. Rather, the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide protection against a risk arising from a physically significant elevation differential" (Runner v New York Stock Exch., Inc., 13 NY3d 599, 603, 922 N.E.2d 865, 895 N.Y.S.2d 279; Kandatyan v 400 Fifth Realty, LLC, 2017 N.Y. App. Div. LEXIS 8064, *3-4, 2017 NY Slip Op 07984, 1 [2d Dept. 2017] [worker pushing dolly up ramp, injured as object rolled backward, was within purview of Labor Law 240[1].)

Labor Law § 241(6) imposes on owners and contractors a nondelegable duty 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. To sustain a cause of action pursuant to Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code regulation that is applicable to the circumstances of the accident. (Yaucan v Hawthorne Vil., LLC, 2017 N.Y. App. Div. LEXIS 8088, 2017 NY Slip Op 08035 [2d Dept. 2017].) "Whether a regulation applies to a particular condition or circumstance is a question of law for the court" (Harrison v State of New York, 88 AD3d 951, 953, 931 N.Y.S.2d 662 [2d Dept. 2011]). As a prerequisite to a Section 241(6) cause of action, a plaintiff

must allege a violation of a concrete specification promulgated by the Commissioner of the Department of Labor in the Industrial Code. (DelRosario v. United Nations Fed. Credit Union, 104 A.D.3d 515, 961 N.Y.S.2d 389 [1st Dept. 2013] [citations omitted] [granting summary judgment to plaintiff based on Labor Law §241[6].)

Labor Law § 241(6) is designed to provide protection to workers engaged in renovation, excavation, or construction work (see Mordkofsky v V.C.V. Dev. Corp., 76 NY2d 573 [1990]). However, "[n]ot every employee lawfully on the property is necessarily affiliated with the construction work … or is otherwise 'frequenting the premises within the meaning of Labor Law § 241(6)' … The statutory protection does not extend, for example, to employees performing routine maintenance tasks at a building that happens to be undergoing construction or renovation" (Blandon v Advance Contr. Co., 264 AD2d 550 [1st Dept 1999]; see Panico v Advanstar Communications, Inc., 92 AD3d 656 [2d Dept 2012]).

At the outset, the statements of witnesses previously undisclosed in discovery should not be considered in opposition to a motion for summary judgment. (See Rodriguez v New York City Hous. Auth., 304 AD2d 468, 469, 758 NYS2d 53 [1st Dept 2003]; Gonzalez v 1225 Ogden Deli Grocery Corp., 158 A.D.3d 582, 584, 71 N.Y.S.3d 473, 475 [1st Dept 2018]; Epps v Bibicoff, 124 A.D.3d 1100, 1102, 2 N.Y.S.3d 645, 647 [3d Dep't 2015] [as plaintiff provided no reasonable excuse for the failure to provide witness's name as a notice witness, Supreme Court properly excluded the affidavit on summary judgment motion].) Accordingly, this Court cannot consider the statement of Crawford, a notice witness not disclosed by defendant during discovery, as to which no excuse has been proffered as to why the witness was not disclosed.

As to Tomechko's affidavit, similarly, the affidavit may not be considered as it flatly contradicts his deposition testimony that the stairway could be used by plaintiff and other workers, and he had no knowledge why the opening in the landing was covered with correx. "A party's affidavit

that contradicts her prior sworn testimony creates only a feigned issue of fact and is insufficient to defeat a properly supported motion for summary judgment (see, e.g., Phillips v Bronx Lebanon Hosp., 268 AD2d 318, 320; Kistoo v City of New York, 195 AD2d 403, 404)." (Harty v. Lenci, 294 A.D.2d 296, 298, 743 N.Y.S.2d 97, 98 [1st Dept. 2002]. )

Contrary to the defendants' arguments, the opening here presented a gravity-related hazard. "Section 240 (1) is violated when workers fall through unprotected floor openings." (*Alonzo v. Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 A.D.3d 446, 450, 961 N.Y.S.2d 91, 95 [1st Dept. 2013].) Notably, "there is no bright-line rule minimum height differential that determines whether an elevation hazard exists" (Auriemma v Biltmore Theatre, LLC, 82 AD3d 1, 9, 917 N.Y.S.2d 130 [1st Dept 2011]). In Brown v 44 St. Dev., LLC (137 A.D.3d 703, 27 N.Y.S.3d 380 [1st Dept. 2016]), the First Department granted summary judgment under Labor Law 240 to a plaintiff who fell through an opening in a latticework rebar deck to a plywood form that was 12 to 18 inches below. Here, the plaintiff fell to a distance, a few inches below his knee, which satisfies the requirement of the statute.

The fact that plaintiff prevented himself from falling does not bar recovery under Labor Law 240(1). (Fernandes v. The Equitable Life Assurance Society of the United States, 4 A.D.3d 214, 215 (1st Dept. 2004) ("[i]t does not avail defendants that plaintiff did not actually fall off of the ladder but instead was injured in preventing himself from falling"); Franklin v. Dormitory Authority, 291 A.D.2d 854, 854 (4th Dept. 2002) (where plaintiff "fell backward but was prevented from falling to the ground because his left leg became entangled in the scaffolding," "Labor Law 240[1] applies to this accident because it was caused by the failure of a scaffold while plaintiff was working at a height").

With respect to the dimensions of the hole other than depth, defendants concede that the hole was 12 inches wide by 6 feet in length. Other Departments have held that a "small" hole – one that a worker cannot fall through—presents a tripping hazard but not an elevation-related risk. For example,

in Alvia v. Teman Elec. Contr., Inc. (287 A.D.2d 421, 731 N.Y.S.2d 462 [2d Dept. 2001]), plaintiff was injured when he fell after his left leg descended into an approximately 12 inch by 16 inch hole in the floor. The Court held that the hole did not present an elevation-related hazard, but instead, constituted "the type of 'ordinary and usual' peril a worker is commonly exposed to at a construction site," quoting Misseritti v Mark IV Constr. Co. (86 NY2d 487, 489.)

As indicated in Brown v 44 St. Dev., LLC (supra, 137 A.D.3d 703, 27 N.Y.S.3d 380 [1st Dept. 2016]), the First Department does not adhere to this reasoning. The lower court decision in Brown, which was affirmed, made clear that the opening was only one square foot, but the court nevertheless granted summary judgment in favor of the plaintiff. (Brown v 44TH St. Dev., LLC, 48 Misc. 3d 234, 5 N.Y.S.3d 692 [Sup Ct, NY Co. 2015].)

Plaintiff is accordingly entitled to partial summary judgment on his claims under Labor Law 240. It is accordingly not necessary to consider the remaining claims or arguments.

Accordingly, it is hereby,

ORDERED that the motion is granted to the extent of granting plaintiffs partial summary judgment in their favor as to liability against all defendants under Labor Law 240(1), and the Clerk shall enter judgment accordingly.

This is the Decision and Order of the Court.

Dated: OCT 16 2024

Hon. Elizabeth A. Taylor, J.S.C.