Supreme Court of the State of New York
County of Kings

Part LL1M

CARLOS GARCIA,

Plaintiff,

against

85 JAY STREET (BROOKLYN) LLC, CIM NY MANAGEMENT, LLC, LIVWRK REALTY LLC, NEW LINE STRUCTURES & DEVELOPMENT LLC, AND CONSTRUCTION SAFETY REALTY GROUP INC.,

Defendants.

Index Number 511311/2022
Seq. 004–006

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed	1-3
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	4-6
Replying Affidavits	7-8
Exhibits	Var.
Other	

Upon the foregoing papers, defendants' motion for summary judgment (Seq. 004), plaintiff's motion for summary judgment (Seq. 005), and plaintiff's cross-motion to amend his pleadings (Seq. 006) are decided as follows:

Introduction and Factual Background

Plaintiff commenced this action to recover for damages he claims to have sustained on September 25, 2020, while working at a construction site located at 85 Jay Street, Brooklyn, NY. The following facts are undisputed: 85 Jay Street (Brooklyn) LLC (85 Jay) owned the premises. New Line Structures & Development LLC (New Line) was contracted to serve as the construction manager. Parkview was New Line's plumbing sub-contractor, and the plaintiff was employed by Parkview. Plaintiff, a journeyman plumber, was performing work on the nineteenth and twentieth floors of the premises on the date of the accident. There were holes, called "steamfitter's sleeves," in the floor that measured sixteen inches in diameter. Plaintiff

knew about the hole on the nineteenth floor and had originally placed the plywood on the hole himself (Garcia EBT at 59).

On the date of the accident, plaintiff knew that carpenters were working on the floor and needed to remove the plywood; plaintiff told the carpenters to replace the plywood when they finished (*id.* at 48). While carrying a bucket of tools and a drill to the gangbox to secure them overnight, plaintiff stepped into the steamfitter's sleeve (*id.* at 53–54). Plaintiff's left foot descended to approximately the level of his knee, where it was stopped by cross-piping within the sleeve (*id.* at 64).

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Amendment

Since it changes the foundations of the summary judgment analysis, the court must first address plaintiff's motion to amend. "Leave to amend the pleadings to identify a specific, applicable Industrial Code provision may be properly granted, even after the note of issue has been filed," but the plaintiff must demonstrate that the amendment has "merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant" (*Gonzalez v City of New York*, 227 AD3d 958, 961 [2d Dept 2024]).

Here, plaintiff seeks to amend his pleadings to allege a violation of Industrial Code Rule 23-1.7 (e), governing tripping hazards. The note of issue has already been filed and plaintiff

seeks to make this amendment after defendants' filed their own motion for summary judgment, to their prejudice. Moreover, the proposed amendment does not conform to the proof. Plaintiff does not testify that he tripped, but rather that he stepped into a hazardous opening—testimony that conforms with plaintiff's original pleadings alleging a violation of Rule 1.7 (b). Therefore, plaintiff's motion to amend must be denied (*see also Alvia v Teman Elec. Contr.*, 287 AD2d 421 [2d Dept 2001]).

Labor Law § 240 (1)

Liability under Labor Law § 240 (1) is "absolute" where the failure of a safety device enumerated by the statute is the proximate cause of the plaintiff's accident (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 N.Y.3d 280, 287 [2003] [citing *Haimes v. New York Tel. Co.*, 46 N.Y.2d 132, 136 (1978) and *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 500 (1993)]). The failure or absence of a plywood floor covering placed over a hole constitutes a violation of the statute (*see Gamez v New Line Structures & Development, LLC*, 218 AD3d 446 [2d Dept 2023]).

In support of his motion, plaintiff contends that he was exposed to a significant elevation-related risk (the uncovered steamfitter's sleeve) and that the absence of a covering was a statutory violation which served as at least a proximate cause of his accident.

In opposition and in support of their own motion, defendants advance essentially two arguments. The first is that the plaintiff was the sole proximate cause of this occurrence because he knew about the uncovered opening and failed to determine if the plywood cover had been returned before walking across the floor. This argument is unavailing since the carpenters, not the plaintiff, removed the plywood cover. Therefore, at most, plaintiff's actions implicate comparative fault, which is not a defense under Labor Law § 240 (1) (*Blake*, 1 NY3d at 289).

Defendants' second argument is that the hole plaintiff stepped into was not large enough for him to fall through because he weighed 450 pounds, and that it was merely an "ordinary and usual peril" common to "a construction site" (*Alvia*, 287 AD2d at 422). This argument presents an opportunity to examine the standard established by *Alvia* and its progeny. Defendants' position would require the court to predicate any statutory violation upon the dimensions of each individual plaintiff—while an unguarded opening might be a Labor Law § 240 (1) violation for a 150-pound plaintiff, the same opening would not constitute a statutory violation if the plaintiff weighed 450 pounds. Such a rule would divest some workers of their rights by virtue of their size, which runs contrary to the purpose of Labor Law § 240 (1) (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]). Moreover, this rule would relativize safety procedures in a way that cannot possibly have been the intent of the legislature (*see Vitale v Astoria Energy II, LLC*, 138 AD3d 981 [2d Dept 2016] [employing indefinite article "a" instead of definite article "the" when discussing whether the hole was large enough to fall through, albeit in the context of Section 241 (6)]).

Although defendants' argument concerning *this* plaintiff's size is unpersuasive, there is a question of fact about whether this opening was one which "a worker" could fall through to the level below, both due to its dimensions and due to the cross-piping that stopped the plaintiff's leg. Therefore, both plaintiff and defendants' motions are denied with respect to plaintiff's Labor Law § 240 (1) claim.

Labor Law § 241 (6)

To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show that he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury, (4) the proximate cause of which was a violation of an Industrial Code provision (*Moscati v*

Consolidated Edison Co. of N.Y., Inc., 168 AD3d 717, 718 [2d Dept 2019]). Plaintiff only argues with respect to the alleged violation of Rule 23-1.7 (b) and the proposed amendment, which was denied. The remaining Industrial Code provisions pleaded are, therefore, deemed waived (*Medina v 1277 Holdings, LLC*, 234 AD3d 839 [2d Dept 2025]).

Rule 23-1.7 (b) governs the proper covering of hazardous openings. Like a claim under Section 240 (1), a worker seeking to recover under Labor Law § 241 (6) based on a hazardous opening must demonstrate that the opening was large enough for "a worker" to fall through (*Vitale*, 138 AD3d at 983). Since there is a material question of fact on this issue, plaintiff's motion is denied with respect to Rule 23-1.7 (b). Defendants' motion is granted to the extent of all the alleged Industrial Code violations except Rule 1.7 (b).

Labor Law § 200

"Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]), and claims are evaluated using a negligence analysis (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). Where a plaintiff alleges both a dangerous condition and dangerous methods, the court will conduct an analysis under both standards (*id.*).

Here, New Line's construction management agreement states that "[New Line] shall be responsible to Owner for all construction means, methods, [and] techniques . . . for the project" (Article III, § 3.4 [b]). This is sufficient evidence to demonstrate that New Line "bore responsibility" for the way the work was performed, and also had the authority to coordinate the trades (*Ortega*, 57 AD3d at 62). Drew Pollard, New Line's representative, testified that New Line was not notified that work was being done on the nineteenth floor and that, if New Line had notice, it would have properly coordinated the trades (Pollard EBT at 97). However, this

testimony is insufficient to avoid liability for the authority that New Line had to supervise control the work, which is not undermined by apparency of the condition (*see Torres v Accumanage, LLC*, 210 AD3d 718 [2d Dept 2022]). To the extent plaintiff knew about the uncovered sleeves and did not check the condition before traversing the work area, the issue of comparative fault is reserved for the time of trial (*Rodriguez v City of New York*, 31 NY3d 312 [2018]).

With respect to a dangerous condition, defendants argue that the condition was open and obvious, and that plaintiff's motion as to Labor Law § 200 is precluded by plaintiff's testimony that he know about the uncovered holes (*Graziano v Source Builders & Consultants, LLC*, 175 AD3d 115, 122 [2d Dept 2019]). There is a question of fact as to whether the condition was sufficiently obvious to preclude liability under Labor Law § 200; therefore, the owner's motion for summary judgment is denied, and the plaintiff's motion for summary judgment is denied with respect to the owner.

Conclusion

Defendants' motion for summary judgment (Seq. 004) is granted with respect to plaintiff's Labor Law § 241 (6) claim as predicated on all alleged Industrial Code violations except Rule 23-1.7 (b); the motion is otherwise denied.

Plaintiff's motion for summary judgment (Seq. 005) is granted with respect to his Labor Law § 200 claim against New Line with a *Rodriguez* reservation on the issue of comparative fault; the motion is otherwise denied.

Plaintiff's motion to amend (Seq. 006) is denied.

This constitutes the decision and order of the court.

July 8, 2025
DATE

DEVIN P. COHEN
Justice of the Supreme Court