

Pontrello v Skanska USA Civ. Northeast, Inc.
2025 NY Slip Op 33363(U)
September 2, 2025
Supreme Court, Kings County
Docket Number: Index No. 521942/2019
Judge: Ingrid Joseph
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At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 2nd day of September, 2025.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
VINCENT PONTRELLO,

Plaintiff,

-against-

SKANSKA USA CIVIL NORTHEAST, INC. and
SKANSKA USA CIVIL, INC.,

Defendants.
-----X

Index No. 521942/2019
Mot. Seq. Nos. 4-5

DECISION AND ORDER

The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion and Affidavits (Affirmations) Annexed____
Opposing Affidavits (Affirmations)_____
Affidavits/Affirmations in Reply_____

49-62; 88
82-87; 93-94
90-91

Upon the foregoing papers in this action to recover damages for personal injuries, Vincent Pontrello (plaintiff) moves, pursuant to CPLR 3212, for summary judgment on his Labor Law § 241 (6) cause of action, as predicated on the alleged violation of 12 NYCRR 23-1.7 (e) (1) (Motion Seq. No. 4). Skanska USA Civil Northeast, Inc. and Skanska USA Civil, Inc. (collectively, defendant) jointly cross-move, for summary judgment dismissing plaintiff’s Labor Law § 241 (6), cause of action as predicated on the alleged violation of 12 NYCRR 23-1.7 (e) (1) (Motion Seq. No. 5).

On November 1, 2018, plaintiff, a foreman electrician employed by a nonparty subcontractor, was working inside the electrical distribution room of a subway station under renovation when, while traversing the concrete floor of the room, he stepped with his right foot into the floor-embedded water drain which measured 8 to 11 inches in diameter and which was missing a cover or grating.¹ Defendant was the general contractor for the NYCTA’s project for the

¹ See Defendant’s “Incident Report – Statement,” filled out and signed by plaintiff on November 2, 2018, describing his accident as follows: “[While] [w]orking in [the] electrical closet [*i.e.*, the electrical distribution room], [I] stepped

Renewal of Three Stations on the Sea Beach Line (BMT) in Brooklyn, including the Avenue U station on the “N” line which housed the electrical distribution room in which plaintiff’s accident happened.

Approximately one year later in October 2019, plaintiff commenced this action asserting, inter alia, a violation of Labor Law § 241 (6), as predicated on 12 NYCRR 23-1.7 (e) (1).² After the completion of discovery, plaintiff and defendant served the instant motion and cross-motion, respectively.

“On a motion for summary judgment, facts must be viewed ‘in the light most favorable to the non-moving party’” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). The movant “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Once this showing has been made, . . . the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Bazdaric v Almah Partners LLC*, 41 NY3d 310, 316 [2024] [internal quotation marks omitted]).

“Labor Law § 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 . . . all areas in which construction . . . work is being performed” (*Lopez v New York City Dept. of Envtl. Protection*, 123 AD3d 982, 983 [2d Dept 2014], *lv denied* 26 NY3d 905 [2015]). “As a predicate 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” (*Simmons v City of New York*, 165 AD3d 725, 729 [2d Dept 2018]). The Industrial Code provision at issue – 12 NYCRR 23-1.7 (e) (1) – “has been held to be sufficiently specific to support

on [the] uncovered floor drain that was covered with an MTA floor mat” (NYSCEF Doc No. 83). Plaintiff authenticated the entirety of the contents of (as well as his signature on) Defendant’s Incident Report at page 57, line 16 to page 59, line 20 of his pretrial deposition (NYSCEF Doc No. 55). *See also* Plaintiff’s C-3 Employee Claim Report to the Workers’ Compensation Board, signed by plaintiff on May 10, 2019, describing his accident as follows: “[I] [s]tepped into an uncovered floor drain (MTA soft mat covering)” (NYSCEF Doc No. 85). Plaintiff likewise authenticated the description of his accident and his signature on the C-3 Report at page 97, line 19 to page 100, line 25 of his pretrial deposition (NYSCEF Doc No. 55).

² *See* Plaintiff’s Supplemental Verified Bill of Particulars, dated May 15, 2024, ¶ 6 (part of NYSCEF Doc No. 54).

a cause of action under Labor Law § 241 (6)” (*Lundy v Austein*, 170 AD3d 703, 704 [2d Dept 2019]).

12 NYCRR 23-1.7 (e) (1) (Protection from general hazards – Tripping and other hazards – Passageways) provides, in relevant part, that “[a]ll *passageways* shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping” (emphasis added). “A ‘passageway’ [which is not defined in the Industrial Code] is commonly . . . understood to be ‘a typically long narrow way connecting parts of a building[,]’ and synonyms include the words corridor or hallway” (*Quigley v Port Auth. of New York*, 168 AD3d 65, 67 [1st Dept 2018] [internal citation omitted]). Stated another way, a passageway is “a defined walkway or pathway used to traverse between discrete areas as opposed to an open area” (*Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1250 [4th Dept 2013]; *Cody v State of NY*, 82 AD3d 925, 928 [2d Dept 2011] [an open work area is not a passageway]).

Defendant has demonstrated prima facie that 12 NYCRR 23-1.7 (e) (1) does not apply to the facts of this case because plaintiff’s accident happened in the electrical distribution room (akin to an open work area), rather than in a passageway (*see Bittrolff v City of New York*, 237 AD3d 1024, 1026 [2d Dept 2025]; *Freyberg v Adelphi Univ.*, 221 AD3d 658, 659-660 [2d Dept 2023]; *Stewart v Brookfield Off. Props., Inc.*, 212 AD3d 746, 747 [2d Dept 2023]; *Cody v State*, 82 AD3d 925, 928 [2d Dept 2011]; *Castillo v Starrett City, Inc.*, 4 AD3d 320, 322 [2d Dept 2004]; *see also Pereira v 504 W 34, LLC*, ___ AD3d ___, 2025 NY Slip Op 03982, *1 [1st Dept 2025]; *Smith v Extell W. 45th LLC*, 230 AD3d 1044, 1045 [1st Dept 2024]; *Borrero v ACC Constr. Corp.*, 178 AD3d 440, 441 [1st Dept 2019]).

In opposition to defendant’s cross-motion and in support of his own motion, plaintiff has failed to raise a triable issue of fact. Plaintiff’s reliance on *McCullough v One Bryant Park*, 132 AD3d 491 (1st Dept 2015), is unavailing because the accident in *McCullough* happened when the worker “stepped into an uncovered ‘drain hole’ in the floor directly behind the threshold [of an interior room], causing him to fall to the floor” (*id.* at 492). Here, however, the drain into which plaintiff stepped into was located “fairly dead center” in the electrical distribution room which (in his estimation) measured 7-8 feet deep and 20-30 feet wide, as more fully set forth in the margin.³

³ See Plaintiff’s EBT transcript, page 41, lines 10-21 (“Q. . . And, approximately, how big was the room? A. I’m going to say 7 to 8 feet deep when you walked in . . . and these are just estimates – 10 to 15 feet to the left and 10 to 15 feet to the right maybe. Q. And when you say, ‘10 to 15 feet to the left,’ ‘10 to 15 feet to the right,’ the room was a total width of about approximate[ly] . . . 20 to 30 feet if you add those up? A. Yes. . . .”); page 43, lines 20-22 (“Q. So, the

The parties' remaining contentions have been considered and found to be either without merit or moot in light of the court's determination.⁴ All relief not expressly granted herein is denied.

Accordingly, it is hereby

ORDERED that in Motion Seq. No. 4, plaintiff's motion for an order, pursuant to CPLR 3212, granting him partial summary judgment on the issue of liability on his Labor Law § 241 (6) claim, as predicated on the alleged violation of 12 NYCRR 23-1.7 (e) (1) (Protection from general hazards – Tripping and other hazards – Passageways), is denied; and it is further

ORDERED that in Motion Seq. No. 5, defendant's cross-motion for an order, pursuant to CPLR 3212, dismissing plaintiff's Labor Law § 241 (6) claim, as predicated on the alleged violation of 12 NYCRR 23-1.7 (e) (1), is granted.

This constitutes the decision and order of the court.

E N T E R,



Hon. Ingrid Joseph, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice

... was it off to [your] left, dead center, [or] to [your] right? A. I'm going to say fairly dead center.") (NYSCEF Doc No. 55).

⁴ Because the site of plaintiff's accident – the electrical distribution room – was not a passageway, the parties' additional contentions as to whether the drain was (or was not) integral to the construction/renovation work which was then performed in the station are moot. Further, plaintiff's contention (in Part II of his counsel's reply affirmation at NYSCEF Doc No. 990) that defendant's affirmative defenses of comparative negligence should be stricken because of defendant's failure to oppose to such relief in plaintiff's motion is without merit. Plaintiff never requested (either in his notice of motion or in his counsel's opening affirmation at NYSCEF Doc Nos. 49 and 50, respectively) that defendant's affirmative defenses be stricken.