SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LETICIA M. RAMIREZ** **PART** **29**

Justice

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ZACK WARNER,

Plaintiff,

- v -

TISHMAN CONSTRUCTION CORP. and CITIGROUP TECHNOLOGY, INC.,

Defendants.

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INDEX NO. 158577/2021

MOTION DATE 09/13/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 48, 49, 50, 51

were read on this motion to/for JUDGMENT - SUMMARY.

Defendants Tishman Construction Corp. (hereinafter "Tishman") and Citigroup Technology, Inc. (hereinafter "Citigroup") move pursuant to *CPLR § 3212* for an Order granting them summary judgment dismissing plaintiff's complaint. Plaintiff partially opposes the motion.

Plaintiff commenced this action on September 16, 2021, to recover from personal injuries allegedly sustained on June 4, 2021, when he was a construction worker at the Citibank building located at 388 Greenwich Street. Issue was joined on October 12, 2021. Thereafter, a preliminary conference was held on March 28, 2023, and the Note of Issue was filed on July 19, 2024.

Defendants argue that summary judgment is warranted dismissing plaintiff's *Labor Law § 240(1)* claim because plaintiff was not performing his work at an elevation requiring an enumerated protective device. Defendants further argue that plaintiff's *Labor Law § 241(6)* should be dismissed because plaintiff cannot demonstrate that defendants violated any specific section of the New York State Industrial Code for which liability may attach. Finally, defendants seek dismissal of plaintiff's common-law and *Labor Law § 200* claims on the grounds that plaintiff's accident arose out of the manner and method in which plaintiff and his co-worker were performing their work in spraying the fireproofing material.

In reviewing plaintiff's opposition, the Court notes that plaintiff does not oppose defendants' motion to dismiss the *Labor Law § 240(1)* claim. Plaintiff also does not oppose defendants' motion to dismiss the *Labor Law § 200* and common-law negligence claims as asserted against Citigroup *only*. However, plaintiff opposes defendants' motion seeking to dismiss his *§ 241(6)* claim against both defendants, and his *§ 200* and common-law negligence claims as against Tishman.

Plaintiff argues dismissal should be denied on his *§ 241(6)* claim predicated on violations of Industrial Code *§§ 23-1.7(d)* and *23-1.7(e)(1)-(2)* because at a bare minimum an issue of fact exists as to whether the over spraying of the fireproofing material constituted an "accumulation of dirt or debris" within the meaning of the subject regulations. Plaintiff further argues that defendants' sole argument that the over spraying of the fireproofing material was integral to plaintiff's work is unavailing in light of relevant caselaw stating that the "integral to work" defense does not apply where it is demonstrated there was a "safer alternative" to accomplishing the work. Moreover, plaintiff argues that the "integral to work" defense does not apply where the evidence demonstrates that cleaning the over sprayed fireproofing material from the stairway would not have impeded the work being performed, the stairs were not being used as a work platform (only as a passageway), and the over spraying served no functional purpose to the work being performed. Finally, plaintiff argues that any comparative

fault on the part of plaintiff in waiting until the end of the day to clean up the overspray does not absolve the defendants of liability.

Regarding his *§ 200* and common-law negligence claims against Tishman, plaintiff argues issues of fact preclude summary judgment from being granted where the accumulation of the spraying constituted a premises hazard, and therefore Tishman can be held liable even absent a lack of its control over the means and methods of the work being performed if they had control of the worksite and actual or constructive notice of the hazard. In the alternative, plaintiff argues that, should this Court consider this case a purely "means and methods" case, summary judgment should also be denied because the contract between Citigroup and Tishman made Tishman "solely" responsible for supervising a site safety program, and therefore Tishman had a non-delegable duty to ensure safe methods of work were employed and authority to direct subcontractors to stop using unsafe methods.

In reply, defendants argue that plaintiff created the condition he slipped on due to the work he was performing, and therefore the Industrial Code sections plaintiff cites are inapplicable under the "integral to work" defense. Defendants further argue that plaintiff's reliance on *Bazdaric v. Almah Partners*, 41 N.Y.3d 310, 241 A.D.3d 391 (2024), is misplaced where, unlike in the case at bar, the defective condition in *Bazdaric* was not being created by the ongoing work the plaintiff was performing. Finally, defendants contend plaintiff's premises argument is also unavailing since the condition was the result of the manner and method in which plaintiff was performing his work, and therefore, in order for Tishman to be held liable, Tishman must have had control over the manner and method of the work. Lastly, regarding plaintiff's *§ 200* and common-law negligence claims, defendants argue that plaintiff does not cite any caselaw to support his proposition that the accident was the result of a defective condition on the premises and not due to a condition resulting from the manner and method plaintiff performed his work in failing to have a cleaner present and/or stopping himself from working to clean up the unintended areas.

On October 3, 2023, plaintiff appeared for a deposition. Thereat, plaintiff stated he was working for non-party Long Island Concrete (Tishman's sub-contractor) on the date of his accident (NYSCEF Doc. #39 at 2-12). Plaintiff was an employee of Long Island Concrete for 8 months prior to his accident, where he performed mostly fireproofing work (*Id.* 14:16-19; 16:13-21). Plaintiff's accident occurred in the maintenance room located on the roof of the Citibank building located at 388 Greenwich Street, where he had been working for about a week prior to his accident (*Id.* 15:10-21; 20:4-6). Plaintiff's supervisor was Bobby, and the only other person on the worksite for Long Island Concrete was Ryan, whom plaintiff was working with (*Id.* 17:18-20; 18:8-12; 18:14-20; 19:7-14).

Plaintiff worked in the machine room for the entire week prior to his accident and described the machine room as being huge, "more like a floor level" (*Id.* 22:8-13). Plaintiff described the equipment he was using as a mixer with a hose and gun connected to it (*Id.* 37:3-9). The mixer was a square where fireproofing would go into to be mixed with water and pumped while someone turned the machine on and off as you spray (*Id.* 37:10-18). Because the hose was ten to fifteen feet long, the mixer would have to be moved depending on the area being sprayed (*Id.* 37:19-25). The second person would have to be "manning" the mixer while the first was spraying (*Id.* 38: 2-5). Plaintiff was the person spraying while Ryan was feeding the mixer and Bobby would "pop in and out" (*Id.* 20:7-14; 21:2-4; 38:6-25). To perform the spraying, Ryan would pass the gun to plaintiff through the pipes that were above, and plaintiff would pass it back to Ryan when he would stop spraying, so that plaintiff was never carrying the gun or the hose on his way down the stairs (*Id.* 53:16-23; 53:24-54:5). When the accident occurred, plaintiff was not carrying anything in his hands (*Id.* 54:6-10).

Plaintiff's accident occurred on the stairs leading to the boiler room inside the maintenance room (*Id.* 23:16-19). Plaintiff's work required him to use the stairs to access the pipes on the ceiling to walk on them and access the area that needed spraying (*Id.* 23:24-24:8; 26:2-11). Specifically, the staircase had a platform with a railing which plaintiff would go over and onto the pipes to spray fireproofing on the steel beams located on the ceiling (*Id.* 27:3-6; 28:7-29:7; 30:14-20; 33:9-23). At the time of his accident, plaintiff was going down the stairs (*Id.* 29:14-18). He had been spraying the beams for about three hours prior to his accident and had gone up and down the stairs about three or four times prior to the accident (*Id.* 34:16-20; 35:7-10).

Plaintiff stated his accident occurred between 8:30 and 9:00am, but he had started working at 6:00am (*Id.* 39:2-8). Plaintiff stated he was having issues with the mixture where it clogged twice prior to his accident (*Id.* 39:20-40:12). This was happening because Ryan was not adding enough water to the mixture (*Id.* 40:13-19). Plaintiff stated that, as far as the spraying itself, he did not use any tarps or barriers to prevent fireproofing material from getting sprayed onto unintended areas (*Id.* 40:24-41:7). He stated that this was the cleaner's job; yet they had not had a cleaner available for the week they've been working in the maintenance room. Plaintiff had mentioned this to his foreman, Bobby, but no cleaner was provided, and Bobby would come to assist plaintiff and Ryan with the cleaning (*Id.* 41:8-25). Prior to starting his work on the date of his accident, plaintiff told Bobby that they needed a cleaner (*Id.* 42:19-43:12).

Plaintiff stated that, on the date of his accident, the fireproofing was unintentionally getting on the steps, the platform, the floor, and pipes (*Id.* 42:4-13). There was fireproofing material getting on the stairs for the approximately three hours before the accident where plaintiff had also used the stairs to go up and down (*Id.* 44:7-13; 45:11-17). Plaintiff testified that, on the occasions when he was going down the stairs prior to his accident, he had noticed the fireproofing material on them, and he did not do anything to clean the stairs because "that's the cleaner's job" (*Id.* 45:18-23). Plaintiff also testified that on prior workdays where there was also no cleaner to assist, he and Ryan would usually wait until the job was completed to clean it up and that there were no occasions when they didn't clean it (*Id.* 45:24-46:6; 62:9-17). On the occasions where plaintiff was using the stairs to go down and was observing fireproofing material on the stairs, plaintiff would go down carefully and use the handrail to assist him (*Id.* 46:7-14). Plaintiff finally stated that it was not possible for him and Ryan to stop the work for five minutes to clean the steps "'cause when you're the sprayer, you spray and when you're a mixer, you mix" and, "if the foreman comes in, you have to get the job done in a time [sic], in time to finish it" (*Id.* 47:2-10; 48:4-9).

Plaintiff testified that, when he was going up and down the steps on the occasions prior to his accident, he observed the fireproofing getting all over the steps and he would have to step on it to get down the stairs (*Id.* 50:5-15). When asked whether by stepping on the fireproofing plaintiff was tracking it to other locations, plaintiff stated that the fireproofing "was all over the floor, all over the stairs, the platform" (*Id.* 50:16-20).

Plaintiff finally testified that his accident occurred when he fell down the stairs after his right foot slipped on the first step of the stairs when he attempted to go down (*Id.* 56:2-17; 65:21-24). Plaintiff's hand was on the handrail, but he was unable to prevent himself from slipping further (*Id.* 56:18-25). When plaintiff slipped, he fell backwards and slid down the stairs to the bottom (*Id.* 66:5-17). After plaintiff fell to the ground, he got up with Ryan's assistance and noticed that blood was coming from his right glove (*Id.* 67:9-68:4). Plaintiff took the glove off and noticed that the blood was coming from his index finger (*Id.* 68:5-16). When plaintiff went down the stairs, he was looking at the steps and saw his foot step onto the fireproofing material (*Id.* 57:22-58:5).

On February 29, 2024, the deposition testimony of Greg DeBobes was held. Mr. DeBobes has been a laborer foreman for Tishman for at least 30 years (NYSCEF Doc. #41 at 9:20-25). At the Greenwich project, Mr. DeBobes was the "secondary or … backup" site safety manager to Brendan Carol from CSRG safety (*Id.* 16:16-19; 57:18-24). Mr. DeBobes came in at the end of the project when it was about 90-95% complete, filling in for the CSRG site safety manager that was moving on to another job (*Id.* 15:20-18:6). During the time he was on the project (approximately a year), Mr. DeBobes would perform walk-throughs on a regular basis (*Id.* 32:14-19). The walk-throughs would consist of ensuring no one would be working in a dangerous situation and he performed these walk-throughs every day, approximately twice a day (*Id.* 33:14-16; 38:7-13). Mr. DeBobes testified that, if he observed something not to seem right to him on the jobsite, he would first speak to the person performing the work and, if he didn't receive satisfactory results from him, he would speak to the worker's foreman (*Id.* 33:17-23). If the issue wasn't resolved, Mr. DeBobes would speak to the third-party site safety consultant (*Id.* 34:3-9). While Mr. DeBobes testified that he had the authority to intercede where necessary—notwithstanding that there was a third-party safety company—he also testified that he would not tell the subcontractor's employees "don't do [the work] this way, do it that way, because that's up to a contractor to – their means and methods. It's up to

them to figure out that. We don't tell them how to do the things, but if they are doing something that's not safe, then we would tell them change their procedures or make it safe, whatever" (*Id.* 34:17:35:5).

When asked about the process of applying fireproofing material, Mr. DeBobes acknowledged that because the material is sprayed with a nozzle, "it is not all getting on the steel, some of it lands on the floor" (*Id.* 26:18-27:5). The material that lands on the unintended areas is like an oatmeal texture, wet, and dries within several hours (*Id.* 27:6-16). The unintended areas would need to be cleaned off and protected to prevent it from being sprayed (*Id.* 27:17-28:3). Mr. DeBobes testified that workers wouldn't use plastic protection for the floor or stairs—this protection would be only for the pipes, duct or wall—and that, depending on the size of the job, a cleaner would need to be employed to clean the floors or stairs (*Id.* 28:5-17; 28:23-29:5). Mr. DeBobes testified that, if he had observed during his walkthroughs, fireproofing material covering the metal stairs, he would have been prompted to speak to the workers performing the work to make sure they cleaned up (*Id.* 72:10-20).

To prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (*Winegard v. New York Univ. Med. Ctf.*, 64 N.Y.2d 861 [1985]; *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). Absent such prima facie showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 [1984]). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 [1st Dept. 2007], citing *Alvarez*, 68 N.Y2d. at 324).

"On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v. Citibank, N.A.*, 64 A.D.3d 477, 478 [1st Dept. 2009]; *see also Sheehan v. Gong*, 2 A.D.3d 166, 168 [1st Dept. 2003]. And "all of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v. Grasso*, 50 A.D.3d 535, 544 [1st Dept. 2008]).

Labor Law § 200 "codifies landowners' and general contractors' common-law duty to maintain a safe workplace" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505, 618 NE2d 82, 601 NYS2d 49 [1993]). "Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144, 950 NYS2d 35 [1st Dept 2012]). "Where … the accident arises … from a dangerous premises condition, a property owner is liable under Labor Law § 200 when the owner created the dangerous condition … or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9, 919 NYS2d 129 [1st Dept 2011] [internal quotation marks omitted]). "It is settled law that where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under section 200 of the Labor Law (*Lombardi v. Stout*, 80 N.Y.2d 290, 604 N.E.2d 117, 590 N.Y.S.2d 55 [1992]). Similarly, where the dangerous condition arises from a subcontractor's methods or materials, "recovery against the … general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation" (*See Reilly v. Newireen Assocs.*, 303 A.D.3d 214, 756 N.Y.S.2d 192 [1st Dept. 2003]).

Labor Law § 241(6) "requires owners and contractors to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501, 618 N.E.2d 82, 601 N.Y.S.2d 49 [1993]. "[T]he duty to comply with the Commissioner's regulations is nondelegable" (*Id.*, 81 N.Y.2d 502). "Labor Law § 241 (6) is, in a sense, a hybrid, since it reiterates the general common-law standard of care and then contemplates the establishment of specific detailed rules through the Labor Commissioner's rule-making

authority" (*Id.* 81 N.Y.2d 503). Traditionally, provisions that merely incorporate the general common-law standard are treated differently from provisions containing specific commands and standards (*See Ross*, supra at 503). "The latter have been held to create duties that are nondelegable … while the former do not" (*Id.*).

The "integral-to-the-work" defense applies equally to Industrial Code *§§ 23-1.7(e)(1)* and *23-1.7(e)(2)* (See *Krzyzanowski v. City of New York*, 179 A.D.3d 479, 118 N.Y.S.3d 10 [1st Dept. 2020]). "The integral to the work defense applies to things and conditions that are an integral part of the construction, not just to the specific task a plaintiff may be performing at the time of the accident" (*Ruisech v. Structure Tone Inc.*, 208 A.D.3d 412, 174 N.Y.S.3d 367 [1st Dept. 2022]; see also *Krzyzanowski v City of* New York, 179 AD3d 479, 480-481, 118 NYS3d 10 [1st Dept 2020]).

Industrial Code *§§ 23-1.7(d)* states that "Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slipper condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

Industrial Code § 23-1.7(e)(1) states 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." This provision establishes a non-delegable duty and standard of conduct which supports a *Labor Law § 241(6)* claim (See *Corbi v. Avenue Woodward Corp.*, 260 A.D.2d 255, 688 N.Y.S.2d 523 [1st Dept. 1999]).

Industrial Code § 23-1.7(e)(2) states, regarding working areas, that "parts of floors, platforms and similar areas where persons who work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed. "This regulation is sufficiently specific to support a Labor Law § 241 (6) claim" (*Smith v. Extell W. 45th LLC*, 230 A.D.3d 1044, 1045, 219 N.Y.S3d 262 [1st Dept. 2024]; see also *Corbi*, supra).

Here, defendants argue that the Industrial Code sections enunciated by plaintiff are inapplicable because the unintended spraying of the stairs was an "integral part of the work" being performed by plaintiff. However, in light of *Badzaric v. Almah Partners LLC*, 41 N.Y.3d, 232 N.E.3d 1244, 209 N.Y.S.3d 310 (2024), the "integral work" defense does not apply to the circumstances of this case. In *Badzaric*, the Court of Appeals held that the "integral work" defense applies "only when the dangerous condition is inherent to the task at hand" and "not … when a defendant or third party's negligence created a danger that was avoidable without obstructing the work or imperiling the worker" (*Id.* at 320). The Court of Appeals also held that "[t]he doctrine … recognizes that certain work assignments are, by their nature, dangerous but still permissible, and [therefore] the particular commands of the Industrial Code may not apply if they would make it impossible to conduct the work" (*Id.* at 318). Finally, the Court of Appeals stated that the "integral work" defense "does not … absolve a defendant of liability for … us[ing] … an avoidable dangerous condition or for fail[ing] to mitigate the danger, …, if preventive measures would not make it impossible to complete the work" (*Id.* at 321).

Here, plaintiff has submitted sufficient evidence to demonstrate that the employment of a cleaner to remove the excess fireproofing material from the stairs could have been implemented without making his work impossible to complete. Mr. DeBobes's own deposition testimony acknowledges that, depending on the size of the job, a cleaner would be necessary to ensure that the floors and stairs would be cleaned while the spraying of the fireproofing material was being performed. At the very least, there is an issue of fact as to whether the size of the job required a cleaner[1]. Therefore, because the evidence demonstrates that the defendants could have

[1] Compare this matter to *Galazka v. WFP One Liberty Plaza Co., LLC*, 55 A.D.3d 789, 865 N.Y.S.2d 689 [2nd Dept. 2008], where the Second Department found that defendants were properly awarded summary judgment dismissing plaintiff's *§ 241(6)* claims based on Industrial Code *§§ 23.1-7(d)* and *(e)(2)* because the wet plastic plaintiff slipped on was an integral part of the asbestos removal project plaintiff was working. In *Galazka*, the moving defendants demonstrated that the plastic was designed and required to collect the accumulation of asbestos fibers during the asbestos removal project, and that safety regulations required the asbestos fibers to be constantly wet to prevent them from filling the air.

implemented preventive measures (i.e., a cleaner) to mitigate the slipping hazard presented by the fireproofing landing on unintended areas (e.g., stairs), the defendants cannot avail themselves of the "integral work" defense, warranting denial of their motion seeking dismissal of plaintiff's *§241(6)* claim.

Defendants' arguments that the *Bazdaric* decision is somehow limited to its facts because it does not involve a plaintiff where the work he was performing was creating the defective condition that caused his accident is unavailing. Whether the defective condition was created by the plaintiff's work or by the defendant is immaterial. *Labor Law § 241(6)* applies to owners and contractors and "the duty to comply with the Commissioner's regulations is nondelegable" (*Ross, supra,* 81 N.Y.2d 502).

Next, the Court finds that Tishman has failed to establish its *prima facie* entitlement to summary judgment regarding plaintiff's *Labor Law § 200* and common-law negligence claims against it. While the evidence unequivocally establishes that this matter falls under the "means and methods" and not the "premises defect" category of cases, Mr. DeBobes' testimony demonstrates that he exercised the degree of control and supervision over the project to warrant liability to attach under *Labor Law § 200* and common-law negligence claims. Notably, Mr. DeBobe's deposition testimony establishes that he was the site safety manager at the project, that he had authority to direct subcontractors to stop using unsafe methods, that he could intervene if the subcontractors failed to act, and that the overspraying of the fireproofing material on the stairs would be a circumstance where he would be prompted to exercise his safety authority. In *Brown v. Tishman Constr. Corp. of N.Y.,* 226 A.D.3d 529, 208 N.Y.S.3d 600 (1st Dept. 2024), the First Department found that Tishman was not entitled to dismissal of plaintiff's *Labor Law § 200* and common-law negligence claims where Tishman's representative testified that he had authority to stop any work he deemed to be unsafe (*Id.* at 531). Like in *Brown*, the record here demonstrates that Tishman's representative also had the authority to stop any work he deemed hazardous, and therefore an issue of fact is presented whether Tishman had the requisite level of control and supervision over plaintiff's work to warrant liability to attach under *Labor Law § 200* and common-law negligence.

Accordingly, it is

ORDERED: Defendants' motion to dismiss plaintiff's *Labor Law § 240(1)* claim against them is hereby granted,

ORDERED: Defendants' motion to dismiss plaintiff's *Labor Law § 200* and common-law negligence claim against Citigroup is hereby granted,

ORDERED: Defendants' motion to dismiss plaintiff's *Labor Law § 241(6)* claims are denied; and it is further

ORDERED: Defendants' motion to dismiss plaintiff's *Labor Law § 200* and common-law negligence claims against Tishman are hereby denied.

This constitutes the decision and Order of this Court.

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9/25/25
DATE

LETICIA M. RAMIREZ, 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