| **Sereno v Smitell LLC** |
| --- |
| 2025 NY Slip Op 33757(U) |
| October 6, 2025 |
| Supreme Court, New York County |
| Docket Number: Index No. 153571/2023 |
| Judge: Leticia M. Ramirez |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication. |

**SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY**

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

***Justice***

---------------------------------------------------------------------X

ANTHONY SERENO,

Plaintiff,

- v -

SMITELL LLC, EXTELL DEVELOPMENT COMPANY, and TOTAL HOME IMPROVEMENT SERVICES, INC.,

Defendants.

---------------------------------------------------------------------X

SMITELL LLC and EXTELL DEVELOPMENT COMPANY,

Third-Party Plaintiff,

-against-

LENDLEASE (US) CONSTRUCTION LMB INC.,

Third-Party Defendant.

---------------------------------------------------------------------X

**INDEX NO.** 153571/2023

**MOTION DATE** 03/03/2025

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

Third-Party Index No. 595498/2023

The following e-filed documents, listed by NYSCEF document number (Motion 001) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71

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

Plaintiff moves pre-Note of issue for an order pursuant to *CPLR § 3212*, granting him summary judgment against defendants Smitell, LLC and Extell Development Company (hereinafter "Smitell" and "Extell") on the issue of liability on his *Labor Law § 241(6)* claim and dismissing their affirmative defenses of sole proximate cause and culpable conduct. Smitell, Extell, Total Home Improvement Services, Inc. (hereinafter "Total Home") and third-party defendant Lendlease (US) Construction LMB Inc. (hereinafter "Lendlease") oppose the motion.

Plaintiff commenced this action on April 19, 2023, to recover for personal injuries allegedly sustained on September 14, 2022, when plaintiff tripped and fell on warped, upturned, and protruding Masonite boards covering the entire floor of a five-foot-wide passageway while performing construction work at 217 West 57th Street in Manhattan. After Smitell and Extell joined issue on May 31, 2023, and defendant Total Home on August 4, 2023, Smitell and Extell commenced a third-party action against Lendlease on June 1, 2023. Lendlease interposed its Answer to the third-party complaint on July 29, 2024. Prior to the filing of the within motion, a preliminary conference was held on April 9, 2024, and a compliance conference on August 21, 2024. Status conferences were subsequently held on April 2, 2025, and July 9, 2025.

Plaintiff argues that defendants Smitell and Extell violated *Labor Law § 241(6)* predicated on *Industrial Code § 23-1.7(e)(1)* when they permitted Masonite boards to become "warped, upturned, and protruding" on the service entrance floor of the subject premises, thereby causing plaintiff's fall. In opposition, Smitell and Extell contend that plaintiff's motion is procedurally defective under *22 NYCRR § 202.8-g*, which requires the inclusion of a Statement of Material Facts on any motion for summary judgment. They further contend that plaintiff's motion should be denied, as they were not the owners of the building where plaintiff's accident occurred for purposes of Labor Law liability. Specifically, they state that the building is a condominium owned by Central Park Tower Condominium since July 2019. Moreover, they contend that the Masonite boards were protective floor coverings integral to the work being performed and therefore liability cannot attach under *Labor Law § 241(6)*. Lastly, defendants argue that plaintiff's motion seeking to dismiss their affirmative defense should be denied where recent caselaw determined that, when a plaintiff testifies that he was "looking forward" at the time of the accident, it is a question for jury to consider whether plaintiff contributed to his accident.

In opposition to plaintiff's motion, Total Home and Lendlease argue, *inter alia*, that plaintiff's motion is premature, warranting denial as necessary discovery remain outstanding. On the merits, they contend issues of fact preclude summary judgment in favor of plaintiff where caselaw has determined that Masonite boards are integral to the work on the construction site.

In reply, plaintiff contends that the motion is not premature, as no statement of facts is required since the statute has been repealed. Plaintiff also contends that defendants have had the advantage of submitting their witnesses' testimonies via affidavits rather than submit them to a deposition and they've had 2 ¾ years to investigate plaintiff's accident. Regarding Smitell's argument that it is not the "owner" for purposes of the Labor Law, plaintiff contends that, even if Smitell organized the building as a condominium before the completion of the construction, it is not immunized from Labor Law liability. Finally, the plaintiff contends that in *Bowden v. Summit Glory Prop. LLC* the First Department held that the "integral to work" defense does not apply to Masonite floor where the boards constitute a tripping hazard.

"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 § 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.*).

*Industrial Code § 23-1.7(e)(1)* states regarding "Tripping and other hazards:" "Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered."

Here, the Court finds that plaintiff's motion is not premature in light of *Guzman-Saquisili v. Harlem Urban Dev. Corp.,* 231 A.D.3d 685 (1st Dept. 2024). Defendants have not established that they "needed proof that was within the exclusive knowledge of plaintiff." Additionally, the parties' submissions establishes that plaintiff was deposed twice (i.e., November 18, 2024, and May 7, 2025), allowing for Lendlease's new counsel to appear for the deposition on May 7th. Moreover, Smitell's and Extell's opposition stems on two main points: whether (1) they are the appropriate owner and/or general contractor for Labor Law purposes and (2) whether liability may attach under "integral work" defense. Both of these legal arguments can easily be supported by submissions within the knowledge and possession of the defendants.

The Court further finds that plaintiff's motion is not procedurally defective as no Statement of Facts is required given that the statute has been repealed as of May 6, 2025, effective July 7, 2025 (See *NYCRR § 202.8-g*).

The Court of Appeals in *Guryev v. Tomchinsky,* 20 N.Y.3d 194, 981 N.E.2d 273, 957 N.Y.S.2d 677 (2012) reiterated that "condominium apartments are owned by individual unit owners" and "ownership of the premises where the accident occurred—standing alone—is not enough to impose liability under Labor Law § 241(6) where the property owner did not contract for the work resulting in the plaintiff's injuries ..." (*Id.* at 20 N.Y.3d 201). The Court of Appeals has "insisted on some nexus between the [non-contracting] owner and the worker, whether by lease agreement or grant of an easement, or other property interest" (*Id.;* citing *Morton v. State of New York*, 15 N.Y.3d 50, 56, 930 N.E.2d 271, 904 N.Y.S.2d 350 [2010]).

Here, while Smitell contracted with Lendlease to build the subject project via an Agreement for Construction Management Services dated December 13, 2017, plaintiff's own submissions contain an Amended and Restated Declaration of Condominium dated October 21, 2020 (hereinafter "Declaration") demonstrating that the building was converted into a condominium under the ownership of Central Park Tower Condominium as of July 2019. Moreover, a review of plaintiff's deposition further demonstrates that approximately a year prior to plaintiff's accident, plaintiff and his co-workers were required to use the back entryway where the accident happened "when the building got turned over and tenants were coming in" (NYSCEF Doc. #41 at 50:3-7). Plaintiff's deposition further establishes that the Masonite boards were laid down and maintained by Total Homes (*Id.* 53:16-54:10). Therefore, "[i]n keeping with the vesting of exclusive control of a condominium's common elements in the board of managers, it is well established that a claim arising from the condition or operation of the common elements does not lie against the owners of individual units; the proper defendant on such a claim is the board of managers" (*Jerdonek v. 41 W. 72 LLC,* 143 A.D.3d 43 [1st Dept. 2016]). Thus, because plaintiff has failed to eliminate all issues of fact as to whether Smitell or Extell are the proper "owners" for

Labor Law purposes, and in light of relevant caselaw establishing that a condominium's board of managers is the proper defendant for claims arising from the use of a condominium's common elements, denial of this portion of the motion is warranted.

Next, plaintiff seeks to dismiss defendants' affirmative defenses sounding in sole proximate cause and comparative negligence. Our courts have held that an injured worker is the sole proximate cause of his injury where the worker (1) had adequate safety devices available, (2) knew both that they were available and that he was expected to use them, (3) chose for no good reason not to do so and (4) would not have been injured had he not made that choice (*Biaca-Neto v. Boston Rd. II Hous. Dev. Fund Corp.,* 34 NY3d 1166 [2020]; *Sacko v. New York City Hous. Auth.,* 188 A.D.3d 546 [1st Dept. 2020]). Here, the sole proximate cause defense is inapplicable to the facts of this case where plaintiff was not required to use any safety devices within the meaning of the Labor Law. Therefore, this defense must be dismissed.

Finally, that portion of plaintiff's motion to dismiss defendants' comparative negligence defense is denied as the Appellate Division has held that, when a plaintiff testifies that he did not observe a defective condition because he was looking straight ahead, it is "for the jury to consider whether plaintiff failed to see the … defect, thereby contributing to [his] accident" (See *Yanky v. 2839 Bainbridge Ave. Assoc. LLC,* 234 A.D.3d 583, 227 N.Y.S.3d 18 [1st Dept. 2025]; see also Plaintiff's Deposition, NYSCEF Doc. 41 at 68:11-13). Moreover, a review of the video of the accident reveals plaintiff was running prior to falling. Whether this contributed to plaintiff's fall, is an issue for the jury to resolve.

Accordingly, it is

**ORDERED:** Plaintiff's motion pursuant to *CPLR 3212* for an Order granting him summary judgment against defendants SMITELL LLC and EXTELL DEVELOPMENT COMPANY is granted solely to the extent that defendants' affirmative defense of sole proximate cause is hereby dismissed.

**ORDERED:** Plaintiff's motion is otherwise denied.

This constitutes the Decision and Order of this Court.

**10/ 6 / 2025**
**DATE**

**LETICIA M. RAMIREZ, J.S.C.**

| | | | | |
|---|---|---|---|---|
| **CHECK ONE:** | ☐ **CASE DISPOSED** | | ☒ **NON-FINAL DISPOSITION** | |
| | ☐ **GRANTED** | ☐ **DENIED** | ☒ **GRANTED IN PART** | ☐ **OTHER** |
| **APPLICATION:** | ☐ **SETTLE ORDER** | | ☐ **SUBMIT ORDER** | |
| **CHECK IF APPROPRIATE:** | ☐ **INCLUDES TRANSFER/REASSIGN** | | ☐ **FIDUCIARY APPOINTMENT** | ☐ **REFERENCE** |