SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART** **58**

Justice

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ARMANDO FLORES,

Plaintiff,

- v -

WEST 38 RES L.L.C., SITE C GC L.L.C.,

Defendants.

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INDEX NO. 152419/2021

MOTION DATE 06/19/2024, 06/20/2024

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

WEST 38 RES L.L.C., SITE C GC L.L.C.

Plaintiffs,

-against-

ECD NY, INC.

Defendant.

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Third-Party
Index No. 595569/2021

The following e-filed documents, listed by NYSCEF document number (Motion 001) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 72, 74, 76, 77, 78, 79, 80, 84

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 75, 85

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER.

Plaintiff moves (Seq. 001), pursuant to CPLR 3212, for partial summary judgment on liability under Labor Law § 241(6), alleging violations of Industrial Code §§ 23-1.22(b)(2) and 23-1.7(d).

Defendants West 38 Res LLC (West 38) and Site C GC LLC (Site C) oppose, and move (Seq. 002), for summary judgment, pursuant to CPLR 3112, dismissing the complaint in its entirety. Plaintiff opposes.

I. UNDISPUTED FACTS

On January 20, 2020, plaintiff was employed by ECD NY, Inc. (ECD), the foundation contractor at a construction project located at 555 West 38th Street, New York, New York (premises) (NYSCEF 32). West 38 owned the premises, and Site C served as the general contractor (*id.*). Richard Hall served as ECD's site supervisor, and Robert Roche was the general superintendent for Site C (NYSCEF 32). Both Hall and Roche conducted daily safety walkthroughs, and Roche had authority to stop work if unsafe conditions were observed (*id.*). A site safety contractor, Total Safety, also present at the site, maintained safety logs and prepared accident reports (*id.*).

ECD was performing foundation work in an excavation at the premise that was "wide-open," with conditions plainly visible (NYSCEF 32, 78). The foundation area consisted of an open, rocky floor, and a series of trenches that were dug for installing plumbing and utilities (*id.*). To facilitate movement across these trenches, "bridges" were in use at the site; some bridges consisted of plywood laid across boards, equipped with handrails to keep workers from stepping off the sides (*id.*).

On the date of the accident, plaintiff had been stripping concrete forms (NYSCEF 32). Late in the afternoon, while preparing to leave, he walked to return unused nails into a bucket located near a trench (*id.*). In that area, there was a ditch with wooden boards spanning it; the ditch was approximately seven feet long and about two to seven feet deep, and the boards covered the width of the trench (NYSCEF 32, 78). The boards were approximately 10 feet long and seven inches wide and were not secured or attached to each other (*id.*). As plaintiff crossed the boards over the trench, a board moved; he fell forward toward the far side, landing on his

right knee and striking his chest on a rock, and experiencing pain in his knee, arms, and chest (*id.*).

Plaintiff's Deposition (NYSCEF 41-43)

Employed by ECD, plaintiff received directions only from ECD supervisors and had no involvement with, or knowledge of, Site C or West 38 at the time of the accident (NYSCEF 41). He was walking across a wooden board laid over a trench when the incident occurred (NYSCEF 42). The trench and the boards had been in place for a couple of days, and he had seen other crossings with railings elsewhere on site (*id.*). He made this crossing near the end of the day after being told it was time to leave, choosing that spot because it was the closest route, and the other area was crowded with workers (*id.*). While he was crossing the boards without railings, one of the boards moved and he fell into the trench which was wet with water (*id.*). Before the accident, he did not complain to anyone about the boards (NYSCEF 41).

Hall Testimony

In his deposition, Richard Hall testified he served as ECD's site supervisor at the project (NYSCEF 44). He was present at the site daily and responsible for overseeing ECD's work (*id.*). Hall conducted regular walkthroughs of the site and attended safety meetings (*id.*). His responsibilities included monitoring conditions in the excavation and ensuring that ECD's work was carried out safely (*id.*). He was aware of trenches dug for plumbing and utilities and of the means workers used to cross them (*id.*).

In his affidavit, Hall affirms that, after learning of plaintiff's incident, he inspected the area within approximately 30 minutes and observed a plumbing trench about two feet wide and two feet deep, with no bridge or planking present and no water or mud (NYSCEF 77). He further states that ECD laborers were instructed daily to use bridges with railings to cross longer,

deeper trenches, or to walk around smaller trenches (*id.*). Hall also relates that an ECD supervisor told him two coworkers reported that plaintiff jumped across the trench, landed on sloped rock, and slipped, and that bridges with railings were available nearby (*id.*).

Roche Deposition

In his deposition, Robert Roche testified he served as general superintendent for Site C (NYSCEF 45). He conducted daily safety walkthroughs of the project and had authority to stop work if unsafe conditions were observed (*id.*). The excavation was open and visible, with trenches dug for plumbing and utilities (*id.*). Roche acknowledged awareness of the trench conditions and of crossing structures present on site (*id.*).

II. DISCUSSION

On a motion for summary judgment, the movant bears the initial burden of establishing, through admissible evidence, its entitlement to judgment as a matter of law by eliminating all material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the burden shifts to the opposing party to demonstrate the existence of triable issues of fact requiring a trial (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The evidence is viewed in the light most favorable to the nonmoving party (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

A. Motion Seq. 001 – Plaintiff's Motion for Summary Judgment

Plaintiff argues that he was injured while working at the premises after crossing a trench using unsecured planks that shifted beneath him, causing him to fall. He contends the planks violated the Industrial Code because they were too narrow and not secured, and that the trench was unsafe due to water creating a slippery condition, resulting in his injury.

Defendants oppose, arguing that plaintiff was not injured by slipping on unsecured planks but rather after attempting to leap across an open trench after being instructed not to. They argue that even if planks were present, plaintiff chose to use them instead of bridges with railings that were available and safe, contrary to instructions. Defendants assert that plaintiff's choice was the sole proximate cause of his accident and that they neither created nor had notice of any unsafe condition.

In reply, plaintiff reasserts there is no evidence he was instructed to use only the bridges and that he had a reasonable basis for crossing where he did, given that the bridge was farther away and crowded. He argues that defendants' position raises only his comparative negligence, which does not defeat his motion, and that defendants had authority and constructive notice through daily inspections to correct the unsafe planks.

i. Labor Law 241(6) Standard

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, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998] [internal quotations omitted]). To prevail on a Labor Law 241(6) claim, the plaintiff must establish that there was a violation of rule or regulation setting forth a specific standard of conduct, and that the violation was a proximate cause of the injury (*Santos v Condo 124 LLC*, 161 AD3d 650 [1st Dept 2018]; *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 268-269 [1st Dept 2007]).

"Section 241(6) subjects owners and contractors to liability for failing to adhere to required safety standards whether or not they themselves are negligent. Supervision of the work, control of the worksite, or actual or constructive notice of a violation of the Industrial Code are

not necessary to impose vicarious liability against owners and general contractors, so long as some actor in the construction chain was negligent" (*Leonard v City of New York*, 216 AD3d 51, 55-56, 188 NYS3d 471 [1st Dept 2023]). Comparative negligence is a defense, but does not bar summary judgment for plaintiff (*Rodriguez v City of New York*, 31 NY3d 312 [2018]).

ii. Industrial Code § 23-1.22(b)(2) (Ramps and Runways)

Industrial Code 12 NYCRR 23-1.22 (b) (2) provides that runways and ramps for the use of persons shall be not less than 18 inches in width and constructed of specified materials. The rule further requires that such runways and ramps be substantially supported and braced, and that "[w]here planking is used it shall be laid tight, and shall be securely nailed" (12 NYCRR 23-1.22).

Plaintiff testified that, at the time of the accident, the planks spanning the trench were approximately seven inches wide, about 10 feet long, and not nailed or secured, and that one of them shifted as he crossed, causing him to fall. As defendants submit no proof to controvert plaintiff's testimony, plaintiff demonstrates that the planks did not satisfy the minimum width or security requirements of § 23-1.22(b)(2). Courts have held that the provision applies to boards or planking used as walkways or crossings at construction sites, and that planks narrower than 18 inches or unsecured may support liability (*see Marte v Tishman Constr. Corp.*, 223 AD3d 527 [1st Dept 2024]; *Sotarriba v 346 W. 17th St. LLC*, 179 AD3d 599 [1st Dept 2020]).

Defendants respond that plaintiff leapt and slipped on rock and that no planks were present, relying on Hall's affidavit recounting what two coworkers allegedly observed. That account is hearsay and, standing alone, cannot defeat summary judgment (*Lourenco v City of New York*, 228 AD3d 577, 582 [1st Dept 2024]); nor does Hall's inspection some 30 minutes later conclusively refute plaintiff's testimony.

Defendants further contend that even if boards were on site, they were not intended for pedestrian use because bridges with railings were available. But § 23-1.22's coverage turns on how the surface functioned in practice—i.e., whether it was used to transport pedestrian traffic—not on retrospective characterizations (*see Marte v Tishman Constr. Corp.*, 223 AD3d 527, 528–529 [1st Dept 2024]; *see also Torkel v NYU Hosps. Ctr.*, 63 AD3d 587, 590 [1st Dept 2009]).

On this record, plaintiff has established a prima facie violation of § 23-1.22(b)(2), and defendants' arguments raise, at most, credibility issues as to how the accident occurred, not whether the provision applies.

iii. Industrial Code § 23-1.7(d) (Slipping Hazards)

Industrial Code (12 NYCRR) § 23-1.7 (d) provides that "[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery 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."

Here, although the record reflects that water was present in the trench, plaintiff did not state that he slipped because of water; rather, he attributed his fall to the movement of unsecured planking. 12 NYCRR § 23-1.7 (d) applies only where a slippery condition on a qualifying walking surface causes the fall (*see Pina v Arthur Clinton Hous. Dev. Fund Corp.*, 188 AD3d 614 [1st Dept 2020]; *Potenzo v City of New York*, 189 AD3d 479 [1st Dept 2020]), and it is not applicable where the accident is attributed to a different mechanism (*cf. Purcell v Metlife Inc.*, 108 AD3d 431, 433 [1st Dept 2013] [dismissing § 241(6) claim where the relied-upon subdivision did not fit the facts). Any water in the trench was incidental to the accident and not identified by plaintiff as the cause of his fall.

Accordingly, plaintiff has not established a prima facie violation of § 23-1.7(d) and his motion for summary judgment based on this Industrial Code violation is denied.

iv. Sole Proximate Cause

Defendants argue that plaintiff was the sole proximate cause of his accident, as the planks spanning the trench were not intended to be used as a walkway, and plaintiff chose to cross them despite the availability of nearby bridges equipped with railings. They assert that plaintiff was instructed to use those bridges or walk around, and that the accident occurred because he disregarded those instructions and attempted to leap across the trench.

To prevail on a sole proximate cause defense, defendants must establish that (1) adequate safety devices were available; (2) plaintiff knew he was expected to use them; (3) he chose not to do so for no good reason; and (4) his choice caused the accident (*Gallagher v New York Post*, 14 NY3d 83 [2010]).

Here, the record does not support defendants' position. Plaintiff testified that he was never instructed to use only the "bridges" and that he was not told the planks were off-limits. Although Hall averred that safety talks were held daily, he did not identify any specific instruction directing plaintiff to avoid the planks. Even assuming the bridges were available, there is no proof that plaintiff knew he was required to use them exclusively. Plaintiff further testified that the bridge was farther away and crowded with other workers, which provided a reasonable basis for crossing where he did. At most, defendants' assertions raise an issue of comparative negligence, which does not bar liability under Labor Law § 241(6) (*Rodriguez v City of New York*, 31 NY3d 312 [2018]).

Accordingly, defendants fail to establish that plaintiff's actions were the sole proximate cause of the accident, and their opposition does not defeat plaintiff's prima facie showing of liability under § 23-1.22(b)(2).

B. Motion Seq. 002 – Defendants' Motion for Summary Judgment

Defendants' motion to dismiss plaintiff's Labor Law § 241(6) claim is academic in light of the court's determination on Seq. 001 as to a violation of 12 NYCRR § 23-1.22(b)(2). However, as discussed above, plaintiff's accident did not involve a violation of section 23-1.7(d), and thus defendants are entitled to dismissal of that claim.

Therefore, only plaintiff's Labor Law § 200 and common-law negligence claims remain to be determined.

Defendants argue that they cannot be held liable under Labor Law § 200 or common-law negligence because plaintiff's accident arose solely from his own actions, that they neither created nor had notice of any dangerous condition, and that plaintiff's work was directed exclusively by his employer, ECD, not by defendants.

Plaintiff opposes, arguing that defendants' motion must be denied because they conceded an awareness of the conditions in the excavation site at the premises, including the open trenches that plaintiff needed to cross. Plaintiff also contends that defendants conceded responsibility for the site, as well as the authority to correct unsafe conditions. Plaintiff argues, at minimum, triable facts remain as to defendants' negligence.

Labor Law § 200 is a codification of the common-law duty imposed upon owners and general contractors to provide construction site workers with a safe place to work (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316–317 [1981]). Cases involving Labor Law § 200 fall into two broad categories: those where workers are injured as a result of dangerous or defective

premises conditions at a work site, and those involving the manner in which the work is performed (*Cappabianca v Skanska USA Bldg. Inc*., 99 AD3d 139, 144 [1st Dept 2012]; *see Rosa v 47 E. 34th St. (NY), L.P.*, 208 AD3d 1075 [1st Dept 2022]).

Where an injury stems from the manner in which the work is performed, an owner or general contractor will be held liable under Labor Law § 200 only if it had the authority to supervise or control the performance of the work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). General supervisory authority is insufficient to impose liability unless the defendant had control over the manner in which the plaintiff performed the injury-producing work (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *see also Diaz v P&K Contr., Inc.*, 224 AD3d 405 [1st Dept 2024]; *Torres-Quito v 1711 LLC*, 227 AD3d 113 [1st Dept 2024]).

Where an injury is caused by a dangerous condition on the premises, a defendant may be liable under Labor Law § 200 if it either created the condition or had actual or constructive notice of it (*see Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]; *see also Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]). Constructive notice may be found where the condition is visible and apparent and existed for a sufficient length of time before the accident such that it could have been discovered and remedied (*see Gordon v Am. Museum of Nat. History*, 67 NY2d 836, 837 [1986]).

Defendants have established prima facie that they did not supervise or control plaintiff's work, based on plaintiff's testimony that he received instructions only from his employer, ECD, and that he had never heard of defendants. Consistent with this testimony, defendants demonstrate that they exercised no authority over the manner in which plaintiff performed his

work. Accordingly, liability may not be imposed on defendants under a means-and-methods theory (*see Diaz*, 224 A.D3d 405; *Torres-Quito*, 227 AD3d 113).

Triable issues exist, however, as to whether plaintiff's accident was caused by a dangerous condition on the premises of which defendants had constructive notice. Plaintiff contends that unsecured boards spanning a trench shifted beneath him, causing him to fall. He argues that Roche performed daily safety walkthroughs, was aware of the excavation and trench crossings, and had authority to remove unsafe boards if they were not safe for use. Defendants observe that plaintiff never complained about the boards and that any hazard was "instantaneous and emergent." They also argue that the boards were not placed or maintained by them and were not intended as a means of crossing trenches.

On this record, factual disputes remain as to whether unsecured boards spanning the trench constituted a dangerous condition that was visible and apparent during routine inspections and whether defendants failed to remedy it. These issues preclude summary dismissal of plaintiff's Labor Law § 200 and common-law negligence claims under a premises-condition theory (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]; *Gordon v Am. Museum of Nat. History*, 67 NY2d 836, 837 [1986]).

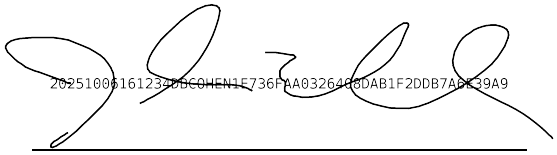
III. CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment on liability under Labor Law § 241(6) (Seq. 001) is granted to the extent of finding defendants liable for a violation of 12 NYCRR § 23-1.22 (b) (2), and is otherwise denied; and it is further

ORDERED that defendants' motion (Seq. 002) for summary judgment is granted as to plaintiff's Labor Law § 241(6) claim predicated on 12 NYCRR § 23-1.7(d), and that claim is severed and dismissed, and the motion is otherwise denied, and it is further

ORDERED that the parties are to appear for a settlement/trial scheduling conference on January 28, 2026, at 9:30 a.m. at 71 Thomas Street, Room 305, New York, New York.



10/6/2025
DATE

DAVID B. COHEN, J.S.C.

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