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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA9

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Juan Batista-Rosa,

Plaintiff,

-against-

1230 Franklin, LLC and Angel Development, Inc.,

Defendants.

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Index No. 30656/2019E
Motion Seq. #2

DECISION AND ORDER
Hon. Myrna Socorro, J.S.C.

Recitation as required by CPLR §2219 of the papers filed by the parties in motion sequence no. 2, marked submitted on February 15, 2024:

Papers	NYSCEF Doc. No.
Plaintiff's Notice of Motion, Affirmation in Support & Exhibits	# 61-76
Defendants' Cross-Motion, Affirmation in Support & Exhibits	# 79-96
Plaintiff's Opposition	# 97
Defendants' Reply	# 98-103

Motion by the plaintiff, for an order pursuant to CPLR §3212, granting judgment on the Labor Law §240(1) and §241(6) claims against defendants, and cross-motion by defendants for an order pursuant to CPLR §3212, dismissing the plaintiff's complaint in its entirety, are decided as follows:

According to the plaintiff, at the time of the accident, he was employed by non-party Phoenix Plumbing and Mechanical and was working at a construction project located at 1230 Franklin Avenue, Bronx, New York. While working on connecting a gas line, plaintiff alleges that he went upstairs to the second floor to retrieve piping materials, and that there were no lights in the staircase. Plaintiff further states that when he was walking down the stairs, he slipped on a piece of gray tube and water on the landing of the staircase and fell down.

In support of its motion, plaintiff argues that he is entitled to summary judgment on his Labor Law § 240(1) claim because he was exposed to an elevation related hazard when he slipped and fell on water and debris on a staircase that served as the sole means of access between the first and second floors of the building he was working in.

In support of their motion for summary judgment for dismissal of plaintiff's Labor Law § 240(1) claim, defendants argue that the subject staircase does not qualify as a safety device. Defendants argue that given that plaintiff slipped and fell on water and/or "tube" on the building's interior permanent concrete staircase, in which plaintiff was not actively performing his work as a plumber, Labor Law § 240(1) is not applicable.

Summary Judgment Standard

The court's function on a motion for summary judgment is issue finding rather than issue determination or assessing credibility. *Genesis Merchant Partners LP v Gilbride, Tusa, Last & Spellane LLC,* 157 AD3d 479 [1st Dept 2018]; *Meredian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508; 894 NYS 2d 422 [1st Dept 2010].

Summary judgment is a drastic remedy and is to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact. *See CPLR § 3212[b];Friends of Thayer Lake LLC v. Brown,* 27 NY3d 1039; 33 NYS 3d 853 [2016]; *Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]. The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]. If the movant fails to make such prima face showing then the motion must be denied regardless of the sufficiency of the opposing papers *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY 2d 851; 487 NYS 2d 316 (1985).

Once the movant has made a prima facie showing, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.,* 68 NY 2d 320; 508 NYS 2d 923 [1986]; and *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment. *See Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY3d 381 [2004].

Labor Law §240 (1)

Labor Law § 240(1) provides in part: "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The Court of Appeals has held that "[n]ot every worker falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law 240(1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." *Narducci v Manhasset Bay Assoc.*, 96 NY2D 259 (2001), citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 (1993). Labor Law §240 (1) does not apply every time an employee is injured as "the result of an elevation differential" (*Stoneham*, 41 NY3d 217, 221 [2023]).

To the extent that the staircase from which the plaintiff slipped and fell was a permanent structure of the building does not remove this case from the ambit of Labor Law §240(1). *See Conlon v Carnegie Hall Socy., Inc.*, 159 AD3d 655 [1st Dept 2018]. "Staircase" or "stairs" is not mentioned as an enumerated safety device in the statute, and only where a staircase is the "sole means of access" to and from a work area is a staircase deemed a safety device for the purposes of liability

under Labor Law 240(1). *See Wowk v Broadway 280 Park Fee, LLC*, 94 AD3d 669 [1st Dept 2012]; *see also Ramirez v Shoats*, 78 AD3d 515 [1st Dept 2010].

Upon a review of the motion papers, this Court finds that plaintiff is entitled to summary judgment of his Labor Law §240(1) claim as there is no question of fact that the subject staircase was the sole means of access between the different floors at 1230 Franklin Avenue. In his deposition, Zannis Angelidakis, witness on behalf of defendant Angel Development, testified that there were two apartment buildings right next to each other (i.e. 1230 Franklin Avenue – the subject premises- and 1232 Franklin Avenue). Mr. Angelidakis further testified that: there was a cinderblock wall between the two buildings and said wall had openings in order to facilitate access between the two buildings; each building had its own staircase; and to access the second floor of 1230 Franklin Avenue, you could "pass over to the other building [1232 Franklin] and use the staircase on the other side." The following testimony was also elicited from Mr. Angelidakis:

> Q: So within 1230 Franklin Avenue, would you agree that that stairway was the sole means of access between the second floor and the ground floor?
> A: It was the sole staircase between the second floor and the ground floor.

Thus, based on defendants' own witnesses, it is clear that although plaintiff could have accessed the second floor by crossing over to 1232 Franklin Avenue (which is a different building than the one in question) and going back into the subject premises, the subject staircase was the *sole* means of access between the ground and second floors ***within*** 1230 Franklin Avenue and therefore qualifies as a safety device under Labor Law §240(1).

Accordingly, plaintiff's motion for summary judgment on his Labor Law §240(1) claim is **GRANTED**.

Labor Law §241(6)

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. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]. The standard of liability under Labor Law 241(6), requires that a plaintiff allege that an owner or general contractor breached a specific rule or regulation containing a positive command. *See Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]. In addition, Labor Law 241(6) requires that a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident. *See Gonzalez v Stern's Dep't Stores*, 211 AD2d 414 [1st Dept 1995].

In support of his Labor Law §241(6) claim, the plaintiff cites Industrial Codes 12 NYCRR §§ 23-1.7(d), 23-1.7(e)(1), 23-2.1(a)(1) and 23-1.30.

12 NYCRR § 23-1.7(d) provides: "Slipping hazards. Employers shall not suffer or permit any employees to use a floor, passageway, walkway, . . . which is in a slippery condition." At his deposition, plaintiff testified that he slipped on water and gray metal tube on the landing of the staircase and that he thought the water came from the roof due to a leak. In his deposition, Victor Garcia, plaintiff's foreman, testified that plaintiff reported to him that he stepped on a pipe and

made no reference to water or leak. Mr. Garcia further testified that he never witnessed any leaks in the stairwell. Thus, upon a review of the papers, this Court finds that there is a question of fact as to whether 12 NYCRR § 23-1.7(d) was violated.

12 NYCRR § 23-1.7(e)(1) provides: "Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions that could cause tripping." As indicated above, plaintiff testified that he slipped on a gray tube. However, Mr. Garcia testified that plaintiff told him that he slipped on a pipe, specifically a sprinkler pipe. Thus, defendants argue that the circumstantial evidence shows that plaintiff slipped on material being used by plaintiff on the project. This Court finds that there are triable issues of fact as it relates to 12 NYCRR § 23-1.7(e)(1).

12 NYCRR § 23-1.30 provides: "Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass." Plaintiff testified that at the time of the accident, there was no lighting in the stairway. However, plaintiff's co-worker, Gonzalo Cerron, provided a notarized statement indicating that at the time of the accident, there was a generator which he turned off as they were on their coffee break. He further states that plaintiff chose not to finish his coffee break and instead went to the second floor to obtain materials. Thus, this Court finds that there is a question of fact as to whether 12 NYCRR § 23-1.30 was violated.

12 NYCRR § 23-2.1(a)(1) provides: "All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare." For the reasons stated above, this Court finds that there is a question of fact as to whether 12 NYCRR § 23-2.1(a)(1) was violated.

Labor Law §200

The branch of defendants' summary judgment motion seeking to dismiss the Labor Law §200 and common-law negligence claims as against it is DENIED. Although the record demonstrates that defendants did not direct, supervise, or direct the means and methods of the plaintiff's work, a defendant may still be held liable if it either created the dangerous condition or failed to remedy it despite having actual or constructive notice thereof. *See Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]. In support of its cross-motion, defendants submit daily logs of the jobsite. While some of the daily logs have a note stating "housecleaning" only the daily log of April 11, 2019, indicates that "all floors" were cleaned. However, the subject accident occurred on April 23, 2019, which leaves the question as to when was the last time that the subject staircase was inspected or cleaned and whether defendants had actual or constructive notice of the alleged hazard. Therefore, upon a review of the motion papers, this Court finds that defendants have failed to establish *prima facie* that it neither created nor had notice of a hazardous condition resulting in the plaintiff's injuries to support dismissal of the Labor Law 200 and common-law negligence claims against it. *See Padilla v Touro Coll. Univ. Sys.*, 204 AD3d 415 [1st Dept 2022].

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on its Labor Law 240(1) claim is GRANTED; and it is further

ORDERED that plaintiff's motion for summary judgment on its Labor Law 241(6) claim is DENIED; and it is further

ORDERED that defendants' cross-motion seeking dismissal plaintiff's Labor Law 240(1) claim is DENIED; and it is further

ORDERED that defendants' cross-motion seeking dismissal plaintiff's Labor Law 241(6) claim is DENIED; and it is further

ORDERED that defendants' cross-motion seeking dismissal plaintiff's Labor Law 200 and common law negligence claims is DENIED; and it is further

ORDERED that plaintiff is to file a Notice of Entry of this Decision and Order within twenty (20) days from the date hereof.

This constitutes the Decision and Order of the Court.

Dated: January 15, 2025

Hon. Myrna Socorro, J.S.C.