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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

JOHN FRANCESCON,

Plaintiff,

- v -

GUCCI AMERICA, INC., a/k/a GUCCI SHOPS, INC. and STRUCTURE TONE, INC.,

Defendants.

(And two third-party actions and a fourth-party action).

INDEX NO. 114399/01

MOTION DATE 3/26/12

MOTION SEQ. NO. 008

The following papers, numbered 1 to 8 were read on this motion for summary judgment

Notice of Motion— Affirmation — Exhibits A-O	No(s).	1-2
Affirmation In Opposition — Exhibits 1-11	No(s).	3
Reply Affirmation — Exhibits A-B	No(s).	4
Notice of Cross Motion— Affirmation	No(s).	5-6
Affirmation In Opposition — Exhibits 1-7	No(s).	7
Reply Affirmation	No(s).	8

Upon the foregoing papers, it is ordered that this motion and cross motion for summary judgment (referred to this Court by Justice Wooten by order dated March 21, 2012) are decided in accordance with the annexed memorandum decision and order.

Dated: 7/12/12
New York, New York

, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ☐ GRANTED ☐ DENIED ■ GRANTED IN PART ☐ OTHER
3. Check If appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

----------X

JOHN FRANCESCON,

Plaintiff,

-against-

GUCCI AMERICA, INC. a/k/a GUCCI SHOPS, INC. and STRUCTURE TONE, INC.,

Defendants.

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Index No.: 114399/01

GUCCI AMERICA, INC. a/k/a GUCCI SHOPS, INC. and STRUCTURE TONE, INC.,

Third-Party Plaintiffs,

-against-

Third-Party Index No.: 590019/02

PETRILLO SETTING CORP. and PETRILLO STONE CORPORATION,

Third-Party Defendants.

----------x

GUCCI AMERICA, INC. a/k/a GUCCI SHOPS, INC. and STRUCTURE TONE, INC.,

Second Third-Party Plaintiffs,

-against-

Third-Party Index No.: 590139/06

FLOORING SOLUTIONS, INC.,

Second Third-Party Defendant.

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FLOORING SOLUTIONS, INC.,

Fourth-Party Plaintiff,

-against-

Third-Party Index No.: 590372/06

CONSOLIDATED CARPET TRADE WORKROOM, INC., CONSOLIDATED CARPET SYSTEMS, LTD. and CONSOLIDATED CARPET WORKROOM, LLC,

Fourth-Party Defendants.

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Decision and Order

HON. MICHAEL D. STALLMAN, J.:

In this job-site tort action, a construction worker alleges that he was injured when he stepped past the covered edge of a floor and fell, while working at a construction site located at 685 Fifth Avenue, New York, New York on July 31, 2000.

Pursuant to this Court's decision and order dated January 15, 2009, fourth-party defendant Consolidated Carpet Trade Workroom, Inc., sued herein as Consolidated Carpet Systems, Ltd., and Consolidated Carpet Workroom, LLC (collectively, Consolidated) move for summary judgment dismissing plaintiff's remaining claims under Labor Law § 241 (6); defendants Gucci America, Inc. a/k/a Gucci Shops, Inc. (Gucci) and Structure Tone, Inc. (Structure Tone) cross-move for the same relief, joining in Consolidated's arguments. (Motion Seq. No. 008.)

Second third-party defendant/Fourth-party plaintiff Flooring Solutions, Inc. (Flooring) also separately moves for summary judgment similarly dismissing plaintiff's remaining claims under Labor Law § 241 (6). (Motion Seq. No. 009).

Plaintiff opposes both motions, and this decision addresses both motions.

BACKGROUND

The background allegations were set forth in the Court's prior decision and order dated January 15, 2009. On July 31, 2000, plaintiff was working as a marble

helper on the first floor of five floors of a store owned by Gucci. Structure Tone served as the general contractor on a project to renovate the store, located in a 21-story commercial building. Plaintiff's employer, third-party defendant Petrillo Setting Corp. (Petrillo) was hired to perform stone work for the project. Flooring was hired to provide carpeting for the project. Flooring subcontracted the carpet installation to Consolidated.

Plaintiff testified at his deposition, that, immediately before his accident, he was asked by his supervisor to make a mix of "screed" out of cement and stone. To carry out this task, it was necessary for plaintiff to retrieve a 50-pound bag of cement from outside of the building. As plaintiff was reentering the building, he found an "A-frame of stone" blocking the entrance to the first floor of the building. The "A-frame" was loaded with eight stone blocks, each weighing approximately 250 pounds. Plaintiff described the A-frame at his deposition on June 17, 2005 as "a base with four wheels on it with a roll bar," "made so that stone can be laid on an angle so that the weight of each stone keeps the stone down, so you don't have to use a strap." Gucci and Structure Tone refer to the "A-frame" as an A-frame cart.

As plaintiff was moving the A-frame out of his way, his left foot stepped on a piece of carpeting which was bunched up and hanging approximately 18 inches past the edge of the first floor. Past the edge of the first floor was a subfloor

approximately 12 to 15 inches below (the edge of the first floor would later become a step leading to the subfloor). Plaintiff mistakenly believed that the carpet where he stepped was supported by concrete flooring, but there was actually nothing underneath, because plaintiff had stepped beyond the edge of the first floor. When plaintiff placed his foot, his foot was caused to go down approximately 12 to 15 inches to the subfloor below. Subsequently, the wheel of the A-frame went over the edge and the stone tumbled down on top of plaintiff, causing him to become injured. Plaintiff stated that no ramps, railings or other safety measures were in place to prevent him from becoming injured. Plaintiff also noted that the subfloor was already carpeted.

Consolidated, Gucci and Structure Tone, and Flooring brought motions for summary judgment seeking, among other things, dismissal of plaintiff's claims under Labor Law § 241 (6) against Gucci and Structure Tone. Plaintiff moved for leave to supplement and amend the bill of particulars to allege violations of 12 NYCRR 23-1.7 (b) (1) (i) and (ii), and 12 NYCRR 23-1.7 (d) and (f).

By decision and order dated January 15, 2009, this Court granted plaintiff's motion for leave to supplement and amend the bill of particulars, but vacated the note of issue for Gucci and Structure Tone, Consolidated, and Flooring "to conduct additional discovery regarding plaintiff's newly alleged Industrial Code violations.

. ." (Pfuhler Affirm., Ex N at 7.) This Court also granted Gucci and Structure Tone, Consolidated, and Flooring leave to renew their motions for summary judgment with respect to plaintiff's claims under Labor Law § 241 (6) after completion of discovery. (*Id.* at 19-20.)

On appeal, the Appellate Division, First Department affirmed that part of the of this Court's decision that granted plaintiff leave to amend. The Appellate Division stated,

> "The additional alleged violations of the Code are based on facts in the record, and the court appropriately vacated the note of issue and granted Flooring Solutions additional discovery in connection therewith. Contrary to Flooring Solutions' contention, the belated expert disclosure does not assert a new theory of causation. Plaintiff's deposition testimony was unclear as to whether he had stepped on an extended portion of the sub-floor carpet or on a piece of carpet draped over the step-off area. However, it is not entirely his fault that defendants failed to clarify of this issue at the deposition. In any event, there is evidence in the record that reasonably supports the expert's piece-of-carpet theory."

(*Francescon v Gucci Am., Inc.*, 71 AD3d 528, 529 [1st Dept 2010].)

Consolidated, Gucci and Structure Tone, and Flooring now renew their motions for summary judgment dismissing plaintiff's claims under Labor Law § 241 (6), arguing that the additional Industrial Code provisions are not applicable to this alleged accident as a matter of law.

DISCUSSION

Labor Law § 241(6) states:

> "All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein . . . the commissioner may make rules to carry into effect the provisions of this subdivision . . . ."

This statute creates a non-delegable duty for owners, general contractors and their agents to comply with the provisions of the New York State Industrial Code. (*Ross v Curtis-Palmer Hydro Electric, Inc.*, 81 NY2d 494, 501-503 [1993].) Here, plaintiff alleges that defendants violated 12 NYCRR 23-1.7 (b) (1) (i) and (ii), and 12 NYCRR 23-1.7 (d) and (f).

As a threshold matter, plaintiff's argument that the renewed motions for summary judgment should be denied based on the doctrine of the law of the case is without merit. "It is settled that the standard applied on a motion to amend a pleading is much less exacting than the standard applied on a motion for summary judgment." (*James v R & G Hacking Corp.*, 39 AD3d 385, 386 (1st Dept 2007). Although the Appellate Division's decision speaks of "issues of fact," its affirmance

of this Court's decision permitting leave to amend must be understood in the context of the less exacting standard of granting leave to amend, i.e., whether the proposed amendment plainly lacks merit. (*See e.g. Brannon v Mills*, 89 AD3d 536, 537 [1st Dept 2011].) Therefore, "the earlier determination granting plaintiff leave was not on the merits or, as plaintiff characterizes it, 'law of the case.'" (*James,* 39 AD3d at 386.)

12 NYCRR 23-1.7 (b) (1) (i) and (ii)

12 NYCRR 23-1.7 (b) (1) (i) and (ii) state:

> "(b) Falling hazards.
>
> (1) Hazardous openings.
>
> (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).
>
> (ii) Where free access into such an opening is required by work in progress, a barrier or safety railing constructed and installed in compliance with this Part (rule) shall guard such opening and the means of free access to the opening shall be a substantial gate. Such gate shall swing in a direction away from the opening and shall be kept latched except for entry and exit."

Consolidated, joined by Guccci and Structure Tone, argue that these provisions do not apply because plaintiff did not fall through "a hazardous opening," which they argue should be interpreted as "a relatively small opening." (Pfuhler Affirm. ¶ 18.)

However, as Flooring indicates, cases have interpreted a "hazardous opening" under 12 NYCRR 23-1.7 (b) to mean "openings large enough for a person to fit [through]." (*Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002]; *compare Gallagher v Levien & Co.*, 72 AD3d 407 [1st Dept 2010][12 NYCRR 23-1.7 (d) where plaintiff fell through a hole up to his chest] *with Urban v. No. 5 Times Square Development, LLC*, 62 AD3d 553 [1st Dept 2009][10 to 12 inch gap not a hazardous opening].)

Nevertheless, the Court agrees with Flooring that plaintiff did not fall into a "hazardous opening" because he essentially stepped off the edge of the first floor. *Lupo v Pro Foods, LLC* (68 AD3d 607 [1st Dept 2009]), which Flooring cites, is instructive In *Lupo*, the plaintiff, a laborer at a construction project, was injured when, while going to retrieve a lighting fixture, he walked across a freshly poured concrete surface, covered with polyplastic sheeting. The plaintiff walked past the edge of the sheeting, falling into an inclined opening or ramp that had been at least partially concealed by the sheeting. The Appellate Division, First Department upheld the lower court's implicit denial to amend the bill of particulars, stating, "The regulation relied upon by plaintiff, Industrial Code (12 NYCRR) § 23–1.7(b), which applies to hazardous openings of significant depth and size was inapplicable. Plaintiff failed to establish that the ramp constitutes a hazardous opening." (*Id.* at 607

[internal citations omitted].)

Here, plaintiff's allegations are similar to those the facts in *Lupo*. As discussed in the prior decision and order, plaintiff's his left foot stepped on a piece of carpeting which was allegedly bunched up and hanging approximately 18 inches past the edge of the first floor, like the polyplastic sheeting that concealed the edge of the concrete flooring in *Lupo*. Plaintiff argues that *Lupo* is distinguishable because there was a ramp past the edge of concrete flooring in *Lupo*, whereas in this case the edge of the first floor was a subfloor approximately 12 to 15 inches below. This distinction is unpersuasive because it was the concealed nature of the edge of concrete flooring in *Lupo* that was a factor in plaintiff's fall onto the inclined opening or ramp beyond the edge.

Cases from the Appellate Divisions of the Second and Third Departments have also ruled that the area past the edge of an elevated work area is not considered a "hazardous opening" within the meaning of 12 NYCRR 23-1.7 (b). (*Landon v Austin,* 88 AD3d 1127, 1129 [3d Dept 2011] ["the edge of a roof does not qualify as a 'hazardous opening'"]; *Pope v Safety and Quality Plus, Inc.,* 74 AD3d 1040, 1041 [2d Dept 2010];*see also Garlow v Chappaqua Cent. School Dist.*, 38 AD3d 712, 714 [2d Dept 2007].)

In *Pope*, the plaintiff allegedly sustained personal injuries when he stepped off

the unguarded edge of an elevated concrete portion of the basement at the Metropolitan Museum of Art. According to Pope, he suddenly stepped off the unguarded edge onto a pile of cardboard while walking and talking to his foreman. The Appellate Division, Second Department affirmed the lower court's decision granting the defendant summary judgment dismissing the plaintiff's claims under Labor Law § 241 (6), reasoning that the 12 NYCRR 23-1.7 (b) (1) was inapplicable. The Appellate Division stated,

> "Even though there was a height differential between the raised concrete floor and the floor below, the concrete landing from which the injured plaintiff stepped off did not constitute a 'hazardous opening' within the meaning of 12 NYCRR 23–1.7(b)(1)."

(*Pope*, 74 AD3d at 1041.) Here, the height differential between the first floor and the subfloor is like the height differential between the raised concrete floor and the cardboard below in *Pope*, where the Appellate Division, Second Department ruled that 12 NYCRR 23-1.7 (b) (1) was inapplicable.

In *Garlow*, the plaintiff, an iron worker, fell approximately 16 feet from the top of a concrete wall. The Appellate Division, Second Department reversed the lower court's decision denying the branch of the defendant's motion to dismiss the plaintiff's claims under Labor Law § 241 (6). The Appellate Division ruled that 12 NYCRR 23-1.7 (b) was inapplicable because "even though there was a height

differential, there was no hole or hazardous opening where the plaintiff was walking, into which he could have fallen." (*Garlow*, 38 AD3d at 629.)

Here, the area past the edge of the first floor was not an opening within the first floor. Rather, the edge marked the end of first floor and the start of the subfloor, which was at a lower level than the first floor. Plaintiff testified as follows:

> "A. As you enter the building, you had what looks like a first floor. That was a adjoined by a sub-floor. The first floor being, I don't know, roughly 35 feet straight and to the sides.
>
> To the left you had a staircase. Straight ahead you had an elevator and to the right of the elevator and to the left of the staircase you had the sub-floor where all the – whatever they were going to sell was going to be.
>
> * * *
>
> Q Did the sub-floor surround the entire first floor?
> A Yes.

(Francescon EBT, Nov. 17, 2006, at 23, 81.) The testimony in the record indicates that the subfloor was neither covered nor ever intended to be covered after construction was completed. Plaintiff testified at his deposition that the subfloor was carpeted. (*Id.* at 29.) Jennifer Myers, Gucci's store planning coordinator, was asked at her deposition on December 14, 2005 to describe the finished retail space. (Fortunato Opp. Affirm. dated 8/11/11, Ex 1, at 12-13.) She testified as follows:

> "Q. Now, assume with me we're inside the second set of doors. Now where are we in the retail space of Gucci at that point?
>
> A. On an open floor.
>
> Q. Now, this open floor, does it go straight back?

A. No, there are then two steps down into the handbag retail area and to the right is a ramp."

(*Id.* at 16-17.)

Given all the above, 12 NYCRR 23-1.7 (b) is not applicable to facts alleged, because plaintiff did not fall through an "hazardous opening" in the first floor within the meaning of 12 NYCRR 23-1.7 (b), but rather allegedly stepped past the edge of the first floor and fell onto the level below. Therefore, so much of plaintiff's claims under Labor Law § 241 (6) based on the alleged violations of 12 NYCRR 23-1.7 (b) (1) (i) and (ii) are dismissed.

12 NYCRR 23-1.7 (d)

12 NYCRR 23-1.7 (d) states:

"(d) Slipping Hazards.

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 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."

Consolidated and Flooring, joined by Gucci and Structure Tone, all argue that this provision does not apply because plaintiff's accident allegedly occurred due to improperly laid carpet, and that he testified at his deposition on April 8, 2009 that he did not slip of trip. Plaintiff was asked at his deposition:

"Q. So you didn't slip, right?
A. No.
Q. And you didn't trip, correct?
A. No."

(Pfhuler Affirm., Ex O at 44.) However, plaintiff's counsel argues that this testimony must be considered in connection with an "errata sheet", apparently sworn to before a notary on June 16, 2009, which states:

> "When I was asked the question on page 44 line 2: "So you didn't slip right; and the question on page 44 line 4: "And you didn't trip, correct"? I thought I was being asked if I slipped or tripped on something other than the scrap of carpet which caused my fall. The answer to both questions is therefore corrected to read: "As I previously testified at my November 17, 2006 deposition, the scrap of carpet I stepped on had no support below it. This caused me to stumble and trip as my foot slipped to the sub-floor below."

(Fortunato Opp. Affirm. to Flooring's Motion, Ex 2.) As plaintiff's counsel indicates, the inconsistencies between the original deposition transcript and the corrections that he submitted in the errata sheet, which contained a statement of the reasons for the changes, raise issues of plaintiff's credibility, which cannot be resolved on a motion for summary judgment. (*Yefet v Shalmoni*, 81 AD3d 637, 638 [2d Dept 2011]; *Cillo v Resjefal Corp.*, 295 AD2d 257 [1st Dept 2002].)

Flooring also argues that 12 NYCRR 23-1.7 (d) does not apply because plaintiff was not working on "an elevated working surface." However, Flooring has not met its burden of summary judgment on this ground. Flooring neither cites any

authority nor offers any explanation why the area where plaintiff was working, which was above the sub-floor, may not, as a matter of law, be considered an "elevated working surface" within the meaning of 12 NYCRR 23-1.7 (d).

12 NYCRR 23-1.7 (f)

12 NYCRR 23-1.7 (f) states:

> "Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided."

Consolidated, joined by Gucci and Structure Tone, contends that this provision does not apply because "[i]t has been undisputed that a staircase was provided." (Pfuhler Affirm. ¶ 24.) Flooring argues that the statute does not apply because plaintiff was not using the staircase as access to different working levels at the time of the accident.

Neither Consolidated nor Gucci and Structure Tone cite to any portion of the record to support the contention that a staircase "was provided". At his deposition on June 17, 2005, plaintiff testified that there was a staircase, but his testimony appears to indicate that this staircase led to the second floor:

"Q. Where is the sub floor located in relation to the first floor?
A. To the left.
Q. As you walk in to the left?
A. As you walk in you're on the first floor.

Q. Correct.
A. *Then you have a staircase straight ahead*, you have the first floor, sub floor, to your left you have the first floor and a sub floor. You walk in, okay, you're on the first floor, which is all cement, like I said, straight ahead, straight ahead, the first floor drops down to a sub floor, okay now, to your left that's straight ahead *you have the staircase that goes up to the second floor,* to the left of the staircase you have the first floor and sub floor.

(Fortunato Opp. Affirm. 8/11/11, Ex 4 [Francescon EBT, June 17, 2005], at 71.)

Meanwhile, plaintiff testified at his deposition on November 17, 2006 that there were no stairs that led from the first floor to the sub-floor:

"Q. Were there stairs that led from the first floor to the sub-floor?
A. No.
Q. Was there a step that led from the first floor to the sub-floor?
A. Yes, one step.
Q. One step?
A. One step.
Mr. Giard: Can I clarify something in my mind; that one step, was that from the surface down to the sub-floor, or surface, step, sub-floor?
The WITNESS: Surface, sub-floor."

(Francescon EBT [Nov. 17, 2006], at 24.) Therefore, Consolidated, Gucci and Structure Tone have not established that plaintiff "was provided" with a staircase in compliance with 12 NYCRR 23-1.7 (f).

However, the Court agrees with Flooring that 12 NYCRR 23-1.7 (f) does not apply as matter of law. The requirements for safe vertical passage do not apply here because plaintiff was not trying to access different work levels. At his deposition on

June 15, 2005, when plaintiff was asked, "So you weren't intending to actually go into the sub floor; were you?", plaintiff answered, "No." (Francescon EBT [June 15, 2005], at 103.) In essence, plaintiff argues not only that 12 NYCRR 23-1.7 (f) required some kind of safe vertical passage between the sub-floor and first floor, but also that such safe vertical passage ought to have been a step of a stairs, located exactly underneath the carpet where plaintiff allegedly stepped, even though plaintiff was not trying to descend to the subfloor.

Therefore, so much of plaintiff's claims under Labor Law § 241 (6) based on the alleged violations of 12 NYCRR 23-1.7 (f) are dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion for summary judgment by fourth-party defendants Consolidated Carpet Systems, Ltd. and Consolidated Carpet Workroom, LLC, the cross motion for summary judgment by defendants Gucci America, Inc. a/k/a Gucci Shops, Inc. and Structure Tone, Inc., and the motion for summary judgment by second third-party defendant Flooring Solutions, Inc. are granted only to the extent that so much of plaintiff's Labor Law § 241 (6) claims based on alleged violations of 12 NYCRR 23-1.7 (b) (1) (i) & (ii) and 12 NYCRR 23-1.7 (f) are dismissed, and the motions and cross motion are otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: July 17, 2012
New York, New York

ENTER:

J.S.C.

FILED
JUL 17 2012
NEW YORK
COUNTY CLERK'S OFFICE