[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN *Justice* PART 21

VINCENT ST. LEWIS,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, and JUDLAU CONTRACTING, INC.,

Defendants.

INDEX NO. 104238/10

MOTION DATE 2/9/12

MOTION SEQ. NO. 001

The following papers, numbered 1 to 8 were read on this motion for summary judgment; cross motion for leave to serve supplemental bill of particulars

Notice of Motion; Affirmation — Exhibits A-G, H [Affidavit]	No(s).	1; 2-3
Notice of Cross Motion; Affirmation — Exhibits A-D	No(s).	4-5
Replying Affirmation — Exhibits	No(s).	6
Defendants' Supplemental Affirmation	No(s).	7
Plaintiff's Supplemental Affirmation– Exhibit A	No(s).	8

Upon the foregoing papers, it is ordered that defendants' motion for summary judgment and plaintiff's cross motion for leave to serve a supplemental bill of particulars are decided in accordance with the memorandum decision and order.

FILED

JUL 19 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

VINCENT ST. LEWIS,

Plaintiff,

Index No. 104238/2010

- against -

THE CITY OF NEW YORK, THE NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, and JUDLAU CONTRACTING, INC.,

Decision and Order

Defendants.

----------X

HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiff alleges that, on September 9, 2009, at approximately 10:30 a.m., plaintiff and his co-worker were lifting and carrying a concrete lintel in preparation for its placement, as part of a renovation project of the 59th Street-Columbus Circle subway station. Defendants move for summary judgment dismissing the action. Plaintiff opposes the motion and cross-moves for leave to supplement his verified bill of particulars.

BACKGROUND

Plaintiff testified at his deposition that, on September 9, 2009, he was employed by non-party KT Construction as a foreman and bricklayer. (Sondhi Affirm., Ex F [Plaintiff's EBT], at 9-10.) According to plaintiff, he arrived at the construction site at approximately 7:00 a.m and met with his supervisor, Lloyd St.

Lewis,[1] and "discussed what we going [*sic*] to do for that day, you know, the work." Plaintiff stated, "Well, we walk around the job – myself and him – and looking to see what had to be done on the job site. And one of the things that we had to do was putting up the concrete beam." (*Id.*)

Plaintiff testified that he and Michael Harris, a helper/laborer also employed by KT Construction, had a discussion that morning about moving the beams. (*Id.* at 32.) Plaintiff stated that he told Harris "those beams are very heavy and I don't know if we will be able to move it." Plaintiff described the beam as "about six inches thick, nine-and-a half inches high, and about seven foot four long," and weighed "like over 200 pounds." (*Id.* at 27-28.) According to plaintiff, the beam was supposed to go over the top of a door, and there was scaffolding above the door. (*Id.* at 36.)

Plaintiff testified that he and Harris placed the beam on a trolley, and Harris wheeled the trolley "maybe about 40, 50 feet" towards the location of the work, "about eight or ten feet or so" from the door. (*Id.* at 35-37, 40.) According to plaintiff, he and Harris lifted the beam off the trolley (*id.* at 40) and tried to lift the beam onto the scaffolding:

> "Okay. We started lifting the beam. Mike was like in front and I was in like in the back going towards the work area. So, Mike was coming to me. I was backing up and Mike was coming to me. And we had an

[1] Plaintiff testified that Lloyd St. Lewis is plaintiff's brother. (*Id.* at 12.)

> uneven floor, an uneven floor there, that they had poured prior. I had to step up to the, you know, step on the floor and then go up on the scaffold. And when I stepped on the floor, that's when I lose my balance. And I tried to balance myself. I said, "Mike, hold it, hold it." I'm trying to balance myself and I stepped on a block or something there, and I twist my ankle – twist my knee."

(*Id.* at 39.)

When asked if he knew why he lost his balance, plaintiff testified, "Well, I lose my balance – that's hard to say. I think because I had the weight of the beam and then I have to step – to make this step up on the floor, you know. I think that's how I lose my balance there." (*Id.* at 42.) Plaintiff testified further as follows:

> "Q After you lost your balance, you testified that you stepped on a block; is that correct?
> A Yes. When I try to balance myself, I stepped on the block.
> Q Can you describe for me what the block looked like?
> A It's like a six-inch concrete block.
> Q Is it like a cinder block?
> A Exactly."

(*Id.* at 44.)

Plaintiff commenced this action against the City of New York, the New York City Transit Authority (NYCTA), Metropolitan Transportation Authority (MTA), and Judlau Contracting Inc. (Judlau), asserting causes of action sounding in negligence and asserting violations of Labor Law §§ 200, 240, and 241.

DISCUSSION

Plaintiff's Cross Motion for leave to serve a supplemental bill of particulars

Plaintiff seeks leave to serve a supplemental bill of particulars that would add New York City Building Code § 28-301.1 and Industrial Code Provision "23.17 (e)" to the statutes which plaintiff claims defendants have violated. (Gaisi Affirm., Ex D.) Based on the contention of plaintiff's counsel that Industrial Code "23.17 (e)" requires passageways and work areas to be free of tripping hazards, the Court will construe Industrial Code Provision "23.17" as referring to 12 NYCRR 23-1.7 (e) (1) and (2).[2]

"Leave to amend a pleading should be freely given as a matter of discretion in the absence of prejudice or surprise, although to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated." (*Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept 2005][internal citations and quotation marks omitted].) Leave to amend should not be granted

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[2] 12 NYCRR 23-1.7 (e) states, in pertinent part:

"(1) 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.

(2) Working areas. The parts of floors, platforms and similar areas where persons 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."

"where the proposed amendment plainly lacks merit and would serve no purpose than to needlessly complicate and/or delay discovery and trial." (*Verizon New York, Inc. v Consolidated Edison, Inc.*, 38 AD3d 391, 391 [1st Dept 2007].)

Here, the proposed supplemental bill of particulars plainly lacks merit as to the allegation that defendants violated Administrative Code of the City of New York § 28-301.1. In *Garcia v New York City Transit Authority* (63 AD3d 1100 [2d Dept 2009]), the Appellate Division, Second Department held that the 1968 Building Code of the City of New York (Administrative Code § 27-101 *et seq.*) did not apply an accident occurring within the subway. The Appellate Division reasoned,

> "Section 643 of the City Charter provides, in relevant part, that the jurisdiction of the New York City Department of Buildings 'shall not extend to . . . subways or structures appurtenant thereto' (New York City Charter § 643 [7]). Inasmuch as the stairway at issue in this case is a structure wholly contained within a subway station and is inseparable from the function of that station, it is 'appurtenant' to a subway within the meaning of section 643 of the City Charter."

(*Garcia*, 63 AD3d at 1101.) Although *Garcia* involved the 1968 Building Code, the reasoning is applicable here, because Administrative Code § 28-301.1, which is part of the New York City Construction Codes, is enforced "by the commissioner of buildings, pursuant to the provisions of [New York City Charter § 643]." (Administrative Code § 28-103.1.)

Plaintiff's reliance on *Huerta v New York City Transit Authority* (290 AD2d

33 [1st Dept 2001]) is misplaced. In *Huerta*, the Appellate Division, First Department rejected the argument that the 1968 Building Code did not apply to an accident that occurred at the upper landing of an escalator leading from a subway station. In interpreting New York City Charter § 643 (7), the Appellate Division, First Department stated, "The statute's language clearly limits the exemption to a subway or structure appurtenant to a subway, not an escalator." Here, it is undisputed that plaintiff alleged accident occurred underground within the 59th Street-Columbus Circle subway station.

The proposed supplemental bill of particulars also plainly lacks merit as to the allegation that defendants violated 12 NYCRR 23-1.7 (e) (1), which applies to passageways. As defendants indicate, the notice of claim alleges that plaintiff's accident occurred "underground, in a storage room." (Sondhi Affirm., Ex A.) When asked at his deposition to describe the size of the room, plaintiff answered, "Huge, big room. I can't tell you. It's huge." (Plaintiff's EBT, at 49.) Because plaintiff's accident allegedly occurred in a room, 12 NYCRR 23-1.7 (e) (1) would not be applicable to this case. (*Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 382 [1st Dept 2007][12 NYCRR 23-1.7 (e) (1) did not apply to the site of plaintiff's accident, because plaintiff testified at his deposition that he was injured while walking across a room that measured 18 feet by 20 feet]; *Militello v 45 W. 36th St. Realty Corp.*, 15

AD3d 158 [1st Dept 2005].)

As to 12 NYCRR 23-1.7 (e) (2), defendants argue that this provision does not apply because there is no testimony that plaintiff tripped or stumbled, and because the cinder block on which plaintiff stepped was an integral part of the work being performed. Plaintiff testified at his deposition that this type of block was "used to put up a partition like a wall." (Plaintiff's EBT, at 44.)

On the record presented, the Court cannot say that the proposed supplemental bill of particulars alleging a violation of 12 NYCRR 23-1.7 (e) (2) plainly lacks 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). Defendants argue that the cinder block could not have played a role in causing plaintiff to lose his balance. Plaintiff was asked at his deposition "After you lost your balance, you testified that you stepped on a block; is that correct?" (Plaintiff's EBT, at 44.) Plaintiff answered, "Yes. When I try to balance myself, I stepped on the block." (*Id.*) However, plaintiff went to testify as follows:

> "Q. So the block, itself, didn't cause you to lose your balance, correct?
> A. I would say it's a combination of both. Because I lose my balance and then I stepped on the block trying to regain my balance.
> Q. And when you stepped on the block, did you regain your balance?

A. Not really, That's when I lose my balance. After struggling with the weight, you know, eventually I regain my balance.
Q. After you regained your balance, then you injured your knee?
A. I injured my knee before I regained my balance. I injured my knee while I was trying to balance myself, not when I finish."

(Plaintiff's EBT at 44-46.) Given plaintiff's deposition testimony, the Court does not agree with defendants that the cinder block could not have played any possible role in causing plaintiff to lose his balance, for the alleged violation of 12 NYCRR 23-1.7 (e) (2) to be plainly lacking in merit. The perceived inconsistencies in plaintiff's testimony would present questions of plaintiff's credibility for the trier of fact.

12 NYCRR 23–1.7(e)(2) requires that areas where persons work or pass be kept "free from accumulations of . . . debris and from . . .materials . . . *insofar as may be consistent with the work being performed.*" (emphasis supplied.) The provision is inapplicable if the materials or the debris "was an integral part of the construction." (*O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805, 806 [2006].) It is not clear from plaintiff's testimony whether the cinder block could be either debris or materials that, on the date of plaintiff's accident, was intended to be used as part of the construction. (*See Martinez v 835 Ave. of Americas, L.P.*, 2011 WL 3689361, *4 [Sup Ct, NY County 2011] [collecting cases].) Therefore, viewed under the standard of granting leave to amend, the Court cannot say that such testimony would establish the

proposed violation of 12 NYCRR 23-1.7 (e) (2) plainly lacks merit.

Next, defendants argue that they are prejudiced because plaintiff is asserting a new theory of liability. However, the factual theory that plaintiff tripped or stumbled was set forth in the notice of claim, which states, in pertinent part:

> "Manner in which claim arose: While the Claimant, Vincent St. Lewis was employed by K.T. Construction, a subcontractor to Judlau Contracting Inc., working as a bricklayer at the 59th Street & Columbus Avenue train station, the claimant was caused to be injured when he was caused to *trip and or stumble on and over work site materials and debris*."

(Sondhi Affirm., Ex A [emphasis supplied].) In addition, plaintiff testified at his deposition that he visited a "knee doctor" named Dr. Christini. (Plaintiff's EBT, at 49.) When asked, "In summary what did you tell Dr. Christini?", plaintiff answered, "I told him I was lifting a heavy concrete beam and I lost balance, and I tripped and hurt my knee." (*Id.* at 50.)

Thus, the Court is not persuaded that defendants would be prejudiced if leave were granted, because the additional Industrial Code violation is based on what is contained in the record. (*Francescon v Gucci Am., Inc.*, 71 AD3d 528, 529 [1st Dept 2010].) Therefore, plaintiff is granted leave to serve a supplemental bill of particulars to allege a violation of 12 NYCRR 23-1.7 (e) (2), and leave is otherwise denied.

Defendants' Motion for Summary Judgment

The standards of summary judgment are well-settled.

> "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action."

(*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986][internal citations omitted].)

A. Labor Law § 200

> "To support a finding of liability under Labor Law § 200, which codifies the common-law duty of an owner or general contractor to provide a safe work site, a plaintiff must show that the defendant supervised and controlled the plaintiff's work, or had actual or constructive knowledge of the alleged unsafe condition in an area over which it had supervision or control, or created the unsafe condition."

(*Torkel v NYU Hosps. Ctr.*, 63 AD3d 587, 591 [1st Dept 2009].)

Here, plaintiff testified at his deposition the only person who instructed plaintiff to lift the beam was his supervisor. (Plaintiff's EBT, at 30.) Plaintiff testified that he did not receive any instructions on September 9, 2009 from any employee of the City, the MTA, Judlau or NYCTA. (*Id.* at 29-30.) Therefore, defendants have established that they neither supervised nor controlled plaintiff's

work in lifting the concrete beam.

Defendants did not specifically address in their moving papers whether they could be held liable under Labor Law § 200 based on an alternative theory of allegedly unsafe conditions of work area. "Proof of defendants' supervision and control over plaintiff's work is not required to impose liability under the statute and the common law where. . . the accident results from a dangerous work site condition." (*Cordeiro v TS Midtown Holdings, LLC* 87 AD3d 904, 906 [1st Dept 2011].) Here, plaintiff maintains that he lost his balance due to an uneven floor, and that the floor was not cleared of cinder blocks. (Gaisi Opp. Affirm. ¶¶ 19-20.) Although defendants contend, among other arguments, that there was no evidence that they had actual or constructive notice of any dangerous conditions at the work site, this argument was raised for the first time in reply. (*Ritt v Lenox Hill Hosp.*, 182 AD2d 560 [1st Dept 1992].)

Therefore, the City, NYCTA, and Judlau are not entitled summary judgment dismissing plaintiff's claims under Labor Law § 200.

However, as defendants indicate, "[i]t is well settled, as a matter of law, that the functions of the MTA with respect to public transportation are limited to financing and planning, and do not include the operation, maintenance, and control of any facility." (*Delacruz v Metropolitan Tr. Auth.*, 45 AD3d 482, 483 [1st Dept

2007], quoting *Cusick v Lutheran Med. Ctr.*, 105 AD2d 681 [2d Dept 1984].) Therefore, the branch of defendants' motion for summary dismissing plaintiff's claims under Labor Law § 200 is granted only as to the MTA, and this branch of the motion is otherwise denied.

B. Labor Law § 240

Labor Law § 240 (1), provides in pertinent part:

> "All contractors and owners and their agents, . . . 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, hangars, 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."

Here, the MTA cannot be held liable under Labor Law § 240 (1) either as the owner of the area where plaintiff's accident allegedly occurred, as a contractor, or as agent of either the owner or contractor. As discussed above, the MTA's functions do not include operation, maintenance, and control of any Transit facility. (*Delacruz v Metropolitan Tr. Auth.*, 45 AD3d 482, *supra*.) Pursuant to 1953 lease agreement between the City and NYCTA, "the City relinquished possession and control of all of its transit facilities to the Transit Authority." (*McGuire v City of New York*, 211 AD2d 428, 429 [1st Dept 1995].) Stuart Hall, a safety engineer employed by Judlau Contracting, Inc., testified at his deposition that Judlau Contracting was the general

contractor for the Columbus Circle job site, and that it was his understanding that Judlau Contracting hired or retained all the subcontractors as well (Sondhi Affirm., Ex G [Hall EBT], at 13-14.) Defendants are therefore granted summary judgment dismissing plaintiffs' claims under Labor Law § 240 against the MTA.

Turning to the other defendants, "Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or a person." (*Ross v Curtis-Palmer Hydro-Elec., Co.,* 81 NY2d 494, 501 [1993].) The legislative purpose underlying this section of the labor law is to protect workers by making the owners and general contractors of building construction jobs ultimately responsible for safety practices on those jobs. (*Rocovich v Consolidated Edison Co.,* 78 NY2d 509, 513 [1991] *citing* 1969 NY Legis Ann, at 407.)

> "The failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers 'are scarcely in a position to protect themselves from accident.' Therefore, the statute should 'be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed.'"

(*Cherry v Time Warner, Inc.*, 66 AD3d 233, 235-236 [1st Dept 2009][internal

citations and quotation marks omitted].)

Defendants have not established, as a matter of law, that plaintiff was not exposed to an elevation-related risk. Plaintiff testified at his deposition that the concrete beam weighed between 200 and 300 pounds, raising the issue of whether plaintiff should have been provided with a hoist to carry the beam instead of carrying the beam by hand. (*See Runner v New York Stock Exch., Inc.,* 13 NY3d 599, 602 [2009]; *see also Brown v VJB Constr. Corp.,* 50 AD3d 373 [1st Dept 2008].)

In *Runner v New York Stock Exchange, Inc.* (13 NY3d at 603), a worker was injured while serving as a counterweight on a makeshift pulley, when he was dragged into the pulley mechanism, after a heavy object on the pulley mechanism rapidly descended a set of stairs that were less than three feet high. The Court of Appeals framed the decisive question as, "whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." (*Id.* at 603.) The Court of Appeals ruled that the harm to plaintiff was the direct consequence of the application of the force of gravity to the reel, and that the less than three foot elevation differential could not be viewed as de minimus, "particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent." (*Id.* at 605.)

In *Brown*, a granite slab weighing 1,000 pounds fell three feet off a forklift, struck the ground, and then tilted over and pinned the plaintiff's right wrist between the slab and a wall. It was undisputed that the slab fell because a clamp securing the slab to the forklift had failed. The Appellate Division, First Department rejected the argument that Labor Law § 240 (1) did not apply because there was no "substantial" elevation differential, stating,

> "While it is true that section 240 (1) liability requires an elevation differential between the worker and the object being hoisted, the extent of the elevation differential is not necessarily determinative of whether an accident falls within the ambit of Labor Law § 240 (1). . . .
>
> it is of no consequence that the ultimate destination of the slab was the same level where the forklift was positioned, or where plaintiff was standing. The relevant facts are that a slab of granite measuring four by three feet and weighing 1,000 pounds had to be hoisted three feet above grade in order to transport it, and that the accident occurred while it was hoisted in the air due to the effects of gravity and the defective clamp."

(*Brown,* 50 AD3d at 376 [citation omitted].)

Defendants' reliance on *Cruz v Neil Hospitality LLC* (50 AD3d 619 [2d Dept 2008]) is misplaced. In *Cruz*, an iron worker, along with five other workers, was attempting to move a steel beam, 20 feet long and weighing approximately 800 pounds, by pushing it over a dirt mound about 15 feet high. They were moving the beam by pushing it on top of another beam, and had moved the beam half way up the mound when the workers stopped for a moment. The beam began to slide back down

and everyone else moved out of the way. A large ditch behind the plaintiff prevented him from moving back. The plaintiff attempted to jump over the beam, but his left leg was caught and crushed between the beams.

Therefore, summary judgment dismissing plaintiffs' claims under Labor Law § 240 against the City, NYCTA, and Judlau is denied.

C. Labor Law § 241 (6)

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, the complaint alleges that defendants violated 12 NYCRR 23-1.8 (a) (Sondhi Affirm., Ex A), and paragraph 15 of the bill of particulars alleges that defendants violated 12

NYCRR 23-6.1, 23-6.2, 23-6.3 ,and 23-7.2. (*Id.*, Ex D.)

Defendants are granted summary judgment dismissing plaintiff's claims under Labor Law § 241 (6) against the MTA, because MTA is neither an owner, contractor or agent under this statute.

As to the other defendants, they have demonstrated that 12 NYCRR 23-1.8 (a), which requires approved eye protection equipment, does not apply to this action. Plaintiff neither alleged any type of eye injury nor alleged that he lacked proper eye protection. The bill of particulars alleges that plaintiff injured his knee. (Sondhi Affirm., Ex D ¶ 8.)

Defendants also correctly point out that 12 NYCRR 23-6.1, 23-6.2, 23-6.3 and 23-7.2 do not apply here. "12 NYCRR 23-6.1 and 23-6.2 govern the use and maintenance of ropes and hoists but do not state when such safety devices must be used. Since plaintiff was not using a hoist, there could be no violation of either regulation." (*Hawkins v City of New York*, 275 AD2d 634, 635 [1st Dept 2000].) 12 NYCRR 23-6.3, which concerns the operation and specifications of material platform and bucket hoists, and 12 NYCRR 23-7.2, which concerns the operation and specifications of temporary personnel or workmen's hoists, are similarly inapplicable. (*Toefer v Long Island R.R.*, 4 NY3d 399 [2003].)

Therefore, defendants are granted summary judgment dismissing so much of

plaintiffs' claims under Labor Law § 241 (6) that are based on violations of 12 NYCRR 23-1.8 (a), 12 NYCRR 23-6.1, 23-6.2, 23-6.3, and 23-7.2.

D. Other statutes

Defendants are granted summary judgment dismissing plaintiff's claims that defendants violated "New York City Building Code §§ 27-104, 27-128, 27-128 [*sic*]." (Verified Bill of Particulars ¶ 15.) As discussed above, the provisions of the 1968 Building Code are not applicable to plaintiff's alleged accident within the 59th Street-Columbus Circle subway station. (*Garcia v New York City Tr. Auth.*, 63 AD3d 1100, *supra*.) In any event, defendants point out that these provisions were not in effect at the time of plaintiff's alleged accident on September 9, 2009. Local Law No. 33 (2007) of City of New York, which repealed the 1968 Building Code, became effective July 1, 2008. (available at http://www.nyc.gov/html/dob /downloads/pdf/ll33of2007.pdf [accessed June 29, 2012].) Section 7 of Local Law No. 33 expressly repealed Administrative Code § 27-128, and Administrative Code § 27-104, also relied upon by plaintiff, set forth a rule of construction of the 1968 Building Code. Administrative Code § 27-104 stated, "This code shall be liberally interpreted to secure the beneficial purposes thereof. Any conflict or inconsistency between the requirements of this code and applicable state and federal laws and regulations shall be resolved in favor of the more restrictive requirement."

Finally, the Court does not address defendants' argument that Administrative Code § 7-201 (c) (2) does not apply here. Plaintiff does not allege that defendants violated Administrative Code § 7-201 (c) (2), but rather the complaint purports to plead compliance with the prior written notice requirement.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted in part as follows:

1) The fifth and sixth causes of action are severed and dismissed, with costs and disbursements to defendant Metropolitan Transportation Authority as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant;

2) so much of the complaint that alleges that defendants violated New York City Building Code §§ 27-104 and 27-128 is dismissed;

3) so much of the second, fourth, and seventh causes of action that allege that defendants violated Labor Law § 241 (6), based on 12 NYCRR 23-1.8 (a), 12 NYCRR 23-6.1, 23-6.2, 23-6.3, and 23-7.2 is dismissed;

and defendants' motion for summary judgment is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that plaintiff's cross motion for leave to supplement the bill of particulars is granted only to the extent of granting leave to allege a violation of 12 NYCRR 23-1.7 (e) (2), and the cross motion is otherwise denied; and it is further

ORDERED that plaintiff shall serve a supplemental bill of particulars within 20 days of service of a copy of this order with notice of entry.

Dated: July 17, 2012
New York, New York

ENTER:

J.S.C.