Fitzgerald v Marriot Intl., Inc.
2016 NY Slip Op 30881(U)
May 13, 2016
Supreme Court, New York County
Docket Number: 153776/14
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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DAVID FITZGERALD and DONNA FITZGERALD,

Plaintiffs,

-against-

MARRIOT INTERNATIONAL, INC. and STRUCTURE TONE, INC.,

Defendants.

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Index No. 153776/14
Motion Sequence 001

DECISION & ORDER

HON. SHERRY KLEIN HEITLER

Defendants Marriot International, Inc. ("Marriot") and Structure Tone, Inc. ("Structure Tone") (collectively, "Defendants") move pursuant to CPLR 3212 for summary judgment dismissing plaintiffs' common law negligence and Labor Law §§ 200, 240(1), and 241(6) claims in their entirety. Plaintiffs oppose and cross-move for summary judgment on their Labor Law 241(6) cause of action. Plaintiffs further move pursuant to CPLR 3025(b) for leave to amend their bill of particulars to allege violations of certain subdivisions of the Industrial Code which they assert apply to this case.

This action arises out of an accident which allegedly occurred while plaintiff David Fitzgerald ("Plaintiff" or "Mr. Fitzgerald") was working as a steamfitter at a construction site located at 5 Madison Avenue in Manhattan where an existing building was being renovated and converted into a Marriot hotel. Mr. Fitzgerald worked the night shift, and among other things was responsible for monitoring the heating pipes and checking for leaks. Mr. Fitzgerald claims that while he was walking down a ramp at the site he slipped and fell on a piece of loose insulation. As a result of the fall he required surgery to his right knee. Plaintiffs claim that Mr. Fitzgerald will require total right knee replacement surgery in the future.

Mr. Fitzgerald was deposed on March 19, 2015.[1] Prior to the accident Mr. Fitzgerald had been working four nights each week from 4:00 pm to 12:00 am for his employer, Infinity Mechanical. Mr. Fitzgerald spent most of his shift inspecting the construction site. He spent the remainder of his shift in a shanty. If a leak occurred or any other issue arose, he would contact his supervisor at Infinity Mechanical.

The accident in question occurred on March 31, 2014 at approximately 10:00 pm while Mr. Fitzgerald was walking down a ramp leading from the fourth floor of the construction site toward his shanty. According to Mr. Fitzgerald, the ramp was about twenty feet long and about six feet wide. It was made of wood and had a handrail on each side (Fitzgerald Deposition pp. 19-35). Mr. Fitzgerald described the accident as follows (*id.* pp. 44-48, 52):

Q. You said your accident occurred at about 10:00 p.m.; is that correct??

A. That's correct.

Q. Where were you heading to?

A. I was heading to the shanty.

Q. Where were you coming from?

A. I was coming from the upper floors. . . .

Q. Could you describe for me how the accident happened?

A. I was walking down the ramp, and you build up speed, you know, as you are going down the ramp because it is pitched. I just went zoom right out from under me. I stepped on something. I later saw it was a piece of insulation that had been laying there. I don't know for how long.

Q. Could you describe this piece of insulation for me?

A. Pink and silver with mud and dirt on it. . . .

Q. Did you see this piece of insulation at all before the accident?

A. No.

Q. Had you noticed any insulation on the ramp before the accident at any time during the day?

A. No, not that I can remember. There was other dirt, you know, other stuff.

[1] A copy of his deposition transcript is submitted as Defendants' exhibit E ("Fitzgerald Deposition").

Q. Could you describe for me how big this piece of insulation was?

A. Small. About 6 by 6.

Q. 6 inches by 6 inches?

A. I guess that.

Q. When was the first time you saw this piece of insulation?

A. After I hit the ground.

Q. Where did you see the piece of insulation?

A. Right underneath me, right by my foot.

* * * *

Q. After you landed on your backside, was that when you first saw this piece of insulation?

A. First – yes. I mean, I looked at my knee, because I knew, it hurt so bad. I was almost crying.

There were no witnesses to Mr. Fitzgerald's accident and none of his co-workers or supervisors at Infinity Mechanical were deposed or gave statements in connection with this action.

Defendant Structure Tone, the construction site's general contractor, employed Mr. Michael Stiglitz as one of its superintendents. He was deposed on behalf of Structure Tone on April 17, 2015.[2] Among other things, Mr. Stiglitz conceded that the ramp at issue should have been kept free and clear of debris, and that if he had seen any such debris he would have directed someone to clean it up (Stiglitz Deposition, pp. 76-77, 126):

Q. And, as part of a steamfitter's duties, would they be performing the type of work that we discussed before, which was checking for leaks and freezing pipes?

A. Yes.

Q. And performing those duties, would the worker be required to be walking on the ramps?

A. Yes.

[2] A copy of Mr. Stiglitz' deposition transcript is submitted as Defendants' exhibit F ("Stiglitz Deposition")

Q. And would Structure Tone expect that those ramps, at the hours that David Fitzgerald was working there, that those ramps would be kept free and clear of any slipping or tripping hazards as well as any materials?

A. Yes.

* * * *

Q. If during the walk-throughs that you performed on a daily basis you witnessed any scattered debris or materials on a ramp, am I correct that you would direct somebody to clean that off the ramp?

A. Yes.

Q. And, why is that?

A. Path of egress.

Q. What about path of egress?

A. It needs to be free and clear of any debris or material.

DISCUSSION

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This 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) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). However, "rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact." *Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 (1st Dept 2010); *see also Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

I. Labor Law § 240

Plaintiffs do not argue, and there is nothing in the record to show, that Mr. Fitzgerald's injuries resulted from an accident covered by Labor Law § 240.[3] "'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 person.'" *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 (2009) (quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]); *see also Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 10 (2011); *Narducci v Manhasset Bay Associates*, 96 NY2d 259, 267 (2001); *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 (1991). There is no question that Plaintiff did not fall from a height or through an unsecured opening, nor did an item fall onto him from a height. Accordingly Defendants' motion to dismiss plaintiffs' Labor Law § 240 claims is granted, and plaintiffs' Labor Law § 240 claims are hereby dismissed.

II. Labor Law § 200

Labor Law § 200[4] codifies the common law duty imposed upon general contractors to provide a safe workplace. *See Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352 (1998). Labor Law § 200 claims are generally predicated on a showing that the contractor either had the "authority to control the activity bringing about the injury to enable it to avoid or correct an

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[3] Labor Law 240 provides, in pertinent part, that "[a]ll 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, 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."

[4] Labor Law § 200 provides in relevant part that "[a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section."

unsafe condition," (*Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]), or that it had actual or constructive notice of the defective condition which caused the plaintiff's injuries (*see Comes v N. Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Philbin v A.C. & S., Inc.*, 25 AD3d 374, 374 [1st Dept 2006]).

On these motions the record is silent as to the origin of the piece of insulation. Whether it came off of a piece of equipment, fell from above, or was simply dropped by one of Mr. Fitzgerald's coworkers is unclear. As such the court can only speculate whether Structure Tone had the authority to control any activity by which a piece of insulation like the one at issue could end up on the ramp in the first place. Thus plaintiffs' Labor Law § 200 claim, if any, must be predicated on notice to the Defendants' of the injury-causing condition. *See Atashi v Fred-Doug 117 LLC*, 87 AD3d 455, 456 (1st Dept 2011) ("Actual notice may be found where a defendant . . . was aware of [a condition's] existence prior to the accident . . . ."); *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986) ("To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it.")

In this regard, Mr. Fitzgerald testified that one of his colleagues had complained about conditions at the construction site prior to his accident, in particular the presence of equipment and building materials on the ramps (Fitzgerald Deposition pp. 41-42):

Q. Did you ever complain to anyone from Structure Tone about the job site?

A. The other guy did, the guy who worked the other day, made a complaint to him.

Q. Who was that guy?

A. Jeremiah Daily.

Q. Who did Jeremiah Daily work for?

A. He worked for Infinity also. He did the days I didn't. . . .

Q. What did he complain about to your knowledge?

A. Just the mess, couldn't get around. Sometimes the ramp would be loaded with equipment, bundles, sheetrock; whatever they dumped there, and I guess they figured they would get it later.

Q. This was complaints that Mr. Daily made to Structure Tone?

A. I believe everybody saw it. It was there.

Q. What I want to know is what did Mr. Daily complain about to your knowledge?

A. I don't know what his complaints were. I know he said he made them; he couldn't get around.

Mr. Stiglitz denied having knowledge of any such complaints, but conceded that Structure Tone had no formal procedure for the filing of complaints and that he would not have been the person workers such as Mr. Fitzgerald would have approached had they wished to raise any safety concerns (Stiglitz Deposition pp. 150-153):

Q. As far as you know, did anyone from any of the subcontractors complain to anyone from Structure Tone about the condition of the ramps?

A. Not that I am aware.

Q. Did anyone of any [sic] the contractors ever make any complaints to Structure Tone, about the general lack of housekeeping at this construction site? . . .

A. Those complaints wouldn't go to me.

Q. Who would they go to?

A. Probably the project managers.

Q. And, that's James Bickerstaff?

A. Yes, or Total Safety.

Q. Was there a specific form of any sort of when complaints were made, by any of the subcontractors?

A. Not that I'm aware. . . .

Q. Are you aware of any complaints of anyone from Structure Tone about ramps being loaded with equipment, bundles, sheetrock, whatever?

A. No. Nothing I'm aware of. . . .

Q. If that were true, that bundled equipment, or anything was dumped on the ramps, that would be a violation of the safety rules, correct? . . .

A. Technically, yes. You're blocking the egress.

In fact, throughout the examination it became apparent that other Structure Tone employees, in particular the project managers, were more familiar than Mr. Stiglitz with the day-to-day operations at the construction site and the issues relevant to this case. For example, Mr. Stiglitz did not know whether the construction supervisors who reported to him had ever directed any cleanup on the ramps (Stiglitz Deposition p. 126):

Q. Well, okay. So is it correct that you don't recall, as you're sitting here today, you can say that you don't recall, ever, any one of your workers from Structure Tone directing anyone to clean up one of the ramps? . . .

A. That's not what I said. I don't know if they did it. It doesn't mean they didn't. I personally don't know, or don't recall if they did, or didn't.

He also could not recall who, if anyone, from Structure Tone was responsible for making sure the ramps were free and clear of slipping hazards, and did not know whether packing materials such as insulation would have been unpacked outside the construction site or on the platforms above each ramp (*id.* pp. 77, 117-118):

Q. Now, who is responsible from Structure Tone? . . . Who [] is responsible from Structure Tone, to make sure that those ramps are free and clear from any slipping, tripping or scattered hazards?

A. There is no one particular person for that duty.

Q. Was there at least one during the late hours?

A. I don't recall. I am not certain.

Q. Do you know if Structure Tone left any laborers on after 5:00?

A. I'm not certain.

* * * *

Q. All right. Is it correct that during regular construction processes, that materials are regularly being unpacked at the construction site?

A. Yes.

Q. And, does the unpacking of materials at times create debris at the construction site?

A. Yes.

Q. Is it the job of the laborers to clean up that type of debris from packing materials for instance?

A. Yes.

Q. And, is it the job of the laborers to also clean up, if pieces of material break off and get discarded?

A. Yes.

Q. And, are there times during the construction process, that the platform above the ramp on each various floor, would get certain amounts of debris from packing materials and other pieces of broken off materials? . . .

A. I can't answer that. I don't know if they would unpack outside, if they would do it inside the building. I don't know.

Mr. Stiglitz did recall seeing debris in the walking areas, which he attributed to the fact that the ramps were regularly used to transport building materials (*id.* at 118-121):

Q. You walk the site on a daily basis, right?

A. Correct.

Q. Did you ever see any debris in the walking area [] of the construction site at any time that you walked this site, from the time it started until the time it ended? . . .

A. Yes.

Q. And that debris would remain in areas until it was cleaned up by the laborers or somebody, correct?

A. The project was bought [sic] with a center pile of debris. Each competent person, or competent trade, would send a pile of debris in which the laborers would take that center pile and discard it.

Q. That is the procedure that's supposed to be followed, right?

A. Correct.

Q. At any time that you walked the site, did you ever see debris that wasn't center piled yet?

A. Yes. . . .

Q. Now, were the ramps also used for transporting materials from the top of the platform and outside down into the floor by either dollies or wheelbarrows, or any other method?

A. Yes. Entry into the building.

Q. So when you said "entry into the building", is it correct that it's the entry into the building for both people and materials?

A. Yes.

Q. So is it correct that all day long, during construction at this site, materials would be getting brought into the various floors from the hoist outside down these ramps that we're seeing in these photographs? . . .

A. Yes.

Defendants argue that there is nothing to show whether the alleged hazard existed for any significant length of time prior to the accident. *Gordon*, 67 NY2d at 837; *see also Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 (1994). But as this is a motion for summary judgment, Defendants' cannot merely point to gaps in plaintiffs' proofs (*see Velasquez v Gomez*, 44 AD3d 649, 650 [2d Dept 2007]), but must instead affirmatively establish their *prima facie* entitlement to dismissal of plaintiffs' claims as a matter of law by demonstrating the absence of any material issue of fact. Here, in order for Structure Tone to establish *prima facie* that it lacked constructive notice of the condition at issue herein, it has to offer "specific evidence as to their activities on the day of the accident, including evidence indicating the last time the [ramp] was inspected or maintained before plaintiff fell." *Moser v BP/CG Ctr. I, LLC*, 56 AD3d 323, 324 (1st Dept 2008); *see also Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 (1st Dept 2011) ("A defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell . . . ."); *Ruane v Allen-Stevenson School*, 82 AD3d 615, 617 (1st Dept 2011) (citing *Moser* with approval in a Labor Law § 200 case); c.*f. Vella v One Bryant Park, LLC*, 90 AD3d 645, 646 (2d Dept 2011); *Barillaro v Beechwood RB Shorehaven, LLC*, 69 AD3d 543, 545 (2d Dept 2010); *Schultz v Hi-Tech Constr. & Mgt. Servs., Inc.*, 69 AD3d 701, 702 (2d Dept 2010); *Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d 763, 764 (2d Dept 2009). Nothing of the sort is submitted herein.

What is apparent from the record is that workers utilized the ramps for the transport and temporary storage of building materials; that debris from such materials fell onto walking areas,

including ramps; that laborers employed by Structure Tone were responsible for compiling and removing the debris; and that workers complained about the presence of debris on the ramps. What is absent from the record is testimony and documentary evidence indicating whether the various trades unpacked materials above the ramps; whether debris fell onto the ramps; how often the laborers actually removed debris from the construction site; whether they were responsible for cleaning the walkways on a daily basis; and perhaps most important, the last time Structure Tone inspected and cleaned the ramps prior to Mr. Fitzgerald's accident. *See Kennedy v McKay*, 86 AD2d 597, 598 (2d Dept 1982) (a contractor's "duty to provide a safe place to work encompasses the duty to make reasonable inspections"); *see also Urban v. No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 555 (1st Dept 2009). Structure Tone does not address these omissions in its moving papers, but rather states in a conclusory manner that it had no notice of the hazardous condition. This does not satisfy Defendants' *prima facie* burden.

Since there remains an outstanding material issue of fact whether Defendants should have known about such condition, (*see Ross, supra*; *Moser, supra*; *Ruane, supra*), that branch of Defendants' motion for summary judgment dismissing plaintiffs' Labor Law § 200 claims is denied, and, insofar as plaintiffs' Labor Law § 200 and common-law negligence claims are related, Defendants' motion to dismiss such common-law negligence claims must also be denied. *See Rizzuto*, 91 NY2d at 352 (Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site . . . .")

III. Labor Law 241(6)

Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers. *Ross* 81 NY2d at 501-502. The statute provides, in pertinent part:

> 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, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The [New York State Commissioner of Labor] may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work . . . shall comply therewith.

The court rejects Defendants' contention that Mr. Fitzgerald's job responsibilities do not fall within the parameters of Labor Law § 241(6) because he did not perform actual construction work. The cases upon which Defendants rely in this regard are distinguishable from the case at bar (*see Blandon v Advance Contr. Co., Inc.*, 264 AD2d 550, 552 [1st Dept 1999] ["The statutory protection does not extend, for example, to employees performing routine maintenance tasks at a building that happens to be undergoing construction or renovation. . . or duties as a night watchman or security guard . . . ."]; *Long v Battery Park City Auth.*, 295 AD2d 204 [1st Dept 2002] [plaintiff was hired solely to provide "routine security services"]). Unlike *Blandon* and *Long*, Mr. Fitzgerald was a union steamfitter, not a security guard. At the time of his accident he was wearing a hard hat, construction boots and work gloves (Fitzgerald Dep pp. 19-23, 44-49). Defendants' reliance on *Yong Ju Kim v Herbert Constr. Co., Inc.*, 275 AD2d 709 (2d Dept 2000) is also misplaced. In that case, the plaintiff was employed as a staff electrician at a hotel which hired a separate electrical contractor to renovate the panels in the electrical closets on each floor. He was injured while attempting to determine the cause of a malfunctioning outlet in one of the rooms on the ninth floor. The court determined that the plaintiff was not covered by the Labor Law because his routine maintenance work was unrelated to the renovations taking place at the hotel.

Unlike the plaintiff in *Yong Ju Kim*, Mr. Fitzgerald was a construction worker hired for a specific task. While he may not have been performing actual construction work at the time of his accident, "it is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work. The intent of the statute was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts." *Prats v Port Auth.*, 100 NY2d 878, 882 (2003). Mr. Fitzgerald was not just a "night watchman" as Defendants contend. His steamfitter outfit, and his work in particular, was integral to the overall construction of the building. Without his expertise construction on the hotel would have been impeded since the pipes in the building, which were still under construction, likely would have frozen, causing damage and construction delays. I therefore find that Mr. Fitzgerald's duties included the type of work for which the statutory protections of the Labor Law were enacted.

Labor Law § 241(6) is not self-executing, and in order to withstand a motion for summary judgment, plaintiffs must show that there was a violation of a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*see Ross*, 81 NY2d at 503). Plaintiffs do not dispute Defendants' contention that the Industrial Code provisions cited in their bill of particulars do not apply to the case at bar, and instead move to amend their bill of particulars accordingly to allege violations of 12 NYCRR § 23-1.7(d), 12 NYCRR § 23-1.7(e)(1), and 12 NYCRR § 23-1.7(e)(2).[5]

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[5] 12 NYCRR § 23-1.7(d), entitled "Slipping hazards" 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."

12 NYCRR § 23-1.7(e), entitled "Tripping and other hazards", provides: "(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause

12 NYCRR § 23-1.7(d) and (e) are specific enough to form the basis of a Labor Law § 241(6) violation. *See Matter of 91st St. Crane Collapse Litig.*, 133 AD3d 478, 480 (1st Dept 2015); *Boss v Integral Constr. Corp.*, 249 AD2d 214, 215 (1st Dept 1998). However, 12 NYCRR § 23-1.7(d) is factually inapplicable in that the construction debris Plaintiff allegedly slipped on does not constitute a "foreign substance" under this section. *See D'Acunti v New York School Constr. Auth.*, 300 AD2d 107, 107 (1st Dept 2002) (dirt and debris); *Nankervis v Long Is. Univ.*, 78 AD3d 799, 800-801 (2d Dept 2010) (pipe); *Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d 763, 765 (2d Dept 2009) (debris); *Salinas v Barney Skanska Const. Co.*, 2 AD3d 619, 622 (2d Dept 2003) (demolition debris). Defendants argue that 12 NYCRR § 23-1.7(e)(1) and (2) are also inapplicable because they apply to tripping hazards and Mr. Fitzgerald testified that he slipped (Fitzgerald Deposition pp. 74-76):

Q. Item 10 at the bottom, there is a question "What was the employee doing when he/she was injured or became ill," and it says "Walking down a ramp." Do you agree with that description?

A. Partially. That's his. That's not what I told him. I was walking down the ramp, slipped on a piece of insulation and, you know, twisted out my knee. . . .

Q. Flip over to the next page, please. Section D, item 11, the typed-in part says "When turning left at the bottom of the ramp the IW fell. His right knee give way." Do you see that?

A. Yes.

Q. Is that a correct description of the accident?

A. Except for the slipping on the insulation, that's right.

Q. Did your knee ever give way at any other time other than this incident?

A. Never. Never had a problem.

Q. So it is incorrect that your knee only gave way as a result of the slip and fall on this debris; is that what you are testifying to?

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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."

A. I am saying the only reason it gave way was the slip and fall on the job site. Never had a problem with it before.

Q. You slipped and fell on this piece of insulation, you believe, not just on the ramp itself?

A. Yes.

Plaintiffs could argue that Defendants cannot escape liability simply because Mr. Fitzgerald testified that he slipped, rather than tripped. However, there is controlling precedent from the First and Second Departments on this issue in Defendants favor. S*ee Stier v One Bryant Park LLC*, 113 AD3d 551, 552 (1st Dept 2014) ("Furthermore, 12 NYCRR 23-1.7(e), which requires work areas to be kept free of tripping hazards, is inapplicable because plaintiff does not allege that he tripped on an accumulation of dirt or debris. Rather, he testified that he slipped on an unsecured piece of masonite, which was not a tripping hazard."); *Costa v State of New York*, 123 AD3d 648, 648 (2d Dept 2014) ("The defendant established, prima facie, that [12 NYCRR 23-1.7(e)(1) and (2)] are inapplicable because the decedent did not trip . . . ."); *see also Ventura v Lancet Arch, Inc.*, 5 AD3d 1053, 1054 (4th Dept 2004) ("Plaintiff testified at his deposition that he slipped on the wet mortar as he attempted to move the mixer, and thus he may not contend that he tripped due to a violation of [NYCRR 23-1.7(e)]").[6]

Accordingly, it is hereby

ORDERED that Defendants' summary judgment motion is granted only with respect to plaintiffs' Labor Law § 240 and Labor Law § 241(6) claims; and it is further

ORDERED that Defendants' motion is denied in respect of plaintiffs' common law negligence and Labor Law § 200 claims; and it is further

[6] *Cohen v New York City Indus. Dev. Agency*, 926 NYS.2d 343, 2011 NY Misc. LEXIS 959, * 7 (Sup. Ct. NY Co. Jan. 28, 2011, Friedman, J) ("Nor may defendants escape liability based on their contention that plaintiff testified that he slipped, rather than tripped, on the debris.")

ORDERED that plaintiffs' Labor Law § 240 and Labor Law § 241(6) claims are hereby severed and dismissed in their entirety; and it is further

ORDERED that plaintiff's cross-motion for summary judgment on its Labor Law § 241(6) claims is denied; and it is further

ORDERED that plaintiffs' cross-motion for leave to amend its bill of particulars to allege violations of 12 NYCRR § 23-1.7(d) and (e) is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

DATE: 5-13-16

SHERRY KLEIN HEITLER, J.S.C.