SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: TP 12

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JOSEPH ALAIA,

Plaintiff,

DECISION and ORDER

- against -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Index No. 151163/2014
Motion No. 3453 - 001

Defendants.

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The following papers numbered 1 and 2 were fully submitted on the 19th day of October 2016.

	Papers Numbered
Plaintiff's Notice of Motion for Partial Summary Judgment on Liability under Labor Law § 241(6) and on Plaintiff's Third Cause of Action in the Verified Complaint, with Supporting Papers (dated August 8, 2016)	1
Defendants' Affirmation in Opposition to Plaintiff's Motion for Partial Summary Judgment (dated October 12, 2016)	2

Upon the foregoing papers, plaintiff's motion for partial summary judgment, *inter alia*, on the issue of liability under Labor Law § 241(6) is denied in accordance with the following.

Plaintiff Joseph Alaia (hereinafter, "plaintiff") commenced this action to recover damages for personal injuries he allegedly sustained on December 17, 2013, while employed by Martin Associates as a "fitter and a plumber" on a construction project at the sewage treatment plant known as the Port Richmond Water Pollution Control Plant

located at 1801 Richmond Terrace on Staten Island.[1] Plaintiff's accident occurred at 7:30 A.M. while he was performing work in the course of his employment, i.e., the process of converting the plant to run on methane. Plaintiff alleges there was a thin layer of snow "with ice underneath" that covered the ground on the day of his accident. Further, plaintiff's foreman directed him to "get a cart...to pick up a [certain] fitting" in order to "tie in some lines for the sewage." The fitting, which was in the shape of an elbow, weighed approximately 100 to 120 pounds. In order to comply, plaintiff utilized a walkway leading to the facility where the fitting was stored, where another employee of Martin Associates brought the fitting out and placed it on the ground near the plaintiff, who bent down and picked it up. However, after taking several steps toward the cart he brought to transport the fitting, he lost his footing and fell backwards. As a result, the fitting ended up "land[ing] on his chest." Plaintiff testified that he did not see any salt or sand on the walkway where the accident occurred and that D.E.P., the owner and operator of the Water Pollution and Control Plant, was responsible for the removal of snow and ice on its grounds.

Presently before the Court is plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 241(6) (plaintiff's third cause of action), predicated on alleged violations of certain enumerated provisions of the Industrial Code

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[1] Defendant The New York City Department of Environmental Protection (hereinafter, "DEP") is an agency of defendant The City of New York (hereinafter, "City"). DEP is the owner and operator of the Port Richmond Water Pollution Control Plant located at 1801 Richmond Terrace, Staten Island, New York.

of the State of New York (12 N.Y.C.R.R. §23) and regulation 29 C.F.R. 1926.450 of the Occupational and Safety Health Administration ("OSHA"). In support of his motion, plaintiff maintains that he has demonstrated, prima facie, that defendant's violation of 12 N.Y.C.R.R. §23-1.7(d) (entitled "Slipping Hazards") was a proximate cause of his accident. Plaintiff further maintains that he has made a prima facie showing of his freedom from comparative fault. To the extent relevant, the section in question requires employers to remove, sand or cover any ice or snow on a passageway or walkway "which is in a slippery condition...[*i.e.*] which may cause slippery footing."

In opposition to plaintiff's motion, D.E.P. and the City maintain that material issues of fact exist as to plaintiff's comparative fault. In particular, the City contends that plaintiff's testimony at his 50-h hearing and at his examination before trial, contain an admission that he was aware of the hazardous conditions confronting him, *i.e.*, (1) a thin layer of snow covering the walkway in question, which he described as icy and slippery, and (2) the absence of any sand or salt on the obviously "slippery" walkway to minimize the "slippery hazard" it presented (*see* 12 N.Y.C.R.R. §23-1.7[d]). These defendants also point out that plaintiff failed to alert his supervisor of the danger or complain about the readily observable icy condition of the walkway prior to attempting to pick-up the fitting despite his 30 years of plumbing experience and acknowledged awareness of the hazardous conditions. Instead, plaintiff chose to use the admittedly icy pathway to retrieve the "fitting," which weighed between 100 and 120 pounds, and lifted it from the ground without asking for the assistance of the nearby co-worker who had

brought the fitting to him. Under these circumstances, it is argued that triable issues of fact exist, including whether or not plaintiff's comparative negligence contributed to his accident.

This Court agrees.

It is well established, that as the Court of Appeals held in Rizzuto v. L.A. Wenger Contr. Co., 91 NY2d 343, 349-350, "section 241(6) [of the Labor Law] imposes a nondelegable duty upon an owner or general contractor to respond in damages for injuries sustained *due to another party's negligence* in failing to conduct their...operations so as to provide for the reasonable and adequate protection of ...persons employed [at a job site]." However, the Court went on to note that "an owner or general contractor may, of course, raise any valid defense to the imposition of vicarious liability under section [241(6)]...,including contributory and comparative negligence" (*see* Long v. Forest-Fehlhaber, 55 NY2d 154, 159-161, *rearg. denied* 56 NY2d 805; Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 502, n.4; Zimmer v. Chemung County Performing Arts, 65 NY2d 513, 521-522, *rearg denied* 65 NY2d 1054).

Consonant with the foregoing principles, it is the Court's opinion that triable issues of fact exist as to the extent of plaintiff's comparative negligence, if any, in causing or contributing to this accident. Plaintiff has admitted his awareness of the hazardous condition of the walkway in question, and has failed to demonstrate, prima facie, that he did not have at his disposal the time and resources (*e.g.*, the aid of a co-

worker) to enable him to transfer the 100-120 pound fitting into the cart he had been provided to retrieve same safely (*see* Vega v. Restani Constr. Corp., 18 NY3d 499, 506-507; Sepulveda-Vega v. Suffolk Bancorp., 119 AD3d 850, 850; Wagner v. Wody, 98 AD3d 965, 966; Abbadessa v. Ulrik Holding, 244 AD2d 517, 518, *lv denied* 91 NY2d 814). A worker confronted with a hazardous condition in the work place "may not hold others responsible if he elects to perform his job so incautiously as to injure himself" (Abbadessa v. Ulrick Holding, 244 AD2d at 518). Whether or not this is the case here is for a jury to determine.

Accordingly, it is

ORDERED, that plaintiff's motion for partial summary judgement is denied.

This constitutes the decision and order of the Court.

Dated: December 21, 2016

ENTER,

HON. THOMAS P. ALIOTTA, J.S.C.