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NYSCEF DOC. NO. 57 RECEIVED NYSCEF: 12/02/2016

At an IAS Term, Part 36 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of November, 2016.

PRESENT:

HON. BERNARD J. GRAHAM,
Justice.

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JHON GARCIA,

Plaintiff,

- against -

JOMAR ASSOCIATES NY, LLC,

Defendant.

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DECISION AND ORDER

Index No. 500710/14

Mot. Seq. #3

The following e-filed papers read herein:	NYSCEF #:
Notice of Motion, Affirmations (Affidavits), and Exhibits Annexed	34-49
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In this personal injury action arising out of a workplace accident, plaintiff Jhon Garcia (plaintiff) moves for an order, pursuant to CPLR 3212, granting him summary judgment against defendant Jomar Associates NY, LLC (defendant): (1) on his causes of action under Labor Law § 200, common-law negligence, and Labor Law § 240 (1), and (2) on the issues that, as a matter of law, defendant failed to comply with Industrial Code §§ 23-1.7 (e), 23-1.30, and/or 23-1.33, and that such violation(s) constituted negligence, a failure to use reasonable care under the circumstances, and a substantial factor in causing plaintiff's injuries. Defendant opposes the motion and, in addition, requests that the Court search the record and award it summary judgment dismissing plaintiff's Labor Law § 240 (1) claim.

Facts and Allegations

Defendant, as the owner of the building at 144 Henry Street in Brooklyn, New York, hired plaintiff's employer, a real estate management firm of Tucciarone & DiMilia (T&D), to replace a water heater located in the basement of the building (the basement). The basement has two doors, one of which faces the outside of the building (the exterior door). To exit the basement through the exterior door, one has to step over a permanently secured interior steam pipe (the pipe) that is running across the concrete floor on the way out. The pipe is 1.5 inches in diameter, is partially recessed in the floor, and is not ramped up or covered. There is a height differential of approximately 1.25 inches protruding from between the top of the pipe and the floor.

On March 8, 2013, during the course of his employment for T&D, plaintiff tripped and fell over the pipe in the basement, as he was carrying a water heater by hand with his foreman. Holding one end of the water heater, plaintiff was walking straight and backwards on his way to the exterior door, while the foreman, who was holding the other end of the water heater, was walking straight and forward, looking at him. They were carrying the water heater parallel to the floor. While plaintiff was holding his end of the water heater with both hands, he could not see what was underneath his feet, although the lighting in the basement was adequate and he could otherwise see its floor and walls.[1] As he was walking,

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[1] *See* Garcia tr at 132, lines 11-18 ("Q. When you entered the basement, did you have any difficulty seeing inside the basement? A. No. Q. Were you able to see the floor? A. The floor, I think so. Q. Were you able to see the walls? A. Of course."). *See also* Garcia at 132, line 19 – 133, line 5 ("Q. Did you have any difficulty seeing what was in front of you at any point after you entered the basement until the accident occurred? A. None. Q. Is your claim that there was insufficient lighting in the basement that in any way impacted how the accident occurred? . . . A. No.").

he tripped over the pipe, and the water heater fell on him. The water heater was empty; it weighed between 50 and 80 pounds; its height was between 4½ and 5 feet, and its diameter was between 18 and 20 inches.

Plaintiff testified at his pretrial deposition that he was unaware of the presence of the pipe immediately before the accident,[2] and that he could not specifically recollect whether he had ever noticed or passed over the pipe before the accident.[3] He admitted that the exterior door could be used as an entrance to the basement when it is unlocked from the inside, and that it was unlocked and open at the time of the accident. He further admitted that, more than a month before the accident, he had entered the basement using the exterior door and, hence, by necessity, must have stepped over the pipe.[4]

Jose Idier Giraldo, plaintiff's foreman and a T&D employee, confirmed at his pretrial deposition that plaintiff fell while the two of them were carrying the water heater. Although a witness to the accident, he did not know what caused plaintiff to fall. He identified the pipe

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[2] *See* Garcia tr at 223, lines 15-18 ("Q. As you were walking towards the pipe, did you know the pipe was located in front of the door on March 8th, 2013? A. No."). *See also* Garcia tr at 223, lines 11-14 ("Q. At any point before the accident, did you take note of the pipe on March 8th, 2013? A. No.").

[3] *See* Garcia tr at 224, lines 4-7 ("Q. Had you ever taken notice of that pipe at any point prior to the accident? A. I don't remember."). *See also* Garcia tr at 183, lines 24-25 ("Perhaps I went in through there once, but I do not remember this ever."); at 184, lines 9-10 ("It [the pipe] was something indifferent, none of us ever saw it."); at 184, lines 13-16 ("Q. Prior to March 8th, 2013, had you ever seen the pipe...? A. I don't remember.").

[4] See Garcia tr at 184, lines 17-21 ("Q. Prior to March 8th, 2013, had you ever entered the basement of 144 Henry Street using the [outside] staircase [leading to the exterior door]...? A. Yes.").

from the photographs of the basement as one of the items during his weekly inspections of the basement for the past 20+ years in which he had been maintaining the building. He acknowledged that he did not warn plaintiff to watch out for the pipe when the latter was walking backwards carrying one end of the water heater. He explained that there was no need to warn, since plaintiff knew about the pipe.

John DiMilia, a principal of T&D, the plaintiff's employer, testified at his examination before trial that he learned of plaintiff's accident when plaintiff, accompanied by Giraldo, came to his office with a doctor's note. Giraldo, in plaintiff's presence, told DiMilia that plaintiff fell while the two of them were carrying the water heater and further relayed to him plaintiff's request to take a few days off from work. DiMilia identified the pipe from the photographs of the basement. He acknowledged that the pipe had existed since the time he and his partner bought the building in the 1980s, and that no wood, planks, or platforms had been placed over it before the accident. DiMilia testified that he had received no complaints about the pipe, or of anyone tripping over it, before the accident.

Plaintiff commenced this action, asserting causes of action based on common-law negligence and violations of Labor Law § 200, 240 (1), and 241 (6). Defendant joined issue. After discovery was completed and a note of issue was filed, plaintiff served the instant motion for partial summary judgment.

Plaintiff's Common-Law Negligence and Labor Law § 200 Claims

The common-law duty placed on owners, among others, to provide employees with a safe place to work has been codified in Labor Law § 200 (*see Jock v Fien*, 80 NY2d 965, 967 [1992]). If the worker is injured in whole or in part as a result of the existence of

a dangerous condition on the owner's property, of which condition the owner had actual or constructive notice, it may be held liable for the worker's injuries under Labor Law § 200 and in common-law negligence, irrespective of whether the owner supervised the work (*see Kerins v Vassar College*, 15 AD3d 623, 626 [2d Dept 2005]).

Here, plaintiff has failed to make a prima facie showing that the height differential of approximately 1.25 inches between the top of the pipe and the floor constituted a defective or dangerous condition, particularly given his pretrial testimony that (1) the lighting in the basement was adequate at the time of the accident, and (2) he had entered the basement through the exterior door in the past (*see Grizzell v JQ Assoc., LLC*, 110 AD3d 762, 764 [2d Dept 2013]; *Smith v A.B.K. Apts.*, 284 AD2d 323 [2d Dept 2001]; *see generally Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]). Therefore, the branches of plaintiff's motion for partial summary judgment on liability on his common-law negligence and Labor Law § 200 claims are denied without regard to the sufficiency of defendant's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Plaintiff's Labor Law § 240 (1) Claim

Labor Law § 240 (1) requires property owners, among others, to provide workers with "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 the workers. The purpose of the statute is to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v Curtis-Palmer Hydro-Elec. Co.*,

81 NY2d 494, 501 [1993]). The protections of Labor Law § 240 (1) do not encompass any and all perils that may be connected in some tangential way with the effects of gravity (*see Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 916 [1999]).

In this case, the approximately 1.25 inch differential between the pipe and the floor did not present an elevation-related hazard to which the protective devices enumerated in Labor Law § 240 (1) are designed to apply (*see Alvia v Teman Elec. Contr., Inc.*, 287 AD2d 421, 422 [2d Dept 2001], *lv dismissed* 97 NY2d 949 [2002]). Moreover, the impetus for the water heater's fall on plaintiff was his tripping on the ground level, rather than the direct consequence of gravity (*see Ghany v BC Tile Contr., Inc.*, 95 AD3d 768, 769 [1st Dept 2012]). Under the circumstances presented here and at defendant's request, the Court exercises its authority to search the record and both deny the branch of plaintiff's motion which is for summary judgment on liability on his Labor Law § 240 (1) claim, and award summary judgment to defendant dismissing this claim against it (*see* CPLR 3212 [b]; *Carrasco v Weissman*, 120 AD3d 531, 534 [2d Dept 2014]).

Plaintiff's Labor Law § 241 (6) Claim

Labor Law § 241 (6) is intended to provide workers engaged in construction and demolition work with reasonable and adequate safety protections. It places a non-delegable duty upon owners, among others, to comply with the specific safety rules set forth in the Industrial Code (*see Ross*, 81 NY2d at 501). "Contributory and comparative negligence are valid defenses to a section 241 (6) claim; moreover, breach of a duty imposed by a rule in the

Code is merely some evidence for the factfinder to consider on the question of a defendant's negligence" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]).[5]

Plaintiff's motion relies on Industrial Code §§ 23-1.7 (e), 23-1.30, and 23-1.33 as one or more bases for his Labor Law § 241 (6) claim.

Industrial Code § 23-1.7 (e) (Tripping and Other Hazards)

Industrial Code § 23-1.7 (e) consists of two subsections (1) and (2), both of which are sufficiently specific to support a Labor Law § 241 (6) claim (*see Mugavero v Windows By Hart, Inc.*, 69 AD3d 694, 695 [2d Dept 2010]). Subsection 1 (titled "Passageways") of Industrial Code § 23-1.7 (e) provides that:

> "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" (emphasis added).

It appears that subsection 1 fits within the largely unchallenged version of events described by plaintiff; namely that, while walking in a passageway, he encountered an "obstruction[ ] or condition[ ]" in the form of the protruding pipe that caused him to trip and sustain injuries (*see Marshall v Glenman Indus. & Com. Contr. Corp.*, 117 AD3d 1124, 1126 [3d Dept 2014]). Nevertheless, plaintiff is not entitled to partial summary judgment on any of the elements of his Labor Law § 241 (6) claim to the extent predicated on the alleged violation of Industrial Code § 23-1.7 (e) (1) (*see Marshall*, 117 AD3d at 1127). As stated,

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[5] *See also Long v Forest-Fehlhaber*, 55 NY2d 154, 161 (1982) ("since violation of the administrative rules adopted pursuant to the authorization of subdivision 6 of section 241 of the Labor Law cannot rise to the level of negligence as a matter of law, . . . comparative negligence . . . is . . . a defense to an action based on such a dereliction").

a violation of an Industrial Code provision, "while not conclusive on the question of negligence, . . . constitute[s] *some evidence of negligence* and thereby reserve[s], for resolution by a jury, the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 351 [1998] [emphasis in the original]). Moreover, plaintiff has failed to demonstrate the absence of comparative fault on his part (*see Riffo-Velozo v Village of Scarsdale*, 68 AD3d 839, 842 [2d Dept 2009]).[6]

Nor is plaintiff entitled to partial summary judgment on any of the elements of his Labor Law § 241 (6) claim to the extent premised on the alleged violation of subsection 2 of Industrial Code § 23-1.7 (e). This subsection (titled "Working areas") provides that:

> "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" (emphasis added).

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[6] In light of this ruling, it is unnecessary for the Court to consider defendant's expert opinion (at page 3 of the affidavit of Angela DiDomenico, Ph. D., Certified Professional Ergonomist and at the unnumbered page 6 of her report) that:

> "Mr. Garcia's described kinematics [the study of motion exclusive of the influences of mass and force] [is] not consistent with [his] tripping on the subject pipe given the dimensions of the [basement] and the location of the subject pipe relative to the edge of the landing at the [exterior] doorway. Based on Mr. Garcia's anthropometry (i.e. height) and described kinematics, it is unlikely that Mr. Garcia's lower back made contact with the edge of the landing as he described in his testimony. Thus, the subject pipe was not a proximate cause of Mr. Garcia's subject fall incident. . . ."

It is a question of fact whether the pipe constituted a "sharp projection" by virtue of its protrusion from the floor[7] (*see Giza v New York City School Const. Auth.*, 22 AD3d 800, 801 [2d Dept 2005] [question of fact existed as to whether the warped piece of plywood that caused the worker to trip and fall created a tripping hazard as contemplated by subsection 2]). *Compare Aragona v State*, 74 AD3d 1260, 1261 (2d Dept 2010) (the padeye over which the worker tripped was not a "sharp projection" within the meaning of subsection 2) *and Dalanna v City of New York*, 308 AD2d 400, 401 91st Dept 2003) (the bolt which was embedded in the ground was not a "sharp projection" within the meaning of subsection 2),[8] *with Lenard v 1251 Ams. Assoc.*, 241 AD2d 391, 393 (1st Dept 1997) (a door stop constituted a "sharp projection" within the meaning of subsection 2), *appeal withdrawn* 90 NY2d 937 (2003).

Industrial Code § 23-1.30 (Illumination)

Industrial Code § 23-1.30 is sufficiently specific to support a Labor Law § 241 (6) claim (*see Dickson v Fantis Foods, Inc.*, 235 AD2d 452, 453 [2d Dept 1997]). It provides that:

> "Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in

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[7] This factual issue is the additional reason for denying this branch of plaintiff's motion under Industrial Code § 23-1.7 (e) (2). The other reasons, as discussed in connection with Industrial Code § 23-1.7 (e) (1) above, are the general principle that a violation of an Industrial Code provision does not constitute negligence per se, and the specific failure of this plaintiff to establish freedom from negligence.

[8] The lower court's decision indicates that the extent of the bolt's protrusion from the walking surface was between 1½ and 2 inches (*see Dalanna v City of New York*, 2003 WL 25668472 [Sup Ct, NY County 2003], *affd* 308 AD2d 400 [1st Dept 2003]).

> construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass."

Section 23-1.30 cannot support plaintiff's Labor Law § 241 (6) claim, since there is no evidence that he tripped and fell because of inadequate lighting. As stated, plaintiff was walking backwards while carrying one end of the water heater when he tripped and fell. He testified at his pretrial examination that lighting (or the lack thereof) did not in any way contribute to the accident. Thus, the alleged violation of this regulation was not a proximate cause of the accident (*see Annicaro v Corporate Suites, Inc.*, 32 Misc 3d 1213[A], 2011 NY Slip Op 51274[U], *4 [Sup Ct, Queens County 2011] ["under the facts as alleged, including plaintiff's walking backwards down the stairs while sweeping, the alleged violation of (Industrial Code § 23-1.30) was not a proximate cause of plaintiff's injuries"], *rearg denied* 2011 WL 11084034 [Sup Ct, Queens County 2011], *affd* 98 AD3d 542, 545 [2d Dept 2012]). Accordingly, the branches of plaintiff's motion for partial summary judgment on the elements of his Labor Law § 241 (6) claim, to the extent predicated on the alleged violation of Industrial Code § 23-1.30, are denied.

Industrial Code § 23-1.33 (Protection of Persons Passing by Construction, Demolition or Excavation Operations)

The remaining branches of plaintiff's motion for partial summary judgment on the elements of his Labor Law § 241 (6), to the extent predicated on the alleged violation of

Industrial Code § 23-1.33, are also denied.[9] Although Industrial Code § 23-1.33 is specific enough to support a Labor Law § 241 (6) claim (*see Ozzimo v H.E.S., Inc.*, 249 AD2d 912, 913 [4th Dept 1998]), it does not apply to accidents occurring in the cities having a population of one million or more, such as the City of New York (*see* Labor Law § 241 [8]).[10] In addition, Industrial Code § 23-1.33 applies to persons passing by construction operations and not to workers, such as plaintiff, on a construction site (*see Mancini v Pedra Const.*, 293 AD2d 453, 454 [2d Dept 2002]; *Lawyer v Hoffman*, 275 AD2d 541, 542 [3d Dept 2000]).

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[9] Contrary to defendant's assertion, plaintiff's belated allegation that defendant violated Industrial Code § 23-1.33 does not involve any new factual allegations or raise a new theory of liability, and thus there is no prejudice to defendant for the Court to consider it (*see Boscarello v FC Beekman Assoc., LLC*, 2016 NY Slip Op 31627[U], *6 [Sup Ct, Kings County 2016] [collecting authorities]).

[10] Labor Law § 241 (8) provides, in relevant part, that:

> "The commissioner, as deemed necessary, shall promulgate rules designed for the purpose of providing for the reasonable and adequate protection and safety of *persons passing by all areas, buildings or structures in which construction, excavation or demolition work is being performed*, and the owners and contractors and their agents for such work . . . shall comply therewith. *The provisions of this subdivision shall not apply to cities having a population of one million or more*" (emphasis added).

The sole purpose for the addition of subdivision (8) to Labor Law § 241 was to protect the *public* by the enactment of safety regulations (*see LaClair v Shelly Elec.*, 264 AD2d 55, 57 [3d Dept 2000]).

Conclusion

Plaintiff's motion for partial summary judgment in Seq. No. 3 is denied in its entirety.

Upon searching the record at defendant's request, the Court grants it summary judgment dismissing plaintiff's Labor Law § 240 (1) claim against it.

The parties are reminded of their next scheduled appearance in JCP-1 on January 5, 2017.

This constitutes the decision and order of the Court.

E N T E R,

J. S. C.