[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____ PART 21

Justice

Randy Daugherty

-v-

City of New York

INDEX NO. 108964/99

MOTION DATE _____

MOTION SEQ. NO. 02

MOTION CAL. NO. 22

SCANNED

AUG 04 2003

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

Motion decided in accordance with accompanying memorandum.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: July 23, 2003

Robert D. Lippmann

HON. ROBERT D. LIPPMANN

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

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

RANDY DOUGHERTY,

Plaintiff,

INDEX NO.
108964/99

-against-

CITY OF NEW YORK,

Defendant.

- X

ROBERT D. LIPPMANN, J.:

Defendant City of New York moves for summary judgment dismissing with prejudice plaintiffs claims for violations of Labor Law §§ 200, 240 and 241(6) and common-law negligence.

Plaintiff, an iron worker employed by non-party Grow-Perini, brought this action to recover for personal injuries he allegedly sustained while working on defendant's Queensboro Bridge project on October 28, 1998 around 2 a.m., on a barge moored to the East River, when he fell upon tripping on a 4" x 4" wood skid used to support steel beams.

Defendant argues that the complaint must be dismissed for the following reasons: (i) the Labor Law § 200 claim cannot be sustained because defendant did not have control or supervision over plaintiffs work; (ii) plaintiff has not made out a prima facie case of common-law negligence because defendant neither created the defective condition nor had actual or constructive notice of it; (iii) the circumstances of plaintiffs accident did not entail the height-related risks required for redress under Labor Law § 240; and, (iv) no claim can be sustained

under Labor Law § 241(6) because the Industrial Code violations alleged by plaintiff are not sufficiently specific and no causality has been proven between an Industrial Code violation and the accident. Defendant also makes much of the fact that the offending wood was placed where it was by plaintiff and his co-worker.

In opposition to defendant's motion, plaintiff argues that: there are outstanding issues of fact; under the Labor Law defendant as undisputed owner of the property has a non-delegable duty to protect plaintiff; and, defendant has failed to meet its burden of proof as movant of establishing its defenses as a matter of law.

Plaintiffs complaint asserts all the aforementioned claims but does not state them in discrete causes of action.

Both sides rely heavily on their exposition of the burden of proof on this motion. Each is correct, but only up to a point. "On a summary judgment motion, defendant has the initial burden of coming forward with evidence proving that plaintiffs cause of action has no merit...., thereby shifting the burden to plaintiff to come forward with evidence to demonstrate the existence of a triable issue of fact" (Cronin v. Chrosniak, 145 AD2d 905,906 [4th Dept 19881, citing GTF Mkta. v. Colonial Aluminum Sales, 66 NY2d 965,967 [1985]; Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Winegrad v. New York University Medical Center, 64 NY2d 851, 853 [19851). Applying this standard, the court finds that only the claims under Labor Law § 241(6) may be sustained.

For an owner to be liable under § 200, it must have had the right to exercise control over the method or manner in which the contractor performed the work (Gregorio v. Getty Petroleum Corporation, 201 AD2d 278,279 [1st Dept 19941; Tanzer v. A. Terzi Productions, 244 AD2d

224 [1st Dept 19971). Plaintiff does not claim such control. "Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200" (Comes v. New York State Electric and Gas Corporation, 82 NY2d 876, 877 [19931). If the owner has the requisite control over the contractor's activities, it must also have constructive notice of the condition that caused plaintiffs injury (Balaj v. Equitable Life Assurance of the Uited States, 211 AD2d 487 [1st Dept 19951, lv den 85 NY2d 811 [1995], rearg den 86 NY2d 839 [1995]). Notice alone is not enough; if the owner lacks sufficient control to correct or avoid the unsafe condition, it can't be held liable under Labor Law § 200 (Gonzalez v. Stem's Deuartment Stores, Inc., 211 AD2d 414 [1st Dept 1995]; see also Rosenberg v. Eternal Memorials, Inc., 291 AD2d 391, 391-392 [2d Dept 20021). This same standard governs plaintiffs common-law negligence claim, since Labor Law § 200 is a codification of the common law (see Houde v. Barton, 202 AD2d 890,891 [3d Dept 19941, lv den 84 NY2d 977 [1994]).

Labor Law § 240(1) protects workers exposed to elevation-related risks from injuries caused by such hazards (Gregorio v. Getty Petroleum Corp., supra, citing Ross v. Curtis-Palmer Hvdro-Electric Company, 81 NY2d 494, 500-501 [1993]). No such hazard was involved in plaintiffs accident, and plaintiff has not opposed that branch of defendant's motion seeking to dismiss this claim.

Labor Law Section 241(6) imposes on owners and contractors the non-delegable duty to insure that areas in which construction work is being performed are safe for the workers. An owner may be held liable under this section even absent a showing that the owner controlled, directed or supervised the work or the site (Allen v. Cloutier Construction Corp., 44 NY2d 290

[1978], rearg den 45 NY2d 776 [1978]; Sernio v. Beniolo. N.V., 168 AD2d 235,236 [1st Dept 19901). To make a prima facie case under this statute, plaintiff must show that a specific safety violation was a proximate cause of his accident (Ross v. Curtis-Palmer Hydro-Electric Co., supra, 81 NY2d at 505; Sharrow v. Dick Corporation, 233 AD2d 858, 860 [4th Dept 19961, lv den 89 NY2d 810 [1997], rearg den 89 NY2d 1087 [1997]).

Plaintiff herein alleges independent violations of four specific sections of the Industrial Code: 12 NYCRR §§ 23-1.7(e)(1) and (2), 23-2.1 and 23-1.30. One of these, 12 NYCRR §§ 23-2.1 [maintenance and housekeeping], is insufficient to support a claim under Labor Law § 241(6) (Quinlan v. City of New York, 293 AD2d 262 [1st Dept 20021; Scannell v. Mt. Sinai Medical Center, 256 AD2d 214 [1st Dept 19981). However, the other Industrial Code regulations, 12 NYCRR §§ 23-1.30 [illumination] (Dickson v. Fantis Foods, Inc., 235 AD2d 452 [2d Dept 19971) and 12 NYCRR §§ 23-1.7(e)(1) and (2) [tripping hazards] (Colucci v. Equitable Life Assurance Society of the United States, 218 AD2d 513 [1st Dept 19951) are specific enough to sustain a § 241(6) claim. Whether violation of one or more of these regulations proximately caused plaintiffs accident is for the jury to determine (Gawel v. Consolidated Edison Company of New York. Inc., 237 AD2d 138 [1st Dept 19971).

With respect to the claim of inadequate lighting (12 NYCRR § 23-1.30), plaintiff has submitted sworn testimony attesting to more than his subjective belief that it was so dark he couldn't see his feet; he has testified to the objective fact that there was no light source on the barge whatsoever. This is enough to create a factual issue (contrast Herman v. St. John's Episcopal Hospital, 242 AD2d 316 [2d Dept 19971). Defendant's contention that there was sufficient light because plaintiff knew the skid was there is totally inadequate to vitiate this issue.

"Workers do not assume the **risk** of injury caused by a statutory violation" (Lucas v. KD Development Construction Corporation, 300 AD2d 634 [2d Dept 20021). The claims of tripping hazards (12 NYCRR §§ 23-1.7(e)[1] and [2]) are also sufficiently grounded in evidence to raise triable issues of fact (see Canning v. Barneys New York, 289 AD2d 32 [1st Dept 20011). The evidence before the court is insufficient to find as a matter of law that the path taken by plaintiff among the skids was not a "passageway" or that the skids were not "sharp projections" (see Rossi v. Mount Vernon Hospital, 265 AD2d 542 [2d Dept 19991; compare Lenard v. 1251 Americas Associates, 241 AD2d 391 [1st Dept 19971, app wdn 90 NY2d 937 [1997]; Schroth v. New York State Thruway Authority, 300 AD2d 1044 [4th Dept 20021). In reaching this determination, the court is mindful that "[s]ince defendant has moved for summary judgment, and, plaintiff[] oppose[s] same, ... plaintiffs' pleadings ... [must be accepted] ... as true, and [the court's] decision 'must be made on the version of the facts most favorable to ... [plaintiff]'" (McLaughlin v. Thaima Realty Corp., 161 AD2d 383, 384 [1st Dept 19901, citations omitted). "[O]nce it has been alleged that a concrete specification of the code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiffs injury" (Crystal v. Japan Airlines Management Corp., 255 AD2d 161, 162 [1st Dept 1998]).

Accordingly, defendant's motion for summary judgment is granted only to the extent that the Clerk is directed to enter judgment dismissing the plaintiffs claims based on Labor Law §§ 200 and 240(1) and on common-law negligence and is otherwise denied. If a pre-trial order has not been completed in this matter, counsel shall contact the **Part** 21 Clerk forthwith to

schedule a conference date for the purpose of completing such order specifying all discovery to be conducted and setting forth a date for plaintiff to file a note of issue.

This decision constitutes the order of the court.

DATED: July 23, 2003

J.S.C.
HON. ROBERT D. LIPPMANN
J.S.C.