Pauling v 39 Prince Realty, LLC
2016 NY Slip Op 30671(U)
March 9, 2016
Supreme Court, Bronx County
Docket Number: 306618/13
Judge: Betty Owen Stinson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
----------x

CHRISTIAN PAULING,

DECISION AND ORDER

Plaintiff(s), Index No: 306618/13

- against -

39 PRINCE REALTY, LLC AND TOP 8 CONSTRUCTION CORP.,

Defendant(s).

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Stinson, J.

In this action for personal injuries arising from, *inter alia*, violations of Labor Law §§ 200, 240(1), and 241(6), defendants move (1) seeking an order granting them summary judgment, thereby, dismissing this action; and (2) striking plaintiff's complaint on grounds that he spoliated evidence. Significantly, defendants aver that summary judgment is warranted because (1) with respect to plaintiff's claim premised on a violation of Labor Law § 200 and common law negligence, his accident was the result of his own independent decision to come into contact with an open and obvious condition, which was not inherently dangerous; (2) with respect to his claim pursuant to Labor Law § 240(1), the accident causing work did not expose plaintiff to elevation differentials, such that § 240(1) does not apply; and (3) with regard to his claim pursuant to Labor Law § 241(6), the Industrial Code violations on which he premises his claims are factually inapposite or too general. With

respect to defendants' motion seeking a spoliation sanction, defendants aver that despite evidence that a photograph of the hazard alleged was created and that a request that the same be preserved and exchanged, plaintiff has failed to provide the photograph; claiming that the same never existed.

For the reasons that follow hereinafter, defendants' motion is granted, in part.

The instant action is for personal injuries resulting from the alleged failure to properly maintain premises and for purported violations of the Labor Law. Plaintiff's complaint alleges the following. On April 12, 2013, plaintiff while within premises located at 39-02/38-16 Prince Street, Queens, NY (39-02) was involved in accident. Specifically, plaintiff, who was employed by nonparty Tri-Square Construction Corp. (Tri-Square) tripped/slipped over debris within 39-02 and more specifically, the area within which plaintiff was working . Plaintiff alleges that 39-02 was owned by defendant 39 PRINCE REALTY, LLC (Prince), who hired defendant TOP 8 CONSTRUCTION, CORP. (Top 8) to perform work therein. Top 8, in turn, hired Tri-Square to perform a portion of the aforementioned work. Based on the foregoing, plaintiff alleges that defendants were negligent in allowing the debris - a dangerous condition - to exist within 39-02 and in failing to ameliorate the same. Plaintiff also alleges that based on the foregoing, defendants - in failing to provide plaintiff with a reasonably safe

place to work - violated Labor Law §§ 200, 240(1), and 241(6).

Defendants' Motion for Summary Judgment

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]).

Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562).

Moreover, when deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]),

> [s]upreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies

> between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial

(*see also Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]; *Perez v Bronx Park Associates*, 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the Court's function when determining a motion for summary judgment is issue finding not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

Common Law Negligence and Labor Law § 200

Defendants' motion seeking summary judgment with respect to plaintiff's common law negligence claim and his claim pursuant to Labor law § 200 - essentially one in the same - is denied insofar as the defendants' own evidence establishes that plaintiff's accident was caused, in whole or in part, by a large area of debris within the instant premises - and more specifically, the area where plaintiff was required to work, and that the debris had existed for a substantial period of time prior to the accident alleged. Accordingly, whether the aforementioned debris constituted a hazard or an inherently dangerous condition and whether defendants had

constructive notice of the same are material questions of fact reserved for the jury, and which preclude summary judgment on thi cause of action.

Labor Law § 200 reads

> [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.

Thus, Labor Law § 200 essentially codifies the common law, namely that an owner and general contractor have a duty to provide workers with a safe place to work (*Rizzutto v Wagner Contracting Co.*, 91 NY2d 343, 353 [1998]["section 200 is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site."]; *Comes v New York State Electric and Gas Corporation*, 82 NY2d 876, 877 [1993]; *Russin v Picciano*, 54 NY2d 311, 317 [1981]; *Allen v Cloutier Construction Corp.*, 44 NY2d 290, 299 [1978]). The lynchpin for purposes of liability pursuant to Labor Law § 200 is supervision and control. In other words, generally, the party against whom liability is sought must "have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe

condition" (*Rizzutto v Wagner Contracting Co.*, 91 NY2d 343, 352 [1998]).

Accordingly, under Labor Law § 200, in addition to liability for a dangerous condition arising from the methods employed by a subcontractor, over which the owner or general contractor exercises supervision and/or control (*Comes* at 877; *Allen* at 299; *Dalanna* at 400), liability can also arise when the accident is caused by a dangerous condition at the worksite that was either created by the owner or general contractor or about which they had prior notice (*see Mitchell v New York Univ.*, 12 AD3d 200, 201 [2004]; *Ortega v Puccia*, 57 AD3d 54, 61-62 [2008]); *Paladino v Society of N.Y. Hosp.*, 307 AD2d 343, 345 [2003]).

Accordingly, under the common law, no liability lies absent proof that a defendant created the dangerous condition alleged to have caused a plaintiff's accident or unless the defendant has prior actual or constructive notice of the same (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Bogart v Woolworth Co.*, 24 NY2d 936, 937 [1969]; *Armstrong v Ogden Allied Facility Mgt. Corp.*, 281 AD2d 317, 318 [2001]; *Wasserstrom v New York City Tr. Auth.*, 267 AD2d 36, 37 [1999], *lv denied* 94 NY2d 761 [2000]). A defendant is charged with having constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the happening of an accident to permit the defendant to discover and remedy the same

(*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). The notice required must be more than general notice of any defective condition (*id.* at 838; *Piacquadio* at 969). Instead, the law requires notice of the specific condition alleged to have caused an accident and at the specific location alleged (*Gordon* at 838).

In support of the instant motion, defendants submit plaintiff's deposition transcript, wherein he testified, in pertinent part, as follows. On April 12, 2013, plaintiff was injured within 39-02, at which time he was employed by Tri-Square and had been so employed since October 2, 2012. Upon arriving at 39-02 in October, plaintiff noted that a new building was being built thereat and that the first five levels had already been erected. Plaintiff reported to Mr. Chang who along with another employee - Guy - gave him work-related instructions. Because plaintiff neither understood nor spoke much English, Basilio, another employee would translate any instructions given to plaintiff. Essentially, plaintiff was helper at the site, doing things such as mixing cement and debris removal. On the date of his accident, at 8AM, he was told to help Astacio - another worker - unload a truck that had delivered ceramic tiles to the construction site. Specifically, Astacio was to operate a forklift to unload the pallets on which tiles sat from the truck and plaintiff was to direct the forklift, using a flag, to the

basement, where the tiles were to be stored. At some point, after almost all of the pallets had been transported to the basement, where they were laid side by side, one of the pallets fell off the forklift at or near the basement. As a result, several boxes of tiles also fell off the pallet, to the ground, causing the tiles to break. Plaintiff was then directed to sort through the tiles on the pallet that had fallen and separate the broken tiles from those still intact. He was told to do this by Mr. Chen, who indicated that he wanted the broken tiles back on an incoming truck as soon as possible. While in the basement, plaintiff proceeded to remove the broken tiles, which were in boxes, from the pallet on which they sat and transport them to another pallet, 10 feet away. The basement, was a very large space. At some point, after he had moved four boxes of broken tiles to the other pallet and as he carried a fifth box of broken tiles, plaintiff tripped over an accumulation of plastic and metal cables located in the basement. Plaintiff indicated that the cables had been there for several weeks. The cables were tangled together, exceeded five in number, and occupied an area exceeding five feet on the basement's floor. Plaintiff testified that upon stepping on the cables, he slipped/tripped and went forward, falling to the ground. The cables were the kind used to bind materials brought to the site.

Based on the foregoing, material questions of fact with respect to whether the condition alleged - a tangle of metal and

plastic cables - constituted an inherently dangerous condition about which defendants had constructive notice - preclude summary judgment with respect to plaintiff's Labor Law § 200 claims and his claims premised on common law negligence. Specifically, here, plaintiff's testimony establishes that as he worked within 39-02, he tripped/slipped and fell on a large pile of tangled plastic and metal cables which had existed for several weeks prior to his accident. Contrary to defendants' assertion, the foregoing evidence does militate in favor of summary judgment. To be sure, defendants' only arguments in support of summary judgment with respect to plaintiff's claim pursuant to Labor Law § 200 and claims of common law negligence are that the condition alleged was - as a matter of law - both open and obvious and not inherently dangerous and that the instant accident was solely the result of plaintiff's mistake in that he came into contact with the debris alleged.

As noted above, liability under Labor Law § 200 arises when, *inter alia*, the accident is caused by a dangerous condition at the worksite that was either created by the owner or general contractor or about which they had prior notice (*Mitchell* at 201; *Ortega* at 61-62; *Paladino* at 345). Similarly, under the common law, a defendant cannot be liable for the negligent maintenance of a premises unless it is established that it created the dangerous condition alleged to have caused a plaintiff's accident or unless the defendant has prior actual or constructive notice of the same

(*Piacquadio* at 969; *Bogart* at 937; *Armstrong* at 318; *Wasserstrom* at 37). Constructive notice exists when a defective condition is visible, apparent, and exists for a sufficient length of time prior to the happening of an accident so as to permit the defendant to discover and remedy the same (*Gordon* at 837). Here, plaintiff's testimony - if credited - establishes that he tripped on debris; the same constituting a dangerous condition as a matter of law (*Lane v Fratello Constr. Co.*, 52 AD3d 575, 576 [2d Dept 2014]; *Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d 763, 764 [2d Dept 2009), and that because it existed for weeks prior to his accident, defendants had constructive notice of the same (*Gordon* at 837).

Defendants argument that summary judgment is warranted because the condition alleged was both open and obvious and not inherently dangerous in unavailing. First, generally, a hazardous condition, which is both open and obvious, obviates a defendant's duty to warn of the condition's existence (*Garrido v City of New York*, 9 AD3d 267, 267-268 [1st Dept 2004]). However, the fact that a condition is both open and obvious and, thus, readily observable does not negate a defendant's liability for failing to keep a premises in a reasonably safe condition (*id.* at 268; *Delia v 1586 Northen Blvd. Co., LLC*, 27 AD3d 269, 269 [1st Dept 2006]; *DeJesus v F.J. Sciame Construction Co., Inc.*, 20 AD3d 354, 354 [1st Dept 2005]; *Sanchez v Lehrer McGovern Bovis, Inc.*, 303 AD2d 244, 245 [1st Dept 2003]). Instead, evidence that a condition was both open and obvious merely

raises an issue of fact as to a plaintiffs comparative negligence (*Sanchez* at 354; *Hogan v Baker*, 29 AD3d 740, 740 (2d Dept 2006]). Accordingly, evidence of an open and obvious condition does not form the basis for awarding summary judgment in a defendant's favor (*Marrone v South Shore Properties*, 29 AD3d 961, 962 [2d Dept 2006]). Notwithstanding the foregoing, however, it is well settled that when a condition is both open and obvious and not inherently dangerous, a defendant is generally not liable for an accident arising therefrom (*Cupo v Karfunkel*, 1 AD3d 48, 52 [1st Dept 2003]; *see also Burke v Canyon Rd. Rest*, 60 AD3d 558, 559 [1st Dept 2009]).

Second, here, while the condition alleged - the large debris pile consisting of cables - was arguably open and obvious, as noted above, such condition - a pile of construction related debris like the one about which plaintiff testified - has been deemed a hazard sufficient to preclude summary judgment (*Lane* at 576; Aguilera at 764). Accordingly, cases like *Cupo* and *Burke*, are inapposite - requiring both that a condition be open and obvious and not inherently dangerous - and do not avail defendants.

Similarly, defendants' reliance on *Haynie v New York City Hous. Auth.* (95 AD3d 594 [1st Dept 2012]) and *Smith v Curtis Lbr. Co.* (183 AD2d 1018 [3d Dept 1992]) is also unavailing. In *Haynie*, plaintiff tripped and fell as he entered defendant's backyard to perform work therein (*id.* at 594-595). Plaintiff sued and the

court granted summary judgment in defendant's favor, holding that "[h]ere, by contrast, plaintiff testified that he knew he had to step on the concrete chunks in order to enter the backyard" (*id.* at 594-595). The court so held, citing *Smith* and, therefore, adopting the rationale promulgated in *Smith*, namely, that "[a] defendant is not required to protect a plaintiff from his own folly" (*id.* at 594-595). Significantly, in *Smith*, the court granted summary judgment in favor of defendant holding

> [t]he complaint does not allege the usual slip and fall situation where a plaintiff is caught by surprise when confronted by a dangerous condition which results in a fall and injury. Rather, here, plaintiff was fully aware of the stacked wood pile on which, for some inexplicable reason, he elected to stand to accommodate himself in taking down wooden planks. The danger in standing on loose wood was apparent. There is no duty to warn against a condition which is readily observable

(*id.* at 1019). It is clear that the holdings in *Smith* and *Haynie* were that the plaintiffs therein caused their own accidents by engaging in work despite the clear dangers associated therewith; hence the use of the term folly. Here, however, these cases do not control the outcome. At best, plaintiff's testimony is that he had seen the pile of debris which caused his fall for several weeks prior to his accident and that he inadvertently tripped thereon. This is markedly different than the facts in *Haynie* and *Smith* wherein plaintiffs' work was inextricably intertwined with the

hazards that caused their accidents. To be sure, as evinced from his testimony, plaintiff was able to work safely around the foregoing debris insofar as he had substantially performed work in and round the debris prior to his fall.

In light of the foregoing, defendants fail to establish prima facie entitlement to summary judgment on plaintiff's claims pursuant to Labor Law § 200 and common law negligence. Thus, the Court need not address the sufficiency of plaintiff's opposition papers on this issue (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] ["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 eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (internal citation and quotation marks omitted)]; *6014 Eleventh Ave. Realty, LLC v 6014 AH, LLC*, 114 AD3d 661, 661 [2d Dept 2014]).

Labor Law § 241(6)

Defendants' motion seeking summary judgment with respect to plaintiff's cause of action pursuant to Labor Law § 241(6) is granted to the extent of precluding plaintiff from asserting all but 12 NYCRR § 23-1.7(e)(2) as a predicate for his cause of action pursuant to Labor Law §241(6). With the exception of the forgoing section of the Industrial Code, plaintiff's version of the events

fails to establish a violation of all other portions of the Industrial Code alleged.

Labor Law § 241 states that "[a]ll contractors and owners and their agents . . . when constructing or demolishing buildings" shall comply with, *inter alia*, the requirements under Labor Law § 241(6), which require that

> [a]ll 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 or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

Thus, Labor Law § 241(6) imposes a duty of reasonable care upon owners, contractors and their agents, requiring that owners, contractors and their agents provide reasonable and adequate protection to those employed in all areas where construction, excavation, or demolition is being conducted (*Rizzutto v Wagner Contracting Co.*, 91 NY2d 343, 348 [1998]; *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494, 501-502 [1993]). The duty imposed by the this section of the labor law is nondelegable, meaning that an owner, contractor or agent can be held liable for the breach of the statute absent supervision or control of the

particular work site at issue (*Rizzutto* at 348-349; *Ross* at 502. A violation of Labor Law §241(6) necessarily requires a failure to comply or adhere to external rules and statutes (*Ross* at 503). More specifically, in order to establish a violation of Labor Law § 241(6), it must be shown that a defendant also violated an applicable section of a rule or regulation promulgated by the Commissioner of Labor, which mandates compliance with concrete specifications (Ross at 501-502; Basile *v ICF Kaiser Engineers Corp*, 227 AD2d 959, 959 [4th Dept 1996]). Accordingly, a violation of Labor Law § 241(6) requires a violation of an underlying statute or rule and such statute or rule must be one that prescribes a concrete and specific standard of conduct (*Rizzutto* at 350; *Ross* at 503). Moreover, the facts alleged must be tantamount to a violation of the Industrial Code section asserted (*Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 271 [1st Dept 2007]). Unlike a violation of Labor Law § 240(1) which establishes conclusive negligence, a violation of Labor Law § 241(6) does not conclusively establish negligence and is instead "merely some evidence of negligence which the jury may consider on the question of defendant's negligence" (*Rizzutto* at 349 [internal quotation marks omitted)]; *see also Long v Forest-Fehlhaber*, 55 NY2d 154, 159 [1982]; *Teller v Prospect Hgts. Hosp.*, 280 NY 456, 460 [1939]). Moreover, unlike Labor Law § 240(1), contributory and comparative negligence are valid defenses to any allegation

pursuant to Labor Law §241(6) (*Rizzutto* at 350; Unlike a violation of Labor Law § 240(1) which establishes conclusive negligence, a violation of Labor Law § 241(6) does not conclusively establish negligence and is instead "merely some evidence of negligence which the jury may consider on the question of defendant's negligence" (*Rizzutto* at 349 [internal quotation marks omitted)]; *see also Long* at 159; *Teller v Prospect Hgts. Hosp.*, 280 NY 456, 460 [1939]). Thus, a party may not be liable under Labor Law § 241(6), even if it is established that said party failed to comply with an applicable predicate statute. Moreover, unlike Labor Law § 240(1), contributory and comparative negligence are valid defenses to any allegation pursuant to Labor Law §241(6) (*Rizzutto* at 350; *Long* at 161). at 161).

Prima facie entitlement to summary judgment, is established when plaintiff demonstrates that Labor Law § 241(6) has been violated insofar as defendant has violated a rule or regulation promulgated by the Commissioner of Labor, which mandates compliance with concrete specifications (*Ross* at 501-502; *Basile* at 959).

Within his bill of particulars, plaintiff alleges that defendants violated 12 NYCRR §§ 23-1.5(a) and (c), 23-1.7(d), (e)(1) and (2), and 23-2.1(a) and (b). To establish a violation of Labor Law § 241(6), it must be shown that a defendant violated an applicable rule or regulation promulgated by the Commissioner of Labor, which prescribes a concrete standard of conduct (Ross at

501-502; Basile at 959). But for 12 NYCRR § 23-1.7(e)(2), all sections of the Industrial Code alleged are insufficient predicates for a violation of Labor Law § 241(6) as a matter of law.

12 NYCRR § 23-1.5(a) and (c), which require that worksites be constructed so as to provide adequate protection to those working therein and that all equipment used by the employees be maintained in good repair, it is well settled that the foregoing sections "are generic directives that are insufficient as predicates for section 241 (6) liability" (*Maldonado v Townsend Ave. Enters., Ltd. Partnership*, 294 AD2d 207, 208 [1st Dept 2002]; Sihly v New York City Tr. Auth., 282 AD2d 337, 337 [1st Dept 2001]). Similarly, 12 NYCRR §§ 23-2.1(a) and (b), which generally prescribe the manner in which materials at a worksite ought to be stored and how debris should be disposed are likewise insufficient predicates as a matter of law (*Canning v Barneys N.Y.*, 289 AD2d 32, 33-34 [1st Dept 2001]; *Lynch v Abax, Inc.*, 268 AD2d 366, 367 [1st Dept 2000]).

12 NYCRR § 23-1.7(d), mandates that no floors at a construction site be allowed to become slippery with "ice, snow, water, grease and any other foreign substance which may cause slippery footing," is concrete enough to form the basis of a violation under § 241(6) (*Boss v Integral Constr. Corp.*, 249 AD2d 214, 215 [1st Dept 1998]). However, it is factually inapplicable, as required by prevailing law (*Buckley* at 271). Specifically, the cables alleged to have caused the accident do not constitute a

slippery condition so as fall within the ambit of 12 NYCRR §23-1.7(d) (*Boss* at 215).

The same is true with respect to 12 NYCRR § 23-1.7(e)(1), mandating that passageways be kept free of tripping hazards. To be sure, here, plaintiff testified that his accident was caused by an accumulation of metal and plastic cables on the floor of a large room, namely the basement. Accordingly, here, the basement does not fall within the ambit of 12 NYCRR § 23-1.7(e)(1) because it is a room not a passageway (*Rajkumar v Budd Contr. Corp.*, 77 AD3d 595, 595 [1st Dept 2010]; *Boss* at 215).

Contrary to defendant's assertion, however, the version of the events as described by plaintiff do establish a violation of 12 NYCRR § 23-1.7(e)(2), requiring that platforms and floors in work areas be kept free of debris. Significantly, it has been held that 12 NYCRR § 23-1.7(e)(2) is not violated when the debris alleged to have caused an accident is an integral part of the floor (*Viera v Tishman Constr. Corp.*, 255 AD2d 235, 236 [1st Dept 1998]). Here, however, there is little merit to defendants' argument that merely because plaintiff had performed a substantial portion of his work prior to his accident, the cables herein were not within the area where he was told to work. This argument skews reality because it seeks to have the Court disregard plaintiff's clear and unequivocal testimony that the cables were in fact within the area where plaintiff was working, namely the two pallets (*see Samiani v New*

York State Elec. & Gas Corp. (199 AD2d 796 [3d Dept 1993]).

Defendants, have established prima facie entitlement to summary judgment with respect plaintiff's claim pursuant to Labor Law § 241(6) to the extent of dismissing all the predicate Industrial Code violations, *except* 12 NYCRR § 23-1.7(e)(2). Accordingly defendants' motion is granted to the extent of precluding plaintiff from asserting the foregoing Industrial Code violations - except 12 NYCRR § 23-1.7(e)(2) - as predicates for his claim pursuant to Labor Law § 241(6).

Labor Law §240(1)

Defendants' motion seeking summary judgment with respect to plaintiff's cause of action pursuant to Labor Law § 240(1) is granted without opposition. It is clear that when plaintiff was involved in the instant accident he was not engaged in any work that exposed him to any risks related to elevation differentials.

Labor Law § 240(1), applies where the work being performed subjects those involved to risks related to elevation differentials (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 561 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Specifically, the hazards contemplated by the statute "are those related to the effects of gravity where protective devices are called for . . . because of a difference between the elevation level of the required work and a lower level" (*Gordon* at 561 [internal quotation marks omitted]). Since Labor Law § 240(1) is intended to prevent

accidents where ladders, scaffolds, or other safety devices provided to a worker prove inadequate so as to prevent an injury related to the forces of gravity (*id.*), it applies equally to injuries caused by falling objects and falling workers (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]).

Here, plaintiff testified that his job was to move boxes of broken tiles and in the course thereof, he tripped and fell on cables. It is clear that insofar as plaintiff's assignment did not require him to work at a height or exposed him to the risk caused by a falling object, Labor Law § 240(1) does not apply. Defendants' motion seeking summary judgement with respect to plaintiff's claim pursuant to Labor Law § 240(1) is hereby granted.

Defendants' Motion for Spoliation Sanctions

Defendant's motion seeking a spoliation sanction on grounds that plaintiff destroyed a photograph of the condition alleged to have caused his accident is granted to the extent of ordering that at trial the jury be given an adverse inference charge with respect to the photograph.

Spoliation is the intentional or accidental destruction of evidence (*Kirkland v New York City Housing Authority*, 236 AD2d 170, 173 [1st Dept 1997]) ["Although originally defined as the intentional destruction of evidence arising out of a party's bad faith, the law concerning spoliation has been extended to the nonintentional destruction of evidence"]; *Squittieri v The City of*

New York, 248 AD2d 201, 203 [1st Dept 1998]). Sanctions for spoliation are thus appropriate "where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them" (*Kirkland* at 173). Dismissal of an action or the striking of pleadings, while severe, is an appropriate remedy when the evidence spoiled is a "*key piece of evidence*," (emphasis added) whose destruction precludes inspection by an adverse party (*id.* at 173; *Mudge, Rose, Guthrie, Alexander & Ferdon v Penguin Air Conditioning, Corp.*, 221 AD2d 243, 243 [1st Dept 1995]; *Lichtenstein v Fantastic Mdse. Corp.*, 46 AD3d 762, 763-764 [2d Dept 2007]; *Gray v Jaeger*, 17 AD3d 286, 287 [1st Dept 2005]; *Standard Fire Ins. Co. v Federal Pac. Elec. Co.*, 14 AD3d 213, 215 [1st Dept 2004]; *Herrera v Matlin*, 303 AD2d 198, 198 [1st Dept 2003]; *Goldman v Gateway Toyota*, 383 AD2d 457, 457 [2d Dept 2001]).

Conversely, in cases where the spoiled evidence is not crucial to a litigant's case, such that its absence does not prevent the outright prosecution or defense of a case, preclusion of evidence, or having the jury draw an adverse inference, rather than outright dismissal of pleadings, is the preferred remedy (*Strong v City of New York*, 112 AD3d 15, 24 [1st Dept 2013]; *New York City Hous. Auth. v Pro Quest Sec., Inc.*, 108 AD3d 47, 473 [1st Dept 2013]; *Tommy Hillfiger, USA, Inc. v Commonwealth Trucking*, 300 AD2d 58, 60 [1st Dept. 2002]; *Longo v Armor Elevator Co.*, 278 AD2d 127, 128

[1st Dept 2000]; *Strelov v Hertz Corporation*, 171 AD2d 420, 421 [1st Dept 1991]; *Gallo v Bay Ridge Lincoln Mercury, Inc.*, 262 AD2d 450, 451 [2d Dept 1999]).

It is clear, that irrespective of the spoliator's state of mind, the dispositive inquiry for purposes of fashioning a spoliation sanction is the prejudice caused to the opposing party by an opponent's spoliation of evidence (*Alleva v United Parcel Serv., Inc.*, 102 AD3d 573, 574 [1st Dept 2013]; *Giuliano v 666 Old Country Rd., LLC*, 100 AD3d 960, 962 [2d Dept 2012]; *Schantz v Fish*, 79 AD3d 4481, 481 [1st Dept 2010].

At his deposition, plaintiff testified that after his accident, he used his cell phone to photograph the cables that caused his fall. He further testified that he provided the cell phone to his attorney, who created a paper copy of the photograph that plaintiff took of the cables. Defendants, by counsel, then, requested a copy of the aforementioned photograph and further asked that plaintiff preserve his cell phone.

On July 14, 2014, defendants served a notice of preservation upon plaintiff, asking that he preserve his cell phone. Thereafter, on July 16, 2014, defendants served a discovery demand upon plaintiff asking that all photographs relevant to this action be provided. On August 14, 2014, plaintiff provided a response to the foregoing demand, providing 15 photographs, none of which depicted the cables alleged to have caused this accident. On

August 25, 2014, inasmuch as defendants were not provided with the photograph of the condition alleged, and to which plaintiff testified, defendants sent a letter seeking said photograph from plaintiff. On September 4, 2014, plaintiff, by counsel, responded by letter, indicating that he did not and never did possess the photograph about which plaintiff testified.

In opposition to the instant motion, plaintiff argues that no spoliation sanction is warranted and that if the Court deems it fit to levy a sanction, the striking of his complaint is unwarranted. Additionally, plaintiff submits an affidavit wherein he merely asserts that any photographs in his possession and related to this accident were provided to his attorney. Plaintiff further avers that sometime thereafter, he dropped his phone, the same broke, but that he nevertheless provided the same to his attorney in May 2015.

Plaintiff also submits an affidavit from Alan Boshnack (Boshnack), a Senior Network Engineer with Netsolvers, a firm which provides technology related services. Boshnack states that upon a request by plaintiff's counsel, he attempted to retrieve photographs from plaintiff's telephone to no avail.

Based on the foregoing, it is clear that plaintiff spoliated evidence, namely, the photograph he testified he took of the cables that caused his fall. Contrary to plaintiff's assertion, he unequivocally testified that he took a photograph of the cables that caused his fall. He further testified that he provided the

same to his attorneys. That now both plaintiff and his attorney seek to deny the foregoing is troubling, but nevertheless insufficient to preclude a spoliation sanction. Moreover, the fact that attempts to recover photographs from plaintiff's broken telephone does not avail him. Simply stated, plaintiff testified to the existence of a relevant photograph, unequivocally, and under oath. Despite being asked that he and his attorney's preserve and exchange the same, they failed to do so. Since, however, the evidence that has been spoliated is merely a photograph of the condition alleged to have caused his fall - a condition about which he testified to - it cannot be credibly asserted that he absence of such photograph has left defendants' without the ability to defend this action. Defendant's, however, have certainly been prejudiced since such photograph could have conceivably shown that the defect was either more prominent than testified so as to augment comparative negligence or more *de minimis* than asserted so as to negate causation.

Whether the photograph was lost by design or through inadvertence is irrelevant where, as here, there is clear prejudice to the defendants (*Alleva* at 574; *Giuliano* at 962; *Schantz* at 481; *Lichtenstein* at 763; *Standard Fire Ins. Co.* at 218; *see also Gray* at 287; *Herrera* at 198; *Goldman* at 457). Nevertheless, the appropriate remedy is an adverse inference at trial (*Strong* at 24; *New York City Hous. Auth.* at 473; *Tommy Hillfiger, USA, Inc.* at 60;

Longo at 128; *Strelov* at 421; *Gallo* at 451). It is hereby

ORDERED that with respect to plaintiff's cause of action pursuant to Labor Law § 241(6), he be precluded premising the same on violations of 12 NYCRR §§ 23-1.5(a) and (c), 23-1.7(d), and 23-2.1(a) and (b). It is further

ORDERED that plaintiff's cause of action pursuant to Labor Law § 240(1) be hereby dismissed with prejudice. It is further

ORDERED that with respect to plaintiff's photograph of the condition alleged, at trial, the jury be read an adverse inference charge. It is further

ORDERED that defendants serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : March 9, 2016
Bronx, New York

Betty Owen Stinson
BETTY OWEN STINSON, J.S.C.